No. 25-1230

IN THE

Supreme Court of the United States

GOOGLE LLC,

Petitioner,

v.

VIRTAMOVE, CORP., *et al.*,

Respondents.

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

BRIEF OF ASKELADDEN L.L.C. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

MATTHEW J. MEYER
KILPATRICK TOWNSEND & STOCKTON LLP
1302 El Camino Real, Suite 175
Menlo Park, CA 94025

ADAM H. CHARNES
Counsel of Record
ALTON L. ABSHER III
KILPATRICK TOWNSEND & STOCKTON LLP
1001 West Fourth Street
Winston-Salem, NC 27101
(336) 607-7300
acharnes@ktslaw.com

Counsel for Amicus Curiae

May 29, 2026

393415

COUNSEL PRESS
A Proceed Service
The Appellate Experts®
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

In the America Invents Act, Congress established a carefully calibrated temporal framework for administrative patent review. Congress provided that post-grant review is available for the first nine months after a patent issues, 35 U.S.C. § 321(c), while inter partes review is available at any time thereafter, *id.* § 311(c), subject only to a specific one-year time bar triggered by the service of an infringement complaint, *id.* § 315(b). To ensure administrative efficiency, Congress also provided that the agency's determination "whether to institute an inter partes review" is "final and nonappealable." *Id.* § 314(d).

The questions presented are:

1. Whether the Patent and Trademark Office may unilaterally rewrite the America Invents Act by imposing an extra-statutory, six-year limitations period on inter partes review based on a patentee's purported "settled expectations," thereby overriding the specific temporal boundaries enacted by Congress.

2. Whether 35 U.S.C. § 314(d) strips Article III courts of the jurisdiction to review the agency's promulgation of categorical, extra-statutory rules that openly defy the limits of its congressionally delegated authority.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Page

Page

Statutes and Other Authorities

INTEREST OF AMICUS CURIAE

Askeladden L.L.C. is an education, information, and advocacy organization that, through its Patent Quality Initiative, is dedicated to improving the understanding, use, and reliability of patents in financial services and elsewhere. Through this initiative, Askeladden strives to improve patent quality and to address questionable patent holder behaviors.

Askeladden is a wholly owned subsidiary of The Clearing House Payments Company L.L.C. The Clearing House is a banking association and payments company that is owned by the world's largest commercial banks and dates back to 1853. The Clearing House owns and operates core payments system infrastructure in the United States, clearing and settling more than $2 trillion in U.S. dollar payments each business day. As the country's oldest banking trade association, The Clearing House also provides informed advocacy and thought leadership on critical payments-related issues.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

The America Invents Act (AIA) reflects a carefully calibrated congressional compromise. Congress created a robust administrative mechanism to weed out invalid patents, recognizing the profound public interest in

1. Per this Court's Rule 37.2, counsel for the parties were timely notified of amicus's intention to file this brief. No counsel for a party wrote any part of this brief and no one other than amicus made a monetary contribution in relation to the brief.

ensuring that patent monopolies are kept within their legitimate scope. In doing so, Congress established specific time limits governing when these administrative challenges may be brought.

The United States Patent and Trademark Office (PTO) has now decided that it prefers a different framework. By administrative fiat, the PTO has imposed a presumptive rule that a patent's six-year age endows its owner with "settled expectations" that shield the patent from *inter partes* review (IPR). That extra-statutory time bar directly overrides the express statutory timeline enacted by Congress. Worse, the Federal Circuit has held that the courts are entirely powerless to review this agency overreach, interpreting the AIA's bar on appealing individual institution decisions as an impenetrable shield for widespread agency lawlessness.

This Court should grant certiorari because the Federal Circuit's decision threatens far more than the patent system. If an agency can weaponize a statutory non-appealability clause to rewrite its enabling legislation and invent unreviewable, extra-statutory limitations, the stability of the entire administrative state is at risk. A ruling permitting the PTO to insulate categorical rulemaking from judicial review would give a green light to other federal agencies—such as the Securities and Exchange Commission, the Consumer Financial Protection Bureau, and the National Labor Relations Board—to similarly destabilize corporate compliance and private property rights across the economy. This case presents the ideal vehicle to reaffirm the strong presumption of judicial review and to clarify that agencies may not use unreviewable gatekeeping provisions to usurp the legislative power of Congress.

