

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
U.S. Court of Appeals for the Federal Circuit

REPLY BRIEF FOR PETITIONER

GINGER D. ANDERS
Counsel of Record
RACHEL G. MILLER-ZIEGLER
ANDREW J. SLOTTJE
MUNGER, TOLLES & OLSON LLP
601 Massachusetts Ave. NW
Suite 500E
Washington, DC 20001-5369
(202) 220-1100
Ginger.Anders@mto.com

Counsel for Petitioner Google LLC

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	2
I. The PTO Lacks Statutory Authority To Establish A Limitations Period Based On Patent Age.	2
II. The Settled-Expectations Policy Is Subject To Judicial Review.....	7
III. This Court May Review Questions Of Law Arising From Mandamus Denials.....	9
IV. This Is An Excellent Vehicle To Address Issues Of Exceptional Importance.	11
CONCLUSION	12

TABLE OF AUTHORITIES

	Page(s)
FEDERAL CASES	
<i>In re Cambridge Indus.</i> , 2025 WL 3526129 (Fed. Cir. 2025)	9, 10
<i>Cheney v. U.S. Dist. Ct.</i> , 542 U.S. 367 (2004)	2, 10
<i>Cuozzo Speed Techs. v. Lee</i> , 579 U.S. 261 (2016)	1, 7, 8
<i>Exxon Mobil v. Corporación CIMEX</i> , 146 S.Ct. 1909 (2026)	6
<i>Loper Bright Enters. v. Raimondo</i> , 603 U.S. 369 (2024)	4, 8, 9
<i>McNary v. Haitian Refugee Ctr.</i> , 498 U.S. 479 (1991)	8
<i>Mullin v. Doe</i> , 146 S.Ct. 2121 (2026)	7
<i>Nat’l Ass’n of Mfrs. v. Dep’t of Def.</i> , 583 U.S. 109 (2018)	4, 5, 6
<i>Oil States Energy Servs. v. Greene’s Energy Grp.</i> , 584 U.S. 325 (2018)	6
<i>Patchak v. Zinke</i> , 583 U.S. 244 (2018)	8

TABLE OF AUTHORITIES
(continued)

	Page(s)
<i>SAS Inst. v. Iancu</i> , 584 U.S. 357 (2018)	5, 8
<i>SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods.</i> , 580 U.S. 328 (2017)	5
<i>Schlagenhauf v. Holder</i> , 379 U.S. 104 (1964)	10
<i>SEC v. Chenery Corp.</i> , 318 U.S. 80 (1943)	10
<i>Sutton v. United Air Lines</i> , 527 U.S. 471 (1999)	5
<i>TC Heartland v. Kraft Foods Grp. Brands</i> , 581 U.S. 258 (2017)	10
<i>Thryv v. Click-To-Call Techs.</i> , 590 U.S. 45 (2020)	1, 7, 8
<i>United States v. Jicarilla Apache Nation</i> , 564 U.S. 162 (2011)	2, 10
<i>Van Dusen v. Barrack</i> , 376 U.S. 612 (1964)	10
<i>West Virginia v. EPA</i> , 597 U.S. 697 (2022)	5

TABLE OF AUTHORITIES
(continued)

	Page(s)
<i>Whitman v. Am. Trucking Ass'ns</i> , 531 U.S. 457 (2001)	4, 5
FEDERAL STATUTES	
5 U.S.C. 701(a)(2).....	9
35 U.S.C. 314(a)	4, 6
35 U.S.C. 314(d)	1, 6, 7, 8
35 U.S.C. 321(c)	5
Patent Act of 1952, Pub. L. No. 593, 66 Stat. 792.....	5
LEGISLATIVE MATERIALS	
H.R.Rep.No. 112-98	6, 11
ADMINISTRATIVE DECISIONS	
<i>Apple v. Allani</i> , 2025 WL 3908118 (U.S.P.T.O. 2025)	3
<i>Home Depot v. H2 Intellect</i> , 2025 WL 3908177 (U.S.P.T.O. 2025)	3

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

Unified Patents, <i>Patent Dispute Report</i> (July 9, 2026), https://www.unifiedpatents.com/ insights/2026/7/9/patent-dispute- report-first-half-2026	11
Arti K. Rai & S. Sean Tu, <i>Invigorating Judicial Review of Agency Head Discretion</i> (2026), https://perma.cc/3MFS-YKJF	3, 12

INTRODUCTION

The government’s opposition confirms the urgent need for this Court’s review. The government asserts that the PTO possesses unconstrained, unreviewable authority to refashion the inter partes review (IPR) framework by adopting a limitations period based on patent age that Congress never would have enacted. That time bar is irreconcilable with fundamental aspects of the Patent Act—most notably, Congress’s considered decision to enact age-based limitations periods in other administrative contexts but not for IPR, and the bedrock principle that only *Congress* may expand the patent grant by conferring presumptive immunity from administrative cancellation after six years.

