

No. 23-315

IN THE
Supreme Court of the United States

VIRNETX INC. AND LEIDOS, INC.,
Petitioners,

v.

MANGROVE PARTNERS MASTER FUND, LTD.; APPLE
INC.; BLACK SWAMP IP, LLC; AND KATHERINE K.
VIDAL, UNDER SECRETARY OF COMMERCE FOR THE
UNITED STATES PATENT AND TRADEMARK OFFICE,
Respondents.

**On Petition For Writ Of Certiorari To The
United States Court Of Appeals
For The Federal Circuit**

**BRIEF FOR THE BIOTECHNOLOGY
INNOVATION ORGANIZATION AS *AMICUS
CURIAE* IN SUPPORT OF PETITIONER**

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**BRIEF FOR THE BIOTECHNOLOGY
INNOVATION ORGANIZATION AS *AMICUS
CURIAE* IN SUPPORT OF PETITIONER**

INTEREST OF *AMICUS CURIAE*¹

The Biotechnology Innovation Organization (“BIO”) is the world’s largest biotechnology trade organization, representing over 1,000 members including companies, academic institutions, and other related organizations both domestically and abroad. BIO’s members invest billions in research and development in diverse fields, such as agriculture, pharmaceuticals, and manufacturing. Through this investment, BIO’s members are able to create products that reduce pollution, increase crop yields, and cure once thought to be incurable diseases.

Of BIO’s corporate members, approximately 90% are small to mid-size businesses with revenues under \$25 million. For many of these companies, patents are their most valuable assets, and they earned their patents through costly, risky and time-consuming research and development. The development of medicines that rely on biotechnology generally takes over a decade and costs approximately \$2 billion. Indeed, many once-promising drug candidates fail, leaving companies to incur large losses.

Because the investment is so costly, BIO’s members rely on a strong, predictable, and fair patent

¹ No counsel for a party authored this brief, in whole or in part, and no counsel for a party or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae* or its counsel made a monetary contribution to this brief’s preparation or submission.

system to ensure investment in research and development. This means a system that protects inventors against repetitive and abusive challenges to their patents. BIO's members who work in pharmaceuticals also have a particular interest in joinder in front of the Patent Trial and Appeal Board ("PTAB"). Challenges involving patents protecting medicines that have received approval from the Food and Drug Administration are far more likely to be joined by other parties—joinder was granted in 17% of reviews concerning approved medicines as compared to 4% of reviews of all other technologies. David P. Rushke, et al., Chat with the Chief, *New PTAB Studies in AIA Proceedings: Expanded Panels and Trial Outcomes for Orange Book-listed Patents*, slide 49, USPTO (Mar. 13, 2018) <https://perma.cc/W4CH-N4J2>.

BIO has a strong interest in enforcing the plain language of the America Invents Act ("AIA"), preventing time-barred parties from engaging patent holders in virtually endless litigation. Therefore, BIO urges this court to grant VirnetX Inc., and Leidon, Inc.'s petition for a writ of certiorari as to the first question presented.²

SUMMARY OF ARGUMENT

"If at first you don't succeed, try, try again,"³ may be good advice, but it should not be a viable litigation strategy. The PTAB and Federal Circuit's interpretation of 35 U.S.C. § 315(c) has made it just

² BIO takes no position on the second question presented, nor does BIO take a position on the ultimate validity or infringement of the patents at issue in this litigation.

³ Thomas H. Palmer, *Teacher's Manual* 223 (1840).

that. If an infringer fails once (or if a patent challenger completely sleeps on its rights) it can join, or even takeover, an existing inter partes review, regardless of whether it would have been barred from bringing its own challenge. Unsurprisingly, this interpretation of the AIA has warped inter partes review into a vehicle for unending litigation.

Inter partes review is meant to provide an efficient way to determine a patent's validity. To prevent serial challenges and wasteful overlap with Article III litigation, the AIA limits how parties can seek review. Two such limits are relevant here: (1) a petitioner may not petition for inter partes review later than one year after being served with a complaint for infringement; and (2) to join an existing inter partes review, a third party must "properly file[]" a petition. 35 U.S.C. § 315(b), (c). A party who files a petition more than a year after being served with a complaint would not have "properly file[d]" its petition, and as a result, could not join an ongoing inter partes review.

