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BEFORE THE ASSISTANT SECRETARY- INDIAN AFFAIRS

UNITED STATES DEPARTMENT OF THE INTERIOR

BRIAN KRAMER AND SUZANNE KRAMER,
COUNTY OF SANTA BARBARA, CALIFORNIA
NO MORE SLOTS
LEWIS P. GEYSER AND ROBERT B. CORLETT
PRESERVATION OF LOS OLIVOS
SANTA YNEZ VALLEY CONCERNED CITIZENS
ANNE (NANCY) CRAWFORD-HALL
And SANTA YNEZ VALLEY ALLIANCE
APPELLANTS

v.

PACIFIC REGINAL DIRECTOR,
BUREAU OF INDIAN AFFAIRS
APPELLEE

OPENING BRIEF

LEWIS P. GEYSER AND

ROBERT B. CORLETT

APPELLANTS

This case involves a tentative decision by the executive branch of the federal government to remove California's jurisdictional authority over 1,427 acres of its sovereign land. That decision proposes to transfer this land to federal trust, where an Indian tribe will regulate that land, together with the federal government, to the complete exclusion of State law. This exclusion extends to all matters of traditional State authority, including regulations striking at the heart of traditional State and local control. This decision suggests that this complete dislocation of all State power is permissible under the Indian Commerce Clause and the governing statutory scheme. According to the decision, there is no meaningful limit, constitutional or statutory, on

the ability of the federal government to establish federal or Indian enclaves on sovereign land that has always been governed and controlled by the State.

We respectfully submit that the decision is wrong. There are indeed meaningful checks on the ability of the federal government to displace State power over State lands. The Enclave Clause sets out specific limits on the federal government's ability to withdraw land from State jurisdiction. The Indian Commerce Clause is subject to limits on the ability to preempt all State law on every issue, even those affecting matters traditionally removed from federal control. And the federal statutory scheme, in the interest of federal-state comity, precludes the federal government from interfering with State land in such an intrusive manner without first satisfying a number of checks, some of which were not satisfied here.

In light of these failings, and the serious constitutional issues the tentative decision implicates, we urge the Assistant Secretary to reverse the decision and reject the Tribe's application to eject California from a significant portion of its own sovereign territory.[1]

IDENTIFICATION OF THE CASE; STATEMENT OF JURISDICTION; AND APPELLANTS' STANDING

This Appeal challenges the BIA's December 24, 2014 Notice of Decision to take into trust approximately 1,427 acres of off-reservation land in Santa Barbara County for the Santa Ynez Band of Chumash Mission Indians (the "Tribe"). The Tribe purchased the five parcels at issue (known as "Camp 4") and allegedly owns that land in fee. After appellants filed a timely notice of appeal, Kevin K. Washburn, Assistant Secretary-Indian Affairs, issued a series of Orders assuming jurisdiction over all Camp 4 appeals.

Appellants are nearby property owners. They have prudential standing under the Administrative Procedure Act to challenge the Decision because they will suffer alleged economic, environmental, and aesthetic harms falling within the zone of interests protected by law. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210-12 (2012).[2]

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[1] This brief hereby incorporates the entire substance of Appellants' Notice of Appeal, its accompanying Statement of Reasons, and the attached Notice of Decision.

[2] This Appeal uses material in the two volume report INTERDEPARTMENTAL COMMITTEE FOR THE STUDY OF JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES 1956-1957 ("Jurisdiction Report"), available at http://www.supremelaw.org/rsrc/fedjur/fedjur1.htm; http://www.supremelaw.org/rsrc/fedjur/fedjur2.htm; http://www.constitution.org/juris/fjur/1fj-bb.txt. This Appeal also cites the State of California response for the Jurisdiction Report: State of California Department of Justice JURISDICTION OVER FEDERAL ENCLAVES IN CALIFORNIA, Edmund G. Brown Attorney General of the State of California, January 1958 (Library Reference KB29.I5 C153) ("California Report").

