

**05-5612-cv,** 04-6161-cv; 05-5274-cv; 05-5310-cv;  
05-5311-cv; 05-5540-cv; 05-5574-cv; 05-5583-cv; 05-5590-cv; 05-5601-cv; 05-5602-cv;  
05-5603-cv, 05-5604-cv; 05-5605-cv; 05-5606-cv; 05-5609-cv; 05-5612-cv; 05-5616-cv;  
05-5618-cv; 05-5621-cv; 05-5623-cv; 05-5626-cv; 05-5631-cv

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**United States Court of Appeals**  
*for the*  
**Second Circuit**

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DR. THOMAS WEISS, ERNA BIRNBAUM GOTTESMAN  
and MARTHA BIRNBAUM YOUNGER,

*Plaintiffs-Appellants,*

– v. –

ASSICURAZIONI GENERALI, S.P.A., a foreign corporation, BUSINESS  
MEN’S ASSURANCE COMPANY OF AMERICA, a foreign corporation,  
A FOREIGN CORPORATION, a foreign corporation, DOE COMPANY NO. 1,  
as Successor to Deutscher Lloyd Lebens Versicherung, DOE COMPANY NO. 2,  
as Successor to Deutscher Lloyd Versicherung, DOE COMPANY NO. 3, as  
Successor to Moldavia Generali, DOE COMPANY NO. 4, as Successor to Tristi  
Altalanos Bixtosito Tarsulat and DOE COMPANIES NO. 5-100,

*Defendants-Appellees.*

*(And Other Actions)*

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

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**BRIEF *AMICI CURIAE* ON BEHALF OF PROFESSORS OF  
CONSTITUTIONAL LAW AND FOREIGN RELATIONS LAW  
OF THE UNITED STATES IN  
SUPPORT OF PLAINTIFFS-APPELLANTS**

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## TABLE OF CONTENTS

|   | Page |
|---|------|
| TABLE OF AUTHORITIES .....  | ii   |
| LIST OF <i>AMICI CURIAE</i> PROFESSORS OF CONSTITUTIONAL<br>LAW AND FOREIGN RELATIONS LAW OF THE UNITED<br>STATES .....   | iv   |
| INTEREST OF THE <i>AMICI CURIAE</i> .....   | 1    |
| SUMMARY OF ARGUMENT .....   | 1    |
| ARGUMENT .....  | 5    |
| I.    THE DECISION BELOW CONFLICTS WITH BASIC<br>PRINCIPLES OF SEPARATION OF POWERS AND<br>FEDERALISM .....   | 5    |
| A.    The Constitution’s Basic Principles of Separation of<br>Powers and Federalism Require that Mere Presidential<br>Policies Cannot Displace Otherwise-Constitutional<br>State Law .....                                | 5    |
| B.    The Decision Below Conflicts with Basic<br>Constitutional Principles by Giving Preemptive Effect<br>to Mere Presidential Policy .....   | 10   |
| II. <i>MEDELLIN V. TEXAS</i> REAFFIRMED THAT MERE<br>PRESIDENTIAL FOREIGN POLICY DOES NOT<br>DISPLACE STATE LAW AND REJECTED BROAD<br>READINGS OF <i>GARAMENDI</i> TO THE CONTRARY .....                                  | 13   |
| A.    In <i>Medellin</i> , the Supreme Court Refused to Find a State<br>Law Preempted by a Mere Presidential Policy .....   | 13   |
| B.    The Decision in <i>Medellin</i> Limits <i>American Insurance<br/>              Association v. Garamendi</i> , on which the District Court<br>Relied, to State Laws that Conflict with Executive<br>Agreements ..... | 17   |
| III. <i>MEDELLIN’S</i> LIMITED READING OF <i>GARAMENDI</i><br>COMPORTS WITH CONSTITUTIONAL TEXT AND<br>STRUCTURE .....  | 20   |
| IV.  CONCLUSION .....   | 23   |

