

No. 22-298

IN THE
Supreme Court of the United States

JUMP ROPE SYSTEMS, LLC,
Petitioner,
v.

COULTER VENTURES, LLC, dba Rogue Fitness,
Respondent.

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

**COULTER VENTURES, LLC'S
BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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January 19, 2023

QUESTION PRESENTED

Petitioner sued respondent in federal district court for infringement of two patents. The district court stayed the lawsuit pending inter partes review (“IPR”) of the patents in the U.S. Patent and Trademark Office (“PTO”) by the PTO’s Patent Trial and Appeal Board (“PTAB”). In separate decisions, the PTAB determined that all claims in both patents were unpatentable. The Federal Circuit affirmed and petitioner did not further appeal. The district court then dismissed the infringement lawsuit. After the PTO formally cancelled the claims, petitioner appealed to this Court the dismissal of its lawsuit and seeks to maintain its infringement lawsuit using the unpatentable and now cancelled patent claims.

The question presented is:

Where a district court makes no findings about the validity of patent claims and stays a patent infringement lawsuit pending PTAB inter partes review and the Federal Circuit affirms the PTAB determination that all the patent claims are unpatentable, can a plaintiff maintain the patent lawsuit and require the defendant to prove invalidity of the unpatentable claims or is the plaintiff collaterally estopped from doing so?

(i)

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Coulter Ventures, LLC states that it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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OPINIONS AND ORDERS

The district court's entry of a consent judgment in favor of respondent on March 9, 2022 is unreported and can be found at Pet. App. 5.

The Federal Circuit's May 5, 2022 denial of petitioner's petition for *en banc* hearing is unreported and can be found at Pet. App. 3.

The Federal Circuit's June 28, 2022 affirmance of the district court's consent judgment is unreported and can be found at Pet. App. 1. *Jump Rope Sys., LLC v. Coulter Ventures, LLC*, No. 2022-1624, 2022 WL 2313969 (Fed. Cir. June 28, 2022).

Opinions and orders in related proceedings:

The PTAB's July 17, 2020 final written decisions finding unpatentable all claims of the asserted patents may be found at *Coulter Ventures, LLC v. Jump Rope Systems, LLC*, No. IPR2019-00586, 2020 WL 4037647 (P.T.A.B. July 17, 2020) and *Coulter Ventures, LLC v. Jump Rope Systems, LLC*, No. IPR2019-00587, 2020 WL 4037935 (P.T.A.B. July 17, 2020).

The Federal Circuit's October 6, 2021 decision affirming the PTAB decisions of unpatentability is unreported and may be found at *Jump Rope Systems, LLC v. Coulter Ventures, LLC*, Nos. 2020-2284, 2020-2285, 2021 WL 4592276 (Fed. Cir. Oct. 6, 2021).

The Inter Partes Review Certificates issued August 3, 2022 by the U.S. Patent and Trademark Office cancelling all the claims of both asserted patents can be found at Opp. App. 1a and 3a.

INTRODUCTION

The petition should be denied for four reasons. First, petitioner's appeal is moot. After the district court entered judgment and the Federal Circuit affirmed, the PTAB cancelled all of petitioner's patent claims. A case is moot where, as here, an intervening event causes the plaintiff to lose the right it seeks to litigate. The cancellation of the patent claims means that there is no case or controversy, the case is moot, and petitioner lacks standing to appeal.

Second, this case involves a straightforward application of collateral estoppel that does not raise an important federal question and in no way conflicts with relevant decisions of this Court. The PTAB unpatentability determination means that petitioner does not have, and should never have had, patent rights. Once the Federal Circuit affirmed the PTAB determination, petitioner was collaterally estopped from further litigating infringement and validity of the unpatentable claims.

Petitioner takes issue with the Federal Circuit's *XY* decision, but this decision is correct and unremarkable. The court concluded that affirmance of a PTAB unpatentability determination "collaterally estops [the plaintiff] from asserting the patent in any further proceedings." *XY, LLC v. Trans Ova Genetics, L.C.*, 890 F.3d 1282, 1294 (Fed. Cir. 2018). As such, the *XY* court did not address the defendant's invalidity arguments and "dismiss[ed] [the defendant's] appeal of the district court's decision on this issue as moot." *Id.* at 1295.

The *XY* decision, which analyzed Supreme Court precedent, reflects the necessary result of applying the collateral estoppel doctrine to a final judgment of unpatentability resulting from an IPR. Petitioner does

not contest that the elements of collateral estoppel in the Restatement (Second) of Judgments § 27 (Am. L. Inst. 1982) are present here—nor could it. The PTAB determined that no patent should have been issued. Federal Circuit affirmance resulted in a final and conclusive judgment. Collateral estoppel as to the issue of patentability, therefore, prevents petitioner from continuing to litigate its patents.

