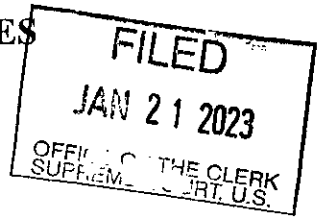
23-141

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES



ROWLAND J. MARTIN, JR.

Petitioner

v.

COUNTY OF BEXAR, et al,

Respondents

On Petition For a Writ Of Certiorari to
To The United States Court Of Appeals
for The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Before the Court is a novel case and controversy involving a patent related conflict of laws. The case was removed from state court after the expiration of the applicable statute of limitations, but was later remanded by the district court without regard to a motion for abatement supported by patent related subject matter. Later, the clerk of the district court transmitted the Federal Circuit notice of appeal to the Fifth Circuit where the case was dismissed. Upon the docketing of the appeal in the Federal Circuit, the Clerk of that court also dismissed the appeal. Two questions are presented:

1. Whether a removal action supported by 28 USC 1338 and 1454 is justiciable by way of a district court order of remand issued pursuant to 28 USC 1447?

2. Whether the jurisdictional scheme embodied by *Sperry v. Florida*, 373 U.S. 379 (1963), and by codified grants of jurisdiction in 28 USC 1295(a), confer exclusive appellate jurisdiction upon the Federal Circuit, notwithstanding an order of remand issued pursuant to 28 USC 1447 by the federal district court where the notice of removal was filed?

PARTIES TO THE PROCEEDINGS AND TO THE RELATED PROCEEDINGS

The parties to the case are as follows:

The Petitioner is Rowland J. Martin. He was the defendant in the district court, the defendant appellant in the Federal Circuit, and the claimant in general of a right to repose.

The Government Respondents and plaintiffs are the County of Bexar, Texas, the City of San Antonio, and the San Antonio Independent School District. The Government Respondents were plaintiffs in the state district court and plaintiff appellees in the Federal Circuit.

The Private Respondent is Edward Bravenec, et al, a third party cross claim defendant and state court plaintiff of a state court tortious interference case.

The related proceeding is:

Bravenec v. Martin, Case No. 22-2191 (Fed. Cir., appeal dismissed April 7, 2023)

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PETITION FOR WRIT OF CERTIORARI

Rowland J. Martin petitions the Court for a writ of certiorari to the Federal Circuit.

OPINIONS BELOW

The appendix contains a final order of the U.S. Court of Appeals for the Federal Circuit, and orders issued by the U.S. District Court of the Western District of Texas, including an order of remand dated July 18, 2022 and a final order terminating a show cause proceeding dated August 24, 2022, respectively.

JURISDICTION

The Court has jurisdiction under 28 U.S.C. §1257, under 28 U.S.C. 1331, 1367 1631, and 1651. The petition was received by the Court on January 26, 2023, after its original mailing on January 21, 2023 within ninety days of the last decision in that case on November 23, 2022.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The controlling constitutional and statutory provisions in this case are the following: (1) Articles I and III of the Constitution, and Amendments I, V and VI of the Bill of Rights; (2)

statutory delegations of jurisdiction in 28 U.S.C. 1295((a)(1), 1338 and 1454, and (3) the patent related legislation in the Federal Courts Improvements Act of 1982, Section 19 of the America Invents Act, Pub. L. 112 - 29, the "Study of Underrepresented Classes Chasing Engineering and Science (SUCCESS) Act of 2018, Pub. L. 115-273, and the micro entity statute in 35 U.S.C. 123.

STATEMENT OF THE CASE

A. The Anti-Competitive Practices Cases

The jurisdictional facts bearing on Petitioner's claims about anti-competitive practices and his right to maintain claims for quiet title are fundamentally undisputed. In 2014, a group of tax collector plaintiffs sued Petitioner in a representative capacity for the second time, claiming a right to collect against a tax account owned by the Estate of King. The second case commenced after a 2009 judgment in favor of the plaintiffs was judicially vacated in 2013. Petitioner asserts that he is the beneficiary of a probate court distribution of estate assets that effectively moots the county's claims against the Estate of King.

