No. _____

IN THE

Supreme Court of the United States

RICHARD STORER, GILLES GOSSELIN, JEAN-PIERRE SOMMADOSSI, and PAOLA LACOLLA,

Petitioners,

v.

UNITED STATES OF AMERICA and JEREMY CLARK,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

For almost two centuries, the Nation's patent laws have established two options for aggrieved parties to challenge agency determinations in priority-of-invention disputes between competing inventors—district-court civil actions allowing for civil process and additional evidence (followed by appellate-court review), *see* 35 U.S.C. § 146, or immediate appellate review of the agency action, *see* 35 U.S.C. § 141.

The Federal Circuit, however, has interpreted the Leahy-Smith America Invents Act of 2011 (and its technical amendments) as having impliedly repealed by negative inference § 146 district-court subject-matter jurisdiction, and limiting Article III jurisdiction unto itself under § 141, for such "interference" proceedings declared after September 15, 2012. In so ruling, the Federal Circuit has never even attempted to reconcile its decision with this Court's rulings holding that "jurisdiction is not defeated by implication." *Galveston, Harrisburg & San Antonio Ry. Co. v. Wallace*, 223 U.S. 481, 490 (1912).

The question presented is:

In the America Invents Act, did Congress impliedly repeal the almost-200-year-old statutory grant of district-court subject-matter jurisdiction, currently codified in 35 U.S.C. § 146, in favor of exclusive jurisdiction in the Federal Circuit?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners (Appellants below) are Richard Storer, Gilles Gosselin, Jean-Pierre Sommadossi, and Paola LaColla. Their real parties in interest are Idenix Pharmaceuticals LLC, Universita Degli Studi di Cagliari, Centre National de la Recherche Scientifique, and Université de Montpellier. Of those, only Idenix Pharmaceuticals LLC has a parent company or publicly traded corporation that owns 10% or more of any of their stock: its parent company is Merck & Co., Inc. This petition refers to Petitioners and their real parties in interest collectively as "Storer."

Respondents are Jeremy Clark ("Clark") (Appellee below and whose real party in interest is Gilead Pharmasset LLC) and the United States of America (Intervenor below).

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INTRODUCTION

This case presents an important question of jurisdiction and statutory interpretation. Via a single 2015 panel decision, *Biogen MA, Inc. v. Japanese Foundation for Cancer Research*, 785 F.3d 648 (Fed. Cir. 2015), which was reached without consideration of several salient points regarding statutory interpretation, the Federal Circuit has narrowed Article III jurisdiction over a class of priority-of-invention disputes to only itself, overturning nearly two centuries of continuous district-court jurisdiction over such disputes.

The *Biogen* panel calcified the Federal Circuit's exclusive jurisdiction in this area based on a very thin reed: It found in the America Invents Act ("AIA") a repeal of this longstanding district-court jurisdiction by negative inference. Yet this Court has held, on numerous occasions, that "jurisdiction is not defeated by implication." *Galveston, Harrisburg & San Antonio Ry. Co. v. Wallace*, 223 U.S. 481, 490 (1912); *see also, e.g.*, *Rosecrans v. United States*, 165 U.S. 257, 262 (1897) (Where a statute "clearly defin[es] the jurisdiction of the courts," the "force and effect" of that jurisdiction "should not be disturbed by a mere implication flowing from subsequent legislation.").

The Federal Circuit cemented its *Biogen* interpretation as binding circuit precedent without ever engaging with this Court's decisions—and not for lack of trying by interested parties. In proceedings subsequent to the *Biogen* decision (including this case), the Federal Circuit, both panels and *en banc*, has been presented with this authority—authority never considered or applied by the *Biogen* decision—yet has

blithely dismissed these showings without comment, let alone any effort to reconcile *Biogen*'s holding with this Court's jurisprudence. That court has also been shown that the *Biogen* interpretation raises serious equal-protection problems, and should not have been adopted for that reason as well. Here, too, these objections have been dismissed without analysis—in this case, the panel dealt with these problems with a perfunctory single sentence that engaged neither of these arguments: "Although Storer says that *Biogen* was incorrectly decided, that decision is binding on this panel." Pet. App. 3a. And when they were represented to the court *en banc*, it denied rehearing without comment.

As a result of the Federal Circuit's one-sentence ruling in this case, the silence from the court *en banc*, and the Federal Circuit's exclusive jurisdiction over such patent cases, 28 U.S.C. § 1295(a)(4)(A), (C), this dubious ruling is now the law of the land—no further percolation is possible in the Federal Circuit, and none is available in the other courts of appeals. Without this Court's intervention, the Federal Circuit's erroneous precedent—which decides an important, purely legal question in an erroneous and mischief-making way—will be locked in as National law.

It would be regrettable if the strange new regime crafted by the Federal Circuit's erroneous *Biogen* decision were allowed to stand. That court's unwillingness to read the AIA as this Court's precedents command has resulted in a bizarre jurisdictional scheme, whereby the longstanding option of district-court review of priority-of-invention disputes is abolished, but only for the class of

interference disputes declared between September 16, 2012, and a decade or two from now. (For earlier interferences, and for post-AIA patents, the two alternative routes remain.) That discordant approach among similarly situated proceedings and parties is both unworkable and irrational.

A final note: Although the United States has appeared in this case as an intervenor in the Federal Circuit (and thus a respondent here), it has consistently limited its litigating position on the Article III question to only its constitutional dimension—namely, whether the Federal Circuit's interpretation of the America Invents Act can satisfy rational-basis equal-protection review. The United States has yet to take a position on the merits of the Federal Circuit's statutory interpretation. It may do so here.

The Court should grant review.

OPINIONS BELOW

The Patent Trial and Appeal Board's decision is reproduced at Pet. App. 27a. The Federal Circuit's opinion (Pet. App. 1a) is reported at 860 F.3d 1340 (Fed. Cir. 2017). The Federal Circuit's order denying panel rehearing and rehearing *en banc* is reproduced at Pet. App. 25a.

JURISDICTION

The Federal Circuit denied rehearing on November 13, 2017. On January 3, 2018, the Chief Justice extended Storer's time to petition for certiorari to and including March 5, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides:

> No person shall *** be deprived of life, liberty, or property, without due process of law.

