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Note, The McCarran-Ferguson Act's Intersection with Foreign Insurance Companies, 58 Clev. St. L. Rev. 883 (2010)

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THE MCCARRAN-FERGUSON ACT'S INTERSECTION WITH FOREIGN INSURANCE COMPANIES

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I.	INTRODUCTION	883
II.	UNDERSTANDING THE MCCARRAN-FERGUSON ACT	885
	A. “Act of Congress”	885
	B. <i>The History and Enactment of the McCarran-Ferguson Act</i>	887
III.	THE CURRENT STATE OF THE MCCARRAN-FERGUSON ACT	890
	A. <i>Preemption</i>	890
	B. <i>McCarran-Ferguson Act’s Three-Prong Test</i>	891
	C. <i>No Limit on Equal Protection or Due Process Clauses</i>	892
	D. <i>Current Split Among the Circuits</i>	894
	E. <i>The Second Circuit Extends the McCarran-Ferguson Act to Foreign Insurers</i>	894
	F. <i>The Fifth Circuit Limits the McCarran-Ferguson Act to Domestic Insurers</i>	895
	G. <i>Arguments Restricting Application Are Misguided</i>	898
IV.	WHY THE SUPREME COURT SHOULD FOLLOW THE SECOND CIRCUIT’S LINE OF AUTHORITY AND APPLY THE MCCARRAN-FERGUSON ACT TO FOREIGN INSURERS	899
	A. <i>Plain Language</i>	899
	B. <i>State Laws Govern Foreign Insurers</i>	901
	C. <i>Public Policy</i>	904
V.	CONCLUSION	905

I. INTRODUCTION

The touchstone of insurance regulation is the state’s authority to regulate the business of insurance, particularly the relationship between insurer and insured.¹

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¹ Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 218-19 (1979).

Congress has consciously established a statutory scheme that generally preserves state regulation of insurance from federal interference.²

Ordinarily, an act of Congress is “the supreme Law of the Land.”³ But Congress may only legislate within defined spheres, such as interstate and domestic commerce.⁴ While the insurance industry developed in the late nineteenth and early twentieth century, it was thought to lie outside Congress’ sphere of competence because the Supreme Court “had consistently held that the business of insurance was not commerce.”⁵ Accordingly, “the States enjoyed virtually exclusive domain over the insurance industry.”⁶

But the Supreme Court held for the first time, in *United States v. South-Eastern Underwriters Ass’n*,⁷ that an insurance company doing business across state lines thereby engages in interstate commerce and is therefore subject to federal laws regulating commerce. The very next year, Congress, wishing to preserve the states’ primacy in insurance regulation and to protect these efforts from inadvertent intrusion by federal law, passed the McCarran-Ferguson Act.⁸ Section 1012(b) provides that federal legislation “general in character” constitutes authority *inferior* to state law specifically regulating “the business of insurance.”⁹ Thus, in a reversal of the usual hierarchy, a state law regulating insurance “reverse preempts” general federal legislation.

Arbitration agreements provide a notable example of McCarran-Ferguson’s reverse preemption. Because of the Federal Arbitration Act,¹⁰ arbitration agreements are generally enforceable outside the insurance context despite a long history of state laws, constitutional provisions, and judicial doctrines prohibiting arbitration.¹¹ Federal law, as usual, trumps the contrary state law. But most courts, including all courts of appeals to consider the issue, have ruled that a state law regulating “the business of insurance” reverse preempts the FAA.¹² Currently, approximately one-

² See 15 U.S.C. §§ 1011-15 (2006) [hereinafter McCarran-Ferguson Act].

³ U.S. CONST. art. VI, cl. 2.

⁴ See U.S. CONST. art. I, § 8, cl. 3; see also *Marbury v. Madison*, 5 U.S. 137, 176 (1803).

⁵ *Humana, Inc. v. Forsyth*, 525 U.S. 299, 306 (1999) (citing *Paul v. Virginia*, 75 U.S. 168, 193 (1869)).

⁶ *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 539 (1978).

⁷ *United States v. South-Eastern Underwriters Ass’n*, 322 U.S. 533, 539 (1944).

⁸ 15 U.S.C. §§ 1011-15 (2006).

⁹ See *Forsyth*, 525 U.S. at 306-07.

¹⁰ 9 U.S.C. §§ 1-14 (2006) [hereinafter FAA].

¹¹ See Susan Randall, *Mandatory Arbitration in Insurance Disputes: Inverse Preemption of the Federal Arbitration Act*, 11 CONN. INS. L.J. 253, 255-57 (2004).

¹² See, e.g., *Am. Bankers Ins. Co. of Fla. v. Inman*, 436 F.3d 490, 494 (5th Cir. 2006); *McKnight v. Chi. Title Ins. Co.*, 358 F.3d 854, 858 (11th Cir. 2004); *Standard Sec. Life Ins. Co. v. West*, 267 F.3d 821, 824 (8th Cir. 2001); *Mut. Reinsurance Bureau v. Great Plains Mut. Ins. Co.*, 969 F.2d 931, 933 (10th Cir. 1992).

third of the states have limits on arbitration of insurance disputes that would, under existing doctrine, reverse preempt the FAA.¹³

This Note is designed to answer a simple question: must insurance companies incorporated in foreign countries follow the same rules as their competitors incorporated in this country? More specifically, it addresses whether the McCarran-Ferguson Act should reach foreign insurance companies and foreign commerce. Part II discusses the historical enactment and early interpretation of the McCarran-Ferguson Act. Part III explains concepts of preemption and reverse preemption and the current divergent views of the McCarran-Ferguson Act's interpretation in case law. Part IV provides an analysis and proposal as to why the Act should not be limited in a way that excludes foreign insurance companies. This Note advocates for the Supreme Court to include foreign insurance companies within the statute, so they are not left wholly unregulated when doing business in the United States.

II. UNDERSTANDING THE MCCARRAN-FERGUSON ACT

A. "Act of Congress"

The McCarran-Ferguson Act is a unique law because, ordinarily, federal law preempts or invalidates inconsistent state law.¹⁴ However, the McCarran-Ferguson Act creates an exception to this general rule exclusively for the business of insurance.¹⁵ This exception allows state laws, enacted to regulate the business of insurance, to reverse preempt inconsistent "acts of Congress."¹⁶ The only time an "act of Congress" may "invalidate, impair, or supersede"¹⁷ any law enacted by any state for the purpose of regulation of the business of insurance is when the Act specifically relates to the business of insurance.¹⁸

An "act of Congress" is a law enacted according to formal Article I procedures.¹⁹ It includes any legislation passed by a majority of both houses of Congress, presented to and signed into law by the President.²⁰ Thus, a congressional statute is by definition an "act of Congress."²¹ States often enact statutes that include anti-arbitration provisions. When these statutes affect the business of insurance, the state law will preempt inconsistent federal law by way of the McCarran-Ferguson Act. Thus, federal laws that do not specifically relate to the business of insurance and

¹³ Randall, *supra* note 11, at 270-71.

¹⁴ See U.S. Dep't of Treasury v. Fabe, 508 U.S. 491, 507 (1993).

¹⁵ See 15 U.S.C. § 1012(b).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 944-45 (1983) (citing U.S. CONST. art. I, § 7).

²⁰ *Id.*

²¹ Denver Area Educ. Telcomm. Consortium Inc. v. Fed. Comm'n Comm'n, 518 U.S. 727, 737 (1996).

permit arbitration will be reverse preempted by state laws invalidating arbitration, in the insurance context.²²

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards²³ is a treaty signed by the United States. This treaty and its implementing legislation²⁴ permit the United States courts to send disputes to arbitration. Thus, a question arises whether a foreign insurance company whose home country is a party to the treaty may invoke the treaty to require an insured from the United States whose domicile state has an anti-arbitration statute to submit a claim to arbitration abroad. The answer hinges upon an initial decision as to whether the treaty is an “act of Congress” under the meaning of the McCarran-Ferguson Act.

