

No. 19-253

IN THE
Supreme Court of the United States

STRAIGHT PATH IP GROUP, LLC,
Petitioner,

v.

APPLE INC., ET AL.,
Respondents.

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

**BRIEF IN OPPOSITION FOR
RESPONDENT APPLE INC.**

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QUESTION PRESENTED

Whether the Federal Circuit violated due process when, in accord with the practices of this Court and every other Circuit, and after two prior written opinions on the same patent claim, it received full briefing on petitioner's appeal, held oral argument, and then summarily affirmed the District Court's decision on the ground that the decision "ha[d] been entered without an error of law." Fed. Cir. R. 36(e).

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INTRODUCTION

The First Law of Holes states: “when you find yourself in a hole, stop digging.” Now facing the prospect of sanctions in the District Court for bringing this frivolous lawsuit, Straight Path is still digging. It asks this Court to review an oft-denied, splitless question, unrelated to the dubious merits of its case, that would upend the practices of every Circuit and over a century of this Court’s precedents. The Court should again decline that request.

In 2015, Straight Path secured several patents on a method for determining whether a user “is connected” to a computer network. According to Straight Path, its patents improved on the prior art by enabling a computer to determine not merely whether a user *was* connected to a network at some prior time—a method well established in the prior art—

but whether the user *is* connected to the network at the moment a query is made. The Federal Circuit approved the patents on the basis of that narrow construction. *Straight Path IP Grp., Inc. v. Sipnet EU S.R.O.*, 806 F.3d 1356 (Fed. Cir. 2015). Two years later, it did so again. *Samsung Elecs. Co. v. Straight Path IP Grp., Inc.*, 696 F. App'x 1008 (Fed. Cir. 2017).

Straight Path then sued Apple based on a dramatically broader construction of its patents than the one the Federal Circuit had adopted at Straight Path's urging. Apple's FaceTime system does not continuously track the current online status of its users. It employs a "registration" system indistinguishable from the one established in the prior art. Nonetheless, Straight Path claimed that Apple infringed its patents because, any time an Apple user *answers* a FaceTime call, the caller is able to infer backwards from that event that the callee "is connected" at the time the call is made.

The District Court rejected this argument. It described Straight Path's theory as "astonishingly overbroad," explaining that it would expand the company's "narrowly-preserved infringement theory into one of breathtaking scope." Pet. App. 17a, 22a. Furthermore, the court observed that Straight Path's theory contradicted the claim construction that Straight Path itself had convinced the Federal Circuit to adopt. *Id.* at 4a, 9a-17a. In light of the company's "disingenuous litigation tactics," and the objective baselessness of its claims, the District Court ordered Straight Path to show cause why it should not be sanctioned. *Id.* at 31a, 35a-36a.

Straight Path pressed on with an appeal. After full briefing and oral argument, the Federal Circuit declined to revisit for a third time the claim construction it had previously adopted. *Id.* at 2a. It summarily affirmed the District Court’s judgment under Federal Circuit Rule 36, which permits summary affirmances where “a judgment or decision has been entered without an error of law.” Fed. Cir. R. 36(e). The Federal Circuit then denied rehearing without dissent. Pet. App. 38a.

Rather than putting away its shovel, Straight Path now asks this Court to grant certiorari—not on the merits of its infringement claim, but on *the very practice of issuing summary affirmances under Rule 36*. This request is indistinguishable from a dozen other petitions in which this Court has denied certiorari over the last several years. It should meet the same fate.

The question presented involves no conflict on a question of federal law. It is common to dispose of cases by brief summary affirmance, and every Circuit to consider the question has affirmed the legality of this practice. The fact that different Circuits’ local rules use slightly different verbal formulations when issuing summary affirmances does not establish disagreement on a question of federal law; it just shows a variation in local practice, and an inconsequential one at that.

Nor does this petition raise any substantial federal question. Straight Path does not attempt to substantiate its claim that summary affirmances violate due process. And such a conclusion is directly foreclosed by this Court’s precedents, as well as this Court’s longstanding practice of issuing one-word summary

affirmances to dispose of cases within its mandatory jurisdiction.