The full text of the pre- and post-AIA versions of 35 U.S.C. §§ 141 and 146 is set forth at Pet. App. 106a. The full text of the Leahy-Smith America Invents Act ("AIA"), Pub. L. No. 112-29, 125 Stat. 284 (2011) (codified in part at scattered sections of 35 U.S.C.), is set forth at Pet. App. 111a. The full text of the Leahy-Smith America Invents Act Technical Corrections amendments ("TCA"), Pub. L. No. 112-274, 126 Stat. 2456 (2013), is set forth at Pet. App. 235a.

The relevant portions of those provisions are set forth here. In particular:

Pre-AIA 35 U.S.C. § 146, Pet. App. 108a-109a, states in relevant part:

> Any party to an interference dissatisfied with the decision of the Board of Patent Appeals and Interferences on the interference, may have remedy by civil action, if commenced within such time after such decision, not less than sixty days, as the Director appoints or as provided in section 141, unless he has appealed to the United States Court of Appeals for the Federal Circuit, and such appeal is pending or has been decided.

Post-AIA 35 U.S.C. § 146, Pet. App. 109a-110a, states in relevant part:

> Any party to a derivation proceeding dissatisfied with the decision of the Patent Trial and Appeal Board on the derivation proceeding, may have remedy by civil action, if commenced within such time after such decision, not less than sixty days, as the Director appoints or as provided in section 141, unless he has appealed to the United States Court of Appeals for the Federal Circuit, and such appeal is pending or has been decided.

Pre-AIA 35 U.S.C. § 141, Pet. App. 106a-107a, states in relevant part:

> A party to an interference dissatisfied with the decision of the Board of Patent Appeals and Interferences on the interference may appeal the decision to the United States Court of Appeals for the Federal Circuit, but such appeal shall be dismissed if any adverse party to such interference, within twenty days after the appellant has filed notice of appeal in accordance with section 142 of this title, files notice with the Director that the party elects to have all further proceedings conducted as provided in section 146 of this title.

Post-AIA 35 U.S.C. § 141, Pet. App. 107a-108a, states in relevant part:

> A party to a derivation proceeding who is dissatisfied with the final decision of the

> Patent Trial and Appeal Board in the proceeding may appeal the decision to the United States Court of Appeals for the Federal Circuit, but such appeal shall be dismissed if any adverse party to such derivation proceeding, within 20 days after the appellant has filed notice of appeal in accordance with section 142, files notice with the Director that the party elects to have all further proceedings conducted as provided in section 146.

The Federal Circuit relied on **AIA § 6(f)(3)**, Pet. App. 169a-170a, which states in full:

> (3) PENDING INTERFERENCES.—
>
> (A) PROCEDURES IN GENERAL.—The Director shall determine, and include in the regulations issued under paragraph (1), the procedures under which an interference commenced before the effective date set forth in paragraph (2)(A) is to proceed, including whether such interference—
>
> (i) is to be dismissed without prejudice to the filing of a petition for a post-grant review under chapter 32 of title 35, United States Code; or
>
> (ii) is to proceed as if this Act had not been enacted.
>
> (B) PROCEEDINGS BY PATENT TRIAL AND APPEAL BOARD.—For purposes of an interference that is commenced before the effective date set forth in paragraph (2)(A), the Director may deem the Patent

> Trial and Appeal Board to be the Board of Patent Appeals and Interferences, and may allow the Patent Trial and Appeal Board to conduct any further proceedings in that interference.
>
> (C) APPEALS.—The authorization to appeal or have remedy from derivation proceedings in sections 141(d) and 146 of title 35, United States Code, as amended by this Act, and the jurisdiction to entertain appeals from derivation proceedings in section 1295(a)(4)(A) of title 28, United States Code, as amended by this Act, shall be deemed to extend to any final decision in an interference that is commenced before the effective date set forth in paragraph (2)(A) of this subsection and that is not dismissed pursuant to this paragraph.

The Federal Circuit also relied on **TCA § 1(k)(3)**, Pet. App. 241a, which states in full:

> (3) REVIEW OF INTERFERENCE DECISIONS.—The provisions of sections 6 and 141 of title 35, United States Code, and section 1295(a)(4)(A) of title 28, United States Code, as in effect on September 15, 2012, shall apply to interference proceedings that are declared after September 15, 2012, under section 135 of title 35, United States Code, as in effect before the effective date under section 3(n) of the Leahy-Smith America Invents Act. The Patent Trial and Appeal Board may be deemed to be the Board of Patent Appeals

and Interferences for purposes of such interference proceedings.

STATEMENT

1. This petition relates to a patent interference requested by Clark against Storer that the Patent Office declared on December 3, 2013. An interference is a proceeding in the Patent Office "between contesting parties as to priority of invention." *Kappos v. Hyatt*, 566 U.S. 431, 433 (2012) (citing *Morgan v. Daniels*, 153 U.S. 120, 125 (1894)). In the Storer-Clark interference, the dispute was between Storer's U.S. Patent No. 7,608,600 and Clark's U.S. Patent Application No. 11/854,218, both filed under the pre-AIA system. *See* Pet. App. 29a. Interference proceedings can include invalidity issues, as they did here: The Patent Office held Storer's patent invalid for non-enablement under 35 U.S.C. § 112, ¶ 1 (pre-AIA numbering; *cf.* 35 U.S.C. § 112(a) (post-AIA numbering)). *See* Pet. App. 69a.

2. On May 21, 2015, Storer sought to challenge the Patent Office's unfavorable ruling in district court under 35 U.S.C. § 146. *See* Complaint, *Idenix Pharms. LLC v. Gilead Pharmasset LLC*, No. 1:15-cv-00416 (D. Del. May 21, 2015) (Dkt. 1). Section 146 (pre-AIA) provides "[a]ny party to an interference dissatisfied with" the decision "remedy by civil action" in district court, unless either party to the interference has appealed to the Federal Circuit pursuant to 35 U.S.C. § 141. These alternate forms of review, currently granted in §§ 141 and 146, date back nearly two centuries. *See* P.J. Federico, *Commentary on the New Patent Act*, 35 U.S.C.A. 1, 55 (West 1954) ("Two forms of review, varying in details, have been provided since the Patent Act of 1836."). These alternate forms have also long been available for other Patent Office

proceedings. *See, e.g.*, *Kappos v. Hyatt*, 566 U.S. 431, 434 (2012) (discussing 35 U.S.C. §§ 141 and 145, which provide an applicant who was denied a patent "two options for judicial review": "either: (1) appeal the decision directly to the United States Court of Appeals for the Federal Circuit, pursuant to § 141; or (2) file a civil action against the Director of the PTO in the United States District Court for the District of Columbia pursuant to § 145").