Treaties can be either self-executing or non-self-executing. A self-executing treaty has automatic domestic effect by its own provisions.²⁵ A non-self-executing treaty is given force through an act of Congress²⁶ and, as an act of Congress, is subject to the McCarran-Ferguson Act three-prong test.²⁷

Currently there is a dispute over whether the New York Convention is an “act of Congress.”²⁸ In *Medellin v. Texas*,²⁹ the Supreme Court cited the New York Convention as an example of a non-self-executing treaty that required implementing legislation for its domestic effect. This Note proceeds under an assumption that the New York Convention, which allows enforcement of arbitration clauses contained within contracts, is a non-self-executing treaty whose implementing legislation³⁰ is an “act of Congress” within the meaning of the McCarran-Ferguson Act. Consequently, it is subject to reverse preemption by state anti-arbitration clauses if the three-prong test is satisfied. Thus, assuming the New York Convention can serve as the federal law in the McCarran-Ferguson Act analysis, this Note discusses whether foreign insurers and foreign commerce are subject to state insurance laws.

²² 15 U.S.C. § 1012.

²³ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Sept. 30, 1970, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Convention].

²⁴ 9 U.S.C. § 201 et seq.

²⁵ See *Foster v. Neilson*, 27 U.S. 253, 313-14 (1829).

²⁶ *Stephens v. Am. Int'l Ins. Co.*, 66 F.3d 41, 45 (2d Cir. 1995).

²⁷ See *infra* Part III.B.

²⁸ Compare *Stephens*, 66 F.3d at 45, with *Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London*, 587 F.3d 714 (5th Cir. 2009).

²⁹ *Medellin v. Texas*, 552 U.S. 491, 526 (2008).

³⁰ The argument that the New York Convention is an “act of Congress” rests upon a finding that it is non-self-executing because it depends entirely on its implementing legislation for its domestic effect. See *Whitney v. Robertson*, 124 U.S. 190, 194 (1888). Additionally, the treaty's signatories did not unanimously intend for it to be self-executing. See *United States v. Jimenez-Nava*, 243 F.3d 192, 195 (5th Cir. 2001) (noting “international agreements should be consistently interpreted among the signatories”).

B. The History and Enactment of the McCarran-Ferguson Act

Under the United States Constitution, Congress has the power to regulate commerce.³¹ In *Paul v. Virginia*,³² the Supreme Court upheld a state statute that required the licensing of foreign insurance companies. The Court held that the issuance of an insurance policy was *not* a transaction that Congress could regulate under the Commerce Clause.³³ The Supreme Court adhered to this holding for more than seventy years, during which it upheld various state statutes regulating insurance.³⁴ But everything changed in 1944³⁵ when the Supreme Court was faced with the question of whether, consistent with the Commerce Clause, Congress had the power to regulate interstate insurance transactions. The Court's holding in *South-Eastern* was twofold: it held that the business of insurance (1) was not beyond the regulatory power of Congress; and (2) was not exempt from antitrust regulation³⁶ under the Sherman Act.³⁷

This result—that the business of insurance was within the regulatory power of Congress—was widely criticized and perceived as a threat to state power to tax and regulate the insurance industry.³⁸ Immediately after the *South-Eastern* decision, there was a call for change, and Senators McCarran and Ferguson proposed legislation³⁹ to reaffirm the states' right⁴⁰ to regulate the business of insurance. One year later, in 1945, Congress enacted the McCarran-Ferguson Act.⁴¹

The legislative history, floor debates, and senate reports evidence the McCarran-Ferguson Act's purpose. Congress noted, "enactment of this bill will (1) remove existing doubts as to the right of the States to regulate and tax the business of insurance, and (2) secure more adequate regulation of such business."⁴² During the congressional hearings preceding the enactment of the McCarran-Ferguson Act,

³¹ U.S. CONST. art. I, § 8, cl. 3 [hereinafter Commerce Clause] ("The Congress shall have Power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."). Congress has options with regard to this power; it can choose to act or refrain from acting.

³² *Paul v. Virginia*, 75 U.S. 168 (1868).

³³ *Id.* (emphasis added).

³⁴ 125 L. Ed. 2d 879, at *2a (2008) ("The invalidation of such statutes—in the absence of any federal regulation—would have meant that insurance companies could have engaged in interstate commerce without any legal restraint.").

³⁵ *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533.

³⁶ *Id.* at 560-61.

³⁷ 15 U.S.C. § 1013 (2006).

³⁸ *U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491, 499-500 (1993).

³⁹ 59 Stat. 33 (1945).

⁴⁰ *Fabe*, 508 U.S. at 500; *Prudential Prop. & Cas. Ins. Co. v. Bannon*, No. 1994 Conn. Super. LEXIS 3399, at *9 ("In 1945, . . . Congress removed all Commerce Clause limitations on the authority of the states to regulate and tax the business of insurance by passing the McCarran-Ferguson Act.")

⁴¹ 15 U.S.C. §§ 1011-15 (2006).

⁴² *See S. REP. NO. 79-20*, at 3 (1945).

President Franklin D. Roosevelt sent a letter to Maryland Senator Radcliffe that stated, “the responsibility for the regulation of the business of insurance has been left with the States; and I can assure you that this administration is not sponsoring Federal legislation to regulate insurance or to interfere with the continued regulation and taxation by the States of the business of insurance.”⁴³ The importance of enacting the McCarran-Ferguson Act was made clear in the senate reports, wherein Congress noted, “from its beginning the business of insurance has been regarded as a local matter, to be subject to and regulated by the laws of the several states.”⁴⁴

Thus, in 1945, Congress enacted the McCarran-Ferguson Act, which provides in its preamble:

The 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 Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several states.⁴⁵

After stating its purpose in this section, the Act further 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 insurance⁴⁶

The McCarran-Ferguson Act was introduced by Senators McCarran and Ferguson on January 18, 1945.⁴⁷ It passed the House on February 23, 1945,⁴⁸ the Senate on February 27, 1945,⁴⁹ and was signed into law on March 9, 1945. Shortly after the Act was signed, the Supreme Court examined Congress’ intention. “Obviously Congress’ purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance.”⁵⁰ Congress achieved its purpose in two ways. The first was by “removing obstructions which might . . . flow from its own power”⁵¹ The second was by “declaring expressly

⁴³ 91 CONG. REC. 1479 (1945).

⁴⁴ S. REP. NO. 79-20, at 1 (1945).

⁴⁵ 15 U.S.C. § 1011 (2006).

⁴⁶ *Id.* § 1012.

⁴⁷ *See* 91 CONG. REC. 330 (1945).

⁴⁸ *See id.* at 1396.

⁴⁹ *See id.* at 1488-89.

⁵⁰ *Prudential v. Benjamin*, 328 U.S. 408, 429 (1946). *See also* 125 L. Ed. 2d 879, at *4 (2008).

⁵¹ *Id.*

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.”⁵² Congress was aware of the widely-varied state systems of regulation, yet intended to entrust its powers to the states.⁵³ The enactment of the McCarran-Ferguson Act in response to *South-Eastern*, coupled with the Act’s stated purpose,⁵⁴ the legislative history, and case law,⁵⁵ establish that Congress intended for the states to regulate the industry of insurance.

Two important Supreme Court cases followed the enactment of the McCarran-Ferguson Act: *Prudential v. Benjamin*,⁵⁶ and *Robertson v. California*.⁵⁷ These two cases confirmed the meaning of the McCarran-Ferguson Act—Congress intended to relinquish its regulatory power under the Interstate Commerce Clause in the narrow context of insurance.⁵⁸

In *Prudential*, the Supreme Court upheld, under the McCarran-Ferguson Act, a state law which imposed a tax on foreign insurers who wished to do business within the state, while not imposing the tax on local, domestic insurers.⁵⁹ In reaching this decision, the Supreme Court reinforced the constitutionality of the McCarran-Ferguson Act, along with declaring the extent of its reach within the insurance industry. The Supreme Court recognized that “Congress must have had full knowledge of the nation-wide existence of state systems of regulation and taxation; . . . that they differ greatly in scope and character; . . . [and] that many, if not all, include features which, to some extent, have not been applied generally to other interstate business.”⁶⁰ Further, the Court noted that Congress’ “purpose was evidently to throw the whole weight of its power behind the state systems, notwithstanding these variations.”⁶¹

Similarly, the Supreme Court upheld a state statute which imposed licensing requirements on foreign insurers, stating that it did not unduly burden commerce.⁶² This case differed from *Prudential* because it was a criminal case wherein the state

⁵² *Id.* at 430.

⁵³ *Id.*

⁵⁴ 15 U.S.C. § 1011 (2006).

⁵⁵ *Prudential*, 328 U.S. 408; *Sec. & Exch. Comm’n v. Nat’l Sec. Inc.*, 393 U.S. 453 (1969); *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531 (1978).

⁵⁶ *Prudential*, 328 U.S. 408.

