

2017-1517, -1518

**UNITED STATES COURT OF APPEALS FOR THE FEDERAL
CIRCUIT**

CASCADES PROJECTION LLC,

Appellant,

v.

EPSON AMERICA, INC., SONY CORPORATION,

Appellees.

Appeals from the United States Patent and Trademark Office, Patent Trial
and Appeal Board in Nos. IPR2015-01206 and IPR2015-01846.

**AMICI CURIAE BRIEF IN SUPPORT OF APPELLANT'S PETITION
FOR INITIAL HEARING EN BANC OF CONSTITUTIONAL
QUESTION**

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Society of South Florida, Music City Inventors, National Innovation Association,
San Diego Inventors Forum, South Coast Inventors, Tampa Bay Inventors Council,
US Inventor, Inc.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CASCADES PROJECTION LLC v. EPSON AMERICA, INC., SONY CORP.

Case No. 2017-1517, -1518

CERTIFICATE OF INTEREST

Counsel for the:

(petitioner) (appellant) (respondent) (appellee) (amicus) (name of party)

SECURITY PEOPLE, INC., ET AL

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10 % or more of stock in the party
SECURITY PEOPLE, INC.	NONE	NONE
SEE EXTRA SHEET		

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (**and who have not or will not enter an appearance in this case**) are:

NONE

Mar 1, 2017

Date


Signature of counsel

FREAR STEPHEN SCHMID

Printed name of counsel

Please Note: All questions must be answered

cc: _____

Reset Fields

CERTIFICATE OF INTEREST
(continued)

1. Full Name of Party Represented by me	2. Name of Real Party in interest represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
Edison Innovators Association	None	None
Independent Inventors of America	None	None
Inventors Network of the Capital Area	None	None
Inventors Network of the Carolinas	None	None
Inventors Network of Minnesota	None	None
Inventors' Roundtable	None	None
Inventors Society of South Florida	None	None
Music City Inventors	None	None
National Innovation Association	None	None
San Diego Inventors Forum	None	None
South Coast Inventors	None	None
Tampa Bay Inventors Council	None	None
US Inventor, Inc	None	None

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I. INTERESTS OF AMICI CURIAE¹

Amici's authority for filing the brief is Rule 29(a)(2). This brief is filed in support of appellant's request for an en banc hearing to have the *America Invents Act* (AIA) declared unconstitutional.

Amicus Security People, Inc. ("SPI") is a California corporation, which holds over thirty patents, the bulk of which it has actively practiced in products that it manufactures, markets, and sells. SPI is currently involved in litigation in the Northern District of California regarding infringement on one of its patents (*Security People, Inc. v. Ojmar US, LLC*, case number: 3:14-cv-04968-HSG). The District Judge stayed the action upon defendant Ojmar US, LLC having filed a petition for *inter partes* review ("IPR") under the AIA. The stay of that action has thwarted SPI's Article III litigation for over a year. Also, due to the stay, the scheduled jury trial that had been originally set for October, 2016 was derailed. At issue in that case is SPI Patent No. 6,655,180 issued on December 2, 2003, which patent claims SPI

¹ Pursuant to this Court's Circuit Rule 29, *amici* gave notice to counsel for appellant and counsel for all appellees who entered an appearance in the court of appeals of *amici's* intent to file this brief. All counsel for all parties responded and consented to filing this *amicus* brief. Pursuant to this Court's Circuit Rule 29, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the briefs preparation or submission, the undersigned counsel is the author of the brief. No person other than *amici* or their counsel made a monetary contribution to the brief's preparation or submission.

incorporated in its products starting in 2002. SPI has actively practiced the patent at all times since, having invested millions of dollars into the patent, product development and its business built around the patent. SPI is a classic small business success story, which has invested in patent development in good faith reliance that its property interest in its issued patents would be protected by the United States Judicial System. In sum and substance, SPI has been deprived of its rights to hearings, trial, and the standards of proof applicable in Article III courts. Due to the stay of its Article III judicial rights, SPI brought a lawsuit against Director Lee and the United States and Trademark Patent Office challenging the constitutionality of the AIA in the Northern District of California, entitled *Security People, Inc. v. Michelle K. Lee, et al.*, action number 3:15-cv-03172-JST. A motion by Director Lee to dismiss that action was granted, the dismissal of which this Court recently affirmed in *Security People, Inc v. Lee* case # 16-2378.

Amicus has a long-standing and vested interests in various patents, and the preservation of the property rights secured thereby. *Amicus* is very concerned with the complete chaos and clouding of title of patent rights due to the *inter partes* review process under the AIA. Specifically, *amicus* is very concerned about patent owners being stripped of their rights to have their patents adjudicated in Article III courts (with the attendant Seventh

Amendment right to a jury trial) instead of at the hands of the Patent Office. The *inter partes* review process, as constituted, has an absolutely destabilizing effect on long-term patent innovations and development, and the remuneration for such efforts. And, as such, is profoundly detrimental to the well-being and purpose of fostering patents as envisioned by the U.S. Constitution.

