

No. 13-720

IN THE
Supreme Court of the United States

STEPHEN KIMBLE, *et al.*,
Petitioners,
v.

MARVEL ENTERPRISES, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should overrule *Brulotte* v. *Thys Co.*, 379 U.S. 29 (1964), a statutory precedent that Congress has left unchanged for half a century even while modifying other patent misuse doctrines.

CORPORATE DISCLOSURE STATEMENT

Respondent, Marvel Entertainment, LLC (“Marvel”) is a successor by merger to Marvel Entertainment, Inc., which was formerly known as Marvel Enterprises, Inc. Marvel is wholly owned by The Walt Disney Company, the shares of which are publicly traded. No publicly held corporation owns 10% or more of the stock of The Walt Disney Company.

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BRIEF IN OPPOSITION

STATEMENT

A. Prior Litigation And Settlement

Stephen Kimble is the named inventor on U.S. Patent No. 5,072,856, which was drawn to a glove “for shooting foam from the palm of a hand to give the impression that a spider web is being formed.” ’856 Patent, col. 2, ll. 32-34. The invention allowed a child to role-play as Marvel’s iconic superhero character, Spider-Man. Pet. 7-8; Pet. App. 3. The ’856 patent expired no later than May 25, 2010. Pet. App. 49.

In 1997, Kimble sued Toy Biz, Inc. (now part of Marvel) for infringement of the ’856 patent in the manufacture and sale of the Web Blaster, “a role play toy

whose primary play value is to allow the user to adopt aspects of Marvel’s Spider-Man character by shooting foam string.” Pet. App. 49; *see Kimble v. Toy Biz, Inc.*, No. 97-CV-557 (D. Ariz.). Kimble also brought a breach of contract claim, alleging that the president of Toy Biz had orally agreed at a December 1990 meeting to compensate Kimble if the company used his invention or related toy ideas. Pet. App. 49. Kimble’s application for the ’856 patent was pending at the time of the alleged oral agreement.

The district court granted summary judgment to Marvel on Kimble’s patent infringement claim. Pet. App. 49-50. The contract claim was tried to a jury, which found for Kimble and awarded him a percentage of royalties on “net product sales” of the Web Blaster. *Id.* 50. Marvel then sought judgment as a matter of law or a new trial, arguing in part that Kimble had failed to establish the elements of a contract or had shown, at most, an unenforceable agreement to agree. After those motions were denied, Marvel noticed an appeal from the judgment, and Kimble noticed a cross-appeal from the district court’s adverse ruling on his patent infringement claim.

The parties settled the litigation in 2001, before any appellate briefing on the merits. Pet. App. 50. Under the settlement agreement, “the Patent Holders agree[d] to sell to Marvel the Patent.” *Id.*¹ In exchange, Marvel agreed to pay “the Patent Holders” \$516,214.62, plus

¹ Robert Grabb—who represented Kimble in the 1997 litigation—had acquired an interest in the ’856 patent and was a party to the settlement agreement, which referred to Kimble and Grabb collectively as “the Patent Holders.” Pet. App. 50 & n.3. Grabb joined Kimble as a plaintiff in the subsequent suit against Marvel and is also a petitioner, along with Kimble, in this Court.

3% of “net product sales” ... made after December 21, 2000. For purposes of this paragraph 3.b, “net product sales” shall be deemed to include product sales that would infringe the Patent but for the purchase and sale thereof pursuant to this Agreement as well as sales of the Web Blaster product that was the subject of the Action[.]

Id. 51 (quoting agreement). The parties withdrew their cross-appeals after settling, and the district court vacated its judgment. *Id.* 50.

The settlement agreement contains no express end date for the 3% payments on net product sales. Petitioners were paid more than \$6 million in royalties during the term of the ’856 patent. Pet. App. 7.

B. Proceedings Below

Petitioners brought the present suit in 2008, alleging a breach of the settlement agreement. Pet. App. 47. In particular, petitioners claimed that Marvel had failed to pay royalties due on “subsequent iterations of the Web Blaster that included additional functions” other than simply shooting foam string, as well as “Web Blasters that were packaged with other role play items (such as Spider-Man masks).” *Id.* 7; *see also id.* 67-70 (explaining royalty dispute). Petitioners alleged that both types of products came within Marvel’s royalty obligation because their manufacture and sale “would infringe the Patent.” *Id.* 8.

In its answer, Marvel denied that those products were covered by the royalty obligation. In addition, Marvel counterclaimed for a declaratory judgment that, under *Brulotte v. Thys Co.*, 379 U.S. 29 (1964), its royalty obligations would become unenforceable when the

'856 patent expired. Pet. App. 47. That decision, as explained further below, holds that a contractual obligation to pay royalties for use of a patented invention after the patent expires is presumed to be the result of the patentee having improperly leveraged its patent beyond the patent term, and is therefore unenforceable after the patent expires.

