

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

OIL STATES ENERGY SERVICES, LLC,)
) Petitioner,)
) v.) No. 16-712
GREENE'S ENERGY GROUP, LLC, ET AL.,)
) Respondents.)

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OIL STATES ENERGY SERVICES, LLC,)
Petitioner,)
v.) No. 16-712
GREENE'S ENERGY GROUP, LLC, ET AL.,)
Respondents.)
- - - - -
Washington, D.C.
Monday, November 27, 2017

The above-entitled matter came on for oral
argument before the Supreme Court of the United
States at 10:05 a.m.

APPEARANCES:
ALLYSON N. HO, Dallas, Texas; on
behalf of the Petitioner
CHRISTOPHER M. KISE, Tallahassee, Florida; on
behalf of Respondent Greene's Energy Group, LLC
MALCOLM L. STEWART, Deputy Solicitor General,
Department of Justice, Washington, D.C.;
on behalf of the Federal Respondent.

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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case Number 16-712, Oil States Energy Services versus Greene's Energy Group.

Ms. Ho.

ORAL ARGUMENT OF ALLYSON N. HO
ON BEHALF OF THE PETITIONER

MS. HO: Mr. Chief Justice, and may it please the Court:

For 400 years, courts have adjudicated disputes between private parties about the validity of patents. Six years ago, Congress transferred this judicial power to an executive branch tribunal that is unusual because of five features.

First, it exercises the judicial power. Second, in disputes between private parties. Third, over private rights. Fourth, without both Article III supervision and consent. And, fifth, about questions adjudicated in courts for 400 years.

JUSTICE GINSBURG: Ms. Ho, you outlined your position, but there must be some

1 means by which the Patent Office can correct
2 the errors that it's made, like missing prior
3 art that would be preclusive.

4 So do you recognize any error
5 correction mechanism as within Article III?

6 MS. HO: Yes, certainly, Justice
7 Ginsburg. And -- and our position -- our
8 position is not that the PTO is precluded from
9 error correction. It simply can't do it
10 through this adjudication.

11 So, for example, we believe ex parte
12 reexams, which are fundamentally examinational
13 and not adjudicational in nature, are perfectly
14 consistent with Article III.

15 JUSTICE GINSBURG: But your brief
16 wasn't clear on that. You -- you recognize a
17 difference between reexamination, but you
18 didn't take a position on -- on whether that
19 would be permissible, but now you are? The
20 reexamination procedure would be all right?

21 MS. HO: Yes, ex -- ex parte
22 reexaminational -- reexamination --

23 JUSTICE KAGAN: What about inter
24 partes reexamination?

25 MS. HO: I think inter partes

1 reexamination presents a closer case, but it is
2 still fundamentally examinational. I think in
3 the government brief that we cite on page 13 of
4 our reply, where the government itself draws a
5 line between both ex parte and inter partes
6 reexamination and says these are fundamentally
7 examinational.

8 CHIEF JUSTICE ROBERTS: Could you --

9 MS. HO: And that distinguishes us --

10 CHIEF JUSTICE ROBERTS: Could you
11 review for me what you mean by examinational?

12 MS. HO: Certainly. When we -- when I
13 -- I think what the government means by
14 examinational and what we mean by examinational
15 is that that is fundamentally a proceeding
16 between the Patent and Trade Office, between
17 the government and the Patent Owner, between
18 the private -- the private party.

19 CHIEF JUSTICE ROBERTS: But it's one,
20 I suppose, in which anybody can participate?
21 In other words, including the person alleging
22 infringement or the person challenging the
23 grant of the patent?

24 MS. HO: Not with respect to -- with
25 -- with respect to -- I think that's a

1 fundamental difference. With respect to ex
2 parte reexam, the only role for the third party
3 is to request, and then at that point, the
4 third party drops out.

5 Even with respect to inter partes
6 reexam, where Congress gave the third party
7 more -- more participatory rights, the third
8 party bears no burden of production or
9 persuasion. It is still fundamentally a matter
10 between the PTO and the Patent --

11 JUSTICE KAGAN: But I thought --

12 JUSTICE SOTOMAYOR: I'm sorry, there
13 is always inherent a burden of -- of -- of
14 production. You can't write the PTO and say:
15 I think this patent's invalid, period. You
16 have to supply them with a reason for doing
17 what they're doing.

18 So why is that reason any different
19 than actively participating and pointing the
20 PTO in the right direction? What is so
21 fundamentally Article III that changes this
22 process into an Article III violation?

23 MS. HO: Certainly, Justice --

24 JUSTICE SOTOMAYOR: Both of them are
25 just informing the PTO of the nature of its

1 error and giving it an opportunity to correct
2 its error.

3 MS. HO: I think the fundamental
4 difference, which is I think why the -- the
5 government itself has referred to inter partes
6 reexam as adjudicational, is it is -- it is
7 initiated by the third party and the third
8 party actually prosecutes that proceeding.

9 It is deciding a cause between the
10 patent owner --

11 JUSTICE SOTOMAYOR: Well, not quite,
12 because under the rules, if the third party
13 settles with the patent owner, the PTO can
14 still continue the action, can still decide the
15 question, can still participate on appeal.

16 So it is a public issue that is being
17 litigated or discussed or adjudicated, so isn't
18 that quite different than a normal
19 adjudication?

20 MS. HO: I -- I don't believe so, Your
21 Honor. And -- and -- and let me -- let me push
22 back a little bit on -- on when you say that --
23 that the -- the PTO may -- may continue to
24 conduct the proceedings.

25 Both the statute and the regulations

1 provide that the PTAB may dismiss the case,
2 which its public guidance says is -- is its
3 preference, or it may proceed to final written
4 decision.

5 And we've located only four instances
6 where the PTAB, even after settlement, has
7 proceeded to final written decision. And in
8 every case, it has informed the parties that it
9 has already decided the case. So --

10 JUSTICE GINSBURG: But in -- in your
11 -- in your brief, you said if the parties
12 settle, the PTO can't go on. That was -- that
13 was an error, wasn't it, in --

14 MS. HO: Well, I believe what we did
15 was we -- we -- we quoted the statute, which
16 says it -- it can -- its preference is to
17 settle, or it may proceed -- it may proceed to
18 final written -- written decision.

19 And we've -- again, we've located only
20 four times when the PTO has -- PTAB has done
21 that. And, again, it's already reached its
22 decision.

23 JUSTICE SOTOMAYOR: If this is a
24 private right, as you claim, what does it
25 matter in terms of whether the process is

1 adjudicatory or not?

2 If I own something, which is what your
3 basic position, I understand, is, that this is
4 a personal right, how can a government agency
5 take that right away without due process of law
6 at all? Isn't that the whole idea of Article
7 III, that only a court can adjudicate that
8 issue?

9 MS. HO: I think I would say, Justice
10 Sotomayor, your -- it -- in terms of -- of
11 matters that have been adjudicated
12 traditionally in courts, over -- between
13 private parties over -- over private rights, I
14 think this Court's cases have established a
15 baseline where those matters -- Article III
16 vests those matters in Article III courts.

17 At the same time, this Court's cases
18 have recognized narrow exceptions, where public
19 rights, as distinct from private rights, are at
20 issue, where Article III does not require that
21 those rights be vested, the decisions of those
22 rights --

23 JUSTICE KENNEDY: Just to examine
24 public rights, could Congress say -- let's
25 hypothesize going forward -- that we will grant

1 you a patent on the condition that you agree to
2 this procedure; otherwise, we don't give you
3 the patent. Could Congress do that?

4 MS. HO: No, for -- for two reasons.
5 First, we believe that would be an
6 unconstitutional condition, so that Congress
7 cannot condition the exercise of a right or a
8 property or benefit of -- of any sort, to the
9 extent that doing so would -- would conflict
10 with another article of the -- of the
11 Constitution.

