

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.,
Respondents.

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

**MOTION FOR LEAVE TO FILE BRIEF OF
AMICI CURIAE AND BRIEF OF AMICI CURIAE
PROFESSORS OF PATENT AND ADMINISTRATIVE
LAW IN SUPPORT OF RESPONDENT
CLICK-TO-CALL TECHNOLOGIES, LP**

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**MOTION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF IN SUPPORT
OF RESPONDENT CLICK-TO-CALL
TECHNOLOGIES, LP**

Amici are professors who write and teach on the administrative law and process of the patent system from a range of theoretical and empirical perspectives. Amici have no personal interest in the outcome of this case, but a professional commitment to ensuring that the interrelated institutions of the patent system function coherently and effectively. Petitioner and Respondent Click-to-Call Technologies, LP have filed blanket consent to the filing of *amicus curiae* briefs in support of either party or neither party in this case. Amici requested consent from Federal Respondent, but have not received a response, necessitating the filing of this Motion.

Amici respectfully submit that the filing of this brief will be beneficial to the Court. As discussed in detail in the brief, this case has especially important implications with respect to the balance of power between (i) the United States Patent and Trademark Office (“USPTO”), and (ii) the federal courts. The attached brief details this separation-of-powers issue, and analyzes empirical evidence demonstrating the importance of judicial review of the USPTO’s time-bar determinations.

Accordingly, amici respectfully request that this Court grant leave to file an *amicus curiae* brief in support of Respondent Click-to-Call Technologies LP.

Respectfully submitted,

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**STATEMENT OF INTEREST
OF AMICI CURIAE¹**

Amici are professors who write and teach on the administrative law and process of the patent system from a range of theoretical and empirical perspectives. We have no personal interest in the outcome of this case, but a professional commitment to ensuring that the interrelated institutions of the patent system function coherently and effectively. The list of signatories is attached as an appendix to this brief.

¹ Petitioner and Respondent Click-to-Call Technologies, LP have filed blanket consent to the filing of *amicus curiae* briefs in support of either party or neither party in this case. Amici sought Federal Respondent's consent to the filing of this brief, but amici have not received a written response. Pursuant to Sup. Ct. R. 37.6, this brief was written by the undersigned *amicus curiae*, and was produced and funded exclusively by the undersigned *amicus curiae* and their counsel. No party or counsel for a party was involved in preparing this brief or made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This case implicates a significant balance in the patent system between the competing powers of the federal courts and the U.S. Patent and Trademark Office Patent Trial and Appeal Board (“PTAB”) to review patent validity. Congress allocated those powers through several provisions of the America Invents Act, including the one-year time bar of 35 U.S.C. § 315(b). The Federal Circuit, starting with its en banc decision in *Wi-Fi One, LLC v. Broadcom Corp.*, 878 F.3d 1364 (Fed. Cir. 2018), has been taking proper account of that balance of power by exercising judicial review over the PTAB’s application of the one-year bar.

Judicial review of § 315(b) time-bar determinations is foundational to safeguarding the court-agency balance of patent powers, whose scope and impact extend well beyond the PTAB and into the courts. Accordingly, the Federal Circuit’s conclusion that such review is available correctly applies this Court’s guidance in *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131 (2016), and is strengthened even further by this Court’s subsequent decision in *SAS Institute Inc. v. Iancu*, 138 S. Ct. 1348 (2018).

Moreover, detailed empirical evidence reveals that litigants use the PTAB to a significant extent as a strategic substitute for courts in reevaluating patent validity. Strategic substitution is subject to important statutory constraints, especially the one-year bar of § 315(b). These constraints promote repose for litigants, conservation of both court and agency resources, and inter-branch respect for the judgments of competing tribunals. Accordingly, in evaluating the

reviewability of the PTAB's timeliness determinations under § 315(b), this Court should take careful account of the significant scope and impact that § 315(b) has beyond the *inter partes* review setting in preserving the balance of power that Congress has allocated to the PTAB and to the courts.

