

No. 21-118

IN THE
Supreme Court of the United States

APPLE INC.,

Petitioner,

v.

OPTIS CELLULAR TECHNOLOGY, LLC, OPTIS WIRELESS
TECHNOLOGY, LLC, AND UNWIRED PLANET
INTERNATIONAL LIMITED,

Respondents.

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

**BRIEF OF ACT | THE APP ASSOCIATION AS
AMICUS CURIAE IN SUPPORT OF
PETITIONER**

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August 27, 2021

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TABLE OF CONTENTS

Contents

TABLE OF AUTHORITIES iii
INTEREST OF THE *AMICUS CURIAE*..... 1
SUMMARY OF THE ARGUMENT3
ARGUMENT6
**I..... SMALL BUSINESSES DEPEND ON A
FAIR AND PREDICTABLE PATENT
SYSTEM TO ENABLE CONTINUED
GROWTH AND INNOVATION WITHIN
THE APP ECONOMY.....6**
**II. THE *INTER PARTES* REVIEW PROCESS
HAS OPERATED AS CONGRESS
INTENDED, UNTIL RECENTLY
UNDERCUT BY THE IMPROPER *NHK-*
FINTIV RULE10**
 A. The NHK-Fintiv Rule Exceeds the
 USPTO’s Authority Under the AIA.....14
 B. The NHK-Fintiv Rule is Arbitrary and
 Capricious.....15
 C. The NHK-Fintiv Rule Was Not Developed
 Using a Sufficient Notice and Comment
 Period.....16
**III..... THE PETITION FOR WRIT OF
CERTIORARI SHOULD BE GRANTED
TO CORRECT THE FEDERAL
CIRCUIT’S FLAWED DETERMINATION
THAT IT LACKS JURISDICTION TO
HEAR PLAINTIFF’S APPEALS.....17**
 A. The Federal Circuit Has Appellate
 Jurisdiction Under §1295(a)(4)(A).....18

B. The Federal Circuit Has Incorrectly Determined that Petitioner’s Claims are Barred by §314(d).....	19
C. Certiorari Should Also Be Granted to Provide Much-Needed Guidance on the Availability of Mandamus Relief Where §314(d) Bars Appeal.....	21
CONCLUSION	21

TABLE OF AUTHORITIES

Page(s)

CASES

<i>Apple Inc. v. Fintiv, Inc.</i> , No. IPR2020-00019, 2020 WL 2486683, at *5 (P.T.A.B. May 13, 2020).	15
<i>Association of Data Processing Service Organizations, Inc. v. Board of Governors of Federal Reserve System</i> , 745 F.2d 677 (D.C. Cir. 1984).....	15
<i>Cuozzo Speed Techs., LLC v. Lee</i> , 136 S. Ct. 2131 (2016).	5, 18, 19, 20, 21
<i>Hollingsworth v. Perry</i> , 558 U.S. 183 (2010).....	21
<i>In re Power Integrations, Inc.</i> , 899 F.3d 1316 (Fed. Cir. 2018)	21
<i>Lincoln v. Vigil</i> , 508 U.S. 182 (1993).....	16
<i>Medtronic, Inc. v. Robert Bosch Healthcare Sys., Inc.</i> , 839 F.3d 1382 (Fed. Cir. 2016).....	21
<i>Mylan Laboratories v. Janssen Pharmaceutica, N.V.</i> 989 F.3d 1375 (2021).	21
<i>NHK Spring Co. v. Intri-Plex Techs., Inc.</i> , IPR2018- 00752 (Sept. 12, 2018)	13-14

<i>Oil States Energy Servs. v. Greene’s Energy Grp</i> , 138 S. Ct. 1365 (2018)	9
<i>SAS Institute, Inc. v. Iancu</i> , 138 S. Ct. 1348 (2018).....	5, 18, 20
<i>TC Heartland v. Kraft Foods Brand</i> , 137 S. Ct. 1514 (2017)	9

STATUTES

5 U.S.C. §553.....	16
5 U.S.C. §706.....	15, 19, 20
28 U.S.C. §1295.....	18, 19
35 U.S.C. §314.....	5, 16, 18, 19, 20, 21

