No.

In the Supreme Court of the United States

UNITED THERAPEUTICS CORPORATION,

Petitioner,

v.

LIQUIDIA TECHNOLOGIES, INC.,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under 35 U.S.C. § 312, a petition for *inter partes* review (IPR) of a patent must "identif[y]" "with particularity" the "grounds on which the challenge to each [patent] claim is based" and include "copies" of the "printed publications that the petitioner relies upon" in support of each ground. Those grounds and printed publications "define the contours of the proceeding" "from institution through to conclusion." *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1355, 1357 (2018). Thus, § 312 bars the Patent and Trademark Office (PTO) or parties from injecting new issues or new printed publications into the statutorily-defined proceeding.

The Federal Circuit has taken inconsistent and irreconcilable stances on the standard of review over the PTO's reliance on new arguments never presented in an IPR petition—some panels applying *de novo* review and others deferring to the agency's discretion. In the decision below, the court opted for maximum deference, allowing duly issued patent claims to be canceled based on theories absent from the petition and publications never identified in the petition or introduced into evidence. According to the court, the PTO may decide IPR challenges based on new arguments or references so long as they are "not inconsistent with" the initial petition.

The questions presented are:

1. Whether the IPR statute and *SAS* require the Federal Circuit to review *de novo*, or only for an abuse of discretion, the PTO's reliance on new grounds and new printed publications—not raised in the initial petition—when deciding to cancel patent claims.

2. Whether, if § 312 is deemed ambiguous, the Court should overrule *Chevron*.

CORPORATE DISCLOSURE

Petitioner United Therapeutics Corporation discloses that it has no parent corporation and that BlackRock Inc., collectively through different BlackRock entities, may own 10% or more of its stock.

RELATED PROCEEDINGS

U.S. Court of Appeals for the Federal Circuit:

United Therapeutics Corp. v. Liquidia Techs., Inc., No. 2023-1805 (Dec. 20, 2023).

Patent Trial and Appeal Board (PTAB):

Liquidia Techs., Inc. v. United Therapeutics Corp., No. IPR2021-00406 (July 19, 2022).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner United Therapeutics Corporation petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The court of appeals' opinion (App. 1a-14a) is unreported but available at 2023 WL 8794633. The Patent Trial and Appeal Board's final written decision (App. 15a-63a) is unreported but available at 2022 WL 2820717.

JURISDICTION

The court of appeals entered judgment on December 20, 2023, and denied a timely petition for rehearing on March 12, 2024 (App. 87a-88a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

35 U.S.C. § 311(b) provides:

> A petitioner in an inter partes review may request to cancel as unpatentable 1 or more claims of a patent only on a ground that could be raised under section 102 or 103 and only on the basis of prior art consisting of patents or printed publications.

35 U.S.C. § 312(a)(3) provides:

> [A petition filed under section 311 may be considered only if] the petition identifies, in writing and with particularity, each claim challenged, the grounds on which the challenge to each claim is based, and the evidence that supports the grounds for the challenge to each claim, including—
>
> (A) copies of patents and printed publications that the petitioner relies upon in support of the petition; and (B) affidavits or declaration of supporting evidence and opinions, if the petition relies on expert opinions[.]

Both statutes appear in full in the Appendix at 89a-90a.

INTRODUCTION

An *inter partes* review (IPR) is an administrative proceeding in which the Patent and Trademark Office (PTO) considers a patent challenger's request to cancel claims of a patent. In the initiating pleading, the "petition," the petitioner must identify specific printed publications, predating the patent, that allegedly make the invention "unpatentable." Under 35 U.S.C. § 312(a), an IPR petition to the PTO is required to "identif[y]" "with particularity" the "grounds on which the challenge to each claim is based" and include "copies" of the asserted "printed publications" used to challenge a patent. This requirement that a petitioner set out the bounds of its case in the initial petition ensures that the petition—not the agency's discretion—controls the scope of the IPR proceeding. That protects patentees from being sandbagged later by new theories of unpatentability not raised in the petition. And it is particularly important in an IPR because IPRs proceed quickly based on a schedule largely defined by statute.

The Federal Circuit regularly betrays this statutory directive by deferring to agency discretion rather than reviewing *de novo* whether the PTO has adjudicated a patent claim unpatentable based on grounds or publications outside the scope of the petition. Yet other panels of the same court have recognized that conformity to the petition is a legal requirement reviewed *de novo*. This inconsistency has produced a unique intra-Federal Circuit split concerning the standard of appellate review that will not be resolved absent this Court's intervention. This schism has led to incongruent and bizarre results.

The decision below is particularly stark. The Federal Circuit held that any arguments "not *inconsistent* with" the initial petition are deemed "not new over[] the grounds raised in [the agency] petition." It thus affirmed the Patent Trial and Appeal Board (the "Board" or "PTAB"), which relied on alleged prior art not even cited in the petition,

because "the Board did not abuse its discretion in considering the arguments" first raised in reply. App. 8a. In other words, instead of considering only what is *in* the petition, this line of Federal Circuit cases will let the Board consider anything not ruled *out* by the petition.

The Federal Circuit's result is directly contrary to statute. The Board has no statutory authority to consider arguments or publications not raised in the petition. Yet here the panel permitted the Board to rely on hypothetical "abstract books" never mentioned in the petition, not in evidence, and never seen by either party, by the Board, or by the panel. Had the Board limited itself to the "grounds" and "copies" of the "printed publications" included in the initial petition, the outcome would have been different. Had the panel reviewed the Board's departure *de novo*, the outcome also would have been different. The panel grounded its decision not in statutory text or precedent, but in the contested view that it need only say that "the Board did not abuse its discretion" in considering the "arguments" never raised in the petition.

STATEMENT

The IPR procedure allows a litigant to challenge patents in an agency proceeding, before the Patent Trial and Appeal Board, instead of in district court. The process has advantages for challengers—speedier outcomes and a lower burden, preponderance rather than clear and convincing, relative to district court. The process is an "adversarial" one "that mimics civil litigation" in which the tribunal considers only the grounds presented by the challenger in its petition. *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1352 (2018); 35 U.S.C. § 312(a)(3). With the benefits to challengers come strictures. The only grounds of unpatentability that an IPR petition may present are those based on "prior art consisting of patents or printed publications." 35 U.S.C. § 311(b). The petition also must identify "with particularity" that prior art and how it applies to render the

claims unpatentable. 35 U.S.C. § 312(a). Thus, § 312 forbids the PTO from rendering claims unpatentable in an IPR based on grounds not raised in the petition or based on prior art other than the specific "patents or printed publications" identified in the petition. *See SAS*, 138 S. Ct. at 1355, 1357. The issue before the Court is what standard of review the federal courts apply to determine when the PTO has violated that statutory requirement.

