

No. 18-916

IN THE
Supreme Court of the United States

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

v.

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

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

BRIEF AMICUS CURIAE OF THE
PTAB BAR ASSOCIATION IN
SUPPORT OF NEITHER PARTY

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INTEREST OF AMICUS CURIAE¹

The PTAB Bar Association is a voluntary bar association dedicated to the free flow of ideas regarding the evolving trial practice before the Patent Trial and Appeal Board (PTAB or Board). The PTAB Bar Association's approximately 575 members are a wide and diverse group of individuals, joining from many different private and public companies, government agencies, and institutions involved directly and indirectly in the practice of patent and intellectual property law. The members include a broad spectrum of owners, users, and challengers of intellectual property rights.

The PTAB Bar Association has no interest in any party to this litigation and does not take a position on the merits of this case. However, PTAB Bar Association members have a strong interest in the decision in this case. Collectively, PTAB stakeholders have thousands of patents and have litigated roughly 10,000 *inter partes*

¹ In accordance with Supreme Court Rule 37.6, amicus curiae states that this brief was not authored, in whole or in part, by counsel to a party, and that no monetary contribution to the preparation or submission of this brief was made by any person or entity other than the amicus curiae and its counsel. Specifically, after reasonable investigation, the PTAB Bar Association believes that (i) no member of its Board or Amicus Committee who voted to file this brief, or any attorney in the law firm or corporation of such a member, represents a party to this litigation in this matter and (ii) no representative of any party to this litigation participated in the authorship of this brief. The parties have consented to the filing of this amicus brief in support of neither party through the filing of blanket consent letters.

review (IPR) petitions. And many PTAB Bar Association members represent innovative companies at the forefront of technological advancement and are therefore heavily invested in an *inter partes* review process that is just, speedy, and inexpensive. Therefore, this Court's decisions about the Board and the *inter partes* review process in general—including about whether a Board time-bar decision is reviewable under the circumstances presented here—may have a profound impact on the members of the PTAB Bar Association.

Although PTAB Bar Association members may not be in full agreement on the merits of this case, the PTAB Bar Association submits this brief to provide this Court with important context about PTAB practice and the *inter partes* review process. Through this brief, the PTAB Bar Association offers the Court the perspective that the Association's members have gained litigating thousands of *inter partes* review proceedings since 2012.

SUMMARY OF ARGUMENT

1. The *inter partes* review process allows the United States Patent and Trademark Office (Patent Office) to take a fresh look at an issued patent to determine whether the claims are unpatentable, based on the grounds of obviousness or lack of novelty. The *inter partes* review process strikes a balance between the interests of patent owners and those challenging patents. The time bar at issue in this case is one example of a provision ensuring a limited, efficient, and streamlined process.

2. The PTAB Bar Association is neutral on the outcome of this case, but the outcome will have effects on

patent stakeholders and on *inter partes* review practice in general. For example, this case involves a time-bar determination discussed in a Final Written Decision, and a Final Written Decision is subject to appeal under 35 U.S.C. § 319. But time-bar determinations occur in many other situations too. Depending on the reasoning and language this Court uses in its opinion, this case may affect whether time-bar decisions in those other situations are reviewable, or may create uncertainty about that reviewability. That uncertainty makes it more difficult for parties to weigh predictably the costs and benefits of *inter partes* review proceedings.

Similarly, this Court’s decision may have implications on many other issues related to the interpretation of 35 U.S.C. § 315(b) that both the Board and the Federal Circuit have been grappling with since the procedure began in 2012. And this Court’s decision may also have implications outside the context of section 315(b) on practice before the Board and on the *inter partes* review process going forward.

3. Patent owners generally favor reviewability while patent challengers generally do not. The Court should consider the interests of both patent owners and patent challengers discussed below in deciding this case.

ARGUMENT

I. Background On The *Inter Partes* Review Process.

In 2012, Congress created the *inter partes* review process through the Leahy–Smith America Invents Act (“AIA”), 35 U.S.C. § 100 *et seq.* “Under that process, the

United States Patent and Trademark Office is authorized to reconsider and to cancel an issued patent claim in limited circumstances.” *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1370 (2018). *Inter partes* reviews were not the first process Congress created for challenging issued patents. Pre-existing processes include Patent Office reexaminations, which allow the Patent Office to review its prior decisions issuing patents. *Inter partes* review represents the most recent attempt to balance the interests of patent stakeholders by allowing for an efficient and limited process for challenging patents.

