No. 12-9

In The
Supreme Court of the United States

HARRY ARZOUMANIAN, GARO AYALTIN, MIRAN KHAGERIAN, AND ARA KHAJERIAN,

Petitioners,

v.

MUNCHENER RUCKVERSICHERUNGS-GESELLSCHAFT AKTIENGESELLSCHAFT AG,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* ARMENIAN BAR ASSOCIATION, ARMENIAN NATIONAL COMMITTEE OF AMERICA, ZORYAN INSTITUTE FOR CONTEMPORARY ARMENIAN RESEARCH AND DOCUMENTATION, INC., GENOCIDE EDUCATION PROJECT, JEWISH ALLIANCE FOR LAW AND SOCIAL ACTION, THE CENTER FOR THE STUDY OF LAW & GENOCIDE, USC GOULD SCHOOL OF LAW INTERNATIONAL HUMAN RIGHTS CLINIC IN SUPPORT OF PETITIONERS

DAVID M. BALABANIAN
Counsel of Record
DAVID B. SALMONS
ROBERT A. BRUNDAGE
LUCY WANG
BINGHAM MCCUTCHEN LLP
Three Embarcadero Center
San Francisco, CA 94111
Telephone: 415.393.2000
Facsimile: 415.393.2286
david.balabanian@bingham.com

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Can a state law concerning traditional state responsibilities, such as extending the statute of limitations and providing forum access for insurance claims, be invalidated under the foreign affairs doctrine in the absence of a conflict with federal policy or an indication of federal intent to preempt the field?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

STATUTES

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

INTERESTS OF *AMICI CURIAE*[1]

Pursuant to Supreme Court Rule 37, the Armenian Bar Association ("ABA"), Armenian National Committee of America ("ANCA"), Zoryan Institute for Contemporary Armenian Research and Documentation, Inc. ("Zoryan Institute"), the Genocide Education Project, Jewish Alliance for Law and Social Action, the Center for the Study of Law & Genocide, and the International Human Rights Clinic of the USC Gould School of Law submit this brief in support of the petition for a writ of certiorari.

The ABA was formed in 1989 to provide an arena for lawyers of Armenian heritage to come together socially and professionally and to address the legal concerns of the Armenian community. ANCA is a grassroots organization representing constituencies in California and throughout the United States on a broad range of human rights, civic, and public policy concerns. The Zoryan Institute is an international academic and scholarly center devoted to the

[1] Pursuant to Supreme Court Rule 37.6, counsel for the *amici curiae* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than the *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, Counsel of record for all parties received notice of *amici curiae*'s intention to file this brief more than 10 days prior to the due date. All parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

documentation, study, and dissemination of educational material related to Armenian history and culture. The Genocide Education Project is a nonprofit organization that assists educators in teaching about human rights and genocide, particularly the Armenian Genocide, by developing and distributing instructional materials, providing access to teaching resources and organizing educational workshops. The Jewish Alliance for Law and Social Action, Inc. is dedicated to the civil rights and liberties of all Americans, whose members actively pursue legal and economic justice for all through community action, litigation, and the encouragement of legislation. The Center for the Study of Law and Genocide is a nonprofit organization founded in 2007 as an educational project of Loyola Law School, Los Angeles. The goal of the Center is to focus on legal scholarship of issues pertaining to genocide and mass violations of human rights, with particular emphasis on improving and making more accessible effective legal resources and remedies for victims. The University of Southern California Gould School of Law's International Human Rights Clinic was established in January 2011 to provide law students with the opportunity to work on projects and cases that confront some of the most pressing human rights concerns of our day and support the critical work of human rights advocates worldwide.

Amici curiae have a substantial interest in the outcome of the questions presented in this case and

submit this brief so that they may share their views with the Court on these matters of interest to them.

STATEMENT OF THE CASE

I. CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 354.4 EXTENDS THE STATUTE OF LIMITATIONS FOR CERTAIN INSURANCE CLAIMS

Section 354.4 of the California Code of Civil Procedure extends the statute of limitations on certain insurance claims. The class of eligible claimants includes any person (regardless of ancestry) living in the Ottoman Empire during the period of 1915 to 1923 who, during that period, *either*

(1) died;

(2) was deported; or

(3) escaped to avoid persecution.

Cal. Code Civ. Proc. § 354.4(a)(1).

