No. 26-73

IN THE

Supreme Court of the United States

INTEL CORPORATION, *et al.*,

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 OF ASKELADDEN L.L.C. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS INTEL CORPORATION AND GOOGLE LLC

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August 17, 2026

395545

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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.

Askeladden is a wholly owned subsidiary of The Clearing House Payments Company L.L.C. The Clearing House is a banking association and payments company that is owned by the world's largest commercial banks and dates back to 1853. The Clearing House owns and operates core payments system infrastructure in the United States, clearing and settling more than $2 trillion in U.S. dollar payments each business day. As the country's oldest banking trade association, The Clearing House also provides informed advocacy and thought leadership on critical payments-related issues.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

When Congress enacted the America Invents Act (AIA), it established a carefully calibrated framework to clear the thicket of low-quality patents burdening the American economy. Recognizing the profound public interest in weeding out invalid patents that are

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.

weaponized in litigation, Congress guaranteed accused infringers a specific, one-year window after being sued to petition for *inter partes* review (IPR).

The United States Patent and Trademark Office (PTO) decided it preferred a different framework. Through administrative fiat, the PTO adopted the *Fintiv* rule—an extra-statutory policy that denies meritorious IPR petitions based not on the statute, but on the highly speculative trial schedules of parallel district court litigation. In doing so, the PTO effectively erased the statutory one-year window set by Congress.

Worse, the Federal Circuit held that Article III courts are entirely powerless to review this agency overreach. The court below interpreted 35 U.S.C. § 314(d)—a narrow provision barring appeals of individual, case-specific institution decisions—as an impenetrable shield for widespread agency lawlessness. By conflating an unreviewable *application* of a statutory threshold with the *adoption* of generally applicable, extra-statutory policymaking, the Federal Circuit essentially declared that the PTO can rewrite its enabling legislation with absolute impunity.

This Court should grant certiorari. The decision below represents a dangerous abdication of the judicial role that threatens far more than the patent system.

ARGUMENT

I. The Federal Circuit Has Placed the PTO's Displacement of Congress's Policy Beyond the Reach of Judicial Review.

Petitioners sought prospective relief from a generally applicable PTO policy alleged to restrict access to IPR in violation of the AIA and the APA. They did not ask a court to reverse any individual institution decision or disturb any completed IPR. App. 69a, 72a. Yet the Federal Circuit held their substantive claims barred by § 314(d), leaving no judicial forum in which the legality of the PTO's *Fintiv* rule could be tested. App. 69a–73a. The statutory conflict and the consequences of that complete foreclosure demonstrate the need for this Court's review.

A. The PTO's *Fintiv* Rule Displaces Congress's Deliberate Judgment About the Timing of IPR Petitions.

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 Inst., Inc. v. Iancu*, 584 U.S. 357, 363 (2018).

In the AIA, Congress spoke with unmistakable clarity regarding the timeframe under which patent challengers would be permitted to file IPR petitions. Section 315(b) provides that an IPR "may not be instituted" if the petition is filed more than one year after the petitioner, real party in interest, or privy is served with a complaint alleging infringement. 35 U.S.C. § 315(b). Congress therefore expressly anticipated that accused infringers would seek IPR while litigation involving the same patent was already pending.

The legislative history confirms that the one-year time limit for litigants to file IPR petitions was the result of deliberate negotiations. The Senate bill initially proposed a six-month deadline, but Congress ultimately extended the period to one year. Senator Kyl explained that technology companies are often sued on numerous patents containing many uncertain claims, making it difficult during the first months of litigation to determine which claims matter, how they allegedly read on the accused products, and what prior art is relevant. 157 Cong. Rec. S5429 (daily ed. Sept. 8, 2011). He emphasized that, "[i]n light of the present bill's enhanced estoppels," defendants need "a reasonable opportunity to identify and understand the patent claims that are relevant to the litigation." *Id.*

That judgment has particular force in the financial services sector. A challenged payment function may implicate technology furnished by multiple software developers, processors, equipment vendors, network operators, and financial institutions. Determining which component performs the accused function, which entity possesses the relevant technical information, and which prior art bears on the asserted claims can require substantial investigation and coordination. Congress's one-year period gives accused infringers time to perform that work before accepting the substantial consequences that may follow from an IPR proceeding.

