No. 24-518

# In the Supreme Court of the United States

PARKERVISION, INC.,

*Petitioner*,

*v.*

TCL INDUSTRIES HOLDINGS CO., LTD., *et al.*,

*Respondent.*

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

## BRIEF OF AMICUS CURIAE INJUSTICE POOL, LLC SUPPORTING PETITIONER

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## INTEREST OF AMICI CURIAE[1]

Amicus Injustice Pool, LLC is an organization that protects inventors by advocating for strong intellectual property rights and developing innovative methods to help them defend against infringement and improper invalidation. Many of Amicus's members and contributors own patents, and have therefore gained an intimate familiarity with the innerworkings of the administrative regime

[1] This brief serves as notice more than 10 days in advance of the deadline for filing this brief. No counsel for any party authored this brief in whole or in part, and no person or entity other than the amici, their members, or their counsel made a monetary contribution intended to fund the brief's preparation or submission.

within the U.S. Patent and Trademark Office—and great familiarity with the particularly abusive tactics of the main Respondent in this case, TCL Industries Holdings, Co., Ltd. That collective experience makes Amicus well-situated to explain the practical impact of the Federal Circuit's practice of writing one-word decisions in patent rights, and to examine the ways in which the lack of oversight fostered by that practice fosters abusive practices like TCL's, harms American patent owners, American startups, and the American economy, while strengthening foreign adversaries that wish to do us harm. Amicus therefore urges the Court to overturn this abusive practice. And they contend that this case is the right vehicle to address the problem.

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

When Congress created the inter partes review (IPR) procedure in the Leahy-Smith America Invents Act, Pub. L. 112-29, 125 Stat. 284 (2011), to create a cheaper alternative to court proceedings to litigating patent validity, it unleashed administrative law at its most potent and consequential. IPR proceedings adjudicate rights of the highest importance—intellectual property rights "entitled to protection as any other property." *Oil States Energy Services, LLC* v. *Greene's Energy Group, LLC*, 584 U.S. 325 (2018). In those proceedings, administrative functionaries within the PTO make decisions that carry the force of law—and sometimes occupy the role of both judge and jury in doing so. Each of these determinations is assigned exclusively to the administrators of the Patent Trial and Appeal Board (PTAB), without the involvement of juries or Article III judges. And those administrative

functionaries operate with greater freedom, and less significant constraints, than litigants and judges in court.

There is no jury in IPR proceedings. Nor is there live testimony or cross-examination. There is no presumption in favor of a patent's validity—as there would be in district court. *See* 35 U.S.C. § 282(a). The truncated PTAB hearings cover in hours what takes weeks in district court. And there is no ethical code prohibiting the administrative judges of the PTAB from laboring under conflicts of interest that would be disqualifying for a federal district judge. The political appointees of the PTAB are often pulled from the same industries and companies that most often institute IPR proceedings against competitors. They bring with them a demonstrated tendency to favor the interests of their former employers and clients when they ascend to the bench.[2] Worse still, USPTO representatives admit to "stacking" PTAB panels with judges known to have views aligned with the Director on particular issues in order to ensure that administration's favored outcomes are achieved in particular cases.[3]

In short, the PTO is charged with weighty responsibilities and operates in an administrative context that— perhaps more than any other—depends upon definite, fair application of law and reasoned decision-making. It is an

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[2] *See, e.g.*, Steve Brachmann, *Apple, APJ Clements and final written decisions: a lethal cocktail for patents* IPWatchdog Blog (June 22, 2017), <bit.ly/2g63xi8> (demonstrating through statistical evidence Administrative Patent Judge Matt Clements's tendency to favor the interests of Apple, his former client, in IPR proceedings).

[3] Gene Quinn, *USPTO admits to staking PTAB panels to achieve desired outcomes*, IPWatchdog Blog (Aug. 23, 2017) <bit.ly/2iE9mnS>.

administrative regime that operates at the very bleeding edge of the matters that agencies may be permitted to consider, in which agency personnel operate outside of the sorts of external constraints that might otherwise be expected to hold them to account.

