

No.

IN THE
Supreme Court of the United States

LYNK LABS, INC.,
Petitioner,

v.

SAMSUNG ELECTRONICS CO., LTD. AND
COKE MORGAN STEWART, ACTING UNDER SECRETARY OF
COMMERCE FOR INTELLECTUAL PROPERTY AND ACTING
DIRECTOR OF THE UNITED STATES PATENT AND
TRADEMARK OFFICE,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In the Leahy-Smith America Invents Act, Congress created an administrative procedure for challenging patents. Through that new procedure—called “inter partes review”—the U.S. Patent and Trademark Office may review and possibly cancel patent claims, but “only on the basis of prior art consisting of *patents or printed publications*.” 35 U.S.C. §311(b) (emphasis added). Elsewhere, the Patent Act identifies “application[s] for patent” as a distinct category of prior art, but omits that category as a permissible ground for inter partes review under §311(b).

This case concerns the meaning of “printed publications.” For more than a century, “[t]he statutory phrase ‘printed publication’” was given consistent meaning throughout the Patent Act: It referred to documents that were published or publicly accessible “*before* the critical date” as of which a patent’s validity is measured. *Constant v. Advanced Micro-Devices, Inc.*, 848 F.2d 1560, 1568 (Fed. Cir. 1988) (emphasis added); 1 William C. Robinson, *The Law of Patents for Useful Inventions*, §325 at 447 (1890).

The question presented is:

Whether patent applications that became publicly accessible only after the challenged patent’s critical date are “prior art * * * printed publications” within the meaning of 35 U.S.C. §311(b).

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Lynk Labs, Inc. was the patent owner in the proceedings before the Patent Trial and Appeal Board and the appellant in the court of appeals.

Respondent Samsung Electronics Co., Ltd. was the petitioner in the proceedings before the Patent Trial and Appeal Board and the appellee in the court of appeals.

Respondent Coke Morgan Stewart, Acting Under Secretary of Commerce for Intellectual Property and Acting Director of the United States Patent and Trademark Office, was an intervenor in the court of appeals. Acting Director Stewart succeeded Derrick Brent, Acting Under Secretary of Commerce for Intellectual Property and Acting Director of the United States Patent and Trademark Office, who succeeded Katherine K. Vidal, Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office, as intervenor in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioner Lynk Labs, Inc. states that it has no parent corporation and that no publicly held company owns 10% or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

There are no proceedings directly related to this case within the meaning of Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

Lynk Labs, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The court of appeals' opinion (App., *infra*, 1a-31a) is reported at 125 F.4th 1120. The court of appeals' denial of Lynk's rehearing petition (App., *infra*, 100a-101a) is unreported. The Patent Trial and Appeal Board's final written decision (App., *infra*, 32a-99a) is unreported.

STATEMENT OF JURISDICTION

The Federal Circuit entered judgment on January 14, 2025, App., *infra*, 1a-31a, and denied rehearing on April 15, 2025, *id.* at 100a-101a. On July 7, 2025, the Chief Justice extended the time to file this petition to and including September 12, 2025. No. 25A14. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, §8 of the U.S. Constitution and relevant provisions of Title 35 of the U.S. Code—§§ 102-103 (2006 & 2018), § 122(a)-(b) (2018), § 311 (2018), and § 315(e)(2) (2018)—are set forth in the appendix. App., *infra*, 102a-114a.

PRELIMINARY STATEMENT

Time and again, this Court has admonished that, when Congress enacts a statute, “Congress says what it means and means what it says.” *Simmons v. Himmelreich*, 578 U.S. 621, 627 (2016). This case starkly presents whether that principle applies in patent cases. When Congress established a new agency procedure for invalidating already-issued patents, it expressly limited the grounds for review—such proceedings are authorized “only on the basis of prior art consisting of *patents* or *printed publications*.” 35 U.S.C. § 311(b) (emphasis added). The question before the Federal Circuit in this case was whether the statute actually means that, or whether it should instead be read as if Congress wrote “only on the basis of prior art consisting of patents or printed publications *or applications for patent*”—where the words “application[s] for patent” appear elsewhere in the statute but are omitted as grounds for review.

This case, like many others this Court has reviewed in recent years, concerns the proper scope of a critically important process called “inter partes review” (IPR) created by the Leahy-Smith America Invents Act (AIA). Pub. L. No. 112-29, 125 Stat. 284 (2011); see *Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261 (2016); *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 584 U.S. 325 (2018); *SAS Inst. Inc. v. Iancu*, 584 U.S. 357 (2018); *Return Mail, Inc. v. Postal Serv.*, 587 U.S. 618 (2019); *Thryv, Inc. v. Click-To-Call Techs., LP*, 590 U.S. 45 (2020); *United States v. Arthrex, Inc.*, 594 U.S. 1 (2021).

IPRs are administrative proceedings in which the United States Patent and Trademark Office may, on a challenger’s request, review and potentially cancel previously issued patent claims. In *district court* litigation, patents may be challenged on any ground, and challenges may be based on any kind of prior art recognized by the patent statutes. See 35 U.S.C. §282(b)(2)-(3). But Congress limited the grounds on which patent claims may be challenged in IPRs. “[I]n an inter partes review,” patents may be challenged “*only* on a ground that could be raised under section 102 or 103” and “*only* on the basis of prior art consisting of patents or printed publications.” §311(b) (emphasis added).

For over a century, prior-art “printed publications” were consistently understood to be documents that were publicly accessible before the date of the claimed invention (the “critical date”). As the Federal Circuit has long recognized:

The statutory phrase “printed publication” has been interpreted to mean that *before the critical date* the reference must have been sufficiently *accessible to the public* interested in the art[.]

Constant v. Advanced Micro-Devices, Inc., 848 F.2d 1560, 1568 (Fed. Cir. 1988) (emphasis added). In other words, materials “publi[shed]” *after* the critical date cannot be prior-art printed publications.

In the decision below, the Federal Circuit declined to follow that long-settled “interpret[ation]” of the “statutory phrase” Congress chose. *Constant*, 848 F.2d at 1568. Instead, the Federal Circuit held that §311(b) permits challenges based on patent applications that were *not* publicly accessible until *after* the critical date. App., *infra*, 21a. That defies the “presum[ption]” that, when Congress chose to re-use existing statutory language in the AIA, Congress was “adopt[ing] * * * earlier judicial construction[s]” of that language. *Helsinn Healthcare S.A. v. Teva Pharms. USA, Inc.*, 586 U.S. 123, 131 (2019). It ignores text, structure, and history showing that §311(b)’s reference to prior-art “printed publications” means the same thing that phrase has always meant everywhere else in the Patent Act.

Congress’s instructions about which categories of prior art are available in which proceedings are unmistakably clear. But the Federal Circuit’s interpretation—driven by perceived “purpose” rather than text, App., *infra*, 19a-20a—transfers to administrative patent judges matters Congress instead entrusted to district courts. It leaves Congress’s deliberate delineation of authority a jumbled mess. And it injects recurring uncertainty into proceedings with billions of dollars on the line. Review is warranted.

