No. _____

In the Supreme Court of the United States

DELAWARE DEPARTMENT OF INSURANCE,
Applicant,
v.
UNITED STATES OF AMERICA,
Respondent.

TO THE HONORABLE SAMUEL A. ALITO, JR., ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE THIRD CIRCUIT ON APPLICATION TO STAY PROCEEDINGS AND RECALL THE MANDATE OF THE THIRD CIRCUIT COURT OF APPEALS

EMERGENCY APPLICATION TO STAY PROCEEDINGS AND RECALL THE THIRD CIRCUIT'S MANDATE PENDING THE FILING OF A PETITION FOR A WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING, CORPORATE DISCLOSURE STATEMENT, AND RELATED PROCEEDINGS

Applicant is the Delaware Department of Insurance (the "Department"). The Respondent is the United States of America, acting on behalf of and through its agency the Internal Revenue Service (the "IRS").

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

The related proceedings are:

1. *United States v. Delaware Dep't of Ins.*, No. 1:20-cv-00829-MN-CJB, 2021 WL 4453606 (D. Del. Sept. 29, 2021).
2. *United States v. Delaware Dep't of Ins.*, 66 F.4th 114 (3d Cir. 2023).

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TO THE HONORABLE SAMUEL A. ALITO, JR., ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE THIRD CIRCUIT:

Pursuant to 28 U.S.C. § 2101(f), Applicant Delaware Department of Insurance (the "Department") respectfully brings this emergency application to stay the proceedings and recall the mandate of the Third Circuit Court of Appeals pending the timely filing, consideration, and disposition of Applicant's petition for a Writ of Certiorari. At issue is the order of the Third Circuit Court of Appeals affirming the decision of the United States District Court for the District of Delaware enforcing an IRS summons that requires the Department to violate Delaware insurance law.

This case results from the misapplication by the District Court and Third Circuit Court of Appeals of "reverse-preemption"[1] under the McCarran-Ferguson Act. 15 U.S.C. § 1011 *et seq.* Specifically, these courts 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 that require Supreme Court intervention to settle the circuit split caused by the Third Circuit Court of Appeals' interpretation of the McCarran-Ferguson Act, which

[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). The text of Section 1012 of the McCarran Ferguson Act is attached hereto as Appendix A.

conflicts with decisions of this Court and all of the other circuit courts that have weighed in on the proper test for reverse-preemption under the McCarran-Ferguson Act.

Absent emergency relief, the Third Circuit's precedential opinion and simultaneous issuance of the mandate will cause per se irreparable harm to Applicant. It requires a state insurance commissioner to violate the express command contained in the insurance laws of his own state, an outcome that upends Congress' stated purpose in enacting the McCarran-Ferguson Act. An emergency stay is necessary because the Third Circuit issued its mandate simultaneously with denying the Applicant's petition for a stay of the mandate. This places the Department in imminent danger of enforcement of the summons that compels the Delaware Insurance Commissioner (the "Insurance Commissioner") to violate Delaware law. A stay and recall of the mandate maintains the status quo and relieves Applicant from the harm of violating the laws of its own state until this Court can consider Applicant's impending petition for Writ of Certiorari.

The McCarran-Ferguson Act provides, in pertinent part, that 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…" 15 U.S.C. § 1012(b). The Act's concept of reverse-preemption flows from § 1012(b), and mandates that federal

statutes not specifically identified in the McCarran-Ferguson Act would not automatically override state insurance regulation. All ten circuit courts (along with this Court) that have articulated a test for determining whether a law is reverse-preempted under the first clause of the McCarran-Ferguson Act employ the same three-factor test.[2] However, the Third Circuit erroneously found an additional element for establishing reverse-preemption by relying on Section 1012(a) of the Act, which conflicts with precedent of this Court, the other circuit courts, and the plain text § 1012(a).

