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No. 07-56722

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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**MOVSESIAN, *et al.*,**

***Plaintiffs and Appellees,***

**v.**

**VICTORIA VERSICHERUNG AG, *et al.*,**

***Defendants and Appellants.***

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On Appeal From An Order Of The United States District Court For The Central  
District Of California, No. CV-03-9407 CAS,  
The Honorable Christina A. Snyder, United States District Judge

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**BRIEF *AMICUS CURIAE* OF THE REPUBLIC OF TURKEY  
IN SUPPORT OF APPELLANTS'  
PETITION FOR REHEARING *EN BANC***

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## TABLE OF CONTENTS

	<b>Page</b>
INTEREST OF THE AMICUS CURIAE .....	1
ARGUMENT .....	1
I.    SECTION 354.4 IMPAIRS THE FOREIGN RELATIONS OF TURKEY AND THE UNITED STATES .....	1
A.    Efforts in the United States to characterize World War I era events in the Ottoman Empire as the crime of genocide have been an unfortunate element of the otherwise lasting and rich bilateral relationship between Turkey and the United States.....	1
1.    Background .....	1
2.    Recent legislative efforts to validate the Armenian allegation of genocide failed after intervention by the Obama administration, which took into account Turkish diplomatic initiatives, including the recall of its Ambassador.....	2
3.    The U.S. speaks with one voice in foreign policy and listens with one pair of ears .....	9
II.    SECTION 354.4 OFFENDS TURKEY’S SOVEREIGNTY BY LEGISLATING TURKISH HISTORY AND BY DECLARING TURKEY AND ITS PREDECESSOR STATE GUILTY OF THE CRIME OF GENOCIDE.....	11
CONCLUSION .....	12
CERTIFICATE OF COMPLIANCE .....	14
CERTIFICATE OF SERVICE.....	15

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
 <b>CASES</b>	
<i>American Ins. Assn. v. Garamendi</i> , 539 U.S. 396 (2003) .....	9
<i>Crosby v. National Foreign Trade Council</i> , 530 U.S. 363 (2000) .....	10
<i>Hines v. Davidowitz</i> , 312 U.S. 52 (1941) .....	9
<i>The Chinese Exclusion Case</i> , 130 U.S. 581 (1889) .....	9
<i>United States v. Belmont</i> , 301 U.S. 324 (1937) .....	9
<i>United States v. Pink</i> , 315 U.S. 203 (1942) .....	9
<i>Zschernig v. Miller</i> , 389 U.S. 429 (1968) .....	10
 <b>STATUTES</b>	
18 U.S.C. § 1901 .....	11
California Code of Civil Procedure Section 354.4 .....	<i>passim</i>
 <b>OTHER AUTHORITIES</b>	
H.R. Rep. 111-622 (2010) .....	5
 <b>OTHER MATERIALS</b>	
Convention on the Prevention and Punishment of the Crime of Genocide. 78 U.N.T.S. 277 (Jan. 12, 1951) .....	11
H. Res. 106 110th Cong. (2007).....	5
H. Res. 252 111th Cong. (2010).....	4-8, 13

Edward J. Erickson, *The Armenians and Ottoman Military Policy 1915*,  
 15 War in History 141 (April 2008).....4

Guenter Lewy, *The Armenian Massacres in Ottoman Turkey, A Disputed  
 Genocide* (Univ. of Utah Press 2005) .....4

Jeremy Salt, *The Unmaking of the Middle East*  
 (Univ. of Cal. Press 2008).....4

Justin McCarthy, *Death and Exile: The Ethnic Cleansing of Ottoman  
 Muslims, 1821-1922* (Darwin Press 1996).....4

Letter from Nabi Sensoy, Ambassador, to Molly Dwyer, Clerk of the Court  
 (Dec. 4, 2008).....2, 10

Letter from Member of Parliament Mercan to Representative Berman  
 (March 11, 2010)..... 5-6

Philip J. Crowley, *Daily Press Briefing*, U.S. Department of State (March 5,  
 2010), <http://www.state.gov/r/pa/prs/dpb/2010/03/137870.htm> .....5

Philip J. Crowley, *Daily Press Briefing*, U.S. Department of State (Dec. 17,  
 2010), <http://www.state.gov/r/pa/prs/dpb/2010/12/153124.htm> .....6