CAMP 4 IS CALIFORNIA LAND TRADITIONALLY SUBJECT TO THE STATE'S JURISDICTIONAL AUTHORITY

Camp 4 covers land in Santa Ynez Valley and Santa Barbara County that was privately owned before the Tribe's purchase and therefore subject to State and local legislative and jurisdictional authority. Specifically, Camp 4 was subject to all Santa Barbara County zoning, general plan, and California Environmental Quality Act ("CEQA") laws; all land-use and density requirements set forth in those laws and regulations; and the General Plan adopted by the County under State law, all of which reflect the State's statutory requirements. As a political subdivision, Santa Barbara County is required by the State to take into account county-wide and local-community considerations regarding traffic, policing, fire control, air quality, pollution, water, sewage, utilities, roads, and school capacities, including issues of public welfare and cost. Santa Ynez Valley General Plan and Zoning requirements reflect the restrictions, capacity, and needs of the Santa Ynez Valley, a distinct community with 20,000 inhabitants. Restrictions setting forth typical architectural planning and aesthetic requirements, density rules, and development regulations (including restrictions on the amount and type of development) are specifically tailored in that Plan to several different parts of the Valley.

These state and county requirements directly affect Camp 4. They serve to protect the County's citizens, residents, and visitors, as well as traffic passing through the Santa Ynez Valley, from the use of property within the planning areas that does not conform to legislative requirements. Notwithstanding this traditional local authority, the Decision would excuse Camp 4 and its proposed developments from these requirements and eliminate all State and County jurisdictional control over this territory. This elimination of the State's jurisdictional power portends serious and detrimental social, aesthetic, economic, and environmental impacts, which will significantly and negatively affect these areas and their local population, including Appellants.

I. THE DECISION IMPROPERLY DISPLACES THE STATE'S JURISDICTIONAL AUTHORITY WITHOUT COMPLYING WITH CONTROLLING CONSTITUTIONAL AND STATUTORY REQUIREMENTS

Under the decision, exclusive legislative jurisdiction over Camp 4 will be transferred from California and assigned to the federal government and the Tribe, thus preempting all State control (traditional and otherwise) from this local territory.[3]

This staggering result is confirmed by multiple passages in the Decision. It says that the "trust lands" would not fall "under the County's jurisdiction" (at 17); the "Tribe…would no longer be subject to State or local jurisdiction" (at 21); "placing the property into trust allows the Tribe to exercise its self-determination and sovereignty over the property Ibid.; and "[o]nce the lands are placed under the jurisdiction of the Federal and tribal governments, the tribal right to govern the lands becomes predominant" Ibid. Indeed, the decision itself confirms that it is necessary to remove the land from California's sovereign territory precisely to *avoid* State and local control: "If the land were to remain in fee status, tribal decisions concerning the use of the land would be subject to the authority of the State of California and the County of Santa Barbara, impairing the Tribe's ability to adopt and execute its own land use decisions and development goals." Ibid. In short, "in order to ensure the effective exercise of tribal sovereignty and development prerogatives with respect to the land"—and thus to ensure the complete displacement of local control—"trust status is essential." *Ibid.*

This wholesale elimination of all State and County authority is incompatible with controlling law. This is not a typical situation of a State interfering with Tribal regulation on an established tribal reservation. On the contrary, this is an attempt by the Tribe to purchase *private* land—subject to the State's ordinary authority—and transfer that land to exclusive federal and Tribal control. The mechanism set up by the BIA flouts the State's role in regulating its own territory. Under a proper scheme, "the Indians' right to make their own laws and be governed by them *does not exclude* all state regulatory authority on the reservation." *Nevada v. Hicks*, 533 U.S. 353, 361 (2001) (emphasis added); *see ibid.* ("State sovereignty does not end at a reservation's border. Though tribes are often referred to as 'sovereign' entities, it was 'long ago' that 'the Court departed from Chief Justice Marshall's view that 'the laws of [a State] can have no force' within reservation boundaries' [citations omitted]. 'Ordinarily', it is now clear, 'an Indian reservation is considered part of the territory of the State.'" (citations omitted)).

