No. 20-237

IN THE
Supreme Court of the United States

OLD REPUBLIC HOME PROTECTION CO., INC.,

Petitioner,

v.

WILLIAM B. SPARKS, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Oklahoma

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner Old Republic Home Protection Co. failed to present to the Oklahoma state courts, and thereby waived, the issues it seeks to present to this Court regarding the McCarran-Ferguson Act.

2. Whether the Supreme Court of Oklahoma erred in holding that the Oklahoma Uniform Arbitration Act's prohibition of arbitration under insurance contracts "reverse preempts" the Federal Arbitration Act by virtue of the McCarran-Ferguson Act.

STATEMENT OF RELATED PROCEEDINGS

The petition omits the statement of related proceedings required by this Court's Rule 14.1(b)(iii). Respondents therefore provide the following list of proceedings directly related to the case in this Court.

Sparks v. Old Republic Home Protection Co., Inc., No. 115,789 (Okla.) (opinion and judgment issued May 27, 2020).

Sparks v. Old Republic Home Protection Co., Inc., No. 115,789 (Okla. Ct. Civ. App.) (opinion and judgment issued Nov. 19, 2018).

Sparks v. Old Republic Home Protection Co., Inc., No. CJ-16-795-TS (Okla. Dist. Ct. Cleveland County) (order denying motion to compel arbitration and stay entered Feb. 7, 2017).

There are no additional proceedings in any court that are directly related to this case.

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INTRODUCTION

In this case, the Supreme Court of Oklahoma declined to compel arbitration of an insurance dispute. The court relied in part on a provision of the Oklahoma Uniform Arbitration Act (UAA), 12 O.S. § 1855(D), which precludes enforcement of arbitration agreements in insurance contracts. The court held that the Federal Arbitration Act (FAA) did not preempt the state statute because the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), provides that no federal law shall "invalidate, impair, or supersede" a state law enacted "for the purpose of regulating the business of insurance" unless the federal law "specifically relates to the business of insurance."

Petitioner Old Republic Home Protection Co. now asks this Court to consider whether Oklahoma's statutory prohibition on insurance arbitration is a law "regulating the business of insurance," and whether application of the FAA to override that prohibition would "impair" the state law. But Old Republic did not raise either of those arguments in the state courts. Indeed, Old Republic expressly stated below that it "does not dispute" that the Oklahoma UAA provision regulates the business of insurance within the meaning of the McCarran-Ferguson Act.[1] It argued instead that the McCarran-Ferguson Act was inapplicable because the contract at issue contained a "choice of law" agreement that called for application of the FAA rather than state law. Old Republic also contended that the state-law prohibition did not apply because its home

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[1] [1] App't's Br. in Chief 13, No. IN-115789 (Okla. April 13, 2017)). The briefs below are available at https://www.oscn.net/dockets/GetCaseInformation.aspx?db=appellate&number=IN-115789&cmid=120944.

warranty plan was not an insurance product. But it never hinted at the issues it now seeks to raise in this Court. That alone is reason for the Court to deny certiorari. *Webb v. Webb*, 451 U.S. 493, 501 (1981).

The issues Old Republic asks the Court to decide would not merit review even if they were preserved below. Federal and state appellate courts agree that state statutes prohibiting arbitration of insurance disputes are laws regulating the business of insurance under the McCarran-Ferguson Act. Old Republic's assertion that there is a conflict on the point rests on a 23-year-old decision of the Vermont Supreme Court, *Little v. Allstate Ins. Co.*, 705 A.2d 538 (Vt. 1997). But *Little* expressly acknowledged that a state statute that governed arbitrability of insurance disputes *would* regulate the business of insurance. *Id.* at 540. The decision turned on the court's holding that Vermont's arbitration law did *not* prohibit arbitration of insurance disputes and thus left insurance arbitration *unregulated*. *Id.* at 540–41.

Here, by contrast, the Oklahoma courts construed Oklahoma's UAA as an affirmative prohibition on arbitration of insurance disputes. Old Republic *embraced* that view of the Oklahoma UAA, which it described as "the explicit Oklahoma statute that prohibits binding arbitration clauses in insurance policies."[2] The difference in outcome between this case and *Little* thus turns *not* on a disagreement about the McCarran-Ferguson Act, but on differing constructions of state statutes. Old Republic's new argument that the Oklahoma statute does not regulate the business of insurance because "nothing in it can plausibly be read

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[2] App't's Br. in Chief 10.

to prohibit, invalidate, or void arbitration agreements in insurance contracts," Pet. 20, would require this Court not only to override a state court's interpretation of state law—which this Court lacks power to do—but also to overlook Old Republic's concession below about the statute's meaning.

