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 ISLAND INTELLECTUAL PROPERTY LLC AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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December 6, 2024

QUESTION PRESENTED

ParkerVision (this case) presents the issue of the Federal Circuit's improper use of its Local Rule 36 one-word affirmances in the context of an appeal from the USPTO under 35 U.S.C. §144, which requires the Federal Circuit to issue "its mandate and opinion". Similarly, in *Island Intellectual Property LLC v. TD Ameritrade, Inc.*, No. 24-461, Amicus Island, as petitioner there, challenges such use of Local Rule 36 affirmances in the context of an appeal under 28 U.S.C. §1291, generally governing appeals from "all final decisions of district courts of the United States".

The Federal Circuit uses is Local Rule 36 practice of one-word affirmances, without explanations, in over 35% of all appeals, and over 45% of appeals from the USPTO. Other circuits handling Section 1291 appeals do not provide for one-word affirmances, or rarely use them.

ParkerVision/*Island* together present this Court an opportunity to consider not merely *whether one-worded affirmances are appropriate under certain circumstances*, but more particularly:

- whether the Federal Circuit's Local Rule 36 properly designates how and when summary affirmances can be used,
- when and how much information needs to be included in summary affirmances, and
- whether the differences in context between an appeal from the USPTO under 35 U.S.C. §144

requiring issuance of a "mandate and opinion" (such as in *ParkerVision*), and a district court proceeding under 28 U.S.C. §1291 (such as in *Island*) mandate different treatment.

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Island Intellectual Property, LLC ("Island") respectfully submits this *amicus curiae* brief in support of the Petition for Writ of Certiorari by *ParkerVision, Inc.*, No. 24-518. Amicus Island is itself a petitioner in a similar, pending petition in *Island Intellectual Property LLC v. TD Ameritrade, Inc., et al.*, No 24-518, which Amicus respectfully submits should be considered in conjunction with the present petition as discussed herein.[2]

Island is an affiliate of Double Rock Corporation ("Double Rock"). Since the 1970s, Double Rock has been a leading commercially successful cash-management and technology solution provider to the banking broker-dealer, qualified plan, and retail financial markets, with at times up to $125 billion in assets under management. The company was founded by Bruce Bent, who co-created the world's first money-market fund in 1970. Mr. Bent and his son, Bruce

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[1] Pursuant to Rule 37.2, counsel of record for all parties received timely notice of the amicus curiae's intention to file this brief. In accordance with Rule 37.6, counsel for the amicus curiae certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than the amicus curiae or its counsel made a monetary contribution intended to fund the brief's preparation or submission.

[2] The *Island* Petition also raises as a second and separate issue, beyond the scope of the *ParkerVision* Petition, regarding the failure of the Federal Circuit and lower courts in patent cases to follow the normal rules of civil procedure on summary judgment.

Bent II, are pioneers and industry leaders in the deposit sweep and insured cash deposit industry.

As pertinent to Island's Petition, and its interest in this case, Island owns three separate patents that were the subject of litigation before the Eastern District of Texas, an appeal under 28 U.S.C. §1291 to the Federal Circuit, petitions for rehearing/rehearing *en banc*, and, currently, a pending Petition for Certiorari to this Court. *Island Intellectual Property, LLC. v. TD Ameritrade, Inc.*, No. 24-461 ("Island Pet."). The Island Petition raises as its second question presented:

> 2. Is it proper for the Federal Circuit to use its own unique Local Rule 36 to affirm district court rulings with one-word decision lacking explanation or analysis, when the grounds for affirmances are unclear in view of the arguments made on appeal?

(Island Pet., i).

As the Island Petition explains, the use of Local Rule 36 to issue a one-word affirmance, without any explanation of the basis, at least in *Island*'s case, left the parties (and the public) uncertain as to whether the Federal Circuit was saying that:

- in patent cases, the rules of summary judgment as set forth by this Court in *Tolan v. Cotton*, 572 U.S. 650, 651 (2014) (quoting and citing *Anderson v. Liberty Lobby, Inc.*,

> 477 U.S. 242, 249, 255 (1986)) for some unspecified reason do not apply;
>
> - this Court's full analysis, including step 2 from *Alice* and *Mayo*, are not required to be applied for some unspecified reason;
>
> - the 1400 pages of historical facts that Island presented to the district court in opposition to the motion for summary judgment for some unspecified reason was not credible for some unspecified reason; or
>
> - some other alternative, unspecified ground supported affirmance, as argued by the TD Ameritrade Respondents ("TD") in *Island* at the panel level (see TD Red Br., 34-48; *Island* Federal Circuit Recording of Oral Argument, 16:13-25:15), and again to this Court (*see* TD BIO, 13, 15-19, 23).

