No. 02-722

IN THE
Supreme Court of the United States

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

Petitioners,

v.

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

Respondent.

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

BRIEF FOR THE RESPONDENTS — GERLING COMPANIES-IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

California's Holocaust Victim Insurance Relief Act ("HVIRA") requires California insurers to provide extensive information regarding every insurance policy issued in Europe between 1920 and 1945 by any insurer with which a California insurer now has a legal relationship. The district court enjoined enforcement of the HVIRA on three constitutional grounds: interference with the federal government's power over foreign affairs, due process, and the Foreign Commerce Clause. Over the objections of the U.S. government and affected foreign governments, and in direct conflict with *Gerling Global Reinsurance Corp. v. Gallagher*, 267 F.3d 1228 (11th Cir. 2001), the Ninth Circuit reversed and upheld the HVIRA in all respects.

The questions presented are:

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

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

3. Whether the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, insulates the HVIRA from review under the Foreign Commerce Clause.

LIST OF PARTIES AND CORPORATIONS

The petitioners are: American Insurance Association, American Re-Insurance Company, Winterthur International America Insurance Company, Winterthur International America Underwriters Insurance Company, General Casualty Company of Wisconsin, Regent Insurance Company, Southern Insurance Company, Unigard Indemnity Company, Unigard Insurance Company, Blue Ridge Insurance Company, and Assicurazioni Generali S.p.A. In addition, the respondents Gerling Global Reinsurance Corporation of America, Gerling Global Reinsurance Corporation-U.S. Branch, Gerling Global Life Reinsurance Company, Gerling Global Life Insurance Company, Gerling America Insurance Company, and Constitution Insurance Company (collectively, the "Gerling Companies") were parties to the proceedings below. The respondent, John Garamendi, is the Commissioner of Insurance for the State of California.

The Rule 29.6 statement for each of the respondent Gerling Companies is set forth in their petition for a writ of certiorari (Docket No. 02-733) at page iii.

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OPINIONS BELOW

The district court's initial opinion (per Shubb, D.J.) entering a preliminary injunction (Pet. App. 85a-113a) was not published. The court of appeals' opinion (per Graber, C.J.) rejecting the reasoning of the district court and remanding (Pet. App. 34a-60a) is published at 240 F.3d 739 (9th Cir. 2001). The district court's subsequent opinion (per Shubb, D.J.) granting a permanent injunction (Pet. App. 61a-84a) was published at 186 F. Supp. 2d 1099 (E.D. Ca. 2001). The court of appeals' subsequent opinion, as amended (per Graber, C.J.), reversing the district court (Pet. App. 1a-33a) is published at 296 F.3d 832 (9th Cir. 2002). The court of appeals' order denying rehearing and rehearing *en banc* is not otherwise published.

JURISDICTION

The court of appeals entered its judgment on July 15, 2002, and issued its amended opinion and order denying rehearing and rehearing *en banc* on September 9, 2002. Pet. App. 3a-4a. The petition for a writ of certiorari (*American Ins. Ass'n v. Low*, No. 02-722) was filed on November 7, 2002, and granted on January 10, 2003. The Gerling Companies[1] were parties to the court of appeals' opinions which are now under review and filed a companion petition for writ of certiorari on November 8, 2002 (*Gerling Global Reinsurance Corp. of America v. Low*, No. 02-733).[2]

1. Gerling Global Reinsurance Corp. of America, Gerling Global Reinsurance Corp. – U.S. Branch, Gerling Global Life Reinsurance Company, Gerling Global Life Insurance Company, Gerling America Insurance Company and Constitution Insurance Company.

2. Pursuant to SUP. CT. R. 12.6, the Gerling Companies, as parties "to the proceeding in the judgment . . . sought to be reviewed," (Cont'd)

The Gerling Companies' petition has not been ruled on. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant text of the Due Process Clause, the Commerce Clause, the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 and the Holocaust Victim Insurance Relief Act (CAL. INS. CODE §§ 13800-13807) are reprinted in the appendix to the petition for a writ of certiorari at 114a-122a. The provisions of the "Knox Bill" (1999) Cal. A.B. 600 are reprinted in the Lodging filed with the Gerling Companies' petition for a writ of certiorari at L-136-L-141.

STATEMENT

This case arises out of a California insurance statute that demands disclosure of every insurance policy in effect in Europe during a 25 year period in the early part of the Twentieth Century. The central issues presented here relate to the limitations imposed by the U.S. Constitution on state regulatory power. First, whether Due Process and Commerce Clause considerations allow a state to mandate conduct by entities with no jurisdictional nexus to the state regarding transactions that occurred far beyond its borders. Second, whether the California statute violates the foreign affairs power exclusively entrusted to the federal government.

(Cont'd)
are "entitled to file documents in this Court" and are considered respondents. The Gerling Companies support the Petitioners in this action and file their brief in accordance with Petitioners' briefing schedule. *See* SUP. CT. R. 25.1.

In 1999, the State of California enacted the Holocaust Victim Insurance Relief Act, CAL. INS. CODE §§ 13800-13807 (the "HVIRA"), which, in part, requires insurers to compile and report detailed information in the possession of their European affiliates relating to European insurance policies for the purpose of aiding in the "resolution" of Holocaust-era claims pursuant to California-imposed standards. CAL. INS. CODE § 13801(e)-(f). The HVIRA requires European insurers to amass voluminous information, the disclosure of which is prohibited by European law, and provide it to their California affiliates, who in turn must provide it to the California Insurance Commissioner (the "Commissioner") for inclusion in a public registry. The HVIRA mandates automatic license suspension of California insurers for their inability to provide information in the hands of distant European affiliates.

Adopting the Commissioner's unsupported, after the fact recharacterization of the HVIRA as a "fitness" or "licensing" statute of California insurers, the Ninth Circuit upheld the constitutionality of the HVIRA. In doing so, the Ninth Circuit ignored the district court's findings that the Gerling Companies lack possession, custody or control over the European insurance records demanded. The Ninth Circuit also ignored the conclusive determination of the Federal Republic of Germany that its laws prohibit the wholesale disclosure of private insurance information for public dissemination as required by the HVIRA.

The Ninth Circuit brushed aside the Gerling Companies' objections to the impossible demands imposed on them by the HVIRA with the suggestion that the "California insurer's employees could travel overseas to examine the documents themselves." Pet. App. 13a. Alternatively, the Ninth Circuit

suggested that California insurers simply disaffiliate themselves from their European relatives so as to shed themselves of any reporting requirements. Pet. App. 13a.

The HVIRA empowers the Commissioner to penalize domestic insurers as a means of coercing foreign insurers to bend to California's will. As a representative for the Commissioner has unequivocally stated, "Maybe the [California] subsidiary has not been involved, but the [European] parent company has, and the only way to send a clear message to the parent company is to hit the arm of the company that can be hurt."[3] The HVIRA's attempted expansion of the Commissioner's powers far beyond the borders of the state is simply incompatible with constitutional limitations on state power.

A. California's Regulation Of European Insurance Policies

On October 8, 1999, California Governor Gray Davis signed into law Assembly Bill No. 600, the "Knox Bill." Pet. App. 115a-122a. The Knox Bill represents California's attempt to use its leverage over local insurers to force European insurers, over whom California has no jurisdiction, to produce information concerning millions of European insurance policies. *See* CAL. INS. CODE § 13801(e). California undertook this mission to achieve a clearly defined goal – to aid in "the rapid resolution" of Holocaust-era insurance claims arising out of policies issued in Europe. Pet. App. 119a.

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3. Amanda Levin, *California Acts Against Four Firms Over Holocaust Claims*, National Underwriter – Life & Health, June 28, 1999.

