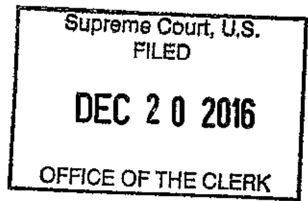

No. 16-428

In the Supreme Court of the United States

SINO LEGEND (ZHANGJIAGANG) CHEMICAL CO. LTD.,
ET AL.,

Petitioners,

v.

INTERNATIONAL TRADE COMMISSION & SI GROUP, INC.,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The Federal Circuit's decision in *TianRui Grp. Co.* v. *ITC*, 661 F.3d 1322 (Fed. Cir. 2011), erroneously grants the International Trade Commission worldwide authority, permitting the ITC to prosecute the misappropriation of trade secrets anywhere in the world—applying U.S. law to determine whether misappropriation occurred—as long as an article incorporating the claimed trade secrets is imported into the United States. That holding, which does not rest on any express congressional authorization, is incompatible with the strong presumption against extraterritorial application of federal statutes.

This Court has intervened repeatedly to correct the lower courts' impermissibly extraterritorial applications of federal law. See *RJR Nabisco, Inc.* v. *Eur. Cmty.*, 136 S. Ct. 2090 (2016); *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013); *Morrison* v. *Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010). It should do so here as well.

Respondents are unable to mount any convincing defense of *TianRui*'s expansive holding. SI Group insists that the decision below did not turn on *TianRui*. But that is incorrect: petitioners challenged *TianRui* before the ITC, but acknowledged it was binding on the ITC. The ITC then identified—and rejected—petitioners' extraterritoriality argument solely on the basis of *TianRui*. And the Federal Circuit summarily affirmed. This case thus cleanly presents this question.

Finally, the importance of the question presented has been confirmed by the *amicus* brief filed by the Trade Remedy and Investigation Bureau of the Ministry of Commerce of China ("TRB") in support of the

petition—which we believe to be the first such filing by the Chinese government before this Court. As the TRB explains, the ITC "has impugned the sovereignty of China and refused to accord the comity expected of a trade partner." TRB Amicus Br. 2. Indeed, "[t]he ITC's disregard for the sovereignty of China risks the very international discord underlying the presumption against extraterritorial application of U.S. law." *Id.* at 6. Review is warranted.

A. The Decision Below Is Wrong.

Section 337(a)(1)(A) lacks a "clear indication" that it applies extraterritorially (Pet. 15-25), and the "relevant conduct" regulated here occurred outside the United States (*id.* at 25-27). The ITC's application of the statute was thus impermissibly extraterritorial. Respondents are unable to refute either conclusion.

1. *The presumption against extraterritorial application is not overcome.*

We demonstrated in the petition that neither the text of Section 337(a)(1)(A), nor its historical background, give a clear indication of extraterritorial effect. Pet. 15-25. Indeed, "*nothing* in the plain language of the statute" indicates that it applies extraterritorially. *TianRui*, 661 F.3d at 1339 (Moore, J., dissenting) (emphasis added).

In response, the ITC rests principally on Section 337(a)(1)(A)'s use of the term "importation" (ITC Opp. 14-16), relying on *TianRui*'s observation that importation is "inherently international." 661 F.3d at 1329. But the ITC does not so much as address our demonstration that a subject of "inherently international" character is not enough to overcome the presumption against extraterritoriality. Pet. 20-22.

Kiobel concerned the "law of nations"—a subject of "inherently international" character—yet nonetheless concluded that the presumption was not overcome. 133 S. Ct. at 1665.

The ITC observes that importation, by definition, involves "bringing an article into the country from the outside." ITC Opp. 14. Of course that is so. But at the time of importation, there are two separate things that can be regulated: (a) acts relating to the manufacture of the article that take place outside the United States, and (b) acts relating to its importation.

Here, the plain text of the statute clearly regulates only the latter: Congress regulated "[u]nfair methods of competition and unfair acts *in the importation* of articles * * * into the United States." 19 U.S.C. § 1337(a)(1)(A) (emphasis added). To the extent the text is ambiguous, the presumption against extraterritoriality supplies the answer.

The ITC's main (and uncontroversial) observation—that the "sovereign" has plenary power over importation (ITC Opp. 14)—simply indicates that Congress *could* regulate the acts underlying the foreign manufacture of the good. The question, however, is whether Congress has in fact done so. Nothing in the text of the statute manifests the requisite clear indication to regulate conduct abroad.

