No. 26-73

In the Supreme Court of the United States

INTEL CORPORATION, GOOGLE LLC,

Petitioners,

v.

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

Respondents.

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

BRIEF FOR TESLA, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

ANGELA M. OLIVER
HAYNES AND BOONE, LLP
888 16th Street, N.W., Ste. 300
Washington, DC 20006

ASHRAF FAWZY
PAUL MARGULIES
TESLA, INC.
800 Connecticut Avenue NW
5th Floor
Washington, DC 20006

DEBRA J. MCCOMAS
MICHAEL F. QIAN
Counsel of Record
HAYNES AND BOONE, LLP
2801 N. Harwood Street, Ste. 2300
Dallas, TX 75201
(214) 651-5041
michael.qian@haynesboone.com

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INTEREST OF *AMICUS CURIAE*[1]

Tesla, Inc.'s mission is to build a world of amazing abundance. To accomplish its mission, Tesla designs, develops, manufactures, and sells high-performance fully electric vehicles and energy generation and storage systems, installs and maintains such systems, and sells solar electricity. Tesla also develops and deploys real-world autonomy and artificial intelligence at scale, in vehicles and robots, through the development of Full Self-Driving software, semiconductors, neural networks, and the Tesla Optimus humanoid robot.

In the United States, Tesla has manufacturing operations across multiple facilities to build a sustainable future. Collectively, Tesla has invested billions in U.S. facilities that support over 70,000 employees and generate billions of dollars in economic activity each year.

Tesla is dedicated to advancing innovation and a healthy patent system. In 2014, Tesla announced its Patent Pledge for the advancement of electric vehicle technology, that Tesla would not initiate patent lawsuits against anyone who, in good faith, wanted to use its technology. It did so based on its goal of accelerating the advent of sustainable transport and to allow the world to benefit from a common technology platform. See Tesla, *Patent Pledge*, https://www.tesla.com/legal/additional-

[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.

resources#patent-pledge. Despite its Patent Pledge, Tesla has been a defendant in many patent cases.

Tesla believes the availability of *inter partes* review ("IPR") is an important safeguard for parties accused of infringing invalid patents. And more generally, Tesla believes the efficient correction of improperly issued patents in IPR promotes patent quality and enables innovation. Tesla therefore seeks to ensure that the administration of IPR by the U.S. Patent and Trademark Office ("PTO") adheres to the scheme Congress designed.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Federal Circuit has left the PTO free to exceed its statutory limits, with no judicial review. That extraordinary result is wrong, harms the Nation's patent system, and urgently warrants this Court's review—for the reasons explained below and similarly set forth in *amicus*'s own pending certiorari petition, *Tesla, Inc.* v. *Granite Vehicle Ventures LLC*, No. 26-136.

IPR is a way of challenging bad patents. Congress designed a detailed scheme governing when IPR is available in the Leahy-Smith America Invents Act ("AIA"), Pub. L. No. 112-29, 125 Stat. 284 (2011). The PTO has now devised its own constraints on IPR's availability, found nowhere in any statute. The PTO denies IPR petitions, for example, based on the time to trial in separate litigation involving the patent—a criterion Congress never mentioned.

According to the Federal Circuit, no court may even *ask* whether PTO-invented grounds for denying IPR are within the agency's statutory authority. The matter is beyond judicial review. The PTO can ignore or rewrite Congress's scheme without consequence. The PTO can impose any IPR constraint it wishes—it could deny all IPR petitions filed on Tuesdays—and courts must look the other way.

That is wrong. Like any other agency, the PTO must adhere to statutory limits, and those limits are enforceable by courts. The Federal Circuit's unreviewability holding rests on 35 U.S.C. §314(d), which bars appeal of "[t]he determination by the [PTO] Director whether to institute an inter partes review." But this Court has repeatedly held that "§314(d) does not 'enable the agency to act outside its statutory limits.'" *SAS Inst., Inc.* v. *Iancu*, 584 U.S. 357, 371 (2018) (quoting *Cuozzo Speed Techs., LLC* v. *Lee*, 579 U.S. 261, 275 (2016)). Yet that is just the type of challenge the Federal Circuit foreclosed here. The PTO has also mistakenly invoked 5 U.S.C. §701(a)(2), which bars review of matters committed to agency discretion. That does not bar review of what discretion the agency has in the first place. Moreover, the PTO's discretion here is not nearly as broad as the Federal Circuit has assumed. Congress specified the criteria for IPR institution and conferred agency discretion in specific areas; the statute never authorizes the PTO to supplant Congress's scheme with its own.

Arming the PTO with extraordinary, unreviewable power has had severe consequences—especially in the last two years. The PTO has reshaped IPR, imposing one new extra-statutory limit after another. Stakeholders must now expect IPR to be upended afresh at the whim of every new PTO Director. In 2025, the agency embarked on its most sweeping rewrite of IPR limits yet, and the effects have been unprecedented. IPR institution rates have collapsed in half, and IPR petition filings are down 85%. The agency is gutting the IPR scheme Congress built. This Court's review is needed now more than ever.