⁵⁷ *Robertson v. California*, 328 U.S. 440 (1946).

⁵⁸ *Id.* at 462; *Prudential*, 328 U.S. 408.

⁵⁹ *Prudential*, 328 U.S. 408. In this case, the Court used the word “foreign insurance company” to describe an out-of-state insurer rather than an insurer from another country. *See id.* at 410 (referring to South Carolina and New Jersey).

⁶⁰ *Id.* at 430.

⁶¹ *Id.*; *see also* H.R. REP. NO. 79-143, at 3 (1945) (“It clearly put the full weight of its power behind existing and future state legislation to sustain it from any attack under the commerce clause to whatever extent this may be done with the force of that power behind it, subject only to the exceptions expressly provided for.”).

⁶² *Prudential*, 328 U.S. 440.

statute purported to regulate, rather than tax. However, the Court applied the logic of *Prudential* and held that the McCarran-Ferguson Act did not preclude a state's regulation of interstate commerce.⁶³ Notably, the Court stated "until Congress speaks otherwise, the Commerce Clause does not preclude a state's exclusion of foreign insurers from carrying on business in the state."⁶⁴

The Commerce Clause makes transactions across state lines subject to federal laws. The purpose of the McCarran-Ferguson Act, however, is to ensure that activities of insurance remain subject to state regulation.⁶⁵ The Supreme Court, in *Western & Southern Life Insurance Co. v. State Board of Equalization of California*,⁶⁶ stated, "the McCarran-Ferguson Act removes entirely any commerce clause restriction" on a state's power to tax the insurance industry.⁶⁷ Therefore, "Congress removed all Commerce Clause limitations on the authority of the States to regulate and tax the business of insurance when it passed the McCarran-Ferguson Act."⁶⁸

III. THE CURRENT STATE OF THE MCCARRAN-FERGUSON ACT

A. Preemption

Traditional preemption mandates that federal law reigns supreme over any conflicting state law.⁶⁹ "It has been settled that state law that conflicts with federal law is without effect."⁷⁰ Under the Supremacy Clause of the United States Constitution, laws of the United States "shall be the supreme Law of the Land."⁷¹ When considering issues of preemption, courts "start with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress."⁷² "Congress' intent may be explicitly stated in the statute's language or implicitly contained in its structure and purpose."⁷³

⁶³ *Id.* at 449.

⁶⁴ *Id.* at 459.

⁶⁵ *See Sec. & Exch. Comm'n v. Nat'l Sec. Inc.*, 393 U.S. 453 (1969).

⁶⁶ *W. & S. Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648 (1981).

⁶⁷ *Id.* at 655.

⁶⁸ *Id.* at 653.

⁶⁹ *See Cipollone v. Liggett Grp.*, 505 U.S. 504, 516 (1992).

⁷⁰ *Id.* (internal quotation omitted).

⁷¹ U.S. CONST. art. VI, cl. 2.

⁷² *Cipollone*, 505 U.S. at 516 (citation omitted).

⁷³ *Id.* (internal quotation omitted). State law is preempted in three circumstances. *English v. Gen. Elec. Co.*, 496 U.S. 72, 78 (1990). "First, Congress can define explicitly the extent to which its enactments pre-empt state law." *Id.* (citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95-98 (1983)). "Second, in the absence of explicit statutory language, . . . where [state law] regulates conduct in a field that Congress intended the Federal Government to occupy exclusively." *Id.* at 79. This intent can be inferred from "a scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). "Finally, state

Reverse preemption on the other hand, is an instance in which Congress declares that in a certain area, state law reigns supreme rather than federal law. Reverse preemption establishes that only express preemption will be permitted and this occurs only if the applicable test demands that the federal law remains supreme. Thus, although ordinarily a federal law supersedes any inconsistent state law,⁷⁴ the McCarran-Ferguson Act creates an exception to this general rule, wherein state laws enacted to regulate the business of insurance reverse preempt federal laws that do not govern this business. This is made clear from the legislation itself.⁷⁵

B. *McCarran-Ferguson Act's Three-Prong Test*

The McCarran-Ferguson Act reverse-preempts a federal statute if: (1) it does not “specifically relate to the business of insurance”; (2) the state statute was enacted “for the purpose of regulating the business of insurance”; and (3) the federal statute would “invalidate, impair, or supersede” the state statute.⁷⁶ Case law has developed substantially in an effort to explain these prongs. The phrase “business of insurance” appears in two prongs of the analysis and has caused quite a bit of litigation over the years. This phrase has been explained by the Supreme Court, which identified three characteristics relevant to determining whether particular activities fall within the category: “*first*, whether the practice has the effect of transferring or spreading a policyholder’s risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry.”⁷⁷ As a guideline, courts have also endeavored to define the term “insurance.”⁷⁸

The Court recognized in *Fabe*⁷⁹ that “laws enacted for the purpose of regulating the business of insurance”—pursuant to the second prong of the McCarran-Ferguson test—consisted of “laws that possessed the end, intention, or aim of adjusting, managing, or controlling the business of insurance.”⁸⁰ Although the Supreme Court

law is preempted to the extent that it actually conflicts with federal law.” *English*, 496 U.S. at 79. Courts have found preemption in this circumstance when state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

⁷⁴ *Fabe*, 508 U.S. at 507.

⁷⁵ See 15 U.S.C. §§ 1011-12 (2006).

⁷⁶ *Fabe*, 508 U.S. at 501.

⁷⁷ *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982) (summarizing the criteria set forth by the Court in *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205 (1979), and noting “none of these criteria is necessarily determinative in itself”).

⁷⁸ See *Royal Drug*, 440 U.S. at 211 (citing WEBSTER’S NEW INTERNATIONAL DICTIONARY 1289 (unabr. 2d ed. 1958)) (defining insurance as: “[a]ct of insuring, or assuring, against loss or damage by a contingent event; a contract whereby, for a stipulated consideration, called a *premium*, one party undertakes to indemnify or guarantee another against loss by a certain specified contingency or peril, called a *risk*, the contract being set forth in a document called the *policy* . . .”).

⁷⁹ *Fabe*, 508 U.S. 491, 505 (1993).

⁸⁰ *Id.* (quoting BLACK’S LAW DICTIONARY 1236, 1286 (6th ed. 1990)).

wrestled with this term,⁸¹ it settled upon the following broad definition: “statutes aimed at protecting or regulating [the relationship between the insurance company and the policyholder], directly or indirectly are laws regulating the ‘business of insurance.’”⁸²

Furthermore, the case law has helped clarify the third prong in the test for the McCarran-Ferguson Act’s application. It is not enough for a state to enact a statute that regulates the business of insurance. The state law and the federal law must be in conflict with one another, so much so that the state statutes “would be invalidated, impaired or superseded [by application of the federal law].”⁸³ Thus, the McCarran-Ferguson Act allows state law to reverse preempt federal law unless the federal law “contain[s] an express and unambiguous declaration that state law regarding the regulation of the business of insurance is preempted.”⁸⁴ The key terms in the third prong have also been defined by the Supreme Court.⁸⁵ “The term ‘invalidate’ ordinarily means ‘to render ineffective, generally without providing a replacement rule or law. And the term ‘supersede’ ordinarily means ‘to displace’ (and thus render ineffective) without providing a substitute rule.”⁸⁶ With respect to the “impair” prong, the Court has noted, “when federal law does not directly conflict with state regulation, and when application of the federal law would not frustrate any declared state policy or interfere with a State’s administrative regime, the McCarran-Ferguson Act does not preclude its application.”⁸⁷

C. No Limit on Equal Protection or Due Process Clauses

Although the McCarran-Ferguson Act exempts the insurance industry from Commerce Clause restrictions,⁸⁸ it does not limit in any way the applicability of the Equal Protection Clause.⁸⁹ State regulations also must be kept within the limits set

⁸¹ *Sec. & Exch. Comm’n v. Nat’l Sec., Inc.*, 393 U.S. 453, 460 (1969) (“[W]hatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder.”).

⁸² *Id.* at 569.

⁸³ *Miller v. Nat’l Fid. Life Ins. Co.*, 588 F.2d 185, 187 (5th Cir. 1979).

⁸⁴ *John Alden Life Ins. Co. v. Woods*, 1981 WL 1403, at *4 (D. Idaho 1981); *see generally Nat’l Sec. Inc.*, 393 U.S. 453.

