NO. 23-1217

In the Supreme Court of the United States

CHESTEK PLLC,

Petitioner,

v.

KATHI VIDAL, DIRECTOR,
UNITED STATES PATENT AND TRADEMARK OFFICE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF AMICI CURIAE INTERNATIONAL GAME DEVELOPERS ASSOCIATION AND CODEMIKO PROJECT, LLC IN SUPPORT OF PETITIONER

Brandon J. Huffman
Counsel of Record
Connor Richards
Michele Robichaux
Ryan Fairchild
Amanda Whorton
ODIN LAW AND MEDIA
4600 Marriott Drive, Suite 520
Raleigh, NC 27612
(919) 813-0090
brandon@odinlaw.com

June 13, 2024 *Counsel for Amici Curiae*

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

The International Game Developers Association ("IGDA") is a California nonprofit association serving 34,000 games industry professionals. IGDA seeks to enhance the lives of game developers by connecting members with their peers; promoting professional development; publishing on technical, creative, and business matters of interest to the development community; and advocating on issues that affect the community. IGDA has 64 chapters in the United States and 67 abroad.[2]

CodeMiko Project, LLC is a Delaware limited liability company that serves as a holding company for CodeMiko,[3] a digital avatar representing an internet-based entertainer (a "VTuber") best known for interviewing other streamers and content creators, as well as pushing interactive VTuber technology forward. CodeMiko has a vested interest in maintaining individual privacy for herself and her peers.

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[1] Pursuant to this Court's Rule 37.3(a), all parties have received timely notice of the intent to file this brief. Pursuant to Rule 37.6, amici affirm that no counsel for a party wrote this brief in whole or in part, and no party, party's counsel or any person other than amici made a monetary contribution intended to fund the brief's preparation or submission.

[2] *Chapters*, International Game Developers Association, https://igda.org/chapters/ (last visited June 11, 2024).

[3] "CodeMiko" is the alias of Youna Kang, an individual citizen of the United States who operates the digital avatar.

Members of the video game and content creation industries routinely do business using proprietary marks and file applications with the United States Patent and Trademark Office ("PTO") to protect these marks. They apply for these registrations based on an understanding of the informational burden required by the application process and their expectations surrounding potential exposure created by submitting this information to a federal government unit that will publish this information on a publicly accessible database. Accordingly, these parties have vested interests in participating in processes whereby they may be able to limit this personal exposure and sensibly tailor information requests to affect public policy.

This Court's review is needed to clarify whether constituents have the ability to participate in notice-and-comment rulemaking processes to represent their interests. To aid in that clarification, IGDA and Code-Miko file this brief in support of the petition for writ of certiorari to provide the Court foundational information about the game development industry, the digital entertainment and VTuber industries and their particular interests in both the protection of trademarks and the privacy of their individual members.

SUMMARY OF ARGUMENT

The U.S. Court of Appeals for the Federal Circuit (the "Federal Circuit") erred in holding that the PTO was not obligated to engage in notice-and-comment rulemaking when it enacted a final rule (the "Final Rule") materially modifying a proposed rule with an additional requirement that all trademark applicants provide their domicile addresses.[4] This rule was promulgated with the purpose of requiring that applicants located outside of the United States retain an attorney located inside the United States to ensure better conformance with trademark law and to reduce the number of fraudulent applications.

As a matter both of policy and of proper statutory interpretation, the PTO should have engaged in notice-and-comment rulemaking. Notice-and-comment rulemaking is mandated by the statute setting out the PTO's rulemaking authority where substantive rights of individuals are concerned. Further, engaging in notice-and-comment rulemaking provides the public with an opportunity to better inform the PTO on the potential secondary harms caused by the rule. Here, the requirement that trademark applicants provide the PTO with their domicile addresses carries with it significant secondary harms related to trademark registration applicant privacy and safety.

The private information of applicants and associated secondary harm provides no value to the PTO's

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[4] The Federal Circuit's opinion is reported at *In re Chestek PLLC*, 92 F.4th 1105 (Fed. Cir. 2024).

stated objective where applicants are already represented by United States attorneys and such attorneys' information is reported to the PTO.

For these reasons, the petition for certiorari should be granted, and the decision of the Federal Circuit should be reversed.

ARGUMENT

I. The Notice-and-Comment Rulemaking Process Is a Critical Institution as a Matter of Public Policy That Ensures Administrative Rules Are Reasonable and Proper.

A. History and Importance of Notice-and-Comment Rulemaking.

The PTO, acting alone, has no legislative authority.

Article I, Section 1 of the United States Constitution vests all legislative powers in the Congress of the United States.[5] Since the Constitution's ratification, Congress has repeatedly delegated some legislative powers to administrative agencies via lawful enabling statutes. Such was the genesis of the PTO almost 200 years ago.[6]

Delegation of legislative power to agencies carries with it some public concern, particularly as Congress increasingly delegated authority during Franklin D.

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[5] U.S. Const. art. I, § 1.

[6] 35 U.S.C. § 1 (1836).

