

No. \_\_\_\_

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IN THE  
Supreme Court of the United States

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EMED TECHNOLOGIES CORPORATION

*Petitioner,*

v.

REPRO-MED SYSTEMS, INC.,

*Respondent.*

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

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTION PRESENTED

1. Given the clear error standard for reviewing factual determinations made by the PTAB<sup>1</sup>, is it error for the PTAB to not adhere to the *Phillips* claim-construction standard in construing claims?

2. Given the clear error standard for reviewing factual determinations made by the PTAB, is it error for the PTAB to apply a *Texas-Digital* claim-construction standard in construing claims?

3. Is it error for the PTAB to consult dictionaries to construe claim terms, without explaining why the claim term could not be construed by reference to only intrinsic evidence, as the construction potentially becomes a taking, because the construction on appeal is reviewed for clear error and not de novo?

4. Given that patents are private property rights subject to the public rights doctrine, is the invalidation of one or more Claims of a patent with a filing date before the institution of the *inter partes* review procedure at the Patent Trial and Appeal Board an impermissible taking?

5. Given that patents are private property rights subject to the public rights doctrine, is the invalidation of one or more Claims of a patent with a priority date before the institution of the *inter partes*

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<sup>1</sup> U.S. Patent Trial and Appeal Board.

review procedure at the Patent Trial and Appeal Board an impermissible taking?

### **PARTIES TO THE PROCEEDINGS**

The parties to the proceeding in the court whose judgment is sought to be reviewed (the Federal Circuit Court of Appeals) are:

#### **Petitioner**

- EMED Technologies Corporation

#### **Respondent**

- Repro-Med Systems, Inc.

### **RULE 29.6 STATEMENT**

EMED Technologies Corporation has no parent corporations or publicly held corporation that owns 10% or more of the stock of EMED Technologies Corporation.

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## **OPINIONS BELOW**

The Federal Circuit's opinion is reprinted at App. A, and is reported at 832 F.3d 1343. The Federal Circuit's unpublished order denying full court rehearing is reprinted at App. C.

The Patent Trial and Appeal Board's Final Written Decision is reprinted at App. B and is unpublished.

## **JURISDICTION**

The Federal Circuit entered judgment on April 3, 2018, and denied a timely petition for rehearing en banc on May 18, 2018. (App. C) This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS**

The Question Presented involves Amendment V of the U.S. Constitution that states:

### **U.S. Constitution Amendment V**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## STATEMENT OF THE CASE

This case is about what standard the PTAB uses for factual determinations in construing claim constructions. The underlying case involves the use of a *Texas-Digital* claim-construction standard instead of the *Phillips* claim-construction standard. This case is also about the Constitutional Takings and Due-Process's effects on the retroactive application of *inter partes* review to patents filed before the enactment of the *inter partes* review procedure.

The filing and priority dates of Petitioner's '476 Patent (U.S. Patent No. 8,961,476) was before the *inter partes* review ("IPR") proceeding was enacted.

Respondent Repro-Med Systems, Inc. ("RMS") filed its IPR Petition on September 17, 2015. On January 12, 2017, the PTAB issued a Final Decision in which it:

- applied a *Texas-Digital* claim-construction standard instead of the *Phillips* claim-construction standard;<sup>2</sup> and
- invalidated Claims 1–8 and 10 as being anticipated by or obvious in light of certain prior art.<sup>3</sup>

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<sup>2</sup> Final Decision (Paper No. 65) at 35B (Appx.B).

<sup>3</sup> *Id.* at 93B (Appx.B).

## REASONS FOR GRANTING THE PETITION

Review is warranted to resolve issues of significant national and legal importance, specifically: (1) the PTAB's use of the impermissible *Texas-Digital* claim-construction methodology (i.e., elevating extrinsic evidence over intrinsic evidence) and (2) the violations of the U.S. Constitution's Taking and Due Process Clauses by the USPTO's<sup>4</sup> retroactive application of *inter partes* review to patents filed before the enactment of the *inter partes* review procedure.

### A. THE FEDERAL CIRCUIT COURT OF APPEALS ERRED IN FAILING TO HOLD THE PTAB ERRED BY APPLYING THE IMPERMISSIBLE *TEXAS-DIGITAL* CLAIM-CONSTRUCTION METHODOLOGY RATHER THAN THE *PHILLIPS* CLAIM-CONSTRUCTION METHODOLOGY; I.E., BY CONSULTING DICTIONARIES WITHOUT EXPLAINING WHY EACH CLAIM TERM COULD NOT BE CONSTRUED BY REFERENCE TO ONLY INTRINSIC EVIDENCE.