The Court explained that when "state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land." *Id.* at 362. As noted

[3] *See* Kelsey J. Waples, *Extreme Rubber-Stamping; The Fee-to-Trust Process of the Indian Reorganization Act of 1934*, 40 Pepp. L. Rev. 1, 305 (2013): "the acceptance rate for IRA fee-to-trust acquisitions in California from 2001 through 2011…communicates an equally powerful message: with a 100% acceptance rate, the process is merely an exercise in extreme rubber-stamping… [and] a biased toothless process."

above, there can be no question that the proposed development of Camp 4 will implicate significant "state interests outside the reservation." *Ibid.* For the Decision to be permissible at all, it must preserve traditional State and local control over this area. Contrary to the Decision's contention, Tribal authority and BIA decision-making are not adequate substitutes for State and local regulation. The Decision cannot supplant State power without satisfying constitutional and statutory requirements.

II. BY VESTING EXCLUSIVE JURISDICTION IN THE BIA AND THE TRIBE WITHOUT STATE CONSENT, THE DECISION VIOLATES THE FEDERAL STATUTORY FRAMEWORK

Under governing federal law, the federal government may not obtain exclusive or concurrent jurisdiction over State land without obtaining the State's consent:

> When the head of a department, agency, or independent establishment of the Government, or other authorized officer of the department, agency, or independent establishment, considers it desirable, that individual may accept or secure, from the State in which land or an interest in land that is under the immediate jurisdiction, custody, or control of the individual is situated, consent to, or cession of, any jurisdiction over the land or interest not previously obtained. The individual shall indicate acceptance of jurisdiction on behalf of the Government by filing a notice of acceptance with the Governor of the State or in another manner prescribed by the laws of the State where the land is situated.

40 U.S.C. § 3112(b) (formerly 40 U.S.C. § 255). Moreover, the government *must* satisfy § 3112(b) to establish its jurisdiction over the land: "It is conclusively presumed that jurisdiction has not been accepted until the Government accepts jurisdiction over land as provided in this section." *Id.* § 3112(c).

Section 3112's requirements apply to actions taken by the Federal Government pursuant to the Indian Reorganization Act ("IRA") (25 U.S.C. § 465) and the Indian Land Consolidation Act of 1983 (the "ILCA") (25 U.S.C. § 2202).[4]

These requirements are consistent with a series of provisions designed to respect the horizontal separation of powers between the Federal Government and the States. *See, e.g.*, 4 U.S.C. § 103 ("The President of the United States is authorized to procure the assent of the legislature of any State, within which any purchase of land has been made for the erection of forts, magazines, arsenals, dockyards, and other needful buildings, without such consent having been obtained."). Since 1841, Congress has limited the federal government's ability to assert

[4] Section 3112(a) "is substituted for 40:255 (last par. 1st sentence words before semicolon) to eliminate unnecessary words. In subsection (b), the words "exclusive or partial" are omitted as unnecessary." Historical and Revision Notes. In former 40:255 the language was "Notwithstanding any other provision of law..."

exclusive jurisdiction over sovereign state land. A joint resolution of Congress prohibited the use of any public money for public buildings on land purchased by the United States until the "legislature of the State in which the land was situated had consented to the purchase." In subsequent years, the States enacted statutes consenting to federal land acquisition in general terms. In the 1930s, however, in response to increased federal land acquisition, many States repealed their general consent statutes, substituting that authority with limited cession statutes that authorized the purchase while reserving some regulatory authority to themselves. Jurisdiction Report Part I at 8-10.

In a series of decisions, the Supreme Court held that States may cede exclusive jurisdiction to the United States while reserving conditions that were consistent with the intended use of that property. *See, e.g., Fort Leavenworth R. Co. v. Lowe*, 114 U.S. 525 (1885); *see also James v. Dravo Contracting Co.*, 302 U.S. 134, 143 (1937). The Court recognized that, under the Enclave Clause, there is "no express stipulation that the consent of the state must be without reservations"; because the State is always permitted to "refuse" any transfer entirely, it may condition any transfer on appropriate reservations. *Ibid.*

Appellants are unaware of any statutory or legal authority that permits the BIA to assert jurisdiction over California land without first complying with the mandatory conditions for obtaining the State's consent. The Federal Government and all of its departments are subject to Section 3112. As a result, land taken into trust without obtaining the required consent or cession from the State leaves all such land subject exclusively to State jurisdiction for all purposes. *See* 40 U.S.C. § 3112(c).

