No. 22-109

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

IN RE HYUNDAI MOTOR AMERICA

Petitioner

On Petition for a Writ of Mandamus to the
United States District Court for the Western District of Texas,
Case No. 6:20-cv-01125-ADA
Judge Alan D Albright

PETITIONER'S REPLY IN SUPPORT OF ITS PETITION FOR A WRIT OF MANDAMUS

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November 12, 2021

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number: 22-109
Short Case Caption: In re Hyundai Motor America
Filing Party/Entity: Hyundai Motor America

1. Represented Entities	2. Real Parties in Interest	3. Parent Corporations and Stockholders
Hyundai Motor America	Hyundai Motor Company	Hyundai Motor Company

4. Legal Representatives		
Darin W. Snyder	Timothy S. Durst	

5. Related Cases
Petitioner is aware of one related case in which a defendant filed a similar improper venue motion that will likely be directly affected by the Federal Circuit's ruling in this appeal: *StratosAudio, Inc. v. Volkswagen Group of America, Inc.*, No. 6:20-cv-01131-ADA (W.D. Tex.)

6. Organizational Victims and Bankruptcy Cases
Not Applicable

I certify that the foregoing information is accurate and complete to the best of my knowledge.

Dated: November 12, 2021

/s/ Bradley N. Garcia
Bradley N. Garcia

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I. INTRODUCTION

StratosAudio does not dispute that the implications of the decision below will be dramatic. At a minimum, the vast majority of automobile manufacturers that deal with independent resellers of their products in the Western District of Texas—resellers that are required ***by law*** to be independent—will be subject to venue in patent infringement cases in that district. *See* Brief of Amicus Curiae (Dkt. 8-2) at 8–9 (explaining that the contract provisions cited by the district court are "common[]" and "typical"). StratosAudio also does not suggest that any of the relevant facts are disputed; it disputes only the ***legal significance*** of those undisputed facts. In short, there is no meaningful dispute that mandamus relief is warranted here if the district court's rationale is clearly erroneous. And, as this reply details, it is.

II. THIS COURT SHOULD INTERVENE

StratosAudio incorrectly argues that district courts are not divided over the question presented in this case. Opposition (Dkt. 11) ("Opp.") at 25–30. For example, StratosAudio argues *Omega Pats., LLC v. Bayerische Motoren Weke AG*, 508 F. Supp. 3d 1336, 1340 (N.D. Ga. 2020), is distinguishable by asserting in conclusory fashion that the "allegations about agency" there were deficient. Opp. at 25. But StratosAudio's arguments and allegations are similar to the plaintiff's in *Omega*, and are likewise deficient. *See infra*, Part III.A–C. That is why

StratosAudio is forced to argue, incorrectly, that *Omega* "improperly collapses the agency and ratification inquiries." Opp. at 26. StratosAudio further proves the point by relying on the *Blitzsafe* decision (Opp. at 27), the rationale of which *Omega* expressly rejected. Dkt. 2-1 ("Pet.") at 16–17. There is no reasonable dispute that district courts are in open disagreement.

StratosAudio attempts to distinguish *W. View Rsch., LLC v. BMW of N. Am., LLC*, but ignores that the plaintiff there argued ratification based on over thirty provisions in a franchise agreement, similar to StratosAudio. No. 16-2590, 2018 WL 4367378, at *6, 8 (S.D. Cal. Feb. 5, 2018); s*ee infra*, Part IV.A.

StratosAudio also mischaracterizes the amicus brief. Opp. at 28. The amicus did not argue that an "alter ego" finding is a necessary prerequisite to finding agency. *See* Dkt. 8-2 at 11–12. The amicus highlighted the concept of corporate distinctness because plaintiffs, including StratosAudio, find it convenient for venue purposes to argue that retailers conduct distributor business. Doing so requires improperly collapsing the corporate forms. *See infra*, Part III.D.

StratosAudio claims several cases are distinguishable because they did not involve automotive dealerships. Opp. at 29–30. But distributors and retailers have relationships in many industries, and they face many of the same venue issues that the parties face in this case. Pet. at 15–16. Those cases are instructive and demonstrate the broad applicability of the district court's erroneous reasoning.

