

No. 16-969

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IN THE  
**Supreme Court of the United States**

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SAS INSTITUTE INC.,

*Petitioner,*

v.

JOSEPH MATAL, Interim Director, U.S. Patent and  
Trademark Office, and COMPLEMENTSOF, LLC,

*Respondents.*

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

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**REPLY BRIEF FOR PETITIONER**

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## REPLY BRIEF FOR PETITIONER

One would be forgiven, after reading the Interim Director's brief, for thinking that this Court had granted certiorari on the question of how 35 U.S.C. § 314, dealing with institution of inter partes reviews before the Patent Trial and Appeal Board, should be interpreted. Fed. Resp. Br. i, 17-45. Indeed, the Interim Director has provided this Court with scantily more than three pages of argument (*id.* at 45-48) addressed to the single question on which certiorari *was* granted—whether the requirement of “a final written decision with respect to the patentability of any patent claim challenged by the petitioner” means what it says (Pet. i)—and even there, he offers little more than a conclusory “[*a*] *fortiori*” argument in the final sentence of his brief as his complete response on the merits of this important interpretive question. Fed. Resp. Br. 48.

But this case is about one thing: 35 U.S.C. § 318(a)'s mandate of a “final written decision” that addresses every “patent claim challenged by the petitioner.” This case is not about the beginning of the inter partes review process, but the end. The proper interpretation of § 318(a)'s “final written decision” requirement does not call upon this Court to review “[t]he determination by the Director whether to institute an inter partes review under this section”—the only thing made “final and nonappealable” under § 314(d).

Because the Interim Director seeks to make this case about § 314 and not § 318, most of his brief is nonresponsive to petitioner's opening brief, leaving almost all of petitioner's showings un rebutted.

The judgment should be reversed.

## ARGUMENT

### I. THIS CASE IS REVIEWABLE

This Court granted certiorari on a single question—whether 35 U.S.C. § 318(a) means—as it says—that the Board must issue a final written decision on every “patent claim challenged by the petitioner.” Pet. i; J.A. 79. Nowhere in that question, nor in the singular re-phrased question in the former Director’s Brief in Opposition to certiorari (BIO i), is there any reference to § 314, the section addressing the Director’s authority to institute an inter partes review.

Yet the Interim Director now seeks to smuggle a § 314 question into the case. He attempts this first by adding it to his now-plural re-re-statement of the “Questions [*sic*] Presented” (*see* Fed. Resp. Br. i), and then by repeatedly asserting that the § 314 question is actually petitioner’s “primary submission” (*id.* at 13), “primary” or “principal argument” (*id.* at 17, 18, 23), or “principal contention” (*id.* at 22, 43, 46).

Repeating that does not make it so. The question on which certiorari was granted is about the proper scope of a final written decision under § 318(a), and does not involve the institution section, § 314, at all, let alone “primar[ily]” or “principal[ly]” so. Even so, the Interim Director actually tries to chide petitioner for failing to “address Section 314(d)’s application to this case.” Fed. Resp. Br. 23. Of course petitioner did not address it—the court of appeals did not decide on that ground, and the Court did not grant review on that question.

Section 314(d) provides only that “[t]he determination by the Director whether to institute an inter partes review under this section shall be final and unappealable.” Petitioner does not challenge the

Director’s “determination . . . whether to institute an inter partes review,” for as to that “determination . . . whether,” the Director in fact did institute such a review, on petitioner’s request. This case instead represents a proper, judicially reviewable appeal, under § 319, by “[a] party dissatisfied with the final written decision of the . . . Board.” Even the Federal Circuit recognized this by deciding the issue on its merits, not on any principle of unreviewability. Pet. App. 20a-21a; *Synopsys, Inc. v. Mentor Graphics Corp.*, 814 F.3d 1309, 1316-17 (Fed. Cir. 2016).

