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1 P R O C E E D I N G S

2 (11:09 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument next in Case 16-969, SAS Institute  
5 versus Matal.

6 Mr. Castanias.

7 ORAL ARGUMENT OF GREGORY A. CASTANIAS

8 ON BEHALF OF THE PETITIONER

9 MR. CASTANIAS: Mr. Chief Justice, and  
10 may it please the Court:

11 For three reasons, the Patent Trial  
12 and Appeal Board is not authorized to issue  
13 final written decisions on fewer than all of  
14 the patent claims challenged by inter partes  
15 review petitioners.

16 The first is the plain language of the  
17 statute. It requires the Board to issue a  
18 final written decision with respect to the  
19 patentability of "any patent claim challenged  
20 by the petitioner." That's also supported by  
21 the context of the Act.

22 Second, that plain and inclusive  
23 command is not --

24 JUSTICE GINSBURG: And doesn't -- may  
25 I just ask you about what you just quoted,

1 doesn't the provision begin "if an inter partes  
2 review is instituted"? If there is -- it's  
3 instituted, then --

4 MR. CASTANIAS: Yes, that's exactly  
5 right, Justice Ginsburg. The -- the statute  
6 starts with a conditional. The conditional was  
7 met in this case because an inter partes review  
8 was -- was, in fact, instituted in this case.

9 The second -- the second reason --

10 JUSTICE SOTOMAYOR: It was only  
11 instituted with respect to certain claims. So  
12 I have two questions.

13 MR. CASTANIAS: Please.

14 JUSTICE SOTOMAYOR: I'm not at all  
15 clear what it is you're challenging here. Are  
16 you challenging the Board's right to initiate  
17 partial adjudications or are you challenging  
18 the fact that they are not addressing all of  
19 the claims in their final decision? What is it  
20 that you're actually asking us to review?

21 MR. CASTANIAS: Well, we are  
22 challenging the latter. Our question presented  
23 is focused on the language --

24 JUSTICE SOTOMAYOR: So what is it  
25 exactly that you want the Board to do with

1 respect to the claims that it didn't grant  
2 adjudication of?

3 MR. CASTANIAS: We -- we believe that  
4 Section 318(a) requires the Board --

5 JUSTICE SOTOMAYOR: So you want them  
6 to say we didn't grant review on these claims  
7 because? Or do you want them to say the patent  
8 is valid with respect to these claims that we  
9 didn't grant review?

10 MR. CASTANIAS: Well, I think it's  
11 actually --

12 JUSTICE SOTOMAYOR: Because the only  
13 -- the only power they're given is to decide  
14 the patentability of claims. So what exactly  
15 is it that you're asking them to do?

16 MR. CASTANIAS: Well, Justice  
17 Sotomayor, what we are asking the Board to do  
18 is to say, in its final written decision, that  
19 we are not finding, for example, claim 4 of the  
20 ComplementSoft patent -- as they did in this  
21 case, we are not finding that unpatentable.  
22 That way, we can then appeal that decision --

23 JUSTICE SOTOMAYOR: Ahh, you want to  
24 get around Cuozzo.

25 MR. CASTANIAS: No, I don't.

1 JUSTICE SOTOMAYOR: That -- that's  
2 exactly what you want to do.

3 MR. CASTANIAS: That -- that's what  
4 the government --

5 JUSTICE SOTOMAYOR: You want to --

6 MR. CASTANIAS: That's what the  
7 government says we want to do. That's not what  
8 we want to do.

9 JUSTICE SOTOMAYOR: Well, I don't see  
10 what else you're trying to do, because what  
11 will you do? You will come up on appeal and  
12 say the Board was wrong in not instituting  
13 review of those other claims? That's what  
14 Cuozzo was about, us saying you can't do that.

15 I didn't agree with Cuozzo, so --

16 MR. CASTANIAS: Well, I certainly  
17 under --

18 JUSTICE SOTOMAYOR: -- you know, I  
19 mean --

20 MR. CASTANIAS: -- I certainly  
21 understand that.

22 (Laughter.)

23 JUSTICE SOTOMAYOR: But -- but -- but  
24 it is what we said. And -- and so, assuming I  
25 stick with precedent on this issue, what other

1 purpose would there be for the Board basically  
2 to say we made a decision not to institute  
3 review?

4 MR. CASTANIAS: Well, first of all,  
5 Justice Sotomayor, if you look at what the  
6 Board actually did in saying that they were not  
7 going to institute review, the Board  
8 effectively did make a patentability  
9 determination in what it calls its initial  
10 determination. So we have a decision by the  
11 Patent -- the Patent Trial and Appeal Board  
12 that has, in fact, ruled on the question but  
13 because of the way they have ruled on it, we  
14 can't appeal it and it can't be estopping. And  
15 --

16 JUSTICE SOTOMAYOR: All right. You do  
17 want to get around Cuozzo.

18 MR. CASTANIAS: Well, it's --

19 JUSTICE SOTOMAYOR: Because there is  
20 absolutely no way that that's anything other  
21 than that. What's the -- if you're not  
22 challenging their decision not to institute  
23 review, why would that make any difference?

24 MR. CASTANIAS: Well, Justice Breyer's  
25 opinion for the Court in Cuozzo was very clear

1 in saying that the -- that the determination in  
2 that case was a challenge under the Section  
3 314(a) institution only.

4 We're not challenging the Section  
5 314(a) institution; what we're saying is that  
6 whatever institution means, whatever  
7 institution means when the Board says we're  
8 only instituting as to these particular claims,  
9 it doesn't take into account the fact -- and  
10 this was not addressed in Cuozzo -- that 318(a)  
11 by its terms, by its text, requires a final  
12 written decision.

13 JUSTICE SOTOMAYOR: So would the  
14 review on appeal be on the basis of a motion --  
15 like a motion to dismiss? On the face of  
16 whatever you presented the Board with, at the  
17 beginning, did the Board have a reasonable  
18 basis to conclude that no reasonable basis  
19 existed to challenge the validity of that  
20 claim?

21 MR. CASTANIAS: No, the review would  
22 not be over the reasonable basis or not. The  
23 review would be on the question of  
24 patentability.

25 JUSTICE SOTOMAYOR: So how could we --

1     how could the appellate court make that  
2     determination if there's no record with respect  
3     to that issue?

4             MR. CASTANIAS:  Well, Justice  
5     Sotomayor, there actually --

6             JUSTICE SOTOMAYOR:  If --

7             MR. CASTANIAS:  -- is a record.  I'm  
8     sorry, I didn't mean to --

9             JUSTICE SOTOMAYOR:  No, no, I --

10            MR. CASTANIAS:  -- cut you off.

11            JUSTICE SOTOMAYOR:  If the Board  
12     didn't institute review of those claims, there  
13     would be an incomplete record with respect to  
14     those other claims.

15            MR. CASTANIAS:  Let's keep in mind  
16     that there are -- inter partes review is a --  
17     is a much more streamlined process than trial  
18     court litigation.  And the complaint is much  
19     more than notice pleading.

20            In this case, the -- the petition that  
21     was filed here was a complete document.  It  
22     laid out all of the grounds and all of the  
23     challenges to all 16 of the ComplementSoft  
24     patent claims.  It also included a declaration  
25     from an expert witness.

1           If you look at the first few pages of  
2 the Joint Appendix in this case, which has  
3 the --

4           JUSTICE SOTOMAYOR: Well, that's fine.  
5 But if the Board didn't institute review of  
6 those other claims, the other side has not had  
7 an opportunity to present its evidence in  
8 contravention of your expert.

9           You're asking the appellate court to  
10 decide patentability on the basis of an  
11 incomplete, undeveloped record.

12           MR. CASTANIAS: Well, we'll either ask  
13 the appellate court to decide patentability or  
14 at least decide that we made a case of  
15 patentability that ought to be decided.

16           JUSTICE SOTOMAYOR: All right.

17           MR. CASTANIAS: And it --

18           JUSTICE SOTOMAYOR: So why don't you  
19 get to the first issue at all?

20           MR. CASTANIAS: Right.

21           JUSTICE SOTOMAYOR: What you really  
22 want to say is the Board shouldn't institute  
23 partial reviews; it should, if it finds -- I  
24 think what you're saying is, once it determines  
25 you have enough evidence to challenge one

1 claim, it should hold a hearing on everything.  
2 Because without that, you can't really decide  
3 patentability in a due process way, in a fair  
4 way.

5 So why have you limited your challenge  
6 in the way you have? What's the purpose of  
7 doing that? And what advantage does that give  
8 you?

9 It seems to me that it's an unfair  
10 advantage to the other side. It's an unfair  
11 advantage to the system. So why don't you just  
12 argue what you really want to argue, which is,  
13 I should have an opportunity to litigate all of  
14 my claims?

