

No. 26-\_\_\_\_

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

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IN RE VOLKSWAGEN GROUP OF AMERICA, INC.,  
*Petitioner*

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On Petition for a Writ of Mandamus to the  
United States Patent and Trademark Office, Patent Trial and Appeal Board,  
Case No. IPR2025-00925

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**PETITION FOR A WRIT OF MANDAMUS**

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January 6, 2026

## CERTIFICATE OF INTEREST

**Case Number** 26-  
**Short Case Caption** In re Volkswagen Group of America, Inc.  
**Filing Party/Entity** Volkswagen Group of America, Inc.

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Date: January 6, 2026 Signature: /s/ Elliot C. Cook

Name: Elliot C. Cook

<b>1. Represented Entities.</b> Fed. Cir. R. 47.4(a)(1).	<b>2. Real Party in Interest.</b> Fed. Cir. R. 47.4(a)(2).	<b>3. Parent Corporations and Stockholders.</b> Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	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.	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.
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**4. Legal Representatives.** 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).

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### **STATEMENT OF RELATED CASES**

No other appeal in or from the same *inter partes* review (“IPR”) proceeding, IPR2025-00925, was previously before this or any other appellate court.

The patent at issue in this proceeding, U.S. Patent No. 8,085,192, is involved in the following case: *Longhorn Automotive Group LLC v. Volkswagen AG*, 2:24-cv-00933 (E.D. Tex.).

## **RELIEF SOUGHT**

Petitioner Volkswagen Group of America, Inc. (“Volkswagen”) respectfully requests this Court issue a writ of mandamus to the United States Patent and Trademark Office (“USPTO”) to vacate the discretionary denial of institution in IPR2025-00925 and remand to consider institution under a statutory framework that does not violate the nondelegation doctrine.

## **INTRODUCTION**

The USPTO denied Volkswagen’s petition for inter partes review, reasoning that Longhorn Automotive Group LLC (“Longhorn”) had “strong settled expectations” in its thirteen-year-old patent. Emboldened by decisions that interpret 35 U.S.C. § 314 to give the Director “complete discretion” to deny inter partes review, *see, e.g., Saint Regis Mohawk Tribe v. Mylan Pharms. Inc.*, 896 F.3d 1322, 1327 (Fed. Cir. 2018), the USPTO has made such extra-statutory denials the norm. Thus far, the USPTO has used § 314(d) to shield from appellate review the question of whether the Director can create discretionary considerations like “settled expectations” to justify denying a petition that otherwise satisfies the statutory requirements for institution.

The USPTO’s extension of the “complete discretion” language to its current body of discretionary denial considerations, found nowhere in any statute, highlights the constitutional issue that this interpretation of § 314 creates. The Constitution

precludes Congress from delegating its legislative powers to other branches of government. *Gundy v. United States*, 588 U.S. 128, 135 (2019). If Congress wants to “‘vest[] discretion’ in executive agencies to implement and apply the laws it has enacted,” it must “set out an ‘intelligible principle’ to guide what it has given the agency to do.” *FCC v. Consumers’ Rsch.*, 606 U.S. 656, 672-73 (2025) (quoting *J.W. Hampton, Jr. Co. v. United States*, 276 U.S. 394, 406, 409 (1928)). Otherwise, it runs afoul of the nondelegation doctrine. If Congress, indeed, delegated such unbounded authority to the Director, so that the Director can deny institution for any reason or even no reason at all, then no “intelligible principle” exists, and that delegation of power violates the separation of powers under the nondelegation doctrine.

This problem does not mean the end of inter partes reviews, as the Court can cure this constitutional violation by interpreting the statute as it is written—to permit the Director to discretionarily deny institution only when authorized by statute. *See, e.g.*, 35 U.S.C. § 325(d) (allowing the Director to “reject the petition . . . because, the same or substantially the same prior art or arguments previously were presented to the Office”). This is also consistent with the Supreme Court’s policy of “giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional” under the nondelegation doctrine. *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989) (collecting cases).

## **ISSUE PRESENTED**

Whether Congress violated the nondelegation doctrine, and hence the separation of powers principle of the Constitution, by granting to the Director of the USPTO unbounded discretion to deny institution of inter partes review, even when the petition otherwise meets the requirements for institution.

