No. 16-712

IN THE

Supreme Court of the United States

OIL STATES ENERGY SERVICES, LLC,

Petitioner,

v.

GREENE'S ENERGY GROUP, LLC, ET AL.

Respondents.

On 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—an adversarial process 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.

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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 long advocated for the rights of small inventors, and has filed *amicus curiae* briefs in defense of those rights. Phyllis Schlafly personally spoke out against enactment of the Leahy-Smith America Invents Act ("AIA"), which is at issue in this

[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 and Respondent Greene's Energy Group, LLC, have filed blanket consent for *amicus* briefs, and Respondent United States consented by the letter that accompanies the filing of this *amicus* brief.

case. Eagle Forum ELDF has consistently advocated for the traditional, pre-AIA American patent system as being the foundation for innovation and wealth. For example, Eagle Forum ELDF successfully filed an *amicus curiae* brief on the side of inventors in *Bilski v. Kappos*, 561 U.S. 593 (2010).

Eagle Forum ELDF has a direct and vital interest in this case to defend against the evisceration of patent rights in the United States and to support longstanding judicial precedent that patents are "private rights" protected by Article III courts and the right to a jury trial, rather than the mistaken and nebulous view advocated today by the United States Department of Justice that patents are "public rights."

INTRODUCTION

The Leahy-Smith America Invents Act ("AIA") sharply tilted the playing field against small inventors, by favoring large corporations having a comparative advantage that includes greater lobbying influence. Specifically, the AIA facilitated a mistaken notion of patents as being "public rights" so that the issue of whether a patent was validly issued is now dependent entirely on the whim of a federal agency, the Patent and Trademark Office, which the AIA empowered with the authority to use *inter partes* review to override even Article III courts. This is a form of *Chevron* Deference that has run amok, insomuch that under the AIA a federal agency can and does now rescind private property rights in its sole and unfettered discretion at the insistence of corporate behemoths that have the immense resources to use the

AIA for their own benefit and to the detriment of small inventors.

Article III courts have the independence and the finely tuned procedures essential to establishing a level playing field for parties involved in patent disputes, including the all-important right to a jury trial before one's property rights may be revoked. Executive branch agencies, in contrast, are heavily susceptible to influence by political winds and a multi-billion-dollar lobbying industry. In contravening the Constitution by undermining Article III courts and the right to a jury trial, the AIA disrupts and deters innovation by small inventors which has long been the foundation of American prosperity.[2]

At issue in the case at bar is whether patents are "public rights" vulnerable to rescission at any time by a federal agency, and whether that agency may overrule Article III courts while denying a patent owner the right to a jury trial. The answer to both of these questions should be "no."

SUMMARY OF ARGUMENT

The term "right" appears only once in the text of the original Constitution, in the Patent Clause at Article I, Section 8, clause 8. Patent rights are not a "public right" that can be willy-nilly taken away in a mere administrative proceeding, any more than one's

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[2] *See, e.g.*, Raymond P. Niro, "Why Are Individual Inventors Important To America?" IPWatchdog.com (July 7, 2013) (listing nearly three-dozen inventions that changed the world, all by "individual inventors who ultimately formed companies to exploit their ideas, but who initially manufactured nothing") http://www.ipwatchdog.com/2013/07/07/why-are-individual-inventors-important-to-america/id=42758/ (viewed Aug. 7, 2017).

ownership right in real property or one's money in a bank account can be administratively deprived. To allow for administrative agency deprivation of private property rights contravenes multiple provisions of the Constitution, including Article III and the Seventh Amendment. Particularly objectionable is how an administrative agency can take patent rights away from a patent holder after a patent has been validly issued by the very same administrative agency. Indeed, the very term "public right" is an oxymoron, lacking any coherent meaning in the patent context.

Signed into law on September 16, 2011, the AIA has been an unconstitutional disruption of settled rules of law concerning private property rights, the bedrock right to a jury trial, and Article III jurisdiction. Pub. L. 112–29, 125 Stat. 284. The AIA authorizes a federal agency, the Patent and Trademark Office ("PTO"), comprised of officials who have never been elected and nearly all of whom were never confirmed by the Senate, to preempt a proceeding before an Article III judge concerning patentability.

