

Nos. 18-1638, -1639, -1640, -1641, -1642, -1643

United States Court of Appeals for the Federal Circuit

SAINT REGIS MOHAWK TRIBE, ALLERGAN, INC.,

Appellants,

v.

**MYLAN PHARMACEUTICALS, INC.,
TEVA PHARMACEUTICALS USA, INC., AKORN, INC.,**

Appellees.

Appeals from Patent and Trademark Office,
Patent Trial and Appeal Board in Nos.
IPR2016-01127, IPR2016-01128, IPR2016-01129,
IPR2016-01130, IPR2016-01131, IPR2016-01132,
IPR2017-00576, IPR2017-00578, IPR2017-00579,
IPR2017-00583, IPR2017-00585, IPR2017-00586,
IPR2017-00594, IPR2017-00596, IPR2017-00598,
IPR2017-00599, IPR2017-00600, IPR2017-00601.

**BRIEF FOR *AMICUS CURIAE*
REGENTS OF THE UNIVERSITY OF MINNESOTA
IN SUPPORT OF *EN BANC* REHEARING**

September 4, 2018

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CERTIFICATE OF INTEREST

Counsel for *amicus curiae* Regents of the University of Minnesota (“UMN”) certifies the following:

1. The full name of every party represented by me is:
 - Regents of the University of Minnesota
2. The names of the real parties in interest represented by me are:
 - Regents of the University of Minnesota
3. All parent corporations and any publicly held companies that own 10 percent of the stock of the parties represented by me are listed below.
 - None, *amicus curiae* is a state entity created by the constitution of the State of Minnesota.
4. The names of all law firms and the partners and associates that have appeared for the party in the lower tribunal or are expected to appear for the party in this court and who are not already listed on the docket for the current case are:
 - None, *amicus curiae* did not appear in the lower tribunal, and *amicus curiae* does not expect other counsel to appear on its behalf in this case.
5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court’s decision in the pending appeal:
 - *Regents of the University of Minnesota v. LSI Corporation*, No. 2018-1559, -1560, -1561, -1562, -1563, -1564, -1565 (Fed. Cir.)
 - *Regents of the University of Minnesota v. LSI Corporation*, No. 5:18-cv-00821 (N.D. Cal.)
 - *Regents of the University of Minnesota v. Gilead Sciences, Inc.*, No. 3:17-cv-06056 (N.D. Cal.)
 - *Regents of the University of Minnesota v. AT&T Mobility LLC*, No. 0:14-cv-04666 (D. Minn.)

- *Regents of the University of Minnesota v. Sprint Solutions, Inc.*, No. 0:14-cv-04669 (D. Minn.)
- *Regents of the University of Minnesota v. T-Mobile USA, Inc.*, No. 0:14-cv-04671 (D. Minn.)
- *Regents of the University of Minnesota v. Cellco Partnership*, No. 0:14-cv-04672 (D. Minn.)
- *Gilead Sciences, Inc. v. Regents of the University of Minnesota*, No. IPR2017-01753 (P.T.A.B.)
- *Gilead Sciences, Inc. v. Regents of the University of Minnesota*, No. IPR2017-01712 (P.T.A.B.)
- *Gilead Sciences, Inc. v. Regents of the University of Minnesota*, No. IPR2017-02004 (P.T.A.B.)
- *Gilead Sciences, Inc. v. Regents of the University of Minnesota*, No. IPR2017-02005 (P.T.A.B.)
- *Ericsson Inc. v. Regents of the University of Minnesota*, No. IPR2017-01186 (P.T.A.B.)
- *Ericsson Inc. v. Regents of the University of Minnesota*, No. IPR2017-01197 (P.T.A.B.)
- *Ericsson Inc. v. Regents of the University of Minnesota*, No. IPR2017-01200 (P.T.A.B.)
- *Ericsson Inc. v. Regents of the University of Minnesota*, No. IPR2017-01213 (P.T.A.B.)
- *Ericsson Inc. v. Regents of the University of Minnesota*, No. IPR2017-01214 (P.T.A.B.)
- *Ericsson Inc. v. Regents of the University of Minnesota*, No. IPR2017-01219 (P.T.A.B.)
- *LSI Corporation v. Regents of the University of Minnesota*, No. IPR2017-01068 (P.T.A.B.)

