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

SUPPLEMENTAL BRIEF FOR PETITIONER ISLAND INTELLECTUAL PROPERTY LLC

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SUPPLEMENTAL BRIEF FOR PETITIONER

I. Introduction

Pursuant to Rule 15.8, Petitioner, Island Intellectual Property, LLC ("Island"), submits this supplemental brief to advise the Court of new petitions and amicus briefs that have been filed covering the questions presented in this Petition, and other related developments.

These developments further support the need for this Court to exercise its supervisory authority to address the failure of the lower courts in patent cases to apply the same rules of summary judgment as used in other civil litigation (Question 1), as well as the Federal Circuit's overuse of one-word affirmances under Local Rule 36, which do not inform the parties or the public as the reasons for that court's decision (Question 2).

The problems raised in Island's Petition have now been raised in three other petitions related to summary judgment (Question 1), and four other petitions related to Local Rule 36 (Question 2).

II. Additional Petitions Reflect That Problems with Lower Courts' Application of the *Tolan* Axiom in Deciding Summary Judgment in Patent Cases Continue to Persist

1. Question 1 of the Petition asks:

> Do the Federal Rules of Civil Procedure apply to patent cases like any other federal case, including in particular FRCP 56 and its prescription against granting summary judgment when the nonmoving party presents evidence that raises material facts in dispute?

As the Petition explained, lower courts in patent cases routinely misapply the summary judgment standard by making credibility determinations and weighing evidence. *See Island* Pet. 27-33; *see also Island* Reply 4-10. These actions not only ignore FRCP 56 but also violate patent owners' Seventh Amendment rights to a jury trial. *Island* Pet. 27-29; *see also Island* Reply 17.

2. There are now two additional petitions pending raising the same issue, and another request for more time to file a third petition.

3. Harris Brumfield filed a Petition for Writ of Certiorari in *Harris Brumfield, Trustee for Ascent Trust v. IBG LLG, et al.*, No. 24-764 (U.S. filed Jan. 2, 2025) ("*Brumfield* Pet.") to address as Question 3: "[w]hether this Court's supervisory authority is

needed to correct the Federal Circuit's improper (1) application of Rule 56 to patent cases and (2) practice of deciding issues that were never argued or briefed on appeal". There, the Federal Circuit "affirm[ed] ineligibility at summary judgment despite substantial evidence of disputed fact". *Brumfield* Pet. 36. Like this Petition, "the Federal Circuit ignored over 800 pages of evidence" when granting summary judgment. *Id*. at 37.

Island and Audio Evolution filed amicus briefs supporting the *Brumfield* Petition. The arguments presented therein also support the Court granting certiorari on Question 1 of this Petition.

4. Broadband iTV filed a "me too" petition in *Broadband iTV, Inc. v. Amazon.com, Inc.*, No. 24-827 (U.S. filed Jan. 31, 2025) ("*Broadband* Pet."), asking this Court to address the same question as presented as Question 1 here in *Island*. There, the lower courts ignored testimony and conflicting evidence regarding conventionality of the claimed elements. *Broadband* Pet. 6-8.

Respondent Amazon's BIO does not address any of the overarching Rule 56 issues raised by this and other petitions. Brief in Opposition, *Broadband iTV, Inc. v. Amazon.com, Inc.*, No. 24-827 (U.S. filed Mar. 6, 2025) ("Amazon BIO"). Rather than deny that patent cases should apply the same summary judgment rules as other civil cases as described in *Tolan*, the Amazon BIO repeats the evidence the Federal Circuit relied upon (improperly read in light most favorable to Amazon, the moving party),

sidestepping the evidence presented by Broadband (the non-movant) from which a reasonable juror could have decided differently. *Cf.* Brief of Island Intellectual Property LLC as Amicus Curiae in Support of Petitioner 12-15, 18-19, 21, *Harris Brumfield, Trustee for Ascent Trust v. IBG LLG, et al.*, No. 24-764 (U.S. filed Feb. 11, 2025). Thus, Amazon in its BIO repeats the error and further evidences the need for supervisory review.

5. While Mirror Worlds has not yet filed a petition, it was granted an extension of time until May 2, 2025, to file a petition that would "present the same question as Question 1 presented [here]", noting that *Brumfield* and *Broadband iTV* "both raise similar issues" and "are also pending before this Court." Application to Extend Time, *Mirror Worlds Technologies, LLC v. Meta Platforms, Inc.*, No. 24A821 (U.S. filed Feb. 21, 2025) (granted).

III. The Federal Circuit's Overuse of Rule 36 Judgments Continues to Be Problematic and Remains Unlikely to Be Addressed Without This Court's Intervention, as Additional Petitions Demonstrate

6. Question 2 of this Petition asks:

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

As the Petition explained, the Federal Circuit routinely issues one-word affirmances under Rule 36, which fail to identify for the parties and the public the basis for the affirmance. *See Island* Pet. 37-41; *see also Island* Reply 10-11, 14. This practice contradicts appellate tradition and runs counter to the practices of other sister circuits. *See Island* Pet. 35-37, 41-42; *see also Island* Reply 10-11, 14-16. Island raises this issue in the context of an appeal under 28 U.S.C. § 1291 from a district court decision.

7. As the Court is aware from the *Island* Reply (and Island's Amicus Brief submitted in *ParkerVision* at the same time), ParkerVision filed a similar petition which also challenged the Federal Circuit's use of Local Rule 36 in the context of appeals from the PTAB under 35 U.S.C. § 144. Petition for Writ of Certiorari, *ParkerVision, Inc. v. TCL Indus.*

Holdings, et al., No. 24-518 (U.S. filed Nov. 4, 2024) ("*ParkerVision* Pet.").