12 JUSTICE KENNEDY: What --

13 MS. HO: So, for example -- yes, Your
14 Honor.

15 JUSTICE KENNEDY: What's your closest
16 case for that? Not Crowell versus Benson, that
17 doesn't quite work.

18 MS. HO: I think -- I think, perhaps
19 -- I think, perhaps our -- our closest case to
20 that might be Northern Pipeline or maybe one of
21 the bankruptcy cases --

22 JUSTICE KENNEDY: I --

23 MS. HO: -- where even -- even -- even
24 the fact that Congress had recognized -- had
25 said that it's permissible for -- for these

1 rights to be adjudicated in an Article III
2 court. This Court still, in Stern, held that
3 Article III prevented the -- those
4 adjudications may not --

5 JUSTICE KENNEDY: But -- but Congress
6 didn't create the right in Stern, so that's
7 quite distinguished.

8 Let me ask you this, a basic question
9 patent lawyers would probably know the answer.
10 Could Congress say that we are reducing the
11 life of all patents by 10 years?

12 MS. HO: Yes, I think that would --
13 that -- that goes to the limited times
14 requirement in Congress that this Court doesn't
15 --

16 JUSTICE KENNEDY: Well, then that --
17 doesn't that show that the patent owner has
18 limited expectations as to the scope and the
19 validity of the property right that he holds?

20 MS. HO: No, Your Honor, I don't -- I
21 don't think the limited times requirement,
22 which is the Article I, Section 8 requirement,
23 I don't think that goes to whether Congress
24 could, by statute, withdraw the adjudication of
25 disputes that have been adjudicated in courts

1 for centuries, could withdraw those cases and
2 put them in a non-Article III tribunal.

3 Again --

4 CHIEF JUSTICE ROBERTS: What is --
5 what is the relationship between your position
6 and the takings clause? The government can
7 certainly diminish the value of your property
8 rights quite extensively when it comes up with
9 new -- new regulation.

10 You have a lot that you think you
11 could have built a mansion on, and then the
12 government passes a law and you can only build
13 a shed on it and -- and yet we often say -- or
14 give the government a lot of leeway in saying
15 that -- that they don't have to pay
16 compensation.

17 So, if the government can restrict
18 your property right in real property to that
19 extent, why can't it do so with respect to
20 patent rights?

21 MS. HO: And I think the fundamental
22 difference there, Mr. Chief Justice, in terms
23 of -- of -- of takings and due process, which
24 we haven't advanced arguments about, and
25 Article III, which is really focused on the

1 exercise of the judicial power, and it has
2 really two components.

3 It has the component that is directed
4 toward the individual rights guarantee, so the
5 guarantee of litigants to impartial
6 decision-makers and at the same time at the
7 structural protections, the checks and balances
8 protections that protect the -- the judicial
9 integrity.

10 So I think the difference here is that
11 when Congress -- and certainly individual
12 rights are at stake when the government takes
13 property that belongs to one person for a
14 public use and doesn't pay just compensation.

15 But I think, in the Article III
16 context, where Congress is taking a category of
17 cases that have been adjudicated in courts for
18 centuries and removes those cases -- withdraws
19 those cases to a non-Article III tribunal, that
20 impacts not only the individual rights
21 guarantees that Article III does --

22 JUSTICE GINSBURG: But for a very
23 limited purpose, for the purpose of determining
24 whether -- it's not a duplication of an
25 infringement action. It's -- it's a narrow

1 kind of reexamination that the -- it's only for
2 the prior art, right? And there are other
3 restrictions.

4 So it's -- it's not -- it is geared to
5 be an error correction mechanism and not a
6 substitute for litigation.

7 MS. HO: Several points to that, that
8 -- Justice Ginsburg, you're absolutely correct
9 that the grounds are under sections 102 and 103
10 novelty and non-obviousness with respect to
11 prior art.

12 Even if that were narrow, I think this
13 Court has said that it's no more permissible
14 for Congress to -- to kind of nibble around the
15 edges, as opposed to a wholesale transfer, but
16 even so, here, setting aside that those two
17 areas of novelty and obviousness make up about
18 60 percent of the patent validity challenges in
19 the district courts, the estoppel provisions
20 provide that, in the 80 percent of cases, in
21 80 percent of inter partes reviews, those
22 proceedings are taking place with concurrent
23 district court litigation.

24 So, if in those cases, if in the IPR
25 the patent holder wins, then the -- the claims

1 of the patent are canceled and the patent --
2 the challenger goes into the district court and
3 says the action is moot -- the infringement
4 action is moot.

5 If -- I'm sorry.

6 JUSTICE GORSUCH: Ms. -- Ms. Ho, we
7 have a number of cases that have arguably
8 addressed this issue already, like McCormick,
9 for example, in which this Court said the only
10 authority competent to set a patent aside or to
11 annul it or to correct it for any reason
12 whatever is vested in the courts of the United
13 States. We have cases -- and American Bell is
14 another one. We have that wonderful quote from
15 Justice Story indicating that any correction to
16 a patent has to go to a court.

17 The United States takes the position,
18 as I understand it, that some of those
19 decisions are purely statutory interpretation.

20 What's your reading of those cases?

21 MS. HO: So our reading of those
22 cases, particularly McCormick, is they are
23 constitutional. We don't need this Court to go
24 that far for us -- us to prevail. It's enough
25 in this case for the Court to hold --

1 JUSTICE GORSUCH: Why is your reading
2 that they're constitutional, if you could help
3 me with that?

4 MS. HO: Certainly. We believe -- we
5 believe they're constitutional in McCormick
6 because this Court wasn't -- didn't reach that
7 decision sort of in the absence of statutory
8 authority but in the face of it.

9 There was, at that time, statutory
10 authority in a different procedure, albeit, for
11 the --

12 JUSTICE SOTOMAYOR: Ms. Ho, I'm sorry,
13 I thought in McCormick, that -- why did the
14 Court even bother looking at the statute? What
15 it did, I understood, was look at the statute
16 and say the statute basically defines the issue
17 of a new patent being issued as one -- before
18 the old patent expires.

19 And so they were really doing a
20 statutory analysis of whether or not, by that
21 process, the old patent was expired, and they
22 were saying, no, if you want it to expire now,
23 you have to go to court, because there's no
24 statutory authority for doing it currently.

25 So I'm not quite sure how -- how you

1 get to the constitutional holding.

2 MS. HO: I -- I think how we -- how we
3 get to the constitutional holding, Your Honor,
4 is that there was, at that time, there -- there
5 -- there was another statute in play that would
6 have -- would have permitted the -- the -- the
7 -- the cancellation. So it wasn't -- it's not
8 that the Court -- there wasn't any statutory
9 authority. It wasn't simply a statutory
10 holding.

11 It's certainly true that the Court
12 didn't refer to Article -- Article III. It
13 didn't -- didn't refer to that.

14 JUSTICE SOTOMAYOR: It's certainly
15 true that it didn't refer to that other statute
16 either.

17 MS. HO: I --

18 JUSTICE KAGAN: Ms. Ho --

19 MS. HO: Yes, Your Honor.

20 JUSTICE KAGAN: Can -- can I take you
21 back to this question of where you would draw
22 the line --

23 MS. HO: Yes.

24 JUSTICE KAGAN: -- between ex parte
25 and inter partes reexamination on the one hand

1 and this? Because, as I understand what you
2 would permit, those proceedings too can be
3 initiated by a third party -- you know, can be
4 at the request of a third party, and -- and
5 those -- in those proceedings too, the third
6 party can participate in some way, can file a
7 reply to the patentee's statement, can make
8 known its views.

9 So what's the line? Where would you
10 -- what are the procedures that are here that
11 you think make this essentially adjudicatory
12 that are not in those other proceedings?

13 MS. HO: Certainly. I think how we --
14 we would define an adjudication as it's where a
15 tribunal is hearing and deciding a cause
16 between two private -- two private parties.

17 So in -- in -- in both IP reexam and
18 ex parte reexam, as Your -- as Your Honor said,
19 the third party essentially falls out after
20 making the request, is able to comment. The
21 patent holder is not --

22 JUSTICE KAGAN: No, I didn't say they
23 fall out. There are opportunities for it to
24 make known its views as to what --

25 MS. HO: Certainly.

1 JUSTICE KAGAN: And so what is it? Is
2 it discovery? Is it -- is it participation in
3 the hearing? I mean, I just want to ground
4 this in something.

