No. 10-

IN THE

Supreme Court of the United States

In re ASSICURAZIONI GENERALI, S.P.A.,
DR. THOMAS WEISS,

Petitioner,

v.

ASSICURAZONI GENERALI, S.P.A., et al.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), this Court held that a California statute requiring European insurance companies to disclose Holocaust-era insurance policies was preempted by executive agreements with Germany and Austria which provided an alternative forum for resolution of such claims. In this case, the United States Court of Appeals for the Second Circuit held the state common law claims by the heirs of Holocaust victims against an Italian insurance company were preempted, despite the absence of an executive agreement and in the face of no other relief being available. This case thus poses the issue:

Whether common law state claims are preempted by federal foreign policy interests in the absence of an executive agreement and where no other recourse would be available to the plaintiffs.

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The District Court's order, dated October 14, 2004, is attached at Appendix pp. 16a-53a.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Second Circuit, dated January 15, 2010, pursuant to 28 U.S.C. §1254. The United States Court of Appeals for the Second Circuit denied rehearing and rehearing en banc on April 12, 2010.

STATEMENT OF THE CASE

This case raises important questions about the Executive's power to make law and simultaneously to nullify long-standing state common law without following any sort of constitutionally or statutorily established procedure. It raises issues left unresolved by this Court in *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), concerning whether state common law claims are preempted by the implied dormant foreign affairs power of the President in the absence of an executive agreement. Although as in *Garamendi*, this

case arises in the context of long-delayed (and denied) payment of contractual obligations owed to victims of the Holocaust, the Second Circuit's opinion in this case expands Executive authority far beyond what *Garamendi* allowed and conflicts with the approach taken by this Court and lower federal courts since *Garamendi*.

A. Delayed Compensation for Victims of Nazi-Era Persecution

In the years leading up to World War II, many Jewish families in Europe purchased insurance policies from an Italian company, Assicurazioni Generali, which was founded by Jewish merchants in 1831. Jewish and other persecuted minorities "purchased insurance policies from Generali believing this would provide protection against the rise of Nazi power." *In re Assicurazioni Generali, S.P.A.*, 592 F.3d 113, 115 (2d Cir. 2010). However, Generali cooperated with the Nazis during the war and refused to pay the beneficiaries of those policies following the surrender of Germany and Italy.

After World War II, the Western Allies were concerned that the burden of reparations would hinder their efforts to rebuild Germany and established a moratorium on reparation claims with the London Debt Agreement. In 1996, German courts interpreted the treaty reunifying East and West Germany as lifting that moratorium. As a result, many Holocaust claimants filed suit against companies which did business with the Nazi-era German government.

B. The United States-Germany Executive Agreements

In 2000, the United States and Germany reached an agreement for the German government to establish a foundation to "compensate all victims who suffered at the hands of German companies during the Nazi era." *Id.* at 116. In return, President Clinton pledged, through a formal Executive Agreement, that whenever a German company was sued on a Holocaust-era claim in American courts (state or federal), the Executive Branch would submit a non-binding statement of interest to the court expressing that "it would be in the foreign policy interests of the United States for the Foundation 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." *Garamendi*, 539 U.S. at 406. The United States-Germany Executive Agreement covered principally claims by former slave laborers ($1 billion) and forced laborers ($3 billion) that had been previously dismissed in federal courts.

The Executive Agreement between Germany and the United States specified that the Foundation would work with the International Commission on Holocaust Era Insurance Claims (ICHEIC) to handle insurance claims against German companies. The Executive Agreement created a $250 million cap on such claims. The ICHEIC was formed in 1998 by several European insurance companies, including Generali, the State of Israel, Jewish non-survivor NGOs, and the National Association of Insurance Commissioners. The purpose

of the ICHEIC was to create a "voluntary, non-adversarial" forum for resolution of claims that arose under those policies. The United States reached a similar agreement with Austria, which also included insurance claims, and an agreement with France, which did not address insurance claims. The United States has negotiated no such agreement with Generali's home nation, Italy.

