

**UNITED STATES PATENT AND TRADEMARK OFFICE**  
**BEFORE THE PATENT TRIAL AND APPEAL BOARD**

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ONEPLUS TECHNOLOGY (SHENZHEN) CO., LTD.,  
Petitioners,

v.

PANTECH CORPORATION,  
Patent Owner

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**Case: IPR2025-00637**

**U.S. Patent No. 9,763,283**

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**PATENT OWNER'S RESPONSE TO  
PETITIONER'S REQUEST FOR DIRECTOR REVIEW**

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**TABLE OF CONTENTS**

	<b>Page</b>
I. INTRODUCTION .....	1
II. BACKGROUND .....	1
III. NO CHANGED CIRCUMSTANCES WARRANT REVERSAL OF THE DIRECTOR’S DISCRETIONARY DENIAL .....	2
A. To The Extent Other IPRs Can Have A Bearing On the Outcome Here, The Outcome Is Still Discretionary Denial .....	2
B. Changed Circumstances In Discretionary Denial Law Further Warrants Denial .....	5
C. The Merits Demonstrates Referral to the Board Would be Futile .....	9
IV. THERE IS NO VIOLATION OF DUE PROCESS OR THE APA .....	11
A. There Has Been No Violation of Due Process Rights .....	12
B. Notice and Comment Rulemaking Was Not Required .....	14
C. The “Arbitrary and Capricious” Standard Does Not Apply to Section 314(a) .....	15
V. CONCLUSION .....	15

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>Advanced Micro Devices, Inc. et al. v. Concurrent Ventures, LLC et al.</i> , IPR2025-00478, Paper 10 (Director July 31, 2025) .....	8
<i>Amazon.com Inc. et al. v. Audio Pod IP, LLC</i> , IPR2025-00768, Paper 15 (Director August 14, 2025).....	3
<i>Anthony Inc. v. Controltec LLC</i> , IPR2025-00559, Paper 12 (Director, July 16, 2025).....	11
<i>Apple Inc. v. Vidal</i> , 63 F.4th 1 (Fed. Cir. 2023).....	2, 8, 9, 15
<i>Arm Ltd. et al. v. Daedalus Prime LLC</i> , IPR2025-00207, Paper 14 (Director, August 6, 2025).....	9
<i>Cuozzo Speed Techs., LLC v. Lee</i> , 579 U.S. 261 (2016).....	12
<i>Eunsung Global Corp. v. HydraFacial LLC</i> , IPR2025-00445, Paper 14 (Director, July 10, 2025).....	10
<i>FCC v. Prometheus Radio Project</i> , 141 S. Ct. 1150 (2021).....	15
<i>Hallowell v. Commons</i> , 239 U.S. 506 (1916).....	14
<i>Landgraf v. Usi Film Prods.</i> , 511 U.S. 244 (1994).....	14
<i>Lincoln v. Vigil</i> , 508 U.S. 182 (1993).....	14
<i>Mercedes-Benz Group AG v. The Phelan Group, LLC</i> , IPR2025-00758, Paper 8 (Director, August 14, 2025).....	9

Case IPR2025-00637  
Patent No. 9,763,283  
Patent Owner Response to Request for Director Review

*Mexichem Fluor, Inc. v. Env’t Prot. Agency*,  
866 F.3d 451 (D.C. Cir. 2017) .....13

*Mylan Labs. Ltd. v. Janssen Pharmaceutica, N.V.*,  
989 F.3d 1375 (Fed. Cir. 2021) ..... 12, 14

*Samsung Electronics Co., Ltd. et al. v. Genghiscomm Holdings, LLC*,  
IPR2025-00780, Paper 11 (Director, Aug. 14, 2025) .....7

*Samsung Electronics Co., Ltd. et al. v. Icashe, Inc.*,  
IPR2025-00639-45, Paper 11 (Director August 14, 2025).....3