OTHER AUTHORITIES

ACT The App Association, <i>State of the U.S. App Economy: 2020</i> , 7th Edition (2020), https://actonline.org/wp-content/uploads/2020-App-economy-Report.pdf	6
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- IoT Analytics, *State of the IoT Q4 2020 & 2021* (Nov. 2020)..... 8
- Josh Landau, *Inter Partes Review: Five Years, Over \$2 Billion Saved*, *Patent Progress*, (Sept. 14, 2017), <https://www.patentprogress.org/2017/09/14/inter-partes-review-saves-over-2-billion/> 11
- Lexi Sydow, *The State of Mobile in 2020: How to Win on Mobile*, *App Annie*, (Jan. 15, 2020), <https://www.appannie.com/en/insights/market-data/state-of-mobile-2020/>. 9

<i>Litigation on the Rise: Number of New Cases Filed by Patent Assertion Entities</i> , Engine (Nov. 9, 2020), https://www.engine.is/s/Pae-stats-Diagram_Jan-Oct-2020.pdf	13
Morgan Reed, Comments of ACT The App Association to the National Telecommunications and Information Administration regarding the Benefits, Challenges and Potential Roles for the Government in Fostering the Advancement of the Internet of Things (June 2, 2016), http://actonline.org/wp-content/uploads/NTIA-Comments-on-IoT-Regulations.pdf	8
<i>Q3 2020 Patent Dispute Report</i> , Unified Patents, (Sept. 30, 2020), https://www.unifiedpatents.com/insights/q3-2020-patent-dispute-report	13
Scott McKeown, <i>Texas Plaintiffs More Likely to Side-Step PTAB?</i> , Patents Post-Grant, (Apr. 7, 2020), https://www.patentspostgrant.com/texas-plaintiffs-more-likely-to-side-step-ptab/	14
<i>Unified's Patent Quality Initiative (PQI) Releases Economic Report Showing AIA led to over 13,000 Jobs and Grew U.S. Economy by \$3 Billion since 2014</i> , Unified Patents, (June 24, 2020), https://www.unifiedpatents.com/insights/2020/6/23/the-perryman-group-releases-economic-report-an-assessment-of-the-impact-of-the-america-invents-act-and-the-patent-trial-and-appeal-board-on-the-us-economy	12

Unified Patents, “Portal,”
<https://tinyurl.com/xwmajkyx>..... 17

“What is the IoT? Everything you need to know
about the Internet of Things right now,” ZDNet,
February 3, 2020, *available at*
[https://www.zdnet.com/article/what-is-the-
internet-of-things-everything-you-need-to-know-
about-the-iot-right-now/](https://www.zdnet.com/article/what-is-the-internet-of-things-everything-you-need-to-know-about-the-iot-right-now/)..... 7

INTEREST OF THE *AMICUS CURIAE*¹

ACT | The App Association (“App Association”) is an international not-for-profit grassroots advocacy and education organization representing more than 5,000 small business software application developers and technology firms. Today, the ecosystem the App Association represents – which we call the “app economy” – is valued at approximately \$1.7 trillion and is responsible for 5.9 million American jobs. Our members lead in developing innovative applications and products across consumer and enterprise use cases, driving the adoption of the internet of things (IoT).

The App Association has a keen interest in the U.S. patent system functioning predictably and fairly while continuously rewarding innovation, consistent with Congress’ intent. Our members include companies who own patents as well as those who license patents, all of which are directly impacted by the courts’ approaches to patent validity, as well as the U.S. Patent and Trademark Office (“USPTO”) and Patent Trial and Appeal Board’s (“PTAB”) approach to patent rights and litigation. The App

¹ Pursuant to Supreme Court Rule 37.2(a), all parties have received appropriate notice of and consented to the filing of this brief. Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. No person or entity, other than *amicus*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

Association is deeply invested in ensuring that its members and the app economy can rely on the American patent system to grow and innovate.

