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

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

The Commissioner's brief is a study in misdirection, avoiding the "actual purpose" of the HVIRA (Resp. Br. 4) — which is to foster litigation in California courts (Pet. Br. 10-12) — and focusing on other purported state "interests" that find no support in the statute's text, legislative history, or practical application (Pet. Br. 9-13, 48-50). The Commissioner argues that a plainly distinguishable decision of this Court, *Barclays Bank PLC* v. *Franchise Tax Bd.*, 512 U.S. 298 (1994) — which does not discuss the foreign affairs power or cite *Zschernig* v. *Miller*, 389 U.S. 429 (1968) — circumscribes the President's constitutional authority to negotiate and resolve issues arising out of World War II (Resp. Br. 24-26). And the Commissioner relies heavily on a federal statute, the U.S. Holocaust Assets Commission Act of 1998, Pub. L. No. 105-186, 112 Stat. 611, 22 U.S.C. § 1621 note, that does not mention statutes like the HVIRA or compelled disclosure of insurance records and plainly supports *presidential* authority to negotiate and resolve Holocaust-era insurance issues (Pet. Br. 30).

The Commissioner ultimately seeks to discredit (Resp. Br. 8-12) the efforts of the Clinton and Bush Administrations, which in "prolonged, intense international negotiations" have sought to "provide a dignified measure of justice to Holocaust survivors and their families worldwide." Pet. App. 174a-175a. The Commissioner maintains that the Constitution allows the California legislature to substitute its judgment for the President's judgment in determining what is in the national interest in conducting the "last great compensation related negotiation arising out of World War II." SER 940.

If accepted by this Court, the Commissioner's argument would not only subvert U.S. foreign policy on Holocaust-era insurance claims, and thereby "frustrate or prevent [the] attainment of" justice for Holocaust survivors (Pet. App. 179a), but also tie the hands of the President in negotiating future claims and disputes arising from wars and international

conflicts involving the United States. The most immediate consequence would be further damage to U.S. relations with Germany, Switzerland and other countries "at a time of international tension when relations between this Nation and its European allies are at their most sensitive." U.S. *Amicus* Br. 18.

I. THE HVIRA IMPAIRS THE FEDERAL GOVERNMENT'S FOREIGN AFFAIRS POWER.

A. *Zschernig*, Not *Barclays*, Governs This Case.

1. As described in our opening brief (at 24-32), the HVIRA violates the foreign affairs power under *Zschernig*, 389 U.S. at 434-435, 441. Any state law with more than an "incidental or indirect effect in foreign countries" or with "great potential for disruption or embarrassment" of U.S. foreign policy is unconstitutional — "even in the absence of" a federal statute, a treaty, or international negotiations on the subject. *Ibid*. The HVIRA conflicts with U.S. foreign policy in the "last major multinational negotiation with Germany for the wrongs perpetrated during Nazi Germany's ruinous period of power." SER 940.

In light of the *amicus* briefs filed by the United States, the Commissioner cannot dispute that the HVIRA conflicts with U.S. foreign policy on Holocaust-era insurance claims. As the United States' most recent brief explains (at 9), the "HVIRA is specifically concerned with gathering information concerning European insurance transactions in order to facilitate claims by and on behalf of victims of Nazi Germany." Thus, the "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." *Ibid*.

In an effort to distract attention from this serious impairment of U.S. foreign policy, the Commissioner characterizes the HVIRA as a "traditional" insurance regulatory statute with only minimal foreign effects. Resp. Br. 14-16. But the HVIRA

"is not a law of general applicability with only an incidental effect on matters outside the State or the United States." U.S. *Amicus* Br. 14. To the contrary, the statute was *expressly drawn* to influence the resolution of Holocaust-era insurance claims arising out of World War II in Europe. See Pet. Br. 25-28; Cal. Ins. Code § 13801(f). And the effect of the HVIRA is felt exclusively by European insurers and their regulators.

The HVIRA directly implicates the President's authority under Article II as Commander in Chief — "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) — to resolve issues arising out of international conflicts involving the United States. See *Dames & Moore* v. *Regan*, 453 U.S. 654, 682 (1981).

The Commissioner tries to distinguish *Zschernig* by asserting that the HVIRA "does not criticize or show hostility toward foreign governments." Br. 22. *Zschernig*, however, does not proscribe only "criticism" of foreign governments. It is also directed at state laws with "great potential for disruption or embarrassment" of U.S. foreign policy. 389 U.S. at 435. The HVIRA, which would impose enormous burdens on foreign insurers and undermine foreign insurance regulations, has already caused actual "disruption and embarrassment" of U.S. foreign policy. Pet. Br. 24-28. The HVIRA's effect on foreign citizens is significant as well. "[I]nternational 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.

