

No. _____

**In The
Supreme Court of the United States**

—◆—
RPX CORPORATION,

Petitioner,

v.

CHANBOND LLC,

Respondent.

—◆—
**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit**

—◆—
PETITION FOR A WRIT OF CERTIORARI

—◆—
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QUESTION PRESENTED

Can the Federal Circuit refuse to hear an appeal by a petitioner from an adverse final decision in a Patent Office inter partes review on the basis of lack of a patent-inflicted injury in fact when Congress has (i) statutorily created the right to have the Director of the Patent Office cancel patent claims when the petitioner has met its burden to show unpatentability of those claims, (ii) statutorily created the right for parties dissatisfied with a final decision of the Patent Office to appeal to the Federal Circuit, and (iii) statutorily created an estoppel prohibiting the petitioner from again challenging the patent claims?

**PARTIES TO THE PROCEEDING
AND RULE 29.6 STATEMENT**

Petitioner, who was Appellant below, is RPX Corporation. Petitioner currently has no parent company, and no publicly held corporation owns 10% or more of any of its stock. However, in April 2018, Petitioner entered into a definitive merger agreement pursuant to which a tender offer would be made to be acquired by Riptide Parent, LLC. Petitioner will notify the Clerk as required by Rule 29.6 upon the closing of that transaction.

Respondent is ChanBond LLC, Appellee below.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT	ii
PETITION FOR A WRIT OF CERTIORARI.....	1
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	1
CONSTITUTIONAL AND STATUTORY PROVI- SIONS INVOLVED	2
STATEMENT.....	3
REASONS FOR GRANTING THE WRIT	7
I. THE FEDERAL CIRCUIT'S DECISION BE- LOW AND CURRENT JURISPRUDENCE CONFLICTS WITH THE COURT'S PREC- EDENT REGARDING THE POWER OF CONGRESS TO CREATE ARTICLE III STANDING BY STATUTE.....	7
A. IN ENACTING 35 U.S.C. §§ 318, 311, AND 315, CONGRESS CREATED NEW PRIVATE RIGHTS THE INVASION OF WHICH CONSTITUTE INJURIES IN FACT.....	10
B. IN ENACTING §§ 319 AND 141, CON- GRESS INTENDED FOR ANY PARTY DISSATISFIED WITH A FINAL DECI- SION TO BE ABLE TO APPEAL	15

TABLE OF CONTENTS – Continued

	Page
II. THIS CASE RAISES THE IMPORTANT CONSTITUTIONAL QUESTION OF WHETHER VIOLATION OF A LEGALLY PROTECTED INTEREST PROVIDED BY CONGRESS CONFERS ARTICLE III STANDING, AND IS A GOOD VEHICLE BECAUSE THE FEDERAL CIRCUIT HAS ISSUED MULTIPLE CONSISTENT DECISIONS ON THE ISSUE AND HAS EXCLUSIVE JURISDICTION OVER APPEALS FROM THE BOARD.....	21
CONCLUSION	26

APPENDIX

Order, United States Court of Appeals for the Federal Circuit (Jan. 17, 2018)	App. 1
Final Written Decision, United States Patent and Trademark Office, Patent Trial and Appeal Board (May 25, 2017).....	App. 9

TABLE OF AUTHORITIES

	Page
CASES	
<i>Altaire Pharm., Inc. v. Paragon Biotech, Inc.</i> , 889 F.3d 1274 (Fed. Cir. 2018)	8, 9, 22, 25
<i>Americans for Safe Access v. DEA</i> , 706 F.3d 438 (D.C. Cir. 2013)	12
<i>Brandon v. Eckard</i> , 569 F.2d 683 (D.C. Cir. 1977)	24
<i>California v. Rooney</i> , 483 U.S. 307 (1987)	20
<i>Consumer Watchdog v. Wis. Alumni Research Found.</i> , 753 F.3d 1258 (Fed. Cir. 2014)	8, 9, 15, 22
<i>Cuozzo Speed Techs., LLC v. Lee</i> , 136 S. Ct. 2131 (2016)	3, 12, 19
<i>Deposit Guar. Nat'l Bank v. Roper</i> , 445 U.S. 326 (1980)	20
<i>FEC v. Akins</i> , 524 U.S. 11 (1998)	14, 24
<i>Havens Realty v. Coleman</i> , 455 U.S. 363 (1982)	24
<i>Intellectual Prop. Dev., Inc. v. TCI Cablevision of Cal.</i> , 248 F.3d 1333 (Fed. Cir. 2001)	22
<i>Lear, Inc. v. Adkins</i> , 395 U.S. 653 (1969)	12
<i>Linda R.S. v. Richard D.</i> , 410 U.S. 614 (1973)	10
<i>Lujan v. Defs. of Wildlife</i> , 504 U.S. 555 (1992)	10, 11, 16, 18
<i>Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC</i> , 138 S. Ct. 1365 (2018)	3, 17
<i>Phigenix, Inc. v. Immunogen, Inc.</i> , 845 F.3d 1168 (Fed. Cir. 2017)	<i>passim</i>

