No. 23-258

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

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

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Respondent concedes the circuit split in this matter. (Br. in Opp. 9, 14). Further, Respondent does not in any way contest that the Third Circuit's decision was decided contrary to the decision of this Court in *Humana, Inc. v. Forsyth,* 525 U.S. 299, 307 (1999). Indeed, Respondent makes no effort to defend the Third Circuit's decision that the regulated activity must "constitute the business of insurance" before a statute regulating that activity reverse-preempts a federal statute under the McCarran-Ferguson Act.

Instead, after abandoning the positions it urged below, and jettisoning the language of the Third Circuit's ruling, the IRS now argues that "it is unclear" that the Third Circuit's approach could ever be outcome determinative. To support this new approach the IRS wrongly equates the Third Circuit's extra requirement that regulated activity must itself "constitute the business of insurance" with the phrase "activity which is not wholly unrelated to the insurance business." Br. in Opp. 15-16. The Third Circuit never applied this equivalence. Rather, the Third Circuit specifically required activity constituting the business of insurance, and rejected any inquiry into the purpose of the statute and how it fits into the state's overall regulatory scheme.

Contrary to Respondent's arguments, this Court and other circuit courts have recognized that statutes enacted for the purpose of regulating the business of insurance are necessarily broader than, and contain issues not included in just the "business of insurance." As such, there will be cases where the

regulated activity does not "constitute the business of insurance," yet the statute that regulates the activity was enacted "for the purpose of regulating the business of insurance." Indeed, this approach demonstrates the very harm the IRS evades—under the erroneous Third Circuit approach wide categories of insurance regulatory laws would not receive proper McCarran-Ferguson consideration or protection.

The Amicus Brief of the National Association of Insurance Commissioners (the "NAIC") explains the genesis, purpose, and importance of statutes like the Delaware statute, and why they are crucial to ensuring that regulatory agencies can effectively regulate the nation's insurance markets. They also ensure that domestic and international regulators can work together to maintain a comprehensive view of the marketplace and of individual insurers.

A. Respondent's Brief Does Not Dispute the Bases for Certiorari

1. Supreme Court Rule 10(a)

Respondent concedes (Br. in Opp. 9, 14) the circuit split in this matter, but contends (Br. in Opp. 16) certiorari is not appropriate because the split is so "lopsided" and (as addressed in Section C, below) the difference is "not outcome determinative."

While the split is, indeed, "lopsided," the circuit split requires action by this Court. This is not a case of the Third Circuit making an erroneous determination based on ignorance of other circuits' rulings. Instead, the Third Circuit reaffirmed its longstanding position in full knowledge of the other circuits' decisions. It determined that its unique

formulation of the test was correct, and the formulations of this Court and each of the other circuit courts neither considered nor addressed the question of whether § 1012(a) was a part of the test. Pet. App. 32-33. Respondent's Brief does not defend the Third Circuit's novel proposition that every other court's enunciation of the proper test is incomplete. Such a conflict cannot be so blithely dismissed.

2. Supreme Court Rule 10(c)

Respondent also does not contest that the Third Circuit's decision was decided in a way that conflicts with the decision of this Court in *Humana*. Indeed, Respondent ignores *Humana* completely, never citing it in its argument. Instead, Respondent asserts (Br. in Opp. 9) "[i]n a ***pair***[1] of cases, this Court has addressed when the McCarran-Ferguson Act has allowed a state statute to reverse preempt federal law under the first clause of Section 1012(b)." (Emphasis added). In fact, there are a ***trio*** of cases from this Court addressing when the McCarran-Ferguson Act allows a state statute to reverse preempt federal law under the first clause of Section 1012(b). Respondent omits *Humana,* the most recent decision of this Court on the issue, where the unanimous Court specifically enunciated the three-factor test utilized by each of the Circuits other than the Third Circuit to have decided the issue. 525 U.S. at 307.

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[1] *Securities & Exchange Commission v. National Securities, Inc.*, 393 U.S. 453 (1969) and *United Sates Department of Treasury v. Fabe*, 508 U.S. 491 (1993).