Moreover, the HVIRA *does* manifest hostility toward European governments — particularly Germany, Switzerland, and Austria — and their oversight of domestic insurers. As the Commissioner himself explains (at 15-16), insurance "is a quasi-public industry" and European governments regulate the insurers that the Commissioner now alleges (at 1) are "wrongfully withholding insurance information from insureds and

beneficiaries." This is a direct criticism of European governments and their regulation of insurance, and not surprisingly has sparked vigorous protest. See, *e.g.*, FRG *Amicus* Br. 12-13.

In addition, the HVIRA refers specifically to Germany, see Cal. Ins. Code § 13802(a), and expresses dissatisfaction with the restitution of property and insurance proceeds, *id*. § 13801(b), for which the German government was made responsible under treaties with the United States and other countries.[1] Thus, even under the Commissioner's grudging reading of *Zschernig*, the HVIRA is plainly unconstitutional.

2. Unable to distinguish *Zschernig*, the Commissioner relies on this Court's decision in *Barclays*, but that case is wholly inapplicable, as the United States has explained (at 19). *Barlcays* did not address the federal government's foreign affairs power or *Zschernig*. Rather, *Barclays* "addressed an unusual situation" under the Commerce Clause "in which Congress and the Executive had taken divergent positions." U.S. *Amicus* Br. 19; 512 U.S. at 324-330. Moreover, Congress had expressly "condoned" the state tax at issue, *id*. at 329, and the state tax did not conflict with federal policy, *id*. at 330.

Here, by contrast, Congress has not "condoned" the HVIRA. The Commissioner looks for congressional authorization for the HVIRA in the U.S. Holocaust Assets Commission Act ("HACA") (Resp. Br. 12-14, 26-27), but as demonstrated in our opening brief (at 30; see U.S. *Amicus* Br. 19-21), the HACA endorses *presidential* leadership on this issue and gives no blessing to state statutes like the HVIRA. Indeed, the federal statute was enacted *prior to* the HVIRA.

The HACA established a federal commission "to examine issues pertaining to the disposition of Holocaust-era assets in

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[1] U.S. foreign policy was to rehabilitate the West German government and make it responsible for compensation and restitution to the victims of Nazi Germany. See *Frumkin* v. *J.A. Jones, Inc.*, 129 F. Supp. 2d 370, 376 (D.N.J. 2001); Pet. Br. 3; FRG *Amicus* Br. 4-5.

the United States" and "to make recommendations to the President on further action." Pub. L. No. 105-186 (preamble). A majority of the Commission members were appointed by the President. *Id*. § 2(b)-(c). The HACA also obliged the Commission to "encourage the National Association of Insurance Commissioners to prepare a report on the Holocaust-related claims practices of all insurance companies," but only "to the degree the information is available." *Id*. § 3(a)(4)(A)-(B).

The HACA required the Commission to "submit a final report to the President" recommending "such legislative, administrative, or other action as it deems necessary or appropriate." Pub. L. No. 105-186, § 3(d)(1). The President was asked to "submit to the Congress any recommendations for legislative, administrative, or other action that the President considers necessary or appropriate." *Id*. § 3(d)(2).

In December 2000, the Commission issued its report to the President, *Plunder and Restitution: The U.S. and Holocaust Victims' Assets*. The report made a number of recommendations for action by the *federal government*, including that "[t]he United States should continue its leadership to promote the international community's commitment to addressing asset restitution issues." *Id*. at 25. The report made no recommendation regarding Holocaust-era insurance claims and did not suggest any proposed action by *state* governments.

The HACA's emphasis on presidential leadership indicates approval of the President's policy on Holocaust-era insurance claims. The HACA demonstrates no support for the HVIRA or the compulsion by any government of information on European insurance policies. The Commission itself lacked subpoena power. As the United States explains (at 21), the HACA took "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."

Because Congress has not "condoned" the HVIRA and the state statute conflicts directly with U.S. foreign policy, the "repeated representations by the Executive Branch supported by formal diplomatic protests and concrete disputes" on this issue (*Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 386 (2000)) are highly probative, if not dispositive, on whether the State has unconstitutionally interfered with the federal government's foreign affairs power. The Commissioner's bold contention (Br. 26) that states can adopt their own statutes in conflict with U.S. foreign relations until Congress specifically disapproves them is unsupported by precedent and would impose an intolerable burden on Congress. Indeed, *Crosby* specifically rejected reliance on the fact that Congress had not preempted a state statute as a basis for concluding that Congress "approved" of the state law. 530 U.S. 386-388.