Roosevelt's administration.[7] Agencies are unelected bodies, constituted through standard hiring and executive appointments. Because agencies are not legislative bodies, they do not engage in public legislative debate, committee markup or voting processes. Further, rule-creating agencies never stand for election.

The concern is that individuals who do not directly answer to the voting public become "roving commission[s] to inquire into evils and upon discovery correct them."[8] This concern was realized during the New Deal, with courts at various levels issuing more than 1,600 injunctions against the enforcement of New Deal legislation, including delegations of authority to agencies.[9]

An American Bar Association Special Committee on Administrative Law formed in 1933, determined that New Deal agencies were "acting without considered judgment, without due process, without sufficient consideration of the issues, and without granting parties the right to be heard or procedures for relief."[10] To curtail this concern, the 79th Congress passed the Administrative Procedure Act (the "APA"),[11] which

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[7] Lars Noah, *Interpreting Agency Enabling Acts: Misplaced Metaphors in Administrative Law*, 41 WM. & MARY L. REV. 1463, 1464 (2000).

[8] *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935) (Cardozo, J., concurring).

[9] Roni Elias, *The Legislative History of the Administrative Procedure Act*, 27 FORDHAM ENV'T L. REV. 207, 209 (2015).

[10] *Id.* at 210 (citing Matthew D. McCubbins et al., *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180, 196 (1999)).

[11] 5 U.S.C. §§ 551–559 (1946).

codified requirements for how administrative agencies engage in rulemaking and adjudicate disputes arising under their authority.

A central fulcrum of the APA's new requirements was that agencies provide the public with adequate notice of a proposed rule and a meaningful opportunity to comment on the proposed rule (hereafter referred to as "notice-and-comment rulemaking").[12] Congress viewed notice-and-comment rulemaking as a minimum requirement, alongside any expectation that "[m]atters of great import, or those where the public submission of facts will be either useful to the agency or a protection to the public, should naturally be accorded more elaborate public procedures."[13]

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[12] 5 U.S.C. § 553. To that end, the Administrative Procedure Act required that proposed rulemaking include "(1) a statement of the time, place, and nature of public rulemaking proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved." Pub. L. No. 79-404, 60 Stat. 237, § 4(a) (1946). Once adequate notice is provided, the agency must provide interested persons with a meaningful opportunity to comment on the proposed rule through the submission of written "data, views, or arguments." *Id.* § 4(b).

[13] H.R. Rep. No. 1980, at 259 (1946).

B. The PTO Erred in Failing to Conduct Notice-and-Comment Rulemaking Prior to Requiring That Trademark Applicants Provide Their Domicile Address (This Rule Is Hereafter Referred to as the "Domicile Rule").[14]

1. The Domicile Rule Materially Impacts Individual Rights, Namely Individuals' Rights to Privacy, Such That It Cannot Be Considered a Procedural Rule.

The PTO's rulemaking authority is generally limited to the issuance of procedural rules.[15] Adoption of "substantive" rules requires a more robust process that includes providing the public with notice of the proposed rule and an opportunity to comment.[16] Where a final rule is not a "logical outgrowth" of a proposed rule, a new notice-and-comment rulemaking process is required.[17] "Substantive" rules are those rules that "effect[] a change in existing law or policy which affects

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[14] "Domicile" is defined under 37 C.F.R. § 2.2(o) as "the permanent legal place of residence of a natural person," as cited by the PTO. *See* Final Rule, 84 Fed. Reg. 31511 (July 2, 2019) (amending 37 C.F.R. § 2.32(a)(2)).

[15] 35 U.S.C. § 2(b)(2); *Cooper Techs. Co. v. Dudas*, 536 F.3d 1330, 1335 (Fed. Cir. 2008).

[16] 5 U.S.C. § 553.

[17] *Mid Continent Nail Corp v. United States*, 846 F.3d 1364, 1373–74 (Fed. Cir. 2017).

individual rights and obligations,"[18] or alternatively, a rule that does not "merely clarif[y]" existing law.[19]

The United States Supreme Court has long established that individuals possess an individual right to privacy, whether derived from the penumbra of the First Amendment,[20] the Fourth and Fifth Amendments,[21] the Ninth Amendment,[22] or the Fourteenth Amendment,[23] and whether arising out of a context related to speech,[24] use of contraception,[25] or unlawful searches and seizures.[26]

The PTO's requirement that a domicile address be disclosed in any application for trademark registration affects an individual's right to privacy. Consequently, the PTO's claim that the domicile address requirement is merely procedural, and therefore exempt from notice-and-comment rulemaking, is untenable.

The Federal Circuit argues that this new requirement does not alter the "substantive standards by which

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[18] *Animal Legal Def. Fund v. Quigg*, 932 F.2d 920, 927 (Fed. Cir. 1991) (quoting *Cubanski v. Heckler*, 781 F.2d 1421, 1426 (9th Cir. 1986)) (internal quotation marks omitted).

[19] *Cooper Techs. Co.*, 536 F.3d at 1336.

[20] *NAACP v. Alabama*, 357 U.S. 449, 462 (1958).