Although the statute uses the term "Armenian Genocide victim" to refer to these persons, it creates no cause of action for genocide and there is *no* circumstance in which the statute would require or authorize a court to determine whether genocide occurred. Rather, the statute uses the term "Armenian Genocide [V]ictim" as a shorthand reference to all the persons for whom the statute of limitations is extended on any of the three alternate grounds it

provides. The statute also states that its provisions are severable "[i]f any provision of this section or its application is held invalid. . . ." *Id.* § 354.4(d).

II. THE NINTH CIRCUIT RULED THREE TIMES, EACH TIME APPLYING A DIFFERENT STANDARD OF PREEMPTION

Plaintiffs filed this action on behalf of beneficiaries of unpaid life insurance claims. They seek to recover damages resulting from the defendant insurance carrier's failure to pay those claims.

Defendant moved to dismiss the claims as time-barred, arguing that Section 354.4 violated the foreign affairs doctrine. The district court held that under *Clark v. Allen*, 331 U.S. 503 (1947), *Zschernig v. Miller*, 389 U.S. 429 (1968), and *American Insurance Assn. v. Garamendi*, 539 U.S. 396 (2003), the statute was not preempted under the foreign affairs doctrine. It certified its order for interlocutory appeal under 28 U.S.C. § 1292(b).

On appeal, the Ninth Circuit struggled to determine the appropriate standard for preemption under the foreign affairs doctrine. It ultimately issued three separate opinions. Each applied a different standard for preemption, leading to diametrically opposed results.

A. First Panel Decision: A Divided Panel Holds That Section 354.4 Conflicts With A "Foreign Policy Preference"

In a 2-1 decision, the first Ninth Circuit panel invalidated Section 354.4 under conflict preemption. App. 21a-44a.[2]

The majority determined that Section 354.4 conflicted with an executive policy prohibiting legislative "recognition" of the Armenian Genocide by states. App. 28a (relying on *Garamendi*). Unlike G*aramendi* where the federal government had negotiated agreements with foreign governments and created a special mechanism to adjudicate Holocaust-era life insurance policies, however, the majority could not identify any federal statements or actions embodying a policy against state recognition of the Armenian Genocide or resolution of state-law claims regarding life insurance policies from that era. App. 28a-29a. Indeed, as the dissent noted, there was "no evidence of any express federal policy forbidding states from using the term 'Armenian Genocide.'" App. 44a.

Nonetheless, the majority found that executive "diplomatic objectives" could be extracted from some presidential speeches and even some "private" lobbying efforts. App. 30a. After interpreting these executive actions and certain instances of congressional inaction, the majority found that a federal policy thus

---

[2] We abbreviate the Petition for Writ of Certiorari as "Pet." and the appendix to the certiorari petition as "App."

"emerg[ed]." On this basis, the majority concluded that the use of the term "Armenian Genocide [V]ictims" in Section 354.4 conflicted with the executive's "foreign policy preferences." App. 35a-37a.

B. Second Panel Decision: A Divided Panel Upholds Section 354.4 Under Both Conflict And Field Preemption

On rehearing, the panel reversed itself 2-1, finding that Section 354.4 was not preempted under the foreign affairs doctrine. App. 45a-65a. It upheld the statute against claims of both conflict and field preemption. *Id.*

This time the majority held that "there is no express federal policy forbidding states to use the term 'Armenian Genocide.'" App. 47a. The majority found there were no executive agreements or any other federal statement even addressing the subject. Even if it were to interpret certain presidential speeches as expressing a "preference" against use of that term, the majority reasoned, those speeches "are counterbalanced, if not outweighed, by various statements from the federal executive and legislative branches *in favor* of such recognition." App. 53a. In any event, the majority held that informal presidential communications are not "sufficient to constitute an express federal policy." App. 53a.

Having found no conflict with federal policy, the majority also upheld the statute against challenge

under the "complementary" doctrine of field preemption. App. 55a-56a (quoting *Garamendi*, 539 U.S. at 420 n.11). The majority reasoned that field preemption "only appl[ied] if a 'State were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility.'" App. 56a (quoting *Garamendi*, 539 U.S. at 420 n.11). The statute, it held, "clearly falls within the realm of traditional state interests" of regulating the insurance industry. App. 56a. Moreover, the mere inclusion of the term "Armenian Genocide" within the statute, it said, "has, at most, an incidental effect on foreign affairs." App. 56a. Consequently, the court upheld Section 354.4.