Philip J. Crowley, *Daily Press Briefing*, U.S. Department of State (Dec. 20,  
 2010), <http://www.state.gov/r/pa/prs/dpb/2010/12/153216.htm>. .... 6-7

*President Obama Fails to Honor Pledge to Affirm the Armenian Genocide*  
 (April 24, 2010), <http://www.aaainc.org/index.php?id=722&type=98>.....9

*President Obama Retreats From Armenian Genocide Pledge* (April 24,  
 2010),  
[http://www.anca.org/press\\_releases/press\\_releases.php?prid=1701](http://www.anca.org/press_releases/press_releases.php?prid=1701).....8

*Remarks and a Question-and-Answer Session With Editors and Station  
 Managers of Ethnically Oriented Publications and Radio Stations* (Oct.  
 18, 1983),  
<http://www.reagan.utexas.edu/archives/speeches/1983/101883a.htm> .....3

*Remarks by President Obama and Turkish Prime Minister Erdogan After  
 Meeting*, The White House, Office of the Press Secretary (Apr. 9, 2009),  
<http://www.whitehouse.gov/the-press-office/remarks-president-and-pm-turkey-after-meeting>..... 1

*Remarks by President Obama and Prime Minister Erdogan of Turkey After Meeting*, The White House, Office of the Press Secretary (Dec. 7, 2009), <http://www.whitehouse.gov/the-press-office/remarks-president-obama-and-prime-minister-erdogan-turkey-after-meeting>. ..... 1, 2

*Secretary Clinton Comments on Turkey and Armenia*, U.S. Department of State, Consulate General in Istanbul, Turkey (March 4, 2010), [http://istanbul.usconsulate.gov/pr\\_030410.html](http://istanbul.usconsulate.gov/pr_030410.html) ..... 4-5

Umit Enginsoy, *Armenian ‘guerrilla attack’ in US Congress meets its Waterloo*, Hurriyet Daily News, Dec. 23, 2010, available at Hurriyet Daily News, Dec. 23, 2010, available at <http://www.hurriyetaidailynews.com/n.php?n=armenian-guerrilla-attack-dies-a-natural-death-2010-12-23>. ..... 8

*Written Responses to Questions Submitted by Hurriyet of Turkey* (Mar. 29, 1985), <http://www.reagan.utexas.edu/archives/speeches/1985/32985g.htm> ..... 3

**INTEREST OF THE *AMICUS CURIAE***

The interest of the sovereign state of the Republic of Turkey (“Turkey”) in this case is substantial; the California statute at issue impairs the foreign relations of Turkey and the United States while harming Turkey’s sovereign interests. Turkey’s concern is a continuing one, as it had previously attempted to alert the Court to the statute’s negative impact in a letter dated December 4, 2008.

The matters asserted herein are relevant to the disposition of this case because the panel’s opinion dated December 10, 2010 considers at length whether and to what extent Section 354.4 of the California Code of Civil Procedure impacts the foreign relations of the United States, and no one can speak with more authority as to the Turkey – United States bilateral relationship than the state participants.

## ARGUMENT

### I. SECTION 354.4 IMPAIRS THE FOREIGN RELATIONS OF TURKEY AND THE UNITED STATES.

#### A. Efforts in the United States to characterize World War I era events in the Ottoman Empire as the crime of genocide have been an unfortunate element of the otherwise lasting and rich bilateral relationship between Turkey and the United States.

##### 1. Background.

President Barack Obama chose Turkey for his first bilateral transatlantic visit in April 2009. After meeting with Turkey's Prime Minister, Recep Tayyip Erdogan, he declared, "Turkey is a critical strategic partner with the United States, not just in combating terrorism, but in developing the kind of economic links, cultural links and political links that will allow both countries to prosper and I truly believe the entire region and the world to prosper." *Remarks by President Obama and Turkish Prime Minister Erdogan After Meeting*, The White House, Office of the Press Secretary (Apr. 9, 2009), <http://www.whitehouse.gov/the-press-office/remarks-president-and-pm-turkey-after-meeting>. The President reiterated this assessment during Prime Minister Erdogan's reciprocal visit to the White House in December 2009, noting that he was, "incredibly optimistic about the prospect of stronger and stronger ties between the United States and Turkey that will be based not only on our NATO relationship, our military-to-military relationship, our strategic relationship, but also increasing economic ties." *Remarks by President Obama and Prime Minister Erdogan of Turkey After Meeting*, The White House,

Office of the Press Secretary (Dec. 7, 2009), <http://www.whitehouse.gov/the-press-office/remarks-president-obama-and-prime-minister-erdogan-turkey-after-meeting>.

