No. 19-1173

IN THE

Supreme Court of the United States

COMCAST CORPORATION, et al.,

Petitioners,

v.

INTERNATIONAL TRADE COMMISSION, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF OF THE R STREET INSTITUTE, THE INNOVATION DEFENSE FOUNDATION, LINCOLN NETWORK, AND THE ELECTRONIC FRONTIER FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF THE PETITION

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INTEREST OF *AMICI CURIAE*

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[1]Pursuant to Supreme Court Rule 37.2(a), all parties received appropriate notice of and consented to the filing of this brief. Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity, other than *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

regulatory frameworks that support economic growth and individual liberty.

The Innovation Defense Foundation is a project of the Method Foundation, which is a nonprofit, nonpartisan research and issue-advocacy institution that advocates for "permissionless innovation," seeking to repeal, relax, or replace unnecessary regulations that stand in the way of innovation. Through a combination of research, advocacy, and regulatory filings, the IDF pushes back against risk-averse, regressive, and precautionary policies that both threaten America's innovators and limit our society's ability to cope with new and existing challenges.

Lincoln Network is a nonprofit organization that seeks to bridge the often siloed discussions between policy makers in Washington, D.C. and technologists in Silicon Valley so as to advance smart policy that encourages innovation. The organization regularly hosts policy panels, hackathons, and conferences convening influencers and technologists to address challenges facing political institutions and the nation.

The Electronic Frontier Foundation is a nonprofit civil liberties organization that has worked for more than 25 years to protect innovation, free expression, and civil liberties in the digital world. EFF and its more than 30,000 active donors have a powerful interest in ensuring that intellectual property laws serve the general public by promoting more creativity and innovation than they deter.

SUMMARY OF ARGUMENT

Can a federal trade agency that deals with the importation of patent-infringing goods assert jurisdiction over companies that import nothing and products that infringe no patents? This remarkable situation was the result of an expansive interpretation of regulatory authority by the respondent agency, the U.S. International Trade Commission. Such interpretation warrants reconsideration on a grant of certiorari, both because of the dramatic impact on American businesses that the ITC's newfound power may have and because of the especially important constitutional and administrative law questions it raises.

I. By claiming jurisdiction over non-trade patent disputes, the ITC imposes large and duplicative costs of litigation on a wide swath of American businesses. The facts of the present case are instructive: Petitioner Comcast imports no products from abroad, and its supposedly patent-infringing technology is a computer network system run entirely within the United States. There was no reason for Comcast to find itself before an international trade agency, yet the ITC found jurisdiction over Comcast through convoluted interpretation of the agency's statutory authority. That interpretation could equally apply to other communications services, Internet companies, domestic manufacturers, farmers, and small business enterprises.

All these enterprises would be subjected to litigation before the ITC that is costly, duplicative, and unfair. Because an American company that finds itself in the ITC can also be sued in federal district court, the company potentially must, and frequently does, pay the costs of two legal defenses. These companies are also subjected to an administrative forum that lacks the protections and inde-

pendence of an Article III court, that applies different patent law that tends to favor patent holders, that disregards this Court's precedents on patent injunctions, and that recreates the forum shopping problems that both Congress and this Court have sought to avoid. It is questionable whether businesses engaged in foreign importation should be subjected to these inequities in an administrative trade tribunal; it is astonishing that even companies not involved in trade will be subjected to them too.

II. In addition to their importance to American businesses and the structure of patent litigation, the questions presented implicate at least two especially pressing questions of the constitutional structure of the federal government. First, by adjudicating domestic patent infringement disputes in an independent agency, the ITC steps into a role that ought to be the exclusive province of the Article III judiciary. Patent infringement by domestic firms has always been remediable in district court, and it ignores separation of powers to have an administrative agency conduct such proceedings untethered to importation. Second, the ITC's expansive interpretation of its jurisdictional statute, without any clear grant of rulemaking authority, does not merit the level of deference that the Federal Circuit has given the agency so far. The especially strained reading of the ITC's jurisdictional limits in this case highlights the risks of leaving agencies to police the scope of their own authority.

