No. _____

In The
Supreme Court of the United States

UNITED STATES STEEL CORPORATION AND
U.S. MAGNESIUM LLC,

Petitioners,

v.

CANADIAN LUMBER TRADE ALLIANCE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the United States Court of Appeals for the Federal Circuit erred in finding that parties are not statutorily barred from asserting a private right of action to enforce Section 408 of the North American Free Trade Agreement Implementation Act ("NAFTA Implementation Act").

Whether the "magic password" provision in Section 408 of the NAFTA Implementation Act is an impermissible legislative entrenchment provision that restricts Congress' power of the purse.

PARTIES TO THE PROCEEDING

The parties to the proceeding below are as follows: (1) the Petitioners, United States Steel Corporation and U.S. Magnesium LLC, and (2) the Respondents, Canadian Lumber Trade Alliance, Norsk Hydro Canada, Inc., Canadian Wheat Board, the Government of Canada, Ontario Forest Industries Association, Ontario Lumber Manufacturers Association, The Free Trade Lumber Council, the United States, Coalition for Fair Lumber Imports Executive Committee, U.S. Foundry & Manufacturing Co., Neenah Foundry Co., Municipal Castings, Inc., Lebaron Foundry, Inc., East Jordan Iron Works, Inc., Allegheny Ludlum Corporation, and AK Steel Corporation. In addition, the Government of Mexico, Mexinox USA, Inc., and ThyssenKrupp Mexinox S.A. de C.V. participated in the proceedings below as *amici curiae*.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Petitioner United States Steel Corporation does not have a parent company. In addition, no publicly held company owns 10% or more of United States Steel Corporation's stock.

Petitioner U.S. Magnesium LLC is a subsidiary of The Renco Group, Inc. No publicly held company owns 10% or more of U.S. Magnesium LLC's stock.

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BRIEF OF PETITIONERS UNITED STATES STEEL CORPORATION AND U.S. MAGNESIUM LLC IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit ("Federal Circuit") in *Canadian Lumber Trade Alliance v. United States* ("*CLTA III*"), 517 F.3d 1319 (Fed. Cir. 2008), is set forth in the Appendix. (App. A at 1a).

The judgments of the United States Court of International Trade ("CIT") in *Canadian Lumber Trade Alliance v. United States* ("*CLTA I*"), 425 F. Supp. 2d 1321 (Ct. Int'l Trade 2006), and *Canadian Lumber Trade Alliance v. United States* ("*CLTA II*"), 441 F. Supp. 2d 1259 (Ct. Int'l Trade 2006), are also set forth in the Appendix (App. B at 50a and App. C at 155a, respectively).

JURISDICTION

The judgment of the Federal Circuit was entered on February 25, 2008. An order granting the United States' motion to extend the time to file a petition for rehearing or rehearing *en banc* was entered on April 7, 2008. On May 7, 2008, the Federal Circuit entered another order that further extended the time to file a petition for rehearing or rehearing *en banc* to May 23, 2008. No petition for rehearing or rehearing *en banc* was filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (2000).

STATUTORY PROVISIONS INVOLVED

This Petition presents issues for review under two separate provisions of the implementing legislation for the North American Free Trade Agreement (the "NAFTA"). First, it presents issues pursuant to 19 U.S.C. § 3312(c) (2000), which is also known as Section 102(c) of the NAFTA Implementation Act (App. D at 194a). Section 102(c) serves as a statutory bar against private rights of action to enforce provisions of the NAFTA

Implementation Act. This Section states in pertinent part that

> No person other than the United States —
>
> > (1) shall have any cause of action or defense under —
> >
> > > (A) the Agreement or by virtue of Congressional approval thereof,
> > > ....

The full text of Section 102(c) of the NAFTA Implementation Act is set forth in the Appendix. (App. D at 194a).

Second, this Petition presents issues arising under 19 U.S.C. § 3438 (2000), which is also referred to as Section 408 of the NAFTA Implementation Act (App. D at 195a). This provision states that

> Any amendment enacted after the Agreement enters into force with respect to the United States that is made to —
>
> > (1) section 303 or title VII of the Tariff Act of 1930, {19 U.S.C. § 1671 *et seq.*} or any successor statute ...
>
> shall apply to goods from a NAFTA country only to the extent specified in the amendment.

Section 408 is a "magic password" provision in that it requires a subsequent Congress to make an express reference – *i.e.*, by specifying application to Canadian and Mexican goods – if it wants an amendment to Title VII of the Tariff Act of 1930 ("Title VII of the Tariff Act") to apply to such goods.[1] Title VII of the Tariff Act governs, *inter alia*, antidumping and countervailing duties that are imposed to combat unfair trade.

STATEMENT OF THE CASE

This Petition asks the Court to resolve a direct conflict among the Courts of Appeals as to whether parties have a private right of action under the Administrative Procedure Act ("APA") to enforce provisions in the implementing legislation of trade agreements enacted under the Congressional procedure commonly known as "fast track." As demonstrated below, such actions are barred by the prohibition against causes of action that arise under "the Agreement or by virtue of Congressional approval thereof" which is found in Section 102(c) of the NAFTA Implementation Act as well as in every single trade bill enacted under the fast track procedure. Although the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") has determined that such causes of action are barred, the Federal Circuit failed to do so here.

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[1] As indicated in Section 408, Title VII of the Tariff Act is found at 19 U.S.C. § 1671 *et seq.*(2000).

Absent action by this Court, parties in one Circuit will be able to bring claims to enforce the implementing legislation for trade agreements while parties in another Circuit will not. This Court should grant this Petition for Writ of Certiorari to ensure consistency among the Circuits. The Court should also grant this Petition for Writ of Certiorari because the Federal Circuit's interpretation of the relevant phrase "by virtue of Congressional approval thereof" in Section 102(c) of the NAFTA Implementation Act renders it superfluous and is otherwise erroneous.

