Nos. 13-35513 and 13-35518

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROCKY BIXBY; LAWRENCE ROBERTA; RONALD BJERKLUND; CHARLES ELLIS; MATTHEW HADLEY; COLT CAMPREDON; VITO PACHECO; BRIAN HEDIN; CHARLES SEAMON; AARON ST. CLAIR; BYRON GREER; JASON ARNOLD,
Plaintiffs—Appellees—Cross-Appellants,

v.

KBR, INC.; KELLOGG BROWN & ROOT SERVICES, INC.,
Defendants—Appellants—Cross-Appellees.

Appeal from United States District Court for the District of Oregon
Paul Papak, Magistrate Judge; Case No. 3:09-cv-00632-PK

MOTION OF INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL AND AMERICAN CHEMISTRY COUNCIL TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF DEFENDANTS-APPELLANTS-CROSS-APPELLEES KBR, INC. AND KELLOGG BROWN & ROOT SERVICES, INC.

[Submitted concurrently with Amici Curiae Brief]

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MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF

Amici Curiae International Association of Defense Counsel (IADC) and American Chemistry Council (ACC) respectfully move for leave to file the attached *amici curiae* brief.

The Interests of the IADC and ACC. The International Association of Defense Counsel (IADC), established in 1920, is an association of approximately 2,500 corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, culpable defendants are held liable for appropriate damages, and non-culpable defendants are exonerated and can defend themselves without unreasonable cost. In particular, the IADC has a strong interest in the fair and efficient administration of toxic tort actions such as this.

The American Chemistry Council (ACC) represents leading companies engaged in the business of chemistry. ACC members apply

the science of chemistry to provide innovative products and services that make people's lives better, healthier, and safer. The business of chemistry is a $700 billion enterprise and a key element of the nation's economy. The business of chemistry in California alone generates a payroll of over $6.8 billion and directly employs over 73,000 workers. In Oregon, the business of chemistry generates a payroll of over $200 million.

Necessity of the Motion. IADC and ACC received the consent of the attorneys for Defendants—Appellants—Cross-Appellees KBR, Inc. and Kellogg Brown & Root Services, Inc. (KBR) to file this brief. IADC and ACC endeavored to obtain consent from Plaintiffs—Appellees—Cross—Appellants Bixby, et al., but were unable to do so, requiring the filing of this motion. *See* Circuit Rule 29-3.

In response to consent requests from other amici, Plaintiffs' counsel first conditioned consent on pre-approving a draft of the proposed amicus briefs. Plaintiffs have since acceded to the filing of two amicus briefs while contending that two other amicus briefs are untimely. Although Plaintiffs have not yet asserted that the *amici* brief of IADC and ACC is untimely, we anticipate that they will do so, even

though KBR's motion for leave to file an oversized opening brief remains pending before the Appellate Commissioner, and KBR's brief has not yet been accepted for filing by this Court.

Timeliness of the Proposed Brief. As two other *amici* have already argued, any amicus brief submitted in support of KBR is not only timely, it is early. Federal Rule of Civil Procedure 29(e) provides that an *amicus curiae* brief must be filed no more than seven days after the filing of the principal brief of the party whose position is being supported. KBR filed a motion to file portions of its brief under seal, and to file an oversized brief, on July 26, 2013. This Court has not ruled on that motion yet, and as a result KBR's brief has not yet been accepted for filing. If the motion is granted, the court will reset the date for filing any remaining briefs; if it is denied, the court will set a new date for the moving party's brief to be resubmitted as well as due dates for any remaining briefs. See Circuit Rule 32-2 and Adv. Comm. Note; Ninth Circuit Civil Appellate Practice, sections 6:118-6:119 (Rutter Group 2013). Therefore, the time for Plaintiffs to file their responsive brief has not begun to run yet and neither has the seven-day time period in

which to file an amicus brief in support of KBR. Plaintiffs will suffer no prejudice from the filing of this brief.

