

No. 21 - \_\_\_\_\_

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In the  
**United States Court of Appeals**  
**for the Federal Circuit**

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IN RE: B.E. TECHNOLOGY L.L.C.,  
*Petitioner.*

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On Petition for a Writ of Mandamus to the  
United States Patent and Trademark Office  
Patent Trial and Appeal Board in Nos. IPR2021-00482,  
IPR2021-00483, IPR2021-00484, and IPR2021-00485  
Before the Hon. Neil T. Powell, Miriam L. Quinn,  
and Iftikhar Ahmed, Administrative Patent Judges

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**PETITION FOR A WRIT OF MANDAMUS**

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

**CERTIFICATE OF INTEREST**

**Case Number** \_\_\_\_\_

**Short Case Caption** IN RE: B.E. TECHNOLOGY L.L.C.

**Filing Party/Entity** B.E. Technology, L.L.C.

**Instructions:** Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box.** Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

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Signature: /s/ Agatha M. Cole

Name: Agatha M. Cole

<p><b>1. Represented Entities.</b> Fed. Cir. R. 47.4(a)(1).</p>	<p><b>2. Real Party in Interest.</b> Fed. Cir. R. 47.4(a)(2).</p>	<p><b>3. Parent Corporations and Stockholders.</b> Fed. Cir. R. 47.4(a)(3).</p>
<p>Provide the full names of all entities represented by undersigned counsel in this case.</p>	<p>Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.</p> <p><input checked="" type="checkbox"/> None/Not Applicable</p>	<p>Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.</p> <p><input checked="" type="checkbox"/> None/Not Applicable</p>
<p>B.E. Technology, L.L.C.</p>		

Additional pages attached

**4. Legal Representatives.** List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

None/Not Applicable  Additional pages attached

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**5. Related Cases.** Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

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Twitter, Inc. and Google LLC, v. B.E. Technology, L.L.C. Patent Trial and Appeal Board in No. IPR2021-00482	Twitter, Inc. and Google LLC, v. B.E. Technology, L.L.C. Patent Trial and Appeal Board in No. IPR2021-00483	Twitter, Inc. and Google LLC, v. B.E. Technology, L.L.C. Patent Trial and Appeal Board in No. IPR2021-00484
Twitter, Inc. and Google LLC, v. B.E. Technology, L.L.C. Patent Trial and Appeal Board in No. IPR2021-00485	B.E. Technology, L.L.C. v. Twitter, Inc., D. Del. Case No. 1:20-cv-00621	B.E. Technology, L.L.C. v. Twitter, Inc., D. Del. Case No. 1:20-cv-00622

**6. Organizational Victims and Bankruptcy Cases.** Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

None/Not Applicable  Additional pages attached


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Pursuant to the All Writs Act, 28 U.S.C. § 1651(a), B.E. Technology, L.L.C. (“B.E.”) hereby petitions this Court for a writ of mandamus directing the Patent Trial and Appeal Board (“PTAB”) of the United States Patent and Trademark Office (“USPTO”) to vacate its decisions granting the institution of four separate *Inter Partes* Review (“IPR”) proceedings, *see Twitter, Inc. and Google LLC v. B.E. Technology, L.L.C.* (Nos. IPR2021-00482, IPR2021-00483, IPR2021-00484, and IPR2021-00485).

### **INTRODUCTION**

This Petition seeks the Court’s intervention to prevent an unconstitutional deprivation of B.E.’s property rights in the onslaught of IPR proceedings that have been brought to challenge the validity of its most critical patents.

As explained herein, the USPTO’s inner machinations have rendered adjudications before the PTAB so profoundly unfair and biased against independent inventors that B.E. doesn’t stand a chance at a fair trial against its “Big Tech” adversaries in the pending IPR proceedings.

The myriad due process violations emanating from the PTAB's structure, financial operations, and internal procedures can be grouped into three broad categories.

First, the impartiality of Administrative Patent Judges ("APJs") who preside over IPR proceedings has been mired by improper financial incentives that favor large and well-established industry players who yield tremendous political and financial influence over the USPTO, and who serially challenge the validity of existing patents to quash competition from independent inventors, *infra*, at 7-22. These incentives tilt the scales of justice from the very outset of IPR proceedings at the institution stage, *infra*, at 8-12, and on through to the final written decision stage, where APJs are rewarded with substantial bonus payments for cancelling patents held by independent inventors, *infra*, at 12-13, and punished if they stray from the herd by authoring dissenting or concurring opinions, *infra*, at 13-15; *see also infra*, at 27-31.

Second, it is now a matter of public record that USPTO leadership routinely abuses its case-assignment authority to selectively staff APJs to specific cases based on their perceived propensity for ruling a certain way, and to "stack" APJ panels for the purpose of achieving specific

adjudicative outcomes that comport with the USPTO leadership's unwritten policy objectives, *infra*, at 15-18, 32-33.

And third, in the unlikely event that a final proposed decision still does not comport with the agency leadership's preferred outcome—the decision can be re-written by a secret extra-judicial review panel that has been authorized to review, edit, and change adjudicative outcomes—irrespective of the merits of the case presented before the original three-member APJ panel, *infra*, at 18-19, 33-34.

These circumstances have turned IPR proceedings into a Kafkaesque nightmare in which independent inventors are forced to participate against their will, despite knowing that the deck has been irretrievably stacked against them. Simply put, the circumstances surrounding IPR proceedings, as currently implemented, are so fundamentally unjust that patent owners effectively receive no process at all.

B.E. is not the first litigant to challenge the constitutionality of IPR proceedings before this Court. *See, e.g., Mobility Workx, LLC v. Unified Patents, LLC*, No. 2020-1441, 2021 WL 4762265 (Fed. Cir. Oct. 13, 2021); *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir.

2019), *vacated and remanded sub nom. U.S. v. Arthrex, Inc.*, 141 S. Ct. 1970, 1986-87 (2021); *Celgene Corp. v. Peter*, 931 F.3d 1342, 1360 (Fed. Cir. 2019), *cert. denied*, 141 S. Ct. 132 (2020); *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 639 F. App'x 639 (Fed. Cir. 2016), *aff'd*, 138 S. Ct. 1365, 1379 (2018); *In re Cuozzo Speed Techs., LLC*, 793 F.3d 1268 (Fed. Cir. 2015), *aff'd sub nom. Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131 (2016). Unfortunately, however, none of those previous cases has fully addressed the constellation of issues presented herein—regarding the repeated and ongoing violations of patent owners' constitutional due process rights at all stages of IPR proceedings.

