
No. 07-56722

In the United States Court of Appeals for the Ninth Circuit

REVEREND FATHER VAZKEN MOVSESIAN, *et al.*, Plaintiffs-Appellees,

vs.

VICTORIA VERSICHERUNG AG, *et al.*, Defendants,
MUNCHENER RUCHVERSICHERUNGS-GESELLSCHAFT AKTIENGESELLSCHAFT AG, Defendant-Appellant.

On Interlocutory Appeal From an Order of the United States District Court For the Central District of California

The Honorable Christina A. Snyder

District Court No. CV-03-9407

BRIEF OF AMICI CURIAE HUMAN RIGHTS ORGANIZATIONS IN SUPPORT OF PLAINTIFFS-APPELLEES AND REHEARING

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STATEMENT OF CONSENT TO FILE

All parties to this appeal have consented to the filing of this brief pursuant to Federal Rule of Appellate Procedure 29(a) and Ninth Circuit Rule 29-2(a).

STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE

EarthRights International (ERI) is a non-profit human rights organization which litigates and advocates on behalf of victims of abuses worldwide. ERI is counsel in several transnational lawsuits asserting state-law claims, such as *Bowoto v. Chevron Corp.*, No. 99-02506 (N.D. Cal.), No. 09-15641 (9th Cir.), which alleges that California corporations are liable under, *inter alia*, California state law for their complicity in abuses in Nigeria. ERI therefore has an interest in ensuring that state-law claims arising out of human rights abuses committed abroad are not improperly dismissed for perceived interference with federal foreign affairs powers.

The Center for Constitutional Rights (CCR) is a non-profit legal and educational organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. CCR litigates many significant international human rights cases, including those asserting state law claims, including *Bowoto v. Chevron Corp.*, and currently *Saleh v. CACI Int'l Inc.*, No. 08-7008; No. 08-7009, 2009 U.S. App.

LEXIS 20435 (D.C. Cir. Sept. 11, 2009). The Court's disposition in this case is therefore of great interest to CCR and the people we represent.

STATEMENT OF THE ISSUE ADDRESSED BY AMICI CURIAE

The narrow question amici address is whether speeches and letters by the President and other executive branch officials can carry the authority to preempt state law under the foreign affairs conflict preemption doctrine, where the President's actions are not within any expressly delineated powers granted by the Constitution, statute, or treaty, and where they do not rise to the same level of historical acceptance and congressional acquiescence as the practice of making executive agreements to settle civil claims between Americans and foreign entities.

SUMMARY OF ARGUMENT

The panel's decision to preempt California Code of Civil Procedure § 354.4 based upon speeches and letters of the President and other executive officials is manifestly at odds with the delicate balance between state and federal prerogatives struck by the Supreme Court in its foreign affairs preemption jurisprudence and reaffirmed as recently as last year.

Foreign affairs conflict preemption requires, as its starting point, federal

action with the force of law that is therefore "fit to preempt" state law. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 416 (2003). Typically such authority comes from the Constitution, statutes and treaties; the Supreme Court has recognized an exception to this rule for executive agreements negotiated by the President to settle civil claims between Americans and foreign entities. The Court made clear in *Medellin v. Texas*, 128 S. Ct. 1346, 1371 (2008), that the preemptive force of executive agreements involves a "narrow set of circumstances" that does not apply generally to executive action, including memoranda from the President.

No express authority from the Constitution suggests that the President may unilaterally control the use of the term "genocide" or prohibit states from using the phrase "Armenian genocide." Nor is there any longstanding practice equivalent to that of making executive agreements that would support such a presidential power. Even if this is the policy of the current administration, such a policy extends back no further than the 1980s.

No foreign affairs preemption case has ever afforded executive branch officials such unlimited power as the panel decision creates, nor has any such case ever placed so much state authority on such tenuous footing. Amici therefore urge rehearing by the panel or by the Court *en banc*.

