No. 02-722

# In the Supreme Court of the United States

AMERICAN INSURANCE ASSOCIATION, ET AL.,
PETITIONERS

*v.*

JOHN GARAMENDI, INSURANCE COMMISSIONER,
STATE OF CALIFORNIA

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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## QUESTION PRESENTED

Whether a California statute that requires an insurance company doing business in the State to retrieve, compile, and disclose information about each insurance policy issued by that company or an affiliate in Europe that was in effect between 1920 and 1945 (1) impermissibly intrudes upon the national government's exclusive power over foreign affairs and foreign commerce or (2) regulates extraterritorially in violation of the Commerce Clause, the Due Process Clause, or both.

TABLE OF CONTENTS



TABLE OF AUTHORITIES

Cases—Continued: Page

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### INTEREST OF THE UNITED STATES

The United States has engaged in extensive diplomatic efforts to assure that the nations and enterprises responsible for the Holocaust provide some measure of justice to their victims. In so doing, the United States has consistently encouraged the use of voluntary, non-adversarial mechanisms for resolving Holocaust victims' claims. California has adopted a different approach. The State has enacted a series of related statutes, including the one challenged here, to provide a separate means of resolving those claims. Such state laws directly interfere with the national government's authority over foreign affairs and foreign commerce.

### STATEMENT

1. a. Since the end of World War II, the United States has committed substantial diplomatic resources to achieving

some measure of justice for the victims of Nazism. The United States and its allies entered into treaties with the post-War governments of Germany and Austria that required them to pay compensation to such persons. See Pet. App. 97a-98a. More recently, the United States has engaged in extensive international discussions concerning claims of Holocaust victims and their heirs. As a result of those discussions, the United States has entered into executive agreements with Germany and Austria and has issued a joint statement with Switzerland.

As with Holocaust-related claims generally, the United States has sought to encourage the resolution of insurance claims of Holocaust victims and their heirs "through cooperative means outside of litigation." Office of the Spokesman, U.S. Dep't of State, *Holocaust Insurance Agreement Signed* (Oct. 17, 2002). The United States has promoted the expeditious disposition of such claims in accordance with the procedures established by the International Commission on Holocaust Era Insurance Claims (ICHEIC).

ICHEIC is a voluntary organization formed by five European insurance companies, the State of Israel, Jewish organizations, and the National Association of Insurance Commissioners. The United States has observer status in ICHEIC, as do several European countries, including Germany, France, Italy, Poland, and the Czech Republic. ICHEIC is chaired by former Secretary of State Lawrence S. Eagleburger. Through ICHEIC, Holocaust victims' insurance claims are processed and checked against European insurers' records in a manner consistent with participating insurers' concerns that they not violate European data privacy laws.

The United States has repeatedly stated that ICHEIC "should be recognized as the exclusive remedy for all insurance claims that date to the Nazi era" and has "encourag[ed] all insurance companies that wrote policies during the Nazi era to join the ICHEIC." Office of the Spokesman, U.S.

Dep't of State, *International Commission on Holocaust Era Insurance Claims Begins World-Wide Effort to Identify Unpaid Claims* (Feb. 15, 2000); see Pet. App. 177a (statement of Ambassador Randolph M. Bell, Special Envoy for Holocaust Issues) (reiterating United States' position that ICHEIC should be viewed as "the exclusive remedy for unresolved insurance claims from the National Socialist era and World War II").

b. The United States' approach to resolving Holocaust victims' claims, including insurance claims, is reflected in the executive agreement entered into between the United States and Germany in 2000. See Pet. App. 153a-168a. That agreement recognizes the creation of a foundation in Germany, funded with $5 billion from public and private sources, to address Holocaust-era claims against German companies that were not addressed by earlier measures. The German government agreed to supervise the activities of the foundation. *Id.* at 155a-156a. The United States, in turn, agreed to inform its courts that "it would be in [its] foreign policy interests * * * for the Foundation to be the exclusive remedy and forum for resolving [Holocaust-era] claims asserted against German companies." *Id.* at 156a. The United States also agreed to "use its best efforts" to promote the objectives of the agreement, including the achievement of an "all-embracing and enduring legal peace" with respect to such claims. *Ibid.*

The agreement specifically endorses ICHEIC as the proper vehicle for resolving Holocaust-era insurance claims. Germany agreed that all claims by or on behalf of Holocaust victims against German insurance companies would be processed based on ICHEIC procedures and additional proce-

dures to be agreed upon among ICHEIC, the foundation, and the German Insurance Association. Pet. App. 156a.[1]

The additional procedures recently established by ICHEIC and the German entities provide, among other things, for potential claims to be checked against insurance companies' records in a manner consistent with German privacy law. ICHEIC publishes a list that includes only the names of policyholders who are believed to have been Holocaust victims (based on information from various sources such as German census records) and those policyholders' years of birth. See *Agreement between the International Comm'n on Holocaust Era Insurance Claims, the Foundation "Remembrance, Responsibility, and the Future" and the German Ins. Ass'n* Annex H, Para. IV (Oct. 16, 2002) <http://www.icheic.org/eng/press.html>.

2. The State of California has taken a different approach to securing compensation for Holocaust victims and their families. In a series of closely related statutes, including the one challenged in this case, the State has sought to use its regulatory authority to compel resolution of Holocaust-era insurance claims.

a. The statute at issue here, the Holocaust Victim Insurance Relief Act of 1999 (HVIRA), Cal. Ins. Code §§ 13800 *et*

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[1] The executive agreement between the United States and Austria, which consists of an exchange of diplomatic notes and annexes, contains nearly identical undertakings. See *Exchange of Notes* Annex A, Para. 14 (Jan. 23, 2001) <http://www.usembassy.at/en/policy/annex_a.htm>. The joint statement of the United States and Switzerland similarly endorses ICHEIC and notes the "potentially disruptive and counterproductive effects of investigative initiatives or the threat or actual use of sanctions on a sub-federal level against insurers, including those that are * * * participants in [ICHEIC]." *Joint Statement Between the Government of the United States of America and the Government of the Swiss Confederation* (Jan. 29, 2000) <http://www.us-embassy.ch/NEWS/ jointstatement. htm>.

