No. 11-35252

United States Court of Appeals
for the Ninth Circuit

COOK INLET REGION, INC.

Plaintiff-Appellee

v.

ROBERT W. RUDE AND HAROLD RUDOLPH

Defendants-Appellants,

On Appeal from the United States District Court
for the District of Alaska (Hon. Ralph R. Beistline)
Civil Action No. 3:09-cv-00256-RRB

REPLY BRIEF OF DEFENDANTS-APPELLANTS

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Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984).....27

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Treatises and Other Authorities

3 SINGER, N.J. AND SINGER, J.D., STATUTES AND STATUTORY CONSTRUCTION (7th ed. 2009).....7

ERWIN CHEMERINSKY, FEDERAL JURISDICTION (5th ed. 2007).....24

WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE (3rd ed. 2008). 19

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Triem, Fred W., *Judicial Schizophrenia in Corporate Law: Confusing the Standard of Care with the Business Judgment Rule,* 24 ALASKA L.REV. 23 (2007) 14

INTRODUCTION and OVERVIEW

In its Brief of Appellee, CIRI asserts that it has provided the Federal District Court with federal question jurisdiction to hear this case. Federal jurisdiction, CIRI argues, rests on two of its claims: (1) that Rude and Rudolph, defendants-appellants, violated 43 U.S.C. § 1629b(c)(1)(B) by using false and misleading statements in the solicitations of signatures for a petition that relates to the alienability restrictions mentioned in 43 U.S.C. §1629c(b)[1]; and (2) that Rude and Rudolph violated the procedural requirements in 43 U.S.C. 1629b(b)(2)(A) and in 43 U.S.C. 1629b(c)(b)(2) because they "failed to give shareholders written notice of the language of their proposed amendment and specify the date alienability restrictions would terminate." [2]

These two claims, according to CIRI, arose out of federal law, i.e. from ANCSA §§ 36 and 37, codified at §1629b(c)(1)(B), §1629b(2)(A) and §1629c(b)(2).

The effect of CIRI's argument would be to displace an entire body of Alaska law that presently (1) establishes requirement for corporate elections, voting, and proxies, (2) creates an administrative procedure under Alaska law to determine

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1 *See* CIRI's Brief of Appellee at 6.

2 *Id*. at 20-21. Also see the District Court's Amended Order Granting Motion for Partial Summary Judgment at 11-12.

whether solicitations of signatures for a petition that is related to a proxy solicitation contain false and misleading statements,[3] and (3) creates a right to appeal the resulting administrative decision to the Alaska Superior Court.[4]

CIRI would replace Alaska's administrative system (or federalize it) with a new federal private cause of action that can be filed in federal district court. And the only purpose of this new federal private cause of action would be to have *federal* courts rather than Alaska's state court decide whether statements in a solicitation for signatures for a petition were false and misleading.

Such wholesale disregard of state law is counter-intuitive and disruptive of sensitive federal-state relations. However, CIRI's extreme position does not raise a substantial federal question. CIRI has not done this.

This is purely a state law case.

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3 *See,* AS 45.53.935 and 3 AAC 08.930.

4 *See,* AS 45.55.940; Alaska Appellate Rules 600 et seq.

APPELLANTS' ARGUMENT IN REPLY

I. CIRI's core argument is unsound: ANCSA does not "federalize" Alaska corporate and securities laws—ANCSA §§ 36 and 37 do not incorporate Alaska Statutes, AS 10.06 and AS 45.55 and put them into the U.S. Code:

CIRI mistakenly assumes that §1629(b)(c)(1)(B) "federalizes" Alaska law. This is the critical but flawed premise in CIRI's argument that federal question jurisdiction exists for its false and misleading claim. The district court had made a similar mistake in its analysis.

(A) ANCSA adopts the "laws of the State" to govern Native corporations, but does not incorporate state law into the body of federal law: Rude and Rudolph explained in their appellants' opening brief that the purpose of §1629b(c)(1)(B) is not to federalize Alaska law for the purpose of providing federal question jurisdiction over disputes about shareholder petitions. Instead, its purpose is to make clear that disputes over the accuracy of these statements (made in solicitations of signatures for a petition relating to the alienability restrictions referred to in §1629c(b)) were to be resolved by state law — enacted and enforced by the State of Alaska through its state law proxy regulations – not by federal agencies or federal courts.

Rude and Rudolph pointed to the failure of Congress to create a federal private cause of action for claims like CIRI's as evidence that Congress did not

intend to "federalize" state law. *See,* Appellants' Opening Brief at 16-18.

The appellants also noted that the relevant language of §1629(c)(1)(B) reads: "[t]he requirement of the laws of the state . . . shall govern" *rather than* "an action based on Alaska Statute AS 45.55.160 challenging the accuracy of statements made in solicitations of signatures of a petition described in subparagraph (c)(1)(A) may be brought in federal district court."

(B) ANCSA does not disclose any Congressional intent to incorporate state law into federal law (actually quite the opposite): If Congress had intended to preempt state law and state court jurisdiction over the claims like those made by CIRI, it surely would have stated such an intention. Instead, when Congress adopted ANCSA § 10 [43 U.S.C. § 1609], it conferred subject matter jurisdiction on federal courts for only a narrow topic (challenge to the Settlement legislation) and for only a limited time (one year). Congress otherwise rejected any grant of jurisdiction to federal courts and left all other matters (such as this case) to the courts of Alaska. ANCSA § 2(f) [43 U.S.C. § 1601(f)]: "no provision of this chapter shall be construed to constitute a jurisdictional act, to confer jurisdiction to sue . . . ."