Four petitions, including this one, are now before the Court presenting the question whether the PTO is subject to judicial review when it denies *inter partes* review on grounds that are contrary to statute. See *Google LLC* v. *VirtaMove, Corp.*, No. 25-1230 (filed Apr. 27, 2026, response requested June 12, 2026); *Tesla*, *supra*, No. 26-136 (filed July 27, 2026); *Kahoot! AS* v. *Interstellar Inc.*, No. 25A1279.[2] Together, these cases present the reviewability question in every relevant procedural posture—and in the context of the two most consequential IPR limits the PTO has devised. The Court is now ideally positioned to resolve this exceptionally important, urgent issue.

ARGUMENT

I. The Federal Circuit's decision wrongly forecloses judicial review.

A. The Federal Circuit has left the PTO free to devise limits on IPR beyond its authority.

The Federal Circuit refuses to review whether the PTO has exceeded its statutory authority by imposing

[2] The *Kahoot!* petition was not yet docketed as of the filing of this brief, but public reporting indicates the petition was filed on July 24, 2026. See Adam Lidgett, *High Court Asked To Take Another Settled Expectations Case*, Law360 (July 28, 2026), https://www.law360.com/articles/2506123.

agency-devised limits on IPR. According to the Federal Circuit, "there is no reviewability" of the PTO's grounds for denying IPR institution—"except for colorable constitutional claims." *Mylan Lab'ys Ltd.* v. *Janssen Pharmaceutica, N.V.*, 989 F.3d 1375, 1379, 1381, 1382 (Fed. Cir. 2021). The PTO's compliance with *statutory* limits is thus immune from judicial review. *Id.*; Pet. App. 69a-73a (refusing judicial review of "statutory challenge" to "content" of PTO-devised institution limits in an Administrative Procedure Act ("APA") action).

This Federal Circuit precedent has expanded to cover the waterfront, foreclosing every statutory challenge to PTO institution criteria ever advanced. The Federal Circuit has shut off all available procedural avenues. *St. Jude Med., Cardiology Div., Inc.* v. *Volcano Corp.*, 749 F.3d 1373, 1375 (Fed. Cir. 2014) (direct appeal); *Mylan*, 989 F.3d at 1379 (same); *id.* at 1382 (mandamus); Pet. App. 69a-73a (separate APA suit). And the Federal Circuit has refused review over any statutory limit on PTO authority—from the specific AIA scheme governing IPR to universal APA guardrails. See, *e.g.*, *In re Tesla, Inc.*, No. 2026-116, 2026 WL 555080, at *1 & n.1 (Fed. Cir. Feb. 27, 2026) (denying review over contentions that PTO acted "*ultra vires*" and "exceeded [its] statutory authority"); Pet. App. 69a (denying review over contention that PTO rule was "not 'reasonable and reasonably explained'"); *In re Motorola Sols., Inc.*, 159 F.4th 30, 38 (Fed. Cir. 2025) (denying review over unexplained change of position); *id.* (denying review over retroactive application of new rule without statutory authority); *id.* (denying review over failure to account for relevant considerations).

And within the last year, the Federal Circuit removed any doubt that the courthouse doors are closed to such claims, refusing judicial review of more than a dozen challenges to the PTO's authority to refashion the criteria for IPR institution. *In re Motorola Sols., Inc.*, 159 F.4th 30 (Fed. Cir. 2025); *In re SAP Am., Inc.*, No. 2025-132, 2025 WL 3096788 (Fed. Cir. Nov. 6, 2025); *In re Google LLC*, No. 2025-144, 2025 WL 3096849 (Fed. Cir. Nov. 6, 2025); *In re Cambridge Indus. USA Inc.*, No. 2026-101, 2025 WL 3526129 (Fed. Cir. Dec. 9, 2025); *In re Sandisk Techs., Inc.*, No. 2025-152, 2025 WL 3526507 (Fed. Cir. Dec. 9, 2025); *In re Google LLC*, No. 2026-111, 2026 WL 204945 (Fed. Cir. Jan. 27, 2026); *In re HighLevel, Inc.*, No. 2025-148, 2025 WL 3527144 (Fed. Cir. Dec. 9, 2025); *In re Intel Corp.*, No. 2026-113, 2026 WL 506045 (Fed. Cir. Feb. 24, 2026); *In re Kangxi Commc'n Techs. (Shanghai) Co.*, No. 2026-115, 2026 WL 506927 (Fed. Cir. Feb. 24, 2026); *In re Tessell, Inc.*, No. 2026-117, 2026 WL 505597 (Fed. Cir. Feb. 24, 2026); *In re Kahoot! AS*, No. 2026-119, 2026 WL 519635 (Fed. Cir. Feb. 25, 2026); *In re Tesla, Inc.*, No. 2026-116, 2026 WL 555080 (Fed. Cir. Feb. 27, 2026); *In re Volkswagen Grp. of Am., Inc.*, No. 2026-123, 2026 WL 776550 (Fed. Cir. Mar. 19, 2026); see also *In re Maplebear Inc.*, No. 2026-105 (Fed. Cir.) (mandamus petition filed but later voluntarily dismissed).

