SUPREME COURT
OF THE UNITED STATES

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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3 THRYV, INC., FKA DEX MEDIA, INC.,)

4 Petitioner,)

5 v.) No. 18-916

6 CLICK-TO-CALL TECHNOLOGIES, LP,)

7 ET AL.,)

8 Respondents.)

9 -

10 Washington, D.C.

11 Monday, December 9, 2019

12

13 The above-entitled matter came on for

14 oral argument before the Supreme Court of the

15 United States at 11:05 a.m.

16 APPEARANCES:

17 ADAM H. CHARNES, ESQ., Dallas, Texas;

18 on behalf of the Petitioner.

19 JONATHAN Y. ELLIS, Assistant to the Solicitor

20 General, Department of Justice, Washington, D.C.;

21 on behalf of the federal Respondent, supporting

22 reversal.

23 DANIEL L. GEYSER, ESQ., Dallas, Texas;

24 on behalf of the private Respondent.

25

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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 selected
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 state -- 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 -- in the first case, there is no basis to
14 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 like state proceedings. We don't do double

23 jeopardy between states and federal law anymore.

24 MR. ELLIS: I --

25 JUSTICE GORSUCH: So there's always

1 another proceeding available to -- to -- to --
2 there's always another way to skin the cat.
3 MR. ELLIS: But this is the exact same
4 thing.
5 JUSTICE GORSUCH: But this is what
6 Congress wrote in this cat for this cat. And --
7 and I guess I'm just wondering again, with
8 Justice Breyer, in terms of close, how close it
9 is, isn't there always a traditional distinction
10 there that we recognize in our law governing
11 judicial review?
12 MR. ELLIS: This -- maybe there --
13 there is a tradition, I agree. And, actually,
14 Respondent argues that his reading of 314(d)
15 would do nothing at all; in fact, would just
16 reinforce those provisions. But I don't think
17 that's a plausible reading of the statute.
18 And to address the "under this
19 section" language, that language is used
20 throughout the AIA; indeed, throughout 314
21 itself.
22 JUSTICE KAVANAUGH: But "under this
23 chapter" is used in the same provision. If we
24 had "under this chapter" here, that would solve
25 your problem.

1 MR. ELLIS: I -- I don't think we need
2 that. I mean, I think if you talk about -- just
3 look at the text before that, the determination
4 whether to institute inter partes review, nobody
5 doubts that the 314(a) determination is part of
6 that. But no one also doubts that there are
7 other parts -- aspects that go into that
8 determination.
9 So, for example, if you were thinking
10 about a decision -- a court's decision whether
11 to grant a preliminary injunction, no one would
12 reasonably say that the threshold merits
13 determination on a PI, that whether there's a
14 likelihood of success, is the determination
15 whether to grant a PI, even if you say the
16 determination whether to grant a PI under
17 whatever authorization statute you're providing.
18 And that's what "under this section" does. It
19 does it here and it does it everywhere else.
20 All it says is the petition filed
21 under 311, the response filed under 313, the --
22 the final written decision filed under -- under
23 -- or issued under 318(a). That's what "under
24 this section" does here. It does not -- they
25 don't use this language in a way that isn't used

1 -- it's not used anywhere else in the Act.
2 And if you have any doubt about the
3 scope of this provision, I would urge you to
4 look at the former Section 312. It's laid out
5 in our appendix, but it's also block-quoted at
6 page 8 of our reply. Petitioner -- Respondents'
7 reading of 314(d) is to -- exactly what 312(c)
8 said, that the determination under subsection
9 (a) is final and non-appealable.
10 But, if Congress wanted to do that,
11 there's just no reason at all for it to have
12 changed the language and for it to have used a
13 phrase that just doesn't sensibly describe only
14 the threshold merits determination.
15 So you really have a choice of giving
16 under this section not a great deal of meaning
17 that clarifies the authority, or you have a
18 choice of giving a meaning that it has nowhere
19 else in the code and then renders 314(d) largely
20 superfluous in its entirety.
21 We don't think there's a -- that the
22 -- that the former would -- the latter, rather,
23 would respect to Congress's choice. In this
24 case, it's undoubtedly a choice to preclude
25 judicial review.

1 JUSTICE KAVANAUGH: Do you think it's
2 ambiguous?
3 MR. ELLIS: I don't think it's
4 ambiguous, no. I think if there was any
5 ambiguity in this provision, it was the one that
6 was addressed in Cuozzo, whether it only applies
7 for interlocutory appeals or after final written
8 decisions. The Court decided that -- that
9 question in Cuozzo, no one is asking to revisit
10 it.
11 I don't think -- and no one took -- it
12 was taken as a given in Cuozzo that it would
13 preclude 315(b). Justice Alito in his dissent
14 said as much. And I don't think the -- the --
15 at the end of the decision he was going back on
16 that. He just said this is the problem, and I
17 don't agree with the Court's decision.
18 JUSTICE KAGAN: But maybe one way to
19 read Cuozzo, and I take this to be the point of
20 Justice Breyer's question, is that it -- it goes
21 beyond 314 but that it only goes to questions
22 that are closely related to the reasonable
23 likelihood determination. So, there, the
24 particularity requirement was reasonably related
25 -- was related, closely related, to that