An equally serious problem for CIRI's "federalization" claim is determining exactly what state laws were "federalized." (Note: the plural "laws" is used in §1629b(c)(1)(B).) Did Congress intend to federalize the administrative procedure created by AS 45.55.935 and by 3 AAC 08.930, which authorize the Alaska

Department of Commerce and its agencies to conduct a hearing in order to determine whether a statement in a solicitation for a petition is "false and misleading"? Did Congress intend to federalize AS 45.55.940 that gives an "aggrieved person the right to appeal "a final order" issued after a hearing by the Alaska Commissioner to the Alaska Superior Court? And did Congress also mean to federalize the Alaska Administrative Procedure Act, AS 44.62 (which supplies the rules and process for agency hearings under Alaska law)? No such intent appears anywhere in ANCSA.

CIRI's brief is silent on these questions. Instead, CIRI simply asserts that § 1629b(c)(1)(B) federalizes "standards" found in state law.[5] The words "standard" or "standards," of course, do not appear in §1629(c)(1)(B).

The closest CIRI comes to defending its claim that the purpose of the "laws of the state . . . shall govern" language federalizes Alaska law is found in its argument that AS 45.55.160 of the Alaska Securities Act does not govern a petition to the board of directors for a shareholder vote on an amendment authorized by 43 U.S.C. §1606(g) or § 1639c(b).[6] The implication here is that Congress therefore must have intended §1629b(c)(1)(B) to federalize Alaska law relating to the solicitation of proxies and make them applicable to solicitations for signatures for petitions.

But CIRI is mistaken.

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5 *See*, CIRI's Appellee's brief at 6 and 12.

6 *Id.* At 14-17.

AS 45.55.160 prohibits false and misleading statements in any document required to be filed with the Alaska Division of Banking & Securities, an agency of the Department of Commerce & Economic Development. AS 45.55.139 requires any "materials relating to proxy solicitations" that are "distributed" or "published" be filed with the Alaska administrator (i.e., the Alaska Division of Banking & Securities). There is no requirement for filing with the S.E.C. or with any other federal agency. Alaska Native corporations are expressly exempted from the requirements of federal securities laws. ANCSA § 28 [43 U.S.C. § 1625].

(C) The Congressional exemption of Native corporations from federal laws is a clear signal that only state law applies to them:

Quaere: Why would Congress expressly exempt ANCSA corporations from federal law requirements and then (according to CIRI's theory) bring these state law entities back into the federal sphere by federalizing the laws of the state?

The solicitation materials for petition signatures which are the focus of CIRI's claim are directly related to an amendment about alienability restrictions referred to in § 1629c(b) — the petitions solicited by Rude and Rudolph were intended to be presented to the CIRI board of directors with a request to submit an alienability amendment to a vote of the shareholders.[7] (It should be noted that CIRI does not allege that either petition or an amendment were actually presented to the board by Rude or Rudolph.)

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[7] See CIRI's Appellees' brief at 1-2.

Had these petitions actually been submitted to the board of directors together with the amendment, and a vote subsequently scheduled by the board, it is inevitable that a solicitation for proxies would have taken place. Indeed, each of Rude and Rudolph's petitions requested the board to allow "at least 30 days for proxy solicitations before the special meeting."[8] It therefore follows that the petition materials questioned by CIRI are directly related to *future* proxy solicitations and, as such, would later have to be filed under AS 45.55.139 at the same time the proxy solicitations later were filed.[9] AS 44.55.160, then, applies to the solicitations for signatures for a petition that CIRI claims are "false and misleading."

(D) Conclusion – There is no incorporation (or reverse incorporation) of Alaska corporate and securities laws into federal law: There has never been a federal corporations code, and there still is none. Alaska has a substantial code in AS 10.06, which includes proxy laws. There are more in the Alaska Administrative Code, 3 AAC 08. These are the "laws of the State" that Congress chose throughout ANCSA:

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[8] See District Court's Amended Order Granting Motion for Partial summary Judgment at 5.

[9] Because AS 45.55.139 is aimed at conduct for the public good, it should be "liberally interpreted" and "construed in favor of the applicability of the statute to the case" *See,* 3 N.J. SINGER AND J.D. SINGER, STATUTES AND STATUTORY CONSTRUCTION, § 60.1 15 272. (7th ed. 2009). *See also, id.* 2B, § 57.1 at 4 and 6-8 (7th ed. 2008) and *Gregor v. City of Fairbanks,* 599 P.2d 743 (Alaska 1979).

Table counting references to state law in ANCSA §§ 36 and 37

(The phrases "laws of the state" and "state law" appear throughout ANCSA.)