## TABLE OF AUTHORITIES

|  | Page(s)       |
|--|---------------|
| <b>Cases:</b>  |               |
| <i>American Insurance Association v. Garamendi</i> ,<br>539 U.S. 396 (2003).....   | <i>passim</i> |
| <i>Barclays Bank PLC v. Franchise Tax Board</i> ,<br>512 U.S. 298 (1994).....  | 17            |
| <i>Breard v. Greene</i> ,<br>523 U.S. 371 (1998).....  | 17            |
| <i>Dames &amp; Moore v. Regan</i> ,<br>453 U.S. 654 (1981).....  | 4, 9, 12, 19  |
| <i>Gerling Global Reinsurance Co. of America v. Low</i> ,<br>240 F.3d 739 (9th Cir. 2001).....                           | 11            |
| <i>Hamdan v. Rumsfeld</i> ,<br>548 U.S. 557 (2006) .....   | 15            |
| <i>In re Assicurazioni Generali S.p.A. Holocaust Insurance Litig.</i> ,<br>228 F. Supp. 2d 348 (S.D.N.Y. 2002) .....     | 12            |
| <i>In re Assicurazioni Generali S.P.A. Holocaust Insurance Litigation</i> ,<br>340 F. Supp. 2d 494 (S.D.N.Y. 2004) ..... | <i>passim</i> |
| <i>Medellin v. Texas</i> ,<br>128 S. Ct. 1346 (2008).....  | <i>passim</i> |
| <i>United States v. Belmont</i> ,<br>301 U.S. 324 (1937) .....   | 12, 19        |
| <i>United States v. Pink</i> ,<br>315 U.S. 203 (1942).....   | 12, 19        |
| <i>Youngstown Sheet &amp; Tube Co. v. Sawyer</i> ,<br>343 U.S. 579 (1952).....   | 7, 9, 16      |
| <i>Zschernig v. Miller</i> ,<br>389 U.S. 429 (1968).....   | 11            |

**Statutes & Other Authorities:**

|  |              |
|--|--------------|
| U.S. Const., Art. I, Sec. 1.....   | 3, 6         |
| U.S. Const., Art. I, Sec. 7.....   | 6            |
| U.S. Const., Art. I, Sec. 10.....  | 11           |
| U.S. Const., Art. II.....  | 9, 12        |
| U.S. Const., Art. II, Sec. 1.....  | 3            |
| U.S. Const., Art. VI.....  | 6, 9, 12     |
| U.S. Const., Art. VI, cl. 2.....   | 5            |
| Brief of the United States Supporting Petitioner, <i>Medellin v. Texas</i> ,<br>June 28, 2007, 2007 WL 19094262.....   | 15           |
| 1 William Blackstone, <i>Commentaries on the Laws of England</i> 142-43<br>(1765).....   | 7            |
| Bradford Clark, <i>Separation of Powers as a Safeguard of Federalism</i> ,<br>79 Tex. L. Rev. 1321 (2001).....   | 21           |
| Brannon P. Denning and Michael D. Ramsey, <i>American Insurance<br/>Association v. Garamendi and Executive Preemption in Foreign<br/>Affairs</i> , 46 Wm. & Mary L. Rev. 825 (2004)..... | 7            |
| James Madison, Alexander Hamilton and John Jay, <i>The Federalist Papers</i> ,<br><i>No. 47</i> (Isaac Kramnick, ed., 1987).....   | 3, 7, 16, 22 |
| Michael D. Ramsey, <i>The Constitution's Text in Foreign Affairs</i> 91-114<br>(Harvard U. Press 2007).....  | 7            |

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## INTEREST OF THE *AMICI CURIAE*

This brief *amici curiae* is respectfully submitted by law professors with expertise in constitutional law and the foreign relations law of the United States. *Amici* submit this brief because they believe that the present case raises important issues of separation of powers and federalism, areas to which they have devoted extensive scholarly focus. In particular, *amici* believe that the arguments of defendants-appellees and the decision of the District Court in this case invite an undue expansion of executive authority contrary to the fundamental allocations of power contained in the U.S. Constitution. The U.S. Supreme Court's recent decision in *Medellin v. Texas*, 128 S. Ct. 1346 (2008), emphasizes the limited ability of the U.S. President to make binding and preemptive law. *Amici* seek to confirm the importance of the *Medellin* decision and of fundamental constitutional principles in limiting the scope of executive power.<sup>1</sup>

## SUMMARY OF ARGUMENT

The District Court below, on the authority of the U.S. Supreme Court's decision in *American Insurance Association v. Garamendi*, 539 U.S.

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<sup>1</sup>Some fees and costs of counsel for *amici* will be reimbursed by Plaintiffs-Appellants in this case. This brief was not authored in whole or in part by persons other than *amici curiae* and their counsel. Affiliations are provided for purposes of identification only.

