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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court should provide an advisory opinion regarding the propriety of Federal Circuit Rule 36, where the Federal Circuit was provided no opportunity to first address the issue and where providing such an opinion will have no impact on any outcome of the cases below.

RULE 29.6 STATEMENT

There is no parent corporation or any publicly held company that owns 10% or more of TCL Industries Holdings Co., Ltd.

LG Corporation owns 10% or more of LG Electronics Inc., which is a publicly held Korean corporation.

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BRIEF FOR TCL INDUSTRIES HOLDING CO., LTD. AND LG ELECTRONICS INC. IN OPPOSITION

Respondents TCL Industries Holding Co., Ltd. ("TCL") and LG Electronics Inc. ("LG") respectfully submit that the petition for a writ of certiorari should be denied.

STATEMENT OF THE CASE

Petitioner ParkerVision sued respondent TCL in the Western District of Texas on October 12, 2020, alleging infringement of ten patents. *ParkerVision, Inc. v. TCL Industries Holdings Co., et al.*, No. 6:20-cv-00945-ADA (W.D. Tex.) at ECF No. 1.

TCL subsequently petitioned for inter partes review of two asserted patents—U.S. Patent Nos. 7,110,444 ("the '444 Patent") and 7,292,835 ("the '835 Patent")—asking the Patent Office to reconsider the patentability of certain claims. *See* Pet. App. 4a; Pet. App. 114a-115a. LG joined both reviews following institution. *See id.* The PTAB ultimately issued a Final Written Decision in each proceeding finding all challenged claims unpatentable. *See* Pet. App. 3a-86a; Pet. App. 113a-233a. ParkerVision appealed both decisions.

Prior to the oral hearings on ParkerVision's appeals, a unanimous panel of the Federal Circuit affirmed an earlier PTAB decision finding multiple claims of the '444 Patent unpatentable following inter partes review. *ParkerVision, Inc. v. Vidal*, 88 F.4th 969, 982 (Fed. Cir. 2023). In doing so, the Federal

Circuit issued a precedential written opinion (i) affirming the PTAB's construction of the term "storage element" (*id.* at 978); and (ii) holding that the PTAB did not err "in considering Intel's reply arguments" (*id.* at 980).

In appealing the PTAB's decisions in the TCL-filed inter partes reviews, ParkerVision raised the same central issues previously decided in *ParkerVision v. Vidal*: (i) whether the PTAB adopted the correct construction of "storage module"; and (ii) whether the PTAB erred in considering TCL's reply arguments.[1]

On June 3, 2024, the Federal Circuit heard oral argument on both of ParkerVision's appeals. Pet. App. 87a; Pet. App. 234a. The Federal Circuit subsequently affirmed both of the PTAB's decisions under Federal Circuit Rule 36. *See* Pet. App. 2a; Pet. App. 112a.

ParkerVision did not attempt to challenge the Federal Circuit's affirmances under Rule 36 below, either by seeking panel rehearing or rehearing *en banc*.

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[1] *ParkerVision, Inc. v. TCL Industries Holdings Co., Ltd., et al.*, No. 2023-1415 (Fed. Cir.), Dkt. 17 at 46-65; *ParkerVision v. TCL Industries Holdings Co., Ltd., et al.*, No. 2023-1417 (Fed. Cir.), Dkt. 15 at 46-65.

REASONS FOR DENYING THE PETITION

This case raises a single issue that already has been rejected by this Court—repeatedly—as unworthy of a grant of certiorari. And this case is an extraordinarily poor vehicle for addressing the question presented: ParkerVision did not provide the Federal Circuit with a first opportunity to address the issue; ParkerVision overstates the relevance of the question presented; and resolution of the question presented would have no impact on the cases below.

I. ParkerVision Repeats Arguments Already Considered By This Court in Denying Prior Certiorari Petitions

ParkerVision's petition repeats the same arguments that this Court already has considered and denied in earlier certiorari petitions.

In just the last seven years, this Court has denied at least ten challenges to the Federal Circuit's practice of issuing summary affirmances under Rule 36. *See Schwendimann v. Neenah, Inc.*, 144 S. Ct. 2579 (2024) (mem.) (No. 23-1023); *Ameranth, Inc. v. Olo Inc.*, 142 S. Ct. 2814 (2022) (mem.) (No. 21-1228); *Ultratec, Inc. v. CaptionCall, LLC*, 142 S. Ct. 460 (2021) (mem.) (No. 20-1700); *Bobcar Media, LLC v. Aardvark Event Logistics, Inc.*, 142 S. Ct. 235 (2021) (mem.) (No. 21-158); *Kaneka Corp. v. Xiamen Kingdomway Grp. Co.*, 140 S. Ct. 2768 (2020) (mem.) (No. 19-1228); *Chestnut Hill Sound Inc. v. Apple Inc.*, 140 S. Ct. 850 (2020) (mem.) (No. 19-591); *Power Analytics Corp. v. Operation Tech., Inc.*, 140 S. Ct. 910 (2020) (mem.) (No. 19-43); *Straight Path IP Grp., LLC v. Apple Inc.*, 140 S. Ct. 520 (2019) (mem.) (No. 19-253); *Senju Pharm. Co., Ltd. v. Akorn, Inc.*, 140 S. Ct. 116 (2019)

(mem.) (No. 18-1418); *Capella Photonics, Inc. v. Cisco Sys.*, 586 U.S. 988 (2018) (mem.) (No. 18-314).