ANCSA section	*"laws of the state"*	*state law*
ANCSA § 7 [10]	10	1 †‡
ANCSA § 36 [11]	4 †	1
ANCSA § 37 [12]	1	0
ANCSA § 38 [13]	3	1 ‡
ANCSA § 39 [14]	4	0

†‡ "laws of Alaska"
† "the laws of the State shall govern any shareholder right of petition for Native Corporations."
‡ ANCSA § 38(b) "Relationship to State procedure"

To summarize, Congress' reluctance to create a federal private cause of action in § 1629b(c)(1)(B), and the "shall govern" language in the statute – coupled with CIRI's inability to identify exactly what state laws Congress is said to have "federalized" – leads to only one conclusion: Congress did not intend to federalize Alaska law but rather sought to make it clear that disputes over the accuracy of statements made in solicitations for signatures for a petition relating to alienability restrictions were to be resolved by state law enacted and enforced by the State of Alaska.

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10 43 U.S.C. § 1606 — Regional Corporations
11 43 U.S.C. § 1629b — Procedures for Considering Amendments and Resolutions
12 43 U.S.C. § 1629c — Duration of Alienability Restrictions
13 43 U.S.C. § 1629d — Dissenters Rights
14 43 U.S.C. § 1629e — Settlement Trust Option

II. Even if, *arguendo*, ANCSA §§ 36 and 37 have federalized state law, the *Merrell Dow*[15] and *Grable*[16] cases explain that there is no federal question jurisdiction in this case:

Merrell Dow[17] is a removal case. The defendant Merrell Dow claimed that even though the plaintiff Thompson raised a state law claim of negligence *per se*, a federal question was present because plaintiff's claim rested on an allegation that a drug was misbranded in violation of the Federal Food, Drug and Cosmetic Act (the Drug Act).[18] Merrell Dow removed the case to federal court, which later dismissed on grounds of *forum non conveniens*.

On appeal, the Sixth Circuit reversed, finding no "necessary" federal question because the plaintiff's right to relief did not necessarily depend on a question of federal law. Removal to federal court, therefore, was improper.[19]

The Supreme Court affirmed, although it disagreed with the Sixth Circuit on the "necessary" issue and found that the plaintiff's claim did necessarily depend on a question of federal law.[20] The Court went on, however, to underscore that the real problem in the case was that Congress failed to provide a federal remedy (i.e., a federal private cause of action) for a violation of the FDCA, the federal drug act:

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15 *Merrell Dow Pharmaceuticals v. Thompson,* 478 U.S. 804 (1986)

16 *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing,* 545 U.S. 308 (2005).

17 *Merrell Dow,* 478 U.S. at 806-7.

18 *Id.* at 805.

19 *Id.* at 806-807.

20 *Id.* at 817, n.5.

> Given the significance of the assumed congressional determination to preclude federal private remedies, the presence of the federal issue as an element of the state tort is not the kind of adjudication for which jurisdiction would serve congressional purposes and the federal system. …We simply conclude that the congressional determination that there should be no federal remedy for the violation of this federal statute is tantamount to a congressional conclusion that the presence of a claimed violation of the stature as an element of a state cause of action is insufficiently "substantial" to confer federal-question jurisdiction.

Merrell Dow, 478 U.S. at 814.

In *Grable*, the IRS seized Grable's property and then quitclaimed it to the defendant Darue.[21] Five years later, Grable brought a quiet title action against Darue in state court claiming that the IRS did not provide him notice in the "exact manner" required by federal statute.[22] Darue successfully removed the case to federal court, claiming that Grable's quiet title action, even though created by state law, contained an embedded federal issue — the interpretation of the federal tax statute's notice provision.[23] The Sixth Circuit upheld Darue's removal to District Court.

The case made its way to the Supreme Court, which affirmed the Sixth Circuit and determined there was a federal question because Grable's claim involved the meaning of the federal notice statute, an important issue of federal law that has nation-wide importance.

The significance of *Grable*, however, goes beyond its immediate holding

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21 Grable, 545 U.S. *at* 310-11.
22 *Id.* at 315,
23 *Id.* at 311.

and resides in its discussion of federalism. The Court began by noting that *Merrell Dow* recognized that "in exploring the outer reaches of § 1331 determinations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system."[24] The Court cautioned that in resolving questions of "arising under" federal jurisdiction, "there must always be an assessment of any" potential disruption of the balance between federal and state judicial authority:

> It has in fact become a constant refrain in such cases that federal jurisdiction demands not only a contested federal issue, but a substantial one, indicating a serious federal interest in claiming the advantages thought to be inherent in a federal forum.…
>
> But even when the state action discloses a contested and substantial federal question, the exercise of federal jurisdiction is subject to a possible veto. For the federal issue will ultimately qualify for a federal forum only if federal jurisdiction is consistent with congressional judgment about the sound division of labor between state and federal courts governing the application of §1331. Thus, *Franchise Tax Bd.* explained that the appropriateness of a federal forum to hear an embedded issue could be evaluated only after considering the "welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system." … Because arising-under jurisdiction to hear a state-law claim always raises the possibility of upsetting the state-federal line drawn (or at least assumed by Congress), the presence of a disputed federal issue and the ostensible importance of a federal forum are never necessarily dispositive; there must always be an assessment of any disruptive portent in exercising federal jurisdiction.

Grable, 545 U.S. at 313-14 (citations omitted; underlining added).