15 MR. CASTANIAS: Well, that's exactly  
16 -- that is exactly our argument. We should  
17 have the opportunity to litigate them in --

18 JUSTICE GINSBURG: But the statute  
19 precludes you from contesting the Institution  
20 decision.

21 MR. CASTANIAS: Well, the -- the  
22 statute precludes me from contesting the  
23 Institution decision, but, Justice Ginsburg, I  
24 think if we could move to the -- to the  
25 regulation that the Patent Office issued in

1 this case, that there -- that the government is  
2 relying on.

3 What you see in the -- in the Federal  
4 Register, at 77 Federal Register 48702, the  
5 government considered the objection that  
6 reviews ought to take place with regard to all  
7 challenged patent claims.

8 And what you won't see in the Federal  
9 Register, where the Patent Office took up this  
10 regulation, is any reference to Section 318(a).  
11 It was -- that section was never considered.

12 What we have under Section 318(a) is  
13 Congress saying to us and to -- and to the  
14 public that when an -- when an inter partes  
15 review is instituted -- and -- and keep in mind  
16 that that's a binary choice --

17 JUSTICE GINSBURG: And it's -- if it's  
18 instituted and -- here, it was instituted, but  
19 only on two of -- what -- what?

20 MR. CASTANIAS: Nine out of the 16  
21 claims.

22 JUSTICE GINSBURG: Nine -- okay. Nine  
23 out of 16. So that's -- so 318 relates to when  
24 an inter partes review is instituted.

25 MR. CASTANIAS: It's an if/then --

1 it's an if/then. It's a binary, that if it's  
2 instituted, then we're entitled to a decision  
3 on all challenged patent claims. And that's --

4 JUSTICE GINSBURG: If it's -- if it's  
5 instituted on any one, then the decision has to  
6 be on all 16?

7 MR. CASTANIAS: The decision has to be  
8 on all 16, that's right. That's what Section  
9 318 says.

10 JUSTICE GINSBURG: Even though the  
11 only one that they're examining is one?

12 MR. CASTANIAS: Well, that is -- that  
13 is a determination by the Board at the outset  
14 that we apparently have not met a burden of  
15 proof. What we end up with under the -- under  
16 the scheme that -- that the Patent Office is  
17 following right now is a system whereby we were  
18 sued -- we were sued in a complaint by  
19 ComplementSoft, in a complaint that alleged  
20 infringement of -- and I quote the complaint,  
21 "at least claims 1, 2, 3, 4, 8, and 10."

22 We asked for review of all 16 claims  
23 because of that "at least" language. The  
24 Patent Office then only reviewed a certain  
25 number of the claims, and then, in their

1 infringement contentions in this case,  
2 ComplementSoft asserted every single claim in  
3 the patent against us but claim 4.

4 And so, now, what we're left with is a  
5 situation whereby we are in the Patent Office,  
6 fighting for years in the inter partes review  
7 over the patentability of nine of the 16  
8 claims, and then we're going to have to go back  
9 --

10 JUSTICE SOTOMAYOR: I'm sorry. How  
11 did you do that for years? It's a year and a  
12 half, isn't it, at most?

13 MR. CASTANIAS: Well, the -- the  
14 petition was filed in 2012, and then we've gone  
15 up to the Federal Circuit, and now, we're  
16 before this Court. But, yes, it's a year and a  
17 half at most, three months -- well --

18 JUSTICE SOTOMAYOR: It's usually a  
19 year. How long did it take here?

20 MR. CASTANIAS: It took -- they took  
21 the maximum amount of time in this case. So --

22 JUSTICE SOTOMAYOR: A year and a half  
23 or a year?

24 MR. CASTANIAS: The year, they did not  
25 extend the time.

1 JUSTICE SOTOMAYOR: All right.

2 MR. CASTANIAS: So --

3 JUSTICE KAGAN: Mr. Castanias, can I  
4 ask how your statutory argument works, given  
5 your position on canceled claims?

6 MR. CASTANIAS: Uh-huh.

7 JUSTICE KAGAN: If I understand your  
8 position on canceled claims, it's that the  
9 Board need not render a decision as to those  
10 claims. Is that right?

11 MR. CASTANIAS: That's right.

12 JUSTICE KAGAN: So I guess what's the  
13 difference between a canceled claim and a  
14 non-instituted claim? In other words, both  
15 were originally in the petition. Both are no  
16 longer in dispute.

17 So, with respect to the one, you say  
18 it's perfectly consistent with the statutory  
19 language that the Board did not render a  
20 decision. Then why not with respect to the  
21 other as well?

22 MR. CASTANIAS: Well, Justice Kagan,  
23 there's a world of difference between the two.

24 A canceled claim no longer exists. We  
25 can't be sued in the district court on a

1 canceled claim. If the denial of institution  
2 means that we have to go relitigate that claim  
3 under the same Section 102 and 103 grounds,  
4 that we would otherwise be able to challenge  
5 them in front of the -- the Patent Trial and  
6 Appeal Board --

7 JUSTICE KAGAN: So I understand  
8 there's a practical difference, but I was  
9 looking for -- because you say that your view  
10 is commanded by the statute and particularly, I  
11 think, by this phrase "challenged by the  
12 Petitioner."

13 But if you were right about the  
14 statutory language, that would apply to  
15 canceled claims as well? It was challenged by  
16 the Petitioner in the original petition.

17 MR. CASTANIAS: Yes, and -- but it's  
18 no longer challenged by the Petitioner at the  
19 time of the final decision.

20 JUSTICE KAGAN: And this one is also  
21 no longer in dispute.

22 MR. CASTANIAS: And it is -- it is an  
23 ex-claim. It is no longer a claim. There's  
24 nothing -- there's nothing to adjudicate. And  
25 that's the -- that's the answer by the --

1 JUSTICE KAGAN: And I think what the  
2 Board would say is that the same thing is true  
3 here, there's nothing to adjudicate because  
4 they have said that it doesn't pass the  
5 threshold, so they're not in the business of  
6 adjudicating it.

7 MR. CASTANIAS: But it's -- but it's  
8 because they've said that, and that's not what  
9 the statute says. Now, it's -- our position is  
10 --

11 JUSTICE KAGAN: Well, what language in  
12 the statute distinguishes between the canceled  
13 claim and the non-instituted claim?

14 MR. CASTANIAS: It is challenged by  
15 the Petitioner -- and, actually, the word  
16 "claim" would work as well because it's no  
17 longer a patent claim. It doesn't exist.

18 But there is -- the -- the chapter --  
19 the inter partes chapter of the American  
20 Invents Act, Justice Kagan, tells a really --  
21 it's a very simple, straightforward, and I  
22 would dare say elegant story. It starts by  
23 defining the scope of inter partes review in  
24 section 311. Section 311 is entitled Inter  
25 Partes Review.

1           Section 311(b) is entitled Scope. And  
2           in that scope provision, it refers to what the  
3           petitioner in an inter partes review may  
4           request. You then move on to section 312,  
5           which defines the requirements of a petition.  
6           What does it require the petition to identify?  
7           Among other things, each claim challenged.

8           So now, we're still at the beginning  
9           of the process, and then 314 --

10          JUSTICE SOTOMAYOR: Why bother -- why  
11          bother requiring you to set forth all your  
12          grounds for every claim you choose to  
13          challenge? Because nothing in this forces you  
14          to challenge the claims in inter partes review.

15          MR. CASTANIAS: No, we might select a  
16          subset --

17          JUSTICE SOTOMAYOR: So you could  
18          choose -- you could have chosen to challenge  
19          four and still gone back to district court and  
20          challenged all 16 in district court.

21          MR. CASTANIAS: And we -- and we might  
22          have to do that --

23          JUSTICE SOTOMAYOR: So this was never  
24          -- so this was never intended to capture all  
25          litigation over validity?

1 MR. CASTANIAS: Oh, no, of course not.  
2 And -- and we would never say that.

3 JUSTICE SOTOMAYOR: So -- so why  
4 bother requiring you to set forth all your  
5 grounds, particularly if you only really have  
6 to do it with respect to one? You could take  
7 your strongest case, set forth all the grounds  
8 there, and on the other, say, we also want to  
9 challenge all the other 15 because, under your  
10 theory, you don't have to do anything more than  
11 that.

12 You just have to identify one claim  
13 that's weak. The Board says, we'll institute  
14 review, and then you're entitled to challenge  
15 all the other claims that you didn't set forth  
16 with particularity.

17 MR. CASTANIAS: And -- and the --

18 JUSTICE SOTOMAYOR: Because the Board  
19 has to give you a hearing on those claims  
20 anyway.

21 MR. CASTANIAS: And the statute -- but  
22 -- but, Justice Sotomayor, keep in mind that  
23 the statute invests the Board with the  
24 discretion at the outset whether or not, that  
25 binary choice, whether or not to institute.

