No. 18-183

IN THE

Supreme Court of the United States

ADVANCED AUDIO DEVICES, LLC,

Petitioner,

v.

HTC CORPORATION AND HTC AMERICA, INC.,

Respondents.

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

BRIEF OF *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether *inter partes* review ("IPR") of patents filed before enactment of the Leahy-Smith America Invents Act ("AIA") violates the Takings Clause of the Fifth Amendment to the U.S. Constitution.

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INTERESTS OF *AMICUS CURIAE*[1]

Founded in 1981 by Phyllis Schlafly, *Amicus Curiae* Eagle Forum Education & Legal Defense Fund ("Eagle Forum ELDF") has consistently advocated for the patent rights of small inventors, and has filed multiple *amicus curiae* briefs in defense of these rights. Phyllis Schlafly personally spoke out against enactment of the Leahy-Smith America Invents Act ("AIA"), which transferred rights and wealth from

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[1] No counsel for a party authored this brief in whole or in part. No person or entity other than *Amicus* or its counsel made a monetary contribution to the preparation or submission of this brief. Consent for filing this *amicus* brief has been obtained from all parties. Petitioner has filed blanket consent for *amicus* briefs, and Respondents have consented by an email which accompanies the filing of this *amicus* brief.

many small inventors to a handful of massive corporations.

Though less publicized than her work on other issues, Phyllis Schlafly was a tireless defender of small inventors and traditional patent rights, and her writings on this issue have been published in "Patents & Inventions,"[2] dedicated in part to John G. Trump. Mr. Trump, a professor at MIT, was a prolific inventor and an uncle of President Donald Trump. John G. Trump received the National Medal of Science from President Ronald Reagan in 1983.

Eagle Forum ELDF has long emphasized that the bedrock of our Nation's prosperity and economic opportunity is our traditional American patent system. In addition to publishing materials on this topic, Eagle Forum ELDF has filed *amicus curiae* briefs in this Court on the side of small inventors, as it successfully did in *Bilski v. Kappos*, 561 U.S. 593 (2010).

Eagle Forum ELDF has a direct and vital interest in this case to defend against further erosion of property rights in patents. Eagle Forum ELDF urges this Court to narrow rather than expand its holding in *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 137 S. Ct. 2239 (2017). Eagle Forum ELDF argues in favor of applying the Takings Clause to the cancellation by the PTO of already-granted patents.

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[2] Phyllis Schlafly, "Patents and Inventions" (Skellig America: 2018) [hereinafter, "*Patents and Inventions*"]

SUMMARY OF ARGUMENT

Patents are not "second class" property, and the protection of patents is as important as rights in real estate and bank accounts. Patent rights are particularly important to economic opportunity, as captured by the pithy statement attributed to Ralph Waldo Emerson: "build a better mousetrap and the world will beat a path to your door."[3] But under the decision below, a patent issued for that "better mousetrap" can subsequently be invalidated by the same agency as it is influenced by lobbyists, and then the whole world can steal the invention.

The Petition for *Certiorari* presents a question that was expressly left unresolved in *Oil States*: whether the Takings Clause protects patents against cancellation, as it protects forms of property. The invalidation of patents by a government agency – even patents that pre-existed the statutory basis for the cancellation – should be considered a "takings" under the Fifth Amendment.

In *Oil States*, this Court eroded the value of patents by authorizing the Patent and Trademark Office (PTO) to revoke a previously granted patent, while emphasizing that the Court was not deciding whether the patent holder is entitled to just compensation. 138 S. Ct. at 1379. If the public would really benefit from

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[3] Historians cannot locate in writing this concise articulation by Emerson of his point, but seven years after his death a Pennsylvania man invented and then patented the snap-trap mousetrap that remains the most popular today. Jack Hope, "A Better Mousetrap," American Heritage ("The mousetrap is far and away the most invented machine in all of American history.") https://www.americanheritage.com/content/better-mousetrap (viewed 9/8/18)

a cancellation of a patent, then the public should reimburse the property owner. Numerous precedents of this Court have applied the Takings Clause to safeguard property rights having less value than patents, and there is no coherent way to deny that same right to patent holders.

Yet the Federal Circuit did not even attempt to justify the takings below without compensation, which occurred when the PTO revoked previously issued patents of Petitioner. Instead, the Federal Circuit rendered the equivalent of a mere one-word affirmance, without providing a reasoned basis for it. The ruling violated the Takings Clause by cancelling patents issued prior to the enactment of the Leahy-Smith America Invents Act ("AIA"), which was signed into law by President Obama in 2011.