Old Republic's assertion that this case implicates confusion among lower courts about when federal statutes "impair" state insurance regulation is equally meritless. The meaning of "impair" under the McCarran-Ferguson Act is not at issue in this case. McCarran-Ferguson bars application of a federal law to "invalidate" or "supersede," as well as to "impair," a state insurance law. Applying the FAA to preempt Oklahoma's ban on insurance arbitration—or, as Old Republic put it below, to "displace" state law[3]—would "invalidate" and "supersede" the state statute. *Humana Inc. v. Forsyth*, 525 U.S. 299, 307 (1999). This case thus provides no occasion for delving into whether a federal law that does not "directly conflict" with a state statute has the prohibited effect of impairing state insurance laws by "frustrat[ing] … declared state policy or interfer[ing] with a State's administrative regime." *Id.* at 310. Not surprisingly, therefore, the Oklahoma Supreme Court said nothing about "impairment" of state law, as Old Republic grudgingly acknowledges. Pet. 22. The decision presents no issue concerning the scope of that term, still less one requiring resolution by this Court.

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[3] App't's Pet. for Cert. 8, No. IN-115789 (Okla. Dec. 10, 2018). The state-court petition for certiorari will be cited herein as "App't's Pet. for Cert." to distinguish it from the petition in this Court, cited as "Pet."

JURISDICTION

This Court lacks jurisdiction under 28 U.S.C. § 1257(a) to the extent that, as explained below, the petition seeks to present federal issues that were not properly raised and decided in the state courts.

STATEMENT

Old Republic is an insurance company that, among other products, sells home warranty plans that provide insurance to cover home repairs. Respondents William and Donna Sparks bought a policy from Old Republic to protect their home. When their air conditioning unit failed, Old Republic sent a contractor that, after much delay, eventually attempted to repair the unit. Instead of fixing the problem, the contractor damaged the unit so badly that, when the contractor attempted to turn it on, it spewed oil and chemicals all over the Sparks's home.[4]

The Sparks asked Old Republic to remedy the situation, but it refused to repair the damage and directed the Sparks not to clean up their home until it sent an adjuster, which did not happen for weeks. Old Republic then sent two more contractors, who agreed that expensive repairs were necessary. An independent contractor retained by the Sparks also agreed, but Old Republic refused to pay for the required repairs and instead proposed sending yet another contractor, whose incompetence on an earlier occasion when Old Republic had sent it to the Sparks's home had resulted in a multi-system failure.

Left with a broken, non-functioning air conditioner and heat pump for an extended period of time, spills

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[4] The facts summarized here are set forth in detail in the Sparks's brief on the merits below. App'ee's Answer Br. 1–5.

of oil and chemicals that endangered their and their children's health, holes burned in their carpeting and woodwork, and oil and chemical residue and stains throughout their home, the Sparks sued Old Republic in an Oklahoma state court for negligence, breach of contract, and bad faith.

Old Republic admitted in its answer to the Sparks's complaint that it was a "foreign insurance company" and that it had issued the Sparks "a policy of home services insurance" naming them as insureds. *See* App'ee's Answer Br. 7 (citing relevant pleadings). Two months later, Old Republic moved to compel arbitration, citing a provision in its plan purporting to require arbitration of all disputes between the parties. Pet. App. 55a–61a. Old Republic's motion did not argue that it was not an insurance company, did not address the arbitrability of insurance disputes under Oklahoma law, and did not contend that Oklahoma law concerning arbitration of insurance disputes is preempted by the FAA. Instead, it said that whether it was an insurance company had "no bearing" on whether the claims were subject to arbitration. *Id.* at 57a n.2.

The Sparks responded that, under Oklahoma law, disputes between insurance companies and policyholders are not subject to arbitration because Oklahoma's UAA provides that it "shall not apply to … contracts which reference insurance, except for those contracts between insurance companies." 12 O.S. § 1855(D). The Sparks pointed out that under the McCarran-Ferguson Act, the FAA could not override the state statutory prohibition on arbitration of insurance disputes. The trial court denied Old Republic's motion to compel arbitration.

Old Republic responded by filing an amended answer that denied that it was an insurance company and asserted that the Sparks's plan was not an insurance policy, but a home service contract. *See* Pet. App. 5a. Old Republic then appealed the denial of its motion to compel arbitration to the Supreme Court of Oklahoma. On appeal, it argued for the first time that its home warranty plan was actually a home service contract subject to Oklahoma's Home Service Contract Act, which states that home service contracts are "not insurance." 36 O.S. § 6751(A). Old Republic contended that such contracts therefore are also not "contracts which reference insurance" for purposes of the Oklahoma UAA's exclusion of such contracts.