The AIA has created havoc for the patent framework that had worked remarkably well for two-and-a-quarter centuries. The traditional patent system, prior to the AIA, played an essential role in incentivizing the innovation that brought productivity and wealth to the American people far greater than anything ever seen in human history. Just as small businesses create most jobs, individual inventors have been responsible for most innovation. The AIA distorted that historically successful process to the point where now a patent holder is subject to having his intellectual capital – private property rights –

arbitrarily taken away by a bureaucratic process that operates without the safeguards that exist in the federal courts, without the benefit of a jury trial, and ***even over the objections or the contrary findings of an Article III judge***. This is unconstitutional and unjustified.

Patent rights are private, not public, rights, and this Court has never held otherwise. The briefing in this case by Respondent United States, espouses the mistaken view that patents are public rights. That distorted view of patent rights by the Executive branch has caused the PTO to overreach in adjudicating issues of patent validity and has resulted in a violation of the separation of powers. Accordingly, *Chevron* Deference should not be given to the PTO's interpretation and implementation of the AIA and Article III authority over patent invalidation must be restored here.

The importance of the traditional patent laws is one of the few issues on which Phyllis Schlafly and Ayn Rand agreed. Both viewed the American patent system as a foundation of prosperity, and both viewed patent rights as private rights as strong and essential as other well-recognized property rights. By striking down as unconstitutional the AIA system of agency interference with patent rights, this Court would protect fundamental rights and the separation of powers, and facilitate more of the inventive achievements that have long propelled the American economy.

ARGUMENT

I. PATENT RIGHTS ARE PRIVATE, NOT PUBLIC, RIGHTS, AND PATENT HOLDERS ARE ENTITLED TO A JURY TRIAL.

Private rights are entitled to a jury trial before they are taken away. "If the right is legal in nature, then it carries with it the Seventh Amendment's guarantee of a jury trial." *Granfinanciera v. Nordberg*, 492 U.S. 33, 54-55 (1989); U.S. CONST. Amend. VII. Patent rights are private rights, and thus the AIA is unconstitutional in depriving inventors of their Seventh Amendment right to a jury trial.

Perhaps the single biggest objection to the ratification of the Constitution in 1788 was its lack of protection for the right to a jury trial in civil cases, so this right is no small matter. "The objection to the plan of the convention, which has met with most success in this State, and perhaps in several of the other States, is *that relative to the want of a constitutional provision* for the trial by jury in civil cases." *The Federalist No. 83* (Hamilton, July 5, 1788) (emphasis in original).[3]

Patents have all the characteristics of a private right, similar to the right in real property. For example, patent rights include the fundamental "right to exclude," which is considered the *sine qua non* on which all of property is based. 35 U.S.C. § 154 ("Every patent shall … grant to the patentee, his heirs or assigns, of the right to exclude others from making,

[3] http://www.constitution.org/fed/federa83.htm (viewed Aug. 27, 2017).

using, offering for sale, or selling the invention throughout the United States."). "[O]ne of the essential sticks in the bundle of property rights is the right to exclude others." *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 82 (1980). A patent grant, which carries with it the right to exclude, clearly shows that the framers of the Constitution intended that patents be private rather than public rights.

"The right to exclude others is generally one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011 (1984) (citation and quotations omitted). "[T]he 'right to exclude[]' [is] universally held to be a fundamental element of the property right." *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) (quoting, *inter alia*, *Int'l News Svc. v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting) ("An essential element of individual property is the legal right to exclude others from enjoying it.")).

But patent rights are much broader and include far more than the right to exclude, further confirming that patents are a private property right. As Professor Mossoff has convincingly explained, patents have long been understood to be rooted as property rights:

> 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).

