

No. 25-308

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IN THE  
**Supreme Court of the  
United States**

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LYNK LABS,

*Petitioner,*

v.

SAMSUNG ELECTRONICS CO., LTD. ET AL.,

*Respondents,*

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

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**BRIEF OF ALLIANCE OF U.S.  
STARTUPS & INVENTORS FOR  
JOBS AS AMICUS CURIAE IN  
SUPPORT OF PETITIONER**

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Steven C. Carlson  
ROBINS KAPLAN LLP  
555 Twin Dolphin Drive,  
Suite 310  
Redwood City, CA  
94065-2133

Robert P. Taylor  
*Counsel of Record*  
RPT LEGAL STRATEGIES PC  
2443 Fillmore Street, Suite 332  
San Francisco, CA 94115  
(650) 400 – 6995  
Robert.Taylor@  
RPTStrategies.com

*Counsel for Amicus Curiae*

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## INTEREST OF AMICI CURIAE <sup>1</sup>

*Amicus curiae* Alliance of U.S. Startups Inventors for Jobs (“USIJ”) is a coalition of startup companies, inventors, entrepreneurs and investors whose businesses depend upon stable and reliable patent protection as an essential foundation for making long-term investments of capital and time commitments to high-risk ventures developing new technologies. USIJ’s fundamental mission is to assist and help inform members of Congress, the Federal Judiciary and leaders in the Executive branch regarding the critical role that patents play in our nation’s economic system, and the particular importance of innovative small companies to our country’s economic health and its continued leadership role in the development of strategically critical technologies.<sup>1</sup> The list of USIJ’s members is attached as Appendix A.

*Amicus* and its supporting members are affected by the question presented in this case, *i.e.*, whether an abandoned patent application, which was never patented, and which was not published as of the priority date of the challenged patent,

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<sup>1</sup> No counsel of a party authored this brief in whole or in part. No party or counsel of a party contributed money that was intended to fund preparing or submitting this brief. No person (other than *amicus curiae*, its members, or its counsel) contributed money intended to fund preparing or submitting the brief. The parties received timely notice through their counsel of record of USIJ’s intention to file this brief, as required by Supreme Court Rule 37.2.

constitutes eligible “prior art consisting of patents or printed publications” pursuant to 35 U.S.C. § 311(b) for purposes of instituting an inter partes review (“IPR”) at the Patent Trial and Appeal Board (“PTAB”) of the U.S. Patent and Trademark Office (“PTO”). Many innovators, such as those represented by *Amicus*, have had their patents cancelled at the PTAB through the PTAB’s expansive view of its own jurisdiction. This case presents yet another instance of administrative overreach, when the agency has invalidated Petitioner’s patent based on an abandoned application that constitutes neither a “patent” nor a “printed publication,” as required by Section 311(b).

The PTAB is a creature of statute. There is a destabilizing effect on innovation when the PTAB oversteps its jurisdiction and strikes down patents based on supposed “prior art” beyond its statutory mandate. *Amicus* files this brief to highlight this case of administrative overreach, which exemplifies the PTAB’s destabilizing effect on innovators.

## **SUMMARY OF ARGUMENT**

The America Invents Act (“AIA”) struck a deliberate balance between the interests of patent owners in enforcing their patents, and the interests of accused infringers in seeking an efficient pathway to challenge the validity of those patents. Congress allowed these new Article I proceedings, outside the Article III jury system, *only* when there was a clean prior art basis for an invalidity attack. Rather than

allowing all bases of invalidity challenges, Congress provided that an IPR could proceed *only* if based on prior art consisting of “patents or printed publications.” 35 U.S.C. § 311(b). Thus, only a clean shot based on “patents or printed publications” could be the basis of these new, expedited IPR challenges. *Id.*

A panel of the Federal Circuit, in affirming an erroneous Final Written Decision (“FWD”) from the Patent Trial and Appeal Board (“PTAB”), approves the unlawful expansion of the limited statutory jurisdiction given by Congress to that Article I tribunal. An abandoned patent application is not a “patent.” Nor is an abandoned patent application “published” until such time as it is actually published. Until such time as it becomes an actual publication, an abandoned application remains unavailable to the public. It cannot give rise to the clean shot that is the premise of the PTAB’s expedited agency proceedings.