In addition to these state statutory arguments, Old Republic's appeal brief asserted that the Oklahoma UAA's exclusion of insurance disputes did not apply because the warranty plan's arbitration provision stated that it was governed by the FAA, and that statement was a "choice of law" provision enforceable under Oklahoma contract law. App't's Br. in Chief 8. Old Republic further asserted that the FAA preempted the Oklahoma UAA's provision concerning insurance contracts, which Old Republic referred to as "the explicit Oklahoma statute that prohibits binding arbitration clauses in insurance policies." *Id*. at 10. Old Republic asserted that "[t]he FAA preempts contradictory or inconsistent state laws, so while Oklahoma law disallows insurance products from including binding arbitration clauses, this arbitration clause is still enforceable under the FAA." *Id*. at 11.

Old Republic's brief acknowledged that the McCarran-Ferguson Act "provides individual states the right to regulate insurance." *Id*. at 13. Nowhere did it assert that the Oklahoma UAA's exclusion of insurance

contracts is not a law regulating the business of insurance. On the contrary, it expressly stated that "Old Republic does not dispute that 12 O.S. § 1855(D) purports to regulate insurance in Oklahoma." *Id*. Moreover, Old Republic did not claim that applying the FAA instead of the Oklahoma statute would not "invalidate, supersede, or impair" the state law within the meaning of the McCarran-Ferguson Act. Instead, Old Republic argued that the FAA "preempts contradictory or inconsistent state laws, including 12 O.S. [§] 1855." *Id*. at 12. Old Republic's sole basis for asserting that the McCarran-Ferguson Act was "inapplicable" was that the parties "chose the FAA to apply to all disputes—to the exclusion of any other contradictory state law." *Id*. at 12–13.

After the briefs were filed, the Oklahoma Supreme Court transferred the appeal to the Oklahoma Court of Civil Appeals.[5] That court affirmed the trial court's denial of the motion to compel arbitration. The bulk of the court's opinion addressed Old Republic's principal argument that its plan was not a contract referencing insurance within the meaning of Oklahoma's UAA. The court concluded that the contract displayed "all the fundamental features of insurance." Pet. App. 36a. It held that while the Home Service Contract Act was intended to establish a regulatory regime for such contracts that is separate from that applicable to other insurance contracts, it was not intended to take such plans outside the Oklahoma UAA's provision

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[5] Under Oklahoma law, the Supreme Court has direct appellate jurisdiction over civil appeals but may assign cases to the Court of Civil Appeals. That court can then dispose of the appeal, subject to review by the Supreme Court if it grants a petition for a writ of certiorari. *See* 20 O.S. § 30.1.

prohibiting arbitration of contracts that "reference insurance." *Id.*

As to FAA preemption and McCarran-Ferguson, the intermediate appellate court found it "well-settled" that that laws regulating the business of insurance "reverse preempt" federal statutes, such as the FAA, that do not specifically reference insurance. *Id.* at 29a. It rejected on state-law grounds Old Republic's argument that the FAA nonetheless applies to its contracts because they contain an enforceable choice-of-law provision that circumvents the bar on insurance arbitration otherwise imposed by the Oklahoma UAA. *Id.* at 30a.

Old Republic filed a state-level petition for certiorari asking the Oklahoma Supreme Court to review the Court of Civil Appeals' decision. The petition focused primarily on whether the lower court had erred in holding that its contracts "reference insurance" within the meaning of the Oklahoma UAA: Old Republic claimed that its plans themselves were not insurance contracts. With respect to FAA preemption and the McCarran-Ferguson Act, the petition argued that the lower court had "deviated from *Oklahoma* law by not applying the Federal Arbitration Act to the dispute" by virtue of the contract's so-called choice-of-law provision. App't's Pet. for Cert. 7 (emphasis added). The petition then asserted that the state-law prohibition on insurance arbitration conflicts with the FAA, and thus is "displaced," "invalidat[ed]," and "superseded" by the FAA. *Id.* at 8 (citing *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 533 (2012); *Preston v. Ferrer*, 552 U.S. 346 (2008)). The petition did not, however, raise any issue about whether the Oklahoma UAA provision on insurance arbitration is a law regulating the business of insurance under the

McCarran-Ferguson Act, nor did it argue that applying the FAA instead of the Oklahoma UAA would not "impair" the state law.

