

No. _____

In The
Supreme Court of the United States

WHIRLPOOL CORPORATION, PETITIONER

v.

HOMELAND HOUSEWARES, LLC

*ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT*

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This petition presents the same question that the Court is considering in *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, No. 16-712:

Whether *inter partes* review—an adversarial process used by the United States Patent and Trademark Office to analyze the validity of existing patents—violates the Constitution by extinguishing private property rights through a non-Article III forum without a jury.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the court of appeals and in the Patent Trial and Appeal Board are listed in the caption.

CORPORATE DISCLOSURE STATEMENT

No publicly held company holds 10% or more of the stock of Whirlpool.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Whirlpool Corporation respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-24a) is reported at 865 F.3d 1372. The final written decision of the Patent Trial and Appeal Board (App., *infra*, 25a-40a) is unreported.

JURISDICTION

The court of appeals entered judgment on August 4, 2017. Petitioner timely filed a petition for rehearing on October 5, 2017. The court of appeals denied the petition on December 6, 2017. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

INTRODUCTION

In *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, No. 16-712, this Court is considering whether *inter partes* review of the validity of existing patents violates the Constitution by extinguishing private property rights through a non-Article III forum without a jury. This Court's resolution of that question will determine whether the Federal Circuit's judgment in this case should be vacated.

Here, the United States Patent and Trademark Office ("Patent Office") instituted *inter partes* review of

Whirlpool Corporation's existing patent. In the *inter partes* proceeding, the Patent Trial and Appeal Board ("Board") held that the petitioner Homeland Housewares, LLC had failed to prove unpatentable any claim of Whirlpool's existing patent. The Federal Circuit reversed and ordered the Board to cancel all of Whirlpool's claims. But if extinguishing existing patent rights through *inter partes* review at the Patent Office violates the Constitution, then the unpatentability determinations here are unconstitutional, and the Federal Circuit's judgment should be set aside.

This Court should therefore hold this petition until it decides *Oil States*. If the Court holds that extinguishing patent rights through *inter partes* review violates the Constitution, then the Court should grant the petition, vacate the Federal Circuit's judgment, and remand.

STATEMENT

A. Factual Background

Whirlpool owns U.S. Patent No. 7,581,688 ("'688 patent"). The Patent Office issued the '688 patent before Congress enacted the Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011). The application for the '688 patent was filed on March 12, 2007, and the patent issued on September 1, 2009. CA JA 18.

The '688 patent claims significant improvements to household blenders for food processing, and especially for making crushed ice. Previous blender technology

struggled to uniformly mix and crush food, and particularly ice, quickly and efficiently. To crush ice and other food items, many existing blenders used a pulsed sequence of alternating periods, first rotating the blender cutter assembly for a set time, then holding the cutter assembly at rest for a set time. CA JA 24 (col.1:6-56). When the cutter assembly is rotating, it crushes solid particles near the assembly's blades; when the cutter assembly is at rest, the blender reservoir's contents ideally settle to the bottom of the reservoir, near the cutter assembly's blades. CA JA 24 (col.1:6-56). Yet this fixed-period pulsing pattern was not efficient nor was it always effective. Because the properties of the blender reservoir's contents were not always the same, a fixed pulsing pattern would often take too long or not last long enough to properly process given content; indeed, the optimal pulsing period may change even as the blender processes the reservoir's contents because the contents' properties are changing. CA JA 24 (col.1:6-56).

The '688 patent's inventors solved this problem by developing a unique blender cycle. The cycle involves first rotating the cutter assembly at a blending speed and then dropping to a settling speed. The settling speed allows the blender contents to settle around the cutter assembly's blades, so that they can be blended further at the blending speed. CA JA 24 (col.1:60-2:2); CA JA 402 (§ 21). But each pulse lasts only as long as needed for the cutter assembly to reach the settling speed. CA JA 24 (col.1:24-36). Because the time to reach a settling speed varies depending on the contents

of the blender reservoir and the contents' properties, by slowing the cutter assembly until a desired settling speed is just reached, the blender processes food more uniformly and quickly than previous blenders. CA JA 26 (col.5:18-50, col.6:5-18).

B. Proceedings Below

1. Proceedings before the Board

Respondent, Homeland Housewares, LLC ("Homeland"), filed a request for *inter partes* review of the '688 patent with the Patent Office. App, *infra*, 2a. The Board granted the request, instituting *inter partes* review of all sixteen claims of the patent. App., *infra*, 25a-26a.

During the review, Homeland argued that the challenged claims were unpatentable because they were anticipated by a single prior art reference or alternatively were obvious combinations of elements disclosed in disparate references throughout the prior art. *E.g.*, App., *infra*, 29a.

A core dispute between the parties was whether the prior art references disclosed the portion of the claims that require reducing the cutter assembly operating speed "to a predetermined settling speed indicative of the items in the container having settled around the cutter assembly." App., *infra*, 30a-31a, 39a. Homeland admitted that the relevant prior art did not expressly disclose operating a blender in that way. App., *infra*, 39a. But Homeland argued that the prior art disclosed reducing the speed of a cutter assembly and

that the settling of items was “merely an inherent property when a blender is operating at a ‘low speed.’” App., *infra*, 39a. Whirlpool responded with expert testimony explaining why the prior art’s low-speed operation was different from the claimed predetermined settling speed. App., *infra*, 39a.

