

No. 2013-1377

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CONSUMER WATCHDOG
(formerly known as the Foundation for Taxpayer and Consumer Rights),

Appellant,

v.

WISCONSIN ALUMNI RESEARCH FOUNDATION,

Appellee.

Appeal from the United States Patent and Trademark Office,
Patent Trial and Appeal Board, in Reexamination No. 95/000,154

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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INTRODUCTION AND SUMMARY

The United States, including the United States Patent and Trademark Office (PTO), respectfully submits this brief in response to the Court's order of December 4, 2013, inviting the government to address whether Consumer Watchdog has Article III standing to pursue this appeal. In the government's view, Consumer Watchdog lacks standing and its appeal should be dismissed.

This Court's jurisdiction extends only to cases and controversies under Article III. Consequently, although PTO may decide questions of patentability in a reexamination proceeding without regard to the requirements of Article III, this Court cannot review PTO's decisions in such a proceeding unless the irreducible minima of Article III jurisdiction are present. In particular, the requirement of an injury-in-fact is the "hard floor of Article III jurisdiction." *Summers v. Earth Island Institute*, 555 U.S. 488, 497 (2009). Except at the behest of a party with a concrete and particularized interest in the question presented, neither this Court nor any other Article III tribunal has the power to render judgment.

Because Consumer Watchdog fails to identify any concrete or particularized interest in the patentability of the invention claimed in U.S. Patent No. 7,029,913 (the '913 patent), it lacks standing to invoke this Court's jurisdiction. Consumer Watchdog does not suggest that it is an actual or prospective competitor or licensee

of the Wisconsin Alumni Research Foundation (WARF), nor does it assert any concrete interest in the invention claimed in the '913 patent. The fact that Congress has created a procedural right to appeal an adverse PTO decision does not by itself confer Article III standing. The appeal should therefore be dismissed for lack of jurisdiction.

In dismissing Consumer Watchdog's appeal, however, the Court should avoid suggesting that the same standards that limit the availability of declaratory judgment relief in federal district court necessarily govern the ability of petitioners in PTO post-grant proceedings to appeal adverse decisions to this Court. Although the same "hard floor of Article III jurisdiction" exists in both circumstances, anticipatory actions for declaratory relief involve considerations of prudential ripeness, immediacy, and redressability that may not apply, or may apply with diminished force, when Congress provides an express procedural right to judicial review. Moreover, for a petitioner with a more particularized interest in the patentability of a particular invention – for example, a potential competitor of a patentee attempting to decide whether to develop a competing product – the AIA's estoppel provisions may have the practical effect of converting a future infringement risk into a present injury. The Court has no reason in this case to cast doubt on the ability of a such a party to appeal from an adverse PTO decision in a post-grant administrative

proceeding. It is sufficient to conclude that Consumer Watchdog, which fails to assert *any* concrete or particularized interest in the patentability of the invention claimed in the '913 patent, lacks Article III standing to appeal PTO's decision here.

QUESTION PRESENTED

Whether Consumer Watchdog has Article III standing to appeal PTO's decision affirming the patentability of the '913 patent as amended during reexamination.

ARGUMENT

I. A Party Dissatisfied with a PTO Decision Must Demonstrate Article III Standing To Invoke This Court's Jurisdiction

As an initial matter, there is no question that a party seeking to appeal a PTO decision directly to this Court must demonstrate the existence of a justiciable case or controversy. As the Supreme Court recently emphasized, the standing requirement of Article III "must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997)). Consequently, "[w]hen a federal court of appeals reviews an agency action, Article III standing must be demonstrated as it would be if such review were conducted in the first instance by the district court." *Americans for Safe Access v. Drug*

Enforcement Admin., 706 F.3d 438, 443 (D.C. Cir. 2013) (internal quotation marks and citation omitted).

