No. 24-461

IN THE

Supreme Court of the United States

ISLAND INTELLECTUAL PROPERTY LLC,

Petitioner,

v.

TD AMERITRADE, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR *AMICUS CURIAE* BOSTON INTELLECTUAL PROPERTY LAW ASSOCIATION IN SUPPORT OF PETITIONER

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INTERESTS OF THE AMICUS CURIAE[1]

Founded in 1924, the Boston Intellectual Property Law Association ("BIPLA," formerly known as the Boston Patent Law Association or BPLA) is one of the oldest intellectual property law associations in the country. The BIPLA sponsors educational programs and forums for its nearly 1,000 members on topics such as patents, trademarks, copyrights, and licensing, among others. Accordingly, the BIPLA has substantial interest in the work of the Federal Circuit, which has jurisdiction to hear appeals of most intellectual property cases. The BIPLA submits amicus briefs and otherwise works to educate the public on intellectual property law. Over the years, the BIPLA has prepared and filed a number of amicus briefs in this Court and other courts. For example, the BIPLA submitted an amicus brief to this Court in United States Patent and Trademark Office et al. v. Booking.com B.V. (2020).

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1. The BIPLA has no financial interest in any party or in the outcome of this case. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, its members, or its counsel made a monetary contribution to its preparation or submission. Counsel for petitioner and respondents received timely notice of the BIPLA's intent to file an amicus brief under Rule 37.2. This brief is submitted solely on behalf of the BIPLA as its consensus view. The stated arguments and positions do not necessarily reflect the views of any individual BIPLA member, associated firm, or client of a member. All work to prepare and submit this brief were provided on a pro bono basis by McCarter & English, LLP.

BIPLA members—attorneys, scholars, licensing executives, and other professionals—serve a broad range of clients in numerous industries that create and rely on intellectual property. BIPLA members are on the front lines of intellectual property law practice: they represent their clients in intellectual property prosecution in the United States Patent and Trademark Office (USPTO), in intellectual property licensing and portfolio development, and in intellectual property disputes in federal courts and other venues. The BIPLA has thus gained valuable insights on both intellectual property law and practice and also on how intellectual property works in the business world.

Over its 100 years of existence, the BIPLA has seen first-hand that strong and clear intellectual property rights benefit the American economy and society generally. Indeed, during those periods in which—due to inconsistent enforcement or political trends—intellectual property rights were weakened, innovation and economic growth stalled and even declined. Thus, the BIPLA has a substantial interest in seeing that intellectual property law—under the federal appellate judiciary—develops in a clear, predictable, and consistent way to promote commerce, fair competition, and the public good.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

As the 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); *see also* Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 4, 30 (1997) (*hereinafter*

SCALIA, A MATTER OF INTERPRETATION) (explaining the law is learned "by studying the judicial opinions that invented it."). Despite the Court's recognition of the importance of a principled justification to any appellate decision, the United States Court of Appeals for the Federal Circuit has established a practice of issuing one-word decisions on the merits that offer no principled justification.

Citing its own Rule 36, the Federal Circuit has issued thousands of one-word decisions on the merits. The second question in Island Intellectual Property's Petition is ripe for review because the Federal Circuit now issues one decision without justification for about every three decisions with supporting opinions.

Any justification for a Rule 36 decision is at least undisclosed, but also potentially unknowable. The legitimacy of a one-word decision thus relies on the public confidence that the Federal Circuit must have a principled justification. But by frequently offering no justification for its decisions, the Federal Circuit erodes public confidence that each of its decisions has a principled justification. The Federal Circuit's one-word decision in the instant case is worthy of review because such decisions undermine the legitimacy of the federal appellate judiciary and the country's ability to see itself as a country bound by well-reasoned rule of law—not by the whim of those who happen to have authority at the time.

The BIPLA urges the Court to grant certiorari on Island's second question and review the Federal Circuit's practice of issuing one-word decisions that offer no principled justification. The Rule 36 decision at issue is an appropriate vehicle for review of Island's second question

because it is an illustrative example of a Rules 36 decision that deserves principled justification. It addresses the murky area of patent eligible subject matter, where the proper application of law is developing.

