No. 02-722, 02-733

IN THE

Supreme Court of the United States

AMERICAN INSURANCE ASSOCIATION *et al.*,
Petitioners,
v.
HARRY LOW, COMMISSIONER OF INSURANCE FOR THE STATE OF CALIFORNIA,
Respondent.

GERLING GLOBAL REINSURANCE CORP. *et al.*,
Petitioners,
v.
HARRY LOW, COMMISSIONER OF INSURANCE FOR THE STATE OF CALIFORNIA,
Respondent.

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

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AND THE ORGANIZATION FOR INTERNATIONAL INVESTMENT FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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November 27, 2002

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AND THE ORGANIZATION FOR INTERNATIONAL INVESTMENT FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2(b) of the Rules of this Court, the Chamber of Commerce of the United States (the "Chamber") and the Organization for International Investment ("OFII") move for leave to file the accompanying brief as *amici curiae* in support of the petitions for writs of certiorari. Counsel for the petitioners have consented to the filing of this brief, but counsel for the respondent has withheld consent.

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

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

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

The Chamber and OFII believe that this petition raises two related issues that are critical to the definition of a state's role in foreign policy and foreign commerce. First, this case provides the Court with an opportunity to resolve important questions about the federal government's exclusive authority over foreign relations—questions left open in *Crosby*. Where the nation's foreign policy is clearly established at the federal level and its implementation by the federal government is ongoing, states may not insert themselves as protagonists on the international stage. *Crosby* unequivocally confirmed this principle in a case where U.S. foreign policy was embodied in an act of Congress, *id.* at 373-74. But *Crosby* did not directly address its applicability in the more common case where foreign policy is set and pursued through diplomatic initiatives undertaken by the Executive.

Second, this case provides the Court with an opportunity to resolve a conflict among the courts of appeal as to whether due process constraints on a state's legislative power prevent it from overreaching in international affairs. As noted, a state's power to act in foreign affairs is limited where such action conflicts with federal powers. But this limitation—on its own—does not fully define the boundaries of state action on the international stage. Under the Constitution, notions of due process also limit the extent to which a state may regulate parties and subject matters that lie beyond its borders. But the courts of appeal are split on the standard that governs these limits on state legislative power.

Chamber and OFII members depend on a stable and predictable framework of international laws and agreements, made possible by United States diplomatic efforts, that allow them to conduct business around the globe. In their view, the decisions below put that framework at risk, by permitting states to legislate beyond their boundaries in a deliberate effort to influence delicate international relations.

The accompanying Chamber and OFII brief offers a broader perspective on the importance of Supreme Court review in this case than that of the petitioners. In their brief, *amici* focus on the consequences of the Ninth Circuit's decisions for U.S. foreign policy-making writ large, as well as for global commerce, whose flows of goods and services depend on networks of corporate relationships that the decision below puts in jeopardy. The Chamber and OFII believe that this perspective is not only relevant but indeed critical to a full appreciation of the need for review by this Court.

For the foregoing reasons, the motion of the Chamber and OFII for leave to file the accompanying brief as *amici curiae* should be granted.

Respectfully submitted,

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

Under cover of the accompanying motion pursuant to Rule 37.2(b) of the Rules of this Court, the Chamber of Commerce of the United States and the Organization for International Investment respectfully submit this brief *amici curiae* in support of Petitioners seeking writs of certiorari to the U.S. Court of Appeals for the Ninth Circuit.[1]

INTERESTS OF THE *AMICI CURIAE*

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

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

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

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Further, no counsel for any Petitioner or Respondent authored this brief in whole or in part.

Amici view the state legislation at issue in this case as a threat to their members' interests in a stable legal environment for business and investment, and as a significant hindrance to the foreign commerce on which their members, and the U.S. economy, depend.

SUMMARY OF THE ARGUMENT

The American Insurance Association *et al.* and Gerling Global Reinsurance Corp. *et al.* have petitioned for writs of certiorari to the U.S. Court of Appeals for the Ninth Circuit on the grounds that that court's decisions in *Gerling Global Reinsurance Corp. of America* v. *Low*, 296 F.3d 832 (9th Cir. 2002) and 240 F.3d 739 (9th Cir. 2001), *cert. withdrawn*, 534 U.S. 1120 (2002), clearly conflict with precedents of this Court and other courts of appeal regarding the exclusive foreign affairs powers of the federal government and the limits on a state's power to regulate beyond its borders. *Amici* agree and urge the Court to grant the petitions.

