

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**

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a party dissatisfied with a final written decision of the Patent Trial and Appeal Board has Article III standing to appeal that decision based solely on the statutory provisions of 35 U.S.C. §§ 315, 318, and 319, regardless of whether the appellant otherwise suffered an injury in fact.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent ChanBond, LLC states as follows:

ChanBond, LLC is a wholly owned subsidiary of UnifiedOnline, Inc. (“UnifiedOnline”). UnifiedOnline is a publicly traded company (OTCBB: UOIP).

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BRIEF IN OPPOSITION

INTRODUCTION

Two months after ChanBond, LLC (“ChanBond”) filed patent infringement actions against several telecommunications companies, petitioner RPX Corporation (“RPX”) filed an administrative challenge at the Patent Trial and Appeal Board (“Board” or “PTAB”) seeking to invalidate one of ChanBond’s asserted patents. RPX describes itself as a “patent risk management” company that helps client companies lower patent litigation costs. When RPX challenged ChanBond’s patent in administrative proceedings, however, it did not purport to do so on behalf of the defendants in the infringement action or any of its clients. Nor did it disclose them as “real par-

ties in interest.” Instead, it purported to pursue only its own interest in generally improving “patent quality.”

The PTAB rejected RPX’s challenge and confirmed the validity of ChanBond’s patent. RPX appealed to the Federal Circuit. To show Article III standing—that it suffered injury in fact—RPX abandoned its purported interest in “patent quality.” Instead, it asserted that it sustained “competitive injury” and “reputational injury” from the adverse PTAB decision. RPX also asserted that it had been denied its “rights” to invalidate patents at the PTAB and to file multiple petitions at the PTAB seeking that relief. RPX, however, did *not* assert standing based on its purported statutory right to appeal adverse PTAB decisions. Nor did RPX assert associational standing based on its members’ interests. The court of appeals rejected RPX’s standing theories and dismissed the appeal.

RPX seeks this Court’s review. But RPX asserts an argument it did not press below and the court of appeals did not consider: RPX now argues that, even in the absence of specific facts that show a concrete and particularized injury in fact, it can assert standing to appeal the PTAB’s decision based solely on statutory provisions, including a statutory right to appeal, 35 U.S.C. § 319. The standing issue RPX raises, moreover, is of limited significance. It is unique to a handful of third-party patent challengers that, like RPX, do not allege facts supporting a credible basis for standing. And RPX’s lack of standing here is a problem of RPX’s making: It chose not to assert associational standing, despite having hundreds of member companies. Those features make this case a singularly unsuitable vehicle for review. Finally, even apart from those vehicle issues, RPX’s statutory standing argument is contrary to the law as set forth by this Court

and as consistently applied by the courts of appeals. The petition should be denied.

STATEMENT

I. STATUTORY FRAMEWORK

The petition arises out of an inter partes review or “IPR”—an administrative proceeding established by the Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011).

A. Inter Partes Review Procedure

In an IPR, “the United States Patent and Trademark Office (PTO) is authorized to reconsider and to cancel an issued patent claim in limited circumstances.” *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1370 (2018). Congress established IPRs as “a quick, inexpensive, and reliable alternative to district court litigation to resolve questions of patent validity.” S. Rep. No. 110-259, at 20 (2008).

Anyone other than the patent’s owner may file a petition for an IPR seeking review of the patent’s validity. 35 U.S.C. §311(a). Because any party may petition the Board, “[p]arties that initiate the proceeding need not have a concrete stake in the outcome.” *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2143-2144 (2016). “[I]ndeed, they may lack constitutional standing.” *Ibid.* (citing §311(a) and *Consumer Watchdog v. Wis. Alumni Research Found.*, 753 F.3d 1258, 1261-1262 (Fed. Cir. 2014)). The Board may institute an IPR if it finds “a reasonable likelihood that the petitioner would prevail.” 35 U.S.C. §314(a). If the Board institutes an IPR, the proceeding culminates in “a final written decision with respect to the patentability of any patent claim challenged by the petitioner.” *Id.* §318(a).

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.” 35 U.S.C. §319; see *ibid.* (“Any party to the inter partes review shall have the right to be a party to the appeal.”). Section 141, in turn, provides that “[a] party to an inter partes review * * * may appeal the Board’s decision only to the United States Court of Appeals for the Federal Circuit.” *Id.* §141(c).

B. IPR Estoppel, Time Bar, and the “Real Party in Interest” Disclosure Requirement

In creating IPR proceedings, Congress imposed important restrictions. First, it imposed a one-year time limit for filing IPR petitions. 35 U.S.C. §315; see also H.R. Rep. No. 112-98, at 46-48 (2011). “An inter partes review may not be instituted if the petition requesting the proceeding is filed *more than 1 year after the date on which the petitioner * * * is served* with a complaint alleging infringement of the patent.” 35 U.S.C. §315(b) (emphasis added).

