

No. 18-1285

IN THE
Supreme Court of the United States

GILBERT P. HYATT AND AMERICAN ASSOCIATION
FOR EQUITABLE TREATMENT, INC.,

Petitioners,

v.

ANDREI IANCU, IN HIS OFFICIAL CAPACITY AS
DIRECTOR OF THE U.S. PATENT AND
TRADEMARK OFFICE,

Respondents.

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

**BRIEF FOR U.S. INVENTOR, SMALL
BUSINESS TECHNOLOGY COUNCIL,
ORBITAL RESEARCH INC. AND
CLEVELAND MEDICAL DEVICES INC.
AS *AMICI CURIAE* IN SUPPORT
OF PETITIONER**

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QUESTIONS PRESENTED

Section 134 of the Patent Act (35 U.S.C. § 134) provides that an “applicant for a patent, any of whose claims has been twice rejected, may appeal from the decision of the primary examiner to the Patent Trial and Appeal Board.” 35 U.S.C. § 6 provides, in turn, that the “Appeal Board shall...on written appeal of an applicant, review adverse decisions of examiners upon applications for patents pursuant to section 134.” Interpreting those provisions’ predecessors, *U.S. ex rel. Steinmetz v. Allen* held that *mandamus* was the appropriate remedy when the U.S. Patent and Trademark Office refused to allow an appeal to proceed to the Appeal Board’s predecessor. 192 U.S. 543 (1904). The Patent Office’s implementing regulation, 37 C.F.R. § 41.39(b), provides that once an applicant files a written appeal and pays the required fee, the applicant maintains control over whether the appeal reaches the Board for decision. Contrariwise, the Patent Office’s Manual of Patent Examining Procedure (“MPEP”) § 1207.04 authorizes patent examiners to block an applicant’s appeal from ever reaching the Appeal Board by reopening patent prosecution to enter additional rejections.

Accordingly, the question presented is:

Whether MPEP § 1207.04 violates patent applicants’ statutory right of appeal following a second rejection.

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INTEREST OF THE *AMICUS CURIAE*¹

U.S. Inventor provides education for independent inventors, small and medium-sized businesses, and colleges and universities.

The **Small Business Technology Council** is a council of the National Small Business Association (NSBA), and advocates for 6,000 highly inventive firms that participate in the Small Business Innovation Research and Small Business Technology Transfer programs. These firms produce more patents than all the American universities combined.

Orbital Research Inc. is a custom engineering company, and **Cleveland Medical Devices Inc.** is a medical technology company. Together, they have some 90 patents and applications, a number of which have been materially affected and delayed through the operation of MPEP § 1207.04, when an examiner withdraws an appeal from its path to the Board.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court should grant *certiorari* to review a matter of exceptional importance. When a patent applicant

1. Pursuant to Rule 37.6, counsel for the *amicus curiae* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than the *amicus curiae* or its counsel made a monetary contribution intended to fund the brief's preparation or submission. All parties received timely notice of the *amicus curiae*'s intention to file this brief pursuant to Rule 37.2(a), and all have consented to its filing.

reaches impasse with an examiner, three statutes come into play:

- 35 U.S.C. § 134, “An applicant for a patent, any of whose claims has been twice rejected [by an examiner], *may appeal* from the decision of the primary examiner to the Patent Trial and Appeal Board”
- 35 U.S.C. § 6(b)(1), “The Patent Trial and Appeal Board *shall* ... on written appeal of an applicant, *review* adverse decisions of examiners” and
- 35 U.S.C. § 6(c), “Each appeal ... *shall be heard* by at least 3 members of the Patent Trial and Appeal Board”

The statute states two conditions on appeal: the appellant must pay a fee, and submit a written appeal. Regulations authorized by statute add further requirements for form, all of which are requirements within the control of the appellant. However, according to the Patent Office and Federal Circuit, these statutes permit the Patent Office to add further conditions *over which the appellant has no control*, and that give unilateral control to the patent examiner to prevent the Board from hearing or deciding the appeal. The Patent Office and Federal Circuit held that “shall” does not require the Board to review the examiner—rather, Board review occurs only if and when the examiner permits it. The examiner can keep an application bottled up in a protracted cycle of bouncing up and down between levels intra agency. Note that this block is at the instance of the very examiner whose errors are at issue in the appeal—

neither the Patent Office nor the Federal Circuit identified any other government official that has similar power to insulate his/her own actions from a statutory “appeal” review.