In *Phillips v. AWH Corp.*, the Federal Circuit Court rejected the *Texas Digital* claim-construction methodology of consulting the specification only after

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<sup>4</sup> U.S. Patent and Trademark Office.

a determination is made, such as based on a dictionary, as to the ordinary meaning or meanings of the claim term in dispute and then evaluating whether that meaning is narrowed by explicit definition in the specification or by inventor disavowal.<sup>5</sup>

“In effect, the *Texas Digital* approach limits the role of the specification in claim construction to serving as a check on the dictionary meaning of a claim term[.]”<sup>6</sup>

As the Federal Circuit Court explained:

The main problem with elevating the dictionary to such prominence is that it focuses the inquiry on the abstract meaning of words rather than on the meaning of claim terms within the context of the patent. Properly viewed, the “ordinary meaning” of a claim term is its meaning to the ordinary artisan after reading the entire patent. Yet heavy reliance on the dictionary divorced from the intrinsic evidence risks transforming the meaning of the claim term to the artisan into the meaning of the term in the abstract, out of its particular context, which is the specification. . . .

Although the *Texas Digital* line of cases permit the dictionary definition to be narrowed in some circumstances even

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<sup>5</sup> *Phillips v. AWH Corp.*, 415 F.3d 1303, 1320, 1321 (Fed. Cir. 2005) (en banc), *cert. denied*, 546 U.S. 1170 (2006).

<sup>6</sup> *Id.* at 1320.

when there is not an explicit disclaimer or redefinition in the specification, too often that line of cases has been improperly relied upon to condone the adoption of a dictionary definition entirely divorced from the context of the written description. The problem is that if the district court starts with the broad dictionary definition in every case and fails to fully appreciate how the specification implicitly limits that definition, the error will systematically cause the construction of the claim to be unduly expansive. The risk of systematic overbreadth is greatly reduced if the court instead focuses at the outset on how the patentee used the claim term in the claims, specification, and prosecution history, rather than starting with a broad definition and whittling it down. [7]

Here, the PTAB erred in using the *Texas Digital* methodology of claim construction; i.e., applying a general dictionary meaning and then assessing whether the definition was narrowed by express definition or disavowal.<sup>8</sup>

Here the PTAB's constructions of the claim terms erroneously used the *Texas-Digital* claim construction methodology; i.e., applying a general dictionary

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<sup>7</sup> *Id.* at 1321.

<sup>8</sup> Final Decision (Paper No. 65) at 35B (AppxB).

meaning and then assessing whether the definition was narrowed by express definition or disavowal.<sup>9</sup>

**B. APPLICATION OF THE INTER-PARTES-REVIEW PROCEDURE TO A PATENT HAVING A PRIORITY OR FILING DATE PRECEDING THE EXISTENCE OF THE INTER-PARTES-REVIEW PROCEDURE IS A RETROACTIVE APPLICATION AFFECTING THE PATENT APPLICANT'S PROCEDURAL AND PROPERTY RIGHTS AND VIOLATES THE CONSTITUTIONAL TAKINGS AND DUE PROCESS CLAUSES.**

An IPR violates the Fifth Amendment Takings Clause and Due Process Clause when applied to patents filed before the IPR procedure was enacted. This Court recently, in *Oil States Energy Servs., LLC v. Greene's Energy Group, LLC*,<sup>10</sup> indicated this issue remains unresolved:

[W]e address only the precise constitutional challenges that *Oil States* raised here. *Oil States* does not challenge the retroactive application of *inter partes* review, even though that procedure was not in place when its patent issued. Nor

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<sup>9</sup> Final Decision (Paper No. 65) at 35B (AppxB).

<sup>10</sup> *Oil States Energy Servs., LLC v. Greene's Energy Group, LLC*, 138 S. Ct. 1365, (2018).



has *Oil States* raised a due process challenge. Finally, our decision should not be misconstrued as suggesting that patents are not property for purposes of the Due Process Clause or the Takings Clause.<sup>11</sup>

An IPR does constitute an impermissible taking and a Due-Process violation for patents filed before the procedure was created. Retroactive application of an IPR to patents filed before the AIA enactment constitutes a regulatory taking. See generally Gregory Dolin and Irena Manta, Taking Patents, 73 Wash. & Lee L. Rev. 719, 775-96 (2016). Here, IPR invalidation of Petitioner’s patent claims constitutes a regulatory taking by the USPTO.

The Fifth Amendment protects private property from wrongful taking by the Government without just compensation. Patents are a species of property. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 642 (1999). “[T]he rights of a party under a patent are his private property” which “cannot be taken for public use without just compensation.” *Brown v. Duchesne*, 60 U.S. 183, 197 (1857).

The Government appropriated Petitioner’s patent rights by new weakened patent laws not in existence during the original inventor-Government negotiation of patent rights to invalidate certain claims. Invalidation placed Petitioner’s inventions

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<sup>11</sup> *Oil States*, 138 S. Ct. 1365, 1379 (2018).

into the public domain, where they previously were not.

Here, the IPR regulatory framework enabling the taking was created after Petitioner's patent application was filed.<sup>12</sup>

## CONCLUSION

Because of the (1) PTAB's use of the impermissible *Texas-Digital* claim-construction methodology (i.e., elevating extrinsic evidence over intrinsic evidence) and (2) violations of the U.S. Constitution's Taking and Due Process Clauses by the USPTO's retroactive application of *inter partes* review to Petitioner's patent filed before the enactment of the *inter partes* review procedure, Petitioner requests the Supreme Court grant review of this matter.

Respectfully Submitted,

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<sup>12</sup> United States Patent No. US 8,961,476 B2, at 1 (AppxE).

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