No. 20-166

In The
Supreme Court of the United States

MICHAEL SCOTT ANGLESEY, D.C.;
ELISEO GUTIERREZ;
VERONICA GUTIERREZ,

Petitioners,

v.

ALLIED PROFESSIONALS INSURANCE COMPANY,
A RISK RETENTION GROUP, INC., an Arizona corporation,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the federal Liability Risk Retention Act of 1986, 15 U.S.C. § 3901 et seq. ("LRRA"), pre-empt the authority of states to regulate the operations of "foreign" risk retention groups (i.e., risk retention groups domiciled in other states) by voiding contractual arbitration clauses within their insurance policies?

PARTIES TO THE PROCEEDING

Petitioners in this Court are Michael Scott Anglesey, D.C., Eliseo Gutierrez, and Veronica Gutierrez. Petitioners are residents of the State of Washington.

The respondent in this Court is Allied Professionals Insurance Company, a Risk Retention Group, Inc. ("APIC"). APIC is incorporated in the State of Arizona and is also domiciled in the State of Arizona pursuant to the LRRA.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's Rules, respondent states that it has no parent corporation, and there is no publicly held company which owns 10% or more of its stock.

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RESPONDENT'S SUPPORT FOR THE PETITION

Respondent respectfully supports the issuing of a writ of certiorari to review and affirm the judgment of the United States Court of Appeals for the Ninth Circuit in this matter.

OPINIONS BELOW

The opinion of the court of appeals affirming the district court's order compelling arbitration (Appx. 1-11) is published at 952 F.3d 1131.

The opinion of the district court compelling arbitration and certifying a controlling issue of law as to which there is substantial ground for difference of opinion, i.e., whether the LRRA preempts Washington's anti-arbitration statute, Wash. Rev. Code § 48.18.200(l)(b), as applied to foreign risk retention groups (Appx. 16-37), is published at 2018 WL 6219926.

A prior, unpublished opinion of the court of appeals in this matter (R.Appx. 1) is published at 680 Fed.Appx. 586.

JURISDICTION

The Ninth Circuit entered its decision on March 12, 2020. Petitioners filed their Petition For Writ Of Certiorari on August 10, 2020. The instant response was originally due September 14, 2020. On August 21, 2020, respondent filed a motion to extend the time to

file a response to the petition. The motion was granted on August 24, 2020, and the instant response is now due on or before October 14, 2020.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Pertinent provisions of the Liability Risk Retention Act, 15 U.S.C. § 3901 *et seq.*, and Revised Code of Washington 48.18.200 are reproduced in petitioners' appendix at Appx. 55-66 and Appx. 67, respectively.

Revised Code of Washington 48.92.030 and 48.92.040 are reproduced in respondents' appendix R.Appx. 6 and 8, respectively.

STATEMENT OF THE CASE

I. Legal Background

This case highlights a sharp divide, between various state and federal courts, regarding the pre-emptive effect of the LRRA.

Most courts, including the Ninth Circuit Court of Appeals below, have concluded that the LRRA's "broad" and "sweeping" pre-emption provisions ensure that risk retention groups ("RRGs") are largely exempt (with certain enumerated exceptions) from the insurance laws and regulations of non-chartering states

where they conduct business. *E.g.*, *Allied Prof'ls Ins. Co. v. Anglesey*, 952 F.3d 1131, 1134-36 (9th Cir. 2020) ("*Anglesey*"); *Wadsworth v. Allied Prof'ls Ins. Co.*, 748 F.3d 100, 106 (2d Cir. 2014) ("*Wadsworth*").

A minority of courts, meanwhile, present the LRRA's preemptive effect far more narrowly. In this view, the LRRA is a "nondiscrimination" law, i.e., a law ensuring that RRGs may function as insurance carriers in all fifty states, without *discriminatory* state legislation against them. As the Seventh Circuit stated, erroneously, "what concerned Congress was a state legislature enacting laws *intending to thwart* RRGs." *Opthalmic Mut. Ins. Co. v. Musser*, 143 F.3d 1062, 1070 (7th Cir. 1998) ("*OMIC*") (emphasis in original).

As discussed herein, this minority body of law is inconsistent with the text and legislative history of the LRRA. Since the LRRA was enacted in 1986, a majority of courts have properly understood the LRRA's "broad" pre-emptive effect with respect to non-chartering state insurance laws. *E.g.*, *Swanco Ins. Co.-Ariz. v. Hager*, 879 F.2d 353, 357 (8th Cir. 1989) ("*Swanco*") ("Thus, aside from the specific powers reserved to non-chartering states, the [LRRA] prohibits those states from regulating risk retention groups.").

The minority position, however, has gained traction within federal and state courts. It began with erroneous statements regarding the LRRA's purpose and function by the Eleventh Circuit Court of Appeals (*see Mears Transp. Group v. State of Fla.*, 34 F.3d 1013, 1016-17 (11th Cir. 1994)) and by the Seventh Circuit

Court of Appeals (*see OMIC*, 143 F.3d at 1067-70). It has since emerged as an alternative theory of the LRRA, with a sharply contrasting view of, and implications for, the national role, function, and operations of RRGs. *See National Home Ins. Co. v. King*, 291 F.Supp.2d 518, 530-31 (E.D. Ky. 2003) ("*King*"); *Sturgeon v. Allied Prof'ls Ins. Co.*, 344 S.W.3d 205, 214-17 (Mo. Ct. App. 2011) ("*Sturgeon*"); *Zeigler v. Housing Authority of New Orleans (Hano)*, 192 So.3d 175, 179-81 (Ct. App. La. 2016) ("*Zeigler*"); *Leonberger v. Missouri United Sch. Ins. Council*, 501 S.W.3d 1, 13 (Mo. Ct. App. 2016) ("*Leonberger*"). The Supreme Court of Missouri denied applications for "transfer" to itself (i.e., denied review) in both *Sturgeon* and *Leonberger*, thereby leaving their erroneous constructions of the LRRA standing. *Sturgeon*, 344 S.W.3d at 205; *Leonberger*, 501 S.W.3d at 1.

