No. _____

In the Supreme Court of the United States

DELAWARE DEPARTMENT OF INSURANCE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The McCarran-Ferguson Act (15 U.S.C. § 1011, *et seq*.) was enacted to "restore the supremacy of the States in the realm of insurance regulation." *United States Dep't of Treasury v. Fabe*, 508 U.S. 491, 505 (1993). The first clause of § 1012(b) "grant[s] the States broad regulatory authority over the business of insurance." *Id*. Ten Circuit Courts of Appeals use a three factor test which mirrors the statute in determining preemption under § 1012(b).

Here, the Third Circuit added an additional factor, misapplied from later in the statute's second clause which relates only to antitrust cases. The Court thus erroneously held that a Delaware insurance statute intended to promote the free flow of information between insurers and their regulators did not preempt the IRS code authorizing a summons. The Court found that the "conduct at issue" did not constitute "the business of insurance." The Court's error requires the Insurance Commissioner to violate his own statute.

The question presented in this case is:

1. When determining whether a state insurance statute preempts a federal law of general application under the McCarran-Ferguson Act, are the three statutory factors set forth in the first clause of § 1012(b) the only proper factors to consider, or may a court first constrain the inquiry by assessing whether the "conduct at issue" constitutes the "business of insurance?"

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner represents that it has no parent entities and does not issue stock.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is related to the following proceedings in the United States District Court for the District of Delaware and the United States Court of Appeals for the Third Circuit:

U.S. District Court for the District of Delaware

- *United States v. Delaware Dep't of Ins.*, No. 20-829-MN-CJB

  Report and recommendation of magistrate judge (July 16, 2021)

- *United States v. Delaware Dep't of Ins.*, No. 20-829-MN-CJB

  Opinion adopting report and recommendation (Sept. 29, 2021)

U.S. Court of Appeals for the Third Circuit

- *United States v. Delaware Dep't of Ins.* – No. 21-3008

  Order and opinion affirming judgment of district court (April 21, 2023)

- *United States v. Delaware Dep't of Ins.* – No. 21-3008

  Order denying petition for rehearing *en banc* (June 16, 2023)

There are no other proceedings in state or federal trial or appellate courts directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

This Petition results from the misapplication by the Third Circuit Court of Appeals of the test for "reverse-preemption"[1] under the McCarran-Ferguson Act. 15 U.S.C. § 1011 *et seq*. Specifically, the Third Circuit found, in error, that a state insurance regulatory statute did not reverse-preempt a federal statute having nothing to do with insurance regulation. This error implicates critical questions of federalism and statutory interpretation that requires Supreme Court intervention to settle the circuit split caused by the Third Circuit's interpretation. This erroneous interpretation directly conflicts with decisions of this Court and all of the other circuit courts that have addressed the proper test for reverse-preemption. The Third Circuit decision requires a state insurance commissioner to violate the insurance laws of his own state, an outcome that upends Congress' purpose in enacting the McCarran-Ferguson Act.

The Third Circuit's ruling below determined the preemption provision of the McCarran-Ferguson Act did not apply to 18 *Del. C.* § 6920, the Delaware insurance statute at issue. In doing so it used a test

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[1] "Reverse-preemption" refers to the concept that federal statutes not specifically identified in the McCarran-Ferguson Act or not yet enacted would not automatically override state insurance regulation, otherwise referred to as "first-clause" preemption (from the first clause of § 1012(b)). This is contrasted with the second clause of § 1012(b) which carves out a narrower exception from antitrust laws. *See generally U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491, 505 (1993).

which disrupts the balance Congress carefully set between state and federal control over the regulation of the business of insurance. The Third Circuit shifted the line significantly, removing large pieces of insurance regulation from the purview of states, where it has long been placed and confirmed by the McCarran-Ferguson Act.

Since the passage of the McCarran-Ferguson Act in 1945, states have had primary jurisdiction over the regulation of the business of insurance. While Congress reserved the ability to enact laws affecting insurance, state laws which were enacted to regulate the business of insurance were not preempted by federal laws of general jurisdiction, *i.e.* laws which did not specifically relate to insurance. Instead, such state laws act to "reverse-preempt" non-insurance-related federal laws. To implement this policy, Congress enacted the first clause of § 1012(b) of the McCarran-Ferguson Act.[2]

Other than the Third Circuit, each of the Circuit Courts of Appeals which has analyzed reverse-preemption under the first clause of the McCarran-Ferguson Act uses the three statutory factors set forth in the first clause of § 1012(b). The Third Circuit, on the other hand, grafted an additional, narrowing factor before considering the three factors of the first clause of § 1012(b). It

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[2] "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance… unless such Act specifically relates to the business of insurance."

imposed a requirement that the "conduct at issue" must constitute the business of insurance, finding this requirement in 15 U.S.C. § 1012(a).[3] App. 4, 19-21.

