

**United States Court of Appeals
for the Federal Circuit**

SAINT REGIS MOHAWK TRIBE, ALLERGAN, INC.,
Appellants

v.

**MYLAN PHARMACEUTICAL, INC., TEVA PHARMA-
CEUTICALS USA, INC., AND AKORN, INC,**
Appellees

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

Appeals from the U.S. 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 OF THE STATES OF INDIANA, HAWAII, ILLINOIS,
MASSACHUSETTS, TEXAS, UTAH, AND VIRGINIA AS
AMICI CURIAE IN SUPPORT OF EN BANC REHEARING**

Office of the Attorney General
302 West Washington Street
IGCS 5th Floor
Indianapolis, Indiana 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

CURTIS T. HILL, JR.
Attorney General of Indiana
THOMAS M. FISHER
Solicitor General*
KIAN J. HUDSON
Deputy Attorney General

Counsel for Amici States
Additional counsel listed with signature block

CERTIFICATE OF INTEREST

Counsel for *Amicus Curiae* certifies the following:

1. The full names of every party represented by me are:
 - The States of Indiana, Hawaii, Illinois, Massachusetts, Texas, Utah, and Virginia
2. The names of the real parties in interest represented by me are:
 - The States of Indiana, Hawaii, Illinois, Massachusetts, Texas, Utah, and Virginia
3. All parent corporations and any publicly held companies that own 10 percent of the stock of the parties represented by me are:
 - None. The *amicus curiae* are sovereign States.
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:
 - None.
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:
 - *Allergan, Inc. v. Teva Pharmaceuticals USA Inc.*, No. 2018-1130 (Fed. Cir.)
 - *Regents of the University of Minnesota v. LSI Corporation*, No. 2018-1559 (Fed. Cir.)
 - *Allergan, Inc. v. Deva Holding A.S.*, No. 2:16-cv-1447 (E.D. Tex.)
 - *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/ Thomas M. Fisher

TABLE OF CONTENTS

CERTIFICATE OF INTEREST	i
TABLE OF AUTHORITIES	v
AMICI’S STATEMENT OF IDENTITY AND INTEREST	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. Eliminating State Sovereign Immunity in <i>Inter Partes</i> Review Would Seriously Harm States.....	5
A. Permitting private parties to force States into IPR would offend States’ sovereign dignity	5
B. Excluding sovereign immunity from IPR would jeopardize the substantial, publicly beneficial revenues generated by public universities’ intellectual property.....	6
II. The Panel’s Decision Misapplies <i>FMC</i>	8
A. <i>Inter partes</i> review is not a proceeding brought by the federal government	9
B. The existence of sovereign immunity does not turn on minor procedural similarities	13
CONCLUSION	15
CERTIFICATE OF COMPLIANCE.....	17
CERTIFICATE OF SERVICE.....	18

TABLE OF AUTHORITIES

CASES

<i>Alden v. Maine</i> , 527 U.S. 706 (1999).....	6, 9
<i>Cuozzo Speed Technologies, LLC v. Lee</i> , 136 S.Ct. 2131 (2016).....	11
<i>Federal Maritime Commission v. South Carolina State Ports Authority</i> , 535 U.S. 743 (2002).....	<i>passim</i>
<i>Kashani v. Purdue University</i> , 813 F.2d 843 (7th Cir. 1987).....	5
<i>Mylan Pharmaceuticals Inc.</i> , (8,629,111 B2), 2018 WL 1100950, at *3 (Feb. 23, 2018).....	2
<i>Oil States Energy Services, LLC v. Greene’s Energy Group, LLC</i> , 138 S.Ct. 1365 (2018).....	10, 11
<i>SAS Institute, Inc. v. Iancu</i> , 138 S. Ct. 1348 (2018).....	10
<i>Xechem International, Inc. v. University of Tex. M.D. Anderson Cancer Center</i> , 382 F.3d 1324 (Fed. Cir. 2004)	8