⁸⁵ *Humana Inc. v. Forsyth*, 525 U.S. 299, 307-10 (1999).

⁸⁶ *Id.* at 307 (citation omitted).

⁸⁷ *Id.* at 310.

⁸⁸ *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 412 (1946).

⁸⁹ *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 880 (1985) (referring to U.S. CONST. amend. XIV, § 1). The distinction between the Commerce Clause and the Equal Protection Clause diffuses many doubts about policy implications of the McCarran-Ferguson Act reaching foreign insurers. “Under Commerce Clause analysis, the State’s interest, if legitimate, is weighed against the burden the state law would impose on interstate commerce.” *Id.* at 881. “In the equal protection context, however, if the State’s purpose is found to be legitimate, the state law stands as long as the burden it imposes is found to be rationally related to that purpose, a relationship that is not difficult to establish.” *Id.*; *see also W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 657 (1981). The Commerce Clause’s function is to protect interstate commerce, whereas the Equal Protection Clause’s function is

by the Due Process Clause of the Fourteenth Amendment.⁹⁰ The Supreme Court noted that within the legislative history of the McCarran-Ferguson Act, there was an “explicit unequivocal statement that the Act was so designed as not to displace”⁹¹ the validity under the due process clause of particular instances of state taxation or regulation of insurance.

Typically, the analysis hinges on a rational basis test.⁹² The Court noted:

regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.⁹³

The rational basis test is one that the Supreme Court has applied for many years⁹⁴ to “distinguish between domestic and out-of-state corporations.”⁹⁵ The Supreme Court in *Ward* pointed out that it “has always recognized that there are certain legitimate restrictions or policies in which, ‘by definition, discrimination against nonresidents would inhere.’”⁹⁶

The Supreme Court in *Kelo v. City of New London* further explained the rational basis test,⁹⁷ when it stated, “our review is limited to determining that the purpose is legitimate and that Congress rationally could have believed that the provisions would promote that objective.”⁹⁸ In other words, the Court will look at whether the means are rationally related to a legitimate governmental end. “By their very nature such inquiries, where the legislative judgment is drawn in question, must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it.”⁹⁹

to protect persons from unconstitutional discrimination by the states. See *Bethlehem Motors Corp. v. Flynt*, 256 U.S. 421, 423-24 (1921). The Equal Protection Clause is a large part of the McCarran-Ferguson analysis because, although Congress has given up its power to regulate interstate insurance commerce, the states are still regulated.

⁹⁰ 125 L. Ed. 2d 879, at *5 (2008).

⁹¹ See *State Bd. of Ins. v. Todd Shipyards Corp.*, 370 U.S. 451 (1962) (referring to H.R. REP. NO. 79-143, at 3 (1945)).

⁹² *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) (calling for a rational relationship).

⁹³ *Id.* at 152.

⁹⁴ See *Ward*, 470 U.S. at 869.

⁹⁵ *Id.* at 894.

⁹⁶ *Id.* (citing *Arlington Cnty. Bd. v. Richards*, 434 U.S. 5, 7 (1977) (per curiam)).

⁹⁷ *Kelo v. City of New London*, 545 U.S. 469 (2005).

⁹⁸ *Id.* at 488 n.20.

⁹⁹ *Carolene Prods.*, 304 U.S. at 154.

D. Current Split Among the Circuits

State anti-arbitration provisions have raised a number of issues in the realm of the McCarran-Ferguson Act. The United States courts of appeals have recently become split on the application of state insurance anti-arbitration laws to disputes between American insureds and foreign insurers. While the courts are uniform in the view that the FAA is reverse preempted when a state law prohibits arbitration between an insurer and its insured,¹⁰⁰ there is a split in authority as to whether the New York Convention and its implementing legislation should be treated differently. A panel of the Second Circuit concluded unanimously in *Stephens v. American International Insurance Co.*¹⁰¹ that neither the New York Convention nor its implementing legislation prevents state law from regulating the business of insurance under normal McCarran-Ferguson Act principles.¹⁰² But a majority of the Fifth Circuit, sitting en banc, disagreed, believing that the New York Convention, being something other than an “act of Congress,” fell outside the McCarran-Ferguson Act’s purview.¹⁰³ The three dissenting judges, believing that the case presented “an exercise in garden-variety statutory interpretation,” would have found that the New York Convention only had force because of its implementing legislation that was, by its own label, an “act of Congress.”¹⁰⁴

E. The Second Circuit Extends the McCarran-Ferguson Act to Foreign Insurers

In *Stephens*,¹⁰⁵ the court rejected an argument that arbitration provisions within a contract between a British insurer and a domestic insured should be enforced. The state insurance law invalidated an arbitration clause invoked by the British insurer under both the FAA and the Convention Act.¹⁰⁶ The court found that because the New York Convention is not self-executing, its implementing legislation was a federal statute that did not specifically relate to the business of insurance.¹⁰⁷ Further, because the state law was enacted to regulate the business of insurance and the two laws were in direct conflict, the state law was preserved under the McCarran-Ferguson Act.¹⁰⁸ Thus, the foreign insurance companies were subject to the state

¹⁰⁰ See *Standard Sec. Life Ins. Co. v. West*, 267 F.3d 821, 823-24 (8th Cir. 2001) (holding that the Federal Arbitration Act was reverse preempted under the McCarran-Ferguson Act).

¹⁰¹ *Stephens v. Am. Int’l Ins. Co.*, 66 F.3d 41 (2d Cir. 1995).

¹⁰² *Id.* at 45.

¹⁰³ *Safety Nat’l Cas. Corp. v. Certain Underwriters at Lloyd’s, London*, 587 F.3d 714, 717 (5th Cir. 2009) (en banc).

¹⁰⁴ *Id.* at 737 (Elrod, J., dissenting) (emphasis added).

¹⁰⁵ *Stephens*, 66 F.3d 41.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 45.

¹⁰⁸ *Stephens*, 66 F.3d 41. For the purposes of this Note, one should proceed under an assumption that the three prong test of the McCarran-Ferguson Act is satisfied. This Note focuses on the narrower question of whether state laws can bind foreign insurers.

law that invalidated the arbitration clause in the contract.¹⁰⁹ There are a number of cases that support the Second Circuit's decision.

Taking the *Stephens* holding further, in *Sun Life v. Manna*,¹¹⁰ the Supreme Court of Illinois expressly stated that alien insurers were within the ambit of the McCarran-Ferguson Act.¹¹¹ *Sun Life* involved a retaliatory tax imposed upon foreign and alien insurers who conducted the business of insurance within the state of Illinois. The court held that the plain language of the McCarran-Ferguson Act imposed no limitations on the imposition of the tax on an alien insurer.¹¹² Further, Congress has never subsequently enacted legislation prohibiting the imposition of any retaliatory taxes on alien insurers.¹¹³

The regulation of foreign and alien insurers by a state should be appropriate because the courts have already recognized that a state may discriminate on other companies within its own borders.¹¹⁴ It has also been recognized that "for a foreign company to do business in a state is a privilege, not a right."¹¹⁵ Additionally, "an insurer who elects to do business in the state also impliedly consents to be bound by the state's statutes regulating the insurance industry."¹¹⁶ Thus, as long as a state does not violate the Equal Protection Clause,¹¹⁷ there should be no reason to hold that a state cannot impose reasonable regulations upon a foreign or alien insurer doing business within the state under the McCarran-Ferguson Act.¹¹⁸

F. The Fifth Circuit Limits the McCarran-Ferguson Act to Domestic Insurers

In *Safety National*,¹¹⁹ an en banc panel of the Fifth Circuit held that a state anti-arbitration statute did not reverse preempt the New York Convention under the McCarran-Ferguson Act.¹²⁰ In so holding, the court focused on the New York

¹⁰⁹ *Id.* at 45. Thus, the court held that the McCarran-Ferguson Act could reach foreign commerce.

¹¹⁰ *Sun Life Assurance Co. of Canada v. Manna*, 879 N.E.2d 320 (Ill. 2007).

¹¹¹ *Id.* at 331.

¹¹² *Id.*

¹¹³ *Id.* See also *McKnight v. Chicago Title Insurance Co.*, 358 F.3d 854, 855 (11th Cir. 2004), where the court held that a state law excluding arbitration provisions was not preempted by federal law that permitted them. Although *McKnight* involved an interstate, domestic dispute, *Sun Life* expressly held, two years later, that alien insurers were not exempt from provisions of the McCarran-Ferguson Act that reverse preempt federal laws. *Sun Life*, 879 N.E.2d at 331.

