Appeal No. 2020-1400

In the
United States Court of Appeals
for the Federal Circuit

NEW VISION GAMING & DEVELOPMENT, INC.,

Appellant,

v.

SG GAMING, INC. f/k/a Bally Gaming, Inc.,

Appellee,

KATHERINE K. VIDAL, Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office,

Intervenor.

Appeal from the United States Patent and Trademark Office,
Patent Trial and Appeal Board in No. CBM2018-00006.

CORRECTED BRIEF OF *AMICUS CURIAE* US INVENTOR, INC. IN SUPPORT OF APPELLANT AND REVERSAL

ROBERT P. GREENSPOON
DUNLAP BENNETT & LUDWIG PLLC
333 N. Michigan Avenue, Suite 2700
Chicago, Illinois 60601
(312) 551-9500
rgreenspoon@dbllawyers.com

Counsel for Amicus Curiae
US Inventor, Inc.

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 20-1400

Short Case Caption New Vision Gaming & Development, Inc. v. SG Gaming, Inc. f/k/a Bally Gaming, Inc.

Filing Party/Entity US Inventor, Inc.

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I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

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Name: Robert P. Greenspoon

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** 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.	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/Not Applicable	☐ None/Not Applicable	☑ None/Not Applicable
US Inventor, Inc.	US Inventor, Inc.	

☐ Additional pages attached

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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6. Organizational Victims and Bankruptcy Cases. 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).

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STATEMENT OF AUTHORSHIP AND FUNDING

Under Federal Rule of Appellate Procedure 29(a)(4)(E), *Amicus Curiae* US Inventor, Inc. states that no party or its counsel authored this brief in whole or part; no party or its counsel contributed money intended to fund preparing or submitting the brief; and, no person other than *Amicus*, its members or counsel contributed money intended to fund preparing or submitting this brief.

IDENTITY AND INTEREST OF *AMICUS*

Amicus US Inventor is a non-profit 501(c)(4) membership organization founded in 2015 with the mission of restoring the ability of an inventor to stop the theft of a patented invention. US Inventor opposes the erosion of inventor rights in recent years due in part to PTAB institution and trial decisions, and the system that enables them. US Inventor educates, supports, and inspires inventors, and advocates on their behalf in order to protect inventor rights and strengthen the patent system.

US Inventor previously submitted its *amicus curiae* brief in this matter (ECF#62 in 20-1399), and received leave to file the present brief without further motion (ECF#125 in 20-1399).

ARGUMENT

The GAO Report constitutes new evidence justifying fresh analysis on whether the PTAB trial system violates due process rights. Previously submitted statistics show that it does. This Court should grant New Vision Gaming's appeal.

I. CONTROL OVER PTAB OUTCOMES THROUGH UNATTRIBUTED AND PREVIOUSLY UNKNOWN PTAB LEADERSHIP INTERFERENCE VIOLATES DUE PROCESS

Amicus US Inventor respectfully submits that all litigants (petitioners and patent owners) have endured a Patent Trial and Appeal Board ("PTAB") system that, since inception, betrayed American ideals of impartial and unbiased judicial decision making. Newly revealed facts vindicate Appellant New Vision Gaming. US Inventor takes a strong interest in this appeal, since many within its membership share New Vision Gaming's viewpoint (now finally confirmed to Congress and this Court) that something went wrong with the PTAB's implementation from 2011 to at least 2022. This Court should grant the appeal and provide relief to New Vision Gaming for the PTAB's as-applied due process violations.

APJ's are "judges." When adjudicating patentability of issued patents, they are supposed to function, in the ideal, as a "panel of experts" who report only their own, and no one else's, "impartial decision[s]." *United States v. Arthrex*, 141 S. Ct. 1970, 1982 (2021). In our Constitutional scheme (respecting the Appointments Clause), Congress mistakenly omitted review of such "expert" and "impartial" decisions by a politically accountable officer. The Supreme Court fixed this unconstitutional gap. In *Arthrex*, the Supreme Court imposed their remedy requiring the Director as a Presidential appointee to supply her "transparent decision for which a politically accountable officer must take responsibility," if a party requests it. *Id.*

This is the "standard federal model." *Id.* at 1992 (Gorsuch, J., concurring in part, dissenting in part). While the agency adjudication level calls balls and strikes as they actually come across the plate, the agency review level is privileged with a right to change the ball game's score—so long as that occurs in political sunlight. Above all, the institution or merits-phase decision in an IPR, PGR or CBMR is supposedly imbued with "judicial independence" (and the *Arthrex* Court assumed without deciding that it is). *Id.*

Appellant New Vision Gaming showed in its opening brief after remand that such "judicial independence" did not truly exist at the PTAB. The "standard federal model" lines blurred. Citing new bombshell evidence (the General Accounting Office report, Appx9046-9071, hereafter "GAO Report"), New Vision Gaming cited examples where "APJs are subject to PTO and PTAB oversight and interference, such as Management Review and ARC, that lead to changed AIA outcomes." (Blue Br. 36; *see also* Blue Br. 20 *citing* Appx9062, Appx9047, Appx9063; Blue Br. 21 *citing* Appx9057; Blue Br. 22 *citing* Appx9064, Appx9069; Blue Br. 47-48 *citing* same pages).