Nonetheless, Plaintiffs object to the filing of the PLAC and Oregon *Amicus* Briefs – and likely this brief as well – because (1) the KBR opening brief was submitted electronically as well as by overnight carrier, and according to Plaintiffs unlike a paper filing an electronically submitted brief is "filed" the date it is entered into the e-filing system, even if it is submitted with a motion for leave to file an oversized brief and (2) any adjustment made to the filing of the party briefs as a result of the court accepting the oversized opening brief for filing should in any event have no effect on the time for filing amicus briefs. (Opposition to Motion for Leave to File, at 2-6.) Plaintiffs are wrong.

First, there is no reason to carve out a special rule for electronically submitted briefs. However they are submitted, briefs can still be rejected for filing. *See generally Harris v. Wandruff*, 1996 WL 266136, *1 (N.D. Cal. May 15, 1996) ("Several deputy clerks have improperly returned to him unfiled several petitions plaintiff submitted for filing, claiming that they were untimely. Plaintiff seeks damages

and an order compelling defendants to file his petitions.") The Ninth Circuit Commissioner could still reject KBR's brief and order a new, non-oversized brief to be filed. Until an order issues, the brief is not filed. Second, it makes no sense that an order concerning the filing of the opening brief would adjust the time for filing the remaining party briefs, but would have no corresponding impact on the time for filing *amicus* briefs. The time to file *amicus* briefs is tied to the filing date of the parties' briefs.

Discretionary Leave to File. In any event, even if an *amicus* brief were untimely, this Court would have the discretion to nonetheless accept it for filing, particularly where, as here, the brief does not duplicate other briefs and brings to the court's attention helpful additional authorities. Indeed, this Court, as well as the U.S. Supreme Court and other circuits have all accepted for filing *amicus* briefs that would have otherwise been untimely. *See, e.g.*, *Bugenig v. Hoopa Valley Tribe*, 229 F.3d 1210, 1215 (9th Cir. 2000) on reh'g en banc, 266 F.3d 1201 (9th Cir. 2001); *Fry v. Exelon Corp. Cash Balance Pension Plan*, 576 F.3d 723, 725 (7th Cir. 2009) (considering an *amicus* brief filed in support of a petition for rehearing); *Mescalero Apache Tribe v.*

O'Cheskey, 450 U.S. 959 (1981); *Hills v. Scenic Rivers Ass'n of Oklahoma*, 425 U.S. 902 (1976).

The Proposed Amicus Brief. One of the issues central to KBR's appeal is the unavailability of emotional distress damages for fear of future injury without proof of present physical harm (here, only an untested and purportedly temporary "genetic transformation"). *See* Fed. R. App. P. 29(b)(2). IADC and ACC supports this argument. By reviewing other jurisdictions' treatment of the present physical injury requirement in the context of purported subcellular transformation. The discussion of this issue supplements, rather than repeats, KBR's brief and the coverage of Oregon law on the subject in the brief of the Oregon *Amici*.

Brief Preparation Funding. No party or party's counsel authored this brief in whole or in part. No party or party's counsel contributed money to fund the preparation or submission of this brief. No other person except IADC, ACC, and their counsel contributed money to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(c)(5).

IADC and ACC respectfully request that the Court grant leave to file the brief submitted concurrently with this motion.

Dated: August 30, 2013

Respectfully submitted,

SNELL & WILMER L.L.P.

By: /s/ Mary-Christine Sungaila
MARY-CHRISTINE SUNGAILA
Attorneys for Amici Curiae International Association of Defense Counsel and American Chemistry Council

CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2013, I electronically filed the foregoing brief of *Amici Curiae* of the International Association of Defense Counsel and American Chemical Council with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: August 30, 2013
Costa Mesa, California

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

FEDERAL CASES

TABLE OF AUTHORITIES

Page

STATE CASES

FEDERAL RULES

OTHER AUTHORITIES

TABLE OF AUTHORITIES

Page

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(c) of the Federal Rules of Appellate Procedure, *Amici Curiae* state as follows:

Amici Curiae International Association of Defense Counsel (IADC) and American Chemistry Council (ACC) have no parent corporations and no subsidiary corporations. No publicly held company owns 10% or more of their stock.

