

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**

—◆—
REPLY BRIEF FOR PETITIONER
—◆—

STEVE CHIANG
RPX CORPORATION
One Market Plaza,
Suite 1100
San Francisco, CA 94105
(415) 852-3188

SARAH E. JELSEMA
ANDREW M. MASON
JOHN D. VANDENBERG
KLARQUIST SPARKMAN, LLP
One World Trade Center
121 S.W. Salmon Street,
Suite 1600
Portland, OR 97204
(503) 595-5300

September 4, 2018

DANIEL B. RAVICHER
Counsel of Record
RAVICHER LAW FIRM PLLC
2000 Ponce De Leon Blvd.,
Suite 600
Coral Gables, FL 33134
(786) 505-1205
dan@ravicher.com

TABLE OF CONTENTS

	Page
REPLY BRIEF FOR PETITIONER.....	1
I. THE QUESTION PRESENTED RAISES AN IMPORTANT AND RARE ISSUE REGARDING SEPARATION OF POWERS AND THE RIGHT OF CONGRESS TO ENABLE APPEALS FROM ADMINISTRATIVE AGENCIES	2
II. RPX HAS NOT WAIVED THE QUESTION PRESENTED BECAUSE, AS SET FORTH IN THE PETITION, THE RIGHT TO APPEAL UNDER § 319 IS PART AND PARCEL WITH THE RIGHTS TO COMPEL THE PATENT OFFICE TO CANCEL CLAIMS UNDER § 318 AND THE RIGHT TO NOT BE ESTOPPED WHEN FILING ANOTHER PETITION FOR IPR UNDER § 311.....	3
III. CHANBOND’S CITED CASES DID NOT PRESENT OR RESOLVE THE QUESTION PRESENTED HERE	6
CONCLUSION.....	10

TABLE OF AUTHORITIES

	Page
CASES	
<i>Federal Election Commission v. Akins</i> , 524 U.S. 11 (1998).....	7
<i>Hunt v. Wash. State Apple Advert. Comm’n</i> , 432 U.S. 333 (1977)	6
<i>Hydro Investors, Inc. v. FERC</i> , 351 F.3d 1192 (D.C. Cir. 2003)	7
<i>Lujan v. Defs. of Wildlife</i> , 504 U.S. 555 (1992)	6
<i>Phigenix, Inc. v. Immunogen, Inc.</i> , 845 F.3d 1168 (Fed. Cir. 2017)	6
<i>Scanwell Labs., Inc. v. Shaffer</i> , 137 U.S. App. D.C. 371, 424 F.2d 859 (1970)	8
<i>Spokeo, Inc. v. Robins</i> , 136 S. Ct. 1540 (2016).....	6
<i>Wilcox Electric v. FAA</i> , 119 F.3d 724 (8th Cir. 1997)	8
CONSTITUTIONAL PROVISIONS	
U.S. Const., art. III.....	1, 5, 7, 8, 9
STATUTES	
35 U.S.C. § 311	3, 4, 5, 7
35 U.S.C. § 315	3, 4, 5, 7
35 U.S.C. § 315(e)(1).....	4, 7
35 U.S.C. § 318	3, 4, 5, 6
35 U.S.C. § 318(a).....	7

TABLE OF AUTHORITIES

	Page
35 U.S.C. § 318(b).....	7
35 U.S.C. § 319	4, 5

REPLY BRIEF FOR PETITIONER

This case implicates the power of Congress to grant members of the public the conditional right to compel agency action (here, compelling the agency to correct a past mistake upon a sufficient showing of that mistake) which right would be illusory for most members of the public if the agency's denial of that right is not a sufficient injury in fact to appeal to an Article III Court. That such rights be non-illusory, and enforced by Article III Courts, is important not only to the patent system but to Congress' power to rein in administrative agencies generally.

None of ChanBond's three arguments in opposition has merit. ChanBond first argues the question is not properly presented because it is premised on an argument RPX waived below. But ChanBond either misunderstands the Petition's arguments or seeks to artificially sever the right to compel patent claim cancellation from the right of appeal. Further, ChanBond admits that the statutory basis for RPX's injury was not only raised but addressed by the Court of Appeals below. ChanBond next argues the issue is narrow and will have limited impact because it only applies to parties who challenge patents that are not competitors of the patent holder. But the issue here is larger than that, as it relates to whether any agency's disregard of rights Congress creates for a private party can create injury in fact to support standing for the party that otherwise would lack standing. ChanBond finally argues that the decision below was correct. But ChanBond relies on the same inapplicable arguments as the

Court of Appeals, all of which RPX addressed in its Petition, and inapposite caselaw. None of ChanBond's arguments justify denying the Petition.

I. THE QUESTION PRESENTED RAISES AN IMPORTANT AND RARE ISSUE REGARDING SEPARATION OF POWERS AND THE RIGHT OF CONGRESS TO ENABLE APPEALS FROM ADMINISTRATIVE AGENCIES

ChanBond's attempts to minimize the importance of the Question Presented ignore both the broader implications beyond inter partes reviews and also Congress' intent in allowing parties not necessarily charged with infringement of a patent to cause the Patent Office to cancel invalid claims. *See* Brief in Opposition at 13-18.

