No. 16-712

IN THE

Supreme Court of the United States

OIL STATES ENERGY SERVICES, LLC,

Petitioner,

v.

GREENE'S ENERGY GROUP, LLC,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR PACIFIC LEGAL FOUNDATION, SOUTHEASTERN LEGAL FOUNDATION, AND NATIONAL ASSOCIATION OF REVERSIONARY PROPERTY OWNERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

CASES:

Cited Authorities

Cited Authorities

Cited Authorities

Cited Authorities

Page

STATUTES AND OTHER AUTHORITIES:

Page

Page

Cited Authorities

INTEREST OF *AMICI CURIAE*[1]

Founded in 1973, Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation providing a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF's attorneys have participated as lead counsel or counsel for *amici* in several cases before this Court involving the role of the Article III courts as an independent check on the Executive and Legislative Branches under the Constitution's Separation of Powers. See, *e.g.*, *Rothe Dev., Inc.* v. *Dep't of Def.*, No. 16-1239 (U.S. filed Apr. 13, 2017) (*amici* arguing against Executive Branch's unaccountable use of legislative power); *Foster* v. *Vilsack*, 820 F.3d 330 (8th Cir. 2016), *cert. denied*, 137 S.Ct. 620 (2017) (Auer deference to agency staff testimony); *Nat'l Ass'n of Mfrs.* v. *Dep't of Def.*, No. 16-299 (U.S. filed Sept. 2, 2016) (interpretation of Clean Water Act venue statute); *Gloucester Cnty. Sch. Bd.* v. *G.G. ex rel. Grimm*, 136 S.Ct. 2442 (2016) (Auer deference to agency guidance letter); *U.S. Army Corps of Eng'rs* v. *Hawkes Co., Inc.*, 136 S.Ct. 1807 (2016) (judicial review of agency interpretation of Clean Water Act); *Decker* v. *Northwest Envtl. Def. Ctr.*, 133 S.Ct. 1326 (2013) (Auer deference to Clean Water Act regulations); *Sackett* v. *EPA*, 566 U.S. 120 (2012) (same); *Rapanos* v. *United States*, 547 U.S. 715 (2006) (agency regulations defining "waters of the United States").

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents are being lodged herewith.

Founded in 1976, Southeastern Legal Foundation (SLF) is a national nonprofit, public-interest law firm and policy center that advocates individual liberties, limited government, and free enterprise in the courts of law and public opinion. For forty years, SLF has advocated for the protection of private property interests from unconstitutional takings. SLF frequently files *amicus curiae* briefs at both the state and federal level in support of property owners. See *Murr* v. *Wisconsin*, 137 S.Ct. 1933 (2017); *Army Corps of Eng'rs* v. *Hawkes*, 136 S.Ct. 1807 (2016); *Suitum* v. *Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994); *Lucas* v. *S.C. Council*, 505 U.S. 1003 (1992); and *Tenn. Valley Auth.* v. *Hill*, 437 U.S. 153 (1978).

The National Association of Reversionary Property Owners is a Washington State non-profit foundation assisting property owners in the defense of their property rights. Since its founding in 1989, the Association has assisted over ten thousand property owners and has been extensively involved in litigation concerning landowners' interest in the land subject to active and abandoned railroad rights-of-way easements. See *National Ass'n of Reversionary Property Owners* v. *Surface Transp. Bd.*, 158 F.3d 135 (DC Cir. 1998), and *amicus curiae* in *Preseault* v. *Interstate Commerce Comm'n*, 494 U.S. 1 (1990), and *Marvin M. Brandt Rev. Trust* v. *United States*, 134 S.Ct. 1257 (2014).

INTRODUCTION

Once granted an owner's patent "become[s] the property of the patentee, and as such is entitled to the same legal protections as other property." *McCormick Harvesting Mach. Co.* v. *Aultman & Co.*, 169 U.S. 606, 608-09 (1998). See also *United States* v. *Am. Bell Tel. Co.*, 128 U.S. 315, 370 (1888) (patents are "made the private property of the patentee, by the action of one of the departments of the government acting under the forms of law"). An owner's patent is a property interest protected by the Fifth Amendment.

An owner's right to be secure in his property is one of the primary objects for which the national government was formed. In *United States* v. *Jones*, 132 S.Ct. 945, 949 (2012), this Court recalled Lord Camden's holding in *Entick* v. *Carrington*, 95 Eng. Rep. 807 (C.P. 1765), "The great end for which men entered into society was to secure their property."[2]

This Court explained, "In any society the fullness and sufficiency of the securities which surround the individual in use and enjoyment of his property constitute one of the most certain tests of the character and value of government." *Monongahela Navigation Co.* v. *United*

2. "Government is instituted to protect property of every sort ***. This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his own ***." James Madison, *The Complete Madison* (Saul K. Padover, ed., 1953), pp. 267-68 (remarks published in National Gazette, Mar. 29, 1792) (emphasis in original). See also James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* (3rd ed. 2008).

States, 148 U.S. 312, 324 (1893) (followed by *Olson* v. *United States*, 292 U.S. 246, 254 (1934)).[3]

Chief Justice Roberts recalled the protection of private property arises from Magna Carta:

> [The Fifth Amendment] protects "private property" *without any distinction between different types*. The principle reflected in the Clause goes back at least 800 years to Magna Carta *** Clause 28 of that charter forbade any "constable or other bailiff" from taking "corn or other provisions from anyone without immediately tendering money therefor" ***. *** The colonists brought the principles of Magna Carta with them to the New World, including that charter's protection against uncompensated takings of personal property.
>
> *Horne* v. *Dep't of Agriculture*, 135 S.Ct. 2419, 2426 (2015).[4]

This appeal asks whether Congress may vest the exclusive authority to adjudicate (and extinguish) ownership of a patent to a non-Article III tribunal without the right of trial by jury.

