No. 26-115

United States Court of Appeals
for the Federal Circuit

In re Kangxi Communication Technologies (Shanghai) Co., Ltd.,
Petitioner.

On Petition for a Writ of Mandamus to the United States Patent and Trademark Office in IPR2025-00372 and IPR2025-00373

BRIEF OF US*MADE, THE ITC MODERNIZATION ALLIANCE, THE NATIONAL RETAIL FEDERATION, THE HIGH TECH INVENTORS ALLIANCE, THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION, ACT|THE APP ASSOCIATION, AND UNIFIED PATENTS, LLC, IN SUPPORT OF KANGXI COMMUNICATION TECHNOLOGIES AND THE PETITION FOR RELIEF

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November 28, 2025

CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rules 29(a) and 47.4, counsel for amici certifies that:

7. The full names of the parties that I represent are the US Manufacturers Association for Development and Enterprise, the ITC Modernization Alliance, the National Retail Federation, the High Tech Inventors Alliance, the Computer & Communications Industry Association, ACT|The App Association, and Unified Patents, LLC

8. There are no real parties in interest of parties that I represent

9. There are no parent corporations or publicly held companies that own ten percent or more of the stock of the parties that I represent

10. No other law firms, partners, or associates who have not entered an appearance in this appeal either appeared for the parties that I represent in the originating court or are expected to so appear in this Court

11. I do not know of any case in this or any other court or agency that will directly affect or be directly affected by this Court's decision in this case

12. No disclosure regarding organizational victims in criminal cases or debtors or trustees in bankruptcy cases is required under Fed. R. App. P. 26.1(b) or (c).

November 28, 2025 /s/ *Joseph Matal*

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INTEREST OF AMICI CURIAE

The U.S. Manufacturers Association for Development and Enterprise is a nonprofit association representing companies manufacturing diverse goods in the United States.

The ITC Modernization Alliance is a coalition of leaders in the technology, telecom, and automotive industries dedicated to modernizing the International Trade Commission and promoting trade practices that safeguard American industry, workforce, and consumers.

The National Retail Federation is the world's largest retail trade association.

The High Tech Inventors Alliance represents leading technology providers and includes some of the most innovative companies in the world.

The Computer & Communications Industry Association is an international, not-for-profit trade association representing a broad cross section of communications and technology firms.

ACT | The App Association is a global policy trade association that represents entrepreneurs, innovators, and independent developers within the app ecosystem that engages with verticals across every industry.

Unified Patents, LLC is a membership organization dedicated to deterring non-practicing entities, particularly patent assertion entities, from extracting nuisance settlements from operating companies based on likely-invalid patents.[1]

[1] No counsel for any party wrote any part of this brief. No party other than amici curiae's members contributed money that was intended to fund the preparation or submission of this brief. This brief is accompanied by a motion seeking leave to file.

ARGUMENT

I. Declining PTAB review because of ITC investigations, which lack the authority to cancel invalid claims, is irrational.

The USPTO denied review of the petition in this case on the ground that "it is unlikely that the [PTAB's] final written decision in these proceedings will issue before the final determination [by the ITC]." Decision at 2.

This approach, if allowed to stand, would be a complete bar to PTAB review in virtually every case in which there is a co-pending ITC investigation. ITC ALJs typically set a target date for completion of an ITC investigation at 16 months (or less) after the investigation is instituted. *See* 19 C.F.R. § 210.51. During the last three years, the ITC's average time for reaching a final decision on the merits has been 18 months.[2]

The PTAB schedule provides for a final written decision 18 months after a petition is filed. *See* 35 U.S.C. §§ 314(b), 316(a)(11); 37 C.F.R. § 42.107(b). Because of this timing, an ITC investigation will always be likely to reach a determination before a PTAB

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[2] *See* USITC, Section 337 Statistics: Average Length of Investigations (updated Apr. 11, 2025), available at https://www.usitc.gov/intellectual_property/337_statistics_average_length_investigations.htm.

proceeding reaches a final written decision. The only way for a PTAB petitioner to reliably overcome an ITC bar would be to file its petition *before* it is served with an ITC complaint.

