

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

**MOTION FOR LEAVE TO FILE
AMICUS BRIEF AND AMICUS
CURIAE BRIEF OF HARRIS BRUMFIELD,
TRUSTEE FOR ASCENT TRUST
IN SUPPORT OF PETITIONER**

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December 6, 2024

**MOTION FOR LEAVE TO FILE AMICUS
BRIEF**

Amicus Curiae Harris Brumfield, Trustee for Ascent Trust, respectfully moves for leave of Court to file the accompanying brief in support of the petition for writ of certiorari in the above-captioned case. Petitioner has consented to the filing of this brief. Due to Mr. Brumfield's only recently learning of the Petition filed in this case, amicus provided notice to respondents two days before the filing deadline, rather than the ten days specified in Supreme Court Rule 37.2. Respondents have not responded to Mr. Brumfield's request to advise whether Respondents will consent to this filing.

The principal purpose of this Court's ten-day notice requirement is to allow respondents time to seek an extension of time for their brief in opposition should they want to review and respond to arguments made by amici supporting the petition. Here, both Respondents have already waived their right to respond. Accordingly, amicus does not believe that Respondents have suffered any prejudice as a result of the notice provided by Mr. Brumfield.

Harris Brumfield, Trustee of Ascent Trust, is a renowned inventor in the field of electronic trading who created an electronic trading GUI tool that revolutionized the trading industry in the early 2000s. The inventive tool was a radical improvement over prior trading tools because it permitted faster and more accurate trading at a trader's intended price. *See*

Trading Techs. Int'l, Inc. v. CQG, INC., 675 F. App'x 1001, 1006 (Fed. Cir. 2017). One of Mr. Brumfield's patents, which covered this inventive tool, was invalidated by the Patent Trial and Appeal Board ("PTAB") in a Covered Business Method ("CBM") Review proceeding. *IBG LLC v. Trading Techs. Int'l, Inc.*, No. CBM2016-00090, 2017 WL 6210830, at *1 (P.T.A.B. Dec. 7, 2017). On appeal, that decision was summarily affirmed with no explanation as to the bases for the affirmance, which deprived Mr. Brumfield and this Court of the ability to review the Federal Circuit's decision with any clarity. *Trading Techs. Int'l, Inc. v. IBG LLC*, 771 F. App'x 493 (Fed. Cir. 2019). Accordingly, like the Petitioner, Mr. Brumfield has been subjected to the Federal Circuit's practice of issuing one-word affirmances under the Federal Circuit's Local Rule 36.

Amicus respectfully moves this Court for leave to file the accompanying brief in support of the Petitioner.

3

Respectfully submitted,

DECEMBER 6, 2024

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TABLE OF CONTENTS

	Page(s)
INTEREST OF THE AMICUS CURIAE	1
SUMMARY OF THE ARGUMENT.....	2
ARGUMENT	3
I. THE FEDERAL CIRCUIT'S AFFIRMANCE WITHOUT OPINION UNDER RULE 36 LEAVES THE BASIS OF AFFIRMANCE UNCLEAR AND CONFLICTS WITH THE PRACTICE OF THE OTHER CIRCUIT COURTS	3
II. SUMMARY AFFIRMANCES OF PTAB OPINIONS ARE PARTICULARLY CON- CERNING	5
CONCLUSION.....	8

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>IBG LLC v. Trading Techs. Int’l, Inc.</i> , No. CBM2016-00090, 2017 WL 6210830 (P.T.A.B. Dec. 7, 2017).....	1, 4
<i>Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC</i> , 584 U.S. 325 (2018).....	5
<i>TecSec, Inc. v. Int’l Bus. Machines Corp.</i> , 731 F.3d 1336 (Fed. Cir. 2013).....	4
<i>Trading Techs. Int’l, Inc. v. CQG, INC.</i> , 675 F. App’x 1001 (Fed. Cir. 2017).....	1
<i>Trading Techs. Int’l, Inc. v. IBG LLC</i> , 771 F. App’x 493 (Fed. Cir. 2019).....	1, 4
<i>United States v. Arthrex, Inc.</i> , 594 U.S. 1 (2021).....	5, 6
Rules	
Fed. Cir. R. 36	2, 3, 4, 6, 7
Supreme Court Rule 37.2	1
Supreme Court Rule 37.6	1
Other Authorities	
157 Cong. Rec. H4420-06, H4428 (daily ed. June 22, 2011)	5

