

IN THE COURT OF APPEAL  
OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT, DIVISION EIGHT

TAIHEIYO CEMENT CORPORATION, a Japanese business association, as self and successor to ONODA CEMENT CO., LTD., a former Japanese business association, and CHICHIBU ONODA CEMENT CORPORATION, a former Japanese business association; TAIHEIYO CEMENT U.S.A., INC., a California corporation, as self and successor to ONODA U.S.A., INC., a former California corporation that was successor to ONODA CALIFORNIA INC., a former California corporation; CALIFORNIA PORTLAND CEMENT CO., a California corporation; GLACIER NORTHWEST, INC. (fka LONE STAR NORTHWEST, INC.), a Washington corporation, and DOES 1-100, inclusive,

Defendants and Petitioners,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR  
THE COUNTY OF LOS ANGELES,

Respondent.

JAE WON JEONG, on behalf of himself and all others similarly situated,

Real Party in Interest.

2d Civ. No. B155736  
(Los Angeles Superior Court,  
Case No. BC217805  
Honorable Peter D. Lichtman)

**SUPPLEMENTAL BRIEF OF THE UNITED STATES AS  
AMICUS CURIAE IN SUPPORT OF PETITIONERS**

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## INTRODUCTION AND SUMMARY

On January 15, 2003, this Court issued an opinion rejecting petitioners' challenge to California's World War II forced labor statute, Cal. Code of Civ. Pro. § 354.6. See Taiheiyo Cement Corp. v. The Superior Court of Los Angeles County, 105 Cal. App. 4th 398 (2003). The Court reasoned that "unless the language of the 1951 Treaty indicates a clear intent to exclusively occupy the field," it would not pre-empt state law. Id. at 411-12. Applying the Ninth Circuit's analysis in Gerling Global Reinsurance Corp. of America v. Low, 240 F.3d 739 (9th Cir. 2001) ("Gerling I"), the Court further held that, in evaluating California's interests in enacting § 354.6, the statute should be viewed as a mere statute of limitations, an area of traditional state competence. Taiheiyo, 105 Cal. App. 4th at 412-19.

On June 23, the United States Supreme Court reversed the Ninth Circuit's decision in Gerling I, holding that another California statute addressing World War II harms impermissibly interfered with the conduct of foreign policy by the President. See American Insurance Association v. Garamendi, 123 S. Ct. 2374 (2003). The California Supreme Court thereafter vacated this Court's January 15 decision and remanded the case for reconsideration in light of Garamendi.

The Supreme Court's opinion in Garamendi compels the conclusion that California's World War II forced labor statute is invalid as an impermissible interference in matters of foreign policy. Most specifically, Garamendi contradicts two premises of this Court's January 15 decision. First, a state law that conflicts with federal foreign policy is preempted even in the absence of a clear indication of such intent. Second, Garamendi makes clear that in assessing the relevant state interest in a law that implicates foreign relations, a state law directed specifically at war-related claims does not fall within the realm of traditional state regulation. Under the principles articulated in Garamendi, California's World War II forced labor statute must be held invalid as an improper intrusion by the State into the realm of foreign affairs and impermissible interference with federal foreign policy as established in the 1951 Treaty of Peace.

## ARGUMENT

### **I. SECTION 354.6 CONFLICTS WITH FEDERAL FOREIGN POLICY AS REFLECTED IN THE 1951 TREATY AND IS THEREFORE PREEMPTED.**

A. Garamendi involved a challenge to California's Holocaust Victim Insurance Relief Act, Cal. Ins. Code § 13800-13807 ("HVIRA"), which required insurance companies doing business in the State to disclose detailed information about all policies they, or their related companies, had issued in Europe during the period from 1920 to 1945. 123 S. Ct. at 2379.

The federal government had also been actively involved in diplomacy regarding the issue of Holocaust-era insurance policies. In contrast to HVIRA, the policy pursued by the federal government was "to encourage European insurers to work with the ICHEIC," a voluntary international organization of insurers, victims groups, and insurance regulators, "to develop acceptable claim procedures, including procedures governing disclosure of policy information." Id. at 2390. The Supreme Court discerned this policy from executive agreements entered into with Germany and Austria as well as from official statements of high-ranking Executive Branch officers. See id. at 2390-91.

The Supreme Court acknowledged that the executive agreements did not expressly pre-empt state laws such as HVIRA. See id. at 2387-88. Moreover, the executive agreements themselves only related to German and Austrian insurers, id. at 2382-83 & n.3, whereas the California statute reached all policies issued in Europe, id. at 2379. See also Gerling I, 240 F.3d at 750 ("neither of those initiatives governs with respect to Generali (an Italian insurer) or Winterthur (which apparently has affiliates throughout Europe)"). Thus, the Supreme Court did not hold that the executive agreements themselves pre-empted HVIRA, but rather that the State's law must yield to "the consistent Presidential foreign policy" to

encourage settlement instead of litigation, a policy "of which the agreements are exemplars." Garamendi, 123 S. Ct. at 2390.

