No. 19-253

IN THE
Supreme Court of the United States

SPIP LITIGATION GROUP, LLC,
Petitioners,

v.

APPLE, INC. and CISCO SYSTEMS, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF IN OPPOSITION

JOHN M. DESMARAIS
Counsel of Record
JUSTIN P.D. WILCOX
STEVEN M. BALCOF
JENNIFER M. PRZYBYLSKI

DESMARAIS, LLP
230 Park Ave
New York, NY 10169
212-351-3400
jdesmarais@desmaraisllp.com

Counsel for Respondent Cisco Systems, Inc.

QUESTION PRESENTED

1) Whether the Federal Circuit properly issued a Federal Circuit Rule 36 Affirmance, as authorized by Federal Rule of Appellate Procedure 36, where an opinion would add nothing of precedential value in future cases?

PARTIES TO THE PROCEEDING BELOW

The parties to this proceeding are petitioner, SPIP Litigation Group, LLC, and respondents Apple, Inc. and Cisco Systems, Inc.

CORPORATE DISCLOSURE STATEMENT

Respondent Cisco Systems, Inc. has no parent corporation and no public entity owns 10% or more of Cisco Systems, Inc.'s stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

TREATISES

RELEVANT RULES OF PROCEDURE

In addition to Federal Circuit Rule 36, identified by Petitioner (Pet. at 1), Federal Rule of Appellate Procedure 36 is relevant to the present petition:

Entry of Judgment; Notice

(a) Entry. A judgment is entered when it is noted on the docket. The clerk must prepare, sign, and enter the judgment:

(1) After receiving the court's opinion—but if settlement of the judgment's form is required, after final settlement; or

(2) If a judgment is rendered without an opinion, as the court instructs.

(b) Notice. On the date when judgment is entered, the clerk must serve on all parties a copy of the opinion—or the judgment, if no opinion was written—and a notice of the date when the judgment was entered.

STATEMENT OF THE CASE

Petitioner's patents relate to specific protocols for placing calls over computer networks, such as the Internet. To place such calls, a caller must "query" a connection server to "search[] [its] database to determine whether a second processing unit [*i.e.*, the callee] is active and on-line." *Samsung Elecs. Co. Ltd. v. Straight Path IP Group, Inc.*, No. 2016-2004, 2017 WL 2705311, at *1 (Fed. Cir. June 23, 2017); App. 4427-4428.

To preserve its patents in an *inter partes* review proceeding invalidity challenge, Petitioner emphasized that the patents

> expressly require[] a determination of whether the second process (a computer program) is connected to the computer network at the instant in time when the first process (also a computer program) queries whether the second process is connected to the computer network. . . . . This temporal requirement is consistent with the key purpose of the invention.

App. 4772. Through this argument to the Federal Circuit, Petitioner successfully overcame that invalidity challenge.

The parties agreed during the district court litigation that "is connected" meant "is connected to the computer network at the time that the query is transmitted to the server." App. 691. Petitioner's expert conceded that, in the accused products, the callee's online status is not determined until ***after*** the query is made.[1] App. 4437-4439, 4442-4445, 4707, 4709, 4715-4716. In light of this admission, the district court granted summary judgment of non-infringement. App. 12-16.

A panel of the Federal Circuit, following full briefing and oral argument, affirmed the district court's decision. Pet. App. A., p. 2a. The panel issued

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[1] Contrary to Petitioner's statement that "Apple and Cisco witnesses confirmed the expert's explanation that confirmation messages could only be sent if the second device is connected to the network at the time the first device queries the server," (Pet. at 6), all witnesses agreed that online status is not determined in the Cisco Accused Product until a 200 OK message is sent. App. 13. Petitioner's Joint Appendix citations in support of its statement are to its own expert's reports and declarations, not to Apple or Cisco witness testimony as implied.

its affirmance pursuant to Federal Circuit Rule 36. Rule 36 allows, in relevant part to this case, affirmances without opinion where:

(a) the judgment, decision, or order of the trial court appealed from is based on findings that are not clearly erroneous;

(c) the record supports summary judgment;

(e) a judgment or decision has been entered without an error of law.

REASONS FOR DENYING THE PETITION

The petition does not raise a certworthy question for this Court to resolve, and should therefore be denied.