The minority line of cases, by itself, places RRGs in a quandary. The RRG industry, as discussed herein, relies upon the LRRA's specific "tripartite" regulatory scheme. *See Wadsworth*, 748 F.3d at 103 ("Congress enacted a reticulated structure under which risk retention groups are subject to a tripartite scheme of concurrent federal and state regulation.").

In this scheme, under the majority view, an RRG is subject to the full plenum of insurance laws and regulations of the state in which it is *chartered* (i.e., "*domiciled*"), and concurrently, pursuant to the LRRA's preemption language, the RRG is only subject to *specific enumerated types* of insurance laws and regulations of other states in which the RRG does business.

Wadsworth, 748 F.3d at 103. "Federal preemption, therefore, functions not in aid of a comprehensive federal regulatory scheme, but rather to allow a risk retention group to be regulated by the state in which it is chartered, and to preempt most ordinary forms of regulation by the other states in which it operates." *Id.*

The quandary is this. The rise of the minority "nondiscrimination" body of law under the LRRA creates uncertainty regarding the basic regulatory regime under which RRGs operate. Per the majority, does an RRG need to comply with the insurance laws of its chartering state, and concurrently with only a few identifiable types of insurance laws in other states where it insures liability risk? Alternatively, per the minority, does an RRG need to comply concurrently with *both sets* of state insurance laws, excepting only state laws which single out RRGs for differential or discriminatory treatment?

Only by granting certiorari can this Court provide legal certainty to the RRG industry. *See generally*, *e.g.*, *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 21 (2007) (federal preemption under National Bank Act avoids "rival oversight regimes" by multiple states). To date, this Court has never granted certiorari to review any aspect of the LRRA.

Certiorari here is warranted pursuant to Supreme Court Rule 10(a) as the Eleventh and Seventh Circuits (*Mears*, 34 F.3d at 1016-17, and *OMIC*, 143 F.3d at 1067-70) made erroneous statements of law which are in conflict with decisions from the Second, Eighth, and

Ninth Circuits (*e.g.*, *Wadsworth*, 748 F.3d at 106, *Swanco*, 879 F.2d at 357, and *Anglesey*, 952 F.3d at 1134-36) regarding an important matter of federal law, i.e., the LRRA's purpose and preemptive scope.

Certiorari is also warranted under Rule 10(b) as the Supreme Court of Missouri has, by denying "transfer" to itself (i.e., review) in *Sturgeon* and *Leonberger*, ensured that the erroneous construction of the LRRA in those opinions remains in effect. This erroneous construction conflicts with decisions from other state courts of last resort (the Supreme Courts of Georgia and Nebraska, in *Reis v. OOIDA Risk Retention Group, Inc.*, 303 Ga. 659, 666 (2018) ("*Reis*") and *Speece v. Allied Prof'ls Ins. Co.*, 289 Neb. 75, 84 (2014) ("*Speece*")); and also conflicts with decisions from United States courts of appeals (*e.g.*, *Anglesey*, 952 F.3d at 1134-36; *Wadsworth*, 748 F.3d at 106).

Finally, certiorari is also warranted under Rule 10(c) as state courts and United States courts of appeals have decided (in conflicting ways) an "important question of federal law that has not been, but should be, settled by this Court."

II. Factual and Procedural Background

A. The parties and the dispute

Respondent Allied Professionals Insurance Company, a Risk Retention Group, Inc. ("APIC") is a risk retention group ("RRG"). RRGs are liability insurance companies owned by their insured members, which are

formed and operate pursuant to the federal Liability Risk Retention Act of 1986, 15 U.S.C. § 3901 *et seq.* ("LRRA").

Pursuant to the LRRA, APIC is chartered in the State of Arizona, and conducts business in the State of Washington and in all other states. *Allied Prof'ls Ins. Co. v. Anglesey*, 952 F.3d 1131, 1132 (9th Cir. 2020) ("*Anglesey*"). Since APIC is "chartered" or "domiciled" in Arizona, by definition, it operates in Washington as a "foreign" RRG. *Id.* at 1136.

APIC previously insured Dr. Michael Scott Anglesey, a chiropractic doctor in Washington state. In December 2012, Dr. Anglesey provided chiropractic treatment to Eliseo Gutierrez, which allegedly resulted in Mr. Gutierrez suffering a stroke. Dr. Anglesey tendered the claim to APIC, which advised him that it was denying coverage. *Anglesey*, 952 F.3d at 1132-33.

A year later, Dr. Anglesey informed APIC that he was planning to execute a consent judgment in favor of the Gutierrezes, and to assign his rights against APIC to them, in exchange for their agreement to seek satisfaction on the judgment from APIC. APIC responded by demanding that all claims against APIC be submitted to arbitration, pursuant to the arbitration provision within Dr. Anglesey's policy. This provision requires that all coverage disputes must be arbitrated in Orange County, California. Dr. Anglesey and the Gutierrezes refused to arbitrate the coverage dispute. *Anglesey*, 952 F.3d at 1133.

