

No. 18-916

IN THE
Supreme Court of the United States

THRYV, INC., FKA DEX MEDIA INC.,
Petitioner,

v.

CLICK-TO-CALL TECHNOLOGIES, LP, ET AL.
Respondents.

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

BRIEF OF *AMICUS CURIAE*
NEW YORK INTELLECTUAL PROPERTY
LAW ASSOCIATION
IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*¹

The New York Intellectual Property Law Association (“NYIPLA”) is a bar association of approximately 1,000 attorneys who practice in the area of patent, copyright, trademark and other intellectual property (“IP”) law.² It is one of the largest regional IP bar associations in the United States. Its members include in-house counsel for businesses and other organizations, and attorneys in private practice who represent both IP owners and their adversaries (many of whom are also IP owners). Its members represent inventors, entrepreneurs, businesses, universities, and industry and trade associations. They regularly participate in patent litigation on behalf of both plaintiffs and defendants.

The NYIPLA’s members also regularly represent parties—including both petitioners and patent owners—in *inter partes* review (“IPR”) proceedings before the Patent Trial and Appeal Board (“PTAB” or “Board”) of the U.S. Patent and

¹ Pursuant to Sup. Ct. R. 37.6, the NYIPLA and its counsel represent that they have authored the entirety of this brief, and that no person other than the *amicus curiae* or its counsel has made a monetary contribution to the preparation or submission of this brief.

² Pursuant to Sup. Ct. R. 37.3(a), NYIPLA has obtained, by letter, the Federal Respondent’s consent to file this amicus brief. Petitioner and Respondent Click-to-Call Technologies, LP filed consents to the filing of the amicus briefs in support of either party or neither party in docket entries dated July 29, 2019, and August 13, 2019, respectively.

Trademark Office (“PTO”). The NYIPLA thus brings an informed perspective to the issues presented.

Because of the widespread use of IPRs, and the importance of such proceedings to patent owners and validity challengers alike, the NYIPLA’s members and their clients have a strong interest in the issues presented in this case.³

SUMMARY OF THE ARGUMENT

The Court should affirm the Federal Circuit’s holding that in an appeal from a final written decision of the Board in an IPR, the Federal Circuit may review whether the petition for IPR was time-barred under 35 U.S.C. § 315(b).⁴

³ The arguments made in this brief were approved by an absolute majority of NYIPLA’s officers and members of its Board of Directors, but do not necessarily reflect the views of a majority of the members of the Association, or of the law or corporate firms with which those members are associated. After reasonable investigation, the NYIPLA believes that no officer or director or member of the Amicus Briefs Committee who voted in favor of filing this brief, nor any attorney associated with any such officer, director or committee member in any law or corporate firm, represents a party to this litigation. Some officers, directors, committee members or associated attorneys may represent entities, including other *amici curiae*, which have an interest in other matters that may be affected by the outcome of this litigation.

⁴ The NYIPLA takes no position on whether the IPR petition in this case was time-barred. The NYIPLA only advocates for the availability of judicial review of the Board’s time-bar determinations on appeal from a final written decision.

The America Invents Act (“AIA”), Pub. L. No. 112-29, 125 Stat. 284 (2011), imposes strict limits on the PTO’s authority to institute and decide IPRs.

For example, Congress limited the grounds for challenging the validity of patent claims to “ground[s] 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. § 311(b). Congress also imposed a time limit on the PTO’s ability to institute an IPR in certain circumstances, by providing 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, real party in interest, or privy of the petitioner is served with a complaint alleging infringement of the patent.”⁵ 35 U.S.C. § 315(b). Congress thus imposed a bar on IPRs that a petitioner or related party files too long after a related litigation in district court has ensued. In enacting these provisions, Congress sought to balance the availability of IPR proceedings with the need to provide adequate protections for patent owners and to ensure the integrity of proceedings before the PTO and in other fora.⁶

⁵ All emphases are added unless stated otherwise.

⁶ See, e.g., Office Patent Trial Practice Guide, 37 CFR Part 42, 77 Fed. Reg. 48756, Vol. 77, No. 157 at 48759 (Aug. 14, 2012) (the real party-in interest and privies “statutory estoppel provisions ... seek[] to protect patent owners from harassment via successive petitions by the same or related parties, to prevent parties from having a ‘second bite at the apple,’ and to protect the integrity of both the USPTO and Federal Courts by assuring that all issues are promptly raised and vetted”).