The Third Circuit came to this conclusion in a way that sets it apart from every other circuit court of appeals that has considered the question. It recognized the universality of the three-part test for reverse-preemption using the three statutory factors from the first clause of § 1012(b). It then dismissed the findings of this Court and other Circuits by asserting that none of those Courts considered and foreclosed the use of § 1012(a) to provide a fourth factor to the three-factor test those Courts employed. App. 26-27, 29-30.

The Third Circuit's decision implies that not only has this Court not enunciated a definitive test for reverse-preemption under § 1012, but that the ten other circuits that rely on *Fabe* or *Humana, Inc. v. Forsyth*, 525 U.S. 299 (1999) are applying an incomplete test. The question of whether there is a threshold requirement in determining reverse-preemption under the McCarran-Ferguson Act that the "conduct at issue" constitutes the "business of insurance" implicates critical questions of federalism and statutory interpretation. Using the Third Circuit's threshold removes the protection of the McCarran-Ferguson Act from significant areas of

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[3] "The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business."

insurance. This threshold utilizes a narrow filter of "the business of insurance" ***before*** a court reaches the three factor test. Among those three factors is whether the statute was enacted for the purpose of regulating the business of insurance. Given the fact that statutes enacted for the purpose of regulating the business of insurance "necessarily encompasses more than just the 'business of insurance,'" *Fabe*, 508 U.S. at 505, the upside-down approach of the Third Circuit short-circuits proper application of the McCarran-Ferguson Act.

The Third Circuit found this requirement in § 1012(a). However, the identical requirement, that the challenged conduct constitutes the business of insurance, forms part of the test for the narrower antitrust exception, contained in a later clause of § 1012(b). The effect of imposing this narrow, antitrust filter before using the three factor test thwarts Congress' determination that states have "broad regulatory authority over the business of insurance." It subjects state insurance laws to the significantly more limited test of the "narrow exception" for antitrust. The Third Circuit's test thus eliminates wide swaths of insurance regulation from the purview of reverse-preemption, a result that thwarts the letter and intent of Congress, and this Court. This contra-textual approach changes the balance between state regulation and federal general statutes in the Third Circuit, which will lead to myriad consequences disrupting the coordinated state system for regulating insurance.

Supreme Court intervention is therefore necessary to settle the circuit split and ensure uniformity among the federal appellate courts.

OPINIONS BELOW

On July 16, 2021, Magistrate Judge Christopher J. Burke of the District of Delaware issued a Report and Recommendation, which is unreported but available electronically at 2021 WL 3012728 and reproduced at App. 70-114. On September 29, 2021, Judge Maryellen Noreika of the District of Delaware issued a Memorandum Opinion and Order adopting Magistrate Burke's Report, which is unreported but available electronically at 2021 WL 4453606 and reproduced at App. 43-68; 69. On April 21, 2023, the Third Circuit issued its Precedential Opinion and Judgment affirming the District Court, which is reported at 66 F.4th 114 and reproduced at App. 1-40. On June 16, 2023, the Third Circuit issued an Order denying Petitioner's request for rehearing *en banc*, which is unreported but available electronically at 2023 WL 4945352 and reproduced at App. 115.

JURISDICTION

The Third Circuit Court of Appeals entered judgment on April 21, 2023 and a timely petition for rehearing *en banc* was denied on June 16, 2023. This Court therefore has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1012 of the McCarran-Ferguson Act, 15 U.S.C. § 1012, provides:

> **(a) State regulation**
>
> The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> **(b) Federal regulation**
>
> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Section 6920 of the Delaware Insurance Code, DEL. CODE ANN. tit. 18, § 6920 (2007), provides:

