OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: BARNETT BANK OF MARION COUNTY, N.A., Petitioner v. BILL NELSON, FLORIDA INSURANCE COMMISSIONER, ET AL.

CASE NO: No. 94-1837

PLACE: Washington, D.C.

DATE: Tuesday, January 16, 1996

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IN THE SUPREME COURT OF THE UNITED STATES

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BARNETT BANK OF MARION COUNTY, N.A., :

Petitioner :

v. : No. 94-1837

BILL NELSON, FLORIDA INSURANCE COMMISSIONER, ET AL. :

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Washington, D.C.

Tuesday, January 16, 1996

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:10 a.m.

APPEARANCES:

NATHAN LEWIN, ESQ., Washington, D.C.; on behalf of the Petitioner.

RICHARD P. BRESS, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioner.

DANIEL Y. SUMNER, ESQ., Tallahassee, Florida; on behalf of the State Respondents.

ANN M. KAPPLER, ESQ., Washington, D.C., on behalf of the Private Respondents.

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P R O C E E D I N G S

(10:10 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 94-1837, the Barnett Bank of Marion County v. Bill Nelson, Florida Insurance Commissioner.

Mr. Lewin.

ORAL ARGUMENT OF NATHAN LEWIN

ON BEHALF OF THE PETITIONER

MR. LEWIN: Mr. Chief Justice and may it please the Court:

This case concerns the validity of a Florida statute enacted in 1974 that flatly prohibits financial institutions such as banks, including national banks, from selling life and fire insurance.

The case is here on certiorari to the Eleventh Circuit, which upheld the Florida law on the remarkable proposition that a law that prohibits banks from selling life insurance is, within the meaning of the McCarran-Ferguson Act, a law that regulates the business of insurance, while a 1916 Federal law that explicitly does the contrary and authorizes national banks to sell life insurance is not, within the meaning of the very same McCarran-Ferguson Act, a law that specifically relates to the business of insurance.

The statement of that proposition is, we submit,

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its own refutation. Flatly prohibiting all banks from engaging in the business of being an insurance agent is, we believe, not a bona fide regulation of the business of insurance, but if it is, then its converse, the 1916 Federal law that authorizes national banks to do precisely what the Florida law prohibits -- that is, to sell life insurance through licensed agents -- must be a law that specifically relates to the business of insurance.

Now, that language that I've been referring to -- regulates the business of insurance or relates to the business of insurance -- grows out of the two pronged test of validity prescribed by the McCarran-Ferguson Act whenever an act of Congress conflicts with any law enacted by any State. The --

QUESTION: Mr. Lewin, I assume that the Florida courts and the -- or the Eleventh Circuit's view of the matter is that the Florida statute is a statute that governs insurance. It's about insurance. The Federal statute is a statute that's about banks. Now, what it says banks can do is sell insurance, but I think what the Eleventh Circuit says is that doesn't specifically relate to insurance within the meaning of the statute, because the provision is about banks.

MR. LEWIN: The statutes, Justice Scalia, of course use the word regulate in the first portion of --

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QUESTION: Right.

MR. LEWIN: -- the section, and it says that the State law, in order to even satisfy the first of these two hurdles, has to have as its purpose regulating the business of insurance.

The broader term is the second term. The second term speaks about relates to the business of insurance. It appears to us, certainly, you can't, even -- even if a statute speaks about banks, it also relates to insurance if it says, as the 1916 law does, specifically that banks may sell insurance policies, if --

QUESTION: I agree with you that any legislation that regulates insurance relates to insurance, but does any legislation that regulates insurance specifically relate to insurance?

MR. LEWIN: It does, Justice --

QUESTION: You could regulate it -- can't you regulate insurance in passing? I mean, that's the argument made here, that really they -- the Federal legislation may -- you may even say it regulated insurance, but it did it only in passing, not specifically.

MR. LEWIN: But the word specifically, we submit, means to distinguish between the statutes that would include insurance within some broader statutory

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term, commercial services, various kind -- but certainly a statute specifically relates to insurance when the word insurance appears in that statute five times.

If the Court will look at section 92, which appears at 1a and.2a of the appendix to our brief, life -- fire -- life or other insurance is specified in there, and the word insurance appears explicitly in that statute on five different occasions. Nothing could be more --

QUESTION: Mr. Lewin, even so, why can't one read these two provisions, the State and Federal, as compatible, as not in conflict?

The Federal law may specifically relate to insurance, but why not -- as one of your opponents argued, why not read the Federal law as simply giving the banks permission to enter this line of business which it couldn't enter without Federal permission, just giving it Federal permission, yet subject to whatever regulation the State may choose to put on it?

MR. LEWIN: Justice Ginsburg, there are several answers, I think, to that question. First of all, because the statute does not specifically say that. Congress knew how it could say, as our adversaries say, national banks are simply empowered to engage in the business of selling insurance if the State permits them to do so. The statute, section 92, submits the national bank only to the

authority of the Comptroller of the Currency. It says the insurance company whose policies are being sold has to be a company which is authorized by the State authorities. It does not say that the national bank has to be authorized by the State authorities, and the Congress that considered and enacted section 92, the very same Congress, also considered the question of branch banking.

When it did so, and this appears I think more extensively in an amicus brief that's filed by a whole group of banking, local State banking associations, the Court can see, I think, at page 13 of that brief where Congress put into the branch banking provisions that it was considering language which would have subjected the national banks to the authority of the State before they could open branch banks. Congress didn't do that with section 92, so our first point is that the statutory language argues against that reading.

Our second point is that the Comptroller of the Currency constant interpretation argues against that reading. The Comptroller of the Currency, of course, is the one who is authorized to administer this authority under section 92.. This Court very recently in its VALIC decision pointed out how the Court gave deference to the Comptroller of the Currency, and the Comptroller of the Currency since the enactment of this law has always read

it as meaning that the national banks have authority independently of what the State may or may not do.

QUESTION: Mr. Lewin --

QUESTION: That's what he --

QUESTION: -- when you say the Comptroller of the Currency is the regulator, you don't mean to say, do you, that the selling of insurance by the bank --

MR. LEWIN: No.

QUESTION: -- couldn't be regulated by Florida?

