

No. 24-518

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**In the Supreme Court of the United States**

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PARKERVISION, INC.,

*Petitioner,*

*v.*

TCL INDUSTRIES HOLDINGS CO., LTD., ET AL.,

*Respondents.*

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

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**BRIEF FOR *AMICI CURIAE*  
ASSOCIATION FOR AMERICAN INNOVATION,  
PAUL MORINVILLE, AND JEFFREY DEPP  
IN SUPPORT OF PETITIONER**

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ERIK S. JAFFE

*Counsel of Record*

JOSHUA J. PRINCE

SCHAERR | JAFFE LLP

1717 K Street NW, Suite 900

Washington, DC 20006

(202) 787-1060

[ejaffe@schaerr-jaffe.com](mailto:ejaffe@schaerr-jaffe.com)

*Counsel for Amici Curiae*

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## INTERESTS OF *AMICI CURIAE*<sup>1</sup>

*Amicus* Association for American Innovation (AAI) is a non-profit membership organization dedicated to advancing the future of American innovation by supporting and promoting technology startups, entrepreneurs, and inventors through effective policy reform in the United States. AAI strives to create a policy environment where the conception, protection, and commercialization of technologies critical to American economic and national security prosper, thereby enabling the United States to take back the global technological lead from China.

*Amicus* Paul Morinville is the co-founder and executive director of *amicus* AAI. He is also the founder and former President of US Inventor, Inc., an inventor organization in Washington D.C. that advocates for strong patent protections for inventors and startups. Morinville is an inventor with nine issued patents and more than 30 pending patent applications. He has been an executive at multiple technology companies, including Dell Technologies as well as startups creating computer hardware, enterprise middleware, video compression software, medical devices, and artificial intelligence applications. He also has taught statistical quality

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<sup>1</sup> This brief was not authored in whole or in part by counsel for any party and no person or entity other than *amici curiae* or their counsel has made a monetary contribution toward the brief's preparation or submission. Counsel of record for all parties received timely notice of the intent of *amici curiae* to file this brief.

control classes to corporate clients while an adjunct faculty member at Ivy Tech in Indiana.

*Amicus* Jeffrey Depp is the co-founder and Vice-President, General Counsel, and Senior Director for Policy at *amicus* AAI. He is a registered patent attorney and an intellectual property and innovation policy professional with a unique combination of training and real-world experience. He has done policy work for trade organizations, professional societies, and other organizations. He has worked in university technology transfer, the pharmaceutical industry, the practice of intellectual property law, and the federal courts. In addition to his law degree, Depp has a Bachelor's Degree in Chemical & Biomedical Engineering, a Master's Degree in Industrial Administration, and is currently a PhD candidate in Public and International Affairs. His dissertation is entitled "An Inquiry into the Nature and Causes of American Innovation: An Austrian Economics Perspective."

*Amici* are interested in this case because of their commitment to a healthy and vibrant patent system and because the failure of the Federal Circuit to provide written opinions in many cases undermines the quality of patents, introduces greater uncertainty in the system, and harms American innovation.

**SUMMARY OF ARGUMENT**

*Amici* agree with Petitioner that Federal Circuit Rule 36 flouts the plain text of 35 U.S.C. § 144 by allowing the Federal Circuit to affirm decisions of the Patent Trial and Appeal Board (PTAB) without issuing an opinion explaining its reasoning for doing so. Pet. 13-14. They also agree with Petitioner that principles of constitutional avoidance require 35 U.S.C. § 144 to be read according to that plain text. *Id.* at 23-31. And they agree with the other *amici* that the Federal Circuit's failure to adhere to Congress's requirement that it reduce its decisions to an opinion has "made life much harder for America's startups and inventors" by eliminating "consistency" and fairness in PTAB's inter partes review (IPR) procedure, Injustice Pool Br. 6-7, is a boon to China in that it allows Chinese companies to invalidate the patent rights of Americans, Eagles and Eagle Forum Education Br. 8-19, and is an important and frequently recurring issue, Fair Inventing Fund Br. 8-10.

*Amici* write separately to highlight three additional reasons why this case presents an important question worthy of this Court's review.

First, the professed purpose of inter partes review is undermined when the information necessary to create a quality feedback loop via judicial review of streamlined PTAB proceedings is abandoned in favor of a one-word Rule 36 order from the Federal Circuit. IPR was explained and intended by Congress to be an expedited procedure to improve the quality of the patent process and the resulting patents. But it cannot systemically improve patent quality without the

Federal Circuit articulating where the PTAB succeeded or failed in complying with governing patent law and allowing such positive and negative feedback to work back into the system.