INTEREST OF *AMICI CURIAE*

The International Association of Defense Counsel (IADC), established in 1920, is an association of approximately 2,500 corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, culpable defendants are held liable for appropriate damages, and non-culpable defendants are exonerated and can defend themselves without unreasonable cost. In particular, the IADC has a strong interest in the fair and efficient administration of toxic tort actions such as this.

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payroll of over $6.8 billion and directly employs over 73,000 workers. In Oregon, the business of chemistry generates a payroll of over $200 million.

One of the issues central to KBR's appeal is the unavailability of emotional distress damages for fear of future injury without proof of present physical harm (here, only an untested and purportedly temporary "genetic transformation"). IADC and ACC support this argument by reviewing other jurisdictions' treatment of the present physical injury requirement in the context of purported subcellular transformation.

STATEMENT OF COMPLIANCE WITH RULE 29(c)(5)

This brief is submitted pursuant to Rule 29(b) of the Federal Rules of Appellate Procedure, accompanied by a motion for leave to file. No party or party's counsel authored this brief in whole or in part. No party or party's counsel contributed money to fund the preparation or submission of this brief. No other person except IADC, ACC, and their counsel contributed money to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(c)(5).

SUMMARY OF ARGUMENT

The jury awarded each plaintiff $850,000 in noneconomic damages (later reduced to $500,000 under the Oregon statutory damage cap) and $6.25 million in punitive damages. E.R. 86, 88. The only "injury" Plaintiffs supposedly had in common was an untested, fleeting, and imperceptible "genetic transformation injury," on which their emotional distress damages for fear of cancer were based. It was error to permit such a recovery. As KBR and the Oregon *amici* have made clear, Oregon law does not permit recovery of emotional distress damages where, as here, there is no present physical harm associated with the purported future risk of harm or, indeed, there is no physical injury at all.

As we further explain, Plaintiffs' recovery not only runs counter to Oregon law, it also flies in the face of appellate decisions from other jurisdictions that have concluded purported subcellular injury does not meet the emotional distress physical injury requirement.

ARGUMENT

I. BACKGROUND: THE INJURY REQUIREMENT

"The traditional rule in tort law is that 'the threat of future harm, not yet realized, is not enough.'" Gary E. Marchant, *Toxicogenomics and*

Toxic Torts, Trends in Biotechnology Vol. 20, No. 8 (Aug. 2002). But in the last 25 years, plaintiffs in toxic tort litigation have moved in the direction of asserting new non-injury damage claims, such as medical monitoring, fear of cancer, and emotional distress, in an effort to recover for future anticipated harm. *See* Bill Charles Wells, *The Grin Without the Cat: Claims for Damages from Toxic Exposure without Present Injury*, 1 (Master of Laws Thesis, George Washington University July 6, 1993) (republished at 18 Wm. & Mary Envtl. L. & Pol'y Rev. 285 (1994)) ("*Grin without the Cat*"); *see also* Barry B. Cepelewicz & Eric Watt Weichmann, *Genetic Injury in Toxic Tort Cases: What Science Can and Cannot Prove*, 62 DEF. COUNSEL J. 201 (April 1995) ("*Genetic Injury in Toxic Tort Cases*") ("In the past several years, courts have compensated plaintiffs who allege that they were exposed to some substance that increased their risk of developing disease in the future, although at the time of trial they were free of injury;" these claims include fear of future disease, increased risk of future disease, and medical monitoring).

Providing compensation "for an event that has not yet occurred, and, indeed, may never occur," "is a long way from a traditional tort

which only came into being when a victim suffered a harm." *Grin without the Cat,* at 120. Compensation for emotional distress raises particular concerns, since such claims are inherently subjective and based on injuries that cannot be seen. *Id*. at 55.

