No. 23-258

IN THE

Supreme Court of the United States

DELAWARE DEPARTMENT OF INSURANCE,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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October 18, 2023

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INTEREST OF AMICUS CURIAE[1]

Founded in 1871, the National Association of Insurance Commissioners ("NAIC") is the U.S. standard-setting and regulatory support organization created and governed by the chief insurance regulators from the fifty States, the District of Columbia, and five U.S. territories, including the Delaware Department of Insurance ("Department"). The NAIC membership reflects diverse views, with both appointed and elected state officials serving the public interest. Through the NAIC, state insurance regulators establish standards and best practices, conduct peer reviews, and coordinate regulatory oversight. The NAIC represents the collective views of state insurance regulators across the United States and its territories. The NAIC members, together with the NAIC's centralized resources, form the national state-based insurance regulation system.

Throughout its history, the NAIC's purpose has been to provide its members with a national forum that enables them to work cooperatively on regulatory matters that transcend their jurisdictions' boundaries. This allows States, through the NAIC, to develop consistent standards for regulating companies doing business in multiple States and provides a central point of communication and facilitation for joint initiatives with federal and international regulators. Collectively, the state insurance

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[1] Pursuant to Supreme Court Rule 37.2, all parties received timely notice of the intent to file this brief. Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part, and no persons other than *amicus curiae* or its counsel made a monetary contribution to the brief's preparation or submission.

commissioners work to develop model legislation, rules, regulations, handbooks, white papers, and actuarial guidelines that promote and establish uniform regulatory policy.

The States' insurance commissioners are charged with regulating the business of insurance within their jurisdictions under the McCarran-Ferguson Act, 59 Stat. 33, ch. 20, 15 U.S.C. §§ 1011 to 1015. Through the McCarran-Ferguson Act, Congress declared that "the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." 15 U.S.C. § 1011.

The NAIC's interest here arises from its members' interests in maintaining the confidentiality of insurance regulatory information under state law. Effective insurance regulation depends on the regulator's authority to require regulated entities to submit information and the ability to keep this information confidential.

The confidentiality protections in Title 18, Section 6920 of the Delaware Code and similar provisions in state laws foster exchanging information between state insurance regulators and insurers, helping regulators fulfill their mission to protect the public. Individually and collectively, NAIC members and the state agencies over which they preside have a wealth of experience in regulating insurance and collecting and maintaining confidential regulatory information. The NAIC is thus uniquely qualified and situated to explain the negative impact of the Third Circuit's decision.

SUMMARY OF ARGUMENT

Insurance regulation requires a strong framework to keep certain information confidential. To protect the public, state insurance departments need the tools to license, investigate, and examine insurers. These insurers rely on statutory confidentiality protections when disclosing information during these regulatory processes. Regulators, in turn, rely on statutory confidentiality protections when sharing and receiving confidential information with and from other state, federal, and international entities. The Third Circuit's erroneous decision threatens to upend this framework.

State laws guaranteeing that information submitted to state insurance departments will remain confidential is a key pillar in this system. *First*, many States' confidentiality protection laws, including Delaware's § 6920, are substantially similar to the NAIC's model confidentiality language. The Third Circuit's decision will thus frustrate state laws across the country.

Second, ineffective confidentiality laws will, in turn, undermine national and international information-sharing agreements that permit regulators to share information freely. These agreements' signatories rely on other signatories' compliance with the strict confidentiality regime imposed under their laws. If States cannot guarantee to their domestic and international partners that they can keep shared information confidential, regulatory cooperation will be hampered.

Finally, the Third Circuit's decision is wrong on the merits. Reverse preemption under the McCarran-Ferguson Act does not require a separate and inde-

pendent finding that the "regulated conduct" is "the business of insurance." Allowing this decision to stand will intrude on the States' broad regulatory authority over the business of insurance as Congress intended.

For these reasons, this Court should grant the Petition.