B. The Conflict Between The HVIRA And The President's On-Going Negotiations And Executive Agreements Infringes The Foreign Affairs Power.

Even in the absence of *Zschernig*, which applied a form of field preemption to state laws that have the "potential" to disrupt U.S. foreign policy (Pet. Br. 24), the serious conflict between the HVIRA and the President's on-going negotiations and Executive Agreements on Holocaust-era insurance claims renders the HVIRA unconstitutional as an impairment of the federal government's foreign affairs power (Pet. Br. 28-32).[2]

The President's already considerable authority over the Nation's foreign affairs is "at its maximum" in this context because he is acting pursuant to congressional approval of, or acquiescence in, his foreign policy. *Crosby*, 530 U.S. at 380. In *Dames & Moore*, 453 U.S. at 687, this Court found congressio-

[2] Negotiations on Holocaust-era issues, including insurance, continue. The President has a Special Envoy for Holocaust Issues, Ambassador Randolph M. Bell (Pet. App. 174a), and the Bush Administration intervened to facilitate negotiations on the recent agreement between ICHEIC and the German Foundation and German Insurance Association. Pet. Br. 8.

nal acquiescence in the fact that Congress did not act after holding hearings on the President's executive agreement with Iran. In this case, the HACA shows, at a minimum, congressional deference to the President's foreign policy on Holocaust-era insurance claims. Moreover, as in *Dames & Moore*, Congress has held multiple hearings on this subject with testimony by Clinton and Bush Administration officials, Pet. Br. 4-5, 7, 8-9; Pet. App. 126a, 174a, has been fully informed of the Executive Branch's approach to this delicate international issue, and has done nothing to indicate "its displeasure." 453 U.S. at 687.

The Commissioner responds that the Executive Agreements with Germany and Austria "'do not, of their own force, extinguish any claims that Holocaust victims or their families might assert in court against foreign insurance companies.'" Resp. Br. 29 (quoting U.S. *Amicus* Br. 13). The Commissioner reads this limitation to make the agreements nugatory with respect to the HVIRA. *Id*. at 29-30. But the cited language has no such implication. The provision was included "[b]ecause the claims almost exclusively concern persons and transactions that had no relation to the United States at the time of the conduct at issue * * * [and] 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." U.S. *Amicus* Br. 13 n.7.

This case does not involve individual insurance claims, and instead challenges a state regulatory statute. The provisions of the Executive Agreements relevant to this issue provide that the "United States, recognizing the importance of the objectives of this agreement, including all-embracing and enduring legal peace, shall, in a timely manner, use its best efforts, in a manner it considers appropriate, to achieve these objectives with state and local governments." Pet. App. 156a (Executive Agreement with Germany, Art. 2 (2)).

These provisions preserve maximum flexibility for the President to determine which state laws conflict with the

Executive Agreements and undermine the goal of "legal peace." In this case, the Executive Branch has repeatedly stated that the HVIRA conflicts with U.S. foreign policy. As *Crosby* makes clear, this flexibility — unencumbered by state law — is an important component of the President's diplomatic leverage and bargaining power. 530 U.S. at 376-382.

The Commissioner's contrary position would undermine the President's authority to negotiate. According to the Commissioner (at 20), "[i]f the HVIRA is an irritant to the Executive Branch and foreign governments, * * * the Executive can enter into a treaty with those governments or seek relief from Congress." In the Commissioner's view, unless there is a treaty in place or a congressional statute in force, the states are free to engage in their own foreign policy — whether or not that policy conflicts with the federal government's policy or on-going negotiations. This result would eviscerate the foreign affairs power, which was reaffirmed in *Crosby*, 530 U.S. at 381-382 n.16, and the President's ability to speak for the Nation in negotiations with foreign governments. Neither the Constitution nor this Court has so limited the President's authority to negotiate complex issues arising out of a world war or other international crisis. See *Dames & Moore*, 453 U.S. at 678.