B.E. should not be forced to wait for the *fait accompli* before seeking redress for these glaring procedural deficiencies. Accordingly, and for the reasons set forth more fully herein, this Court must grant the Petition to prevent an unconstitutional deprivation of B.E.'s property rights without due process of law.

### **STATEMENT OF JURISDICTION**

This Court has jurisdiction to grant mandamus relief under the All Writs Act, 28 U.S.C. § 1651. Furthermore, although 35 U.S.C. § 314(d) generally precludes appellate review of interlocutory decisions granting

petitions to institute IPR proceedings, the Supreme Court has observed that this statutory provision “may not bar [the] consideration of a constitutional question.” *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2136 (2016).

### **QUESTION PRESENTED**

Whether a writ of mandamus should issue to prevent an unconstitutional deprivation of the Petitioner patent owner’s property rights without due process of law?

### **BACKGROUND**

#### **A. B.E. Technology**

Martin David Hoyle was working as a computer programmer in the mid-1990s, as Americans were increasingly starting to use computers more, and the Internet came into its own. Around that time, Hoyle recognized the opportunity and technical challenges of collecting and implementing user-generated data to provide more personalized advertising products via web-based applications.

To capitalize on his ideas, Hoyle formed B.E. and proceeded to obtain a total of 10 patents directed towards various web-based technologies between 1998 and 2014. As is relevant here, B.E.’s patent

portfolio includes U.S. Patent No. 8,769,440 (the '440 patent), U.S. Patent No. 8,549,410 (the '410 patent) and U.S. Patent No. 8,549,411 (the '411 patent).

## **B. Procedural History**

On May 7, 2020, B.E. filed two separate patent infringement actions against Google and Twitter, seeking to enforce its rights in the '440, '410, and '411 patents. *See generally B.E. Technology, L.L.C. v. Twitter, Inc.*, D. Del. Case No. 1:20-cv-00621 [Appx1-7]; *B.E. Technology, L.L.C. v. Google*, D. Del. Case No. 1:20-cv-00622 [Appx8-13].

Shortly thereafter, Google and Twitter filed petitions seeking to challenge the validity of the subject patents by instituting IPR proceedings before the PTAB.<sup>1</sup>

B.E. opposed the institution of IPR proceedings on the merits and on constitutional grounds—including, most importantly, on the ground

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<sup>1</sup> *See* Petition[s] for *Inter Partes* Review of U.S. Patent 8,769,440, *Twitter, Inc. v. Hoyle*, No. IPR2021-00482 and IPR2021-00483 (P.T.A.B. Feb. 24, 2021) [Appx14, Appx99]; Petitioners' Paper Explaining Multiple Petitions [Appx184]; Petition[s] for *Inter Partes* Review of U.S. Patent 8,549,410, *Twitter, Inc. v. Hoyle*, No. IPR2021-00484 and IPR2021-00485 (P.T.A.B. Feb. 24, 2021) [Appx191, Appx280].

that proceeding before the PTAB would result in an unconstitutional deprivation of its property interest in the challenged patents, without due process of law.<sup>2</sup>

But the PTAB ignored these arguments and granted all four of the petitions to institute IPR proceedings.<sup>3</sup>

### **C. The PTAB's current structure, financial operations, and internal procedures**

Recent media coverage and academic studies, based on publicly-available documents, have revealed a litany of interrelated due process

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<sup>2</sup> See Patent Owner's Preliminary Response, *Twitter, Inc. and Google v. Hoyle*, No. IPR2021-00482 (P.T.A.B. Jun. 9, 2021) [Appx368]; Patent Owner's Preliminary Response, *Twitter, Inc. and Google v. Hoyle*, No. IPR2021-00483 (P.T.A.B. Jun. 9, 2021) [Appx420]; Patent Owner's Preliminary Response, *Twitter, Inc. and Google v. Hoyle*, No. IPR2021-00484 (P.T.A.B. Jun. 16, 2021) [Appx474]; Patent Owner's Preliminary Response, *Twitter, Inc. and Google v. Hoyle*, No. IPR2021-00485 (P.T.A.B. Jun. 16, 2021) [Appx527].

<sup>3</sup> See Decision Granting Institution of Inter Partes Review, *Twitter, Inc. and Google v. Hoyle*, No. IPR2021-00482 (P.T.A.B. Sep. 7, 2021) (Paper No. 9) [Appx581]; Decision Granting Institution of *Inter Partes* Review, *Twitter, Inc. and Google v. Hoyle*, No. IPR2021-00483 (P.T.A.B. Sep. 7, 2021) (Paper No. 9) [Appx616]; Decision Granting Institution of *Inter Partes* Review, *Twitter, Inc. and Google v. Hoyle*, No. IPR2021-00484 (P.T.A.B. Sep. 14, 2021) (Paper No. 8) [Appx651]; Decision Granting Institution of *Inter Partes* Review, *Twitter, Inc. and Google v. Hoyle*, No. IPR2021-00485 (P.T.A.B. Sep. 14, 2021) (Paper No. 8) [Appx688].

concerns arising from the current structure, financial operations, and internal procedures of the PTAB.

**1. The PTAB’s role as a revenue-generating business entity within the USPTO**

As background, it is important to understand that the USPTO is a “fee-funded agency,” meaning that it “operates like a business,” since Congress allows it to retain any revenues generated from patent examinations and administrative proceedings. *See Setting and Adjusting Patent Fees During Fiscal Year 2017*, 82 Fed. Reg. 52780-01 (Nov. 14, 2017); *accord Mobility Workx, LLC*, 2021 WL 4762265, at \*6 (“[T]he USPTO recovers its annual operating costs through fees but is ultimately funded through congressional appropriation.”).

It is equally important to note that IPR proceedings—which generate a substantial amount of fee-based revenues for the agency—are a relatively novel addition to the agency’s adjudicative framework, introduced by the America Invents Act of 2011 (“AIA”), 35 U.S.C. § 100 *et seq.*, to create an ostensibly more efficient system for adjudicating the validity of existing patents.

