

No. _____

In the Supreme Court of the United States

DRAGON INTELLECTUAL PROPERTY, LLC,
Petitioner,

v.

DISH NETWORK L.L.C. and SIRIUS XM RADIO INC.,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether *inter partes* review—an adversarial process statutorily created in 2011 and used by the Patent and Trademark Office (PTO) to analyze the validity of existing patents—violates the Constitution by extinguishing private property rights through a non-Article III forum without a jury, especially for patents granted before *inter partes* review was created.

This petition presents the same question which this Court is considering in *Oil States Energy Services, LLC v. Greene’s Energy Group, LLC*, 639 F. App’x 639 (Fed. Cir. 2016), cert. granted, 2017 WL 2507340 (U.S. June 12, 2017) (“*Oil States Energy Services*”). Because this petition implicates the same issues to be decided in *Oil States Energy Services*, and because the Court will soon decide the power of the Patent Trial and Appeal Board of the USPTO to determine validity of patent rights, Petitioner asks that the Court hold its decision on this petition pending that decision.

**PARTIES TO THE PROCEEDINGS
AND RULE 29.6 STATEMENT**

The parties to the proceedings include those listed on the cover.

Dragon Intellectual Property, LLC, is a limited liability company formed in the State of Delaware.

TABLE OF CONTENTS

QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	
AND RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	v
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS AND ORDERS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED ..	1
INTRODUCTION	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	5
I. This Court’s Precedent Confirms That The Seventh Amendment Provides Patent Owners With A Right To A Jury In Invalidation Proceedings.	5
II. This Court’s Precedent Confirms That Patent Owners Have A Right To An Article III Forum For Invalidation Proceedings.	9
III. <i>Inter Partes</i> Review Cannot Be Justified By The Public-Rights Doctrine, Especially For Patents Granted Earlier.	10
CONCLUSION	14

APPENDIX

Appendix A	Opinion in the United States Court of Appeals for the Federal Circuit (November 1, 2017)	App. 1
Appendix B	Final Written Decision in the United States Patent and Trademark Office, Before the Patent Trial and Appeal Board (June 15, 2016)	App. 11

TABLE OF AUTHORITIES

CASES

<i>Atlas Roofing Co. v. Occupational Safety & Health Review Comm’n</i> , 430 U.S. 442 (1977)	12
<i>Boulton Watt v. Bull</i> , 1795) 126 Eng. Rep. 651 (CP)	9
<i>Crowell v. Benson</i> , 285 U.S. 22 (1932)	12
<i>Curtis v. Loether</i> , 415 U.S. 189 (1974)	5, 6
<i>Darcy v. Allein</i> , (1601) 77 Eng. Rep. 1260 (KB)	6
<i>Ex Parte Wood & Brundage</i> , 22 U.S. 603 (1824)	6
<i>Feltner v. Columbia Pictures Television, Inc.</i> , 523 U.S. 340 (1998)	7
<i>Granfinanciera, S.A. v. Nordberg</i> , 492 U.S. 33 (1989)	6, 11
<i>Iron Silver Mining Co. v. Campbell</i> , 135 U.S. 286 (1890)	10
<i>Markman v. Westview Instruments, Inc.</i> , 52 F.3d 967 (Fed. Cir. 1995)	6
<i>Markman v. Westview Instruments, Inc.</i> , 517 U.S. 370 (1996)	5, 7, 8

