No. 07-56722

In the United States Court of Appeals for the Ninth Circuit

REVEREND FATHER VAZKEN MOVSESIAN, *et al.*, Plaintiffs-Appellees,

vs.

VICTORIA VERSICHERUNG AG, *et al.*, Defendants,
MUNCHENER RUCHVERSICHERUNGS-GESELLSCHAFT AKTIENGESELLSCHAFT AG, Defendant-Appellant.

On Interlocutory Appeal From an Order of the United States District Court For the Central District of California

The Honorable Christina A. Snyder

District Court No. CV-03-9407

BRIEF OF *AMICI CURIAE* HUMAN RIGHTS ORGANIZATIONS IN SUPPORT OF PLAINTIFFS-APPELLEES

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DISCLOSURE STATEMENT PURSUANT TO FED. R. APP. P 26.1

I certify that, pursuant to Fed. R. App. P. 26.1, *amici* are nonprofit corporations; neither of the *amici* has any parent corporation, nor does any corporation hold stock in either of the *amici curiae*.

DATED: February 11, 2011

Respectfully submitted,

s/ Marco Simons
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STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*

EarthRights International (ERI) is a non-profit human rights organization which litigates and advocates on behalf of victims of abuses worldwide. ERI is counsel in several transnational lawsuits asserting state-law claims, such as *Carijano v. Occidental Petroleum Corp.*, No. 07-05068 (C.D. Cal.), No. 08-56187 (9th Cir.), which alleges that a California corporation is liable under, *inter alia*, California state law for injuries suffered in Peru. ERI therefore has an interest in ensuring that state-law claims arising out of injuries suffered abroad are not improperly dismissed for perceived interference with federal foreign affairs powers.

The Center for Constitutional Rights (CCR) is a non-profit legal and educational organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. CCR litigates many significant international human rights cases, including those asserting state law claims, such as *Saleh v. CACI Int'l Inc*., No. 08-7008; No. 08-7009, 2009 U.S. App. LEXIS 20435 (D.C. Cir. Sept. 11, 2009). The Court's disposition in this case is therefore of great interest to CCR and its clients.[1]

STATEMENT OF THE ISSUE ADDRESSED BY *AMICI CURIAE*

The narrow questions *amici* address are 1) whether regulation of the

[1] This brief was not authored in whole or in part by any party or counsel to any party, and no person contributed any money that was intended to fund preparing or submitting this brief.

relationship between certain insurance companies and their insured, which is a matter of traditional state responsibility, can be subject to field preemption; 2) whether speeches and letters by the President and other executive branch officials can carry the authority to preempt state law under the foreign affairs conflict preemption doctrine, where the President's actions are not within any expressly delineated powers granted by the Constitution, statute, or treaty, and where they do not rise to the same level of historical acceptance and congressional acquiescence as the practice of making executive agreements to settle civil claims between Americans and foreign entities; and 3) whether a statement of policy preference by a foreign country, by itself, can demonstrate a foreign policy conflict sufficient to preempt state law.

SUMMARY OF ARGUMENT

The panel's decision upholding California Code of Civil Procedure § 354.4 respects the delicate balance between state and federal prerogatives struck by the Supreme Court in its foreign affairs preemption jurisprudence. Foreign affairs preemption encompasses two related doctrines, field preemption and conflict preemption, each with its own strict requirements that must be met before courts may nullify a duly enacted state law.

Field preemption only applies where a state "take[s] a position on a matter of foreign policy with no serious claim to be addressing a traditional state

responsibility." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 420 n.11 (2003). The statute at issue here involves the regulation of the insurance industry, a field of traditional state responsibility. As the statute has only incidentally effects in foreign countries and is not an example of a state setting its own foreign policy, field preemption is inapplicable.

Foreign affairs conflict preemption requires, as its starting point, federal action with the force of law that is therefore "fit to preempt" state law. *Garamendi*, 539 U.S. at 416. Speeches and letters of the President and other executive officials lack the force of law, and therefore cannot preempt state law.

Preemptive authority comes from the Constitution, statutes and treaties. Although the Supreme Court has recognized an exception to this rule for executive agreements negotiated by the President to settle claims between Americans and foreign entities, the Court has made clear that the preemptive force of executive agreements involves a "narrow set of circumstances" that does not apply generally to executive action, including memoranda from the President. *Medellin v. Texas*, 552 U.S. 491, 531 (2008).

No express authority from the Constitution suggests that the President may unilaterally control the use of the term "genocide" or prohibit states from using the phrase "Armenian genocide" in regulating insurance claims. Nor is there any longstanding practice equivalent to that of making executive agreements that would

support such a presidential power. No foreign affairs preemption case has ever afforded executive branch officials such unlimited power as Defendant-Appellant would create, nor has any such case ever placed so much state authority on such tenuous footing.

