IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 24704

METROPOLITAN LIFE INSURANCE COMPANY; METROPOLITAN INSURANCE AND ANNUITY COMPANY; NEW ENGLAND LIFE INSURANCE COMPANY; METLIFE INVESTORS USA INSURANCE COMPANY; GENERAL AMERICAN LIFE INSURANCE COMPANY; PARAGON LIFE INSURANCE COMPANY; METLIFE INVESTORS INSURANCE COMPANY; METROPOLITAN PROPERTY AND CASUALTY INSURANCE COMPANY; METROPOLITAN GROUP PROPERTY & CASUALTY INSURANCE COMPANY; ECONOMY PREMIER ASSURANCE COMPANY; METROPOLITAN TOWER LIFE INSURANCE COMPANY; and METROPOLITAN DIRECT PROPERTY AND CASUALTY INSURANCE COMPANY,

Plaintiffs/Appellees,

v.

PAUL KINSMAN, Secretary, South Dakota Department of Revenue and Regulation; MERLE SCHEIBER, Director of the South Dakota Division of Insurance;
and the STATE OF SOUTH DAKOTA,

Defendants/Appellants.

APPEAL FROM THE CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
HUGHES COUNTY, SOUTH DAKOTA
THE HONORABLE RODNEY J. STEELE,
JUDGE (Retired)

BRIEF OF AMICUS CURIAE TAX FOUNDATION
IN SUPPORT OF PETITION FOR REHEARING

Ronald G. Schmidt
Schmidt, Schroyer, Moreno,
Lee & Bachland, P.C.
P.O. Box 860-0860
Rapid City, SD 57709
(609) 341-0112
Telephone: (605) 336-2880

Attorneys for Plaintiffs/
Appellees

Timothy M. Gebhart
Eric R. Johnson
Davenport, Evans, Hurwiz
& Smith, LLP
P.O. Box 1030
Sioux Falls, SD 57101-1030
Telephone: (605) 336-2880

Attorneys for Defendants/
Appellants

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STATEMENT OF INTEREST OF AMICUS CURIAE

THE TAX FOUNDATION

The Tax Foundation is the nation's oldest tax policy research organization, founded in 1937 to educate taxpayers about sound tax policy. As a non-partisan educational institution dedicated to raising the nation's tax I.Q., our economic and policy analysis is guided by the principles of simplicity, transparency, stability, and neutrality. We aim to make information about government finance understandable, such as with our annual calculation of "Tax Freedom Day," the day of the year when taxpayers have earned enough to pay for the nation's tax burden and begin earning money for themselves.

We further our mission by educating the legal community and the general public about economics and taxpayer protections, and by advocating that judicial and policy decisions on tax law promote principled tax policy. Past federal and state cases involving allegations of discriminatory taxation where the Tax Foundation has participated as *amicus curiae* include Dep't of Revenue of Kentucky v. Davis, cert. granted, 127 S.Ct. 2451 (U.S. May 21, 2007), CSX Transportation, Inc. v. Georgia State Bd. of Equalization, 128 S.Ct. 467 (U.S. Dec. 4, 2007), Heatherly v. State, 658 S.E.2d 11 (N.C. App. 2008), and DaimlerChrysler Corp. v. Cuno, 547 U.S. 332 (2005).

This case involves important issues of tax policy nationally. The decision of this Court may be relied on for authority by other states confronting similar questions, and because of the alleged interstate tax discrimination, changes in the tax law of South Dakota will affect other states as well. Accordingly, the Tax Foundation has an institutional interest in this case.

STATEMENT OF THE LEGAL ISSUES

Whether the statutory premium tax scheme embodied in SDCL §§ 10-44-2 and 10-44-4 et seq. violates the equal protection guarantees of the Fourteenth Amendment of the United States Constitution and/or the Equal Protection or Privileges & Immunities Guarantees of Article VI, § 18 of the South Dakota Constitution?

