

No. 16-76

In The
Supreme Court of the United States

—◆—
J. CARL COOPER,

Petitioner,

v.

SQUARE, INC.,

Respondent.

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

—◆—
REPLY BRIEF
—◆—

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. Why Review is Exceptionally Important	1
II. Square’s “Vehicle” Argument is Wrong	3
CONCLUSION.....	11

TABLE OF AUTHORITIES

	Page
CASES	
<i>Elgin v. Dept. of Treasury</i> , 132 S. Ct. 2126 (2012).....	6
<i>Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.</i> , 561 U.S. 477 (2010).....	10
<i>Hettinga v. United States</i> , 560 F.3d 498 (D.C. Cir. 2009)	7, 9
<i>Hewlett-Packard Co. v. MCM Portfolio, LLC</i> , IPR2013-00217, Paper 31 (PTAB Aug. 6, 2014)	9
<i>Joseph T. Ryerson & Son, Inc. v. NLRB</i> , 216 F.3d 1146 (D.C. Cir. 2000)	11
<i>Lighting Ballast Control LLC v. Philips Electronics North Am. Corp.</i> , 744 F.3d 1272 (Fed. Cir. 2014)	6
<i>McCormick Harvesting Mach. Co. v. Aultman</i> , 169 U.S. 606 (1898)	12
<i>MCM Portfolio, LLC v. Hewlett-Packard Co.</i> , 812 F.3d 1284 (Fed. Cir. 2015)	8
<i>Nathan Katz Realty, LLC v. NLRB</i> , 251 F.3d 981 (D.C. Cir. 2001)	11
<i>NLRB v. Best Products Co.</i> , 765 F.2d 903 (9th Cir. 1985)	11
<i>Riggin v. Office of Senate Fair Employment Practices</i> , 61 F.3d 1563 (Fed. Cir. 1995).....	9

TABLE OF AUTHORITIES – Continued

	Page
<i>Square, Inc. v. Unwired Planet LLC</i> , IPR2014-01165, Paper 32 (PTAB Oct. 30, 2015)	8
<i>Stern v. Marshall</i> , 131 S. Ct. 2594 (2011)	12
<i>Teva Pharma. USA, Inc. v. Sandoz, Inc.</i> , 135 S. Ct. 831 (2015)	6
<i>Thunder Basin Coal Co. v. Reich</i> , 510 U.S. 200 (1994)	7, 8

RULES AND REGULATIONS

29 C.F.R. § 102.67(f)	11
37 C.F.R. § 42.23	6
37 C.F.R. § 42.120	4

ARGUMENT

This case is the only one left of three that raised a facial constitutional challenge to *inter partes* review (IPR). This Court relisted in *Cooper v. Lee*, No. 15-955, and *MCM Portfolio v. HP*, No. 15-1330, before denying cert on October 11, 2016. This case is distinct from both of those, and far more amenable to adjudication by this Court. This case does not have the vehicle problem identified by the federal respondent in *Cooper v. Lee* (since this case arises directly from an agency final decision, whereas *Cooper v. Lee* arose from a collateral proceeding). And this case does not seek the extreme constitutional remedies of the petitioner in *MCM Portfolio* (since this case seeks relief in the form of making IPR outcomes advisory, not in the form of annihilating an entire section of a federal agency).

I. Why Review is Exceptionally Important

Before addressing respondent Square’s sole developed rationale for denying cert – an alleged “vehicle” problem – Mr. Cooper spends a few words to remind the Court of the extreme constitutional importance of this case. Within this and the other two proceedings (*Cooper v. Lee* and *MCM Portfolio*), eleven amicus submissions uniformly supported the request for review of IPR constitutionality. Law professors, bar groups, manufacturing companies, individual inventors, and innovation scholars all agree that this Court should turn its attention to the extraordinary anomaly within the

lower court's treatment of private property rights of invention patents as so-called "public rights."

IPRs revoke claims in issued patents. IPRs use a broad form of claim construction intended for examination of patent applications where the inventor retains complete discretion to amend. This so-called "broadest reasonable construction" invalidates patents under agency review that would not have been invalidated in court. And because an accused infringer may bring an IPR, litigation of patent validity over prior art has transferred from the courts to one executive agency, vulnerable like they all are to "agency capture."

With IPRs, patent owners see no day in court before having their private property rights administratively revoked. The constitutional injury has no parallel. Had King George III done to inventors in 1776 what the federal government does today, Thomas Jefferson would have likely added a paragraph on the topic to the Declaration of Independence.

