

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.

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

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

In the Leahy-Smith America Invents Act (AIA), Pub. L. No. 112-29, 125 Stat. 284, Congress authorized the United States Patent and Trademark Office (USPTO) to reconsider the patentability of an invention claimed in an issued patent at the request of a third party through an administrative process called inter partes review. Under the AIA, “[t]he determination by the Director [of the USPTO] whether to institute an inter partes review under this section shall be final and nonappealable.” 35 U.S.C. 314(d). In the past, the Director delegated his authority over institution of inter partes review to the Patent Trial and Appeal Board (Board) and identified certain non-dispositive factors for the Board to consider when deciding whether to institute particular inter partes reviews. However, the Director now exercises that discretion himself. The question presented is as follows:

Whether judicial review is available over claims alleging that the factors identified by the Director violate the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, because they are arbitrary and capricious or inconsistent with statutory provisions governing inter partes review.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Cal.):

Apple v. Vidal, No. 20-cv-6128 (judgment of Nov. 11, 2021 reversed and remanded in part; judgment of Apr. 1, 2024, affirmed)

Supreme Court of the United States:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 57a-81a) is reported at 63 F.4th 1. A subsequent opinion of the court of appeals (App. 1a-23a) is reported at 166 F.4th 1349. The opinion of the district court (Pet. App. 83a-96a) is available at 2021 WL 5232241. A subsequent opinion of the district court (Pet. App. 25a-55a) is available at 2024 WL 1382465.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 2026. On May 7, 2026, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July 13, 2026, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Patent Act of 1952 (Patent Act), 35 U.S.C. 1 *et seq.*, charges the U.S. Patent and Trademark Office (USPTO) with examining applications for patents and directs it to issue a patent if the statutory criteria are satisfied. 35 U.S.C. 131. Federal law has long permitted the USPTO to reconsider the patentability of inventions claimed in issued patents. In the Leahy-Smith America Invents Act (AIA), Pub. L. No. 112-29, 125 Stat. 284, Congress expanded those procedures in an effort to “establish a more efficient and streamlined patent system that will improve patent quality and limit unnecessary and counterproductive litigation costs.” H.R. Rep. No. 98, 112th Cong., 1st Sess. Pt. 1, at 40 (2011) (House Report); see *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 584 U.S. 325, 331-332 (2018); *Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261, 267-268 (2016).

The AIA adopted new procedures for third parties to challenge the patentability of claims in issued patents. Such challenges are heard and decided by the Patent Trial and Appeal Board (Board). Among other mechanisms for USPTO reconsideration of issued patents, the AIA established inter partes review. Through inter partes review, any “person who is not the owner of a patent,” 35 U.S.C. 311(a), may “ask the [USPTO] to reexamine the claims in an already-issued patent and to cancel any claim that the agency finds to be unpatentable in light of prior art,” *Cuozzo*, 579 U.S. at 265. See 35 U.S.C. 311.

b. When a petition for inter partes review is filed, the Director first must determine whether to institute inter partes review. 35 U.S.C. 314(a).

The AIA places some restrictions on the Director’s authority to institute inter partes review. See *Cuozzo*, 579 U.S. at 268, 273. The Director may institute review only if he determines that “there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.” 35 U.S.C. 314(a). And inter partes review “may not be instituted” if (1) “before the date on which the petition for such a review is filed, the petitioner or real party in interest filed a civil action challenging the validity of a claim of the patent”; or (2) “the petition requesting the proceeding is filed more than 1 year after the date on which the petitioner, real party in interest, or privy of the petitioner is served with a complaint alleging infringement of the patent.” 35 U.S.C. 315(a)(1) and (b).

Those provisions identify certain circumstances in which inter partes review may *not* lawfully be instituted. The AIA identifies no circumstances, however, in which institution is *required*. Thus, even when a petition meets the statutory conditions for inter partes review, there is “no mandate” for the Director “to institute review.” *Cuozzo*, 579 U.S. at 273; see *SAS Inst. Inc. v. Iancu*, 584 U.S. 357, 366 (2018); *Mylan Labs. Ltd. v. Janssen Pharmaceutica, N.V.*, 989 F.3d 1375, 1382 (Fed. Cir. 2021), cert. denied, 142 S. Ct. 874 (2022); Pet. App. 59a (citing *Mylan* and observing that, even when the AIA’s requirements for inter partes review are satisfied, “the statute uses no language commanding institution”). Nor does the statute specify any criteria that the Director must consider in deciding whether to institute review in cases where that is a lawful option. Instead, “Congress has committed the decision to institute inter partes review to the Director’s unreviewable

discretion.” *United States v. Arthrex, Inc.*, 594 U.S. 1, 8-9 (2021).

If the Director elects to institute inter partes review in a particular matter, the Board then conducts a trial-like proceeding to determine the patentability of the challenged claims. See 35 U.S.C. 316; 37 C.F.R. Pt. 42. At the end of the proceeding (unless the matter has been dismissed), the Board must “issue a final written decision with respect to the patentability of any patent claim challenged by the petitioner.” 35 U.S.C. 318(a). A party aggrieved by the Board’s final written decision may appeal that decision to the Federal Circuit. 35 U.S.C. 141(c), 319.