The two nations work shoulder-to-shoulder to promote security and stability in a vast area from Europe to Asia and Africa, to earnestly counter the threat of terrorism around the globe and to address long-simmering international conflicts.<sup>1</sup>

As stated in then-Ambassador Sensoy's letter to this court in December 2008, Turkey acknowledges the "tremendous mutual suffering of Ottoman Armenians and Turks during the last years of the Ottoman Empire ...." Letter from Nabi Sensoy, Ambassador, to Molly Dwyer, Clerk of the Court (Dec. 4, 2008) (attached as Exhibit 1). But acknowledging nearly century old wartime misery does not justify the label of the crime of genocide that the California legislature has decided to impose on a foreign sovereign.

**2. Recent legislative efforts to validate the Armenian allegation of genocide failed after intervention by the Obama administration, which took into account Turkish diplomatic initiatives, including the recall of its Ambassador.**

To determine whether Section 354.4 has a direct effect upon or conflicts with foreign relations, one may evaluate the various attempts by the U.S. Congress and state governments to pass legislation validating an Armenian genocide and

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<sup>1</sup> The two nations' ties are substantial. Over 120,000 Turks enjoy U.S. citizenship and at least 700,000 Americans visit Turkey each year. Approximately 1,000 American companies do business in Turkey and among them large corporations like Coca Cola, Ford Motor Company, JP Morgan, Microsoft, Procter and Gamble, Nike and General Electric direct their regional operations from Turkey.



Turkey's reaction to those efforts. Because the foreign policy strategies employed and policies adopted by one U.S. administration do not necessarily bind the next, the most relevant legislative attempts are those during the Obama administration.<sup>2</sup> The Obama administration's policy on the controversy is in lockstep with at least the prior two administrations, which has been to acknowledge the tragic deaths of Ottoman Armenian civilians during the World War I era, but to avoid labeling it as the crime of genocide, while arguing strongly against legislative actions that would validate the genocide allegation.

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<sup>2</sup> The panel reached back to the first year of the Reagan administration and beyond in an effort to assess the U.S. position. Op. Dec. 10, 2010 at 19657-58. But neither President Reagan's 1981 Proclamation, which focused on the Holocaust, nor his later actions support the panel's view of Reagan Administration policy on the genocide controversy. President Reagan explicitly disapproved of congressional action on the matter in October 1983 when he was asked, "I would like to know if the American Government has a stand on the Turkish genocide of the Armenians of 1915." The President responded: "[T]he *only official stand* that I can tell you we have is one opposed to terrorism on both sides." *Remarks and a Question-and-Answer Session With Editors and Station Managers of Ethnically Oriented Publications and Radio Stations* (Oct. 18, 1983), <http://www.reagan.utexas.edu/archives/speeches/1983/101883a.htm> (emphasis added). And in March 1985, when asked whether he would, "approve [of] congressional action on [a House resolution "referring to the so-called genocide in 1915]," President Reagan responded that his "*administration opposes congressional action on the kind of resolution to which you refer*. We are concerned such resolutions might inadvertently encourage or reward terrorist attacks on Turks and Turkish-Americans. We also oppose them because they could harm relations with an important ally." *Written Responses to Questions Submitted by Hurriyet of Turkey* (Mar. 29, 1985), <http://www.reagan.utexas.edu/archives/speeches/1985/32985g.htm> (emphasis added).

The administration's reaction to the 2010 version of such a resolution, H. Res. 252 is illuminating. Unambiguously titled, "Affirmation of the United States Record on the Armenian Genocide Resolution," this proposed resolution in the U.S. House of Representatives presented numerous inaccurate or misleading findings.<sup>3</sup> After the House Foreign Affairs Committee ("HFAC") announced that it would consider H. Res. 252 in March 2010, the Obama administration moved to counter the vote. Secretary Clinton fully articulated the administration's view on March 4, just prior to HFAC's consideration of the resolution, stating

When President Obama took office and I became Secretary of State, we determined that the process undertaken by the Swiss in bringing the ... Turkish and Armenian governments together was a very worthy one that we intended to support, and we have done so. I was personally in Zurich at the time that the protocols for the normalization of relationship between the two countries were signed. We think that is the appropriate way to manage the problems that have stood in the way of normalization between the two countries. Within the protocols, there was an agreed-upon approach to establishing a historical commission to look at events in the past. I do not think it is for any

