

No. 18-

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

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JTEKT CORPORATION,

*Petitioner,*

*v.*

GKN AUTOMOTIVE LTD.,

*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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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTION PRESENTED

The Federal Circuit held that JTEKT Corporation (“JTEKT”)—a direct competitor of GKN Automotive Ltd. (“GKN”)—did not have standing to appeal an unfavorable Patent Office inter partes review decision upholding GKN’s patent because JTEKT allegedly did not prove an injury in fact. The Federal Circuit’s action is inconsistent with Congress’s actions conferring Article III standing by statute to parties like JTEKT. The question of statutorily-conferred standing, previously presented and now pending in *RPX Corp. v. ChanBond LLC* (17-1686) (awaiting input from the Solicitor General), is also applicable here, though presented in different order:

Can the Federal Circuit refuse to hear an appeal by a petitioner from an adverse final decision in a Patent Office inter partes review on the basis of lack of a patent-inflicted injury in fact when Congress has (i) statutorily created the right for parties dissatisfied with a final decision of the Patent Office to appeal to the Federal Circuit, (ii) statutorily created the right to have the Director of the Patent Office cancel patent claims when the petitioner has met its burden to show unpatentability of those claims, and (iii) statutorily created an estoppel prohibiting the petitioner from again challenging the patent claims?

**PARTIES TO THE PROCEEDING  
AND RULE 29.6 STATEMENT**

Petitioner, who was Appellant below, is JTEKT Corporation. The Petitioner has no Parent Company and Toyota Motor Corporation is the only public traded company that owns 10% or more of the stock in JTEKT Corporation.

Respondent is GKN Automotive Limited.

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## **PETITION FOR A WRIT OF CERTIORARI**

Petitioner JTEKT respectfully petitions this Court for a writ of certiorari to review the order of the Court of Appeals for the Federal Circuit dismissing JTEKT's appeal of the Patent Trial and Appeal Board's Final Written Decision in the inter partes review JTEKT requested for lack of standing.

### **OPINIONS BELOW**

The Patent Trial and Appeal Board's ("Board") Final Written Decision ("Final Decision") (App. 9a–56a) is unreported. The Court of Appeals for the Federal Circuit's Opinion (App. 1a–8a) dismissing JTEKT's appeal of the Board's Final Decision was reported at 898 F.3d 1217 (Fed. Cir. 2018).

### **JURISDICTIONAL STATEMENT**

The Federal Circuit's Opinion issued on August 3, 2018. On October 5, 2018 the Federal Circuit issued an Order denying JTEKT's petition for panel rehearing and rehearing en banc. App. 57a–58a. Jurisdiction is conferred by 28 U.S.C. § 1254(1).

### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

Article III, Section 2, Clause 1 of the Constitution states in relevant part: "The judicial power shall extend to all cases, in law and equity, arising under . . . the laws of the United States. . . ."

35 U.S.C. § 141, titled, “Appeal to the Court of Appeals for the Federal Circuit,” states in relevant part:

(c) Post-grant and Inter Partes Reviews. A party to an inter partes review or a post-grant review who is dissatisfied with the final written decision of the Patent Trial and Appeal Board under section 318(a) or 328(a) (as the case may be) may appeal the Board’s decision only to the United States Court of Appeals for the Federal Circuit.

35 U.S.C. § 319, titled “Appeal,” states in relevant part, “[a] party dissatisfied with the final written decision of the Patent Trial and Appeal Board . . . may appeal the decision pursuant to sections 141 through 144. Any party to the inter partes review shall have the right to be a party to the appeal.”

35 U.S.C. § 318, titled “Decision of the Board,” states in relevant part, “the Patent Trial and Appeal Board shall issue a final written decision with respect to the patentability of any patent claim challenged by the petitioner . . .” and “the Director shall issue and publish a certificate canceling any claim of the patent finally determined to be unpatentable. . . .”

35 U.S.C. § 315(e), titled “Estoppel,” states in relevant part in paragraph (1), “The petitioner in an inter partes review . . . may not request or maintain a proceeding before the Office . . . on any ground that the petitioner raised or reasonably could have raised during that inter partes review.” Paragraph (2) states in relevant part “The petitioner in an inter partes review . . . may

not assert either in a civil action . . . or in a proceeding before the International Trade Commission . . . that the claim is invalid on any ground that the petitioner raised or reasonably could have raised during that inter partes review.”