Patent owners have had a right to have the validity of their patents tried in common law or equity courts since at least 1604, and certainly by 1789. Accordingly, this Court has repeatedly ruled that only a court of law or equity has the constitutional authority to revoke an issued patent for invalidity. In the face of all of this, lower court labeling of a patent as a "public right" has empowered Congress to do the unthinkable – remove entirely the question of patent validity from the courts. If the decision below is left undisturbed,

Congress may legally obliterate the adjudication of patent validity from Article III courts, in favor of disposal by *ad hoc* employees of an executive agency who lack the protections enjoyed by Article III judges (lifetime tenure and prohibition against salary reduction). And then what? No principled reason would forbid Congress from transferring *all* 1789-vintage federal claims away from the courts and into executive agency tribunals. These anomalies must be corrected.

II. Square’s “Vehicle” Argument is Wrong

Square’s response makes no serious attempt to deliver any rebuttal to these profound arguments in favor of review. They are well articulated in the *Cooper v. Lee* and *MCM Portfolio* petitions, replies, and amicus briefs. Square instead argues against *Cooper v. Square* as a proper vehicle for the issue. As shown below, Square could not be more wrong. If there was ever a “perfect vehicle,” this is it. No future case will ever arrive in a better posture.

Square admits that the PTAB “lacks authority to declare *inter partes* review unconstitutional.” (Square BIO, at 15). In the face of this obvious truth, Square develops a single argument to try to persuade this Court to deny review. Mr. Cooper supposedly did not ask enough times for the PTAB to do what Square admits it cannot. Square casts this as a “vehicle” problem. But this “vehicle” issue wilts under scrutiny. Both the facts and the law nullify the argument. No barrier to

review stands in the way, and this Court should grant Mr. Cooper's petition.

Combing the PTAB record for all the times Mr. Cooper made the constitutional objection, Square found one place he did not: the patent owner's response. But PTAB regulations precluded him from lodging the objection in that document. 37 C.F.R. § 42.120 (limiting scope of patent owner's response to "addressing any ground for unpatentability not already denied."). And though Square argues that the PTAB's "standard scheduling order" entered below supports a finding of waiver (BIO, at 4), Square ignores its text. It states that "[t]he patent owner is cautioned that any arguments *for patentability* not raised in the response will be deemed waived." (A5350, A5356, A5362, emphasis added). The constitutional objection was not an argument "for patentability." The PTAB cautionary note from the scheduling order thus does not support waiver.

Square also points to an oral hearing colloquy in which one PTAB judge suggests that Mr. Cooper might have ignored the rule against impermissible patent owner response content. (BIO, at 11). But this exchange could not have expanded Petitioner's freedom of action at the PTAB. One PTAB tribunal judge has no authority to alter PTAB practice rules, much less retroactively.¹ Nor should the presence of reconsideration or rehearing procedures factor into the present

¹ This judge misunderstood how well Mr. Cooper had preserved the issue. In his Request for Oral Hearing, Mr. Cooper had

vehicle analysis, as Square argues it should. (BIO, at 11). Whether or not a litigant avails himself of reconsideration opportunities is irrelevant to this Court's decision to grant review of the judgment actually rendered below. Square presents no authority suggesting that failure to request rehearing or reconsideration on issues already preserved leads to waiver.

The logic of Square's vehicle argument actually works against Square. Mr. Cooper anticipated that he would not be allowed to raise the constitutional objection in his patent owner response and therefore made clear to Square in his preliminary response that it should draw no inference of acquiescence by silence in the later document. He stated, "By participating in these proceedings further, Mr. Cooper does not waive his Article I Separation of Powers or his Seventh Amendment objection." (A0953, A2607 A4437). Square then had a procedural right to address the constitutional objection in a reply (at least, under Square's

flagged issues raised in his preliminary responses (which included the constitutional objections) as those he would raise at oral hearing. (ECF#19, at 6-7, citing PTAB record). Though Square alleges that Mr. Cooper gave inadequate notice (BIO, at 5-6), the reality is just the opposite. The PTAB expungement order that Square cites reasoned that Mr. Cooper's *extra* notice that he would argue unconstitutionality was unneeded, since, "Patent Owner already had given notice of the issues it [sic] intends to argue at oral argument, in its [sic] request for oral argument, submitted on November 6, 2014." (ECF#19, at 7, *citing* PTAB record). In other words, before the oral hearing, Mr. Cooper had put all parties and the tribunal properly on notice that Mr. Cooper planned to raise constitutional issues raised in the preliminary responses, since he cited those preliminary responses in his Request for Oral Hearing.

logic it did). *See* 37 C.F.R. § 42.23. Though it did file replies, Square omitted discussion of the constitutional objection. (A1332-A1349; A2985-A3002; A4819-A4837). Square here seeks to advantage itself by its own silence. It claims it lacked a way to develop a “record” at the PTAB. (BIO, at 8). But even if true, Square (not Mr. Cooper) brought on this condition.

