Nos. 19-1434, 19-1452 and 19-1458

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

ARTHREX, INC., *et al.*,

Respondents.

SMITH & NEPHEW, INC., *et al.*,

Petitioners,

v.

ARTHREX, INC., *et al.*,

Respondents.

SMITH & NEPHEW, INC., *et al.*,

Petitioners,

v.

ARTHREX, INC., *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF B.E. TECHNOLOGY, LLC AS *AMICUS CURIAE* IN SUPPORT OF ARTHREX AND IN SUPPORT OF REVERSAL

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INTERESTS OF *AMICUS CURIAE*[1]

B.E. Technology, LLC ("BE") was granted ten patents in twelve years. After we filed an infringement action against Google in 2012 in U.S. District Court, Western District of Tennessee, Google filed a petition with the Patent Trial and Appeal Board ("PTAB") against two of our patents. In 2015, the PTAB invalidated both patents. We now have pending patent infringement actions seeking to defend three of our patents and our rights. Without these ten patents, our twenty-three years of work, dedication, and millions in risk capital may all evaporate, depending on this Court's decision here.

BE asks this Court: to find the PTAB "judges" were never properly appointed; to find the court of appeals did not and cannot cure the Appointment Clause defect; and to restore inventors' constitutional right to an impartial trial heard by Article III judges nominated and appointed for life with fixed salaries.

Patents are how we build America's future.

SUMMARY OF ARGUMENT

The Federal Circuit correctly concluded that Administrative Patent Judges ("APJ") of the Patent Trial

1. Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

and Appeal Board ("PTAB") are "principal" officers under the Appointments Clause, but it erred in its attempt to remedy a corrupted process by severance. In 2016, this Court used the term "shenanigans" to describe the due process problems with the Patent and Trademark Office's ("PTO") implementation of the America Invents Act of 2011 ("AIA"). *Cuozzo Speed Technologies v. Lee*, 136 S.Ct. 2131, 2142 (2016). These "shenanigans" could never have occurred without the PTAB judges first being elevated to the level of a principal officer.

The remedy by the Federal Circuit will not fix what has occurred, and is still occurring. In 2008, Congress tried to repair an Appointments Clause problem with the Board of Patent Appeals and Interferences (BPAI), which was the predecessor to the PTAB created under the AIA. Congress retroactively made the APJs appointed by the Secretary of Commerce instead of by the Director of the Patent and Trade Office and included the defense that they were de facto officers. Patent and Trademark Administrative Judges Appointment Authority Revision, Pub.L. 110-313, sec. 1(a)(1)(B) and sec. 1(d), 122 Stat. 3014 (2008) (codified as amended at 35 U.S.C. § 6(a) and (d) (2012)).

However, this time the situation is much more dire and is beyond the attempted remedy by the Federal Circuit with another round of *de facto* officer defenses. After the passage of the AIA, unsurprisingly, the men of commerce cooked up a scheme to inject money into the judicial process, most notably by paying bonuses to APJs, with one APJ receiving a bonus as high as $41,800. https://www.federalpay.org/employees/patent-and-trademark-office/saindon-william-v. These bonuses are paid from

fees of approximately $41,500 per petition, which is paid by the party contesting a patent. https://www.uspto.gov/learning-and-resources/fees-and-payment/uspto-fee-schedule.

In spite of the cost, petitioners are able to increase their odds by filing multiple petitions and paying multiple fees to kill patents previously issued to inventors, knowing that the "trial phase" fee for any petition not accepted by the PTAB is refunded back to the petitioner. Setting and Adjusting Patent Fees, Final Rule, 78 Fed. Reg. 4212, 4233-34 (Jan. 18, 2013); https://www.uspto.gov/sites/default/files/documents/PTAB%20E2E%20Frequently%20Asked%20Questions%20July%2011%202016.pdf at page 13, Question E7. The fee fund is managed by the Patent and Trade Office. https://www.gao.gov/assets/660/658359.pdf at page numbered 2.