A. *Inter partes* review is limited to the specific "patents and printed publications" identified in the petition.

1. Several features of the IPR process advance Congress's aim of "establish[ing] a more efficient and streamlined patent system . . . and limit[ing] unnecessary and counterproductive litigation costs." H.R. Rep. No. 112-98, pt. 1, p. 40 (2011). To request an IPR, "a party must file 'a petition to institute an inter partes review of [a] patent' . . . on the ground that the claims are obvious or not novel." *SAS*, 138 S. Ct. at 1353 (quoting § 311(b)) (alteration in original). "In doing so, the petition must identify 'each claim challenged,' the grounds for the challenge, and the evidence supporting the challenge." *Id.* (quoting § 312(a)(3)). The Director of the PTO then decides whether to institute an IPR "that proceeds in accordance with or in conformance to the petition." *Id.* at 1355-56 (citing § 314(b)) (citation and brackets omitted).

"Once the Director institutes an inter partes review, the matter proceeds before the Board with many of the usual trappings of litigation." *Id.* at 1353-54. For example, "[t]he parties conduct discovery and join issue in briefing and at oral hearing." *Id.* at 1354 (citing § 316(a)(5), (6), (8), (10), (13)). And "'[i]f an inter partes review is instituted and not dismissed,' at the end of the litigation the Board 'shall issue a final written decision with respect to the

patentability of any claim challenged by the petitioner.'"[1] *Id.* (quoting § 318(a)).

Requiring a challenger to identify the basis on which the IPR will proceed at the outset in the petition, and not later, is particularly important in light of the timeliness requirement that applies to IPRs. By statute, the Board generally must issue this final written decision not later than 12 months after review was instituted. 35 U.S.C. § 316(a)(11).

To ensure the Director implements IPR proceedings consistent with these objectives, Congress established two important ground rules. First, the plain text of the statute requires that "the basis" for an IPR challenge be "prior art consisting of patents or printed publications." 35 U.S.C. § 311(b). Thus, although the Patent Act recognizes multiple types of "prior art" disclosures, *see Helsinn Healthcare S.A. v. Teva Pharms. USA, Inc.*, 139 S. Ct. 628, 631 (2019) (discussing 35 U.S.C. § 102(a)(1)), "patents or printed publications" are the only ones that can be the basis of an IPR. A printed publication must be publicly accessible. "'[P]ublic accessibility' has been called the touchstone in determining whether a reference constitutes a 'printed publication.'" *In re Hall*, 781 F.2d 897, 898-99 (Fed. Cir. 1986); *see also, e.g.*, *Application of Bayer*, 568 F.2d 1357, 1358-59 (C.C.P.A. 1978) (an uncatalogued graduate thesis is not publicly accessible).

Second, "the petitioner's petition, not the Director's discretion, is supposed to guide the life of the litigation." *SAS*, 138 S. Ct. at 1356. As this Court has explained, the PTO does not "enjoy[] a license to depart from the petition and institute a *different* inter partes review of his own design." *Id.* at 1356. Congress knew how to give the Director

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[1] After "any" appeals, including this Court's review, the Director of the PTO issues a certificate cancelling the claims found unpatentable and confirming the patentability of the other claims. 35 U.S.C. § 318.

authority "to investigate a question of patentability '[o]n his own initiative, and at any time'"—indeed, it has done so in other contexts (*see infra*, pp. 7-8)—but it chose not to do so here. *SAS*, 138 S. Ct. 1355 (quoting § 303(a)) (alteration in original).

That principle—that the petition guides the life of the litigation—is why "an IPR petitioner may not raise in reply 'an entirely new rationale' for why a claim would have been obvious." *Henny Penny Corp. v. Frymaster LLC*, 938 F.3d 1324, 1330-31 (Fed. Cir. 2019) (quoting *Intell. Bio-Sys., Inc. v. Illumina Cambridge Ltd.*, 821 F.3d 1359, 1369 (Fed. Cir. 2016)); *see also Intell. Bio-Sys.*, 821 F.3d at 1369 ("It is of the utmost importance that petitioners in the IPR proceedings adhere to the requirement that the initial petition identify 'with particularity' the 'evidence that supports the grounds for the challenge to each claim.'" (quoting § 312(a)(3))); USPTO, PTAB Consolidated Patent Trial Practice Guide at 73 (Nov. 21, 2019) ("Petitioner may not submit new evidence or argument in reply that it could have presented earlier, e.g.[,] to make out a prima facie case of unpatentability.").

The legislative history surrounding the adoption of the IPR provisions of the Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011) (AIA) confirms what the text says: Congress enacted IPR proceedings as party-driven and based on the arguments presented in the petition. *See, e.g.*, 157 CONG. REC. S1376 (daily ed. Mar. 8, 2011) (statement of Sen. Kyl) ("The elevated threshold [for instituting proceedings] will require challengers to front load their case."); *id.* ("[B]y requiring petitioners to tie their challenges to particular validity arguments against particular claims, the new threshold will prevent challenges from 'mushrooming' after the review is instituted into additional arguments employing other prior art or attacking other claims."). Accordingly, the PTO "simply decides whether

the petitioner has met his burden." 154 CONG. REC. S9987 (daily ed. Sept. 27, 2008) (statement of Sen. Kyl).

2. When Congress enacted the AIA in 2011, it developed the IPR procedure against the backdrop of preexisting processes known as "*ex parte* reexamination" and "*inter partes* reexamination."

Created in 1980 and still in force today, *ex parte* reexamination allows the PTO "to reexamine—and perhaps cancel—a patent claim that it had previously allowed." *Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261, 267 (2016). "Th[e] [*ex parte* reexamination] statute . . . gives '[a]ny person at any time' the right to 'file a request for reexamination' on the basis of certain prior art 'bearing on the patentability' of an already-issued patent." *Id.* (quoting 35 U.S.C. §§ 301(a)(1), 302). "If the Patent Office concludes that the cited prior art raises 'a substantial new question of patentability,' the agency can reexamine the patent." *Id.* (quoting § 303(a)). The Director also holds authority to institute an *ex parte* reexamination "on her 'own initiative.'" *Id.* (quoting § 303(a)).

