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

BRIEF OF *AMICI CURIAE* SAMSUNG ELECTRONICS CO., LTD.; ACUSHNET CO.; SAS INSTITUTE INC.; SAP AMERICA, INC.; ECHOSTAR CORP.; TSMC LTD.; AND MICROSOFT CORP. IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI*[1]

Amicus Samsung Electronics Co., Ltd. is one of the world's leading manufacturers of consumer electronic products and semiconductors, with its continuous investments in research and innovation regularly making it the leading assignee of U.S. patents each year. Over nearly five decades, Samsung and its subsidiaries have invested more than $100 billion in U.S. manufacturing and operations, and it is one of the most frequent targets of U.S. patent litigation.

Amicus Acushnet Co. is a major American global business based in Fairhaven, Massachusetts, that makes and sells golf gear under brand names including Titleist and FootJoy, and is the largest worldwide patent holder in sporting goods over the last decade.

Amicus SAS Institute Inc. is a global software company headquartered in Cary, North Carolina, with offices and operations in more than 50 countries worldwide. SAS provides advanced analytics, artificial intelligence, and data management solutions. SAS invests heavily in research and development and owns hundreds of patents covering its technological innovations.

Amicus SAP America, Inc. is a leading provider of enterprise software, cloud technologies, and business applications that help organizations manage core

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici*, their members, or their counsel, made any monetary contribution intended to fund its preparation or submission. Counsel for all parties were timely notified under Rule 37.2 of *amici*'s intent to file this brief.

business processes across finance, supply chain, procurement, sales, human resources, data management, analytics, and related functions. SAP and its affiliates hold thousands of patents covering its innovations.

Amicus EchoStar Corp. is a premier global connectivity company headquartered in Englewood, Colorado, providing satellite communications, wireless telecommunications, and video entertainment services. EchoStar is the parent company of DISH Network, Boost Mobile, Sling TV, Hughes Network Systems, and HughesNet. With over 40 years of innovation, EchoStar's subsidiaries own an extensive portfolio of patents covering technological advancements in satellite systems, broadband networking, wireless communications, and digital video technology.

Amicus Taiwan Semiconductor Manufacturing Co. Ltd. is the world's largest dedicated chipmaker and the leading supplier of artificial intelligence chips to U.S. technology giants. It is investing an unprecedented $265 billion in the U.S. to establish an advanced semiconductor manufacturing ecosystem in Arizona. TSMC's tens of billions invested in research and development has made it one of the largest patent holders, with 80,000+ granted patents and holding second place in newly granted U.S. patents for the last two years.

Amicus Microsoft Corp. is a multinational corporation that creates platforms and tools to deliver innovative solutions that meet the evolving needs of its customers. Microsoft is committed to making artificial intelligence available broadly and doing so responsibly, with a mission to empower every person and every organization on the planet to achieve more.

Microsoft and its affiliates hold tens of thousands of patents globally.

Amici have a strong interest. *Amici* are frequent targets of infringement suits based on improperly issued patents and have made routine use of the post-issuance proceedings available under the America Invents Act ("AIA"). If the Federal Circuit's decision were to stand, it would allow the Director of the U.S. Patent & Trademark Office ("USPTO") to unilaterally create any number of rules limiting access to *inter partes* review ("IPR")[2] for *amici* and others similarly situated, all without any means of judicial oversight. That is not a hypothetical result; it is already happening. And it is inconsistent with this Court's precedent allowing for judicial review of administrative action, as well as the language of the AIA itself.

SUMMARY OF ARGUMENT

This Court has repeatedly explained that statutes precluding judicial review of agency action must be construed narrowly. The Administrative Procedure Act ("APA") applies a strong presumption of reviewability of agency action as a check against administrative overreach, allowing the judiciary to properly police agency conduct. As the Petition explains, the Federal Circuit has flouted this well-established law. Rather than applying the presumption against prohibiting judicial review, the Federal Circuit stretched 35 U.S.C. § 314(d)'s judicial-review bar for *individual*

[2] Although this amicus brief, like the Petition, focuses on IPR, many of the statutory arguments raised herein apply to the AIA's post-grant review ("PGR") proceedings.

