No. 17-707

In the Supreme Court of the United States

KIP CR P1 LP, SUCCESSOR IN TITLE TO
CROSSROADS SYSTEMS, INC.,
Petitioner,

v.

ORACLE CORPORATION, NETAPP, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF IN OPPOSITION OF RESPONDENTS ORACLE CORPORATION AND NETAPP, INC.

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QUESTIONS PRESENTED

This Court is currently considering the constitutionality of *inter partes* review in *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, No. 16-712 (U.S. *cert. granted* June 12, 2017).

1. If the Court affirms the constitutionality of *inter partes* review in *Oil States*, should Crossroads's tagalong petition for certiorari in this case be denied?

2. Even if the Court declares *inter partes* review unconstitutional in *Oil States*, should this Court deny Crossroads's petition for a GVR order given Crossroads's failure to raise this issue until its motion for rehearing in the Federal Circuit?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondent Oracle Corporation has no parent corporation and no publicly held company owns 10% or more of its stock.

Respondent NetApp, Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

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BRIEF IN OPPOSITION

Respondents Oracle Corporation and NetApp, Inc. (collectively, "Respondents") submit this brief in opposition to the Petition for a Writ of Certiorari submitted by Petitioner KIP CR P1 LP, purported successor-in-title to Crossroads Systems, Inc. (collectively, "Petitioner" or "Crossroads").[1]

INTRODUCTION

This petition should be denied outright and should not await the result in *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, No. 16-712 (U.S. *cert. granted* June 12, 2017) ("*Oil States*").

In seeking review, Crossroads does not challenge the merits of the Federal Circuit's decision. Rather, Crossroads claims that *inter partes* review is unconstitutional based on arguments already before the Court in *Oil States*. So if *Oil States* is decided in a manner that leaves intact the *inter partes* review process—and Respondents believe it should be—this petition offers nothing of substance and should be denied for that reason alone.

But, even if this Court were to find *inter partes* review unconstitutional in *Oil States*, the petition

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[1] KIP CR P1 LP was introduced as the "successor-in-title" to Crossroads Systems, Inc. for the first time in the Petition for a Writ of Certiorari. Respondents have not had any opportunity to verify this claimed assignment. For purposes of this brief in opposition—and for the sake of simplicity—Respondents will treat these entities as a single, collective patent owner. However, Respondents reserve the right to challenge the ownership claims of KIP CR P1 LP in any future proceedings.

here should be denied because Crossroads forfeited its right to challenge the constitutionality of *inter partes* review in this case by failing to raise any such argument until the Federal Circuit ruled against it. Therefore, the result in this case will not change on remand and a GVR order would be unjust and inappropriate.

COUNTER-STATEMENT OF THE CASE

This case arises from consolidated *inter partes* review proceedings in which the Patent Trial and Appeal Board (the "PTAB") found invalid one of Crossroads's patents, a decision that the Federal Circuit affirmed.

The specific technology behind Crossroads's invalidated patent is not relevant to the narrow legal questions currently before this Court, but the parties' litigation history is. After Crossroads sued Respondents for patent infringement in federal district court, Respondents challenged the validity of the patent in the Patent and Trademark Office under the *inter partes* review ("IPR") procedure offered by the America Invents Act. *See* 35 U.S.C. § 311 *et seq*. The PTAB ultimately found unpatentable the challenged claims in the patent. (App. 57a, 102a.)