Last, the amicus brief submitted by the Republic of Turkey may be considered as would be the opinion of any other amicus curiae, but its statements of policy preference may not be used to demonstrate a foreign policy conflict sufficient to preempt state law.

ARGUMENT

I. Foreign affairs field preemption is not warranted under *Garamendi*.

As this Court has recognized, "foreign affairs" preemption covers two related but distinct doctrines: "field preemption" and "conflict preemption." *Saher v. Norton Simon Museum of Art of Pasadena*, 592 F.3d 954, 960-61 (9th Cir. 2010). Field preemption does not apply in this case because California has acted within its traditional state responsibility in regulating the insurance industry, and has not established its own foreign policy.

Field preemption considers whether state law intrudes upon federal prerogatives in the field of foreign policy, even in the absence of a conflict with any federal act having the power of law. *Garamendi,* 539 U.S. at 418-19. The Supreme Court has suggested that field preemption should apply *only* where a state "take[s] a

position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility." *Id.* at 420 n.11. In contrast, where "a State has acted within . . . its 'traditional competence,' but in a way that affects foreign relations, it might make good sense to require a conflict" with federal law before preemption is warranted. *Id.* (internal citations omitted). Thus, this Court has noted that, in determining whether field preemption applies, whether the state "addressed a traditional state responsibility" is the "central question." *Saher*, 592 F.3d at 964. Therefore, this Court should "require a conflict" before preempting section 354.4 if that statute is within the "traditional competence" of the states. *Garamendi*, 539 U.S. at 420 n.11 (internal citations and punctuation omitted).

Field preemption cannot displace state law here because, as Plaintiffs-Appellees and the Panel Majority have correctly noted, the regulation of the insurance industry is a matter of traditional state responsibility. *See* Pl's. Resp. to Pet'n for Reh'g En Banc ("Pl's. Resp.") at 11-13; *Movsesian v. Victoria Versicherung AG*, 629 F.3d 901, 907-08 (9th Cir. 2010) [hereinafter "*Movsesian II*"]. The extension of statute of limitations for particular classes of insured individuals is one of the means of regulating the insurance industry available to the state, and has been used in different contexts by the State of California. Pl's. Resp. at 12 (citing, *e.g.*, Cal. Code Civil of Procedure § 340.9, extending the statute of limitations for those injured during the 1994 Northridge Earthquake). Thus the

State of California, as *amicus curiae* before this court, affirmed that section 354.4 was intended as a regulation of the insurance industry, with the goal of providing individuals with "access to its courts to resolve disputes concerning insurance policies held by them and issued by companies doing business in this State." Amicus Curiae of the State of Cal. in Supp. of Pet'n for Panel Reh'g at 1. The fact that the regulation at issue falls within an area of traditional state competence ends the field preemption inquiry.

It is immaterial that section 354.4 touches upon events taking place outside of the United States; this does not suggest that California has improperly interfered with a field of exclusive federal power warranting preemption. Many state laws have effects outside the state. But, as the Supreme Court has long held, "some incidental or indirect effect in foreign countries," is insufficient — the same would be "true of many state laws which none would claim cross the forbidden line." *Clark v. Allen*, 331 U.S. 503, 517 (1947). Rather, field preemption only displaces state laws where the state exceeds its traditional competence and "establish[es] its own foreign policy." *Zschernig v. Miller* 389 U.S. 429, 441 (1968). Accordingly, this Court has held that the doctrine should be "applied sparingly." *Deutsch v. Turner*, 324 F.3d 692, 710-11 (9th Cir. 2005) (citing *Clark*, 331 U.S. at 517 (1947)).

A more expansive approach to preemption would wreak havoc with state

law. Indeed, *Clark* adopted its restrained approach in an era in which states were far less interconnected with foreign countries than they are now. Yet the Supreme Court recognized even then that a preemption doctrine that bars state law based upon merely incidental effects would preclude all sorts of state laws and impermissibly intrude upon state prerogatives. The harm to our federalist system would be far greater in today's vastly more globalized world.

The seminal Supreme Court cases of *Zschernig* and *Clark* established and clarified the distinction between direct and incidental effects on foreign countries. In *Zschernig*, in applying Oregon's reciprocal inheritance statute, the Oregon probate courts were inquiring into whether foreign communist regimes would confiscate property, and whether diplomatic statements on this subject were credible. *See* 389 U.S. at 435. In short, Oregon law made "unavoidable judicial criticism of nations established on a more authoritarian basis than our own." *Id.* at 440. Because the law, as the Oregon courts applied it, had a "direct impact upon foreign relations," *id.*, and threatened to "adversely affect the power of the central government to deal with" relations with the communist bloc, *id.* at 441, it had to yield before the federal government's power to conduct foreign policy. In *Clark*, by contrast, the Court had previously upheld a similar reciprocal inheritance law against a foreign affairs challenge. 331 U.S. at 517. Critically, *Zschernig* did not overrule *Clark*; the distinguishing principle was that in *Clark*, the statute was