[21] *Boyd v. United States*, 116 U.S. 616, 630 (1886); *Mapp v. Ohio*, 367 U.S. 643, 656 (1961).

[22] *Griswold v. Connecticut*, 381 U.S. 479, 484–86 (1965).

[23] *Pointer v. Texas*, 380 U.S. 400, 406 (1965).

[24] *NAACP*, 357 U.S. at 460–61.

[25] *Griswold*, 381 U.S. at 485–86.

[26] *Mapp*, 367 U.S. at 654.

the USPTO evaluates trademark applications, *e.g.*, a mark's use in commerce or distinctiveness," and "is therefore a procedural rule that is excepted from notice-and-comment rulemaking."[27]

If Chestek or the amici were arguing only that applicants' rights are materially abrogated because applicants must populate an additional field on the application form, the Federal Circuit would be correct. However, the *contents* of the field are important. The disclosure of applicants' domicile addresses can directly result in substantial harm to the applicants. Compelling trademark applicants to disclose their domicile addresses reflects a disregard for the practical realities of modern digital interactions and the heightened risks they entail. It forces rightsholders to choose between protecting their trademarks or protecting their privacy and their personal security.

The PTO has raised a variety of arguments in opposition to this claim.

First, the PTO argues that the PTO's Trademark Electronic Application System forms permit the use of a special field to enter a domicile address, which will ensure the domicile address "will not be publicly viewable . . . [nor] retrievable in bulk-data downloads."[28] But, as set forth in more detail below, the PTO has demonstrated through its actions that this is factually untrue.

Second, the PTO asserts that the Domicile Rule is a "logical outgrowth" of the existing requirement to provide an address and stated goal of enforcing the

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[27] *In re Chestek PLLC*, 92 F.4th at 1110 (emphasis in original).

[28] Brief for Appellee at 10, *In re Chestek PLLC*, 92 F.4th 1105.

requirement that foreign applicants retain U.S. counsel.[29] However, as set forth in more detail below, there is no connection between the domicile of U.S. applicants represented by U.S. counsel and the foreign applicant requirements.

The Federal Circuit also points out, in finding that the PTO's decision was not arbitrary and capricious, that members of the public did not raise privacy concerns earlier in the notice-and-comment rulemaking process on the proposed rule.[30] However, the PTO did not invite the public to comment specifically on the disclosure of domicile addresses. The proposed rule (hereafter referred to as the "Proposed Rule")[31] did not include the Domicile Rule, but merely a reservation of rights that the PTO may request any information it determined reasonably necessary to effect its policy objectives.

Perhaps the Federal Circuit found the absence of public comment persuasive because such public comment could have been based on a broad "request anything reasonable" rule. That finding unfairly demands that the public anticipate every possible type of information the PTO might request, and then comment on the secondary harms associated with providing that information.

Requiring the disclosure of domicile addresses—especially when such information has demonstrably been mishandled as described more fully below—

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[29] Brief for Appellee at 21–25, *In re Chestek PLLC*, 92 F.4th 1105.

[30] *In re Chestek PLLC*, 92 F.4th at 1112–113.

[31] 84 Fed. Reg. 4393 (Feb. 15, 2019).

runs counter to individuals' privacy rights. The practical application of the Domicile Rule must be balanced against the constitutional rights of individuals to privacy and security.

The broader implications of such regulatory actions on individual freedoms and privacy render such rules substantive, not procedural.

At its core, the Federal Circuit's interpretation would effectively nullify the statutory requirement for public input, as virtually any rule change could be labeled non-"substantive," thus circumventing the need for notice-and-comment rulemaking entirely. Such a broad exemption would undermine the purpose of the APA, which seeks to involve affected parties in the rulemaking process.

2. Even If the Domicile Rule Is Not Substantive, Congress Intended the PTO to Engage in Notice-and-Comment Rulemaking for Procedural Rules.

In the PTO's enabling statute, Congress set forth that the PTO "may establish regulations, not inconsistent with law," which include those that "govern the conduct of proceedings in the Office" and those that "shall be made in accordance with section 553 of title 5."[32] By not engaging in notice-and-comment rulemaking, the PTO did not adhere to this mandate. The amici agree with the arguments put forward by Petitioner on this point.[33]

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[32] 35 U.S.C. § 2(b)(2)(A)–(B).

[33] Petition for Writ of Certiorari at 2, *Chestek PLLC v. Vidal*, No. 223-1217 (May 13, 2024).

II. Were Notice-and-Comment Rulemaking Followed, the PTO Should Not Have Put the Final Rule into Effect Due to Privacy Concerns.

If the PTO had properly followed notice-and-comment rulemaking, it would have received pushback on the domicile address requirement. While this assertion may appear speculative, it is not. At minimum, the amici would have commented.

