No. 25-1230

IN THE

Supreme Court of the United States

GOOGLE LLC,
Petitioner,

v.

VIRTAMOVE, CORP., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Federal Circuit

BRIEF OF ASSOCIATION FOR COMPETITIVE TECHNOLOGY (ACT) AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER GOOGLE LLC

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

ACT is a global policy trade association for the small business technology developer community.[1] ACT's members lead the development of innovative applications and products across consumer and enterprise use cases. The value of the U.S. ecosystem ACT represents—the app economy—is approximately $1.8 trillion and is responsible for 6.1 million American jobs, while serving as a key driver of the $8 trillion internet of things (IoT) revolution. ACT | The App Ass'n, *State of the App Economy* (2022).[2] Our members include startups, app developers, and device manufacturers who own and use patented technologies and rely on a fair, predictable intellectual property system.

For ACT's members, a robust, accessible, and efficient *inter partes* review (IPR) process at the Patent Trial and Appeal Board (PTAB) is not a procedural detail; it is a critical tool for preserving competition, deterring abusive litigation, and ensuring that innovation is not stifled by weak patents. Small businesses rely on IPR as a fast, cost-effective alternative to district court litigation, which can cost millions of

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[1] Pursuant to this Court's Rule 37.2, all parties with counsel listed on the docket received notice of the *amicus curiae*'s intention to file this brief. Per Rule 37.6, *amicus curiae* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

[2] https://actonline.org/wp-content/uploads/APP-Economy-Report-FINAL.pdf.

dollars and take years to resolve. The Patent and Trademark Office's (PTO) new "settled expectations" policy—which denies IPR institution for patents over six years old based solely on patent age—directly threatens ACT's members by insulating potentially invalid patents from meaningful review.

This case thus implicates the core interests of ACT's members and the broader small business community. ACT files this brief to explain why the PTO's "settled expectations" presumption exceeds its statutory authority, why the Federal Circuit's decision to immunize that policy from review is erroneous, and why this Court's review is urgently needed to protect American innovation.

SUMMARY OF ARGUMENT

In the Leahy-Smith America Invents Act (AIA), Congress created *inter partes* review as an efficient administrative mechanism to challenge and cancel "bad patents [that] slip[ped] through" the examination process. *See SAS Inst., Inc. v. Iancu*, 584 U.S. 357, 360 (2018). Congress deliberately did not impose any time limit based on a patent's age. Instead, IPR is available throughout a patent's entire term, reflecting Congress's judgment that an invalid patent confers no legitimate property rights regardless of how long it has been in force.

In 2025, the PTO announced that it will routinely deny IPR institution for patents that have been in force for six years or more, on the ground that patent holders have developed "settled expectations" in the continued validity of their patents. That policy contradicts the statutory scheme in two fundamental respects: First, it purports to confer on patent holders a right to be free from administrative cancellation that Congress never provided. Second, it creates a *de facto* statute of limitations that Congress expressly declined to enact. Patents are public franchises granted subject to statutory conditions—including the condition that they may be administratively canceled at any time. The PTO has no authority to unilaterally expand the rights conferred by a patent beyond what Congress provided.

The Federal Circuit held that it is powerless to review whether the PTO's "settled expectations" policy exceeds its statutory authority, concluding that 35 U.S.C. § 314(d) bars any judicial review of the PTO's institution decisions. That holding is fundamentally flawed. Section 314(d) provides that the decision "whether to institute" review is final and nonappealable. But Google does not challenge the up-or-down institution decision; it challenges the PTO's authority to rely on a statutorily impermissible factor—patent age—in making that decision. This Court has recognized that judicial review remains available where an agency has exceeded its statutory bounds. The Federal Circuit's contrary reading raises serious Article III concerns by insulating agency overreach from any judicial scrutiny.

The stakes here extend far beyond the parties. The PTO's "settled expectations" policy directly harms small businesses that rely on IPR as a vital shield against abusive patent assertions. For a small company facing an infringement suit, IPR offers a path to resolve validity questions in months at a fraction of the cost of district court litigation. The PTO's new policy forces small businesses into costly, protracted litigation or coercive settlements—the very outcomes Congress sought to prevent when it created IPR. And because the policy applies retroactively, small businesses that planned their patent strategies around the availability of IPR now find that avenue closed.