assessed on its face and there was therefore no record of judges engaging in criticisms of the nature of other governments that are the province of the Executive Branch. *Zschernig*, 389 U.S. at 432-34. That is, in *Clark* the effects on foreign policy were indirect; in *Zschernig* direct. Subsequent to *Zschernig*, foreign affairs field preemption has been applied primarily in situations involving "state 'regulations which amount to embargoes or boycotts' passed with the express intent to coerce foreign states into altering their political and social policies." *Cruz v. United States*, 387 F. Supp. 2d 1057, 1076 (N.D. Cal. 2005) (citations omitted).

Courts applying the foreign affairs preemption doctrine must thus do so with restraint, and only where the state has clearly set a foreign policy, as the Supreme Court has cautioned that the "foreign policy of the United States [is] much more the province of the Executive Branch and Congress than of the Court," and the judiciary is not "vested with power to decide how to balance" the effects of a state law on foreign relations. *Barclays Bank Plc v. Franchise Tax Bd.*, 512 U.S. 298, 327-28 (1994) (internal citations omitted).[2]

The law at issue in this case merely incidentally touches on matters of foreign affairs, and is not an example of California setting foreign policy. As the Panel Majority concluded, the reference in the statute to "Armenian Genocide victims"

[2] *Barclays Bank* involved an analysis under the related dormant foreign commerce clause, and the Supreme Court refused to find the state law preempted despite the

alone has at most an incidental effect on foreign policy, particularly in light of the fact that thirty-nine states officially recognize the "Armenian Genocide." *Movsesian II*, 629 F.3d at 908. Neither does the application of the law, in extending the statute of limitations for a narrow class of insured individuals, amount to establishing the state's own foreign policy. Beyond the vague and unsupported assertion that the statute sends a "foreign relations message," Def.'s Pet'n for Reh'g En Banc ("Def.'s Pet'n") at 10, Defendant-Appellant has failed to present any evidence of an effect on United States foreign policy as a result of the application of this statute which merely regulates the relationship of insurance companies — over which California has jurisdiction — and their insured.[3]

Despite Defendant-Appellant's assertion, the law at issue is not a "virtually identical 'sister statute'" to those that this Court has struck down in *Deutsch* and *Saher*. Def.'s Pet'n at 2. Rather, both of those cases dealt with the State of California's intrusion into the narrow realm of "rectifying wartime wrongs committed by our enemies or by parties operating under our enemies' protection" following the Holocaust and World War II. *Saher*, 592 F.3d at 966. The Court

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clear evidence of foreign policy effects including, *inter alia*, the enactment of retaliatory legislation by the United Kingdom. *See* 512 U.S. at 324-28.

[3] As in *Cruz*, it is significant here that "the United States . . . has not filed a statement of interest representing that the California statute threatens its relations" with Turkey. *Cruz*, 387 F. Supp. 2d at 1077. Nor can Turkey unilaterally define the foreign policy concerns of the United States. *See* Part III, *infra*.

found these efforts to intrude on the exclusively federal power to "make and resolve war," by creating "a world-wide forum for the resolution of Holocaust restitution claims." *Id.* at 965-66. Defendant-Appellant does not argue that that the California statute at issue here similarly interferes with the federal power to make and resolve war. The statute at issue in this case, in contrast with those in *Saher* and *Deutsch*, does not deal with restitution for wartime wrongs, but rather seeks only to vindicate claims in contract for past-due insurance policy benefits. As the Panel Majority correctly acknowledged, the California statute here "does not implicate the government's exclusive power over war." *Movsesian II*, 629 F.3d at 908.

Nothing in *Garamendi* changes this conclusion. Although Judge Thompson's dissent and the Petition for Rehearing En Banc both suggest that the Panel Majority's field preemption analysis is inconsistent with *Garamendi*, because that case struck down a similar California law under foreign affairs preemption, *Garamendi* expressly declined to conduct a field preemption analysis. *See* 539 U.S. at 419-20. The dissent asserts that *Garamendi* "specifically rejected Justice Ginsburg's position that California in that case had broad authority to regulate the insurance industry," arguing that section 354.4 is therefore subject to field preemption. *Movsesian II*, 629 F.3d at 911-12. But the *Garamendi* Court's discussion of the strength of California's interests in the statute at issue was done in the context of weighing this against a *conflict with federal acts*, not for the purpose

of determining whether the statute was subject to field preemption. 539 U.S. at 420. Indeed, in a proper field preemption analysis, the degree of conflict with federal policy is immaterial: if the state is acting outside a sphere of traditional competence and conducting its own foreign policy, courts do not assess the degree of conflict because "the Constitution entrusts foreign policy exclusively to the National Government." *Id.* at 420 n.11. Conversely, if the state is acting within its traditional competence, courts do not conduct a field preemption analysis at all. Thus the majority's field preemption analysis does not conflict with *Garamendi*.