Petitioners then reversed course. Although they had alleged in both the 1997 litigation and the present suit that the Web Blaster infringed the '856 patent, petitioners sought to distinguish *Brulotte* on the theory that the Web Blaster and its variants were in fact *not* infringing products. Pet. App. 56-57. In petitioners' revised view, the settlement agreement distinguished between infringing products and (by implication) non-infringing Web Blasters, because it provided for royalties on sales of products that "would infringe the Patent ... *as well as* sales of the Web Blaster." Petitioners argued that the Web Blaster payments were not for use of the '856 patent but rather for Marvel's use of unpatented ideas or know-how that Kimble allegedly disclosed at the December 1990 meeting. They further contended that such payments could run past the expiration the '856 patent without violating *Brulotte*, which does not apply to unpatented intellectual property. *See id.* 35, 57.

A magistrate judge recommended that Marvel's motion for summary judgment on its counterclaim be granted (Pet. App. 53-60), and the district court agreed (*id.* 34-37). The district court assumed that an agreement to pay royalties for the use of both patented and non-patented intellectual property may extend beyond the expiration of the patent without violating *Brulotte*, but stressed that that will be true only if there is a discernible "distinction between the royalties" for the two

kinds of rights, such as a lower royalty rate in the post-expiration period. *Id.* 35; *see also id.* 58-59 (magistrate’s report and recommendation). The district court found no such distinction in the settlement agreement. *Id.* 37. Thus, the court held that “the royalty provision is unenforceable after the expiration of the Kimble patent.” *Id.*

The court of appeals affirmed. Pet. App. 1-26. The court articulated the rule set forth by *Brulotte* and later decisions as follows:

[A] license for inseparable patent and non-patent rights involving royalty payments that extends beyond a patent term is unenforceable for the post-expiration period unless the agreement provides a discount for the non-patent rights from the patent-protected rate. This is because—in the absence of a discount or other clear indication that the license was in no way subject to patent leverage—we presume that the post-expiration royalty payments are for the then-current patent use, which is an improper extension of the patent monopoly under *Brulotte*.

Id. 18. Applying these “bright line rules” (*id.* 16), the court found that the settlement agreement “did not include a discounted rate” post-expiration or any “other clear indication that the [post-expiration] royalty was in no way subject to patent leverage” (*id.* 20, 21). Thus, “*Brulotte*’s presumption must apply.” *Id.* 23.²

² The agreement in this case was not a license but rather an assignment—a sale—of the ’856 patent to settle the 1997 litigation. Pet. App. 19. Petitioners have never argued (including in their petition) that that distinction is material to the application of *Brulotte*, and so any such argument is waived. Moreover,

While noting that *Brulotte* has been criticized and that its application “arguably deprive[d] Kimble of part of the benefit of his bargain” (Pet. App. 23-25), the court observed that the parties could easily have structured their agreement to comply with *Brulotte*, had they considered it (*id.* 21 & n.5).³ Further, although petitioners claimed that the rationale of *Brulotte* was inapplicable here because their negotiating leverage lay in alleged non-patent rights, the court found no “clear indication” in the settlement agreement itself that the royalty rate upon which the parties agreed for the post-expiration period was free of “patent leverage.” *Id.* 21-22.

On the same day that the court of appeals affirmed the decision below in this case, it ordered further proceedings in related litigation in which Kimble is claiming a breach of the alleged December 1990 oral agreement. *See Marvel Entm’t LLC v. Kimble*, 533 F. App’x 749, 750 (9th Cir. 2013). That litigation is ongoing.

ARGUMENT

Petitioners identify no compelling reason why this Court should reconsider *Brulotte*, a narrow statutory decision that Congress has declined to modify for half a century. *Brulotte* prohibits only a single licensing prac-

Brulotte’s rule against leveraging patent rights does not depend on whether the patentee is offering a license or an assignment; in either case, the licensee (or assignee) is being required to pay to use an invention after it enters the public domain. *But see* 1 Hovenkamp et al., *IP and Antitrust* § 23.2e (2d ed. 2009 & Supp. 2013) (contrary view).

³ Although there has been no factfinding concerning the negotiations of the settlement agreement, petitioners have represented that they were unaware of *Brulotte* at that time. *See* Pet. 9. Marvel informed the court of appeals at oral argument that it did not take account of *Brulotte* during the negotiations of the settlement agreement. *See* Pet. App. 7.

tice: extracting royalties for the post-expiration use of an invention, after it has entered the public domain. The decision does not prohibit licenses in which payments for pre-expiration use of an invention are postponed until after the patent expires. Thus, it permits the vast majority of beneficial licensing practices that depend on the flexibility to spread costs over time.

Petitioners' criticism that the decision relies on an outdated presumption that a patent confers market power is misplaced. Like many patent misuse doctrines, *Brulotte* is aimed, rather, at ensuring that the patentholder receives compensation only for the rights granted by that patent, and not for other rights or knowledge outside the patent's scope. The core bargain at the heart of the patent system is that an inventor must publicly disclose an invention, in return for a limited period of exclusivity in which to reap the rewards of innovation. *Brulotte*'s conclusion that permitting post-expiration royalties would upset this bargain is justified and is independent of antitrust principles.

