No. 12-9

In the Supreme Court of the United States

HARRY ARZOUMANIAN, ET AL., PETITIONERS

v.

MUNCHENER RUCKVERSICHERUNGS-GESELLSCHAFT AKTIENGESELLSCHAFT AG

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
STUART F. DELERY
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
JEFFREY B. WALL
Assistant to the Solicitor General
MARK B. STERN
SHARON SWINGLE
SPARKLE L. SOOKNANAN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

MARY MCLEOD
Principal Deputy Legal Adviser
Department of State
Washington, D.C. 20520-6310

QUESTION PRESENTED

Whether the court of appeals correctly held that federal law preempts Section 354.4 of the California Code of Civil Procedure, which creates a cause of action and an extended statute of limitations for insurance claims arising out of the persecution of Armenians between 1915 and 1923 in the Ottoman Empire.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, treaties and statutes:

Statutes—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

No. 12-9

HARRY ARZOUMANIAN, ET AL., PETITIONERS

v.

MUNCHENER RUCKVERSICHERUNGS-GESELLSCHAFT AKTIENGESELLSCHAFT AG

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to this Court's invitation to the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. In 2000, California amended its Code of Civil Procedure to create a cause of action related to the persecution of Armenians between 1915 and 1923 in the Ottoman Empire. See Cal. Civ. Proc. Code § 354.4 (West 2006).[1] Section 354.4 provides:

> Notwithstanding any other provision of law, any Armenian Genocide victim, or heir or beneficiary of an Armenian Genocide victim, who resides in this state

[1] Unless otherwise indicated, citations to Section 354.4 of the California Civil Procedure Code are to the West 2006 edition.

> and has a claim arising out of an insurance policy or policies purchased or in effect in Europe or Asia between 1875 and 1923 from an insurer * * * may bring a legal action or may continue a pending legal action to recover on that claim in any court of competent jurisdiction in this state.

Id. § 354.4(b). The statute defines an "Armenian Genocide victim" as "any person of Armenian or other ancestry living in the Ottoman Empire during the period of 1915 to 1923, inclusive, who died, was deported, or escaped to avoid persecution during that period." *Id.* § 354.4(a)(1). The statute defines an "[i]nsurer" as "an insurance provider doing business in the state, or whose contacts in the state satisfy the constitutional requirements for jurisdiction, that sold * * * insurance covering persons or property to persons in Europe or Asia at any time between 1875 and 1923." *Id.* § 354.4(a)(2).

In addition to creating a cause of action, Section 354.4 extends the applicable statute of limitations for any suit (not simply a suit under Section 354.4) "seeking benefits under the insurance policies issued or in effect between 1875 and 1923," regardless of whether the suit is brought by "a resident or nonresident" of California. Cal. Civ. Proc. Code § 354.4(c). As originally enacted, Section 354.4 provided that any such suit had to be "filed on or before December 31, 2010." *Ibid.* In 2011, California extended the limitations period to December 31, 2016. See *id.* § 354.4(c) (West Supp. 2013).

2. In 2003, petitioners brought this class action in federal district court in California against respondent Muchener Ruckversicherungs-Gesellschaft Aktiengesellschaft AG (Munich Re), a German insurer and reinsurer. Petitioners are five individuals who claim to be entitled to benefits under unpaid life insurance policies

issued to various relatives, all of whom were allegedly killed in Ottoman Turkey between 1915 and 1923. See 2d Am. Compl. 2-3 (June 22, 2006). According to petitioners, those policies were issued to their relatives by Victoria Versicherung AG (Victoria), which is a subsidiary of respondent. See *id.* at 3-5; Pet. 7 & n.2. Petitioners seek damages for breach of contract and a covenant of good faith and fair dealing, unjust enrichment, and constructive trust, but they rely on Section 354.4 to render those common-law claims timely. See 2d Am. Compl. at 3, 10-13; Pet. App. 69a, 77a. Respondent moved to dismiss petitioners' claims on several grounds, among them that Section 354.4 is preempted because it impermissibly intrudes on the foreign affairs powers of the federal government. See 03-cv-9407, Doc. No. 50, at 1-3 (Nov. 1, 2006).