B. The instant litigation

APIC initiated arbitration with the American Arbitration Association, and on April 28, 2014, brought this action in the United States District Court for the Central District of California to compel arbitration of the pending coverage dispute with Dr. Anglesey and the Gutierrezes. *Anglesey*, 952 F.3d at 1133.

The basis for federal subject matter jurisdiction was 28 U.S.C. § 1332(a)(1) because the matter in controversy exceeded $75,000, exclusive of interest and costs, and complete diversity existed between APIC, on the one hand, and Dr. Anglesey and the Gutierrezes on the other hand.

The district court initially held that APIC did not have standing to bring this action to compel arbitration, but the Ninth Circuit Court of Appeals reversed. (R.Appx. 15) *Allied Prof'ls Ins. Co. v. Anglesey*, 680 Fed.Appx. 586 (9th Cir. 2017).

On remand, the district court granted APIC's motion to compel arbitration, and certified a controlling question of law to the Ninth Circuit. This controlling question is whether the LRRA preempts, as applied to foreign RRGs, a Washington state law voiding mandatory arbitration clauses in policies of insurance. *Anglesey*, 952 F.3d at 1133.

The Ninth Circuit agreed that there was a controlling issue of law to which there is a substantial ground for difference of opinion, and granted permission for petitioners to file an interlocutory appeal (R.Appx. 14).

The Ninth Circuit thereafter affirmed the order compelling arbitration, holding that the LRRA preempts Washington's anti-arbitration law, as applied to foreign RRGs like APIC. *Anglesey*, 952 F.3d at 1134-36. The Ninth Circuit explained that the "anti-discrimination" reading of the LRRA urged by Dr. Anglesey and the Gutierrezes, who were seeking to avoid arbitration, "would jeopardize the purpose of the LRRA." *Id.* at 1135. This Ninth Circuit ruling, affirming the district court's order compelling arbitration, is the opinion at issue in the petitioners' Petition for Certiorari.

REASONS FOR GRANTING THE WRIT

Review here would afford this Court an opportunity to address the core function and preemptive scope of the LRRA, which are now called into question due to the rising "anti-discrimination" or "nondiscrimination" reading of this law. As the Ninth Circuit concluded below, this reading "would jeopardize the purpose of the LRRA." *Allied Prof'ls Ins. Co. v. Anglesey*, 952 F.3d 1131, 1135 (9th Cir. 2020) ("*Anglesey*"). By resolving this question, this Court would eliminate the uncertainty presently facing the RRG industry, and all of its insureds, due to the minority "nondiscrimination" body of law.

This section highlights the importance of the question presented. Through legislative history, text, and majority case law, it addresses the LRRA's central purpose, i.e., to create a specific "tripartite" regulatory

system for RRGs to operate nationally. *See*, *e.g.*, H.R. Rep. No. 190, 97th Cong., 1st Sess. 12 (1981), *reprinted in* 1981 U.S.C.C.A.N. 1432, 1441 ("1981 House Report") (purpose of the LRRA is to enable "the efficient operation of risk retention groups by eliminating the need for compliance with numerous non-chartering state statutes that, in the aggregate, would thwart the interstate operation [of] . . . risk retention groups").

This section then turns to the minority "nondiscrimination" view, detailing its origins within erroneous statements by the Eleventh Circuit (*Mears Transp. Group v. State of Fla.*, 34 F.3d 1013, 1016-17 (11th Cir. 1994) ("*Mears*")) and Seventh Circuit (*Opthalmic Mut. Ins. Co. v. Musser*, 143 F.3d 1062, 1067-70 (7th Cir. 1998) ("*OMIC*")) and pinpoints the flaws in its reading of the LRRA. *See*, *e.g.*, *Zeigler v. Housing Authority of New Orleans (Hano)*, 192 So.3d 175, 179-81 (Ct. App. La. 2016) ("*Zeigler*"); *Leonberger v. Mo. United Sch. Ins. Council*, 501 S.W.3d 1, 13 (Mo. Ct. App. 2016) ("*Leonberger*"); *Sturgeon v. Allied Prof'ls Ins. Co.*, 344 S.W.3d 205, 214-17 (Mo. Ct. App. 2011) ("*Sturgeon*").

Finally, this petition addresses the legal uncertainty facing RRGs—i.e., a basic uncertainty as to *which state's* insurance laws and regulations to comply with—due to rising adoption of the "nondiscrimination" analysis.

A grant of certiorari would enable this Court to resolve this important, and growing, dispute over the LRRA's fundamental purpose and effect, and provide necessary clarification to the RRG industry.

I. Congress intended to make liability insurance more affordable by exempting "foreign" RRGs from most state insurance laws

During the 1980s, American businesses and professionals were suffering from a crisis caused by wildly escalating liability insurance premiums. The healthcare profession was particularly affected, as malpractice carriers either left the industry or charged prohibitively high premiums. Congress addressed the problem in 1981 by enacting the Products Liability Risk Retention Act ("PLRRA"), which was subsequently amended in 1986 to become the Liability Risk Retention Act, 15 U.S.C. §§ 3901-3906. *Swanco Ins. Co.-Arizona v. Hager*, 879 F.2d 353, 354 (8th Cir. 1989) ("*Swanco*").