STATEMENT

I. STATUTORY BACKGROUND

This case concerns the statutory scope of inter partes review (IPR) before the United States Patent and Trademark Office (PTO).

A. Obviousness and Different Categories of “Prior Art”

The Constitution grants Congress the power “[t]o promote the Progress of Science” by granting patents to inventors for their “Discoveries.” U.S. Const. art. I, § 8, cl. 8. To ensure patents have that effect, the Nation’s patent laws have long authorized patents only for discoveries that are “*new*, that is, bestowed for the first time upon the public by the patentee.” 1 William C. Robinson, *The Law of Patents for Useful Inventions* § 221, at 305 (1890). For example, the Patent Act of 1790 limited patents to “improvement[s]” that were “not before known or used.” Act of Apr. 10, 1790, ch. 7, § 1, 1 Stat. 109, 110. In the language of the current statute, claimed inventions are entitled to patent protection only if they are, among other things, “novel[]” and “non-obvious.” 35 U.S.C. §§ 102-103; *Bilski v. Kappos*, 561 U.S. 593, 602 (2010). Putative inventions are thus unpatentable if they have already been disclosed (§ 102). And they are unpatentable if, given what was already known to those skilled in the relevant art at the time, they would have been “obvious” (§ 103).

The contents of “what was known before” in the relevant field is called “prior art.” *Graham v. John Deere Co. of Kan. City*, 383 U.S. 1, 15 (1966). Over time, Congress has recognized discrete categories of prior art and established different rules for which categories are available under different circumstances. Three categories of

prior art are relevant here: printed publications, patents, and patent applications.

Prior-Art Printed Publications. In the Patent Act of 1836, Congress specified that an invention is not entitled to patent protection if, before the invention date, the invention had been “described in any printed publication.” Act of July 4, 1836, ch. 357, § 7, 5 Stat. 117, 119-120. That language remains in the Patent Act today. See § 102(a) (2006) (“described in a printed publication”); § 102(a)(1) (2018) (same).¹

For as long as “printed publication[s]” have been recognized as prior art, that phrase has had consistent meaning. To qualify as a prior-art printed publication, the reference “must * * * have been placed within [the public’s] reach” and “actually published in such a manner that any one who chooses may avail himself of [its] information.” Robinson, *supra*, § 327, at 448. And the reference had to be “[p]ublished before the date of the later invention” being claimed in the patent. *Id.* § 325, at 447.

Thus, courts have consistently recognized that, to be prior art, printed publications must be “published to the world” *before* the alleged invention’s priority date or critical date. *New Departure Bell Co. v. Bevin Bros. Mfg. Co.*, 73 F. 469, 474 (2d Cir. 1896); see, e.g., *Imperial Glass Co. v. A.H. Heisey & Co.*, 294 F. 267, 269 (6th Cir. 1923)

¹ For the Court’s convenience, the petition cites both the pre- and post-AIA versions of § 102. Because the patent challenged here (the ’400 patent) was effectively filed as of February 25, 2004, this case is governed by the pre-AIA version. App., *infra*, 4a n.1, 7a n.6, 37a n.13; see *SNIPR Techs. Ltd. v. Rockefeller Univ.*, 72 F.4th 1372, 1376 (Fed. Cir. 2023). As the parallel citations show, there are no differences material to the question presented.

(“sufficient[] circulat[ion]” shows “due publication”).² As Judge Learned Hand explained nearly a century ago, “the phrase, ‘printed publication,’ presupposes enough currency”—*i.e.*, circulation—“to make the work part of the possession of the art.” *Jockmus v. Leviton*, 28 F.2d 812, 813 (2d Cir. 1928). Or, as the Federal Circuit put it, “[t]he statutory phrase ‘printed publication’ has been interpreted to mean that *before the critical date* the reference must have been sufficiently accessible to the public interested in the art.” *Constant v. Advanced Micro-Devices, Inc.*, 848 F.2d 1560, 1568 (Fed. Cir. 1988) (emphasis added). Obviousness or newness is thus judged against what was publicly known before the invention being claimed.

Prior-Art Patents. At the same time that Congress recognized prior-art “printed publication[s],” it also identified another category—prior-art “patent[s].” § 7, 5 Stat. at 119. Congress later provided that a putative invention would be unpatentable if it had been “described in a [granted] patent,” so long as the application underlying that patent was filed “before the invention.” 35 U.S.C. § 102(e)(2) (2006); see § 102(e) (1952). Under those provisions, this Court has held, patents are “prior art” as of the date they were “filed.” *Hazeltine Rsch., Inc. v. Brenner*, 382 U.S. 252, 254-256 (1965) (citing *Alexander Milburn Co. v. Davis-Bourmonville Co.*, 270 U.S. 390, 401 (1926)). The 2011 AIA reenacts the same longstanding

² The “critical date” or “priority date” is the date as of which the patent’s newness and non-obviousness are measured. There are various methods for calculating the critical date. See *SNIPR*, 72 F.4th at 1376; *Voter Verified, Inc. v. Premier Election Sols., Inc.*, 698 F.3d 1374, 1380 (Fed. Cir. 2012). The calculation method is irrelevant here; the critical date is undisputed. App., *infra*, 4a n.1.

rule. An issued patent, it declares, is considered prior art as of the date it was “effectively filed.” § 102(a)(2).

That makes “patents” different from “printed publications” in an important respect. A patent’s date of “effective filing” is based on the underlying application’s filing date (and sometimes the filing date of an earlier, associated application disclosing the same invention). See 35 U.S.C. § 100(i)(1). Such patent applications, however, ordinarily would not qualify as “publications” because patent applications generally are not publicly available when filed. Rather, they generally remain confidential for 18 months after filing (or until patent issuance). § 122(a), (b)(1)-(2)(A)(i). Thus, unlike printed publications, issued patents may qualify as prior art as of a date before they actually become publicly accessible.

Patent Applications. Unlike printed publications and patents, *patent applications* historically were not considered prior art at all. “[M]ere application[s] for a patent” were “not mentioned” in the patent statutes. *Brown v. Guild*, 90 U.S. (23 Wall.) 181, 210-211 (1874). An application that did not result in an issued patent could not be considered a “‘patent’”; it was merely an application for one. *Ibid.* And patent applications as such did not qualify as “‘printed publication[s]’” either, as they generally were not publicly accessible. For more than a century, patent applications were never published. See App., *infra*, 13a.

Congress first recognized patent applications as prior art in 1999, when Congress provided—also for the first time—that patent applications would be published. See American Inventors Protection Act of 1999, Pub. L. No. 106-113, tit. IV, § 4505, 113 Stat. 1501, 1501A-565; see 35 U.S.C. § 122(b) (2006). In a new subsection of § 102, Congress provided that “an application for patent, published

under section 122(b),” could qualify as prior art if “filed * * * before the invention.” § 102(e)(1) (2006). And Congress provided that patent applications, like issued patents, would be prior art as of when they were “filed,” not when they became public. § 102(e)(1) (2006); see § 102(a)(2) (2018).

