No. 07-56722

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REVEREND FATHER VAZKEN MOVSESIAN, *et al.*,

Plaintiffs and Appellees,

v.

VICTORIA VERSICHERUNG AG and
ERGO VERSICHERUNGSGRUPPE AG,

Defendants,

and

MÜNCHENER RÜCHVERSICHERUNGS-GESELLSCHAFT
AKTIENGESELLSCHAFT ("Munich Re"),

Defendant and Appellant.

On Appeal Pursuant To 28 U.S.C. § 1292(b) From An Order Of The United States District Court For The Central District Of California, No. CV-03-9407 CAS, The Honorable Christina A. Snyder, United States District Judge

PETITION FOR REHEARING *EN BANC*

MAYER BROWN LLP
NEIL M. SOLTMAN (SBN 67617)
CHRISTOPHER MURPHY (SBN 120048)
MATTHEW MARMOLEJO (SBN 242964)
350 South Grand Avenue
Los Angeles, CA 90071-1503
Telephone: (213) 229-9500
Facsimile: (213) 625-0248

MAYER BROWN LLP
CHARLES ROTHFELD
PAUL HUGHES
1999 K Street, N.W.
Washington, DC 20006-1101
Telephone: (202) 263-3000
Facsimile: (202) 263-3300

Attorneys for Defendant and Appellant Munich Re

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

OTHER AUTHORITIES

OTHER MATERIALS

TABLE OF AUTHORITIES
(continued)

Page

INTRODUCTION AND FRAP 35(B) STATEMENT

This petition presents an issue of extraordinary public and doctrinal importance, involving a challenge to California legislation that threatens significant interference with U.S. foreign policy. The legislation, Code of Civil Procedure ("CCP") Section 354.4, creates a cause of action exclusively applicable to insurance claims (1) arising from policies sold only in Europe or Asia during the period 1875-1923, that (2) are asserted only by victims of a statutorily defined "Armenian Genocide" occurring in the Ottoman Empire from 1915-1923. Three consecutive U.S. presidents have forcefully rejected governmental recognition of an "Armenian Genocide" because it would cause "great harm" to the nation's foreign policy interests. A divided panel (Pregerson and Nelson; Thompson dissenting), vacating its prior opinion (Thompson and Nelson; Pregerson dissenting), upheld Section 354.4. The new panel majority rejected arguments that the law is preempted by both the conflicting national policy against recognizing an "Armenian genocide" and the federal government's exclusive authority over foreign affairs. *Movsesian v. Victoria Versicherung AG*, 2010 WL 5028828 (Dec. 10, 2010) ("*Movsesian II*," Appendix A), *vacat'g* 578 F.3d 1052 (2009) ("*Movsesian I*," Appendix B).

The panel's holding is both incorrect and a danger to U.S. interests. It cannot be reconciled with decisions of the Supreme Court, this Court, the Second

Circuit, and California courts, all of which have struck down virtually identical "sister statutes" relating to claims arising generations ago in distant nations. *See Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 401 (2003) (requirement that insurers doing business in Europe from 1920-1945 disclose policy information to California regulators); *In re Assicurazioni Generali S.P.A.*, 592 F.3d 113, 117-20 (2d Cir. 2010) ("*Generali*") (state statutes providing damage actions for Holocaust-era insurance claims); *von Saher v. Norton Simon Museum*, 578 F.3d 1016, 1029 (9th Cir. 2009), *petition for cert. pending*, S. Ct. No. 09-1254 (CCP § 354.3, regarding claims for recovery of Holocaust-era artworks); *Deutsch v. Turner Corp.*, 324 F.3d 692, 719 (9th Cir. 2003) (CCP § 354.6, regarding claims of World War II slave laborers); *Deirmenjian v. Deutsche Bank, A.G.*, 526 F. Supp. 2d 1068 (C.D. Cal. 2007; Morrow, J.) (CCP § 354.45, regarding claims by "Armenian Genocide" victims for looted bank assets); *Steinberg v. Int'l Comm'n on Holocaust Era Ins. Claims*, 133 Cal. App. 4th 689, 701 (2005) (CCP § 354.5, regarding Holocaust-era insurance claims); *Taiheiyo Cement Corp. v. Superior Court*, 117 Cal. App. 4th 380, 398 (2004) (CCP § 354.6); *Mitsubishi Materials Corp. v. Superior Court*, 113 Cal. App. 4th 55, 79 (2003) (same).