Petitioner’s arguments about collateral estoppel not applying when there are different burdens of proof in separate proceedings ignore the statutory basis of the burdens. The U.S. Patent and Trademark Office (“PTO”) examines and issues patents, which remain subject to further review in the PTO by the PTAB under the Leahy-Smith America Invents Act (“AIA”). The statutory burden of preponderance of the evidence applies to an unpatentability determination in an IPR because the IPR allows the PTAB to review and, if necessary, correct its original patentability decision. The burden of clear and convincing evidence applies to a defendant in a district court litigation seeking to invalidate a patent issued by the PTO. There the defendant must overcome the presumption that the patent was correctly issued by the PTO. Congress was aware of the burden of proof in district court, yet enacted a lower burden for IPRs. Petitioner offers no reason to disregard the law or Congress’s intent. In any event, because petitioner’s patents were never properly issued, the burden of proving invalidity in district court is irrelevant.

Third, petitioner’s proposal that unpatentable claims should be litigated in district court is a significant departure from established precedent and would frustrate the framework of the AIA. For decades, the PTO has exercised its authority to cancel patent claims, yet

petitioner cites no example of a district court litigating a cancelled claim. This is not surprising since petitioner’s proposal would improperly allow a district court to recognize or create patent rights where the PTO’s PTAB has determined (and the Federal Circuit has affirmed) that there are none. And petitioner’s proposal would turn the AIA on its head. Congress created IPR proceedings to allow for more efficient review and removal of low-quality patents that should not have been issued and expressly envisioned IPRs to be an alternative to litigation. Petitioner’s proposal would render this fundamental aspect of the AIA meaningless because patent claims found unpatentable by the PTAB in an IPR would still be subject to litigation in district court.

Fourth, this case is particularly unsuited for certiorari because the PTAB did nothing that conflicts with a district court decision, judgment or jury verdict. The district court stayed the proceedings so the PTAB could resolve patentability and then dismissed the case after the claims were found unpatentable. The PTAB did not overrule, trump or act inconsistently with the district court.

STATEMENT OF THE CASE

Petitioner obtained two patents on jump ropes, in 2010 and 2012. The alleged novelty of the jump ropes was having the rope connect to a swivel joint placed on the end of a rotating shaft—features that had been included in jump ropes since the 1970s.

Petitioner approached respondent Coulter Ventures, LLC about licensing the patents in 2011.¹ Respondent

¹ Respondent disagrees with petitioner’s characterization of the early communications between the parties prior to the law-

studied the patents and the “prior art” (already existing information describing jump ropes) and determined that the patents did not cover anything new. As a result, respondent declined to pay a license fee and told petitioner that respondent’s jump rope products did not infringe any valid claim of petitioner’s patents. Respondent also invited petitioner to provide additional information or answer questions regarding its allegations of infringement, but petitioner did not respond.

Petitioner next embarked on a campaign of seeking and, in some instances, obtaining royalties for those patents from other parties that sold jump ropes. The parties that settled and agreed to pay royalties were small; the fees and costs of defending a patent infringement lawsuit, even briefly, would have dwarfed the royalty payments.

Then, over seven years after first alleging infringement against respondent, petitioner sued respondent for patent infringement in the Southern District of Ohio on July 26, 2018. As part of its defense, respondent initiated on January 17, 2019 inter partes review of the patents at the PTAB in accordance with the AIA.

Respondent then moved to stay the lawsuit pending the outcome of the IPR. The district court granted the stay, recognizing the inefficiencies that would result if the parties continued to litigate patents that the PTAB later determined should not have been issued. Order Mot. Stay at 3, ECF No. 33. The district court made no finding as to the validity of the asserted patents.

suit but will not address them because they are not relevant to granting certiorari.

The PTAB, following the AIA provisions, reviewed the claims of petitioner's patents in separate IPRs. The PTAB considered jump rope prior art from the 1970s that was not previously considered by the PTO. The PTAB conducted a trial that lasted many months and involved fact and expert discovery, expert reports, expert depositions, briefing, and oral argument. Petitioner fully participated, submitting a patent owner's statement, patent owner's reply, an expert report, and trial exhibits, as well as cross-examining respondent's expert and participating in oral argument.

During the IPR, petitioner also had the opportunity to amend or narrow its patent claims to avoid the prior art. Petitioner did not do so.

In lengthy, detailed Final Written Decisions dated July 17, 2020, the PTAB determined that all claims of both patents were directed to subject matter that would have been obvious in view of the prior art and thus were not patentable under 35 U.S.C. § 103. *Coulter Ventures, LLC v. Jump Rope Sys., LLC*, No. IPR2019-00586, 2020 WL 4037647 (P.T.A.B. July 17, 2020); *Coulter Ventures, LLC v. Jump Rope Sys., LLC*, No. IPR2019-00587, 2020 WL 4037935 (P.T.A.B. July 17, 2020).

Petitioner appealed the PTAB's Final Written Decisions to the Federal Circuit, which, after briefing and oral argument, affirmed. *Jump Rope Sys., LLC v. Coulter Ventures, LLC*, Nos. 2020-2284, 2020-2285, 2021 WL 4592276 (Fed. Cir. Oct. 6, 2021). Petitioner did not appeal that decision to the Supreme Court. Accordingly, there is a final, unappealable judgment of unpatentability.

On March 9, 2022, the district court, which had stayed the proceedings, entered a consent judgment in favor of respondent. Pet. App. 5.

On April 19, 2022, petitioner appealed the entry of the consent judgment, petitioning for hearing *en banc* with the Federal Circuit in view of the governing XY decision.