Section 6920[3] of the Delaware Insurance Code (18 *Del. C.* § 6920) is at the heart of this dispute. This provision prevents 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

[2] This test comes from 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 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." As set forth in greater detail *infra*, the Third Circuit is now an outlier among all other federal appellate courts which have determined the issue. Those Courts apply the three-part test articulated in *United States Dep't of Treasury v. Fabe,* 508 U.S. 491, 504 (1993) and *Humana Inc. v. Forsyth,* 525 U.S. 299, 308 (1999)

[3] The text of Section 6920 is attached hereto as Appendix B.

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.

The Third Circuit's anomalous ruling places much of state insurance regulatory law at risk of being removed from the authority of the states in the Third Circuit. Additionally, the ruling effectively compels the Insurance Commissioner to violate his own state's laws. Therefore, and as set forth in greater detail herein, the requisites for a stay have been satisfied: (1) there is a reasonable probability that certiorari will be granted; (2) there is a significant possibility that the judgment will be reversed; and (3) Applicant would be irreparably harmed absent a stay. This Court should grant Applicant's request for emergency relief and enter a stay and recall of the Third Circuit's mandate pending Applicant's filing of a petition for a Writ of Certiorari.

DECISIONS BELOW

Magistrate Judge Christopher J. Burke of the District of Delaware issued an unreported Report and Recommendation on July 16, 2021. (Appendix E).

On September 29, 2021, Judge Maryellen Noreika of the District of Delaware issued a Memorandum Opinion and Order, adopting Magistrate Burke's Report which, *inter alia*, granted Respondent's Petition to Enforce Summons. (Appendix D).

The Third Circuit's Precedential Opinion and Judgment affirming the District Court was then issued April 21, 2023. (Appendix C).

JURISDICTION

The Supreme Court has jurisdiction over this Application for a Stay and Recall of Mandate pending the filing of a petition for a Writ of Certiorari. Following the Third Circuit's issuance of its Opinion and Order, the Department petitioned the Third Circuit for Rehearing and Rehearing En Banc, which the Third Circuit denied on June 16, 2023. Applicant then filed a request with the Third Circuit on June 22, 2023 to stay the issuance of its Mandate pending the filing of a petition for a Writ of Certiorari. The Third Circuit denied Applicant's Motion on July 18, 2023 and simultaneously issued the mandate the same day.

Applicant now seeks relief from this Court to stay enforcement of the summons and recall the Third Circuit's mandate pending Applicants' filing of a petition for a Writ of Certiorari and this Court's disposition of that petition. *See* 28 U.S.C. § 2101(f). Finally, given the Third Circuit's denial of a stay pending certiorari, the relief sought here is not available in any other court. Sup. Ct. R. 23(3).

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 Department 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: disclose documents from insurers relating to licensing and financial examinations of those insurers without complying with the safeguards of Delaware law.[4]

The full factual background is set forth in the opinion of the Third Circuit opinion. (Appendix C at pp. 12-14). Only the facts relevant to this application are set forth herein.

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. By Order dated September 29, 2021, the District Court adopted the R&R over the Department's Objections and granted the Petition ("9/29/21 Order"; Appendix D). On the same day, the District Court also entered an "Errata Order" making certain non-substantive changes to the R&R and a Memorandum Opinion setting forth the basis for the 9/29/21 Order.

[4] Section 6920 allows production to law enforcement entities or the agencies of the United States where that entity signs a written agreement to hold the documents confidential and in a manner consistent with section 6920. 18 *Del. C.* § 6920. The IRS has refused to execute such an agreement.

On November 1, 2021, the Department 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 part to the test for reverse-preemption under the McCarran-Ferguson Act. (Appendix C). 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 established by the Supreme Court and adopted by every other Circuit Court to consider the issue. However, the Supreme Court and each of the ten other Circuit Courts of Appeals to have considered the appropriate test for reverse-preemption under the McCarran-Ferguson Act have employed the same three-factor test that tracks the statutory language of the first clause of Section 1012(b).

