



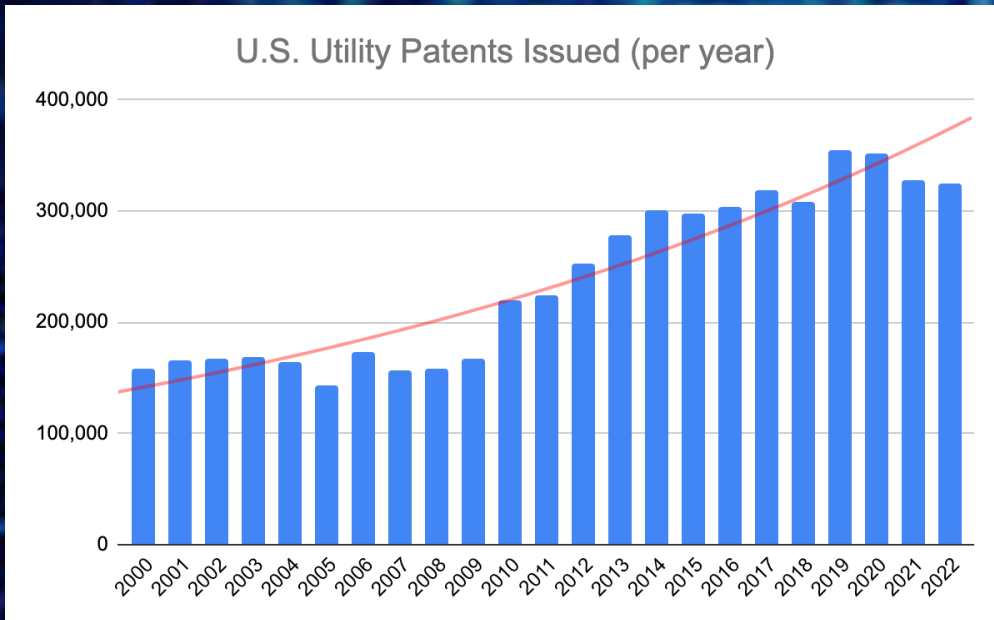
**EO 12866**

**Meeting**

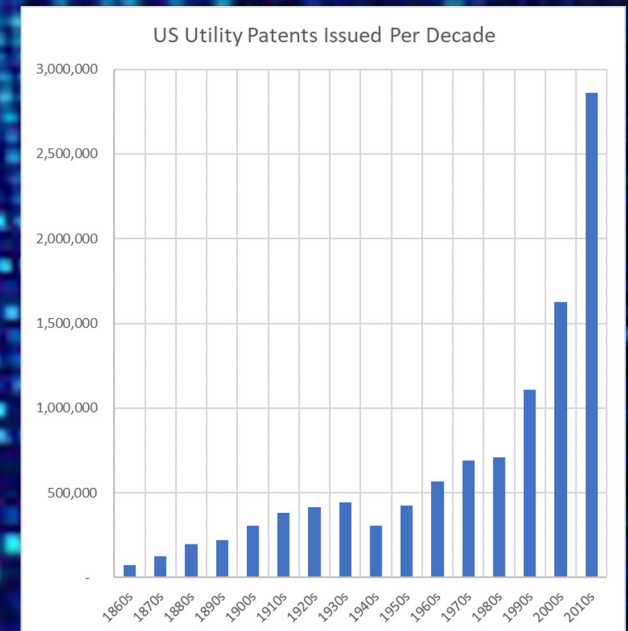
**RIN: 0651-AD47**

**Amendments to the Rules of  
Practice for Trials Before the  
Patent Trial and Appeal Board**

# USPTO Grant Rate/Available Assets

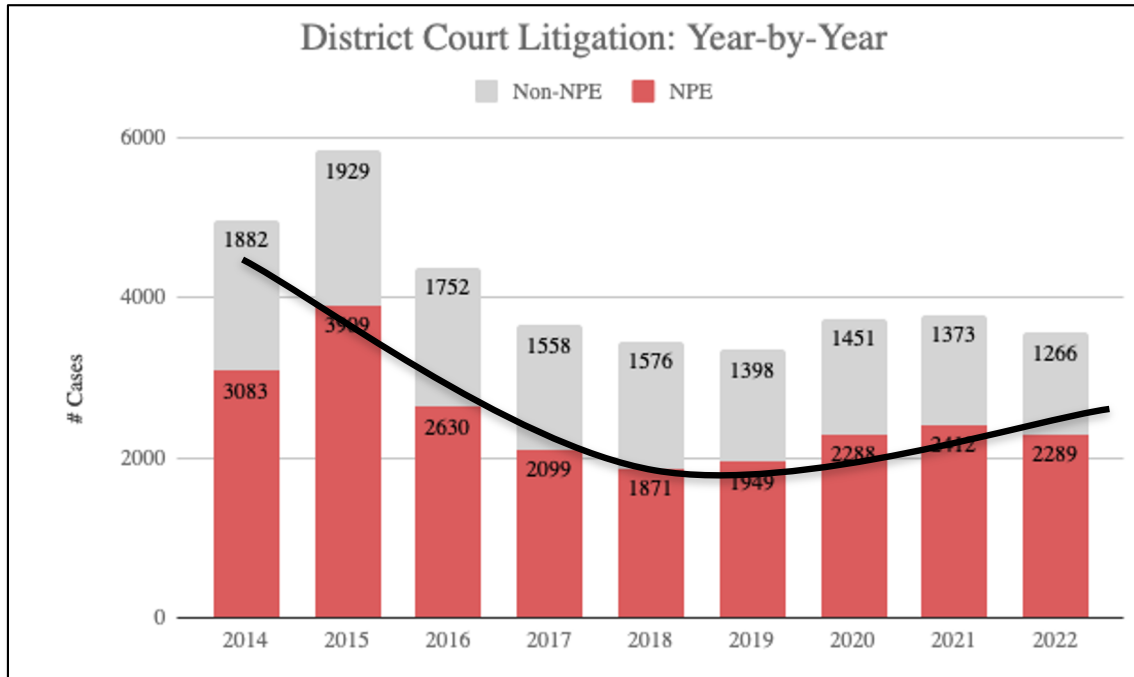


**~56% of issued U.S. patents owned by foreign companies**



**Patent Grants Near All-time High**

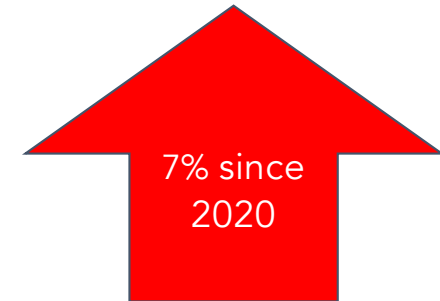
# Increasing NPE Campaigns & Purchases



In general, district court filings were down 10.6% year-to-year, but suits by large Patent Assertion Entities (PAEs) remained steady with 1,756 filings in 2022.

