No. 20-237

IN THE

Supreme Court of the United States

OLD REPUBLIC HOME PROTECTION COMPANY, INC.,

Petitioner,

v.

WILLIAM B. SPARKS, *et al.*,

Respondents.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF OF PETITIONER

Respondents' opposition brief ("Opp.") is predicated on three flawed assertions designed to avoid this Court's review of an erroneous application of federal law by the highest court of a state.

First, Respondents' assertion that the Petition's issues were not preserved misses the mark. As Respondents' opposition details (Opp. 5–8), ORHP consistently asked each level of Oklahoma's state courts to compel arbitration under the Federal Arbitration Act (FAA), argued the FAA preempts § 1855(D) by citing this Court's precedents, and opposed Respondents' McCarran–Ferguson Act arguments. And the Oklahoma Supreme Court explicitly ruled that § 1855(D) reverse preempts the FAA under the McCarran–Ferguson Act. Opp. 9. OHRP has, therefore, sufficiently persevered the issues presented to this Court. See *infra*, Part I.

Second, Respondents' assertion that this Court cannot decide whether a state statute qualifies for McCarran–Ferguson Act reverse preemption lacks logic and legal support. The text of the McCarran–Ferguson Act requires courts to assess whether a state law is one "enacted for the purpose of regulating the business of insurance," 15 U.S.C. § 1012(b), and interpretation of federal law is this Court's domain. *Marbury* v. *Madison*, 5 U.S. 137, 177 (1803); see also *infra*, Part II.

Third, Respondents' remaining arguments—that there is no conflict over whether state statutes prohibiting arbitration of insurance disputes regulate the business of insurance and that the decision below was correct—are based on a mischaracterization of

the Oklahoma Arbitration Act and the relevant case law. By its express terms, § 1855(D) does not prohibit arbitration relating to insurance contracts—it does not apply at all to such contracts. Only by assuming the statute is something it is not can the Oklahoma Supreme Court, and Respondents in their brief, conclude that it regulates the business of insurance and that there is no conflict with this Court's decisions or the decisions of other appellate courts.

I. THE PETITION'S FEDERAL ISSUES ARE PROPERLY BEFORE THIS COURT.

ORHP consistently asserted that § 1855(D) of the Oklahoma Arbitration Act is preempted by the FAA. Pet. 9–12 (specifying, per Rule 14.1(g)(i), the stage and method in the trial court and appellate proceedings in which the federal questions were raised).[1] Accordingly, the Oklahoma Supreme Court acknowledged that ORHP preserved these issues (Pet. App. 11a. ¶15) and granted certiorari to decide (among other things) "whether * * * § 1855 of the Oklahoma Uniform Arbitration Act is a state law enacted for the purpose of regulating insurance under the McCarran–Ferguson Act, 15 U.S.C. § 1012(b)" and whether, "pursuant to the McCarran–Ferguson Act, * * * § 1855 preempt[s] the application of the Federal Arbitration Act, 9 U.S.C. §§ 1–307?" Pet. App. 3a. Those issues are entirely consistent with, and encompassed by, the Petition's Question Presented.

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[1] Contrary to Respondents' assertion (Opp. ii), ORHP did not fail to list "directly related" cases in its Petition. As required by Rule 14.1(d), ORHP properly cited to the opinions and orders below. Pet. 4–5.

Ultimately, the Oklahoma Supreme Court rejected ORHP's preemption arguments, concluding that § 1855(D) "is a state law regulating the business of insurance" and that, "under the McCarran–Ferguson Act, the state law must prevail over the federal law, the FAA[.]" Pet. App. 15a.

Respondents' cited authority (Opp. 13) establishes that a litigant "indicate[s] the federal law basis for his claim in a state-court petition or brief * * * by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim 'federal.'" *Howell* v. *Mississippi*, 543 U.S. 440, 444 (2005) (quoting *Baldwin* v. *Reese*, 541 U.S. 27, 32 (2004)).

