

No. 2020-2040

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

GOOGLE LLC,

Appellant,

v.

UNILOC 2017 LLC,

Appellee.

On Appeal from the United States Patent and Trademark Office,
Patent Trial and Appeal Board in No. IPR2020-00115

**MOTION OF APPLE INC., ACT | THE APP ASSOCIATION,
COMPUTER AND COMMUNICATIONS INDUSTRY ASSOCIATION
(CCIA), ENGINE ADVOCACY, AND HIGH TECH INVENTORS
ALLIANCE FOR LEAVE TO FILE BRIEF AS AMICI CURIAE**

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September 17, 2020

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Pursuant to Federal Rule of Appellate Procedure 29(a)(3), Apple Inc., ACT | The App Association, Computer and Communications Industry Association (CCIA), Engine Advocacy, and High Tech Inventors Alliance (“Amici”) move for leave to file the attached brief as amici curiae supporting Appellant Google LLC’s September 10, 2020 response to the Court’s August 27, 2020 order to show cause. Google has consented to filing the proposed brief. Uniloc states its position as: “While it is unclear the rules allow for an amicus brief at this stage and under these circumstances, Uniloc does not oppose.”

Rule 29(a) permits the filing of amicus briefs during the initial consideration of an appeal on its merits by leave of court or with the parties’ consent. Fed. R. App. P. 29(a)(1), (2). This Court accordingly accepts amicus briefs at preliminary stages before the principal briefing of an appeal, such as when important jurisdictional issues are presented. *See, e.g., Momenta Pharm., Inc. v. Bristol-Myers Squibb Co.*, No. 17-1694 (Fed. Cir. May 4, 2017) (granting motion for leave to file amicus brief opposing motion to dismiss for lack of jurisdiction). Here, amici have a strong interest in the disposition of the pending order to show cause and submit that the brief will aid the Court’s consideration of this recurring and significant question.

Amici are a U.S. technology company, industry organizations, and advocacy groups from a wide range of industries that rely on and advocate for a strong patent

system that promotes innovation. Apple is an American success story and developer of iconic consumer devices and software that have transformed the American economy. ACT | The App Association is an international not-for-profit grassroots advocacy and education organization representing more than 5,000 small business software application developers and technology firms. The Computer and Communications Industry Association (“CCIA”) represents more than two dozen companies of all sizes providing high technology products and services, including computer hardware and software, electronic commerce, telecommunications, and Internet products and services. Engine Advocacy is a technology policy, research, and advocacy organization that bridges the gap between policymakers and startups, working with government and a community of high-technology, growth-oriented startups across the nation to support the development of technology entrepreneurship. The High Tech Inventors Alliance (“HTIA”) is a 501(c)(6) nonprofit whose members include Adobe, Amazon, Cisco, Dell, Google¹, Intel, Microsoft, Oracle, Salesforce, and Samsung.

Amici and their members include leading innovators whose success in developing cutting-edge technologies depends on a patent system that vigorously protects meritorious patents while ensuring that weak patents cannot be exploited

¹ Google did not participate in the drafting of this brief.

in litigation to inhibit innovation. Collectively, Amici and their members invest billions of dollars in research and development each year and own thousands of patents.

Amici and their members include companies that are frequent defendants in patent infringement suits in which the patents are later found to be invalid and thus never should have issued. Such patents threaten innovation—particularly in the hands of non-practicing entities that use the patent system not to spur their own inventions, but to extract monetary returns by asserting weak patents in infringement suits. These suits divert resources into litigation that innovators like Amici otherwise could use to develop new technologies. Amici thus have a strong interest in patent-review procedures like inter partes review (“IPR”) that robustly protect patent rights while also providing an efficient and expert alternative to litigation for clearing away bad patents.

This appeal challenges a recently adopted rule of the Patent and Trademark Office (“PTO”) that unlawfully cuts off access to IPR—regardless of the weakness of the challenged patent claims—when parallel litigation over the validity of the same patent claims is pending. As a result, Amici or their members have had IPR petitions denied under this rule (the “*NHK-Fintiv* rule”) merely because parallel litigation is pending. In fact, the *NHK-Fintiv* rule has already resulted in dozens of institution denials for patent challengers across a range of industries. Amici thus

have a stake in ensuring that judicial review is available to redress the PTO's unlawful restriction of IPR under the *NHK-Fintiv* rule.