**NPEs Drive 88% of all High-Tech Patent Litigation**

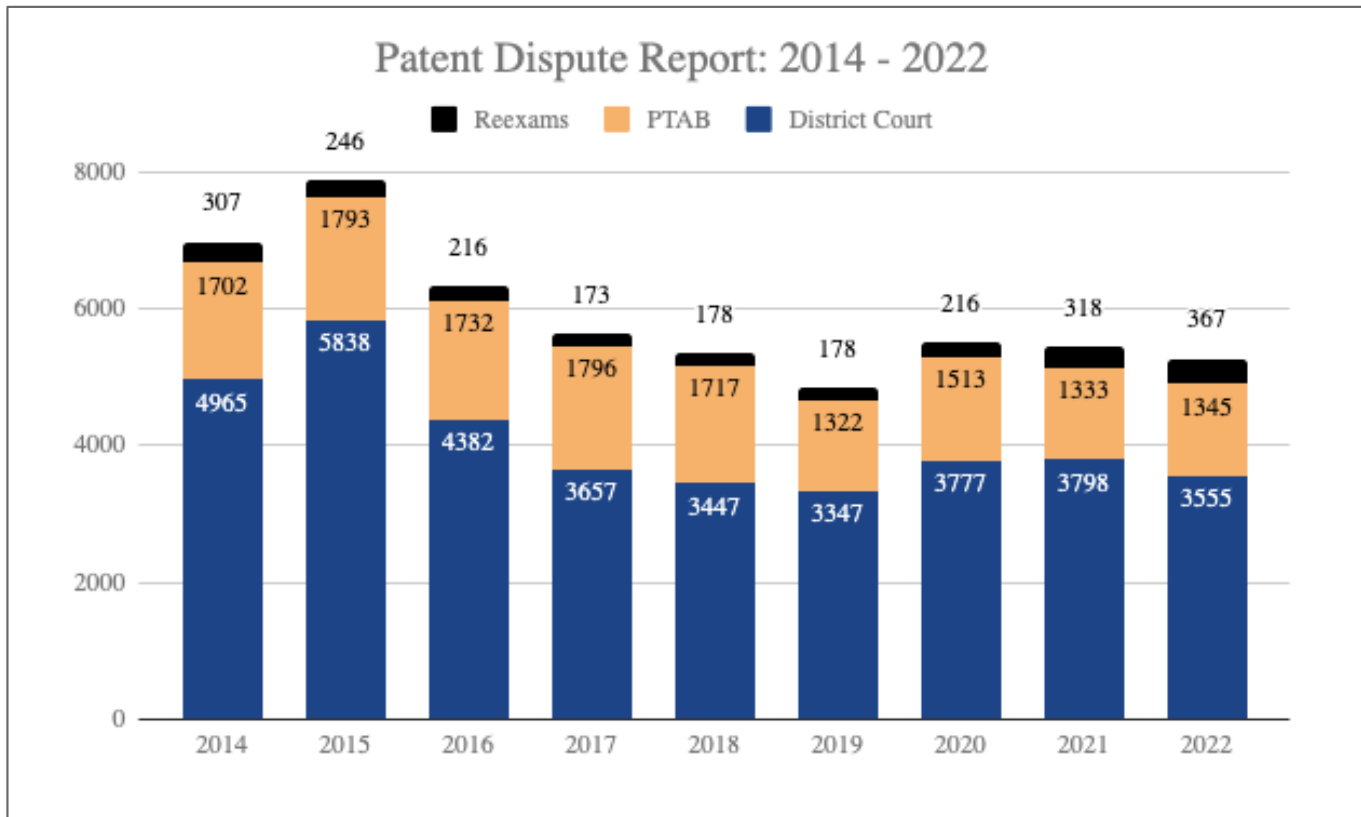
2022 NPE Litigation



Nearly 60% of all patent litigation in 2022 stemmed from NPEs

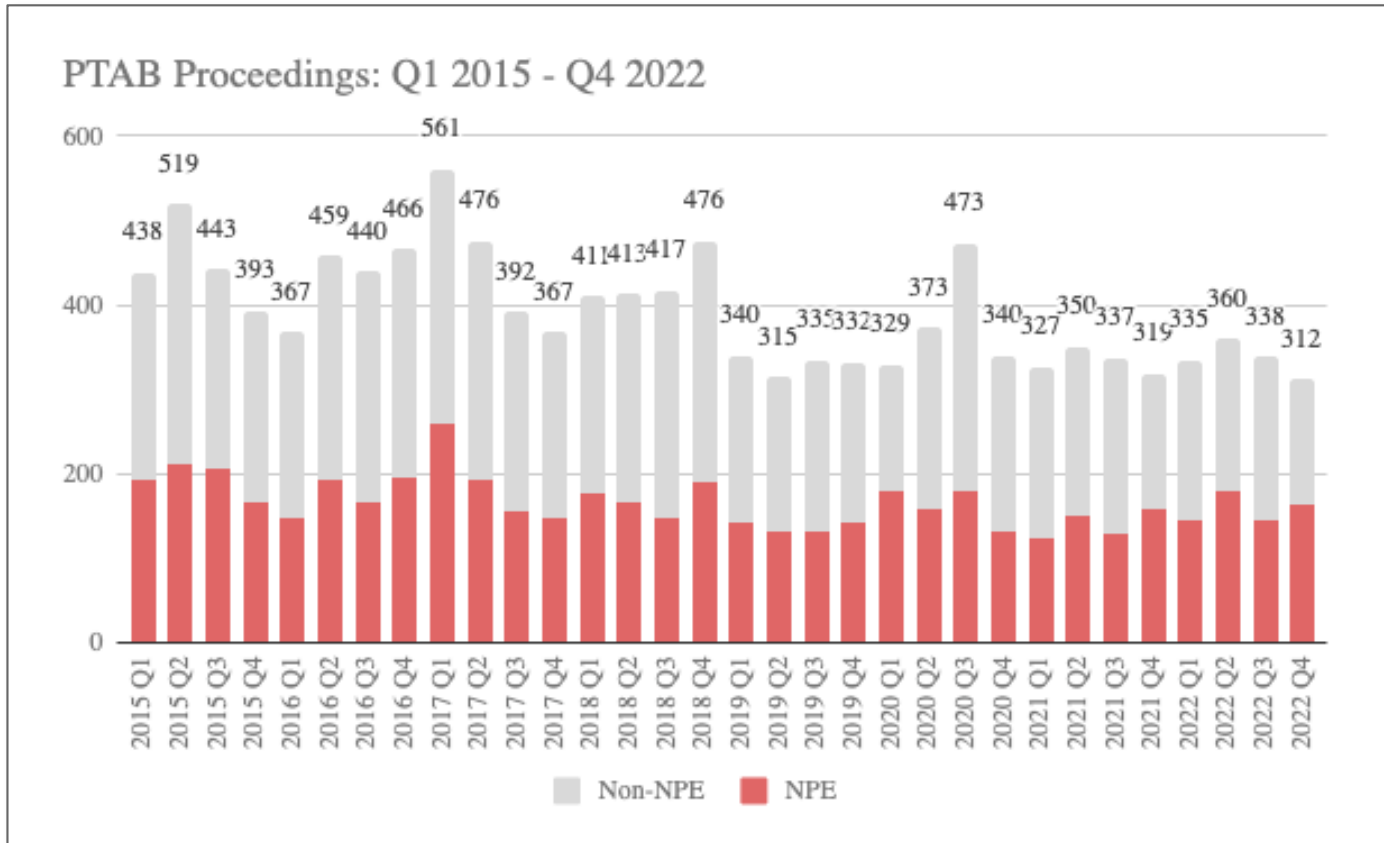


# Annual Patent Litigation Rates



- District Court litigation steady (down 10.6% in 2022)
- PTAB Filings remain high
- **NPE related PTAB filings increased 11.4%**