Thereafter, on June 5, 2023, the Department filed a Petition for Rehearing En Banc, which was denied on June 16, 2023. On June 22, 2023, the Department filed a Motion with the Third Circuit to stay the issuance of its Mandate pending the filing of a petition for a Writ of Certiorari. The Third Circuit denied Applicant's Motion on July 18, 2023 and issued its mandate the same day. Applicant therefore seeks emergency relief staying the proceedings and recalling the mandate of the Third Circuit.

ARGUMENT

Under 28 U.S.C. § 2101, a justice of the Supreme Court may stay the enforcement of "the final judgment or decree of any court" that is "subject to review by the Supreme Court on writ of certiorari." 28 U.S.C. § 2101(f). A stay is appropriate under Section 2101 where there is:

(1) a reasonable probability that certiorari will be granted;

(2) a significant possibility that the judgment below will be reversed;[5] and

(3) a likelihood of irreparable harm if the judgment is not stayed.

Barnes v. E-Sys., Inc. Grp. Hosp. Med. & Surgical Ins. Plan, 501 U.S. 1301, 1302 (1991) (Scalia, J., in chambers); *see also Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers). Each factor is satisfied in this case, a § 2101(f) stay of the proceedings is appropriate, and the stay should be granted.

A. There is a Reasonable Probability that the Supreme Court Will Grant Certiorari

There is a reasonable probability that certiorari will be granted in this case. The issues in the lower court, which will be raised by Applicant in its impending petition for Writ of Certiorari, satisfy two of the criteria for granting review contained in Rule 10 of the United States Supreme Court Rules:

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[5] This is often stated as "a fair prospect that a majority of the Court will vote to reverse the judgment below." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (*per curiam*); *Maryland v. King*, 567 U.S. 1301, 1302, (2012) (Roberts, CJ, in chambers) (quoting *Conkright v. Frommert,* 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers)).

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter…..
>
> * * *
>
> (c) . . . a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

U.S. Sup. Ct. R. 10(a) and (c).

1. The Third Circuit's Decision Is at Odds with Ten Other Circuit Courts of Appeals

In the first instance, the Third Circuit's decision satisfies U.S. Sup. Ct. R. 10(a), as it is in conflict with all the other federal appellate courts that have articulated a test for reverse-preemption under the first clause of 15 U.S.C. § 1012(b) of the McCarran-Ferguson Act. As discussed below, the Supreme Court issued seminal decisions in 1993 and 1999 on reverse-preemption under the first clause of § 1012(b) of the McCarran-Ferguson-Act in which the Court used a three-part test, mirroring the statutory language of the first clause of § 1012(b).[6] *United States Dep't of Treasury v. Fabe*, 508 U.S. 491, 501 (1993) and *Humana, Inc. v. Forsyth*, 525 US 299, 307 (1999).

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[6] "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 . . .." 15 U.S.C. § 1012(b).

The Fifth Circuit has characterized the Supreme Court's articulation of the "framework in which [McCarran-Ferguson Act] preemption questions are to be addressed" as:

> 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).

Since *Fabe*/*Humana*, ten other circuit courts have addressed the criteria for reverse-preemption under the first clause of the McCarran-Ferguson Act. Each of those circuits uses the three-part test, citing either *Fabe* or *Humana* as support for that test.[7] Two circuits, the Federal and D.C. Circuits, do not appear to have decided

[7] *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,* 345 F.3d at 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.,* 267 F.3d 1209, 1220 (11th Cir. 2001) (citing *Humana*).

the issue.[8]