Finally, the question presented is singularly unimportant. The precise content of a summary affirmation order makes no practical difference to litigants or to the courts. And if ever there were a case to review the question, this is not that case, given that Straight Path's suit is obviously, and perhaps sanctionably, meritless.

STATEMENT

1. Many computer programs permit users to communicate directly over the Internet. In order to establish a "point-to-point" communication of this kind, the caller's device must identify the Internet Protocol (IP) address of the callee's device. Appx005795.¹ For decades, a well-known means of identifying a callee's IP address has been to establish a "registration" system, under which each device registers its current IP address with a central server when it goes online. *See Samsung Elecs. Co. v. Straight Path IP Grp, Inc.*, No. IPR2014-01366, 2016 WL 861393, at *9 (P.T.A.B. Mar. 4, 2016). When a device wishes to make a call, it checks whether the callee's IP address is registered with the server; if it is, the caller retrieves the address and uses it to contact the callee. *See Samsung*, 696 F. App'x at 1011-12.

Registration systems do not always track current online status accurately, however. Registration information stored in a server may be "stale"—meaning the server may record a device as online

¹ All appendix citations are to the Federal Circuit appendix.

even though it has moved IP addresses or gone offline. *See* Appx005643. Consequently, users frequently attempt to communicate with devices that are not in fact connected to the network. Appx005807.

Straight Path owns several patents that purport to state a method that avoids the drawbacks of a registration system that maintains stale information. *See* Appx000151. Under Straight Path's claimed invention, before attempting a call, the caller "transmit[s], to the server, a query as to whether the [callee] *is connected* to the computer network"; then, if the server determines that "the [callee] *is connected*," it retrieves the callee's IP address and sends it to the caller. *Id.* (emphases added). According to Straight Path, determining online status before calling avoids "wast[ing] resources" by "trying to connect to another endpoint that is not even connected to the network." Appx005796.

That was Straight Path's story, at least, when its patents were challenged. In response to multiple challengers' arguments that its patents merely described registration systems well established in the prior art, Straight Path urged a much narrower construction, under which the "plain meaning" of the "is connected" claim language is not "satisfied by a query that asks only for registration information, regardless of its current accuracy." *Sipnet*, 806 F.3d at 1360. The Federal Circuit adopted that construction, explaining that "[t]he query required by [Straight Path's] claim language asks if the callee 'is' online, which is a question about the status *at the time of the query*." *Id.* (emphasis added). So construed, Straight Path's claimed invention purports to

make a “temporal” improvement to a standard registration system, by determining with “current accuracy” whether each device is connected to the network at the time the caller’s device first queries the server. *Id.* at 1360, 1362.

2. FaceTime is a computer program that uses a registration system to enable point-to-point video communications between users of Apple devices. Each time an Apple device connects to the Internet, it registers a device identifier with a collection of central Apple servers. Appx005641-42; *see* Appx 006442-43. When a user wishes to place a FaceTime call, it sends a message to the servers, which query whether one of the callee’s Apple devices is currently registered. Appx005644-45. If it is, the servers transmit an invitation to the callee to start a FaceTime call. Appx005645.

Like other registration systems, Apple’s system does not always track online status accurately, and does not conclusively determine a callee’s online status before attempting to establish a point-to-point communication. Instead, Apple’s servers “de-register” a device only if the device “power[s] down in an orderly fashion,” Appx005642, or fails to “check-in” during a certain interval, Appx005643. Because these methods are imperfect, registration data stored on the servers is “frequently wrong,” and Apple attempts billions of times each month to deliver messages to users who are offline. Appx005643-44; *see* Pet. App. 27a-28a. Further, because a callee may decline to answer a call for a number of reasons—for instance, because she is busy, because she is ignoring the call, or because she is actually offline—a caller does not always learn whether a callee “is connected”

even after an invitation is sent to that user and the callee receives a non-response. Appx005646.

