

**UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE PATENT TRIAL AND APPEAL BOARD**

MYLAN PHARMACEUTICALS INC., TEVA PHARMACEUTICALS USA,
INC., and AKORN INC.,¹
Petitioners,

v.

ALLERGAN, INC.,
Patent Owner.

Case IPR2016-01127 (8,685,930 B2)
Case IPR2016-01128 (8,629,111 B2)
Case IPR2016-01129 (8,642,556 B2)
Case IPR2016-01130 (8,633,162 B2)
Case IPR2016-01131 (8,648,048 B2)
Case IPR2016-01132 (9,248,191 B2)

**BRIEF OF AMICUS CURIAE LUIS ORTIZ AND KERMIT LOPEZ IN
SUPPORT OF PATENT OWNER'S MOTION TO DISMISS FOR LACK
OF JURISDICTION BASED ON TRIBAL SOVEREIGN IMMUNITY**

¹ Cases IPR2017-00576 and IPR2017-00594, IPR2017-00578 and IPR2017- 00596, IPR2017-00579 and IPR2017-00598, IPR2017-00583 and IPR2017- 00599, IPR2017-00585 and IPR2017-00600, and IPR2017-00586 and IPR2017-00601 have respectively been joined with the captioned proceedings. The word-for-word identical paper is filed in each proceeding identified in the caption pursuant to the Board's Scheduling Order (Paper 10).

TABLE OF CONTENTS

INTEREST OF AMICI 1

SUMMARY OF ARGUMENT 2

ARGUMENT..... 3

 I. The Board Must Adhere to Existing Precedent 3

 A. Congressional Policy Supports The Tribe's Sovereign Immunity 4

 B. Indian Nations Rely Upon Tribal Sovereign Immunity 7

 C. Courts Avoid Finding Constructive Waivers of Sovereign
 Immunity..... 8

 II. The Board Should Not Analyze The Scope of Tribal Sovereign
 Immunity 9

 A. Congress Circumscribed The Board's Powers 10

 B. Executive Branch Policy Supports The Tribe's Sovereign
 Immunity..... 12

CONCLUSION 13

TABLE OF AUTHORITIES

CASES:

<i>Bassett v. Mashantucket Pequot Tribe</i> , 204 F.3d 343 (2d Cir. 2000)	8
<i>Caring Hearts Personal Home Servs., Inc. v. Burwell</i> , 824 F.3d 968 (10th Cir. 2016)	10
<i>Chevron, U.S.A., Inc. v. NRDC</i> , 467 U.S. 837 (1984).....	11
<i>FDA v. Brown & Williamson Tobacco Corp.</i> , 529 U.S. 120 (2000).....	10
<i>Kiowa Tribe of Okla. v. Manuf’g Techs., Inc.</i> , 523 U.S. 751 (1998).....	5, 6
<i>Marbury v. Madison</i> , 5 U.S. (1 Cranch) 137 (1803)	13
<i>Mexichem Fluor, Inc. v. EPA</i> , 866 F.3d 451 (D.C. Cir. 2017).....	9
<i>Michigan v. Bay Mills Indian Community</i> , 134 S.Ct. 2024 (2014).....	7, 8, 11
<i>Miles v. Apex Marine Corp.</i> , 498 U.S. 19 (1990).....	4, 6
<i>Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Okla.</i> , 498 U.S. 505 (1991).....	5
<i>Plaut v. Spendthrift Farm, Inc.</i> , 514 U.S. 211 (1995).....	13

Santa Clara Pueblo v. Martinez,
436 U.S. 49 (1978)..... 5, 6

Stark v. Wickard,
321 U.S. 288 (1944)..... 9

State of New York v. Shalala,
119 F.3d 175 (2d Cir. 1997) 10

Three Aff'd Tribes of Fort Berthold Res. v. Wold Eng'g, P.C.,
498 U.S. 505 (1991)..... 8

United States v. USF&G Co.,
306 U.S. 506 (1940)..... 7

Utility Air Regulatory Grp. v. EPA,
134 S.Ct. 2427 (2014)..... 4

Western Minn. Mun. Power Agency v. FERC,
806 F.3d 588 (D.C. Cir. 2015)..... 4

Xechem Int'l, Inc. v. Univ. of Tex. M.D. Anderson Cancer Ctr.,
382 F.3d 1324 (Fed. Cir. 2004) 8

STATUTES:

5 U.S.C. § 553 2

25 U.S.C. § 1451 8

25 U.S.C. § 5301 8

28 U.S.C. § 1604..... 5

35 U.S.C. § 6..... 3, 11

35 U.S.C. § 102..... 9

35 U.S.C. § 103..... 9

35 U.S.C. § 134 3

35 U.S.C. § 135 3

35 U.S.C. § 311 3, 4, 9

35 U.S.C. § 321 3

REGULATIONS:

Tribal Government-to-Government Consultation Policy,
81 Fed. Reg. 40,893 (2016) 12

Executive Order 13175, 65 Fed. Reg. 67,249 (Nov. 6, 2000) 12

INTEREST OF AMICI

Luis Ortiz and Kermit Lopez are the name partners of Ortiz & Lopez, PLLC, a professional limited liability company formed under the laws of Texas. We are both registered patent attorneys who have represented independent inventors, entrepreneurs, small companies, large corporations, and non-profit entities in matters before the Patent and Trademark Office (“PTO”). We have obtained nearly 900 patents for our clients and have about 100 additional applications in prosecution. We have also personally obtained no fewer than 78 patents for our own inventions.

As frequent practitioners before the PTO who represent various sovereign entities, and as independent inventors ourselves, we have an uncontestable interest in ensuring predictable and fair proceedings, consistent with law, by the PTO, its Director, and the Patent Trial and Appeal Board (“PTAB”). Mr. Ortiz also has family who are registered members of the Navajo Nation in Northwestern New Mexico. PTAB proceedings must ensure that the Board does not seek to make new law or policy, and instead applies extant legal doctrines consistent with the judicial framework of the United States and the separation of powers between the three branches of the federal government. To that end, we submit this amicus brief in support of the Saint Regis Mohawk Tribe (“Tribe”), a federally recognized, sovereign American Indian Tribe in these proceedings.

SUMMARY OF ARGUMENT

The Tribe is a sovereign government. The history of tribal sovereign immunity and the exclusive power of Congress to determine the parameters of tribal sovereign immunity date back decades. PTAB is the designee of an executive agency, the PTO. The PTO itself is an agency within the Department of Commerce. Administrative agencies are charged with administering the Congressional directives that are within their peculiar expertise and, outside of that, with applying the law that Congress and the judicial branch have developed. The PTO has no expertise in determining the scope of sovereign immunity in any context.

The Administrative Procedure Act (“APA”) enables a court to reverse or nullify an agency action that is “contrary to law.” That means an agency, including any hearing tribunal or hearing officer within the agency, has no discretion to issue legal decisions contrary to controlling precedent. Similarly, the APA only allows an agency to engage in rulemaking through the notice and comment procedure set forth in 5 U.S.C. § 553, unless the agency is creating rules that “are required by statute to be made on the record after opportunity for an agency hearing” – an exception that does not apply here.

Because PTAB has no authority to make law, nor to reach a legal conclusion contrary to established precedent, it can only rule in the Tribe’s favor because Supreme Court precedent is clear: the Tribe is immune from this proceeding.

Allowing amici briefs in this IPR by parties aligned with the petitioners does nothing more than allow various commercial interests to complain in the wrong forum. Only Congress, whose elected members have the authority and duty to make the *political* decision whether to abrogate sovereign immunity, and who must face voters after such decisions, can choose to eliminate sovereign immunity for Indian tribes in IPRs. The Board cannot.

ARGUMENT

I. The Board Must Adhere to Existing Precedent.

The Board includes the Director, Deputy Director, Commissioner for Patents, Commissioner for Trademarks and the administrative patent judges (“APJs”). 35 U.S.C. § 6(a). The APJs must have competent legal knowledge and scientific ability. *Id.* Under 35 U.S.C. § 6(b), the Board’s duties include *only* reviewing appeals under 35 U.S.C. § 134, conducting derivation proceedings under 35 U.S.C. § 135 and conducting the *inter partes* reviews (“IPR”) and post grant reviews under 35 U.S.C. §§ 311, *et seq.*, and 35 U.S.C. §§ 321, *et seq.*, respectively, that Congress created in the America Invents Act (“AIA”).

The Board has no authority or duty to review exercises of Congressional authority outside of Title 35, and no authority to deviate from Supreme Court, Federal Circuit, or other Circuit Court decisions. This is because an agency has authority to make policy only insofar as Congress expressly or impliedly delegates such power.

Western Minn. Mun. Power Agency v. FERC, 806 F.3d 588, 593 (D.C. Cir. 2015).

The Board cannot interpret the statutes it administers to meet a policy goal contrary to clearly stated Congressional will, nor can the Board manipulate the statutes it interprets in a way not commensurate with Congressional intent. *Utility Air Regulatory Grp. v. EPA*, 134 S.Ct. 2427, 2445 (2014). Ultimately, the only issue is before the Board is whether Congress, in passing the AIA, unequivocally and expressly waived tribal sovereign immunity as to IPR proceedings. It clearly did not.