A. Domicile Addresses Are Private Information That the PTO Does Not Adequately Safeguard.

A person's home address is private information.[34] Requiring trademark applicants to disclose their domicile addresses has material privacy implications, especially for victims of domestic abuse, public figures, those in industries or professions often subject to targeted harassment such as game developers, internet-based entertainers such as VTubers and other similarly situated individuals. These individuals face heightened

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[34] *See, e.g.*, *Reuber v. United States*, 829 F.2d 133, 142 (D.C. Cir. 1987) (concluding that a letter reprimanding an individual sent to and disclosed by agency was a "record" for purposes of the Privacy Act of 1974 because it clearly identified the individual by name and address).

risks of harassment, stalking, and "doxxing"[35] if their private addresses are exposed.[36]

By default, mailing addresses are publicly disclosed in the PTO's Trademark Status and Document Retrieval system ("TSDR"). Where an alternative mailing address is provided, the TSDR is not *supposed* to publicly list applicants' domicile addresses. While the PTO asserts that domiciles "will be hidden"[37] it has consistently failed to do this in practice.

In the short time that the Domicile Rule has been in effect, PTO system failures have caused at least two known widespread data breaches, exposing domicile addresses.[38] In those breaches, the PTO exposed 61,000

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35 "Doxxing" is the practice of publicly posting or propagating the private information of an individual, generally intended to cause others to direct targeted harassment at that individual. *See* Nellie Bowles, *How 'Doxxing' Became a Mainstream Tool in the Culture Wars*, N.Y. TIMES (Aug. 30, 2017), https://www.nytimes.com/2017/08/30/technology/doxxing-protests.html.

36 *See, e.g.*, *id*.

37 *See Personal Information in Trademark Records*, USPTO, https://www.uspto.gov/trademarks/apply/faqs-personal-information-trademark-records (last visited June 11, 2024).

38 Nihal Krishan, *US Patent and Trademark Office Data Leak Exposed 61K Private Addresses*, FEDSCOOP (June 29, 2023), https://fedscoop.com/us-trademark-and-patents-office-data-leak-exposed-61k-private-home-addresses/; Tim Lince, "*Disappointing" – USPTO Suffers Second Data Breach of Applicant Domicile Addresses*, World Trademark Review (May 10, 2024), https://www.worldtrademarkreview.com/article/disappointing-uspto-suffers-second-data-breach-of-applicant-domicile-addresses; *USPTO Discloses Accidental Data Leak of TM Applicants*, International Intellectual Property Law Association (May 10, 2024), https://iipla.org/uspto-discloses-accidental-data-leak-of-tm-applicants/.

domicile addresses between 2020 and 2023 and 14,000 addresses in a subsequent breach in 2024.[39] Such breaches highlight the inadequacies in the PTO's data protection measures. These breaches occurred despite assurances that private addresses would be masked and that system vulnerabilities were fixed. The data breaches at the PTO, which exposed thousands of purportedly "private" addresses, underscore the real and present dangers of such a domicile address requirement.

Though the PTO assured the public in 2023 that the system failures causing breaches had been rectified, as mentioned above, similar breaches continued until as recently as May 2024. Regarding the most recently reported widespread data breach, the PTO stated that no domicile addresses appeared in regular searches and that it has informed all affected parties.[40] However, these admissions do not account for inadvertent breaches of which the PTO is unaware. For example, on February 16, 2023, the remote video game development studio, Yak & Co PTY Ltd, through their U.S. attorney, submitted the home address of one of the company's founders to overcome PTO's refusal to register their mark (U.S. Registration No. 7077642) based on the Domicile Rule. Thereafter, the PTO published the address in its public, searchable database. Yak & Co properly designated the address as their domicile address and included a separate, public-facing mailing address in the application. Yet, the PTO wrongly

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[39] Krishan, *supra* note 39; Lince, *supra* note 39.

[40] Zack Whittaker, *US Patent and Trademark Office confirms another leak of filers' address data*, TECH CRUNCH (May 8, 2024), https://techcrunch.com/2024/05/08/us-patent-and-trademark-office-confirms-another-leak-of-filers-address-data/

publicized the domicile address in the TSDR, where it remained searchable for over a year.[41] Worse, still, the PTO was apparently unaware of its mistake. Had Yak & Co not noticed the PTO's error and alerted the PTO, the address would doubtlessly have been publicly exposed for much longer. Moreover, after receiving notice of the breach, it took more than a week, and multiple requests, for the PTO to take any action to rectify the error.

Privacy violations have tangible consequences. Individuals whose home addresses are exposed can face harassment, threats and physical danger. Victims of domestic abuse, for example, rely on their addresses remaining confidential to avoid their abusers. Public figures, including internet personalities like VTubers, developers of video games, and others often experience targeted harassment and need robust privacy protections to ensure their safety.[42] The exposure of domicile

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[41] While the PTO record on this application lacks a specific memorandum to the file or other recordation of this error, there is an unusual "Note to the File" dated February 20, 2023, that simply states "Changed Address." Moreover, the undersigned's law firm represented Yak & Co. and communicated directly with the PTO on this topic.