ARGUMENT

The Third Circuit's decision is manifestly incorrect, creates a circuit split, and conflicts with decades of this Court's consistent precedents. As the Petition aptly discusses, and as briefly addressed in Section III below, the Petition's merits warrant this Court's review.

In this brief, the NAIC stresses the substantial risk the Third Circuit's error poses to insurance regulation as a whole and the NAIC's and its members' efforts to maintain healthy insurance markets and protect consumers. The confidentiality provisions at issue here—and their corollaries across States—are crucial to ensuring that regulatory agencies can effectively regulate the nation's insurance markets. They also ensure that domestic and international regulators can work together to maintain a comprehensive view of the marketplace and of individual insurers.

This Court should grant the Petition.

I. State Confidentiality In The Sharing of Regulatory Information Is a Priority of The NAIC and The States.

As the Department explained in its Petition, the Third Circuit applied the wrong test to determine if § 6920 trumps a federal subpoena and erred in finding that a statute enacted "for the purpose of

regulating the business of insurance" is not saved from preemption. 15 U.S.C. § 1012(b). The NAIC and its members endorse the Department's position and appear here to stress the risk that the Third Circuit's errors will undermine state confidentiality laws—a critical part of the insurance regulatory system.

Maintaining and protecting confidentiality is critical in exchanging certain information with regulated entities and regulators.[2] Similarly, sharing confidential regulatory information without compromising the appropriate level of confidentiality is key to enhancing consumer protection and more efficient, coordinated regulatory action.

State law recognizes and protects regulators' need to receive and disclose confidential information by and between regulators. Indeed, all States have provisions to protect the confidentiality of this information. For good reason. If insurers believe the information provided to regulators for legitimate and recognized regulatory purposes could be subpoenaed or subject to civil discovery in outside litigation, they will be substantially less forthcoming with the information that they share. Not only that, but the sharing of confidential information between regulators will also be chilled.

Three examples specific to the NAIC illustrate the risk posed by the Third Circuit's decision.

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[2] Of course, not all information provided by insurers to regulators is confidential. But highly sensitive information—for example, information that could compromise the competitive business capabilities of insurers, or information that contains private policyholder information—is commonly designated by statute and/or regulation to remain confidential.

A. The Third Circuit's Decision Jeopardizes the NAIC's Model Laws With Respect to Confidentiality and Information Sharing.

The operative confidentiality language in § 6920 of the Delaware Code is consistent with Section 5F(3)(a) of the NAIC's Model Law on Examinations (#390) and other model laws, which set out confidentiality protections for various types of information. The Model Law on Examinations provides:

> In order to assist in the performance of the commissioner's duties, the commissioner . . . [m]ay share documents, materials or other information, including the confidential and privileged documents, materials or information subject to Paragraph (1), with other state, federal and international regulatory agencies, with the National Association of Insurance Commissioners and its affiliates and subsidiaries, and with state, federal and international law enforcement authorities, provided that the recipient agrees to maintain the confidentiality and privileged status of the document, material, communication or other information[.]

NAIC Model Law, Regulations, and Guidelines ("NAIC Model Law"), Model Law on Examinations, MO-390-4, § 5F(3)(a) (1999), available at https://content.naic.org/sites/default/files/MO390.pdf.

This model law is generally applicable to all licensed insurance companies and contains language consistent with the language that the Third Circuit held is preempted. Many States have adopted this model language, illustrating the substantial risk that

the Third Circuit's errant opinion poses to state law nationwide. *See* NAIC Model Law, Model Law on Examinations, ST-390-2–390-6 (2019), available at https://content.naic.org/sites/default/files/ST390.pdf.

This model law's history also underscores the importance of keeping information confidential. The original 1956 version did not address the confidentiality of examination materials shared with commissioners or information sharing requirements with other state, federal, and international regulators. But in 1999, it became clear that an amendment was essential to address the need to share information among regulators and to clarify existing law.