C. The Commissioner's Challenge To ICHEIC Is Irrelevant And Meritless.

Instead of coming to grips with the conflict between the HVIRA and U.S. foreign policy, the Commissioner devotes much of his brief to challenging the wisdom and efficacy of the U.S. policy. He criticizes ICHEIC, which both the Clinton and Bush Administrations have concluded should be "the exclusive remedy for unresolved insurance claims from the National Socialist era and World War II." Pet. App. 177a, 135a. The "entire" German, Austrian, and Dutch insurance industries "are committed to using ICHEIC procedures for Holocaust-era claims." *Id.* at 176a-177a. Other members of ICHEIC include "Axa, Generali, Winterthur, and Zurich." *Id*. at 136a.

The Commissioner asserts that ICHEIC is ineffective, but the authorities on which he relies (Resp. Br. 10) predate the recent implementation of the agreement by ICHEIC with the German Foundation and the German Insurance Association in September 2002 "on the processing and payment of insurance claims against the entire German insurance industry." Pet. App. 177a. Under this agreement, "$100 million from the German Foundation will be made available to pay valid insurance claims against German companies and $175 million will be distributed by ICHEIC for humanitarian purposes." *Ibid*.

A "chief component" of the agreement is the creation of the "most comprehensive listing ever available of insurance policies issued to Jewish residents of Germany during the National Socialist era." Pet. App. 177a. In light of imminent publication of this list, ICHEIC on March 14, 2003, extended the deadline for filing claims to September 30, 2003. See <http://www.icheic.org/eng/MAR1203.pdf>. The list of "additional policyholders from Germany and Eastern Europe" will be made available on the ICHEIC website, *ibid*., without violating European privacy laws.[3]

The Commissioner complains (Br. 10) that not all European insurers are members of ICHEIC. The United States has "encourage[d] all insurers that issued policies during the Holocaust era" to join ICHEIC and many have, Pet. App. 136a,176a-177a. But the HVIRA and similar statutes have "undermined" the United States' ability "to persuade foreign governments and foreign enterprises to participate in voluntary mechanisms" like ICHEIC. U.S. *Amicus* Br. 9; Pet. App. 125a. If as a consequence of this interference the ICHEIC process fails, the result will be "years" of litigation in U.S. courts with

[3]Representatives of the Conference on Jewish Material Claims Against Germany, the Jewish Agency for Israel, and the State of Israel have "accept[ed] the ICHEIC-Foundation agreement as a valid and worthy result" and "have endorsed the agreement's key provisions for publishing the most comprehensive list possible of German policyholders who may have been Holocaust victims." Pet. App. 178a.

uncertain results for elderly Holocaust victims whose claims will be subject to a "variety of legal defenses." *Id*. at 132a. U.S. foreign policy has sought to avoid that pernicious result; the California legislature, whether or not it believes that the federal effort is misguided, has no authority to substitute its policy for the U.S. policy on this issue.

II. THE HVIRA IS INVALID UNDER THE COMMERCE CLAUSE.

A. The HVIRA Cannot Be Reconciled With Governing Commerce Clause Principles.

1. The Commissioner entirely fails to engage our argument that the HVIRA is unconstitutional under the Commerce Clause. To begin with, there can be no serious doubt that the HVIRA is "extraterritorial legislation" in the sense that the Court has used that term in its Commerce Clause decisions. The Commissioner does argue, halfheartedly, that the HVIRA is not extraterritorial because it "is a California regulation of California insurance companies." Br. 36. But that contention rests on a transparent formalism. The statute's impact on domestic companies is, of course, simply the hook used by the State to induce *foreign* companies to make disclosures of information held *overseas* that concerns transactions *conducted in Europe* — disclosures that the State could not compel directly. In this respect, the HVIRA is identical to many other state laws that the Court has invalidated under the Commerce Clause because of their extraterritorial impact: all used state power over an entity that had some in-state presence to compel actions that otherwise lay outside the enacting state's jurisdiction. See, *e.g., Healy* v. *Beer Inst., Inc.*, 491 U.S. 324 (1989); *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. 573 (1986). Indeed, because states by definition cannot directly enforce laws that purport to govern conduct in other states or nations, extraterritorial legislation necessarily will operate on the model of the HVIRA.

