

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 FOR UNIFIED PATENTS, LLC
AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER**

ANGELA M. OLIVER	DEBRA J. MCCOMAS
HAYNES AND BOONE, LLP	<i>Counsel of Record</i>
888 16th Street, N.W., Ste. 300	MICHAEL F. QIAN
Washington, DC 20006	HAYNES AND BOONE, LLP
	2801 N. Harwood Street, Ste. 2300
JONATHAN STROUD	Dallas, TX 75201
ROSHAN MANSINGHANI	(214) 651-5375
KELLY R. HUGHES	<i>debbie.mccomas@haynesboone.com</i>
UNIFIED PATENTS, LLC	
1015 15th Street NW, Ste. 629	
Washington, DC 20005	

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INTEREST OF *AMICUS CURIAE*¹

Unified Patents, LLC (“Unified”) is a membership organization that seeks to improve patent quality and deter unsubstantiated or invalid patent assertions in defined technology sectors. In particular, Unified is dedicated to deterring non-practicing entities (“NPEs”), particularly patent assertion entities and litigation investment entities, from extracting nuisance settlements from operating companies based on patents that are likely invalid.

To that end, Unified provides a variety of services to its members, including analytics, prior art, invalidity contests, patentability analysis, administrative patent review, amicus briefs, economic surveys, and standard essential patent essentiality studies. In addition, Unified monitors patent ownership data and secondary-market patent sales. Unified also challenges patents it believes are unpatentable or invalid. This has included challenges in *inter partes* review (“IPR”).

IPR is a vital tool for ensuring the integrity of the patent system and stopping the assertion of poor-quality patents. As an organization dedicated to those purposes, Unified urges this Court to grant review to preserve IPR’s crucial functions.

¹ No counsel for a party authored this brief in whole or in part and no counsel, party, or person other than *amicus curiae* and its counsel made a monetary contribution intended to fund the preparation or submission of the brief. Notice of the intent to file this brief was provided to all parties’ counsel at least ten days prior to filing.

INTRODUCTION AND SUMMARY OF ARGUMENT

The questions presented are vitally important to the Nation’s patent system and warrant this Court’s review.

“Congress, concerned about overpatenting and its diminishment of competition,” established IPR “to weed out bad patent claims efficiently.” *Thryv, Inc. v. Click-To-Call Techs., LP*, 590 U.S. 45, 54 (2020). Congress directed the U.S. Patent and Trademark Office (“PTO”) to implement the statutory IPR scheme.

Now the PTO is rewriting that scheme. Enabled by Federal Circuit precedent, the PTO wields unreviewable power to devise its own limits on IPR availability. As the law currently stands, the PTO can exceed its statutory authority and no court can do anything about it.

The PTO’s exercise of this unreviewable power is harming the patent system—and the situation has worsened considerably in the past year. The agency has unilaterally devised an array of new constraints on IPR. And since 2025, the PTO has imposed its most significant IPR limits yet. These unilateral agency actions are shutting down the IPR system. The public suffers, and entities that use weak patents to extract fees from productive companies benefit.

The PTO’s “settled expectations” constraint on IPR is especially consequential. By insulating patents from IPR based on their age, this new doctrine inflicts harm throughout the patent system. It protects invalid patents, burdens courts and the PTO with unnecessary disputes, and prejudices stakeholders. Worst of all, it shields the very patents that are most likely to be deployed in abusive litigation against productive companies.

The PTO's actions have upended the system Congress designed. In the last year, the situation has grown worse than ever. This Court's review is urgently needed.

ARGUMENT

I. The reviewability question is exceptionally important.

The petition presents an exceptionally important question regarding the judicial reviewability of the PTO's authority over IPR institution. That question has sweeping consequences for the Nation's patent system, far beyond the specific challenge at issue here.

The Federal Circuit's reviewability precedent insulates the PTO from a wide range of statutory challenges for any IPR institution criteria it might devise. Exercising that unreviewable power, the PTO has devised an array of extra-statutory institution criteria—including not just the “settled expectations” constraint, but an ever-growing list of agency revisions to the IPR scheme.

The consequences have been severe, especially in the last year. IPR institution rates and IPR filings are at all-time lows. The PTO's unilateral actions are choking off access to IPR and dismantling a vital scheme Congress established to ensure the integrity of the Nation's patent system.