TABLE OF AUTHORITIES – Continued

	Page
<i>Pope Mfg. Co. v. Gormully</i> , 144 U.S. 224 (1892)	12
<i>PPG Indus., Inc. v. Valspar Sourcing, Inc.</i> , 679 F. App'x 1002 (Fed. Cir. 2017)	9
<i>Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.</i> , 324 U.S. 806 (1945)	19
<i>Pub. Citizen v. DOJ</i> , 491 U.S. 440 (1989)	14, 24
<i>Pub. Citizen v. FTC</i> , 869 F.2d 1541 (D.C. Cir. 1989)	24
<i>Raines v. Byrd</i> , 521 U.S. 811 (1997)	10
<i>Rushforth v. Council of Econ. Advisers</i> , 762 F.2d 1038 (D.C. Cir. 1985)	24
<i>SAS Inst., Inc. v. Iancu</i> , 138 S. Ct. 1348 (2018)	3
<i>Sierra Club v. Morton</i> , 405 U.S. 727 (1972)	16, 20
<i>SkyHawke Techs., LLC v. Deca Int'l Corp.</i> , 828 F.3d 1373 (Fed. Cir. 2016)	20
<i>Spokeo, Inc. v. Robins</i> , 136 S. Ct. 1540 (2016)	<i>passim</i>
<i>Warth v. Seldin</i> , 422 U.S. 490 (1975)	10
<i>WiAV Solutions LLC v. Motorola, Inc.</i> , 631 F.3d 1257 (Fed. Cir. 2010)	22
<i>Zivotofsky v. Secretary of State</i> , 444 F.3d 614 (D.C. Cir. 2006)	24
CONSTITUTION	
U.S. Const. Article III, Section 2, Clause 1	<i>passim</i>

TABLE OF AUTHORITIES – Continued

	Page
STATUTES	
Freedom of Information Act, 5 U.S.C. § 552.....	24
Sunshine Act, 5 U.S.C. § 552b	24
Administrative Procedure Act, 5 U.S.C. § 702	20
Federal Advisory Committee Act, 5 U.S.C. app. 2	
§§ 1–16.....	14, 24
28 U.S.C. § 1254	1
28 U.S.C. § 1295	25
35 U.S.C. § 141	<i>passim</i>
35 U.S.C. § 142	2, 6, 25
35 U.S.C. § 143	2, 6, 25
35 U.S.C. § 144	2, 6, 25
35 U.S.C. § 311	8, 10, 11, 14
35 U.S.C. § 312	8
35 U.S.C. § 313	8
35 U.S.C. § 314	3, 8, 19
35 U.S.C. § 315	<i>passim</i>
35 U.S.C. § 316	3, 8, 11
35 U.S.C. § 317	8
35 U.S.C. § 318	<i>passim</i>
35 U.S.C. § 319	<i>passim</i>
America Invents Act, § 18, 125 Stat. 329–31	
(2011).....	4, 5, 8, 19, 23

TABLE OF AUTHORITIES – Continued

	Page
OTHER AUTHORITIES	
3B Charles Alan Wright et al., <i>Fed. Prac. & Proc.</i> § 3531.13 (3d ed. 2017)	11
157 Cong. Rec. S5409 (daily ed. Sept. 8, 2011)	19
H.R. Rep. No. 112–98 (2011)	19
Charles Macedo et al., <i>Rethinking Article III Standing in IPR Appeals at the Federal Cir- cuit</i> , http://www.patentqualityinitiative.com/-/ media/pqi/files/articles/rethinking-article-iii- standing-in-ipr-appeals.pdf (2018)	25

PETITION FOR A WRIT OF CERTIORARI

Petitioner RPX Corporation (“RPX”) respectfully petitions this Court for a writ of certiorari to review the order of the Court of Appeals for the Federal Circuit dismissing RPX’s appeal of the Patent Trial and Appeal Board’s Final Written Decision in the inter partes review RPX requested for lack of standing.

**OPINIONS BELOW**

The Patent Trial and Appeal Board’s (“Board”) Final Written Decision (“Final Decision”) (App. 9–48) is unreported. The Court of Appeals for the Federal Circuit’s Order (App. 1–8) dismissing RPX’s appeal of the Board’s Final Decision is unreported.

**JURISDICTIONAL STATEMENT**

The Federal Circuit’s Order issued on January 17, 2018. On April 2, 2018, the Chief Justice granted RPX’s application (17A1057) to extend the time to file a petition for writ of certiorari from April 17, 2018, to June 16, 2018. Jurisdiction is conferred by 28 U.S.C. § 1254(1).



CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2, Clause 1 of the Constitution states in relevant part: “The judicial power shall extend to all cases, in law and equity, arising under . . . the laws of the United States. . . .”

35 U.S.C. § 141, titled, “Appeal to the Court of Appeals for the Federal Circuit,” states in relevant part:

(c) Post-grant and Inter Partes Reviews. A party to an inter partes review or a post-grant review who is dissatisfied with the final written decision of the Patent Trial and Appeal Board under section 318(a) or 328(a) (as the case may be) may appeal the Board’s decision only to the United States Court of Appeals for the Federal Circuit.

35 U.S.C. § 319, titled “Appeal,” states in relevant part, “[a] party dissatisfied with the final written decision of the Patent Trial and Appeal Board . . . may appeal the decision pursuant to sections 141 through 144. Any party to the inter partes review shall have the right to be a party to the appeal.”

