

No. 20-1561

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**UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT**

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APPLE INC.,

*Appellant,*

v.

QUALCOMM INCORPORATED,

*Appellee.*

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Appeal from the United States Patent and Trademark Office,  
Patent Trial and Appeal Board in No. IPR2018-01279

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**BRIEF OF UNIFIED PATENTS, LLC  
AS *AMICUS CURIAE* IN SUPPORT OF  
APPLE INC.'S PETITION FOR REHEARING EN BANC**

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FORM 9. Certificate of Interest

Form 9 (p. 1)  
July 2020

**UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT**

**CERTIFICATE OF INTEREST**

**Case Number** 20-1561

**Short Case Caption** Apple Inc. v. Qualcomm Incorporated

**Filing Party/Entity** Unified Patents, LLC

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Date: 05/21/2021

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## FORM 9. Certificate of Interest

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<b>1. Represented Entities.</b> Fed. Cir. R. 47.4(a)(1).	<b>2. Real Party in Interest.</b> Fed. Cir. R. 47.4(a)(2).	<b>3. Parent Corporations and Stockholders.</b> Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.  <input checked="" type="checkbox"/> None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.  <input type="checkbox"/> None/Not Applicable
Unified Patents, LLC		Parents:
		UP HOLDCO INC.
		Unified Patents Holdings, LLC
		Unified Patents Acquisition, LLC
		Unified Patents Management, LLC
		No such public companies

☐ Additional pages attached

## FORM 9. Certificate of Interest

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**4. Legal Representatives.** List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

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

Unified Patents, LLC is a membership organization dedicated to deterring non-practicing entities, or NPEs, from extracting nuisance settlements based on patents that are likely invalid. Unified's 3,000-plus members are Fortune 500 companies, start-ups, automakers, industry groups, cable companies, banks, credit card companies, technology companies, open-source software developers, manufacturers, and others dedicated to reducing the drain on the U.S. economy of now-routine baseless litigations asserting infringement of patents of dubious validity.

Unified files challenges here and abroad on NPE-owned patents it believes are unpatentable or invalid. Unified also studies the ever-evolving business models, financial backings, and practices of NPEs. Unified is a deterrence entity that seeks to discourage the assertion of poor-quality patents.

Unified acts and litigates independently from its members, including Apple or any other company. *See, e.g., Unified Patents, LLC. v. Uniloc USA, Inc. et al.,*

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<sup>1</sup> Apple and Qualcomm have consented to the filing of this brief. Neither party's counsel authored this brief in whole or in part; neither party nor party counsel contributed money that was intended to fund preparing or submitting the brief; no person—other than the *amicus curiae*, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief. *See* Fed. R. App. P. 29(a)(2), (a)(4).



IPR2018-00199 Paper 33, 10 (May 31, 2019) (Unified members not real parties in interest to *inter partes* reviews filed by Unified); *id.* (collecting PTAB decisions).

## **ARGUMENT**

### **I. Standards for Standing to Appeal are of Exceptional Importance**

This court’s cases have adopted a narrow, patent-specific standing rule that effectively immunizes a class of PTAB decisions from review. This court’s decisions frequently bar appeals from post-grant proceedings brought by parties with concrete interests in the patent’s validity. These parties include:

- appellants competing with the patent holder in a three-player market challenging a patent “directed to ...the very type of technology over which [the parties] fiercely compete.” *Gen. Elec. Co. v. United Techs. Corp.*, 928 F.3d 1349, 1355 (Fed. Cir. 2019) (“GE I”) (Hughes, J., concurring in judgment);
- appellants competing with the patent holder in a market where the parties frequently assert patents against each other and customers account for potential infringement injunctions when considering products. *AVX Corp. v. Presidio Components, Inc.*, 923 F.3d 1357, 1360–61 (Fed. Cir. 2019);
- appellants that generally compete with the patent holder and seek to clear patent rights while developing a new product for market. *See*

*JTEKT Corp. v. GKN Auto. LTD.*, 898 F.3d 1217, 1221 (Fed. Cir. 2018).