## **STATEMENT OF FACTS**

### **I. Volkswagen Petitioned for Inter Partes Review**

Volkswagen petitioned for inter partes review of U.S. Patent No. 8,085,192 (the “’192 patent”), asserting four grounds of unpatentability and challenging all 22 claims of the ’192 patent. Appx8-120. As Volkswagen’s petition explained, the ’192 patent was allowed in error. Appx21; Appx25; Appx108. The Examiner’s sole stated reason for allowance was the claim limitation: “A removable storage module for storing the encrypted location . . . .” Appx21; Appx25; *see* Appx108. This was erroneous because independent claims 13 and 22 do not require “removable” storage, and instead more broadly recite: “[a] storage module for storing the encrypted location . . . .” Appx21; Appx25; *see* Appx108. Regardless of this error, the petition showed why each claim was unpatentable based on the cited prior art.

### **II. The Director Discretionarily Denied Volkswagen’s Petition**

Longhorn requested discretionary denial of Volkswagen’s petition. Appx121-138. While Longhorn never addressed, much less contested, the Examiner’s error, it

argued that factors such as the '192 patent's age and the proximity of trial in parallel litigation warranted discretionary denial. Appx126-135.

Volkswagen responded in detail, explaining why the merits of Volkswagen's petition were strong and every known discretionary factor either supported institution or was neutral. Appx139-204. Volkswagen's analysis addressed all six factors specified in the Board's precedential decision, *Apple Inc. v. Fintiv, Inc.*, IPR2020-00019, Paper 11 (P.T.A.B. Mar. 20, 2020). Appx151-152; Appx157-183; Appx195-200. Volkswagen also addressed the newly relevant factor of "settled expectations," explaining why the Examiner's undisputed error during prosecution weighed in favor of institution, consistent with other Board decisions. Appx183-186. Volkswagen pointed out that Longhorn's conclusory arguments about "settled expectations" were entitled to no weight, consistent with this Court's and the Board's prior decisions. Appx183-184; Appx186-189. Volkswagen further noted that its broad stipulation akin to statutory estoppel further favored institution, and Longhorn's settled expectations arguments were overcome by other evidence. Appx184; Appx189-195.

Despite Volkswagen's detailed arguments, the Director discretionarily denied the petition. Appx1-4. The Director's only stated reason for denying institution was that the age of the patent created "strong settled expectations" for Longhorn. Appx2. The Director recognized that the proximity of a district court trial was neutral and

thus would “neither favor nor counsel against discretionary denial.” Appx2. The Director also disagreed with Volkswagen’s identification of the Examiner’s error during prosecution. Appx2. While Longhorn never disputed this error, the Director asserted without explanation that Volkswagen’s arguments concerning the error did “not accurately characterize the prosecution history.” Appx2.

### **III. The Director Denied Volkswagen’s Request for Director Review**

Volkswagen requested Director Review of the Director’s discretionary denial for three reasons. Appx205-217. First, the file history—including the Examiner’s own statements—rendered the Examiner’s error during prosecution unambiguous. Appx208-212. Second, Volkswagen’s unpatentability grounds were demonstrably strong on the merits. Appx212-213. Lastly, the Director erred by failing to discuss several of Volkswagen’s arguments in favor of institution, contravening both the Administrative Procedure Act and Due Process. Appx213-215. On November 12, 2025, following Longhorn’s opposition, the Director reaffirmed the prior discretionary denial without explanation. Appx5-7.

Throughout the proceeding, the Director therefore never addressed the merits of Volkswagen’s unpatentability grounds. Nor did the Director invoke a statutory ground for discretionary denial, such as 35 U.S.C. § 325(d). Instead, the Director simply denied Volkswagen’s petition as a matter of the Director’s discretion based

on “settled expectations.” And then the Director upheld that decision without providing any reasoning.

### **STANDARD OF REVIEW**

Because 35 U.S.C. § 314(d) “prevents any direct appeal,” the Court’s “mandamus jurisdiction is especially important” when the USPTO denies institution of a petition for inter partes review. *Mylan Lab’ys Ltd. v. Janssen Pharmaceutica, N.V.*, 989 F.3d 1375, 1380 (Fed. Cir. 2021). To protect its future jurisdiction, this Court has “jurisdiction to review any petition for a writ of mandamus denying institution of an IPR.” *Id.* at 1381. To show that it is entitled to mandamus, “[t]he petitioner must: (1) show that it has a clear and indisputable legal right; (2) show it does not have any other adequate method of obtaining relief; and (3) convince the court that the writ is appropriate under the circumstances.” *Id.* at 1381-82.

