No. 10-80

In The
Supreme Court of the United States

THOMAS WEISS,

Petitioner,

v.

ASSICURAZIONI GENERALI, S.p.A. and
BUSINESS MEN'S ASSURANCE CO.
OF AMERICA,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

BRIEF OF REP. ILEANA ROS-LEHTINEN AND ELEVEN ADDITIONAL MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

ALAN GURA*
CANDICE HANCE
GURA & POSSESSKY, PLLC
101 N. Columbus Street, Suite 405
Alexandria, Virginia 22314
703.835.9085
alan@gurapossessky.com

* *Counsel of Record*
Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

Blank Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

Blank Page

INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are Representative Ileana Ros-Lehtinen and eleven additional Members of Congress. *Amici* propose and pass laws that govern international relations and guide the country's foreign policy. *Amici*'s participation is required for the creation of any law that, by operation of the Supremacy Clause, may override valid laws of the States.

Congress has a significant interest in insulating its legislative role against executive encroachment, not only for its own institutional sake, but also as guardian of the States and their People's interest in maintaining the federalist structure of our government.

---

[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae's* intention to file this brief. The parties have consented to the filing of this brief in letters on file in the Clerk's office. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

INTRODUCTION

The decision below announces a dramatic departure from this Court's settled understanding of executive power. Without benefit of a duly-ratified treaty, an enacted law, or even an executive agreement with another sovereign nation, the lower court granted the President authority to nullify long-standing state common law doctrines wherever the President declares that doing so is, in the President's exclusive view, in America's foreign policy interest.

This new Presidential authority to override state law, without Congressional input, is as boundless as it is arbitrary. It warrants careful review by this Court, the lower court having "so far departed from the accepted and usual course of judicial proceedings," and "sanctioned such a departure by a lower court, so as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a). In so doing, the lower court determined an important question of federal law contrary to this Court's precedent. Sup. Ct. R. 10(c).

* * *

Petitioner, an American citizen, sought access to the courts of his State for the presentation of standard common law contractual and tort claims against Respondent insurance company.[2] The dispute is not

---

[2] *Amici* take no position on the ultimate outcome of that litigation.

inherently unusual—the plaintiff claims the benefit of insurance policies, the insurer would respond that its liability is limited or non-existent.

Petitioner is the beneficiary of several policies issued in the 1930's to his father, Pavel Weiss, whose first wife, three young children, and siblings were murdered in the Holocaust. Petitioner's father also sustained complete property and business losses, and no small disability owing to his concentration camp experiences. Petitioner and his family subsequently emigrated to the United States. Also surviving the war was Respondent insurance company, which had marketed many life, disability, and property casualty insurance policies to Jews throughout pre-war Europe. Whether the insurance obligations also survived, written as they were to be made payable anywhere in the world, Pet. at 8 n.3, is an issue for Florida's common law courts. Those courts, or federal courts exercising diversity jurisdiction, would weigh the evidence under the law and enter judgment for either party, but for one factor: the Executive Branch has announced that subjecting the insurer to this litigation contravenes American foreign policy interests.

No treaty, federal law, or executive agreement compels this result. The lower courts conceded as much: "no executive agreement at issue in this case could be read to preclude litigation of [plaintiffs'] claims in U.S. courts." Pet. App. 38a (citation omitted); *see also* Pet. App. 10a (rejecting view that

binding foreign policy "depended on the existence of executive agreements").

Rather, the relevant foreign policy interest, asserted as sufficiently binding to nullify the States' common law, is conveyed through nothing more than statements of Executive Branch officials. The policy interest is alleged to be reflected by a series of executive agreements with Germany, Austria, and France. Under these agreements, the Executive Branch is committed to informing courts that in consideration of the Nation's foreign policy interests, certain World War II era claims against German, Austrian, and French companies ought to be resolved by an organization that no longer functions, the International Commission on Holocaust Era Insurance Claims (ICHEIC).