Left uncorrected, the ITC's expansion of authority—stretching beyond a statutory trade focus to reach domestic patent disputes hardly related to trade—will set a precedent for enlarged administrative power for not just the ITC itself but also the whole of the federal government. The present decision is just one step, albeit a large

one, toward the ITC's longstanding project of shedding its statutory trade role and becoming a general-purpose patent tribunal, and lawmakers are already looking to create new administrative courts to replace Article III adjudication. These rapid developments of administrative expansion demand this Court's imminent attention. Certiorari should be granted.

ARGUMENT

I. The International Trade Commission's Decision Subjects Numerous American Businesses to Costly, Duplicative, and Unbalanced Patent Litigation

The ITC's expansive interpretation of its statutory authority, going well beyond the international trade context that Congress carved out for the agency, will force a wide range of domestic businesses uninvolved with importation to face costly trials before an administrative agency. This result is especially concerning given that ITC litigation is frequently duplicative, with companies defending themselves simultaneously in both courts and the agency, often on the same charges of patent infringement.

A. By Expanding Its Trade Authority to Reach Non-Trade Disputes, the ITC's Ambit Now Reaches a Wide Range of Domestic Firms

Few industries would be outside the reach of the ITC under the agency's interpretation of its jurisdiction in this case. That result is especially surprising given that the ITC, by definition, deals only with international trade and

importation of goods, and yet can now hear disputes involving purely domestic service providers.

By name and by statute, the International Trade Commission's jurisdiction is international trade. Section 337 of the Tariff Act of 1930 gives the ITC authority to deal with "importation into the United States . . . by the owner, importer, or consignee, of articles that infringe a valid and enforceable United States patent." Tariff Act of 1930 § 337(a)(1)(B)(i), 19 U.S.C. § 1337 (as amended) (internal numbering omitted). Upon finding a violation, the ITC may "direct that the articles concerned, imported by any person violating the provision of this section, be excluded from entry into the United States." Tariff Act § 337(d)(1). The violation is enforced by Customs and Border Patrol. *See id.*; Exclusion Orders, Customs Directive No. 2310-006A, § 4, at 2 (U.S. Customs Serv. Dec. 16, 1999), *available online*.[2] Legislative history further confirms that the ITC's *raison d'être* is "to adjudicate trade disputes between U.S. industries and those who seek to import goods from abroad." *Omnibus Trade Act of 1987*, S. Rep. No. 100-71, at 129 (1987), *available online*. "Importation" and "importers" are thus central to and ubiquitous throughout the ITC's authorizing statute.

Yet the ITC has contorted this statutory authority to reach domestic firms and activity hardly linked to importation or trade. Petitioner Comcast, the defending party in the ITC, provides communications services within the United States. It imports no goods but rather buys them from third-party sellers. Pet. App. 85–89a. The allegedly patent-infringing instrumentality was a domestic computer network system; the imported set-top boxes that

[2]Locations of authorities available online are shown in the Table of Authorities.

were the subject of the ITC investigation were staple articles that did not even contain the key components necessary to infringe the patents, and fewer than 1 percent of set-top boxes were ever used in an infringing manner. *See id.* at 3–5a, 406–407a. Nevertheless, the ITC issued an exclusion order against all of Comcast's set-top boxes, by holding that (1) Comcast was an "importer" because Comcast had ordered and set the specifications for the set-top boxes that were imported; and (2) because the set-top boxes could be used eventually as part of Comcast's infringing network system, they counted as "articles that infringe" patents. *See id.* at 41–42a.

Those two lines of reasoning apply to virtually every American business enterprise, even ones distant from international trade. The nature of global supply chains means that even the most home-grown business will likely contract for at least some imported parts or goods that might find their way into an infringing product or service. *See* Nat'l Research Council, *Surviving Supply Chain Integration: Strategies for Small Manufacturers* 89 (2000). Under the ITC's analysis, that company would be an importer of articles and subject to the ITC's jurisdiction.

