

Nos. 19-1434, 19-1452, 19-1458

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

ARTHREX, INC., ET AL.,

Respondents.

(Caption continued on inside cover)

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

**BRIEF FOR APPLE INC. AS AMICUS CURIAE
IN SUPPORT OF NEITHER PARTY**

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SMITH & NEPHEW, INC., ET AL.,
Petitioners,

v.

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INTEREST OF AMICUS CURIAE¹

Amicus Apple Inc. is one of the world's leading technology innovators. Apple designs, manufactures, and sells mobile phones and tablets, media devices, and personal computers, as well as related products and services. Its innovations have revolutionized the way we communicate, work, and play. Among the market-leading products Apple has launched over the past 15 years are the iPhone, iPad, AirPods, Apple Watch, and Apple TV. And Apple also develops the software that runs on those devices, as well as groundbreaking features and services like Apple Pay, Apple Music, and Apple Arcade.

Like any tech company, Apple has a keen interest in the U.S. patent system. Apple frequently protects its own innovations by securing patent rights. And Apple's success also makes it a frequent target of others who claim that Apple's inventions implicate their patent rights. Because it so often wears both hats, Apple has long advocated for a balanced, principled patent system. From patent examination to post-judgment litigation on attorneys' fees, Apple has supported sensible rules and policies that promote innovation and competition.

When it comes to advancing those ends, no policy development over the past decade comes close to the

¹ The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Apple, its members, or its counsel made a monetary contribution to the preparation of this brief.

one at issue here. Congress created the inter partes review (IPR) system as part of its 2011 America Invents Act (AIA). “By providing for inter partes review, Congress, concerned about overpatenting and its diminishment of competition, sought to weed out bad ... claims efficiently.” *Thryv, Inc. v. Click-to-Call Techs., LP*, 140 S. Ct. 1367, 1374 (2020). It devised a system of adversarial testing within the U.S. Patent & Trademark Office (PTO), adjudicated by multimember panels of administrative patent judges (APJs) with both legal and technical training. Through this system, members of the public can bring post-grant challenges to the validity of questionable patents.

And no single party has used the IPR system more than Apple, likely because no party is as frequent a target of litigation as Apple is. Apple’s success makes it a favorite patent defendant, especially of so-called “non-practicing entities”—parties who exist not to invent or innovate, but to own and monetize patents by asserting them against others. When Apple is sued, it typically interposes invalidity defenses through IPR petitions, relying on Congress’s promise of a fair and efficient forum to challenge what often prove to be woefully weak patents that should not have issued in the first instance. Apple has used the IPR process to successfully challenge nearly 200 such patents. The results it has obtained have frequently obviated what would otherwise have been protracted, expensive litigation, conserving the resources of both the parties and the court, and speeding resolution of disputes.

Apple is hardly alone. Less than a decade on, the IPR system is humming. Parties have filed petitions at a rate of over 100-per-month for six years running.

There are now over 200 APJs tasked with resolving these petitions. Pet. App. 10a. And this extensive use of the IPR procedure has induced extraordinary reliance by all stakeholders in the patent system.

Apple takes no position on the alleged Appointments Clause defect in the IPR system’s design, nor on the adequacy of any particular cure. Its interest in this case lies in the continued and healthy operation of the IPR system.² Apple files this amicus brief to provide its perspective as an innovator and frequent user of the IPR process on the benefits of the system and the reliance interests placed in it. And if the Court decides that the IPR system is indeed in need of correction to comply with constitutional requirements, Apple respectfully urges the Court to adopt available remedies that avoid significant disruption to the system’s functioning.

SUMMARY OF ARGUMENT

I. Congress designed the IPR system to be a reliable and cost-effective means for the public to test the validity of issued patents.

² Apple has sought to advance this same interest in other cases and forums. See Brief for Apple Inc. as Amicus Curiae in Support of Respondents, *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365 (2018) (No. 16-712) (amicus brief detailing benefits of IPR system); Amended Complaint for Declaratory & Injunctive Relief, *Apple Inc. v. Iancu*, No. 5:20-cv-6128-EJD (N.D. Cal. Nov. 9, 2020), Dkt. 54 (lawsuit brought by Apple—along with Cisco Systems, Inc., Google LLC, Intel Corp., and others—concerning the PTAB’s consideration of petitions to institute review).

A. Several aspects of the IPR system work together to promote Congress’s twin aims of reliability and efficiency. IPRs are adversarial and adjudicatory in nature. They concern only the narrow issue of the validity of the challenged patent, and the APJs who apply these legal principles have both legal and technical training. IPRs also have important structural safeguards that promote the uniformity, predictability, and quality of final written IPR decisions—such as common rules governing the proceedings and the pooling of expert APJs in three-member panels. And the IPR system has statutorily prescribed time limits that prevent challenges from dragging on for years.

Available data strongly suggests that the IPR system Congress devised works largely as intended. Thousands of IPR petitions have been filed since the system’s inception and approximately one hundred continue to be filed on average every month. Final written IPR decisions are affirmed by the Federal Circuit at a high rate. And while the PTAB’s patent invalidation rate is comparable to that of district courts’, IPR proceedings reach a final disposition more quickly and less expensively than district court litigation.

B. Over the past decade, innovators like Apple have come to depend on the promise of the system Congress created. As Apple’s own experiences confirm, the benefits from using the system are considerable. IPRs conserve resources, narrow patent disputes in district court, and level the playing field against “non-practicing entities.”

