No. 15-1330

In the Supreme Court of the United States

MCM PORTFOLIO LLC,
Petitioner,

v.

HEWLETT-PACKARD COMPANY, and MICHELLE K. LEE, DIRECTOR, U.S. PATENT & TRADEMARK OFFICE,
Respondents.

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

BRIEF OF INTERDIGITAL, INC. AND TESSERA TECHNOLOGIES, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI CURIAE[1]

Amici are leaders in the development of technologies that drive some of the most dynamic sectors of the American economy.

InterDigital, Inc. ("InterDigital"), based in Wilmington, Delaware, has been a pioneer in mobile technology and a key contributor to global wireless communication standards for over four decades. The company's patented innovations have been critical to the deployment of 2G, 3G, 4G, and IEEE 802-related wireless networks and compatible products.

Tessera Technologies, Inc. ("Tessera"), a public technology company based in San Jose, California, has been researching and developing semiconductor and imaging technologies for nearly 25 years. Over 100 billion semiconductor chips have shipped with Tessera's semiconductor technology, and Tessera's advanced imaging technology is embedded in more than 60 percent of global high-end smartphones.

Collectively, *amici* employ hundreds of engineers, including many with advanced degrees. They invest tens of millions of dollars annually in research and development related to their core technology areas. They have thousands of patents in their respective fields. They have experienced first-hand the perverse

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[1] The parties have consented to the filing of this *amicus* brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention to file this brief. No counsel for a party authored this brief in whole or in part; and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund its preparation or submission.

and destabilizing effects of the Patent Trial and Appeal Board's ability to invalidate patents, depriving patentees of an Article III forum and their Seventh Amendment rights to a jury trial, and thereby dramatically undermining their substantive property rights. *Amici*, therefore, have a profound interest in both questions presented in the petition for a writ of certiorari.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Federal Circuit's decision declaring patents to be a "public right," and depriving patent holders of an Article III forum and their jury trial rights, warrants this Court's review for at least three reasons.

First, the Federal Circuit's decision conflicts with this Court's binding precedent. Multiple decisions of the Court, including *McCormick Harvesting Machine Co. v. C. Aultman & Co.*, have held that the Executive Branch has no constitutional authority to revoke a granted patent. 169 U.S. 606 (1898). That power lies only in Article III courts, and Congress may not alter that fundamental separation of powers. The Federal Circuit came to the opposite conclusion by dismissing *McCormick* and ignoring the foundational precedent on which *McCormick* is based.

Second, the Federal Circuit's decision exemplifies why the current state of "public right" jurisprudence is unsustainable. In *Stern v. Marshall*, this Court identified various different formulations of the amorphous line between public and private rights and expressly declined to decide the proper inquiry. 564 U.S. 462, 489-94 (2011). The Federal Circuit here focused on certain formulations, declaring patents to be

a statutory right, while ignoring their unique constitutional foundation and historical pedigree. Confusion over the appropriate inquiry and purpose of the public/private distinction led the Federal Circuit to improperly label patents as public rights, even though they look nothing like the statutory rights this Court has previously recognized.

Third, by incorrectly branding patents as "public rights," the Federal Circuit's decision has profound implications. For instance, if patents are true public rights, then Congress could place all patent adjudication in the Executive Branch, excluding the judiciary entirely. Congress could prohibit the Executive Branch from issuing new patents and could even alter a court's final determination of patent validity or invalidity. Those perverse consequences further counsel in favor of this Court's review.

ARGUMENT

I. THE FEDERAL CIRCUIT'S DECISION CONFLICTS WITH BINDING PRECEDENT ESTABLISHING THAT CONGRESS MAY NOT REMOVE PATENT ADJUDICATION FROM ARTICLE III COURTS

In *McCormick Harvesting Machine Co. v. C. Aultman & Co.*, this Court held that the Executive Branch had no authority to invalidate issued patent claims. 169 U.S. 606 (1898). The Court based its decision on constitutional separation of power principles between the Executive Branch and Article III courts. The Federal Circuit, however, dismissed *McCormick* as resting on the absence of statutory authority. The Federal Circuit's interpretation of

McCormick cannot be reconciled with this Court's reasoning or, critically, with the long line of cases on which *McCormick* relies. These cases uniformly hold that only an Article III court can invalidate an issued patent. The direct conflict between this Court's precedent and the Federal Circuit's decision warrants the Court's review.

