

No. _____

**In The
Supreme Court of the United States**

—◆—
ULTRATEC, INC.,

Petitioner,

v.

CAPTIONCALL, LLC AND THE DIRECTOR OF
THE U.S. PATENT AND TRADEMARK OFFICE,

Respondents.

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

—◆—
PETITION FOR WRIT OF CERTIORARI

—◆—
DONALD K. SCHOTT
Counsel of Record
KRISTIN GRAHAM NOEL
MARTHA JAHN SNYDER
ANITA MARIE BOOR
QUARLES & BRADY LLP
33 East Main Street
Suite 900
Madison, WI 53703
(608) 251-5000
donald.schott@quarles.com

Counsel for Petitioner

QUESTIONS PRESENTED

In these related cases, the Federal Circuit summarily affirmed nine separate final written decisions of the Patent Trial and Appeal Board. On inter partes review, the Board collectively found unpatentable claims of eight patents, each of which was duly issued prior to the availability of the statutorily-created inter partes review procedure. These decisions directly conflict with, and now put in jeopardy, the verdict of a federal jury that found the patents valid and infringed six years prior, assessing over \$44 million in past damages alone. The Federal Circuit did not issue an opinion in any of the appeals, even though the underlying decisions rested on a claim construction standard that was indisputably incorrect. The questions presented are as follows:

1. Does retroactive application of the inter partes review process violate the Due Process Clause of the Fifth Amendment to the United States Constitution?

2. Does the use of Federal Circuit Rule 36 to summarily affirm decisions from the Patent Trial and Appeal Board “without opinion” violate 35 U.S.C. § 144, which provides that the Federal Circuit “shall issue . . . its mandate and opinion” upon its determination of appeals arising from the Patent and Trademark Office?

PARTIES TO THE PROCEEDING

Petitioner, Patent Owner-Appellant below, is Ultratec, Inc.

Respondent, Petitioner-Appellee below, is Caption-Call, LLC.

Respondent, the Director of the U.S. Patent and Trademark Office, was an intervenor in the Federal Circuit. At that time, the Director was Andrei Iancu. Petitioner understands that the acting Director is Drew Hirshfeld. *See* S. Ct. R. 35.3, 35.4.

CORPORATE DISCLOSURE STATEMENT

Petitioner is a privately held corporation. No publicly-held entity owns 10% or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

This petition is taken from three judgments of the Federal Circuit in nine related appeals, consolidated as follows:

- *Ultratec, Inc. v. CaptionCall, LLC*, Case Nos. 19-1998, -1999, -2001, -2002 (Fed. Cir.), judgment entered October 14, 2020 and order denying rehearing and rehearing en banc entered January 5, 2021;
- *Ultratec, Inc. v. CaptionCall, LLC*, Case Nos. 19-2000, -2005, -2006 (Fed. Cir.), judgment entered October 14, 2020 and order denying rehearing and rehearing en banc entered January 5, 2021; and

STATEMENT OF RELATED PROCEEDINGS—
Continued

- *Ultratec, Inc. v. CaptionCall, LLC*, Case Nos. 19-2003, -2004 (Fed. Cir.), judgment entered October 14, 2020 and order denying rehearing and rehearing en banc entered January 5, 2021.

Each of the nine Federal Circuit appeals arose from a final written decision of the Patent Trial and Appeal Board on inter parties review, as follows:

- *CaptionCall, LLC v. Ultratec, Inc.* IPR2013-00540 (P.T.A.B.), final written decision entered March 3, 2015, decision denying rehearing entered December 1, 2015, and order on remand entered April 10, 2019;
- *CaptionCall, LLC v. Ultratec, Inc.* IPR2013-00541 (P.T.A.B.), final written decision entered March 3, 2015, decision denying rehearing entered December 1, 2015, and order on remand entered April 10, 2019;
- *CaptionCall, LLC v. Ultratec, Inc.* IPR2013-00542 (P.T.A.B.), final written decision entered March 3, 2015, decision denying rehearing entered December 1, 2015, and order on remand entered April 10, 2019;
- *CaptionCall, LLC v. Ultratec, Inc.* IPR2013-00543 (P.T.A.B.), final written decision entered March 3, 2015, decision denying rehearing entered December 1, 2015, and order on remand entered April 10, 2019;

STATEMENT OF RELATED PROCEEDINGS—
Continued

- *CaptionCall, LLC v. Ultratec, Inc.* IPR2013-00544 (P.T.A.B.), final written decision entered March 3, 2015, decision denying rehearing entered December 1, 2015, and order on remand entered April 10, 2019;
- *CaptionCall, LLC v. Ultratec, Inc.* IPR2013-00545 (P.T.A.B.), final written decision entered March 3, 2015, decision denying rehearing entered December 1, 2015, and order on remand entered April 10, 2019;
- *CaptionCall, LLC v. Ultratec, Inc.* IPR2013-00549 (P.T.A.B.), final written decision entered March 3, 2015, decision denying rehearing entered December 1, 2015, and order on remand entered April 10, 2019;
- *CaptionCall, LLC v. Ultratec, Inc.* IPR2013-00550 (P.T.A.B.), final written decision entered March 3, 2015, decision denying rehearing entered December 1, 2015, and order on remand entered April 10, 2019; and
- *CaptionCall, LLC v. Ultratec, Inc.* IPR2014-00780 (P.T.A.B.), final written decision entered December 1, 2015, decision denying rehearing entered May 19, 2016, and order on remand entered April 10, 2019.

Prior appeals to the Federal Circuit from these agency proceedings were consolidated as follows:

STATEMENT OF RELATED PROCEEDINGS—
Continued

- *Ultratec, Inc. v. CaptionCall, LLC*, Case Nos. 16-1706, -1707, -1710, 1712 (Fed. Cir.), judgment entered August 28, 2017;
- *Ultratec, Inc. v. CaptionCall, LLC*, Case Nos. 16-1708, -1709, -1715 (Fed. Cir.), judgment entered August 28, 2017; and
- *Ultratec, Inc. v. CaptionCall, LLC*, Case Nos. 16-1713, -2366 (Fed. Cir.), judgment entered August 28, 2017.

There are no other proceedings directly related to this case within the meaning of Supreme Court Rule 14.1(b)(iii).

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OPINIONS BELOW

The Federal Circuit’s opinions below are (1) reported at 872 F.3d 1267 (Fed. Cir. 2017) and (2) unreported (App. 1-6). The Patent Trial and Appeal Board’s final written decisions, decisions denying rehearing, and orders on remand are unreported.¹



STATEMENT OF JURISDICTION

The Federal Circuit issued its judgments on October 14, 2020 and issued orders denying rehearing and rehearing en banc on January 5, 2021. On March 19, 2020, this Court extended the deadline to file any petition for a writ of certiorari to 150 days from the date of the order denying a timely petition for rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).



CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Due Process Clause of the Fifth Amendment to the U.S. Constitution provides, in pertinent part, that:

¹ Citations to “App.” are to the appendix submitted herewith. Unless otherwise noted, citations to “R.__:__” are to the Joint Appendix in *Ultratec, Inc. v. CaptionCall, LLC*, Case No. 19-1998, Dkt. 48 (Fed. Cir.). The evidence cited is substantially the same across the three consolidated appeals.

No person shall be ... deprived of life, liberty, or property, without due process of law

U.S. Const. amend. V.

35 U.S.C. § 144 provides:

The United States Court of Appeals for the Federal Circuit shall review the decision from which an appeal is taken on the record before the Patent and Trademark Office. Upon its determination the court shall issue to the Director its mandate and opinion, which shall be entered of record in the Patent and Trademark Office and shall govern the further proceedings in the case.