The bonuses are approved by either the Chief Judge or the Vice Chief Judge of the PTAB itself. See https://usinventor.org/wp-content/uploads/2020/05/FOIA-F-19-00277-2019-11-04-APJ-PAPS.pdf, 1, pp. 2-47. The Director does not have the authority to approve or issue such bonuses:

> The Director may fix the rate of basic pay for the administrative patent judges appointed pursuant to section 6 and the administrative trademark judges appointed pursuant to section 17 of the Trademark Act of 1946 (15 U.S.C. 1067) at not greater than the rate of basic pay payable for level III of the Executive Schedule under section 5314 of title 5. The payment of a rate of basic pay under this paragraph shall not

> be subject to the pay limitation under section 5306(e) or 5373 of title 5.

33 U.S.C.A section 3(b)(6).

The PTO is a fee-funded agency that "operates like a business." *Setting and Adjusting Patent Fees During Fiscal Year 2017*, 82 Fed. Reg. 52, 780 (Nov. 14, 2017). It is generally appropriated the full amount of revenue generated from AIA proceedings. https://fas.org/sgp/crs/misc/RS20906.pdf. Plus, the §42 of the AIA established a Patent and Trademark Fee Reserve Fund ("Reserve Fund") in the Treasury. 35 U.S.C. § 42 (c)(2). The Reserve Fund is for fees "collected in excess of the appropriated amount." *Id.* While the PTO is funded by the congressional appropriations process, the fees in the Reserve Fund are available only to the PTO. *Id.* U.S. Congressional Research Service. U.S. Patent and Trademark Office Appropriations Process: A Brief Explanation (RS20906 Aug. 28, 2014), by Glenn J. McLoughlin. Text in https://fas.org/sgp/crs/misc/RS20906.pdf.

Unlike many other agencies, the PTO sets its own fees, without congressional approval. The PTO sets AIA post-grant proceeding fees at whatever it deems a "reasonable" amount, taking into account "aggregate costs." 35 U.S.C. §§ 311(a), 321(a).

Big businesses have been taking advantage of a provision of the AIA that denies the right of patent owners to obtain judicial review of adverse USPTO decisions in ex parte patent reexaminations by civil action in district court – a right that has existed under 35 U.S.C. § 306 and § 145 since the inception of reexamination in 1980.

Abolishing this right leaves direct appeal to the Federal Circuit as the only judicial recourse. This provision exacerbates ex parte reexamination abuses by creating an unprecedented end-run around Federal District Courts in practically all patent disputes. Alleged infringers simply file ex parte reexamination requests with USPTO and receive a final agency decision subject only to Federal Circuit review, essentially bypassing Federal courts. Large numbers of prospective/alleged infringers have chosen this favorable path to challenge a patent, overwhelming the USPTO, causing much lengthier delays in reexamination, and holding up patentees' patent rights for years.

Given the built-in economic incentives, the "Business Unit" of the USPTO, the PTAB, is more than willing to institute petitions because in so doing, it feeds the "business unit's" budget. To keep this flow continuing, the PTAB has placed itself in a vice that favorable decisions for the petitioners must be in the majority or else new petitions – money flowing into the PTAB budget - will dry up and so too will APJ Bonuses.

The results speak for themselves. After the AIA was implemented the tech companies went on a patent killing spree. Seventy-four percent of contested proceedings were brought by tech, internet and communications companies. https://www.ipwatchdog.com/2014/03/24/ptab-death-squads-are-all-commercially-viable-patents-invalid/id=48642. Since passage of the AIA, approximately 2,925 patents have been subject to written opinions by the PTAB and 2,469 have been killed. https://usinventor.org/assessing-ptab-invalidity-rates/. Approximately 84% of the patents (not petitions) adjudicated in full have been

killed on appeal. https://usinventor.org/assessing-ptab-invalidity-rates/.

Justice Gorsuch recognized the patent killing field at the Patent and Trial Appeals Board:

> Some say the new regime represents a particularly efficient new way to "kill" patents. Certainly, the numbers tell an inviting story for petitioners like Thryv. In approximately 80% of cases reaching a final decision, the Board cancels some or all of the challenged claims. Patent Trial and Appeal Board, Trial Statistics 10 (Feb. 2020), https://www.uspto.gov/sites/default/files/documents/ Trial_Statistics_2020_02_29.pdf. The Board has been busy, too, instituting more than 800 of these new proceedings every year. See *id.*, at 6.

