

No. 2014-1527

**THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

CLEARCORRECT OPERATING, LLC AND
CLEARCORRECT PAKISTAN (PRIVATE), LTD.,

Appellants

v.

INTERNATIONAL TRADE COMMISSION,

Appellees,

and

ALIGN TECHNOLOGY, INC.,

Intervenor.

*Appeal from the United States International Trade Commission in Investigation No.
337-TA-833.*

**BRIEF OF AMICUS CURIAE
INTERNATIONAL CENTER FOR LAW & ECONOMICS
IN SUPPORT OF APPELLEE'S PETITION
FOR REHEARING EN BANC**

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TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iii
IDENTITY AND INTEREST OF <i>AMICUS CURIAE</i>	iv
INTRODUCTION.....	1
ARGUMENT.....	2
I. THE PANEL MAJORITY INCORRECTLY HELD THAT THE TERM “ARTICLES” IN SECTION 337 WAS NOT AMBIGUOUS.....	2
II. THE PANEL MAJORITY INCORRECTLY DISMISSED THE COMMISSION’S REASONABLE INTERPRETATION OF “ARTICLES”6	
III. THE COMMISSION DID NOT IMPERMISSIBLY EXPAND ITS AUTHORITY, BUT THE PANEL MAJORITY IMPROPERLY RESTRICTED IT.....	8
CONCLUSION.....	10
CERTIFICATE OF COMPLIANCE.....	12
CERTIFICATE OF SERVICE.....	13

TABLE OF AUTHORITIES

Cases

<i>Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.</i> , 467 U.S. 837 (1984)	1,3,5,7
<i>Int'l News Serv. v. Associated Press</i> , 248 U.S. 215, 221 (1918)... ..	8
<i>Nat'l Cable & Telecommunications Ass'n, Inc. v. Gulf Power Co.</i> , 534 U.S. 327, 338-39 (2002).....	3
<i>Nat'l Tel. News Co. v. W. Union Tel. Co.</i> , 119 F. 294, 295 (7th Cir. 1902)	9
<i>Suprema, Inc. v. ITC</i> , 796 F.3d 1338 (Fed. Cir. 2015)	passim
<i>Twentieth Century Music Corp. v. Aiken</i> , 422 U.S. 151, 156 (1975)	3

Administrative Decisions

<i>In re Certain Digital Models</i> , Inv. No. 337-TA- 833 at 55 (Apr. 3, 2014)	8
---	---

Statutes

19 U.S.C. § 1337	1
Tariff Act of 1922	passim
Tariff Act of 1930	passim

Other Authorities

S. Rep. 67-595 (1922)	3,9
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IDENTITY AND INTEREST OF *AMICUS CURIAE*

Amicus ICLE is a nonprofit, non-partisan global research and policy center. ICLE works with more than fifty affiliated scholars and research centers around the world to promote the use of evidence-based methodologies in developing sensible, economically grounded policies that will enable businesses and innovation to flourish.

As a leading academic center for intellectual property and international trade policy research (among other things), ICLE has followed this case closely. ICLE scholars have written extensively and spoken at public events about the case.

The outcome of this litigation will have a significant impact on both the legitimate expectations of rights holders, as well on the continued functioning and relevance of the International Trade Commission in the modern, digital economy. ICLE is dedicated to providing a carefully reasoned law and economics analysis of these and related issues.¹

¹ This brief was not authored in whole or in part by a counsel to a party in this case. Neither a party nor a party's counsel contributed money that was intended to fund the preparation or submission of this brief. No person, other than *amicus*, contributed money that was intended to fund the preparation or submission of this brief.

INTRODUCTION

The majority writes as if language is perfectly determinate. Although *Chevron* counsels courts to look to a statute's original meaning, *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984), it by no means requires the termination of review at that stage. Step Two exists because rarely are words ever so clear as to convey their drafters' intent with a plain reading. Thus, except in rare cases where ambiguity clearly does not exist, courts must determine whether an agency's statutory interpretation was reasonable.

Here, the majority instead selected an exceedingly narrow and inappropriately static definition of the term "articles" as used in Section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337. It ignored a number of plausible, alternate meanings that would have been well understood by Congress when it drafted the Act. And it then faulted the Commission for not adopting the panel's preferred meaning, declaring the Commission's rigorous interpretation unreasonable. *Suprema v. ITC*, 796 F.3d 1338 (Fed. Cir. 2015) ("Op.") at 4.