JURISDICTION STATEMENT AND STATEMENT OF THE FACTS

The Tax Foundation adopts the jurisdictional statement and statement of the facts as set forth by Plaintiffs/Appellees.

SUMMARY OF ARGUMENT

Amicus Curiae Tax Foundation respectfully requests that this Court grant the petition for rehearing, because the factual assumptions this Court relies on in its Opinion of March 26, 2008 are erroneous. While the challenged statute may be neutral on its face, actual practice in South Dakota and in other states shows otherwise. Because the statutory scheme results in effective discrimination in violation of the Equal Protection Clause, the statute is unconstitutional.

The standard adopted in this Court’s Opinion -– that the statute is constitutional because the plaintiff can modify its behavior to avoid the discrimination -- would effectively uphold *any* statute against an Equal Protection challenge. Because this

Court cuts short its analysis before a proper rational basis review, it should take the opportunity to conduct that analysis.

Finally, the statute does not survive rational basis review because the asserted purposes are not rationally related to a legitimate governmental purpose. While encouraging domestic industry and raising revenue are legitimate state interests, they cannot be accomplished with a persistent pattern of discriminatory taxation that burdens out-of-state companies while exempting in-state companies from the same burdens. South Dakota's laws can only encourage economic activity through competitive neutrality.

ARGUMENT

I. THIS COURT'S FACTUAL CONCLUSION THAT DOMESTIC INSURERS DO NOT AUTOMATICALLY ENJOY LOWER EFFECTIVE INSURANCE TAX RATES THAN FOREIGN INSURERS, AND THEREFORE THAT THE TAX STRUCTURE IS NOT DISCRIMINATORY IN PRACTICE, IS ERRONEOUS.

In its Opinion, this Court states that "we do not find that a domestic insurer is entitled to a credit *as a matter of law* or that the domestic insurer must do *nothing* to receive the lower tax rate." Metropolitan Life Ins. Co. v. Kinsman, -- N.W.2d ---, 2008 WL 803651, slip. op. at 11 (Mar. 26, 2008) (emphasis in original) (hereafter "Op."). Further, the Opinion states that "South Dakota's current statutory scheme does not favor the 'home team' or give domestic insurers a lower tax rate simply based on their residence in the state." Id. at 14. These conclusions conflict with the factual evidence of the tax structure in practice and with the findings of the trial court.

South Dakota's insurance tax structure bears many similarities to the insurance tax struck down in Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985). Any insurance company that meets the statutory definition of “domestic company” automatically pays a lower tax, and no insurance company that meets the statutory definition of “foreign company” automatically qualifies for the lower tax rate. To escape the discriminatory tax, a foreign company must succumb to the state’s condition of moving economic activity from other states into South Dakota, whether or not it is good economics or business practice. Such a condition violates the Equal Protection Clause.

A. The tax structure is discriminatory in practice because domestic insurers automatically enjoy lower effective insurance tax rates than foreign insurers.

The Opinion focuses entirely on whether the statute is facially discriminatory, without even considering *de facto* discrimination. This Court must consider both. See, e.g., Hillsdale Dairy, Inc. v. Lyons, 539 U.S. 59, 67 (2003), citing Chalker v. Birmingham & Nw. R. Co, 249 U.S. 522 (1919) (“The tax did not on its face draw any distinction based on citizenship or residence. It did, however, impose a higher rate on persons who had their principal offices out of State.... [W]e concluded that the practical effect of the provision was discriminatory.”); Pharmaceutical Research and Mfrs. of Am. v. Walsh, 538 U.S. 644 (2003), 670, citing West Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994) (“[T]he program was invalid because it had a discriminatory effect....”); Associated Indus. of Missouri v. Lohman, 511 U.S. 641, 650 (1994) (“[A]ctual discrimination, wherever it is found, is impermissible....”); Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64, 71 (1963) (“[I]f this comparison discloses discriminatory effects, it could be ignored only after a showing of adequate justification.”); Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886) (“Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered . . . so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.”).