C. Generali Faces Lawsuits in American Courts

Various plaintiffs sued Generali in 20 separate actions in American courts, seeking damages for the company's refusal to pay contractually owed benefits to Holocaust-era policy holders or their heirs.[1] The Panel on Multidistrict Litigation transferred those cases to the Southern District of New York, which dismissed the claims under this Court's decision in *Garamendi*. *In re Assicurazioni Generali S.p.A. Holocaust Insurance Litigation*, 340 F.Supp.2d 494, 497 (2004) ("[I]t appears that the laws supporting litigation of plaintiffs' benefits claims are preempted by a federal Executive Branch policy favoring voluntary resolution of Holocaust-era insurance claims through ICHEIC.") Generali reached settlements with the plaintiffs in most of the cases, while the plaintiffs in the two remaining cases, Dr. Thomas

1. In 2000 and 2001, Generali sought a statement of interest from the Clinton Administration asserting that the United States foreign policy interests favored dismissal, similar to what was promised to German insurers, but the Clinton Administration refused because of the absence of an executive agreement with Italy.

Weiss and Mr. Edward David, pursued appeals to the Second Circuit.[2]

D. The Court of Appeals' Decision

The Second Circuit, *sua sponte*, requested advice from Secretary of State Condoleezza Rice whether adjudicating the suits would conflict with the foreign policy of the Bush administration. The Department of Justice, not the State Department, responded with a letter brief asserting that the foreign policy interests of the United States favor using the ICHEIC as the exclusive forum for resolution of insurance claims. Significantly, however, the letter brief made clear the government did not consider its foreign policy interests to be an independent basis for dismissal of the cases. Following the election of President Obama, the Second Circuit made a similar request for advice of Secretary of State Hillary Clinton. The Department of Justice again responded with a letter brief which indicated the policy was unchanged under the Obama administration.

In January 2010, the Second Circuit affirmed the district court's dismissal, holding that a United States foreign policy interest existed in favor of using the ICHEIC as the exclusive forum for resolving Holocaust-

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2. The putative class cases settled at the briefing stage and over 25 individual plaintiffs pursued their appeals in the Second Circuit. After the court's *sua sponte* letter to Secretary of State Rice seeking the Bush Administration's position, all plaintiffs except Dr. Weiss and Mr. David settled. Petitioner has been informed that after the Second Circuit denied rehearing in April 2010, Mr. David reached a settlement with Generali.

era insurance claims. The court interpreted the executive agreements involved in *Garamendi* as being expressions of the government's foreign policy, rather than the definition of that policy. *Generali*, 592 F.3d at 118. Therefore, the Second Circuit determined that it did not matter whether the United States had negotiated an executive agreement with Italy; the letters from the Department of Justice were sufficient to express the government's policy regarding claims against Generali. The Second Circuit also found it irrelevant that unlike *Garamendi*, where the German and Swiss governments actively opposed California's disclosure statute, the government of Italy had never opposed plaintiffs' litigation against Generali.

The court of appeals rejected the argument by the plaintiffs that much stronger, traditional state interests — the right of citizens to pursue ordinary contract and tort claims under state law — were at play here than in *Garamendi*. *Id.* at 119. The Second Circuit applied *Garamendi* in holding that "state law must yield to the federal policy, regardless of the importance of the interests behind the state law." *Id.*

The Second Circuit also rejected the plaintiffs' argument that, because the ICHEIC had set a deadline of December 31, 2003 for accepting claims, dismissal of the suits would deny the plaintiffs the opportunity to pursue the claims in any forum. The court held that because the government said its policy was for the ICHEIC to be the exclusive forum for these claims, "if the ICHEIC door has closed on plaintiffs, it is because they chose to allow it to close." *Id.*

REASONS FOR GRANTING THE PETITION

THIS COURT SHOULD GRANT REVIEW TO RESOLVE AN ISSUE OF NATIONAL IMPORTANCE AND AN ISSUE WHICH IS SPLITTING THE LOWER COURTS CONCERNING WHEN STATE COMMON LAW LIABILITY IS PREEMPTED IN THE ABSENCE OF AN EXECUTIVE AGREEMENT AND WHERE NO OTHER FORUM WOULD BE AVAILABLE TO PROVIDE RELIEF TO THE PLAINTIFFS.

In *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), this Court, in a 5-4 decision, concluded that a California statute, the Holocaust Victim Insurance Relief Act ("HVIRA") was preempted by federal law. The California statute applied to insurance companies doing business in California and required them to disclose details of insurance policies sold in Europe between 1920 and 1945 or face suspension of their license to do business in the state. California was concerned by the "stonewalling" by insurance companies and by the failure of the federal government to effectively gain information about these policies and payments under them.