That is true even when the underlying administrative proceedings are open to any person to commence and prosecute. Administrative agencies such as PTO are not constrained by the strictures of Article III or the related prudential limitations on federal judicial power. *See, e.g., Ritchie v. Simpson*, 170 F.3d 1092, 1094 (Fed. Cir. 1999) (explaining that the “‘case’ and ‘controversy’ restrictions for standing do not apply to matters before administrative agencies and boards, such as the PTO”); *Pfizer Inc. v. Shalala*, 182 F.3d 975, 980 (D.C. Cir. 1999). For this reason, Congress may – and commonly does – authorize administrative agencies to take action or issue decisions at the behest of parties who lack any particularized interest in the subject matter of the proceeding. In the inter partes reexamination statute at issue here, for example, Congress authorized “[a]ny third party requester at any time” to request reexamination of an issued patent, without regard to the relationship (or lack thereof) between the requester and the patentee. 35 U.S.C. 311(a) (2010).¹ Other federal statutes commonly allow any person to request an administrative action, *see*,

¹ Although Congress repealed the inter partes reexamination procedure in the Leahy-Smith America Invents Act (AIA), Pub. L. No. 112-29, 125 Stat. 284 (2011), Congress specified that prior law would continue to govern pending proceedings. *See* AIA § 6(c)(3)(C), 125 Stat. 305. This case is therefore governed by the pre-AIA version of the Patent Act.

e.g., *Americans for Safe Access*, 706 F.3d at 391-392 (discussing a petition to reschedule marijuana under the Controlled Substances Act), or to submit comments for consideration in an agency rulemaking process, *see, e.g.*, *Summers*, 555 U.S. at 496-497 (discussing the right to submit comments on proposed Forest Service actions). Article III imposes no limitation on the authority of federal agencies to receive and act on such requests.

When the petitioner in such a proceeding later seeks judicial review in an Article III court, however, “the constitutional requirement that it have standing kicks in.” *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002). In many cases, the petitioner’s standing to appeal will be apparent on the face of the administrative record. *See id.* at 899-900. If PTO had concluded that the ’913 patent was unpatentable, for example, there would have been little doubt regarding WARF’s standing to appeal that adverse decision. *Cf. ASARCO Inc. v. Kadish*, 490 U.S. 605, 617-619 (1989). In other cases, however, the petitioner’s standing to seek judicial review may not be apparent from the record before the agency. In such circumstances, this Court may require the appealing party to submit declarations or other evidence sufficient to establish the party’s standing to invoke this Court’s jurisdiction. *See Sierra Club*, 292 F.3d at 900-901 (in an administrative review proceeding, “a petitioner whose standing is not self-evident should establish its

standing by the submission of its arguments and any affidavits or other evidence appurtenant thereto at the first appropriate point in the review proceeding”).²

II. Consumer Watchdog Lacks Article III Standing To Appeal PTO’s Reexamination Decision

A. Consumer Watchdog Has No Concrete Interest in the Patentability of the Invention Claimed in the ’913 Patent

Consumer Watchdog was free to petition PTO for inter partes reexamination of the ’913 patent (or most any other issued patent). See 35 U.S.C. 311(a) (2010). But it cannot appeal the resulting administrative decision to this Court unless it can identify some particularized, real-world consequence of that decision for Consumer Watchdog itself. Although Consumer Watchdog is plainly adverse to WARF and believes the ’913 patent to be invalid, “[t]he presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art[icle] III’s requirements.” *Diamond v. Charles*, 476 U.S. 54, 62 (1986). Rather, as the Supreme Court has stressed, the right to appeal belongs “in the hands of those who have a

² The D.C. Circuit, which often confronts questions of standing in appeals from administrative agencies, has adopted specific local rules to implement this requirement. Under those rules, the appellant’s docketing statement in a direct appeal from an administrative agency must include a recitation of the basis for the appellant’s standing, see D.C. Cir. R. 15(c)(2); the appellant’s opening brief must include a separate section addressing standing, see D.C. Cir. R. 28(a)(7); and any declarations or other evidence relevant to standing but not included in the administrative record must be bound in a separate addendum to the brief, see *ibid.*

direct stake in the outcome.” *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972). “The decision to seek review is not to be placed in the hands of concerned bystanders, persons who would seize it as a vehicle for the vindication of value interests.” *Arizonans for Official English*, 520 U.S. at 64-65 (internal quotation marks and citation omitted).