In any event, the question for the Court is not whether *Brulotte* might be questioned but whether it should be overruled. Petitioners fail to offer any special justification for setting aside the principle of *stare decisis*. *Brulotte* has provided a workable bright-line rule that has informed countless intellectual property licensing negotiations. It is also firmly within Congress's power to change. That consideration is especially relevant here because Congress rejected proposals to modify *Brulotte* after hearing arguments for and against the decision before enacting the Patent Misuse Reform Act, Pub. L. No. 100-703, tit. II, 102 Stat. 4674, 4676 (1988). Congress has since declined to modify *Brulotte* despite other major reforms to patent law. The petition should therefore be denied.

I. *BRULOTTE* IS A NARROW RULE THAT PREVENTS A FORM OF PATENT MISUSE WHILE GENERALLY ALLOWING PARTIES TO CONTRACT FREELY

1. *Brulotte*'s reach is limited. The decision prohibits only a specific form of patent misuse, in which the patentee requires a licensee to pay "for use of [the invention] ... in the post-expiration period," after "the patent has entered the public domain" and should be free to all. *Brulotte v. Thys Co.*, 379 U.S. 29, 33 (1964).

The license at issue in *Brulotte* itself required licensees to pay a royalty for their use of a patented hop-picking machine ("\$3.33 1/3 per 200 pounds of dried hops harvested"), subject to an annual minimum. 379 U.S. at 29. The licensees' royalties continued to "accrue[] after the last of the patents incorporated into the machines had expired." *Id.* at 30. *Brulotte* held that the agreement to pay patent royalties for use of the machine even after it was no longer covered by any patent was unenforceable "insofar as" it required such royalties. *Id.*

Brulotte was premised on the "the policy and purpose of the patent laws," and in particular the fundamental requirement, reflected in the Patent Act, 35 U.S.C. § 154, that patents last for limited times (at the time of the decision, seventeen years). 379 U.S. at 30-31. After that limited term of exclusivity has run, the patented invention "become[s] public property" to be used freely for further innovation, *id.* at 31, and "[t]he rights in the invention are ... no longer subject to private barter, sale, or waiver," *Scott Paper Co. v. Marcus Mfg. Co.*, 326 U.S. 249, 256-257 (1945). If a patentee could use the "device" of requiring royalties for post-expiration use as a condition of licensing its patent, the "free market visualized for the post-expiration period" could be threatened. *Brulotte*, 379 U.S. at 32.

Petitioners characterize *Brulotte* as mistakenly reasoning that “post-expiration patent *royalties* somehow extend the patent *right*,” which they claim is “fundamentally in error.” Pet. 17. But that was not the rationale for the decision. To the contrary, *Brulotte* was squarely concerned about an attempt to extend the patent *right* into the post-expiration period; the patentee had secured payments for post-expiration *use* of its invention even though it no longer had a patent. See 379 U.S. at 32 (patentee made “a bald attempt to exact the same terms and conditions for the periods after the patents have expired as ... for the monopoly period”); *id.* at 31-32 (suspicion of patent misuse confirmed by other licensing conditions patentee imposed, such as “prevent[ing] assignment of the machines or their removal from Yakima County *after*, as well as before, the expiration of the patents”).

2. *Brulotte* tempered its concern about patent misuse with a “sensitivity toward ... the need to allow parties to contract freely.” Lim, *Patent Misuse and Antitrust Law* 107 (2013); see also 2 Holmes, *Intellectual Property and Antitrust Law* § 24.3 (rev. 2013). One limitation to the decision is particularly relevant: *Brulotte* “[r]ecogniz[ed] that the patentee could lawfully charge a royalty for practicing a patented invention prior to its expiration date and that payment of this royalty could be *postponed beyond that time*.” *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 136 (1969) (emphasis added).

Indeed, whether the royalties in *Brulotte* were for pre- or post-expiration use of the relevant patents was a central dispute in the case. The Supreme Court of Washington had concluded that the royalties were enforceable as deferred payments for pre-expiration use of the patent. See *Thys Co. v. Brulotte*, 382 P.2d 271,

275 (Wash. 1963) (licenses contemplated “a reasonable amount of time over which to spread the payments for use of the patent”). Justice Harlan, in dissent, agreed with that reading of the licenses. *See Brulotte*, 379 U.S. at 34 (Harlan, J., dissenting) (post-expiration payments were akin to “extend[ing] credit terms” to licensees to pay for the patented machine over a period of years beyond the patent term); *id.* at 39 (post-expiration royalties were “a convenient means of spreading out payments”). The *Brulotte* majority, however, rejected that reading, stressing that the royalties “due for the post-expiration period are by their terms *for use during that period*, and are not deferred payments for use during the pre-expiration period.” *Id.* at 31 (emphasis added). Had the royalties not been for use during the post-expiration period, they would not have been unlawful.

