No. 26-73

In the Supreme Court of the United States

INTEL CORPORATION,

Petitioner,

v.

JOHN A. SQUIRES, UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY AND DIRECTOR OF THE UNITED STATES PATENT AND TRADEMARK OFFICE,

Respondent.

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

BRIEF OF UNIFIED PATENTS, LLC AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Unified Patents, LLC ("Unified") is a membership organization that seeks to improve patent quality and deter unsubstantiated or invalid patent assertions in defined technology sectors. In particular, Unified is dedicated to deterring non-practicing entities ("NPEs"), particularly patent assertion entities and litigation investment entities, from extracting nuisance settlements from operating companies based on patents that are likely invalid.

To that end, Unified provides a variety of services to its members, including analytics, prior art, invalidity contests, patentability analysis, administrative patent review, amicus briefs, economic surveys, and standard essential patent essentiality studies. In addition, Unified monitors patent ownership data and secondary-market patent sales. Unified also challenges patents it believes are unpatentable or invalid. This has included challenges in *inter partes* review ("IPR").

IPR is a vital tool for ensuring the integrity of the patent system and stopping the assertion of poor-quality patents. As an organization dedicated to those purposes, Unified urges this Court to grant review to preserve IPR's crucial functions.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel, party, or person other than amicus curiae and its counsel made a monetary contribution intended to fund the preparation or submission of the brief. Notice of the intent to file this brief was provided to all parties' counsel at least ten days prior to filing.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents a question of vital importance to the United States patent system: whether the Patent and Trademark Office's rules for governing access to IPR remain subject to judicial review. The Federal Circuit has held that they are not—reading 35 U.S.C. § 314(a) to give the Director unlimited discretion to deny institution for any reason he chooses, *see Mylan Labs. Ltd. v. Janssen Pharm., N.V.*, 989 F.3d 1375, 1382 (Fed. Cir. 2021) (the Director is "never compelled" to institute); *Apple Inc. v. Vidal*, 63 F.4th 1, 6-7 (Fed. Cir. 2023), and 35 U.S.C. § 314(d) to shield that discretion, and the substance of rules built on it, from review by any court even under allegations of APA violations, *see* Pet. App. 72a-73a. Freed of any check, the PTO has used that reading of the governing statute to deny the vast majority of would-be filers access to IPR contrary to the scope of access Congress authorized. Indeed, IPR petitions have dropped to an all-time low—from over a thousand annual filings to dozens.

Neither provision compels such an extreme, unprecedented reading that shields agency action from review under the APA. Section 314(d) makes nonappealable only the Director's "determination . . . whether to institute," which this Court construed as only barring review of ordinary disputes about how an institution statute applies. Importantly, neither Congress nor this Court created a force field around any policy related to institution. This Court said as much in *SAS*. There it rejected the agency's bid for broad, policy-driven discretion over institution, holding that where the institution statutes speak plainly, the Director must follow their commands "as written" rather than substitute the policy he "may prefer." *SAS Inst. Inc. v. Iancu*, 584 U.S. 357, 363 (2018). And Section 314(a)'s command that the Director "may not" institute "unless" a petition meets the statutory threshold fixes a floor below which he cannot institute; it is not a grant of standardless discretion to deny institution for any reason.

The overreach before this Court is the PTO's timing rule—denying review when a parallel district-court trial is likely to finish first, regardless of the petition's merits. Congress did not leave the timing of IPR to the PTO's discretion. It gave an accused infringer a fixed window—one year from service of an infringement complaint—to seek review, and it chose that period deliberately, after weighing and rejecting a shorter one. *See* 35 U.S.C. § 315(b). The PTO has nonetheless layered its own timing requirement on top of the statute, insisting that a petition be filed early enough for review to conclude before the scheduled trial date of a parallel district court. In the districts where most infringement suits are brought, that requirement can shrink the statutory year to a month or two—and where trial is set inside eighteen months, it leaves no time to file at all. An agency deadline that consumes the congressional one is not an interpretation of § 315(b); it is a rewrite.