Without dissent, the Federal Circuit denied that petition on May 5, 2022. Pet. App. 3. The Federal Circuit then affirmed the district court's judgment on June 28, 2022. Pet. App. 1; *Jump Rope Sys., LLC v. Coulter Ventures, LLC*, No. 2022-1624, 2022 WL 2313969 (Fed. Cir. June 28, 2022).

The PTAB issued cancellation certificates on August 3, 2022 that cancelled all claims in both of petitioner's patents. Opp. App. 1a, 3a.

Petitioner filed its petition for writ of certiorari with the Supreme Court on September 26, 2022.

REASONS FOR DENYING THE PETITION

I. The Petition Is Moot and Petitioner Lacks Standing

A. The PTAB Reviews Patentability of Patent Claims and Cancels Them if Unpatentable

The AIA allows the PTO's PTAB to conduct inter partes review of issued patents. 35 U.S.C. § 311(a); *Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261, 272 (2016) (an "important congressional objective" of the AIA is "giving the Patent Office significant power to revisit and revise earlier patent grants."). "Inter partes review is simply a reconsideration of [a patent] grant, and Congress has permissibly reserved the

PTO's authority to conduct that reconsideration." *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1373 (2018).

One purpose of the review is to eliminate patents that should never have been issued because the patent claims are not novel or inventive and are therefore unpatentable. H.R. Rep. No. 112-98, pt. 1, at 39–40 (2011), *as reprinted in* 2011 U.S.C.C.A.N. 67, 69 (inter partes review is an “efficient system for challenging patents that should not have issued”); 157 Cong. Rec. 13024 (2011) (statement of Sen. Klobuchar) (“The legislation also provides a modernized, streamlined mechanism for third parties who want to challenge recently issued, low-quality patents that should never have been issued in the first place.”); 157 Cong. Rec. 9949 (2011) (statement of Rep. Goodlatte) (“If the evidence shows that the patent is indeed invalid, then the patent applicant should never have received the patent in the first place.”); 157 Cong. Rec. 2860 (2011) (statement of Sen. Whitehouse) (“Unfortunately, numerous poor-quality patents have issued in recent years, resulting in seemingly endless litigation that casts a cloud over patent ownership.”).

Eliminating these erroneously issued patents protects the public interest and the entire patent system. *Oil States*, 138 S. Ct. at 1374 (“inter partes review protects ‘the public’s paramount interest in seeing that patent monopolies are kept within their legitimate scope’” (quoting *Cuozzo*, 579 U.S. at 279–80)); 157 Cong. Rec. 13024 (2011) (statement of Sen. Klobuchar) (“Eliminating these potential trivial patents will help the entire patent system by improving certainty.”); 157 Cong. Rec. 2707 (2011) (statement of Sen. Leahy) (“Patents of low quality and dubious validity, by contrast, enable patent trolls who extort unreasonable

licensing fees from legitimate businesses, and constitute a drag on innovation. Too many dubious patents also unjustly cast doubt on truly high quality patents.”).

When a patent claim is determined to be unpatentable in an IPR, the PTO cancels the claim once the time for appeal has expired or any appeal has terminated. 35 U.S.C. § 318(b); *see also Oil States*, 138 S. Ct. at 1370 (“Patent claims are granted subject to the qualification that the PTO has ‘the authority to reexamine—and perhaps cancel—a patent claim’ in an inter partes review.” (quoting *Cuozzo*, 579 U.S. at 267)).

B. The PTO’s Cancellation of Petitioner’s Patent Claims Moots Petitioner’s Appeal and Eliminates Petitioner’s Standing

The PTO issued certificates canceling petitioner’s patent claims under 35 U.S.C. § 318(b) on August 3, 2022.² Opp. App. 1a, 3a. Once the claims were canceled, petitioner had no patent rights. *See Moffitt v. Garr*, 66 U.S. 273, 283 (1861) (“unless [a patent] exists, and is in force at the time of trial and judgment, the suit fails”); *Meyer v. Pritchard*, 23 L. Ed. 961, 961 (1877) (“because the patent upon which their rights depend has been cancelled[,] [t]here is no longer any real or substantial controversy . . . and for that reason the appeal is dismissed”); *John Simmons Co. v. Grier Bros. Co.*, 258 U.S. 82, 91 (1922) (holding that a court must apply intervening legal developments affecting the asserted patent’s validity while a patent suit remains pending).

² The PTAB cancellation certificates issued after the district court’s judgment, on March 9, 2022, and the Federal Circuit’s affirmance of that judgment on June 28, 2022.

Because petitioner has no patent rights, there is no actual controversy and petitioner's case is moot.³ This Court has "repeatedly held that an 'actual controversy' must exist not only 'at the time the complaint is filed,' but through 'all stages' of the litigation." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90–91 (2013) (citation omitted). If, as here, an intervening event "deprives the plaintiff of a 'personal stake in the outcome of the lawsuit,' at any point during litigation, the action can no longer proceed and must be dismissed as moot." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 72 (2013) (citation omitted). An intervening event moots litigation when it "affects, resolves, or terminates the subject matter of the controversy," including when the resolution is by an administrative agency. 15 James Wm. Moore et al., *Moore's Federal Practice* §§ 101.93[1], [3], 101.94[2], 101.96 (3d ed. 2022).

