No. 18-599

IN THE

Supreme Court of the United States

WI-FI ONE, LLC,

Petitioner,

v.

BROADCOM CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF

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CORPORATE DISCLOSURE STATEMENT

The Rule 29.6 disclosure statement in the petition for a writ of certiorari remains accurate.

PETITIONER'S SUPPLEMENTAL BRIEF

Petitioner Wi-Fi One, LLC ("WFO") files this Supplemental Brief pursuant to Supreme Court Rule 15(8) to address an intervening legal development that occurred after WFO filed its Petition for Writ of Certiorari.

On December 10, 2018, the Court granted certiorari in *Kisor v. Wilkie*, Case No. 18-15, to consider "Whether the Court should overrule *Auer*[1] and *Seminole Rock*.[2]" WFO respectfully contends that this appeal is an ideal companion case to *Kisor* because the first question presented by WFO's Petition is very closely related to, yet subtly distinct from, the question presented by the *Kisor* appeal.

The question presented in *Kisor* will require the Court to consider the appropriate standard of review for, and degree of deference given to, a federal agency's interpretation of its own regulation when the agency's decision is reviewed by an Article III court.[3] Similarly, WFO's petition for certiorari asks the Court to consider the standard of review for, and degree of deference given to, the Patent Trial and Appeal Board's interpretation of its own procedural regulations in *inter partes* review trials. *See* WFO Petition at 6-11. As discussed in WFO's

1. *Auer v. Robbins*, 519 U.S. 452 (1997).

2. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

3. *See* Kisor Petition at 3 ("This case is an attractive vehicle for the Court to reconsider . . . how much deference courts should afford an agency's interpretation of its own ambiguous regulation.")

Petition, the Federal Circuit's "abuse of discretion" standard of review in this context is loosely derived from, and even more deferential than, *Auer* / *Seminole Rock* deference. *See id.* at 31-32.

There are, however, two important distinctions between this case and *Kisor*.

First, in *Kisor* the underlying Board of Veterans Appeals decision represents an official decision of the Department of Veterans Affairs ("VA") as a whole. In other words, Kisor appeals from a decision of the VA that the VA rendered through its Board of Veterans Appeals.[4] In this case, by contrast, WFO appeals a decision rendered by a panel of the Patent Trial and Appeal Board ("PTAB") that does not represent the official views of the United States Patent and Trademark Office ("USPTO") as a whole; and the PTAB panel decision below is not binding on the USPTO or on subsequent PTAB panels. *See* WFO Petition at ii (Questions Presented). *See also id.* at 9 n.9. This distinction is important because the "non-binding" nature of the PTAB decision below implicates issues regarding agency inconsistency in administrative adjudications that are not implicated on the facts of the *Kisor* appeal. *See id.* at 36-38.

Second, Kisor does not allege that the appealed VA decision itself violated any specific procedural requirements of the Administrative Procedure Act

4. *See,* Kisor Petition at 7 (noting that the appeal is taken from a decision of the VA rendered "through the Board of Veterans' Appeals").

("APA").[5] Instead, Kisor argues that the VA's decision is premised upon a legally erroneous reading of the relevant VA regulation standing alone, and therefore would be reversed if the agency's interpretation it is not afforded *Auer* deference.[6] WFO, by contrast, argues that the PTAB interpreted and applied its own trial regulations in a way that violated specific procedural requirements of the APA. *See* WFO Petition at 22-27 (arguing the PTAB failed to engage in reasoned decision-making when it failed to comply with specific procedural requirements of the APA). Accordingly, in ways that the *Kisor* appeal does not, WFO's appeal implicates issues related to agency deference when the reviewing court must determine if the agency's interpretation of its own regulation is contrary to specific statutory procedural requirements of the APA. *See id.* at 32 and n. 34 (noting that an agency is not afforded deference regarding its "interpretation or application of the statutory procedural requirements of the APA."). *Also compare* Kisor Petition Question 2 (asking whether *Auer* deference should yield to a cannon of statutory construction) *with* WFO Petition Question 2 (asking whether the PTAB's interpretation of its trial regulations is inconsistent with statutory procedural requirements of the APA).

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5. Kisor's petition does argue that *Auer* / *Seminole Rock* deference "provides agencies an end-run around the notice-and-comment procedures required by the Administrative Procedure Act . . . ." *See* Kisor Petition at 15. But Kisor does not assert that the VA violated any particular provision of the APA in his case.

6. *See* Kisor Petition at 20-22 (arguing that review is warranted "because, under de novo review of the regulation, petitioner is substantially likely to prevail.").

Indeed, one of the primary criticisms of *Auer* / *Seminole Rock* deference is that such deference is inconsistent with the standards of review mandated by the APA. *See* 5 U.S.C. §706 ("To the extent necessary to decision and when presented, *the reviewing court* shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of an agency action.") (emphasis added). As compared to the *Kisor* appeal, this case presents a more ideal vehicle for the Court to consider the APA's statutory relevance on issues related to agency deference. A central focus of WFO's Petition is the Federal Circuit's abdication of the §706 judicial review standards when it reviews PTAB procedural rulings. *See* WFO Petition at 6-7, 10-11, 28-30, 33-35. The *Kisor* petition, by contrast, does not cite §706 or make arguments regarding the tension between the statutory language of §706 and the judicially-created doctrine of *Auer* / *Seminole Rock* deference.

Because of the subtle differences between the two cases, the Court's decision in *Kisor* is unlikely to resolve fully the issues presented by WFO's Petition. This appeal is an ideal companion case to *Kisor* because it would allow the Court to address issues that are closely related to *Auer* / *Seminole Rock* deference, but in the context of reviewing a non-binding administrative adjudication such as a PTAB trial decision.

In the alternative, if the Court declines to consider this case as a companion to *Kisor*, WFO urges the Court to defer ruling on WFO's Petition for Writ of Certiorari until it decides the *Kisor* case and, if appropriate, grant WFO's Petition to vacate the Federal Circuit decision

below and remand this case for reconsideration in light of the Court's *Kisor* decision.

Respectfully submitted,

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