No. 2025-148

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

IN RE: HIGHLEVEL, INC.,
Petitioner

On Petition for Writ of Mandamus to the United States Patent and Trademark Office in Nos. IPR2025-00234, IPR2025-00235

HIGHLEVEL, INC.'S REPLY IN SUPPORT OF PETITION FOR A WRIT OF MANDAMUS

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INTRODUCTION

This case is not business as usual. The Government and Etison try to paint HighLevel's petition as just another challenge to a *Fintiv* discretionary institution denial. It is not. What's at stake here is far more serious: the USPTO abruptly changed the rules of the game—mid-game—by imposing a new, categorical policy (the *Hulu* rule) that automatically slams the door on *inter partes* review whenever a district court issues a § 101 invalidity ruling, no matter if that ruling is still on appeal or later reversed. This new rule was applied retroactively to HighLevel's pending petitions, even though they were filed in reliance on the USPTO's then-binding guidance (the Vidal Memo) assuring that "compelling merits" would prevent—not promote—discretionary denial.

This is not a mere tweak in agency practice. It is a fundamental, retroactive shift that permanently strips parties like HighLevel of the AIA's efficient PTAB forum for challenging patent validity—contrary to the statute's design, Congress's intent, and basic principles of fairness. The Government and Etison never confront the real problem: *Hulu*'s categorical rule exceeds statutory limits; changes the rules; ignores companies, like HighLevel, acting in reliance on old guidance; and fails to provide a reasoned explanation for its abrupt reversal. The Government and Etison do not—because they cannot—deny that the retroactive application of *Hulu* inflicts irreparable harm that no district court proceeding can fix. Nor do they address

HighLevel's practical, narrower request: to hold review in abeyance until this Court resolves the § 101 decision pending appeal, as the PTAB has done in similar situations.

Their reliance on § 314(d), moreover, may apply to garden-variety *Fintiv* cases, but it does not shield the USPTO from review when constitutional rights and *ultra vires* action are at stake, like here. This is precisely the "extraordinary" case where mandamus is warranted.

ARGUMENT

I. Mandamus Relief Is Necessary to Remedy Unconstitutional and *Ultra Vires* Agency Action Not Mooted by § 314(d)

A. Writ Is Appropriate Under These Changing Circumstances

The Government and Etison (collectively, "Respondents") rely on 35 U.S.C. § 314(d) and decisions denying mandamus in ordinary *Fintiv* disputes. But § 314(d) does not foreclose review where a petitioner raises colorable constitutional claims or alleges agency action that exceeds statutory authority. *Mylan Labs. Ltd. v. Janssen Pharmaceutica, N.V.*, 989 F.3d 1375, 1382 (Fed. Cir. 2021). This petition does not ask the Court to second guess the weighing of *Fintiv* factors; it challenges the legality and retroactive application of a categorical policy the USPTO treated as dispositive. Even where Congress has barred direct appeal, the Supreme Court has repeatedly confirmed that courts retain jurisdiction to remedy constitutional violations and *ultra vires* agency action. *See, e.g.*, *Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261, 275

(2016); *SAS Inst., Inc. v. Iancu*, 584 U.S. 357, 370–71 (2018). Mandamus relief is necessary to restore petitioners, like HighLevel, to the rules and guidance that were in effect at the time of IPR petitions' filing.

B. HighLevel Had a Clear and Indisputable Legal Right

The Government insists HighLevel lacks any protected interest to trigger due process, characterizing HighLevel's property interest as "marginal at best." Gov't Resp. 31. The Government's conception of HighLevel's interest is too cramped. While there is no entitlement to institution, agencies must satisfy due process and Administrative Procedure Act (APA) requirements when they change policies in a way that produces retroactive effects and concrete prejudice. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Contrary to Respondents' argument, HighLevel is not asserting a right to institution but instead is challenging the agency's use of a new categorical rule—untethered to the merits of §§ 102/103—to conclusively deny access to the America Invents Act (AIA) forum on which it reasonably relied. That is a cognizable due process/APA claim and a classic *ultra vires* problem. *See SAS*, 584 U.S. at 373 (Director's discretion remains bounded by statute).

