

No. 20-779

In The
Supreme Court of the United States

ARGENTUM PHARMACEUTICALS LLC,

Petitioner,

v.

NOVARTIS PHARMACEUTICALS CORPORATION,

Respondent.

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

**BRIEF OF JONATHAN STROUD AS *AMICUS*
CURIAE IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICUS CURIAE*¹

Amicus is the Chief Intellectual Property Counsel of Unified Patents, LLC, a membership organization dedicated to deterring nuisance settlements based on patent claims that should not have issued. Unified is itself a frequent *amicus* on patent issues, including this one.² *See* 27. Here, *amicus* writes the Court in his personal capacity, to expand upon and share the perspective of a writer,³ professor, and member of the bar concerned with consistency in applying this court's justiciability doctrines.

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.

² 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, *General Electric Co. v. United Tech. Corp.*, No. 19-1012 (U.S. Mar. 16, 2020), 2020 WL 12898, *cert. denied*, *General Electric Co. v. Raytheon Techs. Corp., fka United Technologies Corporation*, 140 S.Ct. 2820 (2020).

³ *See*, e.g., Matthew Dowd & Jonathan Stroud, *Standing to Appeal at the Federal Circuit: Appellants, Appellees, and Intervenors*, 74 Catholic U. L. Rev. 661 (2018).

INTRODUCTION AND SUMMARY OF ARGUMENT

Amicus urges that, where Congress has spoken, a dissatisfied party to an administrative dispute between direct competitors has the right to appeal the decision denying the relief it requested. The Federal Circuit’s current appellate standing standard is unduly narrow, is of recent vintage, and continues to be inconsistently applied. This conflicts with other circuits and this Court’s precedent. It has provoked fractured and inconsistent opinions. It has been the subject of previous petitions for certiorari.⁴ And it has recently produced irreconcilable results for disputes between those same competitors on appeal from the same general dispute.⁵ This Court’s intervention is needed.

Congress gave these administrative patent review proceedings, *inter partes* review (“IPR”) and post-grant review (“PGR”), appellate review for any party dissatisfied by the government’s decision. This is the only regular Article III review of the process and was a carefully considered choice by Congress. It is

⁴ See, e.g., *General Electric Co. v. Raytheon Techs. Corp., fka United Technologies Corporation*, 140 S.Ct. 2820 (2020) (denial of cert).

⁵ Compare *General Electric Co. v. United Techs. Corp.*, 928 F.3d 1349, 1353–54 (Fed. Cir. 2019) (determining there was no “concrete and imminent injury to GE,” and that GE asserted “only speculative harm”), *cert denied sub nom. General Electric Co. v. Raytheon Techs. Corp., fka United Techs. Corp.*, 140 S.Ct. 2820 (2020), with *General Electric Co. v. Raytheon Techs. Corp.*, No. 2019-1319 (slip op.) at 2 (Fed. Cir. Dec. 23, 2020) (“Because General Electric alleged sufficient facts to establish that it is engaging in activity that creates a substantial risk of future infringement, GE has standing to bring its appeal.”)

both fair and ensures legal consistency of the administrative process. By unduly circumscribing judicial review for one side, the Federal Circuit has impeded the effective functioning of this system and hidden otherwise appealable concerns from Article III review.

As is often the case in a free market, private competitors are normally best positioned to invest the time and money to pursue and point out administrative errors—they have the incentive, the resources, and the knowhow. They also suffer when patents crowd the market in which they operate—whether they are poised to infringe or not. By 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.

The Federal Circuit's rule has bred uncertainty as to who can obtain Article III review of agency rulings and has preventing market competitors clearly locked in wide-ranging disputes from any Article III recourse. It has led to an intra-Circuit split of opinion as to one set of competitors—GE and UTC. Those conflicting opinions demonstrate that even within the Federal Circuit, the idiosyncratic appellate standing standard will continue to be inconsistently applied absent this Court's review.

ARGUMENT

I. The Federal Circuit's Narrowing Appellate Standing Rules Frustrate Article III Policing of the Agency

A. *The Federal Circuit's Patent-Specific Appellate Standing Rules*

The Federal Circuit's restrictive approach to standing undermines the uniform development of patent law that the Federal Circuit is charged with promoting and limits their ability to effectively police administrative agencies.

