

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 UNIFIED PATENTS, LLC AND
ARISTA NETWORKS, INC. AS AMICI CURIAE
IN SUPPORT OF PETITIONERS**

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INTEREST OF THE AMICI CURIAE¹

Unified Patents, LLC (“Unified”) is a member organization dedicated to deterring non-practicing entities from extracting nuisance settlements from operating companies based on patent claims that should not have issued, either because of a failure of invention or because of overbreadth. Unified has more than 3,000 members, which include Fortune 500 manufacturers, start-ups, automakers, high-technology companies, industry groups, cable companies, banks, open-source developers, and others dedicated to reducing the drain on the American economy and innovation caused by baseless litigation asserting the infringement of patents of questionable validity.

Arista Networks, Inc. (“Arista”) is a member of the S&P 500 and provides hardware and software for computer networks. Arista is the market leader in providing scalable high-performance networks for data centers and cloud computing environments worldwide.

As filers of *inter partes* reviews before the Patent Office, Unified and Arista have a strong interest in ensuring that the designated mechanisms for seeking review of the validity of a patent are not misused. The Federal Circuit’s decision opens the door for the Inter-

¹ All parties have consented to the filing of this brief. *Amici curiae* timely provided notice of intent to file this brief to petitioners and to respondent International Trade Commission, and provided notice to the other respondents on April 24, 2020. No counsel for a party authored any part of this brief, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to the brief’s preparation or submission.

national Trade Commission (“Commission”) to go far beyond its statutory authority and its ambit in protecting domestic industries from unfair international trade practices. The Commission seeks to reinvent itself as a forum for adjudicating domestic cases of patent infringement, to be used by patent holders seeking to exploit the Commission’s unique, foreign trade-focused remedies to extract leverage for patent disputes. The *amici* have an interest in ensuring that the Commission’s reach stops at the borders of the United States—as Congress intended—and that the Commission’s actions do not disrupt the proper channels for the resolution of domestic patent infringement disputes. Indeed, as a U.S. company with a global footprint, Arista can be—and has been—subject to claims brought in the Commission, and thus has a strong interest in ensuring that the Commission focuses on the areas designated to it by statute.

SUMMARY OF ARGUMENT

A. Under the Tariff Act, the International Trade Commission may exercise its authority over imported “articles that . . . infringe a valid and enforceable United States patent.” 19 U.S.C. § 1337(a)(1)(B)(i). The statute’s use of the present tense plainly means the articles must infringe at the time importation occurs. But the Commission’s interpretation of the Act expands its authority to any articles that *may* infringe at some point after importation. Such a sweeping interpretation turns the Commission into an alternative forum for domestic patent disputes, so long as importation occurred at some point. That is not the role that Congress intended for the Commission. The Federal Circuit should have checked the Commission’s atextual reading of the Tariff Act. Instead, the court of

appeals left the Commission's dramatic alteration of the patent dispute resolution landscape intact, failing to conduct even the most cursory analysis of whether the Commission exceeded its statutory authority.

B. Turning the Commission into a forum for resolving cases of domestic infringement would allow patent holders to bypass the safeguards of patent infringement litigation. For example, a patent holder cannot obtain an injunction from a federal court unless it meets the traditional four-factor test for injunctive relief—including a showing of irreparable harm. Many patent holders, particularly non-practicing entities, cannot meet this standard, because they do not produce anything and cannot suffer market harm or any other form of irreparable injury. But the Commission does not require a showing of injury. In most cases, the Commission will impose an exclusion order—one of the harshest remedies available—when it finds infringement. Even the threat of such a remedy provides a patent holder (in many cases, a non-practicing entity) with increased leverage to extract excessive royalties, to the detriment of consumers and innovators. As a result, nonpracticing entities partner with domestic companies specifically to take advantage of this favorable forum.

C. The Commission's self-expanded role in resolving disputes of domestic patent infringement will disrupt the mechanisms for resolving patent disputes that have been carefully calibrated by Congress and this Court. The Commission has already made clear that it will not wait for the Patent Office to resolve questions of patent validity before making its own findings of infringement (and imposing sweeping remedies); indeed, it sometimes ignores such rulings entirely. And it allows patent holders to side-step

limitations on the number of defendants in district-court proceedings by initiating investigations linking together respondents with little in common, but for the mere accusation of infringement.

ARGUMENT

A. The Federal Circuit’s decision threatens to upend review of domestic patent infringement cases, allowing the Commission to exercise authority in a manner that Congress did not intend.

