

No. 2020-1601

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

**SLING TV, L.L.C., SLING MEDIA, L.L.C.,
DISH NETWORK L.L.C., DISH TECHNOLOGIES L.L.C.,**

Appellants,

v.

REALTIME ADAPTIVE STREAMING LLC,

Appellee,

**ANDREW HIRSHFELD, Performing the Functions and Duties of
the Under Secretary of Commerce for Intellectual Property
and Director of the United States Patent and Trademark Office,**

Intervenor.

Appeal from the United States Patent and Trademark Office,
Patent Trial and Appeal Board in No. IPR2018-01331

**REALTIME'S RESPONSE TO SLING'S PETITION FOR
REHEARING *EN BANC***

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Dated: June 9, 2021

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REALTIME'S CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rule 47.4(a)(1) and Federal Rule of Appellate Procedure 26.1, counsel for Appellee Realtime Adaptive Streaming LLC certifies the following:

1. Provide the full names of all entities represented by undersigned counsel in this case.

- Realtime Adaptive Streaming LLC

2. Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.

- None

3. Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.

- Realtime Data LLC (parent corporation)

4. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

- None

5. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected

by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

- *Realtime Adaptive Streaming LLC v. Sling TV L.L.C.*, Case No. 1:17-cv-02097-RBJ (D. Colo.) This co-pending district court case involves the '610 patent at issue in the present appeal of an inter partes review proceeding. The district court case had been stayed when this appeal was filed, but the district judge terminated the stay and set the case for trial in August 2021.

6. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

- N/A

Dated: June 9, 2021

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I. INTRODUCTION

This is an appeal of an order from the PTAB reconsidering institution of an IPR. The Board did so in light of guidance from the Director that service of a complaint triggers the one-year time bar, even if the complaint is defective in some way. This Court has repeatedly held that such reconsideration is within the Board's inherent power and is a statutorily non-reviewable institution decision on timeliness under 35 U.S.C. § 315(b). Sling asks this Court to overturn that precedent in light of *Thryv, Inc v. Click-To-Call Techs., LP*, 140 S. Ct. 1367 (2020). But *Thryv* only serves to confirm, not displace, that well-reasoned precedent. It holds that a petition's timeliness under § 315(b) is "integral to, indeed a condition on, institution" and therefore decisions applying § 315(b) are non-appealable. *Id.* at 1373.

There is no jurisdiction to hear Sling's appeal under all Federal Circuit and Supreme Court precedent. The petition for rehearing *en banc* should be denied.

II. BACKGROUND

In IPR2018-1331, about five months before the statutory deadline for a final written decision (FWD), Patent Owner Realtime asked the Board to reconsider its earlier decision to institute IPR in view of the PTAB's new precedential opinion in *GoPro, Inc., v. 360Heros, Inc.*, IPR2018-01754, Paper 38 (Aug. 23, 2019) (precedential), Specifically, Realtime asked the Board to find that all petitioners are time-barred under § 315(b) and *GoPro*. Although styled as a motion to terminate,

the basis of Realtime’s motion was that the Board’s institution decision was incorrect and should be reversed. Realtime requested termination because that would be the result of the Board revisiting its institution decision and deciding to not institute.

The Board authorized Realtime to file a motion to terminate and allowed supplemental briefing from Petitioners Sling and ARRIS. Appx2. It took several more months to complete briefing and for the Board to issue a decision. Meanwhile, Sling opposed Realtime’s request to postpone all IPR deadlines until the motion to terminate could be decided. Appx4357. Sling also opposed Realtime’s request to postpone the oral hearing. *See* IPR2018-01331, Paper 33 (Nov. 22, 2019) at 2.