A. The Federal Circuit Misinterpreted *McCormick* And Ignored The Decades Of Precedent On Which It Relied

McCormick concerned an application for reissue of a patent. Pursuant to statute, a person could choose to submit an application for reissue of his own patent. 169 U.S. at 609-10. If the reissue application was rejected, then the original patent remained valid. *Id.* at 610, 612. But if the reissue was accepted, it replaced the original patent. *Id.* at 610-11, 612. In *McCormick*, the Patent Office had rejected some claims from the reissue application which were also included in the original patent. *Id.* at 607, 611. The patentee eventually abandoned the application for reissue, which by statute meant that the original patent was still in effect. *Id.* at 608-10. The question for the Court was whether, through the reissue procedure, the Patent Office could have invalidated the claims in the *original* patent. *Id.* at 608.

Relying on a long line of cases, the Court found that the Patent Office had no such power, because "[i]t has been settled by repeated decisions of this court that when a patent has [issued], it has passed beyond the control and jurisdiction of that office, and is not subject to be revoked or canceled by the president, or any other officer of the government." *Id.* at 608. Rather, the "only authority competent to set a patent aside, or

to annul it, or to correct it for any reason whatever, is vested in the courts of the United States, and not in the department which issued the patent." *Id.* at 609.

In the decision below, the Federal Circuit concluded that *McCormick* did not address whether the Constitution bars the Patent Office from invalidating an issued patent. According to the court, *McCormick*'s holding rested on the fact that Congress had not granted the Patent Office such authority in the circumstances at hand, not that Congress could not do so. Pet. App. 9a-10a. The Federal Circuit maintained that "*McCormick* … did not address Article III and certainly did not forbid Congress from granting the PTO the authority to correct or cancel an issued patent." *Id.* at 10a.[2]

The Federal Circuit misunderstands *McCormick*. This Court's holding was in no way dependent on the absence of statutory authority. To the contrary, *McCormick* reaffirmed a long line of prior cases that rested on constitutional grounds. Before even mentioning the reissue statute, the Court cited this constitutional precedent and explained that only Article III courts are competent to set aside a patent. *McCormick*, 169 U.S. at 608-09. The Court further

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[2] The Federal Circuit gave a different justification for dismissing *McCormick* the first time it considered the application of the public rights doctrine to patents, in *Patlex Corp. v. Mossinghoff*, 758 F.2d 594, 604 (Fed. Cir.), *modified*, 771 F.2d 480 (Fed. Cir. 1985). There, the court asserted that *McCormick* concerned mistakes by the patentee, whereas the reexamination provision at issue in *Patlex* was aimed at remedying mistakes by the government. *See id.* That distinction fares no better. If anything, the consent of the patentee makes a procedure *more* likely to be constitutional, not less. *See Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1942-44, 1947 (2015).

explained that allowing the Patent Office to invalidate the original patent "would be to deprive the applicant of his property without due process of law, and would be in fact an invasion of the judicial branch of the government by the executive." 169 U.S. at 612. This is a constitutional holding.[3]

B. Prior To *McCormick*, This Court Repeatedly Held That Only An Article III Court May Revoke A Granted Patent

Even if the constitutional basis of *McCormick*'s holding were unclear, the cases upon which *McCormick* relies dispel any doubt. *McCormick* cites several cases in concluding that, once issued, the "only authority competent to set a patent aside, or to annul it, or to correct it for any reason whatever, is vested in the courts of the United States." 169 U.S. at 609. The cited cases further establish that revocation of a patent by the Executive Branch violates separation of powers principles.[4] The Federal Circuit's decision conflicts with those decisions as well.

1. In *United States v. Stone*, the earliest of the cases cited by *McCormick*, this Court began its

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[3] *See also* 1 Robert A. Matthews, Jr., Annotated Patent Digest § 1:3 (online ed. 2016) ("Indeed, the Supreme Court has held that once a patent issues only a court has jurisdiction to revoke the patent. Permitting the PTO to nullify a previously granted patent deprives the patentee of its property without due process of law. It also violates the separation of powers as it amounts to an invasion of the judicial branch by the executive branch." (citing *McCormick*)).