ARGUMENT

I. The Supreme Court's Holding in *Cuozzo* Implicates the Court-Agency Balance of the Power to Review Patent Validity.

In *Cuozzo*, the USPTO overcame the strong presumption that would otherwise have favored judicial review of the PTAB's routine decisions whether to institute *inter partes* review. 136 S. Ct. at 2137. The Court, however, expressly declined to extend that conclusion of nonreviewability to other broad categories of appeals from the PTAB. These other appeals, which *Cuozzo* did not immunize from review, include those "that present other questions of interpretation that reach, in terms of scope and impact, well beyond" the decision under 35 U.S.C. § 314 of whether institution of *inter partes* review is appropriate. *Id.* at 2141. The mutually substitutionary balance of power between the PTAB and the courts to review patent validity presents just this sort of far-reaching scope and impact.

A. The one-year bar of § 315(b) allocates power between the PTAB and the courts as mutual substitutes for reviewing patent validity.

Under the America Invents Act, a party may raise a challenge to a patent’s validity in the federal courts or may raise the challenge in the PTAB—but, generally, is not entitled to a separate validity adjudication in both tribunals. A number of statutory provisions that define *inter partes* review allocate patent validity review power between the courts and the agency by forcing petitioners to choose between them. This necessary choice makes the PTAB and the courts substitutes for each other.

The one-year time bar of § 315(b) is a prime example of that statutorily imposed choice. A petitioner who has been served with a complaint alleging infringement of a patent must seek *inter partes* review within one year or else be satisfied to make its arguments in court. 35 U.S.C. § 315(b) (further providing that service upon the petitioner’s real party in interest or privy also triggers the bar). Petitioners who challenge the same patent may be joined together, and a *request* for joinder may come more than one year after the earlier civil action. *Id.* (providing that “a request for joinder under subsection (c)” of § 314 is exempt from the one-year bar). Nevertheless, under the plain language of § 315(c), even joinder is permitted only if each underlying petition “warrants the institution of *inter partes* review under section 314”—that is, only if each petition

separately satisfies the one-year bar,² which is an independent constraint on the Director's discretion. 35 U.S.C. § 315(c). Similarly, a would-be petitioner who wishes to challenge the validity of a patent in court must forgo any subsequent *inter partes* review on the same patent. 35 U.S.C. § 315(a)(1) (a civil action by the petitioner's real party in interest also triggers the bar).

The mandatory choice is equally salient for those who seek agency review first. If a petitioner requests *inter partes* review and then challenges the same patent in court, the court proceeding is automatically stayed. 35 U.S.C. § 315(a)(2) (providing that a civil action by the petitioner's real party in interest also triggers the mandatory stay). The stay can be lifted only if the patent owner takes certain actions or if the petitioner dismisses the duplicative court challenge altogether. 35 U.S.C. § 315(a)(2)(A)–(C). Likewise, court-agency estoppel forbids a petitioner who reaches

² The USPTO's interpretation is different. According to 37 C.F.R. § 42.122(b), the PTAB may properly grant joinder in two situations, one of which allows circumvention of the one-year time bar of § 315(b). One situation is party joinder, where the second petitioner seeks simply to join the first petitioner's already-instituted petition (which must have satisfied the one-year bar). However, the other situation is issue joinder, where the second petitioner seeks to join its own petition to the first petitioner's already-instituted petition. Here, even if the second petitioner's petition is past the one-year deadline, the PTAB will accept it so long as it comes within one month after the first petition's institution. *See, e.g., Teva Pharm. USA, Inc. v. Allergan, Inc.*, IPR2017-00579, Paper No. 9 (Mar. 31, 2017). The Federal Circuit has not yet conclusively ruled on the correctness of this agency interpretation, but this atextual circumvention by the PTAB of the one-year bar underscores the need for effective judicial review.

a final written decision in *inter partes* review to reassert in litigation not only arguments that it actually raised but also those that it reasonably could have raised during *inter partes* review. 35 U.S.C. § 315(e)(2) (the estoppel also subsequently binds the petitioner’s real parties in interest and privies).

The allocation of power through substitution of the PTAB for the courts is not merely an incidental effect of § 315(b) and the other court-agency boundary provisions. Rather, it is a key aim of Congress in designing the system of *inter partes* review as a “quick, inexpensive, and reliable alternative to district court litigation.” S. Rep. No. 110–259, p. 20 (2008). It is also the direct effect of the statute that Congress actually wrote, as *inter partes* review “looks a good deal more like civil litigation” and “proceeds before the Board with many of the usual trappings of litigation.” *SAS Institute*, 138 S. Ct. at 1353, 1354. *See also* Saurabh Vishnubhakat, Arti K. Rai & Jay P. Kesan, *Strategic Decision Making in Dual PTAB and District Court Proceedings*, 31 BERKELEY TECH. L.J. 45, 50–51 (2016) (introducing a discussion of *inter partes* review and other administrative review proceedings as substitutes for federal court litigation).