Respondents do not even attempt to defend the PTO’s time bar as statutorily authorized or consistent with the Patent Act’s structure and operation. Instead, they contend that absent an *express* prohibition on establishing a time bar, the PTO’s discretion to deny institution cannot be constrained by what the government dismissively terms “negative inference.” That startling assertion of sweeping administrative-agency authority contradicts decades of precedent. Respondents further contend that Section 314(d) bars judicial review even of PTO *policies* governing institution that exceed its statutory authority. That argument ignores Section 314(d)’s text and the presumption of judicial review—and it finds no support in *Cuozzo Speed Technologies v. Lee* or *Thryv v. Click-To-Call Technologies*. Respondents thus assert PTO impunity from both statutory constraint and judicial review. That respondents must resort to such extreme arguments speaks volumes.

The weakness of respondents' position is laid bare by their misconceived tactic of centering their opposition on the mandamus standard. As the government well knows (or at least used to know), the mandamus posture provides no reason to deny review. This Court regularly reviews questions of law arising from mandamus denials, without deciding whether to issue the writ itself. See U.S. Certiorari Reply Br., *United States v. Jicarilla Apache Nation*, 2010 WL 4959720, at *10 (2010) (urging review of legal question and remand for "reconsider[ation]" of mandamus). Moreover, contrary to the government's apparent assumption, the Court's adjudication of legal questions in mandamus cases is de novo. See, e.g., *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 170-186, 187 n.12 (2011); *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 382-389 (2004). The government's attempts throughout to shore up its statutory arguments by conflating the mandamus standard with the question whether petitioner is correct about the law are flat wrong. Just like the government itself in *Jicarilla*, petitioner does not ask this Court to grant mandamus, but instead to review the construction of the Patent Act on which the Federal Circuit's mandamus denial was based.

This Court should grant certiorari.

ARGUMENT

I. The PTO Lacks Statutory Authority To Establish A Limitations Period Based On Patent Age.

A. The government's opposition confirms that the settled-expectations policy functions as a statute of limitations—i.e., a *rule* that is applicable in all cases and virtually always requires denial. The government concedes (Opp.21) that the PTO will not institute IPR

for a patent over six years old unless other circumstances “outweigh” patent age. That is the very definition of a limitations period: a time bar applicable in all cases that can be overcome only upon a substantial equitable showing. Pet.10-12. The government’s paltry two examples of institution despite patent age prove the point. *Home Depot v. H2 Intellect*, 2025 WL 3908177, at *1 (2025) (unfair surprise); *Apple v. Al-lani*, 2025 WL 3908118, at *1 (2025) (patentee inequitable conduct). And although the PTO has recently begun obscuring its enforcement of the time bar by adopting a policy of refusing to explain discretionary denials, Pet.34, the numbers do not lie: petitions involving patents over six years old are overwhelmingly denied. Rai & Tu, *Invigorating Judicial Review of Agency Head Discretion*, 20-22 (2026).¹

B. 1. The government cannot bring itself to acknowledge—much less defend—the PTO’s stated reasons for adopting the settled-expectations policy, no doubt because those reasons are either patently meritless (the PTO’s analogy to the limitations period for *damages* actions) or reflective of the agency’s policy disagreement with the IPR system that it has a statutory duty to enforce (the ipse dixit assertion that patentees deserve more “stability” than the statute otherwise accords them). Pet.19-20. Nor does the government identify any statutory authority permitting the PTO to adopt a limitations period applicable to every case—a quintessentially legislative action.

¹ <https://perma.cc/3MFS-YKJF>. VirtaMove’s assertion (Opp.22) that patent age does not affect the denial rate misleadingly relies on an unrepresentative sample and expired patents excluded from the settled-expectations policy. The *complete* dataset shows that the policy has caused a sharp decrease in IPR institution. See pp. 11-12, *infra*; US*MADE.Amicus.Br.5-10.