35 U.S.C. § 144.

Federal Circuit Rule 36(a) provides:

Judgment of Affirmance Without Opinion. The court may enter a judgment of affirmance without opinion, citing this rule, when it determines that any of the following conditions exist and an opinion would have no precedential value:

- (1) the judgment, decision, or order of the trial court appealed from is based on findings that are not clearly erroneous;
- (2) the evidence supporting the jury's verdict is sufficient;
- (3) the record supports summary judgment, directed verdict, or judgment on the pleadings;

(4) the decision of an administrative agency warrants affirmance under the standard of review in the statute authorizing the petition for review; or

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

Fed. Cir. R. 36(a).

These provisions are included in the appendix submitted herewith, along with the other statutes cited herein.



PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

In 2011, Congress passed the Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011); *see also* 35 U.S.C. § 100 *et seq.* (the “AIA”), which introduced numerous substantive changes to the patent system. The AIA established a process called inter partes review (“IPR”), under which the Patent and Trademark Office (“PTO”) is authorized to reconsider and cancel an issued patent claim on the grounds that it was anticipated or rendered obvious by prior art by mere preponderance of the evidence. 35 U.S.C. §§ 311(b), 316(e). The AIA also created a new tribunal, the Patent Trial and Appeal Board (“Board”), to conduct IPR. *Id.*, §§ 6, 316(c).

The AIA did not limit IPR to patents issued after its enactment, or even the date IPR went into effect—

September 16, 2012. Pub. L. No. 112-29, § 35, 125 Stat. 284, 341 (2011). Rather, it extended IPR to patents issued long before, eviscerating the rights vested in those patents, including their presumptive validity in adjudicative proceedings, which allows for invalidation only by clear and convincing evidence.

In *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, 138 S. Ct. 1365 (2018), this Court held that IPR, generally, does not violate Article III or the Seventh Amendment. However, the Court reserved opinion on whether retroactive application of IPR violates the Due Process Clause. *Id.* at 1379. The Court should grant certiorari to address that issue now.

Further exacerbating the problem with retroactive application of the AIA is the fact that the Federal Circuit routinely relies on its Rule 36 to summarily affirm PTO decisions without written opinion.

35 U.S.C. § 144 provides that the Federal Circuit shall review PTO decisions and “[u]pon its determination ... shall issue to the Director its mandate and opinion”

Yet the Federal Circuit has disposed of nearly half of all PTO appeals in recent years without opinion. This Court should grant certiorari to address whether Rule 36 violates 35 U.S.C. § 144 when used in this manner.

A. Petitioner, Ultratec, Inc., Invents the Captioned Telephone and Captioned Telephone Service

Over twenty years ago, Ultratec revolutionized telecommunications for the deaf and hard-of-hearing by inventing the first captioned telephone and captioned telephone service (R.48:3192-3194; R.48:3249). A captioned telephone allows a hard-of-hearing caller to use whatever residual hearing she has to listen to the voice of the other caller, while also viewing text captions of the other caller's words generated via captioned telephone service. (R.48:595, 6:36-46; R.48:572, 3:13-25; R.48:579, 3:13-25; R.48:594, 3:20-36; R.48:603, 3:20-50; R.48:606, 9:3-13). Ultratec's commercial service, CapTel, utilizes its patented "revoicing" to create captions, whereby assistants restate each word of the hearing caller into voice recognition software specially trained to the voice of each assistant. (R.48:3156; R.48:3193-3194; R.48:3252).

Prior to CapTel, hard-of-hearing individuals relied on traditional relay service, which inserted a typing intermediary between the hearing and hard-of-hearing users. (R.48:3188-3189; R.48:3247-3249; R.48:571, 1:52-65; R.48:578, 1:51-65; R.48:593, 1:61-2:17; R.48:602, 1:54-67; R.48:3247-3248; R.48:3197-3198; R.48:3263). Because intermediaries could type approximately 40–60 words per minute, traditional relays were far slower than the normal rate of speech (approximately 200 words per minute). (R.48:3197; R.48:3248). Traditional relays were also only 90% accurate. (R.48:3203-3204).

With traditional relay, the hard-of-hearing user received only text of the conversation, meaning he could not use residual hearing if even to discern emotion and tone. (R.48:3208; R.48:3262-3264). Further, users had to dial the relay before connecting to the other caller. (R.48:3219).

For these reasons, traditional relays were regarded as “slow and indirect,” “cumbersome, inefficient, and a poor alternative.” (R.48:3209, R.48:3213). Hard-of-hearing persons who utilized traditional relay service experienced shortened calls or hang-ups as hearing users became frustrated with the long delays. (R.48:3196-3197; R.48:3209). The embarrassment of feeling like a burden on hearing users often lead hard-of-hearing persons to cease using the phone altogether. (R.48:3187-3189).

Ultratec’s inventions, including revoicing, tackled these issues, resulting in a service—captioned telephone service—that provided captions at 150–250 words per minute with accuracy exceeding 98%. (R.48:3197-3198; R.48:3156; R.48:3203-3204). With captioned telephone service, hard-of-hearing and hearing users also could speak directly to one another, without interruption from the assistant. (R.48:3216-3217).

Having expended significant time and resources to develop the many innovations that led to captioned telephone service, Ultratec turned to the patent system. Ultratec disclosed its inventions to the public through its patent applications beginning in 1997 (R.48:575) and was granted numerous patents on its technologies,

including those at-issue in the proceedings below. All eight of these patents were applied for years prior to the enactment of the AIA; all but one issued prior to the enactment of the AIA; and all issued prior the availability of IPR. (R.48:575, 568, 598, 583; Case No. 2000, R.48:327, 338, 348; Case No. 2003, R.46:253). Thus, Ultratec upheld its end of the trade-off inherent in the patent system well before the AIA was enacted; it disclosed its inventions to the public with the expectation that it would receive an exclusive, albeit temporary, right to enforce under the laws existing at the time.

Ultratec relied on its issued patents, partnering with telecommunications providers, like Sprint, and state administrators all across the country to bring its CapTel-branded captioned telephone service into the homes of thousands of hard-of-hearing individuals. (See R.48:3217-3221; R.48:3271; R.48:3203-3204). CapTel was tremendously commercially successful (R.48:3161-3168), and has been heralded by the hard-of-hearing community as “life-changing” and “a gift and blessing” as it allowed the hard-of-hearing to regain their independence. (R.48:3214; R.48:3211).

B. Respondent, CaptionCall, LLC, and the District Court Litigation

Years after CapTel’s launch, CaptionCall entered the market with captioned telephones and service that knocked off CapTel and infringed Ultratec’s patents. On May 17, 2013, Ultratec and CapTel sued

CaptionCall and its parent company, Sorenson, asserting the eight Ultratec patents-at-issue here. *Ultratec, Inc. v Sorenson Commc'ns Inc.*, No. 3:13-cv-00346, Dkt. 1 (W.D. Wis. May 17, 2013).

After sitting for a two-week trial in October 2014, hearing the story of Ultratec's innovations, and assessing the credibility of the parties' live witnesses, a jury found that CaptionCall infringed Ultratec's patents and that the asserted claims were not invalid. (App. 114-117). The jury awarded Ultratec \$44.1 million for past damages. (App. 118). Months later, the court stayed post-trial proceedings pending the outcome of appeals of the IPRs at-issue here. *Ultratec*, No. 3:13-cv-00346, Dkt. 876 (May 13, 2015). Ultratec petitioned the Federal Circuit to overturn the stay, but was denied. *Ultratec, Inc. v. CaptionCall, LLC*, 611 F. App'x 720 (Fed. Cir. 2015). The stay has been in place for over six years.

