Appeal No. 2017-2497

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

GENERAL ELECTRIC COMPANY,

Appellant,

v.

UNITED TECHNOLOGIES CORPORATION,

Appellee.

Appeal from the United States Patent and Trademark Office,
Patent Trial and Appeal Board, IPR2016-00531

APPELLEE UNITED TECHNOLOGIES CORPORATION'S RESPONSE TO APPELLANT GENERAL ELECTRIC COMPANY'S PETITION FOR REHEARING *EN BANC*

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AMENDED CERTIFICATE OF INTEREST

Counsel for the appellee United Technologies Corporation certifies the following (use "None" if applicable; use extra sheets if necessary):

1. The full name of every party represented by me is:

   United Technologies Corporation

2. Name of the Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:

   N/A

3. Parent corporations and publicly held companies that own 10% or more of the stock of the party:

   N/A

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (**and who have not or will not enter an appearance in this case**) are:

   Finnegan, Henderson, Farabow, Garrett & Dunner, LLP
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5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. *See* Fed. Cir. R. 47.4(a)(5) and 47.5(b). (The parties should attach continuation pages as necessary).

   The Court has designated the following as companion cases:
   United Technologies Corp. v. General Electric Co., No. 2017-2502
   United Technologies Corp. v. General Electric Co., No. 2017-2537
   United Technologies Corp. v. General Electric Co., No. 2018-1020

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I. Introduction

GE seeks rehearing on a single issue: whether this Court's application of the competitor standing doctrine in this case is consistent with binding Supreme Court precedent and decisions by other circuits. *E.g.*, Pet. 2. First, GE asks this Court to abrogate the panel decisions in this case and *AVX Corp. v. Presidio Components, Inc.*, 923 F.3d 1357 (Fed. Cir. 2019). Second, GE contends that the AIA somehow confers standing on GE, in derogation of the constitutional requirements of Article III. Third, GE contends that declarations speculating about future actions that GE might take somehow establish concrete and immediate injury in fact. GE is wrong on all three points. Competitor standing does not give GE a right to appeal.

The panel applied binding Supreme Court precedent requiring injury in fact. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992); *Clinton v. City of New York*, 524 U.S. 417, 432-33 (1998). The PTAB's final written decision confirming the patentability of UTC's claims did not alter the competitive landscape or, through the "ordinary operation of economic forces," inflict concrete, immediate harm on GE.

Competitor standing requires injury in fact—a government action must alter the competitive landscape so, through the "ordinary operation of economic forces," it harms a competitor having a concrete interest in the market. *AVX*, 923 F.3d at 1364-65; *Clinton*, 524 U.S. at 432-33; *Ass'n of Data Processing Serv. Orgs., Inc. v.*

Camp, 397 U.S. 150 (1970). The PTAB's decision confirming the '605 claims did not alter the competitive landscape; rather, it merely upheld existing patent rights, maintaining the status quo. Nor did the PTAB's decision harm GE in any concrete, immediate way. GE failed to submit sufficient evidence identifying definite plans implicating the '605 claims. This is not enough to confer Article III standing.

GE contends, alternatively, that the AIA eliminated constitutional standing requirements when it provided a right to appeal from a PTAB decision. Pet. 11-13. The AIA did not. The Supreme Court, this Court, and the U.S. Solicitor's Office agree that Congress cannot erase the Article III standing requirements by granting a statutory appeal right to plaintiffs who otherwise lack standing.

Applying the well-established requirements for standing, the panel majority correctly determined GE lacked standing because it failed to establish a concrete, immediate injury in fact. UTC respectfully requests this Court deny GE's petition.

