No. 17-609

IN THE

Supreme Court of the United States

EVOLUTIONARY INTELLIGENCE LLC,

Petitioner,

v.

SPRINT NEXTEL CORPORATION, SPRINT COMMUNICATIONS COMPANY, L.P., SPRINT SPECTRUM L.P., SPRINT SOLUTIONS, INC., APPLE INC., FACEBOOK INC., FOURSQUARE LABS, INC., GROUPON, INC., LIVINGSOCIAL, INC., MILLENNIAL MEDIA, INC., TWITTER, INC., YELP, INC.,

Respondents.

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

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2(b) of the Supreme Court, Eagle Forum Education & Legal Defense Fund ("Eagle Forum ELDF") respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the Petition for a Writ of *Certiorari* submitted by Petitioner ("Petitioner").

Amicus Eagle Forum ELDF provided counsel for all parties with timely notice along with its request for consent to file the accompanying *amicus curiae* brief. Petitioner filed blanket written consent to the submission of *amicus* briefs in this action, but Respondents failed to respond timely to the request by *Amicus*, thereby necessitating this motion.

Amicus Eagle Forum ELDF was founded in 1981 by Phyllis Schlafly, and has long advocated for the rights of small inventors. Eagle Forum ELDF has filed multiple *amicus curiae* briefs in defense of those rights. For example, Eagle Forum ELDF successfully filed an *amicus curiae* brief on the side of inventors in *Bilski v. Kappos*, 561 U.S. 593 (2010), and more recently filed an *amicus* brief in the patent case pending before this Court on the merits in *Oil States Energy Services v. Greene's Energy Group* (Sup. Ct. No. 16-712).

Amicus Eagle Forum ELDF has a direct and vital interest in this case to defend against the erosion of patent rights in the United States and to support longstanding judicial precedent that patents are "private rights" protected by the right to full fact-finding and a jury trial.

Amicus Eagle Forum ELDF urges the Court to grant the Petition and reject an underlying misguided

view that patents are merely "public rights" to be disposed of without even the fact-finding process customarily accorded to other property rights.

For the foregoing reasons, *Amicus* Eagle Forum ELDF respectfully requests that its motion for leave to file the accompanying brief *amicus curiae* be granted.

Dated: November 15, 2017

Respectfully submitted,

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QUESTIONS PRESENTED

In *Alice Corp. Pty. Ltd.* v. *CLS Bank Int'l*, 134 S. Ct. 2347 (2014), this Court clarified the proper approach to issues of "abstractness" under Section 101 of the Patent Act and urged "tread[ing] carefully in construing this exclusionary principle lest it swallow all of patent law." *Id.* at 2354. However, lower courts have interpreted *Alice* as authorizing invalidation of issued patents on abstractness grounds based solely on the pleadings, even where the invalidation rests on resolution of a disputed issue of fact or of claim construction or scope. This overreading of *Alice* has been widely criticized by patent commentators, yet encouraged by the Federal Circuit.

The questions presented are:

1. Whether *Alice* authorizes a district court to invalidate a patent solely on the pleadings based on an abstractness argument that depends upon one view of a disputed question of fact—notwithstanding the presumption of patent validity in Section 282 of the Act and settled procedural and Seventh Amendment safeguards that ordinarily prevent the resolution of such questions on the pleadings.

2. Whether *Alice* and its predecessors authorize a court to invalidate a patent on the pleadings based on one view of a disputed question of claim construction or scope—including (in *Alice*'s words) what the claims "are directed to"—notwithstanding the presumption of patent validity and the general principle that, on a motion to dismiss, any legal instrument must be construed in the light most favorable to the non-moving party.

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 1981 by Phyllis Schlafly, *Amicus Curiae* Eagle Forum Education & Legal Defense Fund ("Eagle Forum ELDF") has long advocated for the rights of

[1] No counsel for a party authored this brief in whole or in part. No person or entity other than *Amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. *Amicus* files this brief with the requisite ten-day prior written notice to all parties. *See* S. Ct. R. 37.2(a). Petitioner filed a blanket consent for amicus briefs, while Respondents failed to respond timely to the request by *Amicus* for consent, thereby necessitating the accompanying motion for leave to file.

small inventors, and has filed *amicus curiae* briefs in defense of those rights. Phyllis Schlafly personally spoke out against enactment of the Leahy-Smith America Invents Act ("AIA"), which deprived small inventors of well-established rights. Eagle Forum ELDF has consistently advocated for the traditional, pre-AIA American patent system as being the foundation for innovation and wealth. For example, Eagle Forum ELDF successfully filed an *amicus curiae* brief on the side of inventors in *Bilski v. Kappos*, 561 U.S. 593 (2010).

