No. 17-1686

IN THE

Supreme Court of the United States

RPX CORPORATION,

Petitioner,

v.

CHANBOND LLC,

Respondent.

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

BRIEF *AMICI CURIAE* OF THE INITIATIVE FOR MEDICINES ACCESS & KNOWLEDGE (I-MAK) AND PATIENTS FOR AFFORDABLE DRUGS, INC. (P4AD) IN SUPPORT OF PETITIONERS

A. NEAL SETH
Counsel of Record
WESLEY E. WEEKS
WILEY REIN LLP
1776 K Street, N.W.
Washington, DC 20006
(202) 719-7000
nseth@wileyrein.com

Counsel for The Initiative for Medicines Access & Knowledge and Patients for Affordable Drugs, Inc.

July 20, 2018

282049

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

Cases

Page

Statutes

Cited Authorities

Page

Regulations

Other Authorities

INTEREST OF AMICI CURIAE[1]

The Initiative for Medicines, Access & Knowledge ("I-MAK") is a not-for-profit charitable organization, comprised of lawyers, scientists, and health experts interested in increasing access to affordable medicines by restoring integrity to the patent system. I-MAK is committed to challenging, repairing and ultimately redesigning the patent system to ensure that consumers worldwide can obtain the lifesaving medications that they need. I-MAK helps patients, consumers, governments, and patent offices create systems that support a competitive market where the needs of patients and payers are equally represented.

To advance the public interest by reducing drug costs and increasing access to affordable, lifesaving medicines, I-MAK files petitions for inter partes Review of unmerited patents stifling competition to life-saving pharmaceuticals.

Patients for Affordable Drugs ("P4AD") is a non-profit national patient organization focused exclusively on policies to lower drug prices. P4AD does not accept

---

1. The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the amici curiae's intention to file this brief.

Pursuant to Supreme Court Rule 37.6, amici curiae states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission. Amici curiae discloses that counsel of record for Petitioner, Daniel Ravicher, is also U.S. Patent Counsel for I-MAK. Mr. Ravicher was not involved in the preparation or submission of this brief.

funding from any organizations that profit from the development and distribution of prescription drugs. The work of P4AD is to engage, educate and activate patients in support of reforms that will lower drug prices.

Ensuring a robust and dynamic patent system is a critical element in the work of P4AD. Patients need patents to reward only truly inventive drugs that save and improve patients' lives, ensuring that patents are not used for non-inventive medications or to extend monopolies beyond the time envisioned under law. As such, P4AD expects to file petitions for inter partes review of unmerited patents stifling competition to life-saving pharmaceuticals.

SUMMARY OF THE ARGUMENT

Congress passed the Leahy-Smith America Invents Act ("AIA") to curb the spread of unmerited patents, stop abusive litigation, and ensure a fair playing field for patent applicants. Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011). In the face of industry overreliance on patenting, the AIA took a major step towards restoring the integrity and strength of the U.S. patent system.

The AIA created an administrative framework known as inter partes review ("IPR") to ensure that patent monopolies are restricted to their legitimate scope. *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2144 (2016). As a "specialized agency proceeding," IPR enables the United States Patent and Trademark Office ("PTO"), through the Patent Trial and Appeals Board ("PTAB"), to reevaluate its initial patentability decision and cancel unpatentable claims. *Id.* at 2143-44; *see* 35 U.S.C. § 316(c).

Congress specifically chose to allow anyone to file an IPR, ensuring that any member of the public with enough reason to pay the $30,500 filing fee would be able to challenge bad patents.

The decision below contravenes Congress's goals. By barring petitioners like RPX from appealing adverse decisions, while simultaneously saddling them with estoppel, the Federal Circuit undercuts the AIA's goal of eliminating bad patents through third-party IPRs.

For reasons Petitioner has explained, the decision below conflicts with the Court's precedents and must be reversed. I-MAK fully endorses the analysis in Petitioner's brief.

