No. 25-308

IN THE
Supreme Court of the United States

LYNK LABS, INC.,

Petitioner,

v.

SAMSUNG ELECTRONICS CO., LTD. ET AL.,

Respondent.

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

BRIEF OF PROFESSOR TIMOTHY T. HSIEH AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

WILLIAM J. COOPER
Counsel of Record
FELIPE CORREDOR
CONRAD | METLITZKY | KANE LLP
217 Leidesdorff Street
San Francisco, CA 94111
(415) 343-7100
wcooper@conmetkane.com
Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes & Rules

Other Authorities

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BRIEF OF PROFESSOR TIMOTHY T. HSIEH AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

Professor Timothy T. Hsieh is an Associate Law Professor at the Oklahoma City University School of Law. His research and teaching focus on technology law, antitrust and intellectual property, including patent law. Professor Hsieh previously practiced intellectual property law and worked as an Assistant Patent Examiner at the U.S. Patent & Trademark Office ("USPTO"). His professional experience and his areas of scholarship give him a strong interest in the sound development of patent law, and particularly the

legal rules applied by and to the USPTO. He submits this brief to underscore the importance of the question presented to the constitutional separation of powers and to the predictable administration of our Nation's patent system.[1]

SUMMARY OF ARGUMENT

This case presents a pressing question that extends far beyond the patent system: whether federal courts may circumvent this Court's landmark decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), by favoring the agency's preferred policy over a statute's plain text.

Although this case arises in a patent context, it is really about the Judiciary's role in interpreting statutes and the limits of agency power. The Federal Circuit's decision in *Lynk Labs, Inc. v. Samsung Co. Ltd.*, 125 F.4th 1120 (Fed. Cir. 2025), Pet. App. 1a, endorses a U.S. Patent & Trademark Office ("USPTO") administrative policy that expands statutory meaning—a move that covertly reprises the deference *Loper Bright* repudiated.

Hence, this case is not about technicalities of patent law. Instead, it is about whether courts will

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[1] Pursuant to Supreme Court Rule 37.6, the counsel of record listed on the cover states that no counsel for a party in this case authored this brief in whole or in part, nor did any such counsel or party or anyone other than *amici curiae* make a monetary contribution intended to fund the preparation or submission of the brief. The parties received timely notice through their counsel of record of Professor Hsieh's intention to file this brief, as required by Supreme Court Rule 37.2.

uphold or erode the separation of powers. In *Loper Bright*, 603 U.S. at 371, this Court overruled the experiment of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), recalling the judiciary to its duty to interpret statutes independently. But here, the Federal Circuit parroted an agency's policy-driven interpretation of a statute instead of its settled judicial interpretation. The court of appeals effectively treated agency policy as determinative of the meaning of the phrase "printed publication" in 35 U.S.C. § 311(b)—resurrecting *Chevron* through semantic gymnastics. That approach flouts this Court's precedents, upsets constitutional structure, and creates uncertainty for inventors. This Court should grant *certiorari*.

ARGUMENT

I. The Federal Circuit's Decision Conflicts with *Loper Bright* and Revives *Chevron* Deference in Disguise.

The U.S. Constitution vests the power to interpret law in the judiciary. *Loper Bright* made clear that the Framers envisioned legal interpretation as "the proper and peculiar province of the courts." 603 U.S. at 385 (citation modified). *Chevron* deference—allowing agencies to interpret ambiguous statutes based on their policy preferences—was repudiated as something that "cannot be squared" with the Administrative Procedure Act ("APA"). *Id.* at 396.

The Federal Circuit's decision revives *Chevron* in all but name. The question before the court was purely one of statutory interpretation: whether "printed publications" under 35 U.S.C. § 311(b) include abandoned patent applications that were not publicly accessible at the relevant time. Instead of interpreting that term according to its text, structure, and historical meaning, the Federal Circuit relied on a USPTO policy determination that such applications should count as prior art because patent applications are within the agency's subject matter expertise. *Loper Bright* prohibits such reliance when statutory interpretation is at issue.