Thus, as Federal Circuit law stands, the PTO can devise any limit on IPR—no matter how egregiously beyond its authority or arbitrary. The PTO could ignore clear directives from Congress; it could deny petitions based on a coin flip; it could shut down IPR altogether. The Federal Circuit would look the other way.

B. The Federal Circuit's approach is contrary to 35 U.S.C. §314(d) and this Court's decisions interpreting it.

The Federal Circuit's approach cannot be squared with the AIA or this Court's precedents. It has freed the PTO from the congressional and judicial constraints that bind other agencies. "Administrative agencies are creatures of statute" that "possess only the authority that Congress has provided." *Nat'l Fed'n of Indep. Bus.* v. *Dep't of Labor*, 595 U.S. 109, 117 (2022) (per curiam). And it is the "traditional" office of the courts to "'fix[] the boundaries of [that] delegated authority.'" *Loper Bright Enters.* v. *Raimondo*, 603 U.S. 369, 395-96 (2024) (citation omitted). So this Court "ordinarily presume[s] that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command." *Bowen* v. *Michigan Acad. of Family Physicians*, 476 U.S. 667, 670 (1986).

While the Federal Circuit reads 35 U.S.C. §314(d) to immunize the PTO from statutory challenge, this Court has held otherwise: "§314(d) does not 'enable the agency to act outside its statutory limits.'" *SAS Inst., Inc.* v. *Iancu*, 584 U.S. 357, 371 (2018) (quoting *Cuozzo Speed Techs., LLC* v. *Lee*, 579 U.S. 261, 275 (2016)).

Rather, §314(d) provides only that "[t]he determination by the Director whether to institute an inter partes review under this section shall be final and nonappealable." §314(d). It thus bars review of the Director's case-specific determination whether institution is warranted ("[t]he determination . . . whether to institute an inter partes review"). *Id.* As this Court has put it: §314(d) applies to "'an ordinary dispute about the application of'" statutory institution criteria. *Thryv, Inc.* v. *Click-To-Call Techs., LP*, 590 U.S. 45, 54 (2020) (quoting *Cuozzo*, 579 U.S. at 271).

Section 314(d) does not extend to the more fundamental question whether the PTO has authority to impose a new limit on institution. That is an overarching question of agency authority, not merely a challenge to the case-specific "determination . . . whether to institute an inter partes review." §314(d). Again, this Court has already drawn this distinction: it has not applied §314(d) to appeals "that present other questions of interpretation that reach, in terms of scope and impact, well beyond 'this section.'" *Cuozzo*, 579 U.S. at 275.

Section 314(d) is especially far afield in the posture of this case. This is a standalone APA suit. No particular IPR proceeding is at issue. And petitioners do not seek to command the PTO to institute review in any case. So the case does not even involve—let alone challenge—any "determination . . . whether to institute an inter partes review." §314(d).

By applying §314(d) to bar petitioners' statutory challenge, the Federal Circuit has extended §314(d) far beyond where this Court has ever gone. This Court has twice applied §314(d) to bar review, and both times the challenger merely contested how the agency applied a statutory institution criterion in granting institution. In *Cuozzo*, the challenger argued that the PTO should not have instituted review because the petition was not pleaded sufficiently "with particularity" under §312(a)(3).

579 U.S. at 271-72. In *Thryv*, the challenger argued that in applying §315(b)'s one-year bar, the PTO should have measured the time from a different triggering event. 590 U.S. at 54. In both cases, the Court found the challenges barred by §314(d) because they "raise[] 'an ordinary dispute about the application of' an institution-related statute." *Id.* at 54 (citation omitted); *Cuozzo*, 579 U.S. at 271. Neither case concerned the outer limits of the agency's statutory authority.

The Court has refrained from applying §314(d) to that different kind of dispute. In *Cuozzo*, the Court illustrated the boundary with a hypothetical: if the Board instituted review to cancel a claim for indefiniteness (which would "act outside [the agency's] statutory limits" because §311(b) limits IPR petitions to other grounds of invalidity), that decision "may be properly reviewable." 579 U.S. at 275. The Court then confirmed reviewability of statutory-authority challenges in *SAS*. *SAS* reiterated that "[i]f a party believes the Patent Office has engaged in 'shenanigans' by exceeding its statutory bounds, judicial review remains available." 584 U.S. at 371 (quoting *Cuozzo*, 579 U.S. at 275). Applying that rule, *SAS* held that §314(d) does not bar review of a contention "that the Director exceeded his statutory authority" ("by limiting the review to fewer than all of the claims SAS challenged"). *Id.* And even where §314(d) might otherwise apply, this Court has reserved the question "whether mandamus would be available in an extraordinary case." *Thryv*, 590 U.S. at 54 n.6.

