No. 10-35455

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

K2 AMERICA CORPORATION,
Plaintiff - Appellant

v.

ROLAND OIL & GAS, LLC,
Defendant - Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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v.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

By order dated March 14, 2011, this Court invited the United States to file a supplemental brief addressing two questions related to the district court's jurisdiction to hear this case:

(1) Does the district court have jurisdiction over this case under 28 U.S.C. § 1360(b), 28 U.S.C. § 1331, 25 U.S.C. § 345, 28 U.S.C. § 1353, the doctrine of "complete preemption," or any other basis?

(2) Even if the district court has jurisdiction, must the plaintiff exhaust tribal remedies before the Blackfeet Nation tribal court?

The United States submits this brief in response to that order.

1. ***Factual Background*** – This case is a tort action between K2 America Corp. ("K2") and Roland Oil & Gas, LLC ("Roland"), both of which are Montana entities[1/] doing business in oil and gas development. K2 alleges that it retained an individual named John Harper ("Harper") as a contract operator to assist in oil and gas development, particularly with respect to oil and gas leasing on certain lands located within the Blackfeet Reservation. K2 further alleges that Harper acquired confidential information, including trade secrets, in the course of his employment with K2 that he improperly used to acquire the oil and gas leases within the reservation for himself, through Roland, a company formed for the purpose of securing the leases. K2's complaint alleges wrongdoing with respect to two Indian mineral leases within the Blackfeet reservation, one on tribal lands and one on allotted Indian lands (the "allotment lease").

K2 seeks damages and restitution as to both leases, and also seeks an order requiring Roland to assign to K2 its interest in the allotment lease or an order declaring that K2 is the rightful owner of that lease. K2

[1/] K2 is a wholly-owned subsidiary of Guardian Exploration, Inc., headquartered in Calgary, Alberta, Canada (K2 Br. 2). The Complaint alleges that K2 is incorporated in Montana, and we therefore believe that the district court correctly concluded (Order at 2) that diversity jurisdiction is not established on the face of the Complaint.

asserted federal jurisdiction in the district court on the ground that 28 U.S.C. 1360(b) precludes state jurisdiction of its "possessory claim," and invoked supplemental jurisdiction pursuant to 28 U.S.C. 1367 with respect to its other claims.

Roland moved the district court to dismiss the complaint for lack of jurisdiction, on the ground that K2 failed to exhaust tribal remedies before seeking relief in federal court. Roland contends that Harper and the majority of the allottee-lessors are enrolled members of the Blackfeet Tribe, that the lands subject to the lease are located within the boundaries of the Blackfeet Reservation, and that "Roland has a consensual relationship with the Blackfeet Tribe through its business operations on the Blackfeet Indian Reservation." Roland urged dismissal on the ground that in these circumstances exhaustion of tribal remedies is required. It further asserted that a judgment for K2 would "necessarily affect" the Blackfeet Tribe and the United States, which therefore would be necessary parties under Rule 19, Fed. R. Civ. P.

K2 opposed Roland's motion on the ground that "any jurisdiction that the Blackfeet Tribe could otherwise assert over this controversy is overridden by the sovereignty of the United States." Plaintiff's Response

to Defendant's Motion to Dismiss (Dkt 42) at 14-24. It further asserted that its Complaint does not seek to alter Roland's lessor-lessee relationship with the Blackfeet Tribe, seeking only monetary relief with respect to the lease of tribal lands. *Id.* at 27-28. As explained below (p.6), federal regulations require that any assignment of an Indian mineral lease must first be approved by the Secretary of the Interior. K2 acknowledged this requirement, but asserted that the relief it seeks with respect to the allotment lease would not "limit or otherwise infringe upon the Secretary of [the] Interior's right to approve the assignment." *Id.* at 30.

The district court dismissed the case, concluding that K2 had failed to identify any statutory or other basis for federal court jurisdiction. It held that 28 U.S.C. 1360(b) does not confer jurisdiction on federal courts, but instead limits the scope of 28 U.S.C. 1360(a), which grants to *States* – not including Montana – certain jurisdiction in Indian country. It also held that 28 U.S.C. 1367 does not confer federal jurisdiction in the first instance, but only provides supplemental jurisdiction to hear related state-law claims where the federal court has jurisdiction.

