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.	2d Civ. No. B155736 (Los Angeles Superior Court, Case No. BC217805 Honorable Peter D. Lichtman)
JAE WON JEONG, on behalf of himself and all others similarly situated, Real Party in Interest.	

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

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INTRODUCTION

This case concerns the ability of the Federal Government to speak as the sole voice of the United States in matters of foreign policy. At the conclusion of World War II, the President and Senate determined that the United States needed a strong, democratic ally against communism in Asia and could not afford for the rebuilding of Japan and its economy to be hindered by ongoing damages claims arising out of the war. The Treaty of Peace between the United States, other Allied nations, and Japan, provides that such claims are to be resolved on a government-to-government basis, rather than through individual litigation. The California legislature has adopted a statute that seeks to encourage litigation of precisely those claims that the Treaty declares should be resolved by inter-governmental arrangement. California's World War II forced labor statute goes far beyond the State's legitimate domestic interests and interferes in a direct and significant way in matters of foreign relations, undermining in the process long-established federal policy.

BACKGROUND

1. The 1951 Treaty of Peace.

The Treaty of Peace signed on September 8, 1951 between the United States, 47 other Allied powers, and Japan formally concluded World War II with respect to the Pacific Theatre. See 3 U.S.T. 3169. The Treaty

reflects the United States government's foreign policy determination that all war claims – including private claims – against Japan and its nationals were to be resolved by government-to-government agreement rather than by individual litigation.[1]

John Foster Dulles, the United States' principal negotiator, believed that continued reparations demands would prevent Japan's economic recovery and its development into a reliable democratic ally against communism. The wealth and profitability of many Japanese companies fifty years after the fact cannot obscure the historical context in which the Treaty was entered. The Korean War had begun; communist forces had taken control of the Chinese mainland; and Soviet expansionism was a world-wide threat. Japan was at the center of these geopolitical forces. The United States viewed an economically stable, anti-communist Japan as essential to the United States' interests in the Pacific region. Japan could not play that role if it were subject to continuing war claims that might stifle its economy. See generally Statement of Interest of the United States of America filed August 9, 2000 in In re World War II Era Japanese Forced

[1] The history of the 1951 Treaty is discussed in much greater detail, with extensive citations to the historical record, in the Statements of Interest filed by the United States with the superior court. A copy of those Statements are attached at Tab 32 of the Writ Petition Exhibits.

Labor Litigation, MDL No. 1347 (N.D. Ca.) ("August 2000 Statement"), at 4 [Tab 32(3) of the Writ Petition exhibits].[2]

Nor did the United States and the Allies want to repeat the experience of the Versailles Treaty after World War I, which brought Germany to its knees and which many consider to be one of the root causes of World War II. See generally id. at 5. Finally, the U.S. Government, having taken on sole responsibility for Japan's recovery during the Occupation of Japan following the War, eventually realized that any substantial payment of war-related claims ultimately would come out of the pockets of the American taxpayers. See ibid. For these reasons, the President, and the Senate in its advise-and-consent role, determined that all claims against Japan and its nationals should be waived in exchange for the forfeiture by Japan and its nationals of their foreign assets.[3]

The Allied nations that are parties to the Treaty, including the United States, expressly waived all claims that they or their nationals might have against Japan and its nationals arising out of the war. Article 14 of the

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[2] The Statements of Interest filed by the United States in the federal litigation were submitted to the superior court as attachments to the Statement of Interest filed in this case.

[3] The United States was fully aware that the economic situation of Japanese companies might some day improve to the point where they could make more extensive payments on war-related claims. See August 2000 Statement at 6 (quoting extensive analysis by Dulles). Thus, the waiver of claims was made with open eyes.

Treaty covers reparations and other claims against Japan by the Allies "for the damage and suffering caused by it during the war." Art. 14(a). Article 14 has three principal elements: (1) a grant of authority to the Allied governments "to seize * * * all property, rights and interests of * * * Japan and Japanese Nationals" located in the Allies' respective jurisdictions; (2) a commitment by Japan to help rebuild the territory that had been occupied by Japanese forces; and (3) a waiver of claims by Allied governments and their nationals against Japan and Japanese nationals. Art. 14(a)-(b). The waiver provision states:

> Except as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other 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, and claims of the Allied Powers for direct military costs of occupation.

Art. 14(b).[4]

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[4] The Allies and their nationals received significant compensation for the released claims. Under Article 16, Japan transferred its assets in neutral or enemy jurisdictions, worth approximately $20 million, to the International Committee of the Red Cross for distribution to those who had been held as prisoners of war by Japan and to their families. Under Article 14, which authorized the Allied governments to seize the property of "Japan and Japanese Nationals" located within the respective Allied governments' jurisdictions, the allies confiscated approximately $4 billion, including assets worth, in 1952, over $90 million that were located in U.S. territory (including the Philippines). The United States used these assets to compensate, through the War Claims Commission, American prisoners of war who had suffered from inadequate food, inhumane treatment, and certain types of forced labor. See 50 U.S.C.App. § 2005(d). See generally August 2000 Statement, 10-14.

The Allied governments determined that the war claims of other foreign nationals against Japan should also be resolved by government-to-government negotiations. These claims, especially those of China and Korea, were extremely large and, if left unresolved, would have frustrated efforts to rebuild Japan. Implementing this policy posed significant difficulties. No consensus existed among the Allies as to whether the People's Republic of China ("PRC") or the Republic of China ("Taiwan") legally represented China. Neither could Korea be a party to the Treaty because Korea, as part of the Japanese empire, had fought against the Allies during the Pacific War. As a result of these complications, no Chinese or Korean political entities signed the 1951 Treaty, and Article 14(b)'s waiver provision does not, by its own terms, cover the PRC, Taiwan, or North or South Korea. See generally Statement of Interest of the United States of America filed December 6, 2000 in In re World War II Era Japanese Forced Labor Litigation, MDL No. 1347 (N.D. Ca.) ("December 2000 Statement"), 4-6 [Tab 32(2) of the Writ Petition exhibits].