"Once instituted, though, an ex parte reexamination follows essentially the same inquisitorial process between patent owner and examiner as the initial Patent Office examination." *SAS*, 138 S. Ct. at 1353. In other words, as the "*ex parte*" label suggests, the contours of the reexamination are not determined by a private party challenging the patent.

In 1999, Congress supplemented *ex parte* reexamination with the *inter partes* reexamination proceeding. *See* Pub. L. No. 106-113, 113 Stat. 1501A-567 (repealed 2011). The new system allowed "[a]ny third-party requester . . . [to] file a request for an *inter partes* reexamination by the Office of any claim of the patent based on prior patents or printed publications." Manual Pat. Examining Proc. § 2610 (8th ed. Rev. 7, July 2008). While *inter partes* reexamination permitted the third-party requester "to file

written comments addressing issues raised by [an] action of the Office or the patent owner's response thereto," Pub. L. No. 106-113, 113 Stat. 1501A-568, 35 U.S.C. § 314(b)(3) (2006) (repealed 2011), the proceeding was still unequivocally examinational with the burden of proving unpatentability entirely on the PTO examiner, *see id.* § 314(a) ("[R]eexamination shall be conducted according to the procedures established for initial examination under the provisions of sections 132 and 133.").

The legislative history surrounding the AIA reflects that the *inter partes* reexamination proceeding proved "unworkable" because "[u]nder a reexam system, the burden is always on PTO to show that a claim is not patentable. Every time that new information is presented, PTO must reassess whether its burden has been met." 154 CONG. REC. S9987 (daily ed. Sept. 27, 2008) (statement of Sen. Kyl). As a result, in 2011, Congress "converted [*inter partes* reexamination] into an adjudicative proceeding in which the petitioner, rather than the Office, bears the burden of showing unpatentability." 157 CONG. REC. S1375 (daily ed. Mar. 8, 2011) (statement of Sen. Kyl). And "the name of the proceeding [wa]s changed from 'inter partes reexamination' to 'inter partes review.'" *Id.*

Thus, in enacting the AIA and creating IPR, Congress departed from the inquisitorial (and in some cases, Director-led) approach for reexamining patents. It set up the party-directed IPR proceeding instead. *See Cuozzo Speed Techs.*, 579 U.S. at 267; *SAS*, 138 S. Ct. at 1355.

B. The Board sustains Liquidia's challenge to UTC's novel pulmonary hypertension treatment on unpatentability grounds not advanced in Liquidia's initial petition.

1. Petitioner United Therapeutics Corporation (UTC) has pioneered several inventions related to the treatment of pulmonary hypertension using treprostinil, including a novel use of treprostinil by inhalation as claimed in U.S.

Patent No. 10,716,793 (the '793 patent). C.A. App. 1001-1025. Respondent Liquidia Technologies (Liquidia) sought FDA approval to market its own treprostinil-based inhaled pulmonary hypertension treatment. *United Therapeutics Corp. v. Liquidia Techs., Inc.*, 74 F.4th 1360, 1364 (Fed. Cir. 2023). UTC accordingly initiated patent-infringement proceedings in the District of Delaware and successfully established that Liquidia's proposed product would infringe the '793 patent and defeated Liquidia's invalidity defenses. *Id.* at 1364, 1371-72.

Well after district court litigation commenced, Liquidia petitioned for *inter partes* review of the '793 patent, and the Board instituted review. App. 16a. As relevant here, Liquidia's petition asserted that the '793 patent claims were obvious over a combination involving two abstracts that appeared in journal supplements. App. 3a, 20a. The parties have referred to these asserted abstracts as "JESC" and "JAHA" because the copies submitted with the petition were excerpts from supplements to the Journal of the European Society of Cardiology and the Journal of the American Heart Associations, respectively. App. 5a; C.A. App. 1234-1243. Liquidia's petition attached copies of pages from the journal supplements, and it asserted that these JESC and JAHA journal supplements were "published" and available at libraries before the critical date of the '793 patent. App. 7a; *see* 35 U.S.C. §§ 100(i)(1), 102(b) (pre-AIA).

UTC's response to Liquidia's petition disputed whether these journal supplements were publicly accessible—and, thus, whether they qualified as printed publications. App. 3a, 7a. UTC presented evidence that the JESC and JAHA journal supplements were unindexed and not available in libraries by the critical date.

Facing the certain failure of its IPR petition if it could not rely on the JESC or JAHA journal supplements submitted with its petition, Liquidia advanced new arguments

in reply. First, Liquidia asserted the teachings of the JESC and JAHA journal supplements attached to the petition were separately distributed at conferences as part of "abstract books" and were publicly accessible before the critical date. App. 7a. In other words, Liquidia pivoted to different prior art. These abstract books were not in evidence *at all*, and they certainly were not attached to Liquidia's petition. Second, Liquidia argued that the citation of JESC and JAHA in other articles—which it called "research aids"—made those journal supplements publicly accessible prior to the '793 patent's critical date. App. 24a-25a. The Board denied UTC's request to submit responsive evidence in sur-reply. App. 35a n.8.

2. The Board initially accepted Liquidia's "research aid" argument. In its final written decision, the Board explained that new evidence in reply is permitted if it "does not constitute 'changing theories' after filing [the] petition." App. 23a. Under that standard, the Board found that the "research aid" theory was timely because it was "merely additional evidence supporting Petitioner's original theory that a person of ordinary skill in the art could have located the [published] references," *i.e.*, the JESC and JAHA journal supplements. App. 24a. The Board concluded that the proffered "research aids" were sufficient to establish the public accessibility of JESC and JAHA. App. 24a-25a.

The final written decision relied on this "research aid" theory and nothing else for the public accessibility of the JESC and JAHA journal supplements. App. 24a-25a. Based on the disclosure of these journal supplements, the Board concluded that the relevant claims of UTC's patent were obvious.

