No. 2020-1321

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

NATIONAL ORGANIZATION OF
VETERANS' ADVOCATES, INC.,

Petitioner,

v.

SECRETARY OF VETERANS AFFAIRS,

Respondent.

Petition for Review Pursuant to 38 U.S.C. § 502

RESPONSE TO THE PETITION FOR INITIAL HEARING EN BANC

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INTRODUCTION

Petitioner, National Organization of Veterans' Advocates, Inc. (NOVA), seeks to invalidate two knee-related provisions of the Department of Veterans Affairs' Adjudication Procedures Manual M21-1 (Manual)—an online guidance document used by the VA's regional offices initially to adjudicate individual benefits claims. *See* Pet. for Review, ECF No. 1.

Before showing it is entitled to such relief, NOVA first seeks immediate and extraordinary action by the full Court to remove "two roadblocks to . . . review" of NOVA's petition under 38 U.S.C. § 502. Pet. for Initial Hearing En Banc at 2, ECF No. 11 (Pet.). First, NOVA urges the Court to decide—for the second time in

two years—whether to jettison its recent decision in *Disabled American Veterans v. Secretary of Veterans Affairs*, 859 F.3d 1072 (Fed. Cir. 2017) (*DAV*). Second, NOVA asks the Court to invalidate Federal Circuit Rule 47.12(a)—adopted nearly 30 years ago—because NOVA filed its petition long after the rule's 60-day filing deadline had expired.

The Court should deny en banc review. NOVA not only fails to demonstrate that either so-called "roadblock" involves "precedent-setting questions of exceptional importance[.]" Fed. Cir. R. 35(b)(1). NOVA fails more fundamentally to show that either *DAV* or Rule 47.12(a) is, in fact, a "roadblock" to judicial review here.

BACKGROUND

Section 502 authorizes this Court's facial review of certain "action[s] of the Secretary" of Veterans affairs—namely, those "to which section 552(a)(1) or 553 of title 5 (or both) refers[.]" 38 U.S.C. § 502.

A. In *DAV*, the Court held that it lacked jurisdiction under section 502 to review revisions to one provision of the Manual (part IV, subpart ii, ch. 2, ¶ D) because the revisions were not "actions of the Secretary subject to either §§ 552(a)(1) or 553." *Id*. at 1075; *see also id*. at 1078. The Court concluded that the disputed revisions "f[e]ll within § 552(a)(2)," and "not § 552(a)(1)," because they were "interpretations adopted by the agency, not published in the Federal Register, not binding on the [Board of Veterans' Appeals] itself, and contained

within an administrative staff manual[.]" *Id*. at 1078. The Court further concluded that the revisions did not amount to substantive rules or "carry the force of law," *id*. at 1077, and thus were beyond the scope of section 553 too. *See id*.

B. In *Gray v*. *Secretary of Veterans Affairs*, 875 F.3d 1102 (Fed. Cir. 2017), both an individual veteran and a veterans' association filed section 502 petitions challenging revisions to a different provision of the Manual (part IV, subpart ii, ch. 1, ¶ H.2.a). *See id*. at 1104, 1106-07. The *Gray* Court, however, found that "the[] scope and binding effect" of those revisions were "identical" to those at issue in *DAV*. *Id*. at 1109. And because the revisions thus "f[ell] under § 552(a)(2) and not § 552(a)(1) or § 553," the Court held that they were beyond the Court's "jurisdiction under § 502 to hear Petitioners' direct challenge to [them]." *Id*. at 1109 (citing *DAV*, 859 F.3d at 1075-77); *but see id*. at 1109-16 (Dyk, J., dissenting in part and concurring in the judgment).

C. Both *Gray* petitioners sought en banc review, contending that "*DAV* was wrongly decided" because it had "assume[d] that Sections 552(a)(1) and (a)(2) are mutually exclusive[.]" Combined Pet. for Panel Reh'g & Reh'g En Banc at 6, *Gray v*. *Sec'y of Veterans Affairs*, No. 16-1782 (Fed. Cir. Dec. 13, 2017), ECF No. 66; *see also id*. at 8, 12. The *Gray* petitioners further argued that section 502 review must extend to revisions of the Manual because section 553 "refers to" "interpretative rules." *Id*. at 16 (quoting 5 U.S.C. § 553(b)(A), (d)(2)); *accord* Consol. Pet. for Panel Reh'g & Reh'g En Banc at 7-14, *Blue Water Navy Vietnam*

Veterans Ass'n v. Sec'y of Veterans Affairs, No. 16-1793 (Fed. Cir. Dec. 15, 2017), ECF No. 77-1.

