No. 08-721

IN THE

Supreme Court of the United States

FIRST AMERICAN TITLE INSURANCE COMPANY AND OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY,
Petitioners,

v.

SUSAN COMBS, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, AND GREG ABBOTT, ATTORNEY GENERAL OF THE STATE OF TEXAS,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Texas

BRIEF OF ALAMO TITLE INSURANCE, CHICAGO TITLE INSURANCE COMPANY, COMMONWEALTH LAND TITLE INSURANCE COMPANY, FIDELITY NATIONAL TITLE INSURANCE COMPANY, LAWYERS TITLE INSURANCE CORPORATION, SECURITY UNION TITLE INSURANCE COMPANY, AND TICOR TITLE INSURANCE COMPANY, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

LINDA J. BURGESS *
WINSTEAD PC
401 Congress Avenue
Suite 2100
Austin, Texas 78701
(512) 370-2800

* Counsel of Record

Counsel for Amici Curiae

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Under *Western & Southern Life Insurance Co. v. State Board of Equalization of California*, 451 U.S. 648 (1981) and *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985), retaliatory taxation by the states is legitimate precisely because it aims to equalize domestic and foreign taxation. In this case, Texas' retaliatory tax statute has been interpreted to produce an effective premium tax rate of 0.2025%. Texas has gone beyond the point of equalization because no legislature could reasonably believe a sister state would reduce its premium tax to this negligible rate. Necessarily then, has the Texas statute lost its legitimacy under the Equal Protection Clause?

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INTEREST OF *AMICI CURIAE*

This amicus brief is presented by seven title insurance underwriters, which engage in a significant amount of title insurance business in Texas and across the country—Alamo Title Insurance, Chicago Title Insurance Company, Commonwealth Land Title Insurance Company, Fidelity National Title Insurance Company, Lawyers Title Insurance Corporation, Security Union Title Insurance Company, and Ticor Title Insurance Company (collectively "Amici Title Insurers").[1] With the exception of Alamo Title, all of these underwriters are incorporated and domiciled in states other than Texas. Chicago Title, Commonwealth, and Lawyers Title are domiciled in Nebraska. Fidelity, Security Union, and Ticor are domiciled in California. In 2007 alone, the non-domiciled Amici Title Insurers collected in excess of $740 million in title insurance premiums in Texas. They will face increased retaliatory tax liability on their premiums collected in Texas if this Court denies the Petitioners' Petition for Writ of Certiorari and allows the Texas Comptroller's reinterpretation of the Texas retaliatory tax statute (called "new math" by the Texas Supreme Court Majority) to stand. In the case of Alamo Title, because of Texas' retaliatory tax treatment, it risks retaliation from sister states in which it does business. Amici Title Insurers submit

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[1] The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk of the Court. Further, counsel of record for the parties received timely notice of the intent of Amici Title Insurers to file this brief. Amici Title Insurers state that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than Amici Title Insurers made such a monetary contribution.

that the Comptroller's "new math" renders Texas' retaliatory tax statute unconstitutional by going beyond what this Court held Constitutionally permissible under the Equal Protection Clause in *Western & Southern Life Insurance Co. v. State Board of Equalization of California*, 451 U.S. 648 (1981). As such, Amici Title Insurers urge this Court to grant the Petition for Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

SUMMARY OF ARGUMENT

The Texas Comptroller increased Texas state revenues under the State's retaliatory tax system by deciding for purposes of calculating the retaliatory tax to exclude 85% of the assessed state premium tax. This Court should take the opportunity to consider the constitutional principles enunciated in *Western & Southern Life Insurance Co. v. State Board of Equalization of California*, 451 U.S. 648 (1981), in this context. In *Western & Southern*, this Court held that a California retaliatory tax law was legitimately purposed and passed muster under the Equal Protection Clause when the tax on foreign insurers could "apply pressure on other States to maintain low taxes on California insurers" and "promot[e] domestic industry by deterring barriers to interstate business" and when lawmakers could reasonably believe that the retaliatory tax could achieve those purposes. *Id.* at 669-70, 671.

With the Texas Comptroller's "new math" reinterpretation of the Texas retaliatory tax statute, this legitimate purpose disappears. Under the Texas Comptroller's "new math," eighty-five percent of the state tax on title insurance premiums is ignored for purposes of calculating the retaliatory taxes owed by

foreign insurers, making the effective tax rate on those premiums only 0.2025%. The constitutional principles enunciated in *Western & Southern* will not accept as rational that Texas lawmakers could believe other States would respond by lowering their tax rates on Texas insurers to such a negligible rate. Simply, the new interpretation of the Texas retaliatory tax statute is not rationally related to the legitimate state purpose under the Equal Protection Clause identified by this Court in *Western & Southern*, and the only purposes that the statute could reasonably be thought to have—raising revenues or penalizing foreign insurers—are not legitimate under this Court's Equal Protection jurisprudence. Accordingly, the new interpretation, as settled by the Texas Supreme Court, renders the statute unconstitutional, and this Court should grant review.