To achieve their foreign policy goals, the Allies inserted several provisions into the Treaty that were intended to ensure that Chinese and Korean war claims against Japan were also resolved through government-to-government arrangements. The Treaty ensured that China and Korea would receive from Japan the same compensation that the Allies had

obtained for relinquishing their claims, and, more importantly, obligated Japan to enter into bilateral agreements with Chinese and Korean representatives on terms similar to those provided in the Treaty.

Article 21 of the Treaty gave China the benefits of Articles 10, in which Japan renounced all rights and interests in China, and 14(a)2, which allowed China to seize and liquidate all Japanese assets located in Chinese territory. These provisions were extremely significant because almost half of all Japanese-owned assets abroad were located in China and gave China the same benefit that the Allies had obtained for themselves in exchange for relinquishing their claims and those of their nationals. In return, Article 26 provided 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." Art. 26 (emphasis added). As contemplated by Article 26, a subsequent treaty between Japan and the Republic of China ("Taiwan") states that "property of such authorities and residents [of Taiwan] and their claims * * * against Japan and its nationals, shall be the subject of special arrangements between the Government of the Republic of China and the Government of Japan." See Treaty of Peace Between the Republic of China and Japan, April 28, 1952, 1858 U.N.T.S. 38.

The Treaty of Peace dealt with Korean war claims against Japan in a similar fashion. Article 21 stated that Korea was entitled to the benefits of Articles 2, 4, 9, and 12 of the Treaty. Article 2 required Japan to recognize Korea's independence and renounce all claims 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." Article 4(b), as construed by the United States, gave Korea the same benefits the Allies had obtained for themselves. It allowed Korean authorities to seize all Japanese-owned assets in Korea – assets worth billions of dollars.

As contemplated in Article 4(a), Japan and the Republic of Korea (South Korea) entered into an agreement in 1965, following years of protracted negotiations in which the United States was heavily involved. [Tab 7 at pp. 315-359.] The terms of this agreement were greatly influenced by the fact that Korea had already received substantial compensation under Article 4(b) of the 1951 Treaty. Article II.1 of the Japan-ROK treaty specifically provides that the "problem * * * concerning claims between the Contracting Parties and their nationals, including those provided for in Article IV, paragraph (a) of the [1951] Treaty of Peace * * * is settled completely and finally." [Tab 7 at p. 318.] A similar agreement between Japan and North Korea is currently under negotiation.

2. California's World War II Slave and Forced Labor Statute.

In 1999, California enacted a statute that permits World War II slave and forced laborers to sue the companies that benefitted from their labor. See Cal. Code of Civ. Pro. § 354.6. The author of the provision, State Senator Tom Hayden, stated at the time of its enactment that the law was intended to "send[] a very powerful message from California to the U.S. government and the German government, who are in the midst of rather closed negotiations about a settlement" of World War II-era claims. See Henry Weinstein, Bill Signed Bolstering Holocaust-Era Claims, Los Angeles Times, July 29, 1999, at A3 (1999 WL 2181642) (emphasis added). The "message," according to Hayden, was that "[i]f the international negotiators want to avoid very expensive litigation by survivors * * *, they ought to settle. * * * Otherwise, this law allows us to go ahead and take them to court." Ibid.

The California statute creates a cause of action for victims of slave labor practices of the "Nazi regime, its allies and sympathizers" with uniquely favorable substantive and procedural rules. See Cal. Civ. Pro. § 354.6. The statute permits any "prisoner-of-war," "concentration camp" prisoner, or "member of the civilian population conquered by the Nazi regime, its allies or sympathizers," who was forced "to perform labor without pay for any period of time between 1929 and 1945, by the Nazi

regime, its allies and sympathizers," or companies within their jurisdictions, to bring suit to recover the "market value" of the labor they performed. Ibid. California has defined the cause of action so as to remove any defense based on the law of the place where the conduct occurred, id. § 354.6(b), affixed damages in a manner to eliminate the effect of post-war inflation, id. § 354.6(a)(3), made corporations doing business in California liable for the debts of their Asian and European affiliates, without regard to traditional principles of corporate identity, id. § 354.6(b), and set aside generally-applicable statutes of limitations in favor of an 81-year statute of limitations that extends to 2010, id. § 354.6(c).

3. Proceedings in the Superior Court

Plaintiff alleges that, during World War II, he was a Korean national forced by the Japanese government to perform labor for a Japanese cement manufacturing company in support of Japan's war effort. See Order dated September 14, 2001 at 2-3 ("Sept. 14 Order"). Plaintiff subsequently moved to the United States and became a U.S. citizen in 1997. Id. at 4 n.2. Plaintiff filed a class action suit in the Los Angeles County Superior Court against the company for which he was forced to work as well as its corporate affiliates.[5] The complaint alleges claims under California's

[5] Plaintiff purports to represent a class including all citizens and residents of the United States who were forced to perform labor for the (continued...)

Section 354.6 as well as common law causes of action. Defendants moved to dismiss, arguing, among other grounds, that plaintiff's claims present non-justiciable political questions, that the suit is barred by the 1951 Treaty of Peace, and that California's forced labor statute is unconstitutional.

The United States appeared as amicus curiae to support dismissal. The United States explained that California's forced labor statute frustrates the foreign policy of the United States, established in the 1951 Treaty of Peace, that claims such as plaintiff's are to be resolved through government-to-government arrangements rather than through litigation.

The superior court refused to defer to the United States' statement of its foreign policy. See Ruling re: Defendants' Second Motion for Judgment on the Pleadings, filed November 29, 2001 ("Nov. 29 Opinion"), 11. The court criticized the United States for what the court characterized (based upon incorrect information) as "disparate" and "uneven" treatment of World War II claims against Japanese as compared to claims against Germans. Ibid.[6] Counsel for the United States noted that, even assuming that there

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[5](...continued)
benefit of Onoda cement company or its affiliates between 1929 and 1945.

[6] The district court mistakenly believed that the United States had not filed Statements of Interest supporting dismissal of claims brought by Holocaust victims against German companies. In fact, the United States has filed numerous such Statements, and has filed amicus briefs in suits involving German companies that argue, as we do here, that California's Holocaust Victims Insurance Relief Act and forced labor statute are an

(continued...)

were differences between the United States' policy with respect to Germany and its policy toward Japan, the Federal Government is not bound to have a uniform foreign policy as to all foreign nations. Ibid. Nonetheless, the superior court criticized the nation's foreign policy as "legally unsupportable." Ibid. The court went on to hold, as a matter of law, that California's World War II forced labor statute did not interfere with federal foreign policy because the statute did not, in the court's view, target a particular country, and because no foreign government was a party to the litigation. Id. at 5, 11-12.

