19-1727

United States Court of Appeals for the Federal Circuit

AMERICAN INSTITUTE FOR INTERNATIONAL STEEL, INC., SIM-TEX, LP, KURT ORBAN PARTNERS, LLC,

Plaintiffs – Appellants,

v.

UNITED STATES, KEVIN K. MCALEENAN, Commissioner of U.S. Customs and Border Protection,

Defendants – Appellees.

On Appeal from the United States Court of International Trade in case No. 1-18-CV-00152, before a Three-Judge Panel consisting of Judge Claire R. Kelly, Judge Jennifer Choe-Groves, and Judge Gary S. Katzman.

BRIEF FOR CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

American Inst. For Int'l Steel **v.** United States

Case No. 19-1727

CERTIFICATE OF INTEREST

Counsel for the:
☐ (petitioner) ☐ (appellant) ☐ (respondent) ☐ (appellee) ☒ (amicus) ☐ (name of party)

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certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held Companies that own 10 % or more of stock in the party
Cato Institute	Same	None
	Same	None
	Same	None
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	Same	None
	Same	None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (**and who have not or will not enter an appearance in this case**) are: n/a

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 of be directly affected by this court's decision in the pending appeal. See Fed. Cir. R. 47(a)(5) and 47.5(b). (The parties should attach continuation pages as necessary.)

None

August 16, 2019
Date

/s/ Ilya Shapiro
Signature of counsel

Ilya Shapiro
Printed name of counsel

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ISSUE PRESENTED

Whether the Court of International Trade erroneously concluded that judicial review of an exercise of executive discretion under Section 232 of the Trade Expansion Act is not a necessary component to a permissible delegation of Congress's power to regulate foreign commerce.

INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

This case presents a facial challenge to Section 232 of the Trade Expansion Act of 1962, as amended, 19 U.S.C. § 1862, and its use to impose more than $4.7 billion of tariffs on steel products, on the ground that Section 232 unconstitutionally delegates legislative power to the president in violation of Article I, Section 1 of the Constitution and the separation of powers. A three-judge panel of the Court of International Trade held that it was bound by *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976), which rejected a statutory challenge to the president's order and a nondelegation argument offered to bolster that challenge.

Appellants ask this court to rule that *Algonquin* is distinguishable and that Section 232 be held facially unconstitutional because its congressional delegation

[1] Pursuant to F.R.A.P. 29(a), all parties received timely notice of *amicus curiae*'s intent to file this brief, and have consented. No part of this brief is authored by any party's counsel; nobody but *amicus* funded its preparation and submission.

lacks any legislative boundaries. *Amicus* speaks to both of these issues by arguing that the lower court erred when it held that judicial review is not a necessary complement to a permissible delegation of Congress's power to regulate foreign commerce under Section 232 of the Trade Expansion Act.

This is an important issue for Cato because the separation of powers preserves liberty by ensuring that too much power doesn't reside in a single government actor.

SUMMARY OF ARGUMENT

There must be *some* limit on the president's discretion pursuant to Section 232 of the Trade Expansion Act. If the president may simply cite "national security," and therefore regulate international commerce to any desired extent, then the legislature would have ceded its "exclusive and plenary" authority to the executive branch. *See Bd. of Trustees of Univ. of Ill. v. United States*, 289 U.S. 48, 56 (1933) (describing Congress's constitutional authority to pass a tariff statute). The Constitution, of course, does not allow such a delegation of lawmaking authority, for "[t]here can be no liberty where the legislative and executive powers are united in the same person." *The Federalist*, No. 47 (Madison).

To ensure enough separation between the political branches, the Supreme Court requires that Congress delineate the boundaries of its delegated authority with an "intelligible principle." *J.W. Hampton Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). Courts thus police the legislature to ensure against delegations so

capacious as to effectively give away the lawmaking function to the executive branch. At the same time, there must be a check on the law's execution. Otherwise, the president could aggrandize executive power—at the expense of a coordinate branch—by making nominal gestures toward an undefined "intelligible principle."

Although the Court of International Trade ("CIT") conceded the constitutional dangers of unbound executive authority, the lower court refused to check. According to the CIT, Section 232 regulation falls into "a gray area where the President could invoke the statute to act in a manner constitutionally reserved for Congress but not objectively outside the President's statutory authority, and the scope of review would preclude the uncovering of such a truth." *Am. Inst. for Int'l Steel, Inc. v. United States*, 376 F. Supp. 3d 1335, 1345 (Ct. Int'l Trade 2019). Although the CIT based its decision on a mistaken reading of Supreme Court precedent, common sense alone compels a reversal. Under the rule of law, there can be no "gray areas" where the president may act *within the statute but outside the Constitution*.

