

No. 17-_____

In the Supreme Court of the United States

FAST FELT CORPORATION,

Petitioner,

—v—

OWENS CORNING,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

JAMES D. PETRUZZI
COUNSEL OF RECORD
THE PETRUZZI LAW FIRM
4900 WOODWAY, SUITE 745
HOUSTON, TX 77056
(713) 840-9994
JIM@PETRUZZI.COM

GREGORY L. PORTER
HUNTON ANDREWS KURTH LLP
600 TRAVIS STREET, SUITE 4200
HOUSTON, TX 77002
(713) 220-4200

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COUNSEL FOR PETITIONER

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QUESTION PRESENTED

This petition presents the same question that the Court is considering in *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, No. 16-712:

Whether *inter partes* review—an adversarial process used by the United States Patent and Trademark Office to analyze the validity of existing patents—violates the Constitution by adjudicating and potentially extinguishing private property rights through a non-Article III forum without a jury.

CORPORATE DISCLOSURE STATEMENT

Fast Felt Corporation is a privately held corporation. It has no parent company, and no publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Fast Felt Corporation (“Fast Felt”) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.



OPINIONS BELOW

The U.S. Court of Appeals for the Federal Circuit’s opinion (App.1a-13a) below is reported as *Owens Corning v. Fast Felt Corp.*, 873 F.3d 896 (Fed. Cir. 2017). The final written decision of the Board is unreported but is available at 2016 WL 8999740 (P.T.A.B. Aug. 11, 2016). (App.14a-76a).



JURISDICTION

The Federal Circuit entered its opinion on October 11, 2017. Fast Felt timely filed a Petition for Rehearing on November 13, 2017. The Federal Circuit requested briefing from Appellant Owens Corning and subsequently issued its order denying Fast Felt’s Petition for Rehearing on January 9, 2018. (App.77a-78a). This petition was timely filed within 90 days of that order. This Court’s jurisdiction is invoked under 28 U.S.C. § 1254(1).



CONSTITUTIONAL PROVISION INVOLVED

- U.S. Const. amend. VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.



INTRODUCTION

In *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, No. 16-712, this Court is considering whether *inter partes* review of the validity of existing patents violates the Constitution by extinguishing private property rights through a non-Article III forum without a jury. This Court's resolution of that question will determine whether the Federal Circuit's judgment in this case should be vacated.

Here, the United States Patent and Trademark Office ("Patent Office") instituted *inter partes* review of Fast Felt's existing patent. In the *inter partes* proceeding, the Patent Trial and Appeal Board ("Board") held that the petitioner Owens Corning had failed to prove unpatentable any challenged claim of Fast Felt's patent. The Federal Circuit reversed and ordered the Board to cancel the challenged claims. But if adjudicating without a jury and extinguishing existing patent rights through *inter partes* review at the Patent

Office violates the Constitution, then any unpatentability determinations made by a reviewing court is equally unconstitutional, and the Federal Circuit's judgment should be set aside.

This Court should therefore hold this petition until it decides *Oil States*. If the Court holds that adjudicating or extinguishing patent rights through *inter partes* review violates the Constitution, then the Court should grant the petition, vacate the Federal Circuit's judgment, and remand.



STATEMENT OF THE CASE

Fast Felt Corporation is the owner of the patent-at-issue, U.S. Patent No. 8,137,757 (“the ’757 Patent”), which was issued before the enactment of the Leahy-Smith America Invents Act (“AIA”), Pub. L. No. 112-29, 125 Stat. 284 (2011). The ’757 Patent, is a continuation of Patent Application No. 11/475,455, which was originally filed on June 27, 2006 and claims priority to two provisional patent applications filed in 2003. The ’757 Patent is directed to applying reinforcement material for nails on to roofing materials during the manufacture of those materials.

In 2014, Petitioner filed suit in the United States District Court for the Northern District of Ohio (Western Division), Case No 3:14 CV 803 (filed April 14, 2014), alleging, *inter alia*, that Respondent Owens Corning infringed the claims of the ’757 Patent. Owens Corning filed a petition for IPR before the Board, seeking to invalidate the asserted claims of the ’757

Patent. The Board instituted review and ultimately issued its final written decision finding all challenged claims of the '757 Patent patentable over the prior art. (App.76a).

Owens Corning filed an appeal of the Board's final written decision on September 2, 2016. On October 11, 2017, the Federal Circuit reversed the Board's decision by relying on the testimony of a witness the Board found to be unqualified to opine on the primary prior art reference. This Court has previously explained that appellate courts lack the power to make factual findings or substitute their own findings for that of an agency. *See Sec. & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 88, 63 S.Ct. 454, 459, 87 L.Ed. 626 (1943). Fast Felt timely sought rehearing to correct the court's errors. On January 9, 2018, the Federal Circuit denied Fast Felt's petition for rehearing. (App.77a-78a).



REASONS FOR GRANTING THE PETITION

This case presents a question identical to the one that this Court will resolve in *Oil States*: whether extinguishing patent claims in *inter partes* review violates the Constitution.

In this case, the Patent Office granted *inter partes* review of Fast Felt's '757 Patent. As a result of the *inter partes* proceedings and the court of appeals decision, the Board, and U.S. Patent Office have been ordered to cancel the challenged claims of the '757 patent.

The decision of the court of appeals in this case thus will allow the Board to take the very action that is being reviewed by this Court in *Oil States*—extinguish private property rights (patent claims) through a non-Article III forum (*inter partes* review at the Patent Office) without a jury. Because the unpatentability determinations were made in the context of *inter partes* review, *Oil States* will control whether the unpatentability determinations were unconstitutional.

Fast Felt need not have raised the *Oil States* argument in its opening brief in the court of appeals to receive the benefit of a favorable decision. The Federal Circuit's decision in *MCM Portfolio LLC v. Hewlett-Packard Co.*, foreclosed the contention in the Federal Circuit that *inter partes* review violates the Constitution. 812 F.3d 1284, 1292-93 (Fed. Cir. 2015). When an intervening Supreme Court decision reverses previously binding precedent of the court of appeals, an appellant in a pending case may raise the intervening change in law even if not raised in the opening appeal brief. *Joseph v. United States*, 135 S.Ct. 705, 706-07 (2014) (Kagan, J., respecting denial of certiorari). Here, Fast Felt raised the *Oil States* argument in its petition for rehearing shortly after this Court granted certiorari. Fast Felt will thus be entitled to the benefit of a favorable decision in *Oil States*.

This Court should therefore hold this petition until it decides *Oil States*. And if the Court decides that *inter partes* review cannot be used to extinguish patent claims, then the Court should grant the petition, vacate the Federal Circuit's judgment, and remand the case for further proceedings.



CONCLUSION

The petition should be held pending this Court's disposition of *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, No. 16-712. Should the Court hold in *Oil States* that extinguishing patent claims in *inter partes* review violates the Constitution, the petition should be granted, the judgment vacated, and the case remanded for further proceedings.

Respectfully submitted,

JAMES D. PETRUZZI
COUNSEL OF RECORD
THE PETRUZZI LAW FIRM
4900 WOODWAY, SUITE 745
HOUSTON, TX 77056
(713) 840-9994
JIM@PETRUZZI.COM

GREGORY L. PORTER
HUNTON ANDREWS KURTH LLP
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