To stem concerns about a resulting flood of new, false emotional distress claims, courts have taken a variety of approaches. Some have imposed "floors" for recovery (e.g., a requirement that emotional distress be "serious") and "hurdles" to recovery (requirements that must be met before a claim can go to a jury, e.g., the present physical harm requirement for emotional distress claims). *Id*. at 55-56.

"For years, the prevailing law was that the claim of a subclinical injury was held insufficient to constitute a 'present physical injury.'" *Genetic Injury in Toxic Tort Cases, supra*, 62 DEF. COUNSEL J. at 202. But then a "handful of courts" held that "whether a sub-cellular or sub-clinical injury is a present, physical harm is a question of fact for the jury." Anthony G. Hopp, *Not so Fast: The DNA Revolution in Toxic Tort Practice is Still a Long Way Off,* Mealey's Emerging Toxic Torts, Vol 17, #18 (December 16, 2008). The majority rule remains, however,

that a clinical symptom or disease is necessary before an emotional distress or personal injury claim can exist. *Id.* at 2.

II. THE MAJORITY OF COURTS TO CONSIDER THE ISSUE HAVE DETERMINED THAT SUBCELLULAR INJURY DOES NOT CONSTITUTE A PHYSICAL INJURY THAT CAN GIVE RISE TO AN EMOTIONAL DISTRESS FEAR OF FUTURE INJURY CLAIM.

In Oregon, to sustain a claim for emotional distress, a plaintiff must establish that the plaintiff suffered a corresponding physical injury. *See Rustvold v. Taylor,* 14 P. 3d 675 (Or. Ct. App. 2000); *see also Lowe v. Philip Morris USA, Inc.*, 183 P. 3d 181 (Or. 2008) (the mere "threat of future harm…is not sufficient to give rise to a negligence claim"); *Paul v. Providence Health System-Oregon,* 573 P. 3d 106 (Or. 2012).[1] At a minimum, "the physical impact rule requires an act or omission that results in some perceptible physical effect on a plaintiff." *Chouinard v. Health Ventures*, 39 P. 3d 951 (Or. Ct. App. 2002).

[1] Oregon is not alone. As far back as 1992, a majority of jurisdictions adhered to the rule requiring some form of physical injury in order to recover for emotional distress damages arising from fear of a potential disease. *See generally* Scott D. Marrs, Mind Over Body: Trends Regarding the Physical Injury Requirement in Negligent Infliction of Emotional Distress and "Fear of Disease" Cases, 28 Tort & Ins. L. J. 1 (1992-1993) (collecting cases).

In the instant case, the plaintiffs' expert witness, Dr. Carson, was unable to say whether any individual plaintiff experienced a "genetic transformation injury" at Qarmat Ali, much less whether such an injury persisted in any particular individual. E.R. 743, 745; *see also* E.R. 754, 795. Moreover, he acknowledged that "genetic transformation injury" is asymptomatic with no observable physical symptoms, and is capable of being spontaneously repaired by the body. E.R. 797-800. Given Dr. Carson's testimony, Plaintiffs' claims for "genetic transformation injury" should not be compensable under Oregon law, because there is no "perceptible physical injury."

Oregon is not alone in requiring proof of a perceptible physical injury before a plaintiff can recover emotional distress damages. In fact, five Circuit Courts of Appeal – including this Court – have all determined that subcellular injury is insufficient to maintain an emotional distress claim under a range of federal and state laws. *See, e.g., Dumontier v. Schlumberger Technology Corp.*, 543 F.3d 567, 570, 571 (9th Cir. 2008) (affirming grant of summary judgment for defendant on Price Anderson Act claims stemming from purportedly damaged cells and modified DNA; reasoning that "not every alteration of the body is

an injury," that "[a]ll life is change, but all change is not injurious," and even if radiation always damages DNA, that does not mean there will always be corresponding compensable physical pain, injury or disease); *Abuan v. General Elec. Co.*, 3 F.3d 329, 335 (9th Cir. 1993) (summary judgment affirmed because plaintiffs had failed to demonstrate present physical injury, which was an essential element of their common law claims; although plaintiffs presented expert testimony that "[a]ll cases of exposure to [the defendant's] carcinogenic chemicals inexorably lead to physical injury taking the form of present cellular damage to the genetic material (DNA)," no expert testified that toxic exposure more probably than not would lead to a malady in these plaintiffs).