MR. LEWIN: Absolutely not, Justice Ginsburg. We agree that the qualifications of the agents who are selling is subject to all the State laws. The State licensure laws which apply to all insurance agents would apply to those who would sell it on behalf of the banks, and we're not arguing that the entire State licensure system is preempted or replaced.

Our adversaries are trying to make the Court believe that maybe that's the consequence of our position. It is not at all. What we are saying is, banks under section 92 are permitted to sell insurance, and then subject to the regulation, of the kind of regulation that Congress had in mind when it enacted McCarran-Ferguson.

It knew that prior to the South-Eastern Underwriters case there was a whole web of regulation on the part of the States of the business of insurance,

including the licensure of agents, and consequently when it enacted McCarran-Ferguson it maintained that system of regulation in place, but when a State comes in after the fact and for motives that are not the protection of policyholders with regard to the integrity or the ability of insurance agents, but which are anticompetitive motives, and we think that clearly emerges from this, the history of this statute as well --

QUESTION: Well, Mr. Lewin, the other side argues that there is a public motive, that you don't want the banks too closely tied up with the insurance in connection with a loan.

MR. LEWIN: We understand that that is what they are saying. That is -- first of all, that is contrary to the preamble that the -- this statute had when it was first put in, and there is no other suggestion in the legislative history that there was a motive other than the motives which the preamble set out, but --

QUESTION: That motive wouldn't explain allowing banks that are not part of bank holding companies to do it, would it? As I understand the Florida statute, it doesn't prohibit all banks.

MR. LEWIN: It does not prohibit banks that are in communities of less than 5,000 that are not subsidiary to bank holding companies.

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QUESTION: And the rationale of stopping banks, the procompetitive rationale of preventing banks from getting all of the business when they make the real estate loan, that makes no -- no reason to limit it to nonbank holding companies.

MR. LEWIN: That's true. That distinction would not make sense in that context. I mean, you can't -- it doesn't carry across to all banks.

QUESTION: The statute doesn't refer to --

QUESTION: Mr. Lewin, are there -- go ahead.

QUESTION: The statute doesn't cover credit life either, does it?

MR. LEWIN: No, it does not.

QUESTION: So that would be, I suppose, the field in which you would assume the banks would be most overbearing in trying to exercise their authority, and yet that's exempted.

MR. LEWIN: It's true there are really a number of very good rational arguments that demonstrate that this is not the purpose. This is -- protection of consumers is not the purpose of this statute. The lines that are drawn, the legislative history, the fact that the statute invokes the Bank Holding Company Act. It doesn't say, we're doing this because of the authority we have under McCarran-Ferguson to regulate insurance.

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QUESTION: What do you say to the argument, the kind of subsidiary argument, to be sure, but what do you say to the argument that because the effect is to regulate what your opponents describe as the point of sale of the insurance, that therefore you simply must impute a purpose to regulate insurance to that effect, and therefore the purpose prong of the statute is satisfied?

MR. LEWIN: Well, we think that goes too far. It would -- there's almost any kind of law that would affect insurance could be dressed up or could be explained after the fact in that way. Indeed --

QUESTION: So it would read the intent requirement out of the --

MR. LEWIN: -- this Court's opinions --

QUESTION: As a distinction it would read the intent requirement out, you're saying.

MR. LEWIN: We think it would not -- it would not be an effective and useful distinction, and indeed, this Court's opinions in Pireno and in -- in the prior cases, where the Court was considering these, the Court rejected the argument that simply looking to either the solvency of the insurance company, whether it would ultimately be solvent, whether it would -- and its impact on policyholders was a sufficient basis for saying that its purpose was the regulation --

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QUESTION: That would have to have gone the other way.

MR. LEWIN: -- of the business of insurance.

QUESTION: Yes.

MR. LEWIN: And the Pireno case does lay down three standards that make it clear that what we're dealing with is really the relationship between the insurer and the policyholder.

This is not a statute that deals with the regulation of insurance within the meaning of the Pireno definitions. And this Court has said in the Fabe case, which is this Court's most recent examination of this statute, and indeed one of only two, the Court said in Fabe that the only time it has previously looked at this language specifically about the regulation of insurance was in the National Securities case, which involved the application of the securities laws to insurance companies and their ability to deal with potential stockholders and that regulation.

But the Court said in Fabe also that the key test, the standard as to whether this was regulation of the business of insurance, turned upon whether it dealt with the relationship between the insurance company and the policyholders, the actual implementation of that policy.

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QUESTION: Are there cases in the courts of appeals where a State has what on its face appears to be a neutral law that in effect prohibits the national bank from acting as an agent? That is to say, a State would have a law that no agent can have a loan relationship with the customer.

MR. LEWIN: I don't know, off-hand, of any -- the cases in the courts of appeals have involved more specific -- I mean, the Owensboro case and the Louisiana case that has come up through the Louisiana courts have involved more specific statutes that are directed, really, at financial institutions or banks rather than in this more indirect manner to my knowledge, but I think the same question would come up if, in fact, the State were trying to reach national banks' power under section 92 by camouflaging what they were really doing by making it appear to be a different --

QUESTION: I don't know. What about some other thing that only bank -- any characteristic that is possessed exclusively by banks or at least is possessed by all banks. Are you saying that no such characteristic may be made the basis of State regulation? I thought you said earlier that State regulations of insurance, including that sold by banks, continues to apply?

MR. LEWIN: Well, there are --

QUESTION: But not a regulation that says you cannot be an insurance agent if you're also the lender.

MR. LEWIN: That would apply. Let me say first, Justice Scalia, that only applies to the first prong, or the first hurdle. It may be, and I'm not questioning that if a State in fact had a legislative record that indicated that banks in some way were deceiving insurance customers that it could not enact a statute that would reach that kind of practice even if what they did is, they did it in terms of reaching banks, but that would not affect the question of whether section 92 goes beyond that and specifically relates to the business of insurance.

QUESTION: Well, maybe it wouldn't, but I am much less inclined to come out the way you would like me to with regard to the question of whether section 92 specifically relates to insurance. I am less inclined to do it if I'm worried about what effect I'm going to be having on State regulation, including a regulation which seems to me perfectly reasonable that the insurer can't be the lender. You're saying that would be bad, that would be good? What is your --

MR. LEWIN: No, I think a more narrow statute that would reach certain kinds of practices would certainly be good. I'm not questioning -- we have no problem with regulatory statutes that reach practices

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rather than eliminate categories of --

QUESTION: And that would be okay. No insurance -- the lender can't be the insurance agent. That's going to be the next statute that Florida passes. You know that's coming up.

