

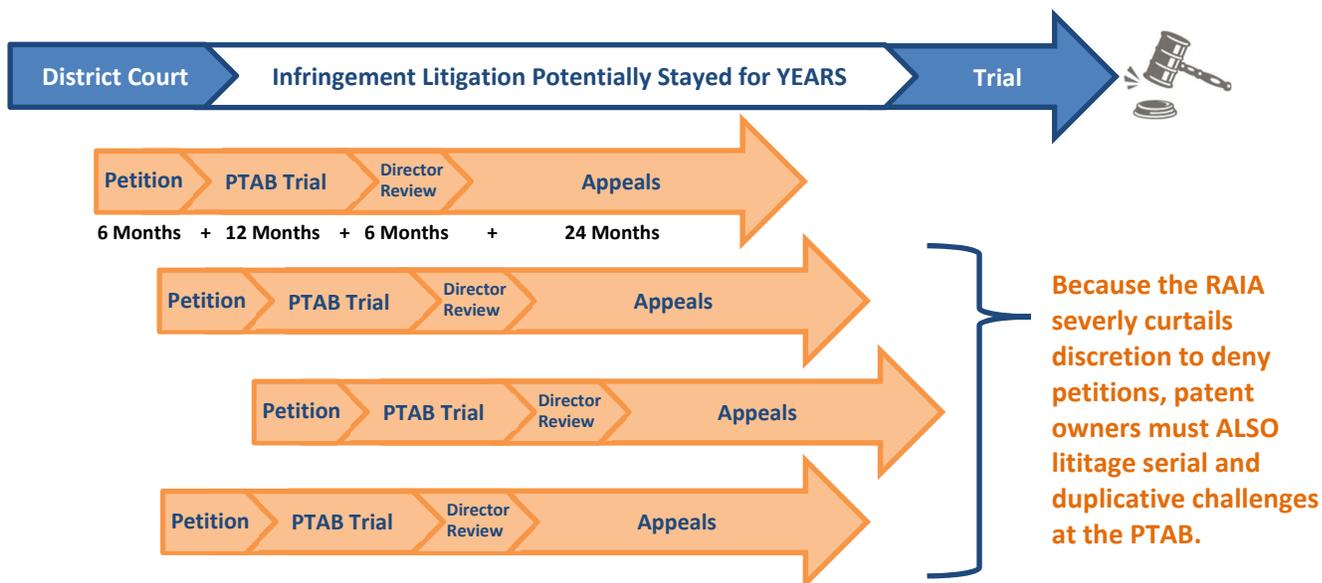
The *Restoring the America Invents Act* (S.2891) Would Harm Startups and Inventors

Innovative startups, particularly those with significant research and development costs, rely on patents to ensure a seat at the table when negotiating with much larger, highly capitalized, and heavily entrenched players. When Congress passed the *America Invents Act* (AIA) in 2011, it recognized that the new *Inter Partes* Review (IPR) and Post Grant Review (PGR) proceedings could be used to harass patent owners. Congress expressly gave the USPTO Director discretion to preserve a balanced system. The *Restoring the America Invents Act* (RAIA) would upend that balance, prolong litigation, and open the floodgates for abusive petitions. The net result would make patent enforcement impractical.

The current system permits denial of petitions when district courts will decide validity first:



The RAIA would reverse the current system. PTAB proceedings are extended and multiplied, infringement litigation is stayed, and justice is delayed for years while infringement continues:



Under the AIA, the PTAB was intended to be an *alternative* to litigation. Under the RAIA, the PTAB would become a **tactic to delay litigation**. The RAIA would institutionalize inefficient and abusive proceedings, discouraging jury trials and encouraging duplicative PTAB challenges of valid patents:

- By removing the USPTO Director's discretion to deny petitions;
- By encouraging district courts to stay co-pending litigation; and
- By extending PTAB proceedings by adding up to six months for Director review and another approximately 24 months or more for the exhaustion of all appeals before estoppel takes effect.

The RAIA is not a balanced bill. Big Tech companies in particular have been lobbying for these changes and fighting for them in court. Big Tech will use them aggressively to drain small inventors and startups of resources while they drag out litigation and steal market share. **Patent enforcement will become impractical.** This is not what Congress intended in 2011, and Congress should not support it today.

Specific Problems with the *Restoring the America Invents Act (S.2891)*:

1. **Institutionalizing Inefficient and Abusive Proceedings:** The RAI would amend 35 U.S.C. §§ 314(a) and 324(a) to remove the USPTO Director's discretion to reject:
 - a. Petitions unlikely to be resolved before a decision in co-pending district court litigation (currently limited by *NHK Spring*, *Fintiv*, and *Sotera*);
 - b. Abusive serial petitions (currently limited by *General Plastic*);
 - c. Burdensome parallel petitions (currently limited by PTAB Trial Practice Guide);
 - d. Petitions presenting primarily unmeritorious arguments (pursuant to *SAS Institute*, the PTAB would have to institute on all grounds, whereas now it often denies such petitions);
 - e. Petitions filed purely to harass or manipulate stock prices (as some hedge funds have previously attempted to file); and
 - f. Petitions that would otherwise burden the agency.

2. **Dragging out Costly Litigation:** Justice delayed is justice denied, making enforcement of patent rights impractical, particularly for small players in our judicial system. The RAI would extend litigation by several years and potentially millions of dollars by:
 - a. Encouraging district courts to stay litigation in view of IPR or PGR proceedings in new § 325(a)(4)(A) and new provisions in § 315(b)(2), thereby favoring duplicative administrative proceedings over jury trials; and
 - b. Effectively extending IPR and PGR proceedings by delaying estoppel until after the new Director-review provided in new § 6(d), which can add up to six months under new §§ 318(e) and 328(e), and until all appeals are exhausted, which typically takes up to 24 months or longer, pursuant to new provisions in §§ 315(e) and 325(e).

3. **Increasing Burdens on Patent Owners:** The RAI would disproportionately and negatively impact patent owners by, among other things:
 - a. Increasing the scope of IPR petitions by amending § 311(b) to include double patenting and statements not found in prior-art references as permissible bases for review;
 - b. Subjecting patent owners to post-grant proceedings initiated by governmental entities pursuant to amendments to §§ 302, 311(a), and 321(a);
 - c. Shifting burden to patent owners for substitute claims in §§ 316(e) and 326(e);
 - d. Imposing new patent-owner estoppel in §§ 315(e) and 325(e);
 - e. Artificially granting some petitioners (e.g., third parties such as Unified Patents or hedge funds) standing to appeal in §§ 319(b) and 329(b); and
 - f. Permitting the Director to pause examination of co-pending continuation applications during an IPR or PGR proceeding under §§ 315(d) and 325(d).

4. **A One-Sided, Unbalanced Bill:** The RAI empowers large incumbent companies (primarily Big Tech) while failing to address the real patent problems facing inventors and startups, such as:
 - a. The lack of clarity regarding patent-eligible subject matter;
 - b. The extreme difficulty of securing injunctive relief; and
 - c. The inconsistent validity standards applied in district court and the PTAB.