II. Conflict preemption is inapplicable here because, even if some officials within the federal government have objected to state use of the term "Armenian Genocide," there is no federal act that is "fit to preempt" state law.

Conflict preemption considers whether state law interferes with an affirmative federal foreign policy act with the power to preempt state law. *Garamendi*, 539 U.S. at 416, 418-19. The majority here found that there was no federal foreign policy prohibiting the recognition of the "Armenian Genocide." But even if such a policy could be identified from the informal and disparate executive communications cited by Defendant-Appellant, it could not preempt state law in the absence of a federal act with preemptive force.

A. Conflict preemption requires an act "fit to preempt" state law.

Conflict preemption requires, as its starting point, a federal act that is "fit to preempt," state law. *Garamendi*, 539 U.S. at 416. Under the Supremacy Clause, certain sources — the "Constitution," the "laws of the United States," and "treaties" — are the "supreme law of the land," and can preempt state law. U.S. Const., art. VI, § 2. Conflict preemption, therefore, only applies to actions of the political branches carrying the force of law; federal activity lacking legal force cannot preempt state law. *See, e.g. S. Pac. Transp. Co. v. Pub. Util. Comm'n*, 9 F.3d 807, 812 n.5 (9th Cir. 1993); *Wabash Valley Power Ass'n v. Rural Electrification Admin.*, 903 F.2d 445, 454 (7th Cir. 1990) ("We have not found any case holding that a federal agency may preempt state law without either rulemaking or adjudication."); *see also Garamendi*, 539 U.S. at 442 (Ginsburg, J., dissenting) (no authority grants executive branch officials "the power to invalidate state law simply by conveying the Executive's views on matters of federal policy").[4]

The requirement that conflict preemption be based on acts that carry the force of law holds true even in the foreign policy arena. The Supreme Court made this

[4] Nothing in the majority opinion in *Garamendi*, which relied on executive agreements rather than mere statements by the executive as the source of preemptive power, conflicts with this conclusion.

clear in *Medellin v. Texas*, where the President had attempted to intervene in a state criminal case on the basis of its interference in federal foreign policy. There, the President himself issued a memorandum to the Attorney General mandating that state courts comply with the United States' obligations under a decision of the International Court of Justice. 552 U.S. at 503. Although the Court recognized that the President has the lead role in making "sensitive foreign policy decisions," and that the case presented "plainly compelling" federal foreign policy interests, it held that "[s]uch considerations . . . do not allow us to set aside first principles. The President's authority to act, as with the exercise of any governmental power, 'must stem either from an act of Congress or from the Constitution itself.'" *Id*. at 524 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952)). The Court found no such authority in that case.

Thus *Medellin* was primarily focused on searching for a possible basis—either a ratified treaty, *see* 552 U.S. at 525-30, or some independent power of the President, *id.* at 530-32 — that would give the President the authority to displace state law. No such basis for preempting state law was found in *Medellin*, and none should be found in this case: the Court in *Medellin* held that presidential memoranda do not generally carry the force of law, even where important foreign affairs interests are clearly implicated. Aside from powers derived from statutes and treaties, or powers expressly granted by the Constitution, the only other "narrow set

of circumstances" in which the *Medellin* Court recognized preemptive authority involves "the making of executive agreements to settle civil claims between American citizens and foreign governments or foreign nationals." *Id.* at 531. This is because the President's power to make such agreements has "been exercised since the early years of the Republic," and the practice "has received congressional acquiescence throughout its history." *Garamendi*, 539 U.S. at 415. Thus, such agreements are "legally binding," *Barclays Bank*, 512 U.S. at 329, and have long been held to have "the full force of law." *United States v. Walczak*, 783 F.2d 852, 856 (9th Cir. 1986) (citing *United States v. Pink*, 315 U.S. 203 (1942)).

Neither *Medellin* nor *Garamendi* suggest that, aside from powers granted by statute, treaty, or the Constitution, as well as executive agreements to settle international disputes, there is any other relevant authority that would allow the President to preempt state law. Although *Garamendi* relied on executive branch statements to illuminate the policy animating the executive agreements, *see* 539 U.S. at 411 & 422, it does not suggest that such a statement alone has preemptive force, or that the state statute at issue would have been preempted in the absence of an executive agreement. Indeed, even the "authority to settle international claims disputes pursuant to an executive agreement" is "narrow and strictly limited." *Medellin*, 552 U.S. at 532. Simply because the executive branch has certain enumerated powers in the management of foreign affairs does not mean that all

communications made by Executive Branch officials are an exercise of such a grant of power that is "fit to preempt state law."

