

No. 19-1012

In The
Supreme Court of the United States

GENERAL ELECTRIC COMPANY,

Petitioner,

v.

UNITED TECHNOLOGIES CORPORATION,

Respondent.

*On Petition for Writ of Certiorari to the
United States Court of Appeals for the Federal Circuit*

**BRIEF OF UNIFIED PATENTS, LLC; ENGINE
ADVOCACY; CABLE TELEVISION
LABORATORIES, INC.; THE R STREET
INSTITUTE; AND THE NISKANEN CENTER AS
AMICI CURIAE IN SUPPORT OF PETITIONER**

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QUESTION PRESENTED

Whether competitive harm alone suffices to confer Article III standing to appeal an IPR determination, or whether an appellant must also show concrete plans for future activity that creates a substantial risk of a future patent infringement action.

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INTEREST OF *AMICI CURIAE*¹

Amici are five organizations, representing businesses from all sectors of the economy, dedicated to ensuring that the patent system works as intended to foster innovation, not stifle it, in part through effective administrative mechanisms for voiding invalid patents.

Unified Patents, LLC is a membership organization dedicated to deterring nuisance settlements based on patent claims that should not have issued. Unified's more than 250 members are Fortune 500 companies, startups, automakers, open-source developers, high-technology companies, industry groups, cable companies, banks, manufacturers, cybersecurity companies, and others devoted to reducing the drain on the U.S. economy caused by baseless lawsuits asserting infringement of questionable patents.

Engine Advocacy ("Engine") is a non-profit technology policy, research, and advocacy organization that bridges the gap between policymakers and startups, working with governments and high-technology, growth-oriented startups across the nation to support the development of technology entrepreneurship.

Cable Television Laboratories, Inc. ("CableLabs") is a non-profit research and development organization

¹ Counsel of record for all parties received timely advance notice of the intent to file this brief and consented to the filing of the brief. S. Ct. R. 37(2)(a). No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* or its counsel made a monetary contribution intended to fund the brief's preparation or submission.

owned by the cable industry. CableLabs has 65 members world-wide, including all of the major U.S. cable operators (e.g., Comcast, Charter, Cox, Altice USA, MediaCom, CableOne, etc.) representing over 45 million cable subscribers.

The R Street Institute is a nonprofit, nonpartisan public-policy research organization. R Street’s mission is to engage in policy research and educational outreach that promotes free markets as well as limited yet effective government, including properly calibrated legal and regulatory frameworks that support economic growth and individual liberty.

The Niskanen Center is a nonprofit, nonpartisan public policy think tank. Niskanen works to advance an open society both through active participation in the marketplace of ideas and direct engagement in the policymaking process. Niskanen develops policy proposals, works with other interested groups to support them, and promotes those ideas to legislative, executive, and judicial decision makers.

Amici write to share the perspective of innovation-driven businesses in general, and high-technology startups in particular, that the Federal Circuit’s crabbed approach to appellate standing causes substantial harm, encourages the propagation of questionable patents in contravention of Congress’s clear intent, and cries out for this Court’s review.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici agree with Petitioner that a dissatisfied party to a patent challenge before the Patent Trial and Appeal Board (“PTAB”), brought by one competitor

against another, has the right to appeal a decision denying the relief it requested. The Federal Circuit's patent-cases-only appellate standing standard unevenly favors the holders of questionable patents, thwarting Congress's reason for establishing streamlined administrative proceedings in the first place. Beyond resolving the conflict with other circuits and this Court's precedent, this Court's intervention is urgently needed to avoid the harms to the patent system, and the innovation economy, caused by the Federal Circuit's lopsided deference to the non-Article III decisions of the PTAB.

Administrative patent review proceedings, like *inter partes* review ("IPR") and post-grant review ("PGR"), were designed to serve Congress's goals to "improve the quality of patents" and "make the patent system more efficient," by providing an easier way to challenge "questionable patents." H.R. REP. NO. 112-98, pt. 1, at 39, 48 (2011). Providing appellate review, in an Article III court, for any party dissatisfied by the administrative decision, was a carefully considered choice by Congress, central to the effectiveness of the revamped administrative review process. By unduly circumscribing the judicial review of agency action promised by Congress, the Federal Circuit has impeded the effective functioning of this system.

