

No. 18-916

IN THE

Supreme Court of the United States

DEX MEDIA, INC.,

Petitioner,

v.

CLICK-TO-CALL TECHNOLOGIES, LP,

AND

ANDREI IANCU, UNDER SECRETARY OF COMMERCE FOR
INTELLECTUAL PROPERTY AND DIRECTOR OF THE UNITED
STATES PATENT AND TRADEMARK OFFICE,

Respondents.

**On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Federal Circuit**

REPLY BRIEF FOR PETITIONER

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ARGUMENT

In urging the Court to deny the petition, both respondents—the Director of the Patent and Trademark Office and Click-to-Call Technologies, LP (“CTC”)—focus almost entirely on whether the Federal Circuit decided the questions correctly, ignoring whether the petition satisfied Rule 10. The Federal Circuit, in taking both issues *en banc*, believed that the two questions presented were of “exceptional importance,” Fed. R. App. P. 35(a)(2), and that court was correct. This Court should grant the petition.

I. THE COURT SHOULD REVIEW THE SECOND QUESTION PRESENTED, INVOLVING THE SECTION 315(b) TIME BAR.

Neither the Director’s nor CTC’s brief in opposition justifies declining to review the second question presented.

A. Just last year, the Director argued to the Federal Circuit that the PTAB’s longstanding precedent holding that the 35 U.S.C. § 315(b) time bar does not apply to a dismissal without prejudice “is the most reasonable interpretation of the statute.” Second Supplemental Brief for Intervenor at 6, *Click-to-Call Techs., LP v. Ingenio, Inc.*, 899 F.3d 1321 (Fed. Cir. 2018) (No. 2015-1242), 2018 WL 1308485, at *6. Now, the Director states that he “has reconsidered the agency’s interpretation of Section 315(b)” in light of the decision below and “has determined that the court of appeals’ reading reflects the better view of Section 315(b).” U.S. BIO 11–12. In light of this new statutory interpretation, the Director argues that the question

whether dismissals without prejudice can trigger the § 315(b) time bar should not be reviewed. The Director’s newly discovered interpretation of § 315(b) is insufficient to justify denial of the petition.

It is important to note that, in support of the Director’s contention that he “reconsidered” his position, his brief cites ... nothing.¹ Indeed, it appears that this newfound reading of § 315(b) was first articulated in his brief in opposition in this Court—after the decision was made, and without notice or the opportunity for interested parties to provide comments. This newfound agency position is entitled to no deference, because this Court “den[ies] deference ‘to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice.’” *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 741 (1996) (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988)). Indeed, just this Term the government conceded to this Court that agency reversals of position, made without “fair notice” to interested parties, are entitled to no deference. Brief for Respondent at 27, 30–31, *Kisor v. Wilkie*, No. 18-15 (U.S. Feb. 25, 2019).

The Director’s failure previously to explain his change in legal views is important, because his

¹ Later in the brief, the Director states (U.S. BIO 18) that, “[g]oing forward, the agency ... does not intend to institute inter partes review in circumstances like these,” citing *Baker Hughes Oilfield Operations, Inc. v. Smith Int’l, Inc.*, No. IPR2016-01440, 2018 WL 5262654, at *2 (PTAB Oct. 4, 2018). *Baker Hughes*, however, did not discuss the Director’s interpretation of § 315(b), let alone explain his change in position on its meaning. Instead, that case reflects merely the PTAB’s unsurprising acquiescence in the Federal Circuit’s decision below.

statutory analysis in the brief is quite sparse—indeed, even being generous, it consists of part of a single sentence that reads more like an assertion than analysis. U.S. BIO 12 (“the applicability of Section 315(b)’s time bar turns on whether specified parties were ‘served with a complaint,’ and which does not establish any exception for complaints that are voluntarily dismissed thereafter”). The Director never explains, for example, why the principle that “a voluntary dismissal without prejudice under Rule 41(a) leaves the situation as if the action had never been filed” (Pet. 21) does not apply to § 315(b). He also never opines why he believes the dissent below erred, or why the majority below is correct.

