

No. 04-15332 (consolidated with No. 04-15455)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICAN INSURANCE ASSOCIATION, *et al.*,
Plaintiffs-Appellants,

v.

JOHN GARAMENDI, in his capacity as the
COMMISSIONER OF INSURANCE FOR THE
STATE OF CALIFORNIA,
Defendant-Appellee

Appeal from the United States District Court
For the Eastern District of California
Honorable William B. Shubb, District Judge
Dist. Ct. Docket Nos. CIV-S-00-0613 WBS JFM,
CIV-S-00-0506 WBS JFM, CIV-S-00-0875 WBS JFM

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, appellants make the following disclosures:

1. American Insurance Association (“AIA”) has no parent company, and no publicly held company owns stock in AIA. American Re-Insurance Company is a wholly owned subsidiary of American Re Corporation, which is wholly owned by Munich-American Holding Company. Munich-American Holding Company is wholly owned by Muenchener Rueckversicherungs-Gesellschaft Aktiengesellschaft.

2. Assicurazioni Generali S.p.A. (“Generali”), an Italian corporation, has no parent corporations. Mediobanca S.p.A., a publicly held company, owns slightly more than ten percent of Generali’s stock.

3. Gerling Global Reinsurance Corporation Of America (formerly known as Constitution Reinsurance Corporation), Gerling Global Reinsurance Corporation – U.S. Branch, Gerling America Insurance Company, Constitution Insurance Company (formerly known as Gerling Global Reinsurance Corporation of America), Revios Reinsurance Canada, Ltd. (formerly known as Gerling Global Life Insurance Company), and Revios Reinsurance U.S. Inc. (formerly known as Gerling Global Life Reinsurance Company), identify the following parent corporations and publicly traded companies that own ten percent or more of their stock: Gerling-Konzern Allgemeine Versicherungs AG; Deutsche Bank; Gerling-

Konzern Versicherungs-Beteiligungs-AG; Gerling-Konzern Globale Ruck-
versicherungs AG; and Gerling Global U.S. Investments, Inc.

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INTRODUCTION

The current appeal involves a dispute over attorneys' fees growing out of plaintiffs-appellants' successful challenge to the constitutionality of a California statute. Plaintiffs brought suit under 42 U.S.C. § 1983 to contest the constitutionality of the state law on three grounds: they argued that it violated (1) the constitutional doctrine granting the federal government exclusive authority over foreign affairs, (2) the Commerce Clause, and (3) the Due Process Clause. Over the course of a lengthy series of proceedings that included two trips to this Court and one to the Supreme Court, the district court struck down the statute on all three grounds. This Court reversed, upholding the constitutionality of the state law and rejecting each of plaintiffs' constitutional arguments. The Supreme Court in turn granted review on all three constitutional issues and reversed this Court's judgment. The Supreme Court held that the California law violated the Constitution's foreign affairs doctrine; having invalidated the statute on that ground, the Court expressly found it unnecessary to reach the Commerce and Due Process Clause questions.

On remand, the district court denied plaintiffs' request for attorneys' fees pursuant to 42 U.S.C. § 1988, reasoning that the Constitution's foreign affairs principle does not create "rights" within the meaning of section 1983 and that a successful suit to enforce that principle accordingly cannot support an award of

fees under section 1988. The court recognized that the Commerce and Due Process Clauses, which also had been invoked by plaintiffs, *do* create rights under section 1983. The court found the claims under those provisions irrelevant, however, because plaintiffs ultimately did not obtain relief on those claims.

The district court's decision is plainly wrong. It is settled law that a plaintiff who prevails on a non-fee claim is entitled to an award of fees if the plaintiff also advances substantial but unresolved section 1983 claims that arise out of the same nucleus of operative fact. The district court therefore was incorrect even on its own terms: if it is assumed that the foreign affairs doctrine does not create rights, fees still should be awarded to plaintiffs because they advanced substantial claims under rights-creating constitutional provisions that were fully litigated and considered, but not resolved, by the Supreme Court. Moreover, the district court also erred in its analysis of the foreign affairs doctrine, which *does* create rights within the meaning of section 1983. For these reasons, the district court's decision should be reversed and the case remanded for determination of the amount of attorneys' fees to be awarded to plaintiffs.

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(a)(3), 2201, and 2202. See Excerpts of Record ("E.R.") at 2, 17, 102, 122.

Plaintiffs-appellants are appealing from an order denying a motion for attorneys' fees. The district court's order was a final determination on the merits of plaintiffs' motion and, as such, is immediately appealable. See 28 U.S.C. § 1291.

The district court's memorandum and order denying plaintiffs' motion was filed on January 29, 2004. E.R. 226. Plaintiffs filed a joint notice of appeal from this order on February 20, 2004. E.R. 236. Plaintiffs' appeal therefore is timely under Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The issues are:

1. Whether plaintiffs who prevail on non-fee claims that arise out of the same nucleus of operative fact as substantial, unresolved section 1983 claims should be treated as prevailing parties entitled to attorneys' fees under section 1988.

2. Whether the Constitution's exclusion of the states from regulation of foreign affairs creates "rights, privileges, or immunities" within the meaning of section 1983.

STATEMENT

A. Statement of the Case

In March and April 2000, four plaintiff groups filed separate actions against California's Commissioner of Insurance (the "Commissioner") under 42 U.S.C. §§

1983 and 2201, contending that California's Holocaust Victim Insurance Relief Act of 1999 (the "HVIRA") violates the United States Constitution in various respects. E.R. 1-139. The district court consolidated the four lawsuits. On June 9, 2000, the district court granted plaintiffs' motions for a preliminary injunction, enjoining the Commissioner from enforcing the HVIRA and its implementing regulations. E.R. 97-175. The court found that plaintiffs had established a probability of success on claims advanced under the foreign affairs doctrine and the Commerce Clause; it did not address plaintiffs' remaining claims. E.R. 170.

On appeal, this Court rejected the district court's constitutional reasoning, finding that plaintiffs had not shown a probability of success under the foreign affairs doctrine or the Commerce Clause. The Court left the preliminary injunction in place, however, to give the district court an opportunity to resolve plaintiffs' due process claim. *Gerling Global Reinsurance Corp. of Am. v. Low*, 240 F.3d 739 (9th Cir. 2001).

On remand, the parties filed cross-motions for summary judgment. On October 2, 2001, the district court entered a final judgment on the merits for plaintiffs, holding that the HVIRA denies them due process. The Commissioner appealed that judgment. On November 1, 2001, plaintiffs filed a motion in district court seeking attorneys' fees pursuant to section 1988. E.R. 186. The district court found that plaintiffs were prevailing parties but nevertheless denied the motion

because it believed that the balance of equities militated against the award of fees. E.R. 212-222. Plaintiffs appealed that decision and this Court consolidated the fee appeal with the Commissioner's appeal of the merits of the district court's due process ruling.

In the second appeal, this Court again reversed, rejecting plaintiffs' due process claim. The Court also reaffirmed its holding that the HVIRA was consistent with the foreign affairs doctrine and the Commerce Clause. Having denied plaintiffs relief, the Court held that plaintiffs were not prevailing parties and accordingly were not entitled to attorneys' fees. *Gerling Global Reinsurance Corp. of Am. v. Low*, 296 F.3d 832 (9th Cir. 2002).

The Supreme Court then granted certiorari to consider whether the HVIRA violates the foreign affairs power, the Commerce Clause, and the Due Process Clause. *American Ins. Ass'n v. Garamendi*, 537 U.S. 1100 (2003). After briefing and argument on all three questions, the Supreme Court reversed this Court's judgment, holding that the HVIRA violates the foreign affairs principle. *American Ins. Ass'n v. Garamendi*, 123 S. Ct. 2374, 2386-2394 (2003). Having reached that conclusion, the Supreme Court did not address the Commerce and Due Process Clause questions. *Id.* at 2385 n.7.

On remand, plaintiffs renewed their request for attorneys' fees before this Court, which transferred the case to the district court for consideration of the fees

question. *Gerling Global Reinsurance Corp. of Am. v. Low*, 339 F.3d 1078, 1080 (9th Cir. 2003). On January 29, 2004, the district court denied plaintiffs' request for fees. E.R. 226-235. This appeal followed.

B. Statement of Facts

1. This attorneys' fees dispute grows out of plaintiffs-appellants' successful challenge to the constitutionality of the HVIRA. That California law imposed extensive obligations on insurance companies doing business in the State to disclose the details of insurance policies in effect in Europe at any time between 1920 and 1945. See *American Ins. Ass'n v. Garamendi* ("Garamendi"), 123 S. Ct. 2374, 2383-2384 (2003). This disclosure obligation extended to policies issued by any company "related" to the insurer, "whether or not the companies were related during the time when the policies subject to disclosure were sold" (*id.* at 2384), and applied to "policies sold to anyone during that time." *Id.* The penalty for noncompliance was "suspension of the company's license to do business in the State." *Id.* The HVIRA was a central element of broader California legislation that permitted state residents to sue in state court on insurance claims based on Holocaust-era policies. *Id.* at 2383.