1 reasonable likelihood of patentability
2 determination, but timing is -- is less so.
3 MR. ELLIS: So I -- I -- I grant you
4 that's one way to read that one particular
5 passage. I think if you look elsewhere in
6 Cuozzo, you'll see that what the Court says, for
7 example, on page 2141, is that it's the
8 questions that are closely tied to the
9 application and interpretation of statutes,
10 plural, related to the Patent Office's decision
11 to institute inter partes review. So I don't
12 think that's a plausible reading of what was
13 going on in Cuozzo. And I would point out --
14 JUSTICE GINSBURG: But what about
15 the --
16 MR. ELLIS: -- that it was 312(a)(3)
17 that was at issue there, not 314(a).
18 JUSTICE GINSBURG: -- the -- in
19 Cuozzo, it was a particularity requirement, and
20 that was described as a minor statutory tech --
21 technicality. But, here, we're not dealing with
22 a minor statutory technicality; we're dealing
23 with a time bar.
24 So does that expression in Cuozzo that
25 it was a minor statutory technicality limit it

1 so that a time bar is -- is -- is -- could not
2 be characterized that way?
3 CHIEF JUSTICE ROBERTS: Briefly, Mr.
4 Ellis.
5 MR. ELLIS: No, Your Honor, it does
6 not. For one, 312(a) was a meaningful limit on
7 the director's decision to even institute at
8 all. So we think it is -- to the extent that's
9 a minor technicality, this one fits into the
10 same bucket. It doesn't actually preclude the
11 director from reaching the final decision.
12 And I take the point of that passage
13 in Cuozzo to be that we shouldn't throw out the
14 Board's final written decision on patentability.
15 The major -- the major question on a ground
16 that's completely unrelated to that decision,
17 315(b) is exactly that.
18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.
20 Mr. Geyser.
21 ORAL ARGUMENT OF DANIEL L. GEYSER
22 ON BEHALF OF THE PRIVATE RESPONDENT
23 MR. GEYSER: Thank you, Mr. Chief
24 Justice, and may it please the Court:
25 I respectfully waive my two minutes

1 but would otherwise start by underscoring the
2 truly extraordinary nature of the top side
3 argument.
4 As we've heard today, as my friends
5 read this statute, Congress delegated the
6 judicial function to an administrative agency,
7 gave that agency the unfettered discretion to
8 say what the law is, and then instructed that no
9 Article III court at any time at any level may
10 review the agency's interpretation of the
11 statutory limits on its own power.
12 CHIEF JUSTICE ROBERTS: Well, if
13 you're going to waive your two minutes, I'm not
14 going to sit back.
15 (Laughter.)
16 CHIEF JUSTICE ROBERTS: The -- the
17 point's been made, and it's an important one,
18 about the separation of powers. And I -- I will
19 repeat a question that has been asked this --
20 this morning.
21 But is that really implicated here
22 when you're talking about a -- a time bar on
23 something that a party is going to get review of
24 anyway? I mean, the question of patentability
25 could be put at issue in any number of ways.

1 And I wonder if those types of very significant
2 concerns, concerns that it is importantly our
3 job to be concerned -- to be vigilant about,
4 really do come into play when it's simply a
5 question do you go this route or can you go that
6 route and that the fundamental question that's
7 at issue about patentability is -- is going to
8 be reached. That's not being foreclosed.
9 MR. GEYSER: Well, the -- the ultimate
10 question isn't being foreclosed. That's true.
11 But the -- the 315(b) bar, this is not a minor
12 statutory technicality. This is one of the
13 substantive safeguards that Congress put into
14 the Act in implementing this very new procedure
15 that is adversarial in nature.
16 And it understood that this is a
17 significant protection for patent owners. And
18 it's a significant way to divide the authority
19 between the courts on the one hand and the
20 agency on the other.
21 So this isn't the type of provision
22 that just is out there and it doesn't really
23 have any effect in the real world.
24 CHIEF JUSTICE ROBERTS: Well, but, I
25 mean, I don't think it's what we were fighting

1 over at Yorktown. I mean, it's just a question
2 of whether --
3 (Laughter.)
4 CHIEF JUSTICE ROBERTS: -- as you
5 said, the ultimate question, the ultimate issue
6 that affects the property rights in a patent,
7 it's going to be reached. It's just a question
8 of whether you use one procedure or another.
9 MR. GEYSER: Well, Congress viewed it
10 otherwise, Your Honor. Congress definitely
11 could have put in the inter partes review
12 scheme, something like it did in Section 303(c),
13 and so the director can institute sua sponte if
14 it wants to. Instead required a proper petition
15 and it categorically cut off the agency's
16 authority to act if the petition is filed after
17 that one-year deadline in 315(b).
18 JUSTICE KAGAN: Well, it does, but you
19 don't contest, right, that one -- if this
20 Petitioner is thrown out, somebody else can
21 bring another petition, right?
22 MR. GEYSER: Oh, hypothetically, they
23 -- they could, Your Honor, but you would need a
24 hypothetical future party raising a hypothetical
25 future petition. It hasn't happened yet. And

