No. 00-

In the Supreme Court of the United States

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

Petitioners,

v.

HARRY LOW, IN HIS CAPACITY AS COMMISSIONER OF INSURANCE FOR THE STATE OF CALIFORNIA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit erred in refusing to apply the foreign affairs doctrine of *Zschernig* v. *Miller*, 389 U.S. 429 (1968), to a California law directed at the foreign activities of European insurance companies, which has been declared by the federal government to be "in direct conflict" with "United States foreign policy" and which has generated strong protests from affected foreign nations.

2. Whether the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, authorizes California to regulate overseas activities of insurance companies having no connection with the State.

LIST OF PARTIES AND RULE 29.6 STATEMENT

The petitioners are: American Insurance Association ("AIA"), American Re-Insurance Company, 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, Constitution 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, Republic Insurance Company, and Assicurazioni Generali S.p.A. The respondent, Harry Low, is the Commissioner of Insurance for the State of California.

AIA has no parent company, and no publicly held company owns stock in AIA.

American Re-Insurance Company is a wholly owned subsidiary of American Re Corporation, which in turn is wholly owned by Muenchener Rueckversicherungs-Gesellschaft Aktiengesellschaft.

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 identify the following parent corporations and all publicly traded companies that own ten percent or more of their stock:

Gerling-Konzern Allgemeine Versicherungs AG;

Deutsche Bank;

Gerling-Konzern Versicherungs-Beteiligungs-AG;

Gerling-Konzern Globale Ruckversicherungs AG; and

Gerling Global U.S. Investments, Inc.

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, and Blue Ridge Insurance Company ("the Winterthur Petitioners") state that the following companies are parents or publicly held companies that own ten percent or more of each of the Winterthur Petitioners' stock:

> Winterthur U.S. Holdings, Inc (parent of the Winterthur Petitioners and owner of more than ten percent of the Winterthur Petitioners' stock);
>
> Winterthur Swiss Insurance Group (parent); and
>
> Credit Suisse Group (parent).

Republic Insurance Company states that the following companies are parents or publicly held companies that own ten percent or more of its stock: Columbia Insurance Company (parent and owner of more than ten percent of stock) and Berkshire Hathaway (parent).

Assicurazioni Generali S.p.A. is an Italian corporation. It has no parent corporation and no publicly held company owns ten percent or more of its stock.

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-27a) is reported at 240 F.3d 739. The opinion of the district court (*id.* at 28a-56a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on February 7, 2001. The court of appeals denied rehearing on March 29, 2001. App., *infra*, 57a-59a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

The United States has been engaged in lengthy international negotiations to achieve a comprehensive resolution of Holocaust-era insurance claims. The premise of the negotiations is that all such claims should be resolved under the terms of international agreements. In return, the federal government has committed to assist insurers in obtaining legal peace in this country, including protection against state regulatory action.

Dissatisfied with U.S. diplomatic efforts, California enacted the Holocaust Victim Insurance Relief Act of 1999 ("the HVIRA"), Cal. Ins. Code §§ 13800-13807 (App., *infra*, 60a-67a). The purpose of the HVIRA is to extract decades-old records from foreign insurance companies for use in litigation in California. The HVIRA achieves this goal by revoking the license of any California insurer that does not provide extensive information regarding each insurance policy issued by any European corporate relative in Nazi-occupied Europe between 1920 and 1945 — even if the California and European insurers only recently became related and the European insurer has never had any connection at all to California. Other legislation creates a cause of action for Holocaust-era insurance claims and waives the applicable limitations period.

Thus, under the HVIRA, California has sought to require action by European insurers on policies that were written in Europe, under European laws, and sold to Europeans as long as 80 years ago. If European insurers do not comply with the HVIRA, California insurers to which they are now related will lose their licenses to do business. The regulatory burden of the HVIRA on European insurers is staggering. They must produce voluminous information, whether or not its production violates foreign law, or their California affiliates will be expelled from the State.

The United States complained immediately to Governor Davis and the State Insurance Commissioner about the severe impairment of U.S. foreign policy worked by the HVIRA. Thereafter, this lawsuit was filed to challenge the conflict between the California statute and the federal government's international negotiating position.

The district court preliminarily enjoined enforcement of the California law, on the ground that it inflicts irreparable injury on petitioners and likely violates both the Foreign Commerce Clause and the federal government's exclusive authority over foreign affairs. Despite the filing of *amicus* briefs urging affirmance by the United States and the German government, the Ninth Circuit rejected the district court's analysis. Without even mentioning these submissions, the court of appeals held that the HVIRA does not violate the Commerce Clause or the federal government's foreign affairs power.

This holding not only conflicts with decisions of this Court and other courts of appeals, but also undermines important U.S. foreign policy initiatives, including an Executive Agreement between Germany and the United States on Holocaust-era claims. In a statement issued on June 12, 2001, the German government noted that

> [t]he German-American Executive Agreement of July 17, 2000, provides for, among other things, administrative and legislative legal peace for German companies in the United

> States. State-law initiatives obligating German insurers, under threat of withdrawal of their licenses, to publish all insurance policies arising from the period of National Socialism are not in conformity with that agreement, in the opinion of the German Government.

App., *infra*, 115a. The HVIRA thus stands as an obstacle to effectuation of this important international agreement.

A. United States Foreign Policy On Holocaust-Era Claims.

The United States government "has been actively involved in compensating Holocaust victims since the end of World War II." App., *infra*, 40a. The "issue of confiscated life insurance policies was first addressed in Restitution Orders * * * issued by the Allied Control Counsel in 1949 for the three western occupation zones." ER 1743.[1]

Consistent with its longstanding involvement in Holocaust issues, Congress enacted the U.S. Holocaust Assets Commission Act of 1998, Pub. L. 105-186, 112 Stat. 611, establishing a Commission to examine the disposition of Holocaust-era assets in the United States (including unpaid insurance policies). Reflecting the federal government's strong interest in these matters, the Act calls for the President to consider the need for appropriate "legislative, administrative, or other action" at the federal level. *Id*. at 614.