### STATEMENT

This case concerns Congress’ power to confer Article III standing by statute, as does *RPX Corp. v. ChanBond LLC* (17-1686). Together, these cases ask whether a party that requests inter partes review (“IPR”) of a patent has standing to appeal the Patent Office’s final decision in the IPR to the Court of Appeals for the Federal Circuit, when Congress has passed statutes expressly providing for any dissatisfied party to appeal, conferring a right to compel agency action, and creating an estoppel that precludes the party from requesting or maintaining another challenge against the patent.

Since IPRs (and their predecessor, inter partes reexaminations) became available, numerous petitioners (both direct competitors such as JTEKT and third-party petitioners such as RPX) have been challenged for lack of Article III standing based on lacking an injury in fact. Thus far, the Federal Circuit has consistently found that only parties facing an imminent threat of suit for infringement of the underlying patent have an injury in fact sufficient to establish standing to appeal.

By limiting standing to definitive patent-inflicted injury associated with an infringement suit, the Federal Circuit risks creating overly-narrow, patent-specific standing jurisprudence that does not consider the

broader law necessary to address standing in appeals from all agency actions. And even for patent cases, this unnecessarily-narrow view of standing undercuts the effectiveness of the IPR scheme and works to discourage these types of administrative proceedings because petitioners faced with invalid competitor patents during the product design process—such as JTEKT—will have no recourse following an adverse Final Decision. Denying appeal access to IPR petitioners, particularly to direct competitors such as JTEKT, is inconsistent with congressional intent and has the potential to affect thousands of companies who want to do their due diligence before finalizing development or entering commercial production.

### **The Proceedings Below**

After determining that its competitor GKN's patent raised a potential risk of infringement for a product under development, JTEKT challenged the patentability of claims 1–7 of U.S. Patent No. 8,215,440 (“the '440 patent”) via IPR (IPR2016-00046). When claims 2 and 3 were confirmed as patentable in the Final Decision—and thus the risk of infringement remained—JTEKT appealed, and GKN moved to dismiss the appeal based on lack of standing.

In response, JTEKT submitted testimonial evidence demonstrating a potential risk for infringement based on matching its concept's technical elements to claims 2–3 of the '440 patent. But, the Federal Circuit focused on the fact that there is not yet a final product, and without one, JTEKT could not *definitively* say whether it will infringe the '440 patent, and thus the potential risk of

infringement is impossible to quantify at this time. App. 7a. JTEKT separately argued that it has standing based on its economic injury resulting from development costs, an issue the Federal Circuit did not address at all. App. 6a–8a. Finally, JTEKT argued that it suffered an injury in fact because—based on the estoppel provisions of 35 U.S.C. § 315(e)—it lost its ability to challenge the validity of claims 2–3 based on the Final Decision that JTEKT was not permitted to appeal. The Federal Circuit found this insufficient without a concurrent patent-based injury (*i.e.*, infringement suit). App. 8a.

Despite proving injury based on (i) the potential risk of infringement, (ii) economic injury, and (iii) injury based on the IPR estoppel provisions, the Federal Circuit found that JTEKT failed to definitively prove an injury in fact based on potential infringement sufficient to confer Article III standing and dismissed the appeal. In doing so, the Federal Circuit disregarded that standing only requires *likely* harm, not certainty, and limited IPR appellants to purely definitive patent-based injury for standing. And, while ostensibly saying that IPR petitioners need not concede infringement to establish standing, the Federal Circuit provided no guidance for successfully establishing standing other than the injury associated with an infringement suit. *Id.*

The Board had jurisdiction under 35 U.S.C. § 6 over the petition for IPR JTEKT filed against GKN’s ’440 patent. The Board issued its Final Decision in IPR2016-00046 on January 23, 2017. JTEKT timely filed its Notice of Appeal on March 24, 2017. The Federal Circuit had jurisdiction under 28 U.S.C. § 1295(a)(4)(A) and 35 U.S.C. §§ 319, 141.



***RPX Corp. v. ChanBond LLC* (17-1686)**

The standing issues presented by Congress' statutory actions in this case are also up for review in *RPX Corp. v. ChanBond LLC* (17-1686). On October 1, 2018 the Solicitor General was invited to file a brief in the *RPX* case. Given the overlapping issues in these cases, JTEKT respectfully requests that the cases be considered together.

