No. 02-722

In the Supreme Court of the United States

AMERICAN INSURANCE ASSOCIATION, AMERICAN RE-INSURANCE COMPANY, *ET AL.*,
Petitioners,

v.

JOHN GARAMENDI, IN HIS CAPACITY AS COMMISSIONER OF INSURANCE FOR THE STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

California's Holocaust Victim Insurance Relief Act ("HVIRA") requires California insurers to provide extensive information regarding every insurance policy in effect in Nazi-dominated Europe between 1920 and 1945 and issued by any insurer with which a California insurer now has a legal relationship. The district court enjoined enforcement of the Act on three constitutional grounds: interference with the federal government's exclusive power over foreign affairs, the Foreign Commerce Clause, and due process. Over the objections of the United States government and affected foreign governments, the Ninth Circuit reversed and upheld the HVIRA in all respects.

The questions presented are:

1. Whether the HVIRA, which the United States government has called an "actual interference" with U.S. foreign policy, and which affected foreign governments have protested as inconsistent with international agreements, violates the foreign affairs doctrine of *Zschernig* v. *Miller*, 389 U.S. 429 (1968).

2. Whether the HVIRA, which regulates on an extraterritorial basis in an area where the United States must speak with one voice, violates the Foreign Commerce Clause and exceeds the scope of legitimate state regulation under the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015.

3. Whether the HVIRA, which regulates insurance transactions that occurred overseas between foreign parties more than half a century ago, exceeds California's legislative jurisdiction under the Due Process Clause.

LIST OF PARTIES AND RULE 29.6 STATEMENT

Petitioners are American Insurance Association, American Re-Insurance Company, Winterthur International America Insurance Company, Winterthur International America Underwriters Insurance Company, General Casualty Company of Wisconsin, Regent Insurance Company, Southern Insurance Company, Unigard Indemnity Company, Unigard Insurance Company, Blue Ridge Insurance Company, and Assicurazioni Generali S.p.A. In addition, Gerling Global Reinsurance Corporation of America, Gerling Global Reinsurance Corporation-U.S. Branch, Gerling Global Life Reinsurance Company, Gerling Global Life Insurance Company, Gerling America Insurance Company, and Constitution Insurance Company were parties to the proceedings below.

Respondent John Garamendi is the Commissioner of Insurance for the State of California.

The Rule 29.6 statement for each petitioner is set forth in the petition for a writ of certiorari at pages ii-iii.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals reversing the district court's permanent injunction (Pet. App. 1a-33a) is reported at 296 F.3d 832. The opinion of the court of appeals reviewing the district court's preliminary injunction (Pet. App. 34a-60a) is reported at 240 F.3d 739. The opinion of the district court granting a permanent injunction (Pet. App. 61a-84a) is reported at 186 F.Supp.2d 1099. The district court's preliminary injunction opinion (Pet. App. 85a-113a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 2002, and a petition for rehearing was denied on September 9, 2002. Pet. App. 3a. The petition for a writ of certiorari was filed on November 7, 2002, and was granted on January 10, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant text of the Due Process Clause, the Commerce Clause, the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, and California's Holocaust Victim Insurance Relief Act of 1999, Cal. Ins. Code §§ 13800-13807, is set forth in the appendix to the petition for a writ of certiorari (at 114a-122a).

STATEMENT

This case arises from the conflict between United States foreign policy and a California statute "that interferes with the national government's diplomatic efforts" on an issue of intense international interest. Brief for the United States as *Amicus Curiae* Supporting Petitioners, Nos. 02-722 and 02-733, 2 ("U.S. *Amicus* Br.").

The President and Secretary of State have been engaged for years in complex negotiations with foreign nations to achieve

a prompt and comprehensive resolution of Holocaust-era insurance claims. During these negotiations, the United States government has "consistently emphasized the desirability of voluntary, non-adversarial compensation mechanisms." U.S. *Amicus* Br. 2. As a result, the United States reached agreements with foreign governments providing an international commission — the International Commission on Holocaust Era Insurance Claims — with authority to resolve claims with funds contributed by insurers, the German government, and private industry. In return, the United States committed to assist insurers in obtaining "legal peace" in this country, including protection against state legislative and regulatory action.

In the face of this multinational diplomatic initiative led by the United States, the State of California has enacted a legislative scheme to encourage and facilitate litigation over Holocaust-era insurance claims in California courts. As a part of this scheme, the Holocaust Victim Insurance Relief Act of 1999, Cal. Ins. Code §§ 13800-13807 ("HVIRA"), requires insurers licensed to do business in California to provide detailed reports regarding each insurance policy issued by any European corporate relative that was in effect in Nazi-occupied Europe at any time between 1920 and 1945, for use in litigation in California. The HVIRA compels action by insurers from virtually all European countries on policies that were written in Europe, under European laws, and sold to Europeans as long as 80 years ago, and imposes the penalty of license suspension on their California affiliates if they do not comply, even when production of the information would violate foreign law.

In sustaining the constitutionality of the HVIRA, the Ninth Circuit disregarded the constitutional limits on state power over foreign commerce and on state legislative jurisdiction under the Due Process Clause. "In addition, the court of appeals' decision undermines the United States' effective conduct of foreign relations, including its continuing efforts to secure compensation for surviving Holocaust victims within their lifetimes." U.S. *Amicus* Br. 8.

A. U.S. Foreign Policy On Holocaust-Era Claims.

The United States has been "involved in compensating Holocaust victims since the end of World War II." Pet. App. 97a. The U.S. Military Government in West Germany enacted laws seizing property controlled by the Nazi regime and providing "restitution of identifiable property * * * to persons who were wrongfully deprived of such property." SER 533.[1] "The specific issue of confiscated life insurance policies was first addressed in Restitution Orders * * * issued by the Allied Control Counsel in 1949." SER 57.

In 1952, the United States, Germany, the United Kingdom, and France entered into the Convention on the Settlement of Matters Arising out of the War and the Occupation, SER 377-462, under which Germany agreed to create a uniform national restitution law. Germany also concluded bilateral agreements with the United States, Israel, and 15 European nations that "provid[e] payments to the citizens of those countries who were the victims of the Third Reich." SER 1438.

1. The negotiations on the German Foundation.

Since the post-war period in Europe, the United States has remained "actively involved in Holocaust victims compensation efforts." Pet. App. 98a; U.S. *Amicus* Br. 2. Within the past decade, the United States has undertaken "the last great compensation related negotiation arising out of World War II," SER 940, to "bring some measure of justice" to Holocaust survivors and their heirs and beneficiaries. Pet. App. 127a.

In 1999, President Clinton and Chancellor Schroeder participated in negotiations establishing the "Foundation, 'Remembrance, Responsibility and the Future'" to be funded by the German government and German corporations to resolve the claims of those "who suffered at the hands of German banks, insurance companies, and other German companies."

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[1] Citations to "ER" and "SER" refer to the Excerpts of Record and Supplemental Excerpts of Record in the court of appeals.

SER 937-938. In return for the creation of a 10 billion Deutschemark ($5 billion) Foundation to pay Holocaust-era claims, the President offered to take "unprecedented steps" in the United States — including the filing of statements of interest in litigation in U.S. courts against German companies over Holocaust claims — to ensure that "the Foundation should be regarded as the exclusive remedy for all claims against German companies arising out of the Nazi era." *Ibid*.

Deputy Secretary of the Treasury Stuart Eizenstat, the principal U.S. representative in negotiations on the German Foundation (SER 941), observed that the "crucial element" in convincing German companies to participate in the Foundation was the assurance "that they not pay twice, once into this foundation and a second time into U.S. courts." SER 941.

In negotiations on the Foundation in Berlin on December 17, 1999, Secretary of State Madeleine Albright stated that

> [t]he United States is agreeing to assist in providing legal peace to German companies, both in our courts and from state and local action. * * * Chancellor Schroeder and the German companies took the lead in proposing the Foundation as an alternative to endless litigation that would have drained everyone and satisfied no one.

SER 953. Deputy Secretary Eizenstat added that, "[i]n the context of a comprehensive German Foundation, in all cases * * * brought against German companies for claims arising out of the Nazi-era," the United State government is "prepared to say that the German Foundation should be regarded as the exclusive remedy and that dismissal of such cases would be in our foreign policy interests." SER 957.

After another round of "long and arduous negotiation" in Berlin, Deputy Secretary Eizenstat testified to the Senate Foreign Relations Committee that "an agreement on [the] allocation" of German Foundation funds had been reached. Pet. App. 129a. Of the 10 billion Deutschemarks contributed to the

Foundation, it was agreed that "[o]ne billion will go to property claims and insurance claims, as well as property and insurance humanitarian funds." *Ibid*.

On June 12, 2000, Deputy Secretary Eizenstat announced that the German Foundation negotiations were "on the verge" of a "legal closure agreement" that "w[ould] remove" one of the last "major hurdle[s] to the establishment of" the Foundation. J.A. 50. He explained that "the next step" before the United States "meet[s] again with all the parties to sign" an Executive Agreement on the Foundation "is for the German Parliament to pass the necessary legislation to establish the Foundation, an action that members felt they could not take without an effective mechanism for legal peace." *Id*. at 50-51.

To encourage the German Parliament to pass enabling legislation, the Clinton Administration wrote to Chancellor Schroeder's National Security Assistant to "state[] the final position of the Administration on [the issue of] legal closure" for German companies. J.A. 52. The letter reiterated President Clinton's previous assurance to the Chancellor that the United States is "committed * * * to enduring and all-embracing legal peace for German companies." *Ibid*.

The letter offered additional assurances "to give German companies even greater comfort against future suits." J.A. 52. One of the assurances was an agreement to "have the Secretary of State issue a formal statement of U.S. foreign policy emphasizing our strong interests in the German Foundation as the exclusive remedy and forum for claims and strongly favoring dismissal of Nazi-era cases brought against German companies," along with a declaration by Deputy Secretary Eizenstat that the negotiations "continue a 55-year effort by the United States government to work with the German government to address the consequences of the Nazi-era." *Id*. at 53.

On July 5, 2000, the Chancellor's National Security Assistant responded that the Clinton Administration's letter "accurately reflects the agreement reached" on "lasting and

comprehensive legal closure for German companies." J.A. 55. He further stated that Chancellor Schroeder "regards the personal commitment of the President of the United States as crucial to the establishment of the Federal Foundation." *Ibid*.

2. The Executive Agreement.

Shortly after this exchange of correspondence, the German Parliament enacted the legislation necessary to establish the German Foundation, thereby allowing the United States and Germany to sign the Executive Agreement on the Foundation. Pet. App. 153a-168a.