In opposing en banc review, the Secretary demonstrated that "*DAV* did not find section 552(a)(1) and (a)(2) mutually exclusive[.]" Resp. in Opp. to Combined Pet. for Panel Reh'g & Reh'g *En Banc* at 9, *Gray v. Sec'y of Veterans Affairs*, No. 16-1782 (Fed. Cir. Jan. 12, 2018), ECF No. 90 (*Gray* EB Resp.). The Secretary also disputed that *DAV*'s "jurisdictional holding" categorically foreclosed review of the Manual, inasmuch as the result in *DAV* hinged "upon DAV's failure 'to articulate why the revisions [in that case] amount[ed] to' interpretations subject to section 552(a)(1)(D)[.]" *Id*. at 6 (quoting *DAV*, 859 F.3d at 1078); *accord* Resp. in Opp. to Combined Pet. for Panel Reh'g & Reh'g *En Banc* at 7-15, *Blue Water Navy Vietnam Veterans Ass'n v. Sec'y of Veterans Affairs*, No. 16-1793 (Fed. Cir. Jan. 12, 2018), ECF No. 83 (*Blue Water* EB Resp.). And the Secretary emphasized that the Manual does not implicate section 553 because it "does not bind the entire agency, including the Board of Veterans[']Appeals[.]" *Gray* EB Resp. at 4; *see also id*. at 8; *Blue Water* EB Resp. at 4.

The Court denied en banc review. *See Gray v. Sec'y of Veterans Affairs*, 884 F.3d 1379, 1380 (Fed. Cir. 2018) (per curiam); *id*. at 1380 (Taranto, J., concurring); *id*. at 1382 (Dyk, J., dissenting). In concurring in the denial of the petitions, Judge Taranto agreed with the Secretary that neither *DAV* nor the panel decision had treated "5 U.S.C. § 552(a)(1) and § 552(a)(2) . . . as mutually

exclusive in what they cover." *Id*. at 1380 (Taranto, J., concurring); *see also id*. at 1381 ("I do not think our decisions stand for that [mutual exclusivity] premise."). Judge Taranto likewise agreed with the Secretary that both decisions "rel[ied] on particular features of the" disputed Manual provisions to find them beyond review under section 502. *Id*. at 1381. And Judge Taranto saw "[n]o urgency" to resolving en banc "the more general question of § 502's application to" provisions of the Manual, given that "[f]ew challenges to Manual pronouncements ha[d] been brought through § 502." *Id*.

D. Both *Gray* petitioners then sought discretionary review by the Supreme Court, which initially agreed to decide in Mr. Gray's case whether section 502 authorized review of those particular Manual revisions. *See* Br. of Petitioner at i, *Gray v*. *Wilkie*, No. 17-1679 (S. Ct. Dec. 17, 2018); *Gray v*. *Wilkie*, 139 S. Ct. 451 (2018). Before the Supreme Court could decide that question, however, this Court decided *Procopio v*. *Wilkie*, 913 F.3d 1371 (Fed. Cir. 2019) (en banc), effectively invalidating the disputed revisions, prompting a settlement of Mr. Gray's benefits claim, and mooting his case. Consequently, the Supreme Court vacated this Court's judgment in *Gray* and remanded with instructions to dismiss. *Gray v*. *Wilkie*, 139 S. Ct. 2764 (2019); *see also Blue Water Navy Vietnam Veterans Ass'n, Inc*. *v*. *Wilkie*, 139 S. Ct. 2740 (2019) (granting certiorari, vacating the judgment, and remanding).

E. In November 2016, the VA revised section III.iv.4.A.6.a of the Manual, which concerns whether and how to evaluate partial knee replacements for compensability. *See* ECF No. 1-2 at 40, 43-44, 127-28 (Knee Replacement Provision). In April 2018, the VA revised section III.iv.4.A.6.d of the Manual, which concerns how to rate varying degrees of joint instability. *See* ECF No. 1-2 at 127, 129 (Joint Stability Provision). These revisions, like all Manual provisions, were published publicly. *See* U.S. Department of Veterans Affairs, M21-1 Compensation and Pension Manual Rewrite, https://www.benefits.va.gov/warms/M21_1MR.asp (last visited Apr. 2, 2020). NOVA challenged both revisions here in January 2020.

