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 FOR THE STATE OF TEXAS, AND GREG ABBOTT, ATTORNEY GENERAL OF THE STATE OF TEXAS,
Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Like virtually every other State, Texas has a retaliatory-tax statute that is designed to equalize the tax burdens borne by its domestic and foreign-based insurance companies. If a foreign insurer's home state would impose a greater aggregate tax burden on a Texas insurer than Texas "directly imposes" on the foreign insurer, Texas applies a retaliatory tax to the foreign insurer in the amount of the difference.

The calculation of retaliatory taxes is directly affected by Texas's pass-through system for collecting premium taxes on title insurance. In Texas, title agents, which are distinct entities from title-insurance companies, are responsible for 85% of the premium taxes, which they remit to title-insurance companies. Title-insurance companies are then required to remit the entire amount of taxes due to the State. Because a title-insurance company is only burdened by 15% of the premium taxes in Texas, Texas includes only that 15% in the company's aggregate tax burden when calculating the retaliatory tax owed to the State.

When calculating the retaliatory taxes owed by foreign title-insurance companies, does the Equal Protection Clause require Texas to credit those companies with premium taxes that they have remitted on behalf of title agents?

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BRIEF IN OPPOSITION

Petitioners seek review of the Texas Supreme Court's decision that applying Texas's retaliatory-tax statute to foreign-based title insurers does not violate the Equal Protection Clause. But the case does not warrant review for several reasons. First, Petitioners have failed to identify any conflict among state or federal courts that is implicated by the Texas Supreme Court's decision. Second, contrary to Petitioners' assertions, the case does not present issues of "vital interest" to the national insurance industry, nor does it "dramatically alter the legal landscape" concerning challenges to state retaliatory-tax regimes. Pet. 15. Rather, the lower court's decision turned on interpreting Texas's unique statutes concerning the assessment of premium taxes on title insurers and their independent title agents. And because the decision focused on Texas's particular method of collecting premium taxes from one segment of the insurance industry—title insurers and title agents—it did not herald any significant change concerning nationwide retaliatory-tax regimes or challenges to those regimes.[1]

Finally, Petitioners have failed to demonstrate any disharmony between the lower court's decision and the Court's relevant Equal Protection Clause precedent concerning state taxation of foreign insurance companies. In *Western & Southern Life Insurance Co. v. State Board of Equalization*, the Court held that retaliatory taxes do not generally violate the Equal Protection Clause. 451

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1. It is therefore unsurprising that the insurance industry has offered virtually no support for the petition. Indeed, only one amicus brief has been filed in support of Petitioners, by a group of affiliated title insurers, and it makes no argument that this case will result in dire consequences to the national insurance industry.

U.S. 648, 674 (1981). The Texas retaliatory tax statute, in form and function, operates just like the California statute upheld in *Western & Southern*. The crux of Petitioners' complaint actually concerns the effect of Texas's pass-through system for collecting title-insurance-premium taxes on the calculation of foreign title insurers' retaliatory taxes. Under Texas law, title agents must remit 85% of the premium taxes to title-insurance companies, and the title-insurance companies must then remit the entire amount of taxes due to the State. Petitioners do not, and cannot, dispute that 85% of the premium taxes do not come "out of their pocket," so to speak; nonetheless, they want to be credited for those monies for retaliatory-tax purposes *as if* they had actually been burdened with the tax. But because none of the Court's Equal Protection Clause cases stand for the proposition that retaliatory taxes must be adjusted to credit foreign insurance companies for tax payments actually borne by other parties, this case presents no conflict with the Court's precedent warranting review.

STATEMENT

I. BACKGROUND

A. Premium Taxes

1. Texas, like most other States, imposes a tax on title insurance premiums. TEX. INS. CODE art. 9.59, §§ 1, 4;[2] *see*

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2. Texas recodified its premium-tax statutes in 2003. *See* TEX. INS. CODE §§ 223.001-.011. The Legislature did not intend the recodification to make any substantive changes to the law. Act of May 22, 2003, 78th Leg., R.S. ch. 1274, 2003 Tex. Gen. Laws 3611. For clarity, the brief will refer to the version of the statutes in effect at the time the facts of this case arose.

also Pet. App. 75a-76a. Texas also regulates the division of premiums between title agents and insurance companies: agents keep 85% of the premiums and remit 15% to the insurance company. 28 TEX. ADMIN. CODE § 9.1 (adopting Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas, which sets the division between insurance companies and agents). Texas's premium tax, however, is imposed on 100% of the premiums, regardless of whether they are retained by the agent or remitted to the insurer. TEX. INS. CODE art. 9.59, § 8(b).

Instead of burdening one party with the entire premium tax or creating two separate collection mechanisms (one for insurers and one for agents), the Texas Legislature chose to consolidate the collection process by making title insurers pass-through entities for title agents' premium taxes. *See id.* §§ 1, 8(b). As described by the Texas Supreme Court, "'[I]n lieu of creating a separate tax collection system for insurance agents, the Legislature implemented an integrated system of taxation with the insurance company acting as the central collection point." Pet. App. 11a. Title agents remit their portion of the premium tax (85%) to title-insurance companies who, in turn, remit the entire premium tax to the State.