This Court concluded that HVIRA was preempted by the foreign policy of the United States to "encourage European insurers to work with the ICHEIC [International Commission on Holocaust Era Insurance Claims] to develop acceptable claim procedures, including procedures governing disclosure of policy information." *Id.* at 421. The Court was explicit that

preemption was based on "the national position, *expressed unmistakably in the executive agreements signed by the President.*" *Id.* (emphasis added).

The district court and the court of appeals expanded on this Court's holding in *Garamendi* to conclude that the plaintiffs' claims against Generali were likewise preempted by federal law even though here, unlike *Garamendi*, common law claims are asserted,[3] no executive agreement exists, the Italian government never opposed the lawsuit, and no other recourse is available to the plaintiffs. The Second Circuit was explicit that its dismissal of plaintiffs' suits was based on this Court's decision in *Garamendi.* It stated: The Second Circuit declared: "[W]e hold under the authority of *Garamendi* that Plaintiffs' claims, which fall within the scope of the ICHEIC process, are preempted by the foreign policy of the United States." 592 F.3d at 120.

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3. The Weiss complaint, which is the basis of this petition for certiorari, presented 13 counts, 11 of which were under Florida common law.

The insurance agreement entered into between Generali and Petitioner's father Pavel Weiss provides that Generali would pay the insured's policy benefits anywhere in the world where payment was requested, which in this case was Florida.

In the spring of 1944, Pavel Weiss, and his wife Helen and their three young children Julie, Alice, and Salomon, were deported to Auschwitz. Mr. Weiss's wife and children were murdered upon their arrival at Dr. Mengele's instructions. After liberation in 1945, Mr. Weiss recuperated from shrapnel wounds, typhus, and other injuries and illnesses in a military hospital. After a brief return to Czechoslovakia, he emigrated to the United States, eventually settling in Florida in 1949 for health reasons. Mr. Weiss passed away in Miami Beach in 1985.

In finding preemption, the lower courts in this case failed to appreciate key differences between this case and *Garamendi*. These differences raise important unresolved issues of federal law and, in fact, have caused splits among the lower courts. This Court's review is needed to clarify the scope of preemption under *Garamendi* in light of this Court's subsequent decisions and in view of the split among the lower courts which has developed in applying *Garamendi*.

A. Does Garamendi Preempt State Common Law Claims?

In *Garamendi*, the question was whether a state *statute* was preempted by federal law, whereas here the issue is whether *common law* liability under state law is preempted. The central concern of *Garamendi* was with a state legislating in a manner that had extraterritorial effect and interfered with the foreign policy choices of the Executive. Thus, this Court held that the California statute was preempted because it "employs a different state system of economic pressure and in doing so undercuts the President's diplomatic discretion and the choice he made exercising it." *Id.* at 423-24 (quotation omitted); *see also id.* at 427 ("The basic fact is that California seeks to use an iron fist where the President has consistently chosen kid gloves.")

These concerns are not present with common law claims. Indeed, as Judge Garland noted, "no precedent has employed a foreign policy analysis to preempt generally applicable state laws." *Saleh v. Titan*, 580 F.3d 1, 24 n.8 (D.C. Cir. 2009) (Garland, J., dissenting). *See* Jack Goldsmith, *Federal Courts, Foreign Affairs,*

and Federalism, 83 Va. L. Rev. 1617, 1711 (1997) (explaining that foreign affairs preemption should be limited to, at most, state laws that purposely interfere with foreign policy, not state laws that "are facially neutral and were not designed with the purpose of influencing U.S. foreign relations").

Contrary to the Second Circuit's approach, other lower courts have concluded that common law liability is not preempted by this Court's decision in *Garamendi*. In *Schydlower v. Pan American Life Insurance Co.*, 231 F.R.D. 493 (W.D. Tex. 2005), the beneficiary of a life insurance policy bought in Cuba brought a putative class action against the life insurer, alleging state law claims for breach of contract, fraud, and misrepresentation. The defendant moved to dismiss based on *Garamendi* and contended that the plaintiff's lawsuit was preempted by the process and purpose of the Foreign Claims Settlement Commission. The court denied the motion to dismiss and distinguished *Garamendi* on the ground that it involved a new statute and not common law claims. The court explained:

> 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.

Id. at 498. *See also Cruz v. United States*, 387 F.Supp.2d 1057 (N.D. Cal. 2005) (*Garamendi* is limited to conflicts preemption); *In re Agent Orange Product Liability*

Litigation, 373 F.Supp.2d 7, 79-80 (E.D.N.Y. 2005) (same).