**REASONS FOR GRANTING THE PETITION****I. THE FEDERAL CIRCUIT'S DECISION BELOW AND CURRENT JURISPRUDENCE CONFLICTS WITH THE COURT'S PRECEDENT REGARDING CONGRESS' POWER TO CREATE ARTICLE III STANDING BY STATUTE**

The Federal Circuit has consistently found that the only injury sufficient to confer standing in appeals from IPRs or inter partes reexaminations is a definitive patent-based injury. *See Consumer Watchdog v. Wis. Alumni Research Found.*, 753 F.3d 1258, 1262 (Fed. Cir. 2014) (addressing standing for a requester in an inter partes reexamination); *Phigenix, Inc. v. Immunogen, Inc.*, 845 F.3d 1168 (Fed. Cir. 2017) (affirming the *Consumer Watchdog* holdings in the context of IPRs).

In *RPX* the Federal Circuit again found that RPX had not suffered an injury in fact when RPX was not engaging in allegedly infringing activities. *RPX Corp. v. Chanbond LLC*, Appeal No. 2017-2346, Order (Jan. 17, 2018).

Similarly, in the present case, the Federal Circuit held that JTEKT did not have standing because—despite

being known competitors and despite JTEKT spending years developing a product it believed potentially infringes GKN's patent—JTEKT allegedly could not definitively prove infringement at this time. App. 6a–8a.

Indeed, the only case in which the Federal Circuit has found that an IPR petitioner appellant challenged for lack of standing had standing was in *Altaire Pharmaceuticals, Inc. v. Paragon Biotech, Inc.*, where the petitioner had demonstrated a patent-inflicted injury in view of an imminent infringement suit. 889 F.3d 1274, 1283 (Fed. Cir. 2018), *remand order modified by stipulation*, 738 F. App'x 1017 (Fed. Cir. 2018); *see also PPG Indus., Inc. v. Valspar Sourcing, Inc.*, 679 F. App'x 1002, 1004 (Fed. Cir. 2017) (a requester for inter partes reexamination who appealed an adverse Board decision had established an injury in fact in facing imminent threat of suit, but finding the appeal mooted because the patent owner had filed a covenant-not-to-sue for infringement of the underlying patent).

Taken together, these cases discount any injury to the appellant not inflicted by the patent itself. But this approach conflicts with the Court's precedent and with the America Invents Act ("AIA"). And, this approach impermissibly deviates from the Court's precedent regarding the power of Congress to create Article III standing by statute.

JTEKT does not concede that it fails to satisfy the Federal Circuit's current requirement of a patent-inflicted injury in fact. Indeed, JTEKT maintains that the Federal Circuit overlooked and/or misapprehended facts and evidence demonstrating JTEKT's potential risk for infringement based on matching its concept's technical

elements to claims 2–3 of the '440 patent. And the Federal Circuit did not address JTEKT's economic injury at all.

Regardless, for the purposes of this petition, JTEKT focuses on how the Federal Circuit's decision conflicts with Supreme Court precedent regarding Congress' power enabling a party to satisfy Article III standing by statute. Congress statutorily created injury in fact sufficient for competitor IPR petitioners such as JTEKT to have standing to appeal the Board's Final Decision to the Federal Circuit.

**A. IN ENACTING §§ 319 AND 141, CONGRESS INTENDED FOR ANY PARTY DISSATISFIED WITH A FINAL DECISION TO BE ABLE TO APPEAL**

Both 35 U.S.C. §§ 319 and 141 are clear. A party may appeal the Board's Final Decision to the Federal Circuit if they are "dissatisfied." There is no dispute that JTEKT is a "party to the inter partes review" and is "dissatisfied" with the Board's Final Decision because two claims were found patentable that may read on JTEKT's final product.

JTEKT's dissatisfaction with the Board's Final Decision in the IPR is based on both an economic and competitive injury. Because JTEKT and GKN are competitors, the Board's failure to cancel all claims forces JTEKT to undertake costly design-arounds or face expensive litigation. Thus, there is no dispute that JTEKT satisfies the statutory requirements to appeal the Board's Final Decision to the Federal Circuit. The only issue to be confirmed is whether Congress intended for these statutes to confer Article III standing, allowing judicial review.

