No. 26-

IN THE

Supreme Court of the United States

INTEL CORPORATION, GOOGLE LLC,
Petitioners,

v.

JOHN A. SQUIRES, UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY AND DIRECTOR OF THE UNITED STATES PATENT AND TRADEMARK OFFICE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Congress established inter partes review (IPR) to provide an efficient administrative alternative to protracted federal court litigation for challenging the validity of dubious patents. Under 35 U.S.C. § 314(a), the Director of the U.S. Patent and Trademark Office (PTO) has authority to decide whether to institute an IPR to review a challenged patent. Section 314(d) further provides that "[t]he determination by the Director whether to institute an inter partes review … shall be final and nonappealable." Petitioners brought claims under the Administrative Procedure Act (APA) challenging a PTO rule that has curtailed access to IPR by setting restrictive, non-statutory standards for deciding whether to institute an IPR. Petitioners do not challenge any particular "determination … whether to institute an [IPR]," but rather seek prospective relief setting aside the challenged rule as contrary to law and arbitrary and capricious. The Federal Circuit held that § 314(d) precludes review of those claims and later affirmed the dismissal of petitioners' only reviewable claim.

The question presented is whether 35 U.S.C. § 314(d), which bars judicial review of "[t]he determination … whether to institute an inter partes review," applies even when no institution decision is challenged to preclude review of PTO rules that set standards governing institution decisions, particularly when those rules are based on a misinterpretation of § 314(a) to supposedly confer unlimited discretion on the Director to deny institution for any reason.

PARTIES TO THE PROCEEDING

Petitioners Intel Corporation and Google LLC are plaintiffs in the district court.

Respondent John A. Squires, Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office, is a defendant in the district court sued in his official capacity.

Apple Inc., Cisco Systems, Inc., Edwards Lifesciences Corporation, and Edwards Lifesciences LLC are plaintiffs in the district court and respondents in this Court.

CORPORATE DISCLOSURE STATEMENT

Intel Corporation (NASDAQ: INTC) has no parent company, and no publicly held corporation owns 10% or more of its stock.

Google LLC is a subsidiary of XXVI Holdings Inc., which is a subsidiary of Alphabet Inc., a publicly traded company (NASDAQ: GOOG and GOOGL). No publicly traded company holds more than 10% of Alphabet Inc.'s stock.

DIRECTLY RELATED PROCEEDINGS

This petition arises from the following proceedings:

- *Apple Inc.* v. *Squires*, No. 2024-1864 (Fed. Cir. Feb. 13, 2026) (affirming grant of summary judgment);
- *Apple Inc.* v. *Vidal*, No. 5:20-cv-6128 (N.D. Cal. Mar. 31, 2024) (granting motion for summary judgment);

- *Apple Inc.* v. *Vidal*, No. 2022-1249 (Fed. Cir. Mar. 13, 2023) (affirming dismissal in part and reversing in part);
- *Apple Inc.* v. *Vidal*, No. 5:20-cv-6128 (N.D. Cal. Dec. 13, 2021) (granting motion to dismiss).

Counsel for petitioners are not aware of any other proceedings that are directly related to this case within the meaning of Rule 14.1(b)(iii).

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

CORPORATE DISCLOSURE STATEMENT ii

DIRECTLY RELATED PROCEEDINGS ii

TABLE OF AUTHORITIES vii

INTRODUCTION 1

OPINIONS BELOW 4

JURISDICTION 4

STATUTORY PROVISIONS INVOLVED 4

STATEMENT 5

A. Legal Background 5

1. Inter partes review 5

2. The challenged rule 8

3. Subsequent developments 10

B. Proceedings Below 12

REASONS FOR GRANTING THE PETITION 14

I. THE FEDERAL CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS INTERPRETING ANALOGOUS JUDICIAL-REVIEW BARS 14

II. THE FEDERAL CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENT APPLYING § 314(d) 19

TABLE OF CONTENTS—Continued

Page

III. THE FEDERAL CIRCUIT'S DECISION MISUNDERSTANDS THE DIRECTOR'S OBLIGATIONS UNDER § 314(a) 22

IV. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT AND WARRANTS REVIEW IN THIS CASE 26

A. Review Is Needed To Ensure That The PTO Does Not Flout Statutory Limits And The APA's Requirement Of Reasoned Decisionmaking 26

B. Review Is Needed To Prevent Erosion Of The Presumption Of Reviewability 31

C. Review Is Warranted Without Delay 32

CONCLUSION 34

TABLE OF AUTHORITIES

CASES

Page(s)

Abbott Laboratories v. *Gardner*, 387 U.S. 136 (1967) 14, 31

American Clinical Laboratory Association v. *Azar*, 931 F.3d 1195 (D.C. Cir. 2019) 18

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Apple Inc. v. *Fintiv, Inc.*, 2020 WL 2126495 (P.T.A.B. Mar. 20, 2020) 8, 9

Apple Inc. v. *Fintiv, Inc.*, 2020 WL 2486683 (P.T.A.B. May 13, 2020) 9

Apple Inc. v. *Maxell, Ltd.*, 2020 WL 3662522 (P.T.A.B. July 6, 2020) 10

Arbaugh v. *Y&H Corporation*, 546 U.S. 500 (2006) 25

Block v. *Community Nutrition Institute*, 467 U.S. 340 (1984) 14

Bowen v. *Michigan Academy of Family Physicians*, 476 U.S. 667 (1986) 1, 3, 14, 15, 31, 32

Cuozzo Speed Technologies, LLC v. *Lee*, 579 U.S. 261 (2016) 13, 16, 20, 21, 22, 24, 25

Department of Homeland Security v. *Regents of University of California*, 591 U.S. 1 (2020) 3, 16, 17

Facebook, Inc. v. *Windy City Innovations, LLC*, 973 F.3d 1321 (Fed. Cir. 2020) 16

TABLE OF AUTHORITIES—Continued

Page

Geisinger Community Medical Center v. *Secretary United States Department of Health & Human Services*, 794 F.3d 383 (3d Cir. 2015) 19

Heckler v. *Chaney*, 470 U.S. 821 (1985) 22

In re Motorola Solutions, Inc., 159 F.4th 30 (Fed. Cir. 2025) 10, 26

Intel Corporation v. *Vidal*, 144 S. Ct. 548 (2024) 34

Judulang v. *Holder*, 565 U.S. 42 (2011) 29

Lepre v. *Department of Labor*, 275 F.3d 59 (D.C. Cir. 2001) 18

Lindahl v. *Office of Personnel Management*, 470 U.S. 768 (1985) 14, 31

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Magnolia Medical Technologies, Inc. v. *Kurin, Inc.*, 2026 WL 1348926 (P.T.A.B. May 14, 2026) 33

McNary v. *Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991) 17, 18

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TABLE OF AUTHORITIES—Continued

Page

NFC Technology LLC v. *HTC America, Inc.*, 2015 WL 1069111 (E.D. Tex. Mar. 11, 2015) 7

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NHK Spring Company v. *Intri-Plex Technologies, Inc.*, 2018 WL 4373643 (P.T.A.B. Sept. 12, 2018) 8, 9

ParkView Medical Associates, LP v. *Shalala*, 158 F.3d 146 (D.C. Cir. 1998) 19

SAS Institute, Inc. v. *Iancu*, 584 U.S. 357 (2018) 2, 3, 4, 19, 20, 21, 23

Supercell Oy v. *GREE Inc.*, 2020 WL 3455515 (P.T.A.B. June 24, 2020) 10

Thryv, Inc. v. *Click-To-Call Technologies, LP*, 590 U.S. 45 (2020) 5, 7, 21, 22, 25

