No. 10-80

IN THE

Supreme Court of the United States

THOMAS WEISS,

Petitioner,

v.

ASSICURAZIONI GENERALI, S.P.A., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMICUS CURIAE CALIFORNIA STATE SENATE IN SUPPORT OF PETITIONER

DIANE F. BOYER-VINE
Legislative Counsel of California
State Capitol, Suite 3021
Sacramento, CA 95814-3702
(916) 341-8123
diane.boyer@lc.ca.gov

Attorney for Amicus Curiae

231680

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Authorities

Statutes

Rules

Other Authorities

Blank Page

INTEREST OF THE *AMICUS CURIAE*

Amicus, the California State Senate, submits this brief pursuant to Supreme Court Rule 37.2 in support of the Petition for a Writ of Certiorari. Counsels of record for all parties have received timely notice of the intent to file this brief. All parties have given consent to the submission of this brief.[1]

The California State Senate, as part of the California State Legislature, passes laws to provide for the health, safety, and welfare of the residents of California pursuant to the states' constitutionally reserved police powers. The ability of the states to enact statutes of general applicability pursuant to their police powers has traditionally been afforded great deference by the courts.

The decision of the court of appeals below, however, is based on the view that state laws which are facially neutral with respect to matters of foreign policy are categorically preempted pursuant to the Executive's foreign policy power, even if the state law has only an unintended and peripheral effect on international affairs. Given that prior authority from this Court permits federal foreign policy to preempt state law based on nothing more than an informal statement from a mid-level member of the Executive Branch, the

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[1] No counsel for any party authored this brief in whole or in part, and no party or counsel for any party made a monetary contribution intended to fund the preparation or submission of this brief. Only *amicus curiae* made such a monetary contribution.

decision below is significant, undermining cardinal principles on which the American legal system is premised. The holding of the court of appeals will undermine the California State Senate's ability to enact statutes of general applicability to protect the welfare of millions of California residents without the risk of federal preemption.

Amicus has a direct interest in maintaining the predictability of the legal system of California, and therefore urges the Court to grant certiorari and reverse the decision below. Accordingly, *amicus* California State Senate submits this brief to assist the Court in the resolution of this case.

INTRODUCTION AND STATEMENT OF THE CASE

This Court has held that state statutes of general applicability are entitled to greater deference in foreign policy preemption analysis than statutes of limited application that are intended to regulate within the field of foreign policy. Likewise, common law causes of action have received deferential treatment. In the decision below, *In re Assicurazioni Generali S.P.A.*, 592 F.3d 113 (2d Cir. 2010), the United States Court of Appeals for the Second Circuit ("Second Circuit") ignored these important distinctions and improperly affirmed the dismissal of all of Petitioner's causes of action. Not only does this holding depart from the holding of *American Insurance Association v. Garamendi,* 539 U.S. 396 (2003), and its progeny, but, if permitted to stand, it poses a substantial threat to the ability of the California

State Senate to provide for the health, safety, and welfare of California residents.

Accordingly, this Court should grant the Petition for a Writ of Certiorari in this case. *Garamendi* made a substantial change in foreign policy preemption jurisprudence, but the parameters set by *Garamendi* have been confused by the *Generali* ruling. Clarification should be provided to the lower courts so that errors such as those committed by the Second Circuit in this case will not be repeated in the future.

THE SECOND CIRCUIT'S DECISION IN THIS CASE CONTRAVENES *GARAMENDI* AND ITS PROGENY

The Second Circuit improperly applied the *Garamendi* preemption analysis by ignoring the distinction between state statutes that directly address foreign policy matters and state statutes of general applicability and common law causes of action. *Generali*, 592 F.3d at 1119. Rather than addressing this analytical distinction, the Second Circuit simply asserted that "[t]he state law must yield to the federal policy, *regardless of the importance of the interests behind the state law*." *Id.* (emphasis added). This view mirrors the *Generali* ruling at the district court level, where the court, in striking down both Petitioner's benefit claims arising under state holocaust statutes, and those arising "under generally applicable state statutes and common law," concluded that "the legal justification for such claims is irrelevant." *In re Assicurazioni Generali S.P.A. Holocaust Ins. Litigation*, 340 F.Supp.2d 494, 501 (S.D.N.Y. 2004). As this blanket conclusion is contrary

not only to *Garamendi* but also subsequent cases interpreting *Garamendi,* it is crucial that the Court remedy this error.

