No. 02-722

In The Supreme Court of the United States

AMERICAN INSURANCE ASSOCIATION, AMERICAN RE-INSURANCE COMPANY, *et al.*,

Petitioners,

v.

HARRY W. 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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Holocaust Victim Insurance Relief Act (the "HVIRA") – a California statute that imposes reporting requirements upon insurance companies doing business in California, and does not seek to influence, insult or comment upon any foreign government – is constitutional under the dormant foreign affairs power.

2. Whether the HVIRA, a reporting statute that does not regulate either foreign transactions or foreign insurance companies, exceeds California's legislative jurisdiction under the Due Process Clause.

3. Whether the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, which insulates state regulation of the business of insurance from challenge under the dormant Commerce Clause, forecloses petitioners' dormant Commerce Clause challenge to the HVIRA, and if not, whether the HVIRA violates the dormant Commerce Clause.

LIST OF PARTIES

Respondent Harry W. Low is the Commissioner of Insurance for the State of California (the "Commissioner"). The Commissioner accepts the petitioners' "List of Parties and Rule 29.6 Statement."

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BRIEF IN OPPOSITION

Respondent Harry W. Low, in his capacity as the Commissioner of Insurance of the State of California (the "Commissioner"), respectfully requests that this Court deny the Petition for a Writ of Certiorari filed by the American Insurance Association, *et al.* ("AIA"), Assicurazioni Generali S.p.A. ("Generali"), and Winterthur International America Insurance Company, *et al.* (collectively, the "AIA Petitioners"), which is docketed as No. 02-722 (the "AIA Petition"). The Commissioner also opposes the Petition for a Writ of Certiorari filed by Gerling Global Reinsurance Corporation of America, *et al.* ("Gerling"), which involves the same decisions below and is docketed as No. 02-733 (the "Gerling Petition").

In the consolidated proceedings below, the AIA Petitioners and Gerling brought identical challenges to a California statute, the Holocaust Victim Insurance Relief Act ("HVIRA"), California Insurance Code §§ 13800-13807. The Court of Appeals upheld the HVIRA against all their challenges. Now, the AIA Petitioners and Gerling bring separate petitions for a Writ of Certiorari, appealing between them five of the adverse rulings below.

The AIA Petitioners and Gerling both appeal from rulings upholding the HVIRA against the claim that it invades the federal foreign affairs power and that it exceeds California's legislative jurisdiction under the Due Process Clause. Only the AIA Petitioners appeal from the ruling that the statute does not violate the dormant Commerce Clause.[1] Only Gerling appeals from rulings that the statute violates neither substantive nor procedural due process.

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[1] Although Gerling did not present the Commerce Clause question to this Court for review, it "join[s] in and fully adopt[s] the questions presented and arguments set forth in the [AIA Petition]." Gerling Petition at 3 fn.3. The Commissioner addresses the petitioners' appeal from the ruling upholding the HVIRA against their Commerce Clause challenges in this Brief (Section IV).

In this Brief, the Commissioner argues that neither the foreign affairs claim nor Commerce Clause claim merits a grant of certiorari. In his Brief in Opposition to the Gerling Petition, the Commissioner argues that neither the legislative jurisdiction claim nor either of the other due process claims merits a grant of certiorari. The Commissioner also argues in that Brief, in response to an argument made only by Gerling with respect to its foreign affairs claim, that the HVIRA does not interfere with U.S. obligations under the General Agreement of Trade in Services (GATS).

For convenience, the Commissioner includes similar preliminary Statements in both Briefs. To avoid any additional duplication, this Brief simply references the legislative jurisdiction argument that the Commissioner makes in his Brief in Opposition to the Gerling Petition, and the Brief in Opposition to the Gerling Petition references the foreign affairs arguments the Commissioner makes in this Brief. The Commissioner has attached an identical Appendix to each Brief.

OPINIONS BELOW

The Commissioner accepts the petitioners' statement of the "Opinions Below."

JURISDICTION

The Commissioner accepts the petitioners' statement of "Jurisdiction."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions

The dormant foreign affairs power, which is not found in any provision of the Constitution but which, in limited circumstances, has been implied from the nature of federalism.

The Due Process Clause and the Commerce Clause, reproduced in the appendix attached to the AIA Petition at 114a.

Federal Statutes

The McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (2000), reproduced in the attached appendix at Resp. App. 1-3.

The U.S. Holocaust Assets Commission Act of 1998, Pub. L. 105-186, 112 Stat. 611, as amended Pub. L. 106-155, § 2, 113 Stat. 1740 (1999) (codified at 22 U.S.C. § 1621 note (2000)), reproduced in the attached appendix at Resp. App. 4-16.

State Statute

The Holocaust Victim Insurance Relief Act of 1999, Cal. Ins. Code §§ 13800-13807 (2002), reproduced in the attached appendix at Resp. App. 17-22.

STATEMENT

For more than 55 years, Holocaust survivors have been stonewalled by insurance companies from which they have sought information. California is home to thousands of Holocaust survivors. ER 1699-1706.[2] These survivors are elderly and many live in poverty. App. at 23a;[3] ER 1699, 1700. Many are beneficiaries of insurance policies issued in Europe before World War II. ER 1700-1701; Resp. App. at 23.[4] In most instances, the survivors and their families no longer have proof of that insurance, and the only remaining information is in the hands of insurers. Yet, many insurers have refused to make that information available, while at the same time denying numerous claims because the

[2] "ER" refers to the Excerpts of Record in the permanent injunction appeal.

[3] "App." refers to the Appendix to the AIA Petition.

[4] "Resp. App." refers to the Appendix attached to this Brief.

claimants cannot provide proof of insurance.[5] Some companies, recognizing their legal and moral responsibilities, have now provided this information.[6] Petitioners have not.

Instead, petitioners have attacked a California statute, the Holocaust Victim Insurance Relief Act ("HVIRA"), California Insurance Code §§ 13800-13807, which seeks some of the information that has been withheld. Relying on a rarely invoked and clearly inapplicable "foreign affairs" doctrine, petitioners have attempted to manufacture a foreign policy "crisis" that simply does not exist. They have also mischaracterized the HVIRA by asserting – contrary to the detailed findings of the Court of Appeals – that it requires the payment of claims and regulates both foreign companies and the substance of foreign transactions. It does nothing of the sort. Rather, the HVIRA "'is a California insurance regulation of California insurance companies' that 'requires California companies only to *provide information* about Holocaust-era insurance policies that they (or any of their affiliates) issued.'" App. at 9a (emphasis in original).

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[5] The head of the International Commission on Holocaust Era Insurance Claims ("ICHEIC"), former Secretary of State Lawrence Eagleburger, has publicly accused one of the ICHEIC members, Allianz, of failing to pay *any* of thousands of claims submitted to ICHEIC. ER 1958. In response, Allianz pointed out that 92% of the claims did not name any insurance company because survivors did not recall where their families had held the policies. ER 1958.

To the extent that petitioners suggest that needed insurance policy information is being provided through ICHEIC or a settlement with a German insurance foundation, that suggestion is, unfortunately, just wrong. Resp. App. at 25-27, 32-33; ER 544-552. For example, it appears that Allianz will *not* be required under the German Foundation Agreement to produce information about the more than one million policies it wrote. Resp. App. at 26. ICHEIC is a voluntary, private organization that includes only some European insurance companies. ER 544. A number of petitioners' affiliates here (*e.g.*, Gerling and members of the AIA such as Royal SunAlliance and CGU) have declined to join that organization. ER 544, 556.

[6] *See* Resp. App. at 35-41.

Applying this Court's well-known and long-standing precedent, the Court of Appeals has twice rejected the same arguments petitioners now advance in this Court. On both occasions, petitions for rehearing *en banc* were denied, with no judge requesting a vote on the petitions. App. at 3a-4a and Resp. App. at 42-43. Elderly Holocaust survivors and the State of California have already waited too long to obtain needed insurance information. Continued delay should not be permitted.

Before detailing the reasons why the petitions should be denied, the Commissioner will describe the statute at issue here and will address some of the more egregious misstatements in the petitions. *See* Supreme Court Rule 15.2.

A. The HVIRA And Its Purposes

The California legislature, based on uncontradicted findings of decades-long frustration of Holocaust survivors, unanimously passed the HVIRA. A reporting statute, the HVIRA seeks insurance policy information that will assist survivors in deciding whether and against whom they may have an insurance claim. Survivors may then decide whether they wish to pursue that claim, and if so, in what manner (*e.g.*, informally with the insurer, or through the ICHEIC, or through litigation).

The HVIRA imposes the obligation to obtain this policy information on insurers doing business in California if the insurer or a related company sold insurance policies in Europe during the Holocaust. The legislature expressly recognized the persistent and present refusal by insurance companies to disclose needed information, and it determined that insurers doing business in California should take responsibility to obtain that information to avoid further victimization of survivors and their families. Cal. Ins. Code § 13801(a)-(e). Implicit in that determination is the legislature's conclusion that insurers who fail to comply are unfit to continue doing business in California. As the Court of Appeals concluded, the HVIRA reflects a number of state regulatory interests, including protecting California residents from insurance companies that refuse to provide

critical information and/or refuse to pay valid insurance claims, and informing California residents about the character of the family of companies from which they might purchase insurance. App. at 16a, 22a, 23a, 25a. The Court of Appeals found that the HVIRA is rationally related to these legitimate government interests. App. at 22a-27a.

The HVIRA's approach – obtaining information from licensees about affiliate transactions elsewhere – is not materially different from long-standing statutes in every state that require insurance companies, banks and other regulated entities to provide disclosures about their own foreign transactions and those of their affiliates. All of the petitioners except Generali are members of insurance holding company systems[7] – multinational conglomerates whose members are linked together through various control relationships. ER 552-553. California, and virtually every other state,[8] understands and expects that membership in such holding company systems carries with it the obligation by licensees to report on the conduct of other members of that system. *See*, *e.g.,* Cal. Ins. Code §§ 1215-1215.16. Such membership may require cooperation by affiliates in reporting on foreign transactions. *See*, *e.g.*, Cal. Ins. Code § 1215.4(g).

Given that insurance and other industries are dominated by worldwide holding company systems, states must have the ability to obtain information about foreign transactions and foreign affiliates if they are effectively to carry out their regulatory function. App. at 25a-27a. Indeed, European insurance regulations also require the denial of a license where a prospective or actual licensee claims that foreign law prevents its disclosure of relevant information.

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[7] Generali is an Italian company that does business in California directly, and that issued Holocaust-era insurance itself. The HVIRA, of course, requires licensees such as Generali to report their own foreign transactions.

[8] *See Alleghany Corp. v. McCartney*, 896 F.2d 1138, 1140 (8th Cir. 1990).

European Parliament and Council Directive 95/26/EC, 1995 O.J. (L 168) 7. So too, if a company improperly fails to comply with the HVIRA's reporting requirement, the Commissioner must "suspend the certificate of authority to conduct insurance business in the state." Cal. Ins. Code § 13806.

B. Petitioners Mischaracterize The HVIRA

Petitioners repeatedly mischaracterize the HVIRA, claiming that it "regulates" the substance of foreign insurance transactions, that it "regulates" foreign insurers, that it "encourages and facilitates drawn-out litigation" and that its "subject matter" is the "payment of claims." Gerling Petition at 2, 14, 19, 20 and "Question Presented" No. 1; AIA Petition at 15, 17 and "Question Presented" No. 2. The Court of Appeals has twice ruled, however, that such contentions "mischaracterize HVIRA as a matter of law." App. at 9a, 43a. Instead, the HVIRA is simply a reporting statute that "seeks only to obtain information about conduct in another jurisdiction without affecting directly any of the conduct." *Id.* As the Court of Appeals concluded:

> HVIRA's reporting provisions do not seek to regulate the substance of out-of-state transactions. The statute does not require insurers to pay any claims or otherwise alter the terms of Holocaust-era insurance policies. To the contrary, HVIRA requires California insurers *only to disclose information about* their foreign transactions or those of their affiliates. A request for information is simply not equivalent to a direct regulation of out-of-state transactions.

App. at 15a-16a (emphasis in original). *See also* App. at 43a.

Petitioners similarly attempt to characterize the HVIRA as an "extraterritorial" regulation. AIA Petition at 24-26, 28. The Court of Appeals also rejected that argument:

> HVIRA's reporting requirements might force a "related" company of a California business to search for information, but that is the extent of HVIRA's

> "extraterritorial" reach. HVIRA, on its face, does not regulate foreign insurance policies, or control the substantive conduct of a foreign insurer, or otherwise affect "the business of insurance" in any other country. . . .

App. at 44a.

Petitioners support their mischaracterizations by complaining that the HVIRA makes them pay twice for Holocaust-era claims. AIA Petition at 4, 13.[9] But the HVIRA does not compel any such thing. It does not demand, require or force the payment of any claims, and it makes no judgment as to whether policies have been properly paid. Nor does it encourage private litigation in California or elsewhere. Quite the contrary, as ICHEIC Chairman Eagleburger and others have recognized, the disclosure of insurance policy information is essential to *any* resolution of Holocaust-era insurance claims, including resolution through ICHEIC. ER 1955.

Petitioners also improperly resort to extensive citation and discussion of another California statute, Code of Civil Procedure Section 354.5, that was enacted a year earlier than the HVIRA. AIA Petition at 7, 8, 23, 115a-122a; Gerling Petition at 1, 3, 4, 5, 14, 20. Section 354.5 provides a California venue for claims made against insurers doing business in the state or whose contacts would already subject them to jurisdiction here, and it extends the statute of limitations on those claims to 2010. The statute does *not* confer personal jurisdiction over foreign affiliates and does *not* impose liability on the local licensee under policies issued by a foreign affiliate.

Petitioners present this separate and distinct statute as though it were part of the HVIRA. But both the District Court and the Court of Appeals rejected identical attempts to conflate the HVIRA with the other statute. App. at 6a,

[9] Holocaust survivors would be grateful if these companies paid just once.

7a, 10a, 16a, 17a, 38a 43a, 86a, 87a. The District Court dismissed all petitioners' challenges to Code of Civil Procedure Section 354.5 for lack of standing, petitioners never appealed that ruling, and both the District Court and Court of Appeals expressly declined petitioners' invitation to link that statute with the HVIRA. *Id.* The District Court, noting that petitioners were referring to both statutes as the "HVIRA," pointed out that Code of Civil Procedure Section 354.5 had been enacted *before* the HVIRA and was "*not* part of the HVIRA." App. at 86a, n.1 (emphasis added). Indeed, petitioner Generali itself has argued in unrelated litigation concerning payment of Holocaust-era insurance claims that the HVIRA "is a separate enactment from [Code of Civil Procedure Section 354.5]" that "[does] not apply California law to foreign insurance contracts, but merely [seeks] information about such policies." Resp. App. at 71.

In short, the HVIRA does not regulate either foreign transactions or foreign companies. Instead, as the Court of Appeals found: "HVIRA is a California insurance regulation of California insurance companies that affects foreign commerce only indirectly." *Id.* at 45a.