But the United States Court of Appeals for the Federal Circuit and the PTAB have not applied this common-sense limitation that is dictated by the AIA's plain text. And that practice is bolstered by incorrect dicta from this Court in *Thryv, Inc. v. Click-to-Call Technologies, LP.*, 140 S. Ct. 1367, 1374–75 (2020). The result has been predictable. Parties use joinder as a method to collaterally attack judgments of Article III courts. And third-party opportunists, with no skin in the game, use the threat of untimely parties moving for joinder to extort patent holders for quick cash and offer their assistance to time-barred patent infringers anxious for another bite at the apple. The end result is that inter partes review, which was meant to be an

efficient alternative to Article III litigation, can now lead a patent holder to litigate its rights under a patent for the majority of the patent's term.

Supreme Court review is needed to enforce the plain text and clear purpose of the AIA. Until this Court intervenes, patent holders will continue to be subject to serial and abusive patent challenges, discouraging investment and dampening American innovation.

ARGUMENT

The plain text of the AIA prevents time-barred parties from joining an inter partes review initiated by another party. But the PTAB and the Federal Circuit are unlikely to change their position that such joinder is permitted because they may believe themselves bound by this Court's dicta in *Thryv*, making the Court's review of joinder all the more necessary. Indeed, as the examples provided *infra* demonstrate, allowing untimely parties to join undermines the AIA's purposes and encourages shakedowns and abuses that Congress did not intend.

I. By Its Plain Text, The AIA Does Not Allow Time-Barred Parties to Join in Properly Instituted Inter Partes Review

1. The AIA is clear: A party that would be barred from bringing its own challenge cannot join an ongoing inter partes review. Section 315(c) governs joinder in front of the PTAB. It unambiguously provides that the Director may join a party to an already existing inter partes review only if that party "properly file[d]" a petition for review:

If the Director institutes an inter partes review, the Director * * * may join as a party to that

inter partes review any person who properly files a petition under section 311 that the Director * * * determines warrants the institution of an inter partes review under section 314.

35 U.S.C. § 315(c). This Court has been clear; a document is “properly filed” when “its delivery and acceptance are in compliance with the applicable laws and rules governing filings.” *Artuz v. Bennett*, 531 U.S. 4, 8 (2000). That includes, “the time limits upon its delivery.” *Id.*; see also *Pace v. DiGuglielmo*, 544 U.S. 408, 413 (2005) (observing that “[i]n common understanding, a petition filed after a time limit, and which does not fit within any exceptions to that limit” is not properly filed).⁴

The statute is similarly unambiguous as to the proper time to file a petition for inter partes review. A party who has been served with a complaint has one year in which to file a petition: “An inter partes review may not be instituted if the petition requesting the proceeding 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).

A petition filed more than a year after being served would be untimely, and therefore, the petition would not be “properly file[d]” under § 315(c). As a result, the party who filed an untimely petition could not be joined to an already instituted inter partes review.

⁴ And if there was any doubt that Congress intended to rely on the well-established common usage of “properly filed” that doubt is vitiated by the legislative history. 154 Cong. Rec. S9988 (daily ed., Sept. 27, 2008) (statement of Senator Kyl) (referring to *Artuz* and *Pace* by name).

That makes sense: After all, the AIA's purpose "is to minimize burdensome overlap between inter partes review and patent-infringement litigation." *Thryv*, 140 S. Ct. at 1374-75. And Congress recognized "the importance of quiet title to patent owners." H.R. Rep. No. 112-98, at 48 (2011). Allowing parties to join cases more than a year after they were served with a complaint (and the district court case has progressed), creates the "burdensome overlap" the AIA sought to avoid. It, as the examples given *infra* will show, instead duplicates efforts, giving petitioners a second (and sometimes a third or fourth) bite at the apple.

Proponents of the exception to § 315(b)'s time bar rest their argument on a misreading of the second sentence of § 315(b). After stating that a "*petition* requesting the proceeding" is untimely if filed by a petitioner more than a year after that petitioner is served with a complaint, the statute clarifies that "[t]he time limitation set forth in the preceding sentence shall not apply to a *request for joinder* under subsection (c)." 35 U.S.C. § 315(b) (emphasis added). The PTAB has taken this sentence to mean that if an out-of-time petition is filed contemporaneously with a request for joinder, that petition suddenly becomes "properly file[d]" under § 315(c).

