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The Honorable Leroy Not Afraid and  
The Honorable Sheila Wilkinson Not Afraid*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
BILLINGS DIVISION**

MICHAEL F. LAFORGE,

Plaintiff,

v.

JANICE GETS DOWN, NATASHA J.  
MORTON, LEROY NOT AFRAID,  
SHEILA WILKINSON NOT AFRAID

Defendants.

No. CV-17-48-BLG-BMM-TJC

**MEMORANDUM IN SUPPORT OF  
MOTION TO DISMISS FOR LACK OF  
SUBJECT MATTER JURISDICTION AND  
FAILURE TO STATE A CLAIM**

Complaint Filed: May 5, 2017  
Trial Date: None Set

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Defendants the Honorable Leroy Not Afraid and the Honorable Sheila Wilkinson<sup>1</sup> Not Afraid (collectively, the “Judicial Defendants”), by their undersigned counsel, respectfully submit this memorandum of law in support of their motion to dismiss plaintiff’s complaint. This motion is made pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. In support of their motion, the defendants state as follows:

**I. Introduction**

Michael LaForge filed suit in the Crow Tribal Court seeking a dissolution of his marriage. Mr. LaForge and his spouse are both members of the Crow Tribe. After a full hearing (at which Mr. LaForge was represented by an attorney), the Crow Tribal Court, the Honorable Sheila Wilkinson Not Afraid presiding, ruled against him. Mr. Laforge appealed, his appeal was dismissed, and he followed the appeal with a flurry of motions in the Crow Tribal Court, which were denied by the Honorable Leroy Not Afraid. Mr. LaForge now seeks to collaterally challenge the judgment of the Crow Tribal Court—in a Tribal Court action that he initiated—by seeking damages from the judges who ruled against him. This is an entirely specious claim, unarticulated in the complaint and without basis in law or provocation in fact.

The Complaint alleges a “Judgment of Property” as its sole supporting fact. (Doc. 9 at 6.) The Complaint does not plead how this Judgment of Property gives rise to a cause of action against the Judicial Defendants. The Complaint is facially defective on at least four grounds.

*First*, Plaintiff has failed to plead any basis for federal jurisdiction.

*Second*, judicial immunity precludes a damages award against judges.

*Third*, tribal sovereign immunity precludes review of the actions of the Judicial Defendants acting in their official capacity.

*Fourth*, the Complaint does not state or include the elements of any cognizable claim.

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<sup>1</sup> Plaintiff’s complaint misspells the Honorable Sheila Wilkinson Not Afraid’s maiden name.

Plaintiff submitted his marital dissolution dispute to the Crow Tribal Court. He was represented by counsel. He received full due process there. His claim was adjudicated promptly and with a written judgment. He exercised his appeal rights within the Crow Tribal Court system. He has no basis to file this frivolous lawsuit seeking damages from the Crow Tribal Court judges. His Complaint should be dismissed.

## **II. Factual Background**

On April 29, 2016, Plaintiff petitioned the Crow Tribal Court for dissolution of marriage. (Ex. 1, Petition for Dissolution of Marriage.) The Tribal Court scheduled a hearing on the matter on May 31, 2016. (Ex. 2, Notice of Hearing.) Plaintiff was represented by counsel during these proceedings. (Ex. 3, Notice of Appearance.)

The matter came before the Tribal Court on May 31, 2016. (Ex. 4, Findings of Fact, Conclusions of Law and Order of Dissolution.) Plaintiff appeared through counsel. On June 7, 2016, the Tribal Court entered Findings of Fact, Conclusions of Law, and a Decree of Dissolution in accordance with Crow Tribal law. (Ex. 4.) The Decree of Dissolution set the distribution of property, debts, and the Respondent's request for alimony for hearing before the Tribal Court on July 12, 2016. (Ex. 4 at 3.)