C. Petitioners Attempt To Manufacture A Foreign Policy "Crisis" When None Exists

No international Holocaust initiative has been prevented or delayed by the HVIRA. None of the petitioners other than Generali is a European company (Generali is an Italian company licensed to do business in California). Many of petitioners' affiliates are not German companies. Many are not members of ICHEIC.[10] However, relying primarily on earlier suggestions from the Executive Branch and Germany that the HVIRA might "complicate" a then-unfinished agreement with German companies or might undermine ICHEIC, petitioners seek to create the spectre of a foreign policy "crisis," when in fact none exists. AIA

[10] The United States did not create ICHEIC, and the Government's role in ICHEIC is only as an observer. ER 544.

Petition at 2-9, 12-14; Gerling Petition at 5-9. Quite the contrary, the German Foundation Agreement has been consummated and funded, and ICHEIC continues to function as it always has, unaffected by the HVIRA.

In 1999, Germany and several German companies announced their intent to establish a foundation primarily to compensate forced laborers and others who suffered at the hands of German companies during the Nazi era. App. at 51a, 129a. Soon thereafter, the Foundation "Remembrance, Responsibility and the Future" was established. The Foundation is to pay claims that have been or may be asserted against German companies arising from the Nazi era, and is to be funded by German companies and the German government. App. at 51a, 129a, 153a-168a.

In July 2000, Germany and the United States entered into an Executive Agreement regarding the Foundation. App. at 51a, 129a, 153a-168a. That agreement is not a treaty, is not even a "government-to-government claims settlement agreement," and does not preempt the HVIRA. Resp. App. at 45, 48-49. Instead, that agreement simply recognizes that German companies desire "legal peace," and the United States agreed that in any case filed in a court in this country *against* a German company arising from the Holocaust-era, the United States will "inform its courts . . . 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 such claims." App. at 156a.

But the United States has already advised the Court of Appeals in this case that, contrary to petitioners' assertions, the government "has not . . . undertaken a 'duty . . . to achieve' legal peace for German companies against state litigation and regulatory action." Resp. App. at 47-48.[11] The

[11] The agreement recognizes that the United States' interests concerning the Foundation do not "in themselves provide an independent basis for dismissal," of lawsuits against German companies. Resp. App. at 45-46. The United States has since acknowledged that the agreement does not have any preemptive effect. Resp. App. at 48-49.

United States has similarly explained that the agreement's contemplation of "legal peace" relates to "claims *against* German companies that arise out of the Nazi era," that the HVIRA does not contravene specific provisions of the Executive Agreement, and that this case (which does not involve claims against *any* insurance company) "is not one that implicates the German obligation to make payments from the Foundation." Resp. App. at 51-52 n.7 (emphasis in original).

Nor has the HVIRA precluded the consummation or implementation of the Executive Agreement. As the United States also informed the Court of Appeals in this case:

> [Petitioners] are wrong to represent that the panel's decision has placed 'major international agreements . . . in jeopardy' and that Holocaust survivors 'will get no relief from the German Foundation so long as the panel's decision remains in effect.' Under German law, the contribution of German companies to the Foundation, and payments to victims, depend upon a determination by the German Parliament that 'adequate legal security' exists.

Resp. App. at 51 n.7. On May 30, 2001 (after the Court of Appeals' first decision in this case), the German Bundestag determined that adequate "legal peace" exists, and authorized the Foundation to make funds available for the payment of claims. Resp. App. at 53-54. On October 16, 2002 (after the Court of Appeals' second decision in this case), German insurance companies, which continue to refuse to be bound by ICHEIC's claims procedures, reached agreement with ICHEIC to coordinate their claims handling and other procedures with that organization. *See* "Lodging", submitted in support of the Gerling Petition, at L-70 to L-180.

There is simply no evidence that the HVIRA impairs the effective exercise of the Nation's foreign policy. App. at 45a-53a. Quite the opposite, the Court of Appeals concluded that through the U.S. Holocaust Assets Commission Act of 1998 (Resp. App. at 4-16), "Congress has spoken

affirmatively in the area of Holocaust-era insurance policies and has acquiesced in state laws like HVIRA." App. at 47a. Among other things, that Act directs a commission to study and develop a record of Holocaust-era insurance policies, and instructs the commission to enlist the aid of, and coordinate with, state insurance regulators in that endeavor. App. at 47a-50a. Based on the "text, context, and history" of the Act, the Court of Appeals determined that "Congress was aware of the states' involvement in this area and, at least implicitly, encouraged laws like HVIRA." App. at 50a.

D. European Data Protection Laws

Petitioners contend that disclosure of the information sought by the HVIRA would violate certain European data protection laws and subject foreign companies to civil and criminal penalties. AIA Petition at 11, 29; Gerling Petition at 2, 10, 11, 19. As discussed below, the fact that disclosure might violate foreign law does not make the HVIRA unconstitutional.

But even if foreign law were a relevant consideration, petitioners have grossly overstated its application here. The German data protection law is the only law on which petitioners seriously rely. Most of the petitioners, however, are not German companies. One of the petitioners, Generali, is an Italian company, and it makes no claim that Italian law precludes disclosure. Whether compliance with the HVIRA would violate German law is hotly disputed (ER 1708-1768, 1914-1929), and there is no evidence in the record that any foreign government has taken or would take steps to prosecute petitioners or their affiliates if they provided the information the HVIRA requires.

SUMMARY OF ARGUMENT

This case does not warrant review, and the petition should be denied. Petitioners grossly overstate the case's potential impact on foreign affairs, and do not show a conflict with any decision of this Court or any federal court of appeals.

A. Foreign Affairs

The HVIRA does not interfere with U.S. foreign policy. The only alleged "threat" to U.S. foreign policy suggested by petitioners is that the HVIRA poses some vague obstacle to the German Foundation Agreement and ICHEIC. As detailed in this Brief, the facts belie petitioners' argument. The German Foundation and ICHEIC remain unaffected by the HVIRA, and petitioners present no evidence of *any* tangible effects upon or threats to foreign affairs.

Nor do the decisions below conflict with *Zschernig v. Miller*, 389 U.S. 429 (1968) or *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999), as petitioners contend. Both *Zschernig* and *Natsios* involved state statutes that singled out foreign governments for hostility and criticism, and in neither case had Congress indicated any approval of the state laws. In contrast, the HVIRA is merely a regulation of private business, and does not criticize, or even affect, foreign governments. Thus, this case is totally distinct from *Zschernig* and *Natsios*, and instead resembles *Barclays Bank PLC v. Franchise Tax Board*, 512 U.S. 298 (1994), and *Trojan Technologies, Inc. v. Pennsylvania*, 916 F.2d 903 (3rd Cir. 1990) (two cases petitioners do not even cite). *Barclays* and *Trojan* upheld state regulations affecting foreign private companies that, while protested by foreign governments, did not criticize or otherwise directly affect those governments.

B. Legislative Jurisdiction

The Commissioner summarizes and fully discusses the reasons why the HVIRA does not exceed California's legislative jurisdiction under the Due Process Clause in his Brief in Opposition to the Gerling Petition (No. 02-733) (pages 14-15, 18-26).

C. Commerce Clause

The HVIRA does not violate the dormant Commerce Clause. The HVIRA regulates the business of insurance. Through the McCarran-Ferguson Act, Congress delegated

its authority to regulate the business of insurance to the states and insulated the exercise of that authority from any Commerce Clause challenge. 15 U.S.C. § 1011 (2000); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 431 (1946) (holding that the Act shields state insurance regulation "from any attack under the Commerce Clause"). Since the enactment of McCarran-Ferguson, this Court has repeatedly held that the Act insulates state insurance regulations from all Commerce Clause challenges. *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648 (1981).

Petitioners rely on a supposed "extraterritorial" Commerce Clause exception to McCarran-Ferguson that has never been recognized by any court. The only case petitioners cite for such an exception, *Federal Trade Comm'n v. Travelers Health Ass'n*, 362 U.S. 293 (1960), does not even address the Commerce Clause. Instead, that case dealt with the relationship between the McCarran-Ferguson Act and the Federal Trade Commission Act. The FTC Act is not at issue here. Nor does the language of the McCarran-Ferguson Act support any extraterritorial exception. This Court has already held that the language of the McCarran-Ferguson Act must be read broadly in some instances and narrowly in others in order for the Act to achieve its primary legislative purpose, which is to insulate state insurance regulation from any Commerce Clause challenge. *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979). No court has ever read *Travelers* to be relevant to dormant Commerce Clause claims.

Finally, the HVIRA does not have extraterritorial application. It applies only to companies doing business in California and does not burden or discriminate against commerce. Nor does the HVIRA interfere with the United States' ability to "speak with one voice" in matters of foreign commerce. *See, e.g.*, *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298 (1994).

REASONS TO DENY THE PETITION

I. THE COURT OF APPEALS' DECISIONS HAVE NOT HAD, AND ARE NOT LIKELY TO HAVE, ADVERSE EFFECTS ON U.S. FOREIGN POLICY

Petitioners attempt to manufacture a foreign policy crisis.[12] According to them, "it is difficult to overstate the conflict" between the HVIRA and U.S. foreign policy goals. AIA Petition at 13. But there is no conflict, and, as the Court of Appeals found, there is no basis for believing that enforcement of the HVIRA will have material adverse foreign policy effects. App. at 53a-59a. Petitioners reach their overblown conclusions only by mischaracterizing the HVIRA.

Petitioners describe the HVIRA as forcing payment of European claims in California courts, and thus conflicting with U.S. efforts to settle Holocaust-era claims internationally. But as the Court of Appeals observed, the HVIRA is only a reporting statute that requires nothing more than disclosure of information about Holocaust-era policies. App. at 9a, 15a-16a. Nothing in the HVIRA requires any payment of any claim in any forum. It does not conflict with the international settlement of claims.

Petitioners further imply that because the HVIRA may indirectly impose some burdens on private foreign insurers, it may interfere with negotiations concerning the international settlement of Holocaust-era claims. But there is no evidence of any such interference. The German Foundation Agreement has been consummated, and ICHEIC is proceeding. Petitioners' unsupported assertion that the HVIRA will

[12] The AIA Petitioners and Gerling both claim, in essentially identical terms, that the HVIRA interferes with U.S. foreign policy and is unconstitutional under the dormant foreign affairs power. The Commissioner's arguments in Sections I and II of this Brief are equally responsive to the foreign affairs claims raised in the Gerling Petition (No. 02-733).

interfere with either process is in fact belied by recent events.

With respect to the German Foundation, the United States, while opposing the HVIRA on other grounds, has said that the HVIRA does not jeopardize the German Foundation Agreement and specifically that the HVIRA does not "contravene specific provisions of the [Agreement]." Resp. App. at 51-52 n.7. The United States has also disavowed a number of petitioners' arguments: "[Petitioners] are wrong to represent that the [court of appeals] decision has placed 'major international agreements . . . in jeopardy.'" *Id*. "[Petitioners] also err in asserting that the German Foundation Agreement and other international agreements contain a promise of comprehensive 'legal peace' – in particular, protection of European companies from litigation and from other state and local action, including the HVIRA." *Id*.

The German Foundation Agreement is being fully effectuated despite the Court of Appeals' decisions upholding the HVIRA. In particular, Germany has acknowledged the existence of "satisfactory legal peace for German companies" as contemplated in the Agreement, and since the Court of Appeals' initial decision in this case, the funding contemplated by the Agreement has been made. Gerling Petition at 8.

With respect to ICHEIC, the voluntary efforts to settle Holocaust-era insurance claims are also proceeding without effect from the HVIRA. ICHEIC recently signed an agreement with the German Foundation, establishing a settlement process for claims against German insurers. *See* "Lodging", submitted in support of the Gerling Petition, at L-70 to L-180. Notably, this too occurred after the Court of Appeals' second decision in this case, finally rejecting all of petitioners' claims. Indeed, as the Court of Appeals noted, there is nothing inconsistent between ICHEIC and the HVIRA, both of which seek disclosure of information relating to Holocaust-era insurance policies. App. at 53a. There is simply no evidence that the reporting requirements the HVIRA imposes on California-licensed companies

have had or will have any material effect on the Foundation, ICHEIC or any other international negotiations.

II. THE COURT OF APPEALS' DECISIONS UPHOLDING THE HVIRA AGAINST A FOREIGN AFFAIRS CHALLENGE DO NOT CONFLICT WITH ANY DECISION OF THIS COURT OR ANY OTHER FEDERAL COURT

A. The Court Of Appeals' Decisions Are Consistent With This Court's Decision In *Zschernig v. Miller*

Petitioners claim that the decisions below are in "direct conflict" with and "tantamount to a refusal to follow" this Court's decision in *Zschernig v. Miller*, 389 U.S. 429 (1968). AIA Petition at 14, 18. On the contrary, the Court of Appeals carefully considered that decision and subsequent decisions applying it, and correctly concluded, in light of the facts, that *Zschernig* and related cases do not invalidate the HVIRA. App. at 55a-59a.

In *Zschernig*, this Court invalidated an Oregon inheritance law that, as applied, led to sharp criticism of Communist governments by Oregon state courts. This Court found that "in this reciprocity area under inheritance statutes, the probate courts of various States have launched inquiries into the type of governments that obtain in particular foreign nations, [leading to] judicial criticism of nations established on a more authoritarian basis than our own." *Zschernig*, 389 U.S. at 433-434, 440. The court below, after examining *Zschernig* and evaluating the facts of this case, found that the diplomatic concerns present in *Zschernig* were not present here, for at least three reasons.

First, unlike the statute in *Zschernig*, the HVIRA does not insult, criticize or exhibit hostility toward any foreign government. App. 55a-59a. As the Court of Appeals observed, "in *Zschernig*, the Oregon probate statute violated the foreign affairs power because, as applied, it allowed Oregon judges to insult foreign nations." *Id.* (citing *Zschernig*, 389 U.S. at 433-435). In contrast, the HVIRA does not criticize, or even address, any foreign government. It is

directed only to private in-state companies, and only requires them to provide information as a condition of doing business in California. The Court of Appeals thus found that "there is no evidence that HVIRA would be applied in a way that would implicate the diplomatic concerns mentioned in *Zschernig*" – *i.e.*, the danger of states insulting foreign governments. *Id*.

Second, the HVIRA does not target any country or group of countries. Instead, it merely regulates all insurers, regardless of nationality, doing business in California. While some foreign governments may object to the way California has chosen to regulate its insurance market, that also does not raise the sort of diplomatic concerns evident in *Zschernig,* which was not concerned with incidental and indirect effects on foreign governments. *Id*.[13]

Third, Congress has implicitly approved state legislation like the HVIRA. The Court of Appeals found that, by passing the U.S. Holocaust Assets Commission Act of 1998, "Congress has spoken affirmatively in the area of Holocaust-era insurance policies and has acquiesced in state laws like HVIRA." App. at 47a. That statute and its legislative history show that "Congress was aware of the states' efforts to obtain information on Holocaust-era insurance policies" and "encouraged laws like HVIRA." *Id*. at 49a, 50a. Among other things, Congress directed the federal Holocaust Commission to "encourage [state regulators] to prepare a report on the Holocaust-related claims practices of all insurance companies, both domestic and foreign." *Id*. No comparable action of Congress had occurred in *Zschernig*. Petitioners simply ignore this congressional activity in discussing *Zschernig*. AIA Petition at 16-18.