In reaching its holding, the CIT ignored the symbiosis between the nondelegation doctrine and safeguards that keep the president within the "limitation of a prescribed standard" set by Congress. *United States v. Chicago, Mil., St. P. & P.R.R.*, 282 U.S. 311, 324 (1931). Typically, "a court . . . ascertain[s] whether the will of Congress has been obeyed" through judicial review. *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 218–19 (1989) (cleaned up). In rarer instances, Congress

achieves the "appropriate restraints . . . through provisions for administrative procedure." *Amalgamated Meat Cutters & Butcher Workmen of N. Am., AFL-CIO v. Connally*, 337 F. Supp. 737, 759 (D.D.C. 1971) (three-judge panel).

In analyzing the appellants' nondelegation-doctrine claim, the CIT's key mistake was a failure to distinguish the circumstances where the Supreme Court rightly defers to a president's broad statutory power from those instances, such as this one, where review is demanded by the nondelegation doctrine. As a result, the CIT failed to make "an inquiry for rationality," *Am. Inst. for Int'l Steel, Inc.*, 376 F. Supp. 3d at 1343, notwithstanding telltale signs of unreasonableness. *See, e.g.*, Brief of Appellant at 36, fn. 5 (noting that government, during oral argument, refused to acknowledge that a Section 232 peanut-butter embargo could be legally challenged).

By abandoning judicial review and thereby allowing for an unconstitutional "gray area," the CIT ducked its duty "to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Of course, the president is not normally a direct delegee of statutory authority, and the office must be respected as the head of a coequal branch of government. Nevertheless, an attenuated judicial review, properly accounting for the president's unique constitutional status—and requiring no national security expertise—would demonstrate that the Section 232 steel regulation is irrational and *ultra vires*. Absent such critical oversight, there can be no "boundaries" on presidential power to regulate foreign commerce, which is the *sine qua non* of a

nondelegation violation. *See*, *e.g.*, *Yakus v. United States*, 321 U.S. 414, 423 (1944) (approving a broad delegation of authority to the executive branch under the war-time Emergency Price Control Act because "[t]he boundaries of the field of the Administrator's permissible action are marked by the statute.").

Instead of determining and applying the constraints on executive authority that must accompany any lawful delegation, the CIT felt powerless to review the president's decision making in upholding the steel tariffs from a nondelegation challenge. Further, the CIT based its helplessness on an incorrect reading of Supreme Court precedent. In addition to creating an avowedly unconstitutional "gray area" of executive power, the CIT's decision serves as a blank check for the president to undermine the Trade Expansion Act, whose purpose, after all, is to grow international commerce through nondiscriminatory trading. Accordingly, this Court should reverse the decision below and hold that Section 232 is a permissible legislative delegation only if complemented by calibrated judicial review.

ARGUMENT

I. The Court Below Failed to Perform Any Oversight of Section 232 Regulation on Steel Imports, Due to Mistaken Reading of Supreme Court Precedent Regarding Judicial Review of a President's Statutory Powers

The CIT's nondelegation analysis was fundamentally flawed by its conclusion that "at the time of *Algonquin*, there was no judicial review of matters that Congress had committed to presidential discretion—such as those the President makes under

section 232—for rationality, findings of fact, or abuse of discretion." *See Am. Inst. for Int'l Steel, Inc.*, 376 F. Supp. 3d at 1342 (referring to *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976)). Contrary to the CIT's holding, neither the Supreme Court nor this Circuit has ever shied from meaningful oversight of a president's statutory actions merely because the law allows for an element of discretion. *See*, *e.g.*, *Trump v. Hawaii*, 138 S. Ct. 2392, 2407 (2018) ("assum[ing] without deciding that plaintiffs' statutory claims [against the president] are reviewable"); *Cole v. Young*, 351 U.S. 536, 543 (1956) (denying president's extension of "national security" personnel authority to "general welfare" agencies); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 431–33 (1935) (holding, in the alternative, that the president impermissibly abused his statutory discretion by failing to provide a finding grounding his regulation in the statute). "[T]his court's own precedent offers ample authority for the proposition that trade-related actions of the President . . . are subject to review to determine whether that action 'falls within his delegated authority, whether the statutory language has been properly construed, and whether the President's action conforms with the relevant procedural requirements.'" *Motions Sys. Corp. v. Bush*, 437 F.3d 1356, 1364 (Fed. Cir. 2006) (en banc) (Gajarsa, J., concurring in judgment) (string-citing Circuit precedent).

