

No. G030056

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION THREE

mitsubishi materials corporation,
mitsubishi materials usa corporation,
mitsubishi corporation, mitsubishi
international corporation, mitsubishi
heavy industries, ltd., mitsubishi heavy
industries america, inc., mitsui & co.,
ltd., mitsui & co. (u.s.a.), inc., mitsui
mining company, ltd., and mitsui mining
u.s.a., inc.

Petitioners,

v.

SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF ORANGE,

Respondent.

FRANK H. DILLMAN, GEORGE E. COBB, ETHEL
GEORGEAN JAEGER, OLGA L.E. BJORK, AND
MARJORIE MARTIN,

Real Parties in Interest.

ORANGE COUNTY

MASTER DOCKET NO.
81 44 30

JCCP No. 4353

Case Nos. 81 44 30, 81 45
94

Honorable William F.
McDonald

**BRIEF OF THE UNITED STATES AS AMICUS CURIAE
IN SUPPORT OF WRIT PETITION**

Of Counsel:

JAMES G. HERGEN
LARA A. BALLARD
United States Department of State
Office of the Legal Adviser
Washington, D.C. 20037

ROBERT D. McCALLUM, JR.
Assistant Attorney General

JOHN S. GORDON
United States Attorney

MARK STERN
DOUGLAS HALLWARD-DRIEMEIER
KATHLEEN KANE CA Bar # 209727
Attorneys, Appellate Staff
Civil Division, Room 9113
Department of Justice
Washington, DC 20530-0001
Tel: (202) 514-5735
Fax: (202) 514-9405

Attorneys for Amicus Curiae the United States of America

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INTRODUCTION

At the conclusion of World War II, the President and Senate determined that the United States needed Japan as a strong, democratic ally against communism in Asia and that the United States could not permit the rebuilding of Japan and its economy to be hindered by ongoing damages claims arising out of the war. In furtherance of this policy, the Treaty of Peace between the United States, other Allied nations, and Japan, waived the claims of American and Allied nationals against Japan and Japanese nationals arising out of the war.

Because the claims presented are barred by treaty, they must be dismissed. In adopting a statute that facilitates litigation of precisely those claims waived by the Treaty of Peace, the California legislature has interfered in a direct and significant way in the conduct of foreign 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

¹ The history of the 1951 Treaty is discussed in much greater detail, with extensive citations to the historical record, in the Statement of Interest filed by the United States with the superior court. A copy of that Statement is reproduced as Exhibit 9 of the Writ Petition Exhibits.

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.

The United States viewed an economically stable, anti-communist Japan as essential to the United States' interests in the Pacific region and believed that 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 October, 2000 ("October 2000 Statement"), at 3-6 [Ex. 9 of the Writ Petition exhibits].

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 5-6. In addition, the United States government, having taken on sole responsibility for Japan's recovery during the occupation of Japan following the war, concluded that any substantial payment of war-related claims ultimately would in large part be funded by the American taxpayers. See id. at 4-5. For these reasons, the President and Senate 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.²

² 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 October 2000 Statement at 5-6 (quoting extensive analysis by Dulles). Thus, the waiver of claims was made with open eyes.

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 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).³

The Allies and their nationals received significant compensation for the released claims. Under Article 16, Japan transferred its assets in neutral

³ The United States and Allies' policy in favor of government-to-government resolution of war-related claims was so strong that the Treaty of Peace further provided that the claims of non-parties and their nationals should likewise be resolved by inter-governmental arrangements rather than individual litigation. See, e.g., Art. 26 (providing 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" (emphasis added)); Art. 4(a) (specifying 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").

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. See October 2000 Statement at 10. Under Article 14, which authorized the Allied governments to seize the property of "Japan and Japanese nationals" located within their respective jurisdictions, the Allies confiscated approximately \$4 billion, including assets in U.S. territory worth, in 1952, over \$90 million. See October 2000 Statement at 10. 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, including labor without pay. See 50 U.S.C.App. § 2005(d). See generally October 2000 Statement, 11-13.

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

In 1999, California enacted a statute that permits World War II 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 forced 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

Plaintiffs in the consolidated cases below are former members of the United States military who were held as prisoners of war ("POWs") by Japan during World War II, or the heirs of other POWs. The complaints allege that during the time of their imprisonment by the Japanese military, the POWs were forced to perform labor without pay for various Japanese companies.

The defendants are the companies for which plaintiffs were forced to labor or affiliates of those companies. The defendants moved the superior court for judgment on the pleadings, arguing, among other things, that

plaintiffs' claims were barred by the 1951 Treaty of Peace, which waived the war-related claims of United States nationals against Japanese nationals. Defendants also urged that, even apart from the Treaty, California's attempt to legislate with respect to war-related claims that arose in foreign countries exceeded the jurisdictional limits imposed on the States by the federal Constitution.