The Agreement formalizes the obligation of the United States to seek legal closure for German companies. In Article 1, the parties agree that "the Foundation * * * covers, and that it would be in their interests for the Foundation to be the exclusive remedy and forum for the resolution of, all claims that have been or may be asserted against German companies arising from the National Socialist era and World War II." Pet. App. 155a. Article 2 requires the United States government: (1) to "inform its courts through a Statement of Interest * * * that it would be in the foreign policy interests of the United States for the Foundation to be the exclusive remedy and forum for resolving [Holocaust-era] claims asserted against German companies"; and (2) to "use its best efforts" "with state and local governments" to achieve "all-embracing and enduring legal peace" for German companies. Pet. App. 156a. Finally, the Agreement mandates that insurance claims that come within the scope of the claims handling procedures of the International Commission on Holocaust Era Insurance Claims ("ICHEIC") "shall be processed * * * on the basis of such procedures and on the basis of additional claims handling procedures that may be agreed among the Foundation, ICHEIC, and the German Insurance Association." *Ibid*.

On the day the Executive Agreement was signed, Deputy Secretary Eizenstat explained why "the U.S. Government [has] taken such a direct role * * * in helping to shape the German

Foundation," noting specifically "our national interest in addressing any tensions in our relationship with Germany, one of our most important in the world, arising out of prolonged litigation and threats of sanctions." J.A. 64.

3. *The International Commission on Holocaust Era Insurance Claims.*

The commission referred to in the Executive Agreement — ICHEIC — investigates and resolves Holocaust-era insurance claims. Chaired by former U.S. Secretary of State Lawrence Eagleburger, ICHEIC was established in 1998 by European regulators, major European insurers from Germany, Italy, France, and Switzerland, representatives of Jewish and Holocaust survivor organizations, the State of Israel, and the National Association of Insurance Commissioners in the United States. SER 1209, 1213; Pet. App. 134a.

Deputy Secretary Eizenstat testified before the House Banking Committee that the "U.S. Government has supported [ICHEIC] since it began, and we believe it should be considered the exclusive remedy for resolving insurance claims from the World War II era." ER 865. In Senate testimony, he reiterated that ICHEIC should be "the exclusive remedy" for Holocaust era insurance claims. Pet. App. 135a.

ICHEIC has established a three-step process to "expeditiously address the issue of unpaid insurance policies issued to victims of the Holocaust," including "an investigatory process to determine the current status of those insurance policies issued to Holocaust victims" and "a claims and valuation process to settle and pay individual claims" employing "relaxed standards of proof." SER 1213-1215. Each participating insurer must establish "its own dedicated account" for "immediate payment" of claims "which are determined by [ICHEIC] to be valid." SER 1215.

The Executive Agreement on the German Foundation stipulates that ICHEIC's procedures will govern insurance

claims. Pet. App. 156a. Negotiations involving ICHEIC, the German Foundation, and the German Insurance Association culminated in an agreement in September 2002 on claims handling procedures and other related issues. Pet. App. 177a. The Bush Administration intervened to "facilitate" these negotiations. *US Agrees to Facilitate Talks on Holocaust-Era Claims*, AGENCE FRANCE PRESSE, July 18, 2001.

President Bush and Chancellor Schroeder have reaffirmed their commitment to the Executive Agreement on the German Foundation and its goal of "all-embracing and enduring legal peace." Pet. App. 172a. Ambassador Randolph Bell, President Bush's Special Envoy for Holocaust Issues, told Congress on September 24, 2002, that U.S. policy remains that ICHEIC is "the exclusive remedy for unresolved insurance claims from the National Socialist era and World War II." *Id*. at 177a.

4. *Other foreign commissions and foundations.*

Other European governments have agreed to work with ICHEIC and to support commissions and foundations in their own countries. The United States has concluded an Executive Agreement with Austria that is virtually identical to its Agreement with Germany. U.S. *Amicus* Br. 2.

In January 2000, the United States and Switzerland issued a Joint Statement on Holocaust-era insurance policies. SER 1263-1274. The United States commended Switzerland's ongoing efforts on Holocaust-related matters and specified ICHEIC as the "appropriate forum for resolving Holocaust-related issues" with Swiss insurance companies. SER 1267. Switzerland and the United States condemned as "potentially disruptive and counterproductive * * * investigative initiatives" like the reporting scheme mandated by the HVIRA. *Ibid*. The two governments agreed that the United States would "call on the U.S. State insurance Commissioners and State legislative bodies to refrain from taking unwarranted investigative initiatives or from threatening or actually using sanctions against Swiss insurers." SER 1272.

Referring to these international initiatives, Deputy Secretary Eizenstat remarked in Senate testimony that they "serve[] important U.S. foreign policy interests" (Pet. App. 127a),

> such as maintaining close relations with Germany, a partner of ours in promoting and defending democracy for the last fifty years and a nation that is vital to both the security and economic development of Europe and, with Switzerland, a major trading partner. It also helps in the removal of impediments to greater cooperation and unity among the nations of that continent.

B. California's Regulation Of Holocaust-Era Insurance Policies.

In the midst of these wide-ranging diplomatic efforts, the State of California has taken a far different and unilateral approach aimed at fostering litigation in California courts.

In 1997, the State Insurance Commissioner began a series of highly publicized "investigatory" hearings on Holocaust-era insurance issues. ER 870. The Commissioner subsequently requested $16 million in funding from the legislature, asserting that "[i]t is vital that the Commissioner be involved in every effort to force the insurers to pay the proceeds on these [Holocaust-era] policies." ER 876. The Commissioner stated his intention to "us[e] his power and influence as regulator to get money" for claimants. ER 877.

The California legislature supported this effort. The legislature passed a statute declaring that failure to "pay any valid claim from Holocaust survivors" is an unfair practice and empowering the Commissioner to suspend the license of any insurer that failed to pay on such policies, regardless of whether under the governing foreign law any payments were legally owed. Cal. Ins. Code § 790.15.

The legislature also considered a bill to create a Holocaust-era insurance registry based on records compelled from European insurance companies. The bill was subsequently

enacted as the HVIRA in 1999. The California Department of Insurance supported the "Holocaust Insurance Registry * * * [as] an important measure to ensure that Holocaust survivors and descendants of Holocaust victims obtain their rightful compensation." ER 969.

The California Senate Committee on Insurance described the HVIRA as "ensur[ing] that Holocaust victims or their heirs can take direct action on their own behalf with regard to insurance policies and claims." The Committee reported that the "Department [of Insurance] believes this bill will be of significant assistance to the Department in its endeavor to ensure full payment of claims to Holocaust survivors and their descendants." ER 994-995. The California Assembly Committee on Appropriations described the bill as "provid[ing] assistance to Holocaust victims and their families in collecting the proceeds of insurance policies." ER 999.

1. The extraterritorial reach of the HVIRA.

The HVIRA requires the State Insurance Commissioner to establish a "Holocaust Era Insurance Registry" to maintain "records and information" on all "life, property, liability, health, annuities, dowry, educational, or casualty" insurance policies "in effect between 1920 and 1945" that were sold by a California "insurer," either "directly or through a related company," to persons in Nazi-occupied Europe. Cal. Ins. Code §§ 13803-13804.

The HVIRA provides that each "insurer currently doing business in the state" that sold Holocaust-era policies directly to individuals, or that is "related" to a company that sold Holocaust-era policies, must file detailed reports with the Insurance Commissioner specifying (1) the number of policies the insurer or its related company had in effect from 1920 to 1945 in Nazi-occupied Europe; (2) the name of the holder and beneficiary of each of those policies, and the "current status" of each policy; and (3) the "city of origin, domicile, or address" for each policyholder. Cal. Ins. Code § 13804(a). The HVIRA

further requires that, for each policy reported, the insurer must state, under the threat of criminal penalty (*id*. § 13804(b)), whether the policy has been paid, whether diligence has been used to identify beneficiaries, and whether unclaimed funds have been distributed to charitable organizations.

Through an expansive definition of "related company," the HVIRA extends these requirements to California insurers that *never* issued any policies in effect in Nazi-occupied Europe but that *now* have a corporate "parent, subsidiary, reinsurer, successor in interest, managing general agent, or affiliate" that did. Cal. Ins. Code § 13802(b). The Act also requires insurers to report information not only on policies that were held by "Holocaust victim[s]" — defined as any "person who was persecuted during the period 1929 to 1945, inclusive, by Nazi Germany, its allies, or sympathizers," *id*. § 13802(a) — but also on *all policies* held by *all persons in Nazi-occupied Europe* between *1920 and 1945*. *Id.* § 13804(a). Finally, the Act directs the Commissioner to "suspend" the "certificate of authority to conduct insurance business in the state" of any insurer that does not comply with its requirements. *Id*. § 13806.

2. The revival of Holocaust-era claims against European insurers in California.

The HVIRA is a central component of the State's Holocaust compensation program. The goal of that program is to enable Holocaust victims and their heirs or beneficiaries to file private lawsuits in California under California law to compel payment of Holocaust-era insurance claims that arose from transactions occurring wholly outside California's borders.

Passed in the same bill as the HVIRA was an amendment of the California Code of Civil Procedure that purports to revive Holocaust-era insurance claims and to provide a California forum in which to litigate such claims. Cal. Code Civ. Proc. § 354.5(b). Any action by a Holocaust victim (or heir or beneficiary) seeking proceeds of insurance policies issued before 1945 "shall not be dismissed for failure to comply with

the applicable statute of limitation, provided the action is commenced on or before December 31, 2010." *Id*. § 354.5(c). This 65-plus-year limitations period is imposed whether or not the plaintiff is a California resident. *Ibid*.

The legislation circumvents otherwise applicable jurisdictional limits by allowing a cause of action to proceed against an entity other than the issuer of a Holocaust-era policy. Any insurance company doing business in California may be held liable for a Holocaust-era policy issued by any of its "related compan[ies]" — whether or not the California company exercises any control over the "related" company. Cal. Code Civ. Proc. § 354.5(a)(3). It is not even necessary for the companies to have been related at the time the policy was issued; so long as they are related at the time of suit, both may be held liable. *Ibid*. Under this scheme, a California insurer that was established in 1999 would be forced to pay a civil claim arising from a 1929 insurance policy, so long as the European entity that issued the policy was, at the time of suit, a "parent, subsidiary, reinsurer, successor in interest, managing general agent, or affiliate" of the California insurer. *Id.* § 354.5(a)(2).

3. The Insurance Department's international investigation of Holocaust-era insurance claims.

The HVIRA operates in an even broader statutory context that purports to extend the State Insurance Commissioner's mandate far beyond the Nation's borders. The Insurance Department is required under Cal. Ins. Code § 12967(a)(1) to "develop and implement a coordinated approach to gather, review, and analyze the archives of insurers and other archives and records, using onsite teams and an oversight committee to provide for research and investigation into insurance policies, unpaid insurance claims, and related matters of victims of the Holocaust." The Department has "an affirmative duty to play an independent role in representing the interests of Holocaust survivors." *Id.* § 12967(a)(2).