The AIA provides that “[t]he determination by the Director whether to institute an inter partes review under this section shall be final and nonappealable.” 35 U.S.C. 314(d). The agency’s decision *not* to institute an inter partes review therefore may not be appealed. And in cases where the Director does institute a review and determines the patentability of the challenged claims, judicial review of the agency’s decision on patentability does not extend to the agency’s antecedent institution decision. See *Thryv, Inc. v. Click-To-Call Techs., LP*, 590 U.S. 45, 52 (2020) (explaining that, in such appeals, the Federal Circuit may not review a contention “that the agency should have refused to institute an inter partes review”) (internal quotation marks omitted); *Cuozzo*, 579 U.S. at 272-274. Section 314(d)’s bar on judicial review “applies where the grounds for attacking the decision to institute inter partes review consist of questions that are closely tied to the application and interpretation of statutes related to the Patent Office’s

decision to initiate inter partes review.” *Cuozzo*, 579 U.S. at 274-275.¹

c. At the time petitioners filed suit, and at the time the court of appeals considered this case, the Director permitted the Board to exercise his authority to make institution decisions. 37 C.F.R. 42.4(a) (delegating authority to the Board to “institute[] the trial on behalf of the Director”). However, the Director now largely exercises that authority directly. See pp. 10-11, *infra*. And even when he previously allowed the Board to exercise his authority in the first instance, the Director retained ultimate authority over institution and could reverse decisions made by the Board as his delegatee. See *In re Palo Alto Networks, Inc.*, 44 F.4th 1369, 1375 & n.3 (Fed. Cir. 2022). The Director also provided guidance for the Board to consider in exercising his discretionary authority over institution.

In addition to his institution authority, the Director is “responsible for providing policy direction and management supervision for the Office and for the issuance of patents.” 35 U.S.C. 3(a)(2)(A). One way in which the Director discharges that responsibility is by designating Board opinions as precedential, thereby making them “binding Board authority in subsequent matters involving similar facts or issues.” Patent Trial and Appeal Board, *Standard Operating Procedure 2 (Revision 11)*, at 7 (July 24, 2023) (SOP 2), <https://perma.cc/3WR3-ECPU>.

¹ The Court has reserved the possibility that judicial review of the USPTO’s institution decision may be available for constitutional claims. See *Cuozzo*, 579 U.S. at 275; see also *Mylan Labs.*, 989 F.3d at 1382 (recognizing possibility of mandamus review for “colorable constitutional claims”), cert. denied, 142 S. Ct. 874 (2022).

As relevant here, the Director designated as precedential two Board decisions that identified factors for the Board to consider when deciding whether to institute particular inter partes reviews. See *Apple Inc. v. Fintiv, Inc.*, No. IPR2020-19, 2020 WL 2126495 (P.T.A.B. Mar. 20, 2020); *NHK Spring Co. v. Intrix-Plex Techs., Inc.*, No. IPR2018-752, 2018 WL 4373643 (P.T.A.B. Sept. 12, 2018). Those decisions specifically address when “the advanced state” of parallel district-court litigation is a “factor that weighs in favor of denying” inter partes review. *NHK*, 2018 WL 4373643, at *7. In *NHK*, the Board explained that, when a district-court proceeding involving “the same prior art and arguments[] is nearing its final stages,” instituting inter partes review will generally “be an inefficient use of Board resources” and thus will contravene “an objective of the AIA . . . to provide an effective and efficient alternative to district court litigation.” *Ibid.* (citation omitted).

In *Fintiv*, the Board set forth six “non-dispositive factors” to consider “[w]hen the patent owner raises an argument for discretionary denial under *NHK* due to an earlier trial date.” 2020 WL 2126495, at *2. The factors are: (1) “whether the court granted a stay or evidence exists that one may be granted if a proceeding is instituted”; (2) “proximity of the court’s trial date to the Board’s projected statutory deadline for a final written decision”; (3) “investment in the parallel proceeding by the court and the parties”; (4) “overlap between issues raised in the petition and in the parallel proceeding”; (5) “whether the petitioner and the defendant in the parallel proceeding are the same party”; and (6) “other circumstances that impact the Board’s exercise of discretion, including the merits.” *Ibid.* “Th[o]se factors,” the Board explained, “relate to whether efficiency,

fairness, and the merits support the exercise of authority to deny institution in view of an earlier trial date in the parallel proceeding.” *Id.* at *3. And they “should be weighed as part of a ‘balanced assessment of all relevant circumstances of the case, including the merits.’” *Id.* at *2 (citation omitted).

2. Petitioners are Intel Corporation and Google LLC, technology companies that have previously filed inter partes review petitions. 22-1249 C.A. App. 1135, 1143.² In some of those cases, the USPTO denied institution of inter partes review based on the *Fintiv* factors. *Id.* at 1143. Petitioners sought judicial review of certain of those denials, specifically “challeng[ing] the Board’s application of the so-called *Fintiv* factors,” but the Federal Circuit held that Section 314(d) barred such review. *Intel Corp. v. VLSI Tech. LLC*, No. 21-1614, 2021 WL 5968443, at *1 (May 5, 2021), cert. denied 142 S. Ct. 1363 (2022); Order, *Google LLC v. Uniloc 2017 LLC*, No. 20-2040 (Fed. Cir. Oct. 30, 2020). Intel filed a petition for a writ of certiorari, which this Court denied. See *Intel Corp. v. VLSI Tech. LLC*, 142 S. Ct. 1363 (2022) (No. 21-888). Petitioners predict that “[t]he Board is likely to deny at least some of [their] pending or future [inter partes review] petitions under the [*Fintiv* factors].” 22-1249 C.A. App. 1143.