In addition to the conflicts identified by Petitioner, the decision below conflicts with this Court's FOIA and FECA precedents, which hold that anyone requesting documents under those statutes has standing to seek judicial review when their requests are denied. Together, these cases establish that when Congress creates a public right to petition the Government for relief, and that relief has been denied, it results in a concrete and particularized injury sufficient for standing.

The decision below conflicts with these cases because the denial of an IPR on the merits creates just such an injury. Just as a FOIA requester would have "specifically requested, and been refused," certain documents, RPX has specifically requested and been refused cancelation of certain patent claims and has been injured as a result. *See Pub. Citizen v. DOJ*, 491 U.S. 440, 449 (1989).

Indeed, when an instituted IPR is wrongly denied (as RPX contended in its appeal), the petitioner has spent $30,500 in IPR fees without obtaining cancellation of the challenged claims, as required by statute. That injury is concrete and particularized. And by denying such petitioners standing to appeal, the decision below contravenes Congress's intent to grant full public rights to challenge unmerited patents.

Finally, this case is an ideal vehicle because it is undisputed that RPX was not threatened with infringement liability as required by the Federal Circuit's standing test. Because the Federal Circuit has exclusive jurisdiction over appeals from denied IPRs, this issue is unlikely to be presented again so cleanly.

The decision below is the latest in a line of Federal Circuit decisions holding that petitioners challenging the validity of patents before the PTO lack standing to appeal adverse decisions unless they are threatened with infringement liability. *See Consumer Watchdog v. Wis. Alumni Research Found.*, 753 F.3d 1258 (Fed. Cir. 2014); *Phigenix, Inc. v. Immunogen, Inc.*, 845 F.3d 1168 (Fed. Cir. 2017).

This Court's review is needed.

ARGUMENT

I. THE IPR PROCESS PROTECTS THE PUBLIC BY ALLOWING ANY PERSON TO CORRECT THE GOVERNMENT'S ERRORS IN GRANTING BAD PATENTS.

In 2011, Congress overhauled the patent system by passing the AIA. The AIA created the PTAB and the IPR process.

Unlike most other Patent Office procedures, Congress provided that any person "who is not the owner of a patent may file" an IPR. 35 U.S.C. § 311(a). Congress also authorized any "party dissatisfied with the final written decision of the Patent Trial and Appeal Board under section 318(a) [to] appeal the decision."[2] *Id.* § 319.

As this Court has recognized, "[b]y issuing patents, the PTO take[s] from the public rights of immense value, and bestow [s] them upon the patentee." *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1373 (2018) (internal quotation marks omitted). Thus, the IPR process protects "the public's paramount interest in seeing that patent monopolies are kept within their legitimate scope."[3] *Id.* at 1374 (internal quotation marks and citation omitted).

---

2. The denial of institution of an IPR is not appealable, but if the IPR is instituted, and the PTAB denies it on the merits, the IPR filer can appeal that decision.

3. For that reason, even if the parties settle, the PTAB has the authority to continue on with the case and decide the IPR on its merits. *See Oil States Energy Servs*, 138 S. Ct. at 1371 ("If the settlement results in no petitioner remaining in the inter partes review, the Board can terminate the proceeding or issue a final written decision.") (citing 35 U.S.C. § 317(a)).

The judicial review of patent grants similarly checks government behavior rather than protecting private interests. *Cf. Patlex Corp. v. Mossinghoff*, 758 F.2d 594, 604 (Fed. Cir. 1985) (observing that "[t]he reexamination statute's purpose is to correct errors made by the government, to remedy defective governmental (not private) action, and if need be to remove patents that should never have been granted").

The Federal Circuit's decision effectively strips away the judicial review Congress intended to make available to petitioners like RPX and amici curiae, cutting short the process Congress created and demoting their petitions to a lesser status than those filed by a petitioner threatened with infringement. By precluding certain parties—including public interest organizations like amici curiae—from appealing, this result contravenes the AIA's intent to encourage public challenges to bad patents. *Id.*

Indeed, even companies that compete with the patentee may decide not to risk filling an IPR given the uncertainty over whether they will be allowed to appeal an adverse decision, especially when there is no doubt that the patentee would be free to appeal a decision of the PTAB cancelling its patent claims. Such a one-sided right to appeal (patentees, but not challengers) not only conflicts with the express language and intent of the applicable statutes, it also violates fundamental fairness.