STATUTES

35 U.S.C. § 141	14
35 U.S.C. § 311	14
35 U.S.C. § 313	11
35 U.S.C. § 314	11

OTHER AUTHORITIES

37 C.F.R. § 42.51(b) 10

37 C.F.R. § 42.73 14

Dave Merrill, Blacki Migliozi & Susan Decker, *Billions at Stake in University Patent Fights*, Bloomberg (May 24, 2016), <https://www.bloomberg.com/graphics/2016-university-patents/>..... 7

Federal Rule of Appellate Procedure 29(a) 1

Ind. Univ., Intellectual Property Policy, <https://policies.iu.edu/files/policy-pdfs/ua-05-intellectual-property.pdf>..... 8

Indiana University Research and Technology Corp. Reports \$7.03 Million in Revenue in 2015-16, IU Newsroom (Sept. 21, 2016), <http://archive.news.iu.edu/releases/2016/09/iurtc-revenue-2015-16.shtml> 7

National Academy of Inventors, Top 100 Worldwide Universities Granted U.S. Utility Patents in 2016, <http://www.academyofinventors.com/pdf/top-100-universities-2016.pdf> 5

OTC Metrics, Purdue Research Found., <https://www.prf.org/otc/about/otc-metrics/index.html> (last visited September 4, 2018) 7

Rubén Muñoz et al., *How New Testimonial Evidence Affects IPR Institution* (Jun. 5, 2018), <https://www.law360.com/articles/1049967> 11, 12

U.S. Patent and Trademark Office, U.S. Colleges and Universities Utility Patent Grants, https://www.uspto.gov/web/offices/ac/ido/oeip/taf/univ/org_gr/all_univ_ag.htm..... 5

AMICI'S STATEMENT OF IDENTITY AND INTEREST

Amici Curiae, the States of Indiana, Hawaii, Illinois, Massachusetts, Texas, Utah, and Virginia, file this brief in support of en banc rehearing as a matter of right pursuant to Federal Rule of Appellate Procedure 29(a).

The Supreme Court's landmark decision in *Federal Maritime Commission (FMC) v. South Carolina State Ports Authority* holds that state sovereign immunity's "preeminent purpose" is "to accord States the dignity that is consistent with their status as sovereign entities." 535 U.S. 743, 760 (2002). And because "[t]he affront to a State's dignity does not lessen when an adjudication takes place in an administrative tribunal as opposed to an Article III court," immunity applies in administrative proceedings as well. *Id.* at 760–61.

Although *FMC* addresses *state* sovereign immunity, and although "the precise contours of tribal sovereign immunity differ from those of state sovereign immunity," the panel's decision misapplies *FMC* to hold that *tribal* sovereign immunity does *not* apply in *inter partes* review (IPR) before the Patent Trial and Appeals Board (PTAB). Slip Op. 6. While the decision "leave[s] for another day the question of whether there is any

reason to treat state sovereign immunity differently,” *id.* at 12, litigants have already begun claiming that its reasoning forecloses *state* sovereign immunity—even though the PTAB has repeatedly held that state sovereign immunity *does* apply in IPR. *See Mylan Pharm. Inc.*, (8,629,111 B2), 2018 WL 1100950, at *3 (Feb. 23, 2018).¹

The *amici* States have a strong interest in ensuring the panel’s misapplication of *FMC* is corrected. Sovereign immunity protects States’ sovereign dignity and the value of patents held by States and their public universities. *Amici* States file this brief to show why the Court should rehear this case en banc and correct the panel’s misreading of *FMC*.