Significantly, since *Garamendi*, this Court has evidenced a great reluctance to preclude state common law liability based on implied preemption. In *Wyeth v. Levine*, 129 S.Ct. 1187, 1194-95 (2009), this Court stressed the strong presumption against a finding of federal preemption, noting that "[i]n all preemption cases, and particularly in those . . . in a field which the States have traditionally occupied . . . we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of the Congress.'" (Quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). The Court in *Wyeth* explained that "[w]e rely on the presumption [against preemption] because [of the] respect for the States as 'independent sovereigns in our federal system.'" 129 S.Ct. at 1195 n.3.

This Court thus refused to find implied preemption of state tort liability for those injured by the failure of drug companies to adequately warn physicians and patients about possible side effects of prescription drugs. *See also Wyeth v. Levine*, 129 S.Ct. at 1205 (Thomas, J., concurring in the judgment)

> I have become increasingly skeptical of this Court's "purposes and objectives" pre-emption jurisprudence. Under this approach, the Court routinely invalidates state laws based on perceived conflicts with broad federal policy objectives, legislative history, or

> generalized notions of congressional purposes that are not embodied within the text of federal law. . . . [I]mplied pre-emption doctrines that wander far from the statutory text are inconsistent with the Constitution.

See also Altria Group, Inc. v. Good, 129 S.Ct. 538, 543 (2008)

> When addressing questions of express or implied preemption, we begin our analysis "with the assumption the assumption that the historic powers of the States are not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." That assumption applies with particular force when Congress has legislated in a field traditionally occupied by the States.

It is difficult to reconcile the Second Circuit's broad preemption of common law claims in this case with this Court's strong presumption against implied preemption of common law claims in *Wyeth v. Levine*. This Court should grant review to resolve an issue of national importance as to whether *Garamendi* applies to preempt state common law claims.

B. Does Garamendi Apply in the Absence of An Executive Agreement?

In *Garamendi*, this Court focused on the Executive Agreement between the United States and Germany and found that this preempted California's statute, even though the Executive Agreement did not contain express language preempting state law claims. By

contrast, the plaintiffs' claims here involve an insurance company that was and remains headquartered in Italy, a nation with which the United States has never had an executive agreement or even an informal understanding regarding Holocaust-era insurance claims.

This distinction is crucial. In *Garamendi*, this Court repeatedly stressed that preemption of the California statute was based on executive agreements negotiated by the President. At the outset of its opinion, the Court stated: "The principal argument for preemption made by petitioners and the United States as *amicus curiae* is that HVIRA interferes with foreign policy of the Executive Branch, as expressed principally in the executive agreements with Germany, Austria, and France." 539 U.S. at 413. The Court stressed "our cases have recognized that the President has authority to make 'executive agreements' with other countries, requiring no ratification by the Senate or approval by Congress, this power having been exercised since the early years of the Republic." *Id.* at 415. The specific issue in *Garamendi* was whether an executive agreement without a preemption clause nonetheless preempted a state statute.

The Court's opinion found preemption based on the text of the executive agreement between the United States and Germany, the German law enacted to implement the executive agreement, the Statement of Interest filed by the United States which was required by the executive agreement, and the *amicus curiae* briefs filed by the United States and German governments explaining the conflicts between the California disclosure statute and the executive agreement.

But this case is quite different because there is no executive agreement. Unlike the countries involved in *Garamendi*, there never has been an executive agreement between the United States and Italy with regard to Holocaust-era insurance claims.[4] This matters enormously because *Garamendi* was based on the authority of the President to enter into executive agreements, including agreements to settle claims. An executive agreement is formally entered into, has the force of law, and can be overridden by a federal statute. It is a binding agreement of the United States with a foreign country.

But here the Second Circuit was willing to find preemption based on nothing more than the opinions expressed by the Department of Justice. There is no United States government action with the force of law, no action by the President himself, no conflict with any foreign law, and no opposition from any foreign government. This is a substantial expansion of the circumstances in which preemption will be found and raises an important issue as to the scope of preemption under *Garamendi* which this Court needs to resolve. *See Barclay's Bank PLC v. Franchise Tax Board*, 512 U.S. 298, 329 (1994) ("The Executive Branch actions, press releases, and amicus briefs . . . are merely precatory. Executive Branch communications that

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4. The Court in *Garamendi* also cited extensive post-WWII negotiations and agreements concerning reparations and restitution for Holocaust victims involving the United States and Germany. In contrast, there were no international negotiations or agreements for restitution of victims' property with Italy after WWII, including up to the present time.

express federal policy but lack the force of law cannot render unconstitutional California's otherwise valid, congressionally condoned, use of worldwide reporting.")