Eagle Forum ELDF has a direct and vital interest in this case to defend against the evisceration of patent rights in the United States and to support longstanding judicial precedent that patents are "private rights" to be fully protected by Article III courts and the right to a jury trial, rather than the mistaken view that patents are merely "public rights."

SUMMARY OF ARGUMENT

Lower courts are treating patent rights differently from other property rights, as illustrated by the Petition here and the data it provides about the high rate of dismissals on pleadings in patent cases. By what Petitioner aptly calls "pleading invalidations," patent rights are being taken away based not on fact-finding, but on conjecture from the bench.

This process deprives patent-holders of meaningful due process protections with respect to their property rights in patents. As embodied in this case, this trend implicitly marginalizes patent rights as some kind of "public right" to be taken away without robust fact-finding, which would not be allowed for any other type

of property right. By undermining the rights of small inventors to fact-finding procedures on their patent claims, the decision below and many other recent ones like it deter innovation by small inventors, and dampen investments in their work. This is to the detriment of American prosperity, which depends heavily on continued innovation by individual inventors.[2]

This alarming trend undermines not only property rights, but "Rule of Law" itself. In an era where intellectual property fuels the American economy, intangible property rights such as patents should receive at least as much procedural safeguards as real property enjoys. The erosion of the Rule of Law for patent-holders warrants a grant of *certiorari* here.

ARGUMENT

I. The Deprivation of the Fact-Finding Process from Patent-Holders Is a Departure from Accepted Practice, Which Requires Granting the Petition.

Not only was Petitioner denied a right to a jury trial below, but Petitioner was not even allowed its right to the basic fact-finding process. Its patents were rejected entirely at the pleading stage, which constitutes a departure from the accepted practice of

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[2] *See, e.g.*, Raymond P. Niro, "Why Are Individual Inventors Important To America?" IPWatchdog.com (July 7, 2013) (enumerating nearly three-dozen inventions that changed the world, all by "individual inventors who ultimately formed companies to exploit their ideas, but who initially manufactured nothing") http://www.ipwatchdog.com/2013/07/07/why-are-individual-inventors-important-to-america/id=42758/ (viewed Nov. 14, 2017).

not dismissing Complaints based on factual findings made by a trial court:

> Defendants contend that the '536 and '682 patents are invalid for failure to claim patent-eligible subject matter. For the reasons set forth below, the court finds that both patents fail to claim patent-eligible subject matter, and GRANTS defendants' motion to dismiss and for judgment on the pleadings.

(Pet. App. 28a)

This was a substantial departure from accepted practice, where the issue of patent-eligible subject matter is generally a fact-intensive inquiry not to be decided at the pleading stage. "[I]t will ordinarily be desirable—and often necessary—to resolve claim construction disputes prior to a § 101 [patentability] analysis, for the determination of patent eligibility requires a full understanding of the basic character of the claimed subject matter." *Bancorp Servs., L.L.C. v. Sun Life Assurance Co. of Canada (U.S.)*, 687 F.3d 1266, 1273-74 (Fed. Cir. 2012), *cert. denied*, 134 S. Ct. 2870 (2014). *See also Arrhythmia Research Tech., Inc. v. Corazonix Corp.*, 958 F.2d 1053, 1055-56 (Fed. Cir. 1992); *Card Verification Solutions, LLC v. Citigroup Inc.*, 13 CV 6339, 2014 U.S. Dist. LEXIS 137577, *6 (N.D. Ill. Sept. 29, 2014); *Genetic Techs. Ltd. v. Glaxosmithkline, LLC*, 12 CV 299, 2014 U.S. Dist. LEXIS 156473, at *2-4 (M.D.N.C. Aug. 22, 2014).

Pleading invalidations of patents without any fact-finding does not comport with the rich history of patents as being full-fledged property rights:

> The first four patent statutes – adopted in 1790, 1793, 1836, and 1870 – ***all defined patents as property rights in substantive terms***, securing

> the same rights to possession, use, and disposition traditionally associated with tangible property entitlements. Nineteenth-century courts followed Congress's definition of patents as property, securing to patentees their "substantive rights," including the "right to manufacture, the right to sell, and the right to use" their inventions.

Adam Mossoff, "Exclusion and Exclusive Use in Patent Law," 22 Harv. J. Law & Tech. 321, 340-341 (Spring 2009) (collecting the statutory provisions, and citing *Adams v. Burke*, 84 U.S. (17 Wall.) 453 (1873), emphasis added).