Thryv, Inc. v. Click-to-Call Technologies, LP, 140 S.Ct. 1367, 1379 (2020) (Gorsuch, J., dissenting).

Justice Gorsuch was prophetic in his dissent in *Thryv, supra,* wherein observed the underlying problems with the PTAB:

> The abdication of our judicial duty comes with a price. The Director of the Patent and Trademark Office is a political appointee. The AIA vests him with unreviewable authority to institute (or not) inter partes review. Nothing would prevent him, it seems, from insulating his favorite firms and industries from this process entirely. Those who are not so fortunate proceed

> to an administrative "trial" before a panel of agency employees that the Director also has the means to control. The AIA gives the Director the power to select which employees, and how many of them, will hear any particular inter partes challenge. It also gives him the power to decide how much they are paid. And if a panel reaches a result he doesn't like, the Director claims he may order rehearing before a new panel, of any size, and including even himself.
>
> No one can doubt that this regime favors those with political clout, the powerful and the popular. But what about those who lack the resources or means to influence and maybe even capture a politically guided agency?

Thryv, 140 S.Ct. at 1388 (Gorsuch, J., dissenting).

It is respectfully submitted that this Court affirm the Federal Circuit on the issue that the Patent Appeals Judges are principal officers appointed in violation of the Appointments Clause.

ARGUMENT

I. ADMINISTRATIVE PATENT JUDGES ARE PRINCIPAL OFFICERS

The first question before this Court is "Whether, for purposes of the Appointments Clause, U.S. Const. Art. II, § 2, Cl. 2, administrative patent judges of the U.S. Patent and Trademark Office are principal officers who must be appointed by the President with the Senate's advice

and consent, or "inferior Officers" whose appointment Congress has permissibly vested in a department head.

The government itself has recognized that there is a "functional resemblance between *inter partes* review and litigation," and that the Board uses "trial-type procedures in *inter partes* review." 2017 WL 4805230 at *26, *31, Brief for the Federal Respondent as Amicus Curiae, *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365 (2018).

In *Lucia v. SEC*, 138 S.Ct. 2044, 2053-54 (2018), the Supreme Court held that SEC administrative law judges ("ALJs") are inferior officers of the United States and not mere employees. Based on this status, the Court held that the process of appointing SEC ALJs was unconstitutional because the appointments were not done by a method approved in the Appointments Clause. The Appointments Clause requires inferior officers to be appointed by one of four methods: (1) by the President with advice and consent of the Senate; (2) by the President alone; (3) by the "courts of law"; or (4) by the "heads of departments." *Lucia,* 138 S.Ct. at 2051.

In *Edmond v. United States*, 520 U.S. 651, 663 (1997), the Supreme Court held that "generally" inferior officers are those who are directed and supervised by others who have been appointed by the President with the advice and consent of the Senate. In view of *Edmond,* officers that issue final executive decisions, subject only to Presidential review, are likely to be considered principal officers.

In *Buckley v. Valeo,* 424 U.S. 1, 125 (1976) *(per curiam), superseded by statute as stated by McConnell*

v. Federal Election Com'n, 540 U.S. 93 (2003), this court held the Appointments Clause of Article II is more than a matter of "etiquette or protocol"; it is among the significant structural safeguards of the constitutional scheme. By vesting the President with the exclusive power to select the principal (noninferior) officers of the United States, the Appointments Clause prevents congressional encroachment upon the Executive and Judicial Branches. See *id.,* at 128-131; *Weiss v. U.S.,* 510 U.S. 163, 183-85 (Souter, J., concurring); *Freytag v. Commissioner,* 501 U.S. 868, 904, and n.4 (1991)(Scalia, J., concurring).