Such feedback is necessary to allow both PTAB and the issuing Patent and Trademark Office to better follow the law when reviewing patents. The required opinions also would give applicants and investors a clearer understanding of what inventions are patentable and would give prospective challengers the ability to assess more accurately their positions vis-à-vis existing patents. The result of such a process would be higher quality patents, fewer questionable patents, fewer questionable challenges to high quality patents, and, consequently, a decrease in uncertainty about the lasting validity of patents and an increase in American innovation. Rule 36 affirmances, however, fall far short of creating that important feedback loop. They provide little or no guidance, often send misleading signals where there are multiple grounds for a PTAB decision, and thereby fail to advance or even actively interfere with the central goal of improving patent quality. The purposes of inter partes review—and the virtues of judicial feedback from statutorily required opinions—are thus frustrated when the Federal Circuit does not show its work.

Second, beyond the constitutional-avoidance issues raised by the petition, thorough and articulated judicial review of PTAB decisions as required by § 144 serves to mitigate some of the property rights and separation of powers concerns raised by the novel IPR procedures. Particularly where PTAB, through inter partes review, invalidates a patent, the patent holder

may have been deprived of a property right by administrative fiat without sufficient due process or compensation in the case of error. The statutory provisions for judicial review of such decisions, and the requirement of an opinion, provide important checks and balances against arbitrary or politically motivated administrative action, reflect congressional authority over both a federal court created by statute and the executive agency directed to implement Congress's directives, and ensure that each branch keeps the others in their relevant lanes.

Third, the opinion requirement of § 144 also ensures the proper functioning of the Federal Circuit and this Court, and facilitates the checks created by en banc review and by writs of certiorari from this Court. It is hardly a secret that one-word non-precedential decisions are exceedingly unlikely to be reviewed en banc or by this Court. Rule 36 decisions thus can escape the ordinary discipline of judicial oversight even within the judicial branch. Such lack of internal oversight not only diminishes judicial quality control, it creates incentives to cut corners or jump to conclusions rather than do the often-complicated work of analyzing patents and patent law. Given the Federal Circuit's deviation from an express statutory opinion requirement and the interference with further judicial review from such one-word decisions, the Question Presented is not only important for the patent system, it warrants an exercise of this Court's supervisory power over the Federal Circuit. See Sup. Ct. R. 10(a).

For these additional reasons, the petition should be granted.

**ADDITIONAL REASONS FOR GRANTING  
THE PETITION**

**I. The Question Presented Involves an Important Issue for the Proper Implementation of the Patent System that Should Be Decided by this Court.**

**A. The failure to abide by the written-opinion requirement of 35 U.S.C. § 144 undermines the quality-control function of the America Invents Act.**

One of the central goals of the United States Patent and Trademark Office is to provide “high-quality, efficient examination of patent applications” by, among other things, “promot[ing] and support[ing] the continuous improvement of patent products, processes and services.”<sup>2</sup> In furtherance of that goal, Congress explained that it created PTAB to “improv[e] patent quality and provid[e] a more efficient system for challenging patents that should not have issued; and reduc[e] unwarranted litigation costs.”<sup>3</sup> When President Obama signed the America Invents Act (AIA), the official press release suggested that a key element of the act was the creation of “re-engineered \* \* \* quality management processes to increase the quality of the examinations” and the issuance of “guidelines that clarify and tighten its standards for

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<sup>2</sup> U.S. Patent & Trademark Off., *Patent Quality* (Apr. 28, 2020), <https://tinyurl.com/ykuh6kyy>.

<sup>3</sup> H.R. Rep. No. 112-98, at 39-40 (2011), <https://tinyurl.com/2x522y9n>.

the issuance of patents.”<sup>4</sup> But part of that reengineered process (and an essential part) was continued application of the longstanding requirement of judicial review and decisions accompanied by a judicial opinion. 35 U.S.C. § 141(a) (allowing parties “dissatisfied” with a PTAB decision to appeal to the Federal Circuit); *id.* § 144 (requiring the Federal Circuit to “review” any appealed PTAB decision and to “issue \* \* \* its \* \* \* opinion” to “govern the further proceedings in the case”).