Most importantly, however, the Director’s brief utterly fails to explain why the petition should be denied under the criteria in this Court’s Rule 10. Indeed, the *only* reason the Director offers for denying certiorari is that the Federal Circuit’s decision is (in his new view) correct. Needless to say, the United States’ opinion that a decision below is correct is not a basis to deny certiorari, as shown by the many cases heard by this Court in which the government is the respondent. *E.g.*, *Lorenzo v. SEC*, 139 S. Ct. 1094 (2019); *Stokeling v. United States*, 139 S. Ct. 544 (2019); *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361 (2018). It is particularly meritless to rely on the Director’s new (and almost entirely unexplained) legal position when many businesses have reasonably relied on his contrary position, which he first articulated (through his delegatee, the PTAB) just a few months after the America Invents Act (“AIA”) was enacted. *See Macauto U.S.A. v. BOS GMBH & KG*, IPR2012-00004, 2013 WL 5947694, at *7 (PTAB Jan. 24, 2013).

Nor does the Director mention, let alone dispute, the petition's explanation for why certiorari should be granted. The petition explained that the decision below will require application of the time bar in circumstances that make no sense, which Congress could not possibly have intended. Pet. 24–25. The Director does not dispute this assertion. The petition explained that the decision below will spur additional, unnecessary litigation, because parties who otherwise would walk away from litigation with a dismissal without prejudice will now end up litigating. *Id.* at 25–27. The Director does not dispute this assertion. And the petition explained that the decision below will result in “manipulative abuse.” *Id.* at 27–28. Again, the Director does not dispute this assertion.

B. CTC contends that the dismissal-without-prejudice issue is “insubstantial.” CTC BIO 7. But, like the Director, CTC fails to offer even a single reason why the question is not worthy of review under Rule 10, nor does it even attempt to rebut the petition's explanation of the importance of the question. Pet. 24–28. Further, the fact that the Federal Circuit took the issue *en banc* (Pet. App. 43a n.3) demonstrates that a majority of judges of that court viewed the issue as one of “exceptional importance.” Fed. R. App. P. 35(a)(2). CTC says nothing to rebut their determination.

CTC's merits argument (CTC BIO 7–12)—that the Federal Circuit correctly subjected dismissals without prejudice to § 315(b)'s time bar—is wrong. CTC focuses narrowly on that provision's “plain text,” and contends that nothing in the statute permits “the act of service [to] be undone.” *Id.* at 9. But in focusing on the text of one provision of the AIA, CTC loses the

forest for the trees. “Congress is understood to legislate against a background of common-law adjudicatory principles.” *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 457 (2012) (quoting *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 108 (1991)). This Court therefore routinely interprets statutes in light of well-established background legal principles not expressly set forth in the statutory text. *E.g.*, *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1425–26 (2018); *Torres v. Lynch*, 136 S. Ct. 1619, 1631 (2016); *Samantar v. Yousuf*, 560 U.S. 305, 320 n.13 (2010); *Meyer v. Holley*, 537 U.S. 280, 285 (2003); *Young v. United States*, 535 U.S. 43, 49 (2002); *Nat’l Private Truck Council, Inc. v. Okla. Tax Comm’n*, 515 U.S. 582, 589–90 (1995); *United States v. Shabani*, 513 U.S. 10, 13 (1994); *Wis. Dep’t of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 231 (1992).

Here, CTC does not dispute the background legal principle that a dismissal without prejudice “leaves the situation as if the action had never been filed.” (Pet. 21.) But CTC’s argument is that, though a dismissal without prejudice “leaves the situation as if the action had never been filed,” it also leaves the situation as if service of process *had been* effectuated. CTC therefore wants to attach legal consequences to the service of a complaint that the law treats as never having been filed in the first place. That position makes no sense. And it contravenes well-settled law. A dismissal without prejudice “carries down with it previous proceedings and orders in the action, and *all pleadings, both of plaintiff and defendant*, and all issues, with respect to plaintiff’s claim.” *In re Matthews*, 395 F.3d 477, 480 (4th Cir. 2005) (emphasis added). Indeed, permitting such a dismissal to trigger § 315(b) allows the plaintiff to benefit from the

dismissal, in violation of the established principle that a dismissal without prejudice “leaves the parties in the *same legal position* as if no suit had ever been filed.” *Dawson Farms, LLC v. Farm Serv. Agency*, 504 F.3d 592, 601 (5th Cir. 2007) (emphasis added); *see also, e.g., Jorge v. Rumsfeld*, 404 F.3d 556, 563 (1st Cir. 2005).

