

**SUPREME COURT  
OF THE UNITED STATES**

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IN THE SUPREME COURT OF THE UNITED STATES

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THRYV, INC., FKA DEX MEDIA, INC., )  
  ) Petitioner,  
  ) )  
  ) v. ) No. 18-916  
CLICK-TO-CALL TECHNOLOGIES, LP, )  
ET AL., )  
  ) Respondents.  
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Pages: 1 through 71  
Place: Washington, D.C.  
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THRYV, INC., FKA DEX MEDIA, INC., )

Petitioner, )

v. ) No. 18-916

CLICK-TO-CALL TECHNOLOGIES, LP, )

ET AL., )

Respondents. )

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Washington, D.C.

Monday, December 9, 2019

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 a.m.

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on behalf of the Petitioner.

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reversal.

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on behalf of the private Respondent.

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1 P R O C E E D I N G S

2 (11:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument next in Case 18-916, Thryv Incorporated  
5 versus Click-To-Call Technologies.

6 Mr. Charnes.

7 ORAL ARGUMENT OF ADAM H. CHARNES

8 ON BEHALF OF THE PETITIONER

9 MR. CHARNES: Mr. Chief Justice, and  
10 may it please the Court:

11 The text of the America Invents Act,  
12 the statutory history, the statute's policy  
13 goals, and this Court's decision in Cuozzo all  
14 confirm that Section 314(d) precludes judicial  
15 review of the director's time-barred  
16 determination under Section 315(b).

17 Begin with the text of the statute.  
18 Congress drafted the appeal bar to apply to "the  
19 determination whether to institute an inter  
20 partes review under this section." Congress  
21 could have written Section 314(d) to review only  
22 the determination whether there was a reasonable  
23 likelihood that the petition -- petitioner would  
24 prevail, but Congress wrote the provision more  
25 broadly to apply to the institution decision as

1 a whole.

2 Further, Section 314 itself instructs  
3 the director to look beyond that section in  
4 making the institution determination in at least  
5 two ways. First, subsection (b) instructs the  
6 director to "determine whether to institute an  
7 inter partes review under this chapter." And  
8 more expressly, subsection (a) tells the  
9 director to consider the patent owner's response  
10 in determining whether to institute review. And  
11 Section 313 says the patent owner in that  
12 response can present reasons explaining why the  
13 petition fails to meet any requirements of the  
14 chapter.

15 In other words, the text of the  
16 statute makes clear that the institution  
17 determination occurs under Section 314 based on  
18 the prerequisites in the entire chapter. And  
19 because subsection (d) provides the institution  
20 determination cannot be judicially reviewed, the  
21 agency's application of those prerequisites  
22 located elsewhere in the chapter cannot be  
23 appealed, including Section 315(b).

24 Now the statutory history confirms  
25 this reading. Congress knew how to limit the

1 appeal bar just to the preliminary patentability  
2 determination. That is, after all, how it wrote  
3 the similar -- the analogous limits on judicial  
4 review for ex parte reexaminations in former  
5 Section 312 and inter partes reexaminations in  
6 Section 313.

7           The inter partes reexamination  
8 statute, former 312, although now repealed, is  
9 particularly instructive. Like with IPRs,  
10 Congress included several prerequisites to  
11 institution in former Section 311. But, when it  
12 wrote the appeal bar, it wrote it narrowly  
13 focused on "the determination under subsection  
14 (a)."

15           Subsection (a) contained the  
16 preliminary patentability standard, which is a  
17 substantial new question of patentability. That  
18 -- by writing it that way, Congress excluded  
19 from the appeal bar the agency's determination  
20 of the statutory prerequisites. With the  
21 America Invents Act, however, Congress broadened  
22 the appeal bar in Section 314(d) to apply to the  
23 institution decision as a whole.

24           And this deliberate drafting decision  
25 essentially refutes Respondents' reading of the

1 statute. This reading -- our reading of the  
2 statute is also confirmed by this Court's  
3 decision in *Cuozzo*.

4 Now *Cuozzo* dealt with a prerequisite  
5 to institution that was not in 314(a). It was  
6 in 312(a)(3), the particularity requirement.  
7 Nonetheless, this Court held that it was subject  
8 to the -- the Board's assessment of -- the  
9 particularity requirement was subject to the  
10 appeal bar in Section 314(d).

11 And it's important to focus on what  
12 the Court explained -- why the Court explained  
13 it was subject to that. The Court said the  
14 appeal bar applies to two different things. It  
15 applies to the preliminary patentability  
16 determination in 314(a). That is the Board's  
17 assessment about whether it was reasonably  
18 likely that the petitioner would prevail. And  
19 it also applied, this Court said in *Cuozzo*, to  
20 statutes that are closely related to the  
21 institution decision.

22 And in our view, Section 315(b) is by  
23 definition closely related to the institution  
24 decision. After all, 315(b) begins with the  
25 words "an inter partes review may not be

1 instituted if."

2 JUSTICE KAVANAUGH: Cuozzo had a part  
3 that, of course, responded to concerns that have  
4 been raised, I -- I think in the dissent, and  
5 says we -- our interpretation does not enable  
6 the agency to act outside its statutory limits,  
7 for example; such shenanigans may be properly  
8 reviewable and focused really on the narrow  
9 issue before it. So how do we take into account  
10 that language from the decision?

11 MR. CHARNES: Right. Well, the  
12 question is -- what the Court explained in  
13 Cuozzo was, for example, if the Board vacated --  
14 invalidated a patent on grounds that were beyond  
15 the scope of an IPR, that that would be a  
16 shenanigan that -- that could be reviewed.  
17 That's a merits decision. That's a step two  
18 decision. That's not an institution decision.

19 And I think it's important to focus on  
20 the fact -- on really the limited nature of  
21 Section 315(b) within the statutory scheme.  
22 315(b) is not a merits determination. 315(b) is  
23 not a statute of repose, as it's traditionally  
24 understood. Instead, it's a limited forum  
25 selection provision.



1                   And it's a limited forum selection  
2 provision in two different ways.

3                   JUSTICE GORSUCH: But, Mr. Charnes,  
4 let's -- let's -- just to follow up on this,  
5 let's just hypothesize that someone has tried to  
6 undo this patent four times or maybe even more  
7 in a court of law, failed for various reasons  
8 every single time, and then comes to the  
9 director of patents, who has a political  
10 mission, perhaps, to kill patents, let's just  
11 say. And it is clearly time-barred under the  
12 statute. Let's just hypothesize that. And yet,  
13 the director goes ahead and does it anyway.

14                   Under your submission to the Court, I  
15 believe you're saying that is a shenanigan this  
16 Court cannot review.

17                   MR. CHARNES: Well, I think it would  
18 be -- it's correct that our submission is that's  
19 not reviewable. The time bar is not reviewable  
20 and not immediate --

21                   JUSTICE GORSUCH: You just disagree  
22 that it's a shenanigan?

23                   MR. CHARNES: Well, I'm not sure  
24 exactly what the Court meant in a shenanigan.  
25 As we pointed out in our brief, shenanigan -- I

1 think it was a good-faith application by the  
2 Board of the legal standard, and I think --

3 JUSTICE GORSUCH: I'm asking you in my  
4 hypothesis.

5 MR. CHARNES: Yes.

6 JUSTICE GORSUCH: All right. The  
7 hypothesis, there's no good faith, okay? The  
8 director of patent has a political desire for  
9 whatever reason to destroy this patent and many  
10 others.

11 MR. CHARNES: But --

12 JUSTICE GORSUCH: Just hypothesize  
13 that, okay?

14 In your circumstance, you're telling  
15 the Court there's no review of that decision, I  
16 believe, or maybe it's not a shenanigan even in  
17 your -- your view perhaps.

18 MR. CHARNES: Well, I think there is  
19 -- there is no review under -- under 314(d). It  
20 may be that it's an appropriate case for  
21 mandamus relief if the circumstances are as  
22 egregious as you suggest in your hypothetical.

23 JUSTICE GORSUCH: How would it be if  
24 it's not -- if it's not reviewable under 314(b)?

25 MR. CHARNES: Well, mandamus is only

1 available when there's no appellate review to  
2 begin with. So the fact that there is no  
3 appellate review --

4 JUSTICE GORSUCH: So we're going to  
5 just channel all these cases to mandamus? Is  
6 that -- is that the upshot of your position?

7 MR. CHARNES: No, because mandamus is  
8 a rare relief. I mean, it would only be  
9 reserved for really egregious circumstances like  
10 your hypothetical. The mine-run cases where the  
11 Board applies 315(b) and makes a determination  
12 would not be appropriate for mandamus relief.

