

# 05-5602-CV

---

## United States Court of Appeals

*for the*

## Second Circuit

---

MARTA DRUCKER CORNELL and SAMUEL HERSLY,

*Plaintiffs-Appellants,*

ERNA GANS, IGOR KLING, AMALIA KRANZ BURSTIN, TIBOR VIDAL,  
MORRIS WEINMAN, MARTHA SARAFFIAN, ROSE STEG, on behalf of  
themselves and all other persons similarly situated, MARGARET ZENTNER,  
SOCRATES FOKAS, RUTH HESS, IVAN SOLTI, RENATA SCHWARZ,  
HENRY DIAMANT, ERNEST BRODERICK, MIRIAM KOHN BREINER,  
FRITZ J. EHRLICH, SIEGFRIED HERZFELD, LESLIE KELLER, KARL  
LOWENSTEIN, MARIA SOLT, GEORGINA FEHER REICH, HENRY BAUER,  
MAGDELENA KALLAN, RUDY ROSENBERG, GEORGE H. STRAUSS,  
GITTA BRON, AMALIA KRANZ BURSTIN and MICHAEL A. JORDAN, on  
behalf of themselves and all other persons similarly situated,

*Plaintiffs,*

– v. –

ASSICURAZIONI GENERALI S.P.A. - Consolidated,

*Defendant-Appellee,*

*(For Continuation of Caption See Inside Cover)*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

---

### JOINT BRIEF FOR PLAINTIFFS-APPELLANTS

---

NANCY SHER COHEN  
WARRINGTON S. PARKER III  
REYNOLD SIEMENS  
JOHN C. ULIN  
DOUG M. KELLER  
PEGGY J. WILLIAMS  
ESTA L. BRAND  
HELLER EHRMAN LLP  
333 S. Hope Street  
Los Angeles, California 90071  
(213) 689-0200  
[Additional Counsel Listed on Signature Page]

---

---

WIENER ALLIANZ WIENER ALLIANZ VERSICHERUNGS  
AKTIENGESECHAFT AG, also known as Phenix Allegegemeine Phenix  
Allegegemeine Versicherungs Aktiengesellschaft, A.G. F., ASSURANCES  
GENERALES DE FRANCE VIE, RIUNIONE ADRIATICA DI SICURTA  
S.P.A., - Consolidated, ALLIANZ GROUP OF GERMANY, BAVARIAN  
REINSURANCE COMPANY, also known as Bayerische Allegegemeine  
Versicherungs Aktiengesellschaft, INSURANCE COMPANIES #1-100,  
WIENER ALLIANZ VERSICHERUNGS AG, as a Successor-in-Interest to  
Phonix Allgemeine Versicherungs Gesellschaft and Fortuna R.T. Budapest  
Universal Insurance Company, VICTORIA LEBENSVERSICHERUNG AG,  
BASLER LEBENS-VERSICHERUNGS GESELLSCHAFT, GERLING  
KONZERN LEBENSVERSICHERUNGS-AG, ZUERICH  
LEBENSVERSICHERUNGS GESELLSCHAFT, NORDSTERN  
LEBENSVERSICHERUNGS-AG, UNION DES ASSURANCES DE PARIS, as  
Successor-in-Interest to L'Union, VEREINTE VERSICHERUNG AG, as  
Successor-in-Interest to Isar Lebensversicherung AG and Magdeburger  
Versicherung AG, MANNHEIMER LEBENSVERSICHERUNG AG,  
WINTERTHUR LEBENSVERSICHERUNGS GESELLSCHAFT,  
DEUTSCHER RING LEBENSVERSICHERUNGS-AG, as Successor-in-Interest  
to Star Life of Prague Insurance Company, Funnick, Osterreichische  
Versicherungs Aktiengesellschaft, and Phonix and/or Phonix Osterreichische  
Lebensversicherungs-AG, JOHN DOE CORPORATION #1, as Successor-in-  
Interest to Phonix Allgemeine Versicherungs Gesellschaft, JOHN DOE  
CORPORATION #2, as Successor-in-Interest to Phonix (Prague, The Czech  
Republic), JOHN DOE CORPORATION #3, as Successor-in-Interest to Feniks  
Life Insurance Co. (In Bulgaria), JOHN DOE INSURANCE COMPANIES OR  
CORPORATIONS #4-100,

*Defendants,*

CALIFORNIA INSURANCE COMMISSIONER,

*Movant.*

---

## TABLE OF CONTENTS

	<u>Page</u>
PRELIMINARY STATEMENT .....	1
JURISDICTIONAL STATEMENT .....	1
ISSUE PRESENTED .....	1
STATEMENT OF THE CASE .....	2
STATEMENT OF FACTS .....	9
A.    Generali, Historically And Currently One Of The Largest Insurers, Sells Out Its Insureds .....	9
B.    Generali’s Participation In ICHEIC Is Entirely Voluntary And Has Proven To Be Inadequate .....	12
C.    The Executive Agreements Provide Other Insurers A Different Relationship With ICHEIC .....	15
D.    The U.S. Government Refuses To Issue A Statement Of Interest Despite Generali’s Repeated Lobbying .....	18
SUMMARY OF ARGUMENT .....	21
ARGUMENT .....	24
I. <i>AMERICAN INSURANCE ASSOCIATION</i> v. <i>GARAMENDI</i> DOES NOT SUPPORT THE DISTRICT COURT’S CONCLUSION THAT DISMISSAL WAS APPROPRIATE DUE TO A CONFLICT WITH U.S. FOREIGN POLICY .....	24
A.    There Is Neither An Executive Agreement Nor A Statement Of Interest .....	24
B.    These Claims Fall Within Traditional States’ Interests .....	34
C.    Allowing These Claims To Go Forward Will Not Jeopardize ICHEIC .....	40
II.   THE DISTRICT COURT’S DECISION IS CONTRARY TO THE WEIGHT OF AUTHORITY .....	42

III. THE DISTRICT COURT’S DECISION WOULD RESULT,  
EFFECTIVELY, IN AN ABANDONMENT OF CLAIMS .....48

IV. FORCING PLAINTIFFS TO LITIGATE IN A MANIFESTLY  
INADEQUATE FORUM VIOLATES THEIR RIGHT TO  
DUE PROCESS .....50

CONCLUSION .....54

## TABLE OF AUTHORITIES

	<u>Page</u>
<b>CASES</b>	
<i>Alperin v. Vatican Bank</i> , 410 F.3d 532 (9th Cir. 2005).....	44, 45
<i>Arbitration between Monegasque de Reassurances S.A.M. v. Naftogaz</i> , 311 F.3d 488 (2nd Cir. 2002).....	52
<i>American Insurance Association v. Garamendi</i> , 539 U.S. 396 (2003).....	<i>passim</i>
<i>Baker v. Carr</i> , 369 U.S. 186 (1962).....	33
<i>Container Corp. v. Franchise Tax Board</i> , 463 U.S. 159 (1983).....	32
<i>Crosby v. Nat’l Foreign Trade Council</i> , 530 U.S. 363 (2000).....	41
<i>Cruz v. United States</i> , 387 F. Supp. 2d 1057 (N.D. Cal. 2005).....	39
<i>Deutsch v. Turner Corp.</i> , 324 F.3d 692 (9th Cir. 2003).....	35
<i>Doe v. Exxon Mobil Corporation</i> , 2006 WL 516744 (D.D.C. 2006).....	46
<i>Ibrahim v. Titan Corporation</i> , 391 F. Supp. 2d 10 (D.D.C. 2005).....	46
<i>In re Agent Orange</i> , 373 F. Supp. 2d 7 (E.D.N.Y. 2005).....	24, 45, 46
<i>In re Assicurazioni Generali S.p.A. Holocaust Ins. Litigation</i> (“ <i>Generali I</i> ”), 228 F. Supp. 2d 348 (S.D.N.Y. 2002) .....	<i>passim</i>

<i>In re Assicurazioni Generali S.p.A. Holocaust Ins. Litigation</i> (“ <i>Generali II</i> ”), 340 F. Supp. 2d 494 (S.D.N.Y. 2004) .....	<i>passim</i>
<i>In re Murchison</i> , 349 U.S. 133 (1955).....	50, 52
<i>In re Nazi Era Cases</i> , 334 F. Supp. 2d 690 (D.N.J. 2004).....	30
<i>Jones v. Rath Packing Co.</i> , 430 U.S. 519 (1977).....	39
<i>Joo v. Japan</i> , 413 F.3d 45 (D.C. Cir. 2005) .....	29
<i>Kadic v. Karadzic</i> , 70 F.3d 232 (2d Cir. 1995).....	21, 37
<i>Kennedy v. Mendoz-Martinez</i> , 372 U.S. 144 (1963).....	50, 51
<i>Klinghoffer v. S.N.C. Achille Lauro</i> , 937 F.2d 44 (2d Cir. 1991).....	37
<i>Mujica v. Occidental Petroleum Corp.</i> , 381 F. Supp. 2d 1164 (C.D. Cal. 2005) .....	47, 49
<i>Quackenbush v. Allstate Ins. Co.</i> , 517 U.S. 706 (1996).....	37
<i>Republic of Austria v. Altmann</i> , 541 U.S. 677 (2004).....	33, 45
<i>Schydlower v. Pan American Life Insurance Company</i> , 231 F.R.D. 493 (W.D. Tex. 2005).....	35, 43, 44
<i>Steinberg v. International Commission on Holocaust Era</i> <i>Insurance Claims</i> , 133 Cal. App. 4th 689 (2005).....	26
<i>Trojan Techs., Inc. v. Pennsylvania</i> , 916 F.2d 903 (3d Cir. 1990).....	39

<i>United States v. Curtiss-Wright Export Corp.</i> , 299 U.S. 304 (1936).....	51
<i>United States v. Portrait of Wally</i> , 2002 WL 553532 (S.D.N.Y. 2002) .....	45
<i>Vasquez v. Van Lindt</i> , 724 F.2d 321 (2nd Cir. 1983).....	50, 52
<i>Victoriatea.com, Inc. v. Cott Beverages Canada</i> , 239 F. Supp. 2d 377 (S.D.N.Y. 2003) .....	53
<i>Whiteman v. Dorotheum GMBH</i> , 431 F.3d 57 (2d Cir. 2005).....	21, 29, 32
<i>Zschernig v. Miller</i> , 389 U.S. 429 (1968).....	37, 38

## STATUTES

28 U.S.C.	
§ 1291 .....	1
§ 1332(a)(2) .....	1
§ 1332(a)(3) .....	1
§ 1367 .....	1
Fed. R. Civ. P. 59.....	1

## **PRELIMINARY STATEMENT**

The decision appealed from, reported at 340 F. Supp. 2d 494 (S.D.N.Y. 2004), was rendered by the Honorable Michael B. Mukasey.