To assist it in this broad-ranging international assignment, the Department is authorized to "employ insurance archaeologists, economists, attorneys, accountants, and other specialists, in this country and in Europe." Cal. Ins. Code § 12967(a)(3). The information compiled by the Department is to be placed in the "centralized data base for the retention of policy and claimant data." *Id.* § 12967(a)(1).

C. Complaints By The United States Government And ICHEIC About The HVIRA.

Shortly after the HVIRA was enacted, Deputy Secretary Eizenstat wrote to Governor Davis and the State Insurance Commissioner complaining of the disruption to U.S. foreign policy caused by the HVIRA. He warned the Governor that the HVIRA "ha[s] already potentially damaged and could derail [German Foundation] negotiations and the progress already achieved by [ICHEIC]," because, "for th[e German Foundation] deal to work[,] * * * German industry and the German government need to be assured that they will get 'legal peace,' not just from class-action lawsuits, but from the kind of legislation represented by the California [Holocaust] Victim Insurance Relief Act." Pet. App. 124a.

In his letter to the Commissioner, Deputy Secretary Eizenstat criticized the HVIRA as having "the unfortunate effect of damaging the one effective means now at hand to process quickly and completely unpaid insurance claims from the Holocaust period, the International Commission on Holocaust Era Insurance Claims." SER 975. He further stated that actions by California that "threaten or result in sanctions against German insurers could complicate my ability to resolve the other claims against German companies for the benefit of Holocaust survivors." *Id*. at 976.

At the same time, ICHEIC urged the California Department of Insurance not to force five European insurers and their U.S. affiliates to testify on whether they would comply with the HVIRA. In response, California Assembly Member Wally

Knox, the sponsor of the HVIRA, wrote to Chairman Eagleburger (SER 973), asking him to refrain from "interfer[ing] with the resolute implementation of [the HVIRA] by seeking exclusions for companies that are participating" in ICHEIC. Mr. Knox maintained that any exclusions would contravene the HVIRA because, for California to establish "a complete registry of all policies written between 1920 and 1945," "no European Insurance company can be 'excused' from" having to report policy information. *Ibid*.

Deputy Secretary Eizenstat later explained in Senate testimony that California's actions under the HVIRA threatened to undermine ICHEIC (Pet. App. 136a-137a):

> I recently wrote to the state insurance commissioner[] in * * * California, emphasizing my strong support for the international efforts to create a claims settlement process under [ICHEIC] and stressing that, in [his] legitimate concern for Holocaust survivors, proposed action[] in th[is] state[] could undermine the work of the ICHEIC.

He underscored that the United States government's support of ICHEIC was "link[ed]" in important ways to its general "policy on Holocaust issues," which, in turn, furthers "important U.S. foreign policy interests" across Europe. Pet. App. 127a, 135a.

D. The Commissioner's Implementation Of The HVIRA.

Despite the federal government's pleas for non-interference, the State Insurance Commissioner announced a policy of immediate and rigorous enforcement of the HVIRA. ER 1060, 1065. He subpoenaed insurers to testify at hearings as to their readiness to comply and told the companies to either produce the required records or "leave the State." ER 1095.

At a hearing in December 1999, the Commissioner remarked that the issue of compensation for Holocaust-era insurance claims "will be resolved in California. I promised that for the last two years." ER 1060. The Commissioner then

offered his judgment that the international process for claims resolution "has not succeeded to this date, and California can't wait around any longer. It is your choice now whether you're going * * * to bring your company in full compliance, whether you're going to leave the state voluntarily, or whether I'm going to kick you out." ER 1097.

E. The Proceedings Below.

1. The preliminary injunction.

Faced with the imminent suspension of their California licenses, petitioners (insurers, reinsurers, and a national trade association of property and casualty insurers) filed suit to challenge the constitutionality of the HVIRA and sought injunctive relief.

The district court granted a preliminary injunction, holding that petitioners "ha[d] shown that irreparable harm will occur if the court does not enjoin enforcement of the HVIRA" (Pet. App. 113a) and that the HVIRA was likely to be facially unconstitutional on two grounds. First, the statute "intrude[s] into 'matters which the Constitution entrusts solely to the Federal Government.'" Pet. App. 96a-105a (quoting *Zschernig* v. *Miller*, 389 U.S. 429, 436 (1968)). Second, the HVIRA violates the Foreign Commerce Clause because it "potentially prevents the federal government from speaking with one voice in its expectations of foreign insurance companies" and impermissibly "meddl[es] in foreign commerce entirely outside its borders." Pet. App. 106a-110a. The court did not address petitioners' due process claims.

The Commissioner appealed and, in opposition to that appeal, the United States filed an *amicus* brief stating that the HVIRA "impairs the ability of the United States to conduct the nation's foreign policy," in violation of the Constitution's foreign affairs power. ER 807-808. The brief explained that "both Germany and Switzerland have protested to the State Department California's attempt to regulate the conduct of

German and Swiss insurers with respect to insurance policies written in those countries." *Ibid*. It also expressed serious doubt as to the HVIRA's validity under the Commerce Clause and concluded that the McCarran-Ferguson Act "does not shield a State's attempt to regulate insurance extraterritorially." ER 802. The Federal Republic of Germany also filed an *amicus* brief, stating that country's opposition to the HVIRA.

The Ninth Circuit overturned the district court's decision. Without mentioning the submissions by the United States and Germany, and dismissing the relevant international agreements as mere "executive branch initiatives," the court of appeals concluded that the HVIRA poses no conflict with U.S. foreign policy. Pet. App. 45a-59a. The court also questioned the validity of the foreign affairs doctrine, stating that *Zschernig* "has been applied * * * sparingly" and "does not govern" (*id*. at 56a-59a). In addition, the court held that the McCarran-Ferguson Act shields the HVIRA from Commerce Clause scrutiny because the HVIRA "is a California insurance regulation of California insurance companies that affects foreign commerce only indirectly." *Id.* at 45a. The court of appeals remanded for consideration of petitioners' other claims, while leaving the preliminary injunction in place.

2. The permanent injunction and reversal on appeal.

On remand, the district court found that the HVIRA does not exceed California's legislative jurisdiction under the Due Process Clause. Pet. App. 74a. The court concluded, however, that by mandating license suspension for non-performance of impossible tasks, the HVIRA deprives petitioners of a protected property interest without due process of law. Accordingly, it permanently enjoined enforcement of the statute. *Id.* at 75a-83a.

On appeal, the United States, Germany, and Switzerland filed *amicus* briefs in support of petitioners. The Ninth Circuit again reversed, holding that the HVIRA does not violate due process. The court of appeals also reaffirmed its prior decision

on petitioners' foreign affairs and Commerce Clause claims, concluding: "[w]e are not persuaded that we erred." *Id.* at 29a.

In support of a petition for rehearing, the United States once more informed the Ninth Circuit that the HVIRA implicates "significant foreign policy concerns" involving close allies of the United States and that the statute constitutes "not merely a theoretical, but an actual interference with the United States' conduct of foreign policy, that undermines the Constitution's exclusive grant to the national government of authority to conduct foreign policy." 2002 U.S. *En Banc Amicus* Brief 1, 15. Nonetheless, the court of appeals denied rehearing.

SUMMARY OF THE ARGUMENT

The State of California seeks to undermine international efforts led by the United States to resolve Holocaust-era insurance claims by extending its insurance code to impose onerous reporting requirements on European insurers to foster litigation in California courts. The conflict with U.S. foreign policy is direct and substantial, as is the regulatory burden on foreign insurers and the affront to the sovereignty of foreign governments. The HVIRA is unconstitutional on three grounds.

I. The statute invades the foreign affairs power of the federal government. The text and history of the Constitution, as well as necessary concomitants of national sovereignty, require that "the whole subject" of "relations" with "foreign nations" be entrusted exclusively to the federal government. *Chy Lung* v. *Freeman*, 92 U.S. 275, 280 (1875). To protect this singularly important federal power, this Court has held that a state statute that has "more than 'some incidental or indirect effect in foreign countries,'" or has "great potential for disruption or embarrassment" of U.S. foreign policy, is unconstitutional. *Zschernig*, 389 U.S. at 434-435.

The HVIRA is invalid under *Zschernig*, because it conflicts with U.S. foreign policy and its effect in foreign countries is direct and burdensome. The United States has entered into

international agreements to resolve Holocaust-era insurance claims in an international forum for the very purpose of avoiding litigation. These agreements are the culmination of years of multilateral negotiations seeking to ensure just compensation to Holocaust victims and final resolution of the issue for foreign insurers.

California has taken the opposite approach, seeking to impose unilaterally its own policy through insurance regulation and litigation in state court and thereby rendering illusory the "crucial" goal of "legal peace" for insurers. The HVIRA's impairment of U.S. foreign policy has generated strong protests from foreign governments. The state statute plainly infringes the federal government's foreign affairs power and cannot stand under *Zschernig*.

II. The HVIRA violates the Foreign Commerce Clause because it prevents the federal government from speaking with "one voice" in its commercial relations with foreign governments, *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 451 (1979), and because it is an extraterritorial regulation of foreign commerce, *Healy* v. *Beer Inst., Inc.*, 491 U.S. 324, 336 (1989).

The extraterritorial scope of the HVIRA is vast, as intended by the California legislature. The statute requires the production of information on millions of insurance policies issued decades ago in Europe — in violation of European privacy laws. The practical effect of the HVIRA is to compel European insurers to engage in specified extraterritorial conduct that contravenes governing foreign law. The statute cannot survive scrutiny under this Court's Commerce Clause precedents.

The Ninth Circuit held that Commerce Clause principles were inapplicable to the HVIRA because of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015. But as this Court held in *Federal Trade Comm'n* v. *Travelers Health Ass'n*, 362 U.S. 293 (1960), that federal statute does not shield a state's attempt to regulate insurance extraterritorially. The legislative history

of the McCarran-Ferguson Act confirms that Congress did not intend to allow the states to engage in extraterritorial insurance regulation.

III. California also lacks the minimum contacts with the parties and transactions regulated by the HVIRA that are required by due process to sustain the State's legislative jurisdiction. The burden of complying with the statute falls entirely on European insurers, which must undertake a continent-wide search for information on millions of insurance policies issued in Europe, by European insurers, to Europeans, to cover risks in Europe over a half century ago.

