

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

JTEKT CORPORATION,

Appellant,

– v. –

GKN AUTOMOTIVE LTD.,

Appellee.

*On Appeal from the United States Patent and Trademark Office,
Patent Trial and Appeal Board in No. IPR2016-00046*

**BRIEF OF *AMICUS CURIAE* ASKELADDEN L.L.C.
IN SUPPORT OF APPELLANT’S PETITION FOR
REHEARING AND REHEARING *EN BANC***

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SEPTEMBER 18, 2018

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

JTEKT CORPORATION v. GKN AUTOMOTIVE LTD.

No. 2017-1826

CERTIFICATE OF INTEREST

Counsel for amici curiae state the following:

1. The full names of every party or amicus represented by me are:

Askeladden L.L.C.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

Not applicable.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

The Clearing House Payments Company L.L.C.

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

Charles R. Macedo and Brian A. Comack of Amster, Rothstein & Ebenstein LLP.

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal are:

None.

Dated: September 18, 2018

By: /s/Charles R. Macedo

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STATEMENT OF INTEREST

Amicus Askeladden L.L.C. (“Askeladden”) respectfully submits this *amicus curiae* brief in support of the petition for rehearing and rehearing *en banc* filed by JTEKT Corporation.¹

Askeladden is a wholly owned subsidiary of The Clearing Housing Payments Company L.L.C. Askeladden founded the Patent Quality Initiative (“PQI”) as an education, information, and advocacy effort to improve the understanding, use, and reliability of patents in financial services and elsewhere.

Among other activities, Askeladden regularly files petitions for *inter partes* review (“IPR”) at the Patent Trial and Appeals Board (“PTAB”) to take a second look at patents that it believes are invalid and may be used to inhibit innovation in the financial services industry. Askeladden also supports the patent system by regularly filing amicus briefs in cases presenting important issues of patent law. The issue of when a “dissatisfied” petitioner has standing to challenge an adverse decision of the PTAB in an IPR proceeding—raised by Appellant in this appeal—is one such important issue.

¹ Pursuant to Fed. R. App. P. 29(a)(4)(e), no counsel for a party authored this brief in whole or in part, and no party or party’s counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Askeladden or their counsel made a monetary contribution to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

Pursuant to 35 U.S.C. § 311, JTEKT filed an IPR petition with the PTAB, challenging the validity of claims 1–7 of U.S. Patent No. 8,215,440. In its final written decision, the PTAB denied JTEKT the relief it requested for claims 2–3.

Congress created the statutory right for a party to the proceeding (such as JTEKT, as petitioner) who is “dissatisfied” with the PTAB’s final written decision in an IPR to appeal that decision to the Federal Circuit. 35 U.S.C. §§ 141(c), 319. The panel’s denial of this statutory right conflicts with Supreme Court precedent that holds that a Court’s denial of a party’s statutory right confers standing on that party, even where there would be no standing in the absence of the statute.

Moreover, as the Supreme Court held in *Lujan v. Defenders of Wildlife*, when a party is the “object” of “government action,” “there is ordinarily little question that the action . . . has caused him injury” which confers standing upon the party to challenge the “legality of [that] government action.” 504 U.S. 555, 580 (1992). Here, there is “little question” that JTEKT is the “object” of government actions that have caused it multiple injuries, including: (1) the PTAB’s allegedly improper denial of JTEKT’s statutory right to request cancellation of claims 2 and 3; (2) the estoppel that attached to JTEKT as a result of these allegedly improper denials; and (3) the intangible injury defined by Congress of

being “dissatisfied” with the allegedly improper Government action on JTEKT’s petition.

This case is no different than the long line of Supreme Court decisions finding standing where a government agency has denied a party its statutory rights, such as a petition for information under the Freedom of Information Act (“FOIA”).

In addition to having the statutory right to appeal and contrary to the panel’s holding, the PTAB’s finding that claims 2 and 3 are patentable create a specific and undeniable tangible injury-in-fact—namely, JTEKT is estopped from challenging the validity of those claims under 35 U.S.C. §§ 315(e)(1), (2). Since a patent has a potential life span of two decades, such estoppel would impact an unsuccessful petitioner for the remaining life of the patent.

Moreover, as discussed by in *Spokeo* and Justice Kennedy’s concurrence in *Lujan*, it is well within Congress’ authority to define intangible injuries. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) (“Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.” (quoting with approval *Lujan*, 504 U.S. at 580 (Kennedy, J., opinion concurring in part and concurring in judgment))). Congress did exactly that in 35 U.S.C. §§ 141(c), 319, specifying the intangible injury as being “dissatisfied” with the PTAB’s final written decision and granting the dissatisfied party with the statutory right to appeal that decision.

This Court should hear argument on JTEKT’s petition to bring this Court’s standing jurisprudence in line with binding Supreme Court precedent and Congressional mandates of Sections 141(c) and 319.