Brulotte thus “reaches only agreements in which royalties actually *accrue* on post-expiration use.” DOJ & FTC, *Antitrust Enforcement and Intellectual Property Rights* 117 (2007) (“2007 DOJ/FTC Report”); *see also*, e.g., ABA Section of Antitrust Law, *Intellectual Property Misuse* 51, 81 (2000) (“ABA, *IP Misuse*”); 2 Epstein, *Eckstrom’s Licensing in Foreign and Domestic Operations* § 8E:14 (rev. 2014); Lim, *supra*, at 107. What is important for *Brulotte* is when the obligation to pay royalties is incurred, not when the royalties are paid.

3. *Brulotte*’s narrow scope was confirmed in *Aronson v. Quick Point Pencil Co.*, which held that *Brulotte* was not offended by an agreement, negotiated while a patent application was pending, to pay one royalty rate if the patent issued or a second, lower rate indefinitely if the patent did not issue. 440 U.S. 257, 259-260, 264-265 (1979). The Court in *Aronson* concluded that the parties had dispelled any inference of patent misuse or improper leverage by “specifically

provid[ing] for a reduced royalty in the event no patent issued” and thus making clear that patent rights “played no part in the contract to pay the [lower] royalty indefinitely.” *Id.* at 265.

Aronson teaches that the parties to a license may agree simultaneously on patent royalties and non-patent royalties without triggering *Brulotte*’s patent misuse concerns, as long as they distinguish between the two. Although *Aronson* involved a royalty to be paid if no patent issued, its principle has been extended to the common modern practice of “hybrid” licensing—licenses involving patents and other intellectual property, such as trade secrets. See 3 Milgrim & Bensen, *Milgrim on Licensing* § 18.07 & n.19 (rev. 2013); ABA, *IP Misuse* 82. The parties to a hybrid license may agree on patent royalties and royalties for the use of other intellectual property after the patent expires, as long as they “distinguish between rates of payment for pre-expiration and post-expiration periods or between royalties attributable to the patent rights and those for any other rights.” *Broggild v. Kenner Prods.*, 776 F.2d 1315, 1319 (6th Cir. 1985), *cert. denied*, 477 U.S. 908 (1986); see also *Meehan v. PPG Indus., Inc.*, 802 F.2d 881, 886 (7th Cir. 1986), *cert. denied*, 479 U.S. 1091 (1987); *Pitney Bowes, Inc. v. Mestre*, 701 F.2d 1365, 1372-1373 (11th Cir.), *cert. denied*, 464 U.S. 893 (1983).

Brulotte and *Aronson* together offer a clear and flexible framework: A license agreement may not extend the obligation to pay royalties for the *use* of a patented invention in the post-expiration period, but the parties may make deferred-payment arrangements for pre-expiration use, and they may also enter into “hybrid” licensing arrangements extending into the post-expiration period that cover use of both patented and unpatented intellectual property, as long as they dis-

tinguish between the two. As explained further below, that framework is sound, and petitioners provide no basis for overturning it after so many years.

II. PETITIONERS' CRITICISMS OF *BRULOTTE* ARE OVERSTATED AND DO NOT WARRANT OVERRULING FIFTY YEARS OF SETTLED PATENT MISUSE LAW

A. *Brulotte* Already Provides Much Of The Flexibility In Timing That Petitioners Seek

Many of petitioners' criticisms of *Brulotte* rest on the premise that the decision limits the duration of royalty payments to the life of the patent, thereby preventing pro-competitive licensing practices. *See* Pet. 22-27. That premise is mistaken.⁴ As explained above, *Brulotte* permits post-expiration payments for pre-expiration use of an invention. *See supra* p. 10 (collecting citations); *see also, e.g.*, ABA Section of Antitrust Law, *Intellectual Property and Antitrust Handbook* 496 (2007) (patent misuse doctrine "does not prohibit intellectual property owners from allowing licensees to satisfy payment obligations on a deferred schedule that extends beyond the life of the patent"); 1 Epstein & Politano, *Drafting License Agreements* § 7.07[C] (4th

⁴ The same misreading of *Brulotte* is reflected in some of the academic commentary on which petitioners rely. *See, e.g.*, 1 Hovenkamp et al., *IP and Antitrust* § 23.2b (2d ed. 2009 & Supp. 2013) ("*Brulotte*'s per se rule limits the ability of patentees to amortize royalty payments over longer periods than the remaining life of the patent, even when such an arrangement is in the interest of the licensee."); 2 Schlicher, *Patent Law, Legal and Economic Principles* § 11:27 (2d ed. 2003 & Supp. 2011) (criticizing *Brulotte* for preventing parties from "spreading royalties over a longer period" than the patent term, which "helps the licensee defer costs"); Cotter, *Misuse*, 44 Hous. L. Rev. 901, 939 n.169 (2007) ("In the wake of *Brulotte*, parties should structure their transactions so that all royalties attributable to the patent are paid before the end of the term.").

ed. 2002 & Supp. 2013) (“Extension of the payout period ... would not be an attempt to extend the monopoly power of the patent.”); Altman, *Is There an Afterlife?*, 64 J. Pat. Off. Soc’y 297, 302-303 (1982) (“no court can find fault” with “pay-out period extend[ing] beyond the life of the patent” when “the royalty is being paid only for use of the invention *during* the patent term”). And *Aronson* permits payments for the use of other intellectual property in a hybrid agreement after a licensed patent expires, as long as the parties distinguish the two.