3. The two routes of Article III review—civil action under § 146 (and similar statutes) or direct appeal under § 141—are different. As this Court has explained, a § 146 civil action in district court "is something more than a mere appeal. It is an application to the court to set aside the action of one of the executive departments of the government." *Morgan*, 153 U.S. at 124 (discussing § 146's predecessor statute). When a party files a § 146 action, "[a] new proceeding is instituted in the courts,—a proceeding to set aside the conclusions reached by the administrative department, and to give to the plaintiff the rights there awarded to the defendant. It is something in the nature of a suit to set aside a judgment . . . ." *Id*. Both sides may present new issues and evidence. *See Kappos v. Hyatt*, 566 U.S. at 441 (citing *Butterworth v. United States ex rel. Hoe*, 112 U.S. 50, 61 (1884), for its description of the predecessor statute to § 146 as permitting a proceeding that is "prepared and heard upon all competent evidence adduced, and upon the whole merits"); *see also id.* ("The *Butterworth* Court also cited several lower court cases, which similarly described R.S. 4915 proceedings [§ 146 predecessor] as 'altogether independent' from the hearings before the Patent Office and made clear

that the parties were 'at liberty to introduce additional evidence' under 'the rules and practice of a court of equity.'").

By contrast, under § 141 (and its predecessor statutes), judicial review consists of "a technical appeal from the patent-office . . . confined to the case as made in the record of that office." *Butterworth*, 112 U.S. at 61 (discussing § 141's predecessor statute). "[T]here is no opportunity for the [appellant] to offer new evidence," and the Administrative Procedure Act "governs the Federal Circuit's review of the [Patent Office's] factual findings," and thus may set aside those findings only if they "are 'unsupported by substantial evidence.'" *Kappos*, 566 U.S. at 434-35 (quoting *Dickinson v. Zurko*, 527 U.S. 150, 152 (1999)).

4. On May 7, 2015, two weeks before Storer filed his § 146 action, the Federal Circuit decided *Biogen MA, Inc. v. Japanese Foundation for Cancer Research*, 785 F.3d 648 (Fed. Cir. 2015). In *Biogen*, the Federal Circuit held that the AIA had impliedly eliminated district-court subject-matter jurisdiction over actions filed pursuant to § 146 that challenge the outcomes of interferences, such as the Storer-Clark interference, that were declared after September 15, 2012. Instead, the Federal Circuit held, interference decisions may be challenged only by direct appeal to that court, pursuant to 35 U.S.C. § 141.

Biogen petitioned for panel and *en banc* rehearing. Though the petition did not assert constitutional concerns with the *Biogen* panel's interpretation, it pointed out certain statutory-interpretation problems. On August 12, 2015, the Federal Circuit denied rehearing in *Biogen* without comment, and on March

21, 2016, this Court denied the petition for a writ of certiorari in the *Biogen* case, which also presented only statutory-interpretation arguments. *See* No. 15-607. The *Biogen* case did not raise or decide any constitutional arguments.

5. The AIA was enacted in 2011. Principally, it changed the U.S. patent system from a first-to-invent to a first-to-file system, and it enacted new proceedings for "a third party to ask the U.S. Patent and Trademark Office to reexamine the claims in an already-issued patent and to cancel any claim that the agency finds to be unpatentable in light of prior art." *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2136 (2016) (describing inter partes review); *see id.* at 2149 (Alito, J., concurring in part & dissenting in part) ("In the Leahy-Smith America Invents Act (AIA), 35 U.S.C. §100 et seq., Congress created three new mechanisms for Patent Office review of issued patent claims—inter partes review, post-grant review, and covered business method patent review (CBM review).").

Priority-of-invention challenges continue to be available for patents applied for under the AIA ("post-AIA" patents and applications), though such proceedings have been named "derivation" proceedings rather than "interferences." *See* AIA § 3(i), (n), 125 Stat. at 289-90, 293 (Pet. App. 123a, 130a) (authorizing the PTO to "institute" a "derivation proceeding" for post-AIA patents and patent applications to address whether "an inventor named in an earlier application derived the claimed invention from" another "without authorization"). The new label reflects the AIA's transformation of the patent system from granting patents based on who is the first

inventor to who was the first to file, with the exception that a first filer who improperly derived his or her invention from another is not entitled to a patent. *See* Joe Matal, *A Guide to the Legislative History of the America Invents Act: Part I of II*, 21 Fed. Cir. Bar J. 435, 496 (2012) (hereafter, "*AIA Legislative History Guide Part I*") (derivation proceedings, which "appl[y], of course, only with respect to first-to-file patents," "determin[e] whether an inventor named in an application with an earlier effective filing date derived the invention from an inventor named in an application with a later effective-filing date"). Derivation proceedings thus continue to adjudicate a significant "subset of an interference's functions": priority disputes under the applicable regime. *Id.*

6. The Federal Circuit's decision in *Biogen* nonetheless treats priority-of-invention disputes differently, and even then only certain of those disputes. Under the Federal Circuit's interpretation of the AIA, priority disputes that are (i) "interferences" (*i.e.*, those involving pre-AIA patents and patent applications), and (ii) declared after September 15, 2012, are *not* subject to relief by civil action under § 146.[1] It is undisputed that derivation proceedings continue to be subject to § 146, permitting parties to

[1] Certain patent applications filed under the AIA are governed by the pre-AIA first-to-invent system and thus subject to interferences. *See* AIA § 3(n)(1), 125 Stat. at 293 (Pet. App. 130a-131a) (pre-AIA law, including interferences, govern patents or patent applications with an effective filing date, based on an earlier related application, that is before March 16, 2013). For simplicity, this petition refers to all patents and patent applications governed by pre-AIA law as "pre-AIA" patents and patent applications.

derivation proceedings to obtain relief by civil action. *See* AIA § 3(j), 125 Stat. at 290-91 (Pet. App. 125a-127a). It is further undisputed that interferences declared on or before September 15, 2012, also remain subject to § 146, permitting those parties to also obtain relief by civil action. *See Biogen*, 785 F.3d at 655 (acknowledging that interferences continue, that "pre-AIA law generally applies to" them, and that the new regime applies "only to new applications").