The only "nexus" that California can claim between the State and the parties and transactions regulated is that a few Holocaust survivors have moved to California in the decades since World War II. But this Court repeatedly has held that a post-transaction change of residence does not support a state's legislative jurisdiction. Moreover, the HVIRA cannot be justified as a routine licensing or fitness statute. It was not intended by the California legislature to serve such purposes and does not seek information relevant to a fitness inquiry.

ARGUMENT

I. THE HVIRA INFRINGES THE FEDERAL GOVERNMENT'S EXCLUSIVE AUTHORITY OVER THE NATION'S FOREIGN AFFAIRS

A. The Constitution Vests Exclusive Authority Over Foreign Affairs In The Federal Government.

1. The Constitution "entrusts" the Nation's foreign affairs "solely to the Federal Government." *Zschernig*, 389 U.S. at 436. This was the plan of the Framers, who were keenly aware of the serious problems that would arise if the Nation had a diffuse foreign policy spread among several governments. See *Oldfield* v. *Miller*, 51 U.S. (10 How.) 146, 164 (1850).

Under the Articles of Confederation, the Continental Congress lacked authority to prevent individual states from conducting their own foreign policy. See John Jay, *In An Address to the People of the State of New York on the Subject of the Constitution*, in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 69, 72 (Paul Ford ed., 1971). As a result, individual states repeatedly caused foreign policy embarrassments. The turmoil created by these separate foreign policies was a "major drive wheel in the movement for constitutional reform." Frederick W. Marks, III, INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION 50 (1973). "Nothing contributed more directly to the calling of the 1787 Constitutional Convention than did the spreading belief that under the Articles of Confederation Congress could not effectively and safely conduct foreign policy." Walter LeFeber, *The Constitution and United States Foreign Policy: An Interpretation*, 74 J. AM. HIST. 695, 697 (1987).

The debates in the Constitutional Convention reveal the prevailing view among the Framers that "[t]he states were not 'sovereigns' in the sense contended for by some. They did not possess the peculiar features of sovereignty — they could not make war, nor peace, nor alliances, nor treaties." Rufus King, 5 ELLIOTT'S DEBATES 212. The American people could not negotiate with foreign powers if each state was free to pursue its own foreign policy. As Alexander Hamilton explained: "No nation acquainted with the nature of our political association would be unwise enough to enter into stipulations with the United States, * * * while they were apprised that the engagements on the part of the Union might at any moment be violated by its members." THE FEDERALIST NO. 22, at 144 (Clinton Rossiter ed., 1961); see also George Sutherland, *The Internal and External Powers of the National Government*, 191 N. AM. REV. 1 (1910).

The text of the Constitution reflects this overriding concern, reserving preeminent authority over the Nation's foreign affairs to the federal government. See, *e.g.*, U.S. CONST. art. I, § 8, cls.

1, 3, 11 (granting Congress the authority to "provide for the common Defence," "regulate Commerce with foreign Nations," and "declare War"), art. II, §§ 2, 3 (granting the President authority to "make Treaties," "appoint Ambassadors," and "receive Ambassadors"). The Constitution further restricts the authority of the States to engage in foreign relations. See, *e.g.*, U.S. CONST. art. I, § 10 (States may not "enter into any Treaty, Alliance, or Confederation," "lay any Imposts or Duties on Imports or Exports," "enter into any Agreement * * * with a foreign Power," or "engage in War").

Even if the Constitution did not make these affirmative grants of authority to the federal government, "[t]he powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, * * * would have vested in the federal government as necessary concomitants of nationality." *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936).

2. In light of this history, the text of the Constitution, and the essential requirements of a sovereign national government, this Court has long shown "concern for uniformity in this country's dealings with foreign nations." *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 427 n.25 (1964).

The exclusive character of the federal foreign affairs power was articulated in a series of cases beginning with *Chy Lung*, 92 U.S. at 275, which held that the Constitution entrusts "the whole subject" of "relations" with "foreign nations" to the federal government and prohibits the States from taking acts with respect to other countries for which the entire Nation might be held responsible. *Id*. at 280. The Court in *Chy Lung* struck down a state law that, without targeting any particular nation or government, permitted a state immigration commissioner to require a bond to admit an alien who might become a public charge because of her status as a pauper, an infirmed person, or a "lewd or debauched woman." *Id.* at 278. Because the state law gave insult to the Emperor of China, it implicated

powers that were available only to the federal government — even in the absence of a preemptive federal treaty, statute, or policy. *Ibid*.

Subsequent decisions have consistently reflected this view, describing the federal government's authority over foreign relations as "full and exclusive," "entirely free from local interference," *Hines* v. *Davidowitz*, 312 U.S. 52, 63 (1941), and "not shared by the States [but] vested in the national government exclusively." *United States* v. *Pink*, 315 U.S. 203, 233 (1942); see also *United States* v. *Belmont*, 301 U.S. 324, 330 (1937) ("[g]overnmental power over external affairs is not distributed, but vested exclusively in the national government"). This line of cases culminated in *Zschernig*, 389 U.S. at 434-435, which held that state statutes having "more than some incidental or indirect effect in foreign countries," or having "great potential for disruption or embarrassment" of U.S. foreign policy, are unconstitutional.

In *Zschernig*, the Court addressed the validity of a state probate law that blocked the distribution of an estate to a foreign heir if the property was subject to confiscation by foreign officials. No international negotiations or federal statutes or treaties bore on the subject; the law involved an area "traditionally regulated" by the states; and the United States government denied that it "interfere[d] with [its] conduct of foreign relations." 389 U.S. at 434. This Court nonetheless struck down the state statute. Noting that application of the statute would require "inquiries concerning the actual administration of foreign law [and] into the credibility of foreign diplomatic statements," the Court reasoned that this "intrusion by the State into the field of foreign affairs" threatened to "adversely affect the power of the central government to deal with those problems [of foreign relations]." *Id*. at 432, 441.

Since *Zschernig*, this Court repeatedly has reaffirmed that the federal foreign affairs power is "exclusive" of state power. See *Perpich* v. *Department of Defense*, 496 U.S. 334, 353

(1990) ("constitutional provisions commit matters of foreign policy and military affairs to the exclusive control of the National Government"); *South-Central Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82, 92 n.7 (1984) ("[t]he need for a consistent and coherent foreign policy * * * is the exclusive responsibility of the Federal Government"); *United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452, 465 n.15 (1978) (the "exclusive foreign relations power [is] expressly reserved to the Federal Government"). "[W]hatever the division of foreign policy responsibility within the national government, all responsibility is ultimately reposed at the national level rather than dispersed among the states and localities." 1 Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW § 4-5, at 656 (3d ed. 2000).

This Court's most recent discussion of the federal foreign affairs power was in *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363 (2000), which invalidated a Massachusetts statute that, by interjecting the State into a foreign policy matter, deprived the President of economic and diplomatic leverage in international negotiations. While ultimately resting its decision on federal preemption, the Court condemned state interference with foreign policy negotiations and noted that "similar concerns" have animated the Court's cases under the foreign affairs power. *Id*. at 381-382 n.16. "It is not merely that the differences between the state and federal Acts * * * threaten to complicate discussion; they compromise the very capacity of the President to speak for the Nation with one voice in dealing with other governments." *Id*. at 385. The Court explained that the state law imposing economic sanctions on companies doing business with Burma, if enforceable, would deprive the President of "economic and diplomatic leverage" in negotiations with Burma. *Id*. at 387. The Court concluded that "the President's maximum power to persuade rests on his capacity to bargain for the benefits of access to the entire national economy, without exception for enclaves fenced off willy-nilly by inconsistent political tactics." *Ibid*.

B. The HVIRA Unconstitutionally Infringes The Federal Government's Foreign Affairs Power.

Any state law with more than an "incidental or indirect effect in foreign countries" or with "great potential for disruption or embarrassment" of U.S. foreign policy is unconstitutional — "even in the absence of" a federal statute, a treaty, or international negotiations bearing on the subject. *Zschernig*, 389 U.S. at 441; accord *Chy Lung*, 92 U.S. at 280. In this sense, the foreign affairs power is analogous to field preemption, reserving "the whole subject of [foreign] relations" to the national government (*Chy Lung*, 92 U.S. at 280) and guaranteeing that "the United States is speaking with one voice" (*Crosby*, 530 U.S. at 382 n.16). It bars the states from passing laws that might "embroil us in disastrous quarrels with other nations" (*Chy Lung*, 92 U.S. at 280) or from undertaking "uncoordinated responses that can put the U.S. on the political defensive." *Crosby*, 530 U.S. at 382 n.16. "[T]he interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference." *Hines*, 312 U.S. at 63.

The HVIRA has more than an "incidental or indirect effect in foreign countries" and has "great potential for disruption or embarrassment" of U.S. foreign policy. The conflict between the HVIRA and U.S. foreign policy is immediate and substantial and the effect of the state statute in foreign countries is direct and burdensome.

The United States has negotiated agreements with Germany and Austria and a Joint Statement with Switzerland that represent the culmination of decades of diplomatic efforts to obtain compensation for Holocaust victims. The allocation of responsibility for Nazi-era wrongs is quintessentially a matter of foreign policy, in which the federal government has a continuing and exclusive interest. It was the United States that waged World War II, defeated Nazi Germany, and rehabilitated

Germany under the Marshall Plan. And it is the United States that has been engaged for decades in multilateral negotiations to ensure just compensation to Holocaust victims and final resolution of the issue for foreign insurers.

United States foreign policy and the international agreements produced thereunder seek to resolve — once and for all — property claims arising out of the Nazi era. The overarching goal of "all embracing and enduring legal peace" depends entirely on the establishment of an "exclusive remedy and forum" for resolving Holocaust-era claims, including insurance claims. Pet. App. 153a-155a.

It is difficult to overstate the conflict between the federal approach and that of California. The federal solution rests on the premise that relief for *all* Holocaust-era claimants is best achieved if claims are resolved in an international forum; the California solution rests on the notion that foreign insurers may be called to account on a *piecemeal* basis in the courts of the 50 states.[2] The United States believes that European insurers should be required to pay claims only *once*, from a single fund containing a pre-determined sum; California believes that insurers may be forced to pay *twice* in undisclosed amounts solely out of their own pockets. The premise of the United States' agreements is that payment for wrongs committed overseas during a world war is a matter of exclusive *federal* concern; the premise of the HVIRA is that *states* may assert control over foreign companies that have never done business within their borders for acts committed on another continent more than 60 years ago.

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[2] This is not an academic concern: seven states have enacted legislation similar to the HVIRA (Arizona, Florida, Maryland, Minnesota, New York, Texas, and Washington) and four states have introduced similar legislation (Illinois, Massachusetts, New Jersey, and Rhode Island). See Brief for the Federal Republic of Germany as *Amicus Curiae* in Support of Petitioners, Nos. 02-722, 02-733, 13 ("FRG *Amicus* Br.").