Amici are gravely concerned that California has enacted legislation that implements its own foreign policy agenda, with serious consequences for foreign commerce and for the nation's foreign policy. Specifically, California has enacted an insurance regulation that has impaired U.S. foreign policy negotiations and that continues to threaten a delicate international settlement. Officials of the U.S. government have confirmed repeatedly that the Holocaust Victim Insurance Relief Act of 1999, Cal. Ins. Code §§ 13800-13807 ("HVIRA")—which requires foreign insurance companies to provide information about foreign insurance policies issued abroad half a century ago, on pain of their California affiliates' exclusion from business in that state—has directly interfered with federal foreign policy promoting a global settlement of Holocaust-era claims. See Petition for a Writ of Certiorari at 8-12, *American Ins. Ass'n* v. *Low*, No. 02-722 (U.S. filed Nov. 7, 2002) ("Pet. 02-722").

This case requires the Court's intervention on two important federal questions. First, this case squarely presents a substantial and important question left unresolved in the Court's recent decision in *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363 (2000). There can be no doubt that a federal statute or treaty preempts a state statute on the same subject. See *id.* at 373-74. Yet, in the field of foreign affairs, where Congress rarely speaks directly and the President often acts through international negotiations and executive agreements, a question remains: is national foreign policy the exclusive province of the federal government even in those instances where that foreign policy is not embodied in a statute or treaty?

Second, this case presents an important question concerning the scope of a state's legislative power: to what extent may a state legislature seek to regulate parties or subject matters that lie beyond that state's territory or, as here, lie outside the United States? Statutes like HVIRA threaten cross-border corporate relationships by using U.S. corporate affiliations as a pressure point to extend a state's regulatory reach far beyond its borders, offering foreign and out-of-state businesses a lose-lose choice between, on the one hand, isolation and loss of competitiveness, and, on the other, affiliations that potentially subject them to the regulatory power of every one of our fifty state legislatures. Two courts of appeal have reached opposite answers to this question.

ARGUMENT

HVIRA INTERFERES WITH FOREIGN POLICY AND DISRUPTS FOREIGN COMMERCE.

Resolution of this case will answer two important federal questions: First, in those instances where national foreign policy is not embodied in a statute or treaty, is a state statute that interferes with that foreign policy prohibited, just as surely as if Congress had acted? Second, to what extent may a state seek to regulate parties or subject matters that lie beyond its borders or, as here, lie beyond the borders of the United States?

In this case, the federal government has acted not through statute or treaty, but through the negotiation and formation by executive agreement of two international organizations to resolve Holocaust-era insurance claims: the Remembrance, Responsibility, and the Future Foundation ("Foundation") and the International Commission on Holocaust Era Insurance Claims ("ICHEIC"). The United States also negotiated the Swiss-U.S. Joint Agreement with an "Action Plan" for future settlement. These federal foreign policy initiatives—and the United States' relations with Germany and Switzerland—are threatened by California's interference. Likewise, California's actions pose serious and immediate risks to U.S. and foreign companies and to foreign commerce itself.

In this brief, *amici* wish to focus particular attention on the diplomatic, business, and economic implications of allowing HVIRA to stand.

A. Impact On The Conduct Of Foreign Affairs

Statutes like HVIRA have a corrosive effect on the conduct of foreign relations. United States diplomats and foreign policymakers will find that their ability to calibrate the mix of carrots and sticks at the international bargaining table has been abrogated by state action. National concerns will remain unresolved and the effects of such state actions will be felt far beyond the state's borders.

California deliberately chose to insert itself into delicate, U.S.-led international negotiations. The statute has the stated aim of "encourag[ing] the development of a resolution to these issues through the international process *or through direct action by the State of California, as necessary.*" Cal. Ins. Code § 13801(f) (emphasis added). The very purpose of the statute is to make California's considerable weight felt directly in the international negotiating arena, and in the implementation process that has since followed. Foreign governments and businesses would disregard California at their peril; its economy produces enough goods and services to be ranked among the top ten economies of the world.

California has ignored HVIRA's debilitating effects on the United States' international initiatives. As early as November 1999, then-Deputy Treasury Secretary Stuart Eizenstat wrote directly to California Governor Gray Davis and then-Insurance Commissioner Quackenbush stating that "actions by California, pursuant to this law, have already potentially damaged and could de[r]ail both a settlement of forced and slave labor negotiations and the progress already achieved by the International Commission on Holocaust Era Insurance Claims."[2] The United States has maintained the position ever since, in public statements and in this litigation, that HVIRA is hindering the nation's foreign policy interests.