7. Citing *Biogen* as binding law, the district court dismissed Storer's § 146 civil action for lack of subject-matter jurisdiction. *See Idenix Pharms. LLC v. Gilead Pharmasset LLC*, No. 1:15-cv-00416, 2016 WL 6804915 , at *1 (D. Del. Nov. 16, 2016) ("The Court is bound by the Federal Circuit's precedential opinion in *Biogen MA, Inc. v. Japanese Foundation for Cancer Research*, 785 F.3d 648 (Fed. Cir. 2015), which held that district courts lack subject matter jurisdiction, pursuant to 35 U.S.C. § 146, over challenges to the result of a PTO interference that was declared after September 15, 2012."). Accordingly, Storer was unable to access the § 146 action's benefits—such as the availability of judicial process to subpoena witnesses, as well as an opportunity to put that witness testimony, and other new and additional evidence, into the record.

8. Meanwhile, in light of the Federal Circuit's decision in *Biogen* that a § 146 civil action in district court is not available to interferences, like Storer's, declared after September 2012, Storer followed *Biogen*'s directive and also filed an appeal to the Federal Circuit under § 141. *See* Notice of Appeal, *Storer v. Clark*, No. 15-1802 (Fed. Cir. May 22, 2015)

(Dkt. 1-2). In that appeal, Storer challenged the Federal Circuit's interpretation of the AIA. Storer included statutory and constitutional arguments not made or addressed in *Biogen*. With respect to the merits, Storer was "confined to the case as made in the record" of the Patent Office, pursuant to the rules governing "technical appeal[s]" under § 141, *see Kappos*, 566 U.S. at 441 (2012).

9. The United States intervened in Storer's appeal to address Storer's constitutional arguments. *See* Motion to Intervene, *Storer v. Clark*, No. 15-1802 (Fed. Cir. Jan. 12, 2016) (Dkt. 40). The United States did not take a position on Storer's statutory arguments or on the Federal Circuit's interpretation of the AIA that was the basis of that court's decision in *Biogen*.

10. On June 21, 2017, the Federal Circuit issued its decision in this case. Pet. App. 1a. Regarding the threshold question of whether the § 141 appeal should have proceeded at all, rather than Storer being allowed to pursue his § 146 district-court action, the Federal Circuit stated in one conclusory sentence that it was bound by its *Biogen* decision. Pet. App. 3a ("Although Storer says that *Biogen* was incorrectly decided, that decision is binding on this panel."). The court did not address Storer's constitutional arguments or the other statutory-interpretation arguments that were not presented or addressed in *Biogen*. On the merits of the enablement issue, the panel affirmed based strictly on "[t]he record before the Board," as required by § 141. Pet. App. 24a.

11. Storer petitioned the Federal Circuit for panel and *en banc* rehearing. The court invited responses from Clark and the United States but ultimately

denied Storer's petition without comment. Pet. App. 25a-26a. In its response, the United States again addressed Storer's constitutional arguments but did not take a position on Storer's statutory arguments or on the Federal Circuit's statutory interpretation of the AIA set forth in its *Biogen* decision.

12. The Federal Circuit has been presented with the flawed reasoning of its *Biogen* decision in other cases as well, but it has refused to reconsider that decision. Most recently, in *Board of Trustees of Leland Stanford Junior University v. Chinese University of Hong Kong*, 860 F.3d 1367, 1374 (Fed. Cir. 2017), the Federal Circuit stated: "We held in *Biogen* that the AIA abolished the right of parties to bring civil actions in district court under 35 U.S.C. § 146 for review of Board decisions in interferences declared on or after September 16, 2012," and that it was bound by that decision as "the law in this circuit." *Id.* As that panel noted, the consequence is that only the Federal Circuit, and not any federal district court, has "exclusive jurisdiction over appeals from decisions of the Board in interferences declared after September 15, 2012." *Id.* And, in those appeals, the Federal Circuit's "review of a Board interference decision must be confined to the 'four corners' of the record before the Board." *Id.*

REASONS FOR GRANTING THE WRIT

I. THE AIA DID NOT REPEAL § 146 JURISDICTION

A. The AIA's Text, Framework, and Purpose Confirm that It Did Not Repeal § 146

The Federal Circuit's reading of the AIA violates ordinary canons of statutory construction, chief among them "that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). The AIA says many things, but it nowhere says that § 146 jurisdiction is repealed.

For the past two centuries, district courts have had subject-matter jurisdiction over requests for relief from unfavorable interference proceedings before the Patent Office. *See Kappos v. Hyatt*, 566 U.S. 431, 443 (2012) ("Although interference proceedings were previously governed by R. S. 4915, they are now governed by a separate section of the Patent Act, 35 U.S.C. § 146 . . . ."); *Troy v. Samson Mfg.*, 758 F.3d 1322, 1327 (Fed. Cir. 2014) ("Section 146 and its predecessor statutes date back to the Patent Act of 1836."); Federico, *Commentary on the New Patent Act*, 35 U.S.C.A. at 55, *supra*.

The AIA did not change that. It is undisputed that the AIA did not expressly repeal § 146. As the Federal Circuit acknowledged, the provision in the AIA addressing interferences and their successor derivation proceedings "is silent as to whether interference proceedings and judicial review of these

proceedings continues with respect to patent applications filed prior to March 16, 2013." *Biogen MA, Inc. v. Japanese Found. for Cancer Research*, 785 F.3d 648, 655 (Fed. Cir. 2015) (discussing AIA § 3).