C. *En Banc* Decision: Decision Invalidates Section 354.4 Under Field Preemption

On rehearing, the *en banc* panel reversed the second panel decision and invalidated Section 354.4 in its entirety. App. 1a-20a. The *en banc* panel based its decision exclusively on the doctrine of field preemption.

Because the *en banc* panel relied on field preemption, it did not address the second panel's determination that there was no federal policy on a state's use of the term "Armenian Genocide." Indeed, the *en banc* panel did not engage in *any* conflict preemption analysis. App. 7a-8a. "[E]ven in the absence of any express federal policy," it said, a state law still may be preempted . . . if it intrudes on the field of foreign

affairs without addressing a traditional state responsibility." App. 7a-8a.

In applying the "rarely invoked doctrine" of field preemption, the panel did not have the benefit of this Court's subsequent decision in *Arizona v. United States*, 132 S. Ct. 2492 (2012). Therefore, it did not consider whether there was any "pervasive" federal action in the field such that the federal government "left no room for the States to supplement." *Id.* at 2495. Nor did it identify any "federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Id.* at 2501.

Indeed, the *only* federal action the court discussed was a newspaper report – not contained in the record before the court – which noted that in 2010 "President Obama [carefully avoided] the word 'genocide' during a commemorative speech." App. 18a-19a.[3] As discussed below, presidential word choice is not sufficient to establish a federal field of action or a dominant federal interest. *Infra* at pg. 15.

---

[3] Although the President did not use the term, "genocide," he did ask the nation to reflect upon the "inhumanity" what the President described as "one of the worst atrocities of the 20th century . . . [when] 1.5 million Armenians were massacred or marched to their death." Statement of President Barack Obama on Armenian Remembrance Day (April 24, 2010), *available at* http://www.whitehouse.gov/the-press-office/statement-president-barack-obama-armenian-remembrance-day.

Instead of analyzing the United States' actions, the court focused on the presumed reaction of modern day Turkey – which displaced the Ottoman Empire nearly a century ago – to the California legislature's use of the term "Armenian Genocide Victim." Despite the "passage of nearly a century since the events in question" the court stated, present-day Turkey "expresses great concern over the issue." App. 18a. In support of this conclusion, it cited only a newspaper article reporting Turkey's reaction to a proposed *French* law that would *criminalize* denial of the Armenian Genocide. App. 18a-19a.[4]

Ignoring the operative provisions of the statute, the panel found that Section 354.4 did not concern an area of traditional state responsibility because the legislature's "real purpose" was to express a distinct "viewpoint" on a matter of foreign policy. App. 16a. By defining the class of eligible claimants as "Armenian Genocide victim[s]," the panel held, the statute "establishes a particular foreign policy for California – one that decries the actions of the Ottoman Empire and seeks to provide redress for 'Armenian Genocide victim[s].'" App. 17a-18a (citing *Zschernig*, 289 U.S. at 441).

Finally, the court found that one of the three alternative grounds for relief under the statute, the "persecution" category of Section 354.4, intruded on

[4] The article appeared three days before the oral argument and was not mentioned there by the court or any of the parties.

the federal foreign affairs power by potentially authorizing California courts to conduct a "politicized inquiry to the conduct of a foreign nation." App. 18a.

No claim has yet been adjudicated under the "persecution" category and, whatever its meaning, it neither requires nor authorizes a finding of "genocide" nor does it require a finding that a government or state organ was responsible for the "persecution." Nevertheless, the panel speculated that the statute might lead a court to undertake a "politicized inquiry." App. 18a (citing *Zschernig*, 389 U.S. at 435-36). Without considering the express severability provision of the statute, it then struck down the entire statute based on the theoretical possibility that a claim brought under the "persecution" prong of the statute could invite a "politicized" inquiry.[5]

ARGUMENT

I. THE COURT SHOULD GRANT CERTIORARI

The Court should grant certiorari and reverse the Ninth Circuit's decision or, at the least, vacate and remand it for further consideration in light of *Arizona v. United States*, 132 S. Ct. 2492 (2012).