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3. See also *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 552 (1972) ("[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights ***. That rights in property are basic civil rights has long been recognized."); *United States* v. *James Daniel Good Real Property*, 510 U.S. 43, 61 (1993) ("an essential principle: Individual freedom finds tangible expression in property rights.").

4. Quoting Magna Carta, Cl. 28 (1215), in William S. McKechnie, *Magna Carta: A Commentary on the Great Charter of King John* 329 (2nd ed. 1914); emphasis added.

SUMMARY OF ARGUMENT

A patent, once issued, is a private property interest protected by the Constitution. Allowing a non-Article III tribunal composed of Executive Branch appointees to divest an owner of their previously vested property interest in a patent without a jury trial violates *both* the Seventh Amendment and the separation of powers doctrine.

ARGUMENT

I. Separation of powers prohibits Congress from delegating Article III judicial decisions to the non-Article III Patent Trial and Appeal Board.

> *"There is no liberty if the power of judging be not separated from the legislative and executive powers."*
>
> Alexander Hamilton,
> *Federalist No. 78*.[5]

A. Separation of Powers prohibits Congress from conferring "judicial Power" on non-Article III tribunals.

The Framers devised this nation's constitutional structure in accordance with one "fundamental insight: concentration of power in the hands of a single branch is a threat to liberty." *Clinton* v. *City of New York*, 524

5. *The Federalist Papers* (Clinton Rossiter ed. 1961), p. 466 (quoting 1 Montesquieu, *Spirit of Laws*, p. 181 (1748)).

U.S. 417, 450 (1998) (Kennedy, J., concurring) (citing Madison, *Federalist No. 47*, p. 301). James Madison was unequivocal about the degree of that threat, stating that "an accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." *Id.* The Framers were all too familiar with how the tyrannical impulses of consolidated power could interfere with individual pursuits of life, liberty, and property.[6]

Thus, the Constitution divides and separates the power of the federal government into three coequal branches – legislative, executive, and judicial. Article I vests "[a]ll legislative Powers *** in a Congress of the United States[;]" Article II vests the executive power "in a President of the United States[;]" and Article III vests "[t]he judicial Power of the United States *** in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. I §1; art. II §1; art. III §1.

This structure "diffus[es] power the better to secure liberty." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). But the Framers understood that mere "parchment barriers" between the branches could not alone ensure such security. Madison, *Federalist No. 48*, p. 308. Accordingly, the Constitution "give[s] to each [branch] a constitutional control over the

6. See generally Phillip Hamburger, *Is Administrative Law Unlawful?* (2015) (detailing historical abuses of consolidated power and describing the development of the U.S. Constitution as a response to and protection against such abuses).

others," without which "the degree of separation which the maxim requires, as essential to a free government, [could] never in practice be duly maintained." *Id.* The "constant aim," Madison explained, was "to divide and arrange the several [branches] in such a manner as that each may be a check on the other ***." Madison, *Federalist No. 51*, p. 322. The substantive and procedural limitations built into this tripartite system serve as a "self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley* v. *Valeo*, 424 U.S. 1, 122 (1976) (*per curiam*).

The authority to decide cases is the "constitutional birthright" of Article III courts which Congress cannot deny.[7] "Article III establishes an independent Judiciary, a Third Branch of Government with the 'province and duty *** to say what the law is' in particular cases and controversies." *Marbury* v. *Madison*, 5 U.S. 137, 177 (1803). The Founders understood "[a] Judiciary free from control by the Executive and Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government." *United States* v. *Will*, 449 U.S. 200, 217-18 (1980). "As its text and our precedent confirm, Article III is 'an inseparable element of the constitutional system of checks and balances' that 'both defines the power and protects the independence of the Judicial Branch.'" *Northern Pipeline* v. *Marathon Pipeline Co.*, 458 U.S. 50, 58 (1982).

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7. "[T]he authority to decide cases, which is our Constitutional birthright, we said in *Stern* *** Congress can't take that away from us." *Executive Benefits Ins. Agency* v. *Arkison*, 134 S.Ct. 2165 (2014), Oral Argument Trans., p. 51 (statement of Chief Justice Roberts).

Under "the basic concept of separation of powers, the judicial power can no more be shared with another branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto." *Bank Markazi* v. *Peterson*, 136 S.Ct. 1310, 1330 (2016) (Roberts, C.J., dissenting) (quoting *Stern* v. *Marshall*, 564 U.S. 462, 483 (2011)).

When Congress impermissibly vests Article III "judicial Power" in a non-Article III tribunal, that delegation of judicial authority will be struck down as unconstitutional. See *Stern* and *Northern Pipeline*, *supra*.

In *Executive Benefits*, 134 S.Ct. at 2172, this Court explained:

> [In *Stern*] Congress had improperly vested the Bankruptcy Court with the "judicial Power of the United States," just as in *Northern Pipeline*. Because "[n]o public right exception excuse[d] the failure to comply with Article III," we concluded that Congress could not confer on the Bankruptcy Court the authority to finally decide the claim.[8]

8. Citing *Northern Pipeline*, 458 U.S. at 85-86. A "public rights exception" is inapplicable here. An owner's property interest in a vested patent is a "private right," not a "public right." See *Crowell* v. *Benson*, 285 U.S. 22, 50 (1932) ("the distinction is at once apparent between cases of private right and those which arise between the government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments."). See also *Northern Pipeline*, 458 U.S. at 68 ("The public-rights doctrine is grounded in a historically recognized distinction between matters that could be conclusively determined

In *Morrison* v. *Olson*, 487 U.S. 654, 694 (1988), this Court reminded us that it zealously guards the separation of powers.