13 And part of the reason is, as I was  
14 alluding to, is that 315(b) is --

15 JUSTICE GORSUCH: If the institution  
16 decision is not reviewable at all, how would it  
17 be mandamus-able?

18 MR. CHARNES: Well, if it's an  
19 egregious decision and where --

20 JUSTICE GORSUCH: So it's not  
21 reviewable unless it's egregious?

22 MR. CHARNES: Well, mandamus is only  
23 available in circumstances where there is no  
24 review. That's the first step -- first step for  
25 the -- mandamus. If there's -- if you can

1 review it on appeal, then mandamus is not  
2 available. So I don't think that excludes  
3 mandamus.

4 I think in the circumstance where the  
5 director says, for example, yeah, we think this  
6 is time-barred, but I want to kill this patent  
7 for political reasons, that may be egregious  
8 enough. And the Federal Circuit has indicated  
9 in a couple of different cases that mandamus may  
10 be appropriate in truly egregious cases in the  
11 context as to --

12 JUSTICE GORSUCH: Do you agree with  
13 those decisions?

14 MR. CHARNES: Yes.

15 JUSTICE GORSUCH: Okay. If that's the  
16 case, what does the work of -- of the  
17 presumption of judicial review do here in -- in  
18 your view?

19 MR. CHARNES: Well, I don't -- surely,  
20 we don't dispute that there is a presumption of  
21 judicial review.

22 JUSTICE GORSUCH: Okay. You agree  
23 with the government in the last case that it's  
24 based on separation of powers and it is designed  
25 to ensure people that they're not subject to

1 whimsical executive decisions?

2 MR. CHARNES: Well, in -- in general  
3 terms, yes. But I think it's important to  
4 recognize, as this Court held in Dalton versus  
5 Specter, that separation of powers requires this  
6 Court to respect Congress's withdrawal of  
7 jurisdiction to the courts as much as implying  
8 jurisdiction where it should exist.

9 Here, it would be one thing -- it  
10 would be a different case, for example, like in  
11 the first case, where the ultimate merits  
12 decision Congress tries to put or may put or the  
13 question is whether they put beyond judicial  
14 review. This is just a -- this is a forum  
15 selection provision. The question is, are these  
16 parties going to fight in the agency or are they  
17 going to fight in court?

18 It doesn't restrict the time-barred  
19 IPR petitioner's ability to challenge the  
20 validity of the patent in court, and it doesn't  
21 restrict the ability of the director of the PTO  
22 to institute other mechanisms that are  
23 available, ex parte reexamination, for example,  
24 under Section 303, to invalidate this patent.

25 So it's --

1 JUSTICE GINSBURG: What do you -- what  
2 do you do with the sentence in this Court's SAS  
3 decision that says 314(d) precludes judicial  
4 review only of the Board's initial determination  
5 under 314(a) that there is a reasonable  
6 likelihood that the claims are unpatentable?

7 MR. CHARNES: Yes, Justice Ginsburg,  
8 we -- we think that that's not a complete  
9 description of Cuozzo, and the reason is because  
10 SAS Institute, the rationale for why there was  
11 judicial review was completely different.

12 SAS held that Section 318 prohibited  
13 the agency's practice of only reviewing some of  
14 the challenged claims and not all of the  
15 challenged claims.

16 Section 318 is a step two merits  
17 statute. And --

18 JUSTICE GINSBURG: But it -- but just  
19 this sentence sounds like it's saying what  
20 314(d) precludes, and it does say only a Board's  
21 initial -- initial determination under 314(a).

22 MR. CHARNES: I -- I agree that it  
23 sounds that way. We don't think that's a  
24 complete summary of what Cuozzo said.

25 JUSTICE GINSBURG: So you -- you think

1 that that was just a -- a wrong -- a wrong  
2 sentence?

3 MR. CHARNES: I wouldn't say it was  
4 wrong. What I'd say is that the Court had no  
5 need to describe Cuozzo more broadly, analyzing  
6 exactly what institution stage step one  
7 decisions would be precluded from of you because  
8 that was not the factual circumstance of SAS.

9 SAS clearly involved the question of  
10 whether the final written decision addressed all  
11 the claims that were being challenged. So  
12 that's the reason why reviewability was allowed  
13 in 314.

14 JUSTICE KAVANAUGH: I think you are  
15 saying it's wrong, to pick up on Justice  
16 Ginsburg's question, at least the use of the  
17 word "only."

18 MR. CHARNES: I -- I think it's not a  
19 complete description. I think that's -- let me,  
20 Justice Kavanaugh -- I think it's not -- that's  
21 not the only basis that this Court explained in  
22 Cuozzo. I think that's -- that's a fair point.

23 JUSTICE KAVANAUGH: If we took it that  
24 -- sorry.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 MR. CHARNES: Thank you.

3 CHIEF JUSTICE ROBERTS: Mr. Ellis.

4 ORAL ARGUMENT OF JONATHAN Y. ELLIS ON  
5 BEHALF OF THE FEDERAL RESPONDENT,  
6 SUPPORTING REVERSAL

7 MR. ELLIS: Mr. Chief Justice, and may  
8 it please the Court:

9 Congress established inter partes  
10 review as a quick and efficient means for the  
11 PTO to revisit issued patents and to cancel  
12 unpatentable claims. It proceeds in two steps,  
13 institution and trial. To prevent duplicative  
14 proceedings between the agency and the courts,  
15 Congress established a series of prerequisites  
16 to the institution of such a trial.

17 But, to maintain the efficiency of the  
18 process and ultimately to -- to preserve the  
19 resources of the agency and the parties, it  
20 focused judicial review on the issue that  
21 matters most to the system as a whole, the final  
22 patentability analysis and the final written  
23 decision after trial.

24 Respondents' argument to the contrary  
25 is inconsistent with the plain text of 314(d),



1 with the structure of the Act, and with this  
2 Court's decision in *Cuozzo*, and, ultimately,  
3 would give 314(d) the exact same meaning as its  
4 direct predecessor in Section -- former Section  
5 312, despite Congress's use of markedly  
6 different language.

7 Section 314(d) on its face precludes  
8 judicial review of the determination whether to  
9 institute inter partes review. Because  
10 Respondents' challenge in this case is directed  
11 solely at that determination, the Federal  
12 Circuit lacked authority to review.

13 JUSTICE ALITO: I think you have --

14 CHIEF JUSTICE ROBERTS: I want --

15 JUSTICE ALITO: Chief.

16 CHIEF JUSTICE ROBERTS: I want to pose  
17 for you the same question that Mr. Charnes was  
18 asked about the separation of powers.

19 As I understand his answer, at least  
20 part of it is more or less that this is small  
21 potatoes. It's just about timing for -- for the  
22 institution of the matter and that the basic  
23 issue of the patent validity is something you're  
24 going to get to. You have a number of avenues  
25 to get to it.

1                   Is that your -- do you agree with that  
2 view?

3                   MR. ELLIS: I -- I do largely agree  
4 with that view. I -- I think that the -- the  
5 presumption of judicial reviewability is  
6 primarily about congressional intent. And so I  
7 do think that in a case where you have an  
8 express bar on judicial review, you've gone a  
9 long way down the road.

10                  That doesn't mean that it drops out  
11 entirely. But I also think it's important in  
12 this case, and it would mitigate any separation  
13 of powers concerns, that you do get review at  
14 the end of the day of the patentability  
15 analysis, the -- the issue that matters most to  
16 that system and to the parties themselves.

17                  And I -- I do think it's important to  
18 think about the fact that Section 315(b) isn't a  
19 limit at all on the director's ability to  
20 revisit the patentability of any particular  
21 patent.

22                  And so, Mr. -- Justice Gorsuch, when  
23 you offered a hypothetical about the director  
24 who was just bent on reviewing the -- the  
25 patentability of a particular patent, I -- I

1 think one thing to address that concern is that  
2 you're going to get review, judicial review of  
3 the patentability, that is to say whether the  
4 director's decision is correct or not.

5 JUSTICE GORSUCH: But you're not going  
6 to get review, though, of the question of  
7 whether the director could institute that  
8 proceeding in the first place, are you,  
9 especially after -- I mean, as I understand it,  
10 this patent has been challenged four times  
11 before, unsuccessfully.

12 MR. ELLIS: Even --

13 JUSTICE GORSUCH: And, here, it was  
14 challenged successfully only because it was  
15 filed out of time.

16 MR. ELLIS: Even -- well, I'm not sure  
17 that last part is -- is entirely true. Even  
18 where --

19 JUSTICE GORSUCH: I thought the  
20 government had conceded that the -- that the  
21 institution of proceedings here was untimely?

22 MR. ELLIS: That's right. So 314 --  
23 315(b) --

24 JUSTICE GORSUCH: And that there's no  
25 review of that decision in this proceeding at

1 all?

2 MR. ELLIS: That's right. And that --  
3 but the reason that it doesn't mean that the  
4 director was precluded from -- from reviewing  
5 the patentability of that determination is what  
6 my friend alluded to, that 3 -- Section 315(b)  
7 doesn't bar the director from revisit -- or from  
8 revisiting an issued patent.

9 They could -- could have -- the  
10 director could have taken the exact same  
11 materials that was submitted with a petition for  
12 inter partes review, decided that the review,  
13 inter partes review, was time barred but then  
14 instituted an ex parte reexamination.