United States v. *Arthrex, Inc.*, 594 U.S. 1 (2021) 22

DOCKETED CASES

Apple Inc. v. *Vidal*, No. 2022-1249 (Fed. Cir.) 22

Sotera Wireless, Inc. v. *Masimo Corporation*, No. IPR2020-01019 (P.T.A.B.) 28

STATUTORY PROVISIONS

5 U.S.C. § 555 24

8 U.S.C.
§ 1160 17
§ 1182 32
§ 1252 ..... 16, 17

TABLE OF AUTHORITIES—Continued

Page

15 U.S.C. § 4305 32

28 U.S.C. § 1254 4

35 U.S.C.
- § 6 6
- § 135 32
- § 303 23
- § 311 ..... 5, 6, 20, 23
- § 312 ..... 6, 20
- § 313 ..... 5, 6, 23
- § 314 ..... 1-6, 12-13, 15-26, 32-33
- § 315 ..... 6, 7, 12, 24, 28, 30
- § 316 ..... 6, 20
- § 317 6
- § 318 ..... 6, 20, 21
- § 319 6
- § 324 32
- § 325 24

42 U.S.C.
- § 1395m-1 18
- § 1395ff (1982) 15

REGULATIONS AND ADMINISTRATIVE MATERIALS

37 C.F.R.
- § 42.2 6
- § 42.4 ..... 6, 31
- § 42.108 ..... 6, 19

77 Fed. Reg. 48,680 (Aug. 14, 2012) 8

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TABLE OF AUTHORITIES—Continued

Page

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LEGISLATIVE MATERIALS

157 Cong. Rec. 3375 (2011) (statement of Sen. Sessions) 30

157 Cong. Rec. 3403 (2011) (statement of Sen. Udall) 6

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TABLE OF AUTHORITIES—Continued

Page

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Memorandum from John A. Squires to PTAB, *Additional Discretionary Institution Considerations* (Mar. 11, 2026), https://tinyurl.com/yu4d3sf9 12

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Memorandum from Katherine K. Vidal to PTAB, *Interim Procedure for Discretionary Denials in AIA Post-Grant Proceedings with Parallel District Court Litigation* (June 21, 2022), https://tinyurl.com/557h9mjd 10, 29

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Unified Patents, Portal, https://tinyurl.com/2s3ypzk4 (visited July 13, 2026) 9

TABLE OF AUTHORITIES—Continued

Page

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Intel Corporation and Google LLC respectfully petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Federal Circuit in this matter.

INTRODUCTION

Disregarding the "strong presumption that Congress intends judicial review of administrative action," *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986), the Federal Circuit stretched the judicial-review bar in 35 U.S.C. § 314(d) far beyond its text to hold that standards the PTO adopts to govern institution of IPR are immune from judicial review—even if those rules directly contravene congressionally

imposed standards or are as arbitrary as a coin flip. The decision gives the PTO free rein to adopt unlawful institution standards that undermine the patent system with no judicial oversight, in sharp conflict with this Court's precedent.

Section 314(d) provides that "[t]he determination by the [PTO] Director whether to institute an inter partes review … shall be final and nonappealable." Petitioners did not challenge any such determination. Petitioners instead seek prospective relief setting aside the "*Fintiv* rule," which establishes institution standards that have severely curtailed access to IPR for petitioners challenging the validity of patents also asserted in district-court litigation. Petitioners allege that the rule violates the America Invents Act of 2011 (AIA), which expressly permits IPR to proceed in parallel with pending litigation involving the same patent. Petitioners further allege that the rule is arbitrary and capricious in violation of the APA because it rests on irrational factors and produces irrational outcomes. With barely a nod to the text of § 314(d) or the presumption of reviewability, the Federal Circuit held those claims nonjusticiable, applying a broad "unreviewability principle" barring judicial review of "any challenge … where the invoked provisions of law directly govern institution" of IPR. App. 69a-73a.

That decision risks foreclosing judicial oversight of any PTO rule governing institution of IPR—a procedure Congress saw as vital to the patent system. Although this Court has held that § 314(d) does not "enable the agency to act outside its statutory limits," *SAS Inst., Inc.* v. *Iancu*, 584 U.S. 357, 371 (2018), the Federal Circuit's decision permits exactly that—clearing the way for the PTO to adopt any institution standards it prefers, no matter how plainly they contradict the AIA

provisions dictating when IPR is available, and no matter how irrational the consequences.

Those concerns are not hypothetical. The *Fintiv* rule has severely restricted access to IPR precisely where Congress deemed it most important—as an efficient mechanism for challenging questionable patents asserted in litigation. That is just the tip of the iceberg. In the wake of the Federal Circuit's decision, the PTO proposed a regulation to codify a more aggressive form of the *Fintiv* rule, even though it would be irreconcilable with the statute. The Federal Circuit's decision effectively eliminates judicial oversight of the lawfulness of that measure and any others the PTO might prefer in the future.

Nothing in § 314(d) or this Court's precedent justifies that result. The Federal Circuit's decision conflicts with decisions of this Court and other circuits holding that statutory provisions precluding judicial review of specific agency decisions do not bar review of other administrative actions or rules falling outside the specific wording of the statutory bar. Even where Congress expressly insulated specific agency determinations, standards the agency adopts to govern those determinations remain subject to review. *E.g.*, *Department of Homeland Sec.* v. *Regents of Univ. of Cal.*, 591 U.S. 1, 19 (2020); *Bowen*, 476 U.S. at 675-681.

The Federal Circuit's decision also conflicts with this Court's precedent interpreting § 314(d). In *SAS*, the government argued—just as the Federal Circuit held here—that § 314(d) "foreclos[es] judicial review of any legal question bearing on institution of [IPR]." 584 U.S. at 370; *see* App. 70a (reading § 314(d) to bar review of any challenge "focus[ed] directly and expressly on institution standards"). This Court rejected that assertion

and saw no bar to reviewing a PTO rule allowing "partial institution" of IPR, even though that review turned on the interpretation of statutes governing institution. *SAS*, 584 U.S. at 363-368.

As this Court has made clear, § 314(d) shields the PTO's preliminary institution decision by foreclosing judicial review in particular cases. It does not allow the PTO to change the rules of the game for all cases in a legislative manner, immune from judicial oversight, particularly while the PTO takes an overly expansive view of discretion supposedly conferred to it by § 314(a). This Court's intervention is needed to prevent misinterpretations of § 314 from undermining the patent system and eroding the presumption of reviewability.

OPINIONS BELOW

The Federal Circuit's relevant decision (App. 57a-81a) is reported at 63 F.4th 1; its subsequent decision (App. 1a-23a) is reported at 166 F.4th 1349. The district court's first decision (App. 83a-96a) is unpublished but available at 2021 WL 5232241; its subsequent decision (App. 25a-55a) is likewise unpublished but available at 2024 WL 1382465.

JURISDICTION

The Federal Circuit entered judgment on February 13, 2026. App. 1a. The Chief Justice granted petitioners' application to extend the time for filing a petition up to and including July 13, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

35 U.S.C. § 314 provides:

> (a) THRESHOLD.—The Director may not authorize an inter partes review to be instituted unless the Director determines that the information presented in the petition filed under section 311 and any response filed under section 313 shows that there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.
>
> ***
>
> (d) NO APPEAL.—The determination by the Director whether to institute an inter partes review under this section shall be final and nonappealable.

STATEMENT

A. Legal Background

1. Inter partes review

More than a decade ago, Congress became "concerned about overpatenting and its diminishment of competition." *Thryv, Inc.* v. *Click-To-Call Techs., LP*, 590 U.S. 45, 54 (2020). "[Q]uestionable patents [were] too easily obtained and too difficult to challenge." H.R. Rep. No. 112-98, at 39-40 (2011) (House Report). Congress enacted the AIA to "establish a more efficient and streamlined patent system that will improve patent quality and limit unnecessary and counterproductive litigation costs." House Report 40.