Texas has further simplified this process by building the title agents' tax burden into the mandated division of premium. TEX. INS. CODE art. 9.59, § 8(b). Specifically, Texas "set[s] the division of the premium between insurer and agent so that the insurer receives the premium tax due on the agent's portion of the premium and remits it to the State." *Id.* Texas's premium division of 85/15 was set

by the Department of Insurance with the understanding that the insurer's portion would include the agent's tax burden. Once the insurer receives its portion of the premium from the agent, the insurer is legally obligated to pay the entire tax to the State. *Id.* § 1. But, if the title insurer does not receive the required premium from the title agent, it is not obligated to pay the full premium tax, as insurers and agents are separately liable for their portions of the tax. 34 TEX. ADMIN. CODE § 3.831(4)(C).

In sum, although Texas law places a duty on the title insurer to remit the entire premium tax to the State, that duty arises only when the insurer receives its share of the premium from the title agent. The only burden placed on insurance companies with respect to the agent's portion of the tax is an "administrative burden of acting as a conduit for the agents' tax payments." Pet. App. 12a.

The Texas Legislature has recognized that both insurance companies and agents pay premium taxes by exempting both from paying other taxes. Article 9.59, § 8(a) provides that "[t]itle insurance companies and title insurance agents *subject to the tax levied by this article* may not be required to pay any additional tax in proportion to their gross premium receipts levied by this state or any county or municipality . . . ." (emphasis added).[3] Thus, Texas's premium-tax system makes both title-insurance companies and title agents responsible for their proportionate burden of the premium tax and exempts them from other taxes as a result.

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3. The Texas Tax Code also exempts title insurance companies and title agents from paying Texas's franchise tax. TEX. TAX CODE § 171.052.

2. Texas's premium tax system has not always existed in its current form. Prior to 1988, Texas taxed title-insurance premiums in accordance with a general tax scheme that applied to multiple types of insurance and simply imposed an annual tax on "insurance carriers." TEX. INS. CODE art. 4.10, § 1, Act approved May 16, 1907, 30th Leg., 1st C.S., ch. 18, § 8, 1907 Tex. Gen. Laws 479, 482-84 (amended 1981), repealed by Act of May 22, 2003, 78th Leg., R.S., § 26(a)(1), 2003 Tex. Gen. Laws 3611, 4138. In 1987, the Texas Legislature enacted article 9.59, separating the taxation of title insurance from that of other insurance. Act of June 1, 1987, 70th Leg., R.S., § 22, 1987 Tex. Gen. Laws 3610, 3638-40. This article created the same pass-through system described above—facilitating the collection of premium taxes by including the agent's taxes within the division of premium and exempting insurers and agents from other taxes. *Id.*

In 1996, the Texas Comptroller of Public Accounts issued a letter interpreting article 9.59 in response to questions from the State of Oregon. 2.R.585-86.[4] The Comptroller took the position that both title-insurance companies and title agents are taxpayers under Texas's premium-tax system and, therefore, title insurers would be allowed to adjust their tax filings if title agents failed to remit the required portion of premiums. 2.R.585. The Comptroller reserved the right to take enforcement action against delinquent title agents to collect the premium taxes due. *Id.* Thus, the Comptroller concluded that a title insurer's premium-tax liability is based only on its

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4. Citations to the record are in the form [volume number].R.[page number].

portion of the premiums. 2.R.586. Four years later, in 2000, the Comptroller made her position publicly available by including it in a letter published on the Comptroller's online State Tax Automated Research System (STAR system).[5] 2.R.588-90.

In 2001, the Comptroller reinforced her view that title agents are taxpayers of the premium tax by amending the relevant administrative rule to state that insurers and agents are "separately liable for the [premium] tax." 34 TEX. ADMIN. CODE § 3.831(4)(C); *see also Lewis v. Jacksonville Bldg. & Loan Ass'n*, 540 S.W.2d 307, 310 (Tex. 1976) (stating that properly enacted administrative rules have the force and effect of law in Texas). Therefore, title insurers are not guarantors of the entire premium tax. Rather, they are responsible for 15% of the tax and bear only an administrative burden of remitting the agent's 85% of the tax to the State once it is received from the agent.

B. Retaliatory Taxes

1. In *Western & Southern*, the Court considered the constitutionality of California's retaliatory-tax statute and determined that it did not violate the Equal Protection Clause because it was rationally related to the legitimate state interest of "promot[ing] . . . domestic industry by deterring barriers to interstate business." 451 U.S. at 671; *see also* U.S. CONST. amend. XIV, § 1. As described by the Court, retaliatory taxes under California's statute were

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5. The STAR system is located at http://cpastar2.cpa.state.tx.us/index.html (last visited Mar. 27, 2009), and the letter referenced is No. 200009751L.

computed by comparing the taxes owed by a foreign insurance company in California with the total taxes that would be imposed on a hypothetical California insurance company doing business in the foreign company's state of origin. *Western & Southern*, 451 U.S. at 650-51. If the taxes on the hypothetical California company were higher than those of the foreign company in California, California imposed a retaliatory tax in the amount of the difference between the two. *Id.* at 651. Use of the retaliatory tax thus "appl[ied] pressure on other States to maintain low taxes on California insurers." *Id.* at 669-70.