The taking of property rights from patent holders is to the detriment of economic opportunity, and the decision below extends beyond what the divided 7-2 Court in *Oil States* allowed. A grant of the Petition for *Certiorari* is needed to restore property rights in patents. Economic opportunity and American prosperity depend heavily on strong intellectual property rights, which requires applying the Fifth Amendment to patent rights as robustly as any other property right. The traditional pre-AIA patent system incentivized innovation in a way that minimized wealth inequality, such that rags-to-riches success was available to most Americans. But as misapplied by the PTO and the court below, the AIA has reduced the economic opportunity available to inventors, and instead increased the concentration of wealth.[4]

[4] Francesco Bogliacino and Virginia Maestri, "Wealth Inequality and the Great Recession," 51 Intereconomics, 61-66 (March/April

The Petition presents for resolution a simple issue left over from *Oil States*, as to whether the Takings Clause protects patents. This Court should grant *certiorari* to resolve this matter in favor of patent rights.

ARGUMENT

Patents are property, and deprivation of that property by an agency should trigger application of the Takings Clause. U.S. CONST. Amend. V. Yet the Federal Circuit affirmed invalidation of patents issued even before enactment of the AIA, without just compensation. (Pet. App. 2)

The original Constitution contains only one reference to the term "right", and it is in the Patent Clause at Article I, Section 8, clause 8. That wisdom unleashed a prosperity never seen before in history, as Phyllis Schlafly and others have observed:

> It's no accident that the United States has produced the overwhelming majority of the world's great inventions. It's because the Founding Fathers invented the world's best patent system, which was a brilliant stroke of inspired originality when the Constitution was written in 1787, and still is stunningly unique in the world.

Patents and Inventions at 138-39. But she wrote that paragraph in 2007,[5] before the setback to patent rights in *Oil States* and before the PTO began invalidating

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2016) (showing a rapid increase in wealth inequality in the U.S. between 2010 and 2015, roughly corresponding to the time period following the enactment of AIA).

[5] Phyllis Schlafly, "Economic Integration of Our Patent System" (August 2007) (chapter 19 of *Patents and Inventions*).

the vast majority of existing patents brought before it in AIA-based *inter partes* proceedings.

As explained below, cancellation by the PTO of patents that were granted prior to the enactment of the AIA infringes on historically rooted expectations of compensation, and should thereby trigger the Takings Clause. Moreover, application of this Clause to agency invalidations of patents is necessary to preserve economic opportunity and prevent regulatory capture. This Court should grant *certiorari* in order to reverse the one-sentence Federal Circuit decision below, and remand with instructions for it to address these issues.

I. PTO's Cancellation of Pre-AIA Patents Interferes with an "Historically Rooted Expectation of Compensation," and thus Constitutes a Taking.

This Court requires application of the Takings Clause to protect an "historically rooted expectation of compensation." *Loretto v. Teleprompter Manhattan Catv Corp.*, 458 U.S. 419, 441 (1982). As this Court held in *Teleprompter*:

> We affirm the traditional rule that a permanent physical occupation of property is a taking. In such a case, the property owner entertains a historically rooted expectation of compensation, and the character of the invasion is qualitatively more intrusive than perhaps any other category of property regulation.

Id.

Contrary to this Fifth Amendment protection of property, the PTO took the patents at issue here

entirely away from the owner without compensation. This thereby ran afoul of both the "historically rooted" test and the "qualitatively more intrusive" test, contrary to long-standing safeguards of rights in private property. "The public good is in nothing more essentially interested than in the protection of every individual's private rights, as modeled by the municipal law." 1 Blackstone, Commentaries 135 (quoted in Adam Mossoff, "What Is Property? Putting The Pieces Back Together," 45 Ariz. L. Rev. 371, 399 n.106 (Summer 2003)).

It cannot be doubted that PTO cancellation of pre-AIA patents "is qualitatively more intrusive than perhaps any other category of property regulation." *Teleprompter*, 458 U.S. at 441. A patent "confers upon the patentee an ***exclusive property*** in the patented invention." *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2427 (2015) (quoting *James v. Campbell*, 104 U.S. 356, 358 (1882), emphasis added). The historical understanding of patents as property rights is well-established:

> The first four patent statutes – adopted in 1790, 1793, 1836, and 1870 – ***all defined patents as property rights in substantive terms***, securing the same rights to possession, use, and disposition traditionally associated with tangible property entitlements. Nineteenth-century courts followed Congress's definition of patents as property, securing to patentees their "substantive rights," including the "right to manufacture, the right to sell, and the right to use" their inventions.

Adam Mossoff, "Exclusion and Exclusive Use in Patent Law," 22 Harv. J. Law & Tech. 321, 340-341 (Spring 2009) (collecting the statutory provisions, and citing

Adams v. Burke, 84 U.S. (17 Wall.) 453 (1873), emphasis added).