Date: September 4, 2018

/s/ Michael A. Albert
Michael A. Albert

TABLE OF CONTENTS

CERTIFICATE OF INTEREST	i
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF INTEREST.....	1
ARGUMENT	3
I. The Panel Decision Concerns Critically Important Issues.....	3
II. IPR Is A Suit by the Petitioner, Not the U.S.	4
A. The Exception Applies Only to Suits “Commenced and Prosecuted” by the U.S.....	4
B. IPR Is Not “Commenced and Prosecuted” by the U.S.	5
C. The Director’s Purported “Political Responsibility” for Institution Does Not Support the Panel’s Decision.	8
III. IPR Meets All of <i>FMC</i> ’s Criteria.	9
CONCLUSION.....	13
CERTIFICATE OF COMPLIANCE.....	14
CERTIFICATE OF SERVICE AND FILING	15

TABLE OF AUTHORITIES

CASES

<i>AI23 Sys. v. Hydro-Quebec</i> , 626 F.3d 1213 (Fed. Cir. 2010)	7, 9
<i>Alden v. Maine</i> , 527 U.S. 706 (1999)	4, 8, 12
<i>Applications in Internet Time v. RPX</i> , 897 F.3d 1336 (Fed. Cir. July 9, 2018)	6
<i>Blatchford v. Native Vill. of Noatak & Circle Vill.</i> , 501 U.S. 775 (1991)	4
<i>City of Ont. v. Quon</i> , 560 U.S. 746 (2010)	2
<i>Cohens v. Virginia</i> , 19 U.S. 264 (1821)	4, 6
<i>Covidien v. Univ. of Fla. Research Found.</i> , 2017 WL 4015009 (P.T.A.B. Jan. 24, 2017)	9, 10, 11
<i>Eli Lilly & Co. v. Bd. of Regents of Univ. of Wash.</i> , 334 F.3d 1264 (Fed. Cir. 2003)	11
<i>Fed. Mar. Comm’n v. S.C. State Ports Auth.</i> , 535 U.S. 743 (2002)	passim
<i>Hans v. Louisiana</i> , 134 U.S. 1 (1890)	9, 10, 12
<i>In re Magnum Oil Tools Int’l</i> , 829 F.3d 1364 (Fed. Cir. 2016)	6, 7, 10
<i>Novartis v. Torrent Pharm.</i> , 853 F.3d 1316 (Fed. Cir. 2017)	10
<i>Oil States Energy Servs. v. Greene’s Energy</i> , 138 S. Ct. 1365 (2018)	7, 10

<i>R.I. Dep’t of Env’tl. Mgmt. v. United States</i> , 304 F.3d 31 (1st Cir. 2002)	12
<i>SAS Inst. v. Iancu</i> , 138 S. Ct. 1348 (2018)	5, 6, 8, 10
<i>U.S. ex rel. Foulds v. Tex. Tech Univ.</i> , 171 F.3d 279 (5th Cir. 1999).....	5, 9
<i>U.S. ex rel. Long v. SCS Bus. & Tech. Inst.</i> , 173 F.3d 870 (D.C. Cir.), <i>supplemented</i> , 173 F.3d 890 (D.C. Cir. 1999).....	8
<i>Vas-Cath v. Curators of Univ. of Mo.</i> , 473 F.3d 1376 (Fed. Cir. 2007)	passim
<i>Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens</i> , 529 U.S. 765 (2000)	5
<i>Xechem v. Univ. of Tex. M.D. Anderson Cancer Ctr.</i> , 382 F.3d 1324 (Fed. Cir. 2004)	7

STATUTES

28 U.S.C. §§ 2201-02	9
31 U.S.C. § 3730(b)(1).....	5
31 U.S.C. § 3730(c)(2)(A)	5, 9
35 U.S.C. § 200	3
35 U.S.C. § 315(a)(1)-(2).....	6
35 U.S.C. § 315(e)(2).....	6

OTHER AUTHORITIES

Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756 (Aug. 14, 2012).....	6, 7
---	------

RULES

Fed. R. App. P. 35(a)	1
-----------------------------	---

REGULATIONS

37 C.F.R. § 42.2.	6
37 C.F.R. § 42.4(a).....	8
37 C.F.R. § 42.73(d)(3).....	6
46 C.F.R. § 502.282 (2001)	5
46 C.F.R. § 502.61(a) (2001).....	5

STATEMENT OF INTEREST

Private parties filed petitions for IPR of UMN patents. UMN moved to dismiss them based on sovereign immunity. Although the Patent Trial and Appeal Board (“Board”) determined that sovereign immunity applies, the Board found UMN waived immunity by asserting the patents in court.

