

No. 17-408

**In The
Supreme Court of the United States**

OUTDRY TECHNOLOGIES CORPORATION,

Petitioner,

v.

GEOX S.P.A.,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit**

**REPLY BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

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**STATEMENT OF PARTIES TO THE
PROCEEDINGS AND RULE 29.6
CORPORATE DISCLOSURE STATEMENT**

All parties are identified in the caption of this petition. Petitioner Outdry Technologies Corporation is a wholly owned subsidiary of Columbia Sportswear Company, a publicly traded company.

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REPLY BRIEF IN SUPPORT OF PETITION

In *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, 639 F. App'x 639 (Fed. Cir. 2016), *cert. granted*, 2017 WL 2507340 (U.S. June 12, 2017) (No. 16-712) (*Oil States*), this Court will be evaluating the constitutionality of the *inter partes* review process prescribed by the Leahy-Smith America Invents Act (AIA), 35 U.S.C. §§ 100 *et seq.* Specifically, this Court will be deciding whether Congress constitutionally may vest the Patent Trial and Appeal Board (PTAB) with jurisdiction to adjudicate disputes about the validity of existing patents, or whether such a transfer of adjudicatory authority to an administrative agency of the executive branch violates Article III of the Constitution and the Seventh Amendment.

This petition presents the same issue as *Oil States* and should be held pending this Court's decision. If this Court decides in *Oil States* that the PTAB lacks constitutional authority to revoke existing patents in *inter partes* review proceedings, then the PTAB acted without authority in revoking Outdry's patent in this case. Although Geox complains that "Outdry makes no attempt to defend the validity of its patent at this Court" and insists that no "different result would follow" if Outdry were permitted to defend its patent in an Article III proceeding (Opp. at 2, 9), Geox misses the point and wrongly dismisses the importance of the protections provided by Article III courts. Geox's opposition also is wrong in arguing that Outdry forfeited any challenges to the PTAB's constitutional authority. Outdry did not consent to *inter partes* review, and the *inter*

partes review process raises structural constitutional issues that may be considered on review even if the PTAB's authority was not challenged below. If this Court determines in *Oil States* that *inter partes* review is unconstitutional, Outdry asks the Court to grant this petition, vacate the judgment below, and remand for further consideration in light of this Court's decision.

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ARGUMENT

I. Petitioner Did Not Forfeit Its Challenge to the PTAB's Authority to Revoke Existing Patent Rights

In opposing the petition, Geox initially argues that Outdry forfeited any constitutional challenge to the PTAB's authority to adjudicate disputes about patent validity because Outdry did not challenge PTAB's authority in the proceedings below. (Opp. at 4-8.) Geox is correct that individual constitutional rights, like other personal rights, may be waived or forfeited if not timely raised. *See, e.g., Yakus v. United States*, 321 U.S. 414, 444 (1944) (stating general rule). That rule does not preclude review in this case, however, because Outdry did not consent to the *inter partes* proceeding, and the PTAB's jurisdiction to decide patent disputes raises structural separation-of-power issues that are not subject to waiver.

This Court repeatedly has held that, just like challenges to federal subject-matter jurisdiction,

constitutional challenges to the jurisdiction or authority of a decision-making tribunal may be considered on appeal even if those challenges were not raised below. *See, e.g., Freytag v. Comm’r*, 501 U.S. 868, 878-79 (1991) (constitutional challenges to special trial judges were not waived even though challenges were not raised below); *Glidden Co. v. Zdanok*, 370 U.S. 530, 535-36 (1962) (considering challenge to adjudicative authority of judicial officers under Article III even though challenges were not raised in lower courts); *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014) (considering challenges to recess appointments even though challenges were not raised in underlying administrative proceedings). Those precedents apply to the challenges at issue here.

This Court long has recognized that “Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decisionmaking if the other branches of the Federal Government could confer the Government’s ‘judicial Power’ on entities outside Article III.” *Stern v. Marshall*, 564 U.S. 462, 484 (2011). For that reason, Congress generally “may not ‘withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.’” *Id.* (quoting *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 284 (1856)). Thus, although the individual right to adjudication in an Article III court is a personal right that may be waived by knowing and voluntary consent, constitutional challenges to congressional attempts to transfer jurisdiction away from Article III courts are not subject

to waiver because such challenges raise structural issues about the power of federal judiciary and “the constitutional system of checks and balances.” *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1943-44 (2015) (internal citations and quotation marks omitted); see also *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 850-51 (1986) (Article III bars “congressional attempts to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating constitutional courts” and serves to prevent “the encroachment or aggrandizement of one branch at the expense of the other” (internal citations and quotation marks omitted)).

In *Oil States* and in this case, the challenges to PTAB’s decision-making authority do not implicate only individual constitutional rights; rather, the challenges implicate the integrity of Article III courts and the “basic limitations [imposed by Article III] that the other branches may not transgress.” *Stern*, 564 U.S. at 483. In *inter partes* review, an Article I adjudicator – the PTAB – is empowered to resolve disputes about patent validity without the consent of the patent owner and subject to only appellate review, even though such powers normally are vested only in Article III courts. Because Article III limitations are at issue with the PTAB’s exercise of jurisdiction, “notions of consent and waiver cannot be dispositive” and operate to preclude review because “the limitations [of Article III] serve institutional interests that the parties cannot be expected to protect.” *Schor*, 478 U.S. at 851. Geox’s forfeiture arguments lack merit and are not grounds to deny Outdry’s request to hold this petition for the

decision on the constitutionality of *inter partes* review in *Oil States*.

II. Respondent's Other Arguments Also Lack Merit and Do Not Justify Denial of the Petition

There also is no merit to Geox's other arguments against holding this petition for the decision in *Oil States*. In opposing the petition, Geox insists that "the *inter partes* review process passes constitutional muster" and that "no constitutional problem justifies review in this case." (Opp. at 9-10.) But this Court already granted certiorari in *Oil States* to decide whether the *inter partes* review process violates Article III and the Seventh Amendment. Geox's arguments about the constitutionality of *inter partes* review will be addressed in *Oil States*, and this Court should hold this petition until the decision issues.

There also is no support for Geox's argument that this case would not warrant reversal even if this Court were to determine in *Oil States* that the *inter partes* review process is unconstitutional. (Opp. at 9-12.) Although Geox argues that Outdry's patent is invalid, that argument ignores the fact that the PTAB's invalidity determination was made outside of the structural protections of an Article III court. If this Court determines in *Oil States* that only an Article III court has jurisdiction to adjudicate disputes about the validity of issued patents, that determination would invalidate the *inter partes* review proceeding in this case,

and an order granting certiorari, vacatur, and remand (GVR) would be warranted.

Geox also cannot avoid that outcome with its incorrect assertion that this case is “no longer ‘open on direct review’” simply because the Federal Circuit has issued its mandate. (Opp. at 10-12.) As Geox admits, this Court has held that “when this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect to all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.” *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 97 (1993). A case is open on direct review before this Court when, as in this case, a petition for certiorari is timely filed. No support exists for Geox’s contrary arguments, and Geox identifies no valid reason why this petition should not be held for this Court’s decision in *Oil States*.

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CONCLUSION

The petition for a writ of certiorari should be held pending this Court’s decision in *Oil States*. If this Court determines in *Oil States* that *inter partes* review is unconstitutional, Outdry respectfully asks the Court to grant this petition, vacate the judgment below, and

remand for further consideration in light of this Court's decision.

Respectfully submitted,

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