The accompanying brief will aid the Court's consideration of the jurisdictional issues in this appeal by providing further discussion of the reasons why this Court retains jurisdiction to hear this appeal despite 35 U.S.C. § 314(d)'s bar on appeals from non-institution decisions. In particular, Amici's brief explains why denial of institution under the *NHK-Fintiv* rule is precisely the type of agency action "in excess of statutory jurisdiction" that the Supreme Court has repeatedly held is subject to judicial review notwithstanding § 314(d). *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2142 (2016) (quoting 5 U.S.C. § 706(2)); *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1359 (2018). Moreover, the amicus brief adds further perspective as to why judicial review is not only available, but also vitally necessary: The rule has dramatically limited access to IPR, produced inconsistent and irrational results, and created inefficient incentives that Congress could not have intended. Amici's perspective on these significant issues—grounded in their considerable real-world experience as both patent owners and frequent IPR petitioners—will assist the Court's consideration of its jurisdiction over Google's appeal.

CONCLUSION

The Court should grant leave to file the accompanying amicus brief.

Respectfully submitted,

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CERTIFICATE OF INTEREST

Counsel for *Amici Curiae* Apple Inc., ACT | The App Association, Computer and Communications Industry Association (CCIA), Engine Advocacy, and High Tech Inventors Alliance certifies the following:

1. Represented Entities. Fed. Cir. R. 47.4(a)(1). Provide the full names of all entities represented by undersigned counsel in this case.

Apple Inc.

ACT | The App Association

Computer and Communications Industry Association (CCIA)

Engine Advocacy

High Tech Inventors Alliance (HTIA)

2. Real Party in Interest. Fed. Cir. R. 47.4(a)(2). Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.

None.

3. Parent Corporations and Stockholders. Fed. Cir. R. 47.4(a)(3). Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.

Apple: None.

ACT | The App Association: ACT | The App Association has no parent corporation and no publicly traded company owns 10% or more of its stock. A list of ACT | The App Association's members is available at <https://actonline.org/members-2-2/>.

CCIA: CCIA has no parent corporation and no publicly traded company owns 10% or more of its stock. However, its membership includes companies that have issued stock or debt securities to the public. A list of CCIA's members is available at <https://www.ccianet.org/about/members/>.

Engine Advocacy: None.

HTIA: HTIA has no parent corporation and no publicly traded company owns 10% or more of its stock. However, its membership includes companies that have issued stock or debt securities to the public. A list of HTIA's members is available at <https://www.hightechinventors.com/>.

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

None.

5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

Uniloc 2017 LLC v. Google LLC, No. 5:20-cv-05334 (N.D. Cal.)

Uniloc 2017 LLC et al v. Google LLC, No. 3:20-cv-05341 (N.D. Cal.)

Uniloc 2017 LLC v. Vudu Inc., No. 1:19-cv-00183 (D. Del.)

Uniloc 2017 LLC v. Sling TV, LLC, No. 1:19-cv-00278 (D. Col.)

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Sling TV, LLC v. Uniloc 2017, IPR2019-01367 (P.T.A.B.)

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Vudu, Inc. v. Uniloc 2017 LLC, IPR2020-00677 (P.T.A.B.)

Uniloc 2017 LLC v. American Broadcasting Cos., Inc., No. 8:18-cv-02056 (C.D. Cal.)

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

None.

Dated: September 17, 2020

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATIONS**

The foregoing filing complies with the relevant type-volume limitation of the Federal Rules of Appellate Procedure and Federal Circuit Rules because:

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CERTIFICATE OF SERVICE

I hereby certify that, on this 17th day of September, 2020, I filed the foregoing with the Clerk of the United States Court of Appeals for the Federal Circuit via the CM/ECF system, which will send notice of such filing to all registered CM/ECF users.

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(CCIA), ENGINE ADVOCACY, AND HIGH TECH INVENTORS
ALLIANCE SUPPORTING APPELLANT GOOGLE LLC's
RESPONSE TO ORDER TO SHOW CAUSE**

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None.