This Petition further requests that the Court resolve the question of whether magic password provisions such as Section 408 of the NAFTA Implementation Act constitute an impermissible legislative entrenchment. Legislative entrenchment occurs when one Congress restricts the power of a subsequent Congress. While the Court has clearly established that legislative entrenchment is impermissible, the Court has never addressed the issue of whether magic password provisions represent legislative entrenchment. This case squarely presents this issue to the Court and does so in a critically important context involving Congress' power of the purse. Accordingly, the Court should grant this Petition for Writ of Certiorari to resolve this crucial and unresolved question.

Background. The NAFTA entered into force among the United States, Canada, and Mexico on January 1, 1994. *See* Statement of Administrative

Action ("SAA") Accompanying NAFTA Implementation Act, *reprinted in* H.R. Doc. No. 103-159 (I), at 454 (1993) (App. D at 214a). In the NAFTA, each Party expressly reserved "the right to apply its antidumping law and countervailing duty law to goods imported from the territory of any other Party." NAFTA, art. 1902(1) (Dec. 17, 1992) (App. D at 208a). Each of the Parties also reserved "the right to change or modify its antidumping law or countervailing duty law." *Id.*, art. 1902(2). Nevertheless, NAFTA Article 1902(2)(a) provides that among the NAFTA Parties such amendments "shall apply to goods from another Party only if the amending statute specifies that it applies to goods from that Party or from the Parties to this Agreement." *Id.*, art. 1902(2)(a).

Congress approved and implemented the NAFTA via the NAFTA Implementation Act under the procedure commonly known as fast track. NAFTA Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993), *codified at* 19 U.S.C. §§ 3301-3473 (2000). Fast track refers to procedures by which the Congress conducts an "up-or-down" vote on trade agreements and the accompanying implementing legislation without amendment. *See* 19 U.S.C. § 2191 *et seq.* (2000) (App. D at 184a-192a). Under fast track, trade agreements are approved and implemented through a single vote in a single bill. *See* Trade and International Economic Policy Reform Act of 1987, H.R. Rep. No. 100-40 (I), at 48-49 (1987) (App. D at 216a-218a). In other words, fast track "effectively merges legislative

approval with implementing legislation." *See* John Setear, *The President's Rational Choice of a Treaty's Preratification Pathway: Article II, Congressional-Executive Agreement, or Executive Agreement?* ("Setear"), 31 J. Legal Stud. S5, S29 (2002) (App. D at 202a-203a).

Congress implemented the requirements of Article 1902(2)(a) of the NAFTA in Section 408 of the NAFTA Implementation Act. 19 U.S.C. § 3438 (2000) (App. D at 195a). Moreover, Congress barred private rights of action brought under "the Agreement or by virtue of Congressional approval thereof" in Section 102(c) of the NAFTA Implementation Act.

In 2000, Congress amended Title VII of the Tariff Act by passing the Continued Dumping and Subsidy Offset Act of 2000 (the "CDSOA"). Pub. L. No. 106-387, § 1003, 114 Stat. 1549 (2000), *codified at* 19 U.S.C. § 1675c (2000) (App. D at 178a-183a). Prior to the CDSOA, the U.S. Bureau of Customs and Border Protection ("Customs") placed the money from antidumping and countervailing duties (collectively "duties") assessed on imported goods into the general fund of the United States Treasury. *CLTA III*, 517 F.3d at 1326 (App. A at 7a). The CDSOA directed Customs to distribute such money to U.S. companies that were affected by the conduct that gave rise to the antidumping and countervailing duties. *Id.* (App. A at 7a-8a); 19 U.S.C. §§ 1675c(a), (b)(1) (2000) (App. D at 178a-179a). Pursuant to the CDSOA, Customs distributed duties assessed on

Canadian and Mexican goods to the relevant U.S. companies.[2]

The CIT proceedings. On April 29, 2005, the Government of Canada and several Canadian companies and trade associations commenced actions under the APA before the CIT.[3] In those actions, the plaintiffs challenged Customs' distribution of duties assessed on Canadian imports pursuant to the CDSOA. Specifically, the plaintiffs contended that Section 408 of the NAFTA Implementation Act required any post-NAFTA amendment of Title VII of the Tariff Act to expressly state that it applied to goods from Canada and Mexico in order for goods from those countries to be subject to the amendment. They further argued that because the CDSOA was an amendment to Title VII of the Tariff Act and because the CDSOA did not

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[2] The CDSOA was repealed in the Deficit Reduction Act of 2005, but only with respect to duties collected on merchandise entering the United States after October 1, 2007. Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7601(b), 120 Stat. 4, 154 (2006) (App. D at 201a). Customs currently holds a significant amount of duties for merchandise that entered the United States *before* October 1, 2007 that will be directly impacted by the resolution of the instant case. In fact, two cases concerning CDSOA distributions are stayed before the CIT pending resolution of this case. *Ivaco Rolling Mills 2004, L.P. et al v. United States*, Court No. 06-297 (Ct. Int'l Trade Nov. 21, 2006) (order granting motion to stay); *ThyssenKrupp Mexinox S.A. de C.V. et al v. United States*, Court No. 06-236 (Ct. Int'l Trade Sept. 25, 2006) (order granting motion to stay).

[3] The CIT asserted jurisdiction pursuant to 28 U.S.C. 1581(i) (2000) (App. D at 198a).

contain an express reference to Canada or Mexico, the CDSOA could not be applied to duties assessed on goods from those countries. The plaintiffs sought a declaratory judgment from the CIT to that effect, a permanent injunction against further CDSOA distributions of duties assessed on Canadian products, and the disgorgement of prior distributions made under the CDSOA.

Petitioners and several other U.S. parties that were eligible to receive money under the CDSOA intervened in the actions as defendant-intervenors. Thereafter, defendant United States and defendant-intervenors moved to dismiss the plaintiffs' actions pursuant to CIT Rules 12(b)(1) and 12(b)(5) for lack of jurisdiction and failure to state a claim for which relief can be granted. The plaintiffs cross-moved for summary judgment. The CIT converted all the pending motions into cross motions for summary judgment and/or motions for judgment on the agency record.

