No. 22-298

In The
Supreme Court of the United States

JUMP ROPE SYSTEMS, LLC,

Petitioner,

v.

COULTER VENTURES, LLC,
dba ROGUE FITNESS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF OF *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

This Court repeatedly has held that, absent a directive to the contrary in a federal statute or rule of procedure, federal courts should not (1) create issue- or claim-preclusion rules that are inconsistent with the *Restatement (Second) of Judgments*; or (2) create common-law procedural rules applicable in patent-law cases that differ in application from federal cases generally. Nonetheless, the Federal Circuit did just that in *XY, LLC v. Trans Ova Genetics, L.C.*, 890 F.3d 1282 (Fed. Cir. 2018), by creating a widely applicable collateral-estoppel rule in patent-infringement cases flatly inconsistent with section 28(4) of the *Restatement* and in direct conflict with this Court's decisions in *Grogan v. Garner*, 498 U.S. 279 (1991); *Medtronic, Inc. v. Mirowski Family Ventures*, LLC, 571 U.S. 191 (2014); and *B&B Hardware, Inc. v. Hargis Indus.*, 575 U.S. 138 (2015). The Federal Circuit applied *XY, LLC* in petitioner's patent-infringement case as dispositive in denying petitioner relief.

The question presented is:

Whether, as a matter of federal patent law, a determination of patent invalidity by the Patent Trial and Appeal Board in an inter partes proceeding, affirmed by the Federal Circuit, has a collateral-estoppel effect in a patent-infringement lawsuit filed in federal district court by the patentee.

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INTERESTS OF *AMICUS CURIAE*[1]

Amicus Curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum ELDF") was founded in 1981 by Phyllis Schlafly, who vocally defended traditional patent rights. Eagle Forum ELDF advocates that the bedrock of our Nation's prosperity is our traditional American patent system. In addition to publishing materials on this topic, Eagle Forum ELDF has filed multiple *amicus curiae* briefs in this

[1] *Amicus* provided the requisite ten days' prior written notice to all the parties, who have all filed blanket written consent for *Amicus* to file this brief. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to the preparation or submission of this brief.

Court and elsewhere on the side of small inventors for more than a decade, including in *Bilski v. Kappos*, 561 U.S. 593 (2010).

Amicus therefore has strong interests in this Petition for a Writ of Certiorari.

SUMMARY OF ARGUMENT

This case presents a separation-of-powers violation that further erodes patent rights, and thereby decreases the incentives for innovation on which the United States economy depends for continued prosperity. Separation-of-powers doctrine should be enforced here to rein in the runaway administrative state and thereby limit its growing harm to intellectual property.

The well-established burden of proof to invalidate a patent in court is the clear and convincing standard. In an administrative proceeding before the Patent Trial and Appeal Board (PTAB), the burden of proof is lower, requiring merely a preponderance of evidence to invalidate a patent. The error by the Federal Circuit is to allow a patent infringer – here, allegedly the Respondent – to circumvent the higher standard in court by exploiting an administrative action in order to apply the administrative result retroactively in frustration of the Article III adjudication. This procedure plainly violates separation-of-powers doctrine.

An American inventor here, Molly Metz of Colorado, thereby loses the value in her unique jump rope patents to Chinese exporters of unlicensed similar technology. The loss is not merely to this inventor – which is cert-grant-worthy in itself – but to

all future American inventors whose creative genius is thereby discouraged. Today, China issues and protects more patents in imitation of the traditional American patent system, while the lobbyist-driven administrative state in D.C. goes in the opposite direction in denigration of traditional patent rights and our economy. The judiciary, not Congress, has caused this erroneous, harmful result, and the Petition should be granted to correct it on this matter of substantial national importance.

ARGUMENT

I. The Administrative State Violates Separation of Powers by Encroaching on a Judicial Standard.

The ever-growing administrative state transgressed separation-of-powers doctrine by invalidating these patents under a preponderance-of-evidence standard, which the Federal Circuit then improperly applies retroactively against an Ohio federal judicial proceeding that uses a clear-and-convincing standard. Separation of powers should prevent such interference by the administrative state in the judicial process, and the Petition should be granted before this grave error spreads further.