Since *Garamendi*, lower courts have disagreed as to whether the existence of an executive agreement is necessary for such preemption. The Ninth Circuit, like the Second Circuit in this case, found that an executive agreement is not necessary for preemption. In *Movsesian v. Victoria Versicherung AG*, 578 F.3d 1052 (9th Cir. 2009), the court found that a California law which extended the statute of limitations for claims arising out of life insurance policies issued to Armenian genocide victims conflicted with the Executive branch's clearly expressed foreign policy refusing to officially recognize the Armenian Genocide. The court acknowledged that there was an executive agreement in *Garamendi*, but held that this was not required to find preemption. *See also Central Valley Chrysler-Jeep v. Witherspoon*, 456 F.Supp.2d 1160, 1179 (E.D. Cal. 2006)

> The Supreme Court cases do not suggest that the absence of a statute or an executive agreement is fatal to a foreign policy preemption claim. . . . If Executive Branch statements are competent evidence of what our foreign policy is, the court sees no reason to limit preemption to foreign policy as expressed in statutes or executive agreements.

Steinberg v. International Com'n on Holocaust Era Claims, 133 Cal.App.4th 689, 700-01 & n.14, 34 Cal.Rptr.3d 944, 952-53 & n.14 (Cal. App. 2005) (for

preemption purposes, letter from United States Ambassador suffices as an expression of foreign policy); *Taiheiyo Cement Corp. v. Superior Court*, 117 Cal.App.4th 380, 386 n.4, 392-94, 12 Cal.Rptr.3d 32, 36 n.4 (Cal. App. 2004) (no affirmative federal activity is required for successful invocation of the foreign affairs preemption doctrine).

But other courts have found that *Garamendi* is limited to instances in which there is an executive agreement preempting state law. For example, in *Ibrahim v. Titan Corp.*, 391 F.Supp.2d 10 (D.D.C. 2005), Iraqi detainees and spouses of deceased detainees brought an action against two private government contractors who provided interrogators and interpreters to the United States military. The court expressly distinguished *Garamendi* and declared that "[h]ere, unlike in many other reparations cases entangled with political questions, there is no state-negotiated reparations agreement competing for legitimacy with this court's rulings." *Id.* at 16.

Similarly, in *Whiteman v. Dorotheum GmbH & Co., KG*, 431 F.3d 57 (2d Cir. 2005), the court stressed that preemption under *Garamendi* is based on the existence of executive agreements. The court explained:

> Deference to a statement of foreign policy interests of the United States urging dismissal of claims against a foreign sovereign is appropriate where, as here, (1) the Executive Branch has exercised its authority to enter into executive agreements respecting the resolution of those claims; (2) the United

> States Government (a) has established through an executive agreement an alternative international forum for considering the claims in question, and (b) has indicated that, as a matter of foreign policy, the alternative forum is superior to litigation; and (3) the United States foreign policy advanced by the executive agreement is substantially undermined by the continuing pendency of the claims.

Id. at 59-60. *See also Diermenjian v. Deutsche Bank, A.G.*, 526 F.Supp.2d 1068, 1077 (C.D. Cal. 2007) (federal preemption of state statutes may be predicated on "treaties and executive agreements.")

Quite importantly, the Second Circuit's approach — finding preemption in the absence of an executive agreement — is inconsistent with this Court's decision in *Medellin v. Texas*, 552 U.S. 491 (2008). *Medellin* involved a Mexican national who was sentenced to death in Texas for murder. In violation of the Vienna Convention, his home nation's consulate had not been notified. The International Court of Justice ordered the United States to comply with the Vienna Convention and President Bush issued a Memorandum ordering the Texas Courts to comply with this mandate.

This Court held that the Vienna Convention was not enforceable because it was not self-executing and because Congress had not formally executed the treaty. More importantly for this case, the Court found that the President's Memorandum was not binding on Texas. This Court noted that "[t[he claims-settlement cases

involve a narrow set of circumstances: the making of executive agreements to settle civil claims between American citizens and foreign governments or foreign nationals." *Id.* at 531. In language directly on point for this case, the Court stated that the "President's narrow and strictly limited authority to settle international claims disputes pursuant to an executive agreement cannot stretch so far as to support the current Presidential Memorandum." *Id.* at 532.