### **REASONS WHY THE WRIT SHOULD ISSUE**

#### **I. The Director’s Unbridled Authority to Deny Institution of Inter Partes Review Clearly and Indisputably Violates Separation of Powers**

The Supreme Court and Federal Circuit have, thus far, interpreted 35 U.S.C. § 314 to give the USPTO Director complete discretion in deciding to deny institution of inter partes review. *See SAS Inst., Inc. v. Iancu*, 584 U.S. 357, 366 (2018) (stating “§ 314(a) invests the Director with discretion on the question *whether* to institute review”); *Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261, 273 (2016) (“[T]he agency’s decision to deny a petition is a matter committed to the Patent Office’s

discretion.”); *Mylan*, 989 F.3d at 1382 (stating “the Supreme Court has determined that” a decision to deny institution “is committed to agency discretion by law”); *Saint Regis Mohawk Tribe v. Mylan Pharms. Inc.*, 896 F.3d 1322, 1327 (Fed. Cir. 2018) (“If the Director decides not to institute, for whatever reason, there is no review. In making this decision, the Director has complete discretion to decide not to institute review.”). In particular, this Court has interpreted § 314(a) to mean that “[t]he Director is permitted, but never compelled, to institute an IPR,” even if the Director determines that the petition shows a reasonable likelihood that the petitioner would prevail. *Mylan*, 989 F.3d at 1382; *Wi-Fi One, LLC v. Broadcom Corp.*, 878 F.3d 1364, 1372 (Fed. Cir. 2018) (en banc), *abrogated on other grounds by Thryv, Inc. v. Click-to-Call Techs., LP*, 590 U.S. 45 (2020). And because a Director’s determination “whether to institute” is “final and nonappealable” under § 314(d), this Court has held that “there is no reviewability of the Director’s exercise of his discretion to deny institution except for colorable constitutional claims.” *Mylan*, 989 F.3d at 1382.

While courts have discussed the Director’s discretion to deny institution, no court has yet addressed whether interpreting § 314 to give the Director unfettered discretion reflects an unconstitutional delegation of power. If Congress indeed delegated such unbounded, unreviewable authority to the Director—so broad the Director could override Congress and shut down inter partes review entirely, for any

reason or no reason—that delegation violates separation of powers under the nondelegation doctrine. The Constitution forbids this kind of uncontrolled and unreviewable delegation of power from the legislative branch to the executive.

**A. The Constitution prohibits Congress from delegating legislative powers to agencies with unbounded discretion**

Under Article I of the Constitution, “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.” U.S. Const. art. I, § 1. “Accompanying that assignment of power to Congress is a bar on its further delegation.” *Gundy v. United States*, 588 U.S. 128, 135 (2019). For Congress to “‘vest[] discretion’ in executive agencies to implement and apply the laws it has enacted,” it must “set out an ‘intelligible principle’ to guide what it has given the agency to do.” *FCC v. Consumers’ Rsch.*, 606 U.S. 656, 672-73 (2025) (quoting *J.W. Hampton, Jr. Co. v. United States*, 276 U.S. 394, 406, 409 (1928)); see *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001) (requiring Congress to provide an intelligible principle when it “confers decisionmaking authority upon agencies”). A statutory delegation of discretion that fails to provide an intelligible principle is unconstitutional. *Gundy*, 588 U.S. at 135-36; see *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541-42 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 430 (1935).

Determining whether “Congress has supplied an intelligible principle to guide the delegee’s use of discretion” begins by “construing the challenged statute to figure

out what task it delegates and what instructions it provides.” *Gundy*, 588 U.S. at 135-36. “Only after a court has determined a challenged statute’s meaning can it decide whether the law sufficiently guides executive discretion to accord with Article I.” *Id.* at 136. Finding an intelligible principle in a challenged statute requires that “Congress has made clear both ‘the general policy’ that the agency must pursue and ‘the boundaries of [its] delegated authority.’” *Consumers’ Rsch.*, 606 U.S. at 673 (alteration in original) (quoting *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)). In other words, Congress must have “provided sufficient standards to enable both ‘the courts and the public [to] ascertain whether the agency’ has followed the law.” *Id.* at 673 (alteration in original) (quoting *OPP Cotton Mills, Inc. v. Adm’r of Wage & Hour Div., Dep’t of Labor*, 312 U.S. 126, 144 (1941)). This is because “[p]rivate rights are protected by access to the courts to test the application of the policy in the light of these legislative declarations.” *Am. Power & Light*, 329 U.S. at 105.

Two notable Supreme Court cases have held that statutes delegating unbounded discretion to the executive were unconstitutional. *See Schechter Poultry*, 295 U.S. at 541-42; *Panama Refining*, 293 U.S. at 430. In *Schechter Poultry*, the Court explained that “Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry.” 395 U.S. at

537-38. The Court held the challenged statute was unconstitutional because it delegated to the President “virtually unfettered” discretion “in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country.” *Id.* at 541-42. Similarly in *Panama Refining*, the Court held unconstitutional a statute that delegated the ability to prohibit petroleum transportation because Congress “established no standard,” “laid down no rule,” and provided no requirement or “definition of circumstances and conditions in which the transportation [was] to be allowed or prohibited.” 293 U.S. at 430. Instead, Congress gave the President “unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit.” *Id.* at 415.

