No. 15-607

IN THE

Supreme Court of the United States

BIOGEN MA, INC.,

Petitioner,

v.

JAPANESE FOUNDATION FOR CANCER RESEARCH AND BAYER PHARMA AG,

Respondents.

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

BRIEF IN OPPOSITION

KANNON K. SHANMUGAM
DAVID M. KRINSKY
ALLISON B. JONES
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, NW
Washington, DC 20005
Attorneys for Bayer Pharma AG

MARK C. FLEMING
Counsel of Record
WILMER CUTLER PICKERING HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
mark.fleming@wilmerhale.com

S. CALVIN WALDEN
WILMER CUTLER PICKERING HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007

NELS T. LIPPERT
TARTER KRINSKY & DROGIN LLP
1350 Broadway
New York, NY 10018
Attorneys for Japanese Foundation for Cancer Research

ADDITIONAL COUNSEL LISTED ON INSIDE COVER

BRITTANY BLUEITT AMADI
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006

ERIC F. FLETCHER
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109

Attorneys for Japanese Foundation for Cancer Research

QUESTION PRESENTED

Whether decisions in patent interferences declared after September 16, 2012, are subject to review only in the United States Court of Appeals for the Federal Circuit, or in a district court as well.

CORPORATE DISCLOSURE STATEMENT

The Japanese Foundation for Cancer Research has no parent corporation and no publicly held company owns 10% or more of its stock.

Bayer Pharma AG is a subsidiary of Bayer AG. Bayer AG has no parent corporation and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

This Court's review is properly reserved for cases raising critical issues of continuing importance. This is not such a case.

Patent interference proceedings were abolished by the Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011) (the "AIA"), which transitioned the United States patent system from a "first-to-invent" system to a "first-inventor-to-file" system. Since the AIA's enactment, the already small number of interferences declared each year has declined substantially, and the number of interference decisions

challenged in *district courts*—the only cases in which the question presented would arise—has consistently been in the single digits. This sort of transitional issue, affecting a vanishingly small number of cases, does not warrant the Court's review. What is more, judicial review of interference decisions remains available in the Federal Circuit, assuring that losing parties may air their grievances before an Article III court. Thus, the only consequence of the decision here is that interferences may be reviewed in only one forum, rather than two. This case is also a particularly weak vehicle, given that the Federal Circuit already reached the merits of the underlying appeal and unanimously affirmed—a holding that petitioner Biogen MA, Inc. has not further appealed to this Court. Biogen offers no reason to believe that a district court would reach any different result.

In any event, the Federal Circuit correctly interpreted Section 3 of the AIA, and unanimously determined that Congress provided only for Federal Circuit review of decisions in interferences commenced on or after September 16, 2012, and eliminated district court review of such interferences. Biogen's attack on the Federal Circuit's decision conflicts with the plain text of the amended statute and relies primarily on cases involving implied repeals of continuing jurisdictional grants. But the Federal Circuit did not find an *implied* repeal of a jurisdictional grant; rather, the Federal Circuit interpreted the AIA according to its plain language and familiar canons of statutory construction to find an *express* repeal of district court jurisdiction for interferences declared on or after September 16, 2012 (which includes the interference in this case).

The petition should be denied.

STATEMENT

A. The Interference Proceedings And The Board's Decision

This case involves the third in a series of interferences between patents and patent applications directed to a protein called "human fibroblast interferon" ("hFIF") and the DNA that encodes it. The mature form of hFIF has valuable therapeutic properties.

Respondent Japanese Foundation for Cancer Research ("JFCR") is a leader in the research and development of pioneering treatments for all forms of cancer. JFCR researchers Haruo Sugano, Masami Muramatsu, and Tadatsugu Taniguchi (collectively, "Sugano") were the first to discover the amino acid sequences of mature and precursor hFIF protein and the DNA sequences that encode hFIF. As a result, Sugano was named as an inventor on several patents and patent applications related to hFIF, including U.S. Patent Application No. 08/463,757, which was assigned to JFCR and is at issue here. A2071-2072.[1] JFCR has licensed certain patent rights relating to hFIF to respondent Bayer Pharma AG pursuant to an exclusive license agreement. A2097. Since 1993, Bayer and its predecessors and/or affiliates have marketed a modified version of hFIF called Betaseron® to treat multiple sclerosis.