2. Texas's retaliatory-tax statute is similar in form and effect to California's retaliatory-tax statute. *Compare* CAL. INS. CODE § 685(a) *with* TEX. INS. CODE art. 21.46, § 1(a).[6] Texas's retaliatory law, like that of all other States, does not demand a line-by-line comparison of tax rates and fees, but rather requires a comparison of aggregate tax burdens. TEX. INS. CODE art. 21.46, § 1(a); *see also* Pet. App. 73a-74a. Specifically, Texas compares the "aggregate . . . taxes, including maintenance or similar regulatory fees, income and corporate franchise, licenses, fees, fines, penalties, deposit requirements or other obligations, prohibitions or restrictions" directly imposed on a foreign insurance company in Texas with those imposed on a hypothetical Texas insurance company doing business in the foreign insurer's state. TEX. INS. CODE art. 21.46, § 1(a). For example, if a California title-insurance

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6. Texas has also recodified its retaliatory-tax statute without substantive change. *See* TEX. INS. CODE § 281.004; Act of May 22, 2003, 78th Leg., R.S., ch. 1274, 2003 Tex. Gen. Laws 3611. The brief will refer to the version of the statute in effect at the time the facts in this case arose.

company's tax burden in Texas is $800, but an identical Texas company operating in California would face a tax burden of $1000, the amount of retaliatory tax in Texas is $200.

Comparing the aggregate dollar amount owed by a title insurer is critical, because each State has its own unique tax system. Consider the tax burdens in the three states involved here: California, Minnesota, and Texas. The tax rate on title-insurance premiums in California is 2.35%, CAL. REV. & TAX. CODE § 12202; however, California's premium tax does not apply to the premiums retained by the title agent, but only to the net premiums remitted to the insurer. *See* California Title Insurance Tax Return Form Instructions, *available at* http://www.insurance.ca.gov/0250-insurers/0300-insurers/0100-applications/tax-forms-instruct-and-info/2008/index.cfm (last visited Mar. 27, 2009) (instructing insurers to deduct sum retained by underwritten title companies). Minnesota, by contrast, requires title-insurance companies to pay a 2% tax on 100% of the premiums. MINN. STAT. § 297I.05(1); *Stewart Title Guar. Co. v. Comm'r of Revenue*, 757 N.W.2d 874, 877 (Minn. 2008). Texas, as described above, makes title-insurance companies responsible for 15% of the 1.35% tax on the total premiums. *See supra*, at 2-4.

Although California has the highest tax rate of the three states, Minnesota imposes the greatest burden on insurance companies. For example, using a $1000 premium and an 85/15 split between agent and insurer, the insurance company's tax burden would be $3.53 in

California, $20.00 in Minnesota, and $2.03 in Texas.[7] Texas's retaliatory tax statute, like that of other States, focuses on the dollar amount owed by each title-insurance company, rather than a comparison of tax rates, thereby taking into account the tax structure of each State. Therefore, a Minnesota company operating in Texas—or California—would owe retaliatory taxes.

3. The calculation of retaliatory taxes in Texas was altered by the Comptroller's conclusion that title agents are responsible for 85% of the premium tax. Prior to 2000, Texas did not prohibit title insurers from including 100% of the premium tax as part of their premium-tax burden in Texas when calculating retaliatory taxes. Pet. App. 38a-39a. But, after concluding that agents are liable as taxpayers for 85% of the premium tax, the Comptroller amended the retaliatory-tax forms to provide that insurers should include only their 15% premium-tax burden in calculating whether retaliatory taxes were owed. *Id.* at 5a. In the case of Petitioners, this change increased the amount of retaliatory taxes they were required to pay. *Id.* at 6a.

II. PROCEDURAL HISTORY

A. Lower State Court Proceedings

In 2002, as a result of audits, the Comptroller determined that Petitioners owed additional taxes because they had incorrectly included taxes borne by title agents in the calculation of their retaliatory taxes. Petitioners

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7. The calculations are as follows: California = (($1000 x 0.15) x 0.0235), Minnesota = ($1000 x 0.02), and Texas = (($1000 x 0.0135) x 0.15). Other taxes and fees are set aside for purposes of this example.

paid the disputed taxes under protest and then filed separate suits for refunds, arguing that (1) the Comptroller misinterpreted Texas law, and (2) the Comptroller's interpretation violated the equal protection clauses of both the United States and Texas constitutions. The trial court granted summary judgment for the Comptroller in each suit, *id.* at 61a-64a, and the cases were consolidated on appeal. The Austin Court of Appeals affirmed, rejecting Petitioners' interpretation of state law and concluding that the application of the retaliatory tax was constitutional. *Id.* at 36a-60a.