<i>McCormick Harvesting Mach. Co. v. C. Aultman & Co.</i> , 169 U.S. 606 (1898)	2, 10
<i>MCM Portfolio LLC v. Hewlett-Packard Co.</i> , 812 F.3d 1284 (Fed. Cir. 2015)	4, 7
<i>Murray’s Lessee v. Hoboken Land & Improvement Co.</i> , 59 U.S. 272 (1855)	9, 12
<i>NFIB v. Sebelius</i> , 132 S. Ct. 2566 (2012)	13
<i>N. Pipeline Constr. Co. v. Marathon Pipe Line Co.</i> , 458 U.S. 50 (1982)	9, 13
<i>Oil States Energy Services, LLC v. Greene’s Energy Group, LLC</i> , 639 F. App’x 639 (Fed. Cir. 2016), cert. granted, 2017 WL 2507340 (U.S. June 12, 2017)	i, 4
<i>Spokeo, Inc. v. Robins</i> , 136 S. Ct. 1540 (2016)	12
<i>Stern v. Marshall</i> , 564 U.S. 462 (2011)	<i>passim</i>
<i>Tegal Corp. v. Tokyo Electron Am., Inc.</i> , 257 F.3d 1331 (Fed. Cir. 2001)	7
<i>United States v. Am. Bell Tel. Co.</i> , 128 U.S. 315 (1888)	8, 13
CONSTITUTION	
U.S. CONST. art. III	<i>passim</i>
U.S. CONST. amend. VII	1, 5

STATUTES AND REGULATIONS

28 U.S.C. § 1254(1)	1
35 U.S.C. § 103	4
35 U.S.C. § 261	11
35 U.S.C. § 311(a)	3
35 U.S.C. § 311(b)	3
35 U.S.C. § 318(a)	3
37 C.F.R. § 42.100(a)	3
125 Stat. 299	3

OTHER AUTHORITIES

2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE (Melville M. Bigelow ed., Little, Brown, & Co., 13th ed. 1886)	9
3 WILLIAM BLACKSTONE, COMMENTARIES	12
Brief for Intervenor—Director of the United States Patent and Trademark Office, <i>Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC</i> , 639 F. App’x 639 (Fed. Cir. 2016)	7
Oren Bracha, <i>Owning Ideas: A History of Anglo- American Intellectual Property</i> (June 2005) (unpublished Ph.D. thesis, Harvard Law School), https://law.utexas.edu/faculty/obracha/disserta- tion/pdf/chapter1.pdf	6

<i>General information concerning patents</i> , USPTO (Oct. 2015), https://www.uspto.gov/patents-getting-started/general-information-concerning-patents	7, 8
H.R. Rep. No. 112-98, pt. 1 (2011)	3
Adam Mossoff, <i>Patents As Constitutional Private Property: The Historical Protections Of Patents Under The Takings Clause</i> , 87 B.U. L. REV. 689 (2007)	11

PETITION FOR A WRIT OF CERTIORARI

Petitioner Dragon Intellectual Property, LLC respectfully submits this petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Federal Circuit.

OPINIONS AND ORDERS BELOW

The order of the Federal Circuit affirming the opinion and order of the Patent Trial and Appeal Board (PTAB) (App., *infra* 1-10) is unreported and available at 2017 U.S. App. LEXIS 21707 (Fed. Cir. November 1, 2017). The opinion and order of the PTAB (App., *infra* 11-36) is unreported and available at 2016 Pat. App. LEXIS 7559 (PTAB June 15, 2016).

STATEMENT OF JURISDICTION

The court of appeals entered its order on November 1, 2017. An application to extend the time to file a petition for a writ of certiorari was granted on January 25, 2018, making the petition due on or before March 16, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Seventh Amendment of the United States Constitution provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

INTRODUCTION

This petition presents the same issue currently before this Court in *Oil States Energy Services*: whether the Constitution permits an administrative agency to extinguish a patentee’s private issued patent rights without a trial by jury. Because the grant of certiorari in *Oil States Energy Services* is relevant to this case, this Court should hold this petition pending the outcome of *Oil States Energy Services*. Should the Court determine in *Oil States Energy Services* that IPRs are unconstitutional, Petitioner respectfully requests that the Court grant this petition, vacate the judgment below, and remand with an instruction to dismiss for want of jurisdiction.

STATEMENT OF THE CASE

Patents create property rights, protected by the Constitution. Once a patent is granted, it “is not subject to be revoked or canceled by the president, or any other officer of the Government” because “[i]t has become the property of the patentee, and as such is entitled to the same legal protection as other property.” *McCormick Harvesting Mach. Co. v. C. Aultman & Co.*, 169 U.S. 606, 608-09 (1898).

