No. 02-722

IN THE

Supreme Court of the United States

AMERICAN INSURANCE ASSOCIATION *et al.*,

Petitioners,

v.

JOHN GARAMENDI, COMMISSIONER OF INSURANCE FOR THE STATE OF CALIFORNIA,

Respondent.

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

BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES AND THE ORGANIZATION FOR INTERNATIONAL INVESTMENT IN SUPPORT OF PETITIONERS

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Pursuant to Rule 37.3(a) of the Rules of this Court, the Chamber of Commerce of the United States and the Organization for International Investment respectfully submit this brief *amici curiae* in support of Petitioners.[1]

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no person or entity other than *amici,* their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Further, no counsel for any Petitioner or Respondent authored this brief in whole or in part. This brief is filed under Supreme Court Rule 37.3(a) with the consent of the parties, and copies of the letters of consent have been filed with the Clerk of the Court.

INTERESTS OF THE *AMICI CURIAE*

Amici curiae are business associations that have a substantial interest in ensuring stable and predictable legal regimes affecting international trade and investment.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation, representing an underlying membership of more than three million U.S. businesses and organizations of every size, in every business sector, and from every region of the country. While most of the country's largest companies are Chamber members, 96% of its members are small businesses with fewer than 100 employees. Chamber members transact business in all or nearly all of the United States, as well as in a large number of countries around the world. An important function of the Chamber is to advocate its members' interests in matters of national concern before the courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the federal government.

The Organization for International Investment ("OFII") is the largest business association in the United States representing the interests of U.S. subsidiaries of international companies. OFII's member companies employ hundreds of thousands of workers in thousands of plants and locations throughout the United States, as well as in many foreign countries, and are affiliates of companies transacting business in countries around the world.

Both organizations regularly file briefs as *amici curiae* in cases such as this one that raise issues of vital concern to the business community. Together they filed a brief as *amici curiae* in this Court in *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363 (2000), an important precursor to the present litigation. In this case, they again seek to assist the Court in exploring the Constitution's limits on the role of states in the conduct of foreign affairs and foreign commerce.

Chamber and OFII members rely on a stable framework of international laws and agreements, made possible by United States diplomatic efforts, that allow them to conduct business around the globe. In their view, the decisions below put that framework at risk, by permitting states to legislate beyond their boundaries in a deliberate effort to influence delicate international relations. The decisions thereby threaten diplomatic efforts supporting business and investment, and constitute a significant hindrance to the foreign commerce on which *amici*'s members, and the U.S. economy, depend.

SUMMARY OF THE ARGUMENT

Amici urge the Court to reverse the decisions of the Ninth Circuit in *Gerling Global Reinsurance Corp. of America* v. *Low*, 240 F.3d 739 (9th Cir. 2001) ("*Gerling I*") and 296 F.3d 832 (9th Cir. 2002) ("*Gerling II*"). These decisions conflict with precedents of this Court regarding the exclusive foreign affairs powers of the federal government and the limits on a state's power to regulate beyond its borders.

In an attempt to implement its own foreign policy, California has enacted an insurance statute that has impaired U.S. foreign policy negotiations and that continues to threaten a delicate international settlement. Officials of the U.S. government serving in two administrations have pursued a federal foreign policy of promoting the international settlement of Holocaust-era claims. That policy reflects a careful foreign policy judgment in which the Executive Branch balanced, among other factors, the commercial and diplomatic importance of relations with major European allies, the strain that Holocaust-era claims against German and other European companies places on these important relations, and the need for equitable treatment of Holocaust-era victims.

Apparently displeased with the decisions of the Executive Branch in assessing these interests, California seeks to alter the international agreements to which the Executive has pledged the Nation. The Holocaust Victim Insurance Relief Act of 1999, Cal. Ins. Code §§ 13800-13807 ("HVIRA"), requires foreign insurance companies to provide information about insurance policies issued in Europe between 1920 and 1945, on pain of their California affiliates' exclusion from business in that state. California imposed this requirement in conjunction with other measures in order to enable claimants to pursue Holocaust-era insurance claims in the California courts. In seeking to augment the international remedies the federal government negotiated for the Nation as a whole, California is upsetting a delicate foreign policy calculus, despite its lack of responsibility (or political accountability) for managing the many-faceted aspects of the Nation's relations with important foreign allies. This is precisely the type of state interference with foreign affairs that the Framers, and this Court, have condemned as fundamentally inconsistent with our federal system.

