

No. 20-1558, 20-1559

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

**QUALCOMM INCORPORATED**

*Appellant,*

v.

**APPLE INC.**

*Appellee,*

**ANDREW HIRSHFELD, Performing the Functions and Duties of the Under  
Secretary of Commerce for Intellectual Property and Director of the  
United States Patent and Trademark Office,**

*Intervenor.*

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APPEAL FROM THE UNITED STATES PATENT AND TRADEMARK OFFICE,  
PATENT TRIAL AND APPEAL BOARD IN INTER PARTES REVIEW NOS.  
IPR2018-01315, IPR2018-01316

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**APPLE INC.'S PETITION FOR REHEARING *EN BANC***

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March 18, 2022

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**CERTIFICATE OF INTEREST**

Counsel for Appellee Apple Inc. (“Apple”) certifies the following:

1. Provide the full names of all entities represented by undersigned counsel in this case.

**Apple Inc.**

2. 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.

**Not Applicable**

3. 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.

**None**

4. 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).

**Fish & Richardson P.C.: W. Karl Renner, Thomas Rozylowicz,  
Timothy Riffe, David L. Holt**

5. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court’s decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

**None**

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). Fed. Cir. R. 47.4(a)(6).

**Not Applicable**

March 18, 2022

*/s/ Lauren A. Degnan*  
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**STATEMENT OF COUNSEL**

Based on my professional judgment, I believe this appeal requires an answer to one or more precedent-setting questions of exceptional importance:

Whether applicant admitted prior art found within the specification of a challenged patent may serve as the basis for an *inter partes* review proceeding under 35 U.S.C. § 311(b), which provides that a petitioner may request *inter partes* review “on the basis of prior art consisting of patents or printed publications”?

Dated: March 18, 2022

/s/ Lauren A. Degnan  
Lauren A. Degnan

## INTRODUCTION

Section 311(b) of the AIA permits *inter partes* review of issued patents “on the basis of prior art consisting of patents or printed publications.” 35 U.S.C. § 311(b). This plain statutory language encompasses applicant admitted prior art (“AAPA”) found within a challenged patent. This type of AAPA is prior art and it consists of a patent, thus satisfying the two limitations the statute places on IPR bases.

Yet, the panel opinion held that AAPA may not form the basis of an IPR. The panel reached this decision by overlooking the plain meaning of “prior art consisting of patents or printed publications,” without explaining how its holding comports with that statutory language. Instead, the panel opinion construes the statute as meaning: on the basis of prior-art patents or printed publication. That interpretation entirely reads out the clause “consisting of,” turns the noun “prior art” into the adjective “prior-art,” and fundamentally alters the statute’s meaning. The panel opinion’s primary basis for this construction is prior case law that does not attempt to construe section 311(b) and/or that otherwise does not bear on the issue.

Courts must faithfully apply statutes as Congress drafts them. By eschewing traditional statutory construction, the panel opinion falls short of that universally accepted touchstone. Indeed, the panel opinion does not comport with Congress’s



goal for section 311(b) in particular—easing evidentiary burdens on the Board—or Congress’s overall goal for IPRs—helping rid the patent system of low-value patents. To correct this error and enforce the statute as Congress intended, this Court should set the panel opinion aside, rehear this case *en banc*, and hold that AAPA is a permissible basis for an IPR.

### **BACKGROUND**

Apple and Qualcomm engaged in a multi-patent dispute spread across several fora. One patent Qualcomm asserted was U.S. Patent No. 8,063,674. The ’674 patent generally describes a power detection circuit for a system with multiple supply voltages. Appx85. Its Figure 1 is labeled “Prior Art” and demonstrates a configuration satisfying all of the claimed elements except one—a feedback circuit. Appx86.