As a result, diverse companies now fall within the ITC's grasp. Like Comcast, many domestic communications providers and Internet platforms buy network and computer equipment for business use, enabling the ITC to adjudicate software and business method patents against those non-importer companies. American manufacturers will likely use some imported parts. A farm that sells only crops that it grows—as far as possible from an importation business—could be haled before the ITC for planting patent-infringing soybeans, if it plants

them with fertilizer or tools that originated from abroad. *Cf. Bowman v. Monsanto Co.*, 569 U.S. 278, 289 (2013). The size of the business would seem to make no difference: A one-person furniture-making shop that uses only American lumber might nevertheless be deemed an "importer" involved in "international trade" for buying imported glue or saws.

In none of these cases is the ITC's long-arm reach to domestic American industries necessary to prosecute infringement of patents—American companies may be sued in federal courts, and any infringement may be remedied there. *See* 35 U.S.C. § 281. The traditional justification for the ITC, that it provides patent holders with "adequate protection against foreign companies violating such rights," is irrelevant when the alleged infringer is a non-importing American business. *See* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, sec. 1341(a)(2), 102 Stat. 1107, 1212. The question is which of those American non-importing businesses should be doubly subject to suit in a trade agency. Under the ITC's interpretation of its own jurisdiction, it is a large number of them.

B. ITC Patent Infringement Adjudication, when Against American Firms, Is Unfair and Imposes Redundant and Unnecessary Costs

Opening the doors of the ITC to domestic patent disputes will likely attract a great deal of litigation and force many of the above-discussed American businesses to navigate the federal trade bureaucracy. The ITC is already a popular forum for patent disputes, hearing about 49 cases per year and conducting roughly 10–20 percent

of all patent trials in the United States. *See* Bill Watson, *The ITC in 2019: America's Administrative Patent Court*, ITC Pol'y Project (Feb. 24, 2020). This number will likely grow as the ITC relaxes its jurisdictional limitations because, compared to the district courts, the agency offers different procedures and remedies that tend to favor patent holders and burden defending parties haled before the agency.

The right to an independent adjudicator and a trial by jury are lost in the ITC. Article III provides judges with life tenure to ensure their independence; ITC commissioners have a small amount of tenure, being heads of an independent agency, but they still lack life tenure or guaranteed salaries. *See* 19 U.S.C. § 1330(b), (c)(3). Indeed, Congress may exercise extensive control over the ITC through appropriations and legislation. *See* James M. de Vault, *Congressional Dominance and the International Trade Commission*, 110 Pub. Choice 1, 5 (2002). The Seventh Amendment guarantees patent infringement defendants a right to trial by jury, but ITC investigations are heard only by an administrative law judge and the commissioners of the agency. *See* Tariff Act § 337(c); 19 C.F.R. § 210.10(b)(2)–(3).

Remedies also differ starkly. In district court, both injunctions and monetary damages are available, *see* 35 U.S.C. §§ 283–284, but injunctive relief requires consideration of "the traditional four-factor framework that governs the award of injunctive relief" under this Court's decision in *eBay Inc. v. MercExchange, LLC*. 547 U.S. 388, 394 (2006). Since *eBay*, injunctions on patents, while still frequently granted, are not universal. *See* Christopher B. Seaman, *Permanent Injunctions in Patent Litigation Af-*

ter eBay: An Empirical Study, 101 Iowa L. Rev. 1949, 1982–84 (2016).

By contrast, the ITC does not apply *eBay* at all. *See Spansion, Inc. v. Int'l Trade Comm'n*, 629 F.3d 1331, 1359 (Fed. Cir. 2010). The agency does consider a "public interest" test before issuing an exclusion order, *see* Tariff Act § 337(d)(1), but that test is narrower than *eBay*—"public interest" is just one of the four factors—and unlike the frequent denials of injunctions under *eBay*, the ITC has not rejected an exclusion order since 1984. *See* Colleen V. Chien & Mark A. Lemley, *Patent Holdup, the ITC, and the Public Interest*, 98 Cornell L. Rev. 1, 19–23 (2012).

