

No. 19-1012

In the
Supreme Court of the United States

GENERAL ELECTRIC COMPANY,

Petitioner,

v.

RAYTHEON TECHNOLOGIES CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The America Invents Act allows anyone to file an *inter partes* review proceeding to challenge a previously issued patent. Because Article III's requirements are inapplicable in administrative proceedings, the challenger need not establish injury-in-fact or any other prerequisite of Article III to initiate the challenge. But if *inter partes* review confirms the validity of the patent, a party seeking appellate review must establish Article III standing to pursue an appeal in the Federal Circuit. Indeed, this Court has twice considered and denied petitions seeking review of the Federal Circuit's insistence that appellants demonstrate injury-in-fact. In cases where the appellant's standing is suspect, the Federal Circuit permits the appellant to submit declarations establishing that it suffered injury-in-fact. In evaluating such declarations, the Federal Circuit has recognized the doctrine of "competitor standing," but does not treat being a competitor in the same industry as an automatic substitute for a showing of concrete and imminent injury. In this case, after a full round of briefing and oral argument, the Federal Circuit found that petitioner's declarations failed to establish injury-in-fact.

The question presented is:

Whether petitioner's factual declarations are sufficient to show injury-in-fact or whether there is any reason to relax the bedrock requirements of Article III to allow a competitor to appeal an unsuccessful *inter partes* review of a rival's patent.

CORPORATE DISCLOSURE STATEMENT

United Technologies Corporation consummated a merger with Raytheon Company on April 3, 2020, under which Raytheon Company became a wholly owned subsidiary. United Technologies Corporation changed its name to Raytheon Technologies Corporation. Raytheon Technologies Corporation has no parent corporation, and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

GE asks this Court to review the Federal Circuit's factual finding that GE failed to establish an injury-in-fact sufficient to appeal the Patent Office's reaffirmation of a rival's patent. Although GE conspicuously fails to mention it, this Court has twice recently rejected petitions raising similar challenges to the Federal Circuit's insistence that parties dissatisfied with the outcome of an *inter partes* review proceeding satisfy Article III before obtaining appellate review. More remarkable still, GE fails to mention that one of those petitions precipitated a CVSG and Solicitor General brief recommending against certiorari. As the United States explained, the Federal Circuit's approach properly requires the party appealing a Patent Office decision to establish injury-in-fact under the same rules and applying the same principles that govern in every other context.

Nothing has changed. Attempting to put a "competitor standing" gloss on this issue and invoking a non-existent circuit split, GE contends that the Federal Circuit's application of "competitor standing" doctrine parts ways with that of its sister circuits. In reality, the Federal Circuit, like every other circuit, recognizes "competitor standing," and like every other circuit, the court's application of the doctrine depends on the facts of the case. Differences in results reflect factual distinctions, which only underscore the fact-intensive nature of the standing inquiry. No circuit confers automatic standing on every competitor that challenges the conferral of a government benefit on a rival. A competitor must still show that the challenged government action inflicts a concrete and

imminent injury-in-fact. The Federal Circuit applied those principles here. It simply found GE's efforts to demonstrate a concrete injury-in-fact wanting.

It is thus GE, not the Federal Circuit, that seeks to depart from precedent and create a unique rule that would significantly loosen Article III's normal standing requirements. Were GE to get its way, any competitor could challenge any rival's patent in federal court immediately upon issuance, as it is the patent—not the later Board decision confirming its validity—that confers a benefit. Two hundred years of precedent is to the contrary and demands that a competitor must show concrete and imminent injury-in-fact to satisfy Article III.

In the end, this petition presents the Court with a factbound dispute about the application of well-settled law. The Federal Circuit considered GE's declarations that attempted to establish injury-in-fact and found them inadequate. This Court does not exercise its certiorari jurisdiction to second-guess such factfinding. Indeed, the factbound nature of this dispute is underscored by the existence of *another* pending appeal filed by GE to challenge the Board's decision upholding another patent owned by Respondent involving similar jet engine technology (yet another proceeding GE conveniently fails to mention). There, GE submitted different declarations with different facts and argued they sufficed under Federal Circuit precedent. In the end, neither GE's "competitor standing" gloss nor the facts of this case materially distinguish its petition from the two previous petitions this Court has denied.

STATEMENT OF THE CASE

A. Statutory Background

In 2011, President Obama signed into law the Leahy-Smith America Invents Act (AIA), altering the manner in which patents may be reviewed. *See* Pub. L. 112-29, 125 Stat. 284. The AIA established a procedure known as “inter partes review” (IPR) through which “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). As the strictures of Article III are inapplicable to administrative proceedings, Congress made the IPR process broadly accessible. Anyone “who is not the owner of a patent” may petition the PTO for review of a patent’s validity. *See* 35 U.S.C. § 311(a). Upon such a petition, the Patent Trial and Appeal Board decides whether re-review of the patented claims is warranted and, if so, evaluates the patentability of those claims. Relevant here, “[a] party to an inter partes review” that is “dissatisfied with the final written decision” may appeal to the Federal Circuit. 35 U.S.C. §§ 141(c), 319.

The AIA’s statutory provisions regarding appeals do not and cannot confer Article III standing to appeal, as anyone may initiate an IPR. This Court recognized as much in *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131 (2016). “Parties that initiate the proceeding need not have a concrete stake in the outcome; indeed, they may lack constitutional standing.” *Id.* at 2143-44 (citing 35 U.S.C. § 311(a); *Consumer Watchdog v. Wis. Alumni Research Found.*, 753 F.3d 1258, 1261-62

