

No. 26-198

IN THE
Supreme Court of the United States

KAHOOT! AS,

Petitioner,

v.

INTERSTELLAR INC., *et al.*,

Respondents.

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

**BRIEF OF ASKELADDEN L.L.C.
AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICUS CURIAE*

Askeladden L.L.C. is an education, information, and advocacy organization that, through its Patent Quality Initiative, is dedicated to improving the understanding, use, and reliability of patents in financial services and elsewhere. Through this initiative, Askeladden strives to improve patent quality and to address questionable patent holder behaviors.

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INTRODUCTION AND SUMMARY OF ARGUMENT

Congress created *inter partes* review (IPR) to provide an efficient administrative means of testing patents that should not have issued. It specified when review is available, the grounds on which a petition may

1. Per this Court's Rule 37.2, counsel for the parties were timely notified of amicus's intention to file this brief. No counsel for a party wrote any part of this brief and no one other than amicus made a monetary contribution in relation to the brief.

proceed, the showing necessary to obtain institution, and the circumstances in which parallel litigation affects the proceeding. Congress also provided that the Director’s determination whether to institute a particular IPR is “final and nonappealable.” 35 U.S.C. § 314(d).

The Patent and Trademark Office has converted that case-specific bar on appellate review into a source of substantive policymaking authority. Under the agency’s recently announced “settled expectations” policy, the age of a patent may justify denying institution even when the petition complies with every timing rule Congress enacted. *See* Pet. App. 8a–11a. The Federal Circuit has compounded the problem by holding that courts may not review whether the agency possesses that authority. *In re Kahoot! AS*, No. 2026-119, 2026 WL 519635, at *1 (Fed. Cir. Feb. 25, 2026).

This brief tracks the statutory arguments amicus previously presented in *Google LLC v. VirtaMove Corp.*, No. 25-1230, *Intel Corp. v. Squires*, No. 26-73, and *Tesla, Inc. v. Granite Vehicle Ventures LLC*, No. 26-136. Amicus files again because this fourth petition confirms that the Federal Circuit’s error is recurring and systematic. The same rule of nonreviewability now governs different PTO policies, different industries, prospective and as-applied challenges, and every potential route to judicial review.

The four petitions present the issue from every material angle. Google challenged through mandamus the PTO’s reliance on patent age and supposed “settled expectations.” Intel and Google brought a prospective Administrative Procedure Act action challenging the generally applicable *Fintiv* rule. Tesla challenged *Fintiv* as

applied after the PTO denied timely petitions based on a projected trial date that later moved by nearly two years. Kahoot! now challenges the settled-expectations policy in a case where the patent had not even reached its sixth anniversary when the IPR petition was filed.

The timing in this case is revealing. Interstellar’s patent issued on July 2, 2019. Kahoot! filed its IPR petition on March 7, 2025, while the patent was less than six years old. The patent crossed the six-year mark while the petition was pending, and the PTO then denied institution on July 31, 2025, reasoning that the patent had been in force for “over six years, creating strong settled expectations.” Pet. App. 5a–6a.

The PTO’s treatment of Kahoot!’s petition shows how the policy works in practice. The agency gave decisive weight to an anniversary that arrived only while an already-filed petition sat pending. The six-year benchmark thus operates as an age-based bar on review—a limit Congress never enacted. Nothing in the AIA makes the fate of a timely petition turn on whether the agency rules before or after a patent’s birthday. That timing problem is the administrability flaw at the heart of the agency’s rule. Congress tied IPR access to objective events that parties can know and plan around, including the expiration of the post-grant-review window and service of an infringement complaint, not to the date on which the agency happens to act on a pending petition.

Congress instead adopted a specific temporal framework. Post-grant review is available during the first nine months after a patent issues. 35 U.S.C. § 321(c). IPR becomes available after that period, *id.* § 311(c), subject to

the one-year bar triggered when the petitioner is served with an infringement complaint. *Id.* § 315(b). Congress expressly addressed timing, selected the events that start the relevant clocks, and omitted any upper limit keyed to patent age.

