

No. 23-315

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**In the Supreme Court of the United States**

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VIRNETX INC., ET AL., PETITIONERS

*v.*

MANGROVE PARTNERS MASTER FUND, LTD., ET AL.

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

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**BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION**

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## QUESTIONS PRESENTED

1. Whether a party whose own petition for inter partes review would otherwise be time-barred by 35 U.S.C. 315(b) may be joined to an ongoing inter partes review proceeding pursuant to 35 U.S.C. 315(c).

2. Whether the Commissioner for Patents violated the Federal Vacancies Reform Act of 1998, 5 U.S.C. 3345 *et seq.*, by exercising a delegable function or duty of the Director of the United States Patent and Trademark Office pursuant to a longstanding agency delegation order.

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**OPINIONS BELOW**

The opinion of the court of appeals in Federal Circuit Nos. 20-2271 and 20-2272 (Pet. App. 1a-26a) is not published in the Federal Reporter but is available at 2023 WL 2708975. The opinion of the court of appeals in Federal Circuit Nos. 17-1368 and 17-1383 (Pet. App. 30-54a) is not published in the Federal Reporter but is available at 778 Fed. Appx. 897. The order of the court of appeals denying rehearing in Federal Circuit Nos. 20-2271 and 20-2272 (Pet. App. 280a-282a) is unreported. The final written decisions of the Patent Trial and Appeal Board (Pet. App. 58a-85a and 143a-174a) are not published in the United States Patents Quarterly. An order of the United States Patent and Trademark Office Commissioner for Patents (Pet. 55a-57a) is unreported.

The opinions of the court of appeals in Federal Circuit No. 21-1672 (Pet. App. 27a-29a and 243a-275a) are not published in the Federal Reporter but are available at 2023 WL 2770074 and 792 Fed. Appx. 796 respectively.



The order of the court of appeals denying rehearing (Pet. App. 285a-286a) is unreported. The judgment of the district court (Pet. App. 278a-279a) is unreported.

#### JURISDICTION

The judgments of the court of appeals were entered on March 30, 2023 and March 31, 2023. Petitions for rehearing were denied on June 22, 2023 and June 27, 2023. The petition for a writ of certiorari was filed on September 20, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

#### STATEMENT

1. The Patent Act of 1952, 35 U.S.C. 1 *et seq.*, establishes the United States Patent and Trademark Office (USPTO) as an agency within the United States Department of Commerce. 35 U.S.C. 1. The Patent Act charges the USPTO with examining applications for patents and directs it to issue a patent if the statutory criteria are satisfied. 35 U.S.C. 2(a)(1); see 35 U.S.C. 131. Federal law has long permitted the USPTO to reconsider the patentability of the inventions claimed in issued patents. *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1370 (2018).

a. The Leahy-Smith America Invents Act (AIA), 35 U.S.C. 100 *et seq.*, establishes a process called “inter partes review,” which allows the USPTO to “reconsider and to cancel an issued patent claim in limited circumstances.” *Oil States*, 138 S. Ct. at 1370. When inter partes review is instituted, “the Patent Trial and Appeal Board [(Board)]—an adjudicatory body within the PTO created to conduct inter partes review—examines the patent’s validity.” *Id.* at 1371; see 35 U.S.C. 6(b)(4), (c), and 316(c).

To implement inter partes review, Congress granted the USPTO new rulemaking authority. See 35 U.S.C. 316(a); see also *Cuozzo Speed Techs., LLC v. Lee*, 579

U.S. 261, 276 (2016). Among other things, Congress authorized the USPTO to issue regulations “establishing and governing inter partes review” and “the relationship of such review to other proceedings,” as well as regulations “setting forth the standards for the showing of sufficient grounds to institute a review under section 314(a).” 35 U.S.C. 316(a)(2) and (4). Congress further directed that, in exercising its rulemaking authority under the AIA, the USPTO should take into account the need to ensure “the integrity of the patent system” and the “efficient administration of the [agency].” 35 U.S.C. 316(b). Pursuant to that authority, the USPTO has promulgated regulations governing the initiation, conduct, and disposition of inter partes review proceedings. See 37 C.F.R. Pt. 42, Subpts. A-B.

Under the AIA, any person other than the patent’s owner may petition for inter parties review alleging that claims in an issued patent are unpatentable on certain grounds specified by statute. 35 U.S.C. 311(a) and (b); see 35 U.S.C. 102 and 103. A party requesting inter partes review must file a petition that identifies, “in writing and with particularity, each claim challenged, the grounds on which the challenge to each claim is based, and the evidence that supports the grounds for the challenge to each claim.” 35 U.S.C. 312(a)(3). The patent owner may file a preliminary response to the petition. 35 U.S.C. 313. The Director of the USPTO must then make a “threshold” determination as to whether to “authorize an inter partes review to be instituted,” and the agency must provide notice of its decision to the petitioner, the patent owner, and the public. 35 U.S.C. 314(a) and (c) (capitalization omitted). The Director has delegated this responsibility to the Board. 37 C.F.R. 42.4(a). The USPTO’s decision whether to institute

inter partes review is “final and nonappealable.” 35 U.S.C. 314(d).