This Court should grant certiorari to determine whether the PTO has authority to deny IPR based on patent age and whether the Federal Circuit correctly held that such denials are unreviewable.

ARGUMENT

I. The PTO's "Settled Expectations" Policy Exceeds Its Statutory Authority

The Leahy-Smith America Invents Act created *inter partes* review to provide an efficient, streamlined mechanism for challenging the validity of issued patents. Pub. L. No. 112–29, 125 Stat. 284 (2011); H.R. Rep. No. 112-98, at 39–40 (2011). The AIA requires the Director of the PTO to "prescribe" regulations governing IPR proceedings, 35 U.S.C. § 316(a), and establishes a detailed statutory framework for when and how IPR may be instituted. That framework reflects a deliberate congressional judgment: IPR is available for all patents, regardless of when they issued, with no age-based limitation. The PTO's recent "settled expectations" policy flatly contradicts that judgment.

A. Congress Deliberately Omitted Any Age-Based Limitation On IPR

The AIA's text makes clear that Congress knew how to impose time limits when it wanted to. Post-grant review (PGR) must be filed within nine months of a patent's issuance. 35 U.S.C. § 321(c). Congress also barred any IPR petition from being filed during the first nine months after a patent issues. 35 U.S.C. § 311(c)(1). And when a patent challenger has been sued for infringement, it must file its IPR petition within one year of service of the complaint. 35 U.S.C. § 315(b). Those provisions establish the only time-related restrictions Congress chose to enact.

Conspicuously absent from the AIA is any provision limiting IPR based on a patent's age. Congress did not leave room for the PTO to invent an additional time bar—much less one that would eliminate review for the vast majority of patents. As this Court has observed, when Congress knows how to impose a limit and does so in specific instances, its decision not to impose a similar limit elsewhere is deliberate. *Cf. SAS Inst.*, 584 U.S. 357 at 365 ("[I]f Congress wanted to adopt the Director's approach it knew exactly how to do so"). A patent can be challenged on the day it issues, after the nine-month post-grant window closes, in its tenth year, or in its nineteenth year—or even after it expires.

Congress wrote the AIA this way because it understood that invalid patents impose costs regardless of their age. Indeed, many patents are never enforced until late in their terms, especially those owned by patent trolls. Brian J. Love, *An Empirical Study of Patent Litigation Timing: Could a Patent Term Reduction Decimate Trolls Without Harming Innovators?*, 161 U. Pa. L. Rev. 1309, 1340 (2013) (finding that "[non-practicing entity]-asserted patents are the overwhelmingly dominant source of patent litigation in the final years of a patent term"). Creating an age-based bar would have shielded precisely the kinds of patents that cause the most harm: dubious patents acquired by non-practicing entities and asserted against innovative companies years after issuance.

B. The "Settled Expectations" Policy Creates A De Facto Statute Of Limitations

Beginning in 2020, the PTO developed frameworks for discretionarily denying IPR institution in certain circumstances, such as when parallel district court litigation was pending. *See Apple Inc. v. Fintiv, Inc.*, IPR2020-00019, 2020 WL 2126495 (P.T.A.B. Mar. 20, 2020) (precedential); *Sotera Wireless, Inc. v. Masimo Corp.*, IPR2020-01019, 2020 WL 7049373 (P.T.A.B. Dec. 1, 2020) (precedential in pertinent part). In March 2025, a memorandum from the Acting Director introduced a new factor for discretionary denial: "[s]ettled expectations of the parties, such as the length of time the claims have been in force." Memorandum re: Interim Processes for PTAB Workload Management at 3 (Mar. 26, 2025). The PTO has since applied this factor to deny IPR institution in hundreds of cases, adopting a presumption that patents six years or older create "strong settled expectations" against review. *See, e.g., Kahoot! AS v. Interstellar Inc.*, 2025 WL 2176613, at *1 (U.S.P.T.O. July 31, 2025) ("the challenged patent has been in force for over six years, creating strong settled expectations").

