

No. A

IN THE
Supreme Court of the United States

WESTERNGECO LLC,
Petitioner,

v.

ION GEOPHYSICAL CORPORATION, ION INTERNATIONAL S.A.R.L.,
Respondents.

**APPLICATION FOR A 60-DAY EXTENSION OF TIME TO FILE A
PETITION FOR WRIT OF CERTIORARI**

TO THE HONORABLE JOHN G. ROBERTS, CHIEF JUSTICE OF THE UNITED
STATES AND CIRCUIT JUSTICE FOR THE FEDERAL CIRCUIT:

Under this Court's Rule 13.5, petitioner WesternGeco LLC respectfully requests a 60-day extension of time to petition for a writ of certiorari, to and including Friday, December 14, 2018.¹

1. The court of appeals issued its panel opinion on May 7, 2018 (attached, published 889 F.3d 1308). The full court denied WesternGeco's timely-filed petition for rehearing on July 16, 2018 (attached). This Court's jurisdiction would be invoked under 28 U.S.C. § 1254.

¹ All parties are listed in the caption. Per Rule 29.6, WesternGeco LLC is an indirectly, wholly owned subsidiary of Schlumberger Limited, a publicly traded company.

2. Absent an extension, WesternGeco's deadline to petition for a writ of certiorari would be Monday, October 15, 2018.² This application is filed more than 10 days before that date.

3. WesternGeco is the owner of U.S. Patent Nos. 7,162,967, 7,080,607, and 7,293,520. WesternGeco's petition will seek review of a decision of the Federal Circuit that sharply limits the effectiveness of the statutory time bar of 35 U.S.C. § 315(b). In the Leahy-Smith America Invents Act (AIA) in 2011, Congress created *inter partes* reviews (IPRs): proceedings where the Patent Office resolves challenges to the validity of issued patents. Since the creation of IPRs, patent challengers have filed thousands of petitions at the Patent Office, and continue to file approximately 100 petitions per month. 35 U.S.C. § 315(b) limits who may file an IPR petition: "[a]n inter partes review *may not be instituted* if the petition requesting the proceeding is filed more than 1 year after the date on which the petitioner, real party in interest, or *privy of the petitioner* is served with a complaint alleging infringement of the patent." 35 U.S.C. § 315(c) permits otherwise time-barred petitioners to move to join a

² 90 days from July 16, 2018 is Sunday, October 14, 2018. By operation of Rule 30.1, the deadline to file the petition would be Monday, October 15, 2018.

properly-filed petition, but in all events there must be an underlying, properly-filed petition by a non-time-barred petitioner.

4. This case involves precisely the sort of second-bite-at-the-apple attacks on issued patents that Congress sought to prevent through adoption of §315(b). In 2009, WesternGeco sued Respondent ION Geophysical Corporation in district court for infringement of four of its patents (the three patents listed above, and a fourth patent). The jury issued a verdict in WesternGeco's favor in 2012, awarding approximately \$120 million in damages. That case reached this Court two Terms ago, where this Court issued a GVR order concerning WesternGeco's damages, *WesternGeco LLC v. ION Geophysical Corp.*, 136 S. Ct. 2486 (2016), and again last Term, where this Court reversed the Federal Circuit's ruling reducing WesternGeco's damages based on an erroneous application of the presumption against extraterritoriality. *WesternGeco LLC v. ION Geophysical Corp.*, 138 S. Ct. 2129 (2018).

5. While the district court litigation was pending, ION and its customer/co-developer Petroleum Geo-Services, Inc. ("PGS") have tried to attack WesternGeco's patents collaterally in the Patent Office. WesternGeco's district court litigation against ION concerned a product

that PGS and ION developed, tested, and commercialized over the course of several years. ION extended several indemnities to PGS concerning WesternGeco's patents. And PGS appeared in ION district court litigation, fought WesternGeco's discovery requests, and invoked "common interest" privilege over its communications with ION. .