(Fed. Cir. 2014)). To address that reality and ensure that the appellant has a sufficient stake in the controversy to satisfy Article III, the Federal Circuit has permitted appellants to file declarations demonstrating their Article III injury before reaching the merits of an appeal, as do other circuits. *See, e.g., Phigenix, Inc. v. Immunogen, Inc.*, 845 F.3d 1168, 1173-74 (Fed. Cir. 2017); *Nat'l Ass'n of Home Builders v. E.P.A.*, 667 F.3d 6, 14-15 (D.C. Cir. 2011). Although this procedure puts the appellate court in the unaccustomed role of factfinder, the statutory scheme—allowing anyone to initiate an IPR proceeding and then providing for direct appellate review—necessitates such appellate factfinding. The Federal Circuit has found such declarations both sufficient, *see, e.g., E.I. DuPont de Nemours & Co. v. Synvina C.V.*, 904 F.3d 996, 1004-05 (Fed. Cir. 2018), and insufficient, *see, e.g., Momenta Pharm., Inc. v. Bristol-Myers Squibb Co.*, 915 F.3d 764, 770 (Fed. Cir. 2019), based on the specific averments in those declarations. The Federal Circuit has rejected the notion that merely being a competitor of the patent holder in the same industry suffices for Article III purposes. *See AVX Corp. v. Presidio Components, Inc.*, 923 F.3d 1357, 1365 (Fed. Cir. 2019). That rule is consistent with the longstanding rule governing declaratory judgments involving patents, in which more than simply being a competitor in the same industry is necessary to challenge the validity of a patent. *See Prasco, LLC v. Medicis Pharm. Corp.*, 537 F.3d 1329, 1338 (Fed. Cir. 2008).

B. Factual Background

Since 1925 when it produced its first engine, Pratt & Whitney, a division of Respondent Raytheon Technologies Corporation (RTC), has been a leader in jet engine development and manufacture.¹ United States Patent Number 8,511,605 (“the ’605 patent”), the subject of this dispute, is one of several patents RTC owns that cover Pratt & Whitney’s latest advancement in the field. For more than twenty years, Pratt worked to develop a high bypass “geared turbofan” jet engine. Appx3562. Pratt’s work culminated in the introduction of a highly efficient, quiet, and environmentally friendly family of engines that entered commercial service in January 2016. The development of these engines reflected Pratt’s distinct approach—no other engine manufacturer has introduced a high bypass geared turbofan engine. *See id.*

The ’605 patent, which discloses a geared turbofan architecture, and specifically claims 7-11, which concern an axially movable variable area fan nozzle, were at issue in the IPR and appealed to the Federal Circuit. The patent discloses an “epicyclic gearbox” and related architecture that improve the engine’s operation and efficiency. Appx50 at 3:59-61, 4:20-22. The addition of a gearbox was crucial to the design, as it allowed certain engine components like the fan and low pressure turbine to rotate closer to

¹ After General Electric petitioned for a writ of certiorari, United Technologies Corporation consummated a merger with Raytheon Company, under which Raytheon Company became a wholly owned subsidiary, and United Technologies Corporation changed its name to Raytheon Technologies Corporation.

their optimal speeds than they would in a conventional gas turbofan engine. *E.g.*, Appx49 at 1:43-47. As the '605 patent notes, the ultimate effect of the gearbox is to enhance engine performance and efficiency. Appx50 at 4:14-21.

Jet engines are complex, high-performance machines comprising thousands of parts. *See* Appx3819 at 78:11-15; Appx4004-05 at 263:21-264:6. To achieve its innovative design, Pratt had to overcome challenges and develop solutions to a number of engineering problems. That is because, as GE's own expert recognized, in a gas turbofan engine, "[e]verything is related to everything. It is a system." *See* Appx3984 at 243:4-7. Introducing the gearbox therefore required redesigning components throughout the engine. Appx3967-3984 at 226:14-243:7. The culmination of Pratt's enormous investment and effort was a next-generation, highly efficient and distinctive engine.

GE Aviation, a subsidiary of GE, also manufactures jet engines. Unlike Pratt, however, GE has long eschewed bringing a geared turbofan engine to market. In the late 2000s, before the '605 patent issued, it chose "not to pursue an engine with a gear train" for "business risk reasons." Pet.App.68a (¶ 22).

Indeed, for years GE not only rejected Pratt's distinctive approach, but mocked it, describing its geared engine design as "simply a bad idea" that was full of "risk." Appx3599; Appx3602. As then-CEO of GE Aviation, Scott Donnelly, explained, "We've looked at a gearfan ... I don't see the reward side. I see only the risk side." Appx3599. And GE Chief Technology Officer Mark Little echoed that GE had "considered a

geared approach ... and we chose very consciously not to take that approach.” Appx3562. According to GE, Pratt’s approach to engine design “could have a serious negative impact on reliability.” Appx3602. A spokesperson told investors that GE believed the “added complexity” of a geared engine increased risk, and that the company therefore preferred to rely on the “proven architecture” of a non-geared engine. *Id.* Specifically, GE feared “that the addition of the [geared turbofan] would add reliability and weight challenges, and durability challenges that [GE] could avoid by going” with a more conventional design. Appx3562. Consequently, GE’s most recent proposals to airplane manufacturers are still based on a direct-drive architecture that does not use a geared architecture. Pet.App.72a (¶ 9).

C. Proceedings Below

Despite its avowed disinterest in employing geared turbofan engines, GE nonetheless petitioned the Board for *inter partes* review of the ’605 patent and several others owned by RTC in 2016. Specifically, GE challenged claims 1, 2, and 7-11 of the ’605 patent. *See* Appx2000-2050. Because any party can initiate the IPR process, the Board had no occasion to consider GE’s injury from the patent, and thus made no findings to that effect. The Board instituted trial of claims 1, 2, and 7-11. Appx2133. Thereafter, RTC disclaimed claims 1 and 2, leaving in dispute claims 7-11, which are more specific to a geared turbofan engine having a variable area fan nozzle. *See* Appx2.

Following an extensive review of the evidence, the Board rejected GE’s challenge. According to the Board, GE failed to demonstrate that claim 7 would

have been obvious, and it “necessarily follows that GE has failed to establish that dependent claims 8-11 which depend from claim 7 are unpatentable as obvious.” Appx30 (citation omitted). The Board thus rejected GE’s arguments and reaffirmed the patentability of the challenged claims.