Petitioner joined Bravenec as a cross defendant in the tax because Bravenec was a losing party in an appeal before the U.S. Court of Appeals for the

Fifth Circuit against whom Petitioner is entitled to assert a right to quiet title relief as a purchase money lien holder. See 42 USC 1985. For reasons more fully explained in deed records shown in the Appendices C, Petitioner maintains that Bravenec's filing of a plea to jurisdiction in the county's case is unsustainable because the plea falsely implies that his tortious interference suit was closed at the time of its removal. Martin v. Bravenec, 627 F. App'x 310 (5th Cir. 2015), cert denied, 137 S. Ct. 1137 (2016) (Martin v. Bravenec I).

B. The Patent Related Controversy

Concurrent with his capacity as a state court defendant, Petitioner claims status as an interested party in patent protection with a right to revive the involuntary abandoned application in USPTO #13/026, 246. Consistent with statutory criteria for patent related subject matter, Martin filed a provisional patent application in USPTO #13/026, 246 with the U.S. Patent and Trademark Office in 2010 with the prescribed fee for Small Entity inventors. The '246 specification establishes that Petitioner seeks to advance the useful arts and sciences for the mitigating of internet access disparities, i.e. for bridging the digital divide, and that he qualifies on that basis as a covered party under 28 USC 1338 and 1454 who is entitled to be heard under the patent related laws.

As of 2014, moreover, both the public and private plaintiff groups were responsible for predations that trespassed against, infringed upon and unduly restrained Petitioner's progress clause expectation in quiet title relief. Section 1338(a) of title 28 provides in this regard that "[t]he district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents ... and further, that "[n]o State court shall have jurisdiction over any claim for relief arising under any Act of Congress relating to patents ..." 28 USC 1338. Section 1338(b) additionally provides that "[t]he district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the ... patent ... laws." 28 USC 1338(b). Lastly, Section 1454 of title 28 provides that "[a] civil action in which any party asserts a claim for relief arising under any Act of Congress relating to patents ... may be removed to the district court of the United States for the district and division embracing the place where the action is pending." 28 USC 1454(a).

C. The Federal Court Proceedings Below

On removal to federal court of the county's twenty one year old claim in 2022, Petitioner asserted rights under 28 USC 1446 based on

plaintiffs' transmittal of a trial setting order founded on a backdated certificate of service. In district court, Petitioner moved for the abatement of the plaintiffs cases pursuant to FRCP 43, citing patent related subject matter to support preemption claims authorized by the American Rescue Plan Act. Petitioner's Rule 43 motion to abate also showed that Bravenec's implied claim of a right to repose in his plea to jurisdiction was illusory.

In opposition to removal and abatement, plaintiffs' law firm contended without legal or evidentiary support that "[t]here is not a limitations issue presented in the underlying case as the lawsuit was initiated in 2014 tolling the limitations period for all the tax years included in the lawsuit ..." See, Plaintiffs' Response To Defendant's Motion For A Definitate Statement, ECF 12. Ultimately, the district court struck the pleading for abatement relief from the record, remanded the case to state court, and referred notices of appeals to the Fifth Circuit that were designated for review by the Federal Circuit.

On August 15, 2022, the district court disregarded the motion to abate, and instead issued an order of remand pursuant to 28 USC 1447 and an order to show cause why sanctions should not be applied. in which it omitted to notice the patent related subject matter of his motion to abate. In his response to a post-remand order to show cause,

Petitioner's showing again conclusively established that Bravenec was not the beneficiary of a final judgment or order that might lawfully preclude litigation on purchase money lien issues on res judicata grounds.

The district court's failure to sua sponte ascertain patent related jurisdiction eventually led to the docketing of Petitioner's appeal in both the Fifth and Federal Circuits, without Petitioner's consent. In response to this anomaly, and prior to any final rulings by the Federal Circuit, Petitioner filed a Standard Form 95 notice of claim to alert the Administrative Office of the United States Courts to the problem and to exhaust administrative remedies for a prospective right to sue. In it, Petitioner expressly disclosed the patent related subject matter of intended appeals, and on that basis gave notice of his claim that the docketing of his appeal in the Fifth Circuit was actionable under the Federal Tort Claims Act.

On November 23, 2022, the Clerk of the Federal Circuit dismissed County of Bexar, et al v. Martin, after the case was finally docketed in the Federal Circuit as Case No. 22-2211. Ironically, on December 28, 2022, a Fifth Circuit panel addressed the identical problem with the ruling that Western District personnel had transmitted Petitioner 's appeal to the Fifth Circuit in error: "It is apparent from the face of the [Notice of Appeal

for Case SA22-cv-00522] that it was not intended to be a notice of appeal to this court from any action by the district court. The appeal was erroneously opened and must be dismissed." See Order in Bravenec v. Martin, Case No. 22-50822 (5th Cir., November 28, 2022) in Appendix A.