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<sup>3</sup> Its first finding stated, "The Armenian Genocide was conceived and carried out by the Ottoman Empire from 1915 to 1923, resulting in the deportation of nearly 2,000,000 Armenians, of whom 1,500,000 men, women, and children were killed, 500,000 survivors were expelled from their homes, and which succeeded in the elimination of the over 2,500-year presence of Armenians in their historic homeland. H. Res. 252, 111<sup>th</sup> Cong. § 2(1) (2009). This ignored the great disagreement among scholars regarding such an assertion. *See, e.g.*, Edward J. Erickson, *The Armenians and Ottoman Military Policy 1915*, 15 *War in History* 141-167 (April 2008); Jeremy Salt, *The Unmaking of the Middle East*, 61-69 (Univ. of Cal. Press 2008), Guenter Lewy, *The Armenian Massacres in Ottoman Turkey, A Disputed Genocide*, (Univ. of Utah Press 2005), Justin McCarthy, *Death and Exile: The Ethnic Cleansing of Ottoman Muslims, 1821-1922*, 185-87, 193-95 (Darwin Press 1996).

other country to determine how two countries resolve matters between them, to the extent that actions that the United States might take could disrupt this process. *Therefore, both President Obama and I have made clear, both last year and again this year, that we do not believe any action by the Congress is appropriate, and we oppose it.*

*Secretary Clinton Comments on Turkey and Armenia*, U.S. Department of State, Consulate General in Istanbul, Turkey (March 4, 2010) [http://istanbul.usconsulate.gov/pr\\_030410.html](http://istanbul.usconsulate.gov/pr_030410.html) (emphasis added); see Philip J. Crowley, *Daily Press Briefing*, U.S. Department of State (March 5, 2010), <http://www.state.gov/r/pa/prs/dpb/2010/03/137870.htm> (“We continue to believe that the best way for Turkey and Armenia to address their shared past is through their ongoing effort to normalize relations. ... [And] Secretary [of State Clinton] made [our position] clear in a conversation with Chairman Berman earlier this week, ... [while] other officials have been talking to congressional staff for some time on this.”)

Deeply divided, the committee approved the resolution by a single vote, 23-22, on March 4, 2010. H.R. Rep. 111-622, at 2-3 (2010). Turkey immediately recalled its ambassador in protest, thus downgrading Turkey-U.S. relations.<sup>4</sup>

Turkish legislators also reacted. In a March 11, 2010 letter from Mr. Murat Mercan, Member of the Turkish parliament and Chair of its Foreign Affairs

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<sup>4</sup> Relations were similarly downgraded in October 2007 following approval by the same committee of a nearly identical resolution, H. Res. 106 during the 110th Congress, which the Bush administration had actively opposed.

Committee, to Mr. Howard Berman, Chair of HFAC, Mr. Mercan highlighted that, a visiting Turkish delegation had “underlined [its] concerns” and “the adverse consequences [the resolution’s] adoption would have for Turkey-US bilateral relations and our cooperation on a wide range of issues critical to US interests ....” Letter from Member of Parliament Mercan to Representative Berman (March 11, 2010) (attached as Exhibit 2).

When, days before the 111<sup>th</sup> Congress adjourned, Turkey learned that the Speaker of the House intended to bring H. Res. 252 to a vote by the full House of Representatives, the Obama administration again firmly resisted. On December 17, 2010 the U.S. State Department declared, “We are aware of a potential House Resolution 252, and *we strongly oppose that resolution*. We continue to believe that the best way for Turkey and Armenia to address their shared past is through their efforts to normalize relations.” Philip J. Crowley, *Daily Press Briefing*, U.S. Department of State (Dec. 17, 2010), <http://www.state.gov/r/pa/prs/dpb/2010/12/153124.htm> (emphasis added). Three days later the subject was raised again at the U.S. State Department’s daily press briefing. A journalist asked, “What about the Armenia genocide resolution which already caused the Turkish Ambassador to be recalled once earlier this year. There’s talk about it going to the floor. What is the Administration doing to try to stop that?” The State Department Spokesperson responded, “Well, we’ve made

clear our opposition to that resolution. ... We are in touch with the House [of Representatives] on this.” Philip J. Crowley, *Daily Press Briefing*, U.S. Department of State (Dec. 20, 2010), <http://www.state.gov/r/pa/prs/dpb/2010/12/153216.htm>.