This discrepancy has led patent attorneys baldly and publicly to advise using the ITC to circumvent *eBay*.[3] The notion that litigants can use an administrative tribunal to "circumvent" law set forth by this Court is jarring at a minimum.

Further differences relate to procedure. In district court patent litigation, 28 U.S.C. § 1400(b) sharply limits venue to a handful of ones convenient to the party defending, but when an action is brought in the ITC, the defending party must appear in the agency's single headquarters office. *See* 19 C.F.R. § 201.3. The ITC thus enables

[3] *See* Chien & Lemley, *supra*, at 18 (observing this phenomenon); Adam R. Hess & Catherine S. Branch, *Court: ITC Can Grant Injunctive Relief in Patent Disputes Without Using eBay Factors*, Client Alert 2 (Pillsbury Winthrop Shaw Pittman LLP Jan. 5, 2011); John F. Rabena & Kim E. Choate, *Injunctive Relief in the ITC Post eBay*, 1 Akron Intell. Prop. J. 27, 34 (2007) ("[T]he ITC is likely to become even more popular for patent owners"); Robert J. Walters & Yefat Levy, *An Introduction To Remedies and Enforcement Proceedings in Section 337 Investigations at the International Trade Commission*, Intell. Prop. Owners Ass'n 1 (describing ITC as "an appealing alternative to the relief available in U.S. District Courts").

the sort of forum shopping that is now unavailable in district courts following *TC Heartland, LLC v. Kraft Foods Group Brands LLC*, 137 S. Ct. 1514, 1521 (2017). And ITC litigation is not subject to the limits on joinder of unrelated parties in a single action imposed by the America Invents Act. *See* 35 U.S.C. § 299.

Additionally, unlike district courts, the ITC as a rule refuses to stay its proceedings while the asserted patents are being challenged for validity before the Patent Trial and Appeal Board. *See, e.g., In re Certain Rd. Constr. Machs.*, Inv. No. 337-TA-1088, at 5–6 (Jan. 31, 2020). As a result, the agency has issued and enforced exclusion orders based on patent claims concurrently deemed erroneous. In a recent example, the ITC is currently enforcing an exclusion order, despite a final written decision of unpatentability having already issued. *See id.*

Imbalances and discrepancies between the ITC and judiciary are compounded by the fact that the forums are not mutually exclusive: A patent holder is free to bring simultaneous litigation in both, on identical subject matter. *See Tex. Instruments Inc. v. Tessera, Inc.*, 231 F.3d 1325, 1330 (Fed. Cir. 2000); Sapna Kumar, *The Other Patent Agency: Congressional Regulation of the ITC*, 61 Fla. L. Rev. 529, 538–40 (2009). This is costly to defending parties that now must pay attorney fees twice over to resolve the same issue. ITC litigation costs over twice as much as comparable district court litigation: A median patent infringement case with $1–10 million at stake costs $1.5 million in district court, and $4 million in the ITC. *See* Am. Intellectual Prop. Law Ass'n, *Report of the Economic Survey* 50, 52 (2019). And redundant dispute resolution in two branches of government heightens the specter of forum shopping, abusive litigation, duplicative recoveries,

and conflicting judgments. *See generally* Bill Watson, *R Street Short No. 57*, *Preserving the Role of the Courts Through ITC Patent Reform* 2–3 (2018).

This catalog of differences between the ITC and district court litigation shows that it is no mere academic question whether to house patent litigation in an administrative agency along with the judiciary; the ITC strips away many safeguards for defending parties and opens them up to costly, duplicative litigation. The impact of the ITC's expansion of its own authority will be felt widely across the nation, rendering the propriety of that expansion a matter of exceptional importance warranting review on a writ of certiorari.

II. The Petition Implicates Exceptionally Important Questions About Separation of Powers and Agency Statutory Interpretation

The questions presented raise two issues that have been of great concern to this Court: the relationship between administrative agencies and the judicial power under Article III, and judicial deference to agency self-interpretations of statutory authority.