II. Argument

A. *AVX* Is Consistent with Binding Supreme Court Precedent

GE's petition challenges this Court's decision in *AVX* and its application of the competitor standing doctrine. Pet. 1. GE contends that there is a presumption of injury in fact and, thus, standing whenever the government acts in a way that ***might*** aid a competitor. Pet. 6-18. GE is wrong. Competitor standing has never been that broad. *Clinton*, 524 U.S. at 432-33; *Data Processing*, 397 U.S. at 151-52. Rather,

"government actions that 'alter competitive conditions' *may* give rise to injuries that suffice for standing." *AVX*, 923 F.3d at 1364 (citation omitted); *see id.* ("As the D.C. Circuit has made clear, . . . not every alleged possible competitive harm suffices . . . .").

For competitor standing to provide Article III standing, GE must establish two things. First, it must show that the complained-of government action altered the competitive landscape. Second, this alteration must impose competitive harm on GE. As this Court held in *AVX* and this case, a PTAB decision confirming the patentability of previously issued claims (here, the '605 claims) neither alters the competitive landscape nor imposes competitive harm. GE has failed to establish a "present or nonspeculative interest" in conduct implicating the challenged claims. *Id.* at 1363; Maj. Op. 6-7.

1. The PTAB's Decision Confirming the Patentability of UTC's '605 Claims Did Not "Alter" the Competitive Landscape

As this Court correctly held in *AVX* and this case, the PTAB's final written decision confirming the patentability of already issued patent claims does not alter the competitive landscape. *See AVX*, 923 F.3d at 1363-67; Maj. Op. 6-7. At best, it simply "maintain[s] an exclusion" that was previously authorized when the patent issued years ago. Pet. 8-9; *see FTC v. Actavis, Inc.*, 570 U.S. 136, 160 (2013) (C.J. Roberts, dissenting) (noting a patent is a permitted restriction on competition). The

issuance of a patent does not itself convey market power. *See Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 31 (2006). An IPR can only narrow or invalidate a patent, and an IPR decision affirming patent claims neither confers market power nor changes the competitive landscape. *Id.* The competitive landscape is precisely the same as it was before the PTAB's decision. The PTAB's decision preserves the status quo—nothing more. It does not alter the competitive landscape and does not confer standing on GE. Maj. Op. 6-7 ("[T]he Board's upholding of claims 7-11 of the '605 patent did not change the competitive landscape . . . . Therefore, we see no competitive harm to GE sufficient to establish standing to appeal."); *AVX*, 923 F.3d at 1364-65.

This is consistent with the Supreme Court's competitor standing cases. In each, the challenger was required to show that the challenged government action altered the competitive landscape. In *Clinton*, the government cancelled a direct tax benefit that farmers' cooperatives used to acquire property. 524 U.S. at 424-26. By removing this direct benefit, the government altered the competitive landscape and placed the cooperatives at an immediate competitive disadvantage. This alteration caused the cooperatives to suffer concrete injury sufficient to confer standing. *Id.* at 432-33. Unlike GE here, the appellants in *Clinton* proved they were unable to follow through on concrete plans to use the funds implicated by the policy change. *Id.*

Likewise, in *Data Processing*, the government issued a ruling that allowed national banks to provide data processing services to banks and bank customers, a market that, until the ruling, excluded national banks. 397 U.S. at 152. This ruling altered the competitive landscape when it introduced new competitors (banks) into the data processing market. *See id.* at 151-52. Again, the Court found this alteration expanded the market and caused concrete and immediate injury sufficient to confer standing. *Id*.; *Inv. Co. Inst. v. Camp*, 401 U.S. 617, 629 (1971). The banks faced immediate, increased competition from these new entrants as a direct result of the challenged government action.

And, in *FCC v. Sanders Bros. Radio Station*, the government granted a new license to a new broadcast station that was entering the marketplace, allocating it certain radio frequencies. 309 U.S. 470, 471-72 (1940). This license grant altered the competitive landscape by introducing a new competitor. *Id.* at 472. Existing stations faced immediate, increased competition from the new licensee as a direct result of the challenged government action. The Court again noted this alteration was the first step towards showing an existing broadcaster, who established it also wanted to use the frequencies allocated to the new competitor, suffered a concrete and immediate injury sufficient to confer standing. *Id.* at 472-77.