Invalid patents create a drain on American innovation, increase the costs of competition, and can block competition and research and development altogether. With the modern volume of patent applications, no one expects initial grants to be perfect. The private sector can (and does) help the government promote patent quality by challenging

invalid patents. Such challenges pursue “the important public interest in permitting full and free competition in the use of ideas which are in reality a part of the public domain.” *Lear, Inc. v. Adkins*, 395 U.S. 653, 670 (1969).

Competitors are best positioned to perform this function—they have the incentive and they have the knowhow. They also suffer when questionable patents crowd the market in which they operate—whether they are poised to infringe or not. By closing its eyes to these harms, and effectively requiring competitors to admit planned infringement to justify judicial review, the Federal Circuit has discouraged the most likely would-be patent challengers from using the streamlined administrative review proceedings that Congress sought to promote.

If left unchecked, the Federal Circuit’s one-sided rule will reduce patent quality—by limiting Article III review of agency rulings upholding (but not denying) the validity of questionable patents and distorting the uniform development of patent law that the Federal Circuit was created to promote.

Competition and innovation will be harmed across the economy, but startups, especially, will pay the price. Startups cannot effectively compete with established incumbents who hold large patent portfolios unless they have opportunities to reduce the risk and cost imposed by issued-but-invalid patents. The only meaningful way for resource-constrained new companies to address questionable patents is the administrative process. And they need to be able to invoke that process—including congressionally-provided judicial review—long before they get to the

point of planning to infringe a patent. Otherwise, potential investors are likely to balk due to the cloud of extortionate licensing requests or infringement suits looming in the horizon.

For startups and established innovators alike, the Federal Circuit's lopsided regime that stacks the appellate-review deck against patent challengers will undermine the very efficiencies in the patent quality ecosystem that Congress sought to promote when it revamped the administrative patent review process. The Federal Circuit having rejected en banc review, only this Court can restore proper functioning to the critical administrative system Congress established to promote patent quality.

ARGUMENT

I. The Federal Circuit's Unique Appellate Standing Rule Frustrates Congress's Carefully Balanced Policy To Root Out Questionable Patents.

Petitioner has thoroughly covered how the Federal Circuit's patent-specific standing decisions conflict with other circuits' decisions and this Court's precedent. *Amici* agree with Petitioner's analysis, as

do many commentators.² And that divide in authority, alone, warrants this Court’s review. When coupled with the harm caused by the Federal Circuit’s rule, the case for *certiorari* is overwhelming.

The Federal Circuit’s one-sided appellate review standard causes substantial harm to innovation. Congress set up streamlined, cost-effective administrative procedures for a reason: such review makes it easier to challenge questionable patents and thereby improve patent quality. The Federal Circuit’s asymmetric appeal rule vitiates Congress’s considered choice to make judicial review equally available to dissatisfied parties, without regard to who prevailed below. 35 U.S.C. § 319. And it causes immediate and substantial harm to the patent system by weakening judicial review of an important tool for identifying and voiding patents that should never have issued in the first place—the efforts of competitors, armed with the knowhow and incentive, in invoking an efficient

² See, e.g., Matthew Dowd & Jonathan Stroud, *Will the Federal Circuit Consider the Competitor Standing Doctrine?*, LAW360 (Dec. 18, 2018) (Federal Circuit may be “taking an overly patent-focused view and not looking to nonpatent precedent,” and “has struggled with determining what constitutes Article III standing for purposes of appealing a PTAB decision”); Michael J. Burstein, *Rethinking Standing in Patent Challenges*, 83 GEO. WASH. L. REV. 498, 500 (2015) (“Federal Circuit ... has crafted patent-specific standing rules that are more restrictive than those called for under the Supreme Court’s broader standing precedents”); Ryan Fitzgerald, *No Leg to Stand On: How the Federal Circuit Improperly Restricted the Application of the Competitor Standing Doctrine to Patent Challengers When Establishing Article III Standing Upon Appealing an Inter Partes Review*, MINN. L. REV. De Novo Blog (posted Nov. 25, 2019).

administrative process to clear invalid, innovation-constraining restrictions from the marketplace.