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[13] Petitioners claim that "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." AIA Petition at 17. Nothing in the record or on the face of the statute supports this characterization.

B. The Court Of Appeals' Decisions Are Consistent With Subsequent Decisions That Apply *Zschernig*

The Court of Appeals' decisions are consistent with two important decisions applying *Zschernig*, neither of which petitioners mention. In *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298 (1994), and *Trojan Technologies, Inc. v. Pennsylvania*, 916 F.2d 903 (3d Cir. 1990), this Court and the Court of Appeals for the Third Circuit upheld state statutes against *Zschernig* challenges in circumstances similar to this case. In both cases, the challenged regulations had substantial effects on foreign businesses, had been the subject of strong diplomatic complaints by foreign governments, and were the subject of international negotiations. However, in neither case was the *Zschernig* challenge sustained.[14]

In *Barclays*, this Court considered a state tax that was highly disadvantageous to foreign companies and had been vigorously protested by numerous foreign governments, including many of the main trading partners of the United States. *Barclays*, 512 U.S. at 324-326 & n.22. Although the law had obvious effects on foreign affairs, this Court upheld it, relying largely on the implicit approval of Congress. The U.S. Executive Branch, under pressure from foreign governments, had asked Congress to override the state statute, but Congress declined. For this reason, this Court said, it was not the Court's role to override what Congress had decided to permit. *Id*. at 324-331. The present case is an even stronger one for upholding the state law, for here

[14] Although the grant of certiorari in *Barclays* included the *Zschernig* challenge, this Court decided the case under the dormant Commerce Clause and upheld the statute without mentioning *Zschernig*, thus implicitly rejecting the *Zschernig* challenge. In *Trojan Technologies*, the Third Circuit specifically considered and rejected the *Zschernig* challenge.

Congress not only has declined to override statutes such as the HVIRA, but has implicitly encouraged them.[15]

The Third Circuit's decision in *Trojan* also informed the decisions below. In *Trojan*, Pennsylvania had directed its agencies to buy only American products. Foreign governments protested. Moreover, international negotiations at the time were seeking a comprehensive agreement on lowering barriers to international competition in procurement, a result the U.S. supported. *Trojan*, 916 F.2d at 906-908. Nonetheless, the Third Circuit upheld the state law. In addition to noting implicit congressional acquiescence, the court emphasized that the state law did not single out any country or group of countries for insult or criticism. *Id*. at 913-914. In the decisions below, the Court of Appeals relied on the Third Circuit's application of *Zschernig*, upholding the HVIRA because it also does not single out any country or group of countries for insult or criticism. App. at 57a-58a (citing *Trojan*).

C. The Decisions Below Do Not Conflict With Any Decision Of Any Other Court Of Appeals

Petitioners claim that the decisions below conflict with the First Circuit's decision in *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999), *aff'd sub nom. on other grounds, Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000). AIA Petition at 14-19; Gerling Petition at 24-28. Petitioners are again mistaken.

In *Natsios*, the First Circuit invalidated a Massachusetts statute that penalized companies for doing business in Burma. It did so on multiple grounds, including federal statutory preemption and under *Zschernig*.[16] The state

[15] Further, like the present case and unlike *Zschernig*, *Barclays* involved a commercial regulation directed at private companies rather than foreign governments, without any suggestion of criticism or hostility toward any foreign government.

[16] In *Crosby*, this Court affirmed the statutory preemption holding and did not reach the *Zschernig* issue. *Crosby*, 530 U.S. at 373 n.8.

statute, enacted in direct response to the repressive policies of the Burmese military regime, consciously sought to coerce the Burmese government into holding democratic elections. *Natsios*, 181 F.3d at 47. As a result, the statute came within *Zschernig*'s prohibition of state statutes that show hostility toward foreign governments. *See Natsios,* 181 F.3d at 56 (distinguishing *Trojan Technologies* on the ground that the law involved there "did not single out or evaluate any particular foreign state and did not involve state evaluations of political conditions abroad," whereas "[i]n contrast, the Massachusetts Burma law is aimed at a specific foreign state").

Unlike the statute in *Natsios*, the HVIRA does not criticize any foreign government. Further, in *Natsios*, Congress had passed conflicting federal legislation. In this case, the Court of Appeals specifically found that Congress had approved state involvement in Holocaust-era insurance issues. App. at 47a-50a.

In short, the three Circuits that have applied *Zschernig* – the First Circuit in *Natsios*, the Third Circuit in *Trojan*, and the Ninth Circuit below – are in perfect accord. Where a state law singles out a foreign country or group of countries for criticism, and the law is not approved by Congress, it may be questioned under *Zschernig* because it is not the role of states to pass judgment upon foreign governments. But where a state law regulates private businesses in a manner that has some international effects but is not directed at foreign governments, and particularly where Congress has encouraged state involvement, *Zschernig* does not apply.

III. THE COURT OF APPEALS DECISION UPHOLDING THE HVIRA AGAINST A DUE PROCESS/LEGISLATIVE JURISDICTION CHALLENGE DOES NOT WARRANT FURTHER REVIEW BY THIS COURT

The AIA Petitioners and Gerling both argue, in essentially the same terms, that the HVIRA exceeds California's legislative jurisdiction under the Due Process Clause, and that the decision by the Court of Appeals below conflicts

with a decision by the Court of Appeals for the Eleventh Circuit concerning Florida's Holocaust insurance statute. The Commissioner fully addresses these arguments at pages 18-26 of his Brief in Opposition to the Gerling Petition (No. 02-733), and respectfully requests the Court to refer to that Brief for discussion of these issues.

IV. THE COURT OF APPEALS' DECISION UPHOLDING THE HVIRA AGAINST A COMMERCE CLAUSE CHALLENGE IS CONSISTENT WITH THIS COURT'S INTERPRETATION OF THE MCCARRAN-FERGUSON ACT

The AIA Petitioners claim that the Court of Appeals "went fatally astray" from "a controlling decision of this Court" in holding that the McCarran-Ferguson Act, 15 U.S.C. § 1011-1015, protects the HVIRA from challenge under the Commerce Clause. AIA Petition at 24. This mischaracterizes the decision below. The Court of Appeals followed over fifty years of precedent holding that the McCarran-Ferguson Act insulates state insurance regulations from *all* Commerce Clause restrictions, even if the regulations affect extraterritorial conduct. Indeed, since the passage of the McCarran-Ferguson Act, neither this Court nor any other court has invalidated a state insurance regulation under the Commerce Clause based on its extraterritorial effects.

A. The Court Of Appeals' Decision Is Consistent With The Plain Language Of The Mccarran-Ferguson Act And More Than Fifty Years Of Precedent Holding That The Act Exempts State Insurance Regulations From All Commerce Clause Restrictions

The first section of the McCarran-Ferguson Act provides:

> Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of Congress shall not be

> construed to impose *any barrier* to the regulation or taxation of such business by the several States.

15 U.S.C. § 1011 (2000) (emphasis added). Consistent with this declaration of legislative purpose, Section 1012(a) provides: "The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business."

Consistent with the Act's plain language, for more than half a century, this Court has held that the McCarran-Ferguson Act insulates state insurance regulations from all Commerce Clause attack. This Court first considered the issue in *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946), which concerned a state tax imposed solely on foreign insurance companies doing business in the state. In rejecting a Commerce Clause challenge, this Court assumed that the tax affected interstate commerce and was discriminatory. *Id.* at 429. Nonetheless, this Court held that, by enacting the McCarran-Ferguson Act, Congress had "clearly put the full weight of its power behind existing and future state legislation to sustain it *from any attack under the commerce clause* to whatever extent this may be done with the force of that power behind it." *Id*. at 431 (emphasis added).

The AIA Petitioners attempt to create an "extraterritoriality" exception to the plain language of the Act and this Court's precedent, arguing that the Act does not protect state insurance regulations that are extraterritorial. AIA Petition at 25. But, as the Court of Appeals observed, this purported exception has no basis in this Court's precedent. Instead, following *Benjamin*, 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.[17] In

[17] In *State Bd. of Ins. v. Todd Shipyards Corp.*, 370 U.S. 451 (1962), for example, this Court rejected a Commerce Clause challenge to a Texas statute taxing corporations on premiums paid to foreign insurers.

(Continued on following page)

Western & Southern Life Insurance Co. v. State Board of Equalization, 451 U.S. 648, 669-671 (1981), for example, California imposed a retaliatory tax on foreign insurers to pressure other states to lower taxes on California insurers. Although the statute was both discriminatory and extraterritorial, this Court upheld it against a Commerce Clause challenge.[18]

In sum, the court below followed the plain language of the Act and the clear direction of this Court's precedents. The Commerce Clause presents no barriers to a state's regulation of insurance, even if such regulation affects commerce outside that state, and no court has ever held otherwise.

B. The Court Of Appeals' Decision Is Consistent With This Court's Decision In *Travelers*

In asserting an "extraterritorial" exception to the McCarran-Ferguson Act, the AIA Petitioners rely primarily on *Federal Trade Comm'n v. Travelers Health Ass'n*, 362 U.S. 293 (1960), which they say reached "precisely that

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This Court noted that: (1) the insurer in question was not licensed in Texas, had no agents there, and did not solicit business or investigate claims there; (2) the insured corporation was not licensed in Texas; (3) the insurance was bought and issued outside Texas; and (4) losses under the policies were not paid to Texas residents. *Id*. at 454-455. Yet, this Court found no Commerce Clause violation even though Texas sought to regulate conduct that "take[s] place entirely outside Texas." *Id*. at 454. Despite the statute's extraterritorial effect, this Court stated that Congress had passed the McCarran-Ferguson Act to provide that "the regulation and taxation of insurance should be left to the States, without restriction by reason of the Commerce Clause." *Id*. at 452. The Court did, however, hold that the statute violated the Due Process Clause. *Todd Shipyards*, 370 U.S. at 457. As the Commissioner discusses in his Brief in Opposition to the Gerling Petition (pages 18-29), the HVIRA does not violate due process either.

[18] *Cf. Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 880 (1985); *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 219 n.18 (1979).

conclusion." AIA Petition at 25. Petitioners wholly mischaracterize *Travelers*. As the Court of Appeals held, *Travelers* did not even involve a Commerce Clause challenge, and instead addressed a totally distinct part of the McCarran-Ferguson Act. App. at 41a-42a.

In addition to exempting state insurance regulations from Commerce Clause attack, the Act also gives state insurance regulations a more limited exemption from federal statutory preemption. Section 1012(b) provides in part: "No act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance." Section 1012(b) also provides that the federal antitrust statutes and the Federal Trade Commission Act do apply to the "business of insurance," but only "to the extent that such business is not regulated by state law."

Travelers involved only an interpretation of McCarran-Ferguson's narrow exemption for the Federal Trade Commission Act. It considered whether the FTC could regulate interstate insurance sales under Section 1012(b) of the Act. The FTC sought to enjoin deceptive advertising by a Nebraska company that sold insurance nationwide. To evade federal regulation, the insurer argued that the FTC could not regulate its business because a Nebraska statute already prohibited Nebraska insurance companies from engaging in deceptive trade practice "in any other state." *Travelers*, 362 U.S. at 296.

This Court disagreed, holding that the McCarran-Ferguson Act permitted the FTC to act. This Court reasoned that Congress did not intend to allow a single state's law to displace the FTC's ability to protect residents of other states. *Id.* at 297-298. Otherwise, the purpose of Section 1012(b) would be subverted: If one state had a fair trade statute that purported to regulate nationwide, an insurer located there would be free from the reach of the FTC Act in every other state. *Id*. at 302. To avoid this result, this Court determined that the "state regulation" that could displace the FTC Act under Section 1012(b)

meant "regulation by the state in which the deception is practiced and has its impact," *id*. at 298, or "where the business activities have their operative force." *Id*. at 301-02. However, this has nothing to do with Congress' direction that state insurance regulation be insulated "from *any* attack under the commerce clause." *Benjamin*, 328 U.S. at 421 (emphasis added).

Petitioners' argument that *Travelers'* "extraterritoriality exception" to Section 1012(b)'s preemption exemption should also apply to the state's Commerce Clause immunity under Section 1012(a) is based mainly on similarity in the language of the two provisions. AIA Petition at 27. But the argument ignores and is flatly inconsistent with other language in the Act, namely, its Declaration of Policy in Section 1011, which provides that "silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation" of the business of insurance.

According to the AIA Petitioners, the HVIRA's claimed extraterritoriality not only excepts it from the McCarran-Ferguson Act's protection against Commerce Clause attack, but is also a reason that the HVIRA violates the Commerce Clause. Since no one doubts that, for Commerce Clause purposes, Congress could consent to state HVIRA-type disclosure requirements, Petitioners' Commerce Clause claim is obviously predicated on the absence of such express consent – that is, on Congressional silence. For this argument to prevail, Section 1011 of the McCarran-Ferguson Act must be read to permit an extraterritoriality exception that not only is not in the text, but also is belied by Section 1011's clear preclusion of Congressional silence as the basis of "any" barrier to State regulation. The *Travelers* Court's interpretation of Section 1012(b)'s preemption exemption did not face this textual obstacle because it did not implicate Section 1011's Declaration of Policy with respect to the Commerce Clause.

Petitioners attempt to buttress their argument by citing legislative history of the McCarran-Ferguson Act, relied on by the *Travelers* majority, showing that Congress did not intend to overturn three pre-McCarran decisions of

this Court, which held that the Due Process Clause limits extraterritorial state insurance taxation and regulation. AIA Petition at 28-29. While the *Travelers* majority thought this history relevant to the preemption exemption of Section 1012(b), the decision did not involve the Commerce Clause, and the Court therefore did not have to confront the question of how to reconcile this history with the plain meaning of Section 1011 of the Act. Justices Harlan, Frankfurter and Whitaker dissented in *Travelers*, believing that this same legislative history was "much too meager to justify" even the Court's interpretation of Section 1012(b) of the Act.

In any event, this Court has acknowledged the textual difference between the Act's broad Commerce Clause immunity and the limited statutory exemption of Section 1012(b):

> The McCarran-Ferguson Act operates to assure that the States are free to regulate insurance companies without fear of Commerce Clause attack. The question in the present case, however, is one under the quite different secondary purpose of the McCarran-Ferguson Act – to give insurance companies only a limited exception from the antitrust laws.

Group Life & Health Ins. v. Royal Drug Co., 440 U.S. 205, 218 n.18.

Finally, as the Court of Appeals implicitly recognized, interpreting Section 1011 to mean what it plainly says does not disregard the legislative history on which petitioners rely, or concede that the states may regulate extraterritorially in all cases. Instead, it quite sensibly reads that history to signal Congress' understanding that the McCarran-Ferguson Act did not purport to eliminate due process limits on state legislative jurisdiction.