To that end, the Knox Bill extended the statute of limitations for claims arising under such European policies until December 31, 2010, nullified forum selection provisions contained in European policies, vested California state courts with jurisdiction over related claims, and provided that California-licensed companies could be held directly liable for claims arising out of policies issued by "related" European insurers. Pet. App. 115a-118a. The Knox Bill also purported to modify the value of pre-1945 European policies by eliminating the effects of post-war currency devaluation. Pet. App. 120a.

The Knox Bill introduced an expansively worded definition of the term "related company" to throw the broadest possible net over the European insurance industry: "any parent, subsidiary, reinsurer, successor in interest, managing general agent, or affiliate company of the insurer." Pet. App. 120a. CAL. INS. CODE § 13802. This definition is not limited to companies within the same "corporate family," but extends to entities with little more than contractual or other legal relationships with the California company. *Id*.

The reporting portion of the Knox Bill is known as the HVIRA and was codified at CAL. INS. CODE §§ 13800-13807. The remaining portions of the Knox Bill were codified at CAL. CODE OF CIV. PRO. § 354.5. Pet. App. 117a-118a. The HVIRA requires all California-licensed insurers to provide the Commissioner with information regarding every European insurance policy issued by it or a "related company" in effect between 1920 and 1945. CAL. INS. CODE § 13804(a). The information required includes the number of such European policies; the holder, beneficiary and current status of those policies; and the city of origin, domicile or address for each policy holder listed in the European policies. *Id*.

The HVIRA further requires the *California* insurer to certify whether the *European* insurer has paid the policy proceeds. CAL. INS. CODE § 13804(b).

In the event that the California licensee fails to fully comply with the HVIRA, "The commissioner shall suspend the certificate of authority to conduct insurance business in the state . . ." CAL. INS. CODE § 13806. This penalty is mandatory. Neither lack of control over the information sought nor disclosure prohibitions embodied in European privacy laws is an acceptable defense. ER 1019-20, 1030, 3179.[4] Moreover, the HVIRA does not expressly provide for an administrative hearing prior to license suspension. CAL. INS. CODE §§ 13800-13807.

1. The Legislative History of the HVIRA

The HVIRA's legislative history amply demonstrates that its sole purpose is to compel European insurers to pay European insurance claims. ER 1204, 2695. Throughout its two-year legislative history, the HVIRA's supporters repeatedly expressed the desire to force European insurers to "be held accountable" and to "open their books." ER 2492, 2664, 2671, 2676, 2687, 2695; *see also* ER 1204, 2425. The legislative history highlights a fact which is evident from the language of the statute itself: the HVIRA represents an attempt to effect the conduct of, and thereby regulate, European insurance companies.

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4. "ER" indicates references to the Excerpt of Record in the Ninth Circuit. "SER" indicates references to the Supplemental Excerpt of Record.

a. AB 1715

The HVIRA was initially introduced by California Assemblyman Wally Knox on January 28, 1998 as AB 1715. ER 2429. The bill (1) required the Commissioner to establish a central registry of European insurance information; (2) demanded that insurers affiliated with companies that issued policies in Europe between 1930 and 1945 disclose records of their European affiliates; (3) imposed a $5,000 fine for non-compliance or a civil penalty not to exceed $10,000; and (4) instructed the Commissioner to adopt rules to implement the statute. *See* AB 1715, State Assembly, 1997-98 Reg. Sess. (Ca. Jan. 28, 1998).

Within days of its introduction, the California Insurance Department (the "Department") requested that Assemblyman Knox include two modifications to AB 1715. ER 2490. To maintain pressure on European insurers, the Department specifically requested the inclusion of an urgency clause and a provision authorizing it to suspend non-compliant companies' certificates of authority to conduct business in the state. ER 2490.

The Department's recommendations, as well as other changes penalizing California companies, were incorporated in the bill. *See* AB 1715, State Assembly, 1997-98 Reg. Sess. (Ca. Mar. 17, 1998). When AB 1715 was amended on March 17, 1998, it maintained its requirement that the Commissioner establish and maintain a public registry of European insurance information. *See id.* at § 13803. As amended, AB 1715 imposed upon California-licensed insurers reporting obligations which were in all material respects identical to those ultimately contained in the HVIRA. *See id.* at § 13804; ER 2659-60; Pet. App. 120a-121a.

The revised reporting provisions, the license suspension mandate, and the legislative findings incorporated into AB 1715 further illuminated its purpose – to compel European insurers to pay European insurance claims on California's terms. ER 2492, 2513. The bill also redefined how European policy "proceeds" would be calculated. AB 1715, State Assembly, 1997-98 Reg. Sess. (Ca. Mar. 17, 1998). Assemblyman Knox stated that AB 1715 was intended to "provide assistance to Holocaust victims and their families in collecting the proceeds of insurance policies in effect during World War II, which some insurers have avoided paying." ER 2427. Assemblyman Knox repeatedly echoed these sentiments in statements to the Senate Committee on Insurance, the Senate, and the Assembly Committee on Insurance. ER 2442, 2447-49, 2495, 2487-88. Further, the official Assembly Republican Bill Analysis stated that the bill's purpose was to "provide assistance for Holocaust Victims and their descendants in recovery of unpaid or wrongfully paid claims." ER 2412, 2415. All parties involved acknowledged that the legislation was focused on insurance claims arising under policies issued by European companies to European residents.

During 1998, the Department repeatedly voiced its unequivocal support for AB 1715. ER 2459-60, 2490. The Department viewed the legislation "as an important vehicle for empowering the CDI [California Department of Insurance] to ensure full payment of claims to Holocaust survivors and descendants." ER 2459-60. This position is reiterated throughout AB 1715's legislative history. ER 2427, 2433.

Nowhere in the extensive legislative history is there any mention of a purpose other than compelling European

insurers to pay Holocaust-era insurance claims. The legislative history is devoid of any suggestion that AB 1715 was deemed necessary to determine whether insurers who were already licensed by the Department were, in fact, fit to do business in the state.

AB 1715 was vetoed by Governor Pete Wilson on September 28, 1998. ER 2693-96. Governor Wilson stated that he "would prefer to see the time and resources of the insurers spent in payment of claims by Holocaust victim policy holders, survivors or heirs, than expended in compiling a massive database that seems likely to produce far less relevant and useful information." *Id.*

b. AB 600 – The Knox Bill

On February 19, 1999, following a change in administrations, Assemblyman Knox reintroduced AB 1715 as AB 600 (the "Knox Bill"). ER 2597-606. The Knox Bill was materially identical to the legislation vetoed by Governor Wilson. ER 2663, 2670, 2675, 2680, 2682-686, 2699. Like AB 1715, the Knox Bill introduced an amended California Code of Civil Procedure Section 354.5 as well as the HVIRA (CAL. INS. CODE §§ 13800-13807). ER 2599-606, 1201-1205, 2439; *see also* AB 600, State Assembly, 1999-2000 Reg. Sess. (Ca. Feb. 19, 1999).

The purpose behind AB 600 and the sentiments supporting it mirrored those advanced in AB 1715's legislative history. Assemblyman Knox introduced "AB 600 in order to ensure that Holocaust victims or their heirs can take direct action on their own behalf with regard to family-owned insurance policies." ER 2663, 2670, 2675, 2687, 2695. The Department supported the Knox Bill because of its view

that European "insurance companies . . . should be held accountable, open their books and pay legitimate claims." ER 2664, 2671, 2676, 2687, 2695.

The Assembly Committee on Appropriations bill analysis states that "[a]ccording to the author, European insurers refused to pay claims to Holocaust survivors and their families, or failed to follow up on claims they had reason to believe were due. Some of these insurers have affiliates operating in California." ER 2667. Like its predecessor, the Knox Bill represented a thinly veiled attempt to reach European insurers who otherwise would not be subject to California's jurisdiction.

The legislative history of the Knox Bill is also devoid of any suggestion that "licensing" or "fitness" of California insurers were considerations motivating its introduction. In fact, the legislation (and resulting HVIRA) applied only to insurers with existing California licenses – companies which the Department had presumably already found fit to do business in the state. CAL. INS. CODE § 13804(a).