As with the circuit split, Respondent does not address, let alone defend, the Third Circuit's determination that *Humana*'s use of a three-factor test is not binding because *Humana* never considered or addressed the question of whether § 1012(a) was a part of the test, and thus dismissed the conflict with *Humana*. Pet. App. 32-33. Nor does Respondent contest that the Third Circuit's decision was decided in a way that conflicts with the decision of this Court in *Humana*.

B. There Are Important Reasons for the Court to Grant the Petition Which Respondent's Brief Misconstrues or Fails to Consider

1. The Order Directs a State Official to Violate a State Law

The Third Circuit's determination forces the Delaware Insurance Commissioner to violate Delaware's Insurance Code by providing documents he is statutorily prohibited from providing by 18 *Del. C.* § 6920. This Court has held, in the context of stay motions, that this constitutes irreparable injury, as "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers), quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers); *see also Planned Parenthood of Greater Texas Surgical Health Servs. v. Abbott*, 571 U.S. 1061 (2013) (Scalia, J., concurring).

2. The Third Circuit's Approach Threatens Real Harm

Respondent is dismissive (Br. in Opp. 17-18) of Petitioner's concerns (Pet. 25) that the Third Circuit's approach will jeopardize large portions of the direct regulation of insurance companies by state regulators, characterizing such concerns as "greatly exaggerated." However, as confirmed by the Amicus, the Third Circuit's decision, if followed, threatens the system put in place among each of the States' insurance departments relating to confidentiality, which is central to, and used for communications and determinations about the solvency of insurers. NAIC Amicus Br. 6-12. Shortly after the McCarran-Ferguson Act's enactment, this Court indicated a "reluctance to disturb" these types of state insurance regulatory schemes that are actually in effect. *Sec. & Exch. Comm'n v. Variable Annuity Life Ins. Co. of Am.*, 359 U.S. 65, 68–69 (1959).

The Amicus also explains that the confidentiality provisions are important in international relations between insurance regulatory agencies. NAIC Amicus Br. 13-14.

Respondent fails to address the dangerous consequences of the Third Circuit's determinations. Those determinations are that (1) if the conduct does not "***constitute*** the business of insurance," then the McCarran-Ferguson Act "simply does not apply" (Pet. App. 21); and (2) the Court cannot consider the purpose of the law at issue and how it fits into a state's overall regulatory scheme. Pet. App. 34-35. These determinations necessarily exclude significant

instances of insurance regulation from McCarran-Ferguson Act protection.

For instance, in order to ensure the solvency and reliability of insurers, states commonly regulate the types of investments an insurance company can hold. *See, e.g.* 18 *Del. C.* § 1302. Under the erroneous Third Circuit approach, investments would not "constitute the business of insurance." Because the Third Circuit does not allow consideration of the purpose of such regulation, or how it fits into the state's regulatory scheme, such regulation would not be protected by the McCarran-Ferguson Act.

C. The Third Circuit's Analysis is Outcome Determinative

1. Applying the Three-Factor Test of *Humana* and Other Circuits, the Delaware Statute Would Reverse-Preempt the IRS Statutes

Respondent's primary argument (Br. in Opp. 9, 12-14, 15-16) is that the analysis used by the Third Circuit would not result in a different decision than the test used by other circuits and this court. This is incorrect.

Applying the three-factor test used by the other circuits that have considered the matter and *Humana,*[2] the federal statutes governing the

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[2] As noted above, Respondent's Brief in Opposition does not even mention *Humana.* It also never attempts to analyze the reverse-preemption of the Delaware statute using the three-factor test.

issuance of IRS summons would be preempted. The IRS statutes do not "specifically relate to the business of insurance." Similarly, the IRS statutes "impair" the Delaware statute, as the summons insists upon providing the information without the express protections required by the Delaware statute. (Br. in Opp. 5). Finally, the Delaware statute was enacted for the purpose of regulating the business of insurance.