1 there's nothing in the statute that says that --
2 JUSTICE KAGAN: Well, but it wouldn't
3 be rare to have such a party. Quite the
4 opposite, it would be common to have another
5 party who would pick it up.
6 And what your solution would happen is
7 that we go through the entire process, soup to
8 nuts, and then we get to the end and somebody
9 says, you know, the time bar wasn't applied
10 correctly. We throw it all out and we start all
11 over again on something that we know by now is
12 an invalid patent.
13 MR. GEYSER: Well, we -- first, we
14 don't necessarily know that it is an invalid
15 patent. The --
16 JUSTICE KAGAN: Well, we know that the
17 Board held that it was an invalid patent.
18 MR. GEYSER: And it -- and it is
19 reversed a quarter of the time. But I think the
20 important point is that Congress did say that
21 the agency cannot exercise its review power for
22 inter partes review in those circumstances.
23 And it may be true that there might be
24 a future party, but we don't know that yet.
25 Congress could have excluded that.

1 JUSTICE KAGAN: Well, Congress also
2 said that there's no judicial review of the
3 decision whether to institute.
4 And, presumably, Congress said that
5 for exactly this reason, that once that decision
6 is made and you go through the entire process
7 and you get a merits determination, given that
8 throwing it all out is just going to land you at
9 square one doing the exact same thing, that it
10 was, you know, a little bit silly to go back to
11 square one.
12 MR. GEYSER: Your Honor, I -- I don't
13 think that Congress thought that Section 315(b)
14 was -- was insignificant. I think it -- they
15 wanted it to have teeth.
16 And just to be absolutely clear, the
17 petition that my friends are raising on the
18 other side says that no court can construe what
19 that language means.
20 This is a provision that Congress used
21 to calibrate important interests.
22 JUSTICE GINSBURG: But, if we're --
23 we're in doubt about, we think it's ambiguous,
24 doesn't the nullification of the determination
25 that this patent is no good, that's out there,

1 that's what the Board thinks, that this should
2 not have been patented, and we wipe that out,
3 then you get another challenger and where the
4 Board has already made the decision that the
5 patent is no good. There's something unseemly
6 about nullifying the determination on the
7 merits.
8 MR. GEYSER: I -- I disagree, Your
9 Honor, and for the reason that if the -- if the
10 patent, in fact, is invalid, then it can be
11 invalidated in a proper proceeding. And, again,
12 it's subject to judicial review on the merits.
13 And so it's not entirely sure that
14 that patent, in fact, is invalid. What we do
15 know is that Congress did not want the
16 proceeding to start if the -- the Petitioner is
17 filing it after the year deadline.
18 Often what happens -- and this is not
19 just a question of wasted resources, although we
20 would submit that construing this provision
21 correctly will spare unauthorized future
22 proceedings that will far make up any resources
23 wasted in this individual case.
24 JUSTICE BREYER: Well, what is -- what
25 is the -- the -- the analogy that floats around

1 in my mind on this is that judges and agencies
2 start down a road and then they say, oh, my God,
3 I made a mistake.
4 And -- and we give them lots of power
5 in the law to call back what they did and
6 correct the mistake. The obvious example last
7 week was Rule 59. All right?
8 Now a judge when faced with a 59
9 motion says, my goodness, you're right, I made a
10 mistake, and he changes it. Now, in fact, the
11 party filed that 59 motion one day too late.
12 Okay?
13 Now can there be an appeal to an
14 appeals court that this mistake which was
15 recognized by the judge shouldn't have been
16 recognized because the Rule 59 motion was filed
17 a day late? My guess is the court of appeals
18 will not consider that kind of thing. You get
19 one appeal from the ultimate thing.
20 Now this is highly analogous. You
21 see, they're saying, oh, we think that -- we
22 think that, given all the other ways of filing,
23 getting this in front of us, this issue, of
24 whether we made a mistake, it's not what
25 Congress meant that we can't hear it when there

1 is a -- when there is a complaint filed and the
2 parties say throw it out without prejudice, that
3 that shouldn't stop us from hearing it.
4 They might be wrong about that. But
5 that's like filing the 59 motion a day too late.
6 And we shouldn't have review of that
7 kind of thing. All it was was an effort to
8 correct a mistake. What do you think?
9 MR. GEYSER: Well, this -- this is
10 what I think, Justice Breyer. I think that this
11 is the construction of a federal statute. So
12 the question is not how do we apply a given rule
13 with a given construction on a given day for a
14 certain set of facts.
15 This is what does an act of Congress
16 mean? And, again, this is --
17 JUSTICE BREYER: Well, that's true, of
18 course, or could be true in many matters
19 governing instances where judges or agencies
20 call back something they did because they think
21 they did it wrong.
22 MR. GEYSER: Well --
23 JUSTICE BREYER: Would that make it
24 somehow more reviewable?
25 MR. GEYSER: Well, I -- I think what