Tellingly, the AIA *did* repeal *other*, less foundational provisions of the 1952 Patent Act, and where it did so, it did so *expressly*. For instance, it repealed provisions governing patents made by persons while abroad, *see* AIA § 3(d), 125 Stat. 284 at 287 (Pet. App. 119a-120a) ("Section 104 of title 35 [and related item] . . . are repealed"); provisions authorizing the PTO Director to register patents without examination if certain criteria are met, *see* AIA § 3(e)(1), 125 Stat. 284 at 287 (Pet. App. 120a) ("Section 157 of title 35 . . . are repealed."); a provision establishing notification requirements before certain fees may take effect, *see* AIA § 11(e)(3), 125 Stat. 284 at 323 (Pet. App. 195a) ("Section 41 of title 35, United States Code, is amended . . . by repealing subsection (g)"); and provisions governing patent term extensions and restorations, *see* AIA § 20(k), 125 Stat. 284 at 335 (Pet. App. 221a) ("Sections 155 and 155A of title 35 [and related items] . . . are repealed."). But no provision in the AIA states that it is repealing § 146—which is a powerful clue that Congress did not intend to repeal district-court jurisdiction under § 146. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Rodriguez v. United States*, 480 U.S. 522, 525 (1987) (citations omitted).

The framework and purpose of the AIA confirm that it was not directed to jurisdictional changes. The AIA principally changed the patent system from a first-to-invent to a first-to-file regime (in Section 3) and established new *inter partes* proceedings for adjudicating issued patents' patentability as an alternative to district-court litigation of invalidity disputes (in Section 6). *See* AIA §§ 3, 6, 125 Stat. at 285-93, 299-313 (Pet. App. 114a-132a, 143a-172a); *see also* Matal, *AIA Legislative History Guide Part I*, 21 Fed. Cir. Bar J. at 435 (highlighting that the AIA "adopted the first-to-file system of determining a patent's priority date" and "created several new post-issuance proceedings for patents and revised existing proceedings"). The statutory regime had no purpose of restricting federal-court jurisdiction regarding entirely different proceedings: interferences between competing inventors. To the extent the AIA addressed court jurisdiction at all, it was to address court jurisdiction regarding other matters (*e.g.*, after the outcomes of the new Patent Office proceedings, *see* AIA § 7(a) (Pet. App. 172a), or Federal Circuit jurisdiction over compulsory patent claims, *see* AIA § 19) (Pet. App. 212a)).

As important, to the extent the AIA mentioned Article III jurisdiction regarding interferences at all, it was to account for the new first-to-file system established by the AIA and ensure that the same two avenues of Article III review remained available. *See* AIA §§ 3, 6, 285-93, 299-313 (Pet. App. 114a-132a, 143a-172a). Thus, with respect to § 146 in particular, the AIA simply made stylistic changes to that provision for post-AIA patents and applications to account for new terminology of the AIA system, *e.g.*,

"striking 'Board of Patent Appeals and Interferences' each place it appears and inserting 'Patent Trial and Appeal Board'" and "striking 'an interference' and inserting 'a derivation proceeding.'" AIA § 3(j), 125 Stat. at 290 (Pet. App. 125a) (effective Mar. 16, 2013—*see* § 3(n), 125 Stat. at 293 (Pet. App. 130a)). The only natural, textual conclusion is that Congress intended to preserve, post-AIA, the same two routes of review for interferences decided by the Board of Patent Appeals and Interferences—except to rename the proceeding a "derivation" proceeding and to rename the agency tribunal charged with making those decisions in the first instance.

B. The Federal Circuit's Interpretation is Wrong As a Matter of Statutory, Constitutional, and Common Sense

The Federal Circuit nonetheless found a repeal of § 146 by negative implication. That interpretation was wrong.

1. The Federal Circuit Violated this Court's Precedent Disfavoring Repeal by Implication

Purely as a matter of statutory interpretation, the Federal Circuit's interpretation warrants review. When the question involves the interpretation of an express jurisdictional provision in light of a later enactment, this Court's decisions have consistently forbidden repeal by implication. If a statute "clearly defin[es] the jurisdiction of the courts," then the "force and effect" of that jurisdiction "should not be disturbed by a mere implication flowing from subsequent legislation." *Rosecrans v. United States*, 165 U.S. 257, 262 (1897); *Galveston, Harrisburg & San Antonio Ry.*

Co. v. Wallace, 223 U.S. 481, 490 (1912) ("jurisdiction is not defeated by implication"); *accord Williams v. Taylor*, 529 U.S. 362, 379 (2000) ("If Congress had intended to require such an important change in the exercise of our jurisdiction, we believe it would have spoken with much greater clarity than is found in the text of AEDPA.").

This is consistent with this Court's more general approach to repeal by implication—that it is "strongly presumed" not to have occurred. Rather, repeal of an existing statute must be express—"it can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change," *United States v. Fausto*, 484 U.S. 439, 453 (1988), so "[t]he cardinal rule is that repeals by implication are not favored," and instead "must be clear and manifest." *Posadas v. Nat'l Cty. Bank of New York*, 296 U.S. 497, 503 (1936).

Thus, only the most clear and compelling evidence will support a claim of repeal by implication: In light of the strong presumption against repeal by implication, there must be "overwhelming evidence" of implicit repeal. *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 137 (2001); *see also Branch v. Smith*, 538 U.S. 254, 293 (2003) (O'Connor, J., concurring in part and dissenting in part) ("We have not found *any* implied repeal of a statute since 1975," and "outside the antitrust context, we appear not to have found an implied repeal of a statute since 1917." (emphasis in original)). And as to jurisdictional provisions such as in this case, it appears that this Court has never found a repeal by implication—a conclusion consistent with the Court's seemingly

absolute statement, issued in 1912, that "jurisdiction is not defeated by implication." *Galveston, Harrisburg & San Antonio Ry. Co.*, 223 U.S. at 490.

Despite this Court's strong jurisprudential—and historical—disfavor of repeal by implication, it was never even adverted to by the Federal Circuit in the *Biogen* case. Yet, *Biogen* was then used as binding precedent by the panel in Storer's case, even when that court was clearly presented with these arguments. Pet. App. 3a.

Proper application of the rule against repeal of jurisdiction by implication would certainly yield a different ruling than what the Federal Circuit reached. There is no "clear and manifest" intent to abrogate the federal district-courts' existing jurisdiction over priority-of-invention disputes. The Federal Circuit's contrary view was based on a misreading of § 6(f)(3)(C) of the AIA and a later technical amendment to a different provision in the Act. *See Biogen*, 785 F.3d at 656.