And while parties like RPX cannot appeal adverse decisions, they can participate in defending a decision cancelling patent claims when appealed by the patentee. *See Pers. Audio, LLC v. Elec. Frontier Found.*, 867 F.3d 1246 (Fed. Cir. 2017). This asymmetry creates an incentive

to resolve IPRs in favor of patentability, as a decision upholding the patent is effectively unreviewable when the petitioner is similarly situated to RPX.

II. THE DECISION BELOW CONFLICTS DIRECTLY WITH THIS COURT'S FOIA AND FECA PRCEDENTS, WHICH ESTABLISH STANDING WHERE THE GOVERNMENT HAS DENIED RELIEF AUTHORIZED BY STATUTES DESIGNED TO PROTECT THE PUBLIC.

This Court has explained that generalized grievances do not create standing. But where Congress has created a public right to petition the Government for particular relief, and that relief has been denied, this Court has found standing to challenge the denial. The decision below conflicts with these cases because the denial of an IPR on the merits creates a cognizable injury.

A. The FOIA and FECA Precedents Establish That Where Congress Has Created a Right to Petition the Government for Relief Benefiting the Public, Standing Exists to Challenge the Denial of that Relief.

This Court has repeatedly held that the Freedom of Information Act ("FOIA") and similar statutes confer standing on petitioners whose requests for records have been denied. *Pub. Citizen*, 491 U.S. at 449 (collecting cases).[4] Indeed, this Court's "decisions interpreting the

4. *Public Citizen* involved access to records under the Federal Advisory Committee Act (FACA), which this Court likened to FOIA for purposes of the standing analysis.

Freedom of Information Act have never suggested that those requesting information under it need show more than that they sought and were denied specific agency records." *Id.* Thus, in *Public Citizen*, this Court held that even though "other citizens or groups of citizens might make the same complaint after unsuccessfully demanding disclosure," that did not make Public Citizen's complaint a generalized grievance. *Id.* at 449-50.

Just as Public Citizen had "specifically requested, and been refused," certain documents, RPX has specifically requested and been refused cancelation of certain patent claims. *Id.* at 449. The Federal Circuit's decision below holding that RPX lacks standing to appeal directly conflicts with *Public Citizen*.

Similarly, in *FEC v. Akins*, the Court held that the Federal Election Campaign Act of 1971 (FECA) creates standing to sue for violations of that act. 524 U.S. 11 (1998). FECA imposes record keeping and disclosure requirements for political committees. In *Akins*, voters complained to the FEC that an organization was violating FECA disclosure requirements. *Id.* at 18. The FEC dismissed the voters' complaints, who then sought judicial review under FECA's judicial review provision.

The Court held that the voters had standing because "Congress has specifically provided in FECA that 'any person who believes a violation of this Act . . . has occurred, may file a complaint with the Commission.'" and that "'any party aggrieved by an order of the Commission dismissing a complaint filed by such party . . . may file a petition' in district court seeking review of that dismissal.'" *Id.* at 19 (quoting 2 U.S.C. § 437g (recodified at 52 U.S.C. § 30109)).

The Court reasoned that the voters satisfied the injury-in-fact requirement because the "injury of which respondents complain—their failure to obtain relevant information—is injury of a kind that FECA seeks to address." *Id.* at 20.