Finally, StratosAudio cites two dealership agency cases (Opp. at 29), but neither supports its arguments. Both simply declined an early-stage motion to dismiss due to liberal pleading standards, so that the parties could take discovery on the agency issue. *Morano v. BMW of N. Am., LLC*, 928 F. Supp. 2d 826, 837–38 (D.N.J. 2013); *Kent v. Celozzi-Ettleson Chevrolet, Inc.*, No. 99-2868, 1999 WL 1021044, at *4 (N.D. Ill. Nov. 3, 1999).

In sum, district courts are divided, and resolving this appeal would not only resolve this dispute but provide guidance on many industries involving distributer-retailer relationships. And, as detailed below, the district court's conclusion here is contrary to settled, long-standing agency law.

III. THE DISTRICT COURT ERRED IN FINDING AGENCY

A. Texas Law Invalidates Franchise Control Provisions

StratosAudio does not dispute that any provision in the franchise agreements that constitutes control is unenforceable, and therefore cannot constitute control. *See* Pet. at 23–24. Instead, it cites the district court's statement that "HMA cannot have its cake and eat it too." Opp. at 13–14. That reasoning is contrary to the law and the facts. The dealerships worked with the Texas legislature to strip HMA of all control over the dealerships by rendering all control provisions unenforceable. *See* TOC §§2301.476(c)(2), 2301.003(b). And the district court disregarded that

law and forced HMA to litigate in Texas based on illusory control that HMA does not possess. Appx395. HMA is having no cake at all.

StratosAudio resorts to manufacturing a new and incorrect fact—that "dealers have ... chosen to voluntarily enter into these agreements and to give HMA effective control over their operations." Opp. at 13–14. But there is no evidence in the record, and StratosAudio cites nothing, suggesting that the dealers give HMA "effective control." To the contrary, the undisputed evidence proves the opposite—dealerships include in the agreement that they have "***complete authority*** to make all decisions on behalf of DEALER with respect to DEALER's operations." Appx133 (emphasis added). And, both the agreements and state law expressly state that any unenforceable provision shall be disregarded. Appx167 ("If any term ... will be contrary to any law ... such term … will be deemed deleted…."); TOC §2301.003(b) ("A term … of a franchise inconsistent with this chapter is unenforceable."). Thus, the undisputed facts are that the dealerships have "complete authority" over their own operations, and that any provisions that constitute control are unenforceable. *Id*. The district court's oversimplified analysis highlights why this Court should intervene.

B. HMA Has No Hiring, Firing, Or Supervising Power

Where a separate business entity is allegedly an agent of the principal, courts consistently hold that control requires "the power to hire and fire and the power of

supervision ***over the agent's employees.***" *Cardinal Health Solutions, Inc. v. Valley Baptist Med. Ctr.*, 643 F. Supp. 2d 883, 889 (S.D. Tex. 2008) (emphasis added); *see also EPGT Texas Pipeline, L.P. v. Harris Cty. Flood Control Dist.*, 176 S.W.3d 330, 337 (Tex. App. 2004); *Arguello v. Conoco, Inc.*, 207 F.3d 803, 807 (5th Cir. 2000) (no agency where no authority over "personnel decisions"); *Townsend v. Goodyear Tire and Rubber Co.,* 481 F. Supp. 2d 610 (N.D. Tex. 2007), *aff'd*, 249 Fed. Appx. 327 (5th Cir. 2007); *Smith v. Foodmaker, Inc.*, 928 S.W.2d 683, 687 (Tex. App. 1996).

For example, in a widely-cited decision, a court determined that an auto dealership was not an agent of Ford because, despite allegations of control similar to StratosAudio's, the complaint was "devoid of any allegations of some of the tell-tale signs of a principal-agent relationship, such as the ability of the principal to hire, fire, or supervise dealership employees…." *Ocana v. Ford Motor Co.*, 992 So. 2d 319, 326 (Fla. Dist. Ct. App. 2008); *see* 39 Am. Jur. Proof of Facts 2d 699 (citing *Ocana*); *see also SR20 Holdings, LLC v. Old Republic Aerospace, Inc.*, No. 20-61337, 2020 WL 6470637, at *2 (S.D. Fla. Sept. 22, 2020); *In re Coupon Clearing Serv., Inc.*, 113 F.3d 091, 1099–1100 (9th Cir. 1997); *Case v. Holiday Inns, Inc.*, 851 F.2d 356 (4th Cir. 1988).

