

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

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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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

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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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The Commissioner forced the plaintiffs to litigate for three years about the validity of the HVIRA, although he was warned from the outset by independent third parties that the California law was unconstitutional. Having ultimately lost on the merits at the end of that long and expensive process, he now seeks to avoid responsibility for attorneys' fees by proposing a series of novel and ill-conceived limitations on the scope of sections 1983 and 1988. The Commissioner would apply the rule of *Maher v. Gagne*, 448 U.S. 122 (1980), in ways that would substantially undermine the well-established and socially beneficial congressional purposes expressed in the civil rights attorneys' fees statute. And his insistence that no "right or immunity" within the meaning of section 1983 was vindicated in this case cannot be reconciled with Supreme Court precedent. Because the Commissioner's approach would frustrate important policies of the federal civil rights law, this Court should reject his arguments and order the award of attorneys' fees to the plaintiffs.

**A. Plaintiffs Are Entitled To Fees Under *Maher v. Gagne***

- 1. The *Maher* rule governs when a civil rights plaintiff is unsuccessful on its fee-generating claims before the lower court but prevails on a non-fee claim before a higher court that finds it unnecessary to address the fee-generating claims**

The Commissioner makes no attempt to grapple with the real significance of the *Maher* doctrine for this case – and wholly ignores our central argument. His

theory is that a civil rights defendant who obtains a favorable ruling on a fee-generating claim in a lower court must be treated as having prevailed on that claim for purposes of section 1988, *even when a higher court reverses the judgment and rules for the plaintiff on the merits*, so long as that court does not specifically disapprove the lower court's analysis regarding the fee-generating claim. Appellee's Br. 38-40. As we showed in our opening brief (at 33-34), this approach would present appellate courts with a dilemma whenever they review judgments that rule against plaintiffs who assert both fee-generating and non-fee claims.

In such cases, the appellate court generally would be inclined to address first the holding on the non-fee claim (typically, one arising under state law) and, if that holding is incorrect, to reverse on that ground so as to avoid the unnecessary resolution of a federal constitutional issue. But under the Commissioner's approach, resolving the case in that sensible manner would deny attorneys' fees to the plaintiff, because the defendant – although losing the case – would be regarded as having “prevailed” on the issue that is relevant to the award of fees. The Commissioner does not deny that his proposed rule would have this effect and that it therefore would require appellate courts either to withhold fees from deserving litigants or unnecessarily to resolve difficult constitutional questions.

As we also explained in our opening brief, however, this is precisely the result that the *Maher* rule was designed to prevent. See AIA Op. Br. 23-26, 30-32.

On the one hand, the *Maier* principle recognizes that courts *should* avoid resolving difficult constitutional issues whenever possible; on the other, Congress sought “to avoid penalizing a litigant for the fact that courts are properly reluctant to resolve constitutional questions if a nonconstitutional claim is dispositive.” *Smith v. Robinson*, 468 U.S. 992, 1007 (1984). The Commissioner makes absolutely no attempt to reconcile his approach with this congressional goal. For this reason alone, the Commissioner’s astounding argument that *he* is the prevailing party for section 1988 purposes should be rejected.

Indeed, we noted in our opening brief (at 34-36) that the Commissioner’s argument is foreclosed by *Carreras v. City of Anaheim*, 768 F.2d 1039 (9th Cir. 1985), which applied the *Maier* principle in circumstances essentially identical to those in this case. In response, the Commissioner makes only one attempt to distinguish *Carreras*: he contends that *Carreras* has no bearing here because the plaintiffs in that case “*won* in part in the lower court on federal constitutional grounds” (Appellee’s Br. 52 (emphasis in original)) and therefore “did prevail, at least in part, on a claim that was fee-bearing under Section 1988.” *Id.* at 51.

