

No. 20-1561

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

APPLE INC.

Appellant,

v.

QUALCOMM INCORPORATED

Appellee.

On Appeal from the United States Patent and Trademark Office, Patent Trial and
Appeal Board in Inter Partes Review No. IPR2018-01279

**CORRECTED BRIEF OF AMICI CURIAE ACT | THE APP
ASSOCIATION AND ENGINE SUPPORTING APPELLANT APPLE INC.'s
PETITION FOR REHEARING *EN BANC***

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CERTIFICATE OF INTEREST

Counsel for *amicus curiae* ACT | The App Association and Engine certify the following:

- 1. All *amicus curiae* on whose behalf the brief is filed:** ACT | The App Association and Engine.
- 2. The names of any real parties in interest:** Not applicable.
- 3. Any parent corporation or any publicly held corporation that owns 10% or more of stock in ACT | The App Association or Engine:** None.
- 4. Every law office and attorney that has appeared, or will appear, on behalf of ACT | The App Association and Engine:** None.
- 5. The title and number of any case that is pending that will “directly affect or be directly affected by” this Court’s decision in the appeal being briefed:** ACT | The App Association and Engine defer to the first-hand knowledge of the parties to the appeal on this question.
- 6. Any information required under Federal Rule of Appellate Procedure 26.1(b) (organizational victims in criminal cases) or 26.1(c) (debtors or trustees in bankruptcy cases):** None.

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INTEREST OF AMICI CURIAE¹

Amici represent small businesses from all sectors of the economy that drive American growth and job creation, as well as rely on and advocate for a patent system that promotes innovation. Amici and their members include leading innovators whose success in developing cutting-edge technologies depends on a system that vigorously protects meritorious patents while ensuring that weak patents cannot be exploited to inhibit innovation. Amici therefore have a strong interest in patent review procedures that robustly protect patent rights while providing efficient means for challenging questionable patents and in ensuring the availability of judicial review of agency rulings.

¹ No party or party's counsel authored this brief in whole or in part. No one, other than amici, their members, and their counsel, contributed money that was intended to fund preparing or submitting the brief. This brief is submitted with a motion for leave to file. All parties have consented to its filing.

SUMMARY OF ARGUMENT

The panel’s opinion is the most recent example of the Court taking an overly-narrow view of Article III standing. This decision would displace Congress’s policy choice to allow appeals from administrative patent review, improperly restricting access to courts, and warrants rehearing *en banc*.

Congress designed *inter partes* review to improve patent quality and offer a more efficient, affordable means to challenge questionable patents. And it chose to extend appellate review to any dissatisfied party. In the present case, however, the panel applied an overly-restrictive lens to declaratory judgment case law and the Congressional grant of appellate review. By unduly circumscribing judicial review of certain agency actions, this opinion unevenly favors the holders of questionable patents to the detriment of the overall patent system.

ARGUMENT

I. THE PANEL’S OVERLY-NARROW APPROACH TO STANDING SHOULD BE REVISITED *EN BANC*

The Supreme Court has consistently and correctly acknowledged the public’s interest when it comes to resolving questions of patent validity. It has routinely emphasized that the “far-reaching social and economic consequences of a patent . . . give the public a paramount interest in seeing that patent monopolies . . . are kept within their legitimate scope.” *Blonder-Tongue Labs. Inc. v. Univ. Of Ill. Found.*, 402 U.S. 313, 343 (1971) (quoting *Precision Instrument Mfg. Co. V. Auto.*

Maintenance Machinery Co., 324 U.S. 806, 816 (1945)). And the Court has interpreted and applied the law in ways that keep the path open to third parties willing to invest time and resources challenging questionable patents. *See, e.g., Edward Katzinger Co. v. Chi. Metallic Mfg. Co.*, 329 U.S. 394, 400-01 (1947); *Lear, Inc. v. Adkins*, 395 U.S. 653, 674 (1969). These principles ring especially true for startups and small business innovators, as they stand to suffer the most in the face of questionable patents.

Yet an overly-narrow interpretation of Article III standing erects unwarranted barriers to patent challenges. In *MedImmune*, the Supreme Court empowered licensees—who have unique incentives and highly-relevant expertise—to challenge questionable patents. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007). *MedImmune*'s flexible approach should be applied in cases like this to allow licensees to challenge patents without having to openly concede infringement and/or challenge all patents under a portfolio license in a single case.