The IPR system has become indispensable. Innovators like Apple have placed extraordinary reliance in a functioning IPR system. And any disruption in its functioning would scuttle vast reliance interests and threaten the system's considerable benefits.

II. If this Court decides that the IPR system is constitutionally defective, it should employ remedial doctrines that minimize disruption to the system's functioning.

A. If the Court concludes that the Federal Circuit's solution of severing APJ removal protections from the statute solves any Appointments Clause problem, it should not hesitate to apply the severability doctrine. This Court has expressed a strong preference for severance over destruction so long as the statute in question remains operative and capable of functioning. Even if an IPR system without removal protections is not optimal as a policy matter, there is little question the system would remain capable of functioning.

B. If a legislative fix were necessary, then this Court should stay its judgment, as it has done on many occasions when facing similar circumstances. A stay would afford Congress an opportunity to cure the alleged constitutional defect without impairing the interim administration of the IPR system.

ARGUMENT

I. Congress Wanted To Provide The Public With A Reliable And Efficient System To Test The Validity Of Issued Patents.

The conditions that necessitated the IPR system are no mystery. Congress was responding to “a growing sense that questionable patents are too easily obtained and are too difficult to challenge.” H.R. Rep. No. 112-98, at 39 (2011).

The “too easily obtained” was (and is) the product of the PTO’s process of issuing patents. That process typically takes place *ex parte*, between the inventor and a patent examiner. There are approximately 8,000 patent examiners in the agency—all of them with varying degrees of training, education, and experience—tasked with reviewing over 650,000 patent applications. *See Regents of the Univ. of Minn. v. LSI Corp.*, 926 F.3d 1327, 1331-32 (Fed. Cir. 2019) (collecting sources and noting that examiners spend only around 22 hours reviewing each application), *cert. denied*, 140 S. Ct. 908 (2020). Given this volume of work, low-quality patents are inevitable.

One option for addressing such patents would be to prevent them from issuing in the first instance—Congress could strengthen the examination corps by devoting “more time and more money” to evaluating prior art, and so forth. Mark A. Lemley, *Rational Ignorance at the Patent Office*, 95 Nw. U. L. Rev. 1495, 1496 (2001). But the return on investment would be poor. The reason is that only a small percentage of issued patents (~5%) are ever monetized and fewer

(~1.5%) are ever litigated. *Id.* at 1507 & n.55. “Because so few patents are ever asserted against a competitor, it is much cheaper for society to make detailed validity determinations in those few cases than to invest additional resources examining patents that will never be heard from again.” *Id.* at 1497.

Which brings us to the other half of Congress’s “growing sense”—that “questionable patents” are “too difficult to challenge.” Of course, litigation has always been one option. But it is “costly and protracted.” H.R. Rep. No. 112-98 at 39, 45. An accused infringer must spend large sums of money in litigation costs to challenge the validity and enforceability of a low-quality patent and wait years for the challenge to be resolved. And because litigation requires a case or controversy, even an innovator that becomes aware of low-quality patents before it is sued must risk infringement and a multi-front litigation battle to be able to challenge the validity of the patents in federal court. *See generally* Joseph Farrell & Robert P. Merges, *Incentives to Challenge and Defend Patents: Why Litigation Won’t Reliably Fix Patent Office Errors and Why Administrative Patent Review Might Help*, 19 Berkeley Tech. L.J. 943, 958 (2004).

Previous Congresses had recognized as much. They had in the past tried to “create[] administrative processes that authorize the PTO to reconsider and cancel patent claims that were wrongly issued.” *Oil States*, 138 S. Ct. at 1370. First was *ex parte* reexamination, which began in 1980, and which permitted examiners to take another look at issued patents at the prompting of a third party. *See* 35 U.S.C. §§ 302, 303. Then, in 1999, came *inter partes* reexamination,

which permitted “the third-party requester and the patent owner to participate in a limited manner” in the process. *Oil States*, 138 S. Ct. at 1371. But these options too proved “costly, taking several years to complete,” and indeed turned out to be “a much less favored avenue to challenge questionable patents than litigation.” H.R. Rep. No. 112-98 at 45.

So Congress went back to its workshop. It sought to fix post-grant review procedures in order to “establish a more efficient and streamlined patent system that w[ould] improve patent quality and limit unnecessary and counterproductive litigation costs.” H.R. Rep. No. 112-98 at 40. And what emerged was IPR—an adversarial review process that allows the public to bring a narrow challenge to the validity of an issued patent. 35 U.S.C. § 311(a).

Nine years on, the IPR system has become a viable alternative to district court for challenging questionable patents. By and large, it has delivered reasoned decisionmaking through an efficient process. *Infra* § A. And innovators like Apple have used the system just as Congress intended, realizing its promise and investing extraordinary reliance interests in its continued functioning. *Infra* § B.

A. Congress devised a reliable and efficient system to adjudicate challenges to issued patents.

The design of the IPR system reflects twin aims: reliability and efficiency. By pursuing these goals, Congress sought to improve public confidence in U.S.

patents and provide a cost-effective alternative to district court litigation.

1. Congress designed the IPR system to deliver reliable results.

a. Several aspects of the AIA work together to accomplish Congress’s goal of producing high-quality results.