Here, the decision adds appellants that have been sued for infringement and settled. Op. 2. The harm is concrete; Apple has a time-limited license and pays royalties for the patents at issue. Op. 6. It is subject to “ongoing payment obligations” and the potential “estoppel effects of 35 U.S.C. § 315.” Op. 6. But it cannot access this court to challenge those patents.

In addition, the court has yet to decide whether the estoppel provisions related to IPRs will apply to a competitor refused its statutory appeal rights. *AVX* left the question open. *See AVX*, 923 F.3d at 1363. If the court eventually applies estoppel, that adds to the competitive injury suffered by appellants without judicial access. If not, competitors must appeal and be refused standing to ensure they avoid estoppel.

## **II. The Court Should Grant the Petition to Consider Competitor Standing En Banc**

### **A. The panel decision is inconsistent with the law of this court and the general law’s understanding of competitor standing**

Parties typically have standing to challenge government action that harms them even when the harm is merely a benefit to their competitors. *See Canadian Lumber Trade All. v. United States*, 517 F.3d 1319, 1334 (Fed. Cir. 2008). As this court explained in the trade context, “in most ‘competitor standing’ cases ... it

is *presumed* (i.e., without affirmative findings of fact) that a boon to some market participants is a detriment to their competitors.” *Id.*

Government confirmation of an invalid patent is a financial boon to the patent holder. With or without estoppel, this confirmation causes corresponding harm to the patentee’s competitors. Even before the AIA, scholars understood that “invalid patents can create unacceptable litigation risks for potential entrants, raise entry costs, delay entry, deter customers and business partners from contracting with new entrants, and impose inefficiencies while distorting innovation.” Christopher R. Leslie, *The Anticompetitive Effects of Unenforced Invalid Patents*, 91 Minn. L. Rev. 101, 115–16 (2006).

The PTAB’s approval of patent claims exacerbates this effect. It increases the patent owner’s value to investors interested in the relevant market; it decreases the chance that a competitor would attempt to compete with the claimed invention; it may cause customers to decline to contract with the challenger.

These harms—logical economic consequences to competition—meet *Canadian Lumber*’s view of competitor standing. The regional circuits would agree. In the D.C. Circuit, “[t]he competitor standing doctrine recognizes that ‘economic actors suffer an injury in fact when agencies lift regulatory restrictions on their competitors or otherwise allow increased competition against them.’” *Int’l Bhd. of Teamsters v. U.S. Dep’t of Transp.*, 724 F.3d 206, 211–12 (D.C. Cir. 2013)

(Kavanaugh, J.) (quoting *Sherley v. Sebelius*, 610 F.3d 69, 72 (D.C. Cir. 2010)). In *Teamsters*, the court found standing to challenge a pilot program allowing some Mexico-domiciled trucks to operate throughout the United States. The D.C. Circuit was unmoved by the government’s argument that the pilot program was too small—with an upper limit of just over 300 trucks, most of whom already had permission to operate in the border states—to create a “substantial” risk of harm. *See Teamsters*, Final Brief for Respondents 28-29, Document No. 1366707 (Apr. 2, 2012). Subjecting U.S. domiciled trucks to just this increased competition was “an injury in fact.” *Id.* at 212. For the D.C. Circuit, some injury to a competitor was sufficient.

Likewise, the First Circuit has interpreted Supreme Court cases as upholding “competitor standing based on unadorned allegations of latent economic injury.” *Adams v. Watson*, 10 F.3d 915, 921 (1st Cir. 1993) (marks omitted); *see also id.* at 921 n.13 (collecting cases from Second, Seventh, Ninth, and D.C. Circuits).

In *Canadian Lumber*, this court appeared to agree. *See Canadian Lumber*, 517 F.3d at 1332 (collecting cases). But not in the patent context, where economic injury has been limited to conduct “arguably covered by the upheld claims.” *AVX*, 923 F.3d at 1365. One theme across this court’s cases denying appeal is that the appellant was unwilling to allege “that it has concrete plans for future activity that creates a substantial risk of future infringement or would likely cause the patentee

to assert a claim of infringement.” JTEKT, 898 F.3d at 1221. This view is too narrow when the PTAB confirms a competitor’s patent, and it is out of step with the regional circuits.