35 U.S.C. § 318, titled “Decision of the Board,” states in relevant part, “the Patent Trial and Appeal Board shall issue a final written decision with respect to the patentability of any patent claim challenged by the petitioner . . . ” and “the Director shall issue and publish a certificate canceling any claim of the patent finally determined to be unpatentable. . . .”

35 U.S.C. § 315(e), titled “Estoppel,” states in relevant part, “The petitioner in an inter partes review . . . may not request or maintain a proceeding before the Office . . . on any ground that the petitioner raised or reasonably could have raised during that inter partes review.”

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STATEMENT

This case concerns Congress’ power to confer Article III standing by statute. Specifically, this case asks whether a party that requests inter partes review (“Review”) of a patent has standing to appeal the Patent Office’s final decision in the Review to the Court of Appeals for the Federal Circuit, when Congress has passed statutes conferring a right to compel agency action, expressly providing for any dissatisfied party to appeal, and creating an estoppel that precludes the party from requesting or maintaining another challenge against the patent.

Although the Court has in recent years addressed multiple issues with Reviews, including interpreting the relevant statutes and resolving constitutional challenges, *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131 (2016) (interpreting 35 U.S.C. §§ 314, 316); *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365 (2018) (addressing Article III and Seventh Amendment challenges); *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348 (2018) (interpreting 35 U.S.C. § 318), this would be the first time the Court would address the

question of Article III standing in an appeal of a Board decision in an inter partes review or reexamination. Since inter partes reviews and reexaminations became available, numerous petitioners have been challenged for lack of Article III standing, or more specifically lack of injury in fact, in appeals from a Board decision. In those cases, the Federal Circuit has consistently found that only parties facing an imminent threat of suit for infringement of the underlying patent could prove an injury in fact to establish standing to appeal.

The Petitioner

Petitioner RPX was founded in 2008 in response to the problem of wasteful legal and settlement expenses generated by non-practicing entity patent assertions. RPX's solutions to that problem are premised on the fundamental principle that, like any property, patent rights can and should be transacted in a rational, efficient, and transparent marketplace, rather than through lengthy and costly legal disputes.

To address the problem, RPX has developed several lines of business. In one, RPX acquires rights to patents sold on the open market or asserted in litigation to achieve peaceful resolution of patent disputes through rationally negotiated transactions. In a separate line of business enabled by the passage of the America Invents Act ("AIA"), RPX challenges the validity of low-quality patents asserted by non-practicing entities. The logic for doing so is simple and in line with Congress' intent in passing the AIA: if RPX can help

the Patent Office cancel patents that do not claim real inventions, RPX can reduce the volume of and time spent on patent assertions and litigations, as well as the billions of dollars spent on unnecessary legal fees and settlements.

RPX has not been alone in recognizing the value of third-party petitioners (i.e., those not typically the targets of patent infringement actions) challenging patent validity using the Review process. Congress, in expressly omitting a declaratory-judgment-level standing requirement for requesters of Reviews, implicitly opened the door for non-defendants to challenge patent validity. Patent offices in other jurisdictions with strong patent protections and procedures, including the European Patent Office, Japan Patent Office, and Korean Intellectual Property Office, have also opened the doors for non-defendants to challenge patent validity in opposition and cancellation proceedings. Finally, numerous other third-party petitioners have developed businesses aimed at challenging the validity of low-quality patents, and RPX believes that the collective action of these petitioners helps to address the negative public perceptions undermining the patent system and thus strengthen the patent system overall. In practical effect, these parties often fill a gap left despite the passage of the AIA whereby a non-practicing entity can, with little cost, secure rights to a low-quality patent and accuse multiple parties of patent infringement demanding settlement figures well below the cost to file and prosecute a Review, thus deterring any single defendant from filing a Review. Petitioning for

cancellation of such patents is an important mechanism by which third-party petitioners like RPX help to curb abuses of the U.S. patent system.

The Proceedings Below

RPX requested Review of Respondent's patent by filing a Petition with the Patent and Trademark Office's Patent Trial and Appeal Board ("Board"). The Board instituted Review but ultimately held in its Final Written Decision ("Final Decision") that RPX had not shown that the claims of Respondent's patent are unpatentable. App. 9–10.

35 U.S.C. § 141 expressly provides RPX a statutory right to appeal the Board's Final Decision to the Court of Appeals for the Federal Circuit, stating:

(c) Post-grant and *inter partes* reviews. A party to an *inter partes* review or a post-grant review who is dissatisfied with the final written decision of the Patent Trial and Appeal Board under section 318(a) or 328(a) (as the case may be) may appeal the Board's decision only to the United States Court of Appeals for the Federal Circuit.

35 U.S.C. § 319, which is contained within Chapter 31 of the Patent Act that relates exclusively to Reviews, refers to Section 141 and reiterates RPX's right to appeal, stating, "[a] party dissatisfied with the final written decision of the Patent Trial and Appeal Board . . . may appeal the decision pursuant to sections 141 through 144."