Indeed, Congress has placed only one control on the IPR process that exists outside the PTO itself: appellate review at the Federal Circuit. And to make sure that the Federal Circuit conducts this role with appropriate vigor to check excesses from the functionaries on the PTAB, Congress has imposed an extraordinary directive—one imposed on no other court: a mandate that the court issue an "opinion" in every appeal from the PTAB. 35 U.S.C. § 144.

Yet the Federal Circuit has virtually abandoned this Congressionally conferred obligation. And instead of following that Congressional directive to write full "opinions" in every PTAB appeal, the Federal Circuit instead follows its local practice outlined in Federal Circuit Rule 36(a) allowing it to issue one-word "judgments of affirmance without opinion." And pursuant to that Local Rule, over a third of the parties that take appeals from the PTAB to the Federal Circuit every year receive nothing more than a one-word decision: AFFIRMED.

This tactic makes it obvious that the Federal Circuit is not fulfilling the oversight role that Congress has required. Instead of serving as a check on agency action, it *defers* to agency action, upholding the decision without explaining why. And its abdication of that responsibility is so total and absolute that parties are left to question whether the Federal Circuit is giving their cases any consideration at all.

Lack of Federal Circuit has fueled the excesses of the administrative judges of the PTAB and accelerated harms that the IPR administrative process poses to the separation of powers, to American startups and inventors, and to the American economy as a whole. Amici therefore urge the Court to take this opportunity to overturn this dangerous practice and require the Federal Circuit to do its federally mandated job.

This case presents the proper vehicle to address the problem. Respondent's actions in this case are a perfect example of the lax standards and strategic gamesmanship that is allowed to flourish in the absence of Federal Circuit oversight. This case also demonstrates the full extent of the consequences that result from the circuit's abdication of responsibility, because that gamesmanship has been done at the hands of a Chinese company with close ties to the Chinese government, fueling the rise of a foreign adversary on the backs of hardworking American inventors, and allowing theft of intellectual property that can be used to cause Americans harm. It is therefore that the court to take this case to address the Federal Circuit's improper one-word decision-making practice.

The petition should be granted.

## ARGUMENT

### I. The Court should grant review in this because the Federal Circuit's practice of one-line judgments is irrevocably at odds with Congressional directive.

A. The practice of writing opinions to decide cases stands as one of the major contributions of the common law. And for good reason. The simple act of writing things down makes for clearer thinking, and better decision-

making, in legal matters as in all other things. The deliberation and craft required to commit ideas to writing fosters careful consideration. And the mere fact that the writing exists demonstrates that the author has given attention to the matters recorded.

The reflection required to commit ideas to writing also favors the development of clearer and more informed legal standards. *See, e.g.*, *Negusie* v. *Holder*, 555 U.S. 511, 523–524 (2009); *INS* v. *Orlando Ventura*, 537 U.S. 12, 17 (2002). Recording opinions in writing also encourages consistency, thereby allowing for fundamentally fairer adjudications.

That is exactly why Congress requires the Federal Circuit to write "opinions" in appeals from PTAB proceedings. And that is exactly why the Federal Circuit's abdication of that responsibility has proven so debilitating for patent owners. The Federal Circuit has virtually given up the practice of opinion-writing for a giant chunk of its PTAB appeal docket. Indeed, a study that Amicus conducted specifically for this brief shows that from the period 2012 to 2023, the court has written almost as many one-line decisions in PTAB appeals from IPR proceedings (599) as full opinions (731)—a relative incidence of 45.04%.

B. The consequences of this lapsed oversight have been extraordinarily bad for patent owners. The Federal Circuit's failure to show its legal work, has sent a strong signal that slipshod agency work will be tolerated—one that PTAB personnel have undoubtedly heard and responded to in every case they decide. That is an untenable scenario for intellectual-property owners, whose rights hinge upon well-reasoned, legally sound decision-making. After all, the Federal Circuit writes many more opinions affirming PTAB denials than reversing them, making it an

easy job to destroy a patent at the PTAB, but hard work to uphold it.

