No. 26-170

IN THE
# Supreme Court of the United States

FEDERAL EXPRESS CORPORATION,

*Petitioner*,

v.

QUALCOMM INCORPORATED,

*Respondents*.

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

**BRIEF OF VLSI TECHNOLOGY LLC AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER**

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## INTEREST OF *AMICI CURIAE*[1]

*Amicus curiae* VLSI Technology LLC owns patents on inventions that significantly improve computer and data technologies, which help improve lives worldwide, just as the patent system encourages.

*Amicus* and many other U.S. patent owners are harmed when the Patent and Trademark Office, the agency charged with administering the patent system, admittedly violates the limits that Congress imposed on it to protect the patent system, but refuses to correct its error. Like Petitioner, *amicus* is battling a challenge from a party who evidence suggests is secretly acting in the interest of a company barred by Congress from filing the case under its own name. Indeed, *amicus* already has an infringement verdict against the time-barred party. Congress forbade such challenges without identifying all such persons, , as the Patent Office admits. Yet the Patent Office refused to investigate, declining to enforce the statute. Like Petitioner, *amicus* is now challenging on appeal the Patent Office's refusal to correct its error.

The Federal Circuit's decision in this case gives the Patent Office a green light to ignore unambiguous limits that Congress placed upon its actions.

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[1] Pursuant to Supreme Court Rule 37.6, counsel listed on the cover states that no counsel for a party in this case authored this brief in whole or in part, nor did any such counsel or party or anyone other than the *amici* make a monetary contribution intended to fund the preparation or submission of the brief. The parties received timely notice through their counsel of record of *amici*'s intention to file this brief as provided by Rule 37.2.

## ARGUMENT

*Amicus* respectfully submits this brief to assist the Court's consideration of the Petition.

Federal Express Corporation's Petition already explains why the Court of Appeals for the Federal Circuit erred when it held that the Patent Office's *ultra vires* statutory violation is unreviewable, and therefore Congress's statutory command is unenforceable. Pet., at 10-20. *Amicus* writes to acquaint this Court with the real world consequences that have already been made manifest of the agency's failure to enforce the limits Congress placed on its power to reconsider patents, and failure to remedy that error in cases still on appeal.

### I. The Patent Office's Former Policy Of Refusing To Enforce Congress's Express Limits On Its Powers Affects Many Patent Owners Whose Cases Decided Under The Illegal Former Policy Are Still On Appeal.

"Billions of dollars can turn on a Board decision" in Patent Office challenges to patents under the America Invents Act of 2011. *United States v. Arthrex, Inc.*, 594 U.S. 1, 6 (2021) (opinion of Roberts, C.J.). That is true in *amicus*'s case, which was decided by the Patent Office during the former Administration when the agency's former, illegal policy was still in effect.

Petitioner states that "[t]he Federal Circuit's decision will . . . potentially impact RPI designations in thousands of petitions moving forward." Pet. at 12.

The Court need not rely on such predictions to find ample reasons to grant the Petition. The application of the former, illegal policy of statutory noncompliance at issue in this case, as well as numerous other such former policies that the Patent Office has likewise recently repudiated and ceased to apply, continues to be at issue in many pending appeals. And, as in Petitioner's appeal, the Patent Office has refused in those appeals as well to revisit the decisions that it made based on its former policies, and argues that the Federal Circuit should not review the agency's compliance with the laws those policies violated. In short, the rights of many patent owners are at stake in the Court's decision in this case whether to grant a writ of certiorari.

In *amici*'s case, as in Petitioner's, the Patent Office refused to credit or permit adequate investigation of information suggesting that a time-barred entity (Intel Corporation) was an unnamed real party-in-interest of the nominal challenger—a fact that, if true, would have halted the case in its tracks for failure to "identif[y] all real parties-in-interest" under Congress's express command in 35 U.S.C. § 312(a)(2). *See* Pet., at 5. In fact, Intel had lost a federal jury trial just weeks earlier, which awarded *amicus* over $1 billion for infringement of *amicus*'s patent.

This challenge to the patent, just weeks after Intel's loss at jury trial, was filed by a just-formed South Dakota limited liability company. IPR2021-01226. Given the timing, there were suspicions that

Intel might be connected to the new challenge. But the Patent Office's former policy of refusing to require identification of all real parties-in-interest was still in effect, and these circumstances did not dissuade the Patent Office from granting institution.

Two U.S. Senators urged the Office's then-Director Kathi Vidal to investigate these facts further. She stepped into the case post-institution, and ordered the LLC to disclose information about its members and backers. It refused to do so. Vidal removed the LLC from the case as a party, and found that it had committed misconduct. But then she reversed herself, reinstated the LLC as a party, buried her misconduct findings, and refused to terminate the case post-institution. Meanwhile, the Patent Office received more allegations of connections between Intel and the LLC, allegations which the Director sealed and refused to either consider or make the basis of any discovery. The Board then, after a series of Director orders on how it should conduct its analysis in these unusual circumstances, found unpatentability.