The significance of *Grable* for future federal jurisdictional questions lies in

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[24] *Id.* at 317, quoting *Merrell Dow,* 478 U.S. at 810 (emphasis added).

the Supreme Court's concern over the danger of "any disruptive portent in exercising federal jurisdiction." [25]

As for *Merrell Dow's* emphasis on the lack of a federal private right of action, the *Grable* Court "saw this act as worth some consideration in the assessment of substantiality."[26] But the "primary importance" of the lack of a federal cause of action together with "no preemption of state remedy" is that it furnishes "an important clue" about Congress' intent "of the scope" of federal jurisdiction under § 1331:

> But its [the lack of a federal cause of action] primary importance emerged when the Court treated the combination of no federal cause of action and no preemption of state remedies for misbranding as an important clue to Congress's conception of the scope of jurisdiction to be exercised under § 1331. The court saw the missing cause of action not as a missing federal door key, always required, but as a missing welcome mat, required in the circumstances, when exercising federal jurisdiction over a state misbranding action would have attracted a horde of original filings and removal cases raising other state claims with embedded federal issues. For if the federal labeling standard without a federal cause of action could get a state claim into federal court, so could any other federal standard without a federal cause of action. And that would have meant a tremendous number of cases.

Grable, 545 U.S. at 318 (underlining added).

Applying *Merrell Dow and Grable* to this case, the first thing to note is that §1629b(c)(1)(B) does not create a federal private cause of action. Nor is there any language in 1629b(c)(1)(B) indicating that Congress intended to preempt "state

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25 *Id.*, at 314

26 *Id.*, at 318.

court jurisdiction on the issue in dispute."[27]

CIRI seeks to limit its claim of federal jurisdiction to only those disputes over solicitations for signatures for a petition authorized by §1629b(c)(1)(B), but its argument leads to a much larger area of federal jurisdiction.[28] CIRI argues that the phrase "…the laws of the State …shall govern…" in §1629b(c)(1)(B) demonstrates an intent by Congress to federalize a particular set of Alaska laws relating to the solicitation of proxies. (It is equally logical to conclude that such an explicit Congressional choice of state law is an expression of Congressional intent that these matters are to be governed, regulated, administered, and litigated in the State of Alaska and by its agencies and courts – not by any federal involvement.)

But if CIRI's interpretation is sound, then the identical language in §1629b(c)(2), i.e. "…the laws of the State shall govern any shareholder right of petition for Native Corporations," must also mean Congress intended to federalize all Alaska laws relating to any and all shareholder petitions. So if CIRI is successful with its argument that its claim presents a federal question under §1629b(c)(1)(B), then each and every dispute relating to an ANCSA shareholder's petition can be filed in federal district court! Recall the warning in *Grable:* "And that would have meant a tremendous number of cases." [29]

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[27] *Merrell Dow,* 478 U.S. at 816

[28] See CIRI's Brief of Appellee at 20.

[29] This case is the first proxy dispute arising in an ANCSA corporation (of which there are more than 200, all in Alaska) to be litigated in a federal court. There are numerous disputes about ANCSA corporate governance and proxy issues that have been litigated in the state courts, some of which have led to reported

This means that any state cause of action relating to an ANCSA shareholder petition automatically becomes a federal question, thus allowing it to be heard in federal court and possibly attracting "a horde of original filings and removal cases."[30]

This is why CIRI's argument in favor of federal jurisdiction raises serious questions of federalism. CIRI, after all, claims §1629b(c)(1)(B) federalizes an entire body of state law and turns any dispute involving ANCSA petitions into a federal question. Without a doubt, this clearly upsets the sensitive balance between state and federal judicial power. But it does even more; it creates two identical sets of laws dealing with the same subject matter. This in turn can lead to different interpretations of these identical laws by two distinct sovereigns: federal and state. And this can only lead to confusion and uncertainty—the bane of any rational legal system.

If CIRI is to prevail, it must be able to point to a clear and unequivocal intention on the part of Congress to federalize the laws of the State of Alaska, to adopt state law and to install it as new body of federal law. For this court to approve CIRI's theory, it must find a clear and unequivocal intent by Congress to provide a federal cause of action for a violation of these state laws and must find that Congress precluded a state remedy. ANCSA says neither.

CIRI has failed on both counts.

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decisions of the Supreme Court of Alaska. A discussion of these cases can be found in Fred W. Triem, *Judicial Schizophrenia in Corporate Law: Confusing the Standard of Care with the Business Judgment Rule,* 24 ALASKA L.REV. 23 (2007). *See esp. id.,* at 42 & n.90 (collecting cases).

[30] *Grable*, 545 U.S. at 318.

III. The analysis of federal question jurisdiction in *Merrell Dow* and in *Grable* is highly relevant in this matter – and so is the *McVeigh* case:

CIRI rejects *Merrell Dow and Grable* and attempts unsuccessfully to show a meaningful distinction between (a) federal law embedded in state law, and (b) state law embedded in federal law. CIRI argues that *Merrell Dow and Grable* are not relevant in this case because they involve federal law embedded in state law, whereas here the situation is reversed—state law is embedded in federal law.[31]

CIRI's argument rests on a distinction without substance. To ask if state law is embedded in federal law *or* is federal law embedded in state law is much like asking whether a zebra is white with black stripes, *or* black with white stripes?

