No. 15-955

In The Supreme Court of the United States

J. CARL COOPER AND ECHARGE LICENSING LLC,

Petitioners,

v.

MICHELLE K. LEE, IN HER CAPACITY AS DIRECTOR OF THE UNITED STATES PATENT AND TRADEMARK OFFICE, AND THE UNITED STATES PATENT AND TRADEMARK OFFICE,

Respondents.

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

BRIEF OF PROFESSOR ADAM MOSSOFF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae is a law professor who teaches and writes on patent law, property law, constitutional law, and legal history. He has an interest in both promoting continuity in the evolution of these interrelated doctrines and ensuring that the patent system continues to secure innovation to its creators and owners. In his professional opinion, this Court should grant the petition for writ of certiorari because the decision below by the Court of Appeals for the Federal Circuit contradicts longstanding decisions by this Court and by lower federal courts that have defined patents as private property rights, which are secured to their owners under the Constitution. He has no stake in the parties or in the outcome of the case.

SUMMARY OF ARGUMENT

The decision by the district court in *Cooper v. Lee*, 86 F. Supp. 3d 480 (E.D. Va. 2015), which was

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part, and that no person or entity other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for Petitioners in this case has filed a letter pursuant to Supreme Court Rule 37.3(a) reflecting consent to the filing of *amicus curiae* briefs in support of either party. As stated in a letter filed with the Court, counsel of record for Respondents consented to the filing of this brief. *Amicus curiae* gave timely notice to Petitioners and Respondents of his intent to file this brief.

summarily affirmed by the Court of Appeals for the Federal Circuit, contradicts this Court's longstanding case law that secures constitutional protections in vested private property rights. The petitioners fully address the specific legal and constitutional issues arising from the creation and operation of inter partes review before the Patent Trial and Appeals Board, and thus *amicus* offers an additional reason that this Court should grant petitioners' writ of certiorari: the lower courts in this case should be reversed to correct their mistaken legal claims that patents are public rights, which contradicts existing case law and thus creates problems in the relevant case law going forward. This Court has long recognized and secured the constitutional protection of patents as *private property rights* reaching back to the early American Republic.

In their decisions in this case, the district court and the Federal Circuit in the related case of *MCM Portfolio LLC v. Hewlett-Packard Co.*, Case No. 2015-1091, 2015 WL 7755665 (Fed. Cir. Dec. 2, 2015), held that "patent rights are public rights," *id.* at *9. This is unprecedented, and it is predicated on a misunderstanding of and out-of-context quotations from cases about the ways in which the "public" has an interest at times in the validity of patents. But the public has an interest in the validity of all property rights, and the implications of these decisions by the lower courts are far-reaching and unlimited in terms of breaking down fundamental constitutional protections for vested property rights vis-à-vis the administrative state.

To make this clear, *amicus* details the enduring and binding nineteenth-century case law establishing that patents are private property rights protected by the Takings Clause and Due Process Clause. *See* Adam Mossoff, *Patents as Constitutional Private Property: The Historical Protection of Patents under the Takings Clause*, 87 B.U. L. Rev. 689, 700-11 (2007) (discussing this case law). Congress explicitly endorsed this case law in codifying the legal definition of patents as "property" in 35 U.S.C. § 261. *See* Adam Mossoff, *Exclusion and Exclusive Use in Patent Law*, 22 Harv. J. L. & Tech. 321, 343-45 (2009) (discussing the text and legislative history of § 261 as "codify[ing] the case law reaching back to the early American Republic that patents are property rights").

Just last term, this Court confirmed the continuing vitality and relevance of the revered legal proposition that patents are private property rights in *Horne v. Dep't of Agriculture*, 135 S. Ct. 2419, 2427 (2015) (Roberts, C.J.), in which the Court approvingly quoted nineteenth-century case law that "[a patent] confers upon the patentee an exclusive property in the patented invention which cannot be appropriated or used by the government itself, without just compensation, any more than it can appropriate or use without compensation land which has been patented to a private purchaser" (quoting *James v. Campbell*, 104 U.S. 356, 358 (1882)). This Court also held sixteen years ago that patents are property rights secured under the Due Process Clause of the Fourteenth Amendment. *See Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627

(1999) (holding that patents are property interests secured under the Due Process Clause of the Fourteenth Amendment in a case involving a state's unauthorized use of a patented invention).

The decisions by the lower courts in this case directly conflict with both modern and long-established decisions on the constitutional protection of patents as private property rights. The result of this contradiction with this Court's jurisprudence on patents has a far-reaching, negative impact for the protection of all "exclusive property" under the Constitution. *James*, 104 U.S. at 358. Thus, it is necessary for this Court to reaffirm the precise constitutional and legal status of patents as private property rights by granting petitioners' writ of certiorari and reversing the courts below.