Because *Brulotte* already provides “the flexibility to stretch out payments over a longer period” of time (Pet. 26), the vast majority of pro-competitive benefits cited by petitioners are already available through deferral or amortization of payments for *pre-expiration* use of a patented invention. *E.g.*, Pet. 23 (lower royalties over a longer term may “reduce[] the deadweight loss associated with a patent monopoly” (quoting 2007 DOJ/FTC Report 12)); *see also, e.g.*, Ayres & Klemperer, *Limiting Patentees’ Market Power Without Reducing Innovation Incentives*, 97 Mich. L. Rev. 985, 1027 (1999) (patent results in “supra-competitive pricing” and patentee and licensee “have a joint interest in spreading [this] distortion evenly across time”). Nothing in *Brulotte* prohibits parties from negotiating for lower payments spread out over longer terms, provided those payments reflect the use of the patent during its life, before the invention enters the public domain.

Brulotte’s distinction between (permitted) deferred payment of royalties for use of an invention during the patent term and (prohibited) patent royalties for post-expiration use is well grounded. “Royalties affect [the licensee’s] marginal cost, and hence output and prices” only during the period in which they accrue, after which “any remaining obligation is a fixed cost” with no

marginal effect on the licensee’s decisionmaking. Baxter, *Legal Restrictions on Exploitation of the Patent Monopoly*, 76 Yale L.J. 267, 328 (1966). Thus, allowing a patentee to demand royalties on a licensee’s post-expiration use would affect the licensee’s prices or outputs in “the free market visualized for the post-expiration period,” *Brulotte*, 379 U.S. at 32, in a way that deferred payments do not. Furthermore, royalties for post-expiration use “can no longer be said to be related to the success which the licensed product enjoyed *only* during the term of the patent” and are “related to some extent *also* to the success which the licensed product enjoyed after expiration,” which “offends the statutory policy” of free public access to an invention after the patent term. Altman, 64 J. Pat. Off. Soc’y at 312; *see also infra* pp. 17-19.

In sum, *Brulotte* permits the vast majority of commercially useful licensing activity. Parties need only make clear that the license is intended to capture the pre-expiration value of using the patent, even if payments are spread past the patent’s expiration. Indeed, even some *Brulotte* critics recognize that parties generally can “structure their licenses” to comply with its *per se* rule. Gilbert & Shapiro, *Antitrust Issues in the Licensing of Intellectual Property*, in *Brookings Papers: Microeconomics* 283, 322 (1997); 1 Hovenkamp et al., *IP and Antitrust* § 23.2b (2d ed. 2009 & Supp. 2013) (many problems “can be avoided by careful drafting”); 3 Milgrim & Bensen § 18.05 (similar); *cf. Royalty Agreements Projecting Beyond Expiration of Patent*, 79 Harv. L. Rev. 199, 201 (1965) (noting “limited effect” of *per se* rule given “alternatives available”). There is therefore no substance to petitioners’ exaggerated claim that the decision is causing “significant damage to the American economy.” Pet. 5.

B. *Brulotte*'s Concerns About Patent Misuse Cannot Be Dismissed And Are Independent Of Antitrust Concepts

Brulotte's prohibition on royalties for the post-expiration use of an invention is not grounded on outdated antitrust principles related to market power or fear of market tying. Instead, *Brulotte* rests on a justified concern that agreements for post-expiration royalties contravene the purposes and policies underlying the limited term of a patent. *Brulotte* is part of a broader body of patent misuse law designed to protect against abuse of the limited rights granted under the patent system. Patent misuse law serves different purposes than antitrust law and addresses concerns independent of it.

1. In their broadest attack on *Brulotte*, petitioners suggest that *any* policy concerns about post-expiration royalties are misplaced because such royalties “reflect solely the anticipated value of the authorization to use the patented invention prior to patent expiration.” Pet. 17. Stated differently, petitioners contend that no one would agree to pay for what is free, so no licensee would agree to pay to use a patent after it expires. On this view, although “the patentee may appear to extract an unauthorized fee for post-expiration use” of its patent, “*this appearance is an illusion*” and in reality the licensee is paying only for pre-expiration use. *Id.* 18 (quoting 10 Areeda & Hovenkamp, *Antitrust Law* ¶1782c.3 (3d ed. 2011 & Supp. 2013)); *see also id.* 18-19 (quoting *Scheiber v. Dolby Labs., Inc.*, 293 F.3d 1014, 1017-1018 (7th Cir. 2002) (Posner, J.), *cert. denied*, 537 U.S. 1109 (2003)).

