No. 07-261

IN THE

Supreme Court of the United States

LIFE PARTNERS, INC.,

Petitioner,

v.

THEODORE V. MORRISON, JR., in his official capacity as Commissioner of the Virginia State Corporation Commission, ET AL.,

Respondents.

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

REPLY BRIEF FOR PETITIONER

LEE E. GOODMAN
ROBERT P. HOWARD, JR.
DOUGLAS M. PALAIS
CAMERON S. MATHESON
LECLAIR RYAN, A PROFESSIONAL CORPORATION
1101 Connecticut Avenue, N.W.
Suite 600
Washington, D.C. 20036
(202) 659-4140

THEODORE B. OLSON
Counsel of Record
TERENCE P. ROSS
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Petitioner

RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

REPLY BRIEF FOR PETITIONER

The opposition briefs filed by the State Corporation Commission and the Virginia Attorney General do nothing more than underscore the widespread confusion among the lower courts regarding the definition of the "business of insurance" under the McCarran-Ferguson Act. Indeed, both opposition briefs mistakenly argue that Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), controls this case when in fact it is Section 2(a), *id.* § 1012(a), that is the controlling provision. Att'y Gen. Opp. 9; Corp. Comm'n Opp. 15; *see also Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 217-18 & n.18 (1979) ("The primary concern" of the McCarran-Ferguson Act—"assur[ing] that the States are free to regulate insurance companies without fear of Commerce Clause attack"—"is reflected in . . . [§] 2(a) of the Act"). The fact that the officials responsible for regulating insurance in the Commonwealth of Virginia are unable to identify the correct statutory provision for determining whether the McCarran-Ferguson Act shields a state law from the dormant Commerce Clause demonstrates the urgent need for this Court's review.

Respondents' efforts to mask this regulatory confusion and to reconcile the Fourth Circuit's holding with other courts' interpretations of the McCarran-Ferguson Act are wholly unavailing. When respondents' reliance upon irrelevant statutory provisions and superficial factual distinctions is properly discounted, it becomes apparent that the Fourth Circuit endorsed an unprecedented interpretation of the McCarran-Ferguson Act that directly conflicts with other circuits' decisions, that is at odds with this Court's precedent, and that has profound practical implications for the multibillion-dollar viatical and life settlement industry as well as other industries that do business with insurance companies or insureds.

This Court's review is warranted to put an end to the "enduring problem" of defining the "business of insurance" under the McCarran-Ferguson Act.[1]

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENT AND OTHER CIRCUITS' INTERPRETATIONS OF THE MCCARRAN-FERGUSON ACT.

Respondents attempt to obscure the conflict between the decision below and other courts' interpretations of the McCarran-Ferguson Act by arguing that the Act is inapplicable to this case—even though it is the only ground on which the Fourth Circuit's decision rests—and by attempting to draw factual distinctions between the decision below and other courts' McCarran-Ferguson Act jurisprudence. None of these efforts is persuasive.

As an initial matter, respondents contend that the McCarran-Ferguson Act is inapplicable to this case because a provision of the Internal Revenue Code, 26 U.S.C. § 101(g)(2), purportedly exempts state laws regulating viatical and life settlements from the dormant Commerce Clause's requirements. Corp. Comm'n Opp. 8; *see also* Att'y Gen. Opp. 10. The Corporation Commission concedes, however, that "[i]n order for a state law to be insulated from the dormant Commerce Clause, congressional intent to authorize the discriminating law must be either 'unmistakably clear' or 'expressly stated.'" Corp.

---

[1] *Adams v. Plaza Fin. Co.*, 168 F.3d 932, 942 (7th Cir. 1999) (Easterbrook, J., dissenting).

