

## **OPEN LETTER**

### **OIL STATES ENERGY SERVICES V. GREENE'S ENERGY GROUP**

We are writing to call your attention to a case that will be heard by the U.S. Supreme Court, which we believe all conservatives should be aware of. If wrongly decided, *Oil States Energy Services v. Greene's Energy Group* may be the next *Kelo v. City of New London* decision. At bottom, the case will decide whether patent rights - which are enshrined in our Constitution - are fundamental private property rights, or something less. If the Court adopts the latter perspective, it would radically change the American view of property rights and endanger an innovation edge enjoyed by American companies and consumers alike.

Constitutional conservatives are watching closely to see whether the Court will protect our patent rights, or instead allow for the continued degradation of these rights. In *Oil States*, the Justices will be asked to decide whether a rogue, out-of-control bureaucratic agency known as the Patent Trial and Appeal Board (PTAB) is constitutional. Congress created the PTAB in 2011 as part of a "patent reform" law that attempted to make patent challenges more efficient. Instead, the law has created another administrative process for challenging patent rights, further undermining the judicial branch's role in patent review.

While perhaps a worthy goal, the PTAB has become a regulatory agency run amok. The former head of the Federal Circuit even labeled it a "patent death squad." And the data support this label. The PTAB's patent invalidation rate ranges from 62% to 92%. In some high-tech sectors, well over 90% of patents are invalidated. This is partly because the U.S. Patent and Trademark Office (PTO) frequently uses the PTAB to carry out its own agenda. For instance, during the Obama administration, the director of the PTO often stacked the deck by convening multiple panels of PTAB judges until a panel would achieve her desired result and invalidate a patent that she believed was not valid.

Although the PTAB was intended to be a "fast track" for patent challenges that saved time and reduced the costs associated with courtroom litigation, challenges often occur before the PTAB and in federal court at the same time. Patent holders who have spent years and a great deal of money obtaining a patent now must defend their patent rights on multiple fronts. Moreover, PTAB challenges can be brought by anyone, even if the party has no direct interest in the patent. With such a low barrier to filing, numerous entities can use the PTAB to harass patent owners, challenge their inventions, and hamstring their businesses.

The PTAB raises significant constitutional issues: it undermines judicial review of patent rights and distorts the separation of powers by shifting more power to the executive branch. As Ilya Shapiro and Greg Dolin write in a joint amicus brief from the CATO Institute and the American Conservative Union Foundation (ACUF), this administrative review system has "deprived the federal courts of their power and authority to adjudicate federal rights and to enforce their own judgments." Shapiro and Dolin further explain that "[t]he inter partes review process makes final judgments of federal courts always subject to revision and modification by the executive branch."

Constitutional conservatives have begun to understand the importance of this case. In addition to the CATO and ACUF brief, Eagle Forum Education & Legal Defense Fund, a dozen conservative leaders and organizations, along with 27 law professors, have submitted separate briefs. Alden Abbott, a legal and intellectual property expert at the Heritage Foundation, has called for the Court to "strike down board review." These voices are asking the Court to invalidate this out-of-control administrative tribunal and uphold the enduring

American concept that patent rights are fundamental property rights enumerated in the Constitution.

Conservatives must be vigilant about the importance of the *Oil States* case and understand what is at stake. We do not want to wake up on the morning after this decision and find, just as we did after the *Kelo* decision, that more of our property rights are slipping away. The Supreme Court must uphold our constitutional patent rights and end the administrative usurpation of this judicial responsibility. Our constitutional principles, and the future of American innovation, depend on it.

Dan Schneider  
Executive Director  
American Conservative Union

James Edwards  
Executive Director  
Conservatives for Property Rights

Jackie Anderson  
Director of Policy and Public Affairs  
American Conservative Union Foundation

C. Preston Noell III  
President  
Tradition, Family, Property, Inc.

Kevin L. Kearns  
President  
U.S. Business & Industry Council

Rick Manning  
President  
Americans for Limited Government

The Honorable J. Kenneth Blackwell  
Distinguished Fellow  
American Civil Rights Union

Paul Caprio  
Director  
Family Pac Federal

George Landrith  
President  
Frontiers of Freedom

Jenny Beth Martin  
President  
Tea Party Patriots Foundation

Ed Martin  
President  
Eagle Forum Education & Legal Defense Fund

Gerrye Johnston  
Founder/CEO  
Women for Democracy in America, Inc.  
D/b/a/ Men and Women for a  
Representative Democracy in America

Curt Levey  
President  
Committee for Justice

Seton Motley  
President  
Less Government

Dick Patten  
President  
American Business Defense Council

Matthew Kandrach  
President  
Consumer Action for a Strong Economy

\* Organization names appear for identification purposes only.