1           And that's the -- and that's an  
2           important word in the statute, "whether." It  
3           doesn't say whether and if so as to which  
4           claims. It is a binary choice, whether. And  
5           that's consistent --

6           JUSTICE KENNEDY: Could the Board  
7           contact the parties and say, we will not grant  
8           review as to all of the challenges claimed, but  
9           if you reduce it to just claims 3 and 4, we  
10          will hear it? Could the Board do that?

11          MR. CASTANIAS: I -- I think the Board  
12          could do that and then leave the Petitioner  
13          with the election at that point to say, you  
14          know what, we think we'd rather go challenge  
15          all the claims in district court and have --  
16          have to pay for one proceeding, rather than  
17          two.

18          And that's really what this -- this is  
19          about, Justice Sotomayor, to go back to your  
20          question about what do you really want. We  
21          want to have our Section 102 and 103 objections  
22          to the ComplementSoft patent heard in a single  
23          forum.

24          Is the Patent Trial and Appeal Board  
25          more favorable for that --

1 JUSTICE SOTOMAYOR: But you don't --  
2 you want that, but it doesn't mean the other  
3 side wants that. It doesn't mean that the  
4 Board needs that.

5 MR. CASTANIAS: Well, the statute --  
6 we believe the statute says that that's what  
7 we're entitled to if --

8 JUSTICE SOTOMAYOR: You think it's an  
9 inherent right.

10 MR. CASTANIAS: -- if there is a grant  
11 --

12 JUSTICE SOTOMAYOR: Could you show me  
13 where -- anywhere in this statute the Board is  
14 prohibited directly from initiating --  
15 initiation -- initiating partial review?

16 MR. CASTANIAS: Well, I --

17 JUSTICE SOTOMAYOR: Of some claims --  
18 of some claims or not? And --

19 MR. CASTANIAS: To the extent that  
20 we're talking about the sort of partial  
21 institution that they're doing right now, where  
22 those are not decided in the final decision, I  
23 would start with Section 318(a). It -- it --

24 JUSTICE SOTOMAYOR: Assume there's not  
25 -- I find that 314 --

1 MR. CASTANIAS: Okay.

2 JUSTICE SOTOMAYOR: -- permits -- it  
3 has no direct prohibition of partial  
4 institution, that the Board is entitled to do  
5 that, then why would we have to read the  
6 language "patent claims challenged by the  
7 Petitioner" any different than the Board is  
8 reading it?

9 The Board is reading it to -- to mean  
10 any patent claim challenged by the Petitioner  
11 at the review stage.

12 MR. CASTANIAS: Justice Sotomayor, as  
13 I was -- when I was engaging in colloquy with  
14 Justice Ginsburg earlier and Justice Kagan, I  
15 was talking about how the -- the statute tells  
16 a really elegant story and -- and the way that  
17 the inter partes review is supposed to work.  
18 Once -- once a petition is filed, it is that  
19 petition that is before the Board.

20 And Section 314, the one that you're  
21 -- you're focused on, gives the director the  
22 discretion to institute. It's whether to  
23 institute. But it is whether to institute that  
24 petition. It's not whether to institute with  
25 regard to any particular claim.

1 JUSTICE KAGAN: Well, one of the  
2 stories that the statute as written seems to  
3 tell is of great discretion to the Board with  
4 respect to the institution decision.

5 MR. CASTANIAS: Uh-huh.

6 JUSTICE KAGAN: It says you never have  
7 to institute; it's your choice whether to  
8 institute; you can't get review of the  
9 institution decision, which is our Cuozzo case;  
10 you get to write your own rules about the  
11 institution decision, which is the -- the  
12 rule-making delegation.

13 So it's a little bit odd to say, well,  
14 here's the one thing you don't have discretion  
15 over when it comes to institution: you can't  
16 say these claims but not those claims.

17 In a -- in a context in which Congress  
18 said the institution decision is really for the  
19 Board, it's a discretionary decision that lies  
20 in its bailiwick, why should we carve out that  
21 one thing?

22 MR. CASTANIAS: Well, excuse me,  
23 Justice Kagan, I think I would answer your  
24 question by saying that the fact that that  
25 discretion is imposed to grant or deny, whether

1 to grant, suggests very strongly as a textual  
2 matter that there is not a further secret grant  
3 of selective review at that point.

4 But, moreover, why -- why should it be  
5 our choice? Why -- why should we be the -- the  
6 entity that picks? Well, obviously, the  
7 statutory language, we think, supports us. The  
8 ordinary principle that the petitioner or the  
9 plaintiff in litigation is the master of its  
10 complaint, we -- because so many of these cases  
11 follow litigation, we know best what claims  
12 we're likely to be facing in litigation.

13 And, finally, it serves exactly the  
14 two purposes that the majority opinion of the  
15 Court in *Cuozzo* identified for the inter partes  
16 review system, which is it screens out bad  
17 patents while bolstering valid ones.

18 And it's -- it's one of the reasons  
19 why you don't have a lot of amicus briefs on  
20 either side in this case, is that we're  
21 actually in the position of saying, yes, we  
22 would like -- we would like to be -- have  
23 appellate review and be bound by an adverse  
24 decision with regard to claims that the Patent  
25 Office did not think met the standard for

1 institution.

2 But that's not -- that's not  
3 unreasonable, particularly in this case,  
4 because as we pointed out in our reply brief on  
5 the merits, the Patent Office in this case, the  
6 Board, decided to institute review with respect  
7 to claim 4 but not claim 2.

8 Now, claim 4 actually is identical to  
9 claim 2, except it contains an additional  
10 limitation. Had we been given the opportunity  
11 to say to the -- to either to the Board in the  
12 process of the litigation leading up to a final  
13 decision or to the Federal Circuit on appellate  
14 review, we could have said: Look, claim 4, if  
15 it falls, claim 2 is going to fall with it.  
16 There is no -- there's no earthly reason why we  
17 should confirm this claim or reject that claim  
18 but allow the other claim to go into --

19 JUSTICE BREYER: The Patent Office --  
20 the Patent Office disagrees. So -- so I can't  
21 make -- I -- I think the language does,  
22 actually, help you. I have no doubt that the  
23 language you point to helps you, but where I  
24 run into trouble is I can't imagine how a  
25 statute is supposed to work where you,

1 objecting, say: I object to 10 claims, all  
2 right? Now we look at this and say: You're  
3 going to get that grant; if just one of those  
4 10 claims is reasonable likelihood, you'll  
5 prevail. Okay?

6 MR. CASTANIAS: I'm not sure I -- I'm  
7 not sure I follow that.

8 JUSTICE BREYER: So you will -- you  
9 will have inter partes review under the first  
10 thing, 13, 14, as long as just one, all you  
11 have to have is one, and you will get inter  
12 partes review.

13 MR. CASTANIAS: I -- it's not "will  
14 get"; I "may get."

15 JUSTICE BREYER: You may get. Okay.  
16 They say -- now, it's up to the Patent Office.  
17 And the Patent Office says, yeah, one, okay.

18 Now, what you're saying is because  
19 there was one and nine they're never going to  
20 review, they think there's nothing to it.  
21 Okay? And it says that their decision not to  
22 review will not be appealed, all right?

23 Okay. So they find one, and all of a  
24 sudden, they discover they're in court and have  
25 to appeal everything on nine claims they

1 thought made no sense. But if they find all 10  
2 are no good, then they're out of court, no way  
3 to get them in there, dah, dah, dah. Okay?

4 Now, that's the part I have trouble  
5 grasping, why someone would write a statute  
6 like that.

7 MR. CASTANIAS: Well, Justice Breyer,  
8 I think I'd start by urging you to read the  
9 statute free of the regulation. Just read the  
10 statutory language --

11 JUSTICE BREYER: I have done that. I  
12 actually have it written down. My law clerk  
13 has it here. But I -- I grant you I have a  
14 hard time keeping it all in mind.

15 MR. CASTANIAS: And -- and it's hard  
16 to find in -- in the entire statutory scheme,  
17 the language of scope, what the "challenged in  
18 the petition," even the amendment --

19 JUSTICE BREYER: No, I started by  
20 saying --

21 MR. CASTANIAS: -- language didn't  
22 specify anything about --

23 JUSTICE BREYER: I started by saying  
24 --

25 MR. CASTANIAS: Excuse me.

1 JUSTICE BREYER: -- that I think  
2 language does favor you but not definitely. I  
3 mean, there is a lot of opening and ambiguity  
4 here. And that's why I turned to what I was  
5 having trouble with, is trying to imagine what  
6 the purpose would be of writing a statute the  
7 way you want, though I find it very practical  
8 to think of the statute as your opponents want  
9 it.

10 Now, that -- that exposing my method  
11 of thinking, I'm not wedded to that, but I do  
12 want to know what your answer is.