Further, joining in this *amicus* brief are various inventors' associations consisting of thousands of members, as follows:

1. Edison Innovators Association, Fort Myers, FL
2. Independent Inventors of America, Clearwater, FL
3. Inventors Network of the Capital Area, Baltimore, MD
4. Inventors Network of the Carolinas, Charlotte, NC
5. Inventors Network of Minnesota, Oakdale, MN
6. Inventors' Roundtable, Denver, CO
7. Inventors Society of South Florida, Deerfield Beach, FL
8. Music City Inventors, Nashville, TN
9. National Innovation Association, Stuart, FL
10. San Diego Inventors Forum, San Diego, CA
11. South Coast Inventors, North Bend, OR
12. Tampa Bay Inventors Council, Tampa, FL
13. US Inventor, Inc., Highland, IN

Each of the *amici* has long-standing and vested interests in various patents, and the preservation of the property rights secured thereby. Each of the *amici* is very concerned with the complete chaos and clouding of title of patent rights due to the *inter partes* review process under the AIA. Specifically, each *amicus* is very concerned about patent owners being

stripped of their rights to have their patents adjudicated in Article III courts (with the attendant Seventh Amendment right to a jury trial) instead of at the hands of the Patent Office. The *inter partes* review process, as constituted, has an absolutely destabilizing effect on long-term patent innovations and development, and the remuneration for such efforts. And, as such, is profoundly detrimental to the well-being and purpose of fostering patents as envisioned by the U.S. Constitution.

All of the *amici* have a significant interest in the outcome of this case which tests the constitutionality of the *inter partes* review as currently constituted by the AIA. *Inter partes* review applies and directly affects each and every patent and the considerable time, effort, and energy inventors have invested in said patents. IPR subverts patentees' reasonable expectations that their patent, once issued, would be protected as long-established under United States Supreme Court precedent as a vested property right which could not be taken without Article III determination—above all, in the circumstances where entitled, a right to a jury trial. Each of the *amici* strongly urges this Court to grant en banc review to reject the constitutionality of the IPR as constituted under the AIA which disregards fundamental long-established cardinal principles and underpinnings of the American constitutional system, the tri-partite system of government, to wit:

the separation of powers, the rights and responsibilities of the judiciary under Article III, the right to property secured by the Fifth Amendment of the U.S. Constitution, and the right to a jury trial secured by the Seventh Amendment of the U.S. Constitution.

II. ARGUMENT

A. The Court Should Not Invoke the Constitutional Avoidance Doctrine as this Appeal Involves a Facial Challenge to the AIA.

Given the fundamental constitutional rights issue, and the enormous impact on intellectual property rights, this Court should not delay addressing the constitutional issues tendered by Cascades appeal.² The Supreme Court has long recognized the propriety of reaching constitutional questions even before merits questions when “important reasons” exist for doing so. *Siler v. Louisville & Nashville Railroad Co.*, 213 U.S. 175, 193 (1909) (“where a case . . . can be decided without reference to questions arising under the Federal Constitution, that course is usually pursued and is not departed from without important reasons.”) (emphasis added). Cascades’ petition

² The U.S. Supreme Court just requested on Feb. 27, 2017 a briefing from the U.S. Patent Office of this very issue in the pending petition for writ of certiorari in the manner of Oil States Energy Services, LLC, v. Greene’s Energy Group, LLC, et. al., case No. 2015-1855)

stresses the important reasons to hear the constitutional question en banc, thus meeting the “important reasons” requirement.

Cascades has raised a claim against the IPR process itself. Cascades’ petition is a facial challenge of the IPR process forced unto and as applied to Cascades. *See Public Utilities Commission of California v. United States*, 355 U.S. 534, 539 (1958) (reaching constitutional issue where the “question is whether it is constitutional to fasten the administrative procedure onto the litigant”). The fact that Cascades had to go through this IPR process (win, loose, or draw) is the constitutional wrong inflicted on it. Thus, Cascades raises a facial constitutional challenge that its appeal of the patentability issues will not render moot.

B. IPR Violates Separation Of Powers By Unconstitutional Impingement On Power Reserved To The Judiciary By Article III

This case warrants this Court’s review. For the first time in *MCM Portfolio v. Hewlett-Packard Co.*, 812 F.3d 1284 (Fed Cir 2015), a circuit court has labeled a long recognized private property right (patents) as a public right. It did so to justify executive branch power (bestowed by the legislative branch) that boldly removes a type of traditional 1789-era adjudication from the control of Article III courts. These private property

rights now go for final adjudication before executive branch employees, in violation of the judicial power reserved to Article III courts. As noted in *McCormick Harvesting Co. v. Aultman*, 169 U.S. 606 (1898), once a patent is issued, it can only be cancelled or invalidated by an Article III court, not the executive branch. Similarly, as taught in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), Congress cannot conjure away the Seventh Amendment fact-finding process employed in Article III courts by mandating that traditional legal claims be tried to an administrative tribunal: “Congress cannot eliminate a party’s Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency. . . .”

