

Big Tech's Abuse of Patent Owners in the PTAB Must End

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KEY TAKEAWAYS

The Patent Trial and Appeal Board has destabilized the U.S. patent system as the legal engine that has driven the U.S. innovation economy for over two centuries.

The PTAB plays a key role in predatory infringement by Big Tech companies seeking to steal patented technologies from inventors and small businesses.

Congress should abolish the PTAB or at least reform the PTAB to ensure that it respects due process and the norms of the rule of law.

The patent system has been a key factor in the success of the United States innovation economy.¹ In the Constitution, the Founders directly authorized Congress to secure reliable and effective property rights to inventors.² Beginning with the first patent law enacted by the first Congress in 1790, the patent system has been the driver of U.S. industrial and technological leadership for over 200 years.³ Unfortunately, this technological and economic leadership is threatened by the weakening of the patent system in the past 10 to 15 years. An administrative tribunal known as the Patent Trial and Appeal Board (PTAB) is a principal cause of this threat to U.S. technological leadership and economic growth.

Created by Congress in the America Invents Act of 2011 (AIA), the PTAB is an administrative tribunal that cancels patents previously issued by the U.S. Patent and Trademark Office (USPTO). The PTAB

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is not a court; it is a tribunal of administrative officials that reviews the validity of previously granted patents. As an administrative tribunal, the PTAB has raised the same concerns about lack of respect for due process and the rule of law often voiced about agencies throughout the modern administrative state.⁴

As detailed in a prior *Legal Memorandum*, the PTAB represents the assimilation of the U.S. patent system into the modern administrative state.⁵ The PTAB has operated largely by regulatory fiat, engaging in what lawyers and judges have correctly identified as “shenanigans.”⁶ It has engaged in *ad hoc* decision-making and has violated basic norms of due process in pursuit of its *raison d’être*—to cancel patents. Innovators are now victims of the same abuses of power and disregard for due process and the rights of citizens that occur in other agencies in the administrative state, such as the Federal Trade Commission.⁷

In response to the PTAB’s abuses of power that threaten the U.S. innovation economy and its global technological leadership, numerous bills have been introduced in recent years that would either eliminate the PTAB or at least reform it by imposing important procedural and substantive limitations on its operations. The Restoring American Leadership in Innovation (RALI) Act would have eliminated the PTAB and restored the original legal process that existed for over 200 years in which courts of law assessed the validity of patents.⁸ Federal courts have always provided the same procedural and substantive protections to patent owners that they secured to all U.S. citizens.⁹ Another bill, the Promoting and Respecting Economically Vital American Innovation Leadership (PREVAIL) Act, will not eliminate the PTAB, but rather will impose important reforms mandating that the PTAB respect due process and other legal norms in its administrative hearings.¹⁰

But other ersatz “reform” bills have also been introduced by the very politicians who created the PTAB and who seek to further its mission as an administrative agency. One such bill was the Patent Trial and Appeal Board Reform Act (PTAB Reform Act).¹¹ This was a reform bill in name alone. A byproduct of lobbying by many Big Tech companies (and the advocacy groups they fund),¹² this bill did not seek to eliminate or even fix any of the fundamental problems with the PTAB.¹³ Instead, it *expanded* the power of the PTAB by eliminating a key procedural reform adopted in 2020 by then-USPTO Director Andrei Iancu.

Although the PTAB Reform Act expired along with the 117th Congress, Big Tech’s lobbyists and its supported activists continue to lobby both the USPTO and Congress to repeal this procedural reform. Its regulatory

and legislative lobbying efforts should be strenuously opposed. If the U.S. is to reestablish the engine that drove its innovation economy for 200 years—the reliable and effective rights secured to innovators by the patent system—it must reject false reform efforts like the PTAB Reform Act or other similar bills.

This *Legal Memorandum* explains why Congress should reject any effort to revive the PTAB Reform Act or to enact similar bills. These bills would only serve to bolster and perpetuate abuses by many Big Tech companies of the PTAB, which is now a key tool in predatory infringement strategies by which these companies steal patented technologies from American inventors.¹⁴ As eloquently stated by Joe Kiani, the founder of medical tech company Masimo, which has been in litigation with Apple for years following Apple’s theft of Masimo’s technologies in the Apple Watch: “When Apple takes an interest in a company, it’s the kiss of death.... [Y]ou realize that the long-term plan is to...take it all.”¹⁵

This *Legal Memorandum* proceeds in three parts. It explains:

1. How the PTAB Reform Act would have abrogated what is known as the *Fintiv* rule and why this is significant.
2. Why the *Fintiv* rule has become a flashpoint of controversy for many Big Tech companies because it restricts their ability to use the PTAB as a well-known “patent death squad” that engages in arbitrary processes to kill the patents protecting the technologies that Big Tech is seeking to steal from companies like Masimo, Sonos, Centripetal Networks, and others.¹⁶ Big Tech companies like Google, Apple, Microsoft, and Samsung have been the largest users of the PTAB.¹⁷ They clearly benefit from the PTAB’s shockingly high rates of invalidating patents—the PTAB has a whopping 85 percent invalidation rate of the patents it has reviewed in its administrative hearings.¹⁸ This is double the patent invalidation rate in federal court.¹⁹
3. How, in addition to the extraordinarily high cancelation rates, the PTAB has been the subject of abusive practices and strategic behavior by many Big Tech companies as well as other companies, which file numerous petitions merely to harass patent owners and impose additional costs on them.

It is long past time for Congress to reform the PTAB. Former Representative Lamar Smith (R-TX), one of the original co-sponsors of the AIA,

has recognized that the PTAB has been the “subject of abuse by giant tech companies” that use it to engage in a strategy of “unabated patent theft.”²⁰

Congress should reintroduce the RALI Act and give serious consideration to enacting either this bill or the PREVAIL Act into law.²¹ Ideally, it should eliminate the PTAB and return to the rule of law and due process secured to all patent owners by courts of law; if Congress is unable to achieve this laudable goal in the short term, it should at least enact procedural and substantive reforms that require the PTAB to respect the due process and other rights of patent owners appearing before this administrative tribunal. Regardless, bills like the misleadingly titled PTAB Reform Act should be rejected. The continued growth of the U.S. innovation economy, its global technological leadership, and its ability to respond to global competitive threats from countries like China are at stake.