Thus, as the Court of Appeals observed, *Travelers* did not address the issue in this case – namely, the scope of the McCarran-Ferguson Act's exemption of state insurance regulations from the Commerce Clause under Sections 1011 and 1012(a). App. at 42a. In contrast to those sections,

which are broad grants of Congressional power to the States to regulate the business of insurance free from Commerce Clause restriction, Section 1012(b) simply establishes narrow exceptions for several specific federal laws. Those exceptions apply only to those specified laws, they have a different purpose, and they are subject to a different analysis than Sections 1011 and 1012(a). *Group Life & Health Ins. v. Royal Drug Co.*, 440 U.S. 205, 218-219 & n.8 (1979). Accordingly, *Travelers* has no bearing on petitioners' Commerce Clause challenge, and provides no reason for this Court's review.

C. The Court of Appeals' Decision Is Consistent With This Court's Commerce Clause Precedent Outside the Insurance Context Because The HVIRA Does Not Regulate Extraterritorially

Even if the AIA Petitioners are correct that the McCarran-Ferguson Act does not shield extraterritorial laws from Commerce Clause attack, the HVIRA would still be constitutional because it is not an extraterritorial law. It applies only to insurers doing business in California, and applies equally to all such insurers, foreign or domestic. As the Court of Appeals held, the HVIRA does not "regulate foreign insurance policies" or "control the substantive conduct of a foreign insurer." App. at 44a. Instead, the "HVIRA requires California companies only to *provide information* about Holocaust-era insurance policies that they (or any of their affiliates) issued." App. at 43a (emphasis in original). Although policy information may be located in the offices of related European insurers, the HVIRA does not direct those companies to do anything. Thus, the Court of Appeals correctly held that the HVIRA was distinguishable from the statute in *Travelers* which "sought to regulate directly the conduct of an insurer in another jurisdiction." App. at 43a.

D. The Court of Appeals' Decision Is Consistent With This Court's Authorities Construing The Foreign Commerce Clause

The AIA Petitioners argue that the HVIRA violates the foreign Commerce Clause because it purportedly disrupts "an area where a uniform national approach is necessary." AIA Petition at 24-25. In rejecting this argument, the Court of Appeals followed this Court's decision in *Barclays*, 512 U.S. 298 (1994), and did not create conflict with the decision of any other court.[19] In *Barclays*, this Court considered whether California's worldwide-reporting tax system impaired the federal government's ability to speak with one voice in international commerce. This Court stated that the controlling test for foreign Commerce Clause purposes was whether there were "specific indications of congressional intent to bar the state action here challenged." *Id.* at 324. Finding no such indications, *Barclays* upheld the state law even though foreign governments and the U.S. Executive Branch had strenuously objected to it. *Id*. at 328-329 & n.30.

This Court specifically rejected the argument that a series of Executive Branch actions, statements and amicus filings constituted a "clear federal directive" proscribing California's statute, *id*. at 328, stating that "[t]he Constitution expressly grants Congress, not the President, the power to regulate Commerce with foreign nations." *Id.* at 329. "Executive Branch communications that express federal policy but lack the force of law cannot render unconstitutional California's otherwise valid, congressionally condoned, use of worldwide combined reporting." *Id.* at 329-330. Thus, *Barclays* establishes that Congress, and not

[19] Petitioners claim that "[t]he Ninth Circuit did not deny that the HVIRA violates the Foreign Commerce Clause if it is applicable." AIA Petition at 25. This is simply incorrect. The Ninth Circuit, relying on *Barclays* (which petitioners do not even discuss) held that even if the Foreign Commerce Clause is applicable, the HVIRA does not violate it. App. at 45a-47a.

the Executive Branch, is the "one voice" that matters for purposes of the foreign Commerce Clause. *See also Wardair Canada, Inc. v. Fla. Dept. of Revenue*, 477 U.S. 1 (1986).

Here, petitioners have failed to address *Barclays* or proffer any "specific indications of congressional intent to bar the state action challenged." *Barclays*, 512 U.S. at 324. Nor could they, as Congress has voiced neither a need for national uniformity in insurance regulation nor any intent to bar the HVIRA. On the contrary, through the McCarran-Ferguson Act, Congress left regulation of insurance to the states. Further, as the Court of Appeals found, Congress has passed a statute, the U.S. Holocaust Commission Act of 1998, and made statements supporting the goals of the HVIRA and the significant role of state insurance regulators in addressing Holocaust-era insurance issues. App. at 47a-50a. Accordingly, the HVIRA does not impair Congress' ability to "speak with one voice" in foreign commerce.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

[The McCarran-Ferguson Act,
15 USCS § 1011-1015 (2001)]

§ 1011. Declaration of policy

The Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

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§ 1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948

(a) State regulation. The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) Federal regulation. No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act [*15 USCS §§ 1* et seq.], and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended [*15 USCS §§ 41* et

se.], shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

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§ 1013. Suspension until June 30, 1948, of application of certain Federal laws; Sherman Act [15 USCS § 1 et seq.] applicable to agreements to, or acts of, boycott, coercion, or intimidation

(a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act [*15 USCS §§ 1* et seq.], and the Act of October 15, 1914, as amended, known as the Clayton Act and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended [*15 USCS §§ 41* et seq.], and the Act of June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this Act [*15 USCS §§ 1011* et seq.] shall render the said Sherman Act [*15 USCS §§ 1* et seq.] inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

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§ 1014. Applicability of National Labor Relations Act [29 USCS §§ 151 et seq.] and the Fair Labor Standards Act of 1938

Nothing contained in this Act [*15 USCS §§ 1011* et seq.] shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act [*29 USCS §§ 151* et seq.], or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938,

or the Act of June 5, 1920, known as the Merchant Marine Act 1920.

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§ 1015. Definition of "State"

As used in this Act [*15 USCS §§ 1011* et se q.], the term "State" includes the several States, Alaska, Hawaii, Puerto Rico, Guam, and the District of Columbia.

APPENDIX B

[The U.S. Holocaust Assets Commission Act of 1998. Act of June 23, 1998, P.L. 105-186, 112 Stat. 611; as amended Dec. 9, 1999, P.L. 106-155, § 2, 113 Stat. 1740.]

Section I. Short title.

This Act may be cited as the "U.S. Holocaust Assets Commission Act of 1998."

Sec. 2. Establishment of Commission.

(a) Establishment. There is established a Presidential Commission, to be known as the "Presidential Advisory Commission on Holocaust Assets in the United States" (hereafter in this Act referred to as the "Commission").

(b) Membership.

(1) Number. The Commission shall be composed of 21 members, appointed in accordance with paragraph (2).

(2) Appointments. Of the 21 members of the Commission –

(A) eight shall be private citizens, appointed by the President;

(B) four shall be representatives of the Department of State, the Department of Justice, the Department of the Army, and the Department of the Treasury (one representative of each such Department), appointed by the President;

(C) two shall be Members of the House of Representatives, appointed by the Speaker of the House of Representatives;

(D) two shall be Members of the House of Representatives, appointed by the minority leader of the House of Representatives;

(E) two shall be Members of the Senate, appointed by the majority leader of the Senate;

(F) two shall be Members of the Senate, appointed by the minority leader of the Senate; and

(G) one shall be the Chairperson of the United States Holocaust Memorial Council.

(3) Criteria for membership. Each private citizen appointed to the Commission shall be an individual who has a record of demonstrated leadership on issues relating to the Holocaust or in the fields of commerce, culture, or education that would assist the Commission in analyzing the disposition of the assets of Holocaust victims.

(4) Advisory panels. The Chairperson of the Commission may, in the discretion of the Chairperson, establish advisory panels to the Commission, including State or local officials, representatives of organizations having an interest in the work of the Commission, or others having expertise that is relevant to the purposes of the Commission.

(5) Date. The appointments of the members of the Commission shall be made not later than 90 days after the date of enactment of this Act.

(c) Chairperson. The Chairperson of the Commission shall be selected by the President from among the members of the Commission appointed under subparagraph (A) or (B) of subsection (b)(2).

(d) Period of appointment. Members of the Commission shall be appointed for the life of the Commission.

(e) Vacancies. Any vacancy in the membership of the Commission shall not affect its powers, but shall be filled in the same manner as the original appointment.

(f) Meetings. The Commission shall meet at the call of the Chairperson at any time after the date of appointment of the Chairperson.

(g) (Quorum. 11 members of the Commission shall constitute a quorum, but a lesser number of members may hold meetings.

Sec. 3 Duties of the Commission.

(a) Original research.

(1) In general. Except as otherwise provided in paragraph (3), the Commission shall conduct a thorough study and develop a historical record of the collection and disposition of the assets described in paragraph (2), if such assets came into the possession or control of the Federal Government, including the Board of Governors of the Federal Reserve System and any Federal reserve bank, at any time after January 30, 1933 –

(A) after having been obtained from victims of the Holocaust by, on behalf of, or under authority of a government referred to in subsection (c);

(B) because such assets were left unclaimed as the result of actions taken by, on behalf of, or under authority of a government referred to in subsection (c); or

(C) in the case of assets consisting of gold bullion, monetary gold, or similar assets, after such assets had been obtained by the Nazi government of Germany from governmental institutions in any area occupied by the military forces of the Nazi government of Germany.

(2) Types of assets. Assets described in this paragraph include –

(A) gold, including gold bullion, monetary gold, or similar assets in the possession of or under the control of the Board of Governors of the Federal Reserve System or any Federal reserve bank;

(B) gems, jewelry, and nongold precious metals;

(C) accounts in banks in the United States;

(D) domestic financial instruments purchased before May 8, 1945, by individual victims of the Holocaust, whether recorded in the name of the victim or in the name of a nominee;

(E) insurance policies and proceeds thereof;

(F) real estate situated in the United States;

(G) works of art; and

(H) books, manuscripts, and religious objects. For full classification, consult USCS Tables volumes.

(3) Coordination of activities. In carrying out its duties under paragraph (1), the Commission shall, to the maximum extent practicable, coordinate its activities with, and not duplicate similar activities already being undertaken by, private individuals, private entities, or government entities, whether domestic or foreign.

(4) Insurance policies.

(A) In general. In carrying out its duties under this Act, the Commission shall take note of the work of the National Association of Insurance Commissioners with regard to Holocaust-era insurance issues and shall encourage the National Association of Insurance Commissioners to prepare a report on the Holocaust-related claims practices of all insurance companies, both domestic and foreign, doing business in the United States at any time after January 30, 1933, that issued any individual life, health, or property-casualty insurance policy to any individual on any list of Holocaust victims, including the following lists:

(i) The list maintained by the United States Holocaust Memorial Museum in Washington, D.C., of Jewish Holocaust survivors.

(ii) The list maintained by the Yad Vashem Holocaust Memorial Authority in its Hall of Names of individuals who died in the Holocaust.

(B) Information to be included. The report on insurance companies prepared pursuant to subparagraph (A) should include the following, to the degree the information is available:

(i) The number of policies issued by each company to individuals described in such subparagraph.

(ii) The value of each policy at the time of issue.

(iii) The total number of policies, and the dollar amount, that have been paid out.

(iv) The total present-day value of assets in the United States of each company.

(C) Coordination. The Commission shall coordinate its work on insurance issues with that of the international Washington Conference on Holocaust-Era Assets, to be convened by the Department of State and the United States Holocaust Memorial Council.

(b) Comprehensive review of other research. Upon receiving permission from any relevant individuals or entities, the Commission shall review comprehensively any research by private individuals, private entities, and non-Federal government entities, whether domestic or foreign, into the collection and disposition of the assets described in subsection (a)(2), to the extent that such research focuses on assets that came into the possession or control of private individuals, private entities, or non-Federal government entities within the United States at any time after January 30, 1933, either –

(1) after having been obtained from victims of the Holocaust by, on behalf of, or under authority of a government referred to in subsection (c); or

(2) because such assets were left unclaimed as the result of actions taken by, on behalf of, or under authority of a government referred to in subsection (c).

(c) Governments included. A government referred to in this subsection includes, as in existence during the period beginning on March 23, 1933, and ending on May 8, 1945 –

(1) the Nazi government of Germany;

(2) any government in any area occupied by the military forces of the Nazi government of Germany;

(3) any government established with the assistance or cooperation of the Nazi government of Germany; and

(4) any government which was an ally of the Nazi government of Germany.

(d) Reports.

(1) Submission to the President. Not later than December 31, 2000, the Commission shall submit a final report to the President that shall contain any recommendations for such legislative, administrative, or other action as it deems necessary or appropriate. The Commission may submit interim reports to the President as it deems appropriate.

(2) Submission to the Congress. After receipt of the final report under paragraph (1), the President shall submit to the Congress any recommendations for legislative, administrative, or other action that the President considers necessary or appropriate.

Sec. 4. Powers of the Commission.

(a) Hearings. The Commission may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the Commission considers advisable to carry out this Act.

(b) Information from Federal agencies. The Commission may secure directly from any Federal department or agency such information as the Commission considers necessary, to carry out this Act. Upon request of the Chairperson of the Commission, the head of any such department or agency shall furnish such information to the Commission as expeditiously as possible.

(c) Postal services. The Commission may use the United States mails in the same manner and under the same conditions as other departments and agencies of the Federal Government.

(d) Gifts. The Commission may accept, use, and dispose of gifts or donations of services or property.

(e) Administrative services. For the purposes of obtaining administrative services necessary to carry out the purposes of this Act, including the leasing of real property for use by the Commission as an office, the Commission shall have the power to –

(1) enter into contracts and modify, or consent to the modification of, any contract or agreement to which the Commission is a party; and

(2) acquire, hold, lease, maintain, or dispose of real and personal property.

Sec. 5. Commission personnel matters.

(a) Compensation. No member of the Commission who is a private citizen shall be compensated for service on the Commission. All members of the Commission who are officers or employees of the United States shall serve without compensation in addition to that received for their services as officers or employees of the United States.

(b) Travel expenses. The members of the Commission shall be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under subchapter I of chapter 57 of title 5, United States Code [*5 USCS §§ 5701* et seq.], while away from their homes or regular places of business in the performance of services for the Commission.

(c) Executive director, deputy executive director, general counsel, and other staff.

(1) In general. Not later than 90 days after the selection of the Chairperson of the Commission under section 2, the Chairperson shall, without regard to the civil service laws and regulations, appoint an executive director, a deputy executive director, and a general counsel of the Commission, and such other additional personnel as may be necessary to enable the Commission to perform its duties under this Act.

(2) Qualifications. The executive director, deputy executive director, and general counsel of the Commission shall be appointed without regard to 'Political affiliation, and shall possess all necessary security clearances for such positions.

(3) Duties of executive director. The executive director of the Commission shall –

(A) serve as principal liaison between the Commission and other Government entities;

(B) be responsible for the administration and coordination of the review of records by the Commission; and

(C) be responsible for coordinating all official activities of the Commission.

(4) Compensation. The Chairperson of the Commission may fix the compensation of the executive director, deputy executive director, general counsel, and other personnel employed by the Commission, without regard to the provisions of chapter 51 and subchapter III of chapter 53 of title 5, United States Code [*5 USCS §§ 5101* et seq., 5331 et seq.], relating to classification of positions and General Schedule pay rates, except that –

(A) the rate of pay for the executive director of the Commission may not exceed the rate payable for level III of the Executive Schedule under section 5314 of title 5, United States Code; and

(B) the rate of pay for the deputy executive director, the general counsel of the Commission, and other Commission personnel may not exceed the rate payable for level IV of the Executive Schedule under section 5315 of title 5, United States Code.