StratosAudio does not dispute that HMA lacks the tell-tale signs of agency, including hiring, firing, and supervisory powers over the alleged agent's

employees. *See* Opp. at 9–10. StratosAudio instead repeatedly emphasizes that HMA requires certain ***positions*** to ***exist***. Opp. 7. But what matters is control over ***who fills*** those positions—control HMA utterly lacks.

StratosAudio further offers the incredible argument that such power is not required here because the dealerships—not the dealerships' employees—are the alleged agents. *Id.* As illustrated by the cases above, this distinction is meaningless—StratosAudio must prove that HMA has hiring, firing, and supervisory powers over the employees. None of the cases StratosAudio cites support its argument—they simply state the generic proposition that a corporation can be an agent. *See* Opp. at 9–10.

The case StratosAudio cites that found a dealership to be an agent is over 80 years old and does not apply the relevant agency test or even discuss the concept of control. *See Gen. Motors Acceptance Corp. v. Lee*, 120 S.W.2d 622 (Tex. Civ. App. 1938). Under the correct test, the caselaw above consistently finds retailers are not agents of distributors.

StratosAudio also argues that dealerships are agents because HMA can terminate the contracts. *Id*. StratosAudio is wrong as a matter of Texas law. TOC §2301.453 (limiting termination). More importantly, the power to terminate a contract does not convert an independent contractor into an agent. *Cardinal*, 643

F. Supp. 2d at 889 (explaining that "the power to order the work stopped or resumed" is not control).

It is undisputed that HMA lacks the classic powers of agency. The district court's finding of agency was clear error.

C. The Franchise Agreement Provisions Are Not Evidence Of Control Or Consent To Agency

The types of contractual provisions that *are* involved in this case cannot substitute for the absence of hiring or firing power or any other tell-tale sign of an agency relationship. *See, e.g., Leon v. Caterpillar Indus.*, 69 F.3d 1326, 1334 (7th Cir. 1995) (collecting cases); *Cardinal*, 643 F. Supp. 2d at 888–89 (same). StratosAudio relies on various specific provisions in the franchise agreements as evidence of control, but cites no authority holding that such provisions constitute control. *See* Opp. at 7–8.

The provisions StratosAudio cites (and vaguely and inaccurately characterizes) (*id*.) do not constitute control because they do not allow HMA day-to-day, interim control. *See Leon*, 69 F.3d at 1336 (no agency where manufacturer "provides no direction or consultation to [alleged agent] regarding its day-to-day operations."); *Smith*, 928 S.W.2d at 687; *Cardinal*, 643 F. Supp. 2d at 887–91. Instead, they are typical contractor provisions that specify acceptable standards for minimum service quality. *See Leon*, 69 F.3d at 1365–67; *Cardinal*, 643 F. Supp. 2d at 889–893.

For example, StratosAudio cites provisions that require dealerships to "perform warranty service" and require HMA to "compensate DEALER for" such work. Appx149. Hiring a contractor to do handyman work (such as fixing a vehicle) and agreeing to pay does not transform an independent contractor into an agent. *Leon*, 69 F.3d at 1330, 1334, 1336 (no agency based on warranty work); *State ex rel. Bunting v. Koehr*, 865 S.W.2d 351, 355 (Mo. 1993) ("no agency exists as a result of the dealers' performance of warranty work"). Further, the Board of the Texas Department of Motor Vehicles ("DMV")—*not* HMA—controls what warranty obligations the dealer can be subjected to. TOC §§2301.401 ("Warranty ... requirements placed on a dealer ... are not enforceable unless the requirements are reasonable."), 2301.402, 2301.403–406. The Texas DMV decides what is "reasonable," not HMA. TOC §§2301.153(8), 2301.711, 2301.801–807. Thus, Texas controls warranty work.

The other provisions StratosAudio cites are similarly insufficent.

- Provisions requiring dealerships to maintain a "distinctive, first-class appearance" by having satisfactory "space, appearance, amenities," etc. (Appx153): These are not control; they are "typical in… distributor agreements" because they "protect" the brand's "goodwill and the integrity of the… products line." *Hunter Mining Labs., Inc. v. Management Assistance, Inc.*, 104 Nev. 568, 570–571 (Nev. 1988).