Before the statutory deadline for FWD, the Board issued its decision on the Realtime’s motion to terminate. The Board granted Realtime’s motion, decided to reverse its institution decision in IPR2018-1331 and terminated the proceeding. Appx1. The Board emphasized it has “inherent authority to reconsider [its] decisions[.]”—as this Court has repeatedly held. Appx5. And the Board make clear it was doing just that: reconsidering its decision to institute. Appx5 (“We find *GoPro’s* reasoning persuasive . . . and apply it to ***reconsider our Decision to Institute.***”);¹ Appx6 (“We disagree with Sling that the law-of-the-case doctrine bars *reconsidering our Decision to Institute.*”).

¹ All emphasis added unless otherwise noted.

As part of its reconsideration, the Board determined that Sling’s petition is time-barred under § 315(b) because it was not filed within the one-year period triggered by service of a complaint. Appx7. As a result, the Board reversed its decision instituting Sling’s petition and deinstitutioned the IPR. Appx7, Appx9.

III. ARGUMENT

A. There Is No Jurisdiction to Hear This Appeal Under All Federal Circuit and Supreme Court Precedent

1. The Board’s decision to not institute IPR is nonappealable under both § 314(d) and § 318(a).

The Court lacks jurisdiction to hear this appeal. Sling seeks to appeal an order from the Board that reconsidered its institution decision and decided to not institute IPR because all petitioners were time-barred under § 315(b). But such an order is non-appealable for two independent reasons.

First, the Board’s order was a “determination . . . whether to institute an inter partes review” and thus “final and nonappealable” under 35 U.S.C. § 314(d). The Board’s order was indisputably a decision regarding institution. Indeed, the entire basis of the Board’s order was applying § 315(b), which is a bar to IPR institution. 35 U.S.C. § 315(b) (“An inter partes review *may not be instituted*” if the petition is filed more than 1 year after the petitioner is served with a complaint).

The Supreme Court’s decision in *Thryv* confirms this. *Thryv* held that decisions regarding a petition’s timeliness under § 315(b) constitute non-appealable

institution decisions. *Thryv, Inc v. Click-To-Call Techs., LP*, 140 S. Ct. 1367, 1373 (2020). This is because § 315(b) is “integral to, indeed a condition on, institution.” *Id.* Thus, a challenge to the Board’s application of § 315(b) “raises ‘an ordinary dispute about the application of ‘an institution-related statute.’” And such applications fall squarely within the “No Appeal” bar of § 314(d). *See id.*

Second, this Court lacks jurisdiction over the Board’s order because there was no final written decision in the underlying IPR. Appeals to this Court from decisions in IPRs are limited to cases in which the Board has instituted an IPR, “not dismissed” the proceeding, and issued a “final written decision with respect to . . . patentability.” *See* 35 U.S.C. §§ 141(c), 318(a), 319. Here, the Board reconsidered its institution decision and terminated the proceeding without rendering a final written decision under § 318(a). Appx9.

Thus, the requisite conditions for appellate review under 35 U.S.C. §§ 141(c) and 319 have not been met. This accords with the plain language of 35 U.S.C. §§ 318(a) and 319, which permit appeal from only a “final written decision with respect to the patentability of any patent claim.” *See also* 35 U.S.C. § 141(c) (permitting appeal of “the final written decision of the Patent Trial and Appeal Board under section 318(a)”). Here, the lack of a final written decision provides an independent reason for the lack of jurisdiction over Sling’s appeal.

2. No statute confers jurisdiction over Sling’s direct appeal of the Board’s decision to reinstitute an IPR.

Despite devoting seven pages to arguing that “The Panel Erred in Concluding It Lacked Jurisdiction Over This Case,” Sling’s petition fails to identify a single statute that confers jurisdiction over this appeal. *See* Pet. 7–13. This is fatal to Sling’s argument because without such a statute, there can be no jurisdiction over Sling’s direct appeal. *See Mylan Labs. Ltd. v. Janssen Pharmaceutica, N.V.*, 989 F.3d 1375, 1378–79 (Fed. Cir. 2021) (“Because no statute grants us jurisdiction over appeals from decisions denying institution, we must dismiss Mylan’s direct appeal. . . . [N]o statute confers jurisdiction over appeals from decisions denying institution. Without such a statute, we lack jurisdiction over those appeals”).