5 MS. HO: Yes. I think -- I think
6 certainly the existence of -- of discovery, of
7 a hearing, all of these things show that what
8 you have here is -- is trial -- is trial-like.

9 JUSTICE KAGAN: But what -- what's the
10 most that the government could do, do you
11 think? You know, what's the -- what are the --
12 how many of these things do you have to take
13 away before you have a constitutional system?

14 MS. HO: I think -- I think,
15 fundamentally, an adjudication, an exercise of
16 the judicial power -- and one reason we know it
17 in this case is because it simply has taken a
18 category of cases out and put it into the
19 tribunal, but I think hearing and deciding a
20 cause between two private parties that results
21 -- that results in a -- in a final binding
22 judgment.

23 JUSTICE BREYER: It would be like if
24 the airlines loses your umbrella, for example,
25 and the CAB used to say, you go to the CAB, you

1 complain, they lost my umbrella. The airline
2 says, no, we didn't. Oh, that was
3 unconstitutional?

4 MS. HO: No, Your Honor, the --

5 JUSTICE BREYER: By the way, there was
6 judicial review.

7 MS. HO: I --

8 JUSTICE BREYER. As there is here.
9 And, by the way, it didn't say that your
10 rights, when you fly on an airplane or truck or
11 some other thing regulated, it didn't say as it
12 does here, subject to the provisions of this
13 title, the matter, your umbrella, or in this
14 case patents, shall be private property.
15 Uh-huh. So you have a statute that says you
16 only get the private property if, in fact, you
17 survive the provisions of the title, of which
18 this is one.

19 And, in addition to that, I thought
20 it's the most common thing in the world that
21 agencies decide all kinds of matters through
22 adjudicatory-type procedures often involving
23 private parties. So what's special about this
24 one, or do you want to say it isn't special and
25 all the agency proceedings are unlawful?

1 Because a lot of them would fit the definition,
2 I think, that you propose.

3 MS. HO: Let me -- let me -- let me
4 begin with -- with your last -- your last
5 question, Justice Breyer.

6 I don't think that invalidating IPR
7 would affect these, for the fundamental reason
8 that in virtually -- virtually all truly
9 administrative adjudications, those are between
10 the government as -- as -- as the enforcer.

11 JUSTICE BREYER: You could have -- is
12 an airline the government? Is a trucking
13 company the government? Is a utility,
14 electricity company or a natural gas company,
15 the government?

16 MS. HO: In the vast -- in the vast
17 majority of administrative adjudications, it is
18 -- it is the government, or those proceedings
19 are acting as a permissible adjunct to the
20 district court.

21 JUSTICE KAGAN: Well, one
22 understanding of this, Ms. Ho, is that this is
23 the government in a real sense. It's the
24 government trying to figure out whether it made
25 a mistake by granting the patent, which the

1 government sometimes does and knows it
2 sometimes does, but the government wants to put
3 in place a set of procedures that will actually
4 increase the government's accuracy in figuring
5 out whether it made a mistake.

6 And that involves listening to a third
7 party that has some interest in the proceeding.
8 So it seems a little bit odd to say, sure, the
9 government can reexamine this, the government
10 can allow a third party to request it, can
11 allow the third party to do some things, but
12 there's some line that falls short of what the
13 government thinks of the procedures that enable
14 the greatest accuracy.

15 So why -- why would we do that?

16 MS. HO: Certainly, Your Honor. And I
17 think to be clear, we're not -- we're certainly
18 not contesting the proposition that adversarial
19 testing can't be a very beneficial proceeding
20 for arriving at the truth.

21 But it -- it's useful and it's helpful
22 when Article III protections -- if it's an
23 adjudication between private parties over
24 private rights, adversarial testing also
25 requires Article III protections, a neutral

1 decisionmaker, not subject to -- to the -- to
2 the -- to having to curry favor with the
3 executive, which is the situation that -- that
4 we have here.

5 JUSTICE GORSUCH: Why not -- why not,
6 though, Ms. Ho, just simply say the question is
7 whether there's a private right involved? In
8 answering Justice Kagan's questions and Justice
9 Breyer's questions, you struggled with how much
10 of an adjudication does an inquisitorial
11 process have to have before it becomes an
12 adjudication. Why does that matter at all?

13 If -- if you really want to stake your
14 ground and think McCormick's right, why not
15 just say anytime a private right is taken by
16 anyone, it has to be through an Article III
17 forum?

18 MS. HO: In large measure, Justice
19 Gorsuch, because of several -- in several of
20 this Court's cases, in Schor, for example,
21 in Providence --

22 JUSTICE GORSUCH: Schor is about the
23 line between public and private rights. You
24 can stake your ground and simply say this is a
25 private right.

1 MS. HO: We certainly do stake our
2 ground on that it's a private right. We think
3 this Court held -- has held as much already in
4 Horne.

5 JUSTICE GORSUCH: But then you -- but
6 then you --

7 JUSTICE ALITO: Suppose -- suppose
8 that Congress had included inter partes review
9 in the Patent Act of 1790. Would you make --
10 would you make the same argument? Would you
11 still say it's a private right?

12 MS. HO: Yes, we would, because even
13 in -- even in -- in 1790, Your Honor, there
14 would still be a 200-year history of these
15 rights being adjudicated in -- in courts -- in
16 courts at all.

17 JUSTICE ALITO: But you think Congress
18 was under an obligation to create the patent
19 system, a constitutional obligation to do it?

20 MS. HO: No, we don't.

21 JUSTICE ALITO: So could it do it
22 subject to the -- grant these monopolies,
23 subject to this limitation?

24 MS. HO: I think there are any number
25 of ways that Congress could certainly

1 permissibly condition a grant on -- of a
2 patent. What it can't do is exert an
3 unconstitutional condition on it, either under
4 takings or due process or Article III.

5 JUSTICE SOTOMAYOR: So is your -- is
6 your position that somehow at the founding in
7 1789, given the replete English history of the
8 crown and the Privy Council, sidestepping --
9 sidestepping any judicial adjudication of
10 validity, that in 1789 the founders intended to
11 change that system as radically as to say, no,
12 we're not going to permit either the
13 legislature -- the legislature to change the
14 terms of a patent grant?

15 MS. HO: The way I would respond, Your
16 Honor, I think with respect to the history, I
17 think the history here is very strong that at
18 -- certainly, at the time of the founding and
19 for centuries before, that English courts at
20 law, this was precisely -- this wasn't just the
21 stuff that was decided in the -- in the courts
22 at Westminster in 1789 were those proceedings.

23 JUSTICE SOTOMAYOR: Your amici -- your
24 strongest amici says that it had waned, the
25 Privy Council's adjudications had waned over

1 time and that they could only find 10 times
2 over a 20-year period preceding 1789 in which
3 the Privy Council had acted. But the fact that
4 it waned didn't mean it was eliminated, and it
5 didn't mean that the Privy Council or the crown
6 thought that it no longer had those rights.

7 MS. HO: Respectfully, Your Honor, I
8 believe that it did. The -- the Privy Council
9 revoked its last patent in -- in any -- any
10 case, ordinary or otherwise, in -- in 1779.
11 And that was only after -- it was a national
12 security case in which -- which the Privy
13 Council had told the patent holder that the
14 proper thing to do was to go to a court at law.
15 And the patent holder refused to do it. And it
16 actually involved canons. And so, with the --
17 with the American Revolutionary War in the
18 offing, that was the very last time that the
19 Privy Council revoked a patent. And, in fact
20 --

21 JUSTICE GINSBURG: Who -- who grant --
22 who granted the patent in -- way back in
23 1787 -- 1789? Who granted the patent?