*Samsung Electronics Co., Ltd., v. Genghiscomm LLC*,  
IPR2025-00793, Paper 12 (Director Aug. 22, 2025) .....5, 6

*In re SAP America, Inc.*,  
No. 2025-132, Dkt. 39 (Fed. Cir. July 18, 2025) .....13

*SAS Inst., Inc. v. Iancu*,  
584 U.S. 357 (2018).....12

*Tafas v. Doll*,  
559 F.3d 1345 (Fed. Cir. 2009), 328 Fed. Appx. 658 (Fed. Cir.  
2009)) .....13

*Tafas v. Dudas*,  
511 F. Supp. 2d 652 (E.D. Va. 2007) .....13

*Town of Castle Rock v. Gonzales*,  
545 U.S. 748 (2005).....12

*Zhuhai Cosmox Battery Co., Ltd. v. Ningde Amperex Tech. Ltd.*,  
IPR2025-00385, Paper 9 (Director July 2, 2025) .....4

*Zhuhai Cosmox Battery Co., Ltd. v. Ningde Amperex Tech. Ltd.*,  
IPR2025-00431, Paper 14 (Director July 2, 2025) .....4

**Other Authorities**

37 C.F.R. § 42.75 .....8

Case IPR2025-00637  
Patent No. 9,763,283  
Patent Owner Response to Request for Director Review

*Interim Processes for PTAB Workload Management (“Process  
Memo”)*.....4  
U.S. Const. Amend. V .....12

Case IPR2025-00637

Patent No. 9,763,283

Patent Owner Response to Request for Director Review

### **PATENT OWNER'S EXHIBIT LIST**

<b>Exhibit No.</b>	<b>Description</b>
2001	Second Amended Docket Control Order, <i>Pantech Corporation and Pantech Wireless, LLC v. OnePlus Technology (Shenzhen) Co., Ltd.</i> , No. 5:24-CV-00038-RWS-JBB (E.D. Tex.) (Dkt. 58) (May 13, 2025)
2002	United States District Courts – National Judicial Caseload Profile
2003	Pantech Corporation's July 9, 2021 Notice Letter to OnePlus Technology Co., Ltd.
2004	Preliminary Claim Constructions from <i>Pantech Corp. et al. v. OnePlus Tech. (Shenzhen) Co., Ltd.</i> , No. 5:24-cv-00038-RWS-JBB (E.D. Tex.)

## **I. INTRODUCTION**

Patent Owner Pantech Corporation (“Pantech”) responds to Petitioner’s Request for Director review and respectfully requests that the Director affirm the discretionary denial of this IPR (Paper 17). Petitioner offers no new facts, legal authority, or other changed circumstances that would warrant reconsideration of the Director’s discretionary denial. The “all-or-none” theory advanced by Petitioner is unsupported and, even if accepted, would logically require denial of all pending petitions that Petitioner has filed against Pantech, not reversal of this one. Moreover, the proceedings have complied fully with due process requirements and the APA.

## **II. BACKGROUND**

U.S. Patent No. 9,763,283 issued on September 12, 2017. It has been asserted in *Pantech Corporation, et al. v. OnePlus Technology (Shenzhen) Co., Ltd.*, 5:24-cv-00038-RWS-JBB (E.D. Tex.), filed March 14, 2024. On March 18, 2025, Petitioner filed the instant petition. Paper 1. On June 17, 2025 Patent Owner filed its Request for Discretionary Denial of Institution Under 35 U.S.C. §§ 314(a) and 325(d). Paper 10. On July 17, 2025, Petitioner filed its Opposition. Paper 13. On July 22, 2025, Petitioner filed a supplemental brief to address a change in the district court schedule. Paper 14. On July 23, 2025, Patent Owner filed its supplemental brief explaining why the schedule change did not impact the bases for discretionary denial. Paper 15. On August 14, 2025, the Director denied institution under 35

U.S.C. § 314(a). Paper 17. This is the first of the Director’s decisions in a series of petitions filed by Petitioner, and no other decision on discretionary denial has yet been made.