This Court's §314(d) precedents thus preserve judicial review of whether the PTO has exceeded statutory bounds. Yet the Federal Circuit has now closed off that review, enabling the PTO to devise extra-statutory institution criteria with no judicial oversight. That departure from this Court's precedents—and the erasure of judicial and congressional limits on agency action—calls for this Court's review.

C. The Federal Circuit's approach cannot be justified by 5 U.S.C. §701(a)(2) and rests on an erroneous view of the PTO's discretion.

The Federal Circuit has also suggested that 5 U.S.C. §701(a)(2) may foreclose review of PTO-devised limits on IPR because the institution determination is "committed to agency discretion by law." *Mylan*, 989 F.3d at 1382. While the PTO has pressed that argument, the Federal Circuit expressly declined to rely on §701(a)(2) in this case. Pet. App. 68a-69a. That is for good reason: the §701(a)(2) rationale is doubly mistaken.

1. To begin, §701(a)(2) does not bar review of what discretion the agency has in the first place. That provision withdraws review only "to the extent that" the action is committed to agency discretion. §701(a)(2). Section 701(a)(2) therefore does not disable a court from deciding whether the agency actually possesses the discretion it claims. That antecedent issue is what the Federal Circuit refuses to review: whether Congress conferred discretion to invent the IPR institution criterion challenged here.

Applying §701(a)(2) to bar review of statutory limits on agency discretion contravenes this Court's precedents. Section 701(a)(2) "did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers." *Heckler* v. *Chaney*, 470 U.S. 821, 833 (1985). This Court has accordingly "read . . . §701(a)(2) quite narrowly, restricting it to 'those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *Weyerhaeuser Co.* v. *U.S. Fish & Wildlife Serv.*, 586 U.S. 9, 23 (2018) (quoting *Lincoln* v. *Vigil*, 508 U. S. 182, 191 (1993)). It therefore does not bar "the sort of claim that federal courts routinely assess when determining whether to set aside an agency decision." *Id.* at 25.

And that is exactly the sort of claim at issue here. Courts retain the "obligation[]" to "police the outer statutory boundaries" of congressional delegations of discretionary authority. *Loper Bright*, 603 U.S. at 404. Courts reviewing agency action are thus "required to decide whether the [agency] acted within the scope of [its] authority." *Citizens to Pres. Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 415 (1971). The statute defines that scope—and thus supplies the "meaningful standard" for judging whether the agency exceeded its limits. Petitioners' claim is that the AIA does not permit the PTO to deny access to IPR based on time to trial, and that is the kind of statutory challenge that courts routinely resolve.

Other courts of appeals have applied §701(a)(2) exactly this way: reviewing the statutory limits of an agency's discretion even when the ultimate decision is discretionary. See Pet. 23-25, *Google*, No. 25-1230; see, *e.g.*, *Farmworker Justice Fund, Inc.* v. *Brock*, 811 F.2d 613, 622 (D.C. Cir. 1987), vacated on mootness grounds, 817 F.2d 890 (1987); *Ward* v. *Skinner*, 943 F.2d 157, 160

(1st Cir. 1991); *Rodriguez* v. *Mayorkas*, 2024 WL 4023841, at *2 (2d Cir. Sept. 3, 2024).

2. Relying on §701(a)(2) would be flawed for an independent reason: it seemingly assumes the erroneous premise that the PTO has freewheeling discretion to deny IPR institution for any reason. See *Mylan*, 989 F.3d at 1382 ("For example, the Director is free . . . to determine that for reasons of administrative efficiency an IPR will not be instituted."). That unbounded view of the PTO's power is wrong.

Congress prescribed a reticulated set of IPR institution criteria. The provision governing "Institution of inter partes review" specifies a threshold for institution: IPR "may not" be instituted unless "there is a reasonable likelihood that the petitioner would prevail." 35 U.S.C. §314(a). Other provisions set forth firm limits, such as filing deadlines and estoppel. *E.g.*, 35 U.S.C. §§311(c), 315(b), 315(e). Still others confer specific discretionary power—for example, "the Director may take into account whether, and reject the petition . . . because, the same or substantially the same prior art or arguments previously were presented to the Office." §325(d); see also, *e.g.*, §315(d).

No provision empowers the PTO to supplant that statutory framework with its own by agency fiat. Congress expected that the "reasons why no inter partes review should be instituted" would be "based upon the failure of the petition to meet any requirement *of this chapter*"—that is, the requirements specified *by statute*. 35 U.S.C. §313 (emphasis added). Congress did not craft a detailed institution scheme just so the PTO could act on its own discretionary whim.