Instead, the government claims (Opp.13; see also VirtaMove.Opp.17) unlimited agency lawmaking discretion of the sort that this Court has steadfastly refused to recognize. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 404 (2024). The government contends (Opp.13) that because Section 314(a) confers discretion to deny institution in individual cases, “no petitioner would be able to establish that a denial violated the statute” *no matter what* the basis for the denial. That proves far too much. Even where a provision like Section 314(a) confers discretion, the limits of that discretion are always defined by statute, and the agency acts unlawfully in transgressing them. Pet.21-22, 24. In granting the PTO discretion to deny institution in individual cases, Congress could not have intended to confer unreviewable authority to adopt policies that contravene the rest of the Patent Act framework. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468-469 (2001) (Congress does not “hide elephants in mouseholes”).

The government therefore pivots to an even more remarkable argument: that the PTO can adopt a limitations period because the Patent Act does not *expressly* forbid it. The government denigrates (Opp.19) petitioner’s showing that the age-based time bar is contrary to the Patent Act’s provisions and structure, Pet.14-20, as a mere “negative inference” that is categorically “a clearly inadequate basis for imposing the limit on agency discretion that petitioner advocates.”

Despite the government’s pejorative, this Court reasons from “negative inference” all the time. “Courts are required to give effect to Congress’ express inclusions and exclusions, not disregard them”—because congressional intent is discernible by examining *both* what Congress did and did not do. *Nat’l Ass’n of*

Mfrs. v. Dep't of Def., 583 U.S. 109, 126 (2018). This Court has routinely held that a statutory framework constrains agency authority even in the absence of an express prohibition. See, e.g., *Whitman*, 531 U.S. at 467-468 (“We have therefore refused to find implicit * * * an authorization to consider costs that has elsewhere, and so often, been expressly granted.”); *West Virginia v. EPA*, 597 U.S. 697, 731-732 (2022); *Sutton v. United Air Lines*, 527 U.S. 471, 479 (1999). Indeed, this Court has so held in the IPR context, concluding that Congress’s “structural choices” foreclosed PTO authority to institute partial review. *SAS Inst. v. Iancu*, 584 U.S. 357, 363-365 (2018).

2. Whether or not labeled a “negative inference,” the statutory constraints on the PTO’s discretion are crystal clear: the Patent Act precludes the PTO from creating its own limitations period.

Respondents do not dispute that Congress has established limitations periods running from patent issuance in *other* contexts that require expedition, most notably post-grant review (created to permit validity review immediately after issuance), 35 U.S.C. 321(c), and interferences (which address contemporaneous patents on the same invention), 66 Stat. 792, 802. But Congress imposed no such time limit on IPR. This Court has repeatedly held that Congress’s decisions about “the timeliness of suit” reflect policy judgments that “courts are not at liberty to jettison.” *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods.*, 580 U.S. 328, 335 (2017). That principle applies with particular force here, where Congress’s decision *not* to impose a limitations period reflects important patent policy: that patents should be subject to administrative cancellation throughout their term. Congress

therefore created IPR to provide an avenue of administrative cancellation after concluding that erroneous grants were a significant problem and existing cancellation avenues were inadequate. H.R.Rep.No. 112-98, at 39, 45. The absence of any age-related time bar is a key feature of the IPR framework—and its presence would undermine Congress’s purposes. See *Exxon Mobil v. Corporación CIMEX*, 146 S.Ct. 1909, 1919 (2026) (Congress does not enact “self-defeating statutes”).

Moreover, because a “patentee’s rights * * * cannot go beyond” the patent statutes, the absence of any IPR time bar is an important limitation on the patent grant. *Oil States Energy Servs. v. Greene’s Energy Grp.*, 584 U.S. 325, 338 (2018). No patent, when issued, conveys any statutory entitlement to immunity from administrative cancellation at any point. Pet.17-19. Yet that is precisely what the PTO is purporting to confer. Only Congress may expand the patent grant in that manner.

Congress’s decision that patents should be subject to IPR until the end of their term is thus easily discernible from the statutory structure and bedrock patent-law principles. *Nat’l Ass’n of Mfrs.*, 583 U.S. at 126. Those constraints are every bit as entitled to respect—and every bit as binding on the PTO—as an express provision forbidding a time bar. Congress need not (indeed, cannot) legislate to hedge against every possible administrative arrogation of authority. This Court’s review is needed to confirm that essential point.

C. The government complains (Opp.20) that petitioner’s position is that the PTO may not deny institution based on any nonstatutory consideration. Nonsense. Section 314(a) undoubtedly permits denials based on case-specific considerations not inconsistent

with the statute—for instance, multiple petitions against the same patents, lack of commercial importance, or conservation of resources for the strongest petitions. What the PTO may not do is adopt a policy, *applicable in every case*, that conflicts with the congressional policy judgments clearly discernible in the statutory framework.