The Oklahoma Supreme Court granted certiorari and decided the case without further briefing from the parties. With respect to Old Republic's argument that the FAA preempts the state-law prohibition on arbitration of insurance disputes notwithstanding the McCarran-Ferguson Act, the court noted that Old Republic did not dispute that the state statute was a law regulating the business of insurance. Pet. App. 6a–7a. Old Republic's sole argument concerning McCarran-Ferguson, the court observed, was that the FAA was not reverse-preempted under the McCarran-Ferguson Act because the so-called "choice of law agreement" in the parties' contract chose the FAA "to the exclusion of any contradictory laws." *Id.* at 7a. Stating that it was "not persuaded" by such arguments "without legal authority," the court held that parties cannot override the state statute's exemption of insurance disputes from arbitration. *Id.*

Having rejected Old Republic's choice-of-law argument, the court found Old Republic's FAA preemption argument unavailing in light of the McCarran-Ferguson Act and Old Republic's concession that the state statute at issue regulates the business of insurance. Citing decisions of other federal and state courts holding that, under McCarran-Ferguson, the FAA does not override state statutes that regulate the business of insurance by prohibiting arbitration of insurance disputes, *id.* at 15a, the court held that Oklahoma's statute, which "plainly exempts 'contracts which reference insurance' from arbitration," likewise "enjoys the benefit of reverse-preemption" under McCarran-Ferguson, *id.*

Finally, the court addressed Old Republic's principal argument—its assertion that its contracts were not "contracts which reference insurance" as a matter of state law. The court noted that even Old Republic was "confused about whether the home warranty was insurance and if it was an insurance company," *id.* at 18a, and it pointed out that Old Republic had argued in other cases that its plans were "analogous to insurance," *id.* at 19a, and were not service contracts, *id.* at 20a. The court held that Old Republic's plan "provides for the transfer of risk," *id.*, which is the "hallmark[ ] of an insurance policy," *id.* at 22a. It further rejected Old Republic's argument that its home *warranty* plan was a service contract within the meaning of the Oklahoma Home Service Contract Act. Accordingly, the court held that Old Republic's "home warranty plan meets the definition of insurance and as such is exempt from the Oklahoma Uniform Arbitration Act." *Id.* at 24a.

REASONS FOR DENYING THE WRIT

I. Old Republic did not present the issues it asks this Court to decide to the state courts.

Old Republic's question presented asks this Court to address two distinct issues concerning the application of the McCarran-Ferguson Act to this dispute: (1) whether Oklahoma's statute prohibiting arbitration of insurance disputes "qualifies as a 'law enacted by [a] State for the purpose of regulating the business of insurance' under the McCarran-Ferguson Act"; and (2) if so, whether McCarran-Ferguson reverse preempts the FAA "based on an asserted impairment" of that law. Pet. i. The petition, however, nowhere complies with Rule 14.1(g)(i)'s requirement that it provide a

"specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised" and the "method or manner of raising them," with citations of "specific portions of the record" to "show that the federal question was timely and properly raised." The reason for Old Republic's omission is that it did not raise either question in the state courts.

Instead, Old Republic *conceded* that the Oklahoma UAA provision concerning insurance arbitration was a law enacted for the purpose of regulating the business of insurance. *See* Pet App. 6a–7a; App't's Br. in Chief 13. Nowhere did its merits briefs even suggest the argument that McCarran-Ferguson was inapplicable because the state statute does not regulate the business of insurance. Nor did its state-level petition for certiorari argue that the state statute is not a law governing the business of insurance. Thus, when the Oklahoma Supreme Court stated that the Oklahoma statute was enacted for the purpose of regulating insurance, *see* Pet. App. 24a, it was not deciding a contested point of law, but adopting the position taken by *both* parties before it on that issue.

Old Republic likewise never made any argument below about whether application of the FAA would "impair" the state statute. None of the briefs it filed in the Oklahoma Supreme Court—neither its brief in chief, its reply brief, its petition for certiorari, nor its reply in support of its certiorari petition—even included the word "impair." Not surprisingly, therefore, the Oklahoma Supreme Court's opinion says nothing about whether applying the FAA would "impair" the state law, as Old Republic admits. Pet. 22.