The ITC is thus wrong to submit that "Congress must have anticipated that the Commission would consider some foreign conduct in carrying out its duties." ITC Opp. 15. If that is what Congress had intended, it would have written a different statute. See Pet. 21.

That Section 337(a)(1)(A) regulates conduct relating to importation itself—or otherwise occurring within the United States—is hardly surprising. Indeed, Section 337(a)(1)(A) regulates "[u]nfair methods of competition and unfair acts in the importation of articles * * * into the United States, or *in the sale of such articles* by the owner, importer, or consignee" (emphasis added). The latter conduct—the sale of imported goods—necessarily occurs within the United States.

The food and drug laws provide a telling contrast. Several provisions of the food and drug laws expressly regulate "importation." See 21 U.S.C. §§ 331(t), 331(w), 331(aa). Under the ITC's view, this is all a statute need do to have extraterritorial effect. But Congress did not agree: another statute provides express "extraterritorial jurisdiction" relating to articles "intended for import into the United States" or in circumstances where "any act in furtherance of the violation was committed in the United States." 21 U.S.C. § 337a. Here, however, Congress provided no similarly clear indication of extraterritorial effect.

The ITC's argument reduces to a policy preference—it decries any interpretation of Section 337(a)(1)(A) that could create "'a conspicuous loophole for misappropriators' and other bad actors to exploit." ITC Opp. 16. But there is no "loophole" at all: the foreign conduct of foreign parties in a foreign country is properly adjudicated under the law—and in the courts—of the country where the conduct occurred. As we described, SI Group in fact litigated this case in China; this ITC proceeding exists only because SI Group did not like the result it received. See Pet. 6-8.

And the ITC's suggestion that Congress did mean to reach wholly foreign conduct (ITC Opp. 16) is belied by the recent Defend Trade Secrets Act of 2016. That statute contains an express provision extending its reach extraterritorially (in conspicuous contrast to Section 337(a)(1)(A)), but Congress expressly limited the law to apply only to conduct by U.S. persons, or events where "an act in furtherance of the offense was committed in the United States." 18 U.S.C. § 1837. That limited scope confirms that Congress did not grant the broad extraterritorial power that the ITC claims.

2. The "focus" of Section 337(a)(1)(A) is the regulation of "unfair methods of competition and unfair acts."

As to the second step of the extraterritoriality analysis (ITC Opp. 10-13), the ITC misstates the "focus" of Section 337(a)(1)(A). Taking its cue from *TianRui*, the ITC asserts that the "focus" of the statute is "on the act of importation and the resulting domestic injury." ITC Opp. 10. It repeatedly contends that the focus of the statute is "importation and injury." *Id.* at 11.

But that is not what the statute says. Here, the plain focus of the statute is "*[u]nfair methods of competition and unfair acts* in the importation of articles * * * into the United States." 19 U.S.C. § 1337(a)(1)(A) (emphasis added). The phrase "in the importation of articles" thus defines and delimits the scope of "unfair methods" and "unfair acts" regulated by the statute.

The respondents' error is perhaps best encapsulated by SI Group's argument that "the focus" of the statute is "unfair methods of competition and unfair

acts 'in the importation of articles' resulting in domestic injury." SI Opp. 14. That is precisely right—but it disproves respondents' position. In circumstances where a Chinese entity produces a good in China, using a trade secret that a Chinese national allegedly misappropriated in China, no one would describe the "unfair act" at issue as one being "in the importation of articles." Pursuant to the statute's plain text, its "focus" is on those "unfair acts" that occur "in the importation of articles" or "in the sale of such articles." That does not encompass wholly extraterritorial trade secret misappropriation.

The very different language of Subsections (B) through (E) strongly supports that conclusion. Those provisions bar, among other things, "[t]he importation into the United States * * * of articles that[] infringe a valid and enforceable United States patent." 19 U.S.C. § 1337(a)(1)(B). For those subsections—and not Section 337(a)(1)(A)—the conduct regulated is the infringement which occurs domestically.

This analysis is consistent with *Morrison* and *RJR Nabisco*. In *Morrison*, protecting domestic "purchase-and-sale transactions" was the purpose of the statute, and those transactions were therefore "the objects of the statute's solicitude." 561 U.S. at 267 (2010). Similarly, the purpose of Section 337(a)(1)(A)—according to SI Group itself (see SI Opp. 21)—is to prevent the unfair practices that it proscribes. For respondents to turn around and claim that "unfair practices" are not the focus of the statute is dizzying. *Morrison* also relied on "[t]he probability of incompatibility with the applicable laws of other countries" (561 U.S. at 269), which plainly cuts against respondents here—indeed, conflict is a near certainty.