B. Congress Permits Different Categories of Prior Art in Different Proceedings

“After a patent issues, there are [now] several avenues by which its validity can be revisited.” *Return Mail, Inc. v. Postal Serv.*, 587 U.S. 618, 622 (2019). For nearly 200 years, the federal courts were the only avenue. *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 584 U.S. 325, 353 (2018) (Gorsuch, J., dissenting). Starting in 1980, however, Congress authorized the PTO to adjudicate patent validity. 35 U.S.C. §§ 302 *et seq.* Different avenues permit consideration of different categories of prior art.

In district-court litigation, for example, every relevant category of prior art may be asserted. In particular, 35 U.S.C. § 282(b)(2) states that defendants in infringement actions may assert invalidity “on any ground specified in part II [including § 102] as a condition for patentability.” In turn, § 102 identifies the categories of prior art that may preclude patentability. In addition to patents, patent applications, and printed publications, § 102 also lists (for example) inventions “known or used by others.” § 102(a) (2006); see § 102(a)(1) (2018) (“in public use, on sale, or otherwise available to the public”). Similarly, when deciding whether to issue a patent in the first instance, the PTO must consider all those conditions of patentability. § 131; see § 102.

Administrative proceedings to reconsider the validity of previously issued patents, however, have expressly

narrower scope. “Ex parte reexaminations,” created in 1980, allow the PTO “to reexamine—and perhaps cancel—a patent claim that it had previously allowed.” *Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261, 267 (2016). In ex parte reexaminations, however, the PTO may consider only “certain prior art” categories, *Return Mail*, 587 U.S. at 623—namely, “prior art consisting of patents or printed publications,” 35 U.S.C. § 301(a). Section 301 does not list patent applications.

In 1999, Congress added a new procedure called “inter partes reexamination,” which “allowed the challenger to participate in the administrative proceedings and any subsequent appeal.” *Return Mail*, 587 U.S. at 623. Exactly as it had for ex parte reexaminations, Congress provided that inter partes reexaminations could be based only on prior-art “patents or printed publications.” 35 U.S.C. § 301(a) (2000); see Pub. L. No. 106-113, tit. IV, § 4604, 113 Stat. at 1501A-567 (codified at 35 U.S.C. § 311(a) (2000)).³ In the same legislation, Congress added a new category of prior art—“application[s] for patent”—for other proceedings like lawsuits in federal court and initial patent examinations. § 4505, 113 Stat. at 1501A-565. But ex parte reexaminations and the new inter partes reexamination procedure remained limited to “patents or printed publications.”

Congress has since “replaced” “inter partes reexamination” with “inter partes review.” AIA, Pub. L. No. 112-29, § 6(a), 125 Stat. 284, 299-305 (2011); *Oil States*, 584 U.S. at 331. But Congress limited the scope of the new

³ Inter partes reexaminations could be based only on “prior art cited under the provisions of section 301,” § 4604, 113 Stat. at 1501A-567, which in turn referred to “prior art consisting of patents or printed publications,” 35 U.S.C. § 301 (2000).

“IPR” proceeding in exactly the same way it had limited reexamination, using exactly the same language. Specifically, §311(b) provides:

A petitioner in an inter partes review may request to cancel as unpatentable 1 or more claims of a patent *only* on a ground that could be raised under section 102 or 103 and *only* on the basis of *prior art consisting of patents or printed publications*.

§311(b) (emphasis added). Section 311(b), like its predecessors, does not list “applications for a patent.”

II. PROCEEDINGS BELOW

A. Lynk’s Patent

Lynk Labs, Inc. is an industry-leading developer and manufacturer of light-emitting diode (LED) technology. This case concerns Lynk’s U.S. Patent No. 10,687,400 (the ’400 patent). Issued on June 16, 2020, the ’400 patent claims innovative circuit configurations for alternating-current-powered LED lighting systems. App., *infra*, 2a-3a, 34a. Those systems can be used in everything from ceiling lights to string lights for Christmas trees. *Id.* at 2a. The invention claimed in the ’400 patent was developed by Lynk engineers; the first named inventor, Michael Miskin, is Lynk’s CEO. Lynk filed the provisional patent application that resulted in the ’400 patent on February 25, 2004. *Id.* at 4a n.1. There is no dispute that February 25, 2004, is the ’400 patent’s “critical date.” *Ibid.*

As issued, claim 7 of the ’400 patent recites “‘an LED circuit array comprising an LED circuit comprising a plurality of LEDs connected in series’”; “‘a capacitor’”; and “‘a bridge rectifier configured to receive an input [alternating-current] voltage from a mains [sic] power source’”; all of that is “‘mounted on a single substrate.’”

App., *infra*, 3a. Together, those components ensure the “forward voltage of the LEDs of the LED circuit array”—*i.e.*, the voltage required to turn on the LED—“matches the rectified input [alternating-current] voltage output of the driver.” *Ibid.* There are claims for other variations of that system. *Id.* at 75a, 79a.

B. Inter Partes Review Proceedings

In 2021, Lynk sued Samsung for infringement of the ’400 patent. In response, Samsung filed an IPR petition, challenging claims 7-13 and 17 of the patent. App., *infra*, 2a-3a.⁴ Samsung invoked as prior art an abandoned patent application known as “Martin” (U.S. Patent Application Publication No. 2004/0206970). There is no dispute that the Martin application was not publicly accessible until *after* the ’400 patent’s critical date. App., *infra*, 9a, 41a.

“[I]n an inter partes review,” patents may be challenged “only on the basis of *prior art* consisting of *patents or printed publications*.” 35 U.S.C. § 311(b) (emphasis added). It is undisputed that Martin is not a “patent”: “Martin was later abandoned and never matured into a patent.” App., *infra*, 4a. Lynk urged that Martin likewise was not a prior-art “printed publication.” Under settled law, Lynk explained, a reference cannot be considered a prior-art “printed publication” if it was not publicly available before the invention’s critical date. Lynk C.A.Br.58. Martin was not published, or otherwise publicly accessible, until October 21, 2004—months *after* the ’400 patent’s critical date. App., *infra*, 4a & n.1.

⁴ Samsung also challenged claims 14-16 and 18-20. App., *infra*, 3a. Lynk disclaimed claims 14 and 18-20, see 35 U.S.C. § 253, and did not appeal the disposition of claims 15-16. App., *infra*, 3a-4a & n.3.

The PTO’s Patent Trial and Appeal Board rejected Lynk’s argument. The Board acknowledged that Martin was not publicly accessible until after the ’400 patent’s critical date. See App., *infra*, 41a. But the Board declared that Martin could be asserted in the IPR because it was *filed* before the critical date. *Id.* at 42a. The Board relied on its own previously unreviewed practice of considering “patent application publications under §102(e)” as prior art in IPRs. *Id.* at 42a-43a. The Board found all relevant claims “unpatentable for obviousness” based on Martin. *Id.* at 4a.

C. The Federal Circuit’s Decision

Lynk appealed, and the Director of the PTO intervened. Whether patent applications published after the critical date may be asserted in IPRs, the Director urged, has “foundational” importance. Gov’t C.A.Br.30.