¹¹⁴ See, e.g., *Int'l Ins. Co. v. Caja Nacional de Ahorro y Seguro*, No. 00 C 6703, 2001 WL 322005 (N.D. Ill. 2001).

¹¹⁵ 43 AM. JUR. 2d *Insurance* § 49 (2010) (citing *State ex rel. Life of Maryland, Inc. v. Katz*, 447 N.E.2d 116 (Ohio 1983)).

¹¹⁶ *Id.* (citing *Fireman's Fund Ins. Co. v. Bennett*, 635 S.W.2d 482 (Ky. Ct. App. 1981)).

¹¹⁷ See *supra* Part III.C.

¹¹⁸ See *supra* note 115.

¹¹⁹ *Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London*, 587 F.3d 714 (5th Cir. 2009) (en banc).

¹²⁰ *Id.*

Convention and determined that the treaty did not fall under the term “act of Congress” as used in the McCarran-Ferguson Act. Thus, the court held the state law subordinate to the New York Convention which permitted arbitration.¹²¹ The court, however, never expressly stated that the McCarran-Ferguson Act does not, under any circumstances, reach foreign insurers.

Proponents, in favor of the en banc Fifth Circuit decision in *Safety National* and the broader concept that the McCarran-Ferguson Act should not apply to foreign insurance companies,¹²² support their position through the text of the statute and its legislative history. This argument begins with the textual language of the McCarran-Ferguson Act. A basic rule of statutory construction is that courts need not look beyond the plain language unless that language is unclear or ambiguous.¹²³

The plain language argument is comprised of two key distinctions. First, it is important to distinguish between foreign commerce and interstate commerce. Foreign commerce is the exchange of goods or services “between nations.”¹²⁴ Interstate commerce deals only with the exchange of goods or services “between those located in different states.”¹²⁵ Second, there is a distinction between the power of commerce that is granted. The Constitution grants Congress distinct powers regarding commerce: to regulate “Commerce with foreign Nations, and among the several States, and with the Indian tribes.”¹²⁶ The McCarran-Ferguson Act, on the other hand, applies only to commerce among “the several States.”¹²⁷ Because the language of the McCarran-Ferguson Act does not give a clear statement indicating the areas of commerce to which it applies, the proponents of this view conclude that it should not apply to foreign insurers. However, the McCarran-Ferguson Act does not limit its application to interstate commerce;¹²⁸ thus, one may reasonably presume that the Act governs both foreign and interstate commerce.

Proponents suggest that courts should look beyond the plain language and consider the Senate and House Reports as well as the Congressional Record to show that the Act was intended to apply only to interstate commerce. There is no express mention in the Congressional Reports of any effect on foreign commerce or foreign affairs, and congressional intent can be expressed by omission as well as inclusion of language in the statute and discussion in the legislative history.¹²⁹ Proponents of the

¹²¹ *Id.* The court also conceded that the New York Convention does not specifically relate to the business of insurance. *Id.* at 720.

¹²² See generally Raymond A. Guenter, *Rediscovering the McCarran-Ferguson Act's Commerce Clause Limitation*, 6 CONN. INS. L.J. 253 (2000).

¹²³ *Passa v. Derderian*, 308 F. Supp. 2d 43 (D.R.I. 2004).

¹²⁴ BLACK'S LAW DICTIONARY 285 (8th ed. 2004).

¹²⁵ *Id.*

¹²⁶ U.S. CONST. art I, § 8, cl. 3.

¹²⁷ 15 U.S.C. § 1012(a) (“[S]ubject to the laws of the several states . . .”).

¹²⁸ See *infra* Part IV.A.

¹²⁹ See *Rewis v. United States*, 401 U.S. 808, 812 (1971). In *Rewis*, the Court declined to accept an expansive interpretation of the Travel Act. *Id.* Because the factors that would give the Act such a broad interpretation were “not even discussed in the legislative history,” the Court held that it showed Congress did not intend the statute to have broader reach. *Id.*

Fifth Circuit's view also point out that the Senators who proposed the McCarran-Ferguson Act mentioned only "interstate" commerce. Senator Ferguson emphasized that "what we have in mind is that the insurance business, being *interstate commerce*, if we merely enact a law relating to interstate commerce, or if there is a law now on the statute books relating in some way to interstate commerce, it would not apply to insurance."¹³⁰ Further, Senator O'Mahoney stated that "there is not a line or sentence in the proposed act . . . which would delegate to any State the power to legislate in the field of . . . foreign commerce."¹³¹

The proponents fail to recognize that the comments of the Senators and much of the floor debates were discussions in response to *South-Eastern*. One could argue that because *South-Eastern* dealt only with interstate commerce¹³² and because the McCarran-Ferguson Act was in direct response to *South-Eastern*, the Act only reaches interstate commerce. This argument, however, ignores the crucial point that Congress was aware of the many international insurance contracts that were being entered into at the time.¹³³ Congress could have limited the McCarran-Ferguson Act to interstate commerce if it so desired, but it chose not to place any limit on the type of commerce states can govern, so long as the state laws serve the purpose of regulating the business of insurance.

Lastly, proponents of the Fifth Circuit's view claim that allowing states to regulate foreign insurers impairs uniformity. In *Japan Line*,¹³⁴ the Supreme Court struck down a state tax affecting foreign commerce because it impaired uniformity in foreign relations. The Court focused on the fact that there was a need for the federal government to "speak with one voice" in issues affecting foreign commerce and foreign affairs.¹³⁵ Similarly, in *Garamendi*,¹³⁶ the Supreme Court held that a California law directly conflicting with executive conduct in foreign affairs was preempted, despite the McCarran-Ferguson Act.¹³⁷ The Court stated that the McCarran-Ferguson Act did not give a state the power to regulate the business of insurance carried out beyond its own borders.¹³⁸ This argument relies upon distinguishable case law and fails to address foreign insurance companies that enter the United States and conduct business within state borders.

¹³⁰ 91 CONG. REC. 1487 (1945) (emphasis added).

¹³¹ *Id.* at 1483.

¹³² *See generally* United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944).

¹³³ The mid-1940s was the height of the insurance industry and foreign companies like Lloyds of London were conducting much business internationally. For purposes of statutory interpretation, courts must presume Congress was aware of such worldly factors when it drafted the statute.

¹³⁴ *Japan Line, Ltd. v. Los Angeles Cnty.*, 441 U.S. 434, 448 (1979).

¹³⁵ *Id.*

¹³⁶ *See generally* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003).

¹³⁷ *See id.* at 428.

¹³⁸ *See id.* (citing *FTC v. Travelers Health Ass'n*, 362 U.S. 293, 300-01 (1960)).

G. Arguments Restricting Application Are Misguided

The case law is misleading when shaped to support the Fifth Circuit's view. Cases that purport to limit the McCarran-Ferguson Act to domestic insurers alone are easily distinguishable and devoid of reasoning. For example, when the Supreme Court held that a state statute should be preempted by a federal law for interfering with foreign policy,¹³⁹ its decision was largely based upon executive agreements of the President, made without congressional authority. The executive agreements in *Garamendi* were not considered an "act of Congress" and therefore did not warrant application of the McCarran-Ferguson Act.¹⁴⁰ However, under an assumption that the New York Convention's implementing legislation is an "act of Congress," the McCarran-Ferguson Act is implicated.

Moreover, when a court held that the New York Convention superseded the McCarran-Ferguson Act,¹⁴¹ the holding was not based upon a construction of the scope of the McCarran-Ferguson Act as applying only to domestic contracts. In fact, the court expressly declined to reach the broader question in the case of whether the McCarran-Ferguson Act applies to international contracts.¹⁴² Two unpublished decisions from the district courts of Florida and Louisiana also seem to reject claims that McCarran-Ferguson can apply to foreign insurers.¹⁴³ However, these cases are devoid of reasoning and involved extraterritorial disputes. In *Antillean*, the district court reached the decision that the McCarran-Ferguson Act could not apply to the dispute at issue because it "was intended to apply only to interstate commerce, and not foreign commerce."¹⁴⁴ There was no reasoning offered by the court and there is no basis for its conclusory statement. That is precisely the issue the court in *Goshawk* declined to answer.¹⁴⁵

Furthermore, the policy concerns the Court addressed in *Japan Line*¹⁴⁶ do not preclude the Court from including foreign insurers within the McCarran-Ferguson Act's reach. The Court expressed the importance in respecting international arbitration agreements and creating and maintaining uniformity with regard to foreign affairs.¹⁴⁷ While those concerns are necessary for the United States Supreme Court to consider, they are not outweighed or trumped by including foreign insurers within the McCarran-Ferguson Act. In fact, the McCarran-Ferguson Act's purpose

¹³⁹ *Id.* at 396.