Second, Congress created a statutory estoppel to preclude wasteful relitigation. “The petitioner in an inter partes review of a claim in a patent * * * that results in a final written decision under section 318(a)” is thereafter estopped from asserting “any ground [of invalidity] that the petitioner raised or reasonably could have raised during that inter partes review.” 35 U.S.C. §315(e). Such estoppel applies to proceedings in federal court, before the USPTO, and before the International Trade Commission. *Ibid.* Both the time-bar and estoppel provisions apply not only to a petitioner, but also to a “real party in interest, or privy of the petitioner.” *Id.* §315(b), (e).

To effectuate those provisions, Congress provided that an IPR petition “may be considered only if,” among other

things, it “identifies all real parties in interest.” 35 U.S.C. § 312(a)(2). Patent and Trademark Office regulations similarly require parties seeking IPRs to disclose “each real party-in-interest.” 37 C.F.R. § 42.8(b)(1).

II. PETITIONER’S BUSINESS

Petitioner RPX is a for-profit company that offers “patent risk management” services to about 330 clients. RPX Corp., *Annual Report (Form 10-K)*, at 1, 6 (Mar. 5, 2018), <http://ir.rpxcorp.com/static-files/fe5d0cf-0f5e-4970-bd0e-3654d767971d>. The core of RPX’s patent risk-management services is to “acquire patents, licenses to patents, patent rights, and agreements for covenants not to sue [which] are being or may be asserted against [its] current and prospective clients.” *Id.* at 4. RPX’s clients pay an annual subscription fee and receive non-exclusive sub-licenses to the patent assets in RPX’s portfolio for the period of the client’s membership. *Id.* at 1, 4, 12.

RPX also promises to help members “‘quickly and cost-effectively extricate * * * from [non-practicing entity (‘NPE’)] lawsuits.’” *Applications in Internet Time, LLC v. RPX Corp.*, No. 2017-1698, 2018 WL 3625165, at *2 (Fed. Cir. July 9, 2018) (brackets in original). RPX aims to “‘prevent[] patent litigation,’” but “‘can help after a litigation has begun.’” *Ibid.*

As part of its business, RPX files IPR petitions, putatively to “improve the efficiency of the patent market, lower unnecessary costs, and deter abusive patent assertion practices.” RPX Corp., *Annual Report (Form 10-K)*, at 6. RPX, however, has attempted to prevent its clients from being subjected to IPR estoppel provisions based on its petitions (and conversely to avoid being subjected to the time-limit provisions applicable to clients that have been sued for infringement). To that end, RPX describes its IPR filings as “a separate line of business.”

Pet. 4. RPX states that its policy is to “file[] IPRs if, and only if, RPX decides that it is in RPX’s own interests to do so.” RPX C.A. Br. 2.

RPX adopts “best practices” to “ensure that RPX is and will be deemed by the PTAB and district courts as the sole real party-in-interest in all validity challenges.” *Applications in Internet Time*, 2018 WL 3625165, at *2 (quoting internal RPX document). These best practices “(1) expressly discourage the company from taking suggestions from third parties, including clients, regarding validity challenges; (2) provide that it will not discuss forthcoming validity challenges with third parties in advance of filing; and (3) mandate that RPX will not discuss strategy or take feedback on pending validity challenges, and will ‘maintain complete control of all aspects of pending validity challenges.’” *Ibid.* (quoting same document).

Notwithstanding those efforts, the Federal Circuit has cast doubt on RPX’s separation from its clients for real-party-in-interest purposes. See *Applications in Internet Time*, 2018 WL 3625165, at *11-17. Just last month, the Federal Circuit directed the Board to consider whether RPX failed to identify a real party in interest—as required by statute—where RPX had challenged a patent asserted against one of its members, had stated that its “interests are 100% aligned with those of [its] clients,” and had received “substantial payments” from that member. *Id.* at *17 (alteration in original).

III. PROCEDURAL BACKGROUND

A. The PTAB Upholds ChanBond’s Patents

On September 21, 2015, ChanBond filed patent infringement actions in the U.S. District Court for the District of Delaware against several telecommunications companies. *In re ChanBond, LLC Patent Litig.*, No. 15-842-RGA (consolidated). In its complaints, ChanBond

alleged infringement of three related patents, including U.S. Patent No. 7,941,822 (“the ’822 Patent”).

About two months after ChanBond filed its infringement actions, RPX filed a petition for IPR of the ’822 Patent. The petition alleged that “RPX is the sole real party-in-interest in this proceeding. RPX has not communicated with any client about its intent to contest the validity of this patent, or the preparation or filing of this Petition. RPX has complete, unilateral control of all aspects of this proceeding and is also solely responsible for all costs and expenses associated with this proceeding.” Petition for Inter Partes Review 2, *RPX Corp. v. ChanBond LLC*, No. IPR2016-00234 (filed P.T.A.B. Nov. 20, 2015).

