No. 07-261

In The
Supreme Court of the United States

LIFE PARTNERS, INC.,

Petitioner,

v.

THEODORE V. MORRISON, JR., MARK C. CHRISTIE, and JUDITH WILLIAMS JAGDMANN, in their official capacity as Commissioners of the Virginia State Corporation Commission, ALFRED W. GROSS, in his official capacity as Virginia Commissioner of Insurance, and ROBERT F. McDONNELL, in his official capacity as Attorney General of Virginia,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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BRIEF OF THE VIRGINIA ATTORNEY GENERAL IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When a business transaction alters the contractual obligations between the insurer and the insured in the context of viatical settlements, does the McCarran-Ferguson Act exempt the State's regulation of that transaction from Dormant Commerce Clause limitations?

2. If the McCarran-Ferguson Act does not exempt a State's statute regulating viatical settlements from Dormant Commerce Clause limitations, is the Virginia's regulation of viatical settlements consistent with the Dormant Commerce Clause?

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BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Virginia Attorney General Robert F. McDonnell, who intervened in the district court to defend the constitutionality of a Virginia statute, submits this Brief in Opposition.[1]

INTRODUCTION

This matter involves an as-applied constitutional challenge to Virginia's Viatical Settlements Act ("Virginia Act").[2] Because the Virginia Act directly regulates the relationship between the insurer and the insured, it is exempt from Dormant Commerce Clause scrutiny by the McCarran-Ferguson Act.[3] Even if the McCarran-Ferguson Act did not apply, the Virginia Act, which does not discriminate against interstate commerce on its face or in its practical effect, is constitutional.

Nevertheless, the Petitioner asks this Court to review the Fourth Circuit's judgment upholding the Virginia Act. There is no reason to do so. First, there is no conflict among the Circuits on the issue of whether the McCarran-Ferguson Act applies to the

[1] On September 7, 2007, this Court extended the time for such filing to and including October 29, 2007.

[2] *Virginia Code* §§ 38.2-6000 through 38.2-6015.

[3] 15 U.S.C. § 1012.

regulation of the relationship between the insurer and the insured in the viatical settlement context. While the Circuits have addressed the regulation of the investment aspect of viatical settlements, only the court below has addressed the insurance aspect of viatical settlements. Second, even if there were a conflict among the Circuits on the issue of whether the McCarran-Ferguson Act applies to the regulation of the altered relationship between the insurer and the insured in the viatical settlement context, the Virginia Act is consistent with the Dormant Commerce Clause. Thus, the judgment below is correct, albeit for a different reason. Certiorari should be denied.

STATEMENT OF THE CASE

1. A viatical settlement is a transaction in which a terminally ill or chronically ill person – a viator – sells the right to receive benefits under a life insurance policy for an amount less than the policy's face value. At the core of every viatical settlement is the contract between the insurer and the insured. "While obvious, it must first be stated that the subject of every viatical settlement is an insurance policy. Moreover, the viatical settlement is not collateral to the policy." *Pet. App.* 23a. Indeed, a viatical settlement actually "modifies" the insurance contract, thus "changing the parties' obligations and benefits, while yet leaving the insurance – i.e., the transfer of the specified risk – in place." *Pet. App.* 23a-24a. "At its essence, a viatical settlement is a transaction that fractures the two-part insurance contract between the insurer and the insured and creates a new tripartite arrangement (albeit not a three-party agreement) among the insurer, the insured, and the insured's assignee – the viatical settlement provider." *Pet. App.* 24a. "Because of this new tripartite arrangement, each party has, with respect to the preexisting insurance contract, new or different obligations and benefits." *Pet. App.* 24a.