Like the California Legislature and the Department, Governor Davis saw AB 600 as a vehicle to compel European insurers to pay on Holocaust-era policies. Governor Davis signed AB 600 into law on October 8, 1999. Two days later, the Governor issued a press release announcing that he had "signed legislation . . . providing assistance to Holocaust victims and their survivors in recovering just compensation from Holocaust era insurance policies." Press Release, Office of the Governor-State of California, Governor Davis Signs Bill Requiring Holocaust Insurance Registry (October 10, 1999) (on file with Author at L99:214), *available at* http://www.governor.ca.gov.

2. California's Efforts to Directly Investigate European Insurers

The HVIRA was the culmination of several years of efforts by the Commissioner to directly investigate European insurers. In February 1998, during testimony before the United States House Banking and Financial Services Committee, then Commissioner Chuck Quackenbush stated that he was "deeply committed . . . to resolving all outstanding claims and holding all insurance companies that sold policies to Holocaust victims in Europe . . . accountable for their actions and their failure to act in good faith over the last 50 years." SER 608. Commissioner Quackenbush further testified that:

> [t]he challenge for American insurance regulators now is to ensure that the records of the insurance policies housed in archives throughout Europe – in Italy, Germany, and Switzerland, France and Austria in particular – are secured from tampering. Ensuring the integrity of these records and combing through them to identify which claims have yet to be paid and identifying surviving beneficiaries presents an enormous challenge that we cannot fail to undertake.

SER 610.

In November of 1999, the Commissioner announced that he planned to unveil an aggressive legislative package to put additional pressure on European companies.[5] He further

5. Press Release, Cal. Ins. Department, Insurance Commissioner Quackenbush to Subpoena Companies to December Hearings to (Cont'd)

stated that he "currently [had the] Department reviewing all options to pursue regulations to affect economic sanctions on companies that continue to stand on the sidelines and fail to enter into negotiations to resolve unpaid Holocaust-era insurance policies." *Id*.

3. The Commissioner's Efforts to Investigate the German Affiliates of the Gerling Companies

The Gerling Companies are California-licensed insurers and/or reinsurers based in the United States or Canada that, with one exception, were formed years after the Second World War. ER 642-670. None of the Gerling Companies ever issued any insurance policy that was in force anywhere in Europe between 1920 and 1945. ER 643, 648, 653, 658, 663, 668. Similarly, none of the Gerling Companies are in possession, custody or control of any records pertaining to insurance policies that were in force in Europe at any time between 1920 and 1945. *Id.* Pet. App. 65a. The Gerling Companies are, however, indirectly related (within the meaning of the HVIRA) to two German insurers that issued policies in Europe between 1920 and 1945: Gerling-Konzern Allgemeine Versicherungs-AG ("GKA") and Gerling-Konzern Lebensversicherungs-AG ("GKL"). ER 643, 648, 653, 658, 663, 668. As the district court found, GKA and GKL are not subject to personal jurisdiction in California. Pet. App. 65a.

In 1999, the Commissioner initiated efforts to directly investigate the Gerling Companies' German affiliates. Towards that end, in May 1999, the Commissioner appointed

(Cont'd)
Investigate Efforts to Resolve Unpaid Holocaust-Era Insurance Issues (Nov. 9, 1999), *available at* www.insurance.ca.gov/PRS/PRS1999/Pr171-99.htm.

Special Deputy Insurance Commissioner Karl Rubinstein to "investigate" the Gerling Companies with respect to Holocaust-era claims. SER 684-685. Deputy Commissioner Rubinstein immediately notified the German affiliates of his appointment and of his "right" to "free access" to relevant German insurance records. SER 687.

Deputy Commissioner Rubinstein then commenced an investigation into the claims-paying practices of GKA and GKL and issued written interrogatories to both entities and their German parent. SER 1072-1089. Notwithstanding the fact that none of these companies conduct any business in California, he demanded specific information regarding (1) the number of policies the German companies issued in Europe during the period 1920-45; (2) which premises of these companies were destroyed or damaged during the war; (3) their European reinsurance agreements; and (4) what actions these entities took to identify claimants and/or beneficiaries for policies issued between 1920 and 1945. Furthermore, the Department requested a list (with accompanying records) of all records relative to policies written in Europe between 1920 through 1945 and details regarding the claims-paying practices of the German companies.[6] SER 1072-1089.

In November 1999, respondent Gerling America Insurance Company received a subpoena requiring it, along with certain other insurers, to appear at a hearing before the Commissioner in Los Angeles on December 1, 1999. SER 268-269. During the hearing, the Department conceded that it was not really interested in the subpoenaed entity and requested direct access to the related German companies.

6. At that time, the Department also requested that the German companies make available a representative for a telephone deposition. This deposition took place shortly thereafter in 1999.

ER 1113-1115. In this regard, Leslie Tick, Senior Staff Counsel for the Department, unequivocally stated that "the Knox Bill goes clearly beyond the California licensed company." ER 1111.

B. The HVIRA's Conflict With German Law

In various *amicus* filings in this litigation, the Federal Republic of Germany has characterized the HVIRA as an "affront" to its sovereignty. *See* Brief of the Federal Republic of Germany, *Amicus Curiae* in Support of Petitioners (dated December 12, 2002) at p. 2; ER 844. This view is premised on a litany of complaints which Germany has made as respects the ways in which the HVIRA interferes with the operation of existing German law. In Germany's view, the HVIRA (1) interferes with Germany's regulation of insurers operating within its borders; (2) mandates that German insurers violate German data protection laws; (3) attempts to supplant 50 years of German reparations efforts with respect to Holocaust-era claims; (4) conflicts with post-war German currency reform; and (5) interferes with the operation of various international agreements which Germany has reached with a number of nations including the United States. *See, e.g.*, Brief for the Federal Republic of Germany, *Amicus Curiae* in support of Petitioners (dated December 12, 2002); ER 843-855, 1279-1289; SER 1243-1250, 1425-1432.

1. German Data Protection Laws

In the aftermath of World War II, the European community recognized the importance of ensuring certain fundamental rights, including a right to personal privacy.[7]

7. *See*, *e.g.*, Rainer Arnold, *A Fundamental Rights Charter for the European Union*, 15 Tul. Eur. & Civ. L.F. 43,45 (2000-01); Marsha Cope Huie, et al., *The Right to Privacy in Personal Data:* (Cont'd)

In Germany, the right of "informational self-determination," *i.e.*, the right to determine which data can be used by whom and for what purpose and under what conditions, is embodied in the German Constitution and is recognized as a fundamental human right. ER 681. In accordance with the German constitutional recognition of the fundamental right to "informational self-determination," German companies are subject to the requirements of the German Data Protection Act (*Bundesdatenschutzgesetz* ("BDSG")). ER 682, 846. The BDSG addresses and secures this fundamental right as contained in the Constitution (*Grundgesetz*) of the Federal Republic of Germany. ER 687.

In 2001, the BDSG was amended due to the introduction of the European Data Protection Directive of 1995. The result has been an increase in the protection of particularly sensitive data, such as data concerning racial or ethnic origin, religious or political beliefs, health, sexual habits or union membership. ER 2859. The European Union Directive, which controls the dissemination of personal information in Europe (ER 1488-1542), is intended to respond to the need to safeguard the fundamental rights of individuals. ER 2859.