Invoking 35 U.S.C. § 319, GE sought review in the Federal Circuit as a “dissatisfied” party. RTC moved to dismiss, arguing that GE lacked standing to pursue an appeal in federal court because it suffered no injury-in-fact. As RTC observed, GE had avoided geared turbofan technology, made no effort to develop technology covered by the ’605 patent, and faced no apparent risk that it might implicate that patent. GE responded, arguing it had standing because it had developed a geared turbofan engine in the 1970s for NASA, and that there was a chance that GE theoretically could—at some point in the future—perhaps seek to develop other geared turbofan engines using RTC’s technology in such a manner that might implicate the ’605 patent. *See* Pet.App.2a-3a. GE filed a declaration with its opposition brief purporting to support such a position.

The Federal Circuit denied the motion to dismiss the appeal and ordered that standing be addressed in the parties’ merits briefing. Following oral argument, the Federal Circuit allowed GE to supplement the record with *additional* evidence that might demonstrate standing. After considering that evidence and with the benefit of full briefing and oral argument, the Federal Circuit issued a decision finding that “GE’s purported competitive injuries are too speculative to support constitutional standing.”

Id. at 5a. The two declarations submitted by the company—both from lawyer Alexander Long, GE’s Chief IP Counsel and General Counsel of Engineering for GE Aviation—failed to identify “a concrete and imminent injury to GE related to the ’605 patent.” *Id.* at 5a-6a.

In reaching its decision, the Federal Circuit emphasized the speculative nature of GE’s asserted injuries. As the court explained, GE could not establish that it had lost bids to customers as a result of the existence of the ’605 patent. Although Mr. Long had emphasized in his declaration that a recent solicitation from Boeing welcomed geared turbofan design submissions, in addition to traditional direct-drive designs, there was no indication that the ’605 patent had disadvantaged GE. GE did not submit a geared turbofan engine design in response to that solicitation, and its declarations said nothing about “why it opted not to” do so. *Id.* at 6a. Critically, neither declaration “attest[ed] that GE submitted a direct-drive engine design to Boeing *because* of the ’605 patent” or the particular technology claimed in that patent. *Id.* at 6a; *see id.* at 4a (“The record does not indicate why GE submitted a direct-drive engine design instead of a geared-fan engine design.”). Nor was GE able to substantiate its claim that it had expended funds in an attempt to design a geared turbofan engine in a manner that might infringe the ’605 patent.

Indeed, nothing the company submitted demonstrated that GE had revisited geared engines at any point following its 1970s design for NASA. At most, GE hoped to keep its “options” open should it

decide down the road to develop potentially infringing technology. *See* Pet.App.65a. The supposed existence of efforts to avoid replicating Pratt’s technology were likewise unsupported, as GE “fail[ed] to provide an accounting for the additional research and development costs expended to design around the ’605 patent.” *Id.* at 7a. As the Federal Circuit concluded, GE’s allegations were simply “too speculative” to establish Article III standing. *Id.* at 5a.

The court acknowledged the doctrine of “competitor standing” as one way to satisfy the requirements of Article III standing. *Id.* at 5a, 7a. The court concluded that GE lacked standing under that doctrine because its declarations failed to adequately demonstrate that the Board’s actions changed the competitive landscape. Because GE failed to demonstrate a concrete and particularized injury, there was no case or controversy to adjudicate in federal court. The Federal Circuit therefore rejected GE’s appeal for want of jurisdiction. Judge Hughes concurred in the result, recognizing that it was compelled by the Federal Circuit precedent, which he criticized as an “overly rigid” approach to Article III. *Id.* at 9a. GE’s petition for rehearing en banc was denied without recorded dissent. *See id.* at 55a.

REASONS FOR DENYING THE PETITION

This Court has already twice denied petitions in cases seeking to review the Federal Circuit’s requirement that litigants seeking appellate review of Board decisions upholding a patent’s validity satisfy the strictures of Article III. *See RPX Corp. v. ChanBond LLC*, No. 17-1686 (U.S. denied June 17, 2019); *JTEKT Corp. v. GKN Auto. Ltd.*, No. 18-750

(U.S. denied June 17, 2019). GE does not discuss those unsuccessful petitions (or that one of them precipitated a CVSG and a Solicitor General brief explaining that the issue is not certworthy), but seeks to escape the same fate by pitching its petition in terms of competitor standing. That tack fares no better. Despite GE's suggestions to the contrary, the Federal Circuit has neither rejected the doctrine of "competitor standing" nor applied it in a manner that deviates from other circuits. To the contrary, no circuit confers automatic standing on a competitor or dispenses with the requirement that a competitor show a concrete and imminent injury-in-fact. To be sure, some decisions ultimately find standing while others do not. But those differing results simply reflect factual nuances and differences in the government benefits at issue. For example, when the government benefit comes from a limited pool of government subsidies, such that every subsidy award comes at a rival's expense, establishing injury-in-fact is straightforward. But the granting of other government benefits does not necessarily inflict imminent and concrete injury on rivals. Competitors cannot challenge their rivals' tax deductions or the award of government contracts for which they offered no bid of their own. In the patent context, for example, the issuance of a patent to a rival is not enough, as many patented claims are never practiced, even by the patent holder. Moreover, many patents do not even implicate a rival's competing technology, especially where, as here, the rival favors altogether different technology. In such cases, there is no imminent prospect of infringement or other injury.

GE complains that the Federal Circuit has established a patent-specific exception to Article III. In reality, it is GE that seeks a special rule that relaxes the ordinary Article III requirements in the context of patents or IPR appeals. It has never been the law that a competitor has automatic standing to file a declaratory judgment action challenging a rival's newly issued patent. To the contrary, the rule has always been that a plaintiff in such an action, whether a competitor or otherwise, must establish concrete and imminent injury-in-fact. There is no basis for a different rule for IPR appeals. This Court has already recognized that the right of anyone to initiate an IPR proceeding before the Board does not eliminate the bedrock requirements of Article III on appeal. There is no basis for a patent-specific or IPR-specific exception to Article III. Simply being a competitor that has initiated an IPR proceeding concerning a rival's patent is no substitute for Article III injury-in-fact.