Efforts to limit patent rights to merely the right to exclude can be traced back to a mistaken view of Chief Justice Roger Taney in the 1800s and his tendency to rewrite law from the bench. "Taney rewrote the 1836 Patent Act into the terms later adopted in § 154 of the 1952 Patent Act, declaring that the 'patent ... consists altogether in the right to exclude' and that '[t]his is all that [an inventor] obtains by the patent.'" Mossoff, "Exclusion and Exclusive Use in Patent Law," 22 Harv. J. Law & Tech. at 341. Professor Mossoff explained that "[s]imilar to the concerns expressed by historians about Taney's infamous decision in *Dred Scott*, one patent law historian has characterized the *Bloomer* decision as an 'extraordinary holding which appeared on its face so contradictory to the statutory language.'" *Id.*

Multiple patent doctrines, such as the patent doctrine of exhaustion, recognize the existence and benefits of private property rights in patents and the need for a bright-line demarcation for where those rights end and the rights of others begin. "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. In addition, just as real property often includes a remainder interest after a period of time, patents include a conceptually similar remainder interest for the public after a term of years of exclusivity for the patent holder.

Patent rights exist as a private right for the overall benefit of the public, by creating a powerful private incentive for innovation. "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)).

The unjustified attempt by some anti-patent activists to recharacterize patent rights as some kind of "public right" is of recent vintage, and an outgrowth of the often-criticized legal realism movement. "Since the turn of the century, the concept of property had succumbed to the acid wash of a nominalism first popularized in the law by the legal realists." *Id.* at 372. Part of that legal realism is to mischaracterize patents as merely a government-granted monopoly which can be taken away. Scholars and multiple federal courts have properly rejected that mistaken notion. For example Seventh Circuit Judge Frank Easterbook has written:

> Patents are not monopolies, and the tradeoff is not protection for disclosure. Patents give a right to exclude, just as the law of trespass does with real property. Intellectual property is intangible, but the right to exclude is no different in principle from General Motors' right to exclude Ford from using

> its assembly line, or an apple grower's right to its own crop.

Frank H. Easterbrook, "Intellectual Property is Still Property," 13 Harv. J.L. & Pub. Pol'y 108, 109 (1990) (quoted in Mossoff, "What is Property?", 45 Ariz. L. Rev. at 414).

The Court of Appeals for the Federal Circuit and Respondent United States are mistaken in recharacterizing a patent right as a "public right" that can be taken away by a governmental agency at any time, without the protection of a jury trial or an Article III court. Patent rights should be as secure and inviolate as other kinds of private property rights. Indeed, the framers of the Constitution deemed patent rights to be so important that patent rights are the only explicit reference to "right" in the entire body of the original Constitution. U.S. CONST. Art I, Sec. 8, cl. 8 ("To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive ***Right*** to their respective Writings and Discoveries") (emphasis added).

Patent rights are property rights that require clear delineation without the uncertainties and malleability associated with public rights. As Justice Kennedy wrote for this unanimous Court:

> 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).

The Federal Circuit has also recognized that "[p]atent protection is all about boundaries. An applicant has the right to obtain a patent only if he can describe, with reasonable clarity, the metes and bounds of his invention." *Intellectual Ventures I LLC v. Symantec Corp.*, 838 F.3d 1307, 1328 (Fed. Cir. 2016). "A properly issued patent claim represents a line of demarcation, defining the territory over which the patentee can exercise the right to exclude." *Id.* (citing *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. 2120, 2129 (2014)). This holding reinforces the truism that patents are extraordinarily similar to real property, and that the rights which attach to both patents and to real property are private rights.

The libertarian philosopher Ayn Rand strongly supported patent rights as private rights:

> 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). Likewise, constitutional lawyer and conservative activist Phyllis Schlafly 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.

Phyllis Schlafly, "Death for Innovation" (March 11, 2011).[4]

Some trace the origin of the inapplicable concept of a "public right" to the philosophy of Immanuel Kant, who suggested that "public rights" are those that exist based on institutional support, while "private rights" exist on their own, without the need for institutional backing. *See, e.g.*, Ernest J. Weinrib, "Private Law and Public Right," 61 Univ. of Toronto L.J. 191, 195 (Spring 2011) (Kant's "'public right' refers to a condition in which public institutions actualize and guarantee [certain] rights"). While that dichotomy may have some philosophical appeal, it is not one embraced by our Founders and no right expressly mentioned in the Constitution, as patent rights are, should be considered to be a public right.