This argument is based on a plain misreading of *Carreras*. The Commissioner correctly observes that the civil rights plaintiffs in *Carreras* were successful before the district court on one small element of their federal claim, while losing on the rest. We noted as much in our opening brief. AIA Op. Br. 35

n.7.<sup>1</sup> But that expressly was *not* the basis on which this Court held that fees could be available. To the contrary, after ruling for the plaintiffs on the merits exclusively on state-law grounds, the *Carreras* Court wrote that “[w]hether [the plaintiff] was a prevailing party at the trial is now moot because [the plaintiff] has prevailed on all issues on this appeal.” 768 F.2d at 1050 (emphasis added). The Court held that fees were available on remand because, “[w]hen 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*). This holding – which means that it makes no difference whether the plaintiff won or lost on its fee-generating claim in the lower court, so long as the plaintiff prevailed on a related non-fee claim in the appellate court – compels rejection of the Commissioner’s position.<sup>2</sup>

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<sup>1</sup> The plaintiffs in *Carreras*, members of the International Society for Krishna Consciousness (“ISKCON”), sued the City of Anaheim under the First Amendment and the California Constitution, arguing that (1) the City could not require them to obtain a permit before soliciting donations; (2) they were entitled to solicit in the parking areas and pedestrian walkways of the city stadium; and (3) they could not be barred from soliciting on the exterior walkways of the Anaheim Convention Center. 768 F.2d at 1041-1042. The district court “denied ISKCON relief except with respect to the convention center.” *Id.* at 1042. The district court also “ruled that ISKCON was not a prevailing party entitled to attorney’s fees.” *Id.* at 1041. This Court ruled for the plaintiffs on all three issues on state constitutional grounds. *Id.* at 1042-1050.

<sup>2</sup> None of the decisions cited by the Commissioner at Appellee’s Br. 36 & n.9 advance his argument. In those cases, the court that ruled for the plaintiff *also*  
(cont’d)

**2. The holdings in *Gerling I* and *II* do not survive the Supreme Court's decision in *Garamendi***

a. The Commissioner's argument also is wrong on its own terms. His assertion that he should be regarded as the "prevailing party" on the Commerce Clause and due process issues rests on the proposition that this Court's holdings in *Gerling I* and *Gerling II* remain in effect and retain their precedential force. See Appellee's Br. 38-40. That is so, the Commissioner maintains, because a court of appeals' analysis of an issue continues as binding precedent even when the Supreme Court reverses the appellate judgment on other grounds. But so far as we have been able to determine, the only support for this rule is an off-hand statement that appears in a footnote in a single decision of the Fifth Circuit. See *Central Pines Land Co. v. United States*, 274 F.3d 881, 893-894 n. 57 (5th Cir. 2001), cert. denied, 537 U.S. 822 (2002).<sup>3</sup> And with all due respect for that court, its view on

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rejected the fee-generating claims; those cases would be relevant here only if the Supreme Court in *Garamendi* had expressly rejected plaintiffs' Commerce Clause and due process claims. Of course, it did no such thing.

<sup>3</sup> The Commissioner also cites 18 MOORE'S FEDERAL PRACTICE, § 134.05[5] (Matthew Bender 3d ed.), and *Durning v. Citibank, NA*, 950 F.2d 1419, 1424 n.2 (9th Cir. 1991). MOORE'S, however, relies exclusively on the Fifth Circuit's footnote in *Central Pines*. And the Commissioner reads far more into *Durning* than is actually there. In response to an argument premised on a vacated decision, the Court observed in *Durning* that vacating a decision deprives it of precedential effect, noting that "[a] decision may be reversed on other grounds, but a decision that has been vacated has no precedential authority whatsoever." *Id.* The Court had no occasion to, and did not, address the question whether a holding that has been

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this point cannot be correct. A court of appeals’ analysis of an issue is binding only when it is associated with an effective judgment. See AIA Op. Br. 36-37; cf. *Butler v. Eaton*, 141 U.S. 240, 242-243 (1891) (a judgment that has been reversed is “entirely annulled”). As a consequence, overturning that judgment on *any* ground must deny the analysis its character as binding precedent.

In fact, the Commissioner’s rule would have nonsensical effects. He acknowledges that a decision is sapped of all precedential value when it is *vacated*. See Appellee’s Br. 38-39; see also AIA Op. Br. 37. But the Supreme Court often vacates appellate decisions for reasons that are wholly unrelated to the merits of the appellate court’s analysis – for example, when the controversy has become moot, or when the Supreme Court has issued an intervening decision that bears on the issues in the case. See Robert L. Stern *et al.*, SUPREME COURT PRACTICE 317-320, 832-833 (8th ed. 2002). It would be perverse to say that this sort of vacatur precludes any reliance on the vacated judgment, but that a judgment remains binding for some purposes even though it has been *reversed outright* because of a legal error committed by the court.<sup>4</sup>

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(... cont’d)

reversed on other grounds retains its binding force, much less what the effect would be for section 1988 purposes.