B. Texas Supreme Court

Petitioners sought discretionary review from the Supreme Court of Texas. The court affirmed the judgment in favor of the Comptroller, concluding that the Comptroller's interpretation of the premium-tax system in article 9.59 was "reasonable and in harmony with the statute's plain meaning." *Id.* at 10a.

The court began by reviewing article 9.59 as a whole and noting that it taxed title agents on their portion of the premiums. *Id.* at 8a-12a. Focusing on the requirement that the premium be divided in such a way that the insurer receives the agent's portion of the premium tax, the court reasoned that there would be no need to ensure that the insurer receives the agent's portion of the tax if the agent was not taxed in the first place. *Id.* at 10a-11a. The court concluded that, with respect to a title agent's portion of the premium tax, the Texas Legislature intended a title-insurance company to be a "pass-through entity" and "a conduit for the agents' tax payments." *Id.* at 12a. The court compared this arrangement to federal personal income taxes that are imposed on individual

employees, even though the employer remits the bulk of the taxes. *Id.* at 11a n.40. In response to Petitioners' argument that title-insurance companies alone bore the responsibility for any tax deficiency, the court recognized that the Comptroller had alleviated that concern by promulgating a rule that made agents and insurers separately liable for their own taxes. *Id.* at 12a-13a.

The court concluded that, because title agents bore 85% of the premium-tax burden, only 15% of premium taxes were "directly imposed" on the title-insurance company for purposes of calculating the retaliatory tax. *Id.* at 12a ("At most, the only compulsion or obligation required of the insurer with regard to 85% of the premium tax is to write a check drawn on the money remitted by the agent—at the end of the day, the insurer's bank account is not negatively burdened."). That is, the court approved the Comptroller's interpretation under state law.

The court then turned to Petitioners' constitutional arguments and posed the two questions required under the rational-basis review set forth in *Western & Southern*: "(1) Does the challenged legislation have a legitimate purpose? and (2) Was it reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose?" *Id.* at 20a (internal quotation marks omitted).

As to the first question, the court held that the statute's purpose was the same as that in *Western & Southern*—to deter barriers to interstate commerce. *Id.* at 21a. In so holding, the court confined itself to considering the legitimacy of the statute's purpose and refused to second-guess the wisdom of the Texas Legislature. *Id.* at 22a. The court rejected Petitioners' argument that the

increase in retaliatory taxes necessarily demonstrated an impermissible purpose of revenue-raising, concluding that the tax still exerted some downward pressure on foreign taxes. *Id.* at 21a-22a.

Likewise, the court also held that the second prong of the equal-protection analysis was met. The court "ha[d] no trouble" concluding that the Comptroller could rationally have believed that lowering tax burdens in Texas would encourage other States to lower their burdens as well. *Id.* The court countered the dissent's argument that Texas was comparing 15% of its taxes to 100% of other States' taxes by noting that the proper comparison is between tax burdens on individual companies, not tax rates on industries. *Id.* at 22a-23a.

The dissenting justices did not dispute the majority's conclusion that Texas law created a pass-through system, stating several times that insurance companies and agents "together" pay the premium tax and that 15% of the tax is the "insurer's share." *Id.* at 27a-28a. Instead, the dissenters argued that the retaliatory tax comparison should be at an industry level, without regard to whether the tax is paid by an insurer or an agent. *Id.* at 33a-34a.

REASONS TO DENY THE PETITION

Petitioners do not challenge the constitutionality of Texas's retaliatory-tax statute itself, but rather Texas's interpretation of it in light of the unique premium-tax structure enacted by the Texas Legislature. The Court should decline to hear their petition for several reasons. First, there is no split or confusion among lower courts regarding the Court's retaliatory-tax jurisprudence. Second, there is no pressing need to hear this case: no tax

war is imminent and the case affects Texas alone. And third, the Texas Supreme Court correctly followed the Court's precedent in ruling that the Comptroller's interpretation of the retaliatory-tax statute did not violate the Equal Protection Clause.

I. THERE IS NO SPLIT AMONG LOWER COURTS ON THIS ISSUE.

Although asserting that retaliatory taxes are the subject of much litigation, Petitioners fail to identify any division among lower courts on this issue—and for good reason. The cases cited by Petitioners are uniform in their understanding and application of the Court's equal-protection precedent as applied to retaliatory taxation, and none concerns the issue presented in this case—payment of a premium tax by someone other than the title-insurance company.

1. Petitioners focus on two cases in suggesting that this case implicates a conflict among the lower courts: *American Fire & Casualty Co. v. New Jersey Division of Taxation*, 912 A.2d 126 (N.J. 2006), and *United Services Automobile Association v. Curiale*, 668 N.E.2d 384 (N.Y. 1996). Pet. 16-19. But neither case addresses the constitutional issue raised by this case, much less reaches a decision conflicting with the reasoning or judgment of the Texas Supreme Court.