1. Negotiations on the German Foundation.

The United States has now undertaken the last major multilateral negotiation with Germany "to bring some measure of justice" to "Holocaust survivors and other victims of World War II." App., *infra*, 71a-72a. President Clinton and Chancellor Schroeder negotiated the creation of the "Foundation, 'Remembrance, Responsibility and the Future,'" funded by the German

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[1] Citations to "ER" and "SER" refer to the Excerpts of Record and Supplemental Excerpts of Record in the court of appeals.

government and German corporations to resolve the claims of those "who suffered at the hands of German banks, insurance companies, and other German companies." ER 1748-1749. In return for creation of a 10 billion Deutsche mark ($5 billion) Foundation to pay Holocaust claims, the President pledged to take "unprecedented steps" on behalf of the United States — including the filing of statements of interest in litigation in U.S. courts against German companies over Holocaust claims — to ensure that "the Foundation should be regarded as the exclusive remedy for all claims against German companies," including insurance claims. *Ibid*.

Deputy Secretary of the Treasury Stuart Eizenstat, the principal U.S. representative in negotiations on the German Foundation, explained that the "crucial element" in convincing German companies to participate in the Foundation was the assurance "that they not pay twice, once into this foundation and a second time into U.S. courts." ER 1872-1881. Secretary of State Madeleine Albright observed that (ER 1750-1752)

> [t]he United States is agreeing to assist in providing legal peace to German companies, both in our courts and from state and local action. * * * Chancellor Schroeder and the German companies took the lead in proposing the Foundation as an alternative to endless litigation that would have drained everyone and satisfied no one.

Deputy Secretary Eizenstat declared that the parties (ER 1891)

> have reached agreement on legal closure. In the context of a comprehensive German Foundation, in all cases * * * brought against German companies for claims arising out of the Nazi-era, we are prepared to say that the German Foundation should be regarded as the exclusive remedy.

Of the 10 billion Deutsche marks in the Foundation, "[o]ne billion will go to property claims and insurance claims, as well as property and insurance humanitarian funds." ER 2272.

2. Executive Agreement on the German Foundation.

In July 2000, the United States and Germany signed an Executive Agreement on the Foundation, in which the United States agreed to seek legal closure for German companies. In Article 1, the parties agree that the Foundation is "the exclusive remedy and forum for the resolution of all claims that have been or may be asserted against German companies arising from the National Socialist era and World War II." App., *infra*, 100a. Article 2 imposes two duties on the United States government: (1) to "inform its courts through a Statement of Interest * * * that it would be in the foreign policy interests of the United States for the Foundation to be the exclusive remedy and forum for resolving [Holocaust-era] claims asserted against German companies"; and (2) to "use its best efforts" "with state and local governments" to achieve "all-embracing and enduring legal peace" for German companies. *Id*. at 101a. Finally, the Agreement mandates that insurance claims that come within the scope of the current claims handling procedures adopted by the International Commission on Holocaust Era Insurance Claims ("ICHEIC") "shall be processed * * * on the basis of such procedures and on the basis of additional claims handling procedures that may be agreed among the Foundation, ICHEIC, and the German Insurance Association." *Ibid*.

ICHEIC was established in October 1998 to investigate and resolve Holocaust-era insurance claims. Deputy Secretary Eizenstat testified before the House Banking Committee in February 2000 that the "U.S. Government has supported [ICHEIC] since it began, and we believe it should be considered the exclusive remedy for resolving insurance claims from the World War II era." ER 1905.

President Bush and the German Chancellor have recently reaffirmed their commitment to the Executive Agreement and its goal of "all embracing and enduring legal peace." App. *infra*, 121a.

3. Other Foreign Commissions and Foundations.

Other European nations have agreed to cooperate with ICHEIC and to facilitate commissions and foundations in their own countries. European insurance companies have worked with commissions in France, Belgium, the Netherlands, and Italy, among others. ER 1623, 1908.

In January 2000, the United States and Switzerland issued a Joint Statement addressing the issue of unpaid Holocaust-era insurance policies. SER 619-630. The United States again identified ICHEIC as the "appropriate forum for resolving Holocaust-related issues." SER 622-623. Switzerland and the United States condemned as "potentially disruptive and counterproductive * * * investigative initiatives" like the reporting scheme mandated by the California HVIRA. SER 623. The governments agreed that the United States would "call on the U.S. State Insurance Commissioners and State legislative bodies to refrain from taking unwarranted investigative initiatives or from threatening or actually using sanctions against Swiss insurers." SER 627-628.

Referring to these international initiatives, Deputy Secretary Eizenstat remarked that U.S. policy (ER 2271)

> on Holocaust issues * * * serves important U.S. foreign policy interests, such as maintaining close relations with Germany, a partner of ours in promoting and defending democracy for the last fifty years and a nation that is vital to both the security and economic development of Europe and, with Switzerland, a major trading partner.

B. California's Conflicting Regulation Of Holocaust-Era Insurance Policies.

1. The HVIRA.

In the midst of these wide-ranging diplomatic efforts, California interposed the HVIRA. The statute requires the California Insurance Commissioner to establish a "Holocaust

Era Insurance Registry" to contain "records and information" on all "life, property, liability, health, annuities, dowry, educational, or casualty" insurance policies "in effect between 1920 and 1945" that were sold by a California "insurer," either "directly or through a related company," to persons in Nazi-occupied Europe. *Id*. §§ 13803-13804.

The HVIRA provides that each "insurer currently doing business in the state" that sold Holocaust-era policies directly to individuals, or that is "related" to a company that sold Holocaust-era policies, must file detailed reports with the Insurance Commissioner specifying:

(1) the number of Holocaust-era policies the insurer or its related company issued;

(2) the names of the holders and beneficiaries on *each* of those policies, and the "current status" of those policies; and

(3) the "city of origin, domicile, or address" for *each* policyholder listed in those policies.

See *id*. § 13804(a). The HVIRA further requires that, for *each* Holocaust-era policy, the insurer must state, under the threat of criminal penalty (*id*. § 13804(b)), whether the policy has been paid, whether diligence has been used to identify beneficiaries, and whether unclaimed funds have been distributed to charitable organizations. App., *infra*, 64a-66a.

Through an expansive definition of "related company," the HVIRA extends these reporting requirements not only to direct (*i.e.*, European) issuers of Holocaust-era policies that are currently doing business in California, but also to California insurers that never issued any policies in Nazi-occupied Europe but that have a corporate "parent, subsidiary, reinsurer, successor in interest, managing general agent, or affiliate" that did. *Id*. § 13802(b). The Act also requires insurers to file reports not only on policies that were held by "Holocaust victim[s]" — defined as any "person who was persecuted during the period

1929 to 1945, inclusive, by Nazi Germany, its allies, or sympathizers," *id*. § 13802(a) — but also on *all* policies held by *all* persons in Europe between 1920 and 1945. *Id*. § 13804(a). Finally, the Act provides that any failure to comply with its requirements by May 7, 2000 obligates the Commissioner to "suspend" the insurer's "certificate of authority to conduct insurance business in the state." *Id*. § 13806.