A. Federal Circuit reviewability precedent has immunized the PTO from ordinary limits on agency power.

The Federal Circuit's reviewability precedent gives the PTO extraordinary powers. Ordinary agencies must

adhere to limits established by Congress and enforced by courts. Not so for the PTO under Federal Circuit law.

According to the Federal Circuit, the PTO apparently has judicially unreviewable power over the “content” of IPR institution criteria. *Apple Inc. v. Vidal*, 63 F.4th 1, 13 (Fed. Cir. 2023); see also, *e.g.*, Pet. App. 1a; *In re Cambridge Indus. USA Inc.*, No. 26-101, 2025 WL 3526129, at *3 (Fed. Cir. Dec. 9, 2025); *Mylan Lab’ys Ltd. v. Janssen Pharmaceutica, N.V.*, 989 F.3d 1375, 1382 (Fed. Cir. 2021). So the PTO can apply whatever criteria it devises—no matter how much they exceed Congress’s limits on the agency’s authority.

The Federal Circuit has thus left the PTO free from usual limits on agency action. A normal agency must obey its enabling statute and the Administrative Procedure Act (“APA”). But under Federal Circuit law, when devising IPR institution criteria, the PTO can do any of the following without judicial review:

- Act “*ultra vires*,” *Mylan*, 989 F.3d at 1382-83 (denying judicial review of such a claim);
- Devise standards contrary to statute, see, *e.g.*, *Mylan*, 989 F.3d at 1381; *Apple*, 63 F.4th at 11; *In re Cambridge*, 2025 WL 3526129, at *2-3;
- Adopt standards that are “not ‘reasonable and reasonably explained,’” *Apple*, 63 F.4th at 11 (quoting *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021));
- Change position with no explanation, see, *e.g.*, *In re Motorola Sols., Inc.*, 159 F.4th 30, 38 (Fed. Cir. 2025); *Cambridge*, 2025 WL 3526129, at *2-3; Pet.

at 20-21, *In re Cambridge Indus. USA Inc.*, No. 26-101 (Fed. Cir. Oct. 10, 2025) (“*Cambridge Pet.*”);

- Apply new rules retroactively without statutory authority, see, *e.g.*, *In re Motorola*, 159 F.4th at 38; Pet. at 27, *In re Motorola Sols., Inc.*, No. 25-134 (Fed. Cir. June 23, 2025); *Cambridge*, 2025 WL 3526129, at *2-3; *Cambridge Pet.* 20;
- Regulate without accounting for relevant considerations, like reliance interests, see, *e.g.*, *In re Motorola*, 159 F.4th at 38; *Cambridge*, 2025 WL 3526129, at *2-3; *Cambridge Pet.* 20-21.

These are fundamental, universal limits on agency power, and the Federal Circuit was wrong to hold them judicially unenforceable against the PTO. To be sure, 35 U.S.C. 314(d) makes “final and unappealable” the “determination by the Director whether to institute an inter partes review under this section.” But under this Court’s precedents, that merely bars review of “ordinary dispute[s] about the application of an institution-related statute.” *Thryv*, 590 U.S. at 54 (quoting *Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261, 271 (2016)). “If a party believes the Patent Office has engaged in ‘shenanigans’ by exceeding its statutory bounds, judicial review remains available.” *SAS Inst., Inc. v. Iancu*, 584 U.S. 357, 371 (2018) (citation omitted). The Federal Circuit is mistaken that Section 314(d) immunizes the PTO for all statutory violations, no matter how blatant the violation, how fundamental the issue, or how universal the requirement.

Nor are the PTO’s statutory violations shielded from review by 5 U.S.C. 701(a)(2), which makes APA review unavailable “to the extent that . . . agency action is committed to agency discretion by law.” Statutory challenges to the PTO’s IPR institution criteria concern

limits on the agency’s discretion. Section 701(a)(2) does not disable courts from deciding in the first place whether the agency has the discretion it claims. Yet the Federal Circuit declines to review at all whether the PTO has exceeded its authority.

B. The PTO has exercised its unreviewable power to rewrite the IPR scheme Congress designed.

Exercising its unreviewable power under Federal Circuit law, the PTO has revamped the IPR scheme Congress designed. The changes include—but extend far beyond—the “settled expectations” doctrine. Over the years, the PTO has invented (then re-invented) an array of new limits on IPR availability. All of these changes depart from Congress’s enactments—and all were devised unilaterally by the agency on its own whim.