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None.

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INTRODUCTION

This appeal challenges a rule (“*NHK-Fintiv*”) recently adopted by the U.S. Patent and Trademark Office (“PTO”) that restricts access to inter partes review (“IPR”), regardless of the weakness of the challenged patent claim, when litigation over that patent claim is pending—exactly when Congress intended IPR to be available as an alternative to litigation for eliminating weak patent claims that never should have issued. Adopted as a rule when the Director designated two Patent Trial and Appeal Board (“Board”) decisions as precedential, *NHK-Fintiv* has yielded dozens of institution denials against patent challengers across many industries. And the rule’s application has proven arbitrary and unpredictable.

Although 35 U.S.C. §314(d) ordinarily bars appeal of non-institution decisions, §314(d) does not shield Board decisions denying IPR under *NHK-Fintiv*. Because the rule exceeds the PTO’s authority under the Leahy-Smith America Invents Act (“AIA”) and the Administrative Procedure Act (“APA”), non-institution decisions under the rule are the type of action “in excess of statutory jurisdiction” that remains reviewable notwithstanding §314(d). *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2142 (2016). The Court therefore has jurisdiction, and its intervention is badly needed.

At minimum, the Court should not dismiss Google’s appeal without full briefing and argument. The jurisdictional question goes to the heart of the PTO’s authority and will recur if the PTO continues to deny institution under the rule.

STATEMENT OF INTEREST¹

Amici are a U.S. technology company, industry organizations, and advocacy groups that support a strong patent system that promotes innovation. Amici and their members include leading innovators whose success in developing cutting-edge technologies depends on a patent system that protects meritorious patents while ensuring that weak patents cannot be exploited in litigation to inhibit innovation.

Amici and their members include companies that are frequent defendants in infringement suits asserting patents that never should have issued. Such patents threaten innovation—particularly in the hands of non-practicing entities that use the patent system not to fuel their own inventions, but to extract monetary returns through costly infringement suits. Amici have a strong interest in ensuring the availability of judicial review of agency rules that unlawfully restrict procedures

¹ No party or party’s counsel authored this brief in whole or in part. No one, other than amici, their members, and their counsel, contributed money intended to fund preparing or submitting the brief. Google, a CCIA and HTIA member, played no role in CCIA’s or HTIA’s decision to join or in preparing the brief. Google consented to this brief. Uniloc stated its position: “While it is unclear the rules allow for an amicus brief at this stage and under these circumstances, Uniloc does not oppose.”

Congress created for challenging bad patents. Amici and their member companies have had IPR petitions denied under *NHK-Fintiv* merely because of parallel litigation and now face substantial uncertainty as to whether IPR will be instituted in future cases. Absent judicial review, the rule will continue to improperly narrow the availability of IPR and increase litigation, foster uncertainty, and impede innovation.

ARGUMENT

I. THE COURT HAS JURISDICTION

This Court has jurisdiction over appeals from Board “decision[s]” “with respect to ... inter partes review.” 28 U.S.C. §1295(a)(4)(A). That jurisdictional grant applies here because the Board’s denial of Google’s IPR petition is a decision “with respect to” IPR. *Huffington v. T.C. Grp.*, 637 F.3d 18, 22 (1st Cir. 2011) (“‘with respect to’” means “‘with reference to,’ ‘relating to,’ ‘in connection with,’ ‘associated with’”).

Although §314(d) generally makes institution decisions “final and nonappealable,” that provision does not withdraw the jurisdiction that §1295(a)(4)(A) confers here. Notwithstanding §314(d), “judicial review remains available” “[i]f a party believes the [PTO] has ... exceed[ed] its statutory bounds,” *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1359 (2018), or its action is “‘arbitrary [and] capricious,’” or if the party raises a “question” “less closely related” to a

statute governing IPR institution, *Cuozzo*, 136 S. Ct. at 2141-2142 (quoting 5 U.S.C. §706(2)(A)); see *Facebook, Inc. v. Windy City Innovations*, 2020 WL 5267975, at *5 (Fed. Cir. Sept. 4, 2020).