(5) Employee benefits.

(A) In general. An employee of the Commission shall be an employee for purposes of chapters 83, 84, 85, 87, and 89 of title 5, United States Code [*5 USCS §§ 8301* et seq., 8401 et seq. 8501 et seq., 8701 et seq.,

8901 et seq.], and service as an employee of the Commission shall be service for purposes of such chapters.

(B) Nonapplication to members. This paragraph shall not apply to a member of the Commission.

(6) Office of Personnel Management. The Office of Personnel Management –

(A) may promulgate regulations to apply the provisions referred to under subsection (a) to employees of the Commission; and

(B) shall provide support services, on a reimbursable basis, relating to –

(i) the initial employment of employees of the Commission; and

(ii) other personnel needs of the Commission.

(d) Detail of Government employees. Any Federal Government employee may be detailed to the Commission without reimbursement to the agency of that employee, and such detail shall be without interruption or loss of civil service status or privilege.

(e) Procurement of temporary and intermittent services. The Chairperson of the Commission may procure temporary and intermittent services under section 3109(b) of title 5, United States Code, at rates for individuals which do not exceed the daily equivalent of the annual rate of basic pay prescribed for level V of the Executive Schedule under section 5316 of such title.

(f) Staff qualifications. Any person appointed to the staff of or employed by the Commission shall be an individual of integrity and impartiality.

(g) Conditional employment.

(1) In general. The Commission may offer employment on a conditional basis to a prospective employee pending the completion of any necessary security clearance background investigation. During the pendency of any such investigation, the Commission shall ensure that such conditional employee is not given and does not have access to or responsibility involving classified or otherwise restricted material.

(2) Termination. If a person hired on a conditional basis as described in paragraph (1) is denied or otherwise does not qualify for all security clearances necessary for the fulfillment of the responsibilities of that person as an employee of the Commission, the Commission shall immediately terminate the employment of that person with the Commission.

(h) Expedited security clearance procedures. A candidate for executive director or deputy executive director of the Commission and any potential employee of the Commission shall, to the maximum extent possible, be investigated or otherwise evaluated for and granted, if applicable, any necessary security clearances on an expedited basis.

Sec. 6. Administrative support services.

Upon the request of the Commission, the Administrator of General Services shall provide to the Commission, on a reimbursable basis, the administrative support

services necessary for the (Commission to carry out its responsibilities under this Act.

Sec. 7. Termination of the Commission.

The Commission shall terminate 90 days after the date on which the Commission submits its final report under section 3.

Sec. 8. Miscellaneous provisions.

(a) Inapplicability of FACA. The Federal Advisory Committee Act (5 U.S.C. App.) does not apply to the Commission.

(b) Public attendance. To the maximum extent practicable, each meeting of the Commission shall be open to members of the public.

Sec. 9. Authorization of appropriations.

There are authorized to be appropriated not more than $ 6,000,000, in total, for the interagency funding of activities of the Commission under this Act for fiscal years 1998, 1999, 2000, and 2001, of which, notwithstanding section 1346 of title 31, *United States Code, and section 611* of the Treasury and General Government Appropriations Act, 1998 [unclassified], $537,000 shall be made available in equal amounts from funds made available for fiscal year 1998 to the Departments of Justice, State, and the Army that are otherwise unobligated. Funds made available to the Commission pursuant to this section shall remain available for obligation until December 31, 1999.

APPENDIX C

CHAPTER 4. HOLOCAUST ERA INSURANCE REGISTRY

Section

§ 13800. Short title

This chapter shall be known and may be cited as the Holocaust Victim Insurance Relief Act of 1999. (*Added by Stats.1999, c. 827 (A.B.600), § 2, eff. Oct. 10, 1999.*)

§ 13801. Legislative findings and declarations

The Legislature finds and declares the following:

(a) During World War II, untold millions of lives and property were destroyed.

(b) In addition to the many atrocities that befell the victims of the Nazi regime, insurance claims that rightfully should have been paid out to the victims and their families, in many cases, were not.

(c) In many instances, insurance company records are the only proof of insurance policies held. In some cases, recollection of those policies' very existence may have perished along with the Holocaust victims.

(d) At least 5,600 documented Holocaust survivors are living in California today. Many of these survivors and their descendents have been fighting for over 50 years to persuade insurance companies to settle unpaid or wrongfully paid claims. Survivors are asking that insurance companies come forth with any information they possess that could show proof of insurance policies held by Holocaust victims and survivors, in order to ensure that closure on this issue is swiftly brought to pass.

(e) Insurance companies doing business in the State of California have a responsibility to ensure that any involvement they or their related companies may have had with insurance policies of Holocaust victims are disclosed to the state and to ensure the rapid resolution of these questions, eliminating the further victimization of these policyholders and their families.

(f) The international Jewish community is in active negotiations with responsible insurance companies through the International Commission on Holocaust Era Insurance Claims to resolve all outstanding insurance claims issues. This chapter is necessary to protect the claims and interests of California residents, as well as to encourage the development of a resolution to these issues through the international process or through direct action by the State of California as necessary. (*Added by Stats.1999, c. 827 (A.B.600), § 2, eff. Oct. 10, 1999.*)

§ 13802. Definitions

For purposes of this chapter, the following definitions shall apply:

(a) "Holocaust victim" means any person who was persecuted during the period of 1929 to 1945, inclusive, by Nazi Germany, its allies, or sympathizers.

(b) "Related company" means any parent, subsidiary, reinsurer, successor in interest, managing general agent, or affiliate company of the insurer.

(c) "Proceeds" means the face value or other payout value of insurance policies and annuities plus reasonable interest to date of payment without diminution for wartime or immediate postwar currency devaluation. (*Added by Stats.1999, c. 827 (A.B.600), § 2, eff. Oct. 10, 1999.*)

§ 13803. Holocaust Era Insurance Registry

The commissioner shall establish and maintain within the department a central registry containing records and information relating to insurance policies, as described in Section 13804, of Holocaust victims, living and deceased. The registry shall be known as the Holocaust Era Insurance Registry. The Attorney General, in coordination with the department, shall establish appropriate mechanisms to ensure public access to the registry. (*Added by Stats.1999, c. 827 (A.B.600), § 2, eff. Oct. 10, 1999.*)

§ 13804. Insurers; disclosure of information; certification

(a) Any insurer currently doing business in the state that sold life, property, liability, health, annuities, dowry,

educational, or casualty insurance policies, directly or through a related company, to persons in Europe, which were in effect between 1920 and 1945, whether the sale occurred before or after the insurer and the related company became related, shall, within 180 days following enactment of this act, file or cause to be filed the following information with the commissioner to be entered into the registry:

(1) The number of those insurance policies.

(2) The holder, beneficiary, and current status of those policies.

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

(b) In addition, each insurer subject to subdivision (a) shall certify to any of the following:

(1) That the proceeds of the policies described in subdivision (a) have been paid to the designated beneficiaries or their heirs where that person or persons, after diligent search, could be located and identified.

(2) That the proceeds of the policies where the beneficiaries or heirs could not, after diligent search, be located or identified, have been distributed to Holocaust survivors or to qualified charitable nonprofit organizations for the purpose of assisting Holocaust survivors.

(3) That a court of law has certified in a legal proceeding resolving the rights of unpaid policyholders, their heirs, and beneficiaries, a plan for the distribution of the proceeds.

(4) That the proceeds have not been distributed and the amount of those proceeds.

An insurer who certifies as true any material matter pursuant to this subdivision, which the insurer knows to be false, is guilty of a misdemeanor.

(c) An insurer currently doing business in the state that did not sell any insurance policies in Europe prior to 1945, shall not be subject to this section if a related company, whether or not authorized and currently doing business in the state, has made a filing under this section. (*Added by Stats.1999, c. 827 (A.B.600), § 2, eff. Oct. 10, 1999.*)

§ 13805. Civil penalty

Any insurer that knowingly files information about a policy required by this chapter that is false shall, with respect to that policy, be liable for a civil penalty not to exceed five thousand dollars ($5,000), which penalty is hereby appropriated to the department to be used by it to aid in the resolution of Holocaust insurance claims. (*Added by Stats.1999, c. 827 (A.B.600), § 2, eff. Oct. 10, 1999.*)

§ 13806. Suspension of certificate of authority

The commissioner shall suspend the certificate of authority to conduct insurance business in the state of any insurer that fails to comply with the requirements of this chapter by the 210th day after this section becomes effective, until the time that the insurer complies with this chapter. (*Added by Stats.1999, c. 827 (A.B.600), § 2, eff. Oct. 10, 1999.*)

§ 13807. Regulations

The commissioner shall adopt rules to implement this chapter within 90 days of its effective date. The rules shall be adopted as emergency regulations in accordance with Chapter 3.5 (commencing with Section 11340) of the Government Code, and for the purposes of that chapter, including Section 11349.6 of the Government Code, the adoption of the rules shall be considered by the Office of Administrative Law to be necessary for the immediate preservation of the public peace, health and safety, and general welfare. (*Added by Stats.1999, c. 827 (A.B.600), § 2, eff. Oct. 10, 1999.*)

APPENDIX D

Testimony of Leslie Tick
California Department of Insurance
United States House of Representatives
Government Reform Subcommittee on
Government Efficiency, Financial Management
and Intergovernmental Relations.
September 24, 2002
2:00 pm.

Good afternoon. My name is Leslie Tick. I am senior staff counsel at the California Department of Insurance. I have been with the Department for the past 10 years and have worked on the Holocaust-era insurance issue since late 1997.

In pre-war Europe, insurance was sold extensively and primarily to middle and working class people. Many individuals invested in life insurance policies and in annuities because retirement planning tools, such as pensions, were not widely available. Dowry and education policies were also very common during this time. These policies were purchased when a child was born and paid when a daughter married or a son commenced higher education.

As the religious, ethnic and political repression preceding World War II spread, and later, as the war and Holocaust enveloped Europe, more people purchased insurance products in an effort to keep their assets safe.

Over the past 50 years, some insurers have consistently refused to pay benefits or provide information about these policies. The reasons given for non-payment include:

- No death certificate provided by the claimant;
- Policyholders stopped making premium payments during the war;
- Proceeds of policies sold to Jewish insureds were already paid to the Nazis or nationalized;
- Reparations to Holocaust survivors were made by government restitution treaties, which covered insurance proceeds;
- Companies located in eastern bloc countries were taken over by communist regimes and their assets were confiscated so that no funds exist to pay claims; and
- Records no longer exist to verify the individual's status as a policyholder beneficiary.

An estimated 50,000 to 100,000 Holocaust survivors live in the United States. California has the second largest number of survivors with estimates ranging from 6,300 to 20,000 survivors. If these policies were paid today, at present value with currency adjustments and interest, it is estimated that the total due could reach into the hundreds of millions of dollars.

In order to see that justice is done and provide assistance to those survivors who may wish to file claims on these policies, information needs to come from the insurance companies. Most survivors and their heirs no longer have documentary proof of insurance. Most survivors were children during the war. Some recall details regarding insurance – the agent coming to their home for payment, or their parents telling them that they were insured. The majority of claimants, however, have no actual knowledge of whether or not their family members were insured, but believe they must have been because of their social and

economic status, business holdings, or because they believe that their parents took good care of the family.

The International Commission on Holocaust Era Insurance claims (ICHEIC) was formed in August 1998 to try to address the issues surrounding these policies in a consensual manner. The ICHEIC is made up of a few European insurers (Allianz, Generali, Zurich, AXA and Winterthur), American and European insurance regulators, representatives of Jewish and survivor organizations, and the State of Israel. In order to address the problem of claimants' lack of records, ICHEIC required each member company to provide a list of unpaid policies issued to Holocaust victims. It was envisioned that this list would be made available to the public so that potential claimants would be able to see if they or their relatives had a policy.

ICHEIC required that its member companies provide lists of policies held by victims of the Holocaust, but left each insurer to decide who was and who was not a victim of the Holocaust. Even if some names are known as "Jewish names" a company cannot determine with certainty which policyholder was, or was not, a Jew. And for those who were victims by virtue of the fact that they were homosexual, Roma, disabled, or Jehovah's Witness, for example, it would be entirely impossible.

Another problem arose from ICHEIC's requirement that the insurers provide policyholder names just for those policies that remained unpaid. There was a widespread practice during the pre-war and war years for the Nazis to confiscate policies outright or for the policies held by victims to be paid into "blocked accounts." These "blocked accounts" were in the policyholder's name, but the account only worked one way. The accountholder was forced to

deposit his assets, but was not allowed to make any withdrawals. Unfortunately, the insurers considered these policies to be "paid" even though they were not paid to the beneficiary of the policy, and these names were not included on the lists.

Another problem with the ICHEIC lists is that most of the ICHEIC insurers simply refused to provide lists, saying that European law would forbid such disclosure, or saying that it would simply take too much time and cost too much money to collect the data. Allianz, for example, with approximately 1.3 million paper files, refused to put the information into electronic format, citing cost and difficulty and its decision that such an effort would be unlikely to yield enough Jewish policyholders to make the exercise cost effective. Allianz eventually agreed with ICHEIC to digitize information regarding a small sampling of the 1.3 million policies and to match those names against the Yad Vashem[1] database of Jews killed in the Holocaust, in order to determine which of the policies were victims of the Holocaust. The Yad Vashem database, however, contains the names of only about half of Jewish victims of the Holocaust. The matching was ultimately never done, as Allianz was not willing to agree to the Yad Vashem matching system and so, to date, there are no Allianz names on the ICHEIC database that came from this exercise.

ICHEIC also undertook limited research of non-insurer archives for evidence of individual policies. ICHEIC searched state archives in various locations around

[1] Yad Vashem is the Holocaust memorial in Israel, which to date, has the world's largest collection of names of Jewish Holocaust victims.

Europe and looked mostly at documents reflecting the forced documentation of Jewish assets to be either taxed by or collected by the Nazis. These names were collected in ICHEIC's research database and were added to the policyholder database that is publicly available on ICHEIC's website (www.icheic.org).

To date the ICHEIC policyholder database contains 59,244 policyholder names. Only 15% of those names (8,929) came from ICHEIC's member insurers. Of the 8,929 provided by the insurers, 94% (8,388 names) come from just one company. Generali, which provided 94% of the names on the ICHEIC database, actually collected information on 360,000 policies in force in 1939 but was only willing to give ICHEIC a smaller list of 90,000 "unpaid" policies. Those were then matched against the Yad Vashem list, resulting in the 8,388 names currently published.

When the German Foundation negotiations are completed, the German insurers say that they will provide a list of names of policies in force, to be matched against a list of German Jews. Virtually none of these names will come from Allianz, as the German insurers agreed to provide those names that were already in electronic format. The resulting matched names will be added to the ICHEIC website database. Since the matching will be done against a list of German Jews, it will not capture homosexual, disabled, Jehovah's Witness or Roma victims of the Nazis.