Judicial review is essential to enforcing these statutory limits on the PTO's authority over IPR proceedings, and to maintain the balance and efficiency Congress intended. This Court recognized these principles in *Cuozzo Speed Techs. LLC v. Lee*, 136 S. Ct. 2131 (2016). In *Cuozzo*, this Court held that judicial review was not available for the particular challenge that *Cuozzo* raised, *i.e.*, a “mine-run” claim that the petition for an IPR was not sufficiently particularized. However, the Court made it clear that action by the PTO “outside its statutory limits” or “in excess of statutory jurisdiction” “may be properly reviewable” in an appeal from a final written decision in an IPR. *Id.* at 2141–42. Violation of the timeliness requirement in § 315(b)—which was not before the Court in *Cuozzo*—is such an issue. Under *Cuozzo*, and in view of the “strong presumption” in favor of judicial review,” *id.* at 2140 (quoting *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645 (2015)), PTO decisions that disregard or violate the statutory time-bar of § 315(b) are not immune from judicial review.

The statutory time-bar at issue here is not “some minor statutory technicality.” *Cuozzo*, 136 S. Ct. at 2140. Rather, it is part of the fundamental statutory basis on which Congress authorized the PTO to institute an IPR proceeding. The PTO “act[s] outside its statutory limits” and “in excess of statutory jurisdiction,” if it institutes an IPR based on a time-barred petition. *Id.* at 2141–42. Thus, the entire proceeding, including the final decision, is *ultra vires*. Such conduct “may be

properly reviewable” in an appeal from a final decision under § 319. *Id.* at 2142.

In this case, the Federal Circuit held that the time-bar determination is subject to judicial review. That conclusion avoids turning the statutory limits on the PTO’s authority into a toothless nullity and upholds “the ‘strong presumption’ in favor of judicial review.” *Cuozzo*, 136 S. Ct. at 2140 (quoting *Mach Mining*, 135 S. Ct. at 1645). The AIA and its legislative history do not overcome that strong presumption; they do not provide clear and convincing evidence that Congress intended the PTO’s time-bar determination to be exempt from judicial review. Rather, § 315(b) imposes an explicit limitation on the authority, and jurisdiction, of the PTO. Under § 315(b) the PTO “*may not*” institute an IPR when a petition is time-barred. To the extent the PTO nevertheless institutes an IPR in violation of its statutory authority, judicial review of such *ultra vires* conduct is available. *Cuozzo*, 136 S. Ct. at 2141–42.

To allow the PTO to partake in unreviewable *ultra vires* conduct would provide it carte blanche power to unilaterally expand its authority beyond the clear statutory limits and without judicial constraint. Administrative agencies are obligated to act within the statutory limits on their authority. If an agency violates those limits, its conduct is subject to judicial review absent clear and convincing evidence that Congress intended otherwise. *Abbott Labs. v. Gardner*, 387 U.S. 136, 140-41 (1967). The PTO is no exception.

For all these reasons, this Court should affirm the Federal Circuit’s holding that time-bar

determinations by the PTO under § 315(b) are properly reviewable in appeals from final written decisions.

ARGUMENT

I. There Is a Strong Presumption in Favor of Judicial Review When an Executive Agency Violates Its Statutory Authority

This Court has consistently recognized that “Congress rarely intends to prevent courts from enforcing its directives to federal agencies.” *Mach Mining*, 135 S. Ct. at 1651. Congress ordinarily “intends [an administrative agency] to obey its statutory commands and ... expects the courts to grant relief when an executive agency violates such a command.” *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 (1986). “It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted,” since doing so would effectively give administrative agencies “blank checks” to expand their authority at will. *Id.* at 671 (quoting S. Rep. No. 79-752, at 26 (1945)).