The AIA does not require the agency to institute inter partes review in any circumstance. See *Thryv, Inc. v. Click-To-Call Techs., LP*, 140 S. Ct. 1367, 1373 (2020). The statute does, however, specify certain circumstances under which review may not be instituted. As relevant here, the AIA directs that 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). The statute specifies that this “time limitation \* \* \* shall not apply to a request for joinder.” *Ibid.*

A neighboring AIA provision states that “the Director, in his or her discretion, may join as a party to [any instituted] inter partes review any person who properly files a petition under section 311 that the Director[] \* \* \* determines warrants the institution of an inter partes review.” 35 U.S.C. 315(c). The USPTO has adopted procedural regulations governing the joinder process. A request for joinder must be filed “no later than one month after the institution date of any inter partes review for which joinder is requested.” 37 C.F.R. 42.122(b) (emphasis omitted). The USPTO has understood the requirement that a petition for inter partes review not be filed “more than one year after the date on which the petitioner, the petitioner’s real party-in-interest, or a privy of the petitioner is served with a complaint alleging infringement of the patent,” 37 C.F.R. 42.101(b), to “not apply when the petition is accompanied by a request for joinder,” 37 C.F.R. 42.122(b).

b. If the Director institutes inter partes review, the Board then determines the patentability of the challenged claims through a proceeding that incorporates “many of the usual trappings of litigation.” *SAS Inst. Inc. v. Iancu*, 138 S. Ct. 1348, 1354 (2018); see 35 U.S.C. 316; 37 C.F.R. Pt. 42, Subpt. A. During this merits phase, the parties are entitled to take limited discovery, 35 U.S.C. 316(a)(5); 37 C.F.R. 42.51-42.53; to file affidavits and declarations, 35 U.S.C. 316(a)(8); 37 C.F.R. 42.63(a); to request an oral hearing, 35 U.S.C. 316(a)(10); 37 C.F.R. 42.70; and to file written memoranda, 35 U.S.C. 316(a)(8) and (13); 37 C.F.R. 42.120.

At the conclusion of the proceeding, the Board “issue[s] a final written decision” addressing the patentability of the challenged claims. 35 U.S.C. 318(a). A party aggrieved by the final decision may appeal that decision to the Federal Circuit. 35 U.S.C. 141, 319.

2. a. Article II of the Constitution requires the President to obtain “the Advice and Consent of the Senate” before appointing certain “Officers of the United States.” U.S. Const. Art. II, § 2, Cl. 2. When an office requiring such advice and consent—known as a Presidentially appointed, Senate-confirmed (PAS) office—is vacant, the Federal Vacancies Reform Act of 1998 (FVRA), 5 U.S.C. 3345 *et seq.*, provides a mechanism for authorizing an “acting officer” to temporarily discharge the office’s duties, without Senate confirmation to that office. 5 U.S.C. 3345 (capitalization and emphasis omitted). The FVRA creates a default rule that, when a vacancy arises, “the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity.” 5 U.S.C. 3345(a)(1). Alternatively, the President “may direct a person” who already serves in a PAS office, or who served in a senior position in the relevant agency

for at least 90 days during the 365-day period before the vacancy arose, to “perform the functions and duties of the vacant office temporarily in an acting capacity.” 5 U.S.C. 3345(a)(2) and (3)(A).

The FVRA establishes certain time limits on service as an “acting officer.” 5 U.S.C. 3346. An official serving as an “acting officer” pursuant to the FVRA can exercise all of the functions and duties of the vacant office, including those that are specifically committed by statute exclusively to that office. See 5 U.S.C. 3348(a) and (d).

b. As an agency within the Department of Commerce, the USPTO is subject to the “policy direction of the Secretary of Commerce,” but it retains responsibility for decisions “regarding the management and administration of its operations” and exercises independent control over matters such as “budget allocations,” “personnel decisions,” and “other administrative and management functions.” 35 U.S.C. 1(a).

The USPTO is headed by the agency’s Director, an official who is appointed by the President with advice and consent of the Senate. 35 U.S.C. 3(a)(1). The Patent Act states that “[t]he powers and duties of the [USPTO] shall be vested in” the Director. *Ibid.*; see *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1987 (2021) (*Arthrex I*) (plurality opinion). The Director has broad statutory authority to delegate those powers to subordinate officers and employees. See 35 U.S.C. 3(b)(3)(B) (authorizing the Director to “delegate to [subordinate officials] such of the powers vested in the Office as the Director may determine”); Patent and Trademark Office Efficiency Act (Efficiency Act), Pub. L. No. 106-113, App. I, Tit. IV, Subtit. G, Ch. 3, § 4745, 113 Stat. 1501A-587 (codified at 35 U.S.C. 1 note) (creating a presumption that “an official to whom functions are transferred under this subtitle (including

the head of any office to which functions are transferred under this subtitle) may delegate any of the functions so transferred to such officers and employees of the office of the official as the official may designate”).