REASONS TO GRANT THE WRIT

A. The Lower Courts Recklessly Usurped The Power Of Congress To Regulate The Patent Franchise With Exclusionary Effect.

The guiding principle for an exceptional case such as this is that no one is above the law. The Court can and should grant the writ on that basis to signify its disapproval of district court actions that operated in excess of the patent related jurisdiction that Congress granted 28 USC 1205, 1338 and 1454. The writ is especially necessary to accord conceptual integrity to the core principle of the patent franchise that "Congress has the authority to set the terms of the patent right ... and to delegate that authority ..." *Christy, Inc. v. United States*, 971 F.3d 1332 (Fed. Cir. 2020).

1. The Remand Order Impairs Congress' Power To Promote Progress Clause Objectives. As a threshold matter, the test for ascertaining a binding waiver of state sovereignty interests calls for an inquiry into whether the federal power

claimed is complete in itself, and whether the States consented to the exercise of that power in its entirety in the plan of the Federal Constitutional Convention. *Allen v. Cooper*, 140 S. Ct. 994 (2020); *Torres v. Texas Department of Public Safety*, 597 U.S. ___ (2022) (slip opinion at p 4–6).

In *Sperry v. Florida*, the Court's decision strongly implies that the power to prescribe terms of jurisdiction for Progress Clause purposes can and should be read to incorporate a structural waiver. There, the Court took steps to set aside an unconstitutional burden that had been created by a Florida's attempt to include patent agents under regulations governing the practice of law. The Court concluded there on supremacy clause grounds that "Florida may not deny to those failing to meet its own qualifications the right to perform the functions within the scope of the federal authority." Id. at 385. Congress later codified the outcome of the Court's analysis in the Federal Court Improvements Act of 1982. As amended, the jurisdictional scheme of the FCIA mandates de novo review on appeal of the alleged jurisdictional errors below. *Arreola v. Godinez*, 546 F.3d 788, 794 (7th Cir. 2008), *Agvin v. Razmzan*, 986 F.3d 168, 173-74 (2d Cir. 2021).

In 2011, the Congress enacted new laws for the patent franchise with the Leahy-Smith America Invents Act, Pub. L. No. 112-29 (2011) by

adopting a "First to File" system for determining patent rights, and by recognizing a subclass of small business entities with the "micro-entity" classification codified in 35 U.S.C. 123. In 2018, Congress enacted the "Study of Underrepresented Classes Chasing Engineering and Science Success Act of 2018," Public Law No: 115-273 (2018). In that legislation, Congress memorialized principles that call for notice here: namely, that "the United States has the responsibility ... to harness the maximum innovative potential and continue to promote United States leadership in the global economy." Id. Public Law No. 115-273, Sec. 1(b).

2. Congress Completely Preempted State Court Proceedings With 28 USC 1338 and 1454. The jurisdictional scheme that emerged from the Federal Court Improvement Act of 1982, and the patents laws of 2011 and 2018, impose a mandatory duty on federal courts to administer removal actions that are patent related in fact. As stated before, Section 1338 states that "No State court shall have jurisdiction over any claim for relief arising under any Act of Congress relating to patents ...", while Section 1454 expressly authorized patent related removals. 28 U.S.C. 1338 and 1454. The structure of this comprehensive jurisdictional scheme supplies a compelling source of limiting principles for Section 1447's rule that "[a]n order remanding a case to the State court from which it was removed is not reviewable on

appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise."

As the First Circuit recently observed in *LeChase Constr. Servs., LLC v. Argonaut Ins. Co.*, 2023 U.S. App. LEXIS 6976 (2d Cir. Mar. 23, 2023), the question on appeal in some cases amounts to "whether the district court exceeded the scope of its [statutory] authority by issuing [a] remand order" on grounds not specified in the statute invoked as authorizing remand. In such cases, federal courts are effectively called upon "to review the 'district court's interpretation and construction of a federal statute[]' ... de novo." Id. (citing *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 234 (2007)). Ultimately, the *LeChase* court ruled in favor of removal.