In mid-2016, Crossroads appealed these findings to the Federal Circuit, arguing only against the merits of the PTAB's rulings. *See generally* Opening Brief of Appellant Crossroads Systems, Inc., *Crossroads Systems, Inc. v. Cisco Systems, Inc., et al.*, Nos. 16-1930, 16-1931 (Fed. Cir. June 30, 2016). Crossroads never argued or even suggested to the Federal Circuit—in its Appellant's Brief, in its reply

brief, or even at oral argument—that IPRs might be unconstitutional. Crossroads did not do so even though patent owners in other pending IPR appeals were raising this very issue.[2]

In fact, when Crossroads filed its Appellant's Brief in the Federal Circuit, this Court was considering a petition for writ of certiorari in *MCM Portfolio LLC v. Hewlett-Packard Co.* that squarely challenged the constitutionality of IPRs, along with responsive briefing and at least eight amicus briefs weighing in on the topic. *See* Petition for Writ of Certiorari, *MCM Portfolio LLC v. Hewlett-Packard Co.*, No. 15-1330 (U.S. Apr. 29, 2016), *cert. denied* 137 S. Ct. 292 (2016); Brief for Respondent Hewlett-Packard Company in Opposition, No. 15-1330 (U.S. June 30, 2016); Brief for the Federal Respondent in Opposition, No. 15-1330 (U.S. June 30, 2016).[3]

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[2] *See, e.g.,* Brief for Appellant at 46, *MCM Portfolio LLC v. Hewlett-Packard Co.*, No. 15-1091 (Fed. Cir. Jan. 21, 2015); Brief of Appellant at 52, *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, No. 15-1855 (Fed. Cir. Sept. 21, 2015); *see also* Brief of Appellants at 14, *Cooper v. Lee*, No. 15-1205 (4th Cir. Apr. 13, 2015).

[3] *See also* Brief of 13 Law Professors as *Amici Curiae* in Support of Petitioners, No. 15-1330 (U.S. May 27, 2016); Brief of Interdigital, Inc. and Tessera Technologies, Inc. as *Amici Curiae* in Support of Petitioner, No. 15-1330 (U.S. May 31, 2016); *Amicus Curiae* Brief of Houston Inventors Association in Support of Petitioner, No. 15-1330 (U.S. May 31, 2016); Brief of University of New Mexico as *Amicus Curiae* in Support of Petitioner, No. 15-1330 (U.S. May 31, 2016); Brief of *Amicus Curiae* IEEE-USA in Support of Grant of Certiorari, No. 15-1330 (U.S. May 31, 2016); Brief of *Amicus Curiae* New York Intellectual Property Law Association in Support of Neither Party, No. 15-1330 (U.S. May 31, 2016); *Amicus Curiae* Brief of Security People, Inc. in Support of Petitioner, No. 15-1330 (U.S.

Months passed with the issue of whether IPRs are constitutional brewing all around; yet Crossroads still said nothing to the Federal Circuit.

On June 6, 2017, the Federal Circuit issued an opinion and judgment in this case affirming the PTAB's rulings invalidating the patent. (App. 105a-106a.) Six days later, this Court granted certiorari on the constitutionality of IPRs in *Oil States*.

After failing to raise this legal challenge in its appeal to the Federal Circuit, Crossroads filed a petition for rehearing on July 6, 2017, arguing ***for the first time*** that IPRs should be declared unconstitutional for the reasons discussed in the *Oil States* petition. *See* Petition for Rehearing *En Banc* of Appellant Crossroads Systems, Inc. at 2, *Crossroads Systems, Inc. v. Cisco Systems, Inc., et al.*, Nos. 16-1930, 16-1931 (Fed. Cir. July 6, 2017). On August 8, 2017, the Federal Circuit denied this request without comment and without requesting a response. (App. 107a-108a.)

REASONS FOR DENYING THE PETITION

I. If the Court rules in *Oil States* that *inter partes* review is constitutional, this petition offers no additional ground for review and should be denied.

As an initial matter, denial is certain here if the Court rules in *Oil States* that IPRs are constitutional, since Crossroads presents no other

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May 31, 2016); Brief of *Amici Curiae* Gary Lauder *et al.* in Support of Petitioner, No. 15-1330 (U.S. May 31, 2016).

grounds for review. Indeed, Crossroads makes no attempt to disguise the copycat nature of its petition. For example, the question presented is a verbatim recitation of the issue on which the Court granted review in *Oil States*. (Pet. i.) Further, the body of Crossroads's argument is nothing more than excerpts and block quotes from the petition in *Oil States*. (Pet. 7–9.) And finally, in summarizing its reasons to grant review, Crossroads offers only that "[t]he constitutionality issue raised by *Oil States* is . . . the same here." (Pet. 9.)