Section 314(a) does not authorize the PTO to alter that framework. The provision establishes a merits threshold below which the Director may not institute review. Other provisions identify circumstances in which a petition satisfying that threshold may nevertheless be denied. Nothing in the AIA grants the Director authority to add a six-year cutoff, a projected-trial-date cutoff, or any other substantive condition the agency considers desirable.

Section 314(d) does not shield that policymaking from judicial review. *Cuozzo Speed Technologies, LLC v. Lee*, 579 U.S. 261 (2016), and *Thryv, Inc. v. Click-to-Call Technologies, LP*, 590 U.S. 45 (2020), involved efforts to overturn completed IPR proceedings based on alleged errors in applying statutory institution requirements. *Cuozzo* expressly reserved review for agency action that exceeds statutory limits, 579 U.S. at 275, and *SAS Institute Inc. v. Iancu*, 584 U.S. 357 (2018), confirmed that judicial review remains available when the PTO claims authority Congress did not grant. *Id.* at 370–71. Kahoot! raises that antecedent question of statutory authority. It does not ask a court to reweigh lawful institution considerations or compel institution.

In a matter of months, the Federal Circuit’s rule has generated four petitions raising the same question. Because that court alone hears patent appeals, no circuit split will ever emerge. Further percolation will yield

only more unreviewed agency action and more petitions foreclosed by the same settled rule. The Court should grant this petition alongside one or more of the related petitions, or grant the best vehicle among them and hold the rest.

ARGUMENT

I. The Fourth Petition on the Same Issue Confirms That the Federal Circuit’s Error Is Recurring, Systematic, and Ready for Review.

The decision below forms part of a settled line of Federal Circuit authority holding that substantive challenges to PTO institution standards cannot be heard through direct appeal, mandamus, or a separate APA action. The court has applied that rule to claims that the PTO exceeded its authority under the AIA, relied on considerations Congress did not authorize, acted arbitrarily and capriciously, and changed governing policy without adequate explanation. *See Mylan Laboratories Ltd. v. Janssen Pharmaceutica, N.V.*, 989 F.3d 1375, 1382–83 (Fed. Cir. 2021); *Apple Inc. v. Vidal*, 63 F.4th 1, 11–14 (Fed. Cir. 2023); *In re Motorola Sols., Inc.*, 159 F.4th 30, 38 (Fed. Cir. 2025); *In re Kahoot!*, 2026 WL 519635, at *1.

The four petitions now before the Court illustrate the doctrine’s breadth.

In *Google LLC v. VirtaMove Corp.*, No. 25-1230, the PTO denied institution because the challenged patent had been in force for more than fourteen years and therefore supposedly carried “strong settled expectations.” Google sought mandamus, arguing that the PTO had created

an age-based immunity Congress declined to enact. The Federal Circuit refused to decide whether patent age was a lawful institution consideration. *In re Google LLC*, No. 2026-111, 2026 WL 204945, at *1 (Fed. Cir. Jan. 27, 2026).

In *Intel Corp. v. Squires*, No. 26-73, Intel and Google brought a prospective APA action challenging the generally applicable *Fintiv* rule. They did not seek to reverse any particular institution decision or disturb a completed IPR. The Federal Circuit acknowledged that the action did not present a petition-specific challenge, yet derived from Section 314(d) a broader “unreviewability principle” covering “the content of the Director’s institution instructions” and any challenge focused “directly and expressly on institution standards.” *Apple*, 63 F.4th at 11–14.

In *Tesla, Inc. v. Granite Vehicle Ventures LLC*, No. 26-136, Tesla challenged *Fintiv* as applied. The PTO denied Tesla’s timely petitions because it predicted that trial would occur before the projected December 2026 final written decisions. The case was later transferred, and trial is now scheduled for June 2028, approximately eighteen months after the IPRs would have concluded. The Federal Circuit again refused to consider whether the PTO had statutory authority to deny institution based on projected trial timing. *In re Tesla, Inc.*, No. 2026-116, 2026 WL 555080, at *1–2 (Fed. Cir. Feb. 27, 2026).

