No. 21-746

IN THE
Supreme Court of the United States

APPLE INC.,

Petitioner,

v.

QUALCOMM INCORPORATED,

Respondent.

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

BRIEF OF UNIFIED PATENTS, LLC AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

JONATHAN STROUD

UNIFIED PATENTS LLC
P.O. Box 53345
Washington, D.C. 20009
(202) 805-8931

WILLIAM G. JENKS
Counsel of Record

JENKS IP LAW PLLC
1629 K ST., NW
Suite 300
Washington, D.C. 20006
wjenks@jenksiplaw.com
(202) 412-7964

Counsel for Amicus Curiae

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BRIEF OF UNIFIED PATENTS, LLC AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTERESTS OF *AMICUS CURIAE*[1]

Unified Patents, LLC is a membership organization dedicated to deterring patent assertion entities, or PAEs, from extracting nuisance settlements from operating companies based on patents that are likely invalid before the district courts and unpatentable before the U.S. Patent Office. Unified's more than 3,000 members are Fortune 500 companies, start-ups, automakers, industry groups, medical device manufacturers, cable companies, banks, open-source developers, manufacturers, and others dedicated to reducing the drain on the U.S. economy of now-routine baseless litigations asserting infringement of patents of dubious validity.

Unified studies the ever-evolving business models, financial backings, and practices of PAEs. *See, e.g.*, Unified Patents, 2020 Patent Dispute Report: Year in Review, (Jan. 1, 2021) *available at* https://www.unifiedpatents.com/insights/2020-

[1] Pursuant to this Court's Rule 37.2(a), all parties received timely notice of and consented in writing to the filing of this brief. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

patent-dispute-report-year-in-review ("2020 Patent Year in Review").

Unified also files post-issuance administrative challenges—including inter partes review petitions—regarding PAE patents it believes are unpatentable or invalid. This includes both international and domestic administrative challenges. Thus, Unified is a deterrence entity that seeks to deter the assertion of poor-quality patents. Unified acts and litigates independently from its members, including Apple or any other company. *See, e.g.*, *Unified Patents, LLC. v. Uniloc USA, Inc. et al.*, IPR2018-00199 Paper No. 33, 10 (PTAB May 31, 2019) (Unified members not real parties in interest to *inter partes* reviews filed by Unified); *id.* (collecting PTAB decisions). In 2019, Unified was the fifth most frequent petitioner before the PTAB, and it was by far the leading third-party filer

Sometimes, "bad patents slip through." *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1353 (2018). When that happens, Unified petitions the government for redress. Unified thereby pursues and frequently exonerates "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).

Here, Unified is concerned with ensuring that *inter partes* review and other related Patent Office proceedings remain fair and cost-effective tools for any

member of the public to protect itself from improperly issued patent claims.

SUMMARY OF ARGUMENT

For at least the last quarter-century, the Federal Circuit has construed patent law to shield patents and patent applications from challenge. In *Cardinal Chemical*, *Zurko*, *MedImmune*, and *Minerva*, the general law was given a patent-specific tilt that made it harder to challenge patent claims. In each case, this Court realigned patent law with the undergirding general law. Here, again the law requires correction.

The lower court has limited standing for patent licensees that challenge patents to only licensees that demonstrate that a successful appeal would change their payment obligations. This rule appears facially opposed to *MedImmune's* point that even if the licensee presents a "freestanding claim of patent invalidity," rather than a claim that "no royalties are owing under the license," that "probably makes no difference to the ultimate issue of subject-matter jurisdiction."

That alone is cert-worthy no matter the context where the challenge arose. But here, Petitioner is an unsuccessful appellant from a Patent Office inter partes review proceeding regarding a patent that the parties have hotly contested in district court. If no court can hear its appeal, the appellant will face statutory estoppel that prevents it from challenging the patent in the courts or Patent Office on any ground it raised or reasonably could have raised. Such estoppel

is cognizable harm under the Constitution for licensees. Particularly so here, where the license is a mere ceasefire in an ongoing battle over the patent.

The lack of appellate standing extends beyond licensees. The Federal Circuit has likewise narrowed competitor standing in the patent context so that even bitter rivals with a history of litigation struggle to establish standing. Indeed, when an inter partes review petitioner challenges a competitor's patent, the Federal Circuit limits standing on appeal to those that can show a pending or imminent infringement suit. This approach again ignores the economic reality of patent assertions in the market. It cuts off judicial review for a class of administrative proceedings meant to be an alternative to litigation. Nonetheless, the Federal Circuit, skewing the law against the review of patent challenges, holds that statutory estoppel is insufficient harm to direct competitors fighting over key patents in their field.