ARGUMENT

I. Foreign affairs conflict preemption requires a federal act that is "fit to preempt" state law.

As this Court has recognized, "foreign affairs" preemption covers two related but distinct doctrines: "field preemption" and "conflict preemption." *Saher v. Norton Simon Museum of Art of Pasadena*, __ F.3d __, 2009 U.S. App. LEXIS 18604, *11–13, *20 (9th Cir. Aug 19, 2009). Field preemption considers whether state law intrudes upon federal prerogatives in the field of foreign policy, even in the absence of any conflict with federal activity. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 418–19 (2003) [hereinafter "*Garamendi*"]. Conflict preemption considers whether state law interferes with an affirmative federal foreign policy act. *Id.* The panel here applied only the conflict preemption doctrine; it did not address field preemption. Amici do likewise herein.[1]

Conflict preemption requires, as its starting point, a federal act that has the power to preempt, or is "fit to preempt," state law. *Garamendi*, 539 U.S. at 416. Under the Supremacy Clause, certain sources — the "Constitution," the "laws of

[1] Amici submit, however, that field preemption would not apply here, largely for the reasons discussed in *Cruz v. United States*, 387 F. Supp. 2d 1057, 1075–77 (N.D. Cal. 2005). As in *Cruz*, it is significant here that "the United States . . . has not filed a statement of interest representing that the California statute threatens its relations" with Turkey. *Id.* at 1077. Field preemption generally only displaces state laws where the state "establish[es] its own foreign policy." *Deutsch v. Turner*, 324 F.3d 692, 709 (9th Cir. 2005).

the United States," and "treaties" — are the "supreme law of the land," and can preempt state law. U.S. Const., art. VI, § 2. Conflict preemption, therefore, only applies to actions of the political branches carrying the force of law; federal acts lacking the legal force cannot preempt state law. *See, e.g. S. Pac. Transp. Co. v. Pub. Util. Comm'n*, 9 F.3d 807, 812 n.5 (9th Cir. 1993); *Wabash Valley Power Ass'n v. Rural Electrification Admin.*, 903 F.2d 445, 454 (7th Cir. 1990) ("We have not found any case holding that a federal agency may preempt state law without either rulemaking or adjudication."); *see also Garamendi*, 539 U.S. at 442 (Ginsburg, J., dissenting) (no authority grants executive branch officials "the power to invalidate state law simply by conveying the Executive's views on matters of federal policy").[2]

The requirement that conflict preemption be based on acts with the force of law holds true even in the foreign policy arena. The panel here cites Chief Justice Roberts's opinion for the Court in *Medellin v. Texas*, 128 S. Ct. 1346 (2008), for the proposition that "the President has the 'lead role' in making 'sensitive foreign policy decisions.'" Slip op. at 11430 (quoting 128 S. Ct. at 1367). But the subsequent analysis in *Medellin* makes clear that *despite* "plainly compelling" federal foreign policy interests, "[s]uch considerations . . . do not allow us to set

[2] Nothing in the majority opinion in *Garamendi* conflicts with this point from the dissent.

aside first principles. The President's authority to act, as with the exercise of any governmental power, 'must stem either from an act of Congress or from the Constitution itself.'" 128 S. Ct. at 1368 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952)). Thus *Medellin* was primarily focused on searching for a possible basis — either a ratified treaty, *see* 128 S. Ct. at 1368–71, or some independent power of the President, *id.* at 1371–72 — that would give the President the authority to displace state law.

Medellin made clear that Presidential memoranda do not generally carry the force of law, even where they implicate important foreign affairs interests. Aside from powers derived from statutes and treaties, or powers expressly granted by the Constitution, the only other "narrow set of circumstances" in which the *Medellin* Court recognized preemptive authority involves "the making of executive agreements to settle civil claims between American citizens and foreign governments or foreign nationals." *Id.* at 1371. The President's power to make such agreements has "been exercised since the early years of the Republic," and the practice "has received congressional acquiescence throughout its history." *Garamendi*, 539 U.S. at 415. Such agreements are "legally binding," *Barclays Bank Plc v. Franchise Tax Bd.*, 512 U.S. 298, 329 (1994), and have long been held to have "the full force of law." *United States v. Walczak*, 783 F.2d 852, 856 (9th Cir. 1986) (citing *United States v. Pink*, 315 U.S. 203 (1942)).