C. The IPR Proceedings and Federal Circuit Decisions

Months after Ultratec filed suit—and less than a year after IPR became available—CaptionCall petitioned the Board to review Ultratec's claims.² On March 3 and December 1, 2015, the Board issued final

² R.48:608, 612, 616, 620; Case No. 19-2000, R.48:361, 364, 368; Case No. 19-2003, R.46:278, 282.

written decisions finding all challenged claims unpatentable.³

Ultratec first appealed in March 2016, raising Constitutional challenges to the IPR process. (*E.g.*, Case No. 16-1713, R.62:63-66). Ultratec also appealed the flawed and changing claim constructions and improper treatment of evidence. (*E.g.*, Case No. 16-1708, R.63:48-76). In addition, Ultratec raised problems with the Board’s unfair operating procedures and propensity to act as an advocate instead of an impartial tribunal. (*E.g.*, Case No. 16-1713, R.62:31-36). For example, the Board would not receive, much less consider, conflicting trial court testimony from CaptionCall’s expert witness, or make a written record of that decision. (*Id.*). Similarly, in all but one of the proceedings, the Board disregarded CapTel’s objective indicia of nonobviousness, rejecting undisputed evidence that CapTel “embodied” the patented inventions. (*E.g., id.* at 39-45). In the one proceeding the Board claimed to consider the objective indicia, it relied on an unfounded theory that much of CapTel’s commercial success was attributable to another type of service—an argument that was factually inaccurate and not even advanced by CaptionCall. (*Id.* at 50-52).

On August 28, 2017, the Federal Circuit vacated the decisions, holding the Board abused its discretion in refusing, without analysis or explanation, to admit

³ R.48:68-122, 208-284, 512-552, 370-425; Case No. 2000, R.48:68-98, 181-209, 292-316; Case No. 2003, R.46:68-102, 185-240.

and consider the trial court testimony from CaptionCall's expert. *Ultratec, Inc. v. CaptionCall, LLC*, 872 F.3d 1267, 1275 (Fed. Cir. 2017). The court remanded and ordered the Board to admit and consider the testimony and its potential impact. *Id.* It did not address Ultratec's other appellate issues at the time. *Id.*

After the Federal Circuit issued its opinion, the patents-at-issue expired. This was significant because, under the Federal Circuit's jurisprudence, the proper claim construction standard changes upon expiration of the patents from the "broadest reasonable interpretation" standard to the stricter *Phillips* standard. *Apple Inc. v. Andrea Elecs. Corp.*, 949 F.3d 697, 707 (Fed. Cir. 2020) ("When this court reviews the claim construction of a patent claim term in an IPR appeal after the patent has expired, such as in this case, we apply the standard established in *Phillips*, not the 'broadest reasonable interpretation.'").

On remand, Ultratec informed the Board that the patents had expired, explained how that changed the claim construction standard, and asked to submit briefing. (R.48:4335-4336, 15:6-16:20). The Board denied that request. (R.48:16-20; R.48:62-65).

On April 10, 2019, the Board issued a decision concluding CaptionCall's expert's trial testimony was not inconsistent with his IPR testimony. (R.48:54). The Board did not re-construe any claim terms and simply re-issued its decisions as modified on remand, even where doing so relied on its original broadest

reasonable interpretation constructions. (*Id.*; R.48:21-22 n.4; R.48:50-51).

Ultratec appealed, re-raising those errors left undecided from the first appeal and raising the newly presented issue of the changed claim construction standard. (*E.g.*, R.38:27-34). The PTO intervened on the latter issue and constitutionality.

The Federal Circuit heard argument in all of the appeals on October 9, 2020. During argument, Judge Moore expressed “surprise” and even that she was “troubled” that the PTO suggested the court apply broadest reasonable interpretation since it is a “well settled” rule that it must apply *Phillips* to expired patents. (App. 151-152). Yet a mere five days later, the court summarily affirmed the Board’s orders, which were undeniably premised on broadest reasonable interpretation constructions. Ultratec filed consolidated petitions for rehearing and rehearing en banc, which were denied. (App. 87-92).



REASONS FOR GRANTING THE WRIT

- I. **The Court should address the question deferred in *Oil States*—whether retroactive application of IPR violates the Due Process Clause—because the statute deprives patent owners of their earlier-vested rights.**

Through no small effort, Ultratec invented an entirely new mode of communication, dubbed captioned telephone service. *Supra* at 5-7. Before Ultratec and its

CapTel-branded service, this mode of communication did not exist.

After expending considerable time and resources on developing CapTel's ground-breaking innovations, Ultratec turned to the patent system. *Id.* at 6-7. It applied to patent its inventions with the PTO and succeeded in obtaining numerous patents, including those at-issue here. *Id.*

These patents were granted to Ultratec under the Patent Act in force at that time. Thus, the substantive terms of that statute defined the rights associated with the patents, including their presumptive validity and the corresponding clear and convincing evidence standard required to invalidate them in any adjudicative proceeding, and the right to amend them in a back-and-forth process in any administrative review. *Infra* at 17.

Ultratec's rights were set when the patents were granted, and Ultratec relied upon them. Then, Congress passed the AIA, which diminished Ultratec's rights. In particular, the AIA created a new process—IPR—that allowed the patents to be invalidated in an adjudicative proceeding under a lesser standard, 35 U.S.C. §§ 6, 311, 316(e), effectively eviscerating the patents' presumptive validity,⁴ and that prevented Ultratec from amending its claims by right.

⁴ Unlike in IPR, in reexamination proceedings, the PTO, under Federal Circuit guidance, treated patents as though they were back in prosecution, without a presumption of validity but allowing for iterative amendments. *Celgene Corp. v. Peter*, 931 F.3d

These deprivations are not merely hypothetical; they are concretely illustrated by the drastically different outcomes between the underlying IPRs and the parallel first-filed federal court litigation against CaptionCall. When afforded the presumption of validity, the patents survived challenge and formed the basis of a \$44 million jury verdict, but when subject to the lesser standard in IPR, the patents were found “unpatentable.” *Supra* at 8.

Because subjecting Ultratec’s patents to IPR diminished Ultratec’s vested property rights, this retroactive provision of the AIA violates the Due Process Clause. The Court reserved opinion on this issue in *Oil States*, but the time has come to settle it. Doing so will prevent further harm to patent owners of earlier-granted patents and also presents the Court an opportunity to clarify its jurisprudence.

a. The Due Process Clause protects against changes in the law that violate vested rights associated with patent grants.

The Due Process Clause protects settled interests from backwards-reaching changes in the law. *Landgraf v. USI Film Prod.*, 511 U.S. 244, 266 (1994). Thus, this Court applies a presumption against statutory changes that compromise vested property rights because they are “matters in which predictability and

1342, 1360 (Fed. Cir. 2019); *In re Cuozzo Speed Techs., LLC*, 793 F.3d 1268, 1287-1288 (Fed. Cir. 2016) (Newman, J., dissenting).

stability are of prime importance.” *Id.* at 271 & n.25 (collecting cases).

Patents are property entitled to protection under the Due Process Clause. *McCormick Harvesting Mach. Co. v. C. Aultman & Co.*, 169 U.S. 606, 609, 612 (1898) (teaching that, upon issuance, a patent “has become the property of the patentee, and as such is entitled to the same legal protection as other property”; later warning against depriving a patent holder “of his property without due process of law”).

Oil States distinguished portions of *McCormick*—particularly that “[t]he only authority competent to set a patent aside, or to annul it, or to correct it for any reason whatever, is vested in the courts of the United States, and not in the department which issued the patent”—on the basis that *McCormick* was interpreting a different version of the Patent Act. *Oil States*, 138 S. Ct. at 1375-1376. But it did not overrule *McCormick*’s basic premise: patents are property, and patent property rights are protected by the Due Process Clause, *see id.* at 1379.