Apple petitioned for *inter partes* review of the ’674 patent. Appx204-206. Relevant here, one of the grounds Apple presented was AAPA combined with Majcherczak, which contains the feedback circuit missing from Figure 1. *Id.*

During the IPR, Qualcomm conceded that the combination of AAPA and Majcherczak satisfies all elements of the independent challenged claims. *See* Appx27-28; Appx385-386. Qualcomm argued, however, that a patent applicant’s own admissions of prior art in the patent specification should not be eligible for use in IPR proceedings. Appx403. The Board rejected this argument, finding that

the IPR statute permits using AAPA in IPR proceedings. Appx18-22. Particularly, the Board determined that the statute’s requirement that IPRs may proceed only “on the basis of prior art consisting of patents or printed publications” does not prohibit use of AAPA as it is both “prior art” and “consisting of a patent[.]” *Id.* (citing 35 U.S.C. § 311(b)). The Board ultimately found the ’674 patent unpatentable in view of Apple’s AAPA–Majcherczak ground. Appx82-83.

On appeal, Qualcomm did not challenge the merits of the Board’s final written decision, only its determination that the IPR statute permits the use of AAPA. Apple’s responsive brief analyzed in detail the text of the IPR statute, along with its legislative history, to demonstrate that AAPA may be used in IPRs. The day after Apple filed its brief, the Director of the USPTO issued guidance regarding the use of AAPA in IPRs (“Guidance”). *See* Appx4530-4538. The Director then intervened in the appeal, and submitted a brief asking this Court to remand so the Board could apply the Guidance, without taking a position on the whether the Board’s outcome would change under the Guidance, ECF 38. The Court directed Apple to submit an updated responsive brief, ECF 48, which Apple did, ECF 49.

The panel ultimately held that use of AAPA is limited in IPRs—AAPA may not form the “basis” of an IPR ground. Op. 13. The panel determined that the AAPA may be used to some degree in IPRs, but without defining or separating out

the permissible uses from the impermissible ones. *Id.* at 14-15. The panel remanded to the Board to determine whether Apple’s ground was on the “basis” of AAPA. *Id.* at 16.

### **ARGUMENT**

AAPA is available for use as the basis of an IPR, and the panel opinion holding to the contrary conflicts with the IPR statute. Section 311(b) plainly provides that a petitioner may base its ground on AAPA, as it allows for “prior art consisting of patents” to form the basis of the IPR. AAPA found within a challenged patent unambiguously fits within that description as it is prior art and it is in the form of a patent. The panel opinion overlooks this plain statutory command without justification—and without conducting a traditional statutory analysis—relying instead on shorthand *dicta* appearing in prior cases that, themselves, did not undertake the requisite statutory analysis.

The result is a limitation on the use of AAPA that appears nowhere within the statute. This approach not only re-writes the statutory language, but also neglects Congress’s goals for both section 311(b) and IPRs more broadly. The Court should hear this case *en banc* to correct the panel opinion and give full effect to the words Congress enacted into law.

**I. The AIA Does Not Limit Use of AAPA in IPRs**

**A. Section 311(b) Permits “Prior Art Consisting of Patents or Printed Publications” in IPR**

The plain language of section 311(b) alone settles the question of whether AAPA may be used in IPRs. In relevant part, section 311(b) states:

A petitioner in an inter partes review may request to cancel as unpatentable 1 or more claims of a patent only on a ground that could be raised under section 102 or 103 and *only on the basis of prior art consisting of patents or printed publications.*

35 U.S.C § 311(b).<sup>1</sup> Thus, on its face, the statute constrains an IPR petition in two ways: the challenge may proceed only on (1) a ground that could be raised under section 102 or 103, and (2) the basis of prior art consisting of patents or printed publications.

To interpret this clause properly, “[t]he first step ‘is to determine whether the language at issue has a plain and unambiguous meaning . . . .’” *PDS Consultants, Inc. v. United States*, 907 F.3d 1345, 1357 (Fed. Cir. 2018) (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002)). Here, the statutory language is clear and unambiguous. The clause’s central noun phrase is “prior art,”<sup>2</sup> which is a well-known term in the patent context. *See OddzOn Prods., Inc. v. Just Toys, Inc.*, 122

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<sup>1</sup> All emphasis is added unless otherwise noted.

<sup>2</sup> Noun phrases act as nouns, and for simplicity, this brief will refer to “prior art” as a noun. *See Grant Barrett, Perfect English Grammar* § 5.6.1, at 80 (2016).