The Question Presented is important because it relates to Congress' power to confer rights whose denial constitutes injury in fact for standing. While the context of this case is about patents, the impact of the Court's resolution of this question will span much further and potentially impact every situation where Congress passes statutes granting particularized rights to private parties to compel agency action, which rights would be illusory if their denial by the agency does not constitute an injury in fact.

Further, here, Congress knew full well how to identify the class of parties to whom it wished to confer standing. As pointed out in the Petition, Congress chose to grant any party other than the patent holder

the right to file an inter partes review but at the same time chose to limit to only those who had been sued for or accused of infringing a patent the right to file a Covered Business Method (“CBM”) review. Thus, even if the parties who RPX claims to compete with are small in number, it was nonetheless important enough in Congress’ opinion to include that class in the group of those who can appeal inter partes review final decisions.

II. RPX HAS NOT WAIVED THE QUESTION PRESENTED BECAUSE, AS SET FORTH IN THE PETITION, THE RIGHT TO APPEAL UNDER § 319 IS PART AND PARCEL WITH THE RIGHTS TO COMPEL THE PATENT OFFICE TO CANCEL CLAIMS UNDER § 318 AND THE RIGHT TO NOT BE ESTOPPED WHEN FILING ANOTHER PETITION FOR IPR UNDER § 311

ChanBond’s waiver theory (*see* Brief in Opposition at 9-13) is premised on a misunderstanding of the Petition’s arguments or on artificially severing the right of cancellation from the right of appeal, which the statutory framework precludes. In the Petition, RPX does not suggest the right to appeal under § 319 provides the injury in fact for standing to do so. Rather, as discussed in the Petition, the statutory right to appeal satisfies all “zone of interest” and “prudential standing” considerations. Pet. 20. The Question Presented here asks whether §§ 318, 311 and 315 create injuries in fact sufficient to confer standing to appeal under

§ 319. Respondent's alternative Question Presented also recites those statutory sections. This issue, whether deprivation of rights granted by the applicable statutes creates injury in fact sufficient to support standing to appeal, was raised by RPX below and addressed by the Court of Appeals in its decision. Compare App. 4-5 to Petition § I.A. Thus, Respondent's waiver argument is meritless.

In arguing waiver, ChanBond mischaracterizes the issue as whether § 319 by and of itself creates injury in fact. That is not the issue raised in the Question Presented, nor was it the argument RPX raised below. That section, which provides for appeals of final decisions of the Patent Office in inter partes reviews, resolves prudential standing. Pet. at 20-21. As explained in the Petition, and as argued and addressed below, it is §§ 318, 311 and 315 that create RPX's injury in fact. The Petition rests on these statutory bases for injury in fact, which are the same ones RPX urged to, but were rejected by, the Federal Circuit.¹

¹ Respondent quizzically both argues the Question Presented was waived, at 2 ("RPX asserts an argument it did not press below and the Court of Appeals did not consider: [that] it can assert standing to appeal . . . based solely on statutory provisions"), and yet admits that the exact statutory sections relied on in the Petition were addressed below, at 7-8 "RPX's first theory [below] rested on its assertion that 'the Board's decision injure[d] its 'statutory right to compel cancellation of claims,'" and, "The court [of appeals] also rejected RPX's argument because the estoppel provision of 35 U.S.C. § 315(e)(1) does not constitute an injury in fact.").

There is a relationship between the injury in fact statutes and the prudential standing statute, in that, for example, RPX's particularized right under § 318 to compel the Patent Office to cancel every claim RPX proved unpatentable would be illusory but for the right to appeal the Patent Office's decision to an Article III Court in § 319. The appeals court can correct the agency's refusal to cancel the patent; RPX alone cannot. Thus, the right to appeal under § 319 is part and parcel with the right to compel the Patent Office to cancel unpatentable claims under § 318 and denial of the former is *per se* denial of the latter.

The most generous of interpretations of ChanBond's waiver argument is that because § 319 was not addressed by the Court of Appeals in its decision denying RPX's standing, that RPX cannot now use that statute to support any aspect of its standing. However, lack of prudential standing, which is what § 319 provides, was not the basis for the Court of Appeals' decision. Rather, it was lack of injury in fact. RPX did not below, and does not now, argue § 319 provides injury in fact. Rather, RPX argues in the Petition exactly what it argued to the Court of Appeals, that the right of cancellation under § 318 and the estoppel created by § 315 that denies RPX its right to file an inter partes review under § 311 (and compel patent cancellation at the end of that proceeding) are the statutes that create injury in fact.

