

No. 18-916

In the Supreme Court of the United States

DEX MEDIA, INC., PETITIONER

v.

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

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

**BRIEF FOR RESPONDENT CLICK-TO-CALL
TECHNOLOGIES, LP, IN OPPOSITION**

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**PARTIES TO THE PROCEEDING BELOW AND
RULE 29.6 STATEMENT**

Petitioner is Dex Media, Inc. Respondents are Click-to-Call Technologies, LP, and Andrei Iancu, the Director of the U.S. Patent and Trademark Office.

Click-To-Call Technologies, LP, has no parent corporation, and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

According to petitioner, this case presents “two important questions” that warrant review (Pet. 12), but neither is remotely certworthy. The first asks the Court to declare that Section 314(d) bars any judicial review, ever, over the USPTO’s interpretation of Section 315(b)—one of Congress’s express limits on the USPTO’s authority. This Court already rejected the foundation of petitioner’s argument in *SAS Instit., Inc. v. Iancu*, 138 S. Ct. 1348 (2018), and it recently denied another petition (which squarely raised the same jurisdictional question) without even requesting a response. There is no reason to reach a different result here.

Petitioner’s second question asks the Court to declare that Section 315(b)’s time bar—which is expressly triggered once a party is “served with a complaint”—does not

apply if the lawsuit is later dismissed without prejudice. But petitioner's argument is irreconcilable with Section 315(b)'s unambiguous text, as petitioner itself effectively admits. And even the government has abandoned petitioner's theory, now conceding that the Federal Circuit's construction was correct. There is little point in granting review to consider petitioner's atextual reading of a narrow statutory bar that the agency itself has since disclaimed.

At bottom, this is a straightforward and obvious denial. The decision below is correct: *SAS Institute* makes clear that Congress was not willing to let the Board unilaterally define the scope of its own jurisdiction, and Section 315(b)'s plain text is susceptible of a single construction (not petitioner's). There is no conflict with any decision of this Court or any other court of appeals. And the government itself recommends the Court deny review, declaring this case a "poor vehicle." There is no reason for the Court to devote its finite resources to either question.

The government admits that it exceeded its statutory authority in instituting an IPR, and but-for the availability of judicial review, respondent would never have had the opportunity to correct the agency's unauthorized action. The petition for a writ of certiorari should be denied.

ARGUMENT

A. The First Question Presented—Asking Whether The USPTO Has The Unreviewable Power To Define The Scope Of Its Own Jurisdiction—Is Unworthy Of Review

Under Section 315(b), Congress placed a clear limit on the Board's institution authority: "An inter partes review *may not be instituted* if the petition requesting the proceeding is filed more than 1 year after the date on which

the petitioner, real party in interest, or privy of the petitioner is served with a complaint alleging infringement of the patent.” 35 U.S.C. 315(b) (emphasis added). According to petitioner, the USPTO has the exclusive authority to say what this statutory restriction means, and Section 314(d) prohibits the courts from reviewing the USPTO’s interpretation of its own power.

This contention is unworthy of review. It is premised on a sweeping reading of Section 314(d) that this Court already rejected, and this Court denied a petition in March raising exactly the same question—and did so without even calling for a response. The Federal Circuit correctly affirmed the judiciary’s traditional authority to “ensure that an inter partes review proceeds in accordance with the law’s demands.” *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1359 (2018). There is no reason for this Court to revisit that settled, unremarkable determination. The petition should be denied.

1. Petitioner’s entire argument turns on its expansive reading of Section 314(d), and its directive that the Director’s determination “whether to institute an inter partes review *under this section* shall be final and nonappealable.” 35 U.S.C. 314(d) (emphasis added). According to petitioner, Section 314(d) insulates “*any* determinations” affecting the Director’s institution decision, including whether an IPR petition satisfies Section 315(b)’s time bar. Pet. 13-14 (emphasis added); *id.* at 14-16 (asserting that *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2140 (2016), supports its position). Petitioner is wrong.

a. Indeed, just last Term, this Court unequivocally confirmed that Section 314(d) does not mean what petitioner says. In *SAS Institute*, this Court was confronted with the exact same argument that petitioner raises here:

that Section 314(d) “foreclos[es] judicial review of any legal question bearing on the institution of inter partes review.” 138 S. Ct. at 1359.