By ignoring these pleas and imposing HVIRA's extensive regulatory burdens, California weakened U.S. diplomatic leverage in securing the international agreements settling the insurance claims. In reaching the international settlements, the U.S. emphasized its commitment to help obtain "legal peace" for foreign companies, stating that "it is in the enduring and high interest of the United States to support efforts to achieve dismissal of all National Socialist and World War II era cases against German companies."[3] When the United States and Germany signed the Foundation Agreement in July 2000, some insurance and other companies

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[2] Letter from Eizenstat, Deputy Treasury Secretary, to Davis, Governor (Nov. 30, 1999), *reproduced at* Pet. 02-722 app. 124a.

[3] Agreement Between the Government of the United States of America and the Government of the Federal Republic of Germany Concerning the Foundation "Remembrance, Responsibility and the Future," July 17, 2000, Annex B (Elements of U.S. Government Statement of Interest), 39 I.L.M. 1298, 1303-04.

funding the Foundation initially were hesitant to fulfill their large monetary obligations in light of the threats to legal peace from laws such as HVIRA and the suits that they spawn.[4] Those threats undermine the very goal of the executive agreements—the settlement of long overdue claims in a single, orderly international process.

HVIRA weakens national foreign policy, compromises the government's ability to conduct international negotiations, and makes it virtually impossible for the United States to fulfill its promises once international agreements are completed. By shouting down the federal government's single voice within the international community, HVIRA has caused more than just difficulty and embarrassment for the U.S. government abroad. HVIRA has threatened a global settlement that would benefit thousands of victims outside of California, for whom the global settlement is likely to be the only remedy.

This Court recently confirmed that federal legislation on foreign affairs preempts state legislation in the same area. *Crosby*, 530 U.S. at 373-74. But state interference with foreign affairs is not immunized simply because a federal foreign policy has not been formally codified by Congress.

The Constitution entrusts the nation's diplomatic and foreign economic relations exclusively to Congress and the President because, as national foreign policymakers, they are in a unique position to take into account all of the measures needed to advance the nation's interests as a whole. The absence of a federal statute or treaty does not imply the absence of a federal foreign policy, or the myriad calculations that go into formulating the nation's foreign policy. Rather, international agreements and negotiations are evidence that national foreign policymakers are carefully balancing the nation's competing interests, as surely as if a federal statute

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

were enacted or a treaty signed. State statutes that interfere with national foreign policy upset this balance, potentially frustrating diplomatic efforts to settle the issue at hand.

Moreover, this Court has been clear that foreign policy is by no means the exclusive province of the legislature: "'the President … possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs.'" *Barclays Bank PLC* v. *Franchise Tax Bd.*, 512 U.S. 298, 329 (1994). As this Court noted in *Zschernig* v. *Miller*, 389 U.S. 429 (1968), "even in absence of a treaty, a State's policy may disturb foreign relations." *Id.* at 441. Under international law, an executive agreement invokes the international responsibility of the United States to the same degree as a treaty. Internationally binding executive agreements like those concluded by the United States with Germany and Switzerland deserve and require the same shield from state-level intrusions that treaties and statutes enjoy.

Zschernig remains the law of the land, and neatly articulates the need for plenary federal authority over foreign affairs. The Ninth Circuit's denigration of the *Zschernig* decision because of its age does nothing to undermine that holding's binding force.[5] And though this Court's decision in *Crosby* did not directly reach the federal foreign affairs or foreign commerce powers, it neither criticized nor called into question the First Circuit's holding on either ground in *National Foreign Trade Council* v. *Natsios*, 181 F.3d 38 (1st

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[5] Courts routinely apply *Zschernig* to determine whether a state law impermissibly intrudes on the federal government's foreign affairs power. *See Miami Light Project* v. *Miami-Dade County*, 97 F. Supp. 2d 1174, 1178-79 (S.D. Fla. 2000) (invoking *Zschernig*, and finding Miami-Dade Resolution unconstitutional on preemption grounds). *Cf. North Am. Salt Co.* v. *Ohio Dep't of Transp.*, 701 N.E.2d 454, 462 (Ohio Ct. App. 1997) (applying *Zschernig* analysis); *Mukaddam* v. *Permanent Mission of Saudi Arabia to the United Nations*, 111 F. Supp. 2d 457, 472-73 (S.D.N.Y. 2000) (same).

Cir. 1999).[6] These decisions emphasize the well-founded concern that individual state actions will disrupt federal foreign policy.