2. Section 6(f)(3)(C) Did Not Repeal § 146

The text, and context, of § 6(f)(3)(C) were mangled by the Federal Circuit's interpretation. Section 6(f)(3)(C) is a sub-subparagraph of Section 6, which is entitled "POST-GRANT REVIEW PROCEEDINGS." Section 6 thus addresses the new proceedings enacted by the AIA: inter partes review (Chapter 31, codified at 35 U.S.C. §§ 311-319) and post-grant review (Chapter 32; codified at 35 U.S.C. §§ 321-329).

Taking the specific provisions of Section 6 in order:

- Paragraph 6(f)(1) first establishes a deadline for the PTO to issue regulations governing post-grant review;
- Paragraph 6(f)(2) then addresses the effective date of those sections (in subparagraph (A)) and empowers the PTO Director to initially limit the number of post-grant reviews instituted (in subparagraph (B)); and
- Paragraph 6(f)(3), entitled "PENDING INTERFERENCES," then concludes Section 6.

On its face, Paragraph 6(f)(3) thus addressed the category of interferences straddling the old and the new terminology and regimes—*i.e.*, interferences already pending on the AIA's September 16, 2012 effective date—not interferences declared after that date, like Storer's interference here. And beyond that, its subparagraph (C), found deep within Section 6, plainly does not repeal § 146 in any respect.

Paragraph 6(f)(3) has three subparagraphs addressing then-pending interferences. *See* 125 Stat. at 311 (Pet. App. 169a-170a). Subparagraph (A) empowered the Director to issue regulations regarding procedures for pre-September 2012 (pre-AIA) interferences, in particular whether such interferences should be dismissed without prejudice in favor of post-grant review, or should "proceed as if this Act had not been enacted." Subparagraph (B) then empowered the Director, for pre-September 2012 interferences that were maintained, to enable the newly-constituted and named Patent Trial and Appeal Board to conduct those interferences as though that Board was its predecessor, the Board of Patent Appeals and Interferences. Finally, subparagraph (C)

confirms that those interferences will continue to have the alternate rights—under §§ 141 and 146—to challenge the interference outcome: "The authorization to appeal or have remedy from derivation proceedings in *sections 141(d) and 146* of title 35, United States Code, as amended by this Act, . . . shall be deemed to extend to any final decision in an interference that is commenced before the [September 16, 2012] effective date . . . ." 125 Stat. at 311 (Pet. App. 169a-170a) (emphasis added).

A provision "extend[ing]" jurisdiction cannot plausibly "imply" the contraction of existing jurisdiction for any other proceeding, yet the Federal Circuit held exactly that. *See Biogen*, 785 F.3d at 656. Indeed, § 6(f)(3)(C) nowhere says it "extend[s]" § 146 *only* to pre-September 2012 interferences. Rather, § 6(f)(3)(C) confirmed the dual (§ 141 or § 146) routes of Article III review for those then-pending interferences not dismissed in favor of post-grant review (post-grant reviews have remedy only under § 141—*see* AIA § 7(c), 125 Stat. at 314 (Pet. App. 174a)), and left untouched the dual routes for interferences that the Board declared *after* September 2012, a subject on which Section 6 is silent.

3. Section 1(k)(3) of the TCA Did Not Repeal § 146

The Federal Circuit also relied on § 1(k)(3) of the TCA. *See Biogen*, 785 F.3d at 656-57. But the TCA also did not evidence any congressional desire to treat post-September 2012 interferences differently. "As the name of the Act suggests, the TCA made certain technical corrections to various sections of Title 35 following the enactment of the Leahy-Smith America

Invents Act . . . ." *Actelion Pharm., Ltd. v. Matal*, 881 F.3d 1339, 1341 (Fed. Cir. 2018).

On its face, § 1(k)(3) makes clear that it corrected an error in the AIA's amendments to § 141 in Section 7 of the Act, and had nothing to do with § 146 or Section 6 of the AIA, as the Federal Circuit held. *See Biogen*, 785 F.3d at 656. In amending § 141 for all "proceedings commenced" as of September 16, 2012 (*i.e.*, not solely for new proceedings established by the AIA for post-AIA patents and applications), the AIA set forth, consistent with pre-AIA § 141, "examinations" and "reexaminations" as being directly appealable to the Federal Circuit, but it neglected to include interferences. *See* AIA § 7(c), 125 Stat. at 314 (Pet. App. 174a). Section 1(k)(3) corrected this oversight in § 141; nothing more. *See* 126 Stat. at 2458 (Pet. App. 241a). It provides that pre-AIA section "141 of title 35, United States Code, and section 1295(a)(4)(A) of title 28, United States Code, as in effect on September 15, 2012, shall apply to interference proceedings" declared as of September 16, 2012. 126 Stat. at 2458 (Pet. App. 241a). A provision addressing only § 141 cannot plausibly evidence an implied repeal of longstanding, co-existing jurisdiction under a separate provision, § 146.

4. The Federal Circuit's Interpretation Presents Constitutional and Common-Sense Problems

The constitutional and common-sense problems arising from the Federal Circuit's interpretation of the AIA also warrant review. The court's interpretation creates a disparate impact on similarly situated patent holders and applicants based merely upon an arbitrary calendar date. A silent, arbitrary, and irrational repeal of § 146 jurisdiction for post-September 2012 interferences, but for no other priority-of-invention disputes, cannot possibly be what Congress intended.

The equal-protection component of the Fifth Amendment requires that any classification in a statute bear "a rational relationship to a legitimate governmental purpose." *See Romer v. Evans*, 517 U.S. 620, 635 (1996). "[A]rbitrary and irrational discrimination violates the Equal Protection Clause under even [the] most deferential standard of review." *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 83 (1988).