The panel decision contradicts current U.S. foreign policy in an area of great strategic importance and deeply felt sensitivities. Its validation of California's attempt to establish its own foreign policy—which chooses sides in a dispute

between Turkey and Armenia—is inconsistent with the controlling constitutional structure. Review by the en banc court is imperative.

STATEMENT

1. Section 354.4, entitled "Claim by Armenian Genocide victim, or by heir or beneficiary," seeks to revive time-barred claims for insurance policy proceeds arising out of events occurring in the Ottoman Empire nearly a century ago. It 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 ... during that period." Section 354.4(a). The statute provides that any "Armenian Genocide victim," heir, or beneficiary residing in California may sue on an insurance policy that was "in effect in Europe or Asia between 1875 and 1923," and that any such suit "shall not be dismissed for failure to comply with the applicable statute of limitation, provided the action is filed on or before December 31, 2010." Section 354.4 (b), (c). Section 354.4's reference to the "Armenian Genocide" relates to the tragic and politically charged events occurring in the Ottoman Empire from 1915 to 1923. *See* Stats 2000 ch. 543 § 1(a), *reprinted at* 13C West's Ann. Cal. Codes: Civil Procedure § 354.4, p. 362 (2006).

Section 354.4 is part of a package of related California laws providing special remedies by extending statutes of limitations on claims brought by persons injured by particular foreign governments or in identified foreign conflicts. Every

one of these laws (except, now, Section 354.4) addressing a matter on which the federal government has expressed a view has been struck down as inconsistent with the federal government's exclusive authority over foreign affairs. *See* p. 2, *supra*.

2. In contrast to California, the Executive Branch has vigorously opposed governmental recognition of an "Armenian Genocide" as inconsistent with U.S. interests and foreign policy. Accordingly, administrations of both parties have repeatedly and successfully urged Congress not to pass even a hortatory resolution acknowledging an "Armenian Genocide."[1]

In 2000, the State Department concluded that such a resolution "would be likely to have the unintended effect of injuring ongoing efforts to improve relations between Turkey and Armenia." H.R. REP. 106-933 (2000), 2000 WL 1474590 at *17. Secretary of Defense Cohen added that "passing judgment on this history through legislation could have a negative impact on Turkish-Armenian relations and on our security interests in the region." *Id.* at *16. Ultimately, President Clinton expressed his opposition directly to the Speaker of the House "in the strongest terms." Letter from President Bill Clinton to Speaker J. Dennis Hastert

[1] The contention that Armenians were the subject of a genocide organized by the Ottoman state is vehemently denied by modern-day Turkey, where "[i]dentifying [the] Armenian killings as genocide is considered an insult against Turkish identity[] [and] a crime." Sebnem Arsu, *Turkey Seethes At the U.S. Over House Genocide Vote*, N.Y. Times (Oct. 12, 2007), 2007 WLNR 20039812.

(Oct. 19, 2000), 2000 WLNR 4629055. Following these unambiguous Executive Branch objections, the resolution was abandoned.

In 2003, the Bush Administration reiterated its predecessor's opposition to a new House resolution's "reference to the 'Armenian Genocide,'" explaining that "this wording … could complicate our efforts to bring peace and stability to the Caucasus and hamper ongoing attempts to bring about Turkish-Armenian reconciliation." H.R. REP. 108-130 (2003), 2003 WL 21223864 at *5-6. This proposed House resolution was also abandoned.