**B. The Director’s complete discretion to deny institution for any reason lacks an intelligible principle**

Courts have interpreted § 314 to give the Director “complete discretion” in deciding to deny a petition that otherwise meets the requirements for institution. *E.g.*, *Saint Regis*, 896 F.3d at 1327. Under this interpretation, § 314 presents an unconstitutional delegation of authority to the Director that allows him to deny any petition for inter partes review for any reason or, if desired, shut down inter partes review entirely. Such a delegation without Congress providing a general policy that the Director must follow or boundaries on the delegated authority violates the nondelegation doctrine.

### 1. Congress delegated legislative power to the Director

Congress “delegated legislative power to the agency” when it gave the Director “decisionmaking authority” to refuse a second look at a potentially invalid patent and force invalidity challenges into district court. *Whitman*, 531 U.S. at 472. The Constitution grants to Congress the power “[t]o promote the Progress of . . . useful Arts, by securing for limited Times to . . . Inventors the exclusive Right to their respective . . . Discoveries.” U.S. Const. art. I, § 8, cl. 8. Under this power, “Congress can grant patents itself by statute.” *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 584 U.S. 325, 334 (2018) (citing *Bloomer v. McQuewan*, 55 U.S. 539, 548 (1852)). Congress has also “authorized the Executive Branch to grant patents that meet the statutory requirements for patentability.” *Id.* at 336 (citations omitted). But “[t]he far-reaching social and economic consequences of a patent . . . give the public a paramount interest in seeing that patent monopolies . . . are kept within their legitimate scope.” *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 816 (1945). Indeed, “Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain,” as this would violate the constitutional command to “promote the Progress of . . . useful Arts,” which “may not be ignored.” *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 6 (1966).

“Inter partes review involves the same basic matter as the grant of a patent.” *Oil States*, 584 U.S. at 336. Relying on legislative history, the Supreme Court has stated that Congress created inter partes review both to “resolve concrete patent-related disputes among parties” and to protect the public’s interest in keeping patent monopolies within their legitimate scope. *Cuozzo*, 579 U.S. at 279-80 (citing *Precision Instrument*, 324 U.S. at 816; H.R. Rep. No. 112–98, pt. 1, at 39-40 (2011)). Inter partes review allows “a person who is not the owner of a patent,” upon paying a fee determined to be “reasonable, considering the aggregate costs of the review,” to “request to cancel as unpatentable 1 or more claims” of the patent. 35 U.S.C. § 311(a)-(b). The Director then determines “whether to institute an inter partes review” pursuant to the petition. 35 U.S.C. § 314(b).

Based on its creation and application of nonstatutory discretionary considerations, the agency views § 314 as conferring decision-making authority in setting the policies for when the agency should let patentees maintain their potentially invalid monopolies, despite a reasonable likelihood that their patent never should have issued, and force parties into resolving their patent challenges through district court litigation. *See Whitman*, 531 U.S. at 472. This case presents an example of the Director creating legislative policy out of whole cloth, as the Director denied institution because “the challenged patent has been in force for thirteen years creating strong settled expectations for Patent Owner.” Appx2. Rather than carrying

out any Congressionally stated purpose for creating inter partes review, *see Cuozzo*, 579 U.S. at 279-80, the Director exercised Congress' patent power and enacted a policy that it will ignore evidence that a patent is invalid if the patent is old. An agency exercises legislative power when it "reject[s] the policy judgment made by Congress and rel[ies] on [its] own policy judgment." *See Clinton v. City of New York*, 524 U.S. 417, 444 (1998). Thus far, interpretations of § 314 have allowed just that. If Congress gave the Director authority to deny any and all petitions, Congress left "the expediency" and "the just operation" of inter partes review to the determination of the Director. *See id.* at 442 (quoting *Field v. Clark*, 143 U.S. 649, 693 (1892)).

Moreover, the Director's discretionary denial of inter partes review forces petitioners to instead litigate invalidity disputes in district court before a jury with a higher burden of proof. In *Jarkesy v. SEC*, the court held that Congress's delegation of the ability to determine which "actions are entitled to Article III proceedings with a jury trial, and which are not . . . was a delegation of legislative power." 34 F.4th 446, 461 (5th Cir. 2022), *affirmed on other grounds by SEC v. Jarkesy*, 603 U.S. 109 (2024). This is because "the mode of determining' which cases are assigned to administrative tribunals 'is completely within congressional control.'" *Id.* (quoting *Crowell v. Benson*, 285 U.S. 22, 50 (1932)). This is especially true in matters involving public rights like the validity of a patent. *See Oil States*, 584 U.S. at 334; *Crowell*, 285 U.S. at 50. The ability to deny a petition at the Director's absolute

discretion presents a similar situation to *Jarkesy* because it means the Director gets to determine which petitioners have their “concrete patent-related disputes” resolved through inter partes review, *Cuozzo*, 579 U.S. at 279, and which petitioners must instead litigate their invalidity challenges in district court. The decision “to assign certain actions to agency adjudication . . . is a power that Congress uniquely possesses.” *Jarkesy*, 34 F.4th at 462.