Section 337 prohibits importing, selling for importation, or selling after importation “articles that . . . infringe a valid and enforceable United States patent.” 19 U.S.C. § 1337(a)(1)(B)(i). The statute’s use of the present tense—“articles that *infringe*”—indicates the articles must infringe at the time importation occurs. *Suprema, Inc. v. Int’l Trade Comm’n*, 796 F.3d 1338, 1348 (Fed. Cir. 2015) (en banc). The Commission’s authority is limited to those practices that “qualify as an unfair trade act under Section 337.” *Id.* at 1345.

1. Although judges of the Federal Circuit have disagreed on the *type* of infringement-upon-importation that triggers the Commission’s authority, there has been no dispute about *when* infringement must occur—until now. In *Suprema*, the en banc court of appeals decided whether direct infringement at the time of importation was necessary to trigger the Commission’s authority, or whether infringement by “inducement or contribution,” with direct infringement occurring later, would suffice. *Id.* at 1348; *see also id.* at 1357 (O’Malley, J., dissenting) (contending that direct infringement must occur at the time of importation). The

majority of the court, according *Chevron* deference to the Commission's interpretation, held that inducement at the time of importation was sufficient. *Id.* at 1349 (majority opinion). But no member of the court disputed that liability (and thus, the Commission's authority) "attaches as of the time of the inducing activity." *Id.*; *see also id.* at 1356-57 (O'Malley, J., dissenting) (acknowledging "the point of importation as the cornerstone of liability"); *id.* at 1353-54 (Dyk, J., dissenting) (noting that in the Commission's prior cases, "all of the imported articles infringed because inducing instructions were included in the importation").

Here, the Commission has expanded its authority beyond the plain text of the statute. Instead of limiting itself to "the time of the inducing activity," the Commission construed "articles that infringe" as "articles that *could* infringe," based on post-importation activity. Pet. App. 41a-42a, n.13. For Comcast, the Commission looked to the end-user's alleged infringement, and Comcast's sending of instructions on how to set up a set-top box remotely (domestically, *after* importation). Pet. App. 37a-43a. When Comcast challenged the Commission's assertion of its authority on the basis that "Comcast's inducing conduct took place entirely domestically," Pet. App. 41a, the Commission stated that the timing of the infringement was "no defense." *Id.* The Commission gave to itself the power to decide a patent dispute so long as any "importation of articles" was involved, and some sort of infringement—either direct or induced—had followed.

2. When petitioners appealed to the Federal Circuit, the court of appeals should have considered whether the Commission's self-expansion of its authority went beyond the "clear line" that Congress had set

in Section 337, *City of Arlington v. FCC*, 569 U.S. 290, 307 (2013), or, in the absence of such clarity, whether the Commission’s assertion of authority was “within the bounds of reasonable interpretation.” *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 321 (2014) (citation omitted). But the court barely acknowledged the Commission’s interpretation; it merely restated the Commission’s rationale, and concluded that “Section 337 applies to articles that infringe after importation.” Pet. App. 12a. However deferential *Chevron* deference may be, it requires a more searching inquiry than that.

Had the Federal Circuit so inquired, it would have had to acknowledge that the Commission far exceeded the scope of the authority provided by Congress. The Tariff Act regulates “importation into the United States,” 19 U.S.C. § 1337(a)(1)(B), and thus “focuses on commercial activity related to cross-border movement of goods.” *ClearCorrect Operating, LLC v. Int’l Trade Comm’n*, 810 F.3d 1283, 1289 (quoting *Suprema*, 796 F.3d at 1345). To the extent that the Commission may exercise authority in accordance with the Act, it is to remedy unfair international trade practices, not to resolve domestic patent disputes. *See id.* at 1286, 1289-90 (noting Congress’s unambiguous intent to limit the Commission’s authority to “remedy[ing] unfair international trade practices”); *Suprema*, 796 F.3d at 1344 (explaining that the Tariff Act is a “trade statute,” designed to “regulate international commerce”). Domestic patent infringement is governed by a separate “statutory regime[]” in the district courts. *See Suprema*, 796 F.3d at 1345. And the Act’s legislative history confirms that the statute is meant to serve as a remedy for products that are *already* infringing when they come into the country—not for imported products

that may, after importation, give rise to a claim of infringement based on domestic activities. *See, e.g.*, S. Rep. No. 100-71, at 128-29 (1987) (“The importation of any infringing merchandise derogates from the [patent holder’s] statutory right. . .”).

