

No. 17-1686

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IN THE  
**Supreme Court of the United States**

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RPX CORPORATION,

*Petitioner,*

v.

CHANBOND LLC,

*Respondent.*

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

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**BRIEF OF ASKELADDEN LLC AS  
*AMICUS CURIAE* IN SUPPORT  
OF PETITIONER**

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## **INTEREST OF *AMICUS CURIAE*<sup>1</sup>**

Askeladden LLC is a wholly owned subsidiary of The Clearing Housing Payments Company L.L.C. Since its founding in 1863, The Clearing House has delivered safe and reliable payments systems, facilitated bank-led payments innovation, and provided thought leadership on strategic payments issues. Today, The Clearing House is the only private-sector ACH and wire operator in the United States, clearing and settling nearly \$2 trillion in U.S. dollar payments each day, representing half of all commercial ACH and wire volume. It continues to leverage its unique capabilities to support bank-led innovation, including launching RTP®, a real-time payment system that modernizes core payments capabilities for all U.S. financial institutions. As the country’s oldest banking trade association, The Clearing House also provides informed advocacy and thought leadership on critical payments-related issues facing financial institutions today. The Clearing House is owned by 26 financial institutions and supports hundreds of banks and credit unions through its core systems and related services.

Askeladden founded the Patent Quality Initiative (“PQI”) as an education, information, and advocacy effort to improve the understanding, use, and reliability of patents in financial services and elsewhere.

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<sup>1</sup> Pursuant to Rule 37.6, Askeladden LLC affirms that no counsel for a party authored this brief in whole or in part, and no one other than Askeladden LLC or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel of record for all parties received notice of Askeladden’s intention to file this brief. The parties have consented to the filing of this brief, each in a separate writing that is being filed concurrently with this brief.

Through PQI, Askeladden strives to improve the patent system by challenging the validity of low quality patents and by promoting improved patent holder behavior, while also supporting effective intellectual property practices and improved innovation rights. To that end, Askeladden regularly files amicus briefs in cases presenting important issues of patent law.

This is one of those cases. By 2011, the patent system as a whole had spiraled out of control, resulting in the issuance of a great many illegitimate patents. That was a problem of significant public concern, as these improperly issued patents burdened both interstate commerce and the courts. Congress responded by enhancing proceedings in the Patent and Trademark Office (PTO) through which any person can challenge the validity of issued patents, with judicial review by the Federal Circuit. One such proceeding—*inter partes* review (IPR)—was at the heart of those reforms. See Leahy-Smith America Invents Act (AIA), Pub. L. No. 112-29, § 18, 125 Stat. 284, 329–31 (2011); 35 U.S.C. §§ 311–319.

Askeladden has a strong interest in reaffirming the propriety of this landmark legislative solution. Facing an analogous problem nearly 200 years ago, Congress provided additional powers to the PTO to determine patentability, subject to judicial review, and that solution promised to have a “most beneficial and salutary effect in relieving meritorious inventors, and the community generally, from the serious evils growing out of the granting of patents for everything indiscriminately, creating interfering claims, encouraging fraudulent speculators in patent rights, deluging the country with worthless monopolies, and laying the foundation for endless litigation.” S. Rep. No. 24-338 (1st Sess. 1836), *reprinted in The 1836 Senate Committee Report*, 12 J. of the Patent Office Soc’y 853, 861 (1936).

Congress responded to many of the same concerns in enacting the AIA, including giving any party an avenue to challenge patents.

The Federal Circuit's decision does serious violence to Congress's administrative scheme for protecting the public from invalid patents by frustrating the use of IPR proceedings by non-defendant petitioners. Askeladden is keenly interested in this Court's restoration of the IPR process Congress created.

### **REASONS FOR GRANTING THE PETITION**

RPX's petition fully explains why it has Article III standing to challenge the patent at issue in this case. No useful purpose is served by parroting those arguments here. Instead, the focus here will be on the effect of the Federal Circuit's error in holding that RPX has no appeal right. The Federal Circuit's decision not only painfully undermines Congress's purpose in enacting the AIA's IPR process but also creates an inherently unfair scheme. Only this Court can repair the damage done by the Federal Circuit, and thus the petition should be granted.

