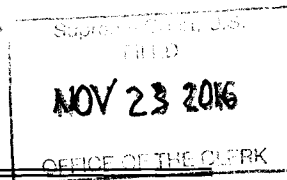


16-712
No. _____



**In The
Supreme Court of the United States**

OIL STATES ENERGY SERVICES, LLC,

Petitioner,

v.

GREENE'S ENERGY GROUP, LLC,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. 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.

2. Whether the amendment process implemented by the PTO in *inter partes* review conflicts with this Court’s decision in *Cuozzo Speed Technologies, LLC v. Lee*, 136 S. Ct. 2131 (2016), and congressional direction.

3. Whether the “broadest reasonable interpretation” of patent claims—upheld in *Cuozzo* for use in *inter partes* review—requires the application of traditional claim construction principles, including disclaimer by disparagement of prior art and reading claims in light of the patent’s specification.

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

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

Oil States Energy Services, L.L.C., formerly known as Stinger Wellhead Protection, Inc., is a wholly owned subsidiary of Oil States Energy Services Holding, Inc., which is a wholly owned subsidiary of Oil States International, Inc., a publicly traded company.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Oil States Energy Services 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 denying panel rehearing and rehearing *en banc* (App., *infra* 37-38) is unreported. The panel order disposing of the case without opinion (App., *infra* 1-2) is unreported and available at 639 F. App'x 639 (Fed. Cir. May 4, 2016). The opinion and order of the Patent Trial and Appeal Board (App., *infra* 3-36) is unreported and available at 2015 WL 2089371 (PTAB May 1, 2015).

**STATEMENT OF JURISDICTION**

The court of appeals entered its order denying rehearing on July 26, 2016. An application to extend the time to file a petition for a writ of certiorari was granted on October 14, 2016, making the petition due on or before November 23, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).



CONSTITUTIONAL AND STATUTORY 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.

35 U.S.C. §§ 311-316 are attached in the Appendix (App., *infra* 39-48).

STATEMENT

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).

In 2011, Congress passed the America Invents Act to combat what it perceived as inefficiencies in patent litigation. The Act allows the PTO’s Patent Trial and Appeal Board (the Board) to review existing patents and extinguish those rights in an adversarial process. See 35 U.S.C. §§ 311(a) & 318(a); *Google Inc. v. Jongerius*

Panoramic Techs., LLC, No. IPR 2013-00191, Paper No. 50, at 4 (PTAB, Feb. 13, 2014). This is known as *inter partes* review. 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.

Without ruling on the constitutionality of *inter partes* review, this Court recently affirmed that such review may consider patent claims under their “broadest reasonable construction.” *Cuozzo*, 136 S. Ct. at 2136. The PTO’s treatment of potential amendments to patents in *inter partes* review directly conflicts with that standard. As the patent office itself has noted, the broadest reasonable interpretation standard only makes sense when a patent holder (or potential patent holder) has the ability to engage in the back-and-forth process for amending the patent. See MANUAL OF PATENT EXAMINING PROCEDURE (M.P.E.P.) § 2258(G) (9th ed., 2015). Yet in *inter partes* review, there is no practical ability to amend and no ability to rebut arguments offered *sua sponte* by the Board. Even if patent owners have no right to an Article III forum, they must receive a fair opportunity to be heard. See 5 U.S.C. §§ 554 & 556.

The *Cuozzo* standard also requires clarification. Currently, it is unclear if traditional principles of claim construction—disparagement of prior art and reading claims in light of the specification—apply under a patent’s broadest reasonable interpretation. And the Federal Circuit has acknowledged the conundrum of using a standard in *inter partes* review that was developed for use in the very different context of a patent application. See *PPC Broadband, Inc. v. Corning Optical Commc’n RF, LLC*, 815 F.3d 747, 752 (Fed. Cir. 2016). After *Cuozzo*, proper application of claim construction standards—vital in the context of extremely valuable patents—requires guidance from this Court, and this question presents an issue of importance warranting this Court’s attention.

1. During hydraulic fracturing (“fracking”) procedures, fluid is pumped into oil and gas wells to stimulate or increase production. See App. 5. The fluid, which can be abrasive and corrosive, is often pumped into the well at pressures up to 15,000 pounds per square inch. JA67, 1:18-23, 791. The wellheads that sit on top of oil and gas wells are not designed to withstand continuous exposure to fracking fluids, and if left unprotected the wellheads can be severely damaged. *Ibid.* Murray Dallas, an employee of Stinger Wellhead Protection, Inc. (now a subsidiary of Oil States), twice attempted to solve this problem. See *id.* at 57-73, 247-78.

2. The first attempted solution was disclosed in Canadian Patent Application No. 2,195,118 (the ’118

Application).¹ This solution relied on using hydraulic pressure first to push a “mandrel” (essentially, a protective tube) into the wellhead and then to push the mandrel down onto the casing, forming a seal between the bottom end of the mandrel and the top end of the casing—pipe that is already cemented in place to form the well. JA287, 3:8-24. Fracking fluid could then be pumped through the mandrel and into the casing without contacting the wellhead equipment.