Petitioners sued the Director in the United States District Court for the Northern District of California, alleging three violations of the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.* Petitioners contended that the *Fintiv* factors: (1) exceed the Director’s authority under the AIA; (2) are arbitrary and capricious;

² Apple Inc., Cisco Systems, Inc., Edwards Lifesciences Corporation, and Edwards Lifesciences LLC were plaintiffs and appellants in the lower courts but are not petitioners here.

and (3) were impermissibly issued without notice and comment. Pet. App. 88a-89a.

The district court granted the government's motion to dismiss. Pet. App. 83a-96a. The district court held that petitioners' claims were unreviewable under Section 314(d) and this Court's decision in *Cuozzo*. *Id.* at 93a-95a. The district court explained that, "[t]o inquire into the lawfulness of the [*Fintiv* factors], [it] would have to analyze 'questions that are closely tied to the application and interpretation of statutes related to the [Director's] decision to initiate inter partes review.'" *Id.* at 95a (quoting *Cuozzo*, 579 U.S. at 275) (fourth set of brackets in original). The court concluded that Section 314(d) and *Cuozzo* "forbid[]" such an analysis. *Ibid.*

3. The court of appeals affirmed in part and reversed and remanded in part. Pet. App. 57a-81a.

a. The court of appeals held that petitioners' statutory-authority and arbitrary-and-capricious claims are unreviewable. Pet. App. 69a-73a. The court explained that both of those claims "focus directly and expressly on institution standards, nothing else." *Id.* at 70a. The court concluded that this Court's decisions interpreting Section 314(d) establish a "principle of unreviewability" that is applicable to such claims. *Ibid.* "Nothing in [that] unreviewability principle," the court of appeals emphasized, "turns on whether the Director has provided an explanation" for the decision not to institute inter partes review, as the Director did with the *Fintiv* factors. *Id.* at 72a.

The court of appeals acknowledged that "[t]he present case, unlike *Thryv* and *Cuozzo*, does not involve a petition-specific challenge, i.e., a challenge to a Director determination whether to institute a review requested in an individual petition." Pet. App. 72a. The court

concluded, however, that the AIA’s “preclusion of review * * * must encompass preclusion of review of the content-focused challenges to the instructions at issue here.” *Ibid.* The court also noted the “congressional expectation” that the Director may choose to delegate the institution decision, and it explained that guidance about institution decisions from the Director to the Board as his delegatee “is crucial for ensuring that [institution] decisions will overwhelmingly be made in accordance with the policy choices about institution [the Director] would follow if [he] were making the determinations [himself].” *Id.* at 72a-73a. The court observed that, if the Director had invoked the *Fintiv* factors in explaining an institution decision that he had made personally, “the decision would be unreviewable for being contrary to statute or arbitrary and capricious.” *Id.* at 73a. The court concluded that, “[f]or the [inter partes review] system to function with the delegations that are inevitable and congressionally expected, the same conclusion must follow for the instructions given by the Director to the Board as delegatee.” *Ibid.*

b. The court of appeals reversed and remanded for further consideration of petitioners’ notice-and-comment claim. Pet. App. 74a-81a. The court found that Apple—which was a plaintiff-appellant below but is not a petitioner here—had Article III standing to press that claim. *Id.* at 77a-80a. The court did not address petitioners’ standing. The court concluded that, while the AIA precludes “judicial review of the substance of the Director’s institution discretion,” that principle does not extend to the procedural issue of “whether to use notice-and-comment rulemaking to announce instructions for the institution decision.” *Id.* at 75a.

c. Petitioner Intel, along with Edwards Lifesciences Corporation and Edwards Lifesciences LLC, filed a petition for a writ of certiorari. This Court denied review. See 144 S. Ct. 548.

4. Only petitioners’ notice-and-comment claim remained on remand. The district court granted summary judgment for the government. Pet. App. 25a-55a. The court of appeals affirmed, concluding that the agency was not required to conduct notice-and-comment rulemaking before issuing the *Fintiv* factors. *Id.* at 1a-3a. Petitioners do not seek review of that holding in this Court. See Pet. 13.

5. During the proceedings on remand, the process for instituting inter partes review proceedings changed. On March 26, 2025, the Acting Director issued a memorandum setting out “temporary” processes through which she would exercise the discretionary portion of her institution authority directly, rather than permitting the Board to act on its delegated discretion. Memorandum from Coke Morgan Stewart, Acting Dir., USPTO, to All PTAB Judges, *Interim Processes for PTAB Workload Management* 3, <https://perma.cc/L997-QPYD>. The memorandum identified numerous circumstances that the Acting Director viewed as impacting her discretion, including “economic, public health, or national security interests,” and “[a]ny other considerations bearing on the Director’s discretion.” *Id.* at 2-3.