At the time that the HVIRA was debated and enacted, the federal government took a very different approach to the problem of obtaining meaningful compensation for Holocaust victims. "From the beginning, the Government's

position * * * stressed mediated settlement ‘as an alternative to endless litigation’ promising little relief to Holocaust survivors.” *Garamendi*, 123 S. Ct. at 2381 (citation omitted). To this end, the United States and Germany entered into an executive agreement (the “German Foundation Agreement”), signed by President Clinton and German Chancellor Schroeder, that committed Germany to establish and fund a foundation that would compensate those who suffered at the hands of German companies during the Nazi era. *Id.* at 2381-2382 (citing 39 INT’L LEGAL MATERIALS 1298 (2000)). For its part, the United States agreed that, because German companies should have “some expectation of security from lawsuits in United States courts” in exchange for their participation in the Foundation, the federal government would inform courts that it is ““in the foreign policy interests of the United States for the Foundation to be the exclusive forum and remedy for the resolution of all asserted claims against German companies.”” *Id.* at 2382 (citation omitted).¹

Because the HVIRA departed dramatically from the federal government’s policy regarding compensation for Holocaust survivors, the United States expressed strong disapproval of the statute. After the Commissioner issued administrative subpoenas to several subsidiaries of European insurance companies

¹ The German Foundation Agreement “has served as a model for similar agreements” with Austria and France. *Id.* at 2383 & n.3.

pursuant to the HVIRA, then-Deputy Secretary of State Eizenstat – the President’s representative for Holocaust issues – “[i]mmediately” wrote to both the Commissioner and California’s Governor, complaining that the HVIRA “has the unfortunate effect of damaging the one effective means now at hand to process quickly and completely unpaid insurance claims from the Holocaust period.” *Garamendi*, 123 S. Ct. at 2384-2385 (citation omitted). Former Secretary of State Eagleburger, who chaired an organization that worked with European insurers to facilitate the payment of Holocaust-era insurance claims, raised similar objections. *Id.*

As the Supreme Court observed, however, “[t]hese expressions of the National Government’s concern proved to be of no consequence.” *Garamendi*, 123 S. Ct. at 2385. The Commissioner – who had vigorously lobbied for enactment of the HVIRA, despite questions raised at the time about the constitutionality and enforceability of the statute (see E.R. 183, 198) – issued what the Court described as an “ultimatum” to insurance companies subject to the HVIRA. *Garamendi*, 123 S. Ct. at 2385. He announced “that he would enforce HVIRA to its fullest, requiring the affected insurers to make the disclosures, leave the State voluntarily, or lose their licenses.” *Id.*

2. Plaintiffs responded to the Commissioner’s ultimatum by bringing this suit under 42 U.S.C. § 1983 and 28 U.S.C. § 2201 for injunctive and declaratory

relief. In particular, plaintiffs argued that the HVIRA was unconstitutional for three reasons. They contended that the HVIRA violated the Constitution's foreign affairs doctrine, which vests responsibility for the United States' foreign relations in the federal government. They maintained that the statute was inconsistent with the Commerce Clause because it both interfered with the federal government's ability to speak with "one voice" in its commercial relations with foreign nations and constituted impermissible extraterritorial regulation of foreign commerce. And they argued that the HVIRA was invalid under the Due Process Clause because it exceeded California's legislative jurisdiction by seeking to regulate foreign entities and transactions with which the State had minimal contact. The district court ruled for plaintiffs on the first two of these grounds, not reaching the due process claim, and issued a preliminary injunction barring enforcement of the HVIRA. E.R. 140-175.

On appeal, a panel of this Court reversed. *Gerling Global Reinsurance Corp. of Am. v. Low*, 240 F.3d 739 (9th Cir. 2001) ("*Gerling I*"). The Court rejected plaintiffs' foreign affairs doctrine argument. *Id.* at 751-754. And it concluded that "the district court erred when it held that Plaintiffs established a likelihood of success on the question whether HVIRA violates the Commerce Clause." *Id.* at 751. In doing so, the panel reasoned that the Commerce Clause extraterritoriality challenge to the statute was foreclosed by the McCarran-Ferguson Act, 15 U.S.C.

§§ 1011-1015, and that the HVIRA is, in any event, a “regulation of California insurance companies that affects foreign commerce only indirectly.” *Gerling I*, 240 F.3d at 744-746. The Court likewise concluded that the HVIRA “does not impede the federal government’s ability to speak with ‘one voice’ on a matter affecting foreign commerce” because Congress, in enacting the U.S. Holocaust Assets Commission Act of 1998 (the “Holocaust Commission Act”), Pub. L. 105-186, 112 Stat. 611, as amended Pub.L. 106-155, § 2, 113 Stat. 1740 (1999) (codified at 22 U.S.C. § 1621 note), “encouraged laws like the HVIRA.” *Gerling I*, 240 F.3d at 749. The Court added that it did not perceive any interference with the federal government’s international commercial policies because (1) it doubted that “there is in fact any policy conflict between HVIRA” and executive agreements like the German Foundation Agreement and (2) the executive agreements lack “preemptive effect.” *Id.* at 750. The Court remanded for resolution of plaintiffs’ due process claim. *Id.* at 754.

On remand, the district court ruled for plaintiffs on that issue, again enjoining enforcement of the HVIRA. On appeal, however, this Court again reversed. *Gerling Global Reinsurance Corp. of Am. v. Low*, 296 F.3d 832 (9th Cir. 2002) (“*Gerling II*”). The Court reasoned that California had legislative jurisdiction to enact the HVIRA because the statute “does nothing more than seek information from California-licensed issuers.” *Id.* at 844. In reaching this

conclusion, the Court attempted to distinguish, and also expressed disagreement with, the Eleventh Circuit's recent holding that a similar Florida law violated the Due Process Clause. *Id.* at 838-839 (discussing *Gerling Global Reinsurance Corp. of Am. v. Gallagher*, 267 F.3d 1228 (11th Cir. 2001)). The Court proceeded to reaffirm its prior rulings on the Commerce Clause and the foreign affairs doctrine. *Id.* at 849.

3. After plaintiffs had prevailed on their due process claim in the district court, they sought an award of attorneys' fees under 42 U.S.C. § 1988. The district court determined that plaintiffs were "prevailing parties" within the meaning of the statute and that "awarding attorney's fees to plaintiffs in this case would further the purposes of section 1988" (E.R. 214), but nonetheless denied the fee application because it found that "special circumstances" made a fee award inequitable. E.R. 216-219. This Court consolidated plaintiffs' appeal of that adverse fee determination with the Commissioner's appeal of the district court's ruling that the HVIRA violated the Due Process Clause. When this Court ruled for the Commissioner on the merits of the due process issue in *Gerling II*, it held that plaintiffs were not prevailing parties and therefore not entitled to fees under section 1988. 296 F.3d at 851.

4. Plaintiffs filed a certiorari petition in the Supreme Court seeking review of *Gerling II*. The petition presented three constitutional questions: whether the

HVIRA violates the foreign affairs power, the Commerce Clause, and the Due Process Clause. The Court granted certiorari and entertained argument on all three questions. *American Ins. Ass'n v. Garamendi*, 537 U.S. 1100 (2003); see *Garamendi*, 123 S. Ct. at 2385 n.7. The Supreme Court then reversed this Court's judgment in *Gerling II*, holding that the HVIRA violates the foreign affairs principle. *Garamendi*, 123 S. Ct. at 2386-2394. Having reached that conclusion, the Supreme Court "ha[d] no reason to address" the Commerce and Due Process Clause questions. *Id.* at 2385 n.7.

In its foreign affairs holding, the Court began by finding "no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy." *Garamendi*, 123 S. Ct. at 2386. The Court also observed that "valid executive agreements are fit to preempt state law, just as treaties are." *Id.* at 2387. And the Court noted a substantial body of authority standing for the proposition that "state action with more than incidental effect on foreign affairs is preempted, even absent any affirmative federal activity in the subject area of the state law, and hence without any showing of conflict." *Id.* at 2388. The Court found it unnecessary to address the force of that principle, however, because it perceived "a sufficiently clear conflict" between the HVIRA and federal policy "to require a finding of preemption here." *Id.* at 2390.