A. *Inter partes* review was intended to be efficient and limited.

Inter partes review is an “efficient system for challenging patents that should not have issued,” based on anticipation or obviousness grounds raised by prior patents or printed publications. H.R. Rep. No. 112-98, pt. 1, at 39-40 (2011), *as reprinted in* 2011 U.S.C.C.A.N. 67, 69. Congress designed *inter partes* review to function as a “quick and cost effective alternative[] to litigation” that would “improve patent quality and restore confidence in the presumption of validity that comes with issued patents in court.” *Id.* at 48, 2011 U.S.C.C.A.N. at 78. And Congress “streamlin[ed] review of patents to ensure that the poor-quality patents can be weeded out

through administrative review rather than costly litigation.” 157 Cong. Rec. 13166 (2011) (statement of Sen. Schumer).²

To make such efficiency possible, Congress placed statutory limits on *inter partes* review proceedings, such as imposing “procedural restrictions” to “limit the time and expense” of patent challenges and barring serial challenges by way of estoppel. 154 Cong. Rec. 22625-26 (2008) (statement of Sen. Kyl); *see* 35 U.S.C. § 315(e). Congress also added provisions intended to remedy the prior “[l]engthy and duplicative proceedings” that were among “the worst evils of the other systems of administrative review of patents.” 154 Cong. Rec. 22625-26 (2008) (statement of Sen. Kyl).

Congress imposed the “time bar” at the heart of this case to balance the competing interests of patent challengers and patent owners. This time bar provides that “*inter partes* review may not be instituted if the petition requesting the proceeding is filed more than 1 year after the date on which the petitioner, real party in interest, or privy of the petitioner is served with a complaint alleging infringement of the patent.” 35 U.S.C. § 315(b). That deadline benefits a patent owner because without

² *See generally* Joseph W. Dubis, *Inter Partes Review: A Multi-Method Comparison for Challenging Patent Validity*, 6 *Cybaris Intell. Prop. L. Rev.* 107, 134-41 (Summer 2015) (cataloging procedural differences between *inter partes* reexamination and *inter partes* review); Alison J. Baldwin & Aaron V. Gin, *Inter partes Review and Inter Partes Reexamination: More Than Just a Name Change*, *Intell. Prop. Today* (2014) (describing *inter partes* reexamination and review as similar yet distinct).

it, the *inter partes* review procedure would create an ever-present risk that patent holders could be subject to a proceeding challenging, and possibly nullifying, an issued patent well after litigation has commenced against an accused infringer. At the same time, that deadline gives patent challengers “a reasonable opportunity to identify and understand the patent claims that are relevant to the litigation,” after a lawsuit is filed, and time to prepare invalidity challenges. See 157 Cong. Rec. at 13187 (2011) (statement of Sen. Kyl).

In short, for patent challengers, *inter partes* review is a swifter and more efficient process than prior Patent Office processes for challenging patents. For patent owners, the one-year time limit offers a swift measure of finality and repose against potential challengers that have been served with an infringement complaint.

B. The *inter partes* review process balances the interests of patent owners and patent challengers.

The *inter partes* review process includes five milestones.

First, a petition for *inter partes* review is filed by “a person who is not the owner of a patent.” 35 U.S.C. § 311(a). “The petition can request cancellation of ‘1 or more claims of a patent’ on the grounds that the claim fails the novelty or nonobviousness standards for patentability,” but “only on the basis of prior art consisting of patents or printed publications.” *Oil States*, 138 S. Ct. at 1371 (quoting 35 U.S.C. § 311(b)). The patent owner may offer a preliminary response explaining “why no *inter partes* review should be instituted.” 35 U.S.C. § 313.

Second, the Board (acting on behalf of the Director) decides whether to institute proceedings. 35 U.S.C. § 314(a); *see* 37 C.F.R. § 42.4(a). The Board has discretion to do so if it finds “there is a reasonable likelihood that the petitioner would prevail” in showing that “at least 1 of the claims challenged” is anticipated or obvious. 35 U.S.C. § 314(a). The Board’s institution “decision is ‘final and nonappealable.’” *Oil States*, 138 S. Ct. at 1371 (quoting 35 U.S.C. § 314(d)). From 2012 through June 2019, the Board has received 9,545 *inter partes* review petitions and decided to institute approximately 60%. *See* Patent Office, *PTAB Trial Statistics* 3, 6 (June 2019), https://www.uspto.gov/sites/default/files/documents/Trial_Statistics_2019-06-30.pdf (“*PTAB Trial Statistics*”).