The CIT issued its decision on the parties' motions on April 7, 2006. In its decision, the CIT held that the Government of Canada lacked injury-in-fact, and thus standing. The CIT determined that the Government of Canada lacked standing because it had already elected a remedy by prevailing on its claims with respect to the CDSOA at the World Trade Organization ("WTO"). *CLTA I*, 425 F. Supp. 2d at 1350-52 (App. B at 102a-107a); Report of the Appellate Body, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R

(Jan. 16, 2003). However, the CIT found that the private party plaintiffs – *i.e.*, plaintiffs other than the Government of Canada – had standing to challenge the application of the CDSOA to duties assessed on Canadian goods. *CLTA I*, 425 F. Supp. 2d at 1349 (App. B at 101a-102a); *id.* at 1354 (App. B at 111a-112a).[4]

Furthermore, the CIT held that the private party plaintiffs had a private right of action to enforce Section 408 of the NAFTA Implementation Act. *Id.* at 1357-66 (App. B at 119a-137a). Defendant and defendant-intervenors had argued that Section 102(c) of the NAFTA Implementation Act barred claims to enforce the implementing legislation because such actions arise "by virtue of Congressional approval" of the NAFTA. However, the CIT disagreed. *Id.* at 1359-62 (App. B at 122a-131a). The CIT determined that Congressional "approval" is separate and distinct from "implementation" and, therefore, Section 102(c)'s bar against claims arising "by virtue of Congressional approval" of the NAFTA did not bar claims brought under the implementing legislation for the NAFTA. *Id.* at 1362-64 (App. B at 128a-131a). Thus, the CIT refused to apply Section 102(c) of the NAFTA Implementation Act to bar claims to enforce Section 408 of the NAFTA Implementation Act.

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[4] The CIT also found that the private party plaintiffs' claims were not barred by the political question doctrine. *CLTA I*, 425 F. Supp. 2d at 1354-57 (App. B at 112a-119a). This issue is not germane to the instant Petition.

Having determined that the private party plaintiffs had standing and that their claims were not barred, the CIT then addressed the merits. The CIT determined that "based on Congress' plain language in Section 408 of the NAFTA Implementation Act, Customs is not authorized to apply {the CDSOA} to goods from Canada or Mexico." *Id.* at 1373 (App. B at 152a). In so doing, the CIT rejected an argument that Section 408 of the NAFTA Implementation Act represented an impermissible legislative entrenchment provision. *Id.* at 1371 (App. B at 147a-148a).

Because it found in favor of the private party plaintiffs on the merits, the CIT ordered further briefing as to the appropriate remedy. *Id.* at 1373 (App. B at 153a). Following briefing and oral argument, the CIT issued its decision on the remedy on July 14, 2006. In that decision, the CIT granted prospective relief in the form of a declaratory judgment and a permanent injunction. *CLTA II*, 441 F. Supp. 2d at 1259 (App. C at 156a). Specifically, the declaratory judgment stated that pursuant to Section 408, the CDSOA "does not apply to antidumping and countervailing duties assessed on imports of goods from Canada or Mexico . . . ." Judgment, *Canadian Lumber Trade Alliance v. United States*, Consol. Ct. No. 05-00324 (Ct. Int'l Trade July 14, 2006) at 1-2 (App. C at 175a). In addition, the permanent injunction barred future CDSOA disbursements of duties assessed on certain products from Canada – namely those on softwood

lumber, magnesium, and hard red spring wheat. *Id.* at 2 (App. C at 175a-176a). Lastly, the CIT denied the private party plaintiffs' request for disgorgement of monies that Customs had previously disbursed under the CDSOA in fiscal years 2004 and 2005. *CLTA II*, 441 F. Supp. 2d at 1259 (App. C at 158a); *id.* at 1268-69 (App. C at 171a).

The Federal Circuit proceedings. Petitioners appealed the CIT's rulings regarding the private party plaintiffs' standing, the statutory bar in Section 102(c) of the NAFTA Implementation Act, and the interpretation of Section 408 of the NAFTA Implementation Act to the Federal Circuit.[5] As to standing, the Federal Circuit found that one private party plaintiff, the Canadian Wheat Board ("CWB"), still possessed standing to pursue its cause of action under the competitor standing doctrine.[6] *CLTA III*, 517 F.3d at 1331-35 (App. A at 18a-27a).

In addition, while its reasoning differed from that of the CIT, the Federal Circuit found that the CWB had a private right of action to enforce Section

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[5] The Government of Canada appealed the CIT's holding that it lacked standing. The Federal Circuit upheld the CIT's decision that the Government of Canada lacked standing, albeit on different grounds. *CLTA III*, 517 F.3d at 1335-38 (App. A at 28a-34a).

[6] The Federal Circuit dismissed the claims of Canadian producers in the softwood lumber and magnesium industries as moot based on events subsequent to the CIT's decision. *CLTA III*, 517 F.3d at 1338-39 (App. A at 34a-37a).

408. *Id.* at 1339-42 (App. A at 38a-43a). Based on its reading of the text of Section 102(c) of the NAFTA Implementation Act and the legislative history, the Federal Circuit held that Section 102(c) did not bar causes of action to enforce Section 408. According to the Federal Circuit, the term "by virtue of Congressional approval thereof" in Section 102(c) only barred causes of action brought to enforce one specific provision of the implementing legislation – Section 101(a) of the NAFTA Implementation Act. *Id.* The Federal Circuit reasoned that because this specific provision, and only this provision, represented Congressional approval of the NAFTA, the phrase "by virtue of Congressional approval thereof" solely related to causes of action brought to enforce this one provision. Because the CWB did not seek to enforce this one provision of the NAFTA Implementation Act, the Federal Circuit found that its cause of action was not barred.

Finally, the Federal Circuit affirmed without change the CIT's ruling regarding the merits of the CWB's claim under Section 408 of the NAFTA Implementation Act. *Id.* at 1342-44 (App. A at 43a-48a). In so doing, the Federal Circuit did not address defendant-intervenors' argument that Section 408 of the NAFTA Implementation Act was an impermissible legislative entrenchment provision.