ARGUMENT

I. The Panel Decision Is Contrary to Supreme Court Precedent

The panel decision found that JTEKT did not have standing to appeal the denial by the PTAB in a final written decision of its request for government action to declare claims 2 and 3 invalid. (PetApp p. 7). This holding conflicts with Supreme Court precedent, which has expressly upheld Congress’ authority to enact statutes that create statutory rights, the denial of which would confer Article III standing (even if no injury would exist without the statute):

Congress may create a statutory right or entitlement the alleged *deprivation of which can confer standing* to sue *even where* the plaintiff would have suffered *no* judicially cognizable *injury in the absence of statute*.

Warth v. Seldin, 422 U.S. 490, 514 (1975)²; *see also Linda RS v. Richard D.*, 410 U.S. 614, 617 n. 3 (1973) (“Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute.”).

Congress’ enactment of the IPR statute has created legal rights for a petitioner in an IPR. For example, Congress has created the legal right of a

² All emphasis added unless otherwise indicated.

petitioner to file a petition seeking institution of an IPR. *See* 35 U.S.C. § 311. Congress has also created the legal right of petitioners who are “dissatisfied with the final written decision” in an IPR to “appeal the decision.” *Id.* §§ 141(c), 319. JTEKT, the petitioner, is dissatisfied with the PTAB’s allegedly improper final written decision in the IPR, yet the panel has deprived JTEKT of its statutory right to appeal. The panel’s decision is contrary to *Warth, Linda RS*, and other Supreme Court precedent, which make clear that JTEKT, as the object of the government’s action, has standing to appeal the allegedly improper denial of its statutory right to seek relief, since Congress has expressly authorized it do so.

II. Like Petitioners for FOIA and FACA Requests, Petitioners for IPRs Have Standing to Challenge the Allegedly Improper Denial of Their Request for Government Action

As explained by the Supreme Court in *Lujan*, when a lawsuit challenges “the legality of government action or inaction, the nature and extent of facts that must be averred . . . in order to establish standing depends considerably upon whether the plaintiff is himself *an object of the action (or forgone action) at issue.*” 504 U.S. at 561. If that challenging party is an object of the action or inaction, “there is ordinarily little question that *the action or inaction [by the government] has caused him injury*, and that a judgment preventing or requiring the action will redress it.” *Id.* at 561–62.

Here, there is no question that JTEKT is the object of a government action which has caused JTEKT to sustain at least three injuries: (1) the PTAB's allegedly improper denial of JTEKT's statutory right to request cancellation of claims 2 and 3; (2) the estoppel that attached to JTEKT as a result of these allegedly improper denials; and (3) the intangible injury defined by Congress of being "dissatisfied" with the allegedly improper Government action on JTEKT's petition.

Under *Lujan*, there should be "little question" that these government actions have caused JTEKT injuries that confer standing on JTEKT to appeal. The panel decision holding otherwise is in direct conflict with *Lujan*.

The panel decision conflicts with the long line of Supreme Court cases where Congress created a statutory right or entitlement and a government agency denied such right or entitlement to a party seeking judicial relief. In those case, there was "little question" that the party has standing under *Lujan*.

For example, under FOIA, a person may petition the government for information. 5 U.S.C. § 552. If the government agency handling such requests fails to provide the requested information, it is an easy case to find standing for the aggrieved petitioner. *See, e.g., U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749 (1989); *U.S. Dep't of Justice v. Julian*, 486 U.S. 1 (1988); *United States v. Weber Aircraft Corp.*, 465 U.S. 792 (1984); *FBI v. Abramson*, 456 U.S. 615 (1982); *Dep't of the Air Force v. Rose*, 425 U.S. 352

(1976); *see also Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449–50 (1989) (“Our decisions interpreting the [FOIA] have never suggested that those requesting information under it [to establish Article III standing] need show more than that they sought and were denied specific agency records.”).

Similarly, the Supreme Court has found standing when a government agency denies statutory rights under the Federal Advisory Committee Act (“FACA”). *See* 5 U.S.C. Appx. §§ 1–16; *Pub. Citizen*, 491 U.S. at 449 (“As when an **agency denies requests** for information under the [FOIA], refusal to permit appellants to scrutinize the ABA Committee’s activities to the extent FACA allows constitutes a sufficiently distinct injury to provide standing to sue.”).

Courts have likewise found standing when other government agencies deny a person his or her statutory rights. *See, e.g., Zivotofsky v. Sec’y of State*, 444 F.3d 614, 617–19 (D.C. Cir. 2006) (holding that appellant had standing under Article III because the Government denied a statutory right conferred to him by Congress); *Rushforth v. Council of Econ. Advisers*, 762 F.2d 1038, 1039 n. 3 (D.C. Cir. 1985) (finding standing where statutory rights were denied under the Sunshine Act).

The denial of a petitioner’s request that the PTAB invalidate one or more claims of an issued U.S. Patent in an IPR is no different than the denial of a petitioner’s request for information. Thus, the panel’s holding is in conflict with the above Supreme Court and D.C. Circuit precedent, which, holds that when

Congress creates a statutory right, the deprivation of that right is enough to satisfy Article III standing.

III. Estoppel Is an Injury-in-Fact

Notwithstanding the forgoing Supreme Court precedent, the panel further misapplied the law in finding that JTEKT does not have standing to appeal because it allegedly failed to suffer any an injury-in-fact. To the contrary, JTEKT also suffered a tangible injury-in-fact from the estoppel that has attached as a result of the PTAB's adverse final written decision.