In UMN’s appeal of that decision (Case No. 2018-1559), the parties opposing UMN argue, as do Appellants here, that the panel decision here concerning tribal immunity disposes of UMN’s case. Doc. 137 at 7. Although the panel’s ruling on tribal immunity does not apply to UMN’s state sovereign immunity, the risk that it could be so applied provides UMN a compelling interest in *en banc* rehearing of the panel’s decision here.

Although state and tribal immunity are not coextensive, and thus caselaw applicable to one does not necessarily apply to the other, this brief nonetheless takes as a premise Appellants’ contrary presumption. Based on that premise, the panel decision is inconsistent with the Court’s prior holding that sovereign immunity applies to USPTO proceedings in *Vas-Cath v. Curators of University of Missouri*, 473 F.3d 1376 (Fed. Cir. 2007), and with Supreme Court precedent, which further demonstrates a need for *en banc* rehearing. Fed. R. App. P. 35(a).¹

¹ No party or party’s counsel authored this brief in whole or in part, and no one other than UMN and its counsel contributed money intended to fund the preparation or submission of this brief. UMN has moved for leave to file this brief.

UMN takes no position on other issues presented in the underlying case, which may be capable of resolution on narrower grounds. *See City of Ont. v. Quon*, 560 U.S. 746, 760 (2010) (deciding on “narrower grounds” is “preferable”).

ARGUMENT

I. The Panel Decision Concerns Critically Important Issues.

Public universities are among the country's largest research institutions and obtain many patents stemming from their research. Pursuant to national policy, the importance of which Congress codified in the Bayh-Dole Act, UMN "use[s] the patent system to promote the utilization of [its] inventions." 35 U.S.C. § 200. Patent licensing is a critical source of educational funding. Consistent with their obligation to safeguard public resources, public universities choose judiciously to engage in litigation. Stripping them of their sovereign immunity enables private parties to wage war on state-owned patents, threatening that revenue and imposing litigation costs on the public fisc.

The panel's decision would also upset the constitutional balance of power between States and the United States ("U.S.") that sovereign immunity protects. The panel found IPR exempt from sovereign immunity largely because the Director acts as a "gatekeeper" with discretion to halt an IPR. Add.11. That reasoning could subject States to any private-party-initiated agency proceeding – where States have long had the protection of sovereign immunity – so long as a federal official has the option to dismiss the proceeding. Whether Congress can skew the balance of power merely by creating such a "gatekeeper" requires careful scrutiny.

II. IPR Is A Suit by the Petitioner, Not the U.S.

The panel found that an agency official’s discretion to let IPRs proceed makes them more like proceedings brought by the U.S. than by private parties, thus exempting them from sovereign immunity. Add.11. But controlling caselaw and the statute that created IPR establish that private parties, not the U.S., commence and prosecute IPRs.

A. The Exception Applies Only to Suits “Commenced and Prosecuted” by the U.S.

The exemption from sovereign immunity for suits brought by the U.S. applies only to proceedings “commenced and prosecuted” by the U.S. *Alden v. Maine*, 527 U.S. 706, 755 (1999). The terms “commenced” and “prosecuted” are significant – they appear in the Eleventh Amendment and have established meanings: “[t]o commence a suit, is to demand something by the institution of process in a Court of justice; and to prosecute the suit, is, according to the common acceptance of language, to continue that demand.” *Cohens v. Virginia*, 19 U.S. 264, 408 (1821); *see also Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 785 (1991) (a suit is “by” the U.S. if brought “at the instance and under the control of responsible federal officers”). The focus of these terms is on the party making a claim – i.e., the “process sued out by that individual against the [sovereign].” *Cohens*, 19 U.S. at 408. *Federal Maritime Commission v. South Carolina State Ports Authority* (“FMC”) reaffirmed this focus, holding that private

actions adjudicated by the agency should not be confused with actions the statute permits the agency to “commence” or “originate.” 535 U.S. 743, 768 (2002); 46 C.F.R. §§ 502.61(a), 502.282 (2001).²