The Federal Circuit affirmed. App., *infra*, 1a-31a. It acknowledged that Martin is not a prior-art “patent” within the meaning of §311; it was an abandoned application. *Id.* at 4a. The court recognized that, under longstanding precedent, a reference cannot constitute a “prior art” “printed publication” unless it was “sufficiently accessible” “prior to” the patent’s “critical date.” *Id.* at 18a-19a n.9 (internal quotation marks and emphasis omitted). Construing the same terms in §311(b), however, the panel addressed “prior art” and “printed publication” separately. It first addressed whether Martin constitutes a “printed publication”; it then independently addressed whether Martin is “prior art” to the ’400 patent. *Id.* at 6a, 8a-9a.

The court of appeals did not dispute that, on the ’400 patent’s critical date, Martin was not a “printed publication.” See App., *infra*, 7a-8a. Indeed, on the ’400 patent’s critical date, Martin was not publicly available; it was

confidential. *Ibid.*; see 35 U.S.C. § 122(a). But the court held that Martin could now be considered a printed publication because it was eventually published and “publicly accessible” after the ’400 patent’s critical date. App., *infra*, 6a.

With respect to the “prior art” requirement, the Federal Circuit did not find that the Martin application would be prior art for the claimed invention under the rules applicable to printed publications. Martin was published after the ’400 patent’s critical date. App., *infra*, 7a-8a. In printed, published form, Martin was subsequent rather than prior art. Nonetheless, having found that Martin was eventually published, the Federal Circuit asked whether Martin could be considered “prior art” as a *different category* of art. *Ibid.* Because Martin was a patent application, the Federal Circuit turned to “application[s] for patent” under § 102—a category of prior art not permissible in IPRs. *Id.* at 8a-9a. “[A]pplication[s] for patent,” the court ruled, are prior art as of their filing dates (not their publication dates). *Id.* at 8a. And Martin was filed before the ’400 patent’s critical date, even though it was published later. *Id.* at 8a-9a. Thus, the court held, Martin was a “prior art * * * printed publication” and formed a permissible basis for the IPR under § 311(b). *Id.* at 6a-11a.

For the Federal Circuit, it did not matter that the governing statutory provision, § 311(b), limits IPRs to “*only * * * patents or printed publications*”—not patent applications. The Federal Circuit was likewise unconcerned that Martin did not qualify as a “printed publication” prior to the ’400 patent’s critical date. Instead, the Martin patent application could be treated as “prior art” under § 311(b) using provisions applicable to patent applica-

tions—even though patent applications are not permissible prior art in IPRs under § 311(b).

The Federal Circuit invoked its view of “‘congressional purpose.’” App., *infra*, 19a-21a & n.10. “[T]hat purpose,” in the Federal Circuit’s view, was to create “a broad division” between “printed documents” (which “may be asserted in these post-grant proceedings” as prior art) and “sale and public use” (which “may not”). *Id.* at 20a. The difference between those categories, the court stated, was how much “discovery or factfinding” they require—sales and public uses “often” require more. *Ibid.* The Federal Circuit identified no statutory text supporting such a distinction. But it concluded that “[p]ublished patent applications clearly fall into the former category” because they putatively “would create even less need for discovery or factfinding than some other alleged printed publications.” *Ibid.*

The Federal Circuit denied Lynk’s petition for rehearing en banc. App., *infra*, 100a-101a.

REASONS FOR GRANTING THE PETITION

If this Court has made anything clear, it is that statutory analysis must “always * * * start with the text”—and that it often ends there. *Campos-Chaves v. Garland*, 602 U.S. 447, 457 (2024). When Congress created inter partes review (IPR), it imposed a critical limit in statutory text: “[I]n an inter partes review,” patents may be challenged “only on the basis of prior art consisting of patents or printed publications.” 35 U.S.C. § 311(b). Congress enacted that limitation against the backdrop of a longstanding judicial construction: For more than a century before § 311(b)’s enactment, the “statutory phrase ‘printed publication’ ha[d] been interpreted to mean that *before the critical date*” for measuring a patent’s validity “‘the reference must have been suffi-

ciently *accessible to the public.*” *In re Klopfenstein*, 380 F.3d 1345, 1348 (Fed. Cir. 2004) (emphasis added).

Text and history should have resolved this case. When Congress “reenact[s]” language with a “settled * * * judicial construction,” this Court “presume[s]” that Congress “adopted” that earlier construction. *Helsinn Healthcare S.A. v. Teva Pharms. USA, Inc.*, 586 U.S. 123, 131 (2019). Thus, when Congress authorized IPRs based on “prior art * * * printed publications,” it preserved the requirement that such references must have been publicly accessible before the critical date.

The Federal Circuit ruled that IPRs need not be limited to “prior art * * * patents or printed publications,” as that phrase has long been understood. Instead, the court held that §311(b) allows IPRs based on a different category of prior art altogether: an abandoned patent application that never issued as a patent and was not publicly accessible until after the challenged patent’s critical date. The court reached that result by dividing the single phrase “prior art * * * printed publications” into a new two-step analysis. Step one: ask whether the abandoned application *ever* became “publicly accessible,” even if well after the critical date. App., *infra*, 6a. Step two: ask whether the application could be “prior art” as a *patent application* under §102, even though §311(b) does not include patent applications as permissible prior art. *Id.* at 8a-9a.

That unprecedented, mix-and-match approach turns ordinary statutory-interpretation principles upside down. Congress did not go through the effort of restricting IPRs to two specific categories of prior art—patents and printed publications—just to permit a third, never-mentioned category (patent applications published *after* the critical date). Indeed, Congress added patent appli-

cations as a permissible category of prior art for some purposes but omitted patent applications from §311(b). The Federal Circuit’s contrary reading impermissibly “rewrite[s] the statute that Congress has enacted.” *Dodd v. United States*, 545 U.S. 353, 354 (2005).

The Federal Circuit’s bifurcated approach underscores its interpretive misstep. To shoehorn a “patent application” into the phrase “prior art * * * printed publication,” the Federal Circuit first asked whether the reference qualified *as a printed publication*—which the court construed to be “temporally agnostic” (despite unquestionable precedent to the contrary). App., *infra*, 17a. But that created another snag: The statute refers to “*prior art* * * * printed publications,” and the patent application at issue concededly was published too late to qualify; it was not publicly accessible, much less a printed publication, until after the invention’s critical date. So the court had to pull in the prior-art rules for yet a different category of prior art—*patent applications*—even though patent applications are mentioned nowhere in §311(b). Nothing in the Patent Act and no tool of statutory interpretation supports such interpretive gymnastics.

That ahistorical and atextual approach threatens havoc for IPRs—and threatens confusion about the scope of district court proceedings too. The issue is “foundational” to the proper conduct of inter partes review. Gov’t C.A.Br.30. Review is warranted.

