No. 07-56722

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

VICTORIA VERSICHERUNG AG and ERGO VERSICHERUNGSGRUPPE AG
Defendants,

MUNCHENER RUCHVERSICHERUNGS-GESELLSCHAFT AKTIENGESELLSCHAFT AG

Defendant-Appellant.

PETITION FROM INTERLOCUTORY APPEAL OF THE UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA
Hon. Christina A. Snyder (Dist. Ct. Case No. CV-03-9407)

RESPONSE TO PETITION FOR REHEARING EN BANC

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I. INTRODUCTION AND STATEMENT OF COUNSEL

The petition for an en banc rehearing filed by Appellant Munich Re ("Munich Re") should be denied.

The Majority opinion authored by Judge Pregerson is well reasoned, and entirely consistent with the law of this Court and the United States Supreme Court. Munich Re, which is a German-based insurance company, predicates its entire petition for rehearing upon the supposition that California Civil Code section 354.4 constitutes a major foreign policy threat to the United States, in contravention of the express foreign policy of the United States government. Strikingly, the petition artfully avoids discussion of the fact that there have been no negative foreign policy repercussions from statutes and/or enactments promulgated by 40 other states that include the words "Armenian Genocide." While California Civil Code section 354.4 refers to the Armenian Genocide as a time reference in connection with a statute of limitations, there are scores of other state statutes and resolutions that have directly and unambiguously recognized the Armenian Genocide (see, footnote 2, *infra*).

As the Majority correctly states, there is absolutely no proof that the state and federal pronouncements, statutes or resolutions have any effect on United States foreign policy. ("The Three cited executive branch communications arguing against recognition of the Armenian Genocide are counterbalanced, if not outweighed, by various statements from the federal executive and legislative branches *in favor* of such recognition." *Op*. at *4.) While Munich Re takes the position that successive United States Presidents "have forcefully rejected governmental recognition of an 'Armenian Genocide' occurring in the Ottoman Empire from 1915-1923" (Petition, p. 1), Munich Re provides no explanation for

the deafening silence by the same administrations when 40 states have actively recognized the existence of the Armenian Genocide.

Munich Re's attempt to construct a clear, express United States foreign policy from carefully selected remarks from government officials fails. Munich Re simply cannot reconcile the fact that: (a) there are multiple contradictory statements within the United States government that make it impossible to discern any clear policy; (b) even if there is a policy against Congress not officially recognizing the Armenian Genocide, that does not constitute a foreign policy that any local statute or ordinance cannot utter the words "Armenian Genocide"; and (c) even if California did somehow conflict with United States foreign policy, the empirical evidence demonstrates that it could not have more than an incidental effect on foreign policy.

Munich Re's petition for *en banc* re-hearing should be denied in all respects.

II. THE MAJORITY OPINION IS ENTIRELY CONSISTENT WITH *GARAMENDI* AND ITS PROGENY; THERE IS NO REASON TO HAVE A THIRD APPELLATE REVIEW OF THE CONSTITUTIONALITY OF CALIFORNIA CIVIL CODE SECTION 354.4

Munich Re contends that the Majority opinion directly conflicts with *American Insurance Association v. Garamendi*, 539 U.S. 396, 410 (2003) and its progeny. This position is without merit.

The *Garamendi* court ruled that a State statute can only be found unconstitutional based upon the "foreign affairs" doctrine if it conflicts with an expressed and unmistakable executive treaty, Congressional enactment or executive policy. *Garamendi* recognized an expressed foreign policy could preempt state law, even in the absence of actual treaty or pronouncement. *Id.* at 414. However, Munich Re fails to appreciate the fact that there must be evidence

of the existence of such a policy – not just conjecture (or, at best, self-serving inferences) based upon conflicting pronouncements from government officials.

In *Garamendi*, the United States filed an amicus brief attesting its foreign policy was in direct conflict with the state law at issue. Appellant cites to a long list of cases where it alleges that courts have struck down "virtually identical 'sister statutes.'" However, these cases are all related to World War II era Holocaust issues upon which, as in *Garamendi*, there was clear evidence of executive foreign policy.[1] The Majority correctly recognized that there is no comparable evidence of a foreign policy with respect to the existence of the Armenian Genocide. Munich Re's attempt to construct a foreign policy "preference" – as opposed to a concrete and documented foreign policy – to invalidate a state statute under the foreign affairs doctrine would constitute an expansion far beyond *Garamendi* and its progeny.