SUMMARY OF ARGUMENT

1.a. The Constitution grants to the Federal Government exclusive authority to conduct the nation's foreign relations. The Framers of the Constitution understood that individual States, would, if allowed, adopt policies with respect to foreign governments that responded to peculiarly local concerns. The whole nation would likely then be held responsible for the acts of a single part. To avoid such risks, the Constitution vests in the Federal Government the responsibility for conducting foreign affairs for the

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[6](...continued)
unconstitutional attempt to interfere in matters of foreign policy. In any event, it should be noted that the political and historical contexts surrounding the United States' post-war agreements with Japan and Germany were quite different, and the Federal Government was under no constitutional obligation to reach similar arrangements with the two nations.

whole of the country, and forbids the States from interfering in such matters.

b. The Supreme Court has enforced the constitutional design by striking down state laws that would frustrate the objectives of established federal foreign policy and, even in the absence of federal action, setting aside state regulations that have more than an indirect effect on the nation's foreign relations. Under this established precedent, California's policy of promoting litigation of World War II forced labor claims must give way. The State's foreign policy conflicts with the considered judgment of the President and Senate, reflected in the 1951 Treaty of Peace, that such claims against Japanese nationals should be resolved by government-to-government agreement, rather than individual litigation.

c. Even in the absence of specific federal law on the issue, the California statute would violate the prohibition against States engaging in foreign policy. The California statute has, and indeed was intended to have, a direct effect on issues that are the subject of international treaty and continuing diplomatic exchanges. California's statute does not concern the State's domestic interests, but, rather, represents an attempt to define and punish violations of international human rights law. That is a power that the Constitution reserves exclusively for the Federal Government.

2. Section 354.6 also violates additional constitutional limits on the jurisdictional reach of state law. It is an inherent constraint of our federal system of government, reflected in both the Commerce Clause and Due Process Clause of the United States Constitution, that each State may legislate only with respect to matters that take place within its borders. It would be an untenable situation if each State were free to regulate conduct that took place in another jurisdiction. Individuals would often be put in the impossible situation of complying with multiple, conflicting legal obligations.

California's forced labor statute is a clear example of extraterritorial legislation. The conduct that California seeks to regulate took place exclusively in foreign lands, with no perceptible connection to California. The mere fact that the parties have subsequently moved to California does not give California the authority to apply its substantive law to events that took place entirely outside the State's boundaries.

The legislation cannot be saved, as the superior court attempts to do, by casting it as a mere "statute of limitations." The structure and language of Section 354.6 betray the State's attempt to establish the substantive as well as procedural rules under which the defendants' liability is to be determined.

ARGUMENT

I. THE CONSTITUTION PRECLUDES CALIFORNIA FROM INTERFERING IN THE FEDERAL GOVERNMENT'S DETERMINATION THAT PLAINTIFF'S CLAIMS SHOULD BE RESOLVED THROUGH GOVERNMENT-TO-GOVERNMENT ARRANGEMENTS.

A. The Constitution Vests Full And Exclusive Responsibility For Foreign Relations In The Federal Government.

1. The Framers understood that the maintenance of peace between the States and with foreign nations required that a single national government be made responsible for both interstate and international affairs. As Hamilton noted, even at the domestic level, one State's attempt to project its regulatory authority into the affairs of another would necessarily lead to conflict between members of the Union. See The Federalist No. 22, 144-45 (C. Rossiter ed. 1961) ("interfering and unneighborly regulations of some States * * * have * * * given just cause of umbrage and complaint to others, and it is to be feared that examples of this nature, if not restrained by national control, would be multiplied and extended until they became * * * serious sources of animosity and discord * * * between the different parts of the Confederacy").

State efforts to interject themselves into the conduct of foreign affairs posed an even greater threat to the collective welfare of the nation. If the States, or small confederacies of States, with their "different

interests," were allowed to conduct independent foreign relations, "it might and probably would happen, that the foreign nation with whom [one set of States] might be at war, would be the one, with whom [another set of States] would be the most desirous of preserving peace and friendship." The Federalist No. 5, 53 (John Jay). Recognizing that "[t]he Union will undoubtedly be answerable to foreign powers for the conduct of its members," the Framers proposed a Constitution that provided for a single national voice over foreign political and commercial affairs, in order to preserve "[t]he peace of the whole." The Federalist No. 80, 476 (Alexander Hamilton).

Endorsing these sentiments, Jefferson wrote in 1787: "My own general idea was, that the States should severally preserve their sovereignty in whatever concerns them alone, and that whatever may concern another State, or any foreign nation, should be made a part of the federal sovereignty." Memoir, Correspondence and Miscellanies from the Papers of Thomas Jefferson (1829), vol. 2, p. 230 (letter to Mr. Wythe) (quoted in Hines v. Davidowitz, 312 U.S. 52, 64 n.11 (1941)).

The Framers' commitment to a Federal Government free from State intrusion in matters of interstate and foreign relations is reflected in a variety of constitutional provisions. The Constitution specifically grants to Congress the authority "[t]o regulate Commerce with foreign Nations, and

among the several States," U.S. Const. Art. I, § 8, cl. 3, and "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," id., cl. 10.[7] The Constitution also designates the President as the "Commander in Chief of the Army and Navy of the United States," id., Art. II, § 2, cl. 1, and gives him the authority to "make Treaties" and "appoint Ambassadors" with the "Advice and Consent of the Senate," id., cl. 2, and to "receive Ambassadors and other public Ministers," id., § 3.

In contrast, the Constitution imposes specific limits on state participation in matters of international relations.[8]

2. From the earliest days of the Republic, the Supreme Court has recognized that the commitment of certain powers to the national government reflects a limitation on the States' authority to regulate the

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[7] The Constitution also confers upon Congress the authority "[t]o lay and collect Taxes, Duties, Imposts and Excises, to * * * provide for the common Defence * * * of the United States," U.S. Const. Art. I, § 8, cl. 1, "[t]o establish a uniform Rule of Naturalization," id., cl. 4, "[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water," id., cl. 11, "[t]o raise and support Armies," id. cl. 12, "[t]o provide and maintain a Navy," id. cl. 13, and "to make Rules for the Government and Regulation of the land and naval forces," id. cl. 14.