<sup>4</sup> The Commissioner’s related argument (at Appellee’s Br. 41) that the Supreme Court could have vacated the *Gerling II* judgment had it “believed that this Court’s  
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Moreover, as we explained in our opening brief (at 37 n.8), this Court’s decision in *Gerling II* never went into effect because the mandate never issued – which means that, far from remaining in force, the holding in *Gerling II* never bound anyone at any time. In arguing to the contrary, the Commissioner asserts only that the court of appeals’ issuance of a mandate ordinarily is a ministerial act and therefore has “no impact on the precedential effect” of the court’s decision. Appellee’s Br. 40 n.11. But that simply is not so. As the authority cited by the Commissioner itself observes, “the obligations of the parties are not fixed until the Court’s mandate issues.” *Finberg v. Sullivan*, 658 F.2d 93, 97 n.5 (3d Cir. 1980) (en banc). And as the Second Circuit held in circumstances closely analogous to those here, a decision is not binding in subsequent proceedings for law-of-the-case purposes when the mandate never issued. *United States v. Simmons*, 923 F.2d 934, 956 (2d Cir. 1991).<sup>5</sup> This means that the analysis in *Gerling II*, whatever its

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Commerce Clause and due process rulings were fundamentally flawed” is bizarre. The Supreme Court outright *reversed* this Court’s judgment; we are not aware of any case in which the Supreme Court, having chosen to reverse an appellate judgment on one ground, went on to vacate other aspects of the lower court’s opinion. Nor should the Court be expected to do so: it has declared repeatedly that it “review[s] judgments, not statements in opinions.” *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723 n.7 (1982).

<sup>5</sup> The Commissioner relies on this Court’s statement that, “[f]or most purposes, the entry of judgment, rather than issuance of the mandate, marks the effective end to a controversy on appeal.” *Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1529 (9th Cir. 1995) (cont’d)

persuasive force, can have no binding effect, and the district court's injunction against enforcement of the HVIRA on due process grounds that was addressed in *Gerling II* "remains unvacated." *Doe v. Cheney*, 885 F.2d 898, 909 (D.C. Cir. 1989). In these circumstances, the Commissioner cannot be regarded as the prevailing party.

b. The Commissioner nevertheless may mean to argue that he is the prevailing party because the decisions in *Gerling I* and *II* will bind future panels in this Circuit. If so, he is wrong. It is difficult to see how a party can be said to have prevailed when the judgment in its favor has been reversed, whatever the future effect of the decision in future litigation. And in any event, as we showed in our opening brief (at 37-41), the Supreme Court's decision in *Garamendi* called into question the Commerce Clause and due process approach applied by this Court in *Gerling I* and *II*. To be sure, the Commissioner is correct in stating (at Appellees' Br. 40-41) that the Supreme Court did not in terms overrule this Court's decisions on those issues, and did not purport to resolve those issues itself. Nevertheless, the Supreme Court in *Garamendi* so substantially undermined the Commerce Clause and due process analysis used in *Gerling I* and *II* as to make it unlikely that those

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Cir. 1989) (citation omitted). See Appellee's Br. 40 n.11. But the Court was there referring to the ordinary case where the Supreme Court has *denied* certiorari. The observation in *Bryant* obviously does not apply in circumstances where the Supreme Court *grants* certiorari and *reverses* the judgment.

opinions will be followed in future cases. For this reason as well, this Court's decisions are not the conclusive word that would entitle the Commissioner to be treated as the prevailing party on the Commerce Clause and due process questions. His argument to the contrary simply disregards the plain language of *Garamendi*.

*First*, the Commissioner makes no meaningful attempt to address the ways in which *Garamendi* undercut *Gerling I*'s holding on the Commerce Clause "one-voice" test. This Court relied principally on its belief that Congress affirmatively "acquiesced in state laws like the HVIRA" when it enacted the Holocaust Commission Act. *Gerling Global Reinsurance Corp. of Am. v. Low*, 240 F.3d 739, 747 (2001). See AIA Op. Br. 38. The Supreme Court, in contrast, stated in so many words that this Court misread that Act, which, "if anything, \* \* \* assumed it was the National Government's responsibility to deal with returning" Holocaust-era insurance proceeds to their rightful owners. *Am. Ins. Ass'n v. Garamendi*, 123 S. Ct. 2374, 2394 (2003). While the Commissioner argues (at Appellee's Br. 42) that the Supreme Court discussed the Holocaust Commission Act in the course of its analysis of the President's foreign affairs authority, that assertion is beside the point; the relevant fact is that the Supreme Court rejected the reading of the Act on which this Court premised its Commerce Clause holding in *Gerling I*.<sup>6</sup>

