No. 20-1396

In the Supreme Court of the United States

WALTER A. TORMASI,

Petitioner,

v.

WESTERN DIGITAL CORPORATION,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES - Continued

Statutes

REPLY BRIEF FOR PETITIONERS

A. This is not an isolated case—it has broader implications

Respondent asserts that the lower courts' decisions are narrow, and this is "essentially a one-off case." Opp.1. But Respondent ignores the broader effect of preventing access to court in response to a prison policy that categorizes enforcement of intellectual property rights as a business operation.

Respondent asserts that enforcement of intellectual property rights sometimes violates the "no business rule," but other times does not, depending entirely on a prison administrator's (or a court's) belief about the subjective intent of the inmate. Opp.6, 12. If Respondent is right, the rule gives prison officials free reign to be arbitrary.

The rule affects more than just enforcement of patent rights—it encompasses all property rights that a prison official could qualify as a "business." In the intellectual property arena, this affects copyrights, which inmates gain automatically at the moment of a work's creation. *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1513 (2020) ("Unlike other forms of intellectual property, copyright protection is both instant and automatic. It vests as soon as a work is captured in a tangible form, triggering a panoply of exclusive rights that can last over a century.") (citing 17 U.S.C. §§ 102, 106, 302). This concern is not farfetched: In *Jerry v. Beard*, 419 Fed. Appx. 260 (3d Cir. 2011) the court was asked to decide if obtaining copyright protection for a book was a "business." Likewise, the rule affects enforcement of real and personal

property rights. For example, can inmates file lawsuits to prevent others from using their homes, cars, boats, or other possessions without compensation? Prison officials have free reign to deem such activities a "business," giving the "no business rule" far reaching effect.

B. Petitioner did not waive his constitutional arguments

Respondent asserts Mr. Tormasi—a *pro se* litigant with limited legal resources in prison—did not raise, disavowed, or abandoned various arguments. Opp.14. Respondent is wrong for several reasons.

First, Mr. Tormasi did not waive his constitutional arguments because he asserted "that the 'no business' rule 'was never intended to supersede [his] right to file civil lawsuits in his personal capacity," but rather "that his capacity to sue is governed by § 2A:15-1, which requires only that he has 'reached the age of majority' and possesses 'mental capacity'" as noted by Judge Stoll in her dissent. App.12a.

Second, Mr. Tormasi did not "expressly waive[] or forcefully disavow[] arguments based on federal constitutional rights," as Respondent contends. Opp.15. Respondent supports its position by reading Mr. Tormasi's Federal Circuit reply brief out of context. Mr. Tormasi's *running header* explaining that suing capacity is determined by applying New Jersey statute as instructed by the Federal Rules of Civil Procedure, Tormasi Fed. Cir. Reply at 14, does not amount to waiver, instead it merely summarizes a single point of Mr. Tormasi's arguments. Mr. Tormasi made clear that his "disavowal" applied only to a "cause of action

against prison officials," *id.* at 15, not more broadly.[1] In his reply, Mr. Tormasi also incorporated the arguments from his opening brief, stating, "[b]ecause Tormasi places primary reliance on his opening brief, it is unnecessary for him to address every aspect of WDS's response." Tormasi Fed. Cir. Reply 5.

Third, even if Petitioner had not raised certain arguments below, "a court may consider an issue

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[1] At the district court, Mr. Tormasi asserted:

> It is well established that prisoners retain the right of access to the courts under the First and Fourteenth Amendments. *Bounds v. Smith*, 430 U.S. 817 (1977). Pursuant to that right, prison officials must allow prisoners to file civil lawsuits and, conversely, are prohibited from "frustrat[ing] or . . . imped[ing]" any "nonfrivolous legal claim." *Lewis v. Casey*, 518 U.S. 343, 349, 353 (1996).

App. 85a.

Likewise, at the appellate level, Western Digital put the Federal Circuit on notice of Mr. Tormasi's argument for his constitutional right to access the courts stating:

> The Court held that Tormasi's Complaint failed to state a claim for denial of access to courts "with respect to Plaintiff Tormasi's desire to pursue patent violation litigation, as impairment of the capacity to litigate with respect to personal business interests is 'simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration.'" *Tormasi I,* 2009 U.S. Dist. LEXIS 50560, at *14-15 (quoting *Lewis v. Casey*, 518 U.S. 343, 355 (1996)).

WDC Fed. Cir. Response at 21. *See also id.* at 27, 32–33 (addressing *Lewis* repeatedly).

'antecedent to . . . and ultimately dispositive of' the dispute before it, even an issue the parties fail[ed] to identify and brief." *United States Nat'l Bank v. Independent Ins. Agents of Am.*, 508 U.S. 439, 447 (1993) (quoting *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77 (1990)). While this Court has not announced a general rule, it recognizes "there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below." *See Singleton v. Wulff*, 428 U.S. 106, 121 (1976). For example, this Court may address an issue not raised "where the proper resolution is beyond any doubt, *see Turner v. City of Memphis*, 369 U.S. 350 (1962), or where 'injustice might otherwise result.'" *Id.* (citing *Hormel v. Helvering*, 312 U.S. 552, 557 (1941)).

Both circumstances apply here. Proper resolution of this case—allowing a U.S. citizen to enforce his duly granted property rights by meaningfully accessing an Article III tribunal—is beyond any doubt as finding otherwise violates a plethora of constitutional rights. And usurping a patentee's right to enforce his exclusionary rights, effectively rendering him without redress, is nothing if not injustice.