Analogously, the U.S. does not “commence” or “prosecute” *qui tam* cases, even though a private relator brings the suit “for” and “in the name of” the U.S., and a federal official has the **option** to dismiss the suit. 31 U.S.C. § 3730(b)(1), (c)(2)(A); *see, e.g., U.S. ex rel. Foulds v. Tex. Tech Univ.*, 171 F.3d 279, 293-94 (5th Cir. 1999) (sovereign immunity applies because of the relator’s control over “whether to sue,” “what manner to make demands, and “whether to settle”); *Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 766 (2000) (expressing “serious doubt” that sovereign immunity permits *qui tam* suits against sovereigns).

B. IPR Is Not “Commenced and Prosecuted” by the U.S.

The words “inter partes” mean “between parties.” As those words suggest, IPRs are proceedings between parties that are **adjudicated** (not brought) by the Board.

The petitioner, not the U.S., “commence[s]” IPR with the petition. *SAS Institute v. Iancu* explained that the AIA “doesn’t authorize the Director to start proceedings on his own initiative.” 138 S. Ct. 1348, 1355 (2018). Rather, “the proceedings begin with the filing of a petition.” Office Patent Trial Practice Guide,

² Citations omitted and emphasis added throughout, unless otherwise stated.

77 Fed. Reg. 48,756, 48,757 (Aug. 14, 2012); *SAS*, 138 S. Ct. at 1353 (explaining that “[a]t its outset, a party must file a petition”). A party “demand[s] something by the institution of process” with a petition. *Cohens*, 19 U.S. at 408. Later, the Board’s institution decision marks the transition from the “Preliminary Proceeding” to the “Trial.” 37 C.F.R. § 42.2.

The petitioner, not the U.S., also “prosecute[s]” IPRs. *SAS* explained that IPR is “a party-directed, adversarial process,” and rejected the idea that the Board’s discretion made IPR “(another) agency-led, inquisitorial process.” 138 S. Ct. at 1355. Although the Board has “discretion on the question *whether* to institute review, the petitioner’s petition, not the Director’s discretion, . . . guide[s] the life of the litigation.” *Id.* at 1356; *id.* at 1357 (“[T]he petitioner’s contentions, not the Director’s discretion, define the scope of the litigation . . .”).

The Board adjudicates the parties’ dispute. *See Applications in Internet Time v. RPX*, 897 F.3d 1336, 1348 (Fed. Cir. July 9, 2018) (IPR is an “adversarial proceeding[]” to enforce “a petitioner’s right”). The Board decides cases based on party arguments, not on arguments that the Board develops. *See In re Magnum Oil Tools Int’l*, 829 F.3d 1364, 1380-81 (Fed. Cir. 2016). Once a Final Written Decision issues, the parties, not the Board, may be subject to estoppel. 35 U.S.C. § 315(a)(1)-(2); § 315(e)(2); 37 C.F.R. § 42.73(d)(3).

The Board’s authority to either “terminate the proceeding or issue a final written decision” upon settlement does not empower the Board to take over “prosecution” of the IPR. *Oil States Energy Servs. v. Greene’s Energy*, 138 S. Ct. 1365, 1371 (2018). The Board can still only adjudicate the parties’ arguments. *See Magnum Oil*, 829 F.3d at 1380-81. Indeed, typically, settlement ends the proceeding “unless the Board has already decided the merits.” 77 Fed. Reg. at 48,768.

Oil States is not contrary. *Oil States* concerned whether the USPTO could exercise a federal power, not the scope of that power. The panel mis-cited *Oil States* as holding that “**IPR** is a matter which arises between the Government and [patent owners].” Add.7. *Oil States* actually held that **patents** are public rights that “arise between the Government and [the patent owner],” 138 S. Ct. at 1373, which does not mean that proceedings regarding those rights are “commenced and prosecuted” by the U.S. Declaratory judgment actions, inventorship actions, and interferences all “reconsider[.]” patents (Add.7), and yet sovereign immunity applies to each. *AI23 Sys. v. Hydro-Quebec*, 626 F.3d 1213, 1219-20 (Fed. Cir. 2010) (declaratory judgment actions); *Xechem v. Univ. of Tex. M.D. Anderson Cancer Ctr.*, 382 F.3d 1324, 1329-30 (Fed. Cir. 2004) (inventorship actions); *Vas-Cath*, 473 F.3d at 1382 (interferences).