With those ends in mind, PTAB quickly established procedural rules that were, at least nominally, designed to “improve patent quality” by establishing “a more efficient and streamlined patent system.”<sup>5</sup> Among those procedures were those governing inter partes review, a process that allows “[a]ny person other than the patent owner” to “request cancellation of ‘1 or more claims of a patent’ on the grounds that the claim fails the novelty or nonobviousness standards for patentability.” *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 584 U.S. 325, 331 (2018) (quoting 35 U.S.C. § 311(b)).

As part of inter partes review, PTAB “examines the patent’s validity” and “issue[s] a final written

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<sup>4</sup> Press Release, The White House Off. of Press Sec’y, President Obama Signs America Invents Act, Overhauling the Patent System to Stimulate Economic Growth, and Announces New Steps to Help Entrepreneurs Create Jobs (Sept. 16, 2011), <https://tinyurl.com/3p6zrcx8>.

<sup>5</sup> Rules of Practice for Trials Before the Patent Trial and Appeal Board and Judicial Review of Patent Trial and Appeal Board Decisions, 77 Fed. Reg. 48612, 48612 (Aug. 14, 2012).

decision no later than a year after it notices the institution of inter partes review.” *Id.* at 331-332. And a party dissatisfied with PTAB’s decision can appeal to the Federal Circuit to assess whether PTAB properly applied the relevant legal standards and whether any factual determinations are supported by substantial evidence. *Id.* at 332. Since the creation of inter partes review, there have been nearly 1,300 appeals from a PTAB decision resulting from IPR proceedings.<sup>6</sup> Of those appeals, over 40% were decided without opinion under Rule 36.<sup>7</sup>

The statutory and regulatory goals of patent quality control and improvement are substantially undermined by the practice of one-word decisions pursuant to Rule 36. In *amicus*’s experience, a typical quality-improvement program starts with a group setting product quality goals. From there, they identify any deviation from those goals, feed product deviation information back to engineering and production, and then have engineering and production take whatever corrective action is necessary to achieve the organization’s desired product quality goals. Feedback of product deviation information to engineering and manufacturing is critical to the success of any quality improvement program.<sup>8</sup>

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<sup>6</sup> Dan F. Klodowski et al., *Federal Circuit PTAB Appeal Statistics for July, August, and September 2024*, Finnegan:PTAB Blog (Nov. 5, 2024), <https://tinyurl.com/2mx74xjn>.

<sup>7</sup> See Fair Inventing Fund Br. 9 n.6 (citing Dan Klodowski et al., *Special Report: Trends in Federal Circuit PTAB Appeals Through 2023*, Finnegan:PTAB Blog (Apr. 19, 2024)).

<sup>8</sup> Satyabrata Das, *The Feedback Loop: Enhancing eLearning Through Continuous Improvement*, eLearning Indus. (May 2, 2024), <https://tinyurl.com/42sf9uhr> (“Many companies are

Without such feedback, product quality deviations may not even be identified. And even if the deviation *is* identified, it often cannot be corrected without feedback as to the *manner* in which a given product deviates from its quality goals. Consequently, without rigorous feedback, product quality is unlikely to be improved.

A similar process would govern a well-functioning patent system—particularly if the system wants to meet its stated goal of improving patent quality. In such a system, a written opinion from the Federal Circuit would serve as a critical source of information that provides clear reasons for why a given patent or a given PTAB analysis either meets or fails to meet the quality goals that the Patent and Trademark Office exists to further. Indeed, in supporting the legality of inter partes review in *Oil States*, Apple identified this very point as a reason to *uphold* the America Invents Act. See Br. for Apple Inc. as *Amicus Curiae* in Supp. of Resp’ts, *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 584 U.S. 325 (2018) (No. 16-712), 2017 WL 4946906, at \*16 (“This growing number of appeals improves the quality of the patent system by providing a healthy body of Federal Circuit case law to guide the PTAB and examiners.”).

When the Federal Circuit issues an opinion, that opinion can be closely read not only by PTAB and any

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discovering that to gain access to insights, align the team, and boost employee engagement, the continuous feedback loop approach is essential.”); Dan Lines, *Feedback loops are a prerequisite for Continuous Improvement*, SD Times (July 12, 2021), <https://tinyurl.com/mpdd5b6n> (“Rapid feedback loops are what make good development teams.”).

district courts addressing the validity of patents, but also by those examining patents at the Patent and Trademark Office—not to mention by patent owners themselves. The guidance from a judicial opinion thus would create a feedback loop under which each person involved in determining a patent’s validity is able to incorporate the law as articulated by the Federal Circuit and produce higher-quality patents. And such an “immediate and focused feedback loop” between PTAB and the Federal Circuit would have “positive benefits and generate[] efficiencies across the PTO.” *Id.* at \*27.