F.3d 1396, 1402 (Fed. Cir. 1997) (explaining that the “real meaning of ‘prior art’” is “knowledge that is available, including what would be obvious from it, at a given time, to a person of ordinary skill in the art”). “Prior art” in the statute is not an “adjective,” but a self-contained noun that is the object of the prepositional phrase “on the basis of.” *See* Bryan A. Garner, *The Chicago Guide to Grammar, Usage, and Punctuation* ¶¶ 244-45, at 139-41 (2016) (describing “of” as a preposition, and similar phrase “on the part of” as a phrasal preposition, and that a “preposition’s object . . . is usually a noun, or else a pronoun”). Thus, the clause initially limits the permitted bases to “prior art.”

The remainder of the clause, beginning with the participle “consisting,” is a participial phrase restricting the form of “prior art” that can form the basis for an IPR petition. *See id.* ¶ 151, at 86 (“A participle is a nonfinite verb that is not limited by person, number, or mood, but does have a tense[;] . . . the present participle invariably ends in *-ing*.” (italicization in original)). It clarifies that the “prior art” must be “consisting of patents or printed publications.” The participial phrase “consisting of patents or printed publications” thus functions as an adjective modifying the noun “prior art”—not the other way around. *See id.* ¶ 154, at 87 (explaining a participial phrase “can be used [] as an adjective,” providing example “she pointed to the clerk *drooping behind the counter*,” which uses participle “drooping” followed by prepositional phrase “behind the counter” (emphasis in

original to highlight participial phrase)). Namely, the “prior art” forming the basis for a petition must be in the form of a patent or a printed publication.

**B. AAPA Is “Prior Art Consisting of . . . Patents”**

AAPA from the challenged patent’s specification meets both plain language requirements of section 311(b).

First, an applicant’s admissions as to the scope of prior art are uniformly considered “prior art” for purposes of a validity analysis. *See In re Fout*, 675 F.2d 297, 300 (C.C.P.A. 1982) (“Valid prior art may be created by the admissions of the parties.”); *see also, e.g., PharmaStem Theras., Inc. v. ViaCell, Inc.*, 491 F.3d 1342, 1362 (Fed. Cir. 2007); *Application of Nomiya*, 509 F.2d 566, 571 (C.C.P.A. 1975) (Rich, J.) (“***By filing an application containing Figs. 1 and 2, labeled prior art, ipsissimis verbis, and statements explanatory thereof appellants have conceded what is to be considered as prior art*** in determining obviousness of their improvement.”).

Second, the AAPA from a patent’s specification is, quite literally, “consisting of” a patent. *See Constant v. Advanced Micro-Devices, Inc.*, 848 F.2d 1560, 1570 (Fed. Cir. 1988) (“A statement ***in a patent*** that something is in the prior art is binding on the applicant and patentee for determinations of anticipation and obviousness.”); *see also, e.g., PharmaStem*, 491 F.3d at 1362 (AAPA in written description); *Nomiya*, 509 F.2d at 571 (AAPA in figures). Thus, AAPA

meets both requirements of section 311(b). Under the plain and unambiguous text of the statute, AAPA is available for use in IPR proceedings.

## **II. The Panel Opinion Misconstrues the Statute**

### **A. The Panel Neglects the Plain Statutory Text**

“As in any case of statutory construction, [the] analysis begins with the language of the statute.” *PDS Consultants*, 907 F.3d at 1357 (quoting *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999)). Yet, the panel’s decision neglects to analyze the critical statutory language “prior art consisting of.”

Instead, the panel opinion focuses on the term “basis” in section 311(b), i.e., that IPRs must be “on the *basis* of prior art consisting of patents or printed publication.” Op. 10. However, there has never been a legitimate dispute about the statute requiring a “basis.” The dispute has focused instead on what can serve as that basis. The panel went astray by determining that “the ‘patents or printed publications’ that form the basis of a ground for *inter partes* review must themselves be prior art to the challenged patent.” *Id.* It held that this “conclusion excludes any descriptions of the prior art contained in the challenged patent.” *Id.*

The panel cites no statutory support for this logical leap, and none exists. For example, nothing in the statutory text provides for the panel’s additional limitation that the prior art forming the basis of the IPR cannot come from the challenged

patent, as with AAPA. *See Romag Fasteners, Inc. v. Fossil, Inc.*, 140 S. Ct. 1492, 1495 (2020) (holding courts must not “read into statutes words that aren’t there”).