After trial, the Board issued a final written decision in ChanBond’s favor, determining that RPX had not shown by a preponderance of the evidence that any of the claims at issue were unpatentable. Pet. App. 10.

B. The Federal Circuit Dismisses for Want of Injury in Fact

RPX sought judicial review, and the Federal Circuit dismissed the appeal for lack of standing in a brief, unanimous, and non-precedential order. Pet. App. 1-8. The court considered—and rejected—each of the three standing theories proposed by RPX. *Id.* at 4-8.

RPX’s first theory rested on its assertion that “the Board’s decision injure[d] its ‘statutory right to compel cancellation of claims on unpatentable inventions’ and its ‘right to file multiple IPR petitions on the same patent claims.’” Pet. App. 4 (quoting RPX C.A. Br. 15, 16). The Federal Circuit rejected that theory. *Id.* at 5-6. The court of appeals explained that “[t]he statute did not guarantee a particular outcome favorable to the reques-

tor. RPX was permitted to request review and participate once the PTO granted its request. That is all the statute requires.’” *Id.* at 5 (internal citation and brackets omitted).¹ The court also rejected RPX’s argument because the estoppel provision of 35 U.S.C. §315(e)(1) does not constitute an injury in fact when the appellant identifies no concrete adverse impact, such as the potential for an infringement suit based on its activities. “It is undisputed that RPX is not engaged in any potentially infringing activity regarding the ’822 patent.” Pet. App. 5.

RPX’s second theory of standing was based on an allegation that the Board’s decision injured its standing relative to competitors that operate similar businesses based on challenging patents through IPRs. Pet. App. 6. The court of appeals rejected that competitor-standing argument because RPX “ha[d] not demonstrated that the Board’s determination increased or aids the competition in the market of the non-defendant IPR petitioners.” *Id.* at 6-7.

Finally, the court of appeals rejected RPX’s third theory—that it had standing because the PTAB’s decision “injur[ed]” its “reputation of successfully challenging wrongfully issued patent claims.” Pet. App. 7. The evidence, the court stated, did “not demonstrate a concrete and particularized reputational injury.” *Ibid.*

RPX did not seek panel rehearing or rehearing en banc. This petition for a writ of certiorari followed.

¹ As discussed below, the statutory-rights argument raised in this petition is different from that pressed by RPX and decided by the Federal Circuit in the proceedings below. See pp. 9-12, *infra*.

REASONS FOR DENYING THE PETITION

The petition asks this Court to address a theory of standing that petitioner did not assert, and that the court of appeals did not address, below. Additional waivers render this case an incomplete and inadequate vehicle for review. The issue on which petitioners seek review is of limited importance. And the court of appeals' decision is correct in any event.

I. THE QUESTION IS NOT PROPERLY PRESENTED

Rather than seek review on issues pressed and passed upon below, petitioner asks this Court to address arguments it never presented to the court of appeals. And petitioner overlooks other grounds for asserting standing, also waived below.

A. The Question Presented Is Premised on an Argument Petitioner Waived Below

The question presented turns on an issue petitioner RPX waived below. The petition asks whether Article III standing exists where, among other things, “Congress has * * * statutorily created the right for parties dissatisfied with a final decision of the Patent Office *to appeal* to the Federal Circuit” under 35 U.S.C. §§ 141 and 319. Pet. i (emphasis added). RPX, however, never made that argument below. Nowhere does RPX’s brief in the court of appeals invoke the statutory provisions *for appeal* as the basis for its assertion of injury in fact. Nowhere does the unpublished decision of the court of appeals address such an argument. That alone forecloses review. This Court will not address questions “not pressed or passed upon below.” *United States v. Williams*, 504 U.S. 36, 41 (1992).

In the court of appeals, RPX’s arguments were entirely different. It urged “competitor” standing—that

the Board’s decision injured its status relative to competitors that operate businesses based on challenging patents through IPRs. RPX C.A. Br. 17-21; Pet. App. 6. It does not make that argument here. RPX also argued “reputational” injury. RPX C.A. Br. 17-21; Pet. App. 4, 7. It does not make that argument here, either.

The only *statutory* arguments RPX made in connection with standing below did not concern a putative statutory right to appeal, but the right to seek IPR reviews in the PTAB. RPX argued that it had suffered injury from deprivation of “its ‘statutory right to compel cancellation of claims on unpatentable inventions’ and its ‘right to file multiple IPR petitions on the same patent claims.’” Pet. App. 4 (quoting RPX C.A. Br. 15, 16). The court of appeals considered, and rejected, only those alleged statutory deprivations. It did not pass on whether RPX had standing based on the statutory provisions addressing appeals—because RPX raised no such issue. *Ibid.*² The court of appeals’ unpublished opinion is devoid of any reference to RPX’s purported statutory right to appeal, or even to the relevant statutory provisions.

