05-5602-cv

United States Court of Appeals

for the

Second Circuit

MARTA DRUCKER CORNELL and SAMUEL HERSLY,

Plaintiffs-Appellants,

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

Plaintiffs,

– v. –

ASSICURAZIONI GENERALI S.P.A. - Consolidated,

Defendant-Appellee,

(For Continuation of Caption See Inside Cover)

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

PROOF BRIEF FOR DEFENDANT-APPELLEE

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WIENER ALLIANZ WIENER ALLIANZ VERSICHERUNGS AKTIENGESECHAFT AG, also known as Phenix Allegemeine Phenix Allegemeine Versicherungs Aktiengesellschaft, A.G. F., ASSURANCES GENERALES DE FRANCE VIE, RIUNIONE ADRIATICA DI SICURTA S.P.A., - Consolidated, ALLIANZ GROUP OF GERMANY, BAVARIAN REINSURANCE COMPANY, also known as Bayerisiche Allegemeine Versicherungs Aktiengesellschaft, INSURANCE COMPANIES #1-100, WIENER ALLIANZ VERSICHERUNGS AG, as a Successor-in-Interest to Phonix Allgemeine Versicherungs Gesellschaft and Fortuna R.T. Budapest Universal Insurance Company, VICTORIA LEBENSVERSICHERUNG AG, BASLER LEBENSVERSICHERUNGS GESELLSCHAFT, GERLING KONZERN LEBENSVERSICHERUNGS-AG, ZUERICH LEBENSVERSICHERUNGS GESELLSCHAFT, NORDSTERN LEBENSVERSICHERUNGS-AG, UNION DES ASSURANCES DE PARIS, as Successor-in-Interest to L`Union, VEREINTE VERSICHERUNG AG, as Successor-in-Interest to Isar Lebensversicherung AG and Magdeburger Versicherung AG, MANNHEIMER LEBENSVERSICHERUNG AG, WINTERTHUR LEBENSVERSICHERUNGS GESELLSCHAFT, DEUTSCHER RING LEBENSVERSICHERUNGS-AG, as Successor-in-Interest to Star Life of Prague Insurance Company, Funnick, Osterreichische Versicherungs Aktiengesellschaft, and Phonix and/or Phonix Osterreichische Lebensversicherungs-AG, JOHN DOE CORPORATION #1, as Successor-in-Interest to Phonix Allgemeine Versicherungs Gesellschaft, JOHN DOE CORPORATION #2, as Sucessor-in-Interest to Phonix (Prague, The Czech Republic), JOHN DOE CORPORATION #3, as Sucessor-in-Interest to Feniks Life Insurance Co. (In Bulgaria), JOHN DOE INSURANCE COMPANIES OR CORPORATIONS #4-100,

Defendants,

CALIFORNIA INSURANCE COMMISSIONER,

Movant.

CORPORATE DISCLOSURE STATEMENT

Appellee Assicurazioni Generali S.p.A. ("Generali") is an Italian corporation. It has no parent corporation, and the only publicly held corporation that owns 10% or more of its stock is Mediobanca S.p.A., another Italian corporation.

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PRELIMINARY STATEMENT

These coordinated appeals, which now exclude three class actions that are the subject of a recent class settlement, raise a narrow issue: whether the District Court (Mukasey, Ch. J.) correctly held that the Supreme Court's decision in *American Insurance Ass'n v. Garamendi*, 539 U.S. 396 (2003) ("*AIA*") – a case involving the same insurance company and many of the same pre-World War II Eastern European insurance policies as here, and in which the Court struck as unconstitutional a California statute expressly designed to support many of these lawsuits – requires dismissal of the cases being pressed by the non-settling Appellants. The District Court's dismissal order is reported at *In re Assicurazioni Generali S.p.A. Holocaust Insurance Litigation*, 340 F. Supp. 2d 494, 504 (S.D.N.Y. 2004) ("*Generali II*").

This Court should affirm *Generali II*. Just as the Supreme Court held in *AIA* that a *statute* intended to support the prosecution of these and similar cases was preempted by the Federal Government's policy that Holocaust-era insurance claims be addressed exclusively by the international commission created to resolve them (and which has successfully resolved thousands of claims and distributed hundreds of millions of dollars), the District Court properly held that the *cases* themselves are preempted.

AIA and this matter overlap greatly. Generali is the target of all Appellants' claims, and it likewise was a named party to *AIA*, having sued the California Insurance Commissioner upon being singled out by him under the unconstitutional statute for expulsion from the state (in addition to being specifically targeted by the California Legislature). Also, the California statute stricken in *AIA* was enacted expressly to support most of the actions here – sixteen of the remaining eighteen appeals originated in California. *See* 539 U.S. at 410 (the statute "was proposed to 'ensure that Holocaust victims or their heirs can take direct action on their own behalf with regard to insurance policies and claims'") (quoting legislative history). The Supreme Court held that the statute was preempted, because it was squarely at odds with the Federal Executive Branch's endorsement of the International Commission on Holocaust Era Insurance Claims ("ICHEIC") as the *exclusive* means for resolving actions such as these. ICHEIC is the claims-resolution organization supported by the United States Government and composed of representatives from leading Jewish organizations, state insurance commissioners (including those of New York and California), and a number of insurance companies.

The District Court properly held that the rationale of *AIA* likewise mandated dismissal of Appellants' cases. It relied on the Supreme Court's unequivocal statements that "*resolving Holocaust-era insurance claims that may be held by*

residents of this country is a matter well within the Executive's responsibility for foreign affairs." *Id.* at 420.[1] The *AIA* Court found that the Executive had affirmatively and unmistakably exercised its prerogative, stating that "*[as] for insurance claims in particular, the national position . . . has been to encourage European insurers to work with the ICHEIC to develop acceptable claim procedures*." *Id.* at 421. And it approvingly cited, among many others, a statement by a key Executive Branch official that "'[t]he U.S. Government has supported [ICHEIC] since it began, and we believe *it should be considered the exclusive remedy for resolving insurance claims from the World War II era.*'" *Id.* at 422 (alterations in original) (citation omitted).

In the wake of *AIA* and the District Court's dismissal order in *Generali II*, the former Appellants in the leading class actions have agreed to settle their claims in return for Generali's agreement to resolve all pending ICHEIC claims in accordance with ICHEIC's payment guidelines and to allow yet an additional period for claims to be made outside the ICHEIC process. (The appeals of the settled class actions have been stayed and the cases remanded by this Court to the District Court for settlement approval proceedings.) Thus, the actions in these appeals involve Appellants who have eschewed ICHEIC, and advocated for years

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[1] All emphasis herein is added, unless otherwise indicated.

against ICHEIC's existence or against *any* negotiated resolution of Holocaust-era disputes. Indeed, some of them have even unsuccessfully sued ICHEIC. They instead are intent on pursuing lengthy and complex litigation aimed at recovering windfall punitive damages, in suits brought at times and in jurisdictions having no temporal or geographic nexus to the insurance policies at issue. These non-settling Appellants' attacks on *Generali II* uniformly fail, for the reasons given by the District Court in carefully evaluating and rejecting substantially identical arguments again pressed here. In short, the *AIA* decision itself undermines Appellants' arguments that it does not control the outcome here.

Appellants argue that suits against Generali are not among those within the ambit of the Federal Government's policy that Holocaust-era insurance claims be resolved by ICHEIC. However, the District Court pointed to abundant evidence, also relied upon by the Supreme Court in *AIA*, establishing that the Executive Branch's policy was intended to, and in fact did, apply to claims against Generali, no less than to all other insurance claims. *E.g.*, 340 F. Supp. 2d at 503 ("Nor is there any serious doubt that the executive policy favoring ICHEIC resolution of Holocaust-era insurance claims extends to claims against Generali in particular.").

As support for this conclusion, the District Court cited, among other things, the *AIA* Court's failure to allow the California statute to be enforced against Generali, despite the California Insurance Commissioner's arguments that the

statute should at least be allowed to stand to this extent. *Id.* The District Court also cited and cataloged numerous statements by the Executive Branch supporting ICHEIC as the exclusive forum for *all* relevant claims, including those against Generali. *Id.* at 503-04. Whether or not, as suggested by the District Court, Appellants have a takings claim against the U.S. Government for having adopted its preemptive policy, *see id.* at 503 n.6, any recovery for Holocaust-era insurance policies themselves was exclusively within ICHEIC's purview.

Finally, there is no weight to Appellants' additional arguments, which are based on inapposite authorities and overlook the relevant cases in addition to *AIA*. Perhaps because their legal position is untenable, Appellants reiterate here the same baseless charges paraded before the Supreme Court, that Generali was complicit in the suffering visited on Holocaust victims. Generali has the deepest respect for these victims and their heirs, but no plea for sympathy can salvage or should influence the outcome of these lawsuits.

STATEMENT OF THE CASE

These appeals involve actions that were consolidated for pretrial purposes by the Panel on Multidistrict Litigation. The initial actions were two putative class actions – now the subject of the recent settlement – filed in the Southern District of New York in 1997 and 1998. The MDL Panel subsequently transferred to the District Court a number of individual actions (a handful of which settled from time

to time, although not as part of the class settlement), and two additional putative class actions (one of which also is the subject of the settlement).

As a result, of the appeals remaining before this Court, all but two were filed in California by a single law firm. The two other cases on appeal originated in Florida and Wisconsin.[2] Each case involves claims by an heir of the insureds under insurance policies written in Eastern Europe in the 1920s-'40s, seeking contractual, tort-based and punitive damages under various state law theories. Certain Appellants, including those in the California actions, have asserted additional ancillary claims attacking ICHEIC's payment procedures and Generali's involvement with the organization. *See Generali II*, 340 F. Supp. 2d at 508 (table summarizing the various Appellants' claims). Relatedly, two of the California Appellants – nos. 05-5604 (*Steinberg*) and 04-6161 (*Brauns*) –separately sued ICHEIC, but not Generali, in California state court. That case was dismissed at the pleadings stage in light of *AIA* and affirmed on appeal, as discussed below.

Generali's motion to dismiss leading to *Generali II* contained several independent grounds for dismissal, including, in addition to the grounds ultimately relied on by the District Court, the following:

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[2] Appellant in one case, no. 05-5311 (*Tabaksman*), originating in New York, has accepted a settlement, but the withdrawal of his appeal has not yet been fully documented.

- That European law governed the Appellants' claims both under traditional choice-of-law principles, as well as Constitutional choice-of-law limitations under the Due Process clause of the Fourteenth Amendment[3];

- That under the governing European laws, the claims were barred for a number of reasons, particularly to the extent they sought to recover tort-based or punitive damages (counsel for the California Appellants admitted as much in an early California proceeding, saying "Czech law is checkmate" *see* Joint Appendix ("JA") __ [Declaration of Peter Simshauser dated 11/14/02, submitted in connection with *Generali II*, Ex. 7 at 46:1]; and

- That the claims presented nonjusticiable issues and accordingly were barred by the political question doctrine.

See JA __ [Generali's Memorandum of Law in Support filed 11/15/02, submitted in connection with *Generali II* ("Generali Supp. Mem. *Generali II*") at 21-46, 46-57, 57-65]. The District Court did not address any of these arguments in *Generali II*.[4] Nor have Appellants addressed them in this Court. We accordingly will not do so, although they each provide an independent basis for dismissal and hence affirmance.

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[3] Earlier in the case and well before the *AIA* decision, the District Court had tentatively agreed that the claims against Generali likely would have to be adjudicated under the substantive law of each of the Eastern European countries where the various insurance policies were issued. *In re Assicurazioni Generali S.p.A. Holocaust Ins. Litig.*, 228 F. Supp. 2d 348, 368-69 (S.D.N.Y. 2002) ("*Generali I*").

[4] In not reaching these issues, the District Court acted as had the Supreme Court in *AIA*. Although it initially granted certiorari on whether the California HVIRA was unconstitutional under the Due Process Clause or Commerce Clause, it ultimately did not reach these questions in light of its decision to strike the statute on foreign affairs grounds. *AIA*, 539 U.S. at 413 n.7.

STATEMENT OF FACTS

A. Background

Appellants' attempt to avoid the application of *AIA* is replete with unsubstantiated allegations about Generali's conduct in the turmoil of World War II and the chaos that followed.[5] We are, therefore, compelled briefly to offer the historical context based on actual historical documents and sworn declarations.

1. Generali's History

Generali was founded by Jewish merchants in 1831 in Trieste, then an important port in the Austro-Hungarian Empire. JA __ [Declaration of Christopher Carnicelli filed 11/15/02, submitted in connection with *Generali II* ("Carnicelli Decl. *Generali II*") at ¶ 2]. Through World War I, Generali was a significant insurer in the Central and Eastern European territories comprising that empire. *Id.* At the end of World War I, when Trieste was ceded to Italy, Generali acquired Italian nationality. *Id.* Between the two world wars – when the insurance policies in these litigations were issued – it operated in the areas that included what became Austria, Hungary, Czechoslovakia, Poland, and Yugoslavia. *Id.* Generali also issued policies elsewhere in Europe. *Id*.