3. FaceTime employs the very type of registration system that Straight Path had repeatedly (and successfully) argued to the Federal Circuit that it was *not* patenting. And yet in 2014, Straight Path sued Apple, alleging that FaceTime infringed its patents because it “track[ed] the network addresses and online status of users.” Appx002554. Straight Path brought a similar claim against Cisco Systems, Inc. The District Court consolidated the two lawsuits, and both Apple and Cisco moved for summary judgment.

The District Court granted summary judgment to Apple and Cisco. It held that, “[b]eing bound by the Federal Circuit’s rulings,” there was “no way defendants’ accused products infringe the asserted claims at issue.” Pet. App. 4a. As the District Court explained, the Federal Circuit had upheld Straight Path’s patents by construing the patents to cover only systems that determined whether a callee “is connected to the computer network *at the time that the query is transmitted to the server.*” *Id.* at 14a (emphasis added) (quoting *Sipnet*, 806 F.3d at 1363). Straight Path itself had expressly advocated this narrow construction in order to “save[] its patents from invalidity.” *Id.* at 4a; *see id.* at 9a-17a (describing numerous representations by Straight Path to that effect). Yet “Apple’s accused server—at the time that it receives a query from the [caller’s device]—does not know if the [callee] is actually online.” *Id.* at 29a. Rather, as Straight Path’s own expert conceded, FaceTime “simply checks a periodically-updated registration database and then attempts to

transmit a message to the [callee] *regardless of whether or not the [callee] is actually online at that very moment in time.*” *Id.*

Straight Path argued that Apple infringed its patents because “[i]f the [callee] actually responds to the message by accepting the call,” it is possible to “infer[] that the [callee] was indeed online.” *Id.* The District Court rejected this argument as “astonishingly overbroad,” *id.* at 17a, observing that “no purported invention, let alone one as narrow as what Straight Path got by the Federal Circuit, could turn on a principle as basic and commonsensical as the inference that any callee responding to a call must have been accessible at the time of the call.” *Id.* at 30a. Indeed, “the point of [Straight Path’s] claimed invention” was to “determin[e] the recipient’s online or offline status *before* attempting to place a call.” *Id.* at 31a. Straight Path could not “make a moving target out of its claimed invention” by seeking to discard the critical temporal limitation on its patents that it once claimed was central to their validity. *Id.*

The District Court concluded by admonishing Straight Path for its “disingenuous litigation tactics.” *Id.* Straight Path had told the Federal Circuit that “its claimed invention ‘has to track’ whether a computer that has come online and registered is ‘continuing to stay on line.’” *Id.* at 31a (quoting Appx007204-05 (Oral Arg. Tr. at 16:24-17:25, *Samsung*, 696 F. App’x 1008 (No. 16-2004))). “Indeed, the Federal Circuit *** went to great pains during oral argument to pin down this exact point,” and it “agree[d] with Straight Path” on this precise issue. *Id.* at 31a-33a (quoting *Samsung*, 696 F. App’x at 1013). Yet despite “[h]aving won on invalidity based

on those representations,” Straight Path sought to “take a different position for purposes of proving infringement,” and “baldly” asserted that the Federal Circuit had not adopted its view. *Id.* at 32a-33a. In light of this conduct, the District Court ordered Straight Path and its counsel to show cause “why they should not be held liable for defendants’ attorney’s fees” under 35 U.S.C. § 285. *Id.* at 35a-36a.²

4. Straight Path appealed, claiming that the District Court had erred in its claim interpretation and had incorrectly applied the claim language to the patents at issue. Appellant’s Corrected Opening Br. 14-16 (Dkt. 40); Appellant’s Reply Br. 1 (Dkt. 62). Apple and Cisco defended the District Court’s decision, explaining that it correctly applied the Federal Circuit’s prior holdings construing Straight Path’s patents. *See* Corrected Br. for Defendant-Appellee Apple Inc. 1-4 (Dkt. 58); Br. for Defendant-Appellee Cisco Systems, Inc. 3-5 (Dkt. 49). The court then held oral argument, during which the panel repeatedly asked Straight Path’s counsel why its argument was not squarely foreclosed by its prior rulings. *See, e.g.,* Oral Argument Recording at 11:35-11:45 (Q: “This is all supposed to be happening at the same time. Time was the underpinning for the claim construction and for allowing your claims to be held valid.”); *id.* at 12:28-12:35 (Q: “How does that [construction] comport with [what] we said in our *Sipnet* case?”).