Unfortunately, using hydraulic pressure failed to form a sufficient seal with the casing. *Id.* at 897. Dallas explained: “[I]t was a failure. It wouldn’t seal, wouldn’t create a seal for us.” *Id.* at 991. Dallas determined that the ’118 design was “useless” and “just scrapped the whole idea.” *Id.* at 961.

3. Dallas’s second solution came in Patent No. 6,179,053 (the ’053 Patent), the patent at issue here. The new design “utilize[d] * * * mechanical lockdowns.” JA992. Instead of pushing down on the mandrel with constant hydraulic pressure, the new design used a mechanical lockdown to “lock” the mandrel in place after it had been inserted. *Id.* at 57, Abstract; *id.* at 70, 7:6-32.

The ’053 Patent criticized the earlier design’s reliance on hydraulic pressure: “[A] hydraulic lockdown mechanism is considered less secure than a mechanical lockdown mechanism” because it “is dependent on

¹ The same disclosure is found in U.S. Patent No. 5,819,851.

maintenance of the hydraulic fluid pressure in the setting tool.” *Id.* at 68, 3:2-9. “Since fluid pressure may be lost for a variety of reasons, persons in the industry are generally less inclined to endorse or accept a hydraulic lockdown mechanism.” *Ibid.* The ’053 Patent explained the “need for a lockdown mechanism for securing a mandrel * * * in an operative position * * * which provides a broader range of adjustment while ensuring a secure mechanical lockdown for maximum security.” *Id.* at 68, 3:42-46.

The redesign brought another significant advantage as well. Because the design did not rely on the same hydraulic pressure both to insert the mandrel and to hold it in place, the device used to insert the mandrel (the “setting tool”) could be removed after the mandrel was locked in its operating position. *Id.* at 70, 7:6-32. The shorter height was both more convenient for well operators and safer for workers. See *id.* at 67-68, 2:62-3:2; *id.* at 626 ¶ 10.

The ’053 Patent criticized the height required by the non-removable setting tool of the previous design. Because “the setting tool is not removable from the mandrel during a well treatment,” the device disclosed in the ’118 Application “has a high profile.” *Id.* at 67-68, 2:63-3:2. “A well tool with a high profile is not convenient because access to equipment mounted thereto, such as a high pressure valve, is impeded by the height of the valve above ground.” *Ibid.*

4. In 2012, Oil States filed an infringement suit against Greene’s Energy Group in the Eastern District

of Texas. During the course of the litigation, the district court, applying the “ordinary meaning” standard and traditional principles of claim construction, construed the ’053 Patent to be distinct from the ’118 Application. See JA509 (construing the term “second lockdown mechanism” to “lock the mandrel in the operative position without hydraulic pressure”). Following the *Markman* order, and almost one year into the litigation as the case was nearing the close of discovery, Greene’s petitioned for *inter partes* review. *Id.* at 306.

5. The Board granted review and construed the claims of the ’053 Patent under the “broadest reasonable interpretation” standard, holding that the ’053 Patent was anticipated by the ’118 Application. That decision was predicated on the construction of two claim terms. First, the Board held that the “second lockdown mechanism” was broad enough to cover a device that (a) relies only on hydraulic pressure to lock the mandrel in position; and (b) was integrally incorporated with the setting tool. App. 12-18. Second, the Board held, contrary to positions taken by both sides’ technical experts, that “locking” did not require maintaining the mandrel in position while operating the tool. *Id.* at 18-19. The Board concluded that the ’053 Patent’s claims were fairly encompassed by the earlier ’118 Application. *Id.* at 29.

6. Oil States moved to amend the ’053 Patent to explicitly align the claims with the specification’s consistent description of a lockdown mechanism that was both mechanical and separate from the setting tool. JA764-81.

When *inter partes* reviews were first instituted, the PTO limited motions to amend to 15 pages—with double-spacing and 14-point font. 37 C.F.R. §§ 42.24(a)(1)(v) & 42.6(a)(2). The motion was required to contain a verbatim recitation of each proposed amended claim, constructions of new claim terms (to the extent necessary to show distinction over the prior art), written description support for all claims in the patent (not just new ones), and substantive arguments establishing that the proposed amended claims were patentable over the known universe of prior art, including proving, as necessary, nonobviousness through potentially complex secondary considerations. See 37 C.F.R. § 42.121(b)(1). Because of the amendment rules in place at the time, Oil States provided a chart to the Board that identified where each claim element was disclosed.²

The Board denied the motion to amend because, according to the Board, Oil States had not “demonstrated” or sufficiently “explained” where and how each and every new claim element was disclosed in the original patent specification. App. 32-34. There was no suggestion by Greene’s that such “demonstration” or “explanation” was either required or lacking—the requirement was developed solely by the PTO. In reaching its conclusion, the Board refused to consider the evidence in the chart offered by Oil States.