15 JUSTICE GORSUCH: Sure. There are a  
16 million other things that could happen, but this  
17 is what happened and we can't review it. Right?

18 MR. ELLIS: I -- I agree, yes. It's  
19 --

20 JUSTICE GORSUCH: And nobody will.  
21 And the patent has now been killed. And there  
22 is no way to review it on the basis of its  
23 timeliness.

24 MR. ELLIS: What was open for review  
25 was that patentability analysis. Now Respondent

1 opted not to challenge that patentability  
2 analysis. But, if it had merit, that would be  
3 judicially reviewable and then the patent  
4 wouldn't be canceled. I think that --

5 JUSTICE SOTOMAYOR: So how about a  
6 situation where it's only discovered during the  
7 proceeding that's been instituted that a privy  
8 of the Petitioner was served with a complaint  
9 alleging infringement in -- that would bar this  
10 action if it had been known at the time it was  
11 instituted. Is that appealable?

12 MR. ELLIS: No, it's not. I -- I  
13 think that the Board --

14 JUSTICE SOTOMAYOR: Why?

15 MR. ELLIS: Because 315(b) determines  
16 -- speaks only and exclusively to the  
17 determination whether to institute inter partes  
18 review. And so --

19 JUSTICE SOTOMAYOR: No, it has -- it  
20 doesn't talk anything about whether to institute  
21 it. It speaks in a -- in a prohibitive sense.  
22 An inter partes review may not be instituted if  
23 the petition requesting the proceeding is filed  
24 more than one year.

25 So it doesn't talk about the

1 director's decision. It talks about barring the  
2 action if it is --

3 MR. ELLIS: Well, with respect, Your  
4 Honor, it talks about barring of the institution  
5 of the action, and the only --

6 JUSTICE SOTOMAYOR: I don't see the  
7 word "institution." May not be -- you're right,  
8 may not be instituted.

9 MR. ELLIS: Okay. So -- so it bars --  
10 and the only actor who is authorized by the  
11 statute to institute inter partes review is the  
12 director. So I think it fits very closely with  
13 314(d) that makes clear that the determination  
14 --

15 JUSTICE SOTOMAYOR: So if he learns  
16 during the proceeding. So this is not sort of a  
17 jurisdiction -- this is not an issue that he can  
18 determine based on the papers necessarily.

19 MR. ELLIS: So he -- the Board at --  
20 at that point does accept a motion to terminate  
21 inter partes review on the basis of newly  
22 discovered information.

23 If the Board finds that 315(b) should  
24 have barred institution of review, it can then  
25 vacate its institution decision.

1           But, importantly, what it does is  
2 vacate its institution decision. It does not  
3 issue a final written decision. And then that  
4 is a determination whether to institute inter  
5 partes review --

6           JUSTICE ALITO: Mr. Ellis --

7           MR. ELLIS: -- that is not reviewable.

8           JUSTICE ALITO: -- I think you have a  
9 -- a -- a strong argument under Cuozzo. But  
10 what do you do with the language that Justice  
11 Ginsburg read from SAS and how would you  
12 reconcile SAS with your position here?

13           MR. ELLIS: So I think, as far as  
14 reconciling the decision itself, I agree with my  
15 colleague that it just wasn't at issue in that  
16 case. The -- the limit on the Board's authority  
17 in that case was 318(a), the provision that --  
18 that dictates the -- the contents of the final  
19 written decision. So I think 314(d) --

20           JUSTICE ALITO: But why would it not  
21 be at issue? Why couldn't you characterize the  
22 issue in SAS whether it was proper to institute  
23 review of only some of the claims?

24           MR. ELLIS: To be sure, that's the way  
25 the government did characterize it. The Court

1 rejected that -- that understanding of what was  
2 at issue and said that 318(a), a provision that  
3 -- that speaks to the final written decision,  
4 had been violated in that stay -- case. And it  
5 wasn't very hard for the Court then to conclude  
6 that 314(d), which only discusses the  
7 determination of whether to institute, wouldn't  
8 bar review of that.

9           And I want to directly address this  
10 sentence that is -- that has been discussed  
11 about. I do think that sentence is wrong, and I  
12 think it's incomplete. I think it starts --  
13 it's important to note the sentence actually  
14 says Cuozzo concluded that Section 314(d) only  
15 precludes the 314(a) determination.

16           Cuozzo concluded more than that. And  
17 I think, if you look at the decision, you'll see  
18 that. I don't -- but the reason that's not a  
19 problem is that it just wasn't at issue in SAS.  
20 And nobody flagged that because the -- the --  
21 the statute that was challenged or that was --  
22 on which the Court's decision was based in SAS  
23 was not either 314(a) or a closely related --

24           JUSTICE BREYER: Look at --

25           MR. ELLIS: -- provision.



1                   JUSTICE BREYER: -- look at Cuozzo,  
2                   and look at SAS. Everybody -- I think several  
3                   of us have the same problem. In Cuozzo, I mean,  
4                   the object of this thing, those words, seem to  
5                   be that -- that -- that, look, there is a Patent  
6                   Office making a decision about this claimed  
7                   patent, and the closer relationship between the  
8                   appeal and the issue on which it's being  
9                   appealed to this decision, the more clearly  
10                  barred it is.

11                  But you could have a reason for  
12                  throwing out the patent that is terribly  
13                  important, that has all kinds of implications,  
14                  constitutional, a different unrelated statute,  
15                  or maybe there's some others which perhaps none  
16                  of us could actually think of, but we could  
17                  characterize them generally.

18                  All right. Then SAS doesn't say  
19                  that's wrong. It's just nervous about the open  
20                  language. And so it tries to take that and --  
21                  and narrow it somewhat by focusing really on the  
22                  heart of what that was about, which is this  
23                  individualized decision, which we know is  
24                  barred, and now we have a statute.

25                  And this statute, well, it's not

1 exactly just about this decision, is it? But  
2 it's sort of close, isn't it? And so what do we  
3 do with this statute? Because this statute  
4 talks about the general problem of complaints  
5 that were dismissed without prejudice. And do  
6 they fall or don't they fall within those words  
7 serving a complaint?

8 And that is a general question, and it  
9 goes well beyond this -- or well beyond it? I  
10 mean, I don't know. So I'm saying, if you were  
11 me and you read it that way, what would you say?  
12 Let's look at this statute. Is it a statute  
13 closely related, Cuozzo, or is it a statute  
14 closely related under SAS? And SAS doesn't use  
15 the words "closely related." But that's what it  
16 -- I think it's driving at.

17 MR. ELLIS: So I do think that this is  
18 a closely related decision. As we've discussed,  
19 it only speaks to institution. And if you have  
20 doubts --

21 JUSTICE BREYER: Yes, of course, it  
22 only speaks to institution, but you could have a  
23 statute that said anyone who's 6'2" can't  
24 institute. That would only speak to  
25 institution, all right? That would be an

1 important statute or an important decision.

2 MR. ELLIS: And so I --

3 JUSTICE BREYER: So -- so the fact  
4 that it only speaks to institution isn't quite  
5 catching the point. The point is, how general  
6 and important is it above and beyond this  
7 particular proceeding, this particular claim?

8 MR. ELLIS: So if that -- if what  
9 you're driving at is sort of what was happening  
10 -- discussed in the first case this morning,  
11 that questions of law should be able to be  
12 reviewed, I just think, unlike the provision at  
13 the first -- in the first case, there is no  
14 basis to draw that distinction.

15 So, if you, at the end of the day,  
16 conclude it's just too difficult to figure out,  
17 as my -- as Respondent says, it's unworkable to  
18 figure out how close is close enough, then what  
19 I'd urge the Court to do is apply the provision  
20 as it's written.

21 JUSTICE GORSUCH: Well, how about --

22 MR. ELLIS: If it's about the  
23 determination whether to institute inter partes  
24 review, then it's not reviewable.

25 JUSTICE KAVANAUGH: Under this

1 section.

2 JUSTICE GORSUCH: Well, how about --  
3 how about -- under this section, yes. How about  
4 that? How about the fact that, traditionally,  
5 executive branch agencies have considerable  
6 discretion in evaluating the merits of claims in  
7 deciding whether to proceed with enforcement  
8 actions, and, traditionally, statutes of  
9 limitations or repose were deadlines that are  
10 clear and written in law, tend to afford  
11 enforceable judicial rights to citizens? How  
12 about that?

13 MR. ELLIS: So, as I -- as I mentioned  
14 before, this is not a statute of repose. This  
15 Petitioner could challenge in the courts. This  
16 Petitioner could -- could join another IPR that  
17 was already proceeding. The director could  
18 institute review on the behalf of any other  
19 person.

20 JUSTICE GORSUCH: There are other  
21 proceedings, I accept that, okay, but there's  
22 always like state proceedings. We don't do  
23 double jeopardy between states and federal law  
24 anymore.