In early 2007, Secretary of State Rice and Secretary of Defense Gates jointly wrote to the Speaker and Minority Leader to oppose another House resolution seeking formal recognition of an "Armenian Genocide." The Secretaries said that such recognition "would … significantly endanger U.S. national security interests in the region" and expressed their "deep concern about the harm that passage ... would cause U.S. efforts to promote reconciliation between Turkey and Armenia." ER078. The Secretaries noted that in 2006, when the French National Assembly voted to recognize an Armenian genocide, "the Turkish military cut all contacts with the French military." ER079. Given these Turkish sensitivities, the Bush Administration concluded that passage of the resolution "could harm American troops in the field, constrain our ability to supply our troops in Iraq and Afghanistan, and significantly damage our efforts to promote reconciliation

between Armenia and Turkey at a key turning point in their relations." *Id.* That position received broad support from every living former Secretary of State, who similarly warned the Speaker that the resolution's passage would "harm our foreign policy objectives to promote reconciliation … strain our relations with Turkey, and … endanger our national security interests in the region, including the safety of our troops in Iraq and Afghanistan." Letter from former Secretaries of State Albright, Baker, Christopher, Eagleburger, Haig, Kissinger, Powell, and Shultz to Nancy Pelosi, Speaker of the House of Representatives (Sept. 25, 2007), *available at* http://turkey.usembassy.gov/statement_092507.html. President Bush then personally urged rejection because "passage would do great harm to our relations with a key ally in NATO." Press Release, White House Office of the Press Secretary, President Bush Discusses Foreign Intelligence Surveillance Act Legislation (Oct. 10, 2007), 2007 WLNR 19889225. This resolution, too, was abandoned.

Most recently, the Obama Administration reiterated this now longstanding U.S. policy. In late December 2010, in actions post-dating the panel's decision in this case, the State Department twice announced that it "strongly oppose[d]" a resolution before the House that would have recognized an "Armenian Genocide" (H. Res. 252). U.S. Department of State, Daily Press Briefing (Dec. 17, 2010), http://www.state.gov/r/pa/prs/dpb/2010/12/153124.htm (comments by current U.S.

Assistant Secretary of State for Public Affairs Philip J. Crowley); *see* U.S. Department of State, Daily Press Briefing (Dec. 20, 2010), http://www.state.gov/r/pa/prs/dpb/2010/12/153216.htm (same) [December Press Briefings]. The resolution was not brought to the House floor.

3. Plaintiffs sued to collect on life insurance policies sold to Armenians who died in the former Ottoman Empire between 1915 and 1923; because their ancient claims were time-barred, plaintiffs invoked Section 354.4. The district court rejected defendant's argument that the national foreign affairs power and the Executive Branch's opposition to governmental recognition of an "Armenian genocide" preempted Section 354.4. On interlocutory appeal the panel reversed, holding the conflict between "express federal policy" and Section 354.4 "clear on the face of the statute." *Movsesian I*, 578 F.3d at 1060.

On rehearing, a newly divided panel, without explaining the change, reversed *Movsesian I*. Writing for the new majority, Judge Pregerson "conclude[d] that there is no clear federal policy with respect to references to the Armenian Genocide, and, therefore, that there can be no conflict." *Movsesian II*, 2010 WL 5028828 at *3. In the majority's view, the past three administrations' "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." *Id*. at *4. The

majority cited two categories of pronouncements as support for this proposition: those dating back a quarter century or more, consisting of 1975 and 1984 House resolutions and a 1981 presidential proclamation (*id.*); and those of "[t]he current administration," which "has also at times favored recognition of the Armenian Genocide." *Id.* The majority then rejected "the possibility of field preemption" because, in its view, "California's attempt to regulate insurance clearly falls within the realm of traditional state interests" and "has, at most, an incidental effect on foreign affairs." *Id.* at *5. The majority's sole support for this conclusion was Justice Ginsburg's *Garamendi* dissent. *Id.*