3. The district court denied in part and granted in part respondent's motion to dismiss. See Pet. App. 68a-114a. As relevant here, the court held that Section 354.4 is not subject to foreign affairs preemption. See *id.* at 101a. The court reasoned that "procedural rules such as statutes of limitations are * * * within the California legislature's traditional competence" and "there is no indication that [S]ection 354.4(c) has had any effect, incidental or otherwise, upon United States foreign policy." *Id.* at 102a-103a, 109a. The court therefore declined to dismiss petitioners' claims for breach of contract and the covenant of good faith and fair dealing. See *id.* at 114a. The court concluded, however, that petitioners had failed to state claims for unjust enrichment and constructive trust. See *id.* at 113a-114a. The district court subsequently certified its order for interlocutory appeal, and the court of appeals agreed to entertain the appeal. See *id.* at 115a-119a, 120a-121a.

4. a. A divided panel of the court of appeals initially reversed, Pet. App. 21a-44a, holding that Section 354.4 "conflicts with Executive branch foreign policy, and thus, is preempted," *id.* at 28a. The panel majority reasoned that "there is an express federal policy prohibiting legislative recognition of an 'Armenian Genocide,' as embodied in the * * * statements and letters of the President and other high-ranking Executive Branch officials." *Id.* at 37a. The panel majority concluded that Section 354.4 "threatens to undermine the Executive Branch's diplomatic relations with Turkey" and "impinges upon the National Government's ability to conduct foreign affairs." *Id.* at 39a, 43a. Judge Pregerson dissented. See *id.* at 43a-44a.

b. The panel subsequently granted petitioners' request for rehearing, withdrew its original opinion, and filed a superseding opinion. Pet. App. 45a-65a. That new opinion, authored by Judge Pregerson, adopted the theory that he had formerly urged in dissent: namely, that "[t]here is no clearly established, express federal policy forbidding state references to the Armenian Genocide" and "California's effort to regulate the insurance industry is well within the realm of its traditional interests." *Id.* at 59a. Senior Judge Thompson, the author of the original panel opinion, dissented. See *id.* at 59a-65a.

5. The court of appeals granted rehearing en banc, Pet. App. 66a-67a, and unanimously held that Section 354.4 is preempted by the federal government's foreign affairs powers, *id.* at 1a-20a. The court rested its decision on principles of field rather than conflict preemption. See *id.* at 8a-14a. It reasoned that Section 354.4 "does not concern an area of traditional state responsibility." *Id.* at 17a. The court further reasoned that Section 354.4 "intrudes on the federal government's exclu-

sive power to conduct and regulate foreign affairs," because "[t]he law establishes a particular foreign policy for California—one that decries the actions of the Ottoman Empire and seeks to provide redress for 'Armenian Genocide victim[s]' by subjecting foreign insurance companies to lawsuits in California." *Id.* at 17a-18a (second pair of brackets in original). The court thus concluded that Section 354.4 "has a direct impact upon foreign relations" between the United States and Turkey. *Id.* at 19a (quoting *Zschernig* v. *Miller*, 389 U.S. 429, 441 (1968)).

DISCUSSION

The unanimous en banc court of appeals correctly held that Section 354.4 of the California Code of Civil Procedure, which creates a cause of action and an extended statute of limitations for insurance claims arising out of events that happened between 1915 and 1923 in the Ottoman Empire, impermissibly intrudes upon the foreign affairs powers vested in the National Government. The decision of the court of appeals does not conflict with any decision of this Court or of any other court of appeals. It also does not present a question of broad importance. Review is therefore not warranted.

A. Section 354.4 Intrudes Upon Substantial Foreign Affairs Powers Of The United States

This case does not involve the application of a state statute or common law of general applicability that addresses matters of traditional state interest and only incidentally touches on foreign affairs prerogatives of the United States. Rather, this case involves a state statute that is specifically directed at claims arising out of events that occurred in Ottoman Turkey during and after World War I. The en banc court correctly held that,

by targeting the insurance claims of the victims of persecution and their heirs, California has impermissibly intruded upon foreign affairs prerogatives of the National Government.