2. Revival of Holocaust-Era Claims Against European Insurers in California.

The HVIRA is a critical part of a comprehensive California Holocaust compensation program. One of the goals of the program is to enable Holocaust victims and their heirs to file lawsuits in California under California law to compel payment of Holocaust-era insurance claims that arose outside the State.

Passed in the same bill as the HVIRA was an amendment to California Code of Civil Procedure § 354.5 that purports to revive Holocaust-era insurance claims and to provide a California forum in which to litigate such claims. Any action by a Holocaust victim (or beneficiary) seeking proceeds of insurance policies issued or in effect before 1945 "shall not be dismissed for failure to comply with the applicable statute of limitation, provided the action is commenced on or before December 31, 2010." *Id*. § 354.5(c). The ordinary limitations period is waived regardless of whether the plaintiff is a California resident.

Moreover, the legislation circumvents otherwise applicable jurisdictional limits by authorizing suit against an entity other than the issuer of a Holocaust-era policy. Any insurer doing business in California may be held liable for a Holocaust-era policy issued by any of its "related compan[ies]" — whether or not the California company exercises any control over that company. *Id*. § 354.5(a)(3). It is not even necessary for the companies to have been related at the time the policy was issued, so long as they are related at the time of suit. *Ibid*. Under this statutory scheme, a California insurer that was established in 1999 would be forced to pay a civil claim arising

from a 1921 insurance policy, so long as the European entity that issued the policy was, at the time of suit, a corporate "parent, subsidiary, reinsurer, successor in interest, managing general agent, or affiliate" of the California insurer. *Id*. § 354.5(a)(2).

C. Complaints By U.S. Officials That The HVIRA Conflicts With U.S. Foreign Policy.

Shortly after the California statute was enacted, Deputy Secretary Eizenstat wrote separate letters to Governor Davis and then-Commissioner Quackenbush complaining of the serious disruption of U.S. foreign policy caused by the HVIRA.

Deputy Secretary Eizenstat warned the Governor that the HVIRA "ha[s] already potentially damaged and could derail [German Foundation] negotiations and the progress already achieved by [ICHEIC]," because, "for th[e German Foundation] deal to work[,] * * * German industry and the German government need to be assured that they will get 'legal peace,' not just from class-action lawsuits, but from the kind of legislation represented by the California [Holocaust] Victim Insurance Relief Act." App., *infra*, 69a.

In a similar letter to the Commissioner, Deputy Secretary Eizenstat criticized the HVIRA because "it has the unfortunate effect of damaging the one effective means now at hand to process quickly and completely unpaid insurance claims from the Holocaust period, [ICHEIC], in which you yourself have been so engaged." ER 1973-1974. He echoed these sentiments in his letter to the Governor (*id*. at 1974), stating that actions by California that "threaten or result in sanctions against German insurers could complicate my ability to resolve the other claims against German companies for the benefit of Holocaust survivors."

In April 2000, Deputy Secretary Eizenstat explained to the Senate Foreign Relations Committee that the Commissioner's

actions threatened to undermine the progress of ICHEIC in resolving Holocaust-era claims (ER 2277):

> I recently wrote to the state insurance commissioners in Washington State and California, emphasizing my strong support for the international efforts to create a claims settlement process * * * and stressing that, in their legitimate concern for Holocaust survivors, proposed actions in these states could undermine the work of the ICHEIC.

Deputy Secretary Eizenstat underscored that the federal government's support of ICHEIC was "link[ed]" in important ways to the Nation's general "policy on Holocaust issues," which, in turn, furthers "important U.S. foreign policy interests" across Europe. ER 2271, 2276.

D. Proceedings in the District Court.

Despite the federal government's pleas for non-interference, the California Insurance Commissioner announced a policy of immediate and rigorous enforcement of the HVIRA. ER 1982-1989. He subpoenaed a number of insurers to testify at hearings as to their readiness to comply with the statute. The Commissioner told the companies either to comply or to "leave the State." ER 1986-1988. The Commissioner also offered his judgment that the international process for claims resolution "has not succeeded to this date, and California can't wait around any longer. It is your choice now whether you're going to work with this Department of Insurance to bring your company in full compliance, whether you're going to leave the state voluntarily, or whether I'm going to kick you out. That's your three choices." ER 1989.

Disclosure of all of the information required by the HVIRA would violate European privacy laws and subject insurers to criminal and civil penalties. See ER 1123-1126. Accordingly, petitioners were forced to file suit to challenge the constitutionality of the HVIRA. App., *infra*, 29a. The district court granted preliminary injunctive relief, determining that petitioners "ha[d]

shown a probability of success on the merits of their claim[s] and ha[d] shown that irreparable harm will occur if the court does not enjoin enforcement of the HVIRA." *Id.* at 56a.

In an extensive opinion relying on decisions of this Court, the district court held that the HVIRA was likely to be facially unconstitutional on two grounds. First, the statute "intrude[s] into 'matters which the Constitution entrusts solely to the Federal Government.'" App., *infra*, 46a (quoting *Zschernig* v. *Miller*, 389 U.S. 429, 436 (1968)). Observing that "'[p]ower over external affairs is not shared by the States'" (quoting *United States* v. *Pink*, 315 U.S. 203, 233 (1942)), the district court held that the HVIRA's attempt to "[e]ncourag[e] resolution" of the problem of unpaid Holocaust insurance policies interferes with a power "vested in the national government exclusively." App., *infra*, 45a. Second, the HVIRA violates the Foreign Commerce Clause because it "potentially prevents the federal government from speaking with one voice in its expectations of foreign insurance companies" and impermissibly "meddl[es] in foreign commerce entirely outside its borders." *Id*. at 51a-53a.