On July 7, 2016, Plaintiff's tribal court counsel filed a notice of withdrawal. (Ex. 5, Notice of Withdrawal.) On July 12, 2016, Plaintiff filed a *pro se* motion for a continuance based on health issues. (Ex. 6, Motion to Continue.) Although this motion was untimely under Crow Tribal Law, the Tribal Court continued the hearing on distribution of property, debts, and the Respondent's request for alimony until July 26, 2016. (Ex. 7, Notice of Continued Hearing.)

On July 25, 2016, the Tribal Court received and filed a faxed letter from the Billings Clinic concerning stating that the Plaintiff was "unable to attend court procedures." (Ex. 8, Faxed Letter.) No motion or other information accompanied this letter. (*See* Ex. 8.)

On July 26, 2016, the Tribal Court heard evidence on the division of property, debts and the award of maintenance. (Ex. 9, Corrected/Supplemented Findings of Fact, Conclusions of

Law and Decree of Dissolution of Marriage, at 2.) On July 29, 2016, the Honorable Sheila Not Afraid entered an amended, final order dividing the parties' property in accordance with Crow Tribal Law. (Ex. 9.) The order granted possession of a modular home to Plaintiff's ex-wife, and established procedures for her to take possession of that home. (Ex. 9 at 5, 7-8.) The Court's order also noted that Plaintiff's letter was "not the equivalent of a Motion To Continue, was not properly filed and was untimely" under Crow Tribal Law. (Ex. 9 at 2.)

On August 9, 2016, Plaintiff appealed to the Crow Tribal Court of Appeals (Ex. 10, Notice of Appeal,) and sought a motion to stay distribution of property. (Ex. 11, Motion to Stay.) The Court of Appeals granted the stay on September 29, 2016. (Ex. 12, Amended Order for Stay.) The Crow Tribal Court of Appeals also ordered Plaintiff to prepare and submit transcripts, as Crow Tribal Law required. (Ex. 13, Order to Follow Rule 7.) Plaintiff failed to do so.

On January 6, 2017, based on Plaintiff's failure to comply with Crow Tribal Law, the Crow Tribal Court of Appeals dismissed the appeal. (Ex. 14, Order Dismissing Appeal and Mandate, at 1.) The mandate dismissing the appeal issued on January 19, 2017. (Ex. 14 at 2.)

On March 6, 2017, the Crow Tribal Court issued an order clarifying the decree of dissolution. (Ex. 15, Order Clarifying Dissolution.) This decree was based in part on the Plaintiff's failure to adhere to the Tribal Court's prior order.

Plaintiff thereafter filed a number of motions, including: a March 8, 2017, motion to dismiss the judgment; a March 31, 2017, motion for an injunction on defendant; an April 5, 2017, motion for re-hearing and motion for injunction; an April 6, 2017, motion for a special judge; and an April 7, 2017, motion requesting a special judge. (*See* Ex. 16, Plaintiff's Post-Appeal Tribal Court Filings.)

On April 7, 2017, the Crow Tribal Court, the Honorable Leroy Not Afraid presiding, denied the motions on the basis that the dismissal of the appeal rendered the Crow Tribal Court's judgment final. (Ex. 17, Order Denying Motions.)

On April 21, 2017, Plaintiff delivered a *pro se* complaint to this Court. (Doc. 2, 9.) This Court ordered it filed on May 9, 2017. (Doc. 8.)

### **III. Argument**

Plaintiff's *pro se* Complaint provides no basis for this Court to exercise jurisdiction over his claim. Plaintiff impermissibly asks the Court to review a domestic relations case and fails to identify any jurisdictional basis for his claim. Additionally, both judicial and tribal sovereign immunity protect Judicial Defendants.

#### **A. Plaintiff's Complaint Fails to Present Any Jurisdictional Basis for This Court's Review**

Plaintiff has the burden to plead subject matter jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Even interpreting Plaintiff's statement of fact generously, it is inadequate to allow this Court to determine whether subject matter jurisdiction exists. *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1194 (9th Cir. 1988).