The PTAB Reform Act and the *Fintiv* Test

The PTAB Reform Act sought to abolish an important regulatory reform that was adopted by former Director Iancu in 2020 in his capacity as the administrative director of the PTAB at the USPTO. This reform is known as the “*Fintiv* test,” named after a PTAB decision in *Apple v. Fintiv*.²² It is without a hint of irony that the *Fintiv* test arises from a PTAB petition to cancel a patent filed by Apple, a Big Tech company known for engaging in predatory infringement.²³

The *Fintiv* Test. The *Fintiv* test is actually a classic multi-factor legal test—sometimes called the “*Fintiv* factors.” If one strips away the legalese of the *Fintiv* test in both form and substance, its primary function is simple: It permits the PTAB to deny petitions to cancel patents if there is a parallel court proceeding that is close to a final judgment addressing the same question of validity of the same patent.²⁴ The *Fintiv* test brought a modicum of the rule of law back to the PTAB. It effectively brought an end to duplicative, multiple bites at the apple by Big Tech companies that were maximizing their chances of canceling a patent by arguing in both a court and the PTAB that a patent is invalid, forcing patent owners to defend their property rights in two different fora simultaneously.

It may seem surprising at first blush why this technical procedural rule at the PTAB has unleashed significant lawsuits by several Big Tech companies (as detailed below) and untold hours of lobbying Congress. These substantial efforts even bore fruit, as former Senator Patrick Leahy (D-VT) and others invested scarce legislative time and resources to introduce the PTAB Reform Act in 2021. But this is one of those

rare instances in which an elephant is hiding in a mousehole, to turn a well-known phrase from Justice Antonin Scalia.²⁵ It turns out that the technical, procedural issue concerning the timing of when different governmental institutions can rule on the validity of a patent—a court or the PTAB—is profoundly significant.

The *Fintiv* test brought an end to one of the abuses of the PTAB within Big Tech companies' predatory infringement strategies, in which these companies used the PTAB to impose additional costs on patent owners who sued them for their theft of patented inventions. Big Tech companies have used the PTAB either to impose additional costs on patent owners in defending their rights or to benefit from the penchant of this "patent death squad" to invalidate patents, thus leaving technology free for the taking. By creating the authority for the PTAB to reject a petition when a court proceeding is close to a decision in which the judge would decide the same questions raised about the validity of the same patent, the *Fintiv* test removed one key tool from their predatory infringement toolbox. To understand why this is the case, we must first review how the PTAB became a "patent death squad" in which all the top petitioners are Big Tech companies like Google, Microsoft, Apple, and Samsung, among others.

PTAB: A Key to Big Tech's Strategy

The original justification for the PTAB was that the U.S. innovation economy was awash in invalid patents exploited by "patent trolls" preying on small businesses that could not afford the high cost of patent litigation in court in defending their lawful activities. This argument was more opportunistic lobbying rhetoric than legal or economic fact;²⁶ it created a faulty narrative that the patent system is "broken" and stifling innovation.²⁷ The entities responsible for pushing this policy rhetoric and lobbying narrative—and creating a moral panic about the patent system in Washington, DC—were Google, Intel, and other Big Tech companies,²⁸ as well as the myriad advocacy groups and scholars funded by them.²⁹

Political Access. The PTAB was created in 2011 in the AIA, and when the AIA was enacted by Congress and signed into law by President Barack Obama, Google and other Big Tech companies were already spending tens of millions lobbying Congress.³⁰ In addition to these exorbitant sums spent lobbying Congress, it was reported in 2016 that Google lobbyists met regularly with President Obama—on average, once per week.³¹ The frequency of these meetings far exceeded access by any other large companies to President Obama.³² President Obama was metaphorically on Google's speed dial,

as Gen Xers would say, or, as today's mobile generation would put it, Google needed political access to President Obama, and it made a (metaphorical) app for that.

This unprecedented political access combined with tens of millions of dollars in massive lobbying and policy advocacy ultimately paid significant dividends for Google, Intel, Microsoft, and other Big Tech companies. These entities successfully created and spread the narrative through academic articles, conferences, and op-eds that “patent trolls are killing innovation” with “bad patents”—to the point at which there are few people left in America who have not heard of the “patent troll,” despite many being barely aware of or knowledgeable about the patent system itself.

This narrative has proven incredibly difficult to dislodge from the minds of policymakers. In fact, many Big Tech companies and others continue to push it in policy arguments to this day.³³ It has led to extensive legal and institutional changes in the U.S. patent system, including the creation of the PTAB in the AIA in 2011.

In response to this narrative, Congress created the PTAB to be an administrative tribunal that could “efficiently” cancel patents.³⁴ Here, “efficiency” means the PTAB is supposed to operate cheaply and quickly.³⁵ Congress thus imposed very few restrictions on the PTAB.³⁶

PTAB—Filing Companies. The absence of any statutory restrictions imposing procedural or substantive guardrails on the PTAB's operations made it easily susceptible to strategic abuse by the same companies that lobbied to create it. For example, under the AIA, PTAB petitioners do not have to establish that they have “standing,” a basic requirement of anyone filing a lawsuit in court alleging that their rights have been threatened or violated. Without such a requirement, anyone in the world can file a petition in the PTAB to cancel a patent for any reason whatsoever. Anti-patent policy organizations file PTAB petitions to attack patents simply because they are opposed to patents.³⁷ An entirely new company has come into existence whose sole job is to profit from filing PTAB petitions to cancel patents; one of the more prominent examples of such PTAB-petitioning companies, Unified Patents, identifies its supporters as “members,” not as legal clients.³⁸

While it does not disclose who funds its PTAB petitions, United Patents does list numerous Big Tech companies as “members.”³⁹ (Google was once identified as a “founding member” of Unified Patents, but it is no longer listed on its website.⁴⁰) Other PTAB-petitioning companies or individuals have filed petitions for a whole range of illegitimate purposes or even outright fraud, including extortion of patent owners and manipulation of stock prices.⁴¹

A Tool of Predatory Infringement. The PTAB has thus come to serve a key role in the rise of predatory infringement by large, well-funded Big Tech companies that try to steal technologies owned by inventors or small businesses.⁴² Predatory infringement (also called “efficient infringement” by policy wonks) occurs when a company determines that it “economically gains from deliberately infringing patents” because the company ultimately will pay less in legal fees in either forcing settlements or in easily petitioning the PTAB to invalidate patents than in paying patent owners for licenses.⁴³

Predatory infringement is a successful strategy because it is now incredibly uncertain and expensive for patent owners to file infringement lawsuits due to a host of changes to the patent system during the past 15 years, including the additional costs of defending one’s patent at the PTAB. It is estimated that a PTAB proceeding costs between \$300,000 and \$600,000, not including the inevitable court appeals that follow such a proceeding.⁴⁴

For a patent owner, the approximately one-half-million dollars in expenses imposed by the PTAB is a pure cost with no potential upside. If the patent owner loses at the PTAB, its patent is canceled, but if the petitioner loses, the patent owner does not gain anything. The patent owner has paid approximately one-half-million dollars in costs to its lawyers, and it must continue to defend its patent against further PTAB petitions or in parallel court proceedings. In short, for patent owners, the PTAB represents the classic perverse adage, “heads, I win, tails, you lose.”