## **JURISDICTIONAL STATEMENT**

This is an appeal from a judgment entered following an order dismissing plaintiffs' complaints on the ground that Executive Branch foreign policy preempted their state-law causes of action. The District Court, Chief Judge Michael Mukasey of the United States District Court for the Southern District of New York, presiding, had jurisdiction under 28 U.S.C. sections 1332(a)(2) and 1332(a)(3). The court also had supplemental jurisdiction under 28 U.S.C. section 1367. The District Court dismissed the actions by order dated October 14, 2004, and entered judgment on October 18, 2004. On September 19, 2005, after denying a motion under Fed. R. Civ. P. 59, the District Court entered an order requiring plaintiffs to file their notices of appeal by September 30, 2005. A timely notice of appeal was filed on September 29, 2005. This Court has jurisdiction under 28 U.S.C. section 1291.

## **ISSUE PRESENTED**

Holocaust survivors and their family members have sued an Italian insurance company that continues wrongfully to deny their property and life

insurance claims. Are their lawsuits preempted by federal foreign policy as expressed in *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), even though, in contrast to *Garamendi*, (a) there is no treaty or Executive Agreement between the United States and Italy, the defendant insurance company's home country, (b) the U.S. government has repeatedly rejected defendant's requests that the government file a statement expressing that there is a foreign policy conflict, (c) the claims at issue seek only to vindicate individual rights, and (d) the only possible alternative forum for resolving plaintiffs' claims was found by the District Court to be "manifestly inadequate"?

### **STATEMENT OF THE CASE**

In the years leading up to the Holocaust, victims of Nazi persecution tried to protect their assets, and their families' futures, by buying property and life insurance policies from Assicurazioni Generali, S.p.A. ("Generali"), an Italian insurance company that was – and remains – one of the largest insurers in Europe. Generali betrayed those policyholders. As the Nazis' power spread through Europe, Generali cooperated with the Nazi regime, paying to it the proceeds of insurance policies purchased by Jews and other persecuted minorities. During the sixty years since World War II, as the survivors and their families struggled to reconstruct their lives, Generali refused to honor the policies it had issued to insure

property the Nazis seized and the lives of those who perished before firing squads and in Holocaust death camps.

***The Complaints.*** Survivors, their heirs, and beneficiaries filed four civil class actions: Two were filed in the United States District Court for the Southern District of New York.<sup>1</sup> Two additional class actions were initially filed in California Superior Court but were removed and then transferred to the Southern District of New York by the Panel on Multidistrict Litigation under Docket No. 1374.<sup>2</sup> Numerous other actions were filed by individual Holocaust survivors and transferred to the District Court by the MDL Panel or removed from New York state court. *See In re Assicurazioni Generali S.p.A. Holocaust Ins. Litigation (“Generali I”),* 228 F. Supp. 2d 348, 349 n.1 (S.D.N.Y. 2002).

The plaintiffs in these actions share a common story: Generali consistently obstructed any recovery of insurance proceeds by Holocaust survivors and their family members. Generali denied, falsely, that policies exist. When unable to conceal the policy, Generali claimed, again falsely, that the policy had been

---

<sup>1</sup> *Cornell, et al. v. Assicurazioni Generali, S.p.A., No. 97 Civ. 2262 (1997) [A-167], Schenker, et al. v. Assicurazioni Generali, S.p.A. et al. (formerly Winters, et al. v. Assicurazioni Generali, et al.), No. 98 Civ. 9186 (1998) [A-443].*

<sup>2</sup> *Smetana, et al. v. Assicurazioni Generali, S.p.A., No. 00 Civ. 9413 (2000) [A-271], Haberfeld v. Assicurazioni Generali, S.p.A. et al., No. 01 Civ. 9498 (2001) [A-481].*

surrendered or voided. Generali asserted spurious defenses, disclaimed coverage without investigating the claims, made unreasonable demands for documentation, and denied claims without adequate explanation or justification.<sup>3</sup>

The complaints allege common law claims such as breach of the insurance contracts and breach of the covenant of good faith and fair dealing implied in every insurance contract by law, as well as tort and unfair business practices claims. Plaintiffs seek damages and declaratory relief, including a declaration of Generali's duty to pay in accordance with the terms of the insurance contracts it issued. *In re Assicurazioni Generali S.p.A. Holocaust Ins. Litigation* ("Generali II"), 340 F. Supp. 2d 494, 508 (S.D.N.Y. 2004).

***The District Court Finds That ICHEIC Is An Inadequate Forum.*** In 2001, Generali moved to dismiss the coordinated actions on the grounds of *forum non conveniens* and contractual forum selection. Generali asked that the lawsuits all be dismissed in favor of litigation in European courts, or in the alternative, resolution by the International Commission on Holocaust Era Insurance Claims ("ICHEIC"), a private organization set up by several private European insurance companies, including Generali, and certain non-governmental and foreign governmental entities.

---

<sup>3</sup> E.g., *Smetana Compl.* ¶ 87 [A-289]; *Cornell Compl.* ¶¶ 23-29 [A-183-187]; *Schenker Compl.* ¶¶ 5, 41 [A-445,458]; *Haberfeld Compl.* ¶¶ 19-29 [A-485-489].

After denying for decades that it had any evidence of the existence or terms of the plaintiffs' insurance policies, Generali attached copies of many of those policies to its motion to dismiss their lawsuits, to show the forum selection clauses they contained. *See Generali I*, 228 F. Supp. 2d at 371 n. 22 (listing policies).<sup>4</sup> The District Court denied Generali's motion on all grounds. *Id.* at 375.

The District Court held that enforcement of the clauses selecting European courts would be manifestly unjust given that the plaintiffs' families had been driven from Europe by Nazi persecution. *Id.* at 373. Moreover, the District Court found Generali's alternative private forum, ICHEIC, presented the "rare circumstance" where the proposed forum was "clearly unsatisfactory":

Defendants have moved to dismiss in favor of a private, nongovernmental forum that they both created and control, the continued viability of which is uncertain. Because of these shortcomings, ICHEIC cannot be considered an adequate alternative forum.

*Id.* at 355.

Expounding on the deficiencies of ICHEIC as an alternative forum, the District Court emphasized that ICHEIC was "manifestly inadequate because it lacks sufficient independence and permanence." *Id.* at 356.

ICHEIC is entirely a creature of the six founding insurance companies that formed the Commission, two of which are defendants in this case;

---

<sup>4</sup> *See also* Declaration of Nicolo Catalanotti in Support of Generali's Motion to Dismiss ("Catalanotti Decl.") and the Exhibits thereto [A-529].

it is in a sense the company store. . . . The concern that defendants could use their financial leverage to influence the ICHEIC process is not merely theoretical. . . . ICHEIC’s decision-making processes are and can be controlled by the defendants in this case . . . .

*Id.* at 356-57.

Noting that where the U.S. government has entered into an Executive Agreement with a foreign nation, the terms of that Agreement may require dismissal of a plaintiff’s lawsuit and compel the plaintiff to try his claims in an international tribunal, the District Court further held that where, as here, no such Executive Agreement exists covering claims against Italian insurers such as Generali, *id.* at 356 n.7, hortatory statements by various sub-cabinet level officials that ICHEIC “should be considered the exclusive remedy for resolving insurance claims from the World War II era”<sup>5</sup> were not a basis for preempting plaintiffs’ suits:

Absent a statute or executive agreement suspending plaintiffs’ claims or an executive agreement that gives rise to specific foreign relations concerns . . . the government’s position is not controlling . . . .

*Id.* at 358.

***The District Court Relies On Garamendi To Dismiss The Action In Favor Of Resolution In ICHEIC.*** Generali again moved to dismiss on November 15, 2002, arguing that plaintiffs’ claims were governed by laws of the European

---

<sup>5</sup> See Declaration of Franklin B. Velie in Support of Generali’s Motion to Dismiss (“Velie Decl.”), Exs. U, V, W, Y [A-608-630].

countries where the insurance policies were issued (*i.e.*, Poland, the former Czechoslovakia, Czech Republic, Slovak Republic, Hungary, Austria, Latvia, the former Yugoslavia, and Italy), and did not state valid claims under those laws. In the alternative, Generali sought dismissal on the ground that plaintiffs' claims were barred "under the Constitution's foreign affairs provisions and the political question doctrine."<sup>6</sup>

On June 23, 2003, just before Generali filed its reply brief, the United States Supreme Court issued its decision in *American Insurance Association v. Garamendi*. There, the Court held that a California statute (not at issue in this case), requiring foreign insurers to disclose to the California Department of Insurance information about Holocaust-era insurance policies, impermissibly interfered with United States foreign policy and was, therefore, preempted. 539 U.S. at 429.

In so holding, the Court considered three Executive Agreements that the United States had entered into with Germany, Austria and France. Those

---

<sup>6</sup> Notice of Motion and Motion by Defendant Assicurazioni Generali, S.p.A., Based on Choice of Law Rules and Related Doctrines, to Dismiss Each of the Complaints Under Rule 12(b), or, Alternatively, (1) to Strike Plaintiffs' Punitive Damages Claims, (2) to Dismiss Plaintiffs' Tort Claims, and (3) to Strike or for Judgment on the California Plaintiffs' Claims Attacking Generali's Efforts to Voluntarily Resolve Holocaust-Era Insurance Claims at 3 [A-1032]; Assicurazioni Generali S.p.A.'s Rule 44.1 Notice of Intention to Raise an Issue of Foreign Law at 2 [A-1040].