Walter C. Fiers is the named inventor on several U.S. patent applications relating to hFIF, including U.S. Patent Application No. 08/253,843, which was assigned to Biogen and is at issue here. A2003.

Beginning in 1983, the Board of Patent Appeals and Interferences and its successor, the Patent Trial and

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[1] "A" refers to the appendix filed in the court of appeals.

Appeal Board (together, the "Board"), declared a series of three patent interferences between Sugano and Fiers involving several patents and patent applications relating to hFIF. Pet. App. 3a-4a. An interference is an administrative proceeding in which the Board determines who among competing inventors was the first to invent the mutually claimed subject matter. Each of the Sugano patents and patent applications at issue in the interferences claimed priority to a Japanese patent application filed on March 19, 1980, while each of the Fiers applications claimed priority to an April 3, 1980 United Kingdom patent application. A190-191. Thus, Sugano was the presumptive first to invent in each interference.

In the first interference, the Board declared an interference "count" (*i.e.*, the subject matter of the disputed invention) directed to the DNA sequences that encode hFIF. Pet. App. 3a. The Board found that Sugano was the first inventor of the claimed subject matter, *id.*, and the Federal Circuit affirmed, *Fiers* v. *Revel*, 984 F.2d 1164, 1172 (Fed. Cir. 1993).

In the second interference, the Board declared a count directed to the DNA sequence that encodes the mature (as opposed to the precursor) form of hFIF protein. Pet. App. 3a. The Board ordered Fiers to show cause as to why the interference should continue, given that its subject matter was the same as the first interference. *Id.* 3a-4a. The Board then found that Fiers failed to discharge that burden and entered judgment for Sugano; Fiers did not appeal. *Id.* 4a.

On July 16, 2013, the Board declared the third interference—Interference No. 105,939, which is the interference at issue here. The third interference was declared between the Sugano and Fiers applications

cited above. Pet. App. 4a. The counts were directed to the mature and precursor hFIF proteins. *Id.* Upon declaring the interference, the Board ordered Fiers to show cause why he should not be estopped from contesting priority, given that he had lost his claims of priority in two prior interferences. *Id.*

The Board again found that Fiers had failed to discharge his burden and entered judgment in favor of Sugano. A19-20. Specifically, the Board determined that Fiers failed to show that the subject matter at issue in the third interference was patentably distinct from the subject matter he had previously lost in the two earlier interferences. Accordingly, Fiers was precluded from contesting priority in the third interference, and his patent application claims were finally refused. A13-20.

Rather than appeal the Board's decision to the Federal Circuit, as 35 U.S.C. § 141 permitted it to do, Biogen, the real party in interest and assignee of the Fiers patent application, filed a civil action seeking review of the Board's decision in the United States District Court for the District of Massachusetts, purporting to base jurisdiction on 35 U.S.C. § 146. A2000-2002.

JFCR and Bayer moved to dismiss Biogen's action for lack of jurisdiction. They argued that Section 3 of the AIA, which took effect on March 16, 2013 (before the third interference was declared), amended Section 146 to eliminate district court review of "interferences."[2] Instead, Section 1(k)(3) of the Leahy-Smith America Invents Technical Corrections Act ("TCA")

[2] As amended by the AIA, Section 146 now provides for district court review of "derivation proceedings." AIA § 3(j)(1)-(2), (4).

provided only for appellate review in the Federal Circuit under 35 U.S.C. § 141 for decisions in interferences declared after September 16, 2012, such as the third interference here. Pub. L. No. 112-274, § 1(k)(3), 126 Stat. 2456, 2458 (2013). Thus, the proper mechanism for Biogen's challenge to the Board's interference decision was an appeal to the Federal Circuit under Section 141.

B. The District Court's Decision

The district court concluded that it lacked jurisdiction over Biogen's attempted Section 146 action. First, the district court rejected Biogen's contention that AIA § 3(n)(1), which provides that "the amendments made by this section *shall take effect*" on March 16, 2013 (emphasis added), nonetheless means that "the pre-AIA version of Title 35 lives on for pre-AIA patents." Pet. App. 37a. The court explained that Biogen's position would "run contrary to the plain language of the statute." *Id.*

Second, the district court recognized that the AIA included a provision, Section 6(f)(3)(C), that specifically conferred jurisdiction on district courts to review interferences commenced *before* September 16, 2012, but that the provision made no reference to interferences commenced on or after September 16, 2012 (including the interference at issue here). Pet. App. 34a-35a; *see also* AIA § 6(f)(3)(C). Thus, the court observed, the AIA "as originally enacted made no mention of venue or appeal from interferences commenced *after* September 16, 2012." Pet. App. 35a.