1 makes it reviewable is the strong presumption
2 favoring judicial review. Again, it is
3 exceedingly rare for Congress to enact a highly
4 reticulated scheme that's restricting the
5 agency's core authority for significant policy
6 objectives and then says, agency, you figure out
7 what those provisions mean.
8 No court --
9 JUSTICE KAGAN: Well, you're -- you're
10 right, it is rare. And that's why we have this
11 presumption and we usually don't think that
12 Congress wants it.
13 But this language is pretty broad.
14 It's the decision to institute is final and
15 unappealable. And you're going to tell me it's
16 in this section. And I'm going to tell you, I
17 mean, in this section is just the decision to
18 institute, is in this section, but the decision
19 to institute is final and unappealable.
20 MR. GEYSER: Well, a -- a couple key
21 points, Your Honor. I am going to tell you that
22 it says under this section, but I do think it
23 says that for a very important reason. And
24 under my friend's reading, that phrase, "under
25 this section," has absolutely no meaning. You

1 can take it out of the statute and it means
2 exactly the same thing.
3 In fact, you can replace the word
4 section with the word chapter. These are two
5 very different terms. And Congress knows the
6 difference because, if you look to 314(b), they
7 used the phrase institute under this chapter.
8 JUSTICE ALITO: Well, I don't want to
9 interrupt the rest of your answer to Justice
10 Kagan, but would it be possible for the director
11 to institute inter partes review under some
12 other section?
13 Could the director say, I don't want
14 to invoke 314, I want to institute inter partes
15 review under some other provision of law? Can
16 he do that?
17 MR. GEYSER: Well, this is -- and
18 there's an oddity with this statute, Justice
19 Alito. There is not an express provision
20 anywhere in Chapter 31 that expressly authorizes
21 the director to institute review. It's not in
22 314. The institution takes place implicitly
23 under this chapter, which is why, if you look
24 through Chapter 31, you'll see repeated
25 instances.

1 And I think 314(b), which is "under
2 this section," is a great illustration. It
3 talks about institute an inter partes review
4 under this chapter. It is not as my friend from
5 the government says. It's just describing where
6 something happens.
7 JUSTICE KAGAN: But, Mr. Geyser, I
8 think 314(a) does. I mean, it does it in a
9 little bit of a backhand way, I understand that,
10 but it says it gives -- 314(a) is what tells the
11 director when he should institute. And so it's
12 314(a) that authorizes the director to
13 institute, and then 314(d) says the decision to
14 institute under this section, in other words,
15 under 314(a), is final and unappealable.
16 MR. GEYSER: I -- I almost agree, but
17 there's a very important predicate step, and
18 that's, in order to get to Section 314, you
19 first have to clear the gateway prerequisites
20 under 315, including 315(b).
21 And as my friend from the government
22 concedes in the reply brief, this is on page 6
23 of the government's reply, they concede that if
24 the prerequisite under 315(b) is not met, the
25 director has nothing else to do, which means

1 that the director doesn't make any determination
2 under Section 314.
3 And you're right that Section 314(d)
4 is linking the determination, under this section
5 whether to institute, to that determination
6 under (a), which is entitled to threshold
7 consideration. It's looking on the merits. If
8 you have an eligible petition, does it satisfy
9 the -- does the director determine that the
10 information presented shows that it's reasonably
11 tolerable --
12 JUSTICE KAGAN: But, if you're right,
13 Mr. Geyser, what does this unappealability bar
14 really amount to? When does it bar anything
15 that anybody would want to raise as an argument?
16 Because, if you are right, it's just
17 limited to the substantive determination at the
18 threshold stage. But, by the time this is going
19 to get to appeal, the substantive determination
20 at the threshold stage has been subsumed by the
21 substantive determination -- the final
22 substantive determination. So, if you're right,
23 you're basically saying, you know, there's this
24 unappealability -- there's this bar on appeals
25 that applies only to something that nobody would

1 raise.
2 MR. GEYSER: Your Honor, what -- what
3 I'm saying is exactly what Congress did in
4 Section 303(c) --
5 JUSTICE KAGAN: Well, you're saying --
6 MR. GEYSER: -- and in 312(c).
7 JUSTICE KAGAN: -- that Congress wrote
8 that silliest provision that the bar on appeals
9 applies only to something that nobody would
10 raise --
11 MR. GEYSER: It --
12 JUSTICE KAGAN: -- because it's been
13 totally mooted out.
14 MR. GEYSER: It's -- it's not silly
15 because Congress has a good reason to make
16 absolutely clear that people will not interrupt
17 the inter partes review while it's going on with
18 a disruptive interlocutory appeal. And at the
19 end of the day, they won't waste the court's
20 time with that preliminary initial threshold
21 decision.
22 But, again, Congress is repeating the
23 exact same pattern that it did in Section 303(c)
24 and that it did in former Section 312(c). This
25 is one area --