This Court had little trouble rejecting that contention. As the Court explained, there is a “strong presumption” favoring judicial review, and Congress has to speak in “clear and convincing” terms to overcome that presumption. 138 S. Ct. at 1359 (internal quotation marks omitted). Given the presumption’s “strength” and “the statute’s text,” the Court found that Section 314(d)’s scope was far narrower: “§ 314(d) precludes judicial review *only* of the Director’s ‘initial determination’ *under § 314(a)* that ‘there is a “reasonable likelihood” that the claims are unpatentable.’” *Ibid.* (explaining *Cuozzo*’s limited holding) (emphases added). Section 314(d)’s bar did not extend to blocking review of the agency’s construction of the statutory framework, and the judiciary retained its usual power to “set aside agency action ‘not in accordance with law’ or ‘in excess of statutory jurisdiction, authority, or limitations.’” *Ibid.* (quoting 5 U.S.C. 706(2)(A), (C)).

As the Court concluded, “§ 314(d) does not ‘enable the agency to act outside its statutory limits,’” and “nothing in § 314(d) or *Cuozzo* withdraws [the judiciary’s] power to ensure that an inter partes review proceeds in accordance with the law’s demands.” 138 S. Ct. at 1359. *SAS Institute* thus reaffirmed that courts may exercise review to cabin agency action to its “statutory bounds.” *Ibid.*

b. These settled principles control the disposition of this case. Under a straightforward application of *SAS Institute*, there is no question that courts have the authority to review the USPTO’s construction of Section 315(b). That statute directly cabins the agency’s authority, and nothing in Section 314(d) forecloses the judiciary’s role in construing this statutory limit on the agency’s power. The

Federal Circuit reached that conclusion before *SAS Institute*, and its holding is now unassailable in light of this Court’s unequivocal rationale. See, e.g., *Wi-Fi One, LLC v. Broadcom Corp.*, 878 F.3d 1364, 1374 (Fed. Cir. 2018) (en banc) (“Enforcing statutory limits on an agency’s authority to act is precisely the type of issue that courts have historically reviewed.”); *id.* at 1375 (O’Malley, J., concurring) (“If the [USPTO] exceeds its statutory authority by instituting an IPR proceeding under circumstances contrary to the language of § 315(b), our court, sitting in its proper role as an appellate court, should review those determinations.”). There is no need for this Court to spend its time confirming that *SAS Institute* meant what it said in construing the limited reach of Section 314(d).¹

Likely for that reason, this Court recently denied a petition presenting the identical question without even calling for a response. See Pet. i, *RPX Corp. v. Applications In Internet Time, LLC*, No. 18-1075 (filed Jan. 22, 2019) (“Whether 35 U.S.C. § 314(d) bars judicial review of the Patent and Trademark Office’s decision to institute inter partes review where a patent holder’s challenge to that institution decision is grounded on a timeliness objection

¹ Petitioner argues that Justice Alito’s dissent in *Cuozzo* supports the opposite result, highlighting the dissent’s suggestion that “the petition’s timeliness” would be “unreviewable” under the majority’s approach. Pet. 16 (quoting *Cuozzo*, 136 S. Ct. at 2155 (Alito, J., dissenting)). But petitioner ignores what Justice Alito also wrote three paragraphs later: “I take the Court at its word that today’s opinion *will not permit the Patent Office ‘to act outside its statutory limits’ in these ways.*” 136 S. Ct. at 2155 (Alito, J., dissenting) (emphasis added). Thus both the *Cuozzo* majority and dissent were on the same page that courts would still be able to review the meaning of statutes setting out the core limits on the agency’s authority—even if they disagreed on other things. And *SAS Institute* has now ended the debate that the Court was serious about the narrowness of *Cuozzo*’s bar.

under § 315(b).”); Order, No. 18-1075 (Mar. 18, 2019) (denying review). The only factor that has changed since that denial is the government’s recommendation that the Court *should also deny here*. There is no reason to reach a different outcome in this case.²

2. Nor are there any countervailing considerations supporting review. The Federal Circuit’s rule is clear and administrable. It is consistent with this Court’s decisions, and it does not conflict with the decisions of any other courts of appeals (on any related provisions). It protects the proper role of the judiciary in construing federal statutes, and it ensures the USPTO will act within the confines of its statutory authority. And while the government (unsurprisingly) disagrees with the Federal Circuit, it still recommends denying review—a strong indication that the government itself does not view this question as sufficiently important or urgent to warrant the Court’s time.³

² Petitioner also errs in grouping together the Director’s *discretionary* determinations with the mandatory limits on the agency’s power. Section 315(b) imposes a jurisdictional bar on the agency’s authority to institute review, and the Director has no discretion (subjective or otherwise) to deviate from that statutory command. This is vastly different from the kind of discretionary determination the Director is authorized to make under Section 314(a).