Relying on the Federal Circuit's grant of immunity from review of 35 U.S.C. § 314(d), the PTO has recently gone even further, announcing that patents beyond a certain age acquire "settled expectations" against challenge and extending estoppel to parties who had no part in an earlier proceeding. Each measure displaces a judgment Congress made about how patent validity is to be tested, and each rests on the assumption that no court will ever require the PTO to justify its decision. And the PTO has moved to guarantee that none will. Having failed to secure these restrictions through notice-and-comment rulemaking, where the overwhelming majority of commenters opposed them, it now imposes them by edict, denying institution without any explanation at all.

Operating companies, including many of Unified's members, bear the consequences. These companies drive innovation and sell real products, yet they are sued by non-practicing entities on the very patents IPR was designed to test—patents that issue through a non-adversarial, resource-constrained process in which every participant is pushed toward allowance. When those companies turn to the review Congress promised, they find it foreclosed—not on the merits, but because the PTO has rewritten rules the statute does not permit it to rewrite. The expert, expedited check Congress built into the system is being withdrawn precisely where it is needed most. *See Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261, 272 (2016).

By transforming a narrow bar on reviewing individual institution decisions into a grant of unbounded, unreviewable power, the Federal Circuit has upended the system Congress designed—and over the past year, as the PTO has pressed that power further, the damage has only deepened. This Court's review is urgently needed.

ARGUMENT

I. The question presented is exceptionally impactful, recurring, and warrants this Court's review.

This petition asks a fundamental question about administrative power: must an agency follow Congress, or can it ignore it?

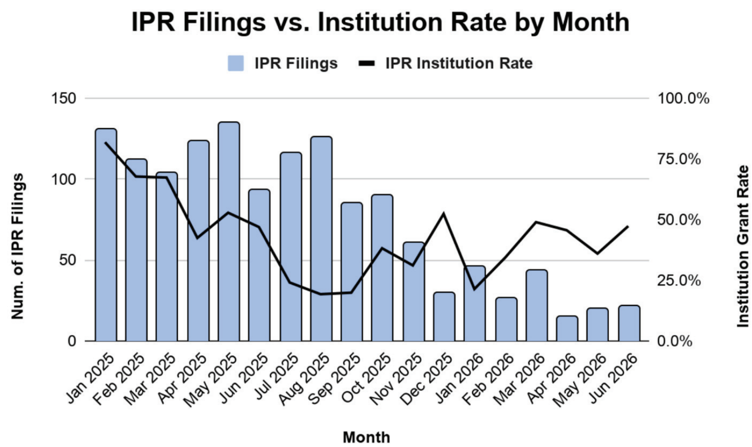
In other words, must the Patent and Trademark Office follow the statute Congress wrote when it created IPR, or may it unilaterally set that statute aside when it prefers a different policy? The Federal Circuit has dodged the question, finding that the PTO's institution decisions—and the rules by which it makes them—lie effectively beyond judicial review. *See In re Motorola Solutions, Inc.*, 159 F.4th 30, 38 (Fed. Cir. 2025); *Apple Inc. v. Vidal*, 63 F.4th 1, 6-7 (Fed. Cir. 2023); *Mylan Labs. Ltd. v. Janssen Pharm., N.V.*, 989 F.3d 1375, 1381-83 (Fed. Cir. 2021). Freed of anyone to account to, the PTO has stopped both implementing the statute and explaining itself. Why should it? Given the reviewing court's abdication, the agency's actions proceed without consequence or correction, absent this Court's intervention.