24 MS. HO: Who granted? It would
25 have -- in England, it would have come -- it

1 would have come from -- from the crown,
2 according to --

3 JUSTICE KENNEDY: And was it subject
4 to findings about novelty, non-obviousness?

5 MS. HO: Yes, it absolutely was, and
6 in -- in disputes between --

7 JUSTICE KENNEDY: Was that statutory,
8 or was that just the custom?

9 MS. HO: Well, the statute of
10 monopolies in 1624 referred to that the
11 validity of patents should be decided as at
12 common law. And at common law, issues of
13 novelty, precisely the issue here, was a
14 question of fact and disputed facts were
15 resolved by -- by juries.

16 JUSTICE GINSBURG: And the king
17 couldn't say I made a mistake?

18 MS. HO: Well, the statute of
19 monopolies in 1624 said the validity of a
20 patent should be decided at common law. We
21 don't disagree that the Privy Council revoked
22 patents after it, but it did so pursuant to --
23 to -- to -- to proceedings and not simply as a
24 -- as a matter of grace.

25 And if I may reserve time for

1 rebuttal.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 MS. HO: Thank you.

5 CHIEF JUSTICE ROBERTS: Mr. Kise.

6 ORAL ARGUMENT OF CHRISTOPHER M. KISE
7 ON BEHALF OF RESPONDENT GREENE'S ENERGY GROUP, LLC

8 MR. KISE: Mr. Chief Justice, and may
9 it please the Court:

10 IPR, inter partes review, comports
11 with both Article III and the Seventh Amendment
12 for at least the following three reasons:
13 First, inter partes review simply reexamines
14 the propriety of the original grant of a
15 patent, engaging in the same type of
16 patentability analysis entrusted by Congress to
17 the executive since 1790.

18 The process itself is not inherently
19 judicial, and it does not involve the exercise
20 of the judicial power.

21 Next, inter partes review does not
22 extinguish, in the language of the question
23 presented, private property rights. To the
24 extent standards of patentability were not met
25 initially, the patent simply should not have

1 issued.

2 And, finally, although we don't
3 believe respectfully the Court need reach this
4 question, inter partes review satisfies any
5 test under any of the courts' public cases.

6 JUSTICE BREYER: You at some point --
7 I mean, what I've wondered as I've read this is
8 suppose that just what you say happens, that
9 all we're doing is reexamining the patent and
10 the statute provides it, but suppose that the
11 patent has been in existence without anybody
12 reexamining it for 10 years and, moreover, the
13 company's invested \$40 billion in developing
14 it. And then suddenly somebody comes in and
15 says: Oh, oh, we -- we want it reexamined, not
16 in court but by the Patent Office.

17 Now, that seems perhaps that it would
18 be a problem or not?

19 MR. KISE: I -- I don't think so,
20 respectfully, Justice Breyer, and here's why.

21 JUSTICE BREYER: Fifteen years?

22 MR. KISE: I don't know that the
23 time --

24 JUSTICE BREYER: Thirty? Everybody --
25 I don't know how long they last, but, you know

1 --

2 MR. KISE: Well --

3 JUSTICE BREYER: -- some lasted a long
4 time.

5 MR. KISE: -- respectfully, I don't
6 think that it matters, certainly not
7 constitutionally, but -- but -- but even in the
8 structure of the -- of the patent statute --
9 the patent scheme that's been created by
10 Congress.

11 Congress established certain
12 patentability criteria that need to be met, and
13 all patents are taken --

14 JUSTICE BREYER: Everybody's dead, by
15 the way, who actually knows about the original
16 article written in Danish, that nobody found
17 except this one guy who happens to be sued for
18 infringement.

19 MR. KISE: All patents are taken
20 subject to these patentability standards.

21 JUSTICE BREYER: Yes, but I'm just
22 saying can it be anything? Can it be anything
23 at all where you're going to re -- do people
24 gain a kind of vested interest or right after
25 enough time goes by and they rely on it

1 sufficiently so that it now becomes what?

2 Is there something in the Constitution
3 that protects a person after a long period of
4 time and much reliance from a reexamination at
5 a time where much of the evidence will have
6 disappeared?

7 MR. KISE: Respectfully, Your Honor, I
8 -- I would say no, because --

9 JUSTICE KAGAN: Well, here is --

10 JUSTICE SOTOMAYOR: I understood --

11 JUSTICE KAGAN: How about -- how about
12 if there were no judicial review at all?

13 MR. KISE: Well, I think, if there
14 were no judicial review at all, that presents a
15 different question.

16 JUSTICE KAGAN: Yes. Then you would
17 have to say yes, right?

18 MR. KISE: Well, I -- I don't know
19 that I would have to say yes because we're
20 still talking about a patentability
21 determination that's being made by the
22 executive branch. This is an executive
23 adjudication. And adjudications are not
24 themselves inherently judicial.

25 CHIEF JUSTICE ROBERTS: So your --

1 your position, it strikes me, is simply that
2 you've got to take the bitter with the sweet.
3 If you want the sweet of having a patent,
4 you've got to take the bitter that the
5 government might reevaluate it at some
6 subsequent point.

7 MR. KISE: Yes -- yes, Mr. Chief
8 Justice.

9 CHIEF JUSTICE ROBERTS: Well, haven't
10 our cases rejected that -- that proposition?
11 I'm thinking of the public employment cases,
12 the welfare benefits cases. We've said you --
13 you cannot put someone in that position. You
14 cannot say, if you take public employment, we
15 can terminate you in a way that's inconsistent
16 with due process.

17 MR. KISE: I -- I don't think,
18 respectfully, Mr. Chief Justice, this is
19 inconsistent with due process. I also think
20 that the scheme itself is set up so that these
21 rights are taken subject to the power of
22 Congress to determine patentability.

23 I mean --

24 CHIEF JUSTICE ROBERTS: What about --
25 in terms of due process anyway, what about this

1 business -- and maybe it's in the Petitioner's
2 brief, that the commissioner can change the --
3 the panels if she doesn't agree with the
4 direction they're going, that she can add new
5 judges to the panel so that they'll -- in other
6 words, it's a -- the panel itself -- and I
7 think constitutionally this may be fine, is --
8 is a tool of the executive activity, rather
9 than something involving some -- anything
10 resembling a determination of rights?

11 MR. KISE: Well, Mr. Chief Justice,
12 the panel packing, if you will, mentioned by
13 Petitioner in the briefs, I don't believe --
14 and -- and I'll leave it to the government to
15 -- to have the exact statistics -- precise
16 statistics, but I don't believe that's taken
17 place more than one or two times, and I don't
18 believe it's taken place with respect --

19 JUSTICE KENNEDY: Well, suppose it
20 were rampant.

21 MR. KISE: Well, if it were rampant,
22 then I think what this Court said in *Cuozzo*,
23 that was written, that the -- the shenanigans
24 point, if you will, that the Administrative
25 Procedures Act and other provisions of the

1 Constitution would deal with infirmities in a
2 particular case on an as-applied basis, but I
3 don't think that the -- the potential for there
4 to be mischief afoot --

5 JUSTICE SOTOMAYOR: That -- that was
6 what troubled me deeply about you telling
7 Justice Kagan that, without judicial review,
8 that this would be adequate. I mean, for me,
9 this -- what saves this, even a patent
10 invalidity finding, can be appealed to a court.

11 There's deference with respect to
12 factual matters, but there is de novo review as
13 to legal matters. So how can you argue that
14 the -- the crown, the executive, the PTO, here
15 has unfettered discretion to take away that
16 which it's granted?

17 MR. KISE: Justice Sotomayor, I did
18 not mean to imply that -- that there is
19 unfettered discretion. What -- what I --

20 JUSTICE SOTOMAYOR: Well, that's what
21 you're saying because, without judicial review,
22 how -- what else is it?

23 MR. KISE: No, I think with respect to
24 this process there is judicial review.

25 JUSTICE GORSUCH: Well, now, counsel,

1 there's only judicial review if somebody
2 appeals. This isn't like an adjunct to the
3 district court, like a magistrate judge or --
4 or a bankruptcy judge, and I didn't -- I didn't
5 see any argument in your brief under Crowell or
6 something like that that this is really an
7 Article III adjunct.

8 I -- I -- I saw an argument that this
9 stands alone, fine, in the executive branch and
10 that there's, in fact, a self-executing
11 judgment issued by the director that, if not
12 appealed, has all the force of law of an
13 Article III court.