First, the IPR system relies upon adversarial adjudication to scrutinize the validity and enforceability of issued patents. Deeply engrained in our legal system is the notion that an “adversarial process leads to better, more accurate decision-making.” *Kaley v. United States*, 571 U.S. 320, 338 (2014). And Congress appreciated that the ex parte examination process was yielding wrongly issued patents. *See* H.R. Rep. No. 112-98 at 39-40. So for post-grant IPR proceedings, it moved “from an examinational to an adjudicative proceeding,” adversarial in nature. *Id.* at 46-47.

Congress also endowed IPR proceedings with “adjudicatory” characteristics and procedures—albeit streamlined ones, as discussed below (at 10, 16). *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2143 (2016). After a party petitions for IPR, the patent owner may respond and object. *See* 35 U.S.C. § 313. And if the PTO Director institutes the IPR petition, the parties to the new proceeding have at their disposal a panoply of trial-like rights. The parties are entitled to conduct “discovery of relevant evidence,” which includes taking depositions, *id.* § 316(a)(5); file “affidavits or declarations” and present “factual evidence and expert opinions” in support of their

arguments, *id.* § 316(a)(8); and participate in an oral hearing before a three-member panel of the PTAB’s administrative patent judges, *id.* § 316(a)(10). Lastly, the PTAB must determine if the challenger met its burden of proving unpatentability, *id.* § 316(e), and issue a written decision accordingly, *id.* §§ 316(a)(10), 318, which can then be appealed to the Federal Circuit, *id.* § 319.

These adjudicative features bolster public confidence in the PTO’s decisionmaking and the quality of U.S. patents. After all, motivated “parties know what is best for them,” and surely know to “advanc[e] the [best] facts and arguments entitling them to relief,” thus leading to better and more reasoned decisions by the agency. *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in the judgment). That is why IPR benefits accused infringers and patent owners alike. It gives challengers an opportunity to choose which patent claims they want to contest before the agency and present their best case in support of invalidation. Similarly, it allows patent owners to test the quality of their patents and respond to any filing adverse to their patent rights.

Second, Congress limited IPR proceedings to a narrow set of defined issues, the standards for which closely track those governing the issuance of patents in the first instance. Congress limited IPR to the basic question of patentability presented to the initial examiner—namely, whether the PTO should “cancel as unpatentable 1 or more claims of a patent only on a ground that could be raised under section 102 or 103 and only on the basis of prior art consisting of patents

or printed publications.” 35 U.S.C. § 311(b). The burden is on the challenger of the patent to “prov[e] a proposition of unpatentability by a preponderance of the evidence,” *id.* § 316(e). *See Cuozzo*, 136 S. Ct. at 2143. Thus, “inter partes review involves the same interests as the determination to grant a patent in the first instance.” *Oil States*, 138 S. Ct. at 1374.

Congress also provided for appellate review of the PTAB’s legal determinations by the Federal Circuit on a de novo standard. As of July 31, 2020, the Federal Circuit had considered approximately 764 IPR appeals. *See* Daniel F. Klodowski, et al., *Federal Circuit PTAB Appeal Statistics*, AIA Blog (Oct. 7, 2020), <https://bit.ly/3moroqv>. With greater opportunities for de novo review comes a more defined (and binding) body of caselaw that predictably governs future decisions.

Third, Congress structured the PTAB to promote the uniformity, predictability, and quality of its decisions. For example, Congress empowered the Director to promulgate certain regulations prescribing the same procedures that will govern all IPR proceedings, *see* 35 U.S.C. § 316(a), including, subject to statutory requirements, the “standards for the showing of sufficient grounds to institute a review under section 314(a),” *id.* § 316(a)(2).

Congress also mandated that the decisionmakers working within this system have both “competent legal knowledge and scientific ability.” 35 U.S.C. § 6(a). APJs must have, among other things, “[m]any years of experience in the practice of patent law (prosecution, litigation, or both),” and “[d]egree(s)/work

experience in science or engineering.” USPTO, PTAB Brochure, <https://bit.ly/3qcM9aV> (last visited Dec. 2, 2020). The PTO has a rigorous hiring process in place to make sure that the most qualified candidates are selected. *See id.*

This expertise is then pooled and channeled through three-member panels, further enhancing the reliability of their decisions. *See* 35 U.S.C. § 6(c). As our system of appellate law teaches, the use of “multimember bodies comprised of individuals of equal stature” is a structural feature that typically supports good and reliable decisionmaking. Marsha S. Berzon, *Dissent, “Dissentals,” and Decision Making*, 100 Cal. L. Rev. 1479, 1480 (2012). Generally speaking, then, a three-member panel guards against any single member’s lapse in judgment or discretion, promoting high-quality results.

In short, Congress devised a system that combines several of the most powerful guarantors of reliability in our legal system and provided for its operation by dedicated APJs with deep technical experience.

b. Statistics on PTAB decisions strongly suggest that Congress’s system has been able to function as intended by weeding out questionable patents and improving public confidence.

The first clue is in affirmance rates before the Federal Circuit. According to one analysis, in the past decade, through August 2020, the Federal Circuit affirmed the PTAB in 80% of cases and affirmed in part in another 7% of cases. *See* Jason Rantanen, *Federal*

Circuit Statistics Update – September 2020, Patently-O blog (Sept. 15, 2020), <https://bit.ly/3fSsjgz>. The PTAB thus gets it right far more often than not, at least according to the Federal Circuit’s standards of appellate review—the PTAB’s affirmance rate is slightly higher than that of district court patent decisions, in which the Federal Circuit affirmed about 70% of the cases and affirmed in part in another 13%. *Id.*

The second clue is in the IPR system’s rate of invalidating patents—and in particular how that rate compares with the baseline in district courts. If the IPR system were defective in some way, or skewed towards a particular result, we might expect its comparative invalidation rate to diverge from that of other bodies. But it has not.