Since the "power imbalance between the viator and the provider creates a substantial potential for abuse," *Pet. App.* 7a, the States have passed laws and adopted regulations prohibiting unfair business practices. Recognizing "the need to protect viators and to create a transparent and fair viatical settlements market, the National Association of Insurance Commissioners developed the Viatical Settlements Model Act in 1993 and Viatical Settlements Regulation in 1994 to guide States in the regulation of the viatical settlements industry." *Pet. App.* 8a. The Virginia Act, which is based on the Model Act, was passed in 1997 to address Virginia's concern for the potential exploitation of vulnerable and seriously ill individuals. *Pet. App.* 9a.

The Petitioner, Life Partners, Inc. ("LPI") is a Texas-based viatical settlement provider that works with brokers to identify viators and arrange the purchase of the life insurance benefits of residents of

Virginia and other States. LPI is licensed in Texas, but not in Virginia.

2. In 2004, LPI worked with a broker, Ideal Settlements, Inc., to negotiate a viatical settlement with Jane Doe, a Virginia resident.[4] On behalf of a consortium of investors, LPI paid Jane Doe $29,900 for a life insurance policy with a face value of $115,000. LPI's physician examined Jane Doe's medical records and opined that her life expectancy was 6-18 months. Doe received 26% of the face value of her policy, far less than the 60% (life expectancy of 18 months) or 70% (life expectancy of 6 months) required by Virginia law.

After realizing that her payments from LPI were less than the minimum price prescribed by the Virginia Act, Doe filed a complaint with the Virginia State Bureau of Insurance ("Bureau"). The Bureau then asked the Virginia State Corporation Commission ("Commission") to issue a show cause

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[4] In order to consummate the transaction with Jane Doe, LPI had numerous contacts with Virginia. From Virginia, Doe forwarded her application to the broker. The broker in New Jersey called Doe in Virginia to communicate LPI's offers. From Virginia, Doe told her broker that she accepted the offer from LPI. LPI sent by Federal Express© a package to Doe in Virginia. LPI called Doe in Virginia several times, and from Virginia Doe called LPI. Doe received the contract in Virginia, accepted it in Virginia, signed the contract forms in Virginia, and from Virginia, Doe returned the package to LPI. LPI continues to monitor Virginia-resident Doe's medical condition. Indeed, there is no evidence that Doe ever left Virginia during the entire viatical transaction.

order directing LPI to respond to the allegation that it engaged in a viatical settlement with a Virginia resident without being licensed in Virginia as required by law.

3. After the Commission issued the show cause order, LPI filed suit in the district court against the individual members of the Commission, alleging that the Virginia Act was unconstitutional *as applied*. The Virginia Attorney General intervened to defend the constitutionality of the Virginia Act.[5]

The district court held that the Virginia Act, as applied to LPI, was consistent with the Dormant Commerce Clause. *Pet. App.* 39a-71a. In doing so, the court held that the Virginia laws are not "per se" invalid as they do not "directly affect" and/or "clearly discriminate against" interstate commerce. *Pet. App.* 57a-63a. Moreover, the district court held that the Virginia laws have a legitimate local purpose that outweighs any of the incidental burdens the laws impose. In particular, the Virginia Act "has a legitimate and important local purpose, namely, the protection of Virginia viators. It is obvious to the Court that a terminally-ill person with a life expectancy of twenty-four (24) months or less is in a particularly vulnerable position and could easily fall prey to sharp business practices and fraud." *Pet.*

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[5] Although the Virginia Attorney General represents most state agencies, courts, and executive branch officials, he does not represent the Commission or the Bureau.

App. 64a. Further, "nothing short of Virginia's comprehensive regulatory scheme, which couples licensing and registration with price controls, could provide a level playing field for its physically infirm citizens financially constrained to liquidate their life insurance policy." *Pet. App.* 70a. In finding that the Virginia laws did not violate the Dormant Commerce Clause, the district court did not reach the issue of whether the Virginia laws were exempt from such limitations by the McCarran-Ferguson Act. *Pet. App.* 51a.