In its pending appeal, *amicus* argues that Intel may be behind the mysterious LLC that filed the case, and that the Patent Office should have terminated the case post-institution based on the LLC's refusal to obey her discovery orders, or, at the very least, permitted further discovery into its alleged connections to other entities. The Patent Office now admits on appeal that when it decided *amicus*'s case it applied its former policy on identifying real parties-in-interest and several other policies, that it now admits were illegal and that it no longer follows, and has indicated that it would not decided *amicus*'s case the same way if it decided it today. Yet, like in Petitioner's case, the Patent Office has refused to reopen *amicus*'s case to apply its new, correct policies, and defends affirmance on appeal of its decision under those policies—not on the basis that the policies or the decision were correct, but on the basis that there is no reason to do so because its former policies will no longer be applied.

A reversal on certiorari in this case would directly impact *amicus*'s pending appeal proceedings, and those of other similarly-situated patent owners seeking redress for Patent Office decisions under its former, statute-violating policies. Presently, the Patent Office insists that it is not required to enforce the statutory limits on its powers to institute these reviews, and that its former policies to ignore those limits on its powers are not subject to review by the courts. Reversal of that position will restore the requirement that the agency must obey unambiguous statutory limits, and oblige the it to revisit its application of its former, illegal policies to the extent necessary for relief to parties still on direct appeal.

## II. The Judicial Enforcement Of Congress's Expressly Intended Limits On Agency Power Has Never Been More Important.

The Petition in this case has ably explained why it was error for the Federal Circuit to hold that the agency's *ultra vires* statutory violation in this case is unreviewable. *Amicus* therefore need not belabor that question. It suffices to say that, in addition to the authorities already discussed in the Petition, which understandably focused on recent cases, the Petition is supported by the Court's century-long line of decisions refusing to interpret statutes to

(i) enact definite statutory prohibitions on agencies' power to act, thus furthering the purposes of the act, yet also

(ii) intend to permit the agency to ignore those prohibitions by barring review of the agency's compliance with them.

Particular magic words are not required to support judicial review so long as "[t]he creation of a legal right by language suitable to that end" is discernible. *Tex. & N. Orleans R. Co. v. Brotherhood of R. & S.S. Clerks*, 281 U.S. 548, 569 (1930). When a direct statutory "prohibition" has been violated, moreover, "[t]he absence of penalty is not controlling," as "many rights are enforced for which no statutory penalties are provided." *Id.*

If Congress were to enact a definite statutory prohibition on review of the agency's compliance with a definite statutory prohibition, unlike in this case, the result might be different. But as this Court has repeatedly stated, even if "the review provisions" of an act "foreclos[e] review of [the agency's] action" in some respects, if the Act's language (or even lack of specific language) is susceptible of an interpretation permitting review of compliance with "a specific prohibition in the [a]ct" that "specifically withheld" an "exercise of power" from an agency, and "'the courts would encounter no difficulty in'" enforcing compliance with the prohibition, "'the conclusion must be that enforcement was contemplated.'" *Leedom v. Kyne*, 358 U.S. 184, 189 (1958) (quoting *Tex. & N. Orleans R.*, 281 U.S. at 569).

In short, a "'definite prohibition which Congress inserted in the Act can not therefore be overridden in the view that Congress intended it to be ignored.'" *Id.* The reason for this rule is straightforward. "This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers." *Id.* at 190.

This case falls within the "'painstakingly delineated procedural boundaries'" of that rule. *NRC v. Texas*, 605 U.S. 665, 681 (2025) (quoting *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964)). First, the "agency has taken action entirely 'in excess of its delegated powers and contrary to a specific prohibition' in [the] statute." *Id.* (quoting *Railway Clerks v. Ass'n For Benefit Of Noncontract Employees*, 380 U.S. 650, 660 (1965)). And second, applying the Act's limitation on judicial review to this case would leave aggrieved persons with no "opportunity for judicial review" of the statutory violation whatsoever. *Id.* (quoting *Governors, FRS v. MCorp Financial, Inc.*, 502 U.S. 32, 43 (1991)).

**CONCLUSION**

The decision below harms the patent system and feeds the administrative state, at the expense of both Article I and Article III powers. The Patent Office's refusal to apply the repudiation of its former, policies to cases that it decided under those policies that are still on direct appeal will have real effects in many pending cases, endangering patent rights that Congress, by its enactment of "specific prohibition[s]" on the Patent Office's "exercise of power," intended to protect. *Kyne*, 358 U.S. at 189.

The petition should be granted.

Respectfully submitted,

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