

No. 22-298

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

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JUMP ROPE SYSTEMS, LLC,

*Petitioner,*

v.

COULTER VENTURES, LLC, dba Rogue Fitness,

*Respondent.*

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

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**REPLY BRIEF**

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**REPLY OF THE PETITIONER****Introduction**

For the first time in its brief in opposition (“BIO”), Respondent Rogue Fitness (“Rogue”) contends that this case is not justiciable because the case is moot and Petitioner Jump Rope Systems (“JRS”) lacks standing based on the Patent and Trademark Office (“USPTO”) Director’s certificate “canceling” claims of JRS’s two patents under 35 U.S.C. § 318(b) on August 3, 2022, after the Federal Circuit’s decision in the instant case on June 28, 2022. *See* BIO, at 7-11.

This case is justiciable because, at the very least, the Director’s “certificates of cancellation” did not extinguish JRS’s right to sue Rogue for *pre-cancellation* damages resulting from Rogue’s infringement. “Cancellation,” a term with prospective meaning, does not void a previously-issued patent *ab initio*. Moreover, because *inter partes* review (“IPR”) proceedings violate due process, the purported cancellations had no legal effect. Because the Federal Circuit has not had the opportunity to address this due process issue – because the issue arose only after the court’s judgment below – this Court may vacate and remand with instructions to address that issue, if “cancellation” were deemed to have some *ex ante* effect. Before doing so, this Court should address the merits of the collateral-estoppel issue, which (if not addressed by this Court) would preclude the Federal Circuit from addressing the due-process issue on remand because the collateral-estoppel ruling would be law of the case.



## ARGUMENT

### **I. This Case Is Justiciable Because No *Ab Initio* Extinguishment of JRS's Patents Occurred.**

Rogue initially contends that this case is moot and JRS lacks standing based on the USPTO Director's cancellation of JRS's two patents on August 3, 2022 – after the Federal Circuit rendered its decision in JRS's case. BIO, at 7-11. According to Rogue, “[o]nce [petitioner's] claims were cancelled, petitioner had no patent rights” and, thus, could not sue Rogue for any damages. BIO, at 9. Rogue supports that argument with citations to decisions of this Court during a different era of patent law. *See, e.g., Moffitt v. Garr*, 66 U.S. 273, 283 (1861); *Meyer v. Pritchard*, 23 L. Ed. 961, 961 (1877).

Those cases concerned “reissue” patents. The patents at issue in those cases were reissued at the request of the patentholder – who voluntarily “surrendered” the original patent – and a “reissue” patent replaced the original patent. *See McCormick Harvesting Mach. Co. v. C. Aultman & Co.*, 169 U.S. 606, 610 (1898) (discussing reissuance). “It [was] well-established that the surrender of a patent upon the granting of a reissue patent serve[d] to extinguish the original patent, leaving the patentee only with those rights arising from the reissued patent.” *PIC Inc. v. Prescon Corp.*, 485 F. Supp. 1302, 1312 n.28 (D. Del. 1980) (citing *Peck*



*v. Collins*, 103 U.S. 660 (1880); *Allen v. Culp*, 166 U.S. 501 (1897); and *McCormick Harvesting*, 169 U.S. 606).<sup>1</sup>

Contrary to the cases cited by Rogue and the reissue statute in place at the time of those cases, under § 318(b), a patent that is “cancelled” after IPR is not the equivalent of a “surrendered” patent. Significantly, unlike surrender, cancellation of a patent after IPR is an involuntary process from the standpoint of the patentholder. A patentholder never “abandons” nor “surrenders” any patent rights when dragged into such proceedings. This Court’s *Moffitt* and *Meyer* decisions are thus inapposite. Moreover, they do not constitute evidence of statutory meaning (much less retroactive reach) of a “certificate canceling” a patent claim under § 318(b), without the consent of the patentholder.

Unlike inapposite precedent from a former legal regime,<sup>2</sup> the language of the current IPR statute is what matters. “Cancel” is “a term that suggests prospective effect,” *People v. Elliott*, 84 N.E.3d 23, 26 (Ill. 2014), and, thus, “something may be ‘cancelled’ without being retroactively erased from existence.” *United States v. Miller*, 891 F.3d 1220, 1240 (10th Cir. 2018);

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<sup>1</sup> Rogue also cites *John Simmons Co. v. Grier Brothers Co.*, 258 U.S. 82, 91 (1922), to argue that courts “must apply intervening legal developments affecting the asserted patent’s validity while a patent suit remains pending.” BIO, at 9. *Simmons* did not interpret the word “cancel,” nor concern the interplay between agency adjudication and court judgments, but instead stands for the supremacy of this Court’s decisions over conflicting nonfinal lower court decisions.