### **III. NO CHANGED CIRCUMSTANCES WARRANT REVERSAL OF THE DIRECTOR’S DISCRETIONARY DENIAL**

#### **A. To The Extent Other IPRs Can Have A Bearing On the Outcome Here, The Outcome Is Still Discretionary Denial**

Petitioner’s reliance on IPR2025-00763 (“the ’763 IPR”) is misplaced. Director Review Request (“DRR”), at 1. While the ’763 IPR is currently before the PTAB panel due to Pantech not noticing an appearance until recently due to a docketing error, **a referral to the PTAB panel does not mean institution has been decided or granted.** The *Interim Processes for PTAB Workload Management* (“*Process Memo*”) provides a timeline for referral to the PTAB panel, but a referral does not finalize a decision on the basis of 35 U.S.C. § 314(a), and process memos such as these do not (and cannot) remove the ultimate discretion of the Director in deciding institution. *See Apple Inc. v. Vidal*, 63 F.4th 1, 7, 13 (Fed. Cir. 2023) (“the Director must be able to give guidance in the form of instructions to her delegatee(s)—the Board (or Board panels)—about how to make the institution determinations on her behalf” but “[w]e have also made clear that any institution decision made by the Board as delegatee of the Director is subject to reversal by the Director”). **Thus, the ’763 IPR may still be denied institution under Section**

**314(a)—a result that would be in keeping with precedent, as explained below, and would result in the same outcome as the instant IPR.**

Regardless, Petitioner’s “all-or-none” approach is illogical. Petitioner’s “all-or-none” approach would require that if a petitioner filed ten IPRs—nine against decade-old patents and one against a newly issued patent—all ten must be referred to a three-judge panel solely due to the presence of a single new patent.<sup>1</sup> This is contrary to established PTAB practice and precedent, which consistently evaluates each petition on its individual merits, often resulting in some petitions being denied and others granted, even where all patents are asserted in the same district court litigation. This individualized approach is grounded in the fact that each petition is evaluated on its own merits, considering the unique scope, prosecution history, and prior art challenges for each patent. As established by recent PTAB and Director

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<sup>1</sup> To the contrary, recent Discretionary Decisions have denied **all** petitions where, like here, the majority of the patents have been in force for longer periods of time even though one (*See Amazon.com Inc. et al. v. Audio Pod IP, LLC*, IPR2025-00768, Paper 15, at 2-3 (Director August 14, 2025)) or two patents (*Samsung Electronics Co., Ltd. et al. v. Icashe, Inc.*, IPR2025-00639-45, Paper 11, at 2-3 (Director August 14, 2025)) were in force for shorter period.

decisions, **the outcome of one petition does not dictate the outcome of others, even when the patents are co-pending in the same district court litigation.**

*Compare Zhuhai Cosmx Battery Co., Ltd. v. Ningde Amperex Tech. Ltd.*, IPR2025-00431, Paper 14 (Director July 2, 2025) and Paper 15 (PTAB August 19, 2025) (July 2025 referral to panel followed by August 2025 panel decision granting institution) *with Zhuhai Cosmx Battery Co., Ltd. v. Ningde Amperex Tech. Ltd.*, IPR2025-00385, Paper 9 (Director July 2, 2025) and Paper 10 (PTAB August 20, 2025) (July 2025 referral to panel followed by August 2025 panel decision denying institution). Petitioner’s “all or none” approach must be rejected.

Moreover, agreeing with Petitioner’s logic would force every Patent Owner who believes discretionary denial is warranted for one of its patents to file for discretionary denial on all of its challenged patents or risk automatic referral to the panel. This approach is entirely inconsistent with the purpose of the *Process Memo* to address “current workload needs of the PTAB.” *Process Memo*, at 3. Precedent should remain where patent owners, respecting the time of the Director, file requests for discretionary denial when warranted, not reflexively for every patent simply to avoid the argument Petitioner maintains here. Policy considerations that IPRs are meant to be an efficient alternative to district court validity challenges likewise warrant rejecting Petitioner’s “all-or-none” approach.