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<sup>6</sup> We agree with the Commissioner that the Supreme Court in *Garamendi* "was not required to reach, and did not reach, the \* \* \* issue of whether Congress had

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In addition, as we noted in our opening brief (at 39 n.9), *Gerling I* also rejected the “one-voice” argument because this Court both “question[ed] whether there is in fact any policy conflict between HVIRA \* \* \* and the executive branch initiatives” and believed that the none of the executive agreements “has preemptive effect.” 240 F.3d at 750. But the Supreme Court expressly rejected both of those propositions, finding “a sufficiently clear conflict” between the HVIRA and the agreements “to require a finding of preemption here.” 123 S. Ct. at 2390. The Commissioner has no response to this point.

*Second, Gerling I* held that the McCarran-Ferguson Act precluded challenging the HVIRA as impermissible extraterritorial legislation. In reaching this conclusion, this Court characterized the Supreme Court’s decision in *FTC v.*

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*affirmatively expressed an intent to bar*” the HVIRA. Appellee’s Br. 45 (emphasis in original). For present purposes, however, the important consideration is that the Supreme Court disapproved the ground on which this Court rejected plaintiffs’ “one-voice” Commerce Clause argument. We do note, though, that the Commissioner is wrong in his further assertion that “[a]bsent such expression of disapproval from Congress, \* \* \* state law does not run afoul of the ‘one voice’ Commerce Clause test.” *Id.* If the Commissioner were correct, the “one-voice” Commerce Clause principle would add nothing to ordinary Supremacy Clause preemption analysis. While the Commissioner relies on *Barclays Bank PLC v. Franchise Tax Board*, 512 U.S. 298 (1994), for his assertions about the irrelevance of Executive Branch views and the need for an express statement by Congress in the Commerce Clause “one voice” context, *Barclays* actually “declined to give policy statements by the Executive Branch officials conclusive weight *as against an opposing congressional policy.*” *Garamendi*, 123 S. Ct. at 2391 n.12 (emphasis added). Given the Supreme Court’s reading of the Holocaust Commission Act, there plainly is no such “opposing congressional policy” here.

*Travelers Health Association*, 362 U.S. 293 (1960), as holding only that “Congress [in McCarran-Ferguson] did not intend for the regulatory scheme of one state to protect the citizens of other states and thereby eliminate the need for federal regulation.” 240 F.2d at 745. The Commissioner now insists that *Garamendi* did not call this analysis into question, asserting that the Supreme Court “simply held that McCarran-Ferguson was not relevant to resolving the conflict between state law and the federal government’s foreign policy.” Appellee’s Br. 43. The Supreme Court said far more than that, however. It described *Travelers* as deciding that “McCarran-Ferguson was not intended to allow a State to ‘regulate activities carried on beyond its own borders’” (123 S. Ct. at 2394 (quoting *Travelers*, 362 U.S. at 300-301)), clearly indicating that the federal statute does not save state laws that have extraterritorial effects. And the Court expressed “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.” *Id.* This language surely is in considerable tension with *Gerling I*’s unequivocal reliance on McCarran-Ferguson.<sup>7</sup>

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<sup>7</sup> Citing *Pharmaceutical Research & Manufacturers of America v. Walsh* (“*PHARMA*”), 538 U.S. 644 (2003), the Commissioner argues on the merits that the HVIRA should not be regarded as unconstitutional on the ground that it has extraterritorial effects. Appellee’s Br. 44. This argument is irrelevant for present purposes; the question here is whether *Garamendi* undermined the reasoning in *Gerling I* – as it plainly did. In any event, the Commissioner is wrong in his

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*Third*, the Commissioner devotes considerable space to his argument that *Garamendi* did not “decide[] major due process issues.” Appellee’s Br. 46; see *id.* at 46-49. That, of course, is not our contention; no one suggests that the Supreme Court in *Garamendi* intended to render a due process holding. It is undeniable, however, that language in the Supreme Court’s opinion undermines *Gerling II*’s due process analysis. In particular, citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 820 (1985) – a due process decision – the Supreme Court declared that California’s “claim to apply its forum law” in the manner asserted by the HVIRA “is not a strong one.” 123 S. Ct. at 2393. For all the words the Commissioner devotes to this topic, he makes no mention of the most relevant statement by the Supreme Court.