ARGUMENT

This Court unequivocally defined patents as property rights in the early American Republic. In 1824, for instance, Justice Joseph Story wrote for a unanimous Supreme Court that the patent secures to an "inventor . . . a property in his inventions; a property which is often of very great value, and of which the law intended to give him the absolute enjoyment and possession." *Ex parte Wood*, 22 U.S. (9 Wheat.) 603, 608 (1824).[2] In hearing patent cases while riding

[2] *See* also *Hayden v. Suffolk Mfg. Co.*, 11 F. Cas. 900, 901 (C.C.D. Mass. 1862) (No. 6,261) (instructing jury that a "patent

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circuit, Justice Story explicitly relied on real property case law as binding precedent in his opinions.[3] Justice Story was not an outlier, as many Circuit Justices and other federal judges repeatedly used common-law property concepts in their opinions in patent cases, such as "title,"[4] "trespass,"[5] and

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right, gentlemen, is a right given to a man by law where he has a valid patent, and, as a legal right, is just as sacred as any right of property").

[3] *See, e.g.*, *Brooks v. Byam*, 4 F. Cas. 261, 268-70 (C.C.D. Mass. 1843) (No. 1,948) (Story, Circuit Justice) (analogizing a patent license to "a right of way granted to a man for him and his domestic servants to pass over the grantor's land," citing a litany of real property cases from classic common law authorities, such as *Coke's Institutes*, *Coke's Littleton*, *Viner's Abridgment*, and *Bacon's Abridgement*); *Dobson v. Campbell*, 7 F. Cas. 783, 785 (C.C.D. Me. 1833) (No. 3,945) (Story, Circuit Justice) (relying on real property equity cases in which "feoffment is stated without any averment of livery of seisin" in assessing validity of patent license).

[4] *See, e.g.*, *Carr v. Rice*, 5 F. Cas. 140, 146 (C.C.S.D.N.Y. 1856) (No. 2,440) (noting that "assignees [of a patent] become the owners of the discovery, with perfect title," and thus "[p]atent interests are not distinguishable, in this respect, from other kinds of property"); *Hovey v. Henry*, 12 F. Cas. 603, 604 (C.C.D. Mass. 1846) (No. 6,742) (Woodberry, Circuit Justice) (instructing jury that "[a]n inventor holds a property in his invention by as good a title as the farmer holds his farm and flock").

[5] *See, e.g.*, *Goodyear Dental Vulcanite Co. v. Van Antwerp*, 10 F. Cas. 749, 750 (C.C.D.N.J. 1876) (No. 5,600) (analogizing patent infringement to a "trespass" of horse stables); *Burliegh Rock-Drilling Co. v. Lobdell*, 4 F. Cas. 750, 751 (C.C.D. Mass. 1875) (No. 2,166) (noting that the defendants "honestly believ[ed] that they were not trespassing upon any rights of the complainant"); *Livingston v. Jones*, 15 F. Cas. 669, 674 (C.C.W.D.

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"piracy."[6] Legally and rhetorically, federal courts throughout the nineteenth century consistently affirmed that "the [patent] right is a species of property," *Allen v. New York*, 1 F. Cas. 506, 508 (C.C.S.D.N.Y. 1879) (No. 232), and thus infringement is "an unlawful invasion of property." *Gray v. James*, 10 F. Cas. 1019, 1021 (C.C.D. Pa. 1817) (No. 5,719).[7] As Circuit

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Pa. 1861) (No. 8,414) (accusing defendants of having "made large gains by trespassing on the rights of the complainants"); *Eastman v. Bodfish*, 8 F. Cas. 269, 270 (C.C.D. Me. 1841) (No. 4,255) (Story, Circuit Justice) (comparing evidentiary rules in a patent infringement case to relevant evidentiary rules in a trespass action).

[6] *See, e.g.*, *Pennock v. Dialogue*, 27 U.S. (2 Pet.) 1, 12 (1829) (Story, J.) (recognizing that "if the invention should be pirated, [this] use or knowledge, obtained by piracy" would not prevent the inventor from obtaining a patent); *Batten v. Silliman*, 2 F. Cas. 1028, 1029 (C.C.E.D. Pa. 1855) (No. 1,106) (decrying defendant's "pirating an invention"); *Buck v. Cobb*, 4 F. Cas. 546, 547 (C.C.N.D.N.Y. 1847) (No. 2,079) (recognizing goal of patent laws in "secur[ing] to inventors the rewards of their genius against the incursions of pirates"); *Dobson v. Campbell*, 7 F. Cas. 783, 785 (C.C.D. Me. 1833) (No. 3,945) (Story, Circuit Justice) (concluding that patent-assignee has been injured by "the piracy of the defendant"); *Grant & Townsend v. Raymond*, 10 F. Cas. 985, 985 (C.C.S.D.N.Y. 1829) (No. 5,701) (noting that the patented machine had "been pirated" often); *Earle v. Sawyer*, 8 F. Cas. 254, 258 (C.C.D. Mass. 1825) (No. 4,247) (Story, Circuit Justice) (instructing jury that an injunction is justified by defendant's "piracy by making and using the machine").