There is a “strong presumption” in favor of judicial review. *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1360 (2018); *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2140 (2016). This presumption can only be overcome by “clear and convincing” indications, drawn from ‘specific language,’ ‘specific legislative history,’ and ‘inferences of intent drawn from the statutory scheme as a whole,’ that Congress intended to bar review.” *Cuozzo*, 136 S. Ct. at 2140 (quoting *Block v. Community Nutrition Inst.*, 467 U.S. 340, 349–50 (1984)). That standard is not met here. Rather, the clear language of the statutes points to Congress’ intent for any party dissatisfied with a Final Decision to have standing to appeal.

And, supporting an interpretation that Congress intended for these statutes to confer standing and allow judicial review, the Court recently summarized these statutes, saying “[a] party dissatisfied with the Board’s decision can seek judicial review in the Court of Appeals for the Federal Circuit.” *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1372 (2018); *see also id.* at 1379 (“the Patent Act provides for judicial review by the Federal Circuit, *see* 35 U.S.C. § 319. . .”).

The Court explained the applicable analysis to determine whether statutes confer standing and allow judicial review, noting that when “Congress has authorized public officials to perform certain functions according to law, and has provided by statute for judicial review of those actions under certain circumstances, the inquiry as to standing must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff.” *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972). Thus, “the inquiry as to standing must

begin with a determination of whether [Sections 141 and 319] authorize[ ] [Federal Circuit] review [of a Board Final Decision] at the behest of [the requester of the IPR].” *Id.* There is no dispute that JTEKT satisfies this threshold inquiry, as JTEKT is “a party to the inter partes review” who is “dissatisfied” with the Board’s Final Decision, and thus authorized to appeal.

Further analysis confirms that JTEKT’s dissatisfaction with the Board’s Final Decision is an injury in fact sufficient to confer standing because it is “an invasion of a legally protected interest” that is “concrete and particularized” and “actual or imminent, not conjectural or hypothetical.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks and citations omitted).

First, JTEKT’s dissatisfaction with the Board’s Final Decision is concrete, because it is “*de facto*” and “actually exists.” *Spokeo, Inc. v. Robbins*, 136 S. Ct. 1540, 1548 (2016). This dissatisfaction is “‘real,’ and not ‘abstract,’” *id.* (citations omitted), as it relates to a specific Final Decision issued in the IPR JTEKT requested. JTEKT’s dissatisfaction is also particularized, because it affects JTEKT in a “personal and individual way.” *Id.* (internal quotation marks and citation omitted).

Second, JTEKT’s dissatisfaction with the Board’s Final Decision is “actual or imminent, not conjectural or hypothetical.” The Board’s Final Decision is an actual decision and JTEKT’s right to appeal to the Federal Circuit is limited in both time and scope.

Notably, the statute here does not allow *any* person to appeal a Board Final Decision with which they

are dissatisfied. Rather, the statute provides only the parties to the IPR such a right. The statute also does not permit hypothetical or political questions to be raised on appeal. Instead, it is only the specific technical issues addressed by the Board in the Final Decision that can be raised. Thus, the statute here does not “erase Article III’s standing requirements.” *Spokeo*, 136 S. Ct. at 1548 (internal quotation marks and citations omitted).

And to the contrary, Congress intended for these statutes to confer Article III standing to dissatisfied IPR parties. As the Court explained in *Spokeo*:

In determining whether an intangible harm constitutes injury in fact, [ ] the judgment of Congress play[s an] important role[ ]. Because [ ] Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important. Thus, we said in *Lujan* that Congress may “elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.” 504 U. S., at 578, 112 S. Ct. 2130, 119 L. Ed. 2d 351. Similarly, Justice Kennedy’s concurrence in that case explained that “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.” *Id.*, at 580, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (opinion concurring in part and concurring in judgment).

136 S. Ct. at 1549. Here, it was Congress’ express decision to give IPR petitioners the right to appeal to the Federal

Circuit the Board's Final Decision if they were dissatisfied with that decision. This contrasts with Congress' express decision to *not* give parties the right to appeal Board decisions whether to institute review in the first place, an issue addressed by the Court in *Cuozzo*. 136 S. Ct. at 2136 (considering 35 U.S.C. § 314(d), which states, "The determination by the Director [of the Patent Office] whether to institute an inter partes review under this section shall be final and non-appealable.").