Under the BDSG, decisions as to the use of personal data must be made by the individuals to whom the data relate. ER 681. The entities holding the personal data (in this case, German insurers) may be subject to civil and criminal penalties as a result of their unauthorized disclosure of such data to third-parties. SER 1248. In a series of *amicus curiae* briefs in this litigation, the Federal Republic of Germany

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The EU Prods the U.S. and Controversy Continues, 9 Tulsa J. Comp. & Int'l L. 391, 441, 442, 456-57 (2002).

has echoed that conclusion. *See* Brief for the Federal Republic of Germany, *Amicus Curiae* in Support of Petitioners (dated December 12, 2002) at pp. 4-5; ER 846; SER 1248; Brief for the Federal Republic of Germany, *Amicus Curiae* Supporting Affirmance of Summary Judgment (dated March 15, 2002) at p. 6; Brief for the Federal Republic of Germany, *Amicus Curiae* in Support of Rehearing and Rehearing *en Banc* (dated August 5, 2002) at pp. 9-10. The German authorities charged with enforcement of the BDSG have already concluded on *two* occasions that compliance with the HVIRA would violate German law and would subject German insurers to criminal and civil penalties. ER 1182, 3131.

The aspects of the HVIRA that appear particularly offensive from a German privacy law perspective are (1) the requirement that German insurers disclose information regarding *all* their insureds (not limited to deceased individuals or to Holocaust victims); and (2) the inclusion of this information in a massive public registry in California. *See* CAL. INS. CODE §§ 13803, 13804(a).

On May 16, 2000, the District Government of Cologne, Germany, concluded "that pursuant to § 28, paragraph 2, No. 1b BDSG, the transmission of data in the form of lists pertaining to all policyholders from 1920-1945 . . . is not permissible." ER 1182. Following the 2001 amendments to the BDSG, the Ministry of the Interior of North Rhine-Westphalia (Nordhein-Westfalen) also determined that "there still appears to be no legal basis that permits the transfer of all personal insurance data for the policies from the period 1920-1945. The substantive requirements of Section 28 BDSG for the transfer of data . . . continues to be limited to [Holocaust victims]." ER 3131. The Federal Republic of Germany has agreed with the foregoing opinions

and stated that "these are correct conclusions under German law." *See* Brief for the Federal Republic of Germany, *Amicus Curiae* in Support of Petitioners (dated December 12, 2002) at pp. 4-5.

Privacy laws such as the BDSG are commonplace in the United States as well. In fact, California has similar privacy requirements for insurance policies issued there. *See* CAL. INS. CODE § 791.13; *see also* 15 U.S.C. § 6802(a). Nevertheless, the HVIRA demands that German companies violate their own nation's laws or have their distant California affiliates stripped of their licenses.

2. U.S. Foreign Policy Initiatives

On July 17, 2000, the United States and Germany entered into an Executive Agreement (the "Executive Agreement") creating the Foundation "Remembrance, Responsibility and the Future" (the "Foundation").[8] The Executive Agreement has been described by former Deputy Secretary of Treasury Stuart Eizenstat, the principal negotiator for the United States, as "the last great compensation related negotiation arising out of World War II."[9] The Executive Agreement recognizes "that for the last 55 years the [United States and the Federal Republic of Germany] have sought to work to address the consequences of the National Socialist era and World War II" and further recognizes that the "[Executive]

8. www.state.gov/www/regions/eur/holocaust/000717_agreement.html. *See* Pet. App. 153a-157a.

9. White House Press Briefing by Stuart Eizenstat on Nazi-Era Forced and Slave Labor Agreement, U.S. Newswire, Dec. 15, 1999. *See* www.state.gov/www/policy_remarks/1999/991215_eizenstat_slavelbr.html. SER 940-47.

Agreement and the establishment of the Foundation represent a fulfillment of these [post-war] efforts." Pet. App. 155a.

a. Post-War Treaties and Other Agreements

The 55 years of United States foreign policy efforts referred to in the Executive Agreement date back to the Potsdam Agreement which was entered into immediately after the end of the war. "This agreement memorialized the dual policy determinations of the Allied governments that reparations should be extracted from Germany to compensate victims to the greatest extent possible . . ." *Frumkin v. JA Jones, Inc.*, 129 F. Supp. 2d 370, 376 (D.N.J. 2001); *see also Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 448 (D.N.J. 1999). Reparation claims were to be satisfied in the "form of machines, other industrial equipment and German external assets rather than in monetary payments." *Iwanowa*, 67 F. Supp. 2d at 448; *see also Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 265 (D.N.J. 1999).

The United States and other allied nations met in Paris in 1946 to develop a more detailed plan regarding the method in which they would distribute reparations between those nations as to which no decision had been reached at the Potsdam Conference. *Iwanowa*, 67 F. Supp. 2d at 448-49. Negotiations produced the Agreement on Reparation from Germany, Establishment of Inter-Allied Reparation Agency and Restitution of Monetary Gold, Jan. 14, 1946, 61 Stat. 3157, T.I.A.S. 1655 (the "Paris Agreement"). The intent of the Paris Agreement was "to obtain an equitable distribution among [the signatories] of the total assets which . . . are or may be declared available as reparation from Germany." *Burger-Fischer*, 65 F. Supp. 2d at 265. Ultimately it was

decided that "[t]he private industrial base of Germany would be dismantled and proportionally distributed to the Allied nations, in satisfaction of their claims, and the claims of their nationals." *Frumkin*, 129 F. Supp. 2d at 376.

The beginning of the Cold War caused the Western Allies, including the United States, to "cease their dispersal of the German industrial base, and balance the extraction of reparations with the restoration of a healthy German economy." *Frumkin*, 129 F. Supp. 2d at 376. This was reflected in the Convention on the Settlement of Matters Arising out of the War and the Occupation, signed at Bonn on May 26, 1952, as amended by Schedule 4 to the Protocol on the Termination of the Occupation Regime, signed at Paris on October 23, 1954, 332 U.H.T.S. 219 (the "Transition Agreement").

Under the Transition Agreement, responsibility to compensate victims of Nazi oppression was shifted to the Federal Republic of Germany. In this regard, Germany assumed:

> the obligation to implement fully and expeditiously and by every means in its power, the legislation referred to in Article I of [the chapter entitled Internal Transition] and the programs for restitution and reallocation thereunder provided. The Federal Republic shall entrust a Federal Agency with ensuring the fulfillment of the obligation undertaken in this Article, paying due regard to the provisions of the Basic Law [the German Constitution].

Transition Agreement Ch. 2, Art. 2. Further, Germany recognized its moral obligation to assure adequate compensation to victims of the Nazi Regime. The Transition Agreement provided as follows:

> The Federal Republic acknowledges the obligation to assure in accordance with the provisions of paragraphs 2 and 3 of this Chapter adequate compensation to persons persecuted for their political convictions, race, faith or ideology, who thereby have suffered damage to life, limb, health, liberty, property, their possessions or economic prospects (excluding identifiable property subject to restitution). Furthermore, persons persecuted by reason of human nationality, in disregard of human rights, who are now political refugees and no longer enjoy the protection of their former home country shall receive adequate compensation where permanent injury has been inflicted on their health.

Transition Agreement, Ch. 4. Consistent with Germany's recognition of its moral obligation, the Transition Agreement was intended to compensate Nazi victims through legislation enacted in Germany and adjudicated by German courts as well as through state-to-state agreements. *Burger-Fischer*, 65 F. Supp. 2d at 268.

b. German Reparations Legislation

Following the Transition Agreement, Germany enacted a comprehensive compensation law entitled the *Bundesentschädigungsgesetz* ("BEG") (*i.e.*, the Federal Compensation Law) in 1953 to provide for the reimbursement

of assets which had been seized by the Nazis. SER 55. This statute expressly provided compensation for loss of insurance and other assets. Under the BEG, and in accordance with its treaty obligations with the United States, the Federal Republic of Germany *assumed the obligation* to compensate victims of Nazi oppression as the sole and exclusive remedy for such claims. ER 847; *see also* SER 466-94, 1438.

German law *precludes direct claims against German insurers* for insurance proceeds that were subject to Nazi seizure. SER 466-94, 1438. In a 1953 decision, the Supreme Court of the Federal Republic of Germany held that claims for insurance proceeds appropriated by the Nazi government could not be asserted against the insurers who issued the policies. Instead, such claims must be asserted directly against the Federal Republic of Germany, as legal successor to the Nazi government. SER 464-94. According to the German Supreme Court, "*any* claims in favor of the policy holder that result from the unjust nature of the expropriation and confiscation of the insurance claim are to be regulated under the laws governing restitution and compensation to victims of persecution by the National Socialist regime." SER 465. (Emphasis added).