The question recurs constantly. The Federal Circuit has confronted a steady stream of mandamus petitions challenging the Office's discretionary-denial regime. Indeed, the same reviewability question is already pending before this Court in separate petitions challenging different discretionary-denial rules, all filed in remarkably short order following last year's policy changes. *See, e.g.*, Pet. for Writ of Certiorari, *Google LLC v. VirtaMove, Corp.*, No. 25-

1230 (U.S. Apr. 27, 2026); Pet. for Writ of Certiorari, *Kahoot! AS v. Interstellar Inc.* (U.S. July 24, 2026); Pet. for Writ of Certiorari, *Tesla, Inc. v. Granite Vehicle Ventures LLC*, No. 26-136 (U.S. July 27, 2026); Pet. for Writ of Certiorari, *Fed. Express Corp. v. Qualcomm Inc.*, No. 26-170 (U.S. July 28, 2026). This Court can expect more. Whether the PTO's institution rules are subject to judicial check is therefore a question of exceptional, timely, and lasting importance that only this Court can resolve.

The system-wide effects are already remarkably stark. Users vote with their feet—monthly IPR petitions have fallen from 131 in January 2025 to just 22 in June 2026, quarterly filings reached an all-time low of 57 in the second quarter of 2026, and the institution rate has collapsed from roughly 80% in early 2025 to the low twenties. Put another way, the agency is on pace to go from thousands of annual filings to dozens—due to the agency's draconian changes. They have effectively driven validity challenges out of the Board altogether and into *ex parte* reexamination, which now accounts for nearly three-quarters (74.7%) of all post-grant filings.[2]

[2] Unified Patents, *Patent Dispute Report: First Half 2026* (July 9, 2026). Except as otherwise noted, the patent-dispute statistics cited in this brief are drawn from this report, which is available at https://www.unifiedpatents.com/insights/2026/7/9/patent-dispute-report-first-half-2026.



IPR filings (bars) and monthly institution grant rate (line), January 2025–June 2026. Source: Unified Patents, Patent Dispute Report: First Half 2026.

One wonders why Congress would bother passing legislation at all if agencies are then free to adopt policies that ignore it. Congress asked the agency to implement its laws. Like Melville's Bartleby, the agency has said, "I would prefer not to."[3]

II. The AIA does not place the PTO's institution rules beyond judicial review.

The decision below rests on two errors of statutory interpretation, either of which warrants this Court's correction. Neither Section 314(d) nor Section 314(a) gives the PTO the unreviewable authority the Federal Circuit perceived. Those errors are hardly harmless—the Federal Circuit has already invoked that immunity to shield the PTO's discretionary institution authority from review—denying many mandamus petitions on the subject in

[3] Herman Melville, *Bartleby, the Scrivener: A Story of Wall Street* (1853).

rapid succession, three of them on a single day. *See In re Motorola Solutions, Inc.*, 159 F.4th 30, 38 (Fed. Cir. 2025); *In re Google LLC*, No. 2025-144, 2025 WL 3096849 (Fed. Cir. Nov. 6, 2025); *In re SAP Am., Inc.*, Nos. 2025-132, -133, 2025 WL 3096788 (Fed. Cir. Nov. 6, 2025). With that free hand, the PTO now denies institution through one-line bulk summary notices rather than any sort of reasoned opinions—so that, absent this Court's review, its rules escape not only judicial scrutiny, but even basic explanation.

A. Section 314(d) forecloses review only of ordinary institution disputes, not claims that the PTO has exceeded the bounds Congress set.

To be sure, in section 314(d) Congress made "final and nonappealable" the Director's "determination . . . whether to institute an inter partes review." This Court has twice explained that the provision bars review only of "'ordinary dispute[s] about the application of' an institution-related statute." *Thryv, Inc. v. Click-to-Call Techs., LP*, 590 U.S. 45, 54 (2020) (quoting *Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261, 271 (2016)). It does not immunize the PTO when it exceeds its statutory authority, for "[i]f a party believes the Patent Office has engaged in 'shenanigans' by exceeding its statutory bounds, judicial review remains available." *SAS*, 584 U.S. at 371. A challenge to a generally applicable rule that governs institution—as distinct from a quarrel with a single institution decision—is exactly the kind of claim Section 314(d) leaves open.