IPR institution determinations so that it also forecloses judicial review of *any* generally applied USPTO rule or standard bearing even tangentially on institution.

Amici write in support of the Petition to explain how the Federal Circuit's § 314(d) determination was premised on its misinterpretation of the related provision § 314(a). Specifically, the Federal Circuit held that the Director possesses absolute discretion under § 314(a), and thus any "guidance in the form of instructions . . . about how to make the institution determinations," App. 70a, must be unreviewable under § 314(d). But § 314(a) does not grant such unlimited discretion, and the court's subsequent overbroad view of § 314(d) has already had consequences far beyond the *Fintiv* rule at issue in the Petition. The result is near complete nullification of the IPR provisions of the AIA. The Petition provides an ideal vehicle for this Court to correct the Federal Circuit's error, and in doing so to restore an appropriate balance under the APA—allowing for judicial review of the Director's administrative overreach.

Section 314(a) sets the threshold that a petitioner for *inter partes* review must meet, providing that the USPTO Director "may not authorize" such a review "unless" he determines "there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged." § 314(a). The remainder of Section 314 provides timing and notice requirements with which the Director must comply, and ends with a statement that the Director's written notice of institution is "final and nonappealable." § 314(d). In reaching its decision below, the Federal

Circuit considered these provisions and interpreted § 314(a) as including an unbounded grant of "discretionary denial" authority. App. 71a-72a; *see also, e.g.*, *St. Regis Mohawk Tribe v. Mylan Pharms., Inc.*, 896 F.3d 1322, 1327 (Fed. Cir. 2018) ("If the Director decides not to institute, for whatever reason, there is no review."). But, although § 314(a) includes "no mandate to institute review," *Cuozzo Speed Technologies, LLC v. Lee*, 579 U.S. 261, 273 (2016), the AIA does not describe, envision, or otherwise authorize a system in which the Director retains unlimited institution-related discretion.

When the Federal Circuit's overbroad interpretation of § 314(a) is coupled with its application of a general "unreviewability principle" of any and all USPTO conduct "related to" institution under § 314(d), App. 69a-73a, the result is unsurprising. The Director (and Acting Director before him) has usurped the limited, prescribed authority granted by Congress and has made sweeping changes to the statutory IPR process, unilaterally driving nationwide patent policy by introducing all manner of new restrictions on access to IPR. Even beyond *Fintiv*, the Director has recently decreed numerous new and incoherent rules, which collectively have throttled IPR access to a trickle. Every one of these newly minted "discretionary" rules conflict with other laws, treaty obligations, or this Court's precedent. And they each reflect policy-based limitations on IPR that are the province of Congress, and which Congress could have written into the statute—but chose not to. Yet under the Federal Circuit's decision, *none* of the Director's new diktats is subject to review, under the APA or otherwise. The result is an unaccountable federal agency choking off access to a vital administrative process that Congress created to challenge invalid patents.

This case meets this Court's rationale for certiorari review. The Federal Circuit has decided an important question of statutory interpretation in a way that conflicts with this Court's longstanding guidance, *see* Sup. Ct. R. 10(c), enabling unprecedented regulatory capture of the USPTO. Moreover, the questions the Petition raises are of exceptional importance because many agencies' governing statutes contain a limited grant of discretion similar to § 314(a)'s "may not . . . unless" language. The decision below has established a de facto rule that such language confers unlimited discretion on an agency to deny doing the very thing that Congress intended for the agency to do. Absent this Court's review, the decision below will have substantial adverse consequences for *amici* and other frequent targets of infringement suits, who have had their statutory right to meaningfully petition for IPR effectively stripped away.

The Court should grant certiorari and reverse.

ARGUMENT

I. THE FEDERAL CIRCUIT'S MISINTERPRETATION OF 35 U.S.C. § 314(A) AS SUPPOSEDLY CONFERRING UNLIMITED DISCRETION IS UNSUPPORTED BY THE TEXT

As the Petition explains, the Federal Circuit interpreted 35 U.S.C. § 314(d) as creating a broad "unreviewability principle" that bars judicial review not only of an individual institution decision but of any

USPTO action, standard, or rule bearing on institution. App. 71a-72a. The court derived this "unreviewability principle" from its interpretation of § 314(a); because the Director has unlimited discretion under that subsection, the court reasoned, any exercise of that discretion—including the issuance of instructions guiding the use of that discretion—must be unreviewable under § 314(d). App. 59a-61a; App. 70a-73a. Accordingly, the Federal Circuit's decision below precludes any judicial review of the USPTO's conduct, providing that conduct is "related to" institution. App. 70a-71a.