Senior Judge Thompson dissented. Noting consistent presidential opposition to governmental recognition of an Armenian genocide, he would have found Section 354.4 "preempted because it clearly conflicts with this express federal policy." *Id.* at *7. Judge Thompson thought "the same result mandated under a theory of field preemption" because the California law is "incompatible with the federal government's foreign affairs power, even in the absence of any conflict." *Id.* He noted that "§ 354.4 is California's attempt to provide relief to a specific category of claimants who were aggrieved by a foreign nation, not a general attempt to regulate the insurance industry," observing that this "is not an area of 'traditional state responsibility.'" *Id.* at *8. Finally, Judge Thompson reasoned that, although the panel majority followed Justice Ginsburg's dissent in

Garamendi, "[t]he *Garamendi* majority specifically *rejected* Justice Ginsburg's position." *Id.* He concluded that the panel's analysis was both inconsistent with *Garamendi* "and in conflict with our recent case law on the issue." *Id.* at *8, *9 (citing *von Saher* and *Deutsch*).

THE PETITION SHOULD BE GRANTED

The panel's decision should not stand. As Judge Thompson noted, the panel majority—quite remarkably—followed the dissent rather than the Supreme Court's governing decision in *Garamendi*. And the panel paid no more attention to this Court's controlling rulings in *von Saher* and *Deutsch*, or to the Second Circuit's recent decision in *Generali*, than it did to the Supreme Court: its discussion of field preemption and Section 354.4's conflict with federal policy failed even to cite, much less distinguish, any of those rulings. The panel consequently misapplied the law governing an area of national importance and international sensitivity, allowing California to interfere with the President's authority to determine foreign policy and threatening vital U.S. interests. It is critical that the en banc Court correct this error.

A. Section 354.4 Improperly Intrudes On The Federal Government's Exclusive Authority Over Foreign Affairs.

1. Wholly apart from its conflict with express federal policy, Section 354.4 is preempted because it oversteps state authority by "intru[ding] … the State into the field of foreign affairs." *Garamendi*, 539 U.S. at 417 (quoting *Zschernig v.*

Miller, 389 U.S. 429, 432 (1968)). "[T]he Supreme Court has long viewed the foreign affairs powers ... as reflections of a generally applicable constitutional principle that power over foreign affairs is reserved to the federal government." *Deutsch*, 324 F.3d at 709; *see also Garamendi*, 539 U.S. at 413-14. Thus, as this Court held in both *Deutsch* and *von Saher*, "the general principle is that 'even in [the] absence of a treaty' or federal statute, a state may violate the Constitution by 'establish[ing] its own foreign policy.'" *Deutsch*, 324 F.3d at 709 (quoting *Zschernig*, 389 U.S. at 441); *see von Saher*, 578 F.3d at 1025-29.

Yet that is just what California did in Section 354.4. As this Court described a companion provision, it created a "special class of tort action[]" (*Deutsch*, 324 F.3d at 708) applicable *only* to injuries occurring in a *single* foreign country. Such a statute necessarily has a "foreign policy purpose" and "send[s] an explicit foreign relations message." *In re World War II Era Japanese Forced Labor Litig.*, 164 F. Supp. 2d 1160, 1173, 1174 (N.D. Cal. 2001), *aff'd on other grounds in Deutsch v. Turner Corp*. This is the very definition of a law by which a state "establish[es] its own foreign policy."

In rejecting field preemption, the panel's *only* response was that Section 354.4 was "California's attempt to regulate insurance [and] clearly falls within the realm of traditional state interests." *Movsesian II*, 2010 WL 5028828 at *5. But that plainly is not so, and identical reasoning was flatly rejected in *Garamendi*, 539