(Island Pet., 40-41).

The failure of the Federal Circuit in *Island* to specify which of these bases, or other bases, support the panel's decision, as in *ParkerVision*, deprives this Court of the ability to review the Federal Circuit's decision with any clarity, contra to this Court's decision in *Cardinal Chemical Co. v. Morton Int'l*, 508 U.S. 83, 101-02 (1993). (Island Pet., 40-41).

Here, *Island* is an example of a patent-owning stakeholder that, together with its related former and ongoing practicing entities, built, developed, and

commercialized computer-implemented technology in the field of financial services and patented the results of its research and development. Although some portions of the businesses that commercialized the results of the patented technologies have since been sold and/or licensed, Island maintains a substantial interest and investment in the fruits of such research and development in the form of ownership of its substantial patent portfolio.

SUMMARY OF ARGUMENT

> "**In our Court there will be an opinion explaining enough to tell you what the law is in every case. *** We do not just render a one-worded decision and go away**."[3]
>
> Hon. Howard T. Markey, first Chief Judge of the Federal Circuit, *The First Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit*, 100 F.R.D. 499, 511 (1983).

This promise of the founding Chief Judge of the Federal Circuit, while endorsed by prior successors, no longer rings true, given the Federal Circuit's extensive application of its own unique Local Rule 36 to render "one-worded decisions and go away". *Id*.

I. Accordingly, this Court's supervisory authority is needed to provide guidance as to whether the use of one-word affirmances under the Federal Circuit's unique Local Rule 36 is ever appropriate and, if so, when.

I.A. The Federal Circuit's Local Rule is unique and different from the other Courts of Appeal's rules in appeals under 28 U.S.C. §1291. It is contrary to the purpose of the creation of the Federal Circuit.

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[3] All bolding added.

It is also out of step with other courts of appeal and is a bellwether of larger problems with its appellate process. For at least the past decade, over 35% of all appeals and over 45% of appeals from the USPTO are decided by the Federal Circuit under its Local Rule 36 with a single word "affirmed", and no explanation of the basis or rationale therefor. The Federal Circuit's overuse of its Local Rule 36 contravenes our nation's long history of "explaining enough to tell you what the law is in every case." 100 F.R.D. at 511. Whatever legitimacy the use of summary opinions may otherwise have, its overuse by the Federal Circuit is at least cause for concern, if not actual evidence of an abuse of that court's discretion.

I.B. The Federal Circuit's overuse of one-word affirmances under Local Rule 36 undermines Congress' original purpose in creating the Federal Circuit, which was "to promote greater uniformity in certain areas of federal jurisdiction and relieve the pressure on the dockets of the Supreme Court and the courts of appeals for the regional circuits …." 96 Stat. 25 (Apr. 2, 1982).

I.C. The Federal Circuit's overuse of one-word affirmances under its Local Rule 36 is also contrary to one of "the great keys to our American judicial system" – "[e]xplain[ing] our decisions" since "[y]ou would never know what the law is otherwise." 100 F.R.D. at 511.

I.D. The failure of the Federal Circuit to even briefly explain its rationale for affirmance in 35% or more of its cases leads to a litany of ills.

I.E. The Federal Circuit's overuse of its Local Rule 36 amounts to an abuse of discretion and is worthy of this Court's supervisory review.

II. *ParkerVision* and *Island* together provide an ideal vehicle for this Court to evaluate the issue of summary affirmances by Court of Appeals generally, and the Federal Circuit's Local Rule 36 in particular, both in the context of the general appeal statute of 28 U.S.C §1291 (*Island)*, as well as with respect to the specific appellate statute for appeals from the USPTO to the Federal Circuit under 35 U.S.C. §144 (*ParkerVision).*

II.A. The records are well-developed in these two cases, which represent egregious examples of how Local Rule 36 is being abused in both contexts.