Central to the AIA was its creation of inter partes review, an administrative process by which the PTO reconsiders previously granted patents. 35 U.S.C. § 311; *see Thryv*, 590 U.S. at 47. Congress intended IPR to provide a "cost effective alternative[] to litigation" over patent validity. House Report 40, 48. To that end,

Congress streamlined the issues that could be raised in IPR, set strict schedules to ensure expeditious resolution, and utilized "the expertise of the Patent Office on questions of patentability," 157 Cong. Rec. 3403 (2011) (statement of Sen. Udall).

The IPR process begins with a petition to institute review to cancel one or more claims of a challenged patent. 35 U.S.C. § 311(a)-(b). The PTO Director has authority to grant or deny such petitions, *id.* § 314, and has delegated that authority to the Patent Trial and Appeal Board (PTAB), 37 C.F.R. § 42.4(a); *see id.* §§ 42.2, 42.108. The AIA establishes several institution standards and requirements by statute, *see* 35 U.S.C. §§ 311-315, including that the Director "may not authorize an inter partes review to be instituted unless" the petition and the patentee's preliminary response indicate "a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition," *id.* § 314(a).

If review is instituted, the Board conducts the IPR and issues a final written decision determining the patentability of the challenged claims. 35 U.S.C. §§ 6(b)(4), 316-318. While the Board's final written decision is appealable, *id.* § 319, "the determination whether to institute an [IPR]" in the first place is "final and nonappealable," *id.* § 314(d). Applying this bar, the Federal Circuit has held that it lacks jurisdiction over all appeals from decisions denying institution—even where the appeal claims the decision applied an unlawful rule—and that mandamus is available only for constitutional challenges. *Mylan Laboratories Ltd.* v. *Janssen Pharmaceutica, NV*, 989 F.3d 1375, 1382 (Fed. Cir. 2021).

IPR quickly became an important feature of the patent system as a tool to "weed out bad patent claims

efficiently." *Thryv*, 590 U.S. at 54. That was especially true for innovators that are often sued by non-practicing entities seeking millions or billions of dollars for infringement of dubious patents. In such cases, accused infringers could petition for IPR to obtain efficient, expert review of a patent being asserted in parallel district-court litigation. Indeed, IPR was "designed in large measure to simplify proceedings before the courts and to give the courts the benefit of the expert agency's full and focused consideration of the effect of prior art on patents being asserted in litigation." *NFC Tech. LLC* v. *HTC Am., Inc.*, 2015 WL 1069111, at *4 (E.D. Tex. Mar. 11, 2015).

Several AIA provisions reflect that expectation by dictating when and how IPR should proceed when parallel litigation involves the same patent. For example, IPR "may not be instituted if the petition … is filed more than 1 year after the date on which the petitioner … is served with a complaint alleging infringement of the patent." 35 U.S.C. § 315(b). Conversely, IPR may be instituted for patent claims asserted in a pending infringement suit when the petition is filed within the one-year window. IPR "may not be instituted" if the petitioner previously "filed a civil action challenging the validity of a claim of the [same] patent." *Id.* § 315(a)(1). But that bar does not apply if the petitioner's previous challenge to the patent was made by counterclaim to an infringement suit. *Id.* § 315(a)(3). And if the petitioner files a civil action *after* petitioning for IPR, the lawsuit is "automatically stayed"—unless and until the patentee asserts an infringement claim against the petitioner. *Id.* § 315(a)(2)(B).

The AIA thus expressly recognizes that IPR may be instituted alongside infringement litigation involving

the same patent, so long as the IPR petition is timely filed. For years, the PTO routinely instituted IPR in such cases, allowing validity issues to be resolved through its more efficient administrative process while district courts regularly stayed parallel infringement suits. *See* Vishnubhakat et al., *Strategic Decision Making in Dual PTAB and District Court Proceedings*, 31 Berkeley Tech. L.J. 45, 78-81 (2016).

2. The challenged rule

The PTO has adopted rules governing IPR, including rules setting criteria or requirements for institution. Some have been adopted through duly promulgated regulations after notice and comment. *E.g.*, 77 Fed. Reg. 48,680 (Aug. 14, 2012); 81 Fed. Reg. 18,750 (Apr. 1, 2016); 83 Fed. Reg. 51,340 (Oct. 11, 2018); 85 Fed. Reg. 79,120 (Dec. 9, 2020). Others originated from the Director's designation of certain Board decisions as "precedential," which makes those decisions "binding" on the Board "in subsequent matters involving similar facts or issues." PTAB, *Standard Operating Procedure 2 (Revision 11)*, at 7 (July 24, 2023).

This case involves one such rule—the "*Fintiv* rule"—that broke from prior practice and the AIA by announcing standards that forbid IPR institution in many situations when litigation involving the same patent is co-pending. In two decisions, the Board asserted authority to deny institution based on the pendency of overlapping infringement litigation—even if the petition was timely and meritorious—and devised six non-statutory factors the Board would weigh to deny an IPR petition in light of pending infringement litigation. *Apple Inc.* v. *Fintiv, Inc.*, 2020 WL 2126495, at *2 (P.T.A.B. Mar. 20, 2020); *NHK Spring Co.* v. *Intri-Plex Techs., Inc.*, 2018 WL 4373643, at *7 (P.T.A.B. Sept. 12, 2018).

Without providing public notice or opportunity for comment, or any explanation, the Director designated those two decisions as "precedential," *see* 2018 WL 4373643; 2020 WL 2126495, thereby adopting a binding rule that required the Board to deny institution when it determined, based on the factors, that conducting IPR would be inefficient in light of a pending patent-infringement suit. C.A.J.A. 1140. Among other factors, the rule required the Board to predict when trial would occur in the district-court litigation and to compare that date with the projected deadline for the Board's final written decision, in order to decide whether to "deny institution in view of an earlier trial date" in the parallel suit. *Fintiv*, 2020 WL 2126495, at *3.

Following the *Fintiv* rule's adoption, the PTO applied it to deny over a thousand timely IPR petitions—notwithstanding the merits—based on the pendency of litigation involving the same patent claims. *Unified Patents*, Portal (visited July 13, 2026); *see* C.A.J.A. 1140-1143. Many of those denials rested on faulty speculation as to trial dates. In *Fintiv* itself, for example, the Board applied the rule to deny institution in May 2020 based on its expectation that trial would take place that year. *Apple Inc.* v. *Fintiv, Inc.*, 2020 WL 2486683, at *3, *7 (P.T.A.B. May 13, 2020). In fact, trial was repeatedly postponed until the *Fintiv* court granted summary judgment of non-infringement on the eve of trial in 2023. And when that ruling was later reversed, the court again granted summary judgment in August 2025—five years later than the PTO had predicted—with yet another appeal still pending. In scores of similar cases, the PTO applied the *Fintiv* rule to deny institution of IPR based on erroneous trial-date predictions, only for trial to be rescheduled—often after it was too late for rehearing of the institution denial. C.A.J.A. 1146-1147. Yet when

IPR petitioners argued that the *Fintiv* rule is irrational or unlawful, the Board responded that it has no authority to depart from the rule. *E.g.*, *Supercell Oy* v. *GREE Inc.*, 2020 WL 3455515, at *7 (P.T.A.B. June 24, 2020); *Apple Inc.* v. *Maxell, Ltd.*, 2020 WL 3662522, at *7 (P.T.A.B. July 6, 2020). The Federal Circuit has consistently rejected efforts to challenge institution denials by appeal or mandamus, even where those challenges asserted that the agency had exceeded its authority or acted arbitrarily. *E.g.*, *Mylan*, 989 F.3d at 1382. It has done the same for challenges asserting constitutional violations. *E.g.*, *In re Motorola Sols., Inc.*, 159 F.4th 30 (Fed. Cir. 2025).