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[1] Munich Re also argues that the Majority's opinion is in direct conflict with the opinion in *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 958 (9th Cir. 2010). This is not correct. With respect to the Holocaust assets that are the subject of California Civil Code section 354.3 in *Von Saher*, the federal government created the Presidential Advisory Commission on Holocaust Assets in the United States. As the Court ruled in *Von Saher*, this "history of federal action is so comprehensive and pervasive as to leave no room for state legislation." *Id.* at 967. The federal government has taken no similar action or steps with regard to the Armenian Genocide. Further, Munich Re fails to recognize the fact that the Ninth Circuit found a direct nexus between California Civil Code section 354.3 and California's expressed dissatisfaction with the federal government's resolution (or lack there of) of restitution claims arising out of World War II. Accordingly, the Ninth Circuit ruled that California can make 'no serious claim to be addressing a traditional state responsibility'" *Id.* at 965. By contrast, in Mo*vsesian* plaintiffs are not seeking claims for restitution or reparations, but the recovery of policy benefits due and owing based on proper premium payments made - an area not traditional regulated by the federal government.

Munich Re also fails to explain how Section 354.4 could even have anything more than an "incidental" effect on foreign policy, as required under *Garamendi*. Any such argument would be belied by the fact that 86% of the States have express pronouncements recognizing the "Armenian Genocide," with no evidence of such recognition having any effect on foreign policy. In stark contrast to California Civil Code section 354.4, which uses the term "Armenian Genocide" as a historical reference for a time frame within which certain insurance policy claims are allowed to be prosecuted, the other state statutes and/or proclamations directly take a position regarding the existence of the Armenian Genocide.[2]

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[2] *See, e.g.*, Legis. Resolve No. 13, Source SR-20 (Alaska 1990) ("[T]he Armenian Genocide . . . was conceived by the Turkish government and implemented from 1915 to 1923 . . . ."); Gubernatorial Proclamation (Alaska Apr. 19, 1990) (same); Gubernatorial Proclamation (Ariz. Apr. 23, 1990) ("[B]eginning April 24, 1915, the Armenian people suffered a genocide of great proportion . . . ."); Gubernatorial Proclamation (Ark. Mar. 27, 2001) (proclaiming "A Day of Remembrance of the Armenian Genocide"); Assemb. J. Res. 44, 2001-02 Reg. Sess. (Cal. 2002) (designating "California Day of Remembrance for the Armenian Genocide"); S.J. Res. 1, 2003-04 Reg. Sess. (Cal. 2003) (same); Cal. Gov't Code § 6720 (2005) (same); H.J. Res. 1049, 64th Gen. Assemb., 1st Reg. Sess. (Colo. 2003) (designating "Colorado Day of Remembrance of the Armenian Genocide"); S.J. Res. 22, 63d Gen. Assemb., 2d Reg. Sess. (Colo. 2002) (same); Gubernatorial Proclamation (Conn. Apr. 24, 2001) (proclaiming "A Day of Remembrance for the Armenian Genocide"); Sen. Con. Res. No. 19, 138th Gen. Assemb. (Del. 1995); Gubernatorial Proclamation (Fla. Apr. 27, 1990) (commemorating the "75th anniversary of the Armenian Genocide"); S. Res. 118, 145th Gen. Assemb., 1999-00 Reg. Sess. (Ga. 1999) (proclaiming Armenian Genocide Remembrance Day); Gubernatorial Proclamation (Idaho Apr. 20, 2004) (same); H. Res. 113, 90th Gen. Assemb., 1997-98 Reg. Sess. (Ill. 1997) (same); S. Res. 50, 89th Gen. Assemb., 1995-96 Reg. Sess. (Ill. 1995) (same); 105 Ill. Comp. Stat. 5/27-20.3 (2005) (mandating the teaching of the Armenian Genocide, in addition to other 20th century genocides, in public schools); Gubernatorial Declaration (Kan. Apr. 20, 2005) ("Armenian Genocide" remembrance); Gubernatorial Proclamation (La. Apr. 18, 2004) ("Armenian Genocide" Remembrance Day); H.B. 1373, 120th Leg., 1st Reg. Sess. (Me. 2001) (express recognition of "Armenian Genocide");