[7] *See* also *Ball v. Withington*, 2 F. Cas. 556, 557 (C.C.S.D. Ohio 1874) (No. 815) (noting that patents are a "species of property"); *Carew v. Boston Elastic Fabric Co.*, 5 F. Cas. 56, 57 (C.C.D. Mass. 1871) (No. 2,398) (explaining that "the rights conferred by the patent law, being property, have the incidents of property"); *Lightner v. Kimball*, 15 F. Cas. 518, 519

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Justice Levi Woodbury explained in 1845: "we protect intellectual property, the labors of the mind, . . . as much a man's own, and as much the fruit of his honest industry, as the wheat he cultivates, or the flocks he rears." *Davoll v. Brown*, 7 F. Cas. 197, 199 (C.C.D. Mass. 1845) (No. 3,662).

This case law is directly relevant to this case, because it underscores this Court's decision in *McClurg v. Kingsland*, 42 U.S. (1 How.) 202 (1843), which held that Congress cannot *retroactively* limit the property rights in patents that had been secured by subsequently repealed patent statutes. *Id.* at 206. Justice Baldwin's opinion for the unanimous Court states bluntly that "a repeal [of a patent statute] can have no effect to impair the right of property then existing in a patentee, or his assignee, according to the well-established principles of this court." *Id.* In sum, a patent issued to an inventor created vested property rights, and "the patent must therefore stand" regardless of Congress's subsequent repeal of the statutes under which the patent originally issued. *Id.*

(C.C.D. Mass. 1868) (No. 8,345) (noting that "every person who intermeddles with a patentee's property . . . is liable to an action at law for damages"); *Ayling v. Hull*, 2 F. Cas. 271, 273 (C.C.D. Mass. 1865) (No. 686) (discussing the "right to enjoy the property of the invention"); *Gay v. Cornell*, 10 F. Cas. 110, 112 (C.C.S.D.N.Y. 1849) (No. 5,280) (recognizing that "an invention is, within the contemplation of the patent laws, a species of property").

In reaching this decision, Justice Baldwin relied on the "well-established principles of this court," *id.*, in affirming the constitutional security provided to the vested property rights in patents. Further confirming the private property status of patent rights, Justice Baldwin continued the practice of invoking real property cases as determinative precedent for defining and securing property rights in patents. *See id.* (citing *Society for the Propagation of the Gospel in Foreign Parts v. New Haven*, 21 U.S. (8 Wheat.) 464 (1823), which addressed the status of property rights in *land* under the treaty that concluded the Revolutionary War). In relying on such "well established principles" set forth in *Society*, the *McClurg* Court explicitly established in 1843 that patents are on par with private property rights in land as a matter of constitutional doctrine, a point the lower courts in this case directly contradict.

Furthermore, this Court and lower federal courts in the late nineteenth century repeatedly and consistently held that patents are private property rights that are secured under the Constitution. *See, e.g.*, *United States v. Burns*, 79 U.S. 246, 252 (1870) (stating that "the government cannot, after the patent is issued, make use of the improvement any more than a private individual, without license of the inventor or making compensation to him"); *Cammeyer v. Newton*, 94 U.S. 225, 234 (1876) (holding that a patent owner can seek compensation for the unauthorized use of his patented invention by federal officials because "[p]rivate property, the Constitution

provides, shall not be taken for public use without just compensation"); *McKeever v. United States*, 14 Ct. Cl. 396 (1878) (rejecting the argument that a patent is a "grant" of special privilege, because the text and structure of the Constitution, as well as court decisions, clearly establish that patents are private property rights).

In *Cammeyer v. Newton*, 94 U.S. 225 (1876), for example, this Court expressly rejected an argument by federal officials that a patent was merely a public grant and thus they could use it without authorization, holding that "[a]gents of the public have no more right to take such *private property* than other individuals." *Id.* at 234-35 (citing the Takings Clause) (emphasis added). Thus, the *Cammeyer* Court held that the Constitution protects patent owners against an "invasion of the *private rights* of individuals" by federal officials. *Id.* at 235 (emphasis added).

By resting their conclusion on the premise that "patent rights are public rights," *MCM Portfolio LLC*, ___ F.3d at ___, 2015 WL 7755665, at *9, the lower courts' decisions in this case and related cases directly contradict these numerous, longstanding, and binding decisions by this Court. This Court recently and repeatedly confirmed the principle that patents are private property rights that are secured under the Constitution. *See, e.g.*, *Horne*, 135 S. Ct. at 2427; *Fla. Prepaid*, 527 U.S. at 642. This Court also warned the Federal Circuit in *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., Ltd.*, 535 U.S. 722, 739 (2002), that lower courts must respect "the legitimate

expectations of inventors in their property" and not radically unseat such expectations by changing doctrines that have long existed since the nineteenth century. Moreover, Chief Justice John Roberts specifically stated in *eBay Inc. v. MercExchange, L.L.C.*, 126 S. Ct. 1837 (2006), that nineteenth-century patent law should be accorded significant weight in modern patent law in determining the nature of the property rights secured to patent owners. *Id.* at 1841-42 (Roberts, C.J., concurring).

CONCLUSION

For the foregoing reasons, *amicus* urges this Court to grant petitioner's writ of certiorari and correct the contradictions created in both patent law and constitutional law by the lower court decisions in this case concerning the status of patent rights as private property rights.

Respectfully submitted,

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