This case returns to the settled-expectations policy, but with a revealing variation. Kahoot! filed its petition before the challenged patent reached its sixth anniversary. By the time the PTO acted, the patent had turned six, and the agency treated that intervening anniversary as

creating “strong settled expectations” sufficient to tip the balance against institution. Pet. App. 5a–6a. The parallel district-court litigation had been stayed, a consideration the PTO acknowledged weighed against discretionary denial. Pet. App. 6a.

The four cases establish that the problem is recurring. The Federal Circuit has repeatedly applied the same nonreviewability rule to materially different extra-statutory institution policies. The issue extends beyond one PTO memorandum, one administration, one industry, or one type of patent.

The problem is also national in scope. The AIA’s institution standards govern every IPR petition filed at the PTO, and the Federal Circuit’s exclusive jurisdiction prevents another court of appeals from adopting a competing interpretation of Section 314(d). The absence of a conventional circuit split reflects Congress’s channeling of patent appeals to a single court, rather than a lack of practical importance or uncertainty over the governing legal principles.

Every available procedural avenue has now been tested and closed. Google and Kahoot! pursued mandamus challenges to the settled-expectations policy. Tesla pursued mandamus against *Fintiv*. Intel and Google brought a prospective APA action directed to the rule itself rather than to any individual institution determination. The Federal Circuit refused substantive review in each posture.

This case also provides concrete evidence that the settled-expectations policy operates as a rule. The PTO

has described patent age as one consideration in a holistic inquiry. Pet. App. 8a–11a. Its treatment of Kahoot!’s petition reveals the practical significance of the six-year benchmark. Kahoot! acted before six years had elapsed, but the agency applied the benchmark based on the patent’s age when the agency eventually ruled. The anniversary itself supplied the asserted expectation.

That approach has the features of a limitations regime. It employs a defined period, gives the passage of that period presumptive legal significance, and attaches consequences without evidence that the patent owner actually relied on the absence of an IPR petition. It also permits the treatment of a timely petition to depend on the timing of the agency’s decision rather than the timing of the petitioner’s filing.

Two otherwise identical petitions filed on the same day against patents of the same age could receive different treatment if one were decided before the sixth anniversary and the other afterward. Nothing in the AIA suggests that Congress intended the PTO’s processing time to alter the substantive institution standards governing a pending petition.

The fourth petition therefore supplies more than another example of the Federal Circuit’s doctrine. It demonstrates how an extra-statutory consideration may harden into an outcome-determinative temporal benchmark while remaining insulated from judicial review. It further confirms that the Federal Circuit’s interpretation of Section 314(d) is producing a recurring nationwide problem that no other court of appeals can address.

Further percolation will not assist the Court. The Federal Circuit has repeatedly stated that, absent a colorable constitutional claim, an *ultra vires* challenge to an institution decision cannot support mandamus relief. See *Mylan*, 989 F.3d at 1382–83; *Kahoot!*, 2026 WL 519635, at *1. It has likewise held that Section 314(d) forecloses prospective APA challenges to the substance of the PTO’s institution standards. *Apple*, 63 F.4th at 11–14. Additional cases will therefore yield further applications of the same rule, not competing appellate analysis.

The four petitions give the Court a complete view of the issue. They present two consequential PTO policies, both prospective and as-applied challenges, and every asserted avenue of judicial review. The Court should grant this petition together with one or more of the related petitions. At a minimum, it should grant the petition that offers the preferred vehicle and hold the others.

II. The PTO’s “Settled Expectations” Rule Unlawfully Supplants the Carefully Calibrated Timelines Enacted by Congress.

Where a statute’s language carries a plain meaning, “the duty of an administrative agency is to follow its commands as written, not to supplant those commands with others it may prefer.” *SAS*, 584 U.S. at 363. In the AIA, Congress spoke with unmistakable clarity regarding the temporal limits on administrative patent challenges. The PTO’s invention of patent age as a presumptive ground for settled-expectations denial is not an exercise of statutory discretion; it is a rewriting of the timing framework Congress enacted.