3. Subsequent developments

After the *Fintiv* rule had been in effect for a couple of years, the Director issued "interim guidance" requiring the Board to continue applying the *Fintiv* rule to deny institution based on parallel litigation unless the petition presented "compelling evidence" that "would plainly lead to a conclusion" that the challenged claims were unpatentable. Memorandum from Katherine K. Vidal to PTAB, *Interim Procedure for Discretionary Denials in AIA Post-Grant Proceedings with Parallel District Court Litigation* 3-5, 9 (June 21, 2022) ("*June 2022 Guidance*"). The guidance further indicated that, to avoid denial under the *Fintiv* rule, petitioners could stipulate that they will forgo any defense in the infringement suit that was raised (or could have been raised) in the IPR petition, surrendering their right to challenge patent validity in parallel actions as the AIA allows. *Id.* at 7-8. The PTO considered whether to codify those rules and other proposals that would have similarly altered the AIA's institution standards, 88 Fed. Reg. 24,503 (Apr. 21, 2023), but no regulation was promulgated.

Following the change in administrations, the PTO rescinded the June 2022 Guidance.[1] In March 2025, the then-Acting Director implemented a procedure under which she would consult with the Board and decide herself whether IPR should be denied based on co-pending litigation or other so-called "discretionary" factors, while leaving it to the Board to decide whether the merits threshold had been satisfied.[2]

Upon confirmation, the new Director announced that he would make all "discretionary" and merits-based institution decisions himself in summary notices, without any explanation of whether or how he is applying the *Fintiv* rule's factors.[3] The same day, the PTO published a proposed rule under which IPR would "not be instituted or maintained if" it is "more likely than not" that "[a] district court trial in which a party challenges the patent" as anticipated or obvious "will occur … before the due date for the final written decision" in the IPR. 90 Fed. Reg. 48,335, 48,341 (Oct. 17, 2025). The agency received over 11,000 comments on the proposal. No final rule has issued, and during the more recent oral argument before the Federal Circuit, the agency declined to speculate whether a final rule would ever issue. While the *Fintiv* decision remains designated precedential, the Director has continued to revise IPR institution

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[1] *USPTO Rescinds Memorandum Addressing Discretionary Denial Procedures* (Feb. 28, 2025).

[2] Memorandum from Coke Morgan Stewart to PTAB, *Interim Processes for PTAB Workload Management* (Mar. 26, 2025).

[3] Memorandum from John A. Squires to PTAB, *Director Institution of AIA Trial Proceedings* (Oct. 17, 2025).

standards, including by prioritizing challenges by small businesses and those who "invest in domestic production."[4]

B. Proceedings Below

Petitioners brought this suit challenging the *Fintiv* rule as unlawful and seeking to set it aside under the APA. C.A.J.A. 1132, 1144-1150. Petitioners asserted three claims. First, the *Fintiv* rule is contrary to law and exceeds the PTO's statutory authority because the AIA prohibits the Director from denying institution based on overlap with pending patent-infringement litigation, so long as the petition is filed within the AIA's one-year window under 35 U.S.C. § 315(b). C.A.J.A. 1144-1146, 1148-1149. Second, the *Fintiv* rule is arbitrary and capricious because it rests on irrational factors—such as speculation about trial dates—and produces arbitrary outcomes that undermine efficiency, encourage forum-shopping by infringement plaintiffs, and thwart the purposes of IPR. C.A.J.A. 1146-1150, 1273. Third, the *Fintiv* rule is procedurally deficient because the PTO adopted it without notice-and-comment rulemaking. C.A.J.A. 1148, 1150.

Petitioners' APA suit does not challenge any decision declining to institute any IPR petition. Petitioners seek only prospective relief holding the *Fintiv* rule unlawful, setting it aside, and enjoining the PTO from relying on the rule to deny institution of IPR. C.A.J.A. 1150.

The district court granted the Director's motion to dismiss, holding that 35 U.S.C. § 314(d) precludes judicial review of petitioners' three claims. App. 93a-95a.

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[4] Memorandum from John A. Squires to PTAB, *Additional Discretionary Institution Considerations* 2 (Mar. 11, 2026).

The court acknowledged that petitioners do not challenge any "determination … whether to institute an [IPR]," 35 U.S.C. § 314(d), but instead the agency's adoption of allegedly "unlawful considerations" governing institution decisions, App. 91a-92a. The court concluded that § 314(d) nonetheless bars review because determining the lawfulness of the *Fintiv* rule would require it to "analyze 'questions that are closely tied to the application and interpretation of statutes related to'" institution decisions. App. 95a (quoting *Cuozzo Speed Techs., LLC* v. *Lee*, 579 U.S. 261, 274-275 (2016)).

The Federal Circuit affirmed the dismissal of petitioners' first two claims that the *Fintiv* rule is contrary to law and arbitrary and capricious. App. 81a. The court acknowledged that those claims "do[] not involve a petition-specific challenge" covered by the text of § 314(d). App. 72a. But the court discerned a broader "unreviewability principle" emanating from § 314(d) and this Court's precedent that bars judicial review not only of a "determination whether to institute," but also of standards the PTO adopts to govern institution decisions. App. 71a-72a. Applying that principle, the court reasoned that petitioners' first two claims are barred because they "challenge the content of the Director's institution instructions" and "focus directly and expressly on institution standards, nothing else." App. 69a-70a.

The Federal Circuit separately held that § 314(d) does not bar petitioners' notice-and-comment claim, which it remanded. App. 74a-76a. On remand, the district court rejected that claim on the merits and entered final judgment. App. 37a-55a. In a second appeal, the Federal Circuit affirmed. App. 23a. The notice-and-comment claim is not before this Court.

REASONS FOR GRANTING THE PETITION

I. THE FEDERAL CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS INTERPRETING ANALOGOUS JUDICIAL-REVIEW BARS

The APA reflects a "strong presumption," long predating the APA's enactment, that final agency action is subject to judicial review. *Bowen*, 476 U.S. at 670. That presumption can be overcome "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent," *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141 (1967), which must appear in the statute's "express language" or "the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action," *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 345 (1984). If the statute leaves any "substantial doubt" as to whether Congress intended to preclude review, "the general presumption favoring judicial review of administrative action is controlling." *Id.* at 351. Policy arguments "cannot override the text" of a judicial-review provision. *American Hosp. Ass'n* v. *Becerra*, 596 U.S. 724, 734 (2022). Even where a statute can plausibly be read to impose a broad bar to judicial review, a court should reject such a reading if the statute can naturally be read more narrowly. *Lindahl* v. *Office of Personnel Mgmt.*, 470 U.S. 768, 779-780 (1985).

Applying these principles, this Court has repeatedly held that statutes barring review of specific agency actions do not bar review of agency standards governing those actions, and there is no reason to limit those holdings to situations in which decisionmaking authority has been delegated by the agency head.

In *Bowen*, for example, the plaintiffs challenged a regulation establishing a method for determining the amount of certain Medicare Part B benefit awards.