*seq.* (West Supp. 2003), requires each insurance company doing business in the State to disclose for publication detailed information concerning policies issued by the company or its affiliates in Europe decades ago. See *id.* §§ 13803, 13804. HVIRA requires disclosure of information concerning "life, property, liability, health, annuities, dowry, educational, or casualty insurance policies" that were sold "directly or through a related company, to persons in Europe, which were in effect between 1920 and 1945." *Id.* § 13804(a). As to each policy, the insurer must disclose "[t]he holder, beneficiary, and current status," the policyholder's "city of origin, domicile, or address," *id.*§ 13804(a)(1), whether the policy proceeds have been paid, *id.* § 13804(b), and, if not, the policy's value, *id.* §§ 13802(c), 13804(b). A domestic insurer is required to disclose such information about any such policies sold by its European affiliates, "whether the sale occurred before or after the insurer and the related company became related." *Id.* § 13804(a). The information is to be entered in a Holocaust Era Insurance Registry that is accessible to the public. *Id.* § 13803. The Commissioner of Insurance must suspend the license of any insurer that fails to provide the information. *Id.* § 13806.

HVIRA declares that its requirements are "necessary to protect the claims and interests of California residents," including some 5600 Holocaust survivors living in the State, and "to encourage the development of a resolution to these issues through the international process or through direct action by the State." Cal. Ins. Code § 13801(f) (West Supp. 2003). HVIRA's requirements apply to *every* insurance policy issued in Europe during the relevant period, however, without regard to whether the policyholder or the beneficiary ever resided in California.

b. In 1998, the California Legislature approved not only HVIRA, which was initially vetoed by the Governor and did

not become law until the following year,[2] but also two related measures that did become law. See Assembly Bill No. 1334, 1998 Cal. Stat. ch. 43; Senate Bill No. 1530, 1998 Cal. Stat. ch. 963.

Assembly Bill No. 1334, which was designed "to provide just compensation to aging Holocaust victims," 1998 Cal. Stat., ch. 43, § 3, authorizes suits on Holocaust-era insurance policies in California courts, Cal. Civ. Proc. Code § 354.5(b) (West Supp. 2003). It permits suits to be brought against any insurer that is "related" to the insurer that issued the policy. *Id.* § 354.5(a) and (b). It also abolishes any statute-of-limitations defense if the suit is brought by 2010, *id.* § 354.5(b) and (c), declares that forum-selection provisions in Holocaust-era policies are unenforceable, 1998 Cal. Stat., ch. 43, § 1(b), and provides that the policies, although issued in Europe, are "subject to California law," *ibid.*

Senate Bill No. 1530, in turn, directs the Commissioner of Insurance to "work to recover information and records that will strengthen the claims of California residents" with respect Holocaust-era policies by undertaking "a coordinated approach to gather, review, and analyze the archives of insurers and other archives and records." Cal. Ins. Code § 12967(a)(1) and (2) (West Supp. 2003). That measure also requires the Commissioner to suspend the license of any California insurer if it "or any affiliate * * * has failed to pay any valid claim" of Holocaust victims or their heirs,

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[2] Governor Pete Wilson vetoed the original HVIRA as unnecessary and unduly broad. *Governor's Veto Message,* A.B. 1715 (Sept. 27, 1998). HVIRA was reintroduced and passed in 1999 with only minor modifications. The accompanying committee report explained that HVIRA was a necessary supplement to existing laws because it provides for dissemination of policy information to potential claimants, so that they "can take direct action on their own behalf." Gerling Appellees' C.A. Reh'g Pet., Exh. J.

whether or not the claimant is a resident of the State. *Id.* § 790.15(a) and (b)(1).[3]

3. a. Petitioners, insurers that do business in California and that have European affiliates, brought suit to challenge the constitutionality of HVIRA. The district court entered a preliminary injunction against enforcement of the statute. The court held that petitioners had shown a probability of succeeding on their claims that HVIRA impermissibly "interferes with the national government's exclusive power over external affairs," Pet. App. 95a-105a, and regulates extraterritorially in violation of the Commerce Clause, *id.* at 106a-110a.

b. The court of appeals rejected each of the constitutional grounds on which the preliminary injunction was based. Pet. App. 34a-60a. The court held that HVIRA, as an insurance regulation, is exempted from Commerce Clause scrutiny by the McCarran-Ferguson Act, 15 U.S.C. 1012(b). See Pet. App. 41a-45a. The court also suggested that HVIRA does not, in any event, regulate extraterritorially because HVIRA "requires California companies only to *provide*

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[3] California has enacted other laws to assist private individuals' claims arising out of events that occurred abroad during World War II. In 1999, California enacted a statute that creates a cause of action, with uniquely favorable substantive and procedural rules, for "any Second World War slave labor victim" or "Second World War forced labor victim," or the heirs of such victim, against "any entity or successor in interest thereof for whom that labor was performed, either directly or through a subsidiary or affiliate." Cal. Civ. Proc. Code § 354.6 (West Supp. 2003). The Ninth Circuit recently struck down that statute as an impermissible intrusion into matters of international relations reserved to the national government. *Deutsch* v. *Turner Corp.*, 317 F.3d 1005 (2003); but see *Taiheiyo Cement Corp.* v. *Superior Court*, 105 Cal. App. 4th 398 (2003) (upholding statute). In 2002, California enacted a further statute that permits Holocaust victims to bring suit in California to recover looted artwork, regardless of whether the property is located in the State. See Cal. Civ. Proc. Code § 354.3.

*information* about" Holocaust-era policies. *Id.* at 43a. The court also held that HVIRA does not impermissibly interfere with the national government's authority over foreign affairs. *Id.* at 58a-59a. The court remanded the case for consideration of petitioners' due process claim.