Simply put, Crossroads's petition offers no additional substance on the constitutional question at issue in *Oil States*. A ruling that affirms the constitutionality of the IPR procedure in *Oil States* would, therefore, necessarily resolve all of the issues in this petition against Crossroads, obviating the need for any review by this Court.[4]

Moreover, a decision affirming the constitutionality of IPRs is the right result in *Oil States*, for all of the reasons stated in the briefs filed in support of the respondents in that case. Accordingly, Respondents hereby request that the Court in *Oil States* declare that *inter partes* review is constitutional and further request the denial of this tagalong petition.

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[4] Apparently acknowledging this, Crossroads does not appear to seek review in the event the Court affirms the constitutionality of IPRs in *Oil States*. (*See* Pet. 10.)

II. Even if the Court rules in *Oil States* that *inter partes* review is unconstitutional, this petition should be denied, rather than granted, vacated, and remanded.

The result here should be the same even if the Court rules in *Oil States* that IPRs are unconstitutional. This possible scenario is the focus of Crossroads's petition, as it requests an order granting, vacating, and remanding this case to the Federal Circuit for further consideration in light of *Oil States*. (Pet. 1, 9.) But GVR is not appropriate—and this petition should be denied outright—because Crossroads failed to raise any constitutional challenge until its motion for rehearing in the Federal Circuit and therefore forfeited its right to rely on a favorable ruling in *Oil States*.

A. GVR orders should be used "sparingly" and only where further proceedings are "just under the circumstances."

Crossroads assumes that a GVR order is a given if the Court rules in *Oil States* that IPRs are unconstitutional, but it offers no argument or authority to justify this requested disposition. (*See* Pet. 9.) GVR, however, is never the default. Instead, this unique power should "be exercised sparingly" and only where further proceedings are "just under the circumstances." *Lawrence v. Chater*, 516 U.S. 163, 166, 173 (1996) (quoting 28 U.S.C. § 2106). This is not one of those cases.

In general, GVR may be appropriate "[w]here intervening developments . . . reveal a reasonable

probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation." *Id.* at 167.

But GVR is permitted only where "the equities of the case" support it. *Id.* at 167–68. Thus, this remedy should not be employed where the intervening development is part of an "unfair or manipulative litigation strategy" or where the "delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court." *Id.* at 168. As set forth below, the equities do not favor a GVR here since Crossroads forfeited its challenge to *inter partes* review by failing timely to raise it in the Federal Circuit.

B. GVR is inappropriate here because Crossroads forfeited any argument that *inter partes* review is unconstitutional.

This is not a proper case for GVR because *Oil States* will not change the outcome on remand. *See id.* at 167–68. That is because Crossroads has forfeited any right to challenge the constitutionality of IPRs by failing to assert such an argument until its motion for rehearing below. Thus, a GVR order would result only in wasteful, ineffective, and unjust remand proceedings before the Federal Circuit.

As discussed above in the Counter-Statement of the Case, the constitutional question now pressed by Crossroads was never an issue in this case until

rehearing—after the Federal Circuit panel had considered all issues in the case and issued its opinion and judgment. It is undisputed that Crossroads never raised this issue in its opening brief to the Federal Circuit, in its reply brief, or even at oral argument. As a result, the Federal Circuit did not address or decide this issue in its opinion.

Review is therefore inappropriate under this Court's general rule that it will not grant certiorari for issues that were not argued or decided below. *See, e.g., CRST Van Expedited, Inc. v. EEOC*, 136 S. Ct. 1642, 1653 (2016) (it is "not the Court's usual practice to adjudicate either legal or predicate factual questions in the first instance"); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."); *see also Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (per curiam) ("[T]his is a court of final review and not first view.").