14 MR. KISE: Well --

15 JUSTICE GORSUCH: Did I miss
16 something?

17 MR. KISE: No, Your Honor. It -- it
18 -- it is subject to the Article III review.
19 It's subject to review of the federal --

20 JUSTICE GORSUCH: If somebody takes
21 review, but if not, it -- it's binding, right?

22 MR. KISE: Well, I think that would be
23 true with respect to any -- even in the
24 original examination process. I mean --

25 JUSTICE GORSUCH: Well, it's not true

1 with respect to magistrate judges or anything
2 like that. You have an absolute, you know,
3 opportunity -- the district judge has to put
4 its imprimatur on it before it has -- as an
5 adjunct of the district court.

6 MR. KISE: No, Your Honor, because I
7 -- this is a different structure. This is --
8 this is --

9 JUSTICE GORSUCH: It is a different
10 structure, yes.

11 MR. KISE: It is because it's the same
12 patentability determination that's made during
13 the original examination.

14 JUSTICE GORSUCH: Do you think it
15 would work if -- if we had land patents subject
16 to the same circumstances, that they could be
17 reexamined at any time over hundreds of years,
18 even after the farmer had sold the land to the
19 developer who built the houses and that the
20 land patent could be revoked by the government
21 by bureaucracy, I suppose, in the Department of
22 Interior?

23 MR. KISE: I think that there is --

24 JUSTICE GORSUCH: But, that it is
25 subject to packing by a director who's unhappy

1 with the results?

2 MR. KISE: There's a fundamental
3 distinction between -- respectfully, between
4 land patents which -- which grant fee-simple
5 title to the holder and an invention patent.

6 JUSTICE GORSUCH: A monopoly in the
7 use of land. What's -- what's the difference
8 between -- operative difference, other than
9 obviously one isn't land?

10 MR. KISE: Well, one is -- one is --
11 one is -- is a core fundamental right, to
12 borrow the -- the expressions of the court,
13 it's more of a Lockean interest, it's a
14 fundamental right. It's a property interest.

15 JUSTICE GORSUCH: Isn't that question
16 begging about what's a private right? Isn't
17 that the very question this Court has to
18 decide?

19 MR. KISE: Respectfully, as I began, I
20 don't believe that the Court does need to
21 decide it because this is an executive
22 adjudication, but to the extent the Court looks
23 to those factors, I think under -- under almost
24 any test the Court has established, we -- we
25 have a right that derives solely from and

1 depends solely on a federal statute.

2 There are no common law antecedents.
3 The Petitioner has not disputed that there --
4 the cases in this Court establish that patent
5 law in the United States is statutory.

6 The adjudication implicates a
7 paramount public purpose. The grant of a
8 patent is -- is the grant of a monopoly, but
9 it's a grant -- it's granted for the purposes
10 of the sovereign. It is not granted for the
11 purposes of the inventor. It benefits the
12 inventor, certainly, but the paramount public
13 purpose that is embedded in every patent is the
14 advancement of the progress of science --

15 JUSTICE GORSUCH: Fair -- fair enough,
16 when it's -- when it's granted, but once it's
17 granted, there's an abundance of law going back
18 400 years. Justice Story says it. I mean, you
19 know, this is not a new idea, that once it's
20 granted, it's a private right belonging to the
21 inventor.

22 Justice Story said it is a property
23 that has -- an inventions of a property which
24 is often a very great value, in which the law
25 intended to give him, the inventor, absolute

1 enjoyment.

2 JUSTICE KENNEDY: That -- and that's
3 the -- that's the constitutional provision.

4 JUSTICE GORSUCH: Yeah.

5 JUSTICE KENNEDY: Securing for limited
6 times authors and inventors the exclusive
7 right, securing to them, not securing to the --

8 MR. KISE: But -- but those cases were
9 decided, first of all, as -- as -- as the
10 discussion earlier revealed, they were decided
11 on a statutory basis. There was no undertaking
12 by the Court to determine that,
13 constitutionally, Congress could not establish
14 the structure that they have in an inter partes
15 review.

16 JUSTICE GINSBURG: I think Ms. Ho
17 conceded that there can be an examination --
18 reexamination. Some of the questions raised in
19 the last few minutes suggest that no -- no
20 reexamination, it's a private right, it can't
21 be taken away.

22 But Ms. Ho, I think, wisely,
23 recognized that the reexamination procedure
24 between the government is okay. But -- but the
25 problem here is it looks too much like a court

1 proceeding.

2 MR. KISE: May I respond, Mr. Chief
3 Justice?

4 Justice Ginsburg, what you're hearing
5 from the Petitioner is a process versus power
6 argument. The quarrel is with the process.
7 The Petitioner has conceded that the power
8 exists, the power of revocation, even though
9 there are -- there are citations in the brief
10 that -- that make that argument seem -- their
11 argument inconsistent, this is a process versus
12 power argument.

13 And in this Court, a unanimous Court
14 in *Cuozzo* determined -- they looked at these
15 same factors and determined that this is not an
16 adjudication, that this is an executive branch
17 action and, therefore, because the purpose of
18 it is to reexamine the patent.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 MR. KISE: Thank you, Mr. Chief
22 Justice.

23 CHIEF JUSTICE ROBERTS: Mr. Stewart.

24

25

1 ORAL ARGUMENT OF MALCOLM L. STEWART
2 ON BEHALF OF THE FEDERAL RESPONDENT
3 MR. STEWART: Mr. Chief Justice, and
4 may it please the Court:

5 Petitioner and some of the questions
6 from this Court have identified two potential
7 challenges to the inter partes review
8 procedure.

9 The first is that this can't be done
10 by executive branch officials because the
11 effect of patent cancellation is to take away a
12 private property interest.

13 The second -- and this is Petitioner's
14 argument -- is that this can't be done in the
15 way that it's being done because the PTAB is
16 using adversarial procedures.

17 JUSTICE GORSUCH: Mr. -- Mr. Stewart,
18 could you address the Chief Justice's question,
19 which I'm also stuck on, the bitter and the
20 sweet, to the -- to what extent could the
21 executive condition patents on, say, you have
22 no takings rights later or you -- you take it
23 subject to whatever conditions in terms of its
24 withdrawal that we wish to impose.

25 MR. STEWART: Well, I think if at the

1 --

2 JUSTICE GORSUCH: Including --
3 including maybe -- and, arguably, I
4 understand -- the condition that we will stack
5 the deck with judges whom we like --
6 administrative judges we like?

7 MR. STEWART: Well, I think if at the
8 time of patent issuance the statute provided
9 that the patent could be taken away for any
10 otherwise appropriate governmental reason, that
11 would be a constitutional scheme. Congress had
12 no obligation to create --

13 JUSTICE GORSUCH: So the answer to
14 Justice Breyer's question then, if there are
15 all these reliance interests and \$40 million or
16 billion dollars spent, that would just be
17 you're out of luck --

18 MR. STEWART: Well --

19 JUSTICE GORSUCH: -- take the bitter
20 with the sweet?

21 MR. STEWART: -- let me address
22 directly the Chief Justice's question.

23 JUSTICE GORSUCH: Can you answer that
24 -- answer that question?

25 MR. STEWART: It has always been part

1 of the scheme that the patent could be
2 reexamined and not -- not by an administrative
3 agency but at least by a court at any time
4 while the patent remained in force, to
5 determine whether the patentee was qualified
6 for a patent in the first place. So --

7 JUSTICE GORSUCH: So is the answer
8 yes?

9 MR. STEWART: The answer is that the
10 patentee never had any expectation that, having
11 been granted a patent, its validity --

12 JUSTICE GORSUCH: So I take it the
13 answer is yes?

14 MR. STEWART: The answer is yes
15 because the rule from the start was you get the
16 patent, but it is not immune from --

17 CHIEF JUSTICE ROBERTS: Well, how can
18 -- how does that work since this patent was
19 issued before there was inter partes review,
20 before the America Invents Act?