Sling argued in its principal brief that the Court has jurisdiction based on § 1295(a)(4)(A) and the APA. Blue Brief at 49–53. Yet it now appears to abandon those arguments on rehearing. For good reason. Both the panel’s decision and this Court’s *Mylan* decision confirm that § 1295 and the APA cannot confer jurisdiction in this appeal. *See* Panel Op. at 3 (“Section 314(d)’s rule of nonappealability, we have also held, confirms the general unavailability of jurisdiction under 28 U.S.C. § 1295(a)(4) to hear an appeal from a decision not to institute.”).

Mylan is dispositive on this point. There, this Court held that when § 1295(a)(4) is read together with § 314(d)—as it must be—those statutes preclude

direct appeal from a Board’s decision denying IPR institution. *Mylan*, F.3d at 1378–79. Further, *Mylan* held that: “*No other statute* provides jurisdiction over” an order denying institution. *Id.* at 1379. This is because § 319 is limited to limited to final written decisions and nothing in other referenced statutes bar § 319’s plain language. *Id.* Nor can the APA confer jurisdiction because it is not a jurisdiction-conferring statute. *Id.* Nor does the APA overcome § 314(d)’s specific bar on appeals from institution decisions. *Id.*

Sling does not and cannot identify any statute that confers jurisdiction over its direct appeal from the Board’s deinstitution decision. “Because no statute grants [this Court] jurisdiction over appeals from decisions denying institution, [this Court] must dismiss [Sling’s] direct appeal.” *Id.* at 1378.

3. SAS and Thryv are fully consistent with long-standing precedent that decisions to terminate an instituted IPR are not reviewable—as this Court has thrice held.

Sling’s additional arguments for jurisdiction lack merit. Sling argues that the Supreme Court’s *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348 (2018) and *Thryv* decisions establish that the Court has jurisdiction to hear this appeal, even though *Thryv* expressly holds that § 315(b) determinations are not subject to judicial review. *See* Pet. at 7–10. Sling asserts that once the PTO institutes IPR, a party is entitled to “a procedural review” of whether the IPR “proceeds according to the law.” *Id.* at 8.

Sling’s argument relies entirely on isolated quotes from *SAS* and *Thryv* and misinterprets those cases. Neither *SAS* nor *Thryv* speak to whether the Board has authority to reconsider its institution decision. And neither suggests that the Board’s decision to deinstitution is any different from an original decision to not institute for purposes of § 314(d)’s rule of nonappealability.

At bottom, *SAS* and *Thryv* do not undermine this Court’s long-standing precedent that (1) the Board has the inherent authority to reconsider institution decisions (beyond the regulatory time for a patentee’s entitlement to seek reconsideration)” and that (2) “a resulting decision to deinstitution is, like an original decision not to institute, ‘final and nonappealable’ under 35 U.S.C. § 314(d).” Panel Op. at 3 (citing *Medtronic, Inc. v. Robert Bosch Healthcare Systems, Inc.*, 839 F.3d 1382, 1383 (Fed. Cir. 2016); *GTNX, Inc. v. INTTRA, Inc.*, 789 F.3d 1309, 1311–13 (Fed. Cir. 2015); *BioDelivery Sciences Int’l, Inc. v. Aquestive Therapeutics, Inc.*, 935 F.3d 1362, 1366 (Fed. Cir. 2019).

Sling’s core argument—that *SAS* and *Thryv* reflect a sea change that created a new category of reviewable IPR decisions—is divorced from the facts and holdings of those cases. It is also an argument that has squarely considered and rejected by this Court at least three times. *See, e.g.*:

- Panel Op. at 4 (Fed. Cir. Apr. 29, 2021) (“Sling has not shown that our precedent equating a deinstitution decision with an initial decision to deny

institution was implicitly overruled by the Supreme Court in *Thryv, Inc. v. Click-To-Call Technologies, LP*, 140 S. Ct. 1367 (2020), which did not involve or address such a deinstitution decision[.]”).