² The PTO has since amended the rules to extend the page limit from 15 to 25 pages. Amendments to the Rules of Practice for Trials Before the Patent Trial and Appeal Board, 80 Fed. Reg. 28,561, 28,562 (May 19, 2015).

The Board also concluded that Oil States failed to provide “express” construction of two claim terms—one of which was defined in the claim itself and discussed at length by Oil States’ technical expert, and the other of which involved simply adding the word “assembly” to the claim’s preamble, a cosmetic change that had no bearing on the patentability of the claims. *Id.* at 35.

7. Oil States appealed the Board’s determination to the Federal Circuit, arguing that the Board erred in construing the claims at issue. First, Oil States argued that the Board ignored the patent’s discussion of the shortcomings of the prior art tool and its explanation—clear in the specification of the patent—that the ’053 Patent did not suffer from these drawbacks. Brief of Patent Owner-Appellant at 18-33, *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, (No. 2015-1855), 639 F. App’x 639 (Fed. Cir. 2016) (mem.). A patent’s “disparagement of the prior art” ordinarily plays an important role in claim construction when the Federal Circuit is reviewing a determination on patent claims. Second, Oil States argued that the Board erred in rejecting the evidence that the ’118 Application failed to enable the ’053 Patent. *Id.* at 35-43.

Oil States also argued that *inter partes* review was contrary to Article III and the Seventh Amendment of the Constitution, *id.* at 52-56, but the Federal Circuit’s decision in *MCM Portfolio LLC v. Hewlett-Packard Co.*, 812 F.3d 1284 (Fed. Cir. 2015), was handed down before the close of briefing and foreclosed that argument. Oil

States also noted—pre-*Cuozzo*—that the virtual unavailability of amendments in the *inter partes* review process counseled against use of the “broadest reasonable interpretation” standard. Brief of Patent Owner-Appellant at 18 n.2.³

Following oral argument, a panel of the Federal Circuit affirmed without opinion under that court’s Rule 36. App. 1-2. The court of appeals then denied panel rehearing and rehearing *en banc*. *Id.* at 37-38.

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.

But even if *inter partes* review were constitutional, its application by the Board violates both this Court’s and Congress’s directives concerning the rights of patent holders to protect their property rights through the amendment process. The Board has recognized that the amendment process is critical to the application of a broadest reasonable interpretation standard, yet patent-holder amendments in *inter partes* review are effectively unavailable. The Board’s implementation of *inter partes* review in this way is contrary to congressional intent and cannot be reconciled with the broadest reasonable interpretation standard, either.

³ The government intervened on appeal to defend the constitutionality of *inter partes* review and its application in this case.

Finally, the Board's application of the broadest reasonable interpretation standard has created intolerable confusion in the Federal Circuit. Different panels have reached different conclusions about how this standard interacts with traditional principles of claim construction. As a result, a patent holder's rights depend on the panel drawn rather than the patent drafted.

The Court should grant the petition and either declare *inter partes* review unconstitutional or else resolve the confusion in its administration.

I. *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.

A. This Court’s Precedent Confirms That The Seventh Amendment Provides Patent Owners With A Right To A Jury In Invalidiation 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/obracha/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.”).⁴

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

⁴ While the dividing line between law and equity can be difficult to draw and has spawned debate over whether a jury should be required in every case, see Mark A. Lemley, *Why Do Juries Decide If Patents Are Valid?*, 99 VA. L. REV. 1673, 1674-77, 1710-19 (2013), the issue here is that the option must be open to patent holders and not foreclosed by *inter partes* review proceedings.

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., LLC v. Greene’s Energy Grp., LLC*, (No. 2015-1855), 639 F. App’x 639 (Fed. Cir. 2016) (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 workaround 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 partes* 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.⁵

⁵ The recent denials of certiorari in *Cooper v. Lee*, No. 15-955, its later iteration in *Cooper v. Square, Inc.*, No. 16-76, and *MCM Portfolio LLC v. Hewlett-Packard Co.*, No. 15-1330, do not militate against review here. First, *Cooper v. Lee* arose in an odd procedural posture—the patent holder sued the Board after it instituted *inter partes* review and the district court dismissed the suit based on failure to exhaust administrative remedies—so it was unclear that the Court could even reach the Article III question. And like its predecessor, *Cooper*’s second petition for certiorari abandoned the Seventh Amendment challenge. Second, in *MCM Portfolio*, this Court’s review might have made no difference to the

B. This Court's Precedent Confirms That Patent Owners Have A Right To An Article III Forum For Invalidation 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

ultimate outcome of the case, given that the validity of the patent in issue was more dubious. The instant case presents neither problem—and the lack of a published opinion is no barrier to review given that the Federal Circuit has already issued a published opinion in *MCM Portfolio* thoroughly discussing the issue.

