

## PATENT CHAOS COULD RESULT IF THE US SUPREME COURT FINDS THE AIA UNCONSTITUTIONAL

President Obama signed The America Invents Act (AIA) into law in 2011, which made substantial changes to the patent system of this country. One of the provisions of the AIA provides the opportunity to challenge the validity of a patent, including by accused infringers, before the United States Patent and Trademark Office Patent Trial and Appeal Board (PTAB) using a tool called an Inter Partes Review (IPR).

The United States Supreme Court has agreed to hear *Oil States Energy Services, LLC v. Greene's Energy Group*. The Court will decide whether, under the US Constitution, only the federal courts - and not the executive branch (like PTAB) - can decide if a patent is invalid. Specifically, the question before the Court is whether patents are private property (an issue for the courts decide) or public rights (an issue that can be decided by government agencies).

If the Supreme Court finds IPRs unconstitutional, the fallout could be huge. Not only could the 1,300 patents invalidated with IPRs be "brought back from the dead" if IPRs are unconstitutional, but the entire AIA could be declared unconstitutional. The AIA does not have a severance clause. A severance clause provides that the remainder of a document stays intact even if one or more parts are found invalid. Absent this provision, if part of the AIA is held unconstitutional, the entire AIA may be unconstitutional. Such a ruling by the Supreme Court may require Congressional intervention and a strategy to handle the resulting flood into the courts.

A link to the docket is **here**.

We are tracking this important case and will keep you updated on any developments. If you have any questions about this or other IP issues, please feel free to contact **Leopold Lueddemann**.