For years, the PTO respected Congress's deliberate judgment that an accused infringer could take up to one year to investigate the claims and prepare a petition without being barred merely because litigation was underway. The agency correctly acknowledged "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). The Board similarly explained that the statute "does not set forth any basis for treating petitions differently depending on which day within that year they are filed." *Amazon.com, Inc. v. CustomPlay, LLC*, No. IPR2018-01498, 2019 WL 1224735, at 3 (P.T.A.B. Mar. 8, 2019).

Indeed, the agency historically affirmed 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) (emphasis added).

The PTO's *Fintiv* rule then took back what Congress gave. Under it, the PTO treats a defendant's decision to use the very time Congress granted as a discretionary reason to deny review without any statutory basis for doing so.

Worse yet, the PTO's extralegal restriction on IPR access directly undermines the fundamental public policy that the AIA was designed to serve. Congress enacted the AIA precisely to combat the stifling effect of low-quality patents 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 as each one reared its head in litigation. The legislative history demonstrates that Congress was particularly concerned with the harms caused by poor-quality patents in the financial services industry. 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 from IPR as soon as they are asserted in fast-moving litigation, the PTO effectively grants immunity to the very patents Congress intended to subject to rigorous administrative review.

The effects of a questionable financial-technology patent rarely end with the first lawsuit. Payment systems depend on common technical functions and interoperable processes used by many institutions and service providers. A patent directed to one such function may therefore be asserted serially against banks, processors, networks, and technology vendors, even though the first defendant's business reasons may favor settlement over a full validity contest. Expert review of patentability can remove an invalid claim from the system before it becomes a recurring charge on an entire industry. The *Fintiv* rule makes that public benefit depend on the projected calendar of the first district-court action in which the patent happens to be asserted.

B. The PTO's Substitution of Its Own Policy Has Produced Predictable Administrative Dysfunction.

By restricting access to IPR on grounds Congress did not specify, the PTO frustrates the core public function of the patent system. This Court has long recognized that patent validity is a matter of public consequence and that the law favors "authoritative testing of patent validity" and the "removal of restrictions on those who would challenge the validity of patents." *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 343–45 (1971). Narrowing IPR beyond the limits Congress enacted impairs the public's ability to clear invalid patents from the system.

Instead of honoring Congress's chosen one-year period, the PTO replaced it with an administratively made policy under which a defendant can lose access to IPR simply because a district court has set an aggressive schedule with a placeholder trial date. That substitution has had exactly the consequences one would expect: wasteful parallel proceedings, arbitrary outcomes, and the preservation of patents that Congress meant to expose to rigorous administrative scrutiny.

The VLSI litigation is the clearest example. When VLSI sued Intel for infringement in the Western District of Texas in April 2019, Intel filed timely IPR petitions as the AIA contemplates. *See VLSI Tech. LLC v. Patent Quality Assurance, LLC*, 2025 WL 494604, at *1 (E.D. Va. Feb. 13, 2025) (discussing case history). But the PTAB denied those petitions based solely on the district court's aggressive scheduling order, predicting the Texas trial would occur first. *Id.* Stripped of the administrative safety valve Congress guaranteed, Intel proceeded to trial. A jury returned a $2.175 billion verdict: $1.5 billion on the ’759 patent and $675 million on the ’373 patent. *See id.* at *2. The aftermath confirmed the cost of the PTO’s choice. The PTAB later invalidated the ’373 patent in a subsequent IPR proceeding. *Id.* at *2–3. And the Federal Circuit reversed the infringement judgment on the ’759 patent and vacated the damages award attributable to the now-invalidated ’373 patent. *VLSI Tech. LLC v. Intel Corp.*, 87 F.4th 1332, 1348–49 (Fed. Cir. 2023).

That sequence was perversely wasteful. Had the PTO followed the statute Congress wrote, Intel’s timely petitions would have received merits review in the first instance, and the system would have avoided years of duplicative litigation, a multi-billion-dollar verdict, a later administrative invalidation, and a substantial appellate unwind.

And the dysfunction did not stop there. Once the *Fintiv* rule blocked Intel’s timely petitions, it created a ready-made arbitrage opportunity for third parties. The PTAB had already signaled that Intel’s challenge could not proceed only because of trial timing, not because of any defect in the merits. That left the door open for outsiders, unconstrained by Intel’s litigation posture, to recycle the same substantive invalidity theories for leverage.

That is exactly what happened. After the March 2021 verdict against Intel, Patent Quality Assurance, LLC was formed in June 2021 and filed an IPR petition challenging the ’373 patent the next month. *VLSI Tech.*, 2025 WL 494604, at *2. PQA’s petition was an “almost verbatim copy” of Intel’s earlier petition challenging the same patent. *Id*. In collateral litigation, VLSI has alleged that PQA then offered to dismiss its petition in exchange for large payments and threatened additional PTAB filings unless VLSI paid it off. *Id.* at *2–3.