² The District Court held in abeyance proceedings relating to attorney’s fees pending resolution of the Federal Circuit appeal, and the matter is currently under submission. *See* D. Ct. Dkt. 185, 233.

After argument, the Federal Circuit summarily affirmed the District Court’s judgment. It wrote that, having “heard and considered” the case, the District Court’s judgment was “AFFIRMED” pursuant to “Fed. Cir. R. 36.” Pet. App. 2a. Rule 36 permits summary affirmances in cases raising only questions of law where the panel determines that “an opinion would have no precedential value” and “a judgment or decision has been entered without an error of law.” Fed. Cir. R. 36(e).

Straight Path filed a petition for rehearing and rehearing en banc. Pet. App. 38a. That petition was denied without dissent. *Id.*

REASONS FOR DENYING THE PETITION

Straight Path contends that the Federal Circuit erred in affirming the summary judgment ruling against it—not because that decision was wrong on the merits, but because the very practice of issuing summary affirmances pursuant to Federal Circuit Rule 36 is unlawful. This Court has recently and repeatedly denied challenges to the Federal Circuit’s practice of issuing summary affirmances under Rule 36. *See Franklin-Mason v. United States*, 138 S. Ct. 1703 (2018) (mem.) (No. 17-1256); *Specialty Fertilizer Prods., LLC v. Shell Oil Co.*, 138 S. Ct. 2678 (2018) (mem.) (No. 17-1243); *Shore v. Lee*, 137 S. Ct. 2197 (2017) (mem.) (No. 16-1240); *Concaten, Inc. v. Ameritrak Fleet Sols., LLC*, 137 S. Ct. 1604 (2017) (mem.) (No. 16-1109); *Cloud Satchel, LLC v. Barnes & Noble, Inc.*, 136 S. Ct. 1723 (2016) (mem.) (No. 15-1161); *Hyundai Motor Am., Inc. v. Clear With Computers, LLC*, 571 U.S. 1010 (2013) (mem.) (No. 13-296); *Kastner v. Chet’s Shoes, Inc.*, 565 U.S. 1201 (2012) (mem.) (No. 11-776); *White v. Hitachi, Ltd.*,

565 U.S. 825 (2011) (mem.) (No. 10-1504); *Max Rack, Inc. v. Hoist Sys., Inc.*, 564 U.S. 1057 (2011) (mem.) (No. 10-1384); *Romala Stone, Inc. v. Home Depot U.S.A., Inc.*, 562 U.S. 1201 (2011) (mem.) (No. 10-777); *Wayne-Dalton Corp. v. Amarr Co.*, 558 U.S. 991 (2009) (mem.) (No. 09-260); *Tehrani v. Polar Electro*, 556 U.S. 1236 (2009) (mem.) (No. 08-1116); see Pet. 21. The result in this case should be no different.

I. THERE IS NO SPLIT IN THE LOWER COURTS.

The question presented does not involve a split among the Circuits on a question of federal law. See Sup. Ct. R. 10(a). Rule 36 of the Federal Rules of Appellate Procedure expressly authorizes Courts of Appeal to issue judgments “without an opinion.” Fed. R. App. P. 36(a)(2). And every Circuit to confront the question has held that courts may issue brief summary affirmances akin to the one rendered here. In *Furman v. United States*, 720 F.2d 263 (2d Cir. 1983) (per curiam), for instance, the Second Circuit held that “[t]here is no requirement in law that a federal appellate court’s decision be accompanied by a written opinion,” and went on to reject a challenge to a decision upholding an adverse judgment “by summary order” instead of “by published opinion.” *Id.* at 264. Likewise, in *United States v. Baynes*, 548 F.2d 481 (3d Cir. 1977) (per curiam), the Third Circuit rejected the claim that an “affirmance by judgment order without an opinion constituted a denial of due process of law.” *Id.* at 482; see also, e.g., *NLRB v. Amalgamated Clothing Workers of Am.*, 430 F.2d 966 (5th Cir. 1970). Straight Path identifies no court that has ever held otherwise. See Pet. 21.