Indeed, the specific discretion that Congress conferred in provisions like §325(d) becomes superfluous under the Federal Circuit's view that the PTO has general discretion to deny IPR petitions for any reason. It is implausible that Congress intended to grant the agency unbounded discretion to craft any institution framework it wished, yet forgot to say so—while articulating a system of narrower, calibrated grants of discretion.

The only AIA provision the PTO has invoked for the supposed grant of unbounded discretion is §314(a). See *Apple Inc.* v. *Fintiv, Inc.*, IPR2020-00019, 2020 WL 2126495, at *1 (P.T.A.B. Mar. 20, 2020) (designated precedential May 5, 2020). But far from conferring power, that provision is phrased as a constraint: the Director "may not" institute IPR "unless" the petitioner is reasonably likely to prevail on the merits. §314(a). Nor does §314(a) (silently) confer unbounded discretion just because it does not mandate institution when that requirement is met. Section 314(a) lacks mandatory language for a simple reason: even for petitions clearing §314(a)'s merits criterion, other statutory criteria outside §314(a) could still defeat institution. *E.g.*, §§315(b), 315(d), 315(e), 325(d). But it was Congress that chose these additional criteria—and specified which would be discretionary. The PTO has no power to supplant those choices.

3. Without support in the statute itself, the Federal Circuit has tried to read this Court's decisions as establishing broad discretion for the PTO. See *Mylan*, 989

F.3d at 1382 (suggesting that because "the Supreme Court has explained[] [that] 'the [Patent Office]'s decision to deny a petition is a matter committed to the Patent Office's discretion,'" the PTO "is free" to deny institution for its own reasons (quoting *Cuozzo*, 579 U.S. at 273); see also Pet. App. 4a (also citing *United States* v. *Arthrex, Inc.*, 594 U.S. 1, 8-9 (2021)). Yet this Court has never considered—let alone decided—what discretion the PTO has to invent new IPR criteria. This confusion over the meaning of this Court's decisions reinforces the need for review.

This Court has described the institution "decision" as committed to the PTO's "discretion," but the *scope* of that discretion was not at issue in those cases. *Cuozzo*, 579 U.S. at 273; *Oil States Energy Servs., LLC* v. *Greene's Energy Grp., LLC*, 584 U.S. 325, 343 n.5 (2018); *Arthrex*, 594 U.S. at 8-9. Those cases decided separate questions. *Cuozzo*, 579 U.S. at 271-83 (whether §314(d) barred review of "Cuozzo's claim that Garmin's petition was not pleaded 'with particularity'" and whether a PTO regulation imposing a standard of construction was valid); *Oil States*, 584 U.S. at 329 (whether IPR violates Article III or the Seventh Amendment); *Arthrex*, 594 U.S. at 11-27 (whether provisions regarding Administrative Patent Judges violated the Appointments Clause). The Court's statements regarding discretion reflect that the AIA gives the PTO discretion in *applying statutory* institution criteria. *E.g.*, §§315(d), 325(d). But the Court had no occasion to decide what discretion the PTO has to *invent new* criteria.

This Court has often warned against reading "general language" in its opinions to resolve issues "not then before the Court." *Illinois* v. *Lidster*, 540 U.S. 419, 424 (2004); *e.g.*, *Olivier* v. *City of Brandon*, 607 U.S. 552, 565 (2026); *Turkiye Halk Bankasi A.S.* v. *United States*, 598 U.S. 264, 278 (2023); *Brown* v. *Davenport*, 596 U.S. 118, 141 (2022). A question of this magnitude—whether the agency may unilaterally revise a statutory scheme without judicial oversight—warrants this Court's plenary consideration. It should not be settled by unexamined inference from passing statements on matters not at issue. And with the Federal Circuit repeatedly declining judicial review, only this Court can supply the reasoned analysis the question has never received.

II. The question presented is exceptionally important, and the need for review has grown in recent years.

1. The reviewability of the PTO's IPR restrictions is exceptionally important. The stakes here are fundamental: whether any court may hold the agency accountable when it exceeds the limits Congress set. The Federal Circuit has placed the PTO's IPR restrictions beyond judicial reach. This gives the agency the extraordinary power to decide for itself how far its own authority extends. The PTO should not wield that power without this Court's review.