The PTAB's operations are overseen by the Chief and Vice Chief APJs, who are appointed by the Secretary of Commerce and report to the Director of the USPTO. Accordingly, the Chief and Vice Chief APJs necessarily occupy dual roles—both as executive branch officers, responsible for a significant portion of the agency's budget and financial operations—and as adjudicative officers, who participate in administrative proceedings.

## **2. Overview of fee-based revenues generated by IPR proceedings**

The commencement of IPR proceedings begins with the filing of a petition for *inter partes* review—which is filed by the party seeking to challenge the subject patent, together with the requisite filing fees. *See* 37 C.F.R. §§ 42.100-103 (Sept. 16, 2012).

Under the USPTO's current fee schedule, the initial IPR petition must be accompanied by a “request fee” in the amount of \$19,000 and a “post-institution” fee in the amount of \$22,500. 37 C.F.R. § 42.15(a) (Oct. 2, 2020). Although any party may file a petition seeking to “institute” IPR proceedings before the PTAB, the majority of IPR petitions are filed by deep-pocketed entities that can easily afford these exorbitant filing fees—

such as tech-industry giants like Google and Twitter—against smaller independent inventors, like B.E.<sup>4</sup>

Once the petition has been filed, the PTAB may decide to “institute” the IPR proceeding, if “the petition demonstrates... [by] a reasonable likelihood[,] that at least one of the claims challenged ... is unpatentable.” 37 C.F.R. § 42.15. If the petition is denied, however, then the \$22,500 “post-institution” fee must be returned to the petitioner. 37 C.F.R. § 1.26. Therefore, the PTAB generates more revenues for the agency by granting IPR petitions than by denying them.<sup>5</sup>

### **3. Improper outcome-driven compensation structure and bonus incentives for APJs**

The compensation structure of APJs appointed to the PTAB includes performance-based bonus incentives that account for a

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<sup>4</sup> See Josh Malone, *PTAB Trials Disproportionately Harm Small Businesses*, LAW360 (Jan. 29, 2021), <https://www.law360.com/articles/1348182/ptab-trials-disproportionately-harm-small-businesses?copied=1>.

<sup>5</sup> In FY 2020, the PTAB's fee collections generated \$67,934,325 in revenues for the USPTO—approximately 51% of which was comprised of fees from IPR petition “request fees” (\$22,998,400) and “post-institution” fees (\$17,432,000). USPTO, *Fiscal Year 2021 Congressional Justification*, 135, 146 (2020), <https://www.uspto.gov/sites/default/files/documents/fy21pbr.pdf>

significant portion of their annual salary. Specifically, while APJs' base salaries are supposed to be subject to a statutory cap of approximately \$181,500 per year,<sup>6</sup> the USPTO has awarded bonus payments as high as \$43,060 on top of APJs' annual base salary,<sup>7</sup> pursuant to a performance-based incentive program that considers overall productivity alongside various subjective criteria—including the “quality” of APJs' written

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<sup>6</sup> 35 U.S.C. § 3(b)(6) (“The Director may fix the rate of basic pay for [APJs] ... at [a rate] not greater than ... level III of the Executive Schedule”). Under the current OPM Salary Table No. 2020-EX, the salary for level III executive officers is set to \$181,500 per annum. *See Rates of Basic Pay for the Executive Schedule* (eff. Jan. 2020), <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2020/EX.pdf>.

<sup>7</sup> APJ Compensation Data (2012-2019), THE FAIR INVENTING FUND, <https://www.fairinventing.org/documents>.

opinions, their interactions with “stakeholders,” and their level of support for the PTAB’s mission and leadership.<sup>8</sup>

This compensation scheme creates problematic financial incentives in the context of IPR proceedings, which generate substantial revenue for the USPTO’s operating budget. Since APJs are subject to performance reviews affecting their compensation by the same USPTO leadership that is responsible for the agency’s budget, there is clearly at least some amount of pressure on APJs to adjudicate IPR petitions in a manner that maximizes fee-based revenues for the agency.

In addition to creating problematic financial incentives at the institution stage of IPR proceedings, there is now ample evidence that the performance-based compensation structure for APJs influences adjudicative outcomes in a manner that is adverse to patent owners.

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<sup>8</sup> See USPTO document compilation produced in response to FOIA Request No. F-19-00277, <https://usinventor.org/wp-content/uploads/2020/05/FOIA-F-19-00277-2019-11-04-APJ-PAPS.pdf>, at 2-5 (explaining that bonus payouts are based upon a four-factor scale that considers productivity, as measured by the number of “decisional units” produced by that APJ, alongside various other subjective criteria); see also Matthew Bultman and Ian Lopez, *Big Bonuses for Patent Appeals Judges Raise Fairness Questions*, BLOOMBERG LAW (Sept. 8, 2020), <https://bna.com/ip-law/big-bonuses-for-patent-appeals-judges-raise-fairness-questions>.

According to a recently-published analysis of IPR decisions and APJ bonuses that were issued during the 2016 fiscal year, APJs “earned an average bonus of ... \$313.6[0] per Final Written Decision when cancelling patent claims,” as compared to “\$2.4[0] per Final Written Decision when uphold[ing] all patent claims” in IPR proceedings. See Ron D. Katznelson, *The Pecuniary Interests of PTAB Judges: Empirical Analysis Relating Bonus Awards to Decisions in AIA Trials* (Jul. 5, 2021) [hereinafter, the “*Katznelson Report*”], at 30, available at <https://ssrn.com/abstract=3871108>. In other words, APJs earn significantly more, as bonus payments, for final written decisions that result in the cancellation of (as opposed to upholding) the challenged patent. It is therefore evident that these bonus payments have been implemented in a manner that consistently favors those challenging the validity of existing patents. This dynamic, which violates the due process rights of patent owners in IPR

proceedings, has also contributed to the PTAB's unfortunate reputation as a "death squad" for patents held by independent inventors.<sup>9</sup>

As if these payments weren't shocking enough, bonus incentives are further utilized to influence adjudicative outcomes by artificially manufacturing decisional uniformity among three-member panels of the PTAB. Specifically, according to documents that were originally obtained through a FOIA request, the USPTO has implemented a policy that expressly suppresses dissenting and concurring opinions by refusing to count those "decisional units" towards APJs' "productivity goals" under the PTAB's compensation scheme.<sup>10</sup>

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<sup>9</sup> See, e.g., Ryan Davis, *PTAB's 'Death Squad' Label Not Totally Off-Base, Chief Says*, LAW360 (Aug. 14, 2014), <https://www.law360.com/articles/567550/ptab-s-death-squad-label-not-totally-off-base-chief-says?copied=1>; Greg Stohr and Susan Decker, *'Death Squad' That Tossed 2,000 Patents Challenged at High Court*, BLOOMBERG (Feb. 27, 2021), <https://www.bloomberg.com/news/articles/2021-02-27/-death-squad-that-tossed-2-000-patents-challenged-at-high-court>.