Though the facts demonstrate no waiver or forfeiture, all of these facts are actually beside the point based on the law. Administrative exhaustion precedents approve of the circuit court, in the first instance, reaching questions of constitutionality of agency enabling enactments. *See Elgin v. Dept. of Treasury*, 132 S. Ct. 2126, 2136-39 (2012) (claim attacking constitutionality of CSRA can be “meaningfully addressed” by Federal Circuit in the first instance). When those circuit courts render judgments, they are no less effective on the questions raised before them simply because the agency below refused litigant requests to get a provisional ruling from the agency. Here, this Court would review a judgment of the Court of Appeals for the Federal Circuit, justified under its detailed (albeit flawed) analysis in the *MCM Portfolio* decision. All “vehicle” objections wash away in the context in which this case arises. This Court remains perfectly capable of reviewing the validity of Federal Circuit precedent that led to rejection of Mr. Cooper’s contrary argument here. This Court recently did a similar thing in *Teva Pharma. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831 (2015), where it reviewed and overruled precedent handed down by the Federal Circuit in another matter, styled *Lighting*

Ballast Control LLC v. Philips Electronics North Am. Corp., 744 F.3d 1272 (Fed. Cir. 2014) (*en banc*).

Though Square paints itself within PTAB proceedings as having been helplessly rendered mute on Mr. Cooper’s constitutional objection, Square does not deny that it engaged in full Federal Circuit merits briefing. Thus, within *this* proceeding, Square had and took the opportunity to brief the merits of IPR’s facial unconstitutionality under Separation of Powers principles. (ECF#22, at 68-77). The Federal Circuit thus hosted the key adversarial contest. And within Square’s Federal Circuit briefing, unlike in its Brief in Opposition in this Court, it never claimed to be hindered in developing its merits position based on an alleged incompleteness in the record developed within the underlying agency. Square therefore waived this aspect of its “vehicle” argument.

Further underscoring that this Court does not need PTAB views (or “record development”) to proceed onto the question presented, this Court has held what Square admits it has held: agencies lack jurisdiction to assess the constitutionality of their enabling enactments. *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994) (“[W]e agree that ‘[a]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies.’”); *see also Hettinga v. United States*, 560 F.3d 498, 506 (D.C. Cir. 2009) (agency proceedings would not include fact-finding relevant to structure of statute or legislative history, reversing

“administrative exhaustion” dismissal of collateral attack on agency statute’s constitutionality). At least once, the PTAB itself has declined an invitation to address the constitutional question presented here on exactly this ground. *Square, Inc. v. Unwired Planet LLC*, IPR2014-01165, Paper 32, at 25-26 (PTAB Oct. 30, 2015). Admittedly, the PTAB has gone beyond its jurisdictional borders in other instances, always overruling the objection. (BIO, at 9, *citing* two PTAB decisions – *American Express Co.* and *MCM Portfolio*). But at best this shows that presentation of the issue to the PTAB is futile.²

Square also seems to suggest that there is some hypothetical administrative “record” that this Court would have in a perfect-vehicle case, that would supply essential agency “fact-finding.” (BIO, at 12-13). But this contention also fails scrutiny. The question presented sets up review of the constitutionality of an act of Congress under Separation of Powers principles. Agencies do not find “facts” on these issues. In *MCM Portfolio*, for example, the Federal Circuit made no reference to any such fact-finding by the PTAB. *MCM Portfolio, LLC v. Hewlett-Packard Co.*, 812 F.3d 1284 (Fed. Cir. 2015). Nor did the PTAB final written decision under review at the Federal Circuit contain such

² Square boasts that the rule against agency adjudication of its own constitutionality is “not mandatory.” (BIO, at 10, *citing Thunder Basin*, 510 U.S. at 215). The context of the Court’s statement in *Thunder Basin* involved issues for which agencies could develop a relevant factual record, such as due process challenges. The Court did not refer to Separation of Powers questions. *See also* note 3, *infra*.

fact-finding. See *Hewlett-Packard Co. v. MCM Portfolio, LLC*, IPR2013-00217, Paper 31, at 4-5 (PTAB Aug. 6, 2014).

Square reaches for examples of what might qualify as such “facts” if the PTAB ever got around to finding them. But this effort also flies wide of the mark. Square suggests that this Court would, in a properly-raised vehicle, be privy to agency fact-finding on “the PTO’s regulatory objectives and whether it is essential to those objectives that the PTO have the ability to reconsider issued patent claims.” (BIO, at 12). Such matters rest far outside of the PTAB’s responsibilities, and are not findable “facts” anyway. Assuming for the sake of argument they are even relevant (which they are not, see generally Petition and Reply in *Cooper v. Lee*, No. 15-955, discussing the “historical antecedents” test as the proper test), issues such as these are grist for the mill of judicial analysis within the disposition of a question of statutory or constitutional law.³ If this