C. The Director’s Purported “Political Responsibility” for Institution Does Not Support the Panel’s Decision.

The panel misinterpreted *Alden* by giving significance to the Director’s alleged “political responsibility” for IPR. *Alden* used “political responsibility” as an explanation for why suits “commenced and prosecuted” by the U.S. are exempt from sovereign immunity: resting the power to “commence[] and prosecute[]” with a federal official is critical because the official has “political responsibility for each suit.” 527 U.S. at 755-56. By contrast, *Alden* explained that permitting private suits against a sovereign removes the required “control” that federal “political responsibility” provides. *Id.* at 756; *see also U.S. ex rel. Long v. SCS Bus. & Tech. Inst.*, 173 F.3d 870, 885 (D.C. Cir.), *supplemented*, 173 F.3d 890 (D.C. Cir. 1999) (private *qui tam* suits “remov[e the U.S.] from direct accountability and from the subtle political pressures that might have precluded the lawsuit in the first place”). Thus, where a private party controls the decision to bring suit, courts cannot sidestep sovereign immunity simply because a federal official has some discretion in determining whether or how a case proceeds. *Id.*

Additionally, the panel did not explain how the Director has political responsibility for institution; nor could it since the Board, rather than the Director, decides whether to institute. 37 C.F.R. § 42.4(a); *see SAS*, 138 S. Ct. at 1353. As the Board has noted, its members are “impartial officers designated, on behalf of the Director, to review the petition and preliminary response.” *Covidien v. Univ. of*

Fla. Research Found., 2017 WL 4015009, at *10 (P.T.A.B. Jan. 24, 2017); *id.* at *7 (rejecting the argument that IPR is “brought by the federal government”). The Board’s discretion to institute IPR is akin to a district court’s discretion to exercise declaratory judgment jurisdiction (28 U.S.C. §§ 2201-02) or a federal official’s discretion to permit a *qui tam* case (31 U.S.C. § 3730(c)(2)(A)) – powers that do not eliminate sovereign immunity. *Al23*, 626 F.3d at 1219-20; *Foulds*, 171 F.3d at 293-94.

III. IPR Meets All of *FMC*’s Criteria.

FMC is the only instance where the Supreme Court has addressed the application of sovereign immunity to an administrative proceeding. *Vas-Cath* is the only instance where this Court addressed the application of sovereign immunity to USPTO proceedings; it applied *FMC* and concluded that interferences met *FMC*’s criteria. 473 F.3d at 1382. Yet the panel did not follow *FMC*’s analysis, nor did it follow or even address *Vas-Cath*. Under *FMC* and *Vas-Cath*, sovereign immunity applies to IPR.

FMC began with the “*Hans* presumption” – a presumption that sovereign immunity bars suits “that were ‘anomalous and unheard of when the Constitution was adopted.’” *FMC*, 535 U.S. at 755 (quoting *Hans v. Louisiana*, 134 U.S. 1, 18 (1890)). *FMC* gave “great significance” to the fact that private agency proceedings against States did not exist at the founding. *Id.* To confirm that sovereign

immunity applied, *FMC* compared the agency proceedings with a proceeding that sovereign immunity indisputably barred: private civil litigation against a sovereign.

Id.

The panel neither applied the *Hans* presumption nor explained why it should not apply to IPRs which, likewise, did not exist at the founding. *Id.* Indeed, IPR has all the features *FMC* found sufficient to apply sovereign immunity:

- *FMC* considered “whether [the ALJ’s role was] functionally comparable to that of a judge.” *FMC*, 535 U.S. at 756. The Board is an “impartial federal adjudicator.” *Vas-Cath*, 473 F.3d at 1382. It has many “notable similarities” with district court judges. *Covidien*, 2017 WL 4015009, at *10.
- *FMC* considered the “safeguards [that] are available in the judicial process.” 535 U.S. at 756-57. IPR is “a party-directed, adversarial process” subject to the APA’s safeguards. *SAS*, 138 S. Ct. at 1355; *Magnum Oil*, 829 F.3d at 1380-81; *e.g.*, *Novartis v. Torrent Pharm.*, 853 F.3d 1316, 1324 (Fed. Cir. 2017).
- *FMC* noted the use of pleadings and discovery. 535 U.S. at 757-58. IPR provides those same procedures. *SAS*, 138 S. Ct. at 1353-54 (also noting that IPR has “many of the usual trappings of litigation,” that it “mimics” civil litigation, and that “the petitioner is master of its complaint”); *Oil States*, 138 S. Ct. at 1371 (noting that the parties to IPR “are entitled to

certain discovery” as well as to file declarations and briefs); *Covidien*, 2017 WL 4015009, at *9-*10.