³ The government’s substantive arguments are unconvincing. Indeed, the majority of its brief simply trots out the same arguments (in large part *verbatim*) that this Court already rejected in *SAS Institute*. Compare, *e.g.*, U.S. Br. in Opp. 14-15, with U.S. Resp. Br. 18-20, No. 16-969 (filed Sept. 5, 2017). In the end, *SAS Institute* confirms that the Federal Circuit was correct in *Wi-Fi One*: the agency does not have unreviewable authority to construe the outer limits of its own power; there is no indication (much less a *clear and convincing* one) that Congress stripped the courts of their traditional reviewing function; and *Cuozzo*, correctly understood, limits Section 314(d)’s bar to

Even taken at face value, petitioner’s position is extraordinary: it says the USPTO can assert authority that Congress never intended to give it; institute review over a time-barred petition contrary to Congress’s express directives; and avoid any judicial review, ever, even if the agency’s construction misreads the core limits on its power—as the agency now admits was the case here. If Congress truly wished to erase all judicial review over the IPR statutory framework, it would have made that unusual intention unmistakably clear. Section 314(d)’s actual text is far more limited. The Federal Circuit correctly construed the statutory framework, and petitioner’s theory is incompatible with this Court’s decisions. Certiorari is plainly unwarranted.⁴

B. The Second Question Presented—Asking The Court To Graft An Atextual Exception Onto Section 315(b)’s One-Year Time Bar—Is Unworthy Of Review

Petitioner’s second question presented is equally insubstantial. According to petitioner, the Federal Circuit erred in holding that Section 315(b) means exactly what it says: a party “served” with an infringement complaint has one year to file an IPR petition, even if the action is later dismissed without prejudice.

the Director’s institution decision *under Section 314(a)*—not the Director’s interpretation of the entire statutory framework. Nothing in the government’s brief casts doubt on any of these core propositions.

⁴ Aside from misreading Section 314(d), petitioner also ignores the broad grant of authority in Section 319: authorizing any party “dissatisfied with the final written decision” to appeal. 35 U.S.C. 319. The USPTO here made its jurisdictional ruling twice—once at the institution stage, and again in its final-written decision. See Pet. App. 120a-122a, 159a-162a. Even if the former were part and parcel of the “institution decision,” the latter was not. And one can assuredly be “dissatisfied” if one believes the agency exceeded its authority.

This narrow question does not warrant the Court’s review. The Federal Circuit’s interpretation is the only plausible reading of the statute’s plain text. It advances the AIA’s objectives and provides clear guidance for the regulated community. Indeed, even the government now agrees that this is the correct reading of the statute, and it also agrees that this “administrable ‘bright-line rule’” leaves defendants ample opportunities to invoke the IPR process or otherwise raise their defenses. U.S. Br. 12 (quoting Pet. App. 88a (Taranto, J., concurring)). And while petitioner conjures up the usual “parade of horrors,” it greatly exaggerates the potential negative effects of the Federal Circuit’s decision—which, again, the USPTO itself now endorses. Further review is unwarranted.

1. a. This question is properly resolved by “the language of the statute itself” (*Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016)), and Section 315(b)’s text could not be any clearer:

An inter partes review may not be instituted if the petition requesting the proceeding is filed more than 1 year after the date on which the petitioner, real party in interest, or privy of the petitioner is *served with a complaint alleging infringement of the patent*. The time limitation set forth in the preceding sentence shall not apply to a request for joinder under subsection (c).

35 U.S.C. 315(b) (emphasis added). Congress could not have spoken any more plainly in this provision. The triggering event is the “serv[ice]” of “a complaint.” Those terms are not hard to understand. The section has no exceptions for dismissals without prejudice, and yet it does create an exception for “joinder[s] under subsection (c),” proving that Congress knows how to make exceptions when it so wishes. Pet. App. 47a, 49a. The text does not

put any weight on what happens after the complaint is served, and nothing in the section (or anywhere else) suggests that service is magically “undone” if the action is later withdrawn. *Ibid.* The act of service creates a “bright-line rule” (*id.* at 88a (Taranto, J., concurring)) that puts all parties on notice of their rights; anyone who wishes to seek IPR review can calculate the deadline and act accordingly.

b. In response, petitioner effectively admits that its contrary reading is atextual, which is all but dispositive. Pet. 22-23; see also Association For Accessible Medicines Amicus Br. 22-23 (faulting, incredibly, the Federal Circuit for applying Section 315(b)’s “ordinary, contemporary, and common meaning”—rather than attempt the “sympathetic and imaginative discovery” of the statute’s supposed purpose). But petitioner says that a dismissal without prejudice effectively *nullifies* the entire proceeding, leaving the parties “as if the action had never been filed.” Pet. 21 (describing the effects of Fed. R. Civ. P. 41(a)). And petitioner assumes that if the legal effects of the action are undone, then the act of service must be undone as well.