In reaching this conclusion, the Court engaged in an extensive review of the negotiations leading to the German Foundation Agreement and the similar executive agreements with other nations (*Garamendi*, 123 S. Ct. at 2381-2383, 2390-2391), determining that they “illustrate that the consistent Presidential foreign policy has been to encourage European governments and companies to volunteer settlement funds in preference to litigation or coercive sanctions” (*id.* at 2390) – and that the federal goals included safeguarding “the [European] companies’ interest in securing ‘legal peace’ when they settle claims in this fashion.” *Id.* at 2391 (citation omitted). In contrast, the Court concluded that the “HVIRA’s economic compulsion to make public disclosure * * * employs ‘a different, state system of economic pressure,’ and in doing so undercuts the President’s diplomatic discretion and the choice he has made exercising it.” *Id.* HVIRA “thus ‘compromise[s] the very capacity of the President to speak for the Nation with one voice in dealing with other governments’ to resolve claims against European companies arising out of World War II.” *Id.* at 2391-2392.

Although “[t]he express federal policy and the clear conflict raised by the state statute are alone enough to require state law to yield,” the Court found added support for its conclusion in “the weakness of the State’s interest, against the backdrop of traditional state legislative subject matter, in regulating disclosure of European Holocaust-era insurance policies.” *Garamendi*, 123 S. Ct. at 2392. While

the Commissioner defended the HVIRA as a “consumer protection” measure designed to provide information on “which insurers have failed to pay insurance claims,” the Court had “great doubt that the purpose of the California law is an evaluation of corporate reliability in contemporary insuring in the State.” *Id.* Instead, the Court found that “the state interest actually underlying HVIRA” was an intent to provide a cause of action to Holocaust survivors now living in California. *Id.* at 2393. “But this fact,” the Court held, “does not displace general standards for evaluating a State’s claim to apply its forum law to a particular controversy or transaction, under which the State’s claim is not a strong one.” *Id.* (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 820 (1985)).

Finally, the Court rejected the Commissioner’s argument that the McCarran-Ferguson and Holocaust Commission Acts validate the HVIRA. Wholly apart “from any doubt whether HVIRA would qualify as regulating ‘the business of insurance’ [within the meaning of McCarran-Ferguson] given its tangential relation to present-day insuring in the State,” the Court concluded that the McCarran-Ferguson Act “cannot sensibly be construed to address preemption by executive conduct in foreign affairs.” *Garamendi*, 123 S. Ct. at 2394. As for the Holocaust Commission Act, the Court held that it does not “authorize HVIRA,” that it “can hardly be read to condone state sanctions interfering with federal efforts” to

address Holocaust-era claims, and that “Congress has not acted on the matter addressed here.” *Id.*

5. After the Supreme Court reversed the judgment in *Gerling II*, plaintiffs renewed their request for attorneys’ fees before this Court. This Court, in turn, remanded the case to the district court for consideration of entitlement to fees. *Gerling Global Reinsurance Corp. of Am. v. Low*, 339 F.3d 1078, 1080 (9th Cir. 2003). On remand, the district court again denied the fee request, although on grounds very different from those expressed in its initial fee decision.

At the outset, the district court repudiated its prior conclusion that “special circumstances” justify the denial of fees. The court found that the Commissioner “essentially concedes that an award of fees would serve the section 1988 purpose of deterring lawmakers from enacting unconstitutional legislation in the future.” E.R. 229. And observing that “the Eleventh Circuit affirmed an award of attorney fees to plaintiff under strikingly similar circumstances to those here,” the court held that the balance of equities did not favor denial of fees. E.R. 229-230 (citing *Gerling Global v. Nelson*, No. 00-16542-BB (11th Cir. Dec. 7, 2001), *aff’g Gerling Global v. Nelson*, No. 4:99v444-RH (D.C. Fla. Jan. 2, 2001)).

Having reached that conclusion, the district court denied the fee request for a separate reason. The court noted that section 1988 provides for the award of fees to “the prevailing party” in “any action or proceeding to enforce * * * section[] * * *

1983,” while section 1983 provides a cause of action for the “deprivation of any rights, privileges, or immunities secured by the Constitution and laws” of the United States. See E.R. 228, 230-231. Here, however, the court held that the Constitution’s foreign affairs principle does not “implicate[] a right, privilege, or immunity secured by the Constitution or laws of the United States,” and therefore “may not form the basis of a section 1983 action.” E.R. 231. The court likewise held that, even assuming the executive agreements applied by the Supreme Court in *Garamendi* “are ‘laws’ within the meaning of section 1983, it would be too much of a stretch to conclude that the kind of Presidential orders involved here, negotiating relief for Holocaust victims and their heirs, were intended to secure any right, privilege, or immunity guaranteed to the plaintiffs in this case.” E.R. 232.

The district court therefore reasoned that plaintiffs are not entitled to invoke section 1988 because they did not “prevail[] on a claim that the HVIRA deprived them of any right, privilege, or immunity secured by the Constitution or federal law.” E.R. 231. Although the court recognized that the Commerce and Due Process Clauses *may* be the bases for a section 1983 action, it concluded that the plaintiffs’ assertion of claims under those provisions does not support the award of fees because “plaintiffs ultimately did not prevail on either of those claims.” E.R. 232.

Plaintiffs now appeal from the district court’s denial of attorneys’ fees.

SUMMARY OF ARGUMENT

A. Plaintiffs should be awarded attorneys' fees even if the district court is correct in its view that the foreign affairs doctrine does not create rights within the meaning of section 1983. Applying the clear congressional intent regarding section 1988, both the Supreme Court and this Court have held that an award of fees is appropriate when a plaintiff prevails on a non-fee claim that arises out of the same nucleus of operative fact as substantial, unresolved section 1983 claims. *Maher v. Gagne*, 448 U.S. 122 (1980); *Carreras v. City of Anaheim*, 768 F.2d 1039 (9th Cir. 1985). That rule is designed to avoid putting courts in the position of having to engage in unnecessary constitutional adjudication simply to resolve the plaintiff's entitlement to fees. And the *Maher* rule plainly applies in this case, where plaintiffs advanced substantial claims under the Commerce and Due Process Clauses – provisions that unquestionably *do* create rights within the meaning of section 1983 – that were not resolved by the Supreme Court.

The Commissioner was wrong in arguing below that the applicability of *Maher* to this case is undercut by this Court's decisions rejecting plaintiffs' Commerce and Due Process Clause claims in *Gerling I* and *II*. Under *Maher*, the fees issue must be viewed from the perspective of the Supreme Court, which had the last word on the merits of the claims that underlie the fee request. Here, the Supreme Court granted review, received briefing, and heard argument on all three

constitutional claims, expressly finding it unnecessary to address the Commerce and Due Process Clauses only because the Justices disposed of the case by holding the HVIRA invalid under the foreign affairs doctrine. The Court thus had both the fee-generating (Commerce and Due Process Clause) and non-fee (foreign affairs doctrine) claims before it when it decided the merits. That is precisely the circumstance that triggers application of the *Maier* rule. Were that not so, the Supreme Court would have been obligated to go on to address one of the remaining constitutional claims – engaging in unnecessary constitutional adjudication – simply to settle plaintiffs’ entitlement to fees. *Maier* was intended to avoid just that outcome. Indeed, this Court reached precisely that conclusion on essentially identical facts in *Carreras*. 768 F.2d at 1050.

The Commissioner also was wrong in arguing that plaintiffs must be regarded as having “lost” on the Commerce and Due Process Clause issues because this Court’s decision rejecting plaintiffs’ challenges to the HVIRA under those provisions remains in effect. By reversing this Court’s judgment upholding the HVIRA in *Gerling II*, the Supreme Court stripped this Court’s decision of its character as binding precedent. Moreover, although the Supreme Court did not expressly address the *Gerling I* and *II* Commerce and Due Process Clause rulings, this Court’s analysis of those issues cannot survive the Supreme Court’s decision.

B. Wholly apart from the principle of *Maher*, the district court was incorrect in holding that the Constitution's foreign affairs principle does not create section 1983 rights or immunities. A constitutional provision confers a right when it creates binding obligations, is not so vague as to be unenforceable, and was intended to benefit the putative plaintiff. *Dennis v. Higgins*, 498 U.S. 439 (1991). The foreign affairs principle satisfies this test. The Supreme Court's decision in *Garamendi* itself establishes that the foreign affairs principle creates binding limits that are within the competence of the judiciary to enforce. As for the third element of the test, plaintiffs here were within the "zone of interests" protected by the foreign affairs principle; otherwise, plaintiffs would not have had standing and the Supreme Court would have lacked jurisdiction to entertain plaintiffs' foreign affairs claim. That is enough to establish that the foreign affairs principle creates rights within the meaning of section 1983.