Section 314(d)’s unreviewability principle has only a narrow, cabined reach. As this Court emphasized in *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131 (2016), the Patent Office there overcame the “strong presumption” in favor of judicial review, *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015), only because the review being sought—court review of the Board’s discretionary decision to institute inter partes review on claims that were not explicitly challenged by the petition—was “closely tied to the application and interpretation of” § 314(d), which only bars appeals of “determinations . . . to initiate an inter partes review *under this section.*” *Cuozzo*, 136 S. Ct. at 2141 (quoting § 314(d) and adding ellipsis). But the Court was just as emphatic that this holding did not extend to “other questions of interpretation that reach, in terms of scope and impact, well beyond ‘this section.’” *Id.* Nor was the Court willing to abide “shenanigans,” such as where “the agency . . . act[s] outside its statutory limits.” *Id.* at 2141-42.

This case, by contrast to *Cuozzo*, involves another question of interpretation that reaches in scope and impact, “well beyond” § 314(d) and the institution

phase. The question here involves the interpretation of an entirely different section, § 318, and deals with not the Board's discretionary institution decision, but the opposite end of the inter partes review process—the “final written decision” required by its subsection (a). In fact, that “final written decision” is a necessary predicate to the court review provided by § 319; it would be bizarre (and would surely qualify as “shenanigans”) if the narrow nonreviewability principle of § 314(d) could limit judicial review of whether the Board issued a proper final decision for which there *is* judicial review. “If a provision can reasonably be read to permit judicial review, it should be.” *Cuozzo*, 136 S. Ct. at 2150 (Alito, J., concurring in part and dissenting in part).

Interpretive absurdity and “shenanigans” aside, the Interim Director's nonreviewability argument is a dangerous one, for it would eliminate an essential judicial check on the agency's power to disobey its authorizing statute. The result of such a holding would elevate this federal agency to a super-powered fourth branch of government, empowered not only to rewrite Congress's carefully crafted adjudicative system to suit its own interests (*contra* Pet. Br. 32-44), but to do so without any judicial oversight. *L'état, c'est l'agence*.

Perhaps the Patent Office in fact knows better than Congress, and perhaps it could have written a superior statute for inter partes review. And surely, the Patent Office (like every agency) would prefer the judiciary to be more supine, and just leave its work alone. But the Patent Office exists only because Congress, exercising its authority under Article I, Section 8, Clause 8 of the Constitution, decided to create that office; the patents that issue from and are reviewed by that office



likewise exist solely because of statutory law that Congress enacts from time to time, and the Patent Office, as with any agency, must act in harmony with its governing statutes. When the agency oversteps its statutory boundaries, that is where courts must step in—“[j]udicial review enforces the limits that *Congress* has imposed on the agency’s power.” *Cuozzo*, 136 S. Ct. at 2151 (Alito, J., concurring in part and dissenting in part).

The statutory-interpretation question presented by this case is judicially reviewable.

## **II. SECTION 318(a) REQUIRES A FINAL WRITTEN DECISION ON “ANY PATENT CLAIM CHALLENGED BY THE PETITIONER”**

The Interim Director’s passing-in-the-night brief means that most of petitioner’s showings from its opening brief stand un rebutted. Most significantly, neither respondent takes issue with petitioner’s demonstration that the term “any patent claim challenged by the petitioner,” as a matter of the plain language used in § 318(a), means “all patent claims challenged by the petitioner.” (Indeed, Respondent ComplementSoft goes so far as to urge the Court to interpret the statute “notwithstanding” its “plain-meaning definition.” ComplementSoft Resp. Br. 13.) Nor do respondents dispute that the remaining text of § 318(a) is strictly additive—“and any new claim added,” post-institution, “under section 316(d).” Nor, for that matter, do respondents dispute petitioner’s showings that the Patent Office was delegated no power to alter or supplement the scope of § 318(a) final written decisions by regulation, and that the Patent

Office in fact implemented no regulation purporting to supplement or vary the scope of § 318(a).