# NPE PTAB Proceedings By Quarter



- **40%** of all PTAB Proceedings are NPE related

# Proliferation of Financiers Enter Patent Litigation Market



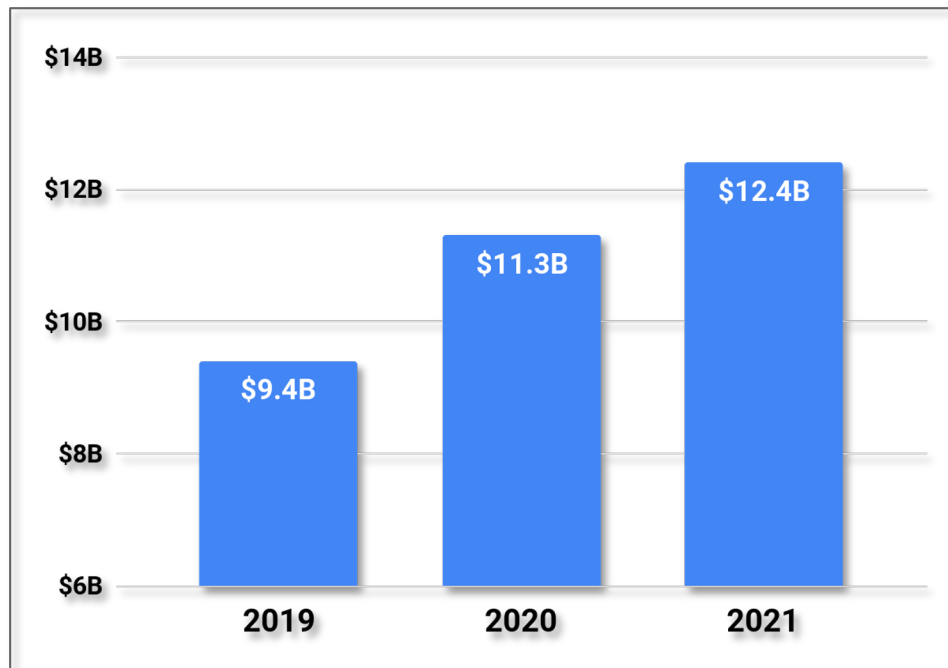
BAKER STREET FUNDING



# Litigation Finance At All-Time High of \$12.4B, Rising



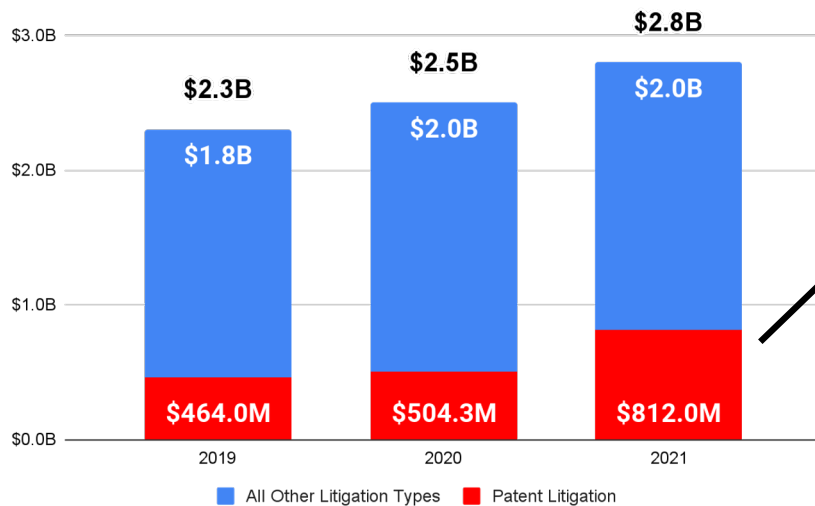
Total Litigation Financing



# Patent Litigation Finance Driving the Increase

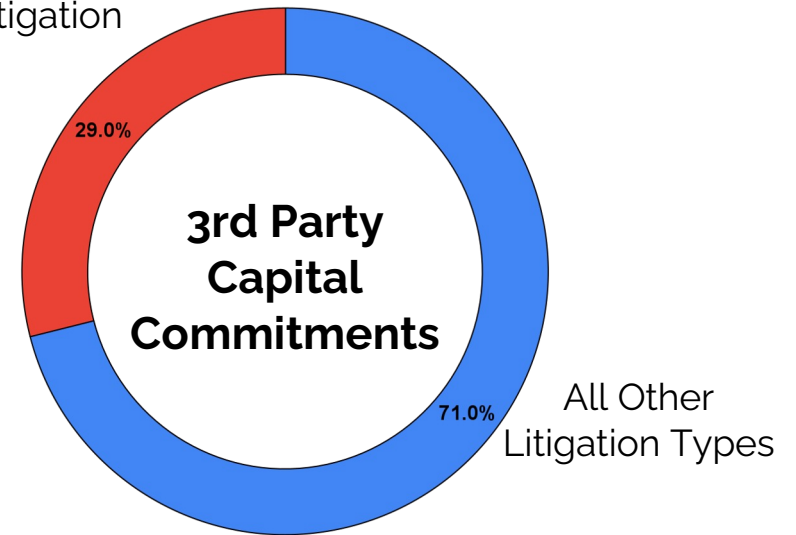