The PTO has analogized its approach to the six-year limitations period for damages in infringement actions under 35 U.S.C. § 286. *See Dabico Airport Solutions Inc. v. AXA Power ApS*, 2025 WL 1710080, at *1 (U.S.P.T.O. June 18, 2025). However, there is no logical connection between the two. Section 286 limits damages recoverable in an infringement suit; it does not bar a defendant from challenging a patent's validity. More fundamentally, Congress chose not to enact any limitations period for IPR petitions. The PTO cannot supply one through agency mandate.

C. The "Settled Expectations" Policy Conflicts With The Nature Of Patent Rights

The "settled expectations" policy rests on a fundamental misunderstanding of patent rights. A patent is a "public franchise" granted subject to statutory conditions. *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 584 U.S. 325, 335 (2018). As this Court has explained, "[i]nter partes review is one of those conditions." *Id.* at 342. A patent holder therefore can never have a legitimate expectation that its patent will remain free from administrative reconsideration, because the patent itself is granted subject to the possibility of cancellation.

The PTO's approach turns this logic on its head. The agency effectively ruled that because a patent has been in force for six years without being canceled, the patent holder has come to rely on it, and that reliance interests advise against canceling it now. But a patent that should never have issued in the first place is no less invalid in its tenth year than it was on its first day. And the public's interest in eliminating invalid patents does not diminish with time.

The AIA's structure confirms that Congress intended no age-based repose for patent validity. The PTO's reliance on patent age is an attempt to rewrite the statute by adding a limitation Congress omitted, exceeding its authority.

II. The Federal Circuit's Holding That Section 314(d) Bars Review Of The PTO's Exercise Of Statutory Authority Threatens To Shield Administrative Overreach From Judicial Scrutiny

The Federal Circuit held that it lacked power to review whether the PTO's "settled expectations" rule exceeds its statutory authority, concluding that 35 U.S.C. § 314(d) bars all judicial review of institution decisions absent a constitutional claim. That holding cannot be squared with this Court's precedents, the Administrative Procedure Act (APA), or fundamental Article III principles.

A. Section 314(d) Does Not Bar Review Of Whether The PTO Has Exceeded Its Statutory Authority

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." This Court has interpreted Section 314(d) to preclude review of "ordinary" questions "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, 274–75 (2016). But the Court has also made clear that Section 314(d) does not "categorically preclude review" in a way that would "enable the agency to act outside its statutory limits." *Id.* at 275. And in *SAS Institute, Inc. v. Iancu*, the Court clarified that "nothing in § 314(d) or *Cuozzo* withdraws our power to ensure that an inter partes review proceeds in accordance with the law's demands." 584 U.S. 357, 371 (2018).

Google's challenge fits squarely within the exception this Court recognized. Google does not ask the courts to second-guess the PTO's application of permissible factors to the facts of a particular case. Instead, Google argues that patent age is a statutorily impermissible factor and the PTO lacks the authority to consider it. The question presented is one of statutory interpretation. Courts are not only authorized to answer that question, but under *Loper Bright Enterprises v. Raimondo*, they have an independent obligation to do so. *See* 603 U.S. 369, 404 (2024) (courts must "police the outer statutory boundaries of [agency] delegations").

The APA confirms this conclusion. While 5 U.S.C. § 701(a)(2) bars review of actions "committed to agency discretion," this Court has "read the exception ... quite narrowly," holding that it forecloses review only in circumstances where there is no "law to apply." *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 586 U.S. 9, 23 (2018) (quoting *Heckler v. Chaney*, 470 U.S. 821, 834 (1985)). This Court has itself recognized that judicial review of institution decisions under the APA is allowed when the PTO "has engaged in 'shenanigans' by exceeding its statutory bounds." *SAS Inst.*, 584 U.S. at 371 (citation omitted). The AIA's statutory framework for institution is not optional or advisory. Congress enacted detailed criteria governing merits thresholds, timing, coordination with other proceedings, and estoppels. Thus, while Section 314(d) bars review of ordinary disputes about applying institution-related statutes, it cannot authorize the PTO to rewrite the statute at will.