[8] The Constitution provides that "[n]o State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal" or, without the consent of Congress, "lay any Imposts or Duties on Imports or Exports," "keep Troops or Ships of War in time of Peace," "enter into any Agreement or Compact * * * with a foreign Power," or "engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay." Id., Art. 1, § 10.

affairs of other States or foreign nations. The grant to the Federal Government of authority to conduct foreign relations, necessarily implies a prohibition on state activity in that arena. "Power over external affairs is not shared by the States; it is vested in the national government exclusively." United States v. Pink, 315 U.S. 203, 233 (1942). As the Court has made clear, the Federal Government is entrusted "with full and exclusive responsibility for the conduct of affairs with foreign sovereignties." Hines v. Davidowitz, 312 U.S. 52, 63 (1941). See also Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423-25 (1964); United States v. Belmont, 301 U.S. 324, 331-32 (1937); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 316 (1936).

In light of the "imperative[] * * * that federal power in the field affecting foreign relations be left entirely free from local interference," Hines, 312 U.S. at 63, the Supreme Court has held that state "regulations must give way if they impair the effective exercise of the Nation's foreign policy," Zschernig v. Miller, 389 U.S. 429, 440 (1968).

Because the conduct of foreign policy is committed to the Federal Government, and because of the unique concerns raised by state action in that arena, federal preemption of a state law concerning foreign affairs may be more readily inferred than in the domestic context where federal and state governments share regulatory authority. When the States act in an

area in which federal interests predominate, "[t]he conflict with federal policy need not be as sharp as that which must exist for ordinary pre-emption when Congress legislates in a field which the states have traditionally occupied." Boyle v. United Technologies Corp., 487 U.S. 500, 507 (1988) (quotation omitted). "Pre-emption of a whole field * * * will be inferred where the field is one in which 'the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 713 (1985) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). Thus, when a State legislates in an area affecting foreign affairs, the courts are "more ready to conclude that a federal Act * * * supersede[s] state regulation." Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Bd., 315 U.S. 740, 749 (1942).

Just as the Supreme Court is more willing to infer affirmative preemption when a state statute intrudes into the foreign policy arena, the Court has also made clear that a state law that directly implicates the conduct of foreign policy will be set aside even if there is no affirmative preemption. In Zschernig v. Miller, the Supreme Court made clear that a state policy that disturbs foreign relations must give way "even in [the] absence of a treaty" or federal statute. 389 U.S. at 441. See also Laurence H. Tribe, American Constitutional Law, § 4-5 at 656 (3d ed. 2000) ("all

state action, whether or not consistent with current foreign policy, that distorts the allocation of responsibility to the national government for the conduct of American diplomacy is void as an unconstitutional infringement on an exclusively federal sphere of responsibility").

The California forced labor statute has far more than an "incidental or indirect effect in foreign countries." Zschernig, 389 U.S. at 434-35. Rather, the State has deliberately undertaken the formulation of foreign policy in an area subject to international treaty obligations, adopting a strategy that directly impairs the accomplishment of federal policy and prevents the nation from speaking with one voice on a matter of international concern.

Because the policy reflected in California's forced labor statute is in direct tension with the nation's foreign policy expressed in the 1951 Treaty of Peace, the state statute "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of federal policy and is, thus, affirmatively preempted. Hines, 312 U.S. at 67; Crosby v. National Foreign Trade Council, 530 U.S. 363, 373 (2000). However, even if the Court were to conclude that the forced labor statute has not been affirmatively preempted, it is plain that the statute in design and effect impermissibly intrudes into the conduct of foreign affairs and is therefore beyond the authority of the State to enact.

B. Federal Law Preempts California's Forced Labor Statute, Which Stands As An Obstacle To Achieving The United States' Foreign Policy Established In The 1951 Treaty Of Peace.

The 1951 Treaty of Peace reflects the President and Senate's considered judgment that all claims arising out of Japan and Japanese nationals' conduct in the course of World War II, including claims between private individuals, should be resolved through inter-governmental negotiations. The Allied parties to the Treaty, including the United States, expressly "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." Art. 14(a) (emphasis added). The Treaty of Peace likewise provides that the claims of Korea and China, and those of their nationals, will be resolved through inter-governmental agreements rather than litigation. While the Treaty may not be directly binding on Korea and China, who were not parties to the Treaty, the Treaty does establish the law of the United States with respect to the war-related claims of Korean and Chinese nationals.

As noted above, the Treaty of Peace both ensured for Korea and China the same benefit as the Allied parties had obtained for themselves and directed that war-related claims of Koreans and Chinese, like those of Allied nationals, would be settled on a government-to-government basis. Japan was required to renounce its interests in Korea and China, and the

Korean and Chinese authorities were allowed to seize and liquidate all Japanese assets within their territories – assets worth billions of dollars. See Art. 4(b) (Korea); Art. 10, 14(a)(2), 21 (China). In return, both Korea and China were expected to settle, as the Allied parties had, the war-related claims of themselves and their nationals against Japan and its nationals. See Art. 4(a) ("claims * * * of [Korean] authorities and residents against Japan and its nationals, shall be the subject of special arrangements between Japan and [Korean] authorities"); Art. 26 (providing that Japan was to enter a peace treaty with China, settling the war "on the same or substantially the same terms as are provided for in the present Treaty" (emphasis added)).

California's forced labor statute runs directly contrary to the United States' foreign policy of relegating the war-related claims of Korean and Chinese nationals to inter-governmental resolution. Whereas federal law provides that the claims of Korean and Chinese nationals, like those of Americans themselves, are to be resolved by government-to-government settlements, the California statute grants such claims a preferred status, with uniquely favorable substantive and procedural rules. See, e.g., Cal. Code Civ. Pro. § 354.6(a)(3) (affixing damages in a manner to eliminate the effect of post-war inflation), § 354.6(b) (making corporations doing business in California liable for the debts of their Japanese affiliates, without regard to traditional principles of corporate identity), § 354.6(c)

(setting aside generally-applicable statutes of limitations in favor of an 81-year limitations period).

