No. 02-722

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

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes:

TABLE OF AUTHORITIES — Continued

Page(s)

Miscellaneous:

REPLY BRIEF FOR PETITIONERS

Respondent argues that the HVIRA generates "no conflict" with U.S. foreign policy and claims that "there is no basis for believing that enforcement of the HVIRA will have material adverse foreign policy effects." Opp. 15. The United States government, the Federal Republic of Germany and Switzerland vigorously disagree and have submitted *amicus* briefs urging this Court to grant review and reverse the Ninth Circuit's decisions that the HVIRA is constitutional.

The United States explains how the HVIRA "undermines" its "effective conduct of foreign relations, including its continuing efforts to secure compensation for surviving Holocaust victims." U.S. *Amicus* Br. 8. Germany states that the Ninth Circuit's decisions sustaining the HVIRA are an "affront" to the "sovereignty of the Federal Republic" and "impede the Federal Republic's ability to engage in diplomatic relations with the United States." FRG *Amicus* Br. 2-3. The Swiss government declares that "the HVIRA would compel the violation of Swiss sovereignty and Swiss privacy laws" and "have a significant effect on the foreign relations of the United States with Switzerland." Swiss *Amicus* Br. 3-4.

In the face of these authoritative submissions, the contrary assertions by respondent are completely untenable and serve only to interfere with the "expeditious compensation for Holocaust victims" sought by the United States. U.S. *Amicus* Br. 2. Rather than respect the federal government's exclusive authority in this field, California has established its *own* foreign policy based on its dissatisfaction with the international negotiations on Holocaust-era insurance issues (see, *e.g.*, Opp. 4 n.5). California's actions frustrate American foreign policy — "as the protests from Germany and Switzerland demonstrate," U.S. *Amicus* Br.18 — and subvert the constitutional order established by the Framers for the conduct of our Nation's foreign affairs, see Pet. 12-20.

Further review by this Court is essential to correct the constitutional errors of the Ninth Circuit in upholding the

HVIRA, which have immediate adverse consequences for U.S. foreign policy.

A. The HVIRA Undermines The Federal Government's Exclusive Authority To Conduct Foreign Relations.

1. Respondent's principal argument is that "petitioners present no evidence of *any* tangible effects upon or threats to foreign affairs." Opp. 13. To create the false impression that the HVIRA has no adverse foreign policy consequences, respondent quotes selectively from a footnote in an *amicus* brief filed almost two years ago by the United States urging rehearing *en banc* in the preliminary injunction appeal. *Id*. at 16. This argument is rendered frivolous by the United States' *amicus* brief filed less than two weeks ago, which concludes (at 2) that the HVIRA "interferes with the national government's authority over foreign affairs * * * and with its traditional role in addressing claims arising out of international conflicts * * *."

Respondent's factual assertions similarly miss the mark. Respondent cites, for example (at 16), the decision of the German Parliament in May 2001 to release funds into the German Foundation after finding there is "satisfactory legal peace for German companies" in the United States. The Foundation is a huge fund (approximately $5 billion), and only a small portion of that money (approximately $250 million) is dedicated to insurance claims. The vast majority of the funds are designated as compensation "for Nazi-era slave and forced laborers." *German Industry to Meet Nazi Slave Labor Compensation Pledge Next Month*, AP WORLDSTREAM, July 24, 2001. The HVIRA has nothing to do with slave or forced laborer compensation and did not affect those payments.

Negotiations on Holocaust-era insurance claims, however, have continued. Pet. App. 177a-180a; Pet. 5. While criticizing these delicate international negotiations, Opp. 4 n.5, respondent contends that the HVIRA has had no "material effect on the Foundation, ICHEIC or any other international negotiations," *id*. at 17. Respondent fails to mention that enforcement of the

HVIRA has been stayed for over two years — since before its effective date — as a result of this litigation. The Ninth Circuit has continued the stay pending the disposition of the petition by this Court. The HVIRA thus has not been allowed to obstruct the "extensive international discussions" on Holocaust-era insurance claims, U.S. *Amicus* Br. 2. But the United States and its allies have warned of serious adverse consequences should the HVIRA be enforced. These consequences include undermining ICHEIC as the "exclusive mechanism for resolving Holocaust-era insurance claims" and the achievement of "legal peace" for German companies, *id*. at 4, 17, and trenching on European privacy laws, see FRG *Amicus* Br. 4-5; Swiss *Amicus* Br. 4 — inevitable effects of the HVIRA that directly contradict U.S. "foreign policy interests." U.S. *Amicus* Br.4.