The Court must dismiss a complaint that fails to allege facts indicating the presence either of federal question or diversity subject matter jurisdiction. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 513-14 (2006). Federal courts are presumptively without jurisdiction over civil actions and the burden of establishing jurisdiction rests upon the party asserting jurisdiction. *Kokkonen*, 511 U.S. at 377 (citations omitted). In particular, "when subject matter jurisdiction is challenged under Federal Rule of [Civil] Procedure 12(b)(1), the plaintiff has the burden to prove jurisdiction in order to survive the motion." *Kingman Reef Atoll Investments, L.L.C. v. United States*, 541 F.3d 1189, 1197 (2008). To determine whether an action arises under federal law, a court applies the "well-pleaded complaint rule." *Toumajian v. Frailey*, 135 F.3d 648, 653 (9th Cir.1998). "[A] claim arises under federal law only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *MooreThomas v. Alaska Airlines, Inc.*, 553 F.3d 1241, 1243 (9th Cir. 2009).

Even giving Plaintiff all benefit of the doubt, Plaintiff's allegations fail to present any federal question. Plaintiff has not alleged that the Crow Tribal Court lacked jurisdiction over him. Rather, Plaintiff voluntarily invoked tribal jurisdiction by submitting his claim and filing suit in the Crow Tribal Court. *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1133 (9th Cir.

2006); *see also Eagleman v. Rocky Boys Chippewa-Cree Tribal Business Committee*, No. 15-36003, 2017 WL 2684129, at \*1 (9th Cir. June 21, 2017). No federal question jurisdiction exists for Plaintiff's claim.

**1. Matters of Domestic Relations are Outside the Province of Federal Courts**

Plaintiff asks the Court to order Defendants to pay all of his supposed damages associated with the Judgment of Property in a Marriage Dissolution case. Federal courts have long recognized that domestic relations cases are beyond the province of the federal courts. *E.g., Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004). Even though a district court may have diversity jurisdiction over such a dispute, the court must decline jurisdiction when the primary issues in the case concern “the status of . . . husband and wife.” *Buechold v. Ortiz*, 401 F.2d 371, 372 (9th Cir. 1968); *cf. Atwood v. Fort Peck Tribal Court Assiniboine*, 513 F.3d 943, 946-47 (9th Cir. 2008) (holding that federal courts lack jurisdiction over a domestic matter arising under diversity jurisdiction.) The issue at the center of this dispute concerns the relationship between a former husband and wife. Plaintiff's claim is a domestic dispute trying disguise its way into federal court. The Court does not have jurisdiction to re-litigate the “Judgment of Property,” as Plaintiff appears to request. (Doc. 9 at 6.) Plaintiff's Complaint should be dismissed.

**2. Plaintiff's Allegations Fail to Provide Federal Jurisdiction**

Even if, *arguendo*, the Court were to disregard the divorce dispute that is the subject matter of the Complaint, Plaintiff still has failed to plead any basis for federal jurisdiction.

**a. Plaintiff's Claim of “Constitutional Rights” Does Not Supply Jurisdiction to Review a Tribal Court Order**

Plaintiff first alleges “Constitutional Rights,” as a basis for federal jurisdiction. This does not provide jurisdiction for this Court to review Plaintiff's complaint. Because Indian Tribes are separate and distinct sovereigns, “no action under 42 U.S.C. § 1983 can be maintained in federal court for persons alleging deprivation of constitutional rights under color of tribal law.” *R.J. Williams Co. v. Fort Belknap Housing Authority*, 719 F.2d 979, 982 (9th Cir.1983). With respect

to Plaintiff's claim against the Judicial Defendants in their individual capacities, it has been held that "Native American tribes and those acting under tribal law do not act under color of state law within the meaning of section 1983." *Chapoose v. Hodel*, 831 F.2d 931, 934-35 (10th Cir. 1987) (tribal action cannot be equated to state or territorial action in order to satisfy the state action requirement which is a pre-requisite to suit under section 1983).