Rather than identifying a legal disagreement among the Circuits, Straight Path claims that the Circuits follow different “Local Rules and practices” in how they draft summary affirmance orders. *Id.* at 11. That alleged difference in local practice would not be a basis for certiorari even if it existed. This Court reviews disagreements among the Circuits on questions of law, not minor variations in matters of local procedure. *See* 28 U.S.C. § 2071(a) (authorizing “[t]he Supreme Court and all courts established by Act of Congress” to “prescribe rules for the conduct of their business”). If a litigant objects to a court’s local rules, the proper vehicle through which to raise that complaint is a petition to the Circuit’s rules committee or the Federal Rules Committee, not a petition for plenary review on this Court’s merits docket.

In any event, the variations in local practice that Straight Path alleges are inconsequential. Every Circuit expressly permits panels to decide appeals by summary affirmance.³ And, where a panel finds an appeal entirely meritless, nearly every Circuit has a practice of issuing a brief statement indicating simply that the panel identified no error in the lower court’s judgment. *See Wilson v. Sellers*, 138 S. Ct.

³ *See* 1st Cir. R. 27.0(c), 36.0(a); 2d Cir. IOP 32.1.1(a); 3d Cir. IOP 10.6; 4th Cir. I.O.P.-36.3; 5th Cir. R. 47.6; 6th Cir. R. 36; 8th Cir. R. 47B; 9th Cir. R. 36-1; 10th Cir. R. 36.1; Fed. Cir. R. 36; *see also Momo Enters., LLC v. Popular Bank*, 738 F. App’x 886, 887 (7th Cir. 2018) (stating when “[s]ummary affirmance may be in order”); *Rogers v. Am. Fed’n of Gov’t Emps.*, 777 F. App’x 459, 460 (11th Cir. 2019) (per curiam) (detailing when “[s]ummary disposition is appropriate”); *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297-298 (D.C. Cir. 1987) (per curiam) (stating when “summary affirm[ance]” is permitted).

1188, 1199-1200 (Gorsuch, J., dissenting) (explaining that “a busy appellate court sometimes may not see the profit in devoting its limited resources to explaining the error and the alternative basis for affirming when the outcome is sure to remain the same, so it issues a summary affirmance instead”). The form of those statements varies, but the content does not.

In some Circuits, a summary affirmance often takes the form of a sentence stating that the appellant has raised no substantial question on appeal. *See, e.g., United States v. Kraus*, No. 18-35516, 2019 WL 2538009, at *1 (9th Cir. Mar. 8, 2019) (“the questions raised in this appeal are so insubstantial as not to require further argument”); *Kelsey v. Muhlenberg Coll.*, No. 17-2399, 2018 WL 2221879, at *1 (3d Cir. Feb. 9, 2018) (“no substantial question is presented by this appeal”).

In other Circuits, a summary affirmance may consist of a statement that the district court did not err or that the panel substantially agrees with the district court’s reasoning. *See, e.g., Wilson v. Arkansas Dep’t of Human Servs.*, 775 F. App’x 261, 261 (8th Cir. 2019) (per curiam) (“we conclude the district court did not err in granting summary judgment”); *Delima v. YouTube, Inc.*, No. 18-1666, 2019 WL 1620756, at *1 (1st Cir. Apr. 3, 2019) (“The judgment of the district court is summarily affirmed essentially for the reasons discussed in Magistrate Judge Johnstone’s Report and Recommendation of August 30, 2018.”); *Momo Enters., LLC v. Popular Bank*, 738 F. App’x 886, 887 (7th Cir. 2018) (“we summarily affirm the judgment of the district court for the reasons set forth in that court’s Memorandum Opinions and

Orders in this case”); *Aronstein v. Thompson Creek Metals Co.*, 711 F. App’x 489, 490 (10th Cir. 2018) (“we affirm the district court’s judgment for substantially the reasons stated in its well-reasoned Order of April 27, 2017, and Opinion and Order of April 28, 2017”); *United States v. Danzell*, 698 F. App’x 93, 94 (4th Cir. 2017) (per curiam) (“We have reviewed the record and the district court’s memorandum opinion and affirm for the reasons cited by the district court.”); *Smith v. Gavulic*, 694 F. App’x 398, 399 (6th Cir. 2017) (per curiam) (“After reviewing the record, the parties’ briefs, and the applicable law, we conclude that the district court’s thorough and well-written opinion correctly articulates and applies the applicable law to undisputed facts and that the issuance of a full written opinion by this court would serve no jurisprudential purpose. Accordingly, for the reasons stated in the district court’s opinion, we affirm.”).