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[5] *See* Appellants' page proof brief in 05-5602 ("Cornell Br.") at 9-11; Appellants' proof brief in 05-5612 ("Weiss Br.") at 2-16; Appellants' supplemental opening brief in 05-5602 ("Brauns Br.") at 8-11.

2. The Impact Of World War II And Its Aftermath On Generali

Generali's losses from World War II and the ensuing Communist takeover in Eastern Europe cannot, of course, be compared to the horrors of the Holocaust, and this is not an attempt to do so. But Generali's predicament is relevant to understand why policies issued in Eastern Europe remained unpaid after World War II in the wake of the Communist takeover. The reason was not, as Appellants strive to suggest at every turn, a conscious practice against Holocaust victims or Jews.

World War II alone devastated Generali's business. In some countries, Generali suffered as much as a 90% reduction in the number of insurance contracts issued and a similar reduction in the capital insured. JA __ [Carnicelli Decl. *Generali II*, Ex. 1 at 1-3]. Equally devastating was the effect of the war on Generali's assets. JA __ [Carnicelli Decl. *Generali II* at ¶ 3]. In 1947, for example, Generali generated business representing only 25% of its pre-war level, and it held only 50% as many assets as it did before the war. JA __ [Carnicelli Decl. *Generali II*, Ex. 2 at 1].

Generali received a number of claims on pre-war insurance policies after World War II, many long after the time had lapsed under the policies for seeking recovery. JA ___ [Carnicelli Decl. *Generali II* at ¶ 4]. The decision whether to pay these claims had *nothing* to do with whether claimants could provide evidence

of the insureds' deaths, or whether the policyholders or beneficiaries were Jews or Aryan, as Appellants recklessly allege. For policies issued in Western Europe, where no other restitutionary arrangements had been made, Generali uniformly paid claims – even when untimely and even when claimants lacked some required documentation – and *never* made a distinction between Holocaust victims and others. *Id.*

However, the Communist takeover in Eastern Europe following the war – which affected everyone's assets, not just those of Nazi victims – led Generali to a different approach regarding policies issued in that region. As they stormed across Eastern Europe and through the late 1940s, the Soviets and their Communist regimes abolished private property and financial holdings, including insurance, and they nationalized or liquidated all businesses and industries, including the insurance business. JA ___-___ [Declarations filed 11/15/02, submitted in connection with *Generali II*: Jaroslav Sodomka Decl. ("Sodomka Decl. *Generali II*") at ¶¶ 51-82; Istavan Hajdu Decl. at ¶¶ 25, 27-39; Dr. Andrzej W. Wisniewski Decl. at ¶¶ 35-43; Aleksandar Preradovic Decl. at ¶¶ 16-22; Juadr. Jan Havlát Decl. at ¶ 22]. State-run companies took over the assets and policies from nationalized insurers such as Generali. *Id.* Assets held by individuals – *all* individuals, not just Nazi victims – suffered the same fate, as policyholders' and beneficiaries' rights to payment under nationalized policies were severely curtailed and often cancelled by

operation of local law. *Id.* Certain state-run insurance entities even openly confirmed that the Communist governments had expressly assumed all obligations under pre-war policies. *Id.*

Czechoslovakia is illustrative. In early May 1945, Czechoslovakia was overrun by Soviet troops, and by mid-May a new government subjected all assets of "enemy countries," including Italy, to government administration, withdrawing any authority of Generali over its portfolio or assets. JA ___ [Sodomka Decl. *Generali II* at ¶ 52-53]. It nationalized Generali's Czech policies and assets – which were substantial because pre-war insurance laws had long required foreign insurers to hold local assets to support locally issued policies. By October 1945, all private insurance companies in Czechoslovakia, not just "enemy property," were nationalized. JA __ [*Id.* at ¶ 74]. And in November 1946, four government-run insurance entities, including one called "Prazska pojistovna," were formed to succeed to the nationalized business. JA __ [*Id.* at ¶ 79]. A December 1946 bulletin issued by the state-run company confirmed Generali's loss of its Czech business:

> I am sorry for you, dear Assicurazioni Generali! You prided yourself so on your tradition of over a hundred years, and now you are like a coin they have withdrawn from circulation. . . . Assicurazioni Generali is dead – Long live Prazska pojistovna.

JA __ [Sodomka Decl. *Generali II*, Ex. U]. Under the order creating Prazska pojistovna, the state entity did not merely swallow Generali's property, it also

succeeded to Generali's liabilities and obligations, including those under individual insurance policies. *Id*.

On May 25, 1948, Prazska pojistovna was merged with the three other state-owned entities to form a new national insurance conglomerate, called "Ceskoslovenska Pojistovna." JA ___ [Sodomka Decl. *Generali II* at ¶ 81]. Having confiscated Generali's assets within Czechoslovakia, the new entity assumed all the liabilities and obligations under insurance policies issued by Generali, as detailed in a January 28, 1950 letter to Generali:

> The entire Czechoslovakia insurance portfolio of Assicurazioni Generali Company, which was nationalized by becoming part of the government on October 27, 1945, became on that day an independent enterprise and, subsequently, Prazska pojistovna narondni podnick took over, effective January 1, all the rights and all the obligations relating to insurance entered on the books of the offices in Prague and Brno. . . . *We are willing to confirm for you – in any way that you may wish – that your company has nothing to do with the policies in question and that all the rights and obligations arising therefrom have been taken over by our Enterprise*.

JA __ [*Id.* at ¶ 82].

The state entity confirmed this position, at Generali's request, in a March 8, 1950 affidavit certified and notarized by the Czech Ministry of Finance:

> On the basis of the Decree of the President of the Republic on October 24, 1945, Coll. No. 103 concerning the nationalization of the private insurance companies, the nationalized portfolio of the Prague Office of the ASSICURAZIONI GENERALI Insurance Company of Trieste was taken over, with all of the rights and obligations arising therefrom.

JA __ [*Id.* at ¶ 86]. The affidavit continued that holders or beneficiaries of policies issued by Generali's Prague branch could submit claims only to the state run entity, not to Generali:

> [Claimants] can enforce their rights and obligations arising from the nationalized insurance portfolio of the Prague Office of the ASSICURAZIONI GENERALI Insurance Company of Trieste only against CESKOSLOVENSKA POJISTOVNA, narodni podnik, Prague, *to the absolute exclusion of Assicurazioni Generali of Trieste*.

JA __ [*Id.*] This history, typical of the Cold War, repeated itself in many of the other Eastern European countries in which Generali had conducted business. This, not some campaign against Holocaust victims, is what underlies the policies left unpaid by Generali in the wake of World War II and the policies at issue in these appeals.[6]

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[6] Inflammatory rhetoric is at its most strident where Appellants offer conclusory allegations (copied almost verbatim from an unverified complaint filed in a California action) of complicity between Generali and the Third Reich. Cornell Br. at 10. This appeal is not the vehicle to document Generali's honorable history during World War II. Moreover, similar attempts to besmirch Generali were, in any case, of no consequence to the *AIA* Court, and are likewise irrelevant here. As a California judge stated, in resisting a similar effort in an earlier litigation to influence the outcome by painting Generali as a Nazi collaborator:

> THE COURT: This case has involved references to the moral issues, and the insurance commissioner has been very aggressive at times depicting Generali as being very complicit in terms of what the Nazis did in the Second World War. . . . Generali has responded through its counsel, Mr. Rothman, with another series of documentation indicating that there's another side to the story. There's a letter from, I believe, Mr. Eagleburger who's now in charge of the

(cont'd)

B. The Federal Government's Longstanding Commitment To Resolving World War II-Era Claims, Including Insurance Claims, Without Litigation

1. Post-War Reparations

The Supreme Court and lower federal courts have recognized that the issue of reparations for Holocaust victims and victims of Communist nationalizations in Eastern Europe has been a fixture of American foreign policy for decades. *E.g.*, *AIA*, 539 U.S. at 403 (stating "[insurance policy] confiscations and frustrations of claims fell within the subject of reparations, which became a principal object of Allied diplomacy soon after the war," and discussing post-war reparations programs). Indeed, claims for reparations arising out of World War II and the Holocaust have always been managed at a governmental level, beginning with the 1945 Potsdam Agreement. *See In re Nazi Era Cases Against German Defendants*

(cont'd from previous page)

> fund that has been set up in Israel, and he's concerned that the Insurance Commissioner is disrupting the process. There's letters from the Israeli Knesset indicating that what Generali has done is above and beyond the call of duty. There are letters given to me from former employees of Generali who wanted to make comments regarding what Generali did for them in removing them from that terrible situation in Europe. You know, I don't think those are the issues that we need to get into. This is not a body to resolve the moral issues.

JA ___ [Transcript of 02/24/2000 hearing before Judge S. James Otero, California Superior Court, Los Angeles County, Dept. No. 68, in Case No. BC185376, *Stern v. Assicurazioni Generali*, and all related actions at 10:6-25].

Litig., 129 F. Supp. 2d 370, 376 (D.N.J. 2001) (describing history of government programs to address reparation claims non-judicially).

The Executive Branch's policy that Holocaust-era insurance claims be resolved by negotiation, not litigation, and particularly through ICHEIC, was integral to the government's approach to addressing the Holocaust-related claims that arose in the late 1990s, as the *AIA* Court discussed. 539 U.S. at 405-08. In summary, the Clinton administration spearheaded efforts – including international negotiations with Germany and many other European countries – to provide compensation for many Holocaust victims and their heirs who had not been previously compensated in the post-war reparations programs. *Id.* These efforts culminated in 1999 when the governments of the United States, Germany, Israel, Poland, Belarus, Ukraine, the Czech Republic and Russia established a foundation entitled "Remembrance, Responsibility and the Future" (commonly referred to as the "German Foundation") for Holocaust-related reparations against German companies. *Id.* The "Berlin Agreement" was announced on December 17, 1999, pursuant to which the German government and German industry contributed DM 10 billion (approximately $5 billion) to the German Foundation to pay Holocaust-related claims against Germany and German companies (including insurance companies), pursuant to agreed standards. *Id.* at 405. Many thousands of claimants have been paid through that process.

A critical feature of these efforts was the objective that Holocaust-related reparations not be subjected to protracted litigation in American courts. Former Deputy Secretary of the Treasury Stuart Eizenstat, who negotiated the Berlin Agreement on behalf of the United States, said that a central component of the agreement was that companies "not pay twice, once into this foundation and a second time into U.S. courts." JA __ [Carnicelli Decl. *Generali II*, Ex. 5 at 2]. Secretary of State Madeleine Albright reiterated this principle in Berlin when the agreement was announced, saying that "[t]he United States is agreeing to assist in providing legal peace to German companies, both in our courts and from state and local action." JA __ [Carnicelli Decl. *Generali II*, Ex. 6 at 2].

The Bush administration has likewise followed and endorsed the previous administration's commitment to resolving Holocaust-era claims without litigation. As stated in an official statement by Amb. Randolph Bell, Special Envoy for Holocaust Issues, "[i]t is the policy of the U.S. government that concerned parties, foreign governments, and non-governmental organizations should act to resolve matters of Holocaust-era restitution and compensation through dialogue, negotiation and cooperation." JA __ [Carnicelli Decl *Generali II*, Ex. 8 at 2]. *See also AIA*, 539 U.S. at 424 ("the portent of further litigation and sanctions has in fact placed the Government at a disadvantage . . . from persuading 'foreign governments and foreign companies [from all nationalities] to participate

voluntarily in organizations such as ICHEIC'" (quoting approvingly from *amicus* brief of the United States)); *Generali II*, 340 F. Supp. 2d at 503-04 (collecting pronouncements by several senior Executive Branch officials to the same effect).

2. The Federal Government's Unequivocal Endorsement Of The International Commission On Holocaust Era Insurance Claims As An Exclusive Remedy

With respect to Holocaust-era insurance claims in particular, the unanimous view of the Clinton and Bush administrations has been that these shall be resolved exclusively through ICHEIC. As the Supreme Court observed in *AIA*, "[a]s for insurance claims in particular, the national position, expressed unmistakably . . . has been to encourage European insurers to work with the ICHEIC to develop acceptable claim procedures." *AIA*, 539 U.S. at 421; *accord id.* at 422 (observing that this deference to ICHEIC has "been consistently supported in the high levels of the Executive Branch"); *Generali II*, 340 F. Supp. 2d at 504 (Amb. Bell testified before Congress that the "ICHEIC process enjoys today the full support of survivors' groups, of major Jewish-American NGOs, and of the Government of Israel, as well as of the Administration").

ICHEIC was established in 1998 as an organization of European regulators, European insurance companies (including Generali), representatives of Jewish and Holocaust survivor organizations, the State of Israel, and insurance regulators from the United States (including California, New York, Pennsylvania and Florida).