ARGUMENT

I. The PTO's "settled expectations" rule unlawfully supplants the carefully calibrated timelines enacted by Congress.

Where a statute's language carries a plain meaning, "the duty of an administrative agency is to follow its commands as written, not to supplant those commands with others it may prefer." *SAS Inst., Inc. v. Iancu*, 584 U.S. 357, 363 (2018). In the AIA, Congress spoke with unmistakable clarity regarding the temporal limits on administrative patent challenges. The PTO's invention of a six-year "settled expectations" bar is not an exercise of statutory discretion; it is a blatant rewriting of the statutory text.

Congress knew exactly how to provide time limits for post-issuance review, and it did so with precision. For post-grant review (PGR), Congress established a strict nine-month cutoff, providing that a PGR petition "may only be filed not later than the date that is 9 months after the date of the grant of the patent." 35 U.S.C. § 321(c). Congress consciously declined to impose a similar post-issuance cutoff for IPRs. Instead, Congress structured the system so that PGR is available for the first nine months, and IPR is available thereafter.

The only time limit Congress placed on IPRs is tied not to the age of the patent, but to the initiation of litigation. Section 315(b) provides that an IPR "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 legislative history confirms that this choice was deliberate. As the bill's sponsors recognized during the drafting of the AIA, prior law imposed "no deadline on seeking inter partes reexamination." 157 Cong. Rec. S5429 (daily ed. Sept. 8, 2011) (statement of Sen. Jon Kyl). After vigorous debate, Congress intentionally adopted a deadline of one year after the service of an infringement complaint. *Id.*

The PTO itself has previously acknowledged that "the statutory scheme specifically contemplates a Petition filed with co-pending litigation by allowing filing one year after service of the complaint." *Precision Planting, LLC v. Deere & Co.*, No. IPR2019-01044, 2019 WL 6481776, at *8 (P.T.A.B. Dec. 2, 2019) (quotation marks omitted). Indeed, the agency has historically recognized that "filing within the one-year period provided by 35 U.S.C. § 315(b) is presumptively proper." *Sprint Spectrum L.P. v. Intell. Ventures II LLC,* No. IPR2018-01770, 2019 WL 1581944, at *27 (P.T.A.B. Apr. 12, 2019).

Yet today, the PTO flouts this statutory scheme. Under the agency's newly minted regime, PGR is available for nine months, IPR is available for six years, and any IPR filed more than six years after issuance is presumptively barred by the patentee's "settled expectations"—even if the petition is filed well within the one-year post-suit window expressly guaranteed by § 315(b). The PTO has thus overridden Congress's one-year post-suit bar with its own six-year post-issuance bar. But it is Congress's job to enact policy, and it is the agency's job to follow it. The PTO may not improvise on the powers granted by Congress simply because it finds its own timeline more expedient.

The legislative history of the AIA removes any doubt that Congress intended IPR to be available regardless of a patent's age. In its section-by-section analysis of the Act, the House Judiciary Committee explicitly stated that "Inter partes review may be sought on the basis of patents and printed publications *any time after* a post-grant review is concluded or, if no such review is instituted, after the time for seeking such review has expired." H.R. Rep. No. 112-98, at 75 (2011) (emphasis added).

Moreover, Congress actively considered—and explicitly rejected—age-based limitations on administrative patent challenges. Prior to the AIA, inter partes reexamination was restricted to patents issued after 1999. Congress intentionally abolished this restriction in the AIA. As the House Report proudly noted under the heading "Repeal of the 1999 limit": "The limit on challenging patents issued before 1999 in inter partes reexamination is eliminated; *all patents can be challenged in inter partes review*." *Id.* at 47 (emphasis added). By fabricating a six-year "settled expectations" bar, the PTO has effectively resurrected the very type of age-based immunity that Congress expressly repealed, directly flouting the legislature's command that "all patents" remain subject to IPR.

II. The PTO's extra-statutory rulemaking contravenes longstanding U.S. patent policy and the public interest

The PTO's extralegal restriction on IPR access directly undermines the fundamental public policy that the AIA was designed to serve. The Supreme Court has repeatedly held that "[t]he possession and assertion of patent rights are 'issues of great moment to the public,'"

Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 815 (1945), and that it "is the public interest which is dominant in the patent system." *Mercoid Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661, 665 (1944). Because a patent "by its very nature is affected with a public interest," the Court has long emphasized that the Patent Act favors the "authoritative testing of patent validity" and the "removal of restrictions on those who would challenge the validity of patents." *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 343–45 (1971). By barring access to quality review for litigation defendants based solely on the age of a patent, the PTO stands these foundational policies on their head.