4. a. On remand, the district court permanently enjoined the enforcement of HVIRA. The court held that HVIRA violates the Due Process Clause by suspending insurers' licenses for not making the required disclosures without enabling them to raise defenses such as a foreign-law prohibition on disclosure. Pet. App. 78a-83a.

b. The court of appeals reversed. Pet. App. 1a-33a. The court held that HVIRA does not violate due process constraints on state legislative jurisdiction because HVIRA merely regulates the insurance industry within California. Pet. App. 9a. The court also held that HVIRA does not violate due process by denying insurers an opportunity to defend against the suspension of their licenses. *Id.* at 20a-29a. The court reiterated its earlier holdings rejecting challenges to HVIRA under the Commerce Clause and the foreign affairs power. *Id.* at 29a.

## SUMMARY OF ARGUMENT

This case arises out of an attempt by a single State to extend its regulatory authority into other nations, thereby undermining the foreign policy of the United States. California, in HVIRA, has sought to compel the disclosure of vast amounts of information contained in foreign archives concerning foreign transactions among foreign parties. It has done so for the express purpose of enabling victims of Nazi Germany to pursue claims with respect to insurance policies issued in Europe before and during the Second World War. HVIRA exceeds several distinct, but complementary, constraints that the Constitution imposes on a State's regulatory authority, all of which serve to avoid unseemly conflict

with the national government, with other States, and with other nations acting within the sphere of their own authority.

I. HVIRA impermissibly intrudes into a field—the conduct of the United States' diplomatic and commercial relations with other nations—that is exclusively reserved to the President and Congress. The national government's authority over external relations includes the authority to resolve claims arising out of, or in connection with, international conflicts. See, *e.g.*, *Dames & Moore* v. *Regan*, 453 U.S. 654, 679-680 (1981).

California has sought in HVIRA to establish its own separate mechanisms for resolving such claims. HVIRA is specifically concerned with gathering information concerning European insurance transaction in order to facilitate claims by and on behalf of victims of Nazi Germany. Moreover, HVIRA threatens to impair the United States government's own approach to the resolution of Holocaust victims' claims —an approach that encourages the use of voluntary non-adversarial mechanisms, in contrast to coercive regulation and litigation. The United States' ability to persuade foreign governments and foreign enterprises to participate in voluntary mechanisms is undermined by state regulations such as HVIRA, which impose additional obligations on foreign enterprises, through their domestic affiliates, for the purpose of aiding the assertion of claims against those foreign enterprises in California judicial proceedings or elsewhere. Indeed, HVIRA has generated the very tension with our European allies that the United States has sought to avoid.

II. HVIRA also regulates extraterritorially in violation of both the Commerce Clause and the Due Process Clause. Those Clauses impose similar constraints on a State's ability to regulate activity that occurs outside its borders. See, *e.g.*, *Healy* v. *Beer Inst., Inc.*, 491 U.S. 324, 336 (1989); *Home Ins. Co.* v. *Dick*, 281 U.S. 397, 407-408 (1930). HVIRA compels

the retrieval, compilation, and public disclosure of information located outside the State, concerning transactions that occurred outside the State, between parties who were not residents of the State. Accordingly, even if the statute applied to policies issued in New York to New York residents, rather than to policies issued in Europe to Europeans, it would exceed the State's authority.

## ARGUMENT

### I. HVIRA IMPERMISSIBLY INTRUDES INTO MATTERS OF FOREIGN RELATIONS AND FOREIGN COMMERCE RESERVED TO THE NATIONAL GOVERNMENT

#### A. Under Our Constitutional System, The President And Congress Exercise Exclusive Authority Over Foreign Relations And Foreign Commerce

As the Court has emphasized, "[i]n international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power." *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 448 (1979); see, *e.g.*, *Hines* v. *Davidowitz*, 312 U.S. 52, 63 (1941) ("The Federal Government * * * is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties."). It necessarily follows that "[p]ower over external affairs is not shared by the States," but instead "is vested in the national government exclusively." *United States* v. *Pink*, 315 U.S. 203, 233 (1942).

The national government's preeminent role in acting for the United States in the international arena was forged out of the experience under the Articles of Confederation, when the States had undermined the national government's efforts to engage in political and commercial relations with other nations. See, *e.g.*, *Oldfield* v. *Marriott*, 51 U.S. (10 How.) 146, 163-165 (1850). The Constitution's reservation of such

powers exclusively to the national government is reflected in its express grants of power to Congress,[4] and to the President,[5] and in its express restrictions on the States.[6] Those provisions serve to set matters of foreign commerce, foreign relations, and war in a field apart. It is a field that the States may not enter.

The national government has traditionally exercised its foreign relations and war powers with respect to the resolution of private parties' claims arising out of international conflicts. See, *e.g.*, *Dames & Moore*, 453 U.S. at 679 ("[T]he United States has repeatedly exercised its sovereign authority to settle the claims of its nationals against foreign countries."); *Pink*, 315 U.S. at 240 (Frankfurter, J., concurring) ("That the President's control of foreign relations includes the settlement of claims is indisputable."); *Ware* v. *Hylton*, 3 U.S. (3 Dall.) 199, 230 (1796); *Deutsch* v. *Turner Corp.*, 317 F.3d 1005, 1025 (9th Cir. 2003) ("[T]he Constitution allocates the power over foreign affairs to the federal government exclusively, and the power to make and resolve war, including

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[4] Those include Congress's powers to "provide for the common Defence," "regulate Commerce with foreign Nations," "define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations," and "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water." U.S. Const. Art. I, § 8, Cls. 1, 3, 10, 11.

[5] Those include the President's powers to serve as "Commander in Chief of the Army and Navy," "make Treaties" and "appoint Ambassadors [and] other public Ministers and Consuls" with the advice and consent of the Senate, and "receive Ambassadors." U.S. Const. Art. II, §§ 2, 3.

[6] Those include restrictions on the States' "enter[ing] into any Treaty, Alliance, or Confederation," "grant[ing] Letters of Marque and Reprisal," "lay[ing] any Imposts or Duties on Imports or Exports," "enter[ing] into any Agreement or Compact * * * with a foreign Power," and "engag[ing] in War." U.S. Const. Art. I, § 10.

the authority to resolve war claims, is central to the foreign affairs power in the constitutional design.").