“[A]pproximately 46.5% of challenged patents are invalidated in whole or in part by a [PTAB] decision.” Josh Landau, *A Little More Than Forty Percent: Outcomes at the PTAB, District Court, and the EPO*, Patent Progress (May 1, 2018) (“*Outcomes at the PTAB*”), <https://bit.ly/3mpI0OF>. These numbers track district court invalidation rates almost exactly; see *Rational Ignorance*, *supra*, at 1529 n.129 (“About 46% of all patents litigated to a final judgment on validity issues are held invalid.” (citing John R. Allison & Mark A. Lemley, *Empirical Evidence on the Validity of Litigated Patents*, 26 AIPLA Q.J. 185, 205-07 (1998))); see John R. Allison, et al., *Our Divided Patent System*, 82 U. Chi. L. Rev. 1073, 1114 (2015) (study examining the merits of patent cases between 2008 and 2009 and placing the patent invalidation rate around 42.6%).

When one does hear criticism of the merits decisions IPR renders, it often comes from patent-holders, who occasionally suggest a bias towards invalidating patents. But the statistics simply do not bear this out. Not only does the PTAB reach roughly the same results as district courts, but its invalidation rates are also in line with those of the European Patent Office. About one third of patents in Europe are found valid, one third are found invalid, and one third are found partly valid and partly invalid. Landau, *supra* (providing a rule of thumb based on data from the German national courts). The fact is that “around 40-45% of all challenged patents are determined to be invalid in whole or in part,” regardless of whether the challenge to the issued patent is made before the PTAB, a federal district court, the EPO, or the European national courts. *Id.* And the IPR system has been much more favorable to patent holders than its direct predecessor, the PTO’s inter partes reexamination. Compare USPTO, *Trial Statistics: IPR, PGR, CBM* 11 (Sept. 2020) (“*Trial Statistics*”), <https://bit.ly/36pxQI0> (PTAB has upheld approximately 20% of all challenged patent claims that reached a final written decision in IPR), with USPTO, *Inter Partes Reexamination Filing Data* 1 (Sept. 30, 2017) (“*Inter Partes Reexamination Filing Data*”), <https://bit.ly/36ooz3d> (PTO has upheld 6% of the challenged patent claims that reached a final decision in inter partes reexamination).

2. Congress designed the IPR system to be highly efficient.

a. Congress also designed an “*efficient* system for challenging patents that should not have issued.”

H.R. Rep. No. 112-98 at 39-40 (emphasis added). And indeed, many of the same features that make the process reliable also promote efficiency, thus making it a viable alternative to district court litigation.

First, the IPR process permits challengers to go straight to the source of challenged patent rights: the entity that issued the questionable patent in the first place. The PTO, staffed by APJs with deep technical expertise, can then revisit its prior patent grant, consider the parties' arguments and evidence, apply the proper legal standard, and ultimately "'issue and publish a certificate' ... [that] cancels patent claims 'finally determined to be unpatentable,' confirms patent claims 'determined to be patentable,' and incorporates into the patent 'any new or amended claim determined to be patentable.'" *Oil States*, 138 S. Ct. at 1372 (quoting 35 U.S.C. § 318(b)).

Importantly, the PTO's "decision to cancel a patent normally has the same effect as a district court's determination of a patent's invalidity." *Cuozzo*, 136 S. Ct. at 2143. And the challenger, often an accused infringer, can thus obtain the relief it needs without having to spend many years and many millions of dollars in patent litigation. *See infra* 17.

IPR also gives the patent owner options. It can ask the PTO to amend the patent—either to voluntarily "[c]ancel any challenged patent claim," 35 U.S.C. § 316(d)(1)(A), or "propose a reasonable number of substitute claims," *id.* § 316(d)(1)(B). The patent owner can also settle with the IPR petitioner prior to the publication of a final written decision. *Id.* § 317. Or the patent owner can fully litigate the challenge in

the IPR proceeding and if it prevails on the challenged claim, the IPR petitioner is barred from challenging that same patent claim in the future. *See id.* § 315(e) (applying principles of estoppel to future challenges before the PTO or future civil actions).

Second, the IPR process is limited in scope, as it focuses on the relevant question at hand—namely, the validity and enforceability of the challenged claims of the patent. And the very same features that promote reliable decisionmaking also streamline and expedite the review process considerably. *See, e.g.*, 157 Cong. Rec. S1376 (daily ed. Mar. 8, 2011) (remarks of Sen. Kyl) (“Among the reforms that are expected to expedite these proceedings [is] the shift from an examinational to an adjudicative model.”). The IPR process accomplishes this goal through various tools, such as streamlined discovery procedures. For example, PTO rules provide for an abbreviated discovery timeline that proceeds sequentially—generally, three months for the patent owner, followed by three months for the petitioner—and with minimal intervention from the agency in the interim. *See* 37 C.F.R. § 42.51; *see also* PTAB, *Consolidated Trial Practice Guide* (Nov. 2019), <https://bit.ly/39uBS3S>.