The district court found that it lacked subject matter jurisdiction and, at Biogen's request, transferred the case to the Federal Circuit. Pet. App. 39a.

C. The Court Of Appeals' Decision

A panel of the Federal Circuit unanimously affirmed the Board's decision awarding priority to Sugano. In so doing, the Federal Circuit agreed with the district court that the Board's decision was reviewable only in the Federal Circuit under Section 141.

On the jurisdictional question, the Federal Circuit ruled that the district court correctly concluded that Congress had not extended jurisdiction under Section 146 to interferences commenced on or after September 16, 2012. First, the court of appeals, like the district court, rejected Biogen's argument that AIA § 3(n)(1) "implicitly preserves" Section 146 review of such Board decisions if they involve patents and patent applications filed before March 16, 2013. Pet. App. 13a. Section 3(n)(1) makes clear that Section 146 was expressly amended as of March 16, 2013, so that it no longer referred to interferences, and the amended Section 146 applies to patent applications filed on or after March 16, 2013. AIA § 3(n)(1)(A) ("[T]he amendments made by this section *shall take effect* [March 16, 2013], and *shall apply to* any application for patent, and to any patent issuing thereon, that contains or contained at any time … an effective filing date … that is on or after [March 16, 2013]." (emphases added)). However, the court of appeals observed, Section 3(n)(1) "on its face is silent as to whether interference proceedings and judicial review of these proceedings continues with respect to patent applications filed prior to March 16, 2013." Pet. App. 14a. From that silence, the court reasoned, one could not infer that "§ 3(n)(1) requires application of pre-AIA judicial review provisions to old applications." *Id.* 13a.

Rather, the court of appeals concluded, Congress "specifically addressed the manner of judicial review of Board decisions in continuing interference[s]." Pet. App. 15a. The court ruled that, while Section 6(f)(3)(C) of the AIA explicitly made interferences declared *before* September 16, 2012, subject to both Federal Circuit review under Section 141 and district court review under Section 146, it did not provide for any judicial review for interferences declared on or after that date. *Id.* Instead, those interferences were addressed by Section 1(k)(3) of the TCA, which corrected the AIA's failure to provide for any judicial review of post-September 16, 2012, interferences by "explicitly authoriz[ing] pre-AIA § 141 review" in the Federal Circuit, but not pre-AIA Section 146 review in district court. *Id.* 16a.

Applying the canon of statutory interpretation that the "'specific governs the general,'" *see RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012), the court of appeals explained that it could not "myopically apply" the general effective date provisions of Section 3(n)(1) to imply jurisdiction "independently of the specific provisions in AIA § 6(f)(3)(C) and [TCA] § 1(k)(3)." Pet. App. 17a. Those provisions, the court concluded, specify that *only* pre-AIA Section 141 review in the Federal Circuit is available for interferences declared on or after September 16, 2012. *Id.* 18a.

Having determined that the district court lacked jurisdiction over Biogen's action, the Federal Circuit exercised its Section 141 jurisdiction to review the Board's estoppel determination on the merits. The court of appeals determined that Fiers "failed to meet his burden to show patentable distinctness to avoid interference estoppel by judgment" (Pet. App. 21a), as

Fiers had "submitted no relevant evidence on patentable distinctness and was thus estopped from continuing with the interference" (*id.* 24a).

Biogen sought panel rehearing and rehearing en banc, raising the same issues presented in its petition for certiorari. Biogen's petition for rehearing, like its petition for certiorari, did not challenge the Federal Circuit's decision affirming the Board's underlying estoppel decision. The Federal Circuit denied rehearing without dissent. Pet. App. 41a-42a.

REASONS FOR DENYING THE PETITION

I. THE QUESTION PRESENTED IS OF VANISHINGLY MINOR IMPORTANCE

The question presented by the petition is nowhere near deserving of this Court's review. The AIA adopted a "first-inventor-to-file" patent system that abolished interferences for newer patent applications. As older applications run their course, the AIA will have the effect of doing away with interferences completely. Indeed, the number of interferences declared each year has declined substantially, and the number of interference decisions challenged in *district courts* is miniscule and has been for years. Reinforcing the issue's insignificance, judicial review of interferences remains available in the Federal Circuit. Thus, parties who lose interference proceedings at the Board continue to have the opportunity to have their arguments fully heard by an Article III court.