On October 17, 2025, the new Director issued a memorandum expanding upon the one issued by the former Acting Director. Memorandum from John A. Squires, Dir., USPTO, to All PTAB Judges, *Director Institution of AIA Trial Proceedings* 1, <https://perma.cc/MZ99-X26J>. The new memorandum explained that as a general matter, the USPTO Director will now make in-

stitution decisions directly, without delegating any portion to the Board. *Ibid.* Under the new process, the Director, in consultation with Board judges, determines both (a) whether the petitioner has satisfied threshold institution requirements and (b) how the Director’s discretion to institute (or not institute) a review should be exercised. *Ibid.* The memorandum explains that “[t]his process will maintain [the Board’s] capacity to conduct [inter partes review] and [post-grant review] trials and promote consistent application of considerations for institution of trial proceedings before the [Board].” *Id.* at 1. “[W]here the Director determines detailed treatment of issues raised in a petition is appropriate (e.g., complex claim construction issues, priority analysis, or real party in interest determination), the Director may refer the decision on institution to one or more members of the PTAB.” *Id.* at 2. The memorandum further explained that, in routine cases, the Director will issue only a summary notice granting or denying institution, although the Director may issue a written decision in cases involving novel or important issues. *Ibid.*

The *NHK* and *Fintiv* decisions at issue in this case are not binding on the Director in this new process because the Director is not required to follow precedential Board decisions. See SOP 2, at 1 (establishing “review procedure for designating Patent Trial and Appeal Board * * * decisions as precedential or informative authority *for the Board*”) (emphasis added). Board panels do not currently exercise the Director’s discretion to institute and therefore have no occasion to apply those decisions.

The USPTO has also made other changes to the inter partes review process. The Acting Director rescinded prior guidance from 2022 regarding the *Fintiv* factors.

See USPTO, *USPTO rescinds memorandum addressing discretionary denial procedures* (Feb. 28, 2025), <https://perma.cc/2MK7-Z7EY>. The Director has identified additional factors that will impact the exercise of his discretion over institution. See Memorandum from John A. Squires, Dir., USPTO, to All PTAB Judges, *Additional Discretionary Institution Considerations – U.S. Manufacturing and Small Business Use of AIA Proceedings 2* (Mar. 11, 2026), <https://perma.cc/55YV-GEZA>. And the USPTO has issued a notice of proposed rulemaking regarding institution of inter partes reviews. 90 Fed. Reg. 48,335 (Oct. 17, 2025). Like *NHK* and *Fintiv*, the proposed rule addresses parallel district-court proceedings. *Id.* at 48,338. The comment period closed December 2, 2025. 90 Fed. Reg. 50,492 (Nov. 7, 2025). The USPTO has not yet issued a final rule.

ARGUMENT

Petitioners seek review of the holding that the AIA precludes judicial review of their challenge to the *Fintiv* factors—factors that have little, if any, binding authority in the current institution process, which is now conducted by the Director himself. In addition to declining to review the court of appeals’ decision at an earlier stage of this case, see 144 S. Ct. 548, this Court has previously denied three certiorari petitions—including one from Intel, which is also a petitioner here—seeking review of decisions holding that challenges to the *Fintiv* factors are not justiciable, see *Intel Corp. v. VLSI Tech. LLC*, 142 S. Ct. 1363 (2022) (No. 21-888); *Mylan Labs. Ltd. v. Janssen Pharmaceutica, N.V.*, 142 S. Ct. 874 (2022) (No. 21-202); *Apple Inc. v. Optis Cellular Tech., LLC*, 142 S. Ct. 859 (2022) (No. 21-118).

The petitioners in the latter cases challenged individual decisions in which the Board declined to institute

inter partes reviews. Petitioners here attempt to avoid the bar to judicial review of Board institution decisions by raising the same basic arguments in a freestanding APA challenge to the Director’s guidance. That challenge likewise does not warrant this Court’s review.

Review is particularly unwarranted because the issue lacks ongoing significance. The *Fintiv* factors are directed to the Board’s exercise of the Director’s delegated institution authority; but the Director has now decided to make the institution decisions himself in most instances. Contrary to petitioners’ assertion (Pet. 14-19), the decision below does not conflict with decisions of this Court and other courts of appeals interpreting judicial-review provisions in other statutes. This case is also a poor vehicle for review because petitioners’ claim to Article III standing is questionable. The petition for a writ of certiorari should be denied.