Accordingly, this Court should reverse the decisions below and confirm that the Nation's foreign policy remains the exclusive province of the federal government. This Court recently confirmed that the enactment of the nation's foreign policy in a federal statute or treaty preempts a state statute on the same subject. See *Crosby*, 530 U.S. at 373-74. Here, the Court similarly should hold that, even in the absence of a statute or treaty, federal power over foreign affairs prevents state legislators from altering the outcome of negotiations between the United States, six foreign governments, and numerous non-governmental actors.

In addition, this Court should affirm the Constitution's limits—whether imposed by the Due Process Clause or the foreign Commerce Clause—on state legislators' power to regulate subjects that lie beyond state, or United States, borders. Statutes like HVIRA use U.S. corporate affiliations as a pressure point to extend a state's regulatory reach far beyond its own territory, threatening critical cross-border commercial relationships. They offer foreign and out-of-state businesses a lose-lose choice between, on the one hand, abandoning their corporate affiliates and the markets in such states, and, on the other, subjecting themselves to the regulatory power of state legislatures solely by virtue of those affiliations.

ARGUMENT

I. HVIRA INTERFERES WITH FOREIGN POLICY.

The federal government has exclusive power over the conduct of foreign affairs. In this case, it has exercised that power not through statute or treaty, but by negotiating executive agreements with foreign nations that led to the formation of two international organizations to resolve Holocaust-era insurance claims: the Remembrance, Responsibility, and the Future Foundation ("Foundation") and the International Commission on Holocaust Era Insurance Claims ("ICHEIC"). The United States also negotiated the Swiss-U.S. Joint Agreement with an "Action Plan" for future settlement, and Austria's "Reconciliation, Peace, and Cooperation Fund." California's HVIRA impermissibly interferes with these federal foreign policy initiatives—and with United States relations with Germany, Austria and Switzerland.

A. The International Process For Resolving Holocaust-Era Claims Represents An Exercise Of The Executive's Plenary Authority Over The Nation's Complex Commercial And Diplomatic Relations With Important European Allies.

This Court has long recognized that the federal government "is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties. 'For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.'" *Hines* v.

Davidowitz, 312 U.S. 52, 63 (1941) (quoting *Chinese Exclusion Case*, 130 U.S. 581, 606 (1889)). Thus, "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." *United States* v. *Belmont*, 301 U.S. 324, 331 (1937).

The Court has likewise recognized "'the generally accepted view that foreign policy was the province and responsibility of the Executive.'" *Department of Navy* v. *Egan*, 484 U.S. 518, 529 (1998) (quoting *Haig* v. *Agee*, 453 U.S. 280, 293-94 (1981)); see also *First Nat'l City Bank* v. *Bano Nacional de Cuba*, 406 U.S. 759, 767 (1972) (plurality opinion) (Rehnquist, J.) ("this Court has recognized the primacy of the Executive in the conduct of foreign relations"). Indeed, "[i]n this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation." *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936). Thus, the President possesses "the very delicate, plenary and exclusive power ... as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress." *Id.* at 320.

The President may exercise this power not only by negotiating treaties, but also by entering into executive agreements with other nations, which have the same preemptive effect on state laws as treaties. *Belmont*, 301 U.S. at 331; L. Tribe, *American Constitutional Law* § 4-4, at 648 (3d ed. 2000). This Court noted in *Zschernig* v. *Miller*, 389 U.S. 429 (1968), that, "even in absence of a treaty, a State's policy may disturb foreign relations." *Id.* at 441. Under international law, an executive agreement invokes the international responsibility of the United States to the same degree as a treaty. Internationally binding executive agreements like those concluded by the United States with Germany, Switzerland, and Austria require the same protection from state-level intrusions that treaties and statutes enjoy.

Of late, presidents have exercised their "delicate, plenary and exclusive power," *Curtiss-Wright*, 299 U.S. at 320, to address a number of extremely "important, complicated, delicate and manifold problems," *id.* at 319, in our foreign relations with Germany and other important European allies. The United States recognized the pressing need for resolution of various Holocaust-era claims against Germany and other countries. Presidents have also recognized, however, that this important goal cannot be pursued in a vacuum, without consideration of other, similarly compelling national interests. Rather, the Executive has sought to strike a careful balance between the goal of affording justice to victims of Nazism and the Nation's other broad and complex interests in normalized and strong relationships with important European trading partners and diplomatic allies.