Thus, the position taken by Munich Re and the minority opinion, that "there is an express Presidential foreign policy, as acquiesced in by Congress, prohibiting legislative recognition of the "Armenian Genocide" (Dissent, p. *9), is simply factually incorrect. Unlike *Garamendi*, the "proof" of a clearly articulated foreign

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H.J. Res. 3, 415th Gen. Assemb., 2001 Reg. Sess. (Md. 2001) ("Armenian Genocide" Remembrance Day); Gubernatorial Proclamation (Md. Apr. 24, 1990) (same); H. Res. 74, 90th Leg., 1999 Reg. Sess. (Mich. 1999) (recognizing "Armenian Genocide"); S. Res. 44, 90th Leg., 1999 Reg. Sess. (Mich. 1999) (same); Gubernatorial Proclamation (Minn. Mar. 16, 2001) (same); H. Con. Res. 4, 91st Gen. Assemb., 2nd Reg. Sess. (Mo. 2002) ("Armenian Genocide" Remembrance Day); Gubernatorial Proclamation (Neb. Apr. 23, 2004) (same); Gubernatorial Proclamation (Nev. Apr. 11, 2000) (express recognition of "Armenian Genocide"); S. Res. 7, 1990 Sess. (N.H. 1990) (same); Gubernatorial Proclamation (N.J. Mar. 15, 2004) (same); H.J. Mem'l 117, 46th Leg., 1st Sess. 2003 (N.M. 2003) (same); State Legis. Res. J4589 (N.Y. 2002) (commemorate "Anniversary of the Armenian Genocide"); S. Legis. Res. 810 (N.Y. 1986) (recognize "American policy of recognition of the Armenian genocide . . . ."); Gubernatorial Proclamation (N.Y. Apr. 24, 2004) (same); Gubernatorial Proclamation (N.C. Apr. 23, 1999) ("Armenian Genocide" Remembrance Day); S. Con. Res. 68 (Okla. 1990) (commemorating "Anniversary of the Armenian Genocide"); Gubernatorial Proclamation (Or. Apr. 23, 1990) (recognition of "Armenian Genocide"); H. Res. 593, 2004 Sess. (Pa. 2004) (designating "Armenian Genocide" Remembrance Day); Gubernatorial Proclamation (Pa. Apr. 19, 1990) (recognition of "Armenian Genocide"); H.B. 6336, 2003-2004 Legis. Sess. (R.I. 2003) ("Armenian Genocide" Remembrance Day); S.B. 2958, 2001-2002 Legis. Sess. (R.I. 2002) (same); Gubernatorial Proclamation (R.I. June 29, 1990) (express recognition of "Armenian Genocide"); R.I. Gen. Laws § 16-22-22 (2005) (required teaching of "Armenian Genocide" in schools); H.B. 3678, Gen. Assemb., 113th Sess. (S.C. 1999) ("Armenian Genocide" Remembrance Day); Gubernatorial Proclamation (Tenn. Apr. 23, 2004) (same); Gubernatorial Proclamation (Utah Apr. 2001) (express recognition of "Armenian Genocide"); Gubernatorial Proclamation (Vt. Apr. 24, 2004) (same); H.J. Res. 298 (Va. 2000) (same); Gubernatorial Certificate of Recognition (Va. Apr. 24, 2002) (same); Gubernatorial Proclamation (Wash. Apr. 20, 1990) (same); S. Res. 14, 95th Legis. Sess., 2001-02 Reg. Sess. (Wisc. 2002) ("Armenian Genocide" Remembrance Day).

policy is, at best, ambiguous.[3] Indeed, the *Garamendi* court ruled, "[a]s for insurance claims in particular, the national position, ***expressed unmistakably in the executive agreements signed by the President with Germany and Austria***, has been to encourage European insurers to work with the ICHEIC to develop acceptable claim procedures, including procedures governing disclosure of policy information." *Id.* at 421 (emphasis added).