<sup>10</sup> See Gene Quinn, *Structural Bias at the PTAB: No Dissent Desired*, IPWATCHDOG.COM (Jun. 6, 2018), <https://www.ipwatchdog.com/2018/06/06/structural-bias-ptab-no-dissent-desired/id=94507> (referring to internal USPTO email advising all APJs that concurring and dissenting opinions would no longer be counted towards their productivity metrics).

And while it is conceivable that APJs could resist the temptation to conform their decisions accordingly, the reality is that this policy has been extremely at bringing about the cancellation of patents held by independent inventors, while also quelling dissent among three-member APJ panels; as a result, approximately 98% of the merits-based decisions issued by the PTAB are unanimous.<sup>11</sup>

These assertions are not based on mere suspicions or suppositions; they are founded on publicly-available documents that demonstrate a direct financial link between “dollars in the door,” that flow from the institution of IPR proceedings and that factor most prominently into the outcome-driven, incentive-based, compensation structure of APJs.

#### **4. Rigged case-assignments and panel stacking**

Furthermore, it is now a matter of public record that the agency’s leadership, including the USPTO Director and the Chief APJ, routinely employ their case-assignment authority to selectively staff APJs based on their perceived propensity for ruling a certain way in specific cases,

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<sup>11</sup> See Scott McKeown, *Judicial Independence & The PTAB: The Tension Between Judicial Independence & Agency Consistency*, ROPES & GRAY (Dec. 12, 2017), <https://www.patentspostgrant.com/judicial-independence-ptab/>.

and engage in the practice of “stacking” APJ panels in order to achieve specific adjudicative outcomes that align with various unwritten and politically-charged policy objectives that the agency’s leadership seeks to advance.

This stunning revelation was first made public by a government attorney representing the USPTO during the course of an oral argument before this Court that sent shock waves through the community of independent inventors.<sup>12</sup> Since then, the agency has essentially admitted, on multiple occasions, that the USPTO Director and Chief APJ employ various mechanisms “to indirectly influence” the course of IPR proceedings before the PTAB—such as by “designat[ing] [certain] APJs [that are presumably] predisposed to decide a case in his preferred

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<sup>12</sup> See Gene Quinn, *USPTO Admits to Stacking PTAB Panels to Achieve Desired Outcomes*, IPWATCHDOG.COM (Aug. 23, 2017), <https://www.ipwatchdog.com/2017/08/23/uspto-admits-stacking-ptab-panels-achieve-desired-outcomes/id=87206/> (referring to statements made by an attorney representing the USPTO during oral arguments in a case before this Court); see also, e.g., Press Release: Congressmen Issa, *Johnson Call on GAO to Investigate PTAB Decision-Making Practices* (June 2, 2021), <https://issa.house.gov/media/press-releases/congressmen-issa-johnson-call-gao-investigate-ptab-decision-making-practices>; Britain Eakin, *Lawmakers Seek Probe Of USPTO Director’s Sway Over PTAB*, LAW360 (June 3, 2021), <https://law360.com/articles/1390697/lawmakers-seek-probe-of-uspto-director-s-sway-over-ptab>.

manner.” *Arthrex*, 141 S. Ct. at 1972; *see also Oil States Energy Servs.*, 138 S. Ct. at 1381 (Gorsuch, J., dissenting) (characterizing such practices as a problematic “retreat from the promise of judicial independence.”).

When probed about these practices by the Supreme Court during oral arguments in the *Oil States* case, the USPTO sought to allay Chief Justice Roberts’ concerns by representing that it had only ever engaged in the practice of stacking panels on three prior occasions.<sup>13</sup> This representation was notably false, however; indeed, publicly-available data reveals that panel stacking is rampant—having impacted at least 1,171 hearings, 391 final decisions, and 737 unique cases, since 2013.<sup>14</sup>

More importantly, this data also shows that the USPTO’s practice of stacking panels always results in the cancellation of the challenged patent, without a single exception. *See Katznelson Report*, at 20 (explaining that 100% of the 2016 IPR proceedings in which panels were

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<sup>13</sup> Transcript of Oral Argument at 46, *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC* (No. 16-712).

<sup>14</sup> PTAB Case Assignment Data (2013-2019), THE FAIR INVENTING FUND, <https://www.fairinventing.org/documents>.

“stacked” resulted in a final written decision invalidating the challenged patent).

### **5. Secret extra-judicial review committee**

In addition to the foregoing, the PTAB maintains a secret internal review committee called the AIA Review Committee (“ARC”), which is apparently responsible for reviewing, editing, and modifying the outcome, if necessary, of proposed draft decisions authored by the original three-member APJ panel in IPR proceedings. *See Katznelson Report*, at 13-14. It is still not publicly known who serves on this committee, or why it has been authorized to alter the judgment of the APJs who preside over the IPR proceedings. Notably, parties to IPR proceedings have no opportunity to present evidence before this committee and cannot lodge appropriate objections or appeals from whatever alterations the committee makes to the original panel’s determination. As a result, IPR proceedings are rendered into show trials, while the substantive decision-making process take place in secret.

## **6. Regulatory capture, big-moneyed interests, and “revolving door” politics**

Finally, it is worth noting that B.E.’s adversaries have a distinct advantage stemming from their unique relationship and political clout with the agency’s leadership.

The “Big Tech” companies seeking to challenge B.E.’s patents—including Google, in particular—exert a tremendous amount of financial and political influence in American government, and even more so at the USPTO. Google is one of the PTAB’s most important customers in terms of the number of IPR petitions that it has filed to date, and the fees that it has thereby generated for the agency. Publicly-available documents show that Google has filed a total of 396 IPR petitions—placing it in the number three spot for the greatest number of petitions filed to date, after only Samsung (554 petitions filed) and Apple (492 petitions filed).<sup>15</sup> Google is also one the agency’s top customers in terms of the fees that it

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<sup>15</sup> See Top 20 Petitioners, UNIFIED PATENTS, [https://portal.unifiedpatents.com/ptab/analytics/case-level/top-parties?sort=-filing\\_date](https://portal.unifiedpatents.com/ptab/analytics/case-level/top-parties?sort=-filing_date) (aggregating publicly available data on PTAB cases from the USPTO).

generates on new patent applications<sup>16</sup> and trademark registrations.<sup>17</sup> And because the USPTO is a “fee-funded” agency whose leadership is comprised of political appointees, there is a strong incentive to provide satisfactory results for those entities that generate most of its revenues.