MR. LEWIN: Any lender to this consumer --

QUESTION: If you win this --

(Laughter.)

MR. LEWIN: No. I think -- if the purpose of that statute, if the legislative record doesn't demonstrate that that is designed to protect consumers and it's really a way of getting around section 92, I think it would present a problem. We'd be back in court.

QUESTION: I'd have to read the legislative history to figure that out, is that right?

MR. LEWIN: Well, I think that's right.

QUESTION: Why would you require a legislative record, Mr. Lewin? Most State legislatures don't have legislative history.

MR. LEWIN: That's true, but in this case, Mr. Chief Justice --

QUESTION: Well, but you were speaking generally. You were speaking of whether a State law would be valid, and you said if there was a sufficient legislative record. Why is that a requirement?

MR. LEWIN: I think because in this case, Mr. Chief Justice, Congress has said so. Congress has said, enacted by any State for the purpose of regulating the business of insurance.

QUESTION: And you think Congress meant there had to be an inquiry into the precise legislative motive in every case?

MR. LEWIN: Well, I think when Congress says purpose, and has used that in the statute, then I think for purposes of that hurdle, the Court does have to look at purpose.

QUESTION: Why can't there just be a presumption that if there appears to be a purpose on the face of the statute, that probably was what Congress talked about?

MR. LEWIN: That's a possible legal rule, Mr. Chief Justice, but I'm saying nonetheless the Court has to deal with the fact that the statute says, purpose, and in some way it has to devine what the purpose was in enacting the statute. Congress could have eliminated the word, purpose. It could simply have said, enacted by any statute, by any State regulating the business of insurance.

QUESTION: And the court of appeals here went about divining the purpose, and it reached a particular conclusion.

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MR. LEWIN: And we submit that conclusion is simply not justified for purposes, again, of the first prong of the test. I have to keep emphasizing -- and I would like to reserve some time for rebuttal. I would have to keep emphasizing that that's only one prong of two prongs that this statute -- two hurdles that this Florida statute has to satisfy: 1) it has to be for the purpose of regulating the business of insurance, and 2) the Federal statute with which it conflicts has to be one that does not specifically relate to the business of insurance, and we submit section 92 plainly specifically relates to the business of insurance.

Thank you.

QUESTION: Thank you, Mr. Lewin.

Mr. Bress, we'll hear from you.

ORAL ARGUMENT OF RICHARD P. BRESS

ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

SUPPORTING THE PETITIONER

MR. BRESS: Mr. Chief Justice, and may it please the Court:

In section 92 of title 12, Congress authorized national banks located in small towns to serve as insurance agents. Section 92 enables those banks to earn an additional source of revenue to supplement the income that they earn in more traditional banking activities. In

the Comptroller's view, national banks located in small towns need to earn that sort of supplemental fee-based income to remain competitive with other financial institution lenders.

To the extent that Florida's antiaffiliation law prohibits national banks from selling insurance in small towns, it frustrates Congress' intentions and impairs the efficiency with which the national banks in small towns can carry on their statutory functions.

QUESTION: Mr. Bress, is the term, relates to insurance broader than the term, regulates insurance in the other portion of McCarran-Ferguson?

MR. BRESS: Yes, Your Honor, it is. This Court has interpreted the term, relates to, frequently and recently. One thing relates to another if it refers to or has any connection with the other. If --

QUESTION: Where do you get that definition of relates to from?

MR. BRESS: Well, this Court used that definition -- in fact, you used other broader terms in Morales and in Shaw.

QUESTION: Were those cases construing this particular act?

MR. BRESS: No, I was -- Your Honor, I was just getting to the words relates to. I will move on if you'd

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like and --

QUESTION: And get perhaps closer to this act.

MR. BRESS: Certainly.

If this statute merely said, relates to, then McCarran-Ferguson would arguably accept any Federal law that has any connection with interstate commerce. Congress did not intend that broader scope. Congress added the modifier, specifically, to make clear that State insurance law would be preempted only when Congress has referred to, focused on, or acted specifically with reference to the business of insurance.

Therefore, if section 92, which is at issue here, merely authorized national banks to engage in commerce, that statute would not specifically relate to the business of insurance.

QUESTION: Mr. Bress, in Fabe, this Court came pretty close to requiring a sort of clear statement rule for a law that relates to insurance by the Federal Government.

MR. BRESS: Your Honor, in its -- I agree, in its description of that prong of the McCarran-Ferguson test, this Court stated that it was a plain statement rule and used language to that effect. It was not a holding, however, of Fabe, and this Court has reminded us often --

QUESTION: Well, if it is a -- if there is some

clear statement requirement, do you think this section 92 meets it here?

MR. BRESS: Well, I guess that would depend what clear statement meant. If the clear statement had to be Congress saying, not only can banks do this but we also affirmatively preempt State law to the contrary, no, this wouldn't pass it, but the language that Congress actually used here, specifically relates to, does not require that sort of statement.

Congress, when it was passing the McCarran-Ferguson Act, had in the bill that originally went to the committee language that would have done that. That language said, unless the act specifically so requires.

QUESTION: But the sentence Justice O'Connor refers to says the first clause of 2(b) reverses this by imposing what is in effect a clear statement rule, a rule that State law is enacted for the purpose of regulating the business of insurance, do not yield to conflicting Federal statutes unless a Federal statute specifically requires otherwise. Are we going to have to ignore that language to rule for your position in this case?

MR. BRESS: You may well, Your Honor. I believe that that language did not accurately describe the text of the statute as it actually reads.

QUESTION: If we follow the position that

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Senator Ferguson has been quoted as taking, we would require at least that there be -- I'm sorry, we would require that there be an express reference to insurance, is that correct?

MR. BRESS: We would find in most cases --

QUESTION: Not an express reference to preemption, but an express reference to insurance.

MR. BRESS: In almost all cases you would want to find the word insurance, or at least other words that meant insurance, in the statute itself, yes.

QUESTION: What kind of other words do you -- you mean reference to specific policies, things like that?

MR. BRESS: Exactly.

QUESTION: Okay.

MR. BRESS: That sort of thing.