That underlying premise is found in the Patent Act itself: “Subject to the provisions of this title, patents shall have the attributes of personal property.” 35 U.S.C. § 261. That provision was in place at the time Ultratec’s pre-AIA patents issued, in a version of the Patent Act that did not include IPRs. *See* Pub. L. No. 97-247, § 14(b), 96 Stat. 321 (1982). This provision mimics the judiciary’s historical treatment of patents. *Evans v. Jordan*, 8 F. Cas. 872, 873 (C.C.D. Va. 1813)

(Marshall, C.J.) (“The constitution and law, taken together, give to the inventor, from the moment of invention, an inchoate property therein, which is completed by suing out a patent. This inchoate right is exclusive. It can be invaded or impaired by no person.”), *aff’d*, 13 U.S. 199 (1815); *Hovey v. Henry*, 12 F. Cas. 603, 604 (C.C.D. Mass. 1846) (“An inventor holds a property in his invention by as good a title as the farmer holds his farm and flock.”).

The corollary—that patents are protected by the Due Process Clause—is also supported by historical jurisprudence. Since the nation’s founding, this Court has afforded patents constitutional protections. *McCormick*, 169 U.S. at 612; *see also Fla. Prepaid Post-secondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 642 (1999) (patents “are surely included within the ‘property’ of which no person may be deprived by a State without due process of law”); *Richmond Screw Anchor Co. v. United States*, 275 U.S. 331, 345 (1928) (construing change in statute to avoid “serious question as to the constitutionality of the act of 1918 under the Fifth Amendment of the Federal Constitution”); *James v. Campbell*, 104 U.S. 356, 358 (1881) (patent grant “an exclusive property” that cannot be used or appropriated by the government without just compensation).

Because patents are property protected by the Due Process Clause, substantive rights vested in a patent and its owner’s settled expectations cannot be violated by subsequent changes in the law. *McClurg v. Kingsland*, 42 U.S. 202, 206 (1843) (repeal in the law “can

have no effect to impair the right of property then existing in a patentee, or his assignee, according to the well-established principles of this court”); *see also Choate v. Trapp*, 224 U.S. 665, 674 (1912) (vested rights in tax exemptions conferred with land patents could not be abrogated by statute). Vested property rights are those that are defined by the statute under which the property is granted. *Ward v. Bd. of Cty. Comm’rs of Love Cty., Okla.*, 253 U.S. 17, 20-21 (1920) (“vested property right[s] aris[e] out of a law of Congress”). They are constitutionally protected and cannot be impaired by statute. *Id.*

Choate v. Trapp and cases following it are instructive. In *Choate*, members of two Native American tribes were each granted a patent to a parcel of land by federal statute. 224 U.S. at 667. The statute restricted sale of the land and exempted it from taxes for a specified period. *Id.* Before the period expired, Congress passed another statute removing restrictions on sale of certain parcels and subjecting those parcels to taxation. *Id.* at 670. The Court held the imposition of taxes on the parcels unconstitutional, reasoning that, once the members received their land patents, “they were vested with all the right conveyed by the patent ... [,]” which included the tax exemption. *Id.* at 672. Because the rights were vested, Congress could not constitutionally deprive the members of them. *Id.* at 674 (citing Fifth Amendment). In the words of this Court, because the exemption was “a vested property right[, it] could not be abrogated by statute.” *Id.*; *see also Ward*, 253 U.S. at 20 (“exemption was a vested property

right which Congress could not repeal consistently with the Fifth Amendment”).

Vested property rights are not unique to land grants; as explained above, they arise out of the substantive terms associated with any statutorily granted property. *Ward*, 253 U.S. at 20-21. In the patent context, the Patent Act defines the substantive terms under which a patent is granted, giving rise to vested rights protected from subsequent changes in the law. *McClurg*, 42 U.S. at 206.

When Ultratec’s patents were granted, the Patent Act then in effect provided a number of substantive terms giving rise to vested rights—none of which were encumbered by the IPR. *See Oil States*, 138 S. Ct. at 1376 (patent rights depend on version of the Patent Act in effect). For example, Ultratec’s patents were imbued with a presumption of validity. (App. 100-103 (citing current and previous versions of 35 U.S.C. § 282)). Consistent with this presumption, they could not be invalidated in any adjudicative proceeding without clear and convincing evidence. *Microsoft Corp. v. i4i Ltd. P’ship*, 564 U.S. 91, 102 (2011). These provisions are not mere procedural considerations; they are rules of substantive law. *Medtronic, Inc. v. Mirowski Fam. Ventures, LLC*, 571 U.S. 191, 199 (2014) (citing *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 249 (1942)). Moreover, the patent-review regime at the time—reexamination—provided a robust “iterative amendment process” through which Ultratec had the right to amend its patent claims in a back-and-forth with the

examiner. *Cuozzo*, 793 F.3d at 1287-1288 (Newman, J., dissenting).

In sum, when Ultratec's patents were granted, it had settled expectations that it could rely on their statutorily provided presumptive validity and the corresponding heightened standard of proof for any adjudicative proceeding, the robust amendment process of reexamination, and all of the other substantive terms under which those patents were granted. Under this Court's jurisprudence, these vested rights were entitled to the protections of the Due Process Clause.

b. IPR unconstitutionally upset Ultratec's settled expectations.

The AIA fundamentally changed the patent system when it introduced IPRs, an adjudicative process that allowed patent challengers to skirt the substantive terms of preexisting patent grants. These new proceedings were—by design—unlike the prior patent review scheme in that they were adjudicative in nature with full participation from the patent challenger. *See* H.R. Rep. No. 112-98, pt. 1, at 46–48 (2011), 2011 U.S.C.C.A.N. 67, 75, 77–79.

These changes violated the vested rights that patent owners, like Ultratec, held in their preexisting patents. In particular, the AIA retroactively abrogated the presumptive validity of all preexisting patents by allowing patent challengers to invalidate them via IPR based on mere preponderance of the evidence. 35 U.S.C. § 316(e). While the AIA did not expressly revoke

the presumption of validity, its imposition of a lower standard to invalidate them in an adjudicative proceeding is the functional equivalent. *See Microsoft*, 564 U.S. at 102 (clear and convincing evidence standard of proof coterminous with presumption of validity).

In addition, when Ultratec's IPRs were instituted, the PTO imposed the broadest reasonable interpretation standard to construe patent claims,⁵ but did not pair this broad standard with any meaningful method to amend the claims. At that time, patent owners were deprived of any *right* to amend their claims; instead, they had to request leave to amend by motion. *Cuozzo*, 793 F.3d at 1287 (Newman, J., dissenting). Patent owners were limited to one motion and could not file that motion until conferring with the Board, were presumptively limited to substituting one issued claim for one amended claim, *id.*, 37 C.F.R. § 42.221 (May 19, 2015), and were assigned the burden of showing their amended claims were not invalid (a standard later

⁵ In an effort to “minimiz[e] differences between” the Board and district courts and to promote “uniformity and predictability of the patent grant,” the Board replaced its broadest reasonable interpretation standard with the stricter *Phillips* standard for all IPRs filed after November 13, 2018, 83 Fed. Reg. 51340-01, but this was too late to help Ultratec. Further, the Board refused to re-construe the claims at-issue under *Phillips* even after the patents expired. (App. 26-27). This error was compounded by the Federal Circuit's failure to issue an opinion, which would have required the same.

changed).⁶ Motions were rarely granted,⁷ making the process practically “illusory.” *Id.*

These deprivations were exacerbated by the PTO’s rules restricting patent owners’ meaningful participation. While the PTO has recently attempted to make some reforms,⁸ at the time the underlying IPRs were decided, the PTO significantly restricted the amount and type of discovery allowed. 37 C.F.R. §§ 42.51(b) & 42.52 (May 19, 2015), imposed strict limits on briefing, 37 C.F.R. §§ 42.24 & 42.63 (May 19, 2015), refused to take live testimony as a matter of course, 77 Fed. Reg.