In *Medellin*, this Court made clear that a presidential directive in the absence of an executive agreement or an executed treaty was not sufficient to override state law. This holding is in direct conflict with the Second Circuit's willingness in this case to find preemption based on statements of the Department of Justice in the absence of an executive agreement.[5] This Court should grant review to resolve an issue left open in *Garamendi* and which is dividing the lower courts as to whether preemption based on foreign policy interests can be found in the absence of a statute, treaty, or executive agreement.

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5. Also, in *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 332 (2006), this Court expressed that

> [t]he Court's authority to create a judicial remedy applicable in state court must therefore lie, if anywhere, in the treaty itself. . . . But where a treaty does not provide a particular remedy, either expressly or implicitly, it is not for the federal courts to impose one on the States through lawmaking of their own.

Here, the Second Circuit precluded state claims in the absence of a treaty or an executive agreement, based entirely on letters from the Department of Justice.

C. Does *Garamendi* Apply When the Effect is to Leave the Plaintiffs' With No Possibility of Relief?

Dismissal here, unlike *Garamendi*, will leave the plaintiffs with no recourse at all. The ICHEIC had a December 31, 2003 deadline for accepting claims and thus the ICHEIC process is not available to plaintiffs. The result of the dismissal is to leave the plaintiffs with no possibility of relief. The Second Circuit found that this is irrelevant and declared: "Permitting state-law claims to proceed now that ICHEIC has ceased operations directly conflicts with [the policy goal that it be the exclusive forum and remedy for claims within its purview.]" 592 F.3d at 119.

But there is an enormous difference between finding preemption of state law claims when the effect is to shift them to a different forum and finding preemption of state law claims when the effect is to preclude them entirely because no forum is available.[6] Nothing in

6. Nor is this argument affected by plaintiffs' choice to not file claims in the ICHEIC. When this case was filed in Florida state court in June 2000, the ICHEIC was regarded as voluntary and supplemental, and those who did apply to the ICHEIC were able to reject any offer that was unsatisfactory and were able to then file a claim in court. In 2001, prior this Court's decision in *Garamendi*, Generali moved to dismiss the claims against it on forum non conveniens grounds, claiming that the ICHEIC should be deemed the exclusive remedy. The district court denied this motion holding that ICHEIC was "entirely a creature of six founding insurance companies . . . the decision-making processes [of which] are and can be controlled by the defendants in this case." *In re Assicurazioni Generali S.p.A. Holocaust Ins. Litigation*, 228 F.Supp.2d 348, 356-57 (S.D.N.Y. 2002). The litigation thus proceeded in federal court. By the time this suit was dismissed based on *Garamendi* the ICHEIC deadline had closed.

Garamendi suggests that preemption is appropriate in such circumstances, especially in a situation like this where there is no executive agreement with a foreign nation and the foreign nation does not object to the suit.

To leave plaintiffs with no forum for their state law claims and no possibility of relief raises serious constitutional issues. *See, e.g., Reno v. Catholic Social Services*, 509 U.S. 43, 63 (1993); *Oestereich v. Selective Service System, Local Board 11*, 393 U.S. 233, 243-44 (1968) (Harlan, J., concurring) (need to interpret federal laws to ensure availability of forum for claims). This Court has been clear that preclusion of all remedies requires a clear statement from Congress, something obviously not present here. As this Court noted, it is, to say the least, "difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984). *See also Medtronic, Inc. v. Lohr*, 518 U.S. at 487. The Second Circuit's opinion thus raises the question of whether letters from the Department of Justice, in the absence of a statute or even an executive agreement, can have the effect of denying plaintiffs access to the courts when that is their only remedy for a serious injustice.

CONCLUSION

This case presents important issues not addressed or resolved in this Court's decision in *American Insurance Association v. Garamendi*. The Second Circuit expansively interpreted *Garamendi* to preclude state common law claims in the absence of an executive agreement and where no other forum or recourse will be available for plaintiffs. The Second Circuit's decision is reflective of confusion in the lower courts as to the proper scope of *Garamendi*, especially in light of subsequent decisions of this Court. This Court should grant review to resolve these important issues.

Respectfully submitted,

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