REASONS FOR GRANTING THIS PETITION

I. This Court Should Grant this Petition Based on the Federal Circuit's Interpretation of Section 102(c) of the NAFTA Implementation Act

For the reasons set forth below, the Federal Circuit's decision that Section 102(c) of the NAFTA Implementation Act does not bar causes of action to enforce Section 408 of the NAFTA Implementation Act directly conflicts with a decision by the Ninth Circuit in a way that impacts every single trade bill adopted by Congress pursuant to the fast track mechanism. The Court should grant this Petition for Writ of Certiorari to resolve this Circuit split, to provide guidance to the Circuits on this issue, and to correct the Federal Circuit's fundamentally flawed decision.

A. There is a Direct Conflict Among the Circuits Regarding the Interpretation of Section 102(c)

Issues regarding statutory bars against private rights of action do not just arise with respect to the NAFTA and its implementing legislation. Like the NAFTA Implementation Act, the Uruguay Round Agreements Act ("URAA") is the implementing legislation for certain international agreements – *i.e.*, the Uruguay Round Agreements – acceded to by the United States. And like the

NAFTA Implementation Act, the URAA has a statutory bar provision found at Section 102(c). In fact, Section 102(c) of the NAFTA Implementation Act and Section 102(c) of the URAA have virtually identical language. Specifically, Section 102(c) of the URAA bars causes of action "under any of the Uruguay Round Agreements *or by virtue of congressional approval of such an agreement . . .*" 19 U.S.C. § 3512(c)(1)(A) (2000) (App. D at 197a) (emphasis added). Likewise, as discussed above, Section 102(c) of the NAFTA Implementation Act bars causes of action under the "Agreement *or by virtue of Congressional approval thereof.*"

Despite the virtually identical language in the two provisions, the Ninth Circuit's interpretation of Section 102(c) of the URAA is directly opposite to the Federal Circuit's interpretation of Section 102(c) of the NAFTA Implementation Act in the instant case. This is clearly shown by the Ninth Circuit's decision in *Bronco Wine Co. v. United States* ("*Bronco Wine*"). In *Bronco Wine*, the plaintiff challenged regulations relating to the labeling of wine that were promulgated by the Bureau of Alcohol, Tobacco and Firearms. 997 F. Supp. 1318, 1319 (E.D. Cal. 1997). The plaintiff brought a cause of action pursuant to the APA to enforce Section 1052(a) of the Lanham Act, which was amended by the implementing legislation for the Uruguay Round Agreements – *i.e.*, the URAA. *Id.* at 1322. In other words, the plaintiff was seeking to bring a cause of action to enforce a provision of the implementing legislation for the Uruguay Round Agreements.

In dismissing the plaintiff's cause of action, the District Court for the Eastern District of California ruled that Section 102(c) of the URAA "clearly and unambiguously" barred the plaintiff from bringing a cause of action under the APA to enforce the provisions of the URAA. *Id.* at 1322. Furthermore, the district court held that

> {i}t is true that generally the APA provides a cause of action for parties who challenge an agency decision as violative of a law. However, in the case at hand, the law which {plaintiff} points to, the {URAA}, *clearly and unambiguously* states that there may be no action by a private party, brought under any law, to enforce its provisions. Simply put, the provisions of the {URAA} which strip private plaintiffs of a cause of action trump the {APA}'s grant of a cause of action.

Id. at 1322 (emphasis added). In an unpublished decision, the Ninth Circuit upheld the district court's determination that causes of action under the APA to enforce provisions found in the URAA were barred. *Bronco Wine Co. v. United States*, 168 F.3d 498 (9th Cir. 1999).[7]

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[7] It should be noted that the plaintiff in *Bronco Wine* submitted a petition for writ of certiorari to this Court. The Solicitor General of the United States ("Solicitor General") opposed the petition. In its *Brief for the Respondents in Opposition*, the Solicitor General fully supported the Ninth Circuit's determination that Section 102(c) of the URAA barred plaintiff's APA cause of action to enforce the implementing

In contrast, in the instant case, the Federal Circuit found that Section 102(c) of the NAFTA Implementation Act did *not* bar causes of action brought to enforce provisions of the NAFTA Implementation Act. *CLTA III*, 517 F.3d at 1341 (App. A at 43a). In so doing, the Federal Circuit dismissed the Ninth Circuit's determination in *Bronco Wine* on two grounds.

First, the Federal Circuit asserted that the Ninth Circuit "conflated" the URAA with the underlying agreements – *i.e.*, the Uruguay Round Agreements – and that Section 102(c) barred causes of action under the agreements but did not bar causes of action to enforce the URAA. In this manner, the Federal Circuit clearly acknowledged that its decision in *CLTA III* was in direct conflict with the Ninth Circuit's holding in *Bronco Wine*. *Id.*; *see also CLTA I*, 425 F. Supp. 2d at 1364 n.40 (App. B at 133a n.40).[8]

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legislation. Solicitor General, *Brief for the Respondents in Opposition*, No. 99-119, 10-11 (Sept. 15, 1999) (App. D at 212a-213a).

[8] In its decision in this case, the CIT went so far as to highlight the possibility of Supreme Court review of this very issue based on the conflict with *Bronco Wine*:

> {t}he court appreciates that the conclusion reached here is contrary to that reached by Judge Coyle in {*Bronco Wine*} which held that the enabling legislation of the {URAA}, 19 U.S.C. § 3512(c), did not create a right of action under the APA. Nevertheless, the United States' judiciary is specifically divided into circuits to foster thoughtful

Second, the Federal Circuit attempted to draw a distinction between the Section 102(c) found in the URAA and the Section 102(c) found in the NAFTA Implementation Act. Specifically, the Federal Circuit stated that "we do not find the *Bronco Wine* decision regarding the URAA to be persuasive in the context of the {NAFTA Implementation Act}, particularly given the clear language of the {NAFTA Implementation Act} itself." *CLTA III*, 517 F.3d at 1341 (App. A at 43a).