In each case, the affected party established concrete and immediate plans to do something that was implicated by the regulatory change. GE, in contrast, has

not offered evidence that its plans are affected by the PTAB's decision to uphold the claims of the '605 patent.

This Court has similarly required a showing that government action altered the competitive landscape before applying competitor standing. *Canadian Lumber Trade All. v. United States*, 517 F.3d 1319, 1333 (Fed. Cir. 2008). The government enacted a regulation distributing to domestic producers duties collected on foreign goods. *Id.* at 1332-34. Canadian producers challenged the regulation and this Court found this redistribution altered the competitive landscape by taking market share away from Canadian producers and reallocating it to domestic producers. *Id.* The impact was immediate. *See id.* In holding for the Canadian producers, this Court reiterated that government action ***altering the competitive landscape*** may inflict injury in fact sufficient to confer standing.

GE ignores these holdings and contends "[c]ompetitor standing recognizes an injury-in-fact ***whenever a company's bottom line may be adversely affected*** by government action conferring a benefit on its competitor." Pet. 7 (emphasis added). These holdings are not so broad, and GE's expansion of competitor standing is unwarranted. The above decisions recognize when a government action alters the competitive landscape, it may result in injury in fact, which may be sufficient to confer standing. 3 K. Davis & R. Pierce, Administrative Law Treatise 13-14 (3d ed. 1994); *Clinton*, 524 U.S. at 432-33. To establish standing, the government

action must, nonetheless, alter the competitive landscape and cause concrete and immediate injury in fact.

This Court faithfully applied this principle in *AVX* and this case. A PTAB final written decision confirming the patentability of issued claims does not alter the competitive landscape and does not cause competitive harm. *AVX*, 923 F.3d at 1364-65; Maj. Op. 6-7. In *AVX*, this Court distinguished both *Data Processing* and *Clinton*, explaining that "the Court recognized that government actions that 'alter competitive conditions' *may* give rise to injuries that suffice for standing." *AVX*, 923 F.3d at 1364-65 (citation omitted). A PTAB decision confirming patentability is "quite different" from other actions that alter the competitive landscape because it merely preserves the status quo:

> The government action is the upholding of specific patent claims, which do not address prices or introduce new competitors, but rather give exclusivity rights over precisely defined product features. That sort of feature-specific exclusivity right does not, by the operation of ordinary economic forces, naturally harm a firm just because it is a competitor in the same market . . . .

Id. at 1365. Likewise, the panel in this case explained:

> For the competitor standing doctrine to apply, the government action must change the competitive landscape by, for example, creating new benefits to competitors. . . . [T]he government action must alter the status quo . . . . Here, the Board's upholding of claims 7-11 of the '605 patent did not change the competitive landscape . . . . Therefore, we see no competitive harm to GE sufficient to establish standing to appeal.

Maj. Op. 6-7 (citation omitted).

This application of competitor standing to a PTAB decision does not, as GE argues, impose a "heightened, patent-specific standard." Pet. 9. Rather, it faithfully applies established precedent. And, it aligns with holdings by other circuits, which recognize a government action that maintains the status quo does not automatically confer standing. *New World Radio, Inc. v. FCC*, 294 F.3d 164, 171-72 (D.C. Cir. 2002). In *New World Radio*, the government renewed an existing radio license. *Id.* at 166, 171-72. The D.C. Circuit dismissed the appeal for lack of standing because the government "decision to grant Birach's Renewal Application merely allow[ed] Birach to retain its . . . license," not expand or relocate its license. *E.g.*, *id.* at 171-72. Because this renewal did not cause the requisite injury in fact, it did not support standing. *Id.*; *see also KERM, Inc. v. FCC*, 353 F.3d 57, 59-61 (D.C. Cir. 2004).