Those allegations prompted extraordinary concern. In response to inquiries from two United States Senators, the Director of the PTO initiated review of the PQA proceeding. *Id*. The Director ultimately found that PQA had "abused the IPR process" by filing the petition and threatening to file another in an attempt to "extract payment from VLSI." *Id.* In other words, the *Fintiv* rule did not merely force Intel, the courts, and the PTO itself into inefficient litigation; it helped create the conditions for a secondary market in PTAB leverage, where denied merits challenges could be repackaged by opportunists and wielded as settlement weapons. *Id.*

That consequence was an entirely predictable result of the PTO's attempt to usurp Congress's role in setting policy. The PTO's expertise lies in evaluating patentability under the Patent Act. It does not possess special competence in macro-level litigation management, docket forecasting, or the economic regulation of parallel patent disputes. Nor does it have Congress's mandate to address those issues. The Supreme Court has now made clear that agencies may not claim authority any time a statute leaves room for judgment; courts must determine the best reading of the law, and agencies must remain within the authority Congress actually conferred. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 400–401 (2024).

The resulting pressure on defendants today is no less troubling. To avoid discretionary denial, petitioners are often expected to stipulate away invalidity defenses in district court as the price of obtaining IPR. The PTO's June 2022 guidance expressly tied relief from *Fintiv*-based denial to stipulations narrowing the petitioner's district-court defenses. But Congress already wrote the estoppel rule. Section 315(e) specifies when IPR estoppel attaches and what it covers, and it does so only after a final written decision. The agency has no authority to impose broader, earlier, extra-statutory surrender terms as the toll for entry into an administrative forum.

Those stipulations are particularly consequential in the financial-services sector. The bank named as defendant may not own or control every component of the accused system, and the relevant prior art or technical information may reside with a processor, software vendor, or other third party. Before discovery and technical investigation are complete, the bank may be asked to surrender defenses based on art it has not yet located and functionality that another entity designed. The stipulation can also affect contractual arrangements concerning indemnification, defense control, and cooperation among firms whose technology is implicated. Congress's decision to attach estoppel only after a final written decision avoided forcing those irreversible choices at the threshold of the proceeding.

The consequences of the *Fintiv* rule illustrate why judicial review remains essential. Congress decided that the public interest in testing patent validity warranted a robust IPR mechanism, bounded by specific statutory limits, including the one-year period in § 315(b). The PTO replaced that framework with one of its own making. The consequences have been predictable: invalid patents left in force, enormous litigation waste, leverage for opportunistic third parties, and mounting pressure on defendants to abandon rights Congress preserved for them after vigorous public debate. The Federal Circuit should not have placed that regime beyond judicial review.

II. The Federal Circuit Extended *Thryv* Far Beyond the Holding and Rationale of the Majority Opinion.

The Federal Circuit's refusal to review the PTO's categorical, extra-statutory policymaking cannot be justified by *Thryv, Inc. v. Click-To-Call Techs., LP*, 590 U.S. 45 (2020). In *Thryv*, the patent owner sought to vacate a completed IPR and undo a final written decision canceling patent claims by arguing that the agency should never have instituted that particular proceeding because the petition was untimely under § 315(b). *See id.* at 49–52.

This case is fundamentally different. Petitioners do not seek to unwind any instituted IPR, vacate any final written decision, or resurrect any claims the Board has already found unpatentable. Instead, they seek prospective APA review of a generally applicable PTO rule that governs future institution decisions and allegedly conflicts with the AIA.

That distinction goes directly to the rationale the *Thryv* majority gave for barring review. The Court explained that allowing the appeal there would "unwind" completed agency proceedings, squander the Board's work in adjudicating patentability, and leave in force patent claims the Board had already found unpatentable. *Thryv*, 590 U.S. at 54–56.

None of those concerns is present here. This suit does not threaten to erase any completed patentability determination, because no merits decision is under review. It does not threaten to waste agency adjudicatory resources, because petitioners do not challenge the Board's substantive resolution of any patent claim. And it does not threaten to revive canceled claims, because petitioners seek only to prevent the PTO from applying an allegedly unlawful rule in future cases. *See* Pet. for Cert. 19–21, 26–34.