[42] Many internet personalities have experienced "swatting," a form of harassment where harassers contact law enforcement reporting a fabricated crime in progress at the address of the internet personality. These false reports have led individuals being killed. *See Three Men Charged in 'Swatting' Schemes in which Admitted Hoax-Maker Targeted Individuals, Schools and a Convention Center*, Press Release, United States Attorney's Office for the Central District of California (Jan. 23, 2019), https://www.justice.gov/usao-cdca/pr/three-men-charged-swatting-schemes-which-admitted-hoax-maker-targeted-individuals. These attacks are not uncommon. *See* Nathan Grayson, *Twitch Streamers Traumatized After Four 'Swattings' in a Week*, WASH.

addresses can lead to doxxing, where personal information is maliciously published online, leading to harassment, stalking and even physical attacks.[43]

Despite the PTO's assurances that it has not detected data misuse, the mere exposure of private

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POST (Aug. 15, 2022), https://www.washingtonpost.com/video-games/2022/08/15/keffals-adin-ross-ishowspeed-swatting-twitch-youtube/. Multiple states have passed criminal laws specifically outlawing swatting or created law enforcement task forces and resources aimed to curb the practice. *See*, *e.g.*, Ky. Rev. Stat. § 519.040 (2022); Sam Machkovech, *Police to Seattle's Techies, Streamers: Sign up for our Anti-Swatting Service*, ARSTECHNICA (Oct. 1, 2018), https://arstechnica.com/tech-policy/2018/10/police-to-seattles-techies-streamers-sign-up-for-our-anti-swatting-service/. The Federal Bureau of Investigation has created a national database to track and prevent these attacks. Jacob Ward and Lora Kolodny, *The FBI has Formed a National Database to Track and Prevent 'Swatting,'* NBC NEWS (June 29, 2023), https://www.nbcnews.com/news/us-news/fbi-formed-national-database-track-prevent-swatting-rcna91722.

[43] *See* Minyvonne Burke, *Tennessee Man, Targeted for his Twitter Handle, Dies After 'Swatting' Call Sends Police to his Home*, NBC NEWS (July 22, 2021), https://www.nbcnews.com/news/us-news/tennessee-man-targeted-his-twitter-handle-dies-after-swatting-call-n1274747; Jason Hanna and Jamiel Lynch, *An Ohio Gamer Gets Prison Time Over a 'Swatting' Call that Led to a Man's Death*, CNN U.S. (Sept. 14, 2019), https://www.cnn.com/2019/09/14/us/swatting-sentence-casey-viner/index.html. Swatting has also been weaponized against victims ranging from political opponents to children. *See*, *e.g.*, Rachel Kleinfeld, *The Rise of Political Violence in the United States*, 32 J. DEMOCRACY 160, 160 (2021) (discussing, among other stories, an executive at Dominion Voting Systems being forced into hiding after political activists shared his home address and phone number alongside a million-dollar "bounty"); Nathan Grayson, *Kid Gets Swatted After Popular YouTuber Helps Him Get Thousands of Subscribers*, Kotaku (Feb. 21, 2018), https://kotaku.com/kid-gets-swatted-after-popular-youtuber-helps-him-get-t-1823209541.

information may lead to significant psychological and physical harm.[44] The PTO has not even detected all instances of leaked domicile addresses, yet applicants are expected to trust its assurance that leaked data has not been misused. Additionally, exposed personal domicile addresses may cause rightsholders to refrain from taking action to enforce their rights for fear of retaliation from infringers.

B. Those in the Games and Digital Entertainment Industries Are Particularly Vulnerable to Exposure.

1. How Games Are Made and Specific Doxxing Concerns.

Video games are made by teams of all sizes. The highest budget games can cost hundreds of millions of dollars and require massive teams to build.[45] These teams often include programmers, artists, designers, writers, and testers, each contributing to different aspects of the game's creation. The collaborative nature

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[44] "Swatting" footnotes, *supra* notes 42 and 43.

[45] The video game Star Citizen has reported more than $656 million in development and marketing costs. *See Cloud Imperium Financials for 2022*, Cloud Imperium (Jan. 2, 2024), https://cloudimperiumgames.com/blog/corporate/cloud-imperium-financials-for-2022. Cyberpunk 2077 reported more than $441 million. Adam Kiciński, CEO, CD Projekt Red, Teleconference on CD Projekt Red 2020 Financials (Apr. 22, 2021), https://www.cdprojekt.com/en/wp-content/uploads-en/2021/04/transcript-2020-results.pdf#page=2. Spider-Man 2 reported more than $315 million. Shubhanker Parijat, *Marvel's Spider-Man 2 Had a Total Budget of $315 Million*, Gaming Bolt (Dec. 19, 2023), https://gamingbolt.com/marvels-spider-man-2-had-a-total-budget-of-315-million.

of game development requires a secure and supportive environment, free from external threats and harassment.

Smaller teams, including solo development teams, make up the teams behind the vast majority of games on the market.[46] These small businesses are often run from individuals' homes, meaning the domicile address of the individual—whether a developer, founder or willing member of the small development team—would also be the domicile address of the *business*.