Br. of Appellant Trading Technologies International, Inc., <i>Trading Techs. Int'l, Inc. v. IBG LLC</i> , 771 F. App'x 493 (Fed. Cir. 2019) (No. 18-1489), ECF No. 36	5
Ryan Davis, <i>Kappos Calls For Abolition Of Section 101 Of Patent Act</i> , Law 360 (Apr. 12, 2016), https://www.law360.com/ip/articles/7 83604%20	7
David Kappos, <i>The State Of The Patent System: A Look At The Numbers</i> , Law 360 (Nov. 27, 2017), https://www.law360.com/articles/987 044/the-state-of-the-patent-system- a-look-at-the-numbers	7
Dan F. Klodowski et al., <i>Federal Circuit PTAB Appeal Statistics for July, August, and September 2024</i> , Fin- negan (Nov. 5, 2024), https://www.finnegan.com/en/insight s/blogs/at-the-ptab-blog/federal- circuit-ptab-appeal-statistics-for- july-august-and-september- 2024.html	7
Charles Macedo et al., <i>Justice is Not Silent: The Case Against One-Word Affirmances in the Federal Circuit</i> , Patently-O (Sept. 22, 2024), https://patentlyo.com/patent/2024/09 /appellate-decision-reasoning.html	4

- Stephen Schreiner, *Recent Statistics Show PTAB Invalidation Rates Continue to Climb*, IP Watchdog (June 25, 2024), <https://ipwatchdog.com/2024/06/25/recent-statistics-show-ptab-invalidation-rates-continue-climb/id=178226/>6
- Gene Quinn, *How to Protect Your Patent from Post Grant Proceedings*, IP Watchdog (Sep. 21, 2014), <https://ipwatchdog.com/2014/09/21/how-to-protect-your-patent-from-post-grant-proceedings-2/id=51333/>6
- World Intellectual Property Indicators Report: Global Patent Filings Reach Record High in 2023*, WIPO (Nov. 7, 2024), https://www.wipo.int/pressroom/en/articles/2024/article_0015.html.....7

INTEREST OF THE AMICUS CURIAE¹

Harris Brumfield, Trustee of Ascent Trust, is a renowned inventor in the field of electronic trading who created an electronic trading GUI tool that revolutionized the trading industry in the early 2000s. The inventive tool was a radical improvement over prior trading tools because it permitted faster and more accurate trading at a trader's intended price. *See Trading Techs. Int'l, Inc. v. CQG, INC.*, 675 F. App'x 1001, 1006 (Fed. Cir. 2017). One of Mr. Brumfield's patents, which covered this inventive tool, was invalidated by the Patent Trial and Appeal Board ("PTAB") in a Covered Business Method ("CBM") Review proceeding. *IBG LLC v. Trading Techs. Int'l, Inc.*, No. CBM2016-00090, 2017 WL 6210830, at *1 (P.T.A.B. Dec. 7, 2017). On appeal, that decision was summarily affirmed with no explanation as to the bases for the affirmation, which deprived Mr. Brumfield and this Court of the ability to review the Federal Circuit's decision with any clarity. *Trading Techs. Int'l, Inc. v. IBG LLC*, 771 F. App'x 493 (Fed. Cir. 2019). Accordingly, like the Petitioner, Mr. Brumfield has been subjected to the Federal Circuit's practice of issuing one-

¹ Pursuant to Rule 37.2, counsel of record for all parties received notice of the amicus curiae's intent to file this brief. Amicus curiae has filed an accompanying motion for leave to file this brief because it only recently became aware of the Petition and therefore was not able to provide notice within ten days of the filing deadline but instead provided notice within two days of the filing deadline. 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, its members, or its counsel made a monetary contribution intended to fund the brief's preparation or submission.

word affirmances under the Federal Circuit's Local Rule 36.

SUMMARY OF THE ARGUMENT

The Federal Circuit's practice of affirming opinions of the lower tribunal with one word under Local Rule 36 should be reviewed by the Court. This is a significant and continued pattern of the Federal Circuit that stands apart from all other Circuit Courts. The failure of the Federal Circuit to articulate a rationale for its decision deprives property owners of an ability to seek meaningful review of that opinion and ignores the role of the Federal Circuit of articulating patent law precedent for the lower courts to follow.