The term "articles" is inherently ambiguous when it is plucked from 19th century language and applied to a 21st century technological problem. Because digital "things" of the sort at issue in this case did not exist when the Tariff Act was written, the court's mining of contemporaneous dictionaries was inappropriate. Instead, the proper task confronting the court was to determine if, given the objectives of the statute, the Act's necessarily imperfect language was reasonably interpreted by the Commission to accommodate later technological developments. Its task was *not* to determine whether "articles" was intended at the time of drafting to include a class of goods to which digital

data sets belong and which was also virtually unknown in 1922. As implemented, a general application of the court's approach would lead inexorably and inappropriately to a "linguistic sun-setting" of a large number of statutes as technology evolves.

The court also faulted the Commission for assuming the power to regulate the Internet. But this dramatically overstates the scope of authority claimed by the Commission. Properly understood, the Commission assumed no more power to regulate the Internet in its decision than it does over the highway system when it seeks to stop infringing goods from entering the U.S. by truck.

ARGUMENT

I. THE PANEL MAJORITY INCORRECTLY HELD THAT THE TERM "ARTICLES" IN SECTION 337 WAS NOT AMBIGUOUS

The basic question at issue is whether Congress's intent in 1922 and 1930 was that the generic term "articles" could reasonably be interpreted to include the importation of digital "articles" in 2012. But a "plain language" reading of the statute simply cannot determine whether Congress intended *digital* "articles" to be part of the Commission's purview. Rather, the appropriate exercise here is to discover whether Congress intended its language to be broad enough to cover new cases as they arose, or intended it to act as a limitation upon the scope of the Commission's future authority. It is not the ambiguity of the *word* "articles" that is properly at issue; rather, it is the ambiguity concerning the extent to which Congress intended the statute to be *limited* by the word. After all, "the meaning of a word must be ascertained in the context of achieving particular objectives..." *Chevron*, 467 U.S. at 861.

The panel majority does not adequately address this ambiguity. And by ignoring the relevant question, the majority effectively reads a non-existent “sun-setting” provision into the Tariff Act whenever technological progress outstrips the limits of 19th century language. But the language that Congress used in the Act was exceedingly broad, as it was meant to empower the Commission to prevent “every type and form of unfair practice” in the importation of goods. S. Rep. 67-595, at 3 (1922). Thus the panel majority effectively imposes a significant limit on an otherwise expansively written statute without any guidance from Congress.

It is *inherently* ambiguous to apply a 19th century word to 21st century technology. Congress could not have “directly spoken to the precise question,” *Chevron*, 467 U.S. at 842, of whether, in 1922, it intended for “articles” to include digital data files that could be used to print 3D models. Given this inherent ambiguity, deference is explicitly called for by the Court. *See Nat'l Cable & Telecommunications Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 338-39 (2002) (Deference is proper in situations where an agency’s subject matter “might be expected to evolve in directions Congress knew it could not anticipate.”); *see also Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“When technological change has rendered its literal terms ambiguous, the... Act must be construed in light of [its] basic purpose.”).

If Congress did not intend for the statute to be bound only by the attributes of “articles” known in 1922, it is an absurd exercise to look to contemporaneous dictionaries in order to divine the word’s authoritative definition. It is more reasonable to infer that “articles” was meant to include at least *some* things that were not known to Congress in 1922. Thus, the

appropriate exercise is to determine the reasonableness of the Commission's interpretation of the evolving scope of the word.

For the Commission, the word was merely a syntactic necessity and not a statement of statutory objective. Tellingly, Congress did not include a statutory definition of "articles" in the Act—a stark distinction from *Chevron* itself where the term at issue was defined in the Clean Air Act Amendments. Far from imbuing it with dispositive significance, the absence of a statutory definition suggests that the word was not meant to be limiting; it was merely a word in common usage, essentially equivalent to basic terms like "things" or "items."

After all, what word *other* than "articles" could Congress have used if it *did* want to include intangible things within the scope of the Act? Any other synonyms would be subject to the same objections as the majority applied to the word "articles." Seemingly, it is only if Congress specifically qualified the term with "tangible and intangible" that its language would pass muster with the majority. However, logically such a construction would mean that the unadorned term, "articles," *could* include both tangible and intangible articles, and thus, at worst, its absence renders the use of the word "articles" ambiguous.

Moreover, Congress did see fit to modify the word "articles" in the Act in order to make clear the Act's "particular objectives," *Chevron*, 467 U.S. at 861. The 1922 Tariff Act (whence the court identifies the origins of the word "articles") declares unlawful the importation of "articles" "the effect or tendency of which is to... substantially injure an industry... in the United States." Tariff Act of 1922, Ch. 356 § 316 (1922).