During the late 1990s, President Clinton and the United States government participated in a major effort to settle a variety of outstanding Holocaust-era claims. For almost two years, U.S. officials negotiated with representatives of the governments of Germany, Belarus, the Czech Republic, Poland, Russia, and the Ukraine, along with the Conference on Jewish Material Claims Against Germany and attorneys for plaintiffs and defendants in a series of related domestic proceedings, in search of a comprehensive and just settlement to Holocaust-era claims.[2] According to participants, the negotiations were "lengthy, hard-fought" and "'extremely difficult.'"[3] Success came only from "compromises … made

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[2] *See In re Nazi Era Cases Against German Defendants Litig.*, 198 F.R.D. 429, 431-32 (D.N.J. 2000) ("*In re Nazi Era Cases*"). The Conference on Jewish Material Claims Against Germany is an umbrella group representing "numerous international Jewish non-governmental organizations." *Id.* at 432.

[3] *Id.*

by 'all parties'" following "'vigorous … bargaining' between all present."[4] President Clinton and German Chancellor Gerhard Schroeder were personally involved in these negotiations.[5]

These delicate negotiations gave rise to the Foundation, established under German law and officially recognized in an Executive Agreement between the United States and Germany.[6] The Foundation's purpose is to settle Holocaust-era claims related not only to insurance but also to slave labor, forced labor, medical experimentation, placement of children in children's homes where they suffered terrible abuse, and property loss.[7]

In the Foundation Agreement, the United States emphasized its commitment to "legal peace" for the German government and German companies. A prerequisite to payment of any claims by the Foundation was dismissal of related pending actions against German defendants in U.S. courts.[8] In addition, the United States agreed to file a statement of interest in all Holocaust-era actions subsequently brought in the United States to the effect that "dismissal … would be in the foreign policy interests of the United States."[9] Subsequently, the Bush Administration demonstrated the Executive's continuing commitment to this means of

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[4] *Id.*

[5] *Id.*

[6] Agreement Between the Government of the United States of America and the Government of the Federal Republic of Germany Concerning the Foundation "Remembrance, Responsibility and the Future," July 17, 2000, 39 I.L.M. 1298 ("Foundation Agreement").

[7] *See* Foundation Agreement, Annex A (Principles Governing the Operation of the Foundation), 39 I.L.M. at 1300-03.

[8] *See In re Nazi Era Cases*, 198 F.R.D. at 432.

[9] *See* Foundation Agreement, Annex B (Elements of U.S. Government Statement of Interest), 39 I.L.M. at 1303.

resolving Holocaust-era claims by facilitating negotiations among ICHEIC, the Foundation, and the German Insurance Association over certain claims handling procedures.[10]

U.S. negotiations also yielded bilateral arrangements with Austria and Switzerland. The United States and Austria entered into an Executive Agreement recognizing Austria's "Reconciliation, Peace, and Cooperation Fund," established to pay Holocaust-era slave labor claims against Austria and Austrian companies in exchange for the United States' commitment to "legal peace."[11] The United States and Switzerland issued an "Action Plan" committing the United States to "'call on … State insurance Commissioners and State legislative bodies to refrain from taking unwarranted investigative initiatives or from threatening or actually using sanctions against Swiss insurers.'"[12]

These U.S. agreements on the international mechanisms for compensation represent complex foreign policy judgments that balance the interests of the various stakeholders and those of the Nation as a whole.[13] Such balancing is characteristic of

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[10] M. Kniazkov, *U.S. Agrees to Facilitate Talks on Holocaust-Era Claims*, Agence France-Presse, July 18, 2001.

[11] Agreement Between the Austrian Federal Government and the Government of the United States of America Concerning the Austrian Fund "Reconciliation, Peace, and Cooperation," Oct. 24, 2000, 40 I.L.M. 523 (hereinafter "Fund Agreement").

[12] *Gerling I*, 240 F.3d at 750.

[13] *See, e.g.*, Foundation Agreement, 39 I.L.M. at 1304 ("[U.S.] interests include the … fair and prompt resolution of the issues involved in these lawsuits to bring some measure of justice to the victims of the National Socialist era and World War II in their lifetimes; … the furtherance of the close cooperation this country has with our important European ally and economic partner, Germany; … maintaining good relations with Israel and other Western, Central, and Eastern European nations, from which many of those who suffered during the National Socialist era and World War II come; and … achieving legal peace for asserted claims against German companies arising from their involvement in … World War II").

foreign policy. The United States defines its relations with its European allies not through single-issue choices but, rather, through balancing among hundreds of delicate diplomatic and commercial decisions that are coordinated at the highest levels of government. Our government's agreement to a specific mechanism for Holocaust-era claims and its commitment to "legal peace" in the United States with respect to such claims are important components in this matrix.