Faced with this stark reality, Biogen struggles to give its question presented some broader significance, citing such irrelevant statistics as the number of *patents* granted in 2012 and making unsupported refer-

ence to the purported "demonstrably enormous" "stakes … for industries that rely on patents." Pet. 21.

In fact, the stakes are very low. Biogen itself concedes that, from 2008 to 2014, the Board declared an average of only 54 interferences per year. Pet. 21. And Biogen's use of the "average" statistic masks the fact that the number of interferences declared and adjudicated has already begun to decline significantly year over year. The Board declared 64 interferences in fiscal year 2011 and only 35 interferences in fiscal year 2014. And in fiscal year 2015—not covered by Biogen's "average"—the Board declared only eight interferences.[3] Interferences were thus already an endangered species before the AIA ensured their elimination; now, they are well on their way to extinction.

Moreover, Biogen does not even attempt to come to grips with the truly relevant number: the frequency of *district court challenges* to interference decisions. While the PTO does not track this statistic, respondents have identified only sixteen district court actions seeking review of Board interference decisions in the past five years, with no more than five in any single year.[4] In other words, the issue that Biogen asks this Court to review typically arises three times a year.[5]

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[3] *See* PTO, *PTAB/BPAI Statistics Archive Page* (Appeals Process Production Reports for FY 2011, FY 2014, FY 2015), *available at* http://www.uspto.gov/patents-application-process/appealing-patent-decisions/statistics/ptabbpai-statistics-archive-page (last visited Feb. 9, 2015).

[4] Aside from this action, which originated in 2013, the other identified cases are: *Intervet Inc.* v. *E.I. DuPont de Nemours & Co.*, No. 15-cv-607 (D. Del. July 16, 2015); *ABT Holding Co.* v. *Garnet Biotherapeutics Inc.*, No. 14-cv-1512 (D. Del. Dec. 23, 2014); *Board of Tr. of Leland Stanford Jr. Univ.* v. *Chinese Univ. of*

The insignificance of Biogen's question presented is reinforced by the fact that a party seeking review of an interference decision unquestionably has a right of appeal to the Federal Circuit. Pet. App. 18a; *see supra* p. 8. Thus, the merits of all interference decisions can still be reviewed by an Article III court—as, indeed, took place in this case. The question whether, in the already diminishing number of interference appeals, the appellant has access to only one court of review or may choose between two is thoroughly unimportant.

Finally, if the Court were inclined to review this issue, this case would be a singularly poor vehicle in

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Hong Kong, No. 14-cv-688 (E.D. Va. June 9, 2014); *Verinata Health, Inc.* v. *Sequenom, Inc.*, No. 12-cv-865 (N.D. Cal. Apr. 16, 2014); *Idenix Pharm. Inc.* v. *Gilead Pharmasset LLC*, No. 14-cv-109 (D. Del. Jan. 29, 2014); *Tyco Elecs. Corp.* v. *Belden Inc.*, No. 14-cv-107 (E.D. Mo. Jan. 21, 2014); *Biogen Idec MA Inc.* v. *Japanese Found. for Cancer Research*, No. 13-cv-1489 (E.D. Va. Dec. 3, 2013); *Donaldson Co.* v. *Baldwin Filters, Inc.*, No. 13-cv-3095 (D. Minn. Nov. 12, 2013); *Johns Hopkins Univ.* v. *454 Life Scis. Corp.*, No. 13-cv-1853 (D. Del. Nov. 6, 2013); *AmSafe Bridport Ltd.* v. *Fatzer AG*, No. 13-cv-474 (E.D. Va. Apr. 18, 2013); *Medical Components, Inc.* v. *C.R. Bard, Inc.*, No. 13-cv-434 (D.N.J. Jan. 22, 2013); *Asterias Biotherapeutics, Inc.* v. *Viacyte, Inc.*, No. 12-cv-4813 (N.D. Cal. Sept. 13, 2012); *TACT IP LLC* v. *Janssen Biotech, Inc.*, No. 12-cv-909 (E.D. Va. Aug. 15, 2012); *MacDermid, Inc.* v. *Enthone, Inc.*, No. 11-cv-716 (D. Conn. May 2, 2011); *Life Techs. Corp.* v. *Pacific Biosciences of Cal., Inc.*, No. 11-cv-1582 (N.D. Cal. Mar. 31, 2011); *Troy* v. *Samson Mfg. Corp.*, No. 11-cv-10384 (D. Mass. Mar. 7, 2011).