RPX's right to appeal the Board decision to the Federal Circuit is supported by two other provisions of the Patent Act, namely 35 U.S.C. § 315, which provides that the Director shall cancel claims RPX proved unpatentable, and 35 U.S.C. § 318, which estops RPX from filing subsequent challenges to Respondent's patent.

RPX timely appealed the Board's Final Decision to the Court of Appeals for the Federal Circuit. Respondent filed a motion to dismiss RPX's appeal for lack of standing. The Federal Circuit granted Respondent's motion, finding that despite the express statutory right to appeal, the express statutory right to cancellation, and the express statutory creation of estoppel, RPX lacked standing because RPX has not been accused of infringing Respondent's patent and "is not engaged in any activity that would give rise to a possible infringement suit." App. 5.



REASONS FOR GRANTING THE WRIT

I. THE FEDERAL CIRCUIT'S DECISION BELOW AND CURRENT JURISPRUDENCE CONFLICTS WITH THE COURT'S PRECEDENT REGARDING THE POWER OF CONGRESS TO CREATE ARTICLE III STANDING BY STATUTE

The Federal Circuit has consistently found that the only injury sufficient to confer standing on a Review or inter partes reexamination petitioner is a

patent-inflicted injury, and its current jurisprudence on Article III injury in fact conflicts with the Court’s precedent and with the America Invents Act. In its first case ruling on a variation of the question in the inter partes reexamination context, the Federal Circuit held that a petitioner for the reexamination lacked standing to appeal, because (1) the appellant was “not engaged in any activity that would give rise to a possible infringement suit,” (2) §§ 311–318 did not guarantee the petitioner a right to a particular outcome, and (3) § 315(e)’s estoppel provision did not constitute an injury in fact when appellant was not engaged in activity potentially giving right to an infringement suit. *Consumer Watchdog v. Wis. Alumni Research Found.*, 753 F.3d 1258, 1262 (Fed. Cir. 2014); see 35 U.S.C. §§ 311–318 (pre-AIA); see also *Phigenix, Inc. v. Immunogen, Inc.*, 845 F.3d 1168 (Fed. Cir. 2017) (affirming the *Consumer Watchdog* holdings in the context of inter partes review).

In the present case, the Federal Circuit again found that neither the statutory estoppel provisions nor the relevant statute requiring the Patent Office to cancel claims shown to be unpatentable created any rights the invasion of which was sufficient to constitute an injury in fact when the Review petitioner was not alleged to be engaging in allegedly infringing activities. App. 5. Indeed, the only case in which the Federal Circuit has found that a Review petitioner-appellant challenged for lack of standing indeed had standing was in *Altaire Pharmaceuticals, Inc. v. Paragon Biotech, Inc.*, where the petitioner had demonstrated a

patent-inflicted injury, namely an imminent infringement suit. 889 F.3d 1274, 1283 (Fed. Cir. 2018) (“Altaire’s injury is imminent, whereas the appellant in *Consumer Watchdog* ‘only alleged a general grievance concerning’ the challenged patent, [] and the appellant in Phigenix only alleged its aspirations of licensing its patent portfolio.”) (internal citations omitted); *see also PPG Indus., Inc. v. Valspar Sourcing, Inc.*, 679 F. App’x 1002, 1004 (Fed. Cir. 2017) (finding that a requester for inter partes reexamination who appealed an adverse decision of the Board had established an injury in fact in facing imminent threat of suit, but finding the appeal mooted because the patent owner had filed a covenant-not-to-sue for infringement of the underlying patent).

Taken together, these cases discount any injury to the appellant not inflicted by the patent itself. They effectively tether the injury-in-fact analysis to allegedly patent-infringing activities in a manner that impermissibly deviates from the Court’s precedent regarding the power of Congress to create Article III standing by statutorily creating a right, the invasion of which constitutes an injury in fact.

RPX does not dispute it fails to satisfy the Federal Circuit’s requirement of a patent-inflicted injury in fact. However, the Federal Circuit’s decision conflicts with Supreme Court precedent regarding the power of Congress to enable a party to satisfy Article III standing by statute. Further, satisfaction of the statutory requirements creates an agency-inflicted injury in fact

sufficient for standing to appeal the Board’s Final Decision to the Federal Circuit.

A. IN ENACTING 35 U.S.C. §§ 318, 311, AND 315, CONGRESS CREATED NEW PRIVATE RIGHTS THE INVASION OF WHICH CONSTITUTE INJURIES IN FACT

While “Congress cannot erase Article III’s standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing,” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547–48 (2016) (quoting *Raines v. Byrd*, 521 U.S. 811, 820, n.3 (1997)), that is not what Congress has done here. Rather, in enacting §§ 318 and 315, Congress has specified by statute *bases* for RPX’s injury in fact by creating private rights, the invasions of which constitute injuries in fact.

The Court has held that “Congress may ‘elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.’” *Spokeo*, 136 S. Ct. at 1549 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 578 (1992)); *see also Warth v. Seldin*, 422 U.S. 490, 514 (1975) (“Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute.”); *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973) (“Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist

without the statute.”); 13B Charles Alan Wright et al., Fed. Prac. & Proc. § 3531.13 at 2 (3d ed. 2017) (“Congress also establishes standing by the direct and simple enactment of a statute that establishes a right of action.”). The Court held in *Lujan* that if “the plaintiff is himself an object of the action (or forgone action) at issue . . . there is ordinarily little question that the action or inaction has caused him injury.” *Lujan*, 504 U.S. at 561–62. And although the *Spokeo* Court tempered some of the broader holdings of earlier cases, it maintained that “a plaintiff [who suffered the violation of a procedural right granted by statute] need not allege any *additional* harm beyond the one Congress has identified.” *Spokeo*, 136 S. Ct. at 1549.