<sup>2</sup> Congress superseded this former regime in 35 U.S.C. §§ 251-252.

accord *American Continental Ins. Co. v. Steen*, 291 P.3d 864, 868 n.2 (Wash. 2004); *Manges v. Guerra*, 621 S.W.2d 652, 658 (Tex. Civ. App. 1981), *rev'd in part on other grounds*, 673 S.W.2d 180 (Tex. 1984); *Fireman's Fund Am. Ins. Co. v. Escobedo*, 80 Cal. App. 3d 610, 619 (1978); *G.E.I. Co. v. Chavis*, 176 S.E.2d 131, 135 (S.C. 1970).

Contrary to Rogue's argument – supported by the Federal Circuit's erroneous holding in *Indivior Inc. v. Dr. Reddy's Laboratories, S.A.*, 930 F.3d 1325, 1349 (Fed. Cir. 2019) – nothing in § 318(b)'s language or legislative history requires that “cancellation” of a patent retrospectively extinguishes a patentholder's right to sue an infringer for pre-cancellation damages. As discussed above, the plain and ordinary language of “cancel” supports JRS's position that a patent-infringement lawsuit for pre-cancellation damages may still proceed. *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 1738 (2020) (holding that this Court normally interprets a statute “in accord with the ordinary public meaning of its terms”). Plain English is in accord. “Canceling” a magazine subscription stops future deliveries, but past issues remain in hand.

Rogue quotes several individual legislators' remarks about the 2011 statute, of which § 318(b) is a part. BIO, at 11-13. Even assuming those remarks are probative of the meaning of the language in the

statute,<sup>3</sup> none addressed whether a patent-infringement lawsuit may proceed concerning *pre-cancellation* damages. Likewise, Rogue’s quotations from a 2008 Senate Report concerning a prior bill (including a passage from the “minority views,” noting what “should” be in like bills) do not address the issue of whether a “cancellation” forecloses a patent-infringement lawsuit for pre-cancellation damages. Nothing in the legislative history supports Rogue’s position. Because the language of the statute supports JRS’s position that it can sue for pre-cancellation damages, this is case is justiciable. *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1311 n.4 (10th Cir. 2010) (“Because money damages are available, mootness is not an issue with regard to those claims.”); *see also Buckhannon Bd. & Care Home, Inc. v. W. Va. Dept. of Health & Human Res.*, 532 U.S. 598, 608-09 (2001).

## **II. It Would Violate Due Process to Apply § 318(b) to Prevent a Patent-Infringement Lawsuit in an Article III Court.**

Even if Rogue were correct that Congress intended the USPTO Director’s “cancellation” of a patent after IPR to foreclose a patent-infringement lawsuit for damages (pre- or post-cancellation), application of § 318(b) in that manner raises due process concerns. *See United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1988 (2021) (Gorsuch, J., concurring in part & dissenting in

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<sup>3</sup> *See N.L.R.B. v. SW General, Inc.*, 580 U.S. 288, 307 (2017) (“[F]loor statements by individual legislators rank among the least illuminating forms of legislative history”).

part) (“For most of this Nation’s history, an issued patent was considered a vested property right that could be taken from an individual only through a lawful process before a court.”) (citing *Oil States Energy Servs., LLC v. Greene’s Energy Group, LLC*, 138 S. Ct. 1365, 1374-75 (2018) (Gorsuch, J., dissenting)); see also *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 642 (1999) (holding that patents “are surely included within the ‘property’ of which no person may be deprived by a State without due process of law”) (citing *Consolidated Fruit-Jar Co. v. Wright*, 94 U.S. 92, 96 (1876)). This Court did not address a broader due process challenge to IPR proceedings in *Oil States*. 138 S. Ct. at 1379 (“We emphasize the narrowness of our holding. . . . *Oil States* [has not] raised a due process challenge.”) (emphasis added).

IPR proceedings violate due process for at least two reasons. First, front-line adjudicators are not sufficiently insulated from political forces. *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1993 (2021) (Gorsuch, J., concurring in part & dissenting in part) (“The Court’s decision in *Oil States* allowing executive officials to assume an historic judicial function was always destined to invite familiar due process problems. . . . [P]owerful interests are capable of amassing armies of lobbyists and lawyers to influence (and even capture) politically accountable bureaucracies.”) (citations and internal quotation marks omitted). Second, by not permitting traditional live cross-examination of witnesses (instead, relying on written depositions), IPR procedures violate due process in view of the importance of

the property right at issue. *See Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) (“In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.”); *see also Guillory v. Domtar Indus., Inc.*, 95 F.3d 1320, 1327 n.4 (5th Cir. 1996) (“A cold transcript of a deposition is generally no substitute [for live viewing] because it cannot unmask the veracity of a testifying witness clad in a costume of deception. . . .”) (internal quotations and citations omitted); *In re Hipp, Inc.*, 895 F.2d 1503, 1519-20 (5th Cir. 1990) (explaining when due process requires decisionmaker to hear testimony live).