Petitioner should have had a valid claim for patent infringement in federal court, where her patent can only be invalidated by a showing of clear and convincing evidence by the alleged infringer. As this Court expressly held about a decade ago in an 8-0 decision:

> Under § 282 of the Patent Act of 1952, "[a] patent shall be presumed valid" and "[t]he burden of

> establishing invalidity of a patent or any claim thereof shall rest on the party asserting such invalidity." 35 U.S.C. § 282. We consider whether § 282 requires an invalidity defense to be proved by clear and convincing evidence. We hold that it does.

Microsoft Corp. v. i4i Ltd. P'ship, 564 U.S. 91, 95 (2011).

The Executive Branch, through the Patent Trial and Appeal Board (PTAB), cannot properly interfere with that standard in an ongoing federal court proceeding, in this case in Ohio, through use of the lower preponderance-of-the-evidence standard. Yet the Federal Circuit below fully embraced this violation of separation-of-powers doctrine.

Justices Thomas and Scalia criticized a less egregious violation of separation of powers in the analogous context of trademarks:

> The Court today applies a presumption that when Congress enacts statutes authorizing administrative agencies to resolve disputes in an adjudicatory setting, it intends those agency decisions to have preclusive effect in Article III courts. That presumption was first announced in poorly supported dictum in a 1991 decision of this Court, and we have not applied it since.

B&B Hardware, Inc. v. Hargis Indus., 575 U.S. 138, 161 (2015) (Thomas and Scalia, JJ., dissenting).

Justice Gorsuch expressed an analogous concern in his concurrence in a patent decision less than two years ago:

> For most of this Nation's history, an issued patent was considered a vested property right that could

> be taken from an individual ***only through a lawful process before a court***. *Oil States Energy Services, LLC* v. *Greene's Energy Group, LLC*, 584 U. S. ___, ___-___, 138 S. Ct. 1365, 200 L. Ed. 2d 671 (2018) (Gorsuch, J., dissenting). I continue to think this Court's recent decision in *Oil States*—upsetting this traditional understanding and allowing officials in the Executive Branch to "cancel" already-issued patents—departed from the Constitution's separation of powers. But it would be an even greater departure to permit those officials to withdraw a vested property right while accountable to no one within the Executive Branch.

United States v. Arthrex, Inc., 141 S. Ct. 1970, 1988 (2021) (Gorsuch, J., concurring in part and dissenting in part, emphasis added).

Despite the above, the Federal Circuit allows PTAB to change the burden of proof in an ongoing Article III judicial proceeding, to the detriment of the earnest patent-holder Molly Metz. The PTAB goes beyond the proper boundaries of Executive Branch power as recognized by Justices of this Court in other circumstances. *Cf. Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261, 286 (2016) (Thomas, J., concurring in judgment) (""[T]he discretion inherent in executive power does not comprehend the discretion to formulate generally applicable rules of private conduct.").

This disruption of separation of powers is worse than what multiple Justices astutely complained about above. Here the Executive Branch is interfering with an ongoing Article III adjudication by using a lower burden of proof than what this Court has established that the Article III court should use. This is not merely one branch of government encroaching

on another, but is more than that: it is the Executive Branch overriding and disrupting the Judicial Branch in an ongoing proceeding, as it tries to do its job as directed by Congress and the Constitution.

Justice Alito wrote the following for the Court while invalidating a separation-of-powers violation:

> As we have explained on many prior occasions, the separation of powers is designed to preserve the liberty of all the people. *See, e.g.*, *Bowsher v. Synar*, 478 U. S. 714, 730, 106 S. Ct. 3181, 92 L. Ed. 2d 583 (1986); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 635, 72 S. Ct. 863, 96 L. Ed. 1153, 62 Ohio Law Abs. 417 (1952) (Jackson, J., concurring) (noting that the Constitution "diffuses power the better to secure liberty"). So whenever a separation-of-powers violation occurs, any aggrieved party with standing may file a constitutional challenge.