A rule that precludes PTAB review in favor of an ITC investigation is particularly nonsensical given that the ITC lacks the authority to cancel invalid claims. Even if the ITC finds that a claim is invalid, and that determination is affirmed by this Court on appeal, such a determination has no preclusive effect against further enforcement of the patent claim.[3] The patent owner remains free to continue to enforce the same "invalidated" claim in district court.[4]

Early PTAB decisions, recognizing the absurdity of this situation, declined to discretionarily deny PTAB review in favor of ITC proceedings.[5] And on June 21, 2022, the USPTO adopted "interim

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[3] *See Hyosung TNS Inc. v. ITC*, 926 F.3d 1353, 1358 (Fed. Cir. 2019) ("[W]e have held that the ITC's determination of patent infringement and validity do not have claim or issue preclusive effect even if affirmed by our court"); *Texas Instruments Inc. v. Cypress Semiconductor Corp.*, 90 F.3d 1558, 1569 (Fed. Cir. 1996).

[4] *See e.g.*, I*n re Convertible Rowing Exerciser Patent Litig.*, 721 F.Supp. 596, 603-604 (D. Del. 1989); *Nautilus Hyosung Inc. v Diebold, Inc.*, 3-16-cv-0364-N (N.D. Tex. Dec. 5, 2019).

[5] *See, e.g.*, *3Shape A/S v. Align Tech.*, Inc., IPR2020-00223 (May 26, 2020); *Intel Corp. v. Tela Innovations, Inc.*, IPR2019-0152 (Mar. 11, 2020).

guidance" providing that the PTAB would not decline review on account of ITC investigations.[6] As the agency acknowledged at the time, "[u]nlike district courts, the ITC lacks authority to invalidate a patent and its invalidity rulings are not binding on either the Office or a district court."[7] As a result, "an ITC determination cannot conclusively resolve an assertion of patent invalidity, which instead requires either district court litigation or a PTAB proceeding to obtain patent cancellation."[8]

Thus for obvious reasons, the USPTO's authorizing statute, though expressly contemplating ITC investigations, declines to make them a basis for preclusion of PTAB review. Section 315(e)(2) of the Patent Act estops validity defenses in district court and at the ITC upon conclusion of a PTAB review: the section provides that "an *inter partes* review . . . that results in a final written decision" bars the petitioner from asserting "that the claim is invalid" on patents and

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[6] *See* USPTO, Interim Procedure for Discretionary Denials in AIA Post-Grant Proceedings With Parallel District Court Litigation, Jun. 21, 2022, available at https://www.uspto.gov/sites/default/files/documents/interim_proc_discretionary_denials_aia_parallel_district_court_litigation_memo_20220621_.pdf.

[7] *Id.* at 6.

[8] *Id.*

printed-publication grounds in "a civil action [in district court]" or "in a proceeding before the International Trade Commission." 35 U.S.C. § 315(e)(2). No similar estoppel, however, flows from ITC proceedings against PTAB review. The only type of proceeding that precludes PTAB review (or an *ex parte* reexamination) is a completed PTAB review. *See* 35 U.S.C. § 315(e)(1).

Congress was well aware of ITC investigations. While it *did* make PTAB review broadly conclusive of all validity challenges that could have been raised in the PTAB review, it consciously declined to make ITC proceedings preclusive of PTAB review.[9]

The statute thus declines to estop PTAB review based on ITC investigations, and the USPTO has acknowledged that such a rule would make no sense in view of the ITC's lack of authority to conclusively resolve validity issues. Yet today, with no explanation

[9] As this Court has noted, Congress even repealed the estoppel against *inter partes* reexamination that had flowed from a district court's finalized rejection of a validity defense. *See Uniloc 2007 LLC v. Hulu, LLC*, 966 F.3d 1295, 1303 (Fed. Cir. 2020) (noting that "when Congress replaced the inter partes reexamination provisions with the IPR provisions in the AIA, Congress did not carry forward pre-AIA § 317(b), concerning the termination of an inter partes reexamination based on parallel judicial proceedings."). The AIA's text reflects a legislative judgment that only contested post-issuance proceedings before the technical experts at the PTAB are sufficiently reliable to serve as the final word on patent validity.

for why its previous reasoning is no longer compelling—indeed, no explanation at all for its change in position—the USPTO makes ITC investigations preclusive of PTAB review.

Amici submit that the USPTO's new ITC-based estoppel is absurd. No rational governmental decisionmaker could have rationally determined that such a rule serves the "efficient administration of the Office" or "the integrity of the patent system." 35 U.S.C. § 316(b).

All statutes and regulations are subject to rational-basis review—a rule must bear "a rational relation to some legitimate end." *United States v. Skrmetti*, 145 S.Ct. 1816, 1828 (Jun. 18, 2025). There must be at least "a plausible policy reason for the [rule's] classification." *Armour v. City of Indianapolis, Ind.*, 566 U.S. 673, 681 (2012). It must appear that "the legislative facts on which the [rule] is apparently based rationally may have been considered to be true by the governmental decisionmaker." *Id.*; *see also Vance v. Bradley*, 440 U.S. 93, 111 (1979) ("[A rule is irrational only if] the legislative facts on which the [rule] is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.")