For example, in *SAS*, §314(d) did not withdraw jurisdiction to review the Director's decision to "institute[] [IPR] on only some [claims] and den[y] review on the rest." 138 S. Ct. at 1354. Rejecting the Director's argument that §314(d) "foreclos[es] judicial review of any legal question bearing on the institution of inter partes review," the Supreme Court explained that SAS claimed the Director's partial-institution policy "exceeded his statutory authority" under the AIA, and "nothing in §314(d)" precluded review of that claim. *Id.* at 1359.

Similarly, §314(d) does not bar Google's appeal. Google contends *NHK-Fintiv* is ultra vires substantively and procedurally. See ECF #10 (Fed. Cir. Sept. 10, 2020). Google's appeal therefore falls outside §314(d)'s narrow exception to the Court's jurisdiction under §1295(a)(4)(A).

This conclusion is unexceptional. Statutes barring judicial review commonly do not apply to claims that an agency exceeded its statutory authority. In *Leedom v. Kyne*, for example, a statute precluding review of certain National Labor Relations Board actions did not withdraw jurisdiction over a claim that the Board's order was "made in excess of its delegated powers and contrary to a specific [statutory] prohibition." 358 U.S. 184, 187-188 (1958). Similarly, in *Aid*

Association for Lutherans v. USPS, statutory provisions “exempt[ing] the Postal Service” from the APA and “preclud[ing] judicial review” of certain agency decisions “d[id] not apply” where the “complaints ... allege[d]” that the agency “exceeded its statutory authority.” 321 F.3d 1166, 1172 (D.C. Cir. 2003). “It d[id] not matter” that the statute generally foreclosed review “because [j]udicial review is favored when an agency is charged with acting beyond its authority.” *Id.* (quotation marks omitted). Section 314(d)’s narrow scope thus mirrors the narrow scope of similar statutory bars.

That the Director has discretion in deciding whether to institute IPR does not alter this analysis, and no court has suggested otherwise. Even where a statute confers discretion—however broad—agencies must exercise that discretion within statutory bounds, and “courts are normally available to reestablish th[ose] limits” when an agency exceeds them. *Sierra Club v. Trump*, 963 F.3d 874, 891 (9th Cir. 2020); *see Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 326 (2014); *Tokyo Kikai Seisakusho, Ltd. v. United States*, 529 F.3d 1352, 1361 (Fed. Cir. 2008) (“An agency cannot, for example, exercise its inherent authority in a manner that is contrary to a statute.”); *cf. Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018) (matters committed to agency discretion remain subject to judicial review except in “rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the

agency’s exercise of discretion”). If the PTO denied an IPR petition on a coin flip or a policy of denying *all* IPR petitions, the AIA would not shield that irrational, ultra vires action from judicial review. Even as the Supreme Court observed in passing that institution decisions are “committed to the Patent Office’s discretion,” *Cuozzo*, 136 S. Ct. at 2140, it also made clear that judicial review is available where the PTO is claimed to have “act[ed] outside its statutory limit,” *id.* at 2141; *see also SAS*, 138 S. Ct. at 1354.²

II. THE ULTRA VIRES *NHK-FINTIV* RULE CRIES OUT FOR JUDICIAL REVIEW

This case is the sort of appeal *Cuozzo* kept open. *NHK-Fintiv* requires the Board to consider denying IPR when litigation over the same patent claims is pending. As Google explains, that rule violates the AIA, which expressly permits IPR while parallel infringement litigation is pending if the IPR petition is filed within one year after the infringement complaint is served. And it violates the APA and AIA, which require the PTO to use notice-and-comment rulemaking. 35 U.S.C. §§2(b)(2)(B), 316(a); *Kisor v. Wilkie*, 139 S. Ct. 2400, 2420 (2019). Had the rule been adopted through notice-and-comment rulemaking, it would certainly

² Although jurisdiction is intertwined with the merits here, jurisdiction must be evaluated based on the nature of the challenge—not a premature evaluation of the merits. *Cuozzo*, 136 S. Ct. at 2141 (§314(d)’s applicability depends on “grounds for attacking” Director’s decision); *SAS*, 138 S. Ct. at 1359 (similar).

be reviewable. The Director should not be rewarded with immunity from judicial review for flouting the AIA's and APA's procedural requirements.