E. Proceedings in the Ninth Circuit.

The United States filed an *amicus* brief in the Ninth Circuit in opposition to the Commissioner's appeal, stating that the HVIRA "impairs the ability of the United States to conduct the nation's foreign policy," in violation of the Constitution's foreign affairs power. U.S. *Amicus* Br. 33-34.[2] The government explained that "both Germany and Switzerland have protested to the State Department California's attempt to regulate the conduct of German and Swiss insurers with respect to insurance policies written in those countries." *Ibid*. It also noted serious

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[2] The United States submitted *amicus* briefs to the panel ("U.S. *Amicus* Br.") and in support of the petition for rehearing *en banc* ("U.S. *En Banc Amicus* Br."). The German government also filed two briefs in the court of appeals ("FRG *Amicus* Br." and "FRG *En Banc Amicus* Br."), and the Swiss government filed a brief in support of the petition for rehearing *en banc*.

doubt as to the HVIRA's validity under the Commerce Clause given its extraterritorial and discriminatory effects and its impairment of the United States' ability to speak with "one voice" in foreign affairs. The government concluded that "the McCarran Ferguson Act does not shield extraterritorial regulation," especially "where the State law has a discriminatory * * * effect in foreign countries." *Id*. at 30.

The Ninth Circuit rejected these arguments, without so much as mentioning that the United States (and Germany) had filed *amicus* briefs condemning the HVIRA. The court of appeals held as a matter of law that the McCarran-Ferguson Act shields the HVIRA because it "is a California insurance regulation of California insurance companies that affects foreign commerce only indirectly." App., *infra*, 12a. As for the "one voice" prong of the Commerce Clause, the court of appeals purported to find congressional approval of the HVIRA in the U.S. Holocaust Assets Commission Act of 1998 (App., *infra*, 14a-17a). The court of appeals then engaged in its own analysis of U.S. foreign policy, including the agreements with Germany and Switzerland. Dismissing these as mere "executive branch initiatives," the court found no conflict with the HVIRA (*id*. at 18a-22a). Finally, the Ninth Circuit rejected the foreign affairs power claim, holding that this Court's decision in *Zschernig* "has been applied * * * sparingly" and "does not govern" (*id*. at 22a-26a). The court remanded the case for consideration of petitioners' due process claim, while leaving the injunction temporarily in place (*id.* at 26a-27a).

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision is a final ruling as a matter of law on petitioners' foreign affairs power and Commerce Clause claims, with drastic and immediate practical consequences. First, the decision has undermined the U.S. government's ongoing international negotiations on Holocaust-era insurance issues, which are premised on "legal peace" from state statutes such as the HVIRA. Second, the decision conflicts with the

means selected by the United States and its allies to provide compensation for elderly Holocaust survivors. Third, by refusing to follow *Zschernig*, the decision has diminished the President's authority to direct the Nation's foreign affairs. Finally, by misapplying the McCarran-Ferguson Act, the decision has expanded the scope of state insurance regulation to allow disruptive intermeddling in interstate and foreign commerce. Review by this Court is plainly warranted.

I. THE COURT OF APPEALS' REFUSAL TO APPLY *ZSCHERNIG* V. *MILLER* TO A CALIFORNIA STATUTE THAT IS "IN DIRECT CONFLICT" WITH "UNITED STATES FOREIGN POLICY" WARRANTS REVIEW BY THIS COURT.

The United States' bilateral agreements with Germany and Switzerland represent the culmination of more than 50 years of diplomatic efforts to obtain compensation for victims of the Holocaust. The agreements are designed to resolve — once and for all — claims arising out of Nazi confiscations of property during World War II. And their hope of achieving an "all embracing and enduring legal peace" rests directly on the goal of an "exclusive remedy and forum" for resolving Holocaust-era claims, including insurance claims. App, *infra*, 98a-100a.

It is difficult to overstate the conflict between the approach of the federal government and that of California. The federal solution rests on the premise that relief for *all* Holocaust-era claimants is best achieved if claims are resolved in an international forum; the California solution rests on the notion that foreign insurers may be called to account on a *piecemeal* basis in at least *50 different* fora. The United States believes that German and Swiss insurers should be required to pay claims only *once*, from a single fund containing a pre-determined sum provided by government and industry; California believes that insurers may be forced to pay *twice* in undisclosed amounts solely out of their own pockets. The premise of the United States' agreements is that payment for wrongs committed

overseas during a world war is a matter of exclusive *federal* concern; the premise of the HVIRA is that *states* may assert control over foreign companies that have never done business within their borders for acts committed on another continent more than 60 years ago.

In other words, just as the United States and European nations are reaching closure on exclusive procedures to resolve Nazi-era insurance claims, California is trumpeting its plans to impose on foreign insurers yet another procedure for investigating such claims and reducing them to judgment. The threat to U.S. foreign policy interests could not be more clear.

The United States, German, and Swiss governments have strenuously objected to the HVIRA. For example, the United States has stated unequivocally that "the premise of the California legislation is in direct conflict with that of United States foreign policy." U.S. *En Banc Amicus* Br. 1. The statute "runs afoul" of the principle that "the nation speaks with one voice in foreign affairs" by "creating new regulatory burdens and incentives to litigation in an area that has been the subject of intense diplomatic negotiation fraught with the potential for international misunderstanding." *Id*. at 3-4.

The Federal Republic of Germany echoed these sentiments, stating that "the HVIRA threatens the fundamental principle upon which the Executive Agreement was negotiated: the objective that the Foundation would be the exclusive remedy and forum for resolution of all claims asserted against German companies arising from the Nazi era." FRG *En Banc Amicus* Br. 3-4. By design and effect, Germany has explained, "the HVIRA fosters precisely the sort of litigation that, according to the Executive Agreement, should be dismissed 'in the foreign policy interest' of the United States and Germany." *Id*. at 4.

Ignoring these official declarations, the Ninth Circuit upheld the HVIRA against a challenge under the foreign affairs doctrine. This decision calls out for review and reversal. It is in

plain conflict with this Court's decisions and with fundamental structural principles of our Constitution.

Moreover, the decision has enormous practical consequences. Under the Executive Agreement, the German Foundation funds were released only on the condition of "legal peace" in the United States. With the recent resolution of certain class action suits, Germany is moving ahead with the Foundation. App., *infra*, 114a. But the German government has made clear its ongoing concerns about the HVIRA, observing that "[s]tate-law initiatives obligating German insurers, under threat of withdrawal of their licenses, to publish all insurance policies arising from the period of National Socialism are not in conformity with th[e German-American Executive Agreement]." *Id*. at 115a.

If not reversed, "the panel decision has opened the door to each of the fifty states substituting their own foreign policy objectives for the unitary federal foreign policy mandated by the U.S. constitution and the U.S. Supreme Court." FRG *En Banc Amicus* Br. 8. That is more than an abstract concern: within days of the ruling below, several other states (including Rhode Island and New Jersey) began considering similar legislation. U.S. *En Banc Amicus* Br. 2.