Moreover, even if the Constitution's foreign affairs doctrine does not create rights of its own force, the executive agreements the Supreme Court held to have preemptive effect in *Garamendi* themselves create actionable rights under section 1983. Again, *Garamendi* shows that those agreements create binding and enforceable obligations. And although the principal goal of the agreements undoubtedly was to obtain redress for Holocaust survivors, the agreements also

unambiguously and expressly were intended to benefit the affected companies by assuring them “legal peace.” That satisfies the *Dennis* test.

STANDARD OF REVIEW

“While awards of attorney’s fees pursuant to 42 U.S.C. § 1988 are generally reviewed for abuse of discretion, any elements of legal analysis and statutory interpretation which figure in the district court’s decision are reviewable *de novo*.” *Gilbrook v. City of Westminster*, 177 F.3d 839, 875 (9th Cir. 1999) (citation omitted). See *Fischer v. SJB-P.D. Inc.*, 214 F.3d 1115, 1118 (9th Cir. 2000) (“Any element of legal analysis which figures in the district court’s decision is reviewed *de novo*.”); *Associated Gen. Contractors v. Smith*, 74 F.3d 926, 931 (9th Cir. 1996) (“This Court reviews *de novo* any elements of legal analysis and statutory interpretation involved in an attorney fee decision.”). The questions (1) whether plaintiffs are entitled to fees because they advanced substantial, unresolved section 1983 claims and (2) whether the Constitution’s foreign affairs doctrine creates “rights, privileges, or immunities” within the meaning of section 1983 involve pure issues of law and therefore should be determined *de novo* by this Court.

ARGUMENT

This would appear to be an easy case. Section 1988 makes attorneys’ fees available to “the prevailing party” in section 1983 litigation. Under the Supreme Court’s “generous formulation of the term, plaintiffs may be considered ‘prevailing

parties' for attorney's fee purposes if they succeed on *any* significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.” *Farrar v. Hobby*, 506 U.S. 103, 109 (1992) (citation and internal quotation marks omitted; emphasis added)). See, e.g., *Texas State Teachers Ass’n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791-792 (1989); *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1160 (9th Cir. 2000); *Gilbrook v. City of Westminster*, 177 F.3d 839, 872 n.17 (9th Cir. 1999). In this case, of course, plaintiffs achieved *all* of the benefits they sought, “obtain[ing] an enforceable judgment against the defendant” (*Farrar*, 506 U.S. at 111) that “changes the legal relationship between [plaintiffs] and the defendant.” *LSO*, 205 F.3d at 1160 (citation omitted). See *Texas State Teachers Ass’n*, 489 U.S. at 791-792; *Gilbrook*, 177 F.3d at 872 n.17. In such circumstances, “[f]ee awards against enforcement officials are run-of-the-mill occurrences.” *Supreme Ct. of Va. v. Consumers Union of the U.S., Inc.*, 446 U.S. 719, 739 (1980).

Here, the district court recognized “that plaintiffs prevailed on a claim that the HVIRA was an invalid, unconstitutional statute.” E.R. 231. The court nevertheless held fees unavailable because, in its view, the foreign affairs principle used by the Supreme Court to invalidate the HVIRA does not create “rights” within the meaning of section 1983 and therefore cannot be used to support an award of fees under section 1988. *Id.* at 6-7. But that conclusion is wrong, for two fundamental reasons. Even assuming that the district court is correct in its analysis

of the foreign affairs principle, the court erred in failing to recognize that fees should be awarded because the plaintiffs also advanced claims under the Constitution's Commerce and Due Process Clauses – provisions that unquestionably *do* create rights within the meaning of section 1983. See *Dennis v. Higgins*, 498 U.S. 439 (1991) (Commerce Clause); *Parratt v. Taylor*, 451 U.S. 527 (1981) (Due Process Clause). Moreover, the district court was *not* correct in its understanding of the foreign affairs principle, which *does* confer rights or immunities that may be asserted under section 1983. The decision below accordingly should be reversed and attorneys' fees awarded to plaintiffs pursuant to section 1988.

I. PLAINTIFFS ARE ENTITLED TO AN AWARD OF ATTORNEYS' FEES BECAUSE THEY ADVANCED SUBSTANTIAL, UNRESOLVED CIVIL RIGHTS CLAIMS

A. Fees Should Be Awarded To Plaintiffs Who Prevail On Non-Fee Claims That Arise Out Of The Same Nucleus Of Operative Fact As Substantial, Unresolved Fee-Generating Claims

1. The district court believed that plaintiffs' claims under the Commerce and Due Process Clauses were irrelevant to the fee inquiry because the Supreme Court did "not consider or decide whether the HVIRA violated" those provisions. E.R. 230. In fact, however, even if it is assumed that the district court correctly concluded that the Constitution's foreign affairs principle does not create rights within the meaning of section 1983, "Congress anticipated the problem facing us

[i.e., that of a plaintiff who prevails on a claim that does not support an award of fees, but also asserts unresolved ‘rights-creating’ constitutional claims], and provided a solution to it.” *Espino v. Besteiro*, 708 F.2d 1002, 1007 (5th Cir. 1983). Addressing a bill substantially identical to the one that was enacted as section 1988 (see *Maher v. Gagne*, 448 U.S. 122, 133 n.15 (1980)), the House Judiciary Committee explained:

In some instances, * * * the claim [supporting an award of] fees may involve a constitutional question which the courts are reluctant to resolve if [a] non-[fee] claim is dispositive. *Hagans v. Lavine*, 415 U.S. 528 (1974). In such cases, if the claim for which fees may be awarded meets the “substantiality” test, see *Hagans v. Lavine*, *supra*; *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), attorney’s fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a “common nucleus of operative fact.” *United Mine Workers v. Gibbs*, *supra*, at 725.

H.R. Rep. No. 94-1558, at 4 n.7 (1976).

Quoting this language, the Supreme Court has explained that “[t]he legislative history makes it clear that Congress intended fees to be awarded when a pendent constitutional claim is involved, even if the statutory claim on which the plaintiff prevailed is one for which fees cannot be awarded under the [Attorney’s

Fees’] Act.” *Maher*, 448 U.S. at 133 n.15.² See *id.* at 129 (“Nothing in the language of § 1988 conditions the District Court’s power to award fees on full litigation of the issues or on a judicial determination that the plaintiff’s rights have been violated.”). Under the *Maher* rule, the Court subsequently held, “a prevailing party who asserts substantial but unaddressed constitutional claims is entitled to attorney’s fees under 42 U.S.C. § 1988.” *Smith v. Robinson*, 468 U.S. 992, 1004 (1984). Section 1988 accordingly “authorizes a * * * court to assume that the plaintiff has prevailed on his fee-generating claim and to award fees appropriate to that success.” *Id.* at 1007. As a consequence, “the fact that a plaintiff has prevailed on one of two or more alternative bases for relief does not prevent an award of fees for the unaddressed claims, as long as those claims are reasonably related to the plaintiff’s ultimate success. The same rule should apply where an unaddressed constitutional claim provides an alternative, but reasonably related, basis for the plaintiff’s ultimate relief.” *Id.* at 1007 n.10 (citations omitted).

The courts of appeals, including this one, uniformly have embraced this principle. Thus, as this Court has held, “when the plaintiff in a civil rights action

² “Although the doctrine of pendent jurisdiction arose in the context of pendent state law claims, * * * courts have relied on this doctrine to award § 1988 attorney’s fees to plaintiffs prevailing on non-fee federal statutory claims as well.” *Espino*, 708 F.2d at 1007-1008. That being so, it surely must be the case that fees are available when, as we are assuming to be the case here, the non-fee claim on which the plaintiff prevailed is one arising under the U.S. Constitution.

prevails on a pendent [non-fee] claim based on a common nucleus of operative fact with a substantial federal [fee] claim, fees may awarded under § 1988.” *Carreras v. City of Anaheim*, 768 F.2d 1039, 1050 (9th Cir. 1985) (citing *Maher*). See *Mateyko v. Felix*, 924 F.2d 824, 828 (9th Cir. 1990). See also, e.g., *Aubin v. Fudala*, 782 F.2d 287, 291 (1st Cir. 1986) (Breyer, J.); *Williams v. Hanover Housing Auth.*, 113 F.3d 1294, 1298 (1st Cir 1997); *Williams v. Thomas*, 692 F.2d 1032, 1036 (5th Cir. 1982) (“a party prevailing on a substantial claim that is pendent to a civil rights claim is entitled to a recovery of attorney’s fees when the civil rights claim and the pendent claim arise out of a common nucleus of operative facts”) (citing cases from many circuits).