396 (2003), held that a mere executive branch foreign policy, not incorporated into any federal statute, treaty, or executive agreement, preempts otherwise-constitutional state laws as applied to plaintiffs' claims. *In re Assicurazioni Generali S.P.A. Holocaust Insurance Litigation*, 340 F.Supp.2d 494, 498, 501-06 (S.D.N.Y. 2004). This conclusion is fatally undermined by the Supreme Court's intervening decision in *Medellin v. Texas*, 128 S. Ct. 1346 (2008). In *Medellin*, the Court held that the President's announced policy of complying with a decision of the International Court of Justice (ICJ) did not override a Texas state law that conflicted with the ICJ decision. *Id.* at 1369-71. The *Medellin* Court expressly rejected the President's preemption argument, to the extent it was based on the *Garamendi* decision, on the ground that *Garamendi* involved a conflict with an executive agreement made with Congress' acquiescence. Because there was no governing executive agreement in *Medellin*, the Court held, *Garamendi* did not support preemption of the state law by executive policy. *Id.* at 1371.

The decision in *Medellin* reaffirms basic constitutional principles of separation of powers and federalism. First, it is a central principle of federalism that state law is valid unless it is inconsistent with the U.S. Constitution or in conflict with an act of federal lawmaking. Article VI of

the Constitution establishes only the Constitution and federal laws and treaties as “supreme Law of the Land” and thus superior to state law. Mere presidential policies are not accorded such status. Second, it is a central principle of separation of powers that the President is not a lawmaker. The Constitution grants the President “the executive Power,” U.S. Const. Art. II, Sec. 1; in contrast, Congress holds “[a]ll legislative Powers herein granted.” U.S. Const., Art. I, Sec. 1. The core meaning of “executive Power” is that the President executes law made by others. As James Madison explained in *Federalist 47*, “[t]he magistrate in whom the whole executive power resides cannot of himself make a law.” James Madison, Alexander Hamilton and John Jay, *The Federalist Papers, No. 47* (Isaac Kramnick, ed., 1987), at 304.

The combination of these principles, the Court concluded in *Medellin*, rejects the contention, advanced by the President in that case, that the President through the articulation of foreign policy can “establish binding rules of decision that preempt contrary state law.” *See* Brief of the United States Supporting Petitioner, *Medellin v. Texas*, June 28, 2007, 2007 WL 19094262 (making this argument). To hold otherwise, the Court explained, would make the President a lawmaker, contrary to the President’s constitutional status as the holder of executive power. *See Medellin*, 128 S.Ct. at 1369-71.

Although there may be limited exceptions – as in the case of certain executive agreements made with the implicit approval of Congress, see *Dames & Moore v. Regan*, 453 U.S. 654 (1981) – *Medellin* makes clear that *Garamendi* does not broadly overturn these basic constitutional principles with respect to all executive branch foreign policy in the way imagined by the District Court. To the contrary, *Medellin* reaffirms that, despite *Garamendi*, the basic rule remains that executive policies are not preemptive unless and until they achieve the status of supreme law in the manner specified in Article VI.

As a result, the decision below cannot stand in light of *Medellin*. Like the state law in *Medellin*, the state laws under which plaintiffs have brought their claims are clearly constitutional, and indeed most of them are part of the state’s ordinary and generally applicable contract and insurance law (as the law in *Medellin* was part of Texas’ ordinary and generally applicable criminal law). As in *Medellin*, there is no applicable federal statute, treaty or executive agreement with which the state laws in the present case conflict. As in *Medellin*, the only conflict claimed by the District Court or the defendants/appellees here is between the state laws and an executive branch foreign policy. Basic constitutional principles, as reaffirmed in *Medellin*,

make clear that such a conflict is insufficient to override the application of state law.

## **ARGUMENT**

### **I. THE DECISION BELOW CONFLICTS WITH BASIC PRINCIPLES OF SEPARATION OF POWERS AND FEDERALISM**

#### **A. The Constitution’s Basic Principles of Separation of Powers and Federalism Require that Mere Presidential Policies Cannot Displace Otherwise-Constitutional State Law.**

The U.S. Constitution sets forth two basic principles of federalism and separation of powers that govern this case. First, state law is valid unless it is displaced by a superior source of federal law. Second, the President is not a lawmaker.