“For that reason, this Court applies a ‘strong presumption’ favoring judicial review of administrative action.” *Cuozzo*, 136 S. Ct. at 2140 (quoting *Mach Mining*, 135 S. Ct. at 1650–51). “[T]he presumption favoring judicial review of administrative action” is “well-settled,” *Kucana v. Holder*, 558 U.S. 233, 251–52 (2010) (quoting *Reno v. Catholic Social Servs., Inc.*, 509 U.S. 43, 63–64

(1993)), and is “a familiar principle of statutory construction.” *Id.* at 251.

Although this presumption is rebuttable, there is “a ‘heavy burden’ in attempting to show that Congress ‘prohibit[ed] all judicial review’ of the agency’s compliance with a legislative mandate.” *Mach Mining*, 135 S. Ct. at 1651 (quoting *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975)). “Only upon a showing of ‘clear and convincing evidence’ of a contrary legislative intent should the courts restrict access to judicial review.” *Dunlop*, 421 U.S. at 567 (quoting *Abbott Labs.*, 387 U.S. at 141).

This “heavy burden” is not easily met. Even statutory language, that “plausibly can be read as imposing an absolute bar to judicial review,” does not overcome the “usual presumption favoring judicial review of administrative action” if there is another natural reading of the statute that permits some level of review. *Lindahl v. OPM*, 470 U.S. 768, 779 (1985); *see also* Stephen G. Breyer et al., *ADMINISTRATIVE LAW AND REGULATORY POLICY* 777 (6th ed. 2006) (“[C]ourts start with a ‘presumption of reviewability,’ which means that they will interpret the asserted preclusive effect of such statutes narrowly... Also, courts frequently interpret language that, on its face, seems explicitly to preclude review not to do so.”). So long as the statute is “reasonably susceptible” of an interpretation that preserves the availability of judicial review, it should be given that interpretation. *Kucana*, 558 U.S. at 251 (quoting

Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 434 (1995)).

II. The Presumption in Favor of Review Compels Judicial Enforcement of the Time-Bar in § 315(b)

A. The Statutory Text Shows That § 315(b) Violations Are Not Immune From Judicial Review

Nothing in the statutory text or structure of the AIA suggests that Congress intended to exempt the PTO's timeliness determination—an express statutory limitation on the PTO's authority to initiate and conduct IPR proceedings—from judicial review. To the contrary, the explicit and plain language of the AIA demonstrates Congress's intent to provide a strict prohibition on the PTO's authority to institute IPRs – specifically establishing that “[a]n *inter partes* review **may not be instituted**” by the PTO if the petition is filed “more than 1 year after the date on which the petitioner, real party or interest, or privy of the petitioner is served with a complaint alleging infringement of the patent.” 35 U.S.C. § 315(b). Absent judicial review, this strict prohibition would be toothless as the PTO would have unreviewable authority to institute petitions despite a § 315(b) time-bar.

Furthermore, 35 U.S.C. § 315(b) directs the PTO that it “may not” institute an IPR under such circumstances and limits the PTO's jurisdiction over IPRs. See *Intellectual Ventures II LLC v. JPMorgan Chase & Co.*, 781 F.3d 1372, 1376 (Fed Cir. 2015). Put otherwise, if the petition for review is time-barred, the PTO lacks discretion to determine “whether” (or not)

to institute review pursuant to § 314(a), since § 315(b) instructs that the PTO “**may not**” do so—irrespective of the perceived substantive merits of the petition.

The PTO’s own regulations recognize the “jurisdictional” nature of the § 315(b) time-bar. Specifically, in its regulations, the section entitled “Jurisdiction” provides in relevant part that “[a] petition to institute a trial [*e.g.*, an IPR] ***must be filed with the Board consistent with any time period required by statute.***” Office Patent Trial Practice Guide, 37 CFR Part 42, 77 Fed. Reg. 48756, Vol. 77, No. 157 at 48756 (Aug. 14, 2012).