American Fire concerned the effect of New Jersey's premium-tax cap on the calculation of retaliatory taxes. 912 A.2d at 128. New Jersey law provided that, if an insurance company's receipt of New Jersey premiums was at least 12.5% of the company's worldwide total, New Jersey would tax only 12.5% of the company's total

premiums, regardless of whether the company received more than 12.5% of its total premiums in New Jersey. *Id.* at 129. Because the cap was not available to New Jersey insurers operating in other States, applying New Jersey's retaliatory tax to foreign insurers could erase the cap's benefits.[8] *Id.* at 132-33. The question was whether to apply the retaliatory tax to the capped or uncapped amount of premium taxes.

The New Jersey Supreme Court decided the case on state-law grounds and described its goal as reconciling the tax-cap and retaliatory-tax statutes so as to give effect to both. *Id.* at 136. The court ultimately concluded that the cap's benefits should not be taken into account in the retaliatory-tax calculation, thereby promoting business in New Jersey while still exerting some downward pressure on other States' premium taxes. *Id.* at 138. The court did not reach the insurer's claim that using the capped amount would violate the Equal Protection Clause, but simply mentioned in dicta that doing so would raise "significant constitutional questions." *Id.*

American Fire is not contrary to the Texas Supreme Court's decision: it involved a completely different statute, did not consider the effect of premium taxes imposed on someone other than the insurer, and failed to decide any constitutional question. The New Jersey court's rationale

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8. For example, if a foreign insurer received 30% of its total premiums from New Jersey insureds, New Jersey would only tax 12.5% of the company's premiums. But, unless the foreign company's home State had a similarly applicable tax cap, the hypothetical New Jersey company would be taxed on all 30% of its premiums, which would likely create a higher tax burden, resulting in a retaliatory tax on the foreign company.

also comports with that of the Texas court. Petitioners refer to the statement in *American Fire* that using the capped amount could result in retaliatory taxes from States "'with a lower tax rate than New Jersey's [stated rate]'" and claim it is contrary to the Texas Supreme Court's decision. Pet. 19 (quoting *Am. Fire*, 912 A.2d at 137). But that statement was part of the court's state-law analysis that attempted to balance the goals of the tax-cap and retaliatory-tax statutes. Further, regardless of how New Jersey may describe its statute, Texas's retaliatory-tax statute explicitly applies to aggregate tax burdens on title-insurance companies—not tax rates. *See* TEX. INS. CODE art. 21.46, § 1(a).

Curiale, the other case examined by Petitioners, also does not conflict with the lower court's decision here. In *Curiale*, the Court of Appeals of New York held that prohibiting foreign-based insurers from including a particular surcharge in the retaliatory-tax calculation violated those insurance companies' equal-protection rights. 668 N.E.2d at 315. There was no question that the insurers paid the surcharge, and the only rationale for excluding it was to "protect" various state funds. *Id.* at 314. Applying the *Western & Southern* analysis, the court recognized that protecting the State's treasury was not a legitimate purpose that justified discriminating against foreign insurance companies. *Id.* at 313-15.

The principle identified by *Curiale*, that retaliatory taxes may tax only to the point of equalization between the States, *id.* at 313, is fully realized in the Texas Supreme Court's ruling. Although it is true that, when retaliatory taxes are due, foreign title-insurance companies will remit to Texas an amount larger than the

premium-tax burden in their own State, the amount remitted includes not only the title insurer's taxes, but also the title agent's taxes that the title insurer is simply passing on to the State. When the title agent's burden is removed, the title insurer's tax burden is the same in Texas and its home State, consistent with the court's opinion in *Curiale*.[9] There is no conflict in either the results or reasoning between the Texas Supreme Court's decision and the cases cited by Petitioners.

2. Unable to demonstrate a genuine split among the lower courts, Petitioners suggest that the Court should nonetheless review this case because "other [state courts] similarly have rejected challenges to retaliatory taxes under the Equal Protection Clause or analogous state provisions—even though some of the applications of the taxes were constitutionally dubious." Pet. 19. But even assuming that the cases cited by Petitioners did indeed involve "constitutionally dubious" taxes, Petitioners fail to identify any link between the issues in this case concerning Texas's pass-through system for collecting premium taxes on title insurance and the entirely different taxes and state tax regimes at issue in those cases—other than the fact that Petitioners consider them all "constitutionally dubious."

Petitioners initially refer to three other state-court decisions: *Sun Life Assurance Co. of Canada v. Manna*,

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9. Using Petitioners' example of Minnesota's 2% tax rate, Pet. 8, a Minnesota title insurer would be required to remit to Texas 3.147% of the title-insurance premium in taxes. However, 1.147% of that amount is the title agent's 85% tax burden of Texas's 1.35% premium tax. When the agent's burden is removed, the title insurer is left paying a 2% tax in Texas—exactly what it would pay in Minnesota.