If anything, prospective review here would advance the same patent-quality objective on which *Thryv* relied. The *Thryv* majority stressed that Congress created IPR to help the PTO "weed out bad patent claims efficiently." 590 U.S. at 54. The *Fintiv* rule does the opposite: it prevents the agency from reaching patentability at all, even where a timely petition presents substantial grounds of unpatentability, based on the anticipated progress of parallel litigation and other nonstatutory considerations.

The practical difference is equally important. In *Thryv*, the patent owner had a final written decision in hand and sought to use an institution objection to undo the result of a completed IPR. 590 U.S. at 49–52. In the *Fintiv* setting, by contrast, denial of institution means there is no IPR, no final written decision, and no later appeal in which to test the legality of the rule that caused the denial.

So barring review here does not merely channel review to a later stage; it eliminates review altogether. *Cf. Thryv*, 590 U.S. at 67 (Gorsuch, J., dissenting) (noting that judicial review was not "eliminated as much as it is channeled toward the Board's final decision"). Congress may choose to insulate case-specific institution determinations from appellate second-guessing in order to protect completed agency proceedings from disruption. It does not follow that Congress silently placed beyond judicial review a nationwide PTO rule that determines which timely petitions may ever reach the merits.

SAS confirms this point. Although the statutory claim there rested in part on § 318(a), this Court directly reviewed and invalidated the PTO's generally applicable partial-institution rule even though that rule dictated which challenged claims would be admitted to IPR. The Court emphasized that § 314(d) does not permit the agency to act outside its statutory limits and that APA review remains available when the PTO exceeds those limits. *SAS Inst., Inc. v. Iancu*, 584 U.S. 357, 370–371 (2018).

The Federal Circuit cannot reconcile its categorical rule of nonreviewability with *SAS*. Petitioners do not challenge a particular determination that Congress made "final and nonappealable." 35 U.S.C. § 314(d). They challenge a generally applicable agency rule alleged to displace Congress's own policy judgment and to operate prospectively across future institution decisions. *See* Pet. for Cert. 14–18, 26–34.

The Federal Circuit thus transformed *Thryv* from a decision protecting completed IPR adjudications against collateral attack into a rule of unreviewable agency policymaking. *Thryv* does not require that result, and its reasoning refutes it. This Court should grant review to make clear that § 314(d) does not give the PTO immunity to adopt a nationwide institution rule that no court may review.

III. Section 314(a) Does Not Grant the PTO Unbounded Discretion to Invent Extra-Statutory Policy Bars.

The Federal Circuit converted five words of dicta from *Cuozzo*—"no mandate to institute review"—into a one-way ratchet: the phrase purportedly expands the Director's power to deny institution under § 314(a), while § 314(d) purportedly prevents any court from enforcing a boundary on that power. App. 59a–60a (quoting *Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261, 273 (2016)).

Cuozzo decided nothing of the kind. There, the PTO had *granted* institution, and the patent owner sought to undo the completed proceeding by arguing that the petition had not pleaded its grounds with sufficient particularity. *Id.* at 269–272. The Court was not asked which non-merits considerations may justify *denying* a timely petition, much less whether the Director may convert those considerations into a nationwide policy immune from APA review. Its "no mandate" observation arose in explaining why § 314(d) would be largely superfluous if confined to interlocutory appeals; it was not a holding that the Director may deny institution for any reason whatsoever. *Id.* at 273.

The distinction is simple. The proposition that satisfying one statutory prerequisite does not compel institution is unremarkable: other statutory restrictions may still apply. The proposition that the Director may invent unlimited additional restrictions is extraordinary. *Cuozzo* stated the first; the Federal Circuit treated it as deciding the second. App. 59a–60a.

The AIA itself explains why § 314(a)'s threshold is necessary but not always sufficient. Other provisions impose a one-year time bar, prohibit institution following certain civil actions, confer express discretion over joinder, and authorize denial when substantially the same art or arguments were previously presented to the PTO. 35 U.S.C. §§ 315(a)–(c), 325(d). Those provisions do not support an implied power to add new policy barriers; they show that Congress itself specified when a petition satisfying the merits threshold may nevertheless be denied.

The Federal Circuit's contrary rule has no limiting principle. If the absence of a mandate supplies all the authority the PTO needs, the Director could deny every petition filed by a financial institution, every petition challenging a patent more than ten years old, or every petition arising from a disfavored judicial district. None would violate an affirmative command to institute, each would govern institution, and all would therefore be unreviewable under the decision below. On that reasoning, the Director could expand the grounds for denial without any judicially enforceable limit.