B. HVIRA Impermissibly Interferes With The Executive's Conduct Of Foreign Affairs.

This Court has stressed that "federal power in the field affecting foreign relations [must] be left *entirely free* from local interference." *Hines*, 312 U.S. at 63 (emphasis added); see also *Belmont*, 301 U.S. at 331 (federal government's "power over international affairs ... is not and cannot be subject to *any* ... interference on the part of the several states") (emphasis added). HVIRA plainly runs afoul of this proscription. The statute is designed to alter the careful balance struck by the President in the complex, U.S.-led negotiations.

As the Ninth Circuit itself recently explained, California "was dissatisfied with how the federal government chose to address the various wartime injuries suffered by victims of the Nazis and their allies."[14] HVIRA was enacted in conjunction with other measures that, collectively, seek to provide Holocaust-era insurance claimants with a comprehensive *alternative* to the international claims process that the President negotiated on behalf of the United States. Thus, Cal. Civ. Proc. Code § 354.5 provides claimants with a cause of action and tolls the statute of limitations, and Cal. Ins. Code § 790.15 provides for the suspension of an insurer's

[14] *Deutsch* v. *Turner Corp.*, 317 F.3d 1005, 1026 (9th Cir. 2003) (finding Cal. Code Civ. Proc. § 354.6, which created a cause of action and tolled statute of limitations for Holocaust-era slave labor claims, unconstitutional under foreign affairs power).

license if the insurer or an affiliate fails to pay a claim. HVIRA mandates the collection of evidence concerning Holocaust-era insurance claims in order to ensure that victims can take advantage of these alternative judicial and administrative remedies that California has made available.[15] California openly acknowledged that HVIRA is intended to "encourage the development of a resolution to these issues through the international process *or through direct action by the State of California, as necessary*." Cal. Ins. Code § 13801(f) (emphasis added).

In concluding that California's "direct action" on a sensitive foreign affairs matter did not interfere with the President's conduct of foreign relations, the Ninth Circuit reasoned that HVIRA "seeks only to obtain information about conduct in another jurisdiction" and does not obligate "'European insurance companies to pay or not to pay claims on European policies.'" *Gerling I*, 240 F.3d at 745. But the impact of HVIRA on the U.S.-led negotiations and on the Nation's ongoing relations with important European allies cannot be so neatly cabined. Our allies perceived, correctly, that HVIRA's information-gathering requirements are part and parcel of a legislative scheme designed to promote Holocaust-era insurance litigation outside the internationally negotiated process for the resolution of such claims. That perception indisputably interfered with the Executive's efforts to balance the Nation's "complicated, delicate and manifold"

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[15] HVIRA's legislative history underscores that its purpose is to facilitate litigation. According to its author, HVIRA "ensure[s] that Holocaust victims or their heirs can take direct action on their own behalf with regard to family-owned insurance policies." *Insurance Claims of Holocaust Victims: Hearing on A.B. 600 Before the Senate Floor*, 1999-2000 Sess. (Cal. Sep. 3, 1999). Similarly, then-Governor Pete Wilson referred to a HVIRA predecessor bill as one means "to bring prompt payment to those who have been denied justice for far too long." *Id.* (referring to A.B. 1715).

interests with important European allies, and is likely to complicate ongoing relations with those countries.

As early as November 1999, then-Deputy Treasury Secretary Stuart Eizenstat wrote directly to California Governor Gray Davis and then-Insurance Commissioner Quackenbush stating that "actions by California, pursuant to this law, have already potentially damaged and could de[r]ail both a settlement of forced and slave labor negotiations and the progress already achieved by the International Commission on Holocaust Era Insurance Claims."[16] In fact, California's legislation weakened U.S. diplomatic leverage in securing the international agreements settling the insurance claims. When the United States and Germany signed the Foundation Agreement in July 2000, some insurance and other companies funding the Foundation initially were hesitant to fulfill their large monetary obligations in light of the threats to legal peace from laws such as HVIRA.[17]

