

Nos. 2018-1167; -1168; -1169

**United States Court of Appeals
For the Federal Circuit**

CELGENE CORPORATION,

Appellant,

v.

LAURA A. PETER, DEPUTY UNDER SECRETARY OF COMMERCE FOR
INTELLECTUAL PROPERTY AND DEPUTY DIRECTOR OF THE UNITED
STATES PATENT AND TRADEMARK OFFICE,

Intervenor.

**Appeals from the United States Patent and Trademark Office,
Patent Trial and Appeal Board in
Nos. IPR2015-01096; IPR2015-01102; IPR2015-01103**

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CERTIFICATE OF INTEREST

Counsel for Appellant Celgene Corporation certify the following:

1. The full name of every party represented by me is:

Celgene Corporation

2. The name of the real party in interest (not including any party identified in Question 3) represented by me is:

Celgene Corporation

3. All parent corporations and any publicly held companies that own 10 percent of more of the stock of the party or amicus curiae represented by me are:

None

4. The name of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this Court (and who have not or will not enter an appearance in this case) are:

JONES DAY: J. Patrick Elsevier, Ph.D. (no longer with firm)

QUINN EMANUEL: Eric C. Stops

5. The title and number of any cases known to counsel to be pending in this or any other court or agency that may directly affect or be directly affected by this Court's decision in the pending appeals are:

Celgene Corp. v. Peter, No. 18-1171 (Fed. Cir.), is a companion case.

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STATEMENT OF COUNSEL

Based on my professional judgment, I believe the panel decision is contrary to the Fifth Amendment of the U.S. Constitution and to related Supreme Court Takings Clause precedents, *e.g.*, *Horne v. Dep't of Agric.*, 135 S. Ct. 2419 (2015); *E. Enters. v. Apfel*, 524 U.S. 498 (1998); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *James v. Campbell*, 104 U.S. 356 (1882); and *McClurg v. Kingsland*, 42 U.S. (1 How.) 202 (1843).

Based on my professional judgment, I believe this appeal requires an answer to a precedent-setting question of exceptional importance: Whether retroactive application of *inter partes* review (“IPR”), to patent claims issued before the America Invents Act (“AIA”), constitutes an unconstitutional taking?

/s/ Gregory A. Castanias
Gregory A. Castanias
Counsel for Appellant

INTRODUCTION

The panel held that “the retroactive application of IPR proceedings to pre-AIA patents is not an unconstitutional taking under the Fifth Amendment.” *Celgene Corp. v. Peter*, 931 F.3d 1342, 1346 (Fed. Cir. 2019). This issue deserves en banc review. Not only is the panel holding contrary to the Fifth Amendment and Supreme Court precedents, but the issue is of national importance. The Supreme Court in *Oil States Energy Services, LLC v. Greene’s Energy Group*,

LLC, 138 S. Ct. 1365, 1379 (2018), explicitly left the issue open, and this Court is the only appeals court with both the authority—and congressional mandate—to consider the issue and establish the proper ruling en banc. *See* H.R. Rep. No. 97-312, at 20 (1981) (observing that increased uniformity from a single court for patent appeals would “strengthen the United States patent system”).

BACKGROUND

In four related IPRs, the Coalition for Affordable Drugs VI, LLC (“CFAD”), a third party without standing to sue in district court, challenged the patentability of all claims of Celgene’s two patents-at-issue: U.S. Patent Nos. 6,045,501 (“the ’501 patent”) and 6,315,720 (“the ’720 patent”). Celgene applied for the patents in 1998 and 2000, respectively—at least 15 years before CFAD filed its petitions and more than a decade before Congress enacted the Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011). The Patent Trial and Appeal Board (“Board”) held all but one claim unpatentable.

Celgene appealed, challenging, among other things, the retroactive application of *inter partes* review to its pre-AIA patents as an unconstitutional taking. CFAD declined to participate. The Patent and Trademark Office (“PTO”) intervened.