That is incorrect. That sentence is referring to a "request for joinder," a motion that is distinct from a petition. See 37 C.F.R. § 42.122 (stating a request for joinder "must be filed, as a motion."); 37 C.F.R. § 42.22 (noting requirements of each "petition *or* motion") (emphasis added). Indeed, the fact that Congress did not use the word "petition," despite using it in the *previous sentence* demonstrates that the second sentence refers to something other than a petition.

See *Russello v. United States*, 464 U.S. 16, 23 (1983). The alternative reading ignores this key distinction, and undermines Congressional intent. Cf. *Gallardo v. Marsteller*, 596 U.S. 420, 431 (2022) (“[W]e must give effect to, not nullify, Congress’ choice to include limiting language in some provisions but not others[.]”).

Moreover, if Congress wanted to allow untimely petitions to serve as a sufficient predicate for a motion for joinder it could have easily done so. It could have removed the requirement that an interested party must have a “properly file[d]” petition before making a request for joinder. In fact, it could have just removed the word “properly.” But Congress did not do that, and a reading that ignores “properly” “runs afoul of the ‘cardinal principle’ of interpretation that courts ‘must give effect, if possible, to every clause and word of a statute.’” *Loughrin v. United States*, 573 U.S. 351, 358 (2014) (quoting *Williams v. Taylor*, 529 U.S. 362, 404 (2000)). Instead, Congress made the timely filing of a petition a precondition to joinder.

And, Congress made the timely filing of a petition a necessary precondition for good reason. This Court has long recognized that statutes of limitations are “fundamental to a well-ordered judicial system,” *Artis v. District of Columbia*, 583 U.S. 71, 91 (2018) (quotation marks omitted), and “generally serve[] the interests of all concerned,” *United States v. Briggs*, 141 S. Ct. 467, 471 (2020). The prospect of allowing untimely parties to join deprives patent holders “of their interest in repose. At some point [parties] should have notice of who their adversaries are.” *Leachman v. Beech Aircraft Corp.*, 694 F.2d 1301, 1309 (D.C. Cir. 1982). The plain text of § 315(c) sets forth a limitation

which provides patent holders with a limited interest in repose. By ignoring that plain text, the Federal Circuit and the PTAB have made inter partes review a merry-go-round where unsuccessful parties, aided by uninterested opportunists, can go around again until they get a favorable result.

2. The Court’s decision in *Thryv* does not govern the outcome here. Although the Court stated in *Thryv* that “the § 315(b)-barred party can join a proceeding initiated by another petitioner,” 140 S.Ct. at 1374, that statement was undoubtedly dicta as it was not necessary to *Thryv*’s holding—that courts cannot review the Director’s decision to institute an inter partes review even if the petition was untimely. See *id.* The Court is not bound by its own dicta, especially when, as here, “more complete argument demonstrate[s] that the dicta is not correct.” *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 548 (2013).

But incorrect dictum poses a danger because while it is not binding, lower courts often “unabashedly defer to Supreme Court dicta.” Randy J. Kozel, *The Scope of Precedent*, 113 Mich. L. Rev. 179, 182 (2014); see also *Am. Civil Liberties Union of Ky. v. McCreary Cnty.*, 607 F.3d 439, 447 (6th Cir. 2010) (“Lower courts are ‘obligated to follow Supreme Court dicta, particularly where there is not substantial reason for disregarding it, such as age or subsequent statements undermining its rationale.’” (quoting *United States v. Marlow*, 278 F.3d 581, 588, n.7 (6th Cir. 2002))). And, indeed, the Federal Circuit has relied on that dicta in a pivotal case allowing joinder from a party who filed an “otherwise * * * time-barred” petition. *Facebook, Inc. v. Windy City Innovations, LLC*, 973 F.3d 1321, 1328, 1334 (Fed. Cir. 2020).