The Federal Circuit's contrary holding places the PTO beyond the ordinary limits that bind every other agency. Under that Court's decisions, the PTO may adopt institution criteria that are contrary to statute, that are not reasonably explained, that reverse position without explanation, and that apply retroactively—all without any court reviewing the substance of the PTO's authority to act. *See In re Motorola Solutions, Inc.*, 159 F.4th 30, 38 (Fed. Cir. 2025); *Apple Inc. v. Vidal*, 63 F.4th 1, 11-13 (Fed. Cir. 2023); *Mylan Labs. Ltd. v. Janssen Pharm., N.V.*, 989 F.3d 1375, 1381-83 (Fed. Cir. 2021). But judicial review of agency action is the rule, and unreviewability is a narrow exception that must be shown by clear and convincing evidence. *See Mach Mining, LLC v. EEOC*, 575 U.S. 480, 486 (2015); *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670-71 (1986). Nothing in Section 314(d) supplies it.

B. Section 314(a)'s "may not . . . unless" is a limit on the PTO's authority, not a tacit grant of unbounded discretion.

The second error compounds the first. Section 314(a) provides only that the Director "may not authorize an inter partes review to be instituted unless" the petition shows a reasonable likelihood of success. 35 U.S.C. § 314(a). That is a limit on the PTO's authority—a floor below which it may not institute—not a grant of boundless discretion to deny institution for any reason the PTO invents. The agency has instead read it as a loophole granting complete discretion and driven a train through it. This despite the fact that the very next section of the statute actually does affirmatively grant discretion— "the Director, in his or her discretion, may" grant joinder. 35 U.S.C. § 315(c). Reading a negative command (may not) as an affirmative delegation of unlimited power has inverted the statute, and it supplied the premise for every extra-statutory rule that has followed. If such unilateral policy changes that purposefully rewrite the statute don't qualify as shenanigans, what would?

III. Shielded by that claimed immunity, the PTO has rewritten the scheme Congress enacted.

None of this was accidental. Treating its institution rules as beyond review, the PTO has not merely applied the America Invents Act—it has rewritten it, grafting on requirements that appear nowhere in the statute and that operate to cut off access to review Congress created. The rule at issue here is the clearest example. It is not the only one.

A. The PTO's newly minted time-to-trial rule overrides the actual one-year deadline Congress fixed in Section 315(b).

Congress did not leave the timing of IPRs to the PTO's discretion. It gave an accused infringer a fixed window—one year from service of a complaint alleging infringement—to seek review, and it chose that period deliberately, after weighing and rejecting a shorter one. 35 U.S.C. § 315(b); see 157 Cong. Rec. S5429 (daily ed. Sept. 8, 2011). The PTO has nonetheless layered its own timing requirement on top of the statute, denying petitions unless they are filed early enough for the review to conclude before a parallel district court's scheduled trial date. *See Apple Inc. v. Fintiv, Inc.*, IPR2020-00019, Paper 11, at 5-6

(P.T.A.B. Mar. 20, 2020).[4] For an accused infringer, that requirement can pare the one-year window down to a few months. In the fastest jurisdictions, it can foreclose review before the year has even run.

The arithmetic is straightforward. Once a petition is filed, the Board takes roughly six months to reach an institution decision. *See* 35 U.S.C. § 314(b); 37 C.F.R. § 42.107(b). If it institutes, the final written decision is not due for another twelve months. *Id.* § 316(a)(11). From filing to decision, then, an IPR runs about eighteen months. The time-to-trial rule denies institution whenever a parallel trial is scheduled before the projected decision date. *See Fintiv*, Paper 11, at 5-6.

That rule bites hardest where infringement suits concentrate, because those courts set trial dates a review cannot beat. In the Western District of Texas, the standing order for patent cases fixes trial roughly seventeen months after the case-management conference—twenty-three weeks to the Markman hearing, then fifty-two weeks to trial. *See* Order Governing Proceedings—Patent Cases (OGP Version 1, Austin) app. A ("Exemplary Schedule"), at 13-15 (W.D. Tex. Mar. 5, 2025) (Albright, J.). The Eastern District of Texas is no slower. There, the court fixes the trial date at the scheduling conference and ties every other deadline to it, so trial is set well