Likewise, respondents misapprehend *RJR Nabisco*. The ITC reads into *RJR Nabisco*'s holding an implicit conclusion that domestic injury suffices to render the application of a statute domestic. But *RJR Nabisco* held that domestic injury is *necessary* to state a cause of action under RICO, not *sufficient*. RICO's cause of action also requires a predicate RICO violation, which the Court held must separately overcome the presumption against extraterritoriality. 136 S. Ct. at 2106. Here, it is not enough that the *injury* be domestic; Section 337(a)(1)(A)'s *substantive prohibitions* must also evince Congress's intent that they apply extraterritorially, or can be applied only to domestic conduct.

B. This Case Is An Appropriate Vehicle To Decide The Question Presented.

Perhaps telegraphing its weakness on the merits, SI Group presents a flurry of arguments in an attempt to avoid the question presented. The ITC's tepid embrace (ITC Opp. 19-20) of these arguments is revealing. This case in fact cleanly poses the question presented. Respondents attempt to erect barriers to review that, if accepted, would be impossible to surmount. The Court should take this opportunity to resolve this important issue.

1. The Federal Circuit's Rule 36 summary affirmance poses no obstacle to review. ITC Opp. 19. Indeed, "the Court grants certiorari to review unpublished and summary decisions with some frequency." Stephen M. Shapiro et al., *Supreme Court Practice* 264 (10th ed. 2013). Recently, the Court reversed a summary affirmance by the Eighth Circuit. See *Christeson* v. *Roper*, 135 S. Ct. 891 (2015).

This Court should be particularly reluctant to deny review on that basis here. The Federal Circuit heavily relies on Rule 36; recent statistics reveal that it uses such single-word affirmances frequently—in 57% of cases arising from the Patent Trial and Appeal Board, and 43% of appeals from district court. See Jason Rantanen, *Data on Federal Circuit Appeals and Decisions*, Patently-O (June 2, 2016), https://perma.cc/YN5N-8KLC.

If, as respondents assert, such determinations foreclosed this Court's review, that would mean that this Court could *never* review *TianRui*, so long as the Federal Circuit continues its current practice of affirming via use of Rule 36. That is an unacceptable result. See *Plumley* v. *Austin*, 135 S. Ct. 828, 831 (2015) (Thomas, J., dissenting from denial of certiorari) (unpublished nature of decision is "disturbing" and "yet another reason to grant review").

2. Respondents' assertion (ITC Opp. 19-20; SI Opp. 10-12) that the Federal Circuit's decision could have rested on waiver is meritless.

In the petition for review to the ITC, petitioners plainly argued that "Section 1337(A)(1)(A) Should Not Reach Extraterritorial Activity." A6859. Sino Legend "acknowledge[d] *TianRui*, but continue[d] to respectfully contest jurisdiction in order to *preserve issues* regarding application of Section 337 to the alleged misappropriation here." *Ibid.* (emphasis added). Petitioners thus expressly preserved the argument—consistent with 19 C.F.R. § 210.43(b)—by raising the issue in the petition for review. Given that *TianRui* bound the ITC, there was little more

for petitioners to do other than to express disagreement with *TianRui*.[1]

The ITC subsequently considered—and rejected—petitioners' extraterritoriality agreement on the basis of *TianRui*. See Pet. 11. Citing *TianRui*, the ITC explained that "the question of whether there is a violation of Section 337 by reason of misappropriation of trade secrets is governed by (U.S.) federal common law, even where that misappropriation occurs abroad." Pet. App. 14a n.1.

Even if there was a basis for the ITC to find waiver (there wasn't), the ITC itself *did not* deem the argument waived. It considered it and rejected it. Because the issue was "passed upon below," it was properly before the Federal Circuit—and is now properly before this Court. *Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976).

3. Respondents' observation (ITC Opp. 20 n.8; SI Opp. 34) that the lower courts made no factual findings regarding SI's assertion that there was domestic conduct in this case is legally irrelevant. And, in any event, respondents are wrong on the facts.

