

No. 17-1686

**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

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

The “basic purpose[]” of the inter partes review system that Congress enacted in the America Invents Act (AIA) is to “protect the public’s ‘paramount interest in seeing that patent monopolies . . . are kept within their legitimate scope.’” *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2144 (2016) (alteration in original) (citation omitted)). One of the key ways Congress did that was to reinvigorate the process for reexamining patents. *Id.* In particular, Congress created a robust inter partes review process that allowed anyone, even those without “a concrete stake” in the specific patent at issue, to challenge the legitimacy of a patent. *Id.* at 2143-44. Congress granted any “dissatisfied” party in an inter partes review proceeding instituted by the Patent Trial and Appeal Board (PTAB or Board) the right to appeal the Board’s decision to the Federal Circuit and obtain an eventual correction. 35 U.S.C. § 319. And Congress mandated that the Patent Office “shall” cancel any patent claim “finally determined to be unpatentable” in such a proceeding and any appeal. *Id.* § 318(b).

Section 319 unambiguously authorizes appeals exactly like the one at issue here. And Congress, in 2011, would not have thought such appeals exceeded Article III, as the government surmises (at 18). This Court had long held that standing turned on “whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff’s position a right to judicial relief.” *Warth v. Seldin*, 422 U.S. 490, 500 (1975). And lower courts had regularly recognized standing based on the violation of statutory rights. *See, e.g., Edwards v. First American Corp.*, 610 F.3d 514, 517

(9th Cir. 2010), *cert. dismissed as improvidently granted*, 567 U.S. 756 (2012); *In re Carter*, 553 F.3d 979, 989 (6th Cir. 2009); *Alston v. Countrywide Fin. Corp.*, 585 F.3d 753, 755 (3d Cir. 2009).

The Federal Circuit's decision in this case sharply limits that appeal right, and thereby erodes an important component of this statutory scheme, on the premise that a petitioner must allege a *patent-inflicted injury* to appeal and that the deprivation of a statutory right is not sufficient. Pet. App. 3-6. For institutional reasons, it is unsurprising that the government defends that decision—the Executive Branch is hard-wired against inviting greater judicial scrutiny of agency action. But what is truly notable is the government's failure to offer any reason for this Court to deny review *other* than the government's agreement with the Federal Circuit on the merits. The government does not deny that the appeal right is important, does not dispute that Section 319 is most naturally read to authorize appeals like the one the Federal Circuit rejected here, does not dispute that this Court invariably reviews lower court decisions that have found that Congress exceeded constitutional bounds, and does not identify any impediment to reaching that issue in this case.

As explained below, the government's defense of the Federal Circuit's decision on the merits is unpersuasive. But at the very least, there is sufficient uncertainty on the scope of standing in this context to warrant plenary review, especially given that the Federal Circuit's decision in this case conflicts with the decisions of the D.C. Circuit recognizing standing in analogous circumstances. *Infra* at 9-10. This Court, not the Federal Circuit, and not the

government, should have the final say on whether the Constitution prevents the courts from giving full effect to the inter partes review process established by Congress to police illegitimate patent monopolies.

I. This Court, Not The Federal Circuit, Should Have The Final Say On Whether Congress’s Authorization of Appeal By Any “Dissatisfied” Party Exceeds Article III

This Court has long treated a lower court’s conclusion that an Act of Congress exceeds constitutional bounds as a compelling basis for certiorari. *See, e.g., Gonzalez v. Raich*, 545 U.S. 1, 9 (2005). That consideration, founded in the Court’s respect for Congress’s role in our tri-partite system of government, counsels strongly in favor of review here. Section 319 by its terms plainly authorizes an appeal in this case because there is no dispute that RPX qualifies as a “dissatisfied” party; the Federal Circuit’s decision, however, holds that the Constitution bars the courts from giving full effect to Section 319’s unambiguous appeal right. Pet. App. 3-6. The “obvious importance” of that ruling by itself warrants certiorari. *Raich*, 541 U.S. at 9.