**3. The *Maher* rule applies when the plaintiff prevails on a non-fee constitutional claim**

In a final effort to oppose an award of attorneys’ fees, the Commissioner contends that, even if the *Maher* rule generally applies when an appellate court reverses a judgment for the defendant without reaching the fee-generating claims, *Maher* does not govern when the civil rights plaintiff prevails in the appellate court on a non-fee *constitutional* claim. Appellee’s Br. 50, 54-56. He reasons that

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defense of the HVIRA: the state law upheld in *PHARMA*, unlike the HVIRA, did not accord *any* significance to acts undertaken outside the regulating jurisdiction. See 538 U.S. at 653-655.

*Mahe*r's purpose is to avoid placing courts in a position where they must decide constitutional claims unnecessarily because fees otherwise would not be awarded. Here, he continues, *Garamendi* did decide a constitutional question, the *Mahe*r rationale accordingly does not apply, and fees should be unavailable. This argument may best be characterized as silly.

a. The point of the *Mahe*r rule is to prevent fee considerations from driving the deliberative processes of courts as they consider the merits of a civil rights claim. But if the Commissioner is right, in any case that combines fee-generating and non-fee constitutional claims, the court will *have* to address the fee-generating claim first, even if it prefers not to; otherwise, a deserving plaintiff will not be awarded fees.

This case illustrates the point. We cannot be certain why the Supreme Court in *Garamendi* chose to base its decision on foreign affairs grounds, rather than on the Commerce or Due Process Clauses. But there are any number of compelling prudential considerations that might have driven that choice and that courts will want to take into account in future such cases: when several constitutional questions are presented, a court may choose to answer first the question that seems easiest or least controversial, or may want to base its decision on the ground that makes the least new law or is the narrowest in its practical effect, or may opt to rule on the basis that is most easily modified by the political branches if they

disagree with the court's holding as a matter of policy.<sup>8</sup> The Commissioner's rule thus presents courts with the very dilemma that *Maier* addresses: he would deny fees to deserving civil rights litigants whenever significant institutional considerations impel a court to rule for the plaintiff on a non-fee claim.

The Commissioner gets no further by observing that language in *Maier*, *Smith v. Robinson*, and the legislative history of section 1988 refers to application of the *Maier* rule in cases where the non-fee claim on which the plaintiff prevailed was "statutory" or "non-constitutional." Appellee's Br. 54. The Court and Congress doubtless used this language because no one at the time imagined that there could be *any* federal constitutional claims that would not support an award of fees under section 1988.<sup>9</sup> And even so, the Supreme Court has not always adhered to the Commissioner's formulation. In *Smith*, for example, the Court observed

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<sup>8</sup> Each of these considerations is present here. As we explain in more detail below, the Supreme Court majority in *Garamendi* believed that its resolution of the case on foreign affairs grounds allowed it to avoid deciding a far-reaching constitutional question. And by premising its decision on agreements executed by the President, the Court made it possible for the President unilaterally to reverse course in the future if he believes that state legislation like the HVIRA is desirable. Had the Court based its decision on the Commerce Clause, its holding could not have been set aside without congressional action; it is doubtful that a decision premised on the Due Process Clause could have been disturbed at all by the political branches.

<sup>9</sup> The first – and only – constitutional provision held not to create rights or immunities under section 1983 is the Supremacy Clause. The Supreme Court did not reach that conclusion until 1989. *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989).

generally “that 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,” adding that “[t]he same rule should apply when an unaddressed constitutional claim provides an alternative, but reasonably related, basis for the plaintiff’s ultimate relief.” 468 U.S. at 1007 n.10. The Court did not specify that the “alternative basis for relief” on which the plaintiff prevailed must be non-constitutional in nature.

b. In any event, as we noted in our opening brief (at 31 n.4, 46-49), *Garamendi* is best regarded as resting on a non-constitutional ground. Indeed, the Commissioner himself insists vociferously that the Supreme Court struck down the HVIRA on a garden-variety preemption theory because California’s law conflicted, not with the Constitution’s foreign affairs principle, but with workaday executive agreements. Appellee’s Br. 18-21. Of course, this argument would seem to render irrelevant the Commissioner’s contention that *Maher* does not apply when the appellate court’s judgment has a constitutional basis. To avoid this problem, the Commissioner gamely insists that his exception to *Maher* nevertheless governs here because the Supreme Court in *Garamendi* had to decide a difficult constitutional question regarding the foreign affairs power *on the way* to its preemption holding. *Id.* at 25.