No USPTO official could have "reasonably believed to be true" that it makes sense to estop PTAB review on account of a proceeding that lacks the authority to prevent an invalid patent from continuing to be asserted. Nor does the USPTO even attempt to explain the reasoning behind such a rule. The USPTO's new rule is irrational.

II. Declining PTAB review because of "settled expectations" is irrational.

The USPTO's "settled expectations" rule effectively bars all PTAB validity review of a patent once it is six years old—and sometimes earlier.[10] The USPTO's leadership has stated that the rule is intended to compel "early challenges" to a patent, such as

[10] *See* Ryan Davis, "Stewart Says New Patent Policies Aim to Bring Stability," Law360, Sep. 8, 2025 (noting that although "settled expectations have often been cited in denials when a patent was issued over six years ago, [that] . . 'does not mean that a patent owner cannot establish strong settled expectations on a younger patent.'") (quoting Acting Director Stewart); *see also Amazon.com, Inc. v. Audio Pod IP, LLC*, IPR2025-00768 (Aug. 14, 2025) (applying "settled expectations" to deny review of a patent that is less than five years old); *Alliance Laundry Sys., LLC v. PayRange LLC*, IPR2025-00950 (Sep. 19, 2025) (same).

via a post-grant review or an *inter partes* review that is filed in the first few years of the life of the patent.[11]

Because the USPTO has applied this new rule retroactively, the Petitioner in this case could not possibly have complied with the rule. The Petitioner filed its PTAB petitions in January 2025. The "settled expectations" rule was subsequently announced in June 2025.[12] The asserted patents, however, were issued in 2014 and 2018—and thus the "settled expectations" rule, even liberally interpreted, closed the window for review of these patents in 2020 and 2024.

Let us suppose, however, that the "settled expectations" rule had been imposed years earlier and thus retroactivity were not a barrier to compliance. How would "settled expectations" operate in practice? Apparently the USPTO expects that makers of amplifiers

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[11] Ryan Davis, "Stewart Says New Policies Seek Fairness for Patent Owners," Law360, Sep. 15, 2025; Davis, *supra* n. 10; *see also* Gene Quinn, "Stewart Says USPTO Wants Early Validity Challenges, Not Late IPRs," IPWatchdog, Jun. 10, 2025.

[12] *See Dabico Airport Solutions Inc v. AXA Power ApS*, IPR2025-00408 (Jun. 18, 2025). The patent at issue in *Dabico* was eight years old. The agency appears to have first applied the "settled expectations" rule to a patent that is only six years old in *Amgen, Inc. v. Bristol-Meyers Squibb Co.*, IPR2025-00601, -00602 (Jul. 24, 2025).

such as the Petitioner would monitor issued patents and published applications in their field, determine which of them might one day read on products that they may manufacture in the next decade and a half, and then file post-grant and early *inter partes* review challenges against those patents that they believe to be invalid.[13]

Let us further suppose that the only patents that may read on the Petitioner's products are those assigned the same classifications as would the patent at issue in this case. U.S. Patent No. 8,717,101, which was challenged by the Petitioner IPR2025-00373, was issued in 2014, and its great-grand child, U.S. Patent No. 9,917,563, which was challenged in IPR2025-00372, was issued in 2018. The patents belong to USPC Class 330, "Amplifiers." In 2014, 819 patents were assigned a classification to Class 330.[14]

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[13] As the Secretary of Commerce has apparently stated, the new policy amounts to "speak now or forever hold your peace." Davis, *supra* n. 3.

[14] *See* USPTO, "Patent Counts by Class by Year," available at https://www.uspto.gov/web/offices/ac/ido/oeip/taf/cbcby.htm#PartA2. The USPTO has only compiled annual data for patents assigned a classification under U.S. Patent Classification System ("USPC") system between 1995 and 2015. For present purposes, we will assume that both patents were issued in 2014.

In a typical year, about three times as many patent-infringement lawsuits are filed as there are PTAB petitions filed.[15] The correspondence between these numbers and the likelihood that an asserted patent will be challenged at the PTAB is not exact. Nevertheless, the best available data indicate that in the decade after the America Invents Act was enacted, the share of patents asserted in court that were subsequently challenged at the PTAB was 28%.[16]

Under the USPTO's proposed reimagining of the post-issuance review system, the Petitioner would have been expected to review the 819 patents that issued in the field of its technology and decide which of them appear to be invalid as obvious. Assuming that the Petitioner identified PTAB-worthy challenges to these patents at the same rate as defendants do when patents are asserted in court, the

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[15] In fiscal year 2023, for example, 3259 patent infringement suits and 1239 PTAB petitions were filed. *See* United States Courts, "Judicial Facts and Figures: Civil Cases Filed, by Nature of Suit," available at https://www.uscourts.gov/data-table-report-names/judicial-facts-and-figures; USPTO, "PTAB Trial Statistics: FY23 End of Year Outcome Roundup," available at https://www.uspto.gov/sites/default/files/documents/ptab_aia_fy2023__roundup.pdf.