A. Adjudication of Domestic Patent Infringement in a Federal Agency Intrudes upon Article III; *Oil States* Does Not Cure This Defect

The ITC's adjudication of domestic patent infringement challenges the basic constitutional allocation of the "judicial Power of the United States." U.S. Const. Art. III. Under the separation of powers doctrine, courts must be

the sole locus of deciding private rights and responsibilities under the law, and no other branch of government may not encroach upon that Article III power except within a narrow class of "matters involving public rights." *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1855) (comma omitted).

This Court has vigilantly policed the exclusive domain of Article III, as "[p]reserving the separation of powers is one of this Court's most weighty responsibilities." *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1954 (2015) (Roberts, C.J., dissenting). In *Stern v. Marshall*, the Court invalidated the authority of Article I bankruptcy courts to hear counterclaims to bankruptcy proceedings, holding that those counterclaims constituted generalized dispute resolution and thus had to be heard in Article III courts. *See* 564 U.S. 462, 503 (2011).

Administrative agencies may resolve disputes only relating to "public rights," which the Court has generally defined as nontraditional statutory schemes of Congress that involve "matters arising between the government and persons subject to its authority." *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 67–68 (1982) (plurality op.) (quoting *Crowell v. Benson*, 285 U.S. 22, 50 (1932) (quotations omitted)); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 589 (1985) (permitting administrative arbitration as part of a "complex regulatory scheme" of pesticide approval).

ITC adjudication of domestic patent disputes under its newly minted authority is much like counterclaims in the bankruptcy courts of *Stern*. Patent disputes are traditional adjudication over private rights and responsibilities, dating back to at least the founding of the nation. *See* Patent Act of 1790, ch. 7, § 4, 1 Stat. 109. A patent in-

fringement action "is one sounding in tort." *Schillinger v. United States*, 155 U.S. 163, 169 (1894); *see Golden v. United States*, No. 19-2134, slip op. at 11 (Fed. Cir. Apr. 10, 2020). The ITC's exclusionary remedies can deny parties the right to engage in business and to use their personal property by importing it into the United States. *See* Tariff Act § 337(d)–(f). These factors strongly suggest that patent infringement is not a matter of public rights, leaving ITC adjudication of domestic patent disputes constitutionally suspect.

This Court's recent decision in *Oil States Energy Services, LLC v. Greene's Energy Group, LLC* is not to the contrary. There, an administrative procedure for reconsidering the validity of patent grants was deemed a matter of public rights, on the grounds that patent grants are "franchises that can be qualified" by Congress with conditions including administrative validity review. *See* 138 S. Ct. 1365, 1375 (2018). *Oil States* specifically reserved the question of whether "infringement actions can be heard in a non-Article III forum." *Id.* at 1379 (comma omitted). And the distinction between patent validity and infringement actions with respect to Article III is plain when one considers what is at stake in each. In a patent validity proceeding, the most that can be lost is the legislatively qualified franchise of a patent. By contrast, an infringement action puts at stake a party's money, business, and personal property—rights that the Constitution specifically protects through institutions such as Article III courts.

This is not to say that the ITC as a general matter violates Article III. Where a patent infringement case is closely tied to acts of importation and international trade, the public rights doctrine may be applicable insofar as importation and trade are federal policy matters. The only

issue presented here is whether domestic patent disputes with only tenuous connections to importation are within the realm of an administrative tribunal; in view of separation of powers, that question carries importance of constitutional dimensions.

B. The ITC's Expansive Interpretation of Its Statutory Jurisdiction, and Deference to That Interpretation, Are Highly Suspect

A second important question arising from the ITC's decision is the propriety of its interpretation of its authorizing statute, particularly in a manner that greatly expands the agency's authority.

As discussed above, the ITC's statutory purpose has always been trade, not patents. *See supra* p. 6. Indeed, when it was first enacted as part of the Smoot–Hawley Tariff Act of 1930, section 337 made no mention of patents, instead broadly prohibiting all "unfair methods of competition and unfair acts in the importation of articles . . . the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States." Pub. L. No. 71-361, sec. 337(a), 46 Stat. 590, 703. The law was meant to be an all-purpose, protectionist trade remedy that could provide "more adequate protection to American industry than any antidumping statute the country has ever had." S. Rep. No. 67-595, at 3 (1922), *available online*; *Frischer & Co. v. Bakelite Corp.*, 39 F.2d 247, 257 (C.C.P.A. 1930). Patents specifically appear in section 337 only in 1988 amendments to the law, a half-century later. *See* Omnibus Trade and Competitiveness Act sec. 1342(a)(1), § 337(a)(1)(B)(i), 102 Stat. at 1212.

