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

In the
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

– v. –

ARTHREX, INC., *et al.*,
Respondents.

(Caption Continued on Reverse Side of Cover)

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

BRIEF *AMICUS CURIAE* FOR FAIR INVENTING FUND IN SUPPORT OF ARTHREX, INC.

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

Petitioners,

– v. –

ARTHREX, INC., *et al.*,

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INTEREST OF *AMICUS CURIAE*

The *amicus* herein is the Fair Inventing Fund (https://www.fairinventing.org/).[1] The Fair Inventing Fund was established in 2020 and advocates for the rights of people who invent, but are not included in the patent ecosystem. The process of creating, securing, commercializing, and protecting patents is capital intensive. This poses barriers to entry for those without access to capital; a condition that disproportionately impacts women, people of color, and people living in socioeconomically deprived areas, which discourages them from engaging with the patent ecosystem. The Fair Inventing Fund has established an *amicus* brief committee of signatories who believe that equal protection and due process standards of review in the patent process would enable more diverse sources of invention that can be rewarded for their ingenuity and labor of the mind.

The *Amicus* Committee of the Fair Inventing Fund consists of the following individuals, all of whom have

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[1] Pursuant to this Supreme Court Rule 37.6, *amicus* affirms that no counsel for any party authored this brief in whole or in part, and that no person other than amicus, its members, and its counsel made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.3(a), the parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 33.1, *amicus* affirms that the instant brief does not exceed 8,000 words.

agreed to be signatories on the attendant *amicus* brief:

1. Audra M. Watson, Bronx
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20. Gregg Semler, Portland, OR
21. Robert Blinn, Manhattan, New York

The *amicus* encourage this Court to guarantee the independence of the Patent and Trial Appeals Board by affirming the Federal Circuit's holding that Administrative Patent Judges are principal officers and must be appointed as such under Article II of the United States Constitution. Furthermore, the *amicus*

advocates the Court to vacate the Federal Circuit's holding which severed the statutory tenure protections of Administrative Patent Judges because the court's remedy does not comport with Congressional intent to promote inclusion and underrepresented communities.

SUMMARY OF ARGUMENT

Before the Court is a critical opportunity to achieve important policy objectives to promote the inclusion of inventors in underrepresented groups by protecting the independence of the Patent and Trial Appeals Board (PTAB). The Court may now remedy the United States Court of Appeals for the Federal Circuit's misguided decision to sever the portion of the America Invents Act (AIA) regarding the tenure of Administrative Patent Judges (APJ), who adjudicate patentability issues before PTAB.

The Federal Circuit's decision is a valiant, but clumsy effort to satisfy the Appointments Clause of the United States Constitution. The Federal Circuit correctly affirmed that APJs are principal officers and must be appointed as such pursuant to the Appointments Clause of the United States Constitution. In doing so, however, the Federal Circuit incorrectly severed the tenure provision from the AIA.

The Federal Circuit's decision contradicts Congress' aim to enable and protect inventors who are underrepresented in the patent ecosystem. Congress intended to promote equity and inclusion, and the judicial independence of the PTAB is important to achieve that aim. The legislative intent evidences Congress' interest to further protections for these inventors. One of the most important protections for these inventors adopted by the AIA were the civil service provisions and review of the APJs. The Congressional record supports the intent to protect those inventors by placing the appointment of APJs under the political oversight of Congress to ensure the goals of equity and inclusion are achieved. Regretfully, those policy objectives remain unfulfilled. This Court has a unique opportunity to ensure that the PTAB continues to make progress to improve participation from all sectors of our society by ensuring that Congress' policy objectives when passing the AIA are being satisfied.

ARGUMENT

I. SUBSTANTIAL DISPARITIES EXIST IN THE PATENTS GRANTED TO MINORITY INVENTORS

Amicus advocates the Court to weigh the effects of its decision on inventors from underrepresented communities. Several studies have documented the issues faced by underrepresented groups, including

African-American, Hispanic, and female inventors, in securing patents. During passage of the AIA, Congress was mindful of the disproportionate effects of patent reform on small inventors generally, and female and minority inventors specifically. In response, eight years after passage of the AIA, the SUCCESS Act, PUB. L. 115–273, 132 STAT. 4158 (2018), was enacted in an effort to document the issues faced by these inventors.