**A. *Inter Partes* and Post-Grant Review
Are Important Means for Ensuring
Patent Quality.**

The “primary purpose of our patent laws”—including the America Invents Act, Pub. L. No. 112-29, Sec. 3(a), 125 Stat. 284 (2011), which created the IPR and PGR procedures (including the appeal right at issue here)—“is not the creation of private fortunes for the owners of patents but is ‘to promote the progress of science and the useful arts.’” *Quanta Computer, Inc. v. LG Elecs., Inc.*, 553 U.S. 617, 626 (2008) (quoting U.S. CONST. art. I, § 8, cl. 8). From inception, this has required wrestling with the problem of questionable patents. The Founders recognized that wrongful claimants would obtain patents, and that improvidently granted ones could be the source of fiscal harm. *See* Letter From James Madison to Congress (Apr. 11, 1816) (“I recommend . . . that further restraints be imposed on the issue of patents to wrongful claimants, and further guards provided against fraudulent exactions of fees by persons possessed of patents.”).

As patent application volume has grown dramatically, so too has the questionable-patent problem. An all-time high of over 330,000 U.S. utility patents issued last year, and over 4 million patents

remain in force.³ Overtaxed examiners and officials do their level best to promote patent quality; “[s]ometimes, though, bad patents slip through.” *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1353 (2018); see also Mark A. Lemley, *Fixing the Patent Office*, 13 INNOVATION POL’Y & ECON. 83, 83 (2012) (discussing the “large number of dubious patents” issued “over the past twenty years, particularly in the software and electronic commerce space”).

Practically speaking, questionable patents are a necessary cost for a sprawling system sifting through more than 600,000 new applications annually. See generally Mark A. Lemley, Essay, *Rational Ignorance at the Patent Office*, 95 NW. U. L. REV. 1495 (2001) (arguing it would be inefficient and near impossible to fund and administer air-tight examination; and expecting absolute perfection from all patent examiners would risk reducing allowances to a trickle). There is much to be done to improve the quality of granted patents, and while strides could be made to improve examination, there will always be questionable patents that issue in error, necessitating a robust *ex post* mechanism to review patent quality. See, e.g., *id.* at 1512; Michael D. Frakes & Melissa F. Wasserman, *Irrational Ignorance at the Patent Office*,

³ Unified’s internal estimates, pulled from the PTO and other databases, count over 4,340,000 active grants. See <https://portal.unifiedpatents.com/patents/analytics/ptab-and-litigation>. In 2018, Statista estimated over 3,06 million patents in force. See Erin Duffin, *Number of Patents in Force in the U.S. 2004-2018*, STATISTA (Dec. 18, 2019), <https://tinyurl.com/rofwjoj>. For current issuance data, see U.S. PATENT & TRADEMARK OFFICE, FY 2019 PERFORMANCE ACCOUNTABILITY REPORT 169, <https://tinyurl.com/qozmxnd>.

72 VAND. L. REV. 975, 978 (2019) (finding U.S. patent examiners have, on average, only eighteen hours total to review a patent application, and suggesting ways to improve examination).⁴

This inevitability of some bad patents slipping through, and the need to ensure that competition is not “repressed by worthless patents,” *Pope Mfg. Co. v. Gormully*, 144 U.S. 224, 234 (1892), means that the patent system cannot effectively promote the sciences and useful arts without effective post-issuance error correction. Today, Congress’s chosen way to ensure that patent protection is “just right” rather than “too much” is via post-issuance administrative review.

In 2011, Congress replaced earlier contested administrative proceedings with IPRs and PGRs, whereby the USPTO can take “a second look at an earlier administrative grant of a patent.” *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2144 (2016); see also *Return Mail, Inc. v. U.S. Postal Serv.*, 139 S. Ct. 1853, 1860–61 (2019) (describing the evolution of post-issuance agency review proceedings); *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1374 (2018) (PTAB proceedings “protect[] the public’s paramount interest in seeing that patent monopolies are kept within their legitimate scope”) (quotations omitted).

⁴ In 2019, the USPTO employed just over 8,000 patent examiners, and those 8,000 individuals were responsible for granting over 370,000 patents. U.S. PATENT & TRADEMARK OFFICE, FY 2019 PERFORMANCE ACCOUNTABILITY REPORT 169, 194, <https://tinyurl.com/qozmxnd>.