C. The PTAB's response to these incentives has only fostered the reputation of its judges as "death squads, killing property rights,"[4] a feature which has attracted infringing petitioners to IPR proceedings like magnets. The PTAB has invalidated claims in as many as 84 percent of the patents it has fully adjudicated.[5] This is a far higher rate of invalidation than in federal district court, where patents are held invalid in only about 46% of cases. Gregory Dolin, *Dubious Patent Reform*, 56 B.C. L. Rev. 881, 924 (2015). This disparity is all the more striking because in litigation, unlike IPR, patents can be invalidated on grounds aside from novelty and obviousness, such as inequitable conduct.[6] Making matters worse, patents can be challenged multiple times. And through the brute force of sheer repetition, the probability of invalidation of any patent, even a high-quality one, approaches 100%.[7]

D. This has made life much harder for America's startups and inventors. The cloud of uncertainty and

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[4] Peter J. Pitts, *'Patent Death Squads' vs. Innovation*, Wall St. J., June 10, 2015, <http://on.wsj.com/1MsqErB>.

[5] Paul R. Michel & Chris Israel, Bloomberg, *Don't Let Big Tech Sabotage U.S. Innovators' Protections* (Apr. 22, 2022) <bit.ly/3h2Ftwn>.

[6] 35 U.S.C. § 282(b); *Therasense, Inc.* v. *Becton, Dickinson & Co.*, 649 F.3d 1276, 1285 (Fed. Cir. 2011) (en banc) (noting the defense of "[i]nequitable conduct").

[7] Matteo Sabatini, *PTAB Challenges and Innovation: A Probabilistic Approach* 5 (Aug. 6, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id= 3668216.

expense that IPR casts over a patent—fostered by the Federal Circuit's lax oversight—can be crippling to startups. The initial investment required to bring innovative ideas to market is particularly high for high-tech products in industries like clean energy and life sciences, frequently reaching into the billions.[8]

Where a start-up company develops such technology, with no revenues to invest and no assets against which to borrow, it would be impossible to attract the investment necessary to develop an innovative product without convincing investors that the enterprise was viable. In many cases, a new company's only chance of success lies in the protection that a patent affords to the company's new technology.

Patents are thus critical to the growth and viability of innovation-oriented start-ups whose inventions might otherwise easily be copied. These advantages, and the competition-destroying ends to which they can be employed, are often difficult to overcome unless the startup has patents protecting its key innovations. It is thus unsurprising that the likelihood of growth for start-up firms is 35 times greater for those that avail themselves of the patent system.[9] Patents also more than double the probability

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[8] Tufts Ctr. for the Study of Drug Dev., *Cost to Develop and Win Marketing Approval for a New Drug Is $2.6 Billion* (Nov. 18, 2014), <bit.ly/1Hfvx6G>; *Climate for Innovation: Hr'g Before H. Select Comm. on Energy Independence and Global Warming*, 111th Cong. 31, 33 (2009) (testimony of Robert T. Nelsen, ARCH Venture Partners).

[9] C. Fazio *et al.*, MIT Innovation Initiative, *A New View of the Skew: A Quantitative Assessment of the Quality of American Entrepreneurship* 9 (2016), <http://bit.ly/1X8MF8r>.

that a startup will grow to sufficient size to be listed on a stock exchange. Farre-Mensa *supra* note 21 at 5.

But the value of a patent depends almost entirely on its validity—the "determinative" factor in whether it will attract funding.[10]

Providing venture capital for start-ups is inherently risky, because three out of four startups will fail.[11] Thus, the attendant uncertainty as to patent validity introduced by the creation of IPR substantially weakens patents' value in the eyes of angel investors and venture capitalists, with devastating effects on the availability of capital for startup businesses. This is not speculation. It has been the personal experience of *amici*, who have had businesses destroyed because the mere *existence* of inter partes review made patent rights so uncertain that funding became impossible—even though IPR petitions were never filed against the patents at issue.