HighLevel had a clear and indisputable legal right to have its IPR petitions be substantively *considered* for institution on the merits, rather than have that analysis be *foreclosed* based on an unrelated § 101 finding in district court. HighLevel cannot undo the harm caused by the USPTO's retroactive application of *Hulu, LLC v. Piranha Media Distrib., LLC*, IPR2024-01252, Paper 27 (P.T.A.B. Apr. 17, 2025) (informative) (the *Hulu* rule).

C. HighLevel Has No Alternative Means

The Government finally asserts "alternate means" exist because HighLevel can litigate invalidity in district court. Gov't Resp. 30–32. That misses the point. Congress created IPRs precisely to provide a distinct, expert forum with far lower costs and different standards of review to decide prior art validity. Denying access to that forum retroactively is not "harmless" because §§ 102/103 can be argued somewhere else. Nor does district court litigation remedy the irreparable, jurisdiction-stripping effect of a retroactive denial after the AIA deadlines have passed. At bottom, HighLevel cannot obtain meaningful relief in another forum. *See In re Palo Alto Networks, Inc.*, 44 F.4th 1369, 1374 (Fed. Cir. 2022).

The Government further mischaracterizes HighLevel's mandamus request—the appropriate inquiry is *not* whether alternative means exist to bring a patent-invalidity challenge. Gov't Resp. 30–32. Rather, the relevant question is whether HighLevel can adequately challenge the USPTO's institution decision based on its rescission of the Vidal Memo using alternative means. It cannot. *See, e.g.*, *In re Princo Corp.*, 478 F.3d 1345, 1357 (Fed. Cir. 2007) (factor met where denial of stay of proceedings could not be remedied by direct appeal). Mandamus is the only option, for the harm is not speculative—the harm has already occurred, and it will continue absent relief.

II. *Hulu* and Its Retroactive Application Violate Due Process and the APA, Exceed Statutory Authority, and Undermine Congressional Intent

A. The Retroactive Rule Change Violates Due Process

1. Due Process Protects HighLevel's Reliance-Backed Interest

HighLevel does not claim an entitlement to institution. It claims the USPTO could not retroactively deploy a new, outcome-determinative policy to foreclose consideration of its timely, fee-paid IPR petitions filed in reasonable reliance on binding guidance promising that compelling merits would defeat discretionary denial. That reliance interest—cemented by concrete expenditure of nonrefundable fees and litigation choices taken in light of the Vidal Memo—is a cognizable interest protected by due process and the APA's fair-notice principles. Indeed, under the Vidal Memo, which was in effect at the time HighLevel filed its IPR petitions, the USPTO was not permitted to base institution on events in a parallel district court litigation "where a petition presents compelling evidence of unpatentability." Appx23.

Respondents' attempt to mischaracterize HighLevel's due process right fails. HighLevel was entitled to have its IPR petitions be *considered* for institution. And that is the crux of the issue—the categorical ban of petitions without consideration of the merits to institute contravenes the intent of the AIA.

HighLevel's interest in having its IPR petitions considered for institution is not abstract or theoretical; it stems directly from real filing fees and the USPTO's own binding commitments—commitments on which HighLevel and similarly situated parties reasonably relied in making costly and strategic decisions. *See* Pet. 14 n.2; US*Made Amicus Br. 7, 14. The existence of such reliance is what gives rise to the constitutional protection at issue here.

2. The USPTO's Retroactive Application of the *Hulu* Rule Violated Due Process

In its rush-job to curb IPR proceedings, the USPTO's retroactive application of *Hulu* violated due process and impaired HighLevel's interests. Due process requires not only that protected interests be respected, but also that parties receive fair notice and a meaningful opportunity to conform their conduct to the rules that will govern official action affecting their rights or interests. *See PHH Corp. v. CFPB*, 839 F.3d 1, 41 (D.C. Cir. 2016), *reinstated in relevant part*, 881 F.3d 75, 83 (D.C. Cir. 2018) (en banc); *see also Ralls Corp. v. CFIUS*, 758 F.3d 296, 318 (D.C. Cir. 2014) (due process requires notice of official action, access to the rationale, and an opportunity to respond before deprivation is finalized).