879 N.E.2d 320 (Ill. 2007), *Premera Blue Cross v. State*, 171 P.3d 1110 (Alaska 2007), and *TIG Insurance Co. v. Department of Treasury*, 629 N.W.2d 402 (Mich.), *cert. denied*, 534 U.S. 1056 (2001). Pet. 19. Of those decisions, only *TIG Insurance* addressed the federal equal protection clause as applied to retaliatory taxes and, even then, in a context different from this case. In *TIG Insurance*, the court considered a Michigan law that precluded insurers from including payments to certain associations in their tax burdens. 629 N.W.2d at 407. Those associations provided insurance for high-risk or otherwise uninsurable individuals, arguably benefitting insurers in Michigan. *Id.* at 408. The Michigan Supreme Court applied the two-prong test from *Western & Southern* and concluded that the law excluding the payments had a legitimate purpose—encouraging States to create similar associations, which could benefit Michigan insurers in those States—and that the law was reasonably related to that purpose. *Id.* at 408-09.

The other two cases were decided solely on state-law grounds. In *Sun Life*, the Illinois Supreme Court held that it was permissible under Illinois law to treat a Canadian insurance company as if it were from Michigan—its port of entry—for purposes of imposing a retaliatory tax. 879 N.E.2d at 325-28. And in *Premera*, the Alaska Supreme Court held that it was permissible to impose a lower premium tax on non-profit corporations, even if the lower rate lead to higher retaliatory taxes. 171 P.3d at 1121-24 (using Alaska's equal protection law, which is "more exacting" than its federal counterpart).

None of these cases concerns the constitutional issue presented in the petition—whether to include taxes paid

by a title agent in the title insurer's calculation of retaliatory taxes—and none is contrary to the Texas Supreme Court's decision. Moreover, there is no reason to believe that a decision by the Court in this case would provide any guidance regarding the validity of unrelated state tax schemes such as those at issue in *TIG*, *Sun Life*, and *Premera*.

3. Petitioners further assert that, because "[o]ther cases abound" concerning "the scope and nature of the equal protection constraints on retaliatory taxes," the Court should review this case because it also concerns retaliatory taxes, a "hotly disputed" issue that is "of substantial importance to the industry." Pet. 20. But the fact that retaliatory taxes generate litigation generally does not mean that this case warrants the Court's review. And the other "hotly disputed" cases cited by Petitioners concern either applying underlying tax regimes different from that at issue in this case or generic challenges to retaliatory-tax statutes that do not survive a straightforward application of the Court's decision in *Western & Southern*. *See, e.g.*, *Prudential Ins. Co. of Am. v. Comm'r of Revenue*, 709 N.E.2d 1096, 1098, 1102-03 (Mass. 1999) (upholding state tax regime providing that tax liability for life-insurance premiums would not be aggregated with tax liability for other premiums in calculating foreign insurers' retaliatory taxes); *Gallagher v. Motors Ins. Corp.*, 605 So.2d 62, 70-71 (Fla. 1992) (rejecting general challenge to Florida's retaliatory-tax statute, which was similar in form and operation to the California retaliatory-tax statute upheld in *Western & Southern*).

Indeed, Petitioners' cases actually demonstrate that state courts have consistently applied the principles of

Western & Southern to the unique tax structures at issue in each case. For example, in *Mutual Life Insurance Co. v. Washburn*, the Illinois Supreme Court rejected an argument that retaliatory taxes should be imposed only when a foreign state's taxes were "on average" greater than Illinois's taxes. 561 N.E.2d 29, 34-35 (Ill. 1990). In doing so, the court affirmed the principle that the comparison should be on a company-by-company basis. *Id.* The court then used the rationale in *Western & Southern* to affirm its interpretation under Illinois's equal protection clause. *Id.* at 37-38.

Similarly, in *Executive Life Insurance Co. v. Commonwealth*, the Commonwealth Court of Pennsylvania upheld an application of its retaliatory-tax statute under the federal equal protection clause. 606 A.2d 1282, 1285-86 (Pa. Commw. Ct. 1992). There, when calculating an insurer's hypothetical burden in California, Pennsylvania included California's tax on annuities if the insurer sold annuities, even though Pennsylvania did not tax annuities. *Id.* at 1283. The court found this reasonable, as it would act to deter California from taxing annuities, *id.* at 1286, and noted that the retaliatory-tax statute was designed to equalize the "burdens or prohibitions" on domestic and foreign companies. *Id.* at 1284.

In sum, the state-court cases cited by Petitioners do not demonstrate any split among the lower courts concerning application of the Court's equal-protection precedent to retaliatory-tax laws. Likewise, none of these cases reflects a conflict with the decision at issue here warranting the Court's review.

II. THIS CASE DOES NOT AFFECT NATIONWIDE INTERESTS.

Petitioners also argue that the Court should grant review of this case because the Texas Supreme Court's decision threatens the stability of the retaliatory-tax system and will "herald a retaliatory tax war." Pet. 14. Significantly, this dire prediction is premised entirely on Petitioners' underlying contention that the Comptroller's interpretation of Texas's premium-tax statutes means that foreign-based title-insurance companies will now pay unconstitutionally discriminatory retaliatory taxes in Texas. Because that underlying contention is untrue, and mischaracterizes how Texas's retaliatory-tax statute applies to foreign title insurers, it provides no basis for granting review.

