

No. 17-655

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**In The  
Supreme Court Of The United States**

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MUSSA ALI,

*Petitioner,*

v.

CARNEGIE INSTITUTION OF WASHINGTON, ET  
AL.,

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

**PETITION FOR REHEARING**

Mussa Ali  
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Seattle, WA 98122  
(503) 890-9179  
Originally filed: February 2, 2018  
Re-filed: February 16, 2018

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CERTIFICATE OF INTEREST

Petitioner Ali certifies the following:

1. The full name of every party represented by me is: N/A.
2. The name of the real party in interest represented by me other than the Petitioner: None.
3. Parent companies or publicly held companies that own more than 10% of the stock of the Petitioner: None
4. the names of all law firms and attorneys that appeared on behalf of the Petitioner in the lower courts, the D.C. Circuit and the Federal Circuit: and the Supreme Court

Mussa Ali, David Scott Taylor, Joseph Berenato, Steven Kelber, Joel P. Leonard, John D. Ostrander, Lance Reich, Gary Myles, BERENATO & WHITE, LLC, Elliott, Ostrander & Preston, P.C.; Helsell Fetterman, Myles I.P. Law

February 16, 2018



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## GROUNDS FOR REHEARING

Petitions for rehearing are rarely granted by this Court and the granting of a rehearing, especially after a denial of certiorari, is extraordinarily rare<sup>1</sup>. In fact, Rule 44.2 spells out the two strictures within which this Court would entertain a petition for rehearing: (a) intervening circumstances of a "substantial or controlling" effect and or (b) other "substantial grounds *not previously* presented". (emphasis added). This petition for rehearing largely<sup>2</sup> falls within the latter category of conditions: that it is grounded on events that were not disclosed to this court in the Attorney Lance Reich-filed certiorari.

### ARGUMENT:

#### I. SOME OF THE FACTUAL ERRORS EMBEDDED IN THE LOWER COURTS' HOLDINGS HAVE IMPEDED PETITIONER'S ABILITY TO PRESENT A CLEAN CONSTITUTIONAL (VIOLATION) QUESTION

It is axiomatic, and some might even say a cliched saying, that a sure-fire way to lose a petition to this court is to argue the factual errors<sup>3</sup> —real or

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<sup>1</sup> While rare there are cases where the "finality of litigation must yield when the interests of justice would make unfair" the denial of a certiorari, this court having denied certiorari, twice denied petitions for rehearing, reversing course *sua sponte*. See, e.g., *U.S. v. Ohio Power Co.*, 353 U.S. 98 (1957)

<sup>2</sup> § III of this Petition may also fall under conditions specified under "a"

<sup>3</sup> Some of the errors may have narrative-building purposes only. For example, a) the Federal Circuit describes Petitioner's claim

imagined by the petitioner— amount to a certiorari-worthy case this court should seriously look into. In deed, Rule 10 expressly states that a writ of certiorari is “rarely” granted when the factual errors so-alleged are ones that do not impact this court’s calculus on taking cases of significance that reverberate outside the mere provinces of a petitioner’s travails.

But, what if, or what is one to do, if the factual errors are such that they would ultimately (in sum) result in not just camouflaging but gutting the likelihood of successfully petitioning this court for writ of certiorari. This case is one such case.

Petitioner would openly admit his constitutional arguments would lose traction if: 1) Petitioner had been given the opportunity to invoke the *Ex-Parte Young* doctrine<sup>4</sup> to explore the legal

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—borrowing the-Judge-Contreras-dubbed micro-aggressive term— as one where Ali claims to have made a “critical contribution” (App.33) to the patents-in-suit. In reality: what Ali had alleged was that he had conceived of the invention and that his conception was dispossessed by Craig Mello and Andrew Fire. Of course, once the facts are in, the fact-finder could reach a number of conclusions: that Ali had indeed conceived of RNAi or that he had made inventive contribution to the reduction-to-practice of the invention or even that Ali has nothing to do with it and that it is all in his head; b) Although Ali had directed damage claims at Carnegie as well (assuming he has no obligation to assign) the Federal Circuit held that Ali “directed [the damages claims] only at UMass” (App. 8)

<sup>4</sup> *Ex-Parte Young*, 209 U.S. 123 (1908) at 159-60 (when a government official acts unconstitutionally, the official “comes in conflict with the superior authority of [the] Constitution” and as such is “stripped of his official or representative character.”)



pliability of such a doctrine by naming (as a defendant) a UMass<sup>5</sup> official that is committing an unconstitutional act in the context of an inventorship dispute; 2) if the Petitioner had been given an opportunity to amend his complaint to suit the lower courts' interpretation of what pathway to take so the Petitioner could have been given "the opportunity to be heard"<sup>6</sup> or litigate his case on the merit. There is only one problem with the aforementioned thesis: despite the DC Court's holdings and the Federal Circuit's affirmances, the facts as enumerated by the lower courts are in fact erroneous. It also makes it remarkably impossible to present convincing arguments before this Court if the facts that may be determinative of this court's assessment of this case, are susceptible to dispute.