The AIA grants § 146 jurisdiction for *all* of the new derivation proceedings. It also maintains § 146 jurisdiction for *all* interferences declared on or before September 2012. But as read by the Federal Circuit, the AIA deprives district courts of § 146 jurisdiction over later-declared interferences, including those pending alongside pre-September 2012 interferences and derivation proceedings. *See Biogen*, 785 F.3d at 656-57. Such arbitrary and irrational line-drawing would render the interpretation unconstitutional, not to mention nonsensical. Certainly, there is no rational

basis for line-drawing by *silence* to upset two centuries' worth of jurisdiction. *See St. Martin Evangelical Lutheran Church v. S. Dakota*, 451 U.S. 772, 788 (1981) (the canon against repeal by implication "carries special weight" if it "might raise constitutional questions"). The lack of any common-sense reason for such a silent repeal is striking.

The Federal Circuit in *Biogen* was not presented with these fundamental problems with its reasoning. The panel in this case was presented with them, but did not confront them, instead simply offering a single conclusory sentence referring back to *Biogen*.

C. The Federal Circuit's Interpretation is Not Supported by Legislative History

"For those who find it relevant, the legislative history confirms as much," *Honeycutt v. United States*, 137 S. Ct. 1626, 1635 (2017). Nowhere in the AIA's history is there any indication of congressional intent to alter federal-court jurisdiction over challenges to unfavorable interference proceedings.

To the contrary, the limited reference to federal-court jurisdiction over interferences refutes the Federal Circuit's interpretation. In a passage relating to the TCA, Representative Lamar Smith—the "Smith" of the Leahy-Smith America Invents Act and the statute's House sponsor—set forth a written "Section-by-Section Summary" of those corrections to the AIA. In relation to § 1(k)(3), Representative Smith noted that a purpose of this correction was to "authorize the PTAB to conduct, and the courts to hear appeals of, interferences commenced after the effective date of the AIA's amendments to § 135(a)." 158 Cong. Rec. E2016

(daily ed. December 31, 2012). Representative Smith's reference to interferences "commenced after" plainly relates § 1(k)(3) to AIA Section 7, likewise addressing interferences "commenced after" the AIA was enacted, not Section 6 as the Federal Circuit incorrectly assumed. And Representative Smith's reference to "courts" (plural) can only *include* § 146 jurisdiction, not suggest jurisdiction was limited to the Federal Circuit, a single court.

Representative Smith's statements were not addressed by the parties or the Federal Circuit in *Biogen*; Storer did present them in this case, but the panel improperly ignored them: Such sponsor remarks "are an authoritative guide to the statute's construction." *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27 (1982); *see also Mohamad v. Palestinian Auth.*, 566 U.S. 449, 460 (2012) (sponsor's remarks provided amendment's "sole explanation"); *Corley v. United States*, 556 U.S. 303, 318 (2009) ("sponsor's statement to the full Senate carries considerable weight"). In fact, the Federal Circuit in *Biogen* inaccurately stated that the legislative history was "silent" on whether § 146 jurisdiction remains available for interferences. *Biogen*, 785 F.3d at 657.[2]

Even more telling, in the extensive, years-long

[2] The Federal Circuit also overlooked, with respect to a prior bill, the statement by Senator Jon Kyl describing language, added to that bill "for logical consistency," acknowledging "that section 145 and 146 proceedings are an exception to the Federal Circuit's otherwise exclusive appellate jurisdiction over applications and interferences under that subparagraph." 157 Cong. Rec. S1368, S1377 (daily ed. Mar. 8, 2011) (statement of Sen. Kyl).

drafting and revisions leading up to the AIA, *no* other portion of the legislative history even touches on Article III jurisdiction regarding challenges to the outcomes of interferences. A change so fundamental to the longstanding and historical adjudicatory role of the Nation's federal district courts in interferences cannot be reconciled with such silence.

II. THE FEDERAL CIRCUIT'S INTERPRETATION IS AN IMPORTANT ISSUE THAT HAS SERIOUS CONSEQUENCES AND IS RIPE FOR REVIEW

The weighty trouble with the Federal Circuit's reservation of Article III interference review to itself goes beyond the fact that it concerns the most recent version of the patent laws, though the proper interpretation of those laws, with their far-reaching consequences on the inventing community and the U.S. and global economies, has already warranted this Court's consideration in several other respects. *See Oil States Energy Services LLC v. Greene's Energy Grp., LLC*, No. 16-712 (S. Ct.) (cert. granted June 12, 2017) (regarding whether the AIA's new inter partes review provisions violate the constitutional right to a jury); *SAS Inst. Inc. v. Lee*, No. 16-969 (S. Ct.) (cert. granted May 22, 2017; argued Nov. 27, 2017) (regarding the interpretation of 35 U.S.C. § 318(a), a new provision of the AIA); *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131 (2016) (regarding the interpretation of 35 U.S.C. § 314(d) and § 316(a)(4), new provisions of the AIA). Indeed, interference cases themselves have reached this Court under predecessor versions of the patent laws where, as here, they present "questions of

importance to the administration of the patent laws." *Brenner v. Manson*, 383 U.S. 519, 520 (1966) (holding that this Court had certiorari jurisdiction to review a federal-court challenge to an interference outcome); *see also Morgan v. Daniels*, 153 U.S. 120, 124-25 (1894) (addressing the standard of review for interferences challenged in district court under Revised Statutes § 4915 (predecessor to § 146) when no new evidence is introduced); *Butterworth v. United States ex rel. Hoe*, 112 U.S. 50, 61 (1884) (determining that, by statute, a federal court's judgment after an interference challenge is final, and not subject to reversal by the Secretary of the Interior).

The weighty trouble, though, goes to something even more fundamental: how far will the Federal Circuit extend its exclusive jurisdiction beyond the scope for which that court was established in 1982? *See* 28 U.S.C. § 1295; *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 820 (1988). Long before the Federal Circuit was born, federal district courts had § 146 jurisdiction to adjudicate priority-of-invention disputes. Instead of honoring that Article III jurisdiction of the district courts, the Federal Circuit has interpreted the AIA as arrogating that jurisdiction solely to itself, for a certain class of cases. The effect of that decision—enlargement of the Federal Circuit's exclusive jurisdiction—should not rest solely on that court's interpretation; the issue is worthy of this Court's review.