The processing of compensation and reparations claims has been ongoing virtually continuously since the enactment of the BEG. To date, the Federal Republic of Germany has paid more than 100 billion *Deutschmark* (nearly $50 billion) in compensation to victims of Nazi oppression. *See* Brief for the Federal Republic of Germany, *Amicus Curiae* in Support of Petitioners (dated Dec. 12, 2002) at p. 2. This figure includes reimbursement of insurance assets seized by the Nazis.

c. Additional International Agreements

During the nearly 60-year period since the end of the Second World War, the United States, Germany and other nations entered into various other agreements which address the issue of Holocaust reparations. For example, on September 10, 1952, Germany entered into the Luxembourg Agreement with the State of Israel. This agreement was intended to assist in the resettling of 500,000 destitute Jewish refugees displaced from Germany and former German controlled areas. Additionally, the United States, France, Great Britain, other Allied nations and the Federal Republic of Germany entered into the Agreement on German External Debts, February 27, 1953, 4 U.S.T. 444. This Agreement was intended to stabilize the German economy.

In the 1950s and 1960s, Germany entered into 12 treaties with western European countries. Pursuant to those treaties, Germany provided funds to those countries for distribution to their nationals who had been victims of the Nazis. Payments under these treaties amounted to DM 977 million. *Burger-Fischer*, 65 F. Supp. 2d at 270.

Germany also entered into agreements: (1) for payment of DM 200 million to the Jewish Claims Conference for the benefit of Jewish victims still living in Eastern Europe; (2) to enable the Red Cross to distribute DM 80 million for victims of Nazi oppression living in southeastern European countries; (3) to create a DM 1.6 billion fund for the benefit of Jewish victims who had been unable to apply for compensation because they were living in Eastern Europe and emigrated to the West after the expiration of claim deadlines; (4) in 1992 with the United States on the Settlement of Certain Property Claims of United States

citizens arising out of confiscation of assets by Nazis and Communist authorities within the Territory of former East Germany; and (5) in 1996 a Second Supplemental Social Security Agreement with the United States providing for payment of German social security benefits to Jews from Eastern Europe with a German cultural background who settled in the United States after fleeing their Nazi occupied homelands. *Burger-Fischer*, 65 F. Supp. 2d at 271.

In 1990, Germany, the United States, the United Kingdom, France and the U.S.S.R. entered into the "2+4 Treaty." *Iwanowa*, 67 F. Supp. 2d at 454. This treaty, which unified West and East Germany, terminated the occupying Allied powers' rights and responsibilities over Germany. *Iwanowa*, 67 F. Supp. 2d at 454. "In accordance with the Transition Agreement, this treaty, a peace treaty between a unified Germany and its former adversaries, finally settled the problems of reparations." *Iwanowa*, 67 F. Supp. 2d at 454 (citing Transition Agreement at Ch. 6, Art. 1). "German courts have held that the signing of the Two-Plus-Four Treaty constitutes the 'final settlement of the problem of [World War II] reparations'. . ." *Iwanowa*, 67 F. Supp. 2d at 455.

d. The German Foundation

The Executive Agreement entered into by the United States and Germany on July 17, 2000, represented the culmination of these reparation efforts. The Executive Agreement is intended to provide a mechanism for "German companies" (as defined in the Executive Agreement) "to respond to the moral responsibility of German business arising from the use of forced laborers and from damage to property caused by persecution, and from all wrongs suffered

during the National Socialist era and World War II." Pet. App. 153a. It reflects the principle that "German business . . . should not be asked to contribute again [or twice] . . . for any wrongs asserted against German companies arising from the National Socialist era and World War II." Pet. App. 154a. The Gerling Companies and their German affiliates are all "German companies" as that term is defined in the Executive Agreement. Lodg., *infra*, L-44.

On August 12, 2000, the German *Bundestag* established the Foundation as a sovereign instrumentality of the Federal Republic of Germany. ER 1382-84. The German government and German companies have funded the Foundation in an amount totaling DM 10 billion. SER 1427-28.

With respect to insurance claims, the Executive Agreement is intended to secure a measure of compensation to Holocaust victims at the earliest possible date in accordance with the claims procedures established by the International Commission on Holocaust-era Insurance Claims ("ICHEIC"). SER 1451. ICHEIC was established in October 1998 to investigate and resolve Holocaust-era insurance claims. The Commissioner is a founding member of ICHEIC. On October 16, 2002, ICHEIC, the German Foundation and the German Insurance Association reached an agreement regarding claims handling procedures and the publication of pertinent European insurance records (in a manner satisfying the requirements of German data protection laws). Lodg., *infra*, L-70-L-80.

SUMMARY OF ARGUMENT

In upholding the HVIRA, the Ninth Circuit has ignored constitutional restrictions imposed upon states by the Due

Process Clause and Commerce Clause. The Ninth Circuit has also paved the way for all 50 states to engage in their own foreign policy initiatives in blatant disregard of the efforts of the federal government.

The record in this matter is clear: the Gerling Companies do not have possession, custody or control over the European insurance information demanded by the HVIRA. Moreover, the German affiliates of the Gerling Companies would face civil and criminal penalties for disclosing this personal insurance information. Notwithstanding their inability to comply, the HVIRA mandates the suspension of the Gerling Companies' California licenses for their failure to produce the information sought.

California's regulation of foreign insurers and foreign transactions through the HVIRA exceeds its legislative jurisdiction under the Due Process Clause. On its face, the HVIRA solely seeks information on transactions that occurred outside the State of California at least 60 years ago – transactions with which California has absolutely no nexus. European companies are required to turn over this information to California in violation of their own laws. To force compliance by European companies, the HVIRA directs the Commissioner to suspend the licenses of their California affiliates irrespective of whether those California insurers ever issued Holocaust-era polices. The nominally regulated California companies merely serve as the conduit for the Commissioner to investigate and regulate insurers over which the State has no jurisdiction.

Similarly, the HVIRA violates Commerce Clause restrictions because of its extraterritorial application and effect. The HVIRA requires European insurers who are not

jurisdictionally present in the United States to take affirmative acts in violation of their own laws. In its application, the HVIRA requires nothing from the local insurers (aside from the sacrifice of their California licenses). In upholding the statute, the Ninth Circuit simply ignored the HVIRA's intent and "practical effect" to control conduct far beyond the borders of the state.

Finally, the HVIRA ignores over half a century of foreign policy initiatives between the United States and the Federal Republic of Germany addressing reparations arising from the Nazi era. The HVIRA conflicts with German data protection laws and internal German reparations laws that were enacted in accordance with international treaty obligations. As such, the HVIRA impermissibly intrudes upon the federal government's foreign affairs power.

ARGUMENT

I. THE HVIRA EXCEEDS CALIFORNIA'S LEGISLATIVE JURISDICTION UNDER THE DUE PROCESS CLAUSE

A. A State Must Have "Minimum Contacts" With A Regulated Subject In Order To Exercise Legislative Jurisdiction.

California's regulation of foreign insurers and foreign transactions through the HVIRA exceeds its legislative jurisdiction under the Due Process Clause. *See Asahi Metal Indus. Co. v. Superior Court of Cal.* 480 U.S. 102, 113 (1987). Legislative jurisdiction refers to both "the lawmaking power of a state" and "the power of a state to apply its laws to any given set of facts." *Adventure Communications, Inc. v.*

Kentucky Registry of Election Fin., 191 F.3d 429, 435 (4th Cir. 1999) (quoting *McCluney v. Jos. Schlitz Brewing Co.*, 649 F.2d 578, 581 n.3 (8th Cir.), *aff'd*, 454 U.S. 1071 (1981)).