The PTO’s unilateral revisions to the IPR scheme include:

- **“*Fintiv*” time-to-trial limit:** The PTO created a new timing requirement, making IPR unavailable if the IPR comes too close to the trial date in a related district-court proceeding. See *Apple Inc. v. Fintiv, Inc.*, No. IPR2020-00019, Paper 11, at 5-6 (U.S.P.T.O. Mar. 20, 2020) (precedential).
- **Surrender of district-court claims (“*Sotera* stipulations”):** The PTO grafted an exception onto its *Fintiv* time-to-trial limit, allowing IPR petitioners to avoid that limit by stipulating not to raise certain claims in district-court litigation (any ground raised or that could have been reasonably raised in an IPR). *Sotera Wireless, Inc. v. Masimo Corp.*, IPR2020-01019, Paper 12, at 18 (U.S.P.T.O.

Dec. 1, 2020) (precedential as to Section II.A). In effect, this conditions IPR institution on petitioners surrendering district-court claims. And it rewrites Congress’s choice for IPR’s estoppel effect on district-court litigation—which attaches only upon the final written decision in IPR, not institution. 35 U.S.C. 315(e)(2).

- **Dispositive *Sotera* stipulations:** The PTO then increased the pressure to surrender district-court claims by making *Sotera* stipulations dispositive: the PTO promised not to deny IPR institution “in view of parallel district court litigation” when the petitioner executes a *Sotera* stipulation. Memorandum from Katherine K. Vidal to Members of the Patent Trial and Appeal Board, *Interim Procedure for Discretionary Denials in AIA Post-Grant Proceedings with Parallel District Court Litigation* at 2-3 (June 21, 2022) (“Vidal Memo”).²
- **Reversal on *Fintiv* time-to-trial limit for ITC proceedings:** While the PTO initially applied the *Fintiv* time-to-trial limit when there were parallel proceedings in the International Trade Commission (“ITC”), in 2022 the PTO reversed course and declared that it would not “apply[] *Fintiv* to a parallel ITC proceeding.” Vidal Memo 6-7.
- **Compelling-merits exception to *Fintiv* time-to-trial limit:** In 2022, the PTO created a new exception to its *Fintiv* time-to-trial limit:

² https://www.uspto.gov/sites/default/files/documents/interim_proc_discretionary_denials_aia_parallel_district_court_litigation_memo_20220621_.pdf.

notwithstanding proximity to a parallel district-court trial, “compelling, meritorious challenges will be allowed to proceed” in IPR. Vidal Memo 3-4.

Then the PTO’s activity hit a new level. In just the last year, the PTO has unleashed its most significant changes yet:

- **“Settled expectations”:** The PTO created a new limit on IPR: it began denying institution on the ground that the patent is too old (and therefore has engendered “settled expectations”). Memorandum from Coke Morgan Stewart to All PTAB Judges, *Interim Processes for PTAB Workload Management* (Mar. 26, 2025) (“Stewart Memo”)³; *Dabico Airport Sols. Inc. v. AXA Power ApS*, IPR2025-00408, Paper 21, at 2 (U.S.P.T.O. June 18, 2025). The PTO has suggested that this constraint may take effect when a patent is around six years old. *Kahoot! AS v. Interstellar Inc.*, IPR2025-00696, 2025 WL 2176613, at *1 (U.S.P.T.O. July 31, 2025). Yet the PTO declines to give clear notice of how old a patent must be to trigger “settled expectations.” *Dabico, supra*, Paper 21, at 3 (“[T]here is no bright-line rule on when expectations become settled.”). *Contra* 5 U.S.C. 706(2)(A) (prohibition on arbitrary and capricious agency action).
- **Prior-adjudication limit:** The PTO created another new limit on IPR: it now denies petitions because the patent claims had been challenged elsewhere—even if the prior proceeding involved different

³ <https://www.uspto.gov/sites/default/files/documents/InterimProcesses-PTABWorkloadMgmt-20250326.pdf>.

parties and different issues. Stewart Memo 2; *Webgroup Czech Republic, A.S. v. DISH Techs.*, IPR2025-00467, Paper 14, at 2-3 (U.S.P.T.O. July 16, 2025); *Intel Corp. v. Advanced Cluster Sys., Inc.*, IPR2025-00795, Paper 13, at 2-3 (U.S.P.T.O. Aug. 14, 2025).