B. The mutually substitutionary balance of power between the PTAB and the courts to review patent validity is a statutory limit on agency authority and therefore extends the scope and impact of time bar determinations under § 315(b) well beyond decisions merely to institute *inter partes* review.

The result of the boundary that the AIA creates between traditional judicial review and *inter partes* review is that the PTAB cannot fail to enforce certain provisions of the AIA without encroaching on the countervailing power of the federal courts. Foremost among these provisions is the one-year bar of § 315(b), which imposes a clear and firm limit on the statutory authority of the PTAB. That is to say, whenever the PTAB does accept *inter partes* review petitions from a litigant who was sued in federal court more than one year earlier for infringing the same patent, the PTAB thereby arrogates to itself a set of powers that properly belongs to the federal court where the infringement case is already pending.

This conclusion is not changed by the discretion that the USPTO Director enjoys on instituting petitions for *inter partes* review. § 314(d) (providing that a decision “whether to institute an *inter partes* review under this section shall be final and nonappealable”). As this Court explained most recently in *SAS Institute*, the scope of that discretion still begins “with the strong presumption in favor of judicial review.” 138 S. Ct. at 1359 (citing *Cuozzo*, 136 S. Ct. at 2140) (internal quotations omitted). And that presumption must still

be overcome with “clear and convincing” indications that judicial review was to be withdrawn. *Id.* (citing *Cuozzo*, 136 S. Ct. at 2140).

That presumption was not overcome in *SAS Institute*, where the patent owner did not challenge the substance of the institution decision itself. *Id.* Rather, the patent owner argued that limiting *inter partes* review to fewer than all of the challenged patent claims was outside the statutory authority of the Director. *Id.* Here, too, patent owner Click-to-Call does not, and could not, challenge the conclusion that the *inter partes* review petition presented “a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.” § 314(a).

Instead, Click-to-Call argues that the petition was beyond the authority of the Director to institute because it came after the one-year bar of § 315(b). In that regard, the discretion afforded by “§ 314(d) does not enable the agency to act outside its statutory limits” and so, in *SAS Institute*, did not supersede the PTAB’s separate statutory obligation of full and reasoned decision-making. 138 S. Ct. at 1359 (citing *Cuozzo*, 136 S. Ct. at 2141). That discretion similarly does not supersede the PTAB’s separate statutory obligation to accept only timely petitions under § 315(b). “And nothing in § 314(d) or *Cuozzo* withdraws [judicial] power to ensure that an *inter partes* review proceeds in accordance with the law’s demands.” *Id.*

II. Empirical Evidence Confirms that the Court-Agency Balance of Power that Congress Allocated in the AIA and Embodied in § 315(b) Does, Indeed, Have Significant Scope and Impact Well Beyond the PTAB and in the Federal Courts.

The necessary choice for litigants between the PTAB and the courts as mutual substitutes is one that Congress intended, the executive branch expected and welcomed, and the plain language of the *inter partes* review provisions now embodies. Detailed empirical evidence shows that litigants make this choice in two distinct ways. One approach is so-called standard substitution, whereby a defendant in district court litigation defensively challenges the validity of the asserted patent in *inter partes* review. Vishnubhakat, Rai & Kesan, 31 BERKELEY TECH. L.J. at 49. The other is nonstandard substitution, whereby the petitioner for *inter partes* review is not yet the target of any prior district court lawsuit on the same patent and challenges the patent preemptively. *Id.* The significant usage of both standard and nonstandard petitioning reflects the broad scope and high impact that court-agency substitution has well beyond the PTAB and into the courts.³

³ The *Strategic Decision Making* study is the first—and, to the amici’s knowledge, only—academic empirical analysis of the PTAB that goes beyond solely tabulating petitions, institutions, outcomes, and patents involved in *inter partes* review. The study goes further by matching patent-petitioner pairs in PTAB proceedings to litigant data from the federal courts and so draws novel and detailed conclusions about timing, strategic behavior such as serial petitioning, and the collective action problem in

A. Administrative review of patent validity has been a significant substitute for judicial review and has generated strategic behavior in both the PTAB and the courts.