A. Significant Gaps Persist In The Number Of African-American, Hispanic, And Female Inventors

Because the Patent and Trademark Office (PTO) does not collect data on the personal characteristics of inventors, trends are difficult to identify. Alex Bell, et al. *Who Becomes an Inventor in America? The Importance of Exposure to Innovation* 1 (Nov. 2018) ("most sources of data on innovation (*e.g.*, patent records) do not record even basic demographic information, such as an inventor's age or gender."). Cross-referencing the names of inventors with other publicly available data, however, provides insight into how different demographics of inventors are being impacted. Kyle Jensen, et al., *Gender Differences in Obtaining and Maintaining Patent Rights,* NATURE BIOTECHNOLOGY vol. 36, p. 307 (April 2018).

In October 2019, the PTO released the "Report to Congress Pursuant to Pub. L. No. 115-273, SUCCESS

Act." The report noted the "impediments" that African-American inventors have traditionally faced "including the lack of financing for development and commercialization of inventions[.]" Report to Congress Pursuant to PUB. L. NO. 115-273, SUCCESS Act. USPTO & SBA p. 12 (Oct. 2019). This trend continues today as "Blacks or African Americans and Hispanics born in the U.S. are significantly underrepresented among innovators" when compared to their white counterparts.[2] *Id*. at 12. The statistics regarding participation of African-Americans are troubling: "African-Americans make up 13% of the U.S. native-born population but comprised less than 1% of the U.S.-born innovators it surveyed." Matthew Bultman, *For Black Inventors, Road to Owning Patents Paved with Barriers*, BLOOMBERG LAW (2020).

In a companion report, on July 4, 2020, the PTO also noted such disparities between males and females in a report titled "Progress and Potential 2020 Update on U.S. Women." *See generally* Office of the Chief Economist (July 2020). The report observed that female participation increased; however, substantial

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[2] Noting that, "Blacks or African Americans represent 11.3% of U.S.-born Americans and only 0.3% of the innovators who responded to their survey." And "that observed gaps in patenting rates between Whites and racial/ethnic minorities cannot be explained by differences in parental income or performance on school tests."

disparities remain.[3] *Id*. at 4, 5. Additional studies demonstrate that women's patent applications were "more likely to be rejected than those filed by teams of men." Jyoti Madhusoodanan, *Why Do Women Inventors Win Fewer Patents?* YALE INSIGHTS April 09, 2018 (last visited December 29, 2020) (available at https://insights.som.yale.edu/insights/why-do-women-inventors-win-fewer-patents) ("Essentially women inventors must pass greater degrees of scrutiny.").

Researchers found that, overall, women inventors' patents were more likely to be rejected than those filed by men. *Gender Differences in Obtaining and Maintaining Patent Rights, Nature Biotechnology*, vol. 36, p. 307–309 (2018). *Id.* When rejected, those applications were 2.5% less likely to be appealed. *Id*. When applications were granted, these patents often had more phrases or words added that reduced the scope of their patents. *Id.* ('An examination of the prosecution and maintenance histories of approximately 2.7 million US patent applications indicates that women have less favorable outcomes than men.").

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[3] Noting that, "The average women inventor rate (AWIR) for 2007-2019 was 14.2%, up from 13.6% for 2007-2016."

B. Congress Sought To Promote Innovation For Minority Small Inventors

The SUCCESS Act aimed to address the "significant gap in the number of patents applied for and obtained by women and minorities." PUB. L. 115–273, 132 STAT. 4158 (2018). The Act expressed:

> [T]he sense of Congress that the United States has the responsibility to work with the private sector to close the gap in the number of patents applied for and obtained by women and minorities to harness the maximum innovative potential and continue to promote United States leadership in the global economy.