ARGUMENT

I. THE PETITION PRESENTS A RECURRING AND IMPORTANT QUESTION

The Federal Circuit has exclusive jurisdiction over nearly all patent appeals, including all appeals from inter partes review (IPR), post-grant review, and reexamination of issued patents. *See* 35 U.S.C. § 141 (b), (c). Because of that exclusivity, the Federal Circuit's rules are "a matter of special importance to the

entire Nation." *See Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 89 (1993).

This is particularly so here, where the Federal Circuit has denied standing to an IPR petitioner, given the importance of IPRs to the modern patent system. Inter partes review has proven to be a successful alternative to patent litigation. Last year, the PTAB heard over 1,000 challenges to issued patents, primarily IPRs. 2020 Patent Year in Review. The PTAB is the Nation's busiest venue for patent disputes. *Id.* But the Federal Circuit's standing caselaw makes it less fair by dismissing IPR petitioner appeals where the petitioners would have standing under the principles expressed by this Court.

The Federal Circuit has issued at least eight precedential decisions dismissing appeals from aggrieved IPR petitioners since 2017. *See Phigenix, Inc. v. Immunogen, Inc.*, 845 F.3d 1168, 1176 (Fed. Cir. 2017); *JTEKT Corp. v. GKN Auto. LTD.*, 898 F.3d 1217, 1221 (Fed. Cir. 2018) *cert. denied* 139 S. Ct. 2713 (2019); *AVX Corp. v. Presidio Components, Inc.*, 923 F.3d 1357, 1367 (Fed. Cir. 2019); *Momenta Pharms., Inc. v. Bristol-Myers Squibb Co.*, 915 F.3d 764, 770 (Fed. Cir. 2019); *Gen. Elec. Co. v. United Techs. Corp., 928 F.3d 1349, 1355 (Fed. Cir. 2019) cert. denied sub nom. Gen. Elec. Co. v. Raytheon Techs. Corp., 140 S. Ct. 2820 (2020)*; *Argentum Pharms. LLC v. Novartis Pharms. Corp.*, 956 F.3d 1374, 1378 (Fed. Cir. 2020) *cert. denied* 141 S. Ct. 1685 (2021); *Apple Inc. v. Qualcomm Inc.*, 17 F.4th

1131, 1137 (Fed. Cir. 2021); *ModernaTx, Inc. v. Arbutus Biopharma Corp.*, No. 2020-1186, 2021 WL 5617751, at *6 (Fed. Cir. Dec. 1, 2021). These dismissals cut off all Article III review of agency decision-making for IPR petitioners that can't point to immediate financial consequences resulting from the Patent Office's decision. This flow of cases will continue so long as the Federal Circuit relies on its overly narrow view to deny standing to IPR petitioners harmed by extant patents.

Uneven access to Federal Circuit review is not new for those testing patents. For the last quarter-century, this Court has frequently explained to the Federal Circuit that it cannot bend general legal principles to insulate patents and patent applications from challenge.

Before *Cardinal Chemical*, the Federal Circuit routinely dismissed any challenge to a patent's validity if it could first uphold a finding of non-infringement. This Court rejected the Federal Circuit's practice. *Cardinal Chemical*, 508 U.S. at 102.

Before *Zurko*, the Federal Circuit allowed patent applicants to appeal Patent Office rejections under a less-deferential standard than found in the APA. This Court reversed. *Dickinson v. Zurko*, 527 U.S. 150, 165 (1999).

In *MedImmune*, the Federal Circuit held a non-breaching licensee did not have standing to challenge a patent under the Declaratory Judgment Act. This

Court reversed. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 137 (2007).

In *Minerva*, the Federal Circuit ruled that the assignee of a patent application could not challenge the resulting patent even when the patent issues with broader claims than those assigned. This Court narrowed the estoppel to the inventor's (implicit and explicit) representations at the time of assignment. *Minerva Surgical, Inc. v. Hologic, Inc.*, 141 S. Ct. 2298, 2311 (2021).

