

No. 18-222

IN THE
Supreme Court of the United States

EMED TECHNOLOGIES CORPORATION,

Petitioner,

v.

REPRO-MED SYSTEMS, INC.,

Respondent.

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

BRIEF IN OPPOSITION

JAMES G. SAWTELLE
Counsel of Record
CHRISTOPHER M. JACKSON
AMANDA LEVIN MILGROM
SHERMAN & HOWARD L.L.C.
633 17th Street, Suite 3000
Denver, CO 80202
(303) 297-2900
jsawtelle@shermanhoward.com

DANIEL W. ROBERTS
LAW OFFICES OF
DANIEL W. ROBERTS
904 Topaz Street
Superior, CO 80027
(720) 304-3026

Attorneys for Respondent

QUESTIONS PRESENTED

1. Whether the Patent Trial and Appeal Board correctly applied the Federal Circuit's decision in *Phillips v. AWH Corporation*, 415 F.3d 1303 (Fed. Cir. 2005).

2. Whether the Petitioner has a viable claim that the Patent Trial and Appeal Board violated its Fifth Amendment rights by invalidating several claims of the Petitioner's patent.

RULE 29.6 STATEMENT

RMS has no parent corporation and no publicly traded company owns 10 percent or more of its stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED	i
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	2
I. The PTAB properly applied the correct Federal Circuit precedent.	3
II. EMED has no viable Fifth Amendment claim.	4
A. EMED did not raise the claim below.	5
B. The PTAB’s inter parties review did not violate EMED’s Fifth Amendment rights.	6
CONCLUSION	7

TABLE OF AUTHORITIES

Page**Cases**

<i>Conoco, Inc. v. Energy & Envtl. Int’l,</i> <i>L.C.,</i> 460 F.3d 1349 (Fed. Cir. 2016)	6
<i>Curtis Publishing Co. v. Butts,</i> 388 U.S. 130 (1967)	5
<i>Oil States Energy Services, LLC v.</i> <i>Greene’s Energy Group,</i> 138 S. Ct. 1365 (2018)	5
<i>Phillips v. AWH Corporation,</i> 415 F.3d 1303 (Fed. Cir. 2005)	3
<i>Ryder v. United States,</i> 515 U.S. 177 (1995)	6
<i>Yakus v. United States,</i> 321 U.S. 414 (1944)	5

Rules

Sup. Ct. R. 10	4
----------------------	---

Treatises

EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE (9th ed. 2007)	4
Stephen G. Breyer, <i>Reflections on the</i> <i>Role of Appellate Courts: A View from</i> <i>the Supreme Court</i> , 8 J. APP. PRAC. & PROCESS 91 (2006)	4

OPINIONS AND ORDERS BELOW

The Federal Circuit’s order denying panel rehearing and rehearing *en banc* is unreported. The panel decision is unreported and available at 725 F. App’x. 1005. The final written decision and order of the Patent Trial and Appeal Board is unreported and available at 2017 WL 378978 (PTAB Jan. 12, 2017).

STATEMENT OF THE CASE

This case arises out of the Patent Trial and Appeal Board’s (“PTAB”) decision invalidating all but one claim of one of the Petitioner’s patents.

1. *Factual background.* EMED Technologies Corp. (“EMED”) and Repro-Med Systems, Inc. (“RMS”) operate in a small market that develops subcutaneous therapies which, as the name indicates, involve the infusion of fluids under the patient’s skin. To administer these therapies, patients generally require three medical devices: (1) an infusion pump, (2) subcutaneous needle sets, and (3) tubing sets that connect the needle sets to the infusion pump. EMED and RMS each have patented inventions for use in connection with subcutaneous therapy.

2. *The district court.* This case is about EMED’s US Patent No. 8,961,476 (the “476 Patent”). EMED filed a complaint in the US District Court of the Eastern District of Texas, alleging that RMS infringed the ‘476 Patent. Dkt. No. 1, Case No. 2:15-cv-01167, ¶ 1. RMS filed a petition for *inter partes* review of the ‘476 Patent before the PTAB, which a panel of three administrative patent judges granted. Pet. App. at 10a.

