No. 18A-

IN THE SUPREME COURT OF THE UNITED STATES

RPX CORPORATION,
Applicant,
v.

CHANBOND LLC,
Respondent.

APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

To the Honorable John G. Roberts, Jr., Chief Justice of the Supreme Court of the United States and Circuit Justice for the Federal Circuit:

Petitioner RPX Corporation hereby moves by undersigned counsel, pursuant to Rule 13.5 of the Rules of this Court, for an extension of time of 60 days, to and including June 16, 2018, for the filing of a petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Federal Circuit dated January 17, 2018 (attached hereto as Exhibit 1). The jurisdiction of this Court is based on 28 U.S.C. § 1254(1).

The date within which a petition for a writ of certiorari would be due, if not extended, is April 17, 2018. This application for an extension of time to file a petition for a writ of certiorari is being file more than ten (10) days prior to the current due date.

1. The case presents a very important question of law dealing with

Article III standing. Namely, this case asks whether an express statutory right to seek court review of an administrative agency decision provides Constitutional standing to do so if the appellant is otherwise estopped from raising the issues addressed in the agency's decision either at the agency or in an Article III court.

2. Petitioner asked the U.S. Patent and Trademark Office to institute *Inter Partes* Review of Respondent's patent relating to wireless communications and find the patent invalid. The Patent Office instituted review of Respondent's patent, but in its final decision concluded that Respondent's patent was not shown to be invalid.

Petitioner appealed the Patent Office's decision to the Court of Appeals for the Federal Circuit, a right expressly provided by 35 U.S.C. § 141, which 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.

Similarly, 35 U.S.C. § 319 states:

> A party dissatisfied with the final written decision of the Patent Trial and Appeal Board under section 318(a) 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.

Relatedly, 28 U.S.C. § 1295(a)(4)(A) states:

> The . . . Federal Circuit shall have exclusive jurisdiction—of an appeal from a decision of—the Patent Trial and Appeal Board ... with respect to a ... *inter partes* review under title 35, at the instance of a party who exercised that party's right to participate in the applicable proceeding before … the Board … .

Thus, the relevant statutes could not be clearer as to the intent of Congress to provide requesters of *inter partes* review the right to appeal decisions of the Patent

Office in those reviews to the Court of Appeals for the Federal Circuit.

One reason why the Patent Act provides requesters of *inter partes* review like Petitioner the express right to appeal to the Court of Appeals for the Federal Circuit is that 35 U.S.C. § 315 estops them from either requesting another review of the patent by the Patent Office or asserting in a civil action that the reviewed patent is invalid. Thus, by filing a request for *inter partes* review, the requester loses rights to challenge the patent again, either at the Patent Office or in court. Because of this serious loss of right, the statutes provide requesters of *inter partes* review the right to appeal to the Court of Appeals for the Federal Circuit.

When Petitioner filed its statutorily provided right to appeal to the Court of Appeals in this case, Respondent moved to dismiss the appeal on the basis that Petitioner lacked Article III standing. The Court of Appeals granted Respondent's motion and dismissed Petitioner's appeal, finding that because "[i]t is undisputed that RPX is not engaged in any potentially infringing activity regarding the '822 patent[], RPX's argument that the Board's decision injured RPX by impeding its 'right to file multiple IPR petitions on the same patent claims,' [] must fail."

3. The certiorari petitioner will explain that Court of Appeals' decision conflicts with this Court's precedents relating to the Freedom of Information Act ("FOIA") and the Federal Election Campaign Act of 1971 ("FECA"), which deftly illustrate the Court's repeated holdings that Congress can create Article III standing to seek review of specific agency action by statute alone. No independent injury is necessary to appeal administrative decisions under those acts. A party who

seeks judicial review of a denied request under FOIA or FECA need demonstrate no more than that she made a request pursuant to the statute and was dissatisfied with the administrative response. She need not show that the dissatisfactory administrative response was harmful to her in any way.

The statutory scheme at issue in this case is precisely analogous to the FOIA and FECA statutes. First, the judicial review statutes here similarly check government behavior rather than protect private interests. Second, if the dissatisfied third-party review requester sought the result it desired (cancellation of the patent) in court without first successfully requesting a review and receiving a final Board decision pursuant to the statute, it would lack standing. Third, when the third-party requester receives an adverse decision from the Board, it is only that party who may appeal.

The Court of Appeals decision raises the important Constitutional question of whether Congress and the President have the power to provide for Article III Court review of discrete administrative decisions. The decision will impact more than just the patent system, as its reasoning could limit the power of Congress and the President to provide for court appeal of administrative responses to requests in any field. Indeed, the issue in this case implicates the power of Congress and the President to create Article III standing by statute in any sense, such as for disputes between private parties, or private parties and the government outside of the administrative context.

4. Petitioner's undersigned counsel was retained in this matter just last

week and thus Petitioner seeks the additional time requested herein in order to enable undersigned counsel to review the matter thoroughly and prepare the petition for certiorari.

In addition, undersigned counsel has responsibility for a number of other matters including: replies in support of motions to amend due on April 9, 2018, in *1964 Ears, LLC, v. Jerry Harvey Audio Holding, LLC*, No. IPR2017-01084 (P.T.A.B.), *1964 Ears, LLC, v. Jerry Harvey Audio Holding, LLC*, No. IPR2017-01091 (P.T.A.B.), and *1964 Ears, LLC, v. Jerry Harvey Audio Holding, LLC*, No. IPR2017-01092 (P.T.A.B.); opening brief due on May 25, 2018, in *Jerry Harvey Audio Holding v. 1964 Ears, LLC*, No. 18-1299 (Fed. Cir.); and, oral argument on May 31, 2018, in *1964 Ears, LLC, v. Jerry Harvey Audio Holding, LLC*, No. IPR2017-01084 (P.T.A.B.), *1964 Ears, LLC, v. Jerry Harvey Audio Holding, LLC*, No. IPR2017-01091 (P.T.A.B.), and *1964 Ears, LLC, v. Jerry Harvey Audio Holding, LLC*, No. IPR2017-01092 (P.T.A.B.). Undersigned counsel also has previously scheduled international travel for the week of May 12-19.

Petitioner's counsel will use best efforts to file the petition for certiorari as soon as practically possible, and in no event beyond the date of the requested extension.

For the foregoing reasons, Petitioner requests an extension of time to and including June 16, 2018, be granted within which Petitioner may file a petition for a writ of certiorari.

Respectfully submitted,

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