Instead, respondents seek to use their § 314 argument as a bootstrap to justify the Board's partial-written-decision practice under § 318(a). According to respondents, when the Board determines to institute review on fewer than all of the claims challenged in a petition, the Board's action constrains the plain meaning of "any patent claim challenged by the petitioner" in § 318(a). Fed. Resp. Br. 46-48; ComplementSoft Resp. Br. 12.

But the statutory text cannot bear the weight that respondents place upon it. Section 318(a) does not say that the Board must issue a final written decision with respect to "any patent claim on which the Director has authorized institution of an inter partes review." Rather, it says broadly, and without limitation, that the Board's final written decision must extend to "any patent claim challenged by the petitioner and any new claim added" by amendment after the inter partes review was instituted.

In § 318(a), Congress chose the term "any patent claim challenged by the petitioner"—a standard that depends only on the decisions of one actor, the petitioner—as the touchstone requirement for a "final written decision." Section 318(a) is otherwise additive—it also requires the final written decision to address "any new claim" added by amendment, whether or not challenged by the petitioner. Neither of those facets of the subsection makes any reference to the Director, or the Board, having the power to narrow the identity of the claims that must be addressed in a final written decision. Had that been what Congress

wanted, it would have written a very different statute. But the entire statutory regime of inter partes review, as it was written by Congress, contains not even a whiff of a hint that “challenged by the petitioner” really means “allowed to proceed, post-institution, by the Board.”

Indeed, the Federal Circuit’s *Synopsys* decision located only a single textual reason for concluding that the scope of the § 318(a) written decision could be narrower than the scope of the claims challenged in the petition under § 314(a)—the slight difference in language between the two provisions. *See* 814 F.3d at 1315; *compare* § 314(a) (“claims challenged in the petition”) *with* § 318(a) (“any patent claim challenged by the petitioner”). But, as petitioner showed in its opening brief, that slight linguistic variation (“in the petition”/“by the petitioner”) is compelled by the single event that could take place under the statute, post-institution, to make the “claim[s] challenged by the petitioner” different than those the petitioner challenges “in the petition”—the voluntary cancellation of a “challenged patent claim” under § 316(d)(1)(A). Had § 318(a) been worded using the identical “in the petition” language of § 314(a), the Board would have been obligated to issue decisions on cancelled, nonexistent patent claims. *See* Pet. Br. 27.

Neither the *Synopsys* majority nor respondents here grapple with the obvious fact that the statute defines the scope of the final written decision with reference to which patent claims “the petitioner” is challenging, not to claims for which “the Board” or “the Director” instituted review. This is why the scope of the final written decision is unaffected by the legality *vel non* of the Board’s institution practices—there is no textual

link of this kind between the Act's institution provision and its final-written-decision provision. Whether or not the Board is justified in instituting inter partes review on only a subset of claims challenged in the petition, § 318(a) unambiguously requires the Board to issue a final written decision on all "patent claim[s] challenged by the petitioner." The Patent Office was not delegated any authority, in § 316(a) or elsewhere, to elaborate upon or vary the plain terms of § 318(a), and the Patent Office has not purported to do so in its regulations. So it is that statutory language that binds the Board.

With a full final decision, all of the challenged claims can be subject to the estoppel effect prescribed by the statute, and can be appealed to the Federal Circuit. But, by deciding only some of the claims challenged, the Board is not only propagating inefficiencies (*see* Pet. Br. 29 & n.2), but, as in this case, an unreviewable absurdity: Here, the Board instituted inter partes review on claim 4 of the ComplementSoft patent, but not on claim 2. Pet. App. 105a-106a. Claim 4 is narrower (contains additional limitations) than claim 2. Thus, if the narrower claim 4 were unpatentable, claim 2 would "necessarily" be unpatentable. *Cf. Cuozzo*, 136 S. Ct. at 2154 (Alito, J., concurring in part and dissenting in part) (noting that the Board in *Cuozzo* expanded the claims for review at the institution stage for this same reason).