13 MR. CASTANIAS: Well, my -- my answer  
14 is that I think that it makes -- it's very  
15 practical to read the statute as we're reading  
16 it. And I don't think it's ambiguous at all.  
17 I think it's -- I think the ambiguity is only  
18 injected by the addition of the regulation that  
19 the Patent Office has -- has introduced into  
20 this, because you won't find a hint of partial  
21 institution anywhere in the statute, and you  
22 have some strong textual indicators against it.

23 That's why we say that even if we were  
24 in Chevron world and even if Section 318 were  
25 the subject of a regulation, which it's not, it

1 would still not be within the zone of  
2 reasonableness with regard to the -- the scope  
3 of the ambiguity.

4 But why would you write it this way?  
5 For exactly the two reasons that you -- you  
6 wrote for the Court in Cuozzo. IPR screens out  
7 bad patents while bolstering valid ones.

8 Look at what the Board did in this  
9 case. In their institution decision, which ran  
10 22 pages, it's not -- it wasn't just a  
11 determination like the statute anticipates. It  
12 was a full, written, reasoned decision, made in  
13 very short order after three months. The Board  
14 moved all of the work that they could have done  
15 at the end to this institution phase and said:  
16 Yeah, we're not going to institute with regard  
17 to claim 2 and claims 10 through 16.

18 But we've still got reasoned decisions  
19 on that. But those claims haven't been  
20 bolstered, to use the words of -- of Cuozzo.  
21 And the -- the decision by the Board to reject  
22 our arguments ought to then, if we lose either  
23 before the Board in the final decision written  
24 or on appeal, it should estop us from  
25 relitigating those issues in the federal

1 courts.

2 That was exactly the point of the  
3 inter partes review statute, is to make  
4 district court litigation simpler by allowing  
5 the expert agency to do these types of  
6 adjudications. I say that with trepidation  
7 because of the first argument -- but they are  
8 adjudications of a type that agencies may make,  
9 and it streamlines the patent litigation that  
10 follows.

11 If there are no further questions,  
12 I'll reserve the remainder of my time.

13 CHIEF JUSTICE ROBERTS: Thank you,  
14 counsel.

15 Mr. Bond.

16 ORAL ARGUMENT OF JONATHAN C. BOND

17 ON BEHALF OF THE RESPONDENTS

18 MR. BOND: Mr. Chief Justice, and may  
19 it please the Court:

20 In establishing inter partes review,  
21 Congress gave the PTO an enhanced tool to  
22 identify and revisit patent claims that it has  
23 determined may not be patentable for certain  
24 reasons, and it entrusted the agency with  
25 determining when to use that tool and how those

1 proceedings should work in practice.

2           Petitioner's challenge to the scope of  
3 the final written decision here, its argument  
4 that it should have included more claims in the  
5 final written decision, fails because the PTO  
6 or the -- the Board here, as under delegated  
7 authority, validly determined not to institute  
8 on those claims. They were never part of the  
9 instituted proceeding, and there's nothing in  
10 the statute that requires the Board to  
11 institute or to include in its final decision  
12 claims that were never part of the proceeding  
13 in the first place.

14           Now, the crux of this dispute is, as I  
15 think the prior colloquy illustrated, over the  
16 partial institution decision. The Board's  
17 partial institution decision here to institute  
18 review, except as to claims 2 and 11 through  
19 16, is not reviewable under Section 314(d) and  
20 this Court's decision in *Cuozzo*. And, in any  
21 event, it reflects a permissible exercise of  
22 the broad discretion conferred on the Board by  
23 the statute.

24           JUSTICE GORSUCH: Well, what is the --

25           CHIEF JUSTICE ROBERTS: But what do

1 you do with the problem your friend raised with  
2 respect to claim 4 and claim 2? It does seem  
3 to put them in a difficult position.

4 MR. BOND: So it's actually not clear  
5 that claim 4 is narrower than claim 2. As we  
6 explained in the briefing in the court of  
7 appeals, it's possible that claim 4 is actually  
8 broader in some respects. That's a close  
9 dispute that the Board, in its discretion,  
10 determined claim 4 presents a -- a close  
11 question. Claim 2 does not, as presented to  
12 us, present a close question.

13 CHIEF JUSTICE ROBERTS: Well, that  
14 doesn't seem to me -- I mean, I know we don't  
15 have review of the decision which claims to  
16 review, it doesn't seem to me like very  
17 helpful, in terms of what the whole process was  
18 supposed to accomplish.

19 MR. BOND: So we think Congress vested  
20 the Board with discretion of deciding in what  
21 circumstances claims are closely-enough related  
22 that granting a review on one may -- implies  
23 that it makes sense to grant a claim on a  
24 related claim -- or grant review on a related  
25 claim because they're so closely related.

1           Here, the Board determined that the  
2           request for review on claim 2 failed because  
3           the petition failed at the threshold. It  
4           didn't identify specific references in the  
5           prior art that rendered claim 2 obvious over  
6           the prior art.

7           With respect to claim 4, the petition  
8           had made a closer showing. Now, that's a  
9           function of the petition.

10           JUSTICE KENNEDY: Well, why couldn't  
11           the Board just -- just say we -- we decline to  
12           grant it unless you reduce the -- unless you  
13           eliminate this claim?

14           MR. BOND: So, we think the Board  
15           could do that, and we think that the Board has  
16           that authority to say we're denying review  
17           across the board, but we -- and on Petitioner's  
18           view, I think that he conceded that that --

19           JUSTICE KENNEDY: But then we can rule  
20           against you, and there's no real problem.

21           MR. BOND: We -- we could deny review  
22           across the board, but if you tailor your  
23           petition, we could grant review in that  
24           circumstance.

25           But that, we think, illustrates the

1 artificiality of the Petitioner's position that  
2 the Board could get to the same result, just  
3 through a more cumbersome, multistage process  
4 of saying, we're not going to grant it this  
5 way, but if you revise and resubmit, we will  
6 then entertain your challenge.

7 Here, we understand that Congress  
8 designed --

9 JUSTICE KENNEDY: Well, it doesn't  
10 because the challengers might say, in that --  
11 in that event, we'll just go to the district  
12 court. We don't want -- we don't want it.

13 MR. BOND: Sure, and they could do  
14 that in this instance. A challenger here who's  
15 dissatisfied with the Board's decision about  
16 the scope of review can say, you know what,  
17 it's not worth our time, we can settle with the  
18 -- the Patent Owner our -- our IPR dispute, we  
19 can agree not to pursue it and can proceed in  
20 litigation.

21 And if, as in this case, the alleged  
22 infringer was sued in a -- in a district court  
23 infringement case and then brings an I -- IPR  
24 proceeding, there's no stay of the district  
25 court proceeding, at least mandated by the

1 statute, so they can proceed in the district  
2 court to litigate as they had -- already had  
3 been doing.

4 CHIEF JUSTICE ROBERTS: I -- I thought  
5 roughly half of the proceedings were stayed?

6 MR. BOND: As matter of the district  
7 court's discretion, I think a little over  
8 50 percent of contested stay motions are  
9 granted, but, of course, if it's the alleged  
10 infringer who went to the IPR or went to the  
11 PTO to ask for an IPR and then says, look, I'm  
12 done with IPR, they wouldn't grant review on  
13 the claims that I would like, they can go back  
14 to the district court and say, I no longer need  
15 a stay if one was granted in the first place,  
16 let's proceed to litigate this here in this  
17 infringement suit.

18 And so we think that the statute is  
19 perfectly consistent with inter partes review  
20 being conducted on a partial institution basis,  
21 and at a minimum, as I think was discussed  
22 earlier, no provision of the statute clearly  
23 prohibits what the -- what the PTO is doing  
24 here.

25 JUSTICE ALITO: Well, what about

1 318(a)? If we look at that by itself, where is  
2 there any ambiguity? If an inter partes review  
3 is instituted and not dismissed under this  
4 chapter, the Patent Trial and Appeal Board  
5 shall issue a final decision with respect to  
6 the patentability of any patent claim  
7 challenged by the Petitioner.

8 What is ambiguous about that?

9 MR. BOND: So a couple of things.  
10 First, we'd say, as Petitioner invited the  
11 Court to do, read through the statute  
12 sequentially. We set it forth starting at page  
13 11A of our brief in the appendix. Read through  
14 and see what --

15 JUSTICE ALITO: Well, that really  
16 wasn't my question. If we look at that  
17 language by itself, where is there ambiguity?

18 MR. BOND: Sure. If -- if you look at  
19 the four words, "challenged by the Petitioner,"  
20 in isolation, they don't answer any of the  
21 questions about the scope of what we mean by  
22 challenged by the Petitioner.

23 So, if you look at those four words in  
24 isolation, they don't tell you standing alone  
25 challenged in an IPR proceeding or this IPR

1 proceeding as distinct from in an infringement  
2 suit where you also challenged them. It also  
3 doesn't tell you challenged on a ground  
4 permitted within IPR.