To this end, the NAIC developed charges for several NAIC committees to address freedom of information and subpoena efforts to obtain confidential information and documents, as well as to achieve a coordinated approach to protect regulatory information. The main purposes for the new language were to (1) "solidify existing law on confidentiality of sensitive documents that were in the possession of the regulator;" (2) "provide a strong platform for States to use in entering into confidentiality agreements with state, federal and international regulators;" and (3) "keep sensitive regulatory information out of the hands of private civil litigants, thus preventing abuse of the discovery process." NAIC, Proceedings of the NAIC, 1999 2d Quarter Vol 1 (1999), at 149, 150, available at https://naic.soutronglobal.net/Portal/Public/en-US/DownloadImageFile.ashx?objectId=5400&ownerType=0&ownerId=17594.

As a result of this process, the NAIC amended several model laws in 1999 to improve model statutory protections for confidential information. These amendments provided States with a template for enhancing confidentiality protections and authorizing respective states' insurance commissioners to disclose and receive confidential information with other state, federal, and international regulators if certain conditions are met. In general, these model provisions provide that the commissioner may share the information with other state, federal, and international regulators; law enforcement agencies; and the NAIC, as long as the recipient agrees to maintain the information's confidentiality and possesses the authority to do so.

These critical protections were then incorporated into many NAIC model laws, including the Model Law on Examinations, Risk-Based Capital Model Act, Participation in the NAIC Insurance Regulatory Information Systems Model Act, Insurance Holding Company System Regulatory Act, and Producer Licensing Model Act.[3]

Without statutory assurances that regulators can and will maintain confidentiality of information—and that state confidentiality laws mean what they say—insurers are likely to be less forthcoming with regulators who need certain information to carry out their public responsibilities. What's more, regulators

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[3] NAIC Model Law, Model Law on Examinations, MO-390-4–5, § 5F(3)(a) (1999); *id.*, Risk-Based Capital Model Act, MO-312-8–9, § 8C(1) (2012); *id.*, Participation in the NAIC Insurance Regulatory Information System (IRIS) Model Act, MO-395-1, § 4C(1) (2000); *id.*, Insurance Holding Company System Regulatory Act, MO-440-26–27, § 8C(1) (2021); *id.*, Producer Licensing Model Act, MO-218-10–11, § 15F(3)(a) (2005).

are likely to be less forthcoming with their counterparts on whom they mutually rely for confidential information about entities operating in their respective jurisdictions.

The Third Circuit's errant decision threatens the NAIC's essential model laws on the confidentiality of information shared with regulators. These model laws—adopted by States nationwide—are essential to ensuring robust regulation and consumer protection. This Court's intervention is critical to resolving the circuit split and to ensure these protections are maintained.

B. The Third Circuit's Decision Threatens The "Master Information Sharing and Confidentiality Agreement."

Besides maintaining these relevant model laws, the NAIC facilitates the Master Information Sharing and Confidentiality Agreement ("Information Sharing Agreement") for its members. The insurance departments of all fifty States, the District of Columbia, and Puerto Rico have entered into the Information Sharing Agreement, which covers confidential information exchanges among the States on an ongoing basis. Establishing a global agreement satisfies many States' requirement that the party receiving the confidential information agree in writing to keep such information confidential.

The Master Agreement, like the NAIC model confidentiality language, depends on the understanding that confidential information will be shared only with entities with which the insurance regulator is authorized by statute to share. And, once again, those entities are ones who can demonstrate an ability to maintain the confidentiality of information

provided by the insurance regulator. In fact, many States rely on their laws' confidentiality and information-sharing provisions (tracking the NAIC model laws) to enter into the Master Agreement and share confidential information with other regulators.

To be clear, the Information Sharing Agreement is not the basis for confidentiality of this information. Rather, each State's underlying and supporting laws (many of which track the NAIC's model language) provide that legal authority. And by signing the Agreement, each State represents that it has the legal authority necessary to protect from disclosure and to otherwise preserve the confidential information received under the Agreement.