In a single, precedential decision, the panel affirmed the Board’s unpatentability determinations for both patents and held that retroactive application

of IPRs to pre-AIA patents does not violate the Takings Clause. The panel rested its latter holding primarily on its view that “IPRs do not differ sufficiently from the PTO reconsideration avenues available when the patents here were issued to constitute a Fifth Amendment taking.” *Celgene*, 931 F.3d at 1360. Celgene hereby seeks rehearing (with identical petitions).

ARGUMENT IN SUPPORT OF EN BANC REHEARING

I. RETROACTIVE APPLICATION OF *INTER PARTES* REVIEW TO EXISTING PATENTS IS AN UNCONSTITUTIONAL TAKING

A. Patents Are Constitutionally Protected Property

The Takings Clause states that “private property [shall not] be taken for public use, without just compensation.” U.S. Const. amend. V. The Clause provides a “safeguard against retrospective legislation concerning property rights.” *E. Enters.*, 524 U.S. at 532-34 (“Retroactivity is generally disfavored in the law,” especially where it “deprive[s] citizens of legitimate expectations and upset[s] settled transactions.”). Where a “government takes private property without paying for it, that government has violated the Fifth Amendment.” *Knick v. Twp. of Scott, Pa.*, 139 S. Ct. 2162, 2170 (2019).

Celgene’s patents are unquestionably private property. *See Celgene*, 931 F.3d at 1358 (“[A] valid patent is private property for the purposes of the Takings Clause.”). “Subject to the provisions of [Title 35], patents shall have the attributes of personal property,” 35 U.S.C. § 261; *see Oil States*, 138 S. Ct. at 1375 (citing

§ 261), and *Horne* holds that personal property—patents included—are not “any less protected against physical appropriation than real property.” 135 S. Ct. at 2427; *see also Richmond Screw Anchor Co. v. United States*, 275 U.S. 331, 345 (1928) (“[A]n attempt to take away” a private citizen’s claim for patent infringement would “raise a serious question as to the constitutionality ... under the Fifth Amendment.”). In fact, in *Horne*, the Supreme Court relied on its prior decision in *James*, 104 U.S. at 357-58, which held “we have no doubt” that a granted “letters-patent for a new invention or discovery in the arts, confers upon the patentee an exclusive property,” which “cannot be appropriated or used ... without just compensation.”

B. Rights In Patents Cannot Be Narrowed Retroactively

Section 261 “qualifies any property rights that a patent owner has in an issued patent, subjecting them to the express provisions of the Patent Act,” *Oil States*, 138 S. Ct. at 1375, but provisions added to the Patent Act after a patent becomes the personal property of its owner cannot, consistent with the Takings Clause, narrow or eliminate those property rights.

In *McClurg*, 42 U.S. (1 How.) at 206, the Supreme Court held that Congress’s power to “legislate upon the subject of patents is plenary,” but only insofar as such legislation “do[es] not take away the rights of property in existing patents.” A legislative change, the *McClurg* Court said, “can have no effect to

impair the right of property then existing in a patentee, or his assignee, according to the well-established principles of this court in” *Society for Propagation of Gospel v. Town of New Haven*, 21 U.S. (8 Wheat.) 464, 493-94 (1823) (“[I]t has never been supposed, that rights of property already vested during [a statute’s] existence, were gone by such [a] repeal” because “[s]uch a construction would overturn the best established doctrines of law, and sap the very foundation on which property rests.”). *McClurg*, 42 U.S. (1 How.) at 206. In recognition of this foundational principle, the Supreme Court has cautioned against “adopting changes that disrupt the settled expectations of the inventing community,” which “risk destroying the legitimate expectations of inventors in their property.” *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 739 (2002).

C. Retroactive Application Of *Inter Partes* Review To Pre-AIA Patents Invades And Destroys Vested Property Rights

Retroactive application of the AIA’s new IPR regime to previously issued patents impairs those patent owners’ vested property rights. At the time of their issuance, pre-AIA patents were subject only to limited reexaminations by the PTO, or to invalidity challenges in civil litigation brought by plaintiffs with an Article III stake in the dispute. If not vacated, the Board’s decisions, which addressed the patentability of Celgene’s patent claims pursuant to the after-enacted AIA, would permanently eliminate Celgene’s vested property rights in its patents, constituting an unconstitutional taking.