> All portions of license applications reasonably designated confidential by or on behalf of an applicant captive insurance company, all information and documents, and any copies of the foregoing, produced or obtained by or submitted or disclosed to the Commissioner pursuant to subchapter III of this chapter of this title that are reasonably designated confidential by or on behalf of a special purpose financial captive insurance company, and all examination reports, preliminary examination reports, working papers, recorded information, other documents, and any copies of any of the foregoing, produced or obtained by or submitted or disclosed to the Commissioner that are related to an examination pursuant to this chapter must, unless the prior written consent (which may be given on a case-by-case basis) of the captive insurance company to which it pertains has been obtained, be given confidential treatment, are not subject to subpoena, may not be made public by the Commissioner, and may not be provided or disclosed to any other person at any time except:
>
> (1) To the insurance department of any state or of any country or

> jurisdiction other than the United States of America; or
>
> (2) To a law-enforcement official or agency of this State, any other state or the United States of America so long as such official or agency agrees in writing to hold it confidential and in a manner consistent with this section.

STATEMENT OF THE CASE

Section 6920 of Delaware's Insurance Code is part of Delaware's statutory scheme regulating insurance companies and the practice of insurance in Delaware. It prohibits the Insurance Commissioner from disclosing information or documents provided to the Delaware Department of Insurance (the "DDOI") as part of the application and financial examination process. 18 *Del. C.* § 6920. This case arises from a petition by the IRS to enforce a summons to compel the Insurance Commissioner to do what Section 6920 forbids: to disclose documents from insurers relating to licensing and financial examinations of those insurers without complying with the safeguards of Delaware law.

On October 30, 2017, the IRS issued a third-party administrative summons to the DDOI pursuant to 26 U.S.C. § 7602 (the "Summons") for certain DDOI and captive insurance company records related to an IRS investigation of Artex Risk Solutions, Inc. and TSA Holdings, Inc., f/k/a Tribeca Strategic Advisors LLC (together "Artex"). The Summons includes four individual requests for records. The Petition sought to enforce Request #1 which requests

"all electronic mail between [the DDOI] and [Artex] related to the Captive Insurance Program." ("Request #1").

On November 28, 2017, the DDOI issued objections and responses to the Summons, including confidentiality objections pursuant to 18 *Del. C.* § 6920. Section 6920 prevents the Commissioner from releasing certain information unless the official or agency agrees in writing to hold it confidential and in a manner consistent with Section 6920(2) which the IRS has refused to do. The DDOI has provided over 20,000 pages of documents not protected by Section 6920, or where, as provided in Section 6920, a captive insurer consented to disclosure.

On June 19, 2020, the IRS filed a Petition (the "Petition") to enforce the Summons in the United States District Court for the District of Delaware. On July 16, 2021, Magistrate Judge Burke issued a Report and Recommendation (the "R&R") recommending granting the Petition. App. 114. By Order dated September 29, 2021, the District Court adopted the R&R over the DDOI's Objections and granted the Petition. App. 69.

On November 1, 2021, the DDOI initiated an appeal in the Third Circuit. On April 21, 2023, the Third Circuit issued an Opinion and Judgment affirming the District Court and holding that 15 U.S.C. § 1012(a) imposed an additional, threshold element on the test for reverse-preemption under the McCarran-Ferguson Act. App. 1-40; 41. The Third Circuit's opinion relied upon an earlier Third Circuit decision which first requires a showing that the "challenged conduct" constitutes the "business of

insurance," before going on to employ the three-part test adopted by every other Circuit Court to consider the issue. However, each of the ten other Circuit Courts of Appeals to have considered the appropriate test for reverse-preemption under the McCarran-Ferguson Act has employed the same three-factor test that tracks the statutory language of the first clause of § 1012(b).

Thereafter, on June 5, 2023, the DDOI filed a Petition for Rehearing En Banc, which was denied on June 16, 2023. App. 115.

REASONS FOR GRANTING THE PETITION

1. There Is a Circuit Split on the Issue of Whether § 1012(a) Imposes an Additional Requirement for First Clause Reverse-Preemption Under the McCarran-Ferguson Act

The Court's intervention is necessary to resolve the circuit split on the proper test used to determine whether a state law "reverse-preempts" federal law under the first clause of § 1012(b) of the McCarran-Ferguson Act. The Third Circuit's decision reiterates its twenty year-old precedent that a four factor test is used: first, a threshold determination is made under 15 U.S.C. § 1012(a) of whether the activity constitutes the business of insurance. Then, the traditional three factor test under § 1012(b).[4] App. 18-20. None of the ten other

[4] The three factor test comes directly from the test of the first clause of 15 U.S.C. § 1012(b). The requirements are: (1) The state statute was enacted "for the purpose of regulating the