And in still other Circuits, like the Federal Circuit, a summary affirmance takes the form of a citation to a local rule that authorizes summary affirmances where the panel finds that the district court committed no error of law. *See, e.g., Belanger v. Commissioner*, --- F. App’x ---, 2019 WL 4316498 (mem.) (per curiam) (Sept. 11, 2019) (“AFFIRMED. *See* 5th CIR. R. 47.6.”); 5th Cir. R. 47.6 (authorizing summary affirmances where “no reversible error of law appears”); Pet. App. 2a (“AFFIRMED. *See* Fed. Cir. R. 36.”); Fed. Cir. R. 36 (authorizing summary affirmances where “a judgment or decision has been entered without an error of law”).

Straight Path claims that courts in this last group are alone in “authoriz[ing] a totally unexplained

decision in an appeal raising only issues of law on the ground that there is no ‘error of law.’” Pet. 13. But any difference between these Circuits and the others is entirely formalistic—as illustrated by the fact that Straight Path itself lumps the Eighth and Tenth Circuits in with the Fifth and Federal Circuits and claims they follow the same practice. *See id.* The Circuits authorize summary affirmances on essentially the same grounds (that the district court did not err), and give essentially the same explanation (that the district court did not err). The only difference is that some Circuits cite a rule that in turn states the reason, while other Circuits use a verbal formula that repeats the reason in every case. That variation in drafting conventions is not the stuff of which meritorious certiorari petitions are made.

Straight Path is also incorrect that, when the Federal Circuit issues a summary affirmance, it “d[oes] not provide a hint of why it affirmed the district court decision.” *Id.* at 10, 13. In cases raising only legal issues, the Federal Circuit enters a summary affirmance when it has determined that the district court’s decision was “entered without an error of law.” Fed. Cir. R. 36(e); *see* Pet. 13 (acknowledging as much). Thus, a summary affirmance in the Federal Circuit—just like a summary affirmance in this Court—means that the court rested its decision on those grounds “essential to sustain [the lower court’s] judgment.” *TecSec, Inc. v. Int’l Bus. Machs. Corp.*, 731 F.3d 1336, 1343 (Fed. Cir. 2013) (quoting *Ill. State Bd. of Elecs. v. Socialist Workers Party*, 440 U.S. 173, 182-183 (1979)); *see Phil-Insul Corp. v. Airlite Plastics Co.*, 854 F.3d 1344, 1357-58 (Fed. Cir. 2017) (holding that a summary affirmance collateral-

ly estops a party from relitigating any issue that was “essential to the [district court’s] judgment”). The Federal Circuit leaves no more uncertainty about the basis for its summary affirmances than this Court does when it summarily affirms.

II. THIS CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

Straight Path also does not identify any legal error in the decision below. This Court has long approved the practice of deciding cases by brief summary affirmance orders. In *Taylor v. McKeithen*, 407 U.S. 191 (1972) (per curiam), the Court stated that “[w]e, of course, agree that the courts of appeals should have wide latitude in their decisions of whether or how to write opinions,” and that “[t]hat is especially true with respect to summary affirmances.” *Id.* at 194 n.4. Even in dissent, then-Justice Rehnquist agreed: “No existing statute or rule of procedure prohibits the Fifth Circuit from issuing a short opinion and order, as it has done here, *or from deciding cases without any opinion at all.*” *Id.* at 195 (Rehnquist, J., dissenting) (emphasis added). Both the majority and the dissent then favorably cited former Fifth Circuit Rule 21 (currently Rule 47.6), which is identical in all material respects to the Federal Circuit’s Rule 36. *Compare NLRB*, 430 F.2d at 968 n.2 (quoting former 5th Cir. R. 21), *with* Fed. Cir. R. 36.

