IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21-3008

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

STATE OF DELAWARE DEPARTMENT OF INSURANCE,

Defendant-Appellant,

On Appeal from an Order of the United States District Court
District of Delaware
C.A. No. 20-829

The Honorable Maryellen Noreika

BRIEF OF DELAWARE CAPTIVE INSURANCE ASSOCIATION, INC., SELF-INSURANCE INSTITUTE OF AMERICA, INC., ARIZONA CAPTIVE INSURANCE ASSOCIATION, CAPTIVE INSURANCE COUNCIL OF THE DISTRICT OF COLUMBIA, MISSOURI CAPTIVE INSURANCE ASSOCIATION, NORTH CAROLINA CAPTIVE INSURANCE ASSOCIATION, OKLAHOMA CAPTIVE INSURANCE ASSOCIATION, SOUTH CAROLINA CAPTIVE INSURANCE ASSOCIATION, TENNESSEE CAPTIVE INSURANCE ASSOCIATION, AND UTAH CAPTIVE INSURANCE ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amicus Curiae* Delaware Captive Insurance Association, Inc. discloses that it has no parent corporation, and there is no publicly held corporation that holds 10 percent or more of its stock.

Amicus Curiae Self-Insurance Institute of America, Inc. discloses that it has no parent corporation, and there is no publicly held corporation that holds 10 percent or more of its stock.

Amicus Curiae Arizona Captive Insurance Association discloses that it has no parent corporation, and there is no publicly held corporation that holds 10 percent or more of its stock.

Amicus Curiae Captive Insurance Council of the District of Columbia discloses that it has no parent corporation, and there is no publicly held corporation that holds 10 percent or more of its stock.

Amicus Curiae Missouri Captive Insurance Association discloses that it has no parent corporation, and there is no publicly held corporation that holds 10 percent or more of its stock.

Amicus Curiae North Carolina Captive Insurance Association discloses that it has no parent corporation, and there is no publicly held corporation that holds 10 percent or more of its stock.

Amicus Curiae Oklahoma Captive Insurance Association discloses that it has no parent corporation, and there is no publicly held corporation that holds 10 percent or more of its stock.

Amicus Curiae South Carolina Captive Insurance Association discloses that it has no parent corporation, and there is no publicly held corporation that holds 10 percent or more of its stock.

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Dated: March 14, 2022

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INTEREST OF *AMICI CURIAE*

Amici Curiae[1] are insurance industry associations from across the nation focused on protecting and promoting the business interests of thousands of companies involved in the captive insurance industry. A captive insurance company is wholly owned and controlled by its insureds. Its primary purpose is to insure the risk of its owners/insureds who benefit from the captive's underwriting profits. Business entities that are experienced in establishing and managing captive insurance companies are called "Captive Managers" and they facilitate the creation, formation, and management of captive insurers in jurisdictions that have passed captive insurance legislation such as Delaware. Membership in the *Amici* is composed primarily of captive insurance companies, Captive Managers, and other captive insurance service providers.

Amici respectfully submit this brief to bring to the Court's attention the widespread effect of the district court's decision on *Amici* and others in the United States insurance industry. Further, this brief presents additional authority and policy

[1] Delaware Captive Insurance Association, Inc., Self-Insurance Institute of America, Inc., Arizona Captive Insurance Association, Captive Insurance Council of the District of Columbia, Missouri Captive Insurance Association, North Carolina Captive Insurance Association, Oklahoma Captive Insurance Association, South Carolina Captive Insurance Association, Tennessee Captive Insurance Association, and Utah Captive Insurance Association (collectively, "*Amici*").

reasons why the interests of *Amici* and others in the insurance industry should be considered in cases such as this one.

STATEMENT OF AUTHORITY TO FILE

Amici have moved to file this brief pursuant to Federal Rule of Appellate Procedure 29(a)(2). This brief was not authored, in whole or in part, by any party's counsel. No one other than *Amici* contributed money intended to fund the preparation or submittal of this brief.