## New Deal Commitments



61% increase  
in 2021

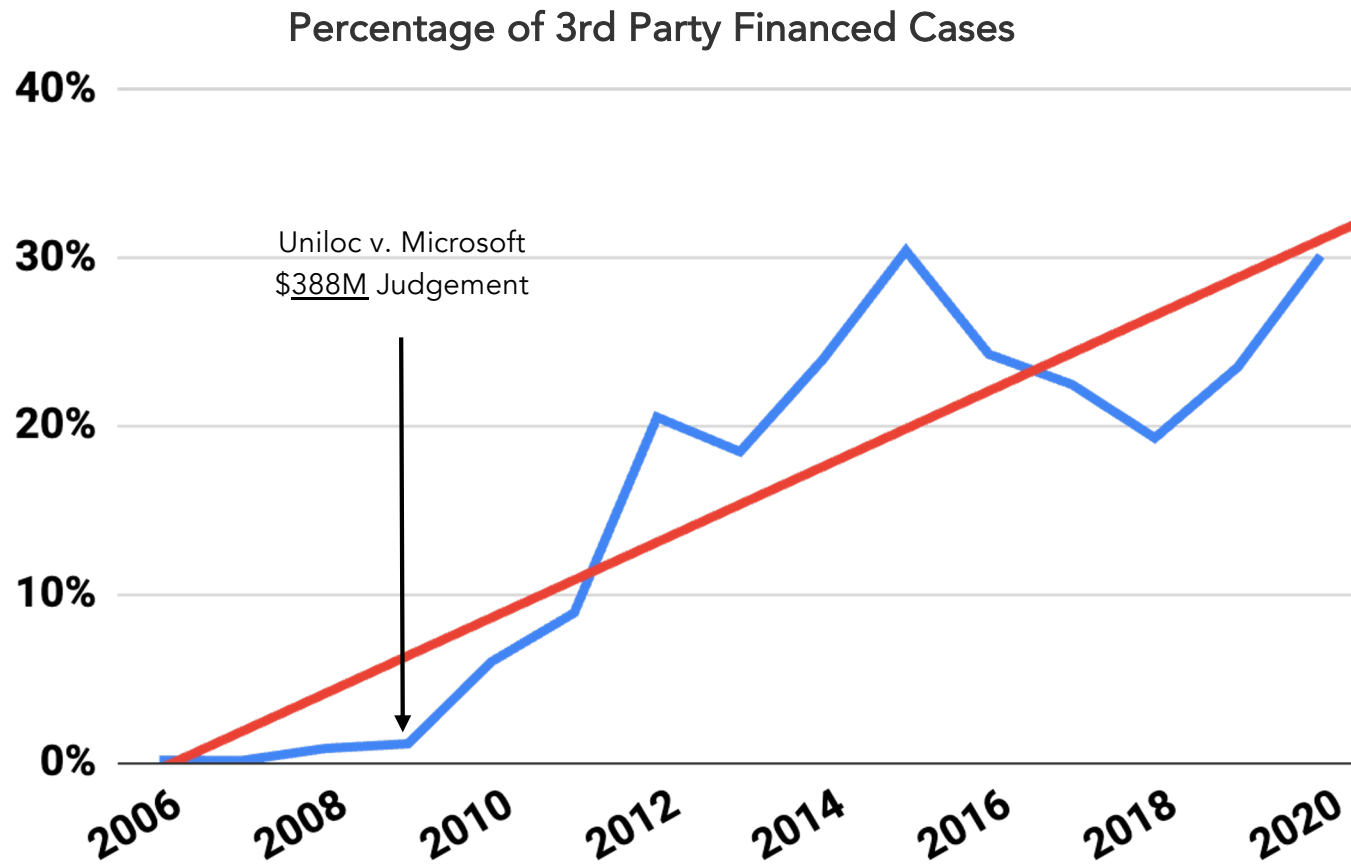
Patent Litigation



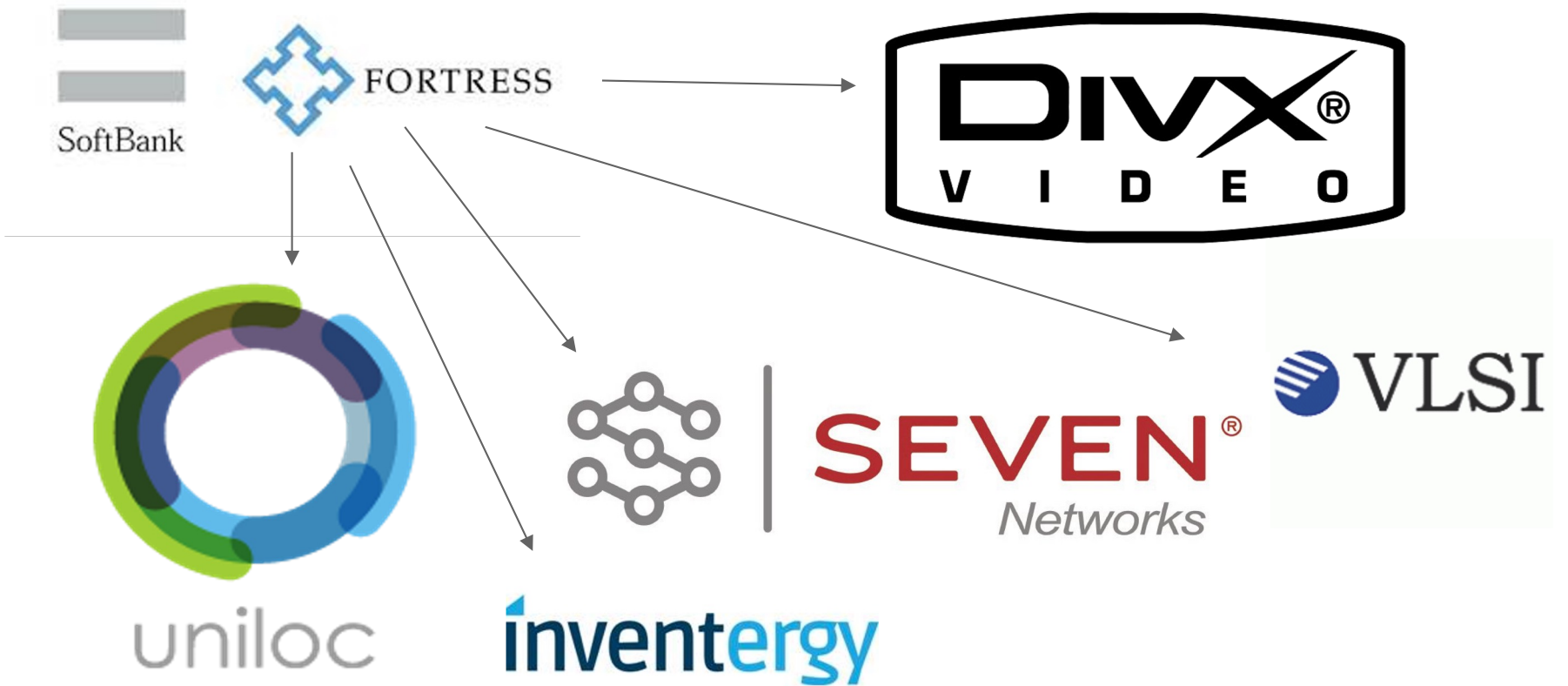
- \$2.8B has been committed for new cases - up 11% (426 New Deals) from 2020
  - AmLaw 200 funding commitments increased nearly 50%
- Patent litigation accounts for 29% of ALL commitments by 3rd Party Capital Providers.



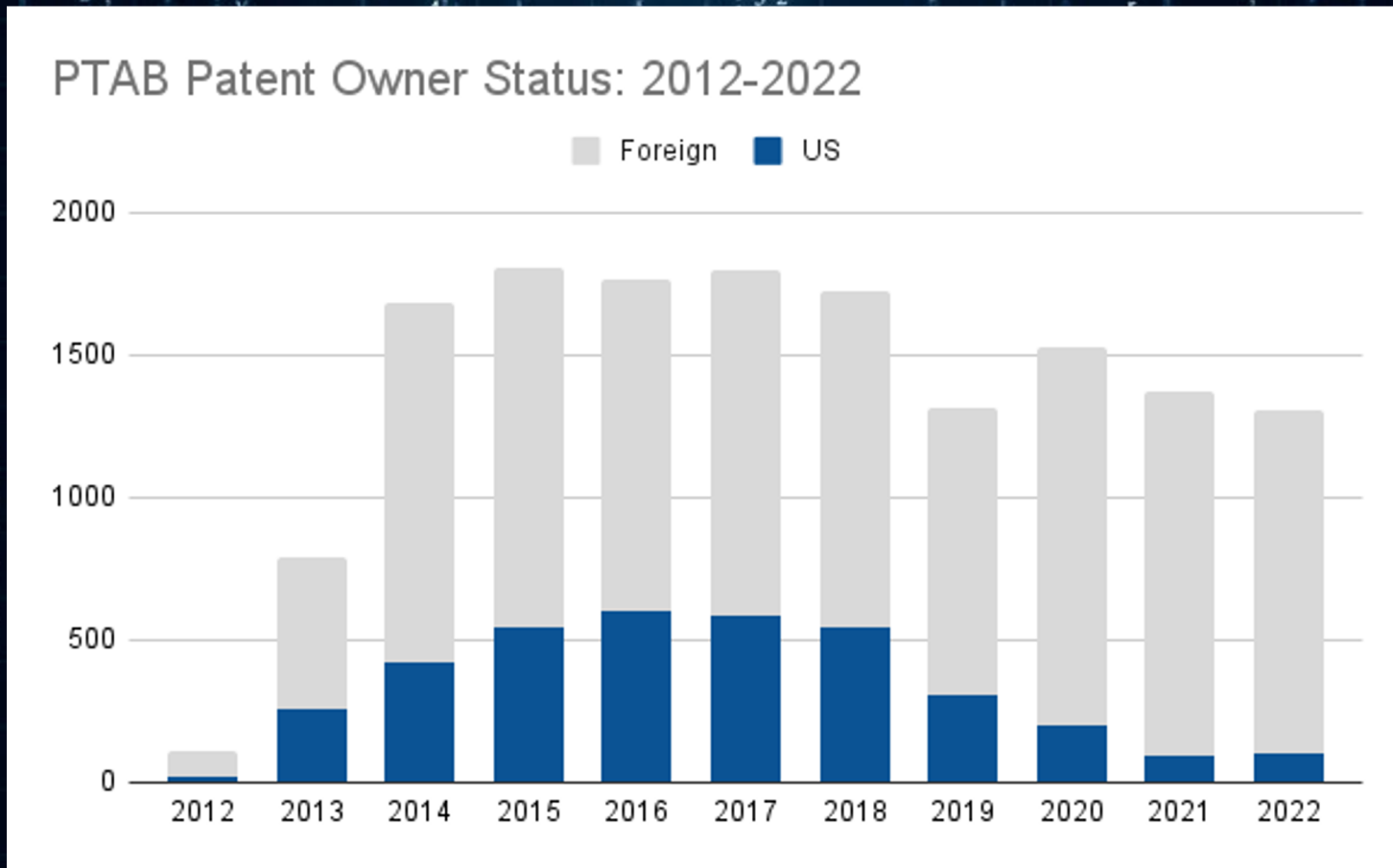
## 30%+ of all Asserted Patents are Financed and Rising