In short, just as the United States and European nations have reached closure on exclusive procedures to resolve Nazi-era insurance claims through international institutions, California seeks to impose its own solution through California insurance regulation and California litigation, rendering illusory the goal of "legal peace." The conflict with U.S. foreign policy could not be more clear.

Indeed, the stated goal of the HVIRA is to affect foreign policy — to "encourage the development of a resolution to these [Holocaust-era insurance] issues through the international process or through direct action by the State of California, as necessary." Cal. Ins. Code § 13801(f). While this *goal* may appear to be consonant with U.S. policy, the *means* selected by California lawmakers — imposition of onerous disclosure requirements to facilitate drawn-out litigation — are directly contrary to the premise of federal negotiations with foreign nations, which is to resolve *all* claims expeditiously under the terms of international agreements. See *Crosby*, 530 U.S. at 379-380 (noting that the Massachusetts Burma Act conflicted with federal policy despite having "a common end"). In fact, the means selected have an enormous impact overseas. The HVIRA imposes a draconian penalty on any California insurer whose European affiliates fail to make the burdensome investigation and disclosures required by the statute — to the point of requiring such companies to violate European privacy laws. See Brief FRG *Amicus* Br. 4; Brief of Government of Switzerland as *Amicus Curiae* in Support of Petitioners, No. 02-722, 3-4, 7 ("Swiss *Amicus* Br.").

The conflict between the California statute and U.S. foreign policy implicates international issues that go to the very heart of the United States' relationship with its European allies, as described by Deputy Secretary Eizenstat. Pet. App. 126a-127a. The seriousness of the conflict between the HVIRA and U.S. foreign policy is indicated by the *amicus* briefs filed by the United States, Germany, and Switzerland, which strenuously object to the HVIRA.

The United States has stated unequivocally that the HVIRA "interferes with the national government's authority over foreign affairs in general, and with its traditional role in addressing claims arising out of international conflicts in particular." U.S. *Amicus* Br. 2. The statute "undermines the United States' effective conduct of foreign relations, including its continuing efforts to secure compensation for surviving Holocaust victims within their lifetimes." *Id*. at 8.

The German government has voiced the same objections, stating that the HVIRA is an "intrusion on German sovereignty and impede[s] the Federal Republic's ability to engage in diplomatic relations with the United States as a unitary political entity." FRG *Amicus* Br. 3. The HVIRA has a "direct, significant effect on Germany." *Id*. at 11. If German insurers "fail to comply with the publication requirements, the California insurance companies to which they are now affiliated (some 55 to 80 years after the issuance of the policies) will lose their licenses to do business in the State of California." *Ibid*. Moreover, the HVIRA undermines the Executive Agreement on the German Foundation by "replacing the international consensus on nonconfrontational resolution [of Holocaust-era claims] through the German Foundation with a scheme premised on coerced publication and litigation in California." *Ibid*.[3]

The HVIRA obviously has "more than some incidental or indirect effect in foreign countries" and presents "great potential" — indeed, actuality — "for disruption or embarrassment" of U.S. foreign policy. *Zschernig*, 389 U.S. at 434-435. The Constitution does not permit California to adopt its own foreign policy on compensation for Holocaust-era insurance claims — whether or not the California Insurance Commissioner believes

[3] The Swiss government similarly has declared that the HVIRA "will have a significant effect on the foreign relations of the United States and Switzerland," and will "compel the violation of Swiss sovereignty and Swiss privacy laws." Swiss *Amicus* Br. 3-4

that the federal government's effort "has not succeeded to this date, and California can't wait around any longer." ER 1097.

C. The Ninth Circuit's Reasons For Not Applying *Zschernig* Are Groundless.

1. The Ninth Circuit — without even mentioning the *amicus* briefs filed by the United States, Germany, and Switzerland objecting to the HVIRA — dismissed the federal government's international agreements on Holocaust-era insurance claims as mere "executive branch initiatives." Pet. App. 53a. Even if these agreements are completely discounted, however, the federal government's exclusive authority over the Nation's foreign affairs would nonetheless invalidate the HVIRA. As described above (at 21-23), the foreign affairs power applies even in the absence of a federal statute, treaty, or international negotiations bearing on the subject of the challenged state law. *Zschernig*, 389 U.S. at 441; accord *Chy Lung*, 92 U.S. at 280.

The existence of executive agreements that actually conflict with the HVIRA makes application of the foreign affairs power more compelling. Executive agreements have the same force as treaties or statutes: "The supremacy of a treaty" over "state laws or policies" has been "recognized from the beginning. * * * '[A]ll international compacts and agreements' are to be treated with similar dignity for the reason that 'complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states.'" *Pink*, 315 U.S. at 223 (quoting *Belmont*, 301 U.S. at 331).

This Court repeatedly has affirmed the President's power to enter into executive agreements with foreign nations, even in the absence of an explicit delegation of authority by Congress, despite any effects the agreements might have on claims pending in state courts. *Dames & Moore* v. *Regan*, 453 U.S. 654, 682 (1981) ("there has also been a longstanding practice of [settling claims of U.S. nationals by] executive agreement without the advice and consent of the Senate"); *Belmont*, 301

U.S. at 330 (that "agreements" with foreign countries are "within the competence of the President may not be doubted"); *Pink*, 315 U.S. at 223 (same); *Curtiss-Wright*, 299 U.S. at 318 (the power to make executive agreements "exist[s] as inherently inseparable from the conception of nationality").

As the Court explained in *Dames & Moore*, the validity of an executive agreement made by the President "hinges on a consideration of all the circumstances which might shed light on the views of the Legislative Branch toward such action, including 'congressional inertia, indifference, or quiescence.'" *Id*. at 668-669 (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)). In light of the President's own considerable constitutional authority in the field of foreign relations, congressional acquiescence in or tacit approval of the President's action removes any doubt. *Dames & Moore*, 453 U.S. at 688; *Pink*, 315 U.S. at 227; see *Crosby*, 530 U.S. at 380 (the President's power to conduct foreign policy is "at its maximum" when he acts "pursuant to an express *or implied* authorization of Congress").

In *Dames & Moore*, the President suspended certain legal claims against the Iranian government by Executive Order and required claimants to pursue remedies before an international tribunal. This Court acknowledged that the Executive Order was not specifically authorized by any statute. 453 U.S. at 677. Nonetheless, the Court upheld the President's action, based on the "general tenor of Congress's legislation in this area" (*id*. at 678) and the fact that Congress had held hearings on the Order and had not "enacted legislation, or even passed a resolution, indicating its displeasure with the Agreement" (*id*. at 687). The same considerations apply in this case.

In concluding the Executive Agreements with Germany and Austria, the President acted with at least the implied approval of and acquiescence by — if not an express delegation of power from — Congress, as well as his independent constitutional

authority as the "sole organ of the nation in its external relations, and its sole representative with foreign nations." *Curtiss-Wright*, 299 U.S. at 319 (quoting John Marshall, 6 Annals of Cong. 613 (1800)).

In 1998, Congress enacted a statute requiring the President to study the issue of unpaid Holocaust-era claims and to recommend "legislative, administrative, or other action that the President considers necessary or appropriate" to resolve issues pertaining to the disposition of Holocaust-era assets in the United States, including unpaid insurance policies. U.S. Holocaust Assets Commission Act of 1998, Pub. L. No. 105-186, § 3(d)(2), 112 Stat. 611 (codified at 22 U.S.C. § 1621 note).[4] The statutory reference to "administrative, or other action that the President considers necessary or appropriate," in addition to proposals for legislation, clearly indicates Congress's understanding that the President would proceed where appropriate through administrative and diplomatic channels.

Like the federal Burma law at issue in *Crosby*, this statute constituted "Congress's express command to the President to take the initiative for the United States among the international community." 530 U.S. at 388. In the words of the author of the insurance portion of the statute, it was designed to "ensure that at least [the President and Congress] will begin to get to the bottom of the unpaid insurance claims." 144 Cong. Rec. H4271 (daily ed. June 9, 1998) (statement of Rep. Foley); see 145 Cong. Rec. H9255 (daily ed. Oct. 4, 1998) (statement of Rep. LaFalce) ("We are united in full support of [Deputy Secretary]

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[4] The court of appeals found that this statute "encouraged laws like HVIRA." Pet. App. 50a. But the statute does nothing of the sort. The Act established a *federal* Commission to examine the disposition of Holocaust-era assets in the United States. The Commission issued a report *that makes no mention of state regulation.* As the United States has explained (U.S. *Amicus* Br. 19-20 n.8), "[n]othing in the Act imposes reporting requirements on insurers under threat of sanctions, confers any new authority on the States to do so, or seeks the sort of private information that may be protected from disclosure under foreign law."

Eizenstat on th[e] process" of securing just compensation for Holocaust victims). These expressions of intent to empower the President to investigate and resolve Holocaust-era insurance claims, along with the plain language of the statute, can only be understood as approval of, or acquiescence in, the Executive Branch's efforts in this area. See *Dames & Moore*, 453 U.S. at 678-679.

Moreover, as evidenced by the extensive testimony by Deputy Secretary Eizenstat and Ambassador Bell on multiple occasions before the House and the Senate, Congress has been comprehensively advised of, and has fully acquiesced in, the Executive Branch's initiatives on Holocaust-era insurance claims, including exclusive reliance on ICHEIC and the necessity of providing legal closure for affected insurers.

2. The Ninth Circuit also questioned *Zschernig*'s current vitality (Pet. App. 59a), but the court failed to note this Court's numerous approving references to the foreign affairs doctrine, including most recently in *Crosby*, 530 U.S. at 381-382 n.16. Beyond its disparagement of *Zschernig*, the Ninth Circuit offered four points that supposedly distinguished that case. None is persuasive.

First, the court of appeals noted that here "[n]o Plaintiff is a foreign government." Pet. App. 58a. But that does not distinguish this case from earlier foreign affairs cases. *Chy Lung* involved insulting treatment of Chinese nationals in the United States; *Zschernig* involved the rights of individuals in Communist countries to inherit property in Oregon; in neither case was a foreign government a party. "Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted or permitted by a government." *Zschernig*, 389 U.S. at 441. The President must be able to negotiate with respect to foreign subjects as well as foreign nations.

Second, the court observed that the "HVIRA does not refer to any particular country." Pet. App. 58a. But neither did the law in *Zschernig*. In any event, the HVIRA on its face *is* directed toward specific European countries and reflects a judgment that the judicial process and regulatory authority of those countries — notably Germany — cannot be trusted.