This Court’s longstanding practice reinforces that summary affirmances are permissible. For at least a century, the Court has regularly resolved cases within its mandatory jurisdiction through one-word summary affirmances. *See, e.g., North Carolina v. Covington*, 137 S. Ct. 2211 (2017) (mem.); *Bluman v.*

FEC, 565 U.S. 1104 (2012) (mem.); *Cox v. Larios*, 542 U.S. 947 (2004); *Adams v. Clinton*, 531 U.S. 941 (2000) (mem.); *Playboy Entm't Grp., Inc. v. United States*, 520 U.S. 1141 (1997) (mem.); *Fund for Accurate & Informed Representation, Inc. v. Weperin*, 506 U.S. 1017 (1992) (mem.); *Martin v. Haith*, 477 U.S. 901 (1986) (mem.); *Butler v. Wilson*, 415 U.S. 953 (1974) (mem.); *Williams v. Va. State Bd. of Elections*, 393 U.S. 320 (1969) (per curiam) (mem.); *Mayor & City Council of Baltimore City v. Dawson*, 350 U.S. 877 (1955) (per curiam) (mem.); *United States v. Hudson Transit Lines, Inc.*, 338 U.S. 802 (1949) (per curiam) (mem.); *Engelhard v. Schroeder*, 258 U.S. 610 (1922) (per curiam) (mem.); *Perth Amboy Dry Dock Co. v. Monmouth Steamboat Co.*, 215 U.S. 592 (1910) (per curiam) (mem.); see generally *Hohn v. United States*, 524 U.S. 236, 260 (1998) (Scalia, J., dissenting) (stating that “judgments[] affirming without comment the disposition appealed from[] were common in the days when this Court had an extensive mandatory jurisdiction”). No Justice has ever identified a legal defect in that established practice, and the Court has often relied on these decisions as precedent in subsequent cases. See, e.g., *Johnson v. United States*, 529 U.S. 694, 701 (2000); *Clark v. Roemer*, 500 U.S. 646, 653 (1991).

Straight Path suggests, without explanation, that the Federal Circuit’s Rule 36 may violate “the Fifth Amendment.” Pet. i. If Straight Path were correct, the summary affirmance practices of this Court, every Circuit, and numerous state courts would be

unconstitutional.⁴ Straight Path is not correct. In *Harris v. Rivera*, 454 U.S. 339 (1981) (per curiam), this Court held that the “occasions when an explanation of the reasons for a [judicial] decision may be required by the demands of due process *** are the exception rather than the rule.” *Id.* at 344. In particular, “when other procedural safeguards have minimized the risk of unfairness, there is a diminished justification for requiring a judge to explain his rulings.” *Id.* at 344 n.11; see also *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 472 (1981) (Stevens, J., joined by Marshall, J., dissenting) (“Judges often decide difficult and important cases without explaining their reasons, and I would not suggest that they thereby commit constitutional error.”).

The Federal Circuit affords ample procedural safeguards to litigants when it decides cases by summary affirmance. As the Federal Circuit has explained, “[a]ppeals whose judgments are entered under Rule 36 receive the full consideration of the court, and are no less carefully decided than the cases in which we issue full opinions.” *U.S. Surgical Corp. v. Ethicon, Inc.*, 103 F.3d 1554, 1556 (Fed. Cir. 1997). Here, for example, Straight Path was afforded full adversarial briefing; an oral argument; a decision stating that the panel identified no error in the District Court’s

⁴ See *Ylst v. Nunnemaker*, 501 U.S. 797, 806 (1991) (holding that where a state appellate court issues an “unexplained” decision affirming the denial of habeas relief, courts may “look through” that affirmance to the last reasoned decision to ascertain the ground on which the decision rested); see also *Wilson*, 138 S. Ct. at 1193-94.

thoroughly reasoned opinion; and an opportunity to seek panel rehearing and rehearing en banc. Adding a “few * * * words” akin to what other Circuits say, as Straight Path proposes, Pet. 22, would do nothing to meaningfully advance anyone’s due process rights or to guard against the risk of error.⁵

In addition to its due process argument, Straight Path notes that some commentators have argued that “35 U.S.C. § 144 requires the Federal Circuit to provide an explicit explanation if it affirms a PTAB decision.” Pet. 18-19; *see id.* at 22. As Straight Path admits, however, this case “does not concern an appeal from a decision of the PTAB.” *Id.* at 19. That statutory question is, accordingly, wholly irrelevant.