In this brief, the BIPLA will discuss three points favoring review. First, the BIPLA will discuss why the frequency of the Federal Circuit's issuance of Rule 36 decisions on the merits is problematic. Second, the BIPLA will discuss why the Federal Circuit would benefit from providing a principled justification for each decision. Third, the BIPLA will discuss why the public and the federal appellate judiciary would benefit from the Federal Circuit providing a principled justification for each of its decisions.

ARGUMENT

1. THE FREQUENCY OF THE FEDERAL CIRCUIT'S ISSUANCE OF RULE 36 DECISIONS IS PROBLEMATIC.

Federal Circuit Rule 36 permits a decision on the merits without an opinion consisting of a single word "affirmed." The rule permits such a decision only when "an opinion would have no precedential value." Federal Circuit, Local Rule 36(a). The rule additionally requires any one of five other conditions to be met. *Id*. The five additional alternative conditions are broad, including when:

> (1) the judgment, decision, or order of the trial court appealed from is based on findings that are not clearly erroneous;

> (2) the evidence supporting the jury's verdict is sufficient;
>
> (3) the record supports summary judgment, directed verdict, or judgment on the pleadings;
>
> (4) the decision of an administrative agency warrants affirmance under the standard of review in the statute authorizing the petition for review; *or*
>
> (5) a judgment or decision has been entered without an error of law.

Id. (emphasis added).

Notably, the Federal Circuit's one-word affirmance need not specify which of the additional alternative conditions the court relied on in concluding that a Rule 36 decision is appropriate. Accordingly, although the issuance of a Rule 36 decision indicates that the Federal Circuit concluded that a supporting opinion would have no precedential value, the parties and the public lack notice of even which of the alternative additional conditions the Federal Circuit relied on as support for its one-word decision.

Unlike the Federal Circuit, some sister circuits use their rules or procedures to reinforce the importance of disclosing some justification for each decision. Such circuit rules or procedures suggest possible alternative approaches to promote disclosure of a justification. *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 reason or reasons for the decision); 6th Cir. I.O.P. 34(c)(1) (explaining 6th Circuit Rule 36 allows for "disposition of the case ... in open court following oral argument" as an alternative to a written opinion); D.C. Cir. R. 36(b) (allowing for "abbreviated disposition" while suggesting that such disposition "contain[] a notation of precedents or [be] accompanied by a brief memorandum"). These alternative approaches reveal the fallacy in the notion that disclosing a justification must be overly burdensome. If the Federal Circuit rightly contends that "[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 [it] issue[s] full opinions," *TecSec, Inc. v. IBM Corp.*, 731 F.3d 1336, 1350-51 (Fed. Cir. 2013) (Reyna, J., dissenting) (quoting *U.S. Surgical Corp. v. Ethicon, Inc.*, 103 F.3d 1554, 1556 (Fed. Cir. 1997))[2], its remaining burden to disclose some justification cannot be too great.

When addressing the disputed impact of a Rule 36 decision, the Federal Circuit cites only old dictum of this Court as support for the validity of such a decision. *Phil-Insul Corp. v. Airlite Plastics Co.*, 854 F3d 1344, 1354-55 (Fed. Cir. 2017) ("A Rule 36 summary affirmance is a valid and final judgment of this court.") (citing *Taylor v. McKeithen*, 407 U.S. 191, 194 n. 4 (1972) ("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.")).

2. *But see* Daniel Roberts et al., *Predicting Fed. Cir. Rule 36 Affirmances in Patent Cases*, IPLAW360, Oct. 12, 2021, at 3 (reporting "Rule 36 judgments [issue] quickly, with more than 94% of Rule 36 judgments (1,473 of 1,578) coming two weeks or fewer after argument.").