QUESTION: So some verbal insurance reference, not necessarily the word insurance.

MR. BRESS: That's right.

QUESTION: Would we be in error if we confined -- if we in fact defined the specific relate to language in that way?

MR. BRESS: No, I don't think you would. I think that would be a correct definition, Your Honor.

QUESTION: And limited it to that.

MR. BRESS: To statutes that specifically refer

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to insurance either in so many words or not. I think that would be the correct definition.

QUESTION: But the so many words have got to be words that either include the word insurance or refer to, what, an insurance product, or a peculiar insurance practice?

MR. BRESS: That's right.

QUESTION: Mr. Bress, can you help us out on what -- if section 92 is read the way you wish, what kind -- you know, you could say the bank could sell insurance, period, and the State can't stop it from selling insur -- you don't take that position. You say, the State can continue to regulate that sale of insurance, right?

MR. BRESS: That's been the Comptroller's consistent position.

QUESTION: Well, now, what if it says lenders can't sell insurance?

MR. BRESS: Well, a statement of lenders can't sell insurance would, in our view, conflict with section 92's directive that banks which are lenders under 24, section 24, can sell insurance, so there would be an express conflict --

QUESTION: Well, I can think of all sorts of other things that banks are which you might want to

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regulate for the purpose of insurance, and you're saying -- I don't understand how you draw that line.

MR. BRESS: Your Honor, you may well want to -- States may well want to regulate lots of things that banks are, but to the degree that States purport to prohibit banks, because they are those things, because the Federal legislation has made banks those things, from selling insurance, you'd have a conflict with Federal law.

QUESTION: So the State can't regulate anything that is a power -- or cannot exclude from insurance agency any power that is a power accorded to banks by Federal law.

MR. BRESS: Your Honor, I don't think I --

QUESTION: Lending money, so forth.

MR. BRESS: I think if the State attempted to pick out a power that the Federal Government has given to banks and that banks possess, and use that as a characteristic for excluding those entities for insurance, it would be preempted by Federal law.

QUESTION: But there's a narrower interpretation other than just, banks can't -- lenders can't sell insurance. What if the regulation says the insurance broker cannot sell to a policyholder who is indebted to the agent? They could sell generally. I mean, lenders could sell, but not -- they couldn't tie the two together,

prohibit tying clauses --

MR. BRESS: That would be a more difficult question, Your Honor.

QUESTION: You don't know the answer to that one.

MR. BRESS: I don't know the answer to that one. I would probably venture to say --

QUESTION: The Comptroller General hasn't spoken to that, anyway.

MR. BRESS: The Comptroller has not spoken to it. I'd like to speak to the preemption issue a bit more generally, if I may.

There's been an argument by Respondent that the -- there's a presumption against preemption, and while that's ordinarily true when you've got Federal and State laws that deal with private persons, here you've got an attempt by a State to regulate a Federal instrumentality.

And as this Court noted in Franklin National Bank, the Federal Government is a rival chartering authority, and when the States presume to control the instrumentalities of the Federal Government, this Court has stated over and over that that sort of control can only be exercised with Congress' consent, and in Franklin National Bank, this Court made a point of pointing out various statutes in which Congress has expressly said,

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national banks may do this only if State banks may as well do it, or national banks may do it subject to State authority.

In Franklin National Bank, it was critical that that statute, which used language like this statute, may language, did not have that sort of State authorization. This case really should come out no differently than Franklin National Bank in that regard.

The same point was made, by the way, by the Court in the Easton case as well as in the Fellows case.

Getting back to the specifically relates point to a moment, I'd like to reiterate that this statute not only mentions insurance but mentions it five times. It specifies which types of bank, what banks may sell insurance, what companies they may sell insurance for, it says who can put out the rules and regulations for insurance, and it has two express limitations on the sale of insurance. There's no question that Congress focused very specifically on insurance when it enacted section 92, and that the statute is one that relates specifically to insurance.

Now, while --

QUESTION: On your interpretation, what, then, gives the State the right to regulate the selling of insurance by this bank if you say it needs Federal

permission, the State needs Federal permission?

MR. BRESS: The Federal Government has not actually regulated the selling of insurance by national banks, and the absence of regulation by the Federal Government would mean that there would be no conflict with ordinary State rules regulating it. The other thing is --

QUESTION: But I thought it was your position a moment ago that it took actual congressional consent for the State to regulate a federally chartered institution, not just lack of conflict.

MR. BRESS: Your Honor, I may have spoken too broadly. It does require consent, but this Court has assumed a background of consent to general State laws. For example, State laws regarding contracts, collection of debt, that sort of thing have always applied to national banks. It's only where the State attempts to regulate the bank as bank where the State has gotten into difficulty.

QUESTION: Thank you, Mr. Bress.

Mr. Sumner, we'll hear from you.

ORAL ARGUMENT OF DANIEL Y. SUMNER

ON BEHALF OF THE STATE RESPONDENTS

MR. SUMNER: Mr. Chief Justice, and may it please the Court:

By enacting the McCarran-Ferguson Act, Congress has broadly reserved to the States regulation of the

business of insurance and declared that State regulation of the business of insurance is in the public interest. Congress' intent to throw the weight of its power behind State regulation is clearly expressed in the McCarran-Ferguson Act.

The Department of Insurance's position is that once a State law is established to regulate the business of insurance by protecting policyholders, that State law is preempted by a Federal law only if the Federal law is a clear statement that Congress intended for the State's regulation of the business of insurance to be displaced.

QUESTION: Suppose --

QUESTION: When you say clear -- I thought I interrupted.

QUESTION: No, go ahead, you were -- please.

It was simultaneous. The -- suppose a State passes a law -- I mean, the question to me at the beginning is whether this is a law that regulates insurance within the meaning of the act. Suppose a State says -- and the test can't be just whether it helps policyholders, is it?

I mean, suppose a State says, I know a great way of helping our policyholders. When an insurance company gets into trouble under this statute, no insurance company has to pay their Federal income tax. I didn't see

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anything in the Federal income tax law that refers specifically to insurance, so what is it that would make that statute be invalid?

I'm helping -- in our State in Florida we think it's really nice, particularly towns under 5,000, where, you know, they have a tough time, and they really don't want to pay their taxes, and they're shaky, and the policyholder will be hurt.