Moreover, Mr. LaForge has failed to allege any action that deprived him of his constitutional rights. He has failed to allege unconstitutional conduct by the Judicial Defendants or the application of an unconstitutional law. But even giving all benefit of the doubt to Plaintiff's allegation of "Constitutional Rights," a tribal court order issued to tribal members under tribal law cannot form the basis of a claim under 42 U.S.C. § 1983. The Court is therefore without jurisdiction to hear Plaintiff's claim of "Constitutional Rights."

**b. Plaintiff's Claim of "Disability Act" Does Not Supply Jurisdiction to Review a Tribal Court Order**

Plaintiff purports to invoke this Court's jurisdiction with "Disability Act." While it is unclear which federal statute Plaintiff alleges has been violated, even if the Court were to infer that Plaintiff is attempting to plead a claim under the Americans with Disabilities Act, 42 U.S.C. § 126 *et seq.*, this court nevertheless lacks jurisdiction because that general federal statute does not apply to an intramural dispute within an Indian Tribe.

Generally-applicable laws will not apply to an Indian Tribe if the law touches "exclusive rights of self-governance in purely intramural matters." *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985) (holding that the Occupational Health and Safety Act applied to a farm owned and operated by a tribe that employed some non-Indian employees and sold produce on the open market). The "tribal self-government exception is designed to except purely intramural matters such as conditions of tribal membership, inheritance rules, and *domestic relations* from the general rule that otherwise applicable federal statutes apply to Indian tribes." *Id.* (emphasis added); *see also, e.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978) (observing that Indian tribes possess "the power of regulating their internal and social

relations” including domestic relations) (quoting *United States v. Kagama*, 118 U.S. 375, 381-82 (1886)); *United States v. Quiver*, 241 U.S. 602, 604 (1916) (noting “the settled policy of Congress to permit the personal and domestic relations of the Indians with each other to be regulated . . . according to their tribal customs and laws”).

Courts are especially reluctant to apply general federal statutes in disputes exclusively involving tribal members. In *EEOC v. Karuk Tribe Housing Authority*, 260 F.3d 1071, 1079–80 (9th Cir.2001), the Ninth Circuit found that the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, did not apply to an employment relationship between the Karuk Tribe Housing Authority, a tribal governmental employer, and a tribal member, because it touched “on ‘purely internal matters’ related to the tribe’s self-governance.” The dispute did “not concern non-Karuks or non-Indians as employers, employees, customers, or anything else.” *Id.* at 1081. The Ninth Circuit noted that “[t]he Housing Authority . . . functions as an arm of the tribal government and in a governmental role. It is not simply a business entity that happens to be run by a tribe or its members, but, rather, occupies a role quintessentially related to self-governance.” *Id.* at 1080.

Here, Plaintiff challenges an action of the Crow Tribal Court in an intramural dispute regarding domestic relations between two members of the Crow Tribe. Their matter was adjudicated by two Tribal Court judges who are also members of the Crow Tribe. Subjecting the Tribal Court’s ruling on a matter of domestic relations to scrutiny under the Americans with Disabilities Act, 42 U.S.C. § 126 *et seq.*, would intrude on a quintessential exercise of self-government in an intramural Crow Tribe dispute. The ADA thus does not apply to this intramural dispute between Plaintiff and the Judicial Defendants arising from the tribal adjudication of an intramural domestic relations dispute which the Plaintiff submitted to their jurisdiction. The Americans with Disabilities Act cannot supply this Court jurisdiction to review Plaintiff’s claim.

**c. Plaintiff’s Claim of “Treaty Rights” Does Not Supply Jurisdiction to Review a Tribal Court Order**

Plaintiff next attempts to invoke this Court's jurisdiction with a claim of "Treaty Rights." This allegation lacks a conceivable relationship with the claim for damages in Plaintiff's Complaint. No federal jurisdiction arises based on Plaintiff's reference to Treaty Rights because none of the Treaties between the United States and the Crow Tribe grant an individual right of action to challenge a Tribe's decision about marriages between tribal members before the Federal Government. *E.g.*, Treaty With The Crows, 1868, May 7, 1868, 15 Stat. 649; Treaty of Fort Laramie with Sioux, Etc., Sept. 17, 1851, 11 Stat. 749; Treaty with the Crow Tribe, 1825, Aug. 4, 1825, 7 Stat. 266. Therefore, Plaintiff's allegation of "Treaty Rights" fails to provide jurisdiction.