1. Petitioners' complaint that title-insurance companies in Texas now have to pay unconstitutionally discriminatory retaliatory taxes, Pet. 22-23, is based on their erroneous assertion that out-of-state insurers will pay retaliatory taxes even if their home States impose lower premium taxes than Texas. *Id.* at 22. However, the proper comparison for retaliatory-tax purposes is not between tax rates, but between aggregate tax burdens imposed on title insurers. *See supra*, 7-9; *see also* TEX. INS. CODE art. 21.46, § 1(a). Because the only burden Petitioners bear with respect to title agents' taxes is the administrative burden of remitting those taxes to the State, Pet. App. 12a, title agents' taxes are not part of Petitioners' aggregate tax burden and should not be taken into account when calculating retaliatory taxes.

And although it is true that foreign-based title insurers may pay increased retaliatory taxes because they will no

longer be credited with premium-tax payments borne by title agents, that does not mean that the increased retaliatory taxes are *unconstitutional*. To the contrary, because the change in calculation of retaliatory taxes merely reflects more accurately the actual financial burden imposed on foreign title insurers by Texas's premium taxes, Petitioners' characterization of the change in retaliatory tax calculation as an attempt to impose unconstitutionally discriminatory taxes on foreign insurers is simply wrong.

2. Equally without merit is Petitioners' claim that the Texas Supreme Court's decision, if left undisturbed, could result in counter-retaliation leading to a "tax war." Pet. 24-25. The Court in *Western & Southern* did not discuss the prospect of counter-retaliation in its constitutional analysis. But, put in its proper context, counter-retaliation or a "tax war" informs the second prong of the rational-basis test—whether the legislature could have reasonably believed its retaliatory tax statute would support the state interest of discouraging other States from enacting excessive taxes. *See Western & Southern*, 451 U.S. at 668.

Retaliatory taxes and decisions interpreting them have existed for many years, and yet the Comptroller is unaware of any prior "tax wars," nor have Petitioners identified any. Further, the Comptroller's interpretation of the statutes in dispute here has been in place since 2001 and there has been no effect on the nationwide retaliatory-tax system. Thus, there is no evidence that disputes over retaliatory taxes have led to tax wars in the past or that the Comptroller's challenged interpretation of Texas's tax statutes will cause a tax war.

Indeed, the only evidence of possible counter-retaliation offered by Petitioners is a revenue notice issued by the Assistant Commissioner for Tax Policy and External Relations in Minnesota. *See* Minn. Dep't of Revenue Rev. Notice No. 2006-01 (Mar. 27, 2006), *available at* 2006 WL 1125895. In that notice, the Assistant Commissioner submits that if a State requires an insurance company to pay a tax on 100% of the premiums and another tax on the agents' portion of the premiums, Minnesota will consider the tax burden to include both taxes. *Id.* But Minnesota's notice is not even on point because it does not describe Texas's premium-tax system, in which a title insurer acts only as a pass-through entity for the title agent's taxes. Further, revenue notices in Minnesota "do not have the force and effect of law and have no precedential effect . . . ." MINN. STAT. § 270C.07, subd. 1. Moreover, to the extent the notice was intended to implicate Texas, it was written without the benefit of the Texas Supreme Court's subsequent authoritative interpretation of Texas's law. Thus, the notice provides no credible indication of any impending "tax war."

Finally, even if Minnesota's opinion letter is presumed to be a sign of things to come, the Texas Legislature has provided a means for the Comptroller to negotiate with other States to resolve differences on applying retaliatory taxes, further negating Petitioners' speculation that the Court must intervene here to prevent a tax war. Section 281.008 of the Texas Insurance Code, enacted in 2007, provides that the Comptroller may, by rule, agree with another State to "set aside retaliatory provisions" if use of the retaliatory statutes is not the preferred way to avoid excessive taxation. This statute allows the Comptroller to

resolve differences with Minnesota or any other State concerning retaliatory taxes. For all of these reasons, Petitioners' claim that the Court's intervention is needed to prevent a hypothetical nationwide tax war is unfounded and provides no basis to grant review.

III. THE TEXAS SUPREME COURT CORRECTLY CONCLUDED THAT TEXAS'S RETALIATORY TAX DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

Finally, the Court should decline to hear the petition because the Texas Supreme Court correctly applied the Court's equal-protection precedent to the facts of this case.

1. The Texas Supreme Court properly subjected the Comptroller's interpretation of Texas's retaliatory tax to a rational-basis review. "The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Thus, as described in *Western & Southern*, the Court asks two questions: "(1) Does the challenged legislation have a legitimate purpose? and (2) Was it reasonable for the lawmakers to believe that use of the challenged legislation would promote that purpose?" 451 U.S. at 668.

Turning to the first question, the Court has recognized that retaliatory-tax statutes serve a legitimate purpose—deterring excessive and discriminatory taxation. *Id.* The Comptroller's interpretation of Texas's statutes does just that—it imposes retaliatory taxes on title-insurance companies from States that impose higher premium taxes on Texas title-insurance companies,

thereby encouraging those States to lower their taxes on Texas companies. TEX. INS. CODE art. 21.46, § 1(a).