In contrast to the ICHEIC list requirements, AB 600, codified as California Insurance Code § 13800 (attached) directs insurers to provide to the Department data regarding *all* insurance policies they or a related company wrote in Europe between 1920 and 1945. This requirement addresses the problem of insurers deciding for themselves

who was and who was not a victim of the Nazis and deciding which policies were paid and which were not paid. It also allows survivors and the families of victims who were not targeted because they were Jews, to be able to search for names.

The statute directs the Department to suspend the certificate of authority of any insurer that fails to comply. The statute required insurers to provide their data to the Department of Insurance by April 10, 2000.

Beginning in March 2000, various insurance companies (Gerling, Generali, American Reinsurance, Winterthur) and the trade association American Insurance Association (representing an additional one hundred or so insurers), filed four separate federal lawsuits against the California Insurance Commissioner asserting that the statute and its implementing regulations violated their federal constitutional rights.

On June 9, 2000, the United States District Court for the North District of California granted plaintiffs' request and enjoined enforcement of the statute.

On February 7, 2001, the United States Court of Appeals for the Ninth Circuit rejected the insurers' commerce clause and foreign affairs constitutional challenges. (Opinion attached as Exhibit 2). The Court kept the injunction in place pending proceedings on the merits regarding due process, the insurers' one remaining constitutional challenge.

In September 2001 the parties argued cross motions for summary judgment on the due process issues. On October 1, 2001, the District Court denied the Commissioner's Motion for Summary Judgment and granted Plaintiffs'

motions, finding that the statute violated the insurers' due process rights.

Both sides took the due process ruling back to the 9th Circuit Court of Appeals. The Court heard oral argument on May 8, 2002.

On July 15, 2002, the Court of Appeals ruled that the statute was not unconstitutional for any of the reasons set forth by plaintiffs (amended Opinion attached as Exhibit 3).

The Court of Appeals denied plaintiffs' request for rehearing en banc on September 9, 2002.

On September 13, 2002 the insurers requested that the Court stay the ruling pending their request to the United States Supreme Court that it hear the case.

Prior to the injunction, which prevented the California Department of Insurance from enforcing the statute, approximately 1,500 California insurers submitted reports.

Four groups representing approximately eight insurers provided reports that fully comply with the statute.

Four groups representing approximately forty-three California insurers provided partial, incomplete submissions, such as policy information regarding unpaid policies issued to Holocaust victims.

The Department has further questions regarding the reports submitted by five groups representing approximately fifty-eight insurers.

Approximately one hundred insurers refused to comply.

The remainder, and overwhelming majority of the insurers reported that they either wrote no insurance in Europe during the applicable time period or that they searched and were unable to find any data responsive to the statute.

APPENDIX E

Statement of Representative Henry A. Waxman
Ranking Minority Member
Committee on Government Reform
at the Subcommittee on Government Efficiency,
Financial Management and Intergovernmental
Relations Hearing on H.R. 2693
September 24, 2002

Today we are holding a hearing on important legislation to help rectify a terrible injustice. The bill is the Holocaust Victims Insurance Relief Act (H.R. 2693). It addresses one of the most difficult problems faced by Holocaust survivors and their families when they seek restitution from insurance companies that have refused to pay claims held by victims of Nazi persecution: How to identify the insurance company that issued the policy.

At the outset, I would like to thank Chairman Horn and Ranking Member Schakowsky. They are both original cosponsors of the legislation before us today. I am very pleased that they have agreed to schedule this hearing to help achieve justice for Holocaust survivors and their families.

The history of Holocaust insurance is shameful. After the war, survivors filing claims for life insurance often were rejected for the cruelest of reasons. Some survivors were rejected because they could not produce death certificates for loved ones who perished in Nazi concentration camps. Other insurance companies took advantage of the fact that claimants had no policy documents to prove their policy existed. In many cases, survivors recalled that their families had insurance but could not name the company holding their assets.

In 1998, the International Commission on Holocaust-Era Insurance Claims (ICHEIC) was set up as a forum for the insurance companies to expeditiously settle outstanding policies. In November 2001, our full Committee held an oversight hearing on the ICHEIC process. We found the work of ICHEIC disheartening.

At the time, ICHEIC had received 77,800 claims for restitution, but had resolved only 758 – less than 1%. Today, nearly a year later, the statistics are not much better.

One of the main problems confronting the ICHEIC process was the difficulty in getting names of Holocaust-era policyholders. At the time of the hearing, less than 10,000 policyholder names had been published by the companies involved in ICHEIC and most of those names came from just one company. Without comprehensive policyholder lists to search for the names of family members, more than 80% of ICHEIC applicants filed incomplete claims naming no insurance company at all. As a result, the rate of claims approval was very small.

A representative case is that of Israel Arbeiter, a Holocaust survivor who was born in Poland and came to the United States after being liberated from Auschwitz. As he testified at last year's hearing, Mr. Arbeiter knows his family had insurance policies because he vividly remembers that every week an agent of an insurance company visited his home to collect premiums. The records were kept in a ledger left behind when the Nazi SS stormed into his home in February 1941. But he never knew which company had issued the policies of his parents and uncles who were killed at the Treblinka death camp. As a result, ICHEIC has been unable to resolve his claim.

The purpose of the legislation we are considering today is to help Mr. Arbeiter and the countless others who are in the same situation. H.R. 2693 requires all insurance companies operating in the United States to provide information about Holocaust-era policyholders to the U.S. government for publication by the Holocaust-Era Assets Recovery Project of the National Archives.

We know this bill can work. It is patterned after a California state law which has already produced positive results within California. In fact, we will hear today from MONY Life Insurance, an insurance company that is fully complying with the California law. Because of the California law, policy information is getting out of companies' archives and into the hands of the rightful beneficiaries.

There has been one positive development recently. Today, we will have the opportunity to hear about a new agreement that was announced last week between ICHEIC and the companies in the German Insurance Association. Under the agreement, the names of Jewish policyholders who lived in Germany after 1933 are to be released publicly. Assuming that the German insurance companies actually comply and that a reliable list of Jews who lived in Germany can be compiled, this could help many families in filing restitution claims.

But this agreement – welcome as it may be – will not solve the problems. For one thing, it will not help Mr. Arbeiter and others like him because he came from areas under Nazi control, not Germany proper.

What's clearly needed is a legislative response by Congress that will in effect compel recalcitrant insurance companies to provide complete lists of Holocaust-era policyholders. That's the goal of H.R. 2693.

Again, I commend Chairman Horn for holding this hearing and I look forward to hearing from the witnesses.

APPENDIX F

Prepared Statement of David S. Waldman, Vice President-Chief Operations Counsel MONY Life Insurance Company For the House Committee on the Government Reform's Sub-committee on Government Efficiency, Financial Management and Inter-Governmental Relations Hearing on H.R. 2693 on September 24, 2002

Good afternoon, honorable members of the Sub-Committee. My name is David Waldman and I am the Vice President-Chief Operations Counsel of MONY Life Insurance Company, formerly The Mutual Life Insurance Company of New York, which was chartered in 1842 and issued the first mutual life insurance policy in the United States. It was my responsibility to provide legal advice to the team of individuals at our Company who prepared and filed the reports required under the various state Holocaust Victim Insurance Relief Acts, including that of California. Thank you for inviting me to testify before this Committee and for affording me the opportunity to share with you our experience in complying with the California Act.

In response to the enactment of the various state Holocaust Victim reporting laws applicable to insurance companies, MONY conducted an extensive and exhaustive examination of its records relating to its European business, including an attempt to identify any policies sold to persons in Europe that would have been in effect between 1920 and 1945.

Such records as did exist indicated that MONY sold life insurance and annuity products in Europe in the early 1900's. However, MONY completely discontinued writing new business in Europe by 1914. Moreover, it appeared that in the 1920-26 time period, MONY disposed of virtually all its existing European business by transfer, with the consent of the policyholder, to European domiciled insurers.

There were a number of policies in various European countries that were not transferred, and we conducted a detailed investigation of any documentation we might have concerning them. There were several boxes of paper files, related record cards on microfilm and policy payment vouchers in the archives area of our record center dating back to the relevant time period. The review of our paper files resulted in the identification and inputting of 6,813 potentially relevant policies.

The next step was the retrieval of material data on these policies as well as on an eventual 4,700 additional policies which were identified in our records center as potentially relevant. This investigative process resulted in the definite identification of 6,149 policies sold to persons in Europe, as defined under the California Act, that were in effect between 1920 and 1945. We reviewed our records from that era including cards denoting policy status in numerical order covering the entire period in question and vouchers evidencing payment dating from 1926. The data obtained from this research, together with any additional information obtained from our files, was then input into our database and organized into a format conforming with the prescriptions of the Act.

Subsequent to this initial examination, we embarked upon a second phase which consisted of a direct review of all our policy records during the relevant time period and an identification of the policies derived from those records sold to persons in Europe that were in effect between 1920 and 1945. The number of policies identified in this second phase was 27,603. The data for these policies was combined with that for the 6,149 identified in the first phase and incorporated into a report reflecting the data for the total of 33,752 policies.

The review of our records resulted in our finding only two cases identifiable as Holocaust Victim claims, one with an agency of record of Brussels and the other in the United States. Both included references to concentration camps on the death benefit voucher as the cause of death; one indicated payment of proceeds in 1945 and the other in 1950. In addition, there was one claim with a cause of death listed as "killed by Germans;" and payment of proceeds was indicated in 1949.

The interpretation and inputting of data from our files was an extremely resource-intensive and time-consuming task. We eventually had four persons in our Operations area and three temporary workers dedicated full-time to the project, and expended over 8,286 hours in identifiable staff time.

This work did serve as the basis for our reports to all the states that have enacted Holocaust Victim Insurance Relief Acts, although some adjustments were needed to define and populate the databases used in the various states due to the differing wording in their laws, particularly in the time periods and geographic areas covered. For example, while California law applies to policies in effect between

1920 and 1945 and sold to persons in areas in the European Continent that were at some time occupied or controlled by Nazi Germany or its allies, other state laws apply to policies issued between 1920 and 1945 to a Holocaust Victim which may include persons in any other neutral European country or area in Europe under the influence or threat of Nazi invasion. The database we created also allowed us to respond in quick order to inquiries we received on particular individuals either directly, through State Insurance Departments or from the International Commission on Holocaust Era Insurance Claims. I may add that in no case was there any documentary evidence of a failure on our part to pay, or an improper payment of, the proceeds of a policy on the life of a Holocaust Victim or the claim of a Holocaust Survivor, or any attempt on our part to avoid our contractual obligations under any of the policies found in our records.

In closing, I would like to express my appreciation to the extremely dedicated group of individuals MONY Life assigned to this project who worked tirelessly and with heartfelt concern for the subject matter until it was completed, and to MONY Life which willingly devoted the resources necessary to do a good job, not only because it was the law but also because it was the right thing to do.

Exhibit A

Assumptions Underlying California Report

In some cases the terminology prescribed for the layout was not reflective of the actual policy designations or transactions; in such cases we added appropriate descriptions. As the records requested were from a time that extended well beyond what our normal record retention

guidelines would have covered, much of the data was nonexistent, illegible, and/or incomplete, which we indicated on the report, except in such cases where we were able to make reasonable assumptions. A synopsis of those assumptions follows.

1. A policy was included in the report where our records indicated a City or country of Origin or Domicile in Europe as defined in the California regulations and a year reflecting an in force status between 1920 and 1945.

2. The agency of record where the policy was issued and the location of that agency were reported as Policyholder and Insured City/Country of Domain, which corresponded to City of Origin or Domicile and Country in California's prescribed layout.

3. Since the policy payment vouchers in our records only dated from 1926, the best evidence of payment prior to that date was the record cards. Payment would ordinarily have been made within one year of the effectuating event. Consequently, if the record card noted that a policy that went out of force prior to 1926 was a death or maturity, we assumed that payment of the proceeds was made to the person entitled to them under the policy. Conversely, if the record card noted that a policy went out of force 1926 or later, we did not report that a payment was made on a death or maturity unless there was a corresponding payment voucher for the policy. If there was a payment voucher for the policy, then we assumed that payment was made. Where the record card noted a surrender, we assumed that payment was made to the person entitled to payment for all years regardless of whether there was a payment voucher for the policy, since a surrender would have been precipitated by the policyholder contacting us

and minimal requirements would have been applicable to payment.

4. With regard to policy payment vouchers, the standard guidelines we followed were to look for a voucher for the year noted on the policy record card plus an additional seven years (a typical escheat period of the time) for a death or maturity, but only one additional year for a surrender based on the same reasoning that resulted in our differentiated treatment of surrenders under 3. above.

5. If payment was made, then we assumed it was made to the person entitled to payment under the policy unless there was documentation to the contrary. This would have been reported as Bene/Heir in accordance with California's prescribed layout even though the payee would generally have been, for example, the owner in the case of a surrendered policy or a matured endowment and the annuitant in the case of a supplementary annuity contract in settlement of a policy. For annuities, the annuitant was also reported as the Insured. When our records only reflected a person named with no identifying label, we assumed that person was the Insured.

6. N/R inserted in a field indicated either that no records existed for that field, the records we did have in our files for that field were illegible, incomplete or otherwise nonresponsive, or the field was not applicable (e.g., payee data where proceeds were not payable).

7. Amount of proceeds was only reported where our files indicated Unpaid, in accordance with California's prescribed layout. The amount unpaid was reported in the Amount Paid field only if the amount was known to us. If the amount was not known to us, it was reported as N/R. If our files indicated Paid, that field was reported as N/R,

which in this case denoted not applicable (to California's reporting requirements).

8. For payments assumed prior to 1926 (where no vouchers would have existed), payment method (if applicable) was reported N/R (no records exist). For payments made after 1926 (where a voucher was found), it was assumed that payment method (if applicable) was Paid Directly unless there was documentation to the contrary.

9. Where our records identified a year for a transaction or occurrence but not an exact date, it was assumed that it took place at the end of that year.

10. In the case of apparently inconsistent data in our records, it was assumed that the most recent data was also the most accurate.

APPENDIX G

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GERLING GLOBAL REINSURANCE CORP. OF AMERICA; GERLING GLOBAL REINSURANCE CORP. – U.S. BRANCH; GERLING GLOBAL LIFE REINSURANCE COMPANY; GERLING GLOBAL LIFE INSURANCE COMPANY; GERLING AMERICA INSURANCE COMPANY; and CONSTITUTION INSURANCE CORP., Plaintiffs-Appellees, v. HARRY W. LOW,* in his capacity as the COMMISSIONER OF INSURANCE OF THE STATE OF CALIFORNIA, Defendant-Appellant,	No. 00-16163 D.C. No. CV-00-00506-WBS

* Harry W. Low is substituted for his predecessor as Commissioner of Insurance for the State of California. Fed. R. App. P. 43(c)(2).

ASSICURAZIONI GENERALI.
Plaintiff-Appellee.
v.
HARRY W. LOW, individually, and in his capacity as the INSURANCE COMMISSIONER for the STATE OF CALIFORNIA,
Defendant-Appellant.

No. 00-16164
D.C. No. CV-00-00875-WBS
(Filed Mar. 29, 2001)

* * *

Paez have voted to deny the petition for rehearing en banc, and Judge Goodwin has so recommended.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it.

The petition for rehearing and petition for rehearing en banc are DENIED.