I. THE FEDERAL CIRCUIT’S DEPARTURE FROM THE LONGSTANDING CONSTRUCTION OF UNAMBIGUOUS TEXT WARRANTS REVIEW

The Federal Circuit’s interpretation of prior-art “printed publications” in §311(b) is contrary to text, precedent, history, and statutory structure. This Court

has made clear that, where there is “settled pre-AIA precedent on the meaning of” a statutory term, courts “presume that when Congress reenacted the same language in the AIA, it adopted the earlier judicial construction.” *Helsinn*, 586 U.S. at 131. At the time Congress added §311(b) in the AIA, a century of precedent made clear that prior-art “printed publications” means materials that were publicly accessible before the critical date. Statutory text and structure confirm that the phrase still means what it has always meant. The prior-art “printed publications” that are permissible bases for IPRs do not include patent applications that were not publicly accessible before the critical date.

A. The Federal Circuit’s Interpretation Defies Settled Precedent and Historic Meaning

1. Section 311(b) allows IPRs “*only* on the basis of prior art consisting of patents or *printed publications*.” 35 U.S.C. §311(b) (emphasis added). No one suggests the reference at issue here qualified as a “patent.” And the phrase “printed publications” was part of the Patent Act for more than a century before Congress re-used it in the 2011 America Invents Act. Act of July 4, 1836, ch. 357, §7, 5 Stat. 117, 119. For all those years, courts and commentators gave that term consistent meaning. By 1890, it was well established that materials would not qualify as prior-art “printed publications” unless they were “[p]ublished *before the date* of the later invention” being claimed. 1 William C. Robinson, *The Law of Patents for Useful Inventions*, §325 at 447 (1890) (emphasis added).

That understanding remained consistent for more than a century. In the 1920s, the Second Circuit recognized that “the phrase, ‘printed publication,’ presupposes” that the work has been “circulated” and made

“part of the possession of the art.” *Jockmus v. Leviton*, 28 F.2d 812, 813 (2d Cir. 1928) (L. Hand, J.). The Federal Circuit’s predecessor acknowledged the “long recognized” rule that “Prior Publication[s]” must be “[p]ublished before the date of the later invention.” *In re Le-Grice*, 301 F.2d 929, 933 (C.C.P.A. 1962) (quoting Robinson, *supra*, § 325).

Since its creation, the Federal Circuit has repeatedly reaffirmed that understanding: The “proponent[s] of the publication bar must show that *prior to the critical date* the reference was sufficiently accessible.” *In re Hall*, 781 F.2d 897, 899 (Fed. Cir. 1986) (emphasis added). “The statutory phrase ‘printed publication’ has been interpreted to mean that *before the critical date* the reference must have been sufficiently accessible to the public interested in the art; dissemination and public accessibility are the keys to the legal determination whether a prior art reference was ‘published.’” *Constant v. Adv. Micro-Devices, Inc.*, 848 F.2d 1560, 1568 (Fed. Cir. 1988) (emphasis added); accord *In re Cronyn*, 890 F.2d 1158, 1160 (Fed. Cir. 1989); *Klopfenstein*, 380 F.3d at 1348; *Voter Verified, Inc. v. Premier Election Sols., Inc.*, 698 F.3d 1374, 1379-1380 (Fed. Cir. 2012); *Acceleration Bay, LLC v. Activision Blizzard Inc.*, 908 F.3d 765, 772-774 (Fed. Cir. 2018); see also *Valve Corp. v. Ironburg Inventions Ltd.*, 8 F.4th 1364, 1373 (Fed. Cir. 2021) (“For a reference to qualify as a printed publication, ‘*before the critical date* the reference must have been sufficiently *accessible to the public* interested in the art.’” (emphasis added)).

2. Three times Congress has enacted laws creating administrative proceedings for review of patent validity that were limited to “prior art consisting of patents or printed publications.” Three times Congress has not included patent applications. Three times Congress has

used the phrase “prior art consisting of * * * printed publications” consistent with its century-old meaning.

Congress used the phrase “prior art consisting of patents or printed publications” when it created ex parte reexaminations in 1980. Act of Dec. 12, 1980, Pub. L. No. 96-517, 94 Stat. 3015, 3015 (codified at 35 U.S.C. § 301 (1982)). It did not allow for ex parte reexaminations based on patent applications. At that time, it would have been impossible for patent applications to qualify as prior-art “printed publications,” because patent applications were neither published nor otherwise recognized as a category of prior art. See pp. 8-9, *supra*. The reference to “prior art * * * printed publications” thus plainly referred to prior-art references that were prior art *as* printed publications—“mean[ing] that *before the critical date* the reference must have been sufficiently accessible to the public interested in the art.” *Constant*, 848 F.2d at 1568 (emphasis added).

Congress’s 1999 amendments underscored the distinction between “printed publications” and “application[s] for patent.” Congress again created an administrative proceeding—this time, inter partes reexamination, the direct predecessor of inter partes review. American Inventors Protection Act of 1999, Pub. L. No. 106-113, tit. IV, § 4604, 113 Stat. 1501, 1501A-567 to -570; see *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 584 U.S. 325, 331 (2018). Again, Congress limited the proceeding to “prior art consisting of patents or printed publications.” 35 U.S.C. § 301 (2000). Again, it did not allow for administrative review based on patent applications.

That silence is especially striking because, in the very same enactment, Congress added a statutory provision recognizing “published” patent applications as a new

category of prior art for other purposes: Congress referenced published patent applications in a new subdivision of § 102, separate from patents and printed publications. Pub. L. No. 106-113, tit. IV, § 4505, 113 Stat. at 1501A-565; 35 U.S.C. § 102(e)(1) (2006). “[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Russello v. United States*, 464 U.S. 16, 23 (1983).

When Congress defined the scope of IPRs in the AIA, it used the *exact same language* it had used when defining the scopes of ex parte reexaminations and inter partes reexaminations: “prior art consisting of patents or printed publications.” § 311(b). Congress clearly intended “printed publications” to retain the same meaning it always had—namely, that “printed publication[s]” are “[p]ublished *before the date*” as of which validity is measured. Robinson, *supra*, § 325, at 447 (emphasis added).

3. That text and history should have resolved the question here. In *Helsinn*, this Court considered the meaning of the phrase “on sale” in the AIA’s revised § 102. The Court recognized that “on sale” was not new terminology under the AIA: “Congress enacted the AIA in 2011 against the backdrop of a substantial body of law”—including “explicit” interpretations from “[t]he Federal Circuit”—“interpreting § 102’s on-sale bar.” *Helsinn*, 586 U.S. at 130. “In light of this settled pre-AIA precedent on the meaning of ‘on sale,’” this Court “presume[d] that when Congress reenacted the same language in the AIA, it adopted the earlier judicial construction of that phrase.” *Id.* at 131.

Here too, there was a “substantial body of law interpreting” the relevant language, *Helsinn*, 586 U.S. at

130—this time, making clear that the “statutory phrase ‘printed publication’ has been interpreted to mean that *before the critical date* the reference must have been sufficiently accessible to the public interested in the art,” *Klopfenstein*, 380 F.3d at 1348 (emphasis added); see pp. 18-20, *supra*. And there was not just one reenactment of the “printed publication” language in the AIA. Congress repeatedly used the *same language* against the backdrop of the *same judicial construction*.

