

No. 19-1012

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**In The  
Supreme Court of the United States**

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GENERAL ELECTRIC COMPANY,

*Petitioner,*

v.

UNITED TECHNOLOGIES CORPORATION,

*Respondent.*

—◆—  
**On Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The Federal Circuit**

—◆—  
**BRIEF OF FRONTIER COMMUNICATIONS  
CORPORATION AS *AMICUS CURIAE*  
IN SUPPORT OF PETITIONER**

—◆—  
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**BRIEF OF FRONTIER COMMUNICATIONS  
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**INTEREST OF THE *AMICUS CURIAE*<sup>1</sup>**

Frontier Communications Corporation (Frontier), through its operating subsidiaries, is a leading provider of business and residential communications services—data, internet, video, voice, network—with over 4.5 million customers and 21,000 employees in 29 states. Frontier participates in patent litigation as both a plaintiff and a defendant, as a patent holder and an accused infringer. Frontier thus has a strong interest in the correct interpretation of the patent laws, and in ensuring that those laws strike a proper balance between promoting innovation and protecting competition. Frontier is also an active participant in *inter partes* review (IPR), which is an efficient and valuable tool to weed out bad patents more efficiently than litigation.

The question presented is exceptionally important, recurrent, and merits this Court’s immediate consideration. The Federal Circuit’s peculiar, patent-specific

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<sup>1</sup> Frontier certifies under Supreme Court Rule 37.2(b) that counsel for both petitioner and respondent received timely notice of Frontier’s intent to file an *amicus curiae* brief, and both granted consent. No counsel for a party wrote this brief in whole or in part, and no person other than the *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund its preparation or submission.

Article III standing rule will negatively impact innovation and undermine the purpose of the IPR process as a low-cost alternative to full-blown federal litigation. What's more, the Federal Circuit's outlier approach will allow government agency action to go unchecked, which is particularly problematic here since it guarantees that invalid patents will remain on the books. Indeed, the data shows that the Patent Office erroneously upholds the validity of patents about 30% of the time in IPR proceedings. The Federal Circuit's approach to standing also creates an unlevel playing field by requiring the disclosure of confidential future business plans, along with essentially an acknowledgment of patent infringement, just to get one's day in appellate court. At bottom, the Federal Circuit's rule hinders fair competition and thereby harms the public.

Adverse effects aside, Federal Circuit's unusual standing rule is plainly incorrect. Rather than apply the flexible competitor standing rule applicable in all civil litigation—in which Article III is satisfied if the government action increases the burdens or costs of competition—the Federal Circuit has breathed new life into a dead patent-specific Article III standing doctrine which requires a party to demonstrate concrete plans that create a substantial risk of infringement. This Court has twice rejected the Federal Circuit's approach. See *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007) (rejecting the Federal Circuit's Article III standing rule that required a company to risk a claim of infringement by not making royalty payments under the licensed patent); *Cardinal Chem. Co.*

*v. Morton Int'l*, 508 U.S. 83 (1993) (rejecting the Federal Circuit’s Article III standing rule that required the vacatur of judgments of patent invalidity after a finding of no infringement). The Federal Circuit’s back-to-the-future rule on this important threshold issue in patent appeals is all the more reason for this Court to step in once and for all, particularly since litigants have nowhere else to go given the Federal Circuit’s exclusive jurisdiction over such things. 35 U.S.C. §141(c), 28 U.S.C. §1295(a)(4)(A).

Frontier therefore respectfully files this brief to offer its views, as an experienced patent litigant, on an important mechanism for ensuring a reliable and fair patent system.



### **SUMMARY OF ARGUMENT**

Only the parent of a patent lawyer could love the Federal Circuit’s peculiar Article III progeny, which Judge Hughes accurately, albeit charitably, described in his concurrence below as “a patent-specific approach to the doctrine of competitor standing that is out of step with Supreme Court precedent.” Petitioner’s Appendix (Pet. App.) 9a. The Federal Circuit held (Pet. App. 7a), over Judge Hughes’ objection (Pet. App. 14a), that the Patent Office’s action in upholding United Technologies Corporation’s (UTC) patent did not “change the competitive landscape by, for example, creating new benefits to competitors.” But if the government grants a patent monopoly to one company, which

precludes its competitors from offering the public an alternative product with the patented features, the competitive landscape has been changed to the advantage of the patent holder. And if in an IPR proceeding the government compounds that error by confirming the validity of an erroneously granted patent, the exclusive competitive advantage given to the patent holder is entrenched and unfairly perpetuated. As Judge Hughes observed (Pet. App. 9a, 13a, 16a), the Patent Office's confirmation of a patent's validity in an IPR proceeding is not meaningfully different from the type of government actions often held to invoke competitor standing. In the end, rather than follow the common sense and flexible competitor standing doctrine, the Federal Circuit applied a heightened and disavowed rule, which it concluded GE failed to satisfy.

