CASE NO. 07-56722

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REVEREND FATHER VAZKEN MOVSESIAN, ET AL.,
Plaintiffs-Appellees,

v.

VICTORIA VERSICHERUNG AG AND
ERGO VERSICHERUNGSGRUPPE AG,
Defendants,

MUNCHENER RUCHVERSICHERUNGS-GESELLSCHAFT
AKTIENGESELLSCHAFT AG
Defendant-Appellant

ON INTERLOCUTORY APPEAL FROM CASE NO. CV-03-9407 IN THE U.S. DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, HON. CHRISTINA A. SNYDER

MOTION OF PLAINTIFFS-APPELLEES ARZOUMANIAN, AYALTIN, KHAGERIAN, AND KHAJERIAN TO STAY THE MANDATE

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I. INTRODUCTION

Pursuant to 28 U.S.C. § 2101(f), Rules 27 and 41(d)(2) of the Federal Rules of Appellate Procedure, and Circuit Rule 41-1 of this Court, Plaintiffs-Appellees Harry Arzoumanian, Garo Ayaltin, Miran Khagerian, and Ara Khajerian (together, the "Plaintiffs-Appellees")[1] respectfully request that this Court stay its mandate pending Plaintiffs-Appellees' filing of a petition for a writ of certiorari with the Supreme Court of the United States.

This Court issued its Opinion reversing the district court's denial of Defendant-Appellant Munchener Ruchversicherungs-Gesellschaft Aktiengesellschaft AG's motion to dismiss and remanding with instructions to dismiss all claims revived by Cal. Code Civ. Proc. § 354.4 on February 23, 2012. Without a stay, the Court's mandate will issue on March 15, 2012. For reasons stated below, Plaintiffs-Appellees respectfully submit that this motion satisfies Federal Rule of Appellate Procedure 41(d)(2) and this Court's Circuit Rule 41-1, in that their petition for a writ of certiorari would present a substantial question and good cause exists to stay this Court's mandate.[2]

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[1] Plaintiff-Appellee Vazken Movsesian is represented by separate counsel and does not join this Motion.

[2] Counsel for Plaintiffs-Appellees contacted counsel for Defendant-Appellant to request consent to a stay of the mandate but did not receive a response.

II. STATEMENT OF THE CASE

Plaintiffs-Appellees (as well as other members of the class they represent) are persons of Armenian descent who claim benefits under insurance policies issued by Defendants Munchener Ruckversicherungs-Gesellschaft Aktiengesellschaft AG ("Defendant-Appellant" or "Munich Re"), Victoria Versicherung AG, and Ergo Versicherungsgruppe AG (collectively, "Defendants"). The policies were sold to hundreds of Armenians living in the Ottoman Empire, who were then subject to large-scale forced deportation, murder, and expropriation of property by the Ottoman Turkish government between 1915 and 1923.

Plaintiffs-Appellees filed a class action against Defendants, seeking damages for breach of written contract, breach of the covenant of good faith and fair dealing, unjust enrichment, and other related claims. In bringing their action, Plaintiffs-Appellees relied upon section 354.4 of the California Code of Civil Procedure, which extended the statute of limitations for claims arising out of life insurance policies issued to "Armenian Genocide victim[s]." Section 354.4 was enacted unanimously by the California Legislature in 2001 as the Armenian Genocide Victims Insurance Act. In enacting that statute, the California Legislature expressed California's strong public policy interest in protecting the victims of insurers who have, over the last several decades, refused to honor their

contractual obligations to pay the proceeds of insurance policies issued prior to, or during, the massacres.

Defendant-Appellant moved to dismiss all claims under Federal Rule of Civil Procedure 12(b)(6), arguing, *inter alia*, that section 354.4 is preempted under the foreign affairs doctrine. The district court rejected this claim, but certified its order for interlocutory appeal to this Court.

In a divided opinion, a panel of this Court initially reversed the district court, holding section 354.4 preempted under the foreign affairs doctrine "because it directly conflicts with the Executive Branch's foreign policy refusing to provide official recognition to the 'Armenian Genocide.'" *Movsesian v. Victoria Versicherung AG*, 578 F.3d 1052, 1063 (9th Cir. 2009), *withdrawn upon grant of reh'g*, 629 F.3d 901 (9th Cir. 2010). On rehearing, the panel then reversed itself, and affirmed the district court. In another divided opinion, the panel held that section 354.4 is not preempted by the foreign affairs doctrine because "[t]here is no clearly established, express federal policy forbidding state references to the Armenian Genocide" and because "California's effort to regulate the insurance industry is well within the realm of its traditional interests." *Movsesian v. Victoria Versicherung AG*, 629 F.3d 901 (9th Cir. 2010), *rev'd en banc*, --- F.3d ----, 2012 WL 589457 (9th Cir. Feb. 23, 2012). This Court then granted rehearing *en banc*,

vacating the panel's opinion. *Movsesian v. Victoria Versicherung AG*, --- F.3d ----, 2011 WL 5336269 (9th Cir. Nov. 7, 2011).