Like this Court, see Taiheiyō, 105 Cal. App. 4th at 411-12, the dissenting justices in Garamendi would have required a "clear statement" of pre-emptive intent before striking down the state law, 123 S. Ct. at 2395 (Ginsburg, J., dissenting). The majority, however, rejected such a requirement. Rather, the Court held, "[t]he express federal policy and the clear conflict raised by the state statute are alone enough to require state law to yield." Garamendi, 123 S. Ct. at 2392 (emphasis added).

The Court went on to note that "any doubt about the clarity of the conflict \* \* \* would have to be resolved in the National Government's favor, given the weakness of the State's interest, against the backdrop of traditional state legislative subject matter, in regulating disclosure of European Holocaust-era insurance policies in the manner of HVIRA." Ibid. Although the Court recognized that the insurance regulation generally was a matter of state control, id. at 2393-94, HVIRA was distinguishable because of its exclusive focus on Holocaust-era policies, id. at 2392. The Court observed that "quite unlike a generally applicable 'blue sky' law, HVIRA effectively singles out only policies issued by European companies, in Europe, to European residents, at least 55 years ago." Ibid. The limited

focus of the statute revealed the foreign policy purposes behind the State's law. See id. at 2392-93.

B. Applying the principles enunciated in Garamendi, it is clear that California's World War II forced labor statute must yield to the federal government's foreign policy, reflected in the 1951 Treaty of Peace, favoring inter-governmental settlement of World War II-related claims, including the forced labor claims of Korean nationals against Japanese corporations.

As the United States explained in detail in its prior amicus briefs, the 1951 Treaty reflects the foreign policy of the United States that all claims arising out of World War II in the Asian theater be resolved through agreements between the respective governments. See Brief of the United States as Amicus Curiae in Support of Petitioners at 1-7; Joo v. Japan, 332 F.3d 679, 684-85 (D.C. Cir. 2003) ("the Treaty manifests the parties' intent to resolve matters arising from World War II without involving the courts of the United States (or of any signatory nation)"). In furtherance of the United States' policy of returning Japan to stable independence, which it could not do if its economy faced continuing liability for war-related claims, the United States pressed for settlement of all such claims against Japan and Japanese nationals through diplomatic means. With the United States' active encouragement, some 47 Allied powers joined the United States in signing the 1951 Treaty, in which the Allied governments waived

all war-related claims of themselves and their nationals against Japan and Japanese nationals. See 1951 Treaty of Peace, Art. 14(b), 3 U.S.T. 3169, 3183 ("the Allied Powers waive all \* \* \* claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war").

In addition, the Treaty reflects the signatories' policy favoring similar resolution of the claims of non-signatory governments and their nationals. Thus, the Treaty provides, in Article 21, that China would have the same benefits that the signatories had secured for themselves, including the right to seize and liquidate all Japanese assets located in Chinese territory, and, in Article 26, provides that Japan was expected to enter into a separate treaty settling the war with a Chinese political entity "on the same or substantially the same terms as are provided for in the present Treaty." 3 U.S.T. 3169, 3188, 3190.

Likewise, with regard to Korea, Article 4(a) provided that the "property \* \* \* and \* \* \* claims \* \* \* of [Korean] authorities and residents against Japan and its nationals, shall be the subject of special arrangements between Japan and [Korean] authorities." Id. at 3173. And Article 4(b), as construed by the United States, allowed Korean authorities to seize all Japanese-owned assets in Korea – assets worth billions of dollars. Ibid.

As the United States Court of Appeals for the D.C. Circuit has recognized, these provisions "expressed a clear policy of resolving the claims of other nationals through government-to-government negotiation." Joo, 332 F.3d at 685 (emphasis added). Indeed, this Court's January 15 opinion similarly observed that this was the foreign policy of the federal government, and that this policy was reflected in the Treaty. The Court recognized "[t]he fact that the 1951 Treaty called upon Japan to enter into future negotiations with Korea," Taiheiyo, 105 Cal. App. 4th at 411, and that "the signatory nations encouraged \* \* \* agreements" with China and Korea on terms similar to the 1951 Treaty, id. at 410 (quoting In re World War II Era Japanese Forced Labor Litigation, 164 F. Supp.2d 1160, 1167-68 (N.D. Cal. 2001)).