The Federal Circuit's practice is particularly troubling in appeals originating from the PTAB. These proceedings have been subjected to numerous constitutionality challenges and scholarly criticisms that have only been amplified by the Federal Circuit's extremely high rate of affirming PTAB decisions invalidating patents, and its frequent use of one-word orders that fail to explain the bases of its decisions. This Court should grant the Petition and restore the integrity and accountability of the judicial system.

ARGUMENT**I. THE FEDERAL CIRCUIT'S AFFIRMANCE WITHOUT OPINION UNDER RULE 36 LEAVES THE BASIS OF AFFIRMANCE UNCLEAR AND CONFLICTS WITH THE PRACTICE OF THE OTHER CIRCUIT COURTS**

The use of Rule 36 by the Federal Circuit as a vehicle to summarily affirm lower tribunals' decisions, without an opinion, is inappropriate because it undermines the principles of transparency and accountability in the judicial process. By issuing decisions without providing any rationale, the Federal Circuit creates a barrier for potential Supreme Court review, as it deprives the highest court of a reasoned explanation to evaluate in the context of a writ of certiorari. This lack of explanation not only denies litigants the opportunity to understand the basis of the decision but also hinders the development of legal precedent. The summary nature of these affirmances is unfair to litigants, as it denies them a fair opportunity to challenge the reasoning behind a ruling, which is fundamental to ensuring justice and legal clarity.

The use of a one-word affirmances in this case illustrates the uncertainty Local Rule 36 creates. Numerous issues were addressed in the appeals, including whether prior art references rendered the claims obvious under § 103(a), and whether the PTAB improperly based its cancellation decision on forfeited arguments. (Pet. at 10). By issuing Rule 36 affirmances and thereby failing to specify the bases for the affirmances, the Petitioner and this Court are deprived of the ability to review the Federal Circuit's decisions

with any clarity. (Pet. App.1a–2a); *TecSec, Inc. v. Int’l Bus. Machines Corp.*, 731 F.3d 1336, 1341 (Fed. Cir. 2013) (“TecSec [argues] that the mandate rule does not apply because it is impossible to glean which issues this court decided when we issued the Rule 36 judgment. This court agrees with TecSec . . .”).

The same occurred in a case involving one of Mr. Brumfield’s patents that was invalidated by the PTAB in a CBM Review proceeding. *IBG*, 2017 WL 6210830, at *1. That case involved issues such as patent eligibility, CBM jurisdiction, and obviousness. *Id.* at *1–18. Yet, the Federal Circuit disposed of the appeal with a single word order. *IBG LLC*, 771 F. App’x at 493. Like here, without knowing the bases of the affirmance, Mr. Brumfield and this Court were deprived of the ability to review the Federal Circuit decision with any clarity.

While the Federal Circuit extensively uses Rule 36 as a vehicle to resolve appeals without opinion, this stands in stark contrast to the other circuit courts. For instance, the majority of circuits, including the First, Second, Third, Fourth, Sixth, Seventh, Ninth, Eleventh, and DC Circuits, do not have a rule that permits a summary affirmance. Charles Macedo et al., *Justice is Not Silent: The Case Against One-Word Affirmances in the Federal Circuit*, Patently-O (Sept. 22, 2024), <https://patentlyo.com/patent/2024/09/apellate-decision-reasoning.html>. Of the remaining four circuits that do permit this practice, “in the past year only the Fifth and Federal Circuit have used one-word affirmances, with the Federal Circuit’s use standing out by a high margin.” *Id.*

Furthermore, such a practice is improper, as it diminishes the judicial responsibility to articulate legal reasoning, which serves as the foundation for legal consistency and public confidence in the courts. This is especially true at the Federal Circuit, whose jurisdiction is premised on providing a unified body of legal precedents from which lower courts may adhere to and follow in their cases.

II. SUMMARY AFFIRMANCES OF PTAB OPINIONS ARE PARTICULARLY CONCERNING

As the Petition in this case explains, proceedings before the PTAB have been the subject of multiple constitutional challenges. (Pet. at 23-31). Indeed, this Court in *Oil States* expressly left open the possibility of a Due Process challenge to such proceedings. *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 584 U.S. 325, 344 (2018); *see also* 157 Cong. Rec. H4420-06, H4428 (daily ed. June 22, 2011) (statement of Rep. Manzullo) (objecting to review “appl[ied] retroactively to already existing patents” as “a ‘taking’ of property.”).