It is not a coincidence that Big Tech companies are the top petitioners at the PTAB: Apple (904 petitions), Samsung (898 petitions), Google (502 petitions), Microsoft (293 petitions), Intel (270 petitions), and Facebook (175 petitions), along with Unified Patents (277 petitions).⁴⁵ Table 1 illustrates the top 20 PTAB petitioners from 2012–2022.

These companies exploit the PTAB by using it for something that it was not intended to become: a parallel-track patent-litigation system that imposes additional costs on patent owners and thus gives Big Tech defendants added leverage. In the debates leading up to the enactment of the AIA, stakeholders claimed that the PTAB would not create a two-track litigation system for patents. Given the “patent troll” narrative, they argued that the PTAB would serve as an inexpensive means for small businesses to quickly invalidate patents asserted against them without the expense and delay of full-blown patent litigation in court. This is what Congress thought it was creating in the PTAB.⁴⁶ But a parallel-track litigation system against patents is exactly what the PTAB has become since it was established in 2012. Indeed, one empirical study found a 70 percent overlap in defendants sued in court for patent infringement and petitioners filing at the PTAB.⁴⁷

TABLE 1

Big Tech Companies Are Biggest Users of PTAB

Top 20 petitioners since PTAB established, 2012–2022:

Company	Number of Petitions Filed
Apple	904
Samsung	898
Google	502
Microsoft	293
LG	285
Unified Patents	277
Intel	270
Cisco	191
Facebook	175
Comcast	174
Dell	166
HP	149
ZTE	148
Sony	145
Ericsson	139
Amazon	137
Huawei	135
Mylan	135
HTC	126
Lenovo	107

NOTE: PTAB—Patent Trial and Appeal Board.

SOURCE: Innovation Alliance, “Infographic: Big Tech Companies Are Biggest Users of PTAB, 2012–2022,” January 31, 2023, <https://innovationalliance.net/from-the-alliance/infographic-big-tech-companies-are-biggest-users-of-pt-ab-2012-2022/> (accessed May 18, 2023).

The Burden of Duplicative PTAB Challenges. These duplicative challenges to patent owners in both court and the PTAB impose immense burdens on patent owners simply seeking justice and remuneration for the violation of their rights. When a patent owner must spend financial resources to defend the same patent again and again in multiple places—in court and against numerous petitions filed in the PTAB—it cannot invest those resources in creating additional innovation, such as recruiting more

talent for technological or commercial innovation. Moreover, the threat of an 85 percent cancellation rate for patents reviewed in PTAB administrative hearings imposes additional costs and uncertainties on all patent owners who seek remedies in court.⁴⁸

In addition to duplicate arguments in court and in the PTAB, patent owners are also inundated with numerous PTAB petitions filed in response to any lawsuit they file, especially against a Big Tech company. These multiple PTAB petitions filed against the same patent are known as “serial petitions,” and this practice began very soon after the PTAB was created. In 2014, for example, a total of *90 PTAB petitions* were filed against a single patent owner that had sued Intel, Toshiba, AMD, and other tech companies for patent infringement.⁴⁹ Out of these 90 PTAB petitions, Intel alone filed 27 petitions.⁵⁰ Another patent owner that sued Apple, Sony, Samsung, LG, and Huawei, among others, faced 12 separate PTAB petitions filed against it.⁵¹

In another well-known case, VirnetX sued Microsoft for patent infringement, and Microsoft responded by filing 12 petitions against VirnetX’s patents.⁵² Notably, RPX, a company offering “defensive” patent litigation services to its paying customers, including filing PTAB petitions, filed multiple petitions against VirnetX’s patents that it asserted in its patent infringement complaint against Microsoft. Microsoft was a customer of RPX. The patent invalidity arguments in RPX’s PTAB petitions were identical to those made by Microsoft, which is unsurprising given Microsoft’s commercial relationship with RPX.⁵³

Similar correlations between defendants in patent infringement lawsuits have long existed at the PTAB between other PTAB-petitioning entities and Big Tech defendants in patent infringement lawsuits. Unified Patents, for example, files PTAB petitions against patents that have been asserted in patent lawsuits in court against Big Tech companies like Apple that are “members” of Unified Patents.⁵⁴

All of this adds up to a simple truth today: Patent owners are disincentivized to sue Big Tech companies in order to vindicate their rights because of the predatory infringement tactics utilized by those companies, with the PTAB playing an integral role in that process. In sum, many Big Tech companies use the PTAB as a venue to institute parallel proceedings to impose additional costs on inventors, universities, start-ups, smaller companies, and other under-capitalized commercial entities who usually end up being the victims of these predatory infringement tactics.

Big Tech's Attack on the *Fintiv* Test

This explains the hue and cry by many Big Tech companies in response to the PTAB's adoption of the *Fintiv* test in 2020. The reaction to *Fintiv* by Apple, Google, Cisco, and Intel was immediate: They filed a lawsuit, asking the courts to abolish the *Fintiv* test as an unjustified act of discretionary authority by the PTAB. Three years later, their litigation campaign against *Fintiv* continues in the courts,⁵⁵ despite the Supreme Court rejecting their (first) appeal in 2022.⁵⁶ Their vigorous opposition to the *Fintiv* test is completely understandable given their policies and practices. If the PTAB declines to institute an administrative hearing to review a patent that a Big Tech company has been sued for infringing, this reduces the tech companies' ability to use PTAB administrative hearings as a legal cudgel in their predatory infringement toolbox.