In light of the "imperative[] * * * that federal power in the field affecting foreign relations be left entirely free from local interference," *Hines*, 312 U.S. at 63, state "regulations must give way if they impair the effective exercise of the Nation's foreign policy," *Zschernig* v. *Miller*, 389 U.S. 429, 440 (1968), or prevent the United States from "speak[ing] with one voice when regulating commercial relations with foreign governments," *Japan Line*, 441 U.S. at 449. This Court has struck down state laws that engaged a State in matters affecting the Nation's external affairs "even in [the] absence of a treaty" or an Act of Congress, *Zschernig*, 389 U.S. at 441, as inconsistent with the Constitution's assignment to the national government of the authority to conduct foreign relations or, in the commercial area, as inconsistent with the Foreign Commerce Clause. See, *e.g.*, *Japan Line*, 441 U.S. at 452-453; *Zschernig*, 389 U.S. at 436; *Chy Lung* v. *Freeman*, 92 U.S. 275, 279-281 (1875); cf. *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 381-382 n.16 (2000) (noting such cases).

### B. HVIRA Regulates In An Area Exclusively Reserved To The National Government

HVIRA intrudes into the field of foreign relations reserved exclusively to the national government. This Court has repeatedly recognized that the President and Congress have the sole authority to resolve, or to establish the mechanisms to resolve, the claims of United States nationals arising out of international conflicts. See, *e.g.*, *Dames & Moore*, 453 U.S. at 679. It follows *a fortiori* that the resolution of claims of *foreign nationals* arising out of, or in connection with, an international conflict is also a matter reserved exclusively to the President and Congress. A State is without authority to pursue its own independent approach to

such claims, even if the United States and the State "share the same goals," because "[t]he fact of a common end hardly neutralizes conflicting means." *Crosby*, 530 U.S. at 379. The conflict between the means chosen by the United States and by California to resolve Holocaust victims' insurance claims is quite evident.

1. As explained above (at 1-4), with respect to still-unresolved claims against foreign enterprises arising out of the Holocaust, the United States has determined that those claims should be pursued through voluntary, non-adversarial processes rather than through coercive regulation and litigation. The United States has concluded that such an approach serves the interests of Holocaust victims and their families throughout the world, including the interests of elderly survivors of the Holocaust in obtaining some measure of justice within their lifetimes. The United States has also concluded that a non-adversarial approach serves important interests of the Nation in cooperative relations with its European allies.

More particularly, the United States, in its executive agreements with Germany and Austria and its other recent diplomatic efforts, has encouraged the use of ICHEIC as the exclusive mechanism for resolving Holocaust-era insurance claims. Those agreements do not, of their own force, extinguish any claims that Holocaust victims or their families might assert in court against foreign insurance companies.[7] They do make clear, however, that United States policy disfavors the imposition of further obligations on companies

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[7] Because the claims almost exclusively concern persons and transactions that had no relation to the United States at the time of the conduct at issue, it is understandable that the United States government did not seek to extinguish or resolve the claims under the laws or international agreements of this Nation or by coercive processes under our laws, and instead sought to promote resolution by other means.

subject to the agreements, whether through regulation or litigation, beyond the obligations contemplated by the agreements themselves. Thus, the executive agreement between the United States and Germany recognizes that it is "in the[] interests" of the two governments for the designated claims process "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.

HVIRA poses a direct threat to "the effective exercise," *Zschernig*, 389 U.S. at 440, of United States policy with respect to Holocaust victims' insurance claims. HVIRA is not a law of general applicability with only an incidental effect on matters outside the State or the United States, or on the national government's ongoing efforts in the international arena. To the contrary, HVIRA imposes disclosure requirements that are applicable *only* to insurance policies issued "to persons in Europe" during the period leading up to and including the Second World War. Cal. Ins. Code § 13804 (West Supp. 2003); see 10 Barclays Cal. Code Regs. § 2278.1(a) (defining term "Europe" in HVIRA as those parts of Europe "occupied or controlled by Nazi Germany, its allies or sympathizers"). HVIRA imposes those requirements for the express purpose of assisting Holocaust victims and their families in pursuing claims with respect to those policies, whether through "international process" or through judicial proceedings or enforcement actions by the State. See Cal. Ins. Code § 13801(b) (HVIRA is intended "to encourage the development of a resolution to these issues through the international process or through direct action by the State"). California has thereby thrust itself into the field of foreign relations and foreign commerce that is reserved exclusively to Congress and the President, who "is the sole organ of the nation in its external relations, and its sole representative with foreign nations." *United States* v.

*Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (quoting statement of John Marshall).

California has proceeded, moreover, in a manner that conflicts with the approach that the national government has elected to pursue. HVIRA not only requires the disclosure of Holocaust-era policy information to an entity in addition to ICHEIC, but also requires the disclosure of information substantially in addition to that required by ICHEIC. And HVIRA imposes a significant economic penalty—suspension of a license to do business—on California affiliates of insurers that fail to make those disclosures. HVIRA thus establishes "a different, state system of economic pressure," *Crosby*, 530 U.S. at 376, that conflicts with the ICHEIC system endorsed by the United States, and that threatens to impede its implementation and operation.

At a minimum, such state laws "compromise the very capacity of the President to speak for the Nation with one voice in dealing with other governments." *Crosby*, 530 U.S. at 381. The United States has stated that participation in the voluntary processes that it has endorsed should "give[] those companies cooperating with [ICHEIC] 'safe haven' from sanctions, subpoenas, and hearings relative to the Holocaust period." Testimony of Stuart E. Eizenstat, Deputy Secretary of the Treasury, before the Senate Foreign Relations Committee (Apr. 5, 2000) (Pet. App. 136a); see Pet. App. 156a (United States undertakes in its agreement with Germany to "use its best efforts * * * with state and local governments" to achieve an "all-embracing and enduring legal peace"). HVIRA, however, makes no exception even for companies that participate in ICHEIC or similar organizations. Indeed, HVIRA and the related California statutes appear designed to facilitate continuing litigation. HVIRA thereby undermines the United States' ability to persuade foreign governments and foreign companies to participate voluntarily in organizations such as ICHEIC. See *Crosby*,

530 U.S. at 377 (recognizing that the President's "economic and diplomatic leverage" is reduced by state laws that seek to penalize foreign governments or foreign commerce); see also *Joint Statement Between the Government of the United States of America and the Government of the Swiss Confederation* (Jan. 29, 2000) (noting the "potentially disruptive and counterproductive effects" of laws such as HVIRA); Letter from Stuart E. Eizenstat, Deputy Secretary of the Treasury, to Gray Davis, Governor (Nov. 30, 1999) (Pet. App. 123a-125a) (observing that HVIRA could "undermine" the ICHEIC claims resolution process and "de[r]ail" negotiations between the United States and Germany concerning claims of Nazi slave and forced laborers).