The government does not dispute: (1) that the plain text of Section 319 applies to (and authorizes) appeals by “dissatisfied” parties like RPX; (2) that if Section 319 is understood to authorize appeals by parties like RPX, then the Federal Circuit’s understanding, which the Government embraces, means that it is “unconstitutional as applied to appeals like this one,” U.S. Br. 17; or (3) that this Court ordinarily reviews lower court decisions finding an Act of Congress unconstitutional in that fashion.

Instead, it asks (at 18) this Court to rewrite Section 319 so that it says “aggrieved by’ or ‘injured by,” instead of “dissatisfied.” But Congress knows how to say “aggrieved by” or “injured by” when it wants to—and it chose to use a different and broader term here.

The government nevertheless argues (at 18) that this Court should invoke “the canon of constitutional avoidance” to rewrite the statute to say “aggrieved by” or “injured by.” That canon, however, “has no application’ absent ‘ambiguity.’” *Nielsen v. Preap*, 139 S. Ct. 954, 972 (2019) (citation omitted). And here, there is no ambiguity—either in the meaning of “dissatisfied,” or in Congress’s intent to use a broader term than “aggrieved by” or “injured by.”¹ The government’s strained invocation of this canon thus only confirms that review is warranted. See Steven M. Shapiro et al., *Supreme Court Practice* 264 (10th ed. 2013) (certiorari ordinarily granted where “federal statute is given an unwarranted construction in order to save its constitutionality”); *id.* (collecting cases)).

The Federal Circuit has invoked the Constitution to rewrite a crucial component of the system that Congress established to reinvigorate the process for challenging illegitimate patents. And, in the process, the Federal Circuit has created an asymmetrical regime in which patent holders can always appeal

¹ Nor is Congress’s use of “dissatisfied” superfluous, as the government suggests (at 18); it ensures that parties that *prevail* before the Board cannot appeal in order to obtain broader precedential effect from a Federal Circuit decision that they could then use to bind non-parties. Cf. *Camreta v. Greene*, 563 U.S. 692, 703-04 (2011) (Court’s general practice is to “decline[] to consider cases at the request of a prevailing party, even when the Constitution allow[s] us to do so”).

decisions *invalidating* patents, yet those challenging patents oftentimes cannot appeal decisions *upholding* patents. That one-sided, pro-patent regime is exactly the opposite of what Congress sought to accomplish in the AIA's inter partes review system.

II. The Government's Self-Serving Defense Of The Federal Circuit's Decision Is Unavailing

The government focuses its arguments against certiorari on its conclusion that the Federal Circuit was right. Such “merits” arguments ordinarily are not a sufficient basis for denying certiorari, and there is no reason to make any exception here.

1. The government admits that the violation of a statutory right *can* be sufficient to establish standing, U.S. Br. 12 (citing *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016)), and argues only that RPX has not suffered the violation of any such right here. Yet, in arguing that “[t]he AIA does not . . . give petitioners for inter partes review ‘the substantive statutory right to compel the Patent Office to cancel unpatentable patent claims,’” the government is once again asking this Court to ignore the plain terms of the statute. *Id.* at 13 (citation omitted).

The key statutory provisions are clear. Section 318(a) states that, where, as here, “an inter partes review is instituted and not dismissed,” the Board “*shall* issue a final written decision with respect to patentability of any patent claim challenged by the petitioner.” 35 U.S.C. § 318(a) (emphasis added). And Section 318(b), in turn, states that, once the Board issues a written decision under subsection (a) and any appeal has concluded, “the Director *shall* issue and publish a certificate canceling any claim of

the patent finally determined to be unpatentable” in such proceeding. *Id.* § 318(b) (emphasis added).