SUMMARY OF THE ARGUMENT

The App Association represents more than 5,000 small business software application development companies and technology firms located across the mobile economy, developing innovative applications and products to meet the demands for rapid adoption of mobile technology, improve workplace productivity, accelerate academic achievement, monitor health, and support the global digital economy. Our members play a critical role in developing new products across consumer and enterprise use cases, enabling the rise of IoT. Today, the App Association represents an ecosystem valued at approximately \$1.7 trillion that is responsible for 5.9 million American jobs.

The small business software and hardware technology industry is a driving force behind the growth in the IoT revolution. Underlying the growth and ingenuity of this sector are intellectual property rights, including patents, and the industry we represent depends on a well-reasoned and predictable framework for patents.

The Federal Circuit's decision to reject reviewing PTAB denials, while also denying a request for mandamus to correct those denials is particularly burdensome to the small business community that the App Association represents. An effective patent system requires balance between the ability to obtain a patent and the ability to challenge one, and *inter partes* review ("IPR") plays an integral role in maintaining that balance. The USPTO's IPR process

is one that provides our members with a much-needed alternative to expensive federal litigation, representing a key efficiency. Since its creation by Congress 10 years ago, the IPR system has been operating as Congress intended.

That is, until recently. Over the last few years, significant steps have been taken by the USPTO to undermine the IPR process's ability to appropriately adjudicate patent quality challenges, contributing to further increases in abusive litigation and creating more obstacles for the American small business technology developer community at large. One of the most damaging steps taken by the USPTO as part of this campaign was its adoption of the *NHK-Fintiv* Rule, which now requires the PTAB to deny institution of IPR merely because parallel pending litigation is then scheduled for trial before the IPR decision is likely to issue. App Association members – thousands of small businesses located across the country that employ millions of Americans who depend on a fair and predictable patent system to compete, grow, and create new jobs – have already been damaged by these developments. The Petitioner and many similarly situated parties have appropriately sought judicial review of the *NHK-Fintiv* rule but have faced improper refusals from the Federal Circuit to properly resolve these issues, refusing both appellate and mandamus review.

The App Association strongly agrees with the Petitioner that the Supreme Court must step in to correct the Federal Circuit, and should grant certiorari because this Court's review is integral to

protecting the role that Congress intended IPR to play in improving the patent system and protecting vulnerable innovators, the Federal Circuit has taken an erroneous approach to determine whether or not it has jurisdiction to hear the appeal, and the Federal Circuit's basis for finding that it lacks jurisdiction under §314(d) conflicts with the Supreme Court's interpretation of §314(d) in *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131 (2016), and *SAS Institute, Inc. v. Iancu*, 138 S. Ct. 1348 (2018).

As a community that relies on the USPTO's specialized expertise and its IPR process, we believe that this Court must finally address the Federal Circuit's refusals to review improper denials of IPR petitions that rest on USPTO rules that depart from Congress' clear intent. We urge this Court to grant the Petitioner's request for a writ of certiorari.

ARGUMENT

I. SMALL BUSINESSES DEPEND ON A FAIR AND PREDICTABLE PATENT SYSTEM TO ENABLE CONTINUED GROWTH AND INNOVATION WITHIN THE APP ECONOMY

The App Association represents more than 5,000 small business software application development companies and technology firms located across the mobile economy. Our members develop innovative applications and products to meet the demands for rapid adoption of mobile technology, improve workplace productivity, accelerate academic achievement, monitor health, and support the global digital economy. Our members play a critical role in developing new products across consumer and enterprise use cases, enabling the rise of the internet of things (IoT). Today, the App Association represents an ecosystem valued at approximately \$1.7 trillion that is responsible for 5.9 million American jobs. ACT | The App Association, *State of the U.S. App Economy: 2020*, 7th Edition (2020), <https://actonline.org/wp-content/uploads/2020-App-economy-Report.pdf>.

IoT is an encompassing concept capturing how everyday consumer and enterprise products begin to use the internet to communicate data collected through sensors, and act on that data in a timely and effective way. IoT is expected to enable improved efficiencies in processes, products, and services

across every sector. In key segments of the U.S. economy, from agriculture to retail to healthcare and beyond, the rise of IoT is demonstrating efficiencies unheard of even a few years ago. “What is the IoT? Everything you need to know about the Internet of Things right now,” ZDNet, February 3, 2020, *available at* <https://www.zdnet.com/article/what-is-the-internet-of-things-everything-you-need-to-know-about-the-iot-right-now/>.