Third, the IPR process is quick and cost effective because it has statutorily prescribed time limits to expedite the proceedings. Congress understood that pre-AIA reexamination proceedings, just like district court patent litigation, took several years to conclude—sometimes pending for more than four years. H.R. Rep. No. 112-98 at 45 & n.33; *see also Inter Partes Reexamination Filing Data, supra*, at 1 (noting that inter partes reexamination took on average

approximately 44.2 months). Against that backdrop, Congress opted for a time-limited review process. It provided for the final determination in an IPR proceeding to be issued no later than one year after institution, or a year and a half upon a showing of good cause. *See* 35 U.S.C. § 316(a)(11); *see also* 37 C.F.R. § 42.100(c).

b. Again, available evidence strongly suggests that the system is functioning as Congress intended.

The median time to a decision on institution of a petition is just 188 days. For petitions that are instituted, the median time to a final written decision from the time of the filing of the petition is 550 days. Most IPRs therefore run their course within 18 months, just as Congress intended. This is an extraordinary improvement over inter partes reexamination, which, again, lasted on average 44.2 months, as well as over traditional district court litigation, which can drag on for much longer.

Litigating IPRs has also proven far less expensive than litigating in district court. The median litigation cost for large-scale patent litigation involving more than \$25 million at risk is \$4 million. AIPLA, *Report of the Economic Survey 2019*, at 50 (Sept. 2019) (“AIPLA Report”). By contrast, the median litigation costs for IPR through appeal is \$350,000. *Id.* at 52. Multiply that delta across all IPRs and the total savings to stakeholders in the patent system, both patent holders and challengers, could well be around \$2.6 billion. *See, e.g.,* Perryman Group, *An Assessment of the Impact of the America Invents Act and the Patent Trial and Appeal Board on the US Economy* 3-6 (June

2020), <https://bit.ly/36okc8k>; *see also generally* AIPLA Report at 50-52, 56-62.

IPRs conserve judicial resources, too. District courts regularly stay patent infringement litigation pending the results of an IPR. A review of publicly available docket data shows that district courts have done so in approximately 1,600 patent cases since the system's advent, allowing APJs to resolve validity disputes expertly and efficiently. At a minimum, this relieves district courts of having to process difficult validity disputes. Where the IPR results in the invalidation of one or more of the patent claims asserted in the district court lawsuit, it will "simplify proceedings before the courts and ... give the courts the benefit of the expert agency's full and focused consideration of the effect of prior art on patents being asserted in litigation." *NFC Tech. LLC v. HTC Am., Inc.*, No. 2:13-cv-1058-WCB, 2015 WL 1069111, at *4 (E.D. Tex. Mar. 11, 2015) (Bryson, J., sitting by designation). And in still other instances, an IPR will result in full dismissal of the case, shifting what would have been protracted, docket-clogging litigation to a forum that handles it just as well, but for a fraction of the cost.

The IPR system is not perfect. Apple is not always happy with the decisions the PTAB renders, just as it is not always happy with decisions in litigation. Like any large-scale government program, IPR procedures and policies need to be evaluated and refined from time to time to fit real-world conditions and ensure a system that better serves Congress's overarching goals. But by and large, the design of the IPR system

represents Congress’s best effort to date to process challenges to questionable patents.

B. Innovators depend on the promise of the IPR system Congress created.

The IPR system was designed with innovators in mind—just as the Framers intended. U.S. Const. art. I, § 8, cl. 8 (granting Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to ... Inventors the exclusive Right to their respective ... Discoveries”). Few innovators have more experience with the challenges Congress sought to address and with the efficacy of Congress’s solution than Apple. Apple is thus well-suited to offer perspective on how an innovator relies upon the IPR process to navigate the patent system.

1. Since 2012, Apple has filed 676 IPR petitions, the most of any party.³ Why is Apple such an active petitioner? Because it is a frequent defendant in patent infringement suits—Apple has faced over 650 lawsuits since 2010, a rate of more than one *per week*. When Apple is sued, it of course must raise any meritorious challenge to the validity of the patents asserted. The only question is which forum. And since its advent, Apple has typically chosen to raise challenges via IPR. The great majority of Apple’s petitions are responses to a patent holder’s claim that Apple is infringing, made either through the filing of a lawsuit

³ Data in this section is tabulated from Apple’s internal records, which have been cross-checked against online database Lex Machina.

or through the saber-rattling demand letter that often precedes litigation.

To date, 476 of Apple's petitions have received an institution decision. Of those petitions, the Director has instituted review on 350 (73.5%), and denied institution in 126 (26.5%). Another 60 of Apple's petitions prompted settlements pre-institution. In the 229 cases in which the PTAB has reached final decision, the PTAB has invalidated all patent claims in 161 (70.3%) and at least one of the patent claims at issue in another 38 (16.6%). Of course Apple prefers to win, but that does not always happen. And of course, Apple often disagrees with the decision when it does not prevail. But Apple can attest that the decisionmaking process is generally reliable, conducted by impartial and knowledgeable APJs seeking to get it right.

In Apple's experience, the process is also efficient. The median time to an institution decision is 6 months. When petitions are instituted, the average time to a final written decision—that is, to conduct discovery, hold the hearing, and obtain a decision—is 12 months. So usually in a year-and-a-half, both Apple and the patent holder have a final decision on validity. The disappointed party can then take the decision up with the Federal Circuit, likely years before district court litigation would arrive there.