In *Garamendi*, this Court invalidated the California Holocaust Victim Insurance Relief Act of 1999 ("HVIRA"). *Garamendi*, 539 U.S. at 429. The California Legislature passed the HVIRA in the midst of ongoing international efforts to provide reparations to Holocaust victims and their heirs. *Id.* at 408-09. As part of these international efforts, President Clinton entered into an Executive Agreement with Germany providing for the processing of Holocaust-era insurance claims through the International Commission on Holocaust Era Insurance Claims. *Id.* at 406-07. As part of this agreement, if a lawsuit is filed against a German company on a Holocaust-era claim in an American court, the Government of the United States is to submit a letter to the court, declaring that it would be in the United States' foreign policy interests if the case was dismissed on any valid legal ground. *Id.* at 406.[2]

The HVIRA required any insurer doing business in California to disclose the details of specified insurance policies that were issued "to persons in Europe, which were in effect between 1920 and 1945." *Id.* at 409-10.

While the *Garamendi* majority found a clear conflict between the foreign policy on Holocaust claims expressed by the Executive Branch and the HVIRA,

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[2] As discussed, *infra*, the *Garamendi* majority also relied on statements of sub-Cabinet level officials to determine the expressed foreign policy interests of the President.

the Court took care to differentiate between laws specifically targeted at areas of foreign policy, such as the HVIRA, and "blue sky" laws, or statutes of general applicability. *Id.* at 426-27. Reciting the view of Justice Harlan, the *Garamendi* majority recognized that legislation within areas of state legislative "traditional competence" may prevail in a case involving potential federal preemption, as it is "reasonable to consider the strength of the state interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring the state law preempted." *Id.* at 420 (citations omitted). Likewise, the *Garamendi* majority noted that "[w]here . . . a State has acted within . . . its 'traditional competence,' . . . but in a way that affects foreign relations, it might make good sense to require a conflict, of a clarity or substantiality that would vary with the strength or the traditional importance of the state concern asserted." *Id.* at 420, n.11 (citations omitted).

In sum, foreign policy preemption analysis differs according to the nature of the state legislative interest. *Garamendi* supports the proposition that, with respect to state laws of general applicability, which are thus *not* intended to intervene into the foreign policy realm, the interests of the state must be given weight, and only a substantial conflict should warrant preemption. With the exception of the holding of the Second Circuit in this case, which fails to even consider the weight to be accorded state interests, courts interpreting *Garamendi* have followed that view.

For example, in *Medellin v. Texas*, 552 U.S. 491 (2008), the Supreme Court held that a presidential

memorandum purporting to apply the terms of a treaty to supersede existing state law did not carry with it preemptive force. *Id.* at 496. The Court disfavored the memorandum in part because it was "a directive issued to state courts that would compel those courts to reopen final criminal judgments and set aside *neutrally applicable state laws*." *Id.* (emphasis added).

The distinction between state laws of general applicability and those expressly directed to matters of foreign policy was further emphasized by the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") in *Movsesian v. Versicherung*, 578 F.3d 1052 (9th Cir. 2008). At issue in *Movsesian* was a California statute that, in a manner similar to the HVIRA, extended the time to file suit in California courts to December 31, 2010, for insurance claims based on the "Armenian Genocide." *Id.* at 1054. The President, however, had expressed dissatisfaction with the recognition of an "Armenian Genocide" on several occasions. *Id.* at 1057-59. While the Ninth Circuit acknowledged that the statute at issue was very similar to the HVIRA, and was thus preempted by the foreign policy expressed by the Executive, the court made certain to distinguish this special statute from laws of general applicability:

> Here, as in *Deutsch* and *Garamendi*, California's "real desiderata" is to provide a forum for the victims of the "Armenian Genocide" and their heirs to seek justice. *Garamendi*, 539 U.S. at 425, 123 S.Ct. 2374; *Deutsch*, 324 F.3d at 707. By opening its doors as a forum to all "Armenian Genocide" victims

> and their heirs and beneficiaries, California expresses its dissatisfaction with the federal government's chosen foreign policy path. *Garamendi* and *Deutsch* clearly hold that this is not a permissible state interest. *Garamendi*, 539 U.S. at 427, 123 S.Ct. 2374; *Deutsch*, 324 F.3d at 712.

Id. at 1062-63.[3]

Finally, in *Schydlower v. Pan American Life Insurance Co.*, 231 F.R.D. 493 (W.D. Tex. 2005), plaintiff made claims based in common law relating to an insurance policy that originated in Cuba prior to the communist overthrow of the Cuban government. *Id.* at 495-97. Defendant cited *Garamendi* for the proposition that these claims were preempted by the Foreign Claims Settlement Commission, which was created by Congress to determine the amount and validity of claims against the Cuban government. *Id.* at 497. In rejecting this argument, the *Schydlower* court stated that it understood "*Garamendi* to deal with a state's ability to pass a law *which specifically circumvents federal foreign policy* by creating a state cause of action which provides relief for its citizens." *Id.* at 498 (citing *Garamendi*, 396 U.S. at 408-09; emphasis added).