## Fortress Example: \$600M & \$900M IP Funds

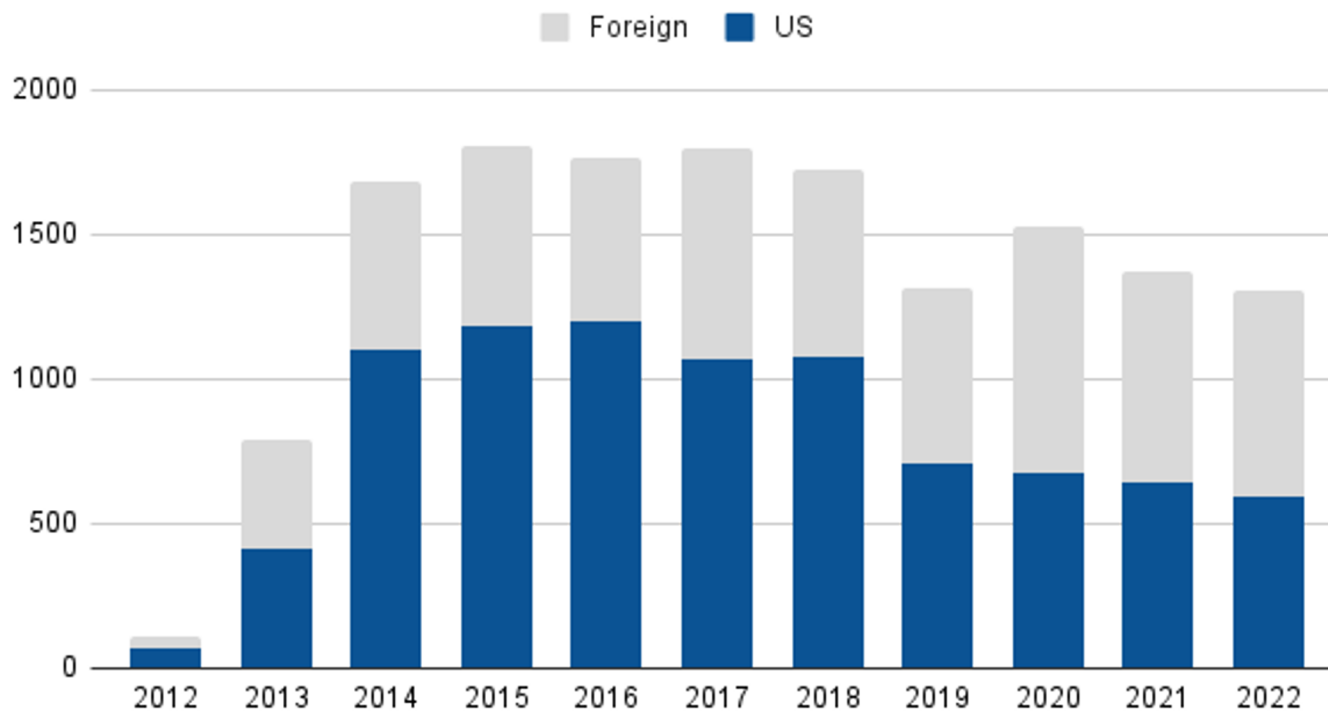


# Most PTAB Patents Challenged are Foreign-Owned

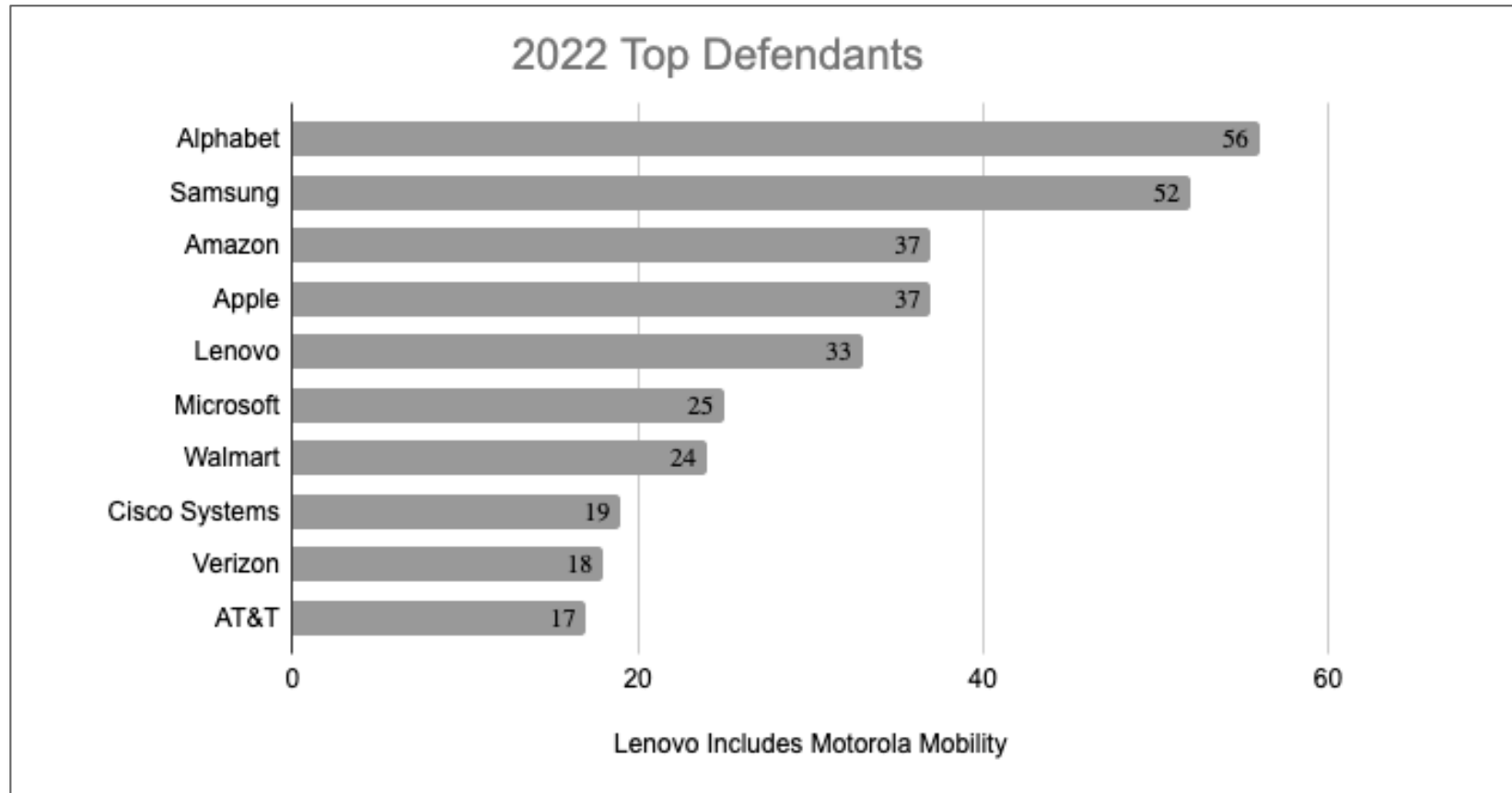


# Most PTAB Petitioners are U.S. Companies

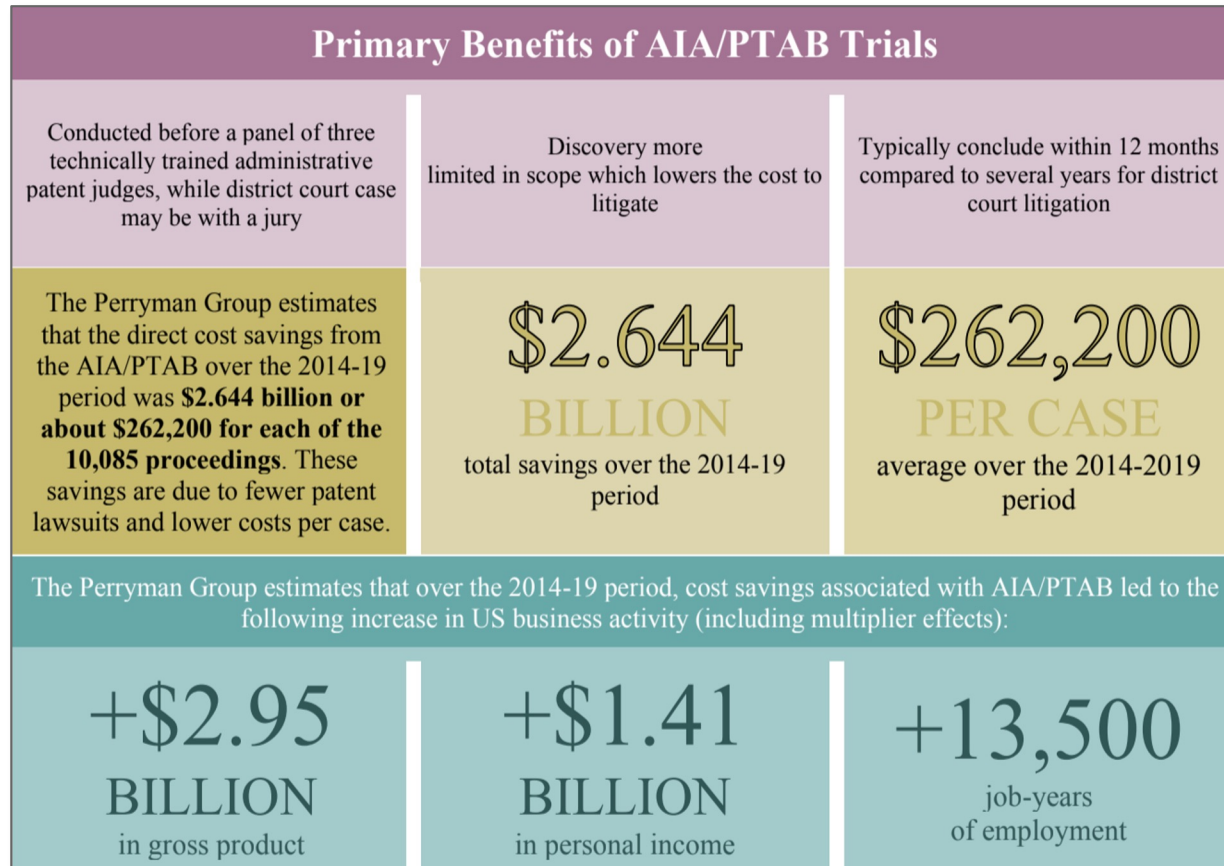
PTAB Petitioner Status: 2012-2022



# U.S. Companies are Most Targeted (8 of the top 10)

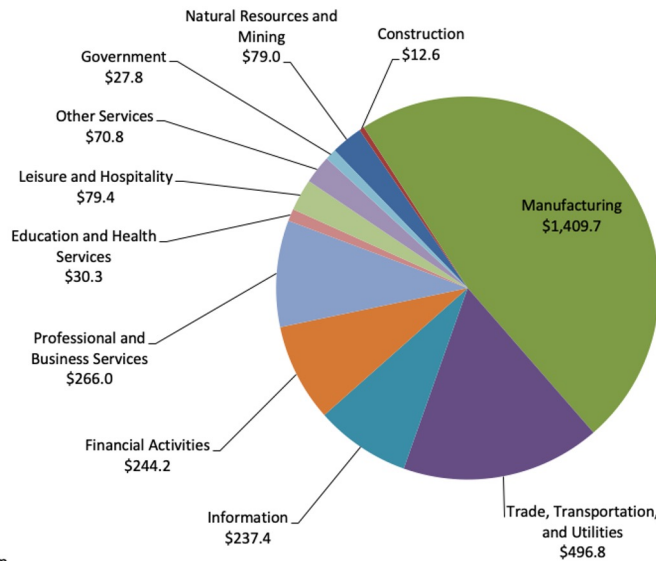


# Economic PTAB Jobs Report



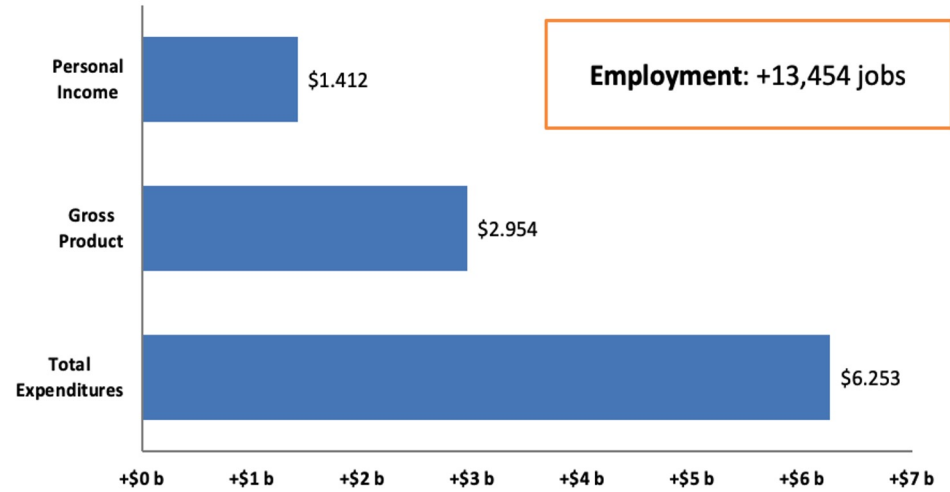
# Economic PTAB Jobs Report

The Estimated Cumulative Impact (2014-2019) of the Cost Savings Associated with AIA and PTAB on Business Activity in the US  
Industry Composition for Gross Product



Source: The Perryman Group

The Estimated Cumulative Impact (2014-2019) of the Cost Savings Associated with AIA and PTAB on Business Activity in the US  
(in billions)



Source: The Perryman Group

# PTAB Denying Institution on Policy

- Multiple Petitions (serial, parallel, or trial dates)
  - *General Plastic* 'factors' (serial petitions)
  - July 2019 Trial Practice Guide Update (parallel)
  - *NHK Spring & Fintiv* factors (denying for trial schedule, stays)
  - *Fintiv* denials declining since 2022 Vidal Memo, but still impactful
  - All rules targeting petitioners
  - Board ignores all other policy arguments
- New Office practice now requires:
  - Petitioners must rank their petitions in order of importance
  - New rules raised in majority of cases
  - Denials disproportionately benefit NPEs and foreign patent owners over U.S. companies



# America Invents Act

- “Companies ... have noted that they are often sued by defendants asserting multiple patents with large numbers of vague claims, making it difficult to determine in the first few months of the litigation which claims will be relevant and how those claims are alleged to read on the defendant’s products.”