4. LPI appealed the district court's conclusion that the Virginia Act is constitutional, and the Commissioners cross-appealed on the issue of whether the McCarran-Ferguson Act exempted the Virginia Act from Dormant Commerce Clause review. The Fourth Circuit, in an opinion written by Judge Niemeyer and joined by Judges Michael and Traxler, held that the McCarran-Ferguson Act applies and, thus, properly declined to address the constitutional issue. *Pet. App.* 1a-38a.

Specifically, the court of appeals had "little difficulty in concluding that the Virginia Viatical Settlements Act relates to the regulation of the business of insurance; was enacted for the purpose of regulating the business of insurance; and indeed regulates directly and substantially the actual business of insurance." *Pet. App.* 34a. "[T]he Virginia Viatical Settlements Act regulates directly the conduct and relationships of those traditionally engaged in the insurance business – insurers and insureds." *Pet. App.* 32a. Rehearing *en banc* was unanimously denied. *Pet. App.* 72a-74a. The Petition followed.

REASONS FOR DENYING THE PETITION

Certiorari should be denied for two reasons. First, there is no conflict among the Circuits regarding the applicability of the McCarran-Ferguson Act to a State's regulation of the portion of a viatical settlement transaction that alters the relationship between the insurer and the insured. Indeed, the court of appeals noted that this case was one of first impression. *Pet. App.* 4a. In the absence of a conflict among the Circuits and in a situation where the lower court has upheld the state statute, this Court should decline review.

Second, because the Virginia Act is consistent with the Dormant Commerce Clause, there is an alternative ground for the judgment. The Virginia Act does not discriminate against interstate commerce on its face or in its practical effect. Moreover, the benefits of the statute – protecting terminally ill consumers – outweigh the burdens of LPI having to comply with Virginia law.

I. THERE IS NO CONFLICT AMONG THE CIRCUITS CONCERNING THE APPLICABILITY OF THE McCARRAN-FERGUSON ACT TO TRANSACTIONS ALTERING THE RELATIONSHIP BETWEEN THE INSURER AND INSURED IN THE VIATICAL SETTLEMENT CONTEXT.

A. The McCarran-Ferguson Act Permits States to Regulate the Relationship between the Insurer and the Insured in the Viatical Settlement Context.

Congress, in the exercise of its power to regulate interstate commerce, may explicitly authorize the States to regulate interstate commerce. *See Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 434 (1946).[6] This is exactly what Congress did when it enacted the McCarran-Ferguson Act. *See United States Dep't of Treasury v. Fabe*, 508 U.S. 491, 507 (1993). The McCarran-Ferguson Act declares, "that the continued regulation and taxation by the several States of the business of insurance is in the public interest." 15 U.S.C. § 1011.

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[6] *See also* 1 Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW, 1242 (3d ed. 2000) (discussing the Court's decisions regarding congressional authorization of the States' regulation of interstate commerce). *Cf. United States v. Sharpnack*, 355 U.S. 286, 294 (1958) (upholding "a deliberate continuing adoption by Congress [of laws] as shall have been already put in effect by the respective States").

Moreover,

> [n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State *for the purpose of regulating the business of insurance*, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided [that the Antitrust Laws] shall be applicable to the business of insurance to the extent that such business is not regulated by State Law.

15 U.S.C. § 1012 (emphasis supplied). "The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation and enforcement – these were the core of the 'business of insurance' under McCarran-Ferguson." *Securities & Exch. Comm'n v. National Securities, Inc.*, 393 U.S. 453, 460 (1969). "[W]hatever the exact scope of the statutory term ['business of insurance'], it is clear where the focus was – it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating the relationship, directly or indirectly, are laws regulating the 'business of insurance.'" *Id.* As the court below explained, "direct regulations focused on selling insurance policies and the altering of insurance contracts" surely falls within the reach of the McCarran-Ferguson Act. *Pet. App.* 33a.