25 MR. ELLIS: I --

1 JUSTICE GORSUCH: So there's always  
2 another proceeding available to -- to -- to --  
3 there's always another way to skin the cat.

4 MR. ELLIS: But this is the exact same  
5 thing.

6 JUSTICE GORSUCH: But this is what  
7 Congress wrote in this cat for this cat. And --  
8 and -- and I guess I'm just wondering again,  
9 with Justice Breyer, in terms of close, how  
10 close it is, isn't there always a traditional  
11 distinction there that we recognize in our law  
12 governing judicial review?

13 MR. ELLIS: This -- maybe there --  
14 there is a tradition, I agree. And, actually,  
15 Respondent argues that his reading of 314(d)  
16 would do nothing at all; in fact, would just  
17 reinforce those provisions. But I don't think  
18 that's a plausible reading of the statute.

19 And to address the "under this  
20 section" language, that language is used  
21 throughout the AIA; indeed, throughout 314  
22 itself.

23 JUSTICE KAVANAUGH: But "under this  
24 chapter" is used in the same provision. If we  
25 had "under this chapter" here, that would solve

1 your problem.

2 MR. ELLIS: I -- I don't think we need  
3 that. I mean, I think if you talk about -- just  
4 look at the text before that, the determination  
5 whether to institute inter partes review, nobody  
6 doubts that the 314(a) determination is part of  
7 that. But no one also doubts that there are  
8 other parts -- aspects that go into that  
9 determination.

10 So, for example, if you were thinking  
11 about a decision -- a court's decision whether  
12 to grant a preliminary injunction, no one would  
13 reasonably say that the threshold merits  
14 determination on a PI, that whether there's a  
15 likelihood of success, is the determination  
16 whether to grant a PI, even if you say the  
17 determination whether to grant a PI under  
18 whatever authorization statute you're providing.  
19 And that's what "under this section" does. It  
20 does it here and it does it everywhere else.

21 All it says is the petition filed  
22 under 311, the response filed under 313, the --  
23 the final written decision filed under -- under  
24 -- or issued under 318(a). That's what "under  
25 this section" does here. It does not -- they

1 don't use this language in a way that isn't used  
2 -- it's not used anywhere else in the Act.

3           And if you have any doubt about the  
4 scope of this provision, I would urge you to  
5 look at the former Section 312. It's laid out  
6 in our appendix, but it's also block-quoted at  
7 page 8 of our reply. Petitioner -- Respondents'  
8 reading of 314(d) is to -- exactly what 312(c)  
9 said, that the determination under subsection  
10 (a) is final and non-appealable.

11           But, if Congress wanted to do that,  
12 there's just no reason at all for it to have  
13 changed the language and for it to have used a  
14 phrase that just doesn't sensibly describe only  
15 the threshold merits determination.

16           So you really have a choice of giving  
17 "under this section" not a great deal of meaning  
18 that clarifies the authority, or you have a  
19 choice of giving a meaning that it has nowhere  
20 else in the code and then renders 314(d) largely  
21 superfluous in its entirety.

22           We don't think there's a -- that the  
23 -- that the former would -- the latter, rather,  
24 would respect Congress's choice. In this case,  
25 it's undoubtedly a choice to preclude judicial

1 review.

2 JUSTICE KAVANAUGH: Do you think it's  
3 ambiguous?

4 MR. ELLIS: I don't think it's  
5 ambiguous, no. I think if there was any  
6 ambiguity in this provision, it was the one that  
7 was addressed in Cuozzo, whether it only applies  
8 for interlocutory appeals or after final written  
9 decisions. The Court decided that -- that  
10 question in Cuozzo, no one is asking to revisit  
11 it.

12 I don't think -- and no one took -- it  
13 was taken as a given in Cuozzo that it would  
14 preclude 315(b). Justice Alito in his dissent  
15 said as much. And I don't think the -- the --  
16 at the end of the decision he was going back on  
17 that. He just said this is the problem, and I  
18 don't agree with the Court's decision.

19 JUSTICE KAGAN: But maybe one way to  
20 read Cuozzo -- and I take this to be the point  
21 of Justice Breyer's question -- is that it -- it  
22 goes beyond 314 but that it only goes to  
23 questions that are closely related to the  
24 reasonable likelihood determination. So, there,  
25 the particularity requirement was reasonably



1 related -- was related, closely related, to that  
2 reasonable likelihood of patentability  
3 determination, but timing is -- is less so.

4 MR. ELLIS: So I -- I -- I grant you  
5 that's one way to read that one particular  
6 passage. I think if you look elsewhere in  
7 Cuozzo, you'll see that what the Court says, for  
8 example, on page 2141, is that it's the  
9 questions that are closely tied to the  
10 application and interpretation of statutes,  
11 plural, related to the Patent Office's decision  
12 to institute inter partes review. So I don't  
13 think that's a plausible reading of what was  
14 going on in Cuozzo. And I would point out --

15 JUSTICE GINSBURG: But what about  
16 the --

17 MR. ELLIS: -- that it was 312(a)(3)  
18 that was at issue there, not 314(a).

19 JUSTICE GINSBURG: -- the -- in  
20 Cuozzo, it was a particularity requirement, and  
21 that was described as a minor statutory tech --  
22 technicality. But, here, we're not dealing with  
23 a minor statutory technicality; we're dealing  
24 with a time bar.

25 So does that expression in Cuozzo that

1 it was a minor statutory technicality limit it  
2 so that a time bar is -- is -- is -- could not  
3 be characterized that way?

4 CHIEF JUSTICE ROBERTS: Briefly, Mr.  
5 Ellis.

6 MR. ELLIS: No, Your Honor, it does  
7 not. For one, 312(a) was a meaningful limit on  
8 the director's decision to even institute at  
9 all. So we think it is -- to the extent that's  
10 a minor technicality, this one fits into the  
11 same bucket. It doesn't actually preclude the  
12 director from reaching the final decision.

13 And I take the point of that passage  
14 in *Cuozzo* to be that we shouldn't throw out the  
15 Board's final written decision on patentability.  
16 The major -- the major question on a ground  
17 that's completely unrelated to that decision,  
18 315(b) is exactly that.

19 CHIEF JUSTICE ROBERTS: Thank you,  
20 counsel.

21 Mr. Geysler.

22 ORAL ARGUMENT OF DANIEL L. GEYSER  
23 ON BEHALF OF THE PRIVATE RESPONDENT

24 MR. GEYSER: Thank you, Mr. Chief  
25 Justice, and may it please the Court:

1                   I respectfully waive my two minutes  
2 but would otherwise start by underscoring the  
3 truly extraordinary nature of the top side  
4 argument.

5                   As we've heard today, as my friends  
6 read this statute, Congress delegated the  
7 judicial function to an administrative agency,  
8 gave that agency the unfettered discretion to  
9 say what the law is, and then instructed that no  
10 Article III court at any time at any level may  
11 review the agency's interpretation of the  
12 statutory limits on its own power.

13                   CHIEF JUSTICE ROBERTS: Well, if  
14 you're going to waive your two minutes, I'm not  
15 going to sit back.

16                   (Laughter.)

17                   CHIEF JUSTICE ROBERTS: The -- the  
18 point's been made, and it's an important one,  
19 about the separation of powers. And I -- I will  
20 repeat a question that has been asked this --  
21 this morning.

22                   But is that really implicated here  
23 when you're talking about a -- a time bar on  
24 something that a party is going to get review of  
25 anyway? I mean, the question of patentability

1 could be put at issue in any number of ways.  
2 And I wonder if those types of very significant  
3 concerns, concerns that it is importantly our  
4 job to be concerned -- to be vigilant about,  
5 really do come into play when it's simply a  
6 question do you go this route or can you go that  
7 route and that the fundamental question that's  
8 at issue about patentability is -- is going to  
9 be reached. That's not being foreclosed.

10 MR. GEYSER: Well, the -- the ultimate  
11 question isn't being foreclosed. That's true.  
12 But the -- the 315(b) bar, this is not a minor  
13 statutory technicality. This is one of the  
14 substantive safeguards that Congress put into  
15 the Act in implementing this very new procedure  
16 that is adversarial in nature.

17 And it understood that this is a  
18 significant protection for patent owners. And  
19 it's a significant way to divide the authority  
20 between the courts on the one hand and the  
21 agency on the other.

22 So this isn't the type of provision  
23 that just is out there and it doesn't really  
24 have any effect in the real world.

25 CHIEF JUSTICE ROBERTS: Well, but, I

1 mean, I don't think it's what we were fighting  
2 over at Yorktown. I mean, it's just a question  
3 of whether --

4 (Laughter.)

5 CHIEF JUSTICE ROBERTS: -- as you  
6 said, the ultimate question, the ultimate issue  
7 that affects the property rights in a patent,  
8 it's going to be reached. It's just a question  
9 of whether you use one procedure or another.