The Supreme Court's decision in *Barclays Bank* is also instructive. There, in the analogous foreign commerce clause context, the Court rejected the contention that amicus briefs or letters from the administration to a state governor had the power to preempt, finding they "lack the force of law." 512 U.S. at 328-30 & n.30. The Court considered whether a state tax law was preempted by the foreign commerce clause because it allegedly interfered with the federal government's ability to speak with one voice in international trade. *Id.* at 320. The state law had engendered considerable diplomatic protest from other nations. *Id.* at 324 n.22. The Court, however, held that only Congress, not the President or the judiciary, has the authority "to evaluate whether the national interest is best served by [] uniformity, or state autonomy." *Id.* at 328-29, 331. Indeed, the Court disavowed any competence to determine whether a state law interfered with Congress' ability to speak with the voice of the nation in foreign affairs, or whether conversely Congress had decided to allow the state to act. 512 U.S. at 324-31. Noting that "[t]he judiciary is not vested with the power" to decide how to balance the competing concerns involved, *id.* at 328, the Court presumed that a lack of "specific indications of congressional intent to bar" state law affecting foreign commerce indicates "Congress' willingness to tolerate" such law. *Id.* at 324, 327; *accord id.* at

332 (Scalia, J., concurring) (noting that the Court's decision "requires no more than legislative inaction to establish that 'Congress implicitly has *permitted*'" state's law (quoting *id.* at 326)).

To be sure, *Barclays Bank* was based in part on the fact that "the Constitution grants Congress, not the President, the power to 'regulate Commerce with foreign Nations.'" *Id.* at 329 (quoting U.S. Const. art. I, § 8, cl. 3). But *Barclays Bank* also implicitly recognizes that, in areas other than foreign commerce, the President's preemptive foreign affairs powers are derived either from the Constitution or from a congressional grant of authority, or exercised pursuant to an executive agreement. Although the situation was not presented in *Barclays Bank*, the Supreme Court there noted that, in another case, Congress might delegate preemptive authority to the President "by a statute or a ratified treaty." *Id.* at 329. In the absence of such a delegation, the Court only contemplated that the President might preempt state law "pursuant to a legally binding executive agreement." *Id*. The Court specifically declined to consider when such unilateral executive action might preempt state law precisely because the only Executive Branch communications at issue in *Barclays Bank* were those "that express federal policy but lack the force of law." *Id.* at 330. Federal policy, therefore, is insufficient to preempt without the force of law. As in *Medellin*, the only mechanism even contemplated by *Barclays Bank* through which the Executive might preempt traditional state authority without congressional action

is an executive agreement.

Indeed, the Supreme Court considered this point so indisputable that it used it in another context as an example of a "broken circle" of logic: "[T]hat Executive agreements may displace state law . . . and that unilateral presidential action (renunciation) may displace Executive agreements, does not produce the 'logical' conclusion that unilateral presidential action may displace state law." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 97 n.2 (1998) (citation omitted). *Barclays Bank* would thus be nullified if the Executive could preempt state law based on some general foreign affairs authority.[5]

Neither the dissent nor the Petition can identify any federal act with preemptive power regarding the use of the phrase "Armenian genocide" from the disparate actions of the Executive branch they chronicle. The first panel opinion, *Movsesian v. Victoria Versicherung AG*, 578 F.3d 1052, 1059-60 (9th Cir. 2009) [hereinafter "*Movsesian I*"], however, postulated that such authority derives directly from the Constitution or, in the alternative, from a longstanding practice to which Congress has acquiesced. *Amici* address each of these bases in turn.

[5] Indeed, since international trade policy is a facet of U.S. foreign policy, affording the President general foreign affairs preemptive power could allow the President unilaterally to regulate international commerce through preemption of state rules, in violation of the foreign commerce clause, by simply declaring that such action was taken pursuant to his authority to "manage foreign affairs."

B. The Constitution does not grant the President exclusive authority over the use of the term "Armenian genocide."

The original panel opinion suggested that the Constitution itself provided authority for presidential control over the phrase "Armenian genocide": "The President acts well within his constitutionally delegated powers by developing and enforcing the policy refusing to provide official recognition to an 'Armenian Genocide.'" *Movsesian I*, 578 F.3d at 1060.

Medellin rejected the notion that the President has general preemptive powers over matters relating to foreign policy. Instead, a specific grant of authority is necessary. The original opinion here identified three potentially relevant clauses of the Constitution. *Id.* at 1059. Article II, section 2, clause 1 provides that the President is the Commander-in-Chief; article II, section 2, clause 2 grants powers to make treaties and appoint ambassadors; and article II, section 3 grants powers to receive ambassadors and to execute the laws. But none of these remotely touches on the power to control recognition of "genocide."