476 U.S. at 668-669. The government argued that review of the rule was precluded by 42 U.S.C. § 1395ff, which had previously been interpreted to limit review of "any determination … of … the amount of benefits" due. *Id.* at 675 (quoting 42 U.S.C. § 1395ff(b)(1)(C) (1982)). The Court rejected that argument, holding that a provision barring review of the amount determination did not bar review of a rule providing instructions on how the amount determinations should be made. *Id.* at 674-678. The statute "simply d[id] not speak to challenges mounted against the *method* by which such amounts are to be determined rather than the *determinations* themselves." *Id.* at 675. There was a difference between "an attack on the validity of a regulation" and an attack on the amount determination "on a particular claim," and only the latter was precluded. *See id.* at 676. Whereas Congress had sought to avoid flooding courts with "minor matters" concerning benefits payable in particular cases, it was "implausible to think [Congress] intended" to preclude review more broadly of the "Secretary's administration of [Medicare] Part B," including the "Secretary's instructions and regulations" for determining benefits. *See id.* at 678-681.

The same analysis should have controlled here. Although 35 U.S.C. § 314(d) precludes review of "the determination … whether to institute an [IPR]," that provision "does not speak to challenges mounted against the *method* by which such" institution decisions are to be made, "rather than the *determinations* themselves." *Bowen*, 476 U.S. at 675. And just as Congress might have sought to avoid burdening the Federal Circuit with appeals from institution decisions in specific cases, it is "implausible" to think Congress intended to insulate the PTO's administration of IPR institution standards from all oversight. *See id.* at 676-678. Indeed, this Court has

explained that § 314(d) was intended not to shield unlawful and arbitrary rules from judicial review, but to ensure that final written decisions cannot be "unwound" based on "some minor statutory technicality." *Cuozzo*, 579 U.S. at 272. Nor would Congress have expected § 314(d) to bar review of rules governing institution, because Congress did not authorize the PTO to establish rules through adjudications of individual IPR petitions. *See Facebook, Inc.* v. *Windy City Innovations, LLC*, 973 F.3d 1321, 1350 (Fed. Cir. 2020) (additional views by panel).

The Federal Circuit's decision likewise conflicts with *Department of Homeland Security* v. *Regents of the University of California*. The plaintiffs there challenged the Secretary's rescission of the Deferred Action for Childhood Arrivals (DACA) program, which gave instructions on the government's discretion to remove unlawfully present noncitizens in certain classes of cases. *Regents*, 591 U.S. at 8-9. The government argued that Congress had precluded review of the policy rescission, invoking two provisions of the immigration laws, but the Court held that those provisions applied only to the specific actions addressed by their text and not general policies governing those actions. The first barred review of "claims arising from 'action[s]' or 'proceeding[s] brought to remove an alien.'" *Id.* at 19 (alterations supplied in *Regents*) (quoting 8 U.S.C. § 1252(b)(9)). The Court held that the "targeted language" of that provision did not preclude judicial review where the plaintiffs were "not challenging any removal proceedings" but instead challenged a change in the standards governing the decision whether to initiate removal proceedings. *Id.* The Court also rejected the government's reliance on a neighboring provision that precluded judicial review of cases arising from "decisions 'to commence proceedings, adjudicate

cases, or execute removal orders.'" *Id.* (quoting 8 U.S.C. § 1252(g)). The Court "rejected as 'implausible'" the government's interpretation of that provision as "cover[ing] 'all claims'" or "impos[ing] 'a general jurisdictional limitation.'" *Id.* Because the challenged DACA rescission was "not a decision to 'commence proceedings,' much less to 'adjudicate' a case or 'execute' a removal order," the challenge was not barred. *Id.*

The reasoning in *Regents* applies fully here. Section 314(d) precludes review of "[t]he determination … whether to institute an inter partes review." As the Federal Circuit recognized, petitioners do not challenge any such determination. App. 72a. That should have been the end of the matter. Section 314(d)'s "targeted language is not aimed at this sort of case." *Regents*, 591 U.S. at 19.

The decision below similarly conflicts with *McNary* v. *Haitian Refugee Center, Inc.*, 498 U.S. 479, 492-494 (1991). There, the plaintiffs alleged a pattern of due-process violations in the administration of the Special Agricultural Worker status-adjustment program. *Id.* at 487-488. The government argued that review was barred by § 210(e)(1) of the Immigration and Nationality Act, which precluded judicial review of "'a determination respecting an application for adjustment of status.'" *Id.* at 491 (quoting 8 U.S.C. § 1160(e)(1)). This Court rejected that argument, noting that the text of the statutory bar "referr[ed] only to review of '*a determination* respecting *an application*.'" *Id.* at 491-492 (emphasis supplied in *McNary*). "Significantly," the Court explained, "the reference to 'a determination' describes a single act rather than a group of decisions or a practice or procedure employed in making decisions." *Id.* at 492. The provision therefore barred only "direct review of individual denials of [Special Agricultural Worker] status," not

challenges to the "practices and policies used by the agency in processing applications." *Id.*; *see id.* at 494 (similar).

Again, the same should have been true here. The AIA's reference to "the determination … whether to institute an inter partes review," 35 U.S.C. § 314(d), "describes a single act" respecting an individual request to institute "an" inter partes review, *McNary*, 498 U.S. at 492. Like the specific wording of the provision in *McNary*, the specific wording of § 314(d) does not speak to challenges to the "practice or procedure employed in making" institution decisions. *Id.*

Other courts of appeals have followed this Court's precedent in construing similar provisions, in conflict with the decision below. In *American Clinical Laboratory Association* v. *Azar*, 931 F.3d 1195 (D.C. Cir. 2019), for example, the court considered whether it had jurisdiction to consider an APA challenge to a rule governing collection of data on certain private-market reimbursement rates, which HHS would use to inform the setting of Medicare reimbursement rates. *Id.* at 1198. The district court dismissed the complaint under a provision prohibiting judicial review of "the establishment of payment amounts." *Id.* at 1204 (quoting 42 U.S.C. § 1395m-1(h)(1)). The D.C. Circuit reversed, holding that the provision reached only challenges to specific payment amounts, not the "practices that precede and inform the setting of those amounts." *Id.* at 1205. "Even where … a statutory provision expressly prohibits judicial review," the presumption of reviewability "dictate[s] that such a provision be read narrowly." *Id.* at 1204; *see Lepre* v. *Department of Labor*, 275 F.3d 59, 64-65 (D.C. Cir. 2001) (provision precluded judicial review of determination of disability benefits, not challenge to procedures followed in making such determinations);

ParkView Med. Assocs., LP v. *Shalala*, 158 F.3d 146, 148 (D.C. Cir. 1998) ("Judicial review of the denial itself is barred. But this bar leaves hospitals free to challenge the general rules leading to denial." (citation omitted)); *Geisinger Cmty. Med. Ctr.* v. *Secretary U.S. Dep't of Health & Hum. Servs.*, 794 F.3d 383, 390 n.4 (3d Cir. 2015) (citing *ParkView*).

The Federal Circuit's decision stretching § 314(d) beyond its targeted language cannot be reconciled with these cases. The Court should grant certiorari to resolve these conflicts and bring the interpretation of § 314(d) into line with precedent applying the strong presumption favoring judicial review of agency action.

II. THE FEDERAL CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENT APPLYING § 314(d)

The Federal Circuit's holding that § 314(d) precludes "any challenge … where the invoked provisions of law directly govern institution," App. 70a, further conflicts with this Court's decision in *SAS* and misconstrues *Cuozzo* and *Thryv*.

SAS rejected a reading of § 314(d) that would bar review whenever institution-related statutes are invoked. There, the Court considered a challenge to a PTO regulation authorizing the practice of "partial institution"—*i.e.*, instituting IPR for only some patent claims challenged in a petition while denying review for the rest. 584 U.S. at 362; *see* 37 C.F.R. § 42.108(a) (2016). The government argued that the rule was unreviewable, contending that § 314(d) "foreclos[es] judicial review of any legal question bearing on the institution of inter partes review." *SAS*, 584 U.S. at 370.