Third, the court stated (Pet. App. 58a) that "there is no evidence that HVIRA would be applied in a way that would implicate the diplomatic [matters] mentioned in *Zschernig*." This statement is inexplicable. If *amicus* briefs by the United States and foreign governments and protests by federal officials to the Governor and the Insurance Commissioner do not constitute such evidence, it is hard to imagine what would. This is precisely the evidence on which this Court relied in *Crosby* to substantiate the "threat to the President's power to speak and bargain effectively with other nations." 530 U.S. at 382.

Fourth, the court noted that this is a facial challenge and *Zschernig* was not. But *Zschernig* involved a law that, on its face, did not regulate extraterritorially or pass judgment on foreign affairs. Only in light of its application by Oregon courts was the statute revealed as violating the foreign affairs power. 389 U.S. at 433. Here, the *very purpose* of the HVIRA is to interfere with the international means for resolving Holocaust-era claims, and it has generated protests from the United States, Germany, and Switzerland. *Zschernig*'s emphasis on the "potential" for disruption of U.S. foreign policy confirms that there is no need for additional proof of actual adverse effects.

II. THE HVIRA VIOLATES THE FOREIGN COMMERCE CLAUSE AND IS NOT SHIELDED BY THE McCARRAN-FERGUSON ACT

A. The HVIRA Cannot Be Squared With Fundamental Commerce Clause Principles.

The Foreign Commerce Clause, U.S. Const. art. I, § 8, cl. 3, like its interstate counterpart, provides "'protection from

state legislation inimical to the national commerce where Congress has not acted.'" *Barclays Bank PLC* v. *Franchise Tax Board*, 512 U.S. 298, 310 (1994) (quoting *Southern Pac. Co.* v. *Arizona*, 325 U.S. 761, 769 (1945)). Indeed, it is "a well-accepted rule that state restrictions burdening foreign commerce are subjected to a more rigorous and searching scrutiny" than are regulations of interstate commerce (*Wunnicke*, 467 U.S. at 100), because "with respect to foreign intercourse and trade[,] the people of the United States act through a single government with unified and adequate national power." *Barclays Bank*, 512 U.S. at 311 (citations and internal quotation marks omitted). As a consequence, "the courts have regularly viewed with great suspicion any state action that impinges on foreign commerce," subjecting such enactments "to 'vigorous and searching scrutiny' under the dormant Commerce Clause doctrine." Boris I. Bittker, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE § 10.03, at 10-6, 10-7 (1999).

The HVIRA, of course, was designed to compel conduct by commercial actors that operated, and are now operating, in foreign nations. Its central purpose is to require — directly or indirectly — the disclosure by foreign entities of commercial data relating exclusively to foreign commercial transactions. And it does so in aid of a broader statutory regime intended to modify the contractual obligations of foreign businesses arising out of those transactions. This interference with foreign commerce runs afoul of the Foreign Commerce Clause in two respects: it precludes the federal government from speaking with "one voice" in its commercial relations with foreign governments, see *Japan Line*, 441 U.S. at 451, and it constitutes impermissible extraterritorial state regulation of commerce, see *Healy*, 491 U.S. at 336.

1. *The HVIRA fails the Foreign Commerce Clause's "one-voice" test.*

A basic purpose of the Foreign Commerce Clause, articulated repeatedly by the Framers, is to prevent individual states from embroiling the United States in disputes with foreign nations, a prospect that could lead to retaliation by foreign countries against American commercial interests. See, *e.g.*, THE FEDERALIST NO. 44, at 281 (James Madison) (Clinton Rossiter ed., 1961) (noting "the advantage of uniformity in all points which relate to foreign powers"). The Foreign Commerce Clause thus proscribes any state law that "prevents the Federal Government from 'speaking with one voice when regulating commercial relations with foreign governments.'" *Japan Line, Ltd.*, 441 U.S. at 434 (quoting *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276, 285 (1976)); see *Barclays Bank*, 512 U.S. at 320-330. This principle was reaffirmed in *Crosby*, 530 U.S. at 381-382 n.16, with explicit citation to *Japan Line*. As with the foreign affairs power, the Foreign Commerce Clause's "one-voice" test thus requires invalidation of any state statute that "implicates foreign policy issues which must be left to the Federal Government." *Container Corp. of Am.* v. *Franchise Tax Bd.*, 463 U.S. 159, 194 (1983); *Cooley* v. *Board of Wardens*, 53 U.S. (12 How.) 299, 319 (1851) (states may not legislate in areas "imperatively demanding a single [national] rule.").

The HVIRA fails the "one-voice" test because, as explained above, the Executive Branch has spoken with full authority for the Nation on the issue of Holocaust-era insurance claims and the state statute interferes with the effectuation of a coherent national policy on that issue. The federal government has endorsed exclusive and effective remedies for victims of the Holocaust. Those efforts cannot succeed if individual states may interpose their own divergent objectives and requirements. In these circumstances, the HVIRA impermissibly undermines the federal government's attempt to set a uniform national policy. See 1 Tribe, *supra*, § 6-24, at 1152 ("[i]f state action

touching foreign commerce is to be allowed, it must be shown not to affect national concerns to any appreciable degree").

The damage to the Nation's commercial interests is compounded by the fact that the HVIRA imposes substantial burdens on foreign insurers, overrides (and purports to require the violation of) foreign privacy laws, and has prompted vigorous complaints from affected foreign governments. FRG *Amicus* Br. 3-4, 11; Swiss *Amicus* Br. 3-4, 7. And the statute's effects are especially pernicious because it imposes unique, discriminatory burdens on foreign companies that engaged in business in specified foreign countries; the dangers of protectionism and commercial warfare posed by such discriminatory laws are so profound that, even in the interstate context, they have been held to be "virtually per se invalid." *Oregon Waste Sys., Inc.* v. *Dep't of Env. Quality*, 511 U.S. 93, 99 (1994). Under these circumstances, the HVIRA presents a "risk of retaliation" that "is acute, and such retaliation of necessity would be felt by the Nation as a whole." *Japan Line*, 441 U.S. at 453. California, "by its unilateral act, cannot be permitted to place these impediments before this Nation's conduct of its foreign relations and its foreign trade." *Ibid.* For that reason alone, the HVIRA should be invalidated.

2. The HVIRA is an extraterritorial regulation in violation of the Foreign Commerce Clause.

It is equally fundamental that the Foreign Commerce Clause precludes the application of state legislation to commercial practices "wholly outside of the State's borders, whether or not the commerce has effects within the State." *Healy*, 491 U.S. at 336 (quoting *Edgar* v. *MITE Corp.*, 457 U.S. 624, 642-643 (1982)); accord, *e.g.*, *C&A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383, 393 (1994). For example, a state may not "impose economic sanctions on violators of its laws with the intent of changing [the affected party's] lawful conduct in other States," nor "may [a state] impose sanctions * * * in order to deter conduct that is lawful in other jurisdictions." *BMW of*

North Am., Inc. v. *Gore*, 517 U.S. 559, 572, 573 (1996). In determining whether a state law is an impermissible extraterritorial regulation for Commerce Clause purposes, "[t]he critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Healy*, 491 U.S. at 336.

It seems self-evident that the HVIRA falls under this standard. Its purpose is to require the production from European archives of detailed information about millions of insurance contracts issued by European insurers. All of the subject policies were issued in Europe by European insurers; any losses under those policies occurred in Europe and were suffered by Europeans. ER 1012-1013, 1044-1045.

Despite these features, the Ninth Circuit held that the HVIRA is not an extraterritorial regulation: it opined that the statute "is a California insurance regulation of California insurance companies that affects foreign commerce only indirectly." Pet. App. 45a. The court of appeals concluded that requiring European insurance companies to produce voluminous data does not "regulat[e]" them, *id*. at 16a, 44a, and that the HVIRA has the salutary domestic effects of "help[ing] California residents recover on unpaid policies" and "protect[ing California] * * * residents from insurance companies that have not paid valid insurance claims," *ibid*. This analysis is flawed at every turn.

First, demanding the production of voluminous confidential information unquestionably *is* a form of regulation. See *Dole* v. *United Steelworkers of Am.*, 494 U.S. 26, 28 (1990) ("rules which require regulated entities to disclose information" are "regulatory tools available to [the] Government"); U.S. *Amicus* Br. 11-12. No one would deny, for example, that requiring issuers of securities to "report" detailed information on their business operations to the Securities and Exchange Commission "regulates" those companies; the HVIRA has precisely the same character. And the HVIRA certainly is no less of a

regulatory burden than any of the other reporting obligations that the federal and state governments impose. Indeed, it is doubtful that the Ninth Circuit really believed its contrary declaration here; the court elsewhere acknowledged that "[s]eeking information from insurers about their claims-paying record, to be used in the licensing process, is a form of regulating the business of insurance." Pet. App. 45a n.3.

Second, and more fundamentally, the HVIRA's regulatory effect is extraterritorial. As we have noted, the statute was *intentionally* drawn to have extraterritorial effect. The HVIRA is part of — and has, as its sole justification, the goal of advancing — a larger legislative agenda that effectively regulates the administration of foreign insurance contracts. By modifying the applicable statute of limitations, dictating the treatment of currency devaluations,[5] and permitting suits in California, see pages 11-12, *supra*, the legislation recasts the terms of insurance contracts entered into between *foreign* nationals, in *foreign* countries, that are subject to *foreign* laws. There is no denying that this treatment has "a sweeping extraterritorial effect." *MITE Corp.*, 457 U.S. at 642.

Even viewed in isolation, the HVIRA projects California's economic regulation in a manner that "control[s] conduct beyond the boundaries of the State." *Healy*, 491 U.S. at 336. The HVIRA requires California-licensed insurers to obtain information held by related foreign entities that are not themselves subject to California's jurisdiction. As a practical matter, the statute requires companies that are *beyond* California's

[5] The HVIRA redefines "proceeds" in a manner inconsistent with the law governing the policies when they were executed. See Cal. Ins. Code § 13802(c) ("proceeds" of insurance policies under the HVIRA are "the face value or other payout value * * * plus reasonable interest to date of payment[,] without diminution for wartime or immediate postwar currency devaluation"). This definition rewrites European insurance policies so that insurers that have fully paid benefits under pre-1945 policies pursuant to governing foreign law may nevertheless be subject to the claim that they have failed to pay the "proceeds" under California's revisionist definition.

borders to engage in specified extraterritorial conduct (including reporting on and certifying their "due diligence" overseas).[6]

It is a transparent fiction for the State to assert otherwise. As the German government has explained (FRG *Amicus* Br. 11), the HVIRA "improperly leverage[s California's] regulatory authority over insurance companies doing business" in the State so as "to regulate the conduct of 'related' insurance companies in Europe that have never done business in the state and are under the regulatory jurisdiction of Germany." And the HVIRA does so even though the required insurance documents and information are protected by European privacy laws.