In contrast, as the Majority aptly points out, both the Executive and Legislative branches of the United States government have specifically recognized the existence of the "Armenian Genocide" by that specific name, or equivalent synonyms as noted in *amici curiae* briefs and scholarly treatises on the international law of the genocide. While the presidential foreign policy at issue in *Garamendi* was embodied in executive agreements and clarified by statements by Executive Branch officials, there are absolutely no such executive agreements in this case.

The purported "preferences" expressed by Presidents Clinton, Bush and Obama that Congress not enact legislation expressly recognizing the Armenian

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[3] In *Garamendi*, the Supreme Court invalidated a State law requiring the disclosure of information on insurance policies sold in Europe between 1920 and 1945. Specifically, the Court held that California's Holocaust Victim Insurance Relief Act ("HVIRA") was preempted by the foreign affairs doctrine because there was a sufficiently clear conflict between HVIRA and the President's foreign policy embodied in several executive agreements. *Garamendi, supra*, 539 U.S. at 421-423. The executive agreements required the United States to submit a statement in any action where a German company was sued on a Holocaust-era claim stating that "'it would be in the foreign policy interests of the United States for the Foundation to be the exclusive forum and remedy for the resolution of all asserted claims against German companies arising from their involvement in the National Socialist era and World War II.'" *Id.* at 406. "On top of that undertaking, the Government promised to use its 'best efforts, in a manner it considers appropriate,' to get state and local governments to respect the foundation as the exclusive mechanism." *Id.*

Genocide highly contrast the concrete presidential policies that have been deemed sufficient to be given preemptive weight under the foreign affairs doctrine. *See, e.g., Crosby v. National Foreign Trade Council*, 530 U.S. 363, 381 (2000) (invalidating a State law where it conflicted with a statute passed by Congress and an express congressional delegation of discretion to the President); *Deutsch v. Turner Corp.*, 324 F.3d 692, 711-14 (9th Cir. 2003) (invalidating a State law that extended the statute of limitations for individuals forced into slave labor during World War II where there was an express federal policy stemming from a series of treaties and international agreements entered into by the United States and foreign nations to end World War II and to resolve disputes stemming from the war).

This restrictive view of preemption on State powers was recently applied in *Wyeth v. Levine*, ____ U.S. ____, 129 S.Ct. 1187, 1194-95 (2009). In *Levine*, the Supreme Court recognized that preemption of traditional State powers can only be imposed upon the existence of a "clear and manifest" contrary purpose. *See also, Id*. at 1194 ("the purpose of Congress is the ultimate touchstone in every pre-emption case"). In *Garamendi*, the Supreme Court expressly ruled that "[t]he exercise of federal executive authority means that the state law must give way where . . . there is evidence of ***clear conflict*** between the policies adopted by the two." *Garamendi, supra*, 539 U.S at 42 (emphasis added). Indeed, President Obama issued a Memorandum warning against the overreaching of executive preemption. (http://www.whitehouse.gov/the_press_office/presidential-memorandum-regarding-preemption)

Finally, and no less significant, even if the various communications relied upon by Munich Re were sufficient to demonstrate an express federal policy, there is no evidence of an express federal policy banning the term "Armenian Genocide" in legislative enactments by the States. Munich Re's attempt to minimize statutes, resolutions and pronouncements which include the term "Armenian Genocide"

(Def. Petition, p.16, fn. 6) by 40 other states cannot be ignored.

An expansive review of the United States record together with decades-worth of federal and state acknowledgments of the Armenian Genocide reveals a long history of references to the Armenian Genocide by both federal and state government entities. From the Executive Branch, President Theodore Roosevelt explicitly stated almost one century ago that "the Armenian massacre was the greatest crime of the war," and that "[t]he Armenian horror is an accomplished fact. Its occurrence was largely due to the policy of pacifism this nation has followed for the last four years. The presence of our missionaries, and our failure to go to war, did not prevent the Turks from massacring between half a million and a million Armenians, Syrians, Greeks and Jews—the overwhelmingly majority being Armenians." Elting Morrison, ed., *The Letters of Theodore Roosevelt* (Cambridge, Mass: Harvard Univ. Press, 1954) at p. 6328.