It is precisely this state of affairs that the national Union was created to prevent and that this Court's foreign affairs doctrine is designed to address. As Alexander Hamilton observed: "No nation acquainted with the nature of our political association would be unwise enough to enter into stipulations with the United States, * * * while they were apprised that the engagements on the part of the Union might at any moment be violated by its members." THE FEDERALIST NO. 22, at 144.

A. The Constitution does not permit an individual state to fashion its own solution to an international problem, to the detriment of the federal government's ability to implement a comprehensive resolution. In a series of cases beginning with *Chy Lung* v. *Freeman*, 92 U.S. 275 (1875), cited recently in

Crosby v. *National Foreign Trade Council*, 530 U.S. 363, 381-382 n.16 (2000), this Court has declared that authority over foreign affairs belongs *solely* to the federal government. See, *e.g.*, *United States* v. *Pink*, 315 U.S. 203, 233 ("Power over external affairs is not shared by the States"). In the leading case, *Zschernig* v. *Miller*, 389 U.S. 429, 434-435 (1968), the Court held that state statutes having "more than some incidental or indirect effect in foreign countries," or having "great potential for disruption or embarrassment" of U.S. foreign policy, are unconstitutional.

This is an *a fortiori* case under *Zschernig*. There, the Court addressed the validity of a state probate law that blocked the distribution of an estate to a foreign heir if the property was subject to confiscation by foreign officials. No international negotiations or federal statutes bore on the subject; the law involved an area "traditionally regulated" by the states; and the United States denied that it "interfere[d] with [its] conduct of foreign relations." 389 U.S. at 434. The Court nonetheless struck down the state statute. Noting that application of the statute would require "inquiries concerning the actual administration of foreign law [and] into the credibility of foreign diplomatic statements," the Court reasoned that this "intrusion by the State into the field of foreign affairs" threatened to "adversely affect the power of the central government to deal with those problems [of foreign relations]." *Id*. at 432, 441.

The conflict with foreign policy here is far more direct. The stated goal of the HVIRA is to affect international policy — to "encourage the development of a resolution to these [insurance claim] issues through the international process or through direct action by the State of California, as necessary." Cal. Ins. Code § 13801(f). While this *goal* may appear to be consonant with American policy, the *means* selected by California lawmakers — imposition of onerous disclosure requirements to facilitate drawn-out litigation — are directly contrary to the premise of federal negotiations with foreign nations, which is to resolve *all* claims expeditiously under the terms of international agree-

ments. See *Crosby*, 530 U.S. at 379-380 (noting that the Massachusetts Burma Act conflicted with federal policy despite having "a common end"). Indeed, the means selected have direct impacts overseas, because the HVIRA imposes a draconian penalty on any California insurer whose European affiliates fail to take action on European contracts with European citizens — to the point of requiring such companies to violate foreign privacy laws. See, *e.g.*, ER 1123-1126.

Thus, in both purpose and effect, the HVIRA has "more than some incidental or indirect effect in foreign countries" and presents "great potential" — indeed, actuality — "for disruption or embarrassment" of American foreign policy. *Zschernig*, 389 U.S. at 434-435. As the district court concluded (App., *infra*, 43a-44a):

> The HVIRA is inconsistent with [the United States'] statements regarding the German Foundation as the exclusive remedy for claims from the Nazi era. It conflicts with the cooperative spirit of the [international commission], which the United States supports. The HVIRA makes the United States' promises in the U.S.-Swiss Joint Economic Statement appear to be unfulfilled. Finally, "legal peace" cannot be achieved if California and each of the other states are free to enact their own legislation forcing companies to report insurance policies or lose their licenses.

The Ninth Circuit did not seriously dispute this. Indeed, it failed even to acknowledge the submissions of the United States and Germany, let alone explain why their views regarding the foreign policy implications of the HVIRA should be disregarded. Instead, the court of appeals questioned *Zschernig*'s current vitality. Pointing out that the foreign affairs doctrine "is rarely invoked by the courts; the Supreme Court has not applied it in more than 30 years," the court reasoned that "[b]ecause *Zschernig* has been applied so sparingly," it should "hesitate to apply [it]" to this case. App., *infra*, 25a. Putting aside the fact that it is not the place of lower courts to

disregard governing precedent — whether "sparingly" applied or not (*Agostini* v. *Felton*, 521 U.S. 203, 237 (1997)) — the court failed to notice that this Court cited the foreign affairs doctrine with approval only a year ago, in *Crosby*, 530 U.S. at 381-382 n.16.

Moreover, the principle that the federal government enjoys exclusive power over foreign affairs is fundamental to our constitutional regime. See *National Foreign Trade Council* v. *Natsios*, 181 F.3d 38, 49-51 (1st Cir. 1999) (quoting the Federalist Papers and other sources on the need to consolidate authority over foreign affairs in a single national government), aff'd on other grounds, 530 U.S. 363 (2000). For the Ninth Circuit to rule that states have authority to pass laws interfering with the conduct of foreign affairs is an astounding proposition, demanding review by this Court.

Beyond its disparagement of the continued authority of *Zschernig*, the Ninth Circuit offered four points that supposedly distinguished that case. First, it noted that here "[n]o Plaintiff is a foreign government." App., *infra*, 25a. But that fact is of no constitutional moment: *Chy Lung* involved insulting treatment of Chinese nationals in the United States; *Zschernig* involved the rights of individuals in Communist countries to inherit property in Oregon. "Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted or permitted by a government." *Zschernig*, 389 U.S. at 441. The President must be able to negotiate with respect to foreign subjects as well as foreign nations. To allow states to adopt Holocaust-era policies that deny "legal peace" to affected companies would deprive the President of precisely the "economic and diplomatic leverage" needed for the conduct of American foreign policy. *Crosby*, 530 U.S. at 375.

In addition, by regulating foreign insurers, the HVIRA is usurping foreign regulatory authority, which foreign nations certainly regard as affecting their "sovereign interest." FRG

Amicus Br. 1. As Germany has explained (*id*. at 1-5), the HVIRA plainly seeks to regulate German insurers, by addressing threats of license suspension to their California-admitted affiliates. The information demanded by the HVIRA cannot be produced without violating German privacy laws, in effect compelling German citizens to perform acts in Germany that violate German laws.