Comm'n Opp. 9 (quoting *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91-92 (1984)). Section 101(g)(2) does not come anywhere close to meeting that standard. The statute provides only that the proceeds of a viatical settlement are excluded from the viator's taxable income if the viatical settlement provider "is licensed for such purposes . . . in the State in which the insured resides," or, "in the case of an insured who resides in a State not requiring the licensing of such persons," if the viatical settlement provider complies with certain requirements under the Viatical Settlements Model Act and Model Regulations. 26 U.S.C. § 101(g)(2). The statute's text provides absolutely no indication—and certainly falls far short of the requisite "unmistakably clear" or "expressly stated" authorization—that Congress intended to authorize States to regulate out-of-state viatical settlement providers without regard to the requirements of the dormant Commerce Clause. *See Ne. Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 472 U.S. 159, 163 (1985) (holding that Congress had authorized the enactment of discriminatory bank holding laws in a statute that explicitly afforded States the discretion to regulate and "authorize[ ]" interstate bank holding transactions). Indeed, Section 101(g)(2)—which appears to have been enacted in response to an I.R.S. decision treating the proceeds of a viatical settlement as taxable income (I.R.S. Priv. Ltr. Rul. 9443020 (July 22, 1994))—is not a grant of authority to the States at all, but rather an income tax provision that affords a tax benefit based, in part, on whether the taxpayer's State of residence has enacted a specific licensing regime.

Respondents next seek to distinguish those cases in which the Fifth, Sixth, and Eighth Circuits have held that transactions between an insurer or an insured and a third party do not constitute the "business of insurance." Even though viatical and life settlements involve only the insured and a third party to the insurer-insured relationship, respondents contend that these cases are factually distinguishable from the decision below because a viatical or life settlement transaction "directly impact[s] the relationship of the insured person with the insurance company." Att'y Gen. Opp. 11; *see also* Corp. Comm'n Opp. 7.

The "direct impact" test proffered by respondents has never been recognized as a definition of the "business of insurance" under the McCarran-Ferguson Act. Indeed, whether or not respondents' self-serving description of viatical and life settlement transactions—which is supported by nothing more than citations to the decision below (*see*, *e.g.*, Att'y Gen. Opp. 2-3)—is accurate, there is no doubt that, in the cases respondents are attempting to distinguish, the transactions and relationships between insurers and third parties also had a "direct[ ] impact[ ]" upon the relationship between the insurer and the insured.

In *Genord v. Blue Cross & Blue Shield of Michigan*, 440 F.3d 802 (6th Cir. 2006), for example, the Sixth Circuit held that a statute regulating agreements between health insurers and health-care providers regarding reimbursement for services to policy holders did not pertain to the "business of insurance" under the McCarran-Ferguson Act (*id.* at 809)—even though the terms on which treatments are reimbursed has a direct impact on an insured, his relationship with the insurer, and the quality of benefits he receives under his insurance contract. Similarly, in *Prudential Insurance Company of America v. Na-*

tional Park Medical Center, Inc., 154 F.3d 812 (8th Cir. 1998), the Eighth Circuit held that the relationship between health insurers and health-care providers seeking to provide services to the plans' members was not the "business of insurance" (*id.* at 830)—despite the fact that the availability of health-care providers has a substantial and direct effect on insureds. *See also Liberty Glass Co. v. Allstate Ins. Co.*, 607 F.2d 135, 137 (5th Cir. 1979) (an agreement between an automobile insurer and a supplier regarding replacement glass for insureds' vehicles did not constitute the "business of insurance").

This same "impact[ ]" on "the relationship of the insured person with the insurance company" is evident in this Court's decisions holding that the McCarran-Ferguson Act does not extend to transactions involving third parties to the insurer-insured relationship. In *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205 (1979), the Court held that agreements between an insurer and a third-party pharmacy regarding drug prices for insureds were not part of the "business of insurance" for McCarran-Ferguson Act purposes. *Id.* at 217. Similarly, in *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119 (1982), the Court concluded that the relationship between an insurance company and a committee that advised the company whether an insured's chiropractic treatments should be reimbursed did not constitute the "business of insurance." *Id.* at 134. The Court reached these conclusions despite the fact that third-party agreements establishing the price that insureds must pay for drugs and the types of medical treatments reimbursable by an insurance company unquestionably exert a "direct[ ] impact[ ]" on the insurer-insured relationship.