Old Republic's suggestion that the state court "necessarily" decided the issue of impairment, *id.*, is also flatly inconsistent with the way it argued the case below: Old Republic told the state courts there was a direct conflict between the FAA and the state statute, and that the FAA should "displace[ ]," "invalidat[e]" and "supersede[ ]" the state law. App't's Pet. for Cert. 8. Because the McCarran-Ferguson Act explicitly bars federal statutes from "invalidat[ing]" or "supersed[ing]" a state law, the state court could, and did, hold that McCarran-Ferguson bars the FAA from *invalidating* or *superseding* the Oklahoma statute without also addressing whether applying the FAA would "impair" state insurance regulation. *See Humana*, 525 U.S. at 307–08 (addressing impairment only after concluding that there was no direct conflict between state and federal law and that applying federal law thus would not invalidate or supersede state law).

The only argument Old Republic preserved below against reverse preemption of the FAA by the McCarran-Ferguson Act was not even based on federal law. It was an argument that under *state* contract-law principles, the courts should give effect to the "choice" of the FAA over state law in Old Republic's contract. *See* App't's Br. in Chief 12–13. Old Republic's certiorari petition in the Oklahoma Supreme Court expressly recognized that this argument raised a question of "Oklahoma law." App't's Pet. for Cert. 7.

This Court ordinarily "do[es] not decide questions neither raised nor resolved below," *Glover v. United States*, 531 U.S. 198, 205 (2001), and it treats arguments that were conceded below as waived, *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 72–73 (2013). These principles have special force in cases coming from state supreme courts via 28 U.S.C.

§ 1257(a), under which it is a *jurisdictional* requirement that a federal question be properly raised or decided below. "Under that statute and its predecessors, this Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim 'was either addressed by or properly presented to the state court that rendered the decision we have been asked to review.' " *Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (quoting *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (*per curiam*)). Accordingly, the petitioner has the "burden of showing that the issue was properly presented" to the highest state court and must demonstrate that "the state court had 'a fair opportunity to address the federal question that is sought to be presented here.' " *Adams*, 520 U.S. at 86–87 (*quoting Webb*, 451 U.S. at 501).

Here, Old Republic expressly disavowed its business-of-insurance argument in the state courts, and neither Old Republic nor the court below even mentioned impairment. Even if the Oklahoma Supreme Court's statements on the business-of-insurance issue could be said to have "addressed" it given the parties' agreement on the point, Old Republic surely never gave the state courts a "fair opportunity" to decide the question it asks this Court to resolve. *Webb*, 451 U.S. at 501. The Court should not excuse Old Republic's waiver of the claims it now seeks to raise.

II. Old Republic's McCarran-Ferguson Act claims depend on an argument about the proper construction of a state statute that this Court lacks authority to decide and that Old Republic waived below.

Both Old Republic's business-of-insurance argument and its impairment argument rest on its

assertion that the Oklahoma UAA provision at issue does not prohibit arbitration of insurance disputes. Old Republic argues that the statute is not a law governing the business of insurance because it does not "purport to render such provisions void, unenforceable, or revocable, or otherwise prohibit agreements that would 'deprive' Oklahoma state courts of their 'jurisdiction.' " Pet. 19–20. Similarly, Old Republic argues that applying the FAA would not "impair" Oklahoma's UAA because, it asserts, the state statute reflects only a choice " '*not to regulate*' arbitration agreements in insurance contracts." *Id*. at 27. This essential premise of Old Republic's McCarran-Ferguson arguments, however, contradicts both the Oklahoma Supreme Court's authoritative construction of its own state law and Old Republic's arguments below.

The Oklahoma Supreme Court expressly construed the Oklahoma UAA to exempt insurance contracts "*from arbitration*," Pet. App. 15a (emphasis added), not just from the coverage of the UAA itself. The court explicitly equated the statute with laws of other states "invalidating arbitration provisions in insurance contracts" and "prohibiting arbitration in contracts of insurance." *Id*. The court further explained that it had previously construed the predecessor of the statute (identical in substance but codified in a different location) to render arbitration agreements in contracts referencing insurance *void*. *Id*. at 16a.

Even Old Republic acknowledges that the state court understood that the Oklahoma statute "invalidated arbitration agreements in such contracts." Pet. 11–12. Old Republic thus asks this Court to decide its new McCarran-Ferguson Act arguments based on an understanding of state law that it concedes is contrary to that of the state's highest court. But this Court has

no authority to correct a state court's construction of its own statute. *See Murdock v. City of Memphis*, 87 U.S. 590, 626, 635 (1875).

Old Republic's argument, moreover, contradicts not only the state court's reading of the state's law, but its own arguments in the state courts about the meaning of the state statute. In the state courts, Old Republic asserted that the state's UAA is an "explicit Oklahoma statute that *prohibits* binding arbitration clauses in insurance policies" and "*disallows* insurance products from including binding arbitration clauses." App't's Br. in Chief 10, 11 (emphasis added).