The Obama administration’s opposition to H. Res. 252 reflects the ongoing diplomacy between Turkey and the U.S. The two governments engaged in numerous exchanges on this matter in the weeks and months leading up to both the March 4, 2010 vote of the House Foreign Affairs Committee and the resolution’s near consideration by the full House in December, culminating in a letter from Prime Minister Erdogan to President Obama on December 19, 2010, which states in pertinent part,

I am profoundly concerned by strong indications that we have been receiving to the effect that the Speaker of the House of Representatives is attempting to bring H.Res. 252 to the floor for adoption .... [And] [j]ust a week ago an appeals court in San Francisco reversed its earlier decision that the position of the US Administration is not against the recognition of ‘genocide’ at the state or federal level. ... I believe there is a great deal at stake here. ... At a time when we are trying to build a culture of peace and reconciliation in the Caucasus by advancing the Turkey-Armenia and Armenia-Azerbaijan tracks, this resolution will definitely hurt our efforts. ....<sup>5</sup>

Ultimately, the 111<sup>th</sup> Congress adjourned without H. Res. 252 being presented for a vote. Turkey’s Minister of Foreign Affairs, Dr. Ahmet Davutoglu commented, “We are pleased that a development that would strike a blow to balances in the Caucasus and Turkish-American and Turkish-Armenian relations

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<sup>5</sup> The balance of this letter constitutes a confidential diplomatic communication.

did not happen in the U.S. Congress. Common sense prevailed yesterday. We thank the U.S. administration for their efforts. This incident once again proved that assessment of historical incidents by political authorities is principally wrong.” Umit Enginsoy, *Armenian ‘guerrilla attack’ in US Congress meets its Waterloo*, Hurriyet Daily News, Dec. 23, 2010, available at <http://www.hurriyetaidailynews.com/n.php?n=armenian-guerrilla-attack-dies-a-natural-death-2010-12-23>.

Mutual expressions of opposition to H. Res. 252 notwithstanding, the panel posits that the Obama administration *seems* to support recognition of the alleged genocide. Op. Dec. 10, 2010 at 19658 (emphasis added). The panel refers to the President’s April 24, 2009 statement on Armenian Remembrance Day and recounts his use of the term, “Meds Yeghern.” But that term translates into “Great Calamity” in the Armenian language, not “genocide.” The major Armenian American advocacy groups clearly agree. The Armenian National Committee of America immediately reacted by declaring its “sharp disappointment with President Obama’s failure to honor his solemn pledge to recognize the Armenian Genocide.” *President Obama Retreats From Armenian Genocide Pledge*, (April 24, 2010), [http://www.anca.org/press\\_releases/press\\_releases.php?prid=1701](http://www.anca.org/press_releases/press_releases.php?prid=1701). The Armenian Assembly of America cited President Obama’s “failure to affirm” the alleged genocide and said that the President “has needlessly delayed the cause of genocide

affirmation.” *President Obama Fails to Honor Pledge to Affirm the Armenian Genocide*, (April 24, 2010), <http://www.aaainc.org/index.php?id=722&type=98>. Presidents choose their words with care; in choosing a term that does not mean “genocide,” President Obama reaffirmed long-standing U.S. policy. While Armenian groups and the California legislature may want President Obama to “use an iron fist,” he has “chosen “kid gloves.” *American Ins. Assn. v. Garamendi*, 539 U.S. 396, 420 (2003) (“California seeks to use an iron fist where the President has consistently chosen kid gloves.”)

**3. The U.S. speaks with one voice in foreign policy and listens with one pair of ears.**

The U.S. speaks with one voice in foreign policy. *See, e.g., The Chinese Exclusion Case*, 130 U.S. 581, 606 (1889) (“[F]or national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power”); *United States v. Belmont*, 301 U.S. 324, 331 (1937) (“The external powers of the United States are to be exercised without regard to state laws or policies. . . . [I]n respect of our foreign relations generally, state lines disappear”); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) (“Our system of government . . . requires that federal power in the field affecting foreign relations be left entirely free from local interference”); *United States v. Pink*, 315 U.S. 203, 233–34 (1942) (“No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government