The Federal Circuit's interpretation of § 314(a) is unfounded, as a straightforward review of the statutory text reveals. That section does not include the word "discretion." Instead, section 314(a) provides the threshold that a petitioner must meet before the Director may "authorize" a petition for IPR: showing at least a "reasonable likelihood" that at least one challenged claim is unpatentable. If the petitioner meets this institution threshold under § 314(a), the Director then must, within three months after receiving a preliminary response (§ 314(b)), issue a written decision on that threshold determination (§ 314(c)). That written threshold determination is the only portion of this enumerated process that is "final and nonappealable," (§ 314(d)). That is all Section 314 provides: a prescribed floor for IPR petitions, below which the Director does not have discretion to institute; timing provisions, which the Director does not have discretion to ignore; a notice requirement, which the Director does not have discretion to violate; and a confirmation that the Director's written notice of institution will not be subject to judicial review.

This Court has clarified that § 314(a) includes "no mandate to institute review," even if a petitioner meets the minimum statutory threshold. *Cuozzo*, 579 U.S. at 273. But nothing in this Court's precedent or the AIA itself supports an interpretation of the statute whereby the Director retains boundless institution-related discretion. *See, e.g.*, *SAS Inst., Inc. v. Iancu*, 584 U.S. 357, 371-72 (2018) (Section 314(d) does not foreclose judicial review where the USPTO exceeds its statutory authority). Indeed, the AIA enumerates specific circumstances in which the Director *must* deny a petition for IPR, regardless of whether it satisfies § 314(a)'s requirements. For example, the Director cannot institute IPR if the petitioner filed its petition more than one year after being sued in district court. 35 U.S.C. § 315(b). And the Director cannot institute IPR on any ground the petitioner raised, or reasonably could have raised, in a prior IPR that resulted in a final decision. *Id.* § 315(e)(1).

In addition to these non-discretionary circumstances, the AIA lists specific limited situations in which the Director *may* exercise his discretion. The Director is entitled to allow joinder "in his [] discretion," *id.* § 315(c), and "may take into account whether, and reject the petition or request because, the same or substantially the same prior art or arguments previously were presented to the Office," *id.* § 325(d). And, because Congress expected the new procedures to be popular and was concerned the Office might initially be overwhelmed, the Director was authorized to reject petitions if their number exceeded the number of requests for *inter partes* reexamination in its final year of availability. Public Law 112-29, § 6(c)(2)(B). This statutory grant of discretion expired in 2016. *Id.*

Taken together, the full text of these provisions demonstrates that § 314(a) was intended to simply provide a necessary, but not always sufficient, condition for institution. Contrary to the Federal Circuit's interpretation, Congress did not intend that provision to grant the Director sweeping, unlimited discretion over conduct that is in any way "related to" institution. App. 71a. Indeed, Congress indicated the opposite by authorizing discretion only under specific, enumerated circumstances.

To be sure, § 314(d) provides that the Director's determination "whether to institute an inter partes review" is "final and nonappealable." But it does not follow that § 314(a)'s authorization to institute review if certain requirements are met grants the Director unbounded discretion to deny institution, with no avenue for judicial review. To the contrary: the USPTO "bears a 'heavy burden' in attempting to show that Congress 'prohibit[ed] all judicial review' of the agency's compliance with [the] legislative mandate" to operate the IPR process in the manner the AIA sets out. *Mach Mining, LLC v. E.E.O.C.*, 575 U.S. 480, 486 (2015). Properly read, § 314(a) and § 314(d) together only create unreviewable discretion over each individual "determin[ation] [of whether] the information presented in the petition … shows that there is a reasonable likelihood' of success." *Cuozzo*, 579 U.S. at 275. These provisions do not grant the Director unfettered discretion to promulgate across-the-board rules that eviscerate the statute.