U.S. at 425-27, *von Saher*, 578 F.3d at 1025-27, and *Deutsch*, 324 F.3d at 707-08, 711; *see also Generali*, 592 F.3d at 119. Section 354.4 is not a generally applicable statute of limitations of the sort that constitutes "traditional state legislative subject matter" (*Garamendi*, 539 U.S. at 425); the limitations period applicable to century-old foreign claims against foreign insurers arising out of a foreign conflict is hardly "regulation" of California insurance transactions or insurers. Instead, the law addresses what the Legislature declared to be unique harms suffered by victims of the "Armenian Genocide"—a term that the national government explicitly avoids as a matter of foreign policy. The conclusion is unavoidable that, so far as Section 354.4 is concerned, "foreign policy attitudes[] ... are the real desiderata." *Zschernig*, 389 U.S. at 437. And on this, "national, not state, interests are overriding." *Garamendi*, 539 U.S. at 421. The Court recognized that very principle in *von Saher*, 578 F.3d at 1026, a case argued and decided with *Movsesian I* ("Courts have consistently struck down state laws which purport to regulate an area of traditional competence, but in fact, affect foreign affairs"); *see also Deutsch*, 324 F.3d at 707. It is no less applicable here.

2. The Supreme Court recognizes the foreign-affairs preemption doctrine because foreign nations are unlikely to distinguish between state and federal enactments. State laws addressing matters of international concern thus carry "great potential for disruption or embarrassment" of U.S. foreign policy.

Zschernig, 389 U.S. at 435. Any adverse reaction by foreign governments to state laws "of necessity would be directed at American [interests] in general, not just that of the ... State, so that the Nation as a whole would suffer." *Japan Line, Ltd. v. Los Angeles County*, 441 U.S. 434, 450 (1979).

That threat is not theoretical. As Judge Thompson noted, "[t]he President's concern that a formal recognition of the 'Armenian genocide' might have negative consequences on our relations with Turkey is very real." *Movsesian II*, 2010 WL 5028828 at *9 n.3. This danger is presented in especially acute form by Section 354.4, which—as this case demonstrates—may result in *federal* judges issuing *federal* judgments premised on California's recognition of an "Armenian Genocide." Indeed, in *Deirmenjian*, 526 F. Supp. 2d at 1089, a case invalidating CCP § 354.45 (Section 354.4's companion provision allowing actions by "Armenian Genocide" victims to recover looted assets), Turkey's Ambassador to the United States informed Judge Morrow that "[w]hether to term such a tragedy genocide … has foreign policy implications," expressing concern about "allowing your court to become an advocate of one side in a genuine historic controversy." Letter from Nabi Sensoy to the Honorable Margaret M. Morrow (Feb. 23, 2007), at 1, 2 (reprinted in the Addendum to Munich Re's Panel Reply Brief).[2] California's enactment of Section 354.4 impermissibly assigns California a role in the

[2] The *Movsesian II* panel refused to take notice of a similar letter sent by Turkey's Ambassador. *See* 2010 WL 5028828 at *9 n.2.

formation of foreign policy that the Constitution does not. The statute should be invalidated for that reason alone.

B. Section 354.4 Conflicts With Federal Policy.

The panel committed a second and equally consequential error in declining to invalidate Section 354.4 as inconsistent with federal policy. "[S]tate laws 'must give way if they impair the effective exercise of the Nation's foreign policy.'" *Garamendi*, 539 U.S. at 419 (citation omitted). As described above, the "national position, expressed unmistakably" by the Executive Branch (*id*. at 421), is that formal recognition of an "Armenian Genocide" by the United States is inconsistent with the national interest. That has been "consistent Presidential foreign policy" (*id*.) in recent times, expressed in the most forceful terms by the Administrations of Presidents Clinton, George W. Bush, and Obama. *See Movsesian I*, 578 F.3d at 1057-59; *Movsesian II*, 2010 WL 5028828 at *7 (Thompson, J., dissenting).

The majority's principal response on this point was to claim that these policy expressions are "counterbalanced" or "outweighed" by "various statements from the federal executive and legislative branches *in favor* of such recognition." *Movsesian II*, 2010 WL 5028828 at *4. That proposition is quite plainly wrong. The first category of statements cited by the panel majority—House resolutions dating to 1975 and 1984, and President Reagan's 1981 proclamation—are wholly irrelevant because they long predate *current* U.S. policy. Because it is

fundamental that "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" (*Garamendi*, 539 U.S. at 413 (citation omitted)), state law necessarily must be measured against "the Nation's foreign policy" that is *presently* in force. *Id.* at 419 (citation omitted).

