

No. 2021-1555

**United States Court of Appeals
for the Federal Circuit**

UNILOC USA, INC., UNILOC LUXEMBOURG S.A.,

Plaintiffs-Appellants,

MOTOROLA MOBILITY LLC

Defendant-Appellee

*On Appeal from the United States District Court
for the District of Delaware*
No. 1:17-cv-1658, Honorable Judge Colm F. Connolly

**CORRECTED BRIEF OF CIRBA INC. (d/b/a “DENSIFY”) AS
AMICUS CURIAE IN SUPPORT OF APPELLANTS AND REVERSAL**

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June 8, 2021

CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rules 29(a) and 47.4(a), counsel for *Amicus Curiae* certifies the following:

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

Cirba Inc. (d/b/a “Densify”)

2. Counsel for *Amicus Curiae* do not represent a real party in interest or any party to this appeal.

3. All parent corporations and any publicly held companies that own 10% or more of the stock of the parties I represent are as follows: *None*

4. The names of all law firms and the partners or associates that appeared for the parties now represented by me in the trial court or that are expected to appear in this court are:

Reichman Jorgensen Lehman & Feldberg: Courtland L. Reichman, Christine E. Lehman, Ariel C. Green, and Aisha Mahmood Haley.

5. Other than the originating case, there are no other cases known to counsel to be pending in this or any other court or agency that will directly affect or be affected by this court’s decision in the pending appeal. *Amicus* has filed a motion for leave to file an amicus brief in *Uniloc USA Inc. v. Apple Inc.*, No. 2021-1572, which this Court’s Clerks’ Office lists as a related case.

6. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees): Not Applicable.

Date: June 8, 2021

/s/ Courtland L. Reichman

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STATEMENT OF INTEREST

Amicus Cirba Inc. (d/b/a “Densify”) is a software company and inventor of technology that focuses on optimizing virtual infrastructure.¹ Its *Fortune 5000* customers deploy Densify’s award-winning software to reduce costs, decrease risk, and increase performance of virtual environments. Densify protects its innovative technology through patents. Like many companies in the United States, Densify assigned the rights to its patents to a wholly owned subsidiary (Cirba IP, Inc.), which, in turn, granted Densify (the parent) an exclusive license to practice the technology.

Densify, like all patent owners, has an interest in clear guidance as to the power of federal courts to hear patent cases and in ensuring its access to the federal courts is not encumbered by special patent rules that both this Court and the Supreme Court have made clear do not belong in the Article III analysis. In particular, current law treats the ownership of “exclusionary rights” in a patent as a mere statutory prerequisite, thus affording flexibility in curing technical defects after a case is filed. Under previous Federal Circuit law, which has since been overturned, ownership of such exclusionary rights was required for Article III standing, thus severely restricting, or even eliminating, the ability of a plaintiff to correct issues after filing the lawsuit. This “trap for the unwary” no longer exists under this Court’s

¹ *Amicus* reached out to the parties but only obtained consent to file from appellants—and not appellees—at the time of filing. Consequently, *amicus* has sought leave from this Court to file this brief.

cases. District courts, however, continue to apply these now-overturned cases, which creates uncertainty and difficulty for litigants unsure of the basic rules as to standing in patent cases, and with district courts applying various standards across the country. Indeed, Densify recently had a patent infringement jury verdict vacated by a district court on the mistaken belief that exclusionary rights were necessary for Article III standing, and therefore has experienced firsthand the effects the lack of uniformity in the law has created.

SUMMARY OF THE ARGUMENT

This Court has decided that exclusionary rights and other statutory requirements are no longer necessary for Article III standing in patent infringement cases. However, district courts have been inconsistent in following this Court's precedent in the wake of *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014), with some continuing to apply previous law that exclusionary rights are required for Article III standing, while others recognizing that such exclusionary rights are now unnecessary. *Amicus* submits this brief to highlight this foundational legal issue underlying the parties' dispute and the need for clarity on this question of federal courts' power to hear patent cases.

In *Lexmark*, the Supreme Court clarified that whether a plaintiff satisfies the requirements of a statute is not a question of Article III standing. Rather, it is a matter of statutory interpretation and entirely separate from the Article III inquiry of

injury in fact, traceability, and redressability. In response, appellate courts across the country have stopped treating statutory requirements as constitutional mandates when interpreting federal statutes such as the Lanham Act, Copyright Act, Clean Air Act, Title VII, and many others.