The Patent Act also creates the office of Deputy Director, who is appointed by the Secretary of Commerce upon nomination by the Director. 35 U.S.C. 3(b)(1). The Deputy Director is “vested with the authority to act in the capacity of the Director in the event of the absence or incapacity of the Director.” *Ibid.*

The USPTO’s leadership foresaw that there could be times (such as periods following Presidential transitions) when the positions of both Director and Deputy Director might be simultaneously vacant. Because the Deputy Director is the “first assistant” to the Director, the FVRA’s default rule would be of no help to the USPTO during such vacancies. And because the Deputy Director position itself can be filled only through “nomination by the Director” and appointment by the Secretary of Commerce, 35 U.S.C. 3(b)(1), a vacancy in the Director position could prevent the installment of a new Deputy Director. In such circumstances, and absent some type of alternative arrangement, none of the Director’s duties could be performed until such time as the President named an Acting Director.

Consistent with longstanding Executive Branch practice, the USPTO has taken proactive steps to protect against interruption in its operations by issuing a standing directive known as Agency Organization Order 45-1. See USPTO, *Agency Organization Order 45-1* (issued Nov. 7, 2016). In pertinent part, that order provides that, in the event of simultaneous vacancies in the positions of Director and Deputy Director, the “non-exclusive functions and duties” of the Director position will be performed by the “Commissioner for Patents”—a position

that is filled through appointment by the Secretary for a term of five years. *Id.* at 2; see 35 U.S.C. 3(b)(2).

The order is an exercise of the Director’s delegation authority, not of any power conferred by the FVRA. Accordingly, the order does not purport to designate the Commissioner for Patents as an “acting official” during periods when the Director and Deputy Director are unavailable. It instead authorizes the Commissioner to perform only the “non-exclusive” (*i.e.*, delegable) functions of the Director. *Agency Organization Order 45-1* at 2.

3. a. This case arises from inter partes review proceedings with respect to claims in two patents held by petitioner VirnetX, Inc.—U.S. Patent Nos. 6,502,135 (’135 patent) and 7,490,151 (’151 patent). Pet. App. 32a. The USPTO instituted the proceedings in response to petitions filed by respondent Mangrove Partners Master Fund, Ltd. (Mangrove). *Id.* at 32a-33a. There is no allegation that Mangrove’s petitions were subject to any time bar, nor is there any dispute that the USPTO’s decision to institute inter partes review based on those petitions is unreviewable. See *Thryv*, 140 S. Ct. at 1373.

After those reviews were instituted, respondent Apple, Inc. filed new petitions raising the same issues as Mangrove, along with requests to be joined to the Mangrove inter partes review proceedings. Pet. App. 32a-33a. More than one year before the Mangrove petitions were filed, Apple had been served with a complaint alleging infringement of both the ’135 and ’151 patents. *Id.* at 34a. Apple’s own petitions therefore were time-barred. See 35 U.S.C. 315(b).

The USPTO allowed Apple to join the pending Mangrove proceedings, subject to certain conditions. Pet. App. 134a-135a. Pursuant to those conditions, Apple was bound by existing discovery agreements and

arrangements, was required to adhere to the existing schedule, was made to submit almost all its filings jointly with Mangrove, and was limited to five pages for any filings about Apple-specific issues. *Ibid.* The USPTO also allowed a second party, respondent Black Swamp IP, LLC (Black Swamp), to join Mangrove's inter partes re-view proceedings. See *id.* at 6a.

After a hearing, the Board issued final written decisions concluding that several of the claims in the '135 and '151 patents were anticipated by prior art and thus unpatentable. Pet. App. 119a, 211a.

b. The court of appeals vacated the Board's decision and remanded. Pet App. 30a-54a. The court first considered VirnetX's argument that Apple's joinder was improper because Apple's petitions were untimely. *Id.* at 34a. The court declined to reach the merits of that contention, however, "because VirnetX ha[d] not demonstrated that it was prejudiced by Apple's involvement." *Id.* at 35a. The court explained that Apple had brought the same challenges to the patents as Mangrove, and that the Board had restricted Apple's involvement in the proceedings. *Ibid.* The court left open the "question of whether prejudice could arise later." *Ibid.*

Turning to the merits, the court of appeals concluded that some of the Board's unpatentability determinations were not supported by substantial evidence, and that the Board had erred in construing certain claims. Pet. App. 40a-53a. The court therefore vacated the Board's decisions and remanded for further proceedings. *Id.* at 53a.

c. On remand, the Board again held that claims in the '135 and '151 patents were anticipated by prior art and therefore were unpatentable. Pet. App. 58a-85a, 143a-174a. VirnetX again appealed. *Id.* at 241a.



While VirnetX's appeals were pending, this Court issued its decision in *Arthrex I, supra*, holding that "the unreviewable authority wielded by [administrative patent judges] during inter partes review is incompatible with their appointment by the Secretary to an inferior office." 141 S. Ct. at 1985. As a remedy, the Court held that 35 U.S.C. 6(c), which states that only Board panels of at least three members may rehear Board decisions, "is unenforceable as applied to the Director insofar as it prevents the Director from reviewing the decisions of the [Board] on his own." 141 S. Ct. at 1987 (plurality opinion); see *id.* at 1997 (Breyer, J., concurring in the judgment in part and dissenting in part) (agreeing with the plurality's "remedial holding"). The Court "conclude[d] that the appropriate remedy is a remand to the Acting Director for him to decide whether to rehear" the Board's decision. *Id.* at 1987 (plurality opinion).