First, the petition's Question Presented does not state an issue that is apropos for this Court to review and resolve. The petition purports to present a Fifth Amendment violation, but fails to identify any failure of due process through the use of Federal Circuit Rule 36(e). Nor does the petition consider that Federal Circuit Rule 36(e) is authorized by Federal Rule of Appellate Procedure 36, or address how the petition implicates Federal Rule of Appellate Procedure 36.

Second, the petition does not raise a circuit conflict for the court to resolve. Although Petitioner draws comparisons between different circuits' local rules, the sheer fact that circuits adopted different rules to govern their courts does not amount to a conflict for this Court to resolve. Moreover, the petition mischaracterizes the rules of the other circuits, which actually support the Federal Circuit's use of Rule 36.

Third, the petition does not establish why the Court should now reconsider a policy that has been in place for decades, when this Court already approved

of its use. Even Petitioner's cited "criticisms" of the Federal Circuit's practice focus on Patent Trial and Appeal Board appeals and indicate that, for district court appeals (as here), the Federal Circuit is authorized to provide summary affirmances.

Because the petition does not raise issues necessary for the Court to resolve—and for the same reasons the Court recently denied a similar petition—this petition should be denied. *See Franklin-Mason v. United States,* No. 17-1256, *cert. denied*, 138 S. Ct. 1703 (2018)

I. PETITIONER DOES NOT PRESENT A QUESTION THAT IS APROPOS FOR THE COURT TO RESOLVE

Petitioner presents its question as a constitutional violation:

> Whether Rule 36(e) of the Federal Circuit's Rules of Procedure violates the Fifth Amendment by authorizing panels of the Federal Circuit to affirm, with no explanation whatever, a District Court judgment resolving only issues of law.

(Pet. at i.) Yet the petition itself does not identify what this Court is meant to resolve regarding the Question Presented: it does not discuss how Federal Circuit Rule 36(e) violates the Fifth Amendment. Nowhere does the petition refer to the Fifth Amendment or present an argument based upon due process. At most, the petition mentions "Due Process of Law" in one heading. (Pet. at 20.) Petitioner does not analyze ***how*** the Fifth Amendment is implicated in this case, how a summary affirmance of an issue of law violates due process, or why issues of law are

unique from other types of summary affirmances such that they require special review.

Instead, the petition compares the local rules of various circuits, in an attempt to manufacture a circuit conflict.[2] In doing so, the petition omits the most important rule to this inquiry—Federal Rule of Appellate Procedure 36, which authorizes appellate courts to provide a judgment "without an opinion." The petition does not identify why this Court should review Federal Circuit Rule 36 in isolation from Federal Rule of Appellate Procedure 36 or how its petition would impact this long-standing rule. This Court has never invalidated a federal rule, and need not consider doing so in this case. *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407 (2010).

Because the petition does not raise a violation of federal laws or rules, it should be denied.

II. PETITIONER DOES NOT PRESENT A CIRCUIT "CONFLICT" FOR THE COURT TO RESOLVE

Petitioner ignores the longstanding rule that courts are permitted to enact local rules to "govern their practices." Instead, Petitioner provides incomplete quotes and paraphrases other circuits' local rules, attempting to create a conflict where none exists.

A. Circuit Courts Are Permitted To Enact Local Rules.

"[A]ll courts established by Act of Congress" have broad congressional authority to "prescribe rules for the conduct of their business." 28 U.S.C. § 2071. Any

[2] As discussed in Section II, *infra*, no such conflict exists.

such rule "must be consistent with—but not duplicative of—Acts of Congress and rules adopted under 28 U.S.C. § 2072."[3] *Id.* Also, the Federal Rules of Appellate Procedure authorize the adoption of local rules by appellate courts: "Each court of appeals acting by a majority of its judges in regular active service may, after giving appropriate public notice and opportunity for comment, make and amend rules governing its practice." Fed. R. App. P. 47. Every United States circuit court has exercised that authority and enacted local practice rules. Oftentimes, those rules differ greatly from circuit to circuit.[4]

Circuit courts may, but need not, adopt rules governing the issuance of judgments. This Court has

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[3] 28 U.S.C. § 2072 gives the Supreme Court "the power to prescribe general rules of practice and procedure . . . for cases in the United States . . . courts of appeals." The Federal Rules of Appellate Procedure were enacted pursuant to 28 U.S.C. 2072.