Two decisions set out this Court's basic framework for distinguishing between officers and employees. *U.S. v. Germaine*, 99 U.S. 508 (1878), held that "civil surgeons" (doctors hired to perform various physical exams) were mere employees because their duties were "occasional or temporary" rather than "continuing and permanent." *Id.,* at 511–512. Stressing "ideas of tenure [and] duration," the Court there made clear that an individual must occupy a "continuing" position established by law to qualify as an officer. *Id.,* at 511. *Buckley* then set out another requirement, central to this case. It determined that members of a federal commission were officers only after finding that they "exercis[ed] significant authority pursuant to the laws of the United States." *Buckley*, 424 U. S. at 126. The inquiry thus focused on the extent of power an individual wields in carrying out his assigned functions.

In *Freytag*, the Court ruled that U.S. Tax Court "special trial judges" (STJs) were officers because they met the elements required under *Germaine* and *Buckley*, and because they had significant discretion

in addition to considerable responsibilities in presiding over administrative proceedings. These responsibilities included "tak[ing] testimony, conduct[ing] trials, rul[ing] on the admissibility of evidence, and hav[ing] the power to enforce compliance with discovery orders." *Freytag,* 501 U.S. at 881-82. The Court reasoned that the SEC's ALJs in *Lucia*, like the STJs in *Freytag*, held a continuing office established by law, and exercised the same degree of discretion when carrying out the same functions as the STJs. *Lucia,* 138 S.Ct. at 2053. But in contrast with the Tax Court STJs, whose decisions were always required to be reviewed by a regular Tax Court judge, the SEC ALJs' decisions were not always subject to review; if the SEC decided against review then the ALJ's decision would become final and be "deemed the action of the Commission." *Lucia,* 138 S.Ct. at 2049, 2053. As such, the SEC ALJs were officers of the United States subject to the Appointments Clause." *Lucia,* 138 S.Ct. at 2055.

While the PTAB has replaced the BPAI in the AIA, the process of appointing PTAB APJs remains unchanged. And "[a]ny reference in any Federal law, Executive order, rule, regulation, or delegation of authority, or any document pertaining to the Board of Patent Appeals and Interferences is deemed to refer to the Patent Trial and Appeal Board." 35 U.S.C. § 6 (a) (2012).

The federal agency's "determination . . . whether to institute an inter partes review under this section" is "final and nonappealable." 35 U. S. C. §314(d). The Board's patentability decisions are final, subject only to rehearing by the Board or appeal to the U.S. Court of Appeals to the Federal Circuit. *See* 35 U.S.C. §§ 6(c), 141(c), 319. Like the special trial judges ("STJs") of the Tax Court in

Freytag, who "take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders," 501 U.S. at 881– 82, and the SEC Administrative Law Judges in *Lucia*, who have "equivalent duties and powers as STJs in conducting adversarial inquiries," 138 S. Ct. at 2053, the APJs of the USPTO exercise significant authority rendering them Officers of the United States.

In light of the *Lucia, Edmond, Germaine, Buckley and Freytag* decisions, and more importantly, because of the power the PTAB APJs exert, PTAB APJs are principal officers. Because of the Appointments Clause, U.S. Const. Art. II, § 2, Cl. 2, administrative patent judges of the U.S. Patent and Trademark Office are principal officers who must be appointed by the President with the Senate's advice and consent and should be appointed for life with fixed salaries increasing over time.

II. SEVERANCE WILL NOT REMEDY DUE PROCESS VIOLATIONS

A. AIA Shenanigans Discussed

Of all the professions we should protect, it is our inventors and writers. Our founding fathers recognized the importance of inventors and writers to the American economic future by providing for a system to protect their rights in Article I, section 8 of the Constitution, which provides in pertinent part:

> The Congress shall have Power . . .;
> To promote the Progress of Science and useful Arts, by securing for limited Times to Authors

> and Inventors the exclusive Right to their respective Writings and Discoveries;
> To constitute Tribunals inferior to the supreme Court; . . .

Article I, section 8 United States Constitution; emphasis added.

Interestingly, the power granted Congress immediately following the patent provision is the power of Congress to establish inferior tribunals. These provisions are at the heart of this case.