Ultimately, the largest value add of IoT is in how new data points become part of what is now commonly referred to as the “big data” ecosystem (which we define to mean structured or unstructured data sets so large or complex that traditional data processing applications are not sufficient for analysis). As sensors become smaller, cheaper, and more accurate, big data analytics enable more efficiencies across consumer and enterprise use cases. IoT deployment will be highly use case-dependent—that is, new connectivity- and big data-enabled IoT efficiencies will vary significantly depending on the product, system, and use requirements. The industry, to date, has done well through open application programming interfaces (APIs) and other widely-adopted standards (e.g., TCP/IP) to enable interoperability. For example, in healthcare, a miniaturized and embedded connected medical device must be able to automatically communicate bi-directionally in real time. This capability enables a healthcare practitioner to monitor a patient’s biometric data as well as for the patient to be able to communicate with a caregiver in the event of a medical emergency. Other uses, such

as sensors deployed to alert security of an unauthorized presence, may only require the ability to send data to security professionals with minimal (or even no) capability to receive communications. It is expected that there will be more than 30 billion IoT connected devices across the global digital ecosystem by 2025, almost four connected devices per person on average. IoT Analytics, *State of the IoT Q4 2020 & 2021* (Nov. 2020).

The app economy's success – and the growth of IoT – relies on continuous innovation and investment in connected devices, requiring legal frameworks that are consistent and strong. Morgan Reed, Comments of ACT | The App Association to the National Telecommunications and Information Administration regarding the Benefits, Challenges and Potential Roles for the Government in Fostering the Advancement of the Internet of Things (June 2, 2016), <http://actonline.org/wp-content/uploads/NTIA-Comments-on-IoT-Regulations.pdf>. Patents allow small business developers to protect their investments, help attract venture capital, establish and maintain competitive position in the marketplace, and level the playing field dealing with established companies and competitors. Small businesses produce 16 times more patents per employee than large patenting firms. *Innovation in Small Businesses” Drivers of Change and Value Use*, Small Business Administration, available at https://www.sba.gov/sites/default/files/rs342tot_0.pdf. Lowering operational costs, by utilizing global computing resources like cloud-based services, has enabled the development of diverse, novel, and

patentable inventions, as well as innovative apps used by hundreds of millions of Americans in every facet of their lives, from education to finance to leisure activities. Assuming a coherent legal framework for intellectual property disputes, the growth of this vital ecosystem is expected to persist. In 2019, there were 204 billion app downloads worldwide, generating \$120 billion in consumer spending, and data from 2019 demonstrates that the app economy's exponential growth will continue. Lexi Sydow, *The State of Mobile in 2020: How to Win on Mobile*, App Annie, (Jan. 15, 2020), <https://www.appannie.com/en/insights/market-data/state-of-mobile-2020/>. In the growing IoT space, small businesses need to be reassured that U.S. patent law applies in a clear, reliable, and predictable manner, particularly when courts are evaluating damages in patent infringement suits. Upending the foundation that small businesses have relied on since the creation of the PTAB introduces uncertainty in the patent system, and further distorts norms in negotiations where there is a reliance or influence from the system's policies on negotiations.

In recent years, the Supreme Court has demonstrated its commitment to creating a more reliable patent system. For example, in *TC Heartland v. Kraft Foods Brand*, 137 S. Ct. 1514, 1520 (2017), this Court ruled that good-faith innovators can avoid distant patent suits in jurisdictions where they have only minimal contacts. Furthermore, this Court in *Oil States Energy Servs. v. Greene's Energy Grp*, 138 S. Ct. 1365, 1373 (2018),

affirmed the USPTO's authority to determine patentability of existing patents using the IPR process was valid under the Constitution. These decisions, among others, demonstrate this Court's commitment to ensuring the U.S. patent system's fairness and reliability. As discussed below, the App Association agrees that this Court's guidance is again needed to ensure that the patent laws are implemented in the public interest, and that Petitioner's request for certiorari should be granted.