Furthermore, and contrary to its present assertion that there is no conflict between the FAA and the state statute, *see* Pet. i, 21–27, Old Republic vigorously asserted below that the FAA directly conflicted with and superseded the state statute's prohibition of insurance arbitration. App't's Br. in Chief 11–12, App't's Pet. for Cert. 7–8. The McCarran-Ferguson Act arguments Old Republic's new attorneys now seek to advance depend on a construction of the state law opposite to the one it advocated below. Even if this Court had authority to adopt that construction, Old Republic affirmatively waived any arguments for such a construction in the state courts.

III. There is no conflict among the lower courts over whether a state arbitration statute that prohibits arbitration of insurance disputes is a regulation of the business of insurance.

Old Republic asks this Court to grant review to resolve a supposed conflict among state supreme courts and federal courts of appeals over whether a state arbitration law's provisions concerning arbitration of

insurance disputes is a law enacted to regulate the business of insurance for purposes of the McCarran-Ferguson Act. There is no such conflict. The lower courts agree that state arbitration laws that explicitly regulate arbitration provisions in insurance contracts—by, for example, prohibiting enforcement of such provisions—are laws governing the business of insurance. The courts likewise agree that state arbitration laws that do *not* specifically address insurance contracts are not laws governing the business of insurance under McCarran-Ferguson. Far from reflecting a conflict, those views are entirely consistent.

As the Oklahoma Supreme Court pointed out, federal courts of appeals and state supreme courts that have addressed state arbitration statutes that prohibit arbitration of insurance disputes have uniformly held them to be laws governing the business of insurance for McCarran-Ferguson purposes. Thus, "state laws invalidating arbitration agreements in insurance policies 'reverse preempt[]' the Federal Arbitration Act." *Minnieland Private Day School, Inc. v. Applied Underwriters Captive Risk Assur Co., Inc.*, 867 F.3d 449, 454 (4th Cir. 2017) (citation omitted). *See Am. Bankers Ins. Co. of Fla. v. Inman*, 436 F.3d 490, 494 (5th Cir. 2006); *McKnight v. Chicago Title Ins. Co.*, 358 F.3d 854, 858–59 (11th Cir. 2004); *Standard Sec. Life Ins. Co. of N.Y. v. West*, 267 F.3d 821, 823–24 (8th Cir. 2001); *Mut. Reins. Bur. v. Great Plains Mut. Ins. Co.*, 969 F.2d 931, 933–35 (10th Cir. 1992); *State Dep't of Transp. v. James River Ins. Co.*, 292 P.3d 118, 123–24 (Wash. 2013); *Love v. Money Tree, Inc.*, 614 S.E.2d 47, 50 (Ga. 2005). Old Republic cites no decision of any federal court of appeals or state supreme court holding that a statutory prohibition on insurance arbitration

is not a law enacted to regulate the business of insurance.

Instead, Old Republic relies on the Vermont Supreme Court's 1997 decision in *Little v. Allstate Insurance Co.*, 705 A.2d 538, to establish its claimed conflict. Even if *Little* did reflect some disagreement with the consensus of other state and federal appellate courts that statutes prohibiting arbitration of insurance disputes are regulations of the business of insurance, it would provide little reason for this Court to intervene. In the nearly quarter century since *Little* was decided, it has never been cited by any appellate court, state or federal, outside Vermont. An isolated decision of a single state supreme court would create, at most, an extremely shallow conflict.

In fact, however, *Little* evinces no conflict at all. The outcome in *Little* did not turn on the Vermont court's adoption of a construction of the McCarran-Ferguson Act at odds with that of the Oklahoma Supreme Court or the decisions of other state and federal courts on which it relied. Rather, *Little*'s holding that Vermont's arbitration statute did not reverse preempt the FAA was based only on its adoption of a construction of *Vermont law* that differs from the construction the Oklahoma Supreme Court gave *Oklahoma law* in this case.

Specifically, the Vermont court held in *Little* that Vermont's statute did *not* prohibit arbitration of insurance arbitration disputes, and indeed did not regulate insurance arbitration agreements at all, but left their enforceability to be governed by the common law. *See* 705 A.2d at 541. The court acknowledged that a statute that *did* regulate the enforceability of insurance arbitration agreements would be a law

regulating the business of insurance because "the business of insurance includes whether disputes between insurer and insured are resolved in litigation or in arbitration." *Id.* at 540. Thus, *Little* distinguished, rather than disagreed with, decisions such as the Tenth Circuit's decision in *Mutual Reinsurance Bureau*, 969 F.2d at 934, holding that laws that specifically make insurance arbitration agreements invalid or revocable are laws regulating the business of insurance. *See Little*, 705 A.2d at 541.