This Court applied *Lexmark* to patent infringement cases in two recent decisions, *Lone Star Silicon Innovations LLC v. Nanya Tech. Corp.*, 925 F.3d 1225 (Fed. Cir. 2019), and *Schwendimann v. Arkwright Advanced Coating, Inc.*, 959 F.3d 1065 (Fed. Cir. 2020). In *Lone Star*, the Federal Circuit held that whether a plaintiff has sufficient exclusionary rights to obtain relief under the Patent Act is a question of statutory entitlement, not constitutional standing — it thus does not go to the court’s jurisdiction. *Lone Star* overturned decades of precedent on “standing” in patent cases, which had treated the requirements of the Patent Act and Article III as one and the same. 925 F.3d at 1235–36. The Federal Circuit recognized *Lexmark* clarified that questions of “statutory standing” do not implicate subject matter jurisdiction. *Id.* It declared: “We therefore firmly bring ourselves into accord with *Lexmark* and our sister circuits by concluding that whether a party possesses all substantial rights in a patent does not implicate standing or subject matter jurisdiction.” *Id.* A year later, *Schwendimann* rejected the argument that the plaintiff need possess exclusionary rights for Article III standing. 959 F.3d at 1071 n.6. It

made the change in approach clear: “decisions treating the prerequisites of the Patent Act as jurisdictional were wrong.” *Id.* at 1071.

Despite the clear mandates of these cases, district courts are split on whether exclusionary rights are still necessary for Article III standing in patent infringement cases, with some courts following *Lone Star* and *Schwendimann*, and other courts applying the previous, now-overturned cases that created special rules in patent cases.

That is not to say that the Patent Act’s requirements do not matter. Of course they do. And defendants are free to challenge a plaintiff’s satisfaction of those statutory requirements in a motion to dismiss under Rule 12(b)(6), summary judgment motion, or even at trial. But the Patent Act’s requirements are not constitutional. Exclusionary rights may be important to satisfy 35 U.S.C. § 281, but they are not required to establish Article III standing.

Amicus respectfully requests that the Court use this opportunity to clarify and reinforce the precedent that exclusionary rights in a patent are unnecessary for Article III standing. The question of federal courts’ power to even hear patent cases is a foundational, gating issue that should be consistently applied. District courts need clear guidance on which strand of cases they should be applying, and litigants have an ongoing interest in understanding the power of courts to hear their disputes. *See Schwendimann*, 959 F.3d at 1077 (Reyna, J., dissenting) (“The clarity of [Article

III standing] is welcome, for litigants require clear notice of how to satisfy the constitutional threshold of standing.”).

ARGUMENT

I. FEDERAL JUDICIAL POWER EXTENDS TO ANY CASE WHERE A PLAINTIFF CLAIMS AN INJURY CAUSED BY A DEFENDANT’S VIOLATION OF FEDERAL LAW THAT A FAVORABLE JUDICIAL DECISION CAN REDRESS.

“The Constitution of the United States vests judicial power in the federal courts.” *Lone Star*, 925 F.3d at 1234 (citing U.S. Const. art. III, § 1). The Framers of our Constitution envisioned a tripartite government where the “legislative, executive, and judiciary departments” are “separate and distinct.” The Federalist No. 47 (James Madison). They understood that “[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self[-]appointed, or elective, may justly be pronounced the very definition of tyranny.” *Id.* But “power is of an encroaching nature” and “ought to be effectually restrained from passing the limits assigned to it.” The Federalist No. 48 (James Madison). To prevent one branch from encroaching on another, a “common understanding of what activities are appropriate to legislatures, to executives, and to courts” is necessary. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–60 (1992). This common understanding serves as a “landmark” for the appropriate exercise of power. The Federalist No. 48 (James Madison). As the Lincoln Memorial is a “landmark” of Washington D.C., the

judicial “landmark” of standing is one that “serves to identify those disputes which are appropriately resolved through the judicial process.” *Whitmore v. Arkansas*, 495 U.S. 149, 154–55 (1990). That is, federal judicial power is properly exercised — and not encroaching on the legislative or executive branches — when the court decides “Cases” or “Controversies” between parties with skin in the game. *See Allen v. Wright*, 468 U.S. 737, 759 (1984) (“the idea of separation of powers . . . underlies standing doctrine”), *abrogated on other grounds by Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 (2014).

To have standing, a plaintiff “must have suffered an ‘injury in fact’ . . . which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical.” *Lujan*, 504 U.S. at 560 (citations and internal quotation marks omitted). “[T]here must be a causal connection between the injury and the conduct complained of — the injury has to be fairly . . . traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.” *Id.* (cleaned up). Finally, “it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Id.* (cleaned up). These requirements are “an essential and unchanging part of the case-or-controversy requirement of Article III.” *Id.* at 561.

Once a plaintiff has demonstrated satisfaction of these minimal, constitutional requirements, a federal court has “no more right to decline the exercise of

jurisdiction which is given, than to usurp that which is not given.” *Cohens v. State of Virginia*, 19 U.S. 264, 404 (1821). “The one or the other would be treason to the constitution.” *Id.* “[S]ubject-matter jurisdiction, because it involves a court’s power to hear a case, can never be forfeited or waived.” *United States v. Cotton*, 535 U.S. 625, 630 (2002). “Jurisdiction existing, this Court has cautioned, a federal court’s ‘obligation’ to hear and decide a case is ‘virtually unflagging.’” *Sprint Comm’cns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013) (quoting *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800, 817 (1976)).