Yet, because of the Board's failure to extend its final written decision to challenged claim 2, petitioner was left without any ability to appeal that adverse determination to the Federal Circuit, or to obtain a remand to the Board for adjudication of claim 2 in view of that court's remand on claim 4. Nor would the

patent owner get any estoppel benefit with respect to claim 2 in the later district court litigation. Instead, without the benefit of a final, appealable, and estopping written decision on claim 2, the parties will have to relitigate the patentability of that claim in the district court. This is exactly the kind of “administrative obstinacy” that, as Judge Newman explained, prevents the statutory provisions from “act[ing] in harmony, like a well-oiled machine.” Pet. App. 26a.

**III. WERE THE COURT TO REACH THE ISSUE,  
IT SHOULD CONCLUDE THAT THE  
BOARD’S PARTIAL-INSTITUTION  
PRACTICE IS *ULTRA VIRES***

Petitioner did not seek, and this Court did not grant, review with respect to the proper interpretation of § 314. *See* Pet. i; J.A. 79. Indeed, as the Interim Director argues, petitioner had no vehicle within the inter partes review process for challenging the Board’s institution decision under § 314(d) and *Cuozzo*. Fed. Resp. Br. 18. However, because the Interim Director seeks to recast this case as a challenge to § 314(a) instead of § 318(a), petitioner responds to that argument out of an abundance of caution.

1. By its terms, the text of the statute cannot be read as allowing “partial” institutions. Nowhere in the entirety of the America Invents Act is there any indication that the Patent Office may institute inter partes review on fewer than all of the claims challenged in a petition.

The closest textual support that the Interim Director has for this proposition is the language of § 314(a) (entitled “THRESHOLD”) that sets a probable-

cause-like determination as the standard for initiating inter partes review—“that there is a likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.” *See Cuozzo*, 136 S. Ct. at 2140. Notably, even though Congress used “at least 1 of the claims” in the statute to define the threshold for institution, Congress did not say that the Director could *limit* institution to only those claims for which a likelihood-of-success determination was made. Rather, the Director’s finding that “at least 1 claim” satisfies the likelihood-of-success standard is enough to institute inter partes review. The Director could permissibly stop there, as the statute calls only for a “determination,” not a reasoned decision. 35 U.S.C. § 314(d) (“determination . . . whether to institute an inter partes review”); *id.* § 314(b) (“[t]he Director shall determine”), (c) (“the Director’s determination”).

2. Confirming this understanding, § 316(a)(2) commands the Director to “prescribe regulations . . . setting forth the standards for the showing of sufficient grounds to institute a review under section 314(a).” This “explicit grant of authority” (Fed. Resp. Br. 45) extends only to elaborating “the standards for the showing of sufficient grounds” for instituting review. Like § 314(a) itself, this paragraph does not authorize the Director to alter the scope of inter partes review.

3. By asserting authority to institute only partial inter partes reviews, the Board distorts the proper operation of other aspects of the inter partes review regime. Other essential provisions of the Act are built upon the premise that it is the petitioner’s petition—not the Director’s or Board’s selection of claims—that

defines the scope of an instituted inter partes review. This starts with § 311, entitled “Inter partes review.” Its subsection (b), entitled “SCOPE,” says that the “scope” of inter partes review is defined by the petitioner’s request: “A *petitioner* in an inter partes review may request to cancel as unpatentable 1 or more claims of a patent . . . .” (Emphasis added.)

The provisions that follow build upon the understanding that the petitioner, not the Director or Board, has defined the scope of a granted inter partes review. An instituted inter partes review starts with “each claim challenged” in the petition, § 312(a)(3), and then, once institution is granted, allows for the respondent to subtract, from the claims challenged in the petition, any cancelled patent claim, § 316(d)(1)(A), and then add any “substitute” (amended) claim, § 316(d)(1)(B). That equals the proper scope of the “final written decision” under § 318(a): “any patent claim challenged by the petitioner and any new claim added under section 316(d).” The Patent Office’s partial-institution practice upends this logical, elegant—and, most importantly, statutorily prescribed—system.