- *Mylan*, 989 F.3d at 1378–79 (Fed. Cir. 2021) (“*Mylan* argues the Supreme Court has undermined *St. Jude Medical, Cardiology Division, Inc. v. Volcano Corp.*, 749 F.3d 1373 (Fed. Cir. 2014), but that is not so. Every relevant Supreme Court case involved an appeal from a final written decision—not an institution decision. . . . When the Supreme Court discussed decisions denying institution, however, it suggested such decisions are unreviewable. In *Cuozzo*, the Court noted that decisions denying institution are ‘committed to agency discretion.’ That suggests that, consistent with *St. Jude*, decisions denying institution are not subject to review on direct appeal. . . . [*SAS*] does not undermine *St. Jude* or our reasoning here. Section 314 bars direct appeal from a decision denying institution.”) (citations omitted).
- *Ruiz Food Prods., Inc. v. MacroPoint, LLC*, Case 19-2113, Doc. No. 33 at 3 (Fed. Cir. June 24, 2020) (nonprecedential) (Section 314(d)’s “bar on appellate review, we have explained, extends beyond the initial determination to cover circumstances, like those presented here, where the Board reconsidered its decision to institute and terminated the proceeding. *Thryv* did not overrule our precedent on this point, as *Ruiz Foods* argues. . . . *Thryv* is

fully consistent with our long-standing precedent that decisions to terminate an instituted IPR are not reviewable.”) (citations omitted).

Each of these decisions—the panel opinion, *Mylan*, and *Ruiz*—contain compelling reasoning that contradicts Sling’s argument for jurisdiction here. And each confirms that Sling’s reliance on isolated quotes from *SAS* and *Thryv* is misplaced. *SAS* and *Thryv* are fully consistent with the panel’s determination that Sling’s appeal from an IPR deinstitution decision is not reviewable.

B. The Panel Correctly Denied Sling’s Mandamus Petition, and Sling Does Not Seek Rehearing on the Mandamus Denial

Although there is no avenue for Sling’s direct appeal of the Board’s decision not to institute, this Court has made clear that “judicial review is available in extraordinary circumstances by petition for mandamus.” *Mylan*, 989 F.3d at 1379. Sling’s appeal alternatively petitioned for a writ of mandamus, and this Court had jurisdiction to entertain that request. Panel Op. at 2–3.

The panel considered and denied the mandamus petition because Sling failed to show a clear right to relief. *Id.* at 4. The panel found that Sling failed to present a colorable constitutional claim. *Id.* And Sling failed to identify a non-constitutional claim that suggests a persuasive justification for granting mandamus. *Id.* Thus, under the circumstances of this case, the panel denied Sling’s request for mandamus. *Id.*

Sling does not address mandamus anywhere in the rehearing petition. Because Sling does not challenge the panel’s mandamus denial, mandamus is outside the grounds sought for rehearing. Indeed, the panel correctly found that Sling failed to meet the requirements of mandamus relief. And Sling does not challenge that finding or identify any error with it. Thus, Court’s mandamus jurisdiction cannot provide an independent basis for reviewing Sling’s arguments on rehearing.

Nevertheless, the availability of mandamus review in extraordinary circumstances undermines any policy arguments Sling might raise. Sling speculates about the ills of insulating Board decisions from appellate review and posits that the Board might adopt a blanket policy of never issuing final written decisions again. *See* Pet. 2. (Of course, this is divorced from the facts of this case or any known practice of the Board.) But egregious violations by the Board are potentially reviewable under mandamus, so long as a party identifies a colorable constitutional claim or sufficiently persuasive non-constitutional claim. The problem for Sling’s appeal is that the facts here do not support such a claim.