As a second line of defense, the Commissioner asserts that the Court's decisions in this area condemn only "a particular kind of extraterritorial effect on pricing in interstate competitive markets." Br. 37. But that contention also is insupportable. The Court has made quite clear that state legislation is invalid under the Commerce Clause whenever its "practical effect * * * is to control conduct beyond the boundaries of the State" because such a law "exceeds the inherent limits of the enacting State's authority" and "'would offend sister States.'" *Healy*, 491 U.S. at 336 & n.13 (citation omitted); *BMW of North Am., Inc.* v. *Gore*, 517 U.S. 559, 571-573 (1996). See also *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, No. 01-1289, slip op. at 10-11 (U.S. Apr. 7, 2003). This fundamental "limit[] on a State's power to enact substantive legislation" (*Edgar* v. *MITE Corp.*, 457 U.S. 624, 643 (1982) (plurality opinion)) has nothing to do with the content of particular pricing rules that a state might seek to project beyond its borders. To the contrary, as the United States observes (at 26), the Court applied the extraterritoriality principle in *BMW* to invalidate a state's attempt to impose nationwide *disclosure* obligations. See *BMW*, 517 U.S. at 570, 572-573. The HVIRA accordingly cannot survive this limit on state authority.[4]

2. The Commissioner also is incorrect in contending (Br. 37-38) that the HVIRA passes the Commerce Clause "one-

[4] In arguing to the contrary, the Commissioner points to the *MITE* plurality's citation of *Hall* v. *Geiger-Jones Co.*, 242 U.S. 539 (1917), which upheld a state "blue-sky" securities law that required disclosure of extra-state securities sales. Resp. Br. 36-37 (citing *MITE*, 457 U.S. at 641). The statute at issue in *Hall*, however, was decisively different from the HVIRA. It imposed obligations on businesses that *themselves* engaged in securities transactions in the regulating state; the *MITE* plurality explained, in language curiously omitted by the Commissioner, that "[t]he Court's rationale [in *Hall*] for upholding blue-sky laws was that they only regulated transactions occurring within the regulating States." 457 U.S. at 641. In contrast, the plurality concluded that the state law challenged in *MITE* was impermissibly extraterritorial because it "directly regulate[d] transactions which take place across state lines." *Ibid*. That also is true of the HVIRA.

voice" test. The Commissioner relies entirely on *Barclays*. The considerations that controlled that case, however, are wholly absent here. In *Barclays*, the Court found that Congress had "indicate[d] that [the challenged] state practices [did] not 'impair federal uniformity in an area where federal uniformity is essential.'" 512 U.S. at 323 (citation omitted). Pointing to a lengthy history during which Congress declined to enact "numerous bills" that would have displaced the challenged state law, and during which the Senate rejected a proposed treaty that would have done the same thing (see *id*. at 324-327), the Court found dispositive these positive "indicia of Congress' willingness to tolerate" the state rule at issue. *Id*. at 327. The Court expressly confirmed that point in *Crosby*, explaining that *Barclays* "found the reactions of foreign powers and the opinions of the Executive irrelevant" because "Congress had taken specific actions rejecting the positions both of foreign governments * * * and the Executive." 530 U.S. at 385.

As we note above, however, there are no such affirmative indicia of Congress's acquiescence in the HVIRA. There have been no bills introduced and rejected that would have displaced the California law. Congress did not disregard calls for such legislation by the Executive. No proposed treaties foreclosing HVIRA-like legislation have been repudiated by the Senate. The HACA predated the HVIRA and therefore could not be thought to signify congressional validation of the state law — and, as we have explained (at 4-7, *supra*), that statute is in any event fundamentally inconsistent with the approach taken by the HVIRA. Given these considerations, the analysis in *Barclays* cuts powerfully *against* the Commissioner's case.

The controlling authority here is *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434 (1979) — which, although it is the Court's seminal modern decision under the Foreign Commerce Clause, the Commissioner fails even to cite. In that case, as in this one, an international agreement "reflect[ed] a national policy" that was inconsistent with the challenged state law, although the agreement did not actually preempt the state

legislation. *Id*. at 453. In that case, as in this one, the challenged state law "create[d] an asymmetry in international [law] operating to [another nation's] disadvantage." *Ibid*. And in that case, as in this one, the challenged state law violated the "one-voice" principle because "California, by its unilateral act, [could] not be permitted to place these impediments before this Nation's conduct of its foreign relations and its foreign trade." *Ibid*. It is not surprising, in this context, that the Commissioner would prefer to ignore *Japan Line*. But that decision remains good law: it was quoted in *Barclays* as stating the controlling test (see 512 U.S. at 320) and was more recently cited with approval in *Crosby*. See 530 U.S. at 381-382 n.16. The "one-voice" principle, like the rule against extraterritoriality, accordingly compels invalidation of the HVIRA.