Any argument by Petitioners that the Comptroller intended her interpretation to be a revenue-raising measure is unfounded. Indeed, examining the premium-tax revenue on title insurance in Texas and Texas's total revenue during the years at issue makes clear that increasing revenue could not have been the Comptroller's purpose.

Between 1998 and 2002, premium-tax revenue on title insurance in Texas ranged from $12,417,556 to $17,721,447.[10] During that same time period, total revenue from all sources in Texas was between $44,497,247,142 and $55,221,546,458.[11] Thus, title-insurance-premium taxes account for 0.025% to 0.037% of Texas's revenue, with retaliatory taxes constituting an even smaller percentage than that.[12] Therefore, any revenue gained from the retaliatory tax is, at most, "relatively modest"—an amount that the Court in *Western & Southern* deemed too small to call into question the legitimate purpose behind the tax. 451 U.S. at 669-70.

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10. Texas's premium-tax revenue on title insurance may be found in the Underwriters Experience Reports on the Texas Department of Insurance's website: http://www.tdi.state.tx.us/reports/report8.html (last visited on Mar. 27, 2009).

11. Information regarding Texas's historical revenues by source is available on the Comptroller's website: http://www.window.state.tx.us/taxbud/revenue_hist.html (last visited Mar. 27, 2009).

12. Also during that time, title-insurance-premium taxes amounted to only 1.6% to 2.2% of insurance-occupation taxes. *See supra*, n.11.

As for the second prong of the equal-protection analysis, it was certainly reasonable for the Comptroller to believe that her interpretation of the tax statutes will encourage lower taxation, as it operates exactly like every other retaliatory-tax statute. Petitioners can have no constitutional complaint that the statute encourages their home States to lower their taxes, as all retaliatory-tax statutes have that effect. Petitioners instead claim that Texas's premium-tax burden is too low to allow for a retaliatory tax. Pet. 28. This argument suggests that there is some numerical threshold embedded in the Equal Protection Clause—*i.e.* if a State's premium tax deviates too far below the national average, then, in Petitioners' view, it is unconstitutional to apply a retaliatory tax.

That concern was never raised by the Court in *Western & Southern*, and indeed such a limit would not make sense. The purpose of retaliatory taxes is to keep tax burdens low. *Western & Southern*, 451 U.S. at 668. Texas has lowered its premium-tax burden on title-insurance companies, thus applying pressure on other States to lower their burdens. Whether other States choose to act has no bearing on the constitutionality of Texas's actions. That they might reasonably choose to act is sufficient for equal-protection purposes. *Id.* at 671-72 ("But whether *in fact* the provision will accomplish its objectives is not the question: the Equal Protection Clause is satisfied if we conclude that the California Legislature *rationally could have believed* that the retaliatory tax would promote its objective.").

The Texas Supreme Court properly applied the Court's equal-protection analysis to the facts of this case and

reached the correct conclusion. There is no need for the Court to revisit the decision.

2. Petitioners' argument that the Texas Supreme Court's decision violates the Court's precedent is also without merit. Pet. 25-27. All of the cases cited by Petitioners concern laws that apply higher taxes or fees to foreign corporations simply because they are foreign. *Id.*

For example, in *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985), the Court struck an Alabama premium-tax statute because it applied one tax rate to domestic companies and a higher rate to foreign companies, regardless of other States' tax burdens. The Court held that Alabama's statute lacked the legitimate purpose identified in *Western & Southern* of attempting to influence other States' policies. *Id.* at 877-78. Instead, the statute simply created obstacles for foreign companies in order to promote domestic business. *Id.*

Similarly, the other cases cited by Petitioners struck down statutes that discriminated against foreign companies or individuals only because they were foreign. *See, e.g.*, *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949) (holding unconstitutional a tax that applied only to foreign corporations); *Hanover Fire Ins. Co. v. Harding*, 272 U.S. 494 (1926) (same).

The Court has recognized that retaliatory taxes do not fall within this line of cases because they serve a different purpose. Retaliatory taxes promote interstate commerce by deterring excessive taxation. *Metro. Life*, 470 U.S. at 876-77. Taxes that discriminate against foreign companies only because they are foreign promote domestic industry by penalizing foreign companies and erecting

barriers to interstate commerce. *Id.* at 877-78. The former purpose is legitimate; the latter is not. *Id.* at 878.

Texas's retaliatory-tax statute and the Comptroller's interpretation of it come within the constitutionally permissible scope of *Western & Southern*. The statute applies only to foreign companies whose home States impose a higher tax burden on title insurers than Texas does. TEX. INS. CODE art. 21.46, § 1(a). Texas does not discriminate against foreign title insurers simply because they are foreign. *Id.*

Because the Comptroller's interpretation of Texas's premium-tax and retaliatory-tax laws is consistent with the Court's precedent, the Court should decline to hear the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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