What's the law? What's the interpretation of the statute?

MR. SUMNER: I think first of all you go to the core of the business of insurance, and you start there, and the core --

QUESTION: Right at the core, making money out of the policy, keeping the money there available for the policyholders so that the company won't go bankrupt, and so forth.

MR. SUMNER: Well, the core of the business of insurance goes to the issues of enforceability, the reliability, and I think also the suitability of an insurance contract, so if you're regulating the business of insurance, you are regulating the policyholder's protection over a current promise, a current contract for a future promise. That's the nature of in --

QUESTION: So that's like from -- that's rates,

regulating selling and advertising, licensing companies and their agents, and relationship between the insured and the insurer. I take it that that kind of thing is right out of SEC v. National Securities.

MR. SUMNER: Yes, sir.

QUESTION: All right. Well then, I don't see how you fit within it, because how do you fit within it? Why isn't this case more like the merger case? Mergers between two insurance companies aren't protected. This has to do with whether a bank holding company could own an insurance company which, after all, a small bank could own.

I mean, which bank owns -- which kind of a bank? Some banks can own. Small banks can own insurance agents. National banks can't. All right, under this test, what's the difference between who can own the insurance agent, a big bank or a little bank, and the question of mergers and banks, both being quite different from regulating the terms of a contract?

MR. SUMNER: Okay, let's basically start with the fundamentals of the regulation of the business of insurance and the insurer-policyholder relationship. The insurer-policyholder relationship is consummated in an insurance contract. That insurance contract needs to be enforceable, it needs to be reliable, and it needs to be

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fairly and suitably entered into.

The individual who is responsible for bringing those parties together and creating an enforceable, reliable, and suitable insurance contract is the insurance agent. Therefore, I think the first question is, is the role of the insurance agent in that insurance transaction, in making sure you have an enforceable, reliable, and suitable insurance contract, part of the insurance policy, insurer-policyholder relationship? I think the answer to that definitely is yes.

The question then becomes, if the insurance agent is an integral player in making sure that the insurer-policyholder relationship occurs, then if the Florida legislature has found that the interjection of a national bank into the role of the agent in that insurer-policyholder relationship creates the dangers of coercion, unfair trade practices, and undue concentration of resources, whether or not that interjection of those perils into the insurer-policyholder relationship is a legitimate regulation of the business of insurance.

There may be issues raised by the petitioner as to the wisdom of whether there was some other way of handling those perils, but if you look at the Michael M. case, the question is if the legislature has identified a particular method of addressing perils with regard to the

protection of policyholders, then normally the Court gives great deference to the State's judgment, which has been ratified by the State courts, as to the manner in which that particular danger will be addressed.

The petitioner repeatedly asserts that the dangers that have been asserted are disingenuous. There is no record evidence, other than the preamble, which would in any way suggest that the State court cases, Production Credit and Glendale, which are cited on pages 20 and 21 of the Department of Insurance brief, are not the most accurate articulation of the purposes of this law, and I would point out that the law was enacted in 1974.

The Production case in 1978 indicated on page 20 that the legislature has found in Florida that there is inherent potential for abuse in banks engaging in insurance agent activities. In 1991 in the Glendale case the Florida appellate court --

QUESTION: It doesn't apply to banks. It doesn't apply to banks. It applies to big banks.

MR. SUMNER: Okay, if you want to talk about -- I think one of the issues is, why is there a prohibition against bank holding companies and not all banks in allowing the small town bank to sell insurance in Florida? I believe that goes most directly to the issue of undue

concentration of resources.

The argument which explains that particular element of the danger is that if a bank holding company is entitled, as the Comptroller has allowed, through a branch in a small town, to market in any geographical area, then that bank holding company can concentrate its entire marketing force into that one location and essentially use it as a venue to engage in the insurance business.

QUESTION: If that is the object why did they accept credit life?

MR. SUMNER: Well, first of all, I think that in the legislature's judgment I believe there was a sense that with regard to credit life three was more of a nexus between the bank's interest in protecting loans and protecting credit than there was in the sale of other insurance.

QUESTION: That -- maybe I don't understand. That, it would seem to me, would increase the likelihood that the bank would in fact unduly use its power to influence the issue of, the issuance of this insurance.

If the bank wants to be insured against anything, it wants to be insured against losing its loan return because of debt, so I should suppose the bank's temptation would be very high there. Why was it accepted?

MR. SUMNER: I think that was a legislative

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judgment, but again --

QUESTION: No, but if -- but it's a legislative judgment that seems to me to be at odds with the rationale that you were saying was the legislative purpose within the meaning of the statute.

MR. SUMNER: Oh, I think it is at odds. If you look at the Department of Insurance brief at page 5, in the record there's testimony that as the exception to 626.988, that in Florida the credit line has become an area where reverse competition has occurred, and that because of that reverse competition, where the competition is not for purposes of gaining customers but to gain market share, that the commission levels in those products have gone to as much as 80 percent.

So it very well may be that the credit line, by the record testimony, is an example of the fact that perhaps the legislature should have made another judgment with regard to that particular line of business.

QUESTION: Well, I suppose you could say that no statute pursues its objectives at all costs, and the legislature just said there's such a overwhelming reason why a bank would want to sell its own insurance in these situations that although the same risks might exist, we won't extend our prohibition that far. That's possible, I suppose.

MR. SUMNER: Yes, sir, and I believe that -- one other thing I would want to point out is one of the dangers which is identified which is somewhat overlooked, and which has been found in Florida, is the issue of unfair trade practices.

One of the issues that's very important is that with the sale of insurance products, that there is the peril that the insurance-buying person will become deceived as to what is a bank product and what is an insurance product, so I think that more than just the problem of tying it to a loan, there's the problem of in essence a deception in consumers being misled.

So I think more than just the problem of tying it to a loan, there's the problem of in essence a deception and consumers being misled.

QUESTION: Suppose I don't look at the legislative history of any of this and think, well, gee, to a person looking at this statute, the only purpose I can imagine it would have is that it wants to help the little banks make more money by preventing the competition from the big banks, and it wants to raise the prices to the insurers who are buying the policies, and as a result, everybody is more secure.

So it's a good insurance purpose -- make everybody more secure, they make more money, there's less

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competition, less chance of default. All right, suppose I thought that.

MR. SUMNER: Yes.