A broad preemption, of non-chartering state insurance laws and regulations, is the core of the LRRA's legislative purpose. *Swanco*, 879 F.2d at 357. In the words of the 1981 House Report, the PLRRA enables "the efficient operation of risk retention groups by eliminating the need for compliance with numerous non-chartering state statutes that, in the aggregate, would thwart the interstate operation [of] . . . risk retention groups." H.R. Rep. No. 190, 97th Cong., 1st Sess. 12 (1981) ("1981 House Report"), *reprinted in* 1981 U.S.C.C.A.N. 1432, 1441.

The 1981 House Report further commented:

> Essentially, the objective of the bill is accomplished by facilitating the formation of an insurance entity able to provide coverage to

> members in any state. **Under existing laws and regulations in the several states, it is extremely difficult to create a small specialized insurance carrier that can operate on a multi-state basis. These [state] laws and regulations, which may be appropriate for commercial insurers dealing with the general public, create an almost insurmountable burden to an insurer seeking to provide specialized coverage to a limited number of risks.**

1981 House Report, at 1981 U.S.C.C.A.N. 1432, 1452 (emphasis added).

In 1986, Congress expanded the PLRRA by enacting the LRRA. 15 U.S.C. §§ 3901-3906. The LRRA extended "the scope of the preemption to enable risk retention and purchasing groups to provide not only product liability insurance but all types of liability insurance." *Swanco*, 879 F.2d at 354.

The reasons why Congress expanded the scope of the Act were clearly outlined:

> BACKGROUND AND NEED
> FOR THE LEGISLATION
>
> During the 99th Congress, the Country has been shaken by a crisis in the availability and affordability of commercial liability insurance. Congress has been besieged with complaints regarding huge rate increases, mass cancellations of coverage, and entire lines of insurance virtually unavailable at any price. Crucial activities and services have been hard

hit. Such activities include, among others, those of municipalities, universities, child daycare centers, health care providers, corporate directors and officers, hazardous waste disposal firms, small businesses generally, and many others.

. . .

Since a risk retention group is simply a group of businesses or others who join together to set up their own insurance company only to issue insurance policies to themselves, it was believed that by encouraging such groups, the subjective element in underwriting could be reduced. The risk retention group would know its own loss experience and could adhere closely to it in setting rates.

. . .

The Committee's hearings indicate the existence of a multi-billion dollar insurance capacity shortage, and the Committee believes that creation of self-insurance groups can provide much-needed new capacity.

. . .

It is necessary to exempt risk retention and purchasing groups from State law, in the respects specified in the Risk Retention Act, in order to achieve the beneficial effects of such groups referred to above.

H.R. Rep. No. 865, 99th Cong., 2nd Sess. (1986), *reprinted in* 1986 U.S.C.C.A.N. 5303, 5304-06 ("1986 House Report") (emphasis added).

II. The LRRA exempts foreign RRGs from all state insurance laws and regulations, with enumerated exceptions

The intent of Congress, to bar non-chartering states from regulating the operation of RRGs (with specific exceptions), is apparent in the LRRA's text. Section 3902 of the LRRA provides, in pertinent part:

> (a) Exemptions from State laws, rules, regulations, or orders
>
> Except as provided in this section, a risk retention group is exempt from any State law, rule, regulation, or order to the extent that such law, rule, regulation, or order would—
>
> (1) make unlawful, or regulate, directly or indirectly, the operation of a risk retention group except that the jurisdiction in which it is chartered may regulate the formation and operation of such a group. . . .

15 U.S.C. § 3902(a).

The scope of preemption under section 3902(a) is further defined by section 3902(b), which clarifies that the LRRA preempts "laws governing the insurance business" of foreign RRGs, including (among

other categories) the "loss control and claims administration" procedures of those foreign RRGs. 15 U.S.C. § 3902(b).

The LRRA's enumerated exceptions to this sweeping preemption language allow a non-chartering state, like Washington in this case, to "require risk retention groups to comply only with certain basic registration, capitalization, and taxing requirements, as well as various claim settlement and fraudulent practice laws." *Wadsworth v. Allied Prof'ls Ins. Co.*, 748 F.3d 100, 106 (2d Cir. 2014) (citing 15 U.S.C. § 3902(a)(1)(A)-(I)); *see also* 15 U.S.C. § 3902(d), (e), (f), (g), (h); 15 U.S.C. § 3905(a), (c), (d). (While petitioners seek to apply certain exceptions to the instant dispute over arbitration, the Ninth Circuit found them inapplicable. *Anglesey*, 952 F.3d at 1136.)

Aside from these "enumerated" exceptions, non-chartering states may not impose additional insurance regulations on RRGs. *Swanco*, 879 F.2d at 357. As the Second Circuit concluded: "In short, as compared to the near plenary authority it reserves to the chartering state, the [LRRA] sharply limits the secondary regulatory authority of nondomiciliary states over risk retention groups to specified, if significant, spheres." *Wadsworth*, 748 F.3d at 104.

III. A majority of federal circuits and state courts recognize the LRRA's broad preemption of state insurance laws, as applied to foreign RRGs

The Second, Eighth, and Ninth Circuits have examined the LRRA's preemptive effect relating to state insurance laws, as applied to foreign RRGs, and repeatedly characterize this effect as "broad," "expansive," and "sweeping." *Anglesey*, 952 F.3d at 1135 (citing cases); *Wadsworth*, 748 F.3d at 103 (citing cases); *Swanco*, 879 F.2d at 357.