There can be no doubt that the decision below tears a hole in the fabric of the AIA. When Congress overhauled the nation's patent system in 2011, it expanded the PTO's ability to reexamine previously issued patents. Recognizing "that questionable patents are too easily obtained and are too difficult to challenge," Congress created a tailored response designed to "improve patent quality and restore confidence in the presumption of validity that comes with issued patents." H.R. Rep. No. 112-98, pt. 1, at 39, 48 (2011), *as reprinted in* 2011 U.S.C.C.A.N. 67, 69, 78. The IPR process, one of three new forms of patent review before the newly constituted Patent Trial and Appeal Board ("PTAB"), al-

lows parties “to go back to the PTO and demonstrate ... that the patent shouldn’t have been issued in the first place. That way bad patents can be knocked out in an efficient administrative proceeding, avoiding costly litigation.” 157 Cong. Rec. S1053, S1053 (daily ed. Mar. 1, 2011) (statement of Sen. Schumer). And the IPR process has been working just as Congress hoped—the new procedures for challenging issued patents have been wildly popular, and over the last six years, the IPR process has been used to invalidate hundreds of patents that never should have been issued in the first place.

The Federal Circuit’s novel standing rule frustrates this important aspect of Congress’s system. Specifically, the decision below artificially restricts the right of non-defendant petitioners to appeal the PTAB’s adverse rulings to the Federal Circuit through the adoption of an overly narrow reading of Article III standing. But the availability of appellate review in the Federal Circuit is critical to the operation of the IPR process. Congress specifically designed this process to grant any person, not just those faced with actual or likely infringement litigation, certain statutory rights to challenge patents, including the right to appeal an adverse administrative determination, because the success and efficacy of the new scheme depends on ensuring robust participation. See 35 U.S.C. § 319.

Indeed, as Congress recognized, restrictions on the right to appeal had contributed in large part to the failure of pre-AIA attempts to establish cost-effective alternatives to litigation as the means to challenge the patentability of issued patent claims. See S. Rep. No. 110-259 (2008). Yet, the Federal Circuit’s new rule will lead to the same result here. Accordingly, by undermining participation in the IPR process by non-defendant petitioners, like RPX, the decision below

threatens an important aspect of the IPR scheme. This Court should grant the petition to correct the Federal Circuit’s error and preserve the careful balance that Congress struck in the AIA.

### **I. THE EFFICACY OF THE IPR PROCESS DEPENDS ON ROBUST PARTICIPATION.**

Congress designed the IPR process in the AIA to overcome its earlier failures to increase patent quality through streamlined administrative proceedings rather than costly and ineffective patent litigation.

In the AIA, Congress eliminated the earlier “*inter partes* reexamination system and replace[d] it with a new post-grant review system at the USPTO that w[ould] give third parties a quick, inexpensive, and reliable alternative to district court litigation to resolve questions of patent validity.” S. Rep. No. 110-259, at 20; see also *Wi-Fi One, LLC v. Broadcom Corp.*, 878 F.3d 1364, 1367–68 (Fed. Cir. 2018) (en banc) (“IPR and other post-grant proceedings are intended to be quick and cost effective alternatives to litigation for third parties to challenge the patentability of issued claims.”). As Congress recognized, the earlier *inter partes* reexamination system had failed in part because certain features had limited and deterred use of the program. See S. Rep. No. 110-259. These restrictions included limitations on participation by the reexamination requester after review was initiated, and the absence—from 1999 to 2002—of any right to appeal the decision of the Patent Board in court. See *id.* at 19 (“Restrictions such as these made reexamination a much less favored avenue to challenge questionable patents than litigation.”); H.R. Rep. No. 112-98, pt. 1, at 45; see also Patent and Trademark Office Authorization Act of 2002, Pub. L. No. 107-273, § 13106(a), 116 Stat. 1758, 1900-01 (2002); Megan M. La Belle, *Patent Law as Public Law*, 20 GEO. MASON L.

REV. 41, 57 n.127 (2012) (“Although Congress did not provide the right to appeal to the Federal Circuit in the initial legislation, it amended the AIPA in 2002 to provide this and other rights in hopes of promoting greater use of the inter partes reexamination proceeding.”).