Indeed, if the Federal Circuit is correct that § 314(a)'s "may not . . . unless" formulation confers unlimited discretion on the Director, that determination would have wide-ranging impact. Regulatory statutes impacting numerous industries, from fishing to telecommunication to broadcasting to insurance to healthcare and beyond, use the same "may not . . . unless" language deemed to justify nonreviewable discretion here. *See* Brief of US*MADE et al. as *Amici Curiae*, *Google LLC v. Virtamove, Corp.*, No. 25-1230, at 22-26 (May 29, 2026). Every one of these statutes would, in the Federal Circuit's view, vest their relevant administrative agency with effectively unlimited discretion to refuse to do things Congress intended them to do. If Congress intended for these statutes (including § 314(a)) to confer broad discretion, it would have said so. *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (courts presume Congress "says in a statute what it means and means in a statute what it says"); *Whitman v. Am. Trucking Assns.*, 531 U.S. 457, 468 (2001) (Congress "does not alter the fundamental details" of a scheme "in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

Put simply, the Federal Circuit interpreted § 314(a) as bestowing unbounded institution-related discretion on the Director, an interpretation that court used to justify its unreviewability determination. But the text of § 314(a) cannot bear the weight the Federal Circuit places on it. In that subsection, Congress merely provided that the Director "may not" institute review "unless" certain requirements are met. That is not a grant of universal discretion, and the Federal Circuit was wrong to think so.

II. THE USPTO DIRECTOR HAS USURPED HIS LIMITED AUTHORITY OVER INSTITUTION TO THROTTLE CONGRESS'S INTENDED ACCESS TO IPR

The result of the Federal Circuit's grant of unbounded authority to the Director is unsurprising: the Director has now gone far beyond the limited discretion granted to him by the text of the AIA. His many sweeping changes—which far exceed the text of the AIA and conflict with other laws, treaty obligations, and this Court's precedent—have gone well beyond the *Fintiv* rule and have substantially limited access to IPR. Indeed, for certain unlucky accused infringers, including for example defendants accused of infringing patents six or more years old and respondents in International Trade Commission ("ITC") investigations, the Director's extra-textual policy changes have effectively eliminated access to IPR altogether. The Federal Circuit's incorrect statutory interpretation has thus allowed the Director to undermine the AIA's undisputed purpose of establishing an efficient, lower-cost alternative to traditional validity litigation. *See Thryv, Inc. v. Click-To-Call Techs., LP*, 590 U.S. 45, 55 (2020) ("By providing for inter partes review, Congress, concerned about overpatenting and its diminishment of competition, sought to weed out bad patent claims efficiently."). Granting certiorari provides an opportunity to correct this costly error and restore the balance Congress created in the AIA.

A. The Director has dictated numerous extra-textual "discretionary" considerations to preclude IPR institution that conflict with precedent and the AIA's own policy determinations.

The Petition explains how the *Fintiv* rule exceeds the Director's statutory authority. But more broadly, the Federal Circuit's unreviewability rule has enabled the Director to wreak havoc on the IPR institution process with no outside check. The Director has created a smorgasbord of new discretionary considerations. These include the following strictures, each of which the Director has consistently applied to deny petitions before even considering their merits:

<u>"Settled expectations of the parties," including the length of time the claims have been in force</u>. Memorandum from Coke Morgan Stewart to the Patent Trial and Appeal Board ("PTAB"), *Interim Processes for PTAB Workload Management* (Mar. 26, 2025) ("Interim Processes Memo") at 2. The gist of this rule is that sometime after its issuance, a patent owner has developed an expectation that a patent should not be challengeable. Although the Interim Processes Memo does not specify when "settled expectations" vest, the Director has since applied a near-absolute rule: he will generally deny any IPR petition seeking review of a patent granted six or more years before the petition's filing date. *See Dabico Airport Sols. Inc. v. AXA Power Aps*, No. IPR2025-00408, Paper 21 at 3 (Acting Director June 18, 2025) ("The approach [here] aligns with other approaches to settled expectations and incentives, for example, for filing infringement lawsuits. *Cf.* 35 U.S.C. § 286 (". . . no recovery shall be

had for any infringement committed more than six years prior to the filing of the complaint [])"). Indeed, USPTO leadership has publicly likened "settled expectations" to a statute of limitations. *See, e.g.*, "'Settled Expectations' as the New Gatekeeper for PTAB Discretionary Denials: Why Late-Stage IPRs Are Getting Harder to File," JD Supra (June 30, 2025).