Nonetheless, rather than provide any justification for decisions to affirm a disposition, the Federal Circuit has established a pattern of simply citing Rule 36 for about a quarter of its merits decisions. *See* Jason Rantanen, *Missing Decisions and the United States Court of Appeals for the Federal Circuit*, 170 U. Penn. L. Rev. Online 73-89, 80 (2022) (reporting in Table 1 that, from 2007 through 2020, the Federal Circuit issued one Rule 36 decision for every 2.7 opinions); United States Court of Appeals for the Federal Circuit Opinions & Orders, https://cafc.uscourts.gov/home/case-information/opinions-orders/ (last visited Nov. 12, 2024) (reporting that, from 2021 through 2023, the Federal Circuit issued one Rule 36 decision for every 3.5 opinions); Roberts, *supra* note 2, at 1 (The Federal Circuit ends the appeals of "approximately 40% of appellants from the Patent Trial and Appeal Board rulings and nearly 25% of appellants from district courts" with a Rule 36 decision); *see also* Dennis Crouch, *From Chief Judge Markey's Promise to Rule 36: We Do Not Just Render One-Worded Decisions*, PATENTLY-O (Nov. 8, 2024), https://patentlyo.com/patent/2024/11/markeys-promise-decisions.html (last visited Nov. 20, 2024) ("[T]he Federal Circuit has increasingly relied on Rule 36 summary affirmances, particularly in appeals from the PTAB. According to the court's own statistics, Rule 36 judgments now account for over 40% of merits decisions in patent appeals."); Dennis Crouch, *Patent Exceptionalism and Procedural Silence: A New Challenge to Federal Circuit Practice*, PATENTLY-O (Oct. 23, 2024), https://patentlyo.com/patent/2024/10/exceptionalism-procedural-challenge.html (last visited Nov. 20, 2024) ("Unlike most other circuits, which either do not permit or rarely use one-word affirmances, the Federal Circuit employs Rule 36 in roughly one-third of its patent appeals."); Gene Quinn

& Steve Brachmann, *No End in Sight for Rule 36 Racket at Federal Circuit*, IP WATCHDOG (Jan. 29, 2019, 07:15 AM), https://ipwatchdog.com/2019/01/29/no-end-sight-rule-36-racket-cafc/id=105696 (last visited Nov. 20, 2024).

Any justification for a Rule 36 decision is at least undisclosed and potentially 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). Nonetheless, involved parties may need to understand which, if any, issues a Rule 36 decision foreclosed from reconsideration. A case addressing such possible foreclosure has revealed that, even among Federal Circuit judges, there may be a reasonable dispute as to whether the underlying disposition was decided on alternative grounds. *TecSec, Inc.*, 731 F.3d at 1350-54 (Reyna, J., dissenting) (dissenting as to whether the disposition affirmed by a Rule 36 judgment was based on alternative grounds). That case recognized that, where a Rule 36 decision affirms a disposition decided on alternative grounds, as is common, the parties and the public have no way to determine what justification the Federal Circuit may have relied on for its decision. *TecSec, Inc.* 731 F.3d at 1342-43 (Reyna, J., dissenting). Accordingly, each Rule 36 decision requires the public to trust that the Federal Circuit has some undisclosed, but principled justification.

Moreover, the Federal Circuit may be issuing Rule 36 decisions outside the boundaries established by its own rule. In the instant case, the underlying trial court order does not provide a straightforward application of law to

facts. The underlying order addresses subject matter eligibility for patent protection (*see* Island Intellectual Prop. LLC v. TD Ameritrade, Inc., et al., Fed. Cir. (2023-1318), *petition for cert. filed*, (U.S. Oct. 21, 2024) (No. 24-461) at 3a-4a), a murky issue where the proper application of the law is developing. Island presented over 1400 pages of evidence to demonstrate that its asserted patents claim unconventional processes. *Id.* at 10-14. The order seems to conclude that "steps that are not well-known, routine, or conventional" may nonetheless be "fundamental economic and accounting activities." *Id.*at 6a-9a. But Island's efforts demonstrate a lack of understanding among the public that, for purposes of a patent eligibility analysis, something may be both unconventional and fundamental. The order also references distinguished "cases relied on by Island where improvements were directed to non-abstract concepts." *Id.* at 7a. The appeal of such an order is not a good candidate for a decision without explanation.[3] Can the Federal Circuit have reasonably concluded, as its own Rule 36 requires, that an opinion on that order "would have no precedential value?"