If CIRI is correct that Congress intended to "federalize" state law in §1629b, then Congress merely adopted previously-enacted state law that Congress did not create. In other words, we still are dealing with a body of state-law rules first enacted into law by the state of Alaska, not by Congress.

Because CIRI dwells on a superfluous distinction, it overlooks the Supreme Court's fundamental concern in both *Merrell Dow* and *Grable*.

The overriding question that bothered the Court in these two cases lay in determining "…the outer reaches of §1331…"; these "determinations about federal

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[31] *See* CIRI's Brief of Appellee at 19-20.

jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system."[32] This same overriding question is present here. No matter whether state law is embedded in federal law, or whether federal law is embedded in state law: the question of judicial power and its relation to our federal system is present in either case, in either path or analysis.

As discussed earlier, Alaska has created an administrative procedure to deal with the kind of claim CIRI has made here, and the state has given the Alaska Commissioner of Commerce broad discretion to fashion a wide range of sanctions under AS 45.55.920—including a civil penalty. There is an entire set of Alaska regulations on this subject in the Alaska Administrative Code: 3 AAC 08.315 - .065.

Congress neither provided for a federal private cause of action in §1629b(c) nor used any language creating federal jurisdiction.[33] Nevertheless, CIRI takes the position that Alaska's carefully crafted administrative system for dealing with the very kind of misleading or false statements here alleged by CIRI, together with its

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[32] *Grable,* 545 U.S. at 317, quoting *Merrell Dow*, 478 U.S. at 810.

[33] Compare the explicit grant of federal subject matter jurisdiction in those federal statutes in which Congress has done what it did not do in ANCSA: expressly authorize federal question jurisdiction by allowing suit in federal courts. For example, see Securities and Exchange Act of 1934, § 27, *Jurisdiction of Offenses and Suits*: "Any suit or action to enforce any liability or duty created by this title … may be brought in any such district." [codified at 15 U.S.C. § 78aa].

hearing procedure, the Alaska Commissioner of Commerce's discretion to fashion sanctions, and the right to appeal to the Alaska Superior Court, all can be swept aside in favor of a direct federal private action filed in federal district court. ANCSA does not provide for this!

But this is not all. CIRI also takes the position that as the result of "federalized" state law, a federal court judge now has the power to order Alaska executive branch officials to perform official functions that are not authorized by state law. The district court judge in this case did exactly this when he ordered the Alaska Division of Banking and Securities to review "all proxy or petition solicitations…prior to such proxy or petition being sent to CIRI's shareholders."[34] Alaska law does not authorize or require any such prior review. This new state procedure was created by a federal district court, not pursuant to Alaska executive branch or legislative choice. The federal court is telling the state agency what it must do, acting under its claim that ANCSA has "federalized" the Alaska law of corporations in AS 10.06 and the Alaska Securities Act in AS 45.55.

Does the judicial power CIRI now claims for federal courts raise the very concern that troubled the Supreme Court in *Merrell Dow* and in *Grable*? And is

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[34] *See* District Court' Amended Order Granting Motion for Partial Summary Judgment at 13.

this new judicial power a "disruptive portent" that will disturb the sensitive balance between federal and state judicial authority?[35] These questions answer themselves.

Without both a federal private right of action created by Congress and a clear statement of displacement of state remedies in §1629b(c)(1)(B), the federal-state disruption that CIRI endorses impairs — yea, even *destroys* — the delicate balance between federal and state judicial authority that *Merrell Dow* and *Grable* require.

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[35] *Grable*, 545 U.S. at 314.

IV. ANCSA §§ 36 and 37 [43 U.S.C. §1629b and §1629c] do not provide an independent basis for federal question jurisdiction:

CIRI's assertion that ANCSA §§ 36 and 37 [43 U.S.C. §§ 1629b and 1629c] supply federal question jurisdiction is devoid of legal merit because these statutes merely provide standards of conduct but do not supply a cause of action. ANCSA is just a humble little appropriations statute, not a major regulatory scheme like the Securities Acts, ERISA, or NLRA, all of which *do* create federal question jurisdiction.

CIRI argues that federal question jurisdiction exists under §1629b and §1629c because Rude and Rudolph's solicitation of signatures for their petitions "did not include a written notice" setting forth the amendment as required by § 1629b(b)(2)(A) and "did not specify the date alienability restrictions would terminate" as required by § 1629c(b)(2).[36]

Section 1629b concerns itself only with duties the corporation and the board of directors of an ANCSA corporation must perform after a §1629b(c) petition is submitted to the board. This duty is the sole responsibility of the board and the board alone; these are not duties of rank-and-file shareholders such as Rude and Rudolph. Mere shareholders could not have violated § 1629b(b)(2)(A). CIRI's argument that its claim against Rudolph arose out §1629b is wholly without merit. There is no federal claim here; CIRI cannot create one out of nothing:

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[36] CIRI's brief at 20-21.

> Though the plaintiff is generally "the master of the complaint,"… a plaintiff cannot create federal jurisdiction under §1331 simply by alleging a federal claim where in reality none exists.

Empire Healthchoice Assurance, Inc. v. McVeigh, 396 F.3d 136, 140 (2nd Cir. 2004) (Sotomayor, J.) (citation omitted; underlining added), *affirmed Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677 (2006).