Such a comparison is as revealing as it is damning. As this Court has explained, "[w]hen Congress enacts a statute of limitations, it speaks directly to the issue of timeliness and provides a rule for determining whether a claim is timely enough to permit relief." *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 580 U.S. 328, 334 (2017). In other words, discretionary equitable considerations are "gap-filling doctrine[s], and where there is a statute of limitations, there is no gap to fill." *Id.* at 335.

Here, Congress spoke on the issue of timeliness of IPR petitions: such petitions must be filed within one year of the petitioner being named as a defendant in an infringement suit. 35 U.S.C. § 315(b). And after the first nine months of a patent's issuance—during which time a petitioner is limited to PGR, § 321(c)—nothing in the AIA suggests that access to IPR should be limited to any subset of the patent's viability, up to and including after its expiration. § 311(c); *see Apple, Inc. v. Gesture Tech. Partners*, 127 F.4th 364, 368-69 (Fed. Cir. 2025) (IPR is available to challenge a patent even if it is expired, if that patent is being asserted to collect past damages). The Director's "settled expectations" rule thus adds a de facto statute of limitations on IPR, supplanting Congress's considered policy choices as codified in the AIA. *Compare* H.R. Rep.

No. 112-98, pt. 1, at 75 (2011) (explaining that IPR "may be sought . . . any time after" post-grant review concludes or, if no post-grant review is instituted, the time for seeking it expires), *with Dabico*, No. IPR2025-00408, Paper 21 at 3 ("[T]he longer the patent has been in force, the more settled expectations should be."). The Director may not deviate from Congress's statutory design in pursuit of his own policy choices. *See SAS*, 584 U.S. at 368-72 (rejecting the USPTO's defense that its partial-institution practice promoted administrative efficiency, explaining that the USPTO may not "improvise" powers that Congress did not grant); *cf. SCA Hygiene*, 580 U.S. at 335 (an agency may not "jettison Congress' judgment on the timeliness of suit").

<u>Whether "another forum has already adjudicated the validity or patentability of the challenged patent claims</u>." Interim Processes Memo at 2; *see also* Memorandum from Coke Morgan Stewart to the PTAB, *PTAB consideration of prior findings of fact and conclusions of law* (Sep. 16, 2025). This consideration has been used to deny petitions in circumstances where a patent has been challenged by a *different* party—unrelated to the petitioner—or in a *different* forum—unrelated to the PTAB—or both. *See, e.g.*, *Sinclair Pharma Ltd. v. Hydrafacial LLC*, No. IPR2025-00145, Paper 41 (Director Feb. 12, 2026) (de-instituting and terminating an instituted IPR based on an ITC initial determination in a case not involving the petitioner); *Verizon Connect Inc. v. Omega Patents LLC*, No. IPR2023-01162, Paper 40 (Acting Director June 3, 2025) (vacating final written decision, de-in-

stituting, and terminating an already-concluded proceeding based on prior validity challenges brought by unrelated parties).[3] When applying this previous-challenge rule to challenges by unrelated parties, the Director has effectively created non-mutual offensive collateral estoppel, precluding a petitioner from challenging a determination made in a proceeding in which it was not involved and could not defend its own interests.

In doing so, he has defied longstanding precedent clarifying that "[d]ue process prohibits estopping" parties who have "never had a chance to present their evidence and arguments on the claim." *Blonder-Tongue Lab'ys v. Univ. of Ill. Found.*, 402 U.S. 313, 329 (1971); *see also, e.g.*, *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979) ("It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard."); *Allen Archery, Inc. v. Browning Mfg. Co.*, 819 F.2d 1087, 1091 (Fed. Cir. 1987) ("The *Blonder-Tongue* rule . . . does not bar someone charged with infringement from

[3] In *Verizon*, the Acting Director de-instituted a proceeding that had already resulted in a final written decision based on discretionary factors, an action couched as a "retroactive" exercise of discretion. Through this action, the Acting Director attempted to artfully sidestep the statute requiring a final written decision be issued once the proceeding is instituted. § 318(a). Her attempt to exercise her authority in this way is subject to a pending appeal. *Verizon Connect Inc. v. Omega Patents, LLC*, No. 25-1994 (Fed. Cir.); *see also* Dennis Crouch, "Have we Reached the Shenanigans Threshold?", Patently-O (Oct. 8, 2025) (questioning whether vacating and terminating a final written decision crosses "*Cuozzo*'s 'shenanigans' line").

challenging the validity of patent claims that were upheld in a prior infringement suit to which it was not a party.").