The statutory arguments pressed below and considered by the Federal Circuit related to the entirely different statutory provisions of 35 U.S.C. §§ 315 and 318.

² Indeed, RPX’s brief below mentions 35 U.S.C. §§ 141 and 319 only once—and not even in the “Argument” section. Instead, those provisions appeared in passing, in connection with a background section summarizing legal principles relevant to prudential standing. RPX C.A. Br. 14. Nowhere in its argument did RPX mention the statutory right to appeal. *Id.* at 15-21. Nor did it mention other issues raised here for the first time, such as the comparison of the appeal provisions of § 319 with the provisions of § 10 of the Administrative Procedure Act, 5 U.S.C. § 702. Pet. 20.

The court of appeals understood RPX to argue that “the Board’s decision injures [RPX’s] ‘statutory right to compel cancellation of claims on unpatentable inventions,’” under § 318. Pet. App. 4 (quoting RPX C.A. Br. 15); see Pet. 11 (“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.”). It also understood RPX to claim a purported “‘right to file multiple IPR petitions on the same patent claims’” under § 315. Pet. App. 4; see Pet. 14. But the court of appeals never addressed, and RPX never raised, the issue of whether the statutory provisions for appeal—35 U.S.C. §§ 141 and 319—give rise to constitutional injury in fact.

The issue waived below, however, is now the centerpiece of RPX’s petition. The bulk of the petition is devoted to the statutory provisions of §§ 141 and 319 and their effect on standing. Pet. 15-21. Those statutory provisions, RPX asserts, show that “Congress clearly intended to provide requesters of Reviews the right to appeal” IPRs. *Id.* at 20. RPX’s *amicus*, too, recognizes that the petition boils down to whether those statutory appeal provisions support standing. It summarizes the question presented as “whether Section 319 of Title 35 of the United States Code, as set forth by Congress, has established an intangible injury-in-fact that meets the ‘case or controversy’ requirements of Article III of the U.S. Constitution.” Br. of New York Intellectual Property Law Association as *Amicus Curiae* in Support of Neither Party 3 (filed July 20, 2018).

Because RPX did not press, and the court of appeals did not pass upon, the central issue raised in the petition, review is unwarranted. *Williams*, 504 U.S. at 41. The decision below, moreover, is non-precedential. RPX did

not seek additional briefing, oral argument, rehearing by the panel, or rehearing by the Federal Circuit en banc. RPX thus failed to crystallize the issues in the court of appeals before seeking review by this Court.

B. Additional Waivers Render This Case a Particularly Flawed Vehicle

In addition to waiving its primary statutory argument, RPX failed to assert other potential bases for standing in the court of appeals, rendering this case an incomplete and distorted vehicle for review.

In *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977), this Court held that associations can assert standing based on the standing of their members. The Federal Circuit has applied associational standing principles to permit organizations to challenge PTO decisions based on injuries to their members. See *Institut Nat'l Des Appellations D'Origine v. Vintners Int'l Co.*, 958 F.2d 1574, 1579-1580 (Fed. Cir. 1992).

RPX, however, did not claim it had standing to appeal based on alleged injury to any of its members. It did not do so even though RPX has hundreds of members. It did not do so even though RPX's members pay RPX to protect them from high patent litigation costs. The court of appeals thus did not address, and this Court has no basis for evaluating, whether RPX might have standing under *Washington State Apple*—whether “(a) [RPX’s] members would otherwise have standing to sue in their own right; (b) the interests [RPX] seeks to protect are germane to [RPX’s] purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” 432 U.S. at 343.

There was a reason RPX did not assert associational standing. When Congress established the IPR process, it

imposed a statutory estoppel against petitioning parties *and* any “real party in interest.” 35 U.S.C. §315(e)(1), (2); pp. 4-5, *supra*. To that end, the statute requires IPR applicants to disclose all “real parties in interest.” 35 U.S.C. §312(a)(2); pp. 4-5, *supra*. But RPX seeks to serve its members’ interests by prosecuting IPRs without subjecting its members to the risk of estoppel they would face if they filed petitions in their own name. RPX thus does not name its members or disclose them as real parties in interest. In that way, RPX seeks to afford them the benefits of the IPR process without facing the burden of estoppel.

That strategy, however, renders the issue presented here a problem of RPX’s own making. RPX’s effort to circumvent statutory real-party-in-interest provisions makes this case a wholly atypical and facially inadequate vehicle for further review.