The potential for HVIRA to complicate the United States' diplomatic efforts is illustrated by contrasting the information that insurers are required to disclose under the ICHEIC procedures endorsed by the United States with the information that insurers are required to disclose under HVIRA. As contemplated by the United States and Germany in their executive agreement, ICHEIC, the German foundation, and the German Insurance Association developed rules to govern what information about Holocaust-era insurance policies must be made available in order to provide adequate notice to potential claimants while safeguarding the privacy interests of other persons under German (or other European) law.[8] Those rules require the disclosure

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[8] Many European countries, like California and other States, limit the disclosure of personal information obtained through commercial transactions, including insurance transactions. See, *e.g.*, Tracie B. Loring, *An Analysis of the Informational Privacy Protection Afforded by the European Union and the United States*, 37 Tex. Int'l L.J. 421, 423-425, 434-439 (2002) (describing the development of laws protecting personal information in the nations comprising the European Union). European laws have been described as more comprehensive in their protection of personal data than are laws in the United States. See *id.* at 425 ("Unlike the European

only of the name of any policyholder who is believed to have been a Holocaust victim and that person's year of birth. See p. 4, *supra*. Insurers are not required to provide other information, such as the value of a policy or the named beneficiary, with respect to policies issued to Holocaust victims, and are not required to provide any information about policies issued to other persons. HVIRA is not so limited. See p. 5, *supra* (information that must be disclosed under HVIRA). Thus, whereas the United States' diplomatic efforts have sought to resolve Holocaust victims' claims while accommodating the interests of Germany and other nations to minimize conflict with European privacy laws, HVIRA strikes a different balance that fails to account for those interests.[9]

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Union's omnibus, centralized approach to informational privacy, which reflects the notion that data protection must be ensured by comprehensive legislation, data protection regulation in the United States is decentralized, fragmented, ad hoc, and narrowly tailored to target specific sectors."); David Bender, *Privacy Law*, 717 PLI/Pat 563, 579 (2002) ("In contrast to the piecemeal U.S. approach that relies largely on self-regulation, the European Union in 1995 adopted a data protection directive * * * that required each of the 15 member states to enact comprehensive data protection legislation.").

[9] As this Court has recognized, when information is sought in the United States from a foreign individual or entity, the data privacy statutes of the foreign party's own government are not controlling. See *Societe Nationale Industrielle Aerospatiale* v. *United States District Court*, 482 U.S. 522, 544-545 n.29 (1987); *Societe Internationale Pour Participations Industrielles Et Commerciales* v. *Rogers*, 357 U.S. 197, 204-206 (1958). Thus, for example, a foreign "blocking" statute does "not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute." *Aerospatiale*, 482 U.S. at 544 n.29. Here, in contrast, the constitutional deficiency in HVIRA is not merely that it imposes disclosure obligations on foreign insurers that may conflict with their *own governments*' privacy laws, but rather that it conflicts with the *United States government's* approach to the resolution of Holocaust victims'

HVIRA has generated the very tensions in international relations that the United States has sought to avoid, prompting protests from the governments of Germany and Switzerland concerning HVIRA's application to insurance policies written in those countries. See *Zschernig*, 389 U.S. at 437 n.7 (relying on similar protests to conclude that state statute impermissibly interfered with national government's authority over foreign affairs); cf. *Crosby*, 530 U.S. at 382-384. It is not for respondents to trivialize the potential implications of those protests for United States foreign policy (see Supp. Br. in Opp. 2), especially at a time of international tension when relations between this Nation and its European allies are at their most sensitive. State government officials, who are not part of the process through which the Nation formulates and conducts its international relations, are not well positioned to evaluate what adverse impact their actions may have for those relations. They cannot, for example, be expected to make an informed assessment of whether, or how, or when a foreign government might respond to provocative state legislation, or how detrimental the response might be to various important interests of the United States as a whole. "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 proliferation of laws in California and other States that seek to facilitate claims against the United States' current allies or their citizens arising out of past international conflicts (see, *e.g.*, note 3, *supra*) demonstrates the danger of allowing States, which are not simultaneously dealing with foreign governments on many other important initiatives, to

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claims against those insurers, an approach that is itself more deferential to European privacy concerns.

pursue their own foreign policies. As the Court recently reaffirmed, the Framers were determined that, because "[t]he union will undoubtedly be answerable to foreign powers for the conduct of its members," "the peace of the WHOLE ought not to be left at the disposal of a PART." *Crosby*, 530 U.S. at 381-382 n.16 (quoting The Federalist No. 80, at 535-536 (Alexander Hamilton) (J. Cooke ed., 1961)).

2. The court of appeals erred in refusing, based on a misunderstanding of *Barclays Bank PLC* v. *Franchise Tax Board*, 512 U.S. 298 (1994), to consider the Executive Branch's views regarding HVIRA's foreign policy ramifications. See Pet. App. 55a. As this Court has explained, *Barclays* addressed an unusual situation in which Congress and the Executive had taken divergent positions. See *Crosby*, 530 U.S. at 385-386; *Barclays*, 512 U.S. at 324-330. *Crosby* reaffirms the central importance in other situations of the President's views in exercising his constitutional responsibility "to speak for the Nation with one voice in dealing with other governments." 530 U.S. at 381, 385-386.