1. The court of appeals correctly held that Section 314(d) precludes review of petitioners’ statutory-authority and arbitrary-and-capricious claims. The APA’s judicial-review provisions do not apply where another “statute[] preclude[s] judicial review.” 5 U.S.C. 701(a)(1). That is the case where “the congressional intent to preclude judicial review is fairly discernible in the [other statute’s] legislative scheme.” *Block v. Community Nutrition Inst.*, 467 U.S. 340, 351 (1984) (quotation marks omitted); see *Elgin v. Department of the Treasury*, 567 U.S. 1, 10 (2012). Such an intent is fairly discernible here.

a. The AIA generally allows judicial review of final Board decisions when the agency institutes inter partes review and the Board determines whether the challenged claims are patentable. See 35 U.S.C. 318, 319. But the AIA creates no mechanism for review of the

agency’s decisions whether to institute review in the first instance. To the contrary, Section 314(d) provides that “[t]he determination by the Director whether to institute an inter partes review under this section shall be final and nonappealable.” 35 U.S.C. 314(d). That provision bars judicial review “where the grounds for attacking the decision to institute inter partes review consist of questions that are closely tied to the application and interpretation of statutes related to the Patent Office’s decision to initiate inter partes review.” *Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261, 274-275 (2016). Applying that principle, this Court has held that “[t]he agency’s application of § 315(b)’s time limit * * * is closely related to its decision whether to institute inter partes review and is therefore rendered nonappealable by § 314(d).” *Thryv, Inc. v. Click-To-Call Techs., LP*, 590 U.S. 45, 48 (2020).

Here, the core contention in petitioners’ complaint is that the *Fintiv* factors “override[] the congressional judgments embodied in §§ 315(a) and (b).” 22-1249 C.A. App. 1145. Specifically, petitioners claim that the *Fintiv* factors conflict with Section 315(b)’s instruction that “[a]n inter partes review may not be instituted if the petition requesting the proceeding is filed more than 1 year after the date on which the petitioner * * * is served with a complaint alleging infringement of the patent.” 35 U.S.C. 315(b); see 22-1249 C.A. App. 1144. Petitioners read that instruction as a congressional determination “that, so long as the [inter partes review] petition is filed within a year after a lawsuit against the petitioner starts, [inter partes review] is appropriate.” 22-1249 C.A. App. 1144; see *id.* at 1147 (arbitrary-and-capricious claim asserting that the *Fintiv* factors

“force[] infringement defendants to file [inter partes review] petitions earlier in litigation”).

Petitioners’ claims are “closely tied to the application and interpretation of statutes related to the Patent Office’s decision to initiate inter partes review.” *Cuozzo*, 579 U.S. at 275. Indeed, those claims principally turn on the same provision—Section 315(b)—that was at issue in *Thryv*. There, the Court recognized that “Section 315(b)’s time limitation is integral to, indeed a condition on, institution,” and accordingly held that Section 314(d) bars “a challenge based on § 315(b).” *Thryv*, 590 U.S. at 53. Similarly here, in concluding that Section 315(b) does not preclude the USPTO from considering additional litigation-related circumstances in determining whether institution is warranted in particular cases, the agency was construing a statute “closely tied” to the USPTO’s institution decisions.

b. Petitioners emphasize (Pet. 21) that *Cuozzo* and *Thryv* involved “appeal[s] from final written decisions” in “particular cases.” Petitioners’ effort to distinguish those cases disregards the “congressional expectation” that the Director might delegate the institution decision. Pet. App. 72a. “When a statute delegates authority to a federal officer or agency, subdelegation to a subordinate federal officer or agency is presumptively permissible absent affirmative evidence of a contrary congressional intent.” *United States Telecom Ass’n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004), cert. denied, 543 U.S. 925 (2004); see *United States v. Giordano*, 416 U.S. 505, 512-513 (1974). Here, subdelegation of the Director’s institution authority to other USPTO officials was not only permissible but likely, “given the large number of institution decisions the Director would

otherwise have to make personally, in highly technical matters involving significant records.” Pet. App. 72a.

To preserve his effective control over the agency in the event of such subdelegation, “the Director must be able to give guidance in the form of instructions to [his] delegatee(s)—the Board (or Board panels)—about how to make the institution determinations on [his] behalf.” Pet. App. 73a. “Such guidance is crucial for ensuring that [institution] determinations will overwhelmingly be made in accordance with the policy choices [the Director] would follow if [he] were making the determinations [himself].” *Ibid.* If the Director invoked the *Fin-tiv* factors in explaining his own decision not to institute review in a particular case, his “decision would be unreviewable [under Section 314(d)] for being contrary to statute or arbitrary and capricious.” *Ibid.* To ensure that the practical need for delegation does not subvert Congress’s decision to shield individual institution decisions from such review, “the same conclusion must follow for the instructions given by the Director to the Board as delegatee.” *Ibid.*

That the Director has now redesigned the institution process to make institution decisions himself, with the assistance of individual Board members as needed, underscores the untenable nature of petitioners’ argument. The AIA does not require the Director to provide any reasoning on institution, see 35 U.S.C. 314(c), and the Director does not currently issue institution opinions in routine cases. Petitioners do not contend that courts may probe the Director’s thought processes to determine whether the Director considers factors petitioners deem arbitrary and capricious or inconsistent with the AIA. See *United States v. Arthrex*, 594 U.S. 1, 8-9 (2021) (“Congress * * * committed” the institution

decision “to the Director’s unreviewable discretion.”). But petitioners’ view would mean that, if the Director ever redelegates institution authority to a subordinate, those thought processes would suddenly become reviewable. Neither Section 314(d) nor this Court’s precedents interpreting that provision make the applicability of the judicial-review bar turn arbitrarily on differences in internal decision-making procedures.