Circuit Courts which have articulated a test for first clause preemption (all except the D.C. and Federal Circuits) utilize this threshold, or even discuss Section 1012(a). Instead, all of them use the three factor test of § 1012(b), citing either *United States Dep't of Treasury v. Fabe*, 508 U.S. 491, 501 (1993) or *Humana, Inc. v. Forsyth*, 525 U.S. 299, 307 (1999) as support. [5]

For example, the Fifth Circuit has characterized the "framework in which [McCarran-Ferguson Act] preemption questions are to be addressed" as:

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business of insurance," (2) the federal statute does not "specifically relate to the business of insurance," and (3) the federal statute would "invalidate, impair, or supersede" the state statute.

[5] *See, e.g. United States v. Rhode Island Insurers' Insolvency Fund*, 80 F.3d 616, 619 (1st Cir. 1996) (citing *Fabe*); *Wadsworth v. Allied Professionals Ins. Co.,* 748 F.3d 100, 109 n. 14 (2d Cir. 2014) (citing *Fabe*); *Am. Chiropractic Ass'n v. Trigon Healthcare, Inc.*, 367 F.3d 212, 231 (4th Cir. 2004) (citing *Humana*); *Dehoyos v. Allstate Corp*., 345 F.3d 290, 294–95 (5th Cir. 2003) (citing *Humana*)*; Genord v. Blue Cross & Blue Shield of Michigan,* 440 F.3d 802, 806 (6th Cir. 2006) (citing *Fabe*)*; Autry v. Nw. Premium Servs., Inc.,* 144 F.3d 1037, 1041-42 (7th Cir. 1998) (citing *Fabe*)*; LaBarre v. Credit Acceptance Corp.,* 175 F.3d 640, 643 (8th Cir. 1999) (citing *Humana*)*; Ojo v. Farmers Grp., Inc.,* 600 F.3d 1205, 1209 (9th Cir. 2010) (citing *Humana*)*; BancOklahoma Mortg. Corp. v. Capital Title Co., Inc.,* 194 F.3d 1089, 1098 (10th Cir. 1999) (citing *Fabe*)*; Moore v. Liberty Nat. Life Ins. Co., 2*67 F.3d 1209, 1220 (11th Cir. 2001) (citing *Humana*).

> In sum, in extremely clear and specific language the [*Humana*] Court identified the following three [McCarran-Ferguson Act] preemption threshold requirements: (1) the federal law in question must not be specifically directed at insurance regulation; (2) there must exist a particular state law (or declared regulatory policy) enacted for the purpose of regulating insurance; and (3) application of the federal law to the controversy in question must invalidate, impair or supercede that state law.

Dehoyos v. Allstate Corp., 345 F.3d 290, 294–95 (5th Cir. 2003).

As discussed in more detail in Section 2, below, the Third Circuit recognized that *Humana* and *Fabe,* and the other Circuits' decisions used the three statutory factors of § 1012(b) in analyzing McCarran-Ferguson Act reverse-preemption under the first clause of § 1012(b), but dismissed each of the decisions because none had considered whether there was an additional factor that must be considered. App. 26-30. The Third Circuit's analysis was not new, but instead followed the analysis of a 1998 Third Circuit opinion, *Sabo v. Metropolitan Life Ins. Co.,* 137 F.3d 185 (3d Cir. 1998)).[6] App. 18-21.

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[6] A later Third Circuit case followed *Sabo*, requiring an initial finding that the challenged conduct constituted the business of insurance, but did not mention § 1012(a); instead citing *Sabo* for

The *Sabo* Court found a threshold requirement that the challenged conduct must constitute the business of insurance in § 1012(a) of the McCarran-Ferguson Act. It was only upon satisfying such threshold that, pursuant to the *Sabo* Court, a court would then move on to the three-factor test of § 1012(b). *Sabo*, 137 F.3d at 189-91. The Third Circuit followed this analysis. App. 18-22. Importantly, even in 1998, the *Sabo* Court recognized that there was a circuit-split over the proper analysis:

> We note at the outset that federal courts have seemingly disagreed as to the proper analytic inquiry into McCarran–Ferguson Act preclusion. Some courts draw upon a four-part inquiry similar to that used by [the] district court and [another district court]. Other courts have announced a more truncated three-part test that does not require a specific conclusion that the defendant's conduct constitutes the business of insurance.

Sabo, 137 F.3d at 189 n. 2 (internal citations omitted).