This Court rejected that argument, holding that § 314(d) did not apply because the claim at issue did not

challenge a determination whether to institute IPR. *SAS*, 584 U.S. at 370-371. Invoking the presumption of reviewability and emphasizing that § 314(d) "does not 'enable the [PTO] to act outside its statutory limits,'" *id.* (quoting *Cuozzo*, 579 U.S. at 275), the Court made clear that where a party does not challenge a decision whether to "'institut[e] an inter partes review,'" judicial review "remains available consistent with the [APA]." *Id.* (quoting § 314(a), (d)).

SAS defeats the Federal Circuit's determination here that § 314(d) bars any suit focused on "institution standards." App. 70a. This Court's consideration of the validity of the PTO's partial-institution rule focused extensively on the interpretation and application of institution-related AIA provisions. *SAS*, 584 U.S. at 361-366 (discussing 35 U.S.C. §§ 311(a), 312(a)(3), 314(a), 314(b), 316(a)(8)). If the Federal Circuit's interpretation of § 314(d) were correct, *SAS* would have had to come out the other way, because the IPR petitioner's challenge "invoked provisions of law directly govern[ing] institution," App. 70a, and resolving that challenge required this Court to interpret and apply "statutory provision[s] … focused on institution," App. 72a.

The Federal Circuit's attempt to distinguish *SAS* fails. The court framed *SAS* as a dispute exclusively concerning the interpretation of 35 U.S.C. § 318, which "prescribes the scope of the final written decision," and having only a "collateral effect" on institution practices. App. 70a. But there was nothing "collateral" about *SAS* on institution decisions. The central issue before the Court was whether the PTO had the authority to "institute[] review on only some" claims "and den[y] review on the rest." *SAS*, 584 U.S. at 362. The Federal Circuit's purported distinction disregards this Court's extensive

reliance on institution-related provisions, *see id.* at 361-366, and conflicts with its own acknowledgement that this Court's interpretation of § 318 "had … the effect of requiring the Director's decision *whether to institute* a requested review to be essentially an all-or-nothing one," App. 70a (emphasis added).

The Federal Circuit derived its "unreviewability principle" from *Cuozzo* and *Thryv*, App. 71a-72a, but neither supports the Federal Circuit's analysis, and the Federal Circuit's overreading of those decisions underscores the need for this Court's review. *See Thryv*, 590 U.S. at 77-78 (Gorsuch, J., dissenting) (lamenting confusion over "the meaning of § 314(d)'s review bar"). In both *Cuozzo* and *Thryv*, the patentees appealed from final written decisions on the ground that IPR should not have been instituted in the first place, thus directly challenging "the determination[s] … whether to institute" the IPRs in those particular cases. The patentee in *Thryv* contended that the IPR petition should have been rejected as untimely, 590 U.S. at 49-52, while the patentee in *Cuozzo* contended that it was improper to institute IPR on patent claims not challenged in the petition, 579 U.S. at 269-271. The Court had no occasion in either case to consider whether § 314(d) would bar review of an agency rule establishing standards for institution decisions.

Cuozzo and *Thryv* thus provide no support for extending § 314(d) to bar review in cases not involving any challenge to an institution decision. To the contrary, *Cuozzo* reaffirmed the "strong presumption in favor of judicial review," emphasizing that it may be overcome only by "clear and convincing indications … that Congress intended to bar review." 579 U.S. at 273 (quotation marks omitted). Indeed, even where an appeal does

directly attack an institution determination, *Cuozzo* indicated that judicial review may remain available where the appeal challenges the PTO's decision as exceeding its statutory authority or as arbitrary and capricious—exceptions that are readily met in this case, *id.* at 274-275; *see Thryv*, 590 U.S. at 52-53. This Court's acknowledgment that § 314(d) might not bar all claims even where an appeal directly attacks an institution determination confirms that *Cuozzo* and *Thryv* counsel in favor of a narrow reading of § 314(d)—consistent with the presumption of reviewability—and do not support the Federal Circuit's transformation of that statute into a broad "unreviewability principle."[5]

III. THE FEDERAL CIRCUIT'S DECISION MISUNDERSTANDS THE DIRECTOR'S OBLIGATIONS UNDER § 314(a)

If more were needed, the Federal Circuit's expansion of § 314(d) rests on the assumed "discretion" conferred by § 314(a) on the Director to deny IPR petitions for any reason. App. 72a. Section 314(a) sets the required evidentiary threshold below which "[t]he Director may not authorize an inter partes review to be instituted." But the Federal Circuit read that threshold, which is expressed as a limitation on the Director's authority, as an affirmative grant of discretion, *see* App. 72a-73a, which the government has likened to prosecutorial discretion, C.A. Appellee Br. 30, *Apple Inc.* v. *Vidal*, No. 2022-1249 (Fed. Cir. May 4, 2023), Dkt. 41 (citing *Heckler* v. *Chaney*, 470 U.S. 821, 832 (1985)); App. 57a-81a. By assuming Congress granted the Director

[5] The Federal Circuit suggested that *United States* v. *Arthrex, Inc.*, 594 U.S. 1 (2021), "confirm[s] the principle of unreviewability" it derived from *Cuozzo* and *Thryv*. App. 71a. *Arthrex* considered a constitutional question under the Appointments Clause and said nothing about the scope of § 314(d). *See* 594 U.S. at 6.

unreviewable discretion to deny institution of IPR petitions for any reason, the Federal Circuit erroneously concluded that any rules built around exercising such discretion must likewise be insulated from judicial scrutiny. That analysis fundamentally misunderstands the AIA, and no agency has discretion to exceed the statutory limits Congress places on its power.

The AIA's text and structure make clear that the PTO's role in initiating IPR is adjudicatory, not prosecutorial. A prosecutorial system is one driven by executive initiative, where the agency itself investigates, selects targets, and determines the scope of the enforcement action. Congress knew exactly how to build such a system in patent law; it did so for ex parte reexamination, explicitly providing that the Director may, "[o]n his own initiative," determine whether a patent raises a substantial new question of patentability based on prior art "discovered by him." 35 U.S.C. § 303(a).

No such self-initiation power exists anywhere in the statutory framework for IPR. To the contrary, the IPR process is entirely reactive and adversarial, structured as an administrative alternative to district-court litigation. The process is driven by a third-party petition, and the private petitioner—not the Director—articulates the specific grounds asserted against the patent. The patentee is statutorily entitled to file a preliminary response under § 313. Under § 314, the Director's ultimate institution determination must be made based strictly on the record created by those private parties—namely, "the petition filed under section 311 and any response filed under section 313." The Director has no authority to independently scout for questionable patents or to initiate an IPR *sua sponte*. As this Court explained in *SAS*, IPR "mimics" civil litigation, and like a civil plaintiff, the petitioner "is master of its complaint." 584 U.S.

at 363; *see* 5 U.S.C. § 555(c) (limiting an agency's investigative power to that "authorized by law"). Prosecutorial discretion is simply not part of the IPR scheme. After all, "[a]dministrative agencies are creatures of statute," so they "possess only the authority that Congress has provided." *NFIB* v. *Department of Labor*, 595 U.S. 109, 117 (2022) (per curiam).