Shall means shall. Thus, while the Board has discretion to decide *whether* to institute an inter partes review to begin with, where, as here, the Board has instituted an inter partes review, the Board *must* issue a written decision with respect to the claims challenged by the petitioner. And, where the Board concludes that a claim is not patentable and any appeals of that determination have concluded, the Director *must* issue a certificate canceling that claim.²

To be sure, “the AIA does not ‘guarantee a particular *outcome*’ for a person that requests inter partes review.” U.S. Br. 13 (citation omitted; emphasis added). But the government simply glosses over a critical step: when assessing standing to appeal the Board’s decision, a petitioner is presumed to be correct on the merits. *Americans for Safe Access v. DEA*, 706 F.3d 438, 443 (D.C. Cir. 2013). Thus, the relevant question is whether the Patent Office must cancel a claim once a petitioner has secured a final determination that the claim *is in fact unpatentable*. The statute unambiguously answers that question.

This also refutes the government’s suggestion (at 14) that RPX rests its standing on “a procedural right *in vacuo*.” *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009). In *Summers*, the alleged injury,

² The government says (at 16) that RPX “disclaims” that Section 319 itself confers standing. To be clear, RPX simply disclaimed that Section 319 itself “provides injury in fact.” U.S. Br. 16 (quoting Pet. Reply Br. 5). As discussed, that injury is provided by the deprivation of other statutory rights; Section 319 helps protect against the denial of those rights.

though grounded in a statute, was purely “procedural”—the denial of “the ability to file comments on some Forest Service actions.” *Id.* By contrast, RPX’s standing is based on the denial of a *substantive* right—the statutory right to cancellation of a specific patent, in a specific inter partes review proceeding that RPX initiated and the Board instituted. That concrete and particularized interest—of RPX’s own—is sufficient to confer standing on RPX under this Court’s precedents.

2. As explained (Pet. 13-14), *Federal Election Commission v. Akins*, 524 U.S. 11 (1998), and *Public Citizen v. United States Department of Justice*, 491 U.S. 440 (1989), strongly support the conclusion that the violation of these statutory rights is sufficient to confer standing. In those cases, this Court held that standing exists where a party has been denied a statutory right to something (there, information), even where—as here—the statute is framed in terms of actions an *agency* was required to take when certain conditions were met. *See Akins*, 524 U.S. at 15-17; *Public Citizen*, 491 U.S. at 445-46.

The government argues (at 15) that RPX “has not been denied access to any information to which it is legally entitled.” But the rationale of *Akins* and *Public Citizen* is not limited to requests for information, and once again, the government is just assuming that RPX is wrong on the merits. *Supra* at 6. For purposes of standing, it must be assumed that RPX is right the patent is invalid—and, thus, that it is entitled to cancellation of the patent after it prevails on appeal. Thus, here, as in *Akins* and *Public Citizen*, the petitioner “is injured-in-fact for standing purposes because he did not get what the statute

entitled him to receive.” *Zivotofsky v. Secretary of State*, 444 F.3d 614, 617-18 (D.C. Cir. 2006).³

3. The government’s standing argument is also notable in what it *overlooks*. For example, the government ignores the unique financial interest that parties have in a correct decision by the Board. While any member of the public may ask the Board to initiate an inter partes review, actual participation in that proceeding requires a petitioner to pay *the Patent Office* substantial sums to reach a decision—a minimum of \$30,500 to fund the proceeding, *see* 37 C.F.R. § 42.15(a)(1)-(2)—and, as is true here, often entails hundreds of thousands of dollars more in legal fees. *See* Jennifer Robichaux Carter, Comment, *Hedge Funds Should be Able to Challenge Patent Validity Using Inter Partes Review Despite Mixed Motives*, 54 Hous. L. Rev. 1315, 1344 n.217 (2017). The unique regulatory requirement of having to fund the proceeding gives petitioners a concrete and particularized interest in the proceeding and a decision that is correct and in accordance with law.