Rule 36 affirmances deprive PTAB and examiners of such explanatory case law and thus interrupt the feedback loop that would otherwise lead to a reasonable development of the law. Consequently, all are unable to learn from a particular patent’s defects to improve the quality of, better review, or make better choices regarding challenges to future patents. The result is a break in the quality-improvement chain that ripples throughout the system. After all, in the absence of a written opinion, no product deviation information is produced, so no information can be sent to PTAB judges, supervisory examiners, or any other persons evaluating the product (*i.e.*, the patent). This causes a cyclical failure of the patent quality improvement program because neither those producing a patent nor those reviewing a patent can learn from the authoritative Article III court responsible for patent-law uniformity why a given patent failed and thus can take no corrective action to avoid such failure in future patents.

**B. Failure to abide by the written-opinion requirement of 35 U.S.C. § 144 aggravates existing separation of powers and other constitutional issues raised by the PTAB’s revocation of property rights with minimal judicial review.**

Beyond disrupting the feedback loop and diminishing the likelihood of higher-quality patents, Rule 36 affirmances raise a host of other problems.

1. In addition to the underlying concerns raised by Petitioner’s constitutional avoidance arguments, Pet. 23-31, when politically appointed members of the Executive Branch invalidate a patent with minimal oversight for legal accuracy, it raises serious concerns regarding the deprivation of vested property rights without sufficient due process or a potential uncompensated taking where the patent revocation was contrary to law. By law, “patents \* \* \* have the attributes of personal property.” 35 U.S.C. § 261. The existence of such property rights in granted patents is reflected in the restrictions on both executive and legislative takings of such property. See *Horne v. Department of Agric.*, 576 U.S. 350, 359 (2015) (patent “cannot be appropriated or used by the government itself, without just compensation” (quoting *James v. Campbell*, 104 U.S. 356, 358 (1881))); *McClurg v. Kingsland*, 42 U.S. (1 How.) 202, 206 (1843) (Congress cannot abrogate a vested property right in a patent through legislation).<sup>9</sup>

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<sup>9</sup> The discussion in *Oil States* of public rights and congressional discretion regarding their grant and enforcement is not even remotely to the contrary. *Oil States* itself recognized that patents

Given the composition of the PTAB, the procedures employed in IPR, and the potential for political manipulation or inconsistent application of the law, Pet. 4-5, the process alone is not intrinsically reliable enough to alleviate constitutional concerns over the deprivation or taking of property rights. It is only the congressionally required judicial review, along with the opinion requirement for such review, that helps mitigate such concerns and creates an important check and balance on executive or agency overreach or error.

The burden on property rights imposed by inter partes review, as it currently operates without consistent feedback from Federal Circuit opinions, is well understood in the real world. Inventors and investors both face the uncertainty and arbitrariness of the IPR procedure and inadequate Federal Circuit guidance. Various “studies have shown” that “the

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are property rights, albeit defined by the statutes under which they are granted. 584 U.S. at 338-339. And it expressly disavowed any inferences regarding constitutional questions not at issue in that case. *Id.* at 344 (“We emphasize the narrowness of our holding. \* \* \* [B]ecause the Patent Act provides for judicial review by the Federal Circuit, we need not consider whether inter partes review would be constitutional without any sort of intervention by a court at any stage of the proceedings[.] Moreover, we address only the precise constitutional challenges that Oil States raised here. \* \* \* [Oil States has not] raised a due process challenge. Finally, our decision should not be misconstrued as suggesting that patents are not property for purposes of the Due Process Clause or the Takings Clause.” (internal citations and punctuation omitted)). Because the opinion-writing requirement is built into the statute itself, it too is part and parcel of any public rights granted and protected by the patent laws and is part of the limitations imposed upon IPR (and other patent procedures).

economic impact of AIA-created post-issuance proceedings is quite severe”—the “value of patents has dropped by” at least “two-thirds since and because of the” Act.<sup>10</sup> Indeed, any investment-backed expectations are fully destroyed when a patent is invalidated and subsequent judicial review seems spartan, at best. From a constitutional perspective, this raises takings concerns due to (1) “[t]he economic impact of the regulation on the claimant;” (2) the “interfere[nce] with distinct investment-backed expectations;” and (3) “the character of the governmental action.” *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

Such concerns can at least partially be mitigated by rigorous enforcement of the congressionally mandated procedures for judicial review and opinion writing in the Federal Circuit. At a minimum, consistent opinion writing following inter partes review will better align future investment-backed expectations with authoritative interpretations of the law governing the issuance and validity of patents.