Here, the Federal Circuit again applies a patent-specific rule to avoid hearing challenges to a patent. The Federal Circuit has invoked its rule—that licensees of more than one patent must show that they will pay less under the license to have standing—in multiple appeals from the Patent Office. This rule has become settled law and is unlikely to be disturbed by that court. *See, e.g.*, App. 81a (denial of rehearing en banc).

The Federal Circuit applied the same reasoning, indeed found that the present case controlled the outcome, in *Apple Inc. v. Qualcomm Inc.*, 17 F.4th 1131, 1137-38 (Fed. Cir. 2021) ("*Apple v. Qualcomm II*"). *But see id.* at 1138 (Newman, J., dissenting); *see also* 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").

More recently, the Federal Circuit relied on the present case in *ModernaTx, Inc. v. Arbutus Biopharma Corp.*, No. 2020-1186, 2021 WL 5617751, at *6 (Fed. Cir. Dec. 1, 2021) ("*ModernaTx I*"). There, the Federal Circuit held that ModernaTx did not have standing at the start of its appeal from the PTAB. ModernaTx had supported its standing argument with its license to the patent in question. But, the Federal Circuit rejected that argument because "the '435 patent is not the only patent licensed under the [relevant sublicense], but rather is one of many licensed patents." *Id.*

The Federal Circuit cited "two crucial cases," *Samsung Elecs. Co. v. Infobridge Pte. Ltd.*, 929 F.3d 1363 (Fed. Cir. 2019) and the present case (as "*Apple*"). *ModernaTx I*, 2021 WL 5617751, at *6. In *Samsung*, the appellant had standing because its multi-patent license was structured such that a successful challenge to the patent at issue "would have changed the amount of royalties." *Id.* (citing *Samsung*, 929 F.3d at 1368). In *Apple*, the court wrote, "the appellant lacked standing because multiple patents had been licensed, and the appellant failed to present evidence that invalidation of the particular patents it was challenging would affect its contractual rights by

changing its royalty obligations." *Id.* (citing *Apple*, 992 F.3d at 1383 [App. 6a]).[2]

As *ModernaTx I* expresses it, the holding, in this case, is settled law at the Federal Circuit level. This Court can correct that error without awaiting unlikely further developments.

Finally, the court's narrow view of standing causes immediate financial ramifications that go beyond the cost of the license. The same day *ModernaTx I* was decided, the Federal Circuit found standing in a companion case with almost identical facts, including the license. *See ModernaTx, Inc. v. Arbutus Biopharma Corp.*, No. 2020-2329, 2021 WL 5617752, at *5 n. 4 (Fed. Cir. Dec. 1, 2021) ("*ModernaTx II*"). The Federal Circuit again rejected licensee status as a basis for standing. *Id.* (relying on *ModernaTx I*). Instead, it found standing in *ModernaTx II* based on Arbutus's actions related to Moderna's COVID-19 vaccine. *Id.* ModernaTx had argued the same vaccine issue in *ModernaTx I*, but the lower court held that that vaccine issue arose after the appeal in *ModernaTx I* was filed and so could not support continuous standing. *ModernaTx I*, 2021 WL 5617751, at *6.

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[2] *ModernaTx I* also held that "[e]ven if" ModernaTx held only a single-patent license, it still would not have standing under *MedImmune* because its payment obligations were tied to internal research milestones, which it had not established it would reach. *ModernaTx I*, 2021 WL 5617751, at *6. Thus, the lower court appears ready to make even finer distinctions over *MedImmune*.

Thus, the difference between the two standing results appears to be the date the appeals were filed.

The lower court may have found this distinction important, but the market treated the two cases as equals. ModernaTx lost on standing in *ModernaTx I* and on the merits in *ModernaTx II*. The market considered this a single loss by ModernaTx. In a same-day article, Bloomberg reported Moderna's stock dropped 12% after the decisions issued. *See* Christopher Yasiejko, Perry Cooper, and Matthew Bultman, *Moderna Drops After Losing Appeal Over Drug-Delivery Patents*, Bloomberg (Dec. 1, 2021) *available at* https://www.bloomberg.com/news/articles/2021-12-01/moderna-drops-after-losing-appeal-in-drug-delivery-patents-case. To the financial news, Moderna lost "an appeal" involving a "rival's drug-delivery technology." *Id.* This loss "could make its Covid-19 vaccine vulnerable to infringement suits." *Id.*(emphasis added). The market—not needing the surety the Federal Circuit rule demands—responded to the mere possibility by tanking Moderna and lifting Arbutus: "Moderna was the S&P 500 Index's worst performer, dropping 12% in New York trading. Arbutus jumped 44%." *Id.*

II. THE FEDERAL CIRCUIT WRONGLY DECIDED THE QUESTION AND UNDULY LIMITED STANDING FOR PATENT CHALLENGERS

A. The decision below undermines this Court's precedent

Apple correctly asserts that the Federal Circuit decision is contrary to Supreme Court patent precedent. Pet. at 18-25. Amicus supports those arguments.

