No. 18-916

In the Supreme Court of the United States

THRYV, INC., FKA DEX MEDIA, INC.,

Petitioner,

v.

CLICK-TO-CALL TECHNOLOGIES, LP, ET AL.

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

BRIEF OF PROFESSOR STEPHEN I. VLADECK AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—continued:

Statutes:

Statutes—continued:

Regulation:

Other authorities:

Other authorities—continued:

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STATEMENT OF INTEREST[1]

Amicus curiae Stephen I. Vladeck is the A. Dalton Cross Professor in Law at the University of Texas School of Law. He teaches and writes extensively about statutory interpretation and the relationship between the federal courts and administrative agencies. He writes in this case

[1] Both Petitioner and the private Respondent have lodged blanket consent letters with the Court. The Federal Respondent has also consented. No counsel for any party authored this brief in whole or in part, and no person or entity other than the amicus, its members, or its counsel made a monetary contribution intended to fund the brief's preparation or submission.

out of concern that the position that Petitioner and the Government advance here is inconsistent with longstanding rules of statutory interpretation and fundamental separation of powers values. For the reasons set forth in this brief, he argues that this position should be rejected.

INTRODUCTION AND SUMMARY OF ARGUMENT

Judicial review of agency action is one of the most important of the many gifts we have received from our common-law legal tradition. It stands at the very center of our constitutional order, protecting the separation of powers on two different fronts: reinforcing the judiciary's primary role in interpreting the law, and serving as a vital check on executive agencies' expansive powers. This dual benefit has only grown more important over time, as administrators have entered the realms of lawmaking and law-*interpreting*, and the administrative state itself has grown ever larger and more powerful.

The Court correctly assumes that Congress will not lightly cast aside this invaluable tool in its lawmaking. The Court therefore imposes a strong presumption that courts should not construe federal statutes to eliminate or restrict judicial review—a presumption that can only be overcome with clear statement by Congress showing intent to do so. Like clear statement requirements imposed in a variety of contexts, this approach to statutory interpretation is also rooted in institutional respect for the separation of powers. Clear statement rules protect Congress's ultimate authority to make the laws that define the structure of government, including on matters touching on the powers of administrative agencies and the courts, protecting the laws on the most critical of those functions from inadvertent infringement. Clear statement rules also

ensure that Congress acts in a deliberate and politically accountable manner before altering the traditional boundaries of that structure. Clear statement rules also reflect judicial modesty, ensuring simultaneously that the courts do not inadvertently step into matters that Congress has not assigned to them, and yet do not shirk from exercising the judicial responsibilities Congress has assigned.

It would be fundamentally inconsistent with the Court's clear statement rules regarding judicial review, and the institutional values they represent, for this Court to rule that courts lack power to review interpretations by the Director of the United States Patent and Trademark Office of the time-bar in 35 U.S.C. § 315(b) for filing a petition seeking inter partes review of a patent grant. Congress provided no clear statement—in Section 315(b), Section 314(d), or anywhere else—that it intended to cut off judicial review of those interpretations. In the language of clear statement rules, which Congress acknowledges and respects in its lawmaking, that definitively answers the question. It is an unambiguous statement by Congress that it intends for decisions interpreting Section 315(b) to be reviewable—as clear as if Congress had said so expressly.

In contending otherwise, the Government and Petitioner would not only mangle the law, but would impose an interpretation that flouts the institutional importance of the reviewability presumption. Their interpretation of Section 315(b) and Section 314 would convey unchecked authority to the Director to interpret Section 315(b)'s time bar, making it impossible for any court, anywhere, to review the Director's interpretations of that section, even he completely misconstrued the provision to make it elective,

rather than mandatory. The Government and the Petitioner would thereby allow the Director to entertain plainly time-barred petitions, authorizing him to do what Congress has expressly precluded him from doing.

Indeed, allowing a strike from the position offered by Petitioner and the Government would make a crater broader than Section 315(b), precluding judicial review over the entire scheme erected in the America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011), for instituting inter partes review. That cannot be squared with the AIA's text, structure, purpose, or history, and flouts both the strong presumption favoring judicial review and bedrock norms of administrative law. It is thus vital that the Court reject the arguments advanced by both Petitioner and the Government and reaffirm the importance of the reviewability presumption and the paramount need for a clear statement of congressional intent before precluding judicial of agency action.