- **Bar on foreign-government-affiliated petitioners:** Creating yet another new limit on IPR, the PTO now denies institution when the petitioner is affiliated with a foreign government. *Tianma Microelectronics Co. v. LG Display Co.*, IPR2025-01579, Paper 12, at 3-7 (U.S.P.T.O. Mar. 18, 2026).
- **Reversal on dispositive *Sotera* stipulations:** The PTO reversed course on *Sotera* stipulations: now, a *Sotera* stipulation “will not be dispositive by itself.” Memorandum from Scott R. Boalick to Members of the Patent Trial and Appeal Board, *Guidance on USPTO’s rescission of “Interim Procedure for Discretionary Denials in AIA Post-Grant Proceedings with Parallel District Court Litigation”* 2-3 (Mar. 24, 2025) (“Boalick Memo”).⁴
- **Re-reversal on *Fintiv* time-to-trial limit for ITC proceedings:** The PTO reinstated its previously abandoned rule on ITC proceedings: now, once again, a parallel ITC proceeding does trigger the *Fintiv* timing requirement. Boalick Memo 2.
- **Reversal on compelling-merits exception:** The PTO also reversed its 2022 compelling-merits exception: now, “compelling merits” are not

⁴ https://www.uspto.gov/sites/default/files/documents/guidance_memo_on_interim_procedure_rescission_20250324.pdf.

enough to permit an IPR petition to proceed when there is parallel litigation. Boalick Memo 3.

- ***Sotera* “plus” stipulations:** The PTO expanded the scope of what petitioners must surrender to pursue IPR. Now the PTO has indicated that petitioners should give up their ability to raise in district court not just arguments available in IPR, but also arguments available only in district court. In particular, the PTO has encouraged stipulations forgoing “system art” challenges—challenges based on a type of prior art that can be raised in district court but not in IPR. *Motorola Sols., Inc. v. Stellar, LLC*, IPR2024-01205, -01206, -01207, -01208, Paper 19, at 3-4 (U.S.P.T.O. Mar. 28, 2025); see 35 U.S.C. 311(b) (limiting IPR to “prior art consisting of patents or printed publications”).
- **Unexplained denials:** The PTO has stopped issuing explanations when denying IPR institution in most cases. Memorandum from John A. Squires to All PTAB Judges, *Director Institution of AIA Trial Proceedings* (Oct. 17, 2025).⁵ The PTO thus now exercises the power to limit IPR availability on grounds it does not even divulge to the parties (let alone submit to review by a court).

All of the PTO’s new restrictions on IPR rewrite the scheme Congress enacted. Not one appears in the statute. And they contradict express congressional judgments. For example, Congress addressed the time limits for IPR. Congress made IPR available for any patent older than 9 months. 35 U.S.C. 311. And it permitted IPR petitions

⁵ https://www.uspto.gov/sites/default/files/documents/Director_Institution_of_AIA_Trial_Proceedings.pdf.

parallel to district-court infringement litigation so long as the petition is filed within one year of the district-court complaint. 35 U.S.C. 315(b). Yet the PTO has now rewritten those time limits. The agency has imposed its own patent age cap with the “settled expectations” doctrine, contrary to Congress’s judgment that no age cap should apply. See Pet. 14-19; 35 U.S.C. 311. And the PTO has imposed its own *Fintiv* time limit in relation to district-court proceedings, which bars petitions that Congress deemed timely. 35 U.S.C. 315(b).

The statute’s own authors have recognized that the agency has rewritten their work. Senator Patrick Leahy (a principal author of the Leahy-Smith America Invents Act (“AIA”), which established IPR) has declared that the PTO’s “unilateral decisions” have undermined the statute—including the *Fintiv* requirement, which “go[es] directly against Congress’s intent.” Patrick Leahy, *New USPTO rulemaking should seek to strengthen, not weaken, the America Invents Act*, The Hill, May 25, 2023.⁶ Another AIA legislator has explained that the “settled expectations” doctrine is “not within the discretion of the Patent and Trademark Office.” *Oversight of the U.S. Patent and Trademark Office*, at 15:04 (Mar. 25, 2026) (Rep. Darrell Issa).⁷ As another AIA legislator summarized: under the PTO’s current approach to IPR, “there are barriers that are being applied that Congress never authorized.” *Id.* at 1:32:46 (Rep. Zoe Lofgren).

⁶ <https://thehill.com/opinion/congress-blog/4020170-leahy-new-uspto-rulemaking-should-look-to-strengthen-not-weaken-the-america-invents-act/>.

⁷ <https://judiciary.house.gov/committee-activity/hearings/oversight-us-patent-and-trademark-office-2>.