However, as shown above, Section 102(c) of the NAFTA Implementation Act and Section 102(c) of the URAA are virtually identical. Thus, there is no valid distinction between the two provisions pursuant to which the Federal Circuit's and Ninth Circuit's decisions can be reconciled. Accordingly, these two Circuits are directly split as to the interpretation of the statutory bar found at Section 102(c) of the URAA and NAFTA Implementation Act.

The Federal Circuit's reliance on the specific statement in Section 101(a) of the NAFTA Implementation Act that it approves the NAFTA also provides no valid basis for distinction. The URAA likewise has a provision (Section 101(a)) that

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discussion of law, while providing uniformity through appellate review by the Supreme Court.

CLTA I, 425 F. Supp. 2d at 1364-65 (App. B at 133a-134a).

specifically states that it approves the Uruguay Round Agreements. *See* 19 U.S.C. 3511(a)(1) (2000) (App. D at 196a). The Ninth Circuit in *Bronco Wine* did not limit the statutory bar only to causes of action seeking to enforce Section 101(a), and the Federal Circuit's attempt to do so here is in direct conflict with the Ninth Circuit's decision.

A Circuit split involving both the URAA and NAFTA Implementation Act alone justifies the Supreme Court granting this Petition for Writ of Certiorari to resolve the conflict and guarantee consistency among the Circuits. Moreover, for the reasons set forth below, the importance of the interpretation of Section 102(c) is in no way limited to just the URAA and the NAFTA Implementation Act.

B. This Circuit Split Impacts *Every Single* Trade Bill Enacted Under Fast Track

The Ninth Circuit's and Federal Circuit's interpretations of the statutory bars found in Section 102(c) of the NAFTA Implementation Act and URAA are in direct conflict. As it stands now, parties can bring APA claims to enforce provisions in the NAFTA Implementation Act and URAA in the Federal Circuit but not the Ninth Circuit.

Furthermore, the split among the Circuits has much broader implications beyond the NAFTA Implementation Act and URAA. The relevant

language subject to conflicting interpretations among the two Circuits – *i.e.*, the language barring actions arising "by virtue of Congressional approval" of the relevant agreement – has been included as a statutory bar to causes of action in *every single* trade bill that has been adopted by Congress pursuant to the fast track mechanism. *See* Figure 1. The split among the Circuits calls into question the interpretation of this provision in each of these trade agreement implementing statutes.

In addition, the split among the Circuits will impact future legislation. For example, Congress currently has before it implementing legislation for the United States-Colombia Trade Promotion Agreement. The proposed implementing legislation for this Agreement includes a statutory bar. And like the NAFTA Implementation Act and the URAA, this statutory bar would prohibit causes of action that arise "under the Agreement or by virtue of Congressional approval thereof." United States-Columbia Trade Promotion Agreement Implementation Act, H.R. 5724, 110th Cong. § 102(c) (Apr. 8, 2008) (App. D at 221a).

Based on the potential impact resulting from conflicting interpretations of this widely used provision, the Court should grant this Petition for Writ of Certiorari.

Figure 1[9]

Implementing Legislation	Date of Enactment	Statutory Bar Language
U.S.-Chile FTA Implementation Act	September 3, 2003	under the Agreement or by virtue of congressional approval thereof.
U.S.-Singapore FTA Implementation Act	September 3, 2003	under the Agreement or by virtue of congressional approval thereof.

[9] United States-Chile Free Trade Agreement Implementation Act, Pub. L. No. 108-77, 117 Stat. 909 (Sept. 3, 2003); United States-Singapore Free Trade Agreement Implementation Act, Pub. L. No. 108-78, 117 Stat. 948 (Sept. 3, 2003); United States-Australia Free Trade Agreement Implementation Act, Pub. L. No. 108-286, 118 Stat. 919 (Aug. 3, 2004); United States-Morocco Free Trade Agreement Implementation Act, Pub. L. No. 108-302, 118 Stat. 1103 (Aug. 17, 2004); Dominican Republic-Central America-United States Free Trade Agreement Implementation Act ("CAFTA"), Pub. L. No. 109-53, 119 Stat. 462 (Aug. 2, 2005); United States-Bahrain Free Trade Agreement Implementation Act, Pub. L. No. 109-169, 119 Stat. 3581 (Jan. 11, 2006); United States-Oman Free Trade Agreement Implementation Act, Pub. L. No. 109-283, 120 Stat. 1191 (Sept. 26, 2006).

U.S.-Australia FTA Implementation Act	August 3, 2004	under the Agreement or by virtue of congressional approval thereof.
U.S.-Morocco FTA Implementation Act	August 17, 2004	under the Agreement or by virtue of congressional approval thereof.
CAFTA Implementation Act	August 2, 2005	under the Agreement or by virtue of congressional approval thereof.
U.S.-Bahrain FTA Implementation Act	January 11, 2006	under the Agreement or by virtue of congressional approval thereof.
U.S.-Oman FTA Implementation Act	September 26, 2006	under the Agreement or by virtue of congressional approval thereof.

C. Other Decisions Demonstrate the Confused State of the Law and the Need for Guidance by this Court

Conflict regarding the interpretation of Section 102(c) of the NAFTA Implementation Act and URAA has not been limited to the instant case and *Bronco Wine*. Indeed, at the Federal Circuit itself, there is conflicting precedent regarding the interpretation of Section 102(c). Specifically, in *Timken Co. v. United States* ("*Timken*"), the Federal Circuit recognized that Section 102(c) of the URAA "bars parties from bringing claims directly against the government on the ground that Commerce acted inconsistently with the {URAA}." 354 F.3d 1334, 1341 (Fed. Cir. 2004). Thus, in clear contrast to the instant case, the Federal Circuit in *Timken* stated that Section 102(c) of the URAA barred causes of action brought to enforce the implementing legislation. The fact that the Federal Circuit has proffered two diametrically opposed interpretations of language that is virtually identical demonstrates the confused state of the law and the need for guidance from this Court.