Second, the court below noted that the "HVIRA does not refer to any particular country." App., *infra*, 25a. But neither did the law in *Zschernig*. In any event, the HVIRA on its face is directed toward specific European countries and reflects a judgment that the judicial process and regulatory authority of those countries — notably Germany — cannot be trusted.

Third, the court stated (App., *infra*, 25a) that "there is no evidence that HVIRA would be applied in a way that would implicate the diplomatic [matters] mentioned in *Zschernig*." This statement is inexplicable. If *amicus* briefs by the United States and foreign governments and formal protests by federal officials to the Governor of a State do not constitute such evidence, it is hard to imagine what would. This is precisely the sort of evidence on which the Court relied in *Crosby* to substantiate the "threat to the President's power to speak and bargain effectively with other nations." 530 U.S. at 382.

Fourth, the court below noted that this is a facial challenge and *Zschernig* was not. But *Zschernig* involved a law that, on its face, did not engage in extraterritorial regulation or pass judgment on foreign affairs. Only in light of its application by Oregon courts was the statute revealed as violating the foreign affairs power. 389 U.S. at 433. Here, the very purpose of the HVIRA is to interfere with the international means for resolving Holocaust-era claims, and it is having that effect in practice. Indeed, *Zschernig*'s emphasis on the "potential" for disruption of U.S. foreign policy confirms that there is no need for case-by-case proof of actual effects.

These attempts to distinguish *Zschernig* are so far off the mark that they are tantamount to a refusal to follow directly controlling Supreme Court precedent. That alone is sufficient basis for a grant of certiorari.

B. In addition to conflicting with this Court's decision in *Zschernig*, the decision below conflicts with the First Circuit's decision in *National Foreign Trade Council* v. *Natsios*, 181 F.3d 38 (1st Cir. 1999). There, the court held unconstitutional under the foreign affairs doctrine a Massachusetts law banning state business transactions with companies that do business in Burma. This Court granted certiorari and affirmed on preemption grounds, but it did not contradict or disparage the First Circuit's foreign affairs doctrine analysis, which thus stands as precedent in the First Circuit.

The decision below conflicts with *Natsios* in two important respects. First, and most significantly, the First Circuit rejected the argument that *Zschernig* "is a weak precedent" (181 F.3d at 52) and did not "hesitate" to apply it. App., *infra*, 25a. Second, the First Circuit rejected the grounds for distinction relied on by the Ninth Circuit. *Natsios*, like this case, involved a statute that was directed against private companies; *Natsios*, like this case, involved a facial challenge; and in *Natsios*, as in this case, the fact that the effect on foreign affairs was more than "incidental or indirect" was demonstrated by examining the purpose and effect of the law and the protests from the State Department and other nations. While no two foreign affairs cases are likely to be identical, the conflict between these two decisions is substantial and warrants this Court's review.

C. Even in the absence of these conflicts, the singular importance of this matter would warrant this Court's attention. The Court has often observed — most recently in *Crosby*, 530 U.S. at 371-372 — the pressing need to resolve legal issues with an impact on American foreign policy. This is especially true where the Executive has negotiated an international agreement, and its effectuation depends on court action. In

Dames & Moore v. *Regan*, 453 U.S. 654, 668 (1981), for example, the Court granted certiorari before judgment in the court of appeals to determine the legality of an Executive Agreement reached with Iran to resolve the Iranian hostage situation. The effectuation of prompt relief for Holocaust survivors is equally of "imperative public importance." *Id*. at 667. See also *Verlinden B.V*. v. *Central Bank of Nigeria*, 461 U.S. 480, 493 (1983) ("the primacy of federal concerns is evident" in cases "rais[ing] sensitive issues concerning the foreign relations of the United States") (citing *Zschernig*).

This Court has not hesitated to grant certiorari to resolve legal issues with a similar impact on foreign policy. See, *e.g.*, *Weinberger* v. *Rossi*, 456 U.S. 25 (1982); *Alfred Dunhill of London, Inc*. v. *Republic of Cuba*, 425 U.S. 682, 689-690 (1976); *First National City Bank* v. *Banco Nacional of Cuba*, 406 U.S. 759, 761-762 (1972); *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 407 (1964); *Regan* v. *Wald*, 468 U.S. 222 (1984). Until the decision below is reviewed and reversed, there will be a cloud over the ability of the President to negotiate with foreign nations to achieve diplomatic solutions as an alternative to litigation. If states are free to undermine international agreements, other countries will be reluctant to enter into them.

II. THE COURT OF APPEALS' INTERPRETATION OF THE McCARRAN-FERGUSON ACT IS INCONSISTENT WITH HOLDINGS OF THIS COURT AND FOSTERS STATE INTERFERENCE WITH FOREIGN COMMERCE

The court of appeals committed a second error that is closely related to its misunderstanding of the foreign affairs doctrine: the court went fatally astray in its treatment of the Foreign Commerce Clause. The Ninth Circuit's holding that the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, shields California's regulation of the *overseas* activities of insurance companies from the reach of the Clause is flatly inconsistent

with a controlling decision of this Court and creates grave uncertainty about the scope of an oft-cited federal statute that has great practical importance. Because the court of appeals committed this error in a foreign commercial setting that "is pre-eminently a matter of national concern" and where "[t]he need for federal uniformity is * * * paramount" (*Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 448, 449 (1979)), review by this Court is essential.

A. Petitioners and the United States argued below, and the district court held, that the HVIRA is unconstitutional under the Foreign Commerce Clause both because the statute has an impermissible extraterritorial effect and because it causes disruption in an area where a uniform national approach is necessary. App., *infra*, 51a-53a. As the United States explained, the HVIRA runs afoul of the Clause by imposing regulatory requirements on insurance policies that "have no nexus with California," by "subject[ing] insurance corporations to conflicting legal obligations," by engaging in "extraterritorial regulation," and by imposing burdens on international commerce "that diverge from the foreign policy interests of the nation." U.S. *Amicus* Br. 18, 19, 21, 24-25. The Clause bars that sort of state interference with foreign commerce because it may foment "international disputes" and lead other nations to "retaliate against American-owned instrumentalities present in their jurisdictions." *Japan Line*, 441 U.S. at 450. The court of appeals did not take issue with these fundamental propositions.