Congress’s aim in revamping post-grant procedures was to prevent unnecessary district court litigation by creating an “adversarial process before the Patent Office that mimics civil litigation,” *SAS Inst., Inc.*, 138 S. Ct. at 1352, yet provides a more accessible alternative, given the “growing sense that questionable patents are too easily obtained and too difficult to challenge.” H.R. REP. NO. 112-98, pt. 1, at 39 (2011). Neither IPR nor PGR are intended to replace litigation, but instead can provide affordable litigation alternatives by accomplishing slightly different things. Anyone other than the patent’s owner can file for review—opening the door to a wider group of would-be challengers than infringement litigation. 35 U.S.C. §§ 311(a), 321(a). But PTAB post-issuance proceedings are also narrower than litigation. In IPRs, the PTAB can review only the novelty and obviousness of issued claims, and only a subset of specific types of printed prior art. 35 U.S.C. § 311(b). For PGRs, the PTAB can review patent validity only within nine months after a patent is granted; a shortened time span during which infringement, much less litigation, is unlikely. 35 U.S.C. § 321(c).⁵ And the PTAB cannot adjudicate infringement.

Congress’s goals to avoid costly litigation, and thereby foster patent quality, have been somewhat successful. Thus far, roughly 20% of patents challenged by IPR avoid litigation; the corresponding

⁵ By contrast to IPR, in PGR a challenger can raise any basis for invalidity. 35 U.S.C. § 321(b).

share for PGRs is roughly half.⁶ Fierce competitors (like the sophisticated parties here) know that post-grant procedures are important for clearing patent thickets or establishing freedom to operate well before bringing a potentially infringing product to market. And the expedited agency review procedures provide a welcome pathway to police those patentees that over-patent, over-assert, or strategically evade invalidity litigation by avoiding suing those likely to pay to defend themselves, or those with the strongest prior art.

B. The Rejection of Competitor Standing Frustrates the Broad Appeal Right Congress Considered Essential to Encourage Challenges to Questionable Patents.

When Congress revamped post-grant procedures to improve patent quality, Congress expressly granted “a party dissatisfied” with the results the right to appeal PTAB decisions. 35 U.S.C. §§ 319, 329. That statutory grant—evenhanded as to both patent challengers and patentees—was plainly intended to afford appellate standing to the limits of Article III authority. *Amici* agree with Petitioner that, under this Court’s precedent and the settled rule in other circuits,

⁶ *Patent Quality Initiative Statistics—Dispelling PTAB Myths*, Unified Patents (Feb. 5, 2020), <https://tinyurl.com/uwfes34>; *see, e.g.*, Greenblum & Bernstein, P.L.C., Keeping Tabs: Inter Partes, Covered Business Methods and Post-Grant Review Filings at the PTAB (2020), <https://tinyurl.com/urvxoex> (listing 2019 PGRs and related litigations, or lack thereof).

Article III’s injury-in-fact requirement can be satisfied through a showing of competitive harm, and that courts can “apply simple economic logic to determine the existence of an injury-in-fact.” Pet. at 17. The Federal Circuit’s refusal to apply this competitor-standing rule—particularly given Congress’s promise of a statutory appeal right to aid competitors and make it easier for them to invalidate patents—demands this Court’s review.

The statutory appeal right was a considered choice. Earlier patent administrative review proceedings had not worked as well as they could have due to pre-AIA restrictions on appellate rights. Thus, in discussing the addition of the appeal-right provision, the Judiciary Committee explained that before the AIA, “a challenger that lost at the USPTO under reexamination had no right to appeal ... either administratively or in court. **Restrictions such as these made reexamination a much less favored avenue to challenge questionable patents than litigation.**” S. REP. NO. 110-259, at 18-19 (2008) (emphasis added). A motivating factor for including an even-handed right to appeal in the AIA was thus to encourage administrative challenges with full Article III review.⁷ And when Congress provides such a full-throated grant of appellate review, certain standing requirements, “namely immediacy and redressability, as well as prudential aspects that are not part of Article III—may be relaxed.” *Consumer Watchdog v. Wis. Alumni Research Found.*, 753 F.3d 1258, 1261

⁷ The availability of Article III review also protects the constitutionality of such administrative proceedings—a question raised but avoided in *Oil States*. See *Oil States*, 138 S. Ct. at 1379.