The Federal Circuit disregarded all of that. It held that the phrase “printed publication” is “temporally agnostic.” App., *infra*, 17a. The term “printed publications” in §311(b), in its view, refers only to the references’ *form*—documents that became publicly accessible *at some point*. *Id.* at 17a-18a. Any “temporal requirement” that a reference be publicly accessible before the critical date, the Federal Circuit urged, had to come from other provisions. *Ibid.* The court reasoned that, so long as a reference is *eventually* publicly accessible, its prior-art status can be based on *different* provisions addressing *different* categories of prior art.

That defies *Helsinn*. The question is what *Congress* would have understood prior-art “printed publications” to mean when it enacted §311(b). And before the AIA’s enactment, there was a century of precedent telling Congress exactly what that “statutory phrase” meant: that, “before the critical date,” the “reference must have been sufficiently accessible to the public.” *Klopfenstein*, 380 F.3d at 1348; pp. 18-20, *supra*. Relegating that precedent to a footnote, as the Federal Circuit did, App., *infra*, 18a n.9, cannot alter that settled understanding.

B. Statutory Text and Structure Show “Printed Publications” Must Be Publicly Accessible Before the Critical Date

Words and phrases must be read as part of the statutory whole. *Yates v. United States*, 574 U.S. 528, 537 (2015). As a whole, §311 is not “temporally agnostic.” App., *infra*, 17a. It refers to “*prior art* * * * patents or printed publications.” That phrase indicates the printing/publication must be *prior*—not subsequent. A prior-art printed publication is, and has always been, something that qualified as a printed publication before the invention’s critical date—not something that became a printed publication afterward.

1. The Federal Circuit did not dispute that §311(b) limits itself to prior-art “patents” and “printed publications” and omits patent applications. Nor could the Federal Circuit deny that “mere application[s] for a patent” do not qualify as granted “patent[s].” *Brown v. Guild*, 90 U.S. (23 Wall.) 181, 210-211 (1874). Consequently, the key prior-art reference in this case—the abandoned patent application called “Martin”—could be considered only if it qualified as a “prior art * * * printed publication.” To put Martin within §311(b), the Federal Circuit treated it as a “printed publication,” because Martin was eventually published (albeit after the invention at issue here). App., *infra*, 10a. To get around the fact that publication came after (subsequent, not “prior,” to) the invention’s critical date, the Federal Circuit then treated Martin *not* as a “printed publication” but as a patent application. Under a special rule in §102, the Federal Circuit ruled, “patent applications” can be prior art as of their filing, not publication. *Id.* at 17a. The court thus held that the Martin patent application could be considered a “printed publication” under §311(b), even though it could not be “pri-

or art” *as a printed publication*. And it concluded Martin could be considered “prior art” under §311(b) *as a patent application* (*i.e.*, as of its filing date), even though patent applications are not permissible art under §311(b).

That interpretive methodology is unprecedented—and makes no sense. Martin cannot be a printed publication for purposes of half the key clause (discerning the categories of art that may be considered), but a patent application for the other half (for determining whether it is prior or subsequent art). Neither text nor precedent supports such mid-sentence transfiguration. And without that, the Federal Circuit’s approach confronts a Catch-22: Either Martin is a printed publication, in which case it is outside the statute because it is not “prior art” *as a printed publication—i.e.*, before the critical date. Or Martin is a patent application, in which case it is outside the statute because, even if it is “prior art” in some sense, it is not a prior-art “printed publication.” Either way, the Federal Circuit got it wrong.

To be sure, patent applications can be prior-art “printed publications” if—as required for any other printed publication—they were publicly available before the critical date. No principle of statutory construction supports the contrary view. Indeed, §311(b) sets forth the “prior art” “printed publication” requirement in a single sentence. If the reference is a “printed publication,” it must also constitute “prior art” as a “printed publication.” It cannot meet the “prior art” requirement by transmogrifying into another category of art, like a patent application, that §311(b) excludes from consideration.

2. The Federal Circuit’s statutory gymnastics underscores its departure from text. Section 311(b) begins by

declaring that IPRs may be brought “*only* on a ground that could be raised under section 102 or 103.” §311(b) (emphasis added). If §311(b) stopped there, this case might be different: Section 102 now recites patents, printed publications, and patent applications. §102(a), (d). But, after saying IPRs may be brought “only on” “section 102 or 103” grounds, §311(b) adds “*and only* on the basis of prior art consisting of *patents or printed publications*.” §311(b) (emphasis added). That juxtaposition—which limits the grounds to those identified in §§102-103, and further limits them to only certain categories of prior art—makes Congress’s choice especially clear. “The word ‘only’ places a strict limit upon the *categories* * * * that are covered.” *Wisconsin Dep’t of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 231-232 (1992). Section 311(b)’s double use of “only” reflects a deliberate choice to restrict IPRs to *two categories* of “prior art” mentioned in “section 102”—“patents” and “printed publications.” The words “patents” and “printed publications” must have the same meaning in both §102 and §311(b). “[W]hen Congress uses a term in multiple places within a single statute, the term bears a consistent meaning throughout.” *Azar v. Allina Health Servs.*, 587 U.S. 566, 576 (2019).

The Federal Circuit’s interpretation also violates the “‘cardinal principle of statutory construction’” that statutes should not be construed to render any “‘word * * * superfluous, void, or insignificant’” by effectively reading “patents” out of the statute. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). Except in rare national-security circumstances, see §122(d)—patents are *published* when they issue (if not before). If a printed publication is *any document* published at *any time*, as the Federal Circuit held below, there would have been no reason for Con-

gress to list patents as a separate category in §311(b); they would all be “printed publications” regardless by virtue of being eventually published.

3. If Congress had wanted §311(b) to extend to patent applications—and to incorporate the special rules for that category of art—“Congress knew how to” do so. *Pugin v. Garland*, 599 U.S. 600, 608 (2023). In lawsuits, infringement defendants can assert all forms of prior art, including patent applications, when challenging validity. See p. 9, *supra*. Similarly, when challenging “covered business method patents” before the PTO, Congress allowed parties to raise patents, printed publications, and public uses and sales. AIA, Pub. L. No. 112-29, §18(a)(1)(C)(i), 125 Stat. 284, 330 (2011); see §102(a) (2006).

But in §311(b), Congress did something different. It specified the “only” “prior art” allowed—“patents and printed publications.” But the Federal Circuit effectively rewrote §311(b) to permit IPRs on the basis of prior-art “patents,” “printed publications,” *and* “patent applications.” That blue-penciling of statutory text cannot be sustained.

C. The Federal Circuit’s Attempts To Justify Its Interpretation Fail

Ultimately, the Federal Circuit retreated to a (mistaken) understanding of congressional “purpose.” And respondents urged that “longstanding” agency practice justified the Federal Circuit’s interpretation. Such arguments are at best “relic[s] from a ‘bygone era of statutory construction.’” *Food Mktg. Inst. v. Argus Leader Media*, 588 U.S. 427, 437 (2019).