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 609.⁶

⁶ In *Patlex Corp. v. Mossinghoff*, 758 F.2d 594, 604 (Fed. Cir. 1985), the Federal Circuit held that *McCormick* did not foreclose the Commissioner from canceling a patent under a change made to the patent statute in 1980 that purported to allow such action. Act of Dec. 12, 1980, Pub. L. No. 96-517, 94 Stat. 3015 (1980) (codified at 35 U.S.C. §§ 301-307 (1981)). But *Patlex* pre-dates and was effectively overruled by *Stern*. Moreover, *inter partes* review is qualitatively different than a reexamination proceeding. An *inter partes* review is adjudicatory in nature and instigated by an

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. But patents do not fall into that category. 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)); see also *Stern*, 564 U.S. at 2615.

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.* “[S]uch an exercise of judicial power may [not] be taken from the Article III Judiciary simply by deeming it part of some amorphous ‘public right.’” *Id.* at 495. And to do so with patent invalidation conflicts with this Court’s mandate that “Congress may not ‘withdraw

adverse party seeking to invoke an affirmative defense against a patent infringement claim.

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).

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.

II. The PTO’s Standards For Amending Patents Conflict With The Broadest Reasonable Interpretation Standard Upheld In *Cuozzo* And The Statutory Scheme.

Part of the balance struck by Congress in enacting *inter partes* review was providing patent owners with

the right to amend their patents to avoid invalidation. 35 U.S.C. § 316(d). In fact, this Court’s approval of the broadest reasonable interpretation standard in *Cuozzo* relied heavily on the assumption that *inter partes* review was meant to serve as a form of reexamination—a process that enables a patent holder to amend disputed claims. *Cuozzo*, 136 S. Ct. at 2144-45. But *inter partes* review has become unmoored from the larger scheme of patent enforcement. The Board has adopted regulations and interpretations that impose requirements beyond what Congress established for amendments. This violates both the APA’s prohibition on arbitrary and capricious agency action, as well as congressional guidance for *inter partes* review set forth in the United States Code. As a result, this Court’s review is needed to bring the PTO’s treatment of potential amendments into line with those statutes.⁷

In *inter partes* review, the patent holder may offer a “reasonable number of substitute claims,” 35 U.S.C. § 316(d), provided that they do not “enlarge the scope of the claims of the patent or introduce new matter.” § 316(d)(3). The patent holder is given one opportunity to amend any and all claims. § 316(d)(1) (“During an *inter partes* review * * * the patent owner may file 1

⁷ The Federal Circuit recently agreed to address some of the issues with the amendment process *en banc*. Supplemental Brief for Appellant Aqua Products, Inc. on Rehearing En Banc, *In re Aqua Prods., Inc.*, No. 2015-1177 (Fed. Cir. Sept. 26, 2016), ECF No. 65, 2016 WL 5817674. Given the lack of meaningful opportunity to amend the patent in this case, the Court may want to hold this petition for the Federal Circuit’s resolution of *Aqua*. *Aqua* does not, however, address the conflict with *Cuozzo*.

motion to amend the patent * * * *”). In practice, however, the opportunity to amend is all but nonexistent.

First, the Board has arbitrarily assumed that it may go outside of the regulations and demand more from a patent holder seeking to amend a claim than is required by law. While the regulations demand that the motion to amend simply “set forth” written support for the amendment from the original specification, 37 C.F.R. § 42.121(b), the Board now insists that the patent owner go further and “explain” how the identified portions each support every element of the proposed claims. In this case, for example, the Board determined that the written support Oil States set forth in its detailed chart was inadequate because it did not, according to the Board, sufficiently “explain” how each identified portion supported every element of the proposed claims. Adding requirements outside of the regulation at the time of the *inter partes* trial, however, violates the APA. 5 U.S.C. § 706(2)(A) & (D) (“The reviewing court shall hold unlawful and set aside agency action [that is] arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; [or] without observance of procedure required by law * * * *”).

Second, the Board has assumed that it may *sua sponte* reject amended claims based on issues and arguments never suggested before the final hearing, either by the Board or the opposing party. Even worse, the Board can develop arguments against amendments *after* the hearing without providing the patent holder advance notice of the Board’s objections or the basis for them, let alone an opportunity to respond.

37 C.F.R. § 42.121(a)(1). This is an affront to due process and the Administrative Procedure Act. 5 U.S.C. § 706(2)(A) & (D).

Here, the Board *sua sponte* refused the proposed amendments because—at least in the Board’s estimation—they were not adequately explained and included undefined terms. Putting aside the fact that the regulation does not require such explanation, see 37 C.F.R. § 42.121(b), the motion to amend did set forth the (unopposed) support, as required by the PTO’s regulations, and the terms at issue would have been easily defined by—or well known to—one ordinarily skilled in the art. Yet there was no chance to explain that to the Board because of its *sua sponte* action. The combination of the single-chance rule with the Board’s approach of developing its own anti-amendment arguments and interpretations—without giving the patent holder a chance to respond—doomed the proposed amendments and violated the APA. See 5 U.S.C. § 556(d) (providing a party in an agency adjudication the opportunity “to submit rebuttal evidence * * * as may be required for a full and true disclosure of the facts”).