Even worse, the PTO has imposed these barriers by pure agency fiat, without even the public input and reasoned explanation that agency rulemaking ordinarily entails. The PTO has repeatedly begun the rulemaking process on IPR institution rules—only to abandon notice-and-comment in favor of unilateral agency decrees. For example, in 2023, the agency issued an advance notice of proposed rulemaking, which included proposals on the *Fintiv* requirement, *Sotera* stipulations, and *Fintiv*'s application to ITC proceedings. 88 Fed. Reg. 24,503, 24,513-516 (Apr. 21, 2023). It received a record-breaking 14,500-plus comments—which were overwhelmingly negative. Unified Patents, *The Public Has Spoken: Stakeholders Overwhelmingly Oppose Proposed Restrictions on Patent Trial and Appeal Board Review* (Sept. 5, 2023).⁸ Yet rather than complete the rulemaking process, the agency simply carried out its own preferred policies on those subjects. See *supra*, at 6-10; see also, *e.g.*, 89 Fed. Reg. 28,693 (Apr. 19, 2024) (notice of proposed rulemaking); 90 Fed. Reg. 48,342 (Oct. 17, 2025) (withdrawing that proposed rulemaking); 90 Fed. Reg. 48,335 (Oct. 17, 2025) (another notice of proposed rulemaking, which has not been finalized); Unified Patents, *The Public Has Spoken – Again: For a Second Time, Stakeholders Overwhelmingly Oppose Agency Proposals that Would Restrict Access to Inter Partes Review* (Dec. 18, 2025)⁹ (noting that 97% of public comments opposed the PTO's latest proposed rules).

⁸ <https://www.unifiedpatents.com/insights/2023/9/05/anprm-public-comments>.

⁹ <https://www.unifiedpatents.com/insights/2025/12/17/the-public-has-spoken-again>.

C. The PTO's actions have upended IPR and the patent system.

The practical consequences have been severe. In the last year, as just explained, the PTO's revisions to the IPR scheme reached their apex—with a spate of new limits on IPR availability, including the “settled expectations” doctrine. See *supra*, at 8-10. This has had immediate, measurable effect: the agency has choked off access to the IPR system Congress established.

Previously, IPR was working well. For much of IPR's history, the PTO instituted IPR over 50% of the time, and when it did, it found invalid patent claims in 60-80% of its final decisions. Paul R. Gugliuzza & Mark A. Lemley, *Myths and Reality of Patent Law at the Supreme Court*, 104 B.U. L. Rev. 891, 912-13 (2024). IPR was thus cleansing the patent system of claims that never should have been granted.

Now, IPR institution denials have skyrocketed. In 2025, the PTO denied more IPR petitions on non-merits grounds than ever before. Unified Patents, *Patent Dispute Report: 2025 in Review* (Jan. 13, 2026) (“2025 Report”).¹⁰ And in the first quarter of this year, those denials have surged 622.7% compared to the same time a year ago. Unified Patents, *Patent Dispute Report: Q1 2026* (Apr. 14, 2026) (“Q1 Report”).¹¹ Two years ago, the PTO denied 32% of IPR petitions; now, it denies 63%. Patent Trial and Appeal Board, *PTAB Trial Statistics 7*

¹⁰ <https://www.unifiedpatents.com/insights/2026/1/13/patent-dispute-report-2025-in-review>.

¹¹ <https://www.unifiedpatents.com/insights/2026/4/14/patent-dispute-report-q1-2026?rq=year%20in%20review>.

(Apr. 2026) (“April 2026 PTAB Statistics”)¹²; see also, *e.g.*, Sarah Geers et al., *An Empirical Dissection of Discretionary Denials Following Bifurcation Policy*, 25 Chi.-Kent J. Intell. Prop. 238, 245 (2026) (identifying a “steep increase in AIA proceedings currently failing to advance to institution”).

Meanwhile, the number of IPR petitions has plummeted. Petitions have hit a historic low this year. Q1 Report. Before the PTO’s 2025 changes, 100 to 185 IPR petitions were filed each month; last month, there were only 15. April 2026 PTAB Statistics 5; Dennis Crouch, *Inter Partes Review in 2026*, Patently-O (May 24, 2026) (“The IPR system . . . is functionally suspended.”)¹³. As this reflects, the PTO has erected enough barriers that many would-be petitioners have simply stopped trying. Why spend tens of thousands of dollars on a nonrefundable IPR “request fee” when the agency can rewrite the rules at will? *USPTO Fee Schedule*, USPTO (last revised May 1, 2026).¹⁴