ARGUMENT

The crux of this case is whether the United States Internal Revenue Service ("IRS") can circumvent federal and Delaware statutory law to obtain confidential documents pertaining to captive insurance companies through a third-party administrative summons to the Insurance Commissioner of Delaware (the "Commissioner") as opposed to seeking the documents directly from the entities themselves. Here, IRS filed a petition to enforce a summons to compel the Commissioner to violate statutory law by producing confidential information related to certain micro-captive insurance companies that those entities were required by law to provide to Delaware as part of its insurance regulatory scheme. The statute prohibiting the disclosure of this information is 18 *Del. C.* § 6920, which provides:

> All portions of license applications reasonably designated confidential by or on behalf of an applicant captive insurance company, all information and documents, and any copies of the foregoing, produced or obtained by or

> submitted or disclosed to the Commissioner pursuant to subchapter III of this chapter of this title that are reasonably designated confidential by or on behalf of a special purpose financial captive insurance company, and all examination reports, preliminary examination reports, working papers, recorded information, other documents, and any copies of any of the foregoing, produced or obtained by or submitted or disclosed to the Commissioner that are related to an examination pursuant to this chapter must, unless the prior written consent (which may be given on a case-by-case basis) of the captive insurance company to which it pertains has been obtained, be given confidential treatment, are not subject to subpoena, may not be made public by the Commissioner, and may not be provided or disclosed to any other person at any time except:
>
> (1) To the insurance department of any state or of any country or jurisdiction other than the United States of America; or
>
> (2) To a law-enforcement official or agency of this State, any other state or the United States of America so long as such official or agency agrees in writing to hold it confidential and in a manner consistent with this section.

18 *Del. C.* § 6920 ("Section 6920").

On September 29, 2021, the District Court held, in short, that (1) before addressing the substance of the reverse-preemption inquiry, a threshold analysis is required to determine whether the conduct at issue is the "business of insurance," and (2) the challenged conduct is characterized as "record maintenance" and not the "business of insurance." *United States of America v. Delaware Department of Insurance*, C.A. No. 20-829-MN-CJB, D.I. 35 at 13-14 (D. Del. Sept. 29, 2021).

The District Court primarily focused on the question of whether a threshold test should be applied and case law interpreting the "business of insurance."

The District Court found that two opinions from this Court, *Sabo v. Metro. Life Ins. Co.*, 137 F.3d 185 (3d Cir. 1998) and *Highmark, Inc. v. UPMC Health Plan, Inc.*, 276 F.3d 160 (3d Cir. 2001), provide that before a court determines whether the McCarran-Ferguson Act ("MFA") applies, it must consider the threshold question of whether the activity in question constitutes the "business of insurance." The District Court rejected the argument that two United States Supreme Court cases, *U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491, 499 (1993) and *Humana Inc. v. Forsyth*, 525 U.S. 299, 307 (1999), implicitly overrule *Sabo* or that the threshold analysis in *Sabo* and *Highmark* is inconsistent with these Supreme Court decisions.

Amici respectfully submit that the District Court erred. The District Court's reliance on the threshold test is inconsistent with Supreme Court authority and black-letter statutory construction principles. Indeed, it appears that the pertinent question of whether Section 6920 is a "law enacted by any State for the *purpose of regulating* the business of insurance" and therefore, entitled to reverse preemption under the MFA, was not considered. As explained further, Section 6920 was enacted for the *purpose of regulating* the business of insurance and is entitled to reverse preemption. The District Court's decision should be reversed.

I. THE MCCARRAN-FERGUSON ACT.

The MFA was enacted in response to the United States Supreme Court's decision in *U.S. v. South–Eastern Underwriters Assn.*, 322 U.S. 533 (1944), which held that an insurance company that conducted a substantial part of its business across state lines was engaged in interstate commerce and, therefore, was subject to antitrust laws. *Fabe*, 508 U.S. 491, 499 (1993). "Prior to that decision, it had been assumed that [i]ssuing a policy of insurance is not a transaction of commerce, subject to federal regulation." *Id.* (internal citation omitted). Accordingly, "the States enjoyed a virtually exclusive domain over the insurance industry." *Id.* To allay fears with respect to state power to tax and regulate the insurance industry, Congress restored supremacy to the States through the MFA. Section 1012 of the MFA provides:

> **(a) State regulation**
> The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> **(b) Federal regulation**
> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, 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.

In other words, as discussed in *Humana Inc. v. Forsyth*, courts must determine whether (1) the state law was enacted "for the purpose of regulating the business of insurance," (2) the federal statute "does not specifically relate to the business of insurance," and (3) the federal statute would "invalidate, impair, or supersede the State's law." 525 U.S. 299, 307 (1999).