A. Congressional Policy Supports The Tribe’s Sovereign Immunity.

Congress’s will to preserve the sovereign immunity of native American tribes in IPRs is clear. The Board cannot legitimately find any intent to foreclose or abrogate tribal sovereign immunity in the AIA, which created this proceeding. *See* 35 U.S.C. § 311, *et seq.* The AIA is silent on tribal immunity—it has no provision that even mentions any type of sovereign immunity. Neither the root word “tribe” nor its derivatives like “tribal” appear in the AIA. The absence of any such discussion speaks volumes.

Congress does not legislate in a vacuum. Longstanding Supreme Court precedent holds that, at the time it makes new legislation, Congress has actual knowledge of all current jurisprudence. More simply, the Supreme Court assumes that “Congress is aware of existing law when it passes legislation.” *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990). When Congress enacted the AIA in 2011, three main

Supreme Court precedents that established the “law” on abrogating tribal sovereign immunity existed, and two of those precedents were at least 20 years old: *Kiowa Tribe of Okla. v. Manuf’g Techs., Inc.*, 523 U.S. 751 (1998), *Okla. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (1991) (“*Potawatomi I*”), and *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

In *Kiowa Tribe*, the Supreme Court noted that “tribal sovereign immunity is a matter of federal law” and noted that when Congress has desired to curtail tribal sovereign immunity, it had done so explicitly. 523 U.S. at 758 (discussing statutes). Seven years before *Kiowa Tribe*, the Supreme Court refused to read a commercial activities exception into the doctrine of tribal sovereign immunity akin to the commercial activities exception to foreign sovereign immunity in the Foreign Sovereign Immunities Act (28 U.S.C. § 1604, *et seq.*). *Potawatomi I*, 498 U.S. at 509-510. Instead, the Supreme Court specifically found that Congressional policy *avored* sovereign immunity for a tribe’s commercial activities due to the need to promote tribal self-government. *Id.* at 510. The Petitioners and their amici effectively argue that the Board should negate tribal sovereign immunity due to the Tribe’s commercial activities—a result the Supreme Court rejected 26 years ago. *Id.*

Potawatomi itself merely followed the clear path that the Supreme Court made in *Santa Clara Pueblo*, 13 years earlier. In *Santa Clara Pueblo*, the Court noted both that “Indian tribes have *long* been recognized as possessing the common-law

immunity from suit traditionally enjoyed by sovereign powers” and that “[i]t is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed.” *Santa Clara Pueblo*, 436 U.S. at 58 (internal citations and quotations omitted).

The *Santa Clara Pueblo* Court also noted that it had “repeatedly” emphasized that “Congress’ authority over Indian matters is extraordinarily broad, and the role of courts in adjusting relations between and among tribes and their members correspondingly restrained.” *Id.* at 71. Indeed, the Supreme Court noted that those doctrines had been long-standing even before issued its *Santa Clara Pueblo* decision, which occurred 33 years before Congress enacted the AIA. The AIA contains no unequivocal expression, or any expression of intent by Congress’ to abrogate tribal sovereign immunity.

Put simply, when it enacted the AIA, as a matter of Supreme Court doctrine Congress knew that tribal sovereign immunity existed. *Miles*, 498 U.S. at 32. Congress also knew, due to the state of the law in 2011, that tribal sovereign immunity protected tribes from all litigation unless Congress had specifically abrogated tribal sovereign immunity or the tribe had explicitly waived such immunity. *Id.* Congress therefore had to expressly abrogate tribal sovereign immunity to render tribes subject to PTAB’s jurisdiction. *Kiowa Tribe*, 523 U.S. at 758. The AIA’s silence on tribal sovereign immunity therefore demonstrates that

Congress had no intent to revoke that immunity and force tribes to defend their patents in IPRs.

The Board does not have a close call. The Supreme Court has noted that “it is fundamentally *Congress’s job*, not ours, to determine whether or how to limit tribal immunity.” *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 2037 (2014) (emphasis added). In other words, the highest and most important judicial authority in the United States has completely avoided placing limits upon tribal sovereign immunity that had not been specifically enacted by Congress. The AIA is silent on tribal sovereignty. The Board should not rush in where the Supreme Court fears to tread.