- “[I]t is important that the section 315(b) deadline afford defendants a **reasonable opportunity to identify and understand the patent claims** that are relevant to the litigation. It is thus appropriate to extend the section 315(b) **deadline to one year.**”

# America Invents Act

- *“While the validity of [...] patents may be tested through litigation ... these proceedings all suffer substantial disadvantages.*
- *Litigation is very expensive . . . . According to [the 2004] AIPLA Economic Survey, the average cost of patent litigation, including the costs of discovery, ranges between \$500,000 and \$3,995,000 per party, depending on the amount at risk.*
- *... a competitor cannot challenge a patent in litigation before the competitor incurs the costs and risks of developing and marketing a product.”*

*Patent Quality Improvement: Post-Grant Opposition: Hearing before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary, 108th Cong. (2004) (statement of Michael Kirk, Ex. Director, AIPLA)*

# No Standing Requirements to Petition Agency



315(a)—

“Subject to the provisions of this chapter, a **person who is not the owner** of a patent may file with the Office a petition to institute an inter partes review of the patent.”

325(a)—

“Subject to the provisions of this chapter, a **person who is not the owner** of a patent may file with the Office a petition to institute a post-grant review of the patent.”

# Meaningful stakeholder involvement in rulemaking

## *Executive Order 12866*

“Sec. 6(a)(1) Each agency shall ... *provide the public with meaningful participation in the regulatory process.*

In particular, ***before*** issuing a notice of proposed rulemaking, each agency should, where appropriate, ***seek the involvement of those who are intended to benefit from and those expected to be burdened by any regulation.***”

## *Executive Order 13563*

“Sec. 2. Public Participation.