This concern is not new—it extends back to the founding of this nation. Alexander Hamilton, in warning of the dangers of individual state foreign policies, identified the same dynamic: "[T]he peace of the WHOLE ought not to be left at the disposal of a PART. The Union will undoubtedly be answerable to foreign powers for the conduct of its members."[7] This is just the type of case that spurred Hamilton's concern. Today's rapid pace of globalization only makes those concerns more pressing. As the First Circuit noted, "in an increasingly interdependent and multilateral world, [the] affirmation of the foreign affairs power of the national government may be all the more significant." *Natsios*, 181 F.3d at 58 n.14.

Where, as here, state action conflicts with the express policy of the federal government, as evidenced by formal international negotiations and even signed executive agreements, that state law must be struck down just as if it were in conflict with a federal statute. Any other result would expose the foreign relations of this nation to the prospect of repeated and destructive intrusions by state initiatives unless Congress has acted—a construction for which there is no justification in the area of foreign affairs. The Court should

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[6] The Ninth Circuit's decision conflicts with the First Circuit's holdings in *Natsios.* Although this Court affirmed the First Circuit's decision on preemption grounds alone, it did not disturb the First Circuit's holding that the Massachusetts procurement law unconstitutionally interfered with the federal government's foreign affairs and foreign commerce powers. Within the First Circuit, then, a state law interfering with foreign policy and regulating commerce in foreign countries violates the federal government's exclusive power over foreign affairs; in the Ninth Circuit, apparently, it does not.

[7] *The Federalist No. 80*, at 535-36 (A. Hamilton) (J. Cooke ed. 1961) (emphasis in original).

hear this case in order to clarify this point, which it left unarticulated in *Crosby*.

The Court should also hear this case in order to resolve a conflict between courts of appeal with regard to states' power to interfere in foreign affairs through the regulation of foreign parties and foreign transactions. The Constitution's framework ensures federal control over the conduct of foreign affairs not only through its exclusive grant of foreign policy-making authority to the federal government, but also through the independent limitations that it sets on state regulatory power. The Due Process Clause requires that the extent of a state's regulatory authority must coincide with—and must not exceed—the extent of that state's legitimate interests. A state does not have the power to regulate a foreign (or domestic) subject if that subject does not have at least "minimum contacts" with the state.[8] Such baseline limitations on a state's legislative power help to prevent state interference in foreign affairs and foreign commerce.

In an international business environment characterized by complex business affiliations that often cross state and

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[8] The Eleventh and the Fourth Circuits recently confirmed that the extent of a state's legislative jurisdiction is determined largely by a "minimum contacts" analysis that is similar to the analysis in personal jurisdiction and choice-of-law questions. *See Gerling Global Reins. Corp. of Am.* v. *Gallagher*, 267 F.3d 1228, 1235 (11th Cir. 2001) ("To determine legislative jurisdiction … we look to choice-of-law and personal jurisdiction analyses…. Applying these standards to the question before us now, we ask whether sufficient contacts exist between the Plaintiffs and the County … such that it would not be fundamentally unfair to subject the Plaintiffs to the County's registration requirements."). *See also American Charities for Reasonable Fundraising Regulation, Inc.* v. *Pinellas County*, 221 F.3d 1211, 1216 (11th Cir. 2000); *Adventure Communications, Inc.* v. *Kentucky Registry of Election Fin.*, 191 F.3d 429, 435-37 (4th Cir. 1999). The Ninth Circuit's decision below diverged from the "minimum contacts" approach taken by the Eleventh and the Fourth Circuits, both in its articulation of the relevant legal standard and in its application of this standard to the facts.

national boundaries, it becomes especially important to respect those limitations. To permit state regulatory power to extend across vast networks of foreign companies in foreign countries—merely because a single network affiliate does business in California—ultimately threatens federal control over foreign affairs and foreign commerce. Yet the Ninth Circuit decision endorses exactly this result. On the other hand, the Eleventh Circuit, considering a Florida statute nearly identical to HVIRA last year, rejected that result on the grounds that it would amount to the exercise of legislative power by a U.S. state over "insurance transactions involving Plaintiffs' German affiliates that took place years ago in Germany, among German residents, under German law, relating to persons, property, and events in Germany." *Gerling Global Reins. Corp. of Am.* v. *Gallagher*, 267 F.3d 1228, 1238 (11th Cir. 2001). This Court's review is needed to reconcile this conflict between the Ninth and Eleventh Circuits, and to define the limits of state legislative authority.

B. Impact On Companies And Foreign Commerce

HVIRA's impact is not limited to the foreign policy arena. At a very practical level, California has jeopardized U.S. and foreign companies, as well as the interstate and foreign commerce in which they engage.