4. That is not all. Partial institutions are also anathema to the estoppel provisions of the Act. As petitioner showed (Pet. Br. 28-31), it makes good sense for petitioners to select the claims for challenge in inter partes review, so that if inter partes review is granted, all—not just some—of the patent claims that the petitioner is likely to face as defendant in an infringement suit can have their patentability adjudicated by the Board. (Or, if inter partes review is denied, the full complement of patent claims can have

their validity adjudicated, without estoppel under § 315, by a district court.)

While the Interim Director seeks to promote partial institutions as an efficiency-enhancing addition to the Act (Fed. Resp. Br. 34-40), it is anything but. As petitioner showed (Pet. Br. 28-32), this approach multiplies parties' litigation burdens, forcing parties like SAS to litigate in a second, district-court forum some of the patentability challenges that could easily have been, as here, adjudicated by the Board. The Department of Justice said it well: "[B]y picking and choosing some but not all of the challenged claims in its Decision, the Board has undermined the Congressional efficiency goal and increased the workload of both parties who are now forced to litigate validity between two forums." Petitioner's Request for Rehearing Pursuant to 37 C.F.R. § 42.71(d), U.S. Patent No. 7,323,980, *Dep't of Justice v. Discovery Patents, LLC*, Case IPR2016-01041 (Patent Trial & Appeal Bd., Nov. 29, 2016); *see* Pet. Br. 30.

The Interim Director nonetheless thinks that the Board's partial-decision approach is more efficient for Patent Office staff. Fed. Resp. Br. 34-35. That is a dubious claim, given that the Board is presently writing what essentially amount to advisory opinions—extensive, unappealable, and un-stopping institution decisions on patent claims for which it is not instituting inter partes review.

Yet, putting aside the fact that the Patent Office is obligated to consider the efficiency interests of all of its stakeholders, not just its own interests, *see* § 316(b), the Interim Director fails to explain why the Patent Office could not effectively—and efficiently—follow



the statute by its terms. *See* Pet. Br. 38-39. For example, if the Board were to institute inter partes review by simply issuing the unreasoned “notice” determination anticipated by the statute, § 314(d), the Board could decide patentability of the challenged claims on a fully developed record, rather than prejudging the case on the limited institution record (*see* §§ 312-313). The Board would then be writing decisions on the same number of claims as present, but the decisions would come in a final written decision at the end of the process, informed by a fully developed record rather than the thin record created by the institution papers, and would make the entirety of the claims challenged by the petitioner both estopping and appealable—just as the design of the statute anticipates.

Or, if the Board were to insist on continuing the practice of extensive institution opinions, the Board could establish standards that make those initial determinations into the equivalent of rulings on motions to dismiss under FED. R. CIV. P. 12, and then carry forward those threshold decisions and merge them into the final decision, just as federal courts do. Pet. Br. 24. It would then take no more additional work than for the Board to say, “We reject petitioner’s challenge to claim 2 for the reasons stated in our institution decision.” The Board’s threshold work on claim 2 would then not be for naught, but would instead be appealable and estopping.

Either of these alternatives would have no adverse effect on the agency’s workload, yet would honor the statute that Congress actually wrote.

5. The Interim Director’s effort to analogize partial institutions to this Court’s practice of granting only some questions presented by a petition for certiorari, or an en banc appellate court’s ability to decide cases “on a question-by-question basis” (Fed. Resp. Br. 27) is off base. For one, the Board is a tribunal of first instance, not a court of review—it would be strange for such a filter to be applied at the outset of litigation, and stranger still in view of the statutory language, which plainly makes “the petitioner” the master of its complaint. *See* Pet. Br. 24. For another, neither this Court nor the en banc courts of appeals are bound by a statutory command that they “shall issue a final written decision as to every issue presented” by a petitioner. As to every patent claim challenged by an inter partes review petitioner, though, the Board is so bound by the express language of § 318(a).