The sole patent involved in this case, U.S. Pat. No. 5,930,444 (the ’444 patent), which is owned by the petitioner, was granted by the PTO on July 27, 1999. In September, 2011—more than a decade later—Congress passed the America Invents Act (the AIA) to combat what it perceived as inefficiencies in patent litigation.

The AIA made several significant changes to the U.S. patent system, including abolishing *inter partes* reexamination and replacing it with *inter partes* review

(IPR). 125 Stat. at 299, 305. The AIA also renamed the PTO's Board of Patent Appeals and Interferences, which is now the Patent Trial and Appeal Board (the Board). *Id.* at 290.

The old *inter partes* reexamination proceeding differs significantly from the new *inter partes* review proceeding in that the former included neither a discovery process nor a trial, while the latter includes both. As such, the AIA allows the Board to review existing patents and extinguish those rights in a true adversarial process, via the newly created *inter partes* review. See 35 U.S.C. §§ 311(a) & 318(a); 37 C.F.R. § 42.100(a); H.R. Rep. No. 112-98, pt. 1, at 46-47 (2011). *Inter partes* review commences when a party—often an alleged patent infringer—asks the Board to reconsider the PTO's issuance of an existing patent and invalidate it on the ground that it was anticipated by prior art or obvious. 35 U.S.C. § 311(b).

Historically, though, suits to invalidate patents would have been tried before a jury in a court of law. The Constitution thus provides patent owners with a right to a jury and an Article III forum. *Inter partes* review violates these rights.

1. On December 20, 2013, Dragon filed infringement suits on the '444 patent against DISH Network and Sirius XM Radio in the District of Delaware. On December 23, 2014, almost at the statutory deadline for doing so, DISH petitioned for *inter partes* review against the '444 patent.

2. Later, Sirius moved to join DISH's IPR petition. The Board granted review for DISH and granted joinder for Sirius on January 8, 2016.

3. Meanwhile, on December 2, 2015, the Federal Circuit held that *inter partes* review was constitutional. *MCM Portfolio LLC v. Hewlett-Packard Co.*, 812 F.3d 1284, 1288-92 (Fed. Cir. 2015).

4. On June 15, 2016, the Board issued its Final Written Decision for the DISH IPR, invalidating all the claims of the '444 patent under the review on obviousness grounds under 35 U.S.C. § 103 (pre-AIA). Dragon timely appealed the Board's determination to the Federal Circuit, arguing that the Board erred in its obviousness findings. The appellate briefing of Dragon's appeal concluded on January 31, 2017, when Dragon filed its appellate reply brief.

5. On June 2, 2017, this Court granted certiorari to the Federal Circuit for the *Oil States Energy Services* case, which is currently still pending before the Court. In that case, among other questions, petitioner Oil States raised the same constitutional question based on which Dragon is now also petitioning for a writ of certiorari—whether *inter partes* review violates the Constitution by extinguishing private property rights through a non-Article III forum without a jury. The Court granted certiorari in the *Oil States Energy Services* case solely for that question.

6. On November 27, 2017, the Court held an oral hearing on the *Oil States Energy Services* case. The Court has not issued an opinion for the case, but is expected to do so soon.

7. The question presented in this case is nearly identical to that presented in the *Oil States Energy Services* case, except that, in addition to all the constitutional issues identified and the arguments

made by Oil States, Dragon also challenges whether *inter partes* review—even under the “public rights” doctrine—can be invoked against patents granted before *inter partes* review was statutorily established by Congress in 2011, including the ’444 patent, which was granted more than 12 years earlier.

REASONS FOR GRANTING THE PETITION

Inter partes review violates the Constitution. Suits to invalidate patents must be tried before a jury in an Article III forum, not in an agency proceeding. *Inter partes* review conflicts with this Court’s cases upholding the constitutional guarantees of a jury and an Article III court for patent invalidation.