> Time and again we have reaffirmed the importance in our constitutional scheme of the separation of governmental powers into the three coordinate branches. *** the system of separated powers and checks and balances established in the Constitution was regarded by the Framers as "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." We have not hesitated to invalidate provisions of law which violate this principle.[9]

And, as Chief Justice Roberts recently reminded us, "Hamilton warned that the Judiciary must take 'all possible care to defend itself against [the] attacks' of the other branches." *Bank Markazi*, 136 S.Ct. at 1335

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by the Executive and Legislative Branches and matters that are 'inherently *** judicial.'") (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 458 (1929)).

Determining whether a patent-owner may be divested of his ownership in an already issued patent is not a "public right" because the determination is an "inherently judicial" responsibility. See *Monongahela Nav. Co.* v. *United States,* 148 U.S. 312, 327 (1893). See also *Wellness Int'l Network, Ltd.* v. *Sharif*, 135 S.Ct. 1932, 1963 (2015) (Thomas, J., dissenting) ("Disposition of private rights to life, liberty, and property falls within the core of judicial power, whereas disposition of public rights does not.").

9. Citing *Bowsher* v. *Synar*, 478 U.S. 714, 725 (1986) (citing *Humphrey's Executor*, 295 U.S. 602, 629-30) (1935), and quoting *Buckley*, 424 U.S. at 122-23).

(Roberts, C.J., dissenting) (quoting *Federalist No. 78*). "The bedrock rule of Article III [is] that the judicial power is vested in the Judicial Branch alone. We first enforced that rule against an Act of Congress during the Reconstruction era in *United States* v. *Klein*." *Id.* at 1333 (citing *Klein*, 13 U.S. 128, 140-41 (1872)). Chief Justice Roberts explained, "Article III vested the judicial power in the Judiciary alone to protect against that threat to liberty. It defined not only what the Judiciary can do, but also what Congress cannot." *Bank Markazi*, 136 S.Ct. at 1333.[10]

The Framers designed the federal judiciary to stand independent of the executive and legislative branches. See *Northern Pipeline*, 458 U.S. at 58. The purpose of such independence is not only to maintain checks and balances among the three branches, but also to ensure the impartiality of the adjudicative process itself. *Id.* This helps prevent injuries to the private rights of citizens from "unjust and partial laws." Hamilton, *Federalist No. 78*, p. 470.

Article III both defines the judicial power and protects the independence of the judiciary. It extends the judicial power to "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority[.]" U.S. Const. art. III §2. That power must be exercised by courts established with certain protections defined in Article III: "The judges, both of the supreme and inferior

10. Citing *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995), and quoting *INS* v. *Chadha*, 462 U.S. 919, 961 (1983) (Powell, J., concurring).

Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." *Id.*

The judiciary is charged with interpreting the law and applying it to resolve disputes, which requires "neutral decision makers" insulated from political pressures "who will apply the law as it is, not as they wish it to be." See *Gutierrez-Brizuela* v. *Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).[11] The Good Behavior Clause grants Article III judges life tenure, subject only to impeachment. See *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 16 (1955). The Compensation Clause guarantees that Article III judges receive a fixed and irreducible salary for their services. See *Will*, 449 U.S. at 218-221. Both provisions were incorporated into the Constitution to ensure judicial independence and impartiality.

The judicial power belongs to the judiciary. "Preserving the separation of powers is one of this Court's most weighty responsibilities." *Wellness Int'l*, 135 S.Ct. at 1954 (Roberts, C.J., dissenting). The Framers anticipated that conflicts and encroachments between the different spheres of power would periodically arise. But the Framers believed (and intended) the Constitution to give each branch the "means and personal motives" to defend against such invasions. Madison, *Federalist*

11. "[W]hat would happen if politically unresponsive and life-tenured judges were permitted to decide policy questions for the future or try to execute those policies? The very idea of self-government would soon be at risk of withering to the point of pointlessness." *Gutierrez-Brizuela*, 834 F.3d at 1149 (Gorsuch, J., concurring).

No. 51, p. 356. To effectively resist encroachment, each branch must "exercise substantially all of its appropriate powers." Malcom P. Sharp, *The Classical American Doctrine of "The Separation of Powers,"* 2 U.Chi.L.Rev. 385, 409 (1935).

Self-defense against encroachment is especially crucial for the judiciary, regarded by the Framers as the "weakest of the three" branches.[12] See Hamilton, *Federalist No. 78*, pp. 465-66. Accordingly, the judiciary was elevated to an independent, co-equal branch. See Irving R. Kaufman, *The Essence of Judicial Independence*, 80 Colum.L.Rev. 671 (1980). The judiciary is not only particularly competent to defend against encroachment on its judicial power, but duty bound "to defend itself, and assert its own independence." *Kendall* v. *United States ex rel. Stokes*, 37 U.S. 524, 537 (1838) (also holding that the executive was both competent and duty bound to assess an encroachment of the executive power by the judiciary).