Such limitations, particularly the restriction on the right to appeal, had “proved to make [reexamination] a less viable alternative ... than Congress intended,” S. Rep. No. 110-259, at 18, and had led to “low utilization of the procedure,” Sapna Kumar, *Standing Against Bad Patents*, 32 BERKELEY TECH. L.J. 87, 119–20 (2017). And this was widely recognized. See, e.g., Nat’l Research Council, *A Patent System for the 21st Century* 96 (Merrill et al. eds. 2004) (“NAS Report”) (referring to the bar on appealing issues as a “disincentive” and “serious drawback” and noting that “[c]hallengers are loathe to forfeit an opportunity to litigate all of the potential validity issues if accused of infringement”); Mark D. Janis, *Inter Partes Patent Reexamination*, 10 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 481, 491 (2000) (“[T]he inter partes reexamination inexplicably falls short in one crucial aspect of enhancing third-party participation: the third-party’s opportunity to obtain judicial review of unfavorable reexamination determinations.”); Michael Xun Liu, *Patent Policy Through Administrative Adjudication*, 70 BAYLOR L. REV. 43, 51 (2018). Indeed, “[b]ecause of the limitations on appeals, *inter partes* re-examinations [had] been rare; there were fewer than 25 requests in 2003.” NAS Report at 96.

Recognizing that these restrictions had undermined earlier attempts to establish cost-effective alternatives to litigation, Congress adopted the IPR process to address the well-known shortcomings of pre-AIA proceedings in order to ensure robust utilization of the

program. See, e.g., S. Rep. No. 110-259, at 20 n.93 (“The post grant review system created by this Section adopts several of the recommendations, in whole or in part, made by the NAS Report.”). Thus, Congress replaced the *inter partes* reexamination process with a review process designed to incentivize widespread pursuit of invalidity challenges. Congress granted any “person who is not the owner of a patent” the right to petition for reconsideration of a patent, 35 U.S.C. § 311(a); the right to participate in that review if granted, § 316; and, critically, the right to then appeal the PTAB’s final decision to the Federal Circuit, § 319. The language of the AIA further emphasized the breadth of the appeal right, providing that a “party dissatisfied with the final written decision ... may appeal the decision” and “[a]ny party to the ... review shall have the right to be a party to the appeal.” § 319; see § 141(c). Congress thus plainly made the availability of appellate review a centerpiece and critical component of the IPR process, and the Act “rests on the foundation that PTAB proceedings will substitute for district court proceedings, and that the Federal Circuit will provide full appellate review.” *Merck & Cie v. Gnosis S.P.A.*, 820 F.3d 432, 437 (Fed. Cir. 2016) (en banc) (Newman, J., dissenting) (per curiam).

Congress’s solution achieved remarkable success. As of April 30, 2018, the PTAB had received 7,775 IPR petitions over a five-and-a-half year period. See Patent Trial & Appeal Bd., U.S. Patent & Trademark Office, *Trial Statistics – April 2018*, at 3 [https://www.uspto.gov/sites/default/files/documents/trial\\_statistics\\_20180430.pdf](https://www.uspto.gov/sites/default/files/documents/trial_statistics_20180430.pdf). Of 8,439 total petitions filed—of which the vast majority were IPRs—the PTAB instituted review in about half (4,408 cases). *Id.* at 3, 11. Of these, 2,127 resulted in final written decisions, invalidating all challenged claims 65% of the time, some challenged

claims 16% of the time, and no claims 19% of the time. *Id.* at 11. This means that, in the five-and-a-half years of its existence, the PTAB has invalidated 1,717 patent claims that should never have been issued. *Id.*

By contrast, *inter partes* reexamination had received only 1,919 petitions over the entire 13 years of its existence. See U.S. Patent & Trademark Office, *Inter Partes Reexamination Filing Data – September 30, 2017*, at 1, [https://www.uspto.gov/sites/default/files/documents/inter\\_parte\\_historical\\_stats\\_roll\\_up.pdf](https://www.uspto.gov/sites/default/files/documents/inter_parte_historical_stats_roll_up.pdf) [hereinafter *Reexamination Filing Data*]. In fact, although the USPTO had projected that in the first year after creation it would receive 400 requests, see H.R. Rep. No. 112-98, pt. 1, at 46, there were *zero inter partes* reexamination filings in fiscal year 2000, only *one* in fiscal year 2001, and just *four* in 2002, see *Reexamination Filing Data, supra*, at 1. In other words, petitioners have pursued IPR proceedings nearly *nine times* more frequently than *inter partes* reexaminations. Compare *Reexamination Filing Data, supra*, at 1, with *Trial Statistics – April 2018, supra*, at 3. This is precisely why Congress adopted the IPR process, and included judicial review as an integral element of that scheme.

