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No. 05-272

In The
Supreme Court of the United States

JOHN GARAMENDI, IN HIS CAPACITY
AS COMMISSIONER OF INSURANCE
FOR THE STATE OF CALIFORNIA,

Petitioner,

v.

GERLING GLOBAL REINSURANCE
CORPORATION OF AMERICA, US BRANCH, et al.,

Respondents.

On Petition For Writ of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION
OF INSURANCE COMMISSIONERS AS
AMICUS CURIAE IN SUPPORT OF PETITIONER

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**BRIEF OF THE NATIONAL ASSOCIATION
OF INSURANCE COMMISSIONERS AS
AMICUS CURIAE IN SUPPORT OF PETITIONER**

Pursuant to Supreme Court Rule 37.1, the National Association of Insurance Commissioners ("NAIC") submits this Brief in support of petitioner, John Garamendi, in his capacity as Commissioner of Insurance for the State of California, in respectfully requesting that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this action.

INTEREST OF THE NAIC¹

The NAIC is a non-profit corporation whose membership consists of the principal insurance regulatory officials of the fifty States, the District of Columbia, the territories and insular possessions of the United States. Formed in 1871, it is the nation's oldest association of state government officials. In filing this *amicus curiae* brief, the NAIC seeks to demonstrate its interest in this proceeding and to fulfill the mission of the NAIC, to:

... assist state insurance regulators, individually and collectively, in serving the public interest and achieving the following fundamental insurance

¹ Neither counsel for the parties to this matter authored this brief in whole or in part. No person or entity, other than the *amicus curiae*, its members or its counsel, made a monetary contribution to the preparation and submission of this brief. The parties have consented to the filing of this *amicus curiae* brief. Stipulations indicating their consent have been filed with the Clerk of the Court.

regulatory goals in a responsive, efficient and cost-effective manner, consistent with the wishes of its members:

Protect the public interest;

Promote competitive markets;

Facilitate the fair and equitable treatment of insurance consumers;

Promote the reliability, solvency and financial solidity of insurance institutions; and

Support and improve state regulation of insurance.²

The Executive Committee of the NAIC voted to file this *amicus curiae* brief to demonstrate its support of Petitioner John Garamendi, Commissioner of Insurance for the State of California, in this cause. The interest of the NAIC in this matter arises out of the regulatory responsibility vested in each insurance commissioner, director and superintendent to see that all laws respecting insurance companies are executed faithfully and to safeguard the solvency and financial integrity of insurance companies for the benefit of insurance consumers. The commissioners, directors, and superintendents of the various states, the members of the NAIC, are charged with the responsibility of regulating the business of insurance within their jurisdictions pursuant to the McCarran-Ferguson Act, 15 U.S.C. § 1011, *et seq.*, and State insurance laws.

² See National Association of Insurance Commissioners, NAIC Mission Statement, available at http://www.naic.org/index_about.htm (last visited September 19, 2005).

With regard to the McCarran-Ferguson Act, this Court has stated that “[t]he views of the NAIC are particularly significant, because the Act ultimately passed was based in large part on the NAIC bill.” *Group Life and Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 221 (1979).

The NAIC agrees with Commissioner Garamendi that the Ninth Circuit’s decision in this case imposing attorneys’ fees on the California Department of Insurance will “create significant mischief in many other cases”³ and will adversely impact the ability of NAIC members to effectively regulate the business of insurance. The NAIC agrees with the analysis of the district court in finding that respondents were not entitled to fees because they had not prevailed on either their Commerce Clause or due process claims. The NAIC supports Commissioner Garamendi in respectfully requesting that this Court issue a writ of certiorari in this matter.

SUMMARY OF ARGUMENT

The Ninth Circuit held in this case that respondents were entitled to an award of attorneys’ fees under 42 U.S.C. § 1988 in spite of the fact that respondents did not prevail on the merits on any claim governed by 42 U.S.C. § 1983. This ruling greatly expands potential liability for attorneys’ fees for all entities potentially liable under Section 1983, including the state insurance regulatory authorities that are the members of the NAIC. This expansion of potential liability will chill important state regulatory activities as regulators will face the prospect of

³ Petition for Writ of Certiorari at p. 9.

paying attorneys' fees to plaintiffs who may prevail against them in litigation on non fee-bearing constitutional and state law grounds even where the court rules that the regulatory conduct at issue does not amount to a Section 1983 violation. Further, it will encourage the addition of meritless Section 1983 claims to any action against a state official and will discourage defendant regulators from appealing adverse state law rulings in cases where plaintiff did not prevail on attached Section 1983 claims. Taken together, these results present a very real threat to the ability of state regulatory officials to supervise the businesses they are charged with regulating and to act in the interests of the consumers they are charged with protecting.