Additionally, Google is probably unmatched in terms of its connections to the agency via the so-called “revolving door,” through which the company hires workers with agency experience, while the agency is, in-turn, led by individuals with significant private sector experience at companies like Google. For example, the former Director of the USPTO, Michelle Lee, previously served as Google’s head of patent strategy before assuming the top position at the agency—and it is well-

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<sup>16</sup> See Joseph Johnson, *Number of Patents in the United States Granted to Alphabet Inc. from 2010 to 2020*, STATISTA (Feb. 24, 2021), <https://statista.com/statistics/897763/alphabet-inc-patents-usa-registered> (showing that Google’s parent company, Alphabet Inc., has received 2,500 to 3,000 new patents for each year from 2015 to 2020).

<sup>17</sup> *USPTO Performance and Accountability Report, Fiscal Year 2020*, p. 232 (Table 29B), <https://www.uspto.gov/sites/default/files/documents/USPTOFY20PAR.pdf> (last visited May 17, 2021) (showing that Google was among the Top 50 filers of trademark registrations filed in 2020).

documented that many other high-ranking USPTO employees have made their way through that same revolving door in recent years.<sup>18</sup>

Based on the foregoing, it is hardly a stretch to view the USPTO as a “captured agency”<sup>19</sup> and to understand the PTAB’s operating procedures as a manifestation of that dynamic; designed to ensure that patent adjudications result in decisions that are consistent with the interests and ideology of the agency’s most important customers.

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<sup>18</sup> See, e.g., *Google’s Revolving Door*, TECH TRANSPARENCY PROJECT (Apr. 26, 2016), <https://www.techtransparencyproject.org/articles/googles-revolving-door-us> (documenting at least “258 instances of ‘revolving door’ activity... between Google... and the federal government, national political campaigns and Congress” during the Obama administration); Haris Tabakovic & Thomas G. Wollmann, *From Revolving Doors to Regulatory Capture? Evidence from Patent Examiners*, Nat’l Bureau of Econ. Research, Working Paper No. 24638 (May 2018), <http://www.nber.org/papers/w24638> (finding that “patent examiners grant significantly more patents to the firms that later hire them and that much of this leniency extends to prospective employers.”).

<sup>19</sup> See David Dana and Susan P. Koniak, *Bargaining in the Shadow of Democracy*, 148 U. Pa. L. Rev. 473, 497 (1999) (“In ‘captured’ agencies ... regulators do not act as ‘arms-length’ representatives of some larger ‘public interest’ in their interactions with regulated industries. Instead, government officials work to advance the agenda of current firms in the industry... In the most malignant capture account, the captured regulatory agency enables an industry to bar new entrants and extract monopoly rents so that consumers are materially worse off with regulation than without it.”).

## REASONS WHY THE WRIT SHOULD ISSUE

Pursuant to the All Writs Act, 28 U.S.C. § 1651(a), this Court is authorized to issue “all writs necessary or appropriate in aid of [its] ... jurisdiction[] and agreeable to the usages and principles of law.” A writ of mandamus is warranted when: (1) the “right to issuance of the writ is ‘clear and indisputable’”; (2) the party has “no other adequate means to attain the relief”; and (3) “the writ is appropriate under the circumstances.” *Cheney v. United States Dist. Court*, 542 U.S. 367, 380-381 (2004) (citation omitted); *accord Mote v. Wilkie*, 976 F.3d 1337, 1342 (Fed. Cir. 2020). All of these considerations strongly support the issuance of a writ of mandamus here.

### **I. THE RIGHT TO A WRIT IS CLEAR AND INDISPUTABLE**

The Fifth Amendment to the United States Constitution provides that:

No person shall be ... deprived of life, liberty, or property without due process, of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

In assessing a Due Process Clause challenge, courts apply the three-factor balancing test prescribed in *Mathews v. Eldridge*, 424 U.S.

319 (1976). Under *Mathews*, courts must evaluate: (1) “the private interest affected”; (2) “the risk of erroneous deprivation of that interest through the procedures used”; and (3) “the governmental interest at stake.” *Nelson v. Colorado*, 137 S. Ct. 1249 (2017) (citing *Mathews*, 424 U.S. at 335).

As detailed below, each of these three factors weighs heavily against the constitutionality of the pending IPR proceedings against B.E.

**A. Patent rights are “property” within the meaning of the Fifth Amendment (*Mathews* Factor #1).**

The first *Mathews* factor (*i.e.*, “the private interest affected by the official action”) is easily resolved here.

The Supreme Court has long recognized that patents are property within the meaning of the Fifth Amendment. *See, e.g. Oil States Energy Servs.*, 138 S. Ct. at 1379 (“[O]ur decision [upholding the constitutionality of *inter partes* review under Article III] should not be misconstrued as suggesting that patents are not property for purposes of the Due Process Clause or the Takings Clause.”) (citing *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 642 (1999); *James v. Campbell*, 104 U.S. 356, 358 (1882)); *see also Consol. Fruit-Jar Co. v.*

*Wright*, 94 U.S. 92, 96 (1877) (“A patent for an invention is as much property as a patent for land.”); *Cammeyer v. Newton*, 94 U.S. 225, 226 (1876) (“the right of the [patent] holder is as much entitled to protection as any other property.”); *Brown v. Duchesne*, 60 U.S. 183, 197 (1857) (“For, by the laws of the United States, the rights of a party under a patent are his private property.”); *see also Celgene Corp. v. Peter*, 931 F.3d 1342, 1358 (Fed. Cir. 2019) (“The PTO does not dispute that a valid patent is private property for the purposes of the Takings Clause.”), *cert. denied*, 141 S. Ct. 132 (2020).

Accordingly, any forum or proceeding that decides upon the validity of a patent must necessarily comport with the minimum due process requirements of the Fifth Amendment.