Consumer Watchdog is a nonprofit consumer rights organization that describes itself as “the nation’s most aggressive consumer advocate.”³ It claims no commercial interest in the subject matter of the ’913 patent; it faces no plausible risk of an infringement claim; it is neither a prospective competitor nor a prospective licensee of WARF. Nor does Consumer Watchdog assert any basis for associational or representative standing. See WARF Suppl. Br. 6-7 & n.1. For all that appears in the record, Consumer Watchdog is wholly a stranger to the ’913 patent and the invention it claims. Consumer Watchdog therefore lacks standing to appeal PTO’s reexamination decision because, as far as the organization’s own concrete interests are concerned, it does not matter whether PTO got the right answer.

Consumer Watchdog argues that WARF’s enforcement of the ’913 patent, which relates to human embryonic stem cells, “has put a severe burden on taxpayer-funded research in the State of California where [Consumer Watchdog] is located.”

³ See <http://www.consumerwatchdog.org/about/> (last visited Jan. 15, 2014).

CW Br. 2. The point of the Article III injury-in-fact requirement, however, is precisely to preclude adjudication of that kind of “generalized grievance” shared by all taxpayers. See, e.g., *Hollingsworth*, 133 S. Ct. at 2662; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-577 (1992); *United States v. Richardson*, 418 U.S. 166, 171 (1974). Generalized grievances about burdens on the public interest – including burdens on taxpayer-funded research conducted in the public interest – are the province of the political branches. See *Lujan*, 504 U.S. at 575-577. And while there is no doubt that Consumer Watchdog has a genuine interest in consumer welfare, “a mere ‘interest in a problem,’ no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself” to create a justiciable controversy. *Sierra Club*, 405 U.S. at 739.

B. The Existence of a Procedural Right to Appeal PTO Decisions Does Not Confer Standing on Consumer Watchdog

Consumer Watchdog nevertheless argues that it has Article III standing to appeal because Congress granted to third-party requesters a “procedural right” to pursue an inter partes reexamination, including an express right to seek judicial review of any resulting PTO decision favorable to patentability. CW Suppl. Br. 1-2. Observing that Article III standing rules are designed to enforce the constitutional separation of powers, Consumer Watchdog argues that no standing problem arises

“[w]hen Congress and the President pass express statutes giving the courts power to resolve certain disputes.” *Id.* at 2.

That argument fails for multiple reasons. As an initial matter, Congress did not give third-party requesters a right to obtain reexamination of an issued patent, but only the right to *request* reexamination. See 35 U.S.C. 311(a) (2010). Congress specified, moreover, that PTO’s decision whether to grant such a request “shall be final and non-appealable.” 35 U.S.C. 312(c) (2010). Consumer Watchdog accordingly cannot rely on a congressionally guaranteed “right” to judicial review for third-party requesters, because nothing in the Patent Act creates such a right.

More fundamentally, the mere existence of a statutory right to obtain judicial review of agency action does not satisfy the requirements of Article III. See generally WARF Suppl. Br. 4-6. Were it otherwise, every plaintiff under the Administrative Procedure Act would have standing and every complaint under the Endangered Species Act’s citizen-suit provision could proceed – both propositions that the Supreme Court has specifically rejected. See *Sierra Club*, 405 U.S. at 738-740; *Lujan*, 504 U.S. at 571-578. As the Supreme Court has emphasized, the injury-in-fact requirement is the “hard floor of Article III jurisdiction that cannot be removed by statute.” *Summers*, 555 U.S. at 497. Consequently, proof of such an injury is “an indispensable part of the plaintiff’s case” in every proceeding in an Article III

tribunal. *Lujan*, 504 U.S. at 561. Congress enacts all statutory rights of judicial review – including the right of third-party requesters to appeal PTO reexamination decisions favorable to patentability, *see* 35 U.S.C. 141 (2010) – against the backdrop of this settled constitutional principle.⁴

Consumer Watchdog is correct that, when Congress creates procedural rights and expressly authorizes the vindication of those rights in federal court, the normal Article III requirements of immediacy and redressability may be relaxed, *see Massachusetts v. EPA*, 549 U.S. 497, 517-518 (2007); *Lujan*, 504 U.S. at 572 n.7; and all prudential limitations on Article III jurisdiction are eliminated, *see, e.g., Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997). For these reasons, as we explain below, the Article III inquiry in direct appeals to this Court may differ from the inquiry that governs anticipatory actions for declaratory judgment relief in federal district court, which often implicate prudential considerations of ripeness, causation, and