But the "research aid" theory ran aground when UTC sought review before the PTO's "Precedential Opinion Panel." This Panel rejected the "research aid" theory, noting that the research aids themselves did not qualify as prior art. App. 65a-66a. The Panel therefore directed the

Board to "clarify whether the relied upon research aids were available prior to the critical date and whether the [JESC] and [JAHA] references were publicly accessible by way of their presentation and/or inclusion in distributed materials, such as at a conference or library." App. 66a.

3. On remand, the Board abandoned its prior conclusion, dispensed with "research aids," and pivoted to Liquidia's other new theory: that purported "abstract books" were distributed at industry conferences before the critical date. App. 77a-80a. As to JESC, the Board determined that an attendee of the 2004 European Society of Cardiology Congress "would have received a copy of the abstract book from which [JESC] is excerpted, either at the meeting itself or as a distribution before the meeting." App. 78a. The Board made similar findings for JAHA. App. 80a. To support this conclusion, the Board relied on the testimony of witnesses that did not attend the conferences and had never seen the alleged "abstract books." App. 79a-80a. The Board reached these conclusions even though Liquidia's petition had not argued that the content of the JESC and JAHA journal supplements had appeared in abstract books disseminated at professional conferences. UTC had no opportunity to present responsive evidence. The Board again held UTC's patent claims obvious—this time based on printed publications that were neither attached to the petition nor even entered as evidence.

C. The Federal Circuit affirms the Board in a decision abdicating independent scrutiny of the Board's compliance with § 312.

UTC appealed to the Federal Circuit, arguing, as relevant here, that the Board erred in concluding UTC's patent claims were unpatentable based on grounds and printed publications not asserted in Liquidia's petition. UTC C.A. Br. at 29-37 (C.A. Dkt. 39). UTC argued that "[w]hether the Board relied on a new ground of unpatentability in its final written decision is a legal issue" the Federal Circuit

"reviews *de novo*." *Id.* at 29 (citing *In re NuVasive, Inc.*, 841 F.3d 966, 970 (Fed. Cir. 2016)). UTC also argued that the PTO's decision violated the Administrative Procedure Act ("APA"), another basis for *de novo* review. *Id.* at 29. Accordingly, UTC argued that the Federal Circuit "must 'hold unlawful and set aside agency action . . . not in accordance with law [or] . . . without observance of procedure required by law.'" *Id.* (quoting *In re NuVasive*, 841 F.3d at 970) (alteration in original); *accord* 5 U.S.C. § 706.

The Federal Circuit affirmed. The court acknowledged that "[b]y statute, the scope of an IPR is limited to the grounds set forth in the initial petition," and that it is thus "improper for the Board to deviate from the grounds in the petition." App. 6a-7a. But rather than limiting the Board's review to the petition as required by the statute, the court held that "the Board has discretion to determine whether a petition for *inter partes* review identified the specific evidence relied on in a reply and when a reply contention crosses the line from the responsive to the new." App. 8a (quoting *Ericsson Inc. v. Intell. Ventures I LLC*, 901 F.3d 1374, 1380 (Fed. Cir. 2018)). In reaching this determination, the court reasoned that "Liquidia's arguments were *not inconsistent with*, and therefore not new over, the grounds raised in its IPR petition[,]" and thus "conclude[d] that the Board did not abuse its discretion in considering the arguments and evidence raised in Liquidia's Reply." App. 8a (emphasis added). Finally, the Federal Circuit held that IPR petitioners need not provide any "evidence of actual existence" of references asserted to be § 102(b) prior art. App. 8a-9a.

Following the Federal Circuit's decision affirming the Board's unpatentability determination, UTC filed a combined petition for panel rehearing and rehearing en banc. C.A. Dkt. 54. The Federal Circuit invited a response from Liquidia, but ultimately denied UTC's petition. App. 87a-88a.

REASONS FOR GRANTING THE WRIT

Despite the statute and clarity from this Court, the Board continues to conduct IPR proceedings untethered from the statute—permitting petitioners to raise arguments and prior art never mentioned in the initial petition. And the Federal Circuit continues to enable the Board's departure from its statutory limits to determine whether patent claims should be canceled. Panels of the Federal Circuit have repeatedly determined—including in this case—that the court may defer to the PTO instead of conduct a plenary review, as the statute and this Court's precedent require. While some Federal Circuit cases have recognized that the statute requires that plenary review, many others have deferred to the PTO creating uncertainty. This intra-circuit split warrants immediate correction.

A. The Federal Circuit is internally split over whether the PTO is entitled deference when making patentability determinations based on new grounds or publications not raised in the initial IPR petition.

There is an unmistakable intra-circuit split over the standard of review in cases like this one—where the PTO exceeds the statutory limits on its power to review the patentability of claims by going beyond the grounds and references included in the IPR petition. Even after *SAS*, panels of the Federal Circuit have routinely continued to defer to the PTO—yet other panels have recognized that § 312 limits the PTO's power to accept new arguments, and those panels have correctly reviewed compliance with the statute *de novo*. The Federal Circuit's uneven treatment of this issue begs for this Court's immediate intervention because the proper standard of appellate review is essential to ensuring the bounds of administrative power are adequately policed.

For litigants today, the Federal Circuit's standard of review over Board decisions relying on new arguments is a

coin flip: in some cases, agency decisions to rely on argument not raised in the initial petition are reviewed for only an abuse of discretion; and in others, the court conducts independent plenary review.

1. A line of Federal Circuit decisions reviews scope-of-the-petition issues only for abuse of discretion.

In one line of decisions, the Federal Circuit has effectively abdicated its responsibility to review the PTO's compliance with § 312. These decisions stem from the Federal Circuit's explanation that it "review[s] the Board's judgments concerning what arguments are fairly presented in a petition and other pleadings for abuse of discretion." *Netflix, Inc. v. DivX, LLC*, 84 F.4th 1371, 1376 (Fed. Cir. 2023) (citing *Ericsson*, 901 F.3d at 1379). In turn, *Ericsson* states that "[d]ecisions related to compliance with the Board's *procedures* are reviewed for an abuse of discretion." *Ericsson*, 901 F.3d at 1379 (emphasis added).