The "hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." *INS* v. *Chadha*, 462 U.S. 919, 951 (1983). Though each branch's interpretation of its own powers is entitled to "great respect," in the end, "'[i]t is emphatically the province and duty of the judicial department to say

12. "The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse ***." Hamilton, *Federalist No. 78*, p. 465 (citing Montesquieu, *The Spirit of Laws* (1823)).

what the law is.'" *United States* v. *Nixon*, 418 U.S. 683, 703 (1974) (quoting *Marbury*, 5 U.S. at 177). Article III protects the role of the judiciary by barring congressional attempts "to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating" constitutional courts. *Nat'l Ins. Co.* v. *Tidewater Co.*, 337 U.S. 582, 644 (1949) (Vinson, C.J., dissenting).

Nevertheless, over the last century, Congress has delegated more and more judicial authority to non-Article III tribunals – drawing ever more power into its "impetuous vortex." See Madison, *Federalist No. 48*, p. 309. But another branch's "willing embrace" of a separation of powers violation does not weaken the Court's scrutiny. *Wellness Int'l*, 135 S.Ct. at 1955 (Roberts, C.J., dissenting). This Court has noted that "enthusiasm" by another branch for a separation of powers violation has "'sharpened rather than blunted' our review." *Id.* (citing *NLRB* v. *Noel Canning*, 134 S.Ct. at 2593 (Scalia, J., concurring) (quoting *Chadha*, 462 U.S. at 944)).

This Court has long recognized that Congress cannot "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." *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856). When such suits are brought within the bounds of federal jurisdiction, the responsibility for deciding them belongs *only* to Article III judges sitting in Article III courts. See *Stern*, 564 U.S. at 484.

B. Separation of powers protects a patent-owner's property.

The power granted the three branches of government was separated to protect individual liberty. Individuals injured by a violation of separation of powers may vindicate this principle. This Court explained, "Separation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others. Yet the dynamic between and among the branches is not the only object of the Constitution's concern. The structural principles secured by the separation of powers protect the individual as well." *Stern*, 564 U.S. at 483 (quoting *Bond* v. *United States*, 564 U.S. 211, 222 (2011)).

Justice Scalia similarly observed, "The purpose of the separation and equilibration of powers in general *** was not merely to assure effective government but to preserve individual freedom." *Morrison*, 487 U.S. at 727 (Scalia, J., dissenting on other grounds). In *Bond*, this Court explained "In the precedents of this Court, the claims of individuals – not of Government departments – have been the principal source of judicial decisions concerning separation of powers and checks and balances." 564 U.S. at 222-23.

In *Stern* Chief Justice Roberts explained:

> Article III protects liberty not only through its role in implementing the separation of powers, but also by specifying the defining characteristics of Article III judges. The colonists had been subjected to judicial abuses at the hand of the Crown, and the Framers

> knew the main reasons why: because the King of Great Britain "made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." The Declaration of Independence para. 11.
>
> The Framers undertook in Article III to protect citizens subject to the judicial power of the new Federal Government from a repeat of those abuses. By appointing judges to serve without term limits, and restricting the ability of the other branches to remove judges or diminish their salaries, the Framers sought to ensure that each judicial decision would be rendered, not with an eye toward currying favor with Congress or the Executive, but rather with the "[c]lear heads *** and honest hearts" deemed "essential to good judges."

564 U.S. at 482-83.[13]

The importance of this principle – an independent judiciary – is at its zenith when the dispute involves an owner defending his right to private property against a decree of an Executive Branch board extinguishing the owner's interest in his property.

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13. Quoting the Declaration of Independence, para. 11 and 1, *Works of James Wilson* 363 (J. Andrews, ed., 1896). See also *Commodity Futures Trading Comm'n* v. *Schor,* 478 U.S. 833, 848 (1986) ("Article III, §1, serves both to protect 'the role of the independent judiciary within the constitutional scheme of tripartite government,' and to safeguard litigants' 'right to have claims decided before judges who are free from potential domination by other branches of government.'").

C. The Patent Trial and Appeals Board is not an Article III court.

The Patent Trial and Appeal Board is not an Article III court. There is no debate on this point. The Board's authority is not derived from Article III but from congressional power. Members of the Patent Trial and Appeal Board are appointed by the Secretary of Commerce without Senate confirmation (or even presidential review), are not guaranteed to serve for any fixed term of years, have no tenure protections, and may be discharged at any time. The members of the Board, like the bankruptcy judges in *Northern Pipeline*, "do not enjoy the protections constitutionally afforded to Article III judges." *Northern Pipeline*, 458 U.S. at 60. Indeed, members of the Board have far less protections and less oversight than bankruptcy judges.

Article III §2 directs, "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made *** [and] to Controversies to which the United States shall be a Party." Article III §1 "provides that these federal courts shall be staffed by judges who hold office during good behavior, and whose compensation shall not be diminished during tenure in office." *Commodity Futures*, 478 U.S. at 847. The members of the Patent Trial and Appeal Board do not fall within this description.

Delegating the exclusive authority to adjudicate – and extinguish – an owner's interest in a patent to the Board violates the separation of powers and is contrary to this Court's holdings in *Commodity Futures*, *Northern Pipeline*, *Chadha*, *Monongahela*, and *Stern*.

When a statutory scheme such as *inter partes* review denies an owner his constitutionally-guaranteed right to an Article III court and trial by jury, this Court must invalidate the act. Chief Justice Marshall explained:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. *** This is of the very essence of judicial duty. If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.

Marbury, 5 U.S. at 177-78.

Monongahela illustrates this point. In *Monongahela*, the United States argued Congress, not the Judiciary, determines the amount of compensation the United States owed the Monongahela Navigation Company for property the government took. This Court emphatically rejected the government's argument and rejected the notion that Congress could usurp from the Judicial Branch the role of adjudicating the compensation an owner is due when the government takes an owner's property. See *Monongahela*, 148 U.S. at 327 ("By this legislation congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial, and not a legislative, question. *** The constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.").