¹⁴⁰ *Id.* It should be noted that the Court in *Garamendi* did not expressly hold the McCarran-Ferguson Act inapplicable to foreign insurers.

¹⁴¹ *Goshawk Dedicated Ltd. v. Portsmouth Settlement Co.*, 466 F. Supp. 2d 1293, 1303 (N.D. Ga. 2006).

¹⁴² *Id.* at 1308.

¹⁴³ *See Antillean Marine Shipping Corp. v. Through Transp. Mut. Ins.*, No. 02-22196-Civ., 2002 WL 32075793, at *3 (S.D. Fla. Oct. 31, 2002); *McDermott Int'l, Inc. v. Underwriters at Lloyd's, London*, No. 91-841, 1992 WL 37695, at *4 (E.D. La. Feb. 14, 1992).

¹⁴⁴ *Antillean Marine Shipping Corp.*, 2002 WL 32075793, at *3.

¹⁴⁵ *Goshawk Dedicated Ltd.*, 466 F. Supp. 2d at 1308.

¹⁴⁶ *Japan Line*, 441 U.S. at 448-49.

¹⁴⁷ *Id.*

is to carve out a *narrow* category, wherein states may regulate the insurance industry. Congress has expressly given its power to speak with one voice to the states whenever the business of insurance is at issue. It is only in this area that the states regulate those who enter into their province, assume contracts therein, and affect their residents. State regulation of a foreign entity's conduct within its own borders is not an attempt to regulate foreign commerce. The Supreme Court has never delineated between foreign and domestic insurers when determining whether a particular law applies to the business of insurance—there is no reason why it should now find such a distinction.

IV. WHY THE SUPREME COURT SHOULD FOLLOW THE SECOND CIRCUIT'S LINE OF AUTHORITY AND APPLY THE MCCARRAN-FERGUSON ACT TO FOREIGN INSURERS

The Supreme Court should apply the McCarran-Ferguson Act to international insurance contracts and domestic contracts alike because the Act contains no language limiting its application to interstate disputes and any such interpretation would be inconsistent with the statute's purpose, history, and public policy. The McCarran-Ferguson Act's language does not limit the scope of laws affecting interstate or foreign commerce. Further, the purpose of the Act is to allow the states to regulate the insurance business. Finally, the McCarran-Ferguson Act should not be construed to allow foreign insurers the right to compel arbitration when domestic insurers are denied these same rights.

A. Plain Language

Rules of statutory construction provide guidance for the courts in determining that the McCarran-Ferguson Act should apply to foreign and domestic insurers alike. “[T]he starting point in a case involving construction of the McCarran-Ferguson Act . . . is the language of the statute itself.”¹⁴⁸ A corollary rule of statutory construction mandates that the Supreme Court look no further than the Act's plain language. “When the statutory language is clear on its face, and its words ‘neither create ambiguity nor lead to an entirely unreasonable interpretation,’ an inquiring court must apply the statute as written, and ‘need not consult other aids to statutory construction.’”¹⁴⁹ The McCarran-Ferguson Act is interpreted based on its plain language, which does not exclude foreign insurers or foreign commerce from its reach.¹⁵⁰

¹⁴⁸ *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 210 (1979) (citing *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 541 (1978)).

¹⁴⁹ *Passa v. Derderian*, 308 F. Supp. 2d 43, 51 (D.R.I. 2004) (quoting *Atlantic Fish Spotters Ass'n v. Evans*, 321 F.3d 220, 224 (1st Cir. 2003)). This is different from treaty interpretation. When interpreting treaties, courts often look beyond the plain language because “[t]reaties are contracts between or among independent nations.” *United States v. Zabaneh*, 837 F.2d 1249, 1261 (5th Cir. 1988). Because treaties are contracts, they do not create rights that are enforceable in courts. See *United States v. Jimenez-Nava*, 243 F.3d 192, 195 (5th Cir. 2001). It is important to distinguish between treaties and statutes because the New York Convention is a treaty, and its implementing legislation takes domestic effect. In order to determine that it is a non-self-executing treaty and thus, an “act of Congress” within the meaning of the McCarran-Ferguson Act, outside aids must be consulted.

¹⁵⁰ See 15 U.S.C. §§ 1011-12. The McCarran-Ferguson Act provides, in relevant part, “[t]he 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.” *Id.* § 1012(a)

To provide clarity in statutory construction, “the plain meaning of legislation should be *conclusive*, except in the ‘rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters.’”¹⁵¹ A complementary rule of statutory construction mandates that courts must give effect to every clause and word of a statute.¹⁵² As previously stated, the McCarran-Ferguson Act provides there will not be “*any barrier*” to prevent regulation of “*every person*” involved in the business of insurance.¹⁵³ The plain meaning of the words of the McCarran-Ferguson Act should be regarded as conclusive to show that Congress, by including the words “any” and “every,” must have intended not to limit its application to domestic insurers.

“Where the legislature has not defined words used in the act, a court must then determine the meaning of the language in accordance with the legislative intent and common understanding to prevent absurdities and to advance justice.”¹⁵⁴ Further, “[courts] may ‘assume that the legislative purpose is expressed by the ordinary meaning of the words used.’”¹⁵⁵ Because the common understanding of the term “every” includes “all possible” and “constitut[es] each and all members of a group without exception,”¹⁵⁶ this necessarily implies that Congress intended to include foreign insurers within the purview of the Act. Additionally, the term “person” includes corporations and companies.¹⁵⁷ The use of these words illustrates Congress’ intent to use unrestrictive language. The Fifth Circuit’s untenable attempt to engraft restrictive terms such as “interstate” or “domestic” is illogical and inconsistent with the purpose of the Act. The language of the McCarran-Ferguson Act, on its face, is clear and unambiguous. Therefore, one need not look to outside sources when interpreting the meaning of the McCarran-Ferguson Act. The Supreme Court should not ignore the plain language and create a limit where none was intended.¹⁵⁸

(emphasis added). The Act further states, “[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 . . . unless such Act specifically relates to the business of insurance.” *Id.* § 1012(b) (emphasis added).

¹⁵¹ *United States v. Ron Pair*, 489 U.S. 235, 242 (1989) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)) (emphasis added).

¹⁵² *U.S. Dep’t of Treasury v. Fabe*, 508 U.S. 491, 504 (1993).

¹⁵³ 15 U.S.C. §§ 1011-12 (emphasis added).

¹⁵⁴ 1A NORMAN SINGER, *SUTHERLAND STATUTORY CONSTRUCTION* § 20.08 (7th ed. 2007).

¹⁵⁵ *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962)).

¹⁵⁶ *THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE* 617 (4th ed. 2000).

¹⁵⁷ 1 U.S.C. § 1 (2006) (“In determining the meaning of any Act of Congress, unless the context indicates otherwise—the word[] ‘person’ . . . include[s] corporations, companies, associations, [and] firms, . . . as well as individuals”); *accord* *United States v. Union Supply Co.*, 215 U.S. 50 (1909) (“A corporation is a ‘person’ within [the] meaning of [the] act”).

¹⁵⁸ *New York Convention*, art. II, 21 U.S.T. 2517, 330 U.N.T.S. 3. There is a textual interpretation argument relating to the New York Convention as well that helps explain why the treaty is non-self-executing and thus an “act of Congress” subject to the McCarran-

As observed by a District of Columbia court, “absent a clearly expressed legislative intention to the contrary, [the plain meaning] must ordinarily be regarded as conclusive.”¹⁵⁹ The effect of the language of the McCarran-Ferguson Act is to impose a clearly stated rule, wherein “state laws that are enacted for the purpose of regulating the business of insurance do not yield to conflicting federal statutes unless a federal statute *specifically requires* otherwise.”¹⁶⁰ This clear rule makes apparent Congress’ intention of leaving the regulation of the insurance industry to the states. Because the New York Convention and its implementing legislation do not include a clear statement that it relates the business of insurance, the McCarran-Ferguson Act should apply and allow state anti-arbitration clauses to invalidate federal arbitration clauses.