- Provisions related to "minimum net working capital" (Appx154): Not control because Texas law provides that "[n]otwithstanding the terms of any franchise, a … distributor … may not prevent a franchised dealer who meets reasonable capital requirements from reasonably changing … the capital structure…." TOC §2301.457. Again, Texas decides what is reasonable, not HMA. Further, minimum working capital is not day-to-day control, it is a typical minimum standard for any going concern.
- Provisions requiring dealers to "procure such service equipment and special tools as HMA may require ... and to maintain the same in good repair ... to enable DEALER to fulfill its service responsibilities" (Appx151–52): Not control because this is a standard for acceptable service quality—the dealer must have proper tools to fix consumer vehicles. *See Arguello*, 207 F.3d at 807–08 (no control where franchise agreement required franchisee to "equip[]" itself in accordance with principal's specifications). And Texas controls tool purchases, not HMA: "a … distributor ... may not ... unreasonably require a franchised dealer to purchase special tools or equipment." *See* TOC §§2301.467(a)(2), 2301.451.
- Provision stating that HMA will "offer general and specialized service and technical training programs" to dealership employees (Appx152):

The right to "make suggestions… which need not be followed" is not control. *Cardinal*, 643 F. Supp. 2d at 888–89. HMA has no ability to enforce the training. *See* Appx152.

- Provisions requiring dealerships to maintain a "service and parts organization" with typical roles such as "service and parts personnel" (Appx149): Not control because it does not grant authority over personnel. This is a standard for minimum service quality—having a service and parts organization is a basic necessity for conducting repairs.
- Provisions related to computer and accounting systems used "[t]o facilitate the accurate and prompt reporting of relevant DEALER operational ... data including ... sales reports, warranty claims," etc. (Appx 154, 155, 152): The right to "receive reports" from an independent contractor is not control. *Cardinal*, 643 F. Supp. 2d 888–89. And again, Texas controls equipment purchases, not HMA. *See* TOC §§2301.467(a)(2), 2301.451.
- Provisions requiring dealerships to maintain a "minimum inventory" and to "explain to purchasers" the "price" and not make "misleading statements" (Appx146–47): Not control because these are standards for acceptable service quality—the dealership must have the vehicles in order to sell them and must not mislead customers. *See Arguello*, 207

F.3d at 807–08 (finding no control where agreement required "customers shall be treated … honestly"). And, Texas provides that a "manufacturer ... may not require ... a franchised dealer to order … a motor vehicle or … part ... unless the dealer voluntarily ordered or contracted for the item." TOC §2301.451. Thus, the dealership decides on an item-by-item basis whether it will order, not HMA.

StratosAudio attempts to distinguish *Arguello* because HMA's control is allegedly "more extensive." Opp. at 12. StratosAudio misses the point—*Arguello* held that a franchise agreement "does not establish that Conoco, Inc. has any participation in the daily operations of the branded stores nor that Conoco, Inc. participates in making personnel decisions." *Arguello*, 207 F.3d at 808. StratosAudio does not dispute that the same is true here.

Finally, StratosAudio argues that these same irrelevant provisions also establish the other two essential elements of agency, namely that the principal must consent to the agent acting on the principal's behalf, and the agent must consent to do so. Opp. at 9–11.[1] For the reasons already given, those provisions are not "indicia of consent" for the dealer to act on HMA's behalf, and cannot override the agreement's explicit statement that HMA is not consenting to be bound and the

[1] StratosAudio's assertion (Opp. at 9 n.1) that HMA did not dispute those elements below or in the Petition is false. *See* Pet. at 7, 19 (arguing no agency because "HMA does not consent"); Appx187 (arguing no agency based on no consent).

dealer is not consenting to bind HMA. Appx168. Such statements are consistently relied upon by courts in finding no agency. *See, e.g., Leon*, 69 F.3d at 1336; *Dulce Rests., L.L.C. v. Tex. Workforce Comm'n*, No. 07-19-00213-CV, 2020 Tex. App. LEXIS 7781, at *11 (Tex. App. Sep. 25, 2020); *Smith*, 928 S.W.2d at 687.