Indeed, the Director has defied the explicit limits Congress itself set on when prior validity determinations should be binding. The AIA itself lists the specific circumstances under which IPR estoppel will attach: a petitioner in a later IPR proceeding against a patent claim "may not request or maintain a proceeding . . . with respect to that claim on any ground that the petitioner, or the real party in interest or privy of the petitioner, raised or reasonably could have raised during" the prior proceeding. 35 U.S.C. § 315(e)(1). Congress thus explicitly wrote the AIA, consistent with this Court's precedent, to include only ***mutual*** offensive collateral estoppel.

Notably, Congress did provide an exception for one specific circumstance in which non-mutuality may apply to preclude a subsequent post-grant challenge to a patent. Section 325(d) provides that the Director may reject a petition "because the same or substantially the same prior art or arguments previously were presented to the Office," without any regard to the petitioner's relationship to a previous challenger. Congress's inclusion of this discretionary carve-out to deny institution in § 325(d) only reaffirms that the AIA did not intend for the Director to have the discretion to apply estoppel whenever he sees fit, regardless of the prior forum or proceeding, and to whomever he sees fit, regardless of party-relationship. Where Congress sought an exception to the well-established presumption against non-mutual collateral estoppel, it was plainly able to include one.

In sum, the narrow grant of institution-related discretion in § 314(a) cannot reasonably be read to allow the Director to modify both the statute's scope of IPR estoppel in § 315(e) and its limited grant of discretion in § 325(d) by declaring that petitioners are precluded from challenging claims that other, unrelated entities have previously challenged, so long as those litigations ended in a validity or patentability determination. *See, e.g.*, *MCI Telecommc'ns Corp. v. Am. Telephone & Telegraph Co.*, 512 U.S. 218, 231 (1994) (holding it "highly unlikely" Congress would leave rate regulation up to agency discretion through a "subtle device" like giving the agency permission to "modify" filing requirements).

The exemplary discretionary considerations discussed above require the Director to consider judicially noticeable facts in reaching his determination, even if those facts are unreliable scheduled trial dates or irrelevant patent ages and prior validity challenges. But more recent Director guidance on discretionary considerations, for example that discussed below, considers factual assertions completely devoid of meaningful standards.

<u>Preference for "small," U.S.-based companies</u>. Memorandum from John A. Squires to PTAB, *Additional Discretionary Institution Considerations* (Mar. 11, 2026) ("Squires Memo"), at 2. The Director now investigates the extent to which "products accused of infringement in a parallel proceeding are manufactured in the United States" and "whether the petitioner is a small business that has been sued for infringement," among other things. *Id.* at 2. These considerations are also entirely untethered from the

language of the AIA. The purpose of the AIA is to establish a streamlined, less expensive alternative to traditional invalidity litigation available to any "person." § 311(a); H.R. Rep. No. 112-98, pt. 1, at 40, 48 (2011). The PTAB was thus not intended to engage in the type of protracted infringement, manufacturing, and corporate investigations necessitated by the Director's new consideration.

Indeed, where Congress is concerned with ensuring only those entities with sufficient domestic manufacturing investments can access certain relief, it drafts statutes that say so. The establishing statutes for the ITC, for example, include an express statutory requirement that the Commission consider whether a complainant has established a sufficient domestic industry to obtain relief. 19 U.S.C. § 1337(a); *see* Dennis Crouch, "Made in America: Director Squires Ties IPR Institution to Domestic Manufacturing," Patently-O (Mar. 12, 2026) ("[The domestic industry] statutory requirement is derived from ITC's trade-protection mission: the agency exists to guard American industry from unfair imports, not to serve as a general-purpose patent court. *Until now, no other patent forum has imposed anything comparable.*") (emphasis added).