[5] None of the claims of any of the named plaintiffs is brought under that portion of the statute. Complaint at 3, *Movsesian v. Victoria Versicherung AG* (No. 2:03-cv-09407-CAS-JWJ); App. 49a.

Arizona, decided four months after the Ninth Circuit's decision, establishes the standards for determining whether a state law can be found to affect foreign affairs in the absence of any express federal action. Since the Ninth Circuit's decision rests on at least three premises that this Court rejected in *Arizona,* there is a reasonable probability that, given the opportunity for further consideration, the Ninth Circuit would hold that Section 354.4 is not preempted.[6]

A. The Ninth Circuit's Decision Is Wholly Inconsistent With This Court's Subsequent Decision In *Arizona*

Arizona considered field and conflict preemption challenges to a state statute affecting immigration and aliens. As the Court's opinion there details, these matters directly affect relations with other governments, and are at the core of the federal government's power over foreign affairs. Treatment of foreign nationals can affect the gamut of foreign affairs – "trade, investment, tourism, and diplomatic relations for the entire Nation" as well as "treatment of American citizens abroad" – making treatment of aliens

[6] A GVR is appropriate "[w]here intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam); 28 U.S.C. § 2106 (authority to vacate decision and to order further proceedings).

"[o]ne of the most important and delicate of all international relationships." *Arizona,* 132 S. Ct. at 2498-99 (quoting, in part, *Hines v. Davidowitz,* 312 U.S. 52, 64 (1941)).

Further, the subject inherently requires the Nation to speak with one voice: foreign governments "must be able to confer and communicate on this subject with one national sovereign, not the 50 separate States." *Id.* at 2498. Hence, the federal government's authority over immigration and treatment of aliens derives largely from its power "to control and conduct relations with foreign nations." *Id.* at 2498.

Arizona's law imposed criminal penalties for an alien's failure to register, made it a crime for unauthorized aliens to seek or engage in work, authorized warrantless arrest of aliens reasonably suspected to have committed crimes making them removable from the United States, and required police officers, in varying circumstances, to verify the immigration status of persons they stopped, detained or arrested. *Id.* at 2496-97. Further, Arizona's law had in fact incurred the ire of a foreign government. The government of Mexico filed a brief in this Court asserting that Arizona's law had already caused "long-term harm to Mexico-U.S. relations" and urging the Court to hold the law preempted. Brief for the United Mexican States as *Amici Curiae* Supporting Respondents, *Arizona v. U.S.*, 132 S. Ct. 2492 (2012) (11-182) at 6. As Mexico noted, the governments of Bolivia, Cuba, Ecuador, Ghana, Guatemala, Micronesia, Panama, Senegal, Turkey and Uruguay, and the

Parliamentary Assembly of the European Council all joined Mexico in a declaration condemning Arizona's law before the United Nation's Third World Conference. *Id.* at 17.

Arizona thus involved a state statute affecting critical aspects of foreign relations. In finding that some parts of that law intruded on a federally-occupied field, and another did not, this Court announced several principles that are wholly inconsistent with those on which the Ninth Circuit decided this case.

1. The Ninth Circuit's Decision Is Inconsistent With *Arizona*'s Test For Field Preemption In The Foreign Affairs Arena

In *Arizona* this Court found portions of that state's law subject to field preemption because they either regulated conduct "in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance" or in which "an intent to displace state law altogether *can be* inferred from a framework of regulation 'so pervasive . . . that Congress left no room for the States to supplement it' or where there is a 'federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" *Arizona*, 132 S. Ct. at 2495 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (emphasis in original)).

Applying that test, the Court held that pervasive federal statutes have "occupied the field of alien registration," and preempted Arizona's penalty for violating federal registration requirements. *Id.* at 2501-03. Equally important, however, it held that the state law's mandate that police officers determine detainees' immigration status was *not* facially preempted. If interpreted only to require state officers to check immigration status during a lawful detention or after releasing the detainee, the Court held, the provision likely would survive preemption. *Id.* at 2497.

Without *Arizona*'s guidance, the Ninth Circuit applied a different test for field preemption. That test preempts a much wider swath of state law and dictated the outcome of this case.