Patent validity challenges in the PTAB are closely connected with the threat or fact of infringement litigation in the courts. *Id.* at 70. Comprehensive data from the start of AIA review on September 16, 2012, through June 30, 2015, shows that a large majority—70 percent—of those who sought *inter partes* review were standard petitioners, who had previously been sued on the patents that they challenged in the PTAB. *Id.* at 73. An even larger majority—86.8 percent—of the patents that were involved in a PTAB challenge were also involved in one or more district court lawsuits. *Id.* at 69. The close connection between PTAB review of a patent and parallel district court disputes involving the same patent reaffirms the importance of § 315(b) and other boundary provisions in allocating power between the PTAB and the courts.

Nonstandard petitioners filing preemptive challenges still made up a substantial minority—30 percent overall—of those who sought *inter partes* review. *Id.* at 73–74. The share of standard and nonstandard petitioners, moreover, varied during this period across technologies. *Id.* at 74, 102 (discussing Figure 15a). For example, among *inter partes* reviews

patent challenges where competitors would also enjoy the benefits of patent invalidation. The study also includes, at its Appendix A, a discussion of data and methodology to aid researchers in replicating the results. See Vishnubhakat, Rai & Kesan, 31 BERKELEY TECH. L.J. at 84, 88-90.

upon patents directed to chemical inventions and computers and communications-related inventions, the share of nonstandard petitions was only slightly above 30 percent. *Id.* at 102. By contrast, for patents directed to drugs and medical-related inventions, nonstandard petitioners actually made up the majority—51.5 percent—of those who sought *inter partes* review. *Id.* at 82.

Because nonstandard petitioners by definition have not previously been sued in the courts, it may seem as if the one-year bar of § 315(b) has no relevance to this form of strategic substitution of the PTAB in place of the courts. Closer scrutiny reveals the opposite, however.

B. Strategic substitution between the PTAB and the courts in reviewing patent validity underscores the significant scope and impact of power-allocating provisions such as § 315(b).

Among patents in certain technology areas, there are substantial disparities “between the share of *petitioners* who were previously sued and the share of IPR *petitions* with at least one petitioner who was previously a defendant on the challenged patent.” *Id.* at 74 (emphasis in original). For drug and medical-related patents, for example, 48.5 percent of the petitioners were previously sued defendants whereas 70.8 percent of the petitions had at least one previously sued defendant as a petitioner. *Id.* at 102–103. The petitioner-petition disparity for mechanical-related patents was 53.1 percent versus 70.2 percent. *Id.*

These large technology-specific gaps suggest that, to a significant extent, nonstandard petitioners were joining petitions filed by standard petitioners. *Id.* at 74. Like original petitions for *inter partes* review that are subject to the one-year bar of § 315(b), petitions may be joined together only if each petition “warrants the institution of *inter partes* review under section 314”—that is, only if each petition satisfies the one-year bar. 35 U.S.C. § 315(c). In some cases, the apparent joinder of *inter partes* reviews may have reflected socially desirable collective action by multiple parties who were willing to share the cost of invalidating a questionable patent rather than free-ride upon the litigation efforts of one or a few challengers. In other cases, joinder may have been a means to cause harassment and delay through serial and duplicative filings. *Id.* Disaggregating these effects is the subject of ongoing research, *id.* at 74–75, but their relevance to the balance of power between the PTAB and the courts is stark.

A particularly helpful way to appreciate this relevance is to measure the actual observed lag between the filing of civil actions asserting patent infringement and the filing of the first *inter partes* review challenging the validity of the same patent. For example, one may measure the lag between the first civil action involving a patent and the first *inter partes* petition on that patent and see that the lags produce a largely normal distribution—except for a sharp spike at the one-year mark, consistent with petitioners seeking *inter partes* review within the deadline set by § 315(b). *Id.* at 76, 105 (discussing Figure 17). This first-lawsuit-to-first-petition lag “takes a broad view of how

court-agency lags are distributed” and, as expected, includes a notable share of patents—23.4 percent—for which the lag exceeds one year. *Id.* at 76. This is to be expected, as the first defendant sued on patent need not be the one to mount an *inter partes* challenge on that patent where the patent will be asserted multiple times. *Id.* at 76.