The LRRA allows an RRG to provide liability insurance in all states, "free of insurance regulation by those states, if it complies with the insurance laws of the state it chooses as its 'chartering jurisdiction.'" *National Warranty Ins. Co. RRG v. Greenfield*, 214 F.3d 1073, 1075 (9th Cir. 2000) ("*Greenfield*"). "A major benefit extended to risk retention groups by the LRRA is the ability to operate on a nationwide basis according to the requirements of the law of a single state, without being compelled to tailor their policies to the specific requirements of every state in which they do business." *Wadsworth*, 748 F.3d at 108. In short: "The very purpose of the LRRA was to allow risk retention groups to operate nationwide under the regulation of one jurisdiction, rather than fifty-one jurisdictions." *Soyoola v. Oceanus Ins. Co.*, 986 F.Supp.2d 695, 703 (S.D. W.Va. 2013).

By reducing the state regulations an RRG must comply with to operate on a national basis, RRGs are

able to reduce their expenses and ultimately the cost of liability insurance for the group's members, per the LRRA's original design. *Greenfield*, 214 F.3d at 1075.

Following decisions such as *Wadsworth* and *Greenfield*, the Nebraska Supreme Court similarly concluded that "in the LRRA, Congress explicitly declared an intent to preempt state law regulating the operation of foreign risk retention groups except in certain enumerated instances not applicable here." *Speece v. Allied Prof'ls Ins. Co.*, 289 Neb. 75, 84 (2014) ("*Speece*"). *Speece* held that a Nebraska insurance law, voiding arbitration clauses in policies of insurance, was preempted by the LRRA as to an RRG domiciled in another state. *Id.* at 88.

The Supreme Court of Georgia concurred. "The clear goal of the LRRA is to streamline the operations of risk retention groups . . . by subjecting them to consistent regulation overseen by their chartering state." *Reis v. OOIDA Risk Retention Group, Inc.*, 303 Ga. 659, 666 (2018) ("*Reis*") (citing *Wadsworth*, 748 F.3d at 108). "[C]ourts across the country have concluded that the LRRA's preemption is sweeping and covers most state insurance laws." *Id.* at 665 n.13 (quoting *Mora v. Lancet Indem. Risk Retention Group, Inc.*, 2017 WL 818718, at *5 (D. Md. Mar. 1, 2017)). *Reis* held that the LRRA preempts, as to foreign RRGs, Georgia statutes authorizing a "direct action" by an injured party against an alleged tortfeasor's insurer. *Id.* at 665-66.

IV. State statutes regulating foreign RRGs are designed to remain within boundaries set by the LRRA

In recognition of the LRRA's preemption language, and the majority case law recognizing its sweeping effect, states have adopted statutes and regulations recognizing their limited regulatory powers over foreign RRGs. *E.g.*, *Wadsworth*, 748 F.3d at 104.

As the Second Circuit described, with respect to New York law governing domestic and foreign RRGs:

> New York Insurance Law, as it pertains to risk retention groups, largely mirrors the structure of federal law. Article 59 of the New York Insurance Law expressly recognizes the limits imposed by the LRRA, noting that its purpose is 'to regulate the formation and/or operation . . . of risk retention groups . . . formed pursuant to the provisions of the federal Liability Risk Retention Act of 1986, to the extent permitted by such law.' N.Y. Ins. Law § 5901 (internal citation omitted). In keeping with those limits, New York cleanly distinguishes between the broad regulatory authority it exercises over those risk retention groups that seek to be chartered in New York, and the more limited regulations it is permitted to adopt with respect to nondomiciliary risk retention groups. Section 5903, entitled 'Domestic risk retention groups,' commands that such groups 'shall comply with *all* of the laws, regulations and orders applicable to property/casualty insurers organized and licensed in this state,' id. § 5903(a) (emphasis added).

> In contrast, § 5904, applicable to '[r]isk retention groups not charted in [New York],' requires that such groups 'comply with the laws of [New York]' set out in ten subsequent subsections, largely tracking the powers reserved to nondomiciliary states by 15 U.S.C. § 3902(a)(1)(A)-(I).

Wadsworth, 748 F.3d at 104.

Like New York, Washington state expressly subjects foreign RRGs to only a specific subset of Washington insurance laws and regulations. *Compare* RCW 48.92.040 (R.Appx. 8) (applying specific Washington insurance laws to foreign RRGs) *with* RCW 48.92.030 (R.Appx. 6) (applying "all of the laws, rules, regulations, and requirements applicable to the insurers chartered and licensed in this state" to domestic RRGs). Like New York's statute, Washington's statute governing foreign RRGs largely tracks the LRRA's enumerated exceptions to preemption. N.Y. Ins. Law § 5904, subparts (a) through (j); RCW 48.92.040, subparts (1) through (11); 15 U.S.C. § 3902(a)(1), subparts (A) through (I).

Thus, state statutes specifically address how the insurance laws and regulations of that state will (or will not) apply to domestic and foreign RRGs, respectively. These state statutes (including the New York and Washington statutes discussed immediately above) recognize the limited powers a state has, under the LRRA, to regulate foreign RRGs. However, this careful calibration of state regulatory powers over foreign RRGs is undermined by the "nondiscrimination"

body of law, which as discussed below, would allow states to comprehensively regulate foreign RRGs, in violation of the LRRA's broad preemptive language.