Against this backdrop, invasions of the legally protected rights granted to Review petitioners under §§ 318, 311, and 315, constitute injuries in fact, because the injuries are both concrete and particularized.

First, 35 U.S.C. § 318(b) creates a statutory right for any petitioner who, in an instituted Review, meets its burden of proving unpatentability of a patent claim to have the Director of the Patent Office cancel the claim. See 35 U.S.C. § 316(e) (“[T]he petitioner shall have the burden of proving . . . unpatentability by a preponderance of the evidence.”); § 318(a) (“If an inter partes review is instituted and not dismissed under this chapter, the . . . Board *shall* issue a final written decision with respect to the patentability of any patent claim challenged by the petitioner. . . .”) (emphasis added); § 318(b) (“If the . . . Board issues a final written

decision under subsection (a) . . . the Director *shall* issue and publish a certificate canceling any claim of the patent finally determined to be unpatentable. . . .”) (emphasis added). This is a matter of right, not discretion. The Patent Office must cancel such a claim. Should it refuse, the only party with standing to compel it to act is the Review petitioner.

Congress gave requesters of Reviews like RPX the substantive statutory right to compel the Patent Office to cancel unpatentable patent claims. This expansive right to compel cancellation of patents makes sense because it is as important to the quality of the patent system to cancel wrongfully issued patents as it is to issue patents on deserving inventions. *See Pope Mfg. Co. v. Gormully*, 144 U.S. 224, 234 (1892) (“It is as important to the public that competition should not be repressed by worthless patents, as that the patentee of a really valuable invention should be protected in his monopoly.”) (quoted by *Lear, Inc. v. Adkins*, 395 U.S. 653, 663–64 (1969)). And Congress recognized that the Patent Office needs help correcting its mistakes. *See Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2144 (2016) (noting Congressional “purpose” of creating Reviews was “to reexamine an earlier agency decision” and “protect the public’s paramount interest in seeing that patent monopolies . . . are kept within their legitimate scope”) (citations and internal quotations omitted).

For purposes of assessing standing, it is assumed that the appellant is correct on the merits. *Americans for Safe Access v. DEA*, 706 F.3d 438, 443 (D.C. Cir. 2013). Thus, here, the Court should assume RPX proved

Respondent's patent claims to be unpatentable and that the Board erred in its Final Decision upholding Respondent's patent. When a patent claim is shown to be unpatentable, Congress does not merely permit the Patent Office to cancel that patent claim, Congress *mandates* the Patent Office cancel that patent claim. 35 U.S.C. § 318(a)–(b). The Patent Office has no discretion.

Here, RPX's interest in having Respondent's patent claims canceled through Review is its "legally protected interest," because Congress provides RPX that right by statute. *See* 35 U.S.C. § 318. RPX secured that right to compel cancellation of the patent at issue no later than the Board's decision, based on RPX's petition, instituting an agency "trial" on the patentability of the patent's claims. That institution triggered the agency's statutory non-discretionary obligation to cancel all patent claims RPX showed to be unpatentable and triggered RPX's statutory right to compel such cancellation, by appeal to the Federal Circuit if necessary. Once RPX secured the Board's discretionary decision to institute Review, the statute required the Director of the Patent Office to cancel Respondent's patent claims. The Board's final decision failed to do so and therefore denied RPX its substantive statutory right to compel the cancellation of the claims.

RPX's dissatisfaction with the Board's Final Decision in the Review need not be based on an economic or competitive injury from the patent, as the Federal Circuit held. Rather, RPX's dissatisfaction with the Board's Final Decision is sufficient in the same way

those seeking information from government agencies have a sufficient legally protected interest for standing when they are dissatisfied with the response the agency provides to their requests for information. *FEC v. Akins*, 524 U.S. 11, 21, 25 (1998) (finding that an “inability to obtain information” that a party contends a statute requires be made public, and would help them evaluate candidates for public office, constitutes a concrete and particular injury in fact); *Public Citizen v. DOJ*, 491 U.S. 440, 449 (1989) (finding failure to obtain information required to be disclosed under the Federal Advisory Committee Act, 5 U.S.C. app. 2 §§ 1–16, is an injury in fact for standing purposes and stating, “Our decisions interpreting the Freedom of Information Act have never suggested that those requesting information under it need show more than that they sought and were denied specific agency records.”).

Second, while 35 U.S.C. § 311 allows any “person who is not the owner of a patent . . . to file . . . a petition [for] inter partes review of the patent,” § 315(e)(1) estops “[t]he petitioner in an inter partes review [from] request[ing] or maintain[ing] a proceeding . . . on any ground that the petitioner raised or reasonably could have raised during the inter partes review.” Put another way, the statutory right to file a petition under § 311 requesting claim cancelation is invaded by an adverse final decision upholding the claims. And although the estoppel provisions under § 315(e) become active irrespective of the outcome of the final decision, the injury exists nonetheless.