ARGUMENT

The Director's determinations regarding a petition's timeliness under 35 U.S.C. § 315(b) are subject to judicial review because Congress has not clearly stated otherwise.

This may seem like a run-of-the-mill statutory construction case about patent statutes, but it has important implications for the limits on federal courts' jurisdiction, and the limits on executive power. This is because the position offered by the Petitioner and the Government in this case risks undermining one of our foundational rules of statutory construction: that courts do not interpret legislation to redefine the traditional roles of or balance of

power among the branches of government unless Congress has clearly stated that it intended to do so—whether that balance concerns the relationship between the courts and Congress, or also incorporates powers that Congress has conveyed to executive agencies. This approach ensures that it is Congress, not the courts, that alters the traditional balance of powers in these foundational features of the federal government. And it is vitally important that this approach be reaffirmed here.

A. Clear statement requirements preserve vital separation of powers principles.

1. Clear statement requirements may relate only to construction and interpretation of statutes, but they have an important place in our constitutional structure, reinforcing the balance of power among the branches of government. Clear statement rules preserve Congress's primary role in lawmaking on certain "critical questions," reflecting "the traditional" and—"plainly correct"—notion that when the nation faces issues that might require changes in the status quo of the national order, it must be Congress that makes those critical decisions. Stuart Minor Benjamin & Ernest A. Young, *Tennis With the Net Down: Administrative Federalism Without Congress*, 57 Duke L.J. 2111, 2149 (2008). That is because in a democracy, the "most important choices" must be made by the "political branches," not unelected, unaccountable judges. William N. Eskridge, Jr. & Phillip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand. L. Rev. 593, 631 (1992).

Clear statement rules also ensure that the politically accountable branches *remain* accountable. Requiring

Congress to clearly state its intentions when making critical decisions ensures transparency, so that legislators may be held accountable to voters for their actions. See Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1399 (1953) ("The primary check on Congress is the political check - the votes of the people. If Congress wants to frustrate the judicial check, our constitutional tradition requires that it be made to say so unmistakably, so that the people will understand and the political check can operate."); see also Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543, 546-547, 558-560 (1954).

2. Clear statement rules protect the legislative primacy of the politically accountable branches by requiring courts to approach interpretation of certain statutes with special caution. Where clear statement rules are applicable, they require courts to ensure that "the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision'"—by restricting themselves to the clearly stated intention. *Gregory* v. *Ashcroft*, 501 U.S. 452, 461 (1991) (quotations omitted).

3. Clear statement rules also reflect the Court's properly modest conception of the judicial role. Congress's lawmaking primacy and "important constitutional values" are perpetually at risk of potential judicial "infringement"—no matter how "accidental," "undeliberated," or well-intentioned. William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking,* 45 Vand. L. Rev. 593, 631 (1992). This is because the interpretation of

statutes is art, not science, and while it is emphatically important for courts to answer all the questions properly put before them, doing so using congressional materials that are *not* clear leads to a risk that courts' best efforts may different than what Congress actually intended. And in certain critically important cases, that risk is intolerable. Default rules presuming Congress's answer on a particular question will remain in line with its traditional answers on similar questions thus offer a hedge against uncertainty, protecting against a risk of introducing error through interpretation. Clear statement rules also check the natural but powerful impulse of judges to assume that their preferred outcome is the one that is written into law. By forcing judges to *find* the answer, in clearly expressed statutory text, rather than *construct* that answer through interpretation, clear statement rules offer judges no room to substitute their own judgment for Congress's.

4. There is another virtue of clear statement rules beyond their function protecting the separation of powers. They also make use of an important insight the Court has gained over time about the relationship between the legislative and judicial branches: that legislation involves a two-way conversation between equally careful and deliberative bodies. The Court recognizes that if it regards a matter as important enough to merit a clear statement rule, Congress probably thinks speaking clearly is important too. And in drafting statutes touching upon those particularly important matters, congressional "'[d]rafters don't intend to leave them unresolved.'" *United States Telecom Ass'n* v. *FCC*, 855 F.3d 381, 422 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc) (quoting Abbe R. Gluck & Lisa Schultz Bress-

man, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan. L. Rev. 901, 1003 (2013)). If it is a matter of real importance, Congress will speak clearly of its intentions.