Id. at 61.

The effect of the IPR process is that Article III courts now routinely stay the court proceedings pending the conclusion of the IPR process with its resulting res judicata effect. It is self-evident that each day that the stay of an Article III infringement action is in place, the plaintiff in such an action is being deprived of its right to proceed before an Article III court as guaranteed by the U.S. Constitution, to wit: the judicial power as reserved to this Court to determine actual cases and controversies involving law and equity arising under the Constitution.

C. IPR Results In Deprivation Of The Right To A Jury Trial

Attached to and inseparable from Article III adjudication is the Seventh Amendment right to a jury trial: “[p]atent validity was a common-law action tried to a jury in Eighteenth Century England. An action to repeal and cancel a patent was pled as the common law writ of scire facias.” *In re Tech. Licensing Corp.*, 423 F.3d 1286, 1292-93 (Fed. Cir. 2005) (Newman, J., dissenting). See *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 377 (1996): “there is no dispute that infringement cases today must be tried to a jury.” Thus, the IPR process is an unconstitutional and improper deprivation of patentees’ established right to a jury trial in an Article III court. The right to a jury trial is not contingent upon any administrative process; it is an absolute fundamental constitutional right in the context of patent litigation.

D. The Article III Violation Unfairly Empowers Infringers By Applying Different Burdens Of Proof, Presumptions, And Standards Of Patent Interpretation Used In IPR Trials

Part of this case’s importance is that this Court may now correct needless destabilizing of the innovation economy. Though adjudicatory, *inter partes* review trials depart from adjudication standards that have been

developed over centuries in Article III courts. For example, when invalidity is raised in a declaratory judgment action or as a defense in an Article III court, the patentee enjoys a presumption of validity that must be overcome by the accused infringer or declaratory judgment plaintiff by clear and convincing evidence. See 35 U.S.C. § 282 (“A patent shall be presumed valid. Each claim of a patent . . . shall be presumed valid independently of the validity of other claims. . . . The burden of establishing invalidity . . . shall rest on the party asserting such invalidity. . . .”); *Microsoft Corp. v. i4i Ltd. Partnership*, 131 S. Ct. 2238, 2242 (2011) (reaffirming clear and convincing standard). By contrast, the petitioner in an *inter partes* review trial must only prove in validity by a preponderance of the evidence. See 35 U.S.C. § 316(e). It is the height of capriciousness that the validity of a patent depends on whether it is challenged in an IPR or in district court.

E. Patentees Are Entitled To Rely On Long-Standing Supreme Court Precedent That Has Always Treated Patents As Property And Hence Patent Invalidation As Subject Solely To The Judicial Power Under Article III

This is an important case meriting the Court’s review en banc due to the very fundamental principles of our Constitution at stake, the

constitutional mandate to further inventions (Article I, § 8, cl. 8), and the huge role patents have played and continue to play in the economic and social development of the United States and the world. Imagine a world without American inventors Alexander Bell, Thomas Edison, and Steve Jobs. Based upon long-established law, patentees have every right to expect that those patents will be protected in Article III courts. The IPR process completely undermines this expectation, which in turn subverts the purpose of the Constitution's patent clause with its express intent to foster inventions. This constitutional objective is greatly diminished if patentees cannot be secure in their patent rights. It is difficult to exploit a patent, and build a product and/or business premised on a patent when it is subject to invalidation in a non-judicial setting.

In *Marbury v. Madison*, 5 U.S. 137, 154-56 (1803), it was held that whether a property right may be revoked lies within the exclusive province of the courts. Hence, a patent, upon issuance, is not subject to revocation or cancellation by any executive agent (i.e., the USPTO or any part of it, such as the PTAB), that authority is vested in Article III courts. *Moore v. Robbins*, 96 U.S. 530, 533 (1877); *Michigan Land & Lumber Co. v. Rust*, 168 U.S. 589, 593 (1897).

Recent Supreme Court activity confirms the need to hold *inter partes* review unconstitutional. In *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1316-1317 (2015), Justices Thomas and Scalia *sua sponte* raised the issue of the constitutionality of giving preclusive effect to agency decisions involving private rights so as to effectively deprive the party of a right to a trial in an Article III court and to a jury.

III. CONCLUSION

The Court should grant an **en banc** hearing. The issue of whether the executive branch (patent office) may cancel vested private property rights is too important for this full Court not to consider.

Dated: March 1, 2017

Respectfully submitted,

/s/ Frear Stephen Schmid
Frear Stephen Schmid

Attorney for Amici Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 35(b)(2)(A). The brief contains 2,378 words, excluding the parts of the brief exempted by Federal Circuit Rule 35(c)(2).

The brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2013 in 14-point Times New Roman type.

Dated: March 1, 2017

/s/ Frear Stephen Schmid
Frear Stephen Schmid

Attorney for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system on March 2, 2017. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: March 2, 2017

/s/ Frear Stephen Schmid
Frear Stephen Schmid

Attorney for Amici Curiae