## **2. Congress failed to provide an intelligible principle to guide the Director**

Congress failed to provide anything resembling an intelligible principle for when the Director should deny institution, despite the petition otherwise satisfying all the criteria for institution. Instead, the statute—as it is currently being interpreted—allows each Director to unilaterally decide the circumstances in which it will or will not resolve the parties’ patent-related disputes, and honor or not the public’s interest in keeping patent monopolies within their legitimate scope. *Cuozzo*, 579 U.S. at 279-80.<sup>1</sup> This interpretation of the statute creates “a monster which rules with no practical limits on its discretion,” as petitioners have no way of knowing the discretionary considerations that the Director will apply to their petitions and no way

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<sup>1</sup> The Director has argued to this Court that the statutory scheme allows the Director to exercise the discretionary authority “on an ad hoc basis, without delegating it to the Board, and without any written explanation of [the Director’s] reasons or the factors [the Director] considers more generally.” Corrected Brief for Appellee at 32, *Apple Inc. v. Vidal*, No. 22-1249 (Fed. Cir. May 4, 2022).

of challenging the Director's application of those discretionary considerations. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167 (1962) (citation omitted)).

Beginning with “what [Congress] has given the agency to do,” *Consumers' Research*, 606 U.S. at 673, the Director must “determine whether to institute an inter partes review . . . pursuant to a petition filed under section 311,” 35 U.S.C. § 314(b). For this to be constitutional, Congress must have “set out an ‘intelligible principle’ to guide” the Director in performing this task. *Consumers' Rsch.*, 606 U.S. at 673 (quoting *J.W. Hampton*, 276 U.S. at 409). Congress provided sufficient guidance for when the Director is *authorized* to institute inter partes review. For example, § 314(a) “identifies a threshold requirement for institution.” *Wi-Fi One*, 878 F.3d at 1372. Other provisions likewise restrict the Director's authority to institute inter partes review. *See, e.g.*, 35 U.S.C. § 315(a)(1), (b), (e)(1).

But this Court has stated that § 314(a) “grants the Director discretion not to institute even when the threshold is met” and “does not address any other issue relevant to an institution determination.” *Wi-Fi One*, 878 F.3d at 1372; *see Cuozzo*, 579 U.S. at 273 (characterizing § 314(a) as providing “no mandate to institute review”); *Saint Regis*, 896 F.3d at 1327 (stating the Director could deny review for “reasons such as administrative efficiency or based on a party's status as a sovereign”). Congress has not set out an intelligible principle guiding the Director

in deciding to deny institution, even when the requirements for institution are met. Congress has not given the Director a “general policy” to pursue, nor has it made clear “the boundaries of [the Director’s] delegated authority.” *Consumers’ Rsch.*, 606 U.S. at 673. To the extent *Cuozzo*’s statement about “[t]he purpose of [inter partes review]” provides a general policy for institution, 579 U.S. at 279-80, the Director is not bound to carry out that general policy if the Director has complete discretion in deciding to deny any petition for any reason. Under these circumstances, Congress’ delegation to the Director is unconstitutional.

While the nondelegation doctrine has rarely been applied to hold a statute unconstitutional, rarely in cases raising a nondelegation challenge does the executive branch have complete discretion without any guidance or constraints on its delegated authority. In such situations, courts have held those delegations unconstitutional. In *Schechter Poultry*, the Supreme Court held unconstitutional a statute that delegated to the President “virtually unfettered” discretion “in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country.” 395 U.S. at 541-42. In *Panama Refining*, the Court held unconstitutional a statute that allowed the prohibition of petroleum transportation because Congress had “established no standard,” “laid down no rule,” or provided no requirement or “definition of circumstances and conditions in which the transportation [was] to be allowed or prohibited.” 293 U.S. at 430. And in *Jarkesy*, the Fifth Circuit held

unconstitutional a statute that gave the SEC “*no guidance whatsoever*” in determining “which subjects of its enforcement actions are entitled to Article III proceedings with a jury trial, and which are not.” 34 F.4th at 461-62.