10 MR. GEYSER: Well, Congress viewed it  
11 otherwise, Your Honor. Congress definitely  
12 could have put in the inter partes review  
13 scheme, something like it did in Section 303(c),  
14 and so the director can institute sua sponte if  
15 it wants to. Instead required a proper petition  
16 and it categorically cut off the agency's  
17 authority to act if the petition is filed after  
18 that one-year deadline in 315(b).

19 JUSTICE KAGAN: Well, it does, but you  
20 don't contest, right, that one -- if this  
21 Petitioner is thrown out, somebody else can  
22 bring another petition, right?

23 MR. GEYSER: Oh, hypothetically, they  
24 -- they could, Your Honor, but you would need a  
25 hypothetical future party raising a hypothetical

1 future petition. It hasn't happened yet. And  
2 there's nothing in the statute that says that --

3 JUSTICE KAGAN: Well, but it wouldn't  
4 be rare to have such a party. Quite the  
5 opposite, it would be common to have another  
6 party who would pick it up.

7 And what your solution would -- would  
8 happen is that we go through the entire process,  
9 soup to nuts, and then we get to the end and  
10 somebody says, you know, the time bar wasn't  
11 applied correctly. We throw it all out and we  
12 start all over again on something that we know  
13 by now is an invalid patent.

14 MR. GEYSER: Well, we -- first, we  
15 don't necessarily know that it is an invalid  
16 patent. The patent office --

17 JUSTICE KAGAN: Well, we know that the  
18 Board held that it was an invalid patent.

19 MR. GEYSER: And it -- and it is  
20 reversed a quarter of the time. But I think the  
21 important point is that Congress did say that  
22 the agency cannot exercise its review power for  
23 inter partes review in those circumstances.

24 And it may be true that there might be  
25 a future party, but we don't know that yet.

1 Congress could have excluded that.

2 JUSTICE KAGAN: Well, Congress also  
3 said that there's no judicial review of the  
4 decision whether to institute.

5 And, presumably, Congress said that  
6 for exactly this reason, that once that decision  
7 is made and you go through the entire process  
8 and you get a merits determination, given that  
9 throwing it all out is just going to land you at  
10 square one doing the exact same thing, that it  
11 was, you know, a little bit silly to go back to  
12 square one.

13 MR. GEYSER: Your Honor, I -- I don't  
14 think that Congress thought that Section 315(b)  
15 was -- was insignificant. I think it -- they  
16 wanted it to have teeth.

17 And just to be absolutely clear, the  
18 petition that my friends are raising on the  
19 other side says that no court can construe what  
20 that language means.

21 This is a provision that Congress used  
22 to calibrate important interests.

23 JUSTICE GINSBURG: But, if we're -- if  
24 we're in doubt about, we think it's ambiguous,  
25 doesn't the nullification of the determination

1 that this patent is no good, that's out there,  
2 that's what the Board thinks, that this should  
3 not have been patented, and we wipe that out,  
4 then you get another challenger and where the  
5 Board has already made the decision that the  
6 patent is no good. There's something unseemly  
7 about nullifying the determination on the  
8 merits.

9 MR. GEYSER: I -- I disagree, Your  
10 Honor, and for the reason that if the -- if the  
11 patent, in fact, is invalid, then it can be  
12 invalidated in a proper proceeding. And, again,  
13 it's subject to judicial review on the merits.

14 And so it's not entirely sure that  
15 that patent, in fact, is invalid. What we do  
16 know is that Congress did not want the  
17 proceeding to start if the -- the petitioner is  
18 filing it after the year deadline.

19 Often what happens -- and this is not  
20 just a question of wasted resources, although we  
21 would submit that construing this provision  
22 correctly will spare unauthorized future  
23 proceedings that will far make up any resources  
24 wasted in this individual case.

25 JUSTICE BREYER: Well, what is -- what



1 is the -- the -- the analogy that floats around  
2 in my mind on this is that judges and agencies  
3 start down a road and then they say, oh, my God,  
4 I made a mistake.

5 And -- and we give them lots of power  
6 in the law to call back what they did and  
7 correct the mistake. The obvious example last  
8 week was Rule 59. All right?

9 Now a judge, when faced with a 59  
10 motion, says, my goodness, you're right, I made  
11 a mistake, and he changes it. Now, in fact, the  
12 party filed that 59 motion one day too late.  
13 Okay?

14 Now can there be an appeal to an  
15 appeals court that this mistake which was  
16 recognized by the judge shouldn't have been  
17 recognized because the Rule 59 motion was filed  
18 a day late? My guess is the court of appeals  
19 will not consider that kind of thing. You get  
20 one appeal from the ultimate thing.

21 Now this is highly analogous. You  
22 see, they're saying, oh, we think that -- we  
23 think that, given all the other ways of filing,  
24 getting this in front of us, this issue, of  
25 whether we made a mistake, it's not what

1 Congress meant that we can't hear it when there  
2 is a -- when there is a complaint filed and the  
3 parties say throw it out without prejudice, that  
4 that shouldn't stop us from hearing it.

5 They might be wrong about that. But  
6 that's like filing the 59 motion a day too late.

7 And we shouldn't have review of that  
8 kind of thing. All it was was an effort to  
9 correct a mistake. What do you think?

10 MR. GEYSER: Well, this -- this is  
11 what I think, Justice Breyer. I think that this  
12 is the construction of a federal statute. So  
13 the question is not how do we apply a given rule  
14 with a given construction on a given day for a  
15 certain set of facts.

16 This is what does an act of Congress  
17 mean? And, again, this is --

18 JUSTICE BREYER: Well, that's true, of  
19 course, or could be true in many matters  
20 governing instances where judges or agencies  
21 call back something they did because they think  
22 they did it wrong.

23 MR. GEYSER: Well --

24 JUSTICE BREYER: Would that make it  
25 somehow more reviewable?

1           MR. GEYSER: Well, I -- I think what  
2 makes it reviewable is the strong presumption  
3 favoring judicial review. Again, it is  
4 exceedingly rare for Congress to enact a highly  
5 reticulated scheme that's restricting the  
6 agency's core authority for significant policy  
7 objectives and then says, agency, you figure out  
8 what those provisions mean.

9           No court --

10          JUSTICE KAGAN: Well, you're -- you're  
11 right, it is rare. And that's why we have this  
12 presumption and we usually don't think that  
13 Congress wants it.

14          But this language is pretty broad.  
15 It's the decision to institute is final and  
16 unappealable. And you're going to tell me it's  
17 in this section. And I'm going to tell you, I  
18 mean, in this section is just the decision to  
19 institute, is in this section, but the decision  
20 to institute is final and unappealable.

21          MR. GEYSER: Well, a -- a couple key  
22 points, Your Honor. I am going to tell you that  
23 it says under this section, but I do think it  
24 says that for a very important reason. And  
25 under my friend's reading, that phrase, "under

1 this section," has absolutely no meaning. You  
2 can take it out of the statute and it means  
3 exactly the same thing.

4 In fact, you can replace the word  
5 section with the word chapter. These are two  
6 very different terms. And Congress knows the  
7 difference because, if you look to 314(b), they  
8 used the phrase "institute under this chapter."

9 JUSTICE ALITO: Well, I don't want to  
10 interrupt the rest of your answer to Justice  
11 Kagan, but would it be possible for the director  
12 to institute inter partes review under some  
13 other section?

14 Could the director say, I don't want  
15 to invoke 314, I want to institute inter partes  
16 review under some other provision of law? Can  
17 he do that?

18 MR. GEYSER: Well, this is -- and  
19 there's an oddity with this statute, Justice  
20 Alito, in that there is not an express provision  
21 anywhere in Chapter 31 that expressly authorizes  
22 the director to institute review. It's not in  
23 314. The institution takes place implicitly  
24 under this chapter, which is why, if you look  
25 through Chapter 31, you'll see repeated

1 instances.

2           And I think 314(b), which is "under  
3 this section," is a great illustration. It  
4 talks about institute an inter partes review  
5 under this chapter. It is not as my friend from  
6 the government says. It's just describing where  
7 something happens.

8           JUSTICE KAGAN: But, Mr. Geysler, I  
9 think 314(a) does. I mean, it does it in a  
10 little bit of a backhand way, I understand that,  
11 but it says it gives -- 314(a) is what tells the  
12 director when he should institute. And so it's  
13 314(a) that authorizes the director to  
14 institute, and then 314(d) says the decision to  
15 institute under this section, in other words,  
16 under 314(a), is final and unappealable.

17           MR. GEYSER: I -- I almost agree, but  
18 there's a very important predicate step, and  
19 that's, in order to get to Section 314, you  
20 first have to clear the gateway prerequisites  
21 under 315, including 315(b).

22           And as my friend from the government  
23 concedes in the reply brief, this is on page 6  
24 of the government's reply, they concede that if  
25 the prerequisite under 315(b) is not met, the

1 director has nothing else to do, which means  
2 that the director doesn't make any determination  
3 under Section 314.