C. Even Ignoring Jurisdiction, Sling’s Arguments Lack Merit and Do Not Justify *En Banc* Review

Because this Court lacks jurisdiction to hear Sling’s appeal, there is no reason to consider Sling’s arguments about (1) the precise meaning of the word “final” (apart from the word “nonappealable”) in § 314(d) (Pet. at 5–7) or (2) the precise

contours of the Board’s authority to reconsider its decisions (*id.* at 13–16). This appeal is a particularly poor vehicle for those issues because the Board acted well within its discretion under the facts of this IPR. Regardless, Sling’s arguments lack merit and do not justify *en banc* review for any issue.

1. “Final and nonappealable” means that IPR institution decisions are “not subject to further review.”

Contrary to Sling’s argument, there is no great mystery about the meaning of “final and nonappealable” in § 314(d). *See* Pet. at 5–7. As this Court held in *Cuozzo*, final and nonappealable means that the decision whether to institute is “not subject to further review.” *In re Cuozzo Speed Techs., LLC*, 793 F.3d 1268, 1273 (Fed. Cir. 2015) , *aff’d*, 136 S. Ct. 2131 (2016) (“Section 314(d) provides that the decision is both ‘nonappealable’ and ‘final,’ i.e., not subject to further review.”).

This means that institution decisions are not reviewable by this Court and not subject to collateral attacks by district courts. It also means that if an IPR is instituted, the Patent Owner knows that it should not argue about the decision to institute in the subsequent Patent Owner Response or at the IPR hearing. The decision to institute, therefore, therefore differs from other factual findings in the Board’s institution decision, which are expressly “preliminary.” And the Board is not required or expected to address its institution determination in the final written decision.

But critically, this Court’s precedents make clear what “final and appealable” does *not* mean. It does not mean:

- The Board cannot revisit or reconsider the decision to institute. *See Medtronic*, 839 F.3d at 1383 (Fed. Cir. 2016); *GTNX*, 789 F.3d at 1312–13 (Fed. Cir. 2015); *BioDelivery*, 935 F.3d at 1366 (Fed. Cir. 2019).²
- The Board cannot, *sua sponte*, reconsider the decision to institute. *See GTNX* at 1312–13.
- The Board cannot allow a party to file a later request for reconsideration and to consider that request. *See id.*

The Board can do all of these things. And they are what happened here. Patent Owner Realtime requested filing supplemental briefing on the time-bar issue because the PTO Director issued guidance confirming that all petitioners in the IPR were time-barred. The Board held a conference call to discuss the request and heard from all parties. The Board allowed supplemental briefing, including two 10-page responses from Petitioners Sling and ARRIS. The Board considered that briefing and the parties’ arguments and exercised its discretion to not institute.

² Indeed, 37 C.F.R. § 42.71(d)(1) confirms this. It states that the Board’s decision “on whether to institute trial is final and non-appealable.” And the very next sentence discusses the procedure for how parties can request rehearing as a matter of right.

Although the motion to terminate was pending for several months, the delay prejudiced Realtime—not Sling. Realtime asked Sling to agree to postpone all deadlines to allow the time-bar issue to be decided. Sling refused and wanted to plow ahead with the IPR. Regardless, all parties knew the Board was reconsidering the institution decision well before the FWD deadline.

Sling’s arguments about “final and nonappealable” are based on at least two errors. First, it reads the “final” in isolation and insists it must mean something completely different from “nonappealable.” This is unsupported. Section § 314(d) uses the phrase “final and nonappealable” and that phrase is what is being interpreted. And there is nothing wrong with individual words of a phrase having similar or overlapping meanings.³

Second, Sling advances an extreme interpretation of the word “final” in isolation. Sling argues that “final” means the Board is forbidden from reconsidering its original decision to institute no matter the circumstances. This is highlighted by the following exchange with Sling’s counsel at oral argument:

JUDGE CHEN: I guess you’re saying that even if during the pendency of an IPR proceeding, the Patent Board were to discover that the Petitioner had lied about something in the contents of its petition. And the Board had relied on that fraud, that lie, in the petition. The Board would have no power,

³ As one example, claim construction looks to “clear and unmistakable” disclaimer.

discretion, or authority to revisit the intuition during the pendency of the proceeding. Is that right?