The difference in outcome between *Little* and this case thus turns on the state supreme courts' different resolution of a purely state-law issue: the construction of a state statute. Although the two state statutes may be similar in their wording, the states' highest courts have given them different constructions, and this Court is bound by those constructions. *See Murdock*, 87 U.S. at 635. The decisions present no conflict over any issue of *federal* law that this Court can resolve.

Beyond *Little*, Old Republic tries to conjure up a conflict by citing cases that hold that general state arbitration statutes that do not treat insurance arbitration differently from arbitration under other contracts are not laws enacted to regulate the business of insurance. *See* Pet. 17–18. Nothing in those decisions, however, contradicts the holding of the court below, and of other state and federal courts, that arbitration statutes that specifically and distinctively regulate the enforcement of insurance arbitration agreements are laws governing the business of insurance.

The absence of any conflict is underscored by Old Republic's failure to acknowledge that some of the decisions it cites for the proposition that *general* arbitration laws that do *not* specifically regulate insurance

arbitration are not laws regulating the business of insurance come from circuits that have expressly held that state arbitration statutes that *do* prohibit arbitration of insurance disputes *are* laws regulating the business of insurance under McCarran-Ferguson. Most notably, Old Republic cites the Eleventh Circuit's ruling in *Kong v. Allied Professional Insurance Co.*, 750 F.3d 1295 (2014), for the proposition that a state arbitration statute that provides for *enforcement* of "all arbitration agreements, not just those found in insurance contracts," does not regulate the business of insurance. Pet. 17–18 (quoting 750 F.3d at 1304). But Old Republic pointedly withholds any citation of the Eleventh Circuit's earlier explicit holding in *McKnight v. Chicago Title Insurance Co.* that "a provision in a state's arbitration code excepting insurance contracts is a law regulating the business of insurance" that reverse preempts the FAA. 358 F.3d at 858. Similarly, Old Republic cites the Tenth Circuit's opinion in *Hart v. Orion Ins. Co.*, 453 F.2d 1358, 1360 (1971). Pet. 18. The Tenth Circuit, however, subsequently recognized that state arbitration laws that prohibit enforcement of insurance arbitration agreements do regulate the business of insurance and reverse preempt the FAA. *See Mut. Reins. Bur.*, 969 F.2d at 934. As these decisions illustrate, there is no conflict between the two lines of cases.

In short, state and federal appellate courts are not in conflict over whether state laws prohibiting arbitration of insurance disputes are regulations of the business of insurance. Even if Old Republic had preserved the point below, there would be no need for this Court to address it.

IV. This case presents no occasion for clarification of the meaning of "impair" under the McCarran-Ferguson Act.

Old Republic's assertion that this Court's intervention is required to address confusion among lower courts over when application of federal law would "impair" state insurance regulation within the meaning of the McCarran-Ferguson Act is equally misguided. Old Republic's claim that the lower courts are confused rests primarily on decisions addressing disparate laws and circumstances unrelated to those at issue here. Even if those cases reflected some confusion, this case would offer no opportunity to dispel it because the application of the McCarran-Ferguson Act here does not turn on *impairment* of state law.

The McCarran-Ferguson Act prohibits application of a federal statute to "invalidate, impair, or supersede" state laws enacted to regulate the business of insurance, unless the federal statute specifically relates to insurance. 15 U.S.C. § 1012(b). As this Court has explained, "invalidate" and "supersede" have meanings different from "impair." *Humana*, 525 U.S. at 307-10. "Invalidate" means "to render ineffective" and "supersede" means "to displace," *id.* at 307, while "impair," in this context, means "to frustrate any declared state policy or interfere with a State's administrative regime," *id.* at 310. When a federal law would "collide head on with state regulation," the relevant McCarran-Ferguson Act prohibition is on invalidating or superseding state law. *Id.* at 309. A court need only delve into the more complicated issue of impairment when a federal law "does not directly conflict with state regulation." *Id.* at 310.