The evidence demonstrates that the statutory scheme effects discrimination in favor of domestic companies. A domestic insurance company is one that by definition locates its principal place of business in the state. See SDCL § 58-5-93; see also Finding of Fact No. 22, Op. 5. According to SDCL § 10-44-4, “any insurer” maintaining either “a principal or regional home office in South Dakota” is entitled to a tax credit reducing its rate to between 0.75% and 1.25%. See Op. 9, ¶11, citing SDCL § 10-44-4. Consequently, any domestic insurance company, by virtue of being a domestic insurance company, is automatically entitled to the lower effective tax rate.

This Court reaches the opposite conclusion. See Op. 11, ¶15 (“The domestic insurer is not given the credit simply by being a domestic company.”). Instead, this Court concludes that to receive the credit, domestic insurers must take the affirmative additional step of opening an office, and foreign insurers may also open an office to receive the credit. But because there is no such thing as a domestic insurer without a principal place of business in the state, the actual effect of the seemingly neutral statutory scheme is discriminatory. The Court’s opinion does not address this discriminatory effect.

Opening a regional home office, which is the only other way a foreign company can obtain a non-discriminatory effective tax rate, requires more than just renting a space. Such an office must be the repository of records and the site of approving or rejecting all claims for insurance, as well as the location of public relations, sales force training, and actuarial and legal functions for three, two, or one more states. See § 10-44-5. It could be said that South Dakota’s purpose is to tax out-of-state companies at a punitive rate, unless and until the companies move substantial business operations into the state. Because such an operation would be scattered and inefficient, with the costs outweighing the benefits even after accounting for the punitive tax, the overwhelming majority of companies have refused to do so. This empirical failure means that foreign companies endure a tax scheme that, while seemingly neutral in text, in actuality discriminates against them with a higher effective tax rate.

This punitive inducement inherent in the differential effective tax rates applies only to foreign companies, since domestic companies by definition have offices in the state and enjoy the lower effective tax. If a domestic insurance company were to close its offices in the state, it would cease to be a domestic insurance company.

This Court's Opinion holds that receiving the credit (and consequently, the lower effective tax rate) is entirely a function of whether or not a company has an office in the state, and not whether the company is domiciled in the state. See, e.g., Op. at 11-12, ¶16 ("There is no disparate treatment when both types of insurers are burdened by being required to do similar actions...."). This conclusion ignores the fact that the only new burden being inflicted is on foreign companies; domestic companies must already maintain in-state offices as required by other statutes. Further, foreign companies face an additional burden in that they must open such a full-service office in every state with South Dakota's tax scheme, while domestic insurance companies enjoy the lower effective tax rate in South Dakota without such efforts. The actual operation of the challenged statutes and their predecessors is to tax foreign insurance companies at a higher effective rate than domestic insurance companies.

The differential effective tax rates are real. This Court should consider not only whether the statute is discriminatory on its face, but also whether it is discriminatory in practice.

B. The tax structure is discriminatory in practice because other states' retaliatory taxes apply to South Dakota's domestic insurance companies.

This Court's Opinion does not address, but likely assumes, that domestic insurance companies are not harmed by the different effective tax rates imposed on domestic and foreign insurance companies. Indeed, it is likely that the statute was enacted to protect such companies and to give them an artificial boost in the marketplace. See, e.g., Trial Op. 6, Finding of Fact No. 29.

However, South Dakota's laws are not enacted in a vacuum. Many states, to punish discriminatory tax schemes such as South Dakota's, have enacted retaliatory taxes on insurance companies domestic to states with punitive effective taxes on non-domestic companies. These taxes are generally equivalent to the difference between the two states' tax rates on foreign companies. For example, a South Dakota insurance company (where the domestic rate is 2.5%, although effectively lower) doing business in Minnesota will have to pay Minnesota's 2.0% rate, plus the 0.5% difference as a retaliatory tax.