Section 3112(b) has not been satisfied here. In the Decision, the State's consent or cession has neither been requested nor received. Consent or cession is crucial not only to comply with Section 3112, but also to respect the traditional balance between state and federal authority. The State has a clear interest in protecting its citizens, and it retains the prerogative (under the Enclave Clause and Section 3112) to condition any consent or cession on the land's continued compliance with State and County zoning and CEQA regulations. This was the process attempted in the Tribal-State Compact between California and the Santa Ynez Band of Chumash Indians. Yet the Tribe has avoided that process in its present reconstruction of its Casino, casting doubt on the Decision's finding that the Tribe has always complied with the Compact: "the Tribe has made every effort to help mitigate any impacts to County service organization...at p. 23.

III. EVEN IF SECTION 3112 DOES NOT APPLY, THE DECISION VIOLATES THE CONSTITUTION'S ENCLAVE CLAUSE

Even without Section 3112, the Constitution's Enclave Clause (Art. I, § 8, Cl. 17) requires the State's consent or cession. That clause gives the Federal government power to "exercise exclusive Legislation . . . over all Places purchased *by the Consent* of the Legislature of the State in which the Same shall be, for the erection of . . . other needful Buildings" (emphasis added). The Enclave Clause has been broadly defined by the Supreme Court: the word "purchased" means an acquisition by any means, and the phrase "other needful Buildings" includes the underlying title to any land within a State.

The Framers included the Enclave Clause to "assure[] that the rights of residents of federalized areas would be protected by appropriate reservations made by the States in granting their respective consents to federalization." Jurisdiction Report Part I, at 6; *see also* The Federalist No. 43, p. 276 ("All objections and scruples are here also obviated, by requiring the concurrence of the States concerned, in every such establishment.").

Similarly, Justice Story, in Commentaries on the Constitution, Volume 3, Section 1219, explained that this exclusive authority to legislate "is wholly unexceptionable; since it can only be exercised at the will of the state; and therefore it is placed beyond all reasonable scruple." Justice Story thus concluded that "if there has been no cession by the state of the place, although it has been constantly occupied and used, under purchase, or otherwise, by the United States for a fort, arsenal, or other constitutional purpose, *the state jurisdiction still remains complete and perfect*." *Id.* at § 1222 (emphasis added).

According to the authoritative Jurisdictional Report, there is "*[n]o Federal legislative jurisdiction without consent, cession, or reservation*. It scarcely need to be said that unless there has been a transfer of jurisdiction (1) pursuant to clause 17 by a Federal acquisition of land with State consent, or (2) by cession from the State to the Federal Government, or unless the Federal Government has reserved jurisdiction upon the admission of the State, the Federal Government possesses no legislative jurisdiction over any area within a State, such jurisdiction being for exercise entirely by the State, subject to non-interference by the State with Federal functions, and subject to the free exercise by the Federal Government of rights with respect to the use, protection, and disposition of its property." Part II, Chapter III, at 45; *cf. also Idaho v. United States*, 533 U.S. 262, 281 (2001) ("Congress cannot, after statehood, reserve or convey submerged lands that 'have already been bestowed' upon a State").

In short, "[t]he consequences of admission are instantaneous." *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163,--- (2009). Once land falls within a State's sovereign jurisdiction, it cannot be removed from that jurisdiction without the State's consent—any contrary conclusion would wrongly "diminish what has already been bestowed," and "that proposition applies *a fortiori* where virtually all of the State's public lands—not just its submerged ones—are at stake." *Ibid.*

California's understanding of the law apparently mirrors that of the Supreme Court: "There is a tendency to confuse exclusive jurisdiction over lands owned by the Federal government and used as Indian reservations with the exclusive right of the Federal government to legislate on Indian matters."