APPENDIX H

Nos. 00-16163, 00-16164, 00-16165, and 00-16182

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GERLING GLOBAL REINSURANCE CORP.
OF AMERICA, et al.,

Plaintiffs-Appellees,

v.

CLARK KELSO in his capacity as the
COMMISSIONER OF INSURANCE OF THE
STATE OF CALIFORNIA,

Defendant-Appellant.

BRIEF FOR AMICUS CURIAE
THE UNITED STATES OF AMERICA
IN SUPPORT OF AFFIRMANCE

ON APPEAL FROM A PRELIMINARY
INJUNCTION ENTERED BY THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA,
THE HONORABLE WILLIAM B. SHUBB

DAVID W. OGDEN
Assistant Attorney General

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Washington, D.C. 20530-0001

Attorneys for the United States

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* * *

legal peace," undertakes to "use its best efforts; in a manner it considers appropriate, to achieve these objectives with state and local governments." Art. 2(2).

The Foundation Agreement and the United States' role in its negotiation are unique. The Foundation Agreement is not a government-to-government claims settlement agreement. As the Agreement makes clear, U.S. policy interests favor "dismissal on any valid legal ground," of all "National Socialist and World War II era cases against German companies." Annex B ¶ 3. And the United States undertakes to explain that interest in court proceedings and to take appropriate steps to achieve the objectives of the Agreement with state and local governments. Art. 2(1), (2). At the same time, the Agreement also makes explicit that "the United States does not suggest that its policy interests concerning the Foundation in

themselves provide an independent legal basis for dismissal" of private claims against German companies. Annex B, ¶¶ 3, 7. The Foundation Agreement reflects the United States' policy of fostering voluntary cooperation between the victims' constituencies on one side and the German government and companies on the other to bring expeditious justice to the widest possible population of survivors.

In addition to the Foundation, the United States has also encouraged participation in the International Commission of Holocaust Era Insurance Claims ("ICHEIC"), a voluntary organization which has established procedures for the processing and payment of Holocaust-era insurance claims. As part of the Foundation Agreement, the German government has agreed that such insurance claims against German insurance companies will be processed on the basis of claims-handling procedures established by the ICHEIC. Art. 1(4). ICHEIC is a voluntary organization, chaired by former United States Secretary of State Lawrence S. Eagleburger, formed by five European insurance companies (including plaintiffs Generali and Winterthur), the State of Israel, Jewish organizations, and the National Association of Insurance Commissioners.[2] The State Department has stated that ICHEIC "should be recognized as the exclusive remedies for all insurance claims that date to the Nazi era" and has "encourag[ed] all insurance companies that wrote policies during the Nazi era to join the ICHEIC." State Department Press Statement, Feb. 15,

[2] The United States has observer status in ICHEIC, together with several European nations, including Germany, France, Italy, Poland, and the Czech Republic.

2000.[3] The United States continues to urge all insurance companies that issued Holocaust-era insurance policies to join ICHEIC.

In view of the importance of the Foundation Agreement, we wish to correct some misunderstandings reflected in the brief of the American Insurance Association ("AIA") concerning the undertakings of the U.S. Government and the impact of the procedures established by the Agreement on existing legal remedies available to American citizens against private corporations. AIA states that "[t]he federal government . . . has committed to give affected insurers legal peace, including against state litigation and regulatory action," AIA Br. 1, and that the Foundation Agreement "imposes a duty on the United States to achieve 'all-embracing and enduring legal peace' for German companies." AIA Br. 2. The United States has committed to various unprecedented undertakings in the Agreement. As discussed, the United States has committed to file a Statement of Interest in private suits against German companies explaining 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 such claims," Foundation Agreement, Art. 2(1), and has committed to "use its best efforts, in a manner it considers appropriate, to achieve the objectives" of the Agreement, Art. 2(2). It has not, however, undertaken a "duty . . . to

[3] Deputy Secretary Eizenstat has likewise stated that the "U.S. Government has supported the International Commission . . . since it began, and we believe it should be considered the exclusive remedy for resolving insurance claims from the World War II era." Statement before the House Banking Committee, Feb. 9, 2000 (ER 1905).

achieve" legal peace for German companies against state litigation and regulatory action.

Nor does the Foundation Agreement itself preclude individuals from filing suit on their insurance policies in court. *Cf.*, *e.g.*, AIA Br. at 2 (stating that the Agreement "creates on exclusive remedy and forum"); *id.* at 12 (stating that the Agreement "mandates that insurance claims that come within the scope of . . . ICHEIC 'shall be processed . . . on the basis of such procedures'"). Although the Agreement obligates the German Foundation to process insurance claims against German companies according to ICHEIC procedures, Foundation Agreement, Art. 1(4), it does not mandate that individual policyholders or beneficiaries bring their claims in that forum. And while the Agreement states that it is in the national interest of the United States that the Foundation be the exclusive forum for such claims, it does not "create" an exclusive remedy; rather, it specifically declares that "[t]he United States does not suggest that its policy interests concerning the Foundation in themselves provide an independent basis for dismissal" of private claims. Foundation Agreement, Annex B, ¶ 7.[4] As we discuss below, the premises underlying the Agreement and the California statutes are plainly different. But AIA is mistaken in asserting that the Foundation Agreement [is] in "direct conflict" with California law (AIA Br. 4), if, by this, AIA means to suggest

[4] The district court, which rendered its decision before the Agreement was finalized, also overestimated the Agreement's ultimate legal affect when it predicted that the Agreement would make the Foundation an "exclusive remedy" as a matter of U.S. law. Memorandum and Order: Preliminary Injunction at 17.

that the Agreement by its terms preempts the California statute.

For the reasons set out below, we believe that there are substantial questions that the California statute impairs interests protected by the Foreign Commerce clause and other constitutional restraints and that these questions justify a preliminary injunction. But affirmance of the district court's order should not rest on any misunderstanding about the scope of the Foundation Agreement.

* * *

APPENDIX I

Nos. 00-16163, 00-16164, 00-16165, and 00-16182

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GERLING GLOBAL REINSURANCE CORP.
OF AMERICA, et al.,

Plaintiffs-Appellees,

v.

HENRY W. LOW, in his capacity as the
COMMISSIONER OF INSURANCE OF THE
STATE OF CALIFORNIA,

Defendant-Appellant.

BRIEF FOR AMICUS CURIAE
THE UNITED STATES OF AMERICA
IN SUPPORT OF REHEARING EN BANC

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Attorneys for the United States

* * *

interests" for the designated claims process "to be 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."[6]

The problem with the California legislation is not that it contravenes specific provisions of the Executive-Agreements – it does not.[7] But when a state projects itself

[6] Agreement Art. 1(1). The Agreement with Austria contains a substantially similar provision, which extends as well to claims against the government of Austria. The U.S.-Swiss Joint Statement expresses a similar policy for claims against Swiss companies, though it does not have the force of an Executive Agreement.

[7] Plaintiffs are wrong to represent that the panel's decision has placed "major international agreements . . . in jeopardy" and that Holocaust survivors "will get no relief from the German Foundation so long as the panel's decision remains in effect." Under German law, the contribution of German companies to the Foundation, and payments to victims, depend upon a determination by the German Parliament that "adequate legal security" exists. This determination is to be based on the dismissal of lawsuits that were pending at the time the Foundation

(Continued on following page)

into the realm of foreign affairs, its activity may threaten the efficacy of the national government's efforts. That danger is very much present here. The

* * *

Agreement was signed, primarily class action cases, that assert claims *against* German companies that arise out of the Nazi era. This case, however, does not involve claims against any German company – indeed the litigation was brought by the insurance companies themselves – and, therefore, is not one that implicates the German obligation to make payments from the Foundation.

Plaintiffs also err in asserting that the German Foundation Agreement and other international agreements contain a "promise of comprehensive 'legal peace' – in particular, protection of European companies from litigation and from other state and local action, including the HVIRA." App. Pet. at 7. *see also* App. Pet. at 6 (negotiations "premised on a guarantee of 'legal peace' from statutes like the HVIRA"). The Foundation Agreement makes clear that the achievement of "legal peace" for German companies in the context of full implementation of the Foundation is in the foreign policy interests of the United States. Foundation Agreement, Art. 2(1), Annex B, ¶¶ 3, 4. However, the Foundation Agreement does not provide a "promise" or "guarantee" of legal peace.

APPENDIX J

[An unofficial/informal translation of the Bundestag resolution, adopted on May 30, 2001, obtained from the United States Department of State.]

Motion introduced by the parliamentary groups of the SPD, CDU/CSU, Alliance90/Greens, FDP and PDS

Determination of Adequate Legal Certainty for German Enterprises Pursuant to Section 17, Para. 2 of the Law on the Creation of a Foundation "Remembrance, Responsibility, and the Future"

The German Bundestag determines:

1. The Law on the Creation of a Foundation "Remembrance, Responsibility, and the Future" of August 2, 2000 stipulates in Section 17, Para. 2: "The first allocation of funds to the Foundation requires as preconditions the entry into force of the German-American Executive Agreement concerning the foundation "Remembrance, Responsibility, and the Future," and the establishment of adequate legal certainty for German enterprises. The German Bundestag shall determine whether these preconditions exist." The German-Americans Executive Agreement entered into force on October 19, 2000. The German Bundestag shares the view held by the Special Commissioner of the Federal Chancellor, Dr. Otto Count Lambsdorff, and the Federal Government, as well as the concurrent opinion of the Foundation Initiative of German Industry that adequate legal security exists for German enterprises.

2. The German Bundestag determines that adequate legal security has been established pursuant to Section 17,

Para. 2 of the Law on the Creation of a Foundation "Remembrance, Responsibility, and the Future."

The Foundation "Remembrance, Responsibility, and the Future" is therefore authorized to make funds of the foundation available to the partner organizations pursuant to Section 17, Para. 1 of the Law.

3. The German Bundestag takes note of the fact that the Foundation Initiative, according to number 4d of the "Joint Declaration" of July 17, 2000, will pay the contribution of the German enterprises in the amount of DM 5 billion plus at least DM 100 million to the Foundation "Remembrance, Responsibility, and the Future." The German Bundestag understands that these funds will be transferred immediately to the Foundation "Remembrance, Responsibility, and the Future."

Berlin, May 30, 2001

Dr. Peter Struck and parliamentary group
Friedrich Merz and parliamentary group
Kerstin Mueller, Rezzo Schlauch and parliamentary group
Dr. Wolfgang Gerhardt and parliamentary group
Roland Claus and parliamentary group

APPENDIX K

Nos. 01-17023 and 01-17433

UNITED STATES COURT OF APPEALS
IN THE NINTH CIRCUIT

GERLING GLOBAL REINSURANCE CORP. OF AMERICA; GERLING GLOBAL REINSURANCE CORP. – U.S. BRANCH; GERLING GLOBAL LIFE REINSURANCE COMPANY; GERLING GLOBAL LIFE INSURANCE COMPANY; GERLING AMERICA INSURANCE COMPANY; and CONSTITUTION INSURANCE COMPANY,

Plaintiffs-Appellees/Cross-Appellants,

v.

HARRY LOW in his capacity as the COMMISSIONER OF INSURANCE FOR THE STATE OF CALIFORNIA,

Defendant-Appellant/Cross-Appellee.

Appeal from the United States District Court
for the Eastern District of California
Honorable William B. Shubb, District Judge
CIV-S-00-0506 WBS JFM and Consolidated Cases

MOTION OF THE FEDERAL REPUBLIC OF GERMANY FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE SUPPORTING AFFIRMANCE OF SUMMARY JUDGMENT FOR PLAINTIFFS-APPELLEES/CROSS-APPELLANTS

ROGER M. WITTEN
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Counsel for Amicus Curiae
Federal Republic of Germany

March 18, 2002

* * *

BAV exercises its authority by issuing "circulars" to insurance companies in Germany. The BAV has reviewed and continues to review the practices of German insurance companies regarding Holocaust-era policies and, in this regard, has issued Circular 1/1999, which requires insurance companies in Germany to "re-check if any benefits to policyholders or beneficiaries under life insurance contracts concluded before 1945 (historical portfolio) are still outstanding."[1]

2. German Sovereignty over the Disclosure of Private Data by German Companies

The Federal Republic also has sovereign authority to regulate the disclosure by German companies in Germany of private personal data concerning German citizens. Pursuant to this sovereign right, the Federal Republic has enacted privacy laws, including the Federal Data Protection Law (Bundesdatenschutzgesetz or BDSG). The BDSG

[1] BAV Circular 1/1999, "Life Insurance Contracts of Jewish and Other Victims of National Socialist Persecution," *available at* http://www.bav.bund.de/en/rundschreiben/r/1999/1.html.

broadly prohibits the disclosure of private data in all sectors of the German economy, including the disclosure of certain information regarding insurance policy records by German insurance companies without the express authorization of policyholders or their beneficiaries. § 28(2) Nr. 1b BDSG. Unauthorized disclosure of private data may result in civil and criminal penalties.

* * *

APPENDIX L

[SEAL]

THE TREASURER OF THE STATE OF FLORIDA
DEPARTMENT OF INSURANCE

BILL NELSON

IN THE MATTER OF:

HOLOCAUST VICTIMS
INSURANCE ACT ENFORCEMENT
PROCEEDING CASE NO. 31393-99-SC
_____/

INVESTIGATIVE SUBPOENA FOR RECORDS

TO: GERLING GLOBAL LIFE REINSURANCE COMPANY
717 FIFTH AVENUE
NEW YORK, NEW YORK 10022
SERVE: RECORDS CUSTODIAN

In accordance with the authority conferred by Sections 624.307, 624.317, 624.318, 624.321, and Chapter 626, Florida Statutes, the FLORIDA DEPARTMENT OF INSURANCE AND TREASURER (hereafter, the "DEPARTMENT"), is conducting an investigation concerning the insurance activities of GERLING GLOBAL LIFE REINSURANCE COMPANY with respect to its compliance with Section 626.9543, Florida Statutes ("Holocaust Victims Insurance Act"). In furtherance of that investigation, the DEPARTMENT issues this Investigative Subpoena for Records to the entity named above. For the purpose of this investigation and records subpoena, GERLING GLOBAL LIFE REINSURANCE COMPANY includes the entity of that name, as well as any and all other entities that are or were under the control of, that were acquired by, that were merged with or into, or that

now have or have in the past had any organizational, managerial, or operational connection with GERLING GLOBAL LIFE REINSURANCE COMPANY, including, but not limited to as a parent company or as a subsidiary.

YOU ARE THEREFORE COMMANDED to produce, within sixty (60) days from the date of service upon you of this Investigative Subpoena, all materials and information designated on the attached list, regardless of the form or media in which it exists or is stored. If you contend with respect to any request, that records or information is not available, you are required to explain in detail all efforts employed to locate the requested documents or information. Production is to be made at the following location: Florida Department of Insurance, Division of Legal Services, 6th Floor, Larson Building, 200 East Gaines Street, Tallahassee, Florida 32399-0333 (Attention: Luke S. Brown, Esq.).