[5] Biogen's claim that a lack of district court review in cases such as this one will harm "industries that rely on patents" (Pet. 20-21) ignores the fact that *both sides* of an interference are typically part of the same "industry," given that an interference is a dispute between two putative inventors over the same invention. Thus, Biogen's effort to don the "industry" mantle does nothing to make this case worthy of this Court's review.

which to do it. Biogen has not challenged the Federal Circuit's merits decision affirming the Board's estoppel ruling, and for good reason. The Board's decision was a legal determination that Biogen was estopped by the adverse judgments in two prior interference proceedings between the same parties and about the same subject matter. Pet. App. 18a-24a. Fiers and Biogen were afforded a full opportunity to brief the estoppel issue to the Board and to adduce evidence in support of their arguments, and the parties submitted more than 50 exhibits in the administrative record, which included an expert declaration (A5194-5205) and a deposition from one of the Sugano inventors in another case (A5237-5318), along with numerous other documents. After reviewing all of that evidence, the Federal Circuit affirmed the Board's determination. *See* Pet. App. 18a-24a.[6]

Biogen has made no effort to explain why a costly, time-consuming additional layer of judicial review in a district court would have any possibility of changing the outcome. Biogen does not say what further evidence it would adduce in the district court—much less why such evidence would support a contrary result, given that the interference here involves subject matter already lost in two prior interferences. Because there is no reason to believe that district court review would lead to a different ultimate judgment in this case, further review is unwarranted.

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[6] Although the Federal Circuit did not state what standard of review it applied, prior Federal Circuit decisions make clear that findings relevant to estoppel are reviewed *de novo*. *Acumed LLC* v. *Stryker Corp.*, 525 F.3d 1319, 1323 (Fed. Cir. 2008); *Pharmacia & Upjohn Co.* v. *Mylan Pharm., Inc.*, 170 F.3d 1373, 1376 (Fed. Cir. 1999).

Biogen relies on inapposite cases to contend that the preservation of district court review is important "for the patent system" (Pet. 22), wrongly suggesting that Board proceedings are somehow insufficient or inferior to district court proceedings. In fact, parties before the Board have a full opportunity to compel discovery, introduce evidence, depose witnesses and experts, brief pertinent issues, and present oral argument. 37 C.F.R. §§ 41.154(a), 41.156, 41.158. While live testimony is generally not permitted, one of the cases cited by Biogen (Pet. 22-23) recognizes that "the live testimony before the district court might be the same or similar to testimony before the Board in the form of affidavits and deposition transcripts." *Winner Int'l Royalty Corp.* v. *Wang*, 202 F.3d 1340, 1347 (Fed. Cir. 2000). Another case cited by Biogen (Pet. 23) notes "the Board's reliance on testimony from the inventors and other … employees." *In re Jolley*, 308 F.3d 1317, 1322 (Fed. Cir. 2002). And the Board's Standing Order, which governed the proceedings here, now contemplates that "[c]ross-examination might be ordered to take place in the presence of an administrative patent judge." BPAI, Standing Order ¶ 157.3.4 (Mar. 8, 2011), *available at* http://www.uspto.gov/sites/default/files/ip/boards/bpai/interf/forms/standingordermar2011.pdf.

The Federal Circuit's opinion in *Agilent Technologies, Inc.* v. *Affymetrix, Inc.*, 567 F.3d 1366 (Fed. Cir. 2009), in no way suggests that limitations on administrative interference proceedings create "evidentiary gaps." *Contra* Pet. 22. In *Agilent*, the relevant "evidentiary gap[]" was created not by Board procedures, but by the losing party's failure to "advance[] any 'meaningful evidence'" on a critical issue, which could have been remedied with "'an expert declaration'" filed

in the administrative proceeding. 567 F.3d at 1379, 1380. This case is no different.