It is also clear that the conflict between California's forced labor statute and federal foreign policy is at least as direct as was the conflict between HVIRA and federal policy regarding Holocaust-era insurance policies. The question is not, as this Court previously believed it to be, whether the 1951 Treaty, of its own force, pre-determined the outcome of negotiations between Japan and China or Korea, see Taiheiyo, 105 Cal. App. 4th at 411, or whether the Treaty expressly speaks to the states' authority to encourage litigation of claims by Korean or Chinese nationals, see id. at 411-12. It did not matter in Garamendi that, as the dissent pointed

out, the executive agreements with Germany and Austria did not establish a particular set of requirements with respect to disclosing Holocaust-era policy information or specifically refer to state disclosure laws. See 123 S. Ct. at 2400-01 & n.5 (Ginsburg, J., dissenting). What was determinative, the majority found, was the fact that the executive agreements "expressed unmistakably" a federal policy "to encourage European insurers to work with the ICHEIC to develop acceptable claim procedures, including procedures governing disclosure of policy information." Id. at 2390. California's compulsory approach to disclosure was inconsistent with the federal policy of encouraging resolution through voluntary arrangements. Id. at 2391-92.

Likewise, here, the critical point is that California's World War II forced labor statute actively promotes litigation in U.S. courts of claims that federal policy deems should be resolved through diplomacy between the governments of Korea, China, and Japan. Whether section 354.6 is viewed, as the statutory text suggests and the Ninth Circuit concluded in Deutsch, as a substantive law creating new liability, or it is construed, as this Court did, as a retroactive resurrection of long-ago time-barred claims, see Taiheiyo, 105 Cal. App. 4th at 420, the provision creates uniquely favorable rules that apply exclusively to claims that arose in foreign countries in the context of a war. See Cal. Code Civ. Pro. § 354.6(a)(2) (limiting statute's scope to those

forced to perform labor without pay "by the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under the control of the Nazi regime or its allies or sympathizers"); Deutsch v. Turner Corp., 324 F.3d 692, 707-08 (9th Cir.), cert. denied sub nom. Kim v. Ishikawajima Harima Heavy Industries, Ltd., No. 02-1773, 2003 WL 21313962; Tenney v. Mitsui & Co., Ltd., No. 02-1776, 2003 WL 21382901; Ma v. Kajima Corp., No. 02-1778, 2003 WL 21382912; Saldajeno v. Ishihara Sangyo Kaisha, Ltd., No. 02-1784, 2003 WL 21383006 (U.S. Oct. 6, 2003). California seeks to facilitate the litigation in U.S. courts of the very claims that federal foreign policy says should be "resolv[ed] \* \* \* through government-to-government negotiation" and "without involving the courts of the United States." Joo, 332 F.3d at 684-85.<sup>1</sup>

As in Garamendi, "any doubt about the clarity of the conflict \* \* \* would have to be resolved in the National Government's favor, given the

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<sup>1</sup> It should be noted that, regardless of whether one views the treaties entered into by Japan with the Republic of Korea and with China as affirmatively waiving the claims of their nationals, it is perfectly clear that neither treaty provides for litigating such claims, much less for litigating such claims in the courts of third-party nations. To the extent that Japan has not reached any agreement yet with North Korea, it remains the policy of the United States that the war-related claims of North Korea and its nationals against Japan and Japanese nationals should be resolved through government-to-government negotiation and not through litigation in the courts of the United States. The availability of a California forum to litigate such claims would almost certainly effect the willingness of North Korea to settle them on terms similar to the 1951 Treaty.

weakness of the State's interest, against the backdrop of traditional state legislative subject matter, in regulating" war-related claims. 123 S. Ct. at 2392. Although, as this Court has noted, the general area of statutes of limitation is one of traditional state competence, Taiheiyo, 105 Cal. App. 4th at 421-22, it is not a traditional state function to establish special statutes of limitations addressed uniquely to reviving long-barred war-related claims. See Garamendi, 123 S. Ct. at 2392 ("quite unlike a generally applicable 'blue sky' law, HVIRA effectively singles out only policies issued by European companies, in Europe, to European residents, at least 55 years ago").<sup>2</sup>

**II. EVEN IN THE ABSENCE OF DIRECT CONFLICT, SECTION 354.6 IS AN IMPERMISSIBLE INTERFERENCE BY THE STATE IN CORE MATTERS OF FOREIGN RELATIONS**

Even if the Court were to hold that section 354.6 is not impliedly pre-empted due to its conflict with the 1951 Treaty of Peace, section 354.6 should be held unconstitutional under the doctrine of foreign affairs preemption articulated in Zschernig v. Miller, 389 U.S. 429, 436 (1968). As summarized by the Court in Garamendi, the Zschernig majority held that "state laws 'must give way if they impair the effective exercise of the

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<sup>2</sup> We note that the case upon which this Court relied for the proposition that the State could revive such long-barred claims, see Taiheiyo, 105 Cal. App. 4th at 423-24 (citing People v. Frazer, 21 Cal.4th 737 (1999)), was subsequently over-ruled by the United States Supreme Court in Stogner v. California, 123 S. Ct. 2446 (2003).