Several European governments and regulators, as well as the U.S. government, participated as observers. Under ICHEIC's protocols, member companies have paid documented Holocaust-era insurance claims according to relaxed (even anecdotal) standards of proof and agreed-upon valuation guidelines, which are favorable to claimants and responsive to the difficulties of proof in these ancient cases. JA __ [Declaration of Franklin B. Velie filed 5/25/01, submitted in connection with *Generali I* ("Velie Decl. *Generali I*") at ¶¶ 4-5]. An independent appeals process is available to any claimant dissatisfied with the evaluation of a claim.[7]

The Executive Branch has endorsed *no* other method for resolving Holocaust-era insurance claims, advocating instead that ICHEIC serve as the "exclusive remedy" not just for claims against German companies, but all

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[7] ICHEIC's standards of proof, processing guide, valuation guidelines, appeals tribunals and rules, and other relevant materials are all publicly available at "www.icheic.org/docs-documents.html". A collection of appellate panel decisions is publicly available at "www.icheic.org/docs-appealspanel.htm". The ICHEIC website can be found at "www.icheic.org". The valuation guidelines consist of a multiple of the insurance policy face values (in "hard," present-day currencies), which reflect changes in currency, economic circumstances and interest during the period from the insured event to the present day. In broad terms, they provide for the conversion of policy amounts from local currencies, in which the policies were expressed, into dollars at the exchange rate in effect before the outbreak of World War II and before many of these currencies were destroyed by war and hyperinflation. Dollar amounts are brought to the present through the application of historical interest rates and agreed upon multipliers.

European companies. The Supreme Court approvingly quoted Secretary Eizenstat, "'[t]he U.S. Government has supported [the ICHEIC] since it began, and we believe it should be considered the exclusive remedy for resolving insurance claims from the World War II era.'" *AIA*, 539 U.S. at 422 (alterations in original) (citation omitted).[8] To provide incentive for insurers like Generali to participate in ICHEIC, Secretary Eizenstat noted that participation in ICHEIC should give companies a ""safe haven" from sanctions, subpoenas, and hearings relative to the Holocaust period.'" *See Generali II*, 340 F. Supp. 2d at 504 (quoting, among other materials, Secretary Eizenstat's testimony from congressional record), JA___ [Velie Decl. *Generali I*, Ex. U at 7].[9]

The grounds for the government's unwavering allegiance to ICHEIC are clear: to provide fair and expeditious relief to Holocaust victims and their heirs, and to further relations between the United States, European allies and the State of Israel. "From the beginning, the Government's position . . . stressed mediated settlement 'as an alternative to endless litigation' promising little relief to aging

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[8] *Accord* JA __ [Carnicelli Decl. *Generali II*, Ex. 8 at 2] (Amb. Bell similarly endorsed ICHEIC as the "exclusive remedy" in his testimony before Congress); JA __ [Declaration of Peter Simshauser dated 11/20/01, submitted In Support of Anderman Motion to Dismiss ("Simshauser Decl. Anderman"), Ex. 2] ("I am pleased to affirm that the United States government continues to support the ICHEIC and believes it should be viewed as the exclusive remedy for unresolved insurance claims from the National Socialist era and World War II").

[9] *Accord* JA __ [Simshauser Decl. Anderman, Ex. 1 at 14] (same).

Holocaust survivors." *AIA*, 539 U.S. at 405. This position was confirmed by Ambassador James Bindenagel, State Department Special Envoy for Holocaust Issues, in a letter to William M. Shernoff, counsel for Appellants in the California actions that are part of this appeal:

> "As a matter of policy, the United States Government believes that the resolution of Nazi-era restitution and compensation matters, including those related to insurance, should be handled through dialogue, negotiation, and cooperation, rather than subject victims and their families to the prolonged uncertainty and delay that accompany litigation."

Generali II, 340 F. Supp. 2d at 504 (quoting letter); JA ___ [Surreply of Plaintiffs Lantos, et al., filed 11/19/03 in connection with *Generali II*, Ex. B at 1].[10]

Moreover, as former Deputy Secretary of State Richard Armitage clearly stated, resolution of claims through ICHEIC, as the "'exclusive remedy for unresolved insurance claims from the National Socialist era and World War II,'" furthers the United States' foreign policy interests by "'fostering good relations

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[10] *Accord* JA __ [Velie Decl. *Generali I*, Ex. W] (Secretary Eizenstat explained in a letter to ICHEIC Chairman former Secretary of State Lawrence S. Eagleburger that "[t]he U.S. government continues to support and encourage parties, foreign governments and non-governmental organizations such as ICHEIC to resolve matters of Holocaust-era restitution on a cooperative basis, rather than subject victims and their families to the prolonged uncertainty and delay that accompany litigation.")

with and among our European allies and the State of Israel.'" *Id*. at 504-05 (quoting statement).[11]

Appellants' remarkable conclusion that the federal government has taken essentially no position with respect to Generali's participation in ICHEIC is plainly blind to the record. Cornell Br. at 18-21. Wholly apart from the repeated policy expressions to the effect that ICHEIC be the exclusive remedy for these claims, Executive Branch officials *expressly* endorsed Generali's participation in ICHEIC. For example, on November 28, 2000, Secretary Eizenstat wrote to Chairman Eagleburger to applaud Generali's additional contribution of more than $100 million to ICHEIC. Specifically, Deputy Secretary Eizenstat stated that he "noted with great interest [ICHEIC's] recent announcement that an agreement was finalized with the Italian insurance company [Generali] to provide $100 million plus earnings for the payment of Holocaust-era insurance claims." JA __ [Velie Decl. *Generali I*, Ex. W]. He continued:

> Although the U.S. government was not a party to, and did not participate in the negotiating of, this agreement among Generali, the World Jewish Restitution Organization and Allied Organizations, and

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[11] *Accord* JA __ [Surreply of Plaintiffs Lantos, et al., filed 11/19/03 in connection with *Generali II*, Ex. B] (Letter from Amb. Bindenagel to Mr. Shernoff dated Nov. 13, 2001, stating, "[o]ur longstanding policy of support for ICHEIC is based on U.S. interests in obtaining a measure of justice for victims, while preserving and protecting our political and economic relations with our European friends and allies and the State of Israel.").

> [the ICHEIC], I commend the ICHEIC's untiring efforts to provide a measure of justice to Holocaust survivors and their heirs.

Id. In closing, Secretary Eizenstat reaffirmed the government's commitment to ICHEIC as the "exclusive remedy" for resolving "*all* insurance claims that relate to the Nazi era." *Id.*; *see Generali II*, 340 F. Supp. 2d at 503-04 (quoting this correspondence and noting that it expresses "no hint of a distinction between Generali and other European insurers"). In turn, Chairman Eagleburger informed Secretary Eizenstat that his letter would be used to assist Generali in securing dismissals of Holocaust-era litigations – to which neither Secretary Eizenstat nor any other government official voiced opposition or concern. JA __ [Velie Decl. *Generali I*, Ex. X].

C. Generali Is The Global Leader In Paying Holocaust-Era Insurance Claims

In 2001, Generali voluntarily and irrevocably transferred $100 million to ICHEIC after having already funded ICHEIC with approximately $12 million. JA __ [Carnicelli Decl. *Generali II* at ¶ 10]. The most recent class settlement (discussed below) is expected to add another $30 million to the payment of claims made through ICHEIC and yet unknown additional amounts to cover any new claims made under such settlement.

The doors of ICHEIC were open to claims from its creation through March of 2004 – more than five years. More than 90% of recipients of Generali offers

worldwide have accepted their ICHEIC offers, and Generali is expected to make some $130 million in payments through ICHEIC alone. In addition, the Generali Fund, a trust in Jerusalem created in 1997 and funded by Generali, which is managed by a board of trustees wholly independent of Generali, has issued offers to Generali-related claimants around the world totaling approximately $14 million and thus far has paid out approximately $11.6 million.[12]

The continued aspersions cast by Appellants (particularly the Weiss Appellants, *see infra*) on ICHEIC are wholly immaterial, as the District Court and the Supreme Court both held. *See Generali II*, 340 F. Supp. 2d at 507-08 (concerns about the adequacy of ICHEIC are irrelevant and foreclosed by the Supreme Court analysis); *AIA*, 539 U.S. at 427 ("[O]ur thoughts on the efficacy of [ICHEIC versus litigation] are beside the point . . . ."). However, they are also wholly unwarranted, as we briefly explain below.

Control of ICHEIC Decisions. There is no truth to Appellants' suggestion that Generali had effective control over all of ICHEIC's decisions. (Cornell Br. at 12.) Although ICHEIC has strived to work on a consensus basis, the ultimate

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[12] These amounts reflect updates since the time of Generali's filings before the District Court – at which time, Generali had made only a fraction of the offers and payments that it has today. The relevant numbers as of the time of Generali's filings in the District Court are set forth in the Joint Appendix at __ [Carnicelli Decl. *Generali II* at ¶ 13].

decision-making authority respecting operations and the resolution of disputed issues has always resided with Chairman Eagleburger – an authority he has exercised on numerous occasions in issuing decisions with which the member companies have strongly disagreed. JA __ [Declaration of Christopher Carnicelli filed 12/02/04, submitted in opposition to Weiss Appellants' Rule 59 Motion ("Carnicelli Decl. Rule 59") at ¶ 5]. This is confirmed by the Declaration of Lawrence Eagleburger submitted in the District Court, in which he explained that his brief resignation years ago was withdrawn after it was agreed that his decisions would be abided. JA __ [Declaration of Lawrence Eagleburger dated 04/16/00, submitted in connection with *Generali I* ("Eagleburger Decl. *Generali I*") at ¶ 5].

It is also undisputed that ICHEIC's key decisions were made by it, not Generali or other insurers. For example, ultimate responsibility for the valuation standards, which as noted above are favorable to claimants and were hotly debated before adoption, rested entirely with Chairman Eagleburger. JA __ [Reply Declaration of Franklin B. Velie filed 1/9/02, submitted in connection with *Generali I* ("Velie Reply Decl. *Generali I*") at ¶ 11, Ex. H at 1-6]. Appellants have offered *nothing* in the record to the contrary. *See* Cornell Br. at 13.[13]

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[13] Appellants' reliance on the Weiss Appellants' Reply Memorandum to Generali Defendants' Response to Rule 59 Motion ("Weiss Reply") in footnote 21 is defective. The Weiss Reply was filed with the District Court on February 5,

(cont'd)

Generali's Continuing Commitment To ICHEIC. Appellants continue to recite Generali's alleged freedom to "exit" the organization at any time. Cornell Br. at 14-15. These unsupported speculations could at least be theoretically entertained when, years ago, they were made to impeach a voluntary organization. But they are incomprehensible today, when the long ICHEIC process is coming to a successful end, with Generali's ongoing and full support. We now *know* that Generali has stood by ICHEIC for its full and successful run. As noted below, Generali's commitment both to ICHEIC and its Holocaust-related claimants is reinforced by the recent class action settlement in these matters, pursuant to which Generali is obligated to pay both all remaining ICHEIC claims despite the exhaustion of the $100 million originally committed to ICHEIC plus any additional claims that might be made in a further claims "window" contemplated by the settlement.

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2005, more than two months after the District Court had issued its opinion, denying the Weiss Appellants' Rule 59 Motion. *See* JA __, __ [Weiss Reply Cert. of Service at 20; Order dated 12/02/04 denying Weiss Appellants' Rule 59 Motion]. The record on appeal is restricted exclusively to materials filed in connection with pending motions – rather than those filed after motions have already been resolved. *See, e.g.*, *Kirshner v. Uniden Corp. of Am.*, 842 F.2d 1074, 1077-78 (9th Cir. 1988). More importantly, footnote 21 reflects dated comments or criticisms of a payment agent appointed by ICHEIC (not Generali) which ICHEIC chose to remove in order to return the claims handling process to Generali in deference to Generali's high processing standards.

ICHEIC Claims Statistics. Appellants' assertion that Generali has "denied the vast majority of claims" submitted under ICHEIC protocols repeats a well-known canard that relies entirely on ICHEIC's own peculiar nomenclature. *See* Cornell Br. at 12-14. JA __ [Carnicelli Decl. *Generali I* at ¶ 7]. ICHEIC itself chose to label as claims *every* inquiry made by anyone about the possible existence of a policy issued by Generali in the name of an ancestor or relative. The ICHEIC process widely publicized its availability for such "matching," and thousands of blind inquiries were received from all over the world. Most of these resulted in "no match" and by ICHEIC's somewhat imprecise nomenclature in a corresponding "denial" of a "claim." This statistic is, in fact, a testament to the effectiveness of ICHEIC's outreach program worldwide and to Generali's willingness to investigate *any* inquiry, even if there was no basis to believe a Generali policy would be found.

It is hardly surprising therefore that most of these inquiries did not find a policy. But the failure to locate a non-existent policy under such circumstances is not a refusal to pay a valid Holocaust-related claim, as Appellants intimate, despite being aware of this nomenclature issue. JA __ [Carnicelli Decl. *Generali I* at ¶ 7]. Claims on policies deemed to be in force during the Holocaust era have generated offers in accordance with ICHEIC's guidelines – more than 90% of which have been accepted by claimants. JA __ [*Id.* ¶ 8]; *see supra* at 22. Among the policies

found to have existed at some time after 1920 and before World War II, the only ones which have not led to offers (under clear ICHEIC eligibility standards) are those that left Generali's portfolio (by, for example, payment, expiration or other reasons) before the onset of the agreed-upon Holocaust era. JA __ [*Id.*]

D. Generali's Class Action Settlement With Certain Appellants

On August 25, 2006, Generali and the Class Plaintiffs settled the class claims. The settlement class consists, in substance, of all beneficiaries and their heirs on Generali insurance policies issued in Europe between 1920 and 1945 claiming through a Holocaust victim. The settlement obligates Generali to pay all remaining ICHEIC claims beyond the previously-agreed $100 million contribution and opens the door to an additional claims "window" for claims to be paid under standards set out in the settlement which are in relevant respects similar to those used at ICHEIC.