3. *The PTAB.* The PTAB’s written decision (“Final Decision”) concluded that claims 1-8 and 10 of the ‘476

Patent were unpatentable. Pet. App. at 110a. In reaching that conclusion, the PTAB gave the ‘476 Patent’s claim terms “their broadest possible construction in light of the specification of the patent in which they appear.” *Id.* at 17a (citing 37 C.F.R. § 42.100(b)). “Under the broadest reasonable construction standard, claim terms are generally given their ordinary and customary meaning, as would be understood by one of ordinary skill in the art in the context of the entire disclosure.” *Id.* at 18a.

EMED contends in its petition that the PTAB improperly relied on a dictionary definition in construing the ‘476 Patent’s claim terms. Pet. at 4-5. But the only reference to a dictionary in the Final Decision involved *EMED*’s citation to a dictionary in support of one of its arguments—an argument that the PTAB explicitly rejected. Pet. App. at 33a. While the PTAB may have made other references to dictionaries at an earlier stage in the matter, its Final Decision did not rely on a dictionary.

4. *The Federal Circuit.* EMED appealed the Final Decision, and the Federal Circuit affirmed. Pet. App. at 2a. The appellate court “discern[ed] no error in [the PTAB’s] reference to a dictionary definition, which was only confirmatory and provided additional support” for its decision. *Id.* at 7a. EMED filed a petition for panel rehearing and rehearing *en banc* of the Federal Circuit’s decision. The Federal Circuit denied EMED’s petition and issued its mandate. Pet. App. C.

REASONS FOR DENYING THE WRIT

The Court should deny the petition for two reasons. First, the PTAB properly applied the correct Federal Circuit precedent, and there is no compelling

reason for the Court to review that decision. Second, EMED does not have a viable Fifth Amendment claim.

I. The PTAB properly applied the correct Federal Circuit precedent.

EMED's petition argues that the PTAB incorrectly utilized the so-called "*Texas Digital*" claim-construction methodology by "applying a general dictionary meaning [to the '476 Patent's claim terms] and then assessing whether the definition was narrowed by express definition or disavowal." Pet. at 6 (citation omitted). Instead, EMED contends, the PTAB should have applied the methodology in *Phillips v. AWH Corporation*, 415 F.3d 1303 (Fed. Cir. 2005), and this Court should grant the petition to correct that error. *Id.*

EMED's argument misconstrues the Final Decision. In *Phillips*, the Federal Circuit did not forbid the use of dictionaries; to the contrary, it noted that dictionaries "have been properly recognized as among the many tools that can assist the court in determining the meaning of particularly terminology" and that "it is permissible for the district court in its sound discretion to admit and use such evidence." *Id.* at 1318-19; *see also id.* at 1322 ("[W]e do not intend to preclude the appropriate use of dictionaries."). Nor is the PTAB required to consider intrinsic or extrinsic materials in any particular order: "[T]here is no magic formula or catechism for conducting claim construction," and the PTAB is not "barred from considering any particular sources or required to analyze sources in any specific sequence" *Id.* at 1324.

In this case, the PTAB correctly applied Federal Circuit precedent. Not only did the PTAB cite the *Phillips* decision, Pet. App. at 51a, but it also recognized that it could not rely exclusively on a dictionary definition in construing the ‘476 Patent’s claims, Pet. App. at 33a. The Federal Circuit determined below that the PTAB committed “no error in its reference to a dictionary definition, *which was only confirmatory and provided additional support.*” Pet. App. at 7a (emphasis added).

In addition, this Court should not agree to review a case merely because the petitioner alleges error. “It has been reiterated many times that the Supreme Court is not primarily concerned with the correction of errors in lower court decisions.” EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 276 (9th ed. 2007) (citation omitted); *see also* Sup. Ct. R. 10. The petition argues only that the PTAB got it wrong: EMED does not challenge the applicable legal rule, but the way the PTAB applied it. Pet. at 5-6 (“Here the PTAB’s construction of the claim terms erroneously used the *Texas-Digital* claim construction methodology”). Because the petition does not present any important federal question, this Court should decline to grant it. *See* Stephen G. Breyer, *Reflections on the Role of Appellate Courts: A View from the Supreme Court*, 8 J. APP. PRAC. & PROCESS 91, 92 (2006) (“If every lower court that has addressed a question arrives at the same answer, it is difficult to understand why the Supreme Court should weigh in on the matter.”).