The PTO's sole justification for its extra-statutory time bar is that a patentee acquires "settled expectations" once a patent has been in force for six years. This rationale is both legally defective and economically destructive. It artificially shields invalid patents from efficient administrative review and actively encourages the very rent-seeking behavior the AIA was designed to curtail.

As an initial matter, a patentee cannot possess a legitimate "settled expectation" of immunity from IPR. As this Court has recognized, a patent is a "public franchise." *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 584 U.S. 325, 335 (2018). It is granted subject to the statutory conditions enacted by Congress—one of which is the susceptibility to IPR for the entire life of the patent. *See id.* at 342. Because the AIA expressly permits IPR challenges at any time after the first nine months of issuance, 35 U.S.C. § 311(c), any "expectation" of immunity at the six-year mark is simply a self-fulfilling prophecy manufactured by the PTO's new rule, not a

right conferred by Congress. Furthermore, there is no cognizable reliance interest in a monopoly that was granted by agency mistake. If a patent is invalid because it claims a routine or obvious concept, it never should have issued. Shielding such a patent from review based merely on its age forces the public to pay monopoly rents for technology that rightfully belongs in the public domain.

Worse, the PTO's rule actively rewards rent-seeking and stifles innovation. By establishing a six-year safe harbor from IPR, the PTO has created a perverse incentive for Non-Practicing Entities (NPEs) to engage in "hold-up" litigation. Under the PTO's regime, an NPE holding a dubious patent is highly incentivized to lie in wait for six years before asserting it. During this artificial grace period, innovators and operating companies independently develop, launch, and widely adopt technologies. Once the six-year mark passes—and the technology is deeply integrated into the market, making switching costs prohibitively high—the NPE springs its trap, secure in the knowledge that the defendant cannot utilize the efficient, cost-effective IPR process to challenge the patent's validity.

For amicus and the financial services industry, the consequences of this rent-seeking are severe. The modern payments ecosystem relies on complex, interconnected IT infrastructure that processes trillions of dollars daily. When NPEs assert older, low-quality software and business-method patents against financial institutions, the goal is rarely to protect a competing product; it is to extract settlements based on the exorbitant costs of district court litigation and the threat of system disruption.

Congress enacted the AIA precisely to combat this stifling effect on the economy, recognizing that "questionable patents are too easily obtained and are too difficult to challenge" in traditional litigation. H.R. Rep. No. 112-98, at 39. Congress intended IPR to serve as a vital, ongoing mechanism to clear the thicket of bad patents regardless of their age. In fact, the legislative history demonstrates that Congress was particularly concerned with the harms caused by older, poor-quality patents that are often weaponized years after issuance. The House Judiciary Committee noted that the "issuance of poor business-method patents during the late 1990's through the early 2000's led to the patent 'troll' lawsuits that compelled the Committee to launch the patent reform project." *Id.* at 54. As an organization representing the financial services industry, amicus is acutely aware of the threat posed by such patents. By shielding patents older than six years from IPR, the PTO effectively grants immunity to the very patents Congress intended to subject to rigorous administrative review.

The danger of insulating older patents from review is best illustrated by the exact type of case Congress designed the AIA to address. Consider the trajectory of VLSI Technology LLC's U.S. Patent No. 7,523,373. Issued in 2009, the '373 patent sat dormant for a decade before becoming the centerpiece of a high-profile infringement campaign against Intel Corporation. That litigation resulted in a staggering $1.5 billion jury verdict in the Western District of Texas. *See VLSI Tech. LLC v. Intel Corp.*, No. 6:21-CV-057-ADA, 2022 WL 1477725, at *1 (W.D. Tex. May 10, 2022), *aff'd in part & rev'd in part*, 87 F.4th 1332 (Fed. Cir. 2023).

Yet, when subjected to the rigorous technical scrutiny of an IPR, the patent crumbled. In 2023, the Patent Trial and Appeal Board issued a final written decision concluding that every claim of the '373 patent was unpatentable as obvious in view of the prior art. *Pat. Quality Assurance LLC v. VLSI Tech. LLC*, No. IPR2021-01229, (P.T.A.B. June 13, 2023), *available at* https://data.uspto.gov/ptab/trials/proceedings/details/IPR2021-01229/IPR2021-01229/11468458/decisions-detail. This result represents the AIA functioning exactly as Congress intended: providing an expert administrative forum to correct agency errors, weed out invalid patents, and protect the American economy from unjustified monopoly rents.