Not only has this Court twice rejected petitions raising this same basic issue, but the petition here is entirely factbound. The Federal Circuit has granted competitors standing to challenge adverse IPR decisions in some circumstances, but not others, depending on the specific facts alleged in declarations designed to substantiate injury-in-fact. Here, the Federal Circuit, after a full round of briefing and oral argument, and even allowing GE the opportunity to submit an additional declaration *after* oral argument, found GE's declarations wanting. The dispute is not only factbound in the ordinary sense, but GE's complaint basically comes down to an effort to second-guess the Federal Circuit's factfinding. Indeed, in a

subsequent, still-pending appeal involving a different RTC patent, GE has submitted declarations with differing averments. That pending appeal only reinforces the factbound nature of this petition.

I. The Federal Circuit Has Not Adopted A Heightened Standard To Appeal Adverse IPR Decisions.

Article III of the United States Constitution mandates that all litigants seeking judicial review establish that they suffer injury-in-fact—that is, “an invasion of a legally protected interest which is (a) concrete and particularized, ... and (b) ‘actual or imminent, not “conjectural” or “hypothetical.”” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). No similar requirements apply in IPR proceedings before the Board. *See Cuozzo*, 136 S. Ct. at 2143-44 (noting a party initiating an IPR “may lack constitutional standing”). Inevitably, not every disappointed party will have standing to appeal. In insisting on a showing of Article III standing and not allowing an appeal by every disappointed party or would-be competitor, the Federal Circuit did not break any new ground or create any special rule or heightened standard for appealing IPRs. To the contrary, it is Petitioner that seeks a special rule that would lower the traditional bar for standing when it comes to IPR appeals.

A. The Federal Circuit Has Not Rejected Competitor Standing.

The Federal Circuit’s approach to standing in this case was far from extraordinary. Instead, the court faithfully followed this Court’s precedent in applying well-established standing principles, including that a

litigant might invoke “competitor standing,” when facts demonstrate that “government action alters competitive conditions.” *See* Pet.App.7a. But competitor standing has never been understood as a rule automatically conferring standing on a competitor when it comes to patents or any other government-conferred benefit. As the court explained, a party invoking such a theory is not relieved of its burden of demonstrating that it has “suffered an injury in fact that has a nexus to the challenged conduct and that can be ameliorated by the court.” *Id.* at 5a.

The Federal Circuit addressed the application of competitor standing principles in the IPR context in *AVX Corp. v. Presidio Components, Inc.*, 923 F.3d 1357 (Fed. Cir. 2019) (Taranto, J.), which GE addresses at length. *See* Pet.14-16 & n.4. AVX did not reject competitor standing. To the contrary, Judge Taranto recognized the doctrine and that the Federal Circuit had previously applied it to permit standing for competitors who had demonstrated a concrete harm to competitive interests. *See* AVX, 923 F.3d at 1363-64 (discussing *Canadian Lumber Trade All. v. United States*, 517 F.3d 1319, 1324 (Fed. Cir. 2008)). Rather than rejecting the competitive standing doctrine or its application to IPR appeals, the court simply held that an affidavit from AVX’s general counsel—explaining that it competed with the patent holder and feared the prospect of future patent infringement litigation—failed to establish injury-in-fact. Judge Taranto explained that to satisfy Article III, “the disputed action must pose a nonspeculative threat to a concrete interest of the challenger.” *Id.* at 1364. Although “competitor standing” was one way to do so, the court

determined that AVX's challenge failed because the company "ha[d] no present or nonspeculative interest in engaging in conduct even arguably covered by the patent claims at issue." *Id.* at 1363-64. A generalized fear of future litigation initiated by a competitor was insufficient.

In reaching such a conclusion, the Federal Circuit relied on a number of "competitor standing" decisions, including this Court's decisions in *Clinton v. City of New York*, 524 U.S. 417 (1998), and *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), as well as the D.C. Circuit's decisions in *U.S. Telecom Association v. FCC*, 295 F.3d 1326 (D.C. Cir. 2002), *Louisiana Energy & Power Authority v. FERC*, 141 F.3d 364 (D.C. Cir. 1998), and *New World Radio, Inc. v. FCC*, 294 F.3d 164 (D.C. Cir. 2002). AVX read those decisions as establishing not a quasi-automatic rule that a competitor has standing but that a competitor may assert standing where "the challenged government action nonspeculatively threatened economic injury to the challenger by the ordinary operation of economic forces." 923 F.3d at 1364.

In *Clinton*, for example, this Court noted that government actions that "alter competitive conditions" may give rise to injuries sufficient to establish standing. There, the Court held that President Clinton's use of the line-item veto to eliminate a tax benefit of the Taxpayer Relief Act of 1997 was an injury sufficiently concrete to confer standing on an entity seeking to acquire processing facilities. *See* 524 U.S. at 432-33. As the Court explained, the petitioner demonstrated that "it had concrete plans to utilize the [tax benefit], and it was engaged in ongoing

negotiations with the owner of a processing plant who had expressed an interest in structuring a tax-deferred sale when the President canceled [the benefit].” *Id.* at 432.

Similarly, in *Association of Data Processing Service Organizations*, this Court held that entities performing data processing could challenge the Comptroller of the Currency’s decision authorizing national banks to perform those same services for others. *See* 397 U.S. at 151. The Court did so after determining not only that “competition by national banks in the business of providing data processing services might entail some future loss of profits for the petitioners,” but specifically because the respondent national bank “was performing or preparing to perform such services for two customers for whom petitioner [the challenger] had previously agreed or negotiated to perform such services.” *Id.* at 152.

Those cases turned, not on the plaintiffs’ status as would-be competitors, but on facts demonstrating that they would suffer concrete and imminent harm as a result of the particular government action at issue. Losing tax benefits associated with a specific contemplated acquisition and losing two customers plainly sufficed. But the competitive relationship alone did not relieve those parties of their burden to identify such injuries.

Applying those principles to *inter partes* challenges, the Federal Circuit has explained that upholding specific patent claims “does not, by the operation of ordinary economic forces, naturally harm a firm just because it is a competitor in the same market” as the patentee. *AVX*, 923 F.3d at 1365. The

Board's action leaves a previously issued patent in place. In *AVX*, for example, the court concluded that there was "simply no evidence in this case that, as an economic matter, [the patent holder's] ability to compete against AVX is enhanced by the upheld claims in a way that would harm AVX." *Id.* at 1367. The court therefore dismissed AVX's challenge, holding that it lacked jurisdiction to consider it.