The appeals court relied on Apple's failure to demonstrate a change in financial obligation to distinguish *MedImmune*: "Apple has not alleged that the validity of the patents at issue will affect its contract rights (i.e., its ongoing royalty obligations)." App. 7a. "This failure," in the Federal Circuit's view, was "fatal to establishing standing under the reasoning of *MedImmune*." *Id.*

But this Court has all but explicitly rejected the Federal Circuit's requirement that licensees demonstrate that their license obligations will change or repudiate their license—and expose themselves to a substantial risk of infringement—before challenging a patent. *MedImmune*, 549 U.S. at 128–29 (infringer need not put itself at risk of infringement litigation before filing declaratory judgment). As the Court wrote, even if MedImmune was presenting a "free-standing claim of patent invalidity," rather than a claim that "no royalties are owing under the license," that "probably makes no difference to the ultimate issue of subject-matter jurisdiction." 549 U.S. at 123.

Whenever an appeals court transforms a distinction made by this Court from "probably makes no difference" into a "fatal" failure, certiorari is appropriate and likely compelled. Parties read this Court's opinions and fashion their behavior accordingly. Here, the parties called a patent ceasefire in litigation but specifically exempted these IPRs. Pet. at 9-10. Doubtless, they assumed the IPRs, including appeals under § 319, would proceed, and Petitioner would face estoppel under § 315(e). In other words, they felt the ceasefire "makes no difference" to the ongoing IPRs. But the Federal Circuit has denied Apple its appeal, and Apple faces the prospect of estoppel when the ceasefire ends. *Apple Inc. v. Qualcomm Inc. II*, 17 F.4th at 1138 (Fed. Cir. 2021) (Newman, J., dissenting) (dismissal subjects Apple "to the risk of estoppel in any district court proceedings after the license terminates.").

B. The decision below disregards the Congressional scheme

The inter partes review statute allows any "person who is not the owner of a patent" to petition the Patent Office for administrative review of the patent. 35 U.S.C. § 311; *see also Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1371-72 (2018) (describing review procedures). The statute promises an appeal to every party dissatisfied with the PTAB's final written decision and guarantees that any party to the review may be a party to the appeal. 35 U.S.C. § 319. Finally, the party that loses the IPR

cannot carry that part of the patent conflict into another venue. If the patent owner loses, the Patent Office cancels the claims at issue. 35 U.S.C. § 318(b).

If the IPR petitioner receives an adverse final written decision from the PTAB—as Apple has here, App. 53a—the Patent Office confirms the claims at issue, § 318(b). The petitioner is then estopped from challenging the claims in the Patent Office, the courts, or before the International Trade Commission on "any ground that the petitioner raised or reasonably could have raised during that inter partes review." 35 U.S.C. § 315(e). Thus, Congress created both the right to appeal and one harm that adheres to an unsuccessful petitioner should their appeal fail.

Appeal

Immediacy and redressability are relaxed when Congress promises an appeal—particularly where appeal is the main form of Article III review of agency action. *Massachusetts v. E.P.A.*, 549 U.S. 497, 517–18 (2007). A party with a Congressionally created procedural right—such as the right to "challenge agency action"—"can assert that right without meeting all the normal standards for redressability and immediacy." *Id.*

Relaxed immediacy, in this context, means that harm is not limited to immediate consequences. Here, for example, relaxed immediacy means the length of the ceasefire is less important than the prior charges of infringement, the refusal to grant a license for the

entire term of the patent, current royalty payments, and the parties exempting the IPRs from the agreement. *See Apple v. Qualcomm II*, 17 F.4th at 1142 (Newman, J., dissenting).

