June 26, 2020

United States Patent and Trademark Office
600 Dulany Street
P.O. Box 1450
Alexandria, VA 22313

**Re: Center for Individual Freedom Comment in Support of Notice of Proposed Rulemaking, Docket No. PTO-P-2019-0024**

To Whom It May Concern:

On behalf of over 300,000 supporters and activists across the nation, the Center for Individual Freedom (hereinafter "CFIF") hereby submits its Comment in support of Notice of Proposed Rulemaking, Docket No. PTO-P-2019-0024.

CFIF is a nonprofit, nonpartisan 501(c)(4) organization established in 1998 for the purpose of safeguarding and advancing Constitutional rights, technological innovation, free market principles and fidelity toward the rule of law. As a core component of that mission, CFIF advocates for public policies that preserve our nation's legacy of strong intellectual property (IP) protections, including patent rights. In that vein, the Proposed Rulemaking under consideration by the United States Patent and Trademark Office (hereinafter "USPTO") offers important improvements to the way in which the Patent Trial and Appeal Board (hereinafter "PTAB") reviews patent challenges, and it is on that basis that CFIF respectfully submits this Comment in support of the Proposed Rulemaking.

As an initial matter, it bears emphasizing that in our brief existence the United States stands unrivaled as the most inventive, creative, prosperous and powerful nation in human history. That is a direct consequence of our legacy of protecting patent and other IP rights like no other nation. Our Founding Fathers considered IP rights so important that they deliberately protected them in the text of Article I of the Constitution, which reads, "The Congress shall have the Power ... [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." They recognized that strong patent rights serve both a utilitarian purpose in incentivizing innovation, while also safeguarding our natural rights by allowing inventors to enjoy the rightful fruits of our labor. As patent attorney Abraham Lincoln himself later observed, "The patent system added the fuel of interest to the fire of genius."

Lincoln's observation is borne out by the fact that no nation approaches America's record of scientific invention, from lifesaving pharmaceuticals to powered flight to communications technology.

Disturbingly, however, America's traditional position atop world rankings of patent protections has receded in recent years, attributable in large part to administrative patent system changes that occurred during the Obama Administration, including PTAB rulings that eliminate at least one existing patent in nearly 80% of petitions before it.[1] Judicial decisions interpreting federal laws in a way that weakened patent enforcement and substantive protections also played a role.

Fortunately, more recent executive branch decisions have interrupted that slide and reemphasized the importance of strong patent rights to America's economy, preventing foreign theft and incentivizing invention.

The instant Proposed Rulemaking extends that rejuvenation of stronger patent protections in important ways.

First and foremost, the Proposed Rulemaking would eliminate the indefensible presumption created in 2016 under former USPTO Director Michelle Lee in favor of challenging petitioners as it relates to evidence presented during proceedings.[2] That presumption that, "testimonial evidence will be viewed in the light most favorable to the petitioner" contravenes basic concepts of fairness and due process, elevating one party's claims over another, which has resulted in increased uncertainty in our nation's patent system. As the Notice of Proposed Rulemaking correctly acknowledges, a presumption favoring petitioners serves to discourage patent owners from filing testimonial evidence as part of their responses, due to the justified concern that such evidence will not receive proper consideration in review proceedings. The existing presumption only serves to encourage dubious patent challenges and infringements, and therefore merits reversal.

Second, CFIF supports the Proposed Rulemaking in its effort to better align PTAB procedures with the United States Supreme Court's recent decision in *SAS Institute Inc. v. Iancu* (2018)[3]. Specifically, under the Proposed Rulemaking, the PTAB cannot institute on fewer than all claims challenged in a petition, but instead must institute on all of the claims challenged in the petition or deny the petition in its entirety. Previously, as the Notice of Proposed Rulemaking correctly observes, the PTAB exercised discretion to institute on all or some of the challenged claims, and on all or some of the grounds of alleged unpatentability asserted in petitions before it. In light of the SAS decision, the PTAB must institute on all claims and all grounds going forward, which constitutes an important advance for due process and legitimate patent rights.

CFIF also supports the Proposed Rulemaking effort to permit replies and patent owner responses to address issues discussed in institution decisions, and sur-replies to principal briefs, such as replies to patent owner responses or replies to oppositions to motions to amend. This proposed change

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1 See, e.g., https://www.uschamber.com/sites/default/files/023331_gipc_ip_index_2018_opt.pdf.

2 37 CFR 42, Docket No. PTO-P-2015-0053.

3 138 S.Ct. 1348 (2018).

accords with concepts of fairness and due process as it relates to the practice of evidentiary filings in decisions and replies.

For these reasons, CFIF respectfully supports the Proposed Rulemaking. Thank you very much for your attention to this important matter.

Respectfully Submitted,

/s/

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