This imposes immense costs on inventors. As the Petition (at 18) notes, examiners rely on MPEP § 1207.04 2,200 times per year to block appeals, about 14% of all appeals. *Amici’s* personal experience includes applications delayed for years because of this bouncing. A database search located an application in which a decision by the PTAB was delayed until six years after the initial appeal, because of four reopens under MPEP § 1207.04.²

Prof. Robert Anthony, the former chair of the Administrative Conference of the United States, explained how cases like this one are exceptionally important when they arise:

Frequently [nonlegislative agency documents] are not challenged in court, because the affected private parties cannot afford the cost or the delay of litigation, or because for other practical reasons they must accept a needed agency approval or benefit on whatever terms the agency sets.³

In most cases, when an agency violates procedural laws, the single-instance cost is small relative to the cost of

2. See discussion of application serial numbers 09/557,708, 10/726,341, 10/947,719, and 11/811,157 in Section I, *infra*.

3. Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them To Bind The Public?*, 41 DUKE L.J. 1311, 1316-17 (June 1992).

litigating an Administrative Procedure Act case. However, because those costs arise so often, the total societal costs are very large.

In the case of MPEP § 1207.04, the direct costs to the public include about \$20 million per year in attorney costs.⁴ When the value of lost patent protection, companies not formed or that fail because of delays and unpredictability of their patent applications, business opportunities not pursued, and similar economic effects are factored in, the economic damage caused by Patent Office's policy of delaying patent applications is far greater. Even though the aggregate societal costs are large, the incentives for any single applicant are seldom sufficient to warrant APA litigation, and this issue is unlikely to reach the Federal Circuit again, let alone this Court. The procedural history that allows this case to reach this Court is essentially unique, even though the problem is pervasive.

Delayed decisions by the Patent Office have a real affect on the economy. For the last 40 years, all net job growth in the U.S. has been due to startups (older firms on balance destroy jobs faster than they create them).⁵ Patents are crucial to those startups: one of the first questions any angel or venture capital investor asks any

4. The average attorney fees for an appeal is about \$5000. AIPLA ECONOMIC SURVEY. $2,200 \times \$5000$ is about \$10 million. Further costs are explained *infra* section II.

5. Tim Kane, *The Importance of Startups in Job Creation and Job Destruction*, Kauffman Foundation Research Series (Jul. 2010) available at <https://ssrn.com/abstract=1646934>; John Haltiwanger, Ron S. Jarmin, and Javier Miranda (of the Census Bureau), *Who Creates Jobs? Small Versus Large Versus Young*, 95 REV. ECON. AND STATISTICS 347-361 (May 2013).

startup is, “Do you have a patent?” New job formation is directly imperiled when the Patent Office delays its decisions. Further, delays in obtaining valid patents are responsible in part for venture capital firms moving their investments out of the U.S. to other nations like China.⁶ In the mid-1990s, the U.S. received 95% of global investment; now it is about half.⁷ Delayed patent approval affects the ability of startups to raise capital; that causes new companies to be stillborn or die in infancy; and that significantly affects job formation.

Weakening of the applicant’s right of appeal distorts the entire examination process, incentivizing examiners to reduce completeness and precision of each rejection letter written during “regulation time” examination before appeal “overtime” commences. The resultant procedural unpredictability shifts immense cost and delay onto inventors.

The Court should grant *certiorari* to correct the Patent Office’s and Federal Circuit’s error.

BACKGROUND: HISTORY OF THE TWO RULES

Patent examination occurs as a series of letters back and forth between a patent examiner and an applicant, called “prosecution.”

6. Jason D. Rowley, *U.S.-China VC Deal Flow Rises Despite Trade Tensions*, <https://news.crunchbase.com/news/u-s-china-vc-deal-flow-rises-despite-trade-tensions> (Dec. 18, 2018)

7. Richard Florida & Ian Hathaway, *How the Geography of Startups and Innovation Is Changing*, HARV. BUS. REV., <https://hbr.org/2018/11/how-the-geography-of-startups-and-innovation-is-changing> (Nov. 27, 2018).