Neither *Medellin* nor *Garamendi* suggested that, aside from powers granted by statute, treaty, or the Constitution, as well as executive agreements to settle international disputes, there was any other relevant authority that would allow the President to preempt state law. Here, the panel misinterpreted *Garamendi* in stating that the executive agreements there were "not central to the Court's finding of preemption." Slip op. at 11430 (citing *Garamendi*, 539 U.S. at 417). Nothing in the cited materials supports this conclusion. Although *Garamendi* relied on executive branch statements to illuminate the policy animating the executive agreements, *see* 539 U.S. at 411 & 422, it does not suggest that such a statement alone has preemptive force, or that the state statute at issue would have been preempted in the absence of an executive agreement. Indeed, *Medellin* noted that, with respect to executive agreements, "the limitations on this source of executive power are clearly set forth," 128 S. Ct. at 1372, and emphasized that the "authority to settle international claims disputes pursuant to an executive agreement" is "narrow and strictly limited." *Id.* "[T]he Court has been careful to note that '[p]ast practice does not, by itself, create power.'" *Id.* (quoting *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981)).

The Supreme Court's decision in *Barclays Bank* is also instructive. There, in the analogous foreign commerce clause context, the Court rejected the contention that amicus briefs or letters from the administration to a state governor

had the power to preempt, finding they "lack the force of law." 512 U.S. at 328–30 & n.30. Indeed, the Supreme Court considered this point so indisputable that it used it in another context as an example of a "broken circle" of logic: "[T]hat Executive agreements may displace state law . . . and that unilateral presidential action (renunciation) may displace Executive agreements, does not produce the 'logical' conclusion that unilateral presidential action may displace state law." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 97 n.2 (1998) (citation omitted).

The panel's opinion does not ground the President's authority in any statute, treaty, or executive agreement.[3] Rather, the panel held that the President's power to prevent states from using the phrase "Armenian genocide" flows directly from the Constitution or, in the alternative, from a longstanding practice to which Congress has acquiesced.

II. No express constitutional authority grants the President lawmaking power over use of the term "genocide."

The panel first held that the Constitution itself provided authority for affording preemptive power to the policy that it identified — a presidential

[3] Amici express no opinion on whether "the Claims Agreement of 1922, and the War Claims Act of 1928," slip op. at 11424, might provide an adequate basis for preemption. *Compare Movsesian v. Victoria Versicherung AG*, No. CV-03-09407 CAS (C.D. Cal. filed June 7, 2007), slip op. at 28–30, *with Deirmenjian v. Deutsche Bank, A.G.*, 526 F. Supp. 2d 1068, 1079–89 (C.D. Cal. 2008).

prohibition on the use of the phrase "Armenian genocide" by the states. The panel stated that "the presidential policy concerns national security, a war in progress, and diplomatic relations with a foreign nation. . . . The President acts well within his constitutionally delegated powers by developing and enforcing the policy refusing to provide official recognition to an 'Armenian Genocide.'" Slip op. at 11430, 11431. But the panel never precisely identifies which provision of the Constitution grants this specific power to create binding law. As *Medellin* clearly held, the mere fact that the subject matter "concern[s] national security" or "diplomatic relations" is insufficient.

The panel identifies three potentially relevant clauses of the Constitution. Slip op. at 11430. Article II, section 2, clause 1 provides that the President is the Commander-in-Chief; article II, section 2, clause 2 grants powers to make treaties and appoint ambassadors; and article II, section 3 grants powers to receive ambassadors and to execute the laws. None of these remotely touches on the power suggested by the panel here. The panel's error was in assuming that the constitutional foreign affairs authority of the President is a general one. This is exactly what the *Medellin* Court rejected, by insisting on a specific basis in law for the President's action in that case.