Petitioner lacks standing for the same reason that its case is moot. Constitutional standing requires that the plaintiff has suffered "an invasion of a legally protected interest." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Because petitioner has no patent rights, it has not suffered an invasion of a legally protected interest and thus has no standing.

And the PTAB did nothing inconsistent with the district court, much less to overrule or trump it. There was no district court finding, judgment, or jury verdict as to the validity of the patent claims. So there is no basis for petitioner to argue that it still has a right or interest to litigate due to a conflicting district court finding.

³ This appeal was also moot when petitioner filed its petition on September 26, 2022.

Petitioner’s argument that there are no procedural or jurisdictional barriers to this Court’s review, Pet. at 16, is incorrect. Petitioner lacks standing and its case is moot; there is no reason to grant certiorari given the cancellation of its patent claims. And if the Court were to grant certiorari, it should only be for the purpose of dismissal. *United States v. Munsingwear*, 340 U.S. 36, 39 (1950) (“The established practice of the Court in dealing with a civil case from a court in the federal system that has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss.”).

II. Collateral Estoppel Applies

Certiorari should be denied because petitioner does not raise any actual defect with the application of collateral estoppel.

A. Unpatentability Determinations Are Intended to Impact District Court Patent Infringement Litigation

Congress intended IPRs to take place concurrently with district court patent litigation. *See, e.g.*, 35 U.S.C. §§ 315(a)(2), (a)(3) (mandating the stay of declaratory judgment actions arising after an IPR is filed); § 315(b) (requiring IPR to be sought within one year of service of a patent infringement complaint); § 315(e)(2) (precluding challenger from asserting invalidity grounds in district court that they raised or reasonably could have raised in the IPR); 157 Cong. Rec. 9778 (2011) (statement of Rep. Goodlatte) (“This legislation retains an inter partes re-exam process, which allows innovators to challenge the validity of a patent when they are sued for patent infringement.”)

Congress also intended IPRs to be an alternative to litigation to resolve whether a patent should have issued—thereby streamlining or eliminating parallel litigation. 157 Cong. Rec. 2710 (2011) (statement of Sen. Grassley) (“These new [IPR] procedures would also provide faster, less costly alternatives to civil litigation to challenge patents.”); 157 Cong. Rec. 13166 (2011) (statement of Sen. Schumer) (discussing that the AIA “streamlines review of patents to ensure that the poor-quality patents can be weeded out through administrative review rather than costly litigation”); 157 Cong. Rec. S5353, S5354 (daily ed. Sept. 7, 2011) (Statement of Obama Administration) (discussing post grant review as “cost-effective, timely alternatives to district court litigation”); S. Rep. No. 110-259, at 20 (2008) (discussing “new post-grant review system at the USPTO that will give third parties a quick, inexpensive, and reliable alternative to district court litigation to resolve questions of patent validity.”); 157 Cong. Rec. 2861 (2011) (statement of Sen. Whitehouse) (“Similarly, the bill will improve administrative processes so that disputes over patents can be resolved quickly and cheaply without patents being tied up for years in expensive litigation.”).⁴

As envisioned by Congress, cancellation of patent claims in an IPR must be binding on a parallel infringement litigation. *E.g.*, 157 Cong. Rec. 9791 (2011) (statement of Rep. Smith) (“Never in the history of U.S. patent law has it been held, after a patent claim was determined to be invalid because it covered unprotectable subject matter, that the owner of the

⁴ Petitioner contends that 353 of 427 pending IPR/PGR appeals have co-pending district court litigations involving the same patents, Pet. at 15, but that only underscores the importance of PTAB reviews in streamlining patent disputes.

patent was nevertheless entitled to compensation on the basis of that invalid claim.”); S. Rep. No. 110-259, at 21 (2008) (“No patent holder has a right to an invalid patent, however long that patent holder may have enjoyed that right inappropriately.”); S. Rep. No. 110-259, at 69 (2008) (“The process should be timely and streamlined and should take issues off the table that cannot be resurrected in subsequent litigation, providing a cost effective alternative to litigation.”). Indeed, IPRs could not meet Congress’s goals of being a quicker, less expensive alternative to litigation if the IPR determination had no effect on the district court litigation as petitioner proposes.

B. Petitioner Is Collaterally Estopped from Litigating Patent Infringement and Validity in District Court Because of the Final Judgment of Unpatentability

The Federal Circuit’s affirmation of a PTAB unpatentability decision is a final judgment that the claims are unpatentable. Under the collateral estoppel doctrine, this final judgment of unpatentability prevents a party from asserting that it has patent rights.

The Restatement (Second) of Judgments § 27 (Am. L. Inst. 1982)⁵ provides:

When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclu-

⁵ Notably, the law regarding collateral estoppel is as set forth by the Supreme Court and does not require strict application of the Restatement. See *Blonder-Tongue Lab’ys, Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 333–34 (1971).

sive in a subsequent action between the parties

Here, all elements of collateral estoppel are present, which petitioner does not dispute. In the IPR, the issue of patentability was “actually litigated and determined”—there are no patentable claims. The Federal Circuit affirmed the PTAB determination and entered judgment. Petitioner did not appeal that decision to the Supreme Court so the judgment is “valid and final.” The determination of unpatentability is the central aspect of the judgment and is thus “essential to the judgment.” With each element of collateral estoppel being satisfied, the unpatentability determination—that petitioner has no patent rights—is “conclusive in a subsequent action between the parties.” *See* Restatement (Second) of Judgments § 27. Accordingly, the final judgment of unpatentability has a collateral estoppel or issue preclusive effect and petitioner cannot maintain its patent lawsuit in district court.