Not too long ago, Justice Gorsuch said of what constitutes a bad Judge or judging is one who "stretches the results he prefers than what the law [or the Constitution] demands"<sup>7</sup>. In this case, the facts of the case are so clinically fictionalized to a point where if one were to read the holdings of the lower courts' alone, one is left with the rational conclusion that Petitioner's writ for certiorari, while hitting the constitutional high notes, is a failing one. After all, as this court had observed, a petitioner

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<sup>5</sup> The terms "UMass" refer to the University of Massachusetts and "Carnegie" to Carnegie Institution of Washington.

<sup>6</sup> *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982), quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

<sup>7</sup> Quoting J. Gorsuch, in a speech, accepting his nomination for the Supreme Court on January 31, 2017

cannot wax of unconstitutional deprivation without exhausting all the possible avenues for an opportunity to be heard however "uncertain" or "less convenient" they may be. See *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627, 644-45 (1999)

For the foregoing reasons, Petitioner would take the unusual<sup>8</sup> step of embedding (within the body of this Petition) declarations under 28 U.S.C. § 1746 affirming as to lower courts' holdings lack of accuracy<sup>9</sup>:

#### DECLARATION OF MUSSA ALI

My name is Mussa Ali and I am making the following unsworn declarations pursuant to 28 U.S.C. § 1746. I have personal knowledge of the facts enumerated in the declarations below:

- 1) Declaration 1: Contrary to the DC court's holdings and the Federal Circuit's affirmance, I was never given leave of court to name UMass official(s) as defendant(s) by the DC Court. (See App.9)
- 2) Declaration 2: Contrary to the DC court's assertions and the Federal Circuit's

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<sup>8</sup> See, supra note 1, at 99, where this court held that "the strict application of" this court's rules must "yield" when the interest of justice so-demands it.

<sup>9</sup> By contrast, there are *no* (material or immaterial) factual errors attributable to Judge Simon and or the Oregon Court

affirmance, I did not file or never filed a one-sentence motion for leave to file amended complaint. I, therefore, couldn't have committed procedural errors as enumerated by the DC Court (e.g., not attaching the proposed amended complaint with the motion, or explaining within the body of the yet-to-be filed motion the justification for such amendment). (See App. 11)

- 3) Declaration 3: Contrary to the DC court's assertions and the Federal Circuit's affirmance, I had never informed the DC Court or the Federal circuit that it need not consider any argument I may have concerning the unconstitutional deprivation of due process under the Fourteenth Amendment (See App. 17)
- 4) (Miscellaneous) Declaration 4: I had never signed an engagement letter with Attorney Lance Reich to represent me, who ultimately filed a petition claiming to want to "preserve" my rights; meanwhile I had signed an engagement letter with Attorney Dr. Gary M. Myles to file my petition for writ of certiorari. Atty. Myles ended up impersonating me (instead of representing me) by filing a writ of certiorari as if I had written it, which this court mailed back to me since Atty. Myles had also sent the said petition as if I had sent it. I had no inputs in the construction or mailing of the two petitions filed on the same day.

I declare under the penalty of perjury the foregoing i.e., Declarations (1-4) are true and correct.

Executed on:  
February 16, 2018



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Mussa Ali

This Court should rehear this case after the request of the lower courts' docket/record, should any of the statements contained in the Petitioner's declarations were determinative factors that impacted its decision to deny certiorari.

**II. THIS COURT SHOULD ADDRESS THE STAND-ALONE PROCEDURAL QUESTION THAT WOULD IMPACT OTHER (IN FACT MOST) CASE FILINGS IN THE LOWER COURTS**

Petitioner had raised a procedural question with the Federal Circuit in his opening appellant brief and in his petition for rehearing en banc, which was denied after having requested a response from the now-Respondents. The Federal Circuit has chosen not to address this procedural question which is not amenable to the discretionary vagaries of the court or the presiding judge —notwithstanding the Appellees' assertion (now and for the first time as they responded to Appellant's petition for rehearing en banc) that it is not a procedural question but a "case management" issue.