Prior to *Fabe,* several circuit courts had held that the additional prong required by the Third Circuit (whether the challenged conduct constitutes the "business of insurance") was an additional factor to the standard three-part test, but have sourced it in § 1012(b) (not in § 1012(a), as done by the Third Circuit). Since *Fabe,* three circuits have expressly ruled that *Fabe* abrogated that additional prong. *Autry v. Nw. Premium Servs., Inc.,* 144 F.3d 1037, 1041-42 (7th Cir. 1998) ("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'") (citing *Fabe*, 508 U.S. at 505); *Doe v. Norwest Bank Minnesota, N.A.*, 107 F.3d 1297, 1305 n.8 (8th Cir. 1997) ("despite the apparent agreement of the parties to the contrary, the application of the McCarran–Ferguson Act in this case does not require a specific conclusion that the allegedly improper activities of Voyager constituted the 'business of insurance'") (citing *Fabe*); *Ambrose v. Blue Cross & Blue Shield of Virginia, Inc.*, 891 F. Supp.1153, 1158 n. 4 & 5 (E.D.Va.1995), *aff'd*, 95 F.3d 41 (4th Cir.1996) (unpublished *per curiam*) (determining *Fabe* required use of three-part test rather than prior cases' four-part test).

[8] District court decisions in the D.C. District Court have adopted the *Humana* three-part test. *See, e.g., Nat'l Fair Hous. All. v. Travelers Indem. Co.*, 261 F. Supp. 3d 20, 34 (D.D.C. 2017) (*citing Humana*); *Wai v. Allstate Ins. Co.*, 75 F. Supp. 2d 1, 5 (D.D.C. 1999) (citing *Humana*).

The *Humana* decision ended the use by any other circuit court. Instead, they simply recite the three part test as the applicable test, citing either *Fabe* or *Humana*.[9]

2. The Third Circuit's Decision Is in Conflict with Prior Decisions of this Court

In the second instance, as discussed more fully in Section "B", *infra*, the Third Circuit's determination is in conflict with *Fabe* and *Humana'*s determination that a three part test applies to McCarran-Ferguson reverse-preemption. It also contravenes *Fabe*'s holding that "[t]he broad 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 506.

The Third Circuit's effort to brush aside both its sister circuits' decisions as well as *Fabe* and *Humana* is neither persuasive nor does it militate against the grant of certiorari by the Supreme Court. The Third Circuit asserts that none of the circuit decisions and neither *Fabe* nor *Humana* considered and foreclosed the use of § 1012(a) to provide a fourth factor to the three-factor test those Courts employed.[10] (Appendix C at pp. 26-27). This argument only enhances the likelihood and validates the propriety of this Court granting certiorari. According to the Third

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[9] *See generally,* cases cited at n. 7, above.

[10] As discussed above, and in Section "B," below, this is unconvincing because prior circuits have rejected the identical factor when it was sourced to § 1012(b), the text of § 1012(a) does not support the Third Circuit's interpretation, and the numerous cases deciding reverse-preemption purport to be providing a comprehensive test, with no suggestion there are additional factors.

Circuit, it is the only circuit court since 1999 which gives the ***full*** test for McCarran-Ferguson Act reverse-preemption, and the decision of the other circuit courts that use a three-factor test are incomplete. It also argues that *Humana*'s recitation of the test for reverse-preemption under the McCarran-Ferguson Act is incomplete. Even if this were correct (and as discussed in Section "B," *infra*, it is not) certiorari would be appropriate because, under the Third Circuit's formulation, the requirement of a fourth part for reverse-preemption is an important question of federal law that has not been, but should be, settled by the Supreme Court (*See* U.S. Sup. Ct. R. 10(c)).

The Third Circuit's tenuous justification in the face of uniformly contrary sister-circuit law suggests further guidance from the Supreme Court is necessary and warranted, and there is therefore a "reasonable probability" that certiorari will be granted.

B. There Is a Significant Possibility that the Lower Court's Judgment Will Be Reversed

The Third Circuit determined that 15 U.S.C. § 1012(a) requires, in addition to the three factors identified by *Fabe, Humana* and each of the other Circuits that have addressed the issue, a "threshold" or additional factor: "whether the challenged conduct constitutes the 'business of insurance.'" (Appendix C at p. 19). This decision was incorrect, and there is a reasonable probability, or "fair prospect," that five justices of the Supreme Court would reverse the Third Circuit's determination because it conflicts with *Fabe* and *Humana*, which set out a three-part test, and

because it is completely unsupported by the plain text of § 1012(a), which nowhere mentions "conduct" or suggests conduct must constitute the "business of insurance."