This long-established collateral estoppel doctrine was applied in the Federal Circuit’s *XY* decision. There, the court unremarkably reasoned that when a PTAB determination of unpatentability is affirmed it “collaterally estops [the plaintiff] from asserting the patent in any further proceedings.” *XY, LLC v. Trans Ova Genetics, L.C.*, 890 F.3d 1282, 1294 (Fed. Cir. 2018). The Federal Circuit’s affirmation of an unpatentability determination “renders final a judgment” and “has an immediate issue-preclusive effect on any pending or co-pending actions involving the patent.” *Id.* The *XY* court explained that because it affirmed the PTAB’s unpatentability decision, “we do not address [patent invalidity arguments] and dismiss [the] appeal of the district court’s decision on this issue as moot.” *Id.* at 1295.

The XY court explained that it applied the Supreme Court's holdings in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971) and *B & B Hardware, Inc. v. Hargis Industries, Inc.*, 575 U.S. 138 (2015) in reaching its collateral estoppel decision. *Id.* at 1294 ("This court has long applied the Supreme Court's holding in *Blonder-Tongue* to apply collateral estoppel in mooting pending district court findings of no invalidity based on intervening final decisions of patent invalidity. This court also recently applied the Supreme Court's holding in *B & B Hardware . . .*, to apply such estoppel to Board decisions."(citations omitted)). The application of collateral estoppel in this case and XY, is consistent with this Court's application of collateral estoppel in *Blonder-Tongue* and *B & B Hardware*.

Blonder-Tongue held that collateral estoppel prevents a patent owner from relitigating a patent that had been previously found invalid by a federal court. *Blonder-Tongue*, 402 U.S. at 350. However, it noted that, absent legislative guidance, application of estoppel is not appropriate if the patent owner can demonstrate "that he did not have 'a fair opportunity procedurally, substantively and evidentially to pursue his claim the first time.'" *Id.* at 333 (citation omitted). *Blonder-Tongue* provided examples of situations where there might not have been a "fair opportunity"—such as where the tribunal failed to follow Supreme Court patent law, failed to grasp subject matter, or the patent owner was deprived of crucial evidence or witnesses. *Id.* Given this fact-based inquiry, the Court explained that as to the precise standard of when estoppel applies "no one collection of words or phrases, will provide an automatic formula for proper rulings on estoppel pleas. In the end, decision will necessarily

rest on the trial courts' sense of justice and equity." *Id.* at 333–34.⁶

Nothing in *Blonder-Tongue* supports petitioner's argument that collateral estoppel should not apply here. There are no credible suggestions that petitioner did not have a fair opportunity to establish patentability of its patent claims in the IPR proceedings. Petitioner actively argued its position in the IPR, including by submitting a patent owner's response, sur-reply, expert declaration and trial exhibits; cross examining respondent's expert; and participating in oral argument. The PTAB's two Final Written Decisions explain in detail exactly why petitioner's claims were unpatentable. The Federal Circuit affirmed that determination and petitioner did not appeal that affirmance to this Court. Indeed, this Court has credited the fairness of IPR proceedings given that, in addition to providing an adversarial forum for arguing patentability, they empower patent holders to amend or narrow their claims (which petitioner did not do here) to avoid cancellation. *See Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261, 282 (2016); 35 U.S.C. § 316(d).⁷

In *B & B Hardware*, the Federal Circuit held that the PTO's decision concerning registrability of trademarks would collaterally estop a parallel infringement litigation as long as the "ordinary elements of issue preclusion are met." 575 U.S. at 141–42. As discussed

⁶ Likewise, exceptions to the application of collateral estoppel should not automatically apply. *See, e.g., Lane v. Sullivan*, 900 F.2d 1247, 1253 (8th Cir. 1990) (applying collateral estoppel where proceedings used different burdens of proof), *cert. denied*, 498 U.S. 847 (1990).

⁷ Petitioner's criticisms of the merits of the PTAB's unpatentability determination, Pet. at 17–18, are improper because that is not the subject of this appeal.

above in this section, the ordinary elements of issue preclusion are met with regard to PTAB determinations of unpatentability. Thus, *B & B Hardware* supports using a PTAB determination to collaterally estop an infringement litigation as was done in *XY* and the present case. *Id.* at 148 (“[W]here a single issue is before a court and an administrative agency, preclusion . . . often applies.”).