CTC asserts that “dismissals without prejudice do not wipe out the very fact of the proceeding,” contending that the filing of the complaint “still has multiple legal consequences.” CTC BIO 9. This assertion is doubly wrong. First, in contending that the dismissal without prejudice does not “wipe out” the action, CTC unduly minimizes the legal effect of the dismissal. In fact, “a voluntary dismissal [without prejudice] ... wipes the slate clean,” *Sandstrom v. ChemLawn Corp.*, 904 F.2d 83, 86 (1st Cir. 1990), “results in a *tabula rasa*,” *Jorge*, 404 F.3d at 563, and “render[s] the proceedings a nullity,” *Norman v. Arkansas Dep’t of Educ.*, 79 F.3d 748, 751 (8th Cir. 1996); *see* 9 Charles Alan Wright, *et al.*, *Federal Practice and Procedure* § 2367 (3d ed. 1998).

Second, CTC errs in contending that a dismissal without prejudice has “multiple legal consequences.” CTC BIO 9. Judge Dyk rejected this very argument in his dissent below, explaining that the Federal Circuit majority identified only two such consequences, and neither was “a situation where the legal issue is the legal effect of the earlier filing, and the question is whether the original filing triggers a legal obligation, such as the start of a time period.” Pet. App. 99a.

Finally, application of the legal principle that a dismissal without prejudice leaves the parties as if no lawsuit had been filed avoids nonsensical outcomes

that Congress could not possibly have intended. CTC says that a dismissed complaint, once served, provides notice of infringement that allows the formerly sued defendant to initiate an IPR if it so desires. CTC BIO 10–11. But why would Congress intend to force the IPR petitioner’s hand if it is sued for infringement by a plaintiff who has no interest in the patent in question, and therefore no standing to sue?² Why would Congress intend to force the IPR petitioner’s hand if it is sued for infringement in state court, a court that lacks subject-matter jurisdiction over patent cases? Why would Congress intend to force the IPR petitioner’s hand if it is sued for infringement in a far-off court that lacks personal jurisdiction over it,

² The PTAB has declined to apply the Federal Circuit’s decision below in this circumstance, but its reasoning is exceedingly unpersuasive. In one case, the PTAB cited the *title* to § 315(b) as well as the a floor statement by one Senator during debate on the AIA. *Sling TV, LLC v. Realtime Adaptive Streaming, LLC*, No. IPR2018-01331, 2019 WL 413674, at *3 (PTAB Jan. 31, 2019). But “[t]he title of a statute ... cannot limit the plain meaning of the text. For interpretive purposes, [it is] of use only when [it] shed[s] light on some ambiguous word or phrase.” *Pa. Dep’t of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) (quoting *Bhd. R.R. Trainmen v. Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 528–29 (1947)) (brackets in the original). There is nothing ambiguous about § 315(b) as read by the Federal Circuit below. And “floor statements by individual legislators rank among the least illuminating forms of legislative history.” *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 943 (2017). In another case, the PTAB asserted that a complaint filed by a plaintiff without standing “was not a ‘proper federal pleading.’” *GoPro, Inc. v. 360Heros, Inc.*, No. IPR2018011754, 2019 WL 1499353, at *4 (PTAB Apr. 3, 2019). This assertion is simply an *ipse dixit*, adopting a concept (“proper federal pleading”) otherwise unknown in the law.

and therefore has no coercive power over it? CTC provides no answers.

II. THE COURT SHOULD REVIEW WHETHER THE PTAB'S TIME-BAR DETERMINATION IS APPEALABLE.

The Court also should review the Federal Circuit's divided *en banc* holding, in *Wi-Fi One, LLC v. Broadcom Corp.*, 878 F.3d 1364 (Fed. Cir. 2018), that it has jurisdiction to review the PTAB's § 315(b) determinations. The arguments advanced by the Director and CTC do not justify denial.

A. The Director agrees with petitioner that the *Wi-Fi One* decision is erroneous, and persuasively explains why that is so. U.S. BIO 13–17. Accordingly, in the Director's view, “the court of appeals lacked jurisdiction over Click-to-Call's appeal.” *Id.* at 17–18. Nonetheless, he contends that this case is “a poor vehicle” for addressing the appealability question because, if this Court were to reverse, it would “reinstate a final Board decision that the Director now agrees should not have been issued.” *Id.* This reasoning is unpersuasive.

To begin with, as explained above, the Court should review the question whether a voluntary dismissal without prejudice triggers § 315(b). If the Court agrees to review the § 315(b) question, the petition is an excellent vehicle for addressing appealability. Pet. 28–29.

The petition is a viable vehicle even were the Court to grant only the first question presented. This Court's jurisdictional holding would apply to the many “[o]ther disputes” that the Director concedes “have arisen in prior cases and can be expected to recur.”