"At the time of *Algonquin*," courts even reviewed the reasonableness of the president's power pursuant to Section 232 of the Trade Expansion Act. In *Indep.*

Gasoline Marketers Council v. Duncan, for example, the district court didn't simply take the president at his word that petroleum regulation under Section 232 addressed "imports." *See* 492 F. Supp. 614 (D.D.C. 1980). Instead, the court was cognizant that the statute "does not authorize the President to impose general controls on domestically produced goods." *Id.* at 618. Thus aware, the court felt it "must look to the design of the program as a whole" to ensure the president wasn't acting beyond his delegated authority. *Id.* Ultimately, the court struck down the regulation, because it "does not fall within the inherent powers of the President, is not sanctioned by the statutes cited by Defendants, and is contrary to manifest Congressional intent." *Id.* at 620–21. *See also AFL-CIO v. Kahn*, 618 F.2d 784, 792 (D.C. Cir. 1979) (surveying "[the statute], its legislative history, and Executive Practice" to ensure a "sufficiently close nexus" between the president's regulation and the statutory standards); *Nat'l Treasury Emp. Union v. Nixon*, 492 F.2d 587, 616 (D.C. Cir. 1974) (holding that mandamus may issue against the president for performance of ministerial statutory duties, although the court limited itself to a declaratory ruling); *Wyoming v. Franke*, 58 F. Supp. 890, 895–96 (D. Wyo. 1945) (subjecting president's exercise of statutory discretion to the substantial evidence test).

In mistakenly claiming that "the legal landscape" has never allowed for reasonableness review of Section 232 regulations, the CIT purported to align with two Supreme Court rulings that supposedly reflect a longstanding custom of refusing

to review the president's decision making under statutory grants of authority from Congress, even where political questions are not present. *See Am. Inst. for Int'l Steel, Inc.*, 376 F. Supp. 3d at 1342 (referring to *Dalton v. Specter*, 511 U.S. 462 (1994) and citing *George S. Bush & Co.*, 310 U.S. 371, 379–80 (1940)).

These cases are inapposite, however, because both pertain to regulatory regimes whereby an independent body—the Defense Base Closure and Re-alignment Commission in *Dalton* and the Tariff Commission in *George S. Bush & Co.*—rendered an expert recommendation to the president, who then could either agree or disagree. *Compare Dalton*, 511 U.S. at 465 ("Within two weeks of receiving the Commission's report, the President must decide whether to approve or disapprove, in their entirety, the Commission's recommendations.") with *George S. Bush & Co.*, 310 U.S. at 376–77 (outlining statutory provision that restricts the president to accepting or rejecting the Tariff Commission's recommendations). In such rare circumstances, the regulatory design *per se* guards against unreasonable decision making. In both *Dalton* and *George S. Bush & Co.*, the president's authority to alter the *status quo* was thereby confined to the acceptance of recommendations from an independent body insulated from direct presidential control. By thus limiting presidential discretion, these statutory designs filled the essential role normally played by judicial review regarding the nondelegation doctrine—that is, to ensure that the president operates within congressional standards.

Section 232 is different. Here, the president is advised by a cabinet department whose head he can remove at-will. If, moreover, the president agrees with his subordinate's determination, he can depart from the recommended remedy. *See* 19 U.S.C. § 1862(c)(1)(A)(ii). Because Section 232 lacks the structural protections of the statutes at issue in *Dalton* and *George S. Bush & Co.*, those cases neither reflect the "legal landscape" at the time of *Algonquin* nor inform the present controversy.[2]

II. Article III Oversight, a Key Part of the Nondelegation Framework, Is Readily Tailored to the President's Statutory Powers, So Judicial Review Does Not Implicate Judicial Involvement in National Security Decisions

An analysis of Section 232 confirms the obvious and essential relationship between the nondelegation principle and the availability of meaningful judicial review. In *Fed. Energy Admin. v. Algonquin SNG, Inc.*, the Supreme Court located Section 232's "intelligible principles" in the requirements that the president regulate for "national security" purposes, and that the regulation pertain to "imports." 426 U.S. at 559. Although these are capacious concepts, Congress did not intend for courts to allow the president to simply cite "national security" and "imports" as pretenses for unfettered regulatory power. To the contrary, if a regulation promulgated under Section 232 is not confined within the standards prescribed by

[2] This Court disagrees with sister circuits regarding the scope of *Dalton v. Specter*. *See Corus Group PLC v. Int'l Trade Comm'n*, 352 F.3d 1351, 1366–67 (Fed. Cir. 2003) (Newman, J., dissenting in part) (observing circuit split), but this case does not implicate that ongoing dispute.