Those Circuits that have previously used a four-factor test have abandoned it in favor of the three

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the requirement. *Highmark, Inc. v. UPMC Health Plan, Inc.*, 276 F.3d 160, 166 (3d Cir. 2001).

factor test.[7] Importantly, the cases *Sabo* relied upon for imposing an additional requirement that the challenged conduct constitutes the business of insurance, found such a requirement in § 1012(b) and not § 1012(a).[8]

Only the Third Circuit now uses or previously used Section 1012(a) in cases of reverse preemption under the first clause of the McCarran-Ferguson Act to impose a requirement that challenged conduct constitutes the business of insurance. Those cases that previously used such a requirement found it in Section 1012(b).[9]

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[7] *Sabo* cited cases from the Fifth, Sixth, Seventh and Ninth Circuit. 137 F.3d at 189 n. 2. Each of those Circuits has since moved to three three-part test. *See* n. 5.

[8] *Cochran v. Paco, Inc.*, 606 F.2d 460, 464 (5th Cir.1979); *Kenty v. Bank One, Columbus, N.A.*, 92 F.3d 384, 391–92 (6th Cir. 1996); *American Deposit Corp. v. Schacht*, 84 F.3d 834, 838–43 (7th Cir.1996); *Merchants Home Delivery Service, Inc. v. Frank B. Hall & Co.*, 50 F.3d 1486, 1489 (9th Cir.1995) (citing *Cochran*).

[9] As discussed in Section 2, below, two circuits use the question of whether challenged conduct constitutes the business of insurance as a part of the inquiry of whether a law was enacted for the purpose of regulating the business of insurance, sourcing it in Section 1012(b). *See, e.g. Genord v. Blue Cross & Blue Shield of Michigan*, 440 F.3d 802, 806 (6th Cir. 2006); *Bailey v. Rocky Mountain Holdings, LLC,* 889 F.3d 1259, 1273 (11th Cir. 2018).

2. Whether Reverse-Preemption Under the McCarran-Ferguson Act Requires a Determination that the Challenged Activity Constitutes the Business of Insurance Is an Important Matter that this Court Should Determine

This Court's intervention is necessary to resolve the important question of whether reverse-preemption under the first clause of Section 1012(b) of the McCarran-Ferguson Act requires a predicate determination that the challenged conduct constitutes the "business of insurance." The basis of the Third Circuit's decision was that this specific issue has not been directly decided by this Court.

The Third Circuit held that while both *Fabe* and *Humana* hold that the first clause of § 1012(b) has three requirements, neither *Fabe* nor *Humana* forecloses a "threshold" inquiry derived from § 1012(a). App. 26-30. The Third Circuit dismissed the decisions of the other Circuits as not having "engag[ed] in legal analysis grappling with (let alone dispensing with) something akin to *Sabo*'s threshold inquiry under § 1012(a)." App. 32-33.

The question of whether § 1012(a) imposes a requirement for reverse-preemption under the first clause of § 1012(b) (hereinafter "First Clause Preemption") has never been directly decided by this Court. As discussed in Section 3(a), this is likely because the text of § 1012(a) does not support a requirement. However, the broader question of whether conduct constituting the "business of insurance" is required or permitted to be considered in a First Clause Preemption analysis is an issue

that has not been directly decided by this Court, even apart from whether such a requirement is contained in § 1012(a). This is an important matter that this Court should determine.

This Court has decided a related question. In *Fabe*, this Court clarified that in cases under the antitrust exception contained in the ***second*** clause of § 1012(b),[10] a court must undertake an initial threshold determination that challenged conduct constitutes "the business of insurance." However, *Fabe* then proceeded to distinguish and explain that, rather than dealing with the second clause of § 1012(b), "[w]e deal here with the ***first*** clause, which is not so narrowly circumscribed." *Id*. at 504 (emphasis in original). The Court contrasted the formulations:

> The language of § 2(b) is unambiguous: The first clause commits laws "enacted . . . for the purpose of regulating the business of insurance" to the States, while the second clause exempts only "the business of insurance" itself from the antitrust laws. To equate laws "enacted . . . for the purpose of regulating the business of insurance" with the "business of insurance" itself, as petitioner urges us to do, would be to

[10] "Provided, that after June 30, 1948, [the Sherman Act, the Clayton Act and the Federal Trade Commission Act] shall be applicable to the business of insurance to the extent that such business is not regulated by State Law."