1. To support its contorted approach to §311(b), the Federal Circuit invoked its view of that provision’s purpose. Section 311(b)’s “purpose,” the court opined,

was to “restrict[]” IPRs to “printed documents.” App., *infra*, 20a (quoting *Qualcomm Inc. v. Apple Inc.*, 24 F.4th 1367, 1376 (Fed. Cir. 2022)). Reading §311(b) to permit patent applications, the Federal Circuit continued, was “fully consistent” with that “purpose.” *Ibid.* But “statutory text * * * best reflects Congress’s intent”—not the other way around. *Republic of Hungary v. Simon*, 604 U.S. 115, 137 (2025). And §311(b)’s text does not refer generically to “printed documents.” It refers to *specific kinds* of documents, including prior-art “printed publications”—a term long understood to require public accessibility before the critical date. The court’s appeal to statutory “purpose” underscores rather than justifies its departure from statutory text.

The court saw no “reason why Congress would have” allowed patents—but not patent applications—to form the basis of IPRs. App., *infra*, 20a n.10; see Gov’t C.A.Br.22. But courts cannot assume “Congress acted inadvertently.” *Hamer v. Neighborhood Hous. Servs. of Chi.*, 583 U.S. 17, 25 (2017). And history shows no accident: When Congress added “application[s] for patent” to §102 in 1999, Congress could have added the same language to the provisions authorizing ex parte reexaminations, inter partes reexaminations (created at the same time) or eventually IPRs. It did not. It is the province of Congress—not the Federal Circuit or PTO—to determine which categories of prior art are appropriate for administrative review and which must be addressed by Article III courts.

Congress’s decision to omit “application[s] for patent” in §311(b) was far from aberrant. Patent applications remain a controversial form of prior art. Some think they should not be prior art at all. See Lidiya Mishchenko, *Thank You for Not Publishing (Unexamined Patent*

Applications), 47 B.Y.U. L. Rev. 1563 (2022). Congress permitted this controversial form of prior art, but sensibly required that challenges based on it be brought in an Article III court under the more rigorous burden of proof that applies there. *ParkerVision, Inc. v. Qualcomm Inc.*, 116 F.4th 1345, 1362 (Fed. Cir. 2024).

2. The Federal Circuit’s departure from the well-understood meaning of “printed publication” cannot be justified by “longstanding” administrative practice either. Gov’t C.A.Br.23; accord *Samsung* C.A.Br.66-67; *Amicus Intel’s* C.A.Br.27-31. To support that argument, the Director cited the agency’s Manual of Patent Examining Procedure. Gov’t C.A.Br.23 (citing Manual of Patent Examining Procedure §2258, at 2200-66 (8th ed. 2001) (discussing ex parte reexamination)). But that Manual has never been binding on courts. See *In re Constant*, 827 F.2d 728, 729 n.2 (Fed. Cir. 1987). At best, the Manual reflects the *agency’s* unexplained assertion about the meaning of the key phrase—an assertion to which courts owe no deference. See *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024). Not even the Federal Circuit rested its reading of §311(b) on the agency’s practice.

II. THIS COURT’S INTERVENTION IS NECESSARY TO AVOID WIDESPREAD CONFUSION

Congress vested “exclusive appellate jurisdiction in the Federal Circuit” on patent issues to “ensure[] * * * uniformity” in that area. *Gunn v. Minton*, 568 U.S. 251, 261-262 (2013). The “rule[s]” that the Federal Circuit “regularly” applies thus are “of special importance.” *Cardinal Chem. Co. v. Morton Int’l, Inc.*, 508 U.S. 83, 89 (1993). But the Federal Circuit below refused to confront multiple conflicts of authority it created—conflicts as to the proper interpretation of an important statute no other Circuit will have an opportunity to address. It

sowed confusion about the prior art that may be asserted in IPRs and before Article III courts, risking unfair and inconsistent results in patent cases worth hundreds of millions of dollars.

A. The Federal Circuit’s Interpretation Threatens Havoc and Inconsistent Results

1. The Federal Circuit’s decision threatens serious mischief. As one respected commentator has explained, the court’s reasoning “could lead to absurd results that Congress surely did not intend,” including “effectively eliminat[ing] Congress’s limitation of IPR proceedings to patents and printed publications.” Dennis Crouch, *Publications Before Publishing and the Federal Circuit’s Temporal Gymnastics*, PatentlyO (Jan. 14, 2025), <https://patentlyo.com/patent/2025/01/publications-publishing-gymnastics.html>.

“Following” the court’s analysis would mean that *any* form of prior art—including “sales and public uses”—could qualify as a prior-art printed publication whenever “documentation of those events [is] later published.” Crouch, *supra*. For example, a long-lost image of an invoice from a prior sale of the invention could qualify as a “prior art * * * printed publication” so long as it is eventually published in a local gazette, maybe years after the patent issues, or if a defendant posts it on the Internet days before filing an IPR.

That defies the well-established rule that “commercial sales and public uses” are not permissible grounds for IPRs. *Qualcomm*, 24 F.4th at 1376; accord App., *infra*, 20a. Yet the Federal Circuit offered no principled way to avoid that result. The court urged that Congress had a “purpose” of dividing “printed documents versus sale and public use” to avoid opening IPRs to “substantial discovery or factfinding” issues. App., *infra*, 20a. But

unenacted purpose is no solution to the uncertainty the decision below has created. With mere purpose as a guide, IPR litigants can argue that recently published sales or uses require no greater discovery or factfinding than a recently published patent application.

The mischief extends beyond IPRs to Article III proceedings. Normally, district courts may hear arguments as to any and all sorts of prior art. See p. 9, *supra*. But once a party has challenged a patent in an IPR, “result[ing] in a final written decision,” that party “may not assert” in the district court “any [invalidity] ground that [was] raised or *reasonably could have [been] raised during that inter partes review*.” 35 U.S.C. §315(e)(2) (emphasis added). The confusion over the grounds that may be raised in IPRs thus threatens corresponding confusion over the arguments that may be raised in district court following an IPR.

2. The decision below, moreover, cannot be reconciled with *Qualcomm Inc. v. Apple Inc.*, 24 F.4th 1367 (Fed. Cir. 2022).