This Court previously held in *Vas-Cath* that interferences met FMC’s criteria. *Vas-Cath*’s reasoning is indistinguishable here. *Vas-Cath* found the following features sufficient to satisfy FMC’s criteria: “adverse parties, examination and cross-examination by deposition of witnesses, production of documentary evidence, findings by an impartial federal adjudicator, and power to implement the decision.” 473 F.3d at 1382. As the Board acknowledged, IPR has all those features. *See, e.g., Covidien*, 2017 WL 4015009, at *10. Yet the panel neither followed *Vas-Cath* nor attempted to distinguish it.

The Board’s discretion to deny institution does not change the applicability of FMC. *Vas-Cath* applied FMC, even though the Director had “discretion to begin or discontinue” the interferences. *Eli Lilly & Co. v. Bd. of Regents of Univ. of Wash.*, 334 F.3d 1264, 1267 (Fed. Cir. 2003). Similarly, the exercise of discretion in declaratory judgment and *qui tam* claims does not avoid sovereign immunity. Indeed, FMC reasoned that the agency’s obligation to explain the use of discretion makes the adjudication *more* like civil litigation. 535 U.S. at 757.

The panel observed that IPR procedures “do not mirror” those in federal court; but no court has required that proceedings be identical for FMC to apply. FMC relied on the similarities concerning discovery and pleadings only to

“confirm” the proceeding was adjudicatory and between adverse parties. *Id.* at 757, 760; *id.* at 761-67 (finding certain differences irrelevant to the analysis); *see also Vas-Cath*, 473 F.3d at 1382 (finding the differences between interferences and civil litigation insufficient to prevent the application of *FMC*); *R.I. Dep’t of Env’tl. Mgmt. v. United States*, 304 F.3d 31, 46 (1st Cir. 2002) (finding rules that “roughly conform[]” to those of civil litigation to suffice under *FMC*).

The panel’s emphasis on differences further establishes that IPR was “anomalous and unheard of” at the founding, triggering the *Hans* presumption. *FMC*, 535 U.S. at 755 (quoting *Hans*, 134 U.S. at 18). Subjecting sovereigns to a private party-initiated administrative proceeding could “constitute[] a greater insult to a State’s dignity than requiring a State to appear in an Article III court,” because of the differences. *Id.* at 760 n.11; *see also Alden*, 527 U.S. at 749 (authorizing private suits outside the federal courts “would be even more offensive to . . . sovereignty”). Thus, while IPR has the features that *FMC* and *Vas-Cath* found sufficient, the few differences between it and civil litigation only illustrate another way in which it is outside our constitutional tradition and, therefore, subject to sovereign immunity.

CONCLUSION

UMN respectfully requests that this Court grant *en banc* rehearing of the panel decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Michael A. Albert, counsel for *amicus curiae* Regents of the University of Minnesota, certify that the foregoing Brief complies with the length limits set forth in Federal Rule of Appellate Procedure 29(b)(4) and Federal Circuit Rule 35(g). Specifically, this brief contains 2,548 words (excluding the parts of the motion exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b)) as determined by the word count feature of the word processing program used to create this brief.

I further certify that the foregoing brief complies with the typeface requirements set forth in Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). Specifically, this brief has been prepared using a proportionally spaced typeface using Microsoft Word 2013, in 14-point Times New Roman font.

Date: September 4, 2018

/s/ Michael A. Albert
Michael A. Albert

CERTIFICATE OF SERVICE AND FILING

I, Michael A. Albert, hereby certify that a true and correct copy of the foregoing has been filed using the Court's CM/ECF system. All counsel of record were served via CM/ECF today.

Date: September 4, 2018

/s/ Michael A. Albert
Michael A. Albert