In this case, RPX proved to the Federal Circuit its intent to file a second Review and there is no dispute that RPX intends to file a second Review or is estopped from doing so. App. 5–6. However, the Federal Circuit found the mere triggering of an estoppel insufficient to constitute an injury in fact and, in keeping with its holdings in *Consumer Watchdog* and *Phigenix*, required that RPX be “engaged in . . . activity that would give rise to a possible infringement suit” in order for the estoppel provision to constitute an injury in fact. App. 5. This reasoning is flawed for at least two reasons. First, the reasoning renders moot any consideration of estoppel. If RPX established that it was engaged in activity that would give rise to a possible infringement suit, that itself would be sufficient to confer standing and any showing of estoppel would not be necessary. Second, the reasoning impermissibly tethers the injury in fact to an injury flowing from the subject patent rather than the invasion of the statutory right to file multiple Reviews on the same patent claims.

B. IN ENACTING §§ 319 AND 141, CONGRESS INTENDED FOR ANY PARTY DISSATISFIED WITH A FINAL DECISION TO BE ABLE TO APPEAL

The Court has held that, when “Congress has authorized public officials to perform certain functions according to law, and has provided by statute for judicial review of those actions under certain circumstances, the inquiry as to standing must begin with a

determination of whether the statute in question authorizes review at the behest of the plaintiff.” *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972).

Thus, here, “the inquiry as to standing must begin with a determination of whether [Sections 141 and 319] authorize [Federal Circuit] review [of a Board Final Decision] at the behest of [the requester of the inter partes review].” *Id.* There is no dispute that RPX satisfies this threshold inquiry, as RPX is “a party to the inter partes review” and “dissatisfied” with the Board’s Final Decision.

A complete analysis confirms that RPX’s dissatisfaction with the Board’s Final Decision is an injury in fact sufficient to confer standing, because it is “an invasion of a legally protected interest” that is “concrete and particularized” and “actual or imminent, not conjectural or hypothetical.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

First, RPX’s dissatisfaction with the Board’s Final Decision is concrete, because it is “*de facto*” and “actually exists.” *Spokeo, Inc. v. Robbins*, 136 S. Ct. 1540, 1548 (2016). This dissatisfaction is “‘real,’ and not ‘abstract,’” *id.*, as it relates to a specific Final Decision issued in the Review RPX requested. RPX’s dissatisfaction is also particularized, because it affects RPX in precisely a “personal and individual way.” *Id.* The Board’s Final Decision with which RPX is dissatisfied is in the Review RPX requested and RPX is a party (indeed the only party other than Respondent) to the Review. RPX here is not seeking Article III Court

review of the Board's Final Decision in a Review to which it was not a party.

Second, RPX's dissatisfaction with the Board's Final Decision is "actual or imminent, not conjectural or hypothetical." The Board's Final Decision is an actual decision and RPX's right to appeal to the Federal Circuit is limited in both time and scope. RPX's dissatisfaction is not with a conjectural or hypothetical decision of the Board in an as-of-yet non-existent Review.

The Court has recently noted that "[a] party dissatisfied with the Board's decision can seek judicial review in the Court of Appeals for the Federal Circuit." *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1372 (2018). As stated above, Section 319 refers to Section 141, which similarly states, "A party to an inter partes review . . . who is dissatisfied with the final written decision of the Patent Trial and Appeal Board . . . may appeal the Board's decision only to the United States Court of Appeals for the Federal Circuit."

This case does not involve statutory interpretation, as both 35 U.S.C. §§ 319 and 141 could not be clearer. Requesters of Review may appeal the Board's Final Decision in a Review to the Federal Circuit if they are "dissatisfied." Neither Respondent nor the Federal Circuit disputed below that RPX is a "party to the inter partes review" here and is "dissatisfied" with the Board's Final Decision. *Id.* Thus, there is no dispute that RPX satisfies the statutory requirements to

appeal the Board's Final Decision in this Review to the Federal Circuit.

The statute here does not allow any person to appeal a Board Final Decision with which they are dissatisfied. Rather, the statute provides only the parties to the Review such a right. The statute also does not permit hypothetical or political questions to be raised on appeal. Instead, it is only the specific technical issues addressed by the Board in the Final Decision that can be raised. Thus, the statute here does not “erase Article III standing requirements.” *Spokeo*, 136 S. Ct. at 1548 (internal citations omitted).

As the Court explained in *Spokeo*:

In determining whether an intangible harm constitutes injury in fact, [] the judgment of Congress play[s an] important role[]. Because [] Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important. Thus, we said in *Lujan* that Congress may “elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.” 504 U. S., at 578, 112 S. Ct. 2130, 119 L. Ed. 2d 351. Similarly, Justice Kennedy’s concurrence in that case explained that “Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.” *Id.*, at 580, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (opinion concurring in part and concurring in judgment).