Decisions Old Republic cites concerning impairment recognize this distinction. For example, in *Monarch Consulting, Inc. v. National Union Fire Insurance Co. of Pittsburgh, PA*, 47 N.E.3d 463 (N.Y. Ct. App. 2016), the New York Court of Appeals held that application of the FAA would not impair a California insurance statute that "did not, at the relevant times, prohibit, limit, or regulate the use or form of arbitration clauses in insurance contracts." *Id.* at 471. In the same breath, however, the court acknowledged that "[t]he clearest example of a scenario in which reverse preemption occurs is where state law expressly prohibits arbitration of insurance related disputes." *Id.* In such circumstances, the court recognized, applying the FAA would "invalidate" and "supersede" state law as this Court defined those terms in *Humana*. *Id.*

Here, Old Republic asked the lower courts to apply the FAA's general requirement that arbitration agreements be enforced rather than Oklahoma's specific prohibition on enforcement of agreements to arbitrate insurance disputes. As Old Republic acknowledged below, its arguments involved a choice between contradictory commands: arbitrate versus do not arbitrate. In *Humana's* words, and Old Republic's, applying the FAA would "directly conflict" with the state law. *Id.*; App't's Pet. for Cert. 7. Old Republic's arguments thus explicitly amounted to a request that the state courts apply the FAA to "displace" state law. App't's Pet. for Cert. 8. In such circumstances, the relevant McCarran-Ferguson prohibition is on construing federal law to "supersede"—i.e., "displace"—state law. *Humana*, 525 U.S. at 307. The prohibition on impairment of state law does not come into play in a case like this one, and the case thus provides no occasion for clarifying the application of that prohibition.

V. The decision below is correct.

Review is also unwarranted because the Oklahoma Supreme Court's application of the McCarran-Ferguson Act was entirely correct. Indeed, given Old Republic's concessions below, the state court could not properly have reached any conclusion other than that the McCarran-Ferguson Act precluded application of the FAA.

Specifically, Old Republic conceded that the Oklahoma UAA provision addressing arbitration under contracts referencing insurance is a law enacted to regulate the business of insurance, App't's Br. in Chief 13, and that the FAA does not specifically refer to insurance, App't's Reply Br. 6. Old Republic also explicitly asked the state courts to construe the FAA to *displace* the Oklahoma law's prohibition on arbitration of insurance disputes. App't's Pet. for Cert. 7.

Thus, Old Republic directly asked the state courts to construe a federal law, which does not specifically refer to insurance, to supersede a state law enacted to regulate the business of insurance. That is *exactly* what the McCarran-Ferguson Act prohibits, in so many words. Once the state courts rejected Old Republic's state-law arguments, Old Republic itself had ensured that there was only one possible answer to whether the McCarran-Ferguson Act precluded application of the FAA. The Oklahoma Supreme Court correctly gave that answer.

Even if Old Republic had not given away its case below, its current argument that a statute prohibiting arbitration of insurance disputes is not a law enacted for the purpose of regulating the business of insurance would still be meritless. The statute directly regulates "the relationship between the insurance company and

its policyholders," the central "focus of McCarran-Ferguson." *U.S. Dep't of Treas. v. Fabe*, 508 U.S. 491, 501 (1993). It does so by determining the enforceability of one of "the terms of the insurance contract," *id.* at 502–03—namely, its arbitration provision. And it "protects policyholders," *id.* at 493, a hallmark of laws that regulate the business of insurance. Moreover, by determining the way insurance contracts are enforced, it directly affects the "transfer of risk from insured to insurer." *Id.* at 503–04 (citation omitted). And the prohibition on arbitration of insurance-related disputes applies "to entities within the insurance industry." *Id.*

Small wonder, then, that the federal courts of appeals agree that a state statutory prohibition on insurance arbitration meets this Court's definition of a regulation of the business of insurance. *See McKnight*, 358 F.3d at 858; *West*, 267 F.3d at 824; *Mut. Reins. Bur.*, 969 F.2d at 934–35. Even if this Court were in the business of granting do-overs to parties who conceded their cases below, the merits of Old Republic's arguments would not justify doing so here.

VI. This case's state-court origins make it unsuitable for addressing a question of FAA preemption given the continuing disagreement among Justices of this Court over the FAA's application to state courts.

Finally, this case would be a particularly poor vehicle for addressing the relationship of the McCarran-Ferguson Act and the FAA because it arises from a state court. The necessary premise of Old Republic's argument is that if McCarran-Ferguson Act reverse preemption is inapplicable here, the Oklahoma state courts would be required to apply the FAA. But

Justices of this Court continue to disagree over whether the FAA applies in state courts. *See Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1429 (2017) (Thomas, J., dissenting). If this Court were to review this case on the merits, the vote of at least one Justice would be to affirm on the ground that the FAA does not apply to state courts, and there would be a possibility that no holding on any other issue that might be presented by the case would command a majority of the Court. Review would thus threaten to waste the time and efforts of the Court.

CONCLUSION

The Court should deny Old Republic's petition for a writ of certiorari.

Respectfully submitted,

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