6. In 2014, PGS filed six IPR petitions to challenge three of WesternGeco's patents. In 2014, ION would undisputedly have been time-barred under 35 U.S.C. § 315(b), as it had been sued five years before on those patents. WesternGeco argued before the Patent Office that PGS—ION's customer, co-developer of infringing technology, and co-owner of a "common interest privilege" was in *privity* with ION, and thus also time-barred. In response to PGS's petitions, WesternGeco asked the Patent Office to permit it to take discovery to uncover the full extent of PGS's and ION's relationship. The Board denied WesternGeco's requests to even file a motion to seek discovery and also rejected its arguments that PGS's petitions were time-barred. Adopting arguments advanced by PGS, the Patent Office applied a "control" test—requiring WesternGeco to show that ION controlled PGS's IPR petitions.

7. After the Patent Office concluded that PGS's petitions were not time-barred, it permitted *ION* to join PGS's petitions under §315(c). On the merits, the Board sided with ION and PGS, invalidating several of WesternGeco's patent claims, including four of the six claims that WesternGeco had successfully asserted against ION in district court several years prior.

8. While WesternGeco's appeals were pending, PGS and WesternGeco settled, leaving only ION to defend the Patent Office's invalidation of WesternGeco's patents. After briefing and oral argument, the Federal Circuit affirmed the Patent Office's rulings holding that the petitions were not time-barred and that WesternGeco's patents were invalid. 889 F.3d 1308.³ As WesternGeco's petition will explain, that decision warrants this Court's review.

9. The Federal Circuit relied heavily on the erroneous notion that an IPR petitioner's "due process" rights counseled in favor of a narrow

³ ION has since tried to use that result to collaterally attack the damage award against it in district court. Although ION had tried and failed to challenge WesternGeco's patents in district court in 2012, and although ION did raise invalidity on appeal, it has argued in the co-pending remand from this Court in 2018 that it is entitled to a new trial on damages. ION Supplemental Br., *WesternGeco LLC v. ION Geophysical Corp.*, Fed. Cir. No. 13-1527, ECF#157 (filed Aug. 31, 2018).

interpretation of the time-bar provision. 889 F.3d at 1317 n.5, 1319, 1328-29. This Court has held that applicants for government benefits (as opposed to recipients) generally do not have due process rights in those benefits, *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Lyng v. Payne*, 476 U.S. 926, 942 (1986). By statute, IPR petitioners have no affirmative entitlement to have their petitions instituted at all. Institution is at the PTO Director’s unreviewable discretion, 35 U.S.C. § 314(a); *SAS Institute, Inc. v. Iancu*, 138 S. Ct. 1348, 1356 (2018), subject only to Congress’s *restrictions* on institution. Congress chose to bar petitioners and their privies who had been served with complaints for patent infringement more than one year prior. 35 U.S.C. § 315(b). Congress could have been more generous or less generous to IPR petitioners, but no “due process” considerations permit courts to construe Congress’ choice with a thumb on the scale.

10. The Federal Circuit’s decisions in this case and others reflect that the Federal Circuit is internally divided on the meaning of “privy” under §315(b). In *Wi-Fi One, LLC v. Broadcom Corp.*, 887 F.3d 1329 (Fed. Cir. 2018), the majority of a divided panel affirmed the Patent Office’s application of a “control” test for privity, but noted that the appellant’s

only arguments below assumed a “control” test. In dissent, Judge Reyna articulated a broader conception of “privity” that accounts for the totality of the parties’ relationship and does not depend on “control.” 887 F.3d at 1348-53. In this case, decided less than three weeks after *Wi-Fi One*, and after taking supplemental briefing focused on the meaning of “privity” in §315(b), the Federal Circuit affirmed the Patent Office’s use of a “control” test, reasoning that “[s]ubstantial evidence supports the Board’s finding that ION lacked the opportunity to control PGS’s IPR petitions.” 889 F.3d at 1313, 1320. The court acknowledged in passing that “‘control’ is not the exclusive analytical pathway for analyzing privity,” but nonetheless proceeded to decide the appeal as if it was.

11. WesternGeco respectfully requests an extension of time to accommodate its counsel’s other professional obligations during the time allotted to prepare a petition for certiorari. In the absence of an extension, those obligations will significantly impede counsel’s ability to prepare a well-researched and comprehensive petition that will assist the Court in evaluating the Federal Circuit’s decision.

Accordingly, WesternGeco respectfully requests a 60-day extension of time to petition for a writ of certiorari, to and including Friday, December 14, 2018.

September 28, 2018

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Respectfully submitted,



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