II.B. The parties in both cases are both motivated and well-represented by experienced patent litigation and appellate counsel. Numerous amici have shown interest in both cases both in this Court (for both *Island* and *ParkerVision*) and at the Federal Circuit (for Island).

II.C. The time for this Court to address the issue is now. There is no reason to believe the Federal Circuit will fix its behavior without this Court's supervisory review.

Together, these cases exemplify how the frequent use of Local Rule 36 affirmances negatively impacts patent law jurisprudence, minimizing transparency, consistency, and accountability.

"In ParkerVision's case, the practice allows the court to sidestep its statutory duty to oversee administrative patent judges through reasoned decision-making. For Island IP, the summary affirmance obscures whether the court properly reviewed the district court's handling of disputed factual evidence in the summary judgment context." Dennis Crouch, *The Federal Circuit's Oracle: When Silence Speaks Louder Than Words*, https://patentlyo.com/patent/2024/11/federal-circuits-silence.html, Nov. 25, 2024.

REASONS FOR GRANTING BOTH THE *PARKERVISION* AND *ISLAND* PETITIONS

I. This Court's Supervisory Authority Is Needed to Correct the Federal Circuit's Improper Use of Its Local Rule 36

A. The Federal Circuit's Local Rule 36 Is Unique and Different from Other Circuits, and Its Use Is Out of Step with Other Courts of Appeal

Federal Circuit Local Rule 36 enables the Federal Circuit to issue one-word affirmances "when it determines that … an opinion would have no precedential value" and when any one of the following five conditions are met:

> (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 statue authorizing the petition for review; or

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

Fed. Cir. Local Rule 36.

The Federal Circuit has made clear that the basis of such decision is undisclosed and unknowable: "Since there is no opinion, a Rule 36 judgment simply confirms that the trial court entered the correct judgment. It does not endorse or reject any specific part of the trial court's reasoning." *Rates Tech., Inc. v. Mediatrix Telecom, Inc.,* 688 F.3d 742, 750 (Fed. Cir. 2012). As the decisions in *ParkerVision* and *Island* demonstrate, neither by rule, nor by practice, does the Federal Circuit even identify which of the five authorized grounds are being relied upon. *See* ParkerVision Pet., App. 1a-2a, 111a-112a; Island Pet., App. A. With no opinion, it is "impossible to glean which issues th[e] court decided when [it] issued the Rule 36 judgment." *TecSec, Inc. v. Int'l Bus. Machs. Corp.*, 731 F.3d 1336, 1341-42 (Fed. Cir. 2013). *See also* Fair Inventing Fund Amicus Br., 9-10.

"On average, over the past ten years, the Federal Circuit has issued one-word affirmances in approximately 35% of cases appealed from a district court or the USPTO." Island Pet., 41; BPLA Amicus Br. (Island), 7 (collecting statistics). Since 2015, the rate is over 40% for appeals from PTAB decisions in post-grant proceedings. ParkerVision Pet., 32; Fair Inventing Fund Amicus Br., 8.

In contrast, the other courts of appeals, which also have authority to decide appeals from district court decisions under 28 U.S.C. §1291, either do not expressly authorize one-word affirmances or use them only rarely. The First, Second, Third, Sixth, Seventh, Ninth, Eleventh and D.C. Circuits do not have local rules authorizing judgments without opinions and/or do not issue one-word affirmances at all. [4] Island Pet.,41-42; *see also* BPLA Amicus (Island), 5-6; Charles Macedo et al., *Good appellate practice means explaining decisions*, JIPLAP, 2024 (Oxford University Press) (available at https://doi.org/10.1093/jiplp/jpae094) ("Oxford").