5 JUSTICE ALITO: You think that's --  
6 you think that is a serious interpretation of  
7 this challenge -- they challenged it in a  
8 discussion in their office. They challenged it  
9 in a discussion in a bar. It means challenged  
10 it in this proceeding. What else could it  
11 mean?

12 MR. BOND: Well, you know that because  
13 of context. It also means challenged on a  
14 ground within IPR, challenged timely and  
15 challenged by a petitioner who's not estopped  
16 from doing so.

17 And the reason that question isn't  
18 hard is because of the context of the statute,  
19 including the opening clause that takes as its  
20 starting premise --

21 JUSTICE ALITO: You think it's not  
22 hard?

23 MR. BOND: We think --

24 JUSTICE ALITO: You think that's not a  
25 hard question at least?

1           MR. BOND: No, we think what's not  
2 difficult is the question you posed -- or the  
3 question that I suggested of we know that they  
4 mean challenged in an IPR proceeding and in  
5 this IPR proceeding. That question we don't  
6 think is difficult because of the context,  
7 because of the opening clause referring to "if  
8 an IPR proceeding is instituted," we're  
9 referring to that IPR proceeding.

10           And it is --

11           JUSTICE BREYER: Is this how you would  
12 read it -- and don't just agree with me because  
13 it sounds as if I agree with you, I just want  
14 to know what you -- don't get me off on a  
15 mistake if it is -- if an inter partes review  
16 is instituted, any patent claim that is the  
17 subject of that inter partes review challenged  
18 by -- in other words, it is understood that the  
19 word "patent claim" refers to a claim that  
20 inter partes review has been granted in respect  
21 to.

22           MR. BOND: We --

23           JUSTICE BREYER: Is that right or  
24 wrong?

25           MR. BOND: We think that's essentially

1 right. I -- I would say that another way of  
2 framing it is challenged by the Petitioner  
3 implicitly within the instituted proceeding,  
4 referred to in the opening clause. So I think  
5 we're -- we're saying --

6 CHIEF JUSTICE ROBERTS: That's more of  
7 a stretch from the -- it's a fairly complicated  
8 and refined stretch of any claim challenged by  
9 the Petitioner.

10 MR. BOND: So we think it's actually  
11 consistent with ordinary usage to say, at the  
12 merits phase of a discretionary review  
13 proceeding, that when you say challenged by the  
14 Petitioner, you mean within the merits phase  
15 that the opening clause presupposes has taken  
16 place.

17 When this Court grants certiorari --

18 JUSTICE BREYER: I put it -- I put it  
19 my way because the word "any" is like Exhibit  
20 Number 1 for a word, the scope of which is very  
21 often ambiguous in a statute.

22 If you can eat any fish, you can eat  
23 any fish. Think about that one.

24 MR. BOND: So --

25 (Laughter.)

1           JUSTICE BREYER: All right. Now --  
2           now my -- my point is we have loads of statutes  
3           where the word "any" has a scope and the scope  
4           is determined by the context of the statute.  
5           And so what I'm thinking in the back of my mind  
6           is this is one of those, but as I say, don't  
7           let me get off on a wrong foot.

8           MR. BOND: So we do agree that any  
9           encompasses anything within the scope that the  
10          context of 318(a) and its broader context of  
11          the scheme encompasses. So it's any claim  
12          within the instituted proceeding.

13          But just focusing on that word "any,"  
14          I think it's helpful to look past the language  
15          the Petitioner quotes to the -- the end of  
16          318(a). It says "any patent claim challenged  
17          by the Petitioner and any new claim added under  
18          section 316(d)."

19          What "any" is doing here is not saying  
20          this is an all-encompassing review provision  
21          that requires this final written decision to  
22          encompass anything in the universe. It's doing  
23          something much more limited.

24          The tail end of this sentence in  
25          section 318(a) is simply clarifying that, when

1 you get to the final decision, there are two  
2 kinds of things the Board needs to address. It  
3 needs to address those claims that were  
4 actually challenged within the instituted IPR,  
5 if there are any left, and it needs to address  
6 any substitute claims added by amendment or  
7 proposed to be added by amendment under 316(d),  
8 if there are any.

9 JUSTICE ALITO: If Congress wanted to  
10 say what you think this means, why in the world  
11 would they phrase it the way it is phrased in  
12 318(a)? Why wouldn't they say with respect to  
13 the patentability of any claim found by the  
14 director to have at least some likelihood of  
15 success? Or any claim on which review was  
16 granted? Why in the world would they say any  
17 patent claim challenged by the Petitioner?

18 MR. BOND: Well, two points, Your  
19 Honor. There are several things that can cause  
20 a claim not to be in the case by the end. The  
21 fact that the PTO or the PTAB on delegated  
22 authority didn't institute is one, but also  
23 canceled claims and also settled claims.  
24 Parties can settle not just the entire dispute  
25 but also their dispute over individual claims.

1           Any of those things would mean that  
2           the claim is no longer challenged by the  
3           Petitioner at the time of the final decision.

4           JUSTICE BREYER:  It doesn't actually  
5           have to mean that.  I just thought there's  
6           another tack here, that if you're voting in  
7           Congress on this, you actually don't know what  
8           you think of in respect to the answer to this  
9           question we are now litigating.

10           And since you don't know, the best  
11           answer, from the point of view of the agency,  
12           you use a word like "any" and "any claim," as I  
13           say, filled with ambiguity, so that the agency  
14           can decide which way it wants to go.  Is there  
15           any indication of that?

16           MR. BOND:  So we -- we do think that  
17           Congress, indeed, left these matters to the  
18           agency in 316(a).  It's just like the question  
19           that was presented in *Cuozzo*.  No statutory  
20           provision in *Cuozzo* specifically addressed the  
21           claim construction standard.

22           CHIEF JUSTICE ROBERTS:  Well, but  
23           that's -- so you're saying, if I understand  
24           your answer to Justice Breyer, that Congress  
25           deliberately adopted an ambiguous term in the

1 statute so that the agency would determine what  
2 it meant.

3 It's one thing to say, you know, the  
4 agency should determine which patent claims  
5 challenge it will decide in --

6 MR. BOND: You --

7 CHIEF JUSTICE ROBERTS: Or which ones  
8 that aren't decided will be considered? It's  
9 another thing to decide let's pick a word  
10 that's so vague that nobody will be able to  
11 figure it out, and we'll leave it to the  
12 Commission.

13 MR. BOND: No, and let -- let me be  
14 clear. Our point is not that Congress enacted  
15 on purpose a deliberately ambiguous statute.  
16 Our point is that the statute Congress enacted  
17 is consistent with partial institution. But to  
18 the extent there's a question about that,  
19 Congress left those questions to the agency.

20 JUSTICE SOTOMAYOR: Well, there is one  
21 very telling sign that the "any patent claim  
22 challenged by the Petitioner" has a different  
23 meaning, and that's in 314 itself, which says  
24 "claims challenged in the petition."

25 If Congress intended claims challenged

1 in the petition to be a part of 318, it could  
2 have used exactly the same words.

3 MR. BOND: That's exactly right. And  
4 that, I think, is the second answer to Justice  
5 Alito's question, the reason to think that  
6 Congress intended this result is that Congress  
7 used this very phrase that would encompass  
8 Petitioner's position in a different phrase of  
9 the statute.

10 JUSTICE ALITO: But you think  
11 "challenged by the Petitioner" is narrower than  
12 -- I'm sorry, any change -- "any patent claim  
13 challenged by the Petitioner" is narrower than  
14 the words that are used in 314?

15 MR. BOND: So we think it is narrower  
16 in the circumstance for the same reason the  
17 Petitioner does, that it includes the  
18 possibility that claims will drop out along the  
19 way.

20 And, again, "challenged by the  
21 Petitioner" standing alone is capaciously broad  
22 and could encompass any number of things. It's  
23 context that tells you that it's narrower.

24 JUSTICE GORSUCH: But doesn't that  
25 exactly work the other way around? Of course,

1 by the end, you're only going to resolve the  
2 challenges that remain pending. When you're  
3 doing the Institution decision of inter partes  
4 review, you're going to look at the petition.  
5 Couldn't it be just that simple?

6 And doesn't 314 kind of cut against  
7 the government in some ways too by suggesting  
8 that all the PTO needs to do is decide whether  
9 there is one claim that isn't frivolous, that's  
10 -- that's the sum total of its job under the  
11 plain terms.

12 MR. BOND: So --

13 JUSTICE GORSUCH: And that -- and that  
14 beyond that, it need not go further.

15 MR. BOND: So two points. First, we  
16 agree that 314 is focused on the Institution  
17 phase and, therefore, the focus is on the  
18 petition --

19 JUSTICE GORSUCH: Right.

20 MR. BOND: -- whereas in 318 --

21 JUSTICE GORSUCH: It's what -- what's  
22 left.

23 MR. BOND: Right, it's what's left of  
24 the proceeding.

25 JUSTICE GORSUCH: So that's why

1 there's a difference in language there, you  
2 agree.