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[3] State courts have also properly applied the *Garamendi* distinction. See, e.g., *Taiheiyo v. Sup. Ct.* 117 Cal. App. 4th 380, 394 (2d Dist. Ct. App. 2005), applying *Garamendi* to find that a statute enacting a "*special rule* authorizing WWII slave and forced labor victims to sue and recover damages in California courts" is preempted by Treaty of Peace with Japan. (Emphasis added.)

The Second Circuit's holding in *Generali* is a substantial deviation from *Garamendi* and its progeny. In applying federal preemption analysis, the Second Circuit purports to erase any distinction between state laws that are expressly directed to foreign policy matters, and state statutes or common law causes of action that are generally applicable and operate in areas of traditional state competence. This decision represents an unwarranted shift of power, suggesting that state legislation formally enacted in areas of traditional state competence may be summarily superseded by informal policy statements made by Executive Branch representatives of the federal government. In addition, as explained below, this view chills the exercise by state legislatures across the country of their longstanding prerogative to enact legislation providing for the health, safety, and welfare of their constituents. As such, the Petition for a Writ of Certiorari should be granted.

IF LEFT UNDISTURBED, THE SECOND CIRCUIT'S DECISION WILL UNDULY HAMPER THE CALIFORNIA STATE SENATE'S ABILITY TO PROVIDE FOR THE PROTECTION OF ITS CONSTITUENTS

This Court has long respected the states' ability to pass laws of general applicability to protect the health, safety, and welfare of their residents. *See, e.g.*, *Kelly v. State of Washington ex rel. Foss Co.*, 302 U.S. 1, 10 (1937) (stating "[t]he principle is thoroughly established that the exercise by the state of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so

'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'"; citations omitted). The Second Circuit's misapplication of *Garamendi* in this case, however, dramatically impairs this ability by erasing the distinction between state statutes of general applicability and state laws that specifically target foreign policy matters within Executive prerogative. Without clarification from this Court, the California State Senate, and other legislative bodies throughout the country, will be hamstrung in their efforts to protect their constituents.

Of utmost importance in this case is the fact that the holding of *Garamendi* was limited to the HVIRA, which was specifically aimed at regulating foreign policy related matters. *Garamendi*, 539 U.S. at 408-12. The Court found, in fact, that the HVIRA intended to apply a much more aggressive approach to providing avenues of relief for those victimized by Holocaust-era practices of insurance companies than was reflected in the Executive Branch policy. *Id.* at 421-23. As stated by Justice Souter, "[t]he basic fact is that California seeks to use an iron fist [in enacting the HVIRA] where the President has consistently chosen kid gloves." *Id.* at 427. Because the *Garamendi* majority found that the express language of the HVIRA directly conflicted with the Executive Branch's expressed foreign policy, the Court invalidated the HVIRA. *Id.* at 429.

The critical distinction between the HVIRA and the statutes of general applicability and common law claims at issue in this case is that, here, the states have not used "iron fists" or even "kid gloves" with respect to foreign policy that would run afoul of the holding of

Garamendi. In stark contrast to the HVIRA, these bodies of law were not directed to claims related to Holocaust reparations or any other foreign policy matter, but were enacted as general statutes, or developed by the courts as common law, to protect the welfare of state residents for purposes well within traditional state jurisdiction. The Second Circuit failed to make this distinction, and apparently assumed that, if a state statute of general applicability or common law cause of action has any application to a matter that is also addressed by federal foreign policy, however informally that federal policy may have been established or expressed, it must be invalidated. *Generali*, 592 F.3d at 1119.

The Second Circuit's misapplication of *Garamendi* in this case is particularly troubling when its practical consequences are considered. *Garamendi* was the first case in which it was found that "'presidential foreign policy' may itself carry the same preemptive force as a federal statute or treaty." *Movsesian*, 578 F.3d at 1056 (citing *Garamendi*, 539 U.S. at 421). *Garamendi* also represented a significant expansion of the potential sources of foreign policy because, "[u]nlike in previous cases, [the *Garamendi* court found that] the presidential foreign policy was not contained in a single executive agreement... [but rather] in several executive agreements, as well as in various letters and statements from executive branch officials at congressional hearings." *Movsesian*, 578 F.3d at 1056 (citing *Garamendi*, 539 U.S. at 421-23). *Garamendi* considerably broadened the basis upon which the Executive Branch may identify a federal foreign policy that carries with it preemptive force.