¹ *See* Pet. For Reh’g En Banc 2; U.S. Br. 8; Br. for Appellees Ericsson Inc. and Telefonaktiebolaget LM Ericsson at 11–39, *Regents of the Univ. of Minn. v. LSI Corp.*, No. 18-1559 (Fed. Cir. Jul. 31, 2018); Br. for Intervenor Gilead Sciences, Inc. at 7, *Regents of the Univ. of Minn. v. LSI Corp.*, No. 18-1559 (Fed. Cir. Jul. 31, 2018); Br. for Appellees LSI Corp. and Avago Technologies U.S., Inc. at 7, *Regents of the Univ. of Minn. v. LSI Corp.*, No. 18-1559 (Fed. Cir. Jul. 31, 2018).

SUMMARY OF ARGUMENT

Excluding state sovereign immunity from IPR would impose serious harms on States. States and their public universities hold many patents, and if States could not claim sovereign immunity in IPR, they would regularly be forced to appear before the PTAB. Beyond this dignitary harm, public universities' patents generate substantial revenues that are reinvested in cutting-edge research and development; subjecting States to IPR would make it more costly and difficult to protect this hard-earned revenue. And in light of the public purposes to which these revenues are devoted, it is unremarkable that sovereign immunity sometimes means States' patents are specially protected.

The panel's decision threatens these harms because it misapplies *FMC*. It incorrectly concludes that "immunity would not apply" in a circumstance wherein "an agency chooses whether to institute a proceeding on information supplied by a private party." Slip Op. 8. But while *FMC* recognizes that the States have consented to "actions brought by the Federal Government," 535 U.S. at 764, private parties, not the federal government, commence and prosecute IPR. The panel's decision also mistakenly focuses on minor procedural dissimilarities between IPR and federal

court litigation. Slip Op. 9–10. Although *FMC* observes that the procedural rules in the administrative proceedings at issue there bore “a remarkably strong resemblance to civil litigation in federal courts,” 535 U.S. at 757, this similarity merely suggested that the proceedings were “the type of *proceedings*” to which sovereign immunity applies, *id.* at 756 (emphasis added). The necessary elements of such a “proceeding” are that it be “before an *impartial federal officer*” and that the State be “*required to defend itself.*” *Id.* at 760–61 (emphasis added). IPR satisfies these requirements, and state sovereign immunity therefore applies in these proceedings.

ARGUMENT

I. **Eliminating State Sovereign Immunity in *Inter Partes* Review Would Seriously Harm States**

A. **Permitting private parties to force States into IPR would offend States' sovereign dignity**

Many States recognize public universities as arms of the State, which means state sovereign immunity extends to these schools. *See Kashani v. Purdue Univ.*, 813 F.2d 843, 845 (7th Cir. 1987). And these schools hold thousands of valuable patents. Between 1969 and 2012, 75,353 patents were issued to U.S. institutions of higher education; many of these were public colleges and universities. *See* U.S. Patent and Trademark Office, U.S. Colleges and Universities Utility Patent Grants, https://www.uspto.gov/web/offices/ac/ido/oeip/taf/univ/org_gr/all_univ_ag.htm. The number of patents issued has surged even more in recent years. In 2016, fourteen universities each received over one hundred utility patents. *See* National Academy of Inventors, Top 100 Worldwide Universities Granted U.S. Utility Patents in 2016, <http://www.academyofinventors.com/pdf/top-100-universities-2016.pdf>. Of the top 100 universities granted U.S. utility patents worldwide, nearly half were U.S. public universities. *See id.*

This large volume of patents makes public universities natural targets for those hoping to profit from research paid for by someone else. If a party manages to invalidate a university's patent, it can use the research—now publicly available in the patent materials—without paying a cent in royalties. This financial incentive ensures that if IPR proceedings were made exempt from state sovereign immunity, public universities would often find themselves hauled before the PTAB. This is a serious offense to States' sovereign dignity, regardless of the proceedings' outcome: "Private suits against nonconsenting States . . . present 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties' *regardless of the forum.*" *Alden v. Maine*, 527 U.S. 706, 749 (1999) (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)) (emphasis added).