B. The HVIRA Is Not Saved By The McCarran-Ferguson Act.

Perhaps because he has so little so say about the scope of the Commerce Clause, the Commissioner places most of his eggs in the McCarran-Ferguson Act basket, contending that the Act insulates the HVIRA against Commerce Clause attack (Br. 32-36). This argument lacks merit, for several reasons.

1. The Commissioner recognizes, as he must, this Court's holding in *Federal Trade Comm'n* v. *Travelers Health Ass'n*, 362 U.S. 293 (1960), that Section 2(b) of the McCarran-Ferguson Act does not authorize extraterritorial state laws. That concession should be fatal to his argument. As noted in our opening brief (at 40-41), and as the Commissioner acknowledges (at 34), Section 2(a) of the Act — the provision on which he relies — uses language essentially identical to that in section 2(b) when describing the universe of state laws that are affected by the Act.[5] Moreover, as we also argue in our opening brief (at

[5] It would take remarkable verbal gymnastics to conclude that Section 2(b)'s phrase "regulated by State law" contemplates anything other than the "laws of the several States which relate to the regulation" of insurance that are identified in Section 2(a).

41), it would be nonsensical to construe these two provisions as differing in scope: such a reading would attribute to Congress an intent simultaneously to *displace* the Constitution but to *preserve* federal statutory law as it applies to exterritorial state insurance regulations. Indeed, the Commissioner's approach, which posits that Section 2(a) of the Act allows for extraterritorial state regulation of insurance, would mean that the very extraterritorial state law at issue in *Travelers could* be applied to govern out-of-state transactions, an outcome that would permit states to impose inconsistent and conflicting requirements on insurers that engage in business across state lines. The Commissioner entirely fails to address this point.

Instead, the Commissioner places principal reliance on 15 U.S.C. § 1011, the McCarran-Ferguson Act's statement of legislative purpose, which declares that "silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of [the business of insurance] by the several States." Here, however, the Commissioner simply assumes his conclusion. It is true that congressional silence does not invalidate state laws that fall within the scope of the Act. But the scope of the Act is determined by Section 2(a) — which, for reasons we have explained, must be understood to exclude extraterritorial state laws. Any other conclusion would make Section 2(a) superfluous.

2. We noted in our opening brief (at 41-42) that the background and purposes of the McCarran-Ferguson Act confirm that it cannot be read to validate state laws that have an extraterritorial effect. In response, the Commissioner takes this history to show only "Congress' understanding that the Act did not purport to eliminate due process limits on state legislative jurisdiction." Br. 35-36. But that argument altogether disregards the central goal of the Act. Because "the business of insurance has been regarded as a local matter," Congress enacted the Act to restore the state authority to regulate insurance that had been recognized prior to the decision in *United States* v. *South-Eastern Underwriters' Ass'n*, 322 U.S. 533 (1944); it was

expressly "not the intention of Congress in the enactment of th[e] 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" in *South-Eastern Underwriters' Ass'n*. H.R. Rep. No. 142, 79th Cong., 1st Sess. 3 (1945). And as Congress knew, prior to the decision in *South-Eastern Underwriters' Ass'n* states consistently had been held to *lack* the authority to engage in extraterritorial insurance legislation. See *ibid*. Viewed in that context, a statute that was premised on the "local" nature of insurance could hardly have been intended to preserve extraterritorial state laws. Cf. *Healy*, 491 U.S. at 342 (although the Twenty-first Amendment gives states great leeway to regulate the sale of alcoholic beverages, the Amendment "does not immunize state laws from invalidation under the Commerce Clause when those laws have the practical effect of regulating liquor sales in other States").

The Court made this point in *Travelers*, finding it "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." 362 U.S. at 300. This was not, as the Commissioner would have it, a case of Congress fastidiously taking extra care to explain that it did not mean to displace due process precedents regarding extraterritoriality even as it enacted legislation that shielded extraterritorial state laws from invalidation under the Commerce Clause. To the contrary, the sponsors of and conferees on the McCarran-Ferguson Act "repeatedly emphasized that the provision did not authorize state regulation of extraterritorial activities." *Id*. at 301 (citing congressional debate). The "basic motivating policy behind the legislative movement that culminated in the enactment of the McCarran-Ferguson Act" therefore precludes application of the Act to save extraterritorial state laws. *Ibid*. See *State Bd. of Ins*. v. *Todd Shipyards Corp.*, 370 U.S. 451, 456 (1962) (even if due process holdings precluding extraterritorial state regulation of insurance were open to question, by enacting the McCarran-Ferguson Act Congress "indicated

without ambiguity that such state 'regulation or taxation' should be kept within the limits set by" those decisions). Indeed, the Court in *Travelers*, citing a pre-Act *Commerce Clause* decision, specifically referred to the constitutional problems that would arise if the Nebraska insurance law at issue were construed "to regulate any given aspect of extraterritorial activity." 362 U.S. at 302 (citing *Western Union Tel. Co.* v. *Brown*, 234 U.S. 542 (1914)). *Travelers* completely refutes the Commissioner's reading of the McCarran-Ferguson Act.