What follow are synapses of the procedural history of this issue in the lower Courts:

After the D.C. Court initial holdings that this case must be dismissed because UMass is a necessary and immune party that cannot be joined, Ali requested that the court reconsider its decision and its contingent interlocutory order. See, Dkt. 86, in which Petitioner specifically requested "reconsideration of this Court's Opinion and Order of August 29, 2014"; see also App. Br. at 115, where Ali reiterated that he was requesting the Court to reconsider "the Court's August 29, 2014 Order and Opinion ("Order")": see also Dkt. 88 at 1 in which Ali specifically stated that Ali "had filed motion for reconsideration ("Reconsideration") (i.e., Dkt. 85) of Court's Order and Opinion of August 29, 2014."

The D.C. Court held that the interlocutory order (allowing Ali to *seek* leave to name UMass officials as defendants) which it had been reconsidering for nearly a year has been withdrawn, a) because Ali has "declined to seek leave" and b) that the deadline for filing leave of court "long since come and gone". App. Br 127 Ali promptly challenged (by way of a Rule 60 motion) that the assertions by the D.C. court were not just inaccurate but in fact temporally precluded because the court's reconsideration of the interlocutory order stays the deadline. App. Br 127-129 Nonetheless, the D.C. Court still held that an interlocutory order that is under active reconsideration is not considered stayed or tolled operationally. App. Br. at 34

Ali had presented this important procedural question to the Federal Circuit and the defendants had responded (arguing for the first time on appeal)

that operationally an interlocutory order is not considered paused while the Court actively reconsiders its mandate. The defendants had cited Rule 60 as an example. The Defendants had stated that under Fed. R. Civ. P. 60(c)(1) "[a] motion [for relief from an order] does not affect the judgment's finality or suspend its operation." Def. Br. at 28. This should have been rejected by the Federal Circuit for several reasons. *First*, the defendants' argument here was not the articulated reason the D.C. Court gave for its denial of Ali's motion for relief under Rule 60. See App. Br 144-151 *Second*, Defendants attempt at creating a procedural parallel between a motion for relief from a final judgment and an interlocutory Order that had literally been collecting dust (apparently intentionally, see App. Br 129, n.4) is unimpressive. There are several reasons as to why the finality of a judgment of a court shouldn't be derailed from taking effect by a pending motion for relief under Rule 60. For example, one can envisage a scenario in which the losing party could endlessly denude the effectiveness of a court's final judgment by filing endless loop of requests for relief under Rule 60, effectively making the finality of the Court's judgment moot. See also as another example, App. Br 314, n. 1

Of course, it goes without an explanation that if courts were to consider an order that is under active timely-filed reconsideration not paused operationally, it would amount to a license (by litigants) to clutter courts with unnecessary filing, for the same reason that when a party elects to seek a reconsideration of the court's holdings "there always is a possibility the order complained of may be

modified in a way which renders" any further action unnecessary. See, *Outland v. CAB*, 284 F. 2d 224, 227 (DC Circuit 1960); see also, *Stone v INS*, 514 U.S. 386, 392 (1995) this Court proposing that for "the purpose of review during the pendency of a motion for reconsideration [to think] in terms of judicial economy".

The Court should rehear this stand-alone procedural question which the Petitioner had raised before the DC Court and the Federal Circuit. While the DC court had held that an interlocutory order that is under active reconsideration is not considered tolled operationally, the Federal Circuit had chosen not to address it, i.e., whether an interlocutory order subject to a timely-filed motion for reconsideration is considered paused operationally while the very same court is reconsidering it.

### **III. THIS COURT SHOULD TAKE THIS OPPORTUNITY TO DEFINE THE FICTIONAL LANDSCAPE AND OR THE DOCTRINAL BOUNDARIES OF THE *EX-PARTE YOUNG* DOCTRINE IN THE CONTEXT OF INVENTORSHIP CASES**

This case is an excellent vehicle to address the pliability of the legal fiction-hood of the *Ex-Parte Young* doctrine in the context of patent-related cases where courts cannot exercise subject matter jurisdiction over a party asserting sovereign immunity under the Eleventh Amendment.

A. THE ATTEMPTED INVOACTION OF THE  
*EX PARTE YOUNG* DOCTRINE IN THIS  
CASE:

Petitioner had attempted (without success) to invoke the *Ex-Parte Young* doctrine as a way to sustain his case in the lower courts. First, when this case was initially with the Oregon Court Ali had requested discovery as to the identities of UMass official(s), as an alternate to UMass (the institution), to name as defendant(s). That discovery was denied under the premise that Ali already could get that information from another case which listed a number of UMass officials as defendants, where the *Ex-Parte Young* doctrine had been invoked in the context of standing between two state actors. Second, it is also not clear the *Ex-Parte Young* doctrine is applicable in this case since, as Judge Dyk's had suggested (App. 19) that, the relief Petitioner seeks is an order to be directed at the director of the patent office therefore there is nothing for the court to order or enjoin a UMass official from doing (at least as it relates to claims under 35 U.S.C. § 256 ("§ 256")).