Where, as here, a regulatory taking deprives an owner of all economically beneficial uses of the property, then just compensation is required. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1982). Moreover, just compensation is required for this regulatory taking based upon the factors in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), which include the interference with distinct investment-backed expectations, *id.* at 124, and whether the decision was an adjustment of the "benefits and burdens of economic life to promote the common good." *Id.*

This unanimous Court has expressly emphasized that patent is a property right and the patent holder should know what he owns:

> The patent laws "promote the Progress of Science and useful Arts" by rewarding innovation with a temporary monopoly. U.S. Const., Art. I, § 8, cl. 8. The monopoly is ***a property right; and like any property right, its boundaries should be clear***. This clarity is essential to promote progress, because it enables efficient investment in innovation. ***A patent holder should know what he owns, and the public should know what he does not***. … [I]nventors ***… rely on the promise of the law to bring the invention forth***, and the public, which should be encouraged to pursue innovations, creations, and new ideas beyond the inventor's exclusive rights.

Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., 535 U.S. 722, 730-31 (2002) (citing *Bonito Boats, Inc.*

v. Thunder Craft Boats, Inc., 489 U.S. 141, 150 (1989), emphasis added).

"A properly issued patent claim represents a line of demarcation, defining the territory over which the patentee can exercise the right to exclude." *Intellectual Ventures I LLC v. Symantec Corp.*, 838 F.3d 1307, 1328 (Fed. Cir. 2016) (citing *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. 2120, 2129 (2014)). This holding reinforces the truism that patents are legally indistinguishable from real property, and that full private property rights attach to patents just as they do to real property.

Additional discussions of patents by this Court reflect how they are to be considered as private property, and thereby protected against takings. For example, application of the exhaustion rule to patents reflects their similarity to other forms of private property. "When a patentee chooses to sell an item, that product 'is no longer within the limits of the monopoly' and instead becomes the 'private, individual property' of the purchaser, with the rights and benefits that come along with ownership." *Impression Prods. v. Lexmark Int'l, Inc.*, 137 S. Ct. 1523, 1531 (2017) (quoting *Bloomer v. McQuewan*, 55 U.S. 539, 549-50 (1853)). "This well-established exhaustion rule marks the point where patent rights yield to the common law principle against restraints on alienation." *Lexmark*, 137 S. Ct. at 1531.

Both Congress and this Court have recognized the unfairness of applying new patent laws retroactively to undermine the rights of pre-existing patent holders. *See, e.g.*, *McClurg v. Kingsland*, 42 U.S. (1 How.) 202, 206 (1843) ("This repeal, however, can have no effect to impair the right of property then existing in a

patentee, or his assignee."). Just as pre-existing rights in real property cannot be taken away by an agency without compensation, neither should patent rights.

Both libertarians and conservatives agree on the importance of protecting patent rights as property. The libertarian philosopher Ayn Rand "was a strong proponent of this position":

> She claims that intellectual property rights are not "grants … in the sense of a gift, privilege or favor" from the laws established by governments, but rather an acknowledgment of "the role of mental effort in the production of material values" and, therefore, a right that exists in the creator. … [T]he idea that was created and as such is owned by the individual who labored in thought to produce it.

John M. Kraft and Robert Hovden, "Natural Rights, Scarcity & Intellectual Property," 7 NYU J.L. & Liberty 467, 472-473 (2013) (citations omitted).

Conservative activist Phyllis Schlafly likewise supported inventors' rights as private rights having precedence over even the individual rights of free speech and religion:

> The mainspring of our success is the American patent system, unique when the Founding Fathers put it into the U.S. Constitution even before freedom of speech and religion, and still unique today.

Patents and Inventions at 151. She predicted in March 2011 that the AIA would mean "death for innovation,"

and the PTO's improper use of the AIA to invalidate even pre-AIA patents confirms that. *Id.*[6]

II. APPLICATION OF THE TAKINGS CLAUSE TO PTO INVALIDATIONS OF PATENTS IS NECESSARY TO FOSTER ECONOMIC OPPORTUNITY AND PREVENT REGULATORY CAPTURE.

Patent law experts have pointed out that the traditional patent system has been "a cornerstone of America's economic prosperity." John J. Connors, "Spotlight on Intellectual Property Law: The Patent Reform Humbug," 51 Orange County Lawyer 32, 32 (July 2009). Pre-AIA, "the American patent system [wa]s open and affordable to inventors from all walks of life. Thus it fosters the principles of freedom and equality by giving a genuine economic opportunity to anyone who makes an invention." *Id.* In his criticism of legislation that was the precursor of the AIA, the commentator explained that it "is a system modeled after the late 19th century German patent law. The German cartels controlling that country's economy designed a system that clearly favored monopolies and oligopolies over small businesses, independent inventors and entrepreneurs." *Id.* In contrast, the traditional American patent system, prior to the AIA, was one that secured meaningful rights to inventors and thereby ensured economic opportunity rather than immense inequities in wealth.