As a result of the settlement, the only pending appeals are those being pursued by individual litigants who have long been inalterably opposed to resolving their claims pursuant to ICHEIC's protocols on the same terms as other claimants, and are instead bent on long-lived litigation.

SUMMARY OF ARGUMENT

The District Court properly held that the *AIA* decision requires dismissal of these actions. In *AIA*, the Court concluded unambiguously that resolution of

Holocaust-era insurance claims rests within the federal Executive Branch's plenary authority over foreign affairs. To this end, the Court expressly stated that "resolving Holocaust-era claims that may be held by residents of this country is a matter *well within* the Executive's responsibility for foreign affairs." 539 U.S. at 420.

The Supreme Court's ruling forecloses debate here about the content of the Executive Branch's policy concerning Holocaust-era insurance claims. Specifically, the Court held that "[a]s for insurance claims in particular, the national position . . . has been to encourage European insurers to work with the ICHEIC to develop acceptable claim procedures." *Id.* at 421. The Court credited the repeated and consistent statements of top Executive Branch officials, summarized above, that "'[t]he U.S. Government has supported [the ICHEIC] since it began, and we believe it should be considered the *exclusive* remedy for resolving insurance claims from the World War II era.'" *Id.* at 421-22 (alterations in original) (citation omitted).

Contrary to the strained view of *AIA* offered by Appellants, the Supreme Court's holding unquestionably applies to their claims against Generali. Indeed, Generali was a plaintiff in *AIA*, and the Court issued its opinion with full knowledge of the strident criticisms of Generali and ICHEIC (which Appellants repeat here), made by both the defendant in *AIA*, the California Insurance

Commissioner, and the dissenting Supreme Court Justices. Despite the Commissioner's arguments that the HVIRA was enforceable against Generali even if not against other insurers, the Supreme Court declined the opportunity to create a Generali "exception" and held uniformly that the Executive Branch's deference to ICHEIC and its opposition to litigation of Holocaust-era claims must be respected as to all the plaintiffs, including Generali. In responding to the same criticisms about ICHEIC reiterated here, the Supreme Court reasoned that "our thoughts on the efficacy of the one approach [ICHEIC] versus the other [litigation] are beside the point, since our business is not to judge the wisdom of the National Government's policy; dissatisfaction should be addressed to the President." *AIA*, 539 U.S. at 427; *see also Generali II*, 340 F. Supp. 2d at 507-08. The criticisms that fill Appellants' filings here are therefore irrelevant and, as noted, unfounded.

Furthermore, an executive agreement between the United States and Italy is not, as Appellants urge, a prerequisite to finding that American foreign policy is to oppose Holocaust-era insurance claims, including those brought against Generali. Cornell Br. at 24-25. The Supreme Court found that the above-quoted statements of senior Executive Branch officials established the President's position, and expressly rejected the dissent's argument, reiterated by Appellants here, that "nothing short of a formal statement by the President himself" is a sufficient indicia of Executive policy. *AIA*, 539 U.S. at 423 n.13.

Equally unfounded is Appellants' related argument that the absence of a statement of interest by the government in these matters undercuts the dismissal order. A statement of interest is purely discretionary, and has *never* been held to be a prerequisite to give effect to federal executive policy. Its absence in this case, where no governmental agreement was necessary to galvanize Generali's participation in ICHEIC, cannot be regarded as "indifference" to the Executive's clearly articulated universal policy or as support for litigation of Appellants' claims. *See Generali II*, 340 F. Supp. 2d at 507.

Finally, there is no basis to Appellants' suggestion that their claims do not run afoul of American foreign policy because they are private. Cornell Br. at 34-37. The *AIA* Court made clear that private claims against corporations, including claims against insurance companies, in fact do have foreign policy implications, and thus fall "well within" the Executive Branch's authority over foreign affairs. 539 U.S. at 420-21. Appellants are pursuing the type of litigation explicitly addressed in *AIA* and openly condemned by the Executive Branch. Their claims are preempted.

ARGUMENT

I. THE DISTRICT COURT PROPERLY CONCLUDED THAT, BASED ON AIA v. GARAMENDI, THESE ACTIONS ARE PREEMPTED BY THE FEDERAL GOVERNMENT'S POLICY OF RESOLVING ALL HOLOCAUST-ERA INSURANCE CLAIMS THROUGH ICHEIC.

A. The Supreme Court Held Unequivocally That Holocaust-Era Insurance Claims Are "Well Within" The Executive Branch's Exclusive Purview Over Foreign Affairs.

In *AIA*, the Supreme Court held that the issue of Holocaust-era insurance claims falls within the exclusive authority of the federal government – and in particular the Executive Branch – over the nation's foreign affairs. As the Court found, this conclusion was consistent with more than two hundred years of American jurisprudence dating back to the Federalist Papers, which demonstrates that responsibility for the nation's foreign affairs consistently has been so allocated. *AIA*, 539 U.S. at 413-14. The Court has long echoed the concerns of the Constitution's framers that there be "'uniformity in this country's dealings with foreign nations.'" *Id.* at 413 (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964)).

To preserve and protect the nation's ability to speak with "one voice" on foreign affairs, the *AIA* Court recognized that the Executive Branch has broad latitude in these matters. "'Although the source of the President's power to act in foreign affairs does not enjoy any textual detail, the historical gloss on the 'executive Power' vested in Article II of the Constitution has recognized the

President's 'vast share of responsibility for the conduct of our foreign relations.'" *Id*. at 414 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952)). The Court relatedly stressed the absence of "any question generally that there is executive authority to decide what [the nation's foreign] policy should be" and that "in the field of foreign policy the President has the 'lead role.'" *Id.* at 414-15 (citations omitted).

Applying these principles to Holocaust-era insurance claims, the *AIA* Court held that resolution of such claims rests within – in fact, "*well* within" – the Executive Branch's authority over foreign affairs. *Id.* at 420. In the Court's precise words, "*resolving Holocaust-era insurance claims that may be held by residents of this country is a matter well within the Executive's responsibility for foreign affairs*." *Id.* The District Court thus was unquestionably correct in finding that the claims in these litigations are within the scope of the Executive Branch's foreign affairs powers.

B. The District Court Was Correct In Finding That The Executive Branch's Policy Of Resolving Holocaust-Era Insurance Claims Through ICHEIC, Not Litigation, Preempts Appellants' Claims.

The Supreme Court in *AIA* went on to determine what the Executive Branch's policy has been on the issue of Holocaust-era insurance policies. As to Holocaust claims generally, the Court found that "the consistent Presidential foreign policy has been to encourage European governments and companies to

volunteer settlement funds in preference to litigation or coercive sanctions." *Id.* at 421. And as to Holocaust-era *insurance* claims specifically, the Court concluded that the Executive Branch's consistent position has been that such claims should be resolved through ICHEIC: "[a]s for insurance claims in particular, the national position . . . has been to encourage European insurers to work with the ICHEIC to develop acceptable claim procedures." *Id.*

In ascertaining this "national position," the Supreme Court did not look only to formal pronouncements in executive agreements and statements of interest, as Appellants and the *AIA* dissent say should be done. Cornell Br. at 28-30. Rather, the Court expressly eschewed the contention that Executive Branch policy would be established only by executive agreements, and relied on statements by a number of Executive Branch officials, in a variety of contexts. *AIA*, 539 U.S. at 422, 423 n.13 (executive agreements are but "exemplars" of a policy; expressly rejecting the dissent's reliance on executive agreements as sole evidence of governmental policy). It thus credited the consistent statements of Executive Branch officials – all of whom have repeatedly affirmed the Executive Branch's firm policy of resolving *all* Holocaust-era insurance claims through ICHEIC, not litigation. Indeed, the Court recognized that "[t]his position . . . has . . . been consistently supported in the high levels of the Executive Branch," *id.* at 422, and cited, among other things, Secretary Eizenstat's statement that "'[t]he U.S. Government has

supported [the ICHEIC] since it began, and we believe it should be considered the *exclusive remedy* for resolving insurance claims from the World War II era.'" *Id.* (alterations in original) (citation omitted).[14] The Court also cited Amb. Randolph M. Bell, Special Envoy for Holocaust Issues, who reiterated this position. *Id.*

As set forth in the Statement of Facts above, the *AIA* Court cited only to a fraction of the Executive Branch's pronouncements articulating its consistent policy of resolving Holocaust-era insurance claims through ICHEIC – some of which specifically addressed the issue of claims brought against Generali. *See supra* at 17-22. In a November 28, 2000 letter to ICHEIC Chairman Eagleburger, for example, Secretary Eizenstat praised Generali's commitment of more than $100 million to ICHEIC and reiterated the government's position that ICHEIC should be "recognized as the *exclusive* remedy for resolving *all* insurance claims that relate to the Nazi era." JA __ [Velie Decl. *Generali I*, Ex. W]. There is *nothing* in the record evidencing that *any* Executive Branch officials *ever* advocated that Holocaust-era insurance claims, including those against Generali, should be addressed through litigation. *See Generali II*, 340 F. Supp. 2d at 503-05 (canvassing expressions of government policy).

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[14] *See also id.* at 405 ("From the beginning, the Government's position, represented principally by Under Secretary of State (later Deputy Treasury Secretary) Stuart Eizenstat, stressed mediated settlement 'as an alternative to endless litigation' promising little relief to aging Holocaust survivors.").

With these clear and consistent policy pronouncements in mind, the Court found the HVIRA to be unconstitutional as applied to Generali and each of the other plaintiffs in that matter, because, contrary to Executive Branch policy, the statute was designed to promote and facilitate litigation of Holocaust-era claims. As the statute's legislative history revealed, "[the] HVIRA was proposed to 'ensure that Holocaust victims or their heirs can take direct action on their own behalf with regard to insurance policies and claims.'" *AIA*, 539 U.S. at 410 (citation omitted); *see id.* at 423 ("California has taken a different tack [from the executive] of providing regulatory sanctions to compel disclosure and payment, supplemented by a new cause of action for Holocaust survivors if the other sanctions should fail.").

In these actions, Appellants are pursuing, under the statutory and common law of various states, the very litigation that the Supreme Court found to conflict with the Executive Branch's explicit policy – *i.e.*, protracted litigations seeking windfall damage and punitive fee awards on Holocaust-era insurance policies issued by a founding member and active participant of ICHEIC. Thus, just as the HVIRA was preempted by the President's contrary foreign policy determination when threatened to be enforced against Generali, so too are Appellants' claims. *See, e.g.*, *Boyle v. United Techs. Corp.*, 487 U.S. 500, 508 (1988) ("[W]here the federal interest requires a uniform rule, the entire body of state law applicable to

the area conflicts and is replaced by federal rules."). As the District Court properly found in *Generali II*, Appellants' rights to pursue these claims in American courts must yield to the overriding Executive Branch policy of resolving such claims through ICHEIC.

C. The District Court's Opinion Is One In A Long Line Dismissing Holocaust-Era Claims In Deference To Executive Branch Policy.

The District Court's opinion in *Generali II* is not unprecedented, as Appellants suggest. Precisely the opposite is true. During the past decade, state and federal courts have consistently dismissed Holocaust-era claims in deference to the Executive Branch's established policy of resolving them through negotiated non-judicial means.

- ***Whiteman v. Doretheum*.** A putative class action was filed against the Republic of Austria and various Austrian entities, seeking to recover for compulsory confiscation of property in Austria during the Holocaust. *Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57, 59 (2d Cir. 2005), *cert. denied*, 126 S. Ct. 2865 (2006). The court found the claims to be nonjusticiable because of the Executive Branch's plenary authority over matters concerning the nation's foreign affairs. Specifically, the court held that "resolution of this case under the political question doctrine is greatly reinforced by the historic deference due to the Executive in the conduct of the foreign relations of the United States." *Id.* at 71.

- ***Burger-Fischer v. Degussa AG.*** Plaintiffs, who were victims of forced labor and "oppressive conditions" during World War II, while manufacturing among other things the lethal gases used in Nazi concentration camps, sued defendant companies seeking significant awards of compensatory and punitive damages. *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 250, 253 (D.N.J. 1999). Over vigorous objections from the plaintiffs, who were represented by many of the same lawyers representing the Class Plaintiffs here (*see id.* at 248-49), the court found that in light of the Executive Branch's significant involvement in the area of World War II-era reparations, the claims, while tragic, were inappropriate for resolution in American courts. *Id.* at 284-85. To this end, the court held:

> Every human instinct yearns to remediate in some way the immeasurable wrongs inflicted upon so many millions of people by Nazi Germany so many years ago, wrongs in which corporate Germany unquestionably participated. For the reasons set forth above, however, this court does not have the power to engage in such remediation.