The Court has also recognized that when it has identified a matter as deserving of a clear statement rule, it is justified in "presum[ing]" that Congress legislates with "knowledge" of that rule in mind. *McNary* v. *Haitian Refugee Ctr. Inc.*, 498 U.S. 479, 496 (1991). This gives the Court confidence that if it "effectively flags" an issue for Congress as requiring a clear statement of intent, and informs it of the default rule to be applied if Congress does not provide clarity, Congress will listen. Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 Tex. L. Rev. 1549, 1611 (2000). Not only does such "flagging" increase "the likelihood that the political process will actually focus on the structural principles at stake," *id.* it also means that Congress will respond to a clear-statement rule in the rule's own language. If Congress *does not* address a matter covered under a clear statement rule with the requisite clarity, "the absence of that clear statement is inextricably part of 'conventional statutory meaning.'" Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 Geo. L.J. 2537, 2586 (1998). It is a definitive answer on the statutory interpretation question—a response from Congress that it intends to adopt the default rule that is to be applied in the absence of the clear statement.

5. For all these reasons, the Court has in a variety of contexts imposed clear-statement rules demanding that Congress speak clearly on the most fundamentally important questions faced by the federal judiciary: those

that would alter the traditional roles of government or the balance of power within its branches. The Court has applied clear statement rules to acts of Congress that assign powers to (or withdraw them from) the co-equal branches. *Miller* v. *French*, 530 U.S. 327, 340 (2000) (citation omitted) (cautioning that Congress cannot alter courts' longstanding prerogatives by "displac[ing] courts' traditional equitable authority absent the 'clearest command.'"); *Ex Parte Yerger*, 75 U.S. (8 Wall.) 85, 103 (1869) (declining to "giv[e] to doubtful words the effect of withholding or abridging" the Court's appellate habeas corpus jurisdiction). It has also imposed clear statement rules in approaching questions about the balance of power between federal and state governments. *See Gregory*, 501 U.S. at 460 (requiring Congress to speak clearly if it intends to "upset the usual constitutional balance of federal and state powers" by prescribing qualifications for state office: "'it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides this balance'" (citation omitted)); *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 238-239, 242-243 (1985) (because abrogation of States' Eleventh Amendment immunity disrupts the "'constitutionally mandated balance of power,'" courts should be "certain of Congress' intent," and "[t]he requirement that Congress unequivocally express this intention in the statutory language ensures such certainty" (citation omitted)). The Court has exhibited the same cautious approach in interpreting statutes that might alter U.S. law's place within the international order, imposing clear statement rules to determine whether acts of Congress apply extraterritorially, *RJR Nabsico, Inc.* v. *European Cmty.*, 136 S. Ct. 2080 (2016), and to determine whether Congress meant for its laws to contravene norms of international law, *Murray* v. *The*

Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (holding that U.S. courts are constrained to avoid interpreting "an act of congress" in a manner that would "violate the law of nations"). In all these structurally vital areas, the Court has stated an intention to presume Congress has not affected the traditional balance of power unless Congress has clearly stated its intent to do so.

B. The Court requires a clear statement from Congress to eliminate or restrict judicial review of agency action.

There is one area where clear statement rules loom larger than any other—the particularly "strong presumption favoring judicial review of administrative action." *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1653 (2015). Under this presumption, one of the most longstanding of this Court's clear statement rules, courts are loathe to assume that Congress intended to preclude judicial review of agency action without the clearest of congressional indications of intent to do so.

1. The presumption favoring judicial review is deeply rooted in both Anglo-American legal history and the history of this Court. See Louis L. Jaffe, *Judicial Control of Administrative Action* 329-334 (1965). The King's judges in England, for example, had authority to issue the prerogative writs to inferior officers, "order[ing] the officer to demonstrate the legality of his order or determination." *Id.* at 153. And the presumption has been law of this Court for over a century, since *American School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94 (1902). There, in determining whether the Court could review an action that the Government argued was "administrative" and therefore unreviewable, *id.* 108-110, the Court held that

delegation of authority to agencies "does not necessarily and always oust the courts of jurisdiction to grant relief to a party aggrieved." *Id.* at 108. Rather, "[t]he acts of all *** officers must be justified by some law, and in case an official violates the law *** the courts generally have jurisdiction to grant relief." *Ibid.* (emphasis added).