A. *Loper Bright* Reaffirmed That Courts, Not Agencies, Say What the Law Is.

Loper Bright overruled *Chevron* and mandated that courts must "exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires." 603 U.S. at 412. The decision reestablished *Marbury v. Madison*'s foundational premise that "it is emphatically the province and duty of the judicial department to say what the law is." *Id.* at 385. Although "[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires", courts "need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous." *Id.* at 412–13. In so doing, the Court rejected an argument that deference to the agency is warranted because of the agency's technical subject matter expertise, because such deference "is

simply not necessary to ensure that the resolution of statutory ambiguities is well informed by subject matter expertise." *Id.* at 374.

The Federal Circuit's opinion is irreconcilable with that command. It ceded interpretive authority to the USPTO because of the agency's expertise with patent applications. Pet. App. 20a (printed documents such as patent applications "are the types of references that 'are normally handled by patent examiners'"). That rationale is indistinguishable from what *Loper Bright* rejected.

B. The Federal Circuit's Reasoning Replicates the USPTO's Policy-Driven Approach and Resurrects *Chevron* in Substance if Not in Name

The Federal Circuit's reasoning in *Lynk Labs* mirrors the USPTO's own policy-driven advocacy. The Director's brief to the Federal Circuit admitted that the agency's view of "printed publication" rests not on statutory text or judicial precedent, but on what the agency perceives to be sound "policy." *See* Br. for Intervenor-Director 16, *Lynk Labs, Inc. v. Samsung Elecs. Co.*, No. 23-2346 (Fed. Cir. filed May 3, 2024) ["Intervenor Br."] (arguing courts should "give effect to the intent of Congress by 'look[ing] not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.'" (quoting *In re Swanson,* 540 F.3d 1368, 1374–75 (Fed. Cir. 2008)).

The Director's brief recast the statutory question as one of administrative logic and practical coherence with the overall patent system, especially

with respect to updates of the Manual of Patent Examination and Procedure ("MPEP"), a policy guidance document used by USPTO examiners that also summarizes provisions in Title 37 of the Code of Federal Regulations. *See* Intervenor Br. 7–8; *see also id.* at 9 (describing the Leahy-Smith America Invents Act as passed "*against the backdrop of the USPTO's interpretation* of the reexamination statutes" (emphasis added)). The brief contended it would be "anomalous" to treat certain confidential applications differently from public ones. *Id.* at 28–30. The Director further argued that including abandoned, later-published applications as prior art "sought to create a streamlined administrative proceeding," "provid[e] quick and cost effective alternatives to litigation" and "provide an efficient post-issuance process to remedy any patentability defects in view of *prior art documents*"—all policy objectives of the USPTO. *Id.* at 21–22. None of these arguments, of course, engage the statutory language of § 311(b). Instead, they appeal to institutional policy preferences—which, *Loper Bright* held, cannot displace statutory text.

The Director's brief openly invited *Chevron*-style deference. It argued that "[f]or over 20 years, the USPTO has interpreted 'prior art consisting of patents or printed publications' to include published patent applications under 35 U.S.C. § 102(e)," as the agency "status quo" in "every version of the MPEP since August 2001." Intervenor Br. 23. The Director stressed the "USPTO's long-standing and consistent definition of 'prior art,'" even citing a discussion of *Chevron* deference in *Commodity Futures Trading Commission v. Schor* to argue that "congressional failure to revise or repeal the agency's interpretation

is persuasive evidence that the interpretation is one intended by Congress." *Id.* at 24 (citing 478 U.S. 833, 846 (1986) (emphasizing "interpretive value of congressional acquiescence" to agency interpretation)). Even on the unwarranted assumption that Congress knew about the MPEP's interpretation (*contra* pp. 12–13, *infra*), this argument betrays the mode of reasoning *Loper Bright* rejected: a privileging of agency practice and policy over textual analysis.