This Court has long held that patent “infringement cases today *must* be tried to a jury, as their predecessors were more than two centuries ago.” *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 377 (1996) (emphasis added). At a minimum, the Constitution requires that an Article III judge adjudicate all cases in law and in equity arising under federal law. U.S. CONST. art. III. Contrary to this Court’s precedent, the Board’s *inter partes* review proceeding provides neither the jury nor the Article III forum guaranteed by the Constitution.

I. This Court’s Precedent Confirms That The Seventh Amendment Provides Patent Owners With A Right To A Jury In Invalidity Proceedings.

The Seventh Amendment ensures a jury trial “[i]n Suits at common law.” U.S. CONST., amend. VII. The “thrust of the Amendment was to preserve the right to jury trial as it existed in 1791.” *Curtis v. Loether*, 415

U.S. 189, 193 (1974). Beyond that, this Court has held that the Seventh Amendment “also applies to actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty.” *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989).

In 1791, “[a]n action for patent infringement is one that would have been heard in the law courts of old England.” *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 992-93 (Fed. Cir. 1995). And it had been that way for 200 years before that, too. See *Darcy v. Allein* (1601) 77 Eng. Rep. 1260 (KB); see also Oren Bracha, *Owning Ideas: A History of Anglo-American Intellectual Property* 33 (June 2005) (unpublished Ph.D. thesis, Harvard Law School), <https://law.utexas.edu/faculty/obrach/dissertation/pdf/chapter1.pdf> (noting that, in *Darcy*, “none of the parties disputed that the common law court had jurisdiction to decide the validity of the patent”). The only other way for a patent to be revoked at that time would have been a writ *scire facias*—essentially a show-cause order as to why the patent should not be revoked—that could be filed in the Chancery courts. And even in those instances, any disputed facts were tried to a jury in the common law courts. See, e.g., *Ex Parte Wood & Brundage*, 22 U.S. 603, 614-15 (1824) (“[I]t is ORDERED * * * that the said Judge do award a process, in the nature of a *scire facias*, to the patentees, to show cause why the said patent should not be repealed * * * and that if the issue be an issue of fact, the trial thereof be by a jury.”).

As this Court has held in the copyright context—indistinguishable from patents in this regard—“the common law and statutes in England and this country granted copyright owners causes of action for infringement [and those suits were] tried in courts of law, and thus before juries.” *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 348-49 (1998). It is thus clear that patent infringement cases—including invalidity defenses where damages are sought—are the province of the jury. See *Markman*, 517 U.S. at 377; *Tegal Corp. v. Tokyo Electron Am., Inc.*, 257 F.3d 1331, 1340 (Fed. Cir. 2001).

Disregarding this long line of precedent, *inter partes* review takes a patent infringement claim out of the jury’s hands and entrusts it to bureaucrats. In support of this regime, the PTO has argued that “patents are a quintessential public right closely intertwined with a federal regulatory program,” thus giving the agency power to revoke patents. Brief for Intervenor—Director of the United States Patent and Trademark Office at 2, *Oil States Energy Servs.*, 639 F. App’x 639 (mem.). Ignoring the proper historical analysis mandated by this Court’s cases, the Federal Circuit has agreed, holding that patent rights are mere “public rights” of the sort outside Seventh Amendment protection. *MCM Portfolio*, 812 F.3d at 1293.

Yet patents are certainly more than that. As even the PTO has recognized, patents are a property right, complete with the most important characteristic of private ownership—the right of exclusion. See *General information concerning patents*, USPTO (Oct. 2015), <https://www.uspto.gov/patents-getting-started/general-information-concerning-patents> (“A patent for an

invention is the grant of a property right to the inventor[—]the right to exclude others * * *”). Even more important is that the private right exists wholly apart from the government once granted. See *United States v. Am. Bell Tel. Co.*, 128 U.S. 315, 370 (1888) (“[The subject of the patent] has been taken from the people, from the public, and made the private property of the patentee * * *”). That is why “[o]nce a patent is issued, the patentee must enforce the patent without aid of the USPTO.” *General information concerning patents*, USPTO, *supra*. If the patent were as tied to a public regulatory scheme as the PTO contends, the agency would also be responsible for violations of the patent. But that has never been the case.