Agreements required Germany, Austria and France and companies located in those countries to set aside approximately \$5 billion to resolve Holocaust-era claims, including claims pending against those countries' insurance companies in U.S. courts. The Agreements required the impacted insurance companies to participate in the ICHEIC claims process – thereby rendering their participation in ICHEIC compulsory, not voluntary. In exchange, the United States obligated itself to assist in securing “legal peace” for impacted German, Austrian and French companies by filing Statements of Interest in lawsuits against them in United States courts, seeking dismissal of those suits. *Id.* at 401-08, 420-23.

There is no similar agreement with Italy. Italy has not agreed to help fund ICHEIC, and Generali's participation in ICHEIC, which remains purely voluntary, is unregulated by any U.S. federal or state law, or any Italian law like the German legislation that implements the Executive Agreement between Germany and the United States.

On October 14, 2004, the District Court granted Generali's motion to dismiss plaintiffs' claims, relying solely on the Supreme Court opinion in *Garamendi*. The District Court held that the Executive Agreements entered into by the United States with Germany, France and Austria, and statements of some sub-cabinet level officials supportive of ICHEIC, demonstrated an Executive Branch policy that favored voluntary resolution of Holocaust-era insurance claims through

ICHEIC, and that therefore the plaintiffs' claims against the Italian insurer Generali were preempted.

The District Court acknowledged that the United States had not entered into any Executive Agreement with Italy. The District Court also understood that the United States had refused to file any Statement of Interest seeking dismissal of plaintiffs' suits against Generali. Still, the District Court found that *Garamendi* compelled dismissal of all of plaintiffs' claims. *Generali II*, 340 F. Supp. 2d at 505-06.

This appeal timely followed.

## STATEMENT OF FACTS

### **A. Generali, Historically And Currently One Of The Largest Insurers, Sells Out Its Insureds**

***Generali Allows The Nazi Regime To Cash Out Policies.*** In the decades before World War II, Generali was one of the largest insurers in Europe.<sup>7</sup> Generali marketed insurance to people living in Europe, both as an investment and as protection against loss of life or property.<sup>8</sup>

---

<sup>7</sup> Generali is currently one of the largest insurers both in Europe and the United States, earning over \$100 billion in annual revenues in the United States market alone. *Schenker Compl.* ¶ 13 [A-447-448].

<sup>8</sup> *Smetana Compl.* ¶ 17 [A-276-277].

In the early 1930s, the government of Nazi Germany began systematically to persecute certain groups, including Jews, by confiscating or destroying their assets, deporting them to concentration camps, forcing them into slave labor, and inflicting mass extermination. As Nazi Germany allied with or conquered other European countries, many attempted to emigrate, or to hide their identities and assets to avoid capture.<sup>9</sup>

Generali facilitated these efforts. It encouraged Europeans who were fearful of Nazi persecution to deposit their assets with and purchase insurance from Generali to safeguard their families' futures.<sup>10</sup> In all this, Generali was little more than a bookie for the Nazi regime. Generali knew that the Nazis were going after the property of its insureds, including insurance policies and their proceeds. And, Generali allowed it. Under Generali's watch, with its knowledge, acquiescence, and participation, the Nazis liquidated and cashed in the insurance policies that Generali had sold to victims of the Holocaust. The proceeds were used to fund the Nazi war machine.<sup>11</sup>

***Generali Resists The Claims of Its Policyholders.*** After the war, surviving policyholders and their heirs and beneficiaries attempted to make claims under the

---

<sup>9</sup> *Id.* ¶¶ 17-19, 21 [A-276-277].

<sup>10</sup> *Id.* ¶ 22 [A-277].

<sup>11</sup> *Id.* ¶¶ 22-26 [A-277-278].

life and property insurance policies that had been issued by Generali. In many cases, Generali failed to respond.

When Generali responded, its response varied in content but not as to goal. Generali denied the existence of the policies or denied having records of them, falsely telling claimants that policy documents stored at certain of its former European offices were “completely destroyed or lost” as a result of the war.<sup>12</sup> *See Generali I*, 228 F. Supp. 2d at 361. Generali demanded evidence of the policies or of the policyholder’s death – requests it knew were unreasonable under the circumstances of the Holocaust.<sup>13</sup> It asserted that it had no obligation to pay on any European policies because its operations had been “nationalized.”<sup>14</sup> It denied claims because the insurance policy proceeds had been paid previously by Generali to the Nazis or the beneficiary was not Aryan.<sup>15</sup> Generali even refused to pay on the ground that the policy lapsed because no premiums were received while the policyholder was in a concentration camp.<sup>16</sup>

---

<sup>12</sup> *Id.* ¶ 27 [A-278]; Catalanotti Decl., ¶ 21 & n.3 [A-534-535].

<sup>13</sup> *Smetana Compl.* ¶ 27 [A-278].

<sup>14</sup> *Id.* ¶ 94 [A-290-291].

<sup>15</sup> *Id.* ¶ 27 [A-278].

<sup>16</sup> *Id.*

**B. Generali's Participation In ICHEIC Is Entirely Voluntary And Has Proven To Be Inadequate**

***ICHEIC Is Not A Forum Appropriate To Resolve Claims Against***

**Generali.** Although, as noted below, Executive Agreements have altered the landscape somewhat for German, Austrian and French insurance companies, ICHEIC's relationship with Generali remains unaltered by any Executive Agreement between the United States and Italy. Generali's historical relationship with ICHEIC, therefore, remains relevant.

In the late 1990s, surviving policyholders or their heirs began to file individual and class action lawsuits to force European insurance companies to honor their policy obligations. In response to these lawsuits and under public pressure, in August 1998, Generali and five other European insurers created ICHEIC as a voluntary, privately funded organization.<sup>17</sup> As the District Court described ICHEIC, it is "an ad-hoc, nonjudicial, private international claims tribunal" that is "entirely a creature of the six founding insurance companies" – including Generali – the "decision-making processes [of which] are and can be controlled by the defendants in this case . . . ." *Generali I*, 228 F. Supp. 2d at 353-54, 356-57.<sup>18</sup>

---

<sup>17</sup> *Id.* ¶ 28 [A-279].

<sup>18</sup> ICHEIC was created by an August 25, 1998 Memorandum of Understanding ("MOU") between Generali of Italy, German insurer Allianz

In theory, and as reflected in the Memorandum of Understanding creating ICHEIC, Generali agreed to establish a “just process” that “will expeditiously address the issue of unpaid insurance policies issued to victims of the Holocaust.”<sup>19</sup> In reality, ICHEIC has simply forwarded claims to Generali, which has then denied the vast majority of claims after scrutiny under standards of review that directly violate the ICHEIC agreement.<sup>20</sup> The remainder of claims simply languish.<sup>21</sup> *Generali I*, 228 F. Supp. 2d at 354-55, 357 (noting that ICHEIC had offered payment on only a tiny percentage of claims, and relatively few claimants have

---

Lebensversicherungs-AG; French insurer AXA, and the Swiss companies Basler Lebens-Versicherungs-Gesellschaft, Winterthur, and Zurich. Weiss Plaintiffs’ Mem. of Law in Opp. to Defendants’ Motion to Dismiss (“Weiss Opp. Mem.”), Ex. Q at 3 [A-885]. Other signatories included certain non-governmental Jewish organizations, the State of Israel, and certain U.S. state insurance regulators. *Id.*; see *Generali I*, 228 F. Supp. 2d at 353-54. No claimants’ or plaintiffs’ representatives are members of ICHEIC.

<sup>19</sup> *Smetana Compl.* ¶ 29 [A-279].

<sup>20</sup> *Id.* ¶¶ 30-32 [A-279-280].

<sup>21</sup> *Id.* ¶¶ 32, 35-38 [A-280-281]; Weiss Opp. Mem., Ex. T (Washington State Insurance Commissioner report noting that Generali possessed a list of 90,000 policies in force in 1937 but had published only 8,740 names on the ICHEIC web site) [A-908]; Weiss Plaintiffs’ Reply Memorandum to Generali Defendants’ Response to Rule 59 Motion at 8-9 (quoting November 1, 2004 memorandum from Lawrence Eagleburger, Chariman of ICHEIC, reporting that the quality of claims-handling by Generali’s claims entity “is clearly below ICHEIC standards, and of a nature that ICHEIC has not seen and certainly would not tolerate from any of the insurance companies processing ICHEIC claims.”) [A-1979; 2034].

been willing to accept those offers even though doing so would relieve them of further need to litigate with Generali).<sup>22</sup>

That ICHEIC would forward claims to Generali for resolution, as opposed to resolving the claims independently, is explained by Generali's view of ICHEIC. According to Generali, ICHEIC is merely a "creature of consensus" among the insurance companies that created and fund it. By this, Generali means that it is free of ICHEIC in any real sense. Generali reserves for itself the right to reject any ICHEIC decision "which we might regard as unfair or unjust." *Generali I*, 228 F. Supp. 2d at 357.<sup>23</sup>

***Nothing Requires Generali's Continued Participation In ICHEIC.***

ICHEIC's self-imposed December 31, 2003 deadline for accepting claims has

---

<sup>22</sup> Public officials have repeatedly criticized ICHEIC's excessive administrative expenses and slow progress. Forty-six members of the U.S. House of Representatives wrote to Chairman Eagleburger on September 29, 2000, expressing concerns that "companies participating in ICHEIC have rejected three out of four claims that were fast-tracked and considered well documented. Hundreds of other policies have been idled for months and no appeals process exists. Many of the excuses by these companies for rejecting claims are ludicrous." Weiss Opp. Mem., Ex. N at 1 [A-868]; *see also id.*, Ex. R (House staff report cites "delay and obstruction" by the ICHEIC members, which ignore or refuse to follow agreed standards for resolving claims; less than one percent of all claims result in offers) [A-900-902].