4           And you're right that Section 314(d)  
5 is linking the determination, under this section  
6 whether to institute, to that determination  
7 under (a), which is entitled to threshold  
8 consideration. It's looking on the merits. If  
9 you have an eligible petition, does it satisfy  
10 the -- does the director determine that the  
11 information presented shows that it's reasonably  
12 tolerable --

13           JUSTICE KAGAN: But, if you're right,  
14 Mr. Geyser, what does this unappealability bar  
15 really amount to? When does it bar anything  
16 that anybody would want to raise as an argument?

17           Because, if you are right, it's just  
18 limited to the substantive determination at the  
19 threshold stage. But, by the time this is going  
20 to get to appeal, the substantive determination  
21 at the threshold stage has been subsumed by the  
22 substantive determination -- the final  
23 substantive determination. So, if you're right,  
24 you're basically saying, you know, there's this  
25 unappealability -- there's this bar on appeals

1 that applies only to something that nobody would  
2 raise.

3 MR. GEYSER: Your Honor, what -- what  
4 I'm saying is exactly what Congress did in  
5 Section 303(c) --

6 JUSTICE KAGAN: Well, you're saying --

7 MR. GEYSER: -- and in 312(c).

8 JUSTICE KAGAN: -- that Congress wrote  
9 that silliest provision that the bar on appeals  
10 applies only to something that nobody would  
11 raise --

12 MR. GEYSER: It --

13 JUSTICE KAGAN: -- because it's been  
14 totally mooted out.

15 MR. GEYSER: It's -- it's not silly  
16 because Congress has a good reason to make  
17 absolutely clear that people will not interrupt  
18 the inter partes review while it's going on with  
19 a disruptive interlocutory appeal. And at the  
20 end of the day, they won't waste the court's  
21 time with that preliminary initial threshold  
22 decision.

23 But, again, Congress is repeating the  
24 exact same pattern that it did in Section 303(c)  
25 and that it did in former Section 312(c). This

1 is one area --

2 JUSTICE KAVANAUGH: Do you disagree  
3 with Justice Kagan that it does no work under  
4 your reading?

5 MR. GEYSER: No. It clarifies what  
6 the likely outcome is, and I think clarifying  
7 does give it significance.

8 JUSTICE KAVANAUGH: But does the  
9 clarifying do any work?

10 MR. GEYSER: The -- I think that --

11 JUSTICE KAVANAUGH: In the real world?  
12 Which is what I took to be the -- her question.

13 MR. GEYSER: This -- this is -- all I  
14 can say is that we know that Congress thought it  
15 was doing work because everyone agrees that is  
16 all that Congress did in 303(c) and 312(c). So  
17 I'm not making this up.

18 If you look back and see what has  
19 Congress done in the past in this very area,  
20 it's done exactly how we're reading 314(d). And  
21 this is an area, again, that all -- I think all  
22 parties to this case agree, everyone agrees that  
23 303(c) and 312(c), former Section 312(c),  
24 accomplish only what Justice Kagan has pointed  
25 out.



1                   JUSTICE KAGAN: I think Mr. Ellis  
2 would say, well, that's true, but those  
3 provisions were -- specifically said exactly  
4 that. If you take a provision that's now  
5 written much more broadly and limit it to that  
6 set of applications, which is essentially  
7 nothing, I mean, isn't Congress's intent being  
8 flouted?

9                   MR. GEYSER: I -- I don't think at  
10 all, Your Honor. And, first of all, the  
11 language is not markedly different. And I think  
12 one would expect that if you're going to expand  
13 an appeal bar -- which, again, we're -- we're in  
14 very rarified territory, as we heard both  
15 earlier today and in the top side of the  
16 argument, of cutting off the court's ability to  
17 say what a -- a provision of the United States  
18 Code means. No court at any time will have the  
19 power to read this and say what it means.  
20 That's --

21                   JUSTICE KAVANAUGH: Can you give any  
22 real-world example of when the bar would do  
23 work?

24                   MR. GEYSER: The -- the bar would do  
25 work if a party came -- let's say that a

1 petition says I think that this patent is  
2 invalid, as -- as obvious, in light of a certain  
3 prior art reference A. And then the agency  
4 says, you know what, we agree; we're going to  
5 institute review. And then, in the course of  
6 review, they say, oh, my goodness, we were  
7 entirely wrong; that argument was actually  
8 frivolous, but you know what, there's actually a  
9 different argument that would invalidate the  
10 patent at the end of the day. Then I could see  
11 a party saying, well, wait a minute, then  
12 institution was improper under (a), because  
13 they're conceding that, in fact, the petition  
14 should not have been instituted, there wasn't --

15 JUSTICE KAGAN: So you think that  
16 Congress wanted, in a case like that where the  
17 Patent Board has found a good reason why the  
18 patent is invalid, to go back and do the entire  
19 thing over again because its initial theory was  
20 not the one that it ended up with?

21 MR. GEYSER: Well, what I think, Your  
22 Honor, is that Congress was not focused in a  
23 single-minded way on a single objective when  
24 they wrote this statute. These provisions were  
25 heavily negotiated. And I think if you see the

1 amici on our side, you can see why they thought  
2 that the 315 bar is a fundamental safeguard to  
3 protect patent owners from both harassment and  
4 abuse.

5           It avoids a situation where someone  
6 litigates in district court, they test the  
7 waters, it turns out they don't like how it's  
8 going, and they try to uproot the proceeding to  
9 the agency after the fact. This is very  
10 important substantive protections for a patent  
11 owner whose property rights are subject to  
12 review in an Article I tribunal.

13           And my friends have even conceded that  
14 that tribunal is truncated. It is not providing  
15 an equivalent process that you would get in a --  
16 in a normal Article III proceeding.

17           JUSTICE KAVANAUGH: But --

18           MR. GEYSER: So I think Congress  
19 didn't look at this as some minor statutory  
20 technicality.

21           JUSTICE KAVANAUGH: Well, it -- it  
22 doesn't have to be characterized as minor just  
23 because it's not judicially reviewable. We  
24 presume that the executive officials are going  
25 to follow the laws set forth by Congress,

1 whether or not there's judicial review.

2 MR. GEYSER: We -- we do presume that,  
3 but we also presume that -- that they're more  
4 likely to follow the law correctly when someone  
5 knows they're checking their homework.

6 JUSTICE KAVANAUGH: That's true in  
7 practice, I -- I grant you that --

8 MR. GEYSER: And --

9 JUSTICE KAVANAUGH: -- but it's not  
10 that it does no work without judicial review.  
11 I'm just pushing a little bit on that point.

12 MR. GEYSER: Well, Your Honor, I fully  
13 agree that we -- we -- we have every belief that  
14 the agency will exercise the utmost good faith  
15 in adjudicating cases under this scheme, but  
16 what we do know from Mach Mining and from other  
17 cases of this Court --

18 JUSTICE KAVANAUGH: But that's a  
19 way -- sorry to interrupt. But that's a way to  
20 make the whole thing do some work under the  
21 theory that it's an important provision, 315.  
22 It does work in telling the agency don't do  
23 this. There may not be judicial review, but  
24 don't do this, and the agency is presumably  
25 going to listen to that.

1           Then the appeal bar, though, also does  
2           some work under this in that it knocks out  
3           claims -- it says certain kinds of claims are  
4           not appealable at the end, even if they happened  
5           in the rare instance, or maybe not so rare, to  
6           violate that bar.

7           So both provisions do substantial work  
8           then. What's wrong with that, looking at it  
9           that way?

10           MR. GEYSER: Well, I think -- I think  
11           what's wrong with it, again, is that you're  
12           removing any ordinary, traditional, normal  
13           function of judicial review to ensure that the  
14           agency's constructing the outer limits on its  
15           own power correctly.

16           And, again, that's not a small thing  
17           --

18           JUSTICE KAGAN: But, you know, you --

19           MR. GEYSER: -- I would submit.

20           JUSTICE KAGAN: -- you cited Mach  
21           Mining, but Mach Mining was very clear to say,  
22           again, we usually think that Congress wants the  
23           court to police a -- a -- a congressional  
24           statute, but sometimes Congress wants the agency  
25           to self-police because it doesn't think that the

1 costs of judicial review, and there are some,  
2 are worth it, given the subject matter, given  
3 the fact that in this case there's going to be  
4 review of the principal question anyway, and,  
5 you know, in the end, this is not -- it's not  
6 unconstitutional if Congress wants to say that  
7 the decision to institute is not reviewable.  
8 And Congress appears to have said that.

9 MR. GEYSER: Well, they appear to say  
10 it with respect to something, but the question  
11 is as to what. And, again, I think it's highly  
12 unusual that Congress put this no appeal bar in  
13 Section 314, said it applies to a determination  
14 under this section, and there -- there's a ready  
15 candidate for what Congress had in mind, and  
16 then is --

17 JUSTICE GINSBURG: But, under this  
18 section, the only section that deals with  
19 institution of inter partes review, any -- any  
20 institution of inter partes review would be  
21 under this section because there is no other  
22 section that deals with institution of inter  
23 partes review.