The rule of *Maher* is essential to further both general principles of judicial management and the particular policies that underlie section 1988. The courts have long recognized “the wisdom of the federal policy of avoiding constitutional adjudication where not absolutely essential to disposition of a case.” *Hagans v. Lavine*, 415 U.S. 528, 547 n.12 (1974). See, e.g., *Superintendent v. Hill*, 472 U.S. 445, 450 (1985); *Carreras*, 768 F.2d at 1042. But if a court’s failure to resolve a substantial constitutional claim makes fees unavailable when the plaintiff prevails on a related non-fee claim – as the district court believed to be the case – courts would be put to an unpalatable choice: they either would be obligated to engage in otherwise unnecessary constitutional adjudication simply to resolve the plaintiff’s

entitlement to fees, or they would have to deny fees to plaintiffs who might well have had meritorious civil rights claims.

At the same time, the district court's approach would create incentives that make the settlement of civil rights litigation more difficult. A plaintiff who obtains a favorable settlement of a suit that contains both fee-generating and non-fee claims is entitled to an award of fees. See, *e.g.*, *Maher*, 448 U.S. at 129. Given this rule, if the district court's approach prevails,

[w]here defendants know that a court is more likely to award relief on the basis of a non-fee statute whose application avoids difficult constitutional questions, they will have little incentive to settle their differences with plaintiffs, knowing as they do that a settlement is very likely to cost them substantial attorney's fees. Federal dockets are already sufficiently crowded without [courts] creating a disincentive to settlement.

Espino, 708 F.2d at 1010.

2. For an unresolved section 1983 claim to justify an award of fees under *Maher*, the claim must be "substantial" enough to support federal jurisdiction under the doctrine of *Hagans v. Lavine* and must arise out of the same nucleus of operative fact as does the non-fee claim on which the plaintiff prevailed. See H.R. Rep. No. 94-1558, *supra*, at 4 n.7; *Maher*, 448 U.S. at 133 n.15; *Williams*, 113 F.3d at 1292-1299 & n.11. These are not rigorous requirements. A claim is substantial under *Hagans* unless it is "essentially fictitious," "obviously frivolous," "and 'obviously without merit.'" *Hagans*, 415 U.S. at 537-538

(citations omitted). These terms mean “that claims are constitutionally insubstantial only if prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial.” *Id.* See, e.g., *Southwestern Bell Tel. Co. v. City of El Paso*, 346 F.3d 541, 551 n.39 (5th Cir. 2003) (Higginbotham, J.). “[T]o arise out of a common nucleus of operative fact, the fee and non-fee claims must be so interrelated that plaintiffs ‘would ordinarily be expected to try them all in one judicial proceeding.’” *Espino*, 708 F.2d at 1010 (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966)).

Plaintiffs’ Commerce and Due Process Clause claims easily satisfy these standards. Those claims were hardly frivolous: the district court ruled *for* the plaintiffs on both; the Eleventh Circuit ruled *for* (and awarded section 1988 fees to) plaintiffs making an essentially identical due process claim³; and the Supreme Court granted review to address this Court’s rejection of both claims, which would seem to establish conclusively that the plaintiffs’ arguments were not “so insubstantial as to be beyond the jurisdiction of the District Court.” *Hagans*, 415

³ *Gerling Global Reinsurance Corp. of Am. v. Gallagher*, 267 F.3d 1228 (11th Cir. 2001) (ruling on merits of due process claims); *Gerling Global Reinsurance Corp. of Am. v. Nelson*, No. 4:99v444-RH (N.D. Fla. 2000), *aff’d*, No. 00-16542-BB (11th Cir. 2001) (ruling on attorneys’ fees); *Gerling Global Reinsurance Corp. of Am. v. Nelson*, No. 03-12376 (11th Cir. Oct. 29, 2003) (reaffirming ruling on attorneys’ fees).

U.S. at 539. See generally Robert Stern *et al.*, SUPREME COURT PRACTICE 223 (8th ed. 2002) (“The Court has traditionally expended its limited time and resources on those cases that present issues of national importance, for which there is some ‘compelling’ reason for invoking the Court’s jurisdiction. In the context of such a nationally important case, perceived ‘error’ in the lower court’s resolution of an important issue does indeed become relevant for certiorari purposes.”). As for the “common nucleus of operative fact” test, the “treatment challenged” in this case under the foreign affairs principle on the one hand, and under the Commerce and Due Process Clauses on the other, “is exactly the same; there [was] every reason to expect that [plaintiffs] would try both in one proceeding.” *Espino*, 708 F.2d at 1010. Compare *Smith*, 468 U.S. at 1014-1015 (“common nucleus” test not satisfied when claims are “based on different facts” and “would have warranted entirely different relief”). In this setting, the rule of *Maher* requires an award of fees to plaintiffs, who – in the district court’s view – prevailed on a non-fee claim that was brought along with substantial section 1983 claims that arose out of a common nucleus of operative fact.

Although plaintiffs argued the applicability of *Maher* at length before the district court, that court made no attempt to distinguish – and, indeed, failed even to acknowledge or cite – the *Maher* decision or the Supreme Court’s rule. For that reason alone, the decision below should be set aside.

B. Because The Supreme Court Granted Review On The Commerce And Due Process Clause Issues In The Case, The Commissioner Cannot Be Treated As Having Prevailed On Those Issues

While the district court made no mention of *Maher*, the Commissioner did attempt below to distinguish the decision, and we assume he will reprise his argument here. Pointing to this Court's rejection of plaintiffs' Commerce and Due Process Clause claims in *Gerling I* and *II*, the Commissioner invoked the rule that precludes the award of fees to a party who prevails on a non-fee claim but *loses* on all of its section 1983 civil rights claims. See, e.g., *Mateyko*, 924 F.2d at 828 (a plaintiff "who loses on his federal claim and recovers only on a pendent state claim is not a prevailing party under section 1988 and may not be awarded fees"). The Commissioner declared that rule applicable here because he was successful in his Commerce and Due Process Clause arguments before this Court and the Supreme Court did not expressly overturn this Court's holdings on those issues. For several reasons, however, the Commissioner's reliance on this principle, as well as his argument that he should be treated as the party prevailing on the section 1983 claims in this case, is insupportable.

1. a. To begin with, the Commissioner commits a fundamental error when he fails to view the fees issue from the perspective of the court that had the last word on the merits of claims that underlie the request for fees – that is, from the perspective of the Supreme Court. The Commissioner's argument might be correct

if the Supreme Court had *denied* certiorari review of the Commerce and Due Process Clause questions presented by plaintiffs, leaving only the foreign affairs issue to be decided. But that is not what the Court did: to the contrary, it *granted* review on all three issues (see *American Ins. Ass'n v. Garamendi*, 537 U.S. 1100 (2003); *Garamendi*, 123 S. Ct. at 2385 n.7), expressly finding it unnecessary to address the Commerce and Due Process Clauses only because the Justices disposed of the case by holding the HVIRA invalid under the foreign affairs doctrine. See *id.*

The Supreme Court thus had both the fee-generating (Commerce and Due Process Clause) and what we are assuming to be the non-fee (foreign affairs doctrine) claims before it when it decided the merits of plaintiffs' suit – and that is precisely what triggers application of the *Maher* rule. So far as *Maher* is concerned, this Court's intervening ruling on the merits regarding the Commerce Clause and due process claims is wholly immaterial. After all, as Congress, the Supreme Court, and this Court each have explained, the point of the *Maher* rule is to avoid having the question of entitlement to fees affect the decision-making processes of the court that is entertaining the merits of the plaintiff's suit by forcing that court to resolve a constitutional claim unnecessarily. But the Commissioner's approach would place courts in just that situation. In this case, for example, the Supreme Court found it unnecessary to decide plaintiffs' Commerce

and Due Process Clause claims; presumably, the Court found it easier, or preferable, or both, to resolve the case on foreign affairs grounds.⁴ If the Commissioner were correct, however, the Supreme Court would have been obligated to go on to address one of the remaining constitutional claims (or, at a minimum, to reverse its preferred order of addressing the issues before it) to settle the plaintiffs' entitlement to fees.⁵ The Commissioner thus would turn *Maher* on its head by having the fee tail wag the merits dog.

Alternatively, if the court resolving the merits does not volunteer to decide superfluous constitutional questions, the Commissioner's rule would have the effect of denying fees to prevailing plaintiffs whose substantial constitutional claims were presented to, but not resolved by, the court that had the last word on the merits. But that, too, is just what the *Maher* rule was designed to prevent. "Congress' purpose in authorizing a fee award for an unaddressed constitutional

⁴ Because the Supreme Court's decision turned in part on its construction of executive agreements that it accorded preemptive force (see *Garamendi*, 123 S. Ct. at 2390-2393), the Court may have believed that its approach allowed it to avoid the most difficult constitutional issues in the case, even as to the foreign affairs doctrine itself. See *id.* at 2389 (although "[i]t is a fair question whether respect for the executive foreign relations power requires a categorical choice between the contrasting theories of field and conflict preemption," "the question requires no answer here").