Contrary to the view of the court of appeals (see Pet. App. 47a-50a), the U.S. Holocaust Assets Commission Act of 1998, Pub. L. No. 105-186, 112 Stat. 611, does not authorize States to enact statutes such as HVIRA. That Act, in fact, confirms that California has departed from the course charted by the United States. As relevant here, the Act established a "Presidential Advisory Commission on Holocaust Assets in the United States" to investigate the disposition of certain Holocaust-era assets that "came into the possession or control of the Federal Government" after January 30, 1933. *Id.* §§ 2(a) and 3(a)(1), 112 Stat. 611, 612. The Act, among other things, directed the Commission to "encourage the National Association of Insurance Commissioners to prepare a report on the Holocaust-related claims practices of all insurance companies, both domestic and foreign, doing business in the United States at any time after January 30, 1933," that

issued an insurance policy to "any individual on any list of Holocaust victims." *Id.* § 3(a)(4)(A), 112 Stat. 613.

Nothing in the federal Act imposes disclosure obligations on insurers under threat of sanctions. Nor does the Act confer any authority on the States to do so. To the contrary, the Act contemplates the gathering of information only "to the degree [it] is available." Pub. L. No. 105-186, § 3(a)(4)(B), 112 Stat. 613, 614. Moreover, unlike HVIRA, which is explicitly directed at facilitating individual claims against European insurers, the federal Act is concerned, among other things, with collecting information on "the Holocaust-related *claims practices*" of insurers "doing business in the United States," to assist the Commission in preparing a report to the President containing "recommendations for such legislative, administrative, or other action as it deems necessary or appropriate." *Id.* § 3(a)(4)(A) and 3(d)(1), 112 Stat. 613, 614 (emphasis added). And, whereas HVIRA seeks specific information about each policy issued by each European insurer during the relevant period, the federal Act seeks more general information, such as "[t]he number of policies issued by each company" to Holocaust victims. *Id.* § 3(a)(4)(B), 112 Stat. 613. Although the federal Act does seek information on the value of each such policy, it does not require the policyholder or beneficiary to be identified. It thus does not present the same privacy concerns as does HVIRA.[10]

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[10] The federal Commission's final report does not disclose any private information regarding the insurance policies issued by European insurers to Holocaust victims. To the contrary, the report discusses such policies only in general terms, such as by describing the ways in which Nazi regimes confiscated the insurance assets of Holocaust victims. See Presidential Advisory Comm'n on Holocaust Assets in the United States, *Plunder and Restitution: The U.S. and Holocaust Victims' Assets* SR-15 (Dec. 2000) (Nazis "confiscat[ed] insurance monies" of "Jews fleeing Germany"); *id.* at SR-17 (Nazis "confiscat[ed] payments from insurers that

Thus, the federal Act takes a deliberately cautious approach, seeking to gather available information and to produce recommendations *for the President* as to what further measures might be appropriate. It provides no authority for California to pursue its own foreign policy, inconsistent with that pursued by the President, with respect to the resolution of claims under insurance policies issued by European companies to European individuals who became victims of the Holocaust.

## II. HVIRA VIOLATES CONSTITUTIONAL PROHIBITIONS ON EXTRATERRITORIAL STATE REGULATION

Both the Commerce Clause and the Due Process Clause of the Fourteenth Amendment prohibit a State from regulating activity outside its borders. HVIRA is such an extraterritorial regulation. HVIRA focuses exclusively on transactions that occurred in Europe between Europeans many decades ago. It compels the disclosure of extensive private information about those transactions, even though they have "no jurisdictionally-significant relationship to [the State]." *Gerling Global Reinsurance Corp. of Am.* v. *Gallagher*, 267 F.3d 1228, 1238 (11th Cir. 2001). A State may not project its regulatory authority into other Nations in this fashion.

### A. The Commerce Clause And The Due Process Clause Prohibit States From Regulating Transactions Outside Their Borders

1. Under familiar Commerce Clause principles, California may not require corporations to adhere to its standards in other States or nations as a condition of doing business in California. The Commerce Clause "precludes the application

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were intended to compensate property owners for their damages" from the Kristallnacht pogrom). Nor does the report recommend any legislative or administrative action with respect to such insurance policies.

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* v. *Beer Inst., Inc.*, 491 U.S. 324, 336 (1989); see *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 572 (1996) ("[I]t follows from the[] principles of state sovereignty and comity" reflected in, *inter alia*, the Commerce Clause that "a State may not impose economic sanctions on violators of its laws with the intent of changing the [violator's] lawful conduct in other States."). A state law does not cease to be impermissibly "extraterritorial" under the Commerce Clause merely because it has some nexus to domestic persons or activities. "The 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; accord, *e.g.*, *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. 573, 583 (1986).

The Court's decision in *Healy* is illustrative. There, the Court struck down a Connecticut statute that required beer distributors, as a condition of doing business in the State, to file monthly statements with state authorities affirming that their prices in Connecticut did not exceed their prices in any neighboring State. 491 U.S. at 328 & n.5. The statute did not, by its terms, require or prohibit any conduct outside Connecticut. The Court nonetheless recognized that the "practical effect" of the statute was to constrain the distributors' ability to adjust their prices in other States in response to local market conditions. See *id.* at 337-339. Accordingly, the Court held that the statute was an impermissible extraterritorial regulation of commerce. *Id.* at 340.

The Commerce Clause's prohibition on a State's regulation of conduct beyond its borders protects against "inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State." *Healy*, 491 U.S. at 336-337. When, as here, a State seeks to project its regulatory regime not merely beyond its own

borders, but into the jurisdiction of another nation, the potential is particularly great for inconsistent legislation and resulting conflict, as well as for interference with United States foreign policy. Cf. *Japan Line*, 441 U.S. at 447-449 (noting that a state tax on instrumentalities of foreign commerce poses special concerns under the Commerce Clause because, unlike in the domestic context, no authoritative tribunal exists to assure that such instrumentalities are not subject to double taxation). Indeed, even Acts of Congress are presumed not to apply extraterritorially, unless Congress clearly indicates otherwise, to "protect against unintended clashes between our laws and those of other nations which could result in international discord." *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

2. A State is also constrained by the Due Process Clause from regulating transactions that do not have a significant relationship to its legitimate interests. See, *e.g.*, *BMW*, 517 U.S. at 568-574; *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 818-819 (1985); *Home Ins. Co.* v. *Dick*, 281 U.S. 397, 407-408 (1930).