"The broad category of laws enacted 'for the purpose of regulating the business of insurance' consists of laws that possess the '***end, intention, or aim***' of adjusting, managing, or controlling the business of insurance." *Fabe*, 508 U.S. at 505 (emphasis added). What is at issue is the ***purpose*** of the statute.

The Petitioner cited (Pet. 24-25 & n. 12) authority explaining that this type of statute and similar statutes in banking were designed to encourage cooperation with the insurance department in their disclosures. Respondent cites no contrary authority. Instead both it and the Third Circuit (Br. in Opp. 13-14; Pet. App. 37-39) expressed unsupported doubts as to ***effectiveness*** of the statute in achieving its goal. This is not the test.

The intent of the statute is confirmed by the amicus brief of the National Association of Insurance Commissioners (NAIC Amicus Br. 5):

> If insurers believe the information provided to regulators for legitimate and recognized regulatory purposes could be subpoenaed or subject to civil

> discovery[3] in outside litigation, they will be substantially less forthcoming with the information that they share. Not only that, but the sharing of confidential information between regulators will also be chilled.

See also NAIC Amicus Br. 8-9 ("Without statutory assurances that regulators can and will maintain confidentiality of information—and that state confidentiality laws mean what they say—insurers are likely to be less forthcoming with regulators who need certain information to carry out their public responsibilities.").

Using the three-factor analysis set forth in *Humana*, the Delaware statute was enacted for the purpose of regulating the insurance business—i.e. with the end, intention, or aim of adjusting, managing, or controlling the business of insurance, and thus would have reverse-preempted the IRS statutes.

2. Respondent's Analysis Misconstrues this Court's McCarran-Ferguson Jurisprudence

Respondent argues (Br. in Opp. 10-11) that the Court in *National Securities* stated the "core" of the "business of insurance" is the "relationship between

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[3] The anticipated concern of insurance companies is with disclosure in civil litigation, and not concerns that the IRS would subpoena documents. NAIC Amicus Br. 7. *Compare* Br. in Opp. 14; Pet. App. 37-38 (both dismissing concerns of insurance companies given ability of IRS to secure such information directly from insurers by summons).

the insurance company and the policyholder." Respondent ignores *National Securities*' determination that the "licensing of companies" is part of the business of insurance. It pays only lip service to the finding that "other activities of insurance companies [that] relate so closely to their status as reliable insurers that they too must be placed in the same class." Br. in Opp. 11 (citing *National Security*, 393 U.S. at 460). That "same class" is the "core of the business of insurance." *National Securities*, 393 at 460. Statutes aimed at protecting or regulating the relationship between insured and insurer, "***directly or indirectly*** are laws regulating the 'business of insurance.'" *Ibid.* (emphasis added).

Respondent argues (Br. in Opp. 13) that *Fabe* supports a claim that the connection between the Delaware statute and the business of insurance is too attenuated, as it protects "the privacy interests of captive insurance companies" rather than the relationship between the insurer and insured. This argument fails. *Fabe*'s analysis was that while every business decision of an insurer could be considered to have ***some*** impact on its status as a solvent and reliable insurer, that did not mean attenuated decisions (or the priority of third party creditors in an insolvency proceeding) would fall within the business of insurance. 508 U.S. at 508-09 (citing *Group Life & Health Ins. Co. v. Royal Drug Co.,* 440 U.S. 205, 216-217 (1979)).

The Delaware statute is designed to protect policyholders by making it more likely that accurate financial and other information is provided to the

Delaware Department of Insurance ("Department") so that the Department can evaluate the licensing and reliability of insurers—both matters which *National Security* puts squarely within the business of insurance. *See* NAIC Amicus Br. at 5, 6-7, 8-9; *National Security,* 393 U.S. at 460.