21 MR. STEWART: There was ex parte
22 reexamination. There was the possibility of
23 judicial proceedings in which patent validity
24 could be called into question. Take --

25 CHIEF JUSTICE ROBERTS: Well, but

1 there was -- I mean, inter partes review
2 changed those things. It is something
3 different.

4 MR. STEWART: It changed --

5 CHIEF JUSTICE ROBERTS: Including
6 particularly with respect to the procedures.

7 MR. STEWART: Well, to go directly to
8 your question about public employees, because I
9 think it is a good analogy, the Court has said
10 that if a public employee has tenure
11 protection, a guarantee that he or she can be
12 fired only for cause, then the employee has a
13 property right in this job --

14 CHIEF JUSTICE ROBERTS: Well, sure.
15 That's just defining what the sweet is. But I
16 -- it sounds to me like your position is if the
17 government says you're hired for this job and
18 if we terminate you, you know, we'll flip a
19 coin and decide whether or not you get to stay
20 or not.

21 MR. STEWART: No, first, the
22 procedures still have to be fair. They have to
23 comport with due process to determine whether
24 you, in fact, committed the acts that would
25 justify a termination for cause.

1 But I want to make two points about
2 that. The first is, even though the firing
3 would have to comply with the Due Process
4 Clause, there's no rule that it could only be
5 done by an Article III court. Executive branch
6 officials make decisions all the time that
7 tenured federal employees should be fired
8 because they have done things that justify
9 their termination for cause. The federal
10 government has to use fair procedures when it
11 makes that decision. It's subject to judicial
12 review. But the decision can be made in the
13 first instance by executive branch officials.

14 The second thing --

15 CHIEF JUSTICE ROBERTS: Does it
16 comport to due process to change the
17 composition of the adjudicatory body halfway
18 through the proceeding?

19 MR. STEWART: This has been done on
20 three occasions. It's been done at the
21 institution stage.

22 CHIEF JUSTICE ROBERTS: So I'll
23 rephrase the question. Was it illegal under
24 those three occasions?

25 MR. STEWART: I don't think it was

1 illegal. It had functional similarities to a
2 court of appeals granting rehearing en banc
3 because the full court doesn't like the initial
4 panel decision. I think it was less extreme
5 than that. My understanding of the cases is
6 that the chief judge was concerned that the
7 initial --

8 CHIEF JUSTICE ROBERTS: The chief
9 judge?

10 MR. STEWART: The chief judge of the
11 PTAB.

12 CHIEF JUSTICE ROBERTS: You're talking
13 about the executive employee?

14 MR. STEWART: An executive branch
15 official. The chief judge of the PTAB --

16 CHIEF JUSTICE ROBERTS: When we say
17 "judge," we usually mean something else.

18 MR. STEWART: Okay.

19 (Laughter.)

20 JUSTICE GINSBURG: You mean an ALJ?

21 JUSTICE KAGAN: No, no, no. There are
22 administrative law judges all over this
23 country, aren't there?

24 MR. STEWART: I'm sorry? The -- the
25 -- the chief judge, as I understand these

1 situations, was concerned that the panel as
2 initially composed was likely to diverge from
3 general PTAB precedent with respect to a matter
4 that bore on the institution decision, and so
5 the chief judge expanded the panel. It's not
6 clear whether the chief judge picked judges
7 that he had a particular reason to think would
8 be sympathetic to a particular view or --

9 CHIEF JUSTICE ROBERTS: How did that
10 case come out?

11 MR. STEWART: I -- I don't know how
12 the institution decisions came out. This has
13 not been done at the merits stage, if you will,
14 when patentability was actually being -- being
15 determined. But our primary point would be
16 that if there's a constitutional flaw in that
17 procedure, then a person who is actually harmed
18 by its use in a particular case --

19 JUSTICE GORSUCH: Mr. Stewart, let's
20 say we had a land patent. Let's say the land
21 patent said it becomes invalid if anybody in --
22 uses the land in an improper way, in violation
23 of an environmental law, labor law, you choose.

24 Let's say the land then gets developed
25 and turns into a housing development outside

1 of, I don't know, Philadelphia. And it turns
2 out, though, that a great-grandfather who owned
3 the land originally back when it was a farm,
4 indeed violated a labor or environmental law,
5 rendering the land patent invalid on its terms.

6 Could -- couldn't the Bureau of Land
7 Management, for example, or some other
8 department, Interior, official just pull back
9 the patent?

10 MR. STEWART: Well, the Court said in
11 some of the 19th-century cases that --

12 JUSTICE GORSUCH: Under your theory?

13 MR. STEWART: -- with respect to land
14 patents that transferred fee simple title,
15 executive branch officials couldn't do that.

16 I think it's unclear from the
17 decisions whether they were constitutional
18 holdings, but we'll accept for purposes of this
19 case that that was --

20 JUSTICE GORSUCH: Well, you dispute
21 that they're constitutional holdings in your
22 brief.

23 MR. STEWART: We dispute -- we
24 dispute the --

25 JUSTICE GORSUCH: So, presumably,

1 there's nothing to prohibit the scheme I've
2 just described in the government's position,
3 correct?

4 MR. STEWART: I --

5 JUSTICE GORSUCH: It's a yes-or-no
6 answer I'm looking for.

7 MR. STEWART: I would not concede the
8 invalidity of that proceeding.

9 JUSTICE GORSUCH: Exactly.

10 MR. STEWART: But -- but I don't think
11 that --

12 JUSTICE GORSUCH: Exactly.

13 MR. STEWART: I don't think that the
14 position we're asserting in this case has any
15 necessary implications --

16 JUSTICE BREYER: Is -- is it possible?
17 You started out and you said this boils down to
18 two different theories, and you -- I didn't get
19 the second. In my mind -- and I'd like you to
20 say whatever you want on any of them -- but as
21 to the first, there is -- and the chief did
22 raise this kind of thing, is there a kind of
23 what Brandeis said in Crowell was a due process
24 problem? Is there a problem of it's unfair to
25 hold these people to the new statute because

1 they got their patent before the statute was
2 enacted? That's one. That's a practical
3 thing, and much of the questioning has been
4 around that, different variations on that
5 theme, what's unfair.

6 The second is formal. That's the
7 public versus private right theory. And the
8 best, or at least most recent, articulation of
9 that is in the Chief Justice's opinion in
10 Stern.

11 And the third is a vested right
12 theory, which had great popularity in the 19th
13 century and might have moved Justice Story but
14 in fact has happily sunk from sight. Now, is
15 that -- have I missed some basic theory, and is
16 there anything you want to say about those?

17 MR. STEWART: Let me address those in
18 turn. As to the first one, the idea does the
19 patentee have some expectation that the patent
20 can't be taken away in this manner because IPR
21 didn't exist when this particular patent was
22 granted? As I said before, it's always been
23 part of a system that, at least in court and
24 sometimes administratively, patents could be
25 reexamined so long as they remained in force to

1 see whether they complied with the initial
2 conditions of patentability. This is not a
3 case in which Congress has changed the
4 substantive rules.

5 And to return to the Chief Justice's
6 hypothetical about public employment, if the
7 executive branch --

8 JUSTICE SOTOMAYOR: Sorry, that only
9 existed as of 1981, correct?

10 MR. STEWART: Well, there -- there
11 were more sporadic instances, and we've
12 discussed them in our brief, in connection with
13 reissuance of patents, in connection with
14 interference proceedings. In some fairly
15 idiosyncratic situations, there could be
16 cancellation without judicial involvement, but
17 you're right, it was only in --

18 JUSTICE GORSUCH: Those were four,
19 four cases, I believe, right? And involve
20 foreign -- foreign patent applicants, right?

21 MR. STEWART: Well, the -- the reissue
22 wouldn't --

23 JUSTICE GORSUCH: No, not the reissue.
24 The invalidity.

25 MR. STEWART: The -- the interference

1 wouldn't necessarily involve patent applicants.
2 You could have a reissue -- an interference
3 proceeding whenever a new patent applicant said
4 I was actually the first inventor and somebody
5 else has gotten the patent who shouldn't have
6 gotten it.