Game developers frequently engage with the public through social media and conferences to promote their work and interact with fans. This high level of public interaction makes them likely targets of doxxing, where malicious actors publish private information, such as home addresses, online.[47] Doxxing can lead to severe consequences, including harassment, stalking and physical danger.[48]

The disclosure of private addresses, as mandated by the PTO's domicile address requirement, exacerbates these risks. Game developers have reported doxxing

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[46] Of the more than 44,000 unique developers registered on the largest and most accessible gaming marketplace, Steam, more than 33,000 have only released one game on the platform. Steam further reports that more than 25,000 of registered developers have earned less than $1,000 of gross revenue from sales of their game(s) on the platform. *See Developers Database*, VG Insights, https://vginsights.com/developers-database (last visited June 11, 2024).

[47] Kellen Browning and Kashmir Hill, *How Streaming Stars Pay the Price of Online Fame*, N.Y. TIMES (July 29, 2022), https://www.nytimes.com/2022/07/29/technology/twitch-stalking.html.

[48] *Id.*

instances leading to threats and harassment that not only affect their personal and family lives, but also disrupt their professional activities.[49] The fear of having their private information exposed can create a chilling effect, discouraging open engagement with the community and hindering the creative process.

A famous example of doxxing in the video game industry is "GamerGate,"[50] a coordinated misogynistic harassment campaign occurring from 2014 to 2015, where doxxing was used as a tool to intimidate video game industry workers, particularly women. Those targeted by the campaign received sustained online abuse, including threats of physical harm, rape and death, causing victims to cancel public appearances and eventually move their homes in order to protect their physical safety.[51]

Doxxing poses a significant threat to the safety and well-being of game developers and VTubers. The PTO's recent data breaches[52] illustrate the real dangers associated with the domicile address requirement as it significantly increases the risk of doxxing. Similar breaches in the private sector often result in FTC

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[49] *See, e.g.*, Bryant Francis, *Why are Valve and Discord Permitting Harassment Against Sweet Baby Inc.?*, GAME DEVELOPER (Mar. 11, 2024), https://www.gamedeveloper.com/business/why-are-valve-and-discord-permitting-harassment-against-sweet-baby-inc-.

[50] Bowles, *supra* note 36.

[51] Nick Wingfield, *Feminist Critics of Video Games Facing Threats in 'GamerGate' Campaign*, N.Y. TIMES (Oct. 15, 2014), https://www.nytimes.com/2014/10/16/technology/gamergate-women-video-game-threats-anita-sarkeesian.html.

[52] Krishan, *supra* note 39; Lince, *supra* note 39.

inquiry,[53] attorney general actions,[54] or civil action.[55] The PTO, however, operates with little oversight on this front, and the Federal Circuit's decision would further minimize that already-limited oversight.

2. What is a VTuber and Why do VTubers Care About Privacy?

VTubers, or Virtual YouTubers, are online entertainers who use digital avatars to interact with their audience.[56] These avatars are typically animated and controlled in real-time using motion capture technology, allowing the creator to perform and engage with their fans without revealing their real identity.[57]

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[53] *See*, *e.g.*, 16 C.F.R. 314.

[54] All fifty states have laws in place specifically targeted at protecting consumers from data breaches, requiring notification of such breaches, compensation in some cases, and investigation mechanisms. Many have whistleblower access points, as well. *See*, *e.g.*, *Colorado's Consumer Data Protection Laws: FAQ's for Businesses and Government Agencies*, Colorado Attorney General, https://coag.gov/resources/data-protection-laws/ (last visited June 11, 2024).

[55] *See*, *e.g.*, *In re Equifax, Inc. Customer Data Sec. Breach Litig.*, 362 F.Supp.3d 1295 (N.D. Ga. 2019); *In re Capital One Consumer Data Sec. Breach Litig.*, 2020 WL 3470261, MDL No. 1:19md2915 (AJT/JFA) (E.D. Va. June 25, 2020); *In re Target Corp. Customer Data Sec. Breach Litig.*, 66 F.Supp.3d 1154 (D. Minn. 2014); *In re OPM Data Sec. Breach Litig.*, 266 F.Supp.3d 1 (D.D.C. 2017).

[56] James Chen, *The Vtuber Takeover of 2020*, POLYGON (Nov. 30, 2020), https://www.polygon.com/2020/11/30/21726800/hololive-vtuber-projekt-melody-kizuna-ai-calliope-mori-vshojo-youtube-earnings.

[57] *Id.*

VTubers are particularly popular in the gaming and digital entertainment industries, attracting large followings on platforms like YouTube and Twitch.[58] Unfortunately, misogyny and harassment are commonplace on these platforms.[59] The anonymity provided by VTubers' digital avatars is crucial for maintaining their privacy and safety, as their work involves a high level of public interaction.[60]

VTubers like CodeMiko,[61] for example, create and operate highly interactive digital personas that engage audiences through streaming platforms. These avatars provide a layer of separation between the creator and the public, which is essential for their security and privacy. The ability to maintain anonymity allows VTubers to protect their real identities from potential harassment and threats. VTubers frequently work from home and their business domicile is frequently their home address.[62] Revealing the real identity of a VTuber, including their domicile address,

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58 *Id.*

59 Taylor Lorenz, *YouTube Remains Rife with Misogyny and Harassment, Creators Say*, WASH. POST (Sept. 18, 2022), https://www.washingtonpost.com/technology/2022/09/18/you-tube-mysogyny-women-hate/.