II. THIS CASE PRESENTS THE ISSUE IN A NARROW AND UNUSUAL CONTEXT

A. The Petition Has Limited Effect for a Narrow Group of Third-Party Patent Challengers

RPX asks this Court to address whether the losing party in a proceeding before the PTAB can claim Article III standing to appeal based *solely* on the statutory provisions of 35 U.S.C. §§315, 318, and 319, even if the patent and the decision not to cancel it has no real-world impact on the third-party challenger. The narrowness and specificity of this question is apparent on its face. RPX’s supposed difficulty establishing Article III injury in fact is shared by just a handful of companies in the peculiar business of challenging the validity of patents—purportedly not in the interest of any accused infringer, but merely for the sake of improving “patent quality.”

Contrary to RPX’s contention that “numerous other third-party petitioners have developed businesses aimed at challenging the validity of low-quality patents,” Pet. 5, in reality, the industry is small. RPX admits it has only two primary competitors: Unified Patents, Inc. (“Unified”) and Askeladden LLC (“Askeladden”). RPX C.A. Br. 6-7; see also Br. of Askeladden LLC as *Amicus Curiae* in Support of Petitioner at 9 (filed July 19, 2018) (listing only RPX, Unified and Askeladden as non-defendant IPR petitioners).³ According to publicly available data,⁴ between the inception of the PTAB (in 2012) and today, these three companies filed a combined total of 211 petitions before the PTAB—out of a total of 8,939.

Moreover, the issue here affects only the tiny fraction of those cases where the PTAB issues a final written decision against the petitioner. Even though the PTAB has been in operation for about six years, respondent could identify only three cases (other than the decision below) in which any of RPX, Unified, and Askeladden suffered any kind of adverse decision on the merits (*i.e.*, where a

³ *Amicus* Initiative for Medicines Access & Knowledge (“I-MAK”) states that it “files petitions for inter partes Review of unmerited patents stifling competition to life-saving pharmaceuticals.” Br. *Amici Curiae* of the Initiative for Medicines Access & Knowledge (I-MAK) and Patients for Affordable Drugs, Inc. (P4AD) in Support of Petitioners 1 (filed July 20, 2018). Respondent was able to locate just ten PTAB petitions filed by I-MAK; all were denied institution without a final, appealable written decision on the merits. *Initiative for Meds., Access & Knowledge (I-MAK), Inc. v. Gilead Pharmasset LLC*, Nos. IPR2018-00103, -00119, -00120, -00121, -00122, -00123, -00125, -00126, -00211, and -00390 (P.T.A.B.). Under 35 U.S.C. § 314, such decisions not to institute are “final and nonappealable.”

⁴ Lex Machina Database, <https://lexmachina.com/>. Data current as of August 20, 2018.

final written decision of the Board upheld any of the challenged claims).⁵ That is hardly surprising: Because third-party patent challengers can pick and choose the patents they attack, they “have the luxury of ‘choosing their battles’ and focusing on patents that are most vulnerable to a validity challenge * * * . This should lead to higher institution and final decision success rates.” *IPR: Not Just for Litigants*, RPX Blog (Feb. 21, 2017), <https://www.rpxcorp.com/2017/02/21/ipr-not-just-for-litigants/>. RPX even boasts of its high success rate to promote its business. Pet. App. 2; RPX C.A. Br. 5-6. Below, it claimed that “prior to the appealed [PTAB decision], RPX had canceled claims in every IPR trial to which it was a party.” RPX C.A. Br. 5.

RPX thus asks this Court to grant review to address an issue affecting a few companies in approximately four cases every six years, or fewer than once a year. That hardly justifies review.

B. The Question Has Little Impact on Conventional IPR Appeals

The issue of standing to appeal a PTAB decision rarely arises. A patent owner always has standing to appeal the PTAB’s invalidity determination, which extin-

⁵ *Unified Patents Inc. v. Textile Comput. Sys., Inc.*, No. IPR2017-00296, 2018 WL 1472565 (P.T.A.B. Mar. 23, 2018); *Unified Patents Inc. v. Intellectual Ventures II LLC*, No. IPR2016-01404, 2018 WL 357622 (P.T.A.B. Jan. 10, 2018); *Unified Patents Inc. v. Dig. Stream IP, LLC*, No. IPR2016-01749, 2018 WL 1230580 (P.T.A.B. Mar. 9, 2018). In one more case, the primary petitioner was the defendant in district court litigation, and RPX was listed as a secondary petitioner. *Sierra Wireless Am., Inc. v. M2M Sols. LLC*, No. IPR2015-01823 (P.T.A.B. Mar. 6, 2017). Thus, any standing to appeal would not have had to rely on a supposed injury to RPX alone.

guishes the property right represented by her patent. The vast majority of IPR petitioners have standing to appeal as well, as they generally are defendants in infringement actions. IPR proceedings were intended to be an “alternative to district court litigation.” S. Rep. No. 110-259, at 20 (2008); see also Saurabh Vishnubhakat, *et al.*, *Strategic Decision Making in Dual PTAB and District Court Proceedings*, 31 *Berkeley Tech. L.J.* 45, 71 (2016) (as of June 30, 2015, only 13.2% of PTAB challenges involved patents not asserted in infringement litigation).