Our allies' perceptions of HVIRA, moreover, will continue to affect and impair the Executive's conduct of foreign affairs. HVIRA burdens foreign companies in order to foster a goal—U.S. litigation over Holocaust-era insurance claims—that is antithetical to the "legal peace" those companies, and their governments, sought to obtain through negotiations with the United States. Such burdens will inevitably cause tensions and frictions, if not worse, in the Nation's relations with its important allies. And HVIRA will likely complicate future negotiations with these and other, countries, who may well question the Executive's ability to fulfill its promises, and therefore may be reluctant to reach agreements with the United States or may only do so on more onerous terms. Indeed, the Executive Branch has consistently maintained, in

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[16] Letter from Eizenstat, Deputy Treasury Secretary, to Davis, Governor (Nov. 30, 1999), *reproduced at* Pet. App. 124a.

[17] *See, e.g.*, Henry Weinstein, *Holocaust Survivors Settlement Hits Snag*, L.A. Times, Mar. 10, 2001, at A15.

public statements and in this litigation, that HVIRA is hindering the nation's foreign policy interests.[18]

These real world impacts—not a formalistic parsing of HVIRA's provisions—must govern this Court's assessment of the law's interference with the President's ability to conduct foreign affairs. And each of these real-world forms of interference with the conduct of foreign affairs is constitutionally intolerable.

This Court has repeatedly held that, when the national government strikes a careful balance among national concerns in the area of foreign affairs, that balance preempts state action in the same area. Thus, in *Hines*, the Court struck down Pennsylvania's alien registration laws based on its finding that Congress, in adopting a federal registration requirement, had "steer[ed] a middle path," 312 U.S. at 73, between national security needs and the recognition that our Nation's treatment of aliens implicates "[o]ne of the most important and delicate of all international relationships." *Id.* at 64. Similarly, in *Crosby* the Court held that a federal statute that restricted the range of economic pressure that could be brought to bear against Burma demonstrated "that Congress's calibrated Burma policy is a deliberate effort 'to steer a middle path,'" and that such a policy preempted state laws designed to influence Burma through economic

[18] *Cf. Banco Nacionale de Cuba*, 406 U.S. at 768 (plurality opinion) (Rehnquist, J.) (relying on representations of the Executive Branch in deciding whether failure to apply the act of state doctrine would interfere with the Nation's foreign policy). In *Barclays Bank PLC* v. *Franchise Tax Board*, 512 U.S. 298 (1994), this Court declined to rely on Executive assessments that California's taxation of foreign-based multinationals so interfered with the Nation's ability to "speak with one voice" that it violated the Foreign Commerce Clause. Because the power to regulate foreign commerce belongs to Congress, the Court stressed that the views of Congress, rather than the Executive, were determinative. *Id.* at 328-30. Here, by contrast, HVIRA interferes with the Executive's plenary authority to conduct foreign affairs, and the Executive's views must be accorded great weight.

sanctions. 530 U.S. at 377-78 (quoting *Hines*, 312 U.S. at 73).

These same principles necessarily apply to, and control, this case. In conducting multi-faceted negotiations with major trading partners and military allies, the Executive struck a carefully calibrated balance between the Nation's strong interest in compensation for Holocaust-era victims, and its other diplomatic and economic interests in Europe. Under our system of government, California cannot second-guess that balance and alter one aspect of a complex negotiation. The states, which bear no responsibility for managing our Nation's relations with other countries, are not entitled to alter a Presidential bargain with other countries. As this Court observed with respect to a different attempt by California to intrude into the realm of international relations, "If [the United States] should get into a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer, or all the Union?" *Chy Lung* v. *Freeman*, 92 U.S. 275, 279 (1875); see also *The Federalist No. 80*, at 535-36 (A. Hamilton) (J. Cooke ed. 1961) ("[T]he peace of the WHOLE ought not to be left at the disposal of a PART. The Union will undoubtedly be answerable to foreign powers for the conduct of its members.") (emphasis in original).

Amici's interests in preserving the federal government's plenary authority over foreign policy are by no means academic. The Chamber, OFII, and their members rely on the federal government, and the Executive in particular, to negotiate a strong, dependable, and consistent international legal regime that will facilitate the growth and viability of the global economy. If the federal government cannot make credible commitments to its foreign counterparts, and cannot implement a carefully calibrated mix of political and economic carrots and sticks in its foreign policy initiatives, its ability to carry out that important mission is gravely compromised—and U.S. and global commercial actors depending on those initiatives suffer.