In the wake of *Arthrex I*, the court of appeals in this case ordered a limited remand to allow VirnetX the opportunity to request Director rehearing of the final written decisions it had challenged. Pet. App. 241a-242a. VirnetX submitted such a request, but at the time it did so, the offices of both the Director and Deputy Director were vacant. Consistent with Agency Organization Order 45-1, the requests were referred to then-Commissioner for Patents Andrew Hirshfeld, who was performing the delegable functions and duties of the Director. *Id.* at 56a. Commissioner Hirshfeld issued an order denying VirnetX's requests, and VirnetX's appeals to the Federal Circuit were then reactivated. *Ibid.*

d. The court of appeals affirmed. Pet App. 1a-26a. The court determined that the Board's final written decisions declaring the challenged patent claims unpatentable were supported by substantial evidence. *Id.* at 13a-26a.

Based on controlling circuit precedent, the court also rejected VirnetX's challenge to Commissioner Hirshfeld's authority to consider its requests for Director review. *Id.* at 12a n.3 (citing *Arthrex, Inc. v. Smith & Nephew, Inc.*, 35 F.4th 1328 (Fed. Cir. 2022) (*Arthrex II*), cert. denied, 143 S. Ct. 2493 (2023)). Finally, the court held that VirnetX had forfeited its challenge to Black Swamp's joinder by not raising it at the same time it had challenged Apple's joinder in the earlier appeal. *Id.* at 25a-26a.

e. Based on the invalidation of the '135 and '151 patent claims, the court of appeals issued judgment against VirnetX and petitioner Leidos as licensor of the patents in a separate appeal arising from district-court litigation in which petitioners had asserted those patent claims against Apple. Pet. App. 28a-29a. Petitioners seek this Court's review of that judgment only insofar as reversal of the court of appeals' decision upholding the Board's patentability determinations would necessitate reversal in the district court appeal as well. Pet. 14 n.3.

f. The court of appeals denied timely petitions for rehearing without noted dissent. Pet. App. 280a-282a, 285a-286a.

#### ARGUMENT

Petitioners contend (Pet. 14-24) that the USPTO exceeded its statutory authority when it joined Apple as a party to Mangrove's inter partes review proceedings. The court of appeals never passed on the merits of that argument. The court found it unnecessary to resolve that issue, concluding that VirnetX had suffered no cognizable prejudice from Apple's joinder because Apple's participation in the Board proceedings was limited to challenges that were entirely duplicative of Mangrove's.

This Court should not address in the first instance the merits of petitioners' arguments concerning the propriety of Apple's joinder. See *Cutter v. Wilkinson*, 544 U.S. 709, 719 n.7 (2005) (noting that this Court is "a court of review, not of first view."). That is particularly so because, given the court of appeals' holding as to lack of prejudice, a determination that Apple should not have been joined would have no effect on the proper disposition of this case. In addition, a potential threshold obstacle to review of the joinder decision could prevent the Court from reaching the merits of that issue.

Petitioners separately challenge (Pet. 24-35) the USPTO's denial of requests for Director review. The court of appeals correctly held that the FVRA did not preclude Commissioner Hirshfeld from exercising the delegable functions and duties of the USPTO Director during the simultaneous vacancies in the offices of Director and Deputy Director. That holding does not conflict with any decision of this Court or another court of appeals. And this case would be an unsuitable vehicle for clarifying the proper construction of the FVRA because certain provisions of that statute do not apply to the USPTO. This Court recently denied petitions for writs of certiorari in two other cases that presented the same question, including a petition seeking review of the prior Federal Circuit decision that the court of appeals applied in rejecting petitioners' claim here. See p. 17, *infra*. The same course is warranted in this case.

1. The AIA provides that inter partes review "may not be instituted" based on a petition that was filed more than one year after the petitioning party was served with a complaint alleging infringement of the challenged patent. 35 U.S.C. 315(b). The same provision states, however, that this "time limitation \* \* \*

shall not apply to a request for joinder.” *Ibid.*; see 37 C.F.R. 42.122(b). The USPTO instituted Apple’s otherwise time-barred petitions and joined the proceedings with Mangrove’s existing proceedings, subject to restrictions on the role Apple could play in the proceedings. Pet. App. 134a-135a, 229a-230a.

Petitioners contend (Pet. 14-24) that the AIA does not authorize joinder in circumstances like these, where the joined party’s own petition for inter partes review would otherwise be time-barred by Section 315(b). But the Federal Circuit has not yet squarely determined the proper application of Section 315(b) and (c) to these circumstances, either in this case or in any other. In any event, this case would be an unsuitable vehicle for the Court’s consideration of the issue.<sup>1</sup>

a. In this case, the USPTO instituted inter partes reviews based upon petitions filed by the original petitioning party, Mangrove, who continued to participate throughout the Board proceedings. When VirnetX argued in the court of appeals that Apple’s joinder was improper, the court “decline[d] to decide whether Apple’s joinder was permitted.” Pet. App. 35a. Instead, the court held that VirnetX was not prejudiced by Apple’s joinder because Apple’s participation did not allow the Board to review any additional claim or to consider any additional theories of unpatentability beyond those that Mangrove had asserted, and because Apple was restricted to a subsidiary role in the proceeding. See *ibid.* In a subsequent decision, the court declined to address

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<sup>1</sup> Commissioner Hirshfeld, later succeeded by current USPTO Director Katherine K. Vidal, intervened in the court of appeals to address VirnetX’s FVRA challenge. Pet. App. 12a n.3. In the Federal Circuit proceedings, the government did not address VirnetX’s challenge to the propriety of Apple’s joinder.