When Congress modified post-grant procedures in 2011, they granted “a party dissatisfied” with the results the right to appeal PTAB decisions. 35 U.S.C. §§ 319, 329.

The statutory appeal right was a considered choice. Earlier administrative reviews had failed, at least in part due to pre-AIA restrictions on appellate rights. As the Judiciary Committee explained, “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). Congress sought to ensure administrative challenges met with full Article III review. 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 (Fed. Cir. 2014) (citing *Massachusetts v. EPA*, 549 U.S. 497, 517–18 (2007)).

And this Court dictates that Congress has a role to play in defining when a litigant has suffered an injury-in-fact. *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”). Congress would have expected its broad judicial-review grant to apply to all cases meeting the usual well-established standing doctrines—including competitor standing.

Standing based on competitive harm, too, has long been well-established. *See, e.g., Clinton v. City of New York*, 524 U.S. 417, 433 (1998).

But the Federal Circuit has adopted a for-patents-only approach to appellate standing that unduly and unfairly constrains judicial review of PTAB ruling.⁶ It has forced patent challengers to

⁶ As noted previously, this Court has regularly admonished that patent law should not diverge from the general rules governing Article III courts, absent 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). Indeed, “[p]atent law is not an island separated from the main body of American jurisprudence.” *Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp.*,

concede current or planned willful infringement to maintain Article III review. The Circuit demands a legal nexus between the patent claims and potential infringement, often ignoring or discounting motivating competitive harm from blocking patents, licensing opportunities, or other market harms the Circuit is less comfortable with than direct patent infringement.

But this Court's decisions on validity challenges have long-rejected what the Federal Circuit now requires—allowing only would-be challengers 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 need not 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. The same holds for an appellant seeking the Article III review of agency action provided for by Congress. If left intact, the Federal Circuit's contrary rules and their application will harm not only competitors but will also insulate such decisions from Article III review.

383 F.3d 1337, 1351 (2004) (en banc) (Dyk, J., concurring in part and dissenting in part).

As the Federal Circuit most recently articulated it, their patent-specific application of appellate standing, despite the jurisdiction conferred by 28 U.S.C. § 1295(a)(4)(A), is driven by the “the irreducible constitutional minimum of standing.” *Amerigen Pharm. Ltd. v. UCB Pharma GmbH*, 913 F.3d 1076, 1082 (Fed. Cir. 2019) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Consistent with this Court’s recent decisions, this means appellants must “have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the [appellee], and (3) that is likely to be redressed by a favorable judicial decision.” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016), as revised (May 24, 2016). And “where Congress has accorded a procedural right to a litigant, such as the right to appeal an administrative decision” some requirements of standing—but not the requirement of injury in fact—“may be relaxed.” *Consumer Watchdog v. Wis. Alumni Research Found.*, 753 F.3d 1258, 1261 (Fed. Cir. 2014).

The primary—really the only—way the Circuit currently recognizes such standing absent suit or concession of direct infringement is through reliance on “*potential* infringement liability as a basis for injury in fact.” *JTEKT Corp. v. GKN Auto. LTD.*, 898 F.3d 1217, 1221 (Fed. Cir. 2018) (emphasis added), *cert. denied*, 139 S. Ct. 2713 (2019). Other commercial harms are often discounted or ignored.

To do so, parties must establish—generally on appeal for the first time, unless the party is well-heeled and can establish it in below or in district court as part of a broader dispute—“that it has concrete plans for future activity that creates a substantial risk

of future infringement or would likely cause the patentee to assert a claim of infringement.” See *JTEKT* at 1221.