The United States filed a Statement of Interest in support of defendants' motion. The United States explained in great detail that the Treaty's waiver of POW claims, such as those presented now by plaintiffs, had been intentional and formed an integral part of the United States' post-war policy toward Japan. See generally October 2000 Statement. The United States further explained that none of plaintiffs' arguments for ignoring the Treaty's clear waiver provision had any merit. See id. at 17-30.

Despite the Treaty's unambiguous waiver provision and the United States' Statement of Interest, the superior court rejected defendants' motion in a two-page order. See Order dated October 19, 2001. Although the superior court took judicial notice of the Treaty, it declined to "accept[] the truth of its contents." Id. at 2. The court ruled that contradictory interpretations of the Treaty contained in extraneous materials submitted to the court precluded it from interpreting the Treaty as a matter of law. Ibid. The court further found that the Treaty's waiver of "all" claims by U.S. nationals against Japanese nationals arising out of the prosecution of the war was not a sufficiently clear indication of the Federal Government's intent to "exclusively occupy the field of WW II war claims." Ibid.

SUMMARY OF ARGUMENT

1. The 1951 Treaty of Peace unambiguously waives the claims of American and Allied POWs against both the government of Japan and Japanese companies arising out of the War. That agreement reflected the foreign policy determination of the United States that the rebuilding of its now-ally should not be impaired by suits arising out of the prosecution of the war by Japan and its nationals.

Plaintiffs' claims are barred by the plain language of the Treaty. Claims for compensation by prisoners of war clearly arise out of the prosecution of the war, indeed, are at the core of that waiver. Under the laws of war, including the Geneva Convention, Japan was responsible for the treatment of its prisoners of war, and was obliged to ensure that prisoners who labored for private entities were paid. Claims for compensation would thus indisputably be barred if asserted against the Japanese government. Such claims are just as surely barred by the plain language of the treaty when asserted against Japanese nationals.

Plaintiffs' attempts to introduce ambiguity into Article 14 fail. The Court need not strain to read Article 14 to exclude POW claims because, contrary to plaintiffs' assertions, there is no constitutional impediment to the Federal Government resolving claims that stand as an obstacle to normal relations with a foreign state, even claims of American nationals against foreign nationals. Plaintiffs' reliance on the fact that Japan's waiver of its claim uses a different formulation than Article 14 is also misplaced. Because the Allies' waiver of claims unambiguously encompasses POW claims, the use of different language to express the waiver of Japan's claims is irrelevant.

Plaintiffs likewise err in asserting that the Treaty's waiver provision was rendered inoperative by virtue of Article 26, a "most favored nation

provision" that granted to the United States any advantages provided to other nations in subsequent treaties. By its plain language, Article 26 creates rights only for the "parties to the [1951] Treaty," i.e., the Allied governments. It is not for a private plaintiff or a court to determine whether, in another treaty, Japan gave a foreign government "greater advantages" than those obtained by the United States.

2. Even if the Treaty did not affirmatively foreclose plaintiffs' claims, the State of California would have exceeded its authority in creating a cause of action for American prisoners of war against a wartime enemy and present ally. The Constitution grants to the Federal Government exclusive authority to conduct the nation's foreign relations. That grant ensures that the nation as a whole need not be dependent on the judgments of any one State in the foreign policy arena. Accordingly, the Supreme Court has held that state regulations that have more than an indirect effect on the nation's foreign relations must be set aside. The California statute has, and was intended to have, a direct effect on issues that are the subject of international treaty and continuing diplomatic exchanges. The forced labor statute 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.

ARGUMENT

I. PLAINTIFFS' CLAIMS ARE BARRED BY THE 1951 TREATY OF PEACE, WHICH WAIVED ALL AMERICAN AND ALLIED NATIONALS' WAR-RELATED CLAIMS AGAINST JAPANESE NATIONALS.

A. The Waiver Of American POW Claims In The 1951 Treaty Of Peace Is Unambiguous.

Where the text of a Treaty is clear a court must give the effect to the text. See Chan v. Korean Air Lines, Inc., 490 U.S. 122, 134 (1989) ("where the text is clear * * * we have no power to insert an amendment"). If the text is unambiguous, the court may not look beyond it to "drafting history" or other extraneous documents that might contradict the text itself. Ibid. (because "the result the text produces is not necessarily absurd," "[w]e must thus be governed by the text – solemnly adopted by the governments of many separate nations – whatever conclusions might be drawn from the intricate drafting history * * * brought to our attention"); Maritime Ins. Co. Ltd. v. Emery Air Freight Corp., 983 F.2d 437, 440 (2d Cir. 1993) ("there can be no doubt that we may rely on [other methods of interpretation] *only* when there is an ambiguity in the text of the treaty"); Vienna Convention on the Law of Treaties, Article 32 (recourse to extraneous materials appropriate only where applying normal canons of construction "(a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable").⁴

Article 14(b) of the 1951 Treaty of Peace broadly waives all Allied claims arising out of the war, including claims by American nationals against Japanese nationals. 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).⁵Art.