Even if the Court decided it needed to look beyond the plain language, the purpose of the McCarran-Ferguson Act is clearly stated in its preamble.¹⁶¹ The McCarran-Ferguson Act grants states the power to “regulate or tax” the insurance industry.¹⁶² By enacting McCarran-Ferguson, Congress expressly gave up its power to control the business of insurance. “The primary concern of Congress” was to “ensure that the States would continue to have the ability to tax and regulate the business of insurance.”¹⁶³ No restrictive language in the Act suggests that these powers apply only to domestic insurers. The legislative history of the McCarran-Ferguson Act warrants that the states are to be the regulators of the insurance industry as a whole.

B. State Laws Govern Foreign Insurers

States are permitted, under the McCarran-Ferguson Act, to tax foreign insurers.¹⁶⁴ In *Sun Life*, the Supreme Court of Illinois upheld a retaliatory tax on

Ferguson Act. The New York Convention originally stated, “[t]he court of a Contracting Stat[e] . . . shall, at the request of one of the parties, refer the parties to arbitration . . .” *Id.* (emphasis added). However, when the United States implemented legislation that adopted the New York Convention, the mandatory language relating to arbitration clauses was changed to permissive: “A court having jurisdiction . . . may direct that arbitration be held in accordance with the agreement . . .” 9 U.S.C. § 206 (2006) (emphasis added). This distinction is crucial. The treaty called for mandatory arbitration but by making it permissive in the Convention Act, Congress presumably recognized that arbitration will not be warranted in every case, and wanted to leave discretion in the courts. For example, “[t]he Sherman Act’s commitment to free competitive markets is among our most important civil policies. This commitment, shared by other nations which are signatory to the [New York] Convention, is hardly the sort of parochial concern that we should decline to enforce in the interest of international comity.” *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 661 (1985) (Stevens, J., dissenting) (citations omitted). The importance of McCarran-Ferguson and states’ regulation of insurance closely mirrors the Sherman Act’s recognized importance in the domestic context. The McCarran-Ferguson Act, like the Sherman Act, is too important to allow international comity concerns to govern these narrow subject matters.

¹⁵⁹ *West End Tenants Ass’n v. George Washington Univ.*, 640 A.3d 718, 726 (D.C. 1994).

¹⁶⁰ *U.S. Dep’t of Treasury v. Fabe*, 508 U.S. 491, 507 (1993) (emphasis added).

¹⁶¹ 15 U.S.C. § 1011 (2006).

¹⁶² *Id.* § 1012(a).

¹⁶³ *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 217-18 (1979).

¹⁶⁴ *Sun Life Assurance Co. of Canada v. Manna*, 879 N.E.2d 320, 331 (Ill. 2007).

foreign and alien insurers.¹⁶⁵ Illinois state law mandated that a tax would be placed on foreign and alien insurers only—no similar tax was imposed on domestic companies.¹⁶⁶ The court upheld that retaliatory tax under the umbrella term “taxation” within the McCarran-Ferguson Act.¹⁶⁷ Most notably, the *Sun Life* court stated, “the McCarran-Ferguson Act permits the states to *regulate* alien insurers.”¹⁶⁸ Precedent from cases like *Sun Life*, where a retaliatory tax fell under the umbrella term “taxation,” provide a foundation for a court to reasonably find that a state’s anti-arbitration provision falls under the umbrella term “regulation.” As long as the underlying purpose of the regulation or tax is sufficiently related to the business of insurance, courts will uphold it under the McCarran-Ferguson Act. *Sun Life* expressly held that “alien insurers are within the ambit of the McCarran-Ferguson Act.”¹⁶⁹

Under the McCarran-Ferguson Act, states have been permitted to regulate foreign insurers in other contexts as well. State law purporting to regulate the business of insurance by requiring companies to post bond before responding to suit was enforced against foreign insurers under the McCarran-Ferguson Act.¹⁷⁰ This is also true, even when domestic insurers were not required to do the same.¹⁷¹ These cases suggest that so long as the state law at issue concerns the business of insurance and meets the three-prong test of the McCarran-Ferguson Act,¹⁷² it will reach any insurer.

In *Republic Insurance Co.*,¹⁷³ a district court rejected the claim that the Swedish reinsurance company did not have to pay bond before responding to suit. The court focused on the fact that the requirement was placed on all insurers across the board.¹⁷⁴ However, in another case,¹⁷⁵ a different court was faced with a similar

¹⁶⁵ *Id.* Illinois classified insurance companies into three categories: domestic, foreign, and alien. *Id.* at 322. “Domestic” insurers are Illinois insurers. *Id.* “Foreign” described those organized under the laws of other states. *Id.* “Alien” insurers are those organized under the laws of another country. *Id.*

¹⁶⁶ *Id.* at 323.

¹⁶⁷ *Id.* at 326.

¹⁶⁸ *Id.* at 331 (emphasis added). The fact that the court used the word “regulate” is an important point to note. The McCarran-Ferguson Act permits the “regulation and taxation” of insurance to be left to the states. 15 U.S.C. § 1012(a) (2006). The term regulation can be quite broad—so long as it specifically relates to the “business of insurance.” See *supra* note 77.

¹⁶⁹ *Sun Life Assurance Co. of Canada*, 879 N.E.2d at 330. “[T]he plain language of the McCarran-Ferguson Act imposes no limitation on the imposition of the tax on an alien insurer.” *Id.* at 331.

¹⁷⁰ See *Republic Ins. Co. v. Atlantica Ins. Co.*, No. 91 CIV. 8362, 1992 WL 350754 (S.D.N.Y. Nov. 12, 1992).

¹⁷¹ See *Int’l Ins. Co. v. Caja Nacional de Ahorro y Seguro*, No. 00 C 6703, 2001 WL 322005 (N.D. Ill. Apr. 2, 2001).

¹⁷² See *supra* Part III.B.

¹⁷³ *Republic Ins. Co.*, 1992 WL 350754.

¹⁷⁴ *Id.* at *3.

state law, yet it extended the *Republic Insurance Co.* holding to a situation in which domestic companies did not face the same requirement.¹⁷⁶ In *Caja Nacional*, state law required a foreign or alien company to file a pre-judgment security with the court that was sufficient to secure the payment of any final judgment that may be rendered prior to filing any pleadings with the court.¹⁷⁷ The federal law provided domestic states immunity from filing this pre-judgment security.¹⁷⁸ Ultimately, the court applied the McCarran-Ferguson Act and held the Swedish reinsurance company was not immune from the state law.¹⁷⁹

Courts have also applied the McCarran-Ferguson Act to bankruptcy proceedings between a United States domestic insurance company and an Israeli reinsurance company.¹⁸⁰ Although the court ultimately held that the McCarran-Ferguson Act did not apply to this case, this was not based upon reasoning that the Act does not encompass foreign insurers. The court applied the three-prong test to the contract and determined that the state law and the federal law were not in conflict.¹⁸¹ “Rather than being contrary to the [federal law], the insurance laws of [the states] relating to the liquidation of nondomiciliary insolvent insurers are remarkably similar to federal law in their underlying purpose.”¹⁸² The court’s holding relied entirely on the fact that the federal law at issue would not “invalidate, impair, or supersede”¹⁸³ the state law at issue; it had nothing to do with the fact that the reinsurance company’s contract was international.¹⁸⁴

If the Act did not encompass foreign companies, the bankruptcy court presumably would not have gone through the tedious task of applying the prongs of the test to the facts of the case. Instead, it would have dismissed the case on the basis of the McCarran-Ferguson Act not reaching foreign companies. Because it did not do so, one may reasonably infer that the McCarran-Ferguson Act applies to foreign and domestic insurers alike.

Because the federal government allows states to tax and impose bonding mandates, it is necessary that states also have the power to demand or deny arbitration where insurance contracts, often contracts of adhesion, are limited in terms of liability. It is apparent from the plain language¹⁸⁵ of the McCarran-Ferguson Act and the numerous cases validating its reach¹⁸⁶ that states may regulate

¹⁷⁵ *Caja Nacional*, 2001 WL 322005.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at *1.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at *2.

¹⁸⁰ *See In re Pinhas Rubin and Joseph Halevy*, 160 B.R. 269 (Bankr. S.D.N.Y. 1993).

¹⁸¹ *Id.* at 281.

¹⁸² *Id.*

¹⁸³ 15 U.S.C. § 1012 (2006).

¹⁸⁴ *In re Pinhas*, 160 B.R. at 281.