II. THE *INTER PARTES* REVIEW PROCESS HAS OPERATED AS CONGRESS INTENDED, UNTIL RECENTLY UNDERCUT BY THE IMPROPER *NHK-FINTIV* RULE

The IPR process put into place by Congress allowed App Association members to have a fair and dispassionate tribunal to first assess whether the patent used against them was properly reviewed and issued. Our members have limited resources for litigation, and the IPR process successfully provided a much-needed alternative for these small businesses that do not have the ability to withstand years of expensive federal court patent litigation that can easily cost millions of dollars. Patent-infringement plaintiffs may rely on the fact that many of these small businesses do not have the capital to fight the case and use that to their advantage to force those small businesses into licensing arrangements accompanied with terms greatly benefiting the litigant. Thus, IPRs serve as a barrier protecting our members from some of the

financial and temporal burdens associated with proceedings based on invalid patents.

A key congressional goal driving the passage of the America Invents Act (AIA) was “to establish a more efficient and streamlined patent system that will improve patent quality and limit unnecessary and counterproductive litigation costs.” H. R. Rep. No. 112-98, pt. 1, p. 40 (2011). By enacting the AIA, Congress recognized “a growing sense that questionable patents [were] too easily obtained and are too difficult to challenge.” *Id.* at p. 39 (2011). Congress sought to “provid[e] a more efficient system for challenging patents that should not have [been] issued” and to “establish a more efficient and streamlined patent system that will improve patent quality and limit unnecessary and counterproductive litigation costs.” *Id.* at 39-40 (2011). Small businesses, the main drivers of the U.S. economy, were at the core of Congress’ decision to enact the AIA; the IPR process provided a more affordable and efficient recourse for small businesses to exercise their rights – whether defending the validity of their granted patent or challenging a granted patent.

The IPR system initially met Congress’ expectations by making it more difficult for serial patent litigants to use the high costs of litigation to pressure startups and small business innovators into settling cases based on questionable patents, thus lowering the number of abusive patent demands since the IPR’s inception. Josh Landau, *Inter Partes Review: Five Years, Over \$2 Billion Saved*, Patent Progress, (Sept. 14, 2017),

<https://www.patentprogress.org/2017/09/14/interpartes-review-saves-over-2-billion/>. The AIA boasts an estimated \$2.6 billion in direct savings in patent litigation costs, which led to a \$2.95 billion increase in business activity in the United States. *Unified's Patent Quality Initiative (PQI) Releases Economic Report Showing AIA led to over 13,000 Jobs and Grew U.S. Economy by \$3 Billion since 2014*, Unified Patents, (June 24, 2020), <https://www.unifiedpatents.com/insights/2020/6/23/the-perryman-group-releases-economic-report-an-assessment-of-the-impact-of-the-america-invents-act-and-the-patent-trial-and-appeal-board-on-the-us-economy>. The IPR process significantly reduced costs to litigants, while also preserving the rights of the parties, affording our members the ability to defend claims effectively and efficiently without expending too much hard-earned capital. Preserving said capital to invest in research, development, and innovation has proven and will continue to be essential to the continued growth of the app economy.

Recent PTAB denials of legitimate and proper IPR petitions have undermined progress made through the IPR, namely through the *NHK-Fintiv* Rule, which undercuts the purpose of the IPR process in contrast to congressional intent. The increasing procedural burdens on IPR petitioners imposed higher costs and more obstacles by shutting off access to IPR for meritorious petitioners. The USPTO's actions modifying IPR proceedings can be traced back as a direct contributor to the recent growth in the number of abusive suits brought by

non-practicing entities. *Q3 2020 Patent Dispute Report*, Unified Patents, (Sept. 30, 2020), <https://www.unifiedpatents.com/insights/q3-2020-patent-dispute-report>. Current USPTO policies subvert this purpose by imposing requirements on IPR petitions that are inconsistent with the statute. Brenton R. Babcock & Tyler R. Train, *Proposed Alternative PTAB Discretionary Denial Factors in View of Co-Pending Parallel Litigation*, *The National Law Review*, (Oct. 2, 2020), <https://www.natlawreview.com/article/proposed-alternative-ptab-discretionary-denial-factors-view-co-pending-parallel>. The PTAB's new approach to patent scrutiny has not gone unnoticed by patent assertion entities (PAEs) – also known as patent trolls – that are dedicated to systematically gaming the U.S. patent system for profit.