II. REVERSE PRE-EMPTION IS APPLICABLE HERE.

The District Court's holding that it must first apply a threshold test contradicts black-letter statutory construction principles. Indeed, it is well-settled that "[t]he first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *U.S. v. Cooper*, 396 F.3d 308, 310 (3d Cir. 2005), *as amended* (Feb. 15, 2005). "Where the language of the statute is clear . . . the text of the statute is the end of the matter." *Id.* However, if the language of the statute is unclear, courts will attempt to discern Congress' intent using the canons of statutory construction. *Id.* "If the tools of statutory construction reveal Congress' intent, that ends the inquiry." *Id.* If, on the other hand, the court is unable to discern Congress' intent using tools of statutory construction, the court will generally defer to the governmental agency's reasonable interpretation. *Id.* It is also a well-known canon of statutory construction

that courts should construe statutory language to avoid interpretations that would render any phrase superfluous." *Id.* at 312.

Here, the Supreme Court's decision in *Fabe* sets forth the correct analysis consistent with the statutory construction framework. In *Fabe*, the Supreme Court held that an Ohio statute escaped federal preemption to the extent that it protected policyholders. *Fabe*, 508 U.S. at 508. In its analysis, the *Fabe* Court determined that it must first look to the language of the MFA to construe the meaning of the statute. *Id.* at 500. The Court held that because it was clear that the federal priority statute at-issue would "invalidate, impair, or supersede" the Ohio priority scheme and that the federal priority statute did not "specifically relat[e] to the business of insurance," all that is left for the Court to determine was whether the Ohio priority statute is a law enacted "for the purpose of regulating the business of insurance." *Id.* at 501. Thereafter, the Court found that the Ohio statute was enacted for the purpose of regulating the business of insurance because it was "aimed at protecting or regulating" the performance of an insurance contract. *Id*. at 505, 508.

Here, the state law at-issue is Section 6920 of the Delaware Captive Law, which provides confidentiality, immunity from subpoena, and immunity from disclosure for confidential documents relating to the license application for captive insurance, and forbids the Commissioner or Delaware Department of Insurance from disclosing such documents other than to insurance departments or law enforcement

or agencies of a state or the United States with an agreement in writing to hold it confidential in a manner consistent with the section. 18 *Del. C.* § 6920.

Applying the MFA in this case, there should be no doubt that the application of the Federal Tax Code would "invalidate, impair, or supersede" Section 6920 of the Delaware Captive Law and the Tax Code does not "specifically relate[] to the business of insurance." *See Fabe*, 508 U.S. at 501. After all, complying with the IRS's summons would require the Commissioner to violate Section 6920 absent an agreement by the IRS to maintain the confidentiality of the documents. Accordingly, similar to *Fabe*, all which is left for this Court to determine is whether Section 6920 of the Delaware Captive Law was enacted "for the purpose of regulating the business of insurance." *See id.*

As *Fabe* recognized, "[t]he broad category of laws enacted 'for the purpose of regulating the business of insurance' consists of laws that possess the 'end, intention, or aim' of adjusting, managing, or controlling the business of insurance." *Fabe*, 508 U.S. at 505. It is not lawful, anywhere in the United States, for an entity to issue insurance policies or pay claims without first having applied for, and received, a license (typically referred to as a "Certificate of Authority"). Here, because Section 6920 is aimed at receiving, maintaining and restricting the dissemination of application and licensing information of captive insurers, it is part-and-parcel of the licensing process for Delaware captive insurers, and, accordingly,

was enacted for the purpose of regulating the business of insurance. Indeed, a state's regulation of "the licensing of [insurance] companies" has long been considered to be the "regulation of the business of insurance." *Sec. & Exch. Comm'n v. Nat'l Sec., Inc.*, 393 U.S. 453, 460 (1969) (internal citation omitted)); s*ee also* 44 C.J.S. Insurance § 55 ("The phrase "business of insurance," includes fixing of rates, selling and advertising of policies, and licensing of companies and their agents."). Because the submission of the information to Delaware now sought by the IRS is a necessary part of Delaware's licensing scheme for captive insurance companies, a statute dealing with the dissemination of such information plainly is designed "for the purpose of regulating the business of insurance."