B. Indian Nations Rely Upon Tribal Sovereign Immunity.

Tribal sovereign immunity is a core legal protection for tribes. Considering the historical background of tribal relations with the United States, and the depredations upon Native American communities that the United States government has effectuated during this Nation’s history, the federally recognized Indian tribes have a special relationship with the federal government. In this context, Congress essentially is the trustee of tribal sovereign immunity and holds plenary authority to protect it for the benefit of Indian tribes, or to abrogate it when necessary to serve a separate policy goal. *United States v. USF&G Co.*, 306 U.S. 506, 512 (1940) (noting that the sovereign immunity tribes held at the time they were conquered by the U.S.

“passed to the U.S. for their benefit”).

Congress understands that tribal sovereign immunity is “a necessary corollary to Indian sovereignty and self-governance.” *Three Aff’d Tribes of Fort Berthold Res. v. Wold Eng’g, P.C.*, 476 U.S. 877, 890 (1986). Thus, it has enacted laws designed to further Indian sovereignty such as the Indian Financing Act, 25 U.S.C. § 1451, *et seq.*, and the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 5301, *et seq.* Because Congressional policy has been to *promote* Indian sovereignty and self-governance, “courts will not lightly assume that Congress in fact intends to undermine Indian self-government”; instead they adhere to the “baseline position” that tribal sovereign immunity remains intact if Congress has not unequivocally expressed its intent to abrogate. *Bay Mills*, 134 S.Ct. at 2031-32.

C. Courts Avoid Finding Constructive Waivers Of Sovereign Immunity.

Participation in the patent system alone cannot mean the Tribe waived sovereign immunity. Courts abhor the notion that “constructive waiver” can nullify sovereign immunity. *Xechem Int’l, Inc. v. Univ. of Tex. M.D. Anderson Cancer Ctr.*, 382 F.3d 1324, 1331 (Fed. Cir. 2004) (“[T]he argument must be rejected that a state’s entry into the patent system is a constructive waiver of immunity for actions in federal court against the state under the patent law.”); *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 357-358 (2d Cir. 2000) (“[T]he fact that a statute applies to Indian tribes does not mean that Congress abrogated tribal immunity in adopting it.”). By

owning a set of patents, the rights and obligations of which are governed by the Patent Act, a tribe has not waived immunity to suit against those patents *no matter how* it acquired them.

For the Board to claim it can find an abrogation of sovereign immunity in the AIA or even in the patent system itself would be an immense error of law and a radical departure made for purely political reasons. Such a decision would significantly undermine the idea that the United States is a nation of laws and add to the current political belief that the administrative state has run amok.

II. The Board Should Not Analyze The Scope of Tribal Sovereign Immunity.

The power of an administrative agency “is circumscribed by the authority granted” by Congress. *Stark v. Wickard*, 321 U.S. 288, 309 (1944). The Board’s authority in IPRs comes from 35 U.S.C. §§ 311-319. The AIA allows the Board to grant a petitioner’s request to cancel 1 or more claims of a patent, but only upon grounds that the patent does not meet the novelty and nonobviousness requirements of 35 U.S.C. §§ 102 and 103. 35 U.S.C. § 311(b). The AIA does not provide the Board, or the PTO, with the authority to determine the metes and bounds of tribal sovereign immunity.

An agency’s “well-intentioned policy objectives” do not allow an agency to impose regulation or determine matters of law outside the agency’s expertise that may tangentially touch upon the agency’s mission. *Mexichem Fluor, Inc. v. EPA*,

866 F.3d 451, 460 (D.C. Cir. 2017). Similarly, Congress’ silence on an issue that the agency confronts does not enable the agency to “take matters into its own hands,” either by notice and comment or by adjudicatory process, even if the agency would act only to preserve the role it believes Congress enabled it to play in post-grant patent matters. *See id.*

An agency also cannot “apply the wrong law to citizens who come before it.” *Caring Hearts Personal Home Servs., Inc. v. Burwell*, 824 F.3d 968, 970 (10th Cir. 2016) (Gorsuch, J.). That maxim especially applies “when the right law would appear to support the citizen and not the agency.” *Id.*

Similarly, an agency “has no special competence or role in interpreting a judicial decision.” *State of New York v. Shalala*, 119 F.3d 175, 180 (2d Cir. 1997). Instead, the Supreme Court has stated that no matter “how serious the problem an administrative agency seeks to address” the agency cannot exercise its authority “in a manner that is inconsistent with the administrative structure that Congress has enacted into law.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000).

A. Congress Circumscribed The Board’s Powers.

The administrative structure Congress enacted in the AIA allows the Board to determine questions of law inherent to reviewing adverse decisions of examiners, reviewing appeals of reexaminations, determining inventorship in derivation

proceedings, and determining novelty and obviousness issues in IPRs and post-grant reviews. 35 U.S.C. § 6(b)(1)-(4). The Board has no Congressional imprimatur to determine whether tribal sovereign immunity applies in an IPR.