3. The Third Circuit's Approach Necessarily Excludes Matters Covered by Section 1012(b)

Respondent argues (Br. in Opp. 15) that it is "unclear that the Third Circuit's approach could ever be outcome determinative." In doing so, Respondent asserts that the Third Circuit's analysis will not result in outcomes at odds with the Act's purpose, as it is "intended only to weed out cases in which the 'contested activities are wholly unrelated to the insurance business.'"[4] Br. in Opp. 15 (quoting Pet. App. 21 (quoting *Sabo v. Metropolitan Life Ins. Co.,* 137 F.3d 185, 190 (3d Cir. 1998)). However, Respondent incorrectly frames the Third Circuit's determination. The Third Circuit ***did not*** hold the threshold test was to determine if the challenged conduct was "wholly unrelated" to the business of insurance. Instead, it held (Pet. App. 34) that to apply the threshold, the court would "identif[y] the conduct being challenged by the party asserting

[4] As discussed in Section B(2), the "contested activity" in this case is far from "wholly unrelated" to the insurance business, and had the Third Circuit actually applied that test when employing the threshold standard the result in this case would be different.

federal supremacy and then ask[] if that conduct **constitutes** the 'business of insurance.'" (Emphasis added).

The Third Circuit repeated its two prior enunciations of the threshold: (1) "if the defendant's conduct does not constitute 'the business of insurance,' then the Act simply does not apply" (Pet. App. 21) (quoting *Sabo*, 137 F.3d at 190) (brackets and quotations omitted); and (2) "[i]f the activity does not constitute the 'business of insurance,' then the [McCarran-Ferguson Act] does not apply." Pet. App. 22 (quoting *Highmark, Inc. v. UPMC Health Plan, Inc.*, 276 F.3d 160, 166 (3d Cir. 2001)). Indeed, the Third Circuit held that a court ***cannot*** consider the purpose of the law at issue and how it fits into a state's overall regulatory scheme. (Pet. App. 34-35).

This distinction contradicts Respondent's suggestion that the threshold employed by the Third Circuit would never be outcome determinative. As did the Third Circuit, Respondent never addresses *Fabe*'s unequivocal holding that the category of laws "enacted for the purpose of regulating the business of insurance. . . . necessarily encompasses more than just the 'business of insurance.'" 508 U.S. at 505.

Because "laws enacted for the purpose of regulating the business of insurance" necessarily encompass more than just "the business of insurance," what the Third Circuit did is outcome determinative.

The Seventh Circuit explained:

> The problem with this approach is that it casts too small a net to capture all of the statutes that were "enacted ... for the purpose of regulating the business of insurance." There will be cases where the regulated activity does not constitute the "business of insurance" as that term is defined in *Pireno,* yet the statute that regulates the activity may have been enacted "for the purpose of regulating the business of insurance." As the *Fabe* Court stated, the "broad category of laws enacted 'for the purpose of regulating the business of insurance' ... necessarily encompasses more than just the 'business of insurance.'"

Autry v. Nw. Premium Servs., Inc., 144 F.3d 1037, 1041-42 (7th Cir. 1998) (quoting *Fabe*, 508 U.S. at 505).

Similarly, the Third Circuit, in a prior case, reviewed the difference between first and second clause claims under 15 U.S.C. § 1012(b), and reiterated *Fabe*'s caution that though both clauses incorporate the phrase "business of insurance," "the broad category of laws enacted 'for the purpose of regulating the business of insurance' ... necessarily encompasses more than just the business of insurance." *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 360 (3d Cir. 2010) (citations and quotes omitted). The Court illustrated that this distinction results in different treatment under the first and second clause in a claim relating to advertising:

> In light of *Fabe*, we interpret this to mean that although any state law that regulates "the selling and advertising of insurance" will qualify as a "law enacted by [a] State for the purpose of regulating the business of insurance" under clause one of the McCarran–Ferguson Act, "the selling and advertising of insurance" is not the "business of insurance" under clause two unless it has some effect on "reliability" or underwriting issues.

Id. at 360–61.

As these Courts and *Fabe* make clear, excluding from McCarran-Ferguson protection cases where the conduct itself does not constitute the "business of insurance," is underinclusive. It necessarily eliminates a number of statutes protected by the McCarran-Ferguson Act, *i.e.* those enacted for the purpose of regulating the business of insurance. This Court's review of the Third Circuit's decision is necessary.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully Submitted,

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