The superior court mistakenly believed that the federal Treaty could preempt the California statute with respect to plaintiff's claim only if the Treaty itself actually resolved the Korean and Chinese claims.[9] Thus, the superior court found it conclusive that the Treaty "did not and could not regulate claims of foreign nationals against the companies that had forced them to work without wages." Sept. 14 Opinion at 14. This misconceives the nature of both the Treaty and federal preemption. It is not necessary for the Treaty to finally resolve plaintiff's claim in order for the federal law to preempt California's attempt to encourage litigation of that claim. It is sufficient that the Treaty establishes, as a matter of United States law, that plaintiff's claim is to be resolved by inter-governmental arrangements, rather than litigation. It is irrelevant, therefore, whether, as a matter of Korean or Japanese law, plaintiff could pursue his claim in the courts of those nations; he may not, according to the United States' policy adopted in the Treaty, pursue his claim in the courts of the United States. The California statute plainly "stands as an obstacle to the accomplishment and

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[9] It should be noted that plaintiff purports to represent a class of individuals who were forced to work for Onoda Cement Company. To the extent that any members of the putative class were nationals of the United States or Allied parties at the time of the Treaty, their claims are directly barred by the waiver in Article 14 of all claims by party nationals against Japanese nationals arising out of Japan's prosecution of the war.

execution of the full purposes and objectives" of the Treaty. Hines, 312 U.S. at 61; Crosby, 520 U.S. at 373.

Plaintiff's argument (and that of the superior court) is similar to that advanced by Massachusetts and rejected by the Supreme Court in Crosby. There, Congress had adopted a policy, reflected in the Federal Burma Act, of giving the President flexibility in using economic sanctions to promote improved human rights conditions in Burma. 530 U.S. at 374-75. Massachusetts contended that the President's flexibility was limited to the specific matters stated in the statute. Thus, Massachusetts argued that while the President had flexibility over federal sanctions, Congress had "implicitly left control over state sanctions to the State." Id. at 376 n.10. The Supreme Court rejected this "cramped view" of the federal law's preemptive scope. Ibid. Because the natural effect of the state law was to reduce the President's bargaining authority, the state statute was preempted. Id. at 376-77.

Similarly here, the natural effect of the California forced labor statute, with its uniquely favorable rules, is to encourage litigation of precisely those claims that federal policy declares should be resolved by government-to-government agreement. Because the state statute "stands as an obstacle to the accomplishment and execution of the full purposes and

objectives" of the 1951 Treaty of Peace, the statute is preempted. See Crosby, 530 U.S. at 377 (quoting Hines, 312 U.S. at 67).

C. Even if Not Affirmatively Preempted, the California Forced Labor Statute Is an Unconstitutional Intrusion Into the Conduct of Foreign Affairs.

The Supreme Court has established that, even apart from statutory preemption, the Constitution's commitment to the Federal Government of the exclusive responsibility for conducting the nation's foreign affairs acts as an independent constraint on state activity. Thus, "even in [the] absence of a treaty" or federal statute, a state policy that disturbs foreign relations must be set aside. Zschernig, 389 U.S. at 441. See also Chy Lung v. Freeman, 92 U.S. 275 (1875) (striking down California statute requiring ship to post bond for certain foreign immigrants without finding conflict with any federal statute or treaty). It is not a question of "balanc[ing] the nation's interest in a uniform foreign policy against the particular interests of a particular state"; rather, "there is a threshold level of involvement in and impact on foreign affairs which the states may not exceed." National Foreign Trade Council v. Natsios, 181 F.3d 38, 52 (1st Cir. 1999), aff'd, 530 U.S. 363 (2000).

Zschernig is illustrative. In that case, the Supreme Court struck down an Oregon probate law that prevented the distribution of estates to foreign heirs if, under foreign law, the proceeds of the estate were subject to

confiscation. 389 U.S. at 431. The Court noted that application of the statute required state courts to engage in "minute inquiries concerning the actual administration of foreign law" and to judge the credibility and good faith of foreign counsels, id. at 435, with outcomes turning upon "foreign policy attitudes" regarding the Cold War, id. at 437. Accordingly, the Court concluded that the statute had "a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems." Id. at 441. The Court held that this "kind of state involvement in foreign affairs and international relations – matters which the Constitution entrusts solely to the Federal Government" – was "forbidden state activity." Id. at 436.

The California forced labor statute represents a similar impermissible intrusion into the Federal Government's authority to regulate foreign affairs. California is plainly of the view that Japanese companies' use of unpaid forced labor, even if condoned by the Imperial Japanese government, violated transcendent principles of international human rights law. But under our constitutional scheme, only the Federal Government has the authority to prescribe penalties for foreign violations of international law. See U.S. Const. Art. 1, § 8, cl. 10.

This is particularly so where, as here, the international law violations at issue were committed in conjunction with a foreign government during

the course of a war against the United States. As the Supreme Court has recognized, war-related claims, including the claims of nationals, are frequently the subject of government-to-government negotiations at the conclusion of hostilities. See, e.g., United States v. The Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801) (upholding the Federal Government's power to abolish, by way of treaty, private prize claims against foreign property); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 230 (1796) (refusing to adjudicate a personal debt, confiscated by Virginia during the Revolutionary War, because the treaty of peace concluding the war had not provided for such claims). The decision whether to risk continued animosity with a foreign power by creating claims in American courts arising out of foreign nationals' participation in their government's atrocities is a determination that only the Federal Government is authorized to make. See Pink, 315 U.S. at 225 (noting that "the existence of unpaid claims against Russia and its nationals which were held in this country * * * had long been one impediment to resumption of friendly relations between these two great powers" (emphasis added)).

Even a State with the best of intentions lacks the resources and breadth of view necessary to assess the impact of punishing particular international law violations on the United States' multi-faceted international interests. See, e.g., Crosby v. National Foreign Trade Council, 530 U.S.