Due process protects petitioners, like HighLevel, from having the rug pulled beneath them. *See PHH Corp.*, 839 F.3d at 46–47. Applying a subsequent change in policy to alter the legal consequences of actions taken in reliance on prior binding guidance is "impermissibl[y] retroactive." *Durr v. Nicholson*, 400 F.3d 1375, 1380

(Fed. Cir. 2005); *see Princess Cruises, Inc. v. United States*, 397 F.3d 1358, 1366 (Fed. Cir. 2005); *PHH Corp.*, 839 F.3d at 47–48. *Hulu* "cannot be applied to cases pending at the time of its promulgation." *Rodriguez v. Peake,* 511 F.3d 1147, 1153 (Fed. Cir. 2008).

Respondents claim rescission of the Vidal Memo and application of the *Hulu* rule were "prospective" because those new directives applied only to institution decisions not yet made. Gov't Resp. 17, 24–25; *see* Etison Resp. 21. But the relevant time was when HighLevel acted (*i.e.*, filed its IPR petitions). A rule is retroactive if it "attaches new legal consequences to events completed before its enactment." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269–70 (1994). Here, the "event completed" was HighLevel's filing of its IPR petitions in strict reliance on binding agency guidance. The "new legal consequence" was the denial of consideration for institution based on a parallel non-final § 101 decision under a rule that *did not exist* at the time of filing—depriving HighLevel of the process and forum Congress designed.

This Court further explained in *Rodriguez* that courts consider "(1) whether it would impair rights possessed by a party when he acted, (2) whether it would increase a party's liability for past conduct, or (3) whether it would impose new duties with respect to already completed transactions." 511 F.3d at 1153. Under this framework, *Hulu* as applied was retroactive: it impaired HighLevel's right to have its IPR grounds considered for institution; imposes a new duty for petitioners to wait to file Rule 12(b)(6) motions in district court; and punished HighLevel for doing so before *Hulu* was made a rule and categorically applied to HighLevel's petitions.

Nor was HighLevel given any meaningful opportunity to conform its conduct to the new rule. Respondents claim "notice and an opportunity to be heard" cured any due process concerns because HighLevel was allowed to brief discretionary denial after *Hulu* issued. Gov't Resp. 23–24; Etison Resp. 16. That misses the point. The fair-notice problem arises from retroactively changing the governing policy after the petition was filed under binding, contrary guidance and then applying the new policy to permanently foreclose AIA review. Post hoc briefing cannot cure that kind of reliance-disrupting retroactivity. The question is not whether HighLevel argued against the new rule once announced; it is whether the agency lawfully imposed the rule on already-filed petitions without acknowledging or accounting for reliance and without a reasoned explanation for the change. *See Georgetown*, 488 U.S. at 208 (no retroactive rulemaking absent clear authorization); *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012) (rejecting retroactive agency interpretations that create "unfair surprise").

Etison's reliance on *NetworkIP v. FCC*, 548 F.3d 116 (D.C. Cir. 2008), confirms HighLevel's point. Etison Resp. 16. Agencies may develop policy through adjudication, but not when doing so produces retroactive injustice or unfair surprise.

"When a[n] agency officially and expressly tells you that you are legally allowed to do something, but later tells you 'just kidding' and enforces the law *retroactively* . . . that amounts to a serious due process violation." *PHH Corp.*, 839 F.3d at 48. HighLevel acted in reliance on official USPTO guidance about how discretion would be exercised; the USPTO changed course midstream and applied the change to pending filings. The USPTO's after-the-fact change in policy—without advance notice, opportunity to comment, or a chance to adjust litigation strategy—upended reasonable reliance and imposed new legal consequences on completed conduct. HighLevel has already paid non-refundable fees, made litigation decisions, and strategically structured its defense case in reliance on the prior guidance.