Id. at 285.

- ***Steinberg v. ICHEIC.*** Represented by counsel for the California Appellants here, a putative class of Holocaust-era claimants with alleged rights under Generali policies brought an action against ICHEIC (but not Generali), challenging its claims handling practices. *Steinberg v. Int'l Comm'n on Holocaust Era Ins. Claims*, 34 Cal. Rptr. 3d 944, 945 (Ct. App. 2005). As noted, the named

plaintiffs were among the Appellants here. In assessing the viability of the putative class's claims, the court reached an identical result as the District Court here, and dismissed the action in deference to the Executive Branch's policy that Holocaust-era insurance claims are to be resolved through ICHEIC. *See id.* at 952-53. In doing so, the court expressly rejected the suggestion – repeated here at length by Appellants, as discussed in detail below – that there are no foreign policy interests implicated in claims against Generali, since there are no executive agreements that expressly cover those claims. In this context, the court observed that "[i]t is not the executive agreements themselves which dictated the result in *Garamendi*, but the policy reflected in them, *a policy which extends to claims against Generali*." *Id.* at 952.

- ***Deutsch v. Turner Corp.*** The Ninth Circuit ruled in *Deutsch* that claims against private companies arising from wartime and Holocaust-related matters are within the exclusive authority of the Executive Branch, and therefore are barred under the Constitution's foreign affairs provisions. *Deutsch v. Turner Corp.*, 324 F.3d 692, 712 (9th Cir. 2003). The court considered the constitutionality of a California statute that purported to create a cause of action for Holocaust-era and wartime slave and forced labor claims in California courts. *Id.* In declaring the statute unconstitutional and affirming the dismissal of the plaintiffs' claims, some of whom were represented by counsel for the Class

Plaintiffs here (*see id.* at 700), the Ninth Circuit ruled that "[i]n the absence of some specific action that constitutes authorization on the part of the federal government, states are prohibited from exercising foreign affairs powers, including modifying the federal government's resolution of war-related disputes." *Id.* at 714.

- ***In re Nazi Era Cases*.** Plaintiff sought to recover from private companies damages stemming from his forced labor during World War II. *In re Nazi Era Cases Against German Defendants Litig.*, 129 F. Supp. 2d 370, 373 (D.N.J. 2001). Following other courts that had likewise dismissed similar World War II-era claims, the court held that the plaintiff's claims must be dismissed in deference to the various claims mechanisms established and endorsed by the Executive Branch. *Id.* at 382-84. The court stated that if it "were to do anything but dismiss Plaintiff's action, it would reach a conclusion that is directly in conflict with a pronouncement made by the Executive Branch." *Id.* at 383.

- ***Anderman v. Republic of Austria*.** In a putative class action asserting Holocaust-related claims against the Republic of Austria and various European companies, including Generali and its wholly-owned subsidiary Interunfall Versicherung A.G., the District Court dismissed the action as barred by the political question doctrine. *Anderman v. Fed. Republic of Austria*, 256 F. Supp. 2d

1098, 1101-02, 1111 (C. D. Cal. 2003).[15] In doing so, the court reached the same conclusion that the *AIA* Court did two months later – *i.e.*, that the determination of how to resolve Holocaust-era insurance policies has been committed exclusively to the Executive Branch. *Id.* at 1116. Thus, the court concluded that "adjudication of the claims asserted by Plaintiffs is beyond its constitutional authority." *Id.* at 1101.

- ***Iwanowa v. Ford Motor Co.*** Claimant brought a putative class action against a German automobile manufacturer and its American parent, seeking compensation and damages for forced labor performed during World War II. *See Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 431-33 (D.N.J. 1999). Despite the absence of any statement of interest filed by the government, the court dismissed the claims, finding that "responsibility for resolving forced labor claims arising out of a war is constitutionally committed to the political branches of government, not the judiciary." *Id.* at 485.[16]

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[15] The portion of the claims in *Anderman* asserted by the putative class against Generali were transferred by the Judicial Panel on Multidistrict Litigation to the Southern District of New York for coordination with the other individual and putative class actions at issue in these appeals. Those claims were dismissed by the District Court together with the other actions before this Court, but the *Anderman* plaintiffs elected not to pursue an appeal.

[16] Other decisions dismissing Holocaust-era claims include: *Friedman v. Bayer Corp.*, No. 99-CV-3675, 1999 WL 33457825 (E.D.N.Y. Dec. 15, 1999) (dismissing Holocaust-era action for, *inter alia*, failure to state a private right of action under international law); *Fishel v. BASF Group*, No. 4-96-CV-10449, 1998 U.S. Dist. LEXIS 21230 (S.D. Iowa Mar. 11, 1998) (dismissing Holocaust forced

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There is therefore simply no basis to characterize the opinions in *AIA* or *Generali II* as novel or unprecedented. *Generali II* follows necessarily from *AIA* and both are exemplars of a long list of cases in which the courts have prudently deferred to Executive policy in matters having to do with World War II over the objections, however strident, of U.S. litigants.

II. THE SUPREME COURT IN AIA REJECTED THE CORE ARGUMENTS NOW OFFERED BY APPELLANTS.

Appellants try to distance these cases from *AIA*, as arising in different factual and legal contexts and, therefore, beyond the reach of the Executive Branch's established policy of resolving Holocaust-era claims through ICHEIC, rather than through litigation. At bottom, they say that, absent an executive agreement or statement of interest, there can be no finding that the Executive Branch's policies apply to claims brought against Generali. This very argument was made to, and rejected by, the Supreme Court in *AIA*. It should not be disinterred again here.

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labor action on personal jurisdiction grounds); *Princz v. Fed. Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994) (dismissing Holocaust slave labor case on sovereign immunity grounds).

A. Generali Was A Party To *AIA* And The Claims Against It Unquestionably Fall Within The Supreme Court's Holding That All Holocaust-Era Insurance Claims Be Resolved Through ICHEIC.

Absent from Appellants' lengthy discussion of the supposed differences between these cases and *AIA* (*see* Cornell Br. at 24-40) is any meaningful recognition that Generali was one of the four plaintiffs in *AIA* and, accordingly, was well within the Supreme Court's contemplation when it declared the Executive Branch's policy to be that ICHEIC shall serve as the "exclusive" remedy for *all* Holocaust-era insurance claims. As the District Court appropriately concluded, the lack of any exception drawn by the Supreme Court for Generali, as a party to the case, is dispositive. *Generali II*, 340 F. Supp. 2d at 503.

Appellants attempt to explain the absence of any such exception by arguing that "[t]here was no need for the *Garamendi* Court to distinguish between Generali and other insurers (*nor was it invited to do so*) given the over-breadth and invasiveness of the statute." Cornell Br. at 32. This is erroneous. Throughout the *AIA* case – in briefing and oral argument – the California Insurance Commissioner and his counsel repeatedly castigated Generali and attempted unsuccessfully to distinguish the company from other insurers.

As Generali demonstrated in its briefing before the District Court, the Insurance Commissioner singled out Generali during the course of the AIA proceedings whenever he deemed it to be strategically advantageous to do so. In

his Supreme Court briefing, for example, the Commissioner asserted, just as Appellants have argued here, that the foreign affairs arguments advanced by other European insurers did not apply to Generali, despite its participation in ICHEIC, because it had not been involved in the negotiations that resolved claims against German companies. In this vein, he argued:

> Petitioners' argument is extraordinarily broad, claiming that Executive Branch activity with respect to *some* Holocaust-era claims precludes state regulation relating to *any* Holocaust-era claims, even ones not involved in the Executive Branch negotiations, such as those against Generali.

Brief of Respondent, *available at American Insurance Association v. Garamendi*, No. 02-722, 2003 WL 1610792, at *31 n.16 (U.S. Mar. 25, 2003) (emphasis original).

Then, at oral argument, the Commissioner's counsel again targeted Generali, accusing the company of willfully refusing to provide information to Holocaust-era claimants. JA __ [Transcript of 04/23/03 Oral Argument before the United States Supreme Court in Case No. 02-722, AIA v. Garamendi, at 52:20-53:3, attached to Generali's Response to Plaintiffs' Surreply Memoranda filed 10/03/03, in connection with *Generali II*]. The dissent explicitly incorporated the Commissioner's criticisms of Generali which had been brought to the Court's attention in an effort to distinguish Generali from other insurers, as Appellants do here. *See AIA*, 539 U.S. at 433.

These arguments had *no* impact on the *AIA* majority. Had the majority agreed with the Commissioner's argument that Generali should be exempted from the Executive Branch's policy, it had ample opportunity to craft its ruling and opinion accordingly.[17] The Court, however, found no basis for singling out Generali, and thus included Generali in its determination that *all* Holocaust-era insurance claims must be resolved through ICHEIC. This conclusion is wholly consistent with the pronouncements by government officials (canvassed above and relied on by the Supreme Court and the District Court) that ICHEIC is to be the exclusive means to resolve all claims. There is not a suggestion in any of those pronouncements that this exclusivity excludes Generali or that the repeated references to insurance claims being resolved through ICHEIC should all be read to exclude those against Generali. *See Generali II*, 340 F. Supp. 2d at 504 (reviewing a letter by Secretary Eizenstat to that effect and concluding that the letter "express[es] no hint of a distinction between Generali and other European insurers"). The District Court properly found that *AIA* compels the conclusion that the claims against Generali are within its scope.

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[17] As the Court has long recognized, "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *United States v. Raines*, 362 U.S. 17, 21 (1960).

B. Appellants' Claims Are Precisely The Type Targeted For Preemption By The Federal Government's Policy, And Cannot Be Saved By Characterizing Them As "Private."

Appellants argue that, unlike in *AIA*, their claims are private not state-created. Cornell Br. at 36. They then assert that their purportedly private disputes that are "within the ambit of traditional state interests" and supposedly do not conflict with Executive Branch policy. Cornell Br. at 36-38. This argument fails because the *AIA* Court rejected it. *AIA* found, as have many other courts, that disputes between *private* litigants about Holocaust-era claims are "well within" the Executive Branch's exclusive authority over matters of foreign affairs. Moreover, Appellants' claims rely heavily on unconstitutional state legislation intended, like the HVIRA in *AIA*, specifically to revive Holocaust-related claims, thus conceding that these are not the "garden-variety" private claims Appellants argue them to be.

1. The Supreme Court Found Claims By Private Individuals Against Corporations Such As Generali To Be Squarely Within The Executive Branch's Power To Preempt.

Appellants' attempt to exclude from the broad scope of the Executive Branch's power, Holocaust-era disputes between private parties, is directly contrary to *AIA*. In finding that the issue of Holocaust-era insurance claims is "well within" the ambit of Executive responsibility, the Supreme Court held that compensating individuals who claim to have been injured by *private corporations* falls within the traditional scope of national government authority. "Vindicating victims injured

by acts and omissions of enemy *corporations* in wartime is thus within the traditional subject matter of foreign policy in which national, not state, interests are overriding, and which the National Government has addressed." 539 U.S. at 421. "[S]ecuring private interests is an express object of diplomacy today, just as it was . . . soon after the Second World War." *Id.* There can be no question that these private claims fall within the scope of Executive Branch authority.[18]

Nor can there be any dispute that Appellants' claims are precisely the type targeted by the Executive Branch's established foreign policy. As the Supreme Court explained in *AIA*, the purpose of the HVIRA was to promote litigation of Holocaust-era insurance claims such as those at issue here: "[The] HVIRA was proposed 'to ensure that Holocaust victims or their heirs can take direct action on their own behalf with regard to insurance policies and claims.'" *Id.* at 410. It was the conflict between the litigation promoted by the HVIRA and the Executive Branch's unequivocal endorsement of ICHEIC as the "exclusive remedy" for Holocaust-era insurance claims that compelled the Supreme Court's finding of preemption. *See supra* at 17-22. In light of this holding, it strains logic to argue,

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[18] The claims in *Burger-Fisher*, *Deutsch*, *In re Nazi Era Cases*, and *Iwanowa*, *see supra*, were likewise brought by private plaintiffs against private defendants. That did not dissuade the respective courts from dismissing these cases in deference to government policy calling for a negotiated resolution of Holocaust-era claims.

as Appellants do here, that their litigation does not conflict with the nation's foreign policy.[19]

Equally without merit is Appellants' suggestion that the "President's position with respect to ICHEIC . . . will [not] be undercut if the present litigation proceeds." Cornell Br. at 40-42. That argument also revisits the arguments rejected by the *AIA* Court. The Executive Branch's position with respect to litigations, such as these, could not be clearer. These litigations, as the District Court found, are no less in conflict with the nation's foreign policy as the HVIRA struck in *AIA*.[20]

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[19] The California Appellants' attempt to draw a distinction between Generali's alleged historical bad faith conduct (*i.e.,* that which occurred during and immediately after World War II) and its "fresh bad faith" (consisting allegedly of Generali's attempts in recent years to resolve Holocaust-era claims outside the context of litigation) is unfounded. Supplemental Cornell Br. at 14, 16. No matter how dressed, these claims, like all the others at issue in these litigations, arise out of and involve the issue of Holocaust-era insurance policies and, therefore, must likewise yield to the Executive Branch's established policy that *all* such claims be resolved through ICHEIC. *See supra* at 17-22; *see also Generali II*, 340 F. Supp. 2d at 508.