RPX asserts that “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.” Pet. 4. With one exception, however, the cases cited by RPX did not turn on the question presented here or the issues decided below.

RPX points to three cases involving third-party petitioner standing: *Consumer Watchdog v. Wisconsin Alumni Research Foundation*, 753 F.3d 1258 (Fed. Cir. 2014); *Phigenix, Inc. v. Immunogen, Inc.*, 845 F.3d 1168 (Fed. Cir. 2017); and *Altaire Pharmaceuticals, Inc. v. Paragon Biotech, Inc.*, 889 F.3d 1274 (Fed. Cir. 2018). Pet. 8-9. After RPX filed the present petition, the Federal Circuit decided a fourth case involving the standing of a third-party petitioner. *JTEKT Corp. v. GKN Auto. LTD.*, No. 2017-1828, 2018 WL 3673005 (Fed. Cir. Aug. 3, 2018).

Only one of those four cases, however, involved a question similar to that raised here. In *Consumer Watchdog*, the appellant “[did] not identify any alleged injury aside from the Board denying [appellant] the particular outcome it desired in the reexamination, i.e., canceling the claims of the [challenged] patent.” 753 F.3d

at 1261. In the other three cases, the appellants claimed standing based not on a bare statutory right, but on actual allegations of injury in fact. In *Phigenix*, the appellant alleged “an actual economic injury because the [challenged] patent increase[d] competition between itself and [patent owner].” 845 F.3d at 1174. The Federal Circuit rejected the argument because the appellant failed to allege that it had licensed its own patent to the same entities that had licensed the challenged patent. *Ibid.* In *JTEKT*, the appellant relied on the “potential risk of infringement” of a product in development as a basis for injury in fact. 2018 WL 3673005, at *2-3. However, in view of the appellant’s concession that the “‘potential risk of infringement * * * is impossible to quantify at this time,’” the Federal Circuit found the appellant’s injury wholly speculative. *Ibid.* In *Altaire*, by contrast, the Federal Circuit found that the appellant *had* properly demonstrated injury in fact where the appellee was “actively seeking a declaratory judgment that it has the right to terminate [a contractual agreement between the parties] in [district court],” and was “seek[ing] all appropriate damages.” 889 F.3d at 1282. RPX’s attempt to amplify the significance of the question presented beyond the microcosm of third-party patent challengers is not supported by those cases.

Even RPX, in its arguments below, pressed a fact-specific standing theory that was entirely different from the one raised here. As noted above, RPX argued standing based on alleged reputational injury and competitive injury. RPX C.A. Br. 17-21. The Federal Circuit considered that standing theory and rejected it on the merits. Pet. App. 6-8. RPX does not renew those arguments here.

RPX broadly alleges, without support, that “[t]he 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.” Pet. 21. RPX, however, provides no examples of this purported broad impact. In fact, the narrowness of the convoluted, multi-pronged question presented by RPX belies that contention.

In sum, RPX’s standing issue is unique to itself and a couple of its competitors; rarely finds application even to those companies; and is of minimal significance to other IPR petitioners. Thus, review by the Court is unwarranted.

III. THE FEDERAL CIRCUIT’S DECISION IS CONSISTENT WITH PRECEDENT

A. The Opinion Below Is Consistent with This Court’s Cases

RPX contends that “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.” Pet. 3-4. The Court has, however, spoken to that question already. In *Cuozzo Speed Technologies, LLC v. Lee*, 136 S. Ct. 2131 (2016), this Court observed that “[p]arties that initiate the [IPR] proceeding need not have a concrete stake in the outcome; *indeed, they may lack constitutional standing.*” *Id.* at 2143-2144 (citing §311(a) and *Consumer Watchdog*, 753 F.3d at 1261-1262) (emphasis added). To the extent the Court has not squarely addressed the narrow question presented by RPX, that is because it has already

addressed each constituent part and resolved it against RPX.