136 S. Ct. at 1549. Here, it was Congress' express decision to give requesters of Review the right to appeal to the Federal Circuit the Board's Final Decision if they were dissatisfied with that decision. This contrasts with Congress' express decision to not give parties the right to appeal Board decisions whether to institute review in the first place, an issue addressed by the Court in *Cuozzo*. 136 S. Ct. at 2136 (considering 35 U.S.C. § 314(d), which states, "The determination by the Director [of the Patent Office] whether to institute an inter partes review under this section shall be final and non-appealable.").

Congress' judgment in enacting the AIA is "instructive and important" for standing purposes. *Spokeo*, 136 S. Ct. at 1549. Congress here identified the harms that result from the maintenance of invalid patents and intended the AIA to create "a more efficient and streamlined patent system that will improve patent quality and limit unnecessary and counterproductive litigation costs." H.R. Rep. No. 112-98, pt. 1, at 40 (2011). Congress' specific intent in creating new patent review processes, including Reviews, was to improve patent quality and "ensure that the poor-quality patents can be weeded out through administrative review." 157 Cong. Rec. S5409 (daily ed. Sept. 8, 2011) (Sen. Schumer). As the Court recognized in *Cuozzo*, "In addition to helping resolve concrete patent-related disputes among parties, inter partes review helps protect the public's 'paramount interest in seeing that patent monopolies . . . are kept within their legitimate scope.'" *Cuozzo*, 136 S. Ct. at 2144 (quoting *Precision Instrument Mfg. Co. v.*

Auto. Maint. Mach. Co., 324 U.S. 806, 816 (1945)). Thus, in enacting §§ 319 and 141, Congress clearly intended to provide requesters of Reviews the right to appeal Board Final Decisions to the Federal Circuit.

Notably, the statutes here are different in a material sense from § 10 of the Administrative Procedure Act (“APA”), 5 U.S.C. § 702, which accords judicial review to only “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.” *Sierra Club*, 405 U.S. at 732–33. Here, the statutes require an appellant be (i) a party to the Review and (ii) dissatisfied with the Board’s Final Decision. In APA cases, the appellant can be any person suffering “legal wrong,” which the Court has interpreted to require a showing of separate injury. Here, Congress defined the injury as “dissatisfaction,” not “legal wrong.” There may be reasonable dispute over whether an appellant has satisfied the latter, but not the former. RPX is unquestionably “dissatisfied.”

Finally, RPX overcomes prudential prohibitions against prevailing parties appealing favorable final decisions, because in addition to being a “dissatisfied” party, RPX did not prevail on any grounds or claims in the final decision below. *See Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 333–34 (1980) (opinions or rulings leading to an ultimately favorable judgment make the matter improper for review by the prevailing party); *California v. Rooney*, 483 U.S. 307, 311–13 (1987); *SkyHawke Techs., LLC v. Deca Int’l Corp.*, 828 F.3d 1373, 1375 (Fed. Cir. 2016) (finding generalized

concerns regarding underlying findings of claim construction insufficient to overcome prudential concerns where the appellant does not seek to alter the judgment of the Board).

II. THIS CASE RAISES THE IMPORTANT CONSTITUTIONAL QUESTION OF WHETHER VIOLATION OF A LEGALLY PROTECTED INTEREST PROVIDED BY CONGRESS CONFERS ARTICLE III STANDING, AND IS A GOOD VEHICLE BECAUSE THE FEDERAL CIRCUIT HAS ISSUED MULTIPLE CONSISTENT DECISIONS ON THE ISSUE AND HAS EXCLUSIVE JURISDICTION OVER APPEALS FROM THE BOARD

The Court of Appeals decision implicates the important constitutional issue of the power of Congress to confer Article III standing by statute by creating a legally protected interest. The decision will impact more than just the patent system, as the issue in this case implicates the power of Congress to indirectly create Article III standing by statute in any setting, such as for disputes between private parties, or private parties and the government, whether inside or outside of the administrative context.

The Federal Circuit's decision in this and its other cases on this issue have created an odd imbalance whereby, under current Federal Circuit law, patent owners can appeal a Board Final Decision without any showing of economic or other harm except for the cancellation of their patent (the term and enforceability of

which is a right created by Congress, see *Intellectual Prop. Dev., Inc. v. TCI Cablevision of Cal.*, 248 F.3d 1333, 1345 (Fed. Cir. 2001) (“Standing [to sue] in a patent infringement case is derived from the Patent Act. . . .”), cf. *WiAV Solutions LLC v. Motorola, Inc.*, 631 F.3d 1257, 1264 (Fed. Cir. 2010) (finding that the Patent Act of 1952 created a legally protected interest for an exclusive licensee of a patent to assert infringement of the patent, because “the right to assert infringement of those interests comes from the Act itself.”)), while requesters of Reviews can only appeal if they prove that they either have been accused of infringement of the challenged patent or imminently will be. See *Phigenix, Inc. v. Immunogen, Inc.*, 845 F.3d 1168 (Fed. Cir. 2017) (denying standing to appeal Board Final Decision in Review because “Phigenix does not contend that it faces risk of infringing the ’856 patent, that it is an actual or prospective licensee of the patent, or that it otherwise plans to take any action that would implicate the patent.”); *Altaire Pharm., Inc. v. Paragon Biotech, Inc.*, 889 F.3d 1274, 1283 (Fed. Cir. 2018) (“Altaire’s injury is imminent, whereas the appellant in *Consumer Watchdog* ‘only alleged a general grievance concerning’ the challenged patent, [] and the appellant in *Phigenix* only alleged its aspirations of licensing its patent portfolio.”) (internal citations omitted); *Consumer Watchdog v. Wis. Alumni Research Found.*, 753 F.3d 1258, 1263 (Fed. Cir. 2014) (“While Consumer Watchdog is sharply opposed to the Board’s decision and the existence of the ’913 patent, that is not enough to make this dispute justiciable.”).