A. The Panel Incorrectly Concludes *MedImmune* Relies upon a Potential Alteration in the Parties' Contractual Rights

Amici have significant concern with the panel's determination that, under *MedImmune*, Apple does not have standing because it has not alleged that the validity of the patents at issue will impact Apple's contractual rights, such as payments under license agreements. Op. 6-8. In *MedImmune*, the Supreme Court clearly established that, with respect to subject matter jurisdiction, it is very likely

irrelevant as to whether a licensee brings a claim of patent invalidity or raises a contract claim. 549 U.S. at 123. *MedImmune* clarifies that the relevant question of whether the declaratory judgment plaintiff has standing turns not on “compliance with the claimed contractual obligations, but rather the consequences of the failure to do so.” *Id.* at 130 n.9.

Amici agree that the Supreme Court’s use of *Altvater v. Freeman*, 319 U.S. 359 (1943), confirms that the *MedImmune* analysis is focused on infringement remedies from nonpayment, and not on altering contract rights. In *Altvater*, jurisdiction existed even though a decision on validity had no impact on either party’s contractual rights. *Id.* at 365-66. Clearly, the *MedImmune* analysis does not turn on whether licensee claims impact contract obligations.

B. *MedImmune* Establishes That Licensee Payments at Issue Were “Coerced,” Confirming This Court Has Jurisdiction

Amici disagree that Apple’s complaints are “little more than an expression of displeasure with a license provision into which it voluntarily entered,” Op. 8, and the panel’s conclusion here conflicts with *MedImmune*. In *MedImmune*, the Supreme Court found that entering into a license agreement can be coerced by, in that case, “the threat of treble damages and loss of 80 percent of [its] business.” *Id.* at 134 n.12. The panel, however, ignores that and maps to the dissent, which would have found such a settlement to be voluntary. 549 U.S. at 146 (Thomas, J., dissenting). Notably, even Justice Thomas’ dissent notes that a threatened patent

infringement suit when no license was in existence would have altered his determination that a settlement was entered voluntarily. *Id.* Unfortunately, the panel goes even further than Justice Thomas did, in considering Apple’s decision to settle voluntary despite Qualcomm not only threatening a patent infringement suit where no licensing agreement existed, but also filing that suit.

C. The Panel’s Decision Disregards *MedImmune*’s “All-the-Circumstances” Test

Amici believe the panel has also improperly applied *MedImmune*’s “all-the-circumstances” test, which requires considering ““whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests,”” 549 U.S. at 127 (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941)). Apple’s Petition for Review clearly demonstrates there is an active and continuing controversy apart from the existence of a license agreement which goes past the settled infringement controversy, and that the panel cites precedent with significantly different circumstances (for example, where a party challenging a patent had not been accused of infringement much less planned to create something that would infringe, *see Op. 9*). *En banc* review is warranted to address these errors.

D. Rejecting Standing Here Frustrates Congress’s Goal of Creating an Efficient Mechanism to Test Questionable Patents

In passing the America Invents Act (AIA) and creating *inter partes* review (IPR), Congress set out “to establish a more efficient and streamlined patent system that will improve patent quality and limit unnecessary and counterproductive litigation costs.” *Thryv, Inc. v. Click-To-Call Techs. LP*, 140 S. Ct. 1367, 1374 (2020) (quoting H.R. Rep. No. 112-98, pt. 1, at 40 (2011)). And, understanding it to be an important feature, Congress chose to make appellate review available to dissatisfied parties—regardless of who prevailed before the Patent Trial and Appeal Board (PTAB). 35 U.S.C. § 319. The panel decision reflects an undue restriction on that right to appeal and contributes to lopsided post-issuance review.

1. Congress Created IPR to Improve Patent Quality

Invalid patents harm domestic innovation, increase costs for competitors without justification, and can block research and development altogether. When Congress passed the AIA by an overwhelming, bipartisan majority, it had those concerns in mind.²

² United States Senate, Roll Call Vote 112th Congress on H.R. 1249 (2011), *available at* https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=112&session=1&vote=00129.

Patent examiners have a vital, enormous task—reviewing hundreds of thousands of applications each year. *E.g.*, *U.S. Patent Statistics Chart*, U.S.P.T.O. (Apr. 2020), https://www.uspto.gov/web/offices/ac/ido/oeip/taf/us_stat.htm (over 600,000 applications filed per year). Under that volume, studies estimate examiners only have on average 20 hours to review even the most complex applications.³ Against that backdrop, it is inevitable that “[s]ometimes . . . bad patents slip through.” *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1353 (2018).