Had the PTO's newly minted "settled expectations" policy been in effect, however, that billion-dollar correction would have been categorically forbidden. Because the '373 patent was issued more than six years before the IPR petition was filed, the agency's extra-statutory rule would have barred institution entirely. The patent would have remained in force not because it was valid, but simply because it was old. An exorbitant toll would have been levied on a foundational technology, and the public would have been forced to pay for a monopoly that never should have been granted in the first place.[2]

Such an outcome turns the statutory framework on its head. Congress deliberately designed the AIA to permit IPR at any time after a patent's initial nine-month post-issuance window, subject only to the one-year post-suit bar

2. The Federal Circuit ultimately vacated the damages award and remanded for a new trial on damages. *VLSI Technology LLC v. Intel Corp.*, 87 F.4th 1332, 1348–49 (Fed. Cir. 2023).

of § 315(b). As the House Judiciary Committee explained, under the AIA, "all patents can be challenged in inter partes review." H.R. Rep. No. 112-98, at 47. Congress expressly repealed prior age-based restrictions, refusing to shield older patents from scrutiny simply because they had managed to evade detection. The PTO possesses no authority to resurrect a temporal immunity that Congress discarded, nor may it subordinate the public's paramount interest in testing patent validity to bureaucratic fiat.

Nor is the VLSI litigation an isolated anomaly. The danger of immunizing older patents from administrative scrutiny is a recurring one, as the history of Uniloc's U.S. Patent No. 5,490,216 demonstrates. Issued in 1996, the '216 patent lay in wait for years before being used to secure a $388 million jury verdict against Microsoft. *See Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1301 (Fed. Cir. 2011). For more than a decade, the patent served as a formidable weapon for extracting settlements across the technology sector.

When Congress enacted the AIA, it provided a mechanism to finally subject such patents to rigorous, expert scrutiny. Fifteen years after the '216 patent issued, a group of defendants petitioned for IPR. The Board found every asserted claim unpatentable over the prior art, a decision the Federal Circuit readily affirmed. *See Sega of Am., Inc. v. Uniloc USA, Inc.*, No. IPR2014-01453, 2016 WL 932971 (P.T.A.B. Mar. 10, 2016), *aff'd*, 711 F. App'x 986 (Fed. Cir. 2017).

Under the agency's newly minted "settled expectations" regime, that review never would have occurred. Because the '216 patent was well over six years old, the agency

would have deemed the patentee's expectations "settled," categorically barring institution. The patent would have remained a potent tool for extracting massive damages—not because it was valid, but solely because it was old.

That outcome cannot be squared with the statutory design. Congress understood that a patent does not ripen into a valid property right simply by aging, and that an invalid patent remains just as invalid—and just as harmful to the public—in year fifteen as it was in year one. By substituting its own temporal cutoff for the one Congress actually enacted in § 315(b), the PTO has arrogated to itself the power to decide which invalid patents the public must continue to endure.

While the PTO may believe that protecting older patents fosters "stability," public policy is properly determined by Congress, not the agency. Congress already weighed these competing interests when it enacted the AIA. It decided that the public's interest in invalidating bad patents required a robust IPR mechanism, constrained only by the specific estoppel provisions and the one-year post-suit time bar it explicitly codified. The PTO has no authority to substitute its own policy preferences for those enacted by the legislature.

III. The statutory framework for patent-validity reviews is not merely advisory or optional for the agency to follow.

The Federal Circuit's refusal to review the PTO's categorical, extra-statutory rulemaking represents a dangerous abdication of the judicial role. This appeal raises profound questions about the scope of agency

authority and whether an agency is required to comply with—or can instead rewrite—its authorizing statute.

Section 314(d) provides 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). But as this Court has made clear, § 314(d) is not a blank check for agency lawlessness. It bars review only of "ordinary dispute[s] about the application of certain relevant patent statutes concerning the Patent Office's decision to institute inter partes review." *Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261, 271 (2016). It does not "enable the agency to act outside its statutory limits." *Id.* at 275.

Under the "strong" and "well-settled" presumption "favoring judicial review of administrative action," *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 229 (2020), review bars must be interpreted narrowly. If a party believes the PTO has engaged in "shenanigans" by exceeding its statutory bounds, "judicial review remains available consistent with the Administrative Procedure Act, which directs courts to set aside agency action 'not in accordance with law' or 'in excess of statutory jurisdiction, authority, or limitations.'" *SAS Inst.*, 584 U.S. at 371 (quoting 5 U.S.C. §§ 706(2)(A), (C)).