Discretionary Rulemaking Authority Supported. Understanding this economic reality is the key to understanding an otherwise perplexing reversal by these Big Tech companies in their legal attack on the *Fintiv* test in the courts. In amicus briefs and in the broader policy debates before 2020, Big Tech companies like Apple, Intel, Google, Samsung, and others vigorously argued that the PTAB has significant discretionary rulemaking authority.⁵⁷

In *Cuozzo Speed Technologies v. Lee* and *SAS Institute, Inc. v. Iancu*,⁵⁸ for example, Apple, Intel, Google, and many other tech companies defended a broad-based discretionary authority inherent in the PTAB as an administrative agency to enact rules in which there is no explicit mandate in the AIA.⁵⁹ These Big Tech companies cheered the Supreme Court's statement in *Cuozzo* that "inter partes review is less like a judicial proceeding and more like a specialized agency proceeding," as well as the Court's decision to confer the same judicial deference on the PTAB's decisions and rules as it gives to other agencies and tribunals in the modern administrative state.⁶⁰

In *Cuozzo*, the Supreme Court deferred to the PTAB's decision to adopt the broadest-reasonable interpretation standard in construing patent claims, which was not authorized by the AIA.⁶¹ This legal standard for interpreting patents made it easier to invalidate them; when the PTAB construed a patent broadly, it was more likely that the patent would be found to cover previous inventions, which meant the claimed inventions in the patent were not novel or were obvious, resulting in the invalidation of the patent for violating these requirements of the patent laws.⁶² The broadest-reasonable interpretation standard in claim construction furthered the interests of these Big Tech companies in securing the 85 percent (or higher) patent cancellation rates in PTAB hearings.⁶³

Discretionary Rulemaking Authority Attacked. Yet, when this same non-statutorily authorized discretion cut against its interests—which occurred when the PTAB adopted the *Fintiv* test—Big Tech companies suddenly began arguing that the PTAB lacks the same discretionary rulemaking authority that they had previously advocated for and defended in *Cuozzo* and *SAS Institute*. Big Tech companies went so far as to file a lawsuit in court arguing that the PTAB lacks the discretionary authority to adopt the *Fintiv* test, and they have pursued this lawsuit through three years—and counting—of proceedings and appeals.⁶⁴

Unified Patents, the PTAB filing company with Big Tech companies as paid members, has also shifted in just two years from openly embracing PTAB discretionary authority to decrying it. The PTAB previously exercised its discretionary authority to permit Unified Patents to file petitions making the same arguments against the same patents as made in other separate petitions filed by its members.⁶⁵

In 2019, when a reporter asked about the PTAB “show[ing] a willingness to flex its muscle with respect to its discretion to deny review” and “whether Unified is concerned about [this] discretionary” power, the chief intellectual property counsel at Unified Patents responded that “[h]e welcomes it.”⁶⁶ Three years later, Unified Patents filed an amicus brief in the extensive legal proceedings arising out of VSLI’s patent infringement lawsuit against Intel, in which Unified Patents now challenges the *Fintiv* rule as a legally unauthorized “abuse of discretion.”⁶⁷

Agencies Have Legal Authority Not to Act. Lastly, the argument by these Big Tech companies and Unified Patents that the USPTO lacks the discretionary authority to account for parallel court proceedings in *denying* a petition to institute a hearing for the PTAB to cancel a patent is wrong as a matter of law. There is well-established and long-standing legal authority in administrative law that agencies have substantial discretion to not undertake enforcement actions.⁶⁸

In 2014, for example, the Second Circuit Court of Appeals acknowledged the settled law that “[i]t is rare that agencies lack discretion to choose their own enforcement priorities.”⁶⁹ Thus, when the PTAB determines that it will *not* institute a hearing in response to a petition to cancel a patent, the USPTO is acting in accordance with well-established administrative law that it has the greatest discretionary authority in choosing not to act.

Political Lobbying for Predatory Infringement Practices

After the Supreme Court turned away Big Tech’s first appeal in 2022 in its lawsuit against the *Fintiv* test,⁷⁰ these companies immediately turned to

the other branch of government that they had successfully lobbied to create the PTAB: Congress. Within several months of the denial of their *certiorari* petition in January 2022, a bill was introduced in Congress to abolish the *Fintiv* test—the PTAB Reform Act.

Congress should not march again to the same old tune about “patent trolls” that many Big Tech companies played for it more than a decade ago in their lobbying campaign for the AIA to create the PTAB. This is the siren song of predatory infringement by companies that have billions in cash in the bank while refusing to pay for the patented technologies they have stolen from innovative American companies like Sonos, Masimo, or Centripetal Networks.⁷¹

Conclusion

The PTAB has fundamentally destabilized the U.S. patent system as the legal engine that has driven the U.S. innovation economy for more than two centuries. It has destabilized the patent system through administrative “shenanigans” that have, unfortunately, been commonplace in other administrative agencies for decades. As a result, innovators no longer have the promise of reliable and effective patent rights to secure the fruits of their labors.

Worse, Big Tech companies use the PTAB as a key tool in their predatory infringement strategies. This explains their argument in courts and in their lobbying efforts that the *Fintiv* test is an act of unauthorized discretionary rulemaking. This contradicts the arguments *by* these same companies during the past decade that the PTAB has wide-ranging, discretionary decision-making authority to set its own rules of operation when it served their predatory infringement strategies.

Congress should end the abuse of patent owners by prominent Big Tech companies using the PTAB as a patent death squad, at worst, or as leverage to force settlements or deter justly aggrieved patent owners from filing lawsuits for the theft of their patented technologies. To truly reform the patent system, Congress should give serious consideration to abolishing the PTAB by reintroducing and enacting the RALI Act (or a renamed version of this law introduced in the new Congress).

Failing that, Congress should consider implementing reform of the PTAB by enacting the PREVAIL Act that imposes proper procedural and substantive restrictions on the PTAB. This will at least diminish the harm caused by the PTAB by requiring it to respect due process and the norms of the rule of law, as this author stated in congressional testimony on a prior

version of PREVAIL Act.⁷² These reforms should be permanently adopted as part of the PTAB's operational structure and not left to administrative decision-making like the *Fintiv* test. Otherwise, patent owners will be subject to the vicissitudes of changing regulations and policies with changes in presidential administrations.

Reform bills that restrain the PTAB with due process and properly limit its agency powers should be supported, and bills that go in the opposite direction in empowering the PTAB should be opposed, such as any effort to repeal the *Fintiv* rule. These false reform bills, such as last year's PTAB Reform Act, expand the power of the PTAB to receive petitions that serve no function other than to encourage and advance the predatory infringement tactics routinely used by many Big Tech companies. If the PTAB Reform Act or another similar bill is reintroduced in the 118th Congress, it should be soundly rejected.

A decade of abuse of the PTAB as a tool of predatory infringement tactics has already damaged the U.S. innovation economy and undermined the ability of the U.S. to address competitive challenges by China.⁷³ Congress should heed the Founders' vision of a patent system that, in the words of the Constitution, truly promotes the "progress of the useful Arts."⁷⁴ It is time for Congress to enact real reform of the PTAB and to fix its inadvertent mistakes in the AIA. Conversely, it should reject the continued efforts by many prominent Big Tech companies to expand and magnify these errors.