ARGUMENT

En banc review is unwarranted unless it is "necessary to secure or maintain uniformity of the court's decisions" or "the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a)(1)-(2); *see also* Fed. R. App. P. 35(b)(1); Fed. Cir. R. 35(b)(1) ("precedent-setting questions of exceptional importance"); Fed. Cir. Internal Operating Procedure No. 13(2) (Nov. 14, 2008).

Here, there are many reasons why neither issue raised by NOVA's petition "involves [a] question[] of exceptional importance." Pet. at 1. But even if they did, there remains one compelling reason why the Court should deny the petition anyway: NOVA may still be able to secure review of its challenges to the Knee

Replacement and Joint Stability Provisions without the full Court's intervention. Unless and until NOVA fails in that effort, en banc review would be improvident.

I. There Is No Need To Revisit *Disabled American Veterans* In This Case

The Court correctly decided *DAV* for all the reasons stated in the Secretary's merits brief to the Supreme Court in *Gray*. And en banc review of *DAV* remains unnecessary today for all the same reasons stated in the Secretary's opposition to Mr. Gray's en banc petition two years ago. Nothing has changed since the Court last declined to revisit *DAV* and, consequently, NOVA provides no meaningful basis to second-guess *DAV* anew.

A. NOVA variously suggests that *DAV* is an absolute bar to its petition that must be swept away. *See, e.g.*, Pet. at 2-3, 8. In doing so, NOVA asks the Court to scrutinize *DAV* in a vacuum, divorced from the substance of the particular Manual provisions that NOVA now disputes. But, again, *DAV* did not categorically foreclose review of Manual provisions. And this Court's authority to review disputed provisions turns on their "particular features" and "not merely" their inclusion in the Manual. *Gray*, 884 F.3d at 1381 (Taranto, J., concurring).

Thus, NOVA may still be able to secure section 502 review of the Knee Replacement and Joint Stability Provisions without eroding *DAV*. NOVA itself has signaled that it has other arguments to make in favor of the Court's "jurisdiction *despite DAV*[.]" Petitioner's Mot. to Stay Briefing Schedule Pending Resolution of Pet. for Initial Hearing En Banc at 2, ECF No. 12 (emphasis in

original). Indeed, NOVA is attempting to argue its way around *DAV* in another pending section 502 challenge by distinguishing the Manual provision in that case from those disputed in *DAV*. *See* Pet. Br. at 3, 7-10, *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, No. 17-1839 (Fed. Cir. Dec. 5, 2019), ECF No. 23.

B. Even if *DAV* did absolutely bar NOVA's petition, veterans adversely affected by the Knee Replacement and Joint Stability Provisions can still challenge them by appealing the determination of their individual benefits claims. *See DAV*, 859 F.3d at 1078; *Gray*, 875 F.3d at 1109. The availability of such individualized review likewise undercuts the "exceptional importance" of revisiting *DAV*—a scarcely three-year-old decision—to answer "the more general question of § 502's application to" provisions of the Manual. *Gray*, 884 F.3d at 1381 (Taranto, J., concurring).

C. Further belying NOVA's claimed "urgency" to revisit *DAV* now, *id*., facial challenges to provisions of the Manual have remained rare since the Court denied rehearing in *Gray* in 2018. We are aware of only three such challenges:
(i) this petition (which attacks two Manual provisions issued years ago);
(ii) NOVA's other pending petition in case number 17-1839 (which was filed

before the denial of rehearing in *Gray*); and (iii) a petition filed just a few weeks ago by Military Veterans Advocacy, Inc., in case number 20-1537.[1]

D. NOVA leans excessively on the Supreme Court's decision to grant review in *Gray* as proof that *this* petition "involves a question of exceptional importance." Fed. R. App. P. 35(a)(2). Of course, the Supreme Court will not grant review absent "compelling reasons," S. Ct. R. 10, and it often considers whether a case involves "an important federal question" or an "important matter" when deciding whether to grant review. S. Ct. R. 10(a), (c). But the Supreme Court has virtually unlimited "discretion" to grant certiorari, S. Ct. R. 10, and the *Gray* petitions involved very different Manual provisions—provisions that had the effect of preventing certain veterans of the Vietnam War from receiving benefits for exposure to Agent Orange. Whatever could be gleaned from the Supreme Court's decision to take up *Gray*, NOVA fails to account for the apparently "compelling" context surrounding that particular case.