K2 has appealed the dismissal to this Court. It urges reversal on the ground of "the preemptive effect of federal law governing transfers of

interest held in trust by the United States on behalf of Indians," (K2 Br. 6) and contends that 28 U.S.C. 1360(b) "codifies the scope of federal preemption and therefore identifies the classes of cases that must be filed in federal court" (*id.* at 14). K2 does not assert that any federal statute confers jurisdiction on federal courts over its state-law tort claims against another Montana business entity.[2/] It asserts instead (K2 Br. 12) that its state-law claims concern ownership of interests in Indian land held in trust, and that all such claims are preempted by federal law, such that exclusive jurisdiction to hear them is in the federal courts.

Roland defends the district court's dismissal, not on the basis that federal court jurisdiction is absent, but rather on the ground that K2 failed to exhaust tribal remedies.

2. *Legal Framework*

a. Mineral Leasing on Allotted Indian Lands

Mineral development of Indian lands is governed under two separate but closely related regulatory schemes, one for lands allotted to individual Indians and the other for unallotted tribal lands. See, *e.g.,* 25 U.S.C. 396,

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[2/] Counsel for K2 acknowledged at oral argument that 28 U.S.C. 1360 does not directly confer jurisdiction on the federal courts.

25 U.S.C. 396a. Indian owners of allotted lands have been authorized since 1909 to enter into mineral leases with non-Indians, provided that such leases are approved by the Secretary of the Interior. 25 U.S.C. 396; 25 C.F.R. Part 212. The Indian owners of such lands also may request that the Secretary advertise leases of allotted lands for sale or negotiate leases on their behalf. 25 C.F.R. 212.20. Allotted Indian oil and gas leases may be transferred or assigned by the lessee only with the approval of the Secretary. See 25 C.F.R. 212.53.

Mineral leasing on tribal lands is governed by the Indian Mineral Leasing Act ("IMLA"), 25 U.S.C. 396a *et seq.*; 25 C.F.R. Part 211. IMLA authorizes Tribes to enter into mineral leases on unallotted lands within their reservation boundaries or otherwise owned by the Tribe, subject to approval by the Secretary of the Interior. See *United States v. Navajo Nation*, 129 S.Ct. 1547, 1553 (2009).

b. Potential Bases for Federal Jurisdiction Identified by this Court's Order

28 U.S.C. 1360(b)

State courts generally lack jurisdiction over civil actions against Indian Tribes and their members within Indian Country. See, *e.g.*, *Williams v. Lee*, 358 U.S. 217 (1959) (Non-Indian may not sue Indian in

state court where cause of action arises in Indian country). Public Law 280, enacted in 1953, provides that certain listed States "shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed [in the statute] to the same extent that such State has jurisdiction over other civil causes of action." 28 U.S.C. 1360(a). P.L. 280 further provides:

> Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

28 U.S.C. 1360(b). Other provisions of P.L. 280 give the United States' consent to the assumption by States not listed in the statute of jurisdiction over certain criminal offenses and civil causes of action in Indian Country within their boundaries. See 25 U.S.C. 1321, 1322. Following a 1968 amendment, these assumptions of jurisdiction are contingent on tribal consent. 25 U.S.C. 1326.

28 U.S.C. 1331

The statutory basis for federal question jurisdiction, 28 U.S.C. 1331, provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

25 U.S.C. 345 and 28 U.S.C. 1353

25 U.S.C. 345 and 28 U.S.C. 1353 confer jurisdiction on federal district courts of claims by "persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land," or claim to be so entitled, or "claim to have been unlawfully denied or excluded" from an allotment to which they claim entitlement.

ARGUMENT

This Court has requested the United States' views on two questions relating to its jurisdiction. As discussed below, we believe that this case was properly dismissed by the district court because the federal courts lack jurisdiction to hear it. This Court therefore need not reach the question whether exhaustion of tribal remedies is required. If the federal courts had jurisdiction, the record does not provide sufficient facts to establish that the tribal court lacks jurisdiction. Under this Court's precedents, therefore,

a remand to further develop the record on that question, or for exhaustion of tribal-court remedies, may be appropriate.

QUESTION I

Does the District Court Have Jurisdiction over this Case under 28 U.S.C. § 1360(b), 28 U.S.C. § 1331, 25 U.S.C. § 345, 28 U.S.C. § 1353, the Doctrine of "Complete Preemption," or Any Other Basis?

The United States believes that the answer to this question is no. As discussed below, the statutes and doctrines identified by the Court do not confer federal jurisdiction in the circumstances presented here, and we are aware of no other basis on which federal district court jurisdiction could be found.