Id. at Sec. 2

The SUCCESS Act was a continuation of many Congressional efforts to provide protections and promote the interests of inventors from traditionally underrepresented communities. For example, the original AIA, adopted Section 29, which mandated that the Director of the PTO conduct statistical studies of the race and gender of inventors similar to the mandate of the Leahy-Smith America Invents Act, PUB. L. 112-29, SEC. 29, 125 STAT. 284, 339 (2011); HOUSE FLOOR DEBATE 157 CONG. REC. H4480-H4505 (2011 – 2012).

The legislative record provides many examples of Congress' efforts to protect the interests of African-American, Hispanic, and female inventors as the "small inventor." More often than not, the small inventor is a woman or a minority individual who does not have access to the capital nor the institutional support that other inventors enjoy. *See* Lisa D. Cook, *Policies to Broaden Participation in the Innovation Process*, THE HAMILTON PROJECT, 8-10, 12-13 (2020). Parsing the Congressional record for the "extra-textual evidence" reveals that the purpose of the statute is to balance the needs to protect the small, non-corporate inventor before the PTAB, and allow greater efficiency and uniformity of patent decisions. *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 950 (2017) (Sotomayor, J., dissenting) (citing "legislative history, purpose, and post-enactment practice").

The fears of the disproportionate effect of the AIA on African-American, Hispanic, and female inventors is well-founded. Today, the PTAB is extremely popular with large corporate entities due to the more favorable standards and procedures to challenge patents. *See* Ryan Gatzmeyer, *Are Patent Owners Given a Fair Fight: Investigating the AIA Trial Practices*, 30 BERKLEY TECH. L. J., 531, 531-32 (2015) (noting the popularity of the PTAB is due to additional rights to challenge patents including the one-year statutory timeline, lower costs, and more favorable standards for challengers, including a lower preponderance-of-

evidence standard for demonstrating unpatentability, and the broadest reasonable claim construction standard that potentially encompasses a greater amount of invalidating prior art) *see also* Office Patent Trial Practice Guide, 77 FED. REG. 48,756, 48,756-57 codified at 37 C.F.R. § 42.

Underrepresented communities do not have the same or equal access to capital nor funding as these corporate entities; thereby, causing a significant disproportionate amount of African-American, Hispanic, and female small inventors and detrimentally impacting Congressional intent at promoting diversity and inclusion.

II. CONGRESS INTENDED TO PROTECT SMALL INVENTORS DURING THE POST-GRANT REVIEW PROCEEDINGS

The primary concerns of advocates for small inventors are the post-grant review proceedings that provide an opportunity to invalidate patents before the PTAB. *See generally* Joe Matal, *A Guide to the Legislative History of the America Invents Act: Part II of II,* Fed. Cir. Bar Review Vol. 21, No. 3. (2012). The initiation of the PTAB was described by its creators as the most comprehensive patent law reform in sixty years. The Act was revolutionary and possibly the most sweeping change to United States patent law since the first patent was issued by George

Washington on July 31, 1790. H.R. REP. NO. 112-98, at 51 n. 52 (2011).

In transitioning to the "first-to-file" system, Congress sought to "improve patent quality and limit unnecessary and counterproductive litigation costs." H.R. REP. NO. 112-98, at 40 (2011). However, this transformation was not without controversy, as Congress' efforts to modernize and harmonize the first-to-file system was viewed as favoring large corporations that have more resources to file patent applications early and make amendments if necessary. 157 CONG. REC. S1496-97 & S1497 (Mar. 9, 2011) (statement of Sens. Hatch & Leahy respectively).