[16] *See* RPX, "The Overlap Between Patents Asserted in District Court and Challenged at the PTAB," Jun. 1, 2023, available at https://perma.cc/5YTN-3QQZ.

Petitioner would then be expected to file 229 post-grant or early *inter partes* review challenges to these patents.

Notably, this analysis accounts for only two of the 475 USPC technology classes—and only one of the thousands of parties that are sued for patent infringement every year. Even assuming some level of coordination among potential defendants in the filing of petitions, one might nevertheless conservatively estimate that the USPTO's new "settled expectations" framework would require the filing of almost 100,000 post-grant and *inter partes* review petitions each year.

The burden and expense of these filings is not the only disadvantage that potential defendants would face under the "settled expectations" framework. Because PTAB petitioners would be required to file their challenges within six years of the patent's issuance, in many cases they would be filing years before they make a product that potentially infringes the patent. Although PTAB proceedings themselves are available to any party that is "not the owner of [the] patent," 35 U.S.C. §§ 311(a), 321(a), a party must have Article III standing to appeal the outcome of a PTAB proceeding to this Court. For PTAB petitioners, standing generally requires concrete plans of future activity that creates a substantial

risk of infringement; this Court has repeatedly dismissed appeals by petitioners who have not yet made substantial investments in an infringing product.[17]

The USPTO's new "settled expectations" framework effectively requires potential future defendants to file pre-emptive challenges to patents and obtain final patentability decisions from the agency for which they would be unable to seek any form of judicial review.

Once again, the USPTO's new "settled expectations" system is absurd. No governmental decisionmaker could have "reasonably conceived to be true," *Vance v. Bradley*, 440 U.S. at 111, that American businesses might file, and the USPTO would decide, nearly 100,000 PTAB petitions every year. Nor could businesses reasonably be expected to seek binding agency proceedings whose outcome they cannot appeal. The USPTO's "settled expectations" rule is fundamentally irrational.

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[17] *See, e.g.*, *Incyte Corp. v. Sun Pharm. Indus.*, Inc., 136 F.4th 1096 (Fed. Cir. 2025); *Allgenesis Biotherapeutics Inc. v. Cloudbreak Therapeutics*, LLC, 85 F.4th 1377 (Fed. Cir. 2023); *Apple Inc. v. Qualcomm* Inc., 992 F.3d 1378 (Fed. Cir. 2021); *Argentum Pharms. LLC v. Novartis Pharmaceuticals Corp.*, 956 F.3d 1374 (Fed. Cir. 2020); *General Electric v. United Techs.*¸ 928 F.3d 1349 (Fed. Cir. 2019); *Pfizer Inc. v. Chugai Pharm. Co.*, Ltd., 812 F. App'x 979 (Fed. Cir. Apr. 27, 2020).

In the real world, the overwhelming majority of patents that are challenged at the PTAB are those that are being asserted in court. In a typical year, between 3,000 and 4,000 patent lawsuits are filed and, as noted previously, just over a quarter of those suits result in a PTAB challenge.[18] What the USPTO purports to envision—a nearly 100 fold increase in PTAB filings—would not only result in a vast waste of resources, but it would require challenges to patents that are not being asserted but may instead be used defensively or to draw funding to a start-up. It defies belief to conclude that any rational government actor could possibly believe that such a system would be in the public interest.

III. PTAB petitioners are entitled to due process.

The USPTO's supporting amici have contended that the Due Process Clause does not protect petitioners in PTAB proceedings—that "IPR petitions do not implicate for petitioners the protections for due process and private rights secured under the Constitution." Retired Officials Brief in *In re SAP Am.*, No. 25-132, at 3; *see also id.*

[18] *See supra* n. 15.

at 7 ("[N]othing about an IPR petition qualifies for due process protection.").[19]

This Court, however, has recognized that particularly those PTAB petitioners who have been sued for infringement have legitimate, protectable interests in their PTAB petitions—and that *both parties* to the proceedings are generally entitled to due process.