## **II. NON-DEFENDANT PETITIONERS ARE PARTICULARLY IMPORTANT TO THE EFFECTIVE OPERATION OF THE IPR PROCESS.**

Non-defendant petitioners like RPX are indispensable to the efficacy of the IPR process. Due to their unique characteristics, they play a critical role in achieving improved patent quality, which was the underlying purpose of Congress in creating these proceedings.

In its role as a non-defendant IPR petitioner, RPX, along with entities such as Unified Patents and Askeladden, “seeks to invalidate low-quality patents and to stop or deter infringement lawsuits that [it] believe[s] are frivolous and wasteful.” RPX Corp., *Digital Audio Encoding Systems LLC*, Inter Partes Review (IPR), <https://www.rpxcorp.com/wp-content/uploads/sites/2/2017/03/IPR-Case-Study-1-Digital-Audio.pdf>. RPX “act[s] alone, fund[s] the petitions unilaterally, and expressly discourage[s] input from clients and other third parties.” *Id.*

RPX, Unified Patents, and Askeladden are exceptionally successful IPR petitioners. RPX has filed 42 IPR petitions, and before this case had a perfect record of claim cancellation before the PTAB in every final written decision. Pet. App. 3 & n.2. Similarly, Unified Patents claims to have filed “more patent challenges than all other third-party petitioners combined” and to have “successfully neutralized more patents than any other third-party.” Unified Patents Inc., <https://www.unifiedpatents.com/success/> (last visited July 17, 2018). And Askeladden has filed 19 IPR petitions with the USPTO; 11 of these included claims found to be unpatentable, and the patent holder requested adverse judgment against itself in two others. Askeladden LLC, Patent Quality Initiative, IPR Petitions, <http://www.patentqualityinitiative.com/actions/iprs-filed> (last visited July 16, 2018); Unified Patents Inc., PTAB Case List PORTAL, [https://portal.unifiedpatents.com/ptab/caselist?petitioners=Askeladden&sort=-filing\\_date](https://portal.unifiedpatents.com/ptab/caselist?petitioners=Askeladden&sort=-filing_date) (last visited July 16, 2018).

These groups are often able to use the IPR process frequently and effectively because they are not subject to a host of pressures and incentives that otherwise deter IPR challenges. *First*, the threat of potential retal-

iation discourages industry participants from challenging bad patents. A “daunting impediment to validity suits is the very real risk that the patent owner will countersue for infringement.” La Belle, *Public Law*, *supra*, at 65. An infringement suit in federal court is particularly likely when the plaintiff is a competitor of the defendant patent owner. *Id.* Accordingly, competitors—especially smaller parties—may be dissuaded from filing offensive IPR petitions because that may trigger “unwanted scrutiny,” including a countersuit for patent infringement. Kumar, *supra*, at 97. And the evidence bears this out, as “only about thirteen percent of patents challenged at the PTAB are not already subject to litigation in federal court.” Megan M. La Belle, *Public Enforcement of Patent Law*, 96 B.U. L. REV. 1865, 1895 n.192 (2016). By contrast, non-defendant petitioners are impervious to counterclaims or other retaliation from patent holders. Accordingly, they do not fear exposure to patent infringement charges or other liability, and are not similarly deterred from challenging bad patents.

*Second*, invalidating illegitimate patents serves a public good, see *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 349–50 (1971), and individual private actors may prefer to forgo costly invalidity actions and instead simply free ride on the efforts of others. Michael J. Burstein, *Rethinking Standing in Patent Challenges*, 83 GEO. WASH. L. REV. 498, 543–44 (2015) (“In other words, because patent challenges generate positive spillovers, we can expect to see fewer of them than is optimal.”). The free-rider problem is particularly acute in the patent context because “a particular defendant must consider that invalidating a patent will not only benefit it but will also benefit all other potential defendants, some or even many of

whom may be its competitors.” Saurabh Vishnubhakat, *The Youngest Patent Validity Proceeding: Evaluating Post-Grant Review*, 24 TEX. INTELL. PROP. L.J. 333, 340–41 (2016). But organizations like RPX do not share the same incentives vis-à-vis their competitors; instead, their “core business” is to cancel low-quality patents, and they file IPR petitions to enhance their “reputational goodwill in ... industries that tend to be negatively impacted by the assertion of these weaker patents.” Chuang Decl. ¶ 7, No. 17-2346 (Fed. Cir. Jan. 17, 2018) (ECF No. 32); see Rochelle Cooper Dreyfuss, *Giving the Federal Circuit a Run for Its Money: Challenging Patents in the PTAB*, 91 NOTRE DAME L. REV. 235, 292–93 (2015) (“organizations like RPX ... and Unified Patents are, in a sense, the ‘good guys’ in that they solve the collective action problem by pooling the resources of their members”). They are thus uniquely positioned to overcome the collective action problem.