The Director's brief also invoked *In re Swanson*, 540 F.3d 1368 (Fed. Cir. 2008), as supposed precedent for its "contextual" method of statutory construction. *See* Intervenor Br. 16 (quoting *Swanson*). *Swanson* stated that courts must interpret patent statutes by looking "not only to the particular statutory language, but to the design of the statute as a whole and to its object and *policy*." 540 F.3d at 1374–75 (emphasis added) (quoting *Crandon v. United States*, 494 U.S. 152, 158 (1990)). But that passage in *Swanson*, which followed an express invocation of *Chevron* deference, 540 F.3d at 1374, n.3, rests on the same interpretive framework *Loper Bright* rejected. To treat "object and *policy*" as coordinate with statutory text is to treat judicial interpretation as policy balancing—a choice among multiple "permissible" interpretations, *Loper Bright*, 604 U.S. at 400. *Loper Bright* forecloses that approach. The judiciary's independent judgment must be exercised with fidelity to the enacted text, not to an agency's sense of statutory purpose.

Swanson is a high-water mark of administrative self-aggrandizement in patent law. It greenlit the modern era of USPTO post-grant proceedings in which agency tribunals routinely revisited

and nullified Article III judgments. The Director's reliance on that case here—and the Federal Circuit's uncritical adoption of the same policy-driven reasoning—illustrates how deeply entrenched the *Chevron* mindset remains within the administrative patent system.

The Federal Circuit's opinion did not merely echo the Director's reasoning; it adopted it wholesale. The court reasoned that the agency's interpretation was "fully consistent with the 'congressional purpose in restricting reexamination'—and later, IPRs—to printed documents"—phrases drawn almost verbatim from the Director's brief. *Compare* Pet. App. 19a–20a, *with* Intervenor Br. 24, 26. That is *Chevron* by another name. The court never explained how the words "printed publication" could encompass non-public, abandoned patent applications. Instead, it credited the agency's policy assertions as if they carried interpretive weight.

C. The Federal Circuit's Reasoning Shows the Need for a Rebuttable Presumption Against Disguised *Chevron* Deference

Loper Bright repudiated *Chevron*'s invitation to treat agency "reasonableness" as a substitute for judicial interpretation. But here, the Federal Circuit smuggles *Chevron* back into the law under another name. Instead of asking what the statute *means*, it asked whether the agency's preferred view *made sense*. The two questions are not the same, and *Loper Bright* emphatically forbids conflating them. As this Court warned in *West Virginia v. EPA*, courts must hesitate before concluding that Congress means to

confer upon agencies "unheralded power" representing a "transformative expansion in [their] regulatory authority." 597 U.S. 697, 724 (2022) (citing *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014)).

This phenomenon—judicial reasoning that tracks an agency's policy arguments without mentioning "deference"—calls for a structural response. When three conditions are met—(1) the court's interpretation departs from the well-settled meaning of a statutory term, (2) it expands administrative power at the expense of private rights or judicial review, and (3) it coincides with the agency's own litigating position—a rebuttable presumption of invalidity should attach. That prophylactic approach would preserve *Loper Bright*'s promise by ensuring that what appears to be "independent judgment" does not devolve into "deference by imitation."

This Court has long employed interpretive canons to safeguard structural principles. The major-questions doctrine ensures that agencies cannot claim vast powers absent clear congressional authorization. The rule of lenity protects liberty by requiring clarity before punishment. The avoidance canon protects constitutional values by preferring interpretations that avert separation-of-powers conflicts. Each of these doctrines rests on the same logic: when a governmental actor seeks to enlarge its authority or constrain private rights beyond the statute's plain meaning, the courts must be skeptical. A rebuttable presumption against agency-policy alignment would be the natural extension of these principles in the post-*Chevron* era.

Under that presumption, courts would ask a simple question: *Does this interpretation just so happen to align with what the agency itself urged as a matter of policy?* If so, heightened scrutiny is warranted, especially when the interpretation expands executive power, diminishes access to Article III courts, or redefines terms Congress deliberately left unchanged. In this case, the alignment is complete. The Federal Circuit's reading (i) mirrors the USPTO's urged interpretation, (ii) rests on the same policy rationales of efficiency and coherence, (iii) neglects to consider alternative readings consistent with textual fidelity, (iv) fortifies the agency's own jurisdictional reach, and (v) erodes the rights of inventors and litigants to independent judicial review. That pattern should trigger every constitutional alarm bell. It is not interpretation—it is policy laundering through the judicial branch.