A thorough examination of the Congressional record reveals that, despite Congress' intent to modernize the "first-to-file" system, considerations were made for the effect on traditionally disadvantaged inventors and small inventors." *See* H.R. REP. NO. 112-98, at 40 fn. 14 (2011) (noting the importance of a grace period of one (1) year for small inventors). Among those with the most potential to benefit from the decreased costs in filing and defending patents in the PTAB are minority and women inventors, who, for numerous historical, political, and societal reasons, have traditionally been excluded and marginalized from the patent process. *See* Lisa D. Cook, *Policies to Broaden Participation in the Innovation Process*, THE HAMILTON PROJECT, 8-10; 12-13 (2020); *see also*

Matthew Bultman, *For Black Inventors, Road to Owning Patents Paved with Barriers*, BLOOMBERG LAW (2020). The lower barriers to challenge patents and "the high rates of invalidation in the PTAB sparked, at least initially, significant concern in the patent community, resulting in the overly dramatic characterization of the PTAB panels as death squads killing property rights." Greg Reilly, *Bridging the Gap Between the Federal Courts and the United States Patent & Trademark Office*, 23 B.U.J. Sci. & Tech. L. 377, 379 (Summer 2019) (internal quotations omitted).

Despite mixed review of the impact of the PTAB on small inventors, many sections of the AIA were enacted to monitor the effect of the newly enacted PTAB on small inventors to protect them from bias. Section 28 of the AIA established a patent ombudsman program that provides "support and services relating to patent filings of small business concerns and independent inventors." Leahy-Smith America Invents Act, PUB. L. 112-29, SEC. 28, 125 STAT. 284, 339 (2011). Section 29 requires the Director to "establish methods for studying the diversity of applicants . . . who are minorities, women, or veterans." *Id*. at SEC. 29. Section 32 requires the Director to "work with and support intellectual property law associations across the country in the establishment of pro bono programs designed to assist financially under-resourced independent and small

businesses." *Id*. at SEC. 32. Lastly, Section 3(l) required the Small Business Administration to conduct a study of the impact of the adoption of the first-to-file system on small business. *Id*. at SEC. 3(L).

Since enactment of the PTAB, small, non-corporate inventors have much to fear from the potential issues that arise from lack of transparency and independence of the PTAB. In the short time since the PTAB was inaugurated, several instances of procedural "shenanigans" by the PTAB concerned the federal judiciary sufficiently to merit mention in oral argument and decisions. In *Nidec Motor Corp. v. Zhongshan Broad Ocean Motor Co.*, for example, Circuit Judges Dyk and Wallach wrote separately to note their concerns of the Board and incorporated the PTO's admission of its potentially unconstitutional purpose to add additional APJs in its own brief when:

> [T]he PTO expands administrative panels to decide requests for rehearing in order to 'secure and maintain uniformity of the Board's decisions.'

Nidec Motor Corp. v. Zhongshan Broad Ocean Motor Co., 868 F.3d 1013, 1020 (Fed. Cir. 2017) (quoting the brief filed on behalf of the PTO Director).

The Government reasserted that position, during oral argument in *Oil States Energy Servs., LLC*, explaining that the Chief Judge of the PTAB

increased the number of APJs during an adjudication, stating it was:

> [C]oncerned that the panel as initially composed was likely to diverge from general PTAB precedent with respect to a matter that bore on the institution decision . . . It's not clear whether the chief judge picked judges that he had a particular reason to think would be sympathetic to a particular view.

See Tr. of Oral Arg. p. 47 ln 20 to p. 48 ln. 4 *In Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC,* 138 S. Ct. 1365 (2018) (available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-712_7kh7.pdf) (argument of Mr. Stewart on behalf of the Government). In response to those concerns, J. Gorsuch raised the issue of whether the PTAB appeared to be stating that it will "stack the deck with judges who we like." *Id.* at p. 43 ln. 19-23. Chief Justice John Roberts noted that adding additional judges give the appearance that the Board is a "tool of the executive activity, rather than anything resembling a determination of rights." *Id.* at p. 34 ln. 15, p. 35 ln. 1. Other salacious examples of "unethical" action have surfaced demonstrating purported bias at the PTO. Ryan Davis, *USPTO Docs Shed Some Light On Secretive SAWS Program*, Law360 (July 24, 2018) (As described by former Commerce Department Inspector General Todd

Zinser). For example, the secretive Sensitive Application Warning System (SAWS) program was an extra-judicial layer of review intentionally and systemically hidden across the Agency that interfered with every step of the patent process. *Id.*