Furthermore, Congress intended for the McCarran-Ferguson Act to apply to the States' regulation of viatical settlements. When the viatical settlement provider is licensed in the State where the insured resides, the Internal Revenue Code excludes the proceeds from the sale of a life insurance policy to a viatical settlement provider from taxable income. *See* 26 U.S.C. § 101(g)(2)(B)(i)(I). If the State in which the insured resides does not provide for the licensing of viatical settlement providers, the insured still receives the tax benefit if the viatical settlement provider meets the requirements of sections 8 and 9 of the Viatical Settlements Model Act as well as the requirements of the Model Regulations relating to standards for evaluation of reasonable payments. *See* 26 U.S.C. § 101(g)(2)(B)(ii)(I-II). By "amending the Tax Code in 1996, Congress did far more than just extend significant tax benefits to viators in § 101(g)(2). It made those tax benefits *contingent* upon the viatical settlement provider's compliance with *state* licensing requirements. . . . " *Pet. App*. 35a. "This incorporation of state regulation shows Congress' concern with the pitfalls of an unregulated viatical market. It also reveals congressional trust in regulatory measures to address these pitfalls. . . ." *Pet. App*. 35a.

B. Cases Regulating the Relationship Between the Insurer and a Third Party are Inapplicable to the Regulation of Viatical Settlements.

Relying on *Prudential Ins. Co. of America v. National Park Med. Ctr., Inc.*, 154 F.3d 812 (8th Cir. 1998), *Genord v. Blue Cross & Blue Shield of Michigan,* 440 F.3d 802 (6th Cir. 2006), and *Liberty*

Glass Co. v. Allstate Ins. Co., 607 F.2d 135 (5th Cir. 1979), LPI claims that there is a conflict among the Circuits on the issue resolved by the lower court. *Pet.* at 14-19. Yet, none of these cases deals with the relationship between the insurer and the insured. Rather, they involve the regulation of the relationship between the health care insurer and third parties such as health care providers. This Petition is distinguishable because viatical settlements directly impact the relationship of the insured person with the insurance company.

For example, in *National Park Med. Ctr., Inc.*, the Eighth Circuit found that an Arkansas law did not regulate the "business of insurance" because it did not "define the terms of the relationship between the insurer and the insured, but only the terms of the relationship between the insurer and a third party." *National Park Med. Ctr., Inc.*, 154 F.3d at 830. Similarly, in *Genord*, the state laws at issue regulated billing arrangements between insurance companies and health care providers. Since such arrangements had little, if any, impact on the insured, the court of appeals found that the state laws at issue did not regulate the business of insurance. Thus, the laws were not covered under the McCarran-Ferguson Act. *Genord*, 440 F.3d at 808. Finally, *Liberty Glass* did not involve a challenge to a state law, but a challenge to the alleged pricing and allocation arrangements between automobile insurance companies (the insurers) and third parties ("the manufacturer and installer of automobile replacement glass"). *Liberty Glass*, 607 F.2d at 137. Although the court of appeals held that such arrangements did not constitute "the business of insurance" because they were "agreements between insurers and third party providers of goods and services," *Liberty Glass*, 607 F.2d at 137, that decision is inapplicable to an agreement that alters the relationship between the insured and her insurance company.

In sharp contrast, the Virginia Act regulates transactions involving the core of the relationship between the insurer and the insured. Indeed, "the viatical settlement is not collateral to the policy." *Pet. App*. 23a. "Rather, it modifies it, changing the parties' obligations and benefits, while yet leaving the insurance – i.e., the transfer of the specified risk – in place." *Pet. App*. 24a. "At its essence, a viatical settlement is a transaction that fractures the two-part insurance contract between the insurer and the insured and creates a new tripartite arrangement (albeit not a three-party agreement) among the insurer, the insured, and the insured's assignee – the viatical settlement provider." *Pet. App*. 23a. Specifically, the sale of a policy to a viatical provider alters three key elements of the insurer-insured relationship: (1) a new entity has the right to designate and change beneficiaries; (2) the recipient of life insurance proceeds has changed; and (3) responsibility for the payment of premiums has changed.