Ericsson's statement about review of compliance with agency "procedures" and similar statements from other cases have spawned a line of Federal Circuit decisions abdicating plenary appellate review to the discretion of the agency. *See, e.g.*, *Rembrandt Diagnostics, LP v. Alere, Inc.*, 76 F.4th 1376, 1383-85 (Fed. Cir. 2023) (reviewing "new-theories argument" for "an abuse of discretion" (quoting *Ericsson*, 901 F.3d at 1379)); *Kom Software, Inc. v. NetApp, Inc.*, No. 21-1075–76, 2021 WL 5985360, at *2 (Fed. Cir. Dec. 17, 2021) ("We review the Board's judgments concerning what arguments are fairly presented in a petition and other pleadings for abuse of discretion."); *MModal LLC v. Nuance Commc'ns, Inc.*, 846 F. App'x 900, 906 (Fed. Cir. 2021) ("The determination of whether the petition has sufficiently made an argument amounts to a determination of compliance with procedural requirements, a matter generally reviewed for abuse of discretion."); *Microsoft Corp. v. IPA Techs. Inc.*, 2022 WL 989403, at *2 (Fed. Cir. Apr. 1,

2022) ("We review the Board's judgments concerning what arguments have been adequately presented in a petition and other pleadings for abuse of discretion."); *Uniloc 2017 LLC v. Facebook, Inc.*, Nos. 19-2162, 19-2159, 2021 WL 5370480, at *7 (Fed. Cir. Nov. 18, 2021) ("We review the Board's judgments concerning what arguments are fairly presented in a petition and other pleadings for abuse of discretion.").

The court below similarly erred, further expanding this branch of ill-conceived law. The court deferred to what "the Board observed," and it did not (and could not) find that the "abstract books" were identified in, or attached to, the petition. The most it would say was that "Liquidia's arguments were not inconsistent with, and therefore not new over, the grounds raised in its IPR petition"—flipping the scope of an IPR to include not just the arguments *included* in the petition, but anything not *excluded*. App. 8a (citing *Ericsson*, 901 F.3d at 1380). The court thus concluded that "the Board did not abuse its discretion in considering the [abstract book] arguments." *Id.*

2. A competing line of Federal Circuit decisions reviews the same issue *de novo*.

The erroneous line of reasoning that the Federal Circuit panel followed here directly conflicts with a different line of Federal Circuit cases—one taking proper account of the statute and this Court's precedent—that specifically and repeatedly mandate *de novo* review. In these cases, the Federal Circuit has held—in direct conflict with *Netflix*, *Ericsson*, and their progeny and consistent with this Court's decision in *SAS*—that the IPR statute "mandate[s]" independent *de novo* review of which arguments are fairly presented in a petition. The Federal Circuit examined this specific question and determined:

> Our standard of review of the Board's application of the newness and responsiveness restrictions differs. The newness restriction stems from the

> statutory mandate that the petition govern the IPR proceeding, so "whether a ground the Board relied on [i]s 'new' . . . is a question of law" we review de novo.

Corephotonics, Ltd. v. Apple Inc., 84 F.4th 990, 1008 (Fed. Cir. 2023) (citing *In re NuVasive, Inc.*, 841 F.3d 966, 970 (Fed. Cir. 2016); *SAS*, 138 S. Ct. at 135).

Other cases likewise correctly applied *de novo* review. *See, e.g.*, *In re NuVasive*, 841 F.3d at 970 (applying "de novo review . . . in the IPR context" to "whether a ground the Board relied on was 'new.'"); *Wildcat Licensing WI LLC v. Atlas Copco Tools & Assembly Sys. LLC*, No. 22-1303, 2024 WL 89395, at *2 (Fed. Cir. Jan. 9, 2024) ("Whether post-petition argument and evidence presents a new invalidity theory implicates the Board's statutory authority and is subject to de novo review."); *TRUSTID, Inc. v. Next Caller, Inc.*, No. 20-1950, 2021 WL 4427918, at *2 (Fed. Cir. Sept. 27, 2021) ("Whether a ground the Board relied upon was new, requiring a new opportunity to respond, is a question of law that we review de novo."); *AIP Acquisition LLC v. Cisco Sys., Inc.*, 714 F. App'x 1010, 1016 (Fed. Cir. 2017) ("Whether the Board relied on a new ground of invalidity is a legal question subject to de novo review."); *see also In re Stepan Co.*, 660 F.3d 1341, 1343 (Fed. Cir. 2011) ("Whether the Board relied on a new ground of rejection is a legal question that we review de novo."). Accordingly, an ongoing and deep intra-circuit split exists at the Federal Circuit with competing standards of review applying to the same question of law concerning whether a "new" argument, not raised in the petition, may be relied on by the Board in its final written decision.

This line of Federal Circuit cases stresses that limiting the proceeding to the arguments made in the petition is fundamental to the expedited IPR procedure mandated by statute. These cases recognize that "[i]t is of the utmost importance that petitioners in the IPR proceedings adhere

to the requirement that the initial petition identify 'with particularity' the 'evidence that supports the grounds for the challenge to each claim.'" *Intell. Bio-Sys.*, 821 F.3d at 1369 (quoting 35 U.S.C. § 312(a)(3)). This is because "[u]nlike district court litigation—where parties have greater freedom to revise and develop their arguments over time and in response to newly discovered material—the expedited nature of IPRs bring[s] with it an obligation for petitioners to make their case in their petition to institute." *Id.*

The irreconcilable contradiction of federal law is highlighted where the same three-judge panel that decided this case under an abuse of discretion standard held weeks later that a petitioner's failure to "identify a distinct alternative argument" concerning a "*subset*" of the argument made in the petition was "not properly presented before the Board" and therefore was "not considered on appeal." *Apple Inc. v. Masimo Corp.*, No. 22-1890, 2024 WL 137336, at *3-4 (Fed. Cir. Jan. 12, 2024). The court below explained that "[t]o the extent Apple raised a new argument in its reply or at the oral hearing, such argument is untimely and improper." *Id.* (citing *Intell. Bio-Sys.*, 821 F.3d at 1369). But this is exactly what happened in this case—and it is the only reason UTC's patent claims were held unpatentable. Had the same three-judge panel applied that standard here, the court would have been required to find that Liquidia's petition similarly "forfeited" arguments based on the new "abstract book" theory, thus compelling reversal. Instead, the court below "conclude[d] that the Board did not abuse its discretion in considering the arguments and evidence raised in Liquidia's Reply." App. 8a. When the same three-judge panel applies disparate standards of review on a case-by-case basis over the same question of law, course correction is inevitable.