1. a. This Court has emphasized that "[i]n international relations * * * the people of the United States act through a single government with unified and adequate national power." *Japan Line, Ltd.* v. *County of L.A.*, 441 U.S. 434, 448 (1979) (citation omitted). It necessarily follows that "[p]ower over external affairs is not shared by the States," but instead "is vested in the national government exclusively." *United States* v. *Pink*, 315 U.S. 203, 233 (1942); see *American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 413 (2003) (discussing "the Constitution's allocation of the foreign relations power to the National Government"); *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 427 n.25 (1964) ("Various constitutional and statutory provisions * * * reflect[] a concern for uniformity in this country's dealings with foreign nations and indicat[e] a desire to give matters of international significance to the jurisdiction of federal institutions.").

The federal government has traditionally exercised its foreign relations and war powers with respect to the resolution of private parties' claims arising out of international disputes. See, *e.g.*, *Garamendi*, 539 U.S. at 416 ("Historically, wartime claims against even nominally private entities have become issues in international diplomacy."); *Dames & Moore* v. *Regan*, 453 U.S. 654, 679 (1981) ("[T]he United States has repeatedly exercised its sovereign authority to settle the claims of its nationals against foreign countries."); *Pink*, 315 U.S. at 240 (Frankfurter, J., concurring) ("That the President's control of foreign relations includes the settlement of claims

is indisputable."); *Ware* v. *Hylton*, 3 U.S. (3 Dall.) 199, 230 (1796); *Deutsch* v. *Turner Corp.*, 324 F.3d 692, 712-714 (9th Cir.) ("[T]he Constitution allocates the power over foreign affairs to the federal government exclusively, and the power to make and resolve war, including the authority to resolve war claims, is central to the foreign affairs power in the constitutional design."), cert. denied, 540 U.S. 820, and 540 U.S. 821 (2003).

b. This Court has repeatedly recognized that a state law in conflict with the federal government's exercise of its foreign relations and war powers is preempted. See *Garamendi*, 539 U.S. at 421; *Zschernig* v. *Miller*, 389 U.S. 429, 440 (1968); *Pink*, 315 U.S. at 230-231. Even in the absence of such a conflict, however, this Court has indicated that a state law is preempted if it intrudes "into the field of foreign affairs which the Constitution entrusts to the President and the Congress." *Zschernig*, 389 U.S. at 432; see *Hines* v. *Davidowitz*, 312 U.S. 52, 63 (1941) ("Our system of government * * * imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference."); *United States* v. *Belmont*, 301 U.S. 324, 331 (1937). For instance, the Oregon probate law at issue in *Zschernig* did not squarely conflict with an actual exercise of the federal foreign affairs power, see 389 U.S. at 440-441, but it required Oregon courts to engage in "detailed inquiries into the political systems and conduct of foreign nations," Pet. App. 9a (citing *Zschernig*, 389 U.S. at 433-440). The Oregon statute thus "illustrate[d] the dangers which are involved if each State, speaking through its probate courts, [were] permitted to establish its own foreign policy." *Zschernig*, 389 U.S. at 441.

In *Garamendi*, this Court explained that the theories of conflict and field preemption in the domain of foreign relations "can be seen as complementary." 539 U.S. at 419 n.11. "If a State were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility," the Court reasoned, "field preemption might be the appropriate doctrine, whether the National Government had acted and, if it had, without reference to the degree of any conflict, the principle having been established that the Constitution entrusts foreign policy exclusively to the National Government." *Ibid.* (citing *Hines*, 312 U.S. at 63). "Where, however, a State has acted within * * * its traditional competence, but in a way that affects foreign relations," the Court further reasoned, "it might make good sense to require a conflict, of a clarity or substantiality that would vary with the strength or the traditional importance of the state concern asserted." *Ibid.* (internal quotation marks and citation omitted).

2. The decision of the en banc court of appeals is a straightforward application of the foregoing preemption principles.

a. The court of appeals rejected petitioners' argument that Section 354.4 concerns "an area of traditional state responsibility because it regulates insurance." Pet. App. 15a. As the court explained, "the text and legislative history of [S]ection 354.4 leave no doubt that the law 'cannot be fairly categorized as a garden variety' insurance regulation." *Ibid.* (quoting *Von Saher* v. *Norton Simon Museum of Art*, 592 F.3d 954, 964 (9th Cir. 2010), cert. denied, 131 S. Ct. 3055 (2011)). "Section 354.4 is *not* a neutral law of general application," the court reasoned, because "[i]t applies only to a certain class of insurance policies (those issued or in effect in Europe and

Asia between 1875 and 1923) and specifies a certain class of people ('Armenian Genocide' victims and their heirs) as its intended beneficiaries." *Id.* at 15a-16a. The court concluded that its textual analysis was supported by the provision's legislative findings, which confirm "that the real purpose of [S]ection 354.4 is to provide potential monetary relief and a friendly forum for those who suffered from certain foreign events." *Id.* at 16a.