The panel majority committed further error in opining that "the current administration has also at times favored recognition of the Armenian Genocide." *Movsesian II*, 2010 WL 5028828 at *4. Because foreign policy is the province of presidents, not candidates for president, that view finds no support in a statement by then-*Senator* Obama that never has been repeated during *President* Obama's administration. The panel also concluded that the current policy lacks clarity by pointing to President Obama's use of the phrase "Meds Yeghern" in an April 2009 proclamation, which the panel majority declared (without citation) to be "the term for 'Armenian genocide' in the Armenian language." *Id.* But it is not. "Meds Yeghern is generally translated as "great calamity," not "genocide." *E.g.*, *Meds Yeghern*, N.Y. Times (May 6, 2009), http://schott.blogs.nytimes.com/2009/05/06/meds-yeghern. This is a distinction of crucial importance in the context of foreign

policy.[3] President Obama used the term for just that reason; indeed, its use was forcefully criticized as a "disgraceful capitulation" to "political expediency" by many in the Armenian-American community precisely because it does *not* mean "Armenian genocide."[4] *See, e.g.*, Letter from Kenneth V. Hachikian, President of the Armenian National Committee of America (ANCA), to President Barack Obama (May 18, 2009) (expressing "profound disappointment with your decision not to … recognize the Armenian Genocide" in the 2009 "Meds Yeghern" proclamation), *available at* http://www.armenianweekly.com /2009/05/18/anca-

[3] The U.S. position has been to refrain from use of the word "genocide" while recognizing that there were "mass killings" and "massacres" of ethnic Armenians in the Ottoman Empire. Letter from President Bill Clinton to Speaker J. Dennis Hastert (Oct. 19, 2000), 2000 WLNR 4629055; Press Release, White House Office of the Press Secretary, President Bush Discusses Foreign Intelligence Surveillance Act Legislation (Oct. 10, 2007), 2007 WLNR 19889225.

[4] *See* Harut Sassounian, *Genocide Recognition and a Quest for Justice*, 32 Loy. L.A. Int'l & Comp. L. Rev. 115, 116 (2010) (President of the United Armenian Fund writes: "President Obama, for reasons of political expediency, resuscitated that old Armenian term [Meds Yeghern] in his April 24 statement, even though, for the past 60 years … Armenians have referred to those mass killings as 'tseghasbanoutyoun' which means genocide."); Laura Rozen, *Obama on Armenian Remembrance Day: "One of worst atrocities in 20th century"*, Politico (Apr. 24, 2010) ("the Armenian National Committee of America … rapped Obama for 'offering euphemisms and evasive terminology'"), http://www.politico.com/blogs/laurarozen/0410/Obama_on_Armenian_Remembrance_Day_One_of_worst_atrocities_in_20th_century.html; *Obama bows to convention in statement on Armenian massacre*, ABC News (Apr. 25, 2009) ("after pressure from key US ally Turkey, which is currently involved in reconciliation talks with Armenia, [President Obama] trod a delicate diplomatic path and pointedly refrained from using the English word 'genocide.'"), http://www.abc.net.au/news/stories/2009/04/25/2552554. htm?section=justin.

chairman-shares-communitys-sharp-disappointment-with-obama/.[5] And any doubt about the nature of current policy is resolved by the statements made by President Obama's State Department in late December 2010 forcefully reaffirming the United States' "strong[]" opposition to governmental recognition of an "Armenian genocide." *See* December Press Briefings, *supra*.[6]

California's approach thus "undercuts the President's diplomatic discretion and the choice he has made in exercising it." *Garamendi*, 539 U.S. at 423-24. The Executive Branch has opposed governmental recognition of an "Armenian Genocide" based on its determination of what best serves U.S. diplomatic interests. By nevertheless attributing genocide to Turkey, while giving both a governmental forum and a judicially enforceable remedy to the victims of that "genocide" and

---

[5] The only apparent record reference on point is in the September 2009 amicus brief from the Armenian Bar Association and ANCA, among others, stating, without citation (at 16), that the President's 2009 proclamation "used the Armenian name for the Armenian genocide, 'The Meds Yeghern.'" That representation to the panel by ANCA simply cannot be squared with its prior objection that the terms have fundamentally different meanings. *See* p. 15 & n.4, *supra*.