Biogen's citation (at 23) of *Harari* v. *Lee*, 656 F.3d 1331 (Fed. Cir. 2011), further undercuts its argument. There, the Federal Circuit remanded an interference decision to the Board in order to "resolve th[e] technical, fact-intensive question" at the heart of the case. *Harari*, 656 F.3d at 1340. Far from supporting the desirability of district court review, *Harari* demonstrates that the Board and Federal Circuit are fully capable of addressing any actual errors raised in interferences. Indeed, in most instances, it will be far more sensible to refer such "technical" issues back to the Board, which consists of technical and scientific experts. 35 U.S.C. § 6(a). The mere theoretical possibility that a second bite at the apple could lead to a different result is hardly sufficient to render the issue presented here worthy of this Court's review—particularly given the issue's transitional nature and the tiny number of affected cases.

II. THE FEDERAL CIRCUIT'S HOLDING ON THE QUESTION PRESENTED WAS CORRECT

The insignificance of the question presented is alone sufficient reason to deny the petition. In any event, the Federal Circuit's holding on that question was plainly correct and does not conflict with any of the decisions of this Court on which Biogen relies.

A. The Federal Circuit's Holding Does Not Conflict With This Court's "Implied Repeal" Cases

Biogen's petition (at 13) is largely built on the premise that the Federal Circuit's jurisdictional ruling rested on "silence or implications." That premise is wrong. The Federal Circuit did not purport to find an

implied repeal, but rather an *express* repeal of district court jurisdiction under pre-AIA Section 146 for interferences declared on or after September 16, 2012. Specifically, the Federal Circuit relied on the language of the AIA, which amended Section 146 to eliminate reference to interferences and accordingly *expressly* removed district court jurisdiction over interferences like this one. *E.g.*, Pet. App. 13a, 15a, 16a, 18a; *see also* AIA § 3(j)(1)-(2), (4). While Congress crafted an exception that preserved district court review for some interferences under Section 146 "as amended," it expressly limited that preservation to interferences declared before September 16, 2012—a category that no one contends would include this case. AIA § 6(f)(3)(C); *see also* Pet. App. 15a. And although the TCA "explicitly authorizes" Section 141 Federal Circuit review for cases such as this one, it does not authorize district court review. Pet. App. 16a; *see also* TCA § 1(k)(3).

Accordingly, the Federal Circuit did not base its ruling on any "implied" repeal of jurisdiction, but on its interpretation of the AIA's express amendments to Section 146. The court's reasoning in no way suggests that a repeal of jurisdiction can be inferred from "silence or implication[]." Pet. 13. Rather, it is wholly consistent with this Court's precedents applying Congress's jurisdictional repeals based on their plain statutory language. *See, e.g.*, *Republic of Austria* v. *Altmann*, 541 U.S. 677, 697-698 (2004); *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 274 (1994); *Bruner* v. *United States*, 343 U.S. 112, 116-117 (1952); *Hallowell* v. *Commons*, 239 U.S. 506, 507-508 (1916) (Holmes, J.).

The cases Biogen cites are all distinguishable, as they involve later-enacted statutes that were claimed to have worked an *implicit* repeal of a jurisdictional grant in a different statute that was not itself amended.

For example, in *Mims* v. *Arrow Financial Services, LLC*, 132 S. Ct. 740, 753 (2012), the Court ruled that Congress' provision for private actions to enforce the Telephone Consumer Protection Act ("TCPA") did not remove ordinary federal-question jurisdiction under 28 U.S.C. § 1331, which the TCPA did not purport to alter. The same is true of the other cases on which Biogen relies, where the statute that supposedly stripped federal-question jurisdiction under Section 1331 did not mention and was in no way inconsistent with Section 1331. *See, e.g.*, *Verizon Md. Inc.* v. *Public Serv. Comm'n of Md.*, 535 U.S. 635, 643 (2002) ("Verizon's claim thus falls within 28 U.S.C. § 1331's general grant of jurisdiction, and … nothing in 47 U.S.C. § 252(e)(6) purports to strip this jurisdiction."); *Lynch* v. *Household Fin. Corp.*, 405 U.S. 538, 547 (1972) ("[T]he supposed conflict between §§ 1343(3) and 1331 simply does not exist.").

Here, by contrast, the Federal Circuit ruled that the AIA *expressly* amended Section 146 to remove district court jurisdiction over interferences, with an express exception not applicable here for pre-September 16, 2012, interferences. Accordingly, there is not even an arguable conflict between the Federal Circuit's decision and any decision of this Court.