Abusive patent litigation is increasing as a result of changes made to the IPR system. Defending against frivolous litigation is prohibitively expensive and more costly than an IPR. Britain Eakin, *PTAB Discretionary Denials Harming Patent System*, *Atty Says*, *Law360*, (Dec. 1, 2020), <https://www.law360.com/articles/1332942/ptab-discretionary-denials-harming-patent-system-atty-says>. Compared to last year, PAE litigation has grown substantially. *Litigation on the Rise: Number of New Cases Filed by Patent Assertion Entities*, *Engine* (Nov. 9, 2020), https://www.engine.is/s/Pae-stats-Diagram_Jan-Oct-2020.pdf. Moreover, the Western District of Texas has seen an increase in PAE cases since the precedential *NHK Spring Co. v. Intri-Plex Techs., Inc.* decision. See *NHK Spring Co.*

v. Intri-Plex Techs., Inc., IPR2018-00752 (Sept. 12, 2018), *see also* Scott McKeown, *Texas Plaintiffs More Likely to Side-Step PTAB?*, Patents Post-Grant, (Apr. 7, 2020), <https://www.patentspostgrant.com/texas-plaintiffs-more-likely-to-side-step-ptab/>. This resurgence of behavior that necessitated the creation of IPR should send a strong signal that the USPTO's current policies are ineffective and stray from Congress' envisioned role.

The App Association will not repeat Petitioner's arguments as to Congress' intent, conveyed in the statutory language, for jurisdiction to review the validity of the *NHK-Fintiv* rule in this case. We do point out, however, that such a review is urgently needed because the PTAB's rule is in plain excess of the USPTO's authority. Specifically, the *NHK-Fintiv* rule exceeds the USPTO's authority under the AIA, is arbitrary and capricious, and was not developed using a sufficient notice and comment period.

A. The *NHK-Fintiv* Rule Exceeds the USPTO's Authority Under the AIA

Congress did not give the USPTO the authority to decline to institute inter partes review just because a parallel infringement suit was pending, even though Congress did grant such authority when other types of proceedings involving the same patent are ongoing. With respect to infringement litigation, Congress imposed only one criterion—that IPR petitions be filed within one year of the complaint

alleging infringement,- which the Petitioner met. 35 U.S.C. §315(b). Congress sought to address the potential for “burdensome overlap between inter partes review and patent-infringement litigation,” by crafting the one-year deadline to balance the interests of accused infringers with the interests of patent owners. See, e.g., 157 Cong. Rec. S1041 (daily ed. Mar. 1, 2011) (Sen. Kyl); 157 Cong. Rec. S1326 (daily ed. Mar. 7, 2011) (Sen. Sessions); 157 Cong. Rec. S5429 (daily ed. Sept. 8, 2011) (Sen. Kyl).

B. The *NHK-Fintiv* Rule is Arbitrary and Capricious

Under §706(2)(A) of the APA, a reviewing court finds an agency action to be arbitrary and capricious if it is an abuse of discretion or contrary to law. A federal regulatory action that is not supported by substantial evidence is impermissibly arbitrary and capricious. *Association of Data Processing Service Organizations, Inc. v. Board of Governors of Federal Reserve System*, 745 F.2d 677, (D.C. Cir. Oct. 2, 1984). Here, the *NHK-Fintiv* rule requires the PTAB to make institution decisions, not based on substantial evidence, but based on its speculation about the course and timing of the parallel infringement litigation. Among other things, the *NHK-Fintiv* rule attaches substantial weight to scheduled infringement-trial dates, even though those dates are so often rescheduled, they tend to occur after the time to reconsider the PTAB’s denial has expired. See, e.g., *Apple Inc. v. Fintiv, Inc.*, No. IPR2020-00019, 2020 WL 2486683, at *5 (P.T.A.B.