Analogous to the parties that opposed removal in *LeChase*, the plaintiffs here cited the Tax Injunction Act for the proposition that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law....", 28 U.S.C. 1341. However, the Court's decision in *Direct Mktg. Asn. v. Brohl*, 575 U.S. 1 (2015) negates that argument. According to *Brohl*, the "discrete phases of the taxation process" for which collection activities are

approved would not preclude acts to inhibit wrongful collection after a right of repose has accrued. Id at p. 5-9; accord; *Hibbs v. Winn*, 542 U.S. 88 (2004) (avoiding the consequences that attach in the absence of a plain, speedy and efficient state court remedy).

The proposition that the tax collectors have the capacity to state a claim for which relief can be granted is further negated by the stop clock rule this Court applied in *Artis v. District of Columbia*, 138 S. Ct. 594 (2018).[1] Respondents would have the federal courts believe that the Texas Tax Code permits them to pick and choose the time frame for their time-barred and repose-barred litigation can and should be rejected.[2] Considering this Court's view that relying on "tolling language to describe a grace period ... is a feather on the scale ..." Id.,

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[1] See, *CTS Corp. v. Waldburger*, Id., ("[a] statute of repose ... puts an outer limit on the right to bring a civil action and bars any action brought after a specified time); see also, *Andrews v. Aldine Independent School Dist.*, 116 S.W.3d 407 (Tex.App. - Houston (14th Dist.] 2003) (once tax authorities file probate claims the Texas Tax Code requires them to comply with normal probate claims and confers a right to repose as the consequence for the failure); and *Bailey v. Cherokee County Appraisal District*, 862 S. W. 2d 581 (Tex. 1993) (tax authorities may not sue heirs).

[2] Section 33.05(c) of the Texas Tax Code states that "if there is no pending litigation concerning the delinquent tax at the time of the cancellation and removal, the collector for a taxing unit shall cancel and remove from the delinquent tax roll: ... a tax on real property that has been delinquent for more than 20 years ..." TEX. TAX Sec. 33.05(c).

the disputed order of remand qualifies on its face as an putative act in excess of all jurisdiction.[3]

Here, the plaintiffs have yet to cite law or evidence to support their conjecture that the limitations period on the claims occurring in 2001 was somehow tolled. The supposed benefit to federalism of deferring to the sovereignty of the states is consequently outweighed by opportunity costs that their litigation exacts against progress clause interests in transformative innovation. The Court should grant the writ because Article III cannot be read to validate a Section 1447 remand to the state court in a patent related case governed by 28 USC 1338 *Marbury v. Madison*, 5 U.S. 137 (1803) (citing U.S. Const. art. III, § 2, cl. 1).

3. Congress Plainly Precluded Multi Circuit Review Of Appeals Under Section 1295. The Court should grant the writ to emphasize that the text of the FCIA as amended unmistakably grants exclusive appellate jurisdiction over patent related matters to the Federal Circuit under 28 USC 1295(a)(1). Section 1295(a) provides for a

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[3] *City of Sherman v. United States*, 400 F.2d 373 (5th Cir. 1968) ("To the extent that recovery for delinquent ad valorem taxes … is barred by limitations, there will be no prior lien for [the collection of] these taxes by state law."); *Iraheta, Iraheta v. Linebarger Goggan Blair & Sampson, L.L.P.*, Case No. 17-20505 (5th Cir., 2018) (applying abatement based on a statute of repose).

right of appeal to the Federal Circuit under "any Act of Congress relating to patents."

In *Jaskiewicz v. Mossinghoff*, 802 F.2d 532, 534 (D.C. Cir. 1986), for example, the D.C. Circuit described the resulting scheme as follows: "We wholeheartedly agree with our sister circuit's assessment of congressional intention regarding the applicability of section 1338. ... [W]e conclude that it cannot be doubted that [this] action is one 'arising under [an] Act of Congress relating to patents.' " Id. The decision in *Jaskiewicz* simply confirms the antecedent understanding that the "jurisdiction of a Circuit Court of the United States is limited [by Section 1295] in the sense that [a regional circuit court] has no other jurisdiction than that conferred by the Constitution and the laws of the United States." *Hanford v. Davies*, 163 U.S. 273, 279 (1896). Here,

The supposition of the lower courts that a de facto transfer under 28 U.S.C. 1631 could effectively promote governmental interests in federalism is untenable and fatally flawed. Section 1631 provides that "Whenever a civil action is filed in a court ... or an appeal is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court ... in which the

action or appeal could have been brought at the time it was filed or noticed ..." 28 U.S.C. 1631.