ARGUMENT

1. Under *Western & Southern*, a retaliatory tax statute passes Equal Protection muster only if it has the legitimate state purpose of promoting domestic industry by applying pressure on other States to maintain low taxes on the retaliating State's domestic insurers.

This Court considered the constitutional principles governing the right of States to impose retaliatory taxes in *Western & Southern*. There, this Court upheld California's retaliatory tax against constitutional challenge. In doing so, the Court explained a State may not impose "more onerous taxes or other burdens on foreign corporations than those imposed on domestic corporations, unless the discrimination between foreign and domestic corporations bears a

rational relation to a legitimate state purpose." *Western & Southern*, 451 U.S. at 668. The Court concluded that California's tax had the legitimate purpose of promoting the interstate business of domestic insurers by deterring other States from enacting discriminatory or excessive taxes:

> Since the amount of revenue raised by the retaliatory tax is relatively modest . . . and the impetus for passage of the tax comes from the nationwide insurance industry, it is clear that the purpose is not to generate revenue at the expense of out-of-state insurers, but to apply pressure on other States to maintain low taxes on California insurers.

Id. at 669-70.

Later, in *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985), this Court relied on the principles enunciated in *Western & Southern* to hold that an Alabama differential premium tax statute did not pass Equal Protection muster, at least under the two expressed statutory purposes. Essentially the state statute coerced foreign insurers to invest domestically by imposing a higher premium tax, but reducing the rate based on domestic investment. This Court held that neither promoting domestic business within the state, nor encouraging capital investment in Alabama assets was a legitimate purpose when furthered by discrimination against non-resident competitors.

The New York Court of Appeals, in holding that the State's exclusion of a certain credit from its retaliatory tax calculation only served to generate revenue and did not further a legitimate purpose, effectively stated the relationship between *Western &*

Southern and *Metropolitan Life*:

> *Western & Southern* and [*Metropolitan Life*] together teach us that retaliatory taxation is legitimate precisely because it aims to equalize domestic and foreign taxation. The rule derived from these cases is that a system of retaliatory taxation, which by definition discriminates between domestic and foreign insurance companies, is constitutionally sound insofar as it aims to equalize the tax burden of domestic and foreign insurers[. However,] the imposition of retaliatory tax ***beyond the point of equalization*** solely to generate revenue at the expense of foreign insurers lacks legitimacy.

See United Servs. Auto. Ass'n v. Curiale, 668 N.E.2d 384, 388 (N.Y. 1996) (emphasis added). In other words, under *Western & Southern* and *Metropolitan Life*, this Court recognizes that a point can be reached with a retaliatory taxation system that the State could not reasonably believe its system could contribute to equalizing the tax burdens of domestic and foreign insurers. At that point, the State's statute could no longer be deemed rationally related to the legitimate purposes identified by this Court in *Western & Southern*. And that would necessarily leave the only possible purposes of the statute to be raising revenue or penalizing foreign insurers, neither of which are constitutionally legitimate.

Amici Title Insurers submit that when a statute imposes a retaliatory tax that cannot be rationalized with the principle of equalization, the State has gone too far. And the State's statute no longer passes muster under the Equal Protection Clause. *See American Fire & Cas. Co. v. New Jersey Div. of Taxation*, 912 A.2d 126 (N.J. 2006) (recognizing that

when the Director applied the state's retaliatory tax statute in a manner that essentially produced an extremely low effective premium tax rate, foreign states were unlikely to respond by lowering their tax rates, and thus holding the Director's interpretation would raise significant constitutional questions).

2. The Texas Comptroller's "new math" reinterpretation of the Texas retaliatory tax statute results in an application of the statute that goes too far under this Court's holding in *Western & Southern* and deprives the statute of constitutional legitimacy.