As the *Federalist Papers* remind us, the judiciary was designed to be "an intermediate body between the people and the legislature" and "to keep the latter within the limits assigned to their authority." The Federalist No. 78 (Alexander Hamilton) (Clinton Rossiter ed., 1961). That same duty applies, with equal or greater force, to executive agencies. Courts serve as the buffer that prevents administrative convenience from becoming administrative law. When courts adopt an agency's policy arguments wholesale, they cease to perform that constitutional function. They become, instead, the agency's institutional echo.

The dangers of agency-policy alignment are not abstract. In the patent context, such reasoning harms

the public's reliance on stable, predictable rules of innovation. When the USPTO can reinterpret statutory terms through litigation, and the Federal Circuit rubber-stamps that view, inventors lose the ability to plan their conduct based on the law as written.

Fidelity to *Loper Bright* requires more than renouncing *Chevron* by name; it requires rejecting its spirit. A jurisprudence that treats agency policy as interpretive guidance revives the same imbalance under another label. Judicial independence means skepticism toward the convenient alignment of power and policy. Courts must recognize that what appears "logical" from an administrative perspective may be unconstitutional from a structural one. A rebuttable presumption against such alignment would not restore the foundational principle that the law must be interpreted by judges.

II. The USPTO's Policy Interpretation Lacks Legal Foundation and Extends Agency Power Beyond Statutory Boundaries.

Congress limited *inter partes* review ("IPR") to "prior art consisting of patents or printed publications." 35 U.S.C. § 311(b). For nearly two centuries, the term "printed publication" has been understood to mean a document publicly accessible before the invention's priority date. *Cf. Helsinn Healthcare S.A. v. Teva Pharms. USA, Inc.*, 586 U.S. 123 (2019) (applying longstanding judicial interpretation of "on sale"). The Federal Circuit's interpretation, driven by USPTO policy, rewrites that limit by adding a third category—unpublished, abandoned applications that only later became public. That expands the USPTO's power beyond what Congress conferred, handing back

to agencies the authority to rewrite the law that *Loper Bright* had taken away. Worse still, the policy the Federal Circuit adopted does not rest on *any* lawful source of authority. It was never promulgated through notice-and-comment rulemaking and appears only in informal guidance documents, the MPEP, and *ad hoc* Patent Trial and Appeal Board (PTAB) decisions.

A. Unreasoned and Informal Agency Guidance Cannot Alter Statutory Meaning

The USPTO successfully urged the Federal Circuit to accept its "long-standing and consistent definition of 'prior art . . . printed publications,'" as reflected in guidance such as the MPEP, on the premise that Congress acquiesced in that interpretation. *See* p. 6, *supra*. But the Director's premise was wrong. Prior *judicial* interpretations of "printed publication" all cut *against* the agency. Rather, this is a case of alleged implicit acquiescence in a prior *administrative* interpretation, which raises no presumption of congressional acquiescence but, on the contrary, requires "'overwhelming evidence'" of it. *Sackett v. EPA*, 598 U.S. 651, 682–83 (2023) (quoting *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U. S. 159, 169–170, n.5 (2001)). No such evidence exists: there is no sign that Congress even knew about the agency's interpretation of § 311(b), which was secreted in the MPEP, a document written for use by patent examiners and supported by no stated reasoning.

The MPEP and PTAB adjudications cannot override congressional limits or supply missing statutory authority. Under the APA, "an agency may not use interpretive rules to bind the public by making law, because it remains the responsibility of the court to decide whether the law means what the agency says it means." *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 103, 109 (2015) (Scalia, J., concurring).

Nevertheless, the Federal Circuit treated nonbinding guidance from the MPEP and the PTAB as dispositive. That approach defies the APA and the Constitution alike. The Judiciary cannot validate executive interpretations merely because an agency asserts them consistently. Consistency is not constitutionality.