D. The Federal Circuit ignores this Court's controlling precedent.

Is there truly a meaningful threat to the separation of powers where Congress confers judicial power outside Article III? As in *Stern*, the answer is emphatically "yes." See *Stern*, 465 U.S. at 502-03. "A statute may no more lawfully chip away at the authority of the Judicial Branch than it may eliminate it entirely." *Id.* at 502. Even supposedly innocuous intrusions upon the judiciary's authority to decide "Cases" and "Controversies" compromise structural constitutional protections.

McCormick recognized the long-standing principle that patents are private property which are, as any other property right, entitled to the full protection of the Constitution. 169 U.S. at 608-09. As such, an Executive Branch employee, an examiner, may not invalidate a patent or any of its claims after it has been issued. A patent is private property that may only be extinguished by an Article III court.

Nearly one hundred years after *McCormick*, the Federal Circuit declined to follow this binding precedent, holding instead that a 1980 statute authorizing third-party-initiated patent reexamination did not violate Article III. *Patlex Corp.* v. *Mossinghoff*, 758 F.2d 592, 607 (Fed. Cir. 1985). The *Patlex* panel acknowledged that *McCormick* established "on constitutional grounds that *** an issued patent could not be set aside other than by an Article III court." *Id.* at 604. But instead of adhering to *McCormick's* command, the *Patlex* panel distinguished it based on Congress' intent to provide authority for patent reexaminations. "A defectively examined and therefore

erroneously granted patent must yield to the reasonable Congressional purpose of facilitating the correction of government mistakes. This Congressional purpose is presumptively correct, and we find that it carries no insult to the Seventh Amendment and Article III." *Patlex*, 758 F.2d at 604. The *Patlex* panel elevated Congress' interest in "correcting mistakes" above one of the "fundamental principles of constitutional law." *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 505 (1977) (Burger, C.J., dissenting).

Thirty years after *Patlex*, the Federal Circuit had another opportunity to consider this Court's holding in *McCormick*. *MCM Portfolio, LLC* v. *Hewlett-Packard Co.* involved a constitutional challenge to the same provision at issue here. 812 F.3d 1284 (Fed. Cir. 2015), *cert. denied*, 137 S.Ct. 292 (2016). In *MCM*, the panel followed *Patlex* and found no reason to distinguish *inter partes* review from the reexamination process. As such, the panel evaded this Court's holding in *McCormick* on different, but contradictory, grounds. It declared *McCormick* statutory, rather than constitutional, asserting that this Court's holding in *McCormick* "did not address Article III and certainly did not forbid Congress from granting the PTO the authority to correct or cancel an issued patent." *Id.* at 1289. And then the Federal Circuit went even further to conclude that patents are "public rights" outside the ambit of Article III.[14]

14. For a discussion of the history of "public rights" and "private rights" and why the Federal Circuit's view of their dichotomy is wrong, see Justice Thomas' discussion in *Wellness Int'l*, 135 S.Ct. at 1962 (Thomas, J., dissenting).

The Federal Circuit rested its decision in *MCM Portfolio* upon the proposition that patents are "public rights" and effectively stripped the owner of a patent of his vested property interest and denied the owner right to a trial by jury in an Article III court. 812 F.3d 1284, 1290-91 (Fed. Cir. 2015). The Federal Circuit concluded patents are "public rights" based on this Court's statement in *Stern* that "what makes a right 'public' rather than private is that the right is integrally related to particular federal government action." 131 S.Ct. at 2613. As explained by Justice Thomas, this view of the "public" right versus "private" right distinction is wrong. See *Wellness Int'l*, 135 S.Ct. 1962 (Thomas, J., dissenting). An individual's ownership of property (whether a car, a home, or a patent) is a "private right" protected by the Constitution.

The Federal Circuit's characterization of the U.S. patent system – which is based solidly in common law foundations – as a "public regulatory scheme" subject to administrative invalidation is a mischaracterization. The issuance of a patent does not "regulate," *i.e.*, control behavior, at all. Instead, when the government issues a patent it confers "the same legal protection as other property." *McCormick*, 169 U.S. at 609; see also *Patlex*, 758 F.2d at 599 ("It is beyond reasonable dispute that patents are property."). Neither Congress nor the Federal Circuit can extinguish established property rights in a patent. *Stop the Beach Renourishment* v. *Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 735 (2010) (Kennedy, J., concurring); see also *id.* at 715 ("If a legislature or a court declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation.") (Scalia, J., lead opinion).

The Federal Circuit's recent decision in *Ultratec, Inc.* v. *Captioncall, LLC*, __ F.3d __, 2017 WL 3687453 (August 28, 2017) demonstrates the constitutional deficiencies of allowing a non-Article III tribunal to adjudicate and extinguish established property rights. In *Ultratec* the patent owner's "case proceeded to trial, where the jury found the patents valid and infringed and awarded damages of $44.1 million." Slip op., p. 4. The infringer, Captioncall, petitioned the Patent Trial and Appeal Board for *inter partes* review, and five months *after* the jury verdict, the "Board issued final written decisions holding that every challenged claim was either anticipated or would have been obvious." *Id.* at 6. The Board effectively nullified the verdict of the Article III court and jury. And the Board did this on the basis of a one-hour conference call in which the Board refused to consider a sworn inconsistent statement of Captioncall's leading expert.