Pursuant to the statute, PTAB judges were appointed by the Secretary of Commerce, in consultation with the Director of the PTO, both of whom are political appointees and serve at the pleasure of the President. 35 U.S.C. § 6(a) (2012). The PTO Director determines PTAB judges' salary, performance reviews, discipline, and removal. *Id.* Further political influence is evidenced as political appointees may even be able to designate particular panels of PTAB judges to hear particular cases. PTAB, Standard Operating Procedure 1 (Revision 15) Assignment of Judges to Panels, https://www.uspto.gov/sites/default/files/documents/SOP%201%20R15%20FINAL.pdf (last visited Dec. 29, 2020). This lack of oversight and review results in adverse consequences for underrepresented groups, including African-American, Hispanic and female inventors, respectfully, which Congress sought to protect through legislative action.

III. MAINTAINING LEGISLATIVE REVIEW OF THE APJS PROTECTS SMALL INVENTORS FROM UNFAIR REVIEW

A significant question before the Court is whether APJs are principal officers, inferior officers, or mere employees, and whether severing the civil service protections of APJs cures the constitutional defect of their appointments. To maintain judicial independence and protect small inventors, the Court should affirm that APJs are principal officers, and vacate the ruling that severs the civil service protections for the APJs.

A. The Court Should Affirm That APJs Are Principal Officers Because Of The Lack Of Review Of Their Decisions By A Principal Officer

The Federal Circuit correctly identified the controlling principle outlined in *Edmond v. United States*, 520 U.S. 651, 663 (1997) to differentiate principal officers from inferior officers. *Edmonds* held that "'inferior officers' are officers whose work is directed and supervised at some level by [principal officers] who are appointed by Presidential nomination with the advice and consent of the Senate." *Id*. While the Federal Circuit correctly affirmed that APJs are principal officers, the court's ruling incorrectly prioritized the importance of "the official's power to remove the officers" over "the

reviewability of the officers' decisions."[4] Ultimately, this error led the Federal Circuit to fashion an inappropriate and ineffective remedy of severing the civil service protections for the APJs from the statute. *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320, 1338 (Fed. Cir. 2019).

In *Edmond*, the Court held that Coast Guard Court of Criminal Appeals judges were inferior officers. 520 U.S. at 666. In reaching this conclusion, the Court found it "significant" that Coast Guard judges "have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers." *Id.* at 665. The Court further distinguished these decisions from those of Tax Court judges, noting that the decisions of Tax Court judges "are appealable only to courts of the Third Branch." *Id.* at 665-666.

This Court has repeatedly affirmed that the principle of reviewability is the determining factor for the question of whether an officer is a principal or

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[4] The three factors to consider in determining whether officers are principal or inferior: "(1) whether [a presidentially] appointed official has the power to review and reverse the officers' decision; (2) the level of supervision and oversight an appointed official has over the officers; and (3) the appointed official's power to remove the officers." *Edmond v. United States*, 520 U.S. 651 (1997).

inferior officer.[5] The principle that consistently drives the Court's reasoning is that the authority to speak on behalf of the United States solely belongs to a principal officer. Because Congress imbued the APJs with this authority in the AIA, the Federal Circuit correctly determined that APJs are principal officers. The Constitution requires the President, with the advice and consent of the Senate, to appoint them. As such, the Court should affirm that aspect of the Federal Circuit's holding.

B. Severing The Civil Service Protections Of APJs Is Unconstitutional And Increases Political Pressure

The Federal Circuit indicated that by severing the statutory tenure provision of APJs, it hoped to achieve

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[5] *See, e.g., Lucia v. SEC*, 138 S. Ct. 2044 (2018) (affirming that that SEC Administrative Law Judge decisions are ultimately subject to review by the Commission and do not become a final decision until the Commission declines review); *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010) (holding PCAOB members inferior officers, the Court noted that its adjudications were subject to the review and approval of the SEC); *Freytag v. Commissioner*, 501 U.S. 868 (1991) (holding that the Tax Court's "special trial judges" are inferior officers because the Tax Court ultimately had the authority to review their decisions); *Ass'n of Am. R.Rs. v. U.S. Dep't of Transp.*, 821 F.3d 19, 39 (D.C. Cir. 2016), *remand Dep't of Trans. v. Ass'n of Am. R.Rs.*, 575 U.S. 43 (2015) (agreeing with J. Alito's concerns that that an arbitrator could issue a final decision with no principal officer review).