The President generally has the power to execute, not unilaterally create, federal law. *Youngstown Sheet & Tube Company v. Sawyer*, 343 U.S. 579, 587 (1952) ("[T]he President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."); *accord Hamdan v. Rumsfeld*, 548 U.S. 557, 591-92 (2006). Indeed, both *Youngstown* and *Hamdan* rejected executive assertions of the authority to make law regarding matters related to an ongoing war.

Youngstown, 343 U.S. at 583, 590 (rejecting President Truman's claim of authority to seize steel mills to support national defense, including prosecution of the Korean War); *Hamdan*, 548 U.S. at 567 (rejecting procedures President established to try prisoner captured during war). These cases both involved "a war in progress," 578 F.3d at 1059, and the presidential action was far more overt than the implied policy at issue here. Yet the President lacked authority to unilaterally make law.

C. There is no longstanding practice that would give the President's letters and speeches the force of law in prohibiting the use of the term "genocide."

The original panel opinion also suggested that, in the absence of any express constitutional authority to act, the President has exclusive authority of the use of the term "genocide" because, like executive agreements, this presidential monopoly is a longstanding practice to which Congress has acquiesced. *Movsesian I*, 578 F.3d at 1060. But, the limitations on sources of executive power are "clearly set forth" and "the Court has been careful to note that '[p]ast practice does not, by itself, create power.'" *Medellin,* 552 U.S. at 532. (quoting *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981)). Regardless, there is no such longstanding practice.

Medellin makes clear that, in granting preemptive force to executive agreements, *Garamendi* relied on the President's "narrow and strictly limited authority to settle international claims," 552 U.S. at 532, not some generalized executive power in the foreign affairs realm. By contrast, the practice at issue in

Medellin — that of issuing directives to state courts — was "not supported by a 'particularly longstanding practice' of congressional acquiescence." *Id*. at 531. However the issue here is characterized, it similarly fails this test.

The dissent suggests that there is a federal practice forbidding "legislative recognition of the 'Armenian Genocide.'" *Movsesian II*, 639 F.3d at 910 (Thompson, J., dissenting). Unlike executive agreements dating back centuries, this purported practice could date back no earlier than 1984. In 1981, President Reagan referred to "the genocide of the Armenians."[6] In 1984, with no apparent objection from the executive, the House of Representatives passed a resolution recognizing "victims of genocide, especially those of Armenian ancestry." H.R.J. Res. 247, 98th Cong. (1984) (passed by House).

Nor is there a general presidential monopoly on recognition of genocide. Indeed, Congress has used the word to describe a contemporary situation prior to the executive branch doing so and has called upon the executive to do likewise. *See, e.g.*, H.R. Con. Res. 467, 108th Cong. (2004) (passed by House); S. Con. Res. 133, 108th Cong. (2004) (passed by Senate).

With respect to forbidding *states* from recognizing the Armenian genocide,

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[6] Proclamation 4838 (Apr. 22, 1981), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=43727.

the evidence of such a practice is thinner still. As in *Medellin*, no one has "identified a single instance in which the President has attempted (or Congress has acquiesced in)" an attempt to prohibit the states from using the phrase "Armenian genocide." *See Medellin*, 552 U.S. at 532. Indeed, the Panel Majority notes that "while some forty states recognize the Armenian Genocide, the federal government has never expressed any opposition to any such recognition," *Movsesian II*, 629 F.3d at 907 — it has not even opposed section 354.4.

D. Even if there were some federal action with the power to preempt, concerns for uniformity in the management of foreign relations have no place where there is no clear, uniform national policy.

Not only is there no longstanding federal practice over the use of the term "genocide," but there is also a remarkable lack of uniformity in those executive branch communications that do address the issue. Defendant-Appellant's claim that deference to these informal communications by Executive officials is necessary in order to insure uniformity in foreign policy is thus seriously misplaced.

To be sure, *Garamendi's* emphasis of the need for uniformity and clarity in national policy in dealings with foreign states is sound. *Garamendi*, 539 U.S. at 413 ("[A]t some point an exercise of state power that touches on foreign relations must yield to the National Government's policy, given the 'concern for uniformity in this country's dealings with foreign nations' that animated the Constitution's allocation of the foreign relations power to the National Government in the first place." (Citation omitted.)). But *Garamendi*'s concerns about uniformity in foreign policy are not

implicated here.

Garamendi presented a situation in which the federal Executive had already adopted through executive agreements a "national position" that was "unmistakabl[e]." *Id.* at 421; *see also Container Corp. of Am. v. Franchise Tax Bd.,* 463 U.S. 159, 194 (1983) (holding that state tax law could only be at variance with "one voice standard" for the purpose of preemption analysis if it violated a "*clear* federal directive" (emphasis added)). Here, by contrast, the executive has taken no clear, unmistaken, national position on the use of the term "genocide"; nor has there been uniformity as to the source, form, or content of the various executive communications that do address the matter.