¹⁸⁵ 15 U.S.C. § 1012.

¹⁸⁶ *See Sun Life v. Manna*, 879 N.E.2d 320 (Ill. 2007); *Republic Ins. Co.*, 1992 WL 350754; *Caja Nacional*, 2001 WL 322005; *In re Pinhas*, 160 B.R. 269.

the conduct of all insurers, domestic and foreign alike, operating within their borders to the extent their conduct falls within the business of insurance. For example, in *Wilburn Boat Co.*,¹⁸⁷ state law was applied to maritime disputes, despite the Admiralty Clause,¹⁸⁸ which granted federal jurisdiction over the claim. Similarly, the Supreme Court should find that because state anti-arbitration clauses purport only to regulate the business of insurance within its borders, it can reverse-preempt the New York Convention by way of the McCarran-Ferguson Act.

C. Public Policy

To construe the McCarran-Ferguson Act in a way that restricts its application to domestic insurers alone would produce unjust, far-reaching results that would, in effect, permit foreign insurance companies to have rights over domestic individuals that domestic companies do not have. Insurance contracts are classified as contracts of adhesion because they are drafted solely by the insurance company, while the policyholder has no bargaining power with regard to the formation of the policy. Thus, an insurance policy is and should be liberally construed in favor of the insured. The purpose of the McCarran-Ferguson Act is to protect policyholders, regardless of where the insurance company is domiciled.

The burden placed upon a United States resident, in enforcing the New York Convention and sending it to another country in order to pursue arbitration, is unduly burdensome.¹⁸⁹ If the company came into the state to create the policy, and the actions were carried out in the state, there is no basis to find it unreasonable to expect it to return in order to defend itself from suit. “Consideration of a fully developed record by a jury, instructed in the law by a federal judge, and subject to appellate review, is a surer guide to the competitive character of a commercial practice than the practically unreviewable judgment of a private arbitrator.”¹⁹⁰

Although the Supreme Court has previously held valid an arbitration clause between a foreign and domestic company in *Scherk*,¹⁹¹ this situation is distinct. The arbitration clause was upheld in that case¹⁹² because the negotiations were conducted in both countries, both countries had experts assisting them, and the deal was closed

¹⁸⁷ *Wilburn Boat Co. v. Fireman’s Fund Ins. Co.*, 348 U.S. 310 (1955).

¹⁸⁸ U.S. CONST. art. III, § 2, cl. 1.

¹⁸⁹ Evan Knott, *Reed Smith LLP on the Fifth Circuit’s Decision in Safety National: Significant Implications for the Future Enforceability of Foreign Arbitration Provisions Conflicting With State Insurance Statutes*, 2010 EMERGING ISSUES 4794 (Jan. 6, 2010) (“Policyholders stand to lose much more than their ability to litigate coverage disputes in U.S. state or federal courts and thus utilize the benefits of formalized fact and expert discovery, transparency of dispute resolution proceedings, and the appellate process typically absent from foreign arbitration proceedings. Policyholders are also at risk of losing crucial rights to litigate and recover for insurer bad faith, which is essentially non-existent under the insurance laws of the United Kingdom and other foreign jurisdictions.”).

¹⁹⁰ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 666 (Stevens, J., dissenting).

¹⁹¹ *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974).

¹⁹² *Id.* at 519-20 (holding international agreements to arbitrate must be respected and enforced in the federal courts).

and signed in the foreign country.¹⁹³ The Court noted, “most significantly, the subject matter of the contract concerned the sale of business enterprises organized under the laws of and primarily situated in European countries, whose activities were largely, if not entirely, directed to European markets.”¹⁹⁴ On the other hand, in a case where the contract was signed in the United States, primarily for the benefit of an American citizen, although the parties may be involved in an international contract, the McCarran-Ferguson Act *should* apply. This is especially true if the business activities were entirely directed at the American market because the policy concerns of *Scherk* would have no bearing on the case.

The international comity gained by enforcing arbitration agreements does not outweigh the importance of leaving the regulation of the insurance industry to the states. “Laws [regulating the business of insurance] symbolize the public interest in having the States continue to serve as the preeminent regulators of insurance in our federal system and indicate the special status of insurance in the realm of state sovereignty.”¹⁹⁵ Further, it is accepted that by enacting the McCarran-Ferguson Act, “Congress intended to declare . . . that uniformity of regulation and state taxation are not required in reference to the business of insurance.”¹⁹⁶

In restricting the McCarran-Ferguson Act to domestic insurers alone, the courts “step out of their proper role [and] rely on no legislative or even executive text, but only on inference and implication, to preempt state laws on foreign affairs grounds.”¹⁹⁷ Courts accept that Congress enacted the McCarran-Ferguson Act to “immunize state insurance regulatory statutes from federal preemption.”¹⁹⁸ Public policy dictates that the McCarran-Ferguson Act should not be narrowed to exclude foreign insurers from its application. This result would unduly burden state residents and the ripple effect would undermine the congressional intent of leaving the insurance industry to the states. Also, because there is no federal instrument that includes a clear statement by Congress that it intended for the McCarran-Ferguson Act to exclude foreign insurers from its application, it should not be limited to domestic insurers alone.

V. CONCLUSION

The McCarran-Ferguson Act specifies that state law relating to the business of insurance shall not be “invalidated, impaired, or superseded by an Act of Congress unless such Act relates to the business of insurance.”¹⁹⁹ It does not say unless such Act relates to *foreign commerce*. It does not distinguish or exempt foreign carriers

¹⁹³ *Id.* at 515.

¹⁹⁴ *Id.* The court also recognized that the United States “cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.” *Id.* at 519 (quoting *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972)).

¹⁹⁵ *Munich Am. Reinsurance Co. v. Crawford*, 141 F.3d 585, 595 (5th Cir. 1998).

¹⁹⁶ *Prudential v. Benjamin*, 328 U.S. 408, 431 (1946).

¹⁹⁷ *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 443 (2003) (Ginsburg, J., dissenting).

¹⁹⁸ *Principal Life Ins. Co. v. City of Philadelphia Tax Review Bd.*, 838 A.2d 854, 859 (Pa. Commw. Ct. 2003).

¹⁹⁹ 15 U.S.C. § 1012(b) (2006).

from the business of insurance. To the contrary, the McCarran-Ferguson Act governs “every person” engaged in the business of insurance.²⁰⁰ Therefore, it is not limited to domestic insurers; it should apply to foreign insurers as well.

Beyond the plain language, the legislative history and early cases interpreting the Act²⁰¹ make clear Congress’ intent that the states be the *sole* regulators of this business. Because the national government has chosen not to regulate foreign insurers and has allowed the states to control in this area, if the McCarran-Ferguson Act does not include foreign companies, those companies would be wholly unregulated.²⁰² Policyholders in the United States face unfair and deceptive business practices from insurers both at home and abroad. Limiting the reach of the McCarran-Ferguson Act to matters of domestic commerce alone leaves policyholders completely unprotected from these risks.

Critics might say, when two large companies, both worth millions of dollars are involved, each party has its own legal team and the contracts are clearly negotiated. However, if the Supreme Court were to step in and create this limitation—excluding foreign insurance companies from the ambit of the McCarran-Ferguson Act—the insurance companies would be unregulated. Implications of that ruling would reach far beyond the multi-million dollar companies. Each person who contracted with a foreign insurance company, who lacked the sophisticated understanding of these complicated areas of law, who operated under the presumption that state law will prevail, would be forced across international waters to pursue a claim. Additionally, if forced to arbitrate, these individuals may be left with the decision of an arbitration panel in another country and with no relief in the United States. This was not the intention of Congress when it passed the McCarran-Ferguson Act. Therefore, the Supreme Court should adopt the Second Circuit’s opinion that the McCarran-Ferguson Act reaches foreign insurers.

²⁰⁰ *Id.* § 1012(a).

²⁰¹ *See Prudential*, 328 U.S. 408; *Robertson v. California*, 328 U.S. 440 (1946).

²⁰² The “business of insurance” is exempt from the laws of Antitrust. 15 U.S.C. § 1013(a). Thus, if the Supreme Court holds that the McCarran-Ferguson Act does not apply to foreign insurers, these companies may enter the United States and subject our citizens to unfair business practices without regulation. Congress has not yet enacted any federal statute that specifically regulates foreign insurers in this context. This is further evidence that Congress intended the McCarran-Ferguson Act to reach foreign insurers and domestic insurers alike.