In short, the Information Sharing Agreement establishes an efficient and robust confidentiality framework allowing the States to regulate their insurers. Because the reasoning of the Third Circuit's decision upends the legal obligation on which the Agreement depends, this Court should grant the Petition.

C. The Confidentiality Requirements are So Critical That The NAIC's Accreditation Program Requires These Robust Protections.

The NAIC Financial Regulation Standards and Accreditation Program ("Accreditation Program") is the backbone of the nation's state-based insurance regulation system. NAIC, The NAIC Accreditation Program (Nov. 2021), https://content.naic.org/sites/default/files/government-affairs-brief-accreditation-program.pdf. The Accreditation Program defines baseline standards deemed essential for effective solvency regulation in each State. In June 1989, the

NAIC adopted the Financial Regulation Standards ("Standards") to guide state legislatures and insurance departments in developing effective solvency regulation. *Ibid.* A year later, the NAIC adopted a formal certification program to guide the States on implementing the Standards and incentivize their adoption. *Ibid.*

The NAIC's Accreditation Program Manual confirms that States "should allow for the sharing of otherwise confidential documents, materials, information, administrative or judicial orders, or other actions with the regulatory officials of any state, federal agency or foreign countries ***provided that*** the recipients are required under law to maintain its confidentiality." NAIC, *Accreditation Program Manual* 243 (2023) (emphasis added).[4] Once again, these confidentiality protections are the cornerstone of effective information sharing and regulation.

The Accreditation Program encourages States to adopt, in a consistent manner, the NAIC model laws, regulations, and requirements, which work together to establish the nation's insurance financial solvency framework. *See* NAIC Accreditation Program, *supra*. It ensures that state insurance departments "perform adequate and timely financial analysis and examinations, maintain appropriate organizational and personnel practices, and have sufficient resources and statutory authority to carry out their duties." *Ibid.*

Accreditation, granted to those States aligned with the Standards, fosters accountability and uniformity and allows regulators of multi-state insurers

[4] The NAIC's Accreditation Program Manual is designated confidential "For Regulator Use Only."

to rely on the domiciliary state's solvency regulation to avoid duplication of effort and expense. *Ibid.* For example, each accredited State's laws or regulations provide that all licensed companies are to be examined periodically. *Ibid.* Instead of performing its own examination, a State may accept the examination report prepared by another insurance department accredited at the time of examination. *Ibid.* This interstate reliance saves insurance companies and, by extension, consumers, millions of dollars in duplicative examination costs. *Ibid.*

Ultimately, the Accreditation Program promotes interstate cooperation, reduces regulatory redundancies, and provides baseline consumer protections. *Ibid.* The standards used in the accreditation process are carefully considered and are developed in an open and transparent NAIC multi-layered committee process. *Ibid.* Regulators receive input from many interested parties, including state legislators, consumer representatives, and industry representatives. *Ibid.* And significant negative consequences stem from losing accreditation, including the potential loss of domiciled insurers and consequences for the state insurance departments' professional reputations. *Ibid.*

One of the Accreditation Program's key features is the requirement that these various entities maintain the confidentiality of information. The Third Circuit's decision places this carefully developed and efficient system in limbo, and this Court should grant the Petition to correct this.

II. These Confidentiality Requirements Are Just as Critical In The International Regulatory Framework.

This is not simply a domestic concern; international insurance regulators likewise understand the need for robust confidentiality protections.

The International Association of Insurance Supervisors is a voluntary membership organization of insurance supervisors and regulators from more than 200 jurisdictions. Int'l. Ass'n. Ins. Supervisors, *Frequently Asked Questions on the IAIS Multilateral Memorandum of Understanding (IAIS MMoU)*, at 2 (Dec. 2021), https://bit.ly/3txuD7u ("MMoU FAQs"). The IAIS's mission is to promote effective and globally consistent supervision of the insurance industry to develop and maintain fair, safe, and stable insurance markets, benefitting and protecting policyholders and contributing to global financial stability. *Ibid.*