There is no meaningful distinction between tribal lands owned by the Federal government and any other federally owned property. The federal government's legislative power and prerogatives turn directly on the manner of acquisition, including any conditions imposed by a State at the time of acquisition. *See, e.g., Surplus Trading Co. v. Cook*, 281 U.S. 647, 650-51 (1930) ("It is not unusual for the United States to own within a state lands which are set apart and used for public purposes. Such ownership and use, without more, do not withdraw the lands from the jurisdiction of the state. On the contrary, the lands remain part of her territory and within the operation of her laws, save that the latter cannot affect the title of the United States or embarrass it in using the lands or interfere with its right of disposal. A typical illustration is found in the usual Indian reservation set apart within a state as a place where the United States may care for its Indian wards and lead them into habits and ways of civilized life. Such reservations are part of the state within which they lie, and her laws, civil and criminal, have the same force therein as elsewhere within her limits, save that they can have only restricted application to the Indian wards."); *see also United States v. McGowan*, 3102 U.S. 535 (1938) ("The federal prohibition against taking intoxicants into this Indian colony does not deprive the state of Nevada of its sovereignty over the area in question. The federal government does not assert exclusive jurisdiction within the colony. Enactments of the federal government passed to protect and guard its Indian wards only affect the operation, within the colony, of such state laws as conflict with the federal enactments.")..

Therefore, without complying with the Enclave Clause, Congress cannot authorize the taking of state land into trust for any reason, without the State's consent or cession. The State retains exclusive jurisdiction over such land, and the Decision's contrary suggestion is mistaken.

IV. THE CALIFORNIA ADMISSION ACT MADE NO RESERVATION FOR CONTINUING FEDERAL JURISDICTION OVER LANDS OWNED OR HELD BY INDIANS OR INDIAN TRIBES

To comply with the Enclave Clause, the State must have either consented to Federal jurisdiction or such jurisdiction must have been reserved when the State was admitted to the Union. As discussed above, the State has not consented to placing Camp 4 outside the State's jurisdictional authority; and as discussed below, there was no controlling reservation when California was admitted to the Union.

California was admitted as a State on September 9, 1850. Before admission, as a Republic, the State retained full legislative jurisdiction over all lands, private and public, within its boundaries. All Indian lands and tribes were thus subject to the State's legislative jurisdiction. At the moment of California's admission, Congress and the President vested in California the accouterments of sovereignty, including title to all lands in the State not reserved to the United States in the Act of Admission.

If the United States wished to reserve certain California Republic lands for exclusive federal jurisdiction, it had to say so explicitly. The Supreme Court explained this proposition in the context of Colorado's admission: "The Act of March 3, 1875, necessarily repeals the provisions of any prior statute or of any existing treaty which are clearly inconsistent therewith. Whenever, upon the admission of a state into the Union, Congress has intended to except out of it an Indian reservation or the sole and exclusive jurisdiction over that reservation, *it has done so by express words*." *United States v. McBratney*, 104 U.S. 621, 623-24 (1881) (emphasis added; citation omitted); *see Draper v. United States*, 164 U.S. 240, 243-44 (1896); *see also Hicks*, 533 U.S. at 365 ("The States' inherent jurisdiction on reservations can of course be stripped by Congress," but only in the Act of Admission). Indeed, the Federal Government has done exactly that with other Admission Acts. *See, e.g.*, 25 U.S. Statutes at Large, February 22,1889, c 180 at 676 ("That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, *and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States*.").

Here, by contrast, the Federal Government released all rights regarding Indian Lands in the California by failing to reserve such rights in California's Act of Admission. That Act provided that "the said state of California is admitted into the Union upon the express condition that the people of said state, through their legislature or otherwise, shall never interfere with the primary disposal of the public lands within its limits." There is no exception for Indian Land or Indian Tribes. All of the nonpublic lands in California, on admission to statehood, became subject to the State's sovereign authority.

As the Court said in *McBratney*, "the act contains no exception of the Ute Reservation or of jurisdiction over it." 104 U.S. at 623. Likewise, the California Admission Act reserves public lands without any exception for Indian lands or any provision that their jurisdiction and control remain vested in Congress. Therefore, all such lands are subject to State regulation unless the United States satisfies the provisions of the Enclave Clause.