Moreover, a viatical transaction requires substantial direct communication among the insured, the provider, and the insurer. In particular, the insurer must scrutinize the transaction to make sure that the transfer is done lawfully, is free from fraud, and that it has accurate data on the new owner (or syndicate of owners) of the policy being sold.[7] Thus, the transactions regulated by the Virginia Act are at the core of the McCarran-Ferguson Act. The decision below dealt with a fundamentally different issue than *National Park Med. Ctr., Inc.*, *Genord*, and *Liberty Glass.* There is no conflict among the Circuits.

[7] Other changes in the insured-insurer relationship are noteworthy as well. "The insurer is faced with the newly divided obligations reflected in the interests of the insured and the viatical settlement provider." *Pet. App.* 24a. As for the insured, she "gives up her financial interest in the insurance contract, her life and the risk of her death remain the subject of the insurance contract." *Pet. App.* 24a. Once the viatical settlement agreement is completed, "the insurer, instead of carrying its obligation to pay on the insurance contact with an insured 'who guards against possible loss and disaster to [her] as an individual,' . . . carries its obligation with a viatical settlement provider, who hopes, for financial reasons, for the early death of the insured." *Pet. App.* 24a.

C. Cases Regulating the Investment Aspect of Viatical Settlements are Inapplicable to the Regulation of the Insurance Aspect of Viatical Settlements.

Contrary to the assertions of LPI, *Securities & Exch. Comm'n v. Life Partners, Inc.*, 87 F.3d 536 (D.C. Cir. 1996), does not demonstrate a conflict between the Circuits. In that case, the court of appeals held that the SEC lacked authority to regulate the *investment* aspect of a viatical transaction, in which the provider sells interests in the policy it purchases to investors. Crucially, the case did not involve the *insurance* aspect of a viatical transaction or any effort to regulate the conduct of the provider and the viator. There is a fundamental difference between regulation of the securities aspect of viatical settlements and regulation of the insurance aspect – particularly when the insured sellers are a uniquely vulnerable population. Furthermore, the D.C. Circuit's decision "has not altogether been embraced by other circuits and continues to generate much discussion in the academic realm." *Wuliger v. Eberle,* 414 F. Supp. 2d 814, 822 (N.D. Ohio 2006). Indeed, at least one Circuit has rejected its reasoning. *See Securities & Exch. Comm'n v. Mutual Benefits Corp.*, 408 F.3d 737, 744 (11th Cir. 2005) (viatical settlements are investment contracts), *cert. dismissed*, 128 S. Ct. ___ (2007). Thus, this decision fails to demonstrate a conflict between the Circuits on the issue decided by the court below.

II. BECAUSE THE VIRGINIA ACT IS CONSISTENT WITH THE DORMANT COMMERCE CLAUSE, THERE IS AN ALTERNATIVE GROUND FOR THE LOWER COURT JUDGMENT.

Even if there were a conflict among the Circuits on the issue of whether the McCarran-Ferguson Act applies to the regulation of the relationship between the insurer and the insured in the viatical settlement context, this Petition would be a poor vehicle for resolving the dispute. Because the Virginia Viatical Settlement Act is consistent with the Dormant Commerce Clause, the lower court judgment is correct, albeit for a different reason.

Because "the peoples of the several states must sink or swim together," *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935), the Commerce Clause[8] contains a "further, negative command, known as [the] [D]ormant [C]ommerce [C]lause," *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995), that "create[s] an area of trade free from interference by the States." *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 328 (1977). Thus, a State may not prohibit the importation of another State's products. *See City of Philadelphia v. New Jersey*, 437 U.S. 617, 629 (1978); *Baldwin*, 294 U.S. at 522-24. Nor may a State attempt to influence the price of products in another State. *See Healy v. Beer*

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[8] U.S. Const. art. I, § 8, cl. 3.