Third, once instituted, the *inter partes* review proceeds before a three-judge panel of administrative patent judges. The patent owner may seek discovery to aid its defense or to serve as the basis for a motion to dismiss—including on grounds that the petition is untimely or otherwise barred under section 315(b). *See* 37 C.F.R. § 42.51(b). The parties then file briefs, submit evidence, and may be heard on whether the claims are patentable and also whether the petition meets the statutory criteria for *inter partes* review. *See* 37 C.F.R. §§ 42.20-42.25, 42.70.

Fourth, if the case is not settled or withdrawn, the Board issues a final decision. 35 U.S.C. § 319. Typically, that will manifest as a Final Written Decision, which can address whether each of the challenged claims is patentable. *See* 35 U.S.C. § 318(a). In some cases, as here, the

Board's Final Written Decision may address other issues such as the time bar. *See* Pet. App. 120a-122a, 137a-138a. From 2012 to June 2019, the Board has issued a Final Written Decision in only about one-quarter of the *inter partes* reviews it instituted, and canceled at least one claim in about 80% of those Final Written Decisions. *See PTAB Trial Statistics*.

Fifth, at the completion of the *inter partes* review, a “party dissatisfied with the final written decision” may seek judicial review before the Federal Circuit. 35 U.S.C. § 319. As of May 15, 2019, the Federal Circuit has affirmed the Board in approximately 74% of appeals, reversed or vacated in 13.6%, affirmed in part and reversed or vacated in part in 9.7%, and dismissed in 2.7%. David C. Seastrunk *et al.*, *Federal Circuit PTAB Appeal Statistics Through May 15, 2019*, Finnegan AIA Blog (May 31, 2019), <https://www.finnegan.com/en/insights/blogs/america-invents-act/federal-circuit-ptab-appeal-statistics-through-may-15-2019.html>.

Inter partes review strikes a balance between patent challengers' interest in deferring challenges until the significance of a patent is clearer, and patent owners' interests in finality. On the one hand, *inter partes* review allows parties to wait to seek *inter partes* review until the value of the patent is better understood. The deadline for seeking *inter partes* review is not tied to when the patent issued; it is keyed to service of “a complaint alleging infringement of the patent.” 35 U.S.C. § 315(b). As a result, putative petitioners need not decide whether to challenge a patent before they are sued, reducing the likelihood that the Patent Office will be bur-

dened by proceedings on claims that may lack value. Potential *inter partes* review petitioners can instead defer the effort and expense to challenge a patent until the patent’s significance is clearer—when the patent is used as the basis for an infringement action, and a year of litigation crystallizes the most important patent claims.

Other provisions of the *inter partes* review scheme are designed to ensure finality for patent owners. If an *inter partes* review results in a Final Written Decision, then the petitioner is estopped from asserting in another action “that the claim is invalid on any ground that the petitioner raised or reasonably could have raised during that *inter partes* review.” 35 U.S.C. § 315(e)(2). Moreover, although this Court has not determined whether and which Board actions are appealable in every circumstance, this Court has emphasized that “the ‘No Appeal’ provision’s language must, at the least, forbid an appeal that attacks a ‘determination . . . whether to institute’ review” in some cases. *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2140 (2016) (quoting 35 U.S.C. § 314(d)); *id.* at 2141 (“[W]e emphasize that our interpretation [of § 314(d)] applies where the grounds for attacking the decision to institute *inter partes* review consist of questions that are closely tied to the application and interpretation of statutes related to the Patent Office’s decision to initiate *inter partes* review.”); *see also SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1359 (2018) (rejecting reading section 314(d) and *Cuozzo* as “foreclosing judicial review of any legal question bearing on the institution of *inter partes* review”).