E. NOVA purports to amplify the grant of certiorari in *Gray* by accusing the Secretary of "repudiat[ing]" and "reimagin[ing]," before the Supreme Court, some of this Court's reasoning in *DAV*. Pet. at 14. That accusation is groundless.

The *DAV* Court found that the disputed Manual revisions did not "fall within . . . § 552(a)(1)" because (among other reasons) they were "not binding on the

[1] Military Veterans Advocacy, Inc., has appeared in this case as *amicus curiae*. *See* Order, ECF No. 30.

Board itself," and because DAV had not shown that they were "'interpretations of general applicability' subject to § 552(a)(1)(D)[.]" 859 F.3d at 1078 (quoting 5 U.S.C. § 552(a)(1)(D)). Accordingly, in opposing en banc review in *Gray*, the Secretary contended that, "as noted in *DAV*, the . . . Manual is not binding outside of the agency or even upon the entire agency," *Gray* EB Resp. at 8 (citing *DAV*, 859 F.3d at 1078), and that *DAV* had implicitly found that the revisions disputed there "were not interpretations of 'general applicability' subject to section 552(a)(1)(D)[.]" *Id*. at 6 (citing *DAV*, 859 F.3d at 1078).

Later, in opposing Supreme Court review, the Secretary asserted that this Court had "correctly held that the [disputed] Manual provisions . . . f[e]ll outside Section 552(a)(1)" because "the Board may decline to apply [the provisions] in any or all cases" and, thus, they could not "fairly be described as having 'general applicability[.]'" Br. for Respondent in Opp. at 21, *Gray v*. *Wilkie*, No. 17-1679 (S. Ct. Sept. 7, 2018) (quoting 5 U.S.C. § 552(a)(1)(D)); *see also id*. at 20 ("The fact that the . . . Manual's provisions do not bind the Board . . . further supports the conclusion that they fall outside Section 552(a)(1)(D)."). And then, in briefing the merits, the Secretary reaffirmed that the disputed provisions fell "outside Section 552(a)(1)(D)" because they "do[] not bind VA or any benefits claimant." Br. for Respondent at 33, *Gray v*. *Wilkie*, No. 17-1679 (S. Ct. Jan. 16, 2019); *see also id*. ("Section 552(a)(1)(D) is best read to require, at a minimum, that an

'interpretation[] of general applicability formulated or adopted by the agency' have a 'binding effect' on the agency or interest members of the public."); *id*. at 23.

In sum, since *DAV*, the Secretary has consistently emphasized the Manual's generally non-binding effect to contest the application of section 552(a)(1)(D) to particular Manual provisions.

F. NOVA further attacks the Secretary's consistently stated positions about *DAV* by seizing upon a statement made by the Secretary of Health and Human Services in *Azar v*. *Allina Health Services*, No. 17-1484 (S. Ct.), *see* Pet. at 14—a non-veteran, non-Administrative Procedure Act case that involved the interpretation of particular statutory language in 42 U.S.C. § 1395hh(a)(2), requiring the use of notice-and-comment rulemaking whenever the agency "establishes or changes a substantive legal standard" governing reimbursements under the Medicare Act. In framing that statute's legislative history, Secretary Azar referred in passing to "the well-settled administrative-law notice-and-comment framework that excludes interpretive rules, which by definition have no binding legal effect." Br. for Petitioner at 35, *Azar v*. *Allina Health Servs*., No. 17-1484 (S. Ct. Nov. 13, 2018).

Both *Allina* and Secretary Azar's statement in that case are inapposite here, as is the Supreme Court's footnoted dictum that "many manual instructions surely qualify as guidelines of general applicability[.]" *Azar v*. *Allina Health Servs*., 139 S. Ct. 1804, 1814 n.1 (2019). Setting aside that dictum's focus on the

Medicare context, the Secretary in *Gray* acknowledged that "*DAV* does not prevent this Court from entertaining direct challenges to 'interpretation[s] of general applicability' . . . that are published in the Manual." *Gray* EB Opp. at 12. But petitioners must still demonstrate that a particular Manual provision amounts to a generally-applicable interpretation, and the *DAV* and *Gray* petitioners simply failed to do so.