The court of appeals observed that the purpose of Section 354.4—to provide relief based exclusively on conduct affecting foreign nationals in a foreign country—is "precisely the same purpose underlying * * * the statute held unconstitutional in *Garamendi* [and] * * * the state law held preempted in *Von Saher*," which created a similar cause of action and extended statute of limitations for the recovery of Nazi-confiscated artwork. Pet. App. 16a-17a. As in those cases, the court explained, "that goal, however laudable it may be, is not an area of traditional state responsibility." *Id.* at 17a (internal quotation marks omitted). The court made clear that it was expressing "neither agreement nor disagreement with the California legislature's viewpoint," but was "simply observ[ing] that California's main goal in enacting [S]ection 354.4 was to provide redress for individuals who were, in its view, victims of a foreign genocide" and "that goal falls outside the realm of traditional insurance regulation." *Id.* at 16a n.4.

b. Having found that California was not acting within an area of its traditional competence, the court of appeals further determined that "Section 354.4 has 'more than some incidental or indirect effect' on foreign affairs." Pet. App. 17a (quoting *Zschernig*, 389 U.S. at 434). The court pointed out that the statute's operation turns on "a distinct political point of view on a specific

matter of foreign policy." *Ibid.* Specifically, the court noted that the statute, in defining the criteria for its special cause of action and statute of limitations, "imposes the politically charged label of 'genocide' on the actions of the Ottoman Empire (and, consequently, present-day Turkey) and expresses sympathy for 'Armenian Genocide victim[s].'" *Ibid.* (brackets in original) (quoting Cal. Civ. Proc. Code § 354.4). Section 354.4 thus "establishes a particular foreign policy for California—one that decries the actions of the Ottoman Empire and seeks to provide redress for 'Armenian Genocide victim[s]' by subjecting foreign insurance companies to lawsuits in California." *Id.* at 17a-18a (quoting Cal. Civ. Proc. Code § 354.4).

The court of appeals explained that, like the probate law in *Zschernig*, Section 354.4 "invite[s] courts to engage in highly politicized analysis of foreign nations' governments and conduct." Pet. App. 18a. Courts applying Section 354.4 would be required to determine whether the relevant policyholder was an "Armenian Genocide victim," Cal. Civ. Proc. Code § 354.4(a)(1), "which in turn would require a highly politicized inquiry into the conduct of" the Ottoman Empire during and after World War I. Pet. App. 18a. The resulting judgments would constitute formal adjudication of those matters by American courts—indeed in this case a *federal* court. The court of appeals recognized that events in the Ottoman Empire during that period "continue[] to be a hotly contested matter of foreign policy around the world" and that "Turkey expresses great concern over the issue." *Ibid.* As a result, the court explained, the effect of Section 354.4 "on foreign affairs is not incidental." *Id.* at 19a. Rather, Section 354.4 "has a direct impact upon foreign relations and may well adversely

affect the power of the central government to deal with those problems." *Ibid.* (quoting *Zschernig*, 389 U.S. at 441).

3. Petitioners acknowledge that foreign affairs field preemption is appropriate "[i]f a State were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility." Pet. 19 (brackets in original) (quoting *Garamendi*, 539 U.S. at 419 n.11). As the court of appeals held, that is what California has done here: it has provided for courts to issue judgments based on politically contentious events that occurred in the Ottoman Empire nearly a century ago, with no substantial basis to claim that it is regulating in an area of its traditional authority. See Pet. App. 19a ("[S]ection 354.4 is, at its heart, intended to send a political message on an issue of foreign affairs by providing relief and a friendly forum to a perceived class of foreign victims."); see also *Von Saher*, 592 F.3d at 965 ("By enacting [Section] 354.3, California has created a world-wide forum for the resolution of Holocaust restitution claims.").