B. Allowing Policy to Substitute for Statutory Interpretation Revives the *Chevron* Regime

Loper Bright teaches that although "[c]areful attention to the judgment of the Executive Branch may help inform" the inquiry of whether an agency has acted within its statutory authority, courts "may not defer to an agency interpretation of the law simply because a statute is ambiguous." *Loper Bright*, 603 U.S. at 412–13. The Federal Circuit's deference to policy sense in its statutory interpretation is *Chevron* Step Two in disguise.

If this reasoning stands, any agency could justify its statutory reinterpretations by invoking "policy" or "expert judgment." The EPA could label

emissions rules "policy-driven interpretations." The SEC could reframe financial regulations as "practical readings." Each would be an end-run around *Loper Bright*.

The USPTO's case is uniquely problematic because all patent appeals flow exclusively to the Federal Circuit. *See* 28 U.S.C. § 1295. Without percolation across circuits, such a doctrine will entrench unchecked deference in a single court—a quasi-administrative loop that insulates agency reasoning from judicial review. Only this Court can restore the constitutional balance.

III. This Case Implicates the Interpretive Principle Affirmed in *New Prime* and *Public.Resource.Org*: Courts Must Respect Congress's Use of Well-Settled Terms

The important question presented goes beyond a technical issue of patent law—it implicates the separation of powers and settled principles of statutory interpretation.

This Court has repeatedly emphasized that when Congress employs well-settled terms of art, the judiciary must interpret them as they were understood at the time of enactment—not as agencies or later courts might prefer to redefine them. That principle protects Congress's legislative prerogative and the stability of statutory law. The Federal Circuit's decision below disregards that principle and substitutes administrative "policy" for statutory fidelity.

In *New Prime Inc. v. Oliveira*, 586 U.S. 105 (2019), the Court rejected an invitation to reinterpret a long-settled statutory term—"contracts of employment"—to reflect modern assumptions. Justice Gorsuch, writing for a unanimous Court, explained that it is a "fundamental canon of statutory construction" that words generally should be "interpreted as taking their ordinary . . . meaning . . . at the time Congress enacted the statute." *Id.* at 113 (citation modified). The Court refused to "freely invest old statutory terms with new meanings" to amend legislation outside the "single, finely wrought and exhaustively considered procedure" the Constitution demands. *Id.* That is, judges may not treat text as elastic merely because a newer or more convenient reading aligns with present policy preferences.

The same fidelity to established meaning animated *Georgia v. Public.Resource.Org, Inc.*, 590 U.S. 255 (2020). There, the Court again rejected a results-oriented argument—this time in an intellectual-property context. Instead of expanding copyright protection beyond the historical understanding of the "government edicts doctrine," this Court reaffirmed that courts must give statutory and doctrinal terms their "settled meaning" as established by a "century of cases" that "rooted" that "doctrine in the word 'author.'" *Id.* at 270. That consistency to settled judicial interpretation ensures that Congress can legislate against a stable backdrop of legal language without fear that agencies will later change its meaning.

Together, these precedents reflect a deep constitutional value: Congress's right to legislate in the language of the law without redefinition by other branches. The Federal Circuit's decision here does precisely what those cases condemn. It "freely invests" the phrase "printed publication"—a term whose meaning was well settled in the Patent Act and in a century of judicial decisions—with a new, policy-driven context and content. Instead of honoring Congress's adoption of language long understood to mean one thing by judges, *cf. Helsinn*, 586 U.S. at 123, the court accepted the USPTO's policy logic for expanding the term to include unpublished, later-released documents.

The ruling below erases the boundary between legislation and execution that this Court's cases protect. Congress must be able to rely on established meanings when it legislates. Otherwise, as *New Prime* warned, reliance interests would be upset by "subjecting people today to different rules than they enjoyed when the statute was passed." 586 U.S. at 106. The Federal Circuit's decision does just that: it updates statutory meaning in line with the agency's "object and *policy*," *Swanson,* 540 F.3d at 1374–75, not the statute's text. Protecting Congress's ability to use settled terminology is essential not only to the Constitution but to the separation of powers. When courts or agencies treat statutory terms as malleable, they shift legislative authority from Congress to the Executive. That is the structural harm *Loper Bright*, *New Prime*, and *Public.Resource.Org* all abjure.