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Endnotes

1. See, e.g., B. ZORINA KHAN, *INVENTING IDEAS: PATENTS, PRIZES, AND THE KNOWLEDGE ECONOMY* (Oxford Univ. Press, 2021); Stephen Haber, *Patents and the Wealth of Nations*, 23 *Geo. Mason L. Rev.* 811 (2016).
2. See Adam Mossoff, *The Constitutional Protection of Intellectual Property*, HERITAGE FOUND. LEGAL MEMORANDUM No. 282 (Mar. 8, 2021), <https://www.heritage.org/economic-and-property-rights/report/the-constitutional-protection-intellectual-property>; RANDOLPH MAY & SETH COOPER, *THE CONSTITUTIONAL FOUNDATIONS OF INTELLECTUAL PROPERTY: A NATURAL RIGHTS PERSPECTIVE* (Carolina Academic Press, 2015); see also Paul Clement, Viet Dinh & Jeffrey Harris, *The Constitutional and Historical Foundations of Copyright Protection*, CTR. FOR INDIVIDUAL FREEDOM (2012), <https://cfif.org/v/images/pdfs/constitutional-and-historical-foundations-of-copyright-protection.pdf>.
3. See B. ZORINA KHAN, *THE DEMOCRATIZATION OF INVENTION: PATENTS AND COPYRIGHTS IN AMERICAN ECONOMIC DEVELOPMENT, 1790–1920* (Cambridge University Press, 2005).
4. See PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (Univ. Chicago Press, 2014).
5. See Adam Mossoff, *Innovation and Leviathan: The Patent System Is Assimilated into the Growing Administrative State*, HERITAGE FOUND. LEGAL MEMORANDUM No. 300 (Apr. 5, 2022), <https://www.heritage.org/economic-and-property-rights/report/innovation-and-leviathan-the-patent-system-assimilated-the>.
6. See *Innovation in America: How Congress Can Make Our Patent System STRONGER*, Hearing Before the Subcomm. on Intellectual Property of the Senate Comm. on the Judiciary, 116th Cong. (testimony of Adam Mossoff, Professor of Law, Antonin Scalia Law School, George Mason Univ.), https://papers.ssrn.com/abstract_id=3457804.
7. See, e.g., Richard A. Epstein & Adam Mossoff, *FTC Enforcement Stifles Biotech Innovation*, N.Y. DAILY NEWS (Jan. 30, 2022), <https://www.nydailynews.com/opinion/ny-oped-ftc-enforcement-stifles-biotech-innovation-20220130-mxwc6gixdfavdjfuod54yl42sa-story.html>.
8. Restoring American Leadership in Innovation Act of 2021, H.R. 5874, 117th Congress (2021).
9. See Adam Mossoff, *Institutional Design in Patent Law: Private Property Rights or Regulatory Entitlements*, 92 *So. CAL. L. REV.* 921 (2019) (detailing how the U.S. uniquely secured patents as private property rights in comparison to other countries in the 18th and 19th centuries).
10. PREVAIL Act of 2023, S. ____, 118th Cong. (2023). The PREVAIL Act comprises portions of the Support Technology and Research for Our Nation's Growth and Economic Resilience (STRONGER) Patents Act of 2019, S. 2082 & H.R. 3666, 116th Cong. (2019), that would have reformed the PTAB. These provisions remain in the PREVAIL Act, but a provision of the STRONGER Patents Act of 2019 that addressed injunctive remedies for patent infringement has been redacted from the now titled PREVAIL Act.
11. Patent Trial and Appeal Board Reform Act of 2022, S. 4417, 117th Cong. (2022). Senator Patrick Leahy (D-VT) was a primary sponsor of the PTAB Reform Act, and he was a co-sponsor of the AIA in 2011.
12. See, e.g., Emily Birnbaum, *Apple Flexes Muscle as Quiet Power Behind App Group*, BLOOMBERG (Sep. 19, 2022), <https://www.bloomberg.com/news/articles/2022-09-19/apple-flexes-muscle-as-quiet-power-behind-app-developer-group#xj4y7vzkg>; Matt Vella, *Google and Facebook's New Tactic in the Tech Wars*, FORTUNE (July 30, 2012), <https://fortune.com/2012/07/30/google-and-facebooks-new-tactic-in-the-tech-wars/>.
13. See, e.g., Andrew Langer, *A Big Tech Legislative Putsch Against Innovators*, ISSUES & INSIGHTS (Aug. 24, 2022), <https://issuesinsights.com/2022/08/24/a-big-tech-legislative-putsch-against-innovators/>; Adam Mossoff, *Big Tech's Sticky Fingers Are Still at Work in Washington*, ISSUES & INSIGHTS (June 21, 2022), <https://issuesinsights.com/2022/06/21/big-techs-sticky-fingers-are-still-at-work-in-washington/>; Paul R. Michel & Chris Israel, *Don't Let Big Tech Sabotage U.S. Innovators' Protections*, BLOOMBERG LAW (Apr. 22, 2022), <https://news.bloomberglaw.com/tech-and-telecom-law/dont-let-big-tech-sabotage-u-s-innovators-protections>.
14. See, e.g., Paul R. Michel, *Our Courts Must End Big Tech's Patent Plunder*, LAW360 (May 2, 2022), <https://www-law360-com.mutex.gmu.edu/articles/1488115/our-courts-must-end-big-tech-s-patent-plunder>; Adam Mossoff, *Google's Loss to Sonos Settles It: Big Tech Has an IP Piracy Problem*, TECHCRUNCH (Jan. 13, 2022), <https://techcrunch.com/2022/01/13/googles-loss-to-sonos-settles-it-big-tech-has-an-ip-piracy-problem/>; Paul R. Michel, *Big Tech Is Abusing the U.S. Patent Challenge System*, BLOOMBERG (Feb. 18, 2022), <https://news.trust.org/item/20220218102516-a1p08/>; Paul R. Michel, *Time to Fight Back Against Big Tech's IP Assault*, NEWSWEEK (Oct. 25, 2021), <https://www.newsweek.com/time-fight-back-against-big-techs-ip-assault-opinion-1641267>.
15. Aaron Tilley, *When Apple Comes Calling, "It's the Kiss of Death,"* WALL STREET J. (Apr. 20, 2023), https://www.wsj.com/articles/WP-WSJ-0000792199?mod=article_recs_pos1_sb_hp&next_redirect=true.
16. See Peter J. Pitts, *Patent Death Squads' vs. Innovation*, WALL STREET J. (June 10, 2015), <https://www.wsj.com/articles/patent-death-squads-vs-innovation-1433978591> (quoting Randall Rader, former Chief Judge of the U.S. Court of Appeals for the Federal Circuit, that the PTAB was a "patent death squad"); Paul Michel, *Big Tech is Overwhelming Our Political System*, REAL CLEAR POLICY (Nov. 20, 2020), https://www.realclearpolicy.com/articles/2020/11/20/big_tech_is_overwhelming_our_political_system_650331.htm; Joe Nocera, *Why Sonos Has Already Lost Its Patent Suit Against Google*, BLOOMBERG (Jan. 10, 2020), <https://www.bloomberg.com/opinion/articles/2020-01-10/even-if-sonos-wins-its-suit-against-google-it-loses>.
17. See Patrick Wingrove, *PTAB Top Petitioners, Patent Owners and Law Firms in 2021*, MANAGINGIP (Feb. 28, 2022), <https://www.managingip.com/article/2a5d0ugt52wrjolsjgq2o/ptab-top-petitioners-patent-owners-and-law-firms-in-2021>.