None of the conditions that Section 1631 requires are plausibly met by the district court's transfer to the Fifth Circuit. See, *Cruz-Aguilera v. INS*, 245 F.3d 1070, 1074 (9th Cir. 2001). By statute, patent related jurisdiction lies in federal district courts and the Federal Circuit, not in the regional circuit courts. Consequently, the "transferring court" in this case had dormant patent related jurisdiction from the outset thus disqualifying it as a transferring court. The transferee court, the Fifth Circuit, could have no patent related jurisdiction under the multi circuit litigation panel statute in 28 U.S.C. 2112, since the latter provides that "[i]f proceedings are instituted in two or more courts of appeals with respect to the same order, the following shall apply ..." Id. Last, the transfer was unrelated to the interests of justice because the district court events defeated the purpose of the underlying jurisdictional grant that comes under the FCIA. In the final analysis, the Court should grant the writ to vindicate the prohibition of multi circuit review proceedings in patent related cases in accordance with the D.C. Circuit's decision in *Jaskiewicz v. Mossinghoff*, Id.

B. A Clarification Of Patent Related Privileges Is Needed To Protect The Patent Franchise From Errors That Cause Irreparable Harm.

The Court should grant the writ in an exceptional case such as this because the errors below have nationwide significance, and de novo review is indispensable in this setting for ascertaining the operative interests in justice.

1. The Process Due To Protect The Patent Franchise Is A Writ To Enable De Novo Review. Not unlike the *LeChase* court, on de novo review his Court "must … decide whether … appellate jurisdiction under section 1447(d) is controlled by what the district court purported to be doing, or by what the district court was actually doing. In other words, we must decide …. 'whether [section] 1447(d) permits appellate review of a district-court remand order that dresses in jurisdictional clothing' - here, the 'clothing' of section 1447(e) - 'a patently non-jurisdictional ground …' Id. 551 U.S. at 234 (citing *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 234 (2007)). It is significant in this context that the Federal Circuit has previously held that curing of patent related standing defects is permitted provided that previously omitted patent-related facts are properly disclosed. See, Lone Star Silicon Innovations LLC v. Nanya Technology Corp., 925 F.3d 1225, 1236 (Fed. Cir. 2019). The Court should uphold the

Federal Circuit's Lone Star Silicon Innovations decision to effectuate the policy goal of the Congress "to harness the maximum innovative potential and continue to promote United States leadership in the global economy." Id.

2. Federal Circuit Law Supplies The Operative Criteria For Awarding Progress Clause Privileges From Section 1447 Remands. The Court should also grant the writ to uphold the Federal Circuit's three prong test on patent related privilege. The Federal Circuit's *Queens University* test for extending patent related privileges calls for a three prong inquiry: (1) whether there is an important issue of first impression, (2) whether the privilege would be lost if review were denied until final judgment, and (3) whether immediate resolution would avoid the development of doctrine that would undermine the privilege. *Queen's University*, Id. By all indications, an extension of patent related privilege to this case is sustainable on all three prongs.

On the first prong, the matter of whether Progress Clause rights vested and could have been noticed as a factor that precluded remand presents an issue of first impression of the first order. "In construing the Constitution of the United States, we are in the first instance to consider, what are its nature and objects, its scope and design, as apparent from the structure of the instrument,

viewed as a whole and also viewed in its component parts. Where its words are plain, clear, and determinate, they require no interpretation. . . ."[4] On that point, the argument can be made that Congress construed "Progress" to mean quiet title relief in a patent related removal action in the sense that it is common for small business enterprises to fund start-up activities with equity from real estate holdings and contributions from friends and family members.

For the second prong, the argument can be made that Petitioner has effectively lost the benefit of jurisdictional grants that guarantee exclusivity of Federal Circuit jurisdiction when the district clerk acted without regard to patent related factors. The argument can be made here that the outcomes of an unsupported remand and a multi circuit review process for processing appeals clearly endanger the rights of patent related litigants through the structural diminution of opportunities for quiet title relief. Cf., *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019) (citing "diminishment ... of federal funds ... and diversion of resources" as sufficient to establish federal question standing).