“The hallmark of a protected property interest is the right to exclude others.” *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999). That “most essential stic[k] in the bundle of rights,” *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994), is “the very essence of the right conferred” by a patent, *Cont’l Paper Bag Co. v. E. Paper Bag Co.*, 210 U.S. 405, 429 (1908), so an IPR cancellation takes away the entirety of the property right. Accordingly, it makes no difference whether the IPR statute’s after-the-fact taking of Celgene’s property is envisioned as a “physical taking” or a “regulatory” one—the taking here was complete, permanent, and far more of an affront to settled expectations in property than was the “minor but permanent physical occupation” caused by the installation of cables and boxes on an apartment building, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982), or the insistence on public easements in *Dolan*, 512 U.S. at 393, both of which ran afoul of the Takings Clause. The new AIA scheme improperly “take[s] away the rights of property in existing patents.” *See McClurg*, 42 U.S. (1 How.) at 206.

D. Retroactive Application Of *Inter Partes* Review To Pre-AIA Patents Upsets Reasonable Investment-Backed Expectations

The cancellation of a patent (or claim) is a complete removal of the owner’s personal property, and is appropriately regarded as a complete, “physical” taking. But, even viewed under the more generous rubric of regulatory takings, the AIA remains unconstitutional when applied to patents already issued pre-AIA. *See*

Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (regulatory taking occurs where, *inter alia*, the regulation economically affected the plaintiff and interfered with reasonable investment-backed expectations). Pre-AIA patent owners made reasonable investment-backed decisions based on the then-existing (administrative) patent-reconsideration and (court) invalidation schemes, including each system’s safeguards against overzealous invalidation.

In reexamination—the PTO reconsideration process that existed pre-AIA—patent owners have an unfettered right to amend claims, which serves the important purpose of preserving claims against *ex post* cancellation. *In re Cuozzo Speed Techs., LLC*, 793 F.3d 1268, 1287 (Fed. Cir. 2015) (Newman, J., dissenting). This unlimited right to amend claims, for both *ex parte* and *inter partes* reexamination, continues a patent owner’s “*pas de deux* with the PTO” that began in initial examination, to clarify claim scope over the prior art. Gregory Dolin & Irina D. Manta, *Taking Patents*, 73 Wash. & Lee L. Rev. 719, 785-86 (2016). Additionally, reexaminations permit disappointed patent owners to seek multiple layers of review—both administrative and judicial. 35 U.S.C. §§ 305, 306.

The AIA scheme, by contrast, created a vast administrative apparatus whose very purpose and effect has been to cancel wide swaths of already-issued patents. This new regime differs “fundamentally” from reexamination, as the Supreme

Court recently observed in *Return Mail, Inc. v. U.S. Postal Service*, 139 S. Ct. 1853, 1865 (2019). In fact, Congress intended *inter partes* review to supplant court litigation and replace administrative reexamination, but with lighter burdens for challengers and a structure specifically designed to cancel issued patents. The legislative history demonstrates that the AIA was passed with the express purpose of providing “quick and cost effective alternatives to *litigation*,” and “convert[ing] *inter partes* reexamination from an examinational to an adjudicative proceeding.” H.R. Rep. No. 112-98, at 46, 48 (2011) (emphasis added). And, unlike federal courts constrained by Article III standing requirements, any “person,” regardless of standing, may (as here) mount an IPR challenge. 35 U.S.C. § 311. To carry out Congress’s mandate, including the AIA’s tight deadlines for IPRs, the PTO has amassed a Board of 270 judges—almost 100 more than currently authorized to sit on all thirteen federal courts of appeals. *See* 35 U.S.C. §§ 6, 316(a)(11); https://www.uspto.gov/sites/default/files/documents/20190207_PPAC_PTAB_Update.pdf, at p. 4.

The differences between the AIA and the regimes that posed risks to patents prior to that act go even further. Unlike in reexamination, a patent owner’s right to amend claims in the adjudicatory context of *inter partes* review is significantly restricted; it must file a motion to amend, proposing substitute claims, and its statutory right to seek amendment is limited to “1 motion.” 35 U.S.C. § 316(d)

(exceptions only for settlement purposes, or if PTO regulations permit).