⁶ Effective January 20, 2021, the PTO revised its rules governing motions to amend to expressly assign the petitioner the burden of showing the substitute claims were unpatentable. 85 Fed. Reg. 82935-01; *see also Aqua Prods., Inc. v. Matal*, 872 F.3d 1290, 1297 (Fed. Cir. 2017) (discussing Board’s former approach of allocating patentee burden of showing proposed amendments overcame prior art).

⁷ Of the first 146 motions to amend seeking substitution of pending claims with amended claims, the Board granted six. Monica Grewal, et al., *IPR Motions to Amend: Rays of Hope Despite Gloomy Statistics*, Law360 (May 19, 2016), <https://www.law360.com/articles/792757/>; *see also* PTO, PTAB Motion to Amend Study, 6 (Apr. 30, 2016), <https://www.uspto.gov/sites/default/files/documents/2016-04-30%20PTAB%20MTA%20study.pdf> (reporting 2% granted, 3% granted in part).

⁸ For example, the Board “relaxed” its rules on page limits for motions to amend, increasing the limit from 15 to 25 pages, 80 Fed. Reg. 28561-01, but this came too late to factor into Ultratec’s IPR strategy. As another example, the Board published an update to its Trial Practice Guide providing that patent owners will generally be allowed sur-replies to support their responses, Trial Practice Guide Update, 14 (Aug. 2018), https://www.uspto.gov/sites/default/files/documents/2018_Revised_Trial_Practice_Guide.pdf, but Ultratec was not able to take advantage of this procedure.

48762, 48768 (Aug. 14, 2012), and discouraged the use of sensitive business information by generally making all evidence public, 77 Fed. Reg. 48760-48761 (Aug. 14, 2012).

All of these problems are compounded by the Federal Circuit's limited, one-sided, and opaque review of IPRs. Decisions to institute IPR—which effectively strip patents of their statutorily-granted presumptive validity—are not reviewable by the Federal Circuit (or any court). 35 U.S.C. § 314(d). Final decisions are reviewable, but are judged only for substantial evidence, which merely inquires “whether the decision could reasonably have been made, not whether it was correctly made.” *Merck & Cie v. Gnosis S.P.A.*, 808 F.3d 829, 840 (Fed. Cir. 2015) (Newman, J., dissenting). Moreover, as explained *infra* the Federal Circuit's reasons for affirming many IPR decisions are unexplained, which is particularly troubling given that this Court took pains to note the importance appellate review had on its holding in *Oil States*. 138 S. Ct. at 1379.

In sum, the AIA violated Ultratec's vested rights in its patents by subjecting the patents to IPR, which effectively stripped the patents of their presumptive validity and deprived Ultratec of other protections that Ultratec reasonably believed it would have.

c. IPRs have devastated the value of earlier-granted patents, violating settled expectations.

The effects of the constitutional deprivations caused by the AIA are on full display in these appeals. When Ultratec’s patents were afforded a presumption of validity and CaptionCall was forced to challenge them in federal court under the clear and convincing evidence standard, Ultratec prevailed, winning a \$44 million jury verdict against CaptionCall for its past infringement of patents that the Board later found “unpatentable” on mere preponderance of the evidence. (App. 118; *supra* at 8).

Ultratec’s plight is not uncommon. The Board invalidates patent claims at an alarming rate.⁹ Ironically, the brunt of these invalidations has been borne by owners of earlier-granted patents, like Ultratec. Saurabh Vishnubhakat, *The Mixed Case for a PTAB Off-Ramp*, 18 Chi.-Kent J. Intell. Prop. 514, 519 (2019)

⁹ Based on data from 7,000 petitions, for those that reached final written decision, the Board found *all* challenged claims unpatentable 69% of the time. Steve Brachmann & Gene Quinn, *Are more than 90 percent of patents challenged at the PTAB defective?*, IPWatchdog (June 14, 2017), <https://www.ipwatchdog.com/2017/06/14/90-percent-patents-challenged-ptab-defective/id=84343/>. This trend is holding strong: The Board reported that, of those petitions that reached final written decision from October 1, 2020 to March 31, 2021, the Board found *all* challenged claims unpatentable over 66% of the time. PTO, AIA Trial Statistic FY 2021 Q2, 11 https://www.uspto.gov/sites/default/files/documents/ptab_aia_fy2021_q2_roundup_.pdf.

(reporting pre-AIA patents accounted for about 62.5% of all IPR petitions in the first six years).

It is difficult to articulate how devastating IPRs have been to the patent system. One observer estimated “the value of patents has dropped by two-thirds since and because of the AIA.” Gregory Dolin & Irina D. Manta, *Taking Patents*, 73 Wash. & Lee L. Rev. 719, 791 (2016). This number is comparable to other estimates. *The Trouble with Patent-Troll-Hunting*, The Economist, Dec. 14, 2019, at 60 (average value of an American patent dropped by 58 percent from 2013 to 2018).

Patent owners have little ability to enforce their patents without exposing themselves to IPRs. Once a patent owner sues, the infringer has up to one year to petition the Board to invalidate the patent under the lower preponderance standard. 35 U.S.C. § 315(b). This, combined with courts’ proclivity to stay (even earlier-filed) proceedings means that patent owners often must defend their patents with no presumption of validity before the infringer is held accountable. Brian J. Love, et al., *Determinants of Patent Quality: Evidence from Inter Partes Review Proceedings*, 90 U. Colo. L. Rev. 67, 100 n.146 (2019) (reporting a 69% overall grant rate for motions to stay pending IPR and higher rates after institution and when the parties are common).

Even if litigation is first-filed and reaches judgment, that does not ensure it will ultimately govern. Ultratec secured its jury verdict before the Board

issued its final decisions (App. 114-117), but under the Federal Circuit's current precedent, the Board's later-issued decisions, if affirmed and finalized, will render the verdict moot. *Fresenius USA, Inc. v. Baxter Int'l, Inc.*, 721 F.3d 1330 (Fed. Cir. 2013).

All these points combine to create a scenario where patent owners are (unconstitutionally) dissuaded from enforcing patents that they duly obtained through innovation and expense. Without the power to enforce, the inherent trade-off that supports the U.S. patent system is lost.

d. These appeals raise an issue of critical importance to holders of millions of earlier-granted patents.

The unconstitutionality of applying IPR to earlier-granted patents is of critical importance to Ultratec and similarly situated patent owners. Whether IPR applies to these patents may be the difference between an infringement verdict and patent cancellation. And the experience is far from unique: when the AIA went into effect in 2011, millions of patents had been granted and were within their expiry period. See PTO, Patent Statistics Chart Calendar Years 1963-2020, https://www.uspto.gov/web/offices/ac/ido/oeip/taf/us_stat.htm.

These appeals present the Court an ideal opportunity to address the constitutional issue because, when compared to the parallel litigation, they illustrate the devastating effects IPR has had on earlier-granted

patents. Ultratec's patents were simultaneously litigated in two different forums with two drastically different outcomes. When their vested presumption of validity was honored, they survived challenge and gave rise to a \$44 million verdict. When unconstitutionally stripped of that vested right, they were wrongly found "unpatentable." These differing outcomes compel the Court to weigh in on the constitutional implications.