[6] The panel's conclusion draws no more support from the observation that, "while some forty states recognize the Armenian Genocide, the federal government has never expressed any opposition to any such recognition." *Movsesian II*, 2010 WL 5028828 at *5. These state declarations are of a decisively different character than Section 354.4. Many are historic artifacts that long predate the current Executive Branch policy. Virtually all involved simple declaratory statements or resolutions by a governor or state legislature.

Section 354.4 uniquely creates *enforceable* rights; by doing so, it is far more likely to jar foreign sensibilities than is a boilerplate and precatory state proclamation valid only for its date of issuance.

their heirs, California "'compromise[d] the very capability of the President to speak for the nation with one voice in dealing with other governments.'" *Id*. at 424 (citation omitted). The en banc Court accordingly should grant review to address the validity of a state law that can be expected to have significant implications for U.S. foreign policy.[7]

[7] The panel majority was plainly incorrect if it meant to suggest—in conflict with the Supreme Court in *Garamendi* and the Second Circuit in *Generali*—that conflict preemption will not come into play unless the governing federal policy is embodied in a treaty, statute, or executive agreement. *See id.* at *3; *compare id*. at *9 (Thompson, J., dissenting). Although *Garamendi* discussed executive agreements, its invalidation of state law was based not on formal preemption by those agreements but on state "*interference with the foreign policy those agreements embod[ied]*." 539 U.S. at 417 (emphasis added). The Second Circuit followed that analysis when it recently agreed, in rejecting a claim that *Garamendi's* force was dependent upon the existence of an executive agreement, that the Supreme Court "did not find that the United States policy … depended on the existence of executive agreements. Rather, the Court viewed the executive agreements as the product of the policy." *Generali*, 592 F.3d at 118. The *Movsesian II* majority did not cite *Generali*, and thus had no occasion to distinguish it.

Although plaintiffs nevertheless relied on *Medellin v. Texas*, 552 U.S. 491 (2008), for the proposition that federal foreign policy will not have preemptive effect unless embodied in an executive order, *Medellin* stands for no such proposition. The *Medellin* Court did not draw the distinction between formal executive agreements and other expressions of Executive Branch policy that is advanced by plaintiffs here; instead, *Medellin* questioned a presidential directive issued to state courts "that reache[d] deep into the heart of the State's police powers and compel[led] state courts to reopen final criminal judgments and set aside neutrally applicable state laws." *Id*. at 532. That holding has no bearing on the application of federal policy to Section 354.4, which, to say the least, is not "neutrally applicable." The Second Circuit agreed with this analysis in *Generali*. *See* 592 F.3d at 119 n.2.

CONCLUSION

The Court should grant rehearing en banc.

Dated: January 3, 2011

Respectfully submitted,

MAYER BROWN LLP
NEIL M. SOLTMAN
CHARLES ROTHFELD
CHRISTOPHER P. MURPHY
MATTHEW H. MARMOLEJO

By: s/Neil M. Soltman
Neil M. Soltman
Attorneys for Defendant and Appellant
MÜNCHENER RÜCKVERSICHERUNGS-GESELLSCHAFT AKTIENGESELLSCHAFT

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This petition complies with the type-volume limitation of Fed. R. App. P 32(a)(7)(B) because this brief contains 4,197 words, excluding the parts of the brief exempted by Fed. R. App. P 32(a)(7)(B)(iii).

This petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point font size and Times New Roman typestyle.

``

By: s/Neil M. Soltman
Neil M. Soltman
Attorneys for Appellant and Defendant
MÜNCHENER RÜCKVERSICHERUNGS-
GESELLSCHAFT AKTIENGESELLSCHAFT