The extraterritorial effect of the HVIRA is clear in an area in which the United States must speak with "one voice."[7] California is "impos[ing] economic sanctions" to change "lawful conduct in other [jurisdictions]" (*BMW*, 517 U.S. at 572). Whether the HVIRA also has some impact in California is irrelevant under this Commerce Clause principle, which "'precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State.'" *Healy*, 491 U.S. at 336.[8]

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[6] For example, petitioner American Re-Insurance Company ("AmRe") must file a report under the HVIRA. Yet AmRe did no business in Europe between 1920 and 1945. ER 699-702. Nor did its parent, American Re Corporation. *Ibid*. AmRe must file a report because its parent was acquired in 1996 by Munich Re, which also sold no Holocaust-era policies, but which, long after World War II, acquired non-controlling interests in other companies that did. Those companies have no contacts with California. They have told AmRe that disclosing the information required by the HVIRA would violate German law and subject them to criminal prosecution. *Ibid.*

[7] If California can regulate foreign insurance policies to require public disclosure of personal information about the policyholders, then Pennsylvania or Colorado can regulate them as well to require privacy. The potential conflict highlights the extraterritorial reach of the HVIRA and the need for a single national policy on this issue.

[8] We note that the two potential effects of the HVIRA in California identified by the Ninth Circuit (see Pet. App. 44a) are marginal compared to

B. The McCarran-Ferguson Act Does Not Shield The HVIRA From The Foreign Commerce Clause.

Against this background, the Ninth Circuit did not deny that application of ordinary Commerce Clause principles would require invalidation of the HVIRA. The court held that those principles were wholly inapplicable here, however, because it believed that the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, shields the HVIRA's regulation of the overseas activities of European insurance companies from the reach of the Clause (Pet. App. 40a-45a). That holding is indefensible: the McCarran-Ferguson Act does not validate a state's attempt to regulate insurance extraterritorially. The federal statute therefore cannot defeat the argument that the HVIRA's impact overseas runs afoul of the Commere Clause's "one-voice" and extraterritoriality principles.

That conclusion is compelled by the Court's holding in *Federal Trade Comm'n* v. *Travelers Health Ass'n*, 362 U.S. 293 (1960). Construing Section 2(b) of the Act, 15 U.S.C. § 1012(b), which provides that specified federal laws apply "to the business of insurance to the extent that such business is not

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the immense extraterritorial burden imposed by the statute. First, there is no evidence in the record that the statute will protect California "residents from insurance companies that have not paid valid insurance claims." *Ibid*. Neither the text of the HVIRA nor its legislative history even hints that this goal was contemplated by the California legislature, see pages 9-13, *supra*, and there are no facts to suggest that this will be an unintended benefit of the statute, see pages 48-50, *infra*. In reality, the undifferentiated mass of information called for by the HVIRA will not provide any insight into the claims-payment practices of European insurers. Second, the fact that a tiny fraction of the world's population of Holocaust survivors moved to California after 1945 is constitutionally insufficient to provide the State with authority to impose vast reporting requirements on European insurers that have no connection to the State, see pages 46-47, *infra*. At the end of the day, any speculative in-state benefits of the HVIRA are far outweighed by the burden imposed on the federal government's regulatory interests and on European insurers required to produce information in violation of European privacy laws. FRG *Amicus* Br. 3-4; Swiss *Amicus* Br. 3. Compare *CTS Corp*. v. *Dynamics Corp. of Am.*, 481 U.S. 69, 92-93 (1987).

regulated by state law," *Travelers* held that the Act does not extend to extraterritorial regulation. See 362 U.S. at 299-302. The Court found it "clear that [the Act] viewed state regulation of insurance solely in terms of regulation by the law of the State where occurred the activity sought to be regulated. There was no indication of any thought that a State could regulate activities carried on beyond its own borders." *Id*. at 300.

That rule is dispositive here. The HVIRA has a broad "extraterritorial reach," "impos[ing] regulatory requirements on corporations that have never done business in California with respect to policies issued to foreign nationals who themselves have no connection to California." 2001 U.S. *Amicus* Br. 14, 20. Indeed, the very purpose of the HVIRA is to require the compilation and disclosure of voluminous materials by foreign entities that are not subject to California's jurisdiction and that in many instances have had no contact with the State at all. And the HVIRA does so even though, as the German and Swiss governments have explained, keeping insurance documents private is *required by* German and Swiss law and unauthorized disclosure is punishable with criminal sanctions.

The Ninth Circuit recognized that it could not uphold the HVIRA without distinguishing this Court's decision in *Travelers*. The court of appeals' effort to do so, however, deviates from this Court's unambiguous holding.

The Ninth Circuit reasoned that the limits on state authority to enact extraterritorial insurance regulations recognized in *Travelers* apply only in cases involving Section 2(b) of the Act and have no bearing on cases concerning Section 2(a), 15 U.S.C. § 1012(a). See Pet. App. 41a-45a. Section 2(b) provides that specified federal statutes "shall be applicable to the business of insurance to the extent that *such business is not regulated by state law*"; its companion paragraph, Section 2(a), provides that the business of insurance "shall be subject to the laws of the several States *which relate to the regulation * * * of such business*," protecting those state laws from attack under

the Commerce Clause. In drawing a sharp distinction between the scope of these two similarly worded provisions, the court of appeals concluded that Congress in the Act (and this Court in *Travelers*) *did not* intend federal statutory law to be displaced by extraterritorial state insurance regulations, but *did* intend to set aside federal Commerce Clause requirements insofar as they apply to those same extraterritorial state regulations.

This peculiar reasoning is insupportable. To begin with, as the United States explained below, the plain language of the Act makes no distinction between the body of state laws described by the Act's two subsections. "Paragraphs (a) and (b) [of Section 2 of the Act] are * * * mirror images": the specified federal laws described in Section 2(b) apply to the business of insurance "unless the insurance business at issue is already regulated by the State as contemplated by paragraph (a). There is no apparent basis for the * * * contention that the language of paragraph (b), 'regulated by State law,' means anything other than the 'laws of the * * * States which relate to the regulation * * * of [insurance],' described in paragraph (a)." 2001 U.S. *Amicus* Br. 30. This means, of course, that state laws like those held in *Travelers* to be outside the scope of Section 2(b) because they are extraterritorial also necessarily must be unprotected by Section 2(a).

The central purpose of the McCarran-Ferguson Act confirms that Congress did not intend to authorize extraterritorial state insurance regulation. The Act was passed "in response to this Court's decision in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944)" (*United States Dep't of Treasury* v. *Fabe*, 508 U.S. 491, 499 (1993)), which held for the first time that insurance transactions are subject to the federal commerce power; "[t]here is no question that the primary purpose of the McCarran-Ferguson Act was to preserve state regulation of the activities of insurance companies, as it existed before the *South-Eastern Underwriters* case." *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205, 219 n.18 (1979). Congress made clear that it did not intend the Act

to give the states "any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the South-Eastern Underwriters Associations case." H.R. Rep. No. 142, 79th Cong., 1st Sess. 3 (1945).

Prior to *South-Eastern Underwriters*, this Court had held specifically and repeatedly that states do *not* have authority to regulate or tax the extraterritorial activities of insurance companies. See *Connecticut Gen. Life Ins. Co.* v. *Johnson*, 303 U.S. 77, 81 (1938) (Stone, J.) (State lacks the "power to tax or regulate the corporation's property and activities elsewhere," even where "the corporation enjoys outside the state economic benefits from transactions within it"); *St. Louis Cotton Compress Co.* v. *Arkansas*, 260 U.S. 346, 349 (1922) (Holmes, J.) ("It is true that the State may regulate the activities of foreign [insurance] corporations within the State but it cannot regulate or interfere with what they do outside."); *Allgeyer* v. *Louisiana*, 165 U.S. 578, 591-592 (1897) (State lacks authority to regulate where the insurance "contract [was] made outside of the state," "to be performed outside of such jurisdiction"). Indeed, as the Court explained in *Travelers*, the House report on the Act specifically cited and approved these decisions, declaring that the "'continued regulation and taxation of insurance by the States'" should be subject

> to the limitations set out in the controlling decisions of the United States Supreme Court, as, for instance, in *Allgeyer* v. *Louisiana* (165 U.S. 578), *St. Louis Cotton Compress Co.* v. *Arkansas* (260 U.S. 346), and *Connecticut General Insurance Co.* v. *Johnson* (303 U.S. 77), which hold, inter alia, that a State does not have power to tax contracts of insurance or reinsurance entered into outside its jurisdiction by individuals or corporations resident or domiciled therein covering risks within the State or to regulate such transactions in any way.

362 U.S. at 300-301 (quoting H.R. Rep. No. 142, *supra*, at 3).

The decision below cannot be squared with this clear expression of legislative intent. Congress believed that states lacked authority to engage in extraterritorial insurance regulation, and it left no doubt that the McCarran-Ferguson Act was not intended to expand state authority in that regard.

The Ninth Circuit also attempted to distinguish *Travelers* on the ground that the decision involved state laws that "sought to regulate directly the conduct of an insurer in another jurisdiction," while the HVIRA "seeks only to obtain information about conduct in another jurisdiction." Pet. App. 41a-43a. But *Travelers* is expressly premised on Congress's recognition that states lack authority to assert extraterritorial control over insurance companies. That is just what California is attempting to do under the HVIRA: require foreign insurers to undertake burdensome actions overseas, on the pain of heavy penalties imposed on their California corporate relatives, even if those actions are contrary to foreign criminal law.

The Ninth Circuit reasoned that the HVIRA is protected by the McCarran-Ferguson Act because the state law ostensibly relates to the California licensing process and "affects foreign commerce only indirectly." Pet. App. 45a. But, as shown above, the HVIRA has a direct effect on foreign commerce. Moreover, under the court of appeals' reasoning, *no* state law ever would be thought to have an extraterritorial effect because states may act directly only on entities within their jurisdiction. Such an approach would read all limits on extraterritorial legislation out of the Act — and out of the Commerce Clause.

III. THE HVIRA EXCEEDS DUE PROCESS LIMITS ON CALIFORNIA'S LEGISLATIVE JURISDICTION

A. Due Process Requires "Minimum Contacts" For State Legislative Jurisdiction.

The HVIRA cannot survive scrutiny under the Due Process Clause, which precludes California from applying its "substantive law to factual and legal situations with which it has little or

no contact." *McCluney* v. *Jos. Schlitz Brewing Co.*, 649 F.2d 578, 580 (8th Cir.), aff'd, 454 U.S. 1071 (1981). Accord, *e.g.*, *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 819-822 (1985); *Home Ins. Co.* v. *Dick*, 281 U.S. 397, 407-408 (1930). This Court's decisions on legislative jurisdiction "stand for the proposition that if a State has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional." *Allstate Ins. Co*. v. *Hague*, 449 U.S. 302, 310-311 (1981) (plurality opinion).