Similarly one may also measure the lag between the *last* civil action asserting a patent before *inter partes* review would be initiated and the first *inter partes* petitions on that patent and see that the lags again produce a largely normal distribution—again with a sharp spike at the one-year mark due to the § 315(b) deadline. *Id.* at 76, 106 (discussing Figure 18). This last-lawsuit-to-first-petition lag reveals “cases where earlier lawsuits against others have revealed useful information about the patent owner’s enforcement strategy so that less time is needed to decide whether and how to prepare an IPR challenge.” *Id.* at 76. As expected, the result is a far smaller share of patents—11.4 percent—for which the lag exceeds one year. *Id.* at 76.

These findings confirm a simple intuition: parties work to deadlines. However, deadlines are only as effective as their enforcement. Both distributions of court-agency lag compare civil actions involving a given patent and *inter partes* review petitions on the same patent, and both reveal a significant adherence to the one-year bar of § 315(b). If judicially unsupervised agency discretion is allowed to weaken or ignore adequate enforcement of § 315(b), then parties will take note. The current spikes of legal compliance at

the one-year mark will likely fall, and court-agency lags will likely extend further out in time, for any rational petitioner would continue to take as much time as the PTAB would allow in practice, not merely the one year that Congress allowed.

The one-year bar of § 315(b) has meaningfully and measurably constrained and defined the ability of federal court defendants to use *inter partes* review as a substitute for judicial review of patent validity. As a result, substantial shares of nonstandard petitioners have chosen to challenge preemptively in the PTAB, before they could be sued and thus before their one-year clock could start to run. Standard and nonstandard petitioners have apparently used the joinder provision quite often. The close connection between PTAB review of a patent and district court disputes involving the same patent empirically supports the intuitive importance of § 315(b) and other boundary provisions in allocating power between the PTAB and the courts.

C. The power-allocation function that § 315(b) serves demonstrably pushes its scope and impact out of the PTAB and into the courts.

Comprehensive data from PTAB review and district court litigation reveal complex relationships of substitution and overlap between the PTAB and the courts as to the patents that are challenged in *inter partes* review, the petitions that are filed upon those patents, and the petitioners who file them. These substitutions and overlaps represent an equilibrium undergirded by the one-year bar of § 315(b), the joinder

safeguards of § 315(c), and other aforementioned provisions.

The impact of this equilibrium is deeply felt by litigants, particularly patent owners, who cannot achieve repose if litigating in court for more than a year offers them no guarantee against the creation of new parallel disputes in the PTAB. The impact is also felt by courts whose scarce resources are squandered if, after a lengthy development of facts and legal argument, a petitioner may start anew in the PTAB. In such cases, the ability to ignore the balance of court-agency power embodied in § 315(b) would leave courts in the awkward position of staying their own hand in order to avoid letting future agency resources go to waste—while their own judicial resources are already sunk beyond what Congress intended.

Accordingly, this Court should guard against the disruption that would likely result from reversing the Federal Circuit and leaving PTAB determinations about the one-year bar unmoored from judicial oversight. The scope and impact of the one-year bar and similar power-allocating provisions are not limited to the PTAB. Because they preserve an inter-branch balance of power, these provisions reach well outside the walls of the agency and into the federal courts with which the PTAB competes.

CONCLUSION

For the foregoing reasons, amici respectfully urge this Court to affirm the conclusion of the Court of Appeals that § 315(b) remains subject to the ordinary presumption in favor of judicial review. That conclusion takes proper account of the significant scope and impact that § 315(b) has not only in *inter partes* review but also in the federal courts. The one-year bar of § 315(b) is a key fulcrum for preserving the balance of power that Congress has allocated to the PTAB and to the courts. That balance should not be ignored when evaluating the reviewability of PTAB determinations about timeliness under § 315(b).

Respectfully submitted,

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November 4, 2019

APPENDIX

APPENDIX

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Appendix LIST OF SIGNATORIES App. 1

APPENDIX — LIST OF SIGNATORIES¹

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