1 JUSTICE KAVANAUGH: Do you disagree
2 with Justice Kagan that it does no work under
3 your reading?
4 MR. GEYSER: No. It clarifies what
5 the likely outcome is, and I think clarifying
6 does give it significance.
7 JUSTICE KAVANAUGH: Does the
8 clarifying do any work?
9 MR. GEYSER: The -- I think that --
10 JUSTICE KAVANAUGH: In the real world?
11 Which is what I took to be the -- her question.
12 MR. GEYSER: This -- this is -- all I
13 can say is that we know that Congress thought it
14 was doing work because everyone agrees that is
15 all that Congress did in 303(c) and 312(c). So
16 I'm not making this up.
17 If you look back and see what has
18 Congress done in the past in this very area,
19 it's done exactly how we're reading 314(d). And
20 this is an area, again, that all -- I think all
21 parties to this case agree, everyone agrees that
22 303(c) and 312(c), former Section 312(c),
23 accomplish only what Justice Kagan has pointed
24 out.
25 JUSTICE KAGAN: I think Mr. Ellis

1 would say, well, that's true, but those
2 provisions were -- specifically said exactly
3 that. If you take a provision that's now
4 written much more broadly and limit it to that
5 set of applications, which is essentially
6 nothing, I mean, isn't Congress's intent being
7 flouted?
8 MR. GEYSER: I -- I don't think at
9 all, Your Honor. And, first of all, the
10 language is not markedly different. And I think
11 one would expect that if you're going to expand
12 an appeal bar -- which, again, we're -- we're in
13 very rarified territory, as we heard both
14 earlier today and in the top side of the
15 argument, of cutting off the court's ability to
16 say what a -- a provision of the United States
17 Code means. No court at any time will have the
18 power to read this and say what it means.
19 That's --
20 JUSTICE KAVANAUGH: Can you give any
21 real-world example of when the bar would do
22 work?
23 MR. GEYSER: The -- the bar would do
24 work if a party came -- let's say that a
25 petition says I think that this patent is

1 invalid, as -- as obvious, in light of a certain
2 prior art reference A. And then the agency
3 says, you know what, we agree; we're going to
4 institute review. And then, in the course of
5 review, they say, oh, my goodness, we were
6 entirely wrong; that argument was actually
7 frivolous, but you know what, there's actually a
8 different argument that would invalidate the
9 patent at the end of the day. Then I could see
10 a party saying, well, wait a minute, that
11 institution was improper under (a), because
12 they're conceding that, in fact, the petition
13 should not have been instituted, there wasn't --
14 JUSTICE KAGAN: So you think that
15 Congress wanted, in a case like that where the
16 Patent Board has found a good reason why the
17 patent is invalid, to go back and do the entire
18 thing over again because its initial theory was
19 not the one that it ended up with?
20 MR. GEYSER: Well, what I think, Your
21 Honor, is that Congress was not focused in a
22 single-minded way on a single objective when
23 they wrote this statute. These provisions were
24 heavily negotiated. And I think if you see the
25 amici on our side, you can see why they thought

1 that the 315 bar is a fundamental safeguard to
2 protect patent owners from both harassment and
3 abuse.
4 It avoids a situation where someone
5 litigates in district court, they test the
6 waters, it turns out they don't like how it's
7 going, and they try to uproot the proceeding to
8 the agency after the fact. This is very
9 important substantive protections for a patent
10 owner whose property rights are subject to
11 review in an Article I tribunal.
12 And my friends have even conceded that
13 that tribunal is truncated. It is not providing
14 an equivalent process that you would get in a --
15 in a normal Article III proceeding.
16 JUSTICE KAVANAUGH: But --
17 MR. GEYSER: So I think Congress
18 didn't look at this as some minor statutory
19 technicality.
20 JUSTICE KAVANAUGH: Well, it -- it
21 doesn't have to be characterized as minor just
22 because it's not judicially reviewable. We
23 presume that the executive officials are going
24 to follow the laws set forth by Congress,
25 whether or not there's judicial review.