There is no reason to think that is always or even generally true. The fact that a licensee is aware that it

will be able to practice the invention for free upon expiration does not prevent the patentee from exercising patent leverage during *pre-expiration* negotiations, which are the subject of *Brulotte*'s concern. In many cases, the licensee may be unable or unwilling to wait until after the end of the patent term. See, e.g., Comment, *Validity of Patent License Provisions Requiring Payment of Post-Expiration Royalties*, 65 Colum. L. Rev. 1256, 1269 (1965) (licensee may be "influenced by the immediate economic circumstances of a competitive market" into accepting onerous post-expiration royalties); 3 Milgrim & Bensen § 18.05 (parties may trade post-expiration royalties against the value of "securing a marketing foothold" by commercializing a patent before its expiration). Of course, it is true that "[o]nce a patent expires," it can be used by the public "for no charge," 2007 DOJ/FTC Report 118 n.18, and "the patentee at that time has nothing else to sell," See & Caprio, *The Trouble with Brulotte*, 1990 Utah L. Rev. 813, 851 (emphasis added). But the licensing negotiations that *Brulotte* targets unfold before expiration, when the patentee can still misuse its patent rights to secure future advantages.

2. Petitioners stress the claims of law professors and antitrust enforcement authorities that post-expiration royalties can sometimes be efficient without lessening competition. E.g., Pet. 13-14, 22-23, 33-34. Those claims are largely overstated because *Brulotte* already permits deferred payments for pre-expiration use, and it is the ability to spread payments over time that is chiefly cited as pro-competitive. See *supra* pp. 12-14. In any event, any potentially pro-competitive effects for the narrow category of licensing agreements *Brulotte* actually forbids—i.e., royalties accruing on the use of an inven-

tion after it enters the public domain—are outweighed by countervailing patent policy concerns.

Fundamentally, it is *patent* policy, not antitrust law, that animated *Brulotte*. The decision was not and is not an antitrust case. It creates an equitable defense against enforcement of a license requiring royalties for the post-expiration use of an invention, but it does not hold that post-expiration royalty requirements are a basis for antitrust liability.⁵ Like other patent misuse doctrines, *Brulotte* “provides no basis for an affirmative legal action against an owner of intellectual property.” 1 Dratler, *Licensing of Intellectual Property* § 5.04 (1994 & Supp. 2014). “[U]nlike an antitrust claim, patent misuse is a shield, not a sword.” *Id.* § 5.04[2].

Beyond these practical differences, “[a]ntitrust law is designed to address only particular types of harm, and it cannot reach everything that patent policy addresses.” Feldman, *The Insufficiency of Antitrust Analysis for Patent Misuse*, 55 *Hastings L.J.* 399, 400 (2003); *see also* Lim, *supra*, at 26-27 (patent misuse doctrine “has additional concerns that antitrust does not capture, or at least that it does not capture very effectively,” including “protection of the public domain, even if non-monopolistic”).

[S]ince the inception of misuse doctrine, courts have treated extension of a patent grant—by lengthening its duration, by bundling it with

⁵ Conversely, the fact that the DOJ and FTC analyze agreements requiring post-expiration royalties under the rule of reason *for antitrust enforcement purposes* does not mean that those agencies necessarily “disagree[] with *Brulotte*” as an equitable defense. Pet. 16. The DOJ/FTC Report announcing this enforcement policy does not call for *Brulotte* to be overruled. *See 2007 DOJ/FTC Report* 116-118.

some other unpatented product, or by some other means—as an evil to be avoided regardless of a demonstrable effect on competition.... Patent policy permits the grant of exclusive rights only under certain conditions and only within a limited scope, and the expansion of that scope through coercive use of a government-granted legal right has been thought to undermine the limitations built into patent law.

1 Hovenkamp § 3.2d; *see also Patent Licensing Reform Act of 1988: Hearing on H.R. 4086 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the H. Comm. on the Judiciary*, 100th Cong. 169 (1988) (“*Patent Licensing Reform Hearing*”) (statement of Prof. Robert Merges) (patent misuse doctrine “grew out of the structure of the patent laws ... [and] the necessity of carrying out the policies underlying the patent laws,” and “only secondly does it address ... competitive behavior”).

Brulotte serves these policies by furthering the statutory aim of “limiting the time of a patent grant”; those policies are distinct from antitrust concepts. *See* Feldman, 55 Hastings L.J. at 445-446; *see also Brulotte*, 379 U.S. at 30-31 (relying principally on “limited times” requirement); Altman, 64 J. Pat. Off. Soc’y at 309 (royalties for post-expiration use “offend[] those provisions in the patent statute and the Constitution which require use of the invention to be free after a certain period of time”).