QUESTION: They want, by stopping competition, to make everybody make more money and the insured then has a better chance of getting a payoff on his policy. Then does it fall within the McCarran Act, any more than, let's say, the mergers between the two companies?

MR. SUMNER: I don't think so, because --

QUESTION: In other words, it's outside the McCarran Act's exception. In other words, you lose the case unless you have some other policy just -- some other reason for this statute, other than just stopping competition.

MR. SUMNER: That's correct.

QUESTION: All right, then why would that be? I mean, I don't know why the -- I mean, I grant you that you'd like to say it has other purposes. I understand that, but I don't see why, in terms of the act, it matters. I don't see why, in terms of the exemption, it matters whether the purpose is an anticompetitive purpose, a procompetitive purpose, or what kind of purpose. In either case, your purpose would be to help the policyholder get a payoff on his policy.

MR. SUMNER: Well, I think that as long as

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McCarran-Ferguson requires that the law be enacted for the purpose of regulating the business of insurance, that there needs to be an inquiry into the purpose, and the purpose has to flow to regulation of the business of insurance. That is, the insurer-policyholder relationship.

You need to be consistent with that term of art, the business of insurance, and that's a very important point in looking at the clear statement rule, because there's been a lot of emphasis on the term, specifically relate.

QUESTION: But the purpose here is to keep the big banks out. That's virtually disputed, keep the big banks out, and the question I would think would be is, is that a regulatory purpose, and exactly why you'd want to keep the big banks out I would think would be almost beside the point, but I'm not sure. That's why I ask.

MR. SUMNER: Well, it depends on whether or not your keeping the big banks out through the regulation of the insurance agent and their association with the bank is regulation, whether or not that, in looking at that law, that there is a relationship there where that -- that law regulates, that is, controls, adjusts, or manages the business of insurance, that is that whether it adjusts controls or manages a peril to the insurer-policyholder

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relationship.

QUESTION: Mr. Sumner, with respect to the purpose of the Florida law, are you claiming any mileage as a result of the Florida supreme court decision? You mentioned Glendale.

MR. SUMNER: That's a district court of appeal case. Yes, I am.

QUESTION: Is there a Florida supreme court decision interpreting this statute?

MR. SUMNER: No, ma'am, there's not.

QUESTION: There's only the district, Federal district court.

MR. SUMNER: Yes, ma'am. In both cases the supreme court --

QUESTION: District court of appeal.

MR. SUMNER: District court of appeal, yes, ma'am.

In both cases --

QUESTION: But this is a State intermediate appellate court, then.

MR. SUMNER: Yes, ma'am.

QUESTION: Yes.

MR. SUMNER: But with -- again, with the clear statement rule.

QUESTION: And you do claim some mileage, some

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extra weight beyond what's in the legislative history for what those State courts say.

MR. SUMNER: Yes, ma'am, absolutely. If you look at the Michael M. case, you again look at the State's justification for a law which is given great deference. In that case, the Court mentioned that the supreme court of that State had given interpretation, but in this case on two occasions the State courts have looked at the purpose of the State law and I would respectfully submit that the State courts ascertaining, or their judgment as to what that particular State law means, is entitled to great deference.

With regard to the clear statement rule, I think it is very important to remember that for a law, Federal law to displace or preempt a State law, it must specifically relate to the business of insurance. It must specifically relate to the insurer-policyholder relationship.

Therefore, to specifically relate to the business of insurance with regard to preemption of a State law which regulates the business of insurance, I would submit that the test should be whether or not the Federal law is a clear statement that Congress intended to remove the policyholder protection afforded by the State law and replace it with a Federal law.

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QUESTION: Thank you, Mr. Sumner.

Ms. Kappler, we'll hear from you.

ORAL ARGUMENT OF ANN M. KAPPLER

ON BEHALF OF THE PRIVATE RESPONDENTS

MS. KAPPLER: Mr. Chief Justice, and may it please the Court:

The Eleventh Circuit ruled on the basis of McCarran and petitioner and the Solicitor General's Office has stressed in particular the McCarran issue, but this Court need not reach the McCarran question, because even under traditional preemption there is no -- traditional preemption doctrine there is no preemption here, and the reason is simple.

A State law that treats State chartered banks and nationally chartered banks evenhandedly, which is what 626.988 does, does not interfere with the objectives of Congress in enacting section 92 which, as stated by the Solicitor General's Office here today, was to enable small, nationally chartered banks to have additional revenue in order to enable them to compete with State chartered banks --

QUESTION: Well, it's not quite that easy. The Solicitor General did not, I think, concede or suggest that this was kind of an equal protection clause for competition. The object which the Solicitor General

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argues is behind the section 92 is indeed a competitive object, but his argument is that one way to provide that competition is to allow them to sell the insurance, period. He didn't concede, it seems to me, that it was simply to put them on an equal footing in the sale of insurance with State banks.

MS. KAPPLER: Perhaps I overstated it. I certainly didn't mean to say he's conceding that there's preemption here, or there's no preemption. He certainly is not.

QUESTION: No, but he wasn't conceding that there was -- there was kind of, as I put it, an equal protection clause here for State and Federal banks, and in fact the argument is, for which there has been I think some evidence adduced here in the courtroom, that in fact the point of the statute was to allow them to get into the insurance business so that they could earn money and, generally speaking, be more competitive against their State rivals, and it seems to me that's what you've got to refute here.

MS. KAPPLER: Your Honor, the legislative history, and although it is very scant here, there is one letter from the Comptroller who drafted this legislation and proposed it to the Congress, who accepted that proposal as written and in fact used this letter as

explanation, the sole explanation for the statute. That's --

QUESTION: And the drafting of the statute is consistent with that in the sense that the statute says nothing about, may sell insurance if State banks sell insurance, may sell it if State regulation allows. It simply gave them a power to sell, and I would suppose that was consistent with the letter.

MS. KAPPLER: Your Honor, in fact the letter makes absolutely clear that what the Comptroller was worried about was allowing them to get additional revenue, but additional revenue in order to enable them to compete with State-chartered banks who had these very powers, Your Honor.

QUESTION: Well, sure, if they go out of business they can't compete, but I mean, the argument was, they need the additional revenue because, given the sort of piddling deposits that they tend to get in these little towns, they just can't earn enough money to stay in business if they haven't got some other revenue source. Wasn't that basically the argument?