Of course, in negotiating these agreements, the Executive Branch specifically advised these nations, and the Congress, that the agreements did not by themselves warrant dismissal of insurance claims in U.S. courts, but only supported dismissal on grounds otherwise available under American law. And no such agreement exists with Italy, the home country of Respondent Generali. Nonetheless, the fact that the President had entered into agreements regarding cases related to other countries, coupled with the Executive's assertion that dismissal of Petitioner's contract and tort action is in the interest of American foreign policy, was held sufficient to bar Petitioner's lawsuit.

The lower court's actions in this regard trample upon the Constitution's separation of powers by imposing the Executive's legal preferences over those of the only body tasked with creating the law. The Court's intervention is required to restore the balance of power between Congress and the President.

SUMMARY OF ARGUMENT

1. The Constitution clearly defines the role each branch of government is to play in our federal system. Congress is granted the power to make laws, U.S. Const. art. I, § 1, and the President has the authority to carry out those laws, U.S. Const. art. II, § 1.

2. Accordingly, in matters relating to foreign affairs, as in all areas, this Court enforces the Constitution's separation of powers. Even when asserting the Nation's foreign policy interests, the Executive must act under a duly-recognized legal authority—a treaty, statute, executive agreement, or similar legally binding instrument.

Any unilateral action that the President might take that would alter the law, including the preemption of state law and the alteration of legal rights and responsibilities, is strictly prohibited by the Constitution as it would encroach upon Congress's power to make the supreme law of the land. This Court has never approved the mere invocation of a foreign policy interest, unmoored from binding legal enactments, to

override state law, be it a duly enacted statute or an application of the common law.

3. Nonetheless, the lower court set out searching for binding foreign policy directives not in any legislative source, but in the statements of Executive Branch officials. Utilizing concededly non-binding executive agreements as evidence of a broader foreign policy that would encompass this litigation, the lower court not only contradicted this Court's precedent—but also reached a conclusion apparently foreclosed by the very executive agreements it used as a guide.

4. Finally, *amici* stress that where foreign policy interests are claimed to override a State's traditional common law, insistence upon adherence to recognized forms of binding federal law is critical. Murky assertions of foreign policy interests, disconnected from any law-making procedure, are far too arbitrary, and, as can be seen in this case, unpredictable. The law should be more stable and transparent.

ARGUMENT

I. THE CONSTITUTION'S ALLOCATION OF LEGISLATIVE AUTHORITY TO THE CONGRESS EXTENDS TO MATTERS CONCERNING FOREIGN POLICY.

The Constitution assigns discrete, unique functions to each branch of government. Congress is granted "*[a]ll* legislative powers herein," U.S. Const. art. I, § 1 (emphasis added). "The magistrate in whom

the whole executive power resides cannot of himself make a law." *Medellin* v. *Texas*, 552 U.S. 491, 528 (2008) (quoting THE FEDERALIST NO. 47, 326 (Madison) (J. Cooke, ed., 1961)).

> In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.

Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579, 587 (1952).

Included within Congress's legislative authority is the power to "regulate Commerce with foreign Nations," U.S. Const. art. I, § 8, cl. 3, "declare War," U.S. Const. art. I, § 8, cl. 11, and "make all Laws which shall be necessary and proper for carrying into Execution [these] Powers," as well as the powers vested in executive officers, U.S. Const. art. I, § 8, cl. 18. The Senate must ratify treaties and confirm Ambassadorial appointments. U.S. Const. art. II, § 2.

Although this Court has held that the President may serve "as the sole organ of the federal government in the field of international relations," this authority may only be exercised pursuant to constitutional principles. *United States* v. *Curtiss-Wright*

Export Corp., 299 U.S. 304, 320 (1936). "[T]he President alone has the power to speak or listen as a representative of the nation," *id.* at 319, but this power exists in tandem with the "authority vested in the President by an exertion of legislative power." *Id.* at 319-20.

Accordingly, while Presidential authority to conduct foreign affairs "does not require as a basis for its exercise an act of Congress . . . like every other governmental power, [it] must be exercised in subordination to the applicable provisions of the Constitution." *Id.* at 320. This includes respecting the delegation of *all* legislative authority to Congress. Congress should give the President substantive latitude within which to act, *id.* at 321-22, but it need not abdicate its own duties in governing foreign matters, nor is it silenced by presidential prerogatives.