**B. The panel decision is inconsistent with Supreme Court caselaw**

The story of patent law in this century is continual realignment with general principles. *See, e.g., Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 134 S. Ct. 843 (2014) (declaratory judgment burdens); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007) (Article III standing); *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006) (injunction standards).

In *Trimble*, for example, this court revisited the personal jurisdiction rule of *Red Wing* because the Supreme Court “has emphasized that ‘patent law is governed by the same ... procedural rules as other areas of civil litigation.’” *Trimble Inc. v. PerDiemCo LLC*, No. 2019-2164, 2021 WL 1898127, at \*5 (Fed. Cir. May 12, 2021) (marks omitted) (quoting *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 964 (2017)).

This court’s “patent-specific approach to the doctrine of competitor standing” requires similar realignment. *See GE I*, 928 F.3d at 1355 (Hughes, J., concurring in judgment). Infringement liability is only one patent-specific competitive harm that an invalid patent can create. The focus on infringement to the exclusion of other hallmarks of constitutional injury is contrary to the Supreme

Court cases that have “repeatedly held that government actions altering the competitive landscape of a market cause competitors probable economic injury sufficient for Article III standing.” *GE I*, 928 F.3d at 1355 (Hughes, J., concurring in judgment).

Commentators agree. *See, e.g.*, Matthew Dowd & Jonathan Stroud, *Will the Federal Circuit Consider the Competitor Standing Doctrine?*, LAW360 (Dec. 18, 2018) (Federal Circuit may be “taking an overly patent-focused view and not looking to nonpatent precedent,” and “has struggled with determining what constitutes Article III standing for purposes of appealing a PTAB decision”); Michael J. Burstein, *Rethinking Standing in Patent Challenges*, 83 Geo. Wash. L. Rev. 498, 500 (2015) (“Federal Circuit ... has crafted patent-specific standing rules that are more restrictive than those called for under the Supreme Court’s broader standing precedents”); Ryan Fitzgerald, *No Leg to Stand On: How the Federal Circuit Improperly Restricted the Application of the Competitor Standing Doctrine to Patent Challengers When Establishing Article III Standing Upon Appealing an Inter Partes Review*, Minn. L. Rev. De Novo Blog (posted Nov. 25, 2019).

And even within that narrow focus, the Supreme Court’s patent cases have all but explicitly rejected what the Federal Circuit now requires—allowing court access only to parties admitting to a substantial risk of infringement. *See, e.g.*, *Cardinal Chem. Co. v. Morton Int’l, Inc.*, 508 U.S. 83, 95–98 (1993) (finding of

non-infringement does not moot validity challenge); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128–29 (2007) (licensee need not risk infringement litigation before filing declaratory judgment).

Indeed, some competitors have been forced close to admitting infringement just to be heard. There is little apparent difference between *GE I* and *GE II* other than General Electric’s concession in the latter that it “fully expects that [Raytheon] would accuse this engine of infringing.” *Gen. Elec. Co. v. Raytheon Techs. Corp.*, 983 F.3d 1334, 1342 (Fed. Cir. 2020) (“GE II”). From this, the court inferred that “GE believes its preferred design raises a substantial risk of infringement.” *Id.* Hence, GE has been forced close to the line that *MedImmune* said was unnecessary to cross: That a “plaintiff must destroy a large building, bet the farm, or (as here) risk treble damages” to have standing “finds no support in Article III.” *MedImmune*, 549 U.S. at 134.

In addition, the panel relied on Apple’s failure to repudiate its license to distinguish *MedImmune*. Op. 7. But the *MedImmune* Court wrote that even if *MedImmune* was presenting a “freestanding claim of patent invalidity,” rather than a claim that “no royalties are owing under the license” that would “probably make[] no difference to the ultimate issue of subject-matter jurisdiction.” 549 U.S. at 123. The panel decision rewrites the Supreme Court’s “probably makes no

difference” into “definitely does change the outcome.” The en banc court should consider at least that point.

### **III. Estoppel Between Competitors is Cognizable Harm**

The panel held that “the harm Apple may face from estoppel is insufficient to provide standing.” Op. 11. As Apple rightly points out, the question should be whether all the circumstances—including estoppel—collectively demonstrate the existence of sufficient injury. Pet. 14-18.