The Due Process Clause requires that "there [is] at least some minimal contact between a State and the regulated subject before it can . . . exercise legislative jurisdiction." *Gallagher*, 267 F.3d at 1235 (quoting *American Charities for Reasonable Fundraising Regulation, Inc. v. Pinellas County*, 221 F.3d 1211, 1216 (11th Cir. 2000)); accord *Home Ins. Co. v. Dick*, 281 U.S. 397, 407-08 (1930). The "minimum contacts" or "substantial nexus" analysis "requires that we ask whether an individual's connection with a State are substantial enough to legitimate the state's exercise of power over him." *Quill Corp. v. North Dakota*, 504 U.S. 298, 312 (1992). The Court must also focus on the state's interest in the transaction it seeks to regulate. *Id.* at 306; *see also Allstate Ins. Co. v. Hague*, 449 U.S. 302, 310 (1981). It is inconsistent with requirements of due process for a state to "regulate and control activities wholly beyond its boundaries." *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66, 70 (1954).

B. The Statutory Background And Legislative History Confirm That The HVIRA Regulates Foreign Insurers And Foreign Transactions

From its introduction in 1998 as AB 1715, through its enactment and initial enforcement in late 1999 and early 2000, the HVIRA had a single articulated purpose: to compel European insurers to provide information concerning millions of insurance policies sold in Europe to facilitate payment of claims under California-imposed standards. While nominally

directed at California-licensed companies, the HVIRA exclusively seeks information regarding European policies sold by European insurers. CAL. INS. CODE. §§ 13801, 13804. Under the HVIRA, the California licensees simply act as the Commissioner's doorway to regulate insurance throughout the world.

The intended extraterritorial reach of the HVIRA is perhaps most clearly reflected in a March 8, 2000, letter which the California State Treasurer wrote directly to a number of European insurers, including a German affiliate of the Gerling Companies, demanding their compliance with the HVIRA. In this letter, California directly threatened the German company with "protracted litigation" in the event that it failed to comply with the HVIRA. SER 901-902.

It was only after the initiation of this action that the Commissioner reinvented the HVIRA as a "fitness" or "licensing" statute of California insurers. The language of the statute does not support the Commissioner's new characterization. On its face, the HVIRA only compels production of information regarding insurance policies sold "to persons in Europe, which were in effect between 1920 and 1945." CAL. INS. CODE § 13804(a). The HVIRA does not request any information concerning policies sold in the United States, much less California.

Nor can the Commissioner find support for the position that the HVIRA is a fitness statute in the Knox Bill or its legislative history. The Knox Bill, in addition to enacting the HVIRA, amended CAL. CODE CIV PRO 354.5, which "authorize[d] those person[s] to bring legal action to recover on a claim arising out of an insurance policy or policies

purchased or in effect in Europe before 1945 from a specified insurer." AB 600, State Assembly, 1999-2000 Reg. Sess. (Ca. 1999). The Knox Bill's author clearly articulated that its target was Europe: "According to the author, European insurers refused to pay claims to Holocaust survivors and their families, or failed to follow up on claims they had reason to believe were due. Some of these insurers have affiliates operating in California." ER 2667. Assemblyman Knox introduced "AB 600 in order to ensure that Holocaust victims or their heirs can take direct action on their own behalf with regard to family-owned insurance policies." ER 2663, 2670, 2675, 2687, 2695.

C. California Has No Nexus With The Transactions Or Insurers It Seeks To Regulate.

Where a "State has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional." *Allstate Ins. Co.*, 449 U.S. at 310-11. Here, California has no identifiable contact with either the parties or the transactions which are the target of the HVIRA. Accordingly, the HVIRA does not comport with the requirements of the Due Process Clause.

In *Gerling v. Gallagher*, 267 F.3d 1228 (11th Cir. 2001), the Eleventh Circuit was faced with an identical record relating to the Gerling Companies, their German affiliates, and a materially identical Florida statute. California, just as Florida, has no contacts with either the Gerling Companies' German affiliates or the transactions it seeks to investigate:

> [the] German companies [are] based in Cologne; they are not registered to do business in the state, and there is no evidence that these German

> insurers have any independent contacts with Florida other than to the extent some current Holocaust-era policyholders or their beneficiaries may currently reside in the state. There is no record evidence that the Plaintiffs have possession, custody, or "control" – in the legal or practical sense – over the records or activities of GKL or GKA.

Gallagher, 267 F.3d at 1231. The fact that some small portion of Holocaust survivors relocated to California after the Second World War is not a sufficient predicate upon which to base jurisdiction. This Court has held that "a postoccurence change of residency to the forum state – standing alone – was insufficient to justify application of forum law." *Allstate Ins. Co.*, 449 U.S. at 311 (citing *John Hancock Mutual Life Ins. Co. v. Yates*, 299 U.S. 179 (1936)).

The Florida Commissioner recognized that jurisdictional flaw, and, on appeal attempted to recast the Florida Act as a reporting or fitness statute. The Eleventh Circuit held the statute unconstitutional because Florida had no nexus with the subject matter or entities it sought to regulate:

> The reporting provisions pertain to, and as a practical matter unquestionably seek to regulate, a subject matter – the German affiliates' payment or non-payment of Holocaust-era policy claims – with no jurisdictionally significant relationship to Florida .

Gallagher, 267 F.3d at 1238.

The Eleventh Circuit, in rejecting the argument that the Florida Act was a fitness statute, refused to ignore the Florida

Legislature's statement of purpose or the statute's obvious subject matter:

> The express purpose of the Act reaches well beyond determining the fitness and potential financial liabilities of Florida insurers; indeed, it has little or nothing to do with that subject. We are unwilling to ignore the Florida Legislature's clear statutory statement of purpose in favor of the Commissioner's litigating position (which the Legislature did not endorse . . .)

Id. at 1240.

Just as in Florida, California's Legislature stated that the HVIRA's purposes was to compel European insurance companies to produce policy information to facilitate payment of claims. CAL. INS. CODE. § 13801. California simply has no nexus with the European insurers or transactions at issue. Accordingly, California lacks the necessary legislative jurisdiction to act in this area.

II. THE HVIRA VIOLATES THE COMMERCE CLAUSE

A. The HVIRA Constitutes Impermissible Extra-territorial Regulation.

The HVIRA violates Commerce Clause restrictions because of its extraterritorial application and effect. The Commerce Clause "precludes application of a state statute to commerce that takes place wholly outside of the State's borders, irrespective of whether the commerce has effects within the State." *Edgar v. MITE Corp.*, 457 U.S.

624, 642-43 (1982); *Healy v. Beer Institute*, 491 U.S. 324, 336-37 (1989).

This Court's decisions concerning the extraterritorial effects of state economic regulations "stand at a minimum" for three propositions. *Healy*, 491 U.S. at 336. *First*, the Commerce Clause precludes the application of a state statute to commerce that takes place wholly outside of the state's borders, irrespective of whether there are effects within the state. *Id*. *Second*, a statute that controls commerce occurring wholly outside the boundaries of a state exceeds the inherent limits of the enacting state's authority and is invalid regardless of whether such extraterritorial reach was intended by the legislature. *Id*. "The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Id*. *Third*, the practical effect of the statute must be evaluated by also considering how the challenged statute may interact with the "legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation." *Id*. "Generally speaking, the Commerce Clause protects against the inconsistent legislation arising from the projection of one state's regulatory regime into the jurisdiction of another." *Id*.