The rule's adverse consequences are serious. The rule defeats the purpose of IPR by denying petitioners that are also defendants in infringement suits the streamlined and specialized review procedure that Congress intended to provide. The rule also yields arbitrary results and inefficient incentives. Consequently, judicial review is not only available, but vitally necessary.

A. *NHK-Fintiv* Thwarts Congress's Policy Judgments

Congress created IPR as a specialized procedure for “weed[ing] out bad patent claims efficiently.” *Thryv, Inc. v. Click-To-Call Techs., LP*, 140 S. Ct. 1367, 1370, 1374 (2020). Congress considered IPR necessary because “questionable patents [we]re too easily obtained” and “too difficult to challenge” through pre-existing procedures, including litigation. H.R. Rep. No. 112-98, at 39-40, 112th Cong., 1st Sess. (2011); *see SAS*, 138 S. Ct. at 1353.

As the AIA's text and structure show, Congress specifically contemplated that IPR would often proceed with litigation involving the same patent claims. The AIA prohibits IPR if the petition “is filed more than 1 year after the date on which the petitioner ... is served with a complaint alleging infringement of the patent.” §315(b). This provision permits IPR that overlaps with infringement litigation if the petition is timely. In crafting this deadline, moreover, Congress balanced the

interests of accused infringers (in having a reasonable opportunity to investigate the patent claims in the litigation) against the interests of patent owners (in protection from unfair delay), rejecting a shorter deadline. *See* S. 23, 112th Cong. sec. 5(a), §315(b) (2011).

Indeed, whereas the AIA explicitly gives the Director discretion to deny institution based on prior or pending *administrative* proceedings, *see* §§315(d), 325(d), no comparable provision grants the Director such discretion when there is a parallel *lawsuit*. To the contrary, the AIA bars timely filed IPR based on parallel litigation only if the petitioner previously filed suit challenging the validity of the patent. §315(a)(1).

Congress thus knew how to limit IPR when litigation is pending and chose not to empower the Director to do so when the litigation is an infringement suit against the IPR petitioner and the IPR petition is timely. Yet *NHK-Fintiv* calls for denial of institution in those circumstances, based on the PTO's own view—contrary to Congress's—that denial better serves the “efficiency and integrity of the patent system.” *Apple Inc. v. Fintiv, Inc.*, 2020 WL 2126495, at *3, *7 (P.T.A.B. Mar. 20, 2020). But Congress already struck this balance and gave the agency no authority to alter that judgment.

B. *NHK-Fintiv* Has Reduced The Availability Of IPR, Produced Arbitrary Results, And Created Inefficient Incentives

For nearly six years after the AIA’s enactment, IPR and infringement litigation often proceeded in tandem. Inefficiency concerns were generally managed through litigation stays. *See Thryv*, 140 S. Ct. at 1379 (Gorsuch, J., dissenting); *Finjan, Inc. v. Symantec Corp.*, 139 F. Supp. 3d 1032, 1035 (N.D. Cal. 2015) (recognizing “liberal policy in favor” of stays pending IPR). IPR thus served its intended function to “simplify proceedings before the courts and to give the courts the benefit of the expert agency’s full and focused consideration of the effect of prior art on patents being asserted in litigation.” *NFC Tech. LLC v. HTC Am., Inc.*, 2015 WL 1069111, at *4 (E.D. Tex. Mar. 11, 2015).

Since *NHK-Fintiv* became binding, however, the Board has relied on it to deny institution of dozens of IPR petitions based solely on overlapping litigation. In amici’s experience, the rule has dramatically reduced the availability of IPR, regardless of the weakness of the challenged patent claims.