The innovation economy needs well-defined rules to support the investments of time and money to drive the next wave of technology. Investors and the companies they fund need to know the rules of the road in terms of what technologies are eligible for patent protection, and to know when patents are eligible to be challenged in these expedited agency IPR proceedings.

The PTAB has cancelled, in whole or in part, over 80% of the patents that reach the FWD stage.<sup>2</sup> The basic uncertainty over what patents will survive these agency reviews manifests in reduced funding of research-intensive technologies.<sup>3</sup> And this instability is exacerbated when the PTAB itself inflates its own jurisdiction beyond the review of clean shots based on “patents or printed publications.” This new expansive interpretation of the PTAB’s jurisdiction now enables a new swath of challenges based on prior art references that were heretofore outside its purview, further destabilizing the innovation landscape.

Because the Federal Circuit’s ruling expands the jurisdiction of the PTAB beyond the limits that Congress provided, this Court should grant the petition.

## **ARGUMENT**

### **I. The PTAB’s Expansive Jurisdiction**

This case turns on a simple question: whether an abandoned patent application, which was secret as of another patent’s priority date, is deemed

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<sup>2</sup> See pages 10-11 of the PTAB published statistics, detailing outcomes [https://www.uspto.gov/sites/default/files/documents/ptab\\_aia\\_fy2024\\_\\_roundup.pdf](https://www.uspto.gov/sites/default/files/documents/ptab_aia_fy2024__roundup.pdf) (focusing on cases reaching a final written decision (“FWD”)).

<sup>3</sup> See, e.g., <https://usij.org/usij-releases-report-on-the-importance-of-an-effective-and-reliable-patent-system-to-critical-technologies/>



“published” as of that priority date. USIJ will not retread this ground which is ably covered by Petitioner and other *amici*. Suffice it to say that a secret application is in no way “published” at that time, which is underscored not only by common sense, but also a steady stream of legal precedents. *E.g., In re Klopfenstein*, 380 F.3d 1345, 1350 (Fed. Cir. 2004) (“[T]hroughout our case law, public accessibility has been the criterion by which a prior art reference will be judged for the purposes of [the] ... ‘printed publication’ inquiry.”); *Koninklijke Philips N.V. v. Zoll Med. Corp.*, 656 F. App’x 504, 529 (Fed. Cir. 2016) (affirming finding that regulatory filing was not “printed publication” because it “was not sufficiently available to the public prior to the priority date”).

The fundamental problem here is the mission creep of the PTAB. Like with many governmental agencies, there has been a steady expansion of the PTAB’s jurisdiction. What was intended by Congress to be a limited forum for reviewing the validity of patents has come to dominate the landscape of patent enforcement. As crafted by a somewhat skeptical Congress, IPR proceedings were intended to be no more than an adjunct to the Post Grant Review (“PGR”) proceedings that were the focus of the AIA.<sup>4</sup> Those PGR proceedings, modeled

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<sup>4</sup> See page 205 of the compilation of the AIA legislative history, imposing limits if “a second window provision is to be enacted into law”:

on the Opposition proceedings that were well-established in the European Patent Office for challenging newly issued patents, are used for reviewing patent validity in the first nine months of a patent's term. 35 U.S.C. § 321(c). Petitioners in PGR proceedings can broadly rely on any basis of invalidity available under the patent statute, including any class of prior art. 35 U.S.C. § 321(b). Even abandoned applications which are subsequently published, like in the instant case, might qualify as prior art if asserted in PGR proceedings. *Id.* But PGR proceedings, which were a central focus of the AIA proceedings, have been a mere 3% of the PTAB's docket for the review of issued patents.<sup>5</sup>

IPRs were only to be a “second window” of review, and only based on a clean attack based on “patents or printed publications.” 35 U.S.C. § 311(b); *see also* fn 4, *supra*. Thus, the prior art challenge for this “second window” needed to be a black-and-white attack based on classes of prior art much narrower than those that may be entertained in PGR proceedings (*e.g.*, not based on prior public use or on-sale evidence, etc.). Nor could IPRs be based on other statutory bases of invalidity challenges,

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<https://www.pillsburylaw.com/a/web/4067/AIA-LegislativeHistory-final.pdf>.