Respondents' observation that transactions between insureds and providers of viatical and life settlements may have an impact upon the insurer-insured relationship therefore confirms that this case is *indistinguishable* from the third-party transactions that other courts—including this Court—have held not to constitute the "business of insurance" under the McCarran-Ferguson Act.[2]

Respondents are no more successful when they attempt to reconcile the decision below with the three-factor "business of insurance" standard established by this Court in *Pireno*. The Corporation Commission contends that all three factors are met in this case because a viatical settlement transfers a policyholder's risk by shifting the "risk" that the viator will live a long life to the viatical settlement provider, because the settlement "materially change[s] policy obligations and [is therefore] integral to the insured-insurer relationship," and because it is "aimed at entities operating within the insurance industry." Opp. 20-22 (emphasis omitted).

---

[2] Contrary to the Corporation Commission's assertion (Opp. 25), the fact that the cases discussed above involved transactions between an insurer and a third party, while this case concerns a transaction between an insured and a third party, is completely irrelevant to the McCarran-Ferguson Act analysis. What matters for McCarran-Ferguson Act purposes is that *all* of these transactions involve a third party to the insurer-insured relationship. In the Fifth, Sixth, and Eighth Circuits, such transactions do not constitute the "business of insurance" because their "connection to the insurer-insured relationship is attenuated at best." *Prudential*, 154 F.3d at 830 (internal quotation marks omitted). As the decision below illustrates, in the Fourth Circuit, such third-party transactions can be part of the "business of insurance."

The Corporation Commission's application of each *Pireno* factor is flawed. *First*, a viatical settlement agreement does not spread the viator's risk because the possibility that the viator will live a long life cannot be deemed a "risk" to the viator, who is hoping to live a long life both after entering into the insurance agreement and after entering into the viatical settlement agreement. The only relevant risk to the viator is that he will die early, and that risk was spread to the insurer "at the time that the [insurance contract] [was] entered." *Pireno*, 458 U.S. at 130. *Second*, viatical settlements are not an "integral part" of the insurer-insured relationship because—like the transactions at issue in each of the cases from this Court and from the Fifth, Sixth, and Eighth Circuits discussed above—they involve only one party to that relationship. As this Court explained under analogous circumstances in *Pireno*, "Arrangements between insurance companies and parties outside the insurance industry can hardly be said to lie at the center of [the McCarran-Ferguson Act's] legislative concern." *Id.* at 133. *Third*, Life Partners is not an entity "within the insurance industry." It is a licensed viatical settlement provider and, under Virginia law, is therefore prohibited from holding a license as an insurer. Va. Code § 38.2-6002(F).

Ultimately, nothing in respondents' briefs diminishes the conflict between the Fourth Circuit's expansive interpretation of the McCarran-Ferguson Act and the decisions of both this Court and other lower courts. Only this Court can authoritatively resolve these conflicts.

II. THIS CASE IS THE IDEAL VEHICLE FOR THIS COURT TO RESOLVE A PROFOUNDLY IMPORTANT QUESTION.

The extensive confusion generated by the McCarran-Ferguson Act extends not only to the definition of "business of insurance" under the Act, but also to the distinction between Sections 2(a) and 2(b) of the Act and to the relationship between the different clauses of Section 2(b). Indeed, the Corporation Commission concedes that, because the Fourth Circuit was unsure as to the correct standard to apply in this case, it "analyzed the facts under every possible approach under the McCarran-Ferguson Act" (Opp. 14)—concluding, alternatively, that the Virginia Viatical Settlements Act "relate[s] to the regulation" of the "business of insurance" under Section 2(a) of the Act (Pet. App. 27a), was "enacted 'for the purpose of regulating the business of insurance'" under Section 2(b) of the Act (*id.* at 30a), and, under a "'common-sense understanding[,]' . . . relates to or affects 'the risk pooling arrangement between the insurer and insured'" (*id.* at 22a).