3 MR. BOND: Right, exactly. And we  
4 think that that underscores that what's left  
5 can include the fact --

6 JUSTICE GORSUCH: But how then do we  
7 deal with the fact that in 314, we have all the  
8 -- all the PTO has to do is decide whether  
9 there is one non-frivolous claim. It's a  
10 thumbs-up or a thumbs-down decision --

11 MR. BOND: Because --

12 JUSTICE GORSUCH: -- that's  
13 anticipated there, not a -- not a  
14 claim-by-claim examination.

15 MR. BOND: Well, two points, Your  
16 Honor. First, what Congress included there is  
17 simply a floor. It's phrased as a prohibition  
18 that the PTO and, on delegated authority the  
19 Board, may not institute, unless it finds that  
20 at least one of the claims has a reasonable  
21 likelihood of being found invalid.

22 It doesn't say that the Board must  
23 therefore institute or must do an up-or-down  
24 determination.

25 JUSTICE GORSUCH: No.

1           MR. BOND: We think that that leaves  
2 room for the Board to say we can't institute if  
3 we don't find at least one, but you know what?  
4 We're going to conserve our resources, as  
5 316(b) tells us in the adopting regulations and  
6 focus then on the claims --

7           JUSTICE GORSUCH: Well, help me --  
8 help me out with 316 then if that's where you  
9 are going to go to. Where do you -- where do  
10 you see the authority for the regulations that  
11 the director is proscribed here?

12           MR. BOND: Sure. They're in two  
13 provisions, principally 316(a)(4), which was  
14 the same provision at issue in Cuozzo.

15           JUSTICE GORSUCH: Now, (a)(4), that --  
16 my problem with that, where I get stuck is that  
17 (a)(4) concerns establishing a governing inter  
18 partes review. And we're not at that stage  
19 yet. We're at the decision whether to  
20 institute inter partes review.

21           MR. BOND: Sure.

22           JUSTICE GORSUCH: I would have thought  
23 you'd have to look to (a)(2) rather than  
24 (a)(4).

25           MR. BOND: Right, so (a)(2) is the

1 second provision, but we do think that (a)(4)  
2 encompasses this because it's establishing and  
3 governing inter partes review. And the Board's  
4 determination whether to institute on a  
5 particular claim is part of that universe of  
6 things that was granted to the Board.

7 But certainly also (a)(2) because that  
8 establishes or gives the Board authority to  
9 establish rules that govern the showing of  
10 sufficiency that needs to be made. This is on  
11 17(a) of the -- defense.

12 JUSTICE GORSUCH: I'd agree with you  
13 that you've given great discussion on the  
14 standards for showing sufficient grounds to  
15 institute a review. I'm not sure, I guess you  
16 can help me on how that also includes the  
17 authority whether to grant review of this or  
18 that claim, the weeding out process.

19 MR. BOND: Sure.

20 JUSTICE GORSUCH: I can see how it  
21 might affect the reasonable likelihood inquiry  
22 and how the director is going to go about doing  
23 that, but I -- I guess it's a little less clear  
24 to me how it also grants him authority or her  
25 authority to decide which claims to proceed

1 with.

2 MR. BOND: Sure. Because -- well,  
3 what it says is the standards for showing of  
4 sufficient grounds. And those standards for  
5 showing sufficient grounds, that's in (a)(2).

6 JUSTICE GORSUCH: Yeah.

7 MR. BOND: And what the Board's  
8 regulation is doing is preserving the Board's  
9 ability to assess sufficiency on a  
10 claim-by-claim basis. We think that's  
11 encompassed within (a)(2).

12 JUSTICE GORSUCH: Well, but -- but  
13 314(a) seems to proscribe that -- that  
14 question, at least with respect to one claim.  
15 It speaks to that very issue.

16 MR. BOND: Well, it sets a floor, just  
17 like the outer time limits that Congress  
18 required in 316(a)(11), set an outer time  
19 limit, but don't preclude the Board from  
20 setting a lower time limit on the completion of  
21 the final written decision.

22 The same we think is true of 316 -- or  
23 314(a). It said you may not institute unless  
24 at least one of these claims, you conclude, is  
25 worthwhile because it clears that reasonable

1 likelihood threshold.

2 But especially in the context of the  
3 scheme that gives the Board complete discretion  
4 to deny review entirely, we think it's  
5 improbable that Congress would have tied the  
6 Board's hands in this one respect.

7 Moreover, not just to say you don't  
8 have --

9 JUSTICE GORSUCH: Is there some  
10 inconsistency with 304 where you're allowed --  
11 the director gets to decide which question  
12 specifically the director wants to take up?  
13 There seems to be an express grant to the  
14 director there to do exactly what you want to  
15 do here. And is its absence here suggestive?

16 MR. BOND: We don't think so, Your  
17 Honor. I think the scheme of ex parte  
18 reexamination is fundamentally different in  
19 that its parties are suggesting to the Board or  
20 the Board on its own initiative saying we're  
21 going to look at a particular substantial new  
22 question of patentability that has been raised,  
23 and we'll look at which particular claims we  
24 think are implicated by that.

25 JUSTICE GORSUCH: It's not just claims

1 in 304, it is questions. And so the director  
2 can pick and choose which questions. And it is  
3 granted that express authority.

4 And normally we -- we think that when  
5 it's granted in one place but not clearly  
6 granted in the other that that -- that that  
7 intends a difference.

8 MR. BOND: So, at a minimum, that  
9 difference doesn't clearly preclude the Board  
10 here under 314(d) and its regulatory authority  
11 from saying we're going to treat this as a  
12 floor, that we are told by Congress we can't do  
13 it unless we clear this floor, but we're going  
14 to hold patents or IPR petitions to a higher  
15 standard and evaluate them claim by claim  
16 because that's consistent with the purpose as  
17 Congress told us in 316(b) to consider in  
18 adopting our regulations.

19 And those purposes boil down to, as  
20 the Court underscored in *Cuozzo*, making sure  
21 we're actually improving patent quality and  
22 doing so efficiently.

23 Now, the Board's partial institution  
24 approach is perfectly consistent with both of  
25 those aims. It focuses its energies on those

1 patent claims it determines actually have a  
2 reasonable likelihood of being invalidated  
3 without wasting time on other claims.

4 The Petitioner's all-or-nothing  
5 approach puts the Board to an untenable choice;  
6 either it wastes time on claims it's already  
7 determined don't have a reasonable likelihood  
8 of being invalidated at least based on the  
9 arguments presented in the petition, or it  
10 doesn't use this new tool at all and all of the  
11 work of creating inter partes review was for  
12 nothing.

13 And so, in either event, we're not  
14 getting the benefit or achieving either of the  
15 goals that Congress had in mind.

16 And there --

17 JUSTICE ALITO: Is there anything in  
18 the statute that would prevent the Board, if it  
19 is required to render a final decision on all  
20 claims initially challenged by the Petitioner  
21 from instituting a streamlined procedure for  
22 dealing with the claims that were found at the  
23 outset to have no likelihood of success?

24 Why does it need to go through a full  
25 proceeding with respect to those claims? Can

1 -- can it not just say in a summary form we  
2 found that these have no likelihood of success?

3 And then that could be appealed to the  
4 Federal Circuit and the Federal Circuit could  
5 decide whether that -- that determination was  
6 permissible.

7 MR. BOND: So a couple of points, Your  
8 Honor. First, at the institution phase, the  
9 Board is not deciding the merits, it is  
10 deciding not to decide the merits. It is  
11 saying you haven't for some reason made a  
12 sufficient showing to make us convinced that it  
13 is worth our time to investigate the merits of  
14 your claim.

15 They can also deny, however, for  
16 additional reasons, irrespective of the merits.  
17 They might say, just as all agree they can deny  
18 the petition entirely apart from the merits,  
19 they might say this patent claim is going to be  
20 very time-consuming and is not going to advance  
21 the goals of the statute, so we're going to  
22 deny review on that ground.

23 So there is not necessarily a ruling  
24 on the merits at all, and it's fundamentally  
25 different than a district court, say, folding

1 in a 12(b)(6) or summary judgment ruling  
2 because it's based on the agency's discretion,  
3 not just the merits.

4 JUSTICE KAGAN: Or couldn't the agency  
5 at that point say, you know, the ground on  
6 which you charge this patent is invalid is not  
7 a ground we can review at this time?

8 MR. BOND: Right. Exactly right.  
9 They could as well say that you have challenged  
10 this on 112 under indefiniteness or under  
11 Section 101, and it's a law of nature  
12 challenge, and that's not properly presented to  
13 us. They could say on those grounds or you are  
14 estopped and we're not going to consider  
15 those -- those --

16 JUSTICE KAGAN: And then it would  
17 seem, I mean, that would be a strange kind of  
18 thing to say, well, you can't challenge on that  
19 ground, but we're going to issue a decision as  
20 to patentability.