A. 28 U.S.C. 1360(b) Does Not Provide Federal Court Jurisdiction over this Dispute.

As the district court correctly concluded (Order 4-5), 28 U.S.C. 1360(b) is a limitation on the exercise of state jurisdiction pursuant to 1360(a), and does not confer jurisdiction on federal courts. Indeed, 28 U.S.C. 1360 was enacted to extend limited *state* jurisdiction into Indian Country. As discussed above, this statute provides that certain States – not including Montana – "shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas

of Indian country listed [in the statute] to the same extent that such State has jurisdiction over other civil causes of action." 28 U.S.C. 1360(a). Because Montana was not granted any civil jurisdiction by P.L. 280 as originally enacted in 1953, and has not assumed any jurisdiction over the Blackfeet Reservation in Montana since then, see, *e.g. Milbank Mut. Ins. Co. v. Eagleman*, 705 P.2d 1117, 1119 (Mont. 1985), no provision of 28 U.S.C. 1360 has any relevance to this or any other dispute involving the Blackfeet Reservation.

B. The Complaint in this Case Does Not Raise a "Federal Question" for Purposes of 28 U.S.C. 1331.

Federal district courts are "courts of limited jurisdiction. They possess only that power authorized by Constitution and statute." *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). The district courts may not exercise jurisdiction absent a statutory basis. *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 552 (2005). Congress has conferred on the district courts original jurisdiction in federal-question cases—civil actions that arise under the Constitution, laws, or treaties of the United States. 28 U.S.C. § 1331. *Ibid.*

Under the well-pleaded complaint rule, a suit "arises under" federal law for 28 U.S.C. § 1331 purposes "only when the plaintiff's statement of

his own cause of action shows that it is based upon [federal law]." *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 152 (1908). Federal jurisdiction cannot be predicated on an actual or anticipated defense, *ibid.*, or rest upon an actual or anticipated counterclaim, *Holmes Group, Inc. v. Vornado Air Circulation Systems*, 535 U.S. 826, 831 (2002). On the face of the Complaint, the claims in this case sound in tort, and are governed by Mont. Code Ann. § 30-14-402(4). They do not, therefore, "arise under" federal law, and 28 U.S.C. 1331 does not confer jurisdiction to hear them on the federal district courts.

C. This Case Is Not Within the Jurisdiction of the Federal Courts under the "Complete Preemption" Doctrine.

"Complete preemption" is a narrow exception to the well-pleaded complaint rule that applies where a federal statute furnishes a cause of action that Congress intended to be exclusive and completely supplants an area of state law such that a claim purportedly based on that pre-empted state law is actually based on federal law and is considered, from its inception, a federal claim. See *Beneficial Nat. Bank v. Anderson*, 539 U.S. 1 (2003) (holding provisions of the National Bank Act completely preempt certain usury claims against national banks); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987) (holding that Section 502(a)(1)(B) of ERISA

preempts state-law actions asserting improper processing of benefits claims under an ERISA plan); *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968) (finding Section 301 of the Labor Management Relations Act completely preempts state causes of action for violation of contracts between an employer and a labor organization);[3/] *cf. Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987) (federal law governing collective bargaining contracts does not completely preempt state-law employment contract claims by individual employees).

K2 contends that federal law completely preempts any state-law claim related in any way to Indian land and that the "complete preemption" doctrine therefore applies to its case. K2 is incorrect. K2 points to no specific federal statutory cause of action applicable to the subject matter of the suit that Congress intended to be exclusive, such that its state-law tort claims would be deemed to be a claim under that federal statute. And no federal statute has preempted state laws prohibiting misappropriation of business information. Nor has any federal statute

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[3/] See also *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 484-85 (1999) (finding that removal to federal court of "any public liability action arising out of or resulting from a nuclear incident" pursuant to an express provision of the Price-Anderson Act "resembles" complete preemption).

preempted all state claims that relate in any way to Indian lands, at least where, as here, the parties to the suit are not a Tribe or an Indian for whom the land is held in trust or restricted status. Although there is a strong federal interest and extensive federal involvement in Indian affairs, actions involving Indian Tribes and Indian land still must satisfy the well-pleaded complaint rule. Compare *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974) (federal court had 28 U.S.C. 1331 jurisdiction where federal law supplied the basis for the Tribe's claim to its ancestral land), with *Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838 (1989) (federal court did not have Section 1331 jurisdiction based on defendant Tribe's potential federal-law defense of sovereign immunity).