2. The HVIRA is unconstitutional under *Zschernig* v. *Miller*, 389 U.S. 429 (1968). Respondent makes almost no effort to defend the Ninth Circuit's analysis of *Zschernig*, which — as the petition demonstrated (at 14-18) — was little more than a thinly veiled refusal to apply this Court's precedents. There is no doubt, and respondent does not deny, that the HVIRA is a deliberate attempt to alter the resolution of a matter that has been the subject of international negotiations at the highest level. See U.S. *Amicus* Br. 16-18. That is the stated goal of the statute. See Cal. Ins. Code § 13801(f); Pet. 15. As such, it is plainly an interference with the exclusive power of the federal government to conduct foreign affairs.

In *Zschernig*, the federal government submitted an *amicus* brief expressly denying that the state law in question "'unduly interferes with the United States' conduct of foreign relations'" (389 U.S. at 434), but this Court nonetheless found that the law unconstitutionally burdened the foreign affairs power. The Court held that where a state law has a "great potential for disruption or embarrassment" of American foreign policy, it is unconstitutional even where the executive disavows any specific adverse foreign policy effect. The Court noted that where a state statute leads to "minute inquiries concerning the

actual administration of foreign law, into the credibility of foreign diplomatic statements, and into speculation [regarding legal developments in foreign countries]," it constitutes "forbidden state activity." *Id.* at 435-436.

Here, the "potential" for disruption and embarrassment is far more direct and obvious than it was in *Zschernig*. The California legislature passed the HVIRA in an open and deliberate effort to second-guess and modify the results of complex international negotiations (U.S. *Amicus* Br. 2). The premise of this state legislation — facilitation of litigation — is directly contrary to the negotiated approach taken by federal officials (*id*. at 2-6, 16-18). The law creates a conflict between state obligations and foreign laws, leading foreign nations to complain of the effect on their sovereignty. Finally, and conclusively, both the United States and the affected foreign governments have filed *amicus* briefs explaining that the HVIRA is inconsistent with the premise of important international agreements. See *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 382-386 (2000).

Respondent attempts to distinguish *Zschernig* and other precedents, largely on the ground that "the HVIRA does not insult, criticize or exhibit hostility toward any foreign government." Opp. 17-21. Even if true, this is constitutionally irrelevant. The Constitution treats the national government's authority over foreign relations as "full and exclusive," "entirely free from local interference," *Hines* v. *Davidowitz*, 312 U.S. 52, 63 (1941). It is "not shared by the States [but] vested in the national government exclusively," *United States* v. *Pink*, 315 U.S. 203, 233 (1942). Nothing in *Zschernig* or the other decisions suggests that the foreign affairs doctrine is limited to preventing states from "insulting" or "criticizing" foreign governments. Indeed, in *Chy Lung* v. *Freeman*, 92 U.S. 275 (1876), this Court's first decision striking down a state law on foreign affairs grounds, the state action had no reference to foreign governments, but only to foreign subjects. The Court held that the Constitution entrusts "the whole subject" of

"relations" with "foreign nations" to the federal government, and prohibits the states from taking acts with respect to other countries for which the entire Nation might be held responsible. 92 U.S. at 280. That is equally true of the HVIRA.

Respondent's claim that Congress has "implicitly approved state legislation like the HVIRA" (Opp. 18) is totally without foundation. The U.S. Holocaust Assets Commission Act of 1998, Pub. L. 105-186, 112 Stat. 611, on which respondent relies, neither authorizes nor endorses state statutes with the extraterritorial regulatory effect of the HVIRA. The Act called on the Holocaust Assets Commission to encourage the National Association of Insurance Commissioners to provide information, "to the degree the information is available," on insurance companies "doing business in the U.S." (*i.e.*, companies within the jurisdiction of the United States). The Act did not signal the states to embark on their own individual and divergent foreign policies. As the United States has noted, "[n]othing in the Act imposes reporting requirements on insurers under threat of sanctions, confers any new authority on the States to do so, or seeks the sort of private information that may be protected from disclosure under foreign law." U.S. *Amicus* Br. 19-20 n.8.

This Court's decision in *Barclays Bank PLC* v. *Franchise Tax Bd.*, 512 U.S. 298 (1994), provides no support for respondent's position (see Opp. 19-20). That case was decided on Commerce Clause grounds and did not discuss or even mention *Zschernig*, and the state tax scheme at issue was "congressionally condoned." 512 U.S. at 330.

B. The HVIRA Exceeds Due Process Limits On California's Legislative Jurisdiction.

1. Respondent parrots the Ninth Circuit's due process analysis of California's legislative jurisdiction to enact the HVIRA. Respondent characterizes the HVIRA as a mere "reporting statute" that does not "regulate the substance of out-of-state transactions" and is not subject to due process scrutiny. Opp. (Gerling) 18-19.