Moreover, the potential for IPR review to weaken property rights saps patentholders of their chance to compete on level footing with more-established rivals. Indeed, larger companies, with their greater resources to devote to litigation, will find IPR proceedings to be particularly effective anti-competitive weapons. The ability to weaken patent rights through administrative challenges to competitors' patents makes it easier for them to destroy smaller companies, and leaves them free to copy patented

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[10] Press Release, Nat'l Venture Capital Ass'n, *National Venture Capital Association Encourages Congress to Support Innovators in Patent Reform Legislation* 1 (Oct. 25, 2007).

[11] Deborah Gage, *The Venture Capital Secret: 3 Out of 4 Start-ups Fail*, Wall St. J., Sept. 20, 2012, <http://on.wsj.com/1FpKaG6>.

technologies without serious risk of suffering legal consequences.[12] It is thus unsurprising that large companies led the push for the AIA's patent reforms and the creation of IPR.[13]

IPR's destabilizing effects on patent rights and the development of small and start-up businesses threaten the economy as a whole, because growth in the American economy depends on advances from small startups supported by strong patent rights.

Patent-driven innovations from startups and individual inventors have nourished much of the creative disruption that has fueled innovation and the American economy, spurring developments in industries as diverse as computer software, semiconductors, online businesses, life sciences, and emerging clean technologies. Nat'l Venture Capital Ass'n, *Venture Impact: The Economic Importance of Venture-Backed Companies to the U.S. Economy* 9–10 (5th ed. 2009), <http://bit.ly/1X8wBmZ>. And at present, net job growth in the U.S. is attributable entirely to jobs created by small startup firms, because companies that are more than one year old actually destroy, on

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[12] Joe Nocera, *the Patent Troll Smokescreen*, N.Y. Times, Oct. 23, 2015, <http://nyti.ms/1PJRz7j> (outlining the business strategy of "'efficient infringing'").

[13] E.g., CQ Press, *First Street Report: Lobbying the America Invents Act* 4, 11-12 (2011), <http://bit.ly/24fgdjg> (noting that the "Coalition for 21st Century Patent Reforms," comprised of some of America's largest companies, "actively lobbied" for enactment of the AIA).

average, more jobs than they create.[14] Innovative industries also create jobs that pay approximately 60 percent more than non-IP-intensive industries, and their products drive the majority of U.S. exports.[15] Patent-ownership was found to be the leading indicator of regional wealth, more important than education or infrastructure.[16]

Recently, however, the startup and small-business environment has begun to suffer, in no small part due to the weakening of patent property rights. Since the 1990s, the number of technology-related startups is down nearly 40%.[17] For the first time, more companies are going out of business than starting up.[18] Accordingly, the Federal Circuit's lax enforcement regime, and the cloud that it casts over the validity of patents, risks tilting the balance still further, inhibiting startup growth and innovation, and depriving the economy of good, high-paying jobs. And so

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[14] Ewing Marion Kauffman Found., *The Importance of Startups in Job Creation and Job Destruction* 4 (Jul. 2010), <http://bit.ly/1eODvIy>.

[15] Nam D. Pham, NDP Consulting, *The Impact of Innovation and the Role of Intellectual Property Rights on U.S. Productivity, Competitiveness, Jobs, Wages, and Exports* 5 (2010), <http://bit.ly/2vKShtG>.

[16] Fed. Reserve Bank of Cleveland, Ann. Rep., *Altered States: A Perspective on 75 Years of State Income Growth* 17-18 & fig. 6 (2005), <http://bit.ly/1RDNkG7>.

[17] J. Haltiwanger et al., Ewing Marion Kauffman Found., *Declining Business Dynamism in the U.S. High-Technology Sector* 7 (Feb. 2014), <http://bit.ly/1OWNUPp>.