The central issue in this case is the Patent Office's rewriting of a statute in order to renege on its half of a regulatory bargain it made with the public. The Patent Office examines applications under a *quid pro quo* called "compact prosecution." Since the 1960s, the Patent Office has limited an applicant to two rounds of written dialog and negotiation with the examiner. For a third round, the applicant has to pay an additional fee, and patent term adjustment largely ends. In return, the Patent Office promises that every Office action (the technical term for an examiner's rejection letter) will be "complete" and that "in every case the applicant is entitled to a full and fair hearing." 37 C.F.R. § 1.104(a); MPEP § 706.07. The Patent Office's half of the "compact prosecution" bargain is that an examiner's work will be complete enough that "a clear issue between applicant and examiner should be developed, if possible, before appeal." MPEP § 706.07.

When examination reaches impasse, an applicant has a statutory right to appeal.

The appeal rules were amended in 2004 to allow examiners to raise new grounds of rejection after an appeal is initiated. The Patent Office's Federal Register notices explained that examiners aren't perfect, and should be allowed to raise new grounds of rejection after an appeal is initiated. But the Patent Office likewise recognized the importance of counterbalancing safeguards that would maintain the same forward momentum and prompt resolution for patent appeals that any other appeal has before any other appellate tribunal. Those safeguards are set forth in the Patent Office's regulation, 37 C.F.R. § 41.39(b). The Patent Office explained that when an examiner raises a new ground of rejection after an appeal is initiated, the examiner is to add the new ground of

rejection into the appeal by arguing it in the examiner's answering brief. In return for this extraordinary flexibility for an examiner as appellee, the Patent Office promised a second *quid pro quo*: the choice for the most efficient course of further proceedings should be the appellant's. If the appellant determines that the examiner's late-raised ground is substantial enough to warrant further amendment to the application, new evidence, or further negotiation with the examiner, the regulation gives the appellant the choice to withdraw the appeal and return to the examiner. If the appellant believes that the examiner's late-raised position is insubstantial, the regulation gives the appellant the choice to stay on the path to the Board, with additional rebuttal argument in the reply brief. 37 C.F.R. § 41.39(a)(1) and (2); Patent and Trademark Office, *Rules of Practice Before the Board of Patent Appeals and Interferences*, Final Rule, 69 Fed. Reg. 49959, 49980, Answer 69 (Aug. 12, 2004); Patent and Trademark Office, *Rules of Practice Before the Board of Patent Appeals and Interferences in Ex Parte Appeals*; Final Rule, 76 Fed. Reg. 72269, 72286, Response 31 (Nov. 22, 2011). The regulation balances the examiner's need to raise last minute issues, with the appellant's need to maintain forward progress toward a conclusion.

Rule 41.39(b) was promulgated as a regulation with full formalities and public participation under the Administrative Procedure Act (APA).

But in sub-regulatory guidance, namely the Manual of Patent Examination Procedure (MPEP), the Patent Office contradicts its own regulation and statute to create an alternative rule that permits the very examiner whose work is being appealed to abort that appeal, with no countervailing safeguards for the appellant. MPEP § 1207.04.

Because the rule at issue in this case, MPEP § 1207.04, was never promulgated as a regulation or offered up for notice and comment, the Patent Office has never offered any explanation of public benefit for taking away the rights and choices granted by statute and regulation. Nowhere in the promulgation history for the regulation, the history for the MPEP, and nowhere in the briefs below, does the Patent Office identify any deficiency in § 41.39(b). Likewise, no Federal Register notice or Patent Office Brief in this case has argued that MPEP § 1207.04 provides greater efficiency *for the public* than § 41.39(b). The “efficiency” that the Patent Office argued below accrues only to *the agency itself*.⁸ And most importantly, nowhere does the Patent Office or Federal Circuit explain how the word “shall” in the statute means “may” in Patent Office practice.

ARGUMENT

This is a question of exceptional importance for several reasons.