Contrary to GE's arguments, the Federal Circuit has embraced the validity of the competitor standing doctrine both generally and in the IPR context specifically. Indeed, the Federal Circuit has recognized standing by competitors to appeal adverse Board decisions when they have come forward with specific evidence of concrete harm. *See, e.g., DuPont*, 904 F.3d at 1004-05; *Altaire Pharm., Inc. v. Paragon Biotech, Inc.*, 889 F.3d 1274, 1282-83 (Fed. Cir. 2018). Moreover, contrary to GE's claims, the Federal Circuit has not announced a "rigid, patent-specific rule" that a competitor lacks standing absent concrete plans for future infringement. Pet.18. Instead, the Federal Circuit has held that a competitor could establish economic or competitive injury in any number of different ways. *See AVX*, 923 F.3d at 1367 (recognizing that other "scenarios of competitive harm are conceivable in other cases"). For example, even absent concrete plans to develop infringing technology, Judge Taranto observed that a competitor may have standing if invalidating a patent "would lead [the patent owner] to invest less in making and selling its" competitive products, thereby improving market conditions for the competitor by reducing competition. *Id.*; *see also JTEKT Corp. v. GKN Auto. Ltd.*, 898 F.3d 1217, 1221 (Fed. Cir. 2018) ("IPR

petitioners need not concede infringement to establish standing to appeal.”). But, as in any case, the party must offer concrete evidence of such harm. *See AVX*, 923 F.3d at 1367.

The Federal Circuit applied the same well-established Article III principles to the specific facts GE presented in this case. Its conclusion that GE’s supposed injuries were simply too speculative to demonstrate that it suffered a concrete injury is not worthy of this Court’s review.

As the Federal Circuit noted, the facts alleged in GE’s Chief IP Counsel’s declarations simply did not identify a concrete injury sufficient to support standing. For example, although GE’s declarations suggested that the ’605 patent could somehow harm the company financially, it offered no specific facts. The court observed that

Mr. Long does not assert that GE lost bids to customers because it could offer only a direct-drive engine design. Nor does Mr. Long attest that GE submitted a direct-drive engine design to Boeing because of the ’605 patent. Mr. Long contends only that GE expended some unspecified amount of time and money to consider engine designs that could potentially implicate the ’605 patent.

Pet.App.6a. Likewise, GE’s suggestion that the ’605 patent put GE at a disadvantage in bidding for a Boeing contract was unsubstantiated speculation. In explaining why it was unpersuaded, the Federal Circuit observed

there is no evidence that Boeing demanded or required an engine covered by claims 7-11 of

the '605 patent, and there is no indication that GE lost the Boeing bid. The evidence shows that GE submitted to Boeing a direct drive engine design, but there is no indication as to why it opted not to submit a geared-fan engine design.

Id. Indeed, GE's declarations made clear that it wanted to keep its "options" open because it "has [not] chosen to permanently forego any and all future engine designs that may use a" variable area fan nozzle. *Id.* at 68a. Moreover, the declarations never addressed the specifics of the claims of the '605 patent (which related to an *axially movable* variable area fan nozzle) at issue in the IPR. And GE's supposed efforts to avoid replicating that technology, now emphasized in GE's petition, were largely absent from its briefing before the Federal Circuit, and for good reason—GE could not identify a single dollar spent to "design around" the patented claims. *See id.* at 7a-8a.

Thus, despite being given repeated opportunities by the Federal Circuit to identify an injury-in-fact, GE failed to do so. GE was unable to identify facts tying its purported competitive injuries—disadvantage in competing for a Boeing contract, coupled with additional expenditures on research—to the particular claims of the '605 patent (let alone to the Board's decision upholding it). Without more, the Federal Circuit properly held that any harm asserted by GE was speculative. Indeed, no decision from any court, before or since the creation of the Federal Circuit, has ever adopted a rule that would automatically allow a competitor to challenge any patent or other government action that goes a rival's

way. A court must always look to the specific facts to determine standing. That is particularly true of patents, many of which are not practiced or pose no obstacle to a competitor's distinct products or means of competing.

GE's petition thus does not challenge any broad rule demanding a heightened showing, but instead disputes how the Federal Circuit weighed the *evidence* GE offered. Were there any doubt, GE's own conduct in another appeal currently pending in the Federal Circuit would remove it. That appeal, which GE fails to mention in its petition, involves a dispute between the same parties competing in the same engine market over another patent on related geared turbofan engine technology. GE presented *different* facts in its declarations in that case—facts that GE argues can satisfy the standard articulated by the Federal Circuit in *AVX* and the decision below. *See* GE's Reply in Support of Mot. to Supp. the Record at 5, *Gen. Elec. Co. v. United Techs. Corp.*, No. 19-1319 (Fed. Cir. June 11, 2019), ECF 36. To be sure, RTC believes that those facts likewise fail to satisfy Article III, but the different facts elicited by GE regarding different patents between the same competitors in the same industry underscores that the standing question in this context is factbound and does not merit plenary review.

B. There Is No Circuit Conflict Warranting This Court's Review.

GE's suggestion that the Federal Circuit has parted ways with other courts is without merit. The Federal Circuit has not rejected competitor standing, and no other circuit has concluded that the mere

existence of a competitive relationship relaxes a party's burden to demonstrate injury-in-fact in the manner GE advocates. Instead, each of those cases evaluates the nature of the particular government action, how it affected the competitive relationship, and only then decides whether a party established a concrete, non-speculative competitive harm in the specific circumstances of each case.

In suggesting a circuit split, GE focuses most of its attention on a supposed divergence between the Federal Circuit and the D.C. Circuit, which GE describes as “especially stark.” Pet.17. But the Federal Circuit in *AVX* invoked and applied D.C. Circuit precedents, like *New World Radio, Inc. v. FCC*, 294 F.3d 164 (D.C. Cir. 2002). There is no split, and the different outcomes reflect different government actions and different factual scenarios.