1 MR. GEYSER: We -- we do presume that,
2 but we also presume that -- that they're more
3 likely to follow the law correctly when someone
4 knows they're checking their homework.
5 JUSTICE KAVANAUGH: That's true in
6 practice, I -- I grant you that --
7 MR. GEYSER: And --
8 JUSTICE KAVANAUGH: -- but it's not
9 that it does no work without judicial review.
10 I'm just pushing a little bit on that point.
11 MR. GEYSER: Well, Your Honor, I fully
12 agree that we -- we have every belief that the
13 agency will exercise the utmost good faith in
14 adjudicating cases under this scheme, but what
15 we do know from Mach Mining and from other cases
16 of this Court --
17 JUSTICE KAVANAUGH: But that's a
18 way -- sorry to interrupt. But that's a way to
19 make the whole thing do some work under the
20 theory that it's an important provision, 315.
21 It does work in telling the agency don't do
22 this. There may not be judicial review, but
23 don't do this, and the agency is presumably
24 going to listen to that.
25 Then the appeal bar, though, also does

1 some work under this in that it knocks out
2 claims -- it says certain kinds of claims are
3 not appealable at the end, even if they happened
4 in the rare instance, or maybe not so rare, to
5 violate that bar.
6 So both provisions do substantial work
7 then. What's wrong with that, looking at it
8 that way?
9 MR. GEYSER: Well, I think -- I think
10 what's wrong with it, again, is that you're
11 removing any ordinary, traditional, normal
12 function of judicial review to ensure that the
13 agency's constructing the outer limits on its
14 own power correctly.
15 And, again, that's not a small thing
16 --
17 JUSTICE KAGAN: But, you know, you --
18 MR. GEYSER: -- I would submit.
19 JUSTICE KAGAN: -- you cited Mach
20 Mining, but Mach Mining was very clear to say,
21 again, we usually think that Congress wants the
22 court to police a -- a congressional statute,
23 but sometimes Congress wants the agency to
24 self-police because it doesn't think that the
25 costs of judicial review, and there are some,

1 are worth it, given the subject matter, given
2 the fact that in this case there's going to be
3 review of the principal question anyway, and,
4 you know, in the end, this is not -- it's not
5 unconstitutional if Congress wants to say that
6 the -- a decision to institute is not
7 reviewable. And Congress appears to have said
8 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
22 director can do if the gateway prerequisite
23 under 315(b) has been satisfied. If it hasn't,
24 then the director has no power to proceed,
25 which, again, we agree with the government on

1 this narrow point, on page 6 of their reply,
2 they say plainly that if that prerequisite is
3 not met, 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. Geyser --
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 affirmatively
6 authorizes judicial review and the second is
7 there a provision that affirmatively precludes
8 judicial review? So we're talking about 314(d).
9 Now, our contention is that let's say
10 the Patent Office misreads 315(b) to say it
11 doesn't have authority when, in fact, it does.
12 It -- it reads one year to mean six months, so
13 it's cutting off lots --
14 JUSTICE SOTOMAYOR: No --
15 MR. GEYSER: -- of time --
16 JUSTICE SOTOMAYOR: -- just this case.
17 MR. GEYSER: Or -- or --
18 JUSTICE SOTOMAYOR: It reads -- it
19 reads it this way, and the other side says
20 you're wrong --
21 MR GEYSER: Okay.
22 JUSTICE SOTOMAYOR: -- for all the
23 reasons it earlier gave.
24 MR. GEYSER: So -- so our contention,
25 again, is that 314(d) would not preclude review.

1 The question is what is the affirmative power to
2 review. Now, it won't come under 319, you're
3 right, there's no final written decision, but
4 that doesn't take away the -- the potential to
5 raise this under the APA, which provides
6 judicial review for decisions where there's no
7 other adequate means of doing it.
8 It potentially could get review under
9 mandamus, depending on the egregiousness of the
10 decision. And there is a provision in Title 28,
11 it's 12 -- it's 1295(a)(4)(A), that gives the
12 federal circuit jurisdiction over a decision of
13 the -- of the patent of the PTAB in -- in the
14 inter partes review setting.
15 So there are lots of different ways
16 that someone who feels aggrieved by a misreading
17 that cuts off power that otherwise exists, and I
18 don't think that would also fall within the
19 exception, just to make sure I'm rounding out
20 the answer, for decisions that are committed to
21 agency discretion, because if the determination
22 is we lack the authority to do something because
23 they've misread one of the outer limits on their
24 power as opposed to we're declining to review,
25 for reasons of agency resources or we just don't

1 think this is important enough to spend our time
2 on, that's a different type of question.
3 So I think that the amici on the other
4 side are wrong in that respect.
5 JUSTICE BREYER: So what's so terrible
6 about reading the "in this section" to mean what
7 it says, which is that where -- where the
8 director -- where the director -- what is the
9 exact word -- where the director decides to
10 institute an inter partes review, under this
11 section, that's it, you can't appeal that
12 decision. That's the norm.
13 And, after all, the director could do
14 this on his own, couldn't he?
15 MR. GEYSER: The -- the director could
16 institute --
17 JUSTICE BREYER: Yeah.
18 MR. GEYSER: -- an ex parte
19 reexamination.
20 JUSTICE BREYER: So -- so this then is
21 basically a way, a little complicated way, but
22 of the agency saying: Oh, my God, we made a
23 mistake. And what that section has is about
24 (d), subsection (d), is don't review the
25 decision, oh, my God, I made a mistake. Judge,

