No. 24-518

IN THE

Supreme Court of the United States

PARKERVISION, INC.,

Petitioner,

v.

TCL INDUSTRIES HOLDINGS CO., LTD., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF *AMICI CURIAE* PHYLLIS SCHLAFLY EAGLES AND EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

In connection with advanced wireless technology essential to our national security, the Federal Circuit issued a summary one-word affirmance, without a written opinion or any disclosure of the court's underlying reasoning, in favor of a China-owned company that is allegedly infringing on an American inventor's patent. The question presented is:

> Whether 35 U.S.C. § 144, which requires the Federal Circuit to issue an "opinion" on appeal from the Patent Trial and Appeal Board (PTAB), is a reason-giving directive that prohibits the Federal Circuit's practice, under Federal Circuit Rule 36(a), of summarily affirming PTAB decisions without issuing opinions, particularly in this case concerning the alleged theft by a hostile nation of technology essential to our national interests.

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INTERESTS OF *AMICI CURIAE*[1]

Amici Curiae Phyllis Schlafly Eagles was founded in 2016 as an association to carry on the work of its namesake, whose father had obtained a patent in a rotary engine in 1945 (U.S. Patent No. 2,373,791). Phyllis Schlafly was outspoken in support of the rights of individual inventors throughout her long political career, which she recognized as a fundamental constitutional right essential to our national security

[1] *Amici* file this brief after providing the requisite ten days' advance written notice to counsel for all the parties. Pursuant to Rule 37.6, counsel for *amici curiae* authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity – other than *amici*, its members, and its counsel – contributed monetarily to the preparation or submission of this brief.

and prosperity. Phyllis Schlafly Eagles continues her political advocacy and weekly commentaries.

Amicus Eagle Forum Education & Legal Defense Fund ("Eagle Forum ELDF") was founded in 1981 by Phyllis Schlafly, to advance conservative educational and legal goals. In addition to publishing materials on this topic, Eagle Forum ELDF has filed multiple *amicus* curiae briefs in this Court in support of individual inventors for more than a decade, including in *Bilski v. Kappos*, 561 U.S. 593 (2010). Eagle Forum ELDF has also submitted numerous comments to the Patent and Trademark Office in defense of inventors' rights.

Amici therefore have strong interests in this Petition for a Writ of Certiorari.

SUMMARY OF ARGUMENT

The Federal Circuit – contrary to every other Court of Appeals – commonly issues one-word affirmances without disclosure of the court's underlying reasoning. The parties, other branches of government, and the public have no means of determining if arbitrariness, mistakes, or abuse of power underlie these unexplained decisions. Rule of Law requires more than the Federal Circuit is providing with its concealment of its bases for its decision-making.

For the American patent system, which is itself grounded in the immense value of public disclosure and transparency, this hide-the-ball practice of the Federal Circuit under its peculiar Rule 36 is particularly inappropriate. Where, as here, an unexplained decision by the Federal Circuit concerns a technology implicating national interests, this lack

of disclosure by the appellate court of the basis for its decision is indefensible.

In this case, the Federal Circuit allowed a China-owned company[2] to use with impunity an American invention concerning a wireless and chip technology that is essential to American interests. If this foreign exploitation of American intellectual property, by a country widely recognized as hostile to the United States, is to be permitted by a federal appellate court, then at least its rationale should be disclosed for full public review, criticism, checks and balances in our system of government and, if desired, further legal challenge to the reasoning or arbitrariness behind the decision.

Both the incoming Secretary of State, Sen. Marco Rubio (R-FL), and the top incoming presidential advisor, Donald Trump Jr., have long been leaders in defending American inventors' patent rights. Senator Rubio opposed, along with Phyllis Schlafly, the Leahy-Smith America Invents Act (2011) that weakened American inventors' rights and strengthened the hand of China.[3] Likewise Donald Trump, Jr., has led in

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[2] Another patent lawsuit alleges that Respondent TCL Industries Holdings Co., Ltd. and related entities "import into the United States infringing products, including smartphones"; the district court found that this entity is organized in China and rejected its challenge to service of process. *Monument Peak Ventures, LLC v. TCL Elecs. Holdings Ltd.*, No. 5:24-cv-11-RWS-JBB, 2024 U.S. Dist. LEXIS 129227, at *4 (E.D. Tex. June 11, 2024), *adopted by*, 2024 U.S. Dist. LEXIS 147548 (E.D. Tex. Aug. 19, 2024).