VirnetX's objection to Black Swamp's joinder, concluding that VirnetX had forfeited that objection. *Id.* at 25a.

Petitioners do not contend that the court of appeals construed Section 315(b) in this case. Instead, petitioners assert (Pet. 22) that the Federal Circuit had previously rejected their construction in two other cases—*Facebook, Inc. v. Windy City Innovations, LLC*, 973 F.3d 1321 (2020), and *Network-1 Techs. Inc. v. Hewlett-Packard Co.*, 981 F.3d 1015 (2020). In neither case, however, did the court decide the question presented here.

In *Facebook*, the Federal Circuit held that Section 315(c) does not permit the Board to join a person to a proceeding in which it is already a party, and that it does not permit the Board to add new issues to a pending proceeding through joinder. 973 F.3d at 1333-1339. The court's opinion in *Facebook* contained citations to this Court's decision in *Thryv*, *supra*, with a parenthetical quoting the Court's observation that "the § 315(b)-barred party can join a proceeding initiated by *another* petitioner." *Facebook*, 973 F.3d at 1334 (quoting *Thryv*, 140 S. Ct. at 1374). That issue, however, was not before the court in *Facebook*. See *National Am. Ins. Co. v. United States*, 498 F.3d 1301, 1306 (Fed. Cir. 2007) (statements unnecessary to decision are dicta). And petitioners themselves emphasize (Pet. 22) that the quoted sentence from *Thryv* was dicta because *Thryv* did not present any question concerning the proper interpretation of Section 315(b). The court in *Facebook* no more resolved that question than did this Court in *Thryv*.

In *Network-1*, the Federal Circuit held that a litigant that had been joined to an inter partes review was not estopped, in subsequent district-court proceedings, from

challenging the same patent on grounds that were not encompassed within the inter partes review. 981 F.3d at 1027-1028 (citing *Facebook*, 973 F.3d at 1334-1336). The *Network-1* court said in passing that the litigant “was permitted to join the [ongoing proceeding] ‘as a party’ even though [it] was time-barred under § 315(b) from bringing its own petition.” *Id.* at 1027. But as in *Facebook* and *Thryv*, that statement was not a holding, because the issue was not litigated by the parties and was not necessary to the resolution of the case.<sup>2</sup>

Petitioners thus cannot identify any Federal Circuit holding that squarely resolves the question presented. This Court should adhere to its ordinary practice and decline to consider the question until the court of appeals has done so. See *Cutter*, 544 U.S. at 718 n.7.

b. The court of appeals declined to address VirnetX’s joinder argument because it held that any error had not prejudiced VirnetX. Pet. App. 35a. Petitioners

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<sup>2</sup> In an earlier case, the court of appeals had stated in dicta that “an otherwise time-barred party may nonetheless participate in an *inter partes* review proceeding if another party files a proper petition.” *Achates Reference Publ’g, Inc. v. Apple Inc.*, 803 F.3d 652, 657 (Fed. Cir. 2015), cert. dismissed, 577 U.S. 126 (2016), overruled on other grounds by *Wi-Fi One, LLC v. Broadcom Corp.*, 878 F.3d 1364 (Fed. Cir. 2018) (en banc). And in a concurring opinion in a different case, two Federal Circuit judges opined that “the exception to the time bar for ‘request[s] for joinder’ was plainly designed to apply where time-barred Party A seeks to join an existing [inter partes review] commenced by Party B when this would not introduce any new patentability issues.” *Nidec Motor Corp. v. Zhongshan Broad Ocean Motor Co.*, 868 F.3d 1013, 1020 (Fed. Cir. 2017) (per curiam) (Dyk, J., concurring), cert. denied, 138 8S. Ct. 1695 (2018) (quoting 35 U.S.C. 315(b)) (first set of brackets in concurring opinion). In neither case did the Federal Circuit issue any binding holding as to the proper construction of Section 315(b) and (c).

contest the court's conclusion as to prejudice (Pet. 23), but that case-specific determination does not warrant this Court's review. And the court did not purport to establish any categorical rule that improper joinder is never prejudicial. Rather, the court concluded only that it saw no prejudice "[a]t th[e] stage" VirnetX challenged the joinder, while "leav[ing] open the question of whether prejudice could arise later." Pet. App. 35a.