This is not the standing requirement Congress intended to be placed on requesters of Reviews seeking to appeal Board Final Decisions with which they are dissatisfied. Congress expressly wanted any requester of a Review to have the right to appeal to the Federal Circuit the Board's Final Decision in their Review if they were dissatisfied with it. To be sure, when Congress wishes to limit who may file a challenge to a patent at the Board, it knows how to do so. In addition to Reviews, the AIA also created another form of challenging patents called Covered Business Method Review ("CBM"). Congress expressly limited who could file a CBM:

A person may not file a petition for a transitional proceeding with respect to a covered business method patent unless the person or the person's real party in interest or privy has been sued for infringement of the patent or has been charged with infringement under that patent.

America Invents Act, § 18, 125 Stat. 284, 329–31 (2011). Thus, if Congress intends to limit the availability of certain administrative procedures to only those who have been sued or charged with infringement, it knows how to do so. Congress expressly chose not to limit Reviews to only such parties.

The question of standing in appeals from the Board should be resolved by the Court. In effect, the Federal Circuit's body of decisions means there is nothing Congress can do to provide Review requesters standing to appeal Board Final Decisions to the Federal Circuit.

No matter what a statute says, the Federal Circuit’s decision requires Review requesters satisfy additional conditions to have standing, namely that they be accused of infringing the patent, “engaged in any activity that would give rise to a possible infringement suit,” or be “imminently” at risk of being accused of infringement.

This hard and fast rule that nothing Congress writes in a statute can provide Review requesters standing to appeal conflicts with numerous precedents of this Court, and the D.C. Circuit, including at minimum the cases cited above as well as other cases. For cases relating to the Freedom of Information Act, 5 U.S.C. § 552, see *FEC v. Akins*, 524 U.S. 11, 23–25 (1998); *id.* at 30–31 (Scalia, J., dissenting); *Pub. Citizen v. DOJ*, 491 U.S. at 449; *Pub. Citizen v. FTC*, 869 F.2d 1541, 1548 n.13 (D.C. Cir. 1989); *Rushforth v. Council of Econ. Advisers*, 762 F.2d 1038, 1039 n.3 (D.C. Cir. 1985); *Brandon v. Eckard*, 569 F.2d 683, 687–88 (D.C. Cir. 1977). For a case relating to the Sunshine Act, 5 U.S.C. § 552b, see *Rushforth*, 762 F.2d at 1039 n.3. For a case relating to the Federal Advisory Committee Act, 5 U.S.C. app. 2 §§ 1–16, see *Pub. Citizen v. DOJ*, 491 U.S. at 449. For a case relating to § 214(d) of the Authorization Act of 2002, see *Zivotofsky v. Secretary of State*, 444 F.3d 614 (D.C. Cir. 2006). For a case relating to the Fair Housing Act of 1968, see *Havens Realty v. Coleman*, 455 U.S. 363 (1982).

Further, multiple panels of the Federal Circuit have adopted the same rule requiring patent-inflicted injury in fact as an absolute requirement for standing

regardless of other injuries flowing from the adverse agency decision. *See, e.g., Phigenix, Inc. v. Immunogen, Inc.*, 845 F.3d 1168 (Fed. Cir. 2017); *Altaire Pharm., Inc. v. Paragon Biotech, Inc.*, 889 F.3d 1274 (Fed. Cir. 2018). And, because the Federal Circuit has exclusive jurisdiction over appeals from the Board (*see* 28 U.S.C. § 1295(a)(4)(A), 35 U.S.C. §§ 141–144), and no panel can deviate from the Federal Circuit’s precedent, this case is a good vehicle for the Court’s review.

Having incorrectly concluded that RPX did not have an injury in fact, the Federal Circuit did not proceed to address the remaining requirements for standing of traceability and redressability, but those requirements are easily satisfied here because the Board’s Final Decision is the direct cause of RPX’s dissatisfaction and it can be redressed by a favorable Federal Circuit appeal. *See* Charles Macedo et al., *Rethinking Article III Standing in IPR Appeals at the Federal Circuit*, <http://www.patentqualityinitiative.com/-/media/pqi/files/articles/rethinking-article-iii-standing-in-ipr-appeals.pdf> (2018) (“[A] Petitioner in an IPR is an ‘object of the action or inaction at issue’ in an appeal from the PTAB’s denial of the relief requested by a petitioner in its IPR petition.”).

No facts are in dispute. It is undisputed that RPX lacks a patent-inflicted injury in fact, is estopped by the agency’s final decision, and obtained an institution decision in its favor triggering the agency’s obligation to cancel all claims RPX showed to be unpatentable.

This case therefore cleanly presents the constitutional question.



CONCLUSION

The petition should be granted.

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