This Court has shown admirable restraint to allow Congress to establish inferior tribunals. In *Oil States Energy Servs., LLC, supra*, this Court observed that due process claims remain viable for judicial review in stating:

> We emphasize the narrowness of our holding. We address the constitutionality of inter partes review only. We do not address whether other patent matters, such as infringement actions, can be heard in a non-Article III forum. And because the Patent Act provides for judicial review by the Federal Circuit, see 35 U.S.C. § 319, we need not consider whether inter partes review would be constitutional "without any sort of intervention by a court at any stage of the proceedings," *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 455, n. 13, 97 S.Ct. 1261, 51 L.Ed.2d 464 (1977). Moreover, we address only the precise constitutional challenges that Oil States raised here. Oil States does not

> challenge the retroactive application of inter partes review, even though that procedure was not in place when its patent issued. Nor has Oil States raised a due process challenge. Finally, our decision should not be misconstrued as suggesting that patents are not property for purposes of the Due Process Clause or the Takings Clause. See, *e.g., Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank,* 527 U.S. 627, 642, 119 S.Ct. 2199, 144 L.Ed.2d 575 (1999); *James v. Campbell,* 104 U.S. 356, 358, 26 L.Ed. 786 (1882).

Oil States, 138 S.Ct. at 1379.

In *Cuozzo*, *supra*, Justice Breyer for the majority and Justices Alito and Sotomayor in the concurrence/dissent, recognized the Court should intervene when necessary to preserve due process/constitutional rights regarding the AIA. *Cuozzo*, *supra*, 136 S.Ct. at 2141.

In *Oil States, supra*, Justice Gorsuch, joined by Chief Justice Roberts, raised due process concerns, as follows:

> After much hard work and no little investment you devise something you think truly novel. Then you endure the further cost and effort of applying for a patent, devoting maybe $30,000 and two years to that process alone. At the end of it all, the Patent Office agrees your invention is novel and issues a patent. The patent affords you exclusive rights to the fruits of your labor for two decades. But what happens if someone later emerges from the woodwork, arguing

that it was all a mistake and your patent should be canceled? Can a political appointee and his administrative agents, instead of an independent judge, resolve the dispute? The Court says yes. Respectfully, I disagree.

We sometimes take it for granted today that independent judges will hear our cases and controversies. But it wasn't always so. Before the Revolution, colonial judges depended on the crown for their tenure and salary and often enough their decisions followed their interests. The problem was so serious that the founders cited it in their Declaration of Independence (see ¶ 11). Once free, the framers went to great lengths to guarantee a degree of judicial independence for future generations that they themselves had not experienced. Under the Constitution, judges "hold their Offices during good Behaviour" and their "Compensation ... shall not be diminished during the[ir] Continuance in Office." Art. III, § 1. The framers knew that "a fixed provision" for judges' financial support would help secure "the independence of the judges," because "a power over a man's subsistence amounts to a power over his will." The Federalist No. 79, p. 472 (C. Rossiter ed. 1961) (A. Hamilton) (emphasis deleted). They were convinced, too, that "[p]eriodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to [the courts'] necessary independence." The Federalist No. 78, at 471 (A. Hamilton).

> Today, the government invites us to retreat from the promise of judicial independence. Until recently, most everyone considered an issued patent a personal right—no less than a home or farm—that the federal government could revoke only with the concurrence of independent judges. But in the statute before us Congress has tapped an executive agency, the Patent Trial and Appeal Board, for the job. Supporters say this is a good thing because the Patent Office issues too many low quality patents; allowing a subdivision of that office to clean up problems after the fact, they assure us, promises an efficient solution. And, no doubt, dispensing with constitutionally prescribed procedures is often expedient. Whether it is the guarantee of a warrant before a search, a jury trial before a conviction—or, yes, a judicial hearing before a property interest is stripped away—the Constitution's constraints can slow things down. But economy supplies no license for ignoring these—often vitally inefficient—protections. The Constitution "reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs," and it is not our place to replace that judgment with our own. *United States v. Stevens,* 559 U.S. 460, 470, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010).

Oil States Energy Services, supra 138 S.Ct. 1380 (Gorsuch, J., dissenting).