MS. KAPPLER: And they were having problems competing with State banks who had this authority.

Your Honor, it's not unremarkable --

QUESTION: We don't limit the terms of a statute

by its purpose. I mean, if the purpose of enabling them to sell insurance was to enable them to compete, we don't read into the statute they can sell insurance only when it is necessary to enable them to compete. Congress passes lots of laws for purposes which do not require as much as Congress confers in the law.

What the law says is that they can sell insurance, and it not only says that, it says in addition to the powers now vested by law in national banks -- in addition to those other powers. Do you know any other power that a national bank has which can be eliminated by States?

MS. KAPPLER: Your Honor, the Fellows case is very instructive. There's a difference between a nonbanking power and a banking power, and the Fellows court articulated the difference. The courts made absolutely clear, and the petitioner keeps relying on the provisions of the Fellows case dealing with banking authority. The Fellows decision --

QUESTION: Fellows, you're talking about?

MS. KAPPLER: Yes, correct, Your Honor, First National Bank v. Fellows. It's cited in the reply brief of petitioners. The cite is 244 U.S. 416. It's a 1917 case, contemporaneous with the enactment of section 92.

In that decision, this Court explained that when

it comes to banking powers, the incidental powers, of course Congress can grant those authority and the State can't interfere with those unless Congress says they can interfere, but when it comes to nonbanking powers -- and there it was the power to act as an administrator for stocks and bonds -- when it comes to nonbanking powers, Congress has the authority to grant those additional nonbanking powers in order to allow the national banks to compete with these State charter banks, because otherwise they'd suffer injury that they could not engage in their banking powers.

The Court went on to say that in those areas, in the exercise of those nonbanking powers, the principle is that so long as the State law is not discriminatory, the national banks must abide by the State laws.

QUESTION: They don't contend that here. They don't contend that they need not abide by State laws. Does that case hold that those nonbanking powers can be eliminated by the States?

MS. KAPPLER: It says they're fully regulable by the State, Your Honor.

QUESTION: They acknowledge that they're regulable here. Mr. Lewin said they're regulable. What we're talking about is whether they can be eliminated. Does this case say they can be eliminated?

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MS. KAPPLER: Your Honor, that's what the Fellows case was talking about. That's precisely what --

QUESTION: Oh, eliminating?

MS. KAPPLER: Yes. Yes.

QUESTION: Eliminating the power entirely.

MS. KAPPLER: At issue there was whether Michigan law would have allowed them to engage in this activity or not. That's precisely what the case was about.

QUESTION: So the Commerce power is limited, is that what you're saying?

MS. KAPPLER: I don't think it's the Commerce power. There what they were talking about, of course, Your Honor, was the fact, the Necessary and Proper Clause, which is tied to the Currency Clause --

QUESTION: No, but the power to regulate insurance is a Commerce power, and it seems to me that you were saying insofar as it involves banks, it doesn't relate specifically to banking, there is a limitation, and hence it must be a limitation on the Commerce power.

MS. KAPPLER: Well, Your Honor, 19 --

QUESTION: Maybe I don't understand your argument.

MS. KAPPLER: In 1916 it was not a Commerce power because Congress didn't believe --

QUESTION: Well, it is now, and it seems to me that that's the consequence of your argument. Am I missing a step?

MS. KAPPLER: No, I'm not trying to suggest that as a constitutional matter it could not have said that the national bank can act -- enact -- act this way and the State can't interfere. All I'm saying is --

QUESTION: So you're back -- it seems to me you're back to the clear statement point.

MS. KAPPLER: No, Your Honor. I'm talking --

QUESTION: In other words, if they say it clearly enough, they can do it. If they don't say it clearly enough, they can't do it.

MS. KAPPLER: No, Your Honor, I'm saying that under traditional preemption analysis there is no conflict unless there is an interference with the objectives of Congress, and the objectives of Congress as stated in the legislative history and as consistent with the principles articulated by the Supreme Court at the time --

QUESTION: Okay, but do you --

MS. KAPPLER: -- were to enable the State bank to compete.

QUESTION: I'm sorry, I didn't mean to cut you off.

MS. KAPPLER: I'm sorry.

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QUESTION: If -- you agree then, I take it, that if we do conclude that Congress was quite clear in its intent to allow banks to do this, period, that's the end of the issue.

MS. KAPPLER: Under traditional preemption it would --

QUESTION: Yes.

MS. KAPPLER: -- be the end of the issue, correct, Your Honor.

QUESTION: Yes.

MS. KAPPLER: It would certainly not be the end of the issue under the McCarran-Ferguson Act, and in fact --

QUESTION: Simply because we have two other steps. I'm just dealing with your first point, your first argument.

MS. KAPPLER: If your --

QUESTION: Your first argument is, there's no preemption because there's no conflict.

MS. KAPPLER: Correct, Your Honor.

QUESTION: Right.

MS. KAPPLER: Because there's no interference with the objectives of Congress.

QUESTION: So everything turns on whether we conclude that Congress did, indeed, intend to give the

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banks the power to do this free of the right of a State to eliminate it entirely, and if we say yes, that was Congress' intent, then we get into McCarran-Ferguson.

MS. KAPPLER: Correct, although it's sort of -- I think it's difficult to think of whether there's an intent to preempt, Your Honor, because the statute and its legislative history is absolutely silent on its effect on State law. The question is sort of what are the larger objectives the Congressmen --

QUESTION: Well, but that then gets us into the third issue, and I take it your position there is that in order to preempt the preemption it's got to be expressed, is that correct?

MS. KAPPLER: Under McCarran, Your Honor?

QUESTION: Yes.

MS. KAPPLER: No, Your Honor, that is not our position.

QUESTION: No, okay.

MS. KAPPLER: Our position is similar to Mr. -- and exactly the same as Mr. Sumner's position, is that in order to specifically relate to the business of insurance, it is a clear statement rule. The clear statement is that Congress must clearly --

QUESTION: But not necessarily a clear statement of preemption. You don't take that position.

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MS. KAPPLER: No, Your Honor. That would be an easy case, but it's not necessary. What they must clearly state is that in fact they mean to displace State insurance regulation. That is, they are enacting Federal insurance regulation, and in particular regulation --

QUESTION: Well, what do you do with the legislative history that was recited to us by Mr. Lewin, that Congress had such language before it in McCarran-Ferguson and it rejected that in favor of the broader, specifically relate language?