V. The LRRA works in tandem with the McCarran-Ferguson Act to clarify state insurance regulatory regimes

The McCarran-Ferguson Act, enacted in 1945, generally ensures the primacy of state insurance laws against federal preemption. The McCarran-Ferguson Act provides that, with a few exceptions including antitrust, no federal Act may preempt state insurance laws "unless such [federal] Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b). However, "[t]he LRRA is, without question, a federal statute that specifically relates to the business of insurance." *Wadsworth*, 748 F.3d at 109. Therefore, the LRRA is not "reverse preempted" by the McCarran-Ferguson Act, and it preempts application of most state insurance laws as to *foreign* RRGs. *Id.*

The LRRA parallels the McCarran-Ferguson Act, insofar as it preempts state laws "governing the insurance business" as applied to foreign RRGs. 15 U.S.C. § 3902(b). Thus, if a state law regulates the "business of insurance," such state law is *generally* shielded from federal preemption under the McCarran-Ferguson Act—but is simultaneously preempted by the LRRA as applied to foreign RRGs, who must comply with the insurance laws of their states of domicile. 15 U.S.C.

§ 1012; 15 U.S.C. § 3902; *Wadsworth*, 748 F.3d at 105-06; *Speece*, 289 Neb. at 82-83.

To put it simply, then, the McCarran-Ferguson Act generally ensures primacy of state insurance laws against federal preemption, and the LRRA then divides that regulatory authority between the state where an RRG is domiciled and the state where it is doing business.

VI. The "nondiscrimination" language of the LRRA does not mean that *only* "discriminatory" laws are preempted

The LRRA's "nondiscrimination" language appears within the statute as follows, in **bold**:

> (a) Exemptions from State laws, rules, regulations, or orders
>
> Except as provided in this section, a risk retention group is exempt from any State law, rule, regulation, or order to the extent that such law, rule, regulation, or order would—
>
> (1) make unlawful, or regulate, directly or indirectly, the operation of a risk retention group except that the jurisdiction in which it is chartered may regulate the formation and operation of such a group. . . .
>
> (2) require or permit a risk retention group to participate in any insurance insolvency guaranty association to

> which an insurer licensed in the State is required to belong;
>
> (3) require any insurance policy issued to a risk retention group or any member of the group to be countersigned by an insurance agent or broker residing in that State; or
>
> (4) **otherwise, discriminate against a risk retention group or any of its members**, except that nothing in this section shall be construed to affect the applicability of State laws generally applicable to persons or corporations.

15 U.S.C. § 3902(a) (emphasis added). Pursuant to this language, states may not discriminate against RRGs, *and* (aside from the enumerated exceptions discussed above) they may not "regulate, directly or indirectly, the operation" of a foreign RRG.

The Second Circuit squarely held that the LRRA is *not* simply an "anti-discrimination" statute. *Wadsworth*, 748 F.3d at 107. Responding to the minority body of law (which has grown since *Wadsworth* was decided), the Second Circuit explained: "If the entire purpose of the preemption provision was solely to invalidate *discriminatory* state laws, Congress could have enacted a far less complex statute that simply adopted the language of subsection (a)(4) without more, and thus prohibited all state laws, and only those, that discriminate against risk retention groups. Instead, however, Congress specifically preempted

'*any*' law, rule, or regulation by a nondomiciliary state that would 'regulate, directly or indirectly, the operation of a risk retention group.' . . . A clearer prohibition would be hard to devise. The express preemption of *any* regulation simply cannot be read as preemption only of *discriminatory* regulation." *Id.* (quoting 15 U.S.C. § 3902(a)(1)) (emphases in original).

VII. Adoption of the "nondiscrimination" approach casts the LRRA's entire regulatory framework into doubt

As discussed above, there is a rising "nondiscrimination" reading of the LRRA. This reading began with erroneous statements of law by the Eleventh Circuit (*Mears*, 34 F.3d at 1016-17) and the Seventh Circuit (*OMIC*, 143 F.3d at 1067-70), and has since emerged as a competing understanding of the LRRA, which has been embraced by a federal district court and by the courts in certain states. *See Nat'l Ins. Co. v. King*, 291 F.Supp.2d 518, 530-31 (E.D. Ky. 2003) ("*King*"); *Sturgeon v. Allied Prof'ls Ins. Co.*, 344 S.W.3d 205, 214-17 (Mo. Ct. App. 2011) ("*Sturgeon*"); *Leonberger v. Missouri United Sch. Ins. Council*, 501 S.W.3d 1, 13 (Mo. Ct. App. 2016) ("*Leonberger*"); *Zeigler v. Housing Authority of New Orleans (Hano)*, 192 So.3d 175, 179-81 (Ct. App. La. 2016) ("*Zeigler*"). This reading effectively nullifies the LRRA's expansive preemption language.

In *Mears*, the dispute centered on a Florida statute which required certain vehicle owners and operators to

maintain particular liability insurance coverage. *Mears*, 34 F.3d at 1015. The Florida statute specified that the carrier must belong to the Florida Insurance Guaranty Association, but under the LRRA, RRGs are prohibited from participating in state insurance guaranty funds. *Id.* at 1015 n.8; 15 U.S.C. § 3902(a)(2). The question, then mistakenly framed by the *Mears* court, was whether the Florida statute improperly discriminated against RRGs in violation of the LRRA.