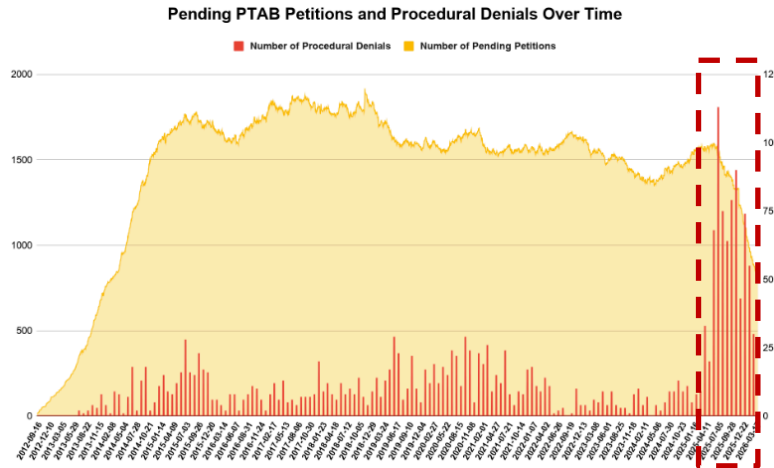
Those twin effects are squeezing IPR out of existence: fewer IPR petitions are being filed, and the ones that do

¹² https://www.uspto.gov/sites/default/files/documents/April_2026_Trial_Statistics.pdf.

¹³ <https://patentlyo.com/patent/2026/05/inter-partes-review-in-2026.html>.

¹⁴ <https://www.uspto.gov/learning-and-resources/fees-and-payment/uspto-fee-schedule>.

are more likely to be denied. And these dynamics in the past year are unprecedented in the history of IPR:



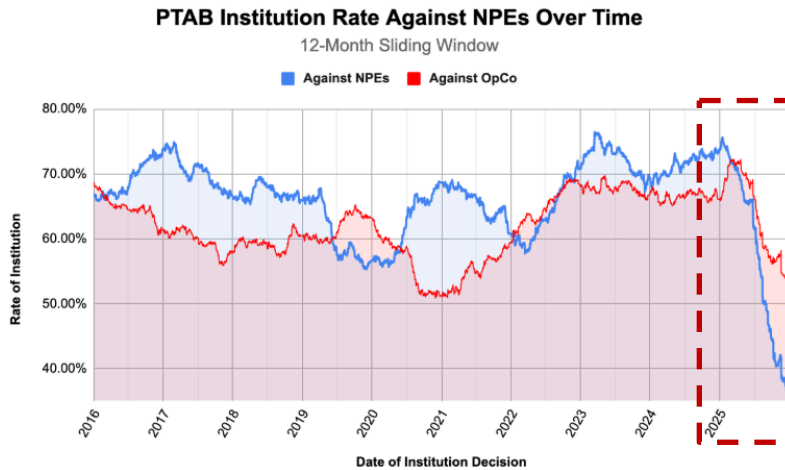
Q1 Report.

This is disastrous for the Nation’s patent system. IPR exists to cancel bad patents efficiently—unencumbering the economy from patent monopolies that never should have issued. Although there are other ways to challenge patent validity, IPR plays an essential role. Without it, Congress recognized, “questionable patents” were “too easily obtained” and “too difficult to challenge.” H.R. Rep. No. 112-98, at 39-40 (2011) (“House Report”). Patents can be challenged in court, but Congress designed IPR proceedings to be “quick and cost effective *alternatives* to litigation.” *Id.* at 48 (emphasis added); see also S. Rep. 110-259, at 20 (2008) (“Senate Report”) (identifying the need for “a quick, inexpensive, and reliable alternative to district court litigation”). The PTO’s recent moves to choke off access to IPR have deprived the public of those benefits, which Congress considered imperative.

Even worse, restricting IPR benefits the very actors most likely to generate costly litigation: non-practicing entities, or NPEs. Congress established IPR to “improve patent quality and limit unnecessary and counterproductive litigation costs.” House Report 40. Congress was especially focused on the “consequences of litigation by nonpracticing entities.” AIA, Pub. L. No. 112-29 § 34, 125 Stat. 284, 340 (requiring study and recommendations to “minimize any negative impact” of NPE litigation). NPEs use patents to extract fees from other companies, rather than using them to offer products and services of their own. They drive much of the country’s patent-infringement litigation. Last quarter, for example, NPEs were responsible for 90.3% of high-tech patent litigation. Q1 Report. IPR provides a crucial outlet, allowing parties targeted by NPEs to challenge patent validity more efficiently than clogging the courts with that litigation. Seven of the top ten patent owners facing IPR challenges last year were NPEs. 2025 Report.