The Government's hollow proposal that HighLevel could have addressed the *Fintiv* factors rests on the mistaken assumption that the circumstances fit squarely with *Fintiv*. Gov't Resp. 24. But as the USPTO acknowledged, *Hulu* and the instant case are not garden-variety *Fintiv* disagreements. *See Hulu* at 3 ("[T]he *Fintiv* framework does not fit neatly with the circumstances of this case, where the district court already had determined that the challenged claims are invalid under § 101 before the Board's Decision."); Gov't Resp. 11. *Fintiv* sought to prevent duplicative efforts or contrary rulings from parallel district court litigation. *See Apple Inc. v. Fintiv, Inc.*, IPR2020-00019, Paper 11, at 7–8 (PTAB Mar. 20, 2020). That concern does not apply to a § 101 challenge in a district court proceeding because § 101 challenges cannot be brought in an IPR. *See* 35 U.S.C. § 311(b).

The Government contends that HighLevel's petitions were "heard" but merely reached a different outcome and thus any due process right was satisfied. Gov't Resp. 24. Not so. HighLevel's petitions were never "heard," as evidenced by the Board's decision: "Because the District Court already found the claims invalid under 35 U.S.C. § 101 in the parallel litigation, we deny institution . . . ." Appx13; Appx20. HighLevel was entitled to have its meritorious IPR arguments be considered.

B. *Hulu*'s Retroactive Application Is Arbitrary, Capricious, and Unlawful Under the APA

The Vidal Memo was improperly rescinded, effecting a rule change subject to notice-and-comment rulemaking under the APA. The rescission altered the "substantive standards by which the USPTO evaluates" IPR petitions. *In re Chestek PLLC*, 92 F.4th 1105, 1110 (Fed. Cir. 2024). Here, the USPTO failed to justify its about-face with "a reasoned explanation for the change, display[ing] awareness that they are changing position, and consider[ing] serious reliance interests." *FDA v. Wages & White Lion Invs., L.L.C.*, 604 U.S. 542, 568 (2025) (quotations and alterations omitted).

The Government does not dispute that the rescission of the Vidal Memo was required to undergo notice-and-comment rulemaking. Instead, it hides behind § 314(d). But that provision does not grant the Director immunity from review of "blatant violations of legal constraints or other shenanigans." *IGT v. Zynga, Inc.*, 144 F.4th 1357, 1367 (Fed. Cir. 2025) (quotations omitted).

Respondents allege that the Director has discretion as to how "agency resources should be devoted" as part of her duties of running the USPTO. Gov't Resp. 32–33; Etison Resp. 18–19. This excuse doesn't fly. By statute, the USPTO is required to set fees at a rate to cover the costs of the proceeding. *See* 35 U.S.C. § 311(a). Moreover, in this case, the USPTO is devoting its allegedly limited resources to opposing HighLevel when it could have just held its denial of institution in abeyance as HighLevel proposed—that would have taken zero resources.

Respondents then try to justify the USPTO's cutting-of-corners as responsive to the "evolving conditions facing the agency." Gov't Resp. 33; Etison Resp. 23–24. This is pretext. For the first twelve years of AIA proceedings, the PTAB handled between 1,200 and 1,700 new AIA petitions each year and rarely, if ever, missed a statutory AIA deadline.[1] The PTAB accomplished this feat while reducing its ex parte appeal backlog from over 26,000 decisions to fewer than 5,000.[2] Regardless of the evolving landscape, the USPTO must continue to "engage in reasoned decision

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[1] Theresa Schliep, *Rising PTAB Filings Follow Surge In Patent Cases*, Law360 (June 12, 2025), https://www.law360.com/articles/2351142/.

[2] *See* USPTO, *Pending Appeals FY12 to FY25*, Patent Trial and Appeal Board Appeal Statistics (Sep. 30, 2025), https://www.uspto.gov/sites/default/files/documents/Monthly_Appeal_Stats_September_2025.pdf.

making under the APA." *In re Brunetti*, — F.4th —, 2025 WL 2446503, at *7–8 (Fed. Cir. Aug. 26, 2025) (precedential). It acted arbitrarily and capriciously by failing to do so when it rescinded the Vidal Memo and applied *Hulu* retroactively.