<sup>23</sup> Weiss Opp. Mem., Ex. S at 1-2 [A-906-907], *id.*, Ex. Q at 12-13 [A-893-894].

passed.<sup>24</sup> With respect to claims submitted before that date, nothing requires Generali to maintain its participation in ICHEIC or even to comply with its claims-processing standards. With no Executive Agreement between Italy and the United States, Generali simply has no obligation to remain an ICHEIC participant. There is nothing, therefore, that ensures the continued viability of ICHEIC as a place to resolve claims against Generali. *Generali I*, 228 F. Supp. 2d at 357.<sup>25</sup>

With no obligation to participate, Generali is also free to withhold money. ICHEIC Chairman Lawrence Eagleburger's observation that member companies have withheld funding they pledged to ICHEIC, as "a form of punishment" for ICHEIC decisions with which the companies disagree, therefore, remains especially pertinent with respect to Generali.<sup>26</sup>

### **C. The Executive Agreements Provide Other Insurers A Different Relationship With ICHEIC**

On July 17, 2000, the United States entered into an Executive Agreement with Germany. It served as a model for similar Executive Agreements between the United States and the governments of France and Austria in 2001. *Garamendi*, 539 U.S. at 408 & n.3. It therefore serves as the framework for this section.

---

<sup>24</sup> See <http://www.icheic.org/>.

<sup>25</sup> Weiss Opp. Mem., Ex. Q at 3 [A-885].

<sup>26</sup> *Id.* at 14 [A-895].

The agreement with Germany requires claims against various German insurance companies to be resolved through ICHEIC. The German government and representatives of German industry agreed to create and fund the German Foundation for Remembrance, Responsibility and the Future (“the German Foundation”) with approximately \$5 billion to assist in resolution of all Holocaust-era claims, including claims brought in United States courts against German companies.<sup>27</sup> The agreement requires the German Foundation to allocate up to approximately \$250 million to ICHEIC for the resolution of unpaid insurance claims against German companies.<sup>28</sup>

In return, the U.S. government agreed to attempt to provide “legal peace” to German companies facing Holocaust-related lawsuits in United States courts. After “extended dickering,” *Garamendi*, 539 U.S. at 405-06, the Clinton Administration agreed to take two actions: First, the United States agreed that it would be obligated to file a “Statement of Interest” in such lawsuits against German companies, seeking dismissal of those suits. The Statement of Interest was to express the view that it was “in the foreign policy interests of the United States” for the German Foundation to be the exclusive forum for resolving

---

<sup>27</sup> Weiss Opp. Mem., Ex. Q at 15-16 [A-896-897].

<sup>28</sup> *Id.* Austria similarly agreed to allocate monies to ICHEIC. *Garamendi*, 539 U.S. at 408 n.3.

Holocaust-related claims against German companies. *Generali II*, 340 F. Supp. 2d at 498.<sup>29</sup> Second, the United States agreed to use its “best efforts, in a manner it considers appropriate,” to get state and local governments to respect the German Foundation as the exclusive mechanism for Holocaust-era claims against German firms. *Id.* The United States’ undertaking in the German Foundation Agreement to help provide legal peace for German companies was conditioned on the German government’s promises that the Foundation will be “fair and equitable,” that its “structure and operation will assure ... swift, impartial, dignified, and enforceable payments,” and that its “operation is open and accountable.”<sup>30</sup>

Consistent with this commitment, various sub-cabinet level officials of the U.S. government friendly to ICHEIC issued aspirational statements that ICHEIC “should be considered the exclusive remedy for resolving insurance claims from the World War II era.”<sup>31</sup> *Generali*, 228 F. Supp. 2d at 358. One of those officials, Deputy Treasury Secretary Stuart Eizenstat, stressed to California’s governor that the California statute challenged in *Garamendi* could derail the German Foundation Agreement, and that “for this deal to work ... German industry and the

---

<sup>29</sup> See Velie Decl., Ex. U at 2, 4 [A-610, 612].

<sup>30</sup> See Declaration of Stuart E. Eizenstadt in Support of the Statement of Interest of the United States Regarding The German Foundation, Ex. B.

<sup>31</sup> Velie Decl., Exs. O, U, W, Y [A-597-630].

German government need to be assured that they will get ‘legal peace’” from Holocaust-related claims. *Garamendi*, 539 U.S. at 411. Similarly, Eizenstat and others have stated the United States’ “support” for ICHEIC. *Generali II*, 340 F. Supp. 2d at 504.

**D. The U.S. Government Refuses To Issue A Statement Of Interest Despite Generali’s Repeated Lobbying**

In contrast to the German, Austrian and French Executive Agreements, the United States has not entered into any Executive Agreement with Italy covering Italian companies like Generali. And the State Department, in refusing to accede to Generali’s pleas for intervention in the present litigation, has taken the position that the United States has no role in resolving claims against Generali, no obligation to intervene in private suits against Italian firms, and no intention of seeking to deter them.

Thus, for example, in a September 13, 2001 letter to William Shernoff, counsel for plaintiffs in 25 individual actions, Ambassador J. D. Bindenagel, the designated U.S. observer at ICHEIC<sup>32</sup> and the State Department’s Special Envoy for Holocaust Issues, stated that the United States would not file any Statement of Interest in Generali’s favor. In explaining why, Ambassador Bindenagel contrasted the U.S. foreign policy position on claims against Italian companies

---

<sup>32</sup> Weiss Mem., Ex. R at 1 [A-900].

with its position vis-à-vis German and Austrian claims. Noting that the United States had entered into agreements with the German and Austrian governments “to file Statements of Interest in all Nazi-era cases against German and Austrian companies, including insurance companies” in exchange for commitments by those governments to facilitate settlement of such claims, Ambassador Bindenagel explained that there was no such agreement with Italy; therefore, the United States had “no obligation” to intervene in private suits against Generali.

[N]either this obligation, nor any other United States legal obligation, extends to lawsuits against non-German or Austrian insurers such as Generali whether or not they are members of ICHEIC. Thus the United States has no obligation to file a Statement of Interest in the Nazi era lawsuits brought against Generali.<sup>33</sup>

This position was not arrived at without prompting. Generali had negotiated for months over the terms on which it would participate in ICHEIC. During those negotiations, Generali had unsuccessfully attempted to secure the same Statement of Interest entitlement for itself that the German Foundation Agreement required the United States to file in lawsuits against German insurers. The United States refused.

---

<sup>33</sup> Surreply of California Plaintiffs Lantos, More, Pioro, Sorter, Ungar, Weiss-Friedman, Zada (“Surreply of California Plaintiffs”), Ex. B at 2 [A-1870].

As the minutes of a July 26-27, 2000, ICHEIC meeting reflect, Generali announced that in return for its promise to pay \$100 million to ICHEIC, it expected the United States to commit to intervene in U.S. lawsuits:

Mr. Perissinotto [Generali's General Manager] said that Generali, in addition to what it had previously contributed, has committed in principle a further \$100 million relating to Holocaust-era insurance policies. *They expect to obtain, in return, a commitment from the U.S. government to provide a Statement of Interest in the U.S. courts, as with the German Foundation, to give them legal closure.*<sup>34</sup>

The State Department's official observer, Ms. Jody Manning, responded that "the U.S. government had taken note of the request for a Statement of Interest with regard to the Generali agreement. A dialogue was initiated with the Justice Department ... with regard to requests such as this."<sup>35</sup>

Ultimately, the United States' answer was "no." The minutes of ICHEIC's November 15-16, 2000 meeting quote Ambassador Bindenagel as stating that because there was no Executive Agreement like that with Germany, the United States had "no place" in the suits against Generali and "no role" in resolving plaintiffs' claims against Generali:

Mr. Bindenagel said the issue is whether the U.S. government would intervene between insurance companies and victims. *There is no role for the U.S. government, and there is therefore no place for them to*

---

<sup>34</sup> Weiss Plaintiffs' Surreply in Opposition to Defendants' Second Motion to Dismiss ("Weiss Surreply"), Ex. 2 at 6 [A-1755].

<sup>35</sup> *Id.*

*intervene in the way they are intervening in the German Foundation agreement.*<sup>36</sup>

In the end, Generali capitulated, and signed on November 16, 2000, its agreement to participate in ICHEIC.<sup>37</sup>

## SUMMARY OF ARGUMENT

The District Court erroneously determined that *American Insurance Association v. Garamendi* required dismissal of plaintiffs' claims. In so holding, the District Court overlooked the fact-specific nature of the foreign-policy preemption inquiry and inadequately addressed crucial distinctions between the facts of *Garamendi* and the present case. As this Court has reiterated, "not every case 'touching [upon] foreign [affairs]' is nonjusticiable." *Whiteman v. Dorotheum GMBH*, 431 F.3d 57, 69 (2d Cir. 2005) (quoting *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995)). Courts must "weigh carefully the relevant considerations on a case-by-case basis" and should resist "reflexively" dismissing cases dealing with delicate areas of foreign relations. *Id.* at 59. *Garamendi* itself requires no less. There, the Court considered, but rejected, a categorical approach to preemption such as the one applied by the District Court in this case, and concluded instead that "it would be reasonable to consider the strength of the state

---

<sup>36</sup> Weiss Surreply, Ex. 3 [A-1761].

<sup>37</sup> Weiss Surreply, Ex. 1 at 12 [A-1751].

interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring the state law preempted.” 539 U.S. at 420.

Five key facts distinguish this case from *Garamendi*. First, there is no Executive Agreement here that “principally” embodies U.S. foreign policy and weighs in favor of dismissal. 539 U.S. at 413. The United States has no agreement with Italy, the home country of Generali. *Generali II*, 340 F. Supp. 2d at 505.

Second, the U.S. government has repeatedly refused to file a “Statement of Interest” recommending that the lawsuits against Generali be dismissed on foreign policy grounds, despite being directly asked to do so by Generali, *id.* at 506, and has announced that it has “no place” in this litigation, “no obligation” to intervene in it, and “no role” in resolving plaintiffs’ claims against Generali.