VirnetX did not allege such prejudice in its later appeal after the further agency proceedings on remand. In light of the court's holding as to prejudice, and Mangrove's continued participation in the proceedings on the same issues that Apple raised, resolution of the first question presented in the petition for a writ of certiorari would not affect the outcome of this case. Accordingly, this Court's consideration of the question is not warranted. See *Supervisors v. Stanley*, 105 U.S. 305, 311 (1882) (explaining that this Court does not grant a writ of certiorari to "decide abstract questions of law \* \* \* which, if decided either way, affect no right" of the parties).

c. A grant of certiorari would also require this Court to confront a threshold issue that could prevent the Court from reaching the merits of petitioners' claim. Under 35 U.S.C. 314(d), "[t]he determination by the Director whether to institute an inter partes review \* \* \* shall be final and nonappealable." *Ibid.* That statutory bar on review reaches "matters 'closely tied to the application and interpretation of statutes related to' the institution decision," including the application of the time bar in Section 315(b). *Thryv*, 140 S. Ct. at 1373 (quoting *Cuozzo*, 579 U.S. at 275). The Federal Circuit has held that Section 314(d) does not preclude judicial review of joinder decisions in this context. See

*Facebook*, 973 F.3d at 1332. But this Court has never confronted the issue and would have an independent obligation to assure itself of its own jurisdiction before reaching the merits of petitioners' statutory claim. See, e.g., *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998).

2. Petitioners' challenge (Pet. 25-35) to the denial of VirnetX's post-*Arthrex* requests for Director review also does not warrant this Court's intercession. Based on its squarely controlling decision in *Arthrex II*, *supra*, the court of appeals rejected VirnetX's contention that those denials were inconsistent with the FVRA. See Pet. App. 12a n.3. This Court recently denied petitions for writs of certiorari in two prior cases, including *Arthrex II*, that presented substantively identical challenges. See *Arthrex, Inc. v. Smith & Nephew, Inc.*, 143 S. Ct. 2493 (2023) (*Arthrex III*); *Fall Line Pats., LLC v. Unified Pats., LLC*, 143 S. Ct. 2496 (2023). The same result is warranted here.

a. The Federal Circuit correctly held that the FVRA does not prohibit the delegation that petitioners challenge. Pet. App. 12a n.3 (citing *Arthrex II*). The Executive and Legislative Branches have long interpreted the statute in the same manner, and petitioners' contrary arguments lack merit.

i. The FVRA establishes a mechanism through which certain classes of government officials may "temporarily carry out the duties of a vacant PAS office in an acting capacity, without Senate confirmation." *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 293 (2017); see 5 U.S.C. 3345(a)(1), 3347. Subject to certain exceptions, the FVRA is "the exclusive means for temporarily authorizing an *acting official* to perform the functions and duties of any office \* \* \* for which appointment is



required to be made by the President, by and with the advice and consent of the Senate.” 5 U.S.C. 3347(a) (emphasis added).<sup>3</sup> An “acting” officer serving pursuant to the FVRA can exercise all the functions and duties of the vacant office, including those that are specifically committed by statute exclusively to that office. 5 U.S.C. 3348(a) and (d)(1).

The FVRA thus limits the circumstances under which an official may take on the title of “acting officer” and exercise those powers that can lawfully be performed only by the occupant of a vacant office, *i.e.*, those powers that cannot lawfully be delegated to subordinates. Nothing in the FVRA, however, purports to prohibit a subordinate official’s exercise of validly delegated authorities. Thus, if an otherwise valid delegation of authorities has been made, the delegated functions may continue to be performed during a vacancy even if there is no serving acting official capable of exercising the vacant office’s *non-delegable* functions.

Section 3348 confirms that distinction between functions that are exclusive to the vacant office and those that

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<sup>3</sup> Petitioners overstate (Pet. 31, 33) the breadth of the FVRA’s exclusivity provision. By its terms, that provision limits only the “means for temporarily authorizing *an acting official*,” 5 U.S.C. 3347(a) (emphasis added); it does not prevent the Executive Branch from entrusting the delegable duties of a vacant PAS office to a delegate not serving in an acting capacity. Moreover, that provision is subject to exceptions and, among other things, does not displace any statute that expressly provides another means of designating an acting official to temporarily perform the functions and duties of a specified office. 5 U.S.C. 3347(a)(1). Thus, for example, the FVRA does not displace the Patent Act provision that allows the USPTO’s Deputy Director to serve as Acting Director during any vacancy in the office of Director. See 35 U.S.C. 3(b)(1). Such office-specific statutes abound.

are not. Under that provision, when a PAS office is vacant and no acting official has been designated in accordance with the FVRA, “the office shall remain vacant” and “only the head of [the] Executive agency may perform any function or duty of such office.” 5 U.S.C. 3348(b)(1) and (2). Section 3348 further provides that any “function or duty” performed in violation of that provision “shall have no force or effect” and “may not be ratified.” 5 U.S.C. 3348(d)(1) and (2). But in so providing, Congress narrowly defined the term “function or duty” to encompass only those functions and duties that are required by statute or regulation “to be performed by the applicable officer (and only that officer).” 5 U.S.C. 3348(a)(2)(A)(ii). Congress thus expressly excluded delegable functions and duties from the restriction, leaving the head of the Executive agency responsible in times of vacancy for only those actions that are non-delegable.