If a state's tax scheme is not discriminatory, a domestic insurance company's tax burden will be the same in both states. However, if the tax scheme is discriminatory, a domestic insurance company will pay a higher tax rate in other states and consequently, will be unlikely to expand into that state.

Because this latter scenario summarizes South Dakota's situation, it demonstrates that the tax system is discriminatory. Domestic companies pay an effective 0.75% to 1.25% rate in South Dakota, but (for example) a 2.5% rate in Minnesota. These tax differentials, which are the result of South Dakota's tax scheme, have led to essentially no South Dakota life insurance companies doing business with any other state, and those that have opting to relocate to other states with no discriminatory tax scheme. If South Dakota had a nondiscriminatory tax system, taxing all companies at the 0.75%

to 1.25% rate currently enjoyed by domestic companies, the retaliatory taxes would almost completely shrink to insignificance.

This Court should consider that retaliatory taxes designed to punish companies located in states with discriminatory tax schemes are harming South Dakota's insurance companies.

C. The trial court found factual evidence that the tax structure is discriminatory in practice to be persuasive.

This Court correctly notes that the constitutionality of a statute is reviewed *de novo*. See Op. 2 fn.1. However, while conclusions of law may be reviewed *de novo*, findings of fact "may not be set aside unless clearly erroneous." SDCL § 15-6-52(a).

The Opinion reaches certain factual conclusions, but at no point does it reference the trial judge's findings of fact. This is of particular importance since many of the trial judge's findings of fact are at odds with this Court's factual conclusions, without the requisite statement that the prior findings were clearly erroneous.

For example, while the trial judge concludes that "the evidence shows that the purpose of HB 1312 [in 1982] was to continue to promote and protect the domestic insurance industry and to give it a competitive advantage," Finding of Fact No. 29, Op. 6, this Court concludes that "South Dakota's current statutory scheme does not favor the 'home team' or give domestic insurers a lower tax rate simply based on their residence in the State." ¶21, Op. 14. Further, in ¶18-19, this Court writes that there is no evidence that the statute's requirements are unreasonable or discriminatory. This conclusion overlooks the trial judge's findings of fact which reflect his recognition that the current statute is only the latest incarnation of a line of discriminatory insurance taxation schemes in South Dakota. Only by removing the current tax from its historical context does it seem plausible that the tax scheme, while producing discriminatory effects for decades, is neutral.

In Finding of Fact No. 33, the trial court concludes that "[t]he tax structure at all times relevant (1970 through the present) is discriminatory, in that it levies a higher effective tax on foreign insurance companies than on domestic insurance companies...." Trial Op. 9. By contrast, this Court concludes that "it is the foreign insurer's business decision that determines its ultimate tax rate, not discrimination by the State." Op. 14, ¶21. This conclusion -– that the tax is not structurally discriminatory -– is in direct conflict with the factual finding of the lower court. This Court should either adopt the finding of fact of the lower court, or state that it is clearly erroneous.

D. Competitive pressures and court challenges have induced the abandonment of similar discriminatory schemes in other states.

At the time of Ward, which held that discriminatory premium taxes violate the Equal Protection Clause, twenty-six states had facially discriminatory taxes against foreign insurers, and an additional eight states had statutes such as South Dakota's, which appear equal but in operation and effect are discriminatory.

Since then, twenty-five of the thirty-four states with domestic company tax preferences have abandoned their discriminatory taxes in favor of equal taxes on domestic and out-of-state insurers, in most cases at a rate that is lower than the former rate on out-of-state companies. Seven other states, including South Dakota, have statutes that are discriminatory in effect. Nevada and Colorado, for instance, have a similar tax/home office credit structure, but Nevada's high tax rate (3.5%, plus a rare tax on annuities) has driven domestic companies from interstate markets due to the effect of other states' retaliatory taxes (described above in I.B). Colorado's home office credit and Hawaii's records repository credit, like South Dakota's scheme, automatically qualify domestic companies for the lower tax rate while imposing a huge cost on foreign companies to do so. In Hawaii, for instance, the costs associated with keeping two sets of records are such that no foreign insurance company is ever likely to comply. These statutes are thus discriminatory in effect.