2. *McAnnulty*'s holding eventually hardened into a bedrock rule of statutory construction: Judicial review is presumed unless Congress clearly says otherwise. That rule has been applied countless times since. *See, e.g.*, *Gegiow* v. Uhl, 239 U.S. 3, 8-10 (1915) (holding that immigration commissioner's decision reflected a misinterpretation of the law and noting that "[t]he courts are not forbidden by the statute to consider whether the reasons, when they are given, agree with the requirements of the act" (emphasis added)); *Dismuke* v. *United States*, 297 U.S. 167, 172 (1936) (interpreting the Civil Service Retirement Act and holding that "in the absence of compelling language, resort to the courts to assert a right which the statute creates will be deemed to be curtailed only so far as authority to decide is given to the administrative officer" (emphasis added)). See also generally Jaffe 339 (discussing *McAnnulty*).

3. The presumption is also cemented into constitutional law, as having its own vital place in the separation of powers—a basic feature of the judiciary's primary responsibility to "to say what the law is" even as Congress has some say in granting that responsibility to others, and assigns some law-making (and law-interpreting) responsibilities to administrative agencies. *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). The canon thus ensures not only that courts stay within the boundaries Congress

has set for their jurisdiction and address only the questions that Congress has tasked them with resolving, but also ensures that the judiciary does not shirk from the duties Congress has assigned to it, and does not cede power on a question when Congress has not required it.

Accordingly, even assuming that Congress may constitutionally foreclose judicial review of agency action in certain circumstances, maintenance of the separation of powers has driven this Court to prohibit the judiciary from construing statutes to have that effect unless it is clear that Congress has addressed the issue in an open and deliberate way. See Young, 78 Tex. L. Rev. at 1611; see also *id.* at 1605-1613; Erwin Chemerinsky, *A Framework for Analyzing the Constitutionality of Restrictions on Federal Court Jurisdiction in Immigration Case*s, 29 U. Mem. L. Rev. 295, 316 (1999) ("The ability of Congress to restrict federal court jurisdiction raises basic constitutional issues in terms of separation of powers[.]"); Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 915, 939 (1988) (describing separation of powers interests served by ensuring appellate review by an Article III court of decisions of non-Article III tribunals).

4. This particular clear statement rule takes on added significance in the modern administrative state, because of the "awkward constitutional position of the administrative agency"—in which "[b]road delegations of power" are given to regulatory agencies, but the agencies themselves are not subject to Congress's direct oversight. Cass R. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* 143 (1990). There is therefore every reason to believe that Congress permitted these "broad delegations" of power to administrative agencies only "on the

assumption that courts would be available to ensure fidelity to whatever statutory directives" Congress's issued. *Ibid.* Accordingly, the presumption of reviewability does more than ensure that the judiciary has the "final say" on legal interpretation. Stephen I. Vladeck, Boumediene's *Quiet Theory: Access to Courts and the Separation of Powers*, 84 Notre Dame L. Rev. 2107, 2128 (2009) It also preserves *Congress's* prerogative to check unlawful executive action in the ever-expanding administrative state, using the only weapon Congress has to ensure agencies will remain faithful to its statutory directives—judicial review. The presumption in favor of judicial reviewability is therefore especially important to maintain the proper balance of power between the branches on two different fronts: between what Congress may do in setting the bounds of executive authority, and what Congress may do in setting the boundaries of the judiciary's review of executive action. This makes it especially unlikely that Congress would ever disrupt the status quo and preclude judicial review of any agency action.

All these factors combine to make the presumption particularly "strong" "that Congress intends judicial review of administrative action." *Bowen* v. *Michigan Acad. of Family Physicians*, 476 U.S. 667, 670 (1986). And it means the agency bears a "heavy burden" before this Court will be convinced that Congress "prohibit[ed] all judicial review" of the agency's compliance with a legislative mandate. *Mach Mining*, 135 S. Ct. at 1653 (quoting *Dunlop* v. *Bachowski*, 421 U.S. 560, 567 (1975)). To overcome the presumption and take away judicial review, it will require "'clear and convincing evidence' of a contrary legislative intent." *Abbott Labs*. v. *Gardner*, 387 U.S. 136, 141 (1967) (quoting *Rusk* v. *Cort*, 369 U.S. 367, 379-380

(1962)); see also *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 424 (1995) ("[W]e have stated time and again that judicial review of executive action will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." (internal quotation marks omitted)).