That is clear here for at least three reasons. Most obviously, Section 354.4 provides a cause of action for California residents based on foreign events that have no connection to the California insurance market. Unlike even the disclosure statute that was held to be preempted in *Garamendi*, Section 354.4 does not have any semblance of traditional state regulation; it simply creates a cause of action with an extended statute of limitations for insurance claims involving foreign nationals that arose nearly a century ago on another continent. In addition, the statute extends any applicable statute of limitations for both residents *and* nonresidents. See Cal. Civ. Proc. Code § 354.4(c). Section 354.4 is there-

fore expressly designed to reach beyond California's borders and provide "a friendly forum to a perceived class of foreign victims" who might reside anywhere in the world. Pet. App. 19a. Moreover, Section 354.4 is one of several California statutes that purport to provide remedies to persons allegedly injured by particular international events. See p. 21, *infra*. Section 354.4 is thus part of a multifaceted effort by California to address in a different way than the United States the resolution of claims arising out of various international or foreign incidents.

The court of appeals therefore correctly determined that, by targeting the claims of "Armenian Genocide victim[s]" and their heirs to insurance benefits, California has encroached upon the foreign affairs authorities of the federal government. The President and Congress have the sole authority to resolve (or to establish mechanisms to resolve) the claims of United States citizens when their claims are singled out precisely because they arise out of such international incidents. See, *e.g.*, *Dames & Moore*, 453 U.S. at 679. *A fortiori*, the same is true of singling out for resolution the claims of foreign nationals (or their heirs) because they arise out of international incidents. See *Von Saher*, 592 F.3d at 967.

4. Section 354.4 would impermissibly intrude upon the federal foreign affairs power even absent any previous diplomatic efforts in this area. In fact, however, the United States acted in the post-World War I era to resolve certain claims by American citizens in ways that are relevant to this case.

a. *Ankara Agreement*. "In connection with the war conditions which existed in Turkey from 1914 to 1922, a number of international claims arose" against the new Turkish government, "including a large number on be-

half of citizens of the United States." E. Russell Lutz, *Current Notes: Claims Against Turkey*, 28 Am. J. Int'l L. 346 (1934). The United States and Turkey formed a committee to examine claims by American citizens against Turkey based on its wartime conduct. See *ibid.* That committee eventually convened in 1933 to consider "[a]pproximately 2500 claims on behalf of American citizens." *Id.* at 347. During the negotiations that followed, the countries disputed whether the United States could advance claims on behalf of naturalized citizens who were of Turkish origin, and the United States ultimately did not advance such claims. See Fred K. Nielsen, *American-Turkish Claims Settlement* 12-15 (1937) (Nielsen Report). It appears to have been understood, however, that the United States could not go beyond advancing the claims of those who were naturalized American citizens at the time of their alleged injuries.

The claims process culminated in an Executive Agreement signed in Ankara, Turkey, on October 25, 1934, in which Turkey agreed to pay $1.3 million "in full settlement" of the claims submitted to the committee. Claims Agreement (Ankara Agreement), United States-Turkey, Art. I, 49 Stat. 3670. Those claims included allegations by American nationals that they had been wrongfully imprisoned or physically injured, or that their property had been taken or destroyed, by Turkish military or civilian authorities. Nielsen Report 22-23. The United States and Turkey agreed that the latter's payment would release it from liability for the submitted claims, which would "be considered and treated as finally settled." Ankara Agreement Art. II, 49 Stat. 3670; see Nielsen Report 7 (noting that the Turkish government's payment achieved "full settlement of all American claims").

b. *American Treaty of Lausanne*. During the post-war period, in an effort to establish diplomatic relations with the new Turkish government, the United States negotiated the Treaty of Lausanne of August 6, 1923. That separate accord was necessary because the United States had not signed the earlier Treaty of Lausanne of July 24, 1923, which set forth terms for peace between the Allied and Associated Powers and Turkey. See 2 U.S. Dep't of State, *Papers Relating to the Foreign Relations of the United States, 1923*, at 886 (1938) (*FRUS 1923*). The American Treaty of Lausanne was intended to establish general relations between the United States and Turkey. Although it would have set aside certain tax liability for American nationals and their property that had been imposed by Turkey between 1914 and 1922, it did not address wartime claims by American nationals against Turkey. See Edgar W. Turlington, *The American Treaty of Lausanne*, 7 World Peace Found. Pamphlets, No. 10, at 599 (1924). The American Treaty of Lausanne was not subsequently ratified by the Senate.