The federal law arguably at issue here is the Indian mineral leasing statutes and regulations (see K2 Br. 12). As explained above, under those statutes and regulations, Indian allottees may lease their minerals to non-Indians, subject to approval by the Secretary. But K2 does not seek relief on the basis of any defect in the federal leasing or lease-approval process, and does not otherwise state a claim "arising under" the Indian mineral leasing statutes. K2's Complaint instead merely states various tort claims against Roland for wrongdoing in the course of a business

relationship preceding the issuance of the leases. Such state-law tort claims are within the jurisdiction of the state courts. The claims at issue here are unrelated to any provision of the leasing statutes, and although K2 seeks the assignment to it of the allotment lease as a potential remedy, it has expressly disclaimed any relief that would "limit or otherwise infringe upon the Secretary of [the] Interior's right to approve the assignment." See Plaintiff's Response to Defendant's Motion to Dismiss (Dkt 42) at 30. Accordingly, the federal courts lack jurisdiction over K2's claims.

D. We Are Aware of No Other Exceptions to the Well-pleaded Complaint Rule That Might Apply Here.

While the great majority of actions that arise under federal law do so because the plaintiff "plead[s] a cause of action created by federal law," there is also a "less frequently encountered variety" of federal question jurisdiction: where a "substantial federal question" is embedded in a state-law claim. See, *e.g.*, *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312, 314 (2005). This doctrine "captures the commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law." *Id.* at 312. It holds that a case "arises under" federal law

where: (1) the state-law claim "necessarily" raises a disputed federal issue; (2) the federal interest in the issue is substantial; and (3) the exercise of jurisdiction does not disturb any congressionally approved balance of federal and state judicial responsibilities. *Id.* at 314. This test is not satisfied here.

The only arguably federal question here is whether Roland could be compelled to assign its interest in the allotment lease to K2. Even assuming that this question presents a federal-law issue, however, it does not provide a basis for federal court jurisdiction in this case. The question whether Harper improperly used information gathered in the course of his employment with K2 to compete with K2 through Roland can be answered without reference to federal law; only the requested remedy here even arguably implicates the Indian mineral leasing statutes, which require that any issuance or assignment of a lease on Indian lands must be approved by the Secretary. 25 C.F.R. 212.53. But K2 has affirmatively disclaimed any relief that would affect the approval authority of the Secretary of the Interior. The federal statute requiring approval of an assignment of the lease accordingly is not even relevant to fashioning the remedy that K2 seeks. Because the plaintiff here – which is the master of

its complaint – has thus tailored its requested relief to avoid application by the court of the federal statutes and regulations that govern federal approval of lease interests, any federal questions under those statutes and regulations are not necessarily raised by plaintiff's tort claims. Thus, the resolution of K2's claims does not necessarily raise a federal law issue, and federal jurisdiction cannot be found here on the basis of the "substantial federal question" doctrine. We are aware of no additional exceptions to the well-pleaded complaint rule that might support federal court jurisdiction here.

E. 25 U.S.C. 345 Does Not Apply to this Case.

The district court suggested (Order at 4) that K2 "might have alleged jurisdiction pursuant to 25 U.S.C. 345." Like 28 U.S.C. 1353, however, this provision confers jurisdiction on federal courts only over actions by persons of Indian descent, and it therefore has no applicability here, where the plaintiff is a Montana corporation. Additionally, these provisions apply where a party claims entitlement to an allotment of land "under any allotment act or any under grant made by Congress," which no party to this action claims. Accordingly, the federal district court could not assert jurisdiction over this dispute on the basis of these provisions. See *United*

States v. Mottaz, 476 U.S. 834, 845 (1986) (§ 345 grants jurisdiction over suits "seeking the issuance of an allotment and suits involving the interests and rights of the Indian in his allotment") (citations omitted).

QUESTION 2

Even If the District Court Has Jurisdiction, Must the Plaintiff Exhaust Tribal Remedies Before the Blackfeet Nation Tribal Court?

This Court has invited the views of the United States on the question whether tribal exhaustion is required regardless whether there is federal jurisdiction. We note, however, that the Court need not reach the question whether tribal-court exhaustion is required. This Court can and should first determine whether federal-court jurisdiction exists. *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83 (1998). As explained above, it is the view of the United States that the federal courts lack jurisdiction here, and that the Complaint was properly dismissed on this ground.

It is well established that Indian Tribes retain sovereignty over their lands and their members, and have authority to regulate activities on the reservation, including certain activities by non-Indians, see *Plains Commerce Bank v. Long*, 554 U.S. 316, 327 (2008). They may also exclude outsiders from entering tribal land and set the conditions upon which non-members enter such land. See *Duro v. Reina*, 495 U.S. 676, 696-697(1990).

However, Tribes do not have unlimited authority to regulate the activities of non-Indians. *Montana v. United States*, 450 U.S. 544 (1981); *Philip Morris USA, Inc. v. King Mountain Tobacco Co., Inc.*, 569 F.3d 932, 938-39 (9th Cir. 2009).