The President generally has the power to execute federal law, not to unilaterally create. *Youngstown*, 343 U.S. at 587 ("[T]he President's power to see

that the laws are faithfully executed refutes the idea that he is to be a lawmaker."); *accord Hamdan v. Rumsfeld*, 548 U.S. 557, 591–92 (2006). Indeed, both *Youngstown* and *Hamdan* rejected executive assertions of the authority to make law regarding matters related to an ongoing war. *Youngstown*, 343 U.S. at 583, 590 (rejecting President Truman's claim of authority to seize steel mills to support national defense, including prosecution of the Korean War); *Hamdan*, 548 U.S. at 567 (rejecting procedures President established to try prisoner captured during war). These cases both involved "a war in progress," slip op. at 11430, and the presidential action was far more overt and arguably more connected to the prosecution of the war than the implied policy at issue here.

III. There is no longstanding practice that would give the President's letters and speeches the force of law in prohibiting the use of the term "genocide."

The panel's opinion alternatively posits that, in the absence of any express constitutional authority to act, the President's power to restrict the use of the term "genocide" has legal force because it is a longstanding practice to which Congress has acquiesced. Slip op. at 11431. There are several ways to characterize such a practice, but none of them has preemptive force.

Medellin makes clear that, in granting preemptive force to executive agreements, *Garamendi* relied on the President's "narrow and strictly limited authority to settle international claims," 128 S. Ct. at 1372, not some generalized

executive power in the foreign affairs realm. By contrast, the practice at issue in *Medellin* — that of issuing directives to state courts — was "not supported by a 'particularly longstanding practice' of congressional acquiescence." *Id*. If the practice at issue here is characterized in a similar way — as a presidential attempt to compel states not to recognize the Armenian genocide — the same result obtains. As in *Medellin*, no one has "identified a single instance in which the President has attempted (or Congress has acquiesced in)" an attempt to prohibit the states from using the phrase "Armenian genocide," *see id*.; indeed, the President has not even objected to section 354.4. While the panel found no evidence that the federal government had opposed the express recognition of the "Armenian genocide" by numerous states, it cited *Deutsch v. Turner* for the proposition that, "[a]bsent explicit authorization, states may not modify or alter the nation's foreign policy." Slip op. at 11434, 11435. But *Deutsch* concerned a situation where the federal government had the exclusive power to resolve wartime claims. *See* 324 F.3d at 714. This reasoning only applies here if the President generally enjoys the exclusive power to use the term "genocide."

Recent practice refutes the notion of a presidential monopoly on the term "genocide." Far from deferring to any general executive authority over the term "genocide," Congress has used the word to describe a contemporary situation prior to the executive branch doing so and has called upon the executive to do likewise.

See, e.g., H.R. Con. Res. 467, 108th Cong. (2004) (passed by House); S. Con. Res. 133, 108th Cong. (2004) (passed by Senate).

Finally, one could characterize the practice as the panel did, as a longstanding practice of not using the specific phrase "Armenian genocide." Amici submit that, in the absence of a *generalized* power to control the use of the word "genocide," the President could not have such a *specific* power to control the use of that word in connection with the Armenian experience. Nonetheless, this practice is not longstanding. While executive agreements date back over two centuries, any congressional "acquiescence" regarding the term "Armenian genocide" dates back, at most, to 1984. In 1981, President Reagan referred to "the genocide of the Armenians."[4] In 1984, the House of Representatives passed a resolution recognizing "victims of genocide, especially those of Armenian ancestry." H.R.J. Res. 247, 98th Cong. (1984) (passed by House).

Although the panel pointed to three "failed" House resolutions over the past decade, this is too brief to qualify as "a particularly longstanding practice." *Garamendi*, 539 U.S. at 415. It is also too speculative regarding Congress's intent. Congress did not vote down the resolutions in the face of presidential opposition; it simply did not act on them. Many resolutions introduced in

[4] Proclamation 4838 (Apr. 22, 1981), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=43727.

Congress never reach the floor, so the fact that these three resolutions never saw a floor vote suggests little other than that providing recognition to "Armenian genocide" was not a high priority of the House of Representatives.[5] Nonetheless, assuming that there is an executive policy against the federal government use the phrase "Armenian genocide," there is no evidence of a policy that states should not use this term, let alone a longstanding practice, purporting to carry the force of law, to which Congress has acquiesced.