One study, for instance, found that “roughly 43.0 percent of patents that went to a final judgment on validity were invalidated.” John R. Allison, et al., *Our Divided Patent System*, 82 U. CHI. L. REV. 1073, 1099 (2015). Another estimated that 28 percent of *all* patents could be invalid—and that, for software patents, 39 percent could be invalid. *See* Shawn P. Miller, *Where’s the Innovation: An Analysis of the Quantity and Qualities of Anticipated and Obvious Patents*, 18 VA. J.L. & TECH. 1, 6-7 (2013). Software patents have been especially prone to validity issues, and as a result, the 2000s also saw a dramatic uptick in suits against technology businesses that produced innovative software and hardware products.⁴

³ *See, e.g.*, Josh Landau, *Granted in 19 Hours*, PATENTPROGRESS (Mar. 6, 2018), <https://www.patentprogress.org/2018/03/06/granted-19-hours/> (summarizing academic study).

⁴ *E.g.*, James Bessen, *A Generation of Software Patents*, 18 B.U.J. SCI. & TECH. 241, 259-60 (2012).

Debate leading up to the passage of the AIA demonstrates Congress was deeply aware of these aspects of the U.S. patent system, and how IPR would alleviate burdens while providing a fair process for adjudication (including through appeals to the Federal Circuit). *See, e.g.*, H.R. Rep. No. 112-98, at 39-40 (2011) (IPR is an “efficient system for challenging patents that should not have issued”); 157 Cong. Rec. S5409 (Sept. 8, 2011) (statement of Sen. Schumer that bill “streamlines review . . . to ensure that the poor-quality patents can be weeded out through administrative review rather than costly litigation”).

2. Congress Contemplated a Broad Right to Appeal IPR Decisions

The right to appeal is a critical feature of the IPR system, yet the panel’s decision is the most recent instance of the Court depriving dissatisfied IPR petitioners access to appellate review. *See, e.g., Gen. Elec. Co. v. United Techs. Corp.*, 928 F.3d 1349 (Fed. Cir. 2019), *cert. denied*, 140 S. Ct. 2820 (2020); *AVX Corp. v. Presidio Components, Inc.*, 923 F.3d 1357, 1359 (Fed. Cir. 2019). This is not only out of step with Supreme Court precedent, but it weakens the overall IPR system.

Congress expressly granted parties in IPR the right to appeal, and plainly intended both patent challengers and owners would have access to the courts. 35 U.S.C. § 319. Indeed, in passing the AIA and replacing previous administrative review mechanisms, Congress noted that “a challenger that lost at the [patent

office] under reexamination had no right to appeal Restrictions such as these made reexamination a much less favored avenue to challenge questionable patents than litigation.” S. REP. NO. 110-259, at 18-19 (2008). Congress wanted to create a system that worked better—and knew appeal was part of that. Likewise, “Congress is well positioned to identify intangible harms that meet minimum Article III requirements,” and as such, its choice to include a right to appeal in the statute is instructive and important. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016).

Depriving dissatisfied petitioners access to judicial review also creates a deterrent to seeking PTAB review. This is especially true because estoppel could apply to any arguments made before the PTAB, 35 U.S.C. § 315(e)(2), even if those arguments are never heard by a court. This understandably instills reluctance in many would-be IPR petitioners, as the consequences of losing could be severe. *See, e.g., Gen. Elec. Co.*, 928 F.3d at 1359 (Hughes, J., concurring) (“the effects of . . . estoppel have especially significant impact”).

An overly-narrow approach to standing also harms uniformity and quality in patent law. If this Court only hears a subset of PTAB appeals, it ends up unilaterally deferring to one category of the agency’s decisions: when it declines to invalidate a patent not yet infringed. Sapna Kumar, *Standing Against Bad Patents*, 32 BERKELEY TECH. L.J. 87, 130 (2017) (discussing lopsided access to the court).

Overall, the IPR system has been incredibly effective at achieving its goals.⁵ Access to Article III courts, as part of IPR, is absolutely essential to the functioning of and confidence in the patent system.