ii. Shortly after the FVRA was enacted, the Department of Justice’s Office of Legal Counsel (OLC) endorsed that plain-text reading. OLC recognized that “Congress understood that there would be occasions \* \* \* when there would, for a period, be no one qualified to serve in an acting capacity.” *Guidance on Application of Federal Vacancies Reform Act of 1998*, 23 Op. O.L.C. 60, 72 (Mar. 22, 1999). Congress further understood that requiring all of the vacant office’s duties to be performed by the head of the Executive agency during such periods would “seriously impair[]” the business of the government. *Ibid.* Rather than mandating that result, Congress narrowly “delimited” the functions or duties that could be performed only by the acting officer or the head of the Executive agency. *Ibid.* OLC observed that “[m]ost, and in many cases all, the responsibilities performed by a PAS officer will not be exclusive, and the

Act permits non-exclusive responsibilities to be delegated to other appropriate officers and employees in the agency.” *Ibid.* The Executive Branch has operated in accordance with that reading ever since.

The Government Accountability Office (GAO)—the arm of Congress charged with monitoring FVRA compliance, see 5 U.S.C. 3349(b)—has expressed a similar understanding. When asked whether the service of a senior OLC official had violated the FVRA, the GAO determined that the official had not “used the title of Acting Assistant Attorney General for OLC” during the time the position was vacant and had not “performed any functions or duties which under the Vacancies Act may be performed only by the Attorney General as head of the Department.” Letter from Gary L. Kepplinger, Gen. Counsel, GAO, to Richard J. Durbin et al., U.S. Senators 3-4 (June 13, 2008), <https://gao.gov/assets/b-310780.pdf>. Based on those determinations, and noting that “the position of Assistant Attorney General for OLC does not have any duties or functions which are exclusive to the position,” the GAO concluded that the official had not violated the FVRA. *Id.* at 4; see *id.* at 4-5.

iii. With respect to the matters at issue in this case, the USPTO acted in accordance with the FVRA’s text and with longstanding Executive Branch practice. A Senate-confirmed USPTO Director, Michelle K. Lee, exercised her statutory authority to promulgate Agency Organization Order 45-1, which provides that under certain conditions the Commissioner for Patents “will perform the non-exclusive functions” of the USPTO Director. *Arthrex II*, 35 F.4th at 1332 (citation omitted). This order was a valid exercise of the USPTO Director’s broad authority to delegate the powers of her office to subordinates. See 35 U.S.C. 3(b)(3)(B); Efficiency Act

§ 4745, 113 Stat. 1501A-587. Because the order does not purport to designate the Commissioner for Patents as an “Acting Director,” and because the order is expressly limited to the Director’s “non-exclusive” (*i.e.*, delegable) functions, the FVRA did not preclude Commissioner Hirshfeld from exercising the authorities delegated to him. Pet. App. 12a n.3; see *Arthrex II*, 35 F.4th at 1339.

b. Petitioners’ contrary arguments are unavailing. Petitioners primarily contend (Pet. 24-26) that the text-based interpretation set forth above must be incorrect because it means that the FVRA will seldom prevent the effective performance of the duties of vacant Executive Branch offices. But that is because Congress rarely precludes delegation of particular executive duties. Under petitioners’ capacious reading, vacancies would cripple the operation of the federal government in the very way that Congress, both in statutory text and by practice, has understandably chosen to avoid. While petitioners might prefer a statute that imposes greater pressures on the President to make permanent appointments, the FVRA’s text makes clear that Congress sought to protect its prerogatives without unduly hindering the performance of important governmental functions. See 5 U.S.C. 3348(a)(2). This Court must “implement the design Congress chose.” *Lora v. United States*, 599 U.S. 453, 464 (2023). If Congress becomes dissatisfied with that design or with the Executive Branch’s longstanding and open exercises of delegated authority, it can amend the statute to address those concerns.

Aside from their policy arguments, petitioners emphasize that Section 3347(a) provides “the *exclusive* means for temporarily authorizing an acting official to perform the functions and duties” of any office. See Pet.

31 (quoting 5 U.S.C. 3347(a)). Within the FVRA, however, the term “acting official” has a narrow and precise meaning. Agency heads can delegate functions, and subordinates can continue to perform delegated functions during a vacancy, without designating the delegates as “acting officials” under the FVRA.

b. Petitioners do not identify any substantial basis for further review. “Other circuits agree” with the court of appeals’ plain-text reading of the FVRA. *Arthrex II*, 35 F.4th at 1336 (citing *Schaghticoke Tribal Nation v. Kempthorne*, 587 F.3d 132, 135 (2d Cir. 2009) (per curiam), cert. denied, 562 U.S. 947 (2010); *Stand Up for Cal.! v. United States Dep’t of the Interior*, 994 F.3d 616, 622 (D.C. Cir. 2021), cert. denied, 142 S. Ct. 771 (2022)); see *Kajmowicz v. Whitaker*, 42 F.4th 138, 148-152 (3d Cir. 2022). Petitioners do not meaningfully argue otherwise. Petitioners’ reliance (Pet. 28-29) on a series of district-court decisions only underscores the absence of a circuit conflict. Cf. *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) (“A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.” (citation omitted)).<sup>4</sup>

There can be no real dispute that most “courts that have considered the issue”—and all courts of appeals that have done so—“have generally upheld the ability of government officials to perform the delegated duties of a vacant office, so long as the delegation is otherwise

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<sup>4</sup> Petitioners suggest (Pet. 28-29) that the government’s dismissals of appeals from various district-court decisions reflect an effort to avoid further review in the courts of appeals. But many FVRA claims can be resolved once the relevant agency vacancies are filled, and agencies often proceed via that route rather than prolonging litigation.

permissible under the legal principles that ordinarily govern delegations.” Valerie C. Brannon, Cong. Research Serv., R44997, *The Vacancies Act: A Legal Overview* 25-26 (updated May 28, 2021), <https://perma.cc/XKGG4-L8F7>.