In allowing itself to charge non-importers with patent infringement over articles that infringe no patents, the ITC ignored Congress's extensive cabining of the agency to trade matters. The Court of Appeals did not question this, instead giving the agency discretion under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See* Pet. App. 12–15a. While not citing *Chevron* by name, the opinion relies on *Suprema, Inc. v. International Trade Commission*, which approved an ITC exclusion order against scanner devices that infringed a patent only after the importer added software to them in the United States. *See* 796 F.3d 1338, 1341–42 (Fed. Cir. 2015) (en banc). The agency held that "articles that infringe" included goods that are noninfringing at the time of importation, but are "used by an importer to directly infringe post-importation as a result of the seller's inducement." *Id.* at 1352–53. In a closely divided opinion, the Federal Circuit en banc found that "articles that infringe" in section 337 is ambiguous and, applying *Chevron* deference, upheld the ITC's interpretation as reasonable. *Suprema*, 796 F.3d at 1349, 1353.

The most troubling aspect of *Suprema* is its contention that the ITC's interpretation is reasonable precisely because it expands the agency's authority. *See id.* at 1350. Citing portions of the legislative history, the court found that "the Commission's interpretation is consistent with Congress' longstanding, broad policy." *Id.* at 1351. But nothing in the legislative history cited by the court shows any intention from Congress that section 337 could be used as a remedy for domestic acts of infringement. *Cf.* S. Rep. No. 67-595, *supra*, at 3 (describing section 337 as "relating to unfair methods of competition *in the importation of goods*" (emphasis added)).

Suprema and the current case thus place sharp focus on the question considered in *City of Arlington v. Federal Communications Commission*, 569 U.S. 290 (2013). There, a divided majority of the Court held that agencies such as the FCC received *Chevron* deference even for interpretations of "jurisdictional" statutory language defining the agency's powers. *City of Arlington*, 569 U.S. at 307. In dissent, Chief Justice Roberts, joined by Justices Thomas and Alito, warned that before assuming that *Chevron* applies, courts must first assess whether Congress has in fact delegated interpretive authority to the agency. *See City of Arlington*, 569 U.S. at 312 (Roberts, C.J., dissenting). Justice Breyer, concurring in the judgment, similarly agreed that courts "will have to decide independently whether Congress delegated authority to the agency to provide interpretations of . . . the statute at issue." *Id.* at 308 (Breyer, J., concurring).

The present case is *City of Arlington* taken to its extremity. While that case dealt with a relatively minor element of the FCC's authority (a rulemaking on deadlines), *see id.* at 294–95, the ITC's interpretations here are existential—what, for an agency premised on dealing with importation of patent-infringing articles, "importer" and "articles that infringe" mean. The statutory terminology in *City of Arlington* was plainly ambiguous ("reasonable period of time"), *see id.* at 295, but the terms being interpreted here have longstanding and fixed meanings in the law. *See Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 122 (1923); U.S. Tariff Comm'n, *Dictionary of Tariff Information* 406 (1924). And the ITC's interpretations are unorthodox at best: "Importer" encompasses one who imports nothing and "articles that infringe" encompasses articles that do not infringe any patent.

To be sure, *City of Arlington* itself need not be revisited in this case; it is straightforward to hold that section 337 is unambiguous under the step one test of *Chevron*. *See City of Arlington*, 569 U.S. at 296 (quoting *Chevron*, 467 U.S. at 842–43). But the similarity to this Court's seminal case on agency discretion highlights how the expansiveness of the ITC's statutory interpretation raises an important question: how far an agency may go in interpreting its own statutory authority.