Under the Ninth Circuit's rule, a state law is preempted when it "intrudes on a matter of foreign policy with no real claim to be addressing an area of traditional state responsibility." App. 14a. Further, it held that *any* state law with "more than some incidental or indirect effect on foreign affairs" intrudes on foreign policy. App. 17a (quoting *Zschernig,* 389 U.S. at 434). That preemptive net includes, in the Ninth Circuit's view, any state law that gives a court occasion to evaluate actions of a foreign government or even expresses a "viewpoint" on a foreign issue. *See* App. 17a-19a (holding Section 354.4 preempted on these bases).

In contrast to *Arizona,* the Ninth Circuit held such a state law preempted even if the federal government has *not* addressed the issue and there is *no* dominant federal interest that implicitly excludes state law.

The Ninth Circuit did not identify any "pervasive" framework of federal regulation, or any federal regulation at all, regarding either the adjudication of Armenian Genocide-era life insurance policies or even the use of the words "Armenian Genocide" nor any federal interest in such subject so "dominant" that the statute might be assumed to be precluded.

Having concluded that California's statute fell outside traditional state competence, it held the statute preempted because it affected "foreign affairs" generally. App. 17a-18a. Indeed, it held that the statute affected foreign affairs merely by expressing a "viewpoint" on a matter of foreign policy. App. 16a.

Neither the respondent here, nor the district court, nor any of the three Ninth Circuit opinions in this case, has ever identified a pervasive federal framework or dominant federal interest respecting the usage of the term "Armenian Genocide," much less over whether a State may use that term.

The United States took *no* position in this case – remarkable in a case involving a circuit court's consideration of the scope of federal preemption – nor did the Ninth Circuit solicit its views.

Indeed, the *en banc* decision's *only* evidence of federal interest in the use of the term Armenian Genocide came from a *newspaper* report of a two year old speech in which the President did not use the word "genocide." App. 19a; *see supra* at pg. 7-8.[7]

An inference from a newspaper report about a Presidential speech cannot preempt state law. Even where the Presidential policy is grounded in the President's foreign-policy authority and announced in a formal memorandum, a mere Presidential communication does not "preempt contrary state law." *Medellin v. Texas,* 128 S. Ct. 1346, 1367-72 (2008) (Presidential memorandum to state courts, instructing them to comply with interpretation of treaty, could not preempt contrary state law of criminal procedure; President's "foreign affairs authority" did not entitle President to preempt state law); *Barclays Bank PLC v. Franchise Tax Bd.,* 512 U.S. 298, 330 (1994) (holding that Executive Branch communications that lack the force of law could not preempt state law).

The Ninth Circuit claimed to be relying on a dictum in *Garamendi,* which had noted a "fair

[7] The present Administration, like others before it, has taken varying and inconsistent positions on whether to use that term in connection with events to which it refers. App. 53a. *See supra* at pg. 6. As Justice Alito noted in his *Arizona* dissent, the scope of field preemption cannot depend on the vagaries of "agency priorities" that "change from administration to administration." *Arizona*, 132 S. Ct. at 2527.

question" about the respective roles of conflict and field preemption in the foreign affairs setting and footnoted a possible solution. 539 U.S. at 420 n.11. But *Garamendi* expressly did not decide that question, which "require[d] no answer" in that case because the statute conflicted with federal law. *Id.* at 419-20.

Arizona has now established the test for field preemption. The Ninth Circuit's decision is inconsistent with that test.

Indeed, if the Ninth Circuit's test were the law, *Arizona* could not have come out the way it did. The Arizona law expressly regulated treatment of aliens, "[o]ne of the most important and delicate of all international relationships." *Arizona,* 132 S. Ct. at 2498. Treatment of aliens is also not an area within states' traditional competence. Under the Ninth Circuit's test for field preemption, the entire statute in *Arizona* would have been preempted.

Instead, this Court found only parts of the Arizona statute to be preempted, those that dealt with issues that the federal government had itself regulated. It also held that one part of the Arizona statute might not be preempted, depending on how it was interpreted and applied by Arizona courts.

In sum, *Arizona* demands something very different than the field-preemption test the Ninth Circuit applied. Because there is a reasonable probability that the Ninth Circuit would find no field preemption if given the opportunity to apply *Arizona,* its decision

should, at the least, be vacated and remanded on that ground alone.