B. The Federal Circuit Correctly Held That The AIA Expressly Removed District Court Jurisdiction

Once Biogen's meritless claim of a conflict with this Court's precedent is discarded, Biogen's petition amounts only to the claim that, in its view, the Federal Circuit misconstrued the AIA. Pet. 17-20. Not one judge of the Federal Circuit agreed with Biogen's tortured reading of the statute, and Biogen does not claim that the Federal Circuit addressed any cross-cutting

issue of statutory interpretation differently from any other court of appeals. The Federal Circuit—like the district court before it—correctly rejected Biogen's reading of the AIA as unsupported by the statutory text or legislative history.

"'Federal courts are courts of limited jurisdiction,' possessing 'only that power authorized by Constitution and statute.'" *Gunn* v. *Minton*, 133 S. Ct. 1059, 1064 (2013). Federal courts thus cannot entertain a cause of action without a statutory provision that affirmatively grants jurisdiction. *See Chase Manhattan Bank (N.A.)* v. *South Acres Dev. Co.*, 434 U.S. 236, 238-240 (1978). As is plain from its text, AIA § 3 *amended* 35 U.S.C. § 146, which had previously provided for review of interference decisions in federal district courts, by eliminating all references to interferences and instead providing only for district court review of decisions in "derivation proceeding[s]." AIA § 3(j)(1)-(2), (4) (codified at 35 U.S.C. § 146). As the Federal Circuit recognized, Congress created only one exception to that removal of district court jurisdiction—district court actions challenging Board decisions in interferences declared before September 16, 2012. AIA § 6(f)(3)(C). For interferences declared on or after that date, the TCA provided only one mechanism for judicial review: Section 141 appeals to the Federal Circuit. *See* TCA § 1(k)(3).

The remaining interpretive question is whether the amendment to 35 U.S.C. § 146 eliminating interference appeals applies here. That question is answered by AIA § 3(n)(1), which provides that "the amendments made by this section shall take effect upon the expiration of the 18-month period beginning on [March 16, 2013], and shall apply to any application for patent, and to any patent issuing thereon, that contains or con-

tained at any time … a claim … that has an effective filing date … on or after [March 16, 2013]." As the Federal Circuit correctly concluded, the natural application of this provision to this case is that, when AIA § 3(j)(2)(A) took effect on March 16, 2013, it amended 35 U.S.C. § 146 to remove district court review of interference decisions (except for pre-September 16, 2012, interferences). Pet. App. 15a (noting that Section 6(f)(3)(C) provides that "*amended* § 146 (which now authorizes review only of derivation proceedings) shall be 'deemed' to provide review of interferences declared before September 16, 2012." (emphasis added)); *see also* AIA § 6(f)(3)(C).

Biogen argues (at 17) that certain language in Section 3(n)(1) operated to preserve pre-AIA district court jurisdiction over *all* interferences involving claimed inventions with effective filing dates before March 16, 2013, regardless of whether the interference was declared before or after September 16, 2012. Biogen's argument is wrong for at least four reasons.

First, Congress knew how to preserve the pre-AIA version of particular statutory provisions by specifically and affirmatively saying so. *See, e.g.*, AIA §§ 3(n)(2), 6(c)(3)(C), 6(f)(3)(C), 7(e)(2). Yet, apart from Section 6(f)(3)(C) (not applicable here), Congress provided no similar preservation with respect to Section 146. Given that "Congress has shown that it knows how to [preserve pre-AIA law] in express terms," it is "particularly inappropriate" for Biogen to argue that Congress meant to do that *sub silentio*. *Kimbrough* v. *United States*, 552 U.S. 85, 103 (2007); *see also Jama* v. *ICE*, 543 U.S. 335, 341 (2005).

Second, Biogen's reading of Section 3(n)(1) would render entirely superfluous Section 6(f)(3)(C), which

created the exception for pre-September 16, 2012, interferences. If Biogen were correct that district court review under pre-AIA Section 146 persisted for *all* interferences involving patents or applications claiming a priority date before March 2013, then such review would necessarily exist for interferences declared before September 16, 2012—the very category of interferences covered by Section 6(f)(3(C). It would then have been completely unnecessary for Congress to provide in AIA § 6(f)(3)(C) that district court review under the "as amended" Section 146 persisted as to that subcategory of interferences. The inclusion of Section 6(f)(3)(C) demonstrates that pre-AIA Section 146 was otherwise eliminated for all other interferences, effective March 16, 2013. Biogen's contrary interpretation violates "one of the most basic interpretive canons, that [a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley* v. *United States*, 556 U.S. 303, 304 (2009) (internal quotation marks omitted); *see also TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001).