The Federal Circuit found, "the Board offers no reasoned basis why it would not be in the interest of justice to consider sworn inconsistent testimony on the identical issue. *** A reasonable adjudicator would have wanted to review this evidence." *Ultratec*, slip op., p. 11. The Federal Circuit also noted that "Live testimony is rare in [*inter partes* review] hearings, which typically last only about an hour." *Id.* And, the Federal Circuit continued, "a number of problems with the Board's procedures contributed to its errors in this case. First, the Board lacked the information necessary to make a reasoned decision. *** Second, the Board's procedures allowed it to make significant evidentiary decisions without providing an explanation or a reasoned basis for its decisions." *Id.* at 12-13. And, the Federal Circuit found, "The Board's procedures impede meaningful appellate review of the

agency decision-making." *Id.* Finally, the Federal Circuit noted, "[i]n district court litigation, a party dissatisfied with a ruling excluding evidence is allowed to make an offer of proof to preserve error. Parties in [*inter partes* review] are not given similar protections." *Id.* at 14.

Ultratec demonstrates why allowing the non-Article III Patent Trial and Appeal Board to extinguish an owner's right to an established patent, already held to be valid and infringed by an Article III court and a jury, violates the Seventh Amendment and separation of powers.

"Slight encroachments create new boundaries from which legions of power can seek new territory to capture." *Reid* v. *Covert*, 354 U.S. 1, 39 (1957) (plurality opinion). In a matter of decades the Patent Office has gone from lacking any authority to invalidate patents post-grant, to birthing a quasi-judiciary within its ranks. In those tribunals, patents – long understood to be constitutionally-protected property rights – are now regarded as privileges conferred by government grace. And, those privileges are revocable at the whim of an arbiter who lacks any of the Article III powers or protections.[15] In devising this scheme Congress has strayed well beyond the limits of its power into core judicial functions. The result is precisely what the Framers were trying to prevent: "the encroachment or aggrandizement of one branch at the expense of the other." *Buckley*, 424 U.S. at 122.

15. "Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decisionmaking if the other branches of the Federal Government could confer the Government's "judicial Power" on entities outside Article III." *Stern*, 564 U.S. at 484.

II. Congress cannot deny a patent owner's Seventh Amendment right to trial by jury.

> *The right to trial by jury shall be preserved.*
>
> Amend. VII,
> United States Constitution

A. The right to trial by jury is the "sacred palladium" of liberty.

Since King John met the barons on the fields of Runnymede in 1215, the right to trial by jury has been accepted as a fundamental premise of Anglo-American jurisprudence. This Court observed:

> The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts.
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> *Jacob* v. *City of New York*,
> 315 U.S. 752, 752-53 (1942).[16]

The Founders were very familiar with a sovereign's desire to deny civil jury trials. King George attempted

16. See also *United States* v. *Booker*, 543 U.S. 220, 239 (2005) ("the right to a jury trial had been enshrined since the Magna Carta").

to circumvent American colonists' right to jury trial by assigning disputes over the Stamp Act tax to admiralty courts that sat without a jury.

> John Adams voiced the American reaction: "But the most grievous innovation of all, is the alarming extension of the power of the courts of admiralty. In these courts, one judge presides alone! No juries have any concern there! The law and the fact are both to be decided by the same single judge." *** Colonists vehemently denounced admiralty courts because they worked without juries. *** [T]he colonists praised [Blackstone's] remarks [in his *Commentaries*] to the effect that trial by jury was the "sacred palladium" of English liberties ***."
>
> Leonard W. Levy, *Origins of the Bill of Rights* (1999), p. 226.

Blackstone explained the philosophy animating the colonists' desire to preserve the right to a jury trial in civil disputes.

> The impartial administration of justice, which secures both our persons and our properties, is the great end of civil society. But if that be entirely intrusted to the magistracy, a select body of men, and those generally selected by the prince, or such as enjoy the highest offices of the state, their decisions, in spite of their own natural integrity, will have frequently an involuntary bias toward those of their own rank

> and dignity; it is not to be expected from human nature, that *the few* should always be attentive to the interests of *the many*.
>
> William Blackstone, *Commentaries on the Laws of England*, Book III, p. 379.[17]

High on the list of the Crown's offenses against American colonists, the Declaration of Independence included "depriving us, in many cases, of the benefit of trial by jury." One commentator summarized why the Founders so highly valued the right to trial by jury and were so offended by the King's effort to deprive them of this right.

> The basic argument is that civil jury trials were prized by the populace chiefly for their public law implications, that is for their utility in preventing possible oppression in tax suits, condemnation proceedings, and other administrative actions and, if necessary, in obtaining redress for consummated governmental wrongs through collateral suits for damages against officials.[18]

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17. Emphasis in original.

18. George E. Butler, II, *Compensable Liberty: A Historical And Political Model of the Seventh Amendment Public Law Jury*, 1 Notre Dame J. of Law, Ethics & Public Policy 595, 635, n.44 (1985) (citing, among other authorities, *Damsky* v. *Zavatt*, 289 F.2d 46, 49-50 (2nd Cir. 1971) (Friendly, J.), and Hamilton, *Federalist No. 83*).

Madison noted and explained that trial by jury in civil litigation secured individual rights, stating, "In suits at common law, between man and man, the trial by jury, as one of the best securities to the right of the people, ought to be preserved." James Madison, *Writings 1772-1836* (The Library of America 1999), p. 444.

For these reasons the Founders included the Seventh Amendment in the Bill of Rights. The Seventh Amendment guarantees "[i]n 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 reexamined in any court of the United States, than according to the rules of the common law."[19]

Alexis de Tocqueville observed, in *Democracy in America*, that "[t]he institution of the jury *** when once it is introduced into civil proceedings, it defies the aggressions of time and man. *** The civil jury did in reality at that time [of the Tudors] save the liberties of England." Tocqueville continued and noted the political importance of the right to trial by jury in civil litigation.