Accordingly, where, as here, state action conflicts with the foreign policy of the federal government, as evidenced by formal international negotiations and signed executive agreements, that state law must be struck down. Any other result would expose the Executive's conduct of the Nation's foreign relations to the prospect of repeated and destructive intrusions by state initiatives—intrusions that are fundamentally inconsistent with our system of government.

II. HVIRA IMPERMISSIBLY REGULATES BEYOND THE STATE'S OWN, AND THE NATION'S, BORDERS.

The constitutional framework ensures federal control over the conduct of foreign affairs not only through its exclusive grant of foreign policy-making authority to the federal government, but also through the independent limitations that the Constitution sets on state regulatory power. Here, two such limitations lead to the same result: HVIRA cannot stand.

Due process requires that the extent of a state's regulatory authority must not exceed the extent of that state's legitimate interests. A state does not have the power to regulate a foreign (or domestic) person or subject matter if they lack sufficient contacts with the state. See, *e.g.*, *Allstate Ins. Co* v. *Hague*, 449 U.S. 302, 310-13 (1981); *International Shoe Co.* v. *Washington, Office of Unemployment Comp. & Placement*, 326 U.S. 310, 316 (1945); *Home Ins. Co.* v. *Dick*, 281 U.S. 397, 407-08 (1930). Here, European insurers and their Holocaust-era policies have no connection to California, other than through their corporate affiliates. If mere corporate affiliation, as HVIRA broadly defines it, is grounds for instrusive state regulation over foreign companies, then the concept of "minimum contacts" has lost its meaning.

Second, the dormant Commerce Clause precludes a state from regulating commerce that takes place outside its territory. See *Healy* v. *Beer Inst., Inc.*, 491 U.S. 324, 336, 338 (1989); *Edgar* v. *MITE Corp.*, 457 U.S. 624, 642-43

(1982). That rule has all the more force when foreign, rather than merely interstate, commerce is impaired. Cf. *South-Central Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82, 96 (1984). HVIRA reaches across the country, and across the Atlantic, to dictate requirements to foreign companies regarding foreign insurance policies issued to foreigners. Its effect on commerce outside California, not to mention its effect on the Nation's ability to "'speak with one voice,'" *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 448-49 (1979), is clear.

Both basic limitations on state power help to prevent state interference in foreign affairs and foreign commerce. It becomes especially important to respect those limitations in an international business environment characterized by complex business affiliations that often cross state and national boundaries. Through HVIRA, California seeks to regulate "insurance transactions involving ... German affiliates that took place years ago in Germany, among German residents, under German law, relating to persons, property, and events in Germany." *Gerling Global Reins. Corp.* v. *Gallagher,* 267 F.3d 1228, 1238 (11th Cir. 2001). Such an exercise of authority violates due process, offends the dormant Commerce Clause, and ultimately threatens federal control over foreign affairs and foreign commerce. Of perhaps more importance to *amici*, it directly threatens the free flow of international commerce, and the commonplace corporate relationships on which that flow depends. These practical effects of HVIRA—on which *amici* wish to focus the Court's attention—highlight its constitutionally infirm extraterritorial reach.

HVIRA requires insurance companies operating in the state to file detailed reports regarding policies sold to persons in Europe between 1920 and 1945. Cal. Ins. Code § 13804(a). The Act's reporting requirement extends to companies that never issued policies in Europe during this period, but are only "related" to those that actually issued policies. The statutory definition of a "related company" is stunningly broad, encompassing "any parent, subsidiary, reinsurer, successor in interest, managing general agent, or affiliate company of the insurer" that is part of the same corporate structure. *Id.* § 13802(b). The reporting requirements thus apply to insurance companies operating in California whether or not they exercise any control over the foreign partners at issue.

If HVIRA is upheld, those companies unable to comply with HVIRA's stringent requirements face suspension of their licenses to do business in California. This severe sanction means immediate loss of revenue, as well as injury to a company's reputation, resulting in loss of market share. It also threatens considerable disruption to California policyholders, who may suddenly find themselves without valid insurance coverage.