Congress' judgment in enacting the AIA is "instructive and important" for standing purposes. *Spokeo*, 136 S. Ct. at 1549. In enacting §§ 319 and 141, Congress intended to provide IPR petitioners the right to appeal Board Final Decisions to the Federal Circuit. Thus, the Federal Circuit's decision conflicts with the Court's precedent explaining Congress' power to create Article III standing by statute.

**B. IN ENACTING 35 U.S.C. §§ 318 AND 311 CONGRESS CREATED A NEW PRIVATE RIGHT, THE INVASION OF WHICH CONSTITUTES AN INJURY IN FACT**

Although it is true that "Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing," *Spokeo*, 136 S. Ct. at 1547–48 (quoting *Raines v. Byrd*, 521 U.S. 811, 820, n.3 (1997)), that is not what Congress has done here. Rather, in enacting § 318 (request to cancel claims), Congress has specified by statute a basis for JTEKT's injury in fact by creating a private right, the invasion of which constitutes an injury in fact.

As detailed in the *RPX* petition and discussed above, “Congress may ‘elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.’ ” *Spokeo*, 136 S. Ct. at 1549 (quoting *Lujan*, 504 U.S. at 578); *see also* *Warth v. Seldin*, 422 U.S. 490, 514 (1975) (“Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute.”). The Court held in *Lujan* that if “the plaintiff is himself an object of the action (or forgone action) at issue . . . there is ordinarily little question that the action or inaction has caused him injury.” *Lujan*, 504 U.S. at 561–62. And although the *Spokeo* Court tempered some of the broader holdings of earlier cases, it maintained that “a plaintiff [who suffered the violation of a procedural right granted by statute] need not allege any *additional* harm beyond the one Congress has identified.” *Spokeo*, 136 S. Ct. at 1549.

Against this backdrop, invading the legally protected right granted to IPR petitioners under §§ 318 (request to cancel claims) and 311 (any person other than the patent owner can file an IPR) constitutes an injury in fact, because the injury is both concrete and particularized.

35 U.S.C. § 318(b) creates a statutory right for any petitioner who, in an instituted IPR, meets its burden of proving unpatentability of a patent claim to have the Director of the Patent Office cancel the claim. *See* 35 U.S.C. § 316(e) (“[T]he petitioner shall have the burden of proving . . . unpatentability by a preponderance of the evidence.”); § 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); § 318(b) (“If the . . . Board issues a final written decision under subsection (a) . . . the Director *shall* issue and publish a certificate canceling any claim of the patent finally determined to be unpatentable. . . .”) (emphasis added). This is a matter of right, not discretion. The Patent Office must cancel such a claim. Should it refuse, the only party with standing to compel it to act is the IPR petitioner. Similarly, if the Patent Office erroneously maintains claims, the only party with standing to compel correction is the IPR petitioner.

Regardless, for purposes of assessing standing, it is assumed that the appellant is correct on the merits. *Americans for Safe Access v. DEA*, 706 F.3d 438, 443 (D.C. Cir. 2013). Thus, here, the Court should assume JTEKT proved all of GKN’s patent claims to be unpatentable and that the Board erred in its Final Decision upholding GKN’s patent. When a patent claim is shown to be unpatentable, Congress does not merely *permit* the Patent Office to cancel that patent claim, Congress *mandates* the Patent Office cancel that patent claim. 35 U.S.C. § 318(a)–(b). The losing IPR petitioner is injured when it doesn’t get what the statute requires—not just the right to a decision, but the right to an error-free decision.

Here, JTEKT’s interest in having GKN’s patent claims canceled through IPR is its “legally protected interest,” because Congress provides JTEKT that right by statute. *See* 35 U.S.C. § 318. JTEKT secured the right to compel cancellation of the patent claims at issue no later than the Board’s decision, based on JTEKT’s petition, instituting an agency “trial” on the patentability of the

patent's claims. That institution triggered the agency's statutory non-discretionary obligation to cancel all patent claims JTEKT showed to be unpatentable and triggered JTEKT's statutory right to compel such cancelation, by appeal to the Federal Circuit if necessary. The Federal Circuit's decision conflicts with the Court's precedent illustrating Congress' ability to create a private right, the invasion of which constitutes an injury in fact.