V. THE INDIAN COMMERCE CLAUSE DOES NOT GRANT CONGRESS THE POWER TO SUPERSEDE STATE SOVEREIGNTY OVER STATE LAND IN CONTRAVENTION OF THE ENCLAVE CLAUSE

The Indian Commerce Clause, U.S. Const., Art. I, § 8, Cl. 3, does not permit Congress to exercise exclusive authority over state land without satisfying the Enclave Clause. The Indian Commerce Clause provides Congress to regulate commerce otherwise within its legislative authority. It does not provide Congress the power to abrogate, after admission, the State's sovereign power over land within the State. That issue falls under the purview of the Enclave Clause, and the two constitutional provisions must be read together. The Supreme Court has reaffirmed that the Indian Commerce Clause does not permit Congress to do through the backdoor what the Enclause Clause prohibits through the front: even when Congress expresses a "clear intent to abrogate the States' sovereign immunity, the Indian Commerce Clause does not grant Congress that power." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). The Enclave Clause's specific requirements overcome Congress's general authority under the Indian Commerce Clause. The former provides the exclusive means for Congress to obtain exclusive jurisdiction over State lands.

For purposes of objecting to the Decision, this analysis applies not only to Camp 4 but, as a result of the Decision's reliance on the ILCA, also to the Santa Ynez Reservation as originally established "pursuant to Departmental Order under the authority of the act of January 12, 1891 (26 Stat. 712)" (Decision, p. 3). The land for that Reservation was acquired "Ultimately, after

settlement of the lawsuit and negotiations, [and] what was transferred [by the Catholic Church] to the United States to be held in trust for the Tribe was a mere ninety-nine acres." Decision, p. 20. It was not until 1935 that the Catholic Church quitclaimed the present reservation land to the United States, and not until January 29, 1938 that the quitclaim was accepted by the Office of Indian Affairs. All such land acquisition occurred without any **specific** compliance with Clause 17 which affirmed that acquisition of land by the United States for the benefit of an Indian Tribe was subject to any then existing general California cession statute.

In sum, Congress has no power to purchase or take into trust State lands—with the aim of wholly displacing the State's sovereign authority—without complying with the Enclave Clause. The Indian Commerce Clause permits extensive regulation of Indian affairs, including preempting State law in appropriate areas. But it cannot permit Congress to regulate in a manner that the Enclave Clause forbids. Until California says otherwise, a Tribe cannot purchase ordinary private property and withdraw that land from the State's regulatory authority by asking the Executive branch of the federal government, or even the United States Congress, to unilaterally transfer that land into federal trust.

CONCLUSION

The BIA should modify the Decision to require that the California State Legislature provide consent or cession pursuant to 40 U.S.C. § 3112 and the Enclave Clause before the BIA may assert jurisdictional authority over Camp 4. Until any such consent or cession has been obtained, the BIA should modify the Decision to confirm that exclusive jurisdiction over Camp 4 remains with California and its political subdivisions.

DATED: June 27, 2015

BY: _____
Lewis P. Geyser
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PROOF OF SERVICE—OPENING BRIEF OF APPELLANTS LEWIS P. GEYSER AND ROBERT B. CORLETT

In accordance with (1) the Order Setting Briefing Schedule of the Assistant Secretary – Indian Affairs, (2) the Order to Resume Briefing and Setting Briefing Schedule, and (3) the Certificate of Service of such foregoing Order incorrectly stated as Order Granting Motion for Extension of Time, of the United States Department of the Interior, Opening Briefs are to be filed by electronic mail to f2tappeals@bia.gov, and served on all interested parties of the Opening Brief by such electronic mail concurrently herewith.

The electronic service address from which service is being made is lewpg@post.harvard.edu and the electronic service address for each interested party, including all other appellants, as well as f2tappeals@bia.gov are as follows:

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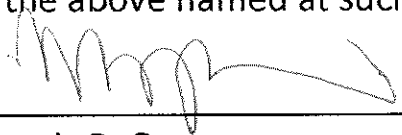
The time of service is December 2, 2015.

I declare under penalty of perjury that I caused to be served the Opening Brief of Lewis P. Geyser and Robert B. Corlett by electronic service on each of the above named at such electronic mail address.



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