In stark contrast, GE seeks to expand the competitor standing doctrine to an untenable scope. Pet. 10 ("[C]ompetitor standing requires showing only that the government has acted in a way that 'aids the [appellant]'s competitors'" (alteration in original) (citation omitted)). GE's rule would grant every competitor Article III standing to challenge every patent issued to a competitor. Nothing in *Clinton*, *Data Processing*, or *Canadian Lumber* sanctions this drastic expansion of the competitor standing doctrine. Rehearing is not warranted.

2. GE Failed to Submit Competent Evidence Showing It Suffered Concrete, Immediate Injury from the PTAB Decision

Even if the PTAB's final written decision somehow altered the competitive landscape—and it did not—it did not cause GE competitive harm because GE has done nothing to implicate the challenged '605 claims. GE failed to identify a "present or nonspeculative interest in engaging in conduct even arguably covered by the patent claims at issue." *AVX*, 923 F.3d at 1363; *see also* Maj. Op. 5-8. This Court's decision requiring a cognizable harm flowing, by the "ordinary operation of economic forces," from the PTAB's decision confirming UTC's claims is a faithful application of the competitor standing doctrine. *Clinton*, 524 U.S. at 432-33; *Data Processing*, 397 U.S. at 151-52; *Canadian Lumber*, 517 F.3d at 1332-34.

a. Competitor Standing Requires an Appellant to Identify Present or Nonspeculative Conduct Implicating the Challenged Claims

As the Supreme Court articulated, "standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan*, 504 U.S. at 560. The appellant must establish that it "suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent . . . .'" *Id.* (citations omitted). Consistent with this mandate, this Court correctly held that a petitioner appealing from a PTAB final written decision must establish concrete particularized injury in fact. *E.g.*, *JTEKT Corp. v. GKN Auto.*

Ltd., 898 F.3d 1217, 1221 (Fed. Cir. 2018), *cert. denied*, 139 S. Ct. 2713 (2019); *Phigenix, Inc. v. Immunogen, Inc.*, 845 F.3d 1168, 1173-75 (Fed. Cir. 2017); *see Momenta Pharm., Inc. v. Bristol-Myers Squibb Co.*, 915 F.3d 764 (Fed. Cir. 2019); *cf. E.I. du Pont de Nemours & Co. v. Synvina C.V.*, 904 F.3d 996 (Fed. Cir. 2018). This Court's application of competitor standing in *AVX* and this case aligns with this framework. *AVX*, 923 F.3d at 1363-67; Maj. Op. 5-8.

In *AVX*, this Court explained that standing may be found if "the challenged government action nonspeculatively threatened economic injury to the challenger by the ordinary operation of economic forces." 923 F.3d at 1364-65; *id.* ("other 'competitor standing' cases are applications of the standing requirement that the disputed action must pose a nonspeculative threat to a concrete interest" (citation omitted)). That is, if the petitioner can identify "present or nonspeculative interest in engaging in conduct even arguably covered by the patent claims" that would be impacted by a PTAB's decision through "ordinary operation of economic forces," it may establish standing. *Id.* at 1363-64. Critically, this requires some concrete action by an appellant implicating the challenged claims. Because AVX failed to show "it [was] engaging in, or ha[d] nonspeculative plans to engage in, conduct even arguably covered by the upheld claims of the [challenged] patent," AVX failed to establish standing. *Id.* at 1364-65.

Instead of embracing this Court's application of competitor standing in *AVX* (and its discussion of *Canadian Lumber*), GE contends that injury in fact should be "***presumed***" from a PTAB decision. Pet. 7, 8, 13-18. But GE misapplies *AVX* and identifies no authority establishing such a presumption. This Court distinguished *Canadian Lumber* in *AVX*, explaining that standing was found there, because the government action, "by the ordinary operation of economic forces," had an effect in the marketplace benefitting a direct competitor and creating injury in fact. 923 F.3d at 1363-67. In *AVX*, in contrast, the government's action upholding the patent claims did not unleash economic forces or harm in the market unless the challenger could establish it was nonspeculatively doing something implicating the challenged claims. Injury in fact is the "irreducible" minimum for Article III standing, and this Court's requirement that alleged harm must implicate the challenged claims aligns with Supreme Court precedent. *Lujan*, 504 U.S. at 560.