*Third*, the high cost of invalidating a patent presents another obstacle, particularly for small businesses or individuals. Although cheaper than full-blown litigation, the IPR process is still expensive, with the average cost of a petition ranging from \$500,000 to \$900,000. Jennifer Robichaux Carter, Comment, *Hedge Funds Should Be Able to Challenge Patent Validity Using Inter Partes Review Despite Mixed Motives*, 54 HOUS. L. REV. 1315, 1344 n.217 (2017); La Belle, *Public Enforcement*, *supra*, at 1895 n.191. Cost is therefore yet another reason why direct competitors may be unwilling or unable to bring challenges even to patents of dubious validity. Non-defendant challengers, like RPX, however, have the financial resources necessary to challenge the validity of patents that might otherwise go unchallenged. See, e.g., Robin Feldman & Tom Ewing, *The Giants Among Us*, 2012

STAN. TECH. L. REV. 1, 84 (2012) (“RPX has spent over \$300 million acquiring patents.”). Moreover, they are particularly efficient and effective as repeat players who “have the luxury of ‘choosing their battles’ and focusing on patents that are most vulnerable to a validity challenge.” *IPR: Not Just For Litigants*, RPX Blog, Feb. 21, 2017, <https://www.rpxcorp.com/2017/02/21/ipr-not-just-for-litigants/>.

For all these reasons, the participation of non-defendant petitioners is vital to the success of IPR. Indeed, Congress expressly contemplated and intended the participation of such non-defendant petitioners by granting *any* “person who is not the owner of a patent” the right to petition for reconsideration of a patent, not just those faced with actual or likely infringement litigation. 35 U.S.C. § 311(a). Moreover, as discussed above, Congress explicitly ensured that such non-defendants would have the ability to appeal, as well—as a necessary element of the overall scheme—by providing that “[a]ny party to the ... review shall have the right to be a party to the appeal.” § 319; see also *Oil States Energy Servs. LLC v. Greene’s Energy Grp. LLC*, No. 16-712, slip op. at 4 (U.S. Apr. 24, 2018). It was, after all, well within Congress’s authority to confer Article III standing in this way. As detailed in the petition, this Court has made plain that Congress may by statute create private rights, the invasion of which constitutes injury in fact for purposes of Article III standing. See Pet. 10–15. And there is certainly no rule, either in this Court’s cases or in logic, *precluding* Congress from doing so here unless non-defendant petitioners can show that they face or are likely to face infringement suits, as the Federal Circuit has erroneously concluded. *Id.* at 24–25. Whether Congress could simply confer a right *ab initio* to go into federal court on an entity like RPX or amicus to challenge any

patent is a different and much harder question than the one posed here. Congress's power to allow an entity to engage in an extensive administrative dispute resolution process and to be permitted at the end of that process both to challenge or defend the agency's outcome in a federal court fully satisfies the fundamental purpose of Article III to ensure that the parties have a sufficient and narrowly drawn stake in the outcome to ensure that the dispute will be fully litigated in court by those parties. *Id.* at 14 & 24 (citing cases).

### **III. THE FEDERAL CIRCUIT'S UNDULY RESTRICTIVE RULE UNDERMINES THE EFFECTIVE IPR PROCESS CONGRESS INTENDED.**

The Federal Circuit's unnecessarily cramped view of standing undercuts the effectiveness of the IPR scheme, frustrating Congress's clear intent in adopting the IPR process to encourage the use of PTO administrative proceedings to address low quality patents that should never have issued.

1. Congress ensured involvement in the IPR process by granting parties certain statutory rights to challenge patents, including the right to appeal to the Federal Circuit. See *supra* at pp. 4–7. The broad right to appeal was a critical part of this scheme. *Id.* Indeed, as discussed above, it was widely recognized by Congress and others that the earlier *inter partes* reexamination scheme had failed in large part precisely because it did not include a right to appeal. *Id.* By dramatically restricting this right for the IPR process, the Federal Circuit's new rule will lead to the same result: it will discourage involvement by non-defendant petitioners, and impair the success of the IPR process established by Congress.