Instead, the Ninth Circuit held that these Commerce Clause principles were rendered irrelevant by the McCarran-Ferguson Act, Section 2(a) of which provides that state insurance regulations are immune from attack under the Clause. App., *infra*, 7a-12a.[3] But that holding is indefensible: as the United

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[3] The court of appeals also suggested that the U.S. Holocaust Assets Commission Act shows that Congress "encouraged laws like HVIRA." App. *infra*, 17a. But that statute does nothing of the sort. The Act established a *federal* Commission to examine the disposition of Holocaust-era assets in

States argued below, the Act is inapplicable to the HVIRA because the Act simply "does not shield a State's attempt to regulate insurance extraterritorially." U.S. *Amicus* Br. 28.

This Court reached precisely that conclusion in *Federal Trade Comm'n* v. *Travelers Health Ass'n*, 362 U.S. 293 (1960). Construing Section 2(b) of the Act, 15 U.S.C. § 1012(b), which provides that specified federal laws "shall be applicable to the business of insurance to the extent that such business is not regulated by state law," the Court held in *Travelers* that the type of state insurance regulation addressed by the Act does not include *extraterritorial* regulation. See 362 U.S. at 299-302. The Court thus found it "clear that [the Act] 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*." *Id*. at 300 (emphasis added). See *Seasongood* v. *K & K Ins. Agency*, 548 F.2d 729, 738-739 (8th Cir. 1977) ("a state regulatory scheme operating essentially extraterritorially is not the kind of regulation contemplated by the McCarran-Ferguson [Act]"); accord, *Hamilton Life Ins. Co. of New York* v. *Republic Nat'l Life Ins. Co.*, 291 F. Supp. 225, 232 (S.D.N.Y. 1968), aff'd, 408 F.2d 606 (2d Cir. 1969).

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the United States. The Commission has issued a report *which makes no mention of state regulation.* The Commission was also asked to encourage the National Association of Insurance Commissioners to report on Holocaust-related claims practices. But, as the United States explained (U.S. *Amicus* Br. 27-28), this provision "addressed a possible role for state insurance regulators in gathering information on Holocaust-era insurance policies, [but] provided for a limited role that avoids the most troublesome features of the California law." Thus, "Congress did *not* impose reporting requirements under threat of sanctions and did not authorize states to impose such sanctions. Moreover, the information specifically identified by Congress concerned only companies doing business in the United States subsequent to 1933 and did not include highly personal information * * * that would likely be the subject of privacy laws in the countries where the policies were written." *Ibid*.

That rule should be dispositive here. The HVIRA has a "vast extraterritorial reach," "impos[ing] regulatory requirements on corporations that have never done business in California with respect to policies issued to foreign nationals who themselves have no connection to California." U.S. *Amicus* Br. 20, 14. Indeed, the *entire purpose* of the HVIRA is to require the compilation and disclosure of voluminous materials by foreign entities that are not themselves subject to California's jurisdiction and that in many instances have had no contact with the State at all. And the HVIRA does so even though, as the German government has explained, keeping insurance documents private is *required by* German law. FRG *En Banc Amicus* Br. 6. Disclosure of the information required by the HVIRA would violate German law and subject an insurer to "criminal as well as civil penalties." *Ibid*.

As a consequence, "the practical effect of the regulation is to control conduct beyond the boundaries of the State" (*Healy* v. *Beer Institute*, 491 U.S. 324, 336 (1989)) and to "impose economic sanctions on violators of [California's own] laws with the intent of changing [the affected party's] lawful conduct in other [jurisdictions]" (*BMW of North America, Inc.* v. *Gore*, 517 U.S. 559, 572 (1996)) — the very definition of an extraterritorial regulation.

B. The court of appeals recognized that it could not uphold the HVIRA without distinguishing this Court's decision in *Travelers*. The Ninth Circuit's effort to do so, however, departs from this Court's unambiguous holding.

1. The court below reasoned that the limits on state authority to enact extraterritorial insurance regulations that were recognized in *Travelers* apply only in cases involving Section 2(b) of the Act, and have no bearing on cases concerning Section 2(a), 15 U.S.C. § 1012(a). See App, *infra*, 8a-11a. Section 2(b) provides that specified federal statutes "shall be applicable to the business of insurance to the extent that *such business is not regulated by state law*"; its companion para-

graph, Section 2(a), provides that the business of insurance "shall be subject to the laws of the several States *which relate to the regulation * * * of such business*," protecting those state laws from attack under the Commerce Clause. In drawing a sharp distinction between the scope of these two similarly worded provisions, the court of appeals reasoned that Congress in the Act (and this Court in *Travelers*) *did not* intend federal statutory law to be displaced by extraterritorial state insurance regulations, but *did* intend to set aside federal Commerce Clause requirements insofar as they apply to those same extraterritorial state regulations. See App., *infra*, 7a-12a.

This peculiar reasoning is insupportable. To begin with, as the United States explained below, the plain language of the McCarran-Ferguson Act makes no distinction between the body of state laws described by the Act's two subsections. "Paragraphs (a) and (b) [of Section 2 of the Act] are * * * mirror images": the specified federal laws described in Section 2(b) apply to the business of insurance "unless the insurance business at issue is already regulated by the State as contemplated by paragraph (a). There is no apparent basis for the * * * contention that the language of paragraph (b), 'regulated by State law,' means anything other than the 'laws of the * * * States which relate to the regulation * * * of [insurance],' described in paragraph (a)." U.S. *Amicus* Br. 30. This means, of course, that state laws like those held in *Travelers* to be outside the scope of Section 2(b) because they are extraterritorial also necessarily must be unprotected by Section 2(a).

In addition, the central purpose of the Act confirms that Congress did not intend to authorize, or to insulate from constitutional challenge, extraterritorial state insurance regulations. The Act was passed "in response to this Court's decision in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944)" (*United States Dept. of Treasury* v. *Fabe*, 508 U.S. 491, 499 (1993)), which held for the first time that insurance transactions are subject to the federal commerce power; "[t]here is no question that the primary purpose of the

McCarran-Ferguson Act was to preserve state regulation of the activities of insurance companies, as it existed before the *South-Eastern Underwriters* case." *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205, 218 n.18 (1979). See *Fabe*, 508 U.S. at 499; *Travelers*, 362 U.S. at 399. Insofar as state authority is concerned, the Act "was an attempt to turn back the clock." *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 459 (1969). For that reason, Congress made clear that it did not intend the Act "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 Associations case." H.R. Rep. No. 142, 79th Cong., 1st Sess. 3 (1945).