Louisiana and Mississippi impose neutral but high tax rates, but give credits for investing 25% or so of the business's assets within the state. Because a multistate company will not invest a quarter of its assets in any one state, and could not do so for more than five states, the effect of the statutes is to discriminate against non-domestic insurers. These statutes resemble South Dakota's in one interesting respect: because South Dakota requires a regional home office to serve three, two, or one more states, universalizing South Dakota's tax system will still ensure discriminatory tax schemes in half the states.

New Jersey curiously discriminates by enabling a company, usually a New Jersey domestic subsidiary that does all its business in the state, to pay one-eighth the tax other foreign and domestic insurance companies pay.

This Court fails to consider these interstate comparisons or implications, and it should do so on rehearing.

II. THE STANDARD ADOPTED BY THIS COURT IS UNPRECEDENTED AND WOULD EFFECTIVELY UPHOLD ANY STATUTE AGAINST EQUAL PROTECTION CHALLENGE.

Because this Court overlooks considerable evidence of actual discriminatory effects and probable purpose, and instead focuses on the formalistic words of the statute, it is able to conclude that South Dakota's insurance tax structure is not discriminatory. See, e.g., Op. at 12, ¶16 ("The current statutory scheme affords both domestic and foreign insurers a favorable tax rate after both insurers maintain a qualifying office in the state.... [I]t is the insurer's business decision that determines its tax, not any discrimination by the State.").

This conclusion is unprecedented. This Court cites no authority for this proposition -– that a challenged tax is not discriminatory as long as the plaintiff can modify its behavior in a way that would avoid the discrimination. See, e.g., Kraft General Foods, Inc. v. Iowa Dep't of Revenue, 505 U.S. 71, 78 (1992) ("We find no authority for the different proposition advanced here that a tax that does discriminate against foreign commerce may be upheld if a taxpayer could avoid that discrimination by changing the domicile of the corporations through which it conducts its business. Our cases suggest the contrary"); Westinghouse Elec. Co. v. Tully, 466 U.S. 388, 406-07 (1984) (rejecting argument that tax is not discriminatory because taxpayer can avoid it by changing behavior).

This Court's standard effectively insulates any discriminatory tax scheme from an Equal Protection challenge. Instead of evaluating actual discriminatory effects on people as they are, courts would instead simply parse out individual characteristics that could conceivably be changed. In this case, this Court holds that a statutory scheme that harms foreign insurers with no offices in the state does not discriminate against foreign insurers with no offices in the state, because they can simply open offices in the state. Using this logic, laws that harm individuals for inherent characteristics could be upheld because the individuals could simply change those characteristics. Applying this principle in other equal protection contexts would be absurd. See, e.g., See Nyquist v. Mauclet, 432 U.S. 1, 8-9 & n.11 (1977) (applying strict scrutiny to a law that discriminated against aliens who were eligible for, but refused to apply for, citizenship); Andrew M. Milz, Note, But Names Will Never Hurt Me?, 16 Temple P. & Civ. R. L. Rev. 283, 300-01 (2006) (arguing that a person's unwillingness to change his name to avoid discrimination should not affect discrimination claim); Sharona Hoffman, Is There A Place for "Race" as a Legal Concept?, 36 Ariz. S. L. J. 1093, 1153 fn. 389

(2004) ("[T]he law could not expect individuals to change their religions simply in order to avoid discrimination."); Michael C. Dorf, Equal Protection Incorporation, 88 Va. L. Rev. 951, 965-66 (2002) ("[E]ven if medical technology made it possible to change one's skin color or sex through a safe, inexpensive, and painless procedure, that would hardly justify race- or sex-based discrimination against those people who opted not to undergo the procedure.").