These appeals also present the Court with the opportunity to clarify its precedent on the Due Process Clause and its application to statutorily granted property rights. While this Court's earlier precedent, *supra* establishes that patents are property entitled to protection from subsequent changes in the law that diminish vested rights, more recent precedent has created confusion concerning the standard, albeit with respect to legislation imposing economic burdens, not legislation conferring property rights.

For example, in *Eastern Enterprises v. Apfel*, this Court invalidated retroactive legislation requiring an employer to fund pensions for retired miners. 524 U.S. 498 (1998). Although the Court struck down the legislation as unconstitutional, it provided no clear framework for doing so. A plurality of Justices held the retroactive provision violated the Takings Clause, *id.* at 504 (plurality opinion), while others argued the Due Process Clause was the more appropriate framework, *see id.* at 539 (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 554-556 (Breyer, J., dissenting).

Justice Kennedy, concurring in the judgment, but dissenting as to its reasoning, wrote that “[a]ccepted principles forbidding retroactive legislation” under the Due Process Clause were “sufficient to dispose of the case,” because the challenged law had a severe retroactive effect and undermined the stability of investment and confidence in law. *Id.* at 547, 549 (Kennedy, J.). Justice Breyer, while dissenting outright, agreed at least with Justice Kennedy’s premise: “the Due Process Clause can offer protection against legislation that is unfairly retroactive ... for as courts have sometimes suggested, a law that is fundamentally unfair because of its retroactivity is a law that is basically arbitrary.” *Id.* at 556-557 (Breyer, J.).

Although *Eastern Enterprises* concerned new economic burdens and not deprivation of vested property rights, the boundary between those concepts is not always clear, and the relative recency of that decision introduces some uncertainty regarding whether and how the Due Process Clause applies to backward-looking legislation like the AIA.

The Court should clearly hold, consistent with its earlier jurisprudence, that the Due Process Clause protects owners of statutorily-granted property from subsequent changes in the law that diminish vested rights, and that the retroactive application of IPR to earlier-granted patents violates this protection.

II. The Court should review the Federal Circuit’s routine use of Rule 36 to summarily affirm PTO decisions without opinion because such affirmances violate 35 U.S.C. § 144 and give rise to constitutional concerns.

On October 14, 2020, the Federal Circuit brought eight years of intense litigation between Ultratec and CaptionCall—encompassing nine IPR proceedings, two Federal Circuit appeals, and parallel litigation that went to a two-week jury trial—to a halt. The Federal Circuit did so by issuing one-word summary affirmances in the underlying appeals pursuant to Federal Circuit Rule 36 (App. 94), endorsing, without explanation, the Board’s decisions that the 37 claims at-issue were unpatentable.

These summary affirmances violate Section 144 because they do not contain an “opinion”—i.e., an explanation of the reasons for the court’s decision—as that statute requires. *See* 35 U.S.C. § 144 (“the court shall issue ... its mandate and opinion”). By definition, summary affirmances are judgments “without opinion,” Fed. Cir. R. 36(a), and thus they do not satisfy the requirements that Congress intended for appeals from PTO decisions.

Ultratec’s predicament clarifies the flaws in this procedure. In these appeals, the underlying PTO decisions were based on erroneous claim constructions that could not be adopted as the Federal Circuit’s own. This is because the patents-at-issue had expired after

the original final written decisions, but before the appeals were exhausted, necessarily changing the proper claim construction standard from broadest reasonable interpretation to the narrower *Phillips* standard. *Apple*, 949 F.3d at 707. Although the claims were never properly construed, the Federal Circuit approved the decisions without explanation.

Ultratec is far from alone in facing judgment without explanation. The Federal Circuit disposed of 44-46% of all PTO appeals in recent years in this manner.¹⁰ This practice has given rise to significant criticism—not only that it violates the Patent Act, but that the court is failing to fulfill its duty to develop and unify patent law and, worse, may actually be distorting it; that it is using its self-made rule to avoid engaging deeply with tricky cases and, worse, may be attempting to “cert-proof” itself; and that it is generally eroding confidence in the judicial system. These concerns give rise to even larger problems, including deprivation of constitutional rights.

The issue of the Federal Circuit improperly using Rule 36 in PTO appeals will not resolve itself. It will require this Court’s intervention. Given the magnitude of the problem, the Court should act now before further damage is done to the patent system and the public’s trust.

¹⁰ *Infra* notes 15-16 & accompanying text.

a. Section 144 commands the Federal Circuit to issue an opinion in PTO appeals.

Section 141(c) grants the Federal Circuit exclusive jurisdiction over direct appeals taken from PTO proceedings, including IPR. 35 U.S.C. § 141(c). Section 144 imposes requirements on the Federal Circuit’s review of these proceedings, including that the Federal Circuit “shall issue ... its mandate and opinion” upon its determination of the appeal. 35 U.S.C. § 144.

This language plainly expresses Congress’ intent that the Federal Circuit must—without discretion—issue an explanation of the reasons for its mandate in any PTO appeal. The term “shall issue” is “both mandatory and comprehensive. The word ‘shall’ generally imposes a nondiscretionary duty.” *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1354 (2018). This Court recently construed similar language from 35 U.S.C. § 318—that the PTO “shall issue a final written decision”—and concluded that it “deliver[s] unmistakable commands” that the PTO must issue a written decision on all claims subject to a petition for review. *Id.* at 1358.

The term “mandate and opinion” is similarly clear. The language plainly distinguishes between the Federal Circuit’s mandate and its opinion, which is consistent with the Court’s treatment of those terms. A mandate contains a court’s decree, whereas an opinion “is a statement of the reasons on which the judgment rests.” *Rogers v. Hill*, 289 U.S. 582, 587 (1933); *see also Comm’r v. Bedford’s Est.*, 325 U.S. 283, 286 (1945) (distinguishing between opinions, judgments, and orders

for mandate); Black's Law Dictionary 1265 (10th ed. 2014) (defining "opinion" as the "court's written statement explaining its decision in a given case, usu[ally] including the statement of facts, points of law, rationale, and dicta.").

This plain meaning is conclusive and there is no reason to look beyond the statute's language. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989). Even so, other devices of statutory construction confirm Congress' intent that the Federal Circuit explain the reasons for its decisions in PTO appeals.

The legislative history of Section 144 supports this understanding. Section 144 first appeared in the 1952 Patent Act, which commanded that the Court of Customs and Patent Appeals ("CCPA"), the Federal Circuit's predecessor, "shall return to the Commissioner a certificate of its proceedings and decision, which shall be entered of record in the Patent Office and govern the further proceedings in the case." Pub. L. No. 593, § 144, 66 Stat. 792, 802 (1952); *see* 35 U.S.C. § 144 (1952). Up until the creation of the Federal Circuit, Section 144 operated in conjunction with Section 216 of Title 28, which separately required the CCPA to issue a written opinion in PTO appeals. *See* 28 U.S.C. § 216 (1976) (the CCPA, "on each appeal from a Patent Office decision, shall file a written opinion as part of the record ...").

In 1984, Section 144 was amended to its present form, replacing the "certificate of its proceedings and decision" language with the "mandate and opinion" language of today. *See* Pub. L. No. 98-620, title IV,

subtitle C, § 144, 98 Stat. 3363 (1984). That change incorporated into Section 144 the “opinion” requirement previously imposed on the CCPA by 28 U.S.C. § 216. *Compare* 35 U.S.C. § 144 (“the court shall issue to the Director its mandate and opinion ...”) *with* 28 U.S.C. § 216 (1976), Repealed. Pub. L. 97-164, title I, § 106, 96 Stat. 28 (1982), (the CCPA, “on each appeal from a Patent Office decision, shall file a written opinion ...”).