Indeed, shortly after the Federal Circuit issued its decision in *Consumer Watchdog v. Wisconsin Alumni Research Foundation*, 753 F.3d 1258 (Fed. Cir. 2014), commentators predicted that if such a sweeping, non-statutory standing requirement were also extended to IPR proceedings, the “inability to appeal will surely chill [its] use by parties Congress may have been particularly interested in attracting.” Dreyfuss, *supra*, at 293. And the broad sweep of the Federal Circuit’s new rule can be expected to further exacerbate this effect, as it threatens to eliminate the right to appeal even in circumstances in which a form of estoppel may apply to bar a party from raising the same arguments in a court proceeding. Under 35 U.S.C. § 315(e)(1)–(2), an IPR petitioner, “or the real party in interest or privy of the petitioner,” is precluded from seeking to invalidate the patent claim on any ground it raised—or reasonably could have raised—in the IPR proceeding. Thus, if a third-party challenger like RPX were to engage in infringing activity or in the future face an infringement action, it would potentially be estopped from defending itself on the basis that the claim was invalid. But IPR’s robust estoppel provision was not meant to function without the safeguard of the statutory right to appellate review. Compare, e.g., *ex parte* reexamination, 35 U.S.C. § 305 (no appeal right and no estoppel), with *inter partes* review, *id.* §§ 319, 315(e)(1)–(2) (appeal coupled with estoppel). To the contrary, the scheme is dependent on that right.

Additionally, even if there were no technical preclusion, the PTAB decision as a practical matter would still risk effective estoppel in litigation for the third-party challenger and its privies and real parties in interest on issues that were raised or could have been raised in the IPR proceeding. Indeed, because of the “lower burden of proof and broader claim construction

used by the PTAB,” any patent that survives review becomes essentially “bullet proof.” Dreyfuss, *supra*, at 296 (“No jury, for example, is likely to find a patent invalid after being told that the experts on the PTAB ... had upheld it.”). In short, the expansive application of the Federal Circuit’s rule risks formal or effective estoppel and threatens to further discourage use of the IPR process in conflict with the express language and purpose of the AIA.

2. The Federal Circuit’s rule is particularly unfair to entities, like RPX, that fill such a critical role in the effective operation of the IPR scheme. See *supra* at 8–12. For such non-defendant challengers, the final adverse board decisions of the PTAB would essentially become unappealable. But patentees unquestionably have standing to appeal a decision that a patent is invalid. See *Pers. Audio, LLC v. Elec. Frontier Found.*, 867 F.3d 1246 (Fed. Cir. 2017), *cert. denied*, 138 S. Ct. 1989 (2018). This creates a one-sided right to appeal for patent owners; entities like RPX—after having researched and selected “patents that are most vulnerable to a validity challenge,” that cross the significant threshold of having PTAB institute the reexamination and reach final decision—have no such reciprocal right to appeal if their claims are nonetheless unsuccessful. *IPR: Not Just For Litigants*, RPX Blog, Feb. 21, 2017, <https://www.rpxcorp.com/2017/02/21/ipr-not-just-for-litigants/>. This discrepant result inherently discourages such parties’ use of the IPR process. And it also perversely favors owners of questionable patents that become consequently less vulnerable to challenge. Because the business model of entities like RPX is premised on bringing high quality challenges, the petitions initiated by non-defendant petitioners that fail before the PTAB are likely to be close cases warranting appellate review. But these cases—involving claims that

were chosen precisely because of the dubiousness of their validity—are precisely the cases now immunized from appeal, whereas even the holder of a junk patent that has been cancelled will be guaranteed Federal Circuit review.

Congress plainly did not intend to establish such an imbalanced system. To the contrary, Congress previously experimented with and rejected that precise model because allowing only patent owners to appeal had “result[ed] in a major disincentive to invoke reexamination as a way of curing allegedly defective patents.” H.R. Rep. No. 107-121, at 2 (2001) (“[T]he asymmetry controlling which parties may appeal the agency’s *inter partes* reexamination decisions to the Federal courts is considered one of the major defects of the patent system ...”). Because nothing in Article III requires gutting the IPR system adopted by Congress, this Court should ensure that the Federal Circuit does not upset the careful balance struck in the AIA to ensure an effective system for challenging defective patents.

**CONCLUSION**

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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