[4] Although the cited cases generally involve patents for land, rather than patents for inventions, the Article III analysis is the same for both. *See* Section I.C, *infra*.

opinion: "A patent is the highest evidence of title, and is conclusive as against the Government, and all claiming under junior patents or titles, until it is set aside or annulled by some judicial tribunal." 69 U.S. 525, 535 (1865). The Court then explained that only courts can void patents that are "issued unadvisedly or by mistake, where the officer has no authority in law to grant them, or where another party has a higher equity and should have received the patent." *Id.* The Court continued: even if the initial patent was void for want of authority, only a court could invalidate the patent because "one officer of the land office is not competent to cancel or annul the act of his predecessor." *Id.* Such a "judicial act" "requires the judgment of a court." *Id.*

Stone contains no discussion whatsoever of any statutory provision for judicial review. Nor does it contain any discussion of the presence or absence of a statutory grant of authority to the Executive Branch. This Court plainly held that, as a matter of constitutional law, only a court can revoke or invalidate a granted patent. *See* Michael Rothwell, *Patents and Public Rights: The Questionable Constitutionality of Patents Before Article I Tribunals After* Stern v. Marshall, 13 N.C. J.L. & Tech. 287, 364 (2012) ("[A]ccording to Supreme Court precedent [such as *Stone*], actions that seek termination of a patent rest wholly within the authority of the Article III judiciary.").

2. *Moore v. Robbins* similarly held that the Executive Branch lacks authority to invalidate an issued patent. In a dispute over conflicting patents to land, the Illinois Supreme Court held that Congress had given the United States Land Department power to make the "final authoritative" decision regarding the

contested land. 96 U.S. 530, 532 (1878). But this Court explained that, whatever the authority of the Land Department to decide to whom to issue a patent, "it is equally clear that when the patent has been awarded to one of the contestants … all right to control the title or to decide on the right to the title has passed from … the Executive Department of the government." *Id.* This is not based upon the mere absence of statutory authorization, but "must, in the nature of things, be so." *Id.*

The Court repeatedly emphasized this point, stating unambiguously that "[t]he functions of th[e] [Executive] department *necessarily* cease when the title has passed from the government." *Id.* at 533 (emphasis added). Even if "fraud, mistake, error, or wrong has been done, the courts of justice present the only remedy." *Id.* This has nothing to do with what laws have or have not been passed by Congress; instead, "[i]t is *a matter of course* that, after [the patent is issued], neither the secretary nor any other executive officer can entertain an appeal. He is absolutely without authority." *Id.* at 533-34 (emphasis added).

The Court then explained why the Executive Branch could not have continuing authority over an issued patent: "the titles derived from the United States, instead of being the safe and assured evidence of ownership which they are generally supposed to be, would be always subject to the fluctuating, and in many cases unreliable, action of the land-office." *Id.* at 534. Such uncertainty would undermine the purpose of the patent system because "[n]o man could buy of the grantee with safety, because he could only convey subject to the right of the officers of the government to

annul his title." *Id.* So obvious is this point that the Court deemed it "needless to pursue the subject further. The existence of any such power in the Land Department is utterly inconsistent with the universal principle on which the right of private property is founded." *Id.* at 534.

3. In *Iron Silver Mining Co. v. Campbell*, this Court addressed whether the United States had granted a patent on land to which someone else had previously been granted a patent. 135 U.S. 286 (1890). The Court held that the original patentee "has a right to have [that question] tried by a court of justice, and from which he cannot be excluded by the subsequent action of the officers of the land department." *Id.* at 293. A patent holder "should be only required to answer persons [who contest the patent] not before the administrative departments, but in courts of justice, by the regular proceedings which determine finally the rights of parties to property." *Id.* at 301.

According to this Court, treating patents as property was consistent with its prior cases, in which it had "more than once held that when the government has issued and delivered its patent for lands of the United States, the control of the department over the title to such land has ceased, and the only way in which the title can be impeached is by a bill in chancery." *Id.* Again, this holding was based on the Constitution and principles of natural law, not on the absence of statutory authority.

4. In *Noble v. Union River Logging Railroad Co.*, this Court addressed a railroad right of way over public lands, which the Secretary of the Interior approved, but then later tried to revoke. 147 U.S. 165 (1893). The Court explained that, although a patent obtained by

fraud can be challenged by the United States in court, "[a] revocation of the approval of the secretary of the interior, … by his successor in office, was an attempt to deprive the plaintiff of its property without due process of law, and was, therefore, void." *Id.* at 176. Citing *Stone* and *Moore*, the Court emphasized that "[o]ne officer of the land office is not competent to cancel or annul the act of his predecessor" because "[t]hat is a judicial act, and requires the judgment of a court." *Id.* (citation omitted).