⁴ Although the United States is not a party to the Vienna Convention, it recognizes the Convention as an authoritative guide to international common law regarding treaty interpretation. See, e.g., Fujitsu Ltd. v. Federal Express Corp., 247 F.3d 423, 433 (2d Cir. 2001).

⁵ The full text of the waiver provision is as follows:

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

14(b). This text leaves no question that it applies to “all * * * claims” by American “nationals” against “Japan and its nationals.”⁶

It is equally clear that claims of prisoners of war regarding the treatment they received during their incarceration are claims arising out of “actions taken * * * in the course of the prosecution of the war.” See In re World War II Era Japanese Forced Labor Litig., 114 F. Supp. 2d 939, 945 (N.D. Cal. 2000) (calling plaintiffs' argument "strained").⁷ This language is "strikingly broad." Ibid. The Court need not, however, determine the boundaries of the waiver, because claims related to a belligerent's treatment of its prisoners of war fall well within the waiver's outer limits.

All plaintiffs in these cases either were, or assert claims as the heirs of, American "prisoners of war" captured by the Japanese during World War II. See Dillman v. Mitsubishi Materials Corp., No. 814430 (Orange Cty.), Complaint ("Dillman Complaint"), ¶¶ 1-13.⁸ Indeed, plaintiffs'

course of the prosecution of the war, and claims of the Allied Powers for direct military costs of occupation.

⁶ Plaintiffs' argument that the Treaty waiver is limited to war “reparations,” a term that plaintiffs maintain encompasses only claims for wrong-doing by the foreign government or its agents, see Plaintiff’s Demurrer Opposition at 9, cannot be squared with the plain language of Article 14. Article 14 specifically waives “reparations” and “other claims” and explicitly extends to “claims of * * * Allied * * * nationals arising out of any actions taken by Japan[ese] nationals.”

⁷ Indeed, while the superior court denied defendants’ demurrer, the court recognized that plaintiffs’ claims arose out of acts taken in the course of prosecution of the war. See Order dated May 22, 2000 (noting that plaintiffs' argument that the claims "did not arise in the prosecution of war * * * is without merit"). See also Aldrich v. Mitsui & Co. (M.D. Fla. Jan 28, 1988) No. 87-912-Civ-J-12, slip. Op. At 3 (Ex. 10 to October 2000 Statement).

⁸ In the initial complaint in Jaeger, plaintiffs similarly acknowledged that the forced labor that is the subject of their suit was performed by United States servicemen while held by Japan as prisoners of war during World War II. See Jaeger v. Mitsubishi Materials Corp., No. 814594, Class Action Complaint, ¶¶ 5, 35-49 (alleging that “prisoners of war taken by the Japanese were enslaved and forced to work for years under inhumane conditions for private Japanese business entities”). These facts have been omitted from their Amended Complaint, though the Amended Complaint does impliedly reference plaintiffs’ “prisoner of war” status in the allegation

prisoner-of-war status is an essential element of their asserted claims under the California forced labor statute, which, with respect to American nationals, only allows claims by "prisoner[s]-of-war." See Cal. Code Civ. Pro. § 354.6(a)(2).⁹

As prisoners of war, plaintiffs were entitled to the protections afforded by the Geneva Convention. See Convention of July 27, 1929, Relative to the Treatment of Prisoners of War ("1929 Convention"), 47 Stat. 2021, Art. 1, Art. 81; Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 ("1949 Convention"), 6 U.S.T. 3316, Art 4.¹⁰ Significantly, under international law, it is the belligerent government's responsibility to ensure that POW's are treated in accordance with the Conventions' requirements. See 1929 Convention, Art. 2 ("Prisoners of war are in the power of the hostile Power, but not of the individuals or corps who have captured them."); 1949 Convention, Art. 12 ("the Detaining Power is responsible for the treatment given" POWs). Indeed, the Geneva Convention establishes that the military authorities of the detaining power remain responsible for the treatment of POWs forced

that plaintiffs' decedents were "forced labor victims" under the California statute. For the reasons stated in the text, the admissions of plaintiffs' original Complaint are unnecessary to resolving the legal question presented, but plaintiffs should, in any event, be judicially estopped from denying the truth of the allegations of their original complaint.

⁹ None of the plaintiffs allege they fall within the other classes of potential plaintiffs under the California statute: "person[s] taken from a concentration camp or ghetto" or "member[s] of the civilian population conquered by the Nazi regime" and its allies. Cal. Code Civ. Pro. § 354.6(a).