Inst., Inc., 491 U.S. 324, 339 (1989). Similarly, a "State is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the state." *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 10 (1928).[9] When a statute discriminates against interstate commerce "*either* on its face or in practical effect," *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979) (emphasis added), this Court applies a rule of virtual *per se* invalidity.[10] *Philadelphia*, 437 U.S. at 624.[11] To prevail in these circumstances, the State must "demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means." *Maine v. Taylor*, 477 U.S. 131, 138 (1996). Conversely, if the statute does not discriminate against interstate commerce on its face or in its practical effect, then it must be upheld "unless the burden imposed on such commerce is clearly excessive in relation to the

[9] *See also H.P. Hood & Sons v. Du Mond,* 336 U.S. 525, 545 (1949) (invalidating attempt by New York State to inhibit exportation of milk).

[10] The issue of facial discrimination is an issue of law, but the issues of discrimination in their practical effect are issues of fact. *Waste Mgmt. Holdings v. Gilmore,* 252 F.3d 316, 334 (4th Cir. 2001).

[11] *See also Oregon Waste Sys., Inc. v. Department of Envtl. Quality*, 511 U.S. 93, 100 n.4 (1994).

putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

A. The Virginia Act Does Not Discriminate on its Face or in its Practical Effect.

The Virginia Act is facially neutral – it does not distinguish between viatical settlement providers located in Virginia and those located in other States. Indeed, the home of the viatical settlement provider is entirely irrelevant to the application of the Virginia Act. Thus, the Virginia law "visits its effects equally upon both interstate and local business." *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 87 (1987) (citation omitted).

Although a state law also will be found to be *per se* invalid "when its effect is to favor in-state economic interests over out-of-state interests," *Northwest Central Pipeline Corp v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 523 (1989), a requirement that companies conform their business conduct to different laws and regulations in different States is the consequence of our constitutional blueprint of dual sovereignty. That the States retain the power to legislate for the protection of their citizens may be the source of an energetic debate surrounding the issue of preemption, but it is not – by itself – a burden that violates the Dormant Commerce Clause. Put another way, that businesses must comply with multiple states' regulations does not impermissibly burden interstate commerce.[12] In having to comply with regulatory regimes of many States, LPI is in the same position as countless other businesses.[13] Furthermore, the presence of in-state competitors is irrelevant to the Dormant Commerce Clause analysis. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 125 (1978) (The fact that State had no in-state petroleum producers and refiners did not mean that state law discriminated against interstate commerce.).

B. The Virginia Act Survives *Pike* Balancing.

Because the Virginia Act is "directed to legitimate local concerns, with effects upon interstate commerce that are only incidental," *Philadelphia*, 437 U.S. at 624, it will be "upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike,* 397 U.S. at 142.

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[12] *See Merrick v. N.W. Halsey & Co.*, 242 U.S. 569, 587 (1917); *Caldwell v. Sioux Falls Stock Yards*, 242 U.S. 559, 563 (1917); *Hall v. Geiger-Jones Co.*, 242 U.S. 539, 557 (1917).

[13] Indeed, many other Virginia laws, as well as the laws of the forty-nine other States, have the same laudatory objectives (preventing fraud and unfair trade practices) as Virginia's Viatical Settlements Law. *See, e.g., Virginia Code* §§ 6.1-408 through 431 (Virginia Mortgage Lender and Broker Act); §§ 6.1-444 through 471 (Virginia Payday Loan Act), §§ 13.1-504 through 506 (Broker-Dealer registration requirements). Those laws provide for licensing, disclosures, proof of good character and financial soundness – the very concerns addressed by the Virginia laws in question here.

> A statute need not be perfectly tailored to survive *Pike* balancing, but it must be reasonably tailored: "the extent of the burden that will be tolerated . . . depends on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."

Yamaha Motor Corp., U.S.A. v. Jim's Motorcycle, Inc., 401 F.3d 560, 569 (4^{th} Cir.), *cert. denied sub nom., Smit v. Yamaha Motor Corp., U.S.A.*, 546 U.S. 936 (2005). The Virginia Act survives *Pike* balancing for two reasons.