5. Finally, in *Michigan Land & Lumber Co. v. Rust*, this Court explained that whenever a statute "specifically provides for the issue of a [land] patent, then the rule is that the legal title remains in the government until the issue of the patent." 168 U.S. 589, 593 (1897). But, the Court continued, once "the legal title has passed," the "power of the [executive] department to inquire into the extent and validity of the rights claimed against the government … cease[s]." *Id.* "After the issue of the patent, the matter becomes subject to inquiry *only* in the courts and by judicial proceedings." *Id.* (emphasis added) (citing *Stone*).

In deciding *Michigan Land*, this Court relied on a prior decision that reflected the same constitutional principle that only courts can revoke granted patents. *Id.* (citing *Bicknell v. Comstock*, 113 U.S. 149, 151 (1885)). In *Bicknell*, the Commissioner of the Land Office "ordered a return of [a] patent to his office, and thereupon 'tore off the seals and erased the president's name from said patent, and mutilated the record thereof in the general land-office.'" 113 U.S. at 151. The Court explained that "this action was utterly nugatory, and left the patent … in as full force as if no such attempt to destroy or nullify it had been made."

Id. Indeed, "when the patent has been executed by the president, and recorded in the general land-office, all power of the executive department over it has ceased." *Id.*

This unbroken line of cases, culminating in *McCormick*, leaves no doubt that revocation of a patent by the Executive Branch violates separation of powers.[5]

C. The Constitution's Protections Apply Equally To Land And Invention Patents

In responding to a pending petition for a writ of certiorari raising similar issues, the government suggested that many of these cases were distinguishable because patents on land are materially different from patents on inventions for purposes of an Article III analysis. *See* Br. in Opp. at 14, *Cooper v. Lee*, No. 15-955 (U.S. Apr. 11, 2016). This Court has rejected that view.

Far from distinguishing between land and invention patents, this Court has stated that Article III protections apply to both equally. In *United States v. American Bell Telephone Co.*, for example, this Court explained that "[t]he power … to issue a patent for an invention, and the authority to issue such an instrument for a grant of land, emanate from the same

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[5] The sixth case cited in *McCormick*, *United States v. American Bell Telephone Co.*, was focused on a somewhat different issue. 128 U.S. 315 (1888). There, the Court held that courts must have judicial power to correct fraud in obtaining a patent for invention. Even in that context, the Court explicitly stated that, when there is no express act of Congress authorizing judicial review, the Constitution itself provides for judicial review. *See id.* at 358, 365-68 (quoting *Stone* and *Moore*).

source, and although exercised by different bureaus or officers under the government, are of the same nature, character and validity ...." 128 U.S. 315, 358-59 (1888) (comparing U.S. Const. art. I, § 8, cl. 8 with *id.* art. IV, § 3, cl. 2). This Court reiterated that view in *McCormick*: "[I]n this respect a patent for an invention stands in the same position and is subject to the same limitations as a patent for a grant of lands. The power to issue either one of these patents comes from congress and is vested in the same department." 169 U.S. at 609.

Accordingly, regardless of whether they concern patents for invention or land, these bedrock separation of powers cases squarely establish that only an Article III court may revoke a granted patent right. The Federal Circuit's decision conflicts with all of those decisions. That alone warrants this Court's review.

II. THIS COURT SHOULD ALSO GRANT REVIEW TO RECONCILE THE VARIOUS DIFFERENT "PUBLIC RIGHT" TESTS FROM *STERN*

In *Stern v. Marshall*, this Court acknowledged that it had articulated "various formulations" of what constitutes a "public right" and identified at least seven different tests. 564 U.S. 462, 488-94 (2011). But because the right at issue in that case did not constitute a "public right" under any of the aforementioned tests, the Court declined to identify the appropriate inquiry. *Id.* at 488.