Because the due-process issue, which this Court reserved in *Oil States*, implicates the justiciability of this case, it would be proper for this Court to address it after granting certiorari on the collateral-estoppel issue. At the very least, because the Federal Circuit has not addressed a due-process challenge to use of § 318(b) to moot entirely a patent-infringement lawsuit pending in an Article III court, this Court should vacate the Federal Circuit’s judgment and remand with instructions to address the issue in the first instance.<sup>4</sup> Under the circumstances in this case – where the due process issue only arose following the USPTO Director’s cancellation of JRS’s patents, which occurred *after* the lower court’s judgment – it would be

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<sup>4</sup> In *Celgene Corporation v. Peter*, 931 F.3d 1342, 1358-63 (Fed. Cir. 2019), the Federal Circuit addressed the Takings Clause issue reserved in *Oil States* but did not address the due process issue.

appropriate for this Court to do so. *Foley v. Blair & Co., Inc.*, 414 U.S. 212, 216 (1973) (vacating judgment and remanding for the lower court to address a mootness issue that arose after the lower court's judgment was issued).

### **III. Before Remanding, This Court Should Grant Certiorari and Address the Federal Circuit's Misapplication of the Collateral-Estoppel Doctrine.**

Rogue devotes the bulk of its briefing on collateral-estoppel to a point not in dispute. *See* BIO, at 11-17. JRS agrees that this Court's decisions in *Blonder-Tongue Labs., Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971), and *B & B Hardware, Inc. v. Hargis Indus.*, 575 U.S. 138 (2015), generally require the collateral-estoppel doctrine to be applied in an Article III judicial proceeding when a prior judicial or administrative proceeding adjudicated a legal or factual issue. *See generally* Restatement (Second) of Judgments § 27 (1982). The parties disagree on whether courts must respect the doctrine's exceptions – here, the different-burdens exception.

Rogue's arguments brushing off different standards and burden in an IPR versus a patent-infringement lawsuit lack merit. *See* BIO, at 18-25. Rogue initially contends that the exception in Restatement (Second) of Judgments § 28(4) – which this Court normally follows – does not apply in a patent-infringement lawsuit after a PTAB unpatentability ruling

because that ruling demonstrates that the claim at issue “should never have issued.” BIO, at 20. According to Rogue: “This means that the presumption of validity . . . does not apply and neither does the [corresponding] higher burden of proof.” *Id.*

Rogue’s argument is circular and tautological: because the PTAB found claims unpatentable under a lower burden, JRS loses the protections of a higher burden in the other venue when litigating the identical issue. But “unpatentability” is not a categorical truth; it is a litigation outcome among adversaries. The Restatement exception (and *Blonder-Tongue*’s adoption thereof) specifically exists to foreclose use of the low-burden outcome to obviate the high-burden challenge. No authority holds that a low-burden agency result justifies overlooking the higher Article III burden on the same issue.

Significantly, the America Invents Act of 2011 expressly applies the collateral-estoppel doctrine to a *challenger* who loses in the IPR proceeding. *See* 35 U.S.C. § 315(e)(2). Congress’ failure to include a provision estopping a losing *patentholder* from asserting any of the grounds that were raised or could have been raised in the IPR proceeding is significant. At the very least, the statute does nothing to prevent the normal operation of the collateral-estoppel doctrine in Article III judicial proceedings – including the principle set forth in § 28(4).

Rogue’s argument that this Court’s decision in *Grogan v. Garner*<sup>5</sup> was “dicta” does not undercut the importance of the issue, particularly considering that this Court repeatedly has stated that the Restatement (Second) of Judgments – including § 28(4) – generally should be followed in federal court proceedings concerning issues of claim and issue preclusion. *See, e.g., B&B Hardware*, 575 U.S. at 148.

Rogue also raises policy objections to the correct application of the IPR statutory design. BIO, at 22-25. They are all misguided.