But that is not how the Supreme Court majority saw things in *Garamendi*. The Court acknowledged that there *is* a difficult, unresolved issue regarding the meaning of *Zschernig v. Miller*, 389 U.S. 429 (1968), and the status of field preemption when state laws have significance for the United States' foreign relations. See 123 S. Ct. at 2388-2390. The Court, however, expressly *declined* to resolve that question, writing that it “requires no answer here” because, even on the narrowest view, there is “a sufficiently clear conflict [between the HVIRA and federal policy] to require finding preemption here.” *Id.* at 2389, 2390. The Supreme Court therefore said explicitly that it was not breaking new constitutional ground in *Garamendi*. The Court's description of its reasoning makes the Commissioner's proposed exception to *Maher* (even if it otherwise were valid) inapplicable to this case.

That description also demonstrates that the Commissioner's rule would be unmanageable in practice. Constitutional discussion often will accompany a holding that is based on non-constitutional grounds. It is not apparent when, or how to determine whether, such discussion renders fees unavailable under the Commissioner's jerry-built standard. His approach therefore would foment time-consuming and unnecessary fee litigation. At the same time, his rule would result in fee considerations affecting the way in which courts write their opinions as they strive to avoid saying anything that would have an unintentional impact on

entitlement to fees. That outcome is fundamentally inconsistent with the principle of *Maher*.

**B. The HVIRA Denied Rights Or Immunities Within The Meaning Of Section 1983**

**1. The executive agreements created rights or immunities**

On the question whether the plaintiffs were denied rights or immunities, the Commissioner's response actually reveals a degree of common ground between the parties. He agrees that the executive agreements at issue in *Garamendi* qualify as "laws" of the sort that may give rise to rights under section 1983. And we do not argue, as the Commissioner would have it (at Appellee's Br. 22-23), that satisfaction of the "zone of interests" test is enough to establish the existence of section 1983-type rights under the agreements; relying on the same authority cited by the Commissioner, our argument is that the agreements establish rights because they create binding obligations, are not so vague as to be beyond the competence of the judiciary to enforce, and were intended to benefit the putative plaintiffs. AIA Op. Br. 46-49 (citing *Dennis v. Higgins*, 498 U.S. 439 (1991), and *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002)). The Commissioner does not deny that the first two prongs of this test are satisfied.

Instead, the Commissioner hinges his position on the assertion that the agreements were intended to benefit *only* Holocaust survivors and that the affected companies are "incidental beneficiaries" whose circumstances were a matter of

indifference to the agreements' participants. Appellee's Br. 24. This argument, however, ignores the language and stated purpose of the agreements, as well as what the Supreme Court had to say about them. While a principal goal of the agreements is obtaining redress for Holocaust survivors, the affected companies are far more than incidental beneficiaries: express provisions also were placed in the agreements to safeguard the companies' interests by shielding them from state-law litigation, regulation, and liability.

As we explained in our opening brief (at 47-48), the German Foundation Agreement's statement of purpose expressly 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" for these companies. *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"). The United States' agreement with Austria contains very similar language. See AIA Op. Br. 48.

There was nothing accidental – or "incidental" – about the inclusion of this language in the agreements. The Supreme Court recognized that the German