#### **A. Estoppel—or the threat of it hanging over Apple today—compounds the injury that the PTAB-approved patent causes competitors**

A patent allows the holder to exclude others. For a valid patent, this right of exclusion is the reward for disclosing an invention that promotes the progress of the useful arts. But an invalid patent deters competition with no corresponding benefit. *See Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 146 (1989) (“The Patent Clause itself reflects a balance between the need to encourage innovation and the avoidance of monopolies which stifle competition without any concomitant advance in the ‘Progress of Science and useful Arts.’”).

A potentially invalid patent that cannot be challenged harms the patentee’s competitors by restricting competition. It raises the barrier to market entry, investment, and competition another notch. “[T]he novelty and nonobviousness requirements express a congressional determination that the purposes behind the



Patent Clause are best served by free competition and exploitation of either that which is already available to the public or that which may be readily discerned from publicly available material.” *Bonito Boats*, 489 U.S. at 150. No competitor should be estopped from challenging patents on these grounds—typically raised in IPRs and PGRs—without a final ruling by a court that the patent is valid as to that competitor.

**B. The reasoning in *Consumer Watchdog* and *Lujan* breaks down once the challenger is a competitor facing estoppel**

The panel decision relies on the portion of *AVX*, 923 F.3d at 1362–63, that cites *Phigenix*, 845 F.3d at 1175–76. Op. 11. *Phigenix*, in turn, analogized to *Consumer Watchdog*. *Phigenix* at 1175-76; see also *Consumer Watchdog v. Wis. Alumni Rsch. Found.*, 753 F.3d 1258, 1260 (Fed. Cir. 2014).

In *Consumer Watchdog*, the court held that similar estoppel provisions covering reexamination did not injure Consumer Watchdog. That may have been correct because Consumer Watchdog was a “self-described ‘not-for-profit public charity dedicated to providing a voice for taxpayers and consumers.’” *Id.* at 1260. It had no “involvement in research or commercial activities involving human embryonic stem cells,” the subject of the patent. It had only a “general grievance against” the patent. *Id.* at 1262–63.

With each new case, the estoppel provisions do more harm to the estopped entity.

- Consumer Watchdog was assuredly not getting into the human-embryonic-stem-cell business.
- Phigenix did not “manufacture any products,” though it possessed and was attempting to market at least one conflicting patent. *Phigenix, Inc. v. Immunogen, Inc.*, 845 F.3d 1168, 1170 (Fed. Cir. 2017).
- AVX was a fierce competitor with the patent holder in the capacitor market. *AVX*, 923 F.3d at 1360–61.

Here, Apple is a time-limited licensee of the patents. It has been sued for infringement of the patents. It is paying royalties on the patents. And it is unlikely to discontinue the line of accused products—the iPhone. Yet Apple may be estopped from challenging the validity of the patents in future cases without getting its statutory appeal.

Across these cases, the court has relied on a lack of immediate infringement liability to find no harm in estoppel. But competitors and licensees are done far more severe injury from estoppel than self-described “watchdogs.” The cases have gotten so far from *Consumer Watchdog* that the en banc court should consider afresh the damage to competitors caused by estoppel.

Similarly, estoppel is a statutory penalty to competitors that renders analogy to *Lujan* inappropriate. In *Lujan*, the citizen-suit provisions of the Endangered Species Act provided that “any person may commence a civil suit” against the

EPA to enforce certain requirements of the Endangered Species Act. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 571-572 (1992). The AIA is *Lujan* with teeth; it allows “a person who is not the owner of a patent” to petition the Patent Office for review. *See, e.g.*, 35 U.S.C. § 311. But a failed petition, if instituted, estops an unsuccessful challenger from asserting the claim is invalid on grounds raised or that reasonably could have been raised. *See, e.g.*, 35 U.S.C. § 315(e). That puts a competitor at an immediate disadvantage in the marketplace sufficient to satisfy the constitution. At a minimum, it should be added to the scales with other non-infringement forms of harm.

### CONCLUSION

The en banc court should rehear the panel decision.

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Fed. Cir. R. 35(g)(3). It contains 2,555 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Fed. Cir. R. 32(b)(2).

2. This amicus brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

/s/ William G. Jenks

William G. Jenks