Congress knew exactly how to provide time limits for post-issuance review, and it did so with precision. For post-grant review (PGR), Congress established a strict nine-month cutoff, providing that a PGR petition “may only be filed not later than the date that is 9 months after the date of the grant of the patent.” 35 U.S.C. § 321(c). Congress consciously declined to impose a similar post-issuance cutoff for IPRs. Instead, Congress structured the system so that PGR is available for the first nine months, and IPR is available thereafter.

The only time limit Congress placed on IPRs is tied not to the age of the patent, but to the initiation of litigation. Section 315(b) provides that an IPR “may not be instituted if the petition requesting the proceeding is filed more than 1 year after the date on which the petitioner, real party in interest, or privy of the petitioner is served with a complaint alleging infringement of the patent.” 35 U.S.C. § 315(b). The legislative history confirms that this choice was deliberate. As the bill’s sponsors recognized during the drafting of the AIA, prior law imposed “no deadline on seeking inter partes reexamination.” 157 Cong. Rec. S5429 (daily ed. Sept. 8, 2011) (statement of Sen. Jon Kyl). After vigorous debate, Congress intentionally adopted a deadline of one year after the service of an infringement complaint. 35 U.S.C. § 315(b).

The PTO itself has previously acknowledged that “the statutory scheme specifically contemplates a Petition filed with co-pending litigation by allowing filing one year after service of the complaint.” *Precision Planting, LLC v. Deere & Co.*, No. IPR2019-01044, 2019 WL 6481776, at *8 (P.T.A.B. Dec. 2, 2019) (quotation marks omitted). Indeed, the agency has historically recognized that “filing

within the one-year period provided by 35 U.S.C. § 315(b) is presumptively proper.” *Sprint Spectrum L.P. v. Intell. Ventures II LLC*, No. IPR2018-01770, 2019 WL 1581944, at *27 (P.T.A.B. Apr. 12, 2019). That congressional judgment has particular force in the financial services sector. Modern banking and payment products often depend on technology supplied by multiple software vendors, processors, cloud providers, network operators, and financial institutions. When such a system is accused of infringement, an operating company may need time after suit is filed to determine which functionality is accused, which entity controls the relevant technical information, what prior art bears on the asserted claims, and how defense, indemnification, and cooperation obligations are allocated among the affected participants. Congress’s one-year post-suit period accommodates that practical reality by tying IPR timing to objective statutory events rather than to extra-statutory factors that may shift while the petition is pending.

Yet today, the PTO flouts this statutory scheme. Under the agency’s newly minted regime, PGR is available for nine months, IPR is available for six years, and any IPR that is not yet instituted six years after issuance is treated as presumptively disfavored by the patentee’s “settled expectations”—even when the petition was filed well within the one-year post-suit window expressly guaranteed by § 315(b). The PTO has thus overridden Congress’s one-year post-suit bar with its own six-year post-issuance bar. But it is Congress’s job to enact policy, and it is the agency’s job to follow it. The PTO may not improvise on the powers granted by Congress simply because it finds its own timeline more expedient.

The facts of this case expose the benchmark’s true operation. Interstellar’s patent issued on July 2, 2019. Kahoot! filed its petition on March 7, 2025—while the patent was still less than six years old. Pet. 6. Yet the PTO did not act until July 31, 2025, after the sixth anniversary had passed, and then denied institution because the patent had been in force for “over six years, creating strong settled expectations.” Pet. App. 5a–6a. The fate of a timely petition thus turned on an anniversary that occurred only because the agency delayed ruling.

Nothing in the AIA makes the treatment of a timely petition depend on whether the agency acts before or after a patent’s birthday. Nothing authorizes the PTO’s own processing delays to alter the substantive standards governing an already-pending petition. The six-year benchmark thus functions as an age-based eligibility rule—one Congress considered and declined to enact.