These issues also have significant practical consequences for the Nation's patent system and economy. Congress established IPR to address "overpatenting and its diminishment of competition" by "weed[ing] out bad patent claims efficiently." *Thryv*, 590 U.S. at 54. Bad patent claims are a severe economic drain, forcing companies to avoid useful activity for fear of infringing patents that should never have issued—or undertake costly litigation or licensing. 153 Cong. Rec. H10284 (daily ed. Sept. 7, 2007) (statement of Rep. Eshoo) (addressing "baseless claims of infringement . . . sapping billions from economic growth"); 157 Cong. Rec. S1363 (daily ed. Mar. 8, 2011) (statement of Sen. Schumer) (recognizing "substantial burden on U.S. courts and the U.S. economy" from "[l]itigation over invalid patents"). IPR alleviates those burdens, canceling invalid patent claims "more quickly and at less than 10% of the cost of litigation." Br. of Amici Curiae 35 Intellectual Property Law Professors 8 & n.4, *Google*, No. 25-1230. IPR has saved billions of dollars in litigation costs. Josh Landau, *Inter Partes Review: Five Years, Over $2 Billion Saved*, Patent Progress (Sept. 14, 2017).[3] The PTO's unreviewable power to restrict IPR puts all of that at risk.

Given the importance of IPR—and of judicial review of the PTO's administration of IPR—this Court has granted review three times in the last decade to address §314(d)'s scope (in *Cuozzo*, *SAS*, and *Thryv*). Here, the reviewability question is even more fundamental. While *Cuozzo*, *SAS*, and *Thryv* concerned the reviewability of particular PTO rationales, at stake here is the reviewability of an entire class of basic challenges to agency action: whether the PTO's institution criteria are reviewable for compliance with statutory limits.

2. The question presented has recently grown even more important. With the unreviewable power the Federal Circuit has conferred, the PTO has increasingly reshaped IPR—especially since 2025.

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[3] https://perma.cc/7HPG-Z4DF.

The PTO has been inventing—then re-inventing—limits on IPR found nowhere in the AIA. See generally Br. for Unified Patents, LLC as Amicus Curiae 6-12, *Google*, No. 25-1230. The agency unilaterally created the *Fintiv* rule at issue in this case, denying IPR based on proximity to trial in separate litigation involving the patent. *NHK Spring Co.* v. *Intri-Plex Techs., Inc.*, IPR2018-00752, 2018 WL 4373643, at *7 (P.T.A.B. Sept. 12, 2018) (designated precedential May 7, 2019); *Apple Inc.* v. *Fintiv, Inc.*, IPR2020-00019, 2020 WL 2126495, at *2 (P.T.A.B. Mar. 20, 2020) (designated precedential May 5, 2020). The PTO has tacked on other limits—like coercing IPR petitioners to stipulate not to raise arguments in district court. *Sotera Wireless, Inc.* v. *Masimo Corp.*, IPR2020-01019, 2020 WL 7049373, at *7 (P.T.A.B. Dec. 1, 2020) (designated precedential as to Section II.A, Dec. 17, 2020). The PTO has added exceptions—only to reverse course later. Compare Memorandum from Katherine K. Vidal to Members of the Patent Trial and Appeal Board, *Interim Procedure for Discretionary Denials in AIA Post-Grant Proceedings with Parallel District Court Litigation* 4 (June 21, 2022)[4] (creating exception if patent challenge has "compelling" merits), with Memorandum from Scott R. Boalick to Members of the Patent Trial and Appeal Board, *Guidance on USPTO's recission of "Interim Procedure for Discretionary Denials in AIA Post-Grant Proceedings with Parallel District Court Litigation"* at 2-3 (Mar. 24, 2025)[5] ("Boalick Memo") (rescinding that exception).

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[4] https://perma.cc/M4AV-X8YP.

[5] https://perma.cc/YG4X-TWV6.

Since 2025, the agency has escalated from tinkering to overhaul. See generally Br. for Unified Patents, LLC as Amicus Curiae 8-10, *Google*, No. 25-1230. In quick succession, it invented a slew of new extra-statutory restrictions on IPR—including a "settled expectations" limit based on patent age, a limit for patent claims previously challenged elsewhere, and a bar on foreign-government-affiliated petitioners. Memorandum from Coke Morgan Stewart to All PTAB Judges, *Interim Processes for PTAB Workload Management*, at 2 (Mar. 26, 2025);[6] *Tianma Microelectronics Co.* v. *LG Display Co.*, IPR2025-01579, Paper 12, at 3-7 (U.S.P.T.O. Mar. 18, 2026) (designated precedential Mar. 18, 2026). The agency also reversed several facets of its *Fintiv* and *Sotera* rules—then added new ones. Boalick Memo 2-3 (reversing course on whether *Sotera* stipulations are dispositive, whether *Fintiv* applies to International Trade Commission proceedings, and the compelling-merits exception to *Fintiv*); *Motorola Sols., Inc.* v. *Stellar, LLC*, IPR2024-01205, -01206, -01207, -01208, Paper 19, at 3-4 (U.S.P.T.O. Mar. 28, 2025) (expanding *Sotera* stipulation to "system prior art" challenges).

The effect on IPR has been dramatic. The IPR petition grant rate has collapsed—from 68% to 38% in the last two years. May 2026 PTAB Statistics 7; see also Dennis Crouch, *An Era of No: The USPTO's New 0% Institution Rate*, Patently-O (Nov. 12, 2025) (reporting that institution rate fell to 0% at one point in fall 2025).[7] In turn, the IPR filing rate has also plummeted to a historic low (down 85% year over year)—indicating that the PTO's

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[6] https://perma.cc/J353-H33U.