c. Petitioners’ contrary arguments lack merit. Petitioners rely (Pet. 19-21) on only one decision interpreting the AIA, *SAS Institute, Inc. v. Iancu*, 584 U.S. 357 (2018), but that decision does not help them. In *SAS Institute*, the Court held that under Section 318(a), “[w]hen the Patent Office initiates an inter partes review,” it must “resolve *all* of the claims in the case.” *Id.* at 359. The Court further held that Section 314(d) does not bar judicial review to ensure compliance with that requirement because “nothing in § 314(d) or *Cuozzo* withdraws [the Court’s] power to ensure that an inter partes review proceeds in accordance with the law’s demands.” *Id.* at 371. But as in *Thryv*, “[t]hat reviewability holding is inapplicable here, for [petitioners] challenge[] not the manner in which the agency’s review ‘proceeds’ once instituted,” but instead the agency’s process in deciding whether to “institute[] review at all.” 590 U.S. at 58.

Petitioners primarily rely (Pet. 14-19) on decisions construing statutory schemes other than the AIA. Contrary to petitioners’ suggestion (Pet. 14), those decisions do not establish any universal rule “that statutes barring review of specific agency actions do not bar review of agency standards governing those actions.” To the contrary, they turned on the particular “text, structure, and purpose” of the statutes at issue. *Elgin*, 567

U.S. at 10. In *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986), for instance, the Court found “specific evidence” in “[t]he legislative history” that Congress intended “to foreclose review only of ‘amount determinations’” for certain benefit payments, but not of “challenges to the validity of the Secretary’s instructions and regulations.” *Id.* at 680 (citation omitted). Here, by contrast, there is no similar evidence of congressional intent to allow review of the Director’s guidance regarding factors his delegatee should consider in making particular institution decisions.³

Petitioners invoke the “‘strong presumption’” that “final agency action is subject to judicial review.” Pet. 14 (citation omitted); see Pet. 31-32. In *Cuozzo*, however, the Court “recognize[d]” that presumption and found that it was “overcome” by Section 314(d)’s “‘clear and convincing’ indications * * * that Congress intended to bar review.” 579 U.S. at 273 (citation omitted). To be sure, the Court reserved the question whether Section 314(d) would bar review of “constitutional” challenges or those “that depend on other less closely related statutes.” *Id.* at 275. But petitioners present no such challenges here.

2. The judgment below is correct for a separate and independent reason. The decision whether to institute

³ The other decisions that petitioners cite (Pet. 16-18) are similarly inapposite. See *DHS v. Regents of the Univ. of Cal.*, 591 U.S. 1, 18 (2020) (finding reviewable a challenge to “a program for conferring affirmative immigration relief,” while reserving the question whether “a non-enforcement policy” would be unreviewable); *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 493 (1991) (finding reviewable certain constitutional and statutory challenges to agency procedures in light of multiple statutory provisions, including one that “would make no sense” under the contrary interpretation).

inter partes review in circumstances where the AIA authorizes that course is committed to the USPTO's discretion by law. 5 U.S.C. 701(a)(2). And just as the AIA provides no standard by which a court could assess the propriety of a particular exercise of agency discretion in this context, it provides no standard for reviewing the Director's guidance.⁴

a. Under the APA, judicial review is unavailable where the action at issue "is committed to agency discretion by law." 5 U.S.C. 701(a)(2). Section 701(a)(2) thus makes clear that "even where Congress has not affirmatively precluded review, review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985); see *id.* at 831 (review is precluded where there is "no law to apply"). Applying that principle, this Court has found that "certain categories of administrative decisions" are "committed to agency discretion." *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993) (citation omitted). For instance, agency "decision[s] not to undertake certain enforcement actions" are presumptively unreviewable, because such decisions "involve[] a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise." *Chaney*, 470 U.S. at 831.

The same logic applies here. The AIA restricts the USPTO's institution discretion in some respects by identifying certain circumstances in which inter partes review may *not* be instituted. See p. 3, *supra*. But petitioners do not contend that the *Fintiv* factors will lead

⁴ The government raised this alternative argument in the court of appeals, but that court had no occasion to address it. See Pet. App. 73a-74a n.6.

the Board to institute review in cases where the AIA does not authorize it. Rather, they argue that the factors reflect an unduly parsimonious approach to institution, and that the Director’s guidance therefore is “likely to produce too many denials of institution requests.” Pet. App. 58a; see Pet. 2 (asserting that the *Fintiv* factors have “severely curtailed access” to inter partes review for “petitioners challenging the validity of patents also asserted in district-court litigation”).

As explained above, however, the AIA “uses no language commanding institution” in any circumstance. Pet. App. 59a. And even where the AIA would permit the USPTO to institute review in a particular case, the statute identifies no criteria the agency should consider in making the discretionary judgment whether review should actually be instituted. Nor does the AIA set forth any standard for determining how many “denials of institution requests” would be “too many.” *Id.* at 58a. A court that attempted to review the Director’s guidance therefore “would have no meaningful standard against which to judge the [Director’s] exercise of discretion.” *Chaney*, 470 U.S. at 830.