[3] *See, e.g.*, "China Hijacks US Patent System to Steal American Inventions," *US Inventor* (providing specific examples and overall statistics demonstrating exploitation of the America Invents Act procedure by China) https://usinventor.org/china-hijacks-us-

advocating for inventors' rights since 2012, when he pointed out that "[n]ot every company that brings suit for software patent infringement is an exploiter. Some are genuine tech innovators with a real historical and financial investment in their ideas."[4] Undisclosed reasoning by the Federal Circuit in negating patent rights impedes the ability to repair what is broken.

Federal appellate courts have traditionally been the paragon of due process and accountability, but this Federal Circuit practice has repeatedly departed from that standard, in this case with national interests at stake. Exploitation by a China-owned company of an American invention – concerning a technology vital to our national interests – is a matter to be addressed in the sunshine of public debate, commentary, and legislative criticism. Radio silence from the Federal Circuit is inadequate as to why it issued its one-word decision in favor of a company owned by a regime hostile to our national interests, and the Petition should be granted to reverse the unexplained decision.

ARGUMENT

The wireless and chip technology, of which this case is a part, has been identified by Congress to be vital to the future of our country. Did the appellate panel fully understand the innovation, or was it mistaken as to a material aspect of the patent? It is impossible to tell when a potentially arbitrary Rule 36 decision is issued by that court, without any

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patent-system-to-steal-american-inventions/ (viewed Dec. 1, 2024).

[4] A&O Sherman, "Predicting Patent Policy Under the Trump Administration" (Jan. 23, 2017) (quoting Donald Trump, Jr.) https://www.jdsupra.com/legalnews/predicting-patent-policy-under-the-47965/ (viewed Nov. 17, 2024).

supporting opinion. Yet this practice by the Federal Circuit of concealing the basis for its decisions has become commonplace there, and should be reversed.

"In this instance [Appellant] was denied due process because the BIA foreclosed his one avenue of relief … ***without a reasoned basis*** for doing so." *Yeghiazaryan v. Gonzales*, 439 F.3d 994, 1000 (9th Cir. 2006) (emphasis added). Protecting American inventions against infringement by a company owned by a hostile foreign power is surely as important to our national interests as a deportation proceeding for which it is reversible error not to provided a reasoned basis for a decision.

I. The Petition Should Be Granted to Require the Federal Circuit to Provide Its Reasons for Transferring Rights in Vital Technology to a Company Owned by a Country Hostile to the U.S.

Wireless technology, which is the subject matter of the patent at issue here, has been identified by the Office of the President as of February 2024 as one of the "Critical and Emerging Technology (CET) Subfields" that are "that are potentially significant to U.S. national security." Executive Office of the President of the United States, National Science and Technology Council, "A Report by the Fast Track Action Subcommittee on Critical and Emerging Technologies" 1, 3 (February 2024).[5] These technologies "are of particular importance to the

[5] https://www.whitehouse.gov/wp-content/uploads/2024/02/Critical-and-Emerging-Technologies-List-2024-Update.pdf (viewed Nov. 17, 2024).

national security of the United States," including "[f]uture generation wireless networks." *Id.* at 2, 5.

The U.S.-China Economic and Security Review Commission has sounded alarm bells to Congress about the continuing erosion to China of American innovation essential to the prosperity of the United States. "On certain manufacturing-intensive technologies, like advanced batteries and EVs, China's various efforts have enabled its companies to obtain a clear advantage." USCC 2024 Report to Congress, Executive Summary and Recommendations 19 (Nov. 19, 2024).[6] The Biden Administration listed China as one of only seven countries, including Russia, which are on the "Priority Watch List" as established by the Office of the United States Trade Representative.[7]

Senator Marco Rubio (R-FL) has been so strong in his stance against encroachment on American interests by communist China that it has imposed a travel ban against him that remained in place as of his recent nomination by President-elect Trump to be the Secretary of State.[8] Rubio has been a leader in opposing "theft" by the Chinese Communist Party, by which China has become "the largest industrial base in the world." Rubio Releases Report: "The World

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[6] https://www.uscc.gov/sites/default/files/2024-11/2024_Executive_Summary.pdf (viewed Nov. 23, 2024).