The District Court's reliance on *Sabo* and *Highmark* for the proposition that a threshold test is required before determining whether the MFA applies is erroneous and inconsistent with *Fabe* (decided before *Sabo*) and *Humana* (decided before *Highmark*). This Court has analyzed the differences between the two clauses in the MFA in *In re Ins. Brokerage Antitrust Litig.*:

> This "first clause ... impos[es] what is, in effect, a clear-statement rule, a rule that state laws enacted 'for the purpose of regulating the business of insurance' do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise." . . . . Both clauses incorporate the phrase "business of insurance," but as the Supreme Court has emphasized, the respective protections afforded to state law under the two clauses are of different scopes. "The first clause commits laws 'enacted ... for the purpose of regulating the business of

> insurance' to the States, while the second clause exempts only 'the business of insurance' itself from the antitrust laws." Because "[t]he broad category of laws enacted 'for the purpose of regulating the business of insurance' . . . necessarily encompasses more than just the business of insurance," judicial determinations made when applying one clause may not be dispositive when applying the other.

618 F.3d 300, 360 (3d Cir. 2010). This Court further held that:

> In light of *Fabe*, we interpret this to mean that although any state law that regulates "the selling and advertising of insurance" will qualify as a "law enacted by [a] State for the purpose of regulating the business of insurance" under clause one of the [MFA], "the selling and advertising of insurance" is not the "business of insurance" under clause two unless it has some effect on "reliability" or underwriting issues.

Id. at 360–61. Accordingly, by inquiring whether the challenged conduct constitutes the "business of insurance," the *Sabo* and *Highmark* threshold test effectively first looks to the more-narrow interpretation of Clause Two. This contradicts the analysis applied in *Fabe* and *Humana:*

> The first clause commits laws 'enacted . . . for the purpose of regulating the business of insurance' to the States, while the second clause exempts only "the business of insurance' itself from the antitrust laws. To equate laws 'enacted . . . for the purpose of regulating the business of insurance' with the 'business of insurance' itself, as petitioner urges us to do, would be to read words out of the statute. This we refuse to do.

Fabe, 508 U.S. 491, 504 (1993). Delaware's captive insurance statutes that address the application process, including Section 6920 addressing the confidentiality of

application materials and other information obtained only through the process of regulating the insurer, are undoubtedly enacted for the *purpose* of regulating the business of insurance. Information collected by the Department and subject to Section 6920 is used by the Department to assess the potential feasibility and solvency of the proposed licensee, and the fitness of its proposed management team. Absent the need to regulate captive insurance companies in Delaware, there would be no conceivable purpose behind Section 6920.

III. CONGRESS' INTENT IS CLEAR AND ADOPTING THE APPELLEE'S ARGUMENT WOULD UNDERMINE THE INSURANCE INDUSTRY.

The first section of the MFA makes its mission clear: "Congress hereby declares 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." *Id.* at 500; 15 U.S.C. § 1011. The United States Supreme Court has recognized that "[o]bviously Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance." *Prudential Ins. Co. v. Benjamin,* 328 U.S. 408, 429 (1946). And this was done in two ways. "One was by removing obstructions which might be thought to flow from its own power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation." *Id.*

"The other was by declaring expressly and affirmatively that continued state regulation and taxation of this business is in the public interest and that the business and all who engage in it 'shall be subject to' the laws of the several states in these respects." *Id.* It is plain that by enacting the MFA, Congress did not intend for the IRS to be able to subpoena a state insurance department for confidential information pertaining to insurance entities that is collected and maintained only for the purpose of regulating the business of insurance. The District Court's decision goes against the expressed intent of Congress and undermines not only Delaware's authority to regulate the business of insurance, but also insurance regulations nationwide.

In another instance where Congress has enacted a law that "specifically relates to the business of insurance," the Federal Liability Risk Retention Act ("LRRA"), 15 U.S.C. § 3901 *et seq.,* Congress demonstrated its broad view of what constitutes "regulating the business of insurance." The LRRA largely took away the ability of states, other than the domiciliary state, to regulate risk retention groups, which are a special kind of insurance company that issues liability insurance to its owners. The relevant text of the LRRA provides:

> (a) Exemptions from State laws, rules, regulations, or orders
>
> Except as provided in this section, a risk retention group is exempt from any State law, rule, regulation, or order to the extent that such law, rule, regulation, or order would—
>
> > (1) make unlawful, or regulate, directly or indirectly, the operation of a risk retention group except that the jurisdiction in

> which it is chartered may *regulate the formation and operation* of such a group…

15 U.S.C. 3902(a)(1) (emphasis added). Congress' use of the phrase "regulate the formation and operation of such a group" in this Act when restoring certain powers to the States indicates that Congress understands that regulation of the business of insurance goes well beyond regulating the relationship between the insured and insurer—contrary to the District Court's interpretation. By inference, the phrase "regulating the business of insurance" in the MFA should be construed in the same way. Regardless, even if Congress intended that only statutes aimed at "protecting or regulating" the insurer/insured relationship are laws regulating the "business of insurance," Section 6920, by addressing the treatment of materials obtained by the Department in the process of licensing a company or examining it is surely a law "aimed at protecting or regulating" the relationship between the insured and insurer, albeit "indirectly." *National Securities, Inc.*, 393 U.S. at 460.