In circumstances where the AIA authorizes inter partes review, the USPTO’s decision whether to institute review in a particular case is a “policy choice[,]” Pet. App. 73a, that is based on “a complicated balancing of a number of factors,” such as resource constraints, predictive judgments about effects on the patent system, and “the proper ordering of [agency] priorities,” *Chaney*, 470 U.S. at 831-832. In addition, a decision not to institute inter partes review involves no “exercise [of the agency’s] coercive power over an individual’s liberty or property rights.” *Id.* at 832 (emphasis omitted). Because “[t]he agency is far better equipped than the

courts” to make non-institution decisions, *id.* at 831, Section 701(a)(2) commits such decisions to the USPTO’s discretion.

If the Director chooses to delegate institution decisions to the Board, he has full authority to fashion guidance so as to ensure that the Board exercises its institution discretion according to the same principles the Director would apply if he made the institution decisions himself. In *Chaney*, the Court held that judicial review was precluded where the plaintiffs challenged an agency’s policy of not pursuing enforcement actions with respect to a *class* of conduct (the provision and use of FDA-regulated drugs for lethal injections). 470 U.S. at 824-825. The same result is warranted here.

b. For the first time in this litigation, petitioners suggest (Pet. 22-25) that the Director lacks discretion to deny institution on *any* grounds other than those specifically identified by the AIA. Petitioners assert (Pet. 24-25) that the Director may deny institution only pursuant to specific “statutory bars and express grants of discretion,” namely “§ 314(a), § 315(b), § 315(a)(1), or § 325(d),” and may not deny institution based on “extra-statutory, non-merits” policy considerations or apply “holistic, multi-factor policy tests.”

Petitioners’ view of the scope of the Director’s discretion is irreconcilable with this Court’s precedents. As noted, this Court explained in *Cuozzo* that the AIA contains “no mandate to institute review” and that, as a result, “the agency’s decision to deny a petition is a matter committed to the Patent Office’s discretion.” 579 U.S. at 273. In *Arthrex*, this Court cited *Thryv* in reiterating that “Congress has committed the decision to institute inter partes review to the Director’s unreviewable discretion.” *Arthrex*, 594 U.S. at 8-9. Those

decisions foreclose petitioners' view that the Director may deny institution only when the statute specifically compels that result—for example, if the petitioner in the proceeding has previously “filed a civil action challenging the validity of a claim of the patent,” 35 U.S.C. 315(a).

Petitioners describe the Court's observations in *Cuozzo* and *Thryv* as “akin to the ‘drive-by jurisdictional rulings’ that this Court has repeatedly characterized as unexamined, non-binding dicta.” Pet. 25 (citation omitted). In fact, the Court simply identified the necessary implication of the AIA provisions that govern institution of inter partes review. The Court's core textual point—that because the AIA does not identify any circumstance in which the Director is *required* to institute review, the Director always has discretion to deny review even where institution would be permissible—applies regardless of whether the Director's non-institution decision rests on a specific statutory provision like Section 315(b) (as in *Thryv*) or on other concerns like efficiency.

Petitioners' policy arguments cannot overcome the clear implications of the statutory text, and are in any event misguided. Petitioners argue (Pet. 23) that Congress created an “adjudicatory” system in which the Director lacks “self-initiation power”—that is, the power to *begin* inter partes review on his own initiative. However, that argument is orthogonal to this Court's recognition that, because the AIA never mandates institution, the statute gives the Director discretion “to *deny* a petition” even when the petition meets the threshold statutory requirements. *Cuozzo*, 579 U.S. at 273 (emphasis added). That inter partes review relies substantially on party presentation of arguments does not

negate or conflict with Congress’s grant of discretion to the Director to decline institution when, for example, review would be an inefficient use of agency resources. See *Mylan Labs. Ltd. v. Janssen Pharmaceutica, N.V.*, 989 F.3d 1375, 1382 (Fed. Cir. 2021) (explaining that “the Director is free, as in this case, to determine that for reasons of administrative efficiency an [inter partes review] will not be instituted”), cert. denied, 142 S. Ct. 874 (2022). Giving the Director that authority not only comports with Congress’s general concern about efficiency, see, e.g., 35 U.S.C. 316(a)(2) and (b), but also ensures that the Director is able to adapt inter partes review to the changing needs of the patent system. Indeed, one of Congress’s primary objectives in enacting the AIA was “to accommodate changes in the economy and the litigation practices in the patent realm.” House Report 38-39.

3. Petitioners suggest (Pet. 18-19) that the decision below conflicts with rulings of other courts of appeals. No such conflict exists.

In *American Clinical Laboratory Ass’n v. Azar*, 931 F.3d 1195 (D.C. Cir. 2019), the court of appeals construed a statutory scheme that is meaningfully different from the one at issue here. The court held that “[s]everal features of” a Medicare provision showed that “Congress meant to bar challenges to the ‘establishment of payment amounts’ but not to prevent review of [a] rule delineating the data collection practices that precede and inform the setting of those amounts.” *Id.* at 1205. The court explained that “the statutory text” “separate[d]” the “data collection process” from the “establishment of payment amounts.” *Id.* at 1206. The court emphasized in particular that the governing statute imposed specific requirements for the agency’s data-collection efforts.

See *id.* at 1207. Here, by contrast, nothing in the AIA speaks to the discretionary criteria the USPTO should apply in making institution decisions, or to the Director’s formulation of guidance on that subject.