Moreover, *NHK-Fintiv* has proven incapable of consistent application. Applying the rule, the Board has *denied* institution where the district court trial was scheduled to begin two months before the Board’s projected deadline to issue a final written decision (“FWD”), *Apple Inc. v. Fintiv, Inc.*, 2020 WL 2486683, at *5 (P.T.A.B. May 13, 2020), but *instituted* IPR where the trial was scheduled to begin *seven to nine months before* the FWD deadline, *Apple Inc. v. Maxell, Ltd.*,

2020 WL 3401274, at *6 (P.T.A.B. June 19, 2020); *Apple Inc. v. SEVEN Networks, LLC*, 2020 WL 3249313, at *4 (P.T.A.B. June 15, 2020). The Board denied another IPR petition based on the expected trial date, even though that trial had been continued indefinitely—and might not have preceded the FWD at all. *Ethicon, Inc. v. Board of Regents, Univ. of Tex. Sys.*, 2020 WL 3088846, at *4 (P.T.A.B. June 10, 2020).

NHK-Fintiv also undermines efficiency—the very interest the PTO claims the rule promotes. For example, *NHK-Fintiv*'s focus on substantive overlap between IPR and litigation can pressure IPR petitioners to stipulate not to pursue the same grounds in litigation as in IPR, in the hope of avoiding denial under the rule, see *Sand Revolution II, LLC v. Continental Intermodal Group – Trucking LLC*, 2020 WL 3273334, at *5 (P.T.A.B. June 16, 2020)—frustrating Congress's goal of promoting efficient resolution of patentability disputes through IPR. Similarly, the rule's focus on trial dates compels infringement defendants to guess when they must file an IPR petition. If a petitioner waits until trial has been scheduled, the petition might be deemed too late under *NHK-Fintiv*. But petitioning early will often result in underdeveloped or bloated petitions because the petitioner lacked a reasonable opportunity to assess the asserted patent claims and focus the petition. See *Cisco Sys., Inc. v. Ramot at Tel Aviv Univ. Ltd*, 2020 WL 2511246, at *10 (P.T.A.B. May 15, 2020) (Crumbley, APJ, dissenting).

Jurisdictions that tend to race to trial or view stays unfavorably can increase this pressure on defendants to file premature IPR petitions, while promoting forum-shopping by plaintiffs. These incentives undermine §315(b)'s carefully calibrated one-year period and disserve the patent system.

Additionally, courts routinely reschedule trials—frequently *after* the Board has cited a previous trial date to deny institution. One study found 70% of trials in the Western District of Texas and *all* trials in Delaware—the two busiest patent venues—were delayed after the Board denied IPR in reliance on earlier trial dates.³ Such uncertainty yields unfair, disparate outcomes and wastes resources. The Board and parties have had to expend resources on at least one rehearing proceeding when the trial date shifted following an initial non-institution decision. *Sand Revolution II*, 2020 WL 3273334, at *4. But rehearing is often unavailable because trials are often rescheduled after the 30-day deadline for seeking rehearing has passed, 37 C.F.R. §42.71(d)(2)—exactly what happened here.

Judicial review is not only available, but necessary to preserve IPR as a pillar of a strong patent system.

³ See McKeown, *District Court Trial Dates Tend to Slip After PTAB Discretionary Denials*, <https://www.patentspostgrant.com/district-court-trial-dates-tend-to-slip-after-ptab-discretionary-denials/> (July 24, 2020).

III. ANY DOUBT ABOUT JURISDICTION SHOULD BE RESOLVED BY THE MERITS PANEL

If the Court has any doubt about jurisdiction, it should refer the question to the merits panel for full briefing and argument. Although three Supreme Court decisions have recognized that §314(d) does not bar review of this type of challenge, no decision has applied those cases on direct appeal from a non-institution decision. Moreover, IPR denials under *NHK-Fintiv* have generated several appeals presenting the same questions as this case, and more are bound to arise. The validity of *NHK-Fintiv*, and the likelihood the PTO will continue denying potentially meritorious IPR petitions for reasons Congress foreclosed, is too important to forgo a duly considered precedential decision.

CONCLUSION

The Court should conclude it has jurisdiction or refer the issue to the merits panel.

Respectfully submitted,

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September 17, 2020

CERTIFICATE OF SERVICE

I hereby certify that, on this 17th day of September, 2020, I filed the foregoing with the Clerk of the United States Court of Appeals for the Federal Circuit via the CM/ECF system, which will send notice of such filing to all registered CM/ECF users.

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