As Plaintiffs-Appellees have demonstrated, and Defendant-Appellant does not dispute, for the past half-century, both the executive and legislative branches have taken multiple, arguably inconsistent, positions on the use of the term. *See also Movsesian II,* 629 F.3d at 906 ("The three cited executive branch communications arguing against recognition of the Armenian Genocide are counterbalanced, if not outweighed, by various statements from the federal executive and legislative branches *in favor* of such recognition.").

Although the panel dissent and Defendant-Appellant may argue about the strength and weight of those pronouncements, they do not dispute that those pronouncements express divergent views. Because there is no clear, express, national

policy controlling the use of the phrase "Armenian genocide," California's use of that language in a state insurance statute can hardly be viewed as lacking in consistency, let alone compromising "the President's ability to speak with one voice for the Nation." *Garamendi*, 539 U.S. at 424 (citations omitted).

E. Affording preemptive force to an alleged policy expressed only in speeches and letters raises serious federalism concerns.

Despite the absence of a national policy against recognition of the Armenian genocide, Defendant-Appellant strives to locate one in various informal speeches, letters, and press briefings from several Presidents and other executive officials. Def.'s Pet'n at 13-16. But affording preemptive force to the materials cited by Defendant-Appellant would give insufficient attention to concerns for state sovereignty.

Under *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 550-51 (1985), states are usually protected against federal intrusion by their representation in the federal political process. Allowing federal courts to override state powers by affording preemptive force to informal executive communications, such as those involved here, without explicit congressional direction, "'would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests.'" *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1990) (quoting Laurence H. Tribe, American Constitutional Law § 6-25, at 480 (2d ed. 1988)). These concerns

counsel strongly against allowing preemption based solely on policy preferences advanced in speeches and communications, for two reasons.

First, the requirement that the President must take the public, high-profile step of negotiating an executive agreement — or equivalent action with the force of law — affords a measure of political protection to states. "Our Framers established a careful set of procedures that must be followed before federal law can be created under the Constitution—vesting that decision in the political branches, subject to checks and balances." *Medellin*, 552 U.S. at 515. Allowing the President to circumvent these procedures, and preempt state law simply by expressing a policy preference in speeches and letters to Congress, would eviscerate the states' protections. Indeed, because the Defendant-Appellant's proposed requirements for expressing policy preferences are so relaxed, they would create a prescription for chaos. States would have little guidance as to what the contours of the expressed policy were at all, let alone how to avoid conflicting with them.

Even the Petition acknowledges that there would be no conflict problem if California had chosen to use, for example, the Armenian term "*Meds Yeghern*" instead of the English phrase "Armenian genocide." Def.'s Pet'n at 14. And there can be no dispute that California's word choice would have posed no problem if it were enacted in, say, 1982, after President Reagan recognized the Armenian genocide. Surely, a conflict cannot arise simply because a state used one synonym

instead of another, let alone where the President has in the past used the same word. Indeed, under Defendant-Appellant's logic, a statute valid when passed would become unconstitutional if the President simply changes his word choice. State authority cannot turn on such whim.

The second reason to require a more formalized lawmaking process before preempting state law is that "the hurdles to political branch correction of untoward state foreign relations activity are relatively insignificant." Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 Va. L. Rev. 1617, 1693-94 (1997). Conversely, "the erroneous federalization of [state] law" will be more difficult to override through Congressional action. *Id.* Thus, if a state goes too far in intruding upon foreign relations, the political branches can protect themselves; if the courts go too far in preempting state law, states are largely helpless.

These concerns have special weight here, where the only identified problem with section 354.4 is the *label* chosen by the state legislature to define which insurance claims were to be covered by the law. Before determining that federal law requires the unprecedented conclusion that states are prohibited from using certain *words* in their statutes,[7] this Court should require more formal, or at least consistent,

[7] Although it is admittedly an open question whether states have First Amendment rights, basic principles of federalism suggest limits on the federal government's restriction of speech by states and local governments. *See e.g.*, Matthew C. Porterfield, *State and Local Foreign Policy Initiatives and Free Speech: The First Amendment as an Instrument of Federalism*, 35 Stan. J. Int'l L. 1, 33-35 (1999)

federal action that has traditionally been held to have the force of law.

III. Turkey cannot preempt state law through the submission of an *amicus* brief.

Reliance on Turkey's assertions regarding the effect on U.S. foreign policy is unwarranted because those assertions have no bearing on the elements of field or conflict preemption. As to conflict preemption, Turkey's claims are irrelevant with respect to whether there is federal action that is fit to preempt state law. As to field preemption, Turkey's arguments about foreign policy effects have no bearing on whether California's action is within an area of traditional state competence and therefore whether any effect on foreign affairs is incidental.