May 13, 2020). The discretion on whether to institute IPR or not must be exercised within statutory boundaries consistent with the Supreme Court's interpretation of §314(d); the courts are available to enforce those boundaries and thus to hear the Petitioner's claim that the *NHK-Fintiv* Rule exceeds them. See, e.g., *Lincoln v. Vigil*, 508 U.S. 182, 193 (1993).

C. The *NHK-Fintiv* Rule Was Not Developed Using a Sufficient Notice and Comment Period

Section 553 of the APA requires agencies go through notice-and-comment procedures when engaging in informal rulemaking. Notice of the proposed rule must be published in the Federal Register and include sufficient detail on its content and basis in law and evidence to allow for meaning and informed comment by potentially affected parties. 5 U.S.C. §553(b). Once notice is given, the agency must give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments during the comment period. *Id.* § 553(c).

Without providing any explanation for his action, public notice, or an opportunity to comment, the Director of the USPTO designated NHK as "precedential" in May 2019 and did the same with Fintiv in May 2020. See 2018 WL 4373643; 2020 WL 2126495. The Director thus made those decisions binding PTAB, adopting the *NHK-Fintiv* Rule, which

embodies the policy that IPR petitions must be denied where the Board determines that conducting IPR would be inefficient in light of pending overlapping infringement litigation.

Since then, the Board has applied the *NHK-Fintiv* Rule to deny hundreds of IPR petitions without any meaningful review, frustrating Congress' goals, inhibiting the availability of IPR and producing arbitrary results. See Unified Patents, "Portal," <https://tinyurl.com/xwmajkyx>. Recent PTAB denials of legitimate and proper IPR petitions have undermined progress made through the IPR process. The increasing procedural burdens on IPR petitioners adversely impacted them with higher costs and more obstacles by having to bring claims against invalid patent holders in court. The USPTO's actions modifying IPR proceedings can be traced back as a direct contributor to the recent growth in the number of abusive suits brought by non-practicing entities. Current USPTO policies undermine this purpose by imposing requirements on IPR petitions that are inconsistent with the statute.

III. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED TO CORRECT THE FEDERAL CIRCUIT'S FLAWED DETERMINATION THAT IT LACKS JURISDICTION TO HEAR PLAINTIFF'S APPEALS

At issue is the Federal Circuit's determination that it has no jurisdiction to hear Petitioner's appeals, which has deprived the small business community

we represent of the ability to realize a IPR process as envisioned by Congress. We agree with Petitioner that the plain language of 28 U.S.C. §1295(a)(4)(A) authorizes the Federal Circuit to hear “‘appeal[s] from’ the Board’s ‘decision[s] ... with respect to ... *inter partes* review.’” C.A. Dkt. 12 at 7 (quoting §1295(a)(4)(A)). The Federal Circuit—as it has done in all similar appeals—dismissed the claims for lack of jurisdiction based on 35 U.S.C. §314(d), and also held that mandamus relief was unavailable. However, the Federal Circuit’s conclusion that §314(d) eliminates its appellate jurisdiction conflicts with this Court’s decisions in *Cuozzo Speed Technologies, LLC v. Lee*, 136 S. Ct. 2131 (2016), and *SAS Institute, Inc. v. Iancu*, 138 S. Ct. 1348 (2018). These decisions clarified that §314(d) does not bar the Federal Circuit from hearing challenges to the PTAB’s denials when “review is sought on the grounds that the denial rested on a rule that exceeds the USPTO’s statutory authority, is arbitrary and capricious, or was adopted without legally required procedures.”