¹⁰ Japan and the United States were signatories to the 1929 Geneva Convention, Yamashita v. Styer, 327 U.S. 1, 23 (1946), and were bound by its terms during World War II, see id. at 73 n.36 (Rutledge, J. dissenting) (noting that, though Japan had not ratified the Convention before the war, Japan and the United States had agreed to adhere to its provisions). Although the 1949 Geneva Convention post-dated World War II, it is a multilateral treaty negotiated at roughly the same time as the 1951 Treaty of Peace, and thus sheds light on whether claims that prisoners of war's rights were violated would have been understood as claims arising out of the prosecution of the war.

to labor for private corporations, including ensuring that they are paid. 1929 Convention, Art. 28 ("The Detaining power shall assume entire responsibility for the maintenance, care, treatment and payment of wages of prisoners of war working for the account of private persons."); 1949 Geneva Convention, Art. 57.

It is plain, then, that if plaintiffs had brought their claims for non-payment of POW wages against Japan – alleging violation of the Geneva Convention, which forms part of the “laws of war,” see Yamashita v. Styer, 327 U.S. 1, 14 (1946); H.R. Rep. No. 698, reprinted in, 1996 U.S.C.C.A.N. 2166 – their allegations would, without question, fall within the scope of actions “taken in the course of the prosecution of the war.” Indeed, violations of the Geneva Convention’s protections can, in certain circumstances, rise to the level of “war crimes.” See 18 U.S.C. 2441, Yamashita, 327 U.S. at 14.

Plaintiffs' claims are, therefore, necessarily waived as against the Japanese companies for which they labored as well. The Treaty's waiver in this respect is coextensive with respect to Japan and its nationals. If claims against Japan relating to the unpaid forced labor of prisoners of war are barred as acts taken in the prosecution of the war, those same claims are also barred when brought against the Japanese nationals for which that work was performed.¹¹

Were there any doubt as to the understanding of the Treaty at the time of its formation, the Statement of Interest filed by the United States, which includes extensive documentation from the historical record, makes

¹¹ As the above demonstrates, it is entirely irrelevant whether the precise work plaintiffs performed had anything to do with Japan's military operations, whether the private companies operated with a profit motive, or whether plaintiffs' suffering was essential to Japan's war effort. Cf. Plaintiffs' Demurrer Opposition, 17-21.

very clear that the United States did understand that its waiver of claims encompassed the claims of American POWs against Japanese nationals. The Supreme Court has frequently noted that the State Department's interpretation of America's treaty obligations is entitled to "great weight." See, e.g., Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 178, 184-85 (1982); Kolovrat v. Oregon, 366 U.S. 187, 194 (1961); Restatement of the Law (3rd) Foreign Relations, § 326 ("The President has authority to determine the interpretation of an international agreement," and courts "will give great weight to an interpretation made by the Executive Branch"). Although the courts are not bound to follow a proffered interpretation that contradicts the plain meaning of a treaty, see Chan, 490 U.S. at 133-35, where the United States' interpretation is consistent with the natural meaning of the treaty language, that interpretation should be conclusive.¹²

to 21

B. None of Plaintiffs' Arguments Can Render The Treaty's Waiver Language Ambiguous.

Before the superior court, plaintiffs offered arguments why the court should not give the broad waiver language in Article 14(b) its natural effect. None of these arguments detract from the Treaty's clarity.

1. Plaintiffs first argue that the Treaty should be construed not to apply to their claims because the Treaty would otherwise violate the Constitution, contending that the United States government lacks the

¹² Plaintiffs have responded to the United States' Statement of Interest in the same manner that they approach the Treaty, they argue that the United States did not mean what it said. See Plaintiffs' Informal Response In Opposition to Writ of Mandate/Prohibition, 12-16 (contending that the Statement of Interest does not, in fact, represent the views of the United States). Plaintiffs' assertion that the United States' filings have been made without authorization has absolutely no basis in fact. For the court's information, the arguments presented in this brief have been reviewed and endorsed by the Solicitor General of the United States, who is the officer authorized to represent the United States before the United States Supreme Court and courts of appeals. See 28 U.S.C. §§ 517, 518; 28 C.F.R. § 0.20 (Solicitor General must authorize amicus participation in any appellate court).

constitutional authority to abrogate claims of American nationals against enemy nationals arising out of the prosecution of a war. See Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Demurrer to the Consolidated Amended Complaint ("Plaintiff's Demurrer Opposition"), 6-8. Plaintiffs are wrong. The Constitution does not deny the Federal Government the tools necessary to end a world war.

It is well established that the Federal Government has the authority to espouse and even abolish the claims of American nationals as the Federal Government deems necessary for the normalization of relations with a foreign government. See Dames & Moore v. Regan, 453 U.S. 654, 679-80 (1981); Asociasion de Reclamantes v. United Mexican States, 735 F.2d 1517, 1523 (D.C. Cir. 1984) ("Once it has espoused a claim, a sovereign has wide-ranging discretion in disposing of it. It may compromise it, seek to enforce it, or waive it entirely"), cert. denied, 470 U. S. 1051 (1985); Ozanic v. United States, 188 F.2d 228, 231 (2d Cir. 1951) ("the necessary power to make such compromises has existed from the earliest times and been exercised by the foreign offices of all civilized nations"). The "sovereign authority" of a government to settle the claims of its nationals against their wishes is necessary because, "[n]ot infrequently in affairs between nations, outstanding claims by nationals of one country against the government of another country are 'sources of friction.'" Dames & Moore, 453 U.S. at 679 (citing United States v. Pink, 315 U.S. 203, 225 (1942)).