c. *Treaty of Berlin and Claims Agreement*. As part of the Treaty of Berlin between the United States and Germany at the end of World War I, Germany agreed to pay certain claims by American citizens arising from the war. See Treaty of Peace (Treaty of Berlin), Aug. 25, 1921, Art. III, 42 Stat. 1943. In 1922, the United States and Germany entered into an agreement for "a mixed commission to determine the amount to be paid by Germany in satisfaction of Germany's financial obligations" under the Treaty of Berlin. Claims Agreement, Aug. 10, 1922, 42 Stat. 2200. Among other things, the commission had jurisdiction over "[d]ebts owing to American citizens by the German Government or by German na-

tionals." *Id.* Art. I(3) at 2201. Although that jurisdiction extended to wartime claims against German nationals like respondent (which is a German insurer and reinsurer), the Claims Agreement contemplated claims only by persons who were U.S. citizens at the time—not persons like petitioners who became U.S. citizens after the war.

d. Section 354.4 does not expressly conflict with the Ankara Agreement, the American Treaty of Lausanne, or the Treaty of Berlin and Claims Agreement. That set of treaties, agreements, and negotiations addressed only the claims of those who were U.S. citizens at the time of World War I, not those who became U.S. citizens after the war had concluded. The post-war treaties and agreements are nevertheless quite relevant, because they demonstrate that the United States actively participated in the resolution of similar claims arising out of World War I, including claims based on events in the Ottoman Empire between 1914 and 1922. The United States did not, however, attempt to negotiate the resolution of claims by Armenians who were injured by the Ottoman Empire during that period and who would later become U.S. citizens. By creating a forum for those claims, California essentially has "expressed its dissatisfaction with the federal government's resolution (or lack thereof)" of wartime claims by Armenians. *Von Saher*, 592 F.3d at 965.

Indeed, the American Treaty of Lausanne did not contain any provisions "with respect to the protection of minorities," including Armenians. 2 *FRUS 1923*, at 1092. That omission was one of a "number of concessions" that proved necessary in negotiating the agreement. *Id.* at 1148-1149. In a letter to Senator Henry Cabot Lodge in 1924, Secretary of State Hughes ex-

plained the practical difficulty in securing any provision that would have safeguarded minority rights. See 2 U.S. Dep't of State, *Papers Relating to the Foreign Relations of the United States, 1924*, at 719-720 (1939) (*FRUS 1924*). Secretary Hughes also noted that it had been "necessary to give consideration to the traditional policy of the United States against intervention in behalf of the nationals of other countries or the assumption of treaty obligations in such matters." *Id.* at 720. Although the Senate did not ratify the Treaty of Lausanne, the relevant point for present purposes is that the United States made a deliberate decision not to intervene "in behalf of the nationals of other countries." *Ibid.* California now seeks to make the contrary decision almost a century after the fact.

e. Section 354.4 does not simply intrude on foreign policy judgments made long ago by the United States. As the court of appeals recognized, "[t]he passage of nearly a century since the events in question has not extinguished the potential effect of [S]ection 354.4 on foreign affairs." Pet. App. 18a. In 2000, President Clinton urged Speaker Hastert not to call for a vote on House of Representatives Resolution 596, which would have addressed the treatment of Armenians between 1915 and 1923 in the Ottoman Empire. See Pet. App. 30a-32a. President Clinton stated that consideration of Resolution 596 "could undermine efforts to encourage improved relations between Armenia and Turkey." *Id.* at 31a. In 2003 and 2007, the Bush Administration opposed similar House resolutions on the same ground. See *id.* at 32a-34a.

The fact that the United States has not established a mechanism for resolving the insurance claims at issue does not mean that California may do so on its own.