Two federal cases, both decided in 2005, illustrate the wisdom of requiring a physical injury beyond the subcellular level.

The decision in *In re Rezulin Products Liab. Litig.*, 361 F.Supp.2d 268 (S.D.N.Y. 2005) addressed whether Texas or Louisiana law allowed recovery where diabetes patients who took Rezulin had only asymptomatic subcellular injuries, but provided expert testimony that "Rezulin will injure the mitochondria of every cell it comes in contact with," causing toxic cellular injury to all patients who use the drug. *Id.*

at 272. The court concluded that any future consequences from the plaintiffs' alleged subcellular injuries were speculative, there was no evidence that the alleged mitochondrial damage was permanent or irreversible, and under Texas law a plaintiff's recovery for asymptomatic subcellular injury would preclude that same plaintiff from recovering the full amount of her damages if she later developed substantial injuries stemming from the exposure. *Id.* at 275, 278. The court also expressed policy concerns about allowing recovery for these kinds of injuries because these "plaintiffs might compete against those with manifest diseases for the legal system's limited resources." *Id.* at 275.

In *Rainer v. Union Carbide Corp.*, 402 F.3d 608, 611-12 (6th Cir. 2005), the Sixth Circuit determined whether workers at a uranium enrichment plant who sustained subcellular damage but no clinical symptoms of exposure to radiation or carcinogens could recover damages. To substantiate the claim, plaintiffs relied on the testimony of Dr. Livingston, who concluded that "[t]he physical injuries sustained by the DNA and the misrepair of those DNA strands is analogous to a knife wound of the skin dividing the cells of the body and the scar tissue

that is generated as the body attempts to repair that cellular damage." *Id.* at 613. In affirming the district court's grant of summary judgment, the Sixth Circuit noted that since "negligently distributed or discharged toxins can be perceived to lie around every corner in the modern industrialized world, and their effects on risk levels are at best speculative, the potential tort claims involved are inherently limitless and endless." *Id.* at 621. The court further noted that if it were to accept the plaintiffs' claim, it would throw open the possibility of litigation by any person experiencing even the most benign subcellular damage. *Id.* at 622. Finally, the court expressed concern under Kentucky's "one claim rule" that if plaintiffs recovered now they would be precluded from recovering later for a debilitating disease and, given the present injuries' speculative nature, it would be almost impossible for a trier of fact to assess damages. *Id.* at 621, 622.[2]

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[2] *Accord*, *Laswell v. Brown*, 683 F.2d 261, 269 (8th Cir. 1982), cert. denied, 459 U.S. 1210 (1983) (rejecting claims of children of father who had been exposed to radiation during nuclear weapon testing; there were no allegations that children had any damage other than cellular damage and exposure to a higher risk of disease; reasoning that more than a mere possibility of some future harm is required to recover for personal injuries); *June v. Union Carbide Corp. Nuclear Reg. Rep.* p. 20, 691, 577 F.3d 1234 (10th Cir. 2009) (DNA damage and cell death, which creates only a clinical possibility of clinical

III. THE MINORITY OF COURTS THAT HAVE PERMITTED SUBCELLULAR EMOTIONAL DISTRESS CLAIMS STILL REQUIRE SOME EVIDENCE OF ONGOING GENETIC CHANGE, WHICH IS LACKING HERE.