Moreover, the interpretation of Section 102(c) impacts cases beyond those found in the Federal Circuit and the Ninth Circuit. Specifically, in *Ford Motor Co. v. United States* ("*Ford*"), the plaintiff brought a cause of action pursuant to the APA to contest importer record keeping regulations promulgated by Customs in implementing the NAFTA. 2006 WL 2457521, *1 (E.D. Mich. Aug. 23,

2006). Customs promulgated the regulations at issue in *Ford* pursuant to statutory authorization in the NAFTA Implementation Act. *Id.* Relying extensively on the CIT's holding in *CLTA I*, the District Court for the Eastern District of Michigan found that the plaintiff could proceed on its APA claim to contest Customs' regulations notwithstanding the statutory bar found in Section 102(c). *Id.* at *4. As shown by *Ford*, it is clear that the conflicting interpretations of Section 102(c) of the NAFTA Implementation Act and URAA have consequences extending well beyond the Federal and Ninth Circuits.

Given the confused state of the law on this issue and its widespread importance, a Writ of Certiorari for clarification by this Court is warranted.

D. The Federal Circuit's Interpretation of Section 102(c) Renders Part of The Provision Superfluous Thereby Frustrating Congressional Intent

As shown below, the Federal Circuit's interpretation of Section 102(c) of the NAFTA Implementation Act in this case renders the phrase "by virtue of Congressional approval thereof" wholly superfluous. Consequently, the Court should grant this Petition for Writ of Certiorari so as to correct the Federal Circuit's erroneous decision and afford

meaning and consequence to the terms chosen by Congress in crafting Section 102(c).

In finding that Section 102(c) of the NAFTA Implementation Act did not bar causes of action to enforce Section 408 of the NAFTA Implementation Act, the Federal Circuit held that

> {t}he Domestic Producers contend that the phrase "by virtue of Congressional approval thereof" refers to the entire {NAFTA Implementation Act}, including section 408, and therefore bars the {CWB's} suit. But the express language of the {NAFTA Implementation Act} refutes this position, and makes clear that "Congressional approval" refers only to section 101 of the {NAFTA Implementation Act} and not to the entire act. Section 2 of the {NAFTA Implementation Act} defines "Agreement" to mean "the North American Free Trade Agreement approved by the Congress under section 101(a)." Section 101, in turn, provides that "the Congress approves-(1) the North American Free Trade Agreement...." Therefore section 102(c)'s bar against causes of action based on "the Agreement or by virtue of Congressional approval thereof," *reads most naturally as barring only those suits brought under NAFTA itself or under section 101* of the {NAFTA Implementation Act.} Because this suit does not rely on NAFTA itself or section 101 of the {NAFTA Implementation Act} but

> rather on section 408 of the {NAFTA Implementation Act}, the suit is not barred by section 102(c).

CLTA III, 517 F.3d at 1340 (App. A at 39a) (internal citations omitted) (emphasis added).

In other words, the Federal Circuit found that the prohibition on causes of action that arise "by virtue of Congressional approval thereof" only bars causes of action that arise under Section 101(a) of the NAFTA Implementation Act.[10] However, there are *no* causes of action that could arise under Section 101(a) of the NAFTA Implementation Act that would not already be barred by the separate prohibition in Section 102(c) on causes of action that arise under the "Agreement" – *i.e.*, the NAFTA.

The Federal Circuit did not elaborate on what types of actions it believed might arise under Section

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[10] Section 101(a) of the NAFTA Implementation Act states that

> the Congress approves —
>
> > (1) the North American Free Trade Agreement entered into on December 17, 1992, with the Governments of Canada and Mexico and submitted to the Congress on November 4, 1993; and
> >
> > (2) the statement of administrative action proposed to implement the Agreement that was submitted to the Congress on November 4, 1993.

19 U.S. C. § 3311(a) (2000) (App. D at 196a).

101(a) of the NAFTA Implementation Act yet not be barred by the prohibition on causes of action under the NAFTA. Indeed, there are none. It is interesting to note in this regard that the plaintiffs argued before the Federal Circuit that the "by virtue of Congressional approval thereof" language "ensured that private litigants would not evade the prohibition on bringing a private right of action based on the unenacted provisions of NAFTA by grounding such a claim in congressional approval of NAFTA in Section 101(a) of the {NAFTA Implementation Act}." *See* Combined Opposition Brief for Plaintiff-Appellees Canadian Lumber Trade Alliance, Norsk Hydro Canada, Inc., CWB, Ontario Forest Industries Association, Ontario Lumber Manufacturers Association and The Free Trade Lumber Council, and Opening Brief for Plaintiff-Cross Appellant Government of Canada (May 14, 2007) at 94-95 (App. D at 199a-200a). However, unenacted provisions of the NAFTA are without question part of the "Agreement" and, therefore, are already barred by the language in Section 102(c) foreclosing causes of action that arise under the Agreement.

Because causes of action based on Section 101(a) would already be barred by the prohibition on causes of action under the Agreement, the Federal Circuit's interpretation of Section 102(c) of the NAFTA Implementation Act renders a significant part of the statute superfluous. Specifically, under the Federal Circuit's interpretation, the statutory bar in Section 102(c) against causes of action that

arise "by virtue of Congressional approval thereof" is rendered completely meaningless.

It is well recognized that an interpretation of a statute that renders meaningless even a single word or phrase cannot be sustained. As this Court has repeatedly stated, "{i}t is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (citations omitted). The Court has also stated that "{i}t is our duty 'to give effect, if possible, to every clause and word of a statute,'" and "{w}e are thus 'reluctant to treat statutory terms as surplusage' in any setting." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (citations omitted). This Court should grant this Petition for Writ of Certiorari to afford meaning to all parts of Section 102(c) of the NAFTA Implementation Act as Congress intended.