The Eleventh Circuit concluded that the Florida statute did not unlawfully discriminate against RRGs, but in reaching that conclusion, made statements to the effect that the primary purpose or effect of the LRRA was to prevent such discrimination. For example: "Congress specified that the [LRRA] would preempt certain state laws that *prohibited or hindered the formation* of these groups." *Id.* at 1016 (emphasis added). What is left out of that formulation, of course, is the concept that the LRRA also preempts state laws which "regulate" the "operation" of foreign RRGs, under 15 U.S.C. § 3902(a)(1). (Later courts would pick up, and amplify, this inapt formulation from *Mears*. *See*, *e.g.*, *King*, 291 F.Supp.2d at 530.) The Eleventh Circuit also noted that the 1986 LRRA amendments "preserve the states' traditional role in regulating insurance and protecting the public" (*id.* at 1017) and concluded that the Florida statute is permissible because it "is aimed at protecting the public, not at discriminating against risk retention groups" (*id.* at 1019).

In *OMIC*, the Seventh Circuit concluded that a Wisconsin statute, requiring ophthalmologists to hold

certain liability insurance from a Wisconsin-licensed insurer, did not impermissibly discriminate against RRGs. *OMIC*, 143 F.3d at 1068-70. Along the way, however, the Seventh Circuit stated its agreement with the Eleventh Circuit's reasoning in *Mears*. *Id.* at 1069. Like the court in *Mears*, the Seventh Circuit repeatedly stated that the LRRA's function was to prevent discrimination against RRGs. *Id.* at 1067-70. The Seventh Circuit concluded, incorrectly: "As far as Congressional intent, the above legislative history indicates that what concerned Congress was a state legislature enacting laws *intending to thwart* RRGs." *Id.* at 1069-70 (italics in original).

These incorrect statements of law from the Eleventh and Seventh circuits created a minority analysis of LRRA preemption, which has created uncertainty as to the basic regulatory structure governing RRGs.

This minority body of law began with *Nat'l Ins. Co. v. King*, 291 F.Supp.2d 518, 530-31 (E.D. Ky. 2003) ("*King*"). In *King*, the court held that the LRRA did not preempt, as to foreign RRGs, a Kentucky statute barring enforcement of arbitration clauses in policies of insurance. *King*, 291 F.Supp.2d at 530-31. The court quoted a limited (and inapt) formulation from *Mears*: "Congress specified that the [LRRA] would preempt certain state laws that prohibited or hindered the formation of [RRGs]." *Id.* at 530 (quoting *Mears*, 34 F.3d at 1016). ("Prohibiting" or "hindering the formation" of an entity is clearly narrower than "regulating" its "operation.") Crucially, the court overlooked the word "regulate" within 15 U.S.C. § 3902(a)(1), commenting:

"Prohibiting the enforcement of an arbitration clause does not 'make unlawful' the formation or operation of such a risk retention group." *Id.* Finally, the court misconstrued the LRRA's "nondiscrimination" provision, viewing it as embodying the statutory purpose: "Moreover, application of [Kentucky's anti-arbitration statute] to [the foreign RRG] does not offend the nondiscrimination principle underlying the LRRA. To the contrary, requiring [the foreign RRG] to abide by this statute puts it on equal footing with all other insurers in Kentucky who are prohibited from enforcing arbitration clauses in agreements with their insureds." *Id.*

In *Sturgeon*, the Missouri Court of Appeals followed *Mears* and *King* to determine that the LRRA did not preempt, as to a foreign RRG, a Missouri statute barring mandatory arbitration of insurance contracts. *Sturgeon v. Allied Prof'ls Ins. Co.*, 344 S.W.3d 205, 214-17 (Mo. Ct. App. 2011) ("*Sturgeon*"). The *Sturgeon* court cited *Mears* on a critical point: " 'Operation' is the key term in the federal statute's exemption: it means that a state may not pass laws that keep risk retention groups from operating as insurance companies; however, the LRRA preserves the state's traditional role in the regulation of insurance." *Id.* at 215 (citing *Mears*, 34 F.3d at 1017). The court then repeated (by quoting) the error from *King*, which omitted the crucial word "regulate" from section 3902(a)(1): "the [*King*] court specifically found that '[p]rohibiting the enforcement of an arbitration clause does not 'make unlawful' the . . . operation of such a risk retention group." *Id.* at 216 (quoting *King*, 291 F.Supp.2d at 531). Finally, the court

embraced the "nondiscrimination" understanding of the LRRA: "[The foreign RRG] cannot complain when it is being treated like every other insurance group in Missouri, e.g., subject to Missouri's prohibition against arbitration clauses in insurance contracts. . . . The LRRA's protection of risk retention groups is based on states' possible discrimination against them. Missouri's prohibition of arbitration clauses in insurance contracts applies to insurance companies across the board and has no discriminatory effect on risk retention groups." *Id.* at 217.

In *Leonberger*, the Missouri Court of Appeals reaffirmed this "nondiscrimination" analysis of the LRRA. *Leonberger*, 501 S.W.3d at 13 (discussing and following *Sturgeon* and reasoning that Missouri's anti-arbitration statute does not regulate a foreign RRG's operation "as a risk retention group", but instead regulates "the operation of an insurance contract"). In fact, the Missouri court went further than any prior court, insofar as it turned the preemption analysis upside down. According to the majority view, state laws "governing the insurance business" are preempted (unless they fit into an enumerated exception), as applied to foreign RRGs. 15 U.S.C. § 3902(b); *Speece*, 289 Neb. at 87. In the *Leonberger* court's reasoning, it is precisely these state laws regulating the "business of insurance" which *may* generally be applied to foreign RRGs, as long as they do not regulate their operation *as an RRG*, whatever that may mean: "Section 435.350 of the Missouri Arbitration Act prohibiting mandatory arbitration clauses in insurance contracts does not

regulate Appellant's operation as a risk retention group. The purpose of Section 435.350 of the Missouri Arbitration Act is to regulate the business of insurance." *Leonberger*, 501 S.W.3d at 13. As a result, the court wrongly concluded the LRRA did *not* preempt this Missouri anti-arbitration statute, and it applied to a foreign RRG. *Id.*

As noted above, the Supreme Court of Missouri denied applications for "transfer" to itself (i.e., it denied review) in both *Sturgeon* and *Leonberger*, thereby leaving those courts' erroneous construction of the LRRA standing. *Sturgeon*, 344 S.W.3d at 205; *Leonberger*, 501 S.W.3d at 1.