Amicus writes to emphasize how anathema and damaging this has been to our core American values. For example, Judges Loken and Wollman from the Eighth Circuit eloquently explained what American values are at stake and under threat in the type of scenario the GAO Report exposes. They wrote their views in a

concurring opinion in the *en banc* case of *Wersal v. Sexton*, 674 F.3d 1010 (8th Cir. 2012). As they hold, judicial independence is such an important value that it constitutes a state interest so overwhelmingly compelling that it defeats even strict scrutiny restrictions on First Amendment speech rights. *Id.*, at 1031-35 (Loken and Wollman, JJ., concurring).

In *Wersal*, Minnesota had banned candidates for elective judicial office from endorsing political candidates. The Eighth Circuit, sitting *en banc*, agreed that such judicial candidates presumptively held a First Amendment right to endorse any other candidate, and that right was subject to strict scrutiny review upon its impairment. Citing the Declaration of Independence and Solzhenitsyn, Judges Loken and Wollman opined that "judicial independence" was exactly that compelling state interest which justified the impairment. Namely, a perception would arise that an elected judge would change decisions at the behest of an endorsed political friend—what the opinion called "telephone justice."

But our nation shuns and abhors "telephone justice" (such as occurred in the Soviet Union and, apparently, at the PTAB) as contrary to the "rule of law" and the "foundation of freedom." *Id.* An extended quotation is appropriate:

> The Declaration of Independence identified as one of the "Injuries and Usurpations" King George inflicted on the States, "He has made judges dependent on his Will alone...." ¶ 11. Modern history demonstrates that this threat to freedom persists. Litigants in the former Soviet Union routinely confronted "telephone justice," in which Communist Party leaders would call judges and instruct them how to

rule in key cases. Alexander Solzhenitsyn vividly described this kind of dependent judiciary: "In his mind's eye the judge can always see the shiny black visage of truth — the telephone in his chambers. This oracle will never fail you, as long as you do what it says." *The Gulag Archipelago,* vol. III 521 (1974), quoted in Jeffrey Kahn, *The Search for the Rule of Law in Russia,* 37 Geo. J. Int'l L. 353, 385 (2006). Predictably, decades of telephone justice came to permeate judicial attitudes and surely corroded public confidence in the Russian judiciary. The lingering adverse effects were apparent to Justice Breyer when he visited a convention of Russian judges in 1993, after Boris Yeltsin's election:

> Telephone justice ... occurred when the party boss called judges and told them how to decide the outcome of a particular case. And the assembled judges spoke about the practice very frankly.... The Russian judges, in turn, asked me whether telephone justice exists in the United States. When I told them that we do not have such a practice, the Russian judges looked at me incredulously. What happens, the judges asked, when the politicians who helped you obtain your judgeship call in a favor regarding a pending case? Again, I told them that no such call would be placed.... [T]hey thought that I was merely being discreet in an effort to protect my supporters.

Judicial Independence, 95 Geo. L.J. at 904-05. When pervasive, this perception corrodes public trust in the courts. Public opinion that judges decide cases based upon their personal political views is unhealthy. But public opinion that judges decide cases based upon the wishes of their political cronies would be far worse. "The rule of law, which is a foundation of freedom, presupposes a functioning judiciary respected for its independence, its professional attainments, and the absolute probity of its judges." *Lopez Torres,* 552 U.S. at 212, 128 S. Ct. 791 (Kennedy J., concurring).

Wersal, 674 F.3d at 1034-35 (Loken and Wollman, JJ., concurring).

Referring back to what New Vision Gaming has exposed, the GAO Report evidences an equally pernicious "shiny black visage of truth" playing a dark and

previously hidden role at the PTAB. PTAB leaders controlled and changed outcomes from behind the scenes. Judges Loken and Wollman (and Justice Breyer whom they cite) were correct. Such "star chamber" hidden decision making—"telephone justice"—corrodes public trust, and bespeaks of a malfunctioning PTAB judicial system. If it is a compelling state interest to preserve judicial independence, *a fortiori*, it is a violation of due process rights to deny it.

Amicus does not lightly make this comparison between internal operations of the PTAB and the former Soviet Union's depraved system of justice. However, the GAO Report permits no lesser conclusion. The GAO Report cites facts that show the PTAB broke the "universal rule against secret trials," *In re Oliver*, 333 U.S. 257, 266 (1948), and contravened the principle that "the administration of justice cannot function in the dark." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980) ("the appearance of justice can best be provided by allowing people to observe it"). PTAB stakeholders like New Vision Gaming were deprived of their right to know who made decisions in their matters, deprived of decisions by their actually-named and appointed judges, and deprived of knowing whether real (albeit secret) decisionmakers should have been disqualified because of a conflict-of-interest.

New Vision Gaming has thus proven a due process violation, and this Court should now address it by granting requested relief.