II. The Settled-Expectations Policy Is Subject To Judicial Review.

A. The government contends (Opp.17) that Section 314(d) renders courts powerless to review whether the PTO’s settled-expectations policy exceeds its statutory authority, solely because that policy “relate[s] to” institution. As the petition demonstrated, that reading contradicts Section 314(d)’s text. Pet.26-27. Respondents ignore that text in favor of a wildly expansive reading of *Cuozzo* and *Thryv* that rips those decisions from their moorings and casts aside the presumption of judicial review. Govt.Opp.17-18; VirtaMove.Opp.17-18.

Section 314(d) renders unreviewable only challenges to “*the determination * * * whether to institute an inter partes review under this section,*” 35 U.S.C. 314(d) (emphasis added)—not claims that the PTO has adopted policies governing the institution decision that exceed its statutory authority. Pet.26-27. As the Court recently confirmed, context is key in construing the term “determination,” as that word “may be used as a synonym for” a specific “decision,” or it may refer more broadly to the “procedures used” to make the decision. *Mullin v. Doe*, 146 S.Ct. 2121, 2133-2134 (2026). Thus, a statute barring review of “a determination *respecting an application*” allowed challenges to “practices and policies used by the agency in pro-

cessing applications” because the italicized phrase indicated Congress’s intent to bar review only of individual determinations. *McNary v. Haitian Refugee Ctr.*, 498 U.S. 479, 491-492 (1991).

Section 314(d)’s text is materially indistinguishable from the provision in *McNary*: the phrase “determination *whether*” refers to a “binary” up-or-down decision, *SAS Inst.*, 584 U.S. at 364-365, and the use of the singular (“the determination”) reinforces that point. Section 314(d) therefore bars only challenges to the decision whether to institute IPR, not challenges to the PTO’s procedures governing the decision, including its policy of considering patent age. Pet.26-27.

Cuozzo and *Thryv* do not suggest otherwise. Neither decision had occasion to address whether Section 314(d) bars review of challenges to PTO “practices and policies” governing institution decisions, *McNary*, 498 U.S. at 492. Both concerned challenges to the institution decision itself. *Cuozzo*, 579 U.S. 261, 271 (2016); *Thryv*, 590 U.S. 45, 58 (2020). Petitioner’s challenge is the former, not the latter. And even in the context of challenges to the institution decision, the Court held that Section 314(d) preserves review of claims based on “statutory limits.” *Cuozzo*, 561 U.S. at 275.

Respondents’ arguments also flout the presumption of judicial review. The government dismisses that presumption because Section 314(d) is a “jurisdiction-stripping” statute. See Opp.18 (quoting *Patchak v. Zinke*, 583 U.S. 244, 253 (2018) (plurality op.)). But it is black-letter law that the presumption governs the *extent* of any jurisdiction stripping. *SAS Inst.*, 584 U.S. at 370; *Loper Bright*, 603 U.S. at 404. And if the presumption—which is animated by Article III values—means anything, it must mean that Section 314(d) cannot be construed to bar review of challenges

to the PTO’s institution of a time bar that exceeds its statutory authority and nullifies Congress’s creation of IPR to address invalid patents of *all* ages.

B. The government has no real response to petitioner’s demonstration that 5 U.S.C. 701(a)(2) does not bar review because courts always may “police the outer statutory boundaries” of statutory discretion, *Loper Bright*, 603 U.S. at 404; Pet.20-24. The government suggests Section 701(a)(2) is “not * * * implicat[ed]” (Opp.22) because the decision below did not cite it; but the decision invoked the Federal Circuit’s erroneous Section 701(a)(2) jurisprudence in denying review. Pet.App.1a-2a (citing *In re Cambridge Indus.*, 2025 WL 3526129, at *2 (2025)). That jurisprudence conflicts with the decisions discussed in the petition (Pet.23-25), and the government does not seriously contend otherwise.

Elsewhere (and inconsistently), the government asserts (Opp.16) that discretionary denials are akin to nonenforcement decisions that are “immune from judicial review” under Section 701(a)(2). The analogy fails. The PTO is declining to correct its own mistakes—based on a policy that those mistakes should be irremediable after six years—not declining to bring an enforcement action. And there is unquestionably “law to apply.” Pet.14-23.

III. This Court May Review Questions Of Law Arising From Mandamus Denials.

Respondents’ mandamus-related arguments are misconceived. Govt.Opp.10-18; VirtaMove.Opp.6-10. This Court often adjudicates legal questions presented in certiorari petitions challenging mandamus denials. It does so de novo, leaving lower courts to determine on remand “whether the standards for granting the writ are met” on a correct understanding of the law.