Furthermore, in *Blonder-Tongue*, *B & B Hardware*, and other cases, this Court has recognized the important role of estoppel in addressing economic injustice, conserving resources, and protecting the public interest—particularly in the context of the PTO proceedings. *Blonder-Tongue*, 402 U.S. at 346–47, 349–50 (“[T]he holder of a patent should not be insulated from the assertion of defenses and thus allowed to extract royalties for the use of an idea that is not in fact patentable.”); *B & B Hardware*, 575 U.S. at 140 (“Allowing the same issue to be decided more than once wastes litigants’ resources and adjudicators’ time, and it encourages parties who lose before one tribunal to shop around for another. The doctrine of collateral estoppel or issue preclusion is designed to prevent this from occurring.”); *see also Cuozzo*, 579 U.S. at 279–80 (“inter partes review helps protect the public’s ‘paramount interest in seeing that patent monopolies . . . are kept within their legitimate scope.’” (citation omitted)). The policy principles relied upon in these cases mirror Congress’s purpose for enacting IPRs as explained in Section II.A and further justify the application of estoppel here.

C. The Restatement Exception to the Application of Collateral Estoppel Does Not Apply

Unable to contest the elements of collateral estoppel, petitioner relies on Section 28(4) of the Restatement (Second) of Judgments, which provides an exception to estoppel where in the subsequent action “the adversary has a significantly heavier burden than he had in the first action.” Petitioner argues that collateral estoppel should not apply because the burden of proof in district court for determining whether an issued patent is valid is higher than the burden to establish unpatentability at the PTAB in an IPR proceeding. Pet. at 10.

But this exception to the Restatement does not apply in the context of a PTAB’s IPR determination for the reasons described in *B & B Hardware*:

[B]ecause the principle of issue preclusion was so “well established” at common law, in those situations in which Congress has authorized agencies to resolve disputes, “courts may take it as given that Congress has legislated with the expectation that the principle [of issue preclusion] will apply except when a statutory purpose to the contrary is evident.”

575 U.S. at 148 (quoting *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 108 (1991)).

The AIA expressly authorized the PTAB to resolve the issue of whether a patent should have been issued. And as explained in Sections I.A and II.A, Congress intended IPR as an alternative to litigation that would streamline or eliminate district court litigation. Such

would only occur if Congress expected collateral estoppel to apply.

Indeed, the statutory basis for the different burdens makes clear that Congress legislated with the expectation that collateral estoppel would apply. The ‘heavier burden’ to invalidate an issued patent in district court is conditioned on the existence of a patent right issued by the PTO. 35 U.S.C. § 282(a) (“A *patent* shall be presumed valid.” (emphasis added)). A patent is presumed valid because the PTO is expected to have duly and legally issued the patent after an examination process that determines whether the patentability requirements have been met. *See Microsoft Corp. v. i4i Ltd. P’ship*, 564 U.S. 91, 97 (2011). To overcome this presumption, the burden in a district court litigation to invalidate a patent is clear and convincing evidence. *Id.* at 95, 102.

But the AIA expressly subjects that patent right to PTO reconsideration under a lower burden of proof, preponderance of the evidence. 35 U.S.C. § 316(e); *see Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1373 (2018) (“Inter partes review is simply a reconsideration of [a patent] grant, and Congress has permissibly reserved the PTO’s authority to conduct that reconsideration.”).⁸ So exactly as Congress directed, the higher burden associated with the presumption of validity of an issued patent in a district court proceeding is not applicable in IPRs because the PTO’s PTAB is reconsidering whether a

⁸ This is the same burden of proof, preponderance of the evidence, for determining patentability that applies when the PTO first examines the patent application and uses when deciding whether to grant a patent. *See In re Oetiker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992); MPEP § 2142 (9th ed. Rev. 10, June 2020).

patent should have issued. 35 U.S.C. § 316(e). Thus, the exception in § 28(4) of the Restatement is not applicable here. *See B & B Hardware*, 575 U.S. at 148, 154–60 (explaining why the “well-known exceptions” in Restatement § 28 were not applicable on the facts that existed and applying collateral estoppel arising from the PTO’s ruling as to trademark registrability).

Here, the PTO’s PTAB reconsidered its grant of patent rights to petitioner and determined that the claims were unpatentable (and later cancelled the claims when the judgment was final). In other words, the PTAB concluded that the patents should never have issued. This means that the presumption of validity, which is based on the idea that the PTO correctly issued the patent, does not apply and neither does the higher burden of proof. Thus, the Restatement exception is not applicable. Regardless, because petitioner’s patents were never properly issued, the burden of proving invalidity in district court is irrelevant.⁹

Petitioner relies extensively on Judge Newman’s *XY* dissent, Pet. at 6–8, 13, but that dissent does not consider the reasons discussed above as to why the Restatement exception does not apply. And Judge Newman was concerned in *XY* about issues not present here: *sua sponte* application of collateral estoppel, non-mutual parties, and a conflicting jury verdict that the patent claims were valid and infringed. *XY, LLC v. Trans Ova Genetics, L.C.*, 890

⁹ Petitioner cites *Sanofi-Aventis U.S. LLC v. Mylan GmbH*, No. 17-CV-9105, 2019 WL 4861428, at *1 (D.N.J. Oct. 2, 2019) for the proposition that a PTAB’s unpatentability determination has no preclusive effect due to the different burden of proof. But there, unlike the present case, the PTAB determination of unpatentability had not been affirmed by the Federal Circuit. *Id.*

F.3d 1282, 1298–99 (Fed. Cir. 2018) (Judge Newman dissenting-in-part).¹⁰

Regardless, a dissent in a different case does not justify certiorari here—indeed Judge Newman did not dissent from the full Federal Circuit denial of *en banc* review of this case. And this Court denied certiorari in *Fresenius USA, Inc. v. Baxter International, Inc.*, where Judge Newman offered a similar dissent regarding PTO reexaminations. 721 F.3d 1330, 1347 (Fed. Cir. 2013), *cert. denied* 572 U.S. 1115 (2014). The Court should do the same here.