II. **LEXMARK MADE CLEAR THAT STATUTORY PREREQUISITES ARE NOT PART OF THE ARTICLE III STANDING INQUIRY.**

In *Lexmark*, the Supreme Court “clarified that so-called ‘statutory standing’ defects do not implicate a court’s subject-matter jurisdiction[.]” *Lone Star*, 925 F.3d at 1235.

We have on occasion referred to [whether a plaintiff has a cause of action under a certain statute] as “statutory standing” and treated it as effectively jurisdictional That label is an improvement over the language of “prudential standing,” since it correctly places the focus on the statute. But it, too, is misleading, since “the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the court’s statutory or constitutional power to adjudicate the case.”

Lexmark, 572 U.S. at 128 n.4 (quoting *Verizon Md. Inc. v. Public Serv. Comm’n of Md.*, 535 U.S. 635, 642–43 (2002)); *see also Flast v. Cohen*, 392 U.S. 83, 99 (1968)

(“The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated.”)

In *Lexmark*, the parties asked the Supreme Court to decide “the appropriate analytical framework for determining a party’s standing to maintain an action for false advertising under the Lanham Act.” 572 U.S. at 125. The Supreme Court concluded this was the wrong question. Article III “standing” was not at issue because Static Control’s allegations of “lost sales and damage to its business reputation” were enough to “give it standing under Article III.” *Id.* Accordingly, the real question was whether Static Control stated a claim under § 43(a) of the Lanham Act, a question requiring statutory interpretation, which differed from the “case or controversy” analysis of Article III. *See id.* at 128.

III. *LONE STAR* AND *SCHWENDIMANN* APPLIED *LEXMARK* TO PATENT INFRINGEMENT CASES, OVERTURNING PRIOR CASES.

For decades, this Court treated the statutory requirements of § 281 as jurisdictional. Thus, this Court previously held that “the touchstone of constitutional standing in a patent infringement suit is whether a party can establish that it has an exclusionary right in a patent that, if violated by another, would cause the party holding the exclusionary right to suffer legal injury.” *WiAV Sols., LLC v. Motorola, Inc.*, 631 F.3d 1257, 1265 (Fed. Cir. 2010); *see also, e.g., Rite-Hite Corp. v. Kelley Co., Inc.*, 56 F.3d 1538, 1553 (Fed. Cir. 1995) (en banc) (treating satisfaction of

§ 281 requirements as “jurisdictional”); *Molon Motor & Coil Corp. v. Nidec Motor Corp.*, 946 F.3d 1354, 1361 (Fed. Cir. 2020) (noting that exclusionary rights are necessary to establish constitutional “injury” in a patent infringement case); *Morrow v. Microsoft Corp.*, 499 F.3d 1332, 1340 (Fed. Cir. 2007) (holding exclusionary rights are necessary for patent licensees to have constitutional standing); *Propat Int’l Corp. v. RPost, Inc.*, 473 F.3d 1187, 1192–93 (Fed. Cir. 2007) (holding a “bare licensee” lacks standing to sue for patent infringement); *Sicom Sys., Ltd. v. Agilent Techs., Inc.*, 427 F.3d 971, 976 (Fed. Cir. 2005) (holding transfer of all substantial rights in a patent was sufficient for constitutional standing); *Intellectual Prop. Dev., Inc. v. TCI Cablevision of Cal., Inc.*, 248 F.3d 1333, 1347–48 (Fed. Cir. 2001) (holding an exclusive licensee had to join patentee to have constitutional standing).

And because this Court treated § 281’s requirements as jurisdictional, defects could not be fixed after the complaint was filed. *See Abraxis Bioscience, Inc. v. Navinta LLC*, 625 F.3d 1359, 1364 (Fed. Cir. 2010) (“[W]e have held that in a patent infringement action, ‘the plaintiff must demonstrate that it held enforceable title to the patent at the inception of the lawsuit’ to assert standing. . . . Thus, ‘if the original plaintiff lacked Article III initial standing, the suit must be dismissed, and the jurisdictional defect cannot be cured’ after the inception of the lawsuit.” (first quoting *Paradise Creations, Inc. v. UV Sales, Inc.*, 315 F.3d 1304, 1309–10 (Fed.

Cir. 2003); then quoting *Schreiber Foods, Inc. v. Beatrice Cheese, Inc.*, 402 F.3d 1198, 1203 (Fed. Cir. 2005))).