While the approach of the other circuits to summary affirmances differs slightly from one another, a common theme is that at least some explanation of the basis for the decision should be given. *See, e.g.*, 1st Cir. R. 36.0 (suggesting a "summary explanation" as a minimum support for a decision); 4th Cir. I.O.P. 36.3 (under certain circumstances, allowing for a "summary opinion" including the reasons for the decision); D.C. Cir. R. 36(b) (allowing for "abbreviated disposition" while

[4] 3rd Cir. I.O.P. 6.1-6.2 authorizes judgments orders, however, in 2015 the Third Circuit confirmed it "has fallen into disuse": "[i]n fact, until some years ago this Court regularly disposed of appeals by issuing judgment orders without accompanying opinions, sometimes even in complex cases. Indeed, our internal operating procedures still authorize the use of judgment orders to announce the outcome of a case **though the practice of using judgment orders has fallen into disuse**." *Cf.* TD BIO, 26.

suggesting that such disposition "contain[] a notation of precedents or [be] accompanied by a brief memorandum."). The Sixth Circuit, in turn, allows for "disposition of the case … in open court following oral argument" as an alternative to a written opinion." 6th Cir. I.O.P. 34(c)(1), cited in BPLA Amicus Br. (Island), 5-6. *See also* Charles R. Macedo et al., *Island Petition Highlights Patent Decisions Increasingly Deviate from Civil Procedure Norms,* https://ipwatchdog.com/2024/06/20/patent-decisions-deviate-civil-procedure-norms/id=178166/, Jun. 20, 2024, 6:15 PM, ("IPWatchdog") (collecting rules and practices of the circuits).

Our research found that so far this year as of December 1st, of the three circuits that permit one-word affirmances or judgments without opinion, it appears only the Fifth Circuit issued any this year, and in only three cases. Even there, the Fifth Circuit's usual practice is to provide at least a cursory explanation. *See* Island Pet., 42 (citing example). "In practice, the Eighth and Tenth Circuits refrain from issuing such opinions." Oxford, *supra*, 3.

The Federal Circuit's overuse of Local Rule 36 is out of step with the other courts of appeal.

B. The Federal Circuit's Overuse of One-Word Affirmances Undermines the Purpose of Congress in Creating a Unique Subject Matter-Based Court of Appeal

In 1982, after a 10-year study commissioned by this Court under Chief Justice Burger, followed by debate over the appellate structure of the federal judiciary, Congress passed the *Federal Courts Improvement Act of 1982*, 96 Stat. 25, and created the Federal Circuit as the thirteenth Court of Appeal. FCIA of 1982, 96 Stat. 25 (Apr. 2, 1982).

As was reported in the historical notes at the time, the purposes of this radical reorganization of the Federal Courts was "to promote greater uniformity in certain areas of federal jurisdiction and relieve the pressure on the dockets of the Supreme Court and the courts of appeals for the regional circuits …." *Id.*

Chief Judge Markey's promise to not issue "one-worded decisions" was consistent with, and a fulfillment of, the Federal Circuit's purpose to "promote greater uniformity" in the law. 100 F.R.D. at 511; FCIA of 1982, *supra*. It is also a sound principle for judicial administration. "Explain[ing] our decisions … is one of the great keys to the American judicial system" since "[y]ou would never know what the law is otherwise." 100 F.R.D. at 511. "The Federal Circuit can only fulfill its responsibility for the clear and consistent development of intellectual property law by the dissemination of its reasoning." BPLA

Amicus Br. (Island), 11 (citing Scalia, *A Matter of Interpretation*, 30).

As former Federal Circuit Chief Judge Paul Michel explained, it is "a dereliction of duty [for the Federal Circuit] not to explain their reasoning … in order to remain consistent with their mission to clarify the patent law." Island Pet., 37 (quoting Ch. J. Michel interview).

This concept is embodied in Section 144 of the Patent Act, entitled "Decision on appeal", which is specific to the appeals from the USPTO to the Federal Circuit and which expressly provides today:

> 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 (emphasis added).

At the first anniversary of the Federal Circuit in 1983, Judge Markey explained Section 144 with an emphasis on the same language:

> With respect to the Patent and Trademark Office, the statute says that the Court will render a decision which will govern the proceedings in the Patent and Trademark Office thereafter. **That would seem to imply, at least, that it would give reasons for its decision**.

Markey, 100 F.R.D. at 511 (emphasis added).