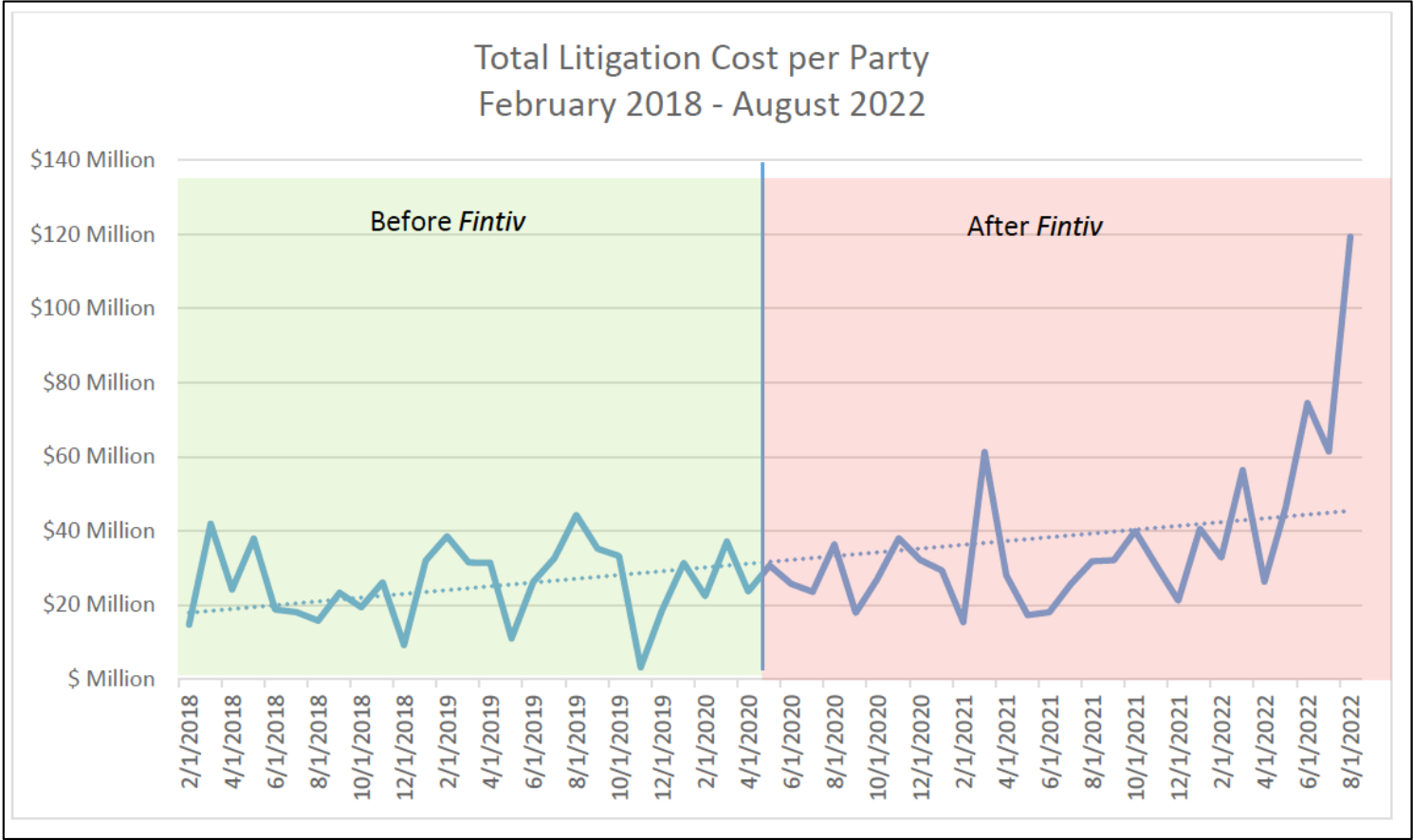
(c) **Before** issuing a notice of proposed rulemaking, each agency, where feasible and appropriate, shall seek the views of those who are likely to be affected, including those who are likely to benefit from and those who are potentially subject to such rulemaking”.

# Rules Affecting Institution Are Economically Significant

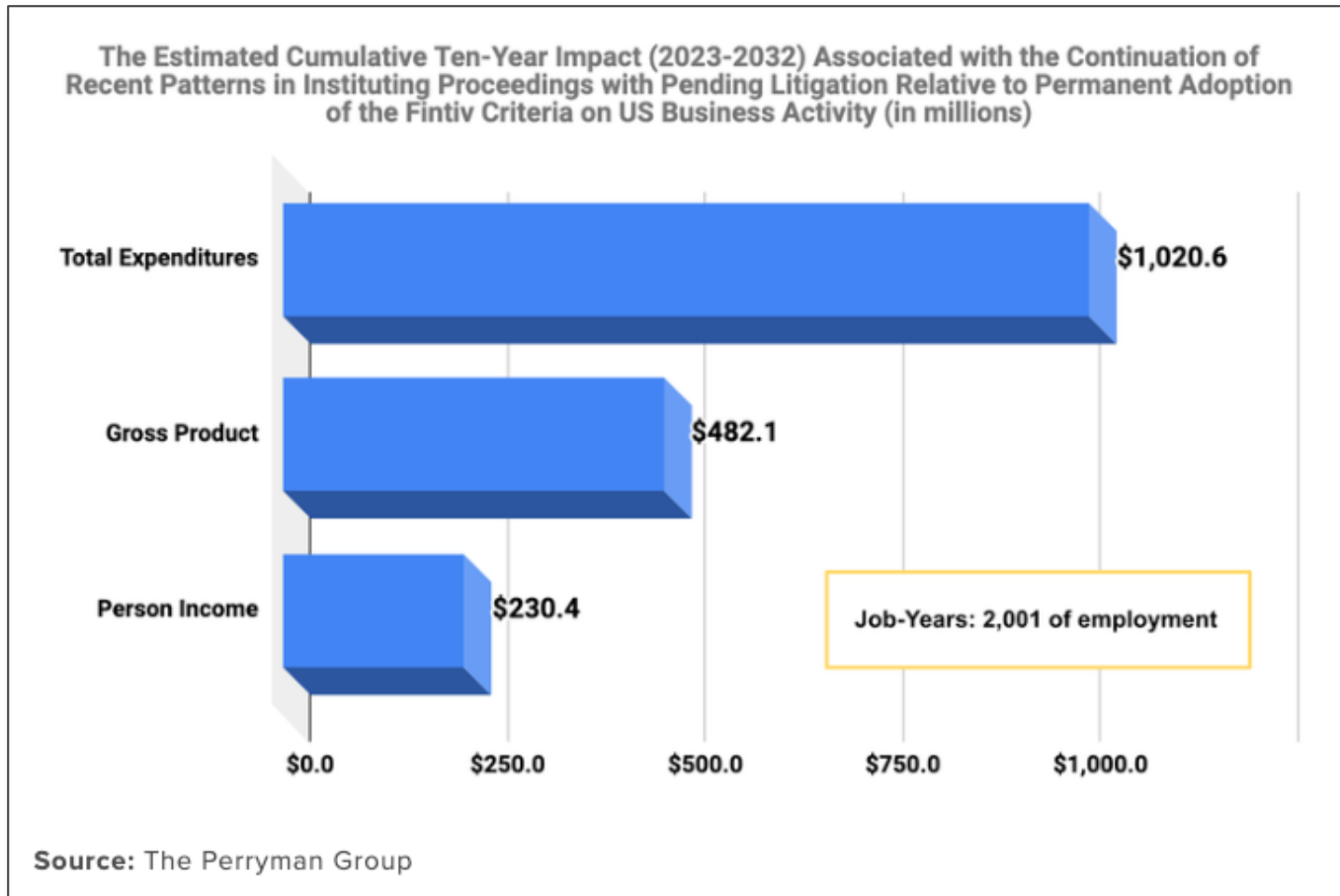
- *Fintiv* increased direct economic costs by **more than \$283M**
- Discretionary denials decreased after the Director's June 2022 Memo
- Over the next 10 years, the Director's Memo will lead to an increase in U.S. business activity of **\$482M+ in gross product**
- This economic impact will be felt largely by **U.S. companies**