A. *Lone Star* Overturned Prior Cases Holding That The Patent Act’s Prerequisites Were Jurisdictional.

In *Lone Star*, this Court held that its earlier authority treating § 281 as a jurisdictional requirement was irreconcilable with *Lexmark*. *Lone Star*, 925 F.3d at 1235. It clarified that questions of statutory interpretation “do not implicate a court’s subject matter jurisdiction.” *Id.* (quoting *Lexmark*, 572 U.S. at 128 n.4). After concluding it was bound by intervening Supreme Court precedent as opposed to its earlier decisions, this Court held: “We therefore firmly bring ourselves into accord with *Lexmark* and our sister circuits by concluding that whether a party possesses all substantial rights in a patent does not implicate standing or subject matter jurisdiction.” *Id.* at 1235–36. In so doing, the Court overturned prior cases holding that meeting the requirements of § 281, or having exclusionary rights more generally, is necessary for Article III standing.

Despite *Lone Star*’s statement that it was “firmly bring[ing this Court] into accord with *Lexmark*,” 925 F.3d at 1235–36, the extent of its ruling remained unclear.

B. *Schwendimann* Made Clear That Exclusionary Rights Are Not Necessary For Article III Standing.

This ambiguity was clarified in *Schwendimann*. There, the plaintiff *thought* she had been assigned rights to a patent at the time of suit but, in fact, had not. *See*

959 F.3d at 1068–70. Only after the defendant filed a motion to dismiss for lack of standing did the plaintiff take corrective action to fix the failed assignment. *Id.* at 1070. The patent owner executed an assignment, after the case had been filed, and then recorded it with the PTO. *Id.*

Thus, at the time of filing, the plaintiff had no legal rights — exclusionary or otherwise — to the patent. *See id.* This Court concluded that plaintiff’s complete lack of legal rights to the patent was no bar to Article III standing under *Lone Star*. “In *Lone Star*, we made clear that whether one qualifies as a patentee under 35 U.S.C. § 281 is a statutory prerequisite to the right to relief in a patent infringement action, but does not implicate the district court’s subject matter jurisdiction.” *Schwendimann*, 959 F.3d at 1071. Thus, because the plaintiff alleged that “she is the owner by assignment of the ’845 patent and Appellants infringed that patent — there is no ‘standing’ issue to be decided in this appeal.” *Id.* at 1071. In other words, while Ms. Schwendimann may have failed to meet the statutory prerequisites of § 281 at the outset of the appeal, she met the three, simple requirements of Article III: injury, causation, and redressability. *See id.* at 1075.

While in *Lone Star*, the plaintiff may have had *some* exclusionary rights at the time of the complaint, Ms. Schwendimann had *no* exclusionary rights when she filed her complaint. Her assignment was recognized only after the district court retroactively reformed it under Minnesota law — a remedy that could not have fixed

Article III standing missing at the time of the complaint under previous precedent. *See Abraxis*, 625 F.3d at 1364.

The dissent and majority's response to it shed light on *Schwendimann's* holding. In accordance with earlier precedent like *Abraxis*, the dissent concluded that Ms. Schwendimann lacked Article III standing when the suit was filed and rejected the proposition that the district court's post-suit reformation could cure this defect. *See Schwendimann*, 959 F.3d at 1077 (noting established law that "[p]ost suit activities cannot confer Article III standing that was otherwise lacking when the suit was filed"). The dissent took the majority to task for not examining whether Ms. Schwendimann possessed any exclusionary rights at the time of filing. According to the dissent, "[t]he issue is constitutional — *i.e.*, whether Ms. Schwendimann had *any* requisite 'exclusionary rights' in the patents-in-suit at the time of filing her infringement suit to establish Article III standing." *Id.* It concluded that "*Lone Star* clarified that a party that fails to satisfy the statutory standing requirements under the Patent Act — *i.e.*, 'all substantial rights' in the patent — may nonetheless meet some baseline constitutional standing threshold so long as the party holds *some* exclusionary rights in the patent." *Id.* (citing *Lone Star*, 925 F.3d at 1234–35). In other words, the dissent concluded that while the § 281 analysis may no longer be constitutional, Article III requires some exclusionary rights in the patent context.

See id. The concept being that because patent rights are a creature of the Patent Act, its requirements must be imported into Article III. *See id.*

The *Schwendimann* majority rejected this argument:

The dissent disagrees and asserts that the Patent Act’s prerequisites must be treated as jurisdictional because the right to exclude has constitutional underpinnings. There are two problems with that contention. First, *Lone Star* states the opposite in a precedential decision. The dissent, like all subsequent panels, is bound by *Lone Star*. Second, not only has the Supreme Court made clear that virtually all statutory prerequisites are non-jurisdictional, but it has held that the registration requirement in the Copyright Act is non-jurisdictional. The Copyright Act is no less tied to the Intellectual Property Clause in the Constitution than is the Patent Act.