II. THIS COURT HAS CONSISTENTLY DEMANDED CONGRESSIONAL PARTICIPATION OR ACQUIESCENCE IN LEGISLATIVE ACTIONS RELATED TO THE CONDUCT OF FOREIGN POLICY.

Acknowledging the balance of powers between the various branches, this Court has routinely held unconstitutional executive actions that changed the state of the law without the consent of Congress, even when undertaken in alleged furtherance of foreign policy interests. *See, e.g.*, *Youngstown*, *supra*, 343 U.S. 579; *Hamdan* v. *Rumsfeld*, 548 U.S. 557 (2006); *Medellin*, *supra*, 552 U.S. 491. An actual statute,

treaty, executive agreement, or other document having the force of law, is a prerequisite for approving of executive action.

In the seminal *Youngstown* case, this Court denied President Truman the power to seize the Nation's steel mills by executive order for the purpose of preventing a wartime materials shortage. That action would have amounted to unconstitutional law-making by the Executive. *Youngstown*, 343 U.S. at 585. The President's executive order did not stem from an act of Congress or the Constitution itself, and it did not meet the requirements for seizure of the mills under applicable federal laws. *Id.* at 585-89. Thus, it could not be deemed a constitutionally valid exercise of executive foreign affairs power. *Id.*

This Court specifically refused to invoke the President's role as Commander in Chief or his aggregate executive powers to justify the seizure, noting, "The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress – it directs that a presidential policy be executed in a manner prescribed by the President." *Id.* at 588. The President having no exclusive legislative authority, the seizure was unconstitutional.

In *Medellin*, a case raising the same issues as this one, albeit arising in the criminal law context, this Court held that President Bush could not override Texas law by invoking the Vienna Convention. *Medellin*, 552 U.S. at 525-27. A non-self-executing treaty, the Convention could only be given force

domestically were it so empowered by Congress. *Id.* This was so even though the foreign policy concerns at issue—compliance with a ruling from the International Court of Justice and support for the Vienna Convention—were "plainly compelling." *Id.* at 524. This Court rejected the notion that the President had authority under his foreign affairs powers to "establish binding rules of decision that preempt contrary state law." *Id.* at 525 (citation omitted). To do so would encroach upon Congress' role as the sole legislative branch of the federal government. *See id.* at 526-27.[3]

Similarly, this Court recently struck down the use of presidentially convened military commissions, because the President was found to have acted under neither his constitutional authority nor an act of Congress in pursuit of his foreign policy objectives. *Hamdan*, *supra*, 548 U.S. 557. Although Congress enacted the Uniform Code of Military Justice, authorizing certain military tribunals, this Court found that the commissions contemplated by the President were not specifically authorized, and in the absence of common law support for the idea, violated the separation of powers. *Id.* at 593-95.

---

[3] *See also Barclay's Bank PLC* v. *Franchise Tax Bd.*, 512 U.S. 298, 329-30 (1994) (holding that the Executive's challenge to California's taxation of foreign corporations doing business in the state could not preempt the state's law because it was based merely on the President's policy preferences expressed in press releases, executive agency letters, and *amicus* briefs rather than upon any documents having the force of law).

Although executive agreements have been given the force of law in foreign policy preemption cases, *see, e.g.*, *United States* v. *Pink*, 315 U.S. 203 (1942); *United States* v. *Belmont*, 301 U.S. 324 (1937), that has occurred only because this Court had found such agreements to reflect Congressional acquiescence. Moreover, "the limitations on this source of executive power are clearly set forth and the Court has been careful to note that 'past practice does not, by itself, create power.'" *Medellin*, 552 U.S. at 531-32 (quoting *Dames & Moore* v. *Regan*, 453 U.S. 654, 686 (1981)).[4]

Only where Congressional consent was expressed or implied through a treaty, statute, executive agreement, or other properly promulgated regulation was the Executive allowed to take action on behalf of the nation in foreign policy matters. For example, President Franklin Roosevelt's decision to declare the sale of arms to Bolivia illegal was upheld by this Court, as the prohibition was buttressed by a joint resolution of Congress authorizing the President to make such a declaration if he believed doing so would end the armed conflict in Chaco. *Curtiss-Wright*, 299 U.S. at 325.