Relaxed redressability means the cancellation of the patent claims must help the IPR petitioner, or the confirmation of the patent claims must harm the petitioner in some logical way. But a judgment for the appellant need not be an immediate financial benefit. Here, for example, relaxed redressability means the failure to immediately change the cost of the license is less important than the benefit Apple may derive from a finding of invalidity or the harm it may suffer considering all the circumstances surrounding the two parties. This includes the removal of one obstacle to Apple repudiating the license. *See* Pet. at 21-22. And the removal of at least the threat of estoppel—being applied by the Patent Office or the courts—hampering Apple's ability to continue its present activities once the license ends. *See MedImmune*, 549 U.S. at 128–29 ("where threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat").

Estoppel

The lower court held that "the harm Apple may face from estoppel is insufficient to provide standing." App. 11a. As Apple rightly points out, the question should be whether all the circumstances—including

estoppel—demonstrate the existence of sufficient injury to support a constitutional case or controversy. Pet. at 23-24.

The Federal Circuit's failure to appreciate estoppel as sufficient Article III injury here can be traced to *Consumer Watchdog*, a case easily analogized to *Lujan*. *Consumer Watchdog v. Wisconsin Alumni Rsch. Found.*, 753 F.3d 1258, 1262 (Fed. Cir. 2014).

In *Lujan*, the citizen-suit provisions of the Endangered Species Act provided that "any person may commence a civil suit" against the EPA to enforce certain requirements of the Endangered Species Act. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 571-572 (1992). The statute granted the right to challenge agency action. But there was no mechanism whereby the unsuccessful citizen was penalized if the suit failed. For example, the citizen could still travel to the areas affected by the challenged regulation, even after a failed civil action. In other words, there was no statutory estoppel.

In *Consumer Watchdog*, the court held that estoppel provisions similar to the one here but covering reexamination did not injure Consumer Watchdog. The *Consumer Watchdog* court relied heavily on *Lujan*, which may have been correct because Consumer Watchdog was a "self-described 'not-for-profit public charity dedicated to providing a voice for taxpayers and consumers.'" *Id.* at 1260-63. It had no "involvement in research or commercial activities

involving human embryonic stem cells," the subject of the patent. It had only a "general grievance against" the patent. *Id.* at 1262–63. Consumer Watchdog's ability to infringe the patent and its participation in the relevant market were even remoter than the Defenders plans to visit the places affected by the EPA's actions.

The reasoning in the decision below can be traced to *Consumer Watchdog*. It relies on the portion of *AVX*, 923 F.3d at 1362–63 that cites *Phigenix*, 845 F.3d at 1175–76. App. 11a. *Phigenix*, in turn, analogized to *Consumer Watchdog*. *Phigenix* at 1175-76. Each step of the way, the estoppel provisions do more harm to the estopped entity, but at no point does the Federal Circuit accept that the harm is considered sufficient for standing.

- Consumer Watchdog was assuredly not getting into the human-embryonic-stem-cell business.
- Phigenix did not "manufacture any products," though it alleged that it possessed and attempted to market at least one conflicting patent. *Phigenix,* 845 F.3d at 1170.
- In *AVX*, the parties were fierce market competitors, with four infringement suits between them. *AVX*, 923 F.3d at 1360–61.

Here, Apple is a time-limited licensee of Qualcomm's patents. It has been sued for infringement of the patents. It is paying royalties on the patents. And

it is unlikely to discontinue the line of accused products—the iPhone and iPad. *See* App. 9a; *Apple v. Qualcomm II*, 17 F.4th at 1139 n.2 (Newman, J., dissenting). Yet Apple may be estopped from challenging the validity of the patents in future cases without getting its statutory appeal. Even without those egregious conditions, estoppel is a statutory penalty to licensees, potential licensees, and other market participants that renders analogy to *Lujan* inappropriate.

The statute here is *Lujan* with teeth. The patent statute is just as liberal with who may seek relief. Any "person who is not the owner of a patent" may petition the Patent Office for review of a patent. 35 U.S.C. § 311. But a failed petition, if instituted, has consequences. An unsuccessful challenger is estopped from bringing additional proceedings against the challenged claims before the Office or asserting in civil actions that the claim is invalid on grounds raised or that reasonably could have been raised. *See, e.g.,* 35 U.S.C. § 315(e)(1), (2). No equivalent penalty adhered to the Defenders when their case was dismissed.