In *National Farmers' Union Ins. Co.. v. Crow Tribe,* 471 U.S. 845, 852-53 (1985), non-members of the Crow Tribe sought to enjoin the tribal court's exercise of jurisdiction over them. The Supreme Court concluded that – although the question whether a tribal court has exceeded its jurisdiction is a "federal question" for purposes of 28 U.S.C. 1331 – a federal court should stay its hand "until after the Tribal Court has had a full opportunity to determine its own jurisdiction." *Id.*, at 857. This tribal court exhaustion doctrine is a prudential one, and is founded on a "policy of supporting tribal self-government * * * [which] favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge." *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. at 484, quoting *National Farmers Union* , 471 U.S. at 856.

Tribal courts have exclusive jurisdiction over a variety of claims brought against Indians for events arising on a reservation. And where a

private plaintiff challenges an exercise of taxing or regulatory authority by the Tribe itself, the plaintiff ordinarily must first present its objections to the tribal administrative agency and then to the tribal court. See, *e.g., Middlemist v. Babbitt*, 19 F.3d 1318 (9th Cir.), cert. denied, 513 U.S. 961 (1994). But the dispute here does not concern an exercise of tribal authority; and no party to this matter has attempted to invoke the jurisdiction of the tribal court, which therefore has had no occasion to consider whether it has jurisdiction. The United States does not believe that tribal-court exhaustion is required when there is no pending proceeding in a tribal court whose jurisdiction is being challenged and the federal suit is not a challenge to an exercise of tribal authority.

This Court, however, has held that "[t]he absence of any ongoing litigation over the same matter in tribal courts does not defeat the tribal exhaustion requirement," *Marceau v. Blackfeet Housing Auth.*, 540 F.3d 916, 920-921 (9th Cir. 2008) (quoting *Sharber v. Spirit Mountain Gaming Inc.*, 343 F.3d 974, 976 (9th Cir. 2003)), cert. denied, 129 S. Ct. 2379 (2009). Finding that "[t]here is no simple test for determining whether tribal court jurisdiction exists,"*Stock West Corp. v. Taylor*, 964 F.2d 912, 919-20 (9th Cir.1992) (en banc)), this Court has required exhaustion in cases in which

there is a "colorable argument" for tribal-court jurisdiction over the underlying dispute. *Allstate Indemnity Co. v. Stump*, 191 F.3d 1071, 1077 (as amended, 197 F.3d 1031) (9th Cir. 1999).

As explained in *Smith v. Salish Kootenai College,* 434 F.3d 1127, (9th Cir 2006) (*en banc*), where a non-member is a party, this Court considers two facts in determining a tribal court's civil jurisdiction: 1) the member or nonmember status of the unconsenting party, *id.* at 1131; and 2) whether the cause of action bears a direct connection to tribal lands. *Id.* at 1132, 1135. In this case, the plaintiff, who does not consent to tribal jurisdiction, is a non-Indian; the Complaint does not allege that the dispute arose on the reservation or seek relief that would affect lands held in trust for the Tribe; and the dispute does not implicate any contractual or other relationship with the Tribe. However, it is undisputed that the Complaint seeks the assignment of a mineral lease to allotted lands within the reservation, and the defendant is a Montana limited liability company at least one of whose principal officers is allegedly a tribal member. On the record here, therefore, the United States cannot conclude that there is no colorable argument supporting tribal jurisdiction. Accordingly, if this Court concludes that federal jurisdiction exists, it should consider remanding with

instructions that the case be stayed pending exhaustion of tribal-court remedies, or that the district court permit development of the record with respect to the question whether the tribal court plainly lacks jurisdiction through discovery or further submissions.

CONCLUSION

For the foregoing reasons, the judgment of the district court dismissing the case for want of federal jurisdiction should be affirmed. In the event that the case is not dismissed for want of federal jurisdiction, the Court should consider whether to remand for further consideration of tribal jurisdiction, or for exhaustion of tribal-court remedies.

Respectfully submitted,

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JUNE 2011
90-12-13403

CERTIFICATE OF COMPLIANCE
Pursuant to Fed. R. App. P. 32(a)(7)(C)
and Circuit Rule 32-1

I certify that:

a. Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached supplemental brief is:

Proportionately spaced, has a typeface of 14 points or more and contains 4250 words.

/s/ *Elizabeth Ann Peterson*

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Supplemental Brief for the United States as Amicus Curiae have been served on counsel, this 17th day of June 2011, through the Ninth Circuit CM/ECF System. I further certify that copies of the foregoing Supplemental Brief for the United States as Amicus Curiae have been mailed to:

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