Thryv did not hold that otherwise time barred parties could join existing inter partes review. And its reasoning is consistent with the position that time-barred petitioners cannot join a properly instituted inter partes review. First, *Thryv*'s holding, that the plain text of § 314(d) prevented judicial review of the Director's decision to institute review of a time-barred petition, is not applicable here. The decision of the Director to join a party to a proceeding is not a determination of whether "to institute an inter partes review," 35 U.S.C. § 314(d), meaning that Congress did not insulate it from judicial review. Second, *Thryv* reasoned that *post hoc* judicial review of § 315(b)'s time bar would undermine the ability of the PTAB to "weed out bad patent claims efficiently." 140 S. Ct. at 1374. But joinder, unlike instituting a review, is not necessary to weed out bad claims; a timely petitioner can proceed on the merits. Preventing untimely joinder would simply avoid costly overlapping litigation without interfering with the PTAB's work.

Moreover, although Congress may have "prioritized patentability," 140 S. Ct. at 1374, over some procedural safeguards, "no legislation pursues its purposes at all costs," *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam). The plain text of the AIA limits untimely joinder and does not prevent courts from reviewing that decision. Congress while recognizing the importance of weeding out bad patents, also recognized the need for patent holders' rights to eventually settle, the need to prevent wasteful overlap with already existing litigations, and the need to prevent serial abuse of the patent system. H.R. Rep. No. 112-98 (2011), at 48. Those goals are furthered by enforcing the plain text of § 315(c),

without any commensurate loss in the ability to challenge bad patents.

* * *

Defending a patent is not meant to be a Sisyphean task. Supreme Court review is needed to protect the rights of patent holders.

II. Allowing Untimely Parties to Join Existing Inter Partes Review Encourages Abusive and Wasteful Litigation

There are also numerous examples of how allowing joinder of otherwise time-barred parties has led to abuse and waste in the patent system. Indeed, *this* case is a prime example of extended litigation where even though Apple was sued for infringement in 2010, litigation is still ongoing thirteen years later. Apple was able to join a proceeding initiated by another party even after Apple's own inter partes review petition was not instituted, and the petition filed with the motion for joinder was time-barred by virtue of a district court case where Apple lost. Apple has gotten the benefit of multiple hearings, full trials, and several appeals. Pet. 8–10. But this is far from an isolated incident. In fact, there are many examples which illustrate how the misinterpretation of § 315(b) has undermined the purposes of the AIA.

1. A notable example is the Director's recent decision to sanction OpenSky and Patent Quality Assurance ("PQA"). The genesis of the case is that Intel, in a widely reported verdict, was ordered to pay about \$2.2 billion. See, e.g., *Intel Corp. will pay \$2.18 billion after losing a patent-infringement trial*, Wash. Post (Mar. 2, 2021); Susan Decker & Mathew Bultman, *Intel Told to Pay \$2.18 Billion After Losing*

Patent Trial, Bloomberg (Mar. 2, 2021). After the verdict, two companies seemingly sprang out of nowhere to file a “copycat” petition, a petition stitched together from parts of Intel’s *previously denied* petitions.⁵ See *OpenSky Indus., LLC v. VLSI Tech. LLC*, IPR2021-01064, Paper No. 102, at 9 (P.T.A.B. Oct. 4, 2022) (“*OpenSky Order*”); *Patent Quality Assurance, LLC v. VLSI Tech. LLC*, IPR2021-01229, Paper No. 102, at 53 (P.T.A.B. Dec. 22, 2022) (“*PQA Order*”).

The two parties then attempted to “extract payment from VLSI,” the patent owner. See *OpenSky Order* at 3; *PQA Order* at 4. For good measure, OpenSky attempted to extract money from Intel, an infringer on the hook for \$2.18 billion, as well, seeking payment “in return for success in the [inter partes review].” *OpenSky Order* at 30. And when that gambit failed, OpenSky sought to settle with VLSI, offering to oppose PQA’s and Intel’s requests for joinder. *Id.* at 31. As the Director explained, OpenSky specifically observed, “there is substantial value to VLSI in settling with OpenSky *before the Board takes up either Intel’s or PQA’s joinder petitions.*” *Id.* at 32 (cleaned up) (emphasis added). Even after Intel joined, OpenSky offered to give Intel the lead role in the review, but of course, only if Intel made a payout to OpenSky to do so. *Id.* at 33.⁶

After the Director found that OpenSky and PQA abused the inter partes review process they were sanctioned. The Director rightly concluded that this

⁵ A practice that is both not discouraged and fairly common in inter partes review proceedings. *OpenSky Order* at 42.