And unlike the ITC's statute-compliant regulatory standards for determining sufficient domestic industry based on technical and economic evidentiary requirements, *see* 19 C.F.R. § 207, not even the Director himself has tried to articulate standards by which this consideration will be judged. For example, his memorandum does not explain what makes a business "small," nor what would constitute a sufficient

U.S.-based investment precluding IPR. Squires Memo at 2-3. But, because the Director has signaled that this is yet another factor to consider, parties now raise domestic industry-type arguments in almost every IPR proceeding, without any meaningful guidance, quantitative standards, or pre-institution discovery mechanisms by which to judge the credibility of their arguments. And it is impossible to quantify the degree to which any such argument has been successful—such that parties could over time attempt to discern the Director's guidance—because the Director began applying these considerations after adopting a practice of issuing one-line, discretionary denials that do not provide even cursory reasoning.

Furthermore, the Director's exercise of discretion in this respect violates treaty commitments. The United States is a signatory of the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property ("TRIPS"). TRIPS provides that "patents shall be available and patent rights enjoyable without discrimination as to the place of invention . . . and whether products are imported or locally produced." Art. 27. The Director's guidance, indicating that the patent owner's presence or absence of domestic manufacturing may bear on whether he will institute an IPR, certainly cannot be squared with TRIPS's requirement that a patentee's rights are not based on "whether products are imported or locally produced." Art. 27.[4] And to the extent the Director's

[4] TRIPS also requires that "[e]ach Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals." Art. 3. The Director's

exercise of his discretion impacts substantial issues of international comity, this Court has repeatedly explained that those considerations are best left to Congress. *See, e.g.*, *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957) (internationally sensitive policy judgments are best left to Congress because Congress "alone has the facilities necessary to make fairly such an important policy decision"); *see also, e.g.*, *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963) (Congressional intent to regulate in the "delicate field of international relations" must be "clearly expressed").

*   *   *

Empowered by the Federal Circuit's unwillingness to cabin the scope of his discretion, the Director has issued (and continues to issue) memorandum after memorandum imposing ever-increasing limitations on access to IPR. But the Director's policy-motivated considerations are absent from the AIA, and in many cases overstep into areas of the law clearly reserved for Congress. At bottom, if Congress intended for access to IPR to be limited in any of the ways the Director now claims it is, Congress could have written the AIA to say so. It did not. But under the Federal Circuit's decision below, no party has *any way* to challenge the Director's actions—even under the APA and even if the challenge is unrelated to a specific IPR and

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prioritization of petitioners whose manufacturing is located in the United States thus risks violating this provision, as well. *See, e.g.*, Sapna Kumar, "Protectionist PTO Memo is on a Collision Course with TRIPS," Patently-O (Mar. 13, 2026).

thus outside § 314(d)'s scope—and no court may review them. That cannot be correct.

B. The Director's efforts to hinder access to IPR have succeeded, defeating the purpose of the AIA and incurring substantial costs on *amici*.

Congress's intent in enacting the AIA is undisputed. In 2011, Congress created IPR to create an "efficient system for challenging patents that should not have issued." H.R. Rep. No. 112-98 at 39-40 (2011); *Thryv*, 590 U.S. at 54 (explaining that Congress established IPR "to weed out bad patent claims efficiently"). The then-existing procedure for challenging such patents, *inter partes* reexamination, was often slow, expensive, and had numerous limitations on the scope of review, and thus Congress sought to replace it with the streamlined adjudicative process of IPR. H.R. Rep. No. 112-98 at 32-34, 45-46; S. Rep. No. 110-259 at 19 (2008) (describing reexamination proceedings as "troublesomely inefficient and ineffective").

Under cover of the Federal Circuit's overbroad understanding of 35 U.S.C. §§ 314(a) and (d), however, the Director has successfully hindered access to IPR: in the most recent quarter (Q2 2026), only 57 new IPR petitions were filed, down from 337 new IPR petitions in Q2 2025. Patent Dispute Report: First Half 2026, UNIFIED PATENTS (July 9, 2026), available at https://www.unifiedpatents.com/insights/2026/7/9/patent-dispute-report-first-half-2026. If current trends continue, fewer than 300 IPR petitions will be filed in 2026, far less than the 530 petitions for *inter partes* reexamination in the last year before its sunset.[5] As a result, IPRs are now used less than the broken program Congress designed IPRs to replace—effectively gutting the AIA.