2. The benefits of IPRs are considerable.

Conserving resources. From Apple's perspective, the most obvious benefit of the IPR system is that it dramatically lowers the cost of litigating

patent disputes. As explained above, for large-scale patent litigation, an alleged infringer must budget anywhere from \$2 to \$9 million. *See* AIPLA Report, *supra*, at 56. But the costs of litigating in the PTAB are a fraction of that. *See id.* at 52. So success in an IPR proceeding will almost always result in huge cost savings, which in turn allow innovators like Apple to invest more in core business functions, like technological research and product development.

One concrete example is a patent dispute with Chestnut Hill Sound Inc. Chestnut Hill sued Apple in the District of Delaware on March 25, 2015, alleging that Apple infringed two patents directed to entertainment and multimedia devices. Complaint, *Chestnut Hill Sound Inc. v. Apple Inc.*, No. 1:15-cv-261-RGA (D. Del. Mar. 25, 2015), Dkt. 1. After some motion practice, Apple filed IPR petitions as to each of the patents asserted, and asked the district court to stay the litigation, which the district court did.

The PTAB ultimately granted Apple's petitions as to both of Chestnut Hill's patents. It issued a written decision on one in January 2017 finding all claims unpatentable; it issued its decision on the other in November 2017, again finding all claims unpatentable. By July 2019, the Federal Circuit had affirmed in both instances. *Chestnut Hill Sound Inc. v. Apple, Inc.*, 714 F. App'x 1020 (Fed. Cir. 2018); *Chestnut Hill Sound, Inc. v. Apple Inc.*, 774 F. App'x 676 (Fed. Cir. 2019). Soon after, Chestnut Hill dismissed its lawsuit. All told, the district court case involved a mere 67 docket entries. Virtually the entirety of the dispute was thus resolved at the PTAB for a fraction of the

resources the parties and district court would have expended on litigation.

Narrowing disputes. Even where Apple's IPRs do not totally negate a patent-holder's infringement claims, they may still succeed in focusing the issues in ongoing district court litigation. District courts have repeatedly recognized that this benefits all parties to the dispute as well as the district court, and they routinely stay cases on this basis. Typical reasoning:

Here, the Court finds that a stay pending IPR will likely simplify the litigation and facilitate trial. Most significantly, all 17 disputed claim terms are at issue in the IPR proceeding and petitions. If a stay is not granted, both the Court and the parties may expend needless resources on claims that will ultimately be amended or declared invalid. Staying the consolidated cases will promote judicial economy and efficiency. Additionally, the PTAB's written determinations may clarify the scope of the patents and prior art, thus narrowing the disputes and limiting the breadth of discovery. Finally, as the parties jointly argue, IPR may encourage a settlement without the further use of the Court.

Arctic Cat Inc. v. Polaris Indus. Inc., No. 13-cv-3579 (JRT/FLN), 2015 WL 6757533, at *3 (D. Minn. Nov. 5, 2015) (cleaned up).

An example is *Aylus Networks, Inc. v. Apple Inc.*, No. 3:13-cv-4700-EMC (N.D. Cal. May 29, 2015). In that case, Aylus sued Apple alleging infringement of 33 separate claims of a patent. Apple petitioned for review of all 33, and the PTAB instituted review on all but 4. *Apple, Inc. v. Aylus Networks, Inc.*, No. IPR2014-01566, 2015 WL 1870711 (PTAB Apr. 23, 2015); *Apple, Inc. v. Aylus Networks, Inc.*, No. IPR2014-01565, 2015 WL 1870710 (PTAB Apr. 22, 2015). As a result, Aylus dismissed from the district court action all claims except those based on two of the claims in the patent. The parties then proceeded to litigate the remaining claims, and Apple ultimately defeated them based on Aylus’s own statements to the PTAB in opposing institution of Apple’s petitions. The Federal Circuit affirmed, relying on Aylus’s binding statements before the PTAB. *Aylus Networks, Inc. v. Apple Inc.*, 856 F.3d 1353, 1363 (Fed. Cir. 2017).

In *Aylus*, the IPR system thus succeeded in sharpening the terms of the parties’ dispute and narrowing the issues to be decided. This is common in Apple’s experience, and it often facilitates resolution of disputes both in court and out.

Leveling the playing field against NPEs. Finally, IPRs help correct a major imbalance in the patent system caused by the prevalence of “non-practicing entities,” or NPEs. Most NPEs exist purely to own and assert patents against innovators. Because they do not make and sell things, they do not mind drawn-out litigation—their very purpose, after all, is to turn patents into profit either by extracting royalties or obtaining damages. And indeed, the cost of litigation provides enormous leverage in this

endeavor. Defendants in an NPE suit are often subject to burdensome one-sided discovery. NPEs inundate defendants with requests for document production, interrogatories, and deposition notices. Thus, even a meritless NPE suit is costly to litigate, a reality NPEs use to force *in terrorem* settlements from innovators.

In 2006, a member of this Court recognized the rise of NPEs. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 396 (2006) (Kennedy, J., concurring). In 2013, Apple filed an amicus brief before this Court in a case about attorneys' fees under the Patent Act, documenting Apple's status as the single favorite target of NPEs. Brief for Apple Inc. as Amicus Curiae in Support of Neither Party, *Octane Fitness, LLC v. Icon Health & Fitness, Inc.*, No. 12-1184 (Dec. 9, 2013). That was back in the IPR system's infancy. And at the time, Apple reported that despite rarely losing patent cases on the merits, it had agreed to a settlement in 51 of 57 cases against NPEs.