The legislative history of the AIA removes any doubt that Congress intended IPR to be available regardless of a patent’s age. In its section-by-section analysis of the Act, the House Judiciary Committee explicitly stated that “Inter partes review may be sought on the basis of patents and printed publications *any time after* a post-grant review is concluded or, if no such review is instituted, after the time for seeking such review has expired.” H.R. Rep. No. 112-98, at 75 (2011) (emphasis added).

Moreover, Congress actively considered—and explicitly rejected—age-based limitations on administrative patent challenges. Prior to the AIA, inter partes reexamination was restricted to patents issued after 1999. Congress intentionally abolished this restriction in the AIA. As the

House Report proudly noted under the heading “Repeal of the 1999 limit”: “The limit on challenging patents issued before 1999 in inter partes reexamination is eliminated; *all patents can be challenged in inter partes review.*” *Id.* at 47 (emphasis added). By fabricating a six-year “settled expectations” bar, the PTO has effectively resurrected the very type of age-based immunity that Congress expressly repealed, directly flouting the legislature’s command that “all patents” remain subject to IPR.

III. The PTO’s Extra-Statutory Rulemaking Contravenes Longstanding U.S. Patent Policy and the Public Interest.

The PTO’s extralegal restriction on IPR access directly undermines the fundamental public policy that the AIA was designed to serve. The Supreme Court has repeatedly held that “[t]he possession and assertion of patent rights are ‘issues of great moment to the public,’” *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 815 (1945) (citation omitted), and that it “is the public interest which is dominant in the patent system.” *Mercoird Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661, 665 (1944). Because a patent “by its very nature is affected with a public interest,” the Court has long emphasized that the Patent Act favors the “authoritative testing of patent validity” and the “removal of restrictions on those who would challenge the validity of patents.” *Blonder-Tongue Laboratories, Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 343–45 (1971). By barring access to quality review for litigation defendants based solely on the age of a patent, the PTO stands these foundational policies on their head.

The PTO's sole justification for its extra-statutory time bar is that a patentee acquires "settled expectations" once a patent has been in force for six years. This rationale is both legally defective and economically destructive. It artificially shields invalid patents from efficient administrative review and actively encourages the very rent-seeking behavior the AIA was designed to curtail.

As an initial matter, a patentee cannot possess a legitimate "settled expectation" of immunity from IPR. As this Court has recognized, a patent is a "public franchise." *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 584 U.S. 325, 335 (2018). It is granted subject to the statutory conditions enacted by Congress—one of which is the susceptibility to IPR for the entire life of the patent. *See id.* at 342. Because the AIA expressly permits IPR challenges at any time after the first nine months of issuance, 35 U.S.C. § 311(c), any "expectation" of immunity at the six-year mark is simply a self-fulfilling prophecy manufactured by the PTO's new rule, not a right conferred by Congress. Kahoot!'s case makes the point concrete. Kahoot! filed before the patent reached six years, yet the PTO relied on the anniversary that occurred during agency consideration to find "strong settled expectations." Pet. App. 5a–6a. If the expectation arose only because the agency waited until after the anniversary to decide the petition, it cannot be an expectation secured by the Patent Act.

Furthermore, there is no cognizable reliance interest in a monopoly that was granted by agency mistake. If a patent is invalid because it claims a routine or obvious concept, it never should have issued. Shielding such a patent from review based merely on its age forces the

public to pay monopoly rents for technology that rightfully belongs in the public domain.

Worse, the PTO's rule actively rewards rent-seeking and stifles innovation. By giving patent age presumptive weight after six years, the PTO creates much the same practical incentive as a safe harbor from IPR. Under the PTO's regime, a non-practicing entity (NPE) holding a dubious patent is highly incentivized to lie in wait for six years before asserting it. During this artificial grace period, innovators and operating companies independently develop, launch, and widely adopt technologies. Once the six-year mark passes—and the technology is deeply integrated into the market, making switching costs prohibitively high—the NPE springs its trap, secure in the knowledge that the defendant cannot utilize the efficient, cost-effective IPR process to challenge the patent's validity.