The authority to espouse and waive claims extends as well to claims against foreign nationals arising out of a war. Indeed, one of the Supreme Court's earliest decisions with respect to the Federal Government's treaty power, United States v. The Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801), upheld the Federal Government's power to abolish, by way of treaty,

private prize claims against foreign property that were not yet fully adjudicated. See id. at 110 (recognizing that "individual rights acquired by war" may need to be "sacrificed for national purposes"). The Court has recognized that claims by the citizens of one country against those of another may be just as much a "source of friction" as claims against a foreign government itself. 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)).¹³ This is especially so where, as here, the alleged misconduct of foreign nationals would be imputed, under international law, to the foreign government itself. See 1929 Convention, Art. 28.

At the end of World War II, the United States determined that it was necessary to waive the war-related claims of American nationals against Japan and Japanese nationals, as part of the United States' normalization of relations with Japan and in furtherance of the United States' policy of developing a democratic ally against communism in Asia. In exchange, the United States obtained the right to confiscate assets of Japan and Japanese nationals worth nearly one hundred million dollars. These assets were, in turn, used to make payments to victims of the war, including American POWs who had suffered at the hands of Japanese nationals.

Because the Federal Government acted well within its constitutional authority in espousing and waiving the war-related claims of American

¹³ It is easy to see how claims between nationals of foreign nations could become a source of friction between their governments. Legal judgments are not self-enforcing; they depend upon the threat that the government will enforce the judgment. Enforcement of a judgment against a foreign national risks the possibility that the foreign national may, in turn, call upon its government to defend it.

POWs, there is no reason that the Court should not give the Treaty's waiver provision its natural effect.

2. Plaintiffs note that Article 19, the provision by which Japan waives its claims, contains a specific reference to claims by POWs.¹⁴ From this plaintiffs seek to infer that Article 14 does not apply to POW claims by Allied prisoners. See Plaintiffs' Demurrer Opposition at 13-17.

As an initial matter, as Judge Walker held in the federal district court suit involving similar claims, because the language of Article 14(b) is itself unambiguous, reliance on Article 19 is unavailing. See In re World War II Era Japanese Forced Labor Litig., 114 F. Supp. 2d 939, 945 (N.D. Cal. 2000). That Japan's waiver of claims was phrased in a manner distinct from that of the Allies' does not alter the waiver of "all" claims of Allied nationals arising out of "any" action of Japan and Japanese nationals in the prosecution of the war. Indeed, distinctions in the language of the two provisions are only to be expected given the dissimilar positions of the United States and Japan which, for example, also had to waive claims against the United States arising out of the post-war occupation.

In any event, plaintiffs' argument proves far too much. As noted above, Article 14(b)'s waiver is coextensive as to claims against Japan and Japanese nationals. Just as Article 14 contains no specific reference to claims by POWs against Japanese nationals, neither does it specifically refer to POW claims against the Japanese government. Therefore, to accept plaintiffs' reasoning would require a court to conclude that POWs can

¹⁴ In Article 19(a), Japan waives "all claims * * * arising out of the War or out of actions taken because of the existence of a state of war." Article 19(b) further states that the waiver in Article 19(a) "includes * * * any claims and debts arising in respect to Japanese prisoners of war and civilian internees in the hands of the Allied Powers."

maintain suit not only against Japanese nationals but against the Japanese government as well.

Moreover, the treaty language leaves no doubt that the drafters believed that the categories in Article 19(b) fell within the scope of the general waiver of Article 19(a). Article 19(b) states that POW claims are "include[d]" in the general waiver of 19(a), not that they were "in addition" to that waiver. If anything, then, the language of Article 19 underscores that the Treaty drafters understood POW claims to fall within the ambit of a broad general waiver such as that contained in Article 14.

C. Even If The Court Were To Consider Extraneous Evidence, That Evidence Supports The Conclusion That The Waiver Of United States Nationals' Claims Was Knowing And Intentional.

Even if the text were ambiguous, "its most natural meaning could properly be contradicted only by clear drafting history." Chan, 490 U.S. at 134 n.5 (emphasis added). The extraneous evidence presented to the superior court does not clearly contradict the text's natural meaning. Indeed, that evidence shows that the United States knowingly and intentionally waived the war-related claims of American nationals, including POWs, against Japanese nationals.