Petitioner and the Government therefore start with the deck stacked heavily against them in their attempt to overcome the strong presumption that the Director's determination of a petition's timeliness under 35 U.S.C. § 315(b) are subject to judicial review. And these long odds prove too much for them to overcome.

C. Congress provided no clear statement that the Director's timeliness determinations under Section 315(b) ought to be unreviewable.

1. Determining whether Congress clearly stated an intention to foreclose judicial review of the Director's decisions interpreting Section 315(b)'s begins here—and ultimately ends—with the statutory text. E.g., *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1721 (2017). And the text is unambiguous. Section 315's prohibition is clear. It provides that "[a]n inter partes review" of a patent "may not be instituted if the petition requesting the proceeding is filed more than 1 year after the date" the petitioner or its privies are "served with a complaint alleging infringement of the patent." 35 U.S.C. § 315(b). That is an express limit on the Director's authority to institute an inter parties review proceeding—one of the few restraints placed on the Director's authority to institute inter partes review.

Nothing in Section 315 gives any indication that Congress intended for the Director's determinations related

to a petition's timeliness to be shielded from judicial review. The clear statement this Court demands from Congress cannot be found there. And despite what Petitioner and the Government contend, that clear statement cannot be found anywhere *else* in the U.S. Code either.

2. It cannot be found, despite what Petitioner (at 17) and the Government (at 15) contend, in Section 314. That provision certainly contains a shield of unreviewability covering *certain* of the Director's determinations made during the process of deciding whether to institute inter partes review. But it does not cover all of them. It covers only the "determination by the Director whether to institute inter partes review *under this section*"—Section 314. 35 U.S.C. § 314(d) (emphasis added). Section 315's time bar falls *outside* that Section 314, ergo it is not covered under Section 314(d)'s reviewability shield.

a. There is only one determination by the Director that is specifically mentioned in Section 314, and thus only one determination on which Congress spoke with clarity of its intention to subject it to Section 314(d)'s reviewability shield. That is the Director's determination that "there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition." 35 U.S.C. § 314(a). And that determination has nothing to do with the Director's application of Section 315(b)'s time bar. It has to do instead with the Director's threshold determination whether the petitioner would be likely to succeed in demonstrating that the respondent's patented invention is unpatentable.

b. Section 314(a) may not use the word "patentability." but is clear all the same that it references only the Directors' threshold decision related to the subject invention's patentability and not any of the other calls made as part

of the Director's institution decision. This much is clear from Section 314(a)'s discretionary language—requiring only that the petitioner demonstrate a "reasonable likelihood" that it will prevail in inter partes review. This is because the whole point of an inter partes review is to do a thorough investigation of the subject invention's patentability, and the point of the institution phase is to determine whether that inquiry is worthwhile. Section 314(a) gives the Director discretion in making that determination because it is only tentative, and could change after a full-blown inter partes review.

Yet that discretionary language makes it equally clear that the decision referenced in Section 314(a) and thereby covered under Section 314(d)'s reviewability shield *cannot* include Section 315(b)'s time bar, because the Director's calls under Section 315(b) are not discretionary. Section 315(b) does not permit institution if there is a "reasonable likelihood" the petition is timely. It absolutely prohibits institution of a time-barred inter partes review proceeding—period. And that means the matters covered under Section 314(a) do not include the Director's decisions relating to Section 315's time bar. The clear statement from Congress this Court requires cannot be found there.

c. Nor does it matter, despite what Petitioner (at 15) and the Government (at 16) contend, that Section 314(a) mentions that the Director's threshold patentability determination is made *as part of* his decision whether inter partes review "may be instituted." The fact that Section 314(a) speaks *generally* about the Director's decision to institute inter partes review cannot render *all* decisions the Director might make during the institution phase unreviewable. That reading would render Section 314 staggeringly broad, and raise substantial questions whether

Congress would—or could—ever go so far in barring judicial review of agency action.

That reading is also unsupportable. Regardless of what Section 314(a) says *generally* about the decisions the Director might make during the institution phase, Section 314(a) it speaks *specifically* about one—and only one—determination the Director must make at the institution level: the threshold determination about an invention's patentability. That is the only subject on which Congress spoke with any clarity of its intention to bar judicial review.