Jicarilla, 564 U.S. at 187; *Cheney*, 542 U.S. at 391; *Van Dusen v. Barrack*, 376 U.S. 612, 615 n.3 (1964); *TC Heartland v. Kraft Foods Grp. Brands*, 581 U.S. 258, 268 (2017). That course would be particularly appropriate here: the Federal Circuit denied mandamus based on the legally erroneous ground that it had no power to review the settled-expectations policy. *Cambridge*, 2025 WL 3526129, at *2-3; Pet.App.1a-2a.

Respondents’ heavy reliance on the mandamus factors is no reason to deny review. Those factors are not any more relevant here than they were to the resolution of the legal questions the government presented in *Jicarilla* and *Cheney*. But in all events, the factors confirm petitioner’s entitlement to relief on remand. First, petitioner sought a writ directing the PTO to consider institution without relying on its unlawful settled-expectations policy. Pet.27. A decision in petitioner’s favor will establish that petitioner may well have a clear and indisputable right to that relief, just as in *Jicarilla*. 564 U.S. at 187; *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) (order “may not stand if the agency has misconceived the law”). Second, the government recognizes (Opp.12) that petitioner had “no alternative means” of judicial review; no other avenue would allow review of the settled-expectations policy. *Cheney*, 542 U.S. at 380.

Finally, this case presents precisely the extraordinary circumstances that make mandamus “appropriate.” *Cheney*, 542 U.S. at 381. The PTO’s “usurpation of power” has created “new and important problems” of critical legal and economic significance. *Schlagenhauf v. Holder*, 379 U.S. 104, 111 (1964). The questions presented have importance far beyond petitioner’s individual rights: they will determine whether the PTO has unreviewable, unconstrained authority to

eliminate IPR for those patents most likely to be invalid.

IV. This Is An Excellent Vehicle To Address Issues Of Exceptional Importance.

The questions presented are exceptionally important. In the government's view, the PTO has absolute authority to adopt a limitations period that Congress declined to enact, on the ground that patentees enjoy property rights against reconsideration that Congress never conferred. That outright rejection of Congress's statutory policy judgments strikes at the heart of the separation of powers and is precisely the sort of overreach that Article III courts must police.

The settled-expectations policy's consequences for the patent system, moreover, have been severe. The policy has been largely responsible for a "collapse in grant probability," and IPR is now effectively unavailable for patents over six years of age. Unified Patents, *Patent Dispute Report* (July 9, 2026).² But older patents are the ones most warranting administrative review, as patent assertion entities and others are especially likely to exploit broad patents issued years ago. Congress accordingly determined that IPR was vital to the economy and technological innovation, a conclusion that remains just as true today. H.R.Rep.No. 112-98, at 39-40. Yet the PTO has made it unavailable in the vast majority of cases. Law.Professors.Amicus.Br.2-3.

Any doubt about the urgency of review is eliminated by the number of certiorari petitions that have been filed in the wake of petitioner's, raising the same

² <https://www.unifiedpatents.com/insights/2026/7/9/patent-dispute-report-first-half-2026>.

or overlapping questions. See *Kahoot! AS v. Interstellar Inc.*, No. 26-198; *Tesla v. Granite Vehicle Ventures LLC*, No. 26-136; *Intel v. Squires*, No. 26-73. And a host of leading U.S. companies, trade organizations, and scholars have filed amicus briefs urging this Court to grant review, attesting to the wide-ranging importance of the questions presented.

Indeed, the need for review is urgent: the issues are certain to recur but they will soon escape review. Parties no longer challenge patents over six years old because they know it would be futile. Rai, *supra*, at 20. And the PTO now refuses to specify the basis for its institution denials, foreclosing new vehicles for any challenge. Pet.33-34. This case, moreover, is an ideal vehicle: contrary to the government's assertion (Opp.21), the PTO articulated patent age as its sole justification for denying review despite factors "counsel[ing] against discretionary denial." Pet.App.4a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

GINGER D. ANDERS
Counsel of Record
 RACHEL G. MILLER-ZIEGLER
 ANDREW J. SLOTTJE
 MUNGER, TOLLES & OLSON LLP
 601 Massachusetts Ave. NW
 Suite 500E
 Washington, DC 20001-5369
 (202) 220-1100
 Ginger.Anders@mto.com

Counsel for Petitioner Google LLC

September 29, 2026