Third, and underlying its other errors, the Board distorts congressional direction to incorrectly require the patent holder to prove the suitability of an amendment. See 37 C.F.R. § 42.121(a)(2)(i) (requiring that motions to amend “respond to a ground of unpatentability involved in the trial”). While this should force a patent holder to show that the proposed amendment responds to a ground raised at the trial, the burden of

proof concerning patentability should still lie with the petitioner. 35 U.S.C. § 316(e) (“In an inter partes review instituted under this chapter, the petitioner shall have the burden of proving a proposition of unpatentability by a preponderance of the evidence.”). Instead, the agency places the burden on the patent holder—and absolves the petitioner of any burden by virtue of the Board’s own *sua sponte* arguments—thus turning the statute on its head and making it virtually impossible to amend.

On top of these substantive issues sits draconian process limitations imposed by the Board on any patent holder wishing to amend. When *inter partes* reviews were first instituted, the PTO enacted a 15-page limitation—with double-spacing and 14-point font—on motions to amend. 37 C.F.R. §§ 42.24(a)(1)(v) & 42.6(a)(2). The predictable result is that amendments have been virtually unavailable to patent holders. Indeed, the Board had granted only four motions to amend (one of which was unopposed) in nearly three years when this case came before it. Brad M. Scheller, *PTAB Grants Fourth Motion to Amend in an IPR Proceeding*, THE NATIONAL LAW REVIEW (June 17, 2015), <http://www.natlawreview.com/article/ptab-grants-fourth-motion-to-amend-ipr-proceeding>.⁸

⁸ The PTO later recognized the process problem and has since amended the rules to extend the page limit from 15 to 25 pages. Amendments to the Rules of Practice for Trials Before the Patent Trial and Appeal Board, 80 Fed. Reg. at 28,562. This, of course, does not ameliorate the statutory and other substantive

But as the PTO itself recognizes, using the broadest reasonable interpretation standard is only appropriate when there is an opportunity to amend. See M.P.E.P. § 2258(G) (“In a reexamination proceeding involving claims of an expired patent, claim construction pursuant to the principle[s] set forth by the court in *Phillips* * * * should be applied since the expired claim[s] are not subject to amendment.”); 1 Patent Office Litigation § 4:70 (justifying the shift from the broadest reasonable interpretation to the standard used by district courts because “claims may not be amended in an expired patent and the sole basis for the ‘broadest reasonable interpretation’ rubric is the ability to amend claims”). A panel of the Federal Circuit has recognized this as well. *In re CSB-System Int’l, Inc.*, 832 F.3d 1335, 1342 (Fed. Cir. 2016) (“The policy underlying our embrace of [broadest reasonable interpretation] in limited circumstances does not extend to cases where a patent expires during a reexamination because the patent owner’s ability to amend is substantially diminished when this occurs regardless of the stage of the reexamination.”).

Conversely, without a meaningful opportunity to amend, presumably even the agency would agree that broadest reasonable interpretation would be incorrect. The agency has made the same concession to this Court previously. See Oral Argument at 29:30, *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131 (2016) (No. 15446) (“[The PTO] has expressly used [broadest

shortcomings of the amendment process in a “broadest reasonable interpretation” regime.

reasonable interpretation] when it is possible for claim amendments to be made because it promotes the improvement of patent quality that Congress was interested in promoting in the America Invents Act by eliminating overly broad claims.”).

Yet the agency, after choosing to use the broadest reasonable interpretation standard in *inter partes* review, turned around and virtually precluded patent holders from amending their claims. Ironically, the agency has justified the restricted amendment capabilities of patent holders precisely because *inter partes* review “proceedings are not examinational in nature; they are adjudicatory proceedings.” Letter from Scott C. Weidenfeller, Associate Solicitor, United States Patent and Trademark Office, to Admiral Daniel E. O’Toole, Clerk of the Court, United States Court of Appeals for the Federal Circuit at 7 (Apr. 27, 2015) (ECF No. 50), *Microsoft Corp. v. Proxyconn, Inc.*, 789 F.3d 1292 (Fed. Cir. 2015) (No. 2014-1542). The PTO cannot have it both ways—and to behave otherwise is the epitome of caprice. The amendment regime established by the agency undermines Congress’s directives for both *inter partes* review and agency action.

If the Board, as here, allows itself the freedom to *sua sponte* find fault with the language of any potential amendment—based on arguments against the claim language that were not raised by the other side—and to ignore the plain text of the language in the patent and the meaning that a person of ordinary skill in the art would have used in defining those terms, there is nothing a patent holder can do. And the Board’s ability

to side-step amendments with an unsupported nod to a process failure only exacerbates the situation, underscoring the folly of allowing the “experts” to interpret these claims without consulting the patent holder. In all events, the Board’s practical foreclosure of patent amendments in *inter partes* review is at odds with the current interpretive standard and the APA’s prohibition on arbitrary and capricious agency action.