B. Excluding sovereign immunity from IPR would jeopardize the substantial, publicly beneficial revenues generated by public universities' intellectual property

Subjecting public universities to IPR proceedings also would threaten universities' patent revenue. Universities obtain substantial patent revenue through "technology transfer" programs and from patent-

infringement litigation. For example, in fiscal year 2017 Purdue University netted \$4.2 million from technology transfer, Office of Technology Commercialization, *OTC Metrics*, Purdue Research Found., <https://www.prf.org/otc/about/otc-metrics/index.html> (last visited September 4, 2018), and in 2015 Indiana University earned \$7.03 million, *Indiana University Research and Technology Corp. Reports \$7.03 Million in Revenue in 2015-16*, IU Newsroom (Sept. 21, 2016), <http://archive.news.iu.edu/releases/2016/09/iurtc-revenue-2015-16.shtml>. Meanwhile, Carnegie-Mellon University settled a patent-infringement suit in 2016 for more than \$750 million, and in 2015 a “jury determined Apple’s A7 processors . . . used technology patented by the [University of Wisconsin] and awarded Wisconsin \$234 million.” Dave Merrill et al., *Billions at Stake in University Patent Fights*, Bloomberg (May 24, 2016), <https://www.bloomberg.com/graphics/2016-university-patents/>.

Jeopardizing these revenues is particularly harmful because they are largely reinvested in universities’ publicly beneficial research and education efforts. Indiana University, for example, directs 30% of intellectual property revenues back into research and development through the

campus units and labs that created the technology. Ind. Univ., Intellectual Property Policy 3–5, <https://policies.iu.edu/files/policy-pdfs/ua-05-intellectual-property.pdf>. Its policy directs a further 35% of the revenues to the University itself to support further research. *Id.*

Indeed, the purpose to which public universities devote their patent revenues demonstrates that the law sensibly treats these patents differently than other patents. Public universities' patents generate revenues that benefit the public, whereas patents held by others generate revenues that simply benefit their owners. It is therefore unremarkable that state sovereign immunity sometimes results in special protections for public universities' patents. *See, e.g., Xechem Int'l, Inc. v. Univ. of Tex. M.D. Anderson Cancer Ctr.*, 382 F.3d 1324 (Fed. Cir. 2004). The Court should therefore not hesitate to correct the panel's misapplication of *FMC*.

II. The Panel's Decision Misapplies *FMC*

The panel's decision threatens the harms discussed above because it draws two mistaken conclusions from *FMC*: (1) that sovereign immunity does not apply when “an agency chooses whether to institute a proceeding on information supplied by a private party,” Slip Op. 8, and (2)

that it does not apply where “the agency proceedings are both functionally and procedurally different from district court litigation,” *id.* at 10. The Court should grant rehearing en banc and correct these errors. A proper application of *FMC* requires applying state sovereign immunity in IPR.

A. *Inter partes* review is not a proceeding brought by the federal government

“States, upon ratification of the Constitution, did not consent to become mere appendages of the Federal Government,” but instead “entered the Union with their sovereignty intact.” *FMC*, 535 U.S. at 751 (internal quotation marks and citation omitted). States have, however, consented to suits “commenced and prosecuted . . . in the name of the United States,” and state sovereign immunity therefore does not apply to such suits. *Alden v. Maine*, 527 U.S. 706, 755 (1999).

The panel’s decision mistakenly expands the category of proceedings “commenced and prosecuted” by the United States to include circumstances where an “agency chooses whether to institute a proceeding on information supplied by a private party.” Slip Op. 8 (citing *FMC*, 535 U.S. at 768). While state sovereign immunity permits private parties to “complain to the Federal Government” and permits the United States “to take

subsequent legal action,” *FMC*, 535 U.S. at 768 n. 19 (internal quotation marks and citation omitted), the “subsequent legal action” still must be *commenced and prosecuted* by the United States.