For the third prong, the argument can be made that an immediate resolution of the issue will

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[4] Edwin Meese III, "Speech to the American Bar Association," Washington, D.C., July 9, 1985, U.S. Department of Justice.

avoid the possibility of an unnoticed constitutional error to the detriment of Progress Clause interests. By statute, patent related jurisdiction lies in federal district courts and the Federal Circuit, not in the regional circuit courts. As stated before, the multi circuit review process was arguably erroneous because none of the conditions that Section 1631 requires are even plausibly met by the district court's transfer to the Fifth Circuit. See, *Cruz-Aguilera v. INS*, 245 F.3d 1070, 1074 (9th Cir. 2001). Given multiple fatal defects in the processes of the lower courts, the Court should grant the writ in deference to the limiting principles of SUCCESS Act. Public Law No. 115-273, Sec. 1(b). ("[T]he United States has the responsibility to work with the private sector to close the gap in the number of patents applied for and obtained ... to harness the maximum innovative potential and continue to promote United States leadership in the global economy.")

C. Two Circuit Splits On Appellate Jurisdiction Support A Facial Constitutional Challenge To Redress Viewpoint Discrimination And To Vacate The Multi Circuit Review Process.

The Court should grant the writ to resolve the existence of a two prong circuit split, one between decisions of the Federal Circuit Clerk and Fifth Circuit panel in Bravenec v. Martin, and the other between two panels of the Fifth Circuit. Contrary

to that outcome, the Congress clearly intended for the jurisdictional scheme of the FCIA to include district courts as a forum for patent related litigation, and to utilize the Federal Circuit for exclusive appellate jurisdiction over appeals. Given these topically organized comprehensive grants of jurisdiction, a fatal presumption of invalidity arguably attaches under each of the three lines of analysis for holistic inquiry into the anecdotal remand and related multi circuit review procedures employed below. See, *Shurtleff v. Boston*, 142 S. Ct. 1583 (2022) (citing *Matal v. Tam*, 137 S. Ct. 1744 (2017)); see also, *New York Times, Co. v. United States,* 403 U.S. 713 (1971).

1. The Patent Related Speech Of An Inventor Is Distinct From Government Speech. *Shurtleff's* first prong inquires into the history of the affected forms of speech. Holistic inquiry is especially appropriate in this case because the breakdown in the administration of Petitioner's appeal apparently coincided with the onset of the reported disability suffered by Chief Judge Newman, and calls into question the fairness of the Federal Circuit's process as administered by the Circuit Clerk without Article III supervision in the ordinary course.

In the ordinary case, the viewpoint entitled to deference for law of the case purposes in relation to Petitioner's purchase money lien

interest is that of the Fifth Circuit's 2105 opinion and due process decree in *Martin v. Bravenec I*. Both attest to an entitlement to further proceedings in which to clear title using a different legal theory than the one relied upon up to that point. Controlling authority for the validity of Petitioner's patent related reliance on the Fifth Circuit's decree appears in *Cordova v. Hood*, 84 U.S. 1 (1872) purchase money lien holder can retain equity interest in a vendee grantee entity without causing a waiver of lien rights); *Roller v. Holley*, 176 U.S. 398 (1900) (due process and separation of powers norms govern the disposition of a purchase money lien dispute), and *Le Grand v. Darnall*, 27 U.S. 664 (1829) (upholding purchase money lien claim after correction of controversy on standing of the claimant).

Contrary to Holistic Inquiry principles, the district court administered the contested remands on the premise that Petitioner is primarily a former fee simple owner and state court defendant who was a party to a closed case and entitled to no relief. Patent related disclosures in 2010 and 2023, however, bring Petitioner's entitlement to claim Progress Clause jurisdictional privileges in direct alignment with terms of inventor status noted in *Evans v Jordan*, 13 U.S. (9 Cranch) 199 (1815): "[t]he constitution and [the patent acts], taken together, give to the inventor, from the moment of

invention, an inchoate property therein, which is completed by suing out a patent." Id.

The proposed reliance on quiet title relief, to conduct a market trial that could possibly enable future participation in patent commerce, embodies an interest in Progress that is entirely consistent with the founding era understanding. James Madison declared this in Federalist #43, in effect, when he stated that the patent franchise represents a sphere where "[t]he public good fully coincides . . . with the claims of individuals." In Thomas Jefferson's famous 1791 reply to correspondence from author and inventor Benjamin Banneker, a person of African descent, Jefferson confessed that no one wanted more than him "to see a good system commenced for raising the condition of [vulnerable classes] to what it ought to be, as fast as ... circumstances ... will admit."