The Ninth Circuit suggests that, if an insurance company is unable to obtain the required information from its foreign partners, it still can avoid sanctions if it chooses to "disaffiliate and thus shed any reporting requirement," *Gerling II*, 296 F.3d at 840. But in today's global marketplace, disaffiliation is not even remotely a viable option. Companies depend on complex, far-flung networks of corporate affiliations to remain competitive in the global marketplace. An insurance company that disaffiliates from its European partners likely faces the same consequences as a company that loses its license in California—loss of revenue, damage to its reputation, and a decrease in market share. An insurance company should not be forced to choose between losing its license in California and losing its affiliates in Europe.

HVIRA creates equally serious difficulties for foreign insurers. California's act requires foreign insurance companies to compile the same massive reports even if the company's only connection to California is through an affiliate or subsidiary. Put another way, it requires action by foreign insurance companies, over whom California has no jurisdiction, in connection with business transacted outside California as many as 80 years ago with persons having no nexus to California. In addition, HVIRA ignores privacy laws that bind these foreign insurers in their own countries. It thereby forces these foreign companies to choose between violating their own domestic privacy laws or sacrificing an affiliate's business in California.

Enforcement of HVIRA would not only disrupt the affairs of individual companies. Foreign commerce generally would also be adversely affected in a number of ways.

Most directly, HVIRA's enforcement would impose serious economic consequences on the insurance industry, the effects of which would be felt well beyond California's borders. The widespread suspension of certificates that HVIRA promises would generate uncertainty and confusion among policy-holders, many of whom would be left scrambling for new coverage. The consequences of suspending the certificates would not be limited to California. The disruption of insurance coverage in the state would radiate outward, as businesses and individuals in other states and countries react. Insurance companies suffering losses in one state might be forced to increase premiums elsewhere. A California import-export company insured by an affected insurance company, for example, might be forced to restrict its operations, affecting suppliers and customers in other states and countries. Furthermore, due to the accelerating pace of mergers and consolidations in the financial services industry, the disruption will extend even farther than it would have a few years ago.

These consequences are exacerbated by the proliferation of similar statutes. If HVIRA's extraterritorial reach is not reined in, it is likely that other states will continue to follow suit—potentially multiplying HVIRA's impact on foreign commerce tens of times over.[19] And if the HVIRA model stands, states may choose to adapt it to any number of other politically popular issues that tempt them to engage in regulation beyond their borders.

More broadly, HVIRA threatens to destabilize the international business partnerships that have become a key mechanism for modern foreign commerce. HVIRA uses U.S. affiliates of foreign companies as a pressure point for regulating conduct far beyond its jurisdictional authority. That approach is impermissible under both the Commerce Clause and the Due Process Clause of the Constitution, and it is particularly troublesome in a globalizing economy.

By seeking to regulate matters outside the state, HVIRA injects uncertainty into existing relationships between foreign and U.S. companies. State laws that try to control commerce overseas through regulation of local affiliates jeopardize the ability of U.S. companies to form critical international alliances, since potential foreign partners will legitimately fear being subjected to heavy reporting requirements and regulatory scrutiny by U.S. states in which they do no business. For foreign companies, laws like HVIRA present the very real possibility that their U.S. affiliates will become unwilling conduits for intrusive state regulations. Foreign companies considering joint ventures with or acquisitions of U.S. companies may reconsider if individual U.S. states are free to reach across their borders—indeed across national borders—and regulate the affairs of foreign companies through their U.S. partners.

State foreign policy regulations can also have the effect of undermining U.S. competitiveness as a result of the desire of

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[19] Other states have already passed statutes that mirror HVIRA. Md. Code Ann., Ins. §§ 28-101 to 28-110; Minn. Stat. § 60A.053; N.Y. Ins. Law §§ 2701-2711; Tex. Ins. Code Ann. § 21.74; Wash. Rev. Code § 48.104.010. As noted, Florida's near-identical statute, Fla. Stat. ch. 626.9543, was struck down in *Gallagher*, 267 F.3d at 1240.

individual states to regulate corporate conduct abroad. There is a danger that foreign countries will retaliate against U.S. companies generally for the actions of a few individual states. This Court has recognized the danger of foreign countries retaliating against "the Nation as a whole" for the actions of individual U.S. states. *Japan Line*, 441 U.S. at 450. This risk of retaliation is borne by companies and individuals throughout the United States, most of which lack access to the local California political process that initiated the dispute and thus lack the political means to ameliorate the conflict. Out-of-state concerns and complaints typically fall on deaf ears. California political actors have no incentive to pay heed to those who are not constituents. Yet California's deafness to national and international concerns puts companies nationwide at risk of retaliation.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully ask this Court to reverse the decisions of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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