II. EMED has no viable Fifth Amendment claim.

EMED also argues in its petition that “[a]n IPR violates the Fifth Amendment Takings Clause and

Due Process Clause when applied to patents filed before the IPR procedure was enacted.” Pet. at 7. Its argument is predicated on a passage from this Court’s decision in *Oil States Energy Services, LLC v. Greene’s Energy Group*, 138 S. Ct. 1365 (2018). There, the petitioner challenged the constitutionality of *inter partes* review under both Article III and the Seventh Amendment. *Id.* at 1370. This Court rejected the challenge, but in doing so it “emphasized the narrowness of our holding,” noting that its opinion did not address “the retroactive application of inter parties review, even though that procedure was not in place when [the] patent issued.” *Id.* at 1379.

EMED seeks to pick up where *Oil States* left off, asking the Court to decide whether retroactive application of *inter partes* review passes constitutional muster. But EMED’s petition fails on both procedural and substantive grounds.

A. EMED did not raise the claim below.

Procedurally, EMED’s argument fails because it never raised this argument below. “No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.” *Yakus v. United States*, 321 U.S. 414, 444 (1944); *see also Curtis Publishing Co. v. Butts*, 388 U.S. 130, 143 (1967) (“Of course it is equally clear that even constitutional objections may be waived by a failure to raise them at a proper time”) (citation omitted).

EMED did not argue before the PTAB or the Federal Circuit that *inter parties* review violated its

Fifth Amendment rights; it asserts that claim for the first time in its petition for certiorari. Because EMED did not raise the issue below, it has been forfeited. *See, e.g., Ryder v. United States*, 515 U.S. 177, 182 (1995) (only a litigant “who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question”); *Conoco, Inc. v. Energy & Envtl. Int’l, L.C.*, 460 F.3d 1349, 1358-59 (Fed. Cir. 2016) (“[L]itigants waive their right to present new claim construction disputes if they are raised for the first time after trial.”).

B. The PTAB’s inter partes review did not violate EMED’s Fifth Amendment rights.

Substantively, EMED’s claim fails because the company did not have any property right in the ‘476 Patent before Congress established *inter partes* review. EMED may have “filed” for the ‘476 Patent before Congress acted, Pet. at 7, but the patent did not issue until February 24, 2015—three-and-one-half years after the President signed the America Invents Act into law. *See Leahy-Smith America Invents Act*, Pub. L. No. 112-29, § 6, 125 Stat. 284, 299 (2011).

It is black-letter law that “a patent does not exist until it is granted” and that “[p]atent rights are created only upon the formal issuance of the patent” *GAR Building Materials Corp. v. Elk Corp. of Dallas*, 90 F.3d 479, 483 (Fed. Cir. 1996). Thus, “[u]ntil the patent is issued, there is no property right in it” *Marsh v. Nichols, Shepherd & Co.*, 128 U.S. 605, 612 (1888); *see also Hendrie v. Sayles*, 98 U.S. 546, 551 (1878) (“[A]n inventor has no exclusive right to make, use, and vend the improvement until he

obtains a patent for the invention, and that is created and secured by the patent”).

EMED had no cognizable property interest in the ‘476 Patent until *after* Congress established *inter partes* review. As a result, it cannot claim that *inter partes* review of the ‘476 Patent was applied retroactively. *Cf. Oil States*, 138 S. Ct. at 1379 (“Oil States does not challenge the retroactive application of inter parties review, even though that procedure was not in place *when its patent issued*.”) (emphasis added). That is, because EMED’s property interest in the ‘476 Patent did not vest until after Congress passed the America Invents Act, the establishment of *inter partes* review could not be a deprivation of property or a taking of private property within the meaning of the Fifth Amendment.

CONCLUSION

For the reasons given above, the Court should deny EMED’s petition.

Respectfully submitted,

JAMES G. SAWTELLE
Counsel of Record
 CHRISTOPHER M. JACKSON
 AMANDA LEVIN MILGROM
 SHERMAN & HOWARD L.L.C.
 633 17th Street, Suite 3000
 Denver, CO 80202
 (303) 297-2900
 jsawtelle@shermanhoward.com

DANIEL W. ROBERTS
 LAW OFFICES OF
 DANIEL W. ROBERTS
 904 Topaz Street
 Superior, CO 80027
 (720) 304-3026

Attorneys for Respondent