If the PTO were to institute an IPR on a time-barred petition, that institution and everything that follows—including the final written decision—would be devoid of statutory authority. This would also violate the specific restrictions imposed under the AIA. In particular, Section 318 of the AIA, which governs the PTO’s authority to render a final written decision, requires first that “an *inter partes* review [be] instituted and not dismissed under this chapter.” 35 U.S.C. § 318(a). Since an “*inter partes* review ***may not be instituted***” on a time-barred petition (under § 315(b)), the PTO likewise lacks authority to render a final decision following from such a petition.⁷

⁷ Underscoring the jurisdictional nature of the time-bar under § 315(b), the PTO’s own regulations and practices explicitly reflect that issues tied to the timeliness of a petition can be raised—and trigger the dismissal of an IPR—even after institution. See 33 CFR Part 117, 81 Fed. Reg. 18750, Vol. 81, No. 63, at 18759 (Apr. 1, 2016) (“[T]o balance efficiency with fairness, the Office, in general, will permit a patent owner to

Similarly, the “No Appeal” provision under § 314(d) is consistent with the need for judicial review. Section 314(d) provides that the “*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 “determination” in § 314(d) refers to subpart (a) of that section, which provides that “[t]he Director may not authorize an *inter partes* review to be instituted unless the Director *determines* that the information presented in the petition ... and any response ... shows that there is a *reasonable likelihood that the petitioner would prevail ...*” *Id.* § 314(a).

§ 314(d) does not provide any evidence—let alone “clear and convincing” evidence—that Congress intended to preclude review of statutory limitations elsewhere in the AIA that explicitly restrict the PTO’s authority to institute IPRs. If the petition is untimely under § 315(b) or otherwise fails to conform to statutory requirements, then the PTO has no discretion “whether to institute” review: it “*may not*” do so.

B. *Cuozzo*’s Treatment of a “Mine-Run” Claim Does Not Apply to the Explicit Statutory Limitation in § 315(b)

Cuozzo also supports judicial review of time-bar determinations in an appeal of a final written decision. In *Cuozzo*, the patent holder claimed that the petition for an IPR was not pled “with particularity,” in violation of § 312(a)(3). 136 S. Ct. at

raise a challenge regarding a real party in-interest or privity at any time during a trial proceeding.”).

2139. Specifically, it argued that the PTO improperly instituted review of certain claims by doing so on the basis of prior art references that were cited in the petition against other related claims, but not *explicitly* linked to the claims at issue. *Id.* According to the Court, such a “mine-run” challenge to the “particularity” of claims in a petition is “little more than a challenge to the Patent Office’s conclusion, under § 314(a), that the ‘information presented in the petition’ warranted review,” 136 S. Ct. at 2142, and as such, was not appealable.

While the *Cuozzo* majority reasoned that Congress did not intend to have an IPR proceeding disturbed based on “some minor statutory technicality,” *id.* at 2140, it cautioned that its decision on the issue before it did not “enable the agency to act outside its statutory limits,” *id.* at 2141. This Court explained that to the extent the PTO “act[s] outside its statutory limits” in instituting IPR or engages in conduct that is “in excess of statutory jurisdiction,” such “shenanigans’ may be properly reviewable in the context of § 319 and under the Administrative Procedure Act.” *Cuozzo*, 136 S. Ct. at 2141–42. In other words, under § 319, the PTO has authority to render a final decision in an IPR only to the extent it acts within the scope of authority granted by Congress. If the PTO institutes an IPR in excess of its statutory authority, that defect permeates the entire proceeding—including the final decision. Section 319, which governs appeals from a final written decision, does not limit the issues that may be raised in such an appeal. *See* 35 U.S.C. § 319.

Indeed, a patent owner may be “dissatisfied with the final written decision” of the PTO, *id.*, where the PTO exceeded its authority in instituting the review vis-à-vis a wrongful time-bar determination. In this way, the time-bar under § 315(b) is fundamentally different than the “particularity” challenge that this Court found to be immune from judicial scrutiny in *Cuozzo*. The time-bar imposed by § 315(b) is not “some minor statutory technicality.” It is an unambiguous, explicit limitation on the authority and jurisdiction of the PTO to institute IPR proceedings. The time-bar also bears no relation to the PTO’s threshold “determination” under § 314(a) as to whether a petition contains sufficient evidence to warrant review. *Cuozzo*, 136 S. Ct. at 2142.