ChanBond's suggestion that RPX should have raised associational standing below is irrelevant to the Question Presented here. The issue raised in the

Petition is about RPX's standing in its own right based on the statutes that affect its personal rights (right to have claims canceled, loss of right to file another challenge to the patent). The issue here is not whether RPX has associational standing. In fact, even if facts were present to have allowed RPX to make associational standing arguments, RPX's raising such arguments would have made this case a poor vehicle for certiorari, because, as ChanBond itself acknowledges, the Court endorsed associational standing in *Hunt*. It is precisely because the Question Presented raises important and novel issues in the context of a statutory scheme seen only by the Federal Circuit that makes the Petition a particularly good vehicle for certiorari.

III. CHANBOND'S CITED CASES DID NOT PRESENT OR RESOLVE THE QUESTION PRESENTED HERE

On the merits, Respondent largely recycles the same cases and points made by the Court of Appeals below, all of which were fully addressed in the Petition, such as *Lujan*, *Spokeo*, and *Phigenix*. See Brief in Opposition at 18-25; Order on Motion to Dismiss at 3-5. However, there are a few points worthy of a brief response.

First, Respondent asserts RPX has no concrete right that is particular to it as opposed to the general public. Brief in Opposition at 20, *citing Lujan*. This is demonstrably false in light of the statutory language. Under § 318, RPX was the only party whose petition

for review of the challenged claims of Respondent's patent was deemed reasonably likely to succeed and thus triggered institution of a PTAB "trial." *See* Pet. at 11-12; 35 U.S.C. § 318(a). It thus is the only party that has been denied its right to have those instituted claims of that patent cancelled under § 318(b). No other person or entity can appeal the Patent Office's decision. Only RPX can. Under §§ 311 and 315, RPX is the only party that has lost its right to file a challenge to Respondent's patent (pursuant to § 311), due to the estoppel that has attached as a result of the issuance of the final decision by the Patent Office (pursuant to § 315(e)(1)). Thus, the rights underlying RPX's injury in fact are entirely personal to RPX.

Second, Respondent cites a couple of Courts of Appeals cases not addressed by RPX in the Petition, but none is applicable to the Question Presented here.

In *Hydro Investors, Inc. v. FERC*, 351 F.3d 1192 (D.C. Cir. 2003), the D.C. Circuit merely said what is obvious, that "Congress cannot abrogate the requirements of Article III." RPX agrees. But Congress has not "abrogated" the requirements of Article III here. Rather, it has created a right whose denial constitutes an injury in fact sufficient for standing by statute. As a case in point, the *Hydro Investors* decision cites and relies on *Akins*, which RPX addresses in its Petition (*see* Pet. 14, 24), where "The voters in *Akins* were injured-in-fact, according to the Supreme Court, because they were unable to obtain the requested information." *Id.* at 1197, *citing* *FEC v. Akins*, 524 U.S. at 21 (1998).

In *Wilcox Electric v. FAA*, 119 F.3d 724 (8th Cir. 1997), the appellant sought review of a final order from the Federal Aviation Administration, but there was no statute giving it the right to do so as there is in this case. The Eighth Circuit there also specifically stated that Congress providing a party a right to participate in an administrative proceeding does not give that party standing to appeal the decision of the agency to Article III Courts. RPX agrees. But for the right to compel cancellation or the estoppel penalty when the agency denies that right, RPX would have no right to appeal the Patent Office's decision. The Eighth Circuit did not address the issue here, which is whether Congress can provide a party rights to compel agency action to be enforced by appealing to an Article III Court if they are dissatisfied with the agency response. That is what Congress did here and *Wilcox Electric* is silent on that issue. If anything, *Wilcox* supports the Petition here because the Eighth Circuit relied on the *Scanwell* framework and says, "*Scanwell* held that a disappointed bidder, that is, a bidder who competed for and failed to receive a government contract, has standing to challenge the allegedly illegal manner in which a federal agency has awarded a contract to another firm. This is so not because the disappointed bidder would necessarily have a right to have the contract awarded to it in case the award is deemed illegal, but because *the bidder has a right to have 'agencies follow the regulations which control government contracting.'*" *Id.* at 864." (emphasis added).

In short, Respondent's position on the power of Congress to control agency action in this matter is in stark contrast with the position of RPX. Respondent argues in effect that there is nothing Congress can do by statute to create a private right, which when deprived by an agency, constitutes an injury in fact sufficient for Article III standing. According to Respondent, a party either has standing based on facts outside of any statute or they do not. That is the same position taken by the Court of Appeals below. RPX disagrees. This case is a good vehicle for resolving this important question.



CONCLUSION

The petition should be granted.

Respectfully submitted,

STEVE CHIANG
RPX CORPORATION
One Market Plaza,
Suite 1100
San Francisco, CA 94105
(415) 852-3188

SARAH E. JELSEMA
ANDREW M. MASON
JOHN D. VANDENBERG
KLARQUIST SPARKMAN, LLP
One World Trade Center
121 S.W. Salmon Street,
Suite 1600
Portland, OR 97204
(503) 595-5300

DANIEL B. RAVICHER
Counsel of Record
RAVICHER LAW FIRM PLLC
2000 Ponce De Leon Blvd.,
Suite 600
Coral Gables, FL 33134
(786) 505-1205
dan@ravicher.com

September 4, 2018