24 MR. GEYSER: Well, again, Your Honor,  
25 though, in order to even get to Section 314, you

1 first have to clear the gateway prerequisites  
2 elsewhere in this chapter, including Section  
3 315. And, again, we're simply reading 314(d) to  
4 say exactly what this Court in SAS said it  
5 meant, which is it is limited to only the  
6 initial patentability threshold in 314(a).

7 Now my friend from the government now  
8 concedes that they think that was wrong. I  
9 don't believe they've asked this Court to  
10 overturn SAS. We don't think that the Court was  
11 wrong.

12 JUSTICE KAGAN: Well, it's not a  
13 question of overturning. It's just -- I think  
14 what they were saying is that SAS dealt with one  
15 issue in which it was unnecessary to recite  
16 Cuozzo's full test, but Cuozzo has a broader  
17 test than SAS quoted.

18 MR. GEYSER: Well, to be very clear, I  
19 -- I think that we win under Cuozzo as well, but  
20 I don't think that -- that the reasoning in that  
21 statement, which is a very plain statement in  
22 SAS, can be limited in that way.

23 SAS was addressing the government's  
24 argument that 314(d) precluded any issue bearing  
25 on the institution decision. That is -- that is

1 taking on exactly the same contention that  
2 they're raising in this case. Their contention  
3 ultimately is that this Court might have adopted  
4 a different rationale and ruled more narrowly in  
5 order to reject that argument, but that is an  
6 absolute part of the core holding of the case in  
7 rejecting what the government eventually framed  
8 as their primary submission in SAS.

9 But I also want to be clear about how  
10 to reconcile SAS with Cuozzo because I think SAS  
11 has already given us the pathway on how to do  
12 that. Cuozzo was absolutely clear that if you  
13 have a fundamental challenge to the 314(a)  
14 determination, but it is using the tools of  
15 other provisions of the Act that are designed to  
16 get information to the director to make that  
17 determination, then that's what's barred.

18 And I think it's clear that when  
19 Cuozzo said it precludes the initial  
20 patentability determination and any other  
21 statute that's challenging that determination,  
22 it specifically used the phrase "that  
23 determination," that patentability question,  
24 that's what's knocked out.

25 And because the -- that's because the



1 ultimate challenge is to 314(a). And that makes  
2 good sense because no party in their right mind  
3 would say I have no problem at all with the  
4 reasonable patentability determination. The  
5 threshold was met.

6 What I'm really upset about is the way  
7 that the petition was written. That's a claim  
8 that will fail every single time. There's no  
9 conceivable prejudice to that. But that is the  
10 opposite of what happens if someone is violating  
11 a strict statutory time bar that, again, is  
12 phrased very differently than the phrasing that  
13 you see under Section 314.

14 315(b) is phrased as an outright ban  
15 on the -- on the authority of the agency to  
16 institute. It says an inter partes review may  
17 not be instituted if those conditions are met.  
18 When you look to 314, it's asking what does the  
19 director think. This is something that the  
20 director has the power to determine.

21 Now that's something that the director  
22 can do if the gateway prerequisite under 315(b)  
23 has been satisfied. If it hasn't, then the  
24 director has no power to proceed, which, again,  
25 we agree with the government on this narrow

1 point; on page 6 of their reply, they say  
2 plainly that if that prerequisite is not met,  
3 the director has nothing else to do.

4 And at that point, the only  
5 determination made by the director is -- is not  
6 --

7 JUSTICE SOTOMAYOR: Mr. Geysler --

8 MR. GEYSER: -- happening under 314.

9 JUSTICE SOTOMAYOR: -- I -- I do have  
10 some sympathy for your argument that a  
11 petitioner should be given an avenue of judicial  
12 review on a legal question, like the timeliness  
13 of -- of the application, but some amici point  
14 out a potential problem under your view, which  
15 is, if the PTO agrees with you on the legal  
16 question and throws this complaint out, that the  
17 other side won't have an opportunity to  
18 challenge that because the only power to appeal  
19 is under 319, and 319 requires a full hearing  
20 for appealability.

21 So what do we really -- one way or  
22 another, we're going to preclude judicial  
23 review, the argument goes.

24 MR. GEYSER: Let me state --

25 JUSTICE SOTOMAYOR: Of a legal

1 question.

2 MR. GEYSER: Let me see if I can give  
3 you some comfort on that. There are always two  
4 questions that come up in these cases. The  
5 first is, is there a provision that  
6 affirmatively authorizes judicial review, and  
7 the second, is there a provision that  
8 affirmatively precludes judicial review? So  
9 we're talking about 314(d).

10 Now our contention is that let's say  
11 the patent office misreads 315(b) to say it  
12 doesn't have authority when, in fact, it does.  
13 It -- it reads one year to mean six months, so  
14 it's cutting off lots --

15 JUSTICE SOTOMAYOR: No --

16 MR. GEYSER: -- of time --

17 JUSTICE SOTOMAYOR: -- just this case.

18 MR. GEYSER: Or -- or --

19 JUSTICE SOTOMAYOR: It reads -- it  
20 reads it this way, and the other side says  
21 you're wrong --

22 MR. GEYSER: Okay.

23 JUSTICE SOTOMAYOR: -- for all the  
24 reasons it earlier gave, okay?

25 MR. GEYSER: So -- so our contention,

1 again, is that 314(d) would not preclude review.  
2 The question is what is the affirmative power to  
3 review. Now it won't come under 319, you're  
4 right, there's no final written decision, but  
5 that doesn't take away the -- the potential to  
6 raise this under the APA, which provides  
7 judicial review for decisions where there's no  
8 other adequate means of doing it.

9           It potentially could get review under  
10 mandamus, depending on the egregiousness of the  
11 decision. And there is a provision in Title 28,  
12 it's 12 -- it's 1295(a)(4)(A), that gives the  
13 federal circuit jurisdiction over a decision of  
14 the -- of the patent -- of the PTAB in -- in the  
15 inter partes review setting.

16           So there are lots of different ways  
17 that someone who feels aggrieved by a misreading  
18 that cuts off power that otherwise exists, and I  
19 don't think that would also fall within the  
20 exception, just to make sure I'm rounding out  
21 the answer, for decisions that are committed to  
22 agency discretion, because, if the determination  
23 is we lack the authority to do something because  
24 they misread one of the outer limits on their  
25 power as opposed to we're declining to review,

1 for reasons of agency resources or we just don't  
2 think this is important enough to spend our time  
3 on, that's a different type of question.

4 So I think that the amici on the other  
5 side are wrong in that respect.

6 JUSTICE BREYER: So what's so terrible  
7 about reading the "in this section" to mean what  
8 it says, which is that where -- where the  
9 director -- where the director -- what is the  
10 exact word -- where the director decides to  
11 institute an inter partes review, under this  
12 section, that's it, you can't appeal that  
13 decision. That's the norm.

14 And, after all, the director could do  
15 this on his own, couldn't he?

16 MR. GEYSER: The -- the director could  
17 institute --

18 JUSTICE BREYER: Yeah.

19 MR. GEYSER: -- an ex parte  
20 reexamination.

21 JUSTICE BREYER: So -- so this then is  
22 basically a way, a little complicated way, but  
23 of the agency saying: Oh, my God, we made a  
24 mistake. And what that section has is about  
25 (d), subsection (d), is don't review the

1 decision, oh, my God, I made a mistake. Judge,  
2 you review whether it was a mistake. You review  
3 whether the patent should have been canceled or  
4 not canceled, but it's up to the director,  
5 really, whether he decides to look at it once,  
6 twice, or three times.

7           Indeed, how do we know the director  
8 didn't look at it 10 times before he ever  
9 decided to grant it? So that -- that's a simple  
10 way of looking at it.

11           MR. GEYSER: Well --

12           JUSTICE BREYER: And that -- that --  
13 that -- that leads you to pretty broad language  
14 about what's -- what's pretty broad category of  
15 what you can't review.

16           MR. GEYSER: Well, again, I don't  
17 think it is -- is so broad. And I do want to  
18 make one thing very clear. The ex parte  
19 reexamination under 303 does not proceed the  
20 same way that an inter partes reexam or inter  
21 partes review does.

22           It -- it mimics the initial  
23 examination process, it gives the patent owner  
24 vastly greater rights. They get to interact  
25 with the office. They have additional amendment

1 rights.

2 JUSTICE BREYER: Yeah, yeah.

3 MR. GEYSER: So the process looks  
4 absolutely nothing like inter partes review.  
5 It's not just that they can say, you know what,  
6 we made a mistake. We'll just switch -- we'll  
7 scratch off --

8 JUSTICE BREYER: Right.

9 MR. GEYSER: -- inter partes review  
10 and rewrite ex parte reexamination. It doesn't  
11 work that way at all.

12 And it's --

13 CHIEF JUSTICE ROBERTS: Well, it's --  
14 it's different, I'll give you that, but, I mean,  
15 it's focused on the same ultimate question.