Critically, the panel opinion never engages with the key statutory text, let alone reconciles its ruling with this text. The statute provides that the “basis” upon which IPRs proceed must be “*prior art* consisting of patents or printed publications.” 35 U.S.C. § 311(b). The panel’s holding that AAPA—which is both prior art and in the form of a patent<sup>3</sup>—cannot form such basis disregards the meaning and placement of the “consisting of” language.

Courts must provide meaning to all words in a statute. *See New Jersey v. Delaware*, 552 U.S. 597, 611 (2008) (holding that to “deny operative effect to *each word* in the [statute]” would be “contrary to basic principles of construction”); *Bennett v. Spear*, 520 U.S. 154, 173 (1997). Because the panel opinion does not give effect to section 311(b)’s “prior art consisting of patents” clause, its statutory construction is incorrect.

## **B. The Panel Improperly Rewrites the Statutory Language**

Because the panel disregards the “consisting of” language, its interpretation effectively rewrites the statute. That is, it rewrites the statute to read: “only on the basis of ~~prior art consisting of~~ prior-art patents or prior-art printed publications.”

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<sup>3</sup> The panel opinion does not dispute either of these propositions.



This re-write highlights the panel opinion’s error in ignoring the grammar of the provision. *See Nielsen v. Preap*, 139 S. Ct. 954, 965 (2019) (“[T]he rules of grammar govern statutory interpretation unless they contradict legislative intent or purpose.” (quoting internally Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 140 (2012))). Specifically, the panel opinion casts the phrase “prior art” in the statute as an adjective describing patents and printed publications, i.e., “prior art patents or printed publications.” Op. 11-12. In the statute, however, the phrase “prior art” is used as a noun, not an adjective. *See Garner, The Chicago Guide to Grammar, Usage, and Punctuation* ¶¶ 244-45, at 139-41. Indeed, if the phrase “prior art” were an adjective modifying the word “patent” as is suggested by the panel’s interpretation, the phrase could be removed without impacting the structure of the clause. However, removing the phrase “prior art” from the statute renders the clause nonsensical: i.e., “only on the basis of [] consisting of patents or printed publications.”

Thus, prior art is not a modifier of “patents or printed publications” and the panel opinion improperly re-writes the statute rather than interprets the language based on the plain text and grammar.

**C. The Cases Upon Which the Panel Relies Do Not Interpret the Statutory Text**

Rather than properly the focus on the statute, the panel opinion relies largely on case law to reach its holding. Op. 11. None construes section 311(b) or

discusses AAPA (or its use in IPRs). As such, they do not qualify as “judicial decision interpreting statutory language,” of which “Congress is presumed to be aware,” as the opinion suggests, Op. 12-13. Even if the cases did engage in statutory interpretation, they cannot displace the statute itself.

**1. *Return Mail* Does Not Support the Panel’s Interpretation**

The panel’s opinion emphasizes that, in *Return Mail*, the Supreme Court described IPRs as reviewing issued patents “in light of ‘patents or printed publications’ *existing at the time of the patent application*.” Op. 11 (original emphasis) (quoting *Return Mail, Inc. v. United States Postal Serv.*, 139 S. Ct. 1853, 1860 (2019)). This quote comes from a portion of *Return Mail* describing the various Board proceedings created by the AIA at a high-level. *See Return Mail*, 139 S. Ct. at 1860. That section of *Return Mail* does not purport to construe section 311(b), nor was section 311(b) at issue in *Return Mail*, which concerns whether a federal agency may use an AIA proceeding to challenge a patent’s validity. *See id.* at 1858-59.

In any event, even were *Return Mail* interpreted as breathing life into the meaning of section 311(b), AAPA fits within its strictures. AAPA is an applicant’s admission as to what already exists in the prior art at the time of the purported invention. *See Nomiya*, 509 F.2d at 571. Thus, AAPA in a patent specification

does “exist[] at the time of the patent application.” *Return Mail*, 139 S. Ct. at 1860.