As the United States' Statement of Interest informed the court, it was the United States that proposed the broad waiver of the Allies' claims, which it characterized as "settl[ing] and dispos[ing] of all claims of the Allied Powers and their nationals arising out of the war." Japanese Peace Treaty: Working Draft and Commentary Prepared in the Department of State, Washington, June 1, 1951, reprinted in Foreign Relations of the United States 1951, Vol. VI, Asia and the Pacific, at 1084 (1977) (Exhibit

10 to the October 2000 Statement). Likewise, the Senate recognized that, under the Treaty, the Allied Powers “waive their claims and those of their nationals.” S.Exec. Rep. No. 82-2 (Ex. 4 to the October 2000 Statement), at 13; id. at 12 (recognizing that full payment of “the claims of the injured countries and their nationals” would defeat “the basic purposes and policy” of the United States with respect to post-War Japan).

The treaty language must also be understood in light of the confiscation by the United States of the property of Japanese nationals to pay American victims of the war, including American POWs. Article 14(a) of the Treaty allowed the Allied Powers to “seize, retain, liquidate or otherwise dispose of all property, rights and interests of * * * Japanese Nationals * * * [and] entities owned or controlled by * * * Japanese nationals.” Art. 14(a)(2). Pursuant to this authorization, the United States seized Japanese-owned assets estimated in 1952 to be worth over \$90 million. See Japanese Peace Treaty Negotiations, Feb. 5, 1952, printed in Executive Sessions of the Senate Foreign Relations Committee (Historical Series), Vol. IV (1976), at 121-22 (Ex. 19 to the October 2000 Statement). These assets were liquidated and, pursuant to the War Claims Act of 1948, placed into a War Claims Fund for distribution to prisoners of war and other claimants. See ibid. Specifically, the fund made payments to POWs who were forced to perform labor without pay for private entities. See 5 U.S.C.App. §2005(d)(3)(A) (authorizing payment for violations of 1929 Geneva Convention, Title III, Section III, including Art. 28, which requires payment of wages to POWs working for private entities). In light of the fact that the assets of private Japanese nationals were confiscated under Article 14 and used to pay American POWs for their war-related injuries, including the failure of Japanese companies to pay wages, the natural

inference is that claims such as plaintiffs' were waived, as, in fact, the Treaty language indicates.

In light of the ample evidence that the United States fully intended to waive the claims of its nationals against Japanese nationals, plaintiffs cannot carry their burden of proving a “clear drafting history” that would contradict the Treaty’s most natural reading.

D. The “Most Favored Nations” Clause In The Treaty Of Peace Creates No Private Rights, And Cannot Be Invoked By Plaintiffs.

Plaintiffs contend that treaties entered into by Japan with other nations contained terms more favorable than the terms obtained by the United States in the 1951 Treaty of Peace. Plaintiffs attempt, on this basis, to invoke of Article 26, which provides that if Japan were to enter into a treaty with another country “granting that State greater advantages than those provided by the present Treaty, those same advantages shall be extended to the parties to the present Treaty.” Art. 26. Plaintiffs’ argument fails as a matter of law because only the United States, as the party to the Treaty, has the authority to invoke Article 26.

The determination whether one set of terms in a peace treaty offer “greater advantages” than another set of terms is one that only the party to the agreement can make. In making such a determination, the United States would analyze all of the aspects of an agreement, not just one, and would weigh, in addition, what effect invoking the “most favored nation” clause would have on the United States’ relations with foreign governments.¹⁵ For

¹⁵ One cannot, for example, simply compare Japan’s concessions to different countries dollar-for-dollar. The Treaty itself contemplated that each Allied party would receive different amounts, because the amount of reparations was wholly dependent upon what Japanese assets happened to be located within that country’s jurisdiction. See Art. 14(a)(2). The Treaty also expressly contemplated that Japan would offer additional assistance to

this reason, Article 26 creates rights only for “the parties to the present Treaty,” i.e., the governments of the party nations. Thus, private individuals, who are not competent to make such foreign policy assessments, have no independent rights under Article 26.

This interpretation is consistent with well-established principles of law with respect to treaty interpretation. “International treaties are not presumed to create rights that are privately enforceable.” Goldstar (Panama) S.A. v. United States, 967 F.2d 965, 968 (4th Cir.), cert. denied, 506 U.S. 955 (1992). Accord United States v. Li, 206 F.3d 56, 67 (1st Cir.) (en banc) (“treaties do not generally create rights that are privately enforceable in the federal courts”), cert. denied, 531 U.S. 956 (2000); Restatement, § 907 comment a (“international agreements, even those directly benefitting private persons, generally do not create private rights or provide for a private cause of action in domestic courts”). Likewise, only the government that is party to a treaty may determine when its rights thereunder have been violated, requiring redress. Matta-Ballesteros v. Henman, 896 F.2d 255, 259 (7th Cir.) (“[t]reaties are designed to protect the sovereign interests of nations, and it is up to the offended nations to determine whether a violation of sovereign interests occurred and requires redress”), cert. denied, 498 U.S. 878 (1990).

The United States has never determined that the terms of any of Japan’s post-war peace treaties gave another country “greater advantages” than were obtained by the United States in the 1951 Treaty. Indeed, the United States directly participated in the negotiations of some of the treaties upon which plaintiffs rely. See October 2000 Statement at 27-28.

those nations that had been occupied by Japan during the War. See Art. 14(a)(1).