* * *

The purpose of the Federal Circuit is to promote conformity in the nation's patent law. Yet here the Federal Circuit has done precisely the opposite. The line of cases relying on *Ericsson* to adopt an abuse of discretion standard conflicts with the line of cases recognizing that the statutory limits on IPR proceedings present legal questions that must be reviewed *de novo*. The result leaves the appellate standard of review for this fundamental question unresolved. Until the intra-circuit split is resolved, litigants will continue to face results as bizarre as the one here—where a panel following the deferential line of cases affirms the Board's authority to render patent claims unpatentable based on supposed "printed publications" that neither the court, nor the Board, nor the patent owner has ever seen.

B. The decisions that review for abuse of discretion are inconsistent with § 312 and *SAS*.

1. By statute, the petition—not the Director's discretion—defines the scope of an IPR proceeding. *See* 35 U.S.C. § 312. The plain text of the statute recites "Requirements of [a] Petition" and mandates that the petition "may be considered only" by the PTO "if" the petition meets certain statutory requirements. *Id.* § 312(a). Relevant here, the petition must "identif[y], in writing and with particularity" each claim challenged and "the grounds" on which each challenge is based. *Id.* § 312(a)(3). Critically, the petition must include "copies" of the "printed publications that the petitioner relies upon in support of the petition." *Id.* § 312(a)(3)(A).

Accordingly, by statute, the burden is on the petitioner at the outset to decide which grounds it decides to pursue, the level of specificity it decides to articulate those challenges, and to include "copies" of the "printed publications" it wishes to rely on in support of the petition. This is, of course, by design: "Congress chose to structure a process in which it's the petitioner, not the Director, who gets to

define the contours of the proceeding." *SAS*, 138 S. Ct. at 1355. It follows, by statutory design, that the Federal Circuit must review the PTO's adherence to the limited scope of the proceedings *de novo*, rather than deferring to discretion that the Board does not have.

This Court was clear in *SAS*: Congress placed limits on the PTO's authority to render unpatentable an already-issued patent in an IPR, and the Federal Circuit is charged with enforcing those statutory limits. *See id.* Deference to the PTO abdicates that responsibility. To keep IPRs streamlined, cost-effective, and resolvable within the one-year time limit, Congress required IPR petitioners to present a full affirmative case in their initial petition; it did not give the PTO discretion to let the challenge mushroom after the review is instituted. *Supra*, pp. 5-7. The structure of the IPR statute memorializes this intent. At each step, the litigation is limited by the petitioner's initial contentions. This is true "all the way from institution through to conclusion." *SAS*, 138 S. Ct. at 1357. Specifically, the statute requires that the petitioner is limited to the contentions raised in the initial petition, the PTO is limited to decide only those issues raised by the petition, and the Federal Circuit is charged with reviewing *de novo* that the PTO complies with these statutory bounds. *Id.* at 1356.

2. The flaws in the Federal Circuit's abuse of discretion approach are underscored by the caselaw recognizing the clear command that the Federal Circuit "review [the Board's] procedures for compliance with the [APA] de novo." *Sirona Dental Sys. GmbH v. Institut Straumann AG*, 892 F.3d 1349, 1352 (Fed. Cir. 2018); *see also In re NuVasive*, 841 F.3d at 970. Reviewing decisions related to compliance with the Board's procedures with deference to the agency's discretion is in direct contrast to the APA's mandate that an Article III court "set aside" decisions that are "in excess of statutory jurisdiction, authority, or limitations," or "without observance of procedure required by

law." *Id.*; 5 U.S.C. § 706(2). Absent immediate correction, the incongruence in law will only fester.

3. The Federal Circuit's approach is particularly problematic because it now allows the PTAB to consider new arguments so long as they are not *inconsistent with* arguments in the petition. But the statute expressly forecloses that not-inconsistent-with standard. Section 312(a)(3) requires the initial petition to identify "in writing and with particularity" the grounds of the challenge. As this Court has recognized, "[n]othing suggests the Director enjoys a license to depart from the petition and institute a *different* inter partes review of his own design." *SAS*, 138 S. Ct. at 1356. Nor can the PTO decide the IPR on a different basis, because "the statute tells us that the petitioner's contentions, not the Director's discretion, define the scope of the litigation all the way from institution through to conclusion." *Id.* at 1357.

4. The decision below incentivizes belated arguments that—by statutory design—were required to be raised in the petition. *See supra*, pp. 5-7. Consequently, the court's decision invites strategic sandbagging by litigants before the Board and adopts a lopsided IPR framework where the *petitioner* "must be afforded a reasonable opportunity in reply to present argument and evidence," while the *patent owner* is denied those same procedural safeguards. *Axonics, Inc. v. Medtronic, Inc.*, 75 F.4th 1374, 1383 (Fed. Cir. 2023). For example, under the decision below, the Board exercised its "discretion" to adopt brand new theories in its final written decision *and* exercised its discretion to prohibit patent owner from offering responsive argument and evidence. *See* App. 6a-8a. The IPR statute forecloses this fundamental unfairness.

* * *

Both the IPR statute and this Court's precedent are clear: the petition defines the scope of the proceeding. That statutory mandate must be enforced—with

consistency—after the Federal Circuit reviews the PTO's determinations *de novo*.

C. This case exemplifies the flaws in the Federal Circuit's abuse of discretion standard.

The Federal Circuit's refusal to review the PTO's decision *de novo* in this case validated the agency's clear violation of the statute. That is, it affirmed a final written decision finding patent claims unpatentable and therefore subject to cancellation based on "grounds" not raised in the petition and publications other than the "copies" of JAHA and JESC journal supplements included in the petition. It relied on "abstract books" that it had not seen, presuming—without evidence—that they exist and disclose the same information as the JESC and JAHA journal supplements included with the petition. Because the JESC and JAHA journal supplements did not qualify as "printed publications" by the critical date, the Board's decision to let Liquidia switch its reliance to the abstract books was case-dispositive.

Under a *de novo* standard of review, the Federal Circuit would not have permitted a document not in evidence to stand in the place of the "printed publications" forming the basis of the petition when the parties dispute the identicality of the disclosures. For example, in *Nobel*, "the actual copy of the ABT Catalog" "obtained" at the conference was in evidence (C.A. App. 7972-8034), corroborated by "specific details" that the catalog had "identical pages" to those asserted as prior art (C.A. App. 7914-7971). *Nobel Biocare Servs. AG v. Instradent USA, Inc.*, 903 F.3d 1365, 1376-78 (Fed. Cir. 2018).