18. See Elliot C. Cook & Daniel F. Klodowski, *Claim and Case Disposition*, FINNEGAN, <https://www.finnegan.com/en/at-the-ptab-blog/claim-and-case-disposition.html> (reporting data as of March 30, 2023) (last visited May 14, 2023).
19. See John R. Allison, Mark A. Lemley & David L. Schwartz, *Our Divided Patent System*, 82 U. CHI. L. REV. 1073, 1100 (2015) (reporting an average patent invalidation rate of 42.6 percent in courts).
20. Lamar Smith, *Stop Big Tech's Patent Abuse*, SAN ANTONIO EXPRESS-NEWS (June 14, 2023), <https://www.expressnews.com/opinion/commentary/article/smith-stop-big-tech-s-patent-abuse-18151847.php>.
21. See Mossoff, *supra* note 5.
22. See *Apple Inc. v. Fintiv, Inc.*, No. IPR2020-00019 (P.T.A.B. Mar. 20, 2020). These factors are sometimes referred to as the “NHK–Fintiv factors” given that they are based in two precedential decisions by the PTAB. See *Apple Inc. v. Fintiv, Inc.*; *NHK Spring Co., Ltd. v. Intri-Plex Techs., Inc.*, No. IPR2018-00752 (P.T.A.B. Sept. 12, 2018). The author follows common practice in referring to them as the “Fintiv test.”
23. See Mossoff, *supra* note 9, at 939 (detailing how “internal documents disclosed in one of the legal cases...revealed that Apple engaged in a deliberate legal campaign to devalue Qualcomm’s patents for the sole purpose of reducing its royalty payments in previously agreed-upon licenses”).
24. This test is sometimes referred to as the “NHK–Fintiv factors” given that it is based in two precedential decisions by the PTAB. See *Apple Inc. v. Fintiv, Inc.*, No. IPR2020-00019 (P.T.A.B. Mar. 20, 2020); *NHK Spring Co., Ltd. v. Intri-Plex Techs., Inc.*, No. IPR2018-00752 (P.T.A.B. Sept. 12, 2018). In this *Legal Memorandum*, I follow common practice in referring to them as only the “Fintiv factors.” For anyone curious about the details of the six factors comprising this legal test, they are succinctly described in Thomas Ritchie & Prateek Viswanathan, *Fintiv Factors: Institution Considerations in View of Parallel Proceeding*, JONES DAY PTAB LITIGATION BLOG (July 10, 2020), <https://www.jdsupra.com/legalnews/fintiv-factors-institution-33622/>.
25. *Whitman v. American Trucking Ass’n, Inc.*, 531 U.S. 457, 468 (2001) (“Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”).
26. See Adam Mossoff, *Weighing the Patent System: It Is Time to Confront the Bias Against Patent Owners in “Patent Reform” Legislation*, WASH. TIMES (Mar. 24, 2016), <https://www.washingtontimes.com/news/2016/mar/24/adam-mossoff-weighing-the-patent-system/>; Adam Mossoff, *Repetition of Junk Science & Epithets Does Not Make Them True*, IPWATCHDOG (Nov. 19, 2015), <https://www.ipwatchdog.com/2015/11/19/repetition-of-make-them-true/id=63302/>.
27. Two oft-cited examples used in lobbying efforts in DC of the narrative of an allegedly “broken patent system” that was stifling innovation were ADAM B. JAFFE & JOSH LERNER, *INNOVATION AND ITS DISCONTENTS: HOW OUR BROKEN PATENT SYSTEM IS ENDANGERING INNOVATION AND PROGRESS, AND WHAT TO DO ABOUT IT* (Princeton Univ. Press, 2007) and JAMES BESSEN & MICHAEL J. MEURER, *PATENT FAILURE: HOW JUDGES, BUREAUCRATS, AND LAWYERS PUT INNOVATORS AT RISK* (Princeton Univ. Press, 2009).
28. See Jonathan Barnett, *Why Big Tech Likes Weak IP*, REGULATION (Spring 2021), <https://www.cato.org/regulation/spring-2021/why-big-tech-likes-weak-ip>.
29. See, e.g., Matt Vella, *Google and Facebook’s New Tactic in the Tech Wars*, FORTUNE (July 30, 2012), <https://fortune.com/2012/07/30/google-and-facebooks-new-tactic-in-the-tech-wars/> (describing abuse of *cy pres* awards by Google and Facebook to funnel millions of dollars in undisclosed donations to advocacy groups like the Electronic Frontier Foundation); Amicus Brief of David Lowrey et al. *Frank v. Gaos*, No. 17-961 (U.S. Supreme, July 16, 2018), https://www.supremecourt.gov/DocketPDF/17/17-961/54334/20180716142956091_17-961%20tsac%20David%20Lowrey%20et%20al.-.PDF.pdf (detailing extensive Google funding of advocacy groups working in intellectual property policy through *cy pres* awards); Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 TEX. L. REV. 1991, 1991 n.* (2007) (“We are grateful to Apple Computer, Cisco Systems, Intel, Micron Technology, Microsoft, and SAP for funding the research reported in this Article.”).
30. See Amanda Becker, *Patent Reform Measure Ignited Fierce Lobbying Effort*, WASH. POST (Mar. 27, 2011), https://www.washingtonpost.com/capital_business/patent-reform-measure-ignited-fierce-lobbying-effort/2011/03/25/AfzD9VkB_story.html (reporting that Apple, eBay, Google, and other Big Tech companies spent more than \$2 million on patent reform and other issues in just 2010).
31. See Mario Trujillo, *Report Finds Hundreds of Meetings Between White House and Google*, THE HILL (Apr. 22, 2016), <https://thehill.com/policy/technology/277251-report-highlights-hundreds-of-meetings-between-white-house-and-google/> (reporting at least a total of 427 meetings between President Obama and Google representatives and Google spending \$3.8 million in lobbying in only the first quarter of 2016).
32. *Id.*
33. See Adam Mossoff, *Thank You, Senator Tillis, for Recognizing the Need for Evidence-Based Policymaking in Patent Law*, IPWATCHDOG (Feb. 15, 2022), <https://ipwatchdog.com/2022/02/15/thank-senator-tillis-recognizing-need-evidence-based-policymaking-patent-law/id=145875/> (describing the continued use of the “patent troll” rhetoric and long-disproven junk science statistical numbers by advocacy groups); Adam Mossoff, *Big Tech’s Opposition to Section 101 Reform: Policy Rhetoric Versus Economic Reality*, IPWATCHDOG (June 22, 2020), <https://www.ipwatchdog.com/2020/06/22/big-techs-opposition-section-101-reform-policy-rhetoric-versus-economic-reality/id=122709/> (explaining how Big Tech opposes patent reform by “invok[ing] the tread-worn narrative of abusive patent litigation by patent trolls”).
34. See *Thryv, Inc. v. Click-To-Call Techs., LP*, 140 S. Ct. 1367, 1374 (2020) (In creating the PTAB, “Congress...sought to weed out bad patent claims efficiently.”)
35. See ROBERT P. MERGES & JOHN F. DUFFY, *PATENT LAW AND POLICY* 959 (8th ed. 2021) (“To be effective, administrative patent review [at the PTAB] must be efficient. It must offer cost savings...by lowering the cost of invalidating the patent.”).
36. The entire statutory guidance governing the operation of the PTAB, an entirely new administrative tribunal, is found in only nine relatively brief provisions of the AIA, codified at 35 U.S.C. §§ 311–319.