Today, Apple remains a favorite target of NPEs, but the IPR system has leveled the playing field considerably. Because IPRs offer a lower-cost way to challenge NPEs on the merits, Apple has less incentive to settle baseless suits. And because many NPEs habitually assert just the sorts of patents IPRs are designed to weed out, Apple has a strong likelihood of success before the PTAB.

A prime example is Apple's ongoing litigation against an NPE called Uniloc, one of several owned or financed by a larger entity called Fortress Investment Group LLC. Uniloc has sought to wage a war of

attrition against Apple, filing 24 lawsuits in the United States over the last 5 years and asserting 35 patents. *See* App. 1a-2a. The asserted patents have a host of problems, and Apple and others have filed IPRs on the patents in 22 of the 24 lawsuits. To date, Apple's IPRs have resulted in the cancellation of all claims at issue in 12 of the 20 cases on which related IPRs have reached a written decision, and cancellation of most of the asserted claims in four more cases. *Id.*; App. 2a-4a. Apple's IPRs against Uniloc have delivered all the typical benefits of IPRs discussed above—cost savings, narrowing of the issues, and clearing away the patent thicket to remove unpatentable claims. And they also reflect how the IPR system has provided a critical mechanism for effectively resolving meritless NPE lawsuits and helping prevent the deadweight losses they impose on society.

3. As the above illustrates, Apple has come to depend heavily on the functioning of the IPR system. It currently has 93 petitions that are not yet final and another 38 that were joined to existing IPR proceedings. Approximately 57 are awaiting a decision on institution; and 74 (including the 38 referenced above that were joined to another proceeding) have been instituted and have progressed to some stage in the adjudicatory process.

And Apple is not alone. Parties filed 1,429 IPR petitions in FY 2020, an average of over 100 per month. *See Trial Statistics, supra*, at 5-6. There are currently 862 pending, and more will roll in during the pendency of this case. The parties who filed these petitions did so expecting dispositions within 18 months—dispositions they hope will allow them to

reallocate resources to their businesses and clear the path for innovation.

A decade into its existence, the IPR system is an indispensable avenue for innovators navigating the patent system. And just as sure as closing down a major thoroughfare would grind a metropolis to a halt, disrupting the IPR system's functioning—even for a short time—would be a systemwide nightmare.

II. If The IPR System Needs Fixing, This Court Should Employ Remedial Doctrines Designed To Minimize Disruption.

Apple appreciates that any government program, no matter how important or beneficial, must comply with constitutional requirements. But Apple also knows first-hand the practical fallout that would result from a ruling that brings the IPR system to an immediate stop. It therefore respectfully urges the Court, whatever its ruling on the merits, to avoid scuttling the vast reliance interests stakeholders have placed in the IPR system. Two flexible remedial powers available to the Court—the power to sever problematic provisions of statutes, *infra* § A, and the power to stay its own judgments, *infra* § B—would allow it to ensure the continuing functioning of the IPR system while permitting Congress to address any necessary fix.

A. An IPR system without removal protections for APJs is capable of functioning.

Having found a constitutional defect in the IPR system's design, the Federal Circuit sought to cure it by severing any problematic provisions in the AIA. Although the court had found APJs to be principal officers, it also recognized that Congress had clearly *intended* APJs to be inferior officers. So, the court reasoned, it could cure any constitutional defect if it could identify a provision that, if severed, would render APJs the inferior officers Congress wanted them to be all along. APJs could then be appointed by the sort of "Head[] of Department[]" who may constitutionally appoint inferior officers under the Appointments Clause, U.S. Const., art. II, § 2, cl. 2. The Federal Circuit found that it could achieve this result by severing APJs' removal protections, 35 U.S.C. § 3(c); 5 U.S.C. § 7513, thus rendering APJs more directly responsive to the Secretary of Commerce and Director of the PTO.

As a policy matter, Apple believes that the optimal IPR system would afford reasonable removal protections to the skilled, dedicated APJs who operate it. Congress, of course, intended just that. If, however, this Court finds that an IPR system without APJ removal protections would pass constitutional muster, it should do the same thing the Federal Circuit did: Sever those protections from the statute, permit the IPR system to operate, and rely on Congress to modify the AIA in due course.

“Th[is] Court’s precedents reflect a decisive preference for surgical severance rather than wholesale destruction.” *Barr v. Am. Ass’n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2350-51 (2020). “Generally speaking, when confronting a constitutional flaw in a statute, [courts should] try to limit the solution to the problem,” severing any “problematic portions while leaving the remainder intact.” *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 508 (2010) (cleaned up).

Severance will be appropriate as long as “the remainder of the law is capable of functioning independently and thus would be fully operative as a law.” *Barr*, 140 S. Ct. at 2352 (cleaned up). In the separation-of-powers context, moreover, this Court has also asked whether “Congress, faced with the limitations imposed by the Constitution, would have preferred no [body] at all to a [body] whose members are removable at will.” *Free Enter. Fund*, 561 U.S. at 509. But the analysis is not a freewheeling search for some prior Congress’s “hypothetical intent.” *Barr*, 140 S. Ct. at 2350. As long as a statute’s basic functioning will not be impaired by severance, it is the preferred remedy.

The IPR system is “capable of functioning” without APJ removal protections and it can remain “fully operative.” It is fully operative right now. The Federal Circuit severed the removal protections on October 31, 2019, more than a year ago. Parties continue to file petitions. APJs continue to make institution decisions, conduct discovery and trials, and issue written determinations. And there is no hint that APJs are failing to perform their duties with the same skill, diligence, and even-handedness they always had.