[18] J.D. Harrison, *More businesses are closing than starting. Can Congress help turn that around?*, Wash. Post, Sept. 17, 2014, <http://wapo.st/1Parrns>.

long as the Federal Circuit's lax oversight of PTAB functionaries remains, that trend is going to continue. That is a compelling reason for this Court to intervene.

## II. This case is a perfect vehicle to restore the Federal Circuit's proper oversight role over the PTAB.

A. This case is also a perfect vehicle to restore the Federal Circuit's proper role in overseeing the PTAB by forcing it to write opinions in PTAB appeals as Congress envisioned. Indeed, this case perfectly illustrates the PTAB chicanery that has been permitted to flourish in the absence of that oversight. During the IPR proceedings in this case, Respondent TCL raised an argument for the first time in its reply brief—that capacitors in the prior art stored non-negligible amounts of energy. (Pet. 8-9) Bringing up such an argument in a reply was a plain violation of 32 U.S.C. § 312(a)(3), which requires that the IPR petition itself must "identify" "each claim challenged," leaving no room for ball-hiding tactics. Nonetheless, this improper argument proved determinative in the PTAB's decision.

Petitioner raised that argument on appeal, and it should have been dispositive. But the Federal Circuit provided only a one-line affirmance—giving no indication whether the court below considered the impropriety of Respondent's improper argument *at all*. That would have never happened under full appellate review.

B. But this case is not merely a valuable vehicle for the Court because it serves as an example of the chicanery that is permitted under the Federal Circuit's current regime of one-line opinions. This case is also valuable because it demonstrates the full extent of the consequences for the country that can arise from abuse of the Federal

Circuit's lax oversight regime—because of the identity of the abuser.

Chinese companies like Respondent TCL have capitalized on the Federal Circuit's lax enforcement to steal American technologies—fueling China's meteoric economic rise, and benefitting America adversaries, by harming domestic businesses through economic warfare, with resultant effects with on the American economy, consumer safety, and national security.

Observers have long complained that Chinese companies steal intellectual property "from American companies, universities, and research institutions," and insist that this theft is often controlled and directed by the leadership of the Chinese government itself.[19] The annual cost of that theft to the U.S. economy is massive, estimated to be between $225 and $600 billion.[20] And that figure likely omits the costs of patent infringement, which alone accounts for between $500 million to $2.8 billion in losses every year.[21]

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[19] SAIS, SAIS Review of International Affairs, *How China's Political System Discourages Innovation and Encourages IP Theft*, (July 31, 2023); Dennis C. Blair & Keith Alexander, *China's Intellectual Property Theft Must Stop*, N.Y. Times, Aug. 15, 2017. https://www.nytimes.com/2017/08/15/opinion/china-us-intellectual-property-trump.html?searchResultPosition=1.

[20] U.S. Int'l Trade Comm'n, *Update to the IP Commission Report: The Theft of American Intellectual Property: Reassessments of the Challenge and U.S. Policy* 1 (2017).

[21] *See* U.S. Int'l Trade Comm'n, China: *Effects of Intellectual Property Infringement and Indigenous Innovation Policies on the U.S. Economy* (USITC Publ. 4426, Investigation No. 332-519, May

So patent infringement is a major front in China's economic war against the United States. And on that battlefield, Chinese companies do not merely steal patented inventions through widespread infringement and copy them, they also take them by force, by destroying the patents themselves. IPR has become one of China's favorite weapons in this takeover. Chinese companies are filing hundreds of IPR petitions at the PTAB to invalidate the patent rights of American small businesses.[22] And they not only use the technologies they steal to fund China's economic development on the backs of American inventors, they also use the products they steal to harm or spy on Americans—especially by using the sorts of connective technologies to take American consumer data and use it for nefarious purposes.