2. The Ninth Circuit's Decision Is Inconsistent With *Arizona*'s Test For Facial Invalidation

Arizona clearly held that a federal court may not find a state statute preempted on its face when the statute might be construed and enforced in a way that avoids preemption. The statute at issue in *Arizona* required police to try to determine a detainee's immigration status if a reasonable suspicion existed that the detainee was an unlawfully-present alien. *Arizona,* 132 S. Ct. at 2507. The lower courts had enjoined this provision as preempted. *Id.* at 2498. This Court agreed that the federal statutory framework would be disrupted *if* state officials held aliens in custody for possible unlawful presence without federal supervision. Congress's program, the Court wrote, "does not allow state or local officers to adopt this enforcement mechanism." *Id.* at 2509.

This Court nevertheless reversed. It held that the statute "could be read to avoid these concerns," there was a "basic uncertainty about what the law means and how it will be enforced," and without definitive state-court interpretation "it would be inappropriate to assume [the section] will be construed in a way that creates a conflict with federal law." *Id.* at 2510. Hence, the lower courts had wrongly enjoined the section without, among other things, "some showing

that enforcement of the provision in fact conflicts with federal immigration law and its objectives." *Id.*

In this case the Ninth Circuit invalidated Section 354.4 in its entirety even though the statute can be applied in ways that could not possibly intrude into the federal field. Indeed, the sole circumstance the Ninth Circuit identified in which the statute might involve California in adjudicating a matter affecting foreign relations is limited to the subset of potential claims under the "avoidance of persecution" prong of the statute. Under that prong, the Ninth Circuit speculated that a California court might have to determine whether century old events constituted "persecution" by the Ottoman Empire or, perhaps, some non-governmental group or individual. Whether or not that is true, it could not preempt claims under the "died" or "deported" prongs. *Supra* at pg. 3 (claimant must have "died," been "deported" *or* "escaped to avoid persecution").

Nor does the case relied on by the Ninth Circuit support facial invalidation. The Ninth Circuit relied on *Zschernig,* 389 U.S. 429*,* to hold that Section 354.4 impermissibly intruded on the foreign affairs power. *See* App. 17a-19a. But *Zschernig* actually establishes the contrary. In that case, the Court had already rejected a facial challenge to a statute similar to the one in *Zschernig*. *Clark v. Allen*, 331 U.S. 503 (1947); *see Zschernig,* 389 U.S. at 432 ("We held in *Clark v. Allen* that [such a statute] did not on its face intrude on the federal domain."). *Zschernig* distinguished *Clark* precisely on the ground that *Clark* was

"concerned with the words of a statute on its face," whereas *Zschernig* was concerned with "the manner of its application." 389 U.S. at 433.

Further, *Zschernig* detailed how actual application of those statutes had led courts into judging foreign governments. "It now appears that" under such statutes, "the probate courts of various States have launched inquiries into the type of governments that obtain in particular foreign nations" and the credibility of their representations. 389 U.S. at 433-34. Decisions that followed in the wake of *Clark* "radiate some of the attitudes of the 'cold war,'" leading to "minute inquiries concerning the actual administration of foreign law, into the credibility of foreign diplomatic statements," and other matters; that "forbidden state activity has infected each of the three provisions of [the statute], as applied by Oregon"; and that the "statute as construed seems to make unavoidable judicial criticism of nations established on a more authoritarian basis. . . ." 389 U.S. at 435, 436, 440.

In this case, the Ninth Circuit invalidated Section 354.4 without considering whether it could be constitutionally applied in some cases and without waiting for actual application or interpretation.

Arizona has now made clear that such facial invalidation is premature. Because the decision of the Ninth Circuit violates that principle, it should be reversed by this Court or, at the least, reconsidered by the Ninth Circuit in light of *Arizona*'s mandate.

3. The Ninth Circuit's Decision Is Inconsistent With *Arizona*'s Invalidation Only Of Those Provisions That Intrude On The Federal Field

Arizona clarifies that an entire state statute is not preempted merely because one aspect of that statute falls within the foreign-affairs power. In *Arizona,* the Court held that the penalties for an alien's failure to register fell within the preempted field of alien registration, and that the section imposing those penalties was preempted by federal law. *Arizona,* 132 S. Ct. at 2501-03. It did not automatically invalidate other sections of the statute but separately determined whether they were preempted on their own merits, *id.* at 2503-10, concluding that the mandate to determine detainees' immigration status was not facially preempted at all. *Id.* at 2507-10.