To the extent that Congress saw fit to delimit the sorts of articles to which the Act would apply, it did so with reference to the consequences of their

importation—not their tangibility. That digital commerce in 2012 could have the “effect or tendency” to cause the harms described in the 1922 Tariff Act is undeniable, and, more to the point, unrelated to an article’s tangibility. By focusing myopically on the physical characteristics of “articles,” the majority actually frustrates Congressional intent.

Finally, it must be pointed out that, by implication, the court acknowledges (as it must) that Congress could not have intended “articles” to include “digital data sets” or “electronically transmitted digital models” or any of a number of other descriptors of the products in question. Instead, the panel majority simply assumes (correctly) that such an analysis would be inappropriate, presumably because it knows that to do so would be to restrict the Act to the scope of technological knowledge in 1922. But the same is true of the analysis that the court did undertake, and it is only the court’s forbearance, and nothing in its approach to statutory interpretation, that precludes such enforced stasis. Such a mode of analysis must be in error.

In fact, the court’s hyper-literal approach to statutory construction would grant the court an almost unlimited authority to undermine the intent of any act of Congress, so long as it was written long enough ago that relevant, new technology exists. Such a reading would render the Fifth Amendment inoperable in the digital realm; it would render the Second Amendment inapplicable to anything but muskets; and it would render modern Eighth Amendment jurisprudence limiting the types of drugs that can be used to administer capital punishment irrelevant. In short, the court’s analysis entails a brand of strict constructionism that would make even the staunchest

originalist blush. That this approach is wholly inconsistent with current standards of statutory construction is apparent on its face.

The court’s quixotic attempt to understand an unforeseen technology through the eyes of drafters from long ago demonstrates nothing so much as the inherent ambiguity in the text of the statute. The effort to try on various definitions found in an arbitrary set of 1922 dictionaries, Cinderella-like, in an effort to shoehorn digital “articles” into one of them is simply anachronistic and inapposite.

II. THE PANEL MAJORITY INCORRECTLY DISMISSED THE COMMISSION’S REASONABLE INTERPRETATION OF “ARTICLES”

Although the majority erred by failing to grasp the inherent ambiguity of “articles,” even on its own terms the court’s analysis is flawed. In the course of its “commonsense” approach to discovering the meaning of the word “articles,” Op. at 3, the court picked among a variety of competing definitions, ultimately selecting its preferred meaning that “‘articles’ means ‘material things.’” *Id.* at 19.² Surely any attempt at divining intent requiring five pages of selective

² It is notable that *Suprema’s* dissent (here, the panel majority) committed a similar error, which this decision seems designed to perpetuate rather than correct. There, the dissent claimed “[t]he word ‘articles’ is not ambiguous—it has a well-defined legal definition. See Black’s Law Dictionary (defining ‘article’ as ‘[g]enerally, a particular item or thing’).... The word connotes a physical object.” *Suprema, Inc.*, 796 F.3d at 1355 (O’Malley, Circuit Judge, dissenting). There is no citation to any authority for replacing Black’s use of “particular” with the dissent’s use of “physical.” This same error—inferring tangibility from the various definitions of “article” that actually imply separation or distinction—animates this majority’s holding.

dictionary analysis, *Id.* at 14-19, in order to determine what Congress might have meant cannot justify an assertion that Congress has “directly spoken to the precise question at issue.” *Chevron*, 467 U.S. at 842.

But even in the context of the its hypothetical Step Two analysis, the panel majority’s impressionistic dictionary exercise was an inappropriate basis for ruling that the Commission’s similar exercise—an exercise that referenced many of the same dictionaries, and drew its own, similarly grounded general sense from a set of disparate definitions—didn’t merit deference under *Chevron*. “In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by... an agency.” *Id.* at 844.

The court’s primary source of disagreement with the Commission fails to demonstrate that the Commission’s interpretation was unreasonable. The court claims that

the Commission turns to the 1924 edition of the Webster’s dictionary for the definition of “article,” but rather than adopt that definition it concludes that it will “embrace a broader meaning that describes something that is traded in commerce.” In other words, it generates its own definition, unrelated to the definition provided by the dictionary.

Op. at 31-32 (citation omitted). But that is not what the Commission said. Rather, the Commission noted that

[s]ome definitions of ‘article,’ *in addition to stating a broader generic meaning*, also set forth a more granular meaning of a material thing.... Thus... the term was also understood to embrace a broader meaning that describes something that is traded in commerce.”