3. That result is consistent with Congress's treatment of Congress's precursors to inter partes review for reconsidering issued patents: ex parte reexamination under 35 U.S.C. § 303, and the now defunct inter partes reexamination under former 35 U.S.C. § 313 (2000). In ex parte reexamination proceedings, only one type of determination by the PTO "Commissioner"—the predecessor to the Director—was made unreviewable: its decision to decline to institute ex parte reexamination because "no substantial new question of patentability ha[d] been raised." 35 U.S.C. § 303(c). Likewise, in inter partes reexamination—the direct precursor to inter partes review—only one relevant decision was excluded from judicial review: the Director's "determine[ation] whether a substantial new question of patentability was raised. 35 U.S.C. § 312(a), (c) (2000). Accordingly, the status quo in judicial review of the Directors' determinations in post-grant review of patents was that only its threshold determinations on the patentability of the subject invention were unreviewable. And Congress gave no hint it intended to deviate from that status quo when it added inter partes review as a new post-grant review option.

The Petitioner (at 20) and the Government (at 18-19) hypothesize that Congress could have written Section 314 more like its predecessors, and made its intention to allow review of Section 315 determinations more plain. But that gets the presumption of reviewability backwards—if Congress was at all unclear, that of clarity cuts *in favor* of judicial review by default, not against. That is because lack of clarity is a statement by Congress—a statement that it wished the default of reviewability to apply. And in any event, hypotheticals about the statutes Congress *could* have drafted are several degrees removed from the textual clarity the Court requires and Congress traditionally provides to make questions unreviewable—and a textual clarity that is plainly lacking in that the statute Congress *has* drafted. The only thing that is clear is that the only decisions Congress has ever shielded from review in post-grant review of the PTO's patent grants relate to the discretionary decision of whether an issue of patentability exists to initiate a full-blown post-grant review proceeding. The status quo is thus that the Director's decisions on all other matters are reviewable. And in the absence of similar clarity that Congress sought to erect a unique shield of unreviewability for the Director's decision of whether a post-grant petition is timely under 315, when it had never done so before, that decision must remain reviewable.

4.a. Petitioner (at 16) and the Government (at 17) fare no better in their attempt to glean a clear congressional statement from the matters covered in institution-level briefing. It is their contention that because timeliness is *one* of the matters that may be raised in the parties' institution-level briefing, it is automatically incorporated into the *only* specific decision actually referenced in Section 314(a), which must be made based on that briefing. This

argument falters first because it requires an extended set of inferences: that because the Director is instructed to consider all of the "information presented in the petition *** and any response," 35 U.S.C. § 314(a), that the response may raise statutory grounds why inter partes review should not be instituted, *id.* § 313, and those statutory grounds may include the time bar in Section 315(b). To Petitioner and the Government, that means they become part of the Section 314(a) determination. But each of these steps is simply a series of inferences from text. It is not a clear statement from Congress *in text*. And the sheer length of this inferential chain makes it impossible to say whether Congress "has in fact faced, and intended to bring into issue," the matter of the reviewability of the Director's timeliness determinations under Section 315(b). *Gregory*, 501 U.S. at 461.

b. This inferential chain also breaks down at every link. Nothing in Section 314 or anywhere else in the AIA *requires* the parties to raise timeliness at the institution stage, and thus nothing makes timeliness inherently part of the determination specifically mentioned in Section 314(a). The respondent may raise Section 315's time bar at any time. After all, if a time-barred inter partes review "may not be instituted" under Section 315(b), it is just as improper for the Director to allow an improperly instituted inter partes proceeding to *continue* as to allow it to *commence*. Indeed, the respondent may not have all the information it needs to raise the Section 315(b) time bar at the institution phase, particularly if application of the time bar turns on particulars about when or how exactly the petitioner was "served with a complaint alleging infringement of the patent." *Ibid.* It might be necessary to develop this information in discovery prescribed under Section

316(a)(5) and raised in supplemental briefing provided for under Section 316(a)(3). And even if the parties never raise timeliness in their briefs, the Director could raise the issue sua sponte at any time. Nothing in the text Congress has provided indicates otherwise.