(Fed. Cir. 2014) (citing *Massachusetts v. EPA*, 549 U.S. 497, 517–18 (2007)).

Congress has a role to play in defining when a litigant has suffered an injury-in-fact, as well. See *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) (“Congress is well positioned to identify intangible harms that meet minimum Article III requirements,” so “its judgment is also instructive and important.”). And Congress would have expected its broad judicial-review grant to apply to all cases meeting the usual well-established standing doctrines—including competitor standing.

Congress enacts all legislation, including patent legislation, against the backdrop of this Court’s decisions. *Midlantic Nat’l Bank v. N.J. Dep’t of Envtl. Prot.*, 474 U.S. 494, 501 (1986). So Congress was presumptively aware of this Court’s repeated admonitions that federal procedure in patent cases should not diverge from the general rules governing Article III courts, absent explicit statutory instructions otherwise. See, e.g., *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391, 394 (2006) (four-factor test for granting permanent injunctions in other areas of law “apply with equal force to disputes arising under the Patent Act”); *Holmes Grp., Inc. v. Vornado Air Circulation Sys.*, 535 U.S. 826, 832–34 (2002) (rejecting that the term “arising under” in the statute granting the Federal Circuit exclusive jurisdiction over patent appeals should be interpreted differently than that phrase is interpreted in other jurisdictional statutes).

By 2011, when Congress created the streamlined PTAB post-issuance review procedures, complete with

the uncircumscribed appeal right, it was well established that “[p]atent law is not an island separated from the main body of American jurisprudence.” *Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp.*, 383 F.3d 1337, 1351 (Fed. Cir. 2004) (en banc) (Dyk, J., concurring in part and dissenting in part). Standing based on competitive harm, too, was well-established. *See, e.g., Clinton v. City of New York*, 524 U.S. 417, 433 (1998). So the Federal Circuit’s erection of a patent-specific rule that cripples competitor standing flies in the face of Congress’s carefully considered choice, against a backdrop of well-established legal principles, to grant review to unsuccessful patent challengers, as well as unsuccessful patent defenders.

Jettisoning Congress’s even-handed approach, the Federal Circuit quickly adopted a for-patents-only rule that unduly and unfairly constrains judicial review of PTAB rulings, forcing unsuccessful patent challengers—but not defenders—into effectively conceding planned willful infringement just to maintain their access to the promised Article III review of agency action, even when they can point to concrete and particularized competitive harm caused by a questionable patent granted by the USPTO and wrongly upheld by the PTAB. This rule flies in the face of the public’s “paramount interest in seeing that patent monopolies . . . are kept within their legitimate scope.” *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 343 (1971) (quoting *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 816 (1945)).

This Court’s decisions on validity challenges have long-rejected what the Federal Circuit now requires—allowing only would-be challengers who are at or near the point of infringement access to Article III courts. *See, e.g., Cardinal Chem. Co. v. Morton Int’l, Inc.*, 508 U.S. 83, 95–98 (1993) (finding of non-infringement does not moot validity challenge); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128–29 (2007) (infringer does not have to put itself at risk of infringement litigation before filing declaratory judgment). That a “plaintiff must destroy a large building, bet the farm, or (as here) risk treble damages” to have standing in district court “finds no support in Article III,” *MedImmune*, 549 U.S. at 134. And the same holds true for an appellant seeking the Article III review of agency action that Congress expressly provided for the purpose of encouraging administrative challenges to questionable patents. If left standing, the Federal Circuit’s contrary rule will harm not only competitors, but also Congress’s efforts to promote patent quality more broadly.

C. The Federal Circuit’s Asymmetric Rule Causes Immediate Problems for the Post-Issuance Process and the Development of Patent Law.

The Federal Circuit’s restrictive approach to standing undermines the value of the procedures that Congress established to make patent challenges easier, and skews the uniform development of patent law that the Federal Circuit is charged with promoting.