Moreover, *Canadian Lumber* did not establish a presumption that every alteration to the competitive landscape necessarily establishes injury in fact. 517 F.3d at 1334. Harm is a separate requirement for standing. It is not presumed. As this Court has explained, although empirical analysis may not always be required, there must still be some showing of any present or nonspeculative future activity implicated by the government action. *Canadian Lumber*, 517 F.3d at 1333-34. In *Canadian Lumber*, Canadian producers provided testimony showing that it was

"more likely than not" they would lose market share when the collected duties were redistributed to U.S. competitors. *Id.* The challenged government action had a direct effect in the market through the "ordinary operation of economic forces." *Id.* There was no "presumed" harm.[1]

Likewise, GE's contentions regarding *Clinton* are unavailing. Pet. 13-18. In *Clinton*, the government cancelled a tax benefit, making it harder for cooperatives to buy property. 524 U.S. at 424. The Court found this alteration to the competitive landscape concretely harmed the cooperatives through the "ordinary operation of economic forces." *Id.* at 432-33. The changed regulation implicated the farmers' then-existing business plans. *Id.* The Court noted one cooperative was harmed in particular because it had concrete and immediate plans to use the tax benefit in its ongoing negotiations to acquire a specific property, and because it was continuing to actively search for possible future purchases should the tax-benefit cancellation be reversed. *Id.* There was no presumption of injury in fact. Rather, the cooperative

[1] GE's citation to *Mendoza v. Perez*, 754 F.3d 1002, 1013 (D.C. Cir. 2014), is equally unavailing. Pet. 8. In *Mendoza*, the D.C. Circuit explained, for standing, the plaintiffs had to show that "the agency . . . affect[ed] their concrete interests in a personal way." 754 F.3d at 1013. The portion GE refers to only assesses whether the specific plaintiff was a part "of [the relevant] market," and to show as much, it "must demonstrate that it is a *direct* and *current* competitor." *Id.* (citation omitted). *Mendoza* does not provide that the only thing a plaintiff must prove for competitor standing is that it is a "direct and current competitor." *Cf.* Pet. 8.

made a sufficient evidentiary showing of harm based on its concrete plans, which were implicated by the altered competitive landscape. *Id.*

GE has not made this showing. Instead, GE asks this Court for an advisory opinion. GE argues it should be allowed to challenge every patent claim in UTC's portfolio based only on the fact that GE competes with UTC. This has never been, nor should it be, enough to confer standing, which must be based on injury in fact. *See, e.g.*, *Lujan*, 504 U.S. at 560. This Court correctly held, absent any showing of nonspeculative current or future plans to use claim features, there is no competitive harm, much less "presumed harm," based on a PTAB decision confirming claims.

b. GE Failed to Prove Injury in Fact

Applying the proper framework set forth above, GE failed to show, through the ordinary operation of economic forces, that it would be adversely affected by a PTAB decision confirming the challenged '605 claims. Maj. Op. 5-8. Because GE failed to submit sufficient evidence showing it has done, or plans to do, anything implicating the '605 claims, it failed to prove injury in fact.

As the panel majority found, GE's declarations:

- "do[] not assert that GE lost bids to customers because it could offer only a direct-drive engine design." Maj. Op. 5-6.
- do not "attest that GE submitted a direct-drive design to Boeing *because* of the '605 patent." Maj. Op. 6.