You must comply with this subpoena by producing true and correct copies of the requested materials to the DEPARTMENT at the place and within the time specified in this subpoena. You will not be required to surrender to the Department the originals of the materials to be provided. Any objections to the production of documents pursuant to this subpoena must be made as soon as reasonably possible before the date that production is due, by serving written notice of specific objections and the grounds therefor to the undersigned attorney.

BILL NELSON
Treasurer and Insurance
Commissioner

By: /s/ Dennis Silverman
DENNIS SILVERMAN, ESQ.
Assistant Director
Division of Legal Services
KAREN ASHER-COHEN, ESQ.
LUKE S. BROWN, ESQ.
612 Larson Building
200 East Gaines Street
Tallahassee, Florida 32399-0333
Telephone: (850) 413-4118

DEFINITIONS OF TERMS USED IN THIS REQUEST

A. "COMPANY" means the entity named upon the face of this subpoena, as well as any and all other entities that are or were under its control, that were acquired by it, that were merged with or into it, or that now or have at any time in the past had any organizational, managerial, or operational connection with it including, but not limited to, as a parent company or as a subsidiary.

B. "DEPARTMENT" means the Florida Department of Insurance.

C. "HOLOCAUST VICTIM" or "VICTIM" means any person who lost his or her life or property as a result of discriminatory laws, policies, or actions targeted against discrete groups of persons between 1920 and 1945, inclusive, in Nazi Germany, areas occupied by Nazi Germany, or countries allied with Nazi Germany.

D. "INSURANCE POLICY", "POLICY", "INSURANCE POLICIES" or "POLICIES" means all insurance policies, including but not limited to life and property and casualty insurance policies, that were issued by the COMPANY and that were in force at any time between

1920 and 1945, inclusive, in Nazi Germany, areas occupied by Nazi Germany, and in countries allied with Nazi Germany.

E. SPECIFIED TIME PERIOD means the years 1920 through 1945, inclusive.

MATERIALS AND INFORMATION TO BE PRODUCED

1. All company files documenting the existence of insurance policies that were in force in Nazi Germany, areas occupied by Nazi Germany, and in countries allied with Nazi Germany during the specified time period.

2. All duplicate policies. For purposes of this request, a "duplicate policy" is a copy, a second original, or other reproduction of an insurance policy that was in force in Nazi Germany, areas occupied by Nazi Germany, and in countries allied with Nazi Germany at any time during the specified time period.

3. All records pertaining to policy number designations and prefixes for policies that were in force in Nazi Germany, areas occupied by Nazi Germany, and in countries allied with Nazi Germany at any time during the specified time period, including any and all explanatory information as to the numbering or other identification system utilized.

4. All cancellation notices or documents of similar import issued by or on behalf of the company with respect to any policies that were in force in Nazi Germany, areas occupied by Nazi Germany, and in countries allied with Nazi Germany during the specified time period.

5. All premium registers or similar data compilations that document gross premiums received by the company on policies issued by it that were in force in Nazi Germany, areas occupied by Nazi Germany, and in countries allied with Nazi Germany at any time during the specified time period. If your response to this request is in the form of a data compilation, it should be categorized by year and by Country and City.

6. With respect to each policy that was in force in Nazi Germany, areas occupied by Nazi Germany, and in countries allied with Nazi Germany at any time during the specified time period, all documentation evidencing the *periodic* premium payment that was charged by the company for that policy.

7. With respect to each policy that was in force in Nazi Germany, areas occupied by Nazi Germany, and in countries allied with Nazi Germany at any time during the specified time period, all documentation evidencing the *aggregate* amount of premium that was paid to the company for that policy.

8. All financial statements or reports of the company for each year that any of the policies were in force in Nazi Germany, areas occupied by Nazi Germany, and in countries allied with Nazi Germany.

9. All reinsurance contracts that were in force during the specified time period and which relate, in whole or in part, to insurance policies issued by the company which policies were in force in Nazi Germany, areas occupied by Nazi Germany, and in countries allied with Nazi Germany during the specified time period.

10. All documents evidencing the identity and, if available, the addresses of insurance brokers and brokerage companies involved in the marketing and sale of insurance policies, which policies were in force in Nazi Germany, areas occupied by Nazi Germany, and in countries allied with Nazi Germany during the specified time period. Your response to this request may be in the form of lists or data compilations created for the purpose of responding to this subpoena. If it is in that form, the responsive information should be categorized by Country and by City.

11. All broker and brokerage files pertaining to the marketing and sale of insurance policies which policies were in force were in force [sic] in Nazi Germany, areas occupied by Nazi Germany, and in countries allied with Nazi Germany during the specified time period.

12. All documents evidencing the identity and, if available, the addresses of insurance agents and agencies involved in the marketing and sale of insurance policies, which policies were in force in Nazi Germany, areas occupied by Nazi Germany, and in countries allied with Nazi Germany during the specified time period. Your response to this request may be in the form of lists or data compilations created for the purpose of responding to this subpoena. If it is in that form, the responsive information should be categorized by [Country] and by City.

13. All agent and agency files with respect to the marketing and sale of insurance policies, which policies were in force in Nazi Germany, areas occupied by Nazi Germany, and in countries allied with Nazi Germany during the specified time period.

14. All correspondence dated between 1920 and present with policyholders and/or beneficiaries, with respect to policies that were in force in Nazi Germany, areas occupied by Nazi Germany, and in countries allied with Nazi Germany at any time within the specified time period. The scope of this request extends to all individual items of correspondence and not merely to form letters or mailings that were sent to policyholders or beneficiaries on an undifferentiated basis.

15. All checks, drafts, and other indicia of payment issued by or on behalf of the company with respect to all policies that were in force in Nazi Germany, areas occupied by Nazi Germany, and in countries allied with Nazi Germany at any time during the specified time period.

16. All receipts for or other proof of receipt of payment of policy proceeds with respect to all policies that were in force in Nazi Germany, areas occupied by Nazi Germany, and in countries allied with Nazi Germany at any time during the specified time period.

17. All books, records, or other writings documenting the identity of the person or entity to whom or to which payment of policy proceeds was made with respect to all policies that were in force in Nazi Germany, areas occupied by Nazi Germany, and in countries allied with Nazi Germany at any time during the specified time period.

18. All records of the company's legal department concerning claims or disputes concerning insurance policies that were in force in Nazi Germany, areas occupied by Nazi Germany, and in countries allied with Nazi Germany at any time during the specified time period, other than such current records that constitute privileged attorney-client communication. For each item concerning

which you claim a privilege, you are to describe it by date, by name and capacity of sender and recipient, and state a general description of its form and subject matter.

19. All written records retention policies, programs or guidelines of the company that have been in force during the period 1920 until present.

20. A list of the names and, if available, the addresses of persons who were in charge of records retention and/or disposal for the company during the period 1920 until present.

21. All billings rendered to the company by outside vendors for services connected with the creation and implementation of programs and mechanisms to locate records, including policies and other evidence of coverage, necessary for the evaluation, processing, handling, and adjusting the insurance claims of policy beneficiaries, Holocaust victims, survivors, and/or their families.

22. All billings rendered to the company by outside vendors for services connected with the creation and implementation of programs and mechanisms for the evaluation, processing, handling, and adjusting insurance claims of policy beneficiaries, Holocaust victims, survivors, and/or their families.

23. All documents including, but not limited to, correspondence, memoranda, instructions, and guidelines issued by or on behalf of the company that pertain to the creation and implementation of programs and mechanisms to locate records necessary for the evaluation, processing, handling, and adjusting the insurance claims of policy beneficiaries, Holocaust victims, survivors, and/or their families.

24. All documents including, but not limited to, correspondence, memoranda, instructions, and guidelines for company employees or agents, that were prepared by or on behalf of the company, to be utilized by such employees or agents, in evaluating, processing, handling, and adjusting the insurance claims of policy beneficiaries, Holocaust victims, survivors, and/or their families.

25. All correspondence, forms, and other documents issued by the company in direct response to insurance claims received from or on behalf of policy beneficiaries, Holocaust victims, survivors, and/or their families. The scope of this request contemplates the production of each item pertaining to each claim, and not merely representative documents.

26. All documents including, but not limited to, correspondence, memoranda, and reports that were prepared by or on behalf of the company and which are directed to any government, governmental agency or entity, or archive, that pertain to the company's mechanisms and efforts to process, handle, or adjust the insurance claims of Holocaust victims, survivors, and/or their families. With respect to each item produced in response to this request, you are also requested to state the specific content of the inquiry that requested your response, or to produce the document that the Company received that triggered a response by it or on its behalf.

Please send all materials responsive to this subpoena to the attention of Luke S. Brown, Esq.

APPENDIX M

626.9543 Holocaust victims. –

(1) SHORT TITLE. – This section may be cited as the "Holocaust Victims Insurance Act."

(2) INTENT; PURPOSE. – It is the Legislature's intent that the potential and actual insurance claims of Holocaust victims and their heirs and beneficiaries be expeditiously identified and properly paid and that Holocaust victims and their families receive appropriate assistance in the filing and payment of their rightful claims.

(3) DEFINITIONS. – For the purpose of this section:

(a) "Department" means the Department of Insurance.

(b) "Holocaust victim" means any person who lost his or her life or property as a result of discriminatory laws, policies, or actions targeted against discrete groups of persons between 1920 and 1945, inclusive, in Nazi Germany, areas occupied by Nazi Germany, or countries allied with Nazi Germany.

(c) "Insurance policy" means, but is not limited to, life insurance, property insurance, or education policies.

(d) "Legal relationship" means any parent, subsidiary, or affiliated company with an insurer doing business in this state.

(e) "Proceeds" means the face or other payout value of policies and annuities plus reasonable interest to date of payments without diminution for wartime or immediate postwar currency devaluation.

(4) ASSISTANCE TO HOLOCAUST VICTIMS. – The department shall establish a toll-free telephone number,

available in appropriate languages, to assist any person seeking to recover proceeds from an insurance policy issued to a Holocaust victim.

(5) PROOF OF A CLAIM. – Any insurer doing business in this state, in receipt of a claim from a Holocaust victim or from a beneficiary, descendant, or heir of a Holocaust victim, shall:

(a) Diligently and expeditiously investigate all such claims.

(b) Allow such claimants to meet a reasonable, not unduly restrictive, standard of proof to substantiate a claim, pursuant to standards established by the department.

(c) Permit claims irrespective of any statute of limitations or notice requirements imposed by any insurance policy issued, provided the claim is submitted within 10 years after the effective date of this section.

(6) STATUTE OF LIMITATIONS. – Notwithstanding any law or agreement among the parties to an insurance policy to the contrary, any action brought by Holocaust victims or by a beneficiary, heir, or a descendant of a Holocaust victim seeking proceeds of an insurance policy issued or in effect between 1920 and 1945, inclusive, shall not be dismissed for failure to comply with the applicable statute of limitations or laches provided the action is commenced within 10 years after the effective date of this section.

(7) REPORTS FROM INSURERS. – Any insurer doing business in this state shall have an affirmative duty to ascertain to the extent possible and report to the department within 90 days after the effective date of this section

and annually thereafter all efforts made and results of such efforts to ascertain:

(a) Any legal relationship with an international insurer that issued an insurance policy to a Holocaust victim between 1920 and 1945, inclusive.

(b) The number and total value of such policies.

(c) Any claim filed by a Holocaust victim, his or her beneficiary, heir, or descendant that has been paid, denied payment, or is pending.

(d) Attempts made by the insurer to locate the beneficiaries of any such policies for which no claim of benefits has been made.

(e) An explanation of any denial or pending payment of a claim to a Holocaust victim, his or her beneficiary, heir, or descendant.

(8) REPORTS TO THE LEGISLATURE. – The department shall report to the Legislature 1 year after the effective date of this section and annually thereafter:

(a) The number of insurers doing business in this state which have a legal relationship with an international insurer that could have issued a policy to a Holocaust victim between 1920 and 1945, inclusive.

(b) A list of all claims paid, denied, or pending to a Holocaust victim, his or her beneficiary, heir, or descendant.

(c) A summary of the length of time for the processing and disposition of a claim by the insurer.

(9) PENALTIES. – In addition to any other penalty provided under this chapter, any insurer or person who violates the provisions of this section is subject to an administrative penalty of $1,000 per day for each day such violation continues.

(10) PRIVATE RIGHT OF ACTION. – An action to recover damages caused by a violation of this section must be commenced within 5 years after the cause of action has accrued. Any person who shall sustain damages by the reason of a violation of this section shall recover threefold the actual damages sustained thereby, as well as costs not exceeding $50,000, and reasonable attorneys' fees. At or before the commencement of any civil action by a party, notice thereof shall be served upon the department.

(11) RULES. – The department, by rule, shall provide for the implementation of the provisions of this section by establishing procedures and related forms for facilitating, monitoring, and verifying compliance with this section and for the establishment of a restitution program for Holocaust victims, survivors, and their heirs and beneficiaries.

(12) SEVERABILITY. – If any provision of this section or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the section which can be given effect without the invalid provision or application, and to this end the provisions of this section are declared severable.

APPENDIX N

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: ASSICURAZIONI GENERALI S.p.A. HOLOCAUST INSURANCE LITIGATION	MDL 1374 M 21-89 (MBM)

MEMORANDUM OF LAW IN SUPPORT OF ASSICURAZIONI GENERALI S.P.A.'S MOTION TO DISMISS, STRIKE, AND/OR FOR JUDGMENT ON ALL PLAINTIFFS' CLAIMS, ON CHOICE OF LAW AND RELATED GROUNDS

* * *

The Ninth Circuit's decision in *Gerling Global Reinsurance Corp. v. Low*, 296 F.3d 832 (9th Cir.), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. Nov. 8, 2002) (No. 02-733), is not on point and does not assist Plaintiffs. At issue in *Low* was the constitutionality of the reporting provisions of California's Holocaust Victims Insurance Relief Act ("HVIRA"), Cal. Ins. Code §§ 13800 *et seq.*, which as the court found important, is a separate enactment from the HVIA. In upholding the HVIRA against constitutional challenge, the court took pains to point out that it did not apply California law to foreign insurance contracts, but merely sought information about such policies. *Id.* at 846. The Ninth Circuit sidestepped the import of *Gallagher* by not addressing the constitutionality of the HVIA and expressly reserving judgment on the constitutionality of that statute for another day. *Id.* at 837. Indeed, in distinguishing *Gallagher*, the Ninth Circuit reasoned that, unlike the HVIRA,

the Florida statute, like the HVIA, contained provisions that directly sought to regulate foreign transactions:

> [T]he only statute at issue in this appeal is a reporting statute. Proposed challenges to other laws that alter the statute of limitations and provide a forum for substantive claims were dismissed for lack of standing. By contrast, the statute considered in *Gallagher* contained both disclosure and substantive elements. Although the Eleventh Circuit based its ruling on only the disclosure provisions, the difference in the structure of the two statutes still is meaningful.

Id. at 839. Thus, the Ninth Circuit's decision in *Low* has no application in this case, where *Gallagher* controls.

* * *

CONCLUSION

For the foregoing reasons, Generali respectfully requests that the Court grant its motion and dismiss Plaintiffs' claims in their entirety.

Dated: New York, New York
November 15, 2002

Respectfully submitted,

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