3. The Commissioner also errs in contending (at 32) that the Court has held that the Act "insulates state insurance regulations from *all* Commerce Clause attack, even where the regulation has extraterritorial effects." The authority he cites (Br. 32-33 & n.17) stands for no such proposition. In contrast to the HVIRA, the state laws at issue in *Western & Southern Life Ins. Co.* v. *State Bd. of Equalization*, 451 U.S. 648 (1981), and *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408 (1946), did not address the extraterritorial conduct of insurers; those laws taxed the companies' local, *in-state* activities (albeit at discriminatory rates) and therefore have no relevance to this case. See *Western & Southern*, 451 U.S. at 651, 654; *Benjamin*, 328 U.S. at 410. *Metropolitan Life Ins. Co.* v. *Ward*, 470 U.S. 869 (1985), likewise involved a discriminatory tax that made no attempt to affect the out-of-state activities of insurers (and that the Court held unconstitutional under the Equal Protection Clause). See *id*. at 871-872, 883. The Commissioner draws even less support from *Todd Shipyards*: the Court *struck down* as impermissibly extraterritorial a premium tax that was levied on insurance contracts negotiated and paid outside the taxing state, because it understood the McCarran-Ferguson Act specifically to approve the Court's pre-Act decisions holding that states lack the authority to tax extra-state activities. 370 U.S. at 455-458. In fact, this Court *never* has upheld under the Act a state's attempt to regulate insurance activities taking place outside its borders.

III. THE HVIRA EXCEEDS DUE PROCESS LIMITS ON LEGISLATIVE JURISDICTION.

The Commissioner's due process argument is based largely on the contention that we have mischaracterized the HVIRA by relying on its "actual purpose." Resp. Br. 38. In so arguing, the Commissioner confuses a subjective inquiry into legislators' "motives" with an objective inquiry into the purpose and effect of the statute. See *id*. at 44 (citing the "difficulty of determining legislative purpose or motive"). Our inquiry into the purpose of the HVIRA is part of a traditional construction of the statute based on its text, legislative history, and interrelated provisions passed by the California legislature at the same time. It is not a subjective inquiry into legislative motive.

Apart from the Commissioner's quibbles over motive, the undeniable purpose and effect of the HVIRA is to compel conduct overseas. The HVIRA regulates extraterritorially in violation of due process. See U.S. *Amicus*. Br. 24-30.

A. The HVIRA Fosters Litigation And Is Not A "Reporting" Or "Fitness" Statute.

The Commissioner dismisses consideration of the "actual purpose" of the HVIRA in the context of California's Holocaust insurance compensation program with the assertion that it is "improper[]" to refer to "other California statutes" related to the HVIRA because they are "*not* part of this litigation" and their constitutionality is "*not* before this Court." Resp. Br. 7; *id*. at 42 n.19. But petitioners have never suggested that the constitutionality of the California statutes related to the HVIRA are at issue. Rather, we have cited those closely related provisions to provide the context in which the HVIRA operates (Pet. Br. 11-13). It is "the most rudimentary rule of statutory construction * * * that courts do not interpret statutes in isolation, but in the context of the *corpus juris* of which they are a part." *Branch* v. *Smith*, 123 S. Ct. 1429, 1445 (2003) (plurality opinion) (citing *United States* v. *Freeman*, 44 U.S. (3 How.) 556, 564-565 (1845)).

As described in our opening brief (at 9-13, 36-38, 47-50), the HVIRA regulates foreign insurance contracts to foster litigation in California. The Commissioner responds that the HVIRA is a benign "reporting statute" that "seeks only the disclosure of insurance policy information." Resp. Br. 6-7. He further maintains (at 8 n. 5) that Section 354.5 of the California Code of Civil Procedure — which was adopted in the same bill that enacted the HVIRA ((Pet. App. 117a-118a)) — "does *not* confer personal jurisdiction over foreign affiliates, does *not* create any new right of action, and does *not* impose liability on the local licensee under policies issued by a foreign affiliate."