All attempts at reliance on the competitor standing have been rebuffed; the Federal Circuit seems much more comfortable with the patent infringement analysis it so often applies; that, it has applied inconsistently, and has expanded upon in tortuous ways that have simply served to complicate the issue. For example, the Circuit later explained that “to establish the requisite injury in an appeal from a final written decision in an inter partes review,” “[a]n appellant need not face ‘a specific threat of infringement litigation by the patentee[.]’” *Adidas AG v. Nike, Inc.*, 963 F.3d 1355, 1357 (Fed. Cir. 2020) (quoting *E.I. DuPont de Nemours & Co. v. Synvina C.V.*, 904 F.3d 996, 1004 (Fed. Cir. 2018)). “Instead, ‘it is generally sufficient for the appellant to show that it has engaged in, is engaging in, or will likely engage in activity that would give rise to a possible infringement suit.’” *Id.* (quoting *Grit Energy Sols., LLC v. Oren Techs., LLC*, 957 F.3d 1309, 1319 (Fed. Cir. 2020)).

The Circuit has now regularly discounted or ignored evidence other than direct monetary damages concessions, in effect forcing parties to concede both infringement and damages before meriting appellate review. Parties are generally reluctant to do so, for reasons obvious to all.

They have also leaned on and extended mootness and the voluntary cessation doctrine to avoid even addressing questions of standing; for instance, this Court found a covenant not to sue in a trademark case mooted an appeal; as recently as the day before this

brief was filed, the Federal Circuit dismissed another appeal from an administrative appeal as moot, but really for lack of standing premised on their “disavowal of [the] right to appeal the district court’s noninfringement judgement.” *See ABS Global, Inc. v. Cytonome/ST, LLC*, No. 2019-2051 (slip op.) at 6 (Fed. Cir. Jan. 6, 2021). The panel predictably confined their analysis to infringement liability alone.

B. The Routine Curbing of Review for Direct Competitors

This plainly frustrates competitor’s ability to seek appellate review of hard-fought disputes. But competitors are generally best positioned to police each other’s patents; there is little societal benefit to forcing them into litigation or concession before they can do so. Competitors routinely have strong incentive to question administrative errors; with an erroneously granted patent claim removed from the marketplace, the competitor can generate revenue, freely license, and increase market share. *See, e.g., Lear, Inc. v. Adkins*, 395 U.S. 653, 670 (1969) (licensee may be the only ones with enough economic incentive to challenge validity); Michael J. Burstein, *Rethinking Standing in Patent Challenges*, 83 *Geo. Wash. L. Rev.* 498, 545-46 (2015) (discussing cost-benefit analysis for competitors challenging invalid patents). The invalidation of an asset may create direct marketing effects, reduce the stock price of a competitor, or otherwise resolve disputes. And competitors are likely to have the best technical knowledge relevant to assessing patent validity. Unduly limiting their right to appeal makes little sense.

The Federal Circuit’s rule is based on the patent-myopic assumption that a company is injured by a questionable patent only if it is already—or is very close to—infringing. *See, e.g., AVX Corp. v. Presidio Components, Inc.*, 923 F.3d 1357, 1365 (Fed. Cir. 2019) (suggesting only those “currently using the claimed features or nonspeculatively planning to do so” can be harmed by a patent). But business disputes are far more complex than a simple infringement analysis. The competitive harm from a questionable patent starts upstream, long before litigation or any concrete plan of infringement, much less a past infringing act. Why else would competitors spend hundreds of thousands or millions of dollars in fees and costs and years of effort on these challenges?

A patent distorts the market by its very nature, even if it is never asserted or infringed. It is, at bottom, a time-limited grant of market exclusivity. It can operate like a scarecrow, deterring competitors and follow-on products. 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.

And if a company invests time and money to develop a product and is later found liable for patent infringement, it can make or break a business. *See, e.g.*, 35 U.S.C. § 284 (treble damages for willful

infringement); *id.* at § 283 (enjoining future conduct). The risk of being sued, irrespective of ultimate liability, has clear—if hard to articulate—substantial market risk.