[4] As discussed in Intel's Brief, these scheduled trial dates are often illusory. Pet. 9-10. For example, in the *Fintiv* case itself, a trial was never held even though the case is still pending more than six years from the Board's decision. *See Fintiv, Inc. v. Apple Inc.*, No. 1:21-CV-00896-ADA, 2025 WL 2633970, at *1 (W.D. Tex. Aug. 15, 2025) (granting Summary Judgment to Apple, appeal pending at the Federal Circuit, docket No. 25-2104).

within the review's projected timeline. *See* Patent Model Docket Control Order, U.S. Dist. Ct. E.D. Tex. (rev. Dec. 14, 2022). A defendant sued in either district cannot use the year Congress gave it. To keep the Board's projected decision ahead of the scheduled trial, it must petition within the first month or two after being served. The twelve-month window Congress fixed collapses to a fraction of that. And where trial is set at or inside eighteen months, no petition filed within the statutory year can be decided before trial. The rule forecloses review before the year has even run. And it does so on a false premise. The scheduled dates the Board credits are optimistic. Actual time to trial in these districts runs even longer—a median of 24 months in the Eastern District of Texas and 27 months in the Western. Docket Navigator, https://compass.docketnavigator.com (running *Time to Trial* for Court: Texas Western District/Texas Eastern District; Trial Date: 2008-01-01-2026-08-13; Excluding Outliers) (last visited Aug. 13, 2026). The Board thus denies review to defer to a trial that, on average, will not occur until long after the review would have concluded.

A deadline the agency contracts at its own discretion is no longer the deadline Congress enacted. When Congress sets a deadline, that deadline controls, and an agency may not supplement it with a shorter one of its own making. *Cf. SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 580 U.S. 328, 334-35 (2017); *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 667 (2014). An agency deadline that consumes the congressional one cannot be squared with the statute Congress enacted or with the ordinary tools courts use to read it. The PTO has moved to entrench that rewrite. Its October 2025 proposed rules would make denial mandatory whenever a parallel proceeding is scheduled to resolve validity first. Revision to Rules of Practice Before the Patent Trial and Appeal Board, 90 Fed. Reg. 48,335, 48,341 (proposed Oct. 17, 2025). And the requirement bites hardest exactly where infringement suits concentrate—the Eastern and Western Districts of Texas together account for roughly 37% of all patent filings, and the Eastern District of Texas alone accounts for 46.6% of suits brought by non-practicing entities.

B. The PTO's other new bars each displace a judgment Congress made.

Invoking the same claimed immunity, the PTO has gone further still. It has announced that patents beyond a certain age acquire "settled expectations" against challenge—despite Congress's deliberate decision to impose no maximum patent age, see 35 U.S.C. § 311; it has extended estoppel to parties who took no part in an earlier proceeding, far beyond the statute's estoppel and privity limits, see 35 U.S.C. § 315(e); and it has revived assignor estoppel, a defense this Court recently confined, see *Minerva Surgical, Inc. v. Hologic, Inc.*, 594 U.S. 559 (2021). Each measure displaces a judgment Congress made about how patent validity is to be tested, and each depends on the same assumption—that no court will ever require the PTO to justify it.

The PTO has pressed these bars further still. Its October 2025 proposed rules would require denial whenever any claim was previously upheld by the PTO, ITC, or a court, regardless of the parties or prior art involved, and would force a petitioner to abandon all Section 102 and Section 103 defenses in every other forum as the price of review. 90 Fed. Reg. at 48,341.

Nor does the PTO act with any public mandate. When it proposed to codify these restrictions in October 2025, more than 11,100 comments poured in, and 97% of them opposed the proposal—an almost exact repeat of 2023, when more than 95% of a record 14,500-plus comments opposed a materially similar proposal that the PTO ultimately abandoned. Unified Patents, *The Public Has Spoken—Again* (Dec. 18, 2025).[5] Having failed to secure these restrictions through rulemaking, the PTO has simply imposed them by unexplained adjudication, over the objection of the manufacturers, technology companies, and retailers that depend on IPR.