21 MR. BOND: Exactly right. So you're  
22 forced with either the PTO -- the PTAB either  
23 deciding we're not going to review this ground  
24 and then that gets baked into the final  
25 decision and treated as a merits ruling, which

1 can then be appealed to the Federal Circuit and  
2 creates circumvention of Cuzo, or you're  
3 forcing the Board to decide the merits,  
4 notwithstanding the fact that it didn't  
5 institute review, didn't get submissions from  
6 the parties at the merits stage, and didn't  
7 apply the different standards that apply at the  
8 merits stage of IPR proceedings.

9 CHIEF JUSTICE ROBERTS: It -- it  
10 didn't institute review, but it issued a quite  
11 lengthy decision addressing the issues, right?

12 MR. BOND: It issued a lengthy  
13 decision, about half as long as the final  
14 decision, but they're different in kind. And  
15 I'd like to emphasize a few ways that they  
16 differ.

17 So, importantly, when the Board denies  
18 review, it often is denying review for some  
19 threshold reason based on a failing in the  
20 petition presented to it, not deciding  
21 patentability at the end.

22 So a good example here is at Petition  
23 Appendix page 115a to 116a where the Board  
24 denies institution of claims 11 through 16.  
25 Those claims are what are known as

1 means-plus-function claims, where under Section  
2 1112(f) -- or 112(f) their meaning is  
3 determined by a particular structure set forth  
4 in the specification, not in the claim itself.

5           Accordingly, the Board's regulations  
6 -- and this is 42.104 -- require a petition for  
7 inter partes review to identify what structure  
8 do you think determines the construction of  
9 this claim so that we, the Board, can determine  
10 if it's unpatentable?

11           The Board said at 115, the petition  
12 didn't identify what structure it was that the  
13 petitioner thought informed the construction or  
14 the interpretation of these claims.

15           So a fortiori, we can't determine  
16 patentability based on your submission.

17           CHIEF JUSTICE ROBERTS: How often --  
18 how often does it issue decisions -- written  
19 decisions at this stage in determining whether  
20 to institute inter partes review?

21           MR. BOND: So I -- I don't have  
22 statistics on how frequently it issues  
23 decisions of this kind. We think it is the  
24 Board's ordinary practice, and we think for two  
25 reasons that is actually a good practice that

1 the Board, in its discretion, has -- has  
2 adopted.

3 It's helpful for the Board itself  
4 because, if the Board institutes review, it  
5 then -- the judges of the panel or whatever  
6 panel is assigned to it, then have a very short  
7 window set by statute to determine the merits  
8 of this proceeding after the administrative  
9 trial is complete.

10 And, second, it's beneficial for the  
11 parties to this case and other cases to know  
12 what it is the Board is looking for in this  
13 relatively new statutory scheme when it  
14 institutes review and exercises its discretion.

15 That discussion at page 115A of the  
16 petition appendix is illustrative. It shows  
17 other parties in the future. If you actually  
18 don't follow our rule and include the kind of  
19 structure that we say you must, because 112F  
20 requires us to look at that in construing the  
21 claim, we are unlikely to grant review on your  
22 petition.

23 That's instructive to the bar and the  
24 patent bar and to the patent community --

25 JUSTICE SOTOMAYOR: I thought --

1 MR. BOND: -- to know how --

2 JUSTICE SOTOMAYOR: -- that that was  
3 the very reason given by the Board in  
4 encouraging these kinds of opinions to be  
5 written.

6 MR. BOND: That's precisely right,  
7 that it's useful to the patent -- it's useful  
8 to the patent bar and useful to the community  
9 to know --

10 JUSTICE SOTOMAYOR: So the patent  
11 Board basically told the public, we're issuing  
12 these decisions for educational purposes?

13 MR. BOND: That's right, it -- to  
14 educate the -- the -- the public and the patent  
15 bar and also itself and its panels on what the  
16 nature of this suit is or what -- what this  
17 dispute is and what it looks for in the future.

18 But, in any event, even if the patent  
19 -- even if the Board could adopt a more  
20 efficient method of partial institution, we  
21 think that's beside the point of the question  
22 presented to you today.

23 Whether the Board could achieve more  
24 efficient partial institution with a thumbs up  
25 or thumbs down is not a reason for the Board to

1 jettison that system entirely and adopt this  
2 much more inefficient approach where it lacks  
3 discretion over the one thing that is common to  
4 patent law. The default rule in patent law is  
5 that claims are evaluated independently. In  
6 litigation, each claim is independently  
7 presumed valid under Section 282.

8           It would be highly incongruous for  
9 Congress to say, when the expert agency is  
10 reviewing patents it has issued, it lacks  
11 discretion to constrain the scope of its review  
12 and lacks discretion to do what is ordinarily  
13 the rule in patent law. And indeed, the rule  
14 in discretionary review generally, we're not  
15 aware of any context in which a tribunal vested  
16 with discretionary review authority is put to  
17 this choice of reviewing all --

18           JUSTICE GORSUCH: What do you say  
19 about our -- our last argument, where a lot of  
20 our attention focused on Congress's putative  
21 intention to -- to want to move things to an  
22 expert agency and -- and speed things along,  
23 make it more efficient?

24           Could -- could that be a reason here  
25 why Congress might have wanted the Patent

1 Office to review any -- and -- and issue a  
2 final decision on any and all claims brought to  
3 it?

4 MR. BOND: So, two points. We don't  
5 think that it would be more efficient in a  
6 sense of making things go faster. If the Board  
7 --

8 JUSTICE GORSUCH: No, I -- no, surely,  
9 not necessarily efficient from the -- the PTO's  
10 perspective, but efficient from the economy's  
11 perspective.

12 MR. BOND: So -- so then two points on  
13 the -- on the economy benefit point. It is not  
14 going to benefit the economy first if the PTO  
15 is put to a choice between not instituting  
16 review at all, that is no benefit to the  
17 economy, or spinning its wheels on claims in a  
18 patent on --

19 JUSTICE GORSUCH: But it could do what  
20 Justice Kennedy said. That -- that would --  
21 everybody agrees would remain an available  
22 choice.

23 MR. BOND: It could indeed do that,  
24 and that, we think, highlights that this is  
25 consistent with Congress's goals. If it could

1     achieve -- achieve the same result in two more  
2     cumbersome steps -- two more cumbersome steps,  
3     it makes sense that Congress did not intend to  
4     preclude it from doing so through this natural  
5     --

6                   JUSTICE GORSUCH:   Well, it would  
7     require consent by the -- by the litigant in  
8     that case, where as here, this litigant took  
9     the view that I really want an adjudication on  
10    everything that -- would it be crazy to suppose  
11    that Congress might have wanted that as a way  
12    to achieve maximum efficiency through this  
13    administrative process?

14                   MR. BOND:    So --

15                   JUSTICE GORSUCH:   From the -- from the  
16    economy's perspective?

17                   MR. BOND:    We don't think the consent  
18    issue is fundamentally different, because if a  
19    petitioner, again, comes in and says, I want  
20    IPR on claims 1 through 10, and the Board says,  
21    we will give you IPR on one through five, the  
22    petitioner can, in effect, walk away if they  
23    can just simply agree with the patent owner to  
24    say, look, we drop our IPR challenge, I'll go  
25    back to the infringement suit where you sued me

1 and presumably want to litigate, and we will  
2 litigate that there. That's permitted under  
3 Section 317.

4 Now, to be sure, the Board at that  
5 point can proceed to adjudicate in its own --  
6 within its own proceeding the underlying  
7 claims, but that has nothing to do with the  
8 rights or a consent of the parties inter se.

9 And I think to the -- the underlying  
10 question here is isn't this meant as a  
11 substitute for litigation? We think the  
12 statute itself makes clear that that's not the  
13 design of inter partes review.

14 The limited scope -- so it's limited  
15 to 102 and 103, it's limited to particular  
16 prior art, and it's limited only to particular  
17 claims that this petitioner brings to the PTO.  
18 It can't be viewed as a substitute for  
19 litigation such that someone could reasonably  
20 look at the scheme and say Congress wanted all  
21 of these claims decided either in one forum or  
22 the other. It's baked into the scheme that  
23 there will be this potential for some claims to  
24 be reviewed by the PTO and others in court.

25 And partial institution actually

1 enhances the efficiency and harmonious working  
2 of these two things because the -- the Board  
3 can say, look, you've got a solid challenge on  
4 claim number 1, we will review that. The rest  
5 of them, we don't think have met our standard,  
6 or we exercise our discretion not to review  
7 them. We're releasing those to the district  
8 court, so the district court litigation can  
9 proceed, and we will deal with this one, and  
10 the district court can decide what to do.