**d. Plaintiff's Claim of "Civil Rights" Does Not Grant Jurisdiction to Review a Tribal Court Order**

Finally, Plaintiff claims that "civil rights," provides this Court with jurisdiction. However, any redress for an alleged deprivation of civil rights accomplished under color of tribal law must be sought in the appropriate tribal court under the Indian Civil Rights Act. 25 U.S.C. §§ 1301–1303; *Kennerly v. United States*, 534 F. Supp. 269, 277-78 (D. Mont.), *rev'd. in part on other grounds*, 721 F.2d 1252 (9th Cir.1983). Relief is not available under a 42 U.S.C. § 1983 state action analogy theory, or a *Bivens* doctrine theory, because Plaintiff does not contend Judicial Defendants acted under color of state or federal law. *Id.*; *see also Evans v. Little Bird*, 656 F. Supp. 872, 874 (D. Mont. 1987), *aff'd in part, rev'd in part on other grounds sub nom. Evans v. McKay*, 869 F.2d 1341 (9th Cir. 1989). The claim Plaintiff advances against the Judicial Defendants are, therefore, beyond the jurisdiction of the federal courts. Plaintiff's allegation of "civil rights" also fails to provide jurisdiction.

Based on the above, Plaintiff has failed to identify any basis upon which this Court may exercise jurisdiction.

**B. Judicial Immunity Forecloses Plaintiff's Complaint**

Even if the Court concludes that Plaintiff has identified some basis for federal jurisdiction, Plaintiff's complaint must yield to judicial immunity.

“[A] tribal court judge is entitled to the same absolute judicial immunity that shields state and federal court judges.” *Penn v. United States*, 335 F.3d 786, 789 (8th Cir. 2003). A claim of damages can only be brought against a judge where there was a “clear absence of all jurisdiction.” *Stump v. Sparkman*, 435 U.S. 349, 355–56 (1978).

Here, the Judicial Defendants are entitled to absolute judicial immunity. Plaintiff does not contend Judicial Defendants lacked jurisdiction over the suit he filed. Nor could he. Plaintiff consented to the jurisdiction of the Judicial Defendants by filing suit in Crow Tribal Court. Therefore, Plaintiff’s claim of damages may not be brought against the Tribal Court Judges.

The jurisdictional defect in Plaintiff’s claim cannot be cured by amendment. “[Plaintiff]’s claim, even if it is amended, is also barred by the doctrine of judicial and tribal immunity. Under common law, officials who are acting in a judicial capacity are protected by judicial immunity. A claim for damages cannot be maintained against a judicial officer exercising the authority vested in the position.” *Sandman v. Dakota*, 816 F. Supp. 448, 452 (W.D. Mich. 1992), *aff’d*, 7 F.3d 234 (6th Cir. 1993) (*citing Stump*, 435 U.S. at 355–56; *Bradley v. Fisher*, 80 U.S. (13 Wall) 335, 351 (1872)).

Plaintiff appears to allege that the Judicial Defendants’ issuance of a judgment against him somehow injured him. Plaintiff thus sues the Tribal Judicial Defendants for actions taken within their jurisdiction, issuing a legal judgment. Such a suit is barred by judicial immunity. Therefore, the Complaint against Judicial Defendant is barred by the doctrine of judicial immunity and must be dismissed.

**C. Tribal Sovereign Immunity Also Forecloses Plaintiff’s Complaint**

Plaintiff’s complaint simultaneously must yield to the Crow Tribe’s sovereign immunity. That immunity shields Crow Tribal Court judges to the extent Plaintiff sues them in their official capacities.

