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## 06-28-1983 Memorandum to the Conference

Lewis F. Powell  
*US Supreme Court Justice*

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

June 28, 1983

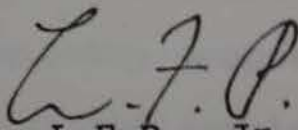
82-52 Arizona Governing Committee v. Norris

MEMORANDUM TO THE CONFERENCE:

In response to the revisions in the Court's opinion circulated today, I am making some changes in footnotes 6 and 7 of my dissent.

I enclose copies of these two footnotes as I propose to revise them, indicating in the margin where the principal changes are made.

If time should become available in the print shop, I may move some parts of these notes up into the text.

  
L.F.P., Jr.

SS

Revised version of footnote 6 (page 5):

When this Court held for the first time that the federal government had the power to regulate the business of insurance, see United States v. South-Eastern Underwriters Assn., 322 U.S. 533 (1944) (holding the antitrust laws applicable to the business of insurance), Congress responded by passing the McCarran-Ferguson Act, 59 Stat. 34, 15 U.S.C. §1011 et seq. As initially proposed, the Act had a narrow focus. It would have provided only: "That nothing contained in the Act of July 2, 1890, as amended, known as the Sherman Act, or the Act of October 15, 1914, as amended, known as the Clayton Act, shall be construed to apply to the business of insurance or to acts in the conduct of that business or in any wise impair the regulation of that business by the several States." S. Rep. No. 1112, 78th Cong., 2d Sess. 2 (1944) (quoting proposed act). This narrow version, however, was not accepted.

Congress subsequently proposed and adopted a much broader bill. It recognized, as it had previously, the need to accommodate federal antitrust laws and state regulation of insurance. See H. Rep. No. 143, 79th Cong., 1st Sess., 3 (1945). But it also recognized that the decision in South-Eastern Underwriters Association had raised questions as to the general validity of state laws governing the business of insurance. Some insurance carriers were reluctant to comply with state regulatory authority, fearing liability for their actions. See id., at 2. Congress thus enacted broad legislation "so that the several States may know that the

Congress desires to protect the continued regulation ... of the business of insurance by the several States." Ibid.

The McCarran-Ferguson Act, as adopted, accordingly commits the regulation of the insurance industry presumptively to the States. The introduction to the Act provides that "silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of [the] business [of insurance] by the several States." 15 U.S.C. §1011. Section 2(b) of the Act further provides: "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 ... unless such Act specifically relates to the business of insurance." 29 U.S.C. §1012(b).

The Court stated that the McCarran-Ferguson Act is not relevant because the petitioners did not raise the issue in their briefs. See 303 U.S. 17. This raises the point that the question presented is whether Congress intended title 29 to prevent any state of insurance regulation that might conflict with federal law. The McCarran-Ferguson Act, however, does not prohibit any state law that regulates the business of insurance. It merely provides that 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 ... unless such Act specifically relates to the business of insurance.

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Revised version of footnote 7 (page 6):

Most state laws regulating insurance and annuities explicitly proscribe "unfair discrimination between persons in the same class." Bailey, Hutchinson & Narber, *The Regulatory Challenge to Life Insurance Classification*, 25 Drake L. Rev. 779, 783 (1976). Arizona insurance law similarly provides that there shall be "no unfair discrimination between individuals of the same class." Ariz. Rev. Stat. Ann. §20-448 (1983). Most of these States, including Arizona, have determined that the use of actuarially sound sex-based mortality tables comports with this state definition of discrimination. Given the provision of the McCarran-Ferguson Act that Congress intends to supersede state insurance regulation only when it enacts laws that "specifically relate to the business of insurance," see n. 6, supra, the Court offers no satisfactory reason for concluding that Congress intended Title VII to pre-empt this important area of state regulation.

The Court states that the McCarran-Ferguson Act is not relevant because the petitioners did not raise the issue in their brief. See ante, at \_\_\_\_, n. 17. This misses the point. The question presented is whether Congress intended Title VII to prevent employers from offering their employees--pursuant to state law--actuarially sound, sex-based annuities. The McCarran-Ferguson Act is explicitly relevant to determining congressional intent. It provides that courts should not presume that Congress intended to supersede state regulation of insurance unless the act in question

"specifically relates to the business of insurance." See n. 6, supra. It therefore is necessary to consider the applicability of the McCarran-Ferguson Act in determining Congress' intent in Title VII. This presents two questions: whether the action at issue under Title VII involves the "business of insurance" and whether the application of Title VII would "invalidate, impair, or supersede" state law.

No one doubts that the determination of how risk should be spread among classes of insureds is an integral part of the "business of insurance." See Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 213 (1979); SEC v. Variable Annuity Co., 359 U.S. 65, 73 (1959). The Court argues, nevertheless, that the McCarran-Ferguson Act is inapposite because Title VII will not supersede any state regulation. Because Title VII applies to employers rather than insurance carriers, the Court reasons that its view of Title VII will not affect the business of insurance. See ante, at \_\_\_, n. 17. This formalistic distinction ignores self-evident facts. State insurance laws, such as Arizona's, allow employers to purchase sex-based annuities for their employees. Title VII, as the Court interprets it, would prohibit employers from purchasing such annuities for their employees. It begs reality to say that a federal law that thus denies the right to do what state insurance law allows does not "invalidate, impair, or supersede" state law. Cf. SEC v. Variable Annuity Co., 359 U.S., at 67. The Court's interpretation of Title VII--to the extent it banned the sale of actuarially sound sex-based annuities--effectively would pre-empt state regulatory authority. In my view, the commands of

the McCarran-Ferguson Act are directly relevant to determining Congress' intent in enacting Title VII.