New World Radio provides a good example of the D.C. Circuit's application of competitor standing. In that case, the D.C. Circuit found a radio station lacked standing to challenge the Federal Communications Commission's decision to renew a competitor's broadcast license. The challenger alleged harm from the renewal based on its hope to move into the licensee's market. The court dismissed the appeal after concluding that the alleged harm was too speculative to establish injury-in-fact. As the court explained, “competitor standing' doctrine [applies] to an agency action that itself imposes a competitive injury, *i.e.*, that provides benefits to an existing competitor or expands the number of entrants in the petitioner's market, not an agency action that is, at

most, the first step in the direction of future competition.” *Id.* at 172.

The Federal Circuit cited and applied *New World Radio* in *AVX*, and similar logic applies here. GE failed to offer any evidence that the Board’s decision actually altered the current competitive landscape. GE argues that it may someday seek to develop geared turbofan jet engines, and that those designs might implicate the ’605 patent, and that RTC may, in turn, initiate litigation. *See* Pet.App.68a (¶ 22) (GE “may use a speed reduction mechanism” in the future). But those various contingencies and qualifications make clear that GE lacks any current plans that give rise to concrete and imminent injury, as the Federal Circuit correctly found.

GE relies heavily on *Sherley v. Sebelius*, 610 F.3d 69 (D.C. Cir. 2010), but the facts prompting that decision are readily distinguishable from those in *New World Radio*, *AVX*, and the decision below. In *Sherley*, the D.C. Circuit held that doctors who received funds for non-embryonic-stem-cell research had standing to challenge the federal government’s decision to increase funding for embryonic-stem-cell research. *See id.* at 75. Crucial to that decision, however, was the fact that the total funding for stem-cell research was fixed, such that greater embryonic-stem-cell research funding “intensified the competition for a share in a *fixed amount* of money,” which necessarily forced the plaintiffs “to invest more time and resources to craft a successful grant application.” *Id.* at 74 (emphasis added). The plaintiffs had thus established concrete harm by demonstrating that the government’s funding decision would result in “an

actual, here-and-now injury.” *Id.* A dollar directed toward embryonic-stem-cell research would constitute a dollar no longer available to fund the type of research Sherley conducted.

The facts here do not involve a similar zero-sum game. The government has not increased competition for a fixed amount of benefits at GE’s expense. The IPR decision simply preserves the status quo by confirming the validity of a previously issued patent. Indeed, even the original issuance of the patent does not necessarily alter the competitive balance—to create a *per se* rule to the contrary would be a revolution in standing jurisprudence. Tellingly, GE cites no cases treating patents in such a categorical manner or allowing a declaratory judgment action challenging a patent’s validity just because the plaintiff is a “competitor.” Indeed, many patents inflict no actual harm because, for example, the patent is not practiced or the competitor uses alternative technology that does not implicate the patent. A patent alters the competitive landscape only if there is some evidence it *actually* harms potential competitors in a concrete way. The problem for GE is it offered no evidence any such harm occurred—let alone that such harm was imminent—with respect to the ’605 patent at issue.

GE’s remaining cases from other circuits likewise provide no support for a split. They reflect only the application of a doctrine that all circuits recognize to different fact patterns. For example, the Second Circuit’s *Center for Reproductive Law & Policy v. Bush*, like *Sherley*, involved discriminatory grants that “create[d] an uneven playing field,” 304 F.3d 183,

197 (2d Cir. 2002). The First Circuit’s decision in *Adams v. Watson*, which also involved a direct cash infusion, made clear that “Article III standing in the commercial context must be premised, at a minimum, on particularized future economic injury which, though latent, *nonetheless qualifies as ‘imminent,’*” 10 F.3d 915, 920-21 (1st Cir. 1993) (emphasis added). Indeed, all of GE’s cases involve conduct that allowed one firm to seize market share at the expense of another. *See, e.g., Marshall & Ilsley Corp. v. Heimann*, 652 F.2d 685, 692 (7th Cir. 1981) (plaintiff could challenge major bank’s acquisition of competitor bank in its market); *TrafficSchool.com, Inc. v. Edriver Inc.*, 653 F.3d 820, 826 (9th Cir. 2011) (“[R]ecommended by DMV’ endorsement is an important factor in consumers’ choice of traffic schools and driver’s ed classes. It stands to reason that defendants will capture a larger share of the referral market—to plaintiffs’ detriment—if they mislead consumers into believing that DMV.org’s referrals are recommended by their state’s DMV.”).

The difference between these decisions and that in this case was not the legal standard applied, but rather the fact-specific circumstances of each case. The inquiry for competitor standing is necessarily context-specific and depends on the nature of the government’s action. The nature of the government’s action here is obviously different from the government benefits in GE’s cited cases. Indeed here, the government action is an administrative decision *confirming* the validity of an earlier-issued patent. That government action, by definition, maintains the status quo. That fact alone is an additional ground distinguishing the present case from all those that GE

cites, which involve challenges to an actual benefit conferred—not a later proceeding in which the government declines to eliminate that benefit.

II. The Federal Circuit Rightly Rejected GE’s IPR- Or Patent-Specific Standing Rule.

Rather than creating a unique rule for standing in the context of patents as GE suggests, the Federal Circuit faithfully applied this Court’s precedent in assessing whether GE established injury-in-fact. Under that standard, competitors sometimes have standing (or not) depending on the specifics of the case. It is GE itself that asks for a patent-specific rule for standing, in which any direct competitor who took the trouble of initiating an IPR proceeding would automatically have standing to appeal. Such a rule simply cannot be squared with this Court’s precedent and the text of Article III.

GE’s petition boils down to a request that this Court relax Article III standing for IPR appeals—and by logical extension for all patent invalidity challenges—involving direct competitors. GE’s approach would mean that simply being a competitor of a patent holder—without more—would be sufficient to establish concrete injury whenever the government issues or upholds a rival’s patent. Thus, under GE’s rule, a firm challenging the Board’s decision need not demonstrate that its rival’s patent actually puts it at a disadvantage in any concrete way. That much is clear from GE’s petition. For example, GE complains that the Federal Circuit should not have distinguished between cases where “government action introduced new competitors and thus increased competition in the relevant market” and cases where it “*excludes* some

competitors from engaging in certain market activities.” Pet.22. But the issuance of *every* patent necessarily excludes a competitor from certain activities, namely, practicing the patent. That is the very definition of a patent; at bottom, patents confer government-backed “monopolies” for the specific patented claims. See *Cuozzo*, 136 S. Ct. at 2144 (quoting *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 816 (1945)). GE’s proposed rule would thus allow any competitor to challenge the Board’s decision in the Federal Circuit.