The consequences of the Federal Circuit's erroneous patent-specific standing doctrine are real and severe. Among other things, and as explained further below, the Federal Circuit's standing rule:

- Guarantees that bad patent monopolies will remain on the books, which unfairly restricts competition and harms the public;
- Allows government agency action to go unchecked precisely where it is most needed;
- Requires the disclosure of confidential future business plans to one's competitor and a virtual acknowledgement of infringement, giving an unfair and significant competitive advantage to the patent holder; and



- Could spark more litigation, undermining one of the primary purposes of IPRs as a low-cost alternative to federal lawsuits.

This Court's definitive intervention is therefore urgently needed.

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## ARGUMENT

### **I. THE FEDERAL CIRCUIT'S RIGID COMPETITOR STANDING RULE PUTS BUSINESSES IN AN UNFAIR QUANDARY AND WILL FRUSTRATE FAIR COMPETITION, IMPEDE INNOVATION, AND HARM THE PUBLIC.**

1. By disallowing appeals from harmed competitors who cannot clear its unduly high Article III standing hurdle, the Federal Circuit is ensuring that agency mistakes will go uncorrected and invalid patents allowed to persist. The Federal Circuit's rule thus undermines the public's "paramount interest" in keeping patent monopolies "within their legitimate scope." *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2144 (2016). That, in turn, will impede the progress of science and useful arts which, after all, is the whole purpose of Patent Law. U.S. Const. Art. I, Sec. 8, Cl. 8. See Suzanne Scotchmer, *Standing On The Shoulders Of Giants: Cumulative Research And The Patent Law*, J. of Economic Perspectives, Vol. 5, No. 1, 29 (Winter 1991) (explaining that affording too broad of patent rights can stymie innovation).

Needless to say, the Patent Office, like any government agency, is not infallible. A 2019 LegalMetric report, for example, shows a Federal Circuit IPR affirmation rate of about 71% for patents upheld by the Patent Office either as not “anticipated” by a single prior art reference under 35 U.S.C. §102 or as not “obvious” by a combination of prior art references under 35 U.S.C. §103:

<b>Affirmance Rates</b>				
	<b>All Validity</b>	<b>Anticipation Obviousness Affirmance Rate</b>	<b>Claim Construction Affirmance Rate</b>	<b>35 USC 101 Affirmance Rate</b>
<b>IPR Claim Construction</b>			71.4	
<b>Invalid Below</b>	88.2	80.9	87.8	
<b>Valid Below</b>	70.6	70.8	70.9	

So nearly 30% of the time, the Patent Office erroneously confirms the validity of a patent in an IPR proceeding. According to the above data, moreover, the error rate of Patent Office IPR decisions *upholding* the validity of an invalid patent is *higher* than cases in which the Patent Office mistakenly found a patent invalid, exacerbating the ill effects of the court's standing rule insofar as it affects the public. The Federal Circuit's unduly restrictive view of Article III standing thus guarantees that bad patents will remain on the books.

Especially in light of the above data, it would be incongruous for only the patent holder—even a non-practicing entity that makes no product at all—to have the right to appeal an adverse IPR decision, but not a rival negatively impacted by the patent. Congress, moreover, plainly did not intend to create a one-way appellate ratchet in favor of patent holders. To the contrary, Congress explicitly empowered “a party”—*any* party—“who is dissatisfied with the final written decision of the Patent Trial and Appeal Board” with the right to appeal an adverse IPR decision. 35 U.S.C. §§141, 319.

2. The Federal Circuit's heightened Article III rule is also untethered from business realities. A rational and profit-maximizing company is unlikely to waste its time and money on an IPR petition unless the patent at issue truly has a negative competitive impact. Though faster and cheaper than litigation, an IPR soup to nuts still costs hundreds of thousands of dollars. See [www.rpxcorp.com/intelligence/blog/iprs-balancing-effectiveness-vs-cost/](http://www.rpxcorp.com/intelligence/blog/iprs-balancing-effectiveness-vs-cost/). A company's willingness to spend

tens of thousands of dollars in an IPR proceeding should be a good indicator of the competitive harm the targeted patent is causing. A company's further expenditure in an appeal from an adverse IPR ruling, not to mention a petition to this Court, is additional indication that the government agency's action caused meaningful competitive injury. A competitor's actions speak louder than the Federal Circuit's standing hypothesis. The market itself thus works as a filter to competitor standing.

The Federal Circuit's rule also fails to internalize a basic fact of patent litigation, which is ironic given the lower court's steady diet of patent cases. Few law-abiding companies launch a new product knowing full well that it infringes another's patent. Above and beyond the business ethics of respecting another's intellectual property rights, the risks and costs of willful patent infringement are significant and potentially debilitating. But the question of patent infringement is rarely black and white; it almost always requires a court first to construe key disputed patent terms often after at least some fact discovery and expert testimony. Even then, honest disagreements about infringement often remain. The Federal Circuit nonetheless practically requires a concession of infringement. Here, in fact, it was not good enough for the court below (Pet. App. 6a) that GE acknowledged its engine designs "could *potentially* implicate" UTC's patent—which in the real world is diplomatic-speak that the patent posed a real problem. The Federal Circuit's rule imposes an unfair and unrealistic burden on litigants.