Crossroads raised this issue for the first time in its motion for rehearing, but that was already too late. Federal courts routinely hold that arguments raised for the first time in a petition for rehearing have been forfeited. *See, e.g., Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147, 1173 n.35 (9th Cir. 2009) (holding an argument raised for first time in petition for rehearing en banc was waived)*; Easley v. Reuss*, 532 F.3d 592, 593–94 (7th Cir. 2008) (rehearing "is not a vehicle for presenting new arguments, and, absent extraordinary circumstances, we shall not entertain arguments raised for the first time in a petition for rehearing");

Pentax Corp. v. Robison, 135 F.3d 760, 762 (Fed. Cir. 1998) (declining to address a new argument "raised for the first time in [a] petition for rehearing"); *Kale v. Combined Ins. Co. of Am.*, 924 F.2d 1161, 1169 (1st Cir. 1991) (arguments raised for the first time in petition for rehearing en banc are "not properly before us"); 16AA CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 3986.1 (4th ed. 2008) ("Issues that were not presented in the initial briefs and argument will seldom be considered when presented for the first time by petition for rehearing.").

Crossroads should not be permitted to use this Court's discretionary jurisdiction to extend the life of its appeal with a previously-unaddressed and already-forfeited argument. A GVR order would be unjust and wasteful because the result below will not change—Crossroads will be found to have forfeited any argument for reviving its patents based on the constitutionality of *inter partes* review. *See Nat'l Home Equity Mortg. Ass'n v. Face*, 322 F.3d 802, 804 (4th Cir. 2003) (per curiam) (declining to reconsider ruling after GVR where argument implicated by new authority had not been preserved). This Court readily denies GVR requests involving issues the petitioner waived or forfeited in the courts below, as it should in this case. *See Local Union No. 38, Sheet Metal Workers' Int'l Ass'n v. Pelella*, 541 U.S. 1086 (2004) (denying cert.[5]); *Time Warner Entm't Co. v.*

[5] *See also Local Union No. 38, Sheet Metal Workers' Int'l Ass'n v. Pelella*, 350 F.3d 73, 89–90 (2d Cir. 2003) (finding challenge to constitutionality of punitive damage award waived); Petition for Writ of Certiorari, No. 03–1472, 2004 WL 892040, at *16 (U.S. Apr. 20, 2004) (raising alternative request for GVR and

Six Flags Over Ga., LLC, 538 U.S. 977 (2003) (denying cert.[6]).

It makes no difference to this analysis that the issue here is a constitutional one. (*See* Pet. 1 n.1.) "'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" *United States v. Olano*, 507 U.S. 725, 731 (1993) (quoting *Yakus v. United States*, 321 U.S. 414, 444 (1944)); *see also, e.g., Barney v. Schmeider*, 76 U.S. 248, 251 (1869) (right to trial by jury "may be waived by the party").

Therefore, because Crossroads did not timely assert this argument in its direct briefing to the Federal Circuit—which had jurisdiction to address it—the argument has been forfeited. *See Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212–13 (1998) (declining to address constitutional issue that was neither raised before nor considered by the court of appeals); *Amoco Oil Co. v. United States*, 234 F.3d 1374, 1377 (Fed. Cir. 2000) (declining to address constitutional arguments raised for the first time in

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reconsideration of punitive damage award in light of *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003)).

[6] *See also Time Warner Entm't Co. v. Six Flags Over Ga.*, 563 S.E.2d 178, 184 (Ga. Ct. App. 2002) (finding challenge to constitutionality of punitive damage award abandoned); Petition for Writ of Certiorari, No. 02-0978, 2002 WL 32133807, at *25–27 (U.S. Dec. 23, 2002) (raising alternative request for GVR and reconsideration of punitive damage award in light of *State Farm*).

a reply brief because they were not raised in the appellant's opening brief).