IPR is *not* commenced and prosecuted by the United States. It is always commenced by a private party: “At its outset, a party must file ‘a petition to institute an inter partes review of [a] patent.’” *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1353 (2018) (quoting 35 U.S.C. § 311(a)). And it is prosecuted by the private-party petitioner: “Much as in the civil litigation system it mimics, in [IPR] the petitioner is master of its complaint and normally entitled to judgment on all of the claims it raises, not just those the decisionmaker might wish to address.” *Id.* at 1355. The “*part[ies]*” conduct discovery in IPR, not the federal government. 37 C.F.R. § 42.51(b).

The three points the panel’s decision cites do not undermine this conclusion. The decision first asserts, citing the Supreme Court’s decision in *Oil States Energy Services, LLC v. Greene’s Energy Group, LLC*, 138 S.Ct. 1365, 1371 (2018), that “the Director [of the U.S. Patent and Trademark Office] has complete discretion to decide not to institute review.” Slip Op. 8. But the Director’s discretion is constrained by a clear legal

standard—he may not “authorize” IPR unless “there is a reasonable likelihood that the petitioner would prevail.” 35 U.S.C. § 314. His discretion is “complete” only in the sense that his “decision is ‘final and nonappealable.’” *Oil States*, 138 S.Ct. at 1371 (quoting 35 U.S.C. § 314(d)).

And even with respect to appeals, the Supreme Court has left the door open to appeals of decisions “that implicate constitutional questions, that depend on other less closely related statutes, or that present other questions of interpretation that reach [beyond IPR.]” *Cuozzo Speed Technologies, LLC v. Lee*, 136 S.Ct. 2131, 2141 (2016). Like the Federal Maritime Commission, the Director, through the PTAB, applies legal principles to neutrally adjudicate the parties’ dispute. That the statute limits appeals from certain of his decisions does not transform the proceeding into one commenced and prosecuted by the United States.

Moreover, patent owners are, as a practical matter, forced to appear before the PTAB even *before* its initial decision. Patent owners may file a preliminary response to the IPR petition, 35 U.S.C. § 313, and a recent study found that the PTAB authorized IPR on *100%* of the petitions where no preliminary response was filed. Rubén Muñoz et al., *How New Testimonial Evidence Affects IPR Institution*, Law360 (Jun. 5, 2018),

<https://www.law360.com/articles/1049967>. The PTAB’s decision to authorize IPR after a State has been effectively hauled before the federal administrative tribunal “does not retroactively convert an . . . adjudication initiated and pursued by a private party into one initiated and pursued by the Federal Government.” *FMC*, 535 U.S. at 764.

The other two points the panel’s decision notes are equally irrelevant. That the PTAB “may choose to continue review even if the petitioner chooses not to participate” and may “participate in appeals even if the private challengers drop out,” Slip Op. 9 (internal quotation marks and citations omitted), does not mean that the PTAB *commenced* the proceeding. As noted above, even if these actions were construed as “prosecuting” the case—itsself a doubtful proposition—they cannot undo the fact that the proceeding was commenced by a private party. And in any event, the *possibility* that the federal government will commence and prosecute an action against a State in a *particular* proceeding does not mean that state sovereign immunity is inapplicable in *all* such proceedings. The United States can sue states in federal court; that does not imply that private parties can as well.

B. The existence of sovereign immunity does not turn on minor procedural similarities

The panel’s decision also errs in emphasizing the differences between “procedures in IPR” and “the Federal Rules of Civil Procedure.” Slip Op. 9. *FMC* compared commission proceedings with federal judicial proceedings not as a *necessary element* of state sovereign immunity, but only as shorthand for “the type of proceedings from which the Framers would have thought the States possessed immunity when they agreed to enter the Union,” *FMC*, 535 U.S. at 756. The existence *vel non* of something so fundamental as state sovereign immunity, however, does not turn on whether procedural rules allow “significant amendments,” authorize “interrogatories [and] depositions,” or permit “live testimony.” Slip Op. 11. Such procedural minutiae may usefully signal that the proceeding is one where sovereign immunity applies, but they should not be confused with the fundamental attributes of proceedings from which States are protected.