* * *

All of these reasons disfavor the Court's extraordinary intervention to revisit—again—its very recent precedent. Yet denying NOVA's petition for *initial* en banc review will not prevent NOVA from seeking *rehearing* en banc later, after full development of the parties' arguments about these particular Manual provisions and the scope of the Court's jurisdiction. Thus, the most prudent course is to test NOVA's other jurisdictional arguments first *before* deciding whether to revisit a decision that may not actually preclude judicial review here: If NOVA convinces the panel that *DAV* does not bar its challenges, then NOVA will not need to seek rehearing at all.

II. <u>En Banc Review Is Also Unnecessary To Address Rule 47.12(a)</u>

NOVA also urges the Court to sit en banc to correct an alleged conflict between Federal Circuit Rule 47.12(a)—which imposes a 60-day deadline to file section 502 petitions—and the six-year limitations period that applies to suits brought in district courts under the APA, 28 U.S.C. § 2401. *See* Pet. at 15-18.

NOVA purportedly needs the en banc Court to change Rule 47.12(a) because NOVA filed its petition more than "60 days after issuance of the" Manual revisions it seeks to challenge. For several reasons, the Court should also decline to review this question now.

A. Even if NOVA were right about this alleged conflict, NOVA's petition has not yet been rejected as untimely under Rule 47.12(a)—and it may never be. *See Preminger v. Sec'y of Veterans Affairs*, 517 F.3d 1299, 1307 (Fed. Cir. 2008) (*Preminger I*) ("We hold that the statute of limitations in section 2401 applies to actions under section 502."); *see also Block v. Sec'y of Veterans Affairs*, 641 F.3d 1313, 1317, 1319 (Fed. Cir. 2011).

We are aware of only two cases in which the Court has squarely rejected a section 502 petition as untimely under Rule 47.12(a), both in unpublished table decisions issued nearly 30 years ago. *See Samudio v. Sec'y, Dep't of Veterans Affairs*, 14 F.3d 612, 1993 WL 525463 (Fed. Cir. 1993) (unpublished); *Nuevas v. Sec'y of Dep't of Veterans Affairs*, 9 F.3d 977, 1993 WL 452676 (Fed. Cir. 1993) (unpublished); *see also, e.g.*, *Brown v. Sec'y of Veterans Affairs*, 124 F.3d 227, 1997 WL 488930, at *2 (Fed. Cir. 1997) (unpublished) (declining to "address the applicability or validity of [Rule 47.12(a)]" because the petition was filed "more than ten years after the regulations issued").

To the limited extent that the Court has addressed Rule 47.12(a) in its precedential decisions, the Court's treatment of the 60-day deadline has amounted to dicta.

In *Jackson v. Brown*, 55 F.3d 589 (Fed. Cir. 1995), for instance, the Court stated that "a request for Section 502 review" of a disputed general counsel precedent opinion "had to be filed within 60 days of [its] issuance[.]" *Id*. at 592. But *Jackson* was not a section 502 case. It was a direct appeal from the United States Court of Appeals for Veterans Claims. *See id*. at 590-91. And the Court's statement addressed the veteran's unavailing theory that Congress must have also intended for the Veterans Court to possess review authority under section 502. *See id*. at 592.

In *Disabled American Veterans v. Gober*, 234 F.3d 683 (Fed. Cir. 2000), the Court held that Rule 47.12(a)'s 60-day deadline ran from a contested rule's effective date, not its publication date. *See id*. at 690. But all of the petitions in the case were deemed timely under that interpretation of Rule 47.12(a), *see id*. at 690 & n.4, leaving no reason to address section 2401 (which, in any event, no party had raised).

And in *Preminger v. Secretary of Veterans Affairs*, 632 F.3d 1345 (Fed. Cir. 2011) (*Preminger II*), the Court concluded that a section 502 challenge was "barred" under Rule 47.12(a) not only because the petitioner had "filed his petition

. . . more than sixty days after the [disputed] Directive was issued," but also because he had not met the rule's separate standing requirements. *Id*. at 1353.[2]

At base, even if there were truly "conflicting statements . . . in [the Court's] precedent" about Rule 47.12(a) and section 2401, those conflicts depend on non-binding dicta, and a three-judge panel may freely "review the cases and reconcile or explain the statements, if possible." *Johnston v*. *IVAC Corp*., 885 F.2d 1574, 1579 (Fed. Cir. 1989).