[7] https://perma.cc/FW4H-QVBC.

restrictions have deterred the public from pursuing IPR. May 2026 PTAB Statistics 5 (petitions per month down from 135 to 20 from May 2025 to May 2026); Unified Patents, *Patent Dispute Report: Q1 2026* (Apr. 14, 2026);[8] Theresa Schliep, *PTAB Filings Crashed After Squires And Stewart's Shake-Ups*, Law360 (Aug. 5, 2026) ("The number of [IPR filings] cratered at the end of 2025 after the U.S. Patent and Trademark Office enacted policies that made the petitions a disfavored route for challenging patents . . . .").[9]

Stakeholders from every quarter have sounded the alarm. With the PTO's new limits on IPR, "[t]he IPR system . . . is functionally suspended." Dennis Crouch, *Inter Partes Review in 2026*, Patently-O (May 24, 2026);[10] see also, *e.g.*, Br. for 35 Intellectual Property Law Professors as Amici Curiae 1-2, *Google*, No. 25-1230 (PTO has acted to "effectively abolish the IPR process"); Br. for PTAB Bar Association as Amicus Curiae 5, *Google*, No. 25-1230 ("The IPR process that Congress designed is being systematically dismantled through administrative fiat . . . ."); Br. for Association for Accessible Medicines as Amicus Curiae 17, *Google*, No. 25-1230 (PTO has "effectively eliminated IPRs for generics and biosimilars" (capitalization altered)); Br. for Askeladden L.L.C. as Amicus Curiae 3-15, *Google*, No. 25-1230; Br. for Association for Competitive Technology as Amicus Curiae 8-15, *Google*, No. 25-1230; Br. for US*Made et al. as Amici Curiae 4-27,

[8] https://perma.cc/SX8X-P2YF.

[9] https://perma.cc/NC77-9ZBB.

[10] https://perma.cc/CJE3-AUST.

Google, No. 25-1230; Br. for Unified Patents, LLC as Amicus Curiae 3-17, *Google*, No. 25-1230.

The question presented is thus more pressing now than ever. The PTO has never before revamped IPR institution criteria so extensively—nor construed its own authority so broadly. And the practical effects have been unprecedented. A flood of challenges has arisen: in the past eight months alone, the Federal Circuit turned away over a dozen cases contesting the PTO's institution criteria. *Supra* 6. Those challenges came from stakeholders across industries: automotive, semiconductor, wireless technology, consumer electronics, e-commerce, and education, to name a few. The PTO has disrupted "a significant portion of the American economy," *W. Virginia* v. *Env't Prot. Agency*, 597 U.S. 697, 722 (2022), yet seeks to avoid judicial review of its actions altogether. Whether this state of affairs can persist should be resolved by this Court.

3. The *Fintiv* time-to-trial rule challenged here exemplifies the problems the Federal Circuit's reviewability precedent invites. The PTO unilaterally fabricated this constraint on IPR from whole cloth, closing off the IPR scheme to cases Congress meant it to address.

A time-to-trial limit on IPR appears nowhere in any statute. Congress made a different choice. It specified one timing condition for IPR filed alongside litigation: the petition must be filed within one year after the infringement complaint is served. 35 U.S.C. §315(b). Congress left no room for the agency to impose a second, extra-statutory deadline of its own.

The time-to-trial limit prevents the cancellation of bad patents—the entire point of the congressional scheme. *Thryv*, 590 U.S. at 54. Congress established IPR as an "alternative[] to litigation." H.R. Rep. No. 112–98, pt. 1, at 40, 48 (2011); see 35 U.S.C. §315 (contemplating IPR coexisting with litigation). Yet the time-to-trial rule does the opposite: it closes off IPR and forces parties to litigate instead. Moreover, the rule necessarily operates to shield weak patents from review, because it adds a barrier to institution on top of the requirement of a "reasonable likelihood" of establishing invalidity. 35 U.S.C. §314(a). Strong patents are already protected against IPR by that reasonable-likelihood criterion; all the time-to-trial limit adds is to protect weak ones.

The time-to-trial limit also operates arbitrarily. It rests on trial-date projections that are notoriously unreliable. Andrew T. Dufresne et al., *How Reliable Are Trial Dates Relied on by the PTAB in the Fintiv Analysis?*, 1600 PTAB & Beyond (Oct. 29, 2021) (finding PTO's trial-date predictions were wrong 94% of the time).[11] *Amicus*'s own case currently pending before this Court is a perfect illustration: the PTO denied institution because it predicted that the district court trial would occur before December 2026, but in fact trial is now scheduled for years later. Pet. 9-10, *Tesla*, *supra*.

