



**Conservatives  
for  
Property Rights**



June 22, 2023

The Honorable Chris Coons  
218 Russell Senate Office Building  
United States Senate  
Washington, DC 20510

The Honorable Thom Tillis  
326 Russell Senate Office Building  
United States Senate  
Washington, DC 20510

The Honorable Ken Buck  
2234 Rayburn House Office Building  
United States Congress  
Washington, DC 20515

The Honorable Deborah Ross  
2366 Rayburn House Office Building  
United States Congress  
Washington, DC 20515

Dear Senators Coons and Tillis and Representatives Buck and Ross:

Conservatives for Property Rights (CPR) is pleased to support the Promoting and Respecting Economically Vital American Innovation Leadership (PREVAIL) Act. Thank you for your leadership on this important issue.

CPR emphasizes the central importance of private property in all its forms—physical, personal, and intellectual. The right to private property ranks among the unalienable rights the Founders referenced in the Declaration of Independence, and they put exclusive patent rights in the Constitution itself. Thus, property rights transcend conservative and liberal politics.

The PREVAIL Act would secure private property rights to inventions and give quiet title, which is crucial for commercialization and investment. That will boost the United States's competitive edge in emerging technologies important to our economic and national security.

The bill would reform the aspects of the Patent Trial and Appeal Board (PTAB) that have been most subject to abuse by patent infringers, Big Tech, Chinese nationally favored champions, and even hedge funds. To date, PTAB has enabled virtually anybody to challenge patent validity repeatedly and viciously. Such abuse has deprived inventors of certainty, reliability, and enforceability of a property right constitutionally declared to be exclusive for a limited period of time. Further, as structured and operated, this actually empowers an administrative body to arrogate judicial power over Article III courts in patent litigation matters.

The PREVAIL Act moves to make meaningful the one-year time bar for challenging a patent and ensure that appropriate parties have one bite at the apple, rather than unlimited ways to game the system with never-ending challenges against a patent. PREVAIL imposes reasonable limits on inter partes (IPR) and postgrant review (PGR) challenges, more closely approximating Congress's intent of a faster, cheaper alternative to patent validity litigation in court. PREVAIL's approach would effectively bolster patent examination decisions.

*"protecting the exertions of talents and industry . . . securing to them their justly acquired fruits"*  
— Alexander Hamilton

PREVAIL would create a standing requirement that limits PTAB challenges to a party facing a patent infringement lawsuit. It would keep alleged infringers' allies, such as financial partners, from leveling repeated challenges at the same patent. It would curb serial and parallel proceedings against a patent. Prior art and arguments could only be employed once, not trotted out repeatedly. The bill would codify the *Phillips* claim construction standard and the "clear and convincing evidence" burden of proof, raising PTAB's low thresholds to the high standards applied in federal court and at the International Trade Commission (ITC).

The PREVAIL Act properly calls for PTAB to defer to Article III judicial and ITC determinations of patent validity, ensuring that those bodies' adjudicatory decisions settle validity questions. It would confine a PTAB judge's involvement in matters regarding a certain patent to either the institution of a proceeding stage or the PTAB proceeding itself. Importantly for PTAB's credibility, the bill would require PTAB to establish a code of ethical conduct for administrative patent judges (APJs) and reduce the PTO director's ability to manipulate IPR and PGR APJ panels to achieve a desired outcome regarding a patent or patent owner.

CPR applauds the elimination of patent application fee diversion from the PTO, thus ensuring timely and thorough patent examination, and addressing small businesses' and universities' particular concerns.

PREVAIL would help alleviate the damage inflicted on our patent system, on inventors who face the prospect of lost commercial traction during what is supposed to be their exclusive ownership and use of their invention, and on the erosion of property rights in the patent arena. Further, the legislation would raise public confidence in this administrative body.

Conservatives for Property Rights commends the PREVAIL Act and looks forward to working with you to advance this worthy legislation.

Sincerely,

James Edwards  
Executive Director  
Conservatives for Property Rights