And the logic of GE’s position would necessarily extend to, and create a revolution in, declaratory judgment practice concerning patents, dramatically and unfavorably impacting district court dockets across the country. After all, the IPR outcome GE seeks to challenge merely preserves the status quo by confirming the validity of a previously issued patent. If anything excludes competition or otherwise affects the competitive balance among rivals, it is the issuance of the ’605 patent itself, not a later decision confirming its validity. Under GE’s rule, merely because GE is a competitor in the engine market, GE would have had standing to seek a declaratory judgment the moment the PTO issued the patent. That would upend long established practice, which has always required an imminent threat of infringement, alteration of the market landscape, or some other concrete harm. See, e.g., *Calderon v. Ashmus*, 523 U.S. 740, 747 (1998).

This Court’s decision in *MedImmune, Inc. v. Genentech, Inc.*, confirms the revolutionary nature of GE’s position. There, this Court allowed a party

already paying royalties to a patent holder to seek a declaratory judgment challenging the validity of the patent. *See* 549 U.S. 118, 127-28 (2007). This Court did not apply any special rule conferring near-automatic standing in patent cases, but rather applied the basic test of Article III: “[T]he question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” *Id.* at 127 (quoting *Maryland Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941)). In *MedImmune*, there was nothing speculative about MedImmune’s desire to practice the patent, as it was already paying royalties for its use. Nor was there lack of imminency, as the royalty payments were the only thing preventing MedImmune from infringement. Thus, the Court concluded that the injury complained of was thus “of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” *Id.*

This case could not be further removed from *MedImmune*. GE is not paying royalties and has not suggested it is about to infringe a patent as in *MedImmune*. To the contrary, GE has steadfastly questioned geared turbofan technology more broadly, making clear its preference for traditional technology. It is thus hardly a surprise that GE has offered no evidence that it risked infringing the particular technology at issue, or that it had expended funds specifically to design around the patented technology, or that the patent had otherwise specifically altered the competitive market in any concrete manner. GE’s only claim to standing is that it went to the trouble of

questioning the validity of the '605 patent through the IPR process because it might—or might not—sometime in the future introduce a similar engine. But the AIA permits any “person ... not the owner of a patent” to initiate review, wholly apart to whether they have any claim to Article III injury. 35 U.S.C. § 311(a). Neither GE’s initiating the IPR process nor its status as a “competitor” in the engine market can substitute for the showing of actual, concrete injury required by Article III.²

While GE stops short of claiming that initiating an IPR process alone is sufficient, it suggests that the AIA itself gives GE some tailwind in establishing standing, arguing that “[t]he Federal Circuit’s rule frustrates Congress’s express intent of using IPR challenges to weed out invalid and overbroad patents.” Pet.4; *see also id.* (“the Federal Circuit’s rule limits Article III oversight of the PTO in circumstances where Congress thought it necessary”); *id.* at 13-14; *id.* at 29-32 (“The Federal Circuit’s rule ignores the unique role of Congress in defining injuries-in-fact.”). To the extent that GE hopes the existence of the AIA loosens the requirement for showing injury-in-fact,

² *Amicus Frontier* goes so far as to suggest that a firm’s mere investment of time and resources to challenge a patent is a “market test” that it has been harmed for purposes of Article III. *See Frontier Amicus Br.* at 8-9 (“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.”). If that were the law, this Court could dispense with its Article III jurisprudence in favor of a test that assumed that anyone who cared enough to file a declaratory judgment action or file an appeal must have injury-in-fact. That is not the law, and for good reason.

the Court closed that door four terms ago with its decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). While Congress certainly may deem particular conduct injurious, “Congress’ role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever 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.” *Id.* at 1549. That logic applies *a fortiori* here as Congress has not provided a statutory damages remedy or done anything more than provide a statutory right to appeal. Such a statutory right has never been understood to obviate the need for satisfying Article III. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009) (“deprivation of a procedural right without some concrete interest that is affected by the deprivation ... is insufficient to create Article III standing”).

In short, GE’s declarations here fall far short of showing the kind of concrete and imminent injury that would allow it to challenge the ’605 patent’s validity in a declaratory judgment action. Its claim to standing thus depends on some patent-specific or IPR-specific exception for “competitors.” There is no basis for such a special exception to Article III, and without it, GE’s effort to invoke the jurisdiction of the Article III courts fails at the threshold.

III. The Question Presented Is Fact-Dependent And This Case Is An Especially Poor Vehicle For Considering It

The decision below correctly rejected GE's claim to standing and implicates no circuit split. It is instead a factbound application of well-established principles. The question presented is not certworthy, as demonstrated by this Court's denial of two petitions raising similar arguments. And GE's appeal is hopelessly factbound, as demonstrated by its ongoing effort to challenge a related patent based on different factual declarations.

A. This Court Has Rejected Petitions Raising the Same Issue.

This Court recently rejected two petitions raising the same basic issue of standing to appeal IPR decisions—a fact that GE mystifyingly omits from its petition. *See RPX Corp. v. ChanBond LLC*, No. 17-1686 (U.S. denied June 17, 2019); *JTEKT Corp. v. GKN Auto. Ltd.*, No. 18-750 (U.S. denied June 17, 2019). In *RPX*, a disappointed IPR petitioner alleged to the Federal Circuit that it had standing to appeal the Board's decision denying its IPR challenge. *See RPX Corp. v. ChanBond LLC*, 780 F. App'x 866, 867 (Fed. Cir. 2018). Following a review of the evidence, the Federal Circuit found standing lacking, explaining that “RPX has not demonstrated that the Board's determination increased or aids the competition in the market of the non-defendant IPR petitioners.” *Id.* at 869. Similarly, in *JTEKT*, the Federal Circuit held that a would-be competitor failed to carry its burden to show a concrete and particularized injury in challenging an IPR decision regarding a patent for a

drivetrain. *See JTEKT*, 898 F.3d at 1221 (“we conclude that JTEKT has not established at this stage of the development that its product creates a concrete and substantial risk of infringement or will likely lead to claims of infringement”).