First, the interaction between the AIA’s estoppel provisions and the Federal Circuit’s one-sided standing rule are likely to deter competitors from bringing even strong administrative challenges—thwarting Congress’s goal of establishing an effective administrative mechanism to encourage the timely testing of questionable patents. In raising validity challenges, petitioners will understandably want to be sure that a court—at some point—has eyes on the issues. But because limiting appellate review of PTAB decisions for patent challengers might mean a patent challenger has *no* avenue for judicial review on invalidity, the Federal Circuit’s rule risks eliminating the most important administrative challenges—those brought by competitors with the means and motive to identify invalid patents.

An IPR or PGR petitioner “may not assert . . . in a civil action . . . that the [already challenged] claim[s] are] invalid on any ground that the petitioner raised or reasonably could have raised” during that IPR or PGR. 35 U.S.C. §§ 315(e)(2), 325(e)(2). The Federal Circuit has not definitively resolved how this estoppel provision would operate for cases dismissed on appeal for lack of standing. *See AVX Corp. v. Presidio Components, Inc.*, 923 F.3d 1357, 1363 (Fed. Circ. 2019) (discussing but declining to reach the issue). But as Judge Hughes explained, the potential effects of estoppel, and uncertainty for a party like GE as to what defenses are left after IPR, “underscore the problems with [the Federal Circuit’s] increasingly narrow approach to Article III standing,” Pet. App. 18a—and heighten the harm to the post-grant system

by leaving the Federal Circuit's lopsided review approach uncorrected.

A would-be patent challenger who unsuccessfully raises invalidity arguments before the PTAB could be barred from making those arguments (or others that could reasonably have been made) in later defending against a district court infringement action. And this is so even if there was no Article III review of the administrative ruling. As such, the consequences of losing an IPR or PGR challenge are potentially severe.

The very real and open question of whether a party in GE's position—if it were to later infringe the challenged patent—would be estopped from raising invalidity to defend itself in later litigation is itself enough to chill use of the administrative procedures that Congress sought to promote. Many would-be patent challengers, especially ones like the hard-fought competitors here, might sensibly decide not to risk having their only bite at the invalidity-challenge apple be one where there is slim chance of review by an Article III judge. If they must be near or already infringing to get judicial review, they might as well wait to be sued.

Second, appeals—in general and especially in the singular Federal Circuit—are supposed to promote quality and uniformity in development of the law. The creation of the Federal Circuit “resulted in a single, relatively coherent body of patent case law” on which parties “can rely with greater certainty.” JANICE M. MUELLER, *PATENT LAW* 39 (3d ed. 2009). But an appellate court cannot develop a uniform and coherent body of law if it structures the appeal process to review mostly decisions upholding questionable patents. By

unduly and unevenly limiting the administrative appeals it hears—and ignoring most appeals where the PTAB declines to invalidate a patent not yet infringed—the Federal Circuit is unilaterally deferring to the agency in one category of decisions. Sapna Kumar, *Standing Against Bad Patents*, 32 BERKELEY TECH. L.J. 87, 130 (2017) (under the status quo, patent challengers and patent owners have lopsided access to the court). The Federal Circuit’s refusal to apply settled competitor-standing principles thus not only undermines the agency review process, it also ties its own hands (and this Court’s) from reviewing the universe of PTAB decisions, jeopardizing the uniform development of patent law.

Ultimately, the Federal Circuit’s miserly approach to appeals by unsuccessful petitioners in AIA post-issuance proceedings works to discourage competitors from raising the early patent challenges that Congress aimed to foster. This is particularly problematic because competitors are generally best positioned to police each other’s patents and there is little societal benefit to forcing them into litigation before they can do so. Competitors have the strongest incentive; with a questionable patent gone, the competitor can generate revenue, freely license, and increase market share. *See, e.g., Lear*, 395 U.S. at 670 (licensee may be the only ones with enough economic incentive to challenge validity); Burstein, *supra*, at 545–46 (discussing cost-benefit analysis for competitors challenging invalid patents). And a competitor is likely to have the technical knowledge relevant to assessing patent validity, understand the perspective of a person of ordinary skill in the art, and

identify relevant prior art. Selectively straight-jacketing their right to appeal makes little sense. Only this Court can restore the effective functioning of the post-grant administrative process.