ORHP did this extensively throughout the Oklahoma proceedings. In the trial court, ORHP moved to compel arbitration based on the FAA and the parties' contract. Pet. App. 60a ("The plain language of the Plan provides that it and the included arbitration provision are governed by the provisions of the Federal Arbitration Act."). On appeal, ORHP asserted that the FAA governed the parties' contract and that § 1855(D) of the Oklahoma Arbitration Act was preempted by the FAA. See ORHP Br. in Chief 8–13, No. IN-115789 (Okla. Ct. App. Apr. 13, 2017) ("Pet. C.A. Br.").[2] But the court rejected that based on its misapplication of the McCarran–Ferguson Act. Pet. 10. Finally, ORHP asked the Oklahoma Supreme Court to reject the lower court's application of reverse

[2] The parties' briefing below is available at https://www.oscn.net/applications/oscn/GetCaseInformation.asp?number=115789&db=Appellate&submitted=true.

preemption of the FAA, which was based on application of the McCarran–Ferguson Act. Pet. App. 8a; see also Pet. App. 3a (discussing issues presented).[3]

The Oklahoma Supreme Court's ruling on these federal issues (Pet. App. 15a) is itself sufficient to have preserved the issues for review under 28 U.S.C. § 1257(a). *Citizens United* v. *Federal Election Comm'n*, 558 U.S. 310, 330 (2010) ("Our practice permits review of an issue not pressed below so long as it has been passed upon.") (internal quotation marks, citation, and alterations omitted); *Orr* v. *Orr*, 440 U.S. 268, 274–75 (1979) (holding it is an "elementary rule that it is irrelevant to inquire when a Federal question was raised in a court below when it appears that such question was actually considered and decided") (quoting *Manhattan Life Ins. Co.* v. *Cohen*, 234 U.S. 123, 134 (1914)).

It does not aid Respondents that ORHP's state court briefing also raised choice of law and whether the contract at issue "reference[s] insurance" for purposes of § 1855(D), both of which relate to federal preemption arguments decided by the Oklahoma Supreme Court and presented in this Petition. "Once a federal claim is properly presented [in state court], a party can make any argument in support of that

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[3] As Respondents acknowledge, the Oklahoma Supreme Court decided the case on briefs submitted to the intermediate state court of appeals, "without further briefing [or oral argument] from the parties." Opp. 9. The dissent in the intermediate appellate court stated there "is nothing in the express language of the Federal Arbitration Act that would 'invalidate' or 'supersede' section 1855(D)" and concluded it would not impair (Pet. App. 50a–52a).

claim; parties are not limited to the precise arguments they made below." *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992). The Petition's Arguments support the same federal claim that ORHP pressed consistently below—namely that the FAA controls and § 1855(D) does not qualify for reverse preemption. Cf. *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (characterizing petitioner's argument "not [as] a new claim" but as "a new argument to support what has been his consistent claim" throughout the case).

None of Respondents' case law contradicts this. Opp. 12–13. In *Webb* v. *Webb*, the petitioner never cited to the Constitution or any federal case in the state court proceedings and "nowhere in the opinion of the Georgia Supreme Court [was] any federal question mentioned, let alone expressly passed upon." 451 U.S. 493, 496–96 (1981). This Court in *Glover* v. *United States* declined to address various federal issues that "were neither raised in nor passed upon" by the federal circuit court and were "outside the questions presented by the petition for certiorari." 531 U.S. 198, 205 (2001). And *Genesis HealthCare Corp.* v. *Symczyk* dealt with a mootness issue that the respondent (as opposed to the petitioner) failed to contest in the federal circuit court or properly raise through a cross-petition for certiorari. 569 U.S. 66, 72–73 (2013).

Finally, ORHP has not waived the issues presented in the Petition. As part of ORHP's argument before Oklahoma's intermediate court of appeals that the McCarran–Ferguson Act was "inapplicable" and did not reverse preempt the FAA, ORHP stated that it did "not dispute that 12 O.S. § 1855(D) ***purports*** to regulate insurance in Oklahoma." Pet. C.A. Br. 13 (emphasis added). Yet

ORHP's brief continued on to make the point that, because the parties "explicitly chose the FAA to apply to all disputes * * *, only the FAA's provisions concerning arbitration apply, not the [McCarran–Ferguson Act] or Oklahoma law concerning arbitration." Pet. C.A. Br. 13–14. A statement that a law "***purports*** to regulate insurance in Oklahoma" does not constitute a concession (Opp. 9, 11 (emphasis added)) that it is, in fact, a "law enacted by [a] State for the purpose of regulating the business of insurance[,]" or is impaired by application of the FAA.