Id. at 1071 n.6 (citations omitted). In other words, under *Schwendimann*, “exclusionary rights” are not required for Article III standing.

Kenall Mfg. Co. v. Cooper Lighting, LLC, No. 17-cv-4575, 2020 WL 4015324 (N.D. Ill. July 16, 2020), is particularly instructive as to the difference between statutory prerequisites and Article III standing. There, the defendant argued that the plaintiff lacked Article III standing because the plaintiff did not possess exclusionary rights sufficient to bring a case under the patent laws. *Id.* at *2. The court rejected this argument based on *Lexmark* and *Lone Star*, stating that “[b]y not distinguishing Article III standing, on the one hand, from having a viable claim under a certain statute — which turns on statutory standing or zone-of-interest analysis — or being a real party in interest, on the other, Cooper fails to recognize that those doctrines are distinct and rest on distinct considerations.” *Id.* (collecting cases). The question

there involved detailed review of contracts to determine whether they assigned or exclusively licensed certain rights, and therefore deprived the plaintiff of what, before *Lone Star* and *Schwendimann*, was considered “standing” to bring a claim under the Patent Act. The court held that, properly understood, this no longer was a question of Article III standing. *Id.* It noted that “[a] plaintiff may have Article III standing to seek relief for a defendant’s alleged misconduct even if it has no viable statutory or common law right to obtain relief.” *Id.* The court usefully analogized the principle to a creditor case:

For example, if a creditor assigns to a third party a delinquent debt, the creditor no longer possesses the right to enforce the debt, but it still has Article III standing because it was injured by the debtor’s nonpayment and its injury could be redressed through money damages. *See Cranpark, Inc. v. Rogers Grp., Inc.*, 821 F.3d 723, 733 (6th Cir. 2016) (“Just as White forfeited his proprietary interest in the check by assigning it to the company, RGI argues Cranpark has done the same with its legal claims. This, however, implicates Rule 17 not Article III.”).

Id.

In sum, after *Lexmark*, *Lone Star*, and *Schwendimann*, exclusionary rights in a patent are not required for Article III standing in patent infringement cases.

IV. LEXMARK HAS BEEN APPLIED CONSISTENTLY TO OTHER FEDERAL STATUTES – THERE IS NO BASIS FOR A SPECIAL RULE IN PATENT CASES.

Appellate courts have kept separate the three requirements of Article III from the requirements of a variety of statutory regimes, in some cases even relying on *Lexmark* to correct previous lines of precedent. This Court is no exception, holding

constitutional requirements apart from statutory ones in appeals from Patent Office proceedings, trademark proceedings, and Tucker Act cases.

A. This Court Has Correctly Separated Statutory Requirements From Those Of Article III In Other Contexts.

This Court has properly separated the requirements of Article III from those of the Patent Act in the context of appeals from decisions of the Patent Trial and Appeal Board. The Patent Act includes a right to appeal final decisions in Patent Office proceedings. Section 319 of Title 35 provides that “[a] party dissatisfied with the final written decision of the Patent Trial and Appeal Board . . . may appeal” and “[a]ny party to the inter partes review shall have the right to be a party to the appeal.” The statutory right to appeal Board decisions is likewise enshrined in 35 U.S.C. § 141 (“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 . . . may appeal the Board's decision only to the United States Court of Appeals for the Federal Circuit.”); *see also* 35 U.S.C. § 329.

As this Court has held, however, meeting the *statutory* requirement — being a dissatisfied party to a Board proceeding — has no bearing on Article III standing. That is, any appellant seeking to appeal the final written decision of an inter partes review must nonetheless independently establish Article III standing. *See, e.g., Phigenix, Inc. v. Immunogen, Inc.*, 845 F.3d 1168, 1175 (Fed. Cir. 2017) (“Phigenix cannot base its injury in fact upon a violation of § 141(c) because it has been

permitted to file its appeal, and the exercise of its right to appeal does not necessarily establish that it possesses Article III standing.”); *JTEKT Corp. v. GKN Auto. LTD.*, 898 F.3d 1217, 1219 (Fed. Cir. 2018) (“In a series of decisions, we have held that the statute cannot be read to dispense with the Article III injury-in-fact requirement for appeal to this court.”); *Gen. Elec. Co. v. Raytheon Techs. Corp.*, 983 F.3d 1334, 1341 (Fed. Cir. 2020); *Gen. Elec. Co. v. United Techs. Corp.*, 928 F.3d 1349, 1353 (Fed. Cir. 2019), *cert. denied sub nom. Gen. Elec. Co. v. Raytheon Techs. Corp.*, 140 S. Ct. 2820 (2020). This Court also recognized that, under *Lexmark*, whether a litigant falls within the zone-of-interests of Section 319 — *i.e.*, whether that litigant has a “statutory cause of action” — was wholly separate from the Article III standing question. *See Mylan Pharms. Inc. v. Rsch. Corp. Techs., Inc.*, 914 F.3d 1366, 1372–1373 (Fed. Cir. 2019) (only addressing the statutory interpretation question because the appellee did not “assert that Appellants lack Article III standing”).

