

No.

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IN THE  
**Supreme Court of the United States**

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VIRNETX INC. AND LEIDOS, INC.,

*Petitioners,*

v.

MANGROVE PARTNERS MASTER FUND, LTD.;  
APPLE INC.; BLACK SWAMP IP, LLC; AND  
KATHERINE K. VIDAL, UNDER SECRETARY OF  
COMMERCE FOR INTELLECTUAL PROPERTY AND  
DIRECTOR OF THE UNITED STATES PATENT AND  
TRADEMARK OFFICE,

*Respondents.*

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

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**PETITION FOR A WRIT OF CERTIORARI**

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(Petitioner with respect to  
Fed. Cir. Case No. 21-1672)*

## QUESTIONS PRESENTED

This petition concerns the Federal Circuit’s construction of two important statutes: the America Invents Act (“AIA”) and the Federal Vacancies Reform Act (“FVRA”).

1. The AIA created “inter partes review,” an agency procedure that allows issued patents to be challenged before the Patent Trial and Appeal Board (“PTAB”). To prevent undue interference with Article III litigation, the statute bars parties from seeking inter partes review “if *the petition* requesting the proceeding is filed more than 1 year after” the petitioner was “served with a complaint alleging infringement of the patent.” 35 U.S.C. § 315(b) (emphasis added). The statute also provides that, where a party “*properly files a petition*” for inter partes review, it may be “join[ed] as a party” to an already-instituted inter partes review proceeding. § 315(c) (emphasis added). The statute provides that joinder—as opposed to the filing of the petition itself—is not subject to the one-year time limit: Section § 315(b)’s one-year time limit does “not apply to a *request for joinder*.” § 315(b) (emphasis added). The first question presented is:

Whether the Federal Circuit erred in upholding joinder of a party under 35 U.S.C. § 315(c), where the joined party did not “properly file[ ] a petition” for inter partes review within the statutory time limit.

2. The Federal Vacancies Reform Act establishes “the exclusive means for temporarily authorizing an acting official to perform the functions and duties” of a vacant presidentially appointed, Senate-confirmed office. 5 U.S.C. § 3347(a); *see* § 3345(a). In *United States v. Arthrex*, 141 S. Ct. 1970 (2021), this Court held that Article II requires that PTAB decisions be subject to review by a presidentially appointed, Senate-confirmed officer—specifically, the Director of the U.S. Patent and Trademark

(i)

Office. When petitioner VirnetX sought that review here, the position of Director was vacant. Nor was there a temporary officer who had been authorized to perform the Director's functions and duties in conformity with the FVRA's exclusive mechanisms. Instead, the PTO had adopted its own succession plan that purported to authorize the Commissioner for Patents—who is neither appointed by the President nor confirmed by the Senate—to perform the Director's functions and duties, including review of PTAB decisions under *Arthrex*. VirnetX's request for Director review was thus denied by the Commissioner for Patents. The second question presented is:

Whether the Commissioner's exercise of the Director's review authority pursuant to an internal agency delegation violated the Federal Vacancies Reform Act.

**PARTIES TO THE PROCEEDINGS BELOW**

Petitioner VirnetX Inc. was the patent owner in the proceedings before the Patent Trial and Appeal Board and the appellant in the court of appeals in Fed. Cir. Nos. 20-2271 and 20-2272; it was a plaintiff in the district court and an appellee in the court of appeals in Fed. Cir. No. 21-1672.

Petitioner Leidos, Inc. was a plaintiff in the district court and an appellee in the court of appeals in Fed. Cir. No. 21-1672.

Respondent Mangrove Partners Master Fund, Ltd., was a petitioner in the proceedings before the Patent Trial and Appeal Board and an appellee in the court of appeals in Fed. Cir. Nos. 20-2271 and 20-2272.

Respondent Apple Inc. was a petitioner in proceedings before the Patent Trial and Appeal Board and an appellee in the court of appeals in Fed. Cir. Nos. 20-2271 and 20-2272; it was the defendant in the district court and the appellant in the court of appeals in Fed. Cir. No. 21-1672.

Respondent Black Swamp IP, LLC was a petitioner in proceedings before the Patent Trial and Appeal Board and an appellee in the court of appeals in Fed. Cir. No. 20-2272.

Respondent Katherine K. Vidal, Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office, was an intervenor in the court of appeals in Fed. Cir. Nos. 20-2271 and 20-2272. Director Vidal succeeded Commissioner for Patents Andrew Hirshfeld, Performing the Functions and Duties of the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office, as intervenor in those appeals.

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