The time-bar is instead more akin to the proscription in § 311 that a petition may request review “*only* on a ground that could be raised under section 102 or 103.” 35 U.S.C. § 311(b).⁸ As explained by this Court, even though § 311 is directed to the contents of the petition to institute review, if the PTO institutes review and thereafter “cancel[s] a patent claim for ‘indefiniteness under § 112’”—in direct violation of § 311—such *ultra vires* action may be reviewed. *Cuozzo*, 136 S. Ct. at 2141–42. By the same token, if the PTO institutes an IPR on a petition that is not timely under § 315(b), such action “outside its

⁸ See 35 U.S.C. § 311(b) (“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.”).

statutory limits” and “in excess of [its] statutory jurisdiction,” warrants judicial review. *Id.*

Thus, the PTO’s failure to adhere properly to what should be a § 315(b) time-bar to an IPR petition would constitute *ultra vires* conduct, which is precisely the category of conduct that this Court held to be properly reviewable in *Cuozzo*. *See* 136 S. Ct. at 2142.

III. Upholding Judicial Review of § 315(b) Time-Bar Determinations Conforms with This Court’s Precedents

The Administrative Procedure Act (“APA”) explicitly directs reviewing courts to “decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.” 5 U.S.C. § 706. Among other things, the APA empowers courts to “hold unlawful and set aside agency action” that is found to be “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” *Id.* § 706(2)(C).

Consistent with these provisions, and the longstanding presumption in favor of judicial review, in *Cuozzo*, this Court emphasized that whether the PTO instituted and decided an IPR in excess of its limited statutory authority and jurisdiction is subject to judicial review. *See supra* II.B. Judicial review is necessary in order to avoid such violations and maintain the careful balance Congress intended when it enacted the AIA.

In turn, the Federal Circuit explicitly relied on this Court's guidance in *Cuozzo* in its *en banc* decision in *Wi-Fi One, LLC v. Broadcom Corp.*, which expressly overruled *Achates Reference Publishing Inc. v. Apple Inc.*, 803 F.3d 652 (Fed. Cir. 2015), which held that § 314(d) “prohibits this court from reviewing the Board’s determination to initiate IPR proceedings based on its assessment of the time-bar of § 315(b), even if such assessment is reconsidered during the merits phase of proceedings and restated as part of the Board’s final written decision.” *Wi-Fi One*, 837 F.3d 1329, 1333 (Fed Cir. 2016) (citing *Achates*, 803 F.3d at 658). In the *Wi-Fi One en banc* decision, the Federal Circuit held that in spite of the language of § 314(d), the Board’s determinations regarding the time bar in § 315(b) are reviewable by the Federal Circuit on appeal from a final written decision. *Id.* at 1367. The Federal Circuit explained that, in view of “the ‘strong presumption’ favoring judicial review of administrative actions,” § 314(d) is best understood as limited to “the determination by the Director whether to institute [*inter partes* review] as set forth in § 314.” *Id.* at 1371, 1372. Because § 315(b) is not “‘closely related’ to the institution decision addressed in § 314(a),” the *Wi-Fi One* court found that §314(d) does not preclude review of the Board’s § 315(b) determination. *Id.* at 1374 (quoting *Cuozzo*, 136 S. Ct. at 2142).

This Court then emphasized in *SAS* that “nothing in Section 314(d) or *Cuozzo* withdraws [judicial power] to ensure that an *inter partes* review proceeds in accordance with the law’s demands.” *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1360 (2018).

The direction handed down by *Cuozzo* and *SAS*, as reflected in the Federal Circuit decisions in *Wi-Fi One* and the present case, could not be clearer. Congress “intends [an administrative agency] to obey its statutory commands and ... expects the courts to grant relief when an executive agency violates such a command.” *Bowen v. Academy of Family Physicians*, 476 U.S. 667, 681 (1986).

As this Court stated, “[w]e need only know—and know that Congress knows—that legal lapses and violations occur, and especially so when they have no consequence.” *Mach Mining*, 135 S. Ct. at 1652–53. Indeed, without judicial review, the explicit time-bar that Congress enacted in § 315(b) and other express limitations on the authority of the PTO to institute and conduct IPRs “would be naught but empty words,” *Bowen*, 476 U.S. at 672 n.3 (citation omitted).

CONCLUSION

It is respectfully submitted that this Court should affirm the holding of the Federal Circuit that the Board’s § 315(b) time-bar determinations are reviewable by the Federal Circuit in an appeal of an IPR final written decision.

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