Loper Bright forecloses that result. Statutory silence is not an implicit delegation of policymaking authority, and courts must independently identify both the existence and the boundaries of any discretion Congress conferred. *Loper Bright*, 603 U.S. at 394–396, 404, 412. A court cannot presume boundless authority from silence and then invoke nonreviewability to prevent anyone from testing that presumption.

The statutory scheme draws a straightforward line. The Director decides whether to institute an individual IPR; courts decide whether the standards governing that decision are authorized by law. The decision below erases that line by extending § 314(d) from individual institution determinations to the legal boundaries of the Director's authority. This Court should grant review and clarify the reach of § 314(d).

IV. 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. By stretching a narrow, case-specific review bar into a broad "unreviewability principle" covering agency rulemaking, the Federal Circuit has created a dangerous, highly attractive blueprint for federal agencies to evade Article III scrutiny.

Congress frequently includes non-appealability clauses in regulatory statutes to prevent courts from being flooded with appeals over highly specific, individualized, or preliminary agency determinations. As Petitioners note, these provisions exist across the administrative state, covering everything from immigration enforcement (*McNary v Haitian Refugee Ctr., Inc.*, 498 U.S. 479 (1991); *Dept. of Homeland Sec. v. Regents of Univ. of Cal.*, 591 U.S. 1 (2020)) to Medicare benefit calculations (*Bowen v Georgetown Univ. Hosp.*, 488 U.S. 204 (1988)). But this Court has consistently held that shielding a *specific determination* does not shield the *categorical rules and policies* the agency adopts to govern those determinations.

The decision below erases that distinction for substantive challenges to PTO institution standards. Under its reasoning, an agency possessing final authority over a gatekeeping decision may claim immunity for a categorical policy governing that authority. The policy could have the practical effect of revising the agency's enabling statute for every matter within its reach, yet no court could determine whether Congress authorized it.

As an organization deeply rooted in the financial services sector and the broader economy, amicus is well-positioned to highlight how other federal regulators could weaponize this exact structural loophole to destabilize commercial markets.

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 a specific unfair labor practice charge. *See NLRB v. United Food & Com. Workers Union Loc. 23, AFL-CIO*, 484 U.S. 112, 126 (1987).

If the Federal Circuit's "unreviewability principle" is the law of the land, a rogue General Counsel could fundamentally reshape American labor law by administrative fiat. Rather than evaluating cases on their individual, fact-specific merits, the General Counsel could issue an internal directive declaring that the agency will categorically refuse to issue complaints protecting certain classes of workers, or conversely, that it will automatically issue complaints against certain targeted industries.

Such a directive would effectively rewrite the NLRA, overriding the statutory definitions Congress intended the Board to apply. Yet, under the Federal Circuit's reasoning, because the *individual decision* to issue a complaint is statutorily unreviewable, any *categorical rule* dictating how those decisions are made is equally immune from judicial oversight. Neither employers nor workers could ever secure Article III review to strike down the unlawful policy. The agency could bypass congressional authorization entirely, secure in the knowledge that the courthouse doors are locked from the inside.

The hypothetical illustrates the importance of preserving the distinction the Federal Circuit rejected. Congress may entrust an agency with final discretion over individual gatekeeping decisions without authorizing the agency to determine, conclusively and for itself, the legal boundaries of that discretion. The presumption of reviewability safeguards that distinction by permitting courts to examine whether a generally applicable policy rests on authority Congress conferred.

The same structural concern matters to financial institutions and other participants in heavily regulated commercial markets. Businesses can plan around statutory standards and agency discretion exercised within known legal boundaries. A different kind of uncertainty arises when an agency may change the generally applicable standards governing access to a statutory process while judicial review of those standards is unavailable. The resulting risk can affect investment, contracting, compliance, and litigation decisions far beyond the parties to any single agency proceeding.

Loper Bright confirms the judiciary's responsibility under the APA. A reviewing court must independently determine whether Congress delegated discretionary authority, "fix[] the boundaries" of that authority, and ensure that the agency engaged in reasoned decisionmaking within those boundaries. *Loper Bright*, 603 U.S. at 394–396, 404, 412. The decision below prevents courts from performing that task whenever the challenged policy governs an institution decision, even though the challenge is directed to the agency's legal authority rather than the disposition of any particular petition.

To protect the structural separation of powers, preserve the presumption of reviewability, 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.

Dated: August 17, 2026

Respectfully submitted,

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