The first principle is established by the Constitution’s Article VI, which provides that the Constitution, the “Laws of the United States which shall be made in Pursuance thereof,” and federal treaties make up the “supreme Law of the Land.” U.S. Const., Art. VI, cl. 2. Thus under Article VI, state law can be displaced by “supreme” federal law in two (but only two) ways: if the Constitution itself prohibits the state from acting, or if an act of supreme federal lawmaking overrides the state’s law. Further, in addition to the Constitution itself, supreme federal law arises only from

treaties and laws made “in pursuance of” the Constitution; the Constitution’s Article I, Section 7 in turn specifies the procedures by which federal law is made.

Article VI and Article I, Section 7 impose substantial procedural hurdles to the creation of federal law. It must be done (a) with the approval of majorities of both of the two separately-elected houses of Congress and of the President, (b) with a supermajority of both houses, or (c) in the case of treaties, with the approval of the President plus a supermajority of the Senate. These hurdles serve to safeguard state interests and protect the Constitution’s federal structure, assuring that state laws are not displaced unless multiple federal actors agree that they should be.

Under the second principle, as a matter of separation of powers the Constitution’s designation of the President as holder of “the executive Power,” *see* U.S. Const., Art. II, Sec. 1, shows the President’s lack of independent lawmaking power. *Compare* U.S. Const., Art. I, Sec. 1 (stating that “[a]ll legislative Powers herein granted” shall be vested in Congress). While the precise scope of executive power may remain unclear, a common core understanding is that the President cannot unilaterally make law (that is, change individual legal rights and duties); to the contrary, the President’s central power and authority is to execute laws made by others. The

Constitution's framers saw this limit as an important check on the powerful executive office they created, and they derived it from an equally central feature of English constitutional law, which held that the king could not make law without Parliament's consent. See 1 William Blackstone, *Commentaries on the Laws of England* 142-43, 261 (1765); 4 *id.* at 67. As James Madison explained in *Federalist 47*, "[t]he magistrate in whom the whole executive power resides cannot of himself make a law." James Madison, Alexander Hamilton and John Jay, *The Federalist Papers, No. 47* (Isaac Kramnick, ed., 1987), at 304.<sup>2</sup>

These basic principles came together in the U.S. Supreme Court's most celebrated case on presidential power, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). In that case, President Harry Truman by executive order directed the seizure of major U.S. steel mills due to an impending strike in order to avoid an interruption of military supplies to the on-going war effort in Korea. The Court found the President's order to be an unconstitutional lawmaking act.

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<sup>2</sup> For further elaboration, see Michael D. Ramsey, *The Constitution's Text in Foreign Affairs* 91-114 (Harvard U. Press 2007); Brannon P. Denning and Michael D. Ramsey, *American Insurance Association v. Garamendi and Executive Preemption in Foreign Affairs*, 46 Wm. & Mary L. Rev. 825 (2004).

Justice Black's opinion for the Court assumed the first proposition: that state law governed unless displaced by federal law. The mill owners held property rights under state law. In the absence of a conflicting federal act, the state law was obviously constitutional and formed the baseline of the mill owners' rights. The question in the case was whether any federal act displaced the state law. Since there was no conflicting treaty or act of Congress, the question was whether the President's order had that effect.

The Court held that it did not, applying the basic proposition that the President was not a lawmaker. As Justice Black wrote for the Court:

In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that "All legislative Powers herein granted shall be vested in a Congress of the United States. . . ."

*Id.* at 587-88.<sup>3</sup>

Although Black’s opinion did not fully explain why the Court regarded the President’s act as a lawmaking act, the answer is evident: the President’s order in *Youngstown* sought to change the existing law. Because state law was the baseline, the mill owners had a legal right to their property which the President sought to alter. For this reason, if mere presidential policy were to be preemptive, that would grant lawmaking power to the President.

In sum, the core constitutional problem in *Youngstown* was that the President tried to make executive policy superior to existing state law. Both Article II and Article VI show this to be beyond the President’s power. Under Article II, the President, like the eighteenth-century English monarch, cannot use “executive” power to issue decrees with the force of law. Article VI confirms this limit by setting forth the ways the federal government can act with the force of supreme law and by confining the President’s role lawmaking role to action in conjunction with one or both legislative branches.