- "contend[] only that GE expended some unspecified amount of time and money to consider engine designs that could *potentially* implicate the '605 patent." *Id.*
- do not establish "Boeing demanded or required an engine covered by claims 7-11 of the '605 patent." *Id.*
- do not establish "GE lost the Boeing bid." *Id.*
- "show[] that GE submitted . . . a direct-drive engine design, but there is no indication as to why it opted not to submit a geared-fan engine design." *Id.*
- do not establish "that GE lost business or lost opportunities because it could not deliver a geared-fan engine covered by the upheld claims." *Id.*
- do not establish "prospective bids require geared-fan designs." *Id.*
- provide no "accounting for the additional research and development costs expended to design around the '605 patent." Maj. Op. 7.
- provide "no evidence that GE actually designed a geared-fan engine or that these research and developments costs are tied to a demand by Boeing for a geared-fan engine." *Id.*
- identify a geared-fan engine from the 1970s, but "[a]ny economic loss deriving from the 1970s engine is not an imminent injury." *Id.*
- do not indicate "GE is in the process of designing an engine covered by claims 7-11 of the '605 patent." *Id.*
- do not "demonstrate[] that it has definite plans to use the claimed features of the '605 patent in the airplane engine market." *Id.*

The record evidence was clear and insufficient to establish standing. GE argued to the panel that it wants to "reserve[] design options." Dkt. 36 at 9; *id.*, Long Decl. ¶ 15 ("GE does not, and cannot, rule out any long-known turbofan architecture that it might have in its 'toolkit' of engine options . . . ."). Wanting to reserve options,

however, is not a concrete, immediate harm. "GE's purported competitive injuries are too speculative to support constitutional standing." Maj. Op. 5.

In its petition, GE repeats the same deficient contentions. GE contends that it refrained from offering "designs to customers that would risk infringement." Pet. 4. It contends it "expend[ed] . . . money on designs that ***do not implicate*** the '605 patent." Pet. 4-5 (citation omitted) (emphasis added). It contends "GE investigated geared turbofan engine designs that ***could*** implicate the '605 patent, . . . landing on an unquestionably non-infringing design," Pet. 4 (emphasis added), and "Boeing asked GE to research and develop a design proposal that ***may have*** implicated the '605 patent," Pet. 16 (emphasis added). Each is a speculative statement, lacking concrete and immediate harm. None rises to the level of injury in fact required to confer standing on GE.

B. The AIA's Statutory Appeal Right Does Not Relieve GE from Satisfying Article III's Requirements

Alternatively, GE contends that when Congress granted the statutory appeal right in the AIA, Congress automatically conferred standing on all appellants. Pet. 11-13. But the Supreme Court and this Court have repeatedly rejected this notion. In *Frank v. Gaos*, the Supreme Court "rejected the premise . . . that '[any] plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right." 139 S. Ct. 1041, 1045 (2019) (citation omitted); *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009). In *Raines v. Byrd*, the Court again

stated 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." 521 U.S. 811, 820 n.3 (1997).

Congress is constrained by Article III and lacks authority to redefine injury in fact. *See JTEKT*, 898 F.3d at 1221; *Phigenix*, 845 F.3d at 1175; *AVX*, 923 F.3d at 1362-63; *see also, e.g.*, Brief for the United States as Amicus Curiae, *RPX Corp. v. ChanBond LLC*, No. 17-1686, 2019 WL 2068588 (U.S. May 9, 2019). GE must establish a concrete, immediate, particularized injury in fact before it can appeal to this Court. *Lujan*, 504 U.S. at 560. This is the "irreducible" minimum requirement for Article III standing. *Id*. GE has not done so.

III. Conclusion

En banc rehearing is not warranted in this case, and it would waste judicial resources. This Court faithfully applied the competitor standing doctrine in *AVX* and here. A PTAB decision upholding issued claims does not alter the competitive landscape. Rather, it simply preserves the status quo. It cannot confer standing on GE when GE failed to present evidence establishing any present or nonspeculative future activity implicating the challenged claims. UTC asks this Court deny GE's petition for rehearing en banc.

Date: September 27, 2019

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing APPELLEE UNITED TECHNOLOGIES CORPORATION'S RESPONSE TO APPELLANT GENERAL ELECTRIC COMPANY'S PETITION FOR REHEARING *EN BANC* on counsel of record on September 27, 2019, by electronic means via the Court's CM/ECF system.

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