Similarly here, “[t]he PTO’s claim to unchecked discretionary authority is unprecedented.” *Shaw Indus. Grp., Inc. v. Automated Creel Sys., Inc.*, 817 F.3d 1293, 1303 (Fed. Cir. 2016) (Reyna, J., concurring). Courts have interpreted § 314 to give the Director unlimited authority to determine the policy and to decide when to institute, or not institute, as the Director may see fit, thereby violating the nondelegation doctrine. *See Panama Refining*, 293 U.S. at 415. “If the intelligible principle standard means anything, it must mean that a total absence of guidance is impermissible under the Constitution.” *Jarkesy*, 34 F.4th at 463.

Even worse, Congress made the Director’s determination “whether to institute an inter partes review under this section . . . final and nonappealable.” 35 U.S.C. § 314(d). This provision has been interpreted as “a congressional protection from judicial review of the substance of the Director’s institution discretion.” *Apple Inc. v. Vidal*, 63 F.4th 1, 14 (Fed. Cir. 2023); *see also id.* at 13 (“Nothing in the unreviewability principle . . . turns on whether the Director has provided an explanation . . .”). Accordingly, not only did Congress fail to provide a general policy for the Director to follow or boundaries to constrain the Director’s authority, but petitioners do not even have “access to the courts” to ensure the Director

complies with the Administrative Procedure Act when considering their petitions. *Am. Power & Light*, 329 U.S. at 105; *see Apple*, 63 F.4th at 11-14 (affirming dismissal of arbitrary-and-capricious challenge under the APA). All petitioners can do is pay their nonrefundable filing fee and hope the Director feels like reviewing the merits.

The lack of Congressional guidance deserves extra scrutiny here, where “the scope of the power congressionally conferred” can have a profound impact on the economy. *See Whitman*, 531 U.S. at 475. Congress “must provide substantial guidance” when the power conferred can “affect the entire national economy.” *Id.* Here, “[b]illions of dollars can turn on a Board decision” in an inter partes review. *United States v. Arthrex*, 591 U.S. 1, 6 (2021). Underscoring the impact that inter partes review has on the economy, the agency’s last two attempts to propose discretionary denial regulations have garnered over 14,000 and over 11,000 comments, respectively. “The Public Has Spoken – Again: For a Second Time, Stakeholders Overwhelmingly Oppose Agency Proposals that Would Restrict Access to Inter Partes Review,” Unified Patents (Dec. 18, 2025), *available at* <https://www.unifiedpatents.com/insights/2025/12/17/the-public-has-spoken-again>. The Director’s ability, if desired, to shut off access to IPRs entirely without recourse for petitioners requires something more than statutory silence from Congress.

True, § 316 states “[t]he Director shall prescribe regulations” on certain issues related to inter partes review and includes certain things that “the Director shall consider” “[i]n prescribing regulations.” 35 U.S.C. § 316(a)-(b). But the agency believes that “[t]he AIA contains no requirement that the Director prescribe regulations with respect to the exercise of” its institution discretion and has, thus far, acted consistently with that belief. Brief for Appellee at 3-4, *Apple Inc. v. Squires*, No. 24-1864, Dkt. 49 (Fed. Cir. Oct. 16, 2024). If the agency is correct (which this Court has not yet decided as of the filing of this petition), then § 316(a)-(b) is inapposite to the intelligible-principle inquiry here. Those provisions relate only to what is required when prescribing regulations, and the agency has never prescribed regulations for discretionary denial. The same goes for § 2(b)(2), which likewise relates only to “establish[ing] regulations.” 35 U.S.C. § 2(b)(2).

Similarly, the agency does not view § 325(d) as providing any sort of general policy the Director must follow or boundaries on the Director’s discretion. *See* 35 U.S.C. § 325(d). Addressing its “settled expectations” discretionary factor, the Director recently argued to this Court that § 325(d) provides “no actual limitations” on the Director’s ability to discretionarily deny institution. Director’s Response to Petition for Writ of Mandamus at 27-29, *In re Cambridge Indus. USA Inc.*, No. 26-101, Dkt. 20 (Fed. Cir. Oct. 24, 2025). Even though § 325(d) provides that “the Director may take into account whether, and reject the petition . . . because, the same

or substantially the same prior art or arguments previously were presented to the Office,” this statute cannot serve as an intelligible principle under the current interpretation of § 314 because it does not provide a general policy the Director must pursue or impose boundaries on his delegated authority. *See Consumers’ Rsch.*, 606 U.S. at 673. Indeed, if the Director has absolute discretion to deny a petition, § 325(d) would be superfluous as subsumed within that unlimited discretion. *See* Section I.C., *infra*.