exclusively”); *Zschernig v. Miller*, 389 U.S. 429, 440 (1968) (“[S]tate regulations must give way if they impair the effective exercise of the Nation’s foreign policy”); *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 381 (2000) (“[The President speaks] for the Nation with one voice in dealing with other governments”). And if the U.S. speaks with one voice, it must surely listen with one set of ears, that of the federal government. It would incapacitate U.S. foreign relations were foreign states expected to monitor and react to the individual actions of fifty state legislatures and governors. Rather, Turkey’s interlocutor with the fifty United States is the U.S. federal government. Turkey has made abundantly clear to the U.S. federal government that it opposes in all U.S. forums legislative enactments and other official acts that render judgment on its history or which accuse it of the crime of genocide. As explained by Ambassador Sensoy in his letter to the Court,

Turkey has not as such protested state proclamations on this historic controversy because it conducts its foreign affairs directly with the U.S. Federal Government, primarily the Executive Branch. We do not have similar relations with the states.

Sensoy Ltr. It should, therefore, be the U.S. federal government’s duty to convey Turkey’s position to the states.



**II. SECTION 354.4 OFFENDS TURKEY’S SOVEREIGNTY BY LEGISLATING TURKISH HISTORY AND BY DECLARING TURKEY AND ITS PREDECESSOR STATE GUILTY OF THE CRIME OF GENOCIDE.**

Section 354.4 offends Turkey’s sovereignty. It was enacted in 2000 to provide special dispensation to what it defined as “Armenian Genocide victim[s].” It assigned jurisdiction to California courts and carved out an additional ten-year limitations period to permit a specified class of individuals to file claims against insurance companies doing business within the state. Cal. Civ. Proc. Code § 354.4 (West 2006). Section 354.4’s legislative findings establish California’s ad hoc definition of this particular alleged genocide:

The Legislature recognizes that during the period from 1915 to 1923, many persons of Armenian ancestry residing in the historic Armenian homeland then situated in the Ottoman Empire were victims of massacre, torture, starvation, death marches, and exile. This period is known as the Armenian Genocide.

Sen. Bill No. 1915 (1999-2000 Reg. Sess.).

But genocide is a crime defined by law and solemnized by a treaty to which both Turkey and the U.S. are party, the United Nations Convention on the Prevention and Punishment of the Crime of Genocide. 78 U.N.T.S. 277, entered into force Jan. 12, 1951; *see* 18 U.S.C. § 1901, as amended by PL 110-151 (2007). And Turkey resents having any U.S. legislature or other official formulate its own definition of genocide specifically to declare that Turkey or its predecessor state is guilty of this crime.

## CONCLUSION

The nature of the events of 1915 is a matter of legitimate scholarly debate. Accepting the Armenian nationalist narrative as uncontested fact, therefore, is both legally and historically problematic. Turkey does not deny that Armenian civilians suffered; however, it objects to considering this in a vacuum, ignoring the suffering of millions of other Ottoman citizens in these same events. Turkey's archives and reliable scholarly research lead Turkey strongly to oppose defining the tragic suffering of civilians in Ottoman Empire during World War I as genocide. Turkey has conveyed this to the U.S. government, which has in turn resisted calls to extract the Armenian experience from its historical context and then label it genocide.

The genocide allegation is of utmost importance to Turkey, both as a matter of foreign policy and as a matter of domestic concern. Turkey has firmly and repeatedly stated that it considers legislation by any U.S. governmental body or official statement that proclaims that events in its history qualify as the crime of genocide to be an impediment to its relations with the U.S. It has conveyed this message consistently to the U.S. government at the highest level and in the plainest possible terms and with corresponding actions.

Turkey seeks to attain a just memory of the suffering that the Turkish and Armenian nations experienced in the past. To that end, Turkey and Armenia have, with the encouragement of the U.S. government, signed bilateral protocols in

October 2009 that will seek to overcome all hurdles in their present relations, and jointly consider the historic controversy. Statutes like Section 354.4 and resolutions like H. Res. 252 place hurdles in the path of attaining a just memory.

For the foregoing reasons and those stated in the petition of the Appellants, rehearing en banc of the Court's December 10, 2010 decision is appropriate and necessary.

Respectfully submitted,

s/David Saltzman

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January 13, 2011

**CERTIFICATE OF COMPLIANCE**

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 29-2(c)(2), I certify that this amicus brief uses a mono-spaced typeface of 14 characters per inch and contains 2,784 words, which is within the 4,200 word limit.

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