For amicus and the financial services industry, the consequences of this rent-seeking are severe. The modern payments ecosystem relies on complex, interconnected IT infrastructure that processes trillions of dollars daily. When NPEs assert older, low-quality software and business-method patents against financial institutions, the goal is rarely to protect a competing product; it is to extract settlements based on the exorbitant costs of district court litigation and the threat of system disruption.

Congress enacted the AIA precisely to combat this stifling effect on the economy, recognizing that “questionable patents are too easily obtained and are too difficult to challenge” in traditional litigation. H.R. Rep. No. 112-98, at 39. Congress intended IPR to serve

as a vital, ongoing mechanism to clear the thicket of bad patents regardless of their age. In fact, the legislative history demonstrates that Congress was particularly concerned with the harms caused by older, poor-quality patents that are often weaponized years after issuance. The House Judiciary Committee noted that the “issuance of poor business-method patents during the late 1990’s through the early 2000’s led to the patent ‘troll’ lawsuits that compelled the Committee to launch the patent reform project.” *Id.* at 54. As an organization representing the financial services industry, amicus is acutely aware of the threat posed by such patents. By shielding patents older than six years from IPR, the PTO effectively grants immunity to the very patents Congress intended to subject to rigorous administrative review.

The danger of insulating older patents from review is best illustrated by the exact type of case Congress designed the AIA to address. Consider the trajectory of VLSI Technology LLC’s U.S. Patent No. 7,523,373. Issued in 2009, the ’373 patent sat dormant for a decade before becoming the centerpiece of a high-profile infringement campaign against Intel Corporation. That litigation resulted in a staggering \$1.5 billion jury verdict in the Western District of Texas. *See VLSI Tech. LLC v. Intel Corp.*, No. 6:21-CV-057-ADA, 2022 WL 1477725, at *1 (W.D. Tex. May 10, 2022), *aff’d in part & rev’d in part*, 87 F.4th 1332 (Fed. Cir. 2023).

Yet, when subjected to the rigorous technical scrutiny of an IPR, the patent crumbled. In 2023, the Patent Trial and Appeal Board issued a final written decision concluding that every claim of the ’373 patent was unpatentable as obvious in view of the prior art. *Pat. Quality Assurance*

LLC v. VLSI Tech. LLC, No. IPR2021-01229, (P.T.A.B. June 13, 2023), *available at* <https://data.uspto.gov/ptab/trials/proceedings/details/IPR2021-01229/IPR2021-01229/11468458/decisions-detail>. This result represents the AIA functioning exactly as Congress intended: providing an expert administrative forum to correct agency errors, weed out invalid patents, and protect the American economy from unjustified monopoly rents.

Had the PTO’s newly minted “settled expectations” policy been in effect, however, that billion-dollar correction would have been categorically forbidden. Because the ’373 patent was issued more than six years before the IPR petition was filed, the agency’s extra-statutory rule would have barred institution entirely. The patent would have remained in force not because it was valid, but simply because it was old. An exorbitant toll would have been levied on a foundational technology, and the public would have been forced to pay for a monopoly that never should have been granted in the first place.²

Such an outcome turns the statutory framework on its head. Congress deliberately designed the AIA to permit IPR at any time after a patent’s initial nine-month post-issuance window, subject only to the one-year post-suit bar of § 315(b). As the House Judiciary Committee explained, under the AIA, “all patents can be challenged in inter partes review.” H.R. Rep. No. 112-98, at 47. Congress expressly repealed prior age-based restrictions, refusing to shield older patents from scrutiny simply because they

2. The Federal Circuit ultimately vacated the damages award and remanded for a new trial on damages. *VLSI Tech. LLC v. Intel Corp.*, 87 F.4th 1332, 1348–49 (Fed. Cir. 2023).

had managed to evade detection. The PTO possesses no authority to resurrect a temporal immunity that Congress discarded, nor may it subordinate the public's paramount interest in testing patent validity to bureaucratic fiat.