See, *e.g.*, *Japan Line, Ltd.*, 441 U.S. at 452-453; *Zschernig*, 389 U.S. at 436; *Chy Lung* v. *Freeman*, 92 U.S. 275, 279-281 (1875). Petitioners' claims implicate difficult questions of foreign policy, and the Executive Branch has consistently responded to those questions by encouraging Turkish and Armenian officials to engage in a dialogue that acknowledges their shared history. California wants to take a different approach and have courts determine on a case-by-case basis whether a particular policyholder was an "Armenian Genocide victim." Cal. Civ. Proc. Code § 354.4(a)(1) and (b). That course would threaten to "disturb foreign relations," because the inquiry under Section 354.4 does not merely lead to but is expressly premised upon "judicial criticism" of historical actions taken by a foreign sovereign. *Zschernig*, 389 U.S. at 440-441.

5. Even assuming that Section 354.4 were not preempted by the provisions of the Constitution vesting power over foreign relations in the National Government, its extraterritorial reach could pose other obstacles to petitioners' efforts to obtain relief. The Commerce Clause generally "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State," *Healy* v. *Beer Inst., Inc.*, 491 U.S. 324, 336 (1989), and here the California statute singles out for special treatment a category of actions in a foreign country involving foreign nationals nearly a century ago. The Due Process Clause also imposes constraints on a State's ability to regulate conduct outside its borders. See *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 568-574 (1996) (reasoning that under the Due Process Clause a State must justify punitive sanctions by

reference to a state interest in regulating in-state conduct).

B. Petitioners' Criticisms Of The Decision Below Lack Merit

Because petitioners recognize (Pet. 19) that the court of appeals applied the analytical framework from *Garamendi* for assessing foreign affairs field preemption, their petition to this Court amounts to a case-specific dispute over whether Section 354.4 satisfies that test, *i.e.*, whether the California statute addresses a matter of foreign policy outside an area of its traditional competence. That case-specific dispute does not warrant this Court's review.

1. Petitioners assert (Pet. 19-20) that the court of appeals erred by not analyzing conflict preemption before field preemption, but they do not cite anything to support that assertion. The Court held in *Garamendi* that the California statute at issue there was preempted because of a "sufficiently clear conflict" with "express foreign policy of the National Government." See 539 U.S. at 420. The Court did not suggest, however, that conflict preemption invariably must be analyzed before field preemption. In some cases, the claim of conflict preemption may be difficult to resolve, but the claim of field preemption will be comparatively straightforward. In that circumstance, there is no reason to require a rigid order of analysis. Cf. *Pearson* v. *Callahan*, 555 U.S. 223, 236 (2009) ("[Courts] should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.").

2. Petitioners argue (Pet. 23-27) that the court of appeals erred in analyzing whether California has regulat-

ed in an area of traditional state responsibility. Petitioners criticize (Pet. 23) the court of appeals for describing the "real purpose" of Section 354.4 as providing "potential monetary relief and a friendly forum for those who suffered from certain foreign events." Pet. App. 16a-17a. The court reached that conclusion, however, after examining the text and legislative findings. See *id.* at 15a-16a. The court thus applied traditional tools of statutory interpretation to discern whether California has "address[ed] a traditional state responsibility." *Garamendi*, 539 U.S. at 419 n.11. Petitioners do not say how else the court should have undertaken that inquiry, and indeed petitioners acknowledge that the California Legislature's purpose was to "provid[e] a means for its citizens and residents to pursue entitlements to insurance benefits" resulting from foreign events. Pet. 26 (emphasis omitted).

At bottom, then, petitioners agree with the court of appeals about what Section 354.4 accomplishes. They simply contend that California has "a traditional state responsibility" to regulate insurance policies issued by a foreign insurer to foreign policyholders roughly a century ago on a foreign continent. *Garamendi*, 539 U.S. at 419 n.11. That contention lacks any support in the decisions of this Court or other courts of appeals. Petitioners argue that *Garamendi* recognized a "weak[]" state interest in the statute at issue there, Pet. 24, but at least in that case California asserted an interest in protecting present-day consumers through the statute's disclosure requirement. 539 U.S. at 425. Here, California has not even offered that strained rationale: it has created a highly unusual cause of action and an extended statute of limitations solely to provide relief for foreign wrongs that occurred long ago. Moreover, the Court in *Gara-*

mendi noted the weakness of the asserted state interest in the process of questioning whether that interest was even genuine. See *id.* at 426 ("[T]here is no serious doubt that the state interest *actually* underlying [the California statute] is concern for the several thousand Holocaust survivors said to be living in the State.") (emphasis added). That is essentially the same thing that the court of appeals did here.