[4] For example, the circuit courts each address the authority granted by Fed. R. App. P. 33, regarding settlement conferences, in different ways. At one end, First Circuit Rule 33.0 requires a court-appointed "Settlement Counsel" to whom separate statements must be submitted and by whom a "pre-argument conference" may be ordered. At the other end, DC Circuit Rule 33 indicates "There is no corresponding Circuit Rule" for Appeal Conferences. Other rules rest somewhere in between, like Federal Circuit Rule 33 requiring that counsel independently undertake a settlement discussion and submit a statement of compliance. *Compare* First Circuit Rule 33.0; Second Circuit Rule 33.1; Third Circuit Rule 33.0; Fourth Circuit Rule 33; Fifth Circuit Rule 15.3.5; Sixth Circuit Rule 33; Seventh Circuit Rule 33; Ninth Circuit Rule 33-1; Tenth Circuit Rule 33; Eleventh Circuit Rule 33-1; DC Circuit Rule 33; Federal Circuit Rule 33.

stated that "courts of appeals should have wide latitude in their decisions of whether or how to write opinions." *Taylor v. McKeithen*, 407 U.S. 191, 194 n.4 (1980). "[N]o court has ever invalidated a local rule that was implemented pursuant to FRAP 36, which expressly allows for decisions without reasons," or "suggested that FRAP 36 is invalid." Matthew J. Dowd, "*Rule 36 Decisions at the Federal Circuit: Statutory Authority*," 21 Vand. J. Ent. & Tech. L. 857, 868 (2019).

B. Circuit Courts Enacted Local Rules Regarding Judgments That Are Not In "Conflict" With Each Other.

Under the broad authority provided by 28 U.S.C. § 2071 and Federal Rule of Appellate Procedure 36, circuit courts have enacted local rules regarding the disposition of cases. Petitioner argues that a "conflict" exists amongst those rules because they are not identical to one another. A comparison of the regional circuit rules demonstrates, however, that no such conflict exists.

The Third, Fifth, Eighth, Tenth, and Federal Circuits Expressly Authorize a Summary Affirmance in an Appeal Raising Only Issues of Law. As Petitioner acknowledges, the Fifth, Eighth, and Tenth Circuits join the Federal Circuit in "expressly authoriz[ing]" a summary affirmance "in an appeal raising only issues of law." (Pet. Br. at 13.) Furthermore, the Third Circuit's procedure, which Petitioner mischaracterizes, is nearly identical to that of the Federal Circuit. Third Circuit Internal Operating Procedure 6 permits a "judgment order" to be issued "when the panel unanimously determines to affirm the judgment . . . and determines that a written

opinion will have no precedential or institutional value." The Third Circuit procedures also state that:

> 6.2.2 A judgment order may be used when:
> (a) The judgment of the district court is based on findings of fact which are not clearly erroneous;
> (b) Sufficient evidence supports a jury verdict;
> (c) Substantial evidence on the record as a whole supports a decision or order of an administrative agency;
> **(d) No error of law appears;**
> (e) The district court did not abuse its discretion on matters addressed thereto; or
> (f) The court has no jurisdiction.

(emphasis added). Thus, five circuits ***explicitly*** permit the issuance of an order affirming a lower court judgment without an opinion in cases involving only issues of law.

First, Second, Sixth, and Eleventh Circuit panels have *broader* authority to determine how a judgment may be entered and whether an opinion is required. These circuits do not, as the petition suggests, prohibit judgments without opinions in cases involving only issues of law. Instead, the decision whether to make a determination is left to the discretion of the panel:

First Circuit Rule 36. "The volume of filings is such that the court cannot dispose of each case by opinion. Rather, it makes a choice, reasonably accommodated to the particular case, whether to use an order, memorandum and order, or opinion." The rule further

explains that a published opinion is not needed "where an opinion does not articulate a new rule of law, modify an established rule, apply an established rule to novel facts, or serve otherwise as a significant guide to future litigants."