II. THIS COURT SHOULD PROVIDE DIRECTION TO THE PTAB SO THAT IT NO LONGER FORCES APJS TO VIOLATE NATIONAL AND INTERNATIONAL NORMS

New Vision Gaming's appeal seeks more than vindication for one private litigant. It necessarily seeks relief for APJs themselves. They each suffer their own harm from being tethered to employment that forbids their comportment with national and international norms of judicial conduct. Revelations in the GAO Report prove sharp departures from such norms. Management interference placed APJs in an impossible position. Ruling for New Vision Gaming will help relieve such pressures on APJs.

For example, the American Bar Association publishes its Model Code of Judicial Conduct (2020 ed.). Under its Canon 2, "A judge shall perform the duties of judicial office impartially, competently, and diligently." Rule 2.4 covers "External Influences on Judicial Conduct." There, "A judge shall not permit family, social, political, financial, or other interests to influence the judge's judicial conduct or judgment." Model Code of Judicial Conduct Rule 2.4(b). New Vision Gaming (citing the GAO Report) demonstrated that PTAB management forced APJs to "permit . . . political . . . or other interests" to have such influence. Likewise, "A judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge." *Id.*, Rule 2.4(c). New Vision Gaming (citing the

GAO Report) demonstrated that PTAB management forced APJs to "permit others to convey" such impressions.

On the global stage, the International Association of Judicial Independence and World Peace administers the highly respected Mount Scopus International Standards of Judicial Independence (2008). Its Section 9A refers to the "Internal Independence of the Judiciary" with particular focus on "Administrative Adjudicators." The most pertinent international norm is its Section 9A.9: "The executive shall not interfere in the substantive decision-making of administrative adjudicators." PTAB structures and practices (as revealed in the GAO Report) "interfere in the substantive decision-making" of APJs and thus mock this fundamental and vital international norm. *See also id.* Section 1.1 ("An independent and impartial judiciary is an institution of the highest value in every society and an essential pillar of liberty and the rule of law.").

More is at stake in this matter than mundane private rights. The United States' reputation as proponent of the rule of law has suffered serious injury. This Court can restore it, while restoring APJ confidence that they will no longer be forced to violate national and international norms of judicial independence.

III. US INVENTOR'S PRIOR AMICUS ARGUMENTS SHOW PTAB STRUCTURAL BIAS THAT VIOLATES DUE PROCESS

For the sake of brevity, *Amicus* US Inventor will not restate at length the separate statistical analysis reported in its previously filed brief in this case. (ECF#62 in 20-1399).[1] In short, US Inventor, in a rigorous statistical study, found that there is an "October Effect" supporting New Vision Gaming's due process arguments about financial incentives. This effect remains unexplained. The October Effect shows that the first month of the performance review year has consistently revealed APJ panels stretching farther to grant less meritorious petitions than they do in the final month when their pipeline for the prior year's "decisional units" is already full. PTAB APJs disproportionately institute trial on weaker petitions when their decisional counter has reset to zero. In other words, something other than petition-merits, something linked to APJ compensation, has consistently played a role driving PTAB panel institution decision outcomes.

In *Mobility Workx, LLC v. Unified Patents, LLC*, 15 F.4th 1146, 1156 n.7 (Fed. Cir. 2021), the two judges in the majority discounted the relevancy of US Inventor's identified "October Effect" by stating that it "hardly establishes that APJs are instituting AIA proceedings to earn decisional units." Respectfully, the decisional

[1] Media reporting on it can be found here: https://www.ipwatchdog.com/2020/08/07/us-inventor-amicus-new-vision-gaming-october-effect-subjective-apj-evaluations-support-due-process-argument-ptab/id=123858/.

standard for New Vision Gaming's due process arguments did not require "establishing" bias through statistics. It was enough to show a possibility that financial incentives (even if unconscious to the decision makers) influenced PTAB institution decisions. *See In re Murchison*, 349 U.S. 133, 137 (1955) (acknowledging that a "stringent rule" that may sometimes bar trials where judges "have no actual bias and [] would do their very best to weigh the scales of justice equally between contending parties" must nonetheless be enforced, since "every procedure" that offers a "possible" threat to judicial impartiality and independence "denies [] due process of law").

In any case, the dissenting judge noted that "[d]ata and statistical analysis have been submitted by *amicus curiae* US Inventor." *Id.* at 1164 (Newman, J., dissenting). This supported the dissenting judge's view that "these due process concerns are not resolved," requiring that judge's departure from "facile endorsement of the present system." *Id.* at 1165. The dissent was correct. *Amicus* respectfully requests renewed consideration of such statistical evidence in this light (from ECF#62 in 20-1399), especially after the GAO Report and New Vision Gaming's new and persuasive due process arguments.

CONCLUSION

The PTAB trial system violates due process and forces APJs to violate national and international norms of judicial independence. The GAO Report proves this. Statistics do as well. This Court should grant New Vision Gaming's appeal on due process grounds.

Dated: September 13, 2022

Respectfully submitted,

/s/ Robert P. Greenspoon
Robert P. Greenspoon
DUNLAP BENNETT & LUDWIG, PLLC
333 N. Michigan Ave.
Chicago, IL 60601

(312) 551-9500
rgreenspoon@dbllawyers.com

Counsel for Amicus Curiae

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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