Having persuaded this Court that the broadest reasonable interpretation standard is appropriate in *inter partes* review, the agency must accept the consequences of that choice—a meaningful opportunity for patent holders to amend their claims. That will only come from enforcing the statutory burden on *inter partes* petitioners and limiting the Board’s authority to decide just those claims and arguments raised by the parties, not ones injected *sua sponte* to which the patent holder cannot respond. The PTO’s regulations and practice are in conflict with both the statute and the APA, as well as this Court’s acceptance of the broadest reasonable interpretation standard. Review is thus warranted to resolve the conflict.

III. The Federal Circuit Is Conflicted In Its Application Of Traditional Principles Of Claim Construction.

Traditional principles of claim construction require reading a patent as a whole, and interpreting the text of individual claims in light of the entire document—including disparagement of prior art and

reading claims in light of the specification. See, e.g., *SciMed Life Sys., Inc. v. Advanced Cardiovascular Sys., Inc.*, 242 F.3d 1337, 1341 (Fed. Cir. 2001) (“Where the specification makes clear that the invention does not include a particular feature, that feature is deemed to be outside the reach of the claims of the patent, even though the language of the claims, read without reference to the specification, might be considered broad enough to encompass the feature in question.”).

This case, however, demonstrates the uncomfortable fit between giving a claim term its “broadest” reading, and yet still accounting for other portions of the patent that can inform the meaning of that same term. See *PPC Broadband*, 815 F.3d at 752 (“While such an approach may result in the broadest definition, it does not necessarily result in the broadest reasonable definition in light of the specification.”). The Federal Circuit has been unable consistently to account for both. In light of *Cuozzo*, the interaction of these traditional principles of interpretation with the broadest reasonable interpretation standard warrants review by this Court to resolve the Federal Circuit’s evident confusion.

Because the proper interpretation of claims is the heart of patent law, the Federal Circuit has developed an extensive body of law governing claim construction. These principles include rules for construing claims when a patentee acts as his own lexicographer and, as relevant here, when a patentee disavows the full scope of claim terms. *Thorner v. Sony Comput. Entm’t Am.*

LLC, 669 F.3d 1362, 1365 (Fed. Cir. 2012); see also *Chicago Bd. Options Exch., Inc. v. Int’l Sec. Exch., LLC*, 677 F.3d 1361, 1372 (Fed. Cir. 2012) (finding disclaimer where the patent was for the “express purpose of remedying these perceived deficiencies” in the prior art); *SafeTCare Mfg., Inc. v. Tele-Made, Inc.*, 497 F.3d 1262, 1270 (Fed. Cir. 2007) (finding disclaimer where the patent “makes clear that [an] attribute of the invention is important in distinguishing the invention over the prior art”).

These rules play a critical role in claim construction. Whether these rules continue to apply as the Board gives claims their “broadest reasonable interpretation” is critically important for the rights of patent holders.

The patent at issue in this case expressly disparaged the prior art, and its abstract identified precise deficiencies in the prior art that the new invention solved. In district court litigation, such steps control the construction of specific patent claims. See, e.g., *Openwave Sys., Inc. v. Apple Inc.*, 808 F.3d 509, 517 (Fed. Cir. 2015) (finding disclaimer where the specification “repeatedly disparage[d] [earlier devices] for their failure to meet the demands of the market”). Indeed, in this case, the district court followed the patent’s disparagement teachings in construing the claims in its *Markman* order.

Likewise, the Federal Circuit has confirmed that such principles apply to decisions by the Board, too.

See *In re Man Mach. Interface Techs. LLC*, 822 F.3d 1282, 1286 (Fed. Cir. 2016) (“The broadest reasonable interpretation of a claim term cannot be so broad as to include a configuration expressly disclaimed in the specification.”). Even *inter partes* review decisions are to account for the specification of the patent and only give a claim term its broadest *reasonable* interpretation. *PPC Broadband*, 815 F.3d at 752.

Yet in *PPC Broadband*, where the Federal Circuit stressed that “reasonable” in the standard would have to account for context, the court recognized that it was “a close and difficult case because of the standard that the Board uses to construe claims.” *Id.* at 756. The panel went on to note that application of the *Phillips* standard from district court litigation would have—as it did in the district court here—yielded a “straight-forward” result. “But this case is much closer under the broadest reasonable interpretation standard given the ordinary meanings attributable to the term at issue.” *Ibid.* Unfortunately, given the murkiness of the law here, many Federal Circuit panels will be willing to punt on a “close and difficult case.” See Philip P. Mann, *When the going gets tough . . . Rule 36!*, IP LITIGATION BLOG (Jan. 14, 2016), <http://www.iplitigationblog.com/2016/01/articles/uncategorized/when-the-going-gets-tough-rule-36/> (arguing that the Federal Circuit relies on summary affirmance under Rule 36 to “side-step difficult issues on appeal and simply affirm”). Such was the case here.