⁴ For this reason, Consumer Watchdog errs in suggesting (Suppl. Br. 10 n.2) that dismissing this appeal for lack of standing would cast doubt on the constitutionality of the federal statutes that authorized third-party requesters to obtain review in this Court of adverse PTO reexamination decisions, *see* 35 U.S.C. 141 (2010); 35 U.S.C. 315(b)(1) (2010), or the similar provisions that Congress enacted in the AIA, *see, e.g.,* 35 U.S.C. 329 (appeals in post-grant review proceedings). Congress enacted all of those provisions against the backdrop of *Lujan*, which was decided in 1992, and presumably understood and intended that the minimum requirements of Article III would continue to govern access to the federal courts.

redressability. But the essential constitutional requirement remains that a party invoking this Court's jurisdiction must have some concrete stake in the outcome. "[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation – a procedural right *in vacuo* – is insufficient to create Article III standing." *Summers*, 555 U.S. at 496.

Analogizing the inter partes reexamination statute to the Freedom of Information Act (FOIA), Consumer Watchdog invokes the principle that "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." CW Suppl. Br. 2 (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973)). The analogy is flawed, however, and the principle inapposite. Statutes such as the FOIA, the Fair Housing Act, *see Havens Realty v. Coleman*, 455 U.S. 363 (1982), and the Federal Election Campaign Act, *see FEC v. Akins*, 524 U.S. 11 (1998), create substantive legal rights that entitle a party to receive concrete and individualized benefits – access to specific government records, for example, or freedom from racial discrimination in housing. A wrongful denial of those rights thus inflicts on the plaintiff a concrete and particularized injury-in-fact: the loss of a specific, personal benefit to which the plaintiff was otherwise entitled under the law.

Neither the inter partes reexamination statute nor the post-grant review scheme in the AIA, by contrast, confers substantive rights on any person. No substantive “right” of Consumer Watchdog’s was “invaded” when PTO confirmed the patentability of the amended claims of the ’913 patent, and no concrete benefit to Consumer Watchdog was denied or withheld. In this respect, the reexamination statute is far more akin to the statutes at issue in *Lujan* and *Summers*, which involved purely procedural rights. Indeed, PTO could have declined Consumer Watchdog’s request for reexamination altogether. See 35 U.S.C. 312(c) (2010) (decisions denying reexamination are “final and non-appealable”).

The reexamination statute guaranteed to Consumer Watchdog a procedural opportunity to ask PTO to reconsider the patentability of the ’913 patent. That was undoubtedly a significant opportunity: the reexamination forced WARF to amend the challenged claims and make statements on the public record regarding their enforceable scope. But it does not alter the fact that Consumer Watchdog itself lacks any stake in the outcome of the PTO proceeding other than a generalized interest in ensuring that the patent laws were correctly applied. Such an interest is not sufficient to support Article III standing. See *Lujan*, 504 U.S. at 577 (rejecting the notion that Congress may “convert the undifferentiated public interest in

executive officers' compliance with the law into an 'individual right' vindicable in the courts").

III. Article III May Permit an Appropriate Party to Appeal an Adverse PTO Decision in Post-Grant Proceedings Even Though a Declaratory Judgment Action for Patent Invalidity Would Be Unripe

For the foregoing reasons, Consumer Watchdog lacks standing and its appeal should be dismissed. Although it is not necessary to resolve the question here, the Court may nevertheless wish to make clear in dismissing this case for lack of Article III jurisdiction that appeals from PTO post-grant proceedings are not necessarily governed by the same Article III inquiry that governs the availability of declaratory judgment relief in federal district courts.