**B. Mandamus is necessary to prevent an unconstitutional deprivation of B.E. Technology’s property rights without due process of law (*Mathews* Factor #2).**

The second *Mathews* factor (“the risk of [an] erroneous deprivation ... through the procedures used”) also weighs overwhelmingly in favor of issuing the requested writ of mandamus.

The Due Process Clause “demands impartiality on the part of those who function in judicial or quasi-judicial capacities.” *Schweiker v. McClure*, 456 U.S. 188, 195 (1982); *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) (“the law concerning disqualification because of interest applies with equal force to ... administrative adjudicators.”); *see also Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (explaining that the Due Process Clause prohibits “any officer, judicial or quasi-judicial” from presiding over the subject-matter of any proceeding in which he or she has even “the slightest pecuniary interest.”).

And the Supreme Court has repeatedly held that the risk of an erroneous deprivation is “unacceptably high” when litigants are not provided with a “neutral decisionmaker.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (applying *Mathews*); *see also, e.g., Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (“It is axiomatic that ‘[a] fair trial in a fair tribunal is a basic requirement of due process.’”) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)); *Weiss v. United States*, 510 U.S. 163, 178 (1994) (“A necessary component of a fair trial is an impartial judge.”); *Concrete Pipe & Products, Inc. v. Construction Laborers Pension Trust for Southern Cal.*, 508 U.S. 602, 617 (1993) (“due

process requires a ‘neutral and detached judge in the first instance’”) (quoting *Ward v. Monroeville*, 409 U.S. 57, 61-62 (1972)); *Goldberg v. Kelly*, 397 U.S. (1970) (“[A]n impartial decision maker is essential.”).

The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law... At the same time, it preserves both the appearance and reality of fairness, generating the feeling, so important to a popular government, that justice has been done ... by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

*Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (internal citations and quotation marks omitted).

These principles necessarily disqualify adjudicators from deciding matters in which they have a “direct, personal, substantial pecuniary interest.” *Tumey*, 273 U.S. at 532; *see also Murchison*, 349 U.S. at 136 (“no man is permitted to try cases where he has an interest in the outcome.”); *accord Ward v. Monroeville*, 409 U.S. 57. Or where there is an apparent risk of bias, undue influence, or a conflict-of-interest giving rise to an appearance of impropriety. *See Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986) (“The Due Process Clause ‘may sometimes bar

trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally... But to perform its high function in the best way, ‘justice must satisfy the appearance of justice.’”); *see also Caperton*, 556 U.S. at 884 (2009); *Berryhill*, 411 U.S. at 564; *Beer v. United States*, 696 F.3d 1174, 1179 (Fed. Cir. 2012); *Long v. Soc. Sec. Admin.*, 635 F.3d 526, 533 (Fed. Cir. 2011).

**1. Procedural due process concerns affecting all patent owners in IPR proceedings**

The PTAB’s operating procedures run afoul of these constitutional strictures many times over and deprive patent owners of their right to due process in IPR proceedings. Indeed, some of the PTAB’s inner machinations are so offensive to the most basic tenets of procedural fairness that any IPR proceeding, as currently implemented, is necessarily unconstitutional.

**i. Improper financial incentives affecting all stages of IPR proceedings**

As described herein, IPR proceedings are tainted by improper financial incentives that undermine APJs’ ability to act as impartial arbiters from the very beginning of IPR proceedings, at the institution stage—and on through to the final written decision stage.

At the outset, it is abundantly clear that the compensation structure of APJs functions as a strong institutional inducement in favor of petitioners seeking to institute IPR proceedings, *supra*, at 9-12. And whether intentional or not, “performance-based” bonuses have consistently been implemented in a manner that rewards the cancellation of patents, while discouraging APJs from upholding the patent rights of independent inventors, *supra* at 12-13. It is equally clear that USPTO leadership has utilized these bonus incentives as an indirect means of exerting undue influence over adjudicative outcomes, by refusing to allow “productivity” credits for dissenting or concurring opinions in IPR proceedings, *supra* at 13-14. As a result, some 98% of the merits-based decisions issued by the PTAB are unanimous, *supra* n. 11 at 14.

B.E. is not the first litigant to raise due process concerns stemming from the current structure, financial operations, and internal procedures of the PTAB. Indeed, this Court recently considered such a challenge in connection with the institution stage of IPR proceedings in *Mobility Workx, LLC v. Unified Patents, LLC*, No. 2020-1441, 2021 WL 4762265 (Fed. Cir. Oct. 13, 2021).

In *Mobility Workx*, the appellants sought to establish that the compensation scheme for APJs gives rise to a “structural bias” in favor of instituting IPR proceedings, which violates patent owners’ right to due process at the outset of these adjudications and casts doubt upon the constitutionality of the entire proceeding. *Id.* at \*2 (“Mobility argues that [APJs]... have an impermissible financial interest in instituting AIA proceedings under the standard articulated in *Tumey*...”). This Court rejected that argument, finding that any connection between the USPTO’s institutional budgetary interests and the compensation structure for APJs was “too remote to constitute a due process violation.” *Id.* at \*5.

[W]e conclude that APJs do not have a significant financial interest in instituting AIA proceedings to earn a bonus ... [because] the number of decisional units earned by an APJ is based upon the number of decisions authored and does not depend on the outcomes of those decisions... This stands in sharp contrast to *Tumey* and *Ward*, which involved fees that were only collected upon conviction of the defendants.

*Id.* at \*7 (citations and quotation marks omitted).

But the Court’s reasoning was premised upon an extremely limited record in *Mobility Workx*—reaching only one aspect of the endless due

process violations arising from the PTAB's inner machinations. And the constitutionality of IPR proceedings, as currently implemented, cannot be properly assessed without an understanding of this larger context and the more consequential due process concerns at issue.

As it turns out, the due process concerns emanating from the institution stage of IPR proceedings are just the tip of the iceberg. After that, patent owners are forced to present their case in a forum where the adjudicators have strong financial incentives to rule against them, due to an outcome-driven incentive pay compensation scheme that also effectively stifles dissenting opinions. This unjustifiable and impermissible usurpation of the adjudicative process is fundamentally at odds with the most basic tenets of judicial independence and procedural fairness.