The PTO’s recent IPR revisions have disproportionately favored NPEs, even compared to other patentees. The new constraints on IPR bar the challenges that are most likely to be brought against NPEs: challenges where the patent has been asserted in parallel litigation, and where the patent has lain dormant for years until snatched up by an NPE. See *supra*, at 8-10 (describing PTO’s 2025 changes immunizing older patents from IPR, requiring more onerous stipulations by parties in parallel litigation, and abridging the “compelling merits” exception to the parallel-litigation restriction on IPR); *infra*, at 21-22 (NPEs are more likely to assert older patents now immunized by the PTO’s “settled expectations” doctrine); Pet. 6 (same).

It is now much harder to bring an IPR challenge to a patent owned by an NPE than one owned by a company that actually uses the patented technology:



2025 Report (“OpCo” means an operating company). Again, the change in the past year has been unprecedented.

* * *

The PTO has reshaped IPR dramatically and unilaterally. The situation has grown especially dire in the past year. Before the PTO continues to wield unchecked power to rewrite a scheme so crucial to the patent system, this Court’s review is urgently needed.

II. The “settled expectations” constraint on IPR is especially detrimental to the patent system.

The agency-devised “settled expectations” constraint on IPR is a particularly consequential development warranting this Court’s review. The PTO has already invoked

it to deny hundreds of IPR petitions.¹⁵ And its effects extend far beyond individual PTO proceedings. The doctrine inflicts systemic harm, including in the following ways.

Protects weak patents. Most fundamentally, the “settled expectations” doctrine leaves invalid patents on the books. It shields a category of patents from cancellation in IPR based solely on their age—regardless of their validity. Indeed, the doctrine necessarily operates to preserve weak patents. Strong patents are already protected against IPR institution by statute: institution is unavailable unless there is a “reasonable likelihood” of establishing invalidity. 35 U.S.C. 314(a). The “settled expectations” doctrine makes a difference only where the challenge clears that merits threshold. That is, the doctrine protects patent claims with a reasonable likelihood of invalidity.

Leaving invalid patent monopolies in effect inflicts obvious harm on the patent system and the economy. And that is equally true for the patents protected by the “settled expectations” doctrine based on their age: invalid patents do not become more innocuous the older they get. That is the very reason Congress enacted IPR with no maximum patent age: “No patent holder has a right to an invalid patent, however long that patent holder may have enjoyed that right inappropriately.” Senate Report 21; see 35 U.S.C. 311.

Increases litigation. The “settled expectations” doctrine will clog federal courts with burdensome, unnecessary patent litigation. IPR exists to curb “unnecessary and counterproductive litigation costs,” including by providing a more efficient way to challenge patent

¹⁵ See Addendum to Brief of the Software & Information Industry Association et al. as *Amici Curiae*, *In re Kahoot! AS*, No. 26-119 (Fed. Cir. Jan. 2, 2026) (collecting cases).

validity. House Report 40, 48. By taking away IPR, the “settled expectations” doctrine leaves parties with no way to participate in a patent challenge other than to turn to federal district court. And without IPR clearing away weak older patents, abusive patent owners are more free to bring baseless patent-infringement lawsuits. That is a recipe for precisely the litigation burden on the federal courts and productive companies that IPR was meant to relieve.

Incentivizes unnecessary PTO filings. The “settled expectations” doctrine also risks clogging the PTO with unnecessary cases, by distorting incentives at the front end of a patent’s life. Now that patents may only be challenged in IPR early in their lives, parties have reason to seek IPR preemptively based on speculation about future infringement risk.

This puts productive companies to a difficult choice. Companies must decide today whether to challenge a patent that might not be asserted against them for years—or ever. After all, with the “settled expectations” constraint taking force just six years into a patent’s twenty-year lifespan, would-be patent challengers must try to see over a decade into the future. To decide whether to seek IPR now to guard against infringement risk in the future, a company must predict what products and services it might offer in the future, whether they will be accused of infringement, and whether it will be able to secure a license. Before, companies could wait to seek IPR until an actual need arose; now under the “settled expectations” doctrine, companies must bring IPRs based on guesswork.