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<sup>3</sup> Justices Jackson and Frankfurter (among others) concurred to suggest some flexibility in the extent of executive power, but they did not dispute Black’s central premise that the President was not a lawmaker. In particular, Jackson’s concurrence suggested that the President might have greater latitude in certain cases when Congress has approved the President’s action. See *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

**B. The Decision Below Conflicts with Basic Constitutional Principles by Giving Preemptive Effect to Mere Presidential Policy.**

In the decision below, the District Court departed from these basic constitutional principles by giving preemptive effect to mere executive branch policy. Plaintiffs-Appellants, who are the heirs of Holocaust victims, brought suit under various provisions of state law against Defendants-Appellees Assicurazioni Generali S.p.A. and related entities (“Generali”) to recover on insurance policies Generali issued to their decedents before or during the Holocaust. The U.S. executive branch has been involved for many years in supporting an international non-governmental body, the International Commission on Holocaust-Era Insurance Claims (“ICHEIC”), to settle Holocaust-era insurance claims. Generali contends, and the District Court found, that an executive branch policy of resolving claims through ICHEIC preempts state law as applied to plaintiffs’ cases. *In re Assicurazioni Generali S.p.A. Holocaust Insurance Litigation*, 340 F. Supp. 2d 494, 498, 501-06 (S.D.N.Y. 2004).

As the District Court recognized, no ordinary source of preemptive federal law conflicts with the state laws in the present litigation. The Constitution itself prevents states from acting in certain foreign affairs

categories, either explicitly (chiefly in Article I, Section 10)<sup>4</sup> or by implication. However, none of these constitutional provisions implicates the state laws at issue here.<sup>5</sup> In addition, Article VI establishes treaties and statutes as preemptive federal law by making them (along with the Constitution itself) part of the “supreme Law of the Land.” Again, it is not argued that the state laws at issue here conflict in any way with any federal statute or treaty.

Finally, there is no conflict between plaintiffs’ state-law claims and any applicable executive agreement. Although executive agreements (international agreements not made through the treatymaking process of

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<sup>4</sup>Article I, Section 10 lists certain specific actions the states cannot take, or can take only with Congress’ consent, such as engaging in war or making treaties and other international agreements.

<sup>5</sup> In *Zschernig v. Miller*, 389 U.S. 429 (1968), the Supreme Court found that the Constitution implicitly precluded some state intrusions into U.S. foreign affairs whether or not they conflicted with announced U.S. foreign policy. It is not clear to what extent *Zschernig* remains good law: the Supreme Court has not relied on it since immediately after it was decided, and *Garamendi* expressly refrained from relying on it. In any event, the District Court did not rely on it here, see *In re Assicurazioni Generali*, 340 F.Supp 2d at 501-06, and *Generali* does not invoke it on appeal. See Brief for Defendant-Appellee, at vi, 30-55. To the extent *Zschernig* remains good law, it appears limited to the particular circumstances present in *Zschernig* itself, in which a state law directly insults or passes judgment upon a particular foreign government. See *Gerling Global Reinsurance Co. of America v. Low*, 240 F.3d 739, 751-53 (9<sup>th</sup> Cir. 2001), *rev’d on other grounds sub. nom. American Insurance Association v. Garamendi*, 539 U.S. 396 (2003). That circumstance is plainly not implicated here.

Article II) fit uncomfortably with the sources of preemptive law described in Article VI, prior decisions of the Supreme Court recognize that in certain circumstances executive agreements may have a preemptive effect akin to that of treaties. *See Dames & Moore v. Regan*, 453 U.S. 654 (1981); *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937). In the present case, however, there is no governing executive agreement. The U.S. President has entered into executive agreements relating to Holocaust-era insurance claims with Germany, Austria and France; Generali is an Italian company and the U.S. President has not entered into any executive agreement with Italy in this regard. *See In re Assicurazioni Generali*, 340 F.Supp. 2d at 505; *see also* Brief for Defendant-Appellee at 51-52 (arguing that existence of a conflicting executive agreement is not prerequisite to finding executive preemption). Indeed, in a prior decision in this litigation, the District Court found that “no executive agreement at issue in this case could be read to preclude litigation of [plaintiffs’] claims in U.S. courts.” *See In re Assicurazioni Generali*, 340 F.Supp.2d at 505, *citing In re Assicurazioni Generali S.p.A. Holocaust Insurance Litig.*, 228 F.Supp.2d 348, 358 (S.D.N.Y.2002).