60 Chen, *supra* note 56.

61 CodeMiko, *Twitch*, https://www.twitch.tv/codemiko (last visited June 11, 2024).

62 *See, e.g.*, Nathan Grayson, *How a Pink-Haired Anime Girl Became One of Twitch's Biggest Stars*, WASH. POST (Apr. 20, 2022), https://www.washingtonpost.com/video-games/2022/04/20/twitch-ironmouse-vtuber-subathon-interview/ (discussing Ironmouse's health condition, which leaves her bedridden).

can expose them to significant risks, including harassment, doxxing, and physical threats.[63]

As digital entertainers, VTubers depend on the separation between their online personas and their real-life identities to navigate their public and private lives safely. The requirement to disclose a domicile address undermines this critical separation, exposing them to potential harm and compromising their ability to engage freely with their audience.

3. Digital Entertainers and Video Game Developers Have a Strong Need for Trademark Registration.

The video game and VTuber industries are flooded with content and players offering competing goods and services. In 2023, game developers released over 14,000 video games on Steam, one of the largest (but not the only) video game distribution platforms offering video games to users via download from the internet.[64] As of August 2023, there were over 37,300 active VTubers on Twitch alone.[65] Brand identification and customer loyalty are crucial to standing out and succeeding amidst the plethora of offerings.

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[63] While CodeMiko has revealed her real name, she has not revealed—and does not want to reveal—her domicile address because of the myriad risks associated with doing so. Many VTubers do not reveal even their real names.

[64] *Steam Game Releases by Year*, SteamDB, https://steamdb.info/stats/releases/ (last visited June 11, 2024).

[65] Yane An, *The Rise of VTubers 2023: Virtual Creators in the Streaming Space*, GAMESIGHT (Aug. 8, 2023), https://blog.gamesight.io/vtuber/.

Building successful brands in these industries requires a great deal of time and resources. Video game studios spend as much on branding and marketing efforts in support of each game as they do developing the game.[66] Indeed, some developers and publishers spend over a billion dollars per year on branding and marketing.[67] Similarly, VTubers invest heavily in building their brands. A VTuber's online personality is their brand.[68] Building a quality VTube model can cost thousands of dollars.[69] Maintaining brand value involves producing a consistent cadence of quality content to keep fans engaged and satisfied.[70] In both industries, rightsholders' brands and livelihoods are inextricably intertwined. Without the ability to meaningfully protect their brands, their income is jeopardized, and their investments wasted. Additionally, the prevalence of video game clones[71] and copycat

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66 Raph Koster, *The Cost of Games*, GAME DEVELOPER (Jan. 17, 2018), https://www.gamedeveloper.com/business/the-cost-of-games.

67 *See, e.g.*, *Electronic Arts Reports Q4 and FY24 Results*, Press Release, Electronic Arts (May 7, 2024), https://ir.ea.com/press-releases/press-release-details/2024/Electronic-Arts-Reports-Q4-and-FY24-Results/default.aspx.

68 Jagjit Singh, *What is a VTuber, and how do you become one?* (May 21, 2023), https://cointelegraph.com/news/what-is-a-v-tuber

69 Rokoko, *The Expert Guide To Making or Buying a VTuber Model* (July 5, 2022), https://www.rokoko.com/insights/the-expert-guide-to-making-or-buying-a-vtuber-model

70 Haseeb Tariq, *How to Become a Successful Faceless Virtual Star* (August 2, 2022) https://www.entrepreneur.com/science-technology/how-to-become-a-vtuber-content-creator/375553

71 *See, e.g.*, Wyatte Grantham-Philips and Gaetane Lewis, *The New York Times is Fighting Off Wordle Look-Alikes with Copyright Takedown Notices*, AP NEWS (Mar. 12, 2024), https://apnews.

VTubers[72] amplifies the need for brand protection in these industries.

Securing trademark registrations is the first, and perhaps the most critical, element of brand protection strategy in the video game and digital entertainment industries. Without trademark registrations, rights-holders are materially limited in their ability to enforce their rights against infringers.

The Domicile Rule creates an unreasonable dilemma for rightsholders in the video game and digital entertainment industries, forcing them to choose between protecting their brands (and thus their livelihoods) or their privacy (and thus their personal safety and that of their families).

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com/article/new-york-times-wordle-clones-takedown-dmca-35d32b7548f7312ea74a2065b2cd31a6 (discussing the cloning of the NEW YORK TIMES game "Wordle"); Siladitya Ray, *Pokemon is 'Investigating' Palworld for Potential IP Infringement-Here's What to Know About the Controversial Game That's Gone Viral*, FORBES (Jan. 25, 2024), https://www.forbes.com/sites/siladityaray/2024/01/25/pokemon-is-investigating-palworld-for-potential-ip-infringement-heres-what-to-know-about-the-controversial-game-thats-gone-viral/ (discussing allegations that the game "Palworld" is a clone of the popular "Pokemon" franchise games).