Even if one of the three alternative grounds for invoking the benefit of the California statute – the "avoidance of persecution" ground – were found to be impermissibly political, that could not justify invalidating the whole statute, or refusing to apply it to the named plaintiffs whose claims do not rest on that ground.

* * *

The Ninth Circuit's *en banc* decision is an unprecedented expansion of foreign affairs preemption, unsupported by *Zschernig* and at odds with *Arizona*. In a field without pervasive federal action – or federal

action at all – and with no dominant federal interest, the Ninth Circuit invalidated a state law for merely expressing a viewpoint that may be offensive to a foreign government. It did so on a facial challenge before any court had the chance to apply the contested provisions, and it struck down the entire law instead of merely the ostensibly offending provisions. Because its decision is inconsistent with this Court's subsequent opinion in *Arizona,* it should be reversed or, at least, vacated and remanded. If the Court opts to not grant certiorari, vacate the lower court's decision, and remand for re-review in light of the *Arizona* decision, it should, in the alternative, grant the petition for certiorari, and set the case for oral argument to correct the erroneous Ninth Circuit decision.

B. The Ninth Circuit's Rule Of Law Risks Preempting A Wealth Of State Laws

The Ninth Circuit's *en banc* decision risks invalidating a wealth of state laws that offend no federal interest.

1. The Ninth Circuit's *En Banc* Decision Jeopardizes States' Ability To Speak On Political Issues

Under the Ninth Circuit's decision, state laws are subject to claims of preemption because they "express[ ] a distinct political point of view on a specific matter of foreign policy." App. 19a. If allowed to stand, the Ninth Circuit's *en banc* ruling would

needlessly and improperly curtail states' ability to speak on political issues that may touch upon foreign affairs.

For decades, some forty states and many localities have referred to the "Armenian Genocide" and the lessons to be learned from it, without a single record of objection by the federal government. Pet. 12-13; App. 55a. *See, e.g.*, H.R. Res. 14, 144th Leg. (Del. 2007); H.R. Res. 192, 25th Leg. (Haw. Apr. 6, 2009); H.R. Res. 0113, 90th Leg. (Ill. 1997); H.R.J. Res. 3 (Md. 2001); S. Res. 395, 91st Leg. (Mich. 2002); H.R. Con. Res. 4, 91st Leg., 2d Reg. Sess. (Mo. 2002); H.R. Con. Res. 3003, 60th Leg. (N.D. 2007); S. Res. 7 (N.H. 1990); H.R.J. Res. 125, 211th Leg. (N.J. 2005); S.J. Res. 34, 45th Leg., 1st Sess. (N.M. 2001); H.R. Res. 172 (Pa. 2005); S. Res. 2987 (R.I. 2008). Indeed, President Obama himself recently acknowledged this long history of states commemorating the Armenian Genocide. Pet. 31.

Under the Ninth Circuit's *en banc* decision, such state laws could be attacked as expressing a "viewpoint" on the Armenian Genocide.

The Ninth Circuit recognized the problem and sought to avoid it with a footnote stating that its decision does not apply to purely "commemorative" resolutions. App. 19a. The rationale and meaning of the exception is, however, obscure. "Commemorative" resolutions are at least as likely to offend foreign governments – the principal ground of the Ninth

Circuit's decision – as statutes that create substantive rights.

Moreover, as explained above, the California statute creates no substantive right that requires, or even permits, proof of "genocide." Rather it simply uses the term "Armenian Genocide [V]ictim" as a shorthand reference to the three classes of persons for which the statute of limitations is to be extended – classes defined by criteria that do not include any proof of genocide. If instead of "Armenian Genocide Victims," the statute had used the words "affected persons" to refer to the persons entitled to its benefits that would not would not have affected the meaning or effect of the statute in any way – and this case would not be before this Court.

A rule that limits the ability of states to express a "viewpoint," even one the concerns the activities of a foreign government, infringes one of their basic rights. "A government entity has the right to 'speak for itself.'" *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009) (quoting *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 229 (2000)). When a state or local entity is speaking as the government, "[i]t is entitled to say what it wishes," and to "select the views that it wants to express." *Id.* (internal citation omitted). The right to "engag[e] in [its] own expressive conduct" is a necessary function of state sovereignty. *Id.* (internal citation omitted).