These preemptive IPRs will also produce less reliable results. Traditionally, the PTO’s final written decisions in IPR are subject to validation in judicial review. See 35

U.S.C. 319. Not so for preemptive IPRs filed by petitioners with only speculative future infringement risk, who will often lack Article III standing to appeal an adverse outcome (yet still potentially be estopped from bringing future claims by 35 U.S.C. 315(e)). See *JTEKT Corp. v. GKN Auto. LTD*, 898 F.3d 1217, 1219-21 (Fed. Cir. 2018). In those IPRs, the agency’s decisions will face no judicial check.

Prejudices stakeholders from retroactive application.

Compounding the harm, the PTO imposed the “settled expectations” constraint without warning and retroactively. Rather than applying the new doctrine prospectively to new patents only, the PTO also applied it to patents that had already reached the age of “settled expectations” before the doctrine was invented—instantly protecting them from IPR challenge.

That retroactive application prejudices all those who relied on the rules as they existed before. Previously, patent age had never weighed against IPR institution. Sara Tonnie Horton et al., *The Unsettling History of Settled Expectations*, 25 Chi.-Kent J. Intell. Prop. 252, 256-258 (2026). Stakeholders understood that they could wait to seek IPR until the need arose; if they were accused of infringement, IPR would be available as Congress provided. But then the PTO pulled the rug, announcing both that a deadline existed and that the deadline had already passed. Contra *Block v. N. Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 286 (1983) (“[S]tatutes of limitations must allow a reasonable time after they take effect for the commencement of suits upon existing causes of action.” (citation and internal quotation marks omitted)).

This affects a huge swath of stakeholders: anyone who would have challenged in IPR, now or in the future, any patent more than six years old when the PTO announced

the “settled expectations” doctrine. It is too late for those stakeholders to change their conduct by seeking IPR sooner. They have all lost the chance at IPR, not knowing that they needed to act before a then-non-existent deadline.

Aids NPEs. Perhaps most harmful of all, the “settled expectations” doctrine disproportionately favors the most detrimental uses of the patent system. The doctrine protects the very patents likely to be asserted by NPEs in abusive litigation.

NPEs—especially the most abusive ones—assert older patents. Empirical evidence shows that on average, “NPEs do not obtain patents until the [twenty-year] patent term is half-spent and hold their patents for several years more before filing suit, perhaps while waiting for emerging industries to mature.” Brian J. Love, *An Empirical Study of Patent Litigation Timing: Could a Patent Term Reduction Decimate Trolls Without Harming Innovators?*, 161 U. Pa. L. Rev. 1309, 1334 (2013). Operating companies, by contrast, assert patents earlier. *Ibid.*; see also Lauren Cohen et al., *Patent Trolls: Evidence from Targeted Firms*, 65 Mgmt. Sci. 5461, 5470 (2019) (“NPE-asserted patents are significantly older than [practicing entity]-asserted patents.”). Moreover, “NPE-asserted patents are the overwhelmingly dominant source of patent litigation in the final years of the patent term.” Love, *supra*, at 1340. And that litigation is driven by “those NPEs most associated with litigation abuse”: 92% of late-term NPE suits are filed by “patent acquisition firms, firms holding the IP remnants of failed companies, and inventor-affiliated licensing firms.” *Ibid.* In short, the older the patent, the more likely it is to be asserted in abusive NPE litigation.

Yet that is exactly what the “settled expectations” doctrine protects: the older the patent, the more the doctrine insulates it from IPR challenge. And the PTO’s six-year mark for “settled expectations” protection is long before the average NPE even acquires a patent, let alone asserts it. Love, *supra*, at 1334. The “settled expectations” doctrine thus distorts the playing field in favor of NPEs and against the productive companies they target.

This agency-devised constraint is reshaping the patent landscape, with no authority from Congress and no judicial review thus far. This threat to the integrity of the patent system warrants this Court’s intervention.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ANGELA M. OLIVER
HAYNES AND BOONE, LLP
888 16th Street, N.W., Ste. 300
Washington, DC 20006

JONATHAN STROUD
ROSHAN MANSINGHANI
KELLY R. HUGHES
UNIFIED PATENTS, LLC
1015 15th Street NW, Ste. 629
Washington, DC 20005

DEBRA J. MCCOMAS
Counsel of Record
MICHAEL F. QIAN
HAYNES AND BOONE, LLP
2801 N. Harwood Street, Ste. 2300
Dallas, TX 75201
(214) 651-5375
debbie.mccomas@haynesboone.com

Counsel for Amicus Curiae

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