the narrowest remedy necessary to cure a constitutional defect. *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320, 1338 (Fed. Cir. 2019). The court noted that "severing the restriction on removal of APJs renders them inferior rather than principal officers." *Id*. at 1338. "Although the [PTO] Director still does not have independent authority to review decisions rendered by APJs, his provision of policy and regulation to guide the outcomes of those decisions, coupled with the power of removal by the Secretary without cause, provides significant constraint on issued decisions." *Id.* Although the Federal Circuit's decision initially held that APJs are principal officers, the court incorrectly remedied the constitutional infirmity of their appointments by severing the tenure protections from APJs and, therefore, making them inferior officers. The Federal Circuit's legislative action was inappropriate. As discussed *infra*, the fact that APJs' decisions remain unreviewable by other principal officers is sufficient reason for finding that APJs are principal officers in their own right. The court should not have gone any further.

When determining that a statute is unconstitutional, a court may sever the portions of the statute if the remaining provisions are "(1) constitutionally valid, (2) capable of 'functioning independently,' and (3) consistent with Congress' basic objectives in enacting the statute." *United States*

v. Booker, 543 U.S. 220, 258-259 (2005). However, the remaining provisions of the statute must "function in a manner consistent with the intent of Congress." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987). A court may not sever tenure protections if "striking the removal provisions would lead to a statute that Congress would probably have refused to adopt." *Bowsher v. Synar*, 478 U.S. 714, 735 (1986).

The Federal Circuit's approach either accidentally overlooks or willfully ignores Congress' intent to shield the patent review process from external political pressures. When passing the AIA, Congress sought to establish a patent review process involving an "adjudicative proceeding," H.R. REP. NO. 112-98, pt. 1, at 46 (2011), one that was "clearer, fairer, more transparent, and more objective," 157 CONG. REC. 12,984 (Sept. 6, 2011) (Sen. Kyl). Congress specifically intended a system wherein APJs would have both independence and impartiality.

The process laid out in the statute merely underscores the unfettered independence by which Congress intended APJs to operate. Congress designed the statute for Board decisions to be appealable to Article III courts only, much like the decisions of Tax Court Judge decisions. *Cf. Edmond*, 520 U.S. at 665-666 (distinguishing Tax Court judges from Coast Guard Court of Criminal Appeal judges on the same basis). Under the AIA, only the Board may grant rehearing of its own decisions. 35 U.S.C. §§ 6(a),

(c), 141. By removing tenure protections from the statute, the Federal Circuit effectively decreased APJs' judicial independence because, without tenure, APJs would answer directly to the political whims of the Director of the PTO, who is a political appointee.

Peculiarly, early in its decision, the Federal Circuit appears to refuse to sever the portions of the statute preventing the Director from unilaterally deciding to grant rehearing of the Board's decisions. The Federal Circuit reasoned that doing so "would be a significant diminution in the procedural protections afforded to patent owners." *Arthrex*, 941 F.3d at 1336. While this particular line of reasoning is both correct as a matter of fact and as a matter of law, such reasoning is equally applicable to the tenure protections that the Federal Circuit nonetheless saw fit to remove.

The solution that the Federal Circuit formulated here was misguided. The implicit reasoning behind the Federal Circuit's remedy is the inconvenience of practically resolving the administrative issues of its holding that APJs are principal officers. Greg Reilly, 23 B.U.J. SCI. & TECH. L. 377, 380 (Summer 2017). Solutions could involve properly appointing APJs as principal officers, congressionally reforming the statute, and sorting out how the present docket of cases is affected. That decision would place a sizable administrative burden on the government to formulate a solution to appoint APJs through the proper procedures. However, maintaining the

legislative intent of the AIA and preserving the Constitution is worthy of such a burden.