Just as FECA authorizes any party to petition for documents and then seek review in the Courts, so too with an AIA. Congress specifically provided that any person "who is not the owner of a patent may file with the Office a petition to institute an inter partes review of the patent." 35 U.S.C. § 311(a), and that any "*party* dissatisfied with the final written decision of the Patent Trial and Appeal Board under section 318(a) may appeal the decision." 35 U.S.C. § 319 (emphasis added). In fact, the case for standing is stronger here than in *Atkins* because by the time the PTAB denies an IPR on the merits, the IPR filer has already achieved institution and litigated the IPR through a full administrative trial. Thus, the decision below conflicts with *Atkins* as well.

B. The Federal Circuit's Attempt to Distinguish *Public Citizen* and *Atkins* Is Unpersuasive.

The decision below is the latest in a line of Federal Circuit decisions holding that petitioners challenging the validity of patents before the PTO lack standing unless they are threatened with infringement liability. In its earlier *Consumer Watchdog* decision involving standing to appeal adverse patent reexamination decisions, the Federal Circuit rejected the applicability of this Court's FOIA and FECA precedents because FOIA and FECA "created substantive legal rights—access to certain government records—the denial of which inflicts a concrete and particularized injury in fact." *Consumer Watchdog,* 753 F.3d at 1262. The Federal Circuit reasoned that, in

its view, "[u]nlike the plaintiffs in the FOIA and FECA cases, Consumer Watchdog was not denied anything to which it was entitled," as it "was permitted to request reexamination and participate once the PTO granted its request." *Id.* Thus, the Federal Circuit's opinion hinged on its conclusion that the ability to request and participate in a reexamination was "all the statute requires."

This reasoning is untenable and misunderstands the statutory regime Congress enacted.

First, 35 U.S.C. § 318(b) creates a statutory right to the cancellation of any claims a petitioner proves are unpatentable. *See id.* § 316(e) ("[T]he petitioner shall have the burden of proving . . . unpatentability by a preponderance of the evidence."); *id.* § 318(a) ("If an inter partes review is instituted and not dismissed under this chapter, the . . . Board *shall* issue a final written decision with respect to the patentability of any patent claim challenged by the petitioner . . . .") (emphasis added);

Second, the patentability requirements are defined by statute. S*ee, e.g.*, *id.* § 102; *id.* § 311(b) ("A petitioner in an inter partes review may request to cancel as unpatentable 1 or more claims of a patent only on a ground that could be raised under section 102 or 103 . . . "). Thus, if the challenged claims to do not meet the statutory requirements for the reasons set forth in an IPR, the PTO Director *must* cancel the claims. He has no discretion to allow claims to persist that are unpatentable by law.[5]

5. Indeed, just this term, the Court emphasized the nondiscretionary nature of this determination once the Director has decided to institute an IPR. *See SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348 (2018).

So if RPX's petition is correct in its argument that the challenged claims were unpatentable, it is entitled to have those claims canceled.

The Federal Circuit's focus on the fact that the statute does not "guarantee a particular outcome favorable to the requester," *Consumer Watchdog*, 753 F.3d at 1262, underscores its misunderstanding, as that is equally true of FOIA and FECA as well. FOIA and FECA do not specify that every record request must be granted. Instead, they require that the agency produce records if a request meets the statutory requirements, just like the AIA does for IPRs.

As explained in Section I above, the judicial review of patent grants checks government behavior rather than protecting private interests. *Cf. Patlex Corp.*, 758 F.2d at 604 (observing that "[t]he reexamination statute's purpose is to correct errors made by the government, to remedy defective governmental (not private) action, and if need be to remove patents that should never have been granted"). The same is true of FOIA and FECA. *See Akins,* 524 U.S. at 14 (stating, "the FECA seeks to remedy any actual or perceived corruption of the political process"); *E.P.A. v. Mink*, 410 U.S. 73, 80 (1973) (superseded on other grounds) (opining that FOIA "seeks to permit access to official information long shielded unnecessarily from public view").

This public interest focus is the exact reason amici curiae file and plan to file IPRs, and it is the reason Congress chose to authorize judicial review of decisions denying their IPRs on the merits. Because "Congress has the power to define injuries and articulate chains of

causation that will give rise to a case or controversy where none existed before," Congress's decision to authorize appeals from petitioners like RPX and amici curiae should have been given greater weight by the Federal Circuit. *See Massachusetts v. E.P.A.*, 549 U.S. 497, 516 (2007) (internal citations and quotation marks omitted).