⁵ Although the non-fee claim here was constitutional in nature, the Commissioner's argument would apply in precisely the same way when the non-fee claim is based on a federal statute or on state law.

claim was to avoid penalizing a litigant for the fact that courts are properly reluctant to resolve constitutional questions if a nonconstitutional claim is dispositive.” *Smith*, 468 U.S. at 1007. As this Court has put it, “[i]n such a case the denial of fees would be unfair.” *Mateyko*, 924 F.2d at 828-829. The Commissioner’s rule, however, would have precisely that inequitable result whenever a reviewing court finds it unnecessary to reverse an adverse lower-court ruling on the plaintiff’s fee-generating claims. Here, for example, the Commissioner would penalize plaintiffs because the Supreme Court understandably, and properly, declined to reach out to decide constitutional questions that were unnecessary to the resolution of the case.

At the same time, denying fees in these circumstances “would frustrate section 1988’s purpose to encourage private parties to vindicate their federal civil rights.” *Mateyko*, 924 F.2d at 828-829. The courts have recognized that this policy is effectuated when fees are awarded to a plaintiff who prevails in the district court on a non-fee claim and also advances unresolved fee-generating claims. See, *e.g.*, *id.*; *Espino*, 708 F.2d at 1010. That policy applies in precisely the same way in cases like this one; the happenstance that there was an intervening adverse decision on the fee-generating claim that was left unresolved by the court that ultimately ruled in the plaintiff’s favor on the non-fee claim has no bearing on the utility of awarding fees to prevailing plaintiffs who advance substantial but ultimately

undecided constitutional issues.⁶ Given this Court’s pronouncement that “[t]he Fees Awards Act must be liberally construed” to “encourage compliance with and enforcement of the civil rights law” (*Bartholomew v. Watson*, 665 F.2d 910, 913 (9th Cir. 1982)), there can be do doubt that the award of fees here is proper.

b. In this context, it is worth noting the breadth of the Commissioner’s argument. His rule is not confined to cases that reach the Supreme Court; it would apply in *all* cases where appellate courts review judgments that reject both non-fee and section 1983 claims. His argument therefore would present the courts of appeals with a dilemma whenever they review district court judgments that, for example, rule against plaintiffs who assert both federal constitutional and pendent state-law claims. The court of appeals’ inclination in such a case will be to first review the state-law holding and, if that holding is incorrect, to reverse on state-law grounds so as to avoid unnecessary decision of a federal constitutional issue. See, *e.g.*, *Southwestern Bell Tel. Co.*, 346 F.3d at 551 (Supreme Court “will affirm a judgment on a pendent, noncivil rights claim when to do so will allow it to avoid an unnecessary decision on a difficult constitutional issue”); *Carreras*, 768 F.2d at

⁶ A contrary rule would create perverse incentives. For example, a plaintiff who lost on both a state-law and a federal civil rights claim in district court, but who believed that it had strong appellate arguments on both claims, might forgo advancing its state-law claim on appeal for fear that the court of appeals would reverse on that ground – which, under the Commissioner’s approach, would make attorneys’ fees unavailable. Cf. *Bartholomew v. Watson*, 665 F.2d 910, 913 (9th Cir. 1982).

1042-1043 (“federal constitutional issues should be avoided even when the alternative ground is one of state constitutional law”). Under the Commissioner’s approach, however, following that course would mean that the plaintiff would be treated as having “lost” on a section 1983 claim that was not addressed by the court of appeals, which would have the effect of denying attorneys’ fees to the plaintiff. The Commissioner’s rule therefore would force courts of appeals either (1) to withhold fees from deserving litigants or (2) to move directly (and unnecessarily) to the resolution of difficult constitutional issues. But the doctrine articulated in *Maher* was intended to keep the merits decisions of courts from being affected by such extraneous considerations.

It therefore is not surprising that this Court *already* has rejected the Commissioner’s position, in a case that is, in principle, identical to this one. In *Carreras*, plaintiffs advanced both state-law and federal constitutional claims. See 768 F.2d at 1041-1042 & n.1. In substantial part, the district court rejected both sets of claims. See *id.* at 1042. Invoking “[t]he doctrine that federal constitutional issues should be avoided if a case can be decided on state law grounds,” this Court first addressed the state-law issues when it took up the appeal. *Id.* at 1042-1043. The Court ruled for the plaintiffs on those issues, awarding them complete relief and finding it unnecessary to resolve the federal constitutional claims that had been rejected by the district court. *Id.* at 1043-1050.

The Court then turned to the availability of attorneys' fees under section 1988, holding that "[w]hether [plaintiffs were] prevailing part[ies] at the trial is now moot because [plaintiffs] ha[ve] prevailed on all issues on this appeal." 768 F.2d at 1050.⁷ The Court explained:

That we base our decision on [plaintiffs'] pendent state constitutional claims does not affect our determination that fees are appropriate. When the plaintiff in a civil rights action prevails on a pendent state claim based on a common nucleus of operative fact with a substantial federal claim, fees may be awarded under § 1988.

Id. (citing *Maher*).

The holding of *Carreras* should be dispositive of the Commissioner's argument here. In that case, as in this one, the plaintiffs sought the same relief (an injunction barring enforcement of unlawful state policies) under both arguably non-fee and fee-generating causes of action. In that case, as in this one, the lower court rejected both sets of claims. And in that case, as in this one, the court that ultimately resolved the merits ruled for the plaintiffs on their non-fee claims, making it unnecessary for that court to set aside the adverse lower-court decision on the fee-generating claims. But in *Carreras*, this Court nevertheless held that the plaintiffs were prevailing parties for section 1988 purposes because they had

⁷ The district court in *Carreras* had granted the plaintiffs a small portion of the requested relief but determined that they were not prevailing parties and denied them attorneys' fees. See 768 F.2d at 1042, 1050.

obtained complete relief – and the Court’s failure to address the federal claims, instead basing its decision on the non-fee state-law cause of action, did “not affect [the Court’s] determination that fees are appropriate.” 768 F.2d at 1050. The Commissioner’s current argument that plaintiffs are not entitled to fees because the Supreme Court did not in terms repudiate this Court’s Commerce and Due Process Clause analysis is foreclosed by *Carreras*.

2. a. The Commissioner’s misunderstanding of *Maher* was not the only thing wrong with his argument below; he also was incorrect in asserting that this Court’s Commerce and Due Process Cause holdings in *Gerling II* remain in effect. It is true that the Supreme Court did not expressly address this Court’s analysis of those constitutional provisions. But the Supreme Court reversed the *judgment* in *Gerling II* – a judgment that incorporated those holdings. *Garamendi*, 123 S. Ct. at 2394. The Supreme Court’s action stripped *Gerling II* of its character as binding precedent, which means that plaintiffs cannot be regarded as having “lost” on their Commerce and Due Process Clause claims.

This logically must be so. A court’s analysis has binding force only because it is associated with a judgment that resolves a dispute between the parties; otherwise, that analysis is dictum that may (or may not) be persuasive, but that has no independent precedential force. The Supreme Court’s reversal of the judgment in *Gerling II* therefore precludes the Commissioner’s argument that he prevailed

on any issue in the case. Cf. *O'Connor v. Donaldson*, 422 U.S. 563, 577 n.12 (1975) (“Of necessity our decision vacating the judgment of the Court of Appeals deprives that court’s opinion of precedential effect, leaving this Court’s opinion and judgment as the sole law of the case”); *County of Los Angeles v. Davis*, 440 U.S. 625, 634 n.6 (1979) (same); *Quinn v. Robinson*, 783 F.2d 776, 799 n.20 (9th Cir. 1986) (when this Court’s judgment is vacated by the Supreme Court, “it is clear that our opinion has no precedential value”). And under a straightforward application of the *Maher* rule, that reality requires the award of fees to plaintiffs.⁸

b. Moreover, although the Supreme Court had no need to address this Court’s Commerce or Due Process Clause rulings, the Supreme Court’s opinion totally undermines the analysis used in *Gerling I* and *II* to reject plaintiffs’ arguments on those claims. First, this Court rejected plaintiffs’ challenge to the

⁸ Moreover, the decision in *Gerling II* actually never went into effect at all. It is black-letter law that “[a]n appellate court’s decision is not final until its mandate issues.” *Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1529 (9th Cir. 1989) (citation omitted). See, e.g., *United States v. Simmons*, 923 F.2d 934, 956 (2d Cir. 1991) (“[a] Court of Appeals decision does not become effective until its mandate issues”). And this Court stayed issuance of its mandate in *Gerling II*. E.R. 223-225. As a result, “because the Supreme Court heard [*Gerling II*] on certiorari and reversed, the mandate in [*Gerling II*] never took effect. * * * Thus, the district court’s determination concerning [plaintiffs’] constitutional claims remains unvacated.” *Doe v. Cheney*, 885 F.2d 898, 909 (D.C. Cir. 1989). See *Simmons*, 923 F.2d at 956 (“[O]ur mandate was stayed while our decision was reviewed, and ultimately reversed, by the Supreme Court. * * * As such, our decision was never binding on the proceedings below.”). *Gerling II* therefore never bound anyone at any time.