In *Barclays Bank*, the Supreme Court considered whether a state tax law was preempted by the foreign commerce clause because it allegedly interfered with the federal government's ability to speak with one voice in international trade. 512 U.S. at 320. The state law had engendered considerable diplomatic protest from other nations. *Id.* at 324, n.22. The Court, however, held that only Congress, not the President or the judiciary, has the authority "to evaluate whether the national interest is best served by [] uniformity, or state autonomy." *Id.* at 328–29, 331. Indeed, the Court disavowed any competence to determine whether

[5] In the 110th Congress, 686 proposed House Resolutions apparently went no further than "introduced" in the House. *See* The Library of Congress, THOMAS, "List of Bills Introduced in the 110th Congress," *at* http://thomas.loc.gov/home/c110bills.html. Simply because these bills did not reach the floor does not suggest that Congress opposes raising awareness of eating disorders, *see* H.R. Res. 13, 110th Cong. (2007), opposes honoring Tony Gwynn's entry into the Baseball Hall of Fame, *see* H.R. Res. 83, 110th Cong. (2007), or opposes honoring patients in clinical trials, *see* H.R. Res. 248, 110th Cong. (2007).

a state law interfered with Congress' ability to speak with the voice of the nation in foreign affairs, or whether conversely Congress had decided to allow the state to act. 512 U.S. at 324–31. Noting that "[t]he judiciary is not vested with the power" to decide how to balance the competing concerns involved, *id.* at 328, the Court presumed that a lack of "specific indications of congressional intent to bar" state law affecting foreign commerce indicates "Congress' willingness to tolerate" such law. *Id.* at 324, 327; *accord id.* at 332 (Scalia, J., concurring) (noting that the Court's decision "requires no more than legislative inaction to establish that 'Congress implicitly has *permitted*'" state's law) (quoting *id. at* 326) (emphasis in original).

To be sure, *Barclays Bank* was based in part on the fact that "the Constitution grants Congress, not the President, the power to 'regulate Commerce with foreign Nations.'" *Id.* at 329 (quoting U.S. Const. art. I, § 8, cl. 3). But *Barclays Bank* also implicitly recognizes that, in areas other than foreign commerce, the President's preemptive foreign affairs powers are derived either from the Constitution or from a congressional grant of authority, or exercised pursuant to an executive agreement. Although the situation was not presented in *Barclays Bank*, the Supreme Court there noted that, in another case, Congress might delegate preemptive authority to the President "by a statute or a ratified treaty." *Id.* at 329. In the absence of such a delegation, the Court only

contemplated that the President might preempt state law "pursuant to a legally binding executive agreement." *Id*. The Court specifically declined to consider when such unilateral executive action might preempt state law precisely because the only Executive Branch communications at issue in *Barclays Bank* were those "that express federal policy but lack the force of law." *Id.* at 330. Federal policy, therefore, is insufficient to preempt without the force of law. As in *Medellin*, the only mechanism even contemplated by *Barclays Bank* through which the Executive might preempt traditional state authority without congressional action is an executive agreement. *Barclays Bank* would be nullified if the Executive could preempt state law based on some general foreign affairs authority.[6]

IV. Affording preemptive force to a "presidential foreign policy preference" expressed only in speeches and letters raises serious federalism concerns.

The panel's opinion allowing speeches and letters from the President to displace state law gives insufficient attention to concerns for state sovereignty. Under *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 550–51 (1985), states are usually protected against federal intrusion by their representation in the federal political process. Allowing federal courts to override

[6] Indeed, since international trade policy is a facet of U.S. foreign policy, affording the President general foreign affairs preemptive power would allow the President unilaterally to regulate international commerce through preemption of state rules, in violation of the foreign commerce clause, by simply declaring that such action was taken pursuant to his authority to "manage foreign affairs."

state powers without explicit congressional direction "'would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests.'" *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1990) (quoting Laurence H. Tribe, American Constitutional Law § 6-25, at 480 (2d ed. 1988)). These concerns counsel strongly against allowing preemption based solely on Presidential policy preferences, for two reasons.