1. The first prong, or sub-question, of the question presented is whether Article III standing exists where “Congress has * * * 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.” Pet. i. RPX contends that its “interest in having Respondent’s patent claims canceled through Review is its ‘legally protected interest,’ because Congress provides RPX that right by statute.” *Id.* at 13. Petitioner even claims a “statutory right to *compel* the Patent Office to cancel unpatentable patent claims.” *Id.* at 12 (emphasis added). But that argument is foreclosed by decision after decision of this Court holding that the bare violation of a statute is not itself sufficient to establish injury in fact. See, e.g., *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 576-577 (1992) (holding environmental organizations have no standing to challenge agency interpretation of federal statute). RPX contends that its “dissatisfaction with the Board’s Final Decision is sufficient” to create standing. Pet. 13-14. But “[t]he presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III’s requirements.” *Diamond v. Charles*, 476 U.S. 54, 62 (1986).

RPX compares its purported “injury” and the invasion of statutory rights previously held sufficient to create Article III standing. Pet. 13-14, 24. But those cases relate to particularized rights created by statute, such that a party is affected “in a personal and individual way.” *Lujan*, 504 U.S. at 560 n.1; see *FEC v. Akins*, 524 U.S. 11, 20-26 (1998) (right to information about candidates for office); *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440,

448-451 (1989) (right of access to committee records); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-375 (1982) (right to truthful information about available housing); *Zivotofsky ex rel. Ari Z. v. Sec’y of State*, 444 F.3d 614, 618-619 (D.C. Cir. 2006) (right to have “Israel” listed as place of birth on one’s passport); *Pub. Citizen v. FTC*, 869 F.2d 1541, 1548 & n.13 (D.C. Cir. 1989) (analogizing right to receive tobacco health warnings to other rights to receive information); *Rushforth v. Council of Econ. Advisers*, 762 F.2d 1038, 1039 & n.3 (D.C. Cir. 1985) (right of access to agency documents); *Brandon v. Eckard*, 569 F.2d 683, 687-688 (D.C. Cir. 1977) (right of access to specific presidential records).

Here, there is no concrete “right” that is particular to RPX as opposed to anyone else. All have the same interest: RPX argues that the cancellation of an invalid patent is “important to the quality of the patent system” because “the Patent Office needs help correcting its mistakes.” Pet. 12. But those are matters of public concern, rather than specific rights particular to RPX. In other words, RPX “seek[s] relief that no more directly and tangibly benefits [it] than it does the public at large.” *Lujan*, 504 U.S. at 573-574.

2. RPX’s second sub-question is whether Article III standing exists where “Congress has * * * statutorily created the right for parties dissatisfied with a final decision of the Patent Office to appeal to the Federal Circuit.” Pet. i. As explained in Section I above, that issue was neither pressed nor passed upon below. See pp. 9-12, *supra*. At any rate, the question was answered in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016):

Congress’ role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement when-

ever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. Article III standing requires a concrete injury even in the context of a statutory violation. For that reason, [a party] could not, for example, allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III.

Id. at 1549. At best, Congress can allow standing to be “expanded to the full extent permitted under Article III.” *Bennett v. Spear*, 520 U.S. 154, 165 (1997). Nor does the fact that RPX was a party to the agency proceeding below, Pet. 16-17, make the injury “particularized.” See *ASARCO Inc. v. Kadish*, 490 U.S. 605 (1989) (taxpayers who were parties to an action in state court would not have standing to appeal in federal court).

3. RPX’s third sub-question is whether it has Article III standing “when Congress has * * * statutorily created an estoppel prohibiting the petitioner from again challenging the patent claims.” Pet. i.⁶ The court of appeals relied on its previous holding in *Phigenix* that the estoppel provision does not constitute an injury in fact when the estoppel lacks impact because the appellant is not engaged in any activity that would give rise to a possible infringement suit. Pet. App. 5. As the court explained in *Consumer Watchdog*—under similar facts and

⁶ Petitioner claims that it has “proved to the Federal Circuit its intent to file a second Review and there is no dispute that [petitioner] intends to file a second Review or is estopped from doing so.” Pet. 15. However, the portion of the opinion below that petitioner cites does not support this contention. Pet. App. 5-6. Nor is it at all clear how a party could even “prove” its intent to file a second petition for inter partes review in the future.

in view of this Court’s precedent—“the ‘conjectural or hypothetical’ nature of any injury flowing from the estoppel provisions is insufficient to confer standing” upon an appellant. 753 F.3d at 1262-1263 (citing *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344 (2006)). Moreover, IPR estoppel applies without regard to who prevails, so long as the IPR “results in a final written decision.” 35 U.S.C. §315(e)(1), (2). RPX concedes that “the estoppel provisions under §315(e) become active irrespective of the outcome of the final decision.” Pet. 14. Thus, there is no causal connection between PTAB action and estoppel. And a reversal on appeal would not remove the estoppel, but rather would render it moot because the claims would be cancelled. Therefore, RPX’s estoppel argument does not meet the causation and redressability requirements, which are part of the “irreducible constitutional minimum of standing.” *Lujan*, 504 U.S. at 560-561.