The same is true in the inverse: Section 314 provides that *no appeal* can be taken from a decision instituting inter partes review. *See* § 314(d) (“(d) No Appeal. The determination by the Director whether to institute an inter partes review under this section shall be final and nonappealable.”); *see also* 35 U.S.C. § 324(e). Yet this Court had no trouble relying on *Lone Star* and *Lexmark* to hold that statutory appealability under Section 314 did not implicate this Court’s subject-matter jurisdiction. *See Mayne Pharma Int’l Pty. Ltd. v. Merck Sharp & Dohme Corp.*, 927

F.3d 1232, 1238 (Fed. Cir. 2019) (“The appeal bar [under § 314] is not characterized as jurisdictional in the statute, and the Supreme Court has told us to avoid characterizing rules as jurisdictional where Congress has not ‘clearly stated that the rule is jurisdictional.’”); *see also id.* at 1239 (citing *Lone Star*, 925 F.3d at 1235, for the proposition that “defects in statutory standing ‘do not implicate a court’s subject-matter jurisdiction’”).

Apart from the patent context, this Court likewise applied *Lexmark* in *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370 (Fed. Cir. 2020), in a trademark case. In *Australian Therapeutic*, this Court clearly explained that the “requirements to bring a cancellation proceeding under 15 U.S.C. § 1064” were “more appropriately viewed as requirements for establishing a statutory cause of action,” not requirements for Article III standing. *Id.* at 1373 (citing *Lexmark*, 572 U.S. at 128 n.4). The Court addressed, *inter alia*, whether “proprietary rights” were required by the statute *without* conflating the statutory “proprietary rights” question with the concept of Article III standing. *Id.* at 1373-74.

This Court also applied *Lexmark* in the Tucker-Act context in *Walby v. United States*, 957 F.3d 1295, 1299 (Fed. Cir. 2020). On review in *Walby* was a Claims Court decision that, because Walby’s administrative tax refund claim was untimely, the Claims Court lacked jurisdiction over it. This Court disagreed, explaining that

under *Lexmark*, “Walby’s failure to meet the . . . statutory requirement of a timely administrative claim . . . would not seem to implicate the Claims Court’s subject matter jurisdiction; rather, it appear[ed] to be a simple failure to meet the statutory precondition to maintain a suit against the government with respect to those taxes.” *Id.* at 1299–1300.

B. The Distinction Between Statutory Questions And Article III Has Been Applied By The Supreme Court And The Other Circuits.

The Supreme Court and other circuits treat statutory requirements and Article III standing separately, regardless of the statutory backdrop. For example, in *Arbaugh*, the Supreme Court explained that the employee-numerosity requirement — a requirement that employers have at least 15 employees to be covered by Title VII — was not jurisdictional and instead simply an element of the plaintiff’s claim for relief. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516 (2006) (“But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.”). In *United States v. Wong*, 575 U.S. 402, 410 (2015), the Supreme Court held that the statute of limitations in the Federal Tort Claims Act, which requires that a claim against the United States “shall forever be barred” if not presented to the agency and federal court within a prescribed period, was not jurisdictional. There is no shortage of Supreme Court precedent holding statutory requirements non-jurisdictional. *See, e.g., Union Pac. R.R. Co. v. Brotherhood of Locomotive Eng’rs & Trainmen Gen. Comm. of*

Adjustment, Cent. Region, 558 U.S. 67, 82–86 (2009) (holding that the requirement in the Railway Labor Act that parties conference about settlement before arbitration was not jurisdictional); *E.P.A. v. EME Homer City Generation, L.P.*, 572 U.S. 489, 511 (2014) (holding that the Clean Air Act requirement that only objections that were raised with reasonable specificity during the public comment period be subject to judicial review was not jurisdictional); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (holding that the timely filing of an EEOC charge was not a jurisdictional prerequisite to suit in federal court” and was, instead, “subject to waiver, estoppel, and equitable tolling”).

Perhaps the most similar case arises in the context of copyright: Section 411(a) of Title 17 provides, *inter alia* and with certain exceptions, that “no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made.” This “registration requirement” is remarkably similar to 35 U.S.C. § 281, which limits “remed[ies] by civil action for infringement of [a] patent” to “patentee[s].” Like Section 281 of the Patent Act, Section 411(a) of the Copyright Act provides a precondition that must be met — *i.e.*, registration — before one is entitled to remedies under the statute. Applying its own approach from *Arbaugh*, the Supreme Court held that Section 411(a) “d[id] not restrict a federal court’s subject-matter jurisdiction.” *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 157, 170 (2010).