Finally, the Federal Circuit has expressed concern about its own frequent issuance of Rule 36 decisions. A sitting Federal Circuit judge has created a public record of his misgivings. In a 2013 dissent, Judge Reyna remarked "Perhaps, as I once believed, this court should revisit its frequent use of Rule 36." *TecSec, Inc.*, 731 F.3d at 1353 (Reyna, J., dissenting).

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3. The BIPLA takes no position on whether the underlying order was properly affirmed.

2. EXPLAINING EVERY DECISION ON THE MERITS WOULD IMPROVE THE FEDERAL CIRCUIT'S PROCESS AND ITS APPEARANCE.

Federal appellate judges are generally not deemed to have power to act as a decisionmaker by virtue of their position alone. Instead, in support of any decision on the merits, they are expected to provide a statement of reasons relying on appropriate legal authority. *See, e.g., In re Complaint of Judicial Misconduct*, 425 F.3d 1179, 1185 (9th Cir. 2005) (Kozinski, J., dissenting) ("It is wrong and highly abusive for a judge to exercise his power without the normal procedures and trappings of the adversary system . . . [including] a statement of reasons for the decision [and] reliance on legal authority.").

The process of drafting a statement of reasons for a decision "helps to ensure that judges properly reason though the issues put before them." Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 Geo. L.J. 1283, 1317 (2008). As Justice Brennan once wrote, this process of stating and explaining the decision "restrains judges and keeps them accountable to the law and to the principles that are the source of judicial authority." William J. Brennan, Jr., *In Defense of Dissents*, 37 Hastings L.J. 427, 435 (1986). "Misconceptions and oversights of fact and law are discovered in the process of writing." Thomas E. Baker, *A Review of Corpus Juris Humorous*, 24 Tech. L. Rev. 869, 873 (1993). "[A] [r]easoning that seemed sound 'in the head' may seem half-baked when written down, especially since the written form of an argument encourages some degree of critical detachment in the writer, who in reading what he has written will be wondering how an audience would

react." Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U.Chi. L. Rev. 1420, 1447-48 (1995). "A decisionmaker who has reasoned through to a conclusion in print has reasoned in fact." Baker, *supra,* at 873.

The Federal Circuit plays a unique role among the federal circuit courts of appeal in that it is largely responsible for the clear and consistent development of intellectual property law. The Federal Circuit has this responsibility because it exerts nationwide jurisdiction over patent law, trademark law, and appeals from decisions of the U.S. Trademark Trial and Appeal Board, the U.S. Patent Trial and Appeal Board, and the U.S. International Trade Commission. The Federal Circuit can only fulfill its responsibility for the clear and consistent development of intellectual property law by the dissemination of its reasoning. *See, e.g.*, Scalia, A Matter of Interpretation, at 30 (explaining the law is learned "by studying the judicial opinions that invented it.").

The Commission on Revision of the Federal Court Appellate System reported that "more than three-fourths of attorneys questioned agreed that it is important for the courts at least to issue memoranda so that they do not give the appearance to litigants of acting arbitrarily, and so that litigants may be assured that the attention of at least one judge was given to the case." Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Recommendations for Change* 109 (June 1975). Accordingly, the Commission's first recommendation to avoid the appearance of federal appellate judiciary impropriety was to "require that in every case there be some record, however brief, and whatever the form, of the reasoning which impelled the decision." *Id.* at 112.

The Commission explained, with respect to the recommended creation of a new national court of appeals, inferior to this Court, that "the goal is not only to assure continued acceptance of the rule of law in a democratic society, but also general satisfaction with its administration and operation." *Id.* at 117. And that is likely why, shortly after the Federal Circuit was created in 1982, Chief Judge Markey acknowledged that "the [Federal Circuit] agreed at the outset to issue an opinion in every single case decided on the merits." *Proceedings of First Annual Jud. Conf. of the Ct. of App. For the Fed. Cir.*, 100 F.R.D. 499, 509 (1983).