This agency-devised limit has had sweeping effect. It has accounted for hundreds of IPR petition denials. Matthew Johnson, *Discretionary Decision Statistics Update*,

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[11] https://ptacts.uspto.gov/ptacts/public-informations/petitions/1549571/download-documents?artifactId=-gkf8A2TF7hsdxNi-fHFg76hHBTqxMt3MHqAUjGLGrmBdauZmYmDXAA.

PTAB Litigation Blog (Nov. 4, 2025)[12] (218 denials over 5-month period in 2025 alone); see also Patent Trial and Appeal Board, *Parallel Litigation Study* 12 (June 2022)[13] (by early 2022, *Fintiv* was raised in over 50% of IPR cases). And it has reshaped not just IPR practice but also patent litigation. Parties now must craft litigation strategy around the PTO's time-to-trial rule (and the agency's other constantly changing extra-statutory criteria). And with its *Sotera* stipulation framework (allowing IPR petitioners to escape the time-to-trial limit by stipulating not to raise certain arguments in litigation), the agency now exerts control over what rights parties give up in court. The PTO should not wield such power—contrary to statute yet untouchable by any court—without this Court's review.

III. The Court now has an ideal—and pressing—opportunity for review.

1. The Court now has before it four petitions addressing the reviewability of statutory challenges to PTO-devised IPR criteria: this case, *Google*, *Kahoot!*, and *Tesla*. These cases give the Court a prime opportunity to resolve this important issue.

These cases raise the reviewability question in every relevant procedural posture. The only ways a party can seek judicial review of the PTO's criteria for denying institution are (a) directly from IPR proceedings (via mandamus, because the Federal Circuit forbids direct appeal, *Mylan*, 989 F.3d at 1379) or (b) in a separate APA

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[12] https://perma.cc/7DVQ-AXVM.

[13] https://perma.cc/74YK-AS8Y.

suit. *Google*, *Kahoot!*, and *Tesla* arise in the first posture; this case arises in the second.

These cases also present the two most significant PTO-devised limits on IPR: the *Fintiv* rule (in this case and *Tesla*) and the "settled expectations" rule (in *Google* and *Kahoot!*). Each of these rules has driven hundreds of IPR denials. See Johnson, *supra* (*Fintiv*); Br. for US*Made et al. as Amici Curiae 2 n.2, *Google*, No. 25-1230 (citing list of cases at https://perma.cc/87GY-NLXK) (settled expectations).

These cases thus allow the Court to resolve the reviewability question with the full picture in view—both procedural postures and both of the PTO's most consequential institution criteria. And with these cases, the Court can provide a complete answer to this important question by resolving whether judicial review is available in each procedural avenue.

2. Such an ideal opportunity for this Court's review is unlikely to recur. The current confluence of vehicles may not exist again, as fewer challenges will arise in the future. IPR filings have plummeted. *Supra* 19. And the Federal Circuit—the only circuit with authority over these challenges—has denied judicial review. Parties have little incentive to bring new cases that are futile under binding precedent.

That is especially true of vehicles like this case: an APA suit independent of any particular IPR proceeding. Such suits (which must start in district court) are even more costly and burdensome to bring than a mandamus challenge directly in the Federal Circuit. Another suit like this might not reach this Court again. Yet this is a vital context for answering the question presented—where no mandamus standard is involved and where applying §314(d) is especially unjustified because no institution determination is even present.

Further impeding this Court from reviewing the question in the future, the PTO is now doing even more to shield its institution criteria from judicial scrutiny. The PTO has begun denying institution in one-line summary notices that disclose no rationale at all. Memorandum from John A. Squires to All PTAB Judges, *Director Institution of AIA Trial Proceedings* (Oct. 17, 2025).[14] A party cannot challenge—and a court cannot review—institution criteria it cannot identify.

And while vehicles will grow more rare, the issue itself will only grow more important. The PTO, equipped with total, unreviewable power to reshape IPR availability, will continue to do just that. With every change in PTO leadership, the entire patent system must brace itself for new upheaval in IPR. IPR today is already unrecognizable compared to just two years ago. *Supra* 16-20. As the PTO's overhaul of IPR intensifies and the window for review shrinks, this Court should not wait to intervene.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[14] https://perma.cc/KX8X-39NZ.

Respectfully submitted.

ANGELA M. OLIVER
HAYNES AND BOONE, LLP
888 16th Street, N.W., Ste. 300
Washington, DC 20006

ASHRAF FAWZY
PAUL MARGULIES
TESLA, INC.
800 Connecticut Avenue NW
5th Floor
Washington, DC 20006

DEBRA J. MCCOMAS
MICHAEL F. QIAN
Counsel of Record
HAYNES AND BOONE, LLP
2801 N. Harwood Street, Ste. 2300
Dallas, TX 75201
(214) 651-5041
michael.qian@haynesboone.com

Counsel for Amicus Curiae

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