But as the United States has explained (at 10 (citation omitted), the HVIRA is "impermissible extraterritorial regulation. Its 'practical effect' is to compel 'conduct beyond the boundaries of the State' * * * — specifically, the collection, compilation, and disclosure of information" on insurance transactions entered into more than 50 years ago in Europe, between European parties, to cover European risks. And "[t]here is no nexus between those transactions and the legitimate interests of California." *Ibid*. Yet California has demanded a full accounting of *every* Holocaust-era insurance policy, notwithstanding the complete absence of contacts between California and the policies at issue. This demand exceeds the State's legislative jurisdiction in violation of due process, as this Court has long held. See, *e.g.*, *Home Ins. Co.* v. *Dick*, 281 U.S. 397, 407-410 (1930).

Respondent insists (Opp. (Gerling) 18-22) that the HVIRA does not regulate foreign insurers or foreign insurance transactions. But requiring a person to "disclose, or refrain from disclosing, confidential information is regulatory in nature. It imposes a substantive obligation on that person, the violation of which carries adverse consequences." U.S. *Amicus* Br. 11-12 (citing *Dole* v. *United Steelworkers of Am.*, 494 U.S. 26, 28 (1990); *BMW of North Am., Inc.* v. *Gore*, 517 U.S. 559, 572-573 (1996)).

Moreover, respondent's revisionist account of the state interests underlying the HVIRA is flatly contradicted by the Act's text, structure and legislative history. Nowhere does the HVIRA even mention licensing standards or the "fitness" of California insurers. No "features of [the] HVIRA suggest that its purpose or primary operative effect is to enable the Commissioner to verify the *bona fides* of insurers doing business in the State." U.S. *Amicus* Br. 12. The "information sought by [the] HVIRA is too remote, too dated, and, at the same time, too detailed to support" the regulatory "purpose" now asserted by respondent. *Id*. at 13; see Pet. 21-22.

Thus, respondent's claim (Opp. (Gerling) 20) that invalidation of the HVIRA would "cripple state regulatory power" is baseless. To the contrary, invalidation of the HVIRA would restore the proper constitutional limits on state regulatory power. Respondent has the constitutionally permissible authority to "gather information to assess the 'fairness and honesty of methods of doing business' of any insurer that seeks to do business in the State." U.S. *Amicus* Br. 13 (citing Cal. Ins. Code §§ 717, 733, 1215.6). These statutes focus on the fitness of California insurers. By contrast, the HVIRA focuses only on "transactions that occurred in Europe during a time of international conflict." U.S. *Amicus* Br. 11.

Rather than supporting a coherent state regulatory regime, respondent's position would upset the orderly regulation of multinational insurers. If California can regulate extraterritorially and demand information from foreign insurers in violation of the laws of the countries in which those insurers are "extensive[ly]" regulated, see FRG *Amicus* Br. 3-5; Swiss *Amicus* Br. 7, the result would be regulatory chaos. "When, as here, a State seeks to project its regulatory regime into the jurisdiction of another Nation, the potential is particularly great for inconsistent legislation and resulting conflict, as well as for interference with United States foreign policy." U.S. *Amicus* Br. 9. The threat is very real, because a number of other states have followed California's lead. See FRG *Amicus* Br. 12-13.

2. Given the HVIRA's purpose and effect, it plainly violates due process, as the Eleventh Circuit concluded in *Gerling Global Reinsurance Corp.* v. *Gallagher*, 267 F.3d 1228 (2001), with respect to a virtually identical Florida statute. As demonstrated in the petition (at 21-23), *Gerling* "cannot be reconciled" with the Ninth Circuit's decision in this case. U.S. *Amicus* Br. 13. In fact, the Ninth Circuit itself acknowledged the "conflict[]" between the two decisions. Pet. App. 11a.

Respondent nonetheless relies on the same purported distinctions drawn by the Ninth Circuit to try to distinguish

Gerling, but none "is persuasive." U.S. *Amicus* Br. 13 n.6; Pet. 21-23. Thus, contrary to respondent's assertion (Opp. (Gerling) 23-24), "the Florida statute, like [the] HVIRA, applies directly only to '[a]ny insurer doing business in th[e] state.'" U.S. *Amicus* Br. 14 n.6 (quoting *Gerling*, 267 F.3d at 1230). Second, like respondent here, Florida tried to defend its statute as regulatory fitness legislation, but the Eleventh Circuit "concluded that the text and structure of the statute did not support that position." U.S. *Amicus* Br. 14 n.6 (citing *Gerling*, 267 F.3d at 1239-1240). Third, just like the Florida statute, the "legislation that enacted the HVIRA * * * contained other provisions to facilitate the litigation of [Holocaust-era insurance] claims." U.S. *Amicus* Br. 14 n.6.