While the Director has continued to institute a limited number of inter partes review proceedings, that cannot cure the constitutional defect that allows the Director to deny all petitions as a rule, without reason or explanation. Courts “have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute.” *Whitman*, 531 U.S. at 472. Under the current interpretation of the law, nothing would prevent the Director from dropping its “settled expectations” policy (and other nonstatutory discretionary considerations) tomorrow and denying all petitions as a matter of policy. The fact that this unconstrained discretion exists, whether the Director avails itself of that discretion or not, creates the constitutional defect associated with the nondelegation doctrine.

If Congress has, indeed, delegated unfettered discretion to the Director to decide the policies for discretionary denial and immunized those policies from

appellate review, that is precisely the type of delegation the Supreme Court recently explained is unconstitutional under the nondelegation doctrine. *Consumers' Rsch.*, 606 U.S. at 673. There are no Congressional policies the agency must pursue, no boundaries constraining the agency's authority to deny institution, and no means for the courts or the public to understand whether the agency is following the law. *Id.* The current interpretation of § 314 creates an unconstitutional delegation of power that violates the nondelegation doctrine.

**C. The Court may cure the constitutional violation by preserving statutory discretionary denial but eliminating the Director's ability to create new bases for discretionary denial not found in the statutes**

Having established a constitutional violation, the next question is the appropriate remedy. Here, the nondelegation problem stems from how courts have interpreted § 314 to give the Director unfettered power to deny institution. *See* Section I.B., *supra*. Bringing that power back within Congressional guidelines will cure the constitutional defect. Thus, the Court should construe § 314 to permit the Director to deny institution only when a statute permits such discretionary denial. Denying institution for nonstatutory reasons (e.g., “settled expectations”) is otherwise prohibited.

Congress has already given the Director several bases to deny institution. As discussed above, for example, the Director may not institute review when a petition fails to show a “reasonable likelihood” of prevailing on at least one challenged claim.

35 U.S.C. § 314(a). Nor may the Director institute if the petitioner previously filed a civil action challenging the validity of the patent (§ 315(a)(1)) or when the petitioner files its petition more than one year after service of a complaint alleging infringement of the patent (§ 315(b)). Petitioners also may not request or maintain proceedings before the Office on any ground they “raised or reasonably could have raised” in a prior IPR reaching a final decision. 35 U.S.C. § 315(e)(1). These bases are nondiscretionary—the Director *must* deny institution if the petition does not satisfy these criteria. Most critically, Congress also provided the Director with discretion to “take into account whether, and reject the petition . . . because, the same or substantially the same prior art or arguments previously were presented to the Office” in “determining whether to institute.” 35 U.S.C. § 325(d). By statute, this consideration lies within the Director’s discretion. *Id.* (“may”).

Volkswagen’s construction of § 314 does not upset this framework. The Director may continue denying institution for any of these statutory reasons and others so enumerated. But when a petition otherwise meets statutory requirements for review, the Director may not invent extrastatutory bases for denying institution, such as “settled expectations.” Such unbounded power violates the nondelegation principle. *See* Section I.B., *supra*.

Volkswagen’s proposed solution to the nondelegation problem also gives meaning to the discretionary powers expressly granted by statute, which are

superfluous under the agency's broader interpretation. Consider § 325(d)'s grant of authority to deny institution when "the same prior art or arguments previously were presented to the Office." This grant of discretionary authority when the Director finds that a specific set of facts exists would be superfluous if § 314 permitted the Director to deny discretion for any reason at all. The same goes for Director's authority to "impose a limit on the number of inter partes reviews that may be instituted . . . during each of the first 4 1-year periods" of inter partes reviews "if such number in each year equals or exceeds the number of inter partes reexaminations that [were] ordered . . . in the last fiscal year ending before the effective date" of the inter partes review amendments. Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284, 304 (2011). Absent a compelling justification, courts generally do not construe statutes to render other statutory terms superfluous. *See, e.g., Corley v. United States*, 556 U.S. 303, 314-15 (2009); *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 166 (2004); *Dole Food Co. v. Patrickson*, 538 U.S. 468, 476-77 (2003); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955). Interpreting § 314 to give the Director unlimited discretion to deny institution makes these provisions in § 325(d) and in the AIA unnecessary. In contrast, interpreting the statutes to preclude discretionary denial for reasons not expressly provided for by statute is a simple application of the common canon that "[w]hen a statute limits a thing to be done in a particular mode, it includes the

negative of any other mode.” *Nat’l R.R. Passenger Corp. v. Nat’l Ass’n of R.R. Passengers*, 414 U.S. 453, 458 (1974) (citation omitted).