7 JUSTICE GORSUCH: But the invalidity,
8 it's just those four cases you have, right?

9 MR. STEWART: The --

10 JUSTICE GORSUCH: The foreign, that
11 period of time when there was a brief statute
12 permitting executive rejection of patents by
13 foreigners?

14 MR. STEWART: I'm -- I'm sorry, I'm
15 not --

16 JUSTICE GORSUCH: All right. Fair
17 enough.

18 MR. STEWART: Yeah, what I was
19 referring to more was the situation where in an
20 interference, the true inventor would -- or the
21 disputedly true inventor would say this person
22 shouldn't have gotten the patent because I
23 actually invented it first.

24 But to your -- return to -- to your
25 question, Justice Breyer, and -- and I'd like

1 to -- to go back to the hypothetical about
2 public employment, the -- the individual who is
3 going to be terminated, even though he has
4 for-cause protection, has due process rights,
5 has to have fair procedures, I don't think
6 anybody would say that if the executive branch
7 devises more effective ways of monitoring its
8 employees and is better able to detect
9 employees who have committed acts that would
10 trigger termination for cause, that somehow the
11 executive branch is forbidden to apply those to
12 people who got tenure protections before those
13 mechanisms were available.

14 This is --

15 CHIEF JUSTICE ROBERTS: I'd like to
16 just touch on more directly the Schor test for
17 whether something is or is not a public right.
18 And as I understand it, it says five different
19 factors that you consider.

20 JUSTICE BREYER: No, that's what I
21 thought.

22 CHIEF JUSTICE ROBERTS: Consent, this,
23 this, this, and other things. And I'm
24 wondering if that is a sufficiently stable and
25 predictive test when you're talking about

1 something like a property right?

2 In other words, as Justice Breyer
3 mentioned, people invest in their patents to
4 the tunes of billions of dollars in building
5 the plant that's going to make the product
6 that's -- and all that, and yet when you're
7 deciding -- when they're deciding is this a
8 right that I can securely rely on, they've got
9 to go through these five factors, you know, any
10 one of which can be determinative in a
11 particular case.

12 MR. STEWART: I guess the -- the first
13 thing I would say about cases like Schor and
14 Stern versus Marshall and Northern Pipeline is
15 that they are really directed at a different
16 sort of problem. In -- in each of those
17 canonic -- canonical cases, the adjudicator was
18 being asked to determine whether one party was
19 liable to another for a violation of law.

20 And in each case, the -- the
21 adjudicator was being asked to impose a money
22 damages remedy -- was asked to direct one
23 person to pay money to another, and that's kind
24 of a classic judicial function.

25 And the question was can that be

1 performed by non-Article III federal
2 adjudicators as well? And the answer was
3 sometimes yes; sometimes no.

4 JUSTICE BREYER: So -- so is that --
5 look, the answer -- what I'm thinking, quite
6 seriously, is saying should we leave open,
7 assuming I basically agree with you, but leave
8 open the question of what happens if there has
9 been huge investment?

10 That, I think, is what was dividing --
11 what was worrying Brandeis in Crowell. I -- I
12 think that -- that we don't face it here in
13 this case, and it seems to me it would be
14 properly raised more likely under either a
15 takings clause or the due process clause
16 probably.

17 MR. STEWART: I -- I --

18 JUSTICE BREYER: What do you think?

19 MR. STEWART: I mean, I think, in --
20 in theory, you could reserve it in the sense
21 that no as-applied challenge has been made, but
22 I think to suggest that invalidation of a
23 patent was particularly -- potentially
24 vulnerable on that basis would cause many more
25 problems than it would solve because --

1 JUSTICE GINSBURG: Is -- is there no
2 --

3 JUSTICE KAGAN: Well, Mr. Stewart --

4 JUSTICE GINSBURG: -- is there no
5 limit on the time you can institute an inter
6 partes review? Is -- is it any -- any time at
7 all, or is there a limit on it?

8 MR. STEWART: There's no limit. There
9 -- it applies to any patent issued before, on,
10 or after the date on which the AIA became
11 effective.

12 Now, obviously --

13 JUSTICE GINSBURG: And what -- what
14 happens if an infringement action is started
15 first in court and the alleged infringer then
16 says, I want to go over to the -- to the Patent
17 Office and institute an IPR proceeding?

18 MR. STEWART: The -- the defendant in
19 that case would have a year to do that. If
20 more than a year had gone by after the -- the
21 defendant was sued, IPR would be unavailable
22 under the statute. If the defendant requests
23 an IPR within the one-year period, then the
24 district court has the option whether to stay
25 the infringement action.

1 And my understanding is, more or less,
2 half the time, the district courts will stay
3 the proceedings. I think the idea behind the
4 one-year limit is let's do this, if we're going
5 to do it at all, before the proceedings have
6 been -- have gotten too far along before the
7 district court and the parties have devoted too
8 much work to it.

9 But it's -- it often is the case, as
10 it was in this one, that somebody requests IPR
11 after being sued for infringement.

12 JUSTICE KAGAN: How important, Mr.
13 Stewart, is judicial review here? I mean,
14 would you concede that there's a constitutional
15 problem, either if there's no judicial review
16 at all or if the judicial review were
17 deferential as to matters of law?

18 MR. STEWART: I -- I wouldn't -- I
19 would concede that it would be a constitutional
20 concern. I don't think it would be an Article
21 III concern. I think it would be a due process
22 concern, that the person was being divested of
23 property, potentially, without due process of
24 law.

25 So I -- I'm very happy that we have

1 judicial review. I would like to say something
2 about the standard of review there because I
3 think it's important.

4 As -- as your question points out, the
5 -- the cancellation is not going to deprive the
6 courts of any role in determining whether the
7 patent was actually valid. The effect of the
8 cancellation is simply going to be that the
9 court will defer to the agency under a
10 substantial evidence standard on questions of
11 fact and will review legal issues de novo.

12 And that's a less favorable standard
13 of review for the patentee than would be
14 applied in district court infringement
15 litigation, where the defendant would have to
16 prove invalidity by clear and convincing
17 evidence.

18 But our view is that's a feature and
19 not a bug of the system. That is we want a
20 standard of review that will take into account
21 what the agency actually thinks. The
22 justification for the clear and convincing
23 evidence standard is the agency is on record,
24 having issued the patent, as thinking that the
25 patent is valid, and, therefore, the -- the

1 court should be not entirely unwilling but
2 reluctant to set that aside, absent clear and
3 convincing evidence.

4 If -- if we can find out that, no, the
5 PTO's current informed view is that the patent
6 is valid, then it's entirely appropriate to
7 have a standard of review that -- that takes
8 that into account. The point that I was making
9 about cases like Stern versus Marshall is those
10 are cases that -- that the jurisdiction, the
11 work of the federal courts is not defined in
12 terms of legal issues that they can resolve.
13 It's defined in terms of types of disputes that
14 they can resolve.

15 And a dispute about whether one party
16 will be required to pay money to another party
17 is a case that's kind of the classic work of
18 Article III courts. And so this Court has
19 grappled and some would say struggled with the
20 question of when is it okay to allow
21 non-Article III federal officials to do that?

22 You don't really need to get to that
23 question because, here, nobody is asking to
24 hold Petitioner liable. The effect of a
25 cancellation is not the Petitioner has to pay

1 money damages.

2 JUSTICE SOTOMAYOR: So, in your
3 judgment, could Congress permit the PTO to
4 adjudicate infringement actions?

5 MR. STEWART: I think that would be
6 much more difficult for two reasons -- much
7 more constitutionally problematic. The first
8 would be an infringement action is a classic
9 instance of one party attempting to hold
10 another party liable.

11 And the ordinary relief at the end of
12 a successful infringement action is money
13 damages. And so that would get the PTO much
14 more out of its usual bailiwick and much more
15 into the business that is usually performed by
16 courts.

17 And the second is there's no
18 historical tradition of non-Article III federal
19 adjudication.

20 JUSTICE SOTOMAYOR: Well, there's no
21 historical tradition here, except the
22 interference actions, up until 1981, of the PTO
23 canceling issued patents.