MR. CORDELL: I think the answer is yes . . .

JUDGE CHEN: It's a runaway train to the final written decision?

MR. CORDELL: I think that's right

Oral Arg. at 5:35–6:47, http://oralarguments.ca9c.uscourts.gov/default.aspx?fl=20-1596_03052021.mp3.

That cannot be correct. The Board should certainly have the authority to revisit its institution decision past the regulatory deadline for patentees to seek reconsideration as a matter of right. Otherwise, petitioners would be encouraged to commit fraud and lie to get an IPR instituted to create a “runaway train to the final written decision.” Sling’s position that “final” precludes all further agency review is untenable and must be rejected.

2. While there is no “split” in existing authority, Sling’s petition invites this Court to create one.

Finally, *en banc* review is particularly unjustified here because there is no “split” in this Court’s authorities. Instead of resolving a split, Sling seeks to create one. It would have the Court reverse the panel decision and also overturn the Court’s precedential decisions in *Medtronic*, *GTNX*, and *BioDelivery*. Pet. at 14 (“they must be reconsidered *en banc* and reversed). But these three precedents are correct and

remain as sound today as when they were (recently) decided. Sling's request to overturn them is meritless, especially since this appeal lacks jurisdiction.

Sling's position also conflicts with *Mylan*. Sling's views about jurisdiction for IPR decisions cannot be squared with *Mylan*'s detailed and careful analysis of the relevant statutes. Sling fails to meaningfully distinguish *Mylan*. See Pet. at 14, n. 5.

Nor is there any tension between *Medtronic*, *GTNX*, and *BioDelivery* and this Court's decision in *Tokyo Kikai Seisakusho, Ltd. v. United States*, 529 F.3d 1352 (Fed. Cir. 2008). As Sling notes, each cites *Tokyo* for the proposition that administrative agencies have inherent authority to reconsider their decisions. Pet. at 14. This is correct and alone demonstrates that there is no "intra-Circuit" split here. *Tokyo* does stand for the cited proposition, and held that the ITC correctly determined that the Department of Commerce possesses inherent authority to consider the result of the yearly administrative review of a company's antidumping duty in light of the company's fraud. *Tokyo* at 1355–56.

Although *Tokyo* notes in dicta that agency reconsiderations "must occur within a reasonable time," it expressly states that this limit on an agency's exercise of inherent power is "not at issue in this case." *Id.* at 1361. Nor does *Tokyo* mention what may or may not constitute a reasonable time.

Sling is also wrong to suggest that this Court's precedents create a split with authorities from other courts. As discussed above, the Supreme Court's decisions in

SAS and *Thryv* are fully consistent with this Court's precedents, as this Court itself has explained. Nor is there any tension with the Fifth Circuit's decision in *Macktal v. Chao*, which is factually and legally inapposite. 286 F.3d 822 (5th Cir. 2002).

Indeed in *Macktal*, the Fifth Circuit upheld the Department of Labor's inherent authority to reconsider its decision and award attorney's fees and costs. *Id.* at 826. It concluded that the agency acted within a reasonable time and did not abuse its discretion to reconsider its fees decision. *Id.* Thus, *Macktal* does not support Sling's argument that the Board abuses its discretion whenever it reconsiders a decision past the deadline for a party to seek rehearing as a matter of right.

IV. CONCLUSION

For the foregoing reasons, Sling's petition for rehearing should be denied.

Respectfully submitted,

Dated: June 9, 2021

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Federal Circuit by using the CM/ECF system on June 9, 2021. I also certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: June 9, 2021

/s/ Philip X. Wang
Philip X. Wang

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Rule 32(a) of the Federal Circuit Rules because it contains 3,625.

Dated: June 9, 2021

/s/ Philip X. Wang
Philip X. Wang