The better Board-to-court analogy is found by comparing the district courts—the courts of first instance—to the Board. District court adjudications are not complete unless they comply with the final-judgment rule, which is a useful analog to the “final written decision” requirement of § 318(a). A final judgment, like a final written decision, is the predicate to both appealability, 28 U.S.C. § 1291, and estoppel, *see Arizona v. California*, 530 U.S. 392, 414 (2000) (“It is the general rule that issue preclusion attaches only ‘[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment . . . .’”). So it should be with § 318(a).

If the Court were to reach the issue, it should conclude that the Board’s partial-institution practice is either contrary to the plain language of the statute,

or, in the case of ambiguity, not based on a permissible construction of the statute for the reasons set forth in Section IV, below: The Patent Office's partial-institution practice is a poor fit with the rest of the inter partes review statute, and thereby distorts the entirety of the operation of inter partes review as Congress drafted it.

#### **IV. CHEVRON IS NOT A LICENSE TO REWRITE THE STATUTE TO SUIT THE PATENT OFFICE**

The Interim Director's effort to shift the ground of analysis from § 318(a) to § 314 is a curious one. It may have been motivated by the fact that the Patent Office finds no specific delegation in § 316(a) to alter the scope of a final written decision, and the further, consequential fact that the Patent Office has promulgated no regulation that addresses the scope of a final written decision. Pet. Br. 34-35. Accordingly, it is the clear, plain language of § 318(a) that resolves this case, and there is no place for administrative deference, under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), or otherwise, in the interpretation of § 318(a).

The Interim Director does not defend the Board's application of § 318(a) under *Chevron*; indeed, the only appearance of *Chevron* in the Interim Director's brief comes via his plea that "[t]he USPTO's regulation construing the AIA to permit partial institution is entitled to deference." Fed. Resp. Br. 40-45. But even there, the Interim Director seeks to use *Chevron* to arrogate too much power to his agency.

The Court need not reach this issue, for the clear statutory language answers the question presented in

favor of petitioner. *See* pp. 5-9, above. But if it were to reach the issue, it should hold that the Patent Office was delegated no authority to narrow the scope of a “final written decision,” and that the statute is clear and should be enforced at *Chevron* step one without the need for further inquiry. Pet. Br. 32-39.

Alternatively, if the Court were to reach *Chevron* step two, the Court should hold that even if there were room for agency elaboration on the statute, the particular practice of issuing “partial final written decisions” is not “based on a permissible construction of the statute” under *Chevron*, 467 U.S. at 843. As shown above, and in petitioner’s opening brief (at 32-41), the Patent Office’s administration of the inter partes review statute has transformed the inter partes review regime into an animal bearing little or no resemblance to the one created by Congress. “Deference” is not fealty.

## V. RESPONDENTS’ REMAINING ARGUMENTS LACK MERIT

The Interim Director and ComplementSoft—which reappears in this case with a merits brief, having failed to file a brief in opposition to certiorari—present a number of other arguments in support of affirmance. None has merit.

1. The fact that “[p]atent [l]aw [i]s [b]ased on a [c]laim-[b]y-[c]laim [a]nalysis” (ComplementSoft Resp. Br. 10) does not give the agency *carte blanche* to issue a final written decision on whatever subset of “patent claim[s] challenged by the petitioner” it chooses. Section 318(a) is written in the language of command (“shall”), not of discretion. Pet. Br. 20. And the further elaboration of that command, that the final written

decision must extend to “any patent claim challenged by the petitioner”—not “some of the patent claims challenged by the petitioner”—confirms that the Patent Office possesses no discretion on the subject of scope. *See United States v. Rosenwasser*, 323 U.S. 360 (1945) (discussed at Pet. Br. 21-23).