> read words out of the statute. This we refuse to do.

Id.

In explaining this distinction, the Court held that "[t]he broad category of laws enacted for the purpose of regulating the business of insurance consist of laws that possess the end, intention or aim of adjusting, managing or controlling the business of insurance." *Id.* at 505 (citation and quotation marks omitted). As such, the Court explained that "[t]his category necessarily encompasses more than just the 'business of insurance.'" *Id.*

While this Court has decided a closely related question, it has not spoken definitively on the question of whether conduct constituting the "business of insurance" is an additional, previously unarticulated factor in determining First Clause Preemption. Two other Circuit Courts of Appeals also utilize "business of insurance" questions in their First Clause Preemption analysis.

The Sixth Circuit, while using the *Fabe/Humana* three-part test, considers whether conduct is the business of insurance to "inform" the *Fabe* inquiry of whether a law was enacted for the purpose of regulating the business of insurance. *See, e.g. Genord v. Blue Cross & Blue Shield of Michigan,* 440 F.3d 802, 806 (6th Cir. 2006). The Eleventh Circuit, while citing the three-part test of Humana, treats "the business of insurance" the same in the first clause as the second. *See Bailey v. Rocky Mountain Holdings, LLC,* 889 F.3d 1259, 1273 & n. 30 (11th Cir. 2018) (stating "cannot imagine that

'business of insurance' could have two different meanings in the same statutory subsection").

The Third Circuit's decision, while superficially similar (especially to *Bailey*), engages in a fundamentally different analysis than those two cases when determining whether the conduct constitutes the business of insurance. In both *Genord* and *Bailey*, the determination of conduct is being made in the context of examining whether a law was enacted for the purpose of regulating the business of insurance. The Third Circuit, on the other hand, rejected that formulation. It held not only that determining (under § 1012(a)) whether conduct constitutes the "business of insurance," is a completely separate step, but it "reject[ed] the contention that defining the challenged conduct for purposes of the threshold entails examining the purpose of [the state statute] and how it fits into Delaware's overall regulatory scheme." App. 35.

3. The Third Circuit Erred in Requiring a Determination that the Challenged Activity Constitutes the Business of Insurance

The Third Circuit's determination that there is a threshold test to the well-established three part test for First Clause Preemption was erroneous for two reasons. First, the Third Circuit's decision conflicts with the plain text of § 1012(a) which neither mentions "conduct" nor suggests that any conduct must constitute the business of insurance. Second, the requirement that conduct constitutes the "business of insurance" is inconsistent with First Clause Preemption, which is broadly construed. It instead imports a concept used in the second clause

of § 1012(b), which deals solely with exceptions from the antitrust laws and is narrowly construed.

a. The Third Circuit's Decision Conflicts with the Plain Text of § 1012(a)

The Third Circuit, relying exclusively on a pre-*Humana* decision of the Third Circuit, determined that § 1012(a) requires courts to make a threshold determination as to whether the conduct at issue broadly constitutes the "business of insurance" when endeavoring to determine whether a state law is within the ambit of the Act's protection. App. 19-20 (citing *Sabo v. Metropolitan Life Ins. Co.*, 137 F.3d 185, 189 (3rd Cir. 1998)). However, this threshold determination, based on whether "conduct" "constitutes the business of insurance," is entirely absent from the text of § 1012(a), which provides:

> **(a) State regulation**. The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

Nothing in § 1012(a) suggests that "conduct" should be considered, much less that such conduct must "constitute the business of insurance." The Third Circuit and *Sabo*'s reading of the statute to employ this "conduct" threshold is completely untethered to § 1012(a)'s text. *Sabo* does correctly note that "[o]f these state 'laws relat[ing] to the regulation or taxation' of the insurance business, 15 U.S.C. § 1012(a), the next subsection [§ 1012(b)] protects from federal preemption a special class of state laws 'enacted . . . for the purpose of regulating

the business of insurance.'" 137 F.3d at 190. And the Court in *Sabo* further acknowledged that "[t]he focus of section 1012(b) is not directed toward the business of insurance itself, but rather toward ***a certain subset of laws*** relating to insurance regulation under section 1012(a)." *Id.* at 191 (emphasis added).