The decision below conflicts with historical practice as well. As this Court noted in *Oil States*, in 18th Century English legal practice, "an individual could challenge the validity of a patent by filing a writ of *scire facias* in the Court of Chancery." *Oil States Energy Servs*, 138 S. Ct. at 1376. Importantly, "***any citizen*** could bring a *scire facias* action as of right in the name of the Crown" because "[e]very person is presumed to have such an interest in a patent for an invention that, if he alleges that it is illegal or void, he is entitled, as of right, to a *scire facias* in the name of the queen, in order to repeal it." Mark A. Lemley, *Why Do Juries Decide If Patents Are Valid?*, 99 Va. L. Rev. 1673, 1683 & n.41 (2013) (emphasis added). The same public interest exists here in appeals from decisions denying IPRs which seek to cancel improperly granted patent claims.

In short, because the Federal Circuit's decision below (and its related decisions) conflict with this Court's precedents, review is needed.

III. THE FILING FEE FOR AN IPR CREATES A PARTICULARIZED AND CONCRETE INJURY-IN-FACT.

In addition to the three injuries identified by Petitioner, the IPR filing fees cause a particularized and concrete injury-in-fact.

First, the filing fees for an IPR are considerable. The minimum combined review and post-institution fee for an IPR is $30,500. 37 C.F.R. § 42.15(a)(2)-(3). Second, the fee is nonrefundable. Thus, if the petitioner wrongly loses on the merits of his or her IPR, he or she cannot get a refund. Moreover, by the time the petitioner has lost on the merits, he or she has expended considerable resources on discovery and trial.

Combined, these facts result in an injury when an IPR is wrongly denied on the merits. In the event a meritorious IPR is wrongly denied, the petitioner is out thousands of dollars but does not receive the benefit the fee should have given him—cancellation of the unpatentable claims.[6] This injury is immediate and concrete. It is also particularized to the specific petitioner. Thus, it should create standing for petitioners like RPX, contrary to the Federal Circuit rule that only a threat of patent infringement liability can satisfy the injury requirement of Article III.

IV. THIS CASE IS THE CORRECT VEHICLE TO CONSIDER THE QUESTION PRESENTED BY THE PETITION.

As Petitioner explained, this case is an ideal vehicle as it is undisputed that RPX has not been threatened with infringement liability, as the Federal Circuit's standing test requires.

---

6. This is similar to the investment made by the patentee. *See Oil States Energy Servs.*, 138 S. Ct. at 1380 (Gorsuch, J., dissenting) (The patentee "endure[s] the further cost and effort of applying for a patent, devoting maybe $30,000 and two years to that process alone.").

Amici Curiae would additionally point out that because this issue has been decided by the Federal Circuit, and because the Federal Circuit has exclusive jurisdiction over appeals from denied IPRs, this issue is unlikely to arise again in a case that presents the issue so cleanly. Future cases will more likely involve IPR challengers who have some claim to future injury under the Federal Circuit's test. *See Momenta Pharm., Inc. v. Bristol-Myers Squibb Co.*, 17-1694 (Fed. Cir.) (currently on appeal, raising whether Momenta has standing to appeal an IPR decision where it is working on a competitor biologic product but has not yet filed for approval with FDA). In those cases, the issue presented by RPX's petition will be muddied by the fact-bound dispute over the imminency of the threat. *See id.*

CONCLUSION

For the reasons stated above, the petition for certiorari should be granted.

Respectfully submitted,

A. Neal Seth
Counsel of Record
Wesley E. Weeks
Wiley Rein LLP
1776 K Street, N.W.
Washington, DC 20006
(202) 719-7000
nseth@wileyrein.com

Counsel for The Initiative for Medicines Access & Knowledge and Patients for Affordable Drugs, Inc.