For these reasons alone, Petitioner’s eight IPR petitions cannot rise or fall together simply because the patents are all asserted in the same district court litigation. But if they do, the Director should exercise her power to deny institution for all eight, especially given the merits that weigh against institution in each, such as settled expectations, the expected trial date, and the investment made already in the district court case.<sup>2</sup>

**B. Changed Circumstances In Discretionary Denial Law Further Warrants Denial**

Petitioner’s assertion that two other related IPRs are likely to be referred to the Board (DRR, at 1) is unsupported and contrary to recent discretionary denial precedent. **Recent decisions have denied institution even for patents that have been in force for as little as three years, where “the same discretionary considerations” applied.** *See, e.g., Samsung Electronics Co., Ltd., v. Genghiscomm LLC*, IPR2025-00793, Paper 12, at 2 (Director Aug. 22, 2025) (“Although the patents challenged in these proceedings have not been in force for as long as those in IPR2025-00780 and IPR2025-00781, this fact alone does not tip the balance against discretionary denial.”). Of the six patents included in that decision, four

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<sup>2</sup> An up-to-date recitation of these common circumstances applicable across all eight petitions has been made of record, for example in IPR2025-00887, Paper 6 at 2-10.

Case IPR2025-00637  
Patent No. 9,763,283  
Patent Owner Response to Request for Director Review

issued in 2022, one issued in 2021, and one issued in 2019. *Id.* at 1-2. The two patents Petitioner now points to, U.S. Patent Nos. 10,863,573 and 10,764,803, *issued far earlier than 2022*, in December 2020 and September 2020, respectively, and other patents here date back to 2015-17:

<b>Related Proceeding</b>	<b>Patent No.</b>	<b>Date of Issuance</b>
<b>IPR2025-00637</b>	<b>9,763,283</b>	<b>Sept. 12, 2017</b>
IPR2025-00720	9,769,776	Sept. 19, 2017
IPR2025-00756	10,764,803	Sept. 1, 2020
IPR2025-00762	10,863,573	Dec. 8, 2020
IPR2025-00763	11,212,838	Dec. 28, 2021
IPR2025-00783	9,288,824	March 15, 2016
IPR2025-00887	8,995,372	March 31, 2015
IPR2025-00888	9,369,251	June 14, 2016

**Accordingly, discretionary denial precedent supports denying institution for the patents in IPR2025-00756 and IPR2025-00762, along with all others.**

Even if the Board were to institute in either of these two other petitions, which is unlikely, Petitioner’s continued reliance on an unverified judge-specific statistic to suggest that trial will post-date the FWD is unsupported and misleading. DRR, at 1-2. The alleged “statistic” that Petitioner cited to the Director was apparently derived by averaging Judge Schroeder’s time-to-trial, including for stayed cases, adding the entire length of the stay from the present litigation (effectively double-counting the stay), and then rounding the result up. This alleged statistic is not supported by any exhibit, does not accurately reflect the circumstances of this case,

and is not consistent with the standard median time-to-trial statistics typically used for *Fintiv* Factor 2. Rather, as Patent Owner has already explained and supported (see Paper 10, at 6, citing EX 2002, at 35), the median time to trial in the Eastern District of Texas is 21.6 months, suggesting a trial date in this case in January 2026 or at least around the scheduled pretrial conference date in April 2026, **well before the expected FWD on October 17, 2026**. Accordingly, Patent Owner respectfully requests reconsideration of the time to trial statistic cited in the Decision (Paper 17, at 2). The timeline in this case is nearly identical to *Samsung Electronics Co., Ltd. et al. v. Genghiscomm Holdings, LLC*, IPR2025-00780, Paper 11, at 2 (Director, Aug. 14, 2025), applying the time-to-trial statistic for the EDTX case of 21.6 months putting an anticipated trial in January 2026, which is before the FWD date of October 2026 and consistent with the scheduled trial date in April 2026. The same statistic and timeline, not Petitioner’s double-counted timeline, applies here.