Collins v. Yellen, 141 S. Ct. 1761, 1780 (2021) (many additional citations omitted).

James Madison enthusiastically agreed. "No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty" than the separation of powers. The Federalist No. 47, at 301 (James Madison) (C. Rossiter ed., 1961). "The legislature makes, the executive executes, and the judiciary construes the law." *Wayman v. Southard*, 23 U.S. 1, 46, 6 L. Ed. 253 (1825). A judicial proceeding concerning patent validity should not be disrupted by an agency decision using a lower burden of proof.

Courts "have too long abrogated [their] duty to enforce the separation of powers required by our

Constitution." *DOT v. Ass'n of Am. Railroads*, 575 U.S. 43, 91 (2015) (Thomas, J., concurring). A circuit split on this issue is unlikely ever to occur, because patent appeals are routed through the same Federal Circuit. That particular court has repeatedly committed this error of constitutional significance, and the Petition should be granted to reestablish separation of powers against the encroaching administrative state.

II. The Unconstitutional Erosion of Separation of Powers Transfers Influence to the Lobbying of Federal Agencies.

A record sum of nearly $4 billion, not merely million, was spent in 2021 "to lobby Congress ***and federal agencies***. Some special interests retain lobbying firms, many of them located along Washington's legendary K Street …."[2] While political contributions to candidates tend to receive the most publicity, "lobbying expenditures are the most important channel of political influence, more than ten times larger than PAC contributions."[3] In 2022, direct lobbying expenditures – which includes lobbying of federal agencies – by China and Chinese companies alone exceeded $10 million.[4]

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[2] https://www.opensecrets.org/federal-lobbying (viewed Oct. 23, 2022, emphasis added).

[3] Blanga-Gubbay, Conconi, and Parenti, "Lobbying for Globalization: How the Winners Dominate the Politics of Trade Agreements" (May 4, 2021) https://www.promarket.org/2021/05/04/lobbying-large-firms-politics-trade-agreements/ (viewed Oct. 25, 2022).

[4] https://www.opensecrets.org/fara/countries/223 (viewed Oct. 25, 2022).

Amid this lobbying influence, an astronomically high 84% of patents challenged in proceedings filed with the administrative agency PTAB are invalidated in whole or in part.[5] These are all patents that the same parent agency, the United States Patent and Trademark Office ("USPTO"), granted at enormous expense to the patent-holders, including Molly Metz in this case. Meanwhile, 87.2% of such inter partes review proceedings before PTAB are redundant with concurrent litigation in federal court.[6]

The result of the high invalidation rate by the PTAB, often contrary to the rulings by federal district courts, is to discourage American innovators from patenting in the United States, while China welcomes and protects innovation. "In 2021, the USPTO granted a total of 327,798 utility patents, down 7% from the previous year."[7] China, in contrast, has adopted the pro-patent system that the United States once had before the Federal Circuit and a runaway administrative state undermined patents here:

> In 2021, 696,000 invention patents were granted [in China], a year-on-year increase of 31.3%. Among them, 586,000 domestic invention patents were granted, accounting for 84.2% of the total; 110,000 foreign-originated invention patents were

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[5] https://usinventor.org/ptab-statistics/ (viewed Oct. 25, 2022).

[6] https://www.venable.com/-/media/files/publications/2020/11/2020-analysis-on-ptab-contested-proceedings.pdf? (p. 13, viewed Oct. 25, 2022).