Third, as the Federal Circuit recognized, "the basic tenet of statutory interpretation that the specific governs the general" trumps any general preservation of pre-AIA Section 146 jurisdiction that could be inferred from AIA § 3(n)(1). Pet. App. 16a-17a. The detailed statutory provisions that preserve district court review of interference decisions in other situations not applicable here trump the "broadly worded provision [of Section 3(n)(1)] that says nothing" about preserving Sec-

tion 146 review specifically. *RadLAX Gateway Hotel*, 132 S. Ct. at 2071.[7]

Finally, there is no basis for Biogen's contention (at 18) that "AIA § 3(n)(1) left in place the pre-AIA, unamended § 146 for interferences declared on or after September 16, 2012, and AIA § 6(f)(3)(C) authorized § 146 actions for interferences declared before September 16, 2012." Nothing in Section 3(n)(1) turns on whether an interference is declared before September 16, 2012; on the contrary, the only date provided for in that section is March 16, 2013, not September 16, 2012. *See* AIA § 3(n)(1). Moreover, under Biogen's reading of Section 3(n)(1), pre-AIA Section 146 would "remain[] unchanged" (Pet. 11) for patents and applications filed before March 16, 2013—regardless of when those interferences were declared.[8]

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[7] Biogen argues (at 19) that the canon that the "specific governs the general" applies only where "a specific provision conflicts with a general one." But as the Court explained in *RadLAX*, the canon not only applies to statutes that expressly conflict with each other, but "has full application as well to statutes … in which a general authorization and a more limited, specific authorization exist side-by-side." 132 S. Ct. at 2071.

[8] Biogen's argument (Pet. 17-18) that Section 6(f)(3)(C) merely closed a nomenclature gap caused by AIA § 7(e)—which made the Section 7(a)(1) amendments applicable only to proceedings commenced on or after September 16, 2012—is a misdirection. *See also* Merck Br. 16-17. Section 6(f)(3)(C) would still be surplusage under Biogen's interpretation of the AIA because *Section 6(f)(3)(B)* fixed the nomenclature issue without any help from Section 6(f)(3)(C). Section 6(f)(3)(B) allows the Director to "deem the [PTAB] to be the [BPAI]" for interferences commenced before September 16, 2012. If pre-AIA Section 146 remains applicable (as Biogen contends), this provision alone would have permitted district court review of decisions in interferences declared before September 16, 2012. Similarly, the suggestion that TCA § 1(k)(3)

As this Court recently recognized, "'a losing litigant deserves no rematch after a defeat fairly suffered.'" *B&B Hardware, Inc.* v. *Hargis Indus., Inc.*, 135 S. Ct. 1293, 1303 (2015). Elimination of Section 146 review—which involves costly and time-consuming "do overs" in district court—is entirely consistent with Congress' recognition that interference proceedings had "[o]ver time … become a costly litigation tactic." 157 Cong. Rec. H4420, H4421 (daily ed. June 22, 2011) (statement of Rep. Lamar Smith). Congress understandably put a stop to the already infrequent review of interference decisions in the district courts, and Biogen has shown no reason for this Court to disturb that decision—particularly given the dwindling number of cases that it affects. This Court should deny the petition and bring this prolonged litigation to an end.

"was a correction to a problem in AIA § 7" (Merck Br. 17) is implausible and unsupported.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KANNON K. SHANMUGAM
DAVID M. KRINSKY
ALLISON B. JONES
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, NW
Washington, DC 20005
Attorneys for Bayer Pharma AG

MARK C. FLEMING
Counsel of Record
ERIC F. FLETCHER
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
mark.fleming@wilmerhale.com

S. CALVIN WALDEN
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007

NELS T. LIPPERT
TARTER KRINSKY &
DROGIN LLP
1350 Broadway
New York, NY 10018

BRITTANY BLUEITT AMADI
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
Attorneys for Japanese Foundation for Cancer Research

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