First, the requirement that the President must take the public, high-profile step of negotiating an executive agreement — or equivalent action with the force of law — affords a measure of political protection to states. "Our Framers established a careful set of procedures that must be followed before federal law can be created under the Constitution — vesting that decision in the political branches, subject to checks and balances." *Medellin*, 128 S. Ct. at 1362. Allowing the President to circumvent these procedures, and preempt state law simply by expressing a policy preference in speeches and letters to Congress, would eviscerate the states' protections. Indeed, because the barriers to such preferences are so low, the panel's doctrine would create a prescription for chaos. With a few speeches by the President and congressional failure to act, state laws could be invalidated; with another speech reversing the policy preference, the same law could be resurrected. At the moment, California could presumably amend section 354.4 to refer to Armenian victims of "massacres," the term used by

President Clinton,[7] or to victims of "annihilation," the term used by President George W. Bush,[8] or to victims of the "*Meds Yeghern*," the Armenian word for genocide most recently used by President Obama.[9] Or, if President Obama fulfills his promise that "as President I will recognize the Armenian genocide,"[10] the panel's decision would no longer hold any weight. Surely preemption of state law cannot be premised on such ephemera.

The second reason to require a more formalized lawmaking process before preempting state law is that, while "the hurdles to political branch correction of untoward state foreign relations activity are relatively insignificant. . . . the erroneous federalization of [state] law . . . will not trigger the political branches' special means to monitor and control adverse foreign relations activity." Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 Va. L. Rev. 1617, 1693–94 (1997). Thus, if a state goes too far in intruding upon foreign

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[7] "Statement of the President" (April 23, 1995), *available at* http://clinton6.nara.gov/1995/04/1995-04-23-president-on-anniversary-of-armenian-massacres.html.

[8] "Armenian Remembrance Day" (April 24, 2004), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2004/04/20040424-1.html.

[9] "Statement of President Barack Obama on Armenian Remembrance Day" (April 24, 2009), *available at* http://www.whitehouse.gov/the_press_office/Statement-of-President-Barack-Obama-on-Armenian-Remembrance-Day/.

[10] "Barack Obama on the Importance of US-Armenia Relations" (January 19, 2008), *available at* http://www.barackobama.com/2008/01/19/barack_obama_on_the_importance.php.

relations, the political branches can protect themselves; if the courts go too far in preempting state law, states are largely helpless.

These concerns have special weight here, where the only identified problem with section 354.4 is the *label* chosen by the legislature. Before determining that federal law requires the unprecedented conclusion that states are prohibited from using certain *words* in their statutes,[11] this Court should require action that has traditionally been held to have the force of law.

CONCLUSION

For the foregoing reasons, amici urge this Court to grant the petition for panel rehearing or, in the alternative, for rehearing *en banc*.

DATED: September 21, 2009

Respectfully submitted,

s/ Marco Simons

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[11] Although it is admittedly an open question whether states have First Amendment rights, basic principles of federalism suggest limits on the federal government's restriction of speech by states and local governments. *See e.g.*, Matthew C. Porterfield, *State and Local Foreign Policy Initiatives and Free Speech: The First Amendment as an Instrument of Federalism*, 35 Stan. J. Int'l L. 1, 33–35 (1999) (collecting cases); *but see*, *e.g.*, *Ceballos v. Garcetti*, 361 F.3d 1168, 1190 (9th Cir. 2004) (O'Scannlain, J., specially concurring).

[*]In the interests of full disclosure, counsel Marco Simons was a law clerk for the Hon. Dorothy Wright Nelson during 2002–2003.

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1

Case No. 07-56722

I certify that, pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 4200 words or less, according to WordPerfect, the word-processor used to create the brief.

DATED: September 21, 2009

Respectfully submitted,

s/ Marco Simons
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9th Circuit Case Number(s) 07-56722

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