MS. KAPPLER: Your Honor, I think the only language rejected is the language that would require an actual preemption clause. We're not saying you need an actual preemption clause.

If, for example, the Federal statute says every life insurance policyholder shall have 5 days to review a life insurance policy before they are bound by the terms of the policy, that would make it absolutely clear that what Congress was trying to do was regulate the business of insurance, not just insurance.

I mean, petitioner would -- constantly uses the word insurance as if that were sufficient. Every McCarran case that this Court has addressed it's not sufficient --

QUESTION: Yes, but of course the statute doesn't say regulate, it says, relates to.

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MS. KAPPLER: Correct, Your Honor, but the question is sort of what is relationship, and that's precisely what this Court looked at in Blue Cross and other cases in which they've deemed, what is the relationship, which is only informed by knowing what the purposes, the objectives of the statute were.

In McCarran, what Congress has tried to avoid, everyone agrees, was inadvertent preemption, inadvertent application of law to the business of insurance, to the spreading, the transfer of risk, the protection of the policyholder. That's how --

QUESTION: Every -- I mean, that's what I'd like us -- can you just spend a minute helping me out with that?

The -- my impression from reading Pireno and the SEC, the cases that we talked about, is that this is rather narrow, this word, regulation of insurance, and really refers to where the policyholder -- what do you charge him, what are the terms of the contract, et cetera.

This is a statute that says big banks but not little banks can go into the insurance businesses in small towns -- the opposite, big banks can't, little banks can.

To me, is this more like a merger? I.e., what are the entities that own these agents, and mergers are outside the word regulation.

MS. KAPPLER: Mergers --

QUESTION: But the -- what those words say in a contract are inside regulation. Why isn't this more like the first than the second?

MS. KAPPLER: Because --

QUESTION: That's what I need a little help on.

MS. KAPPLER: If I might, Your Honor, because mergers, as the Court held, the particular Arizona merger law that was at issue it concluded was in fact enacted to protect stockholders, not to protect the interests of the policyholders.

QUESTION: So if in fact, if that's the key, then we go back to a law that says they don't have to pay income tax, they don't have to comply with a whole bunch of things, because that protects stockholders. There are a lot of ways we could --

MS. KAPPLER: No, Your Honor, if it protects stockholders it is not enacted for the purpose of regulating insurance. That's what national securities --

QUESTION: All right, I mean --

MS. KAPPLER: And --

QUESTION: -- we go back to the income tax and all these exemptions that will protect policyholders. That can't be the law, I wouldn't think.

MS. KAPPLER: Your Honor, I think you're echoing

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the difficulty the dissent had in Fabe with the test that the majority set up.

QUESTION: I absolutely am.

MS. KAPPLER: But -- and so the question is, how close must the protection of policyholders be?

QUESTION: And Fabe seemed to be a case in which the Court majority held that the policyholder has a secured interest in the money that will go to pay off that policy, and if that's so, Fabe is a case that's pretty closely related to the very dollars that are going to pay the policyholder, much more close to the words of the contract than to a merger of the entities owning.

MS. KAPPLER: Your Honor, it is precisely related to whether -- as found by every State court that has looked at this, as reflected in the legislative history, as confirmed by those administrators, that it goes directly to whether the policyholder can purchase a policy that is best suited for him or whether they will be coerced into buying a policy they do not want to purchase.

That particular decision, the decision whether the policy is one that is appropriate for them, that was the design behind it. That is the nexus, the establishment of the relationship between the policyholder and the insurer. If that were --

QUESTION: Big banks can coerce and little banks

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can't coerce? I don't understand.

MS. KAPPLER: Your Honor, just the exceptions you're struggling with and Justice Souter was struggling with, the Glendale court struggled with, and found that these were reasonable decisions the court -- the legislature could have made, and in fact they could have decided, these little banks, that there was a problem with the accessibility of insurance in these small towns, so they --

QUESTION: So let the little banks coerce. That's what you'd like --

MS. KAPPLER: Well, it also found that --

QUESTION: Because they need the money, so we'll let the little banks coerce but not the big banks. I can't believe that that's what they --

MS. KAPPLER: No, certainly not. Certainly not, Your Honor. The Glendale court also said and could have reasonably found they didn't have enough power.

Similarly, with regard to credit insurance, the court decided -- the Glendale court --

QUESTION: You say it didn't have enough power to coerce? They're making you the loan. I mean --

QUESTION: You didn't grow up in a small town.

(Laughter.)

MS. KAPPLER: Your Honor -- I did, Your Honor.

Not at a time when I was asking for a loan, Your Honor.

But at the time --

(Laughter.)

MS. KAPPLER: But at the time -- the fact of the matter is that the court looked at this. They heard evidence. They decided this.

I mean, these exceptions don't go any more towards what petitioner wants to say the statute is. Petitioner wants to say this statute just is a protection for insurance agents. Well, if it were just a protection for independent insurance agents, why did they let them sell credit insurance?

We ask the same question. Those exceptions come from something else. The legislature has made hard decisions, hard policy decisions where to draw the line, and has allowed it to sell credit insurance because --

QUESTION: He doesn't have to establish the purpose. You have to establish the purpose. I mean, it may give as many problems to him as it does to you, but it's not part of his case.

MS. KAPPLER: But Your Honor, the purpose is estab -- the purpose is articulated in the preamble, in every State court that has looked at it, who heard evidence, in every -- I mean, in fact, Your Honor, we have established it. Their whole argument is, it's a sham.

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That's their whole argument. It's a sham.

The only way you can do that is to ignore what Florida State courts have definitively said unanimously, without any contradiction, is, in fact, the purpose of these State laws. You must ignore that in order to rule in petitioner's favor, and there's no basis for doing it here, absolutely none.

CHIEF JUSTICE REHNQUIST: Thank you, Ms. Kappler. The case is submitted.

(Whereupon, at 11:10 a.m., the case in the above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

BARNETT BANK OF MARION COUNTY, N.A., Petitioner v. BILL NELSON, FLORIDA INSURANCE COMMISSIONER, ET AL.

CASE NO. : 94-183

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann Marie Federico

(REPORTER)