The public good is not advanced by implicitly denying that patents protect private rights, whose protection is necessary to further the public good. "The public good is in nothing more essentially interested than in the protection of every individual's private rights, as modeled by the municipal law." 1 Blackstone, Commentaries 135 (quoted in Adam Mossoff, "What Is Property? Putting The Pieces Back Together," 45 Ariz. L. Rev. 371, 399 n.106 (Summer 2003)).

Both the leading libertarian thinker Ayn Rand and the leading conservative Phyllis Schlafly supported strong safeguards for patent rights as private rights:

> Ayn Rand … claims that intellectual property rights are not "grants … in the sense of a gift, privilege or favor" from the laws established by governments, but rather an acknowledgment of "the role of mental effort in the production of material values" and, therefore, a right that exists in the creator. … [T]he idea that was created and as such is owned by the individual who labored in thought to produce it.

John M. Kraft and Robert Hovden, "Natural Rights, Scarcity & Intellectual Property," 7 NYU J.L. & Liberty 467, 472-473 (2013) (citations omitted). *See also* Phyllis Schlafly, "Death for Innovation" (March 11, 2011) ("The mainspring of our success is the American patent system, unique when the Founding Fathers put it into the U.S. Constitution even before freedom of speech and religion, and still unique today.").[3]

Real protections of due process and meaningful fact-finding attach to property rights, and it is a departure of accepted practice for lower courts to hold otherwise with respect to patents.

II. The Erosion Below of the Rule of Law for Patent-Holders Warrants a Grant of *Certiorari* Here.

"[T]here must be some rule of law to guide the court in the exercise of its jurisdiction," explained the Court in *Marbury v. Madison*, and there must be consistent adherence to Rule of Law in addressing property rights. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165 (1803). In lower court rulings since *Alice*, as explained by the Petition, that consistency has been lacking with respect to patent rights due to pleading invalidations without any fact-finding. (Pet. 77a-90a)

Economic prosperity depends on well-defined, consistently protected property rights. Attracting investments in patents becomes impossible if they may be taken away without traditional due process that includes findings of fact. Convenience is not a justification for bypassing basic fact-finding. "The

[3] http://www.pseagles.com/Death_for_Innovation (viewed Nov. 14, 2017).

important rights of persons and of property affected by it cannot be allowed to be overborne by the argument of inconvenience." *Lapeyre v. United States*, 84 U.S. (17 Wall.) 191, 204 (1872).

The need to safeguard the judicial fact-finding process for patent rights is underscored by the insights of "law and economics." The Economics Nobel prize-winning Coase Theorem teaches that market efficiency will occur regardless of how legal entitlements are drawn, as long as they are drawn somewhere in a secure manner:

> As Ronald H. Coase has reminded us … a society needs a system of law (including natural resource and environmental law) that provides them a stable pattern of expectations. So structured, this allows people to plan their economic affairs with reasonable confidence so that they can know in advance the consequences of their choices.

Nicholas Mercuro and Michael D. Kaplowitz, "Performance Indicators for Natural Resource and Environmental Policy: Contributions from American Institutional Law and Economics," 11 Duke Env L & Pol'y J 139 (Fall 2000) (citing Ronald H. Coase, "The Problem of Social Cost," 3 J.L. & Econ. 1, 19 (1960)). Yet arbitrary "pleading invalidations" challenged here undermine protections for owners of patents, and thus is disruptive to property rights.

The growing use by lower federal courts of pleading invalidations of patent rights, without the protections of fact-finding, is reminiscent of an attempt by Justice Oliver Wendell Holmes to resolve without individualized fact-finding a conflict between emerging automobile use and the railroad industry.

After a driver of a truck had been killed by a passing train, Justice Holmes ruled that "we are dealing with a standard of conduct, and when the standard is clear it should be laid down once for all by the Courts." *Baltimore & O. R. Co. v. Goodman*, 275 U.S. 66, 70 (1927). Disregarding the fact-finding by a jury that decided in favor of the truck driver, Justice Holmes declared that the standard of conduct required that an automobile driver "must stop and get out of his vehicle" in order to check for oncoming trains, if his view was obstructed in any way. *Id.* This bench-made rule lasted merely seven years, whereupon Justice Cardozo wrote for the unanimous Court to overturn it in *Pokora v. Wabash R. Co.*, 292 U.S. 98 (1934).

Patent-holders should not be subjected to pleading invalidations without any fact-finding.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Dated: November 15, 2017

Respectfully submitted,

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