[20] Appellants' argument that these litigations could somehow bolster the Executive Branch's foreign policy interests – presumably by giving the Executive Branch leverage in hypothetical negotiations with Italy over the participation of Italian companies in ICHEIC – is untenable. Cornell Br. at 41-42. This is simply a renewal of the rejected argument before the Supreme Court that the plaintiffs' "iron fists" are to be preferred to the Executive's policy of "kid gloves." *AIA*, 539 U.S. at 427.

Appellants' attempt to downplay this conflict as "weak to non-existent" based on the supposedly "strong" interest of the states in "allowing plaintiffs to pursue redress against Generali." Cornell Br. at 39. Again, this too is an argument resuscitated from the *AIA* case, where it was soundly rejected. When made by the Insurance Commissioner, this argument was at least made on behalf of "several thousand Holocaust survivors said to be living in [California]." *AIA*, 539 U.S. at 426. Yet, the Supreme Court held that the state's interest in the issue "is not a strong one." *AIA*, 539 U.S. at 426. And, even if state interest were "strong," as Appellants suggest, the Supreme Court found that it would nevertheless have to yield to the Executive Branch's overriding policy objectives:

> [S]hould the general standard not be displaced, and the State's interest recognized as a powerful one, by virtue of the fact that California seeks to vindicate the claims of Holocaust survivors? The answer lies in recalling that the very same objective dignifies the interest of the National Government in devising its chosen mechanism for voluntary settlements, there being about 100,000 survivors in the country, only a small fraction of them in California. *As against the responsibility of the United States of America, the humanity underlying the state statute could not give the State the benefit of any doubt in resolving the conflict with national policy*.

Id. at 426-27 (citations omitted). That conclusion applies with even more force to Appellants' claims.[21]

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[21] That these litigations are about insurance – an industry that, according to Appellants, "states have traditionally been at the vanguard in regulating" – is of no moment. Cornell Br. at 37 (citing Justice Kennedy's concurring opinion in

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2. Appellants Rely On Unconstitutional State Statutes, Like The HVIRA In AIA, Designed To Promote Litigation.

Appellants reliance on statutes specifically intended to bolster Holocaust-era claims belies their attempt to paint these actions as involving "garden-variety common law claims, such as breach of contract claims, and statutory consumer protection claims." Cornell Br. at 34-35. Far from "garden-variety," Appellants seek to recover on decades-old insurance transactions that took place in Europe between European citizens and a European insurance company in the context of Holocaust-related allegations. To support these claims, Appellants expressly rely on statutes enacted by state legislatures – contrary to the Federal Government's policy – designed to promote Holocaust, not "garden variety," litigation. Appellants' concession, buried in a footnote of their brief, that "some of the plaintiffs in the underlying suits have . . . relied on statutes similar to the one at issue in *Garamendi*," greatly understates their reliance on the state Holocaust statutes. Cornell Br. at 35 n.41.

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Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996). As an initial matter, the Supreme Court in *AIA* was obviously aware of the fact that the HVIRA involved the issue of Holocaust-era insurance claims in concluding that state interest in the issue was weak. *AIA*, 539 U.S. at 426-27. Moreover, Appellants fail to point out that Justice Kennedy's comment was made in reference to the McCarran-Ferguson Act, federal legislation that the *AIA* Court expressly found to be insufficient to override the Executive Branch's exclusive authority over Holocaust-era insurance claims. *See AIA*, 539 U.S. at 427-28.

The statutes in question were enacted in, among other states, New York, Florida and California. *E.g.*, N.Y. Ins. Law § 2704 (McKinney 2006); Cal. Civ. Proc. Code § 354.5 (West 2006); Fla. Stat. Ann. § 626.9543 (West Supp. 2006). They purported, among other things, to extend the statute of limitations on Holocaust-related insurance claims, and the New York and California statutes likewise nullified any forum-related objections by foreign insurers on grounds of *forum non conveniens* or contractual forum-selection clauses, all for Holocaust cases only. *See AIA*, 539 U.S. at 409-10 (discussing Holocaust-related statutory scheme).

Indeed, before certain of these statutory schemes were declared unconstitutional on foreign affairs and due process grounds[22], Appellants sought to invoke their protections in formulating their complaints and defending against Generali's motions to dismiss in the District Court. In the *Smetana* class action, for example, the complaint alleged, as a basis for relief, that Generali had failed to comply with the HVIRA – the very statute at issue in *AIA*. JA __ [Smetana Complaint at ¶ 39]. The California Appellants similarly relied on the state's Holocaust insurance

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[22] *See, e.g.*, *Steinberg*, 34 Cal. Rptr. 3d 944, 951-53 (declaring California's Holocaust Victim Insurance Act to be unconstitutional on foreign affairs grounds); *Gerling Global Reinsurance Corp. of Am. v. Gallagher*, 267 F.3d 1228, 1240 (11th Cir. 2001) (declaring Florida's Holocaust Victim Insurance Act to be unconstitutional on due process grounds).

statutes in asserting their claims against Generali: "Defendants GENERALI . . . committed acts of unfair competition . . . [by] [v]iolating Code of Civil Procedure § 354.5 and [the HVIRA] when failing to calculate proceeds without diminution for wartime or immediate postwar currency devaluation." JA __ [Brauns Complaint at ¶ 45(n)].[23]

Indeed, Appellants even sought to invoke the protections of these statutes in opposing Generali's motion to dismiss, arguing *inter alia* that the extended statutes of limitations applicable under the New York, California and Florida Holocaust statutes salvaged their claims. JA __ [Plaintiffs' Joint Opposition filed on 3/17/03, submitted in connection with *Generali II* at 47-60].

Thus, to cast these cases as "garden variety" commercial litigations is merely a convenient about-face for purposes of argument only. These cases are not immune to preemption.[24]

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[23] Plaintiffs in the *Weiss* action rely on Florida's version of the HVIRA, the Holocaust Victims Insurance Act, in asserting claims against Generali. *See* JA __ [Weiss Complaint at ¶¶ 123-34] ("This is an action pursuant to the Holocaust Victims Insurance Act, which became law on July 1, 1998, and is now codified at section 626.9543, Florida Statutes (1999).").

[24] Appellants' reliance on *Deutsch*, 324 F.3d 692, and *Schydlower v. Pan American Life Insurance Co.*, 231 F.R.D. 493 (W.D. Tex. 2005), for the proposition that a state is more likely to infringe on federal authority "when it seeks to alter or create rights and obligations than when it seeks merely to further enforcement of already existing rights and duties," is misplaced. Cornell Br. at 35. In *Deutsch*, as discussed above, the Ninth Circuit dismissed World War II-era

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C. As The District Court Held, The Absence In This Case Of An Executive Agreement Between The United States And Italy, Or A Statement Of Interest, Has No Impact.

Appellants can do no more than rely on the dissent from *AIA*, which asserted that "nothing short of a formal statement by the President himself" in an executive agreement would suffice to establish Executive Branch policy. But that very argument was *expressly* rejected. *AIA*, 539 U.S. at 423 n.13. Appellants thus further argue that, absent an executive agreement between the United States and Italy or a statement of interest, Generali is left to rely only on "a few sub-cabinet level officials' broad, aspirational utterances that ICHEIC 'should be' the remedy for Holocaust-era insurance claims." Cornell Br. at 25. These statements, according to Appellants (and the *AIA* dissent), are insufficient indicia of the Executive Branch's policy for a finding of preemption. *Id.* at 25-26.

The *AIA* majority ruled otherwise. It expressly held that the statements by officials from both the Clinton and Bush administrations on the issue of Holocaust-

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forced labor claims on grounds that the California statute at issue, which likewise extended the statute of limitations on such claims, unconstitutionally infringed on the exclusive foreign affairs powers of the federal Executive Branch. *Deutsch*, 324 F.3d at 712. The same result should apply here. And in *Schydlower*, there were *no* state statutes at issue. Nor was there a cognizable federal policy regarding claims against the Cuban government, which formed the sole basis for the court's refusal to dismiss the action on foreign affairs grounds. *See Schydlower*, 231 F.R.D. at 498. The Executive Branch's policy with respect to Holocaust-era insurance claims, by contrast, is clear and established.

era insurance claims – examples of which are set forth above – are entirely sufficient to establish Executive Branch policy:

> [T]here is *no* suggestion that these high-level executive officials were not faithfully representing the President's chosen policy, and there is *no* apparent reason for adopting the dissent's "nondelegation" rule to apply within the Executive Branch.

539 U.S. at 423 n.13[25] It further found that executive agreements are mere "exemplars" of federal policy and are *not* pre-requisites to determining the substance of the Executive Branch's stance on a particular issue. *Id.* at 422.

Predictably, Appellants are unable to identify a single record reference to suggest that anyone in the Executive Branch, much less the President or his upper-level officials, has ever endorsed litigation to resolve Holocaust-era insurance

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[25] *In re "Agent Orange" Product Liability Litigation*, 373 F. Supp. 2d 7 (E.D.N.Y. 2005), does not, as Appellants contend, impose a requirement that foreign policy be embodied in an executive agreement in order to have preemptive effect. Cornell Br. at 24. *Agent Orange* involved claims arising out of the Vietnam War – an issue that had lingered in "relative silence" among the Executive and Legislative Branches. *Id.* at 77-78. As the court explained:

> A significant distinguishing feature of the Vietnam War is the absence of Executive and Legislative decisions regarding reparations following termination of hostilities, in stark contrast to the large number of such decisions following World War II.

Id. at 77. It is therefore unsurprising that the Court would look for a more formal pronouncement from the government (in the form of an executive agreement or statement of interest) in attempting to decipher American foreign policy. As the Supreme Court held in *AIA*, there is *no* similar ambiguity as to the Executive Branch's policy with respect to Holocaust-era insurance claims.

claims. Far from seeking to have the Court consider the statements of Executive Branch officials in a "vacuum", Cornell Br. at 29, it is indisputable that every statement emanating from the Executive Branch has been consistent: *all* Holocaust-era insurance claims are to be resolved through ICHEIC, *not litigation*.

The absence of a statement of interest in this case is likewise inconsequential, as the District Court concluded. Such formal intervention by the government in a litigation has *never* been held to be a prerequisite for determining the position of the Executive Branch with respect to a particular issue. *E.g.*, *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J. 1999) (dismissing World War II-era claims on political question grounds without *any* intervention or submission by the federal government). *See* JA ___ [Supplemental Declaration of Peter Simshauser dated 1/29/03, submitted in connection with *Generali II*, Ex. 1 at 1-4]; *Steinberg*, 34 Cal. Rptr. 3d 944 (dismissing Holocaust-era claims in deference to Executive Branch's policy without submission from government). To the contrary, as the Supreme Court held in *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159 (1983), a case cited by Appellants, "[t]he lack of such a submission [a statement of interest] is by *no* means dispositive." *Id.* at 195-96;[26] *see also Generali II*, 340

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[26] Although the Supreme Court in *Container Corp.* upheld the constitutionality of a California franchise tax against a challenge on foreign affairs grounds based, at least in part, on the absence of a statement of interest, the connection between

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F. Supp. 2d at 506 (rejecting argument that failure of the government to intervene on behalf of Generali by filing a statement of interest "suggests . . . ambivalence towards ICHEIC resolution of claims against Generali").

Nor is the government's declining to provide Generali with a statement of interest of any moment. Cornell Br. at 24-26. As the District Court noted, it is unexceptional for the Executive to elect not to file a statement of interest absent a governmental agreement to secure, as in the German case, funding for ICHEIC. *Generali II*, 340 F. Supp. 2d at 506-07. There was no need for a formal governmental role in Generali's commitment of funds to ICHEIC – Generali, as opposed to German insurers, stood prepared to fund claims payments *without* the intercession of the Italian government or an executive agreement. But it is untenable to argue that Generali's readiness to participate in ICHEIC – the very object encouraged by the Executive Branch – could have led to the exclusion of Generali from the quoted expressions of governmental policy. There is nothing in the record to suggest this perverse result. *See id*.

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the state statute and the nation's foreign affairs was highly attenuated. Indeed, the tax at issue applied only to domestic, rather than foreign, corporations and the absence of a statement of interest was consistent with "all the other considerations" reviewed by the Court in attempting to assess the foreign policy implications of the state statute. *Container Corp.*, 463 U.S. at 194-96. Here, as Generali has shown, there is no shortage of evidence as to the Executive Branch's position with respect to Holocaust-era insurance claims.