1. The Third Circuit's Decision Conflicts with *Fabe* and *Humana*

Humana, as did many Courts discussing the McCarran-Ferguson Act, set out a history of the Act. 525 U.S. at 306. The *Humana* Court specifically referred to § 1012(b) as the operative provision of the McCarran-Ferguson Act for reverse-preemption:

> In § 2(b) of the [McCarran-Ferguson] Act—the centerpiece of this case—Congress ensured that federal statutes not identified in the Act or not yet enacted would not automatically override state insurance regulation. Section 2(b) provides that when Congress enacts a law specifically relating to the business of insurance, that law controls. See § 1012(b). The subsection further provides that federal legislation general in character shall not be "construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance." *Ibid.*

Id. at 306-07.

The Court then announced the ***test for the McCarran-Ferguson Act***: "The McCarran–Ferguson Act ***thus*** precludes application of a federal statute in [the] face of state law 'enacted ... for the purpose of regulating the business of insurance,' if the federal measure does not 'specifically relat[e] to the business of insurance,' and would 'invalidate, impair, or supersede' the State's law." *Id.* at 307 (citing *Fabe*,

508 U.S. at 501) (emphasis added) (ellipses in original).[11]

This additional "threshold" element grafts the narrow definition of "the business of insurance" which is part of the test for the ***second clause*** (relating to a narrow antitrust exemption not applicable in this case) onto the test designed for the first clause (relating to general regulation). As recognized by the Supreme 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 insurance' from the federal antitrust laws." *Fabe*, 508 U.S. at 505 (emphasis added).

The Supreme 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 Court

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[11] The Third Circuit's attempt to suggest that *Humana, Fabe* and each of the circuits' recitations of a three-part rule were intentionally incomplete, and that Courts often do not discuss every factor of a multi-part test (Appendix C at pp. 27-29, 31-32), is unconvincing on its face. It presupposes that each Court, when purporting to state a test for reverse-preemption, cited the same factors, and intentionally failed to cite an additional factor. Its attempt further fails as in both *Fabe* and *Humana* the court did not need to decide all three of the factors because of agreements of parties, or assumptions, yet nevertheless, each recited ***all three factors and no others***.

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 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*.

The Third Circuit's decision does exactly what *Fabe* said it could not do: by requiring "conduct" to "constitute the business of insurance" for first clause reverse-preemption, its decision "read[s] words out of the statute." *Id.*

2. The Third Circuit's Decision Conflicts with the Plain Text of 15 U.S.C. § 1012(a)

In addition to being contrary to the Supreme Court's decisions in *Humana* and *Fabe*, the lower court's interpretation of § 1012(a) conflicts with its plain text. 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." Appendix C at 19-20 (citing *Sabo v. Metropolitan Life Ins. Co.*, 137 F.3d 185, 189 (3rd Cir. 1998)) (emphasis added).

However, this threshold, 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," 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 relating to the regulation of 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. The Supreme 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; specifically, 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*. (emphasis added). The Supreme Court's reading of the test in *Barnett* is an intuitive one, as 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."

However, the lower court'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 in that it contravenes the plain text of the statute, which Congress wrote such that "conduct" is a relevant factor only in the narrowest anti-trust considerations contained in the second clause of § 1012(b). However, the Third Circuit's approach is also inappropriate because it frustrates the *purpose* of the Act by excluding from its protection potentially innumerable state laws which are "relating to the business of insurance," a category which necessarily subsumes "laws enacted for the purpose of regulating the business of insurance." In so doing, *Sabo* and the Third Circuit in this case wrote words out of the statute. This error violates a fundamental tenant 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)).

In this regard, the lower court's ruling constitutes an important question of federal law that is in conflict with relevant decisions of the Supreme Court, and there is a "reasonable probability" that certiorari will be granted and a "fair prospect" that

five Justices will vote to reverse the Third Circuit's ruling, and a stay of the proceedings should be granted.