[7] Office of the United States Trade Representative, "2024 Special 301 Report" https://ustr.gov/sites/default/files/2024%20Special%20301%20Report.pdf (viewed Nov. 30, 2024).

[8] Micah McCartney, "Marco Rubio: Five Times He Spoke Out on China" *Newsweek* (Nov. 12, 2024). https://www.newsweek.com/marco-rubio-five-times-he-spoke-out-china-1984357 (viewed Nov. 17, 2024).

China Made: 'Made in China 2025' Nine Years Later" 45 (Sept. 9, 2024).[9] Sen. Rubio cites the semiconductor technology, which is at issue on the Petition, as one of the nine essential sectors in which "Beijing has partially accomplished its goals." *Id.*

"We need a ***whole-of-society effort*** to rebuild our country, overcome the China challenge, and keep the torch of freedom lit for generations to come," Sen. Rubio urged in his statement. *Id.* (emphasis added). This "whole-of-society effort" depends on disclosure by the Federal Circuit of its reasons for its decision when it allows a China-owned company to exploit with impunity an innovation protected by an American patent.

In words that continue to ring true today, Donald Trump, Jr., wrote about both the emerging significance wireless technology and the important of protect patent rights in it:

> Treating [innovation concerning wireless] as common property simply because they are basic or fundamental building blocks of an increasingly popular product ignores a critical fact: someone spent time and resources to develop them and deserves to profit from that investment.

Donald J. Trump Jr., "Defending innovation in America" (May 1, 2012).[10] Mr. Trump explained further:

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[9] https://www.rubio.senate.gov/rubio-releases-report-the-world-china-made-made-in-china-2025-nine-years-later/ (viewed Nov. 30, 2024).

[10] https://dailycaller.com/2012/05/01/defending-innovation-in-america/ (viewed Nov. 17, 2024).

> [G]iant, multinational companies … [are] big enough to employ legal and research staff to do the homework when it comes to the foundations of their app software, and to license those ideas accordingly. Treating these ideas as common property simply because they are basic or fundamental building blocks of an increasingly popular product ignores a critical fact: someone spent time and resources to develop them and deserves to profit from that investment.

Id.

Yet China is repeatedly taking patent rights away from American inventors:

> Chinese companies are filing hundreds of [inter partes review] IPR petitions at the PTAB to invalidate the patent rights of American small businesses that are among the leaders in their technological fields. … [T]he Chinese government is acting through state-controlled entities to weaponize the PTAB against American companies. As a preliminary response recently filed by Terves reflects, the patent owner is a small business located in Euclid, OH, employing a total of 45 people.

Josh Malone, "The PTAB: China's Silent but Deadly Weapon in Its Economic War Against America," *IPWatchdog* (July 26, 2023).[11]

Forced labor is common in manufacturing in China, and the House Select Committee on the Chinese Communist Party concurred with Sen. Rubio and the

[11] https://ipwatchdog.com/2023/07/26/ptab-chinas-silent-deadly-weapon-economic-war-america/id=164145/ (viewed Nov. 17, 2024).

Biden Administration's Department on Homeland Security in blacklisting, due to their use of forced labor, two major companies in China: Xinjiang Nonferrous and Xinjiang Joinworld.[12] While applauding this bipartisan action, the House Select Committee emphasized the need "to reduce our dependency on China."[13]

The greatest number of grants of asylums by the United States is to aliens from China, due to assertions of persecution there: "nearly one out of every three (30%) of all those granted asylum over the last two decades [2001-2021] by Immigration Judges were from China." TRAC, "The Impact of Nationality, Language, Gender and Age on Asylum Success" (Dec. 7, 2021).[14] In a trade proceeding handled by the Commerce Department during the Biden Administration, the U.S. Court of International Trade found "noncooperation of the Chinese government" to require ruling against it. *Yama Ribbons & Bows Co., Ltd. v. United States*, No. 21-00402, 2024 Ct. Intl. Trade LEXIS 93, at *17 (Ct. Int'l Trade Aug. 13, 2024).