Even if no suit is imminent, and even if a patent is clearly unpatentable in light of this court’s more recent rulings, later litigation costs in this field are staggering. *See, e.g., WPEM, LLC v. SOTI Inc.*, 2020-1483, 2020 WL 7238458, at *1 (Fed. Cir. Dec. 9, 2020) (upholding an award of roughly \$180,000 in attorney’s fees for a simple suit that was found frivolous). Self-reported patent litigation costs routinely run into the tens of millions of dollars, and even the costs of administrative challenges average in the hundreds of thousands per side each. *See* AM. Intellectual Prop. Law Ass’n, 2017 Report of the Economic Survey 43 (2017) (reporting the median cost of patent litigation in the tens of millions of dollars, and for post-grant proceedings before the Patent Office, each side as \$200,000 through the end of motion practice, \$250,000 through the PTAB hearing, and \$350,000 through appeal). The risk of litigation alone has substantial competitive cost.

Petitioner, previous petitions to this Court, and previous *amici* have noted how the Federal Circuit’s patent-specific standing decisions conflict with other circuits’ decisions and this Court’s precedent, as have

many commentators, including *amicus*.⁷ That divide in authority warrants this Court’s review.

C. The Circuit’s Rules Have Led to Inconsistent Results in Competitor Appeals from the Same Dispute

Fierce competitors know that post-grant procedures are important parts of commercial disputes. They can help establish freedom to operate (or freedom of significant remunerative risk) before bringing a potentially infringing product to market. The USPTO’s review procedures are one path to do so. But their tortured standing and mootness rulings have complicated resolution of those disputes.

In *General Electric Co. v. United Techs. Corp.*, 928 F.3d 1349, 1353–54 (Fed. Cir. 2019) (“GE I”)

⁷ See, e.g., Matthew Dowd & Jonathan Stroud, *Standing to Appeal at the Federal Circuit: Appellants, Appellees, and Intervenor*, 74 Catholic University Law Review 661 (2018) (reviewing the newly developed standards and cases generally); Matthew Dowd & Jonathan Stroud, *Will the Federal Circuit Consider the Competitor Standing Doctrine?* LAW360 (Dec. 18, 2018) (reviewing competitor standing directly, and noting again that 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”); Burstein, *supra*, at 500 (“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. LAW REV. De Novo Blog (posted Nov. 25, 2019).

(Reyna, J.; Hughes, J.; Taranto, J.), the Federal Circuit, determining there was no “concrete and imminent injury to GE,” and that GE asserted “only speculative harm”), over a strongly worded concurrence from Judge Hughes, who felt bound by the Court’s recent precedent on appellate standing, which he criticized. General Electric sought and was denied certiorari last term. *General Electric Co. v. Raytheon Techs. Corp., fka United Techs. Corp.*, 140 S.Ct. 2820 (2020).

That case is largely irreconcilable with his subsequent ruling in *General Electric Co. v. Raytheon Techs. Corp.*, No. 2019-1319 (slip op.) at 2 (Fed. Cir. Dec. 23, 2020) (“GE II”), where a slightly different panel of judges found that, “[b]ecause General Electric alleged sufficient facts to establish that it is engaging in activity that creates a substantial risk of future infringement, GE has standing to bring its appeal.” (Hughes, J.; Reyna, J.; Lourie, J.).

To be sure, counsel pled additional facts below (after having the previous appeal dismissed and investing time and money in appealing and then seeking certiorari on this very issue, and then adding that fact discovery to a related district court case between the competitors).

Judge Hughes, now in the authoring role, took pains to note in GE II that it was the additional attorney argument and record evidence that carried the day; but the distinctions dissolve under the comparison before us—the competitor party *had* standing in both cases; it was in the Court’s

application of their unduly restrictive standing rule that robbed GE of standing in the earlier appeal.

That GE had to effectively concede future infringement in an unrelated district court case to finally vault this hurdle should likewise give this Court pause. *See* GE II at n. 2 (“GE’s **concession** that Raytheon **would accuse** its preferred next-generation engine of infringing the ’920 patent, and that GE continues to develop this design, **GE may be now infringing the ’920 patent** by its method of designing the engine”) (emphases added).

Thus, appellant GE *had* standing in GE I, they simply ran afoul of the Circuit’s narrow view of what is required under their circuit-specific test and were dismissed. That they then met that higher standard in GE II under virtually identical circumstances should give this Court pause. If parties as sophisticated and well-heeled as GE can run afoul of these rules, others certainly stand little chance.

CONCLUSION

The Court should grant the petition for writ of certiorari.

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