It is no answer to say that estoppel may not apply, absent appeal. *See, e.g.*, *AVX*, 923 F.3d at 1363 (pointedly not deciding whether estoppel would apply before dismissing the case for lack of standing). The statute has both appeal and estoppel. The Due Process concerns raised by applying estoppel absent appeal are of no moment if one does not read out the appeal because of a supposed lack of constitutional harm. Quite the opposite—estoppel can be and is

sufficient harm for the vast majority of IPR petitioners. Market participants like those in *Phigenix* and *AVX* are harmed. Licensees like Apple are harmed. They are barred from challenging a patent in their field, one that the Patent Office has confirmed, enhancing its value.

In the extreme case, a petitioner like Consumer Watchdog—one that has never participated in the market—may lack standing. But in the main, few petitioners go to the expense and trouble of challenging a patent if it is not in their economic interest. That the Federal Circuit regularly dismisses appeals by market participants challenging patents—including patents that have been asserted against them, as here—indicates a flaw in the scope of "harm" that court will accept as sufficient to convey standing.

If the standing issue is not corrected by this Court, the lower court will eventually decide whether a petitioner dismissed for lack of standing is estopped from revisiting the patentability of the claims. If the court holds that estoppel does apply, it will be in a subsequent challenge to the same patent by the same challenger, and doubtless, it will injure the appellant. In other words, the prior dismissal will act just as a judgment on the merits.[3]

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[3] The Federal Circuit does not routinely vacate the PTAB decisions after finding the petitioner-appellant lacks standing. It specifically refused to do so in *Apple v. Qualcomm II*. *See* 17 F.4th at 1137.

If the lower court eventually holds that estoppel does not apply, licensees, competitors, and others will appeal to ensure they are refused standing and avoid estoppel. Otherwise, they risk an infringement action in which they are estopped from challenging a patent they earlier assumed they could not appeal. Where standing doctrine leads to further injury, creates dismissals that are effectively judgments, or encourages fruitless appeals, it is likely not being properly applied.

III. The Federal Circuit's Narrow View Of Harm Limits Standing In The Overlapping Context Of Competitor Standing

The Federal Circuit's failure to grapple with this Court's general standing principles has led it astray in another (overlapping) context, competitor standing. Because the PTAB is the leading venue for patent challenges, it often reviews a patent at the urging of a competitor of the patent owner. Of course, competitors and patent licensees often overlap. For example, many patent owners are operating companies that assert their patents against competitors who may then become licensees. Similarly, a supplier of high-tech components to one company in a market may haul into court that company's competitors and (if successful) make licensees of all competitors in the market.

This Court has long recognized that probable economic injury from government action that alters competitive conditions is enough to establish standing. *See Clinton v. City of New York*, 524 U.S. 417,

432–33 (1998) (citing with approval 3 K. Davis & R. Pierce, Administrative Law Treatise 13–14 (3d ed. 1994)).

But the court below has effectively immunized a broad class of PTAB decisions from review because—as Judge Hughes explains—the Federal Circuit "takes a patent-specific approach to the doctrine of competitor standing." *General Electric*, 928 F.3d at 1355) (Hughes, J., concurring in judgment). The lower court has refused to hear appeals from post-issuance proceedings brought by competitors with concrete interests in challenging the patent's validity in multiple cases.

These situations include:

- appellants competing with the patent holder in a three-player market challenging a patent "directed to … the very type of technology over which [the parties] fiercely compete," *General Electric*, 928 F.3d at 1355-56 (Hughes, J., concurring in judgment);
- appellants competing with the patent holder in a market where the parties frequently assert patents against one another and customers consider potential infringement injunctions when considering products, *AVX*, 923 F.3d at 1360–61;
- appellants that generally compete with the patent holder and seek to clear patent

rights while developing a new product for market, *See JTEKT*, 898 F.3d at 1221.

One common theme across Federal Circuit cases is that the appellant was unwilling to allege "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." JTEKT, 898 F.3d at 1221. Parties understandably hesitate to confess infringement—given the patent act's treble damage provision, most typically applied to willful infringers. *See Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 579 U.S. 93 (2016).

Thus, absent a license, the lower court typically looks only to potential infringement liability, but that is only one harm that an invalid patent can create. Even before inter partes review existed, it was understood that "invalid 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." Christopher R. Leslie, *The Anticompetitive Effects of Unenforced Invalid Patents*, 91 Minn. L. Rev. 101, 115–16 (2006). No wonder some competitors prefer to engage in rights-clearing before dedicating resources to activity that might be construed as infringing. *See, e.g.*, *Argentum*, 956 F.3d at 1377.