None of these “developments” materially change the circumstances of this IPR; instead, at most, they confirm that the remaining petitions should also be denied based on settled expectations and an expected trial date prior to the FWD. Petitioner’s statement that “[r]eferring the instant IPR to the Board alongside the ’763 IPR promotes efficiency and consistency by allowing the Board to address the patentability of all patents asserted in the same parallel litigation in a single forum”

again conflates mere referral to the Board with a decision to institute—**institution has not been granted on any Pantech patent challenged by OnePlus.** DRR, at 2. **Efficiency and consistency is achieved by denying the remaining seven OnePlus Petitions for the same discretionary reasons that warranted denial here.**<sup>3</sup>

Petitioner’s reliance on *Advanced Micro Devices, Inc. et al. v. Concurrent Ventures, LLC et al.*, IPR2025-00478, Paper 10 at 2-3 (Director July 31, 2025) (“AMD”), which does not set forth an all-or-none approach, does not change the outcome here. DRR, at 2. **First**, the Director observed that (1) “[a]ll deadlines in the parallel district court proceeding have been stayed” and (2) “[t]he district court also cancelled the scheduled Markman hearing,” thus “there is currently no concern of inconsistent outcomes and duplication of efforts resulting from two proceedings operating in parallel.” *Id.* at 2. Neither condition exist here: the district court litigation schedule is proceeding and a *Markman* decision has issued. **Second**, in

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<sup>3</sup> Notably, the Director is not bound by the panel referral notice in the ’763 IPR. The Director retains unilateral discretion to initiate review of any decision. 37 C.F.R. § 42.75. A decision on whether to institute the ’763 IPR, including under Section 314(a), still remains to be provided and discretionary denial is always subject to the Director’s ultimate discretion. *Vidal*, 63 F.4th at 7.

*AMD*, the petitioner argued “it did not have any reason to believe the challenged patent was relevant to Petitioner’s products or technology” (*id.*), whereas here notice was given in 2021. *See* EX2003.

With respect to *Arm Ltd. et al. v. Daedalus Prime LLC*, IPR2025-00207, Paper 14, at 2-3 (Director, August 6, 2025), that decision is clearly distinguishable: the single intervening event that prompted the Director to reverse course—namely, **that the district court litigation had been dismissed**—is absent here, where the district court litigation is moving ahead in full force with fact discovery closing in two weeks. EX1035.

Petitioner reliance on *Mercedes-Benz Group AG v. The Phelan Group, LLC*, IPR2025-00758, Paper 8 at 2 (Director, August 14, 2025) likewise fails. DRR at 4. **Once again, Petitioner conflates referral to the Board with an institution decision. Referral alone is not equivalent to an institution decision.** The Board finding a reasonable likelihood of success in another related IPR was the determinative factor in *Phelan* and is not present here.

Nothing in Petitioner’s cited authority undermines the Director’s decision to grant discretionary denial here.

**C. The Merits Demonstrates Referral to the Board Would be Futile**

As explained in Patent Owner’s Request for Discretionary Denial (Paper 10,

at 11-17), the art relied upon in the Petition is cumulative of art already considered by the Examiner and Petitioner has not demonstrated any material error. The Petition also ignores the Examiner's correct determination—consistent with Dudda, Pelletier, Lin, and the LTE standard at the time—that Lin-548 **discusses PUCCH communications in the context of the PCELL, not SCELL**. Paper 13, at 7-13. Petitioner's conclusory, one-paragraph explanation purporting to show the alleged material error is insufficient to meet its burden. *See* Paper 13, at 37. Finally, Patent Owner's Preliminary Response further demonstrates why the merits of the Petition are not compelling and support discretionary denial under Factor 6. *See* Paper 10.