There is no "'clear and convincing evidence' of congressional intent" to allow the PTO to wield § 314(d) to rewrite the rest of the statute. *Guerrero-Lasprilla*, 589 U.S. at 229. Yet, the record in this case demonstrates that the PTO did exactly that. The agency did not engage in a factual inquiry into the specific "settled expectations" of the patentee; the only fact considered was the age of the patent. This is not an exercise of case-by-case discretion

under § 314(a), which contemplates an assessment of whether "there is a reasonable likelihood that the petitioner would prevail." Rather, it is the application of a presumptive, categorical rule that directly contravenes the statute.

This case is therefore the perfect vehicle to address administrative agencies implementing such extra-statutory rules. In his dissent in *Thryv*, Justice Gorsuch asked a prescient question regarding the expansion of § 314(d): "If the case before us doesn't qualify as 'extraordinary,' and if the Board's admitted flouting of § 315(b) isn't 'clear and indisputable,' then what extralegal act wouldn't be just another day at the office?" *Thryv, Inc. v. Click-To-Call Techs., LP*, 590 U.S. 45, 82 (2020) (Gorsuch, J., dissenting).

This case provides the answer to that question.

IV. The Federal Circuit's ruling provides a replicable blueprint for broad administrative overreach across the Executive Branch.

The implications of the decision below reach far beyond the insular confines of the patent bar. If allowed to stand, the Federal Circuit's sweeping expansion of 35 U.S.C. § 314(d) will provide a dangerous, highly attractive blueprint for federal agencies across the executive branch to insulate unlawful, categorical rulemaking from judicial review. Under the guise of exercising unreviewable case-by-case "gatekeeping" or prosecutorial discretion, powerful financial regulators could easily implement sweeping, extra-statutory prohibitions that completely bypass congressional authorization and evade Article III scrutiny.

As an organization deeply rooted in the financial services sector, amicus is well-positioned to highlight how other federal agencies could weaponize this exact structural loophole to destabilize commercial markets and private property rights across the wider economy. Consider a hypothetical example involving the National Labor Relations Board (NLRB).

Under Section 3(d) of the National Labor Relations Act, the Board's General Counsel possesses "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints" alleging unfair labor practices. 29 U.S.C. § 153(d). This Court has long recognized that this gatekeeping authority cloaks the General Counsel with virtually absolute, unreviewable prosecutorial discretion to decide whether to bring or dismiss an unfair labor practice charge. *See NLRB v. United Food & Com. Workers Union Loc. 23, AFL-CIO*, 484 U.S. 112, 126 (1987).

If an agency can use an unreviewable gate to immunize categorical, extra-statutory rules, a rogue General Counsel could fundamentally reshape American labor law by administrative fiat. For example, rather than evaluating cases on their individual, fact-specific merits, the General Counsel could issue an internal enforcement directive declaring that the agency will categorically refuse to issue complaints protecting certain classes of workers.

Such a directive would effectively erase the boundaries of the NLRA, overriding the common-law agency principles Congress intended the Board to apply. Because the gate to the Board's adjudicatory machinery is

entirely controlled by the General Counsel's unreviewable complaint discretion, neither employers nor workers could ever secure Article III review to strike down the unlawful policy. The agency could effectively achieve a permanent, structural amendment of its enabling statute while remaining entirely insulated from judicial oversight.

Following this Court's decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), the constitutional duty of the judiciary to ensure agencies stay within their statutory bounds has never been clearer. Yet, the decision below signals to the entire federal bureaucracy that it can evade *Loper Bright* and rewrite its enabling legislation. All an agency must do is anchor its unlawful, categorical policy to a statutory gatekeeping threshold that carries a non-appealability clause. To protect the structural separation of powers and prevent the erosion of private property rights across the economy, this Court should grant certiorari to close this dangerous loophole.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

MATTHEW J. MEYER
KILPATRICK TOWNSEND
& STOCKTON LLP
1302 El Camino Real,
Suite 175
Menlo Park, CA 94025

ADAM H. CHARNES
Counsel of Record
ALTON L. ABSHER III
KILPATRICK TOWNSEND
& STOCKTON LLP
1001 West Fourth Street
Winston-Salem, NC 27101
(336) 607-7300
acharnes@ktslaw.com

Counsel for Amicus Curiae

May 29, 2026