6-28-1983

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Thurgood Marshall
US Supreme Court Justice

HAB

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 28, 1983

Re: No. 82-52-Arizona Governing Committee v. Norris

MEMORANDUM TO THE CONFERENCE:

In response to the revision in footnote 7 of the dissent to include Arizona Stat. Ann. §20-448, I have revised the second and third paragraphs of footnote 17 on pages 13 and 14 of my opinion to read as follows:

> Although petitioners contended in the Court of Appeals that their conduct was exempted from the reach of Title VII by the McCarran-Ferguson Act, 59 Stat. 33, as amended, 15 U.S.C. §1011 et seq., they have made no mention of the Act in either their petition for certiorari or their brief on the merits. "[O]nly in the most exceptional cases will we consider issues not raised in the petition," Stone v. Powell, 428 U.S. 465, 481 n. 15 (1976); see Sup. Ct. R. 21(a), and but for the discussion of the question in the dissent we would have seen no reason to address a contention that petitioners deliberately chose to abandon after it was rejected by the Court of Appeals.
>
> Since the dissent relies on the McCarran-Ferguson Act, however, post, at 5-7, we think it is appropriate to lay the matter to rest. The McCarran-Ferguson Act provides that "[n]o Act of Congress shall be construed to invalidate, impair, or supercede 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." 15 U.S.C. §1012(b). The application of Title VII in this case does not supercede the application of any state law regulating "the business of insurance." As the Court of Appeals explained, 671 F.2d, at 333, the plaintiffs in this case have not challenged the conduct of the business of insurance. No insurance company has been joined as a defendant, and our judgment will in no way preclude any insurance company from offering annuity benefits that are calculated on the basis of sex-segregated

actuarial tables. All that is at issue in this case is an employment practice: the practice of offering a male employee the opportunity to obtain greater monthly annuity benefits than could be obtained by a similarly situated female employee. It is this conduct of the employer that is prohibited by Title VII. By its own terms, the McCarran-Ferguson Act applies only to the business of insurance and has no application to employment practices. Arizona plainly is not itself involved in the business of insurance, since it has not underwritten any risks. See Union Labor Life Ins. Co. v. Pireno, ____U.S.____, ____(1982) (McCarran-Ferguson Act was "intended primarily to protect 'intra-industry cooperation' in the underwriting or risks") (emphasis in original), quoting Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 221 (1979); SEC v. Variable Annuity Life Ins. Co., 359 U.S. 65, 69 (1959) ("the concept of 'insurance' [for purposes of the McCarran-Ferguson Act] involves some investment risk-taking on the part of the company"). Because the application of Title VII in this case does not supercede any state law governing the business of insurance, see Spirt v. Teachers Ins. & Annuity Ass'n., 691 F.2d, at 1064; EEOC v. Wooster Brush Co., 523 F. Supp. 1256, 1266 (N.D. Ohio 1981), we need not decide whether Title VII "specifically relates to the business of insurance" within the meaning of the McCarran-Ferguson Act. Cf. Women in City Gov't United v. City of New York, 515 F. Supp., at 302-306.

I have sent this change to the printer.

Sincerely,

T.M.

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