This Court should grant review to reaffirm that Congress's words—especially those with an established judicial meaning—are not raw material for agency revision. "Printed publication" and "prior art" meant what they have always meant. The Federal Circuit had no warrant to redefine those words by reference to USPTO policy preferences.

IV. This Court's Precedents Reaffirm That Administrative Convenience Cannot Override Statutory Text or Constitutional Structure

This Court's cases reaffirm a consistent principle: administrative convenience cannot override statutory text or constitutional structure. Across a range of contexts, the Court has insisted that fidelity to Congress's words, rather than deference to agency expedience, governs judicial interpretation.

In *Helsinn Healthcare S.A. v. Teva Pharmaceuticals USA, Inc.*, 586 U.S. 123 (2019), the Court unanimously rejected the Federal Circuit's reliance on the USPTO's policy-driven reading of "on sale" in 35 U.S.C. § 102. The district court held that under the America Invents Act, only public sales could trigger the on-sale bar. *Id.* at 128. But this Court held that Congress's use of the traditional term "on sale" incorporated its long-settled judicial meaning, which includes even confidential commercial sales. *Id.* at 132. *Helsinn* thus stood as a clear rebuke to policy-motivated agency revisionism and a reaffirmation that statutory continuity is presumed unless Congress unmistakably indicates otherwise. The USPTO could

not redefine established statutory terms through "object and *policy*" updates or administrative preferences.

In *Microsoft Corp. v. i4i Ltd. Partnership*, 564 U.S. 91 (2011), the Court confronted another temptation to soften statutory meaning for policy reasons. The question there was whether the phrase "presumed valid" in § 282 of the Patent Act should permit a lower evidentiary burden to challenge patent validity. *Id.* at 95. The Court explained it was "in no position to judge the comparative force" of the parties' "*policy* arguments" as to the wisdom of the clear-and-convincing-evidence standard that Congress adopted. *Id.* at 113. Instead, it held that Congress had adopted § 282 against a settled common-law backdrop establishing that patents are presumed valid unless overcome by clear and convincing evidence. *Id.* at 113–14. *Microsoft* thus reinforces the same interpretive discipline: courts must read statutory terms as Congress enacted them, not as administrators or litigants wish they were written under policy justifications.

The same fidelity guided *Return Mail, Inc. v. United States Postal Service*, 587 U.S. 618 (2019). There, the Court rejected the government's invitation to treat a federal agency as a "person" eligible to petition for post-grant review under the America Invents Act. The Postal Service urged an expansive, policy-friendly interpretation on grounds of consistency with other portions of the patent statutes, the federal government's longstanding practice, and the availability of civil liability for federal agencies.

Id. at 629. The Court instead applied the traditional interpretive presumption that "person" does not include the sovereign absent an affirmative showing to the contrary. *Id.* at 628. The decision exemplified the constitutional baseline that agencies may not enlarge their own authority by appealing to policy rationales when the statutory text provides no support.

Finally, in *SAS Institute Inc. v. Iancu*, 584 U.S. 357 (2018), the Court rebuffed the USPTO's policy-based approach to the IPR statute. The agency had adopted a practice of instituting review on only some challenged claims, asserting that this partial institution was a more "efficient" administration of its docket. *Id.* at 358, 368. The Court held that the statute's command that the Director "shall issue a final written decision with respect to the patentability of any patent claim challenged by the petitioner" meant what it said: a "directive" that was "both mandatory and comprehensive," *Id.* at 362–63. The Director's efficiency-based policy argument was "properly addressed to Congress, not this Court." *Id.* at 358. The policy-based "partial institution" power, "wholly unmentioned in the statute," was "*not* entitled to deference under *Chevron*" even before that decision was overruled, and administrative convenience certainly cannot overcome statutory text after *Chevron*'s overruling. *Id.*

Each of these decisions reflects a unified jurisprudence: policy cannot rewrite the Patent Act, and no administrative body may invoke expedience to expand its authority. The Judiciary's role is to say

what the law is, not to say what would make sense from an agency's perspective. The Federal Circuit's decision below ignores that command. By adopting the USPTO's policy position on the meaning of "printed publication," the court revived the same interpretive elasticity that *Helsinn*, *Microsoft*, *Return Mail*, and *SAS Institute* reject. It treated administrative logic as a substitute for statutory meaning, and in so doing, blurred the boundary between interpretation and policymaking.