<sup>5</sup> See page 3 of the PTAB published statistics for calendar year 2024 at: [https://www.uspto.gov/sites/default/files/documents/ptab\\_aia\\_fy2024\\_\\_roundup.pdf](https://www.uspto.gov/sites/default/files/documents/ptab_aia_fy2024__roundup.pdf)

such as lack of patentable subject matter, *see* 35 U.S.C. § 101, or indefiniteness or lack of enablement, *see* 35 U.S.C. § 311(b).

Within the limited confines of this “second window,” the PTAB began to flex its jurisdiction. For example, far beyond limiting its review to what the prior art actually says, the PTAB openly embraced challenges based on the “inferences and creative steps” of people of skill in the art, which vastly expanded the PTAB’s review of obviousness challenges. *See, e.g., Sotera Wireless, Inc. v. Masimo Corp.*, No. IPR2020-01015, 2021 WL 6339589, at \*17 (P.T.A.B. Nov. 24, 2021) (“Furthermore, in an obviousness analysis, it is not necessary to find precise teachings in the prior art directed to the specific subject matter claimed because inferences and creative steps that a person of ordinary skill in the art would employ can be taken into account.”); *Align Tech., Inc. v. 3shape a/s*, No. IPR2020-01087, 2022 WL 212771, at \*9 (P.T.A.B. Jan. 19, 2022) (“Also, ‘[a] person of ordinary skill in the art is also a person of ordinary creativity, not an automaton.’ One must account for “the inferences and creative steps that a person of ordinary skill in the art would employ.”) (internal citation omitted).

With this expansive view of its own jurisdiction, IPRs have dominated the docket at the PTAB. About 97% of the PTAB’s post-grant cases are filed as IPR challenges.<sup>6</sup> And these IPR challenges

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<sup>6</sup> *See* fn 5, *supra*.

typically result in patents being cancelled.<sup>7</sup> With patent protection now so precarious, it is no surprise that venture capital and other funding has declined in research-intensive fields for which patent protection is important.<sup>8</sup>

The latest incremental expansion of the PTAB's IPR jurisdiction is represented by the present case. Nothing in the AIA or patent law in general would suggest that an unpublished secret application is prior art. The "Nonprecedential" panel decision of the Federal Circuit, however, using tautological and circular reasoning, concludes that a document published long after the critical date for prior art is in fact what Congress meant in 35 U.S.C. §311(b) when it used the word "printed publication." This is well beyond any reasonable or permissible interpretation of statutory language, and to treat it otherwise would create an entirely new category of prior art for the purpose of Section 311(b).

The consequences of this mission creep are severe. As is well told by Petitioner and other *amici*, this is not an isolated case. A long list of matters, both in the PTAB and in district court, may be upended by the Federal Circuit's ruling. Thus, it is imperative that the Supreme Court reinforce what Congress provided – IPR proceedings are limited to review of "patents or printed publications," and this does not extend to abandoned applications that are

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<sup>7</sup> See fn 2, *supra*.

<sup>8</sup> See fn 3, *supra*.

not yet published as of the challenged patent's priority date.

Ultimately, it is the innovation economy that suffers from loose rules governing the PTAB's jurisdiction. Investors need to know the landscape for when patent protection is eligible, and when patents may be stricken in post-grant agency reviews. For these reasons, amicus USIJ urges the Supreme Court to grant review.

### CONCLUSION

The PTAB has acted well beyond the clearly delineated statutory bounds, which the court below must enforce if there is to be continuity in the law. Loose rules over when a patent may be challenged in administrative proceedings ultimately harm the innovation economy by throwing into uncertainty when the investments, anchored by patents, may be undercut by these agency proceedings. The petition should be granted.

Respectfully submitted,

Robert P. Taylor  
*Counsel of Record*  
RPT LEGAL STRATEGIES PC  
2443 Fillmore Street, Suite 332  
San Francisco, CA 94115  
(650) 400 – 6995  
Robert.Taylor@RPTStrategies.com

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Steven C. Carlson  
ROBINS KAPLAN LLP  
555 Twin Dolphin Drive, Suite 310  
Redwood City, CA 94065-2133

*Counsel for Amicus Curiae*

December 3, 2025

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