3. Unless Corrected, the Panel’s Decision Will be Particularly Detrimental to Small Business Technology Innovators

The downside of questionable patents and the need for full IPR review (including judicial review) are perhaps most on display when considering the unique circumstances of startups and small business innovators. It can easily cost upwards of \$1.8 million to defend a district court patent case. Am. Intellectual Prop. Law Ass’n, 2019 Report of the Economic Survey 50-51 (2019) [hereinafter “AIPLA”]. By contrast, the average seed-stage startup raises a total of \$1.2 million—an amount that is expected to cover all of its costs for nearly two years. *The State of the Startup Ecosystem*, ENGINE 6, 17 (2021), <https://engineis.squarespace.com/s/The-State-of-the-Startup-Ecosystem.pdf>. And most startups and small business innovators have far less financing—putting the costs of district court out of reach. *Id.*

⁵ *E.g.*, *An Assessment of the Impact of the America Invents Act and the Patent Trial and Appeal Board on the US Economy*, The Perryman Group ii, 4, 6 (June 2020), available at <https://www.perrymangroup.com/publications/report/an-assessment-of-the-impact-of-the-american-invents-act-and-patent-trial-and-appeal-board-on-the-us-economy/> (estimated savings of \$2.6 billion in legal costs and increase of nearly \$3 billion in U.S. business activity, thanks to PTAB review).

Indeed, startups and small business innovators report substantial operational impacts when they are accused of infringement—and even the *risk of* litigation is enough to chill startup innovation or frighten investors.⁶ Yet IPR costs an order of magnitude less, AIPLA at 51, meaning many smaller innovators concerned about questionable patents now have access to some patent review.

Questionable patents can likewise operate like “scarecrows,” deterring competition and follow-on innovation. Just like litigation itself, “invalid patents can create unacceptable litigation risks for potential entrants, raise entry costs, delay entry, deter customers and business partners from contracting with new entrants, and impose inefficiencies while distorting innovation.” Christopher R. Leslie, *The Anticompetitive Effects of Unenforced Invalid Patents*, 91 MINN. L. REV. 101, 114-16 (2006) .

Questionable patents can also lead a company to “forgo R&D in the areas [a] patent improperly covers.” FED. TRADE COMM’N, TO PROMOTE INNOVATION 5 (2003). That is even more acute for startups, who will often be more inclined to

⁶ See, e.g., Stuart J.H. Graham et al., *High Technology Entrepreneurs and the Patent System*, 24 BERKELEY TECH. L.J. 1255, 1315 (2009) (startups are “particularly sensitive to accusations of infringement because they are likely to experience resource constraints when faced with the costs of funding a suit”); Colleen Chien, *Startups and Patent Trolls*, 17 STAN. TECH. L. REV. 461, 461-62, 474-75 (2014) (majority of surveyed startups had received a demand and large percentage reported significant operational impact).

avoid R&D where there's a high threat of patent litigation down the line. *See, e.g.,* Jean O. Lanjouw & Mark Schankerman, *Enforcement of Patent Rights in the United States*, in PATENTS IN THE KNOWLEDGE- BASED ECONOMY 145, 146 (Wesley M. Cohen & Stephen A. Merrill eds., 2003).

Finally, when larger, more-established firms (like Apple) enjoy full access to IPR—and mount successful challenges to questionable patents—it clears room for startups and small business innovators. If one entity is willing and able to incur the costs of a patent challenge, the benefits are broadly felt.⁷

Innovators, including startups and small business innovators, need full access to IPR. And not the partial access the Federal Circuit is effectively creating by unnecessarily restricting appellate review. IPR puts patent challenges within reach of smaller firms, and allows companies to clear out questionable patents before they incur the actual risk of litigation.

CONCLUSION

The Court should grant rehearing *en banc*.

⁷ There are numerous examples of one IPR generating benefit for many others. *E.g., HP Inc. v. MPHJ Tech. Invs., LLC*, 817 F.3d 1339, 1342 (Fed. Cir. 2016); Daniel Nazer, *EFF Wins Final Victory over Podcasting Patent*, ELEC. FRONTIER FOUND. (May 14, 2018), <https://www.eff.org/deeplinks/2018/05/eff-wins-final-victory-over-podcasting-patent>.

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CERTIFICATE OF SERVICE

I hereby certify that, on this 21st day of May, 2025, I filed the foregoing with the Clerk of the United States Court of Appeals for the Federal Circuit via the CM/ECF system, which will send notice of such filing to all registered CM/ECF users.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(a)(4)(G) and Circuit Rule 29(b), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Circuit Rule 32(b).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f), the brief contains 2598 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Office 365 Pro Plus in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(g), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

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