HVIRA under the Foreign Commerce Clause by holding that the California law “does not impede the federal government’s ability to speak with ‘one voice’ on a matter affecting foreign commerce” (*Gerling I*, 240 F.3d at 746); in particular, this Court reasoned that “Congress has spoken affirmatively in the area of Holocaust-era insurance policies and has acquiesced in state laws like HVIRA” by enacting the Holocaust Commission Act. *Id.* at 747. See *id.* at 748 (“we read the Holocaust [Commission] Act to embrace state legislation like HVIRA”); *id.* at 749 (“On the basis of the text, context, and history of the Holocaust [Commission] Act, we conclude that Congress was aware of the states’ involvement in this area and, at least implicitly, encouraged laws like HVIRA.”).

The Supreme Court, however, expressly disapproved this Court’s holding that “the Holocaust Commission Act authorize[s] HVIRA.” *Garamendi*, 123 S. Ct. at 2394. To the contrary, the Supreme Court concluded that, “if anything, the federal Act assumed it was the National Government’s responsibility to deal with returning” Holocaust-era insurance proceeds to their rightful owners; that the Holocaust Commission Act “can hardly be read to condone state sanctions interfering with federal efforts to resolve such claims”; and that, “[i]n sum, Congress has not acted on the matter addressed here.” *Id.* And the Supreme Court separately determined that the HVIRA *does* “compromise[] the very capacity of the President to speak for the Nation with one voice in dealing with other

governments’ to resolve claims against European companies arising out of World War II.” *Id.* at 2391-2392 (quoting *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 381 (2000)).⁹

Second, this Court in *Gerling I* and *II* rejected plaintiffs’ argument that the HVIRA violated the Commerce Clause because it had extraterritorial effects. The Court held that the validity of the HVIRA was established by the McCarran-Ferguson Act; although plaintiffs relied on *FTC v. Travelers Health Ass’n*, 362 U.S. 293 (1960), for the proposition that McCarran-Ferguson does not save state insurance laws that have extraterritorial effects, this Court read *Travelers* much more narrowly. *Gerling I*, 240 F.3d at 744. This Court also held that the HVIRA should be regarded as having a domestic focus because it “seeks only to obtain information about conduct in another jurisdiction, without affecting directly any of that conduct.” *Id.* at 745.

On these points as well, the Supreme Court’s decision undermines the basis for this Court’s conclusions. The Supreme Court characterized the holding of

⁹ Similarly, this Court believed that the HVIRA did not interfere with the federal government’s international commercial policies because the Court saw no conflict between the state law and the federal executive agreements addressed in *Garamendi*, and also believed that the agreements in any event lacked preemptive effect. See *Gerling I*, 240 F.3d at 750. The Supreme Court rejected both of those propositions, finding “a sufficiently clear conflict” between the HVIRA and the agreements “to require a finding of preemption here.” *Garamendi*, 123 S. Ct. at 2390.

Travelers in terms quite different from those used in *Gerling I*, describing *Travelers* as deciding that “McCarran-Ferguson was not intended to allow a State to ‘regulate activities carried on beyond its own borders.’” *Garamendi*, 123 S. Ct. at 2394 (quoting *Travelers*, 362 U.S. at 300-301). And far from accepting the proposition that the HVIRA was directed at domestic insurance activities, the Supreme Court expressed “doubt whether HVRIA would qualify as regulating ‘the business of insurance’ [within the meaning of McCarran-Ferguson] given its tangential relation to present-day insuring in the State.” *Id.* (citing *Travelers*). See also *id.* at 2392 (noting “great doubt that the purpose of the California law is an evaluation of corporate reliability in contemporary insuring in the State”).

Third, the Supreme Court’s decision casts a long shadow over the due process holding in *Gerling II*. This Court saw the HVIRA as conventional state insurance regulation that had only incidental effects on overseas activities and transactions. See 296 F.3d at 844. But the Supreme Court expressed “great doubt” that the HVIRA was actually directed at California activity (*Garamendi*, 123 S. Ct. at 2392) and, citing due process precedent, noted that California’s “claim to apply its forum law” in the manner asserted by the HVIRA “is not a strong one.” *Id.* at 2393 (citing *Shutts*, 472 U.S. at 820).

Against this background, the Commerce and Due Process Clause reasoning in *Gerling I* and *II* cannot be reconciled with the Supreme Court’s analysis in

Garamendi. In light of that analysis, the Commissioner almost certainly would not prevail were these questions again litigated before this Court. Cf. *United States v. Garcia*, 77 F.3d 274, 276 (9th Cir. 1996) (“intervening controlling authority” makes law-of-the-case doctrine inapplicable). And given a Supreme Court decision that rejects fundamental aspects of his argument on the merits, the Commissioner surely cannot be treated as a prevailing party on those issues now. In sum, a straightforward application of *Maher* requires an award of attorneys’ fees to plaintiffs.

II. THE CONSTITUTION’S FOREIGN AFFAIRS PRINCIPLE CREATES RIGHTS AND IMMUNITIES THAT ARE ENFORCEABLE UNDER SECTION 1983

Under *Maher*, plaintiffs are entitled to fees even if the district court were correct in concluding that the Constitution’s foreign affairs principle does not create rights that are enforceable under section 1983. But the district court’s analysis was wrong on its own terms: the foreign affairs principle *is* a source of rights within the meaning of section 1983. For this reason as well, plaintiffs should be awarded fees under section 1988.

A. The Foreign Affairs Principle Creates Rights Of Its Own Force

1. The district court failed to articulate in any detail its rationale for holding that the foreign affairs principle “is not a source of federal rights.” Dist. Ct. slip op. 6; see *id.* at 6-7. That court thus did not discuss the test set out by the Supreme

Court to guide the inquiry, which describes three considerations that are relevant to whether a constitutional provision “confers a ‘right’ within the meaning of § 1983”: (1) whether the provision “creates obligations binding on the [defendant] governmental unit”; (2) whether “[t]he interest [that] plaintiff asserts” is “[so] vague and amorphous [as] to be beyond the competence of the judiciary to enforce”; and (3) “whether the provision in question was intend[ed] to benefit the putative plaintiff.” *Dennis*, 498 U.S. at 448-449 (citations and internal quotation marks omitted).

In applying this test, the Supreme Court disavowed the proposition – seemingly relied upon by the district court here – “that § 1983 does not apply to constitutional provisions that allocate power.” *Id.* at 443 n.4. See *id.* at 445 n.4 (declining to adopt a “formalistic distinction between power-allocating and rights-conferring provisions of the Constitution”). The Court likewise has “rejected attempts to limit the types of constitutional rights that are encompassed within the phrase ‘rights, privileges, or immunities.’” *Id.* at 445. And it has emphasized that “[a] broad construction of § 1983 is compelled by the statutory language,” “repeatedly [holding] that the coverage of [§ 1983] must be broadly construed.” *Id.* at 443 (quoting *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 105 (1989)) (footnote omitted). See *id.* at 445 (“we have given full effect to its broad language, recognizing that § 1983 ‘provide[s] a remedy, to be broadly

construed, against all forms of official violation of federally protected rights”)) (quoting *Monell v. Department of Social Services of New York*, 436 U.S. 658, 700-701 (1978)). Applying this test, the Court held in *Dennis* that the Commerce Clause creates rights within the meaning of section 1983. *Id.* at 446-451.

The *Dennis* test likewise is satisfied by the Constitution’s foreign affairs principle. There can be no doubt about the test’s first two considerations: the foreign affairs doctrine creates binding limits on state authority and – as the decision in *Garamendi* itself establishes – those limits are within the competence of the judiciary to enforce. See *Dennis*, 498 U.S. at 448. As for the third consideration, at a minimum the plaintiffs here “were arguably within the ‘zone of interests’ protected by the” foreign affairs doctrine (*id.* at 449); otherwise, plaintiffs would not have had standing, the Supreme Court would not have had jurisdiction to resolve their claim, and plaintiffs would have been unable to “sue and obtain injunctive and declaratory relief” under that doctrine. *Id.* at 447. Thus, just as is true of the Commerce Clause, “[t]his combined restriction on state power and entitlement to relief under the [foreign affairs principle] amounts to a ‘right, privilege, or immunity’ under the ordinary meaning of those terms.” *Id.* Indeed, Justice Kennedy made precisely that point in his *Dennis* dissent, observing that “the Court’s rationale [in *Dennis*] creates a § 1983 cause of action when a State * *

* interferes with the federal power over foreign relations.” *Id.* at 463 (Kennedy, J., dissenting). The *Dennis* majority did not take issue with that proposition.