StratosAudio relies in particular on the warranty provisions (Opp. 11–12), but hiring a contractor to conduct handyman work (warranty repairs) does not create agency. *See, e.g., Leon*, 69 F.3d at 1336; *Bunting*, 865 S.W.2d at 355. StratosAudio cites a Texas law stating that a distributor that "reimburses" warranty repair services is "engaged in business in this state." TOC §2301.251(c). But that law does not state that a dealership that performs a repair acts on HMA's behalf. When the dealership repairs a vehicle, it undertakes that work for its own enrichment, and it—not HMA—is responsible for performing that work properly. Again, HMA is prohibited from conducting warranty repairs through an agent. Pet. at 25.

In sum, the provisions StratosAudio identifies are not control, and there is no consent.

D. Independent Dealerships Do Not Conduct HMA Business

StratosAudio argues dealerships conduct HMA business because they "sell and service Hyundai-brand vehicles." Opp. at 14. This argument disregards the facts—HMA operates a distributor business; dealerships operate a distinct retailer

business. Pet. at 25. HMA is prohibited by law from engaging in dealership business, ***including warranty repairs***, at an "established and permanent place of business." *Id*. StratosAudio cannot attribute dealership business to HMA unless it provides evidence sufficient to collapse the corporate forms, which it has not. *See EMED Techs. Corp. v. Repro-Med Sys., Inc.*, No. 17-728, 2018 U.S. Dist. LEXIS 93658, at *4 (E.D. Tex. June 4, 2018) (Bryson, J.) (collecting cases).

StratosAudio alleges dealerships conduct HMA business because HMA's website lists inventory and prices, and because HMA may provide advice, training, and warranty reimbursement to dealerships. Opp. at 15–16; Appx52–55. These arguments miss the point—there is no evidence that ***HMA*** performs any of those activities ***at the dealerships***. *In re Google LLC*, 949 F.3d 1338, 1347 (Fed. Cir. 2020) (explaining venue requires an agent "conducting the defendant's business at the alleged 'place of business'"). More importantly, those arguments contradict *Google*, which explained that the "venue statute should be read to exclude agents' activities, such as maintenance, that are merely connected to, but do not themselves constitute, the defendant's conduct of business in the sense of production, storage, transport, and exchange of goods or services." 949 F.3d at 1347. As in *Google*, StratosAudio points to "no suggestion in the legislative history that" the business functions StratosAudio relies on "constituted 'conducting [the defendant's] business' within the meaning of the statute." *Id*. at 1346. StratosAudio cannot

base venue on activities as minor as redirecting consumers between websites, providing advice, or reimbursing expenses.

StratosAudio argues that "a car warranty" is a "critical part of why customers choose to purchase a vehicle" and therefore warranty repairs are not ancillary. Opp. at 25. But, unlike in *Google*, HMA does not even own the property that is being maintained—the dealerships or consumers do. Pet. at 26; Appx132. Further, as far as HMA is involved, the warranty is a legal obligation—there is no evidence that legal obligation physically exists at the dealerships and, therefore, that obligation is irrelevant to venue. *Google*, 949 F.3d at 1343–44. And, it does not constitute HMA's "conduct of business in the sense of… exchange of goods or services." *Google*, 949 F.3d at 1347.

In sum, the dealership conducts its own operation with its own employees, equipment, and inventory, and does not conduct any business on behalf of HMA.

IV. THE DISTRICT COURT ERRED IN FINDING RATIFICATION

A. HMA Does Not Control Dealership Locations

StratosAudio argues ratification exists because HMA controls dealership locations through the franchise agreements. Opp. at 19. As an initial matter, none of the franchise agreement provisions constitute control over dealership ***operations***, for the same reasons discussed above in connection with agency. *See supra*, Part III.A–C. Regardless, HMA also does not control dealership

locations—it is not even allowed to enter them without consent, much less control them. Pet. at 28.

StratosAudio's reliance on certain franchise agreement provisions is misguided. The agreement sets forth minimum facilities standards for the dealerships in the conduct of their ***own separate business***. It does not ratify ***dealership*** locations as ***HMA's*** locations. *See Andra,* 6 F.4th at 1283. The point of the agreement is to identify minimum standards for how a dealership can conduct itself to avoid damaging the Hyundai brand, not to hold out dealerships as a place where the public can visit HMA. That is why they are not named Hyundai Motor America; they are named Round Rock Hyundai or Greg May Hyundai. Appx079–084, 202–208. Round Rock Hyundai, for example, is located at the same place as Round Rock Honda and Round Rock Toyota. Appx232. A consumer driving by would not see these three businesses and think that it could go there and visit HMA—a California-based distributor. Round Rock Hyundai's website clearly indicates that it is owned by Penske Automotive, a massive publicly-traded company. Appx202–208, 210. StratosAudio ignores these basic facts.