I. MPEP § 1207.04 creates extraordinary costs and erodes predictability of the patent system

Petitioner’s *certiorari* petition (at 18) notes that the Patent Office invokes MPEP § 1207.04 2,200 times per year. Each invocation of MPEP § 1207.04 is a negation

8. The arguments that the Patent Office raised below are forbidden by the implementing regulations for the Paperwork Reduction Act: 5 C.F.R. § 1320.5(d)(1)(iii) provides that an “agency shall also seek to minimize the cost to itself [for rules governing paperwork submissions to the agency], but shall not do so by means of shifting disproportionate costs or burdens onto the public.”

of the procedural safeguards of § 41.39(b), which were negotiated fair-and-square with the public. Each invocation imposes thousands of dollars in costs and imposes delays of many months.

Two and three MPEP § 1207.04 reopens for a single application are not uncommon. *E.g.*, application serial number 10/947,719 of *amicus* Orbital Research (two reopens, contributing to near-seven-year pendency); 11/811,157 of *amicus* Cleveland Medical Devices (one reopen, two appeals, contributing to eight-year pendency); 10/726,341 (two reopens, three appeal briefs, and then all rejections reversed when the appeal reached the Board).

A database search turns up application serial number 09/557,708, in which a decision by the PTAB came **six years** after the first appeal because of repeated reopens. In the '708 application, the applicant engaged in the statutorily-required two rounds of negotiation before the examiner, reached impasse, and filed a first appeal brief in September 2005. Over the next five years, the applicant filed a total of **nine** appeal briefs, before the appeal reached the Board.⁹ In July 2011, the Board issued a decision, the applicant amended the claims to conform to the Board's decision, and the application issued as a patent.

The examiner did nothing in four MPEP § 1207.04 reopens that couldn't have been done at less expense to the Patent Office and the applicant had the same issues been raised in the examiner's brief via § 41.39(b), without derailing the appeal.

9. There were four reopens under MPEP § 1207.04, and four more objections under "rules" that don't exist in any written form. The original brief brings the total to nine.

5 U.S.C. § 555(b) requires “With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it.” Rule 41.39(b) implements § 555, § 134, and § 6; MPEP § 1207.04 conflicts with them, and can only create delay. Following the properly-promulgated regulatory path would have allowed the Patent Office to “conclude a matter presented to it” about four years earlier, as required by § 555(b) of the APA.

The '708 application demonstrates that abuse of the appeal process is not confined to small inventors or individuals like Mr. Hyatt—the owner of this application is IBM Corp.

II. MPEP § 1207.04 is representative of a pattern found by the Inspector General of delay and imprecision among examiners

In adopting MPEP § 1207.04, the Patent Office let down its half of the “compact prosecution” bargain. MPEP § 1207.04 has become an exception that often swallows the rule: § 1207.04 allows an examiner to defer careful, precise, fully-explained examination until appeal. The Patent Office’s compensation system (described in more detail below) incentivizes examiners and supervisors to engage in abridged examination today, leaving the gaps to be filled later, even though this creates immense costs for applicants.

The Inspector General for the Department of Commerce described a related phenomenon of “patent mortgaging” in a 2015 report:¹⁰

10. U.S. Department of Commerce, Office of Inspector General, Final Report No. OIG-15-026A, *U.S. Patent and Trademark*

Patent mortgaging occurs when an employee knowingly submits incomplete work for credit in order to, for example, receive an award or avoid a performance warning. ... [W]e found that USPTO's response to allegations of patent mortgaging varied widely and may not discourage the practice.

The practice of patent mortgaging occurs, in part, because some examiners can receive credit for their work without supervisory review. ... [E]xaminers at the GS-12 level and above are able to receive credit for non-final decisions before undergoing supervisory review. Furthermore, examiners who have achieved full signatory authority are able to issue decisions (and thus receive credit for their work) without any supervisory review. The credit that examiners receive allows them to help meet their, and USPTO's, quarterly productivity expectations.

Though the phenomenon in this case is somewhat different than the one described by the Inspector General, similar incentives based on quantity of work product (without regard to quality), and similar delegation of authority to examiners with a "hands off" supervisory practice,¹¹ result

Office ... Needs to Strengthen Patent Quality Assurance Practices (Apr. 10, 2015), <https://www.oig.doc.gov/OIGPublications/OIG-15-026-A.pdf> at page 19.