Island has explained that both this case and *ParkerVision* should be taken together to provide the Court a fuller range of fact scenarios in which to decide the propriety of the Federal Circuit's issuance of Rule 36 Judgments, which do not provide a basis for such decisions. Brief of Island Intellectual Property LLC as Amicus Curiae in Support of Petitioner i-ii, 22-26, *ParkerVision, Inc. v. TCL Indus. Holdings, et al.*, No. 24-518 (U.S. filed Dec. 6, 2024) ("Island *ParkerVision* Amicus Br.").

As the Federal Circuit explains, "[s]ince 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". *See Rates Tech., Inc. v. Mediatrix Telecom, Inc.*, 688 F.3d 742, 750 (Fed. Cir. 2012). Despite the protests of Respondent, there is no adequate justification for the lack of explanation provided by Rule 36 Judgments in general, and in particular, in *Island* and *ParkerVision*. Tellingly, Respondents TCL and LG in *ParkerVision* do not even attempt to justify the lack of explanation provided by Rule 36 Judgments. *See* Brief in Opposition, *ParkerVision, Inc. v. TCL Indus. Holdings, et al.*, No. 24-518 (U.S. filed Feb. 14, 2025); *cf.* Island *ParkerVision* Amicus Br. 13-21.

8. In addition to *Island* and *ParkerVision*, another petition (*Audio Evolution*) has been filed in the same context as *Island* (an appeal under § 1291),

which raises as Question 2 the same issue as *Island*. Petition for Writ of Certiorari filed in *Audio Evolution Diagnostics, Inc. v. United States, et al.*, No. 24-806 (U.S. filed Jan. 27, 2025).

Island, as well as Brumfield, filed an amicus brief in *Audio Evolution*. The arguments presented therein also support the Court granting certiorari on Question 2 of this Petition.

9. While Atos has not yet filed a petition, it was granted an extension of time until April 7, 2025, to file a petition that would address the Federal Circuit's affirmance "containing no reasoning". *See* Application to Extend Time 2, *ATOS, LLC, dba RideMetric v. Allstate Insurance Company*, No. 24A777 (U.S. filed Feb. 7, 2025) (granted). Atos appealed to the Federal Circuit from an adverse PTAB decision under 28 U.S.C. § 144, which was affirmed under Local Rule 36, like in *ParkerVision*. *Id*. at 2.

10. Another pending petition by Converter Manufacturing LLC from a Rule 36 Judgment by the Federal Circuit raises important issues involving whether the practice violates this Court's instruction in *Loper Bright Enters. v. Raimondo,* 603 U.S. 369, 387, 413 (2024), when the Federal Circuit used a Rule 36 Judgment "to defer to an agency [USPTO] interpretation of the law", by failing to explain a proper interpretation of the law. Petition for Writ of Certiorari ii, 3, *Converter Manufacturing, LLC v. Tekni-Plex, Inc.*, No. 24-866 (U.S. filed Feb. 10, 2025) (Question 3).

11. Thus, *Converter* evidences additional problems with Rule 36 Judgments. More are discussed by Professor Crouch, a notable scholar in the field of Patent Law, who points out several recent and problematic Federal Circuit Rule 36 summary affirmances that "raise serious questions . . . about the court's ongoing reliance on this practice."[1] Dennis Crouch, *Million Dollar Mysteries: Recent Complex Patent Cases Lost to Rule 36*, Patently-O (Feb. 10, 2025), https://patentlyo.com/patent/2025/02/million-mysteries-complex.html; *see also* Brief of Island Intellectual Property, LLC as Amicus Curiae in Support of Petitioner 10-12, *Audio Evolution Diagnostics, Inc. v. United States, et al.*, No. 24-806 (U.S. filed Feb. 27, 2025) ("Island *AED* Amicus Br.").

12. Finally, the Federal Circuit's Local Rule 36 is problematic beyond even patent cases, as exemplified by Petition for Writ of Certiorari filed in *Eric Katz v. Department of Justice*, No. 24-893 (U.S. filed Feb. 12, 2025). While not necessary a good vehicle for this issue, *Katz* illustrates that the problem of such judgments permeate and are unlikely to be

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[1] *Lu v. Hyper Bicycles*, No. 24-1081 (Fed. Cir. Feb. 10, 2025); *Wilson v. Corning*, No. 24-1065 (Fed. Cir. Feb. 10, 2025); *Shell USA v. Scientific Design*, No. 23-1937 (Fed. Cir. Feb. 7, 2025): *In re Google*, No. 23-2119 (Fed. Cir. Feb. 5, 2025); *In re Soto*, No. 23-2008 (Fed. Cir. Feb. 5, 2025); *Maxell v. Amperex Technology*, No. 23-2285 (Fed. Cir. Jan. 15, 2025); *Lynk Labs v. Home Depot*, No. 23-2185 (Fed. Cir. Jan. 14, 2025); *Ward Participations v. Samsung*, No. 24-1065 (Fed. Cir. Jan. 13, 2025).

addressed until this Court exercises its supervisory authority.

13. The problems evidenced by these petitions have been the subject of extensive public scrutiny by commentators including a host of bar associations, public interest groups, law professors, individuals inventors, and media outlets. *See* Island *AED* Amicus Br. 13-20 (discussing examples of such commentary).

IV. Conclusion

The Federal Circuit's handling of summary judgment in patent cases and overuse of Rule 36 Judgments are both problematic, and this Court should exercise its supervisory authority and take these issues in the *Island* Petition.

Respectfully submitted,

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