CIRI's assertion that it has raised a federal claim under § 1629b(b)(2)(A) is not even "colorable", much less "reasonable".[37] There is no "legal substance" to CIRI's position.[38] CIRI has attempted to "create federal jurisdiction under §1331 simply by alleging a federal claim where in reality none exists."[39]

As for CIRI's claim that federal jurisdiction exists under § 1629c(b)(2) because Rude and Rudolph's solicitations for signatures for its petitions did not include an amendment that specified "the date the alienation restrictions would terminate,"[40] this argument also lacks legal substance, and for at least two reasons:

First, federal question jurisdiction could have arisen under §1629c(b)(2) only if Rude and Rudolph had submitted an alienation amendment without a termination date to the board under §1629b(c)(1)(A) and then claimed that the §1629c(b)(2) language requirement was either unlawful or did not apply. But this

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37 *Smith v. Kansas City Title and Trust Co*., 255 U.S. 180, 190 (1921).

38 13D WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE, *Substantiality of the Federal Question,* §3564 at 241- 253 (3rd ed. 2008).

39 *Empire Healthchoice Assurance, Inc. v. McVeigh,* 396 F.3d 136, 140 (2nd Cir. 2004) (Sotomayor, J.).

40 See CIRI's Appellees' Brief at 21.

is not CIRI's claim.[41] CIRI does not challenge the constitutionality of ANCSA §§ 36 and 37, and CIRI does not argue that the meaning of these federal laws is unclear or in conflict. CIRI simply asserts that Rude and Rudolph failed to include an amendment and a termination date in their solicitations for signatures.

CIRI's claim of federal question jurisdiction under §1629c(b) appears to be based on nothing more than a hypothetical scenario where, if Rude and Rudolph had drafted an alienability amendment without termination language and then submitted it to the board, and if they then claimed either that §1629c(b)(2) is unlawful or not applicable, then CIRI's claim would have provided it with subject matter jurisdiction because the meaning of these sections is unclear or because they conflict with each other or with some other law. Such a wildly speculative claim lacks the substantiality required by *Grable*.[42] CIRI's complaint does not raise a substantial question of federal law. Its statutes are not unconstitutional and they do not conflict in a way that requires resolution or explication by a federal court.

Second, §1629c does not create a federal cause of action by which a private party [43] can challenge a solicitation for signatures for a petition that lacks either a

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41 CIRI did not claim that Rude and Rudolph had provided an alienability amendment to its board of directors pursuant to 43 USC §1629b(c)(1)(A). *See* CIRI complaint, ER 75 - 76 (First and Second Claims for Relief).

42 *Grable*, 545 U.S. at 312.

43 CIRI is a private, business-for-profit enterprise that is incorporated under state law. ANCSA § 7(d) ("shall incorporate under the laws of Alaska a Regional Corporation to conduct business for profit"); *cf.* ANCSA § 7(h)(1)(A)(iii) ("vest in the holder all rights of a shareholder in a business corporation organized under the laws of the State"). CIRI is not an agency of state or federal government. It's just another private party.

termination date or a proposed amendment without a termination date. But the lack of a direct federal action does not mean CIRI is without any remedy. Its remedy is obvious: if a petition relating to lifting of the restrictions on alienation is submitted to the board without an amendment (or with an amendment but without a termination date) the board simply can reject the petition as incomplete.

And if CIRI's board were to disallow such a petition for these reasons, and Rude and Rudolph filed suit in state court alleging that the requirements of §1629c(b)(2) were unlawful or inapplicable, the shareholders' case arguably could be removed to federal court on federal question grounds. But this hypothetical is a far different case than CIRI's claim here: that Rude and Randolph's failure to include an amendment with a termination date in their solicitations for signatures thereby provided CIRI with a federal question and subject matter jurisdiction for a direct action filed in federal court.

Congress has not created a federal private cause of action for such a claim. CIRI cannot point to any provision in ANCSA that creates a federal private cause of action for the failure of an ANCSA shareholder to include an amendment setting out a termination date within a solicitation for signatures that are part of a petition to terminate alienability restrictions.

Without a federal cause of action in ANCSA and without a substantial issue of federal law appearing on the face [44] of its complaint, CIRI has not presented a case within § 1331. There is no federal question jurisdiction.

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[44] *See* CIRI complaint, ER 75 - 76 (First and Second Claims for Relief).

V. The *Grable* case provides no support or comfort for CIRI — it is the mirror image of *CIRI v. Rude*:

CIRI's reliance on the Grable case is misplaced; both Grable and Empire Healthchoice support dismissal of this case: *Grable* involved a direct challenge to the government's interpretation of a federal law that was disputed by the parties and that was the central issue – really, the *only* issue – in the case. Here CIRI does not challenge the constitutionality or interpretation of a federal law. And there is no agency involvement.