> The jury, and more especially the civil jury, serves to communicate the spirit of the judges to the minds of all citizens; and this spirit, with the habits that attend it, is the soundest preparation for free institutions. *** It is especially by means of the jury in civil cases that the American magistrates imbue the lower classes of society with the spirit of their

19. Fed. R. Civ. P. 38 similarly provides, "(a) **Right Preserved.** The right of trial by jury as declared by the Seventh Amendment to the Constitution – or as provided by a federal statute – is preserved to the parties inviolate ***."

> profession. Thus, the jury, which is the most energetic means of making the people rule, is also the most efficacious means of teaching it how to rule well.
>
> *Id*. at Vol. I, Ch. XVI.

This Court has repeatedly affirmed the fundamental importance of the right to trial by jury. In *Galloway* v. *United States*, 319 U.S. 372, 398-99 (1943), Justice Black summarized the history animating adoption of the Seventh Amendment.[20]

> [I]n response to widespread demands from the various State Constitutional Conventions, the first Congress adopted the Bill of Rights containing the Sixth and Seventh Amendments, intended to save trial in both criminal and common law cases from legislative or judicial abridgment. ***
>
> [Patrick] Henry, speaking in the Virginia Constitutional Convention, had expressed the general conviction of the people of the Thirteen States when he said, "Trial by jury is the best appendage of freedom. *** We are told that we are to part with that trial by jury with which our ancestors secured their lives and property. *** I hope we shall never be induced, by such

20. Justice Blacks' statement was in an opinion dissenting on other grounds. See also *Solem* v. *Helm*, 463 U.S. 277, 286 (1893) (explaining the fundamental nature of the right to trial by jury and tracing the origin of this right to Magna Carta).

> arguments, to part with that excellent mode of trial. No appeal can now be made as to fact in common law suits. The unanimous verdict of impartial men cannot be reversed." The first Congress, therefore provided for trial of common law cases by a jury, even when such trials were in the Supreme Court itself.[21]

With this history there can be little doubt that the Seventh Amendment's right to trial by jury is a foundational tenet of our Anglo-American heritage guaranteed by our Constitution. Given this point, the inquiry turns to the question of whether this constitutional right extends to the adjudication of an owner's property interest in a vested patent. For reasons we explain below, the answer is absolutely "yes."

B. The Seventh Amendment right to jury trial includes adjudications potentially extinguishing an owner's patent.

This Court's jurisprudence holds the "right of trial by jury" is guaranteed as it existed under English common law in 1791 when the Seventh Amendment was adopted. See *Curtis* v. *Loether*, 415 U.S. 189, 193 (1974) ("[T]he thrust of the [Seventh] Amendment was to preserve the

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21. Citation omitted. Justice Black further noted, "One of the strongest objections originally taken against the constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases." *Galloway*, 319 U.S. at n.3 (quoting *Parsons* v. *Bedford, Breedlove & Robeson*, 28 U.S. 433, 446 (1830)). "Of the seven states which, in ratifying the Constitution, proposed amendments, six included proposals for the preservation of jury trial in civil cases." *Id.*

right to jury trial as it existed in 1791.").[22] See also *Pernell* v. *Southall Realty*, 416 U.S. 363 (1974).

The Seventh Amendment guarantees "the right of trial by jury" for all suits involving legal rights – as opposed to proceedings in admiralty or equity. See *Parsons*, 28 U.S. at 446. Justice Story explained further:

> The phrase "common law," found in the clause is used in contradistinction to equity, and admiralty, and maritime jurisprudence. *** By *common law*, [the Framers] meant *** not merely suits, which the *common law* recognized among its old and settled proceedings, but suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered ***.*** In a just sense, the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the particular form which they may assume to settle legal rights.
>
> *Id.* at 446-47.[23]

An action seeking to enforce a legal right would be heard by the law courts with a jury, as opposed to equity

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22. In *United States* v. *Wonson*, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) Judge Story observed, "treating the Seventh Amendment common law 'Suits' as a dynamic category extending to all new types of cases provided only that they determine 'legal rights.'" See also Butler, *supra* n.18, at n.172.

23. Emphasis in original.

and admiralty that sat without a jury. See *Parsons*, *supra.* This Court held, "if the action must be tried under the auspices of an Article III court, then the Seventh Amendment affords the parties a right to a jury trial whenever the cause of action is legal in nature." *Granfinanciera, S.A.* v. *Norberg*, 492 U.S. 33, 53 (1989).

This Court explained, "The Seventh Amendment thus applies not only to common-law causes of action but also to statutory causes of action '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.'" *City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 708-09 (1999) (citations omitted).[24]

For example, in England, before 1791, actions by owners seeking to vindicate their ownership of property were tried to a jury. Magna Carta §§39 and 52 guaranteed the right to a jury when the King took property:

> No free man shall be taken or imprisoned or disseized or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land ***. If anyone has been dispossessed or removed by us, without the legal judgment of his peers, from his lands, castles, franchises, or from his right, we will immediately restore

24. See generally Roger W. Kirst, *Jury Trial and the Federal Tort Claims Act: Time to Recognize the Seventh Amendment Right*, *Texas Law Rev.* 58 Tex.L.Rev. 549 (1980), and Eric Grant, *A Revolutionary View of the Seventh Amendment and the Just Compensation Clause*, 91 N.W.U.L.Rev. 144 (1996).