⁶ The exact terms that PQA offered to VLSI is unclear because the order is redacted to protect settlement confidentiality.

was an abuse of inter partes review. *PQA* Order at 51; *OpenSky* Order at 51. Intel, however, benefited from this abusive process. Intel was allowed to proceed, despite the fact that it had already unsuccessfully petitioned for review once before *and* the petition filed by Intel was undoubtedly untimely. *PQA* Order at 58; *OpenSky* Order at 51. The PTAB essentially became a vehicle through which Intel could attack a \$2.18 billion verdict.

The Director's public sanctions, while necessary, are not sufficient to prevent abuse from parties like OpenSky and PQA. This misconduct was only brought to the attention of the Director because the PTAB granted discovery, which, by design, is limited in inter partes review. See 37 C.F.R. § 42.51; *Wi-Fi One, LLC v. Broadcom Corp.*, 887 F.3d 1329, 1339 (Fed. Cir. 2018). As such, there will be plenty of instances where such misconduct will not be detected. In fact, this same strategy, based on the experience of BIO's members, is not unique to OpenSky and PQA. Other parties have learned to threaten challenging valuable patents protecting medicines, and specifically, to threaten patent owners with a challenge that would open the door to otherwise time-barred and interested parties.

The correct outcome in this circumstance—and indeed the one that is Congressionally intended—would have been not to allow a party who files an untimely petition to join inter partes review. Truly disinterested parties would not bear the costs to litigate challenges alone, and unscrupulous ones could not extort payment by threatening patent owners with an onslaught of joinder requests from parties who would otherwise be untimely. This abuse of inter

partes review is only possible because of the PTAB's and Federal Circuit's misinterpretation of § 315(b). It sorely needs this Court's correction.

2. Besides just providing an opportunity to extort patent owners, allowing parties who have not timely filed a petition to join inter partes review allows for an otherwise time-barred party to sub-in for a proper party. In *Netflix, Inc. v. Convergent Media Solutions, LLC*, IPR2016-01814, Paper No. 14 (P.T.A.B. May 10, 2017), AT&T moved to join the proceedings, even though its joinder was untimely. *AT&T Servs., Inc. v. Convergent Media Sols., LLC*, IPR2017-01237, Paper No. 9 (P.T.A.B. May 3, 2017). But before the Board ruled on the motion, Netflix and Convergent settled and requested the PTAB to enter a joint termination. *Id.* at 8. The PTAB however continued undeterred, and it simultaneously substituted AT&T into the case when granting Netflix and Convergent's joint-motion for dismissal. *AT&T Servs., Inc.*, Paper Nos. 11 (May 10, 2017), 12 (P.T.A.B. May 11, 2017).

The result here is nonsensical. Allowing the time-barred party to carry on litigation that was effectively over nullifies the AIA's time bar. Besides just dragging on the review and allowing parties who sleep on their rights to plow forth, this substitution practice discourages settlement. Patent holders may see little benefit to ending litigation if even after settling, another party, who could not have filed a petition in the first place, can just jump in and take it over. Untimely joinder frustrates a strong patent system and the needed quiet title of patent rights.

3. Finally, allowing otherwise time-barred parties to join a case can drag out costly litigation. This is demonstrated by *Mylan Pharmaceuticals Inc. v.*

Research Corp. Technologies, Inc., 914 F.3d 1366, 1373 (Fed. Cir. 2019). In *Mylan*, the timely petition for inter partes review was filed by Argentum Pharmaceuticals LLC. Argentum had no regulatory filing or generic product that could have infringed on Research Corporation Technologies' patent at issue. Nor was an infringement suit filed against Argentum. Indeed, it was uncontested at the Federal Circuit that Argentum lacked standing. See *id.* at 1373.

Generic manufacturers Mylan, Breckenridge Pharmaceutical, Inc., and Alembic Pharmaceuticals Ltd., now benefiting from having the door opened by Argentum, filed petitions and motions for joinder. These parties, unlike Argentum, all had abbreviated new drug applications on file with FDA and were each seeking approval of generic versions of the innovator product. Their petitions were undoubtedly untimely—they had been sued for infringement in 2013. Appellee Research Corporation Techs. Motion to Dismiss at 4-5, *Mylan Pharms. Inc. v. Rsch. Corp. Techs., Inc.*, No. 2017-2088 (Fed. Cir. Aug. 3, 2017). Breckenridge, meanwhile, had previously timely filed a petition in the PTAB which was denied. *Id.* at 6. Their motion for joinder, however, was granted, and the PTAB reasoned that granting the motion was appropriate because they had agreed to take a role as an “understudy.” *Mylan Pharms. Inc. v. Rsch. Corp. Techs., Inc.*, IPR2016-01101, Paper No. 11, at 7-8 (P.T.A.B. Oct. 24, 2016).