StratosAudio incorrectly argues that HMA controls "where a dealer can locate its business." Opp. at 19. But a "distributor… may ***not*** deny or withhold approval of a written application to relocate a franchise," except in certain limited

circumstances controlled by the Texas DMV. TOC §2301.464 (emphasis added), 2301.453(a), 2301.467(b), 2301.481(a)(3), 2301.483(c), 2301.002(28). Thus, HMA does not control dealership locations. *See* Appx054, ¶14.

StratosAudio suggests HMA has a right to enter a dealership without consent based on an audit provision, which is false. Opp. at 20–21. The provision does not even identify where the inspection will take place, much less give HMA a right to enter without consent. Appx155, §14.D. StratosAudio argues the dealership agreements are publicly available. Opp. at 20 n. 7. But it cites no evidence of any Texas dealership agreement being available publicly (it cites an Iowa agreement). Appx134.

StratosAudio also argues that its theory does not dramatically expand venue and that each case is fact specific and unique (Opp. at 22–23). But as this appeal and many other disputes demonstrate, the material facts related to franchise agreements are typical. *See* Pet. at 14–17*, supra* Part II; *Leon*, 69 F.3d at 1326; *Smith*, 928 S.W.2d at 687; *Bunting*, 865 S.W.2d at 355. StratosAudio states that HMA could simply remove provisions that constitute control from its agreement. But there are no such provisions and, even if there were, Texas already stripped them from the agreement. *See supra*, Part III.A–C.

In sum, the district court erroneously disregarded the name on the front door of the dealerships, and should be reversed.

B. HMA Does Not Represent That Dealerships Are Places Of HMA

StratosAudio argues that HMA has a place of business in this district, but it does not dispute the relevant facts. *See* Appx188–190. HMA is legally prohibited from engaging in vehicle sales and warranty repair business "at an established and permanent place of business." Pet. at 25. And HMA's website expressly states that dealerships are all independent. Appx055. The dealership websites also state they are independent. Appx242 ("Automax Hyundai is an independent Hyundai franchised dealership."); Appx244; Appx259. Indeed, the dealerships state they are "family-owned" (Appx080) or owned by a massive publicly traded company that sells dozens of brands of new vehicles (Appx080, 202–208, 210, 232). StratosAudio concedes that display by dealerships of the Hyundai logo "is irrelevant." Opp. at 24; Pet. at 32. In short, HMA's express representation is that all dealerships are independent.

StratosAudio points to HMA's website (Opp. at 23), but the website only provides information to users about independent dealerships, it does not tell users that HMA can be visited at dealership locations. Appx054, ¶15. StratosAudio argues HMA conducts business at the dealerships (Opp. at 23–24), which is wrong. *See supra*, Part III.D. StratosAudio attempts to distinguish *Andra* because HMA exercises "far more control." Opp. at 24. But HMA exercises no control. *See supra*, Part III.A–C, IV.A. StratosAudio also points to warranties (Opp. at 24–25),

but warranty repairs are conducted by dealerships at dealership locations (Appx054, ¶12), not by HMA at HMA locations (which would be illegal).

V. CONCLUSION

StratosAudio's response confirms that the district court's rationale and conclusion on several independent steps of the improper venue analysis was clearly incorrect on the undisputed facts and settled law. HMA respectfully requests that this Court issue a writ of mandamus.

Respectfully submitted,

O'MELVENY & MYERS LLP

/s Bradley N. Garcia
Bradley N. Garcia
Counsel for Petitioner

CERTIFICATE OF COMPLIANCE

1. This petition complies with the type-volume limitation of Federal Rule of Appellate Procedure 21(d)(1). The body of the petition contains 3,894 words, excluding the portions exempted by rule.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft® Word and 14-point Times New Roman type.

Dated: November 12, 2021

/s/ Bradley N. Garcia
Bradley N. Garcia

PROOF OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system on November 12, 2021.

A copy of the foregoing was served upon the district court via an express carrier:

Hon. Alan D Albright
United States District Court for the
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I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Dated: November 12, 2021

/s/ Bradley N. Garcia
Bradley N. Garcia
Counsel for Petitioner