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

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

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

HVIRA creates equally serious difficulties for foreign insurers. California's act requires foreign insurance companies to compile the same massive reports even if the company's only connection to California is through an affiliate or subsidiary. Put another way, it requires action by foreign insurance companies, over whom California has no jurisdiction, in connection with business transacted outside California as many as 80 years ago with persons having no nexus to California, on pain of regulatory harm to "related" California insurers. These foreign insurance companies never "purposefully availed" themselves of the California legal system and certainly could not have foreseen that their past activities in Europe might subject them to the authority of the

California legislature.[9] In addition, HVIRA ignores privacy laws that bind these foreign insurers in their own countries. It thereby forces these foreign companies to choose between violating their own domestic privacy laws or sacrificing an affiliate's business in California. To subject these foreign companies to California's legislative authority—solely due to an "abstract, indirect, and unaimed level of involvement" in the state, *American Charities for Reasonable Fundraising Regulation, Inc.* v. *Pinellas County*, 221 F.3d 1211, 1217 (11th Cir. 2000)—is fundamentally unfair and conflicts with the jurisprudence in other courts of appeal.

Enforcement of HVIRA would disrupt not only the affairs of individual companies, but also foreign commerce generally in several ways. Most directly, its enforcement would impose serious economic consequences on the insurance industry, the effects of which would be felt well beyond California's borders. More broadly, it threatens to destabilize the international business partnerships that have become a key mechanism for modern foreign commerce. HVIRA uses U.S. affiliates of foreign companies as a pressure point for regulating conduct far beyond its borders or its jurisdictional authority. That approach is impermissible under both the Commerce Clause and the Due Process Clause of the Constitution, and it is particularly troublesome in a globalizing economy.

The widespread suspension of certificates that HVIRA promises would generate uncertainty and confusion among policyholders, many of whom would be left scrambling for new coverage. The consequences of suspending the certificates would not be limited to California. The disruption of insurance coverage in the state would radiate outward, as

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[9] *See, e.g.*, *American Charities*, 221 F.3d at 1216 ("the regulated party must have performed some act by which it purposefully avails itself of the privilege of conducting activities within the [relevant jurisdiction]") (internal quotation marks omitted).

businesses and individuals in other states and countries react. Insurance companies suffering losses in one state might be forced to increase premiums elsewhere, affecting not only insured individuals but insured companies as well. A California import-export company insured by an affected insurance company, for example, might be forced to restrict its operations, affecting suppliers and customers in other states and countries. Furthermore, due to the accelerating pace of mergers and consolidations in the financial services industry, the disruption will extend even farther than it would have a few years ago.

These consequences are exacerbated by the proliferation of similar statutes. If HVIRA's extraterritorial reach is not reined in, it is likely that other states will continue to follow suit—potentially multiplying HVIRA's impact on foreign commerce tens of times over.[10] And if the HVIRA model stands, states may choose to adapt it to any number of other politically popular issues that tempt them to engage in regulation beyond their borders.

Even more disturbing than the immediate economic consequences of overreaching statutes like HVIRA is their effect on multinational corporate affiliations, an indispensable mechanism in foreign commerce. By seeking to regulate matters outside the state, HVIRA injects uncertainty into existing relationships between foreign and U.S. companies. State laws that try to control commerce overseas through regulation of local affiliates jeopardize the ability of U.S. companies to form critical international alliances, since potential foreign partners will legitimately fear being subjected to heavy reporting requirements and regulatory

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

scrutiny by U.S. states in which they do no business. For foreign companies, laws like HVIRA present the very real possibility that their U.S. affiliates will become unwilling conduits for intrusive state regulations. Foreign companies considering joint ventures with or acquisitions of U.S. companies may reconsider if individual U.S. states are free to reach across their borders—indeed across national borders—and regulate the affairs of foreign companies through their U.S. partners.

State foreign policy regulations can also have the effect of undermining U.S. competitiveness as a result of the desire of individual states to regulate corporate conduct abroad. There is a danger that foreign countries will retaliate against U.S. companies generally for the actions of a few individual states. This Court has recognized the danger of foreign countries retaliating against "the Nation as a whole" for the actions of individual U.S. states. *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 450 (1979). This risk of retaliation is borne by companies and individuals throughout the United States, most of which will lack access to the local California political process that initiated the dispute and without the political means to ameliorate the conflict. Out-of-state concerns and complaints typically fall on deaf ears, as California political actors have no incentive to pay heed to those who are not constituents. Yet California's deafness to national and international concerns puts companies nationwide at risk of retaliation.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully ask this Court to grant the petitions for writs of certiorari to the United States Court of Appeals for the Ninth Circuit.

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