---

[4] The citation of precedent underscoring the need for Congressional authorization of actions related to foreign policy should not be considered an endorsement by *amici* of (1) any particular foreign policy at issue in those cases, or (2) the propriety of any finding of implicit Congressional authorization or acquiescence in those cases.

And in *Dames & Moore*, *supra*, the Court found implicit Congressional approval for the President's settlement of claims between Iran and the United States pursuant to the International Emergency Economic Powers Act and the Hostage Act, and in accord with claims settlement procedures that this Court believed Congress had implicitly approved. 453 U.S. at 678.

In sum, in a variety of contexts, during times of war and of peace, this Court has consistently held that the President may not execute "laws" related to the conduct of foreign policy absent some form of legislative authorization.

III. THE LOWER COURT CONTRADICTED THIS COURT'S PRECEDENT, AS WELL AS THE PRESIDENT'S NEGOTIATING POSITION.

This Court's decision in *American Insurance Association* v. *Garamendi*, 539 U.S. 396 (2003), is perfectly consistent with the established understanding requiring Congressional approval for Executive actions. *Garamendi* held a California statute that required foreign insurance companies to disclose their Holocaust-era insurance policy information was preempted by executive agreements designed to "encourage European insurers . . . to develop acceptable claims procedures, including procedures governing disclosure of policy information." 539 U.S. at 421 (citations omitted).

Yet notwithstanding *Garamendi*'s reliance on the existence of an executive agreement, the District Court found *Garamendi* "strongly implies that an executive policy need not be formally embodied in an executive agreement." Pet. App. at 37a. The Second Circuit repeated the error. Pet. App. at 10a ("[t]he Court in *Garamendi*, however, did not find that the United States policy . . . depended on the existence of executive agreements . . . . The agreements, and statements of interest issued by the Government pursuant to them, illustrate or express the national position, rather than define it.").

This view of *Garamendi* had been specifically rejected in *Medellin,* where the President cited *Garamendi* and other executive agreement cases to support the claim that his vision of American foreign policy interest was binding against state law, "independent of the United States' treaty obligations." *Medellin*, 552 U.S. at 530. This Court rejected the claim, holding that "[t]he Executive's narrow and strictly limited authority to settle international claims disputes *pursuant to an executive agreement* cannot stretch so far . . ." *Medellin*, 552 U.S. at 532 (emphasis added).

Indeed, the lower court's expansive view of the policy interests allegedly lurking beneath the ICHEIC agreement is so broad, it swallows the agreement's express limitations. As the four dissenters noted in *Garamendi,* this executive agreement *specifically disclaimed* any impact on insurance litigation. The agreement

> provides that "the United States will recommend dismissal on any valid legal ground (which, under the U. S. system of jurisprudence, will be for the U. S. courts to determine)." The agreement makes clear, however, that "the United States does not suggest that its policy interests . . . in themselves provide an independent legal basis for dismissal."

Garamendi, 539 U.S. at 436 (Ginsburg, J., dissenting) (citations omitted).

The hazards inherent in having courts guess at the content of foreign policy in applying the Supremacy Clause would be on full display should the Court grant certiorari. For example:

> Key to success was the resolution of the issue of "legal peace." European companies wanted assurances that all litigation and other legal action against them would cease and that they would never be sued again. Our government could not make such absolute guarantees for two reasons. *Our legal system does not work that way. And our Government would not bar Holocaust survivors who were U.S. citizens from having their cases heard in their own courts.*

Ambassador J.D. Bindenagel, Special Envoy for Holocaust Issues, U.S. Dept. of State, "The Current State of Compensation and Restitution Concerning the German Foundation," March 6, 2002, *available at*

http://germany.usembassy.gov/germany/img/assets/8497/bindenagel030602.pdf (last visited Aug. 6, 2010) (emphasis added).

In the name of extending the alleged policy that informed the subject agreements, the lower courts extended Respondent a benefit to which it would explicitly not be entitled even were Italy a signatory to the agreement, and which no German, Austrian, or French insurer could have expected to receive following the Executive's express denial of such a benefit. Even were the agreement to cover Generali, the most to which Respondent would be entitled would be the Executive's support for any valid defense under American law.