Foundation Agreement was specifically designed, among other things, to advance “the companies’ interest in securing ‘legal peace’” (*Garamendi*, 123 S. Ct. at 2391 (citation omitted)), because “[t]he willingness of the Germans to create a voluntary compensation fund was conditioned on some expectation of security from lawsuits in United States courts.” *Id.* at 2383. This aspect of the agreement was necessary to secure the cooperation of European allies, who did not want their companies repeatedly called to account. Indeed, Deputy Secretary of State Stuart Eizenstat, the principal U.S. negotiator, observed that the “crucial element” in obtaining German cooperation was the assurance “that they not pay twice, once into this foundation and a second time into U.S. courts.” White House Press Briefing by Stuart Eizenstat, Dec. 19, 1999, reprinted in Supplemental Excerpts of Record, *Gerling Global Reinsurance Corp. of America v. Low* (9th Cir.), Nos. 01-17023, 01-17433, and 02-15282, at 941. In negotiations with the German government, Secretary of State Madeleine Albright therefore stated unequivocally that “[t]he United States is agreeing to assist in providing legal peace to German companies, both in our courts and from state and local action.” Remarks of Madeleine Albright, Berlin, Germany, Dec. 17, 1999 (reprinted *id.* at 953).

In the face of the agreements’ clear text and unambiguous history, the Commissioner tries to find support for the proposition that their sole purpose was benefiting Holocaust survivors by pointing to briefs filed by the United States in

*Garamendi*. Appellee’s Br. 24. This argument is extremely misleading. The United States, of course, did describe that goal. But in portions of the Federal Government’s brief that are disregarded by the Commissioner – and that are omitted from his Supplemental Excerpts of Record – the United States explained that the agreements *also* were intended to benefit the companies by protecting them from state litigation and regulation. The Government thus made clear that “United States policy disfavors the imposition of further obligations on companies subject to the agreements, whether through regulation or litigation, beyond the obligations contemplated by the agreements themselves.” *Am. Ins. Ass’n v. Garamendi*, No. 02-722, Br. for the United States as Amicus Curiae Supporting Petitioners, at 13-14.<sup>10</sup> The United States added “that participation in the voluntary processes that it has endorsed should ‘give[] those companies cooperating with [ICHEIC] ‘safe haven’ from sanctions, subpoenas, and hearings relative to the Holocaust period.’” *Id.* at 15 (citation omitted).

The Commissioner also calls attention to language in the German Foundation Agreement (1) obligating the United States to use its “best efforts” to secure legal peace and (2) indicating that the policy interests of the United States do not provide an independent legal ground for dismissal of suits advancing

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<sup>10</sup> The brief for the United States is available on the Department of Justice website at: <http://www.usdoj.gov/osg/briefs/2002/3mer/1ami/2002-0722.mer.ami.html>.

Holocaust-related claims. Appellee’s Br. 26. The gist of this observation appears to be that the provisions of the agreement that benefit companies are not legally enforceable. But that assertion misses the point. If the Supreme Court’s holding in *Garamendi* shows anything, it is that the policies expressed in the agreements – which, as we have shown, include an intent to benefit affected companies in specified ways – *are* enforceable in private litigation. And because it is undeniable that the agreements are “phrased in terms of the persons benefited,” with an explicit “focus” on “the interests of individual” companies that are to be penalized from liability (*Gonzaga Univ.*, 536 U.S. at 284, 287 (citation omitted)), they create rights or immunities within the meaning of section 1983.<sup>11</sup>

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<sup>11</sup> The Commissioner asserts that the United States, in its filing with this Court in *Garamendi*, corrected “some of the ‘misunderstandings’ reflected in plaintiffs’ brief in that appeal concerning what the government had agreed to do,” indicating that the Federal Government did not “undertake to achieve any duty to achieve ‘legal peace’ for German companies.” Appellee’s Br. 27 (citing SER 69-70). This assertion is both misleading and immaterial. The United States’ appellate brief in *Garamendi* acknowledged “various unprecedented undertakings in the Agreement,” including the Federal Government’s commitment to file statements urging that litigation against the affected companies not proceed, but the Government also indicated that it had not “undertaken a ‘duty . . . to achieve’ legal peace for German companies.” SER 70. The crucial point for present purposes, however, is that – notwithstanding any limits on the guarantees provided by the United States regarding litigation against the companies – the Supreme Court has held the federal policy regarding state statutes like the HVIRA to be preemptive and enforceable. And it is undeniable that this policy was intended, in part, to benefit the companies.

## **2. The Constitution’s foreign affairs principle creates rights or immunities**

The same outcome would be obtained if the decision in *Garamendi* were thought to rest directly on the Constitution’s foreign affairs principle rather than the executive agreements, because that principle is itself a source of rights or immunities within the meaning of section 1983. In arguing to the contrary, the Commissioner does not deny that the claims asserted by the plaintiffs here fall within the “zone of interests” protected by the foreign affairs principle; instead, his argument reduces to the assertion that satisfaction of the zone of interests test does not make out the existence of a section 1983 right or immunity. Appellee’s Br. 28-34. In the context of a claim based on a provision of the Constitution, the Commissioner’s contention is wrong.