The Board concluded that the patent claims should be construed to include the same two aspects of the prior art that the patent disparaged—a result directly at odds with those traditional principles of claim construction. First, under the “broadest reasonable interpretation” standard, the Board construed the claims of the ’053 Patent to suffer the very deficiencies disparaged in the prior art with respect to the “setting tool,” concluding that the “lockdown mechanism” and “setting tool” could be the same apparatus, App. 18, causing the ’053 Patent to have exactly the same unwieldy “high profile” as the prior art that it disparaged. But the Board’s analysis did not consider disparagement by the ’053 Patent—dispositive on this issue—in its claim construction.

The ’053 Patent disparaged the ’118 Application’s approach of using a non-removable “setting tool” both to insert the mandrel into the well and to hold the mandrel in place. See JA67, 2:48-51 (explaining that under the tool described in the ’118 Application, “[t]he mandrel is not separable from the hydraulic setting tool and the setting tool is used to hydraulically lock the mandrel in an operative position”). Because the setting tool “must be fairly long” and “is not removable from the mandrel,” the tool described by the ’118 Application “has a high profile” (*i.e.*, is very tall). *Id.* at 67, 2:63-66. “A well tool with a high profile is not convenient because access to equipment mounted thereto, such as a high pressure valve, is impeded by the height of the valve above ground.” *Id.* at 67-68, 2:66-3:2. The ’053 Patent explained that the goal of its invention was

to provide a “lockdown mechanism having a low profile.” *Id.* at 68, 3:56.

Second, the Board held that “lockdown mechanism” was broad enough to cover a tool that relied exclusively on hydraulic pressure to hold the mandrel in position. (Indeed, without such a broad construction, counsel for the *inter partes* review petitioner conceded that the invalidity argument would fail. See Transcript of Proceedings from Feb. 11, 2015, at 14, *Greene’s Energy Grp., LLC v. Oil States Energy Servs. LLC*, No. IPR2014-00216, 2015 WL 2089371 (PTAB May 1, 2015).) Ordinary principles of claim construction, however, preclude construing the claims of the ’053 Patent to cover such a lockdown mechanism. The ’053 Patent repeatedly and expressly disparaged the hydraulic mechanism of the ’118 Application (which was also embodied in U.S. Patent No. 5,819,851). A hydraulic lockdown mechanism is “less secure than a mechanical lockdown mechanism” because it “is dependent on maintenance of the hydraulic fluid pressure,” which “may be lost for a variety of reasons.” JA68, 3:2-9. As a result, “persons in the industry are generally less inclined to endorse or accept a hydraulic lockdown mechanism.” *Ibid.* To solve these problems, the ’053 Patent taught the need for “a secure mechanical lockdown for maximum security.” *Id.* at 68, 3:42-46.

But the Board’s application of the “broadest reasonable interpretation” standard did not even address the ’053 Patent’s disparagement of hydraulic lockdown mechanisms. As a result, the Board construed the claims of the ’053 Patent to cover the very hydraulic

mechanism that the '053 Patent criticized and sought to replace. Proper application of traditional claim construction principles would have avoided that result—making this case an ideal vehicle for this Court to consider the application of those principles in the “broadest reasonable interpretation” context.

In sum, this Court’s approval of the broadest reasonable interpretation standard did not end the confusion within the Federal Circuit concerning critical issues of claim construction. Some panels apply traditional canons of claim interpretation, including recognizing the significance of statements disparaging certain aspects of the prior art, while others—such as the one here—rubberstamp Board decisions that ignore the same well-established principles. This Court should clarify how these crucially important legal issues should be addressed.

IV. The Constitutionality And Administration Of Patent Adjudications Is Unquestionably Important And Squarely Presented Here.

When Congress enacts a regulatory measure that is directly at odds with the Constitution, the issue inherently warrants this Court’s review. When the policy causes losses in the trillions of dollars—and potentially risks even more in the future—the urgency of this Court’s review is only increased. Even if *inter partes* review were constitutional, the cost of the agency’s actions in implementing it are enormous and

will continue to grow. This Court's review is needed now.

With over 2.1 million patents currently in force—worth over \$886 billion—it is difficult to overstate their impact on our economy. See Richard Baker, *America Invents Act Cost the US Economy over \$1 Trillion*, PATENTLYO (June 8, 2015), <http://patentlyo.com/patent/2015/06/america-invents-trillion.html>. Likewise, it is difficult to overstate the toll *inter partes* review is taking on the patent system. The Board invalidates almost 80 percent of the patents it reviews—almost ten thousand claims through March of 2016. *PTAB Statistics*, USPTO (Mar. 31, 2016), <https://www.uspto.gov/sites/default/files/documents/2016-3-31%20PTAB.pdf>. Hence former Chief Judge Rader's accurate prediction that Board judges would be “acting as death squads, killing property rights.” Tony Dutra, *Rader Regrets CLS Bank Impasse, Comments on Latest Patent Reform Bill*, Bloomberg BNA (Oct. 28, 2013), <http://www.bna.com/rader-regrets-cls-n17179879684>.