D. Petitioner’s Supreme Court Cases Do Not Support Petitioner’s Proposal

Petitioner’s reliance on *Grogan* and *Medtronic* is misplaced because their holdings did not involve denying the application of collateral estoppel.¹¹ *Medtronic* addressed whether the burden of proving infringement remains with the patentee in a declaratory judgment action. *Medtronic, Inc. v. Mirowski Fam. Ventures, LLC*, 571 U.S. 191, 198 (2014). This Court made only a passing reference to the Restatement’s estoppel exception while discussing the outcome of a hypothetical example where the burden of proof shifted. *Id.* at 200. Likewise, *Grogan* analyzed the burden of proof required to prevent discharge of debts in bankruptcy proceedings, and the statements regarding the collateral estoppel exception were dicta. *Grogan v. Garner*, 498 U.S. 279, 281, 284–85 (1991). *Medtronic* and *Grogan* do not support petitioner’s

¹⁰ The issues discussed by Judge Newman regarding standards of appellate review are equally irrelevant to applying estoppel under the statutory scheme.

¹¹ Petitioner also relies on *B & B Hardware*, which as explained in Section II.B, supports respondent’s position.

position that an exception to the application collateral estoppel applies here where the statutory framework avoids the exception (see Section II.C) and where Congress intended for IPRs to impact concurrent litigation (see Sections I.A and II.A).

Indeed, *Medtronic* and *Grogan* favor the application of collateral estoppel where the outcome is consistent with congressional intent, as is the case here. *See Grogan*, 498 U.S. at 290–91 (holding that federal bankruptcy proceedings use the lowest burden of proof applied by state laws because, in part, it would allow for the application of collateral estoppel, which was consistent with congressional intent); *Medtronic*, 571 U.S. at 201 (reasoning that the burden of proof does not shift in a declaratory judgment action because it would make the procedure “disadvantageous” and would “recreate[] the dilemma the Declaratory Judgment Act sought to avoid”).

III. Litigating Unpatentable Claims Is a Radical Departure from Established Precedent and Would Frustrate the Statutory Framework of the AIA

Petitioner argues that even after the Federal Circuit affirmed the PTAB’s unpatentability determination, the patent should still be litigated in district court and respondent should still be required to prove invalidity in court. Pet. at 18. This is wrong for several reasons.

First, petitioner’s position contradicts established precedent including this Court’s holding in *Oil States* that “[t]he Constitution does not prohibit the Board from resolving [patent rights] outside of an Article III court.” 138 S. Ct. at 1375. Petitioner’s “Statement of the Case” reveals its underlying objection—that petitioner and her company were “never allowed to have

their patent infringement claims heard by an Article III court or federal jury.” Pet. at 3. *Oil States* makes clear that petitioner’s position is unfounded.

Second, petitioner cites no cases or examples in which infringement or validity of an unpatentable or cancelled patent claim is litigated in a district court patent lawsuit. This is true even though the PTO has exercised its authority to cancel issued patent claims for almost half a century, *see Oil States*, 138 S. Ct. at 1370–71, well before IPRs and the *XY* case.

Third, petitioner’s proposal essentially advocates the unprecedented position that Article III courts could create or recognize patent rights separate from the PTO, even where the PTO, the agency authorized to grant patent rights, determined there are no rights. Patent rights “did not exist at common law.” *Id.* at 1374. The Constitution empowers Congress to grant inventors “the exclusive Right to their . . . discoveries.” U.S. Const. art. I, § 8, cl. 8. “And, from the founding to today, Congress has authorized the Executive Branch to grant patents that meet the statutory requirements for patentability.” *Oil States*, 138 S. Ct. at 1374.

Here, the PTAB’s determination that the claims were unpatentable was affirmed by the Federal Circuit and resulted in the PTO cancelling the claims, which extinguished petitioner’s patent rights. Petitioner wants to now litigate these patent claims in district court, which could result in a judgment that the (non-existent) claims are valid or infringed. There is no precedent for Article III courts conferring patent rights, particularly where the PTO has determined there should be none, and this proposal would raise significant issues about separation of powers and constitutionality.

Finally, petitioner’s proposal would frustrate or render inconsequential key aspects of the AIA. For example, IPRs would be pointless. If the challenger established unpatentability of the claims in an IPR (as respondent did here), the challenger would still have to defend itself against the same patent claims in the district court.

And continued litigation of patent validity in a district court would be a collateral attack on the PTAB’s unpatentability decision that would improperly circumvent the statutory requirement that the Federal Circuit has exclusive jurisdiction to review PTAB IPR decisions. 35 U.S.C. § 141(c) (“A party to an [IPR] . . . may appeal the Board’s decision only to the United States Court of Appeals for the Federal Circuit.”); 28 U.S.C. § 1295(a)(4)(A) (The Federal Circuit “shall have exclusive jurisdiction of an appeal from a decision of the [PTAB] with respect to . . . [an IPR].”).