When courts treat policy rationales as interpretive authority, they erode Congress's legislative function and embolden executive agencies to define the limits of their own power. *Loper Bright* restored the principle that judges must exercise independent judgment and give statutes their fair textual meaning. If the Federal Circuit's reasoning stands, that victory for judicial independence will be short-lived. *Chevron* will return—not by name, but by habit.

This case offers a clean, narrow, and recurring vehicle for the Court to reaffirm that *Loper Bright*'s holding applies universally: no form of interpretive deference survives under another name.

V. Fairness and Due Process Concerns Underscore this Case's Importance

Beyond its structural implications, the Federal Circuit's approach strikes at the heart of basic fairness. By allowing the USPTO to classify abandoned patent applications that were secret at the

time of the invention as "printed publications" considered part of the public domain, the decision below exposes inventors to invalidation based on information they could not have known. That result offends the fundamental due-process principle that the law must provide clear notice of the standards by which citizens are judged.

For centuries, Anglo-American law has rested on the proposition that individuals must have notice of the legal rules that govern their conduct. As this Court stated in *Connally v. General Construction Co.*, 269 U.S. 385 (1926), a statute must be "sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." *Id.* at 391. When a legal regime subjects parties to penalties, forfeiture, or loss of rights based on information unavailable to them, it ceases to function as law and becomes arbitrary power.

The requirement of notice is not a mere procedural nicety—it is the first principle of legality. As Justice Holmes explained, "fair warning * * * is represented] in language that the common world will understand, of what the law intends to do if a certain line is passed"—"[t]o make the warning fair, so far as possible[,] the line *should be clear*." (emphasis added). *United States v. Lanier*, 520 U.S. 259, 266 (1997) (citing *McBoyle v. United States*, 283 U.S. 25, 27 (1931)). The Founders viewed that predictability as the dividing line between government by laws and government by men. If the public cannot know in advance what the law requires, it cannot conform its

conduct or exercise its rights in good faith. That same logic applies to the patent system, which operates only when inventors can confidently assess what knowledge constitutes the "prior art" that might be asserted against attempts to patent their innovation.

Patent law, no less than criminal law, depends on predictable, clear and knowable rules. The term "printed publication" has always embodied that premise: it refers to information that has been publicly accessible before the critical date. *See, e.g.*, *In re Hall*, 781 F.2d 897, 899 (Fed. Cir. 1986) ("'public accessibility' has been called the touchstone in determining whether a reference constitutes a 'printed publication' bar"). Hidden or abandoned patent applications, by definition, are not publicly accessible. To classify them as "printed publications" is to invert the concept of publication itself. While it is well settled that examined, issued "patents" may be prior art as of the date they are filed, for "printed publications" the opposite has always been true: it is well settled that "the touchstone" of their prior art status "is public accessibility." *E.g.*, *In re Bayer*, 568 F.2d 1357, 1359 (C.C.P.A. 1978) (rejecting USPTO's broad interpretation of "printed publication"); *In re Hall*, 781 F.2d at 899 (same); *In re Lister*, 583 F.3d 1307, 1311 (Fed. Cir. 2009) (same). There has never been such a thing as a secret "printed publication." Until now.

Such a regime transforms the patent system into a guessing game governed by invisible rules. Inventors would be judged not by what is public, but

by what lies buried in secret agency files. The result is a Kafkaesque system in which innovation is chilled by uncertainty and rights are lost to undiscoverable "prior art." Would-be patentees are entitled to rely on which types of prior art are authorized by Congress to be asserted against their patents. *See* 35 U.S.C. § 311(b). The USPTO's policy, endorsed by the Federal Circuit, undermines the reliance interests of every inventor who trusts that the law's terms mean what they say.