1 you review whether it was a mistake. You review
2 whether the patent should have been canceled or
3 not canceled, but it's up to the director,
4 really, whether he decides to look at it once,
5 twice, or three times.
6 Indeed, how do we know the director
7 didn't look at it ten times before he ever
8 decided to grant it? So that's a simple way of
9 looking at it.
10 MR. GEYSER: Well --
11 JUSTICE BREYER: And that -- that --
12 that leads you to pretty broad language about
13 what's -- what's pretty broad category of what
14 you can't review.
15 MR. GEYSER: Well, again, I don't
16 think it is -- is so broad. And I do want to
17 make one thing very clear. The ex parte
18 reexamination under 303 does not proceed the
19 same way that an inter partes reexam or inter
20 partes review does.
21 It -- it mimics the initial
22 examination process, it gives the patent owner
23 vastly greater rights. They get to interact
24 with the office. They have additional amendment
25 rights.

1 JUSTICE BREYER: Yeah, yeah.
2 MR. GEYSER: So the process looks
3 absolutely nothing like inter partes review.
4 It's not just that they can say, you know what,
5 we made a mistake. We'll just switch -- we'll
6 scratch off --
7 JUSTICE BREYER: Right.
8 MR. GEYSER: -- inter partes review
9 and rewrite ex parte reexamination. It doesn't
10 work that way at all.
11 And it's --
12 CHIEF JUSTICE ROBERTS: Well, it's --
13 it's different, I'll give you that, but, I mean,
14 it's focused on the same ultimate question.
15 MR. GEYSER: Well, sure, Your Honor,
16 but -- but Congress decided in granting this new
17 procedure that has a potent, you know, a potent
18 danger to patent rights that the -- the patent
19 owners are entitled to significant safeguard and
20 the main safeguard that they implemented are the
21 ones in 315.
22 JUSTICE GORSUCH: Well, I guess the
23 question, though, that we're struggling with is
24 so what's the big deal? If you're stuck going
25 to ex parte review anyway, why should we care?

1 What's your answer to that?
2 MR. GEYSER: Well, I -- I think you
3 should care because inter partes review is a
4 very different process than ex parte
5 reexamination. And, again, if Congress wanted
6 --
7 JUSTICE KAGAN: But somebody else can
8 --
9 JUSTICE GORSUCH: Spell that out.
10 Spell that out. Why?
11 MR. GEYSER: It's because instead of
12 having an opportunity for a single response,
13 truncated discovery, you're in an adversarial
14 proceeding. You're before a panel of three PTAB
15 judges who might give you an hour oral hearing.
16 You get a long, iterative process with
17 -- with a talented patent examiner who can say
18 this is what I think is wrong, and then you have
19 lots of opportunities to show them exactly why
20 that concern is unfounded.
21 And, again, the PTAB is reversed a
22 fourth of the time. It's not like this process,
23 because it's so truncated, I'm assuming, is
24 perfect or without error.
25 CHIEF JUSTICE ROBERTS: Well --

1 JUSTICE KAGAN: But if it's not with
2 this Petitioner, it can be another Petitioner.
3 MR. GEYSER: And -- and if --
4 JUSTICE KAGAN: And, indeed, even when
5 a petitioner drops out under this statute, the
6 Board can keep the proceeding going without the
7 petitioner. So the fact that it is this
8 Petitioner seems utterly unimportant under this
9 statute.
10 MR. GEYSER: Not at all, Your Honor.
11 And I think the key is that if Congress thought
12 that the Board -- the Board can do whatever it
13 wants, it would have mimicked the same language
14 it had in 303 saying they have a sue sponte
15 right to institute review. This is a procedure
16 that is keyed directly on there being a proper,
17 timely petition.
18 JUSTICE KAGAN: You -- you don't deny
19 that another petitioner can just step into the
20 shoes of this Petitioner.
21 MR. GEYSER: If they file a timely
22 petition, they can seek review. I absolutely
23 concede that --
24 JUSTICE KAGAN: And you don't deny if
25 a petitioner drops out for any reason, the Board

1 can go on without any petitioner?

2 MR. GEYSER: Assuming that it was a

3 properly filed petition in the first place. We

4 don't disagree with that. But, again --

5 JUSTICE KAGAN: It just doesn't seem

6 as though this petitioner makes all that much

7 difference.

8 MR. GEYSER: Well, Congress felt

9 otherwise in this heavily negotiated process

10 that produced 315(b) as a fundamental safeguard

11 for patents.

12 JUSTICE GORSUCH: But, again, why

13 would it have made that judgment, I guess is the

14 question? Why does it matter whether it's one

15 petitioner or another petitioner?

16 MR. GEYSER: Well, because Congress

17 felt that it was important in this adversarial

18 scheme.