# Economic Cost of *Fintiv* = \$283M+ (in original form)

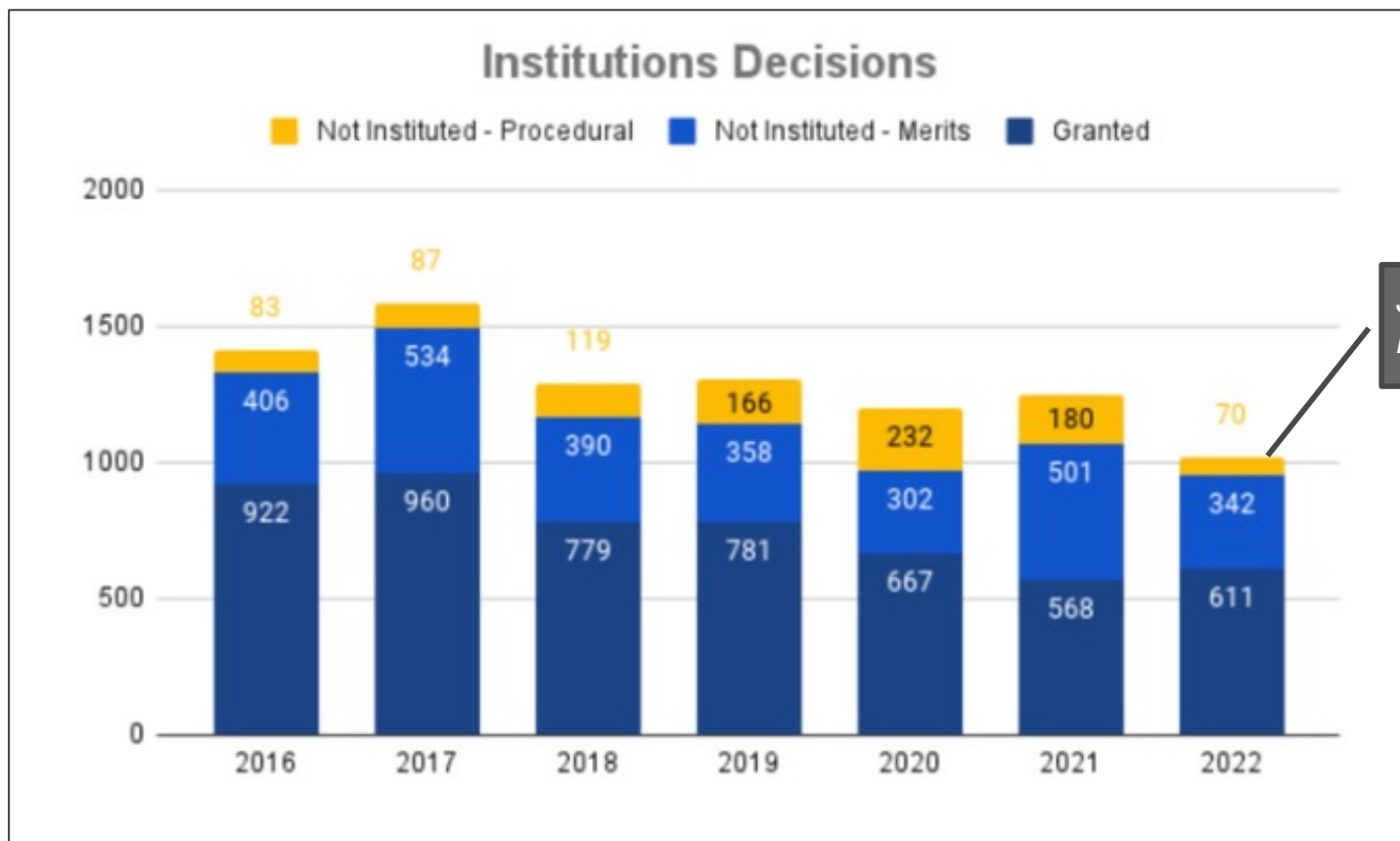
- Post *Fintiv* direct litigation **costs increased by \$7M+ per party, per month**
- Conservative value, not accounting for indirect spend or cases that never reach trial



# Less Discretionary Denials = \$482M+ in gross product



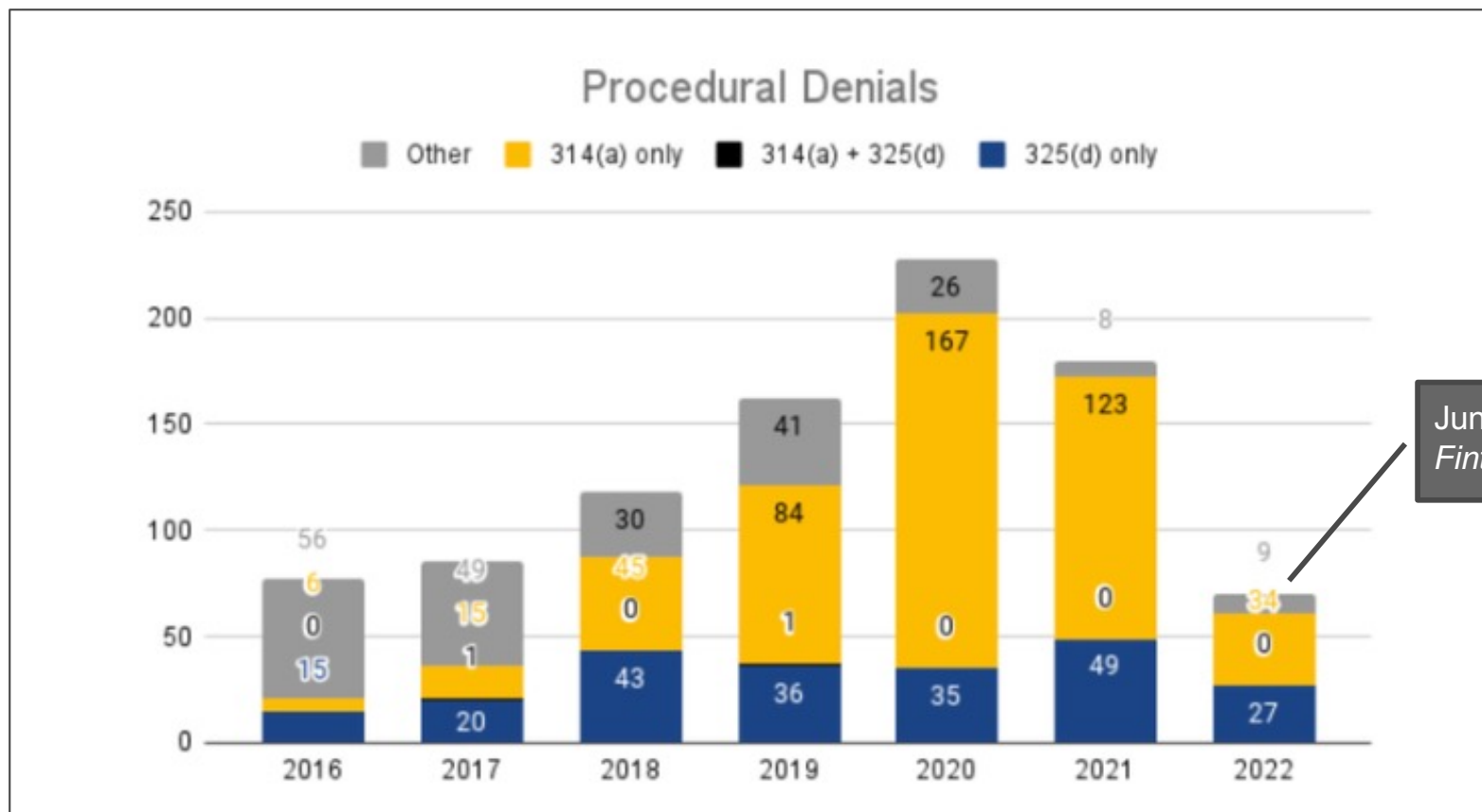
# Discretionary Denial Reports (through Q3 2022)



June 2022 - Vidal Fintiv Memo



# Discretionary Denial Reports (through Q3 2022)



June 2022 - Vidal Fintiv Memo

# Please Contact

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**THANK YOU**