11. *See, e.g.*, MPEP §§ 2107, 2141, 2163 (MPEP disclaims all paths of supervisory review for large areas of activities of examiners relating to examination of patents, notwithstanding 35 U.S.C. § 3(b)(2)(A)).

in similar less-complete work early in the examination process. The Patent Office then allows examiners to hand in “make up work” later, under MPEP § 1207.04. The major difference between the Inspector General’s “patent mortgaging” phenomenon and the situation fostered by MPEP § 1207.04 is that the Patent Office provides no effective quality assurance to catch the latter omissions before the examiner’s incomplete work is mailed to the applicant. Therefore, the applicant is obligated to respond *twice*, once to the early incomplete examination paper, and again to a more-fulsome examination provided later. This creates large and entirely unnecessary costs.

Examiner failure to carefully consider applicants’ arguments the first (or second, or third) time they’re presented and delaying careful attention until appeal, has become a common pattern,¹² all at great expense to the Patent Office and great expense to the public. One example is application serial number 12/507,513—nine Office Actions, two appeals, and three years’ arguments on essentially the same issue, with only tangential response from the examiner. The second appeal, currently pending, presents essentially similar arguments for the fourth time, after the examiner failed to engage three times. MPEP § 1207.04 is a mechanism by which the Patent Office allows examiners to minimize time, care, and attention early in the process, and to delay careful (and time consuming) thought until later.

12. The Inspector General’s Report *supra* note 10, at 20, notes the accelerating trend of “patent mortgaging:” over a six year study period 2008-2014, half of all allegations of patent mortgaging arose in the last year of the survey period. The rising trend relevant to this case, misuse of MPEP § 1207.04, was noted in an email discussion among several hundred patent attorneys on Carl Oppedahl’s email list of patent attorneys, over several weeks in early 2019. Those emails are on file with this firm.

Because MPEP § 1207.04 was never properly promulgated through notice and comment, the Patent Office has not received the benefit of public comment and the cost-benefit analysis required by the Paperwork Reduction Act and Executive Order 12866, so the Patent Office may be unaware of the problem and costs it has created.

Appeal should be a mechanism that leads to a conclusion. In contrast, MPEP § 1207.04 turns appeal into an opportunity for an examiner to delay careful analysis. MPEP § 1207.04 fundamentally alters the “compact prosecution” bargain, creating costs and delay for both Patent Office and for applicants.

III. MPEP § 1207.04 creates conflicts and unintended interactions with the patent term adjustment statute

For many inventors, the biggest cost of an MPEP § 1207.04 reopen is loss of patent term. 35 U.S.C. § 154(b) (1)(A)(ii) and (B)(ii) provide that patent term is adjusted to compensate for “any time consumed by appellate review by the Patent Trial and Appeal Board.”¹³ 37 C.F.R. § 1.703(b) (4) defines that this time begins “on the date on which jurisdiction over the application passes to the Patent Trial and Appeal Board.” That date comes promptly in an appeal that proceeds under § 41.39(b), but is postponed (or lost entirely) for an application reopened under MPEP § 1207.04. When an appeal proceeds within § 41.39(b), the examiner states his/her last and final position, the

13. Patent and Trademark Office, *Revision of Patent Term Adjustment Provisions Relating to Appellate Review*, 77 Fed. Reg. 49354 , 49357-58, Responses 11, 12, and 15 (Aug. 16, 2012).

applicant states his/her last rebuttal, jurisdiction passes from the examiner to the Board promptly, patent term adjustment accrues the way Congress intended, and the matter concludes. When an appeal is aborted under MPEP § 1207.04 (especially by repeated reopens), jurisdiction does not transfer at all, and often, subsequent proceedings become complex and protracted, and the application slips into cracks between the categories of events for which Congress provided adjustment.

IV. MPEP § 1207.04 erodes policy goals

The Patent Office has disclaimed force of law for the interpretation it argues here. The Foreword to the MPEP states that “The Manual does not have the force of law or the force of the rules in Title 37 of the Code of Federal Regulations.”¹⁴ Justice Gorsuch, while on the Tenth Circuit, wrote of another of the Patent Office’s sub-regulatory staff manuals that similarly disclaims force of law: “For surely if the agency is indeed so confused that it has spoken out of both sides of its regulatory mouth, it has to be the side speaking unambiguously through formal rulemaking, rather than the side speaking in garbled terms so quickly disavowed, that speaks the more loudly.” *El Encanto, Inc. v. Hatch Chile Co.*, 825 F.3d 1161, 1166 (10th Cir. 2016) (Gorsuch, J.). As Professor Anthony notes, agencies must present a predictable legal landscape to regulated parties—courts should not bless “cagey” agencies that state their rules in informal documents, knowing them to be unenforceable, and then enforce

14. <https://www.uspto.gov/web/offices/pac/mpep/mpep-0015-foreword.html>

them anyway until someone sues.¹⁵ The Patent Office’s inconsistent approach to its guidance, including MPEP § 1207.04, erodes the goal of having a predictable legal landscape for regulated parties.