The position taken in this case by Respondent United States that "[p]atents are quintessential public rights" is incorrect both factually and legally, and

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[4] http://www.pseagles.com/Death_for_Innovation (viewed Aug. 27, 2017).

contrary to the incentive system that patent law is intended to create. (Brief for the Federal Respondent in Opposition to the Petition at 9) Not only has this Court never accepted the notion that patent rights are public rights, but this Court has repeatedly implied the opposite.

For the first half-century after the Constitution was ratified and the initial Patent Act of 1790 was enacted, there were only about ten references by this Court to the phrase "public right," none of which were related to patents in the sense of an invention. To the contrary, "public right" referred then primarily to matters like access by the public to property. The very concept of a "public right" is a fiction when used in connection with patents and other well-recognized private property rights. More recently, this Court has confirmed that 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 incoherence of describing patents as public rights is made obvious by considering the following. If patents were merely public rights, then Congress itself could take those rights away by repealing the patent statute on which those rights are based. But this Court has held that Congress cannot do that, thereby indicating that patent rights are not public rights which can be revoked by government. Like other private rights, patent rights vest such that not even Congress itself can take away patent rights by subsequently repealing the patent statute upon which already-issued patents are based. *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.").

The mere existence of a public interest in patents does not create a "public right" in them. "[A] public interest in the innovation incentive of the patent law … does not convert a private right into a public right." *Cascades Projection LLC v. Epson Am., Inc.*, Nos. 2017-1517, 2017-1518, 2017 U.S. App. LEXIS 8337, at *3 (Fed. Cir. May 11, 2017) (Newman, J., concurring in denial of an initial hearing *en banc*).

Barely two months ago, in a case involving trademark rights, this Court analogized patent rights to real property and again implied that all of these are private rights:

> Trademark registration is not the only government registration scheme. For example, the Federal Government registers copyrights and patents. State governments and their subdivisions register the title to real property and security interests ….

Matal v. Tam, 137 S. Ct. 1744, 1761 (2017). The assertion that patent rights have somehow become public rights unlike other types of property rights is arbitrary and untenable.

The Seventh Amendment broadly protects the right to a jury trial for private rights. *Granfinanciera* established that where a claim is against a right that is not a "public right," then "the defendant to such a claim is entitled to a jury trial under the Seventh Amendment." *Exec. Bens. Ins. Agency v. Arkison*, 134 S. Ct. 2165, 2169 n.3 (2014). The rule is no different in intellectual property, as held by this Court. *See, e.g.*, *Hana Fin., Inc. v. Hana Bank*, 135 S. Ct. 907, 912 n.2 (2015) (rejecting an attempt to deny a right to a jury trial on a trademark issue).

In sum, a "public right" in the patent context is an oxymoron, and is really not any right at all. Property rights need to be secure to attract investment. The AIA is simply unconstitutional in how it authorizes a federal agency, the PTO, to revoke a patent in derogation of the private right of the patent holder to a jury trial.

II. AGENCY INTERFERENCE WITH ARTICLE III COURTS VIOLATES SEPARATION OF POWERS AND DISCOURAGES INNOVATION.

It is elementary that the constitutional requirement of separation of powers prohibits an agency in the Executive branch from interfering with and overruling a pending proceeding in an Article III court. "To preserve [the] checks [on the branches of government], and maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded." *INS v. Chadha*, 462 U.S. 919, 957-58 (1983).

Yet the AIA establishes *inter partes* review that allows such disruption long after a patent was issued and even amidst ongoing federal litigation in an Article III court. Simple logic dictates that if an appeal is not allowed from an Article III court to an administrative agency, due to separation of powers, then likewise an *inter partes* proceeding at the PTO should not preempt or override an ongoing proceeding in a federal court.