Additionally, the PTO has broad latitude in determining the standard for claim construction in IPRs, and for several years it applied the broadest reasonable interpretation (“BRI”) standard used in initial examination. *See Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2136 (2016). The BRI standard alone subjects patent claims to a higher likelihood of prior-art-based invalidation. Although the Board no longer applies that standard or places on patent owners the burden to prove patentability of amended claims, *see Aqua Prods., Inc. v. Matal*, 872 F.3d 1290, 1301, 1327-28 (Fed. Cir. 2017) (en banc), the AIA’s statutory constraints on amending claims are unlike any prior schemes. New PTO rules that permit some back-and-forth, *see* 84 Fed. Reg. 9497 (Mar. 15, 2019), cannot achieve the meaningful, extended amendment process in reexamination, given the AIA’s mandate that each IPR conclude within a year. Moreover, numerous patents, like Celgene’s, were taken under prior PTO rules.

The advent of IPRs has resulted in a drastically higher invalidation rate than before, which at minimum devalues, if it does not entirely eliminate, existing property rights. With the unfettered right to amend claims in reexamination, patent owners had a high likelihood to emerge with their property rights preserved, at least in some form. *See Gregory Dolin, Dubious Patent Reform*, 56 B.C. L. Rev. 881, 924 (2015) (cancellation of all claims in only 12% of instituted

reexaminations). By contrast, since taking effect in 2012, IPRs have a significantly higher rate of cancellation. *See id.* at 926-28 (cancellation of all claims, including claims having survived previous reexamination, in 74% of instituted IPRs).

The alternative scheme available at the time—invalidity challenges in district court—has its own protections against overzealous invalidation of patents, which are absent in IPRs. Importantly, the presumption of validity in district-court litigation (and the attendant clear-and-convincing burden of proof) lends value to patent owners' property interests. Statistics show a prior-art-invalidation rate in litigation (37.8%) at half the rate of IPRs. *See* John R. Allison & Mark A. Lemley, *Empirical Evidence on the Validity of Litigated Patents*, 26 AIPLA Q.J. 185, 209 (1998). Plus, unlike in IPRs, Article III significantly narrows the class of persons who can mount an invalidity challenge, and most such challenges only come in response to litigation brought or threatened by the property owner.

These fundamental differences between IPRs and prior statutory schemes upset reasonable investment-backed expectations of pre-AIA patent owners in their property rights. Here, the Board's decisions deprive Celgene of “*all* economically beneficial uses” of its invalidated claims. *Lucas*, 505 U.S. at 1019. That is a quintessential taking.

The panel found the differences between IPRs and their reexamination predecessors “not sufficiently substantive” to constitute a taking. *Celgene*, 931

F.3d at 1360. But the panel failed to recognize that so-called “procedural” changes can “go[] beyond ‘mere’ procedure to affect substantive entitlement to relief.” *Lindh v. Murphy*, 521 U.S. 320, 327 (1997); *see also Princess Cruises, Inc. v. United States*, 397 F.3d 1358, 1365 (Fed. Cir. 2005) (imposition of new evidentiary presumption “changes the law in a significant way”). That is the case with retroactive application of the AIA and its dramatically increased cancellation rate. As Judge Friendly observed, “[j]udges are not required to exhibit a naiveté from which ordinary citizens are free.” *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977).

The thin evidence on which the Board relied here in finding Celgene’s patent claims unpatentable exemplifies the substantive change effected by the AIA. Without holding the petitioner to a clear-and-convincing burden of proof as exists in district-court litigation, and without the safeguards that apply in reexamination, the Board found Celgene’s claims obvious under the lower, preponderance-of-the-evidence standard.

For example, the Board held the ’720 patent claims obvious even though it failed to consider whether the prior art teaches all of their limitations, such as the claimed “prescription approval code,” which the Board construed as requiring “an affirmative risk assessment” that “is generated only upon a determination that the risk of a side effect occurring is acceptable,” *i.e.*, a prospective risk assessment.