Final Comm'n Op. at 39, note 20 (emphasis added). The Commission did not manufacture a definition of the word “articles,” as the court’s excerpt suggests; rather, as the full quote makes clear, the Commission adopted a meaning that was “embraced” by contemporaneous dictionaries.

In fact, the Commission quoted a broad range of definitions for “articles”—including those which narrow the term to material things. By simply choosing a *different* dictionary definition and falsely claiming that the Commission simply made up its own definition, the court does not demonstrate that the Commission’s interpretation was unreasonable.

At the same time, it was well understood by 1922 that “intangible” things could harm commerce. A well-known case from 1918, for instance, arose out of a misappropriation action involving parties that used telegraph lines to transmit intangible “articles.” *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 221 (1918). And, in an earlier case, it was held that a party could sue for misappropriation involving electronic signals transmitted to a ticker-tape machine. *Nat'l Tel. News Co. v. W. Union Tel. Co.*, 119 F. 294, 295 (7th Cir. 1902). Thus, it is difficult to conclude that Congress was unaware that articles *could* be intangible, and that they could be the instruments of the sort of unfair competition that the Tariff Act was meant to deter.

III. THE COMMISSION DID NOT IMPERMISSIBLY EXPAND ITS AUTHORITY, BUT THE PANEL MAJORITY IMPROPERLY RESTRICTED IT

The majority essentially holds that the existence or absence of a physical medium on which a data set is fixed is the dividing line Congress intended between “articles” that violate the statute and other “things” that don’t. But

this holding implies that Congress intended to write a statute whose scope turned on something (the physical-ness of the thing at issue) utterly *irrelevant* to its ability to cause the *actual* harm the statute was intended to address.

At the same time, the Commission’s interpretation does not expand its authority beyond what Congress intended. Digital articles have the relevant sorts of properties that matter for trade laws. The data sets in question were defined models of particular sets of teeth straighteners—not a vague, accidental, or ephemeral digital mist. And they had economic value, were traded in commerce, and were actually causing the very harm the statute was intended to avoid.

The Act’s prohibition on the importation of unfairly competing goods was intended to prevent every type and form of unfair practice. S. Rep. 67-595, at 3 (1922). The Commission’s interpretation of “articles” to include these well-defined digital files does not impermissibly expand its authority, which properly includes the universe of imports that harm commerce. Rather, its interpretation furthers the clear objectives of the statute and enables the agency to enforce the Act in some of the country’s most economically significant industries.

Similarly, Judge O’Malley’s concern that “it is very unlikely that Congress would have delegated the regulation of the Internet to the Commission,” Concurring. Op. at 3, is misplaced. Nothing in the Commission’s opinion asserts authority to “regulate the Internet.”

The Commission did not assert jurisdiction over all electronically transmitted information, nor over the Internet in general. This case was about an infringing, illegal production method for physical goods that happened to

involve the importation of digital data sets, and its precedential value is limited to similar circumstances.

The ITC is empowered to police unfair competition over telecommunications networks in exactly the same way it is empowered to prevent someone from transporting infringing products across the Mexican border by truck. No one would think to claim that the ITC has the ability to regulate highways because of its U.S.-Mexico customs authority. Similarly, merely stopping infringing digital articles from reaching the U.S. via the “information superhighway” won’t give the ITC any new power to regulate the Internet. That infringing “articles” might arrive via data packets rather than cargo containers is immaterial.

The great irony of the court’s approach is that it inherently constrains the ITC’s power over time, in *precisely* those areas that grow in economic significance and thus have the greatest power to do the damage that the statute was intended to stop. The court offers no evidence to support this as the proper interpretation of the statute, and certainly offers nothing to support the contention that the Commission’s contrary interpretation was unreasonable (as it must under *Chevron*).

CONCLUSION

For the foregoing reasons, the Appellee’s motion for a rehearing *en banc* should be granted.

Respectfully submitted,

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Dated: February 10, 2016

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 29(c)(7) and Federal Circuit Rule 32(a), I hereby certify that this brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(A) & (B). As per Federal Circuit Rule 32(a)(7) and Federal Circuit Rule 35(g), this brief allows for a maximum of 10 pages or 4,660 words. This brief was prepared in Microsoft Word 2013 using a proportionally spaced type (Century Schoolbook, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), this brief contains 2697 words.

/s/ Geoffrey Manne

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February 10, 2016

CERTIFICATE OF SERVICE

I hereby certify that, on February 10, 2016, I electronically filed the foregoing *amicus curiae* brief with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Geoffrey Manne

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February 10, 2016