These concerns and more were raised in the case involving Mr. Brumfield’s patent. *See* Br. of Appellant Trading Technologies International, Inc. at 78-80, *Trading Techs. Int’l, Inc. v. IBG LLC*, 771 F. App’x 493 (Fed. Cir. 2019) (No. 18-1489), ECF No. 36. And, eventually, this Court even agreed with one of those arguments. *United States v. Arthrex, Inc.*, 594 U.S. 1, 23 (2021) (“We hold that the unreviewable authority wielded by APJs during inter partes review is incompatible with their appointment by the Secretary to an

inferior office.”). As this Court explained, “[t]he [PTAB], composed largely of Administrative Patent Judges appointed by the Secretary of Commerce, has the final word within the Executive Branch on the validity of a challenged patent. Billions of dollars can turn on a Board decision.” *Id.* at 6. Indeed, “[t]he PTAB is the last stop for review within the Executive Branch.” *Id.* at 9. And a “party dissatisfied with the final decision may seek judicial review in the Court of Appeals for the Federal Circuit.” *Id.* With the Federal Circuit’s Rule 36 practice, parties are deprived of this judicial review because they have no way of knowing the bases for the decisions and therefore cannot review the Federal Circuit decision with any clarity.

Additionally, the PTAB proceedings have been widely criticized. Former Chief Judge Randall Rader of the United States Court of Appeals for the Federal Circuit classified PTAB judges as “acting as death squads killing property rights.” Gene Quinn, *How to Protect Your Patent from Post Grant Proceedings*, IP Watchdog (Sep. 21, 2014), <https://ipwatchdog.com/2014/09/21/how-to-protect-your-patent-from-post-grant-proceedings-2/id=51333/> (internal quotations omitted). As a recent study found, “[s]ince 2021, the invalidation rate has been increasing and is currently at 71% for the first two quarters of 2024. In 2023, all challenged claims were found invalid 68% of the time. These are daunting statistics for patent holders.” Stephen Schreiner

, *Recent Statistics Show PTAB Invalidation Rates Continue to Climb*, IP Watchdog (June 25, 2024),

<https://ipwatchdog.com/2024/06/25/recent-statistics-show-ptab-invalidation-rates-continue-climb/id=178226/>.

Likewise, former USPTO Director, David Kappos, has also expressed concerns that “our patent system may have been overcorrected and excessively weakened, discouraging investments in innovation.” David Kappos, *The State Of The Patent System: A Look At The Numbers*, Law 360 (Nov. 27, 2017), <https://www.law360.com/articles/987044/the-state-of-the-patent-system-a-look-at-the-numbers>. He also “said he has begun telling clients that patent protection for biotechnology and software inventions is more robust in other countries like China and Europe.” Ryan Davis, *Kappos Calls For Abolition Of Section 101 Of Patent Act*, Law 360 (Apr. 12, 2016), <https://www.law360.com/ip/articles/783604%20>; see also *World Intellectual Property Indicators Report: Global Patent Filings Reach Record High in 2023*, WIPO (Nov. 7, 2024), https://www.wipo.int/press-room/en/articles/2024/article_0015.html (showing China having more than double the number of patent filings than the US). These concerns provide further evidence of the need for oversight in the form of written opinions.

The Federal Circuit statistics are no less comforting. A recent study found that “the Federal Circuit issued Rule 36 affirmances in 580 cases (42.74%).” Dan F. Klodowski et al., *Federal Circuit PTAB Appeal Statistics for July, August, and September 2024*, Finnegan (Nov. 5, 2024), <https://www.finnegan.com/en/insights/blogs/at-the-ptab-blog/federal->

circuit-ptab-appeal-statistics-for-july-august-and-september-2024.html. This means that the PTAB is invalidating patents at a rate of 70% and the Federal Circuit is entirely silent in affirming those decisions in almost half of the cases. These statistics show that judicial oversight of the PTAB is lacking. This Court should grant the Petition and correct this troubling practice.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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