For applicants, MPEP § 1207.04 offers no benefit, and considerable cost, relative to § 41.39(b). The Patent Office has never offered any legitimate explanation of public benefit of MPEP § 1207.04 that doesn’t apply to the same degree to § 41.39(b). Likewise, no Federal Register notice or Patent Office brief in this case has argued that MPEP § 1207.04 provides benefit to the public relative to § 41.39(b).

On the other hand, the Patent Office and its employees derive several benefits from MPEP § 1207.04, relative to § 41.39(b).¹⁶

First, MPEP § 1207.04 gives examiners and their supervisors a way to hide mistakes from higher-ups. An MPEP § 1207.04 reopen may be approved by a supervisory patent examiner, the first-level supervisor. In many cases, the supervisory examiner signed the Office action that is now appealed, and now has the power to prevent review of the very work that he/she signed. No other government official (except perhaps the President) has equivalent power to insulate his/her own actions from an “appeal” provided by statute. In contrast, if the same new issue is raised in the examiner’s answer brief, § 41.39(a)(2) requires “the approval of the [PTO] Director”—recognizing that this is a serious matter indeed.

15. Anthony, *supra* note 3, at 1317-19.

16. See *supra* note 8.

Second, a decided appeal will be posted on the Patent Office’s web site, and provides helpful diagnostic information and guidance for the public and Patent Office’s quality and process staff—in contrast, an MPEP § 1207.04 reopen leaves little trace.

Third, reopening prosecution through MPEP § 1207.04 allows an examiner to present rejections *seriatim* rather than concurrently. To oversimplify a complex compensation system,¹⁷ the Patent Office’s compensation system gives an examiner a fixed “count” for each rejection letter. That count is awarded no matter whether the examiner’s consideration is careful and complete, or whether it is incomplete. Though the Patent Office’s regulations require that each rejection letter be complete under the “compact prosecution” *quid pro quo*, the Patent Office’s compensation system, and limited view of the role of supervisors, provide essentially no support for that *quid pro quo*. Unfortunately, an examiner’s opportunity to present new arguments after appeal has commenced comes at the expense of the applicants’ right to obtain prompt review of an examiner’s decision. And the Patent Office’s fee structure likewise does not offer management incentives to ensure that every round is as complete and efficient as possible.

Fourth, by promulgating MPEP § 1207.04 as sub-regulatory guidance, the Patent Office was able to implement a major rule change without the procedural rigors of statutory rulemaking. Despite § 1207.04’s large negative impact on applicants, the Patent Office was able to circumvent the process of responding to comments

17. See MPEP § 1705.

from the public, and performing the cost-benefit analyses required by several laws. This allowed the Patent Office to promulgate a rule that saves effort for the Office and shifts costs to the public, but that couldn't have made it through the checks and balances of statutory rulemaking.

Agencies do not naturally confine their own discretion without the encouragement of courts. The Federal Circuit erred in failing to hold the Patent Office to the law that governs agency rulemaking, and allowing a practice that conflicts with both statute and public policy to persist. *See, e.g., Chrysler Corp. v. Brown*, 441 U.S. 281, 303 (1979) (an agency rule “must conform with any procedural requirements imposed by Congress. ... [to] ‘assure fairness and mature consideration of rules of general application.’”); *Christensen v. Harris County*, 529 U.S. 576, 588 (2000) (an agency cannot, “under the guise of interpreting a regulation, ... create *de facto* a new regulation.”); *Perez v. Mortgage Bankers Ass’n*, 135 S.Ct. 1199, 1206 (2015) (to amend a rule, an agency must use the same procedure that was used in first instance—a regulation can't be modified by guidance); and *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 763-66 (1969) (an agency may not bypass statutory rulemaking procedure).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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