C. Review By This Court Is Not Warranted

Apart from the merits of the court of appeals' decision, that decision does not warrant further review for several reasons. As an initial matter, no other court of appeals has addressed whether a State may create a cause of action and its own extended statute of limitations based on "an insurance policy or policies purchased or in effect in Europe or Asia between 1875 and 1923." Cal. Civ. Proc. Code § 354.4(b). Petitioners do not contend otherwise. They argue that the decision below conflicts with this Court's analysis of field preemption in *Zschernig* and *Garamendi*. But even assuming that were correct (which it is not for the reasons given above), petitioners do not point to any more general confusion on field preemption in the lower courts, let alone in the specific context of insurance claims arising out of events in the Ottoman Empire between 1915 and 1923.

In addition, the question whether Section 354.4 is preempted is not of broad importance. In the court of appeals, petitioners stated that "[the] appeal involves an extremely narrow question concerning * * * [S]ection 354.4, the sole application of which is limited to the instant case and probably no other." Pet. C.A. Br. 6; see *id.* at 6 n.2. The parties have informed the government that they are presently aware of only two other pending cases that involve the application of Section 354.4. See

Deirmenjian v. *Deutsche Bank, AG*, appeal pending, No. 10-56359 (9th Cir. docketed Aug. 30, 2010); *Baghtchedjian* v. *Aviva*, No. 2:08-cv-6030 (C.D. Cal. filed Sept. 15, 2008). The infrequency with which the statute has been invoked points up the lack of any need for this Court's review.

Relatedly, the court of appeals' preemption analysis is likely to affect very few other state statutes. Section 354.4 is one of a series of six California laws that provide remedies to those injured by particular international wars, conflicts, or programs. See Cal. Civ. Proc. Code § 354.3 (West 2006) (recovery of Nazi-confiscated artwork by Holocaust victims); *id.* § 354.45 (West Supp. 2013) (recovery of deposited or looted assets by persecuted Armenians); *id.* § 354.5 (West 2006) (recovery on insurance policy claims by Holocaust victims); *id.* § 354.6 (West 2006) (recovery of compensation by World War II slave or forced laborers); *id.* § 354.7 (West 2006). Courts, however, have invalidated four of the other five statutes on preemption grounds, see Br. in Opp. 3 n.2,[2] and this Court denied the petition for a writ of certiorari seeking review of the Ninth Circuit's preemption hold-

[2] The fifth statute, Cal. Civ. Proc. Code § 354.7 (West 2006), provides a cause of action for the recovery of savings funds by participants in the 1940s Bracero labor program between the United States and Mexico. To avoid dismissal "for failure to comply with the otherwise applicable statute of limitations," however, an action had to be "filed on or before December 31, 2005." *Id.* § 354.7(c). As far as the government is aware, all known claims related to the Bracero labor program were resolved by a single class action brought under Section 354.7 prior to December 31, 2005. See *Cruz* v. *United States*, 387 F. Supp. 2d 1057 (N.D. Cal. 2005). In any event, absent further extension of the limitations period, Section 354.7 will not be affected by the decision below.

ing in one of those cases, *Von Saher*, *supra*. The same disposition is warranted here.

Moreover, petitioners do not point to similar statutes in other States that stand to be affected by the court of appeals' analysis. Petitioners note (Pet. 31, 35) that many States have enacted laws or resolutions that either refer to, or require education about, an "Armenian Genocide." But virtually all of those laws or resolutions simply commemorate or officially acknowledge an "Armenian Genocide." See, *e.g.*, Mich. Comp. Laws § 435.281 (West. Supp. 2013) ("Michigan days of remembrance of Armenian genocide"); 1990 Okla. Sess. Laws 1924 ("Armenian Remembrance Day"). That is far different from what California has attempted to do here—namely, to create judicially enforceable rights based on politically charged events that occurred on foreign soil nearly a century ago.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
STUART F. DELERY
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
JEFFREY B. WALL
Assistant to the Solicitor General
MARK B. STERN
SHARON SWINGLE
SPARKLE SOOKNANAN
Attorneys

MARY MCLEOD
Principal Deputy Legal Adviser
Department of State

MAY 2013