First, adopting JRS’s position would not “contradict” *Oil States*. There, this Court confirmed that the PTAB may render decisions on issued patents without violating the separation-of-powers doctrine or the Seventh Amendment. 138 S. Ct. at 1379. Yet this ruling is agnostic about the role of the collateral-estoppel doctrine or the effect of “cancellation” in a pending patent-infringement lawsuit. *Oil States* supported its holding by referring to public land lease cancellation. 138 S. Ct. at 1376 n.3. By regulation, that kind of property “cancellation” takes effect only prospectively, upon the lessee’s receipt of the cancellation notice. 43 C.F.R. § 3231.16. *Oil States* upheld IPR constitutionality from

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<sup>5</sup> 498 U.S. 279, 281, 284-85 (1991) (“If, however, the clear-and-convincing standard applies to nondischargeability, the prior judgment [based on the preponderance standard] could not be given collateral estoppel effect. [Restatement (Second), Judgments] § 28(4).”)



a viewpoint that patent cancellation and land lease cancellation were alike.

Second, applying § 28(4)'s exception would not amount to the judiciary "creat[ing] or recogniz[ing] patent rights separate from the PTO." BIO, at 23. Validity challenges in court presuppose the prior existence of a USPTO-issued patent, granted by the Executive Branch. This is particularly true if the plaintiff only seeks pre-cancellation damages.

Third, IPRs would not be "pointless." BIO, at 24. Such administrative proceedings would retain their capacity to meet Congressional purposes to be an alternative to litigation. When a patentholder loses, and if IPR passes due process muster, no prospective injunction or damages would be possible for future infringement of the cancelled patent. And, an unpatentability decision might be persuasive to a district court or jury (albeit not controlling) when adjudicating past damages. Conversely, challenger estoppels under § 315(e) preclude losing challengers from bringing grounds in court that they raised or reasonably could have in the IPR.

Nor would there be anything "self-defeating" or "Kafkaesque" in applying § 28(4)'s exception to patent-infringement lawsuits. BIO, at 24. Whether a prevailing challenger would be estopped from re-raising winning grounds is not before this Court. Even if the statutory design led to such estoppels, the challenger still receives relief: no future injunctions or damages for post-cancellation infringement (if due process is

satisfied). Likewise, 35 U.S.C. § 315(a)(2), the automatic stay of post-IPR declaratory-judgment challenges, would still rationally pause court proceedings: potential challenger estoppels or injunction-cutoffs might develop at the PTAB during such stay.

Finally, Rogue erroneously asserts that this Court denied certiorari on the same issue in other recent cases. BIO, at 25-26 (citing *Pers. Audio, LLC v. CBS Corp.*, 141 S. Ct. 815 (2020), and *Chrimar Holding Co. v. ALE USA Inc.*, 141 S. Ct. 160 (2020)). The petitions in those cases did not raise the same collateral-estoppel issue presented in the instant case. See Cert Petition in *Pers. Audio*, No. 20-260, at i (questions directed to which court should hear an IPR estoppel issue); Cert Petition in *Chrimar*, No. 19-1124, at i (questions directed to finality-of-judgment standards).<sup>6</sup>

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The related issues of collateral-estoppel and justiciability arise in hundreds of patent-infringement cases each year and, thus, have a substantial effect on patent-infringement litigation. If this Court accepts Rogue's position about justiciability as a basis to deny review, it will never have occasion to address the important collateral-estoppel issue (and clear Federal

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<sup>6</sup> Rogue suggests a better vehicle to correct Federal Circuit law would be a court judgment of no invalidity, allegedly extinguished by a contrary PTAB result under *XY, LLC v. Trans Ova Genetics, L.C.*, 890 F.3d 1282 (Fed. Cir. 2018). BIO, at 20-21, 25-26. Yet this case presents the legal issue more pristinely, since no question of inconsistent judgments clutters the analysis.

Circuit error) raised in the petition because, in every future case in which the Federal Circuit applies its collateral-estoppel rule, the USPTO Director soon thereafter will issue a certificate of cancellation. Therefore, this Court should address JRS's arguments about why this case is justiciable or at least remand to the Federal Circuit to do so in the first instance.

This Court should also address the merits of the collateral-estoppel issue and overrule the Federal Circuit's decision in *XY, LLC*. If the collateral-estoppel issue is not addressed before remanding, it would foreclose any relief on remand under the law-of-the-case doctrine, even assuming the Federal Circuit were to agree that the Director's cancellations have no effect – and, thus, JRS's case remains justiciable – because of constitutional defects in the IPR proceedings.<sup>7</sup>



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<sup>7</sup> It is within this Court's authority to address a dispositive issue that will arise on remand even if other issues remain to be addressed on remand. *See* 28 U.S.C. § 2106; *see also MercExchange, LLC v. eBay, Inc.*, 401 F.3d 1323, 1337 (Fed. Cir. 2005), *rev'd on other grounds*, 547 U.S. 388 (2006).

**CONCLUSION**

This Court should grant certiorari and address the related collateral-estoppel and justiciability issues in this case.

Respectfully submitted,

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