In *Dick*, for example, the Court held that a Texas insurance statute could not, consistent with due process, be applied to invalidate a provision contained in a policy that had been issued in Mexico and was to be performed there. See 281 U.S. at 408. The Court explained that, because all acts relating to the making and performance of the policy occurred outside the State, "Texas was therefore without power to affect the terms of contracts so made." *Ibid.*; see *id.* at 408 n.5 ("[A] State is without power to impose either public or private obligations on contracts made outside of the state and not to be performed there."); see also *Shutts*, 472 U.S. at 821 (a State cannot apply its own law to "a transaction with little or no relationship to the [State]"). Similarly, in *BMW*, the Court held that a state court could not, consistent with due process, impose punitive damages de-

signed to punish conduct that occurred in other States. The Court explained that a State "would be infringing on the policy choices of other States" by penalizing "conduct that was lawful where it occurred and that had no impact on [the State] or its residents." 517 U.S. at 572-573.

Those cases make clear a State cannot apply its law to an out-of-state transaction simply because a party to the transaction resides within the State. Indeed, the policyholder in *Dick* was a citizen and permanent resident of Texas, although all conduct relevant to the policy had occurred in Mexico. The Court held that Texas did not have a sufficient relationship to the policy to permit the State to regulate it. See 281 U.S. at 408. And, in *Shutts*, the Court held that Kansas could not apply its law to out-of-state plaintiffs' claims with respect to out-of-state leases, even though the defendant did business in the State. See 472 U.S. at 818-819.

### B. HVIRA, By Imposing Disclosure Requirements Exclusively With Respect To Foreign Transactions Between Foreign Parties, Is An Impermissible Extraterritorial Regulation

1. Whether analyzed under the Commerce Clause or the Due Process Clause, HVIRA is an impermissible extraterritorial regulation. Its "practical effect" is to compel "conduct beyond the boundaries of the State," *Healy*, 491 U.S. at 336—specifically, to compel the retrieval, compilation, and public disclosure of detailed information, presumably located in Europe, concerning transactions that occurred many decades ago in Europe between European parties. There is no nexus between those transactions and any legitimate interest of California that would permit the State to exercise regulatory authority over them.

As noted above (at 14), HVIRA is not a generally applicable law that focuses on domestic matters and simply happens to have an extraterritorial effect in certain applications. Cf.

*Japan Line*, *supra* (invalidating local taxing laws even in that situation when they interfered with the Nation's ability to speak with one voice). Rather, HVIRA is *specifically and exclusively* directed at transactions that occurred in Europe. It is thus especially evident that HVIRA exceeds the proper legislative jurisdiction of the State. Indeed, HVIRA is inconsistent with California's own general privacy rules, which prohibit, with respect to insurance policies issued in California, the same sorts of disclosures that HVIRA mandates with respect to European policies. See Cal. Ins. Code § 791.13 (West 1993).

The conclusion that HVIRA is an unconstitutional exterritorial regulation is confirmed by "considering how [such laws] may interact with the legitimate regulatory regimes of other States" and nations. *Healy*, 491 U.S. at 336 (noting relevance of such an inquiry); cf. *BMW*, 517 U.S. at 572 (a State cannot "attempt[] to alter [a business's] nationwide policy" in a manner that "infring[es] on the policy choices of other States"). It is plain that HVIRA has the potential to interfere with other jurisdictions' laws limiting the disclosure of personal information gathered in connection with the issuance of insurance policies. See note 8, *supra* (discussing European data privacy laws). German officials have, in fact, opined that a German insurer would violate German privacy laws by complying with HVIRA, at least with respect to the disclosure of information about policyholders who are not believed to be Holocaust victims. See Gerling Appellees' C.A. Reh'g Pet., Exh. C. Yet, as the court of appeals recognized, an insurer that fails to disclose the information required by HVIRA will have its California license suspended, even if "disclosure pursuant to HVIRA [would] violate[] European data protection laws." Pet. App. 25a.

2. a. The court of appeals suggested that HVIRA does not regulate extraterritorially because it does "not seek to regu-

late the substance of out-of-state transactions." Pet. App. 15a (addressing due process challenge); accord *id.* at 43a (addressing Commerce Clause challenge). In the court's view, HVIRA is constitutional because it "requires California insurers *only to disclose information about* their foreign transactions or those of their affiliates." *Id.* at 16a.

The court of appeals' reasoning rests on the erroneous premise that "[a] request for information is simply not equivalent" to a regulation. Pet. App. 16a. A requirement that a person disclose, or refrain from disclosing, confidential information is regulatory in nature. It imposes a substantive obligation, the violation of which carries adverse consequences, in order to advance a government policy objective. See *Dole* v. *United Steelworkers of Am.*, 494 U.S. 26, 28 (1990) (describing "rules which require regulated entities to disclose information" as "[a]mong the regulatory tools available to [the] Government"); see also *BMW*, 517 U.S. at 571 n.15 ("Federal disclosure requirements are, of course, a familiar part of our law.") (citing examples). Indeed, when the Court explained in *BMW* that "no single State could * * * impose its own policy choice on neighboring States," the Court was referring to a State's policy choice "requiring full *disclosure* of every presale repair to a car." 517 U.S. at 570-571 (emphasis added); see *Gallagher*, 267 F.3d at 1238 (observing that the disclosure provisions of Florida's version of HVIRA "pertain to, and as a practical matter unquestionably seek to regulate," Holocaust-era policies). Indeed, the regulatory nature of HVIRA's disclosure requirements is underscored by the substantive and regulatory nature of the converse interest in protecting privacy. The existence of data privacy laws, such as the European laws invoked by petitioners here, belies any claim that laws governing disclosure or non-disclosure of information do not regulate or implicate the Commerce Clause and the Due Process Clause.

b. The court of appeals also suggested that HVIRA is constitutionally justified by the State's purpose to "protect[] its residents from insurance companies that have not paid valid claims." Pet. App. 16a. A State cannot evade constitutional limits on extraterritorial legislation merely by deeming a corporation's conduct outside the State relevant to its ability to perform within the State. See *BMW*, 517 U.S. at 573-574 (State cannot base punitive damages award on conduct that is lawful in other jurisdictions); see generally *Healy*, 491 U.S. at 336 ("[A] statute that directly controls commerce occurring wholly outside the boundaries of a State * * * is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature."); *id.* at 337 n.14 (noting that *only* a statute that "regulates evenhandedly" and "has only indirect effects on interstate commerce" may be justified by a sufficiently important state interest).