B. Patent Trial Appeals Board Bias

Justices Gorsuch and Chief Justice Roberts recognized the political bias of the Director and his/her ability to stack the deck with biased judges, as follows:

> Consider just how efficient the statute before us is. The Director of the Patent Office is a political appointee who serves at the pleasure of the President. 1381 35 U.S.C. §§ 3(a)(1), (a)(4). He supervises and pays the Board members responsible for deciding patent disputes. §§ 1(a), 3(b)(6), 6(a). The Director is allowed to select which of these members, and how many of them, will hear any particular patent challenge. See § 6(c). If they (somehow) reach a result he does not like, the Director can add more members to the panel—including himself—and order the case reheard. See §§ 6(a), (c); *In re Alappat,* 33 F.3d 1526, 1535 (C.A.Fed.1994) (en banc); *Nidec Motor Corp. v. Zhongshan Broad Ocean Motor Co. Ltd.*, 868 F.3d 1013, 1020 (C.A.Fed.2017) (Dyk, J., concurring), cert. pending, No. 17–751. Nor has the Director proven bashful about asserting these statutory powers to secure the " 'policy judgments' " he seeks. Brief for Petitioner 46 (quoting Patent Office Solicitor); see also Brief for Shire Pharmaceuticals LLC as *Amicus Curiae* 22–30.

Oil States Energy Services, supra 138 S.Ct. 1380-1381 (Gorsuch, J., dissenting).

The Director and named defendant in *Cuozzo*, *supra*, Michelle K. Lee, served as Under Secretary of Commerce for Intellectual Property and as Director, Patent and Trademark Office form 2014-2017 during the tech patent killing spree and resultant bonus increases. Lee was deputy general counsel and head of patents and patent strategy at Google from 2003 to 2012. https://www.linkedin.com/in/mlee95070; https://www.uspto.gov/about-us/executive-biographies/michelle-k-lee. Lee is now the vice president of Amazon Web Services. https://en.wikipedia.org/wiki/Michelle_K._Lee.

From 2014-2018 Google alone filed 263 IPR petitions, killing 108 patents, losing 14, giving it an 89% chance of success at the PTAB. https://portal.unifiedpatents.com/ptab/caselist?petitioners=Google+LLC&sort=-filing_date; https://portal.unifiedpatents.com/ptab/caselist?filing_date=2012-09-01--2018-12-31&petitioners=Google+LLC&sort=-filing_date&up_status=Terminated&up_substatus=Final+Written+Decision; and https://portal.unifiedpatents.com/ptab/caselist?filing_date=2012-09-01--2018-12-31&petitioners=Google+LLC&sort=-filing_date&up_status=Terminated&up_substatus=Adverse+Judgment. Plus, it was refunded for 138 cases that were either forced to settle or was a multiple petition in which one petition was accepted by the PTAB.

The bonuses paid to 139 Patent Appeals Judges from the filing fees peaked in 2016 at $3,118,302. Although the average per PTAB Judge is $22,433.82, the reality is that only 48 Judges were paid in excess of $30,000, while one judge made $41,800. https://www.federalpay.org/employees/patent-and-trademark-office/saindon-william-v.

Justice Gorsuch and Chief Justice Roberts recognized the danger of money and influence upon the judicial process in stating:

> No doubt this efficient scheme is well intended. But can there be any doubt that it also represents a retreat from the promise of judicial independence? Or that when an independent Judiciary gives ground to **bureaucrats in the adjudication of cases, the losers will often prove the unpopular and vulnerable**? **Powerful interests are capable of amassing armies of lobbyists and lawyers to influence (and even capture) politically accountable bureaucracies. But what about everyone else**?

Oil States Energy Services, supra 138 S.Ct. 1381 (Gorsuch, J., dissenting)(emphasis added).

Justice Gorsuch and Chief Justice Roberts concluded in their dissent:

> Today's decision may not represent a rout but it at least signals a retreat from Article III's guarantees. Ceding to the political branches ground they wish to take in the name of efficient government may seem like an act of judicial restraint. But enforcing Article III isn't about protecting judicial authority for its own sake. It's about ensuring the people today and tomorrow enjoy no fewer rights against governmental intrusion than those who came before. And **the loss of the right to an independent judge is never a small thing**. It's

> for that reason Hamilton warned the judiciary to take "all possible care ... to defend itself against" intrusions by the other branches. The Federalist No. 78, at 466. It's for that reason I respectfully dissent.