The courts of appeal in other circuits have repeatedly rejected decisions subject to review that provide no reasoned explanation, since they make review impossible. *See* Island Pet., 37-39 (collecting cases). Even the Federal Circuit, when acting as a reviewing authority, in contrast to being subject to review, vacates and remands cases whose decisions call for further clarification. *See* Island Pet., 38 (collecting cases).

Some have argued that this Court's decision in *Taylor v. McKeithen* justifies the Federal Circuit's adoption and implementation of Local Rule 36, because it states that:

> We, of course, agree 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.

407 U.S. 191, 194 (1972) (quoted in TD BIO, 23). But providing discretion on whether or how a court is to "write opinions" is not the same as granting a court

subject to review by this Court permission to issue one-word decisions **without any explanation whatsoever**. *See*, *e.g.*, *Rates*¸688 F.3d at 750; *TecSec*, 731 F.3d at 1341-42. This Court in *Taylor* granted certiorari, vacated, and remanded a Fifth Circuit decision, in part, because it did "not [have] the benefit of the insight of the Court of Appeals". 407 U.S. at 194 (quoted in Island Pet., 39).

This Court made the same point in *Carter v. Stanton*, where "[t]he judgment of the District Court [was] vacated and the case remanded to that court" since "**[the lower court's] order [wa]s opaque and unilluminating as to either the relevant facts or the law with respect to the merits of appellants' claim**" leaving this Court "unconvinced that summary judgment was properly entered." 405 U.S. 669, 671-72 (1972) (emphasis added).

Taking these cases would not be the first time this Court has called the Federal Circuit to task for providing incomplete analysis counter to its mission. In *Cardinal*, this Court rejected the Federal Circuit's then-routine practice of vacating declaratory judgments involving patent validity after a determination of noninfringement. 508 U.S. at 89. This Court explained that it was incumbent of the Federal Circuit to properly adjudicate and explain its decision on both issues, as doing otherwise "injuries not only the alleged infringer and the public; it also may unfairly deprive the patentee itself of the appellate review that is a component of the one full and fair opportunity to have the validity issue

adjudicated correctly." *Id*. at 101-02; *see* Island Pet., 39-40.

C. Providing an Explanation to the Parties and the Public Is "one of the great keys to our American Judicial system"

Former Chief Judge Markey did not stand alone in understanding that explaining to the parties and the public the basis for a decision is "one of the great keys to our American Judicial system". Markey, *supra*, 511.

His successors, like former Chief Judge Michel, and many Justices who have sat on this Court subsequently, have espoused the same virtues of courts' providing at least a brief explanation of the law and facts in their decisions:

- Benjamin N. Cardozo, *Jurisdiction of the Court of Appeals*, §6 (2nd edn Banks & Co Albany 1909) (Island Pet., 35; ParkerVision Pet., 21);

- Ruth Bader Ginsburg, Lecture, *The Obligation to Reason Why*, 37 U. Fla. L. Rev. 205 (1985) (Fair Inventing Fund Amicus Br., 10);

- William J. Brennan, Jr., *In Defense of Dissents*, 37 Hastings L.J. 427, 435 (1986) (ParkerVision Pet., 20; BPLA Amicus Br. (Island), 10);

- Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (1997); and Justice Antonin

Scalia, *The Press and the Law, Speech at Washington Hebrew Congregation* (Mar. 4, 1990) (BPLA Amicus Br. (Island), 2, 3, 11, 13)

The lessons taught by past Justices of this Court should not be lost on this and future generations.

The importance of providing rationale for decisions lies in an abundance of reasons: ensuring transparency, assuring litigants that their arguments have been properly considered, establishing uniformity among case law, and holding decision-makers accountable for their decisions.

As Chief Justice Brennan taught, "explain[ing] *why* and *how* a given rule has come to be . . . restrains judges and keeps them accountable to the law and to the principles that are the source of judicial authority." 37 Hastings L.J. at 435 (1986). *Accord* Harold Leventhal, *Appellate Procedures: Design, Patchwork, and Managed Flexibility*, 23 UCLA L. Rev. 432, 438 (1976) ("there is accountability in the giving of reasons"); Mary Ann Glendon, *A Nation Under Lawyers: How the Crisis in the Legal Profession is Transforming American Society* 147-48 (1994) ("Discipline of writing out the reasons for a decision and responding to the main arguments of the losing side has proved to be one of the most effective curbs on arbitrary judicial power ever devised.").