C. Absent a Stay, the Department Will Suffer Irreparable Harm

The Third Circuit's determination forces the Insurance Commissioner to violate Delaware's Insurance Code by providing documents he is statutorily prohibited from providing by 18 *Del. C.* § 6920. This creates irreparable harm, satisfying that requirement for a stay of the proceedings. *Phillip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1302 (2010) ("assuming the applicant position on the merits is correct, there must be a likelihood of irreparable harm if the judgment is not stayed").

Irreparable injury will occur if a stay is not granted. "[A]ny 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 Thompson v. DeWine*, 976 F.3d 610, 619 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 2512 (2021); *Planned Parenthood of Greater Texas Surgical Health Servs. v. Abbott*, 571 U.S. 1061 (2013) (Scalia, J., concurring).

The irreparable harm, as the Sixth Circuit recognized in *Priorities USA v. Nessel*, 860 Fed. Appx. 419, 423 (6th Cir. 2021), is "an injury in the infringement of the state's sovereign interest in passing and enforcing its laws." Even when the

potential for adverse consequences is minimal, failing to effectuate state statutes causes irreparable harm. *Id*. (reversing injunction to prevent enforcement of state's voter-transportation law); *see also Barnes*, 501 U.S. at 1304 (finding evidence of irreparable harm satisfied where there is potential for "interference with the State's orderly management of its fiscal affairs").

Cases that have addressed this issue find that a state will suffer irreparable harm where a state entity is commissioned to do something – through a statute enacted by representatives of its people – and the effect of the requested relief would stop or prevent the state entity from performing its statutory duty. *See, e.g. Valentine v. Collier*, 956 F.3d 797 (5th Cir. 2020) (state prison officials entitled to stay pending appeal of preliminary injunction that required officials to immediately implement more drastic COVID measures, beyond CDC guidelines); *Org. for Black Struggle v. Ashcroft*, 978 F.3d 603 (8th Cir. 2020) (injunction against enforcement of Texas laws regulating voter registration activity constituted irreparable harm to state); *Hand v. Scott*, 888 F.3d 1206, 1214 (11th Cir. 2018) (state clemency board entitled to stay because it would be irreparably harmed if it could not apply its own laws to grant clemency to eligible applicants); *Veasey v. Abbott*, 870 F.3d 387, 392 (5th Cir. 2017) (motion for stay pending appeal granted where State denied ability to enforce voter registration law); *Voting for Am., Inc. v. Andrade*, 488 F. App'x 890, 904 (5th Cir. 2012) (injunction against enforcement of Texas laws regulating voter

registration activity constituted irreparable harm to the state).

Notably, courts do not weigh the importance of any interests in determining whether a state was irreparably harmed. The test is whether: (1) there is a statute and (2) the state is prevented from performing under that statute. Any time a court prevents the State from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury. *Maryland v. King, supra*.

This case is no different. That injury is present here. If the Summons is enforced, that enforcement will de facto prohibit the Insurance Commissioner from performing his statutory duties. This will directly cause the Insurance Commissioner to violate his express duties under Section 6920 of the Delaware Insurance Code – a law that was enacted in the Delaware Assembly by state legislators who were elected by the residents of Delaware, and which governs and prescribes the Insurance Commissioner's duties. If a stay and recall of the mandate is not granted, the enforcement of the Summons will infringe upon Delaware's sovereign interest in the Delaware Insurance Code, which forms a part of its integrated scheme.

Absent a stay of the proceedings and recall of the mandate, Movant would be compelled to violate the law of the State it serves, constituting serious and irreparable harm to both.

CONCLUSION

For the foregoing reasons, Appellant, the Delaware Department of Insurance respectfully requests that this Honorable Court stay the proceedings and recall the mandate of the Third Circuit, pending certiorari to the Supreme Court of the United States.

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Respectfully Submitted,

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