The only place where it is *required* for parties to raise information relevant to Section 315(b)'s time bar at the institution stage appears not in statutory text, but in the Director's regulations—which, as the Government notes (at 5, 17), require a petitioner seeking inter partes review to certify to the petition's timeliness. 37 C.F.R. § 42.104. But it goes without saying that a statement in a regulation, no matter how clear, cannot serve as a clear statement from Congress. And it would be perilous to allow an agency to rely on its own regulations to provide the clear statement Congress has refrained from providing. That would hand the keys to the agency to determine for itself whether its decisions ought to be reviewable, and that is inconsistent with every institutional value behind this Court's clear statement rules and the presumption of reviewability. Accordingly, the inferential chain demanded by Petitioner and the Government falls apart under scrutiny, because nothing in the text Congress has written indicates that timeliness simply is so inherently a part of the determination made under Section 314(a) as to fall under Section 314(d)'s shield against reviewability.

c. Yet the problems with the argument raised by the Petitioner and the Government do not end there. Even if they were correct, and even if the parties were required to raise every conceivable statutory defense in their institution-level briefing—including Section 315(b)'s time bar—that does not make the Director's interpretation of every one of the statutes outlining those defenses an integral

part of the institution decision specifically mentioned under Section 314(a). The fact remains that of all the matters that go into the institution decision—evidentiary, legal, or otherwise, only one is specifically mentioned in Section 314(a): the threshold determination about the subject invention's patentability. Accordingly, this extended inferential argument ultimately goes no farther than the text itself, and leads to the same place: The shield against reviewability in Section 314(d) preventing review of the Director's determinations "under this section" incorporates only the threshold patentability determination in Section 314(a). It does not include the time bar appearing in Section 315(b)—and certainly does not *clearly* do so.

5. The decisions of this Court do not—and should not—suggest any other result. The Court in *Cuozzo Speed Technologies, LLC* v. *Lee*, 136 S. Ct. 2131 (2016) may have decided that Section 314(d)'s shield against reviewability "applie[d] where the grounds for attacking the decision to institute inter partes review consist of questions that are closely tied to the application and interpretation of statutes related to the Patent Office's decision to initiate inter partes review." But if including questions "closely tied" to the institution decision under Section 314(d)'s unreviewability shield is an expansion at all beyond the Section 314(a)'s plain terms, it is an extremely minor one. Nothing suggests that the decisions "closely tied" enough to the institution decision to fall within Section 314(d)'s reviewability shield include anything entirely *unrelated* to the threshold patentability determination.

Certainly the question at issue in *Cuozzo* was not unrelated to patentability. The question in *Cuozzo* may have been couched in procedural terms outside of Section

314(a), concerning whether the petition at issue met section 312(a)(3)'s requirement that it state its complaints with "particularity." 136 S. Ct. at 2139. Yet the only "particularity" at issue related to the substantive patentability determination—because the "particularity" on which the petition was questioned was whether it had challenged certain patents on obviousness grounds or not. *Ibid.* The Court corroborated the narrowness of this "closely tied" test just last term in *SAS Institute, Inc.* v. *Iancu*, 138 S. Ct. 1348 (2018), which confirmed, based the "strong presumption" favoring judicial review, that Section 314(d)'s scope is confined to its "plain terms" "preclud[ing] judicial review only of the Director's initial determination under 314(a) that 'there is a "reasonable likelihood" that the claims are unpatentable. *Id.* at 1359.

It would be hazardous to read *Cuozzo* as holding any more. The presumption of reviewability is founded upon the idea that statutory interpretation, no matter how legitimate an inquiry, is irreducibly inexact. The pages of the Supreme Court Reporter thus cannot serve as a reliable stand-in for a textual clarity that Congress refrained from providing in the Statutes at Large. And it is especially fraught business to mine the Court's opinions about the logical steps taken to resolve *other* matters of statutory construction to try and suggest Congress's clarity on *this* statutory construction matter. Those opinions may have represented the Court's absolute best wisdom in reviewing the question at issue there. But it should never supplant through reasoning what Congress has done in text.

That risks the very core problems that clear statement rules were designed to combat against: that the judicial branch will look at an unclear statute and see only its own

preferred resolution, not the resolution Congress would have wanted. That may be the risk we have to face in interpreting some statutes. But it cannot be a risk that we are prepared to live with when confronted with a matter on which the Court has properly demanded, and Congress has traditionally provided, clear statements of intent because of their essential importance to the structure of our government.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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