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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 27, 1983

82-52 Arizona Governing Committee v. Norris

MEMORANDUM TO THE CONFERENCE:

In response to changes in Thurgood's third draft circulated today, I have made some additions to footnote 7, p. 6-7.

As our days are running out, I enclose a typewritten copy of footnote 7 with these changes. Of course, I also have sent it to the print shop.

L.F.P.
L.F.P., Jr.

SS

No. 82-52 - Arizona Governing Committee for Tax Deferred Annuity,
etc. v. Norris

Revision of note 7, pages 6-7:

Most state laws regulating insurance and annuities require that there be no "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 (1982). Most of these States, including Arizona, have determined that the use of sex-based mortality tables comports with this state definition of discrimination. Given the presumption 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 13, n. 17. This misses the point. The question presented is whether Congress intended Title VII to prevent employers from offering their employees 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. 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. In the Court's view, "Arizona has not purported to regulate the business of insurance, but has merely created a deferred compensation plan for its employees in which certain insurance companies participate." Ante, at 13, n. 17 (emphasis in original). This argument ignores self-evident facts. State insurance laws, such as Arizona's, provide that there shall be no unfair discrimination between individuals of the same class, and employers have been allowed under these state laws 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 prevents a purchaser of insurance from doing what state insurance law allows does not "invalidate, impair, or supersede" state law. Cf. SEC v. Variable Annuity Co., 359 U.S., at 67. Because the Court seeks to extend Title VII in a way that would

pre-empt state regulatory authority, the commands of the McCarran-Ferguson Act are directly relevant to determining Congress' intent. |