Nor is the VLSI litigation an isolated anomaly. The danger of immunizing older patents from administrative scrutiny is a recurring one, as the history of Uniloc's U.S. Patent No. 5,490,216 demonstrates. Issued in 1996, the '216 patent lay in wait for years before being used to secure a \$388 million jury verdict against Microsoft. *See Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1301 (Fed. Cir. 2011). For more than a decade, the patent served as a formidable weapon for extracting settlements across the technology sector.

When Congress enacted the AIA, it provided a mechanism to finally subject such patents to rigorous, expert scrutiny. Fifteen years after the '216 patent issued, a group of defendants petitioned for IPR. The Board found every asserted claim unpatentable over the prior art, a decision the Federal Circuit readily affirmed. *See Sega of Am., Inc. v. Uniloc USA, Inc.*, No. IPR2014-01453, 2016 WL 932971 (P.T.A.B. Mar. 10, 2016), *aff'd*, 711 F. App'x 986 (Fed. Cir. 2017).

Under the agency's newly minted "settled expectations" regime, that review never would have occurred. Because the '216 patent was well over six years old, the agency would have deemed the patentee's expectations "settled," categorically barring institution. The patent would have remained a potent tool for extracting massive damages—not because it was valid, but solely because it was old.

That outcome cannot be squared with the statutory design. Congress understood that a patent does not ripen into a valid property right simply by aging, and that an invalid patent remains just as invalid—and just as harmful to the public—in year fifteen as it was in year one. By substituting its own temporal cutoff for the one Congress actually enacted in § 315(b), the PTO has arrogated to itself the power to decide which invalid patents the public must continue to endure.

While the PTO may believe that protecting older patents fosters “stability,” public policy is properly determined by Congress, not the agency. Congress already weighed these competing interests when it enacted the AIA. It decided that the public’s interest in invalidating bad patents required a robust IPR mechanism, constrained only by the specific estoppel provisions and the one-year post-suit time bar it explicitly codified. The PTO has no authority to substitute its own policy preferences for those enacted by the legislature.

IV. The Statutory Framework for Patent-Validity Reviews Is Not Merely Advisory or Optional for the Agency to Follow.

The Federal Circuit’s refusal to review the PTO’s categorical, extra-statutory rulemaking represents a dangerous abdication of the judicial role. This petition raises an important question about the scope of agency authority: whether a statutory bar on review of individual institution determinations also insulates the legal standards the agency adopts to govern those determinations.

Section 314(d) provides that the Director’s determination “whether to institute an inter partes review under this section shall be final and nonappealable.” 35 U.S.C. § 314(d). But as this Court has made clear, § 314(d) is not a blank check for agency lawlessness. It bars review only of “ordinary dispute[s] about the application of certain relevant patent statutes concerning the Patent Office’s decision to institute inter partes review.” *Cuozzo*, 579 U.S. at 271. It does not “enable the agency to act outside its statutory limits.” *Id.* at 275.

Under the “strong” and “well-settled” presumption “favoring judicial review of administrative action,” *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 229 (2020), review bars must be interpreted narrowly. If a party believes the PTO has engaged in “shenanigans” by exceeding its statutory bounds, “judicial review remains available consistent with the Administrative Procedure Act, which directs courts to set aside agency action ‘not in accordance with law’ or ‘in excess of statutory jurisdiction, authority, or limitations.’” *SAS*, 584 U.S. at 371 (quoting 5 U.S.C. §§ 706(2)(A), (C)).

The record here illustrates the difference between reviewing a particular institution determination and reviewing the legal standard governing that determination. The PTO identified no evidence that Interstellar had relied on freedom from administrative review. It instead reasoned that the patent’s age alone created “strong settled expectations,” even though Kahoot! filed before the patent reached six years and the parallel district-court action had been stayed. Pet. App. 5a–6a. That reasoning goes beyond ordinary case-specific weighing. It gives a defined patent anniversary presumptive legal significance and allows the passage of

time during agency consideration to alter the treatment of an already-filed petition.