> them to him; and if a dispute arise over this, then let it be decided by the five-and-twenty barons of whom mention is made below in the clause for securing the peace.
>
> Magna Carta[25]

In *De Keyser's Royal Hotel Ltd.* v. *the King*, ch. 2, p. 222 (1919), Swinfen Eady M.R. described English law between 1708 and 1798:

> It appears then to be fully recognized [that by 1708] the land of a subject could not be taken against his will, except under the provisions of an Act of Parliament. Accordingly, in 1708, was passed the first of a series of Acts to enable particular lands to be taken compulsorily *** provision is made for the appointment of Commissioners to survey the lands to be purchased, and in default of agreement with the owners, *the true value is to be ascertained by a jury*.[26]

The English equivalent to an inverse condemnation action is a common law action called a "petition of right" for which there is the right to trial by jury. See *Baron de Bode's Case*, 8 Q.B. Rep. 208 (1845).[27]

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25. James K. Wheaton, *The History of the Magna Carta* (2012).

26. Citing Statute 7 Anne c. 26 (emphasis added).

27. See also Levy, *supra* p. 24, at 211, providing,

> Under an ordinance of 1164 known as the Constitutions of Clarendon, the sheriff, acting at the instigation of

C. Patents are constitutionally-protected private property that cannot be extinguished by a non-Article III tribunal.

The Patent Clause of the Constitution empowers Congress "[t]o 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." U.S. Const. art. I §8 cl. 8. At the time of the founding, patents were recognized as "civil rights in property afforded expansive and liberal protections under the law." Adam Mossoff, *Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent "Privilege" in Historical Context*, 92 Corn.L.Rev. 953, 990 (2007).

The Supreme Court has long recognized that patents are private property entitled to constitutional protection. See, *e.g.*, *Ex parte Wood*, 22 U.S. (9 Wheat.) 603, 608 (1824) ("The inventor has, during this period [of patent monopoly], a property in his inventions; a property which is often of very great value, and of which the law intended to give him the absolute enjoyment and possession."). As private property, patents are protected by the Fifth Amendment Takings Clause in the same manner as personal property or other property. "The Government

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> the bishop, could swear twelve men of the countryside to give a verdict – that is, to speak the truth on issues involving property rights ***. No one could be evicted or disposed of his land without the prior approval of a jury verdict. A verdict in his favor restored him to possession of the land. Thus trial by jury emerged as the legal remedy for a person who had faced dispossession.

has a categorical duty to pay just compensation when it takes your car, just as when it takes your home." *Horne*, 135 S.Ct. at 2426. See also *Fla. Prepaid Postsecondary Educ. Expense Bd.* v. *Coll. Sav. Bank*, 527 U.S. 627, 642 (1999). And the nature of patents as property rights has long been analogized to that of patents for land, which could not be revoked except in the courts. See, *e.g.*, *Consol. Fruit Jar Co.* v. *Wright*, 94 U.S. 92, 96 (1876).

One hundred and nineteen years ago, this Court resolved the specific question raised in this case – whether a patent could be invalidated by some authority other than an Article III court. Then, as now, the answer is "no."

In *McCormick*, a patent owner applied to have his patent reissued and sought to include several new claims. 169 U.S. 606, 607 (1898). While examining the reissue application, the patent examiner determined that some of the original claims lacked patentable novelty. The owner rescinded his application and obtained the original patent back from the Patent Office. This Court granted certiorari to decide whether the patent examiner's review of the new application allowed the examiner to invalidate the original patent.

In no uncertain terms, this Court held that the examiner lacked authority to invalidate the previously issued claims:

> It has been settled by repeated decisions of this court that when a patent has received the signature of the secretary of the interior, countersigned by the commissioner of patents, and has had affixed to it the seal of the patent

> office, it has passed beyond the control and jurisdiction of that office, and is not subject to be revoked or canceled by the president, or any other officer of the government. It 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.

The Court recognized that post-grant cancellation of patents by a non-Article III authority would effect a taking of property without due process of law, and constitute an "invasion of the judicial branch" by the Executive. *McCormick*, 169 U.S. at 612. Thus, "[t]he 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." *Id.* at 609.

The America Invents Act allows the Board to conduct an adversarial adjudication between a patent owner and a third party and allows the Board to extinguish the patent-owner' rights. See 35 U.S.C. §§ 311(a) and 318(a). Under the *inter partes* review proceeding an Executive Branch tribunal adjudicated Oil States' property interest in a previously vested patent and issued a decision extinguishing Oil States' ownership of the patent. Oil States was not afforded access to an Article III court or trial by jury. This statutory scheme violates the Seventh Amendment and separation of powers.

CONCLUSION

There is great risk in the glacial creep of the ever-expanding administrative state – virtually unnoticeable on a smaller scale, but no less devastating to what lies in its path. And we move ever more perilously toward a point of no return.[28]

The Framers entrusted the "judicial Power" to this Court. This power must be "jealously guarded" against such insidious encroachment. *Northern Pipeline*, 458 U.S. at 50 (1982). Without question, it "profits the Court nothing to give its soul for the whole world." *Wellness Int'l*, 135 S.Ct. at 1960 (Roberts, C.J., dissenting).

Here the Court is asked to allow Congress to assign this Court's "judicial Power" to a non-Article III tribunal, so that Congress may determine the ownership of patents already held by private owners. This violates separation of powers and the Seventh Amendment.

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28. "But the fact is *** executive bureaucracies *** swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design. Maybe the time has come to face the behemoth." *Gutierrez-Brizuela*, 834 F.3d at 1149 (Gorsuch, J., concurring).

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