No. 19-253

In The Supreme Court of the United States

STRAIGHT PATH GROUP IP, INC.,

Petitioner,

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

PETITIONER'S REPLY BRIEF

Nathan Lewin
Counsel of Record
Alyza D. Lewin
LEWIN & LEWIN, LLP
888 17th Street, NW
4th Floor
Washington, DC 20006
(202) 828-1000
nat@lewinlewin.com

Attorneys for Petitioner

ARGUMENT

I.

WHEN IT CONCEALS REASON(S) FOR AFFIRMANCE, THE FEDERAL CIRCUIT INVITES INJUSTICE

Apple's Brief in Opposition demonstrates that due process of law is denied when the Federal Circuit affirms with no explanation. No one (except the judges on the Federal Circuit panel) knows why the Federal Circuit summarily rejected petitioner's appeal even though two serious legal issues were argued. By concealing their rationale the judges of the Federal Circuit have granted Apple the liberty of aggressively and erroneously asserting in this Court that petitioner's patent-infringement lawsuit is "frivolous" and "meritless," and that petitioner should be sanctioned for initiating it.

In fact, as Apple acknowledges, petitioner prevailed in appeals it took in 2015 and 2017 to the Federal Circuit from attacks on its patents. Apple Br. in Opp. 2. Petitioner had every reason to expect, in good faith, that it would prevail again in the third round. Petitioner submitted a 54-page brief to the Federal Circuit. Apple responded in that court with a brief of 47 pages, and Cisco with 63 pages. The Federal Circuit's clandestine affirmance has effectively encouraged Apple to submit an intemperate and exaggerated response in this Court.

Our petition asks this Court to rule that a Federal Circuit panel may not deliberately conceal its rationale, as panels of the Federal Circuit have ubiquitously done under the Circuit's Rule 36 in

many patent appeals raising only legal issues. Fundamental due process principles and this Court's supervisory authority over lower federal courts support a rule requiring the Federal Circuit to state, even if very briefly, ***why*** it decides to affirm whenever an appeal presenting only legal issues comes before it.

II.

THE SUMMARY-AFFIRMANCE RULES OF CIRCUITS THAT DIFFER FROM THE FEDERAL CIRCUIT ARE NOT "INCONSEQUENTIAL MINOR VARIATIONS"

Both Apple and Cisco discount and disparage the substantial differences between the broad language in Federal Circuit Rule 36 and the Rules of other Circuits that authorize summary affirmances but require some disclosure, even if very brief, of the court's reason for affirming. Apple claims that the contrasting language of Federal Circuit Rule 36 and the Rules of other Circuits is an "inconsequential minor variation" or an "entirely formalistic" difference. Apple Br. in Opp. 12, 15. Cisco asserts that our petition "attempt[s] to manufacture a circuit conflict." Cisco Br. in Opp. 5.

The standards are, however, worlds apart. For example D.C. Circuit Rule 36(c) – unlike Federal Circuit Rule 36 – authorizes summary affirmance only with "a notation of precedents or accompanied by a brief memorandum." Similarly, the Fourth Circuit's Local Rule 36.3, which allows a panel to affirm summarily if the panel "sets forth . . . the reason or reasons" for its decision is very different

from Federal Circuit Rule 36 which permits an affirmance with no expressed "reason or reasons" whatever.

If there is no substantive difference between Federal Circuit Rule 36 and the summary-affirmance Rules of other Circuits, why did the Eleventh Circuit in 2006 jettison the summary-affirmance language that it inherited from its parent Fifth Circuit when the Eleventh Circuit was created in 1986? Neither respondent attempts to explain why the Eleventh Circuit would have chosen meaninglessly to amend the language of a Rule that had, since the Circuit was created, governed summary affirmances.

III.

REQUIRING A BRIEF DISCLOSURE OF THE REASON FOR AFFIRMANCE IS NOT THE SAME AS REQUIRING A FULL OPINION

Both respondents substantially overstate our legal position in their effort to persuade this Court to reject our petition. We do ***not*** contend, as they assert, that full opinions must be issued in all appeals to the Federal Circuit or to any other federal court of appeals. We maintain only that it is impermissible to conceal totally the Federal Circuit's rationale for affirming a district court opinion when only legal issues have been presented and argued on appeal.

We urge this Court to reverse the decision below and hold that a federal appellate court satisfies its constitutional duty only if the panel discloses ***why*** it reached its result. The stated reason may be no

longer than two or three sentences, or may reveal its rationale by citing binding precedent. The summary-affirmance Local Rules of many Circuits require no more, and we do not challenge those Rules.

IV.

PAST DENIALS OF CERTIORARI ARE NOT GROUNDS FOR DENYING THIS PETITION

Both respondents rely heavily on this Court's record of denying certiorari in recent Terms when parties that lost appeals in the Federal Circuit under Federal Circuit Rule 36 sought review. Cisco Br. in Opp. 12, n.5; Apple Br. in Opp. 10-11. It has long been well-established, however, that denials of certiorari should be given no precedential effect. *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919 (1950); *Brown v. Allen*, 344 U.S. 443, 497, 554-555 (1953). Moreover, our petition is more limited than the petitions filed in the cases cited by the respondents. This case concerns an appeal (a) in which only legal issues were presented and (b) in which a district court decision, rather than a ruling by the PTAB, was challenged.

V.

THIS CASE WILL AFFECT MORE FEDERAL CIRCUIT DECISIONS THAN THE FOUR FEDERAL CIRCUIT CASES NOW ON THE COURT'S DOCKET

The respondents claim that certiorari should be denied because this case is unimportant or not "apropos." Apple Br. in Opp. 19; Cisco Br. in Opp. 3-4. They do not, however, dispute that the Federal Circuit now decides a huge number of appeals with a

Rule 36 affirmance. If that practice is disapproved by this Court and the Federal Circuit is henceforth required to provide some explanation for a summary affirmance, many more future Federal Circuit cases will be affected by such a decision than by this Court's decisions in all the Federal Circuit cases now on its docket. See Petition for Certiorari 19-20. Hence this case cannot accurately be characterized as "unimportant."

CONCLUSION

For the foregoing reasons and those presented in our Petition for a Writ of Certiorari, this Court should grant certiorari and reverse the decision of the Federal Circuit.

Respectfully submitted,

Nathan Lewin
Counsel of Record
Alyza D. Lewin
LEWIN & LEWIN, LLP
888 17th Street NW
4th Floor
Washington, DC 20006
(202) 828-1000
nat@lewinlewin.com

October 2019

Attorneys for Petitioner