There is no “clear and convincing evidence” of congressional intent” to allow the PTO to wield § 314(d) to rewrite the rest of the statute. *Guerrero-Lasprilla*, 589 U.S. at 229. Yet, the PTO did exactly that here.

Nor would review require a court to order institution. Kahoot! requested only that the PTO reconsider its petition without relying on settled expectations derived from patent age. *Kahoot!*, 2026 WL 519635, at *1. That relief would preserve the Director’s lawful discretion while permitting the judiciary to determine its statutory boundaries.

This case is therefore the perfect vehicle to address administrative agencies implementing such extra-statutory rules. In his dissent in *Thryv*, Justice Gorsuch asked a prescient question regarding the expansion of § 314(d): “If the case before us doesn’t qualify as ‘extraordinary,’ and if the Board’s admitted flouting of § 315(b) isn’t ‘clear and indisputable,’ then what extralegal act wouldn’t be just another day at the office?” *Thryv*, 590 U.S. at 82 (2020) (Gorsuch, J., dissenting).

This case provides the answer to that question.

V. The Federal Circuit’s Ruling Provides a Replicable Blueprint for Broad Administrative Overreach Across the Executive Branch.

The implications of the decision below reach far beyond the insular confines of the patent bar. If allowed

to stand, the Federal Circuit’s sweeping expansion of 35 U.S.C. § 314(d) will provide a dangerous, highly attractive blueprint for federal agencies across the executive branch to insulate unlawful, categorical rulemaking from judicial review. Under the guise of exercising unreviewable case-by-case “gatekeeping” or prosecutorial discretion, powerful financial regulators could easily implement sweeping, extra-statutory prohibitions that completely bypass congressional authorization and evade Article III scrutiny.

As an organization deeply rooted in the financial services sector, amicus is well-positioned to highlight how other federal agencies could weaponize this exact structural loophole to destabilize commercial markets and private property rights across the wider economy. Consider a hypothetical example involving the National Labor Relations Board (NLRB).

Under Section 3(d) of the National Labor Relations Act, the Board’s General Counsel possesses “final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints” alleging unfair labor practices. 29 U.S.C. § 153(d). This Court has long recognized that this gatekeeping authority cloaks the General Counsel with virtually absolute, unreviewable prosecutorial discretion to decide whether to bring or dismiss an unfair labor practice charge. *See NLRB v. United Food & Com. Workers Union Loc. 23, AFL-CIO*, 484 U.S. 112, 126 (1987).

If an agency can use an unreviewable gate to immunize categorical, extra-statutory rules, a rogue General Counsel could fundamentally reshape American

labor law by administrative fiat. For example, rather than evaluating cases on their individual, fact-specific merits, the General Counsel could issue an internal enforcement directive declaring that the agency will categorically refuse to issue complaints protecting certain classes of workers.

Such a directive would effectively erase the boundaries of the NLRA, overriding the common-law agency principles Congress intended the Board to apply. Because the gate to the Board's adjudicatory machinery is entirely controlled by the General Counsel's unreviewable complaint discretion, neither employers nor workers could ever secure Article III review to strike down the unlawful policy. The agency could effectively achieve a permanent, structural amendment of its enabling statute while remaining entirely insulated from judicial oversight.

Following this Court's decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), the constitutional duty of the judiciary to ensure agencies stay within their statutory bounds has never been clearer. Yet, the decision below signals to the entire federal bureaucracy that it can evade *Loper Bright* and rewrite its enabling legislation. All an agency must do is anchor its unlawful, categorical policy to a statutory gatekeeping threshold that carries a non-appealability clause. To protect the structural separation of powers and prevent the erosion of private property rights across the economy, this Court should grant certiorari to close this dangerous loophole.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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