Apple, Inc. v. Vidal, 63 F.4th 1 (Fed. Cir. 2023), held that "because of the infringement suit," a PTAB petitioner involved in parallel litigation faces an "injury [that is] is concrete and legally protected." *Id.* at 17. The Court found that PTAB petitioner Apple, Inc., had standing to assert an APA challenge to the USPTO's *Fintiv* parallel-proceedings rule. It concluded that *Fintiv*—which is "plausibly alleged to cause more denials of institution than might otherwise occur"—causes harm to petitioners' protectable interests "in the form of denial of the benefits of IPRs linked to the concrete interest possessed by an infringement defendant." *Id.*

[19] The USPTO, to its credit, merely posits that "it is far from clear that [a PTAB petitioner] has the requisite interest to support any sort of due-process challenge." USPTO Brief in *In re Cambridge Industries*, No. 26-101, at 17.

Apple v. Vidal is consistent with this Court's general holding that "the parties" to PTAB proceedings—not just patent owners—are entitled to the protections of the Administrative Procedure Act, which incorporates "traditional concepts of due process." *Satellite Broadcasting Co., Inc. v. FCC*, 824 F.2d at 3. The Court has emphasized that:

> "As formal administrative adjudications, IPRs are subject to the APA." *Hamilton Beach Brands, Inc. v. f'real Foods, LLC*, 908 F.3d 1328, 1338 (Fed. Cir. 2018) (*citing Dell Inc. v. Acceleron, LLC*, 818 F.3d 1293, 1298, 1301 (Fed. Cir. 2016)). . . . .
>
> To comply with the APA in an IPR proceeding, the Board must "timely inform[ ]" the parties of "the matters of fact and law asserted," 5 U.S.C. § 554(b)(3); it must give the parties an opportunity to submit facts and arguments for consideration, *id.* § 554(c); and it must permit each party to present oral and documentary evidence in support of its case or defense, as well as rebuttal evidence, *id.* § 556(d). *See Hamilton Beach Brands*, 908 F.3d at 1338; *Rovalma, S.A. v. Bohler-Edelstahl GmbH & Co.* KG, 856 F.3d 1019, 1029 (Fed. Cir. 2017); *Belden Inc. v. Berk-Tek LLC*, 805 F.3d 1064, 1080 (Fed. Cir. 2015). "Pursuant to these provisions, the Board may not change theories midstream without giving the parties reasonable notice of its change." *Hamilton Beach Brands*, 908 F.3d at 1338 (citing *Belden*, 805 F.3d at 1080 (interpreting § 554(b)(3) in the context of IPR proceedings)).

Fanduel, Inc. v. Interactive Games LLC, 966 F.3d 1334, 1339 (Fed. Cir. 2020).

Litigation defendants' legitimate, concrete interests in their PTAB petitions are reinforced by the public interest in these proceedings. The Supreme Court has long held that "[t]he possession and assertion of patent rights are issues of great moment to the public," *Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co.*, 324 U.S. 806, 815 (1945), and that it "is the public interest which is dominant in the patent system." *Mercoid Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661, 665 (1944).

To protect the public's interests, the Supreme Court has emphasized the need to allow the "authoritative testing of patent validity." *Blonder-Tongue Labs., Inc. v. Univ. of Illinois Found.,* 402 U.S. 313, 344-45 (1971). The America Invents Act serves these "important congressional objective[s]" by creating administrative proceedings that allow the USPTO to apply its own expertise to "revisit and revise earlier patent grants." *Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261, 272 (2016); *see also Thryv, Inc v. Click-To-Call Techs., LP*, 590 U.S. 45, 54 (2020) (PTAB proceedings protect the public by preventing "overpatenting and its diminishment of competition.").

PTAB proceedings are overwhelmingly filed by parties that have been sued for infringement or face the prospect of suit. These

parties' potential liability is frequently in the millions or even billions of dollars. And vindication of their private interests serves the public's "paramount interest," *Cuozzo*, 579 U.S. at 263, in ensuring that invalid patents do not unfairly increase costs or reduce choices for consumers. These interests are more than sufficient to allow PTAB petitioners to invoke basic due-process protections at the USPTO.

CONCLUSION

The petition for relief should be granted.

Respectfully submitted,

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Dated: November 28, 2025

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel for amici curiae certifies that this brief:

(3) complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(b)(5) and Federal Circuit Rule 21(e) because it contains 3,416 words, including footnotes and excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b); and

(4) complies with the typeface and style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (a)(6) because this document has been prepared using Microsoft Office Word and is set in the Bookman Old Style font in a size equivalent to 14 points or larger.

Dated: November 28, 2025 /s/ *Joseph Matal*