Likewise, in *Medtronic*, a copy of the asserted "Video and Slides" was in evidence, mooting any concern of disparate disclosures (C.A. App. 7881-7913); the only question was "whether such materials were sufficiently disseminated at the time of their distribution at the conferences." *Medtronic, Inc. v. Barry*, 891 F.3d 1368, 1381 (Fed. Cir.

2018). In *MIT*, "the document itself was actually disseminated[.]" *Mass. Inst. of Tech. v. AB Fortia*, 774 F.2d 1104, 1109 (Fed. Cir. 1985). Similarly, in *In re Klopfenstein*, "there [we]re no factual disputes between the parties" that the asserted "reference was displayed to the public[.]" 380 F.3d 1345, 1348, 1350 (Fed. Cir. 2004). The lack of any evidence corroborating the disclosure of the hypothetical abstract books with the asserted JAHA and JESC references precludes a finding that the claimed invention "was" "described" before the critical date as required by § 102(b).

Here, the content of the hypothetical abstract books is hotly contested. To the extent they exist, nobody has ever viewed the not-in-evidence abstract books or corroborated that they contain the same information as the JAHA and JESC journal supplements—which themselves were not publicly available before the '793 patent's critical date. Moreover, the Board could not have made such a finding as the Board relied only on deponents' speculation about what "would have" occurred—and the deponents admitted that they did not attend the relevant conferences and have never seen the hypothetical "abstract books." App. 78a-79a; UTC C.A. Br. at 39; C.A. App. 561-64, 3141-42, 5142. This result is foreclosed by statute, which require IPR proceedings to be adjudicated based on the publicly available printed disclosures that "describe" the claimed invention. 35 U.S.C. §§ 311(b), 102(b) (pre-AIA).

The bizarre result in this case—where a duly issued patent is set for cancellation based on a hypothetical "abstract book" that no adjudicator has ever seen and therefore could not have been found to describe the patented invention—underscores the need for independent *de novo* appellate review. Moreover, the deferential standard of review applied in this case permits this result even though the PTO considers "[a] petition filed under section 311" "only if" the "petitioner provides copies" of the alleged prior art "to the patent owner"—and that could not have

occurred here where the petitioner *never* produced the hypothetical "abstract books." *See* 35 U.S.C. § 312(a)(5). The Federal Circuit's decision demonstrates the need to immediately clarify, and squarely hold, that the PTO is limited to deciding the contentions raised in the petition and that the Federal Circuit must review that statutory requirement without discretion to the agency.

D. *Chevron* does not permit the Federal Circuit to abdicate its *de novo* appellate review to the discretion of the PTO.

The Federal Circuit's decision below allows the agency to cancel patent claims on grounds never properly put before it. That form of deference destroys the statutory requirement under 35 U.S.C. § 312 that the petition must include the "grounds" and "copies of . . . printed publications that the petitioner relies upon in support of the petition."

Chevron cannot save the Board's interpretation of the IPR statute. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). First, as detailed above, the statutory language is clear. *Chevron* deference has no place particularly where, as here, Congress has provided such a clear statutory directive for the agency's conduct. "Even under *Chevron*, we owe an agency's interpretation of the law no deference unless, after 'employing traditional tools of statutory construction,' we find ourselves unable to discern Congress's meaning." *SAS*, 138 S. Ct. at 1358 (quoting *Chevron*, 467 U.S. at 843 n.9). Section 312 unambiguously states that a petition may only be considered if the petition includes copies of any printed publications that the petition relies upon in support of the petition. 35 U.S.C. § 312(a)(3)(A). Congress empowered the petitioner, not the Director, to "define the contours of the proceeding" in its petition. *SAS*, 138 S. Ct. at 1355. Further provisions of the *inter partes* statute, such as §§ 314 and 318, confirm Congress's clear directive to limit the scope of the *inter partes* review to the petition. *See id.* at 1355-58. There is

plainly "no uncertainty that could warrant deference." *Id.* at 1358.

Second, even if § 312 is deemed ambiguous, *Chevron* deference should not apply because that decision should be overturned. The *Chevron* doctrine has been widely criticized, including by members of this Court. As Justice Thomas articulated in *Cuozzo* with respect to another provision of the *inter partes* review statute, the Court should reconsider "*Chevron*'s fiction that ambiguity in a statutory term is best construed as an implicit delegation of power to an administrative agency to determine the bounds of the law." *Cuozzo Speed Techs.*, 579 U.S. at 286 (Thomas, J., concurring).

The *Chevron* doctrine essentially demands "abdication of the judicial duty," at the first sign of any perceived statutory ambiguity. *See Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring). This surrender of the judiciary's authority to the executive branch not only weakens the judiciary, but also undermines the ability of Congress to effectively enact new legislation—after all, why should Congress put itself through the pains of enacting legislation when the executive branch can make up its own rules that swallow the statute? The decision below in this case illustrates why, if the statute is deemed ambiguous, *Chevron* must be overruled. Despite the clear directive from Congress in the statute, the Board still managed to evade the statutory requirements and any appellate *de novo* review. The decision below cannot stand, and neither should *Chevron*.

As explained above, the competing decisions of the Federal Circuit are irreconcilable; the only conceivable way the Federal Circuit could simultaneously believe that compliance with the statutory limits on agency power is a question of law (*supra,* pp. 15-17) *and* that it should defer to the agency on that question (*supra,* pp. 14-15) would be some form of *Chevron* deference. This Court is now considering,

in the *Relentless* and *Loper Bright* cases, whether to abandon or limit *Chevron* deference. *Relentless, Inc. v. Dept. of Com.*, 144 S. Ct. 325 (2023) (granting certiorari); *Loper Bright Enters. v. Raimondo*, 143 S. Ct. 2429 (2023) (same). If it does so, the Court should consider whether to grant, vacate, and remand in this case so that the Federal Circuit can carry out the judicial duty to apply the statute without deference to the executive branch.

E. This case is an ideal vehicle to resolve an exceptionally important question of federal law concerning the Federal Circuit's intra-circuit split.