Nonetheless, on the strength of the Supreme Court’s decision in *American Insurance Association v. Garamendi*, the District Court found that

an executive branch *policy* of resolving claims (including claims against Generali) through ICHEIC preempted plaintiffs’ state law claims. *See In re Assicurazioni Generali*, 340 F.Supp.2d at 501-06. As the District Court made clear, the holding below was based directly on a reading of *Garamendi* that appeared to require preemption by executive policy, even in the absence of a governing executive agreement and despite the basic constitutional principles set forth above. *Id.* While this may have been a plausible (though expansive) reading of *Garamendi* at the time of the decision below, as set forth in the next section the subsequent Supreme Court decision in *Medellin v. Texas* emphatically rejected preemption by mere executive foreign policy.

## **II. MEDELLIN V. TEXAS REAFFIRMED THAT MERE PRESIDENTIAL FOREIGN POLICY DOES NOT DISPLACE STATE LAW AND REJECTED BROAD READINGS OF GARAMENDI TO THE CONTRARY**

### **A. In *Medellin*, the Supreme Court Refused to Find a State Law Preempted by a Mere Presidential Policy.**

The U.S. Supreme Court recently reaffirmed the foregoing constitutional principles as applied to presidential foreign policy in *Medellin v. Texas*, 128 S.Ct. 1346 (2008). In *Medellin*, the Court – rejecting arguments by the executive branch that closely parallel defendants’ arguments in the present case – held that even a “plainly compelling”

presidential foreign policy, *see* 128 S.Ct. at 1367, could not displace an otherwise-valid state law. *See id.* at 1369-71.

The President argued in *Medellin* that the President's policy of complying with an International Court of Justice (ICJ) judgment should displace a provision of Texas criminal procedure that conflicted with the ICJ judgment. *See id.* at 1367. Jose Medellin, the petitioner and a Mexican national, had been convicted and sentenced to death in Texas state court. In a case brought by Mexico on his behalf, the ICJ held that he was entitled to have his sentence reconsidered because he had not been afforded his rights under an applicable treaty, the Vienna Convention on Consular Relations. The Texas courts refused such reconsideration on the basis of a Texas state law that precluded Medellin from raising arguments that should have been presented earlier in the case.

The Supreme Court and the President agreed that the ICJ judgment was not self-executing and thus not directly enforceable as federal law. *See id.* at 1356-67. However, as the Court recounted, "President George W. Bush determined, through a Memorandum to the Attorney General (Feb. 28, 2005) . . . that the United States would 'discharge its international obligations' under [the ICJ judgment] 'by having State courts give effect to the decision.'" *Id.* at 1353, *quoting* the President's memorandum of Feb. 28,

2005). According to the President, the presidential policy reflected in this memorandum displaced Texas' state-law procedural bar and entitled Medellin to a new hearing on his sentence. *See* Brief of the United States Supporting Petitioner, *Medellin v. Texas*, June 28, 2007, 2007 WL 19094262 (arguing that the President by announcing U.S. foreign policy has power to “establish binding rules of decision that preempt contrary state law.”).

The Supreme Court flatly rejected the claim that the President had unilateral power to preempt Texas law in order to enforce a non-self-executing treaty. In doing so, the Court tied the question directly to the question of presidential lawmaking powers:

Once a treaty is ratified without provisions clearly according it domestic effect, . . . whether the treaty will ever have such effect is governed by the fundamental constitutional principle that “[t]he power to make the necessary laws is in Congress; the power to execute in the President.” [quoting *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), internal quotation omitted]; see U.S. Const., Art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States”). As already noted, the terms of a non-self-executing treaty can become domestic law only in the same way as any other law—through passage of legislation by both Houses of

Congress, combined with either the President's signature or a congressional override of a Presidential veto. See Art. I, §7. *Medellin*, 128 S.Ct. at 1369. Thus the Court's conclusion proceeded in two steps: (1) converting a non-self-executing treaty into a domestic legal obligation that preempts state law is a lawmaking act; and (2) the President is not a lawmaker. This approach follows directly from the Court's opinion in *Youngstown*, and the *Medellin* Court quoted *Youngstown*'s observation that “the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.” *Id.*, quoting *Youngstown*, 343 U.S. at 587. The *Medellin* Court also invoked Madison's statement in *Federalist No. 47* that “[t]he magistrate in whom the whole executive power resides cannot of himself make a law” and pointedly observed “[t]hat would . . . seem an apt description of the asserted executive authority unilaterally to give the effect of domestic law to obligations under a non-self-executing treaty.” *Medellin*, 128 S.Ct. at 1369-70.