C. TCL is one of the very worst offenders in this field of economic warfare. TCL is the "third largest television manufacturer in the world."[23] And it has achieved that position through strong ties to the Chinese government and the ruling Communist Party, along with out-and-out economic warfare on its rivals—and possibly outright espionage at the best of the Chinese government. *Ibid.*

TCL has been under investigation by the Department of Homeland security for "incorporate[ing] backdoors in

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2011) (estimating that the U.S. suffered between $500 million to $2.8 billion in losses from Chinese patent infringement in 2009).

[22] Randy Landreau, US Inventor, *China Hijacks US Patent System to Steal American Inventions*.

[23] Dep't of Homeland Security, *Acting Secretary Chad F. Wolf Remarks As Prepared: Homeland Security And The China Challenge* (Dec. 21, 2020).

all of its TV sets exposing users to cyber breaches and data exfiltration." *Ibid.*

These concerns are so serious that it has been placed on the Entity List (15 C.F.R. Part 744, Supplement No. 4), the list compiled by the Bureau of Industry and Security comprised of "foreign individuals, companies, and organizations deemed a national security concern, subjecting them to export restrictions and licensing requirements for certain technologies and goods."[24] TCL was also forced by the Committee on Foreign Investment in the United States (CFIUS) to withdraw its proposed purchase of Novatel Wireless, Inc., the wireless "MiFi business" of Inseego Corp. after the Committee on Foreign Investment in the United States identified national security concerns arising from the sale. See Trade Practitioner, C*FIUS Filing Abandoned, T.C.L. Industries Limited/TCL Corporation and Inseego Corp./Novatel Wireless*, Trade Practitioner (June 12, 2017). This makes TCL one of the biggest risks to American security in the world.

TCL is also a prolific patent infringer. It has been sued many times for infringement, and a frequent attacker of patents in IPR.

And even TCL is only the tip of a much larger spear. TikTok was famously banned in the United States because of its Chinese ownership "to prevent foreign adversaries from conducting espionage, surveillance, maligned operations, harming vulnerable Americans, our servicemen and

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[24] Bureau of Industry and Security, *Entity List*, <https://bit.ly/4fFoI3y>.

women, and our U.S. government personnel."[25] And federal legislators have also raised similar concerns about Contemporary Amperex Technology Limited (CATL), a Chinese state company dominant in EV batteries, with deep ties to the Chinese Communist Parties and the People's Liberation Army.[26] CATL enjoys a massive 37.5 % share of the global electric vehicle battery market. *Ibid.* These legislators and others have raised concerned that this market dominance has given CATL access to internet-connected infrastructure that it could use to install "malware" to allow "extended monitoring" of electronic vehicles and to "gather[] sensitive information about their owners."[27] And this concern is so serious that U.S. legislators have supported bipartisan legislation that would bar CATL completely from the United States.[28] These malignant actors should not be permitted to use the lax protections of American inventors fostered by the Federal

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[25] Bobby Allyn, *President Biden signs law to ban TikTok nationwide unless it is sold*, NPR, Apr. 24, 2024.

[26] Letter from Sen. Marco Rubio to U.S. Department of Defense Lloyd Austin (Aug. 28, 2024).

[27] Craig Singleton, Foundation for Defense of Democracies, *Bejing's Power Play: Safeguarding U.S. National Security in the Electric Vehicle and Battery Industries* (Oct. 23, 2023).

[28] "On November 20, the Senate Homeland Security & Governmental Affairs Committee will meet to debate and vote on H.R.8631, which prohibits the Secretary of Homeland Security (DHS) from procuring certain foreign-made batteries, including CATL. This is the bipartisan bill that passed the House floor in late September with strong statements from Democrats and Republicans urging Senate passage before the end of this year." Peter Harter, *The New 'China Syndrome': Favors for CATL Can Be Stopped by President Trump* (Nov. 18, 2024), <https://bit.ly/4eGeNJq>.

Circuit's lax opinion-writing regime to steal American technologies and use them against us.

## CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

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