[7] https://www.visualcapitalist.com/visualizing-companies-with-the-most-patents-granted-in-2021/ (viewed Oct. 23, 2022).

granted in China, a year-on-year increase of 23.0%.[8]

Additional data confirm this growing disparity. "In 2019, [the World Intellectual Property Organization] reported that China filed 1.4 million patents, or 43.4 percent of the world's total patent applications that year. This was more than twice the level of applications in the United States." Kirsten, Athanasia, and Arcuri, "What Can Patent Data Reveal about U.S.-China Technology Competition?" Center for Strategic & International Studies (Sept. 19, 2022).[9]

If Congress had mandated this loss in intellectual property leadership for the United States, then this Court would understandably remain on the sidelines in deference to Congress. But, in fact, the Federal Circuit is causing this erosion by judicial fiat, improperly transferring authority from independent federal district courts to the lobbyist-influenced administrative state. The United States is thereby being reduced to second-rate status in protecting patents, despite how the U.S. Constitution uniquely established our patent system that facilitated centuries of American prosperity.

In the 19th century this Court successfully rejected an analogous encroachment by the Executive Branch on judicial autonomy over a different kind of patent. Then land patents were a successful way to

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[8] "China's National Intellectual Property Administration Issues 2021 Annual Report," *National Law Review* (June 6, 2022), https://tinyurl.com/3usjyrt8 (viewed Oct. 23, 2022).

[9] https://www.csis.org/analysis/what-can-patent-data-reveal-about-us-china-technology-competition (viewed Oct. 24, 2022).

encourage westward migration, and those patents worked well because title to them was respected and protected by the judiciary without allowing interference by the Executive Branch:

> But in all this there is no place for the further control of the Executive Department over the [land patent] title. The functions of that department necessarily cease when the title has passed from the government. … If this were not so, the titles derived from the United States, instead of being the safe and assured evidence of ownership which they are generally supposed to be, would be always subject to the fluctuating, and in many cases unreliable, action of the land-office. No man could buy of the grantee with safety, because he could only convey subject to the right of the officers of the government to annul his title.
>
> … The existence of any such power in the Land Department ***is utterly inconsistent with the universal principle on which the right of private property is founded***.

Moore v. Robbins, 96 U.S. 530, 533-34 (1877) (emphasis added). *See also United States v. Stone*, 69 U.S. (2 Wall.) 525, 535 (1865) ("[O]ne officer of the land office is not competent to cancel or annul the act of his predecessor. ***That is a judicial act, and requires the judgment of a court***.") (emphasis added).

Judicial economy does not justify abdicating this judicial autonomy to an administrative proceeding that uses a lower burden of proof. Application of collateral estoppel from an administrative proceeding into an ongoing Article III court proceeding may ostensibly seem to conserve judicial resources, but a

federal court has astutely doubted even that small potential benefit:

> I also note that, given the late hour at which [defendant] Liquidia presented its motion, I don't see how issue preclusion effectively accomplishes the goals of conserving judicial resources or preventing unfair burden. Having carefully reviewed the record, I am confident that the Court's consideration of Liquidia's issue preclusion theory is at least as great of an expenditure of judicial resources as trying the issue of validity.

United Therapeutics Corp. v. Liquidia Techs., No. 20-755-RGA-JLH, 2022 U.S. Dist. LEXIS 48461, at *10 (D. Del. Mar. 18, 2022).

Nor should hope be misplaced in Congress to correct this messy interference by the administrative state with Article III adjudication. The Constitution already stands against this derogation of patent rights in Article III adjudication. For example, this Court has observed that the Constitution protects property, not merely liberty or privacy. *See, e.g.*, *Soldal v. Cook Cty.*, 506 U.S. 56, 69 (1992) (emphasizing that the Fourth Amendment protects property, not merely privacy); *United States v. Jones*, 565 U.S. 400, 405 (2012) (embracing the *Soldal* decision, and adding that "our Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century") (Scalia, J.).

Federal courts should safeguard what is arguably the highest form of property: patent rights that encourage innovation to spur our economic growth, as the only right expressly recognized and protected by the original Constitution. U.S. CONST. art. I, § 8, cl.

8. This case presents an excellent vehicle to affirm adherence to separation of powers in protection of this fundamental right against encroachment by the lobbyist-influenced administrative state.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: October 27, 2022