Yet prior to *South-Eastern Underwriters*, the Court had held specifically and repeatedly that states do *not* have authority to regulate or tax the extraterritorial activities of insurance companies. See *Connecticut General Life Ins. Co.* v. *Johnson*, 303 U.S. 77, 81 (1938) (Stone, J.) (State lacks the "power to tax or regulate the corporation's property and activities elsewhere," even where "the corporation enjoys outside the state economic benefits from transactions within it"); *St. Louis Cotton Compress Co.* v. *Arkansas*, 260 U.S. 346, 349 (1922) (Holmes, J.) ("It is true that the State may regulate the activities of foreign [insurance] corporations within the State, but it cannot regulate or interfere with what they do outside."); *Allgeyer* v. *Louisiana*, 165 U.S. 578, 591-592 (1897) (State lacks authority to regulate where the insurance "contract [was] made outside the state," "to be performed outside of such jurisdiction"). Indeed, as the Court explained in *Travelers*, the House report on the Act *specifically cited and approved these decisions*, declaring that the "'continued regulation and taxation of insurance by the States'" should be

> subject always * * * 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 State or to regulate such transactions in any way.

362 U.S. at 300-301 (quoting H.R. Rep. No. 143, *supra*, at 3).

The decision below — which entirely disregarded *Travelers*' discussion of statutory intent — cannot be squared with this history. Congress believed that states lacked the authority to engage in extraterritorial insurance regulation, and it left no doubt that the McCarran-Ferguson Act was not intended to expand state authority in that regard.

2. The court below also attempted to distinguish *Travelers* on the ground that this Court's decision involved state laws that "sought to regulate directly the conduct of an insurer in another jurisdiction," while the HVIRA "seeks only to obtain information about conduct in another jurisdiction." App., *infra*, 9a-10a. But that distinction is wholly chimerical. *Travelers* expressly premised its holding on Congress's recognition in the McCarran-Ferguson Act that states lack authority to assert extraterritorial control over insurance companies. Yet that is just what California is attempting to do under the HVIRA: it is requiring foreign insurers to take specified actions overseas, on the pain of heavy penalties imposed on their California corporate relatives, even if those actions are contrary to governing foreign law.

The Ninth Circuit reasoned that the HVIRA is protected by McCarran-Ferguson because the state law ostensibly relates to the California licensing process and "affects foreign commerce only indirectly." App., *infra*, 12a. But under that reasoning, *no* state law ever would be thought to have an extraterritorial effect because states may act directly only on entities within their jurisdiction. Such an approach would read all limits on extraterritorial legislation out of the McCarran-Ferguson Act — and

out of the Commerce Clause itself. Needless to say, that is not the law: under the Commerce Clause, that state legislation purportedly "is addressed only to [conduct in the enacting state] is irrelevant if the 'practical effect' of the law is to control [conduct] in other States." *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. 573, 583 (1986). See also *Healy*, 491 U.S. at 328-329 & n.5, 338. That plainly is the case here.

C. The holding below on the McCarran-Ferguson Act warrants this Court's review. The court of appeals' misguided statutory construction creates an illogical and unintended asymmetry in the McCarran-Ferguson Act that will cause considerable confusion in an area where state, federal, and foreign interests are often in tension.

III. THE URGENCY OF THIS MATTER WARRANTS IMMEDIATE REVIEW

The court of appeals remanded for further proceedings on a remaining constitutional claim: that the HVIRA violates petitioners' due process rights. App., *infra*, 26a-27a. That remand proceeding is now underway and is estimated to last many months; it may be years before final judgment is entered and the Ninth Circuit can rule again.

The interlocutory character of this case does not affect the certworthiness of the petition. The court of appeals squarely and finally rejected the foreign affairs doctrine and Foreign Commerce Clause claims on the merits. Resolution of these legal issues is thus final and appropriate for review. In *Mazurek* v. *Armstrong,* 520 U.S. 968, 975-976 (1997), an appeal of a preliminary injunction, the Court recently rejected the argument that it should "ignore the error in the Court of Appeals' judgment because the case comes to us prior to the entry of a final judgment in the lower courts." The Court stated:

> [O]ur cases make clear that there is no absolute bar to review of nonfinal judgments of the lower federal courts,

> * * * and we conclude here that reversal of the Court of Appeals' judgment in a summary disposition is appropriate, for two reasons. First, as already noted, the Court of Appeals' decision is clearly erroneous under our precedents. Second, the lower court's judgment has produced immediate consequences for Montana — in the form of a Rule 62(c) injunction against implementation of its law pending the District Court's resolution of respondents' motion for a preliminary injunction — and has created a real threat of such consequences for the six other States[.]

520 U.S. at 975. In this case, as in *Mazurek*, the Ninth Circuit's judgment is "clearly erroneous" under this Court's precedents and the court of appeals' decision is "produc[ing] immediate consequences" for the Nation's foreign affairs.

The urgency of this case for the conduct of American foreign policy demands this Court's immediate attention. German industry and the German Parliament have established a $5 billion fund for the payment of Holocaust-era claims, in reliance on the good faith of the United States to "use its best efforts" "with state and local governments" to achieve "all-embracing and enduring legal peace" for German companies. App., *infra*, 101a. At the same time, the German government has emphatically expressed its conviction that "the HVIRA threatens the fundamental principle upon which the Executive Agreement was negotiated." FRG *En Banc Amicus Br.* 3. The United States has confirmed that the premise of the California statute is in "direct conflict" with that of American foreign policy toward Holocaust-era insurance claims. U.S. *En Banc Amicus Br.* 1.

If these official statements of concern do not warrant invocation of the foreign affairs doctrine of *Zschernig* or the protections of the Foreign Commerce Clause — as the Ninth Circuit held — then the international agreement declaring it to be in the "foreign policy interests of the United States" to establish the Foundation as "the exclusive remedy and forum

for resolving [Holocaust-era] claims" will appear utterly hollow. App., *infra*, 101a.

The Court should not await resolution of the issues now being litigated in the district court. The final outcome of that litigation could take years and bears no logical relation to the premises of the international negotiations. The credibility of the United States is at issue *now*. If the decision below is not reviewed and reversed, the value of American assurances regarding the international resolution of Holocaust claims will be cast into doubt, relations with our allies will be soured, and the ability of the United States to speak with one voice in the field of foreign affairs will be severely compromised. This Court's intervention is necessary to restore the Founders' vision of a Union of many states, with only one foreign policy.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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