24 MR. STEWART: I guess 1980 is still --
25 it's almost 40 years ago, and -- and I do think

1 it's important to point out -- it's an obvious
2 fact, but it's still important to -- to note
3 that the PTO is very supportive of IPR, but
4 it's not something the agency came up with on
5 its own. This is an act of Congress. It's
6 entitled to judicial respect.

7 Evidently, Congress up until 1980
8 believed that the patent system could function
9 adequately with only sporadic opportunities for
10 administrative reconsideration of issued
11 patents, but during the years since 1980,
12 Congress has made a different judgment. It
13 could have tried to beef up the initial
14 examination process.

15 It decided that the more efficient
16 way, both from the standpoint of patentees as a
17 group and -- and for the public, the more
18 efficient way was to use post-grant examination
19 procedures that could target the particular
20 patents that both were of questionable validity
21 and were of sufficient commercial importance
22 to -- to prompt a motivated --

23 JUSTICE GORSUCH: But, Mr. Stewart, if
24 I understand your answer, an infringement
25 action could be adjudicated by the director so

1 long as money damages were not sought, and that
2 would be fine.

3 MR. STEWART: Well --

4 JUSTICE GORSUCH: So a declaration of
5 non-infringement could be issued by the
6 director, for example, right?

7 MR. STEWART: And -- and it would be
8 -- that -- even that would be harder to defend
9 because infringe -- determining whether one
10 private party's action infringes an existing
11 patent is not part of the PTO's traditional
12 work.

13 When the PTO --

14 JUSTICE GORSUCH: So traditional being
15 more than 40 years but less than 400? Or what
16 -- what's the -- what's the cutoff?

17 MR. STEWART: Well, I mean, since
18 1836, the PTO and its patent -- and its
19 predecessor, the Patent Office, have decided
20 whether patents should be granted. They have
21 determined what, in effect, are questions of
22 validity. Does this person meet the
23 prerequisites for the -- the granting of the
24 patent?

25 The last thing I wanted to say, to --

1 to respond briefly to Petitioner's primary
2 theory, which is that it's the use of
3 adjudicative proceedings, proceedings that look
4 like a trial that renders this infirm. It
5 happens all the time that executive branch
6 agencies get input from private people before
7 making their decisions.

8 We've cited formal rule-making as an
9 example, which in rule-making, of course, can
10 be triggered by a petition from a private
11 party. At congressional hearings, the Members
12 of Congress will listen to sworn testimony from
13 witnesses who may express different views, and
14 Congress ultimately decides how to vote.

15 When the Solicitor General is deciding
16 whether to file an amicus brief, we will read
17 the papers that were submitted to this Court.
18 We'll have meetings with the parties that
19 resemble oral arguments.

20 At the end of the day, what makes it
21 unproblematic is that, even though our
22 procedures may resemble the Court's procedures,
23 the decision that we make is the decision to
24 file an amicus brief on behalf of the United
25 States. So long as that's an appropriate

1 exercise of executive branch authority, the
2 fact that we get input from private parties
3 can't render it constitutionally infirm.

4 If there are no further questions.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Ms. Ho, four minutes.

8 REBUTTAL ARGUMENT OF ALLYSON N. HO
9 ON BEHALF OF THE PETITIONER

10 MS. HO: Thank you, Your Honor.

11 Three quick points. First, the
12 government has conceded that at least some
13 constitutional rights, I believe due process,
14 cannot be suspended as conditions or subject
15 to, and in our view, Article III is no
16 different.

17 Second, with respect to the colloquy
18 about panel stacking, Article III entitles
19 litigants not to have to worry about precisely
20 that sort of executive influence. That is
21 exactly what this Court -- as this Court put it
22 in Stern, as not to have decision-makers in
23 positions of having to curry favor with the --
24 with the executive.

25 JUSTICE GINSBURG: Wouldn't that be an

1 obvious due process flaw?

2 MS. HO: I -- I would have thought in
3 a case where it happens, it would have been an
4 obvious due process flaw. I think even in
5 cases like ours where it doesn't happen, every
6 -- every administrative judge of the 200 knows
7 that this is something that can happen, that
8 the director, and the director has said, and I
9 quote, that she justifies it, she justified it
10 to exercise, to make sure her policies, her
11 preferred policies are enforced.

12 JUSTICE GINSBURG: But I think the
13 government has conceded that due process has to
14 be a check on administrative agency
15 adjudications as well as court adjudications.

16 MS. HO: And we certainly -- we
17 certainly don't disagree with that, Justice
18 Ginsburg. Our point is that the existence of
19 it, the existence of the panel stacking shows
20 precisely the danger of judges, of
21 decision-makers, who are subject to executive
22 political influence.

23 And, third, in terms of conditions or
24 subject to --

25 JUSTICE GINSBURG: They're the same

1 people that -- that grant the patent in the
2 first place. They're executive officials.
3 Courts don't grant patents.

4 MS. HO: No. And certainly there is
5 actually -- it is the -- the patent examiners
6 who -- who make the decision to issue. PTAB
7 judges are not -- are not examiners. They are
8 the -- they are the -- the patent, the patent
9 judges.

10 And with respect to -- to waiver, we
11 know what is required to waive Article III
12 protections, as this Court made clear in
13 Wellness.

14 It is knowing and voluntary consent by
15 both parties, which is absent here. It is
16 Article III supervision, which this Court said
17 in Stern and Atlas Roofing is not satisfied by
18 what this Court called ordinary appeal, which
19 is all that the statute provides litigants in
20 our situation.

21 And I guess finally I would say, in
22 response to the government's argument, you
23 know, this doesn't just -- IPR doesn't just
24 look like a trial. It is a trial. It hears
25 and determines a cause between two private

1 parties that results in a final enforceable
2 judgment.

3 Our objection is not to the use of
4 third parties in any number of government
5 proceedings, any more than we would object to a
6 concerned citizen who calls the police to
7 report a crime.

8 Our objection is to the exercise of
9 the judicial power by an executive branch
10 tribunal in violation of Article III.

11 If there are no further questions.

12 JUSTICE BREYER: I guess the Federal
13 Communications Commission, at least as they
14 used to have it, where a citizen could come in
15 and say I want you to take away the franchise
16 of KPIX, sounds to me as if you've described it
17 perfectly. I guess that would be
18 unconstitutional, too?

19 MS. HO: No, Your Honor. And, in
20 fact, again, in any number -- in the NLRB, in
21 the -- the FTC, the SEC, the CFPB, in all of
22 these agencies what ends up happening is that
23 the government makes the decision to prosecute
24 the action, to prosecute the complaint.

25 It is the government. That is -- that

1 is pure executive action. And under -- under
2 our -- our argument against IPR, none of that
3 would be affected whatsoever by invalidating
4 IPR.

5 Thank you, Your Honor.

6 JUSTICE KAGAN: Well, if I could just
7 -- I mean, because there are formal
8 adjudications all over the place in agencies.
9 I mean, for example, the NLRB runs by formal
10 adjudications and, indeed, when they try to
11 make rules, Congress slaps them down and says
12 we want adjudications.

13 So how is that different?

14 MS. HO: Certainly, Your Honor.

15 CHIEF JUSTICE ROBERTS: Go ahead.

16 MS. HO: I think the big difference
17 there is at the NLRB, it is the general
18 counsel, it is the general counsel of the NLRB,
19 it is the government, that is bringing that
20 action and that is prosecuting that action.

21 So you're -- you're right there. I
22 think there is some confusion in terms of
23 adjudication for rule-making purposes, which is
24 the government prosecuting the action and
25 choosing that, as opposed to rule-making, which

1 we're not challenging.

2 Our challenge is to an adjudication in
3 the Article III sense between two private
4 parties, where the government isn't -- isn't
5 engaging in the classic executive action of
6 bringing the action or prosecuting action but
7 is adjudicating, is the decider of the action.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 MS. HO: Thank you.

11 CHIEF JUSTICE ROBERTS: The case is
12 submitted.

13 (Whereupon, at 11:07 a.m., the case was
14 submitted.)

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