C. Left Unreviewed, the ITC's Enlarged Authority Will Be a Roadmap for Other Agency Enhancement of Power

The constitutional and administrative law questions ought to be addressed immediately in this case, because to do otherwise would leave unchecked the continued and accelerating expansion of power at both the ITC specifically and administrative agencies generally.

Though the decisions in the present case are a dramatic expansion of the ITC's authority, they are only one such expansion out of many. In the last few decades, the ITC has repeatedly weakened the various trade-based elements of section 337, such as the domestic industry and public interest elements that promote the ITC's role as a trade agency protecting American industries. *See* Kumar, *supra*, at 548–51. The agency's budget justification reports also reflect a shift away from trade: In earlier reports, the agency described its activities under section 337 as investigating "unfair acts in the importation of articles," reflecting the language of the statute, but they now refer to "unfair acts involving imported articles"—words seemingly calculated to encompass domestic patent disputes with tenuous or no connections to

international trade. *Compare* U.S. Int'l Trade Comm'n, *Budget Justification, Fiscal Year 2012*, at 19 (2011), *available online*, *with* U.S. Int'l Trade Comm'n, *Budget Justification, Fiscal Year 2021*, at 28 (2020), *available online*.

Just six years ago, the ITC made another unabashed attempt to expand its jurisdictional reach. In *ClearCorrect Operating, LLC v. International Trade Commission*, the ITC interpreted section 337 to give the agency authority over digital data transmissions, on the theory that downloading a file on the Internet constituted "importation" of "articles that infringe." *See* 810 F.3d 1283, 1290 (Fed. Cir. 2015). The overreach was so untenable that the Federal Circuit in fact reversed under *Chevron*, finding both the statute unambiguous and the ITC's interpretation arbitrary and capricious. *See ClearCorrect*, 810 F.3d at 1290, 1300.

It is telling that, in its *ClearCorrect* brief, the ITC justified broad jurisdictional authority by misquoting the Senate report on section 337—the agency omitted without ellipses the phrase "in the importation of goods" to suggest wrongly that its authority spanned "every type and form of unfair practice" without limitation. *Id.* at 1301 (quoting S. Rep. No. 67-595, *supra*, at 3). Though there is no reason to believe that this "highly misleading" error was intentional, *id.*, the fact that the ITC was so inattentive as to its own statutory ambit indicates the agency's drive to take on a larger scope of authority than Congress authorized.

Yet rather than investigate the ITC for overreach, Congress apparently hopes to institute even more administrative forums for adjudication of disputes traditionally heard in Article III courts. The House of Representatives recently passed a bill that would create a copyright

small claims board housed not in the federal judiciary but within the U.S. Copyright Office, which is not even an executive agency but a legislative one. *See* Copyright Alternative in Small-Claims Enforcement Act of 2019, H.R. 2426, 116th Cong. sec. 2(a), § 1502(a) (as passed by House of Representatives, Oct. 22, 2019). This Article I "court" would have power to adjudicate intellectual property disputes, bring any person before it, and award damages between private parties. *See id.* sec. 2(a), § 1503(a)(1).[4] Many commentators have noted the failure of this legislation to address Article III separation of powers. *See, e.g.*, Pamela Samuelson & Kathryn Hashimoto, *Scholarly Concerns About a Proposed Copyright Small Claims Tribunal*, 33 Berkeley Tech. L.J. 689, 692–93 (2019); Anthony Marcum, *Potential Pitfalls of the CASE Act*, R Street (July 16, 2019). Nevertheless, Congress appears bent on ignoring those concerns and plowing ahead with the legislation.

At a time when the federal bureaucracy "now wields vast power and touches almost every aspect of daily life," *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010), it is up to this Court to set limits on how far administrative agencies may go. The ITC's actions in this case present a striking vehicle to consider questions of exceptional importance to the fabric of American constitutional republicanism.

[4] Indeed, the ITC is substantially more problematic than this proposed copyright infringement tribunal: While the CASE Act at least enables a defendant to affirmatively opt out and demand a judicial proceeding, *see id.* sec. 2(a), § 1506(i), the defending party in the ITC has no such option.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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