Petitioner's cited case law does not change the outcome here. *Eunsung Global Corp. v. HydraFacial LLC*, IPR2025-00445, Paper 14 at 3 (Director, July 10, 2025) addressed IPRs on three Patents where only one out of the three had been in force since 2017. For that patent, however, the Director found that "Petitioner persuasively demonstrates that the patent examiner overlooked certain teachings in Karasiuk that appear to disclose the allowable features of the claims." Here, Petitioner has not made a similar persuasive showing. That is, in *Eunsung*, there was a persuasive showing of the weight of the merits in favor of institution, but here (as can be seen, if desired, in Patent Owner's Preliminary Response, Paper 12 at 12-18 (all cited references lack the same limitation key to patentability)) the merits are

weak and certainly not so strong as to outweigh the other factors.

Petitioner's reliance on *Anthony Inc. v. Controltec LLC*, IPR2025-00559, Paper 12 at 2 (Director, July 16, 2025) is misplaced because the prosecution history differed and was integral in the decision finding Examiner error:

Specifically, at the beginning of patent examination, the patent examiner issued a restriction requirement for the application that eventually became the challenged patents. Ex. 1002, 72. Patent Owner elected a group of claims and filed a divisional patent application. *Id.* at 36. The patent examiner issued a notice of allowance of both patent applications as the first office action. *Id.* at 14. Petitioner persuasively explains that the patent examiner erred by overlooking the teachings of Carter.

*Id.* at 2. Petitioner's argument merely further highlights that § 325(d) is another basis upon which the Director could exercise discretion to deny this Petition.<sup>4</sup>

#### **IV. THERE IS NO VIOLATION OF DUE PROCESS OR THE APA**

Petitioner's final section raises three cursory arguments against the

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<sup>4</sup> This also further provides evidence on why a mixed bag of outcomes is possible when § 325(d) is the basis for discretionary denial because every patent asserted in a district court litigation that is also challenged at the PTAB will have different prosecution history and thus different risks of discretionary denial under § 325(d).

application of the “settled expectations” factor for discretionary denial of review: (1) a violation of due process, (2) a lack of notice-and-comment rulemaking, and (3) operation of the *Process Memo* as “an arbitrary and capricious retroactive rule.” *See* DRR at 5-6. Each argument fails.

**A. There Has Been No Violation of Due Process Rights**

The Due Process Clause protects against the deprivation “of life, liberty, or property, without due process of law.” U.S. Const. Amend. V. However, there is no protected property or liberty interest in the institution of an *inter partes* review, nor in the application of any particular set of discretionary factors.

To begin with, even if an *inter partes* review proceeding is a benefit provided by statute, “a benefit is not a protected entitlement if government officials may grant or deny it in their discretion.” *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005). It is beyond dispute that “§314(a) invests the Director with discretion on the question whether to institute review.” *SAS Inst., Inc. v. Iancu*, 584 U.S. 357, 366 (2018); *see also Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261, 273 (2016) (“the agency’s decision to deny a petition is a matter committed to the Patent Office’s discretion”). Without any “deprivation of ‘life, liberty, [or] property,’ [] any procedural due process challenge is foreclosed.” *Mylan Labs. Ltd. v. Janssen Pharmaceutica, N.V.*, 989 F.3d 1375, 1383 (Fed. Cir. 2021). Thus, Petitioner has no

due process right in a certain set of factors to be applied in the consideration of discretionary denial under 35 U.S.C. § 314(a).

Indeed, as the USPTO *itself* has recently argued before the Federal Circuit, “the application of the Acting Director’s guidance to SAP’s IPR petition did not affect any of SAP’s rights, because an IPR petitioner never has a right to institution, let alone the application of any particular set of discretionary criteria regarding institution.” *See In re SAP America, Inc.*, No. 2025-132, Dkt. 39 at 18 (Fed. Cir. July 18, 2025) (collecting cases).