Instead, the PTO's interpretation of the AIA has imposed an unconstitutional form of *Chevron* Deference. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). Article III judges nominated by the President and confirmed by the United States Senate

for a life tenure are demoted to secondary status, below that of largely unknown and unvetted bureaucrats located within a federal agency, in this case the PTO. Agency employees can be lobbied by K-Street[5] firms who know best how to game the system, and agency employees themselves may aspire to be hired one day at a much larger salary by a company whose fate on certain cases they have been deciding. This system has all the vices that strict enforcement of separation of powers would and should avert.

Even in its short existence, there have been many arbitrary and capricious decisions rendered by the Patent Trial & Appeal Board ("PTAB") under the AIA, in a classic example of *Chevron* Deference gone wild. The Honorable Randall R. Rader, formerly Chief Judge on the Federal Circuit, co-authored a white paper filled with devastating examples of regulatory abuses by the PTAB under the AIA. A. Abbott, *et al.*, "Crippling the Innovation Economy: Regulatory Overreach at the Patent Office" (August 14, 2017).[6] Among many instances of abuse set forth in that article, it described the following:

> Microsoft filed three separate IPR petitions against U.S. Patent No. 8,144,182 (the '182 Patent), which is owned by Biscotti, a small business in Texas. … When Microsoft chose not [to] take a license to use Biscotti's patented technology, the small start-up company had no other choice but to sue Microsoft in federal court in November 2013. … Microsoft

[5] "K Street" is the common term for referencing the multi-billion-dollar lobbying industry in D.C., located predominantly on K Street in the Northwest quadrant. http://www.opensecrets.org/lobby/ (viewed Aug. 27, 2017).

[6] https://regproject.org/paper/crippling-innovation-economy-regulatory-overreach-patent-office/ (viewed Aug. 29, 2017).

> filed three petitions at the PTAB in April 2014 to invalidate Biscotti's patent. Despite these efforts, Microsoft lost all three IPR challenges in March 2016. Although Microsoft is now precluded from making the same invalidity arguments in court, defending the PTAB actions imposed a significant financial and time burden on Biscotti and delayed the patent infringement trial for almost two years.

Id. at 23-24 (footnotes omitted).

The analysis in "Crippling the Innovation Economy" by former Chief Judge Randall R. Rader and others demonstrates how the PTAB even has an explicit conflict-of-interest that would be unacceptable in an Article III court, and how PTAB proceedings are tilted against small inventors. For example, the PTAB has a significant financial incentive in terms of additional fees when it grants a request for *inter partes* review. As a result of this financial incentive, it should come as no great surprise that the PTAB grants nearly 80% of such requests. *See id.* at 22 (citing Gregory Dolin, "Dubious Patent Reform," 56 B.C. L. Rev. 881, 926 (2015)). Such a conflict-of-interest would surely be a violation of the Due Process Clause if ever utilized in an Article III court. Numerous additional examples of how PTAB procedures are beneath the standards of Article III courts have been documented. *See, e.g.*, A. Abbott, *et al.*, *supra*, at 20-32.

In the context of land patents, this Court rejected the violation of separation of powers that the PTAB is engaging in with respect to patented inventions:

> 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).

Likewise, 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).

Patents for inventions are issued in a manner that establishes property boundaries for the inventor on

one side, and the public on the other. Technological development cannot change the property boundaries, and others may continue to invent outside of those demarcations. Recognizing that patents do constitute vested private rights promotes "Progress of Science and useful Arts" as envisioned by the Constitution. U.S. CONST., Art. I, § 8, cl. 8.

Indeed, it is difficult to imagine any other violation of separation of powers as disruptive as having a federal agency encroach on Article III proceedings, as the AIA empowers the PTO to do. Nobel laureate Professor Ronald Coase observed that "[s]o long as the rule of law is known when parties act, the ultimate economic result is the same no matter which way the law has resolved the issue." *Coltman v. Commissioner*, 980 F.2d 1134, 1136-37 (7th Cir. 1992). Allowing a federal agency to erode the jurisdiction of Article III courts, as the AIA does, disrupts that rule of law and interferes with an optimal economic result.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Dated: August 30, 2017 Respectfully submitted,

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