The standard to apply when addressing whether an IPR proceeding exceeds the bounds of the petition and, thus, its statutory scope is a critical issue that the Federal Circuit regularly faces. Few issues are as fundamental to the consistent application of federal law as ensuring the proper standard of appellate review. And this case presents the ideal vehicle for resolving this pure question of law. For example, the Board rested its decision not only on new "grounds" that Liquidia failed to advance in the petition, but also on new "printed publications" that Liquidia failed to identify in its petition. 35 U.S.C. § 312(a); *see supra*, pp. 9-11. The latter error is especially clear-cut: there is no judgment involved in determining whether the "copies" of the "printed publications" that Liquidia "relied upon in support of the petition" are the same as the "abstract books" on which the Board ultimately based its decision. Accordingly, this case provides a clean vehicle for addressing a statutory question with far broader implications.

This case is also an ideal vehicle because the court below showcased how this side of the intra-circuit split leads to a slippery slope; it further *expanded* the PTO's discretion to include all arguments "*not inconsistent with*, and therefore not new over, the grounds raised in [Liquidia's] IPR petition." App. 8a (emphasis added). This new standard

gives the Board discretion to rely on any new argument, or newly asserted reference, unless the petitioner irreconcilably excluded it from its petition.

Unless this Court grants review, the Federal Circuit's unpredictable application of the IPR framework will continue to plague the careful balance struck by Congress between administrative and Article III patent review and subvert Congress's will "that patent owners have certainty" because "[c]onsistency, uniformity, and fairness are essential to innovation." 157 CONG. REC. S1051 (daily ed. Mar. 1, 2011) (statement of Sen. Bennet).

Consistency in the Federal Circuit's nationwide appellate jurisdiction is an "important" reason to "clarify the standard of review." *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318, 321-22, 324 (2015) (examining the standard for reviewing "the claim construction decisions of federal district courts" and holding that underlying factual disputes regarding claim construction should be reviewed *de novo* rather than for clear error); *see also Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 570 U.S. 947 (2013) (granting certiorari), 572 U.S. 559, 560 (2014) (reviewing "whether an appellate court should accord deference to a district court's determination" and determining that "an appellate court should review all aspects of a district court's § 285 determination for abuse of discretion.").

Indeed, this Court has a history of granting certiorari to ensure consistent and uniform standards of appellate review. *See, e.g.*, *U.S. Bank Nat. Ass'n v. Vill. at Lakeridge, LLC*, 580 U.S. 1216 (2017) (granting certiorari), 583 U.S. 387, 392-93, 399 (2018) (determining "whether the Ninth Circuit was right to review [a bankruptcy court finding] for clear error (rather than *de novo*)"); *Ornelas v. United States*, 517 U.S. 690, 694-95 & n.3, 699 (1996) ("We granted certiorari to resolve the conflict among the Circuits over the applicable standard of appellate review."). Here, where no further inter-circuit split can develop due to the Federal

Circuit's nationwide jurisdiction, this case presents an ideal opportunity to cure the Federal Circuit's ongoing confusion concerning its duty to decide legal questions.

The Federal Circuit was established to "provide uniformity in patent law, . . . make litigation results more predictable and . . . eliminate the expensive and time-consuming forum shopping that characterize[d] litigation in the field." 127 CONG. REC. 27791 (1981) (statement of Rep. Kastenmeier). The Federal Circuit's decision does the opposite: it rubber-stamps the PTO's discretion by allowing petitioners to modify their affirmative case based on alleged prior art and arguments not present in the original petition. And even if this result can be countenanced, the situation is worse: other decisions have applied a different, *de novo* standard of review. Thus, not only was the result here incorrect, but the Federal Circuit applies different standards of review case by case.

The uncertainty that necessarily results from the Federal Circuit's muddled standard of review thus stands contrary to (1) Congress's creation of a uniform court of appeals for patent disputes and (2) Congress's creation of a streamlined and predictable system of *inter partes* review. Specifically, Congress required "challengers to front load their case" because "by requiring petitioners to tie their challenges to particular validity arguments against particular claims, the [elevated] threshold [to institute IPR proceedings] will prevent challenges from 'mushrooming' after the review is instituted into additional arguments employing other prior art or attacking other claims." 157 CONG. REC. S1376 (daily ed. Mar. 8, 2011) (statement of Sen. Kyl); 35 U.S.C. § 312(a) (stating the precise requirements that the petition articulate the "grounds for the challenge to each claim" and include copies of the asserted references). Inexplicably, the decision below, like *Ericsson* and its progeny, incentivizes petitioners to withhold theories and

strategically "mushroom" challenges post-petition—subject only to the case-by-case discretion of the PTO.

Since the PTAB opened for business in September 2012, 10,363 patents have been the subject of a post-issuance administrative challenge. USPTO, *PTAB Trial Statistics: FY23 End of Year Outcome Roundup: IPR, PGR* at 15, https://www.uspto.gov/sites/default/files/documents/ptab_aia_fy2023__roundup.pdf (last visited June 5, 2024). "Of these filings, the overwhelming majority are IPRs." Cong. Rsch. Serv., R48016, *The Patent Trial and Appeal Board and Inter Partes Review* 17 (2024), https://crsreports.congress.gov/product/pdf/R/R48016. And in fiscal year 2023 *alone*, the PTO reported a total of 1,209 IPR petitions filed with the PTAB. USPTO, *PTAB Trial Statistics: FY23 End of Year Outcome Roundup: IPR, PGR* at 3.

A large number of Board decisions are appealed. As of this writing, the Federal Circuit has nearly 700 appeals from the PTO pending—more than a third of its entire caseload and by far the largest share of its patent-related docket. *See* U.S. Ct. Appeals for Fed. Cir., *Year-to-Date Activity as of May 31, 2024*, https://cafc.uscourts.gov/wp-content/uploads/reports-stats/FY2024/FY2024YTDActivity08.pdf (last visited June 7, 2024). The standard-of-review issue comes up repeatedly in these appeals—which is why the Federal Circuit has developed competing lines of authority on the subject.

Absent this Court's intervention, the Board's and Federal Circuit's extra-statutory application of §§ 311 and 312 will continue to contravene plain text and Congressional intent, breed avoidable uncertainty, and have a pervasive impact on a substantial portion of this Nation's patent disputes to the detriment of innovation.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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