The effect of *inter partes* review on the length and expense of proceedings is mixed. On average, a challenge may be resolved faster through *inter partes* review than district court litigation. Compare 35 U.S.C. § 316(a)(11) (requiring completion of *inter partes* review within 18 months), with PricewaterhouseCoopers, *2018 Patent Litigation Study* 14 (2018) (noting data from 2008 to 2017 showing the median time to trial in patent litigation was 2.4 years). But *inter partes* review may also lengthen proceedings if district court litigation is stayed pending the outcome of a concurrent *inter partes* review proceeding and then resumes after the *inter partes* review is concluded. See, e.g., Douglas B. Wentzel, *Stays Pending Inter Parties Review: Not in the Eastern District of Texas*, 98 J. Pat. & Trademark Off. Soc'y 120, 125, 137-38 (2016) (collecting data on stays). Moreover, *inter partes* review may be less expensive than litigation in some cases, but not always. See Am. Intell. Prop. Law Ass'n, *2017 Report of the Economic Survey* I-114 to I-116, I-162 to I-163 (2017).

II. The Court's Decision Will Impact PTAB Stakeholders And *Inter Partes* Review Practice Going Forward.

As explained above, the PTAB Bar Association does not take a position on whether the Court should rule for the petitioner or the respondent in this case. However, the Association has a strong interest in ensuring the Court's ruling is as clear as possible with no unintended consequences. Accordingly, the Association offers the below context about *inter partes* review practice and how it may be affected by this Court's ruling.

A. The Court’s decision may affect reviewability of time-bar determinations beyond the facts of this case.

This case involves only one of many scenarios when some may question whether a section 315(b) determination is reviewable. Here, the Board issued a Final Written Decision on the merits, which included a discussion of the time-bar issue, after the Board earlier found the time bar did not foreclose institution. Because the Board issued a Final Written Decision, the aggrieved party had an express right to appeal to the Federal Circuit. 35 U.S.C. § 319. The question is whether that appeal right allows the Federal Circuit to review the Board’s time-bar determination under section 315(b).

Beyond the relatively narrow confines of this case, time-bar decisions may also be made in other circumstances. This Court’s precise reasoning may affect whether those time-bar decisions are appealable.

For example, if the Court holds that the time-bar decision is appealable based on section 319, that holding would not necessarily resolve whether a litigant may appeal a time-bar decision when the Board does not issue a Final Written Decision. In that scenario, section 319 does not expressly provide for appeal. There is Federal Circuit case law holding that section 319 may be the only way to seek review of a Patent Office decision in *inter partes* review. See *St. Jude Med., Cardiology Div., Inc. v. Volcano Corp.*, 749 F.3d 1373, 1375 (Fed. Cir. 2014) (finding the *inter partes* review statute “authorizes appeals to this court only from ‘the final written decision of the [Board] under section 318(a),” per sections 319 or 141(c) (alteration in original)); *In re Dominion Dealer*

Sols., LLC, 749 F.3d 1379, 1381 (Fed. Cir. 2014) (same, for *mandamus*); accord *Cuozzo*, 136 S. Ct. at 2140 (describing section 319 as “limiting appellate review to the ‘final written decision’”). Consequently, if the Court holds that section 319 confers a right to appeal a time-bar decision, then any time-bar decision issued only at the institution stage of *inter partes* review, or issued later but prior to a Final Written Decision, may still be unreviewable.

Alternatively, if the Court holds more generally that time-bar decisions are appealable even without a Final Written Decision, there may be questions about how to obtain that review when no Final Written Decision issues. Cf. *Arthrex, Inc. v. Smith & Nephew, Inc.*, 880 F.3d 1345, 1349 (Fed. Cir. 2018) (finding 28 U.S.C. § 1295(a)(4)(A) confers jurisdiction to review the Board’s “final decision that disposes of an IPR proceeding in the form of an adverse judgment”).

The decision here could have implications for whether a time-bar determination is reviewable in a number of other situations. For example:

- The Board finds that the petition was time-barred in its Final Written Decision and also issues a decision on the merits.
- The Board finds the petition was not time-barred either before institution or afterwards in a decision on a motion, but the Board does not discuss the time bar issue in its Final Written Decision.
- The Board finds the petition was not time-barred before institution, but later grants a motion to

dismiss (without issuing a Final Written Decision) based on discovery showing the petition was untimely.

Regardless of who prevails in this case, the precise rule of law articulated by the Court may (explicitly or implicitly) shed light on reviewability in these situations. If this Court broadly decides that a time-bar determination is always reviewable after institution, even absent a Final Written Decision, then reviewability may be available in the above situations. If instead the Court narrowly decides the time-bar determination is reviewable in this case because a Final Written Decision issued specifically addressing the time-bar issue, the Court's decision may leave open questions about reviewability of time-bar decisions in the above scenarios.³

B. The Court's decision could have major implications for *inter partes* review practice more generally.

Although the question presented here centers on the narrow issue of whether time-bar decisions are appealable under the circumstances presented, the implications from this case could be far-reaching for PTAB stakeholders. The Court's decision may be relevant to many other section 315(b)-related questions that the Board and the Federal Circuit have been grappling with since the AIA was enacted.