The 1951 Treaty of Peace with Japan has served the foreign policy interests of the United States in the Pacific well over the past half-century. The United States has no interest in renegotiating that Treaty. Plaintiffs' attempt to invoke Article 26 must be rejected.

II. THE CALIFORNIA FORCED LABOR STATUTE IS PREEMPTED AND IS, AS WELL, AN UNCONSTITUTIONAL ATTEMPT BY THE STATE TO PROJECT ITS AUTHORITY OVER MATTERS OUTSIDE OF ITS JURISDICTION.

1. The Framers of the federal Constitution 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 Alexander 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).

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. 10.¹⁶ 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.¹⁷

¹⁶ 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.

¹⁷ 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,

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 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). The need for uniformity in foreign affairs is so strong that a state policy that disturbs foreign relations must give way "even in [the] absence of a treaty" or federal statute. Zschernig v. Miller, 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

unless actually invaded, or in such imminent Danger as will not admit of delay." Id., Art. 1, § 10.

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.

A. California's Attempt To Facilitate Claims That Have Been Waived Under Federal Law Is Preempted.

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, any state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of federal law will be deemed preempted. See Crosby v. National Foreign Trade Council, 530 U.S. 363, 377 (2000) (quoting Hines, 312 U.S. at 67). 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. See Boyle v. United Technologies Corp., 487 U.S. 500, 507 (1988) (when a State acts 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" (quotation omitted)); Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Bd., 315 U.S. 740, 749 (1942) (when a State legislates in an area affecting

foreign affairs, courts are "more ready to conclude that a federal Act * * * supersede[s] state regulation").

As we have discussed, California's forced labor statute is flatly at odds with the 1951 Treaty, under which POW claims regarding their treatment during captivity were abrogated. Federal law waived war-related claims against Japanese nationals and provided a remedy under the War Claims Act. The California statute gives war-related claims against Japanese nationals 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).

Unquestionably, the natural effect of the California forced labor statute is to encourage litigation of precisely those claims that federal policy declares waived. 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).

B. California Exceeded The Limits Of Its Jurisdiction In Adopting A Forced Labor Statute To Govern Claims That Arose In Foreign Lands During The Course Of A War.

The Supreme Court has established that, even apart from statutory preemption, the Constitution's commitment to the Federal Government of the exclusive responsibility to conduct 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, 530 U.S. at 381-82 (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 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,¹⁸ The Eleventh Circuit recently struck down Florida's attempt to force European insurance companies to pay on insurance policies issued in Europe as

¹⁸ The Supreme Court has recognized that the Commerce Clause of the federal Constitution, which gives the Federal Government authority to regulate interstate and foreign commerce, 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 Healy v. Beer Institute, 491 U.S. 324, 336 (1989). 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); Gerling Global Reinsurance Corp. of America v. Gallagher, 267 F.3d 1228, 1238 (11th Cir. 2001) (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-Gallagher").

violating due process limits on extraterritorial legislation. See Gerling-Galagher, 267 F.3d at 1238. 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 is clear from the discussion above, the cause of action that California seeks to provide is one fraught with foreign policy implications, especially as applied to prisoners of war. By its terms, Section 354.6 applies only to conduct in territory "occupied by or under the control of the Nazi regime, its allies or sympathizers." See Cal. Civ. Pro. § 354.6(a)(2). As none of the fifty States was ever occupied or controlled by a foreign power during World War II, the statute can only apply to conduct that occurred in foreign countries. Moreover, as previously noted, under the Geneva Convention, the government of Japan was legally responsible for the treatment of American POWs. See 1929 Convention, Art. 2; 1949 Convention, Art. 12. Even where a POW is forced to perform labor for private entities, the military authorities of the detaining power remain responsible for the treatment of POWs assigned to labor for private corporations, including ensuring that they are paid. See 1929 Convention, Art. 28 ("The Detaining power shall assume entire responsibility for the maintenance, care, treatment and payment of wages of prisoners of war working for the account of private persons."); 1949 Convention, Art. 57. Thus, application of Section 354.6 to the claims of American POWs necessarily involves a finding that Japan violated the laws of war with

respect to its treatment of those POWs.¹⁹ It is beyond the authority of the State to make such a determination or to create a cause of action that would require its courts to make such a determination. See Zschernig, 389 U.S. at 431-41.

The superior court opinions in this and a similar 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. In this case, the superior court took judicial notice of the 1951 Treaty of Peace, but refused to "accept[] the truth of its contents." October 19 Order at 2. Moreover, it refused to accept the United States' Statement concerning the import of the Treaty's waiver provision. Ibid. In another case, pending in Los Angeles County Superior Court, the court issued an opinion criticizing the United States' purportedly "uneven" and "disparate" treatment of Japan and Germany and deemed federal foreign policy "legally unsupportable." Jeong v. Onoda Cement Co. Ltd., Superior Court for the County of Los Angeles, No. BC217805, (November 29, 2001) at 11. See also id. (September 14, 2000) at 18 (holding that adjudication of plaintiff's claim "would not interfere with any *legitimate* United States governmental foreign policy interest" (emphasis in original)).