We agree that, where a *non-constitutional* source of law is at issue, a showing that the plaintiff falls within the zone of interests protected by the law is not sufficient to establish the existence of a “right”; “[f]or a statute to create such private rights, its text must be ‘phrased in terms of persons benefited.’” *Gonzaga Univ.*, 536 U.S. at 284 (citation omitted). But the Supreme Court has applied a different test to constitutional provisions. In *Dennis v. Higgins*, 498 U.S. 439 (1991), the Court held that the Commerce Clause creates rights under section 1983, even though that Clause surely is not “phrased in terms of persons benefited.”

Indeed, by its plain terms the Clause is a simple grant of affirmative authority to Congress. Thus, under the Commissioner’s standard, *Dennis* was wrongly decided.

To be sure, the Court in *Dennis* noted that prior decisions had characterized the Commerce Clause as conferring a “right” to engage in interstate trade. 498 U.S. at 448-449. But in stating its holding, the *Dennis* Court was clear:

[T]he Commerce Clause does more than confer power on the Federal Government; it is also a substantive “restriction on permissible state regulation” of interstate commerce. \* \* \* The Commerce Clause “has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce.” \* \* \* In addition, individuals injured by state action that violates this aspect of the Commerce Clause may sue and obtain injunctive and declaratory relief. \* \* \* *This combined restriction on state power and entitlement to relief under the Commerce Clause amounts to a “right, privilege, or immunity” under the statutory meaning of those terms.*

*Id.* at 447 (emphasis added) (citations omitted). Under this test, which turns on the existence of a constitutional “restriction on state power” and the plaintiff’s “entitlement to relief,” the foreign affairs principle likewise creates rights or immunities under section 1983.

There can be no doubt that the Court understood its holding in *Dennis* to establish just that principle. As we noted in our opening brief (at 43-44), Justice Kennedy and Chief Justice Rehnquist dissented in *Dennis*, complaining that

[t]he Court’s analysis demonstrates the poverty of the “intended to benefit” test *in the constitutional context*, for

it shows that even structural provisions that benefit individuals incidentally come within its purview. The Court's logic extends far beyond the Commerce Clause, and creates a whole new class of § 1983 suits derived from Article I. For example, the Court's rationale creates a § 1983 cause of action when a State \* \* \* interferes with the federal power over foreign relations \* \* \*.

498 U.S. at 463 (Kennedy, J., dissenting) (citing *Zschernig*) (emphasis added).

Although the *Dennis* majority responded to the dissent and expressly rejected Justice Kennedy's "distinction between power-allocating and rights-conferring provisions of the Constitution" (*id.* at 445 n.4), it pointedly did *not* suggest that the dissent misstated the Court's holding. The Commissioner entirely fails to address this point, which is fatal to his argument.

\* \* \* \*

Prevailing "[p]laintiffs in § 1983 actions 'should ordinarily recover attorney's fees.'" *Bauer v. Sampson*, 261 F.3d 775, 785 (9th Cir. 2001) (quoting *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968)). That rule furthers the central policies of sections 1983 and 1988: "fee awards are an integral part of the remedies necessary to obtain" compliance with the civil rights laws. *Hamner v. Rios*, 769 F.2d 1404, 1407-1408 (9th Cir. 1985). The Commissioner's approach, however, would cut back significantly on the ability of successful civil rights plaintiffs to obtain fees, penalizing such litigants and, in the worst case, discouraging the vindication of constitutional rights. The Court accordingly should

reject the Commissioner's cramped construction of sections 1983 and 1988, and should instead apply the controlling rule stated in *Maier* and *Carreras*.

### CONCLUSION

For the foregoing reasons and those stated in the opening brief, the order of the district court should be reversed and the case remanded for the award of attorneys' fees to plaintiffs.

October 8, 2004

Respectfully submitted,

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## 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' Reply Brief is:

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\_\_\_\_\_  
Charles A. Rothfeld

October 8, 2004

## CERTIFICATE OF SERVICE

The undersigned certifies that on October 8, 2004, he caused the foregoing Appellants' Reply Brief to be filed and served as follows:

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