This legislative history comports with Congress’ unique goals for the Federal Circuit, which was meant “to improve the administration of the patent law by centralizing appeal in patent cases ...” S. Rep. No. 97-275, at 2 (1981), 1982 U.S.C.C.A.N. 11, 12. The Federal Circuit cannot effectively complete Congress’ stated goals of unifying and improving the administration of patent law without issuing reasoned, written opinions.

Public policy also supports a written opinion requirement. Requiring a court to “show its work”—particularly in notoriously difficult cases like patent cases—fulfills a number of important functions. It aids the court’s decision-making process and helps ensure correct outcomes. Thomas E. Baker, *A Review of Corpus Juris Humorous*, 24 Tex. Tech L. Rev. 869, 872 (1993). It helps foster trust in the system by showing that the court’s decisions are the product of reason rather than caprice. *Id.* And it helps develop the law and facilitate meaningful judicial review, including by this Court. *Id.*; *see Taylor v. McKeithen*, 407 U.S. 191, 194 (1972) (per curiam).

All of these functions take on particular importance in patent cases, which involve grants of public rights. *Oil States*, 138 S. Ct. at 1373-1376. Fair, well-reasoned, and transparent judicial review of patent grants is a prerequisite if inventors and the public are to understand the scope of their rights and act accordingly. See *Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 30 (1997) (discussing “the public’s right to clear notice of the scope of the patent as embodied in the patent file”).

In sum, the plain language of Section 144, and all surrounding evidence, establish Congress’ intent that the Federal Circuit “shall” explain its reasoning in deciding PTO appeals. This statutory mandate trumps the courts’ general authority to “prescribe rules for the conduct of [its] business” because any such rules “shall be consistent with Acts of Congress” 28 U.S.C. § 2071(a).

Despite this, the Federal Circuit insists that it is entitled to issue judgments without opinions. Apart from citing Rule 36 and its own interpretation of the rule, the Federal Circuit has cited a footnote in the per curiam opinion from *Taylor*, 407 U.S. 191, for the proposition that “the courts of appeals should have wide latitude in their decisions of whether or how to write opinions. That is especially true with respect to summary affirmances,” *id.* at 194 n.4; see, e.g., *Phil-Insul Corp. v. Airlite Plastics Co.*, 854 F.3d 1344, 1354 (Fed. Cir. 2017) (citing *Taylor*).

Taylor did not consider a statutory command like that of Section 144. As emphasized by the dissenting opinion, no then-existing statute or rule of procedure prohibited the appellate court in that case from deciding that particular appeal without an opinion. *Id.* at 195-196 (Rehnquist, J.). That is not the case here, where the appeals were inarguably subject to the requirements of Section 144.

b. Rule 36 affirmances, by definition, issue without opinions and thus violate Section 144 and raise concerns of constitutional magnitude.

The Federal Circuit promulgated Rule 36 in 1989—five years after Section 144 was amended to its current form. *See The Seventh Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit*, 128 F.R.D. 409, 420 (1989). At the time, the Federal Circuit apparently did not consider how the rule interacted with the requirements of Section 144, and it has not meaningfully engaged with the issue since.

The very title of Rule 36—“judgment of affirmance without opinion”—alone demonstrates that summary affirmances do not contain “opinions” as required by Section 144. Fed. Cir. R. 36(a). The Federal Circuit has confirmed this: “Since there is no opinion, a Rule 36 judgment ... does not endorse or reject any specific part of the [lower tribunal]’s reasoning. In addition, a judgment entered under Rule 36 has no precedential value

and cannot establish ‘applicable Federal Circuit law.’” *Rates Tech., Inc. v. Mediatix Telecom, Inc.*, 688 F.3d 742, 750 (Fed. Cir. 2012).

Beyond this statutory problem, Rule 36 summary affirmances create a host of other concerns. The Federal Circuit’s prevalent use of Rule 36, *see infra*, deprives patent owners challenging adverse PTO decisions of meaningful appellate review. The Federal Circuit has effectively shut down opportunities for rehearing of summary affirmances by advising “[a] petition for rehearing en banc is rarely appropriate if the appeal was the subject of a nonprecedential opinion by the panel of judges that heard it.” Practice Notes to Federal Circuit Rule 35.

More fundamentally, because Rule 36 affirmances do not endorse or reject any portion of the underlying decisions, *Rates Tech.*, 688 F.3d at 750, the bases for any one affirmance are unknown and, thus, neither an en banc panel nor this Court can effectively judge the decision, including for whether the affirmance complies with basic rules like the *Chenery* doctrine. *Sec. & Exch. Comm’n v. Chenery Corp.*, 318 U.S. 80, 94 (1943) (“[C]ourts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review.”); *Sec. & Exch. Comm’n v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (“[A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to

affirm the administrative action by substituting what it considers to be a more adequate or proper basis.”).

These are problems of a constitutional magnitude. This Court has held that IPR does not violate Article III or the Seventh Amendment, generally, but suggested that may not be the case if IPR did not provide for appellate review. *Oil States*, 138 S. Ct. at 1379 (“because the Patent Act provides for judicial review by the Federal Circuit, see 35 U.S.C. § 319, we need not consider whether inter partes review would be constitutional ‘without any sort of intervention by a court at any stage of the proceedings’” (citation omitted)).

Finally, the Federal Circuit’s use of Rule 36 in PTO appeals has impeded its ability to carry out Congress’ stated goals for the court. One-word affirmances cannot develop and unify the law. To the contrary, because these affirmances do not endorse or reject any particular rationale, *Rates Tech.*, 688 F.3d at 750, they have the perverse effect of allowing erroneous reasoning to remain “the law.” These ills are compounded when the patents-at-issue or related patents may be involved in parallel proceedings that could benefit from the Federal Circuit’s reasoned explanation.

c. Despite mounting concerns, the Federal Circuit habitually invokes Rule 36 in appeals taken from IPRs.

The Federal Circuit’s prevalent use of Rule 36 has been roundly criticized. Academics have considered the issue raised here—whether Rule 36 affirmances

violate Section 144—and have answered in the affirmative.¹¹ They have also argued that such affirmances distort, rather than develop, the law.¹² Practitioners likewise have raised concerns with the lack of transparency and a perceived margin of error.¹³ And numerous petitioners to this Court have presented variations of all of these issues.¹⁴

Despite this mounting criticism, the Federal Circuit shows no signs of breaking its habit. A recent report specified that the court issued summary affirmances in nearly 44% of PTO appeals in 2021 through April 30.¹⁵ This aligns with numbers reported in

¹¹ 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, 257 (2018); Dennis Crouch, *Wrongly Affirmed Without Opinion*, 52 Wake Forest L. Rev. 561, 576 (2017).

¹² Andrew Hoffman, *The Federal Circuit's Summary Affirmance Habit*, 2018 B.Y.U. L. Rev. 419, 421 (2018).

¹³ Matthew Bultman, *Fed. Cir. Issuing More 'Hidden Decisions' amid Case Influx*, Law360 (Mar. 1, 2017), <https://www.law360.com/articles/894024/fed-circ-issuing-more-hidden-decisions-amid-case-influx>; Peter Harter & Gene Quinn, *Rule 36: Unprecedented Abuse at the Federal Circuit*, IPWatchdog (Jan. 12, 2017), <http://www.ipwatchdog.com/2017/01/12/rule-36-abuse-federal-circuit/id=76971/>.