3. The Commission has long been aware of this limitation on its authority. In 2013, the Commission informed Congress that it is “authorized to provide unique remedies—exclusion orders enforced by Customs and Border Protection (Customs) to prevent *infringing goods* from entering the United States.” U.S. Int’l Trade Comm’n, *Budget Justification: Fiscal Year 2013*, at 5, available at https://www.usitc.gov/press_room/documents/budget_2013.pdf (emphasis added). But after the Federal Circuit’s *Suprema* decision, the Commission took the broader view that it would provide “unique relief in the form of exclusion of goods at the border,” regardless of whether the goods were “infringing.” U.S. Int’l Trade Comm’n, *Budget Justification: Executive Summary Fiscal Year 2015*, at 4, available at https://www.usitc.gov/documents/fy_2015_executive_summary.pdf.

B. The ITC’s self-expanded role allows patent holders to obtain incredibly broad injunctive relief without satisfying the requirements set forth in *eBay*.

If the Federal Circuit’s unexplained deference to the Commission’s atextual assertion of authority is left to stand, the Commission will be able to exercise authority over virtually any patent case involving an imported product, or a product that has an imported component. Indeed, the Commission has made no secret of its desire to become an alternative forum for domestic patent

litigation, billing itself as a place for “relatively quick resolution to what can be expensive and protracted litigation in District Court.” *Id.*

1. The Commission is able to offer “relatively quick resolution” because many of the safeguards that are typically afforded to district-court patent litigants are absent before the Commission. Consider injunctions, for example. This Court stated in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006), that a patent holder is not automatically entitled to an injunction if it were to prevail on its infringement claim. Instead, a court may issue a permanent injunction only if the “well-established principles of equity” and the “traditional four-factor test” justify it. *Id.* at 391, 393.

Following *eBay*, the number of injunctions fell. See Colleen V. Chien & Mark A. Lemley, *Patent Holdup, The ITC, and the Public Interest*, 98 Cornell L. Rev. 1, 9-10 (2012) (noting that the number of injunctions granted upon request dropped from 95% to 75%). And for non-practicing entities—firms that do not make products or provide services, instead using patents purely to obtain royalties from operating companies—the number of granted injunctions dropped precipitously. See *id.* at 10 (observing that, after *eBay*, patent-assertion entities—“patent trolls”—were denied injunctive relief in 75% of cases, with a 90% denial rate when the injunction is contested); Christopher B. Seaman, *Permanent Injunctions in Patent Litigation After eBay: An Empirical Study*, 101 Iowa L. Rev. 1949, 1952 (2016) (noting that, following *eBay*, “the vast majority of patentees still obtain injunctive relief,” but non-practicing entities “rarely do”); Lily Lim & Sarah E. Craven, *Injunctions Enjoined; Remedies Restructured*, 25 Santa Clara Computer & High Tech. L.J. 787, 798

(2009) (“[A] patentee who directly competes in the marketplace with the infringing party gets an injunction 79.6% of the time, while [a non-practicing entity’s] chance of getting an injunction falls precipitously to 33.3%.”). That result is unsurprising, as non-practicing entities generally do not suffer an irreparable injury. *See Seaman, supra*, at 1952-53.

The district court’s obligation to consider the four-part injunctive framework is important to patent litigants, as unwarranted or excessive injunctions can lead to settlements that require an inflated amount of royalties. *See Erik Hovenkamp & Thomas F. Cotter, Anticompetitive Patent Injunctions*, 100 Minn. L. Rev. 871, 884-85 (2016) (describing “a royalty negotiated in the shadow of a threatened injunction as a ‘supracompensatory’ royalty,” which “exceeds the royalty the parties would have negotiated prior to the defendant’s having incurred costs in reliance on its use of the infringing technology”). Inflated royalties eventually lead to increased consumer costs, stymied innovation, and excessive litigation. *See U.S. Fed. Trade Comm’n, The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition* 144-47 (Mar. 2011) (“FTC Report”), available at <https://www.ftc.gov/reports/evolving-ip-marketplace-aligning-patent-notice-remedies-competition>.