The lack of clarity concerning the relationship between the various formulations has caused confusion and eroded critical constitutional protections. In this case, the Federal Circuit reached the wrong result by

focusing on certain formulations that it believed supported its conclusion. The court asked whether the right "derives from a federal regulatory scheme" and is "integrally related to particular federal government action." Pet. App. 13a (citation omitted). Answering both questions in the affirmative, the court concluded its inquiry without taking a closer look at the critical historical and constitutional context. *See Stern*, 564 U.S. at 484 ("When a suit is made of 'the stuff of the traditional actions at common law tried by the courts at Westminster in 1789' … the responsibility for deciding that suit rests with Article III judges in Article III courts." (citation omitted)).

The Federal Circuit's failure to pay heed to history led it to disregard important differences between patents, on the one hand, and true public statutory rights, on the other. The latter category consists of rights granted under modern, detailed regulatory regimes with no common-law antecedents. Typical examples include: data sharing arrangements amongst pesticide manufacturers (*Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985)); payment of OSHA penalties (*Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442 (1977)); state law counterclaims in commodity futures trading reparations proceedings (*Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986)); the government's recovery for overpayment of social security benefits (*Austin v. Shalala*, 994 F.2d 1170 (5th Cir. 1993)); and challenges to the EPA's decision on an application for a boiler and industrial furnace permit required by the Resource Conservation and Recovery Act (*Marine Shale Processors, Inc. v. United States*

EPA, 81 F.3d 1371 (5th Cir. 1996), *cert. denied*, 519 U.S. 1055 (1997)).

Patents are different in kind. Unlike OSHA penalties or industrial furnace permits, patents have a rich common law history and constitutional foundation. As the petition explains (Pet. 20-22), patent actions at common law have existed since the 1600s. *See generally*, *e.g.*, Adam Mossoff, *Rethinking the Development of Patents: An Intellectual History*, *1550-1800*, 52 Hastings L.J. 1255 (2001). And, as this Court recognized in *Stern*, such "traditional actions at common law" cannot be public rights. 564 U.S. at 484 (citation omitted); *see also Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1938 (2015) (quoting *Stern*).

Historical analysis is likewise the cornerstone of the Seventh Amendment inquiry. *See, e.g.*, *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376-77 (1996). If the cause of action "either was tried at law at the time of the founding or is at least analogous to one that was," a jury is required. *Id.* at 376. Patent infringement actions, for example, indisputably fall into this category and thus, by definition, cannot be a public right. *Id.* at 377. "The Seventh Amendment protects a litigant's right to a jury trial only if a cause of action is legal in nature and it involves a matter of 'private right.'" *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 n.4 (1989); *see also id.* at 53 ("Unless a legal cause of action involves 'public rights,' Congress may not deprive parties litigating over such a right of … a jury trial."); *Atlas Roofing Co*, 430 U.S. at 455 ("[W]hen Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment[] ….").

In short, by applying certain "public right" formulations in isolation, the Federal Circuit stripped patents of Article III and Seventh Amendment protections and gave the Executive Branch powers historically held by the judiciary. This Court has repeatedly disapproved of the Federal Circuit's use of bright-line rules. *See, e.g.*, *Bilski v. Kappos*, 561 U.S. 593, 604 (2010) (machine-or-transformation test "is a useful and important clue, an investigative tool," but "was not intended to be an exhaustive or exclusive test"); *id.* at 613 (Stevens, J., concurring) (same); *id.* at 659 (Breyer, J., concurring) (same); *see also eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 394 (2006) (rejecting a categorical rule); *id.* at 395-96 (Kennedy, J., concurring) (same). The Court's review here is needed to correct the same formalistic approach and to clarify the appropriate Article III inquiry.

III. THE FEDERAL CIRCUIT'S DECISION HAS PROFOUND CONSEQUENCES FOR PATENT LAW

Characterizing something as a public right comes with certain consequences. By incorrectly holding that patents are public rights, the Federal Circuit's decision has far-reaching and wholly implausible consequences that the Federal Circuit never grappled with and that have "nothing to do with the text or tradition of Article III." *Stern*, 564 U.S. at 504 (Scalia, J., concurring).

If patents are public rights, then Congress has largely unfettered control over whether, and to what degree, an Article III court is permitted to adjudicate issues of invalidity and infringement. This Court has long understood that "[t]he mode of determining matters of [public right] is completely within congressional control" and that "Congress may reserve

to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals." *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929). Similarly, members of this Court have explained that the "understanding of these [public right] cases is that the Framers expected that Congress would be free to commit such matters completely to nonjudicial executive determination." *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 68 (1982) (plurality). As a result, "there can be no constitutional objection to Congress' employing the less drastic expedient of committing their determination to a legislative court or an administrative agency." *Id.*; *see also id.* at 108 (White, J., dissenting) ("There need be no Art. III court involvement in any adjudication of a 'public right[]' ….").