363, 381-82 (2000) (observing that independent state activity would undermine President's ability to coordinate the country's multi-pronged policy of encouraging democratic change in Burma through enticements, threats, and cooperation with other foreign nations). A state legislature is in a poor position to assess what risks to our relations with Germany and Japan are entailed by a statute that aims to redress the wrongs of World War II, or to weigh those risks against other foreign policy objectives that depend upon the good will of those governments. Whether for lack of responsibility or inadequate information, States' policies are likely to be motivated by purely local considerations, to the detriment of the nation as a whole. See Lori A. Martin, The Legality of Nuclear Free Zones, 55 U. Chi. L. Rev. 965, 993 (1988).

In enacting the World War II slave and forced labor statute, the California legislature has interjected itself into the "forbidden" territory of foreign affairs. At the time of the bill's signing, the provision's author made clear that the statute was intended to influence the conduct of the United States and German governments in their discussions relating to Holocaust-era claims:

> [Section 354.6] sends a very powerful message from California to the U.S. government and the German government, who are in the midst of rather closed negotiations about a settlement. * * * If the international negotiators want to avoid very expensive litigation by

> survivors * * *, they ought to settle. * * * Otherwise, this law allows us to go ahead and take them to court.

See Henry Weinstein, Bill Signed Bolstering Holocaust-Era Claims, Los Angeles Times, July 29, 1999, at A3 (1999 WL 2181642) (emphasis added).

Plainly, the California legislature has engaged in a policy-oriented balancing of interests and decided that the benefits of adopting a law with respect to German and Japanese forced labor claims were worth the risks entailed in antagonizing the target companies and the German and Japanese governments. As to the States, such foreign policy debates are "forbidden * * * activity." Zschernig, 389 U.S. at 435-36. Like other state statutes that have been held invalid under Zschernig, this statute too unacceptably compromises the nation's interest in having its foreign policy conducted by a national government responsible to the citizens of all states. See Natsios, 181 F.3d at 53 (Massachusetts statute restricting the ability of state agencies to purchase goods or services from companies that also did business in Burma was specifically designed to affect the affairs of a foreign country); Miami Light Project v. Miami-Dade County, 97 F. Supp. 2d 1174, 1176-77, 1180 (S.D. Fla. 2000) (by adopting ordinance that required public contractors to certify that neither they nor their sub-contractors had engaged in commerce with Cuba, Cuban products or Cuban nationals, county had impermissibly inserted itself into a "hotbed of foreign affairs" with the

intent to "protest and condemn Cuba's totalitarian regime"); Tayyari v. New Mexico State Univ., 495 F. Supp. 1365, 1376-80 (1980) (state university's policy of denying admission to Iranian students in retaliation for the Iranian hostage crisis intruded upon "the arenas of foreign affairs and immigration policy, interrelated matters entrusted exclusively to the federal government"); Springfield Rare Coin Galleries, Inc. v. Johnson, 503 N.E.2d 300, 302-03 (Ill. 1986) (state law regarding the sale of South African coins was unconstitutional where adopted "as an expression of disapproval of that nation's policies"); New York Times Co. v. City of New York Comm'n on Human Rights, 361 N.E.2d 963, 968 (N.Y. 1977) (striking down prohibition on advertizing jobs in South Africa as an impermissible intrusion upon foreign relations). Compare Trojan Technologies, Inc. v. Pennsylvania, 916 F.2d 903, 913-14 (3d Cir. 1990) (upholding state "Buy America" statute in part because the law did not involve evaluation of specific foreign nations), cert. denied, 501 U.S. 1212 (1991).

Further, like the Massachusetts Burma statute, the potential foreign policy impact of California's forced labor statute must be assessed within the "broader pattern of state and local intrusion." Natsios, 181 F.3d at 53. If California is free to redress the wrongs associated with forced labor during World War II, then each State is free to adopt similar – or even inconsistent – laws relating to their preferred foreign human rights issue,

whether it be repression in Burma, cf. Natsios, 181 F.3d at 53, or communism in Cuba, cf. Miami Light Project, 97 F. Supp. 2d at 1180. In addition to violating the territorial limitations on state jurisdiction, discussed below, such a rule would severely undermine American foreign policy. Individual States cannot be permitted to force their favored issues or preferred resolutions into the Federal Government's discussions. See Crosby, 530 U.S. at 382-83 (observing that Massachusetts had distracted foreign policy toward Burma by making the state law the focus of diplomacy, rather than Burma's conduct).

As discussed above, the conflict with federal policy in this case is real and direct. The Federal Government made the determination at the conclusion of World War II that the nation's strategic need for a strong, democratic ally against communism in Asia required that claims against Japan and Japanese companies be resolved finally through inter-governmental negotiations. Thus, the Allies, including the United States, foreclosed litigation of their nationals' war-related claims in exchange for the right to confiscate and distribute Japanese assets within their territory. The Allies directed that the claims of Korean and Chinese nationals be dealt with similarly. California's forced labor statute moves in precisely the opposite direction, encouraging and facilitating litigation of the exact claims that the federal policy seeks to bar.

The superior court's opinions in this case exemplify the extent to which the California forced labor statute has drawn the State's courts into matters of foreign affairs, in the same way as that condemned by the Supreme Court in Zschernig. Based upon the inaccurate premise that the United States had not opposed California's attempt to meddle in Holocaust-era claims arising from the European Theatre,[10] the superior court criticized the United States' purportedly "uneven" and "disparate" treatment of Japan and Germany and deemed federal foreign policy to be "legally unsupportable." Nov. 29 Opinion at 11. See also Ruling re: Defendants' Motion for Judgment on the Pleadings, filed September 14, 2001 ("Sept. 14 Opinion"), 18 (holding that adjudication of plaintiff's claim "would not interfere with any ***legitimate*** United States governmental foreign policy

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[10] Specifically, the superior court criticized the United States for not filing a brief in opposition to California's interference in foreign policy by way of the Holocaust Victims Insurance Relief Act ("HVIRA"). See Nov. 29 Opinion at 10. A review of the Ninth Circuit's opinion in Gerling Global Reinsurance Corp. of America v. Low, 240 F.3d 739, 741 (9th Cir. 2001), reveals that the United States did file a brief as amicus curiae in support of plaintiff's constitutional challenge to the HVIRA. Moreover, the United States has filed several Statements of Interest urging courts to dismiss on any valid legal basis Holocaust-era claims against German companies. These Statements were filed consistent with President Clinton's determination, in the context of the Agreement between the Government of the United States of America and the Government of the Federal Republic of Germany concerning the Foundation "Remembrance, Responsibility and the Future," that "it would be in the foreign policy interests of the United States for the Foundation to be the exclusive forum and remedy" for Nazi-era claims against German companies. Foundation Agreement, Annex B, ¶ 1. (The Foundation Agreement can be found at: www.state.gov/www/regions/eur/holocaust/germanfound.html.)

interest" (emphasis in original)). Plainly, it is beyond the superior court's authority to determine whether the United States government has a "legitimate" basis for treating one foreign government different from another.