The circumstances under which judicial review in this Court will be available to parties who file challenges to patentability under the AIA's post-grant procedures, *see* 35 U.S.C. 311 *et seq.* (inter partes review); 35 U.S.C. 321 *et seq.* (post-grant review), is a question of significant prospective importance under the patent laws. Organizations such as Consumer Watchdog, who cannot claim any concrete and particularized interest in the validity of the challenged patent, will normally lack standing to appeal. Contrary to WARF's suggestion (Suppl. Br. 7), however, it does not necessarily follow that the same Article III inquiry that governs declaratory judgment relief in the district courts – under which judicial relief is normally not

available unless the declaratory plaintiff can show that the patentee has asserted infringement, threatened litigation, or otherwise affirmatively acted to impair the declaratory plaintiff's freedom in the marketplace, *see, e.g., Prasco LLC v. Medicis Pharmaceutical Corp.*, 537 F.3d 1329, 1339 (Fed. Cir. 2008) – will also govern appeals from PTO decisions in post-grant proceedings.

The question is important because competitors and other likely users of the AIA's inter partes review and post-grant review procedures may be loath to commence such proceedings if they believe that this Court's review will only be available in circumstances in which a conventional declaratory judgment action for patent invalidity would otherwise lie – particularly given the AIA's strict statutory estoppel provisions, *see* 35 U.S.C. 315(e), 325(e). Indeed, Congress enacted the AIA's expanded procedures for post-grant patentability challenges partly in response to concerns that, under prior law, it was not reasonably possible for a company weighing whether to enter a particular market to test the validity of a potential competitor's patent without first incurring the substantial costs and risks of developing a suitable – and potentially infringing – product. *See Matal, A Guide to the Legislative History of the America Invents Act, Part II of II*, 21 Fed. Cir. B.J. 539, 601 (2012) (discussing legislative testimony on this point).

Of course, the same “hard floor of Article III jurisdiction” exists in declaratory judgment actions and in appeals from PTO decisions. *Summers*, 555 U.S. at 497. In an appropriate case, however, the Court could conclude that the relevant Article III inquiries are different. The Court might conclude, for example, that a company’s desire to eliminate a specific patent held by a prospective competitor constitutes a sufficiently concrete and particularized interest to support an appeal of an adverse PTO decision in a post-grant proceeding. Although such an interest would normally lack the immediacy required for declaratory judgment jurisdiction, the Supreme Court has explained that, in some circumstances, “[t]he person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.” *Lujan*, 504 U.S. at 572 n.7; *see also Massachusetts v. EPA*, 549 U.S. at 517-518. Similarly, while a prospective interest in invalidating a competitor’s patent might normally implicate prudential considerations of fitness for judicial review, an explicit congressional authorization to appeal a particular category of legal determinations “eliminates any prudential standing limitations.” *Raines*, 521 U.S. at 820 n.3. For these reasons, the Court could conclude in an appropriate case that the Article III inquiry governing direct appeals from the PTO differs from the inquiry that governs declaratory judgment actions in district court.

In a close case, moreover, the Court may conclude that the AIA's estoppel provisions bear on the Article III analysis. Under those provisions, a petitioner who obtains inter partes or post-grant review of a patent is forever estopped from disputing the validity of that patent in future litigation with the patentee on any ground that the petitioner actually raised or could have raised during the administrative proceeding. See 35 U.S.C. 315(e)(2), 325(e)(2). For an entity like Consumer Watchdog that has no realistic risk of facing a claim of infringement, such provisions have no practical relevance. Cf. 35 U.S.C. 315(c) (2010) (estoppel provision under former inter partes reexamination statute). For a potential competitor of the patentee trying to determine whether to invest in a particular market, however, the estoppel provisions may have the practical effect of ripening the parties' dispute for judicial review: the patentability challenge becomes a matter of now or never. In an appropriate case, the Court could conclude that this factor supports Article III jurisdiction over a direct appeal from PTO, even in circumstances in which a conventional declaratory judgment action would be unripe.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing amicus brief complies with the requirements of Fed. R. App. P. 32(a)(5) because it has been prepared in 14-point Gaudy Old Style, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and 29(d) because it contains 3,634 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

s/ Mark R. Freeman
MARK R. FREEMAN

CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2014, I electronically filed the foregoing amicus brief with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system.

In addition, pursuant to the Court's order of December 4, 2013, I caused six paper copies of the foregoing amicus brief to be delivered to the Court by hand delivery within one business day after electronic filing.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

s/ Mark R. Freeman
MARK R. FREEMAN