C. The *Hulu* Rule Itself Exceeds Statutory Limits, Is *Ultra Vires*, and Contradicts the AIA

Respondents do not contest that the *Hulu* rule is *ultra vires* and runs counter to the AIA. Nor do they dispute that *Hulu* now forces Petitioners to forgo § 101 defenses, contrary to the dual-track system Congress intended.

Hulu's decisive premise is that once a district court has entered a § 101 invalidity judgment, it is "unnecessary" and "more efficient" to discretionarily deny IPR petitions and leave any prior art validity disputes to a district court on remand. That premise, however, collides with the AIA's basic design. Congress carved out limited grounds for IPR (§§ 102/103) to be decided by technically trained administrative patent judges with a preponderance standard and robust estoppel, precisely to improve accuracy and efficiency in prior art determinations. 35 U.S.C. §§ 311(b), 316(e), 315(e). District court § 101 rulings say nothing about prior art patentability, nor do they resolve—or even address—§§ 102/103. Treating a § 101 ruling as categorically dispositive of whether the PTAB should consider §§ 102/103 is an illogical conflation of distinct doctrines and fora. The AIA contemplates parallel proceedings and gives the Director discretion to manage "efficiency," but not to nullify the AIA forum across a swath of cases based on a categorical factor that is unrelated to the AIA's adjudicative mission. *See* § 316(b) (requiring the Director to consider "the effect . . . on the economy, the integrity of the patent system, [and] the efficient administration of the Office"); *SAS*, 584 U.S. at 373.

Respondents cite *Fintiv* and *Mylan* to say efficiency can justify discretionary denial. True, but *Hulu* is not *Fintiv*, at least as *Fintiv* was originally conceived. Prior to the Director taking over discretionary denial from the PTAB, *Fintiv* weighed case-specific factors to manage duplicative efforts and inconsistent outcomes when a parallel trial threatens to overtake the PTAB. *Hulu*, by contrast, imposes an outcome-determinative factor that ends the inquiry (and ends the forum) whenever a district court has reached any § 101 invalidity ruling—even on a Rule 12(b)(6) record, and even when an appeal is pending. That categorical approach bears none of *Fintiv*'s case-specific tailoring and is divorced from the AIA merits actually at issue.[3]

Respondents argue that district court litigation or ex parte reexamination are adequate alternatives to IPRs, but they fail to contest the significant differences between these types of proceedings—e.g., costs, a technically-trained panel of judges, and different burdens of proof. Gov't Resp. 30–31; Etison Resp. 12, 23–24.

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[3] The Board's orders here confirm the point: "Because the District Court already found the claims invalid under § 101 in the parallel litigation, we deny institution." Appx11–13; Appx18–20. The Board saw "no reason to deviate from the [*Hulu*] informative decision" because "the relevant facts . . . are indistinguishable." Appx11–13; Appx18–20. That is a categorical rule, not a *Fintiv* case-specific weighing.

III. Section 314(d) Does Not Bar Judicial Review of Due Process and Statutory Overreach

Section 314(d) does not insulate the Director from judicial review of alleged due process violations or statutory overreach. The Supreme Court has made clear that the presumption in favor of judicial review is "strong," and can be overcome only by "clear and convincing indications" that Congress meant to foreclose review. *SAS*, 584 U.S. at 370 (quoting *Cuozzo*, 579 U.S. at 273). The Court explained that, "[g]iven . . . this presumption and the statute's text . . . § 314(d) precludes judicial review only of the Director's 'initial determination' under § 314(a) that 'there is a "reasonable likelihood" that the claims are unpatentable on the grounds asserted and review is therefore justified.'" *Id.* at 370–71 (quoting *Cuozzo*, 579 U.S. at 273). Nowhere does § 314(d) disable courts from reviewing agency action that exceeds statutory limits or violates constitutional rights. To the contrary, the Supreme Court emphasized, "*§ 314(d) does not 'enable the agency to act outside its statutory limits*.'" *Id.* at 371 (emphasis added) (quoting *Cuozzo*, 579 U.S. at. 275). Accordingly, "[i]f a party believes the Patent Office has engaged in 'shenanigans' by exceeding its statutory bounds, judicial review remains available consistent with the Administrative Procedure Act, which directs courts to set aside agency action 'not in accordance with law' or 'in excess of statutory jurisdiction, authority, or limitations.'" *Id.* (quoting *Cuozzo*, 579 U.S. at 275). Section 314(d), in short, does not "categorically preclude review" of agency action when such action exceeds "statutory limits" or creates "a due process problem." *Cuozzo*, 579 U.S. at 275.