In *Qualcomm*, as below, the Federal Circuit considered the meaning of §311(b)’s critical phrase—“‘prior art * * * patents or printed publications.’” 24 F.4th at 1372. There, *Qualcomm* (like *Lynk* here) argued that §311(b) limits IPRs to “prior art patents or prior art printed publications”—*i.e.*, *not* other sorts of “prior art” governed by different rules. *Id.* at 1373. The other party, *Apple*, disagreed. It urged a two-part approach that should now sound familiar: (1) decide whether something is “contained in any patent or printed publication”; and (2) *separately* determine whether the relevant portion of the document qualifies as “any” type of “prior art.” *Ibid.* The *Qualcomm* court rejected *Apple*’s bifurcated test. The question §311(b) asks, the court held, is whether the

“document” at issue is *itself* “a prior art patent or prior art printed publication”—not whether it can qualify as some other, distinct category of prior art. *Id.* at 1375.⁵

The Federal Circuit below adopted the opposite position. It held that any document could be the basis of an IPR so long as it was “prior art” as something else—here, as a patent application. It did so even though Lynk—and its amicus VLSI—pointed out that such a mix-and-match approach to §311(b) conflicted with *Qualcomm*. Lynk C.A.Br.65-66, VLSI C.A.Br.23-24. At no point did the Federal Circuit offer any principled way to distinguish or reconcile its reasoning with *Qualcomm*. The Federal Circuit—the only court of appeals with the opportunity to interpret §311(b)—has thus endorsed two fundamentally inconsistent methodologies for applying its text. That leaves patent owners and litigants wholly adrift.

B. The Issue Is Recurring and Fundamental

IPRs are legion, with over 1,200 filed and 700 instituted last year alone. See PTAB Trial Statistics FY24 End of Year Outcome Roundup IPR, PGR, https://www.uspto.gov/sites/default/files/documents/ptab_aia_fy2024_roundup.pdf. Many petitions raise precisely the issue

⁵ In *Qualcomm*, the relevant prior-art reference was “applicant admitted prior art” appearing within a non-prior-art “patent.” 24 F.4th at 1369. Apple urged that reference satisfied §311(b) because it was in a “patent,” which the statute mentions, and was also “prior art” under the rules for applicant-admitted prior art, *id.* at 1373—just as Samsung here argued that Martin satisfied §311(b) because it is both a “printed publication” and separately satisfied the rules for a different category of “prior art.” *Qualcomm* (unlike the decision below) rejected the effort to mix-and-match categories because §311(b) authorizes IPRs based on only “prior art patent[s]” and “prior art printed publications.” *Id.* at 1373-1375.

raised here. In just the last five years, the Patent Trial and Appeal Board has instituted dozens of IPRs where the petitioner cited an abandoned patent application that was published *after* the relevant patent’s critical date.⁶ Many of those IPRs resulted in the invalidation of the challenged patents. Multiple pending appeals before the Federal Circuit raise the same question concerning § 311(b)’s scope presented by this petition. *E.g.*, *Netlist, Inc. v. Samsung Elecs. Co.*, Nos. 24-2240, 24-2241 (Fed. Cir.); *VLSI Tech. LLC v. Patent Quality Assurance LLC*, Nos. 23-2298, 23-2354 (Fed. Cir.).

The cancellation of private property rights based on an erroneous statutory construction is significant on its own. But the consequence is especially severe because IPRs typically target the most valuable patents—those that are litigated. RPX, *The Overlap Between Patents Asserted in District Court and Challenged at the PTAB* (June 1, 2023), <http://bit.ly/3UKY3cp> (“79% of the patents challenged in IPR petitions (out of a total of around 8,860 patents) were first asserted in district court”). In one recent example, a jury awarded a \$425 million infringement judgment against Micron based on a single patent—but the Board then found that patent invalid because of a later-published patent application. See *Netlist v. Micron Tech. Tex., LLC*, No. 2:22-cv-294,

⁶ *E.g.*, IPR2020-00475; IPR2020-01534; IPR2021-01229; IPR2021-01339; IPR2021-01576; IPR2022-00149; IPR2022-00279; IPR2022-00405; IPR2022-00479; IPR2022-00615; IPR2022-00775; IPR2023-00198; IPR2023-00203; IPR2023-00454; IPR2023-00455; IPR2023-00876; IPR2023-00955; IPR2023-00958; IPR2023-00994; IPR2023-01034; IPR2024-00132; IPR2024-00171; IPR2024-00200; IPR2024-00209; IPR2024-00287; IPR2024-00354; IPR2024-00413; IPR2024-00416; IPR2024-00627; IPR2024-01167.

Dkt. 151 (E.D. Tex. July 10, 2024), appeal pending, No. 25-1936 (Fed. Cir.); U.S. Patent No. 7,619,912, challenged in IPR2022-00615, appeal pending No. 24-2304 (Fed. Cir.). And in *Patent Quality Assurance, LLC v. VLSI Technology, LLC*, IPR2021-01229, a patent challenger abandoned its invalidity defense on the eve of trial. *Id.*, Ex. 2004 (Oct. 27, 2021). The jury then awarded \$1.5 billion for infringement, only to have the Board invalidate key patent claims in an IPR based on a later-published patent application. *Id.*, Paper 129 at 2, 6, 27-29, 32 (June 13, 2023); see *VLSI Tech. LLC v. Intel Corp.*, 87 F.4th 1332, 1339 (Fed. Cir. 2023).

Ensuring IPRs stay within congressionally prescribed bounds—proceeding “only on the basis of prior art consisting of patents or printed publications,” §311(b)—is essential to the carefully calibrated patent system Congress has created. In the district court, challengers have a “higher burden” of proof on invalidity (clear and convincing evidence) but may assert *any type* of prior art. *ParkerVision*, 116 F.4th at 1362; see p. 9, *supra*. And while the burden in IPRs is lower (a mere preponderance), IPRs have more limited scope. See §311(b). Expanding that limited scope, as the Federal Circuit did below, upsets the careful balance Congress struck.

The issue, moreover, will remain critical going forward. Although this case involved a pre-AIA patent, the decision below applies equally to post-AIA patents. Post-AIA §102 continues to identify “printed publication[s]” and “application[s] for patent” as separate categories of prior art subject to different priority rules. §102(a), (d). Post-AIA Federal Circuit cases recognized that the meaning of “printed publication” remained unchanged. *E.g., Valve*, 8 F.4th at 1367, 1370 n.3, 1373. And nothing

about the AIA’s other revisions to the statutory scheme affects the application or logic of the decision below.

III. THIS CASE PRESENTS AN IDEAL VEHICLE

This case is an ideal vehicle. This case involves an abandoned patent application that concededly was published *after* the critical date. The issue was vigorously litigated before the Board and the Federal Circuit. Both the Board and the court addressed the issue at length. App., *infra*, 6a-21a, 41a-43a.

The issue is outcome-determinative. No party disputes that the Martin application was dispositive of every challenged claim in the ’400 patent. App., *infra*, 4a & n.3. Had the court held that the Martin application was not a “prior art * * * patent[] or printed publication[]” under §311(b), Lynk would have prevailed.

No other issues clutter this case. Whether prior art formed the “basis” of an IPR—as opposed to providing mere “evidence of general knowledge”—is a textual, threshold question that often lurks in the background when a patent owner challenges the scope of an IPR under §311(b). See, *e.g.*, *Shockwave Med., Inc. v. Cardiovascular Sys., Inc.*, 142 F.4th 1371, 1378-1380 (Fed. Cir. 2025); *Qualcomm Inc. v. Apple Inc.*, 134 F.4th 1355, 1368 (Fed. Cir. 2025). Here, there is no dispute that Martin formed the “basis” for the IPR below. This case is a uniquely clean vehicle to resolve the question presented.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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