Congress, then the tariffs lie outside the president's delegation and are, therefore, *ultra vires*. In *Algonquin*, the Court implicitly acknowledged that the statute's intelligible principles amount to judicially testable standards when observing that the "broad" phrase "'national interest' . . . stands in stark contrast with [Section 232's] narrower criterion of 'national security.'" *Id.* at 569.

Of course, the president is a unique delegee of regulatory authority. "Out of respect for the separation of powers and the unique constitutional position of the President," for example, the Supreme Court has declined to subject the president's statutory decision making to review under the Administrative Procedure Act. *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992). But the APA did nothing to alter the basic availability and scope of the traditional "non-statutory" remedies of mandamus, injunction, and declaratory judgment. *See generally* Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 Colum. L. Rev. 1612, 1613–14 (1997) (discussing non-statutory review).

To be sure, the Court is rightly reluctant to exercise non-statutory review when the president's statutory authority implicates political questions. See, e.g., *Orloff v. Willoughby*, 345 U.S. 83, 90 (1953) (denying review of president's exercise of statutory authority to regulate the commissioning of Army officers); *Dakota Cent. Telephone Co. v. S.D. ex rel. Payne*, 250 U. S. 163, 184 (1919) (denying review of president's assessment of state of war as a statutory condition for regulation).

Section 232, by contrast, results from the operation of "a core legislative function." *See Am. Inst. for Int'l Steel, Inc.*, 376 F. Supp. at 1346 (Katzman, J., dubitante). Indeed, the laying of duties is one of the few broad regulatory tasks that was once performed directly by lawmakers *via* a long series of detailed and specific tariff acts passed up through the early 20th century. *See* George Bronz, *The Tariff Commission as a Regulatory Agency*, 61 Colum. L. Rev. 463, 464 (1961) (listing tariff acts). Although the president has a constitutional role in foreign commerce during peacetime, that function is limited to the negotiation of international agreements. *See, e.g.*, *Pub. Citizen v. U.S. Trade Rep.*, 5 F.3d 549, 552 (D.C. Cir. 1993) (refusing to review the president's decision making in the exercise of statutory authority to negotiate a multilateral trade agreement).

Yet even where, as here, the president's statutory powers do not implicate political questions, courts nevertheless might be reluctant to review presidential decision making, out of concern over comparative institutional competencies. As the high court observed in *Boumediene v. Bush*, "neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people." 553 U.S. 723, 797 (2008). Such concerns about relative expertise would be misplaced in this case, however, because a properly attenuated reasonableness review doesn't require subject-matter familiarity.

In reviewing a typical exercise of delegated authority, this Court would conduct a wide-ranging inquiry into the reasonableness of the delegee's decision making, known as "hard look" review. *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983). Where it applies, "hard look" review extends even to whether the delegee acted on a "pretextual basis," *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019), which would prove a high bar for the government to overcome here. *See, e.g.*, Adam Behsudi, *Mattis Departure Leaves Space for More 232 Tariffs*, Politico (Dec. 21 2018), https://politi.co/2Z0whcV (reporting that the Defense Secretary's resignation removed internal opposition to Section 232 tariffs); Michelle Fox, *Commerce Secretary Ross: Tariffs Are 'Motivation' for Canada, Mexico to Make a 'Fair' NAFTA deal*, CNBC (Mar. 8, 2018), https://cnb.cx/2G5D2SF (reporting on non-security reasoning behind tariffs); President Donald J. Trump, Remarks at Signing of the Memorandum Regarding the Investigation Pursuant to Section 232(B) of the Trade Expansion Act (Apr. 20, 2017) ("We've [Commerce Secretary Wilbur Ross and the president] been working on it since I came to office, *and long before I came to office*.") (emphasis added).

In *Franklin v. Massachusetts*, however, the Supreme Court foreclosed "hard look" review of the president's statutory powers. *See* 505 U.S. at 800–01. As a result, something less than a "searching and careful" review—the "hard look" standard—is required for review of Section 232 actions. *See Citizens to Preserve Overton Park,*

Inc. v. Volpe, 401 U.S. 402, 416 (1971). These background principles suggest that a properly attenuated review of presidential regulation is confined to the subset of "hard look" factors that are independent of subject-matter familiarity.