Turkey's arguments submitted in its *amicus* brief should not be considered by this Court to determine whether or not the California law has foreign affairs effects. It is not the appropriate role of the Court to weigh the concerns of foreign governments in interpreting our laws. The Supreme Court has strongly cautioned that it is not the province of the judicial branch to manage and decide affairs with foreign nations. *See*, *e.g.*, *Container Corp.*, 463 U.S. at 194 ("This Court has little competence in determining precisely when foreign nations will be offended by particular acts, and even less competence in deciding how to balance a particular

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(collecting cases); *but see*, *e.g.*, *Ceballos v. Garcetti*, 361 F.3d 1168, 1190 (9th Cir. 2004) (O'Scannlain, J., specially concurring).

risk of retaliation . . . . "). As this Court has discussed:

> Nor do we understand how a court can go about evaluating the foreign policy implications of another government's expression of interest. Assuming that foreign relations are an appropriate consideration at all, the relevant question is not whether the foreign government is pleased or displeased by the litigation, but how the case affects the interests of the United States.

Patrickson v. Dole Food Co., 251 F.3d 795, 803-04 (9th Cir. 2001), *aff'd in part, cert. dismissed in part,* 538 U.S. 468 (2003).

Indeed, it would raise serious concerns about judicial overreaching were this court to give undue regard to the opinions expressed by the Turkish government. This would be precisely the type of overreaching that the Supreme Court warned against earlier this year, when it cautioned that

> preemption analysis does not justify a "freewheeling judicial inquiry into whether a state statute is in tension with federal objectives"; such an endeavor "would undercut the principle that it is Congress rather than the courts that preempts state law". . . . Our precedent "establish that a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act."

Chamber of Commerce of U.S. v. Whiting, 131 S. Ct. 1968, 1985 (2011) (internal citations omitted).

Worse still, were this Court to allow Turkey to unilaterally define when a state law improperly intrudes in the realm of foreign affairs, it would risk becoming a forum in which the policy positions of foreign governments could determine U.S. law. Yet, this Circuit has expressly disclaimed such a possibility. *See Patrickson*,

251 F.3d at 803 ("Federal judges cannot dismiss a case because a foreign government finds it irksome, nor can they . . . tailor their rulings to accommodate the expressed interests of a foreign nation that is not even a party."). Instead, federal judges "are bound to decide cases before them according to the rule of law." *Id*. Courts therefore must refrain from giving undue weight to policy statements such as Turkey's. "If a foreign government finds the litigation offensive, it may lodge a protest with our government; our political branches can then respond in whatever way they deem appropriate — up to and including passing legislation." *Id.*

This Court's recent decision in *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011), is consistent with this approach. There, although the Court took into consideration the submission of *amicus* briefs submitted by foreign governments, it did so for the narrow purpose of considering them as evidence to back the United States government's own claim that the Arizona law was interfering with its ability to conduct relations with foreign states. *See id*. at 353 (emphasizing that the Federal government itself had attested that S.B. 1070 "threatens at least three different serious harms to U.S. foreign relations" (internal citations omitted)).[8] In this case, unlike in *Arizona*, the U.S. government has not claimed that California's law is

[8] The panel also emphasized that the opinions of foreign governments submitted in *amicus* briefs could not, by themselves, determine whether or not a law interfered with the Federal government's ability to conduct foreign affairs. *Arizona*, 641 F.3d at 353 n.14.

hampering its ability to conduct foreign affairs.

The panel's analysis in *Arizona* accords with *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000), in which the Supreme Court had also considered the submissions of foreign governments for a similarly limited purpose. In *Crosby*, the Court took into account "protests from Japan, the European Union (EU), and ASEAN[ ], including an official *Note Verbale* from the EU to the Department of State," but again, only for the limited purpose of analyzing the federal government's own claim that the state law had "complicated its dealings with foreign sovereigns." *Crosby*, 530 U.S. at 382-84. In both *Arizona* and *Crosby*, then, it was, as *Patrickson* counsels, the objection voiced by the United States government that controlled the courts' analysis — and not the grievances submitted by foreign nations who were non-parties to the case. By contrast, here, it is Turkey, and not the U.S. government, who requests that this court take into account Turkey's position on the challenged state law. "[T]he United States itself . . . has not filed a statement of interest representing that the California statute threatens its relations" with Turkey. *Cruz*, 387 F. Supp. 2d at 1077.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to find that California Code of Civil Procedure § 354.4 is not preempted pursuant to federal foreign affairs prerogatives.

DATED: December 7, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1

Case No. 07-56722

I certify that, pursuant to 9th Cir. R. 29-2, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7,000 words or less, according to Microsoft Word, the word-processor used to create the brief.

DATED: December 7, 2011

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