After this Court issued *eBay* in 2006, patent holders began flocking to the Commission. *See U.S. Int’l Trade Comm’n, Section 337 Statistics: Number of New, Completed, and Active Investigations by Fiscal Year (Updated Quarterly)* (Apr. 15, 2020), https://www.usitc.gov/intellectual_property/337_statistics_number_new_completed_and_active.htm (showing a spike in active investigations from 70 investigations in 2006 to 130 in-

vestigations in 2018). The fact that the Commission is serving as a rival forum for domestic patent disputes is no surprise, given the procedural characteristics that enable the Commission to offer a “relatively quick resolution.” In deciding whether to grant an exclusion order—a severe form of injunctive relief that results in a wholesale ban of the imported product—the Commission does not require an irreparable injury, and it does not consider the balance of the equities. *Spansion, Inc. v. Int’l Trade Comm’n*, 629 F.3d 1331, 1358-59 (Fed. Cir. 2010). As a result, if the Commission deems an imported article to be infringing, a general exclusion order is “nearly automatic,” FTC Report at 29-30, even when an injunction would be unwarranted under *eBay*. Chien, *supra*, at 16, 19-20 & fig. 3.

This less-rigorous standard is justified by the “long-standing principle that importation is treated differently than domestic activity.” *Spansion*, 629 F.3d at 1359. The Commission’s decision erodes that principle, blurring importation within the Commission’s reach with purely domestic matters that should be beyond it. And the threat of overreach is worsened by the fact that practically *every* modern technological product has at least some imported component.

2. Non-practicing entities thus have every incentive to resort to the Commission to obtain relief they cannot get from a district court in the wake of *eBay*. The Commission itself has noted the uptick of non-practicing entities seeking the Commission’s intervention. In a 2012 budget request, the Commission reported to Congress that:

since the U.S. Supreme Court’s 2006 *eBay* decision, which has made it more difficult for pa-

tent-holders that do not themselves practice a patent to obtain injunctions in district courts, exclusion orders have increasingly been sought by non-practicing entities that hold U.S. patents.

U.S. Int'l Trade Comm'n, *Budget Justification: Fiscal Year 2012*, at 21, https://usitc.gov/press_room/documents/budget_2012.pdf. Despite recognizing the uptick and the fact that the Commission's authority is being used to evade *eBay*'s requirements, the Commission has done nothing to stem the flow of activity by non-practicing entities.

3. This Court's recent decision in *TC Heartland LLC v. Kraft Foods Group Brands LLC*, 137 S. Ct. 1514 (2017), has made the Commission an even more attractive destination for non-practicing entities seeking to obtain broad, injunctive relief for settlement leverage (without the usual burdens associated with judicial principles of equity). After *TC Heartland* confirmed that patent venue lies only where a defendant "resides" or where it maintains a "regular and established place of business," *id.* at 1516 (citation omitted), non-practicing entities changed venues from the Eastern District of Texas to the Commission. There, such entities find a more sympathetic ear, with the evidence showing that the Commission "favors patent holders vis-à-vis district courts by a wide margin." Robert Hahn, AEI-Brookings Joint Center for Regulatory Studies, *Assessing Bias in Patent Infringement Cases: A Review of International Trade Commission Decisions* 6 (Feb. 2007), <https://www.brookings.edu/wp-content/uploads/2016/06/hahn200702.pdf>. But when a matter before the Commission eventually ends up before a district court, the tides turn: "[w]hen the [Com-

mission] rules in favor [of] a plaintiff, the likelihood that the district court agrees with the ITC's decision is not much better than chance." *Id.* at 7.

C. The Commission's self-anointed role as an alternative arbiter of domestic patent disputes will frustrate the effectiveness of the forums tasked with resolving such disputes.

The disruption caused by the Commission's decision (and the Federal Circuit's failure to stop the agency's overreach) goes beyond sweeping injunctive relief. Allowing the Commission to intrude on an even greater number of disputes involving domestic patent infringement will only encourage the Commission to act independently of the mechanisms that Congress put into place to resolve such disputes.

1. The Federal Circuit's decision will encourage the Commission to run roughshod over the Patent Office, the agency principally charged with patent dispute resolution. The Commission has already made clear that it will not wait for the Patent Office to decide the validity of a patent. When the Patent Office institutes a review of a patent's validity, parallel litigation in district court is typically stayed. *NFC Tech. LLC v. HTC Am., Inc.*, No. 2:13-cv-1058, 2015 WL 1069111, at *7 (E.D. Tex. Mar. 11, 2015). This allows courts to conserve judicial resources while the Patent Office provides its expert views on questions of validity that are often highly technical.