None of the cases cited by Petitioner hold to the contrary. The narrow holdings of *Tafas v. Dudas*, 511 F. Supp. 2d 652, 666 (E.D. Va. 2007) were vacated (*sub nom. Tafas v. Doll*, 559 F.3d 1345 (Fed. Cir. 2009) (itself vacated for *en banc* review, 328 Fed. Appx. 658 (Fed. Cir. 2009))), but in any case the holdings concerned procedural rules rather than the Director’s discretion under Section 314(a).

Regarding *Mexichem*, as the USPTO has pointed out in its *amicus brief* cited above, “‘due process’ cases like *Mexichem Fluor, Inc. v. Env’t Prot. Agency*, 866 F.3d 451, 462 (D.C. Cir. 2017)—which concerned agencies’ inability to ‘impose civil or criminal penalties ... based on [a] manufacturer’s past use’ of a regulated chemical—are irrelevant. There is no contention here that the USPTO is attaching penalties to any past conduct.” *See SAP America*, Dkt. 39 at 13 n. 3.

Finally, *Landgraf v. Usi Film Prods.*, 511 U.S. 244 (1994) does not support Petitioner’s argument. *See* DRR at 5. Even if *Landgraf* is applicable (it concerned statutory reach, not agency procedures), application of the USPTO’s discretionary denial factors “takes away no substantive right but simply changes the tribunal that is to hear the case.” *See Landgraf*, 511 U.S. at 274 (citing *Hallowell v. Commons*, 239 U.S. 506, 508 (1916)). Petitioner is still permitted to raise its invalidity arguments in district court. Thus, *Landgraf*, too, confirms that there has been no violation of due process.

**B. Notice and Comment Rulemaking Was Not Required**

Petitioner’s unelaborated argument about a supposed violation of the APA because the application of the “settled expectations” factor “did not undergo notice-and-comment rulemaking” is incorrect. “The notice-and-comment requirements apply [] only to so-called ‘legislative’ or ‘substantive’ rules; they do not apply to ‘interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.’” *Lincoln v. Vigil*, 508 U.S. 182, 196 (1993).

**None of the *Fintiv* factors have undergone notice-and-comment rulemaking, and their application has been confirmed by the Federal Circuit.** *See Mylan*, 989 F.3d at 1382 (“*Mylan* lacks a clear and indisputable right to review of the Patent Office’s determination to apply the *Fintiv* factors or the Patent Office’s

choice to apply them in this case through adjudication rather than notice-and-comment rulemaking.”). It is entirely unclear, and Petitioner has not explained, why the “settled expectations” factor would be different in this regard from any other *Fintiv* factor.

**C. The “Arbitrary and Capricious” Standard Does Not Apply to Section 314(a)**

Finally, Petitioner’s unelaborated argument about the “settled expectations” factor being “arbitrary and capricious” was firmly settled by *Vidal*, 63 F.4th at 11-12. The “arbitrary and capricious” standard requires that “agency action be reasonable and reasonably explained.” 63 F.4th at 11 (citing *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021)). But where, as here, the applicable statutory scheme has a “reviewability bar,” there are no challenges permitted under the “arbitrary and capricious” standard. *See Vidal*, 63 F.4th at 12 (“If the congressional preclusion of review of the decision to institute is to be respected in the inevitable system of delegation, it must extend to the substance of such instructions.”). Simply put, this requirement of the APA is inapplicable.

**V. CONCLUSION**

For at least the foregoing reasons, Petitioner’s Request for Director Review should be denied and the Director should affirm the Decision Denying Institution.

Dated: August 28, 2025

Respectfully submitted,  
/James A. Fussell Reg No 54885 /

Case IPR2025-00637

Patent No. 9,763,283

Patent Owner Response to Request for Director Review

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 28th day of August, 2025, a copy of the attached **PATENT OWNER'S RESPONSE TO DIRECTOR REVIEW REQUEST** was served by electronic mail to the attorneys of record, at the following addresses:

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Respectfully submitted,

Date: August 28, 2025

By:           /James A. Fussell Reg No 54885/  
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