A. The Federal Circuit Has Appellate Jurisdiction Under §1295(a)(4)(A)

Section 1295(a)(4)(A) provides the Federal Circuit with the appellate jurisdiction over any PTAB IPR decision. 28 U.S.C. §1295(a)(4)(A). Because the PTAB’s denial of an IPR petition is indisputably a final decision, the Federal Circuit has jurisdiction under §1295(a)(4)(A). Section 314(d) does not remove the Federal Circuit’s jurisdiction under

§1295(a)(4)(A). This Court has already determined in *Cuozzo* that, while §314(d) applies “where the grounds for attacking the decision to institute consist of questions that are closely tied to the application and interpretation of statutes related to the Patent Office’s decision to initiate [IPR],” §314(d) does not prohibit hearing appeals dependent on “other less closely related statutes,” or where an appeal is asserting that the USPTO “act[ed] outside its statutory limits” in making that IPR institution decision. *Cuozzo*, 136 S. Ct. at 2141. Judicial review remains available under the Administrative Procedure Act regardless of §314(d). *Cuozzo*, 136 S. Ct. at 2142 (quoting 5 U.S.C. §706(2)(A)-(C) and citing *id.* §706(2)(D)). §314(d)’s limitations therefore should apply when an appeal advances challenges under a statute closely related to the decision whether to institute IPR (and would not impact the ability to hear an appeal under §1295(a)(4)(A)) or when the appeal does not assert that the PTO has exceeded its authority. A challenge to the *NHK-Fintive* rule is clearly not such a challenge.

B. The Federal Circuit Has Incorrectly Determined that Petitioner’s Claims are Barred by §314(d)

The App Association agrees with Petitioner that this Court has previously clarified that appellate review remains available despite §314(d) over claims that the USPTO’s action is “arbitrary and capricious” or procedurally unlawful under the APA. *Cuozzo*, 136 S. Ct. at 2142 (quoting 5 U.S.C. §706(2)(A)-(C) and 5

U.S.C. §706(2)(D)). The Court has held repeatedly that, even where an appeal might come within §314(d)'s prima facie scope, “judicial review remains available consistent with the APA, which directs courts to set aside agency action ‘not in accordance with law’ or ‘in excess of statutory jurisdiction, authority, or limitations.’” *SAS*, 138 S. Ct. at 1359 (quoting 5 U.S.C. §706(2)(A), (C)); see also *Cuozzo*, 136 S. Ct. at 2142.

The Federal Circuit has also incorrectly determined that §314(d)'s exceptions identified in *Cuozzo* and later cases in its tree only apply in the event that an appeal arises from a final written decision of the PTAB issued after IPR has been instituted and completed. While decisions to institute an IPR are unreviewable regardless of §314(d) as they are “preliminary, not final,” *See Cuozzo*, 136 S. Ct. at 2140, decisions denying institution are clearly final agency actions.

Accordingly, none of Apple's claims on appeal—that the USPTO's action exceeds its authority under the AIA, is arbitrary and capricious, and failed to comply with the APA's requirements for notice-and-comment rulemaking—should be barred by §314(d).

C. Certiorari Should Also Be Granted to Provide Much-Needed Guidance on the Availability of Mandamus Relief Where §314(d) Bars Appeal

The App Association further supports Petitioner's request for certiorari to address an unresolved area

where this Court’s guidance is needed by the Federal Circuit: the availability of mandamus relief to address flagrantly incorrect decisions on whether to institute IPR where §314(d) does prevent an appeal. Without guidance from this Court, the Federal Circuit has taken a variety of contradicting views on the matter, acknowledging that “illustrations” in *Cuozzo* could merit mandamus review, *In re Power Integrations, Inc.*, 899 F.3d 1316, 1321 (Fed. Cir. 2018), and confirming its belief that its mandamus jurisdiction is “especially important” when the PTAB denies an IPR institution. *Mylan Laboratories v. Janssen Pharmaceutica, N.V.* 989 F.3d 1375, 1380 (2021). More broadly, and even in these cases where an acknowledgement of mandamus jurisdiction was made, the Federal Circuit has consistently denied requests for mandamus review in contradiction to this position. *See, e.g., Cuozzo*, 793 F.3d at 1274-1275; *Power Integrations*, 899 F.3d at 1319; *Medtronic, Inc. v. Robert Bosch Healthcare Sys., Inc.*, 839 F.3d 1382, 1386 (Fed. Cir. 2016). This Court should grant Petitioner’s request for certiorari to clarify for the Federal Circuit that, in the event that §314(d) bars an appeal, there is an absence of an adequate means of review which makes mandamus both appropriate and necessary. *See, e.g., Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010).

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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