Similarly, in a presidential statement that has been on record for almost 30 years, President Ronald Reagan stated: "Like the genocide of the Armenians before it, and the genocide of the Cambodians which followed it—and like too many other such persecutions of too many other peoples—the lessons of the Holocaust must never be forgotten." Proclamation 4838 – Days of Remembrance of Victims of the Holocaust, April 22, 1981.[4]

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[4] Besides Presidential statements and States' acknowledgements, Congress itself has twice recognized the Armenian Genocide. *See* H.J. Res. 247 (98th Cong., 2d Sess.) (Sept. 10, 1984) (designating April 24, 1985 as "National Day of Remembrance of Man's Inhumanity to Man" and stating that "the President of the United States is authorized and requested to issue a proclamation calling upon the people of the United States to observe such day as a day of remembrance for all the victims of the genocide, especially the one and one-half million people of Armenian ancestry who were the victims of the genocide perpetrated in Turkey between 1915 and1923"); H.J. Res. 148 (94th Cong., 1st Sess.) (Apr. 9, 1975) (same).

It is important to note that previous Administrations did not refuse to recognize the Armenian Genocide; rather resolutions dealing with the Armenian Genocide were removed from the agenda on procedural rather than substantive grounds. Furthermore, Munich Re misinterprets previous Administrations' lack of support of congressional legislation as indicative of a foreign policy prohibiting reference to the Armenian Genocide in legislative enactments ***by the States***. Indeed, the Executive Branch's general resistance to various congressional resolutions is not reflective of a foreign policy to deny the existence of the Armenian Genocide, or to ban States from officially recognizing the Armenian Genocide. At best, it can be interpreted as a preference for a non-position by the United States government as to a symbolic gesture.

In fact, as Judge Snyder's district court opinion noted, President Clinton expressly characterized these events as "the 'tragic deportations and massacres of roughly one and a half million Armenians in the final years of the Ottoman Empire. . . .'" (Snyder Order re Mtn to Dismiss SAC p. 30; 6/6/07.) Notwithstanding their preference to not proceed with a legislative act to officially recognize the Armenian Genocide, the public record reflects that Presidents Bush and Clinton issued annual Presidential Statements on the Armenian massacres that contained the very definition and elements of the crime of genocide.[5] President Obama continued this tradition in April 2009.[6]

In sum, Munich Re's inferential and unsupported speculation that previous Administrations' opposition to particular pieces of congressional legislation demonstrates an express federal policy prohibiting States from referencing the

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[5] *See* http://www.armenian-genocide.org/current_category.4/affirmation_list.html.

[6] *See* Statement of President Barack Obama on Armenian Remembrance Day, Apr. 24, 2009 (http://www.whitehouse.gov/the_press_office/Statement-of-President-Barack-Obama-on-Armenian-Remembrance-Day/).

Armenian Genocide in legislative enactments is simply not supported by the record. Even a cursory view of the United States record reveals that use of the term "Armenian Genocide" in both National and State legislative enactments is not only authorized, but memorialized and has been for decades.

III. THE AMICUS BRIEF FILED BY THE REPUBLIC OF TURKEY CANNOT CREATE FOREIGN POLICY.

The Republic of Turkey's contention that the use of the term "Armenian Genocide" creates foreign policy is truly of no moment. Turkey does not create or dictate United States foreign policy – only the United State government can do that. The *Garamendi* analysis is based upon express foreign policy formulated by the United States Executive Branch, not what foreign government might want that foreign policy to be. Further, and no less significantly, the Majority's analysis of the status of United States foreign policy is not only accurate, it is fully supported by the Record.