11 Petitioner's position, by contrast,  
12 creates, I think, an incentive at least for  
13 parties to seek to tie up district court  
14 litigation by seeking an IPR.

15 And the example we gave in, I think,  
16 page 39 and 40 of our brief is where an -- an  
17 entity sued for infringement, and then, on a  
18 strong patent claim, can take that claim to  
19 IPR, add on some weak and vulnerable claims and  
20 ask the PTO to grant review.

21 If the Board's only choice is to grant  
22 all or nothing and it grants all, then the  
23 district court is very likely we think -- at --  
24 at least there's a possibility, that it will  
25 stay the district court litigation, and the

1 alleged infringer has effectively slowed down  
2 the district court litigation over claims that  
3 had nothing to do with that suit.

4 That possibility, we think, is  
5 inherent in petitioner's approach that puts the  
6 agency though that kind of choice, whereas --

7 JUSTICE GINSBURG: Are you relying at  
8 all on the notion that this entire inter partes  
9 scheme is to give the agency a chance to take a  
10 second look to correct its error, therefore, it  
11 should not be the petitioner who controls what  
12 the agency will consider?

13 MR. BOND: Yes, Your Honor. And I  
14 think that's an important feature of inter  
15 partes review, that this notion of master of  
16 the complaint just doesn't translate here, one,  
17 because Section 311(b) doesn't say you may get  
18 review of anything you want, but you may get  
19 review only of these kinds of things, but more  
20 fundamentally because the point of this scheme  
21 is to give the agency an opportunity to  
22 reconsider decisions in the form of patent  
23 claims it has previously issued.

24 It doesn't make any sense to give the  
25 Board complete --

1 JUSTICE GORSUCH: It can --

2 MR. BOND: -- discretion --

3 JUSTICE GORSUCH: -- it can still do  
4 that through ex parte proceedings reviewability  
5 on its own any time, right?

6 MR. BOND: Well, ex parte --

7 JUSTICE GORSUCH: Those -- those still  
8 exist? They --

9 MR. BOND: They do still exist. They  
10 have a different standard, and Congress thought  
11 that wasn't sufficient and adopted this  
12 additional mechanism.

13 JUSTICE GORSUCH: Right.

14 MR. BOND: And so Congress, in giving  
15 the agency authority and discretion to deny  
16 review entirely and so much discretion over the  
17 way these proceedings work, we think it's  
18 simply improbable that Congress would have  
19 given the agency all the discretion, except  
20 over the scope of which claims it will  
21 institute and particularly given that the  
22 background rule of patent law is that it will  
23 -- it will examine claims one by one.

24 If there are no further questions.

25 Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel.

3 Mr. Castanias, four minutes.

4 REBUTTAL ARGUMENT BY GREGORY A. CASTANIAS  
5 ON BEHALF OF THE PETITIONER

6 MR. CASTANIAS: Thank you, Mr. Chief  
7 Justice.

8 I have three specific responses to  
9 points made by my friend and then four broader  
10 points that I hope I will be able to get in, in  
11 my limited time.

12 Justice Kagan, your colloquy with my  
13 friend here was about 101 and 112. That's  
14 answered by the scope provision of Section  
15 311(b). That limits inter partes reviews to  
16 102 and 103 challenges in the first instance.

17 Mr. Chief Justice, you had a colloquy  
18 with my friend about the lengthy decision that  
19 was entered at the institution phase here. And  
20 my friend responded to you that this was a  
21 failure to follow the rules of the tribunal.

22 This was a merits decision that was  
23 made. It said that we had failed to show the  
24 corresponding structure, which is a requirement  
25 of the law under Section 112-6. And if we had

1 had a challenge to that that we wanted to  
2 appeal, we should have been able to have that  
3 finalized, it -- via estopping, and also  
4 appealable for us.

5 Justice Sotomayor, you asked the  
6 question about what the education purposes of  
7 the institution decision. Our point is that  
8 education can come from an appealable and  
9 estopping decision.

10 Now, the broader points, Justice  
11 Breyer, you, in your colloquy with my friend,  
12 rewrote the statute for him to get to the place  
13 he wanted to go. You said the statute should  
14 be read as "any patent claim that is the  
15 subject of inter partes review and" -- that's  
16 not what the statute says.

17 JUSTICE BREYER: No, I just mentioned  
18 that the word "any" is ambiguous.

19 MR. CASTANIAS: Well, it is only  
20 ambiguous absent context. And as we showed,  
21 the Rosenwasser case, when you have "shall" and  
22 "any" in the same way that that minimum wage  
23 statute was -- was worded, the "any" here  
24 doesn't mean you may have any vegetable on the  
25 menu. It doesn't -- that obviously doesn't

1 mean you can -- you -- you must have  
2 everything --

3 JUSTICE BREYER: Just ambiguous in  
4 between whether they are referring to a claim  
5 in which it has been granted or whether they  
6 are referring to any claim in the petition.

7 MR. CASTANIAS: Well --

8 JUSTICE BREYER: Ambiguous as to  
9 between those two things, it seemed ambiguous.

10 MR. CASTANIAS: And that is where,  
11 Justice Breyer, this Court's decision in  
12 Utility Air, that made clear that a statutory  
13 provision that may seem ambiguous in isolation  
14 is often clarified by the remainder of the  
15 statutory scheme because only one of the  
16 permissible --

17 JUSTICE SOTOMAYOR: Let me ask you --

18 MR. CASTANIAS: -- meanings produces  
19 the substantive effect.

20 JUSTICE SOTOMAYOR: You talked about  
21 canceled claims. How about settled claims?  
22 Say, in the middle of the proceedings, you  
23 settle a claim.

24 Under your theory, the Board would  
25 still have to address that?

1 MR. CASTANIAS: I -- I think that if  
2 we are saying we are no longer challenging  
3 that, we -- it's no longer a claim challenged  
4 by the petitioner. The settlement presumably  
5 --

6 JUSTICE SOTOMAYOR: It's in the  
7 petition.

8 MR. CASTANIAS: The settlement  
9 would --

10 JUSTICE SOTOMAYOR: What gives you a  
11 right to drop it then?

12 MR. CASTANIAS: Because the language  
13 of 318(a) is "by the petitioner." And that's  
14 what the context tells us about that.

15 JUSTICE KAGAN: Mr. Castanias, while  
16 we're on the statute, I understand that this is  
17 your argument for why there has to be a final  
18 decision with respect to every claim  
19 challenged, but, you know, however you -- but  
20 you're still saying that -- that you're not  
21 challenging the -- the partial institution. Is  
22 that right?

23 MR. CASTANIAS: But we're -- we're not  
24 challenging --

25 JUSTICE KAGAN: And I guess here's my

1 question: What language says that partial  
2 institution is not permissible?

3 MR. CASTANIAS: The fact that the  
4 Board has already given the discretion whether  
5 to institute. The discretion whether to  
6 institute does not hide inside it a secret  
7 second level of discretion to decide to  
8 institute anything other than the petition.

9 JUSTICE KAGAN: I think I'm not  
10 understanding. Could you just point me to the  
11 -- the language that you're saying. That's the  
12 --

13 MR. CASTANIAS: It's in Section --

14 JUSTICE KAGAN: -- thing that you can't  
15 --

16 MR. CASTANIAS: It's in Section --  
17 it's in Section 314(b), Timing. And it says,  
18 "The director shall determine whether to  
19 institute an inter partes review."

20 And we say that's a binary choice, and  
21 we say that's consistent with the if/then  
22 language of Section 318.

23 To -- to Justice Gorsuch's colloquy  
24 with my friend, there is no interpretation  
25 here. No evaluation at all, even in the

1 institution regulation of Section 318(a). So I  
2 don't know what we're possibly deferring to  
3 here with regard to the language of Section  
4 318(a).

5 The Section 314(a) did -- didn't  
6 address it. The Section 314(a) regulation  
7 didn't address it in the Federal Register. And  
8 as you pointed out, Justice Gorsuch, the --  
9 (a)(2) talks about grounds to institute. It's  
10 not a weeding-out function and it's not a final  
11 written decision regulation.

12 On reviewability, our yellow brief I  
13 think tells the tale. This is not the same  
14 section. And it is -- it certainly would be,  
15 in the words of Justice Alito, shenanigans, if  
16 the Board is allowed to fail to follow the  
17 regulation here.

18 CHIEF JUSTICE ROBERTS: I thought you  
19 were being overly ambitious when you said you'd  
20 get to four points in rebuttal, but thank you,  
21 counsel.

22 (Laughter.)

23 MR. CASTANIAS: My last point was  
24 efficiency, Your Honor.

25 (Laughter.)

1 MR. CASTANIAS: Thank you.

2 CHIEF JUSTICE ROBERTS: The case is  
3 submitted.

4 (Whereupon, at 12:09 p.m., the case  
5 was submitted.)

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## Official - Subject to Final Review

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