Appx00015. Although the panel found no error in the Board’s omission of the word “prospective” in its analysis because the claims do not use that term, *see Celgene*, 931 F.3d at 1355, the panel missed the point. Whether the word “prospective” was used or not, the Board failed to identify any prior-art reference disclosing the critical requirement that the “prescription approval code” be “generated only upon a determination that the risk of a side effect occurring is acceptable,” and none does. That minimal analysis regarding a key point is inextricably tied with the set of standards and procedures unique to the AIA scheme. *See* 18-1167 Opening Br. 38-43; 18-1167 Reply Br. 6-11. Likewise for the ’501 patent, where, for example, the panel found no error in the Board’s reliance on the slender reed of expert opinion invoking a non-asserted reference (Mann), *see Celgene*, 931 F.3d at 1351-52, even though that opinion contradicted a principal asserted reference (Powell) as read unanimously by the parties and experts—that expert included. *See* 18-1171 Opening Br. 25-31; 18-1171 Reply Br. 4-5. And as statistics show, this diminishment of patent value effected by the AIA reaches broadly across all technologies. *See Dolin, Dubious Patent Reform*, 56 B.C. L. Rev. at 926-29.

Finally, pre-AIA patent owners also have reasonable investment-backed expectations due to Congress’s handling of prior modifications to the reexamination statute. When Congress added *inter partes* reexamination in 1999,

it explicitly applied that scheme prospectively only. *See* American Inventors Protection Act of 1999, Pub. L. No. 106-113, § 4608(a), 113 Stat. 1501, 1501A-572. Pre-AIA patent owners, and particularly those who applied for their patents after enactment of the *inter partes* reexamination scheme, such as Celgene with respect to its '720 patent, reasonably expected that Congress would likewise apply any additional PTO-reconsideration schemes prospectively only. But it did not. *See* AIA § 6(c)(2)(A), 125 Stat. at 304 (IPR provisions “shall apply to any patent issued before, on, or after [AIA] effective date”). The expectation is especially apt here, where the IPR scheme is radically different from what existed at the time—and where long-settled Supreme Court case law, *e.g.*, *McClurg*, 42 U.S. (1 How.) at 206, casts serious doubts on *ex post* diminishment of patent rights.

Patent holders invest substantial sums of money to develop patentable inventions in return for limited exclusionary rights. When inventors enter into this “patent bargain,” they must weigh the burden of disclosing their inventions against the potential benefit of receiving the property right. *See* 35 U.S.C. § 112. Disclosure, of course, eliminates the inventor’s option of protecting the invention as a trade secret. *See Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 480-81 (1974). By so fundamentally changing the rules of the game after-the-fact—and creating and funding a muscular patent-invalidation apparatus in the form of the PTAB—Congress unilaterally, and impermissibly, added a new term to the patent

bargain after the deal was done. If such *post hoc* governmental self-dealing is given imprimatur under the Takings Clause, the patent system will lose the reliability necessary for investors and inventors to “stimulate ideas and the eventual development of further significant advances” that “are of such importance to the public weal.” *Kewanee Oil*, 416 U.S. at 481. Congress’s change of course in retroactively applying IPRs unconstitutionally interferes with pre-AIA patent owners’ reasonable investment-backed expectations.

E. *Patlex* And *Joy Technologies* Do Not Inform This Case

The panel found support in this Court’s prior rejection of takings arguments with respect to *ex parte* reexamination. See *Celgene*, 931 F.3d at 1358 n.13 (citing *Patlex Corp. v. Mossinghoff*, 758 F.2d 594 (Fed. Cir. 1985), and *Joy Techs., Inc. v. Manbeck*, 959 F.2d 226 (Fed. Cir. 1992)). For several reasons, *Patlex* (like *Joy*, which relied on *Patlex* without separately analyzing the takings issue) does not inform the constitutional question here.

First, *Patlex* concerned *ex parte* reexamination, which, as explained, is fundamentally different from IPR. *Ex parte* reexamination has many of the same features as initial examination, whereas IPR has “many of the usual trappings of litigation,” *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1353-54 (2018), but without the safeguards attendant to district-court litigation. Thus, *Patlex* plainly did not address the constitutional question presented here.