Moreover, the \$313.60 amount that APJs stand to receive as bonus compensation per cancellation decision, *supra*, at 12, is substantially higher (even factoring in inflation) than the \$12 per case discussed in *Tumey*, 273 U.S. at 531, which “the mayor received for his fees and costs” in connection with the successful prosecution of Prohibition violations—and which the Supreme Court declared unconstitutional. *Id.* at 532

(“There are doubtless mayors who would not allow such a consideration as \$12 costs in each case to affect their judgment... but the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice.”)<sup>20</sup> This critical fact renders the key rationale in *Mobility Workx* (*i.e.*, that bonus payments to APJs are “based upon the number of decisions authored and do[] not depend on the outcomes of those decisions”) completely untenable. 2021 WL 4762265, at \*7.

Here, as in *Tumey*, B.E. has “the right to have an impartial judge,” and should be “entitled to halt the trial because of the disqualification of the judge[s] ...[due to] [their] direct pecuniary interest in the outcome.” 273 U.S. at 535.

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<sup>20</sup> The revenues generated by IPR proceedings are also far more substantial than the amounts that were at issue in *Ward v. Village of Monroeville*, 409 U.S. at 58, where the Supreme Court invalidated a statute authorizing mayors to “sit as judges in cases of ordinance violations and certain traffic offenses,” that generated municipal revenues in amounts less than \$25,000 per year. *Id.* at 60 (reasoning that “the mayor’s executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor’s court.”).

**ii. Purposefully biased selection of APJs in particular cases**

In addition to creating problematic financial incentives that undermine the legitimacy of IPR proceedings, USPTO leadership routinely abuses its case-assignment authority and “stacks” APJ panels to control adjudicative outcomes, *supra*, at 15-18.

As the Supreme Court recognized in its recent *Arthrex* decision, these questionable practices likely emerged from the USPTO’s flawed implementation of the AIA, which lacked any formal procedural mechanism for the oversight and review of PTAB decisions by agency leadership. As a result, the USPTO Director and other political appointees at the agency’s helm resorted to various informal and improper mechanisms “to indirectly influence” adjudicative outcomes in IPR proceedings. *Arthrex*, 141 S. Ct. at 1981.

Although these practices were purportedly designed to mitigate Appointments Clause issues by removing a certain level of independence from APJs, these “machinations” simply “blur[red] the lines of accountability...,” while leaving parties “with neither an impartial decision by a panel of experts nor a transparent decision for which a

politically accountable officer must take responsibility.” *Arthrex*, at 1972. And although *Arthrex* has forced the USPTO to implement a formal review mechanism, the new interim procedures are notably silent about practices like panel stacking, and do not adequately prevent against the risk of such shenanigans moving forward.

As Justice Gorsuch presciently observed in his dissent, *Arthrex* hardly “resolve[d] all the problems ... in the IPR process,” such as “the revolving door or any of the other due process problems....” *Id.* at 1994 (Gorsuch, J., dissenting) (“No doubt, challenges involving those aspects of the IPR process will come... [and] I hope this Court will come to recognize ...that the process due someone with a vested property right in a patent is a proceeding before a neutral and independent judge.”).

In any event, the fact that APJs are being assigned to specific cases based on their propensity towards particular outcomes (as opposed to their skills and expertise) is a fundamentally unjust practice that cannot be reconciled with the basic requirements of due process.

### **iii. Unaccountable extra-judicial review**

As explained above, the PTAB also puts APJs’ draft decisions through a “black box” process, reviewing and, if necessary, editing them

before publication. This outrageous practice flies in the face of the “universal rule against secret trials,” *In re Oliver*, 333 U.S. 257, 266 (1948), and is fundamentally inconsistent with the general principle that “the administration of justice cannot function in the dark.” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980) (“the appearance of justice can best be provided by allowing people to observe it”). Since the identity of persons serving on this secret extra-panel review committee are never revealed, patent owners are deprived of their right to know who might have contributed to, influenced, or made the ultimate decision in any IPR proceedings—or whether those persons should be disqualified due to a conflict-of-interest. And since parties cannot argue before this secret committee, nor see what it changed, they are also necessarily deprived of the opportunity to lodge any objections or appeals from those decisions.

This committee review policy turns IPR proceedings into meaningless “show trials” that only serve to provide cover for the political decisions of those in power.

## 2. Additional due process concerns specific to the pending IPR proceedings

The USPTO's unique relationship with B.E.'s adversaries presents another source of potential bias that heightens the risk of an unlawful deprivation in the pending IPR proceedings.<sup>21</sup> Google is one of the PTAB's biggest "funders" through its IPR-based and fee-driven operating budget—and it also commands influence by way of the "revolving door" politics, *supra*, at 19-22.

These circumstances give rise to an appearance of impropriety that would surely implicate recusal obligations if presented in any other context. *See, e.g., Beer*, 696 F.3d at 1179 (“[J]udges should disqualify themselves when their impartiality might reasonably be questioned or when they have a potential financial stake in the outcome of a decision.”), *cert. denied*, 133 S. Ct. 1997 (2013) (citing 28 U.S.C. § 455); *Long*, 635

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<sup>21</sup> This is not the first time that B.E. Technology's patents have been placed under attack by Google in IPR proceedings before the PTAB. From 2013 through 2014, B.E. Technology participated in several IPR proceedings instituted by Google, which resulted in the cancellation of two critical patents. The various improprieties surrounding those prior proceedings are particularly astounding, and are currently the subject of collateral litigation in the case of *Hoyle, et al. v. Lee et al.*, W.D.T.N. Case No. 21-cv-02512.

F.3d at 533 (explaining that “the American Bar Association Model Code of Judicial Conduct ... is an [equally] appropriate guide for evaluating the conduct of ALJs,” insofar as it instructs judges to act “in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and ...[to] avoid impropriety and the appearance of impropriety.”); *see also Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986); *In re Murchison*, 349 U.S. at 136.

\* \* \*

In sum, the circumstances surrounding the IPR proceedings that are currently pending against B.E. give rise to an unacceptably high “risk...[that] an erroneous deprivation” will occur, absent this court’s intervention. *Mathews v. Eldridge*, 424 U.S. at 335.