The parties challenging the IPR system’s constitutional structure have argued that removal protections are “necessary to ensure impartiality and independence,” and that severing them will “undermine[] the integrity of the [IPR system] and threaten[] the fairness of agency adjudication generally.” Pet’n for Cert. at 16, *Arthrex, Inc. v. Smith & Nephew, Inc.*, No 19-1458. Again, Apple agrees that an optimal IPR system would afford APJs removal protections. But to treat that feature as some indispensable guarantor of a functioning IPR system sells Congress’s handiwork short. As detailed above (at 9-12), Congress built in a host of structural safeguards to ensure that the IPR process results in consistent and reasoned decisions. Procedurally, Congress opted for an adversarial, adjudicatory proceeding, with discovery, rules of evidence, and multi-member decisionmaking. *Supra* 9-10, 12. Substantively, Congress limited APJs’ basic task to the application of narrow legal doctrines to technical facts—APJs are not asked to make policy decisions.

As for independence, severing removal protections will not destroy Congress’s intended balance. Again, we know Congress intended APJs to be inferior officers, who by definition have superiors. *Edmond v. United States*, 520 U.S. 651, 662 (1997). The Patent Act makes the Director of the PTO “responsible for providing policy direction and management supervision.” 35 U.S.C. § 3(a)(2)(A). This grant of power, along with other specific statutory provisions, already gives the Director authority, within statutorily prescribed bounds, over several aspects of the IPR process and the decisions it yields. *Supra* 9, 11. Severing removal protections will not so alter existing

supervisory authority over APJs as to undermine the system Congress devised.

B. If congressional intervention is necessary, this Court should stay its decision to avoid disrupting the system's functioning.

If this Court rejects the Federal Circuit's fix and finds that congressional action is necessary, it can avoid disrupting the IPR process by staying its judgment while Congress works to amend the statute. This Court has exercised its power to stay its judgment in similar circumstances. Given the extraordinary reliance interests bound up with the IPR system, that is warranted here.

To begin with, the Constitution does not *require* the temporary invalidation of the IPR process. Nothing in the Constitution prescribes any particular remedy for an Appointments Clause violation. This Court has held simply that a person “who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case” is entitled to “whatever relief may be appropriate.” *Ryder v. United States*, 515 U.S. 177, 182-183 (1995).

What relief follows depends on the circumstances of the case—on “what is necessary, what is fair, and what is workable.” *New York v. Cathedral Acad.*, 434 U.S. 125, 129 (1977). This is particularly so for injunctive relief; in that context, considerations of the public interest and the equities at stake always inform this Court's assessment of the appropriate remedy. *See, e.g., Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7,

20 (2008); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-13 (1982).

On multiple occasions, this Court has stayed its judgment to afford Congress an opportunity to cure a constitutional defect, permitting the problematic governmental entity to continue to operate in the meantime. *See, e.g., Bowsher v. Synar*, 478 U.S. 714, 736 (1986) (holding that the delegation of executive functions to the Comptroller General violated the separation of powers principle, but staying the judgment “to permit Congress to implement ... fallback [reporting] provisions” of the Balanced Budget and Emergency Deficit Control Act); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982) (plurality) (holding that the then-existing bankruptcy court system violated Article III of the Constitution, but granting a six-month stay to “afford Congress an opportunity to reconstitute the bankruptcy courts ... without impairing the interim administration of the bankruptcy laws”); *id.* at 92 (Rehnquist, J., concurring in the judgment); *Buckley v. Valeo*, 424 U.S. 1, 143-44 (1976) (holding that protocol for the appointment of Federal Election Commission members violated the Appointments Clause, but granting a “limited stay” of its judgment to “afford Congress an opportunity to reconstitute the Commission by law or to adopt other valid enforcement mechanisms” and thus allow the Commission to operate “in the interim” without affecting its “authority ... to exercise [its] duties and powers”).

There are two reasons this Court should follow that line of precedent here.

First, as noted, Congress designed IPRs to be reliable, efficient, and a cornerstone of our modern patent system. Both patent owners and accused infringers depend heavily on its sustained operation. Any potential interruption of the process “would surely visit substantial injustice and hardship upon” thousands, who like Apple, rely upon the IPR system to process challenges to issued patents. *N. Pipeline*, 458 U.S. at 88 (plurality). Relatedly, the temporary invalidation of the IPR system will undermine the predictability and uniformity essential to ongoing technological development and innovation, and will subvert the public’s ability to make informed commercial decisions.

Second, Congress has acted swiftly in the past when the PTO has required maintenance. *See* Appointment of Administrative Patent Judges and Administrative Trademark Judges, Pub. L. No. 110-313, § 1(a), 122 Stat. 3014, 3014 (2008) (codified at 35 U.S.C. § 6(a)) (transferring the appointment authority of APJs from the PTO Director to the Secretary of Commerce in light of John F. Duffy, *Are Administrative Patent Judges Unconstitutional?*, 2007 *Patently-O Patent L.J.* 21, 21). Congress can be trusted to do the same this time around. In the meantime, its IPR system can (and should) continue to hum.

CONCLUSION

The IPR system works as Congress intended, and innovators depend heavily on its functioning. If this Court decides that its structure runs afoul of the Appointments Clause, Apple respectfully urges the

Court to choose a remedy that avoids disrupting the system's functioning.

Respectfully submitted,

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