Putting Congress' intent aside, the District Court's decision negatively effects the insurance industry on a nationwide scale, and public policy factors weigh in favor of protecting the confidential information subject to provisions such as Section 6920. State regulators, such as the Delaware Department of Insurance, protect the public interest and promote the solvency of insurance companies. In order to accomplish these goals, state regulators require certain confidential and proprietary information of insurers. To encourage full and complete disclosure of information in the license

application process, states across the nation have adopted confidentiality laws (applying to both the traditional insurance and captive insurance industries) to ensure that certain items will be held and remain confidential when in the possession of a state insurance regulator.

Indeed, Section 6920 is part of a broader confidentiality policy that provides confidentiality to not only the captive insurance industry, but also other areas of insurance. *See, e.g.*, 18 *Del. C.* §§ 316(c) (information sharing), 321(g) (examinations); 5707 (holding company registration), 7505(e) (viatical examinations); 8409 (solvency assessments). These confidentiality laws are part of a reciprocal policy among state insurance commissioners and state and federal agencies, allowing the sharing of information, so long as it is held confidential. *See, e.g.*, 18 *Del. C.* § 316(c). Other states, like Delaware, similarly require that the receiving party verify it will maintain the confidentiality of information to be provided by the state, as well as by states with federal agencies. *See, e.g.*, D.C. Code Ann. § 31-3932.10; Okla. Stat. Ann. tit. 36, § 6470.13; Utah Code Ann. § 31A-37-503. This is designed to encourage transparency in multi-state insurance regulation.

By seeking a court order compelling the Commissioner to violate Delaware law by producing confidential information relating to captive insurance companies, the IRS is effectively treating state insurance departments as a drop box of confidential information easily accessible to the IRS. Stated differently, the IRS's

position is that States can require the submission of confidential and proprietary information as part of a regulatory scheme, but, as a result, the information is readily available to the IRS anytime it wishes. This makes little sense—particularly where, as here, the IRS could simply subpoena captive managers or captive insurance companies for information without involving the Commissioner or the Delaware Department of Insurance. Furthermore, Section 6920 does not completely prohibit the disclosure of the information at issue. In fact, it actually provides methods for federal agencies, such as the IRS, to obtain any necessary information (1) by consent of the captive insurance company; or (2) "[s]o long as such official or agency agrees in writing to hold it confidential and in a manner consistent with this section." 18 *Del. C.* § 6920. Based on the briefing below, while some captive companies have provided consent, the IRS has not agreed to keep certain information confidential. Regardless, the IRS's position contradicts with not only Congress' intent but public policy principles relating to the protection of confidential information. Moreover, Congress' expressed intent and these public policy principles demonstrate that *Fabe*'s analysis is correct and consistent with the statutory construction framework. Accordingly, the District Court's order should be reversed.

CONCLUSION

Amici respectfully request that this Court reverse the District Court's September 29, 2021 Order.

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Dated: March 14, 2022

COMBINED CERTIFICATIONS

CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2022, I caused a copy of the foregoing Brief to be filed with the Clerk of the United States Court of Appeals for the Third Circuit via the Court's Electronic Filing System, and to be served electronically upon all counsel of record through that system.

CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that at least one attorney whose name appears on this brief, including Travis S. Hunter, is a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

CERTIFICATE OF COMPLIANCE

The foregoing brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 3,728 words.

The foregoing brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface, 14-point Times New Roman font, using Microsoft Word 2016.

CERTIFICATE OF IDENTICAL TEXT OF BRIEF

I hereby certify that the PDF version of this Brief that is being electronically filed on March 14, 2022, is identical to the text of the hard copies of the brief that are being submitted to this Court.

CERTIFICATE OF VIRUS CHECK

I hereby certify that the PDF version of this brief that is being filed electronically with the Clerk of the Court through the CM/ECF system has been scanned for viruses using Microsoft Windows Defender Antivirus version 1.359.1921.0, and no virus was detected.

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