Even concise decisions provide much greater accountability than one-worded ones. In the words of

Chief Judge Patrica M. Wald, "[t]he discipline of writing even a few sentences or paragraphs explaining the basis for the judgment insures a level of thought and scrutiny by the court that a bare signal of affirmance, dismissal, or reversal does not." *The Problem with the Courts: Black-robed Bureaucracy, or Collegiality under Challenge?*, 42 Md. L. Rev. 766, 782 (1983).

Decisions work in tandem to lay the foundation and framework of our jurisprudence, creating "a body of coherent, predictable law around which public and private actors can orient their decision-making." ParkerVision Pet., 21 (citing Benjamin N. Cardozo, *Nature of the Judicial Process* 30 (1921)). However, this only works when the parties and public can actually understand the decision. In other words, if reasons for decisions are unstated, then it will be impossible for the public to predict the legal implications thereof and adjust future behavior accordingly.

Consistent with *ParkerVision's* compelling evidence that Congress statutorily intended for the Federal Circuit not to issue Rule 36 affirmances in Section 144 appeals, as *Island* explains, our appellate tradition and caselaw support the notion that, in Section 1291 appeals, an opinion is typically necessary to provide the litigants clarity as to the basis of that decision. As this Court has recognized. "a decision without principled justification [is] no judicial act at all." *Planned Parenthood of Se. Pa. v.*

Casey, 505 U.S. 833, 865 (1992) (opinion of the Court); *see also* BIPLA Amicus Br. (Island), 12-14.

D. The Federal Circuit's overuse of Local Rule 36 causes a litany of ills

As the Island Petition explains, the Federal Circuit's overuse of Local Rule 36 causes a litany of ills, including:

- depriving the parties and public of an explanation of why the decision was made;
- depriving the panel with an opportunity to confirm its own summary conclusion by putting pen to paper and having to think out such conclusion;
- depriving this Court with an appropriate record to review;
- creating distorted views of the law, based on misperceptions of why the panel made its decision;
- undermining the appellate review process by biasing results towards affirmances;
- not providing substantive review, but merely being a docket management tool; and
- abdicating the Federal Circuit's responsibility to develop patent law.

Island Pet., 36-37 (citing authority).

However, that is exactly what the Federal Circuit currently does, using its Local Rule 36 in over a third of its cases appealed from a district court or USPTO decision. *See* Charles R. Macedo *et al., Justice is Not Silent: The Case Against One-Word Affirmances in the Federal Circuit,* https://patentlyo.com/patent/2024/09/appellate-decision-reasoning.html, Sept. 22, 2024.

E. The Federal Circuit's overuse of its Local Rule 36 amounts to an abuse of discretion, and is worthy of this Court's supervisory review

While when and how a court of appeals determines to issue opinions may be within its sound discretion, Local Rule 36 practice as implemented by the Federal Circuit is so overused and opaque, like its prior practices at issue in *Cardinal*, such routine "practice denies the patentee such appellate review" and rises to the level of an "abuse of discretion". 508 U.S. 83, 90, 102 (1993); Island Pet., 40-41. As noted above, such courts "have long rejected decisions that provide no reasoned explanation, since they make review impossible." Island Pet., 37-38 (collecting cases). This Court should do the same.

II. The Pair of Cases, *ParkerVision* and *Island*, Are Proper Vehicles for Correcting These Issues

ParkerVision and *Island* together provide an ideal vehicle for the Court to look at the issue of summary affirmances by Court of Appeals generally, and the Federal Circuit's Local Rule 36 in particular, in both the context of the general appeal statute of 28 U.S.C §1291, as well as the specific appellate statute for appeals from the USPTO to the Federal Circuit under 35 U.S.C. §144.

This pair of Petitions enables the Court to look at the fuller context in which this issue arises. While a decision in favor of Island could potentially resolve both petitions, a decision against Island still leaves the impact of Section 144 unanswered. Conversely, a decision in favor of ParkerVision does not necessarily resolve the issues raised by Island, where Section 144 is not at play.