This confusion about the scope and meaning of the McCarran-Ferguson Act is reflected in respondents' briefing. *See* Att'y Gen. Opp. 9 (treating this case as controlled by Section 2(b) of the McCarran-Ferguson Act). It is also evident from the lower courts' difficulties in applying the statute (*see*, *e.g.*, *Int'l Ins. Co. v. Duryee*, 96 F.3d 837, 839 (6th Cir. 1996)), and in this Court's own decisions (*see United States Dep't of Treasury v. Fabe*, 508 U.S. 491, 512 (1993) (Kennedy, J., dissenting) ("The majority's broad holding is not a logical extension of our decision in [*SEC v. National Securities, Inc.*, 393 U.S. 453 (1969)] and indeed is at odds with it.")). Because the Fourth Circuit's decision construed both Sections

2(a) and 2(b) of the McCarran-Ferguson Act, this case provides the Court with the ideal opportunity to clarify each of these areas of confusion under the Act. In the course of determining whether the Virginia Viatical Settlements Act is shielded from the dormant Commerce Clause by the McCarran-Ferguson Act, the Court will have the opportunity to clarify whether Section 2(a) or 2(b) of the Act insulates state laws from the dormant Commerce Clause, the definition of the "business of insurance" under the Act, and whether that definition varies in different clauses of the Act. Each of these issues has generated significant confusion among lower courts and state regulators, and each warrants an authoritative answer from this Court.

Beyond this widespread legal and regulatory uncertainty, there are also compelling practical reasons for this Court to grant review. The Fourth Circuit's expansive interpretation of the McCarran-Ferguson Act authorizes Virginia to use discriminatory and unduly burdensome laws to regulate viatical and life settlement providers with virtually no connection to the Commonwealth. The extraterritorial application of Virginia law discourages out-of-state providers—who may be subject to overlapping and potentially irreconcialable regulatory requirements in other States—from doing business with individuals who reside in the Commonwealth and has dire implications for terminally ill and elderly policyholders who would be able to use the proceeds of a viatical or life settlement to pay medical bills and other essential expenses. *See* Br. of 60/Plus Ass'n, Inc. 3.[3]

[3] The undisputed record below established that Jane Doe paid less than $100 in premiums for her life insurance policy, and sold the right to receive the death benefit for $29,900. C.A.

Although the Commonwealth certainly has the authority to enact laws designed to protect its residents from deceptive and oppressive business practices, the dormant Commerce Clause precludes the Commonwealth from applying those laws in a manner that unduly burdens interstate commerce. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). This Court should grant review to ensure that the States do not invoke the McCarran-Ferguson Act as a basis for enacting parochial laws that regulate business activities that do not even remotely constitute the "business of insurance."[4]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

[Footnote continued from previous page]

J.A. 366-67. She could not have realized this sizable profit if Virginia law had been applied to her out-of-state transaction.

[4] Respondents devote pages of irrelevant argument to the merits of Life Partners' dormant Commerce Clause challenge—an issue that the Fourth Circuit did not reach. Att'y Gen. Opp. 15-22; Corp. Comm'n Opp. 29-31. Whatever the strength of Life Partners' case on the merits—and, in light of the near-total absence of Virginia connections to the transaction between Life Partners and Jane Doe, there is a strong basis for concluding that the Virginia Viatical Settlements Act violates the dormant Commerce Clause as applied to Life Partners—the Fourth Circuit's expansive interpretation of the McCarran-Ferguson Act will remain on the books in the absence of this Court's review. Even if respondents were ultimately to prevail on the merits on remand from this Court, there is a compelling reason for this Court to grant certiorari in order to reconcile the Fourth Circuit's decision with this Court's McCarran-Ferguson Act jurisprudence and to alleviate the pervasive confusion that the Act has fostered among courts and regulators.

LEE E. GOODMAN
ROBERT P. HOWARD, JR.
DOUGLAS M. PALAIS
CAMERON S. MATHESON
LECLAIR RYAN, A PROFESSIONAL CORPORATION
1101 Connecticut Avenue, N.W.
Suite 600
Washington, D.C. 20036
(202) 659-4140

THEODORE B. OLSON
Counsel of Record
TERENCE P. ROSS
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Petitioner

November 13, 2007