In any event, the express purpose of HVIRA is to facilitate the resolution of claims on policies issued in Europe more than 50 years ago rather than to assess the fitness of insurers to do business in California today. See Cal. Ins. Code § 13801(d) and (e) (West Supp. 2003) (HVIRA is designed "to ensure the rapid resolution of * * * questions" concerning "insurance policies held by Holocaust victims and survivors," so as to "eliminat[e] the further victimization of these policyholders and their families"). By contrast, HVIRA makes no mention of the purpose that the court posited. Nor do any other features of HVIRA suggest that its purpose or primary operative effect is to enable the Commissioner of Insurance to ascertain whether an insurance company will deal fairly with California consumers. See *BMW*, 517 U.S. at 572 (state regulation "must be supported by the State's interest in protecting its own consumers and its own economy"). The information that HVIRA requires insurers to disclose is too remote, too dated, and, at the same

time, too detailed to support the court of appeals' posited purpose. The disclosure obligation is tailored to enable individuals—only a small fraction of whom may even now have any connection at all to California—to pursue claims under policies issued in Europe many decades ago. It is not tailored to assessing insurers' current performance in the State.

Indeed, state statutes in effect at the time of HVIRA's enactment already provided the Commissioner of Insurance with all of the tools necessary to investigate insurers' business practices. Cal. Ins. Code § 717(h) (West 1993) (providing Commissioner with the authority to gather information to assess the "fairness and honesty of methods of doing business" of any insurer seeking to do business in the State); *id.* § 733 (authority to examine "all [the insurer's] affairs"); *id.* § 1215.6 (authority to obtain documents in possession of "the insurer or its affiliates"). HVIRA was described by its supporters *not* as a means of obtaining information needed by the Commissioner, but as a means of obtaining information needed by individual claimants. See note 2 *supra*.

c. Contrary to the court of appeals' holding, the McCarran-Ferguson Act, 15 U.S.C. 1011 *et seq.*, does not immunize HVIRA from scrutiny under the Commerce Clause. The McCarran-Ferguson Act provides no authority for a State to extend its regulation of insurance into other States or nations.

The McCarran-Ferguson Act was enacted in response to this Court's decision in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), which held that insurance is "commerce," with the consequence that the States' ability to regulate insurance was circumscribed by the Commerce Clause. See *United States Dep't of the Treasury* v. *Fabe*, 508 U.S. 491, 499-500 (1993). Congress, however, viewed insurance as "a *local matter*, to be subject to and regulated by the laws of the several States." H.R. Rep. No.

143, 79th Cong., 1st Sess. 2 (1945). Thus, Congress enacted the McCarran-Ferguson Act to ensure that the States would continue to have primary responsibility for regulating insurance and that state laws regulating and taxing insurance would be preempted only when Congress stated a clear intent to do so. See *Fabe*, 508 U.S. at 500, 507.

The McCarran-Ferguson Act removes Commerce Clause limitations *only* with respect to a State's regulation and taxation of the insurance business within its own borders. This Court held in *FTC* v. *Travelers Health Ass'n*, 362 U.S. 293, 301 (1960), that the Act was not intended to authorize state regulation of extraterritorial activities. The Court explained that Congress "viewed state regulation of insurance solely in terms of regulation by the law of the State where occurred the activity sought to be regulated." *Id.* at 300. The Court reasoned that a contrary construction of the Act would raise serious constitutional questions, *id.* at 302, and undermine Congress's "basic motivating policy" of leaving the regulation of insurance to those "in close proximity to" the people and policies regulated, *id.* at 301-302.[11]

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[11] The Court was specifically concerned in *Travelers* with an exception to the McCarran-Ferguson Act that, among other things, allows the Federal Trade Commission to regulate insurance to the extent that it is not regulated by state law. See 15 U.S.C. 1012(b). The Court's reasoning applies equally, however, to the Act's general rule that authorizes state regulation of insurance. See 15 U.S.C. 1012(a). The two provisions are complementary. The general rule is that "[t]he business of insurance" is "subject to the laws of the * * * States which relate to the regulation * * * of such business." 15 U.S.C. 1012(a). The exception provides that the Federal Trade Commission Act, among other Acts, "shall be applicable to the business of insurance to the extent that such business is not regulated by State law." 15 U.S.C. 1012(b). Under Section 1012(b), the Federal Trade Commission Act applies *unless* the aspect of the insurance business at issue is already regulated by the State as contemplated in Section 1012(a). As *Travelers* makes clear, extraterritorial state regulation is not within the authority delegated to the States by Section 1012(a).

Finally, whatever the extent to which the McCarran-Ferguson Act immunizes state insurance regulations from scrutiny under the Commerce Clause, the Act provides no immunity from other constitutional provisions, including the Due Process Clause. See *Quill Corp.* v. *North Dakota*, 504 U.S. 298, 305 (1992). Accordingly, even if the Act were understood to provide a Commerce Clause immunity for extraterritorial state regulation of insurance, HVIRA would nonetheless be invalid as exceeding the Due Process Clause's independent limitations on a State's authority "to impose * * * obligations on contracts made outside of the State and not to be performed there." *Dick*, 281 U.S. at 408 n.5.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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* The Solicitor General is recused in this case.