Petitioner vastly overstates its case. As the majority and concurrence established below, dismissals without prejudice do not wipe out the very fact of the proceeding; indeed, under Rule 41 itself, the initial filing still has multiple legal consequences, including limiting the plaintiff’s rights in future suits and exposing the plaintiff to costs and potential sanctions. See Fed. R. Civ. P. 41(a)(1)(B), (d); see also, *e.g.*, Pet. App. 59a; *id.* at 78a, 84a (Taranto, J., concurring). There is no basis in law or logic for pretending a complaint that *was* “served” suddenly was *not* simply because the action was later dismissed. See, *e.g.*, *id.* at 81a (Taranto, J., concurring) (explaining why the “clock-starting effect that is at issue here” is different

from “certain other legal effects that are denied to a complaint once it has been voluntarily dismissed without prejudice”). This statute specifically links the one-year bar to the act of service, and petitioner has not identified any background rule that permits the courts to rewrite the statute.⁵

2. Nor can petitioner’s profoundly atextual reading be saved by its misguided policy arguments. The Federal Circuit’s interpretation is again clear and administrable; it encourages swift action to weed out problematic patents, and it does not unfairly deprive defendants of any rights. As the government notes, parties can still raise their invalidity defenses in a variety of ways, including by filing a timely IPR. U.S. Br. 12-13. The only party prejudiced by this rule is one who sits on its rights.

And while petitioner argues that a bright-line rule encourages gamesmanship (Pet. 26-27), it ignores the realities of litigation on the ground. Any party accused of infringement can always demand a license or covenant not to sue once an action is dismissed without prejudice; if the patentee refuses to comply, the party would have every reason to presume that it might be sued again in the future. Pet. App. 88a (Taranto, J., concurring). The initial service thus puts the defendant on notice of the patent, its alleged infringement, and its future risk. *Id.* at 90a. At that point, the defendant is fully capable of assessing its

⁵ Unlike the petitioner in a related case (*Atlanta Gas Light Co. v. Bennett Regulator Guards, Inc.*, No. 18-999 (pet. filed Jan. 28, 2019)), the petitioner here wisely does not argue that there is a circuit conflict. We are unaware of any court of appeals that has construed comparable language in any statute (triggering a time-bar *based on the act of service*) to silently exempt actions that were later dismissed without prejudice. See, *e.g.*, Pet. App. 53a, 59a-60a; *id.* at 78a (Taranto, J., concurring).

available options, just as Congress intended. If the defendant concludes that there is a legitimate possibility of future litigation, it can always file an IPR to protect its rights and weed “bad” patents from the system. And if it concludes that the future risk does not warrant an IPR—even where the patentee refuses to grant a license or covenant not to sue—then it can defend itself in a future lawsuit. See *SAS Inst.*, 138 S. Ct. at 1353 (“Congress has long permitted parties to challenge the validity of patent claims in federal court”). Either way, the defendant is left in a fair position to make an informed decision.⁶

In short, the plain-text reading of Section 315(b) is consistent with its notice function and the AIA’s overall objectives. Pet. App. 50a; *id.* at 86a-87a (Taranto, J., concurring). And even if petitioner believes its “approach makes for better policy,” “policy considerations cannot create an ambiguity when the words on the page are clear.” *SAS Inst.*, 138 S. Ct. at 1358. The agency agrees

⁶ In any event, an abusive strategy of sue-and-voluntarily-dismiss would be entirely counterproductive for patentees: “By suing many defendants in the first place, the patentee would be expanding the pool of persons objectively threatened by the patent, which would seem to increase the likelihood of an early IPR challenge and to lower the cost of an IPR for any individual defendant if the defendants file jointly.” Pet. App. 90a (Taranto, J., concurring). And even if the ploy somehow worked, the patentee would still be exposed to a potential IPR if it later sued any *additional* defendants—each new suit against each new party would activate a new one-year bar. Unless there is only a single defendant, no one would ever waste the time and energy filing a series of lawsuits only to file another series of lawsuits a year later—all while hoping that not a single defendant will decide to bring an IPR. *Id.* at 90a-91a. And even if there is only a single defendant, most patentees are not interested in forfeiting a year of damages simply to take the chance that the defendant will not file an IPR on the 364th day. See 35 U.S.C. 286 (limiting damages to “six years prior to the filing of the complaint”).

with the Federal Circuit's reading of the statute, and petitioner's contrary view is ultimately unsound. There is no reason for this Court to reconsider this narrow question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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