II. THIS COURT POSSESSES THE AUTHORITY TO DECIDE WHETHER § 1855(D) QUALIFIES FOR REVERSE PREEMPTION UNDER THE MCCARRAN–FERGUSON ACT.

"[T]he starting point in a case involving construction of the McCarran—Ferguson Act * * * is the language of the statute itself." *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205, 210 (1979). In this respect, courts are dealing "with [a] federal statute[] where the word[] 'insurance' * * * [is a] federal term[,]" that presents a "federal question." *SEC* v. *Variable Annuity Life Ins. Co. of Am.*, 359 U.S. 65, 69 (1959).

As a result, federal courts may decide that activities are "not to be part of the 'business of insurance' under McCarran–Ferguson, * * * notwithstanding their classification as such for the purpose of state regulation." *Rush Prudential HMO, Inc.* v. *Moran*, 536 U.S. 355, 369 n.5 (2002) (internal citations omitted). Although a State may pronounce that its law regulates insurance, "how the States may

have ruled is not decisive." *Variable Annuity*, 359 U.S. at 69.

The Court's analysis in *SEC* v. *National Securities, Inc.*, 393 U.S. 453 (1969), is instructive. This Court independently assessed "whether the relevant Arizona statute is a 'law enacted * * * for the purpose of regulating the business of insurance' within the meaning of the McCarran–Ferguson Act." *Id.* (citing 15 U.S.C. § 1012(b)). The Court concluded that most of the state statutory scheme did not regulate insurance and, to the extent a portion did, "the paramount federal interest in protecting shareholders was perfectly compatible with the paramount state interest in protecting policyholders." *Id.* at 463.

Here, the Oklahoma Supreme Court not only interpreted § 1855(D) in a manner that conflicts with its plain language, but it also went on to interpret and apply the McCarran–Ferguson Act. Pet. App. 14a–15a. This inquiry, prescribed by federal statute, remains a federal question.

III. REVIEW IS WARRANTED TO ADDRESS THE INTERPLAY OF THE MCCARRAN–FERGUSON ACT AND THE FAA.

The Oklahoma Supreme Court's decision conflicts with this Court's precedent and other appellate courts' decisions, meriting review. Respondents' disagreements (Opp. 15–19) repackage their incorrect argument that the only issue is one of state law.

A. Conflict Exists Regarding When A Statute Regulates The Business Of Insurance.

To determine whether the McCarran–Ferguson Act applies, courts assess whether the state law "posses[es] the end, intention, or aim of adjusting, managing or controlling the business of insurance." *Department of the Treasury* v. *Fabe*, 508 U.S. 491, 505 (1993) (internal quotations and citations omitted). While some courts struggle with this test (Pet. 14 n.6), the Oklahoma Supreme Court ignored it altogether in jumping to its conclusion. Pet. 16–17; see also Pet. App. 15a. ¶23.

The Oklahoma Supreme Court simply assumed that §1855(D)—part of a general arbitration statute that explicitly does not apply to "contracts which reference insurance"—was enacted to regulate the business of insurance. In doing so, the court relied on cases discussing laws that prohibit arbitration in contracts of insurance and Oklahoma's historic common law, which prohibited arbitration as against public policy. Pet. App. 14a-16a; Pet. 12. That approach, and conclusion, is at odds with *Fabe*, *Little* v. *Allstate Insurance Co.*, 705 A.2d 538 (Vt. 1997) (analyzing similar statute and concluding it did not regulate insurance), and the other appellate cases that have properly analyzed the McCarran–Ferguson Act both in and out of the context of arbitration statutes. Pet. 13–18 (discussing cases).

Respondents do not directly address the Oklahoma Supreme Court's failure to apply the *Fabe* test, instead arguing that no conflict exists for two reasons.