Volkswagen’s proposed framework has analogues in other contexts. In patent reexamination, for example, the Director *must* determine whether a reexamination request raises a substantial new question of patentability and, if so, *must* order “reexamination of the patent for resolution of the question.” 35 U.S.C. §§ 303-304. The Director may discretionarily deny only under 35 U.S.C. § 325(d). Volkswagen’s proposal operates in a similar way: if a petition meets all statutory requirements for institution, and the Director determines that a statutory basis for discretionary denial (e.g., § 325(d)) does not apply, no other discretionary denial option is available and thus the petition must be instituted.

Interpreting § 314 to permit the Director to discretionarily deny institution only when a statute permits such discretionary denial would thus cure the current constitutional problem. Adopting this interpretation conforms with the Supreme Court’s policy of “giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional” under the nondelegation doctrine. *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989) (collecting cases).

## **II. Volkswagen Has No Other Adequate Method of Obtaining Relief**

“Given that there is no adequate remedy by way of direct appeal” from a decision denying institution, Volkswagen has no other adequate method for

obtaining relief here. *In re Palo Alto Networks, Inc.*, 44 F.4th 1369, 1374 (Fed. Cir. 2022). Moreover, raising this issue during the inter partes review proceeding would have been futile. Courts have “consistently recognized a futility exception to exhaustion requirements” because “[i]t makes little sense to require litigants to present claims to adjudicators who are powerless to grant the relief requested.” *Carr v. Saul*, 593 U.S. 83, 93 (2021) (collecting cases); *see also Califano v. Sanders*, 430 U.S. 99, 109 (1977) (“Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions.”). The USPTO has previously declined to address a constitutional challenge under the nondelegation doctrine. *See Cirrus Logic, Inc. v. Greenthread, LLC*, No. IPR2024-00016, Paper 76 at 65-66 (P.T.A.B. Apr. 29, 2025). Moreover, this Court can address “structural constitutional concerns” regardless of whether the issue was raised before the agency. *Palo Alto*, 44 F.4th at 1374 (quoting *Ciena Corp. v. Oyster Optics, LLC*, 958 F.3d 1157, 1160 (Fed. Cir. 2020)).

### **III. Writ of Mandamus Is Appropriate Under the Circumstances**

Mandamus is appropriate “to decide ‘basic’ and ‘undecided’ questions” and “to further supervisory or instructional goals where issues are unsettled and important.” *In re BigCommerce, Inc.*, 890 F.3d 978, 981 (Fed. Cir. 2018) (quoting *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964) and *In re Queen’s Univ. at*

*Kingston*, 820 F.3d 1287, 1291 (Fed. Cir. 2016)). Mandamus is also warranted when “important to ‘proper judicial administration.’” *In re Cray Inc.*, 871 F.3d 1355, 1358-59 (Fed. Cir. 2017) (quoting *Schlagenhauf*, 379 U.S. at 110 and *In re BP Lubricants USA Inc.*, 637 F.3d 1307, 1313 (Fed. Cir. 2011)). This issue is important and unsettled. No court has yet addressed whether Congress can constitutionally grant the Director complete discretion in deciding whether to deny a petition that otherwise meets the requirements for institution. Underscoring the importance of this issue, the agency received over *eleven thousand* comments in response to its recent notice of proposed rulemaking that would create new bases for denying inter partes review. “The Public Has Spoken – Again: For a Second Time, Stakeholders Overwhelmingly Oppose Agency Proposals that Would Restrict Access to Inter Partes Review,” Unified Patents (Dec. 18, 2025), *available at* <https://www.unifiedpatents.com/insights/2025/12/17/the-public-has-spoken-again>. The Court should grant mandamus to decide this important issue.

## CONCLUSION

The Court should grant Volkswagen's petition, vacate the non-institution decision, and remand for the Director to determine whether to institute inter partes review in a manner consistent with constitutional separation of powers.

Date: January 6, 2026

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system on January 6, 2026.

I further certify that I caused a paper copy of this document (and the attached appendix, entry of appearance, certificate of interest, and notice of related cases) to be served upon lead counsel for respondent Longhorn Automotive Group, LLC at the following address via Federal Express:

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cases) to be sent to [efileSO@uspto.gov](mailto:efileSO@uspto.gov) and a paper copy of the same to be served upon the Director of the U.S. Patent and Trademark Office at the following address via USPS Priority Mail Express:

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## CERTIFICATE OF COMPLIANCE

1. This petition complies with the type-volume limitation of Federal Circuit Rule 21(d)(1) because the body of the petition contains 6,155 words, excluding the portions exempted by the rules.

2. This petition complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) or Federal Circuit Rule 28.1 and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 in 14 point font, Times New Roman.

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