E. The Federal Circuit's Interpretation of Section 102(c) Is Contradicted by Its Legislative History

The Federal Circuit's interpretation of Section 102(c) of the NAFTA Implementation Act is also contradicted by its legislative history. Specifically, the Federal Circuit's interpretation directly contradicts the legislative history of the provision in the Canadian Free Trade Agreement

Implementation Act ("CFTA Implementation Act") that was the predecessor to Section 102(c) of the NAFTA Implementation Act. Like the NAFTA Implementation Act, Section 102(c) of the CFTA Implementation Act provided that "{n}o person other than the United States shall – have any cause of action or defense under the Agreement or by virtue of congressional approval thereof . . . ." CFTA Implementation Act, Pub. L. No. 100-449, § 102(c), 102 Stat. 1851, 1853 (Sept. 28, 1988) (App. D at 219a). Also like the NAFTA Implementation Act, the CFTA Implementation Act had a provision (Section 101(a)) that specifically stated that it approved the CFTA. According to the Senate Report that accompanied the CFTA Implementation Act, the statutory bar

> provides that no person other than the United States shall have a cause of action or defense under the Agreement or by reason of Congressional approval of the Agreement (the *only exception* is with regard to a constitutional challenge to the binational dispute panel under section 516A(g)(4), *as provided in section 401(c) of the bill*).

CFTA Implementation Act, S. Rep. No. 100-509, at 11 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2395, 2405 (App. D at 220a) (emphasis added).

If, as held by the Federal Circuit here, the phrase "by virtue of Congressional approval thereof" only barred claims pursuant to Section 101(a) of the

implementing legislation, then Congress simply would not have stated that the "only exception" to the statutory bar was set forth in Section 401(c). Rather, the exception proves the general rule – Section 102(c) bars causes of action to enforce provisions in the implementing legislation.

As shown by this legislative history, Congress specifically provided for one and only one exception to the rule that private rights of action to enforce the implementing legislation are barred. The Federal Circuit's decision ignores this clear Congressional intent.

When Congress subsequently approved the NAFTA, it again made clear its intent to bar causes of action to enforce provisions in the implementing legislation. The SAA accompanying the NAFTA Implementation Act provides that Section 102(c)

> does not preclude the exercise of the right to challenge certain provisions of the implementing bill provided for in section 516A(g)(4) of the Tariff Act of 1930 *pursuant to section 414(6) of the implementing bill.*

SAA Accompanying NAFTA Implementation Act, *reprinted in* H.R. Doc. No. 103-159 (I), at 462-63 (App. D at 215a). If Section 102(c) of the NAFTA Implementation Act was intended just to bar a cause of action brought pursuant to Section 101(a) of the implementing legislation, then Congress would have had no need whatsoever to include the exception in

the SAA allowing causes of action pursuant to Section 414(6) of the NAFTA Implementation Act. Again, the exception proves the rule: causes of action to enforce provisions in the implementing legislation are barred by Section 102(c).

Accordingly, the Federal Circuit's decision conflicts with the legislative history underlying Section 102(c) of the NAFTA Implementation Act. This Court should grant this Petition to correct the Federal Circuit's erroneous decision.

F. The Federal Circuit's Interpretation of Section 102(c) is Inconsistent with the Fast Track Mechanism

Under the fast track mechanism, Congress authorizes the President to negotiate trade agreements within certain parameters and, in return, Congress agrees to conduct a simultaneous "up-or-down" vote on the agreement and its implementing legislation with no amendments. *See* 19 U.S.C. § 2191 *et seq.* (2000) (App. D at 184a-192a). In this manner, trade agreements are approved and implemented through a single vote in a single bill. *See* Trade and International Economic Policy Reform Act of 1987, H.R. Rep. No. 100-40 (I), at 48-49 (App. D at 216a-218a). The NAFTA was approved and implemented via fast track in the NAFTA Implementation Act.

Under fast track procedures, there is no distinction between approval and implementation of a trade agreement. Indeed, approval and implementation occur at the same time and in one bill subject to one vote. In other words, as stated above, fast track "effectively merges legislative approval with implementing legislation." *See* Setear, 31 J. Legal Stud. at S29 (App. D at 202a-203a).

Because fast track merges approval with implementation, the prohibition on causes of action that arise "by virtue of" – *i.e.*, because of – congressional approval of the NAFTA necessarily bars a private right of action to enforce the implementing legislation. *Black's Law Dictionary* 201 (6th ed. 1991) (defining "by virtue of"). To hold otherwise would draw an unwarranted distinction between the approval and implementation of the NAFTA.

The Federal Circuit's decision in *CLTA III* is flatly inconsistent with the merging of approval and implementation in the fast track mechanism used to enact the NAFTA Implementation Act. Accordingly, the Court should grant the Petition for Writ of Certiorari to correct this fundamental error.

II. Section 408 is an Impermissible Legislative Entrenchment Provision

As demonstrated below, this Court has consistently observed and reaffirmed the principle that legislative entrenchment provisions are

impermissible.[11] However, the Court has never addressed the issue of whether magic password provisions constitute legislative entrenchment provisions. The instant case squarely presents this issue to the Court for resolution. Moreover, the issue is presented in a critically important context involving Congress' power of the purse. Accordingly, the Court should grant this Petition for Writ of Certiorari to resolve this question.

A. Legislative Entrenchment Provisions are Impermissible

Since its earliest days, this Court has observed the principle that one Congress cannot restrict the powers of a succeeding Congress. *Fletcher v. Peck*, 6 Cranch 87, 135, 3 L.Ed. 162 (1810) (stating that "one legislature cannot abridge the powers of a succeeding legislature. The correctness of this principle, so far as respects general legislation, can never be controverted."); *see also Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803) (observing that a statute is "alterable when the legislature shall please to alter it."). The Court has continued to reaffirm this principle in more recent cases. *See, e.g., United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996) (recognizing "the centuries-old concept that one legislature may not bind the legislative authority of its successors."). Furthermore, academia has overwhelmingly

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[11] Provisions that impermissibly restrict the powers of a subsequent Congress are commonly said to represent "legislative entrenchment."

supported the principle that one Congress may not restrict the powers of future Congresses. *See, e.g.*, Laurence H. Tribe, American Constitutional Law § 2-3, 125 n.1 (3d ed. 2000) (App. D at 206a-207a) (stating that "the Constitution limits trans-temporal commandeering of a branch by its current occupants.").