Under the principles enunciated by this Court in *Healy*, the HVIRA is a classic example of impermissible extraterritorial regulation. First, it seeks information solely on transactions that occurred outside the State of California. The information sought by the HVIRA exclusively involves insurance transactions entered into in Europe between European parties under European law. Second, the "practical effect" of the HVIRA is to control conduct beyond California's borders. It requires European insurers to take

affirmative acts in violation of their own laws (*see Statement*, *supra*, at § B, 1). In fact, the Ninth Circuit acknowledged the potential extraterritorial impact of the HVIRA. *See* Pet. App. 44a ("HVIRA's reporting requirements might force a 'related' company of a California business to search for information …"); *see also* Pet. App. 13a ("The California's insurer's employees could travel overseas to examine the documents themselves, or the California insurer could disaffiliate and thus shed any reporting requirement"). Finally, it directly interferes with the "legitimate regulatory regime" of the Federal Republic of Germany. It requires German insurers to disclose information on millions of German insurance policies in violation of German law. It effectively seeks to trump the regulatory authority of the Federal Republic of Germany with respect to insurers domiciled in that nation. The HVIRA is part of California legislation which seeks to supplant German Holocaust compensation laws that have been in effect for 50 years.

B. The McCarran-Ferguson Act Does Not Save The HVIRA.

The McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, does not insulate the HVIRA from Commerce Clause restrictions. In *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), this Court held that insurance was "commerce" within the meaning of the Commerce Clause, and therefore, subject to federal regulation. *See also* Cong. Serv. 79th Cong., 1st Sess. 1945, p. 671. Prior to that decision, the power to regulate insurance transactions resided with the states. *See Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 653-54 (1981). In response, Congress enacted the McCarran-Ferguson Act.

The McCarran–Ferguson Act operates to ensure that the power to regulate insurance remains with the states. However, the legislative history of the McCarran-Ferguson Act provides as follows:

> *It is not the intention of the Congress in the enactment of this legislation, to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the South-Eastern Underwriters Association case.* Briefly, your committee is of the opinion that we should provide for continued regulation and taxation of insurance by the States, *subject always, however, to the limitations set out in the controlling decisions of the United States Supreme Court, as, for instance, in Allgeyer v. Louisiana (165 U.S. 578), St. Louis Cotton Compress Co. v. Arkansas (260 U.S. 346), and Connecticut General Insurance Co. v. Johnson (303 U.S. 77),* which hold, inter alia, that a State does not have power to tax contracts of insurance or reinsurance entered into outside its jurisdiction by individuals or corporations resident or domiciled therein covering risks within the States or to regulate such transactions in any way.

Cong. Serv. 79th Cong., 1st Sess. 1945, pp. 671-672 (emphasis added).

"Congress explicitly intended the McCarran-Ferguson Act to restore state taxing and regulatory powers over the insurance business to their *pre-Southeastern Underwriters* scope." *Western & Southern Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 654 (1981); *SEC v.*

National Securities, Inc., 393 U.S. 453, 459 (1968); *Maryland Cas. Co. v. Cushing*, 347 U.S. 409, 411 (1953); *Federal Trade Commission v. Travelers Health Ass'n*, 362 U.S. 293, 300 (1960) ("it is clear 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. There was no indication of any thought that a State could regulate activities carried on beyond its own borders.").

During testimony before the Senate, proponents of the McCarran-Ferguson Act repeatedly emphasized it did not authorize state regulation of extraterritorial activities. *See Travelers*, 362 U.S. at 301 (citing 91 Cong. Rec. 1481, 1483, 1484).[10] For instance, Senator Ferguson specifically stated that a state was not permitted to regulate interstate commerce under the McCarran-Ferguson Act as proposed. Another proponent of the bill testified as follows:

> Mr. President, there is not a line or sentence in the proposed [McCarran-Ferguson] act, as I have read it, which would delegate to any State the power to legislate in the field of interstate and foreign commerce. State regulation must be for the State and not for the United States. The bill does not sacrifice the power of Congress to regulate in the field of interstate commerce. . . .

91 Cong. Rec. at 1483.

10. Proponents of the McCarran-Ferguson Act further argued that the states were in "close proximity" to the people affected by the insurance business, and therefore, in a better position to regulate that business than the Federal Government. *See Travelers*, 362 U.S. at 302 (citing 91 Cong. Rec. 1087; 90 Cong. Rec. 6532). This purpose could not be served if states were permitted to enact regulations of an extraterritorial nature as they could be affecting people in other states which have their own insurance regulators to protect their interests. *Id*.

Prior to *South-Eastern Underwriters*, this Court had recognized the inherent limitations upon a state's power to act extraterritorially. In *Connecticut General Life Ins. Co. v. Johnson*, 303 U.S. 77 (1938), the Court ruled that the Fourteenth Amendment denies the state "power to tax or regulate [a] corporation's property and activities elsewhere." *Connecticut General Life*, 303 U.S. at 81. Similarly, in *St. Louis Cotton Compress Co. v. Arkansas*, 260 U.S. 346 (1922), this Court stated that "[i]t is true that the State may regulate the activities of foreign corporations within the State, but it cannot regulate or interfere with what they do outside." *St. Louis Cotton Compress*, 260 U.S. at 349; *see also Connecticut General Life Ins. Co. v. Johnson*, 303 U.S. 77, 80-81 (1938) ("Hence it is that a state which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them. But the due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere."); *Hanover Fire Ins. Co. v. Harding*, 272 U.S. 494 (1926) (voiding tax, imposed as condition of doing business in state, on receipts of foreign operations of insurer).

As is demonstrated by its legislative history, the McCarran-Ferguson Act does not shield the HVIRA from Commerce Clause scrutiny.

III. THE HVIRA VIOLATES THE FOREIGN AFFAIRS POWER OF THE FEDERAL GOVERNMENT

A. The Constitution Grants The Federal Government Exclusive Authority To Conduct The Nation's Foreign Affairs.

Since this nation's earliest days, the federal government has been vested with the exclusive authority to conduct

foreign affairs.[11] This fact is reflected in the discussions relating to the formation of our Constitution. James Madison proposed that the Constitution should include a class of powers which would regulate the nation's foreign affairs, which he deemed "an obvious and essential branch of the federal administration":

> The second class of powers, lodged in the general government, consists of those which regulate the intercourse with foreign nations, to wit, to make treaties; to send and receive ambassadors, other public ministers, and consuls; to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations; to regulate foreign commerce . . .

James Madison, The Federalist Papers, No. 42. Madison reasoned, "[i]f we are to be one nation in any respect, it clearly ought to be in respect to other nations." *Id.*

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11. The Articles of Confederation gave Congress the "sole and exclusive right and power of" determining peace and war, sending and receiving ambassadors, entering into treaties and alliances, and appointing courts for the trial of piracies and felonies committed on the high seas. U.S. ART. OF CONFEDERATION, ART. IX. The individual states were not to engage in such activities "without the consent of the United States in Congress." U.S. ART. OF CONFEDERATION, ART. VI. However, the Articles of Confederations proved "inefficient." Alexander Hamilton, Federalist Paper No. 1. The then-existing federal government's major failing "arose over the inability of Congress to frame and implement satisfactory foreign policies." Robert J. Delahunty, *Federalism Beyond the Water's Edge, State Procurement Sanctions and Foreign Affairs*, 37 Stan. J. Int'l L. 1, 14 (2001) (quoting Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution*, 26 (1997)).

At the time the Constitution was ratified, the federal government occupied the foreign relations field. The Constitution gives Congress the power to raise armed forces and used them in war, see U.S. CONST. ART. I § 8, CLS. 11, 12, 16; to undertake treaties with other nations to have the status of the supreme law of the land, *see id.* ART. II, § 2, CL. 2, *see id*. at ART. VI; to send and receive ambassadors, *see id.* ART. II, § 3; *id.* ART. II, § 2, CL. 1; to define offenses against the law of nations, *see id.* ART. I, § 8, CL. 10; and to regulate foreign commerce, *see id.* ART. I, § 8, CL. 3. Peter J. Shapiro, *Foreign Relations Federalism*, 70 U. Colo. L. Rev. 1223, 1228, n.21 (1999).