By hearing argument and briefing in tandem in *Island* and *ParkerVision*, this Court will benefit from more diverse, relevant fact patterns, and principals involved in the more common scenario of appeals from district court under Section 1291 (as is the case with other circuits, *see Island*), and the special case of appeals from the USPTO under Section 144 (unique to the Federal Circuit, *see ParkerVision*).

A. *ParkerVision* and *Island* Each Provide Well-documented and Egregious Examples for This Court to Consider

Both *ParkerVision* and *Island* feature well-developed records, which together represent egregious examples of Local Rule 36 being misapplied in both contexts. *See* Island Pet., 9-19, Apps. A-D; ParkerVision Pet., 6-10, App. 1a-86a, 111a-113a.

B. *ParkerVision* and *Island* Provide Are Properly Motivated and Well Represented Parties with Sufficient *Amicus* Support

Both *ParkerVision* and *Island* are motivated and have sufficient resources to present this Court with proper framing and arguments on the issues presented.

Both *ParkerVision* and *Island* are well-represented by experienced patent and appellate counsel. *See* Island Pet. (Amster, Rothstein & Ebenstein LLP; Emmet, Marvin & Martin LLP); Respondent TD (Island) (Greenburg Traurig); ParkerVision Pet. (Kasowitz, Benson Torres; Daignault Iyer); Respondent Samsung (Parkervision) (Ropes & Gray); Respondent LGE (ParkerVision) (Holand & Knight)

Numerous amici have already shown interest in both cases both before this Court (for both *Island* and *ParkerVision*), and at the Federal Circuit (for

Island), and no doubt many more are likely to offer their helpful considerations to this Court if the petitions are granted. *See* Fair Inventing Fund Amicus (ParkerVision) (MoloLamkin LLP); Injustice Pool, LLC Amicus (ParkerVision) (Cecere PC); BPLA Amicus (Island) (McCarter & English); Harris Brumfield Amicus (Island) (Baker & Hostetler); Association of Amicus Counsel Amicus (Island) (Greenspoon Marder; Leichtman Law); US Inventor Inc. Amicus (Island CAFC) (Dunlap Bennet & Ludwig).

Key commentators and media have shown interest in the topic and these cases, including *Patently-O*, *IPWatchdog* and *Law360.*

C. Absent Intervention, the Excessive and Unfettered Use by the Federal Circuit of Single-word Decisions Will Continue Unchecked

In addition to *ParkerVision* and *Island,* as reported in *IPWatchdog*, "[i]n recent years, concerns as to Rule 36 affirmances have been raised in no fewer than 20 petitions for certiorari to the Supreme Court." IPWatchdog. The number of continuing petitions demonstrates the need for this Court's guidance, not a resolution by absentia. *Cf*. TD BIO, 21-22.

The use of Local Rule 36 is so pervasive, and the issue has percolated for so long, that now is the ideal time for this Court to provide redress. Just since these petitions (as of October 1st of this year), the

Federal Circuit has issued 10 Rule 36 judgments, as compared to only 5 opinions in cases originating from the CAFC and PTO. *See* Federal Circuit website, https://cafc.uscourts.gov/home/case-information/opinions-orders/ (last visited December 1, 2024). Prior to 2007, it does not appear that the Federal Circuit ever issued Rule 36 Judgments in such cases, and in 2007 the Federal Circuit only issued 6. *Id.* In other words, the problem is only getting worse.

When offered an opportunity "to either finally eliminate the practice, or else state for high court review why it believes it is proper" (Island CAFC, ECF 54, 16), the Federal Circuit denied rehearing and offered no defense for this practice. There is no reason to believe the Federal Circuit will fix its behavior without this Court's supervisory review. The Federal Circuit has rejected similar requests for rehearing. *See*, *e.g.*, *UNM Rainforest Innovations v. ZyXEL Communications Corp.*, No. 23-1296 (Fed. Cir. May 13, 2024) (nonprecedential).

CONCLUSION

For the foregoing reasons and those set forth in *Island*, this Court should grant both the *ParkerVision* and *Island* petitions for a writ of certiorari in order to have a more complete record and additional viewpoints on these important and troublesome issues.

Respectfully submitted,

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December 6, 2024