B. The Court Has Never Addressed the Issue of Whether Magic Password Provisions Constitute Legislative Entrenchment Provisions

Magic password provisions require Congress to make a pre-determined express statement in order for a certain event to occur. For example, Section 408 of the NAFTA Implementation Act is a magic password provision in that it requires any amendment to Title VII of the Tariff Act to expressly state that it "applies to goods from Canada" or "applies to goods from Mexico" in order for such amendment to apply to Canadian or Mexican goods. Based on the fact that magic password provisions restrict the method by which a Congress may make future laws, such provisions "raise serious constitutional questions." *Id.*

In previous cases involving magic password provisions, this Court has not had to reach the issue of whether such provisions constitute legislative entrenchment provisions and, therefore, are invalid. For example, in *Marcello v. Bonds*, the Court did not

reach the validity of the magic password provision at issue in that case. 349 U.S. 302, 310 (1955). More recently, in *Lockhart v. United States* ("*Lockhart*"), the Court stated that it "need not decide the effect of {the magic password provision} to resolve this case." 546 U.S. 142, 145 (2005); *see also Lockhart v. United States - Opinion Announcement* at 2:56 to 3:01 *available at*: http://www.oyez.org/cases/2000-2009/2005/2005_04_ 881/opinion/ ("we do not decide if the {magic password provision} is valid.")

Nevertheless, at least one member of the Court has expressed the view that magic password provisions are invalid because they result in legislative entrenchment. *Lockhart*, 546 U.S. at 149 (Scalia, J. concurring). According to Justice Scalia, magic password provisions are invalid legislative entrenchment provisions because "{a}mong the powers of a legislature that a prior legislature cannot abridge is, of course, the power to make its will known *in whatever fashion it deems appropriate.*" *Id.* at 148 (emphasis added); *see also* Larry Alexander, Saikrishna Prakash, *Mother May I? Imposing Mandatory Prospective Rules of Statutory Interpretation* ("Alexander"), 20 Const. Comment. 97, 105 (2003) (App. D at 204a-205a) ("Congress may not force a future Congress to use particular language to legislate."). Magic password provisions like Section 408 of the NAFTA Implementation Act restrict this inherent right of Congressional expression by forcing subsequent Congresses to demonstrate their will in a certain pre-prescribed manner – *i.e.*, the form needed to

satisfy the magic password provision. Alexander, 20 Const. Comment. at 105 (App. D at 204a-205a) (stating that "Congress may {not} require future Congresses to bark like seals prior to legislating"). In other words, because Section 408 forces Congress to bark the words "apply to goods from Canada" and "apply to goods from Mexico" in order for amendments to Title VII of the Tariff Act to apply to such goods, it constitutes an impermissible legislative entrenchment.

Based on the fact that this Court has never addressed the validity of magic password provisions and based on Justice Scalia's concurrence in *Lockhart*, the Courts of Appeals have questioned the continued validity of such provisions. Indeed, as the Ninth Circuit has stated, "it is an open question whether Congress could validly impose such a clear statement rule even if it wanted to do so." *United States v. Novak*, 476 F.3d 1041, 1054 n.12 (9th Cir. 2007) (citing *Lockhart*). Likewise, the United States Court of Appeals for the Eighth Circuit has asked, in light of *Lockhart*, "{w}hether or not the Congress of 1946 may bind the Congress of 1998 to make an 'express statement.'" *Robinette v. Commissioner of I.R.S.*, 439 F.3d 455, 460 (8th Cir. 2006). Based on the uncertainty as to the validity of magic password provisions, this Court should grant this Petition for Writ of Certiorari to resolve this issue.

C. This Case Presents an Ideal Vehicle for the Court to Resolve This Issue

This case presents an ideal vehicle by which the Court can determine if magic password provisions such as Section 408 of the NAFTA Implementation Act constitute impermissible legislative entrenchment provisions. Here, there is no question that absent Section 408, the CDSOA would apply to duties assessed on goods from Canada and Mexico. Thus, this case is an ideal vehicle because the resolution of the case is directly dependent on the Court's answer to this question. Furthermore, this case involves Congress' critically important power of the purse, thereby providing another reason for the Court to grant this Petition for Writ of Certiorari.

One of the most important powers entrusted to a Congress is the power of the purse. *U.S. v. Munoz-Flores*, 495 U.S. 385, 395 (1990); *see also* The Federalist No. 58 359 (C. Rossiter ed. 1961) ("This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure."). Section 408 of the NAFTA Implementation Act infringes on this crucial power through its impact on the CDSOA, which represents a decision by Congress as to how to spend and distribute money derived from duties. Specifically, the CDSOA represented Congress' use of the power

of the purse to help U.S. companies affected by either dumped or subsidized imports. Section 408 of the NAFTA Implementation Act impermissibly restricts the Congress that enacted the CDSOA from using its power in this manner.

Moreover, the impact of Section 408 of the NAFTA Implementation Act on Congress' exercise of the power of the purse extends far beyond the CDSOA. For example, in 2006, Congress enacted legislation that, *inter alia*, suspended the ability of certain importers to post a bond, rather than a cash deposit, to cover future duties when importing into the United States. *See* Pension Protection Act of 2006, Pub. L. No. 109-280, § 1632, 120 Stat 780 (2006) (App. D at 209a-211a); 19 U.S.C. § 1675(a)(2)(B)(iii) (2000) (App. D at 177a). Because this legislation amended Title VII of the Tariff Act, but did not expressly say "applies to goods from Canada" or "applies to goods from Mexico," Canadian and Mexican exporters will still have the ability to post bonds rather than make cash deposits of duties under the Federal Circuit's holding in the instant action. Accordingly, the subsequent Congress' desire to exercise the power of the purse by requiring cash deposits rather than bonds is thwarted as to NAFTA imports due to the magic password provision of Section 408 of the NAFTA Implementation Act. Based on Section 408's infringement of Congress' crucial power of the purse, the Court should grant this Petition for Writ of Certiorari.

CONCLUSION

For all of the above-stated reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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