"Even in its international relations, the Federal Government must live with the inconvenient fact that

it is a Union of independent States, who have their own sovereign powers." *Arizona*, 132 S. Ct. at 2514-15 (Scalia, J., dissenting). In *Griswold v. Driscoll,* 616 F.3d 53, 58-59 (1st Cir. 2010), for example, the court rejected a challenge to Massachusetts's treatment of the Armenian Genocide in school curricular materials, in part on the basis of the "developing body of law recognizing the government's authority to choose viewpoints when the government itself is speaking."

2. The Ninth Circuit's Decision Jeopardizes Other Important State Laws

Besides needlessly curtailing governmental speech, the Ninth Circuit's *en banc* decision also threatens to preclude state courts from performing ordinary adjudicative functions. State courts evaluate foreign governments and laws in a wide variety of settings. Under the Ninth Circuit's rule, these evaluations could be labeled "politicized inquiries" because they risk offending foreign sensibilities. If allowed to stand, the Ninth Circuit's *en banc* decision threatens to drastically curtail the ability of state courts to carry out needed functions.

Bedrock legal doctrines have long required state courts to conduct sensitive analysis of foreign events and even foreign nations. The doctrine of *forum non conveniens*, for example, allows a state court to decline to exercise jurisdiction if it finds the cause of action may be more appropriately and justly tried elsewhere. To apply *forum non conveniens*, California

courts must determine whether "the alternative forum is a foreign country whose courts are ruled by a dictatorship so that there is no independent judiciary or due process of law." *Shiley Inc. v. Superior Court*, 4 Cal. App. 4th 126, 133-34 (1992). This standard necessarily requires courts to engage in a politicized inquiry into the foreign country's court system. *See, e.g.*, *Guimei v. General Electric Co.*, 172 Cal. App. 4th 689, 697 (2009) (adjudicating whether the Chinese legal system could provide due process of law).

State courts also evaluate foreign laws and conduct in deciding whether to enforce foreign money judgments. For example, under California Code of Civil Procedure Sections 1713-1729, a state court may decline to enforce a foreign judgment if the judgment was rendered under a political system that does not provide impartial tribunals or due process of law, §1716(b)(1). Code of Civil Procedure Sections 1713-1729 and counterpart statutes in other states explicitly provide the opportunity for state courts to conduct a political inquiry into the conduct of foreign nations.

Justice Harlan, concurring in *Zschernig,* gave additional examples of state laws that empower state judges to evaluate the conduct of foreign nations. In choice of law, a foreign country's tort law will not be applied if the country is "uncivilized." 389 U.S. at 461-62 (Harlan, J., concurring). Disputes as to the content of foreign law require courts to consider how the foreign legal system is administered. 389 U.S. at 461-62 (Harlan, J., concurring).

The Ninth Circuit's holding jeopardizes such traditional and basic legal functions. They now risk *facial* invalidation because they open the door for courts to evaluate the conduct and laws of a foreign nation and may incur the ire of those nations.[8]

CONCLUSION

The Ninth Circuit's decision applies the wrong legal standards for field preemption, facial invalidation, and severability in light of this Court's subsequent decision in *Arizona*. Besides deciding this case incorrectly, the decision's precedential force jeopardizes other important state laws. The Court should grant certiorari and reverse or, at the least, vacate,

[8] Opposition to a state law by a foreign nation does not make it a matter of foreign relations, particularly in the absence of any indication that the U.S. government so regards it. As Justice Scalia noted in his *Arizona* dissent, "[J]ust as . . . rights are not expanded for foreign nationals because of their countries' views . . . neither are the fundamental sovereign powers of the States abridged to accommodate foreign countries' views." *Arizona*, 132 S. Ct. at 2514.

and remand to allow the Ninth Circuit to reconsider its decision in light of *Arizona*.

Respectfully submitted,

DAVID M. BALABANIAN
Counsel of Record
DAVID B. SALMONS
ROBERT A. BRUNDAGE
LUCY WANG
BINGHAM MCCUTCHEN LLP
Three Embarcadero Center
San Francisco, CA 94111
Telephone: 415.393.2000
Facsimile: 415.393.2286
david.balabanian@bingham.com

Counsel for Amici Curiae

Dated: July 31, 2012