Following an invitation from this Court, the United States explained that further review of this issue was unwarranted—another fact GE omits. *See Br. Amicus Curiae of U.S., RPX Corp. v. Chan Bond LLC*, No. 17-1686 (U.S. May 9, 2019). As the United States explained, the Federal Circuit properly requires that a litigant establish injury-in-fact, whether that be risk of infringement, plans to develop infringing technology, or otherwise—a showing mandated by this Court’s precedent and consistent with the law in other circuits. *Id.* at 19-20.

The question presented here merely puts a competitor standing gloss on the same basic question this Court has already twice declined to consider. Those cases at least focused on the unique aspects of the IPR proceedings, such as the statutory appeal right and estoppel effects of a failed IPR challenge. GE downplays such arguments (presumably because they have now twice been rejected), instead making sweeping arguments based on “competitor standing” that are better directed at the issuance of the patent than at a later IPR attack and, as such, are contrary to longstanding practice and bedrock Article III requirements.³ This petition, thus, provides even less

³ GE briefly intimates that the AIA’s estoppel provision creates an “additional risk of harm,” Pet.29, without going so far as to argue that the estoppel provision alone creates an Article III case or controversy. That provision prevents a challenger seeking

reason to grant certiorari than the unsuccessful petitions in *RPX* and *JTEKT*.

B. The Question Presented Is Hopelessly Factbound.

The question presented here is doubly factbound and amounts to nothing more than a request that this Court referee the parties' factual disagreement. The Federal Circuit, like every other circuit, recognizes competitor standing, but like every other circuit, does not apply a rule conferring automatic standing on anyone who is a competitor. The answer in any such case, including this one, is a case-specific application of particular facts to established law that does not merit this Court's review. The petition here is factbound in that familiar sense (as reinforced by the pendency of a different GE appeal attempting to challenge a separate RTC patent based on different declarations, *see supra* at 20).

inter partes review from later asserting in a civil action “that the claim is invalid on any ground that the petitioner raised or reasonably could have raised during that *inter partes* review.” 35 U.S.C. § 315(e)(2). GE does not affirmatively argue that the potential application of the estoppel provision is itself sufficient to constitute injury-in-fact, and it should not be heard to do so for the first time in its reply. The argument is unavailing in any event. The notion that there would be future litigation, that such litigation would implicate the estoppel provision, and the provision would be deemed applicable in a case where appellate review was foreclosed by a lack of Article III standing, is triply speculative. For this reason, the Federal Circuit has time and again rejected the suggestion that “[t]he estoppel provisions contained within the *inter partes* reexamination statute ... constitute an injury in fact for Article III purposes.” *Consumer Watchdog*, 753 F.3d at 1262; *see AVX*, 923 F.3d at 1362-63; *JTEKT*, 898 F.3d at 1221; *Phigenix*, 845 F.3d at 1175-76.

This petition is factbound in yet another sense. The absence of any injury-in-fact requirement to initiate an IPR review necessarily put the Federal Circuit in the position of the factfinder in this case. At bottom, GE's complaint is that the Federal Circuit did not interpret its declarations to establish injury-in-fact. Like a petitioner complaining about the factfinding by a district court, that factfinding does not warrant this Court's review.

To be clear, although GE advocates for a relaxed injury-in-fact requirement in competitor appeals from PTAB decisions, even it does not deny that the appellant must file declarations that establish injury-in-fact. Nor could it, as this Court has already recognized that not everyone who initiates an IPR challenge will have Article III standing. *See Cuozzo*, 136 S. Ct. at 2143-44. Whether a party has actually suffered injury-in-fact is, fundamentally, a question of fact that will turn on lower-court assessments of specific, factbound declarations.

GE's declarations here simply were insufficient to demonstrate standing on the facts. GE's lawyers argued to that court that the patent "impede[d] GE's ability to design engines for airframers because GE's available options for the development of innovative new designs are unduly limited," and that as a result, the patent caused higher design costs, restricted what products GE could offer to its customers, and forced GE to expend additional money on designs that did not implicate the patent. GE's Reply Br. at 24, *Gen. Elec. Co. v. United Techs. Corp.*, (No. 17-2497) (Fed. Cir. Mar. 8, 2018) (citing first declaration at ¶¶ 9-10, 15-16, 22).

But the Federal Circuit, after reviewing the declarations, a full round of briefing, and oral argument, concluded that GE's declarations failed to support such assertions. *See* Pet.App.4a (“The record does not indicate why GE submitted a direct-drive engine design instead of a geared-fan engine design.”); *id.* at 7a (stating that GE “provides no further details” about its expenses with any nexus to the patented claims at issue); *id.* at 7a-8a (“The only evidence that GE actually designed a geared-fan engine is the engine that it designed in the 1970s. Any economic loss deriving from the 1970s engine is not an imminent injury.”). Had GE offered other evidence, the disposition of its appeal may have been different, as it was in *DuPont*, 904 F.3d at 1005, or *Altaire Pharmaceuticals*, 889 F.3d at 1283—cases where the Federal Circuit determined that the facts presented by a challenger did establish standing. As the court explained in *AVX*, “A patent claim *could* have a harmful competitive effect on a would-be challenger if the challenger was currently using the claimed features or nonspeculatively planning to do so in competition, *i.e.*, if the claim would block the challenger’s own current or nonspeculative actions in the rivalry for sales.” 923 F.3d at 1365. Facts presented by GE simply failed to meet that test here.

GE’s petition thus ultimately depends on contesting the Federal Circuit’s factual determinations in assessing GE’s declarations. Although GE may disagree with the Federal Circuit’s factual findings (based on a full round of briefing and oral argument), that disagreement is not worthy of this Court’s limited resources. *See* S. Ct. R. 10; *see, e.g., First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938,

949 (1995) (“This factbound issue is beyond the scope of the questions we agreed to review.”).

CONCLUSION

For the foregoing reasons, this Court should deny the petition.

Respectfully submitted,

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