The protection of the Takings Clause for small inventors is an essential restraint against the monopolies, cartels and other aggregations of wealth that are so dominant in other countries. Unique to

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[6] Available at http://www.pseagles.com/Death_for_Innovation (viewed Sept. 8, 2018).

American freedom and prosperity is the protection that individual property owners have against seizure of their property by government, acting under the influence of wealthy corporations. There was a bipartisan backlash to the decision in *Kelo v. City of New London*, 545 U.S. 469 (2005), where there was broad opposition to the taking of a woman's house for the benefit of Pfizer:

> The Supreme Court's decision in Kelo v. City of New London generated a massive backlash from across the political spectrum. … The U.S. House of Representatives immediately passed a resolution denouncing Kelo by a lopsided 365-33 vote. … Kelo was condemned by numerous liberal political leaders including former President Bill Clinton, then-Democratic National Committee Chair Howard Dean, and prominent African-American politician and California Representative Maxine Waters. The NAACP, the AARP, the liberal Southern Christian Leadership Conference, and others had filed a joint amicus brief in Kelo urging the Court to rule in favor of the property owners. … In two national surveys conducted in the fall of 2005, 81% and 95% of respondents were opposed to Kelo. … [O]pposition to the decision cut across racial, ethnic, partisan, and gender lines.

Ilya Somin, "The Limits of Backlash: Assessing the Political Response to Kelo," 93 Minn. L. Rev. 2100, 2101, 2108-2109 (June 2009).

The culprit, in the minds of many, was "regulatory capture," which is the tendency of wealthy corporations, such as Pfizer in the *Kelo* case, to exert too much influence over government:

> The underlying government action looked to some like a product of regulatory capture by a large multinational corporation, so liberals invoked property rights and the Takings Clause to stop this regressive redistribution of wealth.

Christopher Serkin, "The New Politics of New Property and the Takings Clause," 42 Vt. L. Rev. 1, 12 (Fall 2017).

The problem of regulatory capture is even greater if an administrative agency – the PTO – has no restraints on its power to take private property. As with real property, the Takings Clause is a necessary deterrent to the arbitrary or wasteful deprivation by government of private property. Only then can inefficient, disruptive takings of property be avoided.

Federal courts exist in part to consider, in an Article III proceeding, attempts to invalidate property rights including patents. But by grabbing for itself the authority to cancel even pre-AIA patents, the PTO has gone far beyond the much-criticized growth in agency power allowed by *Chevron* Deference. *See Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). Currently the unrestrained PTO is relegating Article III judges to marginal significance, as ownership of key intellectual property is being decided by agency employees potentially influenced by K-Street lobbyists. Without a deterrent to these deprivations of property, the once-vaunted American patent system is rapidly losing its footing in strong property rights.

This Court rejected such deference to an agency in the analogous context of land patents:

> A patent is the highest evidence of title, and is conclusive as against the Government, and all claiming under junior patents or titles, until it is

> set aside or annulled by some judicial tribunal. In England this was originally done by scire facias, but a bill in chancery is found a more convenient remedy. …
>
> [O]ne officer of the land office is not competent to cancel or annul the act of his predecessor. ***That is a judicial act, and requires the judgment of a court.***

United States v. Stone, 69 U.S. (2 Wall.) 525, 535 (1865) (emphasis added).

This Court has unanimously rejected the notion that the Executive branch should have the authority to reconsider land patents that it had issued:

> But in all this there is no place for the further control of the Executive Department over the [land patent] title. The functions of that department necessarily cease when the title has passed from the government. … If this were not so, the titles derived from the United States, instead of being the safe and assured evidence of ownership which they are generally supposed to be, would be always subject to the fluctuating, and in many cases unreliable, action of the land-office. No man could buy of the grantee with safety, because he could only convey subject to the right of the officers of the government to annul his title.
>
> … ***The existence of any such power in the Land Department is utterly inconsistent with the universal principle on which the right of private property is founded***.

Moore v. Robbins, 96 U.S. 530, 533-34 (1877) (emphasis added).

In sum, the federal judiciary has never before allowed property rights to be deprived by an agency as done below with respect to patents. This Court should grant *certiorari* and clarify this unsettled issue left in the wake of the *Oil States* decision.

CONCLUSION

For the foregoing reasons, the Petition for *Certiorari* should be granted.

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Respectfully submitted,

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