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ARGUMENT

Respondents in this case challenged the constitutionality of California's Holocaust Victim Insurance Relief Act, Cal. Ins. Code §§ 13800-13807 (the "HVIRA") on a variety of grounds. This Court ultimately held that the HVIRA was preempted because it conflicted with federal initiatives concerning Holocaust related insurance claims undertaken pursuant to the foreign policy powers granted to the federal executive branch. *American Insurance Ass'n, et al. v. Garamendi*, 539 U.S. 396, 401 (2003) (*Garamendi*). Respondents' Section 1983 claims, those claiming that the HVIRA violated the Commerce Clause and due process, were rejected by the Ninth Circuit in its two rulings on the merits of this case. *Gerling Global Reinsurance Corp. of Am. v. Low*, 240 F.3d 739 (9th Cir. 2001) ("*Gerling I*") (rejecting respondents' Commerce Clause claims) and *Gerling Global Reinsurance Corp. of Am. v. Low*, 296 F.3d

832 (9th Cir. 2002) (“*Gerling II*”) (ruling that the HVIRA does not violate due process). This Court did not address the due process and Commerce Clause claims. *Garamendi*, 539 U.S. at 413 n. 7.

Following this Court’s decision on the foreign affairs preemption claim, respondents moved for attorneys’ fees pursuant to Section 1988.⁴ The district court found that respondents were not entitled to fees because they had not prevailed on either their Commerce Clause or due process claims. The Ninth Circuit reversed, holding that respondents were entitled to fees even though it recognized that they had not prevailed on any fee-bearing claim. *Gerling Global Reinsurance Corp. of Am. v. Garamendi*, 400 F.3d 803 (9th Cir. 2005), rehearing denied, as amended, 410 F.3d 531 (9th Cir. 2005) (“*Gerling III*”).

The NAIC agrees with Petitioner Commissioner Garamendi that the Ninth Circuit’s decision in this case represents an unwarranted departure from precedent on the issue of entitlement to attorneys’ fees under Section 1988. Section 1988 makes it a prerequisite for the award of attorneys’ fees that the party seeking fees be the “prevailing party”. This Court has previously recognized that victory in the case does not alone satisfy that necessary predicate; the plaintiff must be entitled to relief under Section 1983. *Nat’l Private Truck Council, Inc. v. Okla. Tax Comm’n*, 515 U.S. 582, 592 (1995). *Maher v. Gagne*, 448 U.S. 122 (1980) created a limited exception to the “prevailing

⁴ Respondents first moved for attorneys’ fees after the initial summary judgment ruling and that motion was denied by the district court. The Ninth Circuit then rejected all of respondents’ claims on the merits and ruled that they were not entitled to fees because they were not prevailing parties. *Gerling II*, 296 F.3d at 851.

party" rule in cases where a plaintiff's substantial 1983 claims were never reached for prudential reasons. The *Maher* rule is inapplicable where, as here, the 1983 claims were litigated and plaintiff lost.

The members of the NAIC, in their capacity as the chief insurance regulators of their respective states, may be subject to suits for injunctive relief under Section 1983 for any official act, be it the enactment of a regulation or administrative practice, or the application of an existing statute, regulation or administrative practice to an insurer doing business in their state. The Ninth Circuit's ruling in this case, which makes it possible for plaintiffs to be awarded attorneys' fees in Section 1983 cases even after losing on those claims, increases the expense and expands the risk associated with Section 1983 litigation. The likely result of this expanded availability of fees is that any plaintiff who brings a lawsuit on state law or non-fee bearing constitutional grounds will append a Section 1983 claim so that they may be awarded fees even if they do not prevail on that claim. Further, a defendant regulator who prevails on a Section 1983 claim may be reluctant to appeal an adverse ruling on a state law or non-fee bearing claim for fear that fees will be awarded if plaintiff cross-appeals the Section 1983 claims. Application of the Ninth Circuit's ruling in that scenario could result in an award of attorneys' fees even if the reviewing court never reaches the Section 1983 claims, as in the present case.

More troubling than the impact on litigation is the potential chilling effect the Ninth Circuit's ruling has on the regulatory activities of state insurance departments and other entities potentially liable under Section 1983. Certainly all state insurance commissioners, directors and superintendents are well aware that their actions must be

within constitutional parameters. Under *Gerling III*, however, these officials have to be concerned not only that they succeed in any constitutional challenges, but also that they are not challenged through litigation in the first place. State regulators now face a new risk from litigation, being required to pay attorneys' fees under *Gerling III*, even where a court rules for the regulators and finds that their actions did not violate Section 1983.

The energies and resources of state insurance regulators are focused on protecting insurance consumers in their state and insuring the financial solvency of insurers doing business in their state. Regulators should not be stymied in their efforts towards achieving these goals by the fear of large awards of attorneys' fees if those efforts are challenged and decided on non-fee bearing grounds.

◆

CONCLUSION

For the foregoing reasons, the Court should issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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