The government also overlooks the distinct history, going back to the English Court of Chancery, of allowing parties to challenge improperly issued patents through a writ of scire facias even if they

³ As was true for the plaintiffs in *Akins* and *Public Citizen*, RPX also seeks to vindicate its statutory rights in order to enhance its reputation and business interests. Unlike a random member of the public, RPX has invested millions of dollars in establishing a business that depends in significant part on its reputation for weeding out invalid patents and thus, like its competitors, has a direct and significant economic interest in the outcome of its inter partes review proceedings. *See* Pet. 4-6; RPX Fed. Cir. Opp. to Mot. to Dismiss 3-9 (No. 17-2346).

suffered no specific, patent-related injury. See W.M. Hindmarch, *A Treatise on the Law Relative to Patent Privileges for the Sole Use of Inventions* 235 (1847), (“[E]very person is presumed to have such an interest in a patent for an invention, that if he alleges that it is illegal or void, he is entitled as of right to a *scire facias* in the name of the Queen in order to repeal it.”); see also *The Queen v. Aires* (1717) 88 Eng. Rep. 762 (K.B.), 10 Mod. 354. That tradition bears on the “constitutional standing inquiry” and counsels in favor of recognizing standing here. *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 774 (2000); see *Spokeo*, 136 S. Ct. at 1549.

4. These considerations bolster the conclusion that the important question presented should not be left to a single court of appeals. And that is particularly true given that another circuit has taken a different approach to standing based on the violation of statutory rights. See Pet. 24 (citing cases). The government dismisses (at 19) this conflict based on the facile notion that the D.C. Circuit cases “involved interpretation of statutes other than the AIA.” The AIA cannot be interpreted by another circuit because of the Federal Circuit’s exclusive jurisdiction over patent appeals. But the salient point is that the D.C. Circuit’s standing analysis in cases like *Zivotofsky* would lead to a different result here.

In *Zivotofsky*, the D.C. Circuit held that the plaintiff established standing because (1) “[h]is allegation that Congress conferred on him an individual right to have ‘Israel’ listed as his place of birth on his passport and on his Consular Birth Report is at the least a colorable reading of the statute,” and (2) he “also alleges that the Secretary of

State violated that individual right.” 444 F.3d at 619. Likewise, here, (1) RPX has at least a colorable argument that Congress has conferred a right to cancellation of claims that have been found to be unpatentable by a final decision in a proceeding instituted by the Board, and (2) RPX alleges that it has been denied that right, since it must be presumed that RPX would prevail on appeal. That conflict underscores the need for review.

III. The Question Presented Is Important And Warrants This Court’s Review

The Federal Circuit’s conclusion that Congress exceeded constitutional bounds in conferring a right of appeal on any “dissatisfied” party itself is a compelling basis for review. *Supra* at 3. Moreover, while the government attempts (at 19-20) to downplay the practical significance of that ruling, the fact is that it deals a significant blow to Congress’s efforts in the AIA to police the grant of illegitimate patents, given the important role that non-defendant petitioners like RPX have played in promoting patent quality. *See Askeladden Amicus Br.* 8-13.

The government claims (at 19-20) that the Federal Circuit has not adopted a “categorical rule” requiring a patent-inflicted injury to establish standing. But the *only* circumstance in which the Federal Circuit has recognized standing in this context is where the appealing party engaged in potentially infringing activity or has concrete plans to do so. *See Momenta Pharm., Inc. v. Bristol-Meyers Squibb Co.*, 915 F.3d 764, 769 (Fed. Cir. 2019). Moreover, the Federal Circuit *has* categorically held that a violation of the statutory rights at issue does not establish standing.

That ruling eliminates an important category of appeals by groups that, due to a variety of factors, have been especially effective in the inter partes review process. *See Askeladden Amicus Br. 9-11.*

The government notes (at 10 (citation omitted)) that RPX “concedes that it cannot show ‘a patent-inflicted injury in fact.’” But that is a feature, not a bug: All agree that a patent-inflicted injury establishes standing to appeal, so the fact that RPX concedes the absence of such an injury makes this case an ideal vehicle in which to resolve whether or when the alleged violation of statutory rights confers standing on a “dissatisfied” party to appeal. And, in the end, the fact that the government does not even attempt to argue that there are any waiver or other issues that would prevent this Court from reaching and resolving the important question presented underscores that this case is an ideal vehicle.

And beyond the exceptional importance of this case to the patent system specifically, further guidance is needed from this Court on when statutory rights may confer Article III standing. This case provides a timely vehicle in which to provide it.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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