2. While questionable deprivations or potential takings of property are bad enough on their own, the problem is compounded when such property burdens are imposed by an executive agency operating with diminished checks and balances provided by Article III courts. After all, when the Federal Circuit affirms PTAB without meaningful explanation, it removes what was, by congressional design, supposed to be an important check and quality-control limit on PTAB’s

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<sup>10</sup> Gregory Dolin & Irina D. Manta, *Taking Patents*, 73 Wash. & Lee L. Rev. 719, 791-792 (2016).

ability to invalidate a granted patent. An unexplained rubber stamp by the Federal Circuit, expressly refusing to endorse or reject the reasoning of the PTAB decision below, see Pet. 13-14, hardly qualifies as a judicial check on executive action that can ensure compliance with the law. The already limited Article III checks that exist over IPR are instead reduced to a black-box process spitting out mere zeros and ones.

In a growing string of decisions in recent terms, this Court has cast doubt on agencies supplanting the role of courts. It thus has held that “the Seventh Amendment entitles a defendant to a jury trial when the SEC seeks civil penalties against him for securities fraud,” *SEC v. Jarkesy*, 144 S. Ct. 2117, 2127 (2024), that “courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous,” *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2273 (2024), and that agencies may not “assert[] highly consequential power beyond what Congress could reasonably be understood to have granted,” *West Virginia v. EPA*, 597 U.S. 697, 724 (2022). PTAB’s ability to invalidate patents without meaningful and articulated judicial review in many cases stands in uncomfortable tension with those recent precedents, notwithstanding the public-rights analysis in *Oil States*. See *supra*, n.9. For such rights to remain subject to and benefit from the standards adopted by Congress, agencies tasked with executing such statutes must be faithful to legislative commands, including grants of property rights. And it remains decidedly the province of the courts to say (and under § 144, to explain) what the law is, even for patents.

**II. The Question Presented Reflects a Stark Deviation from the Statutory Requirement of an Opinion in Cases on Appeal from the PTAB, Interference with Further Judicial Review, and Warrants an Exercise of this Court's Supervisory Powers.**

In addition to raising important issues regarding the patent system itself, the failure to issue statutorily required opinions also interferes with the administration of the courts. As a practical matter, the refusal to issue a written opinion largely insulates the panel decision from further review, rendering the panel the sole and final judicial arbiter of the validity of any patent and the sole Article III check ensuring PTAB's compliance with the law. Without an opinion to review, en banc proceedings in the Federal Circuit and certiorari review in this Court become all but impossible. Good luck to any aspiring petitioner seeking to explain how the errors in a one-word affirmance by a panel of the Federal Circuit satisfies the requirements of the new Federal Rule of Appellate Procedure 40 or of this Court's Rule 10. Without any consistent assurance of subsequent judicial reasoning to review, a party appealing from PTAB effectively has only one shot before an Article III court. Both the en banc Federal Circuit and this Court are substantially stymied in their abilities to exert checks not merely on an executive agency, but on panels of the Federal Circuit themselves.

Such an interference not merely with congressional design, but also with the ability of this Court and the en banc Federal Circuit to police panels over which they sit, constitutes a substantial deviation

from sound judicial procedure and itself warrants an exercise of this Court's supervisory power to ensure the proper administration of the courts in patent cases. See Sup. Ct. R. 10(a).

**CONCLUSION**

For these reasons, together with those reasons identified by Petitioner and the other *amici*, the petition should be granted.

Respectfully submitted,

ERIK S. JAFFE

*Counsel of Record*

JOSHUA J. PRINCE

SCHAERR | JAFFE LLP

1717 K Street NW, Suite 900

Washington, DC 20006

(202) 787-1060

[ejaffe@schaerr-jaffe.com](mailto:ejaffe@schaerr-jaffe.com)

*Counsel for Amicus Curiae*

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