The other D.C. Circuit decisions that petitioners cite are even less helpful to them. One held only that a *constitutional* claim was reviewable, while finding a statutory claim unreviewable. See *Lepre v. DOL*, 275 F.3d 59, 67, 74 (D.C. Cir. 2001). Petitioners raise no constitutional claims here. The other determined—without any textual or structural analysis—that although denials of hospital reclassifications under a Medicare statute are unreviewable, “the general rules leading to [the] denial” are reviewable. *ParkView Med. Assocs., L.P. v. Shalala*, 158 F.3d 146, 148 (D.C. Cir. 1998); see *Geisinger Cmty. Med. Ctr. v. Secretary*, 794 F.3d 383, 390 n.4 (3d Cir. 2015) (following *ParkView* with no independent analysis).

4. Review is unwarranted for two additional reasons. First, the question presented—whether the AIA bars judicial review of petitioners’ challenge to the *Fintiv* factors—has been largely overtaken by the Director’s new institution process. The Director himself currently exercises the discretion whether to institute, and precedential Board decisions like *Fintiv* and *NHK* are not binding on him. Even if the Director were to delegate the discretionary component of the institution decision to the Board, as 37 C.F.R. 42.4(a) allows, the *Fintiv* factors constitute guidance from the Director to the Board regarding how the Board should exercise the Director’s discretion when making institution decisions under the Director’s delegated authority. Under those circumstances, the Director would maintain the authority to review the Board’s institution decision despite the

delegation. See *In re Palo Alto Networks, Inc.*, 44 F.4th 1369, 1375 & n.3 (Fed. Cir. 2022) (explaining that “the Director plainly has the authority * * * to exercise her review authority in individual cases despite the delegation” of institution authority to the Board). Thus, the *Fintiv* factors generally have no binding force in the current institution process.

Any decision concerning the propriety of the *Fintiv* and *NHK* factors therefore would have ongoing significance only if the Director again chose at some future time to authorize the Board to exercise his discretion in the institution process. But if the Director took that step, the *NHK* and *Fintiv* factors might not continue to exist or to apply in their current form. Although *NHK* and *Fintiv* currently remain on the books, the Director may de-designate them as precedential at any time. See SOP 2, at 6 n.5. The Director may also alter their effect through guidance to the Board, as Directors have done previously. See, e.g., Memorandum from Katherine K. Vidal, Dir., USPTO, to Members of the Patent Trial and Appeal Board, *Interim Procedure for Discretionary Denials in AIA Post-Grant Proceedings with Parallel District Court Litigation* 3-9 (June 21, 2022), <https://perma.cc/ZSV5-ZPZS>. In addition, the USPTO has proposed, though not finalized, a rule that addresses the same topic as *NHK* and *Fintiv*—that is, the relevance of parallel district-court proceedings to institution. See 90 Fed. Reg. at 48,338. It is therefore entirely speculative whether the outcome of any challenge to the Board’s use of the *NHK* and *Fintiv* factors in making discretionary institution decisions would have any real-world effect.

Second, this Court’s review is not warranted because there are substantial questions about petitioners’

Article III standing, which this Court would need to resolve in order to rule in their favor. The court of appeals determined only that Apple had standing to press a notice-and-comment claim, based on the principle that “when a plaintiff asserts an entitlement to a rulemaking, the redressability requirement for standing is relaxed.” Pet. App. 78a. But Apple is not a petitioner here; petitioners do not seek review of the judgment against them on the notice-and-comment claim; and petitioners are not entitled to a relaxed standing analysis for their remaining APA claims.

Petitioners’ alleged injury is that the *Fintiv* factors create a “‘substantial risk’” that petitioners will suffer the “denial of the benefits of” inter partes review. Pet. App. 80a (citation omitted). But the inability to have an issued patent reconsidered through the discretionary inter partes review process is a mere “deprivation of a procedural right,” which by itself “is insufficient to create Article III standing.” *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009); see, e.g., *AVX Corp. v. Presidio Components, Inc.*, 923 F.3d 1357, 1361 (Fed. Cir. 2019) (explaining that “[a]n [inter partes review] petitioner that lost on some or all of its challenges before the Board” lacks standing to seek judicial review absent a particularized injury stemming from the Board’s decision). The agency’s refusal to institute an inter partes review would injure petitioners only if (1) the review would have culminated in a final written decision finding the challenged patent claims unpatentable, and (2) the USPTO’s failure to cancel those claims caused petitioners concrete harm.

Even if the denial of an inter partes review petition can create a concrete and particularized injury in some cases, petitioners here allege only a risk that the Board

will “deny at least some of [their] pending or future * * * petitions under the” *Fintiv* factors. 22-1249 C.A. App. 1143. But that alleged “risk of harm” is not “sufficiently imminent and substantial” for petitioners to obtain “forward-looking, injunctive relief.” *TransUnion LLC v. Ramirez*, 594 U.S. 413, 435 (2021). Indeed, even assuming that petitioners have filed *past* petitions that were denied based on the *Fintiv* factors, that “does nothing to establish a real and immediate threat that [they] would again” have a petition denied based on those factors. *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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