## 2. This Court’s Prior Cases Did Not Squarely Address the Statutory Construction Issue

The panel opinion also relies on *Regents of the University of Minnesota v. LSI Corp.*, 926 F.3d 1327, 1335 (Fed. Cir. 2019), which paraphrases section 311(b) as “on the basis of *prior art* patents or printed publications” instead of using the statutory text “on the basis of *prior art consisting of* patents or printed publications.” Similarly, the panel opinion cites several cases that use the same shorthand for the analog provision of the predecessor reexamination statute, 35 U.S.C. § 301(a)(1), whose relevant language is identical to section 311(b). *Op. 12* (citing *Mikkelsen Graphic Eng’g, Inc. v. Zund Am., Inc.*, 541 F. App’x 964, 973-74 (Fed. Cir. 2013); *In re NTP, Inc.*, 654 F.3d 1268, 1276 (Fed. Cir. 2011); *In re Swanson*, 540 F.3d 1368, 1375 (Fed. Cir. 2008); *In re Freeman*, 30 F.3d 1459, 1468 (Fed. Cir. 1994)).

As with *Return Mail*, none of these cases purports to construe the meaning of the relevant statutory text, nor was it at issue in them. Rather, the cases use a shorthand as a linguistic convenience.<sup>4</sup> The panel thus improperly shortcut its statutory analysis by citing non-binding cases that did not undertake the requisite

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<sup>4</sup> As explained above, this shorthand improperly reads out “consisting of” and ignores the grammar of the provision. *See* Section II.A-B, *supra*.

statutory analysis. *Union Elec. Co. v. United States*, 363 F.3d 1292, 1297 (Fed. Cir. 2004) (“[W]e have repeatedly held that the disposition of an issue by an earlier decision does not bind later panels of this court unless the earlier opinion explicitly addressed and decided the issue.”); *see also Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993) (reaffirming that if a decision does not “squarely address[an] issue,” a court remains “free to address the issue on the merits” in a subsequent case).

Finally, the panel opinion relied on *In re Lonardo*, 119 F.3d 960 (Fed. Cir. 1997), but that case, as the panel acknowledges, does not concern AAPA. Op. 11. Rather, *Lonardo* simply notes that a reexamination request is limited to “*prior art* consisting of patents or publications” under 35 U.S.C. § 301, but the Director may authorize review on “*other patents* or printed publications” under 35 U.S.C. § 303. *Id.* at 965-66. In other words, the Director is not limited to “prior art.”<sup>5</sup> In the opinion, the Court loosely refers to 35 U.S.C. § 301 as describing “prior art patents,” but the Court used that characterization as shorthand to distinguish between prior art and non-prior art. *See id.* at 965-66. It did not engage in statutory construction of the clause “prior art consisting of patents or publications” in section 301.

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<sup>5</sup> In contrast, AAPA, as reflected in its name, is *prior art*, *see Sjolund v. Musland*, 847 F.2d 1573, 1576-77 (Fed. Cir. 1988) (holding that applicant admissions regarding prior art become “prior art, as a matter of law”), making *Lonardo* even more inapposite.

Accordingly, none of these cases supports re-writing section 311(b) as covering only “prior art patents or printed publications” as the panel opinion does.

### **III. The Use of AIPA in IPRs Effectuates Congress’s Goals**

For the reasons described above, section 311(b) plainly and unambiguously provides that AIPA found within a challenged patent may form the basis of an IPR. The panel’s decision to the contrary goes against not only the statutory text, but also Congress’s intent with section 311(b) specifically and the AIA more broadly. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (“It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”).

The genesis of the disputed language in section 311(b) is section 301(a)(1) of the reexamination statute. In describing the 1980 enactment of the reexamination statute, this Court explained: “The congressional purpose in restricting reexamination to printed documents, 35 U.S.C. § 301, was to provide *a cheaper and less time-consuming alternative way to challenge patent validity* on certain issues.” *Quad Envtl. Techs. Corp. v. Union Sanitary Dist.*, 946 F.2d 870, 875 n.7 (Fed. Cir. 1991) (citing H.R. Rep. No. 1307, at 4 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6460, 6463; R. Tegtmeyer, *Policy Issues on Implementing Reexamination*, 9 AIPLA Quarterly J. 214 (1981)). One authority further explains:

The limitation on the types of prior art considered might be seen as consistent with the overarching goal of providing an expeditious administrative process as a substitute for litigation: *Where the validity issue is raised by categories of prior art other than patents and printed publications, the issue may present difficult issues of fact (e.g., when was a particular item placed ‘on sale’ for § 102(b) purposes?)* that the administrative process could not resolve more efficiently than a court.