Actual adjudication of plaintiff's claims would draw the state courts even deeper into the terrain of foreign affairs. The court would be called upon to adjudicate whether Japan's bilateral treaties with South Korea and the Republic of China do, in fact, resolve the legal claims of plaintiff and other members of the putative class. If the parties to those agreements disagree on their meaning, a court ruling either way might well inflame simmering international disputes. Moreover, a finding that the treaties had not finally resolved those claims would be the equivalent to a determination that Japan had violated its obligations under the terms of the 1951 Treaty of Peace. An individual state legislature cannot interject its courts into such foreign policy thickets. See Zschernig, 389 U.S. at 435-37.

The superior court mistakenly believed that the Ninth Circuit's opinion in Gerling Global Reins. Corp. of America v. Low, 240 F.3d 739 (9th Cir. 2001) ("Gerling-Low") controlled the foreign affairs analysis in this case. As the federal district court explained in its very thorough opinion in In re World War II Era Japanese Forced Labor Litig., 164 F. Supp. 2d 1160 (N.D. Cal. 2001), the Ninth Circuit's decision in Gerling-

Low turned on factors that, in this case, point in the opposite direction. In Gerling-Low, the Ninth Circuit found that the disclosure provisions of the HVIRA were related to the State's domestic interest in monitoring the bona fides of insurance companies doing business in the State. 240 F.3d at 744-45. A disclosure requirement alone, the Court stated, would not affect the "decision making authority" of insurance companies "to pay or not to pay claims." Ibid. Moreover, Congress had, in the Ninth Circuit's view, "expressly delegated to the states the power to regulate insurance," id. at 744-46 (citing the McCarran-Ferguson Act), and had even "embrace[d] state legislation like HVIRA," id. at 748 (citing the U.S. Holocaust Assets Commission Act of 1988). The California forced labor statute, in contrast, is an attempt to force foreign companies and their affiliates to actually pay damages, according to a formula determined by the California legislature, for wrongs committed in foreign lands.[11] Far from encouraging such state legislation, federal policy, as noted above, is precisely the opposite. Thus, the forced labor statute is quite distinct from the HVIRA, as construed by the Ninth Circuit, and more akin to those provisions of California insurance law that the Ninth Circuit specifically declined to address in the Gerling-Low decision. See 240 F.3d at 745 (reserving "for another day"

[11] As described further below, infra at 37-38, the superior court's characterization of Section 354.6 as merely a "statute of limitations," Nov. 29 Opinion, 6, 12-13, cannot be squared with the provision's language.

consideration of the constitutionality of California Ins. Code § 790.15, which authorizes license suspensions of insurance companies who have not paid Holocaust-era claims, and Cal. Civ. Proc. Code § 354.5, which allows claims for payment on Holocaust-era insurance policies)

The superior court would construe the Gerling decision so broadly as to overturn the Supreme Court's Zschernig decision. In the superior court's view, the Gerling-Low court held Zschernig inapplicable wherever the defendants are "simply businesses" and no foreign government has been named as a defendant, and where the statute at issue is not directed at a particular country. See Nov. 29 Opinion, 5. Under this construction, the Gerling-Low opinion necessarily overruled the holding in Zschernig because no foreign government was a party to the litigation in Zschernig, and the statutes there at issue were not, on their face, directed at any particular country. See Zschernig, 389 U.S. at 430, 432.[12] Plainly, the Ninth Circuit did not, and could not, overrule Supreme Court precedent. See Agostini v. Felton, 521 U.S. 203, 237 (1997); United States v. Pacheco-Zepeda, 234 F.3d 411, 414 (9th Cir. 2000).

[12] Even if this were the test, Section 354.6 is, in fact, expressly directed at particular foreign countries: "Nazi [Germany], its allies or sympathizers."

II. THE CALIFORNIA WORLD WAR II FORCED LABOR STATUTE IS EXTRATERRITORIAL LEGISLATION THAT IS BEYOND THE AUTHORITY OF THE STATE TO ENACT.

In addition to Section 354.6's impermissible interference with federal foreign policy, the state statute also violates the federal Constitution's prohibition on States attempting to project their legislative jurisdiction beyond their borders.

A. The Commerce Clause of the federal Constitution "has long been understood" not only as an affirmative grant of authority to the Federal Government, but as a constraint upon the power of the States, which "'provide[s] protection from state legislation inimical to the national commerce [even] where Congress has not acted.'" Barclays Bank PLC v. Franchise Tax Board, 512 U.S. 298, 310 (1994) (quoting Southern Pacific Co. v. Arizona, 325 U.S. 761, 769 (1945)).

As the Supreme Court has explained, the Commerce Clause precludes a State from applying its law "to commerce that takes place wholly outside of the State's borders." Edgar v. MITE Corp., 457 U.S. 624, 642-43 (1982) (plurality opinion). See also BMW of North America, Inc. v. Gore, 517 U.S. 559, 572 (1996) (State may not "impose economic sanctions on violators of its laws with the intent of changing the [violator's] lawful conduct in other States"). Extraterritorial regulation "exceeds the inherent limits of the enacting State's authority and is invalid regardless of

whether the statute's extraterritorial reach was intended by the legislature." Healy v. Beer Institute, 491 U.S. 324, 336 (1989).