³ If the Court holds that a time-bar determination is reviewable because a Final Written Decision issued, the Patent Office could conceivably insulate its time-bar determinations from review by not issuing a Final Written Decision.

For example, in recent years the Federal Circuit has addressed important questions related to the interpretation of section 315(b)—including whose act triggers the time-bar (*i.e.*, a “petitioner, real party in interest, or privy of the petitioner”), and when the time-bar is triggered (*i.e.*, when “served with a complaint alleging infringement”). Some of those cases involve the following:

- Legal standard to determine whether a party is a real party in interest, *see WesternGeco LLC v. ION Geophysical Corp.*, 889 F.3d 1308 (Fed. Cir. 2018) (affirming Board), *cert. denied*, 139 S. Ct. 1216 (2019);
- Burden of proof framework for real party in interest analysis, *see Worlds Inc. v. Bungie, Inc.*, 903 F.3d 1237 (Fed. Cir. 2018) (vacating and remanding to Board);
- Effect of adding corporate parent to the list of real parties in interest, *see Mayne Pharma Int’l Party Ltd. v. Merck Sharp & Dohme Corp.*, 927 F.3d 1232 (Fed. Cir. 2019) (affirming Board);
- Effect of post-petition mergers on the real party in interest issue, *see Power Integrations Inc. v. Industries, LLC*, 926 F.3d 1306 (Fed. Cir. 2019) (reversing Board); and
- Effect of involuntary and voluntary dismissal of a complaint and whether it resets the time-bar clock (*i.e.*, the second question presented in the petition for writ of certiorari in this case).

Several other issues related to the time bar have also been litigated before the Board:

- Does a motion to amend a complaint trigger a time bar, or does the motion need to be granted and the complaint served? *See Amneal Pharmaceuticals, LLC v. Endo Pharmaceuticals Inc.*, No. IPR2014-00360 (P.T.A.B. June 27, 2014) (Paper 15).
- Does a waiver of service trigger a time bar, and if so, is the bar triggered when the waiver is signed or when it is filed in court? *See Brinkman Corp. v. A&J Mfg., LLC*, No. IPR2015-00056, 2015 WL 1347446, at *4 (P.T.A.B. Mar. 23, 2015).
- Does an action filed with the International Trade Commission trigger a time bar? *See Robert Bosch Tool Corp. v SD3, LLC*, No. IPR2016-01751, 2017 WL 1096609, at *5-6 (P.T.A.B. Mar. 22, 2017).
- Does a complaint by a non-patent owner without standing to sue trigger a time bar? *See Sling TV, L.L.C. v. Realtime Adaptive Streaming, L.L.C.*, No. IPR2018-01331, 2019 WL 413674, at *2-3 (P.T.A.B. Jan. 31, 2019).
- Does a defective complaint start the time-bar deadline? *See GoPro Inc. v. 360Heros Inc.*, No. IPR2018-01754, 2019 WL 3992792, at *7-10 (P.T.A.B. Aug. 23, 2019) (Precedential Opinion Panel).⁴

⁴ In September 2018, the Patent Office created the Precedential Opinion Panel—composed of the Patent Office Director, PTAB Chief Judge, and Commissioner for Patents—“to rehear matters ...

- Does continuing infringement litigation from one suit to another trigger a time bar based on the complaint service date in the first suit? *See Fuji-film Corp. v. Sony Corp.*, No. IPR2018-00060, 2018 WL 1902553, at *2-3 (P.T.A.B. Apr. 19, 2018).
- Does service of an amended complaint restart the time bar? *See Loral Space & Commc'ns, Inc. v. ViaSat Inc.*, No. IPR2014-00236, 2014 WL 1619156, at *4-5 (P.T.A.B. Apr. 21, 2014).

In addition, the Court's decision here may also have an impact on whether the following issues, which are outside the context of section 315(b), may be reviewable.