Congress sought to protect APJs with tenure to encourage and foster independent and impartial adjudication of important government issues. Removing those tenure protections would expose APJs to political interference. To fully discern the third element of the *Booker* analysis requires a deeper analysis of the Congress' "basic objectives in enacting the statute." *Booker*, 543 U.S. at 258-259.

C. Judicial Independence Is Crucial To Protect The Interests Of Small Inventors

In Federalist Paper 78, Alexander Hamilton expressed fears that the judiciary was "in continual jeopardy of being overpowered, awed, or influenced by its coordinate branches" and "nothing can contribute so much to its firmness and independence as permanency in office." The Federalist No. 78 at 470-71 (Clinton- Rossiter Ed. 1961). However, if the courts "are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges. . . " *Id.* More recently, Justice Breyer recognized the importance of an independent judiciary noting "the substantial independence that the administrative procedure act's removal

protections provide to administrative law judges" remains "a central part of the act's overall scheme." *Lucia*, 138 S. Ct. at 2060 (Breyer, J., concurring in part). Both an independent appointment process and tenure are recognized as important tools to maintain the independence of a judiciary. *See* Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III,* 101 Harv. L. Rev. 915, 915-16 (March 1998). While Article III judges receive public scrutiny, such as financial disclosure requirements, APJ's are not subject to public examination. *See* Ethics in Government Act of 1978, PUB. L. NO. 95-521, amended by the Ethics Reform Act of 1989, PUB. L. NO. 101-194, 103 STAT. 1716, 5 U.S.C. app. §§ 101-111.

For the small, non-corporate inventor, judicial independence and concerns of political influence at the PTAB are not merely speculative. *Nidec Motor Corp. v. Zhongshan Broad Ocean Motor Co.* 868 F.3d 1013, 1020 (Fed. Cir. 2017). Given that APJs are largely controlled by the PTO Director, a presidential appointee, *see* 35 U.S.C. § 1 *et seq.* (2012), without the advice and consent process of the Senate, APJs are subject to political influence without a counterbalance from the Congress. "Shenanigans" such as "court packing" and the clandestine SAWS program demonstrate the need for legislative review.

Congress is mindful of the impact on minorities and small inventors. To further those policy objectives,

Congress should maintain legislative review of the AIA to ensure judicial independence and a fair forum for all inventors. Therefore, this Court should vacate the Federal Circuit's purported remedy to sever the tenure provisions of the AIA and leave Congress to advise and consent the appointment of APJs as the Constitution requires. Placing the appointment of APJs squarely under the political oversight of the Senate will ensure the accountability of the PTAB and satisfy Congress' stated goals of equity and inclusion. Further, the tenure provisions are fundamental to avoid political influence from the Director of the PTO and to enable judges to follow Congress' direction to respect inclusion. Because many patent holders are large corporations with profound resources and political influence, the review and oversight of the PTAB is paramount to maintain the integrity and fairness of the patent ecosystem. *See* Ryan Gatzmeyer, *Are Patent Owners Given a Fair Fight: Investigating the AIA Trial Practices*, 30 BERKLEY TECH. L. J. 531, 531-32 (2015).

Substantial disparities exist between the patents granted to African-American, Hispanic, and female inventors and their White male counterparts. To address these particular disparities and the difficulties faced by small inventors generally, greater legislative review is required. By affirming the Federal Circuit's decision that APJs are principal officers and vacating the court's decision to sever

tenure provisions, the PTO will have greater accountability to Congress and its intent. By commissioning studies, Congress has identified these disparities. Maintaining its traditional role of legislative review will empower Congress to actively address these issues.

* * *

CONCLUSION

For the foregoing reasons, the independence of the PTAB should be protected by following the intent of Congress and maintaining APJs as principal officers. An independent PTAB will ensure that small, non-corporate inventors generally, and minority inventors specifically, will be protected from the undue influence of large corporations. Therefore, the judgment below should be affirmed with regard to the first question that APJs are principal officers, but reversed on the second question of whether severing the tenure protections for these APJs is constitutional.

Respectfully submitted,

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