¹⁴ See, e.g., *Senju Pharm. Co., Ltd. v. Akorn, Inc.*, No. 18-1418, Pet. Cert. (U.S. May 10, 2019); *Capella Photonics, Inc. v. Cisco Sys., Inc.*, No. 18-314, Pet. Cert. (U.S. Sept. 6, 2018); *Specialty Fertilizer Prods., LLC v. Shell Oil Co.*, No. 17-1243, Pet. Cert. (U.S. Mar. 6, 2018).

¹⁵ Daniel Klodowski & Eric A. Lui, *Federal Circuit PTAB Appeal Statistics Through April 30, 2021*, At the PTAB Blog (May 20, 2021), <https://www.finnegan.com/en/insights/blogs/at-the-ptab-blog/federal-circuit-ptab-appeal-statistics-through-april-30-2021.html>.

previous years: 44% in 2020, 46% in 2019, 46% in 2018, and 44% in 2017.¹⁶

The frequency of these summary affirmances, combined with the Federal Circuit's generally high affirmation rate of Board decisions, mean that patent owners seeking review from an adverse decision are often left with no judicial explanation for why they lost. As one observer noted: "As a group, patent owner-appellants seldom succeeded at the Federal Circuit, with [Board] unpatentability determinations being affirmed 85% of the time. With approximately 60% of such affirmances being made under Rule 36, approximately half of all patent owner IPR appeals were rejected without a substantive appellate opinion."¹⁷

¹⁶ Daniel F. Klodowski & Eric A. Liu, *Federal Circuit PTAB Appeal Statistics Through October 31, 2020*, At The PTAB Blog (Nov. 18, 2020), <https://www.finnegan.com/en/insights/blogs/at-the-ptab-blog/federal-circuit-ptab-appeal-statistics-through-october-31-2020-copy.html#:~:text=Through> (reporting numbers for first ten months of 2020); David C. Seastrunk, et al., *Federal Circuit PTAB Appeal Statistics Through May 15, 2019*, At The PTAB Blog (May 31, 2019), <https://www.finnegan.com/en/insights/blogs/at-the-ptab-blog/federal-circuit-ptab-appeal-statistics-through-may-15-2019.html> (reporting numbers for first five months of 2019); Jacqueline Bell & Ryan Davis, *The Federal Circuit in 2018: A By-The-Numbers Snapshot*, Law360 (Mar. 26, 2019), <https://www.law360.com/articles/1142664/the-federal-circuit-in-2018-a-by-the-numbers-snapshot> (reporting numbers for 2017 and 2018); see also Jason Rantanen, *The Landscape of Modern Patent Appeals*, 67 Am. U. L. Rev. 985, 1021-1023 & Figs. 10-11 (2018) (compiling data on types of nonprecedential decisions in appeals arising from the USPTO from 2008 to 2017).

¹⁷ Larry Sandell, *What 18 Months of IPR Stats Teach Us About Winning Appeals*, Law360 (July 20, 2020), <https://www.law360.com>.

Defenders of the Federal Circuit’s practice may assert that summary affirmances are necessary given the rise of cases from the PTO. But a court’s desire for efficiency cannot trump Congress’ clear intent. Moreover, this concern conflicts with the Federal Circuit’s insistence that cases in which it issues summary affirmances receive the same amount of care as cases in which it issues precedential opinions. *Phil-Insul*, 854 F.3d at 1354.

With this commonly invoked efficiency defense debunked, less legitimate rationales emerge, including a desire to avoid wrestling with difficult issues and “cert-proofing” cases.¹⁸

d. There is a need for this Court to intervene and these appeals present the ideal opportunity.

These appeals present an ideal opportunity for this Court to proclaim invalid the Federal Circuit’s use of Rule 36 in appeals from PTO proceedings. Ultratec has clearly been victimized by the practice: after eight years of parallel litigation in federal court and at the Board, Ultratec saw 37 claims from eight of its patents,

[com/articles/1293373/what-18-months-of-ipr-stats-teach-us-about-winning-appeals](http://www.patentbar.org/articles/1293373/what-18-months-of-ipr-stats-teach-us-about-winning-appeals).

¹⁸ Harter & Quinn, *supra* note 13 (summarizing appeals involving complex issues where the Federal Circuit issued Rule 36 affirmances); Hoffman, *supra* note 12 (examining three cases where the Federal Circuit potentially engaged in cert-proofing).

subject to nine different IPR proceedings, obliterated with three one-word affirmances.

The summary affirmances here violated Congress' intent that Ultratec and the public receive a written explanation for the decisions. Equally troubling, these affirmances blessed decisions premised on unquestionably flawed claim constructions. Ultratec alerted the Federal Circuit to this problem: it explained that the patents had expired after the Board had construed the claims under the broadest reasonable interpretation standard, that the Board had refused to re-construe the claims under the proper *Phillips* standard (App. 26-27), and thus the underlying decisions were unaffirmable under Rule 36 or otherwise (*e.g.*, R.38:27-34). Despite these warnings, and its own precedent mandating that the claims be re-construed under *Phillips* after they expire, *In re CSB-Sys. Int'l, Inc.*, 832 F.3d 1335, 1341 (Fed. Cir. 2016), *Apple*, 949 F.3d at 707, the court summarily affirmed anyway and denied rehearing (App. 1-6, App. 87-92).

As evidenced by the number of petitions raising the issue,¹⁹ there is a compelling need for this Court to intervene. Congress has already spoken on the topic; it has just been ignored. The Federal Circuit appears unwilling to address the problem on its own. That leaves this Court with a duty to step in.

¹⁹ *Supra* note 14.

III. These appeals present the Court an opportunity to weigh in on the important issues raised herein.

Despite the Federal Circuit's cursory treatment of the merits of the underlying proceedings, these appeals present an ideal opportunity for the Court to weigh in on the important issues raised.

As explained *supra*, the issues Ultratec raises have merit, and the Federal Circuit's summary affirmances provide no reasoning to the contrary. Per the Federal Circuit itself, a summary affirmance says *nothing* about the reasoning underpinning the appeal's outcome, or even the relative merits of the parties' arguments in the underlying proceeding. *Innovation Scis., LLC v. Amazon.com, Inc.*, 842 F. App'x 555, 558 (Fed. Cir. 2021) (unpublished).

The two issues raised are pure legal questions that require no further factual development. They are questions of constitutional and statutory interpretation, for which the procedural history of these appeals provide a unique lens to consider the implications of the AIA on preexisting patents.

On the first issue, the Federal Circuit has thus far side-stepped the question, having dispensed with the issue by pointing to its case law interpreting the Takings Clause. *See, e.g., Sound View Innovations, LLC v. Hulu, LLC*, 818 F. App'x 1009, 1013 (Fed. Cir. 2020); *OSI Pharms., LLC v. Apotex Inc.*, 939 F.3d 1375, 1386 (Fed. Cir. 2019) (citing *Celgene*, 931 F.3d at 1362). On the second issue, Congress has spoken, commanding

the Federal Circuit to issue opinions, but the Federal Circuit appears content to ignore the statute. In short, the Federal Circuit has given no indication it is poised to act on either issue.

Ultratec and other similarly situated patent owners have no place to turn other than this Court, and its intervention on both issues is direly needed.



CONCLUSION

For the foregoing reasons, the Court should grant the Petition.

Respectfully submitted June 4, 2021,

DONALD K. SCHOTT
Counsel of Record
KRISTIN GRAHAM NOEL
MARTHA JAHN SNYDER
ANITA MARIE BOOR
QUARLES & BRADY LLP
33 East Main Street
Suite 900
Madison, WI 53703
(608) 251-5000
donald.schott@quarles.com

Counsel for Petitioner Ultratec, Inc.