19 JUSTICE GORSUCH: Why?

20 MR. GEYSER: To make sure that you

21 don't have someone gaming the system, waiting

22 out over a year or even in this case ten years

23 before they seek review, where you don't have

24 repeated inter partes review petitions filed by

25 multiple people trying to hold up the patent and

1 prevent a legitimate litigation in an Article
2 III court seeking recourse for infringement.
3 There are lots of reasons that
4 Congress would have had in mind. But typically
5 the -- the way the system works is Congress
6 passes a law, the agency gets to enforce it, but
7 this Court ultimately gets to say what those
8 provisions mean.
9 Congress thought this was an important
10 provision. Congress could have said: You know
11 what, it doesn't really matter if it's timely or
12 not, do your best, agency, and then we'll --
13 we'll move on. But they limited this, located
14 it in a specific section, keying it to a
15 specific determination, as this Court has
16 already recognized in SAS, and it said that only
17 that determination, the one under this section,
18 not under this chapter, is a thing cut off from
19 appellate review.
20 So I -- I don't think it's enough
21 simply to -- to throw up our hands and say maybe
22 someone else could come along. Maybe they can
23 but maybe they won't. And, even if they do,
24 they still need to mount a challenge that the
25 director is willing to accept.

1 So -- and I would like to say one
2 other point about the statutory history. Again,
3 I do think that this is actually pointing in our
4 favor, not my friend's. It shows exactly
5 Congress following a -- the same pattern in
6 cutting off a similar type of appellate review.
7 It's very narrow.
8 And I think that it would be
9 extraordinary to presume that Congress expanded
10 that in such an oblique, indirect way as they
11 did here.
12 When Congress wants to cut off
13 appellate review and say that the -- the usual
14 Article III function is delegated exclusively to
15 an agency, where no court at any time gets to
16 look through any of these provisions that
17 Congress took care to articulate, to limit the
18 agency's power, Congress presumably writes in a
19 clear and unmistakable way.
20 I would submit that I'm not aware of
21 any case that this Court has ever decided that
22 -- may I finish?
23 CHIEF JUSTICE ROBERTS: Sure.
24 MR. GEYSER: -- that would find
25 Article III review cut off entirely based on

1 language as indirect as this.
2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.
4 Three minutes, Mr. Charnes.
5 REBUTTAL ARGUMENT OF ADAM H. CHARNES
6 ON BEHALF OF THE PETITIONER
7 MR. CHARNES: Thank you. I'd like to
8 make four points.
9 First, with respect to the language
10 under the section in 314(d), other provisions of
11 the -- of Chapter 31 make perfectly clear that
12 Congress viewed the institution decision under
13 314.
14 For example, 315(c) says -- refers to
15 "the institution of an IPR under Section 314."
16 There's similar language in 316(a)(2).
17 So -- so we believe that's all
18 Congress meant by that, those three words, is
19 that institution occurs under 314. The title of
20 314 is Institution of Inter Partes Review. And
21 there is no other provision of the statute that
22 plausibly involve institution.
23 The second point, my -- my friend
24 referred to several times the Section 303 and
25 former Section 312 and suggested that they are

1 analogous to what Congress did here in 314. But
2 that -- that's simply not true.
3 If you look at former Section 312(c),
4 what it says is "a determination by the director
5 under subsection (a) shall be final and
6 non-appealable."
7 If Congress meant to limit the
8 preclusion of judicial review to the preliminary
9 patentability determination in subsection (a) of
10 Section 314, there is no reason it would not
11 have used the language that was already in the
12 statute, that it was replacing, when it drafted
13 the American Invents Act. It did not do that.
14 It specifically changed the language.
15 And that change has to have some --
16 some meaning.
17 Third, my friend also mentioned, when
18 asked, I believe, what work Section 314(d) did,
19 said that, well, it bans interlocutory review.
20 Well, that rationale was specifically rejected
21 by this Court in Cuozzo, where it said it was
22 not limited to simply prohibiting, you know,
23 interlocutory review. In fact, it would have
24 been superfluous if that was the purpose of --
25 of the statute -- of the -- of the provision.

1 And, fourth, going to your question,
2 Justice Sotomayor, we -- we disagree that
3 there's not -- we think there is an asymmetry
4 here if -- if Respondent is correct. This Court
5 in Cuozzo said clearly that denial of an IPR
6 petition is committed to the agency's
7 discretion.
8 And that means it's unreviewable. And
9 that's how the federal circuit in several
10 decisions has interpreted it. In the Wi-Fi One
11 case, which is the en banc case that was applied
12 below, the court said that a denial cannot be
13 reviewed. And in the Saint -- more recently in
14 the Saint Regis Mohawk case it said the same
15 thing.
16 So I think you've got an asymmetry
17 here, which is that legal determinations made by
18 the Board in the course of granting review, if
19 Respondent is right, can be reviewed after final
20 written decision on appeal.
21 But if -- if the Board denies review
22 on the basis of a legal determination, that will
23 never be reviewed.
24 So here, for -- here, for example, if
25 the Board came to the opposite conclusion, it

1 would not be reviewable.

2 CHIEF JUSTICE ROBERTS: Thank you,

3 counsel. The case is submitted.

4 (Whereupon, at 12:08 p.m., the case

5 was submitted.)

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