Established in 1994, the IAIS is the international standard-setting body responsible for developing principles, standards, and other supporting material for supervising the insurance sector. *Ibid.* The IAIS also provides a forum for members to share knowledge on supervising insurance markets. *Ibid.*

Through its membership in the Financial Stability Board and the Standards Advisory Council of the International Accounting Standards Board and its partnership in the Access to Insurance Initiative, the IAIS coordinates with other international financial policymakers and associations of supervisors or regulators and helps shape financial systems globally. *Ibid.* Recognizing its collective expertise, G20 leaders and other international standard-setting bodies rou-

tinely call on the IAIS for input on insurance issues as well as regulating and supervising the global financial sector. *Ibid.*

The IAIS Multilateral Memorandum of Understanding is a framework that establishes a formal basis for global cooperation and information exchange among insurance supervisors. *IAIS Multilateral Memorandum of Understanding (IAIS MMoU)*, Int'l. Ass'n. Ins. Supervisors, https://bit.ly/3FfRcjz. Before signing, IAIS members undergo a rigorous review process. *Ibid.*

Eighty-three IAIS members, including the Department, have signed the MMoU, accounting for over three-quarters of the global insurance sector (measured by gross written premiums). *Ibid.* Each signatory may rely on each other's compliance with the strict confidentiality regime imposed under their respective domestic laws, which each signatory had to confirm and establish before signing. MMoU FAQs at 5. Signatories may exchange relevant information with and support each other freely, promoting cross-border insurance operations' financial soundness and stability to benefit and protect policyholders. *Ibid.*

Based on its domestic insurance regulation work and its extensive cooperation with international regulators, the NAIC believes the best way to preserve confidential information shared among regulators, either directly or through the NAIC, is to have a solid foundation of state confidentiality laws and for all jurisdictions to know the procedures for receiving and disclosing confidential information. Although that exists now, both domestically and internationally, the Third Circuit's error jeopardizes everything.

III. This Court Should Grant The Petition To Correct The Third Circuit's Manifest Error.

As the Petition effectively describes, the Third Circuit's decision conflicts not only with this Court's precedent, but with every other circuit to speak on the issue. Given the importance of the Delaware law at issue, and the many similar laws across the country, this Court's intervention is particularly warranted.

In passing the McCarran-Ferguson Act—and the reverse-preemption provision in particular—Congress resolved any uncertainty over the States' primary regulatory authority over the business of insurance. In the nearly eight decades since its enactment, the McCarran-Ferguson Act has withstood the test of time, and the regulation of the business of insurance has remained squarely on the States' shoulders. "Obviously Congress' purpose was broadly to give support to existing and future state systems for regulating and taxing the business of insurance." *U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491, 500 (1993) (quoting *Prudential Ins. v. Benjamin*, 328 U.S. 408, 429 (1946)).

Ignoring that consistent command, the Third Circuit determined that the McCarran-Ferguson Act's reverse-preemption provision requires courts to make a threshold determination on whether the conduct at issue broadly constitutes the "business of insurance" when evaluating whether a state law is within the Act's protection. App. 19–20 (citing *Sabo v. Metro. Life Ins.*, 137 F.3d 185, 189 (3rd Cir. 1998)). But this threshold determination, based on whether

"conduct" constitutes the business of insurance, is absent from § 1012(a)'s text:

> (a) State regulation. The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

Nothing in § 1012(a) suggests that "conduct" should be considered, much less that such conduct must constitute "the business of insurance." As this Court properly recognized in *Fabe*, this clause "was intended to further Congress' primary objective of granting the States broad regulatory authority over the business of insurance." 508 U.S. at 505.

The Third Circuit's invented approach frustrates the McCarran-Ferguson Act's purpose, excluding from its protection many state laws enacted to regulate the business of insurance even though the specific conduct regulated is not "the business of insurance." That approach is inconsistent with the statute's plain language, decades of this Court's precedent, and all other circuits to opine on the issue.

CONCLUSION

This Court should grant the Petition.

Respectfully submitted,

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