Second Circuit Internal Operating Procedure 32.1.1. "When a decision in a case is unanimous and each panel judge believes that no jurisprudential purpose is served by an opinion (i.e., a ruling having precedential effect), the panel may rule by summary order."

Sixth Circuit Rule 36. "The court may announce its decision in open court when the decision is unanimous and each judge of the panel believes that a written opinion would serve no jurisprudential purpose."

Eleventh Circuit Internal Operating Procedure 36-5. "The policy of the court is: The unlimited proliferation of published opinions is undesirable because it tends to impair the development of the cohesive body of law. To meet this serious problem it is declared to be the basic policy of this court to exercise imaginative and innovative resourcefulness in fashioning new methods to increase judicial efficiency and reduce the volume of published opinions."

The remaining circuits have not indicated that it is unconstitutional or improper to issue a judgment without an opinion. For example, Ninth Circuit Local Rule 36-1 does not, as Petitioner suggests, require that a written opinion be issued in every case. (Pet. at 14.) The attorney practice guide that Petitioner cites provides only that, in practice, Ninth Circuit panels "issue[] a written disposition of some sort in every case." Federal Appellate Practice:

Ninth Circuit § 22:2. In fact, the preceding sentence in the same guide acknowledges that "[t]he Courts of Appeals ***are not required*** by the Federal Rules of Appellate Procedure to enter a judgment with a written opinion." *Id.* (emphasis added). Ninth Circuit Local Rule 36-1 itself states only that "Each written disposition of a matter before this Court shall bear under the number in the caption the designation OPINION, or MEMORANDUM, or ORDER." Notably, it does not indicate (a) that a written disposition is required in every case, or (b) that an order need be more than the word "affirmed."

The circuit courts have long recognized the importance of having the flexibility to decide whether to issue an opinion. While "[a] most important function [of the judiciary] is the writing of opinions," "limited and precious judicial resources can be husbanded by a procedure which eliminates [an] unnecessary opinion." *N.L.R.B. v. Amalgamated Clothing Workers of Am.*, 430 F.2d 966, 971-972 (5th Cir. 1970). That said, "[t]he fact that a disposition is by informal summary order rather than by formal published opinion in no way indicates that less than adequate consideration has been given to the claims raised in the appeal." *Furman v. U.S.*, 720 F.2d 263, 265 (2d Cir. 1983) (*per curiam*); *see also Dia v. Ashcroft*, 353 F.3d 228, 240 n.7 (3d. Cir. 2003) (*en banc*) ("In the past, we often affirmed via 'judgment orders,' with no mention of whether or not we agreed with the reasoning provided by the district court. . . . It is well established, however, that this procedure is constitutional."); *U.S. v. Baynes*, 548 F.2d 481, 482-484 (3d Cir. 1977) (*per curiam*) (holding affirmance by judgment order without opinion did not constitute denial of due process in criminal appeal).

Thus, because the petition does not raise a circuit conflict for this Court to resolve, the petition should be denied.

III. PETITIONER DOES NOT PRESENT A NEW REASON FOR THE COURT TO REVISIT AN ISSUE IT ALREADY RESOLVED

By enacting Federal Rule of Appellate Procedure 36, this Court already granted the circuit courts the ability to provide a judgment "without an opinion." In revisiting this issue, this Court clarified in *Taylor* that "courts of appeals should have wide latitude in their decisions of whether or how to write opinions." 407 U.S. at 194 n.4. The Court specifically acknowledged that this principle "is especially true with respect to summary affirmances." *Id.*

Petitioner argues that *Taylor* indicates "this Court **does** call for an explanation in a case raising a 'substantial federal question.'" (Pet. at 21) (emphasis in original). However, Petitioner's characterization is incomplete—the issue in *Taylor* was a summary ***reversal*** without an opinion. *Taylor*, 407 U.S. at 194 n.4. A summary reversal inherently implies a disagreement with the court below, without stating the basis for the disagreement as guidance to identify the error below. However, a summary ***affirmance*** is an indication that the circuit court agrees with the court below and need not provide an additional opinion to merely repeat the same bases. The Court recognized this distinction, expressing its concern with summarily reversing a decision and thus vacating and remanding the Fifth Circuit decision. But the Court made the decision to clarify that summary ***affirmances*** still fall within the "wide

latitude" of discretion of a court of appeal's "decisions of whether or how to write opinions." *Id*.