To consider the impact another way, some 770 petitions for IPR (about 55% of all petitions) have now been denied for non-merits reasons since the Director began issuing discretionary denials just over a year ago. *See* Brief of US*MADE et al. as *Amici Curiae*, *Google LLC v. Virtamove, Corp.*, No. 25-1230 (May 29, 2026), at 16. Many of these petitioners had no reason to believe, when they paid nonrefundable filing fees, that the USPTO would never even consider the merits of their petition. Indeed, assuming $23,750 in nonrefundable fees, 37 C.F.R. § 42.15(a)(1), and about $150,000 in nonrecoverable preparation costs,[6] the Director's new discretionary rules have cost petitioners in the aggregate over $130 million in quantifiable sunk costs alone.

More significantly, the Director's discretionary decrees have led to perverse results that Congress could not have intended. For example, despite the AIA explicitly allowing any "person who is not the owner of a patent" to seek access to IPR, 35 U.S.C. § 311(a), companies named as respondents in ITC investigations have effectively lost all access to IPR. Those investigations must conclude by statute "at the earliest practicable time," 19 U.S.C. § 1337(b)(1), which in

[5] *See* https://www.uspto.gov/sites/default/files/documents/inter_parte_historical_stats_roll_up.pdf.

[6] See American Intellectual Property Law Association, 2025 Report of the Economic Survey at 40 (reporting average cost to file a petition on electrical and computer patents).

practice means most investigations finish within 16 months. Because the Director has decided that he will not institute IPR if another forum will issue a decision before the 12-month-after-institution statutory deadline for the PTAB's decision, Interim Processes Memo at 2, any IPR petition filed by an ITC respondent is now all but doomed. *See, e.g.*, Petition for a Writ of Mandamus, *In re Kangxi Commc'n Techs. (Shanghai) Co., Ltd.*, No. 26-115, Dkt. 2 (Fed. Cir. Nov. 24, 2025). Indeed, in the last year, amici are aware of only a single instituted IPR where the petitioner is also an ITC respondent.

Or take settled expectations. Despite the AIA explicitly providing that a petition can be filed any time after "the date that is 9 months after the grant of a patent," § 311(c), so long as it is not "filed more than 1 year after the date on which the petitioner … is served with a complaint alleging infringement," § 315(b), it is estimated that something close to 70% of all patents, and an even larger share of litigated patents, are now insulated from review. Brief of 35 Intellectual Property Law Professors as *Amici Curiae*, *Google LLC v. Virtamove, Corp.*, No. 25-1230 (May 29, 2026), at 2. Significantly, most patent assertion entities purchase older patents and "overwhelmingly bring suit late in the patent's life—often in the final three years of a patent's term." *Id.* at 5. Ironically, Congress's system to "remedy the[] sorts of problems" that arise when "bad patents slip through," *SAS*, 584 U.S. at 360, cannot be used to challenge the late-acquired, end-of-life patents that form a majority of patent assertions.

Combined, *amici* have had 166 IPR petitions denied for discretionary reasons, resulting in a net loss of over $3.9 million in non-refundable filing fees, and at least $24.9 million in legal fees preparing their doomed petitions. These numbers do not even consider the greater "unnecessary and counterproductive litigation costs," H.R. Rep. No. 112-98, pt. 1, p. 40 (2011), such as the costs of parallel litigations, increased settlement demands, and jury verdicts, that may not have occurred but for the USPTO's discretionary denials.

The cost of the Director's efforts to gut the AIA are high. *Amici* and other frequent targets of infringement suits now face the prospect of spending billions of dollars in legal fees—money that would otherwise be reinvested to fund research, manufacturing, and job creation—because they no longer have access to the "cost effective alternative[] to litigation" that Congress designed in the AIA. H.R. Rep. No. 112-98, pt. 1, at 40, 48 (2011).

CONCLUSION

For these reasons, this Court should grant certiorari and reverse.

Respectfully submitted,

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