The Constitution also provides the Executive Branch with the power to speak for the nation in the arena of foreign affairs. The President is vested with the power to make treaties, to nominate and appoint ambassadors, and to receive foreign ambassadors. U.S. CONST. ART. II, 2, CL. 2. Moreover, the President has the exclusive authority to negotiate international agreements. *See United States v. Curtiss-Wright Corp.*, 299 U.S. 304 (1936).

The Constitution's framers, in granting the federal government those enumerated powers and denying the states the power to act in the international arena (U.S. CONST. ART. I, § 10, CLS. 1, 2, 3), evidenced an intent to vest exclusive authority over foreign affairs with the federal government. "Indeed, the whole frame of the Constitution supports this construction. All the powers which relate to our foreign discourse are confided to the general government." *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 570 (1845) (C.J. Taney, plurality); *see also* Shapiro, *Foreign Relations Federalism*, *supra*, at 1229.

This Court has repeatedly re-affirmed the federal government's exclusivity in the foreign affairs arena. *See Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) ("Our system of government . . . requires that federal power in the field affecting foreign relations be left entirely free from local interference."); *United States v. Pink*, 315 U.S. 203, 233 (1942) ("Power over external affairs is not shared by the States; it is vested in the national government exclusively."); *Zschernig v. Miller*, 389 U.S. 429, 436 (1968) ("The Constitution entrusts [the nation's foreign affairs and international relations] solely to the Federal Government."); *see also Deutsch v. Turner Corp.*, 317 F.3d 1005, 1020 (9th Cir. 2003).

B. The HVIRA Has More Than An Incidental Effect On Foreign Affairs.

The HVIRA represents California's attempt "to settle unpaid or wrongfully paid" Holocaust-era claims. CAL. INS. CODE § 13801. It constitutes an attempt by California to interject itself into an issue which has been the subject of U.S. foreign policy since the end of the Second World War. From the 1945 Potsdam Agreement to the 2000 Executive Agreement, the United States has engaged in an ongoing foreign policy process seeking compensation for Holocaust victims. *See supra*, pp. 18-20.

In *Zschernig*, the Court struck down an Oregon probate law which allowed a foreign citizen to inherit from a decedent's estate if United States citizens could inherit from a decedent's estate in the foreign citizen's country. 389 U.S. at 431. The Court held that the Oregon statute constituted an impermissible intrusion by the state into the field of foreign affairs, stating that "[t]he statute as construed seems to make

unavoidable judicial criticism of nations established on a more authoritarian basis than our own." *Id*. at 440. The Court further held that a state statute is unconstitutional if it has "more than 'some incidental or indirect effect in foreign countries'" or "great potential for disruption or embarrassment" of American foreign policy. *Id.* at 434-35 [internal citation omitted].

The Court reasoned the statute:

> . . . led into minute inquiries concerning the actual administration of foreign law, into the credibility of foreign diplomatic statements, and into speculation whether the fact that some received delivery of funds should 'not preclude wonderment as to how many may been denied 'the right to receive' * * *.' [citation omitted]
>
> That kind of state involvement in foreign affairs and international relations – matters which the Constitution entrusts solely to the Federal Government – is not sanctioned . . . .

Id. at 435-36.

1. The HVIRA Has Led to Minute Inquiries Into the Administration of German Law.

Like the statute at issue in *Zschernig*, the HVIRA has "led into minute inquires concerning the actual administration of foreign law, [and] into the credibility of foreign diplomatic statements." *Zschernig v. Miller*, 389 U.S. at 435-36. In this regard, the HVIRA requires the production of voluminous amounts of personal information regarding German insurance

policies in contravention to German data protection laws. ER 1182, 3131. The Federal Republic of Germany, and German authorities charged with the enforcement of those laws, have determined that compliance with the HVIRA would subject German companies to civil and criminal penalties. *See* Brief of the Federal Republic of Germany, *Amicus Curiae* in Support of Petitioners (dated December 12, 2002) at pp. 4-5. In response, the Commissioner has retained his own German data protection "experts" to challenge the official pronouncements of the German Government. ER 1921. While defending the HVIRA as "regulation of California insurers," the Commissioner nevertheless suggests, that he has a better understanding of German law than do the German authorities charged with the administration of that law. The Commissioner's criticism of the "actual administration" of German law demonstrates the incompatibility of the HVIRA with the principles articulated in *Zschernig*.

Various other features of the HVIRA reflect hostility to the operation of German law. Examples include the HVIRA's definition of the term "proceeds" which effectively "legislates away" post-war German currency reform. CAL. INS. CODE § 13802. In addition, in its application, the HVIRA attempts to supplant 50 years of Holocaust reparations legislation in Germany. In sum, the HVIRA conflicts with or criticizes German law and is viewed by that nation as an "affront" to its sovereignty. *See* Brief of the Federal Republic of Germany, *Amicus Curiae* in support of Petitioners (December 12, 2002), at p. 2; ER 844.

2. The HVIRA Has a Direct Effect in Germany.

The HVIRA requires direct conduct in Germany and other European countries. The HVIRA compels insurers to

"come forth with any information they possess that could show proof of insurance policies held by Holocaust victims and survivors." CAL. INS. CODE § 13801(d). It exclusively seeks information regarding "insurance policies in force in Europe at any time between 1920 and 1945." CAL. INS. CODE § 13804(a). Under the HVIRA, the nominally regulated California companies merely serve as a conduit for European insurance information.

The HVIRA's requirements can only be fulfilled if companies located in Germany and other European nations assemble and produce the information demanded. As demonstrated above, such companies face civil and criminal penalties if they disclose this information. The HVIRA has clear and direct effects in Germany and elsewhere in Europe.

3. The HVIRA Conflicts with U.S. Foreign Policy and Has Great Potential for Disruption and Embarrassment.

"For the last 55 years, the United States has sought to work with Germany to address the consequences of the National Socialist era and World War II through political and governmental acts between the United States and Germany." Pet. App. 166a. Those political and governmental acts have resulted in several treaties, including the Transition Agreement. *See* 332 U.H.T.S. 219. Under the Transition Agreement, the Federal Republic of Germany accepted the responsibility to compensate victims of Nazi oppression. *Id.* at Ch. 4. In fulfillment of that responsibility, Germany has provided, "in an unprecedented manner, comprehensive and extensive restitution and compensation to victims of National Socialist persecution." Pet. App. 155a. Those

reparations efforts have been ongoing for over 55 years and now total over $100 billion in payments to the victims of World War II. Brief of the Federal Republic of Germany, *Amicus Curiae* in Support of Petitioners (dated December 12, 2002) at p. 6.

Most recently, the United States entered into the Executive Agreement with Germany announcing its support for the Foundation. Pet. App. 153a-157a; *see also supra*, at pp. 17, 23-24. "The Foundation is a fulfillment of a half-century effort to complete the task of bringing justice to victims of the Holocaust and victims of National Socialist persecution." Pet. App. 166a. The Executive Agreement's support of the Foundation is the United States' attempt to ensure an "enduring legal peace" for German companies, which includes the Gerling Companies. Pet. App. 153a. The HVIRA threatens to impair the United States' long standing efforts.

The HVIRA represents California's attempt to impair the effective exercise of the federal government's exclusive control over foreign affairs. California claims that the HVIRA "is necessary to protect the claims and interests of California residents, as well encourage the development of a resolution to these issues . . . through direct action by the State of California." CAL. INS. CODE § 13804(f). California has declared that the international mechanisms put in place by Germany and by the other European countries, in accordance with agreements with the United States, are not sufficient. As the Ninth Circuit itself has recognized in striking another Holocaust statute on foreign affairs grounds: "California has sought to create its own resolution to a major issue arising our of the war – a remedy for wartime acts that California's legislature believed had never been fairly resolved." *Deutsch*

v. Turner Corp., 317 F.3d at 1023. The HVIRA constitutes an impermissible intrusion into the federal government's exclusive authority over the nation's foreign affairs.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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