The “carefully crafted bargain” at the heart of the patent system is the public disclosure of an invention in exchange for “an exclusive monopoly *for a limited period of time*” to reward and encourage such innovation. *Pfaff v. Wells Elecs., Inc.*, 525 U.S. 55, 63 (1998) (em-

phasis added). “[W]hen the patent expires ... the right to make the article ... passes to the public,” *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 230 (1964), as “an addition[] to the general store of knowledge,” *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 481 (1974).

Allowing a patentee to require royalties on post-expiration use of an invention “threatens the overall balances” struck in this bargain by “[l]eaving open the time for determining and capturing the value of [the] invention.” Feldman, 55 *Hastings L.J.* at 445. Without *Brulotte*, patentees could attempt to “shift[] the patent system’s current allocation of reward between those who participated in the early stage of inventions [to] those who participate in later stages of invention.” *Id.*; see also Altman, 64 *J. Pat. Off. Soc’y* at 312 (patentee demanding post-expiration royalties is attempting to substitute “success which the licensed product enjoyed after expiration” for success “during the term of the patent”); Merges, *Reflections on Current Legislation Affecting Patent Misuse*, 71 *J. Pat. & Trademark Off. Soc’y* 793, 803 (1988) (“Congress has determined that 17 years of exclusivity provides enough incentive to call forth inventive activity in the United States. Parties are simply not free to circumvent this through licensing agreements.”).

Petitioners’ approach, which would proceed solely under the antitrust rule of reason, would not adequately address these patent policy concerns. Pet. 30, 33-34. The market for many patented inventions is small or specialized. See Landes & Posner, *The Economic Structure of Intellectual Property Law* 374 (2003) (noting rarity of commercialization). For a given invention, the licensee “may well be dependent on one technology—that of the licensor.” Merges, 71 *J. Pat. & Trademark Off. Soc’y* at 803. Agreements for post-expiration

royalties for such an invention may have “severe” effects on innovation and competition that are not well captured by the rule of reason. *See id.* at 802-803. It was presumably for this very reason that Congress rejected proposals to require proof that the antitrust laws had been violated as a prerequisite to any finding of patent misuse. *See infra* n.8.

III. PETITIONERS FAIL TO JUSTIFY DEPARTING FROM *STARE DECISIS*

Despite asking this Court to jettison a statutory precedent that has stood for nearly a half century, petitioners address *stare decisis* only as an afterthought. Pet. 35-38. But the principles of *stare decisis* must be the starting point for considering whether this Court should grant certiorari to overrule one of its own prior decisions. To depart from a rule of law that has been long settled requires some “special justification,” not just that the existing rule might be questioned. *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). Petitioners fail to offer any persuasive special justification here. To the contrary, the principles of *stare decisis* strongly support retaining *Brulotte*, which Congress has declined to modify despite specific attention to it.

First, “[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property ... rights, where reliance interests are involved.” *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). *Brulotte* meets that criterion: It is now the “legal linchpin” for an extensive body of patent licensing law and, in conjunction with *Aronson*, for hybrid licensing of both patent and other intellectual property rights. 1 Dratler § 4.04[5][d]. Although *Brulotte* restrains relatively few licensing practices (*supra* pp. 12-14), it has doubtless informed the negotiations for numerous past and current licens-

es. Petitioners would dismiss those existing agreements on the theory that overruling *Brulotte* would affect only licenses that are currently forbidden by it (and thus already unenforceable). Pet. 37-38. But numerous licensors and licensees who took account of *Brulotte* in their negotiations arrived at arrangements to comply with it—by, for example, structuring their licenses to provide for discounts after patent expiration, or making clear that deferred payment streams were for pre-expiration use of an invention.

Second, the force of *stare decisis* may be overcome if a decision has “proved to be unworkable in practice.” *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965). Here, petitioners do not even argue that *Brulotte* is unworkable or difficult to apply, which it is not. *See, e.g.*, Pet. App. 16 (court of appeals’ recognition that *Brulotte* and *Aronson* have yielded “bright-line rules”). *Brulotte* is hardly an obscure “trap for the unwary,” waiting to be sprung as “an instrument of injustice” against licensors. Pet. 31. It is discussed in virtually every modern licensing guide. *See, e.g.*, 1 *Dratler* § 4.04[5] (“axiomatic” *per se* rule); 1 *Einhorn & Bensen, Patent Licensing Transactions* § 3.07 (rev. 2013) (“abundantly clear” rule); *Jager, Licensing Law Handbook* § 3:5 (2013-2014 ed.) (“readily apparent” consideration for licensors). Although the parties to this case apparently did not take account of *Brulotte* when they executed the settlement agreement resolving their litigation by assigning the ’856 patent, *see supra* n.3, there is no reason to believe that circumstance is common in standard licensing negotiations.

Third, “[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress

remains free to alter what [this Court has] done.” *Hilton v. South Carolina Pub. Rys. Comm’n*, 502 U.S. 197, 202 (1991). *Brulotte* is a statutory precedent, anchored to the limited term for patents set by Congress. See 379 U.S. at 30 (citing 35 U.S.C. § 154).⁶ Congress has now had fifty years “in which it could have corrected [the] decision,” and its “continued acceptance of [the Court’s] earlier holding” is entitled to considerable weight. *Hilton*, 502 U.S. at 202.