The presumption in favor of judicial review of administrative action may be overcome only by "clear and convincing evidence of a contrary legislative intent," *Traynor v. Turnage*, 485 U.S. 535, 542 (1988), and nothing in the AIA or its legislative history suggests that Congress intended to preclude review of constitutional claims or agency action in excess of statutory authority. *See Johnson v. Robison*, 415 U.S. 361, 373 (1974) ("Nothing what[so]ever in the legislative history of the [] no-review clause[] suggests any congressional intent to preclude judicial cognizance of constitutional challenges."). Indeed, even where Congress enacts a statute making agency decisions "final and conclusive" or "unreviewable," courts retain jurisdiction to hear constitutional and *ultra vires* claims absent unmistakably clear congressional intent to the contrary. *See Webster v. Doe*, 486 U.S. 592, 603–04 (1988); *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 (1986).

Respondents mischaracterize this Court's precedent to justify the Director's assertion of unfettered discretion. Gov't Resp. 14–18; Etison Resp. 8, 10–12. First, Respondents' reliance on *Mylan* is unavailing. *Mylan* plainly states the Court may review "colorable constitutional claims," such as the ones presented here and other petitions requesting writ. 989 F.3d at 1382.

Second, *Apple Inc. v. Vidal*, 63 F.4th 1 (Fed. Cir. 2023), did not distinguish between challenges seeking only prospective relief and petition-specific relief. There, Apple sought prospective relief, even for those petitions deemed unreviewable. *See id.* at 10. This Court explained that § 314(d) bars review of the "substance of the Director's institution discretion," but not of "the Director's choice of whether to use notice-and-comment rulemaking" to establish institution instructions. *Id.* at 14. Consistent with *Apple*, HighLevel here challenges the retroactive manner in which the Director established the rules surrounding institution.

Third, *Cuozzo* dealt with the "application and interpretation" of the "particularity" standard. 579 U.S. at 275–76. And like *Mylan*, *Cuozzo* warned that § 314(d) did not "enable the agency to act outside its statutory limits" and that the USPTO's "shenanigans" remained reviewable under the APA. *Id.* at 275.

IV. Abeyance Is the Reasonable Remedy

Respondents do not address or dispute the reasonableness of HighLevel's alternative request, which asked the Director to wait to decide on the Request for Director Review until the pending § 101 appeal is decided. *See* Pet. 7, 20. Waiting to decide institution—*i.e.*, doing nothing—is a precise and efficient remedy that the Board has done before. *See* Appx50 (citing *Ford Motor Co. v. Ethanol Boosting Sys., LLC*, IPR2021-00339, Paper 17 (P.T.A.B. Nov. 21, 2022)). That approach would have avoided duplicative efforts between the district court and the USPTO, and conserved government resources spent briefing the instant case. Instead, the Government seems more intent on doubling down on its unprecedented expansion of discretionary denials even if unnecessary in this situation.

CONCLUSION

The Court should issue a writ of mandamus vacating the USPTO's *Hulu*-based denials and directing the USPTO to reconsider HighLevel's IPR petitions based on the guidelines in place at the time of petitions' filing; or, at minimum, remand with instructions to hold Director review in abeyance until the pending § 101 appeal is finally resolved.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Federal Circuit Rule 32(b)(1). This brief contains 3,895 words, excluding the portions of the brief exempted by Fed. R. App. P. 32(f). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

Respectfully submitted,

/s/ Robert F. Shaffer

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