According to one estimate, *inter partes* review has, thus far, destroyed \$546 billion of the United States economy by invalidating patents, and wiped out about \$1 trillion in value by devaluing the companies holding those patents. See Baker, *supra*. Even worse, that number is likely underestimated since “[i]t does not include lost opportunities, disincentives to innovation, the inability to raise money due to the decrease in collateral, and the loss of jobs without those investments.” *Ibid*.

And while one might think that only weak patents are being wiped out by this process, “experience has shown that the opposite is true. The IPR procedure is only being used against the best United States patents. This is because of pure economics” and the high monetary costs to an *inter partes* petitioner. *Ibid.* In addition, hedge funds—parties that would lack standing in an Article III court—can initiate *inter partes* review against companies and thus drive down patent owners’ stock prices. Peter J. Pitts, ‘Patent Death Squads’ vs. Innovation, WALL ST. J. (June 10, 2015), <http://www.wsj.com/articles/patent-death-squads-vs-innovation-1433978591>. The fund makes money “shorting” the stocks of patent holders and then subjecting them to the review process to reduce the value of the company.

Beyond the constitutional shortcomings of *inter partes* review, the confusion in its administration by both the Board and the Federal Circuit give rise to concern as well. It is known that “the uncertainty of administrative and judicial outcome and the high cost of resolution are a disincentive to both innovators and competitors.” *CLS Bank Int’l v. Alice Corp. Pty. Ltd.*, 717 F.3d 1269, 1321 (Fed. Cir. 2013) (en banc) (Newman, J., concurring in part, dissenting in part), *aff’d*, 134 S. Ct. 2347 (2014). Unless and until the Board provides patent holders a meaningful opportunity to amend claims challenged in *inter partes* review, and unless and until the Federal Circuit construes claims in a manner consistent with its prior jurisprudence, innovation will continue to be stifled.

This case exemplifies the problems with both the *inter partes* review system and the Federal Circuit's jurisprudence implementing it—questions that are critical to the patent system and deserving of review. Certiorari should be granted to resolve these questions.

V. Notwithstanding The Federal Circuit's Cursory Treatment, This Case Is An Appropriate Vehicle To Resolve The Important Questions Presented.

This case is an appropriate vehicle for addressing the important questions concerning the proper administration of patent law moving forward. If *inter partes* review is unconstitutional, this Court will need to say so. If *inter partes* review is constitutional, then the schisms in the Federal Circuit's jurisprudence require resolution. There are no additional legal or factual issues to complicate this Court's analysis of those important questions. The issues were briefed in the Federal Circuit and are properly before this Court.

The absence of a reasoned opinion from the Federal Circuit should not present an obstacle to certiorari for two primary reasons.

First, the constitutionality of *inter partes* review has already been examined by the Federal Circuit and that court will be reticent to invalidate a scheme with which it is becoming increasingly entangled. There is nothing to be gained from waiting any longer on these issues.

Second, a grant of certiorari in this case would serve as a salutary reminder to the Federal Circuit about the appropriate use of one-word affirmances. As a former Chief Judge of the Federal Circuit has said, it's a tool that is appropriate "where it is not necessary to explain, even to the loser, why he lost." The Seventh Annual Judicial Conference of the Court of Appeals for the Federal Circuit, 128 F.R.D. 409, 420 (May 24, 1989) (remarks of Hon. Howard T. Markey, C.J., Court of Appeals for the Federal Circuit). But the Federal Circuit goes far beyond that these days.

In a case where the district court and the Board reached opposite conclusions on a claim construction, and the Board ignored the evidence on which the district court relied, it cannot be the case that it is unnecessary for the Federal Circuit to explain its reasoning. Yet it is unfortunately not surprising given the Federal Circuit's use of that mechanism to resolve almost 50 percent of its cases. Jason Rantanen, *Data on Federal Circuit Appeals and Decisions*, PATENTLYO, (June 2, 2016), <http://patentlyo.com/patent/2016/06/circuit-appeals-decisions.html> (showing that the percentage of Rule 36 opinions in appeals from district courts has increased from 21 percent to 43 percent in less than a decade). This is an especially staggering number considering that it includes many difficult cases, such as the one here. Cf. Mann, *supra*.

If the Federal Circuit is willing to let the Board's opinion serve as a proxy for its own, this Court should not hesitate to take the Federal Circuit up on the offer. The Federal Circuit's questionable practice should not

be permitted to “cert proof” issues that are otherwise cleanly presented and worthy of this Court’s review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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