The Federal Circuit's holding conflicts not only with this Court's precedents but also with similar statutory-authority challenges even where the underlying decision is otherwise discretionary. *See Apple Inc. v. Vidal*, 63 F.4th 1, 14–15 (Fed. Cir. 2023) (recognizing that *Fintiv*-based denials may be reviewable under the APA); *accord Farmworker Justice Fund, Inc. v. Brock*, 811 F.2d 613, 622 (D.C. Cir. 1987) (courts may review whether agency relied on statutorily impermissible factor even when decision is otherwise discretionary).

B. The Federal Circuit's Absolute Bar Raises Serious Article III Concerns

The Federal Circuit has held that, absent constitutional concerns, even claims that the PTO has exceeded its statutory authority are unreviewable. *In re Cambridge Indus. USA Inc.*, 2025 WL 3526129, at *2–3 (Fed. Cir. Dec. 9, 2025); *Mylan Labs Ltd. v. Janssen Pharmaceutica, N.V.*, 989 F.3d 1375, 1382 (Fed. Cir. 2021). Under that view, the PTO could deny IPR institution to any petitioner it disfavors, or for any reason whatsoever, no matter how far removed from the statute, and no court could intervene. The PTO could categorically exclude certain industries or technologies from IPR or could simply refuse to institute IPR in any case at all.

An absolute bar on judicial review cannot be reconciled with Article III. As Justice Gorsuch observed, a too-expansive reading of Section 314(d) would allow the PTO Director to "insulat[e] his favorite firms and industries from [IPR] entirely." *Thryv*, 590 U.S. at 79 (Gorsuch, J., dissenting). The presumption of judicial review is "strong," *Cuozzo*, 579 U.S. at

273, and this Court should review a statutory interpretation that would entirely foreclose review of an agency's claim of authority. Congress did not intend Section 314(d) to operate as a license for the PTO to disregard the statute's limits with impunity.

The Federal Circuit's approach also undermines the APA's requirement that agencies engage in notice-and-comment rulemaking for substantive policy changes. *See* 5 U.S.C. § 553. The PTO's “settled expectations” policy was implemented through interim guidance, not rulemaking. By immunizing that policy from review, the Federal Circuit effectively sanctions the PTO's decision to bypass the APA's procedural requirements—making the APA's protections entirely illusory.

III. The “Settled Expectations” Policy Harms Small Businesses That Rely On IPR As A Critical Shield Against Abusive Patent Assertions

For small businesses, the PTO's “settled expectations” policy is not an abstract legal dispute. It is an existential threat. ACT's members—small software developers, app creators, and connected technology firms—rely on IPR as a vital shield against abusive patent assertions. The PTO's new rule strips away that shield for patents over six years old, forcing small businesses into costly litigation or coercive settlements.

A. IPR Is A Critical Tool For Small Businesses Facing Patent Assertions

The cost disparity between IPR and district court litigation is staggering. According to the American Intellectual Property Law Association (AIPLA), the median cost for an IPR through the hearing is approximately $355,000 for electrical, computer, and mechanical patents. AIPLA, *Report of the Economic Survey 2025* at 40 (2026).[3] By contrast, district court legal fees can cost upwards of $3.5 million when significant value is at risk and $4 million when the patent holder is also a non-practicing entity. *Id.* at 33, 36. For a small business with limited resources, IPR is not merely a convenient option; it is often the only feasible path to challenge an invalid patent.

IPR is also significantly faster than district court litigation. The PTAB must conclude proceedings with a final written decision within 18 to 24 months. 35 U.S.C. §§ 314(b), 316(a)(11). District court litigation, by contrast, takes, on average, two and a half years to reach trial, with final judgments taking even longer. Jason E. Stach & Jeffery A. Freeman, *District Court or the PTO: Choosing Where to Litigate Patent Invalidity,* Finnegan (Mar. 2014).[4] For a small business facing a patent infringement suit, that delay can be fatal—diverting resources from product development and market expansion into legal defense.