Third, to the extent the purpose of the invocation of the *Ex-Parte Young* doctrine is to have a 'stand-in' for UMass as the court is litigating Ali's § 256 claims without it, Ali's suggestion to the DC court where he requested (for *an opportunity to file for leave*) to name as defendants the UMass-affiliated named inventors would have been a better route: a) this was not without precedent, since none other than Judge Newman in *XeChem* case<sup>10</sup> had suggested that

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<sup>10</sup> See *XeChem Int. v The University of Texas*, ("XeChem") 382 F.3d 1324 (Fed. Cir. 2004)



could have been the way to salvage that case; b) one of the named inventor is a UMass official (Craig Mello) who actual stands to lose (if Ali were to be added as a co-inventor) since his share would be reduced by the mere fact that Ali would be sharing the royalties with the other UMass-affiliated inventors), of course that is all under the assumption that Ali has an obligation to assign his rights to UMass. Fourth, Oregon court denied Ali request for discovery of the appropriate UMass official to name. Therefore, Ali was not able to identify the person. See, e.g., *Pennington Seed, Inc. v. Produce Exch.* No. 299, 457 F.3d 1334, 1342 (Fed. Cir. 2006) (stating in the context of the plaintiff's invocation of the *Ex-Parte Young* doctrine that "[a]llegations that a state official directs a University's patent policy are insufficient to causally connect that state official to a violation of federal patent law ["]").

Fifth, even if Ali could have, the Oregon court transferred Ali's case to the DC Court *sua sponte*. As to the DC court: it only allowed Ali to *seek permission* to file for leave (not granted Ali leave as the Federal Circuit had stated) to name UMass official that the DC court would have had a personal jurisdiction over. Sixth, even then the DC court abruptly withdrew that offer by holding that an interlocutory order is not considered paused operationally while the court reconsiders the very same order.

Seventh, the XeChem case is different from Petitioner's case: there were no defendant left (as judge Newman put it: 'no defendant no case' (*Id.* at 1332)) at least implying that had there been, her "additional views" may have blossomed into full-scale

dissent; Ali had requested to invoke the *Ex-Parte Young* doctrine (unlike XeChem); Ali had also tried to name the UMass-affiliated inventors as defendants; moreover Ali is the inventor in the flesh who has not just economic but other interests (e.g. reputational interest, happiness the like) that the brick-and-mortar XeChem Int. could not have invoked as a practical matter.

B. BY DEFINING THE CONTOURS OF THE  
APPLICABILITY OF THE *EX-PARTE*  
*YOUNG* DOCTRINE THE COURT  
WOULD CLEAR THE DECKS FOR  
OTHER CASES THAT ARE  
PERCOLATING UPSTREAM TO THIS  
COURT

There are several cases in the pipe line that would surely reach this court (and unlike in previous cases) where the state entities have lost their claim to sovereign immunity. It would serve this court plenty to define under what circumstances the *Ex-Parte Young* doctrine is invocable in the present case. If the court were to restrict its application only to the official that, within the course of his official duties, is in the violation of the Constitution, that would set the decks for this court as other cases percolate to its docket to address the question of states sovereign immunity head on —without the state being able to clutter the question by the very vagueness of the applicability of *Ex-Parte Young* doctrine.

It is becoming fashionable now to invoke the *Ex-Parte Young* doctrine against a state official as a mere “stand-in” to bypass the constitutional shield

afforded to state entities. See, e.g., J. Moore dissenting in *University of Utah v. Max-Planck-Gesellschaft Zur Forderung Der Wissenschaften E. V.*, 74 F.3d 1315, 1329 (2013)

**CONCLUSION**

For the foregoing reasons, this Court should grant the petition for rehearing and vacate the order denying the writ of certiorari.

Dated: Originally filed: February 2, 2018; Re-filed:  
February 16, 2018

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'Mussa Ali', written in a cursive style.

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CERTIFICATE OF PETITIONER

I hereby certify (under penalty of perjury) that this  
Petition for Rehearing is presented in good faith and  
not for delay.

DATED:  
this 16<sup>th</sup> day of February, 2018

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Mussa Ali