It violates due process for the Federal Circuit to withhold its underlying reasons, which may have been factually or legally defective. By analogy, in affirming an agency it is often reversible error if the court relied on a reason that the agency did not provide, and yet the Federal Circuit denies parties the ability to challenge the reasons. "'[W]e may not supply a

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[12] Press Release, The Select Committee on the CCP (Nov. 22, 2024) https://selectcommitteeontheccp.house.gov/media/press-releases/moolenaar-green-gimenez-dhs-blacklisting-major-supplier-ccp-aligned-gotion (viewed Nov. 28, 2024).

[13] *Id.*

[14] https://tinyurl.com/yyaw9mhh (viewed Nov. 30, 2024).

reasoned basis for the agency's action that the agency itself has not given.'" *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 224 (2016) (quoting *State Farm*, *infra*, 463 U.S. at 43).

II. The Federal Circuit's Overuse of Its Peculiar Rule 36 Undermines Rule of Law and Confidence in the Judiciary.

A hallmark of Rule of Law is a reasoned explanation for decision-making, and "public disclosure … is [part of] the centerpiece of federal patent policy." *Bonito Boats v. Thunder Craft Boats*, 489 U.S. 141, 157 (1989). This Court requires more than conclusory statements by federal agencies, and the Federal Circuit should not descend below that minimal standard. As this Court emphasized:

> Whatever potential reasons the Department might have given, the agency in fact gave almost no reasons at all. In light of the serious reliance interests at stake, the Department's conclusory statements do not suffice to explain its decision.

Encino Motorcars, 579 U.S. at 224.

Yet the repeated and insistent refusal by the Federal Circuit to disclose the reasoning behind its Rule 36 decisions reflects not only that the American patent system is broken, but also that Rule of Law is not what it used to be in D.C. "[A]n agency may depart from its past interpretation so long as it ***provides a reasoned basis for the change***." *Nat'l Classification Comm. v. United States*, 22 F.3d 1174, 1177 (1994) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983), emphasis added)). Yet the Federal Circuit itself does not provide a reasoned basis for many of its decisions, despite how

its caseload is substantially less than that of many other circuits.[15]

Congress should not need to resort to subpoenaing panel members of the Federal Circuit to obtain answers to why, for example, they allow a China-owned company to exploit an American-patented invention. It is an interference with the American system of checks and balances for the Federal Circuit to conceal its bases for its decisions, in frustration of proper review and consideration of legislative remedies.

As one astute commentator on patent laws recently observed:

> Mark Twain once wrote, "[A] country without a patent office and good patent laws was just a crab, and couldn't travel any way but sideways or backwards." The United States used to be the "gold standard" for patent protection and was the world leader for promoting innovation. But the U.S. patent system is becoming a crab.

Chad Rafetto, "Fostering Innovation Through a Legislative Overhaul of Patentable Subject Matter," 32 Fed. Cir. B.J. 93, 114-115 (Winter, 2024) (quoting Mark Twain, "A Connecticut Yankee in King Arthur's Court 76-77 (Bernard L. Stein ed., Univ. of Cal. Press 1979) (1889)).

The Second Circuit has emphasized how important public monitoring of judicial decision-making is:

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[15] U.S. Court of Appeals for the Federal Circuit Federal Judicial Caseload Statistics (March 31, 2023) https://www.uscourts.gov/statistics/table/b-8/federal-judicial-caseload-statistics/2023/03/31 (viewed Nov. 28, 2024).

> to have a measure of accountability and for the public to have confidence in the administration of justice. … Although courts have a number of internal checks, such as appellate review by multi-judge tribunals, professional and public monitoring is an essential feature of democratic control … [which] deters arbitrary judicial behavior.

United States v. Amodeo, 71 F.3d 1044, 1048 (2d Cir. 1995). The Second Circuit added that "[w]ithout monitoring, moreover, the public could have no confidence in the conscientiousness, reasonableness, or honesty of judicial proceedings." *Id.* The Federal Circuit frustrates such monitoring by issuing unexplained one-word decisions.

CONCLUSION

For the foregoing reasons, those stated in the Petition, and those explained in the other amicus briefs, this Court should grant the Petition.

Respectfully submitted,

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