The Board agreed with Whirlpool. It declined to adopt a formal interpretation of the “predetermined settling speed” claim limitation—in light of the parties’ arguments, the Board found that the language was sufficiently clear to resolve the case without a formal interpretation. App., *infra*, 30a-31a. On the merits of the parties’ dispute, the Board credited Whirlpool’s un rebutted expert testimony that the prior art’s low-speed operation was different from the claimed operation with a “predetermined settling speed.” App., *infra*, 39a. Homeland’s contrary arguments were nothing more than “unsupported attorney argument.” App., *infra*, 39a. Thus, the Board concluded that Homeland had failed to carry its burden of proving Whirlpool’s claims unpatentable. App., *infra*, 40a.

2. Proceedings before the court of appeals

a. A divided panel of the Federal Circuit reversed and ordered the Board to cancel Whirlpool’s claims.

The court of appeals criticized the Board’s treatment of the “predetermined settling speed” claim requirement. App., *infra*, 5a-6a. It held that, because the parties had disagreed about how to interpret that claim language, the Board was required to resolve that dispute and adopt a formal interpretation. App., *infra*, 5a-6a.

Turning to that interpretive issue, the Court declined to adopt either party's proposed interpretation. App., *infra*, 6a-10a. The court rejected Whirlpool's interpretation—that “predetermined settling speed” means “a speed, greater than zero, that indicates that items have settled around the cutter assembly”—as too narrow. App., *infra*, 6a-9a. Yet the Court also rejected Homeland's interpretation—that “‘settling speed’ means any comparative low speed less than the operating speed.” App., *infra*, 9a. That interpretation was inconsistent with the claim's plain language because “not every lowering in speed will cause settling.” App., *infra*, 9a. The Court instead adopted its own, new interpretation, one “not proposed by either party” and never considered by the Board. App., *infra*, 9a. The Court held that a “predetermined settling speed” is “[a] speed that is slower than the operating speed and permits settling of the blender contents.” App., *infra*, 10a.

Based on its new interpretation of the “predetermined settling speed” claim requirement, the court of appeals majority also analyzed whether Homeland had proven the claims unpatentable in the *inter partes* review. The specific unpatentability issue before the court, claim anticipation, is a question of fact normally reserved for a factfinder. App., *infra*, 5a. But the court of appeals addressed the issue in the first instance and found that Homeland had proven the claims unpatentable under the new interpretation. App., *infra*, 11a-13a. The court dismissed out of hand the contrary and un rebutted testimony from Whirlpool's expert. It

concluded that that testimony was “plainly inconsistent with the record” under the court’s fact-based interpretation of the prior art. App., *infra*, 13a-15a.

Because the court concluded that Homeland had proven all claims unpatentable in the *inter partes* review proceeding, the court reversed the Board’s decision. App., *infra*, 16a.

The dissent disagreed with the majority’s conclusions on all counts. On the claim interpretation issue, the dissent viewed the majority as “rewrit[ing] the claims” to broaden the invention beyond what the patent claims stated. App., *infra*, 17a. The dissent also took issue with the majority for “stray[ing] from the substantial evidence standard of review” that applies to factual issues and for “overstep[ping] our appellate role” by making de novo factual findings. App., *infra*, 17a-18a.

b. After oral argument in the Federal Circuit, but before the court issued its decision, this Court granted the petition for a writ of certiorari in *Oil States*. Once the Federal Circuit’s decision issued, Whirlpool timely sought rehearing. Noting that the outcome in *Oil States* would affect whether Whirlpool’s patent claims could be canceled in *inter partes* review, Whirlpool asked the court of appeals to hold its petition pending *Oil States*. The court denied the petition. App., *infra*, 41a-42a.

REASONS THE PETITION SHOULD BE GRANTED

This case presents a question identical to the one that this Court will resolve in *Oil States*: whether

extinguishing patent claims in *inter partes* review violates the Constitution.

In this case, the Patent Office granted *inter partes* review of Whirlpool's '688 patent. As a result of the *inter partes* proceedings and the court of appeals decision, the Board has been ordered to cancel sixteen claims of the '688 patent.

The decision of the court of appeals in this case thus will allow the Board to take the very action that is being reviewed by this Court in *Oil States*—extinguish private property rights (patent claims) through a non-Article III forum (*inter partes* review at the Patent Office) without a jury. Because the unpatentability determinations were made in the context of *inter partes* review, *Oil States* will control whether the unpatentability determinations were unconstitutional.

Whirlpool need not have raised the *Oil States* argument in its opening brief in the court of appeals to receive the benefit of a favorable decision. The Federal Circuit's decision in *MCM Portfolio LLC v. Hewlett-Packard Co.* foreclosed the contention in the Federal Circuit that *inter partes* review violates the Constitution. 812 F.3d 1284, 1292-93 (Fed. Cir. 2015). When an intervening Supreme Court decision reverses previously binding precedent of the court of appeals, an appellant in a pending case may raise the intervening change in law even if not raised in the opening appeal brief. *Joseph v. United States*, 135 S. Ct. 705, 706-07 (2014) (Kagan, J., respecting denial of certiorari). Here, Whirlpool raised the *Oil States* argument in its

rehearing petition shortly after this Court granted certiorari. Whirlpool will thus be entitled to the benefit of a favorable decision in *Oil States*.

This Court should therefore hold this petition until it decides *Oil States*. And if the Court decides that *inter partes* review cannot be used to extinguish patent claims, then the Court should grant the petition, vacate the Federal Circuit's judgment, and remand the case for further proceedings.

CONCLUSION

The petition should be held pending this Court's disposition of *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, No. 16-712. Should the Court hold in *Oil States* that extinguishing patent claims in *inter partes* review violates the Constitution, the petition should be granted, the judgment vacated, and the case remanded for further proceedings.

Respectfully submitted,

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