4. Combining three old, foreclosed questions does not create a new one. As the Court explained in a similar context, “the doctrine of standing to sue is not a kind of gaming device that can be surmounted merely by aggregating the allegations of different kinds of plaintiffs, each of whom may have claims that are remote or speculative taken by themselves.” *ASARCO*, 490 U.S. at 615. RPX cannot surmount the hurdle of Article III standing by creating an ad-hoc combination of circumstances that, taken separately, have been held by the Court to be insufficient to clear that hurdle.

B. The Opinion Below Is Consistent with Other Circuits’ Decisions

Applying this Court’s controlling precedents, the Federal Circuit arrived at an approach consistent with that of other courts of appeals. The Federal Circuit has

not adopted an exceedingly rigid approach to standing or created a new “hard and fast rule.” Pet. 24. For example, RPX contends that “[t]he 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,” *i.e.*, “an imminent infringement suit.” *Id.* at 7-8, 9. But the Federal Circuit has merely required a concrete injury in fact of some sort, as explained in Section II-B above (pp. 16-17, *supra*). In the patent context that may be, for example, a potential threat of infringement liability. But *Phigenix, Altaire*, and *JTEKT* simply determined standing based on the specific facts of each case, not in light of any bright-line rule. And even in the appeal below, the Federal Circuit considered, and dismissed on the merits, RPX’s standing arguments based on factual allegations of reputational injury and competitive injury. Pet. App. 6–8.

In this respect, Federal Circuit precedent is consistent with the law of other circuits. For example, in *Hydro Investors, Inc. v. FERC*, 351 F.3d 1192 (D.C. Cir. 2003), the D.C. Circuit dismissed an appeal from an administrative proceeding brought by a developer of hydroelectric projects. *Id.* at 1194. Like RPX here, the appellant in *Hydro* was a party to the administrative proceedings below. *Ibid.* The appellant alleged that the agency (the Federal Energy Regulatory Commission) had erred in rejecting its argument that an arrangement between two other parties violated the applicable statute (Federal Power Act). *Ibid.* The D.C. Circuit held that the appellant lacked standing because it had no concrete interest in the arrangement being challenged. *Id.* at 1195-1196.

The court of appeals also rejected appellant’s argument that it had standing because the relevant statutes authorized “any person” to petition the agency, and any

“aggrieved” party to seek judicial review. *Hydro Inv’rs, Inc.*, 351 F.3d at 1197. The *Hydro* court explained that, “[i]f the petitioner has no Article III concrete interest in receiving the relief requested before the agency[,] * * * Congress has no power to grant a petitioner a right to seek judicial review of an agency’s decision to deny him relief.” *Ibid.* Further, “this principle applies even if Congress gave [appellant] a right to seek judicial review of [the agency’s] decision * * *. Any other rule would allow Congress to create federal jurisdiction by the simple expedient of granting any party—no matter how far removed from the true controversy—a right to petition the agency, and then a right to seek judicial review if the agency denied the request. Article III does not permit Congress to expand the federal judicial function through such stratagems.” *Ibid.*

The Eighth Circuit followed the same approach in *Wilcox Electric, Inc. v. FAA*, 119 F.3d 724 (8th Cir. 1997). In *Wilcox*, the Federal Aviation Administration (“FAA”), dissatisfied with the performance of a first contractor (Wilcox), terminated its agreement with that contractor, and awarded the contract to another contractor (Hughes). *Id.* at 726. Without contesting the termination of its own contract, Wilcox filed a protest with the FAA challenging the award to Hughes, asserting the agency should have held open bidding. *Id.* at 726-727. After the FAA denied the protest, Wilcox appealed. *Id.* at 727. The court of appeals dismissed the appeal because, “had the FAA conducted a second open bid, Wilcox would not have had a substantial chance of obtaining the second contract”; as a result, “Wilcox ha[d] demonstrated no injury in fact from the FAA’s decision to award [the] contract to Hughes.” *Id.* at 728, 729.

The court of appeals also rejected Wilcox’s argument that the FAA’s decision to deny its protest was in and of itself an injury-in-fact, because that characterization “would transform practically every dispute with an agency into one that is reviewable in a federal court.” *Wilcox*, 119 F.3d at 727. The Court of Appeals further explained that:

[P]arties who lack Article III standing with respect to a certain dispute will have standing to litigate that dispute in an agency adjudication. To allow the losers in such disputes to appeal to the federal courts, asserting that loss as their injury in fact, would be to grant such parties Article III standing merely because Congress granted them standing to appear in the agency adjudication. Such a result would, in essence, improperly allow Congress to modify the constitutional requirements of standing.

Id. at 727-728.

The Federal Circuit’s decision below is entirely consistent with those precedents—and the decisions of this Court.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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