Their challenge was ultimately unsuccessful, and Mylan, Breckenridge, and Alembic appealed, even though the only timely party, Argentum, could not appeal due to its lack of standing. The Federal Circuit held that Mylan, Breckenridge, and Alembic could

appeal even when the proper party—the one that initiated the proceeding in the first place—lacked Article III standing. *Mylan*, 914 F.3d at 1373. Nor was the Federal Circuit fazed that Mylan, Breckenridge and Alembic were *also* pursuing an appeal of the original infringement case in the same court at the same time because the district court case had reached judgment with each of these parties having lost in court. Appellee Research Corporation Techs. Motion to Dismiss at 4-5, *Mylan Pharms. Inc.*, No. 2017-2088 (Fed. Cir. Aug. 3, 2017).

Yet, cases like *Mylan* demonstrate how allowing untimely filers to join undercuts the purpose of the AIA. They exemplify the duplicative and wasteful challenges that create uncertainty for important drug patents due to the Federal Circuit’s misreading of § 315(b). Far from “minimiz[ing] burdensome overlap between inter partes review and patent-infringement litigation,” the Federal Circuit allowed otherwise time-barred parties into federal court, providing parties a collateral attack on court judgments. *Thryv*, 140 S.Ct. at 1374-75. Such a ruling defies common sense, and opens life-sciences innovators to even more costly and time-consuming litigation.

* * *

These examples are only a few where allowing an untimely joinder undermined the goals of the AIA, and there are many more examples of untimely joinder being used to elude the time-bar in § 315(b). See, e.g., *Palo Alto Networks, Inc. v. Centripetal Networks, Inc.*, IPR2022-00182, Paper No. 39 (P.T.A.B. Jan. 4, 2023) (allowing untimely parties to join); *ZTE Corp. v. Cellular Commc’ns Equip.*, IPR2017-01079, Paper No. 10 (P.T.A.B. Oct. 4, 2017)

(same); *Aurobindo Pharma USA, Inc. v. AstraZeneca AB*, IPR2016-01117, Paper No. 12 (P.T.A.B. Oct. 21, 2016) (same); *Qualcomm Inc. v. Bandspeed, Inc.*, IPR2015-00314, Paper No. 21 (P.T.A.B. Nov. 16, 2015) (same); *Zhongshan Broad Ocean Motor Co., Ltd. v. Nidec Motor Corp.*, IPR2015-00762, Paper No. 16 (P.T.A.B. Oct. 5, 2015) (same). Indeed, these joinders can involve numerous parties that would have been barred if they themselves filed the petition. *Mylan Pharmaceuticals Inc., v. Janssen Oncology, Inc.*, IPR2016-01332, Paper No. 21 (P.T.A.B. Jan. 10, 2017) provides one such example. Mylan timely filed a petition for inter partes review of a patent held by Janssen protecting a blockbuster drug. Yet, after Mylan filed one timely petition, *ten* additional generic manufacturers (who already failed to file a timely petition and were far along in district court litigation) moved for joinder. *Actavis Laboratories FL, Inc. v. Janssen Oncology, Inc.*, IPR2017-00853, Paper No. 19 (P.T.A.B. Apr. 12, 2017). The motion for joinder was granted. *Id.* This piling on through belated joinder to another party's proceeding also deters patent holders from pursuing meritorious claims as joinder of numerous parties "places inordinate or hydraulic pressure * * * to settle." *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 164 (3d Cir. 2001) (discussing class certification).

The continuation of this practice means that patent holders, after engaging in expensive research and development, must continually defend against serial litigation. That undermines the incentive to engage in the costly development needed to pursue groundbreaking innovation. But the AIA, as demonstrated by its clear text, was never intended to burden innovator companies and dampen innovation.

Supreme Court review is needed to further the goals of the AIA and protect innovation.

CONCLUSION

The petition for the writ of certiorari should be granted as to the first question presented.

Respectfully submitted.

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