To establish Article III standing, a party must show, *inter alia*, that it has suffered an injury-in-fact. *Lujan*, 504 U.S. at 560–61; *see also Spokeo*, 136 S. Ct. at 1547. In this regard, the appellant must show that it “suffered ‘an invasion of a legally protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’” *Spokeo*, 136 S. Ct. at 1548 (citing *Lujan*, 504 U.S. at 560). A concrete injury can be “tangible” or “intangible,” and an injury is particularized if it affects the appellant “in a personal and individual way.” *Id.* at 1549.

There is no question that the estoppel provisions of the IPR statute meet these requirements. When a petitioner loses an IPR, its legally protected right to challenge (e.g., in another IPR) the validity of claims found to be patentable is extinguished. This is a particularized tangible injury that is personal and individual

to the petitioner. No one else can challenge the PTAB's decision on appeal, and only the petitioner will be estopped by this allegedly improper decision for the remaining life of the patent.

The panel decision fails to discuss this injury in any meaningful way. Instead, it relies on holdings in *Phigenix* and *Consumer Watchdog* that the estoppel provisions do not create an injury-in-fact. (PetApp p. 7). However, in *Consumer Watchdog*, the Court merely stated was that the “conjectural or hypothetical” nature of any injury flowing from the estoppel provisions” do not create standing, without more. 753 F.3d 1258, 1262–63 (Fed. Cir. 2014) (citations omitted).

But there is nothing conjectural or hypothetical about the estoppel provisions. Once a final written decision issues, estoppel immediately kicks in (if the petitioner is not permitted to appeal). The petitioner will thereafter be estopped from ever challenging upheld patent claims, even when the PTAB's decision is clearly erroneous. By the same token, the patent owner greatly benefits from the injury to petitioner. It can unfairly sue petitioner for patent infringement without facing invalidity arguments based on published prior art (even if the PTAB's decision would have been overturned had petitioner been permitted to appeal).

The Federal Circuit has found under similar circumstances that the preclusive effect of an adverse final decision confers standing on a party:

A party shows standing to appeal by demonstrating . . . that it *suffered some actual or threatened injury* as a

result of the appealed action. . . . The threat of an unfavorable determination in future litigation *due to the res judicata effect* of an adverse judicial determination may be such an injury.

Nat'l Presto Indus. v. Dazey Corp., 107 F.3d 1576, 1579 (Fed. Cir. 1997).

In this regard, the estoppel provision of the IPR statute is no different than *res judicata*.

IV. Congress Defines Dissatisfaction in Section 319 as a Sufficient Intangible Injury to Confer Standing on JTEKT to Appeal Here

While “Congress cannot erase Article III’s standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing,” nonetheless, “[i]n determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles.” *Spokeo*, 136 S. Ct. at 1548–49.

As the Supreme Court has held, Congress may identify intangible harms that meet minimum Article III requirements, and may even “elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.” *Id.* at 1549 (quoting *Lujan*, 504 U.S. at 578).

As *Oil States* suggests, that is what Congress has done here, by defining an intangible injury as being “dissatisfied” with the PTAB’s final written decision (a government action). 138 S. Ct. 1365, 1372 (2018) (“A party dissatisfied with the Board’s decision [JTEKT in this instance as Petitioner] can seek judicial review in

the Court of Appeals for the Federal Circuit. § 319. Any party to the [IPR] can be a party in the Federal Circuit.”); 35 U.S.C. §§ 141(c), 319.

Thus, to the extent that a petitioner’s dissatisfaction with the PTAB’s final written decision may not have been sufficient to confer standing in the absence of the IPR statute, Congress’ enactment of Sections 141(c) and 319 elevated such dissatisfaction to the status of an intangible injury that confers standing upon a dissatisfied petitioner to appeal that decision. As such, JTEKT’s dissatisfaction with the PTAB’s decision is an intangible injury that confers standing for it to appeal. *See SAS Inst. v. Iancu*, 138 S. Ct. 1348, 1355 (2018) (“‘Just as Congress’ choice of words is presumed to be deliberate’ and deserving of judicial respect, ‘so too are its structural choices.’” (citations omitted)); *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2140 (2016) (recognizing a “strong presumption” in favor of judicial review).

CONCLUSION

For the reasons set forth herein, Askeladden respectfully urges the Court to accept JTEKT’s petition for rehearing *en banc*.

Dated: September 18, 2018

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I, Robyn Cocho, hereby certify that, on September 18, 2018 the foregoing Brief of Amicus Curiae Askeladden L.L.C. in Support of Appellant's Petition for Rehearing and Rehearing En Banc was filed through the NextGen system and served electronically on the individual registered on the courts NextGen system.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 29, I certify that the foregoing *Amicus Curiae* Brief complies with the applicable type-volume limitations. Excluding those portions exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b), this brief contains 2,572 words. This certificate was prepared in reliance on the word count of the word-processing system (Microsoft Office Word 2010) used to prepare this brief.

This brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-point Times New Roman font.

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