As discussed above, *Garamendi* recognized, however, that generally applicable state statutes addressing matters of traditional state competence should be given weight, and represent a strong state interest in the application of foreign policy preemption analysis. Unquestionably, "the historic police powers of the States" are traditional areas of competence for state legislation. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (citing *Rice v. Santa Fe Elevator Corp.* 331 U.S. 218, 230 (1947) and *Hillsborough County, Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715-16 (1985)). Such state legislation has been traditionally afforded great deference. *See, e.g.*, *Medtronic*, 518 U.S. at 503.

Even with that caveat, the dissenting discussion in *Garamendi* raised concerns about the propriety of permitting formally enacted state legislation to be preempted, not by enacted federal law or the terms of executed international agreements, but merely on the basis of statements made by "individual sub-Cabinet members of the Executive Branch." *Garamendi*, 539 U.S. at 441-442.

Given the suggestion of the Second Circuit's decision in this case that federal preemption on this basis is equally applicable to state laws of general application and common law causes of action, without clarification from this Court it will be extremely difficult for the California State Senate to undertake the passage of general legislation on behalf of California residents without the specter of invalidation, pursuant to federal preemption, simply because that issue may become the subject of policy discussions at an international level.

This is particularly a concern given the extent to which globalization encompasses an ever-increasing scope of matters that may become the subject of international policymaking, specifically with regard to economic matters. The United States is becoming part of the globalized economy. *See, e.g.*, Frederick M. Abbott, Graham Dukes, *Global Pharmaceutical Policy: Ensuring Medicines for Tomorrow's World*, 13 DEPAUL J. HEALTH CARE L. 103, 123 (2010) (describing today's economy as a "capitalist global economy, divided into nation-states competing for markets"); Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 386 (2002) (stating that "[t]he emergence of the global economy has put great pressure on American business"). The influx of foreign-made goods into the United States has become a critical feature of the American marketplace. *See* Press Release, Bureau of Econ. Analysis, U.S. Dep't of Commerce, *U.S. International Trade in Goods and Services* (Apr. 9, 2009), http://www.bea.gov/newsreleases/international/trade/2009/trad0209.htm (last visited July 26, 2010) (noting that, in February 2009, the United States imported $152.7 billion in international goods and services, maintaining a $26 billion trade deficit). It follows that there will be an increasing frequency with which international policy discussions will touch upon matters within the scope of generally applicable state laws.

Moreover, the Second Circuit's decision would introduce an unnecessary element of unpredictability to the American legal system. A fundamental tenet of American jurisprudence is the assumption that

certainty, predictability, and stability in the law are among the major objectives of the legal system. *People v. Garcia*, 39 Cal.4th 1070, 1080 (Cal. 2006). In this connection, this Court has long adhered to doctrines such as *stare decisis* in order to "ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion." *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986). This consistency "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in act." *Id.* "[P]arties should be able to regulate their conduct and enter into relationships with reasonable assurance of the governing rules of law." *Garcia*, 39 Cal.4th at 1080.

The Second Circuit's decision would undermine this principle. Rather than upholding common law, and statutes of general applicability enacted in areas of traditional state legislative competence, the Second Circuit's holding allows sub-Cabinet level members of the Executive Branch to invalidate these laws informally and without notice, exercising "the considerable power of foreign affairs preemption" by pronouncing federal foreign policy through the stroke of a pen. *Garamendi*, 539 U.S. at 441-42 (Ginsburg, J., dissenting) (reciting that the *Garamendi* majority found statements of foreign policy in letters of Deputy Secretary of the Treasury). This result stands in stark contrast to cardinal principles of the American system of justice.

The quagmire that the Second Circuit's decision creates for the California State Senate and state

legislative bodies throughout the country is thus apparent. If this Court permits the decision to stand, it will be impossible to determine what the law is and will be with any confidence, because state statutes that have nothing to do with foreign policy on their face will be subject to preemption, irrespective of the state's interest in the matter or whether the state law in question even stands in actual conflict with foreign policy. The ability of state legislators to reach consensus and pass bills of general application will be substantially undermined, if they are left to speculate whether those laws will be invalidated at some point in the future based solely upon foreign policy statements made by individuals within the Executive Branch. This unpredictability will improperly constrain the California State Senate in the performance of its fundamental purpose—to adequately provide for the health, safety, and welfare of the residents of California. This Court, therefore, should grant the Petition for a Writ of Certiorari to correct the errors of the Second Circuit.

CONCLUSION

For the reasons set forth herein, amicus respectfully asks this Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

DIANE F. BOYER-VINE
Legislative Counsel of California
State Capitol, Suite 3021
Sacramento, CA 95814-3702
(916) 341-8123
diane.boyer@lc.ca.gov

Attorney for Amicus Curiae

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