The Commission does not extend the same courtesy to the Patent Office. The Commission's principal role is to resolve disputes arising from international trade; its assessment of patent validity is an adjunct responsibility, and its determinations about validity warrant

no deference. *See, e.g., Bio-Technology Gen. Corp. v. Genentech, Inc.*, 80 F.3d 1553, 1564 (Fed. Cir. 1996) (holding that ITC decisions on “patent issues should have no claim preclusive effect in later district court litigation”). Yet the Commission sees no reason to defer to the agency principally charged with assessing the validity of a patent. For example, the Commission will not stay one of its own proceedings in deference to a pending *inter partes* review proceeding that may result in invalidation of a patent before the Commission. *E.g., Certain Laser-Driven Light Sources, Subsystems Containing Laser-Driven Light Sources, and Products Containing Same*, Inv. No. 337-TA-983, 2016 WL 11616074, at *6 (USITC Mar. 3, 2016) (denying stay where PTAB proceedings were initiated before ITC investigation).

Even if the Patent Office has concluded its proceeding and has issued a decision regarding the invalidity of a patent, the Commission may not necessarily defer to that decision, either. That leads to a bizarre result where the Commission says a patent is valid (and issues a sweeping exclusionary order), while the Patent Office says the patent is invalid. *E.g., Arista Networks, Inc. v. Cisco Sys., Inc.*, No. 16-cv-923, 2017 WL 6102804, at *2 (N.D. Cal. Oct. 10, 2017) (noting that the Commission refused to lift its cease-and-desist orders despite an invalidity determination made by the PTAB). Such an aberrational outcome may irreparably injure or even destroy a U.S. business that depends on importing a particular product alleged to be infringing on a disputed (or even invalid) patent. And even the Federal Circuit may not defer—in this case, the patents underlying the appeal had either expired or had

been cancelled by the Patent Office, but the court of appeals ruled on the mooted case nonetheless.

2. The Commission's expansive role also threatens to disrupt a key piece of reform implemented by the America Invents Act of 2011: constraints on massive, multi-defendant patent infringement lawsuits. Under the Act, a plaintiff may join only those defendants whose alleged infringement arises from the same "transaction[or] occurrence" and involves "common" "questions of fact." Leahy-Smith America Invents Act of 2011, Pub. L. No. 112-29, § 19(d), 125 Stat. 284, 333 (2011) (codified as amended at 35 U.S.C. § 299(a)). Because of that statutory change, plaintiffs could no longer engage in the routine practice of enjoining numerous unrelated defendants based solely on the fact of their infringement. See Brian T. Yeh, U.S. Cong. Research Serv., *An Overview of the "Patent Trolls Debate,"* Rep. No. R24668, at 13-14 (Apr. 16, 2013), available at <https://fas.org/sgp/crs/misc/R42668.pdf>.

But the practice of conflating together a large group of unrelated parties continues on before the Commission. In recent years, complainants have initiated proceedings involving as many as 45 respondents in a single investigation. See Colleen V. Chien, *Patent Trolls by the Numbers*, Santa Clara Univ. Legal Studies Research Paper No. 08-13 (Mar. 13, 2013); U.S. Int'l Trade Comm'n, *USITC Section 337 Investigations—Facts and Trends Regarding Caseload and Parties* 5-6 (June 10, 2014), https://www.usitc.gov/press_room/documents/featured_news/337facts.pdf. In the wake of the Federal Circuit's decision upholding the Commission's dramatic expansion of its own authority, the Commission may now entertain massive multi-respondent proceedings for any imported product that

might give rise to incidental domestic infringement at a later date.

* * * * *

The Federal Circuit's decision exposes businesses that rely on imported technology to three potential patent-litigation fronts: the Patent Office, a district court, and now, the Commission. The Commission, whose authority to resolve a domestic infringement dispute is thinnest and most tenuous, has the power to impose the harshest equitable remedy for infringement: general exclusion of the infringing product from the borders of the United States. If left to stand, the Federal Circuit's decision risks serious disruption to Congress's carefully crafted scheme for the resolution of patent disputes.

The court of appeals should have never blessed the Commission's decision to exceed its statutory authority, especially with little reasoning as to why the Commission's atextual interpretation is acceptable. And it certainly should not have done so given that the underlying patents before it had expired, making the appeal moot. Pet. 15-19. As a result, this Court should vacate the Federal Circuit's decision as moot, or remand it for a proper determination on the merits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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