Crossroads argues that it could not have raised this argument any earlier because "the Federal Circuit had already addressed the issue in *MCM Portfolio LLC v. Hewlett-Packard Co.*, 812 F.3d 1284 (Fed. Cir. 2015)." (Pet. 1 n.1.)[7] Crossroads cites no authority to support this excuse, and in other contexts, this Court has rejected "futility" as a justification for failing to raise an argument below if that "means simply that a claim was unacceptable to that particular court at that particular time." *Bousley v. United States*, 523 U.S. 614, 623 (1998) (internal quotation marks omitted); *cf. MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 125 (2007) (party preserved argument by raising it in Federal Circuit briefs, even though existing precedent rendered the argument "futile"). Further, the Federal Circuit local rules expressly invite such arguments prior to rehearing. FED. CIR. R. 35 (stating "a party may argue, in its brief and oral argument, to overrule a binding precedent without petitioning for rehearing *en banc*").

To that end, the Federal Circuit has held that a party wishing to benefit from an impending Supreme Court decision that might overrule one of its precedents is obligated to present the issue in its initial appeal if it wants to have the benefit of this Court's opinion once it is released. *See Abbott Labs.*

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[7] Crossroads also argues it could not have raised this argument before the PTAB (Pet. 1 n.1), but that is beside the point. It is Crossroads's failure to preserve this argument in the Federal Circuit that resolves this case, for the reasons discussed above.

v. Syntron Bioresearch, Inc., 334 F.3d 1343, 1355 (Fed. Cir. 2003). While the *Abbott* court was faced with a situation where certiorari had already been granted when the appellant filed its brief, that distinction should not matter here—Crossroads was similarly on notice that this Court might find IPRs unconstitutional given the pending petition in *MCM* and the other cases raising similar arguments. *See Abbott*, 334 F.3d at 1355 ("Abbott was on notice that our decision in *Festo* might be reversed by the Supreme Court, and was obligated to present the issue if it wanted to have the benefit of the Supreme Court's decision.").

Thus, Crossroads was obliged to make this argument in its briefing to the Federal Circuit panel so that all parties (and the court) would be on notice of what issues would be in dispute. *See, e.g., Wood v. Milyard,* 566 U.S. 463, 473 (2012) (waiver rules give "[d]ue regard for the trial court's processes and time investment"); *In re Under Seal*, 749 F.3d 276, 286 (4th Cir. 2014) ("[F]orfeiture and waiver rules offer respect for the integrity of the lower court, avoid unfair surprise to the other party, and acknowledge the need for finality in litigation and conservation of judicial resources.") (internal quotation marks omitted).

This is not a novel requirement. Indeed, the patent owner in *Oil States* preserved this very argument in its Federal Circuit briefing even after *MCM* was decided by the Federal Circuit. Reply Brief of Appellant at 29, *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, No. 15-1855 (Fed. Cir. Jan. 29, 2016) ("Oil States acknowledges that the [panel] is bound by [the decision in *MCM*],

but reserves its constitutional challenge for further review by the en banc Court or the Supreme Court."); *see also MedImmune*, 549 U.S. at 125. Crossroads could have—and should have—followed the example set by the patent owner in *Oil States* if it intended to challenge the constitutionality of IPRs. Because it failed to do so, the issue has been forfeited and a GVR is inappropriate.

In short, the issue raised in Crossroads's petition—like in the motion for rehearing—is "clearly an afterthought, brought forward at the last possible moment to undo the administrative proceedings without consideration of the merits and can prevail only from technical compulsion irrespective of considerations of practical justice." *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36 (1952). Permitting Crossroads to revive its appeal through this eleventh-hour argument is just the kind of mischief this Court's GVR precedents have warned against. *See Lawrence*, 516 U.S. at 167–68. Thus, the petition should be denied outright and Crossroads should not be given a second chance to assert an argument it has already forfeited.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

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Respectfully Submitted,

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