This Court should reconsider its unprecedented and harmful standard. Analysis of Equal Protection challenges should consider whether the statutory scheme imposes discriminatory effects on the actual plaintiff in the case. Dismissing claims because the plaintiff could conceivably alter even immutable behavior or characteristics to avoid discrimination would "eviscerate" the Equal Protection guarantee, as the Supreme Court concluded in Ward with Alabama's purpose of promoting domestic business. See Ward, 470 U.S. at 882.

III. THE STATUTE DOES NOT SURVIVE RATIONAL BASIS REVIEW.

The next proper step after recognizing that South Dakota's statutory scheme discriminates against foreign insurers is to evaluate whether the discriminatory classification is rationally related to a legitimate government purpose. See Ward, 470 U.S. at 875, quoting W. & S. Life Ins. Co. v. State Bd. of Equalization of Cal., 451 U.S. 648, 667-68 (1981) ("[A state's a]uthority does not justify the imposition of 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.”).

The trial judge’s Findings of Fact listed 16 purposes proffered by the state to justify the tax scheme. See Finding of Fact No. 31, Trial Judge Op. 7-8. The trial judge broke these down into four broad categories: “(a) generating tax revenue; (b) promoting economic development; (c) achieving a fair application of South Dakota tax laws as a whole; and (d) facilitating and enabling regulation of insurance companies by the Division.” Finding of Fact No. 32, Op. 8-9.

A. The statute is not rationally related to the purpose of raising revenue.

A neutral statute designed to raise revenue in the least distortionary way furthers a legitimate state purpose. Cf. Livadas v. Bradshaw, 512 U.S. 107, 120 (1994) (“[A] state legislature has an undoubtedly rational and ‘legitimate’ interest in raising revenue.”). A statute that imposes a discriminatory tax is not a legitimate means of serving the revenue-raising purpose. See, e.g., State v. Am. Bankers Ins. Co., 374 N.W.2d 609, 617 (1985) (“It is apparent, therefore, that the stated purposes for the imposition of a higher tax on unlicensed foreign insurers are pretextual. The higher tax appears to be only a revenue raising device, *an impermissible basis* for discriminating against a foreign insurer.”) (emphasis added).

Since application of South Dakota’s statute results in real discrimination against foreign insurers, the purpose of raising revenue would not explain why foreign insurers are targeted for higher effective tax rates than domestic insurers. See Finding of Fact No. 37, Trial Op. 9 ("There is no nexus between raising money and the discriminatory taxation structure except to raise more money from a non resident taxpayer than from a resident taxpayer. The tax structure is not rationally related to the purpose of raising revenue."). While raising revenue is quite legitimate, the statute challenged here is not rationally related to that purpose.

B. The statute's purpose of promoting economic development is not legitimate because it is furthered by discrimination.

South Dakota has the power to promote economic development in its state, but cannot do so by means of a discriminatory tax aimed at foreign insurers. See Ward, 470 U.S. at 880 ("[P]romotion of domestic business within a state, by discriminating against foreign corporations that wish to compete by doing business there, is not a legitimate state purpose."). Here, South Dakota seeks to increase economic activity by levying a higher effective tax rate on any insurer that does not play along with opening new and inefficient offices in the state, and channel economic activity from other states into South Dakota. This the State cannot do. Cf. Boston Stock Exch. V. State Tax Comm'n, 429 U.S. 318, 336 (1977) (invalidating a tax on out-of-state stock brokers designed to induce more use of in-state stock brokers); Westinghouse, 466 U.S. at 390-94 (invalidating a similar tax that instead gave tax rebates to those who used in-state brokers); Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 273 (1984) (invalidating Hawaii's law encouraging local production by an effective tax on out-of-state activity).