A motion to dismiss under Fed. R. Civ. P. 12(b)(1) is the appropriate procedural mechanism to challenge a suit based on sovereign immunity. *Pistor v. Garcia*, 791 F.3d 1104, 1111 (9th Cir. 2015) (citations omitted). On a Fed. R. Civ. P. 12(b)(1) motion, the Court need not

assume that the facts alleged in the Complaint are true, as it would on a Fed. R. Civ. P. 12(b)(6) motion. *Id.* The court may receive evidence concerning jurisdiction and resolve factual disputes if necessary to resolve the motion. *Id.* In opposing this Fed. R. Civ. P. 12(b)(1) motion, Plaintiff bears the burden of demonstrating that tribal sovereign immunity does not exist. *Id.*

Plaintiff's complaint must be dismissed because the Judicial Defendants are sued in their official capacities. The Crow Tribe is a federally-recognized Indian Tribe. *See Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs*, 82 Fed. Reg. 4,915, 4,916 (Jan. 17, 2017). "Tribal sovereign immunity protects Indian tribes from suit absent express authorization from Congress or clear waiver by the tribe." *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718, 725 (9th Cir. 2008). Tribal sovereign immunity precludes not only claims for damages, but also claims for injunctive and declaratory relief. *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991). Sovereign immunity bars lawsuits and court process. *Tonasket v. Sargent*, 830 F.Supp. 2d 1078, 1082 (E.D. Wash. 2011); *United States v. James*, 980 F. 2d 1314, 1319 (9th Cir. 1992).

The Crow Tribe's immunity covers its judicial branch, the Crow Tribal Court, as well as the judges of that court acting in their official capacity. *Cook*, 548 F.3d at 727; *see also United States v. Wahtomy*, No. CRIM.08-96E-BLW, 2008 WL 4693408, at \*1 (D. Idaho Oct. 23, 2008), *aff'd*, 382 F. App'x 666 (9th Cir. 2010) ("By questioning the integrity of [Tribal] Judge Coby, Wahtomy is essentially questioning the integrity of the entire Tribal Judicial system. For that reason, Judge Coby is entitled to the full measure of sovereign immunity accorded to the Tribes."); *see also Lewis v. Clarke*, 137 S. Ct. 1285, 1291 (2017) ("Defendants in an official-capacity action may assert sovereign immunity.")

The complaint names the Judicial Defendants in their official capacities as the "Chief Judge" and "Asst Judge." (Doc. 9 at 4.) Plaintiff demands that "defendants to pay all damages." (Doc. 9 at 7.) Tribal sovereign immunity precludes claims for damages, including against tribal government officials such as judges. *Cook*, 548 F.3d at 725, 727. Therefore, Plaintiff's complaint

against Tribal Court Defendants must yield to tribal sovereign immunity to the extent they are sued in their official capacities.

**D. The Complaint Fails to State a Claim**

Mr. LaForge's Complaint literally fails to state a claim for any cognizable cause of action. Indeed, its factual allegations do not even contain a sentence. Its sole factual allegation is "Judgment of Property." (Doc. 9 at 6.) The Judicial Defendants respectfully submit that the Complaint should be dismissed for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6).

**IV. Conclusion**

For all of the foregoing reasons, the Honorable Leroy Not Afraid and the Honorable Sheila Wilkinson Not Afraid respectfully move the Court to dismiss the claim against them, with prejudice, pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

Dated: July 19, 2017

Respectfully submitted,

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The Honorable Leroy Not Afraid and  
The Honorable Sheila Wilkinson Not Afraid*

**CERTIFICATE OF SERVICE**

**L.R. 5.2(B)**

I hereby certify that on this 19th day of July, 2017, a copy of the foregoing document was served on the following persons by the following means:

1, 3 CM/ECF

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**CERTIFICATE OF COMPLIANCE**

The undersigned certifies that this brief complies with the requirements of Local Rule 7.1(d)(2). The total word count in the brief is 3,677 words, excluding the caption and certificates of service and compliance. The undersigned relies on the word count of the word processing system used to prepare this brief.

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Respectfully submitted,

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