As demonstrated herein, it is indisputable that bonus incentives for APJs have been implemented in a manner that favors those seeking to challenge the validity of patents held by independent inventors. And while the PTAB was designed by Congress to provide fair and meaningful administrative adjudications of patent owners’ rights before three-judge panels comprised of independent and impartial APJs, the reality is that practically all of these cases are being decided by a single APJ, often

hand-selected by the Director of the USPTO in order to achieve a specific pre-determined outcome (regardless of any evidence presented at trial), with the other two APJs merely rubber-stamping the final decision. Last but not least—in the unlikely event that a decision still does not comport with the agency leadership’s unwritten policy objectives—it can essentially be re-written by a secret extra-judicial review panel before publication.

Any of these factors, standing alone, would arguably be sufficient to constitute an independent due process violation. When combined, however, these circumstances amount to a particularly egregious and undeniable deprivation of patent owners’ constitutional rights in IPR proceedings.

Moreover, these are precisely the sort of due process “shenanigans” that the Supreme Court foreshadowed in *Cuozzo*, 136 S. Ct. at 2141-42, when it referred to the possibility of future “appeals that [might] implicate constitutional questions” arising from IPR proceedings before the PTAB.

The PTAB leadership’s dual roles as executive and adjudicator, its award of bonus payments to incentivize higher “production” among APJs,

and its abuse of oversight and management tools, through practices such as panel stacking and secret committee review, all serves as a concrete mechanism for biasing decisions in favor of those who fund the PTAB's fee collections.

Accordingly, the second *Mathews* factor weighs overwhelmingly in favor of granting mandamus to prevent an unconstitutional deprivation of B.E.'s rights without due process of law.

**C. The government has a strong and compelling interest in the constitutionality of patent adjudications (*Mathews* Factor # 3).**

The third and final factor under *Mathews* concerns “the governmental interest at stake.” 424 U.S. at 340.

It is readily apparent that the government has a substantial public interest in the proper functioning of our patent system. *See, e.g., Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 571 U.S. 191, 203 (2014) (noting the importance of “a well-functioning patent system”); *United States v. Line Material Co.*, 333 U.S. 287, 320 (1948) (“[The Constitution] makes the public interest the primary concern in the patent system”); *Mercoïd Corp. v. Mid-Continent Investment Co.*, 320 U.S. 661,

665 (1944) (“It is the public interest which is dominant in the patent system”).

The USPTO’s stated mission is “to ensure that the intellectual property system contributes to a strong global economy, encourages investment in innovation, and fosters entrepreneurial spirit.” USPTO.GOV, <https://www.uspto.gov/about-us/uspto-locations/alexandria-virginia-headquarters>; *see also Kimble v. Marvel Entm’t, LLC*, 576 U.S. 446, 451 (2015) (“In crafting the patent laws, Congress struck a balance between fostering innovation and ensuring public access to discoveries”).

IPR proceedings were originally intended to further that objective, by providing for a more efficient mechanism for the adjudication of existing patents. *See Cuozzo Speed Techs*, 136 S. Ct. at 2144. Unfortunately, however, the current implementation of IPR proceedings fails to advance that interest. Instead, the USPTO has created a system that disincentivizes innovation by placing the legitimate rights of inventors under constant attack in a forum that consistently fails to meet the most basic requirements of due process. Neither the government nor the public stands to benefit from a system that deprives patent owners of their property rights without due process of law. To the contrary, the

issuance of a writ of mandamus in this case is the only course of action that advances the government's interest in fostering fair and functional patent adjudications.

## **II. PETITIONER LACKS ANY OTHER ADEQUATE MEANS OF OBTAINING RELIEF**

Mandamus is also necessary because B.E. has “no other adequate means” for obtaining relief. *Cheney*, 542 U.S. at 381. If this Court does not intervene, B.E. will be forced to expend substantial time and resources defending itself in an unconstitutional forum before seeking review on direct appeal.

Although the availability of review on direct appeal typically precludes mandamus relief, *see Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 27-28 (1943), a “remedy by appeal is [considered] inadequate” in situations arising from the impartiality of the forum:

[I]f prejudice exist[s], it has worked its evil and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient.

*Berger v. United States*, 255 U.S. 22, 36 (1921).

In such circumstances, the need for mandamus relief “is clearly distinguishable from those where a party alleges an error of law that...may be fully addressed and remedied on appeal...” *In re United States*, 666 F.2d 690, 694 (1st Cir. 1981). The critical distinction is that “the injury suffered by a party required to complete judicial proceedings [before a biased] officer is[,] by its nature[,] irreparable.” *Cobell v. Norton*, 334 F.3d 1128, 1139 (D.C. Cir. 2003). Even in the case of apparent bias (rather than *actual* bias), “ordinary appellate review fails to restore ‘public confidence in the integrity of the judicial process[.]’” *In re al-Nashiri*, 791 F.3d 71, 79 (D.C. Cir. 2015) (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988)).

### **III. ISSUANCE OF THE WRIT IS APPROPRIATE UNDER THE CIRCUMSTANCES**

Finally, mandamus is also “appropriate under the circumstances.” *Cheney*, 542 U.S. at 381. Both this Court and the Supreme Court have held that mandamus is appropriate where “deciding th[e] matter now ... [is] important to ‘proper judicial administration.’” *In re BP Lubricants USA Inc.*, 637 F.3d 1307, 1313 (Fed. Cir. 2011) (quoting *LaBuy v. Howes Leather Co.*, 352 U.S. 249, 259-60 (1957)); *see also Mote v. Wilkie*, 976

F.3d 1337, 1343 (Fed. Cir. 2020). Of course, resolving these issues now is “important to ‘proper judicial administration’” because it will ensure that patent adjudications comport with the basic minimum requirements of due process.

### **CONCLUSION**

For these reasons, the petition for a writ of mandamus must be granted.

Dated: November 15, 2021  
New York, NY

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

The foregoing Petition for a Writ of Mandamus complies with the applicable type-volume limitations set forth in Fed. R. App. P. 21(d)(1), as well as the typeface and type-style requirements of Fed. R. App. P. 32(a)(5)-(6), because it contains 7,628 words in proportionally spaced Century Schoolbook 14-point font.

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**CERTIFICATE OF SERVICE**

Pursuant to Fed. Cir. R. Rule 21(3), the undersigned hereby certifies that a copy of the foregoing document was served in accordance with Fed. R. App. P. 25(c)(2),(d)(1)(B), on November 15, 2021, by filing this document via CM/ECF and by delivering a copy via FedEx and electronic mail to the attorneys of record for Google, LLC, and Twitter, Inc., at the following addresses:

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