[72] Pavel Alpeyev and Yuki Furukawa, *How Virtual Streamers Became Japan's Biggest YouTube Attraction*, BLOOMBERG (Sept. 17, 2019), https://www.bloomberg.com/news/articles/2019-09-17/how-virtual-streamers-became-japan-s-biggest-youtube-attraction (noting the spawning of "thousands of copycat acts").

III. The Domicile Rule's Purpose Is Already Satisfied by Reporting United States Legal Counsel Information.

The amici and the general public had no notice that the Domicile Rule would apply to them. The title of the Proposed Rule that eventually gave rise to the Domicile Rule was "Requirements of U.S. Licensed Attorney for Foreign Trademark Applicants and Registrants."[73] The stated purpose was to "instill greater confidence in the public that U.S. registrations that issue to foreign applicants are not subject to invalidation for reasons such as improper signatures and use claims and enable the USPTO to more effectively use available mechanisms to enforce foreign applicant compliance with statutory and regulatory requirements in trademark matters."[74] More specifically, the Proposed Rule aimed to address "the growing problem of foreign individuals, entities, and applicants failing to comply with U.S. law."[75]

The amici agree with the PTO that this concern is legitimate given the complexities of trademark law and the need for accurate representation, as well as the time, expense, and difficulty of cross-border litigation in the event a foreign registrant lacks a connection to U.S. persons.

However, the Domicile Rule as a mechanism for addressing this concern lacks merit.

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[73] 84 Fed. Reg. 4393 (Feb. 15, 2019).

[74] *Id.*

[75] 84 Fed. Reg. 4396.

The second question of the trademark application asks whether an attorney is filing the application, alongside a prompt that foreign-domiciled owners must have a U.S.-licensed attorney. Selecting "yes" and proceeding with the application prompts the applicant to provide the attorney's information, including their full name, bar registration number, and office address. Providing this information satisfies the intent of the Proposed Rule—it confirms for the PTO that the applicant has indeed retained a U.S.-licensed attorney to represent the applicant before the PTO. Additionally, attorney filers are required to undergo extensive identity verification to file.[76] Even this attorney-prepared filing, however, requires the preparer to provide the applicant's domicile address.

In addition to the aforementioned privacy concerns, this new requirement directly contradicts the verbiage of the Proposed Rule. The rulemaking process initially indicated that the proposed changes would not impact U.S. applicants[77] and explicitly stated that the rule would not impose new reporting or recordkeeping requirements on applicants.[78] Despite these assurances, the Final Rule included a blanket requirement for all

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[76] *See Identity Verification for Trademark Filers*, USPTO, https://www.uspto.gov/trademarks/apply/identity-verification (last visited June 11, 2024).

[77] 84 Fed. Reg. 4400 ("The proposed rule would apply to any entity filing with [the] USPTO whose domicile or principal place of business is not located within the U.S. or its territories.").

[78] *Id.* ("The proposed rule imposes no new reporting or recordkeeping requirements.").

applicants to provide a domicile address, regardless of their location.[79]

This represents a significant shift from the original intent of the rule and undermines the clarity and predictability that notice-and-comment rulemaking is supposed to ensure. This violation of traditional notice principles becomes doubly offensive when coupled with the Federal Circuit writing off privacy concerns on the basis that the PTO did not receive comments on that basis.[80] How could parties provide comments on an issue for which there was no notice? The Federal Circuit's position that the public should anticipate changes and future concerns and comment in opposition to a purely theoretical requirement is illogical and would lead to kitchen sink approaches to public commenting on proposed rules that might still not capture the myriad of ways government agencies might impact substantive rights.

Public participation in the rulemaking process is critical for identifying potential issues and suggesting practical solutions. Had the PTO engaged in a more inclusive and transparent rulemaking process—indeed in proper notice-and-comment rulemaking—stakeholders could have highlighted the privacy risks associated with the domicile address requirement. This feedback could have led to alternative approaches that achieve the same goals, without compromising the

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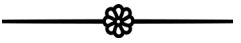
79 Final Rule, 84 Fed. Reg. 31500 (July 2, 2019).

80 The Federal Circuit dismissed Petitioner's argument that the domicile address requirement is arbitrary and capricious because "the policy concerns Chestek raises now were not raised before the agency." *In re Chestek PLLC*, 92 F.4th 1105, 1112–13 (Fed. Cir. 2024).

privacy and safety of U.S. applicants. The failure to solicit and consider such input resulted in a rule that inadequately addresses the original problem and imposes unnecessary risks on a broader group of applicants.



CONCLUSION

For the foregoing reasons, the *amici curiae* respectfully urge the Court to grant the Petitioner's petition for certiorari to correct and clarify the Federal Circuit's decision based on the above arguments.

Respectfully submitted,

Brandon J. Huffman
Counsel of Record
Connor Richards
Michele Robichaux
Ryan Fairchild
Amanda Whorton
ODIN LAW AND MEDIA
4600 Marriott Drive, Suite 520
Raleigh, NC 27612
(919) 813-0090
brandon@odinlaw.com

Counsel for Amici Curiae

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