In *Zeigler*, the Court of Appeal of Louisiana followed *King* and *Sturgeon* and accepted that "nondiscrimination" was the intent and preemptive effect of the LRRA. *Zeigler v. Housing Authority of New Orleans (Hano)*, 192 So.3d 175, 179-81 (Ct. App. La. 2016) ("*Zeigler*"). The issue was whether the LRRA preempted, as to a foreign RRG, a Louisiana statute allowing an injured party to sue an alleged tortfeasor's insurance carrier directly. *Id.* at 179. The court approvingly quoted *King* and *Sturgeon* at length and found *King* "persuasive" on this crucial point: "[A]pplication of the state statute to a risk retention group does not offend the non-discrimination principle underlying the LRRA. Instead . . . requiring the risk retention group to abide by the state statute 'puts it on equal footing with all other insurers' in the state who face the same regulation." *Id.* at 180 (quoting *King*, 291 F.Supp.2d at 530-31).

Courts adopting the "nondiscrimination" analysis are opening the floodgates of *non-domiciliary* state regulation of RRGs, thereby defeating Congress' stated purpose in passing the LRRA. That purpose was to reduce the cost and increase the availability of commercial liability insurance, by enabling "the efficient operation of risk retention groups by eliminating the need for compliance with numerous non-chartering state statutes that, in the aggregate, would thwart the interstate operation [of] risk retention groups." *Greenfield*, 214 F.3d at 1075 (quoting 1981 House Report, at 1981 U.S.C.C.A.N. 1432, 1441).

VIII. This Court should grant certiorari to provide legal certainty and consistency to the RRG industry and its insureds

The "nondiscrimination" analysis under the LRRA poses a severe threat to the RRG industry, as it effectively nullifies the LRRA's sweeping preemption language relating to foreign RRGs.

This minority line of cases creates fundamental uncertainty as to the oversight regime governing RRGs. Per the majority, does an RRG need to comply with the insurance laws of its chartering state, and concurrently with only a few identifiable types of insurance laws in other states where it insures liability risk? Alternatively, per the minority, does an RRG need to comply concurrently with *both sets* of state insurance laws, excepting only state laws which single out RRGs for differential or discriminatory treatment?

Already, all foreign RRGs doing business in Missouri and Louisiana must consider their policies, business plans, and legal strategies in light of the surprising adoption, by courts of these states, of the "nondiscrimination" analysis. *See Sturgeon*, 344 S.W.3d at 214-17; *Leonberger*, 501 S.W.3d at 13; *Zeigler*, 192 So.3d at 179-81. And of course, absent review by this Court, RRGs face a likelihood that this minority body of law will continue expanding to other states.

Only by granting certiorari can this Court provide legal certainty to the RRG industry regarding oversight by the states. *See generally*, *e.g.*, *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 21 (2007) (federal preemption under National Bank Act avoids "rival oversight regimes" by multiple states).

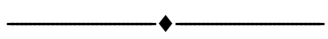
The LRRA (including, crucially, its preemption language) has successfully fostered an RRG industry, which has a clear impact on the availability of liability insurance and the competitiveness of the insurance marketplace. *See* Amicus Brief submitted by the National Risk Retention Association to the Ninth Circuit Court of Appeals ("NRRA Amicus Brief"). (R.Appx. 15 *et seq.*)

According to the National Risk Retention Association, RRGs are able to provide nationwide insurance at very low rates because they are exempt from the complex restrictions imposed by each of the states. Without LRRA preemption, RRGs will no longer be able to develop uniform and streamlined policies, including cost-savings measures such as arbitration provisions

agreed to by their members. Ultimately, RRGs would not be able to afford to do business and bear the risk and expense of litigation in each of the 50 states. (R.Appx. 55-56) The result would be catastrophic to RRG members, as nearly a half-million insureds would lose their ability to obtain affordable liability coverage from RRGs, as they currently do.

As discussed above, Congress intended to make certain liability insurance more affordable and accessible, by creating RRGs that did not have to comply with the totality of each state's insurance laws to do business there. The RRG industry grew quickly, met a profound need and helped rescue the insurance industry from a crisis of unavailability. Persons and entities who previously could not obtain liability coverage at any cost can now protect themselves with reasonably priced policies. This availability is now under threat, however, due to legal uncertainty created by the "non-discrimination" body of law under the LRRA.

This Court should grant certiorari in order to ensure that RRGs, and their insured members, may continue to rely on the LRRA's clear and broad preemption language. *See* 15 U.S.C. § 3902(a)(1). This language ensures that RRGs are primarily governed by the insurance laws and regulations of their states of domicile, and are only subject to enumerated types of regulation in non-domiciliary states where they are conducting business.



CONCLUSION

For all the foregoing reasons, APIC respectfully requests that this Court issue a writ of certiorari to review and affirm the judgment of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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