Petitioners contend that *Brulotte* was undermined by congressional action in 1988. Pet. 6, 32. In fact, the contrary is true. The history of that legislation confirms *Brulotte*’s vitality and underscores that any changes to it are Congress’s prerogative.

The 1988 legislation cited by petitioners, the Patent Misuse Reform Act, modified existing law to require a showing of market power before finding misuse when a patentee refuses to license its patent or when it requires a licensee to purchase another product or to license other patents. See Pub. L. No. 100-703, tit. II, § 201, 102 Stat. at 4676 (enacting 35 U.S.C. § 271(d)(4), (5)); see also *Illinois Tool Works, Inc. v. Independent Ink, Inc.*, 547 U.S. 28, 41-42 (2006) (discussing changes). That legislation, however, left *Brulotte* intact.

The 1988 reforms followed extensive congressional attention to patent licensing and misuse doctrine, spe-

⁶ *Brulotte* is thus distinguishable from the trio of antitrust decisions petitioners cite to support “reconsideration of *per se* prohibitions.” Pet. 36. Each of those decisions stressed that “the general presumption that legislative changes should be left to Congress has less force” in the antitrust context because the Sherman Act is largely an invitation for judge-made law. *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997); accord *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007); *Illinois Tool Works, Inc. v. Independent Ink, Inc.*, 547 U.S. 28, 42 n.3 (2006).

cifically including *Brulotte*. For example, a House subcommittee held a hearing in May 1988 on a proposed bill that would have eliminated the patent misuse defense whenever “the parties have mutually agreed to [post-expiration] payments after the issuance of the patent.” *Patent Licensing Reform Hearing* 3-4 (text of H.R. 4086).⁷ The hearing featured testimony both for and against *Brulotte*. Compare *id.* at 35 (prepared statement of Rene D. Tegtmeyer, Ass’t Comm’r for Patents) (criticizing *Brulotte* as prohibiting “conduct [that] is not anticompetitive”) with *id.* at 134-135 (prepared statement of Prof. Herbert Schwartz) (patentee’s effort to “expand[] the temporal scope of his or her exclusivity beyond the fixed life of the patent ... is uncalled for regardless of whether his or her actions are pro-competitive or anti-competitive”). There was also evidence before Congress that *Brulotte* had not impeded beneficial licensing activity. See *id.* at 169 (statement of Prof. Robert Merges) (“patent licensing is alive and well”).

After considered debate, Congress ultimately declined to modify *Brulotte*. It also rejected efforts to align patent misuse law more closely with antitrust law.⁸ Congress has since declined similar proposals,

⁷ Similar measures addressing patent misuse and antitrust implications for patent licensing had been considered several times before. See, e.g., S. 2525, 99th Cong. (1986); S. 2944, 99th Cong. (1986); H.R. 4070, 99th Cong. (1986); H.R. 4808, 99th Cong. (1986); H.R. 557, 100th Cong. (1987); S. 635, 100th Cong. (1987); see also *Intellectual Property Antitrust Protection Act of 1987: Hearing on S. 438 before the Subcomm. on Technology and the Law of the S. Comm. on the Judiciary*, 100th Cong. (1987).

⁸ See 134 Cong. Rec. 30,688-30,689 (1988) (Senator Leahy’s proposed amendment to Patent Misuse Reform Act, H.R. 4972); *id.* at 32,295 (statement of Rep. Kastenmeier) (Leahy amendment

e.g., Intellectual Property Antitrust Protection Act of 1997, H.R. 401, 105th Cong. (1997), and has not altered *Brulotte* despite extensive other reforms to the patent system, *e.g.*, Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011).

This is therefore a case where considerations of *stare decisis* are at their apogee. *Brulotte* affects arrangements governing property rights on which countless parties have doubtless relied; it is a well-known and workable rule that causes little (if any) interference with desirable licensing practices; and it concerns an area of law to which Congress repeatedly directs its attention. *Stare decisis* must weigh heavily when “Congress [is] asked through the years to change the law ... but decline[s] to do so.” *James v. United States*, 366 U.S. 213, 234 (1961); *see also Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 (1986) (*stare decisis* demands that Court be “especially reluctant” to revisit a statutory precedent “in an area that has seen careful, intense, and sustained congressional attention”). Under those circumstances, “[i]f there is to be an overruling of the ... rule, it must come from Congress, rather than from this Court.” *Square D Co.*, 476 U.S. at 424.

CONCLUSION

The petition for a writ of certiorari should be denied.

would have “require[d] that the court find a violation of the anti-trust laws ... before it [could] find a patent holder guilty of misuse,” but House rejected “such a sweeping and inflexible view”); *id.* (limited reforms actually adopted represent a “careful balance of ... interests”); *id.* at 32,296 (statement of Rep. Moorhead) (other proposed changes “remain controversial”).

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Respectfully submitted.

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