2. In nevertheless holding that the foreign affairs doctrine does not create rights or immunities, the district court analogized that doctrine to the Constitution’s Supremacy Clause, the violation of which has been held not to be actionable under section 1983. E.R. 231. See *Golden State Transit*, 493 U.S. at 107-108; *Associated Gen. Contractors v. Smith*, 74 F.3d 926, 931 (9th Cir. 1996). The contrast with the Supremacy Clause, however, serves to confirm that the foreign affairs principle *is* a source of federal rights and immunities.

In holding that the Supremacy Clause does not itself confer rights within the meaning of section 1983, the Supreme Court explained that the Clause “is ‘not a source of any federal rights’; rather, it “‘secure[s]” federal rights by according them priority whenever they come in conflict with state law.”” *Dennis*, 498 U.S. at 450 (quoting *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 613 (1979)). The Supremacy Clause thus serves only to effectuate *other* provisions of federal law. In contrast, the foreign affairs principle, like the Commerce Clause, “does more than confer power on the Federal Government; it is also a substantive ‘restriction on permissible state regulation’” (*id.* at 447 (citation omitted)) that “of its own force imposes limitations on state regulation * * * and is the source of a right of action in those injured by regulations that exceed such limitations.” *Id.* at

450.¹⁰ See *Zschernig v. Miller*, 389 U.S. 429, 433, 434, 458 (1968) (state action with more than an “incidental or indirect effect in foreign countries” is invalidated by the foreign affairs principle “even in the absence of” a federal statute, treaty, or international negotiations bearing on the subject); *Garamendi*, 123 S. Ct. at 2388 (noting that *Zschernig* “relied on statements in a number of previous cases open to the reading that state action with more than incidental effect on foreign affairs is preempted, even absent any affirmative federal activity in the subject area of the state law, and hence without any showing of conflict”).¹¹ That distinction between the Supremacy Clause on the one hand, and the Commerce Clause and the foreign affairs principle on the other, is crucial.

In addition, the Supreme Court relied on the text of section 1983 in holding that the Supremacy Clause does not create rights under the statute. Section 1983 creates a cause of action for the deprivation of rights “secured by the Constitution and laws.” As the Court explained, “[i]f the Supremacy Clause itself were understood to secure constitutional rights, the reference to ‘and laws’ would have

¹⁰ As also is true of the Commerce Clause, “[t]hat the right at issue here is an implied right * * * does not diminish its status as a ‘right, privilege, or immunity’ under § 1983.” *Dennis*, 498 U.S. at 447-448 n.7.

¹¹ The Court strongly suggested in *Garamendi* that the Constitution displaces state laws – even absent affirmative federal action – when a state “take[s] a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility.” 123 S. Ct. at 2389 n.11. As the Court noted, that is true of the HVIRA. See *Garamendi*, 123 S. Ct. at 2392-2393.

been wholly unnecessary” because *any* federal statutory violation committed pursuant to state authority would implicate the Clause and therefore give rise to a section 1983 action. *Golden State Transit*, 493 U.S. at 107 n.4. See *Dennis*, 498 U.S. at 450 n.8. But that rationale is applicable only to the Supremacy Clause, because that provision – unlike the Commerce Clause and the foreign affairs principle – does not “of its own force” impose limits on state authority. See *id.* at 450.

The Supremacy Clause therefore is unique: it serves only to effectuate other rights-creating provisions of federal law and is implicitly excluded from the list of provisions giving rise to causes of action by the text of section 1983. Indeed, so far as we are aware (and disregarding the decision below), the Supremacy Clause is the *only* constitutional provision that has been held not to create rights within the meaning of section 1983. The district court erred when it placed the foreign affairs principle in the same category.

B. Executive Agreements Executed Pursuant To The Foreign Affairs Power Create Rights That Are Enforceable Under Section 1983

The court also was wrong for an additional reason: even if the Constitution’s foreign affairs principle does not create rights of its own force, the executive agreements that the Supreme Court held to have preemptive effect in *Garamendi* themselves create rights and immunities that are actionable under section 1983. The district court properly assumed that those agreements are “laws” within the

meaning of section 1983,¹² but held that “it would be too far of a stretch to conclude that the kind of Presidential orders involved here * * * were intended to secure any right, privilege, or immunity guaranteed to the plaintiffs in this case.” E.R. 232. That conclusion, however, disregarded the plain language and manifest purpose of the agreements.

To be sure, there is no doubt that the principal goal of the executive agreements applied in *Garamendi* is to obtain redress for Holocaust survivors. But those agreements also are unambiguously intended to benefit the affected insurance companies by shielding them from state-law litigation and liability. As the Supreme Court explained, the German Foundation Agreement was designed, among other things, to advance “the companies’ interest in securing ‘legal peace.’” 123 S. Ct. at 2391 (citation omitted). See *id.* at 2382 (“[t]he willingness of the

¹² The court was correct in doing so. There is no doubt that executive agreements are part of the “supreme Law of the Land” embraced by the Supremacy Clause. And there is every reason to believe that Congress intended the word “laws” in section 1983 to have an all-inclusive connotation. Cf. *Standt v. City of New York*, 153 F. Supp. 2d 417 (S.D.N.Y. 2001) (treaties are enforceable under section 1983). Congress used specific, narrow terms in section 1983 when referring to persons who cause the deprivation of rights under color of any state “statute, ordinance, regulation, custom, or usage”; Congress’s contrasting use in the same sentence of the broader term “laws” when referring to federal provisions that secure rights and immunities must be presumed to have significance. And the Congress that enacted section 1983 was well aware of the existence of binding executive agreements that have the force of law. Such agreements have been entered into “since the early years of the Republic,” with “the first example being as early as 1799.” *Garamendi*, 123 S. Ct. at 2386, 2387.

Germans to create a voluntary compensation fund was conditioned on some expectation of security from lawsuits in United States courts”). The text of the Agreement makes that point expressly. The Agreement’s statement of purpose recognizes “the interest German companies have in all-embracing and enduring legal peace in this matter” and that such companies “should not be asked or expected to contribute again, in court or elsewhere.” 39 INT’L LEGAL MATERIALS at 1298. The operative provisions of the Agreement accordingly commit the United States to use its best efforts to obtain “all-embracing and enduring legal peace.” *Id.* at 1300 (Article 2(2)). See *id.* at 1304 (Annex B(4)) (identifying the U.S. interests as including “achieving legal peace for asserted claims against German companies”). See also Agreement Relating to the Agreement of Oct. 24, 2000 Concerning the Austrian Fund “Reconciliation, Peace and Cooperation,” Annex A(10) (addressing steps “to assist Austria and Austrian companies in achieving legal closure for all such claims”), 2001 WL 935261.

These provisions easily satisfy the three-part *Dennis* test. The holding of *Garamendi* makes indisputable that the executive agreements create obligations that are binding on state government because they “are fit to preempt state law, just as treaties are.” 123 S. Ct. at 2387; see *id.* at 2389-2390. The Court’s use of the agreements to invalidate the HVIRA also necessarily establishes that they are not too vague and amorphous for the judiciary to enforce. And the language from the

agreements that is quoted above is “phrased in terms of the persons benefited,” with an explicit “focus” on “the interests of individual” companies that are to be immunized from liability. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284, 287 (2002) (citation omitted). That is enough to show that the agreements create rights or immunities within the meaning of section 1983.

* * * *

Doubts about the constitutionality of the HVIRA were raised from the outset. The California legislature nevertheless enacted the statute and the Commissioner told plaintiffs to comply with the law or leave the State, forcing them to bring this suit to vindicate their constitutional rights. After three years of burdensome litigation, including two appeals by the Commissioner and a trip to the Supreme Court, plaintiffs obtained complete success in their constitutional challenge. These are precisely the circumstances for which Section 1988 was enacted. Plaintiffs accordingly are entitled to an award of attorneys’ fees.

CONCLUSION

The order of the district court should be reversed and the case remanded for the award of attorneys’ fees to plaintiffs.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Appellants are aware of no related cases pending before this Court.

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(b)(i) and 32(a)(7)(C) and Circuit Rule 32-1, that the attached Appellants' Opening Brief is:

X Proportionately spaced, has a typeface of 14 points or more and contains 12,035 words.

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Charles A. Rothfeld

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The undersigned certifies that on July 2, 2004, he caused the foregoing Appellants' Opening Brief to be filed and served as follows:

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