Second, Patlex rests on since-repudiated grounds. *Patlex* examined whether “[t]he public interest [is] served” by a statute’s retrospective application. 758 F.2d at 601. The Supreme Court has since explained that, although an inquiry into whether retroactive application “achiev[es] some legitimate public purpose” “has some logic in the context of a *due process* challenge,” “such a test is not a valid method of discerning whether private property has been ‘*taken*’ for purposes of Fifth Amendment.” *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005) (emphases added). Indeed, *Patlex* relied heavily on *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), but as *Patlex* itself noted, *Usery* involved a “due process,” not a takings, challenge. *See Patlex*, 758 F.2d at 601-02. Likewise for *Patlex*’s emphasis on the “relatively favored treatment” of “[c]urative statutes” applied retroactively. *Id.* at 603 (citing *Graham v. Goodcell*, 282 U.S. 409, 429 (1931)). *Graham*, too, involved a due process, not a takings, challenge.

Third, contrary to the panel’s supposition, the fact that “there were no PTO reexamination procedures” before Congress enacted the reexamination statute does not make the takings challenges in *Patlex* and *Joy* “stronger” than *Celgene*’s challenge here. *Celgene*, 931 F.3d at 1358 n.13. Again, that improperly ignores the differences between IPRs and reexaminations. In any event, in *Patlex* and *Joy*, the Court did not consider the takings issues en banc. This case presents the first opportunity for the Court acting en banc to revisit those prior holdings.

II. THIS CASE IS AN IDEAL VEHICLE FOR ADDRESSING THIS CONSTITUTIONAL ISSUE

Celgene's constitutional challenge is a pure question of law—whether the AIA's retroactive application of *inter partes* review to pre-AIA patents is an unconstitutional taking. Because pre-AIA patents may be effective until at least 2031, if not thereafter, the impact of the panel decision is profound. Unless and until en banc or Supreme Court review, the panel decision will be the final word. In fact, other panels have already dismissed similar constitutional challenges without discussion, citing this panel's decision.*

Also, the panel decision's inevitable effects warrant prompt reconsideration. The decision introduces great uncertainty for companies that would ordinarily rely on the protections of an issued patent in deciding to invest significant time and money to develop the patented invention and, subsequently, commercial embodiments, including life-saving products of crucial benefit to the public. Without sufficient *ex ante* certainty about the ways in which patents may later be challenged, companies may alter or redirect their research, development, and commercialization efforts to the public's detriment. Worse, the panel decision

* See, e.g., *Arthrex, Inc. v. Smith & Nephew, Inc.*, 935 F.3d 1319, 1331 (Fed. Cir. 2019); *Enzo Life Scis., Inc. v. Becton, Dickinson & Co.*, No. 2018-1232, 2019 WL 3851578, at *7 (Fed. Cir. Aug. 16, 2019); *Collabo Innovations, Inc. v. Sony Corp.*, No. 2018-1311, 2019 WL 3545450, at *4 (Fed. Cir. Aug. 5, 2019).

provides both invitation and roadmap for future legislation to diminish, *ex post*, the enforcement rights of entire classes of patents or patent owners.

Nor is the PTO's waiver argument to the panel any impediment to en banc review. *See Celgene*, 931 F.3d at 1356-57. As the panel recognized, the Board could not have corrected the constitutional error, and this broadly relevant, "pure[]" legal issue was squarely presented here, warranting resolution. *Id.* Regardless, for a precedential decision on the issue, thereby governing all future cases, the PTO's argument is no obstacle.

Finally, the fact that the takings issue arises as a defense rather than as a claim for compensation makes no difference. The PTO certainly does not dispute this Court's jurisdiction to decide the takings challenge. And, a Fifth Amendment takings claim may be raised as a defense where, as here, the taking is "final" and there is no "adequate process for obtaining compensation." *Horne v. Dep't of Agric.*, 569 U.S. 513, 525 (2013); *accord E. Enters.*, 524 U.S. at 519-22 (addressing takings challenge in appeal from district court, rather than Court of Federal Claims); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 998-1000, 1013-14 (1984) (same).

This is an ideal case for the full Court to address the important constitutional question presented.

CONCLUSION

The Court should grant rehearing.

September 27, 2019

Respectfully submitted,

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