It is impossible to reconcile *Sabo*'s above analysis with *Sabo*'s (and the Third Circuit in this case) actual interpretation of § 1012(a), in which the Court ignores the plain text of the statute and grafts onto it a factor used only in antitrust cases by concluding, without explanation or support, "[whether a state law was meant to fall within the McCarran-Ferguson Act's ambit] is achieved by deciding whether the activity in question constitutes the business of insurance…." *Id.*

Just as laws enacted for the purpose of regulating the business of insurance necessarily encompass more than just the business of insurance, *Fabe*, 508 U.S. at 505, laws which "relate" to the "regulation" of the business of insurance (the class of laws afforded protection pursuant to § 1012(a)) encompass more than just laws enacted for the purpose of regulating the business of insurance. This Court, in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996), discussed the definition of the word "relates" in the context of another factor of the reverse-preemption test; whether a federal statute "specifically relates to the business of insurance." *Id.* at 38. Endorsing a broad reading of the statutory scheme, which undermines both *Sabo* and the Third Circuit's choice to employ a much narrower scope, the Court explained that "[t]he word

'relates' is highly general, and this Court has interpreted it broadly in other preemption contexts." *Id*. This Court's reading of the test in *Barnett* is an intuitive one. In order for the Act to carry out its broad mandate of "regulating the business of insurance," laws "relating" to "regulating the business [of insurance]" must necessarily go far beyond "the business of insurance."

b. The Requirement that Conduct Constitutes the "Business of Insurance," is Inconsistent with First Clause Preemption

A requirement that challenged conduct constitutes "the business of insurance" is absent from both § 1012(a) and the first clause of § 1012(b). Instead, it is part of the test under the second clause of § 1012(b), relating to the narrow antitrust exemption not applicable in this case.[11] As recognized by this Court in *Fabe*, the first clause "was intended to further Congress' primary objective of granting the States ***broad regulatory authority*** over the business of insurance" and the second clause "accomplishes Congress' secondary goal [of] carv[ing] out only a ***narrow exemption*** for 'the business of

[11] The full test is that an exemption from the antitrust laws under the second clause of the McCarran-Ferguson Act requires a finding that: "the challenged practices (1) must constitute the "business of insurance," (2) must be regulated by state law, and (3) must not amount to a "boycott, coercion, or intimidation." *See, e.g. Union Lab. Life Ins. Co. v. Pireno*, 458 U.S. 119, 124 (1982). This test is not applicable to first clause cases.

insurance' from the federal antitrust laws." *Fabe*, 508 U.S. at 505 (emphasis added).

This Court clarified that in cases under the antitrust exception contained in the second clause, a court must undertake an initial threshold determination that challenged conduct constitutes "the business of insurance." However, *Fabe* then proceeded to distinguish and explain that, rather than dealing with the second clause of § 1012(b), "[w]e deal here with the ***first*** clause, which is not so narrowly circumscribed." *Id.* at 504 (emphasis in original).

The Third Circuit's reading of the "conduct" requirement into the statute artificially narrows the scope of a broad Act, such that it applies only in circumstances implicating "conduct that constitutes the business of insurance." The Third Circuit's approach is improper because it frustrates the purpose of the Act by excluding from its protection potentially innumerable state laws where the specific conduct regulated by the law was not "the business of insurance," but the law was enacted for the purpose of regulating the business of insurance. In effect, the Third Circuit overturned the funnel by first imposing an artificially narrow test which by necessity excludes a portion of laws enacted for the purpose of regulating the business of insurance. *Fabe,* 508 U.S. at 505. In so doing, *Sabo* and the Third Circuit in this case wrote words out of the statute. This error violates a fundamental tenet of statutory construction: interpretations should not render portions of the statute superfluous, void or insignificant. *See B & G Constr. Co., Inc., v. Officer*

of Workers' Comp. Programs, 662 F.3d 233, 248-49 (3d Cir. 2011) (citing *Market Co. v. Hoffman*, 101 U.S. 112, 115-16 (1879)).

4. The Question Presented is of Exceptional Importance

The decision below threatens to upend the balance between state and federal regulation of insurance created by Congress more than seventy-five years ago. As this Court has explained when discussing this balance:

> We start with a reluctance to disturb the state regulatory schemes that are in actual effect, either by displacing them or by superimposing federal requirements on transactions that are tailored to meet state requirements. When the States speak in the field of 'insurance,' they speak with the authority of a long tradition. For the regulation of 'insurance,' though within the ambit of federal power has traditionally been under the control of the States.

Sec. & Exch. Comm'n v. Variable Annuity Life Ins. Co. of Am., 359 U.S. 65, 68–69 (1959) (internal citation omitted).