The conflict with *Gerling* is real and highlights the need for resolution of the due process issue, because similar statutes have been enacted or are pending in several other states. FRG *Amicus* Br. 12-13; Pet. 13 n.2.

C. The Ninth Circuit's Erroneous Construction Of The McCarran-Ferguson Act Warrants Review.

Respondent does not deny that the Ninth Circuit's interpretation of the McCarran-Ferguson Act involves an important, recurring issue that threatens to foment tension with the United States' international trading partners. The grounds respondent does advance in arguing against review of this issue are insubstantial.

First, respondent is wrong in asserting (Opp. 23) that "this Court has repeatedly held that the McCarran-Ferguson Act exempts state insurance regulations from *all* Commerce Clause restrictions, even where the regulation has extraterritorial effects." Quite the contrary is true: in *State Bd. of Ins.* v. *Todd Shipyards Corp.*, 370 U.S. 451 (1962), the Court relied on the McCarran-Ferguson Act's legislative history to hold that "the Act was so designed as not to displace" decisions limiting state power to engage in extraterritorial regulation of insurance. 370 U.S. at 455. As this Court explained, the legislative record thus

"indicated without ambiguity that such [extraterritorial] state 'regulation or taxation' should be kept within the limits set by the *Allgeyer*, *St. Louis Cotton Compress*, and *Connecticut General Life Insurance* decisions" (*id*. at 456) — each of which held that states do *not* have authority to regulate the extraterritorial activities of insurance companies. See Pet. 28-29. Indeed, even the dissent in *Todd* read the McCarran-Ferguson Act *itself* to withdraw "from the states the power to tax the ownership and use of insurance policies" when "those policies were made * * * in another State." *Id*. at 458. *Todd* leaves no doubt that the Ninth Circuit misunderstood the scope of the McCarran-Ferguson Act.[*]

Second, respondent cannot distinguish *Federal Trade Comm'n* v. *Travelers Health Ass'n*, 362 U.S. 293 (1960). Repeating the Ninth Circuit's holding, respondent asserts (at 25-26) that *Travelers* is inapposite because it involved Section 2(b) of the McCarran-Ferguson Act and did not address a Commerce Clause challenge implicating Section 2(a). As demonstrated in the petition (at 25-27) and as the United States explains (U.S. *Amicus* Br. 16-17), however, Sections 2(a) and 2(b) use essentially identical language in describing the relevant body of state legislation, and therefore must have an identical scope. As explained in the petition (at 28-29), the history of the Act confirms that Congress did not mean to preserve extraterritorial state regulation.

Third, respondent is incorrect in arguing (at 28-30) that, even apart from the McCarran-Ferguson Act, the HVIRA does not violate the Commerce Clause. This was not the basis for the Ninth Circuit's decision, which nowhere disputed that the

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[*] Respondent likewise gets no support from *Western & Southern Life Ins. Co.* v. *State Board of Equalization*, 451 U.S. 648 (1981), cited at Opp. 24. Although the California tax at issue in that case was discriminatory, it was not extraterritorial; it was imposed on insurance companies doing business in California and did not regulate out-of-state commercial activity in any way. See 451 U.S. at 649-650.

HVIRA would be unconstitutional in the absence of the McCarran-Ferguson Act.

Respondent's argument is, in any event, wrong on its own terms. Respondent asserts (at 28) that the HVIRA is "not an extraterritorial law. It applies only to insurers doing business in California, and applies equally to all such insurers." But the "HVIRA is an impermissible extraterritorial regulation," whose "'practical effect' is to 'compel conduct beyond the boundaries of the State.'" U.S. *Amicus* Br. 10 (citing *Healy* v. *Beer Institute*, 491 U.S. 324, 336 (1989)). Extraterritorial regulation is unconstitutional because "a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority." *Ibid*. Because it is undeniable that "the practical effect of [the HVIRA] is to control conduct beyond the boundaries of the State" (*ibid*.), California's statute is unconstitutional.

Finally, respondent relies (at 29-30) on *Barclays* in arguing that there is no need for a "uniform national approach" to Holocaust-era insurance issues. But in *Barclays*, the Court "found the reactions of foreign powers and the opinions of the Executive irrelevant in fathoming congressional intent because Congress had taken specific actions rejecting the positions both of foreign governments * * * and the Executive." *Crosby*, 530 U.S. at 385. Here, there is no action of any kind by Congress evidencing such disapproval and "*Crosby* reaffirms the central importance in [that] situation of the President's views in exercising his constitutional responsibility 'to speak for the Nation with one voice in dealing with other governments.'" U.S. *Amicus* Br. 19.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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