In fact, Secretary Eizenstat's November 28, 2000 letter "commend[ed]" Generali's generous contribution to ICHEIC and reiterated that ICHEIC should be "recognized as the exclusive remedy for resolving *all* insurance claims that relate to the Nazi era." JA __ [Velie Decl. *Generali I*, Ex. W]. Chairman Eagleburger responded with his intention to "make use of [the] letter before U.S. courts" to secure dismissal of claims against Generali. JA __ [Velie Decl. *Generali I*, Ex. X]. Nobody in government objected or retreated from support of the policy that Holocaust-era claims against Generali be resolved through ICHEIC. The absence of a statement of interest in these cases, is not the Executive's implicit endorsement of litigation against Generali, nor can it be fairly or reasonably construed as such.[27]

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[27] The remaining authority cited by Appellants is similarly inapposite. Indeed, the courts' decisions to dismiss World War II-era claims in deference to Executive Branch policy were not contingent on executive agreements, statements of interest, or amicus briefs filed by the government, as Appellants suggest. Cornell Br. at 29. Rather, it was the Executive Branch's longstanding policy of resolving World War II-era claims through negotiation and cooperation, rather than through litigation (no matter whether formally embodied in an executive agreement, statement of interest or amicus brief) that compelled dismissal of the claims. *See In re Nazi Era Cases*, 129 F. Supp. 2d at 389 (dismissing Holocaust-era claims "because the magnitude of World War II has placed claims such as [plaintiff's] beyond the province of this Court, and into the political realm"); *Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57, 62 (2d Cir. 2005) (crediting the Executive Branch's foreign policy position that "'matters of Holocaust-era restitution and compensation . . . be resolved through negotiation and cooperation, rather than subjecting victims and their families to the prolonged uncertainty and delay of litigation'" in dismissing Holocaust-era claims (alteration in original) (citation omitted)), *cert. denied*, 126 S. Ct. 2865 (2006); *Joo v. Japan*, 413 F.3d 45, 51-53 *(cont'd)*

III. APPELLANTS' OTHER ARGUMENTS ARE WITHOUT MERIT.

A. The Authorities Relied Upon By Appellants Do Not Support Them.

Appellants cite to a string of federal opinions issued following the Supreme Court's decision in *AIA* and argue that each counsels against preemption of individual common law claims on foreign affairs grounds. Cornell Br. at 42-47. *None* of these cases are applicable to the questions before the Court on this appeal.

- ***Cruz v. United States*.** In *Cruz*, Mexican nationals who had worked in the United States during and after World War II asserted claims against Mexico, Mexican banks, the United States, and an American bank for failure to pay withheld wages. *Cruz v. United States*, 387 F. Supp. 2d 1057 (N.D. Cal. 2005). The court denied the defendants' motion to dismiss the action on foreign affairs grounds, distinguishing *AIA* and reasoning that *unlike the issue of Holocaust-era insurance claims*, there was no comparable federal Executive Branch involvement with respect to bracero claims:

> Nor is there here, as there was [in *AIA*], evidence produced by defendants that the United States government has consistently reaffirmed a policy of non-judicial dispute resolution for the particular claims at issue. In addition, whereas in [*AIA*] there was a federal policy that the claims at issue would be investigated and processed by international

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(D.C. Cir. 2005) (ordering dismissal of the case on political question grounds because of the Executive Branch's foreign policy interests in resolving World War II-era claims via government-to-government negotiations, rather than through litigation), *cert. denied*, 126 S. Ct. 1418 (2006).

> and federal commissions established for that purpose, defendants here have not cited any effort by the United States government to specify some other procedure for resolving bracero claims.

Id. at 1073-74 (citations omitted). Thus, as the *Cruz* court implicitly acknowledged, where, as in these cases, it is clear that litigation would conflict with Executive Branch policy, preemption is appropriate.

- ***Alperin v. Vatican Bank.*** In *Alperin*, the plaintiffs sought to recover against the bank of the Vatican for alleged wrongdoing during World War II. *Alperin v. Vatican Bank*, 410 F.3d 532, 538 (9th Cir. 2005), *cert. denied*, 126 S. Ct. 1141 (2006). Following dismissal of the entire action on political question grounds, the plaintiffs appealed to the Ninth Circuit. It affirmed the dismissal of plaintiffs' human rights and international law claims, but reversed as to the common law property claims. *Id.* at 562. The Ninth Circuit's decision was premised not, as Appellants contend, on the fact that the property claims were "garden-variety," but rather on the absence of any guidance from the federal Executive Branch on the appropriate manner in which to resolve them. "Indeed, this case is before us not because the Holocaust Survivors disagree with a political decision made regarding their claims, but rather because there simply has been *no* decision." *Id.* at 557. There is no similar void in Executive Branch policy about how Appellants' Holocaust-era insurance claims should be resolved.

- ***Doe v. Exxon Mobil Corporation*.** Plaintiffs brought claims against an American oil company for alleged human rights abuses that occurred during construction of an oil pipeline in Indonesia. *Doe v. Exxon Mobil Corp.*, No. Civ. A. 01-1357, 2006 WL 516744 (D.D.C. Mar. 2, 2006). The court denied the defendant's motion to dismiss on foreign affairs grounds because, unlike in *AIA*, "no state government had passed any statute in conflict with U.S. foreign policy." *Id.* at *3. In these cases, as discussed above, Appellants' claims are predicated in part on state statutes that conflict directly with American foreign policy. Moreover, Appellants' claims fail because these litigations themselves are contrary to the Executive Branch's policy. *Doe v. Exxon* does not suggest otherwise.[28]

- ***Ibrahim v. Titan Corporation*.** In *Ibrahim*, seven Iraqi nationals filed suit against government contractors based on the alleged torture of them or their husbands at the Abu Ghraib prison in Iraq. *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 12 (D.D.C. 2005). The court denied the defendants' motion to dismiss on

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[28] Appellants' citation to *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), and *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44 (2d Cir. 1991), for the proposition that "ordinary" tort claims are "constitutionally committed" to the judiciary and, thus, need not yield to conflicting Executive Branch policy, is no more compelling. Cornell Br. at 37. Neither case involved, as in these cases, an established Executive Branch policy against litigating the claims at issue. To the contrary, in *Klinghoffer*, "both the Executive and Legislative Branches . . . expressly endorsed the concept of suing terrorist organizations in federal court." *Klinghoffer*, 937 F.2d at 49. And in *Kadic*, the Executive Branch repeatedly took the position that the defendant should *not* be immune to suit in American courts. *Kadic*, 70 F.3d at 250.

political question and preemption grounds, finding that, as in *Alperin*, the federal government had not taken a firm position with respect to how such claims should be resolved. *See id.* at 16. There is no comparable ambiguity as to Executive Branch policy here.

Finally, there is no basis for Appellants to attempt to rely on the Third Circuit's recent decision in *Gross v. German Foundation Industrial Initiative*, 456 F.3d 363 (3d Cir. 2006). The court allowed litigation of a narrow question involving the German Foundation, the reparations fund created with the substantial involvement of the United States and German governments to benefit Nazi victims or their descendants – *i.e.*, whether German companies owed "interest" on their payments to the German Foundation. *Id.* at 366. The court based its conclusion that the case was justiciable on the fact that the dispute over the alleged interest obligation (as to which the U.S. Government never took a position) was "significantly different" than cases based on conduct during the Holocaust era, *id.* at 380, and acknowledged that as to such claims, "judicial intervention related to WWII reparations would encroach on decisions reserved for the discretion of the United States Executive." *Id.* at 389. Indeed, *Gross* contrasts pointedly with decision by a district court within the Third Circuit dismissing a Holocaust-era claim brought by a victim of Nazi medical experimentation, *In re Nazi Era Cases Against German Defendants Litig.*, 334 F. Supp. 2d 690 (D.N.J. 2004), which the

Third Circuit affirmed, in an unpublished order citing *AIA*, the day before the *Gross* opinion was issued. *In re*

Cases Against German Defendants Litig., No. 04-3934, 2006 WL 2162308 (3d Cir. Aug. 2, 2006) (designated not precedential).[29] Moreover, whereas *Gross* dealt exclusively with the question of how much money was going to be distributed in the process endorsed by the government (*i.e.*, a judgment would force more to be paid into the German Foundation – not directly to claimants on claims under common law or statutory theories), Appellants have eschewed the only government-endorsed process.

B. There Is No Basis For Appellants' Arguments About Abandonment Of Claims Or Lack Of Due Process.

Appellants finally argue that the District Court erred by dismissing their claims in favor of ICHEIC, which they contend is a "manifestly inadequate" forum. In particular, Appellants posit that forcing them to resolve their claims through ICHEIC would result in an effective "abandonment of their claims" and a deprivation of their rights to due process (*i.e.*, their purported rights to pursue

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[29] Unlike Second Circuit Local Rule 0.23, the Local Rules of the Third Circuit do not bar citation to unpublished decisions of that court. *See* Third Circuit R. 28.3(a) ("Citations to federal decisions that have not been formally reported shall identify the court, docket number and date, and refer to the electronically transmitted decision."); 3d Cir. Internal Operating Procedure 5.3 (unpublished orders are deemed not precedential).

claims in American courts). Cornell Br. at 48-53. Appellants' argument is legally and factually flawed, and indeed has already been rejected by the Supreme Court.

Like Appellants, the Insurance Commissioner and dissent in *AIA* were highly critical of ICHEIC, equating resolution of claims through ICHEIC with, in effect, no resolution at all. The dissent in *AIA* argued, ironically relying, as do Appellants, on the District Court's earlier ruling in *Generali I* that ICHEIC was not an adequate alternative forum for dismissal on *forum non conveniens* grounds:

> As the Court observes, ICHEIC has formulated procedures for the filing, investigation, valuation, and resolution of Holocaust-era insurance claims. At least until very recently, however, ICHEIC's progress has been slow and insecure. . . . ICHEIC has thus far settled only a tiny proportion of the claims it has received. Evidence submitted in a series of class actions filed against Italian insurer Generali indicated that by November 2001, ICHEIC had resolved only 797 of 77,000 claims. The latest reports show only modest increases. . . . Finally, although ICHEIC has directed its members to publish lists of unpaid Holocaust-era policies, that non-binding directive has not yielded significant compliance at the time this case reached the Court.

539 U.S. at 432 (Ginsberg, J., dissenting) (citations omitted).

The *AIA* majority nevertheless, despite these unwarranted criticisms, credited the supremacy of the Executive Branch's deference to ICHEIC as the exclusive mechanism for resolving Holocaust-era insurance claims. The Court reasoned that "our thoughts on the efficacy of the one approach [ICHEIC] versus the other [litigation] are beside the point, since our business is not to judge the wisdom of the National Government's policy; dissatisfaction should be addressed

to the President." *Id.* at 427. Indeed, these very criticisms of ICHEIC made no dent in the conclusions of the District Court, which, having issued *Generali I* – the source of much of the dissent's criticism of Generali in *AIA* – was certainly in a privileged position to appreciate the import of its earlier statements on its ultimate dismissal of these claims. *See Generali II*, 340 F. Supp. 2d at 505 ("That I reached in *Generali I* a somewhat different conclusion . . . does not salvage [Plaintiffs'] claims.").[30]

Appellants' suggestion that forcing them to resolve their claims through ICHEIC would violate their rights to due process fares no better. Cornell Br. at 50-53. This argument could be made (and may well have been made) by every private plaintiff whose claim was dismissed in the many reparations cases that have rejected Holocaust-related claims in favor of negotiated resolutions. As Appellants readily acknowledge, the Supreme Court in *AIA* was aware of the constitutional

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[30] Appellants' argument that there "is a complete absence of due process" in ICHEIC based on the District Court's earlier refusal to dismiss these actions on *forum non conveniens* grounds, misses the mark. Cornell Br. at 52-53 (citing *Monegasque de Reassurances S.A.M. v. Nak Naftogaz of Ukr.*, 311 F.3d 488 (2d Cir. 2002); *Victoriatea.com, Inc. v. Cott Beverages Can.*, 239 F. Supp. 2d 377 (S.D.N.Y. 2003)). Key to the District Court's finding that ICHEIC was inadequate for purposes of a transfer on *forum non conveniens* grounds was the alleged absence of any method for ensuring Generali's continued participation in the process – an issue that is irrelevant, now that ICHEIC is winding down. *See Generali I*, 228 F. Supp. 2d at 357. ICHEIC is only "inadequate" to meet these individual Appellants' demand for windfall recoveries.

limitations on the Executive Branch's exercise of its foreign affairs powers: "'like every other governmental power, [the Executive's foreign affairs powers] must be exercised in subordination to the applicable provisions of the Constitution.'" *AIA*, 539 U.S. at 416 n.9 (citation omitted). Yet, despite its recognition of these limitations on Executive Branch authority and of the supposed shortcomings in the ICHEIC process, the Supreme Court still found that, consistent with Executive Branch policy, *all* Holocaust-era insurance claims shall be resolved through ICHEIC, rather than through litigation. *Id.* at 427. There is no due process violation here.[31]

Moreover, the facts about ICHEIC are not what Appellants say. As set forth above, under the auspices of ICHEIC, Generali became the global leader in payment of claims on Holocaust-era insurance policies. Class Plaintiffs have recently settled their class claims, consistent with the valuation and eligibility guidelines established by ICHEIC. Left to criticize the process are those for whom ICHEIC's very existence is anathema or those who, perhaps dissatisfied with

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[31] As the District Court observed in *Generali II*, if the Appellants believe deprivation has occurred, they may have a remedy in the form of takings claims against the Federal Government for its preemptive policy decision. *See* 340 F. Supp. 2d at 503 n.6.