**C. IN ENACTING 35 U.S.C. § 315, CONGRESS CREATED ESTOPPEL, CONSTITUTING AN INJURY IN FACT WHEN TIED TO AN UNAPPEALABLE, INCORRECT FINAL WRITTEN DECISION**

Congress created another statutory basis conferring an injury in fact onto JTEKT, IPR estoppel. While 35 U.S.C. § 311(a) allows any “person who is not the owner of a patent . . . [to] file . . . a petition [for] inter partes review of the patent,” § 315(e) estops “[t]he petitioner in an inter partes review [from] request[ing] or maintain[ing] a proceeding . . . on any ground that the petitioner raised or reasonably could have raised during the inter partes review.” The estoppel provisions (§ 315(e)(1) and (2)) encompass future IPRs, district court litigation, and ITC litigation, all of which have bearing on JTEKT in its dispute with competitor GKN.

Here, JTEKT fears that GKN will pursue an infringement suit when JTEKT's concept reaches the market, and there can be no dispute that JTEKT would vigorously defend itself against such a suit. But in view of § 315(e) JTEKT will be estopped from asserting in any subsequent USPTO proceeding, district court case, or

ITC investigation “any ground that petitioner raised or reasonably could have raised.” This dramatically restricts JTEKT’s ability to defend itself and constitutes an injury in fact when tied to JTEKT’s inability to appeal the Final Decision.

Indeed, even if there was no statutory preclusion, the Board decision effectively estops JTEKT from raising the same invalidity challenges again. Specifically, in view of the lower burden of proof at the Board level, it is unlikely that raising the same challenge in a different forum would have a different outcome.

Despite this handicapping, the Federal Circuit found estoppel insufficient to constitute an injury in fact (tied with its finding that JTEKT allegedly did not definitively prove potential infringement). App. 8a.

This conclusion is flawed for at least two reasons. First, this approach renders moot any consideration of estoppel. If JTEKT established that it was engaged in activity that would give rise to a possible infringement suit, that itself would be sufficient to confer standing and any showing of estoppel would not be necessary. Second, this approach impermissibly tethers the injury in fact to an injury flowing from the subject patent rather than the invasion of the statutory right to file multiple IPRs on the same patent claims or JTEKT’s ability to defend itself in future litigation. Thus, the Federal Circuit’s decision conflicts with Congress’ intent vis-à-vis estoppel.

## II. THE STANDING ISSUE IN THIS CASE AFFECTS NUMEROUS IPR PETITIONERS

JTEKT's situation demonstrates that the Federal Circuit's flawed application of standing impacts petitioners beyond third-party patent challengers such as RPX. Indeed, limiting standing in this way has the potential to affect thousands of operating companies—such as JTEKT—who want to do their due diligence before finalizing development or entering production.

Statistics indicate that approximately 20% of IPRs that are filed challenge a patent that has *not* been named in any district court cases. *See* <https://www.patexia.com/feed/patexia-chart-44-80-percent-of-ipr-filings-are-for-defensive-purposes-20171107> (last visited Dec. 6, 2018). Thus, 20% of petitioners would not be able to meet the Federal Circuit's jurisprudence limiting standing to definitive patent-inflicted injury associated with an infringement suit. These cases include both third-party petitioners such as RPX as well as direct competitors challenging patents seeking freedom to operate. In fact, JTEKT is aware of several cases pending at the Federal Circuit between competitors where the same standing issues are under consideration. *See, e.g.*, Appeal No. 18-1389 (*Daikin Industries, Ltd. v. Chemours Co. FC, LLC*); Appeal No. 17-2497 (*General Electric Co. v. United Technologies Corp.*); and Appeal Nos. 17-2088, -2089, -2091 (*Mylan Pharmaceuticals Inc. v. Research Corporation Tech.*).

As detailed in Section I, the Federal Circuit's current jurisprudence does not reflect the standing requirement Congress intended to be placed on IPR petitioners seeking

to appeal Board Final Decisions with which they are dissatisfied. Congress expressly wanted any party to the IPR to have the right to appeal the Board's Final Decision to the Federal Circuit if they were dissatisfied with it. The question of standing in appeals from the Board should be resolved by the Court.

### CONCLUSION

The petition should be granted and considered together with *RPX Corp. v. ChanBond LLC* (17-1686).

Respectfully submitted,

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