In any event, those who are most interested in clear and consistent development of intellectual property law continue to agree, in large extent, on the importance of a public record of the Federal Circuit's reasoning on the merits.

3. THE PUBLIC AND THE FEDERAL APPELLATE JUDICIARY BENEFIT FROM THE PRINCIPLED JUSTIFICATION OF JUDICIAL DECISIONS.

After the creation of the Federal Circuit, this Court explained that "[t]he Court must take care to speak and act in ways that allow people to accept its decisions ... as grounded truly in principle ...." *Planned Parenthood of Se. Pa.*, 505 U.S. at 865-866; *see also, id.* at 953, 963 (Rehnquist, J., concurring-in-part and dissenting-in-part, joined by Scalia, J., and Thomas, J.) (expressing concern about the Court's vulnerability to illegitimacy and explaining that the Court's legitimacy derives from decisions made "by its best lights"); *id.* at 982-84 (Scalia, J., concurring-in-part and dissenting-in-part, joined by

White, J., and Thomas, J.) (emphasizing the importance of well-reasoned decisions and warning against judgment based only on the personal predilection of men who for the time being have power). Toward that end, the Court agreed that its decisions rely on their underlying reasoning for acceptance. *See generally id.* (disagreeing on what qualifies as the best reasoning).

The Court acknowledged the contemporary understanding that "a decision without principled justification would be no judicial act at all." *Planned Parenthood of Se. Pa.,* 505 US. at 865; *see also* Justice Antonin Scalia, The Press and the Law, Speech at Washington Hebrew Congregation (Mar. 4, 1990) (available on tape titled "Reflections on the Constitution" from Audio Response, Inc. Rockville, MD) ("[A] judge must give reasons; this is the long tradition of western jurisprudence. The outcome and consequence are not sufficient to tell whether a decision is a good one; one must know the reasons given."). The Court thereby affirmed the expectation that the federal appellate judiciary would disclose decisions on the merits with their underlying reasoning.

The federal appellate judiciary's expected practice of disclosing its reasoning on the merits creates circumstances under which both the public and the judiciary benefit. Whereas the public immediately benefits, the judiciary accrues benefits over time.

The federal appellate judiciary's disclosure of the reasons for its decisions on the merits immediately benefits the public in four ways. First, it validates "the fundamental interest that citizens have in being governed according to reasons and principals to which they can give their considered assent." Micah Schwartzman, *Judicial Sincerity*, 94 Va. L. Rev. 987, 1004 (2008). Second, it demonstrates "a commitment to treating citizens as capable of understanding and responding to the reasons that justify the rules by which they are governed." *Id.* Third, it affirms their expectation that the federal appellate judiciary will only issue decisions based on "reasons that those subject to them can, in principle, understand and accept." *Id.* Fourth, it enables citizens to check that their expectations have been met.

Thus, from the federal appellate judiciary's disclosure of the reasons for its decisions on the merits, the public understands that the judiciary has principled reasons for its decisions and that it expects those reasons to be able to withstand public scrutiny. The federal appellate judiciary's disclosure thereby builds "acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands." *Planned Parenthood of Se. Pa.*, 505 U.S. at 865. Over time, such acceptance becomes trust in the federal appellate judiciary.

CONCLUSION

As argued above, the frequency of the Federal Circuit's issuance of Rule 36 decisions is problematic. The Federal Circuit, along with the larger federal appellate judiciary and the general public, would benefit from the disclosure of its underlying reasoning along with each decision on the merits. Thus, the BIPLA respectfully urges the Court to review the appropriateness of the Rule 36 decision at issue in Island's Petition as an illustrative example of the Federal Circuit's frequent issuance of Rule 36 decisions.

Respectfully submitted,

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