Third, in *Garamendi*, the Court faced a statutory scheme that the California legislature specifically designed to deal with European Holocaust-era insurance policies and to supplant, or compete with, the compensation arrangements established by the Executive Agreements entered into by the United States with Germany, Austria and France. *See* 539 U.S. at 408-09. A majority found the statutory scheme also intruded significantly on the laws of affected European countries. *Id.* at 408-12. In contrast, the claims at issue here are largely private

common law claims or statutory consumer protection claims seeking to vindicate individual rights. These claims and statutes were not enacted to deal generally or specifically with Holocaust-era insurance policies. They provide rights and remedies available to all and do not raise the same foreign policy concerns as the statute in *Garamendi*. *Id.* at 501.

Fourth, unlike the state action at issue in *Garamendi*, if the present private lawsuits go forward, there is no plausible claim that they will undercut ICHEIC or the President's position with respect to ICHEIC.

Fifth, U.S. foreign policy is to assure claimants a forum in which their claims will be adequately resolved. By the Executive Agreements with Germany, Austria and France, the U.S. government assured that there would be a forum for claims against German, Austrian and French companies. In this case the District Court's dismissal of plaintiffs' complaints was not supported by any conflict with United States foreign policy and, if anything, was contrary to the government's policy of providing adequate forums for Holocaust victims.<sup>38</sup>

---

<sup>38</sup> Appellants do not expressly argue in this brief that any one of these distinguishing factors standing alone is dispositive. Certainly, in the absence of any foreign policy, *Garamendi* does not apply. Moreover, even in the presence of some foreign policy statement, as noted *infra*, *Garamendi* suggests that a strong state interest may be sufficient alone to trump preemption. Recognizing this, Appellants need not urge that any factor is more or less dispositive because all of the factors together work to distinguish this case from *Garamendi*.

Given these distinctions, the District Court erred in dismissing plaintiffs' complaints.

## ARGUMENT

### I.

#### AMERICAN INSURANCE ASSOCIATION V. GARAMENDI DOES NOT SUPPORT THE DISTRICT COURT'S CONCLUSION THAT DISMISSAL WAS APPROPRIATE DUE TO A CONFLICT WITH U.S. FOREIGN POLICY

##### A. **There Is Neither An Executive Agreement Nor A Statement Of Interest**

Two critical distinctions between the present case and *Garamendi* undermine the District Court's conclusion that *Garamendi* requires the plaintiffs' lawsuits to be dismissed on foreign policy preemption grounds. Here, in contrast to *Garamendi*, there is no controlling Executive Agreement – which, as one court concluded, was *the* outcome determinative fact in *Garamendi*. *In re Agent Orange*, 373 F. Supp. 2d 7, 80 (E.D.N.Y. 2005). And, in the absence of an Executive Agreement, the federal government has repeatedly refused Generali's requests that it intervene in this litigation and support Generali's contention that these suits conflict with federal foreign policy. This rejection stands in stark contrast to the federal government's position in *Garamendi*, where the United

States clearly announced that the challenged California statute “interferes with [the] foreign policy of the Executive Branch . . . .” 539 U.S. at 413.

With no Executive Agreement or Statement of Interest to rely on, Generali has to rest its entire case on an alleged foreign policy conflict that is suggested only by a few sub-cabinet level officials’ broad, aspirational utterances that ICHEIC “should be” the remedy for Holocaust-era insurance claims.<sup>39</sup> Even Generali must admit that these statements do not create any preemptive foreign policy conflict with respect plaintiffs’ claims in this case. Generali asked for the federal government’s statement of position as to it. It was given a direct answer: No, the United States government will not file any document saying that *this case* implicates U.S. foreign policy; to the contrary, the United States government has “no place” in this litigation, “no obligation” to intervene, and “no role” whatever in resolving plaintiffs’ claims against Generali. *See supra*, Statement of Facts § B. This direct, specific answer trumps any generalized statement that does not even purport to address this case, these facts, or these litigants.

---

<sup>39</sup> Reply Memorandum of Law in Support of Defendant Assicurazioni Generali S.p.A’s Motion to Dismiss, Strike, and/or for Judgment on All Plaintiffs’ Claims at 5-6 [A-1642-1643].

In fact, until the District Court here accepted Generali's argument, no federal court<sup>40</sup> had held that statements of lower level Executive Branch employees alone could preempt state common law claims and claims under state statutes of general application. This is with good reason. As discussed below, in its most expansive reading, *Garamendi* holds that when the Executive Branch advocates that a specific case be dismissed because it conflicts with foreign policy, courts generally allow substantial, if not outcome determinative, deference to that view. Given that Generali can point to neither an Executive Agreement nor any Statement of Interest advocating that the suits before this Court risk disrupting federal foreign policy – and because the government has already repeatedly stated to the contrary that it rejects Generali's argument that any such conflict exists – no such deference is warranted; indeed, there is nothing to defer to. The District Court erred in concluding otherwise.

***Garamendi Concerned Actual Executive Agreements And The Government's Affirmative Representation That Foreign Policy Concerns Were Implicated.*** In determining the scope of the federal government's foreign policy with respect to the statute challenged in *Garamendi*, the Court there initially turned

---

<sup>40</sup> The only state court to reach a conclusion similar to the District Court's is *Steinberg v. International Commission on Holocaust Era Insurance Claims*, 133 Cal. App. 4th 689 (2005), where the court faced the same issues presented to this Court. *Steinberg*, however, came to the same wrong conclusion the District Court for the same reasons.

to Executive Agreements the President had signed with Germany, France, and Austria (the litigation involved insurance companies from each respective country), principally focusing on the Executive Agreement entered into by the United States with Germany. 539 U.S. at 405-08.

As noted, the German Agreement required Germany to “enact legislation establishing a foundation funded with 10 billion Deutsch marks,” which was to be used to “compensate [] those who suffered at the hands of German companies during the National Socialist era.” *Id.* at 405. In exchange for Germany’s commitment to fund ICHEIC, the U.S. government promised to submit a “letter of interest” if any litigant filed a Holocaust-era-related suit in a U.S. court against a German insurance company. The letter was to state that “it would be in the foreign policy interests of the United States for the Foundation [*i.e.*, ICHEIC] to be the exclusive forum and remedy for the resolution of all asserted claims against German companies arising from their involvement in the National Socialist era and World War II.” *Id.* at 406. The German Agreement did not require the U.S. government to advocate that dismissal of such lawsuits was actually required, only that “U.S. policy interests favor dismissal on any valid legal ground.” Austria and France signed similar agreements, covering Austrian and French companies respectively. *Id.* at 406 n.3.

Although the Executive Agreements at issue in *Garamendi* did not mention preemption, in addressing that issue the Court had direct “evidence” that U.S. foreign policy preempted the special statutory scheme before it, including the U.S. government’s commitment to file Statements of Interest on behalf of German, Austrian and French insurance companies; an amicus brief submitted by the United States affirmatively stating that the California statute infringed on U.S. foreign policy; and a similar brief submitted by the German government supporting the constitutional challenge to the California statute. *Id.* at 406, 413.

As *Generali* urged before the District Court here, the *Garamendi* Court also considered statements of lower level Executive Branch officials who supported resolving Holocaust-related insurance claims through ICHEIC or other voluntary methods. For example, Ambassador Randolph Bell stated that “it is the ‘policy of the U.S. government’ ‘to resolve matters of Holocaust-era restitution and compensation through dialogue, negotiation, and cooperation.’” *Id.* at 417-21. Deputy Secretary Eizenstat testified before Congress that “the U.S. government has supported [the ICHEIC] since it began, and we believe it should be considered the exclusive remedy for resolving insurance claims from the World War II era.” *Id.*; see *Generali II*, 340 F. Supp. 2d at 503-04 (quoting various lower level Executive Branch officials).

But those statements were not dispositive. Nor were they considered in a vacuum. Rather, the *Garamendi* Court considered them against the background of Executive Agreements that were the “principal” expression of United States policy. *Id.* at 413. Against that background, the additional statements of sub-cabinet level officials served only to support the Court’s conclusion that there was foreign policy preemption of the statute challenged in that case; they were not, themselves, the statements of foreign policy that had preemptive effect. *See id.* at 421-23 (noting that Executive Agreements were “enough to illustrate” the foreign policy and “expressed unmistakably” the national position).

Thus, *Garamendi* is in accord with – and not, as Generali suggests, a dramatic departure from – the long line of cases in which evidence such as Executive Agreements, Statements of Interest, and amicus briefs filed by the federal government are necessary to support a finding of preemption. *See, e.g., Whiteman*, 431 F.3d at 59-60 (holding that the plaintiffs’ claims against Austria for its role in Nazi-era deprivations were preempted on foreign policy grounds because of a controlling Executive Agreement and the United States’ decision to file a statement of interest advocating that the suit be dismissed); *Joo v. Japan*, 413 F.3d 45, 48 (D.C. Cir. 2005) (affirming dismissal of suit on foreign policy preemption grounds because of the U.S. government’s submission of a statement of interest recommending that the suit be dismissed); *In re Nazi Era Cases*, 334 F. Supp. 2d

690 (D.N.J. 2004) (same). Nothing in *Garamendi* dictates the conclusion that the hortatory comments of a few sub-cabinet level officials alone are sufficient to preempt private litigants' state common law causes of action. The District Court therefore could not properly conclude, as it did, that "that the [*Garamendi*] Court's emphasis on the Executive's position rather than merely on the text of the agreements means that a court seeking to comprehend the substance of an executive policy should not confine its analysis to the text of executive agreements." 340 F. Supp. 2d at 505.