³ Square’s authority suggesting that agencies play a role in constitutional adjudication is easily distinguished and actually supports Mr. Cooper. In *Riggin v. Office of Senate Fair Employment Practices*, 61 F.3d 1563, 1569 (Fed. Cir. 1995), the Federal Circuit held that an agency should address constitutional questions only where the “constitutional challenge to the [statute] bears directly on whether [challengers] have a valid statutory discrimination claim.” This makes sense – agency fact-finding could be useful for both the constitutional question and the merits issue. The same is not true of Separation of Powers challenges in the PTAB. To the contrary, *Riggin* notes that agencies would not have jurisdiction over a constitutional challenge that required the agency to “consider its own statutory authority.” *Id.* at 1570; accord *Hettinga*, 560 F.3d at 506.

Court wants views from the USPTO on “regulatory objectives” and their “essentiality,” the Solicitor General will certainly step in, either as amicus or intervenor.

Not only is there no evidence the PTAB would ever reach questions of “regulatory objectives” and “essentiality” of the power to invalidate (since prior PTAB explorations of constitutionality did not). But also, no vehicle problem arises for lack of the PTAB’s views. These are subsidiary rationales behind questions of law. For that, it is Article III courts that address questions about the scope of Article III under the United States Constitution. See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 (2010) (permitting collateral Article III challenge to agency action to proceed without first requiring agency adjudication where “[n]o [agency] expertise is required here” and constitutional claims were “outside the Commission’s competence and expertise.”). Waiting for the “perfect” vehicle where the PTAB has delivered pure dicta on the same topic, *after* the Federal Circuit’s controlling *MCM Portfolio* decision has preordained what result the PTAB must reach, would bring no benefit to this Court.

For review of some agency decisions, but not those here, Congress has required issue-preservation before allowing appellate jurisdiction (*e.g.*, National Labor Relations Board decisions). Even in those cases, courts have rejected arguments similar to those Square raises. For example, there is a “no-relitigation rule” in NLRB proceedings whereby parties may not re-raise lost issues from “representation” proceedings in

later “fair labor practices” proceedings. *See* 29 C.F.R. § 102.67(f); *see also Joseph T. Ryerson & Son, Inc. v. NLRB*, 216 F.3d 1146, 1151 (D.C. Cir. 2000). This creates a dilemma for litigants who wish to comply with regulations, while still preserving their issues for appeal. In those instances, a party preserves objections simply when it provides “a firm indication to the Board of the party’s non-abandonment of the issue.” *NLRB v. Best Products Co.*, 765 F.2d 903, 909 (9th Cir. 1985). A sensible rationale exists for this standard. “In light of the no-relitigation rule, a detailed restatement of the arguments raised during representation proceedings or in election objections would be futile.” *Nathan Katz Realty, LLC v. NLRB*, 251 F.3d 981, 987 (D.C. Cir. 2001) (adopting Ninth Circuit’s *Best Products* standard). Even Square concedes that Mr. Cooper provided such a “firm indication” of “non-abandonment” of his “futile” objection to the Patent Trial and Appeal Board, when he sought to re-raise it at the oral hearing. (BIO, at 2, 5).

◆

CONCLUSION

No future petition on the question presented will ever come to this Court as a better vehicle. The Federal Circuit’s *MCM Portfolio* decision made sure of that. *MCM Portfolio* is the very decision that Mr. Cooper seeks to have reviewed here. After *MCM Portfolio*, no chance remains of any sustained legal analysis of IPR

constitutionality within any future IPR proceeding. PTAB panels will be bound by controlling authority to follow the Federal Circuit. Likewise, within the Federal Circuit, the *MCM Portfolio* decision has stated the law of that circuit until overturned *en banc* (a near impossibility) or by this Court. And since the courts have decided that the constitutional question presented arises under the patent laws, rather than the general laws, the Federal Circuit retains exclusive jurisdiction. This prevents any other circuit from offering its analysis to this Court.

As set forth by every amicus, as well as within the *Cooper v. Lee* and *MCM Portfolio* petitions (Nos. 15-955 and 15-1330), in creating IPRs, Congress violated this Court's holding in *McCormick Harvesting Mach. Co. v. Aultman*, 169 U.S. 606, 609 (1898). The decisions below that leave IPRs in place also disturb this Court's "public rights" jurisprudence, as discussed most recently in *Stern v. Marshall*, 131 S. Ct. 2594 (2011). The disastrous Article III decisions in *Cooper v. Square*, *Cooper v. Lee*, and *MCM Portfolio* damage the economy by undermining the usability of patent rights to start new businesses and to create new jobs. The Court should reject Square's makeweight "bad vehicle" objections.

Petitioner therefore requests that this Court grant the petition for a writ of certiorari.

Respectfully submitted,

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