The first factor for a court to consider is the "simple but fundamental rule of administrative law" that the delegee of congressional power must set forth the grounds on which it acted. *See SEC v. Chenery Corp.*, 332 U. S. 194, 196 (1947). The second marker is a corollary of the first and entails the "duty to explain [a] departure from prior norms." *Atchinson, T. & SFR Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973) (citations omitted). The third guideline on this non-exhaustive list serves to ensure that the delegee does not "rel[y] on factors which Congress has not intended it to consider." *Motor Vehicle Mfrs. Assn. of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

None of these "not so hard look" factors require courts to possess any expertise beyond common sense. And all of them are offended by the president's Section 232 steel tariffs. To cite an obvious example, the president offered no explanation for his choice of 25 percent tariffs on imported steel. This is a plain violation of the "fundamental rule" that a delegee of congressional authority must at least explain its regulation.

The Section 232 regulations on steel imports also departed radically from prior practice, without explanation. For example, where the president's Section 232

regulations might have macroeconomic effects, the Commerce Department historically weighed the costs against the benefits. *See*, *e.g.*, U.S. Dep't of Commerce, *The Effect on the National Security of Imports of Crude Oil and Refined Petroleum Products*, at ES-9 (Nov. 1999) ("The Department concurs with the conclusions of the 1994 and 1988 studies that, on balance, the costs to the national security of an oil import adjustment out-weigh the potential benefits."). Despite this consistent practice, here neither the department's recommendation nor the president's proclamation acknowledged the costs of the Section 232 regulation.

In addition, the president and the commerce secretary departed without explanation from predecessor administrations' uniform practice of accounting for the "reliability" of the importing countries. See U.S. Dep't of Commerce, *The Effect of Imports of Iron Ore and Semi-Finished Steel on the National Security*, at 27 (Oct. 2001) (finding no national security threat "even if the United States were dependent on imports" because products "are imported from reliable foreign sources"); U.S. Dep't of Commerce, *The Effect of Imports of Gears and Gearing Products on the National Security*, at VII - 17 (1992) (reasoning that "stable, reliable allies of the United States . . . can be expected to trade with the United States . . . in periods in which our country is engaged in military conflict"); U.S. Dep't of Commerce, *The Effect of Crude Oil and Re-fined Petroleum Product Imports on the National Security*, III - 11 (Jan. 1989) (concluding that the "the growth of non-OPEC [oil]

production" enhances U.S. national security); U.S. Dep't of Commerce, *The Effect of Imports of Plastic Injection Molding Machines on the National Security*, at VII - 5 (Jan. 1989) ("A conservative approach is to assume that Canada could provide at least [as many machines imported the prior year] in an emergency.").

Further, the president and the secretary impermissibly relied on extraneous factors by basing Section 232 action on the inefficiency of other forms of statutory import relief, which was precisely what Congress intended to avoid. Section 232 regulation is not meant to provide an alternative to other statutory forms of relief from import injuries. *See, e.g.*, H.R. Rep. No. 1761, 85th Cong., 2d Sess. 13 (1958) ("[T]he national security amendment is not an alternative to the means afforded by [statute] for providing industries which believe themselves injured a second court in which to seek relief."). Yet the Commerce Department cited as a justification for its recommendation—with which the president must concur before he can act—the fact that other statutory mechanisms for import relief are time-consuming and unwieldy relative to Section 232 regulations. *See* U.S. Dep't of Commerce, *The Effect of Imports of Steel on the National Security*, at 28 (Jan. 2018) ("[G]iven the large number of countries and the myriad of different products involved, it could take years to identify and investigate every instance of unfairly traded steel, or attempts to transship or evade remedial duties."). And the president, in promulgating the steel tariffs, observed that he agreed with the secretary's assessment of "previous U.S.

Government measures and actions on steel articles imports and excess capacity," all of which were measures Congress did not intend to be considered. President Donald J. Trump, Proclamation 9705, ¶ 3 (Mar. 8, 2018).

In sum, judicial review can be tailored to the president such that it requires no subject-matter expertise. Under this limited oversight, the steel tariffs here do not withstand scrutiny.

CONCLUSION

For the above reasons, and those stated by the Appellants, this Court should reverse the decision of the court below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On August 16, 2019, the foregoing brief was electronically filed using the Court's CM/ECF System, which will serve via e-mail notice of such filing to all counsel registered as CM/ECF users, including any of the following:

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August 16, 2019

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) and 32(a)(7)(B) and Federal Circuit Rule 32(a) in that the brief contains 3,457 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b).

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August 16, 2019

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