***There Is No Similar Evidence Of Preemption Here – To The Contrary, The Only Evidence Is That There Is No Foreign Policy Conflict.*** There is no Executive Agreement with Italy covering Italian companies; there is no other agreement with Italy covering Holocaust-era claims against Italian companies; and nothing suggests that Italy is negotiating such an agreement with the United States. Nor is there any commitment by Italy that Generali will follow through on any reasonable resolution of Holocaust-era claims. Because the United States has not signed an Executive Agreement with Italy bringing Italian corporations under the umbrella of U.S. foreign policy protection, the United States has rightly taken the position that it "has no obligation to file a Statement of Interest in the Nazi era lawsuits brought against Generali," "no place" in this litigation, and "no role" in resolving the plaintiffs' claims against Generali. *See supra*, Statement of Facts §

B. This then – and not the contrary position urged only by Generali – is the only expression of U.S. foreign policy.

It is a foreign policy position expressed directly and repeatedly to Generali. When Generali agreed to put \$100 million into ICHEIC, it attempted to gain assurances from the United States that the federal government would intervene in U.S. lawsuits on Generali's behalf. After considering Generali's request, the State Department said no, at least *twice*, reiterating that “[t]here is no role for the U.S. government, and there is therefore no place for them to intervene in the way they are intervening in the German Foundation agreement.” *Id.*

The scattered lower level Executive Branch statements on which Generali is forced to rely pale against this affirmative statement of U.S. foreign policy directed expressly and solely at Generali and the claims at issue in this case. No one doubts that the President's policy generally is to support ICHEIC in those instances in which there is an Executive Agreement. But there can be little doubt that, in the absence of such an Agreement, the President will not support dismissal in favor of ICHEIC; indeed, that is exactly what Generali has been repeatedly told. The District Court therefore could not properly conclude, as it did, that the scattered statements on which Generali relies were sufficient to preempt plaintiffs' claims merely because nothing suggested that the lower level officials were not “faithfully representing the President's chosen policy.” 340 F. Supp. 2d at 505 n.8.

A similar conclusion was reached by the Court in *Container Corp. v. Franchise Tax Board*, 463 U.S. 159 (1983). There, when faced with a foreign policy challenge to California’s franchise tax, the Court noted that it had “little competence in determining precisely when foreign nations will be offended by particular acts,” but, in upholding the constitutionality of the statute at issue, the Court found that the United States’ decision not to intervene by filing an amicus brief was indicative of the Executive Branch’s and Congress’ determination that the statute did not “seriously threaten” U.S. foreign policy. *Id.* at 194-96. Here, the Executive Branch’s affirmative rebuff of Generali’s pleas for federal intervention weighs, if anything, even more heavily in favor of allowing the present suits to go forward. *See also Whiteman*, 431 F.3d at 69.

Nor does the “lack of any articulated ‘Generali exception’ in [*Garamendi*] strongly suggest[],” as the District Court concluded, “that the exclusive policy favoring ICHEIC resolution applies equally to Generali and other European insurers that wrote Holocaust-era policies.” 340 F. Supp. 2d at 503. There was no need for the *Garamendi* Court to distinguish between Generali and other insurers (nor was it invited to do so) given the over-breadth and invasiveness of the statute challenged in that case, *see* Section B *infra*, which did not distinguish between Generali and other insurance companies protected by Executive Agreements. The *Garamendi* Court also had no occasion to address preemption of garden-variety

common law claims of private plaintiffs against an insurer – like the present plaintiffs’ claims against Generali – since *Garamendi* involved only state action to enforce a statute that had been specially designed to impinge on the federal government’s efforts to resolve certain Holocaust-related claims. Nor was the Court in *Garamendi* called upon to interpret the significance of the federal government’s express refusal to urge dismissal of the case. In short, *Garamendi* addressed a completely different statute, and different claims brought by different kinds of plaintiffs, raising concerns that are absent here. These significant differences cannot be ignored.

The proper inquiry must be the government’s position in *this* case with respect to *these* claims. As the Supreme Court has remarked, “should the State Department choose to express its opinion on the implications of exercising jurisdiction over *particular* petitioners in connection with *their* alleged conduct [], that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy.” *Republic of Austria v. Altmann*, 541 U.S. 677, 701-02 (2004) (citing *Garamendi*) (emphasis in original). But “it is error to suppose that every case or controversy which touches upon foreign relations lies beyond judicial cognizance.” *Baker v. Carr*, 369 U.S. 186, 211-12 (1962).

As the *Garamendi* Court observed, in that case “[t]he basic fact [was] that California seeks to use an iron fist where the President has consistently chosen kid gloves.” 539 U.S. at 427. In *this* case, however, the President has set aside his kid gloves and twice refused to jump into the ring. As a result, there is no conflict between state and federal foreign policy with respect to Generali. While the litigants in *Garamendi* could point to Executive Agreements, Statements of Interest, amicus briefs filed by the U.S. government and foreign governments, and evidence that the statute challenged there had been designed by the State to supplant remedies expressly adopted by Executive Agreements entered into by the United States with Germany, Austria and France, Generali comes to this Court with a letter and other statements from lower level Executive Branch officials stating that there is no conflict. This cannot be sufficient to deprive the plaintiffs of their day in court in favor of an *ad hoc* and unregulated forum with respect to Generali. This Court should reverse the District Court.

**B. These Claims Fall Within Traditional States’ Interests**

Another salient distinction between the present case and *Garamendi* is that the plaintiffs here do not primarily rely upon causes of action that are state-created devices solely enacted to thrust states into the foreign affairs arena. Instead, they rely primarily on garden-variety common law claims, such as breach of contract claims, and statutory consumer protection claims that seek generally to vindicate

individual rights.<sup>41</sup> Such claims stand in contrast to the statute at issue in *Garamendi*, which was specifically enacted to regulate every aspect of Holocaust-era claims processing and afforded rights and imposed special procedures and requirements not typically available to other claimants, and which was sufficiently far-reaching that it potentially required foreign governments and insurers to violate their own countries' laws. *Garamendi*, 425 U.S. at 425.

This distinction is crucial, for “a state is generally more likely to exceed the limits of its power when it seeks to alter or create rights and obligations than when it seeks merely to further enforcement of already existing rights and duties.” *Deutsch v. Turner Corp.*, 324 F.3d 692, 708 (9th Cir. 2003); *see also Schydlower v. Pan Am. Life Ins. Co.*, 231 F.R.D. 493, 498 (W.D. Tex. 2005) (“The Court understands *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. Here, the Court deals with an individual’s lawsuit and not a state’s creation of a new cause of action.”). Nor was this distinction lost on the *Garamendi* Court.

---

<sup>41</sup> Some of the plaintiffs in the underlying suits have alleged violations of international law and/or relied on statutes similar to the one at issue in *Garamendi*. Even if the Court were to determine that such claims are preempted, such a finding would not necessitate dismissal of these lawsuits because, as noted, they involve claims different from those discussed in *Garamendi*.

While the District Court thought its job was simply to determine in a binary fashion whether a conflict existed between state and federal foreign policy, the *Garamendi* Court recognized the potential pitfalls of granting individual Executive Branch officials carte blanche authority to override state law. As a result, the Court set forth a balancing test to determine the circumstances in which foreign policy could preempt state law: courts are to consider not the mere *ipse dixit* of an individual Executive Branch official, but the state’s interest, as “judged by traditional practice,” “when deciding how serious a conflict must be shown before declaring the state law preempted.” *Garamendi*, 539 U.S. at 420.

The *Garamendi* Court took pains to emphasize that the statute at issue in that case addressed an area of foreign policy that the federal government had actively and deliberately entered. Faced with a regime of regulating “disclosure of European Holocaust-era insurance policies in the manner of HVIRA” – an area that states hardly have traditionally dealt with – the Court concluded that the state interest was “weak” in an arena in which the Executive interest was strong. *See Garamendi*, 539 U.S. at 425.

In contrast, this case concerns traditional common law claims and consumer protection claims based on statutes seeking generally to vindicate individual rights. These claims fall squarely within the ambit of traditional state interests. By allowing its citizens to avail themselves of such claims, a state in no way is

thrusting itself into the realm of foreign policy where the Executive holds sway. It is instead allowing individuals to pursue claims that are constitutionally committed to the judiciary. *See Kadic*, 70 F.3d at 249 (victims of war crimes in former Yugoslavia could assert tort claims in U.S. courts without interfering with foreign policy); *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 49 (2d Cir. 1991) (holding that because resolution of an “ordinary tort suit” alleging that the defendants breached a duty of care has been “constitutionally committed” to the judiciary, “this factor alone ... strongly suggests that the political question doctrine does not apply”).<sup>42</sup>

Nor do the common law causes of action and statutes of general application invoked by plaintiffs steal the spotlight from the President and thwart his ability to speak to other countries with “one voice.” That concern, which informs the *Garamendi* opinion, explains *Garamendi*’s discussion of *Zschernig v. Miller*, 389 U.S. 429 (1968), in which the Court declared a Oregon probate statute preempted on foreign federal policy grounds because it created a forum for state actors to attack foreign countries’ legal systems.

---

<sup>42</sup> Although not strictly necessary, the fact that the causes of action here deal with insurance – something states have traditionally been at the vanguard in regulating – makes the argument even stronger. *See, e.g., Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 733 (1996) (Kennedy, J., concurring) (“States, as a matter of tradition and express federal consent, have an important interest in maintaining precise and detailed regulatory schemes for the insurance industry.”).

The Oregon statute at issue in *Zschernig* prohibited nonresident aliens from inheriting anything unless they could show that the inheritance would not be confiscated by the alien's home country and that the country in question would extend similar rights to U.S. citizens. *Id.* at 430-31. The Court invalidated the statute based on its application. As the *Garamendi* Court described, "it was clear that the Oregon law in practice had invited 'minute inquiries concerning the actual administration of foreign law' and so was providing occasions for state judges to disparage certain foreign regimes, employing the language of the anti-Communism prevalent here at the height of the Cold war." 539 U.S. at 417 (quoting *Zschernig*, 389 U.S. at 435).