Table contrasting *Grable & Sons v. Darue* with *CIRI v. Rude*

Factors Determining Federal Jurisdiction	*Grable & Sons v. Darue*	*CIRI v. Rude*
Federal statute implicated?	I.R.C.	ANCSA
Involves United States or federal agency? †	Yes	No
National interest or nationwide application of the law at issue?	Yes	No
Need for uniformity of law?	Yes	No
Does federal law provide a federal forum?	Yes	No
Plaintiff challenges meaning, interpretation, or constitutionality of federal law?	Yes	No
Substantial issue of federal law?	Yes	No

† *Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. at 692, n. 3 (2006): "Neither the United States nor any United States agency is a party to this case"

(another element identified as important in *Grable* but missing in *Empire Healthchoice* and in *CIRI v. Rude and Rudolph*). A year after *Grable,* the court explained in *McVeigh:*

> This case is poles apart from *Grable.* Cf. Brief for United States as *Amicus Curiae* 27. The dispute there centered on the action of a federal agency (IRS) and its compatibility with a federal statute, the question qualified as "substantial," and its resolution was both dispositive of the case and would be controlling in numerous other cases. See 545 U.S., at 313, 125 S.Ct. 2363. Here, the reimbursement claim was triggered, not by the action of any federal department, agency, or service, but by the settlement of a personal-injury action launched in state court.

Id., Empire Healthchoice v. McVeigh, 547 U.S. at 700.

A helpful discussion of *Grable* and the current jurisprudence of federal question jurisdiction can be found in Rory Ryan, *No Welcome Mat, No Problem?: Federal-Question Jurisdiction After* Grable, 80 ST. JOHN'S L. REV. 621 (2006), *see esp.* at 650-53 (exploring the disruptiveness element of the jurisdictional calculus).

VI. The ANCSA cases cited by CIRI in Part VI. E. of its Brief of Appellee are inapposite and unhelpful because they *do* present substantial issues of federal law, unlike the case now before this Court — What is "substantial"?:

(A) The legal landscape-I — When the federal law does not create a federal cause of action, the only other route to a federal question is a "substantial question of federal law": Some federal law (here: ANCSA) must create a federal cause of action and it must provide a federal remedy *or* there must be an important dispute about federal law presented in the case (e.g., a challenge to the constitutionality of a federal law). The leading treatise on the subject explains this basic principle that governs the interpretation of § 1331:

> The current law appears to be that a case arises under federal law if it is apparent from the face of the plaintiff's complaint either (1) that the plaintiff's cause of action was created by federal law; or (2) the plaintiff's cause of action is based on state law, but a federal law that creates a cause of action is an essential component of the plaintiff's complaint.

ERWIN CHEMERINSKY, FEDERAL JURISDICTION, § 5.2 at 273 (5th ed. 2007) (footnote omitted). The Supreme Court has set the rule in a leading case on federal question jurisdiction:

> Congress has given the lower federal courts jurisdiction to hear, originally or by removal from a state court, only those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law.

Franchise Tax Board for the State of California v. Construction Laborers' Vacation Trust for Southern California, 463 U.S. 1, 27-28, 103 S.Ct. 2841, 2856, 77 L.Ed.2d 420 (1983) (underlining added).

The "substantial question" is often a constitutional challenge, such as in *Broad v. Sealaska,* 85 F.3d 422 (9th Cir. 1996), discussed in sub-part (C), below.

(B) The legal landscape-II — Justice Cardozo explained in Gully precisely what is needed to find a substantial federal question: His classic explanation in 1936:

> To bring a case within the statute [now § 1331] a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto . . . and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal.

Gully v. First National Bank in Meridian, 299 U.S. 109, 112-13, 81 L.Ed. 70, 72, 57 S.Ct. 96 (1936) (citations omitted; underlining added).

ANCSA case law in the Ninth Circuit includes useful examples of how Justice Cardozo's test should be applied. These cases are discussed below and include *Broad v. Sealaska*[45] (one interpretation renders the law unconstitutional,

[45] *Broad v. Sealaska Corp.,* 85 F.3d 422 (9th Cir. 1996), *cert. denied,* 519

the other does not) and *Beuttner v. Kavilco*[46] (dueling subsections of ANCSA § 14: choosing one yields litigation success for the plaintiff and choosing the other gives victory to the defendant).

(C) Broad v. Sealaska is a paradigm of what IS a substantial federal question — the shareholders directly challenged the constitutionality of ANCSA § 39: One of Sealaska's shareholders contended that a corporate scheme to divert shareholder equity from all shareholders pro rata to a privileged subset of shares, pursuant to the Settlement Trust Option, which was authorized by ANCSA § 39 [43 U.S.C. § 1629e] violated the Takings Clause of the Fifth Amendment because it constituted a "taking" of the disadvantaged shareholders' equity. The plaintiff also contended that the scheme for "elders' benefits" violated the Due Process Clause.

A divided panel of this court affirmed affirmed Judge Holland's order, which had dismissed the constitutional claims by which the shareholders' made a direct frontal attack on the constitutionality of ANCSA § 39 [43 U.S.C. § 1629e]. A divided panel of this court also overruled the shareholder's Fifth Amendment challenge to a discriminatory dividend to ANCSA § 39. *But see* Judge Kleinfeld's dissent (federal law does not displace state law that prohibits discriminatory dividends). (Kleinfeld, J. dissenting, 85 F.3d at 432 - 436).

U.S. 1092 (1997).

[46] *Buettner v. Kavilco, Inc.*, 860 F.2d 341 (9th Cir. 1998).