16 MR. GEYSER: Well, sure, Your Honor,  
17 but -- but Congress decided in granting this new  
18 procedure that has a potent -- you know, a  
19 potent danger to patent rights that the -- the  
20 patent owners are entitled to significant  
21 safeguard and the main safeguard that they  
22 implemented are the ones in 315.

23 JUSTICE GORSUCH: Well, I guess the  
24 question, though, that -- that we're struggling  
25 with is, so what's the big deal? If you're

1 stuck going to ex parte review anyway, why  
2 should we care? What's your answer to that?

3 MR. GEYSER: Well, I -- I think you  
4 should care because inter partes review is a  
5 very different process than ex parte  
6 reexamination. And, again, if Congress wanted  
7 --

8 JUSTICE KAGAN: But somebody else can  
9 --

10 JUSTICE GORSUCH: Spell that out.  
11 Spell that out. Why?

12 MR. GEYSER: It's because, instead of  
13 having an opportunity for a single response,  
14 truncated discovery, you're in an adversarial  
15 proceeding. You're before a panel of three PTAB  
16 judges who might give you an hour oral hearing.

17 You get a long, iterative process with  
18 -- with a talented patent examiner who can say  
19 this is what I think is wrong, and then you have  
20 lots of opportunities to show them exactly why  
21 that concern is unfounded.

22 And, again, the PTAB is reversed a  
23 fourth of the time. It's not like this process,  
24 because it's so truncated, I'm assuming, is  
25 perfect or without error.



1 CHIEF JUSTICE ROBERTS: Well --

2 JUSTICE KAGAN: But, if it's not with  
3 this Petitioner, it can be another petitioner.

4 MR. GEYSER: And -- and if --

5 JUSTICE KAGAN: And, indeed, even when  
6 a petitioner drops out under this statute, the  
7 Board can keep the proceeding going without the  
8 petitioner. So the fact that it's this  
9 Petitioner seems utterly unimportant under this  
10 statute.

11 MR. GEYSER: Not at all, Your Honor.  
12 And I think the key is that if Congress thought  
13 that the Board -- that the Board can do whatever  
14 it wants, it would have mimicked the same  
15 language it had in 303 saying they have a sua  
16 sponte right to institute review. This is a  
17 procedure that is keyed directly on there being  
18 a proper, timely petition.

19 JUSTICE KAGAN: You -- you don't deny  
20 that another petitioner can just step into the  
21 shoes of this Petitioner.

22 MR. GEYSER: If they file a timely  
23 petition, they can seek review. I absolutely  
24 concede that --

25 JUSTICE KAGAN: And you don't deny

1 that if a petitioner drops out for any reason,  
2 the Board can go on without any petitioner?

3 MR. GEYSER: Assuming that it was a  
4 properly filed petition in the first place. We  
5 don't disagree with that. But, again --

6 JUSTICE KAGAN: It just doesn't seem  
7 as though this Petitioner makes all that much  
8 difference.

9 MR. GEYSER: Well, Congress felt  
10 otherwise in this heavily negotiated process  
11 that produced 315(b) as a fundamental safeguard  
12 for patents.

13 JUSTICE GORSUCH: But, again, why  
14 would it have made that judgment, I guess is the  
15 question? Why does it matter whether it's one  
16 petitioner or another petitioner?

17 MR. GEYSER: Well, because Congress  
18 felt that it was important in this adversarial  
19 scheme.

20 JUSTICE GORSUCH: Why?

21 MR. GEYSER: To -- to make sure that  
22 you don't have someone gaming the system,  
23 waiting out over a year or even in this case 10  
24 years before they seek review, where you don't  
25 have repeated inter partes review petitions

1 filed by multiple people trying to hold up the  
2 patent and prevent a legitimate litigation in an  
3 Article III court seeking recourse for  
4 infringement.

5           There are lots of reasons that  
6 Congress would have had in mind. But,  
7 typically, the -- the way the system works is  
8 Congress passes a law, the agency gets to  
9 enforce it, but this Court ultimately gets to  
10 say what those provisions mean.

11           Congress thought this was an important  
12 provision. Congress could have said: You know  
13 what, it doesn't really matter if it's timely or  
14 not, do your best, agency, and then we'll --  
15 we'll move on. But they limited this, located  
16 it in a specific section, keying it to a  
17 specific determination, as this Court has  
18 already recognized in SAS, and it said that only  
19 that determination, the one under this section,  
20 not under this chapter, is a thing cut off from  
21 appellate review.

22           So I -- I don't think it's enough  
23 simply to -- to throw up our hands and say maybe  
24 someone else could come along. Maybe they can,  
25 but maybe they won't. And, even if they do,

1 they still need to mount a challenge that the  
2 director is willing to accept.

3 So -- and I would like to say one  
4 other point about the statutory history. Again,  
5 I do think that this is actually pointing in our  
6 favor, not my friend's. It shows exactly  
7 Congress following a -- the same pattern in  
8 cutting off a similar type of appellate review.  
9 It's very narrow.

10 And I think that it would be  
11 extraordinary to presume that Congress expanded  
12 that in such an oblique, indirect way as they  
13 did here.

14 When Congress wants to cut off  
15 appellate review and say that the -- the usual  
16 Article III function is delegated exclusively to  
17 an agency, where no court at any time gets to  
18 look through any of these provisions that  
19 Congress took care to articulate to limit the  
20 agency's power, Congress presumably writes in a  
21 clear and unmistakable way.

22 I would submit that I'm not aware of  
23 any case that this Court has ever decided that  
24 -- may I finish?

25 CHIEF JUSTICE ROBERTS: Sure.

1 MR. GEYSER: -- that would find  
2 Article III review cut off entirely based on  
3 language as indirect as this.

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 counsel.

6 Three minutes, Mr. Charnes.

7 REBUTTAL ARGUMENT OF ADAM H. CHARNES

8 ON BEHALF OF THE PETITIONER

9 MR. CHARNES: Thank you. I'd like to  
10 make four points.

11 First, with respect to the language  
12 under the section in 314(d), other provisions of  
13 the -- of Chapter 31 make perfectly clear that  
14 Congress viewed the institution decision under  
15 314.

16 For example, 315(c) says -- refers to  
17 "the institution of an IPR under Section 314."  
18 There's similar language in 316(a)(2).

19 So -- so we believe that's all  
20 Congress meant by that, those three words, is  
21 that institution occurs under 314. The title of  
22 314 is Institution of Inter Partes Review. And  
23 there's no other provision of the statute that  
24 could plausibly involve institution.

25 The second point, my -- my friend

1 referred to several times the Section 303 and  
2 former Section 312 and suggested that they're  
3 analogous to what Congress did here in 314. But  
4 that -- that's simply not true.

5 If you look at former Section 312(c),  
6 what it says is "a determination by the director  
7 under subsection (a) shall be final and  
8 non-appealable."

9 If Congress meant to limit the  
10 preclusion of judicial review to the preliminary  
11 patentability determination in subsection (a) of  
12 Section 314, there is no reason it would not  
13 have used the language that was already in the  
14 statute, that it was replacing, when it drafted  
15 the America Invents Act. It did not do that.  
16 It specifically changed the language. And that  
17 change has to have some -- some meaning.

18 Third, my friend also mentioned, when  
19 asked, I believe, what work Section 314(d) did,  
20 said that, well, it bans interlocutory review.  
21 Well, that rationale was specifically rejected  
22 by this Court in *Cuozzo*, where it said it was  
23 not limited to simply prohibiting, you know,  
24 interlocutory review. In fact, it would have  
25 been superfluous if that was the purpose of --

1 of the statute -- of the -- of the provision.

2 And, fourth, going to your question,  
3 Justice Sotomayor, we -- we disagree that  
4 there's not -- we think there is an asymmetry  
5 here if -- if Respondent is correct. This Court  
6 in *Cuozzo* said clearly that denial of an IPR  
7 petition is committed to the agency's  
8 discretion.

9 And that means it's unreviewable. And  
10 that's how the federal circuit in several  
11 decisions has interpreted it. In the *Wi-Fi One*  
12 case, which is the en banc case that was applied  
13 below, the court said that a denial cannot be  
14 reviewed. And in the *Saint* -- more recently in  
15 the *Saint Regis Mohawk* case, it said the same  
16 thing.

17 So I think you've got an asymmetry  
18 here, which is that legal determinations made by  
19 the Board in the course of granting review, if  
20 Respondent is right, can be reviewed after final  
21 written decision on appeal.

22 But, if the -- if the Board denies  
23 review on the basis of a legal determination,  
24 that will never be reviewed.

25 So here, for -- here, for example, if

1 the Board came to the opposite conclusion, it  
2 would not be reviewable.

3 Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 counsel. The case is submitted.

6 (Whereupon, at 12:08 p.m., the case  
7 was submitted.)

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