Robert Patrick Merges & John Fitzgerald Duffy, *Patent Law and Policy* 953 (7th ed. 2017).

The same rationale—i.e., avoiding the costly, fact-intensive inquiries attendant to non-patent and non-printed publication references—applies equally to IPRs. *See Dunn v. Commodity Futures Trading Comm’n*, 519 U.S. 465, 475 (1997) (adopting construction of statute “consonant with the history of evolving congressional regulation in th[e] area”). Indeed, the legislative history of section 311(b) confirms that Congress was focused on reducing evidentiary complications as well. A group of Senators voted against an early version of the bill, proposing a revision that would would “continu[e] to limit the proceeding to patents and printed publications” as in reexamination to “*reduce the burden [IPR] places on the PTO.*” S. Rep. No. 111-18, at 57 (2009) (Minority Views of Sens. Kyl, Feingold, and Coburn). That revision passed as section 311(b).

Congress, thus, sought to limit the prior art that could be used in IPRs as a way to reduce the evidentiary burden on the Board. Using AAPA contained in the challenged patent’s specification does not implicate Congress’s concern about

overburdening the Board on evidentiary matters. To the contrary, AAPA found in the challenged patent's specification is incredibly straightforward from an evidentiary perspective because it does not require the introduction of a new prior art reference. The panel opinion, therefore, does not comport with the rationale for enacting section 311(b).

More broadly, the panel opinion is contrary to the policy goals of the IPR regime enacted by the AIA. Congress enacted post-issuance administrative proceedings to provide an efficient method of challenging patent validity. Indeed, “[b]y providing for *inter partes* review, Congress, concerned about overpatenting and its diminishment of competition, sought to weed out bad patent claims efficiently.” *Thryv, Inc. v. Click-To-Call Techs., LP*, 140 S. Ct. 1367, 1374 (2020) (citing *Cuozzo*, 136 S. Ct. at 2139-40; H.R. Rep. No. 112-98, pt. 1, p. 40 (2011) (“The legislation is designed to establish a more efficient and streamlined patent system that will improve patent quality and limit unnecessary and counterproductive litigation costs.”)). With that overpatenting concern in mind, “one important congressional objective” was to “giv[e] the Patent Office significant power to revisit and revise earlier patent grants.” *See also Cuozzo Speed Technologies, LLC v. Lee*, 136 S. Ct. 2131, 2139-40 (2016) (citing, e.g., 157 Cong. Rec. 9778 (2011) (remarks of Rep. Goodlatte) (noting that the IPR process “screen[s] out bad patents while bolstering valid ones”)).

The panel’s reading of section 311(b) hinders Congress’s goal. The Board should consider the applicant’s own admissions about what it did not invent to determine whether the claims in question are innovative enough to merit patent protection. *See Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 74 (2011) (rejecting interpretation that “would run counter to the statute’s overall purpose”).

**CONCLUSION**

Apple requests that the Court rehear this appeal *en banc*.

Dated: March 18, 2022

Respectfully submitted,

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**CERTIFICATE OF SERVICE AND FILING**

I certify that on March 18, 2022, I electronically filed the foregoing **APPLE'S PETITION FOR REHEARING *EN BANC*** of Appellee using the Court's CM/ECF filing system. Counsel for appellant and intervenor were electronically served by and through the Court's CM/ECF filing system per Fed. R. App. P. 25 and Fed. Cir. R. 25(e).

*/s/ Lauren A. Degnan* \_\_\_\_\_

Lauren A. Degnan

**CERTIFICATE OF COMPLIANCE**

I certify that this petition complies with the type-volume limitation of Federal Rule of Appellate Procedure 35(b)(2)(A). The petition contains 3,889 words. This petition has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman, 14 Point.

Dated: March 18, 2022

/s/ Lauren A. Degnan  
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