II. The Federal Circuit’s Out-of-Step No-Competitor-Standing Rule Is Particularly Harmful to Startups.

The nation’s startups—major drivers of innovation—will be disproportionately shut out of Article III review by the Federal Circuit’s blinkered approach to standing. The Federal Circuit’s rule is based on the flawed patent-centric assumption that a company is injured by a questionable patent only if it is already—or very close to—infringing. *See, e.g., AVX Corp.*, 923 F.3d at 1365 (suggesting only those “currently using the claimed features or nonspeculatively planning to do so” can be harmed by a patent). Not so. The competitive harm from a questionable patent starts upstream, long before litigation or any concrete plan of infringement, much less an infringing act. Why else would competitors spend hundreds of thousands of dollars in fees for proactive challenges?

The mere existence of a patent can distort the market, even if the patent owner never asserts it and even if others never infringe it. A questionable patent can operate like a scarecrow, deterring competitors and follow-on innovation. Christopher R. Leslie, *The Anticompetitive Effects of Unenforced Invalid Patents*, 91 MINN. L. REV. 101, 115–16 (2006) (citing *Bresnick*

v. U.S. Vitamin Corp., 139 F.2d 239, 242 (2d Cir. 1943) (Hand, J.)). “[I]nvalid patents can create unacceptable litigation risks for potential entrants, raise entry costs, delay entry, deter customers and business partners from contracting with new entrants, and impose inefficiencies while distorting innovation.” Leslie, *supra*, at 114.

Startups are particularly vulnerable to this deterrence effect, as they are less able to absorb costs or tolerate certain risks. Precarious new businesses hoping to innovate rely on Congress’s promise of low-cost alternatives to patent litigation. The Federal Circuit’s standing decisions upend that promise, effectively denying parties full access to IPR and PGR until they are already close to infringement. But waiting so late to seek an administrative determination of patent invalidity—complete with the promised Article III oversight—defeats the purpose.

The point of streamlined administrative review is to settle questions of patent validity—conclusively—before undertaking activities that would risk infringement, not after. Short-circuiting that process by eliminating Article III review particularly harms startups because litigation is not a reasonable alternative for them; the limitation on judicial review lessens the likelihood that larger competitors will clear the field for innovation; and startups are much more likely to drop their innovative plans than risk even a weak infringement lawsuit.

First, for most startups, there are no reasonable alternatives to administrative review. By design, PTAB post-issuance review proceedings are shorter and less expensive than district court patent

litigation. Smaller companies, including startups, can pursue these alternatives more readily than they can undertake the risks and costs of litigation. The cost of an IPR is still significant for startups, but it is an order of magnitude less expensive than defending a district court case.⁸ Resolving patent validity early and efficiently through IPR or PGR, as Congress intended, *supra* part I.B, allows startups to focus their time and resources on doing what they do best—innovating and generating new economic opportunities.

Second, even when larger, more-established firms (like GE) enjoy full access to IPR and PGR, and mount successful challenges to questionable patents, it creates opportunities and clears risk for smaller innovators as well. When one patent stands in the way of countless innovators, each small entity does not have to step up to bring its own validity challenge. Instead, if there is the opportunity and incentive for one challenger to invest the time in challenging the patent, the benefits will be felt more broadly. *See, e.g.*, Daniel Nazer, *EFF Wins Final Victory over Podcasting Patent*, ELEC. FRONTIER FOUND. (May 14, 2018), <https://tinyurl.com/yddantkn> (describing use of IPR to invalidate one patent that was at risk of being asserted against a plethora of small podcasting

⁸ *Cost of Inter Partes Review: Everything You Need to Know*, UPCOUNSEL, <https://tinyurl.com/ukxamjp> (last visited Feb. 28, 2020) (approximating the cost of an IPR at \$300,000–\$600,000); Malathi Nayak, *Costs Soar for Trade Secrets, Pharma Patent Suits, Survey Finds*, BLOOMBERG LAW (Sept. 10, 2019, 8:01 AM), <https://tinyurl.com/rwh5htv> (reporting the average cost of an electrical or computer-related IPR as \$150,000 in 2019, compared to the \$1.5 million cost of even a mid- to smaller-stakes patent case).

entities); *HP Inc. v. MPHJ Tech. Invs., LLC*, 817 F.3d 1339, 1342 (Fed. Cir. 2016) (after letters were “sent . . . to numerous small businesses, alleging that those businesses likely infringed the '381 patent,” and “[b]ecause the letters were sent to users of HP's multi-function printers, HP petitioned for IPR of the '381 patent”).