In its assessment of the constitutionality of the Texas Comptroller's "new math," the Texas Supreme Court relied on its conclusion the insurer was not "directly liable" for the tax on that part of the premium allocated administratively to the agent.[2] Amici Title Insurers contend that to whom the State allocates liability for the premium tax is not germane to the constitutional question. It is the premium tax assessed by the State that is the relevant burden for

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[2] Specifically, under the new interpretation of the statute, the tax on the portion of the premium retained by the title insurance agent (85%), though remitted to the Comptroller by the title insurer, is deemed paid by the agent and is excluded from the calculation of the foreign title insurer's retaliatory taxes. *See First American Title Ins. Co. v. Combs*, 258 S.W.3d 627, 631 (Tex. 2008). The Comptroller's proffered justification for its "new math" is that the 85/15 premium split is mandated by Texas law, and the title insurer, though responsible for remitting the agent's portion of the tax to the Comptroller, does not actually pay the agent's portion and cannot be held liable for failure to pay it under the Comptroller's Rules. *See id.* at 633, 635.

determining the retaliatory tax because it is the premium tax burden alone that has the potential of influencing other States' insurance tax policies. Essentially, retaliatory tax systems depend on "apples-to-apples" comparisons, or more correctly, on a common understanding of what it is that is being taxed. The "new math" upheld by the Texas Supreme Court accepts that common understanding of what is being taxed—100% of the premiums collected—but arbitrarily ignores 85% of that base to calculate its retaliatory tax. By this arbitrary exclusion, Texas effectively generates a negligible domestic tax rate. Such a low rate deprives the retaliatory tax equation of its equalization rationale because the Texas Legislature could not reasonably believe it would properly influence other States' insurance tax policies.

The Dissenting Opinion in the Texas Supreme Court aptly illustrated this point:

> Suppose an insurer from a state with a 1% premium tax does business in Texas. On a $1,000 premium, the Comptroller would compare the $2.03 insurer's share of the Texas tax to the $10 premium tax in the other state and assess a $7.97 surcharge. In essence, for purposes of applying the retaliatory tax, the Comptroller has reduced Texas' gross premiums tax rate by 85%, from 1.35% to 0.2025%.

See First American Title Ins. Co. v. Combs, 258 S.W.3d 627, 642-43 (Tex. 2008) (Hecht, J., dissenting). Thus, under the Comptroller's "new math," a foreign insurer could owe retaliatory taxes even if the foreign insurer's home state has a lower premium tax rate than Texas' rate of 1.35%. The Dissenting Opinion's hypothetical hits close to home with the

Amici Title Insurers. For example, Chicago Title, Commonwealth, and Lawyers Title are all domiciled in Nebraska, which has a 1% premium tax rate on 100% of the premiums. Comparing the effective tax rate as explained by the Dissenting Opinion, this will result in a retaliatory tax assessment for these Title Insurers, though Nebraska's 1% tax rate is obviously less than Texas' 1.35% tax rate.

The Majority's response to the Dissent that the foreign insurer would still pay the same total amount of taxes as a Texas insurer operating out-of-state (in the Dissenting Opinion's hypothetical, $10), even if correct, misses the point. By ignoring the taxes assessed on 85% of the premiums, the Texas Comptroller has made it unlikely, if not impossible, that a foreign state would respond to Texas' retaliatory tax statute by lowering its rate to the level necessary to achieve equalization and avoid the retaliatory tax on its insurer. *See id.* at 637.

Regardless of how insurers and agents split premiums and allocate the costs of the business enterprise, the relevant tax burden for purposes of the retaliatory tax statute is the tax on the premium. It is this burden that is taken into account by State lawmakers in determining whether to lower their tax rate in response to another State's retaliatory taxing system. Under the Comptroller's "new math," the effective tax rate on Texas premiums for retaliatory tax purposes is 15% of the current statutory rate of 1.35%, *see* TEX. INS. CODE § 223.003(a), or 0.2025%. Other States could not rationally be expected to lower the tax rate on premiums to this negligible amount, and thus, the Comptroller's reinterpretation of the retaliatory tax statute cannot be said to rationally further the purpose of equalizing the tax burden on

Texas insurers doing business in other States. Rather, the only conceivable purpose furthered by the Comptroller's reinterpretation is the generation of additional revenue or the penalization of foreign insurers—neither of which are legitimate state purposes. *See Metropolitan Life*, 470 U.S. at 877-79; *Western & Southern*, 451 U.S. at 669-70. Under the Comptroller's reinterpretation, Texas has violated the principles of this Court's holding in *Western & Southern* and is applying its statute in a way that does not pass muster under the Equal Protection Clause.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

LINDA J. BURGESS *
WINSTEAD PC
401 Congress Avenue
Suite 2100
Austin, Texas 78701
(512) 370-2800

* Counsel of Record

Counsel for Amici Curiae

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