In any event, like *Arthrex III* and *Fall Line*, this case would be a poor vehicle for considering the proper interaction between Section 3347 and agency delegation orders. If this Court chooses to address that subject, it should do so in a case involving an “Executive agency” subject to 5 U.S.C. 3347(b). That provision states that a “statutory provision providing general authority to the head of an Executive agency \* \* \* to delegate duties statutorily vested in that agency head” is not “a statutory provision [that] expressly” designates or authorizes the designation of an official to serve “temporarily in an acting capacity,” so as to provide a means of designating an acting official independent from the FVRA. 5 U.S.C. 3347(a)(1) and (b). Even if Section 3347(b) could be understood as a limitation on delegation, rather than as a limitation on the type of statutes (in addition to the FVRA) that authorize acting service, Section 3347(b) does not apply here because the USPTO is not an “Executive agency” within the meaning of that provision. See 5 U.S.C. 105 (defining “Executive agency” as an “Executive department, a Government corporation, and an independent establishment”); see also *Arthrex II*, 35 F.4th at 1339 (noting that the USPTO is a “subagency of the Department of Commerce”). Accordingly, the delegation here was not an exercise by the “head of an Executive agency,” and Section 3347(b) “does not actually apply.” *Arthrex II*, 35 F.4th at 1339 (emphasis omitted).

c. Petitioners also briefly argue (Pet. 34-35) that the power to rehear Board decisions is an exclusive function of the USPTO Director that cannot lawfully be delegated

and therefore was outside the duties and functions that Commissioner Hirshfeld was authorized to perform. But petitioners do not and could not plausibly argue that this contention independently warrants the Court's review. That challenge does not present a question of government-wide significance but rather is specific to a single Patent Act provision. The question whether this specific Director function is delegable also lacks any present significance because the USPTO now has a Presidentially-appointed, Senate-confirmed Director who has not delegated her review authority outside of situations covered by Agency Organization Order 45-1.

In any event, the Federal Circuit has correctly held that the Director could lawfully delegate her authority to rehear Board decisions if she chose to do so. See *Arthrex II*, 35 F.4th at 1338-1339. In *Arthrex I*, this Court concluded that the Director must have the *option* to review final Board decisions. 141 S. Ct. at 1987 (plurality opinion); see *id.* at 1997 (Breyer, J., concurring in the judgment in part and dissenting in part) (agreeing with the plurality's "remedial holding"). To achieve that result, the Court held that 35 U.S.C. 6(c), which states that Board decisions can be reheard only by three-member Board panels, "cannot constitutionally be enforced to the extent that its requirements prevent the Director from reviewing final decisions rendered by [administrative patent judges]." 141 S. Ct. at 1987 (plurality opinion). That partial-severance remedy left the Director free to review Board decisions pursuant to her general authority to exercise the "powers and duties" of the USPTO. See *id.* at 1986, 1987 (citation omitted); 35 U.S.C. 3(a)(1).

Neither the Appointments Clause nor the Patent Act, however, requires the Director to wield her review

authority personally. See *Arthrex II*, 35 F.4th 1338-1339. Nor does such a restriction follow logically from the *Arthrex I* plurality’s remedial analysis. To the contrary, treating the authority to review Board decisions in inter partes review as one of the Director’s “powers and duties” under Section 3(a)(1) logically implies that the Director may either exercise that authority herself or delegate it to a subordinate.

Petitioners quote the *Arthrex I* plurality’s statement that “Section 6(c) otherwise remains operative as to the other members of the [Board].” Pet. 34 (quoting 141 S. Ct. at 1987). But while the Commissioner for Patents is designated by statute as a member of the Board, see 35 U.S.C. 6(a), Commissioner Hirshfeld reviewed the Board decisions here not in his capacity as a Board member, but as the Director’s delegatee under Agency Organization Order 45-1. Indeed, this Court made clear in *Arthrex I* that the effect of its decision was to match “the almost-universal model of adjudication in the Executive Branch,” 141 S. Ct. at 1987, under which principal officers often delegate final decisionmaking authority. See, e.g., *Smith v. Berryhill*, 139 S. Ct. 1765, 1771 (2019) (describing how the Social Security Administration’s Appeals Council is that “agency’s final decisionmaker” pursuant to a regulatory delegation); 7 C.F.R. 2.35(a)(1) (delegating to a Judicial Officer the Secretary of Agriculture’s authority to act “as final deciding officer in adjudicatory proceedings”). Petitioners do not show any error or any basis for further review.



**CONCLUSION**

The petition for writ of certiorari should be denied.  
Respectfully submitted.

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