Congress’s attempt to “streamline” patent litigation by permitting the Board to resolve invalidity defenses thus impermissibly supplants the jury trial and creates a conflict with this Court’s jurisprudence. Indeed, turning over patent invalidation to agency judges renders *Markman* a dead letter. This Court’s teaching that patent “infringement cases today *must* be tried to a jury” is now easily bypassed by an alleged infringer using *inter partes* review to nullify it. See *Markman*, 517 U.S. at 377. This Court should not permit that workaroud of the constitutional jury-trial guarantee.

Doubtless Congress and the PTO believe that *inter partes* review is more efficient. But the Seventh Amendment enshrines the right to jury in the Constitution precisely because of the possibility that a future legislature would find juries to be inefficient or inconvenient. *Inter parties* review is inconsistent with this guarantee. This Court’s review is needed to resolve

the conflict on this exceptionally important issue and enforce the Constitution's jury-trial right.

II. This Court's Precedent Confirms That Patent Owners Have A Right To An Article III Forum For Invalidity Proceedings.

Even if the Board's determination of invalidity in this case did not violate the Seventh Amendment, it nonetheless violated Article III and this Court's precedent. This Court has "long recognized that, in general, Congress may not 'withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.'" *Stern v. Marshall*, 564 U.S. 462, 484 (2011) (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 284 (1855)). *Inter partes* review hopelessly conflicts with that mandate.

If a suit is within federal jurisdiction, then the test for Article III is whether the case "is made of 'the stuff of the traditional actions at common law tried by the courts at Westminster in 1789.'" *Ibid.* (quoting *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring in judgment)).

Patent infringement cases are. See, e.g., *Boulton Watt v. Bull* (1795) 126 Eng. Rep. 651, 656, 660 (CP). Subject to the caveat of disputed facts being tried to a jury, these suits were raised in England during the Eighteenth Century either in actions at law or suits in equity. 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 236-39, §§ 930-34 (Melville M. Bigelow ed., Little, Brown, & Co., 13th ed. 1886). Either way, as

Stern teaches, they fit comfortably within the Article III tradition.

Given this backdrop, it is unsurprising that this Court has long held that once a patent is granted, it “is not subject to be revoked or canceled by the president, or any other officer of the Government” because “[i]t has become the property of the patentee, and as such is entitled to the same legal protection as other property.” *McCormick*, 169 U.S. at 608-09. That is why this Court has held in the context of land patents that “we do not believe that * * * the man who has obtained a patent from the government can be called to answer in regard to that patent before the officers of the land department of the government.” *Iron Silver Mining Co. v. Campbell*, 135 U.S. 286, 301-02 (1890). “The only authority competent to set a patent aside, or to annul it, or to correct it for any reason whatever, is vested in the courts of the United States, and not in the department which issued the patent.” *McCormick*, 169 U.S. at 609.

III. *Inter Partes* Review Cannot Be Justified By The Public-Rights Doctrine, Especially For Patents Granted Earlier.

To be sure, “there [i]s a category of cases involving ‘public rights’ that Congress could constitutionally assign to ‘legislative’ courts for resolution.” *Stern*, 564 U.S. at 485. And this Court has indeed permitted tribunals other than Article III courts to exercise the judicial power over public rights. But that doctrine cannot justify *inter partes* review because patents do not fall into the public-rights category.

Public rights encompass only claims (i) by or against the government, (ii) which have been historically resolved outside the Judicial Branch, or (iii) the resolution of which is “essential to a limited regulatory objective * * * integrally related to particular federal government action.” *Stern*, 564 U.S. at 490-91. Patent-validity claims are none of these.

A patent has been recognized for centuries as a private property right, so patent infringement cases do not rely on congressional grace for an Article III court. Cf. *Granfinanciera*, 492 U.S. at 54-55 (rejecting the argument that a fraudulent conveyance suit came within the “public rights” exception because it took place in a bankruptcy proceeding and holding that “[i]f a statutory right is not closely intertwined with a federal regulatory program Congress has power to enact, *and* if that right neither belongs to nor exists against the Federal Government, then it must be adjudicated by an Article III court” (emphasis added)).