The concern in both *Zschernig* and, to a lesser extent, *Garamendi*, is that state actors will "send a message" that conflicts with the President's or more directly interfere with the laws of foreign governments. Of course here, that is not possible. States are not sending a message at all. They have allowed private litigants to avail themselves of generally applicable causes of action. Moreover, unlike in *Garamendi* – where enforcement by the State of California of a special statutory scheme was claimed to force insurers into the Hobson's choice of

violating foreign laws – there has been no allegation here that the states are forcing Generali to violate foreign laws.<sup>43</sup>

Here, consequently, the conflict between state policy and foreign policy is weak to non-existent; in contrast, the state interest in favor of allowing plaintiffs to pursue redress against Generali, a private company, through traditional means, is strong. As noted by *Garamendi*, when the state interest is strong, the conflict must be clear and substantial to support foreign policy preemption. *Garamendi*, 539 U.S. at 420 n.11; *see also Trojan Techs., Inc. v. Pennsylvania*, 916 F.2d 903 (3d Cir. 1990) (“Where ... the field which Congress is said to have pre-empted has been traditionally occupied by the States,’ Congressional intent to preempt must ‘[be] clear and manifest.’” (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977))). As discussed above and below, the conflict between federal and state policy here is anything but “clear” and is insubstantial, so dismissal was not warranted.

---

<sup>43</sup> Moreover, lower courts have typically applied the *Zschernig* majority analysis only to cases involving state regulation amounting to “embargoes or boycotts.” *Cruz v. United States*, 387 F. Supp. 2d 1057, 1076 (N.D. Cal. 2005) (listing cases). The causes of actions in the present cases, of course, do not amount to an embargo or boycott of Italy.

**C. Allowing These Claims To Go Forward Will Not Jeopardize ICHEIC**

A third way in which the present case differs markedly from *Garamendi* is the effect of the present suit on ICHEIC itself and the President's position with respect to ICHEIC.

If the present suits go forward, the integrity of ICHEIC will not be put in jeopardy. If the suits in *Garamendi* had gone forward, several of the defendant insurance companies faced the real possibility of extended litigation in U.S. courts despite their commitment, and their governments' guarantees, that all claims would be resolved within ICHEIC. In fact, the consideration that Germany demanded, in exchange for its guarantees and moneys, was "some expectation of security from lawsuits in United States Courts." *Garamendi*, 539 U.S. at 405.

Generali, however, cannot lay claim to the same concern. As the District Court recognized in denying Generali's forum non conveniens motion, nothing prevents Generali from abandoning ICHEIC at any time. 228 F. Supp. 2d at 357. And nothing prevents Generali from ignoring ICHEIC altogether, as it has already promised it will when it sees fit. *See supra*, Statement of Facts § B. Moreover, Generali requires claimants who submit their claims to ICHEIC and accept Generali's settlement offers to release their claims as a condition precedent to payment, so to the extent Generali pays any claims submitted to ICHEIC, Generali presumably considers itself to be insulated from further liability.

Likewise, unlike the insurance companies in *Garamendi*, Generali cannot contend that the President's position with respect to ICHEIC and Italy will be undercut if the present litigation proceeds. The concern underlying the conflict analysis in *Garamendi* is that the states will inappropriately dip their toes in the foreign affairs pool by undercutting the President's ability to "speak for the Nation with one voice in dealing with other governments." 539 U.S. at 424. As the *Garamendi* Court reasoned, the special California statutory scheme challenged in that case "employs a different, state system of economic pressure and in doing so undercuts the President's diplomatic discretion and the choice he has made exercising it. . . . Quite simply, if the California law is enforceable the President has less to offer and less economic and diplomatic leverage as a consequence." *Id.*; see also *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (discussing the importance of allowing the President to present a unified front to foreign governments when bargaining so that he may extract the best deal possible).

Here, in contrast, the lawsuits do not undercut the President's position with Italy. The refusal of the Executive Branch to file any Statement of Interest on Generali's behalf speaks to that, if nothing else does.

In fact, *dismissing* plaintiff's suits potentially does more to undermine the President's authority than allowing this case to proceed. Italy – unlike Austria,

Germany, and France – has not agreed through an Executive Agreement or any other covenant to back ICHEIC. In negotiating with Austria, Germany and France to back ICHEIC, the U.S. government’s leverage was its offer to use its influence to obtain dismissal litigation filed against those countries’ companies in U.S. courts. If this Court upholds the District Court’s dismissal, the President will have no such leverage with Italy, should the two countries ever decide to enter negotiations. In short, if the District Court’s order is affirmed, then “the President has less to offer [Italy] and less economic and diplomatic leverage as a consequence” – not more. *Cf. Garamendi*, 539 U.S. at 424.

Consequently, the Executive Branch’s decision not to intervene on behalf of Generali undercuts Generali’s claim that Executive Branch policy will somehow put in danger if this Court does not uphold the dismissal of the Plaintiffs’ claims. That decision, along with the other distinctions mentioned above, requires this Court to allow the lawsuits to go forward.

## II.

### **THE DISTRICT COURT’S DECISION IS CONTRARY TO THE WEIGHT OF AUTHORITY**

Although alluded to above, it bears noting more directly that every published federal decision post-*Garamendi* has held that *Garamendi* does not counsel pre-

emption of an individual's right to bring a lawsuit against a private company merely because the suit may touch upon foreign affairs.

The federal post-*Garamendi* decisions consistently hold that suits like these that are based on common law claims – in the absence of either an applicable Executive Agreement, a treaty precluding them, or a Statement of Interest submitted by the U.S. government seeking dismissal on foreign policy grounds – are not pre-empted on foreign policy or political question grounds.

For example, in *Schydlower v. Pan American Life Insurance Company*, *supra*, the plaintiff, a life insurance beneficiary, asserted common law claims for breach of contract, fraud and misrepresentation against Pan American Life Insurance Company. The plaintiff's father had purchased a life insurance policy in Cuba before Fidel Castro overthrew the government and seized money and private property. The plaintiff subsequently left Cuba and moved to the United States. The insurance company refused to honor the policy. In the ensuing litigation against the insurer, relying on *Garamendi*, the insurance company argued that the claim was pre-empted by the Foreign Claims Settlement Act ("FCSA"). The court disagreed, holding that *Garamendi* dealt 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. *Here, the Court deals with an individual's lawsuit and not a state's creation of a cause of action . . .*

231 F.R.D. at 498 (emphasis added). The court also disagreed that the plaintiff's claim was encompassed within the FCSA.

Like the beneficiary's claims in *Schydlower*, plaintiffs' claims here are not based on state laws that specifically target Holocaust survivors and victims, and are not subject to pre-emption based on an Executive Agreement or any other law.

The factual context of *Alperin v. Vatican Bank*, 410 F.3d 532 (9th Cir. 2005), is similar to this case and the result is the same as in *Schydlower*. In *Alperin*, the plaintiffs were Holocaust survivors (and their heirs) who were victims of war crimes during World War II. They alleged that the Vatican Bank and others profited from these crimes, and filed suit alleging “garden-variety” legal and equitable claims for the recovery of property based on conversion, unjust enrichment, restitution, and accounting. The *Alperin* plaintiffs also brought claims for violations of human rights and international law.

While affirming the district court's order dismissing the plaintiffs' human rights and international law claims, the Ninth Circuit reversed the district court's dismissal of their common law property claims, holding that the issues raised by those claims were not “‘political questions’ that are constitutionally committed to the political branches.” *Id.* at 552. This was so even though the case involved a foreign company and claims that stemmed from World War II atrocities which “tinge[d] this case with political overtones.” *Id.* As the District Court should have

done here, the *Alperin* court found dispositive the facts that the plaintiffs' claims were not barred by treaty, *id.* at 550, and that the Department of State did not issue any statement seeking dismissal, *id.* at 556-57. In the face of these facts and plaintiffs' common law nature of plaintiffs' claims, the court refused to abdicate its Article III responsibility to adjudicate "cases and controversies" by deferring to some unstated Executive Branch policy, instead affirming that "[d]eciding this sort of controversy is exactly what courts do" – while invoking similar Holocaust-era claims seeking recovery of looted assets that the courts have repeatedly allowed. *Id.* at 551 (citing *Altman, supra*, and *United States v. Portrait of Wally*, 2002 WL 553532 (S.D.N.Y. 2002)).

*Alperin* is like this case in key respects. Both cases involve Holocaust-era claims against private financial institutions for "withholding of assets." Neither case involves claims that are subject to an Executive Agreement or an Executive Branch request for dismissal, and "[d]eciding this sort of controversy is exactly what courts do." For the same reasons that the Ninth Circuit denied the Vatican Bank's motion to dismiss on foreign policy and political question grounds, this Court should vacate the ruling of the court below dismissing appellants' suits. At a minimum, it should allow the common law claims to proceed.

Similarly in *In re Agent Orange, supra*, Vietnamese plaintiffs brought personal injury and property damage claims in a U.S. court against herbicide

manufacturers. Distinguishing *Garamendi* as a case that involved a state statute expressly conflicting with foreign policy objectives implicit in Executive Agreements, 373 F. Supp. 2d at 80, the court denied the defendants' motion to dismiss based on the foreign policy and foreign affairs doctrines because the claims were not subject to a treaty or Executive Agreement and were simply tort claims against private companies of the type typically decided by courts. *Id.* at 78. The court distinguished such private suits for damages from suits seeking "reparations" from foreign nations, and analogized the plaintiffs' claims to damage claims, such as those at issue here, against private defendants arising from conduct during the Holocaust amounting to "common individual robbery and thuggery punishable by both tort and criminal law." *Id.*

Other post-*Garamendi* decisions have allowed similar claims to proceed for the same reasons. For example, in *Ibrahim v. Titan Corporation*, 391 F. Supp. 2d 10 (D.D.C. 2005), the court held that Iraqi detainees' common law claims against a private defendant were not barred by the political question doctrine. The court distinguished *Garamendi* on the ground that there, as here, there was no "state-negotiated reparations agreement competing for legitimacy with this court's rulings." Similarly, in *Doe v. Exxon Mobil Corporation*, 2006 WL 516744 (D.D.C. 2006), the same court refused to preempt, under the foreign affairs doctrine and *Garamendi*, common law claims brought by Indonesian citizens

against an American company, finding that *Garamendi* was inapplicable because no state government had passed a statute in conflict with U.S. foreign policy, and because *Garamendi* did not preclude garden variety state tort claims. *See also Cruz*, 387 F. Supp. 2d at 1072-74 (*Garamendi* does not require pre-emption of claims by Mexican nationals who worked under the “bracero” program in the absence of an Executive Agreement specifically and affirmatively precluding litigation in U.S. courts); *cf. Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1187-88 (C.D. Cal. 2005) (distinguishing generally applicable common law claims from the HVIRA in *Garamendi* that targeted Holocaust-era insurance policies, but dismissing plaintiffs’ claims in light of statement of interest filed by the government urging dismissal on foreign affairs grounds).