Despite the fact that a majority of courts have foreclosed a plaintiff's ability to satisfy the physical injury requirement through allegations of subcellular harm, a minority of courts have left open the possibility that such injuries may suffice. These cases generally fall into one of two categories: (1) the expert evidence presents a genuine

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disease, does not constitute bodily injury); *Cook v. Rockwell Int'l Corp.*, 618 F.3d 1127, 1140 (10th Cir. 2010) (subclinical effects of radiation exposure insufficient to constitute bodily injury); *Paz v. Brush Engineered Materials, Inc.*, 555 F.3d 383 (5th Cir. 2009) (subcellular or subclinical changes, without more, are insufficient to support a medical monitoring claim); *Mateer v. U.S. Aluminum*, No. 88-2147, 1989 WL 60442 (E.D. Pa. June 6, 1989)(granting summary judgment for defendant and rejecting emotional distress and medical monitoring claims because experts failed to assert that plaintiffs presently manifested symptoms of any physical or psychological disorders related to consumption of contaminated water); *Goodall v. United Illuminating*, No. 04-950115437, 1998 WL 914274 (Conn. Super. Ct. Dec. 15, 1998)(granting summary judgment due to lack of causal relationship or physical injury from asbestos exposure); *Exxon Mobil Corp. v. Albright*, No. 12-15, 2013 WL 673738 not yet been referenced for publ. (Md. Feb. 26, 2013), aff'd in part on other grounds, *ExxonMobil Corp. v. Albright*, 67 A. 3d 1181 (Md. 2013)(noting that in the context of physical injuries sustained as a result of exposure to toxic substances, subcellular change produced by exposure to toxic chemicals – without manifested symptoms of a disease or actual impairment – is not a compensable injury under Maryland law).

issue of material fact concerning the existence of a current disease or impairment or (2) the court determines that the continued existence of subcellular injuries presents a genuine issue of material fact.

The case at hand is distinct from both lines of cases in one crucial way: there is no objective proof of the Plaintiffs' having current genetic transformation injuries. Nor, for three of the twelve plaintiffs, has the plaintiffs' expert attempted to link their exposure to any current disease or impairment.

In *E.R. Squibb & Sons, Inc. v. Lloyd's & Companies*, for example, the court explained that the case before it was not one of risk or predisposition because the plaintiffs had actual mutations that would trigger cancer upon arriving at the age of puberty or sexual maturity. For that reason, the court likened the plaintiffs' mutations to "the implant of a time bomb with a short and reliable fuse." *E.R. Squibb & Sons, Inc. v. Lloyd's & Companies*, 241 F.3d. 154, 169 (2d Cir. 2001). In *In re Methyl Tertiary Butyl Ether ("MTBE") Products Liab. Litig.*, 528 F.Supp.2d 303, 314-15 (S.D.N.Y. 2007), plaintiffs' claims survived summary judgment because the element of physical manifestation of

exposure was satisfied in light of evidence that toxin molecules had bound themselves to the plaintiffs' DNA. [3]

Therefore, even if this court were to adopt the minority position, that subcellular harms can satisfy the Oregon physical impact rule, the plaintiffs here cannot satisfy the governing standard.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment in plaintiffs' favor.

Dated: August 30, 2013

Respectfully submitted,

SNELL & WILMER L.L.P.

By: /s/ Mary-Christine Sungaila
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[3] *See also Brafford v. Susquehanna Corp.*, 586 F.Supp. 14, 18 (D. Colo. 1984) (determining that it would be best to allow the parties an opportunity to develop a complete factual record of whether subcellular changes can operate to compromise a plaintiff's immune system); *Parker v. Brush Wellman*, 230 Fed.Appx. 878, 880 (11th Cir. 2007) (vacating and remanding for jury determination whether beryllium sensitization constituted a current disease or impairment and whether, like HIV and AIDS, the condition has a high probability of developing into chronic beryllium disease).

CERTIFICATE OF COMPLIANCE

Certificate of Compliance Pursuant to 9th Circuit Rules

28-4,29-2(c)(2) and (3), 32-2 or 32-4 for

Case Nos. 13-35513 and 13-35518

I certify that this brief complies with the length limits set forth at Ninth Circuit Rule 32-4, and contains 2,759 words. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Dated: August 30, 2013

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