Patents “have * * * the attributes of personal property,” 35 U.S.C. § 261, and thus patent-validity claims involve disputes over quintessential private property rights that must be adjudicated by courts. Adam Mossoff, *Patents As Constitutional Private Property: The Historical Protections Of Patents Under The Takings Clause*, 87 B.U. L. REV. 689, 701 (2007) (discussing the American judicial tradition of patents’ protection under Takings Clause as property rights).

The power sought to be exercised by the Board in *inter partes* review is a “prototypical exercise of judicial power.” *Stern*, 564 U.S. at 494. That is because a final, binding judgment is being entered on *a cause of action*—patent invalidation—that stems from the

common law and does not depend on any agency regulatory regime as it predates the agency by centuries. *Ibid.*

If a question about a patent’s validity may instead be shunted from the federal courts to an administrative agency “simply by deeming it part of some amorphous ‘public right,’” then Article III’s protections have devolved into mere “wishful thinking.” *Stern*, 564 U.S. at 495. And to do so with patent invalidation conflicts with this Court’s mandate that “Congress may not ‘withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity.’” *Id.* at 484 (quoting *Murray’s Lessee*, 59 U.S. at 284). After all, public-rights cases are the exception. Most disputes involve only private rights—including “private tort, contract, and property cases, as well as a vast range of other cases.” *Atlas Roofing Co. v. Occupational Safety & Health Review Comm’n*, 430 U.S. 442, 458 (1977). “Private rights * * * traditionally include[] * * * property rights,” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1551 (2016) (Thomas, J., concurring) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES 130-39), and these cases adjudicate “the liability of one individual to another under the law as defined.” *Stern*, 564 U.S. at 489 (quoting *Crowell v. Benson*, 285 U.S. 22, 51 (1932)). These private rights—the broad swath of matters fit for judicial resolution—may only be adjudicated by Article III courts.

Even if this Court finds that the boundary between a private right and a public right can be sometimes blurry for a particular agency with judicial power assigned by a specific statute, see, *Stern*, 564 U.S. at

489 (“[T]here may be instances in which the distinction between public and private rights * * * fails to provide concrete guidance as to whether, for example, a particular agency can adjudicate legal issues under a substantive regulatory scheme.”), it is clear that *inter partes* review at the very least cannot be invoked under the public-rights doctrine to invalidate patents that were granted before *inter partes* review was even statutorily established by Congress. Indisputably, before the AIA was enacted in 2011, Congress never *assigned* judicial power to the PTO to invalidate patents. Cf. *Stern*, 564 U.S. at 485 (“[T]here [i]s a category of cases involving ‘public rights’ that Congress could constitutionally *assign* to ‘legislative’ courts for resolution.” (emphasis added)).

In sum, patent infringement cases—complete with invalidity defenses—were “traditional actions at common law” and therefore “the responsibility for deciding that [type of] suit rests,” if not with juries then at a minimum, “with Article III judges in Article III courts.” *Ibid.* (quoting *N. Pipeline*, 458 U.S. at 90 (Rehnquist, J., concurring in judgment)); see also *Am. Bell*, 128 U.S. at 365 (“Patents are sometimes issued unadvisedly or by mistake * * * * In such cases courts of law will pronounce them void * * * * That is a judicial act, and requires the judgment of a court.”). Even if good reasons exist to allow the agency to revoke patents through *inter partes* review, this Court’s “deference in matters of policy cannot * * * become abdication in matters of law.” *NFIB v. Sebelius*, 132 S. Ct. 2566, 2579 (2012). The Constitution prohibits *inter partes* review, and this Court’s review is needed to resolve the conflict and ensure the Article III forum for such disputes that the Constitution requires.

CONCLUSION

Petitioner respectfully requests that the Court grant the petition for a writ of certiorari, vacate the judgment below, and remand for further consideration consistent with the Court's decision.

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