ICHEIC payouts, are steadfast in their pursuit of windfall punitive damage awards and attorneys' fees, neither of which is available under ICHEIC's guidelines.[32]

IV. THE VOLUMINOUS SUBMISSIONS AND SPURIOUS ALLEGATIONS MADE IN THE WEISS CASE ARE UNPERSUASIVE.

The submission in the *Weiss* case (no. 05-5612) is particularly strident. When stripped of its invective, the Weiss Appellants tell a story of great personal tragedy that, sadly, was shared by many others, including perhaps most of the thousands who have benefited from the ICHEIC process.[33] However, their arguments fail as well.

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[32] The fact that one or another Appellant such as the Appellants in the *David* action (no. 05-5310) does not qualify for payment under ICHEIC's protocols does not immunize their claims from preemption. The development of ICHEIC's procedures and protocols (including its eligibility and valuation guidelines) was a collaborative process between Chairman Eagleburger, leading Jewish public interest organizations, advisors from several foreign governments, and the member companies. *See supra* at 17-18, 23-24. The resulting rules and guidelines ensured recovery by claimants who could even arguably be said to have claims from policies in effect during the Holocaust-era. The very existence of eligibility and valuation standards implies that some may qualify for payment and others may not. At ICHEIC an instance of appellate review by independent arbiters (whose decisions have been made publicly available on the Internet) is available to verify compliance with ICHEIC guidelines. The Executive Branch was aware of these guidelines and has unquestionably endorsed them in declaring ICHEIC to be the exclusive mechanism for resolving Holocaust-era insurance claims.

[33] We point out reluctantly that Dr. Weiss' filings have become a showcase for his personal crusade against Generali and others whom he associates with the Holocaust on the basis of his own idiosyncratic view of historical events.

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A. The Weiss Appellants' Arguments Are Duplicative Or Erroneous, And The District Court Properly Rejected Weiss's Belated Attempt To File An Amended Complaint After The Entry Of Judgment.

The Weiss Appellants argue: (1) that the claims they assert meet the technical requirements of Florida common and statutory law; (2) that *AIA* does not support dismissal; and (3) that the District Court erred in not granting leave to amend after the case had been finally dismissed. The first point is legally irrelevant and the second is elsewhere addressed in this brief, *supra*.[34]

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Regrettably, in a ruling on a fee application by Dr. Weiss and his counsel, Judge Korman pointedly described Dr. Weiss' attempt to "extort" funds belonging to Holocaust survivors for the benefit of his own private research efforts, in exchange for his not filing appellate objections to a ruling by Judge Korman in the Swiss bank Holocaust litigation:

> [A]t the meeting they [Dr. Weiss and his counsel] revealed their true colors. . . . Dr. Weiss asked how much I would pay to prevent them from filing a notice of appeal. Specifically, he wanted me to provide attorneys fees and funds for private research that would assist him in his litigation against Generali. This was beyond the pale. I was not going to be blackmailed, particularly with funds that belong to Holocaust survivors.

In re Holocaust Victim Assets Litig., 311 F. Supp. 2d 363, 375 (E.D.N.Y. 2004), *aff'd*, 424 F.3d 150 (2d Cir. 2005), *cert. denied*, 126 S. Ct. 2901 (2006). And in summarizing the lack of any significant contribution counsel's filing of Dr. Weiss' "research" had made to the underlying results of that litigation, Judge Korman concluded, "[Counsel] stood by as his client attempted to extort a significant cash award from a fund belonging to Holocaust survivors in exchange for not filing a notice of appeal from my judgment approving the fairness of the settlement." *Id.*

[34] The Weiss Appellants seriously mischaracterize an ancient war-time case against Generali, *Buxbaum v. Assicurazioni Generali*, 33 N.Y.S.2d 496 (Sup. Ct.

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As to the third point, the District Court was well justified in rejecting the motion under Rule 59 for leave to amend to inject a RICO claim after the case had already been dismissed. *See Nat'l Petrochemical Co. of Iran v. The M/T Stolt Sheaf*, 930 F.2d 240, 244 (2d Cir. 1991) (citation omitted); *Van Buskirk v. N.Y. Times Co.*, 325 F.3d 87, 91-92 (2d Cir. 2003). Any different rule would simply condone and encourage gamesmanship. *Nat'l Petrochemical*, 930 F.2d at 245. The burden is particularly heavy where "the moving party has had an opportunity to assert the amendment earlier, but has waited until after judgment before requesting leave [to amend]." *State Trading Corp. of India, Ltd. v. Assuranceforeningen Skuld*, 921 F.2d 409, 418 (2d Cir. 1990).

As early as December 2001, some *three years* before *Generali II*, these same Appellants warned of their intent to amend their complaint to assert RICO claims

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1942). *Buxbaum* was not a case about the application of New York law to a Czech policy, but a dispute during World War II about the venue for payment or litigation, where the court was predictably unwilling to consign American citizens to the tribunals of an "avowed enemy" (Germany had taken control of Czech territory at the time). The opposite result was endorsed in *Dougherty v. Equitable Life Assur. Soc'y of the U.S.*, 193 N.E. 897 (N.Y. 1934) (defendant not liable for Russian policies cancelled by Soviets); *see also Tillman v.Nat'l City Bank of N.Y.*, 118 F.2d 631 (2d Cir. 1941) (same).

against Generali, drawing the *same* strained tobacco analogy they pressed again before the District Court after dismissal and reiterate here:[35]

> [T]he Weiss Appellants will in all likelihood amend their complaint at the earliest opportunity to allege a claim under the applicable Racketeering Influenced and Corrupt Organization Act. The Weiss Appellants' allegations mirror those of the United States Government against several tobacco companies whose widespread deceit concerning the health impact of their products resulted in massive injuries to people.

JA __ [Weiss Appellants' Memorandum of Law in Opposition, filed 12/04/01, submitted in connection with *Generali I*, at 8]; *see also* JA __ [Weiss Appellants' Memorandum of Law in Opposition, dated 05/16/03, submitted in connection with *Generali II*, at 23-26 ("the Weiss Appellants will in all likelihood amend the complaint to allege a claim under RICO")]. The District Court was entirely justified in rejecting this obvious tactical attempt to resuscitate the case based on a RICO claim threatened years earlier. *See* JA ___ [Opinion dated December 2, 2004 at 2] (rejecting Rule 59 application) ("Rule 59 Order").

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[35] The analogy is flawed. The public dissimulation alleged in the tobacco cases arguably encouraged or permitted the public to continue or begin smoking, therefore adding to (or even causing) damage. The alleged failures of disclosure here boil down to Dr. Weiss' disagreement about Generali's legal obligations in the wake of Communist confiscations or his having received what he regards as unsatisfactory information about certain policies – communications that certainly did not "mislead" these plaintiffs, as the Weiss complaint demonstrates. The central harm which all Appellants allege – the nonpayment of policies – ripened presumably at the end of World War II.

The Weiss Appellants continue to rely, as they did before the District Court, on *United States v. Portrait of Wally*, No. 99 Civ. 9940, 2000 WL 1890403 (S.D.N.Y. Dec. 28, 2000), where the court noted that "in the ordinary case the need to protect finality of judgments will prevail," but proceeded to find "other factors" which justified in those particular circumstances granting the government leave to amend. *Id.* at *1. The amendment allowed in *Wally* was justified by the "inadvertent conduct of counsel"; it was not a reward for a purely "tactical" decision. *Id.*

In any event, even these strained RICO charges would have been subject to dismissal because the *AIA* opinion contemplates no "RICO exception" to its ruling. A RICO claim would likewise be encompassed by the District Court's conclusion that "plaintiffs cannot recover independently" on any of the additional claims based on alleged post-war conduct "because they do not appear to allege any cognizable injury other than that caused by Generali's non-payment of benefits, for which redress is available only through ICHEIC." *Generali II*, 340 F. Supp. 2d at 508. Futility alone is, therefore, sufficient to reject this belated attempt to add a RICO claim. *See Van Buskirk v. N.Y. Times Co.*, 325 F.3d 87, 92 (2d Cir. 2003).[36]

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[36] *See also Ruffolo v. Oppenheimer & Co.*, 987 F.2d 129, 131 (2d Cir. 1993); *Antigenics Inc. v. U.S. Bancorp Piper Jaffray, Inc.*, No. 03 Civ. 0971, 2004 WL 2290899 (S.D.N.Y. Oct. 8, 2004).

B. The Charges Weiss Has Leveled Against Generali And ICHEIC Are Groundless.

The Weiss Appellants' Rule 59 motion appeared to be principally a vehicle improperly to enlarge the record with more invective against Generali and ICHEIC for use on appeal.[37] *See* Weiss Br. at 44-49 (relying principally on the materials "submitted in support of their Rule 59 motion" to show supposed ICHEIC failures). However, as noted, these ancient criticisms of ICHEIC are legally irrelevant. *See* Rule 59 Order at 2; *see also AIA,* 539 U.S. at 427. Moreover, none was even "newly discovered". *See In re N.Y. Asbestos Litig.*, No. 92 Civ. 6377, 1994 WL 132137 at *2 (S.D.N.Y. Apr. 11, 1994) (outlining the requirements for introduction of newly-discovered evidence). The Weiss Appellants' objection has always been to ICHEIC's existence, not to one or another of its real or imagined imperfections. *See* Weiss Br. at 48 ("[T]he Weiss Appellants contend that even a 'properly' functioning ICHEIC would not be permitted as an alternative to court litigation . . . .").[38] The attacks on Generali and ICHEIC that permeate the Weiss

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[37] The Weiss Appellants continued to submit *repeated* noticed of "new evidence" in support of their Rule 59 motion into 2005. *See* JA ___ [Weiss Appellants' Second Notice of Filing New Evidence In Support of Rule 59 Motion, certificate of service dated 02/05/05].

[38] "As the Weiss Appellants have stated . . . they opposed the creation of the ICHEIC from its inception . . . includ[ing] . . . [for] German insurers and insurance claims . . . ." JA __ [Weiss Appellants' Surreply In Opposition, certificate of

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Appellants' submissions here (Weiss Br. at 44) and their Rule 59 motion[39], appear virtually in the same words in a twenty page letter from their counsel to Attorney General Janet Reno *four years earlier* urging the government to withhold support for *any* settlement involving World War II-era insurance policies.[40]

An effort as encompassing as ICHEIC's to pay on ancient policies on a world wide basis involved thousands of determinations, large and small, about interest rates, currencies, historical events and dates, company "family trees", consanguinity rules, audits, appeals, languages, evidence, multipliers, names . . . the list is almost interminable. Many of these decisions were hotly debated, and as to any of them reasonable persons may hold differing views in good faith.[41] But in

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service dated 09/30/03, submitted in connection with *Generali II*, at 2 n.2]. "Only the U.S. courts can . . . properly adjudicate Plaintiffs' rights." JA __ [*Id.* at 3 n.4].

[39] *See* JA ___ [Weiss Appellants' Notice of Motion for Rehearing or to Alter or Amend the Judgment Pursuant to Rule 59 and Supporting Memorandum of Law, certificate of service dated 10/28/04, at 12-14].

[40] The September 18, 2000 letter to Attorney General Reno was submitted to the District Court in 2001 in connection with *Generali I*. *See* JA __ [Affidavit of Samuel J. Dubbin dated 12/05/01, submitted in connection with *Generali I*, Exh. G at 1-20].

[41] No wide-scale compensation effort is free from bitter criticisms from those, like the Weiss Appellants here, who have an interest in promoting litigation or simply deeply-felt views about the matters or the parties at issue. Judge Korman was the subject of scathing attacks for his handling of the Swiss bank litigation, which spawned a myriad of objections. *See, e.g.*, *In re Holocaust Victim Assets Litig.*, 311 F. Supp. 2d 363, 366 (E.D.N.Y. 2004) (200 written comments and objections to the Swiss bank settlement), *aff'd*, 424 F.3d 150 (2d Cir. 2005), *cert.*

(cont'd)

the end, the ICHEIC process will have allowed Generali alone to put some $130 million in the hands of claimants world-wide. Hundreds of millions of dollars will have been distributed by ICHEIC to Holocaust-era insurance claimants through the agreement negotiated with the German Government. None of the continued criticisms leveled by the Weiss Appellants against ICHEIC, against Generali, or against any non-litigated resolution of these claims provides a basis to reverse *Generali II*.

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denied, 126 S. Ct. 2901 (2006). And more recently we have heard bitter complaints concerning the administration and terms of the 9/11 fund. *See, e.g.*, *Colaio v. Feinberg*, 272 F. Supp. 2d 273, *appeal dismissed in part and aff'd in remaining part sub nom. Schneider v. Feinberg*, 345 F.3d 135 (2d Cir. 2003).

CONCLUSION

For each of the foregoing reasons, the District Court's opinion in *Generali II* should be affirmed.

DATED: September 29, 2006

Respectfully submitted,

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Dated: September 29, 2006

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