3. The competitive standing doctrine is supposed to be flexible, as this Court, the other courts of appeal, and Judge Hughes recognized. Pet. App. 15a-16a (citing cases). Yet the Federal Circuit’s unbending standing doctrine fails to take into account the different forms in which competitive injury can arise. The increased burden or cost that a patent can cause a competitor can take many forms in many contexts well before the concrete of a business plan hardens. For example, the existence of a patent can complicate and raise the costs associated with a contemplated acquisition of a business or product line. It can also make financial backing difficult to obtain. And it can cause a deal not to go through altogether, if the risks or potential litigation costs are too high. All this is true even if the plan is not “concrete” or the question of infringement has not been definitively answered. And the harm is especially acute if a competitor has blanketed the field with thousands of patents on minor improvements in old technologies, as UTC is alleged to have done here. Petition (Pet.) 8. Government action confirming a patent’s validity in an IPR proceeding—erroneously perpetuating a patent monopoly—most certainly tilts the competitive landscape in favor of the patent holder.

The requirement that a company disclose its future plans as a prerequisite to establish standing—be it a transaction, a product launch, or something else—can in and of itself cause serious competitive injury. GE’s observation (Pet. 3) that the Federal Circuit’s test “requires an IPR petitioner to walk up the line of

admitting to infringement—itsself a perilous and competitively injurious undertaking”—understates the problem. The Federal Circuit’s standing doctrine creates an unlevel playing field, as it requires an IPR challenger to divulge confidential future business plans which, depending on the nature of the product or industry, could give the patent holder substantial advance warning about a competitor’s intentions. Here, for example, GE’s production of complex engines requires years of lead time. Pet. App. 2a, 10a. This is true in many industries and technologies. Knowledge of such plans would allow the patent holder to adjust its own business strategy in response, giving it an unfair competitive advantage and causing its competitor significant lost opportunity costs.

Such a disclosure could also invite litigation, or even a motion for preliminary injunction, once the patent holder learns of the future (imminent) plans. The Federal Circuit’s artificial rule thus could actually spark more litigation, undermining the purpose of IPR as a less costly alternative to patent litigation and further clogging the courts. *In re Affinity Labs of Tex., LLC*, 856 F.3d 883, 890 (Fed. Cir. 2017). Economic scholarship shows that the risk of litigation can distort what research and development is conducted and which innovations are pursued. Josh Lerner, *Patenting In The Shadow Of Competitors*, *J. of Law & Economics*, 463 (1995).

These illustrative consequences of the Federal Circuit’s approach to Article III standing underscore the importance of the question presented and the need for this Court’s immediate review.

## II. THIS COURT HAS PREVIOUSLY REJECTED THE FEDERAL CIRCUIT'S RESURRECTED APPROACH TO ARTICLE III STANDING.

In its petition, GE persuasively explains why the Federal Circuit's unique Article III standing doctrine is wrong, and Frontier does not wish to burden the Court with redundant arguments. Frontier will therefore offer only the following supplemental thoughts.

Above and beyond *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007), which both GE (Pet. 4, 29) and the concurrence below (Pet. App. 13a) rightly cite as foreclosing the Federal Circuit's approach, the Federal Circuit's requirement of concrete plans that create a substantial risk of infringement runs head on into *Cardinal Chem. Co. v. Morton Int'l*, 508 U.S. 83 (1993). There, this Court unanimously rejected the Federal Circuit's then-practice of vacating, for lack of Article III standing, declaratory judgment counterclaims of invalidity once the asserted patent was found not to infringe. In so doing, this Court observed that “[m]erely the desire to avoid the threat of a ‘scarecrow’ patent, in Learned Hand’s phrase, may therefore be sufficient to establish jurisdiction under the Declaratory Judgment Act.” *Id.* at 96 (citing *Bresnik v. United States Vitamin Corp.*, 139 F.2d 239, 242 (2d Cir. 1943)). Thus, notwithstanding a definitive finding that the patent was not infringed, this Court held that Article III was no barrier to consideration of that patent’s validity.

If the absence of *any* possibility of infringement was no impediment to Article III standing in *Cardinal*



*Chem.*, a party ought not be constitutionally required to acknowledge a substantial risk of future infringement—imminent or not—just to have its day in appellate court. A rule that a company must “bet the farm” or “risk treble damages” by essentially acknowledging infringement before asking the courts to consider a patent’s validity “finds no support in Article III.” *Med-Immune*, 549 U.S. at 134.

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### CONCLUSION

While Frontier takes no position on whether UTC’s patent is or is not valid, a company in GE’s shoes ought to have Article III standing to appeal the Patent Office’s adverse IPR judgment. The Court should therefore grant the petition for a writ of certiorari.

Respectfully submitted,

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