37. One organization, called Initiative for Medicines, Access & Knowledge (I-MAK), is dedicated to the proposition that the “high cost of medicines” is caused entirely by “unjust patent monopolies.” *Health Equity: Drug Pricing Crisis*, <https://www.i-mak.org/health-equity/#pricing> (accessed June 20, 2021). I-MAK was the first policy organization to file a petition at the PTAB seeking to cancel a patent on an innovative pharmaceutical invention—in this case, a revolutionary, groundbreaking drug to treat Hepatitis C. See *First-Ever U.S. Patent Challenges Dispute Gilead’s Monopoly on Hepatitis C Drugs that Blocks Millions from Treatment* (Oct. 25, 2017), <https://www.i-mak.org/2017/10/25/first-ever-us-patent-challenges-gilead-hepatitis-c/>.
38. See Unified Patents, Members, <https://www.unifiedpatents.com/members> (last visited Dec. 20, 2022) (identifying Cisco, Facebook (Meta), Twitter, and others as “members”).
39. *Id.*
40. See Marta Belcher & John Casey, *Hacking the Patent System: A Guide to Alternative Patent Licensing for Innovators*, ELECTRONIC FRONTIER FOUND. (May 2014), https://www.eff.org/files/2014/05/29/hacking_the_patent_system.pdf (“Unified was founded in 2012 by former Intuit Head of IP Litigation Kevin Jakel, with founding members including Google and NetApp.”).
41. See Gene Quinn, *OpenSky Attorney Emails Expose the Seedy Underbelly of PTAB Practice*, IPWATCHDOG (Mar. 4, 2022), <https://ipwatchdog.com/2022/03/04/opensky-attorney-emails-expose-seedy-underbelly-ptab-practice/id=147155/> (detailing efforts by OpenSky to extort money from patent owner in exchange for OpenSky undermining the PTAB petition it filed against the patent owner); Adam Mossoff & David Lund, *The Problems with the PTAB*, IAM MAGAZINE (Oct. 1, 2017), <https://www.iam-media.com/article/the-problems-the-ptab> (describing well-documented petitions filed by Kyle Bass, who was a hedge fund manager who shorted the stock of companies that owned patents and for which he filed petitions to cancel at the PTAB); Gregory Dolin, *Dubious Patent Reform*, 56 BOSTON COLLEGE L. REV. 881, 932 (2015) (“[A] hitherto unknown entity, New Bay Capital, LLC filed an IPR request against each of the patents owned and asserted by VirnetX.... New Bay made an offer to VirnetX. For 10% of the jury verdict (or almost \$37 million), it was willing to forego the filing of the IPR request.”).
42. See Adam Mossoff & Bhamati Viswanathan, *Explaining Efficient Infringement*, CPIP BLOG (May 11, 2017), <https://cpip.gmu.edu/2017/05/11/explaining-efficient-infringement>.
43. *Id.*
44. See *Cost of Inter Partes Review: Everything You Need to Know*, UPCOUNSEL, <https://www.upcounsel.com/cost-of-inter-partes-review> (visited Apr. 25, 2023).
45. See *Get the Facts: Big Tech Companies Are Biggest Users of PTAB: Top 20 Petitions Since PTAB Established 2012–2022*, <https://savetheinventor.com/get-the-facts/> (last visited May 13, 2023).
46. For example, former Senator Smith has called for the *Fintiv* test to be codified into law, stating that “[t]he purpose of our law was to provide an alternative to court proceedings to handle patent disputes—not to add another set of proceedings causing duplicative challenges. Small-patent holders should not have to defend their patents in multiple venues.” See Smith, *supra* note 20.
47. See Saurabh Vishnubhakat, Arti K. Rai, & Jay P. Kesan, *Strategic Decision Making in Dual PTAB and District Court Proceedings* 31 BERKELEY TECH. L. J. 45 (2016) (finding 70 percent overlap).
48. See Cook & Klodowski, *supra* note 18.
49. See Vishnubhakat et al., *supra* note 47, at 21.
50. *Id.* at 113.
51. *Id.* at 48–49, 116.
52. See Dolin, *supra* note 41, at 938–39.
53. *Id.* The identical material in the different PTAB petitions was not deemed to create a legal relationship sufficient to trigger the estoppel provisions for petitions filed by a real party in interest at the PTAB.
54. See, e.g., Ryan Davis, *PTAB Says Unified Not An Interested Party In Apple IPR*, LAW360 (June 6, 2019), <https://www-law360-com.mutex.gmu.edu/articles/1166216/ptab-says-unified-not-an-interested-party-in-apple-ipr> (noting “Apple’s subscription agreement with Unified Patents as well as the fact that Unified Patents filed its own petition challenging the same patent using similar arguments within days of Apple’s petition”).
55. See Kelcee Griffis, *Apple’s ‘Fintiv’ Rule Challenge Revived at Federal Circuit*, BLOOMBERG L. (Mar. 13, 2023), <https://news.bloomberglaw.com/ip-law/apples-fintiv-rule-challenge-revived-at-federal-circuit>.
56. See Blake Brittain, *Apple, Mylan Lose Supreme Court Bids to Challenge Patent Review Rule* (Jan. 22, 2022), <https://www.reuters.com/legal/transactional/apple-mylan-lose-supreme-court-bids-challenge-patent-review-rule-2022-01-18/>.
57. See, e.g., Brief of Intel Corp. as Amicus Curiae Supporting Petitioner, *Thryv, Inc. v. Click-To-Call Techs., LP*, 590 U.S. ___, 140 S.Ct. 1367 (2020) (No. 18–916), https://www.supremecourt.gov/DocketPDF/18/18-916/115279/20190910134255629_18-916%20tsac%20Intel%20Corp.pdf; Brief for Cisco, Dell, Google, Intel, Samsung, et al. as Amici Curiae Supporting Respondent, *Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261, 136 S.Ct. 2131 (2016) (No. 15–446), <https://www.scotusblog.com/wp-content/uploads/2016/04/15-446bsacDell-et-al.pdf>; Brief for Apple, Inc. as Amicus Curiae Supporting Respondent, *Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261, 136 S.Ct. 2131 (2016) (No. 15–446), <https://www.scotusblog.com/wp-content/uploads/2016/04/15-446bsacApple.pdf>.