In short, all federal courts applying *Garamendi* have interpreted it so as to allow claims to proceed such as those presented here. It has not been found to require pre-emption of common law claims in the absence of an applicable Executive Agreement or treaty, or an Executive Branch request for dismissal on foreign affairs grounds. The District Court should have reached the same conclusion.

### III.

#### **THE DISTRICT COURT'S DECISION WOULD RESULT, EFFECTIVELY, IN AN ABANDONMENT OF CLAIMS**

Further, nothing in *Garamendi* supports the results that would obtain here were this Court to affirm the District Court opinion. To the contrary, *Garamendi* explicitly and implicitly supports the District Court's exercise of jurisdiction.

The *Garamendi* Court could, and did, take comfort in the fact that as a result of the U.S. foreign policy and Executive Agreements, there was a forum that allowed for the proper resolution of claims. By agreement with Austria, Germany, and France the U.S. government assured that those countries would stand behind ICHEIC, require their insurers to participate in ICHEIC, and ensure that ICHEIC would process Holocaust-era claims against those companies in good faith.

In contrast, there is nothing to assure that plaintiffs' claims against Generali will be properly resolved, or even heard, if consigned to ICHEIC. There is nothing that requires Generali's participation in ICHEIC. There is nothing to guarantee that ICHEIC will serve its agreed upon function when it comes to claims asserted against Generali.

This lack of assurance is a sufficient basis to conclude that ICHEIC will not serve its appointed function. First, independent of ICHEIC, Generali has proven itself to be unworthy of trust. The denial and concealment of policies and

Generali's long history of obstructive behavior alone proves this. Without some binding mechanism, there can be no plausible claim that Generali will become more compliant. Second, and relatedly, General has affirmatively stated that there is no requirement that it comply with ICHEIC's demands and that, in fact, it will not comply with those directives with which it disagrees. *See supra*, Statement of Facts § B. ICHEIC serves no purpose under this regime.

In fact, ICHEIC's December 31, 2003 deadline for accepting claims has long passed,<sup>44</sup> so claims against Generali not submitted to ICHEIC by that date will have no forum at all, if the District Court's order is not reversed.

Neither the *Garamendi* Court nor any other authority suggests that the policy of the United States government is to strip private plaintiffs of their claims or remedies against a private company unnecessarily. The District Court has already found, under the specific circumstances of this case, that the only possible alternative forum, ICHEIC, is a "manifestly inadequate" forum for resolving Holocaust-related claims against Generali. U.S. foreign policy cannot be enlisted to preempt those claims.

---

<sup>44</sup> *See* <http://www.icheic.org/>.

#### IV.

### **FORCING PLAINTIFFS TO LITIGATE IN A MANIFESTLY INADEQUATE FORUM VIOLATES THEIR RIGHT TO DUE PROCESS**

Finally, even if the Executive Branch did intend to use its foreign affairs powers to force the plaintiffs to pursue claims against Generali solely in ICHEIC, it could not do so because it would violate the plaintiffs' right to due process. This result flows from two simple premises. First, the Executive Branch, even when acting pursuant to its foreign affairs powers, is bound by the Due Process Clause. *Garamendi*, 539 U.S. at 416; *Kennedy v. Mendoz-Martinez*, 372 U.S. 144, 164-65 & n.17 (1963). Second, the Due Process Clause requires a Government endorsed process to meet the basic requirements of fairness. *In re Murchison*, 349 U.S. 133, 136 (1955); *Vasquez v. Van Lindt*, 724 F.2d 321, 326-27 (2nd Cir. 1983). Because ICHEIC doesn't meet that basic requirement, there can be no foreign policy preemption without violating the Due Process Clause and dismissal was therefore improper.

***The Constitution Binds The Government When It Acts Pursuant To Its Foreign Affairs Powers.*** As even *Garamendi* itself conceded, the Executive Branch cannot act pursuant to its foreign affairs powers in violation of other

provisions in the Constitution.<sup>45</sup> 539 U.S. at 416 (noting that when the President signs Executive Agreements or treaties, that power, “like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution”) (quoting *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936)). This restriction, of course, also includes the Due Process Clause. *See Kennedy*, 372 U.S. at 164-65 & n.17 (1963) (noting that the Due Process Clause restricts the Government when it acts pursuant to its foreign affairs powers and listing cases). Consequently, if the Executive Branch did intend to preempt the claims at issue here in favor of ICHEIC, it must have done so in observance of at least the minimum requirements of due process.

***ICHEIC Doesn’t Comport With The Minimum Requirements Of Due Process.*** Having determined that process is due to the plaintiffs here, the Executive Branch – or the Judiciary at the Executive’s urging – is not entitled to take that process away directly or effectively by sending the claims to a forum that will not treat those claims fairly. The Due Process Clause does not countenance such a Catch-22. It does not allow the Executive Branch to tout a forum as the proper place for a claim only to have the case treated unfairly in that forum. The Due Process Clause requires more than that. It requires that any forum meet the

---

<sup>45</sup> *Garamendi*, however, was not asked to address a due process claim; this was likely because the statute at issue, as noted above, was a reporting statute, not a claims statute, as is the case here. 539 U.S. at 409 & n.4.

basic requirements of fairness by providing a fair process. *In re Murchison*, 349 U.S. at 136 (“A fair trial in a fair tribunal is a basic requirement of due process.”); *Vasquez*, 724 F.2d at 326-27 (“Due process requires a fair hearing before a fair tribunal.”).

Here, the District Court, however, has already determined that ICHEIC, at least with respect to Generali, is anything but a fair tribunal. As noted above, when Generali attempted to have the case dismissed on forum non conveniens grounds, the District Court concluded that ICHEIC was one of those “rare circumstances” where the proposed forum is inadequate, stating: “ICHEIC is manifestly inadequate because it lacks sufficient independence and permanence. ICHEIC is entirely a creature of the six founding insurance companies that formed the commission, two of which are defendants in this case; it is in a sense the company store.” 228 F. Supp. 2d at 356-57. Given ICHEIC’s short comings, the District Court’s conclusion is unassailable.

Moreover, as courts, including this one, have recognized, if the proposed forum is “manifestly inadequate,” then that is equivalent to there being a “complete absence of due process.” *See, e.g., Arbitration between Monegasque de Reassurances S.A.M. v. Naftogaz*, 311 F.3d 488, 499 (2nd Cir. 2002) (concluding that forum was not inadequate because “[t]his simply is not a case where the alternative forum is characterized by a complete absence of due process”);

*Victoriatea.com, Inc. v. Cott Beverages Canada*, 239 F. Supp. 2d 377, 383

(S.D.N.Y. 2003) (“With regard to the second requirement, generally a court may find a forum inadequate only where there is “a complete absence of due process . . .”). Accordingly, since ICHEIC is “manifestly inadequate” with respect to Generali, forcing the plaintiffs to litigate in ICHEIC completely denies them due process of law.

Therefore, because the Due Process Clause prevents the Executive Branch from preempting the state law claims at issue here in favor of ICHEIC if ICHEIC is an unfair tribunal, and because ICHEIC is an unfair tribunal, the District Court erred in dismissing these claims.

## CONCLUSION

For the foregoing reasons, the District Court's judgment and order of dismissal should be reversed and vacated.

DATED:

Respectfully submitted,

HELLER EHRMAN LLP

Lawrence Kill  
Linda Gerstel  
Anderson Kill & Olick, P.C.  
1251 Avenue of the Americas  
New York, NY 10020  
(212) 278-1000

Robert A. Swift (RS 8630)  
Joanne Zack (JZ 6432)  
Kohn, Swift & Graf, P.C.  
One South Broad Street  
Suite 2100  
Philadelphia, PA 19107  
(215) 238-1700

Caryn Becker  
Lieff, Cabraser, Heimann &  
Bernstein, LLP  
760 Third Avenue, 48th Floor  
New York, NY 10017-2024  
(212) 355-9500

Thomas R. Fahl  
Flanner, Stack & Fahl, LLP  
16535 West Bluemound Road  
Suite 230  
Brookfield, WI 53005

By \_\_\_\_\_

Nancy Sher Cohen  
John C. Ulin  
Reynold L. Siemens  
Heller Ehrman LLP  
Times Square Towers  
New York, NY 10036  
(212) 832-8300

Samuel J. Dubbin  
Dubbin & Kravetz, LLP  
220 Alhambra Circle, Suite 400  
Coral Gables, FL 33134  
(305) 357-9004

William M. Shernoff  
Joel Cohen  
Evangeline F. Garris,  
Shernoff Bidart & Darras  
600 S. Indian Hill Blvd.  
Claremont, CA 91711  
(909) 621-4935

## **CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limitation of Fed. R. App. Proc. 32(a)(7)(B) because this brief contains 10,568 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated:

---

NANCY SHER COHEN  
Attorney for Plaintiffs-Appellants

**ANTI-VIRUS CERTIFICATION FORM**  
Pursuant to Second Circuit Local Rule 32(a)(1)(E)

CASE NAME: Cornell v. Assicurazioni Generali, S.P.A.

DOCKET NUMBER: 05-5602-cv

I, Mariana Braylovskaya, certify that I have scanned for viruses the PDF version of the

Appellant's Brief

Appellee's Brief

Reply Brief

Amicus Brief

that was submitted in this case as an email attachment to [briefs@ca2.uscourts.gov](mailto:briefs@ca2.uscourts.gov) and that no viruses were detected.

Please print the **name** and the **version** of the anti-virus detector that you used:

Symantec AntiVirus version 10.0 was used.

---

Date: November 13, 2006