(D) Broad v. Sealaska is vastly different from the instant case because Mr. Broad attacked the constitutionality of ANCSA § 39: When such a challenge appears on the face of the plaintiff's well-pleaded complaint, there can be no debate that such a case *does* involve a federal question. In *Broad,* the plaintiff contended that Sealaska's program of diverting some corporate assets to a sub-set of privileged shareholders constituted a taking of the victim-shareholders' equity in the corporation. Even in affirming the district court, the majority opinion noted in passing that the plaintiff's theory had some merit:

> The district court ultimately concluded that the takings claim failed because the distribution of funds to elder shareholders was for a private use, and not a public use within the purview of the Fifth Amendment. The district court failed to see that takings for a private use, as opposed to a public use, are presumptively unconstitutional. *See, e.g., Hawaii Housing Auth. v. Midkiff,* 467 U.S. 229, 241, 104 S.Ct. 2321, 2329, 81 L.Ed.2d 186 (1984) ("[T]he Court's cases have repeatedly stated that 'one person's property may not be taken for the benefit of another private person without a public purpose, even though compensation be paid.' ") (quoting *Thompson v. Consolidated Gas Utilities Corp.,* 300 U.S. 55, 80, 57 S.Ct. 364, 376, 81 L.Ed. 510 (1937)). Therefore, the district court erred when it held that because this alleged taking was for a *private use* it did not violate the plaintiffs' Fifth Amendment rights.

Broad v. Sealaska Corp., 85 F.3d 422, 431 n.5 (9th Cir. 1996), *cert. denied,* 519 U.S. 1092 (1997).

(E) CIRI's cases illustrate Justice Cardozo's test of an "essential element" — one choice of dueling federal laws* or *one interpretation in preference to another will determine the outcome of the lawsuit; but no such

choice or debate is present in* CIRI v. Rude and Rudolph*, which presents no challenge to federal law:

- *Buettner v. Kavilco, Inc.*, 860 F.2d 341, 342-43 (9th Cir. 1988): This case was filed in the Alaska Superior Court, but removed by the defendant. The case turned on the dueling interpretations of ANCSA § 14 (c)(1) and (g) [43 U.S.C. § 1613]. The conflict between two apparently inconsistent provisions of federal law presented a substantial question of federal law.

- *City of Ketchikan v. Cape Fox Corp.*, 85 F.3d 1381 (9th Cir. 1996): Another case about the disputed meanings of ANCSA § 14 (c), same or similar issue as in *Buettner.* A paradigm of Justice Cardozo's test: "it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another."

- *Koniag, Inc. v. Koncor Forest Resource*, 39 F.3d 991, 995, 996 (9th Cir. 1994): The issue in *Koniag* is the ownership of subsurface sand and gravel on former federal lands that were conveyed to an ANCSA village corporation. "Whether land patented from the United States is burdened by an implied servitude" and what title the federal government had passed are matters of federal, not state law.

- *Tyonek Native Corp.. v. Cook Inlet Region, Inc. [CIRI]*, 853 F.2d 727 (9th Cir. 1988): Presents an issue analogous to that in *Koniag:* dueling

ownership rights to former federal lands that had been conveyed pursuant to ANCSA's settlement.

- *Sealaska Corp. v. Roberts,* 428 F.Supp. 1254 (D. Alaska 1977): An easy one. The U.S. Secretary of the Interior is a *party* (a named defendant). When the United States is a party, the federal court always has subject matter jurisdiction. 28 U.S.C. §§ 1345 (United States as plaintiff) and 1346 (United States as defendant).
- *Notti v. Cook Inlet Region, Inc. [CIRI],* 31 Fed.Appx. 586 (9th Cir. 2002): An unreported case in the same category as *Broad:* Shareholder challenged the constitutionality of a provision of ANCSA. In *Broad,* the challenge was to § 39; in *Notti* it was to § 7(r). Both cases presented the same basis for federal question jurisdiction.

In none of the reported decisions cited by CIRI and discussed above did the court discuss whether it had federal question jurisdiction, *vel non.* A close look at each of CIRI's cases will disclose that there is a rational basis for federal jurisdiction: a constitutional challenge to a federal law, dueling provisions of federal laws, patents of federal lands, dueling ownership rights to former federal lands, United States as a party — all of which are federal questions, all meet the "substantial" requirement of *Gully* and *Franchise Tax Board,* reiterated and applied in *Merrell Dow*, *Grable,* and *McVeigh.*

Conclusion:

The modern Supreme Court jurisprudence of federal question jurisdiction is found in four cases, all of which the district court ignored: *Franchise Tax Board, Merrell Dow*, *Grable,* and *McVeigh*. Instead of following controlling precedent, it constructed a bizarre "reverse incorporation" theory based on an analogy to the Federal Tort Claims Act, which *does* create a federal cause of action and *does* contain an explicit grant of federal jurisdiction (unlike ANCSA, which does neither).

The decision below must be reversed. This is not a federal case.

Respectfully submitted on 26 September 2011 at Petersburg, Alaska.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the brief is proportionately spaced, has a typeface of 13 points or more, and contains 6,646 words (exclusive of tables and this certificate).

/s *Fred W. Triem*

CERTIFICATE OF SERVICE

I hereby certify that 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 on 26 September 2011.

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.

/s *Fred W. Triem*