58. See *SAS Institute, Inc. v. Iancu*, 138 S. Ct. 1348 (2018); *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131 (2016).
59. See *supra* note 57.
60. This is called “Chevron deference” after the Supreme Court case that created the legal rule that courts should give extreme deference to an agency’s discretionary decision-making. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Supreme Court only recently agreed to hear a case in which it will explicitly consider overruling its *Chevron* decision. See *Loper Bright Enterprises v. Raimondo*, 45 F.4th 359 (D.C. Cir. 2022), *cert granted*, ___ S. Ct. ___ (U.S., May 1, 2023) (No. 22–451). If the Court decides to overrule *Chevron* deference, this may result in closer scrutiny of the PTAB by federal courts.
61. *Cuozzo*, 136 S. Ct. at 2135.
62. See 35 U.S.C. § 102 (requiring patents secure only novel inventions); 35 U.S.C. § 103 (requiring patents secure only nonobvious inventions).
63. See Mossoff, *supra* note 5, at 6 (describing the “inordinately high ‘kill rates’ that at times were almost 100 percent in some of the PTAB’s review programs”).
64. See *Apple Inc. v. Iancu*, No. 5:20–CV–06128–EJD, 2021 WL 5232241 (N.D. Cal. Nov. 10, 2021); see also *supra* notes 57–58, and accompanying text (describing this litigation campaign).
65. See *Davis*, *supra* note 54.
66. Matthew Bulton, *Unified Was Supposed To Face PTAB Crisis. What Happened?* LAW360 (May 30, 2019), <https://www.law360.com/ip/articles/1164204>.
67. Brief of Unified Patents *et al.* as Amicus Curiae in Support of Petitioner, *Intel Corp. v. VLSI Tech. LLC*, No. 21-888 (Jan. 14, 2022), at 5, https://www.supremecourt.gov/DocketPDF/21/21-888/210322/20220114120610157_Amicus%20Brief%20of%20Unified%20Patents%20et%20al.pdf. After extensive administrative maneuvering at the PTAB, in which USPTO Director Kathi Vidal added Intel as a party to another PTAB petition via discretionary action, the PTAB invalidated VLSI’s patent, which a federal court had found Intel had infringed and awarded VLSI damages of \$2.2 billion. The PTAB decision nullifies the federal court decision that Intel was liable for patent infringement. See Ryan Davis, *Intel and OpenSky Get PTAB to Ax Patent in \$2.2B Case*, LAW360 (May 12, 2023), <https://www.law360.com/ip/articles/1607502>. This vividly demonstrates the importance of the PTAB to Big Tech companies like Intel as a means for engaging in predatory infringement.
68. See, e.g., *Massachusetts v. E.P.A.*, 549 U.S. 497, 527 (2007) (recognizing the legal principle in administrative law that “discretion is at its height when the agency decides not to bring an enforcement action”); *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (“This Court has recognized on several occasions over many years that an agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.”); *American Horse Protection Ass’n, Inc. v. Lyng*, 812 F.2d 1, 4 (D.C. Cir. 1987) (recognizing the significant discretionary authority in an agency’s refusal to undertake an enforcement action given in part its similarity to a prosecutorial decision not to indict, “which traditionally involve executive control and judicial restraint”).
69. *Natural Resource Defense Council, Inc. v. U.S. Food & Drug Admin.*, 760 F.3d 151, 171 (2d Cir. 2014).
70. See *supra* note 56, and accompanying text.
71. See *supra* notes 15–16, and accompanying text.
72. See *Innovation in America: How Congress can make our patent system STRONGER*, Hearing Before the Subcomm. on Intellectual Property of the Senate Comm. on the Judiciary, 116th Cong. (testimony of Adam Mossoff), https://papers.ssrn.com/abstract_id=3457804.
73. See *Foreign Competitive Threats to American Innovation and Economic Leadership*, Subcommittee on Intellectual Property of the Senate Judiciary Committee, 117th Cong. (Apr. 18, 2023), <https://www.judiciary.senate.gov/committee-activity/hearings/foreign-competitive-threats-to-american-innovation-and-economic-leadership>; *Intellectual Property and Strategic Competition with China: Part I*, Subcommittee on Courts, Intellectual Property and the Internet of the House Judiciary Committee, 117th Cong. (Mar. 8, 2023), <https://judiciary.house.gov/committee-activity/hearings/subcommittee-courts-intellectual-property-and-internet-intellectual>; Alden Abbott, Erika Lietzan, Adam Mossoff, *et al.*, *Crippling the Innovation Economy: Regulatory Overreach at the Patent Office*, Regulatory Transparency Project of the Federalist Society, (Aug. 14, 2017), <https://rtp.fedsoc.org/wp-content/uploads/RTP-Intellectual-Property-Working-Group-Paper.pdf>.
74. Congress is authorized to create patent and copyright systems in Article 1, Section 8, Clause 8 of the Constitution in order to “promote the Progress of Science and useful Arts.”