And of course, the agreements do not actually cover Respondent Generali. Executive agreements are agreements struck with the executives of foreign sovereigns, not executives of foreign corporations. It is for the Italian government to reach agreements with our government concerning how its subjects' liability might impact relations between our two nations. In the absence of agreement with Generali's foreign sovereign, the lower court should not have accepted the notion that relieving Generali of its legal obligations in the United States was required to advance American foreign policy.

Only federal *law* may preempt state law. U.S. Const. art. VI, cl. 2. Presidential policy that seeks to preempt contrary state law constitutes executive law-making, which is constitutionally impermissible.

IV. THE LOWER COURT IMPROPERLY RECOGNIZED WHOLLY ARBITRARY EXECUTIVE-MADE LAW.

Invoking the Supremacy Clause to nullify state common law, based upon mere statements of Executive actors rather than upon express, enforceable legal texts, is entirely arbitrary. As Justice Brandeis advised,

> The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was . . . to save the people from autocracy.

Myers v. *United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting); *Youngstown*, 343 U.S. at 613-14 (Frankfurter, J., concurring). Insistence upon a legislative product to effectuate important legal outcomes guarantees a needed measure of predictability and stability in the law, in addition to fostering the inclusiveness of the democratic process.

This Court has expressed a preference for relying, wherever possible, on the actual text of a law.

> We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.

Conn. Nat. Bank v. *Germain*, 503 U.S. 249, 253-254 (1992) (citations and internal quotation marks omitted). "As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material." *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005).

Many people, including *amici*, may reasonably disagree about the utility of resolving textual ambiguity by resort to evidence of legislative intent. But *amici* are united in one belief: that their legislative work has value—that their votes, and the language they enact into law, are consequential. While this Court has occasionally examined evidence of legislative intent to clarify the meaning of statutory text, or found Congressional silence instructive, this Court has never endorsed the positive enforcement of legislative intent in the absence of legislative enactments. This Court would not enforce, as binding law, mere statements by Members of Congress that a particular law *would* be in the public interest.

Yet this is precisely the power awarded the President by the lower court. The decision below has the effect of rendering statutes, treaties, and executive agreements—and by extension, Congressional involvement in the formulation of such laws—superfluous. The *Garamendi* agreements were understood by the lower court to not control this action, and there the matter should have ended. And yet the agreements were deemed to be essentially symptomatic of a deeper binding foreign policy interest, known only

to, and revealed only by, Executive Branch officials. When revealed in the decision below, this policy contradicted the agreement it was said to have manifested.

The arbitrary nature of the lower court's action is plain. The lower court sought out the hidden, yet binding foreign policy not by looking to the United States Code or Federal Register, but by seeking input from Secretary of State Rice. Pet. App. 7a. Without any apparent sense that there might be something wrong with applying the Supremacy Clause in this fashion, the lower court returned to the State Department for another perspective after the last Presidential election:

> Because of the possibility of change of foreign policy after the intervening change of administration in 2009, we then inquired of the new Secretary of State Hillary Rodham Clinton whether, in the new administration, the foreign policy of the United States continued unchanged.

Id. This, the lower court did in order to "erase any . . . doubt" as to the foreign policy interest. Pet. App. at 11a. Of course, a future court might obtain contrary advice from the next President, or even from the current President, should he determine that the Nation's policy interests have changed.

Lost in all of this is the fact that an American citizen wishing to access his local court for the resolution of state common law claims suddenly finds the

courthouse door closed, not because of any duly ratified treaty or enacted law, but essentially, on the order of the Secretary of State, with whom a federal court of appeals periodically inquires to determine if the lawsuit might go forward.

The Founders' reverence for the rule of law and the balance of powers among branches of the government cannot tolerate such a result.

CONCLUSION

For the foregoing reasons, *amici* Members of Congress respectfully request that the Court grant the petition for certiorari.

Respectfully submitted,

ALAN GURA*
CANDICE HANCE
GURA & POSSESSKY, PLLC
101 N. Columbus Street, Suite 405
Alexandria, Virginia 22314
703.835.9085

**Counsel of Record*
Counsel for Amici Curiae

Blank Page