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[1] SI's argument (SI Opp. 11) that petitioners waived the argument by means of their brief filed in response to the Commission's notice (A15082) is clearly wrong. 19 C.F.R. § 210.43(b) explains that the petition for review is the document in which a party must raise an argument before the ITC in order to preserve it. When parties file briefs pursuant to the ITC's request to address certain topics (see A15083), there is no requirement for litigants to address *other* arguments for purposes of preservation. SI Group offers no legal argument to the contrary (SI Opp. 11), and it is telling that the ITC does not join SI's argument (ITC Opp. 19-20).

Because *TianRui* has extended Section 337(a)(1)(A) to reach purely extraterritorial conduct, there is currently no reason for any court to address whether the conduct underlying such a claim has any domestic nexus. If that is the standard to which a petition raising this question is held, *no* case will ever pose a suitable vehicle for review. Rather, this is an issue of fact subsequent to resolution of the broad legal question presented. After this Court corrects *TianRui*, respondents may offer any subsequent factual argument on remand. See, *e.g.*, *Fitzgerald* v. *Barnstable Sch. Comm.*, 555 U.S. 246, 260 (2009).

Respondents are factually wrong as well. As even *TianRui* recognized, misappropriation occurs when an employee commits "disclosure of protected information in breach" of their duty of confidentiality. 661 F.3d at 1333. See also Restatement (Third) of Unfair Competition § 40. There is no question that the trade secrets at issue here were disclosed in China, if at all; both C.Y. Lai and Jack Xu were employed in China, and SI Group's trade secrets were allegedly used to produce goods in China.

* * *

The ITC resolved the extraterritoriality question posed here solely on the basis of *TianRui*. Confirming that the Federal Circuit views *TianRui* as settled law, the Federal Circuit summarily affirmed. The correctness of *TianRui* is thus plainly before this Court.

C. The Question Presented Is Significant And Recurring.

We showed in the petition (at 28-34) that the ITC has used its authority under *TianRui* to pursue a number of actions for misappropriation that occurred

abroad, and that the ITC may well use that authority to pursue extraterritorial violations of other U.S. statutes. Respondents' arguments otherwise are unpersuasive.

First, respondents quibble with our statistics. The ITC contends that, while it has instituted nine trade-secret investigations in the past five years, it has instituted many more patent investigations. ITC Opp. 20-21. That is no answer. Each such investigation creates an unacceptable interference with the laws and institutions of foreign nations. The number is likely to rise further still, should the Court deny this petition and signal that *TianRui* remains the law.

Second, respondents' invocation of the Defend Trade Secrets Act (ITC Opp. 21-22; SI Opp. 25) does nothing to lessen the impact of *TianRui*. That Act applies only if an "offender" is a U.S. person or if "an act in furtherance of the offense was committed in the United States." 18 U.S.C. § 1837. But, as this case demonstrates, *TianRui* contains no such limitation. It authorizes the ITC to adjudicate—as it did here—the purely foreign conduct of purely foreign entities. Indeed, *TianRui*'s expansive scope contrasts with the limited reach of the Defend Trade Secrets Act—demonstrating just how far *TianRui* departs from what Congress could have intended.

Third, respondents dispute whether the ITC will investigate violations of other U.S. laws under Section 337. ITC Opp. 22. But the ITC has *already done so* (Pet. 32-33) and parties are investigating such claims now (*id.* at 33-34). The statutory term "unfair methods of competition" provides scant limitation on the scope of claims possible. This Court has concluded that unfairly marketing candy to children (*FTC* v.

R.F. Keppel & Bro., 291 U.S. 304, 314 (1934)), and deceptively advertising the wool content of clothing (*FTC* v. *Winsted Hosiery Co.*, 258 U.S. 483, 492-493 (1922)) are within the broad ambit of this statutory language.

Fourth, the ITC's final assertion—that the foreign policy risks posed by extraterritorial application of Section 337 are "unfounded" (ITC Opp. 22-24)—is belied by this very case. The Chinese government has appeared in this Court to explain that "the ITC has impugned the sovereignty of China and refused to accord the comity expected of a trade partner." TRB Amicus Br. 2. The Presidential review opportunity, which has been used only a handful of times over the past century (Pet. 23 n.4), has not alleviated this affront to Chinese sovereignty. And given that the Presidential review period comes *after* the investigation is complete, that mechanism cannot stem the harm to comity that accrues from the very fact of the ITC investigation.

The question presented is important, and the Court should conclusively resolve it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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