The Federal Circuit's approach is contrary to this Court's cases that have "repeatedly held that

government actions altering the competitive landscape of a market cause competitors probable economic injury sufficient for Article III standing." *General Electric*, 928 F.3d at 1355 (Hughes, J., concurring in judgment). A party typically has standing to challenge government action that harms them even when that harm is merely a benefit to their competitors. Here, the harm is government confirmation of a competitor's potentially invalid patent. *See* § 318(b). Even without estoppel, this is a boon to the patent holder. When the Patent Office confirms patent claims, it essentially gold-plates the patent. It increases the patent owner's value to investors interested in the relevant market; it decreases the chance that any competitor would attempt to compete with the claimed invention; it may cause customers to decline to contract with the challenger.

Notably, the Federal Circuit applies competitor standing in other contexts. *See Canadian Lumber Trade All. v. United States*, 517 F.3d 1319, 1334 (Fed. Cir. 2008). In the trade context, the lower court has held that "in most "competitor standing" cases … it is *presumed* (i.e., without affirmative findings of fact) that a boon to some market participants is a detriment to their competitors." *Id.*; *see also* John F. Duffy, *Standing to Challenge Patents, Enforcement Risk, and Separation of Powers*, 83 Geo. Wash. L. Rev. 628, 643 (2015) ("[E]ven within the Federal Circuit's own jurisprudence, there's a glaring inconsistency in how the court measures standing to challenge

governmental grants of patent rights versus how it measures standing to challenge other governmental grants to competitors."); 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).

But with estoppel applied to a competitor or licensee—it has logical economic consequences to competition—and meets *Canadian Lumber*'s view of economic harm sufficient to support standing. It would also meet the criteria of the regional circuits.

The D.C. Circuit, which frequently hears challenges to agency actions, takes a similar view of competitor standing. "The competitor standing doctrine recognizes that economic actors suffer an injury in fact when agencies lift regulatory restrictions on their competitors or otherwise allow increased competition against them." *Int'l Bhd. of Teamsters v. U.S. Dep't of Transp.*, 724 F.3d 206, 211–12 (D.C. Cir. 2013) citing *Sherley v. Sebelius,* 610 F.3d 69, 72 (D.C. Cir. 2010) (Kavanaugh, J.) (marks omitted). In *Teamsters*, the court found standing to challenge a pilot program allowing some Mexico-domiciled trucks to operate throughout the United States. The D.C. Circuit was unmoved by the government's argument that the pilot program was too small—with an upper limit of just over 300 carriers, most of whom already had

permission to operate in the border states—to create a "substantial" risk of harm. *See id.*, Brief of Respondents 27-28, Document No. 1358724 (Feb. 15, 2012). Causation and redressability were "easily satisfied" by subjecting U.S. domiciled trucks to "increased competition" without considering the extent of the economic injury. *Id.* at 212.

Likewise, the First Circuit has interpreted Supreme Court cases as upholding "competitor standing based on unadorned allegations of latent economic injury." *Adams v. Watson*, 10 F.3d 915, 921 (1st Cir. 1993) (marks omitted); *see also id.* at 921 n.13 (collecting cases from Second, Seventh, Ninth, and D.C. Circuits).

In *Canadian Lumber*, the Federal Circuit appeared to agree. *See Canadian Lumber*, 517 F.3d at 1332 (collecting cases). But in the patent context, economic injury appears limited to conduct "arguably covered by the upheld claims," *AVX*, 923 F.3d at 1365, and not then if the patent is subject to a multi-patent license.

CONCLUSION

The Federal Circuit again creates a rule that insulates patents from challenge. Course correction is necessary to bring patent law back to the mainstream.

The Court should grant the petition.

Respectfully submitted.

JONATHAN STROUD

UNIFIED PATENTS, LLC
P.O. Box 53345
Washington, D.C. 20009
(202) 805-8931

WILLIAM G. JENKS
Counsel of Record

JENKS IP LAW PLLC
1629 K ST., NW
Suite 300
Washington, D.C. 20006
(202) 412-7964
wjenks@jenksiplaw.com

Counsel for Amicus Curiae

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