Nor is the preemption jurisprudence a matter of semantics. Respondent argues that the lower courts' decision "does not give rise to federal preemption issues," because this decision "is limited to Petitioner's *current* circumstances." Opp.17 (emphasis in original). But "[i]n a preemption case . . . a proper analysis requires consideration of what the state law in fact does, not how the litigant might choose to describe it." *Wos v. E.M.A.*, 568 U.S. 627, 637 (2013). Here, the "no-business rule," a state law, as applied, dispenses with Mr.

Tormasi's patent altogether, in violation of the Patent Act. 35 U.S.C. § 100 *et seq*.

Respondent attempts to distinguish preemption caselaw as inapposite because it holds, "state law cannot bestow patent-like protection." Opp.18. Respondent does not appreciate, however, that in a preemption case, the question is not whether patent-like protections were granted or taken away, rather the question is whether the state law conflicts with the federal law.

Regarding Due Process, Respondent blends two separate constitutional issues, Opp.18–20, but deprivation of property without due process and access to the court are separate and independent constitutional issues. As explained in the Petition, the constitutional roots of the constitutional right to access the courts is unclear and its basis may not solely reside in the Due Process Clause. Pet.25 n.6. Violation of Mr. Tormasi's due process rights is the natural result of the lower courts' determination that Mr. Tormasi lacked legal capacity.

The Patent Act provides a patent owner with a cause of action for infringement. *See* 35 U.S.C. § 281. The lower courts' interpretation, that Mr. Tormasi cannot exercise this federally granted right, deprives him of this right without a hearing and thus must be erroneous. *Logan v. Zimmerman Brush Co*., 455 U.S. 422 (1982) ("a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause").

Respondent summarily discards Mr. Tormasi's due process argument, concluding, "Petitioner has already conceded that 'prisoners lack constitutional authority to . . . file patent-infringement lawsuits."

Opp.19. But, as explained above, Respondent quotes Mr. Tormasi out of context.

C. The Court should clarify *Lewis*

Respondent asserts *Lewis* needs no clarification. Opp.24. First, it dismisses the "litany of cases cited or discussed . . . [that] pre-date *Lewis*," not recognizing that these cases lay the foundation for the confusion that exists. Opp.23. Petitioner's brief review of the historical background shows that many circuits had previously found that the constitutional right to access the courts was applicable to "general civil matter," but changed course after *Lewis*, limiting the constitutional right of access to the courts to issues relating to the "underlying conviction or conditions of confinement." *See e.g., Clewis v. Hirsch*, 348 Fed. App'x 347, 348–49 (5th Cir. 2017).

Respondent then summarily asserts all post-*Lewis* cases are consistent. Opp.24–26. Respondent is wrong. Almost a decade after *Lewis*, the Tenth Circuit stated in *Simkins v. Bruce*:

> In order to provide inmates a meaningful right of access to the courts, "states are required to provide affirmative assistance in the preparation of legal papers in cases involving constitutional rights and other civil rights actions related to their incarceration, *but in all other types of civil actions, states may not erect barriers that impede the right of access of incarcerated persons.*"

406 F.3d 1239, 1242 (10th Cir. 2005) (emphasis added). This deviates from, the allegedly "consistent" application of *Lewis*, *see e.g., Clewis,* 348 Fed. App'x at 347, and further demonstrates confusion over *Lewis*.

Respondent cites the Tenth Circuit's more recent case *Gee v. Pacheco*, Opp.24, but *Gee* does not address *Simkins* or the Tenth Circuit's prior precedent. 627 F.3d 1178 (10th Cir. 2010). *Gee* merely applied *Lewis'* first prong and determined that the Appellant failed to plead "actual injury." *Id*. at 1190–91. In other words, *Gee* does not weigh the merits of the second prong of prisoners' rights to access the court.

Gee as interpreted by Respondent is inconsistent with the Seventh Circuit. Approximately, eight years after *Lewis* the Seventh Circuit held, "[t]he right of access to the courts is the right of an individual, whether free or incarcerated, to obtain access to the courts without undue interference." *Snyder v. Nolen*, 380 F.3d 279, 291 (7th Cir. 2004). The Seventh Circuit recognized the "parallel development of these two distinct lines of cases" evolving into the first and second prongs of the constitutional right to access the courts. *Id*. at 290. Respondent fails to address *Snyder*.

It remains unclear whether this Court, via *Lewis*, (1) intended to clarify that general civil matters were beyond the scope of the constitutional right to access the courts or (2) limited its holding to a single prong (*i.e.,* actions involving the underlying conviction and confinement) of a multifaceted right. Thus, confusion exists as to whether the scope of the constitutional right to access the courts includes restraints on the government when "erecting barriers that impede the right to access the courts" for "other types of civil actions" (*i.e.,* the second prong). *See Simkins v. Bruce,* 406 F.3d 1239, 1242 (10th Cir. 2005).

The circuit courts have conflicting views about *Lewis*. The constitutional right to access the courts

needs further clarification. This case gives the Court the opportunity to provide that clarity.

CONCLUSION

Mr. Tormasi asks the Court to reverse the judgment of the Federal Circuit and remand for further proceedings on the merits of Mr. Tormasi's patent infringement lawsuit.

Respectfully submitted,

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