In the closing statement of his 1792 Farewell Address to Congress, George Washington paraphrased his points of emphasis for the Progress Clause by imploring Congress to "Promote the diffusion of knowledge ...", and by implication, alluded to the Banneker Letter. John Adams warned mightily, with words that also closely echoed what Banneker had confided with Jefferson, that predicating patent laws on an ideologized science might become "the most disconsolate of all creeds" leading to an inhumane

materialism. If human dignity is not "an object of respect" in its own right, Adams feared in the 18th century paradigm, then "the extermination of . . . [a] nation" would be "as innocent as the swallowing of mites on a morsel of cheese."

It was clear in Abrahm Lincoln's lectures on Discoveries and Inventions, prior to his election as President, that the concept of "Progress" by then had come to encompass much more than mere technical advances in arts and sciences for elites.[5] In one lecture, Lincoln measures the value to be had from Progress Clause implementation by reference to the advent of patent laws in England and in America, prior to which he said "... the inventor had no special advantage from his own invention." The change came, he noted, when America "added the fuel of interest to the fire of genius, in the discovery and production of new and useful things ..." [6] Printing, a phenomenon he described as "the other half — and in real utility, the better half — of writing", had transformed the world before the revolution to a new one where learning could be self acquired; where "rising to

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[5] See, Henry Clay Whitney, Life on the Circuit with Lincoln, (First Lecture on Discoveries and Inventions, April 6, 1858, Volume II pp. 437-444; Second Lecture on Discoveries and Invention, February 11, 1859, Volume III, pp. 356-363).

[6] It is significant that Lincoln was the only president to secure a patent grant, see USPTO #6469 entitled "Buoying Vessels over Shoals," dated May 22, 1849, and was a practitioner of patent law in the federal courts to boot. See, Volume II pp. 437-444.

equality" was possible, and where freedom from others holding themselves out as "superior beings" could be aspired to.

The Court should grant the writ to preserve the system of free speech that the Framer's implemented for the express purpose of avoiding governmental abridgements of protected speech. Were the Court to defer indiscriminately to the lower courts' viewpoint, the result would effectively obliterate the sense of Congress that the United States should work with micro entity and small entity inventors in the interest of achieving progress in the national interest.

2. The Circuit Split Creates Controversy On Terms Of Review For Patent Related Cases. *Shurtleff's* second prong inquires into the likely public perceptions about the putative government speech. The recent erosion in public understanding about the meaning of the word "Progress" suggests that the implementation of patent laws on terms that cause circuit splits on fundamental jurisdictional issues would be very difficult for the public to comprehend.

> [P]progress is as much about implementation as it is about invention ... In theory, the values of progress form the core of American national identity ... In the past few decades, however, progress has

> faltered—and faith in it has curdled....What went wrong? There are many answers, but one is that we have become ... too inattentive to all the things that must follow a eureka moment... The most fundamental [lesson] is that implementation, not mere invention, determines the pace of progress—a lesson the U.S. has failed to heed for the past several generations.[7]

The breakdown in the judicial process is a manifestation of a categorical failure to implement national policy.

In *Williams v. Taylor Seidenbach*, Inc., 935 F. 3d 358 5th Cir. 2019), Judge Haynes, the senior member of the Fifth Circuit panel in *Bexar County v. Martin*, Case No. 22-50718, offers an outlook on "finality traps" of the type her panel - there and here - was a party in creating:

> I understand the basic underpinning of the original rule: we do not want parties to circumvent the rules that limit interlocutory appeals by "creating" finality where there is none.

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[7] Derek Thompson, "WHY THE AGE OF AMERICAN PROGRESS ENDED: Invention alone can't change the world; what matters is what happens next," Atlantic Monthly DECEMBER 12, 2022.

> [I]n this case, the exact same judgment is both final and not final. In the [Fifth Circuit], this decision was "not final." But [in district court], it suddenly becomes final again. How does that make any sense? ... [A]s courts, we should not allow ghostly magic to transform a decision ... merely because it crosses ... a courtyard between a district court building and circuit court building ... Indeed, the very fact of a trap should tip us off that [the finality trap] rests on a mistaken view of the law.

Id. The presence of the same trap here should tip off the attentive public observer that the entire outcome rests on a mistake, and that the Elrod Panel's attribution of Federal Circuit jurisdiction is worthy of public confidence as a facially legitimate form of government speech.