Oil States Energy Services, supra 138 S.Ct. 1386 (Gorsuch, J., dissenting) (emphasis added).

As Justice Sotomayor noted during oral arguments, "It does seem like the deck is stacked against a private citizen who is dragged into these [IPR/PTAB] proceedings. They've got an executive agency acting as judge with an executive director who can pick the judges, who can substitute judges, can re-examine what those judges say, and change the ruling…" Transcript of Oral Argument at p. 30, l. 21-25, p. 31, l. 1-2, *Return Mail, Inc. v. U.S. Postal Service,* 139 S.Ct. 1853 (2019) (17-1594).

Given that we now know the breadth of the patent office shenanigans, these factors prevent the Court from applying the "de facto officer" doctrine, given there is a massive due process problem. This is the second occurrence, not only in the same agency, but the same department within the agency, and involving the same actors.

CONCLUSION

The USPTO is the frontline of our future economy: As inventors, Benjamin Franklin and Thomas Jefferson saw how England's patent system had sparked the Industrial Revolution and how wealthy and strong it made England. Millions of *future* jobs are dependent on patent

applications being filed today. Big Tech should not be able to buy our souls and future, but they have, all to invalidate a generation of patents *they* are infringing. This case is even more important in that it will forever determine the boundaries of the three branches of Government. By ruling PTAB judges are inferior, or that the Appellate Court fix is acceptable, it gives a green light to all agencies of government to implement tribunals that are not only unconstitutional but also corrupt the authority of the Judicial Branch, forever.

Justice Gorsuch's dissent, joined by the Chief Justice Roberts, in *Oil States Energy Services,* 200 U.S. at 337 quotes Alexander Hamilton from the Federalist Papers, saying that to be independent, federal judges need to be both appointed for life and receive fixed salaries uniformly adjusted upward over the course of their lives, so they will not be susceptible to pressure by bosses who might use money or the threat of losing their jobs to force improper decisions.

"The framers knew that "a fixed provision" for judges' financial support would help secure "the independence of the judges," because "a power over a man's subsistence amounts to a power over his will." The Federalist No. 79, p. 472 (C. Rossiter ed. 1961) (A. Hamilton). *Oil States,* 138 S.Ct. at 1380 (Gorsuch, J., dissenting).

It should come as no surprise that the men of commerce would find a way to inject money into the judicial process by creating a program to give annual bonuses of up to $41,800 per year to Patent Appeals Judges. This tipped the scales of justice in favor of Big Tech and has created monopolies. Now we see massive antitrust litigation by

the Department of Justice and almost every Attorney General in the nation.

Four of this Court's Justices have now expressed concern over the shenanigans created by principal officers at the PTAB, namely Chief Justice Roberts and Justices Alito, Sotomayor and Gorsuch. Other members of the *Cuozzo* majority also mentioned possible shenanigans. The stench from the so-called PTAB judicial process is not imagined. We, therefore present the ascension of inferior officers to that of principal officers at the PTAB as another wrongful act of shenanigans that has been allowed to occur.

The judicial process is the last place in the three branches of government where the inventors and working people have a place to actually be heard by a neutral trier of fact without the influence of money. Of all the professions we should protect it is our inventors and writers. The founding fathers thought the system for protecting inventors and writers was so important that they placed it in Article I, section 8 of the Constitution.

The America Invents Act was passed to protect large companies in their thievery of intellectual property. There is no question that the AIA accelerated the existing shenanigans within the USPTO. It was executed for the goal of maximizing revenues to the benefit of the Patent Office.

The PTAB Judge Bonus program has severely tainted any semblance of justice under the AIA system. It is respectfully submitted that this Court declare the decisions by Patent Appeals Judges appointed in violation of the Appointment Clause null and void.

Respectfully submitted.

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