Other circuit courts have reevaluated past precedent conflating various statutory requirements and the requirements of Article III in view of *Lexmark*. For example, the Third Circuit relied on *Lexmark* to abrogate its prior precedent conflating a litigant’s statutory authority to pursue causes of action under the Bankruptcy Code with constitutional standing. See *In re Wilton Armetale, Inc.*, 968 F.3d 273, 281 (2020). The Third Circuit recognized that *Lexmark* “reaffirmed that constitutional standing only has three elements,” namely injury-in-fact that is fairly traceable to the defendant’s conduct and that a favorable judicial decision would likely redress. *Id.* Other requirements — including “[t]he statutory requirements of bankruptcy ‘standing’ [that] exceed the three elements of constitutional standing” — “do not affect [] constitutional jurisdiction, but only whether [a litigant] has a claim on the merits.” *Id.* Similarly, in resolving an ERISA case, the Second Circuit relied on *Lexmark* to explain that, contrary to its own precedent, “statutory standing” was not a “separate aspect of standing or part of the prudential aspect of standing,” but, instead an injury that “‘does not belong’ to the family of standing inquiries.” *Am. Psychiatric Ass’n v. Anthem Health Plans, Inc.*, 821 F.3d 352, 359 (2016) (quoting *Lexmark*, 572 U.S. at 128 n.4). What is clear among the circuits now is a recognition that requirements for any particular statutory cause of action are separate and apart from the three the requirements of Article III. See, e.g., *Crabtree v. Experian Info. Sols., Inc.*, 948 F.3d 872, 882–83 (7th Cir. 2020) (“Determining

whether Experian can bring its counterclaim requires us to follow *Lexmark's* guidance by asking both whether the company has Article III standing and, separately, whether it falls within the zone of interests Congress meant to protect in creating a civil cause of action in [15 U.S.C.] § 1681b.”); *In re Cap. Contracting Co.*, 924 F.3d 890, 894-98 (6th Cir. 2019); *Moya v. United States Dep’t of Homeland Sec.*, 975 F.3d 120, 129-30 (2d Cir. 2020).

Finally, the Ninth Circuit decided that an analogous issue in a copyright case did not implicate Article III standing in the wake of *Lexmark*. In *Minden Pictures, Inc. v. John Wiley & Sons, Inc.*, 795 F.3d 997, 1001 (9th Cir. 2015), the plaintiff alleged that it was the exclusive licensee of certain copyrights, and therefore had standing to bring its copyright infringement action under the Copyright Act. The defendant filed a Rule 12(b)(1) motion alleging a lack of Article III standing, and later filed a Rule 56 summary judgment motion on substantially similar grounds, which the district court granted. *Id.* The Ninth Circuit concluded that after *Lexmark*, the issue of whether the plaintiff had a statutory right to sue under the Copyright Act was *not* a question of the Court’s Article III jurisdiction, even though it required analysis of purportedly exclusive license agreements to determine whether the plaintiff possessed any rights in the copyright. *Id.* (“We note that Wile’s Rule 12 motion to dismiss should have been brought under Rule 12(b)(6) for failure to state a claim rather than under Rule 12(b)(1) for lack of jurisdiction, for the issue is

statutory rather than Article III standing.”). *Lone Star*’s approving citation of *Minden Pictures*, see 925 F.3d at 1235, underscores that the Federal Circuit’s decisions in *Lone Star* and *Schwendimann* were designed to bring patent law into conformity with the Article III standing requirements in other areas of the law and reflect an understanding that patent cases are not governed by a set of “special rules.” See also *Trimble Inc. v. PerDiemCo LLC*, ___ F.3d ___, No. 2019-2164, 2021 WL 1898127, at *5 (Fed. Cir. May 12, 2021) (“[T]he [Supreme] Court has repeatedly rejected special rules for patent litigation in the context of rules governing civil litigation generally.”).

V. THE FEDERAL CIRCUIT SHOULD CLARIFY CONFUSION AMONG LOWER COURTS BY STATING THAT EXCLUSIONARY RIGHTS ARE NOT JURISDICTIONAL.