Such a ruling would not foreclose South Dakota's efforts to promote domestic economic activity. A recent Tax Foundation report on a Kentucky statute summarized the relevant case law:

> States can constitutionally create incentives to invest within the state. Such actions (lowering tax rates or exempting certain activity from taxation, for instance) foster a competitive business climate consistent with the federalism and liberty protected by the U.S. Constitution. These state "welcome mats" are permissible as long as they are available on a neutral basis to any taker.
>
> But Kentucky's law goes beyond this. Those who invest out-of-state do not merely lose an incentive; they are penalized with taxes. By taxing out-of-state activity while exempting identical in-state activity from taxation, Kentucky seeks to protect its economic policies from interstate competition. It has imposed an unconstitutional "exit toll," not a permissible welcome mat.

Joseph Henchman, Defending Competitive Neutrality Before the Supreme Court, Tax Foundation Special Rep. No. 158 (Nov. 2007), available at http://www.taxfoundation.org/files/sr158.pdf.

South Dakota runs afoul of the Equal Protection Clause when it imposes burdens on foreign insurers while exempting domestic insurers from the same burdens. "Discriminating between residents and non-residents in order to promote domestic development is not a legitimate purpose when furthered by a tax structure based solely on the residence of the taxpayer." Finding of Fact No. 38, Trial Op. 10, citing Ward, supra.

C. The statute is not rationally related to the purpose of facilitating and enabling regulation of insurance companies.

The state proffered the argument that the differential in taxation is designed to induce foreign insurance companies to relocate into the state, “thereby also increasing the state’s ability to regulate those companies” that serve South Dakota’s citizens. See Finding of Fact No. 31(k) & (p), Trial Op. 8.

The statute cannot rationally be said to further this purpose. Foreign insurers must be registered with the Department of Insurance and comply with its regulations before they are permitted to do any insurance business in South Dakota. See SDCL § 58-1-5; see also Finding of Fact No. 40, Trial Op. 10 (“Under South Dakota law, a foreign corporation must be certified to do business in South Dakota, books and records may be perused by the Department of Insurance at any time, and the State admits that a regional home office in this state is not regulated any more extensively than a foreign company.”).

The state already possesses the authority to regulate insurance companies, and the statute challenged here does not facilitate or enable further regulation. A company moving into the state would not be subject to any heightened regulation under South Dakota law, and in any event, the statute is neither designed nor effective at encouraging such moves into the state, see supra, at I.A. Such “encouragement” –- taxing insurance companies who refuse to be encouraged at a higher effective rate –- is also an impermissible means of accomplishing even a legitimate governmental purpose. See supra, at III.B.

D. The statute is not rationally related to the purpose of achieving a fair application of South Dakota tax laws.

A statute that imposes effective discrimination against foreign insurance companies is not rationally related to the purpose of promoting fair application of the tax laws. A sound tax system is one that is simple, transparent, stable, and neutral. See Tax Foundation, Ten Principles of Sound Tax Policy, at http://www.taxfoundation.org/files/tfprinciples.pdf. A competitively neutral state is one that seeks economic growth and development, but does so by treating like economic actors alike, minimizing economic distortions, and not "foreclos[ing] tax neutral decisions." Boston Stock Exch., 429 U.S. at 331.

By imposing the burdens of multiple offices on foreign insurers, subjecting domestic insurers to punitive retaliatory taxes linked with the state's rate, and by generally seeking to promote economic development with protectionist levies rather than inviting tax climates, South Dakota's statute cannot rationally be said to be furthering fair application of the tax laws.

CONCLUSION

Because this Court should reconsider its erroneous factual conclusion that domestic insurance companies do not automatically enjoy lower effective tax rates as a result of the effective discrimination inherent in the statutory structure, and because this Court does not properly consider the Findings of Fact of the court below, and because the standard adopted by this Court is unprecedented and would eviscerate equal protection guarantees, *Amicus Curiae* respectfully requests that the petition for rehearing be granted.

Dated this ____th day of April, 2008.

TAX FOUNDATION

By: ____________________________

Joseph D. Henchman
2001 L Street, N.W.,
Suite 1050
Washington, DC 20035
Telephone: (240) 672-2504
Attorney for Amicus Curiae