First, Respondents assert that "lower courts agree that state arbitration laws that explicitly regulate arbitration provisions in insurance contracts * * * are laws governing the business of insurance." Opp. 16. They rely on cases concluding state arbitration statutes that "***prohibit*** enforcement of insurance arbitration agreements do regulate the business of insurance." Opp. 19 (emphasis added). This Court has never addressed that issue, and many other appellate decisions note that arbitration merely provides an alternative forum for disputes without affecting substantive rights. Pet. 26. Even if Respondents' statement was correct, there is confusion regarding when a statute regulates the business of insurance. Here, Oklahoma's arbitration statute simply provides that it shall not apply at all to "contracts which reference insurance," Okla. Stat. Ann. tit. 12, § 1855(D), rather than prohibiting outright arbitration of insurance disputes. A central issue is whether this can, consistent with federal law, amount to a law "enacted * * * for the purpose of regulating the business of insurance," such that reverse preemption under the McCarran–Ferguson Act is possible. 15 U.S.C. § 1012(b). This Court should correct the Oklahoma Supreme Court's failure to engage in a proper McCarran–Ferguson Act analysis as set forth in *Fabe*.

Second, Respondents argue that any perceived conflict relates only to interpretation of state law. Opp. 18–19. However, as explained in Part II, whether the McCarran–Ferguson Act applies is a federal question and the conflicts cannot be ignored as beyond this Court's purview. See also Pet. 10–12. If state courts are free to ignore the *Fabe* test, it becomes an

open invitation for them to continue long-held hostility to arbitration by simply holding (without review by this Court) that a given statute regulates the business of insurance for McCarran–Ferguson Act purposes. See *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 219–20 (1985).

Even if there were no conflict among the appellate courts, this Court would nonetheless be entitled to grant certiorari given "the importance of the question presented." *Variable Annuity*, 359 U.S. at 66 (granting certiorari to analyze "the business of insurance" under McCarran–Ferguson Act, although "all the States regulate 'annuities' under their 'insurance' laws").

B. Guidance Is Necessary Regarding The Determination Of Whether, And When, The FAA Impairs A State Statute Regulating The Business Of Insurance.

Respondents also argue (Opp. 20–21) that review is not warranted to clarify application of this Court's test in *Humana* for determining when application of a federal law, in this case the FAA, "impair[s]" a state law regulating the business of insurance. *Humana Inc.* v. *Forsyth*, 525 U.S. 299, 307–08 (1999); Pet. 21–28. Respondents' argument is premised on the erroneous proposition that application of the FAA (consistent with the parties' written agreement) would "invalidate" or "supersede" the Oklahoma Arbitration Act.

Once again, Respondents mistakenly assert that the Oklahoma Arbitration Act contains a "specific prohibition on enforcement of agreements to arbitrate insurance disputes" (Opp. 21) of the type necessary to create a direct conflict with the FAA. As the First

Circuit observed in a different context, "[p]ainting a pumpkin green and calling it a watermelon will not render its contents sweet and juicy." *Arruda* v. *Sears, Roebuck Co.*, 310 F.3d 13, 24 (1st Cir. 2002). The analogy applies here. Stating that §1855(D) prohibits arbitration of insurance disputes—even when the statute expressly provides that it does not apply in such circumstances—does not suffice "to transform [it] into something [it] plainly [is] not." *Id.*

Because there is no direct conflict between the FAA and the Oklahoma Arbitration Act that would "invalidate" or "supersede" § 1855(D), the Oklahoma Supreme Court's decision only makes sense if it determined that the application of the FAA would "impair" the Oklahoma Arbitration Act. For the reasons explained in the Petition, that too is not possible, and a ruling to the contrary is at odds with other appellate decisions in the arbitration context (Pet. 23–24), and other cases outside of the context of arbitration, which have appropriately and rigorously applied the *Humana* impairment test (Pet. 24–25). Review is warranted to correct a decision directly at odds with this Court's precedent and address the split in authority discussed in the Petition. Pet. 21–28. Review would permit the Court to address whether the FAA could ever impair a state law prohibiting arbitration of insurance disputes since, as many appellate decisions have observed, arbitration simply provides a different forum for resolving disputes and does not affect substantive rights. Pet. 26–27.[4]

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[4] Respondents claim that the state court origin of this case makes it unsuitable for review. Opp. 23. But "[s]tate courts rather than federal courts are most frequently called upon to apply the Federal Arbitration Act * * *, [making it] a matter of great

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

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importance, therefore, that state supreme courts adhere to a correct interpretation of the legislation." *Nitro-Lift Techs., L.L.C.* v. *Howard*, 568 U.S. 17, 17–18 (2012). Accordingly, this Court routinely grants certiorari to review state court decisions refusing to enforce the FAA. Pet. 2 n.2 (collecting cases).