- Bar against *inter partes* review if prior declaratory judgment action challenged validity of patent under 35 U.S.C. § 315(a)(1), *see Cisco Sys., Inc. v. Chrimar Sys., Inc.*, No. IPR2018-01511, 2019 WL 413645 (PTAB Jan. 31, 2019);
- Bar against *inter partes* review based on petitioner being estopped from other Patent Office proceedings under 35 U.S.C. § 315(e)(1), *see*

on issues of exceptional importance.” USPTO, *Revisions to standard operating procedures: paneling and precedential decisions* (Sept. 21, 2018), <https://www.uspto.gov/patents-application-process/patent-trial-and-appeal-board/procedures/revisions-standard-operating>. That one of the two decisions the Panel has issued since its creation relates to the time bar highlights that the Patent Office recognizes the importance of these issues.

Credit Acceptance Corp. v. Westlake Servs., 859 F.3d 1044, 1049 (Fed. Cir. 2017);

- Requirement that a “person” request *inter partes* review under 35 U.S.C. § 311, rather than a government entity, see *Return Mail, Inc. v. U.S. Postal Service*, 139 S. Ct. 1853 (2019);
- Application of common law doctrine of assignor estoppel to *inter partes* review, see *Arista Networks, Inc. v. Cisco Sys., Inc.*, 908 F.3d 792 (Fed. Cir. 2018); and
- Review of Board decision to decline to institute after Federal Circuit remanded for the Board to institute proceedings after *SAS Institute, Inc. v. Iancu*, 138 S. Ct. 1348 (2018), see *BioDelivery Scis. Int’l, Inc. v. Aquestive Therapeutics, Inc.*, No. 2019-1643, __ F.3d __, 2019 WL 4062525, at *4 (Fed. Cir. Aug. 29, 2019).

In sum, this case does not arise in a vacuum. Whatever the outcome, the decision here will have implications for the reviewability of time-bar and other determinations in various situations. The decision here may also have major implications for practice before the Board both within the context of section 315(b) and in other contexts as well. In crafting its opinion, the Court should be mindful that its legal analysis—and any dicta it provides—will be closely examined in future litigation on these questions.

III. PTAB Bar Association Stakeholders Have Differing Views About How This Court's Decision May Affect The *Inter Partes* Review Balance.

The diverse PTAB Bar Association membership has a range of views on the merits of this case. However, it is generally more common for patent owners to favor and for petitioners to disfavor the reviewability of decisions on whether a time bar applies. Given the potentially significant impact of this case, the Court may wish to take that generalization, and the underlying reasoning, into consideration as it crafts its opinion.

Patent owners may argue that reviewability of the time-bar issue provides an important check on the power of the Board as an administrative agency, and a Board decision should not be review-proof. Absent review of the time-bar issue, the Federal Circuit will be unable to provide any related guidance to the Board, as that court has previously given (including reversing the Board in some instances). Moreover, a patent owner may be unable to seek redress for an *inter partes* review instituted on a petition that should never have been instituted because it was filed after the petitioner's deadline has passed. As a practical matter, patent owners may also favor review because it provides an additional avenue to challenge a Board judgment invalidating some or all of a patent's claims.

Many petitioners, in contrast, may believe that reviewability upsets the *inter partes* review balance. Indeed, the specific procedural posture of this case provides an example of how reviewability can only favor patent owners by giving them another opportunity to raise

time-bar arguments that were previously rejected. Petitioners, however, under the current law discussed above, may have no opportunity to seek review of an *inter partes* review petition rejected erroneously on time-bar or other section 315(b) grounds. And, if decisions on time-bars that are adverse to petitioners are not reviewable, then petitioners have an interest in seeing that time-bar decisions adverse to patent holders are similarly not reviewable.

Petitioners may also believe that reviewability unfairly allows patent owners to use procedural grounds to revive patent claims that the Board correctly found unpatentable on the merits. Further, according to petitioners, reviewability may be inconsistent with the primary purpose of *inter partes* review as efficient, quick, and cost-effective because appellate review of decisions on whether a time-bar applies could add further cost, complexity, and uncertainty to a streamlined *inter partes* review process.

CONCLUSION

Congress created *inter partes* review as a balanced process for challenging patents. The time-bar provision at issue here is an important part of that balance. The PTAB Bar Association takes no position on whether time-bar issues are reviewable under the circumstances of this case. Still, the PTAB Bar Association submits this brief to highlight that: (1) time-bar issues arise in other contexts, too, including some that may not be subject to appellate review under current law; and (2) the decision in this case may have major implications, within the section 315(b) context and beyond, for both patent

owners (who generally favor review) and patent petitioners (who generally do not favor review).

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