2. The Interim Director’s reliance on the current statute’s predecessors (Fed. Resp. Br. 3, 19) only confirms that petitioner’s reading of § 318(a) is the correct one. Neither the *ex parte* reexamination statute, nor the now-superseded *inter partes* reexamination statute, contained any requirement that the Patent Office’s reviewing Board (then known as the Board of Patent Appeals and Interferences) issue a “final written decision” on all “patent claims challenged by the petitioner.” Rather, there was no statutory provision setting forth the requirements of a final, appealable decision, and appeals of Board reexamination decisions under those statutes could be had “with respect to any decision adverse to the patentability of any original or proposed amended or new claim of the patent” (35 U.S.C. § 306 (2011)).

3. Both respondents suggest that, because *inter partes* review was never intended to “wholly displace litigation as a means of resolving disputes about patent validity” (Fed. Resp. Br. 37; *see* ComplementSoft Br. 20-25), that renders irrelevant petitioner’s—and Judge Newman’s—showings that *inter partes* review was meant to be a “faster, less costly alternativ[e] to civil litigation.” Pet. Br. 43 (quoting Sen. Grassley). Respondents miss the point. The point, of course, is that *inter partes* reviews are intended to be an alternative forum for completely adjudicating those patentability challenges that are

within the Board's ken—the most common ones, anticipation under § 102, and obviousness under § 103, based on prior-art patents or printed publications. Challenges under those two sections constitute almost 60% of the patent-invalidity defenses that are litigated in district courts. Mark A. Lemley & David L. Schwartz, *Understanding the Realities of Modern Patent Litigation*, 92 Tex. L. Rev. 1769, 1787 (2014). The fact that inter partes reviews are, by statute, not more comprehensive is no reason to make them *less* comprehensive than the statute commands.

4. Finally, ComplementSoft's suggestion (ComplementSoft Resp. Br. 26-27) that SAS seeks the wrong remedy from this Court is not well taken. ComplementSoft insists that "the appropriate remedy" is for this Court to "strike down the Board's partial institution rules, vacate the IPR decision that would have been inappropriately rendered, and allow the Board the opportunity to decide again in the first instance whether it still wishes to institute the IPR." In the first place, ComplementSoft—which declined to file a brief in opposition to certiorari—has waived this argument by failing to present it at the certiorari stage. *See* Sup. Ct. R. 15.2; *Carcieri v. Salazar*, 555 U.S. 379, 395-96 (2009). ComplementSoft's preferred remedy would be inappropriate in any event because, again, the challenge in this case is not to the "partial institution rules," but to the Board's partial-final-decision regime.

That said, even the Interim Director himself—who did file a brief in opposition to certiorari, and who expends almost all of his energy on trying to recast this case as a challenge to the partial-institution practice—

does not seek this remedy on behalf of the Board. That is telling, indeed.

\* \* \* \*

The Intellectual Property Owners Association (IPO), an international association of over 200 companies and 12,000 individuals who are patent *owners*, and thus subject to inter partes review challenges to their patents, has informed this Court that the Board's interpretation of § 318(a) "undermines the legislative intent" behind inter partes review, and fails to "eliminate abusive practices of pursuing duplicative challenges of invalidity." IPO *Amicus* Br. 2, 12. Patent challengers like SAS, and patent owners like those represented by IPO, would benefit alike from having the statute read and enforced as it was written. That is a good sign that the interpretation of § 318(a) offered by petitioners is the correct one.

### CONCLUSION

For these reasons, and those set forth in petitioner's opening brief, the judgment of the Federal Circuit should be reversed, and the case remanded with instructions to order the Patent Trial and Appeal Board to issue a final written decision with respect to the patentability of claims 2 and 11-16 of the '936 patent.

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