The *en banc* Court held that section 354.4 is preempted under the foreign affairs doctrine. Slip. op. 2023-27 (Feb. 23, 2012). Unlike either of the vacated panel opinions, however, the *en banc* Court did not rely upon the doctrine of conflict preemption in foreign affairs. Under this doctrine, "a state law must yield when it conflicts with an express federal foreign policy." Slip. op. 2017 (citing *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 421 (2003)). Instead, the *en banc* Court analyzed section 354.4 under the doctrine of field preemption, which it acknowledged to be "a rarely invoked doctrine." Slip. op. 2023 (citing *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 963 (9th Cir. 2010)).

The Court first concluded that, although it regulated insurance, section 354.4 does not concern "an area of traditional state responsibility" because "the real purpose of section 354.4 is to provide potential monetary relief and a friendly forum for those who suffered from certain foreign events." Slip. op. 2023-25 (footnote omitted). The Court then held that section 354.4 "intrudes on the federal government's exclusive power to conduct and regulate foreign affairs." Slip. op. 2025. Applying the Supreme Court's decision in *Zschernig v. Miller*, 389 U.S. 429 (1968), the Court reasoned that section 354.4 "expressed a distinct political point of view on a specific matter of foreign policy" and that judicial application of this

provision may "require a highly politicized inquiry into the conduct of a foreign nation." Slip. op. 2025-26 (citing *Zschernig*, 389 U.S. at 434, 435-36). The *en banc* Court then concluded that section 354.4, "at its heart, intended to send a political message on an issue of foreign affairs by providing relief and a friendly forum to a perceived class of foreign victims." Slip. op. 2027. Based on this holding, this Court reversed the district court and remanded the case with instructions to dismiss all claims revived by section 354.4. Slip. op. 2027.

III. REASONS FOR GRANTING THE MOTION FOR A STAY

A. Applicable Legal Standard

This Court has authority to stay its mandate where the aggrieved party intends to seek a writ of certiorari from the United States Supreme Court. 28 U.S.C. § 2101(f). Under Fed. R. App. P. 41(d)(2)(A), "[a] party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court." To obtain a stay, the movant "must show that the certiorari petition would present a substantial question and that there is good cause for a stay." Fed. R. App. P. 41(d)(2)(A). If this Court grants the request for a stay, and a certiorari petition is filed, the stay "continues until the Supreme Court's final disposition" of the case. Fed. R. App. P. 41(d)(2)(B).

As this Court explained, although a stay "will not be granted as a matter of course," Circuit Rule 41-1, "a party seeking a stay of the mandate following this

court's judgment need not demonstrate that exceptional circumstances justify a stay." *Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1528 (9th Cir. 1989). Indeed, it "is often the case" that "the appellate mandate [is] stayed while [a party seeks] certiorari from the Supreme Court." *United States v. Pete*, 525 F.3d 844, 850 (9th Cir. 2008).

B. Plaintiffs-Appellees' Petition Will Present a Substantial Question for the Supreme Court's Review

Plaintiffs-Appellees respectfully submit that good cause exists in this case to stay the mandate pending the filing of their petition for a writ of certiorari with the United States Supreme Court, and that their petition would present a substantial question for the Supreme Court's consideration. As this Court acknowledged, the doctrine of field preemption in foreign affairs is "a rarely invoked doctrine." Slip. op. 2023 (citing *Von Saher*, 592 F.3d at 963). The Supreme Court has not applied the doctrine of field preemption to invalidate a state law in over 40 years since it decided *Zschernig*. *See Garamendi*, 539 U.S. at 439 (Ginsburg, J., dissenting); *see also Deutsch v. Turner Corp.*, 324 F.3d 692, 710 (9th Cir. 2003) ("*Zschernig* is '[t]he only case in which the Supreme Court has struck down a state statute as violative of the foreign affairs power.'") (citation omitted). The Supreme Court's decision in *Zschernig* has often been viewed as a reaction to "'a particular regulatory statute, the operation of which intruded extraordinarily deeply into

foreign affairs,'" *Garamendi*, 539 U.S. at 440 (Ginsburg, J., dissenting) (quoting *Constitutionality of South African Divestment Statutes Enacted by State and Local Governments*, 10 Op. Off. Legal Counsel 49, 50 (1986)), and the way in which that state statute interacted with the U.S. foreign policy in the context of the Cold War, Louis Henkin, *Foreign Affairs and the United States Constitution* 165 (2nd ed. 1996). Given that this case arises in a radically different context, Plaintiffs-Appellees' petition "would present a substantial question," Fed. R. App. P. 41(d)(2)(A), because it would ask the Supreme Court to clarify the applicability and reach of *Zschernig*. Indeed, the last time this Court invalidated a state law under *Zschernig*'s field preemption doctrine, the Supreme Court requested the views of the Solicitor General as to whether the question warranted the high Court's review. *See Von Saher v. Norton Simon Museum of Art at Pasadena*, No. 09-1254 (Oct. 4, 2010).