U.S. BIO 18. As the Director acknowledges, such disputes include appeals involving real-party-in-interest and privity determinations, of which there are many, as the petition explains. Pet. 19–20. But it also includes many others—such as whether the decision below applies to dismissals for lack of standing and whether complaints dismissed without prejudice are subject to § 315(a)(1).³ And that’s just the start of types of determinations now subject to appeal; recent PTAB decisions have involved such questions as when the one-year clock in § 315(b) starts to run when the patent-infringement complaint was served on a Saturday, *see Samsung Electronics Co. v. Immersion Corp.*, No. IPR2018-01486, 2019 WL 855680, at *5–8 (PTAB Feb. 20, 2019), and whether the one-year clock is triggered by a request to waive service of process pursuant to Fed. R. Civ. P. 4(d), *see Ipdatatel, LLC v. ICN Acquisition, LLC*, No. IPR2018-01823, 2019 WL 1753603, at *3–8 (PTAB Apr. 17, 2019).

Moreover, contrary to the Director’s implication (U.S. BIO 18), a holding that the Federal Circuit lacked jurisdiction would have a substantial “case-specific practical effect”: restoring the invalidation of a patent by the expert agency, a determination of unpatentability that CTC did not even appeal. Such

³ Section 315(a)(1) bars an IPR if the petitioner had earlier filed a lawsuit “challenging the validity of a claim of the patent.” The PTAB has extended the decision below to § 315(a)(1) determinations. *See, e.g., Avigilon Corp. v. Canon Inc.*, No. IPR2018-01627, 2019 WL 1283933, at *3–5 (PTAB Mar. 18, 2019); *Ruiz Food Prods., Inc. v. MacroPoint LLC*, Nos. IPR2017-02016, IPR2017-02018, 2019 WL 643108, at *2–5 (PTAB Feb. 14, 2019).

elimination of an invalid patent serves the public interest. Pet. 18.

B. CTC argues that *Wi-Fi One* was correctly decided, relying on *SAS Institute, Inc. v. Iancu*, 138 S. Ct. 1348 (2018). Ignoring the petition’s lengthy discussion of the importance of the question (Pet. 16–21), CTC focuses almost entirely on *SAS Institute* as the reason to deny certiorari.⁴ CTC is wrong for two reasons.

First, *SAS Institute* does not answer the question presented here. As the Director explains: “Unlike ... the partial-institution practice at issue in *SAS Institute*, applying Section 314(d) to the Board’s application of Section 315(b) would not permit the Board to expand the substantive scope of inter partes review or to evade any statutory requirement concerning the content of its final written decision.” U.S. BIO 17. Indeed, *SAS Institute* involved a statute “deliver[ing] unmistakable commands,” 138 S. Ct. at 1358, while §§ 314(d) and 315(b) combined afford the Director discretion whether to institute an IPR, a decision that Congress determined should be “final and nonappealable.” § 314(d).

Second, whatever CTC’s view of the merits of the *Wi-Fi One* decision, the government views it as erroneous and an intrusion on the authority given to the Director by Congress, and therefore the government makes plain that it intends to ask this Court to overturn that precedent. Moreover, the

⁴ CTC seeks support from Court’s denial of the petition, without requesting a response, in *RPX Corp. v. Applications in Internet Time, LLC*, No. 18-1075 (Mar. 18, 2019), which also raised the appealability question. But the Court requested a response in *Superior Commc’ns, Inc. v. Volstar Techs., Inc.*, No. 18-1027, which presents the same two questions.

Federal Circuit viewed this issue as one of “exceptional importance,” Fed. R. App. P. 35(a)(2), and the *en banc* court found the issue sufficiently difficult that it divided nine to four. The issue therefore warrants review.⁵

CONCLUSION

The Court should grant the petition.⁶

Respectfully submitted.

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⁵ CTC contends (CTC BIO 7 n.4) that the Federal Circuit could review the PTAB’s § 315(b) determination pursuant to § 319, because the PTAB reaffirmed its jurisdictional holding in the final written decision. Congress’s purpose in enacting § 314(d) would be destroyed if a patent owner could obtain judicial review simply by objecting to institution of the IPR in the context of the final written decision.

⁶ Two other petitions raise the same issues, though the Director is a party to neither case. *See Atlanta Gas Light Co. v. Bennett Regulator Guards, Inc.*, No. 18-999; *Superior Commc’ns, Inc. v. Voltstar Techs., Inc.*, No. 18-1027. As an alternative to granting this petition, the Court should hold this petition pending disposition of those petitions.