Those fundamental attributes, rather, arise from the crucial question posed in *FMC*, whether “a State is *required* to defend itself in an adversarial proceeding *against a private party* before an *impartial federal*

officer.” *FMC*, 535 U.S. at 760–61 (emphasis added). In addition to excluding suits commenced and prosecuted by the United States, this test sets forth two essential features of “proceedings” from which States are immune: (1) adjudication under neutral legal principles, and (2) significant limitation of future related litigation.

The first element recognizes that purely political exercises of unconstrained discretion are not “proceedings.” IPR easily meets this criterion: The PTAB is a neutral tribunal, and its patentability determinations are governed by law and subject to judicial review. *See* 35 U.S.C. §§ 141, 311.

The second ensures that a State is truly “required” to appear before the administrative tribunal. *FMC* holds that the level of compulsion need not rise to the level of a court order; it is sufficient if failing to appear would “substantially compromise [a State’s] ability to defend itself.” *FMC*, 535 U.S. at 762. IPR qualifies: Failing to appear makes it much more likely—if not guaranteed—that the PTAB will invalidate a challenged patent. Furthermore, a patent owner “is precluded from taking action inconsistent with [an] adverse judgment” of the PTAB. 37 C.F.R. § 42.73. Plainly, unless immune, a State ignores IPR at its peril.

In sum, whether state sovereign immunity applies to IPR is a critically important question for States as patent holders. Because the panel's decision fundamentally misreads *FMC*, it threatens to lead the Court to an incorrect resolution of this question.

CONCLUSION

The Court should grant the petition for rehearing en banc and correct the panel's mistaken application of *FMC*.

Respectfully submitted,

s/ Thomas M. Fisher

Office of the Attorney General
302 West Washington Street
IGCS 5th Floor
Indianapolis, Indiana 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

CURTIS T. HILL, JR.
Attorney General of Indiana
THOMAS M. FISHER
Solicitor General*
KIAN J. HUDSON
Deputy Attorney General

**Counsel of Record*

RUSSELL A. SUZUKI
Attorney General of Hawaii
425 Queen Street
Honolulu, Hawaii 96813

KEN PAXTON
Attorney General of Texas
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548

LISA MADIGAN
Attorney General of Illinois
100 W. Randolph St., 12th Floor
Chicago IL 60601

SEAN D. REYES
Attorney General of Utah
350 N. State Street, Ste. 230
Salt Lake City, UT 84114

MAURA HEALEY
Attorney General of Massachusetts
One Ashburton Place
Boston, MA 02108

MARK R. HERRING
Attorney General of Virginia
202 North Ninth Street
Richmond, VA 23219

Counsel for Amici States

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief complies with the length limits set forth in Federal Circuit Rule 30(a). Specifically, this brief contains 2,599 words (excluding the sections 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 Century Schoolbook font.

s/ Thomas M. Fisher

Thomas M. Fisher
Solicitor General

Office of the Indiana Attorney General
Indiana Government Center South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204-2770
Telephone: (317) 232-6255
Facsimile: (317) 232-7979
Tom.Fisher@atg.in.gov

CERTIFICATE OF SERVICE AND FILING

I hereby certify that on the 4th day of September, 2018, a true and correct copy of the foregoing was filed electronically using the Court's CM/ECF system. Pursuant to Federal Circuit Rule 25, the Notice of Docketing Activity generated by that filing constitutes service on opposing counsel.

s/ Thomas M. Fisher

Thomas M. Fisher
Solicitor General

Office of the Indiana Attorney General
Indiana Government Center South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204-2770
Telephone: (317) 232-6255
Facsimile: (317) 232-7979
Tom.Fisher@atg.in.gov