The injustice is compounded by the fact that the USPTO's own internal practices caused the very secrecy that inventors are now punished for. The agency routinely keeps applications confidential for eighteen months or longer before publication and then abandons them without ever publishing them. To then weaponize those confidential filings as prior art is to penalize inventors for the government's own nondisclosure mandated by Congress. If we are to respect Congress's choice to generally keep patent applications confidential for eighteen months, we must also respect Congress's choice to allow such prior art in IPR proceedings only if they are examined and issued as "patents." 35 U.S.C. § 311(b).

In *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012), the Court held that "regulated parties should know what is required of them so they may act accordingly," otherwise laws fail to comply with due process if they do not "provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages

seriously discriminatory enforcement." *Id.* at 253. The Federal Circuit's acceptance of the USPTO's interpretation creates just such a standardless regime in patent law: a system where private rights depend on hidden materials and what the agency deems to be good policy. That approach transforms the USPTO from an examiner of patents into an arbiter of secret law, able to decide retroactively when nonpublic information should count as prior art.

The constitutional problem with the Federal Circuit's ruling is thus twofold. First, it undermines the predictability that the patent system needs to encourage innovation and investment. Second, it erodes the legitimacy of agency action by detaching it from publicly accessible law. The USPTO's "policy" interpretation creates precisely the kind of arbitrary, post-hoc decision-making that the Administrative Procedure Act and the Due Process Clause were designed to prevent. When the law is "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, it violates the first essential of due process of law." *Connally*, 269 U.S. at 391. Here, even experts in patent law cannot predict what the agency or the Federal Circuit will deem to be available prior art tomorrow. That is not interpretation; it is improvisation.

The erosion of notice in the patent system mirrors broader concerns. In *Loper Bright*, this Court cautioned that when agencies fill in the "gaps" according to their own policy preferences, they assume the very legislative role the Constitution withholds

from them. 603 U.S. at 408–09. The same usurpation occurs when the USPTO transforms its internal confidentiality policies into de facto sources of legal obligation. The separation of powers is not a technical abstraction—it protects fairness by ensuring that laws are made by Congress, interpreted by courts, and announced publicly before they are enforced. When those boundaries blur, ordinary citizens—here, inventors—bear the cost.

The more secret materials are allowed to operate as prior art contrary to Congressional intent, the more property rights are at risk of being extinguished by what is in effect secret law. Patents are not privileges; they are "public franchises" secured by statute. *See Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 584 U.S. 325 (2018). But if they are limited by statute, they should be entitled to the full scope *set* by that statute. Because they derive from statute, their creation and destruction must conform to constitutional norms of transparency and regularity. If private patent rights can be nullified by agency reinterpretations of well-settled statutory language, vested property becomes contingent on administrative grace. That result is incompatible with both due process and Article III's command that judicial decisions, not agency preferences, determine private rights.

The rule of law demands better. Statutes must mean what they say, and citizens must be able to know what the law is before their rights are taken away. When an agency stretches statutory terms to

achieve a preferred outcome, it undermines both the separation of powers and the public's trust that law, not policy, governs. *Loper Bright* reaffirmed that courts must prevent such erosion of our constitutional structure. The Court should grant *certiorari* to reaffirm that agency policy preferences cannot override Congress's statutory enactments.

CONCLUSION

The Federal Circuit's decision exemplifies the danger *Loper Bright* sought to end: judicial abdication of interpretive authority to agencies. By accepting the USPTO's policy-driven view of "printed publication," the Federal Circuit reinstated *Chevron*-style deference in substance if not in name. This Court should grant *certiorari*.

Respectfully submitted.

WILLIAM J. COOPER
Counsel of Record
FELIPE CORREDOR
CONRAD | METLITZKY | KANE LLP
217 Leidesdorff Street
San Francisco, CA 94111
(415) 343-7100
wcooper@conmetkane.com

Counsel for Amicus Curiae

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