Third, startups—which have slimmer coffers to protect against downside risks—are less likely to proceed with new innovative or competitive activity if there is litigation risk. If a company develops a product and is later found liable for patent infringement, the consequences are significant. *See, e.g.*, 35 U.S.C. § 284 (treble damages for willful infringement); *id.* at § 283 (enjoining future conduct). And the risk of being sued, irrespective of ultimate liability, causes substantial harm on its own.

Even if suit is not imminent, and even if one is certain a patent is invalid, litigation costs are staggering, and a startup may not be able to cover those costs through the point that it ultimately prevails. The risk of litigation, alone, is thus enough to chill innovation. Startups are “particularly sensitive to accusations of infringement because they are likely to experience resource constraints when faced with the costs of funding a suit.” Stuart J.H. Graham et al., *High Technology Entrepreneurs and the Patent*

System: Results of the 2008 Berkeley Patent Survey, 24 BERKELEY TECH. L.J. 1255, 1315 (2009).⁹

The mere risk of an infringement suit may also make investors balk. “Venture capitalists do not eagerly embrace business models based on a product that infringes the patent of a dominant player when assertions of invalidity cannot be tested before entering the market.” Leslie, *supra*, at 126. “The threat of being sued for infringement by an incumbent—even on a meritless claim—may ‘scare . . . away’ venture capital financing.” FED. TRADE COMM’N, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY 7–8 (2003); *see also, e.g.*, Robin Feldman, *Patent Demands & Startup Companies: The View from the Venture Capital Community*, 16 YALE J.L. & TECH. 236, 280 (2014) (survey of venture capitalists revealed patent demands could deter all investors).

And for a startup that does get off the ground, questionable patents might still curtail its innovation. For any company, even a large one, another “firm’s questionable patent may lead [it] to forgo R&D in the areas that the patent improperly covers.” FTC at 5. Startups, with less capital, will be even more inclined to avoid R&D if there is a high threat of patent litigation down the line. *See, e.g.*, Jean O. Lanjouw & Mark Schankerman, *Enforcement of Patent Rights in the United States*, in PATENTS IN THE KNOWLEDGE-

⁹ This concern is not new. Decades ago, this Court acknowledged that “the expense of defending a patent suit is often staggering to the small businessman.” *Blonder-Tongue Labs., Inc.*, 402 U.S. at 334 (quoting *Picard v. United Aircraft Corp.*, 128 F.2d 632, 641 (2d Cir. 1942) (Frank, J., concurring)).

BASED ECONOMY 145, 146 (Wesley M. Cohen & Stephen A. Merrill eds., 2003) (referring to evidence that “small firms avoid R&D areas where the threat of litigation from larger firms is high”).

An example of one startup accused of infringement illustrates the stark harms questionable patents cause in the startup space. Even though the suit was ultimately dismissed, one startup’s valuation dropped by \$4 million during the suit, and as a result the company had to lay off over 25% of its staff.¹⁰

Congress provided startups a tool to avoid these harms when their path to innovation and growth was blocked by a questionable patent. The Federal Circuit’s asymmetrical competitor-standing rule hobbles it. This Court has made clear that there is no room for federal procedure rules that apply in patent cases only, *see, e.g., SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods.*, 137 S. Ct. 954, 964 (2017), and that the law should not require a company to expose itself to infringement liability or concede willfulness before seeking freedom to operate. *See MedImmune, Inc.*, 549 U.S. at 132 n.11. The Federal Circuit’s failure to abide by those maxims causes immediate and substantial harm to the patent system, which only this Court can correct.

¹⁰ *See* Joe Mullin, *New Study Suggests Patent Trolls Really Are Killing Startups*, ARSTECHNICA (June 11, 2014, 8:55 PM), <https://tinyurl.com/vwlfqhg>.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted.

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March 2020