The "minimum contacts" or "due process nexus analysis" inquires whether a party's "connections with a State are substantial enough to legitimate the State's exercise" of jurisdiction. *Quill Corp.* v. *North Dakota*. 504 U.S. 298, 312 (1992). Moreover, due process limits on state legislative jurisdiction carry special force in "the international context," where the sovereign interests of other nations are implicated. See *Asahi Metal Indus. Co.* v. *Superior Court*, 480 U.S. 102, 115 (1987) (plurality opinion) (jurisdictional limits require "[g]reat care and reserve" where "[t]he procedural and substantive policies of other *nations* * * * are affected").

In *Home Ins. Co.* v. *Dick*, this Court addressed the scope of state legislative jurisdiction over an insurance contract between a Mexican resident and a Mexican insurer covering the loss of property in Mexico. When a Texas assignee sued the Mexican insurer and its New York reinsurers in Texas, relying on a Texas statute invalidating any contractual limitations period of less than two years in order to avoid the contract's one year limitations period, the Court ruled that Texas lacked legislative jurisdiction over the contract (281 U.S. at 408):

> [N]othing in any way relating to the policy sued on, or to the contracts of reinsurance, was ever done or required to be done in Texas. All acts relating to the making of the policy were done in Mexico. All [acts] in relation to the making of the contracts of reinsurance were done there or in New York. And, likewise, all things in regard to perfor-

> mance were to be done outside of Texas. * * * The fact that Dick's permanent residence was in Texas is without significance.

Subsequent decisions confirm that the Due Process Clause forbids a state to apply its law to transactions or parties having little or no connection to the state. In *Connecticut General Life Insurance Co.* v. *Johnson,* 303 U.S. 77 (1938), this Court invalidated California's attempt to tax a California-licensed insurer's receipt of premiums on reinsurance held by other California insurers. The reinsurance contracts at issue covered losses on life insurance policies issued to California residents, but they were executed (and the premiums were paid) in Connecticut. Observing that "California had no relationship to [the reinsurers] or to the reinsurance contracts" — because "[n]o act in the course of their formation, performance or discharge, took place there" — the Court held that "[t]he tax cannot be sustained either as laid on property, business done, or transactions carried on within the state, or as a tax on a privilege granted by the state." *Id.* at 81-82.

The Court held that the state statute in *Connecticut General* violated due process, even though California law did not purport to change the substantive terms of any foreign insurance contracts. 303 U.S. at 81-82. Rather, it was improper for the State to impose its law in an effort to regulate *any* aspect of contracts that had no significant nexus to the State. See also *State Bd. of Ins.* v. *Todd Shipyards Corp.*, 370 U.S. 451, 454-455 (1962) (reaffirming *Connecticut General* and holding that due process forbids a state from taxing insurance transactions that "take place entirely outside [the State]," even where "the property covered by the insurance is physically located in [the State]"); *Hartford Accident & Indem. Co.* v. *Delta & Pine Land Co.*, 292 U.S. 143, 149 (1934) (invalidating application of a state statute to fidelity bonds executed in other states and holding that a state "cannot extend the effect[s] of its laws beyond its borders").

B. California Lacks The "Due Process Nexus" Required For The HVIRA.

California lacks sufficient contacts with the insurance transactions and parties subject to the HVIRA to sustain the State's legislative jurisdiction. California's primary basis for the assertion of jurisdiction must be the fact that the parties ostensibly subject to the HVIRA are insurance companies registered to do business in the State. But this reasoning elevates form over substance. As we explained above, the HVIRA's impact on domestic companies is simply a means to the end of compelling conduct by entities *outside* California: the entire purpose of the statute is to use the fortuity of a license in California as a lever to compel the disclosure of voluminous information on insurance policies issued in *Europe*, to *European* citizens, by *European* companies. No decision of this Court suggests that the requirements of due process may be circumvented through use of such a subterfuge.

The only other arguable "nexus" that California could possibly claim is the fact that — decades after the events in question — a small number of Holocaust survivors (or their heirs) moved to California. Cal. Ins. Code § 13801(d) ("At least 5,600 documented Holocaust survivors are living in California today."). But this Court repeatedly has held that a party's post-transaction change of residence does not justify a forum state's exercise of legislative jurisdiction over a foreign transaction. See *Shutts*, 472 U.S. at, 820 ("Even if a plaintiff evidences his desire for forum law by moving to the forum, we have generally accorded such a move little or no significance."); *Hague*, 449 U.S. at 311 ("[A] postoccurrence change of residence to the forum State — standing alone — [i]s insufficient to justify application of forum law").

In identical circumstances, the Eleventh Circuit in *Gerling Global Reinsurance Co*rp. v. *Gallagher*, 267 F.3d 1228 (2001), applied due process principles to invalidate Florida's Holocaust Victims Insurance Act. The Florida statute, like the HVIRA,

imposed extensive reporting requirements on Florida affiliates of European insurers that issued policies in Europe during the Holocaust in order to create an insurance registry that would assist in the collection of Holocaust-era insurance proceeds through litigation. Faithfully applying this Court's precedents, the Eleventh Circuit held that the statute exceeded Florida's legislative jurisdiction (*id*. at 1238):

> The subject of the * * * Act is Holocaust-era insurance policies and the payment of claims still due under those policies. While there may be a connection between the State of Florida and that subject to the extent it relates directly to the activities of Florida insurers, there is virtually *no* connection between the State of Florida and that subject to the extent it concerns insurance transactions involving Plaintiffs' German affiliates that took place years ago in Germany, among German residents, under German law, relating to persons, property, and events in Germany.

This case is indistinguishable from *Gerling*. California, like Florida, lacks sufficient contacts with the transactions and parties subject to the HVIRA to sustain its jurisdiction.

C. The HVIRA Regulates Foreign Insurers And Foreign Insurance Transactions.

The Ninth Circuit declined to apply this Court's "legislative jurisdiction analysis" because the HVIRA "does nothing more than seek information from California licensed insurers. Therefore, the Commissioner need not prove that minimum contacts exist between California, Plaintiffs' foreign affiliates, and the Holocaust-era policies issued by them." Pet. App. 20a.

This argument depends on the erroneous assertion that the HVIRA does not "directly regulate[] foreign insurance companies." *Id*. at 12a. But as demonstrated above (at 36-38), the compelled production of huge amounts of confidential information from European archives in violation of foreign privacy laws is plainly regulation. There is no basis as a practical matter

for differentiating between "substantive" regulations and regulations that require "disclosure of information." In either event, California is seeking to impose its governmental power over transactions that have no relationship to the State. Thus, even if this Court were to accept the Ninth Circuit's characterization of the HVIRA as a mere "reporting" statute, that would not immunize the statute from the constitutional limits on California's legislative jurisdiction.

The Ninth Circuit also erred in holding that the HVIRA's reporting provisions "do not seek to regulate the substance of out-of-state transactions." Pet. App. 15a. As described above, the HVIRA redefines the "proceeds" of European insurance policies to exclude wartime or postwar currency devaluation. Cal. Ins. Code § 13802(c). This definition revises European insurance policies that were fully paid under governing foreign law, and insurers may now be subject to claims that they have failed to pay all the "proceeds" due under California's new definition. Thus, contrary to the Ninth Circuit's repeated assertions (*e.g.*, Pet. App. 11a-19a), the HVIRA *does* "substantively regulate" foreign insurance policies. Under *Dick* and this Court's subsequent decisions, the HVIRA is unconstitutional.

D. The HVIRA Is Not A Licensing Or Fitness Statute.

Both the State Insurance Commissioner (Br. in Opp., No. 02-733, at 20) and the Ninth Circuit (Pet. App. 20a, 44a), ultimately defend the HVIRA as a mere "licensing" statute designed to assess the fitness of California insurers that might not have "paid valid insurance claims." Pet. App. 44a. This revisionist account of the purpose of the HVIRA is flatly contradicted by the statute's text and legislative history.

On its face, the HVIRA states that disclosure "is necessary to protect the claims and interests of California residents * * * [and] to encourage the development of a resolution to these issues." Cal. Ins. Code § 13801(f); accord *id*. § 13801(d)-(e) (noting that the Act was passed "in order to ensure that closure on [Holocaust-era insurance] issue[s] is swiftly brought to

pass," and "to ensure the rapid resolution of these questions"). Nowhere does the statute mention licensing standards or the "fitness" or "financial condition" of California licensees.

The legislative history of the HVIRA confirms that the statute was enacted not to establish or enforce licensing standards but "to ensure that Holocaust victims or their heirs can take direct action on their own behalf with regard to insurance policies and claims." ER 994; ER 999 (the HVIRA's purpose is to "provide assistance to Holocaust victims and their families in collecting the proceeds of insurance policies in effect during World War II"); see pages 9-10, *supra*.

Other factors confirm that the HVIRA is not a licensing statute. For example, whereas information submitted to satisfy California's general insurance licensing statute, Cal. Ins. Code § 1215, *et seq*., is not made public, information required by the HVIRA is placed into a registry for public use. *Id*. § 13803. If the purpose of the HVIRA were to assist California *regulators* in identifying mismanaged foreign affiliates, it is difficult to imagine what need there would be to "ensure public access" to such information (*ibid*.). State officials could simply use the data to decide whether to issue a license. Moreover, if the HVIRA were actually concerned with the fitness of insurers in the State, it would apply both to license applicants and to those that hold a license, and not merely — as it does (*id*. § 13804(a)) — to current license holders.

In addition, the propriety of foreign insurers' overseas claims-payment practices cannot meaningfully be analyzed without considering whether the insurers were legally obligated to pay policyholders under foreign law. The HVIRA, however, requires disclosure of the disposition of *all* proceeds of *all* Holocaust-era insurance policies and invites litigation in California without regard to the requirements of governing foreign law. Contrary to the Commissioner's arguments, this is nothing like asking whether a foreign affiliate has ever been found liable for fraud: the requested information provides no

way of knowing whether the claims *should have been paid* and, therefore, is of no help in determining whether the foreign insurer would itself be fit to sell policies in California.

Thus, there is no basis for the Ninth Circuit's concern that invalidating the HVIRA "would invalidate many existing reporting statutes." Pet. App. 20a. Statutes requiring banks and insurance companies to "disclose foreign activities and transactions engaged in by them and their parent and affiliate companies," *ibid*., are directed at current practices bearing on the fitness of state licensees. By contrast, the HVIRA is directed solely at European insurance transactions concluded more than 55 years ago and takes no account of the lawfulness of those transactions under controlling foreign law. That subject has no reasonable nexus with California and is therefore beyond the State's jurisdiction.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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