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[3] https://www.aipla.org/home/news-publications/economic-survey/2025-report-of-the-economic-survey.

[4] https://www.finnegan.com/en/insights/articles/district-court-or-the-pto-choosing-where-to-litigate-patent.html.

The economic benefits of IPR are substantial. An independent analysis quantified that from 2014 to 2019, the PTAB process saved an estimated $2.64 billion in direct litigation costs, leading to an increase of $2.95 billion in U.S. gross product and nearly 13,500 job-years of employment. Perryman Grp., *An Assessment of the Impact of the America Invents Act and the Patent Trial and Appeal Board on the US Economy* (June 25, 2020).[5] The proposed dismantling of IPR access would reverse these gains and harm American competitiveness.

B. The "Settled Expectations" Policy Disproportionately Harms Small Businesses

The PTO's "settled expectations" framework has already had a dramatic impact on IPR availability. Since the policy's implementation, the IPR institution rate has plummeted from approximately 65 percent to 37 percent. *See* Eileen McDermott, *USPTO Stats Show IPR Institution Rate Has Plummeted by 43%*, IPWatchdog (Apr. 8, 2026) (citing USPTO data).[6] The PTO has now denied hundreds of IPR petitions based on its "settled expectations" doctrine.

Small businesses are uniquely vulnerable to this shift. Because small firms typically cannot afford to spend millions of dollars in litigation fees, IPR pro-

[5] https://www.perrymangroup.com/publications/report/an-assessment-of-the-impact-of-the-american-invents-act-and-patent-trial-and-appeal-board-on-the-us-economy/.

[6] https://ipwatchdog.com/2026/04/08/uspto-stats-show-ipr-institution-rate-plummeted/.

vides an alternative, feasible path—a chance to challenge the patent's validity in an expert forum at a fraction of the cost. The "settled expectations" policy closes that path for patents that are more than six years old. This is particularly harmful because older patents are disproportionately asserted by non-practicing entities that acquire patents not to practice the technology but to extract settlements.

C. The "Settled Expectations" Policy Forces Small Businesses Into Coercive Settlements

The practical effect of the "settled expectations" policy is to give patent trolls a roadmap for avoiding meaningful review. By waiting until a patent is six years old before asserting it—a delay that is common with entities that do not compete in the market—a patent holder can invoke the "settled expectations" presumption and foreclose IPR. *See Love*, *An Empirical Study of Patent Litigation Timing*, 161 U. Pa. L. Rev at 1312 (finding that patent trolls "begin asserting their patents relatively late in the patent term and frequently continue to litigate their patents until expiration"). The small company is then left with a binary choice: pay a settlement or face ruinous district court litigation.

For ACT's members, that is no choice at all. Faced with the prospect of millions of dollars in legal fees and years of litigation, many small companies will simply pay the demanded license fee—even if the patent is likely invalid. That is precisely the dynamic Congress sought to eliminate when it created IPR. The "settled expectations" framework resurrects that dynamic for a huge swath of patents.

The PTO's approach is particularly distressing because it applies retroactively. Google filed its IPR petitions in January 2025, before the “settled expectations” policy was announced. The disputed patent was issued in 2010—meaning that even under the PTO's own framework, the window for challenging it closed years before the rule existed. Google could not possibly have known that it needed to challenge these patents within six years of issuance, because no such requirement existed when the patents issued or when Google began developing its products.

This retroactive application is fundamentally unfair. Businesses plan their patent strategies based on the rules in place. The PTO cannot change those rules retroactively and then penalize businesses for failing to comply with rules that did not yet exist. Yet that is precisely what the “settled expectations” policy does.

CONCLUSION

The PTO has exceeded its statutory authority by adopting a presumptive bar on IPR for patents over six years old based on patent holders' purported "settled expectations." The Federal Circuit erred in holding that this agency overreach is entirely unreviewable. And the “settled expectations” policy inflicts concrete harm on small businesses that rely on IPR as a vital shield against abusive patent assertions.

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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