In reaching this conclusion, the Court rejected executive branch arguments that the President's constitutional foreign affairs powers include power to “establish binding rules of decision that preempt contrary state law.” That claim, the Court held, violated the “fundamental constitutional principle that ‘[t]he power to make the necessary laws is in Congress; the

power to execute in the President.”” *Id.* at 1369. The Court reached this conclusion, moreover, even though it acknowledged the “plainly compelling” importance to U.S. foreign affairs of the decision whether or not to comply with the ICJ judgment. *Id.* at 1367.

In sum, the *Medellin* decision strongly reaffirms the proposition that, even in matters potentially affecting foreign affairs, the President cannot make law and otherwise-valid state law cannot be displaced by mere presidential foreign policy.<sup>6</sup>

**B. The Decision in *Medellin* Limits *American Insurance Association v. Garamendi*, on which the District Court Relied, to State Laws that Conflict with Executive Agreements.**

The District Court below relied heavily on *American Insurance Association v. Garamendi* to conclude that executive branch policy, even if not reflected in an executive agreement, preempts state law. *See* 340 F. Supp. 2d at 501 (“The Supreme Court’s decision in *Garamendi* compels

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<sup>6</sup> The result in *Medellin* comports with prior Supreme Court decisions addressing the question. *See Barclays Bank PLC v. Franchise Tax Board*, 512 U.S. 298, 328-29 (1994) (finding that “Executive Branch communications that express federal policy but lack the force of law cannot render unconstitutional California’s otherwise valid, congressionally condoned [tax laws].”); *Breard v. Greene*, 523 U.S. 371 (1998) (finding that the President could only ask, but not require, the State of Virginia to comply with a provisional order from the ICJ).

dismissal of plaintiffs' claims...."); *id.* at 505 ("The *Garamendi* ruling strongly implies that an executive policy need not be formally embodied in an executive agreement" to be preemptive); *see also* Brief for Defendant-Appellee at 30-40 (centrally relying on *Garamendi* for this proposition). As *Medellin* makes clear, however, *Garamendi* should not be read so broadly. The executive branch made exactly the same arguments in *Medellin* as the defendants make here, and the Court expressly rejected them.

In *Garamendi*, the Court held that a California law governing Holocaust-era insurance contracts was preempted by the executive policy reflected in executive agreements with Germany and Austria relating to ICHEIC and to Holocaust-era claims against German and Austrian companies. *Garamendi*, 539 U.S. at 423-28. The District Court below read *Garamendi* to endorse a broad executive foreign policy preemption not limited to the effect of particular executive agreements, and relied on this reading of *Garamendi* in holding plaintiffs/appellants' state law claims to be preempted. *See* 340 F. Supp 2d. at 497, 501-06.

However, the Supreme Court's subsequent decision in *Medellin* expressly rejected a broad reading of *Garamendi*. In *Medellin*, the executive branch relied heavily on a broad reading of *Garamendi* – akin to the reading adopted by the District Court in the present case – to support its claim of

executive foreign policy preemption. In response, the Court, in addition to rejecting the executive's position on broader constitutional principles, directly addressed *Garamendi* and described a much more limited view of *Garamendi*'s holding. According to the *Medellin* Court, *Garamendi* rested centrally on the presence of the German and Austrian executive agreements, and thus followed directly from prior cases such as *Dames & Moore* establishing the preemptive effect of certain executive agreements. As the Court put it, *Garamendi* was one of "a series of cases in which this Court has upheld the authority of the President to settle foreign claims pursuant to an executive agreement." *Id.* at 1371 (citing *Dames & Moore*, *Pink*, and *Belmont*, all of which involved preemptive executive agreements). "The claims-settlement cases," the Court continued, "involve a narrow set of circumstances: the making of executive agreements to settle civil claims between American citizens and foreign governments or foreign nationals." *Id.* Moreover, the *Medellin* Court continued, these prior cases relied on congressional assent to the President's longstanding practice of making executive agreements, and "the limitations on this source of executive power are clearly set forth." *Id.* Thus, the Court concluded, *Garamendi* had no force in a case such as *Medellin*, where there was no executive agreement, but only an executive branch foreign policy. *Id.*