The critiques of summary affirmances that Petitioner references—many of which are written by the same authors and were not subject to peer review—do not set forth a new reason for this Court to reopen the issue addressed in the petition. Rather, those commentaries and petitions query whether the Federal Circuit's ability to summarily affirm ***PTAB*** decisions is limited by ***35 U.S.C. § 144***.[5] As Petitioner acknowledges, "[t]he present case does not concern an appeal from a decision of the PTAB and does not, therefore, turn on a construction of [35 U.S.C.] Section 144." (Pet. at 19.) In fact, a common sentiment amongst the critics that Petitioner cites, is that ***district court*** appeals—like the appeal at issue here—do not give rise to the same concerns as PTAB appeals:

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[5] *See, e.g.*, *Celgard, LLC v. Iancu*, No. 16-1526, *cert. denied*, 138 S. Ct. 1714 (2018); *Integrated Claims Sys., LLC v. Travelers Lloyds of Texas Ins. Co.*, No. 17-330, *cert. denied*, 138 S. Ct. 1693 (2018); *C-Cation Tech., LLC v. Arris Group, Inc.*, No. 17-617, *cert. denied*, 138 S. Ct. 1693 (2018); *Stambler v. Mastercard International Inc.*, No. 17-1140, *cer.t denied*, 139 S. Ct. 54 (2018); *Security People, Inc. v. Ojmar US, LLC*, No. 17-1443, *cert. denied*, 138 S. Ct. 2681 (2018); Dennis Crouch, "*Wrongly Affirmed Without Opinion*," 52 Wake Forest L. Rev. 561 (2017); Rebecca A. Lindhorst, "*Because I Said So: The Federal Circuit, the PTAB, and the Problem With Rule 36 Affirmances*," 69 Case W. Res. L. Rev. 247 (2018); Gene Quinn & Steve Brachmann, "*No End in Sight for Rule 36 Racket at Federal Circuit*," https://www.ipwatchdog.com/2019/01/29/no-end-sight-rule-36-racket-cafd/id-105696/.

> A number of other circuit courts of appeals have local rules that expressly allow for judgment without opinion. The Federal Circuit is not solely a patent court. Rather, the court handles a wide variety of appeals in addition to those arising from the PTO. . . . In addition, the Federal Circuit hears patent infringement cases stemming from the various U.S. district courts. ***The statutes requiring an opinion do not appear to apply to cases arising from these non-PTO fora***.

"*Wrongly Affirmed*," 52 Wake Forest L. Rev. at 569 (emphasis added); *see also* "*Because I Said So*," 69 Case W. Res. L. Rev. at 262 ("35 U.S.C. § 144 does not preclude the Federal Circuit from issuing Rule 36 affirmances in appeals from district court proceedings and other lower tribunals other than the PTAB. In these appeals, the Federal Circuit maintains its discretion on how and when to issue written opinions.").

Given the absence of any valid criticism on point, the petition fails to raise a reason why, after decades of circuit courts properly issuing summary affirmances, this Court should reconsider the practice. This Court recently declined to perform such a review when it denied the petition for writ of certiorari in *Franklin-Mason v. United States,* No. 17-1256, *cert. denied*, 138 S. Ct. 1703 (2018). That petition, like the present petition, sought to appeal a summary affirmance by the Federal Circuit through Federal Circuit Rule 36. The *Franklin-Mason* petition questioned the constitutionality of Federal Rule of

Appellate Procedure 36. Like the *Franklin-Mason* petition, this petition should be denied.

Thus, because this Court has already considered this issue—deeming summary affirmances proper—and because the petition does not raise any new grounds for this Court to resolve, the petition should be denied.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

JOHN M. DESMARAIS
Counsel of Record
JUSTIN P.D. WILCOX
STEVEN M. BALCOF
JENNIFER M. PRZYBYLSKI

DESMARAIS, LLP
230 Park Ave
New York, NY 10169
212-351-3400
jdesmarais@desmaraisllp.com

Counsel for Respondent
Cisco Systems, Inc.

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