B. En banc review is equally unnecessary to correct the alleged "conflict" between Rule 47.12(a) and section 2401, Pet. at 17, because Federal Rule of Appellate Procedure 47 already prescribes a formal process for "amend[ing] rules[.]" Fed. R. App. P. 47(a)(1). This process is distinct from en banc review. *See generally* Fed. R. App. P. 35; Fed. Cir. R. 35.

Although rule changes and en banc review both require action by "a majority of . . . judges . . . in regular active service," Fed. R. App. P. 35(a); Fed. R. App. P. 47(a)(1), the Court cannot change "its rules of practice" without "giving appropriate public notice and opportunity for comment[.]" Fed. R. App. P. 47(a)(1); *accord* 28 U.S.C. § 2071(b). To this end, and pursuant to 28 U.S.C.

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[2] Additionally, the Court in *Preminger I* neither discussed nor accepted the Secretary's theory that the petition in that case was untimely under Rule 47.12(a). *See* Br. for Respondent at *47-49, *Preminger v*. *Sec'y of Veterans Affairs*, No. 07-7008 (Fed. Cir. Feb. 8, 2007), *available at* 2007 WL 624123. The Court addressed only the Secretary's alternative untimeliness argument under section 2401. *Compare id*. at *49-50, *with Preminger I*, 517 F.3d at 1307-06.

§ 2077(b), the Court has established an advisory council "to review, study, and make recommendations regarding" changes to the Court's rules. United States Court of Appeals for the Federal Circuit, Advisory Council, http://cafc.uscourts.gov/the-court/advisory-council (last visited Apr. 2, 2020).

NOVA does not claim that it has pursued the rule-change process prescribed by Rule 47(a)(1), nor that this process is somehow inadequate or unavailable to it. It is further unclear how en banc review in this case would satisfy the Court's express duty to provide notice and invite comment before amending Rule 47.12(a).

C. Finally, even if Rule 47.12(a) prevents NOVA from challenging the Knee Replacement and Joint Stability Provisions directly, it does not prevent NOVA from petitioning the VA, under 5 U.S.C. § 553(e), to issue them as rules and then seeking section 502 review of the VA's response to that request. *See Preminger I*, 632 F.3d at 1351.

NOVA presumes that the VA would deny a rulemaking request and would "take many months" or longer to do so. Petitioner's Reply in Supp. of Mot. to Stay Briefing Schedule Pending Resolution of Pet. for Initial Hearing En Banc at 2, ECF No. 17. Yet NOVA has made no rulemaking request in the years since the VA revised these Manual provisions. *But cf*. *McCarthy v*. *Madigan*, 503 U.S. 140, 145-49 (1992) (discussing the prudential exhaustion doctrine and judicially-recognized exceptions to it), *superseded by statute on other grounds as stated in Woodford v*. *Ngo*, 548 U.S. 81 (2006). Moreover, although "an agency's refusal to

institute rulemaking proceedings is at the high end of the range of levels of deference" afforded under the APA, *Preminger II*, 632 F.3d at 1353 (quotation marks omitted), agencies enjoy less deference when they refuse to rule-make based on the existence of other, otherwise "invalid" authorities. *Id*. at 1354. So, if NOVA is right that the Knee Replacement and Joint Stability Provisions are invalid—and actually petitions the VA for a rulemaking—NOVA would have grounds to challenge the denial of that petition.

CONCLUSION

For these reasons, the Court should deny NOVA's petition for initial hearing en banc.

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

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 35(b)(2) and Federal Circuit Rule 35(e)(4).

   - This brief contains **3,886** words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 35(c)(2).

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/s/ Isaac B. Rosenberg
ISAAC B. ROSENBERG

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April 2, 2020

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 2nd day of April, 2020, I caused a copy of the foregoing "RESPONSE TO THE PETITION FOR INITIAL HEARING EN BANC" to be filed electronically.

■ This filing was served electronically on all registered parties by operation of the Court's electronic filing system.

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