As a result, the District Court’s reliance on *Garamendi* here was erroneous. This case resembles *Medellin* rather than *Garamendi* – like *Medellin*, and unlike *Garamendi*, no executive agreement conflicts with the application of the state laws at issue to plaintiffs’ claims (as the District Court itself expressly found, *see* 340 F.Supp.2d at 505). Plaintiffs’ state-law claims can be displaced only by holding that mere executive branch policy, not incorporated into any executive agreement, is preemptive. That is exactly what the District Court held, *see* 340 F. Supp 2d. at 505-06; it is exactly what Generali argues in this appeal, *see* Brief for Defendant-Appellee at 30-40, and it is exactly what the Supreme Court rejected in *Medellin*.

### **III. MEDELLIN’S LIMITED READING OF GARAMENDI COMPORTS WITH CONSTITUTIONAL TEXT AND STRUCTURE.**

By prescribing sharp limits on the preemptive force of executive policy, the Court in *Medellin* defended the core principles of federalism and separation of powers set forth above. As described, the Constitution protects states by establishing a complex federal lawmaking process which must be navigated before preemptive law is made. Indeed, it is a fundamental protection of federalism values that federal law can be made only through these difficult procedures. A leading academic commentary explains:

Although the Supremacy Clause performs the familiar function of securing the primacy of federal law over contrary state law, it also necessarily constrains the exercise of federal power by recognizing only three sources of law as “the supreme Law of the Land.” . . . .

The Founders, in turn, prescribed finely wrought and exhaustively considered procedures elsewhere in the Constitution to govern the adoption of each type of law recognized by the Supremacy Clause. . . .

[F]ederal lawmaking procedures . . . preserve federalism both by making federal law more difficult to adopt, and by assigning lawmaking power solely to actors subject to the political safeguards of federalism. The text, structure, and history of the Constitution, moreover, suggest that these procedures were meant to be the exclusive means of adopting “the supreme Law of the Land.”

Permitting the federal government to avoid these constraints would allow it to exercise more power than the Constitution contemplates, at the expense of state authority.

Bradford Clark, *Separation of Powers as a Safeguard of Federalism*, 79 Tex. L. Rev. 1321, 1323 (2001). Allowing mere presidential policy to preempt state law, as the President proposed in *Medellin*, circumvents these protections the Constitution established for the states.

The Constitution also limits the President’s power relative to other branches of the federal government by assuring that if the President wants presidential policies to have legally binding effect, the President must secure the cooperation of Congress (or of two-thirds of the Senate in the case of treaties). This provides a powerful check upon unilateral presidential policy. As discussed, under eighteenth-century English law leading authorities such as Blackstone – who in turn heavily influenced the American framers – saw an essential guarantee of liberty in the ancient rule that the monarch could not make law by decree. Not surprisingly, in creating and explaining the office of the Presidency, the framers adopted and invoked the fundamental rule that, as in England, the holder of executive power could not “of himself make a law.” Madison, *supra*, at 304.

A broad reading of *Garamendi* would undo both of these important checks by making it easy for the President to convert presidential policy into law and override conflicting state law. This case in particular illustrates the dangers of a broad reading of *Garamendi*. Under the District Court’s ruling, a mere statement of policy from the executive branch – even an indirect or informal statement – can displace state law. Most of the state laws on which these claims are based are laws of general application, not specifically directed toward Holocaust-era claims or indeed any foreign affairs matters.

They are simply ordinary state laws of contract and insurance. Thus, the decision below in effect gives the President supervisory power over all state laws, with power to displace any of them whenever the executive branch indicates that they are contrary to U.S. foreign policy. In today's interconnected and globalized world, the President may plausibly claim that any state law, no matter how central to the state's own internal affairs, implicates the President's foreign policy and thus may be preempted on presidential say-so.

As a result, the *Medellin* Court was on firm constitutional ground to insist that presidential lawmaking be confined to the narrow categories it identified. In contrast, the decision below, in allowing the executive branch such a sweeping preemptive power, poses a substantial threat to fundamental constitutional protections of federalism and separation of powers.

#### **IV. CONCLUSION**

Amici respectfully urge this Court to preserve the Constitution's checks and balances with respect to separation of powers and federalism by ruling that a mere unilateral executive branch foreign policy cannot displace an otherwise valid state law.

Respectfully submitted,

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Dated: December 18, 2009

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1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,013 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
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Dated: December 18, 2009.

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