Instead, the Board must “give effect to the unambiguously expressed intent of Congress.” *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984). Absent Congressional abrogation of tribal sovereign immunity, the “unambiguously expressed intent of Congress” is that tribal sovereign immunity applies, regardless of how “unfair” such invocation of immunity is to the petitioners. *Bay Mills*, 134 S.Ct. at 2031-32. Only Congress can abrogate sovereign immunity, and its decision to do so must be explicit. *Id.*

In similar circumstances, the Board has correctly ruled, repeatedly, that it cannot force an arm of one of the 50 states to defend its patents in IPR. *E.g., Covidien LP v. Univ. of Fla. Res. Found. Inc.*, Case IPR 2016-01274, Paper 21 (Jan. 25, 2017); *see Neochord, Inc. v. Univ. of Md.*, Case IPR2016-00208, Paper 28 (May 23, 2017). Under that same logic, the Board must now find that tribal sovereign immunity, which protects tribes from being haled into court without their express permission or Congressional waiver of immunity just like state sovereign immunity protects the states, prevents the Board from determining the Petitioners’ challenges to the Tribe’s patents.

B. Executive Branch Policy Supports The Tribe's Sovereign Immunity.

In addition, Executive Branch policy supports upholding tribal sovereign immunity. In his Executive Order 13175, President Clinton reiterated that the United States “supports tribal sovereignty and self-determination.” Executive Order 13175, 65 Fed. Reg. 67,249 (Nov. 6, 2000), § 2(c). President Clinton recognized that “the United States has a unique legal relationship with Indian tribal governments” such that “the United States has recognized Indian tribes as domestic dependent nations under its protection” and that “Indian tribes exercise inherent sovereign powers over their members and territory.” Executive Order 13175, 65 Fed. Reg. 67,249 (Nov. 6, 2000), §§ 2(a), 2(b). For those reasons, President Clinton stated that “[a]gencies *shall* respect Indian tribal self-government and sovereignty” and must employ “an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.” *Id.* §§ 3(a), 5(a). Both President Bush and President Obama followed the Clinton Executive Order. *See, e.g.*, Tribal Government-to-Government Consultation Policy, 81 Fed. Reg. 40,893, 40,894 (2016).

Executive Order 13175 remains in effect; therefore, it has been accepted by all three presidents to succeed President Clinton. As an agency within the Department of Commerce, the PTO is within the executive branch and President Trump has *not* withdrawn the directive that agencies must “respect Indian tribal self-government

and sovereignty.” 65 Fed. Reg. 67,249 at § 3(a). The Board should not doubt that holding the Tribe lacks sovereign immunity to this proceeding would constitute a “regulatory policy” containing “tribal implications.”

Ultimately, Article III of the Constitution established a judicial department whose “province and duty” is “to say what the law is.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). This aspect of the Constitution’s design arose in direct response to “the abuses of legislative interference with the courts at the behest of private interests and factions,” which instilled a “sense of a sharp necessity to separate the legislative from the judicial power” in the minds of the Framers. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 220-21 (1995). To that end, the legislative branch could enact the rules that define the rights and duties of citizens, but only the judicial branch could interpret those laws. *Id.*

Here, the Board is an arm of the executive branch and a creation of Congress. Its purview does not include policy decisions regarding what entities can claim sovereign rights over their intellectual property in this forum. Nor does it have discretion to effectively overrule the Supreme Court and strip an Indian tribe of sovereign immunity in the absence of waiver by the Tribe or abrogation by Congress. For these reasons, the Board should grant the Tribe’s motion to dismiss.

CONCLUSION

There is only one issue presented by the Tribe’s motion to dismiss, whether the

St. Regis Mohawk Tribe has sovereign immunity. That it does is undisputed. Once that undisputed fact is accepted, the only possible result the Board can reach is dismissing this proceeding. The complaints of the petitioners, its amici, or other commentators are irrelevant to the Board. If Congress wants to take the discriminatory action to strip the St. Regis Mohawk Tribe of the same rights enjoyed by state universities, it can vote to do so and face both the voters and future legal challenges. The Board has one conclusion it can reach if it follows the law. Dismissal is required.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to 37 CFR 42.6(3)(4) and 42.205(b), the undersigned certifies that on November 30, 2017, a complete entire copy of the Amicus Curiae Brief of Luis Ortiz and Kermit Lopez In Support of Patent Owner's Motion to Dismiss Based on Tribal Sovereign Immunity was provided, via electronic service, to the persons named below at their address of record, viz:

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