First, *Pike* balancing is inappropriate for neutral consumer protection statutes like the Virginia Act. This Court rejects invitations to

> rigorously scrutinize economic legislation passed under the auspices of police power. There was a time when this Court presumed to make such binding judgments for society, under the guise of interpreting the Due Process Clause. We should not seek to reclaim that ground for judicial supremacy under the banner of the dormant Commerce Clause.

United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 127 S. Ct. 1786, 1798 (2007) (Roberts, C.J., joined by Souter, Ginsburg, & Breyer, JJ., announcing the judgment of the Court) (citation omitted). In other words, because the Virginia Act is an exercise of the police power and because it does not discriminate against interstate commerce on its face or in its practical effect, it should be exempt from

Pike balancing. *Id.* at 1799 (Scalia, J., concurring) (rejecting any form of *Pike* balancing).

Second, the benefits to the citizens of Virginia clearly outweigh any burden on interstate commerce. The Virginia Act serves an important sovereign interest – consumer protection concerns.[14] *See American Trucking Ass'ns, Inc. v. Michigan Pub. Serv. Comm'n*, 545 U.S. 429, 434 (2005). The purpose of the Virginia Act was to establish appropriate safeguards in order to protect Virginia residents, who were facing the last days of their life, from potential fraud and abuse should they wish to become involved in a viatical settlement. Accordingly, the Virginia laws provide for mandatory disclosures to viators, price floors, standards of conduct for providers, privacy protection, truth-in-advertising, and prohibition of unfair trade practices. *See Virginia Code* §§ 38.2-6000 through 6015. Licensing ensures that viatical providers are reputable, financially sound, and trustworthy. Mandatory disclosures and rescission rights require that viators have essential information before (and after) signing viatical settlement agreements. Anti-fraud provisions[15] are of obvious benefit to viators. These provisions easily survive rational-basis review. In addition, the fact that

[14] While LPI would characterize viators as sellers in the marketplace, rather than consumers, they are nonetheless consumers when it comes to the services provided by LPI to facilitate, conclude, and implement the desired transactions.

[15] *Virginia Code* § 38.2-6011.

Congress permitted States to facilitate tax-free income to resident viators by establishing a licensing regime for providers underscores the importance of the local interest achieved by Virginia for its citizens in enacting such a regime. *See* 26 U.S.C. § 101(g)(2).

In sharp contrast, the burden of such regulation on LPI is minimal – the additional costs associated with compliance with the Virginia laws (*e.g.*, filing annual reports, paying the annual fee, and the like). Those costs are avoided easily by simply refusing to enter into transactions with Virginia residents. They have no influence whatsoever on LPI's business elsewhere. Moreover, they are hardly unreasonable when considered in light of the protections that they afford to the terminally ill and – as LPI expands its business – to the elderly. If such a minimal burden constitutes a violation of the Dormant Commerce Clause, then "all of the states" would be forced "to accept the lowest standard for conducting the business permitted by one of them or, perhaps, by foreign countries." *Robertson v. California*, 328 U.S. 440, 460 (1946). The Dormant Commerce Clause does not render a State "helpless to protect her people against the grossest forms of unregulated or loosely regulated foreign insurance" or to destroy "the system for control of purely local insurance business." *Id.*

The Dormant Commerce Clause does not bar reasonable consumer protection laws enacted pursuant to a State's sovereign police power. Thus, regardless of whether the McCarran-Ferguson Act applies, the judgment below is correct, albeit on alternative grounds. This Petition presents neither an appropriate vehicle for elaboration on the scope of the McCarran-Ferguson Act nor an issue worthy of this Court's attention. Certiorari should be denied.

CONCLUSION

For reasons stated above and in the State Corporation Commission's Brief in Opposition, the Petition for a Writ of Certiorari should be **DENIED**.

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