To be sure, this Court has noted that § 314(a) includes "no mandate to institute review" even if its baseline merits threshold is met. *Cuozzo*, 579 U.S. at 273. But that lack of a mandate is not a blank check to invent extra-statutory policy bars. Rather, the negative phrasing of § 314(a) is a structural necessity to accommodate other statutory bars and express grants of discretion. And courts can review agency action to determine whether the agency "has relied on factors which Congress has not intended it to consider." *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

For example, even when the "reasonable likelihood" standard of § 314(a) is met, § 315(b) prohibits institution if the petition was filed more than one year after the petitioner was served with an infringement complaint. Similarly, § 315(a)(1) bars institution if the petitioner previously filed a civil action challenging the patent's validity. And Congress explicitly extended specific, bounded areas of discretion elsewhere in the AIA: § 315(c) allows the Director "in his or her discretion" to join an otherwise time-barred petition to an ongoing IPR, and § 325(d) grants express authority to deny a petition if "the same or substantially the same prior art or arguments previously were presented to the" PTO. Whether the Director denies institution under § 314(a), § 315(b), § 315(a)(1), or § 325(d), the denial is

"nonappealable" per § 314(d) because each decision is closely tied to the application and interpretation of an institution-related statute. *See Thryv*, 590 U.S. at 53.

The negative phrasing in § 314(a) harmonizes those provisions, ensuring that a petition meeting the "reasonable likelihood" threshold can still be rejected if it violates the one-year window, duplicates previous arguments, or runs afoul of other explicit statutory limits. It does not grant the Director authority to bypass the AIA's fine-tuned boundaries by fabricating holistic, multi-factor policy tests like the *Fintiv* rule. And it certainly does not overcome the judiciary's obligation to "police the outer statutory boundaries" of the Director's ability to deny meritorious IPR petitions. *See Loper Bright Enters.* v. *Raimondo*, 603 U.S. 369, 404 (2024).

In bypassing this statutory structure, the Federal Circuit overread this Court's observations in *Cuozzo* and *Thryv*. Both *Cuozzo* and *Thryv* featured appeals by patentees challenging individual decisions granting institution after final written decisions. The scope of the Director's purported discretion to deny petitions based on extra-statutory, non-merits policy preferences was never briefed, argued, or at issue in those cases. The broad, passing remarks regarding a lack of a statutory "mandate to institute," *e.g.*, *Cuozzo*, 579 U.S. at 273, were akin to the "drive-by jurisdictional rulings" that this Court has repeatedly characterized as unexamined, non-binding dicta that should not be accorded weight, let alone expanded, *see Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 511 (2006). Yet that alleged authority has become the centerpiece of the Director's efforts to subvert the statutory IPR system established through the AIA.

The Federal Circuit's assumption that such broad authority flows from § 314(a) has created a perverse

analytical loop. The Federal Circuit reasoned that because the Director possesses absolute discretion to deny an individual petition under § 314(a), any systemic instructions to the Board regarding how to exercise that discretion must share the same unreviewable status under § 314(d). *See* App. 73a. In essence, the court insulated the *Fintiv* rule from judicial review precisely because it assumed the rule was an exercise of vast, unquestionable authority. This Court should grant certiorari to dismantle this circular logic that essentially insulates the PTO from the rule of law. *See Loper Bright*, 603 U.S. at 404.

IV. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT AND WARRANTS REVIEW IN THIS CASE

A. Review Is Needed To Ensure That The PTO Does Not Flout Statutory Limits And The APA's Requirement Of Reasoned Decisionmaking

The Federal Circuit's decision threatens to eliminate judicial review of PTO rules that rewrite IPR institution standards, leaving the PTO with unchecked ability to gut one of the AIA's central reforms. The Federal Circuit has already held that it lacks jurisdiction over all appeals from specific decisions denying institution—even where the appeal contends that the decision applied an unlawful or arbitrary rule—and that mandamus is available to review only constitutional challenges to such decisions. *Mylan*, 989 F.3d at 1382. Mandamus petitions bringing those constitutional challenges have been uniformly denied. *E.g.*, *Motorola*, 159 F.4th at 38. The decision below closes the last door to judicial review of the substance of institution standards, regardless of

whether the standards contravene the AIA or how arbitrary and capricious they are.

In this case, the Federal Circuit insulated from judicial review the *Fintiv* rule—a rule that constricted the availability of IPR contrary to Congress's intent and yielded absurd results. As explained, the AIA makes clear that Congress intended the advantages of IPR to be available when pending infringement litigation involves overlapping patents, so long as the IPR petition is filed within one year of the infringement complaint, and Congress enacted several AIA provisions specifying precisely whether and when IPR may proceed alongside district-court litigation. *Supra* pp. 7-8. The Director's authority to decide institution in particular cases does not constitute authority to override Congress's policy judgment or rewrite the AIA. But by foreclosing judicial oversight, the Federal Circuit has given the PTO free rein to do just that, unleashing a host of pernicious consequences.

Within a short time after the *Fintiv* rule's adoption, the PTO applied it to deny hundreds of IPR petitions, even where the petitioners had presented meritorious patent challenges. Many of those denials rested on erroneous speculation about when trial might occur in the parallel litigation. *Supra* pp. 9-10. One study found that 70 percent of infringement trials in the Western District of Texas and 100 percent of trials in the District of Delaware—two of the busiest patent-litigation venues—were postponed after corresponding IPR petitions had been denied based on original trial dates. McKeown, *District Court Trial Dates Tend to Slip After PTAB Discretionary Denials*, Wolf Greenfield (July 24, 2020). Another study found that predictions of trial dates were incorrect 95 percent of the time and that the discrepancies between the predicted trial dates and the actual trial

dates were often substantial. Dufresne et al., *How Reliable Are Trial Dates Relied on by the PTAB in the* Fintiv *Analysis*?, 1600 PTAB & Beyond (Oct. 29, 2021). In such cases, the rule often irremediably deprived the accused infringer of the expeditious patentability review that IPR was intended to provide, as the *Fintiv* case itself demonstrates. *Supra* pp. 9-10.

In response to the *Fintiv* rule, IPR petitioners have been compelled in many cases to stipulate that they will not pursue overlapping invalidity arguments in both the district-court litigation and the IPR, even though the AIA entitles them to make such arguments. *See* USPTO, *Patent Trial and Appeal Board Parallel Litigation Study* 7-8, 16, 27-29 (June 2022) ("*Parallel Litigation Study*"); Griffis, *Apple's 'Fintiv' Challenge Ups Pressure for Patent Review Rules*, Bloomberg News (Mar. 16, 2023). The PTO codified this practice by designating as precedential the decision in *Sotera Wireless, Inc.* v. *Masimo Corp.*, No. IPR2020-01019, Paper 12 at 18 (P.T.A.B. Dec. 1, 2020), which instituted review based on the petitioner's stipulation that it would not assert in district court any grounds "raised or [that] could have been reasonably raised in an IPR." Doing so effectively amended the AIA's estoppel provision, 35 U.S.C. § 315(e)(2), by moving the estoppel-triggering decision from the end of the proceeding to the beginning. Stipulations increased after *Sotera*. *Parallel Litigation Study* 28. The *Fintiv* rule and resulting pressure to stipulate away validity challenges irrationally promoted splintering of issues between district-court litigation and IPR as the price for the agency simply doing its job by instituting IPRs consistent with the AIA.

While in effect, the June 2022 "interim guidance" doubled down on the *Fintiv* rule, declaring that the Board should continue to deny institution of IPR based

on parallel district-court litigation unless the IPR petition presented "compelling evidence" that "would plainly lead to a conclusion" that the challenged claims were unpatentable or stipulated that the petitioner would forgo any defense in the district court that was raised or could have been raised in the IPR petition. *June 2022 Guidance* 2, 4, 7, 9. That thwarted Congress's intent that IPR should be available to review the validity of dubious patents asserted in patent-infringement litigation. Yet the Federal Circuit's decision leaves courts and parties powerless to bring the PTO's arbitrary and unlawful institution standards into compliance with the AIA.