These principles apply with particular force in the international arena, and the Supreme Court has recognized that the dormant Foreign Commerce Clause prevents States from regulating commerce in a manner that "prevents the Federal Government from 'speaking with one voice when regulating commercial relations with foreign governments.'" Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 451 (1979) (quoting Michelin Tire Corp. v. Wages, 423 U.S. 276, 285 (1976)). A state statute "will violate the 'one voice' standard if it either implicates foreign policy issues which must be left to the Federal Government or violates a clear federal directive." Container Corp. v. Franchise Tax Bd., 463 U.S. 159, 194 (1983)

Similar principles, inherent in the constitutional requirement of due process, also limit a State's ability to project its law beyond its borders. See Allstate Ins. Co. v. Hague, 449 U.S. 302, 310-11 (1981) (plurality) ("if a State has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional"); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818 (1985); Home Insurance Co. v. Dick, 281 U.S. 397, 407-08 (1930); Watson v. Employers Liability Assurance Corp., 348 U.S. 66, 70 (1954). See also Quill Corp. v. North Dakota, 504 U.S. 298, 306 (1992) ("[t]he Due Process Clause 'requires some definite link,

some minimum connection, between a state and the person, property or transaction it seeks to tax'" (citation omitted)). The due process limitations on a State's extraterritorial legislation look "not only at whether the parties * * * have contacts with [the State], but also and more importantly * * * at whether the *subject* [of the legislation] has a sufficient nexus to [the State]." Gerling Global Reinsurance Corp. of America v. Gallagher, 267 F.3d 1228, 1238 (11th Cir. 2001) ("Gerling-Gallagher").

Applying these principles, the Eleventh Circuit in Gerling-Gallagher recently enjoined application of a Florida statute that attempted to force European insurance companies and their Florida affiliates to pay on insurance policies issued in Europe prior to and during World War II. See Gerling -Gallagher, 267 F.3d at 1238. The court explained it was insufficient that, subsequent to the Holocaust, some victims had moved to Florida or that affiliates of the European insurers did business in Florida. Ibid. The State lacked a sufficient nexus to "the *subject*" of the legislation – "the German affiliates' payment or non-payment of Holocaust-era policy claims." Ibid.

B. In enacting its Second World War forced labor statute, the California legislature sought to create and define a cause of action to provide compensation for victims of German and Japanese forced labor practices during World War II. Section 354.6 establishes the cause of

action, Cal. Civ. Pro. § 354.6(b), defines the class of plaintiffs who may sue, id. § 354.6(a)(1), (2), affixes the measure of damages (eliminating the effect of post-war inflation), id. § 354.6(a)(3), makes corporations doing business in California liable for the debts of their Asian and European affiliates, without regard to traditional principles of corporate identity, id. § 354.6(b), and sets aside generally-applicable statutes of limitations, substituting an 81-year statute of limitations that extends to 2010, id. § 354.6(c).

Contrary to plaintiff's and the superior court's suggestion, the statute thus is considerably more than a state "statute of limitations." See Nov. 29 Opinion at 6, 13. In fact, the paragraph that establishes the limitations period expressly disavows any general application to causes of action that arise independently under other provisions of substantive law. To the contrary, the limitations provision applies only to "[a]ny action brought under this section." Id. § 354.6(c) (emphasis added).

Whether the substantive law that the forced labor statute establishes is characterized as "California" law or "international" human rights law, the result is the same: California has sought to define liability for events occurring between foreign nationals in foreign nations.

The principles outlined above plainly preclude this extraterritorial legislation. As noted, both the "dormant" Commerce Clause and the Due

Process Clause prohibit a State from projecting its laws into other jurisdictions. See Healy v. Beer Institute, 491 U.S. 324, 336 (1989) (Commerce Clause); Home Insurance Co. v. Dick, 281 U.S. 397, 407-08 (1930) (Due Process Clause). The California legislature can no more regulate conduct that takes place in Japan or Korea or legislate what damages should be paid for such conduct, than it can impose its regulatory policies on New York.[13]

Section 354.6 applies to conduct in territory "conquered by the Nazi regime, its allies or sympathizers" at any time during World War II. See Cal. Civ. Pro. § 354.6(a)(2). By definition, therefore, the statute applies only to conduct that occurred outside of California. Nor does the statute represent an attempt to afford protection to California citizens victimized in foreign nations. The statute seeks to provide relief to persons "taken from a concentration camp or ghetto" in Europe, or "member[s] of the civilian population[s] conquered by the Nazi regime, its allies or sympathizers." Id. § 354.6(a). Indeed, with respect to claims against Japanese corporations, the only conceivable plaintiffs are individuals who were not nationals of the United States in 1951, when the United States explicitly waived all such claims.

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[13] Thus, the superior court was simply wrong when it stated that, in the absence of a clear indication whether Korean or Japanese law would permit plaintiff's claim, the court was free to "apply California law" instead. See Sept. 14 Opinion at 12.

Plaintiff's claims exemplify the statute's extraterritorial reach. Mr. Jeong was a Korean national living in Japan and Korea during World War II, when he was forced by Japanese "government authorities" to perform unpaid-labor "in Korea" for a Japanese company, Onoda Cement Co., Ltd. See Sept. 14 Opinion, 2. The connection between the tragic events at issue and California are not apparent. Mr. Jeong later moved to California and Onoda (or at least certain affiliates) presently does business in the State. It is well-established, however, that the mere presence of the parties in a State are not an adequate basis for that State to apply its substantive law to activity with no other significant contact with the State. Allstate Ins. Co., 449 U.S. at 310-11 (citing John Hancock Mutual Life Ins. Co. v. Yates, 299 U.S. 178 (1936)).[14]

[14] Notably, the Ninth Circuit in Gerling-Low, specifically declined to address the insurance companies' "due process" challenge to California's disclosure requirements for Holocaust-era insurance policies. 240 F.3d at 754 n.11.

CONCLUSION

For the foregoing reasons, Section 354.6 of the California Code of Civil Procedure violates the constitutional limits on the State's authority and cannot serve as the basis for plaintiff to bring his claims against the defendant corporations. The Court should issue a writ directing the superior court to vacate its previous decisions and set aside Section 354.6 as unconstitutional.

Respectfully submitted,

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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 9,457 words.

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Douglas Hallward-Driemeier

I HEREBY CERTIFY THAT true and correct copies of the foregoing Brief of the United States as Amicus Curiae in Support of Petitioners were served this 11th day of February, 2002, upon the following, by placing the document listed above in a sealed Federal Express package and affixing a pre-paid air bill, and causing the package to be delivered to a Federal Express agency for delivery.

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