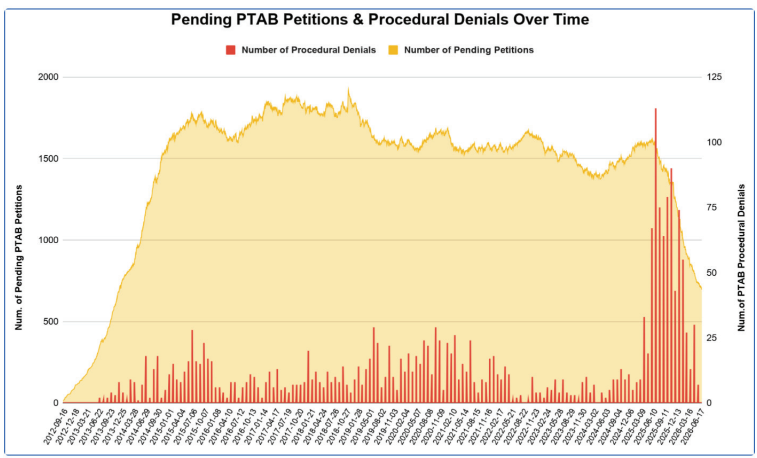
IV. The consequences confirm that this Court's review is needed now.

The practical consequences of the PTO's course are neither abstract nor speculative; they have been swift and severe. Until recently, IPR did what Congress designed it to do—provide an expert, efficient check on patents that should never have issued. That such patents issue at all reflects a recognized weakness in examination itself. The Government Accountability Office has found that patent examiners work under significant time and resource constraints in a system that rewards the quantity of decisions over their quality. *See* U.S. Gov't Accountability Office, GAO-25-107218, *Intellectual Property: Patent Office Should Strengthen Its Efforts*

[5] https://www.unifiedpatents.com/insights/2025/12/17/the-public-has-spoken-again.

to Address Persistent Examination and Quality Challenges 8 (2025).

The PTO's discretionary-denial regime reversed IPR's check on invalid patents almost overnight. The monthly institution grant rate, which stood at 81.8% in January 2025, fell to an all-time low of 19.4% by August 2025 and was still just 21.5% in January 2026. Filings fell in lockstep. Monthly petitions dropped from 131 in January 2025 to 22 in June 2026, and quarterly petitions reached an all-time low of 57 in the second quarter of 2026—a 72.5% decline from the first half of 2025.



Pending PTAB petitions (line) and procedural denials (bars), September 2012–June 2026. Source: Unified Patents, Patent Dispute Report: First Half 2026.

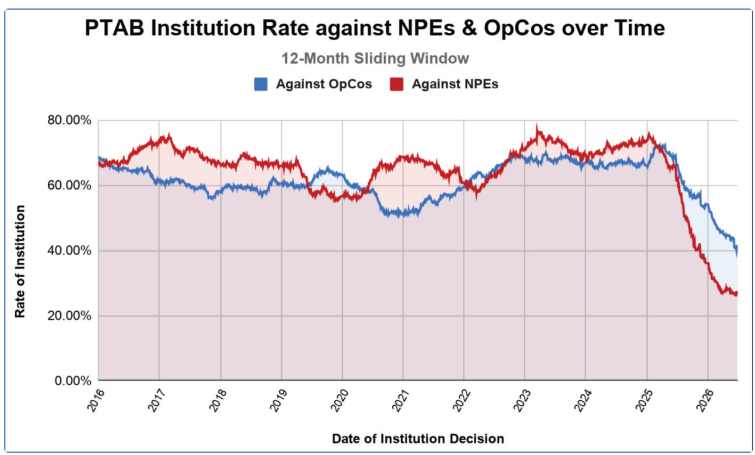
That collapse does not reflect a sudden dearth of meritorious challenges; it reflects a flight from a forum that no longer offers reliable review. Non-merits denials reached a record 607 in 2025, and in the first quarter of 2026, they were more than 620%

higher than the year before. Would-be petitioners have responded by abandoning the IPR process. Requests for *ex parte* reexamination reached an all-time quarterly high and now account for nearly three-quarters (74.7%) of all post-grant filings—an almost exact inversion of the position one year earlier, when IPR made up 72.9%.