Those consequences spread far beyond the *Fintiv* rule. The Federal Circuit's holding endangers the patent system more broadly by threatening to shield from review any PTO rule setting IPR institution standards, no matter how absurd or unlawful. Under the Federal Circuit's approach, the PTO could, for example, adopt a rule that institution decisions will be made by flipping a coin or that all petitions will simply be denied without individualized consideration—with no court able to review such a rule. *Cf. Judulang* v. *Holder*, 565 U.S. 42, 55 (2011) (if agency decided eligibility for discretionary immigration relief "by flipping a coin," this Court "would reverse the policy in an instant").

Indeed, shortly after the Federal Circuit's first decision in this case, the PTO issued an Advance Notice of Proposed Rulemaking (ANPRM), 88 Fed. Reg. 24,503 (Apr. 21, 2023), indicating that it was considering several additional institution standards that would violate the AIA, but which the decision below would shield from judicial review. *Supra* p. 11. Several of those proposed standards, like the *Fintiv* rule, would have imposed a policy in favor of denying institution of IPR when

overlapping district-court litigation is pending. One such proposal would have effectively rewritten 35 U.S.C. § 315(b) by imposing a bright-line rule that a petition must be filed within six months after service of an infringement complaint. 88 Fed. Reg. at 24,515. The PTO considered that proposal even though Congress explicitly considered a six-month window and rejected it in favor of the one-year window based on its conclusion that six months was insufficient. *See* 157 Cong. Rec. 3375 (2011) (statement of Sen. Sessions); 157 Cong. Rec. 13187 (2011) (statement of Sen. Kyl); *see* S. 23, 112th Cong. § 5(a) (2011) (engrossed bill § 315(b) setting six-month limit). The PTO has no authority to substitute its judgment for Congress's, yet the decision below risks allowing the agency to do so with impunity.

Although the PTO abandoned the 2023 ANPRM in the wake of overwhelmingly negative public comments, the agency has not abandoned its project of continually changing institution standards. The effect has been to eviscerate the IPR process set forth by the AIA. The PTO is now considering a bright-line rule compelling denial of institution where trial is "more likely than not" to occur before the statutory deadline for a final written decision in the IPR. 90 Fed. Reg. at 48,341. Such a rule would conflict with and override the AIA, which allows IPR to occur alongside parallel district-court litigation so long as the petition is timely, and would codify all the absurdities of the *Fintiv* rule given the unpredictability of trial dates.

The PTO has not stopped there. To be sure, the Board is not currently applying the *Fintiv* factors because the Director has taken over institution decisions and is now issuing only summary notices that are devoid of reasoning. *Supra* p. 11. Yet the Director has not explained how his process is consistent with the regulation

delegating institution decisions to the Board. 37 C.F.R. § 42.4(a). And the *Fintiv* rule remains binding for any future institution decisions made pursuant to that regulation or under any other institution processes the PTO might devise.[6] In the meantime, the Director has made sudden announcements about institution standards without warning, such as by focusing on ties to American manufacturing. The result has been chaos. Review and reversal of the decision below is necessary to ensure a meaningful check on the Director's modifications to IPR institution standards.

B. Review Is Needed To Prevent Erosion Of The Presumption Of Reviewability

The Federal Circuit's decision has grave potential impact beyond the patent system. "[J]udicial review of administrative action is a 'necessary condition' for the political legitimacy of the modern administrative state." Fallon, *Jurisdiction-Stripping Reconsidered*, 96 Va. L. Rev. 1043, 1116 (2010) (quoting Jaffe, *Judicial Control of Administrative Action* 320 (1965)). The presumption of reviewability has long played a crucial role in ensuring that executive agencies "obey [their] statutory commands." *Bowen*, 476 U.S. at 681; *see id.* at 670 (tracing history of presumption of reviewability). Although Congress can override that presumption, this Court has insisted that judicial review "will not be cut off unless there is persuasive reason to believe such was the purpose of Congress," *Abbott*, 387 U.S. at 140, and that jurisdiction-stripping provisions should be construed narrowly, *e.g.*, *Lindahl*, 470 U.S. at 779-780.

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[6] *See* USPTO, *Precedential and Informative Decisions* (visited July 13, 2026).

The decision below erodes that presumption, setting a precedent that could extend to numerous regulatory contexts. Questions concerning the proper interpretation of judicial-review bars arise under a wide range of statutes, as *Bowen*, *Regents*, and similar cases illustrate. *Supra* Section I. For instance, some statutes grant agencies unreviewable discretion over decisions whether to investigate an employer's labor practices, 8 U.S.C. § 1182(n)(2)(G)(vii), or potential antitrust violations, 15 U.S.C. § 4305(f). Other provisions nearly identical to § 314(d) bar review of determinations by the PTO Director whether to institute other types of proceedings, such as derivations, 35 U.S.C. § 135, or post-grant reviews, *id.* § 324, which could be directly controlled by the Federal Circuit's decision below. Like § 314(d), each of these provisions precludes review of a particular determination in a specific case—not of the "method" or "instructions" governing how such determinations are made. *Bowen*, 476 U.S. at 675-676, 678. It is implausible to conclude that by shielding those decisions from review in individual cases, Congress intended to place the entire administration of important agency programs beyond judicial scrutiny. This Court's intervention is needed to ensure that lower courts do not extend such bars beyond their text, as the Federal Circuit did here, enabling agencies to wield expansive authority arbitrarily or in a manner contrary to law.

C. Review Is Warranted Without Delay

Although the prospect of a rulemaking addressing the *Fintiv* rule and other institution standards could in some circumstances counsel against review, the opposite is true in this case.

It has been nearly six years since the PTO first asserted its intention to undertake a rulemaking.

See 85 Fed. Reg. 66,502 (Oct. 20, 2020) (soliciting comments on institution standards). The number of starts and stops by the agency within that time is telling. Even now that the PTO has issued a notice of proposed rulemaking, there is no assurance that any final rule is imminent. The proposed rule received over 11,000 comments, and even if the agency does not ultimately change its mind, it still needs to respond. In the meantime, the PTO continues to adopt and apply rules restricting access to IPR, like the *Fintiv* rule, by issuing precedential decisions—evading both the check of public notice and comment and the check of judicial review. *E.g.*, *Magnolia Med. Techs., Inc.* v. *Kurin, Inc.*, 2026 WL 1348926 (P.T.A.B. May 14, 2026).

Moreover, as explained, the substance of the most recently proposed rule confirms the need to make clear to the PTO that, if and when it adopts additional rules governing IPR institution, those rules will be subject to judicial review to ensure their compliance with the AIA and APA. If allowed to stand, the decision below could embolden the agency to pursue additional unlawful and arbitrary institution standards, as the agency has already done.

The question presented is not about the substance of the *Fintiv* rule or any other proposed institution standard. The issue is whether those standards are subject to judicial review. That question cannot be the subject of any rulemaking, and it would remain exceptionally important even if the PTO withdrew the *Fintiv* rule altogether. Because this case presents an ideal vehicle to review the Federal Circuit's interpretation of § 314, there is no reason to postpone review.

Finally, the Court's denial of an interlocutory petition for certiorari in this case a few years ago does not

counsel against certiorari now. *See Intel Corp.* v. *Vidal*, 144 S. Ct. 548 (2024) (mem.). The prior petition was filed when the Federal Circuit had revived and remanded petitioners' notice-and-comment claim. App. 74a-76a. Now, however, the Federal Circuit's judgment is final, and this petition is petitioners' only prospect for relief. And to the extent this Court might have wanted to wait and see whether the issues here would sort themselves out, subsequent developments over the past few years have shown that the PTO has been only further emboldened to push institution standards beyond the bounds Congress set in the AIA. Review is even more urgent today.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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