3. The Prior Restraints On Petitioner's Progress Clause Speech Fail To Pass Muster. *Shurtleff's* third prong invites an inquiry into the circumstances of the government's control over private speech, and in this case, the consistency of

its control with the limiting principles of the patent laws enacted in 1982,[8] 2011[9] and in 2018.[10]

Here, the Progres Clause interest which Petitioner asserts in private sector implementation of the information services covenant under Article 7 of the U.S. CERD Treaty is a fundamental aspect of his motive for involving patent related jurisdiction.[11] Article 7 of the Convention as approved by the U.S. Senate in 1996 reads as follows:

> States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and

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[8] See, the Federal Courts Improvement Act of 1982, Pub.L. No. 97–164, 96 Stat. 25 (granting *exclusive* jurisdiction over appeals in cases arising in whole or in part under federal laws relating to patents to the newly created United States Court of Appeals for the Federal Circuit.); see also 28 U.S.C. § 1295(a)(1) (1982 & Supp. III 1985).

[9] See, the Leahy-Smith America Invents Act, Pub. L. No. 112-29 (2011), to adopt a "First to File" system of patent rights, and to recognize a subclass of small business entities with the "micro-entity" classification codified in 35 U.S.C. 123.

[10] See, the "Study of Underrepresented Classes Chasing Engineering and Science Success (SUCCESS) Act of 2018," Public Law No: 115-273 (2018).

[11] See, U.S. reservations, declarations, and understandings, International Convention on the Elimination of All Forms of Racial Discrimination, 140 Cong. Rec. S7634-02 (daily ed., June 24, 1994) (CERD Treaty RUDs) (" ... the Federal Government shall, as necessary, take appropriate measures to ensure the fulfillment of this Convention ... ").

> information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnic groups.

See State DeptTreaties in Force 422-423 (June 1996). As a general rule, federal courts should "presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992). The same is true of legislation that implicates customary law norms, *Murray v. The Charming Betsey*, 6 U.S. 64 (1804); *In re Young*, 209 U.S. 123 (1908); and *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000),

The Congress and the Executive also implemented the CERD Treaty covenants through the understanding of the U.S. Senate that " ... the Federal Government shall, as necessary, take appropriate measures to ensure the fulfillment of this Convention ... " Id. According to that policy scheme, the less restrictive alternative - at least compared to remand and multi circuit review - was forbearance on the striking of Petitioner's motion to abate and an evidentiary hearing on his Progress Clause interest in quiet title relief.

Based on the text of the latter FCIA provision, the grant of the writ is an appropriate means by which to promote judicial accountability. *Clinton v. Jones*, 520 U.S. 681, 694-95 (1997); cf., *Harris v. Harvey*, 605 F.2d 330 (7th Cir. 1979) (imposing liability of state court judge for nonjudicial actions); cf., *Forrester v. White*, 484 U.S. 219 (1988) (state court judge does not have absolute immunity from a damages suit under § 1983 for administrative decisions). Unlike the fact situation in *Mireles v. Waco*, 112 S.Ct. 286 at 288 (1991) where the Court concluded that the "judicial nature" defense warranted an extension of judicial immunity, the remand proceeding here calls attention to the well settled principle that " ...when the court has not jurisdiction of the cause, then the whole proceeding is *coram non judice*, and actions will lie against them without any regard of the precept or process..." *The Case of the Marshalsea*, 77 Eng. Rep. 1027 (1612).

Careful examination further reveals that the Congress manifested for judicial implementation of the FCIA to serve as a means to preempt conflict about the forum for patent related appeals. In fact, it did so not only by prohibiting state court jurisdiction and by outlawing multi circuit review, but by amending 42 U.S.C. 1988(b) with provisions to penalize "an act or omission taken in such officer's judicial capacity [that is] clearly in excess of such officer's jurisdiction',' 42 U.S.C.

1988(b). Thus, the Court should grant the writ because the presumptive invalidity of the lower courts' proceedings fundamentally defies rebuttal. Cf., *Minneapolis Star & Tribune Co. v. Minnesota Commr. of Revenue*, 460 U.S. 575 (1983) (invalidating state tax scheme based on unconstitutional conditions analysis).

CONCLUSION

Under the operative rule of law that no one is above the law, Chief Justice Roberts' observation at oral argument for *Oil States* supplies the operative ground for granting the writ on the facts of this case: "We've said ... you cannot put someone in that position." Transcript of Oral Argument in Oil States Energy Services, LLC v. Greene's Energy Group, LLC, 584 U.S. 1365 (2018), pp. 45 - 46 .

WHEREFORE, the Court is respectfully requested to grant the writ.

Date: August 8, 2022 Respectfully Submitted,

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