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It is a widely held belief that American ingenuity made our country the technological marvel and envy of the world. In truth, it is due to the patent rights—the *only* right specifically and affirmatively granted in our Constitution—that protected the sweat and toil of the American inventors. This protection made it worth their while to undertake the enormous risks often necessary to develop innovations.

Yet that very right which served as the bedrock for our American innovation, for our economic prosperity and international leadership, has been steadily and systematically eroded by the PTAB's illegal, unconstitutional and out-of-control administrative fiat.

The 2011 American Invents Act caused great harm to the rights of inventors in the U.S. The worst part was the creation of the Patent Trial and Appeal Board (PTAB).

- The PTAB is a division of the USPTO that invalidates patents.
- The PTAB has invalidated 84% of the patents they have reviewed (2,421 out of 2,872).
- There is no right to a jury trial at the PTAB.
- Compared to a regular court, the PTAB limits evidence, testimony, due process, and procedural safeguards. For an outcome that often strips inventors and small companies of their hard-earned patent rights and livelihood, this is wholly unjust and un-American.
- Compared to a regular court, the PTAB has a lower burden of proof for invalidation (requiring only a preponderance rather than clear and convincing evidence). Why so? There should not be two systems of justice: One for the rich and powerful corporations, and one for the little guy.
- Most PTAB administrative patent judges oddly have no technical experience and minimal legal experience.
- PTAB administrative judges often overrule examiners and federal judges who previously held a patent to be valid. In terms of qualifications, this is akin to a District Court overruling and ruling over an Appeals Court.
- The PTAB benefits mostly large corporations – top patent challengers include Apple (650 petitions), Samsung (540 petitions), Google (337 petitions), and Microsoft (224 petitions).
- It costs an average of \$450,000 to defend a patent at the PTAB.
- PTAB typically adds 2 to 5 years to the duration of a lawsuit, crushing the little guy in the process.

The bottom line is that the PTAB has been set up to benefit the largest corporations in the world by preventing small companies from enforcing their patents. This has the effect of stifling competition and development of new technologies, causing the U.S. to lose its place as world leader in innovation.

On behalf of America's independent and small inventors, I therefore urge adoption of regulations to govern the discretion to institute PTAB trials consistent with the following important principles.

I: PREDICTABILITY

Regulations must provide predictability. Stakeholders must be able to know in advance whether a petition is to be permitted or denied for policy reasons. To this end regulations should favor objective analysis and eschew subjectivity, balancing, weighing, holistic viewing, and individual discretion. The decision-making should be procedural based on clear rules. Presence or absence of discrete factors should be determinative, at least in ordinary circumstances. If compounded or weighted factors are absolutely necessary, the number of possible combinations must be minimized, and the rubric must be published in the Code of Federal Regulations.

II: MULTIPLE PETITIONS

a) A petitioner, real party in interest, and privy of the petitioner should be jointly limited to one petition per patent.

b) Each patent should be subject to no more than one instituted AIA trial.

c) A petitioner seeking to challenge a patent under the AIA should be required to file their petition within 90 days of an earlier petition against that patent (i.e., prior to a preliminary response). Petitions filed more than 90 days after an earlier petition should be denied.

d) Petitioners filing within 90 days of a first petition against the same patent should be permitted to join an instituted trial.

e) These provisions should govern all petitions absent a showing of extraordinary circumstances approved by the Director, Commissioner, and Chief Judge.

III: PROCEEDINGS IN OTHER TRIBUNALS

a) The PTAB should not institute duplicative proceedings.

b) A petition should be denied when the challenged patent is concurrently asserted in a district court against the petitioner, real party in interest, or privy of the petitioner and the court has neither stayed the case nor issued any order that is contingent on institution of review.

c) A petition should be denied when the challenged patent is concurrently asserted in a district court against the petitioner, real party in interest, or privy of the petitioner with a trial is scheduled to occur within 18 months of the filing date of the petition.

d) A petition should be denied when the challenged patent has been held not invalid in a final determination of the ITC involving the petitioner, real party in interest, or privy of the petitioner.

IV: PRIVY

a) An entity who benefits from invalidation of a patent and pays money to a petitioner challenging that patent should be considered a privy subject to the estoppel provisions of the AIA.

b) Privy should be interpreted to include a party to an agreement with the petitioner or real party of interest related to the validity or infringement of the patent where at least one of the parties to the agreement would benefit from a finding of unpatentability.

V: ECONOMIC IMPACT

Regulations should account for the proportionally greater harm to independent inventors and small businesses posed by institution of an AIA trial, to the extent it harms the economy and integrity of the patent system, including their financial resources and access to effective legal representation.

Thank you for your attention and consideration.

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