This Court's application of *Zschernig* extends considerably the doctrine of field preemption in foreign affairs. The *Zschernig* Court invalidated the Oregon statutory scheme because, although constitutional on its face, "the Oregon law *in practice* had invited '*minute inquiries* concerning the actual administration of foreign law'" and made "'*unavoidable* judicial criticism of nations established on a more authoritarian basis than our own.'" *Garamendi*, 539 U.S. at 417 (quoting *Zschernig*, 389 U.S. at 435, 440) (emphasis added). By contrast, this Court

invalidated section 354.4 on the basis of a conjecture that "[c]ourts applying this provision *may* … have to decide whether the policyholder 'escaped to avoid persecution,' which in turn would require a highly politicized inquiry into the conduct of a foreign nation." Slip. op. 2026 (citations omitted) (emphasis added); *see also id.* (discussing "the *potential* effect of section 354.4 on foreign affairs") (emphasis added). But a potential factual inquiry into whether a particular individual was under a threat of persecution nearly a century ago (during the period of 1915 to 1923) is radically different from "minute inquiries" into other countries' administration of law.

This Court's analysis is also in serious tension with the Supreme Court's decision in *Garamendi*. This Court relied on *Garamendi* in concluding that section 354.4 "does not concern an area of traditional state responsibility" because, despite being an insurance regulation, it "provide[s] potential monetary relief and a friendly forum for those who suffered from certain foreign events." Slip. op. 2025 (footnote omitted). But the *Garamendi* Court did not hold that a state insurance regulation concerned with claims arising out of specific foreign events falls entirely outside the area of traditional state responsibility. Rather, *Garamendi* simply held that this fact rendered the state interest relatively weak — a factor to be considered under the conflict preemption analysis. *Garamendi*, 539 U.S. at 425-26. Therefore, there is a serious question as to whether field preemption — as

opposed to conflict preemption — was even the appropriate mode of analysis in this case. *See id.* at 419 n.11 (field preemption may be "the appropriate doctrine" where a state has "no serious claim to be addressing a traditional state responsibility," but where a state has acted within its "traditional competence, but in a way that affects foreign relations, it might make good sense to require a conflict") (internal quotation marks and citation omitted). Where a court of appeals "has decided an important federal question in a way that conflicts with relevant decisions of th[e Supreme] Court," the Supreme Court is likely to grant a writ of certiorari. Supreme Ct. R. 10(c); *see also* Robert L. Stern, et al., *Supreme Court Practice* § 4.5, at 232 (8th ed. 2002).

C. Good Cause Exists to Grant a Stay of the Mandate

Plaintiffs-Appellees respectfully submit that there is "good cause" to grant their request for a stay of the mandate, and that such a stay would not prejudice Defendants.

Absent a stay, the district court, upon the issuance of the mandate, would have no choice but to dismiss the case because all of Plaintiffs-Appellees' claims rely on Section 354.4. *See* slip. op. 2027. Plaintiffs-Appellees would therefore lose their ability to continue the suit even if they succeed in persuading the Supreme Court to grant review. Furthermore, their petition for a writ of certiorari could well become moot if the district court dismisses the claims before the

petition is filed or while it is pending. *See, e.g.*, *McDaniel v. Sanchez*, 448 U.S. 1318, 1322 (1980) (recalling the mandate and staying Circuit decision pending disposition of applicants' petition for certiorari). Thus, the denial of a stay would result in substantial prejudice to Plaintiffs-Appellees.

By contrast, the grant of a stay will not prejudice Defendants. Neither Defendant-Appellant Munich Re, nor the other Defendants, would incur any costs or attorneys' fees in the district court during the stay period, as the district court stayed all proceedings and removed the action from its active list of cases on August 10, 2010. *See Movsesian v. Victoria Versicherung AG*, No. 2:03-CV-09407-CAS-JWJ, Docket Entry No. 116 (Aug. 10, 2010). Indeed, this appeal has been pending with this Court for over four years, since this Court docketed Munich Re's appeal on December 13, 2007. A modest 90-day stay to enable Plaintiffs-Appellees to file a petition for a writ of certiorari, *see* Fed. R. App. P. 41(d)(2)(B), would therefore not cause prejudice to Defendants. A stay of the mandate would permit the Supreme Court to consider Plaintiffs-Appellees' petition for a writ of certiorari and determine whether the questions it raises warrant review.

As demonstrated above, Plaintiffs-Appellees do not intend to seek the Supreme Court's review "merely for delay." Circuit Rule 41-1. Indeed, delay for its own sake would be contrary to Plaintiffs-Appellees' interest, as they wish to

recover what they consider to be their rightful insurance proceeds as quickly and efficiently as possible.

IV. CONCLUSION

For the reasons set forth above, Plaintiffs-Appellees Harry Arzoumanian, Garo Ayaltin, Miran Khagerian, and Ara Khajerian respectfully request that this Court stay issuance of the mandate pending Plaintiffs-Appellees' filing of a petition for a writ of certiorari with the United States Supreme Court.

DATED: March 14, 2012

Respectfully submitted,

SCHWARCZ, RIMBERG, BOYD & RADER, LLP

By: /s/Kathryn Lee Boyd
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