The need for this Court's intervention is particularly dire given that this issue cannot receive any further percolation. Because the Federal Circuit has reserved this Article III jurisdiction to itself, its

decision binds all district courts, so that opportunity for percolation is out. Percolation among sister courts is out, too—no other circuit court has jurisdiction over patent appeals, so none would be in a position to address the issue. Also, notwithstanding the Federal Circuit's own opportunity—twice—to rehear the issue *en banc*, that court remains steadfastly insistent upon resting on a single panel decision that was decided without regard for several salient points subsequently brought to that court's attention in the *Biogen* and Storer rehearing requests and in other subsequent cases. In short, by virtue of the fact that priority disputes are a creature unique to the patent laws and thus beholden to the Federal Circuit's pronouncements on its exclusive jurisdiction, the views of other courts on the proper application of ordinary statutory construction tools and statutory grants of Article III jurisdiction—matters well within the purview of other courts—are unavailable.

The short shrift that the Federal Circuit has given this issue is in considerable tension with the large number of cases that its rule will govern; that is further reason for this Court's review. "Interference proceedings will continue to be available to address disputes over priority between first-to-invent [*i.e.*, pre-AIA] patents and applications, thus ensuring that interferences will be conducted for many years to come." Matal, *AIA Legislative History Guide Part I*, 21 Fed. Cir. Bar J. at 496. The most recent interference was declared February 8, 2018. *See* https://acts.uspto.gov/ifiling/DispatchServlet (*Regina v. Slade*, Interference No. 106094).

The harmful consequences of the *Biogen* decision

for these many interference proceedings is real. The Federal Circuit's reservation to itself of Article III interference review deprives parties of substantial rights otherwise available in the federal district courts.

In a § 141 appeal, the Federal Circuit conducts Administrative Procedure Act review, in which it is "powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947); *see also AbbVie Deutschland GmbH & Co. v. Janssen Biotech, Inc.*, 759 F.3d 1285, 1296 (Fed. Cir. 2014) (a § 141 appeal is "based solely on the agency record"). And the record on review—the record developed in the Patent Office—is constrained by strict discovery limitations in the Patent Office not applicable in district-court litigation. *See* 37 C.F.R. § 41.150 (authorizing discovery only on specific topics and allowing additional discovery only "in the interests of justice"); *Winner Int'l Royalty Corp. v. Wang*, 202 F.3d 1340, 1347 (Fed. Cir. 2000) (The Board "reviews testimony only in the form of affidavits and transcripts of depositions," not live testimony.).

But in a § 146 action, the parties and the district court may overcome the limitations of the Patent Office's administrative adjudication by procedural mechanisms and discovery options available in district court and not in the Patent Office. A § 146 action offers all of "the procedures and rules of federal litigation," *Streck, Inc. v. Research & Diagnostic Sys., Inc.*, 659 F.3d 1186, 1196 (Fed. Cir. 2011); the parties may present new issues and evidence, *see Kappos v. Hyatt*, 566 U.S. 431, 441 (2012) (citing *Butterworth*, 112 U.S. at 61, and noting that in cases cited by

Butterworth, "the parties were 'at liberty to introduce additional evidence' under 'the rules and practice of a court of equity'"). This new evidence can be highly relevant, and can "'shor[e] up evidentiary gaps' in the agency record." *AbbVie*, 759 F.3d at 1296. And where new evidence is introduced, it is reviewed by the district court "de novo." *Agilent Techs., Inc. v. Affymetrix, Inc.*, 567 F.3d 1366, 1379 (Fed. Cir. 2009).

During the past three years since the Federal Circuit decided *Biogen*, facts have developed to show precisely why district-court jurisdiction over interference proceedings is important and has been a meaningful part of Article III jurisdiction for almost two centuries. A case related to this one is a prime example. For an earlier patent reciting claims to the same general subject matter as this case, the issue of enablement was put to the factfinder in district-court litigation on a more fulsome record than the record before the Board in the interference underlying this petition. Based on a proper application of the same "*Wands* factors" applied by the Board, *see* Pet. App. 63a, the factfinder in the district court action found, on the more extensive record before it, and contrary to the Board's determination here, that the earlier patent was not invalid for lack of enablement. *See Idenix Pharmaceuticals, LLC v. Gilead Sciences, Inc.*, No. 14-846-LPS, 2016 WL 6802481 (D. Del. Jan. 26, 2017) (Judgment Following Jury Verdict).[3]

[3] The district court subsequently granted judgment as a matter of law that no reasonable factfinder could find anything other than that the patent at issue was invalid for lack of enablement. *See Idenix Pharmaceuticals, LLC v. Gilead Sciences,*

Likewise here, had the avenue been available, Storer would have presented additional evidence in a § 146 action that it was not permitted to introduce in a § 141 appeal before the Federal Circuit, but which would have refuted the Patent Office's misapprehensions of the limited record before it. *See* Letter & Exhibits, *Idenix Pharmaceuticals LLC v. Gilead Pharmasset LLC*, No. 1:15-cv-00416-LPS-CJB (D. Del.) (Dkt. 21).

Another example is a case that wound its way to the Federal Circuit as a § 141 direct appeal, after first being adjudicated as a § 146 civil action in district court. *See Bd. of Trs. of Leland Stanford Junior Univ. v. Chinese Univ. of H.K.*, 860 F.3d 1367 (Fed. Cir. 2017). During the § 146 action the parties were able to develop facts that were not available in the interference—"full expert discovery" and other new evidence. *Id.* at 1373-74. But after that case was transferred to the Federal Circuit as a § 141 appeal in light of *Biogen*, that court was "confined" to the agency record. *Id.* Though the court vacated the Patent Office's decision for reasons limited to that record, the district-court discovery itself may have compelled a different outcome. *See id.* at 1374 (appellant arguing that the district-court discovery "materially alter[ed] what the Board understood"). And there have been, and currently are, other § 141 appeals pending before the Federal Circuit—appeals that were not allowed the option to pursue a § 146 district-court action in light of the Federal Circuit's erroneous interpretation

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Inc., No. 14-846-LPS, 2018 WL 922125 (D. Del. Feb. 16, 2018). Idenix will be appealing that judgment.

of the AIA in *Biogen*.

With no other court to scrutinize the Federal Circuit's interpretation of the AIA and stop the harm that the *Biogen* decision is already working, this Court's intervention is needed.

CONCLUSION

The petition should be granted.

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