The academic literature echoes this understanding of public rights. As commentators have explained, this Court "has sometimes viewed Congress's discretion in such cases as total—encompassing even the question whether to allow public rights claims to be presented at all." Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 915, 951 (1988). "[T]he whole point of the 'public rights' analysis was that *no judicial involvement at all* was required—executive determination alone would suffice." Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 632 (1984).[6] If patents

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[6] *See also, e.g.*, Mila Sohoni, *Agency Adjudication and Judicial Nondelegation: An Article III Canon*, 107 Nw. U. L. Rev. 1569, 1584 (2013) ("[A]gency adjudications of public rights *can* be final—direct appellate review need not be available in

are public rights, therefore, not only could an executive agency definitively (and perhaps arbitrarily) invalidate patents, but Congress could relegate patent validity disputes entirely to the PTO or even choose to provide *no* mechanism at all for challenging a patent's validity. That is, Congress could provide that, once granted, patents would be absolutely inviolate and immune from challenge in any forum.

The mischief would not have to stop there. To the extent Congress chooses to provide a judicial forum, Congress could retroactively alter the rules such that final judicial determinations of patent validity or invalidity would no longer control. Courts and commentators have explained that while a statute cannot retroactively annul a court's judgment with respect to a private right, Congress *can* render ineffective a court's judgment concerning a public right. "Even after a public right has been established by the judgment of the court, it generally may be annulled by subsequent legislation." 46 Am. Jur. 2d Judgments § 13 (online ed. 2016); *see also Johnston v. Cigna Corp.*, 14 F.3d 486, 492 (10th Cir. 1993), *cert. denied*, 514 U.S. 1082 (1995); *Rodulfa v. United States*, 461 F.2d 1240, 1252 & n.61 (D.C. Cir.), *cert. denied*, 409

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individual cases to an Article III court ...."); Caleb Nelson, *Adjudication in the Political Branches*, 107 Colum. L. Rev. 559, 577 (2007) ("But as long as only public rights were at stake and no private individual had yet acquired any vested right to the land, judicial power in the constitutional sense was not necessary."); Kenneth S. Klein, *The Validity of the Public Rights Doctrine in Light of the Historical Rationale of the Seventh Amendment*, 21 Hastings Const. L.Q. 1013, 1025 (1994) ("[I]n public rights cases the government could provide as many or as little procedural safeguards as it chose. In particular, perhaps public rights cases were not subject to Article III ....").

U.S. 949 (1972); *City of Norfolk v. Stephenson*, 38 S.E.2d 570, 575 (Va. 1946); *cf. Bank Markazi v. Peterson*, No. 14-770, slip op. at 13 n.3 (Apr. 20, 2016) (Roberts, C.J., dissenting) (noting a public rights exception in similar circumstances).

Indeed, Congress could theoretically eliminate the entire patent system. The public rights doctrine is grounded in the idea that Congress is free to determine the procedure to vindicate the right because it does not need to provide the right at all. *See, e.g.*, Fallon, 101 Harv. L. Rev. at 952-53. If patent rights are public rights, then it seemingly follows that Congress could choose not to provide those rights at all.

Such consequences, of course, border on the absurd. But that only serves to highlight that the Federal Circuit's decision is wrong, and that the public rights doctrine is desperately in need of clarification from this Court. Until then, *amici* and other patent owners will be subjected to the destabilizing effects of allowing an Executive Branch agency to invalidate patents. In several instances already, patent owners have obtained jury verdicts of validity and infringement in Article III forums, only to be met with subsequent decisions by the Patent Trial and Appeal Board finding the same claims invalid.[7] That uncertainty has dramatically undermined *amici*'s substantive property rights, and the stability of the patent system as a whole. Further review is warranted.

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[7] *See, e.g.*, *ZTE Corp. v. IPR Licensing, Inc.*, IPR2014-00525, Paper 48, 2014 WL 10405879 (P.T.A.B. Sept. 14, 2015) (finding patent claims invalid on the same grounds that a district court jury rejected), *appeal docketed*, No. 16-1374 (Fed. Cir. Dec. 29, 2015).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 31, 2016