The loss is a serious one. Congress created IPR to furnish a "quick, inexpensive, and reliable alternative to district court litigation" for testing the validity of wrongly issued patents. S. Rep. No. 110-259, at 20 (2008); *see* H.R. Rep. No. 112-98, at 39-40, 48 (2011). By rewriting the terms of that review, the PTO has made the alternative unavailable exactly when it is needed most.

That loss is not only institutional; it is also economic and measurable. When the PTO briefly reined in *Fintiv*-based discretionary denials in 2022, an analysis by The Perryman Group projected that curtailing those denials would add roughly $482 million in gross product and some 2,000 job-years of employment to the United States economy over ten years, with manufacturers—the operating companies most often sued on the patents IPR was meant to test—capturing the largest share, about $230 million in gross product and 758 job-years. The study expressly warned that reinstating or expanding *Fintiv*-style denials "would reduce or potentially even eliminate these effects." The PTO has since done exactly that, and far more sweepingly—surrendering those gains and reimposing on the economy the very costs an efficient review process had removed. The Perryman Group, *The Potential Economic Benefits of Recent Reductions in Discretionary Denial of Inter Partes Review Based on Criteria Such as the NHK-Fintiv Rules* ii, 5-7 (Mar. 2023).

The burden, moreover, falls unevenly. Because the PTO's new bars apply most forcefully to patents asserted in parallel litigation and to older patents, they shield the patents most often wielded by non-practicing entities. The institution data bear this out. On a trailing twelve-month basis, petitions against NPE-owned patents were instituted just 27.2% of the time, compared with 41.4% for operating-company patents—making it harder to obtain review of a patent held by a non-practicing entity than of a patent owned by a company that actually makes and sells products.



PTAB institution rate against non-practicing entity ("NPE")- and operating-company ("OpCos")-owned patents, twelve-month sliding window, 2016–June 2026. Source: Unified Patents, Patent Dispute Report: First Half 2026.

That is no accident. NPEs often assert old patents. Empirical evidence shows that on average, "NPEs do not obtain patents until the [twenty-year] patent term is half-spent and hold their patents for several years more before filing suit, perhaps while waiting for emerging industries to mature." Brian J.

Love, *An Empirical Study of Patent Litigation Timing: Could a Patent Term Reduction Decimate Trolls Without Harming Innovators?*, 161 U. Pa. L. Rev. 1309, 1334 (2013). Operating companies, by contrast, assert patents earlier. *Ibid.*; *see also* Lauren Cohen et al., *Patent Trolls: Evidence from Targeted Firms*, 65 Mgmt. Sci. 5461, 5470 (2019) ("NPE-asserted patents are significantly older than [practicing entity]-asserted patents."). Moreover, "NPE-asserted patents are the overwhelmingly dominant source of patent litigation in the final years of the patent term." Love, *supra*, at 1340. And 92% of those late-term suits are filed by "patent acquisition firms, firms holding the IP remnants of failed companies, and inventor-affiliated licensing firms." *Ibid*. The PTO's age-based bars thus do not fall evenly. By shielding older patents from review, they shield the patents most likely to be asserted in abusive NPE litigation.

And it is that litigation the PTO's regime leaves unchecked. Non-practicing entities filed 88.3% of the high-tech patent suits brought in district court in the first half of 2026, and six of the ten most-frequently challenged patent owners at the Board were non-practicing entities. Amicus's members bear the consequences directly. They are operating companies that drive innovation and sell real products, and they are sued by non-practicing entities on the very patents IPR was designed to test. When these companies seek the review Congress promised, they are told it is unavailable—not because their petitions are weak, and not because they fail to satisfy the statute, but because the PTO has rewritten the rules in a manner the governing statute does not permit. That is the systemic harm the America Invents Act was enacted to prevent, and it is reason enough to grant review.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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