District courts have been inconsistent in following *Lexmark*, *Lone Star*, and *Schwendimann*. Many district courts have followed these cases by separating the statutory question (whether a plaintiff has exclusionary rights) from the constitutional one (whether a plaintiff has suffered a concrete injury, that is traceable to the alleged violation, and can be redressed by a favorable decision). See, e.g., *Focus Products Grp. Int’l, LLC v. Kartri Sales Co.*, No. 15 Civ. 10154 (PAE), 2021 WL 1946756, at *2 (S.D.N.Y. May 14, 2021) (holding § 281 statutory requirements are not jurisdictional); *Baxalta Inc. Baxalta US Inc. v. Bayer Healthcare LLC*, No. 17-1316-RGA, 2021 WL 1063099, at *3 (D. Del. Mar. 18, 2021);

AnywhereCommerce, Inc. v. Ingenico, Inc., No. 19-cv-11457-IT, 2021 WL 395566, at *2 (D. Mass. Feb. 3, 2021); *Kenall*, 2020 WL 4015324, at *2 (same); *Enventure Global Tech. Inc. v. Weatherford U.S.*, No. H-19-2397, 2020 WL 6144620, at *1 n.1 (S.D. Tex. June 11, 2020); *see also, e.g., Boston Sci. Corp. v. BioCardia, Inc.*, ___ F. Supp. 3d ___, 2021 WL 927267, at *2 (N.D. Cal. Mar. 11, 2021) (“BioCardia has Article III standing arising from its financial interest in and corporate relationship with BioCardia Lifesciences . . . [because] the parent whose financial interests are directly affected by an injury to the wholly owned subsidiary can claim ‘actual injury’ within the meaning of Article III.” (citing *Franchise Tax Bd. of Cal. v. Alcan Aluminum Ltd.*, 493 U.S. 331, 336 (1990))).

But other district courts refuse to acknowledge the change brought by *Lexmark*, *Lone Star*, and *Schwendimann*, continuing to hold that exclusionary rights are necessary for Article III standing, applying now-overturned cases. *See, e.g., Pulse Elecs., Inc. v. U.D. Elec. Corp.*, No. 3:20-cv-01676-BEN-DEB, 2021 WL 1378756, at *7 (S.D. Cal. Apr. 12, 2021); *United Access Techs., LLC v. Verizon Internet Servs., Inc.*, No. 05-866-LPS, 2021 WL 1200650, at *7 n.9 (D. Del. Mar. 26, 2021); *Cirba Inc. v. VMware, Inc.*, No. 19-742-LPS, 2020 WL 7489765, at *2 (D. Del. Dec. 21, 2020); *Chromadex, Inc. v. Elysium Health, Inc.*, ___ F. Supp. 3d ___, 2020 WL 7360212, at *2 (D. Del. Dec. 17, 2020) (same); *Uniloc USA, Inc. v.*

Apple, Inc., No. C 18-00358-WHA, 2020 WL 7122617, at *4 (N.D. Cal. Dec. 4, 2020).

This discord warrants a clear statement by this Court to clarify a critical area of law. Every day, practitioners must decide who can bring patent claims to court, but the district courts are applying vastly different rules. Indeed, online search tools do not even have “red flag” or “red warning” signs for the pre-*Lexmark* decisions have that plainly conflict with *Lone Star* or *Schwendimann*. And, until this issue is clarified, defendants might incorrectly conclude they do not risk forfeiture for failure to bring challenges because in some court statutory prerequisites still are incorrectly classified as going to subject matter jurisdiction, which can be raised at any time. *See Abraxis*, 625 at F.3d at 1364; *see also, e.g., Focus Products*, 2021 WL 1946756, at *2 (concluding defendant waived the right to a failure to state a claim defense because it was not included in its answer and defendants only raised the issue “on the brink of trial, and indeed, after the submission of pretrial motions *in limine*”).

While *Amicus* appreciates that there may be other ways to decide this case without addressing the Article III standing issue, this issue is too important to leave unaddressed. The power of federal courts to even hear patent disputes is a foundational question – the basic rules governing this power should not be in question at this point. And in all events, the Court has the duty to satisfy itself as to subject matter jurisdiction in every case. *See Hertz Corp. v. Friend*, 559 U.S. 77, 94

(2010) (“Courts have an independent obligation to determine whether subject-matter jurisdiction exists, even when no party challenges it.” (citing *Arbaugh*, 546 U.S. at 514)).

CONCLUSION

Accordingly, *Amicus* respectfully requests that the Court clarify that exclusionary rights are not required to for Article III standing in patent infringement cases.

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**STATEMENT REGARDING AUTHORITY TO FILE, AUTHORSHIP, AND
FUNDING**

Pursuant to Federal Rule of Appellate Procedure 29(a)(2) and 29(a)(4)(E),
amicus states:

1. Counsel for Cirba d/b/a Densify reached out to counsel for appellants and appellees seeking consent to file an amicus brief. Appellants provided consent. Appellees did not respond by the time of filing. Cirba Inc. d/b/a Densify has moved for leave to file this brief with the Court.
2. Counsel for Cirba Inc. d/b/a Densify authored this brief in whole.
3. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief.
4. No person—other than *amicus curiae* and/or its counsel—contributed money that was intended to fund preparing or submitting the brief.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 29(a)(5) because it contains 6098 words, excluding the exempted portions.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2021, this document was electronically filed and therefore served on counsel of record via CM/ECF.

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