Each of these assertions is wrong. First, as demonstrated in our opening brief (at 36-38, 47-48) without contradiction by the Commissioner, the compelled production of voluminous information about tens of millions of insurance policies from European archives in violation of foreign privacy laws is a form of regulation under this Court's precedents. Second, as demonstrated in our opening brief (at 37, 48), again without contradiction by the Commissioner, the HVIRA (Cal. Ins. Code § 13802(c)) changes the substantive terms of foreign insurance contracts by redefining the "proceeds" of such policies to exclude wartime or postwar currency devaluation. This change leaves insurers open to the claim that they have failed to pay all of the "proceeds" due under policies that were fully paid under governing foreign law. That is plainly "substantive" regulation of foreign insurance policies and foreign insurers.

It is equally clear that the extraterritorial regulation of European insurance policies by the HVIRA is designed to facilitate litigation on those policies in California. The Commissioner misleads the Court in stating that Section 354.5 of the California Code of Civil Procedure does not expand liability under California law. Resp. Br. 8 n. 5. As described in our opening brief (at 12), a California insurer may now be held liable for a Holocaust-era policy issued in Europe by any of its "related compan[ies]" — regardless of whether the California insurer exercised any control over the "related" company or

whether the companies were even related when the policy was issued. This is a dramatic expansion of liability under California law and is accompanied by a lengthy extension of the statute of limitations. Cal. Code Civ. Proc. § 354.5(c).

The information compelled by the HVIRA allows Holocaust-era insurance claimants to file actions under the expanded liability and statute of limitations provisions of Cal. Code Civ. Proc. § 354.5. That is the sole purpose of the HVIRA, as its text and legislative history explain (Pet. Br. 9-10, 48-50). See Pet. App. 119a, 122a (sole purpose of statute is the "resolution of claims under insurance policies held by Holocaust victims").

The Commissioner adverts to "a number" of other unspecified "state regulatory interests" supporting the HVIRA (Br. 6), although the only purported interest he can identify is "consumer protection" against unfit insurers that have "stonewall[ed]" claimants. See, *e.g.*, Resp. Br.1-2, 42-44. But as demonstrated in our opening brief (at 48-50), the current fitness of California insurers cannot be assessed from the mass of information required by the HVIRA about millions of insurance policies issued by other companies and in effect in Nazi-occupied Europe from 1920 to 1945. Indeed, the Commissioner himself admits (Resp. Br. 7) that the HVIRA "makes no judgment as to whether policies have been properly paid." But without such a "judgment," there is no basis to determine the fitness of an insurer. That is why there is no reference to insurer fitness or licensing standards in the text of the HVIRA, its legislative history, or its application by the California Department of Insurance.

B. The State Lacks Minimum Contacts With The European Insurance Policies And Insurers Regulated By The HVIRA.

The Commissioner cites two facts to show the minimum contacts (or the rational connection) between the State and the transactions and insurers regulated by the HVIRA required by

due process (Resp. Br. 48-50): the presence in the State of insurers "related" to the European insurers that issued Holocaust-era insurance policies and the presence in the State of approximately 5,600 Holocaust survivors (Cal. Ins. Code § 13801(d)). Neither is constitutionally sufficient to provide the State with legislative jurisdiction.

The fortuity that California-licensed insurers may be related to European insurers that issued Holocaust-era policies is, as we described in our opening brief (at 46), merely a subterfuge to allow the State to regulate European insurance policies, which are already subject to regulation by European governments. No decision by this Court has sanctioned that result. Indeed, the argument propounded by the Commissioner knows no logical bounds. New York insurers could be compelled by California to disclose information that must be kept private under New York law. In support of "consumer protection," any California business in any industry could have its affiliates in other states or countries extensively regulated by California law.

As for presence of several thousand Holocaust survivors in the State, we have already demonstrated (Pet. Br. 46) that a post-transaction change of residence is not a sufficient basis for a forum state to impose its law on a foreign transaction and foreign insurer. In this case, the Commissioner relies on the fact that a tiny percentage of the worldwide population of Holocaust survivors moved to California after World War II to provide the State with jurisdiction over *every insurance policy in effect in Nazi-occupied Europe during a 25 year period*. The imposition of California law on those European insurance contracts would clearly frustrate the expectations of the parties to those contracts — the overwhelming majority of whom have no connection to California.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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