That balance is implemented by the first clause of § 1012(b), which "was intended to further Congress' primary objective of granting the States broad regulatory authority over the business of insurance." *Fabe*, 508 U.S. at 505. The second clause "accomplishes Congress' secondary goal [of] carv[ing]

out only a narrow exemption for 'the business of insurance' from the federal antitrust laws." *Id.*

In effect, the Third Circuit's importation of a requirement that "conduct must constitute the business of insurance" from the second clause of § 1012(b) acts to artificially narrow the "broad regulatory authority over the business of insurance" granted to states by Congress. The focus on "conduct" divorced from purpose is particularly problematic in the context of direct regulation of insurers.

Section 6920 of the Delaware Insurance Code (18 *Del. C.* § 6920) is at the heart of this dispute. This provision prohibits the Insurance Commissioner from releasing certain information provided by Delaware insurance companies in the licensing and financial examination process without a written agreement to hold that information confidential and "in a manner consistent with [the statute]." The IRS sought this information through the issuance of a summons, without agreeing to the statutorily required confidentiality provisions. A faithful application of both the plain text and legislative purpose of the McCarran-Ferguson Act dictates that Respondent's statutory authority to issue and enforce the summons is preempted by the requirements of the Delaware Insurance Code, including § 6920.

In examining the purpose of anti-disclosure statutes in insurance codes similar to 18 *Del. C.* § 6920, the statute at issue in this case, courts have specifically found that "[t]he statute is designed to assure [insurance companies] that they will not suffer harm from disclosure by entities over which

they have no control, so that they will be encouraged to cooperate with [the insurance department] during an examination." *Mahon v. Chicago Tit. Ins. Co.,* 2017 WL 3331738 at *7 (quoting *Heritage Healthcare Servs. Inc. v. Beacon Mut. Ins. Co.*, 2007 WL 1234481 (R.I. Super. Apr. 17, 2007)).[12]

The Third Circuit's holding that such purpose was not relevant to its determination jeopardizes large portions of the direct regulation of insurance companies by state regulators. Regulations essential to assure the solvency and integrity of insurers are at risk as a result of the Third Circuit's analysis. For instance, regulation of what types of assets an insurer can hold, under the Third Circuit's reasoning, would not be protected by the McCarran-Ferguson Act because holding assets is not "the business of insurance." Similarly, restrictions on who can own insurers would likewise not have protection, such restrictions again not being the "business of insurance."

The circuit split on this issue is not likely to be resolved without action from this Court. There is no reason to expect the Third Circuit is prepared to abandon the threshold requirement that "conduct must constitute the business of insurance" in order for McCarran-Ferguson reverse-preemption to take

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[12] Courts ascribe a similar purpose to anti-disclosure statutes relating to bank examinations. *See Ball v. Bd. of Governors of Fed. Reserve Sys.,* 87 F.Supp.3d 33, 57 (D.D.C. 2015) ("[I]f a financial institution cannot expect confidentiality, it may be less cooperative and forthright in its disclosures, even if an examination is mandatory.").

effect. The Third Circuit imposed the threshold requirement in *Sabo* over twenty years ago, it unambiguously reaffirmed the propriety of that interpretation below, and when presented with an opportunity for the full Court to revisit *Sabo* by *en banc* review, the Court declined to do so. App. 115.

This issue is of exceptional importance, and this Court should act to restore the balance mandated by Congress in the McCarran-Ferguson Act.

5. This Case Presents a Good Vehicle for the Question Presented

This case is a good vehicle for the Court to consider the question presented. There are no jurisdictional problems, no messy fact disputes, and the issue animating the circuit split is the sole basis for the decision below. Reversing the Third Circuit's decision would be outcome determinative because the decision of the District Court, upheld by the Third Circuit, put the Petitioner out of Court.

This case presents the purest application of the McCarran-Ferguson Act. This is a case where a state statute regulates insurance companies relating to information provided in licensing and examinations. There is a general, non-insurance federal statute, and the two conflict, with the federal statute requiring what the state statute prohibits. Further, this case presents an opportunity for the Court to address confusion that still persists in some circuit courts of appeals as to the question of whether conduct constitutes the business of insurance is a concept that is pertinent only to the second clause of

§ 1012(b) and has no application to the question of reverse-preemption under the first clause of § 1012(b).

CONCLUSION

Accordingly, the petition for a writ of certiorari should be granted.

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Respectfully Submitted,

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