IPRs also would be self-defeating. By statute, a final written decision in an IPR precludes the patent challenger from asserting invalidity in a civil action “on any ground that the [challenger] raised or reasonably could have raised during that inter partes review.” 35 U.S.C. § 315(e)(2). Although unquestionably intended to prevent a challenger in an unsuccessful IPR from reasserting the same arguments in the district court, under petitioner’s proposal, a patent owner could use this provision to estop a challenger who prevailed at the PTAB. In other words, a patent challenger that established claims were unpatentable over certain prior art in an IPR could be prohibited from arguing that the same prior art is invalidating in district court. That Kafkaesque result was not Congress’s goal in enacting the AIA.

The AIA also requires that a litigation is automatically stayed if, after filing an IPR, the patent challenger files a civil action challenging the validity of a patent. 35 U.S.C. § 315(a)(2). But under petitioner's proposal, this provision would be pointless because the PTAB's determination would have no impact on the suit.

IV. This Case Would Be a Particularly Poor Vehicle for Analyzing the Issues Presented

This case would be a poor vehicle to address the relationship of PTAB unpatentability determinations to co-pending infringement litigation. As explained above in Section I, petitioner's patent claims were found unpatentable, that judgment was affirmed, and the claims were cancelled by the PTO. Petitioner has no patent rights. The district court does not have authority to un-cancel the claims or otherwise grant patent rights to petitioner, as discussed in Section III.

And the PTAB did nothing that conflicts with a district court decision, judgment or jury verdict. The district court stayed the proceedings so the PTAB could resolve patentability and then dismissed the case after the claims were found unpatentable. The PTAB did not overrule, trump or act inconsistently with the district court.

This Court denied certiorari in other cases that petitioner presumably would argue are even better suited for analyzing the issues. *See, e.g., Pers. Audio, LLC v. CBS Corp.*, 946 F.3d 1348, 1350, 1354 (Fed. Cir. 2020) (affirming application of collateral estoppel to dismiss the case after affirming the PTAB finding of unpatentability despite a prior jury award of damages that found the same claims valid and infringed), *cert. denied*, 141 S. Ct. 815 (2020); *Chrimar Holding Co. v. ALE USA Inc.*, 785 F. App'x 854, 855–56, 858 (Fed.

Cir. 2019) (applying collateral estoppel to vacate and remand prior judgments for damages and royalties in a pending litigation where the PTAB determined the asserted claims were unpatentable and the Federal Circuit affirmed), *cert. denied*, 141 S. Ct. 160 (2020).

Nothing has changed since these denials and the facts in the present case do not warrant granting certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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January 19, 2023

APPENDIX

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1a

APPENDIX A

(12) INTER PARTES REVIEW CERTIFICATE (2770th)

**United States Patent
Borth et al.**

(10) Number: US 7,789,809 K1

(45) Certificate Issued: Aug. 3, 2022

(54) JUMP ROPE SYSTEM

(75) Inventors: Paul E. Borth; Mary L. Metz

(73) Assignee: JUMP ROPE SYSTEMS, LLC

Trial Number:

IPR2019-00586 filed Jan. 17, 2019

Inter Partes Review Certificate for:

Patent No.: **7,789,809**

Issued: **Sep. 7, 2010**

Appl. No.: **12/080,272**

Filed: **Apr. 1, 2008**

The results of IPR2019-00586 are reflected in this inter partes review certificate under 35 U.S.C. 318(b).

2a

INTER PARTES REVIEW CERTIFICATE

U.S. Patent 7,789,809 K1

Trial No. IPR2019-00586

Certificate Issued Aug. 3, 2022

1

AS A RESULT OF THE INTER PARTES
REVIEW PROCEEDING, IT HAS
BEEN DETERMINED THAT:

Claims 1-10 are cancelled.

* * * * *

3a

APPENDIX B

(12) INTER PARTES REVIEW CERTIFICATE (2771st)

**United States Patent
Borth et al.**

(10) Number: US 8,136,208 K1

(45) Certificate Issued: Aug. 3, 2022

(54) HANDLE SYSTEM

(75) Inventors: Paul E. Borth; Mary L. Metz

(73) Assignee: JUMP ROPE SYSTEMS, LLC

Trial Number:

IPR2019-00587 filed Jan. 17, 2019

Inter Partes Review Certificate for:

Patent No.: **8,136,208**

Issued: **Mar. 20, 2012**

Appl. No.: **12/080,271**

Filed: **Apr. 1, 2008**

The results of IPR2019-00587 are reflected in this inter partes review certificate under 35 U.S.C. 318(b).

4a

INTER PARTES REVIEW CERTIFICATE

U.S. Patent 8,136,208 K1

Trial No. IPR2019-00587

Certificate Issued Aug. 3, 2022

1

AS A RESULT OF THE INTER PARTES
REVIEW PROCEEDING, IT HAS
BEEN DETERMINED THAT:

Claims 1-11 are cancelled.

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