Plaintiffs mistakenly believe that the Ninth Circuit's opinion in Gerling Global Reins. Corp. of America v. Low, 240 F.3d 739 (9th Cir. 2001) ("Gerling-Low") controls the foreign affairs analysis in this case. See Plaintiffs' Demurrer Opposition at 37-40. As the federal district court

¹⁹ Indeed, it appears that one of plaintiffs' goals is to expose violations by Japan of the laws of war. See Informal Response of Plaintiffs at 32 (maintaining that a finding that plaintiffs' forced labor was in the prosecution of the war and, thus, waived by Article 14 "would itself raise critically important issues" because it would constitute "a confession to internationally illegal conduct" on the part of Japan).

explained in its very thorough opinion in In re World War II Era Japanese Forced Labor Litig., 164 F. Supp. 2d 1160, 1170-78 (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.²⁰ Nor is there any federal statute that encourages such claims. 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" consideration of the constitutionality of California Ins. Code § 790.15, which authorizes license suspensions of insurance companies who

²⁰ 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).

have not paid Holocaust-era claims, and Cal. Civ. Proc. Code § 354.5, which allows claims for payment on Holocaust-era insurance policies).

Because the California forced labor statute has far more than an "incidental or indirect effect in foreign countries," Zschernig, 389 U.S. at 434-35, it was beyond the authority of the California legislature to enact.

CONCLUSION

For the foregoing reasons, the superior court was in error when it failed to dismiss plaintiffs' claims.

Of Counsel:

JAMES G. HERGEN
LARA A. BALLARD
United States Department of State
Office of the Legal Adviser
Washington, D.C. 20037

Respectfully submitted,
ROBERT D. McCALLUM, JR.
Assistant Attorney General

JOHN S. GORDON
United States Attorney

MARK STERN
DOUGLAS HALLWARD-
DRIEMEIER
KATHLEEN KANE CA Bar #
209727
Attorneys, Appellate Staff
Civil Division, Room 9113
Department of Justice
Washington, DC 20530-0001

Dated: February 14, 2002

Attorneys for the United States

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David S. Casey, Jr.
Bonnie E. Kane, Esq.
HERMAN, MIDDLETON, CASEY
& KITCHENS, LLP
110 Laurel Street
San Diego, CA 92101

James W. Parkinson
77564 Country Club Drive
Suite B310
Palm Desert, CA 92211-0450

Joe R. Reeder
GREENBERG TRAUIG
800 Connecticut Avenue, NW
Suite 500
Washington, D.C. 20006

Michael Goldstein
LAW OFFICES OF MICHAEL
GOLDSTEIN
120 Birmingham Drive
Suite 200
Cardiff, CA 92007-1721

Bill Lockyer
ATTORNEY GENERAL
Richard M. Frank
Louis Verdugo, Jr.
Catherine Z. Ysrael
300 South Spring Street, Room
5212
Los Angeles, CA 90013

Venus Soltan
SOLTAN & ASSOCIATES
555 Anton Blvd., Suite 1200
Costa Mesa, CA 92626

Kathleen V. Fisher
Arne D. Wagner
Phyllis Oscar
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105-2482

Dean J. Zipser
H. Mark Mersel
MORRISON & FOERSTER LLP
19900 MacArthur Blvd.
Twelfth Floor
Irvine, CA 92612-2445

Barbara L. Croutch
PILLSBURY WINTHROP LLP
725 South Figueroa Street, Suite
2800

Nathan Spatz
Los Angeles, CA 90017

Brett J. Williamson
Todd A. Green
O'MELVENY & MYERS LLP

610 Newport Center Drive, 17th
Floor
Newport Beach, CA 92660-6429

John F. Niblock
O'MELVENY & MYERS LLP
555 13th Street, N.W.
Washington, D.C. 20004

David M. Balabanian, Esq.
Christopher B. Hockett, Esq.
Thomas S. Hixson, Esq.
McCutchen, Doyle, Brown &
Enersen, LLP
Three Embarcadero Center
San Francisco, CA 94111-4067

Matthew E. Digby, Esq.
Heidi A. Leider, Esq.
Bingham Dana, LLP
444 South Flower Street
Suite 4500
Los Angeles, CA 90071

Judge William F. McDonald
c/o Clerk of Court
Orange County Superior Court
Department C-20
700 Civic Center Drive West
Santa Ana, CA 92701

DOUGLAS HALLWARD-
DRIEMEIER
Attorney, Appellate Staff
U.S. Department of Justice, Civil Division
601 D Street, N.W.; Room 9113
Washington, D.C. 20530
Tel: (202) 514-5735/ Fax: (202) 514-9405

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