Turkey's implications that the current administration opposes recognition of the Armenian Genocide are flatly contradicted by President Barack Obama's direct statements. During his presidential campaign, then-Senator Obama affirmed, "I shared with Secretary Rice my firmly held conviction that the Armenian Genocide is not an allegation, a personal opinion, or a point of view, but rather a widely documented fact supported by an overwhelming body of historical evidence. The facts are undeniable."[7] President Obama reasserted this view in 2009 as he stated, "I have consistently stated my own view of what occurred in 1915, and my view of

[7] *See* Statement of Senator Barack Obama on Importance of US-Armenia Relations, January 19, 2008 (http://www.barackobama.com/2008/01/19/barack_obama_on _ the_importance.php/).

that history has not changed."[8] Thus, all of Turkey's arguments fail to counter the Majority's opinion that the United States has no express foreign policy regarding the term "Armenian Genocide."

IV. CALIFORNIA MAINTAINS A STRONG STATE INTEREST IN REGULATING THE CONDUCT OF STATE LICENSED INSURERS ESPECIALLY AS IN RELATION TO CALIFORNIA INSUREDS

There also can be no dispute, as noted by the Majority, that the regulation of insurance companies on behalf of State citizens constitutes a core area of traditional importance for the State of California. *See Garamendi*, *supra*, 539 U.S. at 434 n.1 ("States have broad authority to regulate the insurance industry"); 15 U.S.C. § 1011 ("Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States"); 15 U.S.C. § 1012(a) ("The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business."); *id.* § 1012(b) ("No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance . . . ."); *see also Western & Southern Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 653-55 (1981) (noting that Congress has ordained that the States may freely regulate the insurance business and therefore holding that California's retaliatory tax did not violate either the Commerce Clause

[8] *See* Statement of President Barack Obama on Armenian Remembrance Day, Apr. 24, 2009 (http://www.whitehouse.gov/the_press_office/Statement-of-President-Barack-Obama-on-Armenian-Remembrance-Day/).

or the Equal Protection clause).

The comprehensive interest of California to regulate the insurance industry is further manifested by the existence of the entire California Insurance Code, the California Insurance Department, and the government regulations that facilitate California's comprehensive oversight of the insurance industry. *See* Op. at *5 ("California's interest in ensuring its citizens are fairly treated by insurance companies over which the State exercises jurisdiction is hardly a superficial one.")

Judge Thompson's dissent notes that "Court's have consistently looked past 'superficial' interest to ascertain true legislative intent." *See* Op. at *8. (citations omitted.) Thompson argues that the true intent of "§ 354.4 is California's attempt to provide relief to a specific category of claimants who were aggrieved by a foreign nation, not a general attempt to regulate the insurance industry. *Id.* However, in stark opposition to appellant and Thompson's position that Section 354.4 is not a generally applicable statute of limitations of the sort that constitutes traditional state legislative subject matter, the California legislative has enacted many similar statutes. (i.e. Civil Code of Procedure Section 340.9 similarly extended the statute of limitations for only the narrow class of insureds injured during a single insurable event, the 1994 Northridge Earthquake; and Section 354.7 extends the statute of limitations for "braceros" or their heirs to bring a claim for recovery of savings fund amounts.)

Finally, while it is true that the United States government has not taken a position on whether California Civil Code section 354.4 is in conflict with express United States foreign policy, the State of California has taken an official position that "California[has a] legitimate interest in regulating the insurance industry, a power traditionally reserved to the states…" and overturning section 354.4 would "impair[] California's interest in providing individuals with access to its courts to resolve disputes concerning insurance policies held by them and issued by

companies doing business in this State." Amicus Curiae of the State of California in support of petition for Panel rehearing, Dkt entry 40-1; p. 1.)

Based upon the foregoing, the Majority was correct when it ruled that the regulation of insurance companies on behalf of State citizens constitutes a core area of traditional importance for the State of California, especially with respect to California Civil Code section 354.4.

V. CONCLUSION

For all the foregoing reasons, Appellees respectfully request the petition for rehearing *en banc* be denied.

Dated: February 1, 2011

Respectfully submitted,

KABATECK BROWN KELLNER LLP

/s/ Richard L. Kellner
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,376 words, excluding the parts of the document exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 14 point font size and Times New Roman type-style.

Dated: February 1, 2011

/s/ Richard L. Kellner
Richard L. Kellner

CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: February 1, 2011

/s/ Richard L. Kellner
Richard L. Kellner