III. THIS ISSUE IS UNIMPORTANT.

Apart from being splitless and meritless, the question presented is also singularly unimportant. Because the supposed differences between the Federal Circuit’s Rule 36 and the summary affirmance rules of other Circuits are a matter purely of form rather than substance, *see supra* pp. 12-15, a deci-

⁵ Rule 36 also does not impede this Court’s review. Just two Terms ago, this Court reviewed a decision in which “[t]he Federal Circuit summarily affirmed” in the same manner as it did this case. *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1372 (2018). And the Court has reviewed many other comparably brief summary affirmances from other Circuits. *See, e.g., United States v. Flores-Montano*, 541 U.S. 149 (2004), *rev’g* No. 02-50306, 2003 WL 22410705 (9th Cir. Mar. 14, 2003); *Lane v. Pena*, 518 U.S. 187 (1996), *aff’g* No. 95-5006, 1995 WL 418635 (D.C. Cir. June 5, 1995) (per curiam); *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994), *rev’g* 8 F.3d 811 (3d Cir. 1993) (Table); *Farmer v. Brennan*, 511 U.S. 825 (1994), *rev’g* 11 F.3d 668 (7th Cir. 1992).

sion requiring the Federal Circuit to conform to the practices of other Circuits would have no meaningful practical effect. It would simply entail a change in drafting convention, with no real-world benefit to courts or to litigants.

Straight Path cites a series of blog posts and law review articles that have criticized the frequency with which the Federal Circuit applies Rule 36. *See* Pet. 16-20. Many of those posts and articles were actually addressing the use of Rule 36 to decide appeals from PTO or PTAB decisions—an issue, as already noted, that is not presented here. *See, e.g.,* Dennis Crouch, *Wrongly Affirmed Without Opinion*, 52 Wake Forest L. Rev. 561, 562 (2017). Further, as the Solicitor General explained in successfully opposing certiorari on a similar petition, there is no indication “that the [Federal Circuit’s] use of Rule 36 affirmances is in any way improper in light of the court’s docket,” given that “the number of appeals from USPTO decisions has skyrocketed.” Br. for Federal Respondent in Opposition 12, *Specialty Fertilizer Prods., LLC v. Shell Oil Co.*, No. 17-1243 (May 22, 2018), *cert denied*, 138 S. Ct. 2678 (2018) (describing 1183% increase in cases from 2008 to 2017). It is also not clear how review of a single summary affirmance would enable the Court to review or curtail the frequency with which Rule 36 is employed—unless, of course, the Court is prepared to hold the entire practice unconstitutional.

In any event, if ever there were a poster child for the proper use of Rule 36, this is it. The Federal Circuit had already issued *two* prior opinions definitively construing the precise patents at issue in this case. *See Sipnet*, 806 F.3d 1356; *Samsung*, 696 F.

App'x 1008. The District Court then issued a thorough opinion finding those decisions directly controlling, and ordering Straight Path to show cause why its "disingenuous" claims did not entitle Apple and Cisco to attorney's fees. Pet. App. 31a, 35a-36a. The Federal Circuit reasonably concluded that the District Court's decision was "without *** error" and that nothing more needed to be said. Fed. Cir. R. 36(e). Faulting the Federal Circuit for streamlining its work in this manner, even in the most meritless and duplicative of appeals, would only encourage wasteful litigation, and impose yet more unwarranted costs on litigants and a court already overburdened with a crush of baseless patent claims.

CONCLUSION

The petition for a writ of certiorari should be denied.

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OCTOBER 2019