Nation's foreign policy," even where there is no specific federal instrument or policy with which the the state law, or its administration, is inconsistent. Garamendi, 123 S. Ct. at 2388-89. Section 345.6 plainly impairs the National government's ability to set a uniform foreign policy in the area of war-related claims against Japanese nationals.

To the extent that Garamendi suggests that a preemption analysis under Zschernig should "consider the strength of the state interest," Garamendi, 123 S. Ct. at 2389 & n.11, it also clarifies that California's interest in promoting the litigation of war claims that arose in foreign countries half a century ago is not a particularly strong one when measured "against the backdrop of traditional state legislative subject matter," id. at 2392. As discussed above, the relevant reference point is not the State's traditional authority to set generally applicable statutes of limitations, but whether its traditional competence encompasses the adoption of uniquely favorable rules for long-barred war-related claims that arose in foreign nations. Id. at 2393.

The Ninth Circuit's decision in Deutsch correctly anticipated how Zschernig, as viewed through Garamendi, would apply to section 354.6. The Deutsch court recognized that the subject matter here at issue – "the power \* \* \* to make and to resolve war, including the power to establish the procedure for resolving war claims" – was "for the federal government

alone to address." 324 F.3d at 711-12. Section 354.6 is clearly an attempt by the State of California to insert itself into that arena:

Whether substantive or procedural, section 354.6 creates a special rule that applies only to a newly defined class of tort actions – actions brought by Second World War slave labor victims against entities that enslaved them. This new rule profoundly alters the likelihood that such actions will succeed \* \* \* by reviving claims that were already time-barred. \* \* \*

The important point for our foreign affairs analysis is that the California legislature created – or at least resurrected – a special class of tort actions, with the aim of rectifying wartime wrongs committed by our enemies or by parties operating under our enemies' protection.

Deutsch, 324 F.3d at 708.

Indeed, Garamendi confirms the Deutsch court's recognition that war-related claims against "parties operating under our enemies' protection," 324 F.3d at 708, are as much the proper subject of resolution through diplomacy as claims against enemy governments. See Garamendi, 123 S. Ct. at 2387 ("untangling government policy from private initiative during war time is often so hard that diplomatic action settling claims against private parties may well be just as essential in the aftermath of hostilities as diplomacy to settle claims against foreign governments").

Plaintiffs will likely argue that Garamendi called Zschernig into question and therefore undermined the Ninth Circuit's analysis in Deutsch. The plaintiffs in Deutsch made a similar contention in petitioning the Supreme Court to take certiorari, or, in the alternative, to vacate and remand

the case to the Ninth Circuit for reconsideration in light of the intervening Garamendi decision. The Supreme Court denied those petitions. See Kim v. Ishikawajima Harima Heavy Industries, Ltd., No. 02-1773, 2003 WL 21313962 (U.S. Oct 06, 2003); Tenney v. Mitsui & Co., Ltd., No. 02-1776, 2003 WL 21382901 (U.S. Oct 06, 2003); Ma v. Kajima Corp., No. 02-1778, 2003 WL 21382912 (U.S. Oct 06, 2003); Saldajeno v. Ishihara Sangyo Kaisha, Ltd., No. 02-1784, 2003 WL 21383006 (U.S. Oct 06, 2003). It is clear, in any event, that while the decision in Garamendi did not itself rely on Zschernig's doctrine of foreign affairs preemption, neither did the Court over-rule Zschernig. See Garamendi, 123 S. Ct. at 2389-90 & n.11. Zschernig therefore remains binding on the lower courts. See Agostini v. Felton, 521 U.S. 203, 237 (1997). The Ninth Circuit's decision in Deutsch, which is now final, represents a proper application of Zschernig principles to strike down a state statute that strays far beyond the State's traditional competencies and into matters that "are part of the inner core" of the federal government's foreign relations power. Deutsch, 324 F.3d at 711. Cf. Garamendi, 123 S. Ct. at 2389 n.11 ("the Constitution entrusts foreign policy exclusively to the National Government"); id. at 2392 (noting "the weakness of the State's interest" in adopting legislation directed exclusively at redressing war-related harms).

**CONCLUSION**

For the foregoing reasons, the Court should issue a writ of mandate directing the Superior Court to vacate its previous decisions and hold section 354.6 invalid.

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Dated: October 24, 2003

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY THAT, the foregoing brief is printed in Times New Roman, 13-point, font and that, according to the word-count function on WordPerfect 9, the foregoing brief contains 3,055 words.

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Douglas Hallward-Driemeier

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