In particular, the petitioners in *Ultratec, Senju,* and *Capella* presented nearly identical questions to ParkerVision's here. In *Ultratec*, the petition asked: "Does the use of Federal Circuit Rule 36 to summarily affirm decisions from the Patent Trial and Appeal Board 'without opinion' violate 35 U.S.C. § 144, which provides that the Federal Circuit 'shall issue . . . its mandate and opinion' upon its determination of appeals arising from the Patent and Trademark Office?" *Ultratec* Pet. at i (No. 20-1700). In *Senju*, the petition asked: "Whether 35 U.S.C. § 144's directive that the Federal Circuit 'shall issue . . . its mandate and opinion' in all appeals from the Patent and Trademark Office precludes the Federal Circuit from resolving such appeals through a Rule 36 judgment of affirmance without opinion." *Senju* Pet. at i (No. 18-1418). And the petition in *Capella* likewise asked: "Whether the Federal Circuit's practice of routinely issuing judgments without opinions in appeals from the Patent Trial and Appeal Board violates 35 U.S.C. § 144, which provides that the Federal Circuit 'shall issue . . . its mandate and opinion' in such appeals." *Capella* Pet. at i (No. 18-314).

ParkerVision's supporting arguments here also repeat those raised and rejected in the *Ultratec*, *Senju*, and *Capella* petitions, each of which similarly involved appeals of inter partes review decisions. *See Ultratec* Pet. at 27-38 (No. 20-1700); *Senju* Pet. at 14-24 (No. 18-1418); *Capella* Pet. at 14-28 (No. 18-314). The Court denied all three of those petitions and should do so again here.

II. ParkerVision's Collateral Attack Is Misplaced and Misunderstands the Inter Partes Review Process

ParkerVision dedicates much of its petition to a collateral attack on the inter partes review procedure established by Congress, labeling it "a strange agency proceeding." Pet. 23. Not only is this argument tangential to the question presented, but it reflects a misunderstanding of the inter partes review process.

1. ParkerVision does not ask this Court to assess the legitimacy of inter partes review in its question presented. Indeed, ParkerVision stresses it "is not challenging, in this petition, inter partes review on due-process grounds." Pet. 27. Yet ParkerVision litters its petition with quips and innuendo that suggest otherwise. For example, ParkerVision derides inter partes review as "a peculiar process that diverges from foundational due-process norms." *Id.* at 35. The Court should disregard such undeveloped attacks on a statutory process this Court has consistently upheld. *E.g., Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 584 U.S. 325, 341-42 (2018) (holding that "within the scope established by the Constitution, Congress may set out conditions and tests for patentability" and "inter partes review is one of those conditions") (internal citation omitted).

2. ParkerVision erroneously argues throughout its petition that "the PTAB *invalidated* claims in ParkerVision's patents through inter partes review" (Pet. 4 (emphasis added)) and "no court has ever explained to ParkerVision and numerous other technology companies why claims in their already issued patents were *invalidated*" (*id.* at 3 (emphasis added)). *See also* Pet. 5 (postulating that "due process

may very well demand that if a patent holder challenges, in the Federal Circuit, an inter partes review that *invalidated* an already issued patent, the Federal Circuit must give reasons for its decision") (emphasis added); Pet. 27 ("[T]he procedural infirmities of inter partes review could necessitate a single, minimal explanation why the patent holder's already issued patent was *invalidated*.") (emphasis added).

But the PTAB does not and cannot "invalidate" anything. The PTAB simply reconsiders whether an earlier grant of a patent by the PTO was correct in view of additional information—no more, no less. *Oil States*, 584 U.S. at 334–35 ("Inter partes review is simply a reconsideration of th[e] grant [of a public franchise], and Congress has permissibly reserved the PTO's authority to conduct that reconsideration."); *Cuozzo Speed Techs. v. Com. for Intell. Prop.*, 579 U.S. 261, 279 (2016) (holding that the "basic purposes" established by Congress for inter partes review are "to reexamine an earlier agency decision.").

This Court has uniformly rejected similar attempts to garner attention by exaggerating the nature and effect of inter partes review. *See Saint Regis Mohawk Tribe v. Mylan Pharms. Inc.*, 896 F.3d 1322, 1329 (Fed. Cir. 2018), *cert. denied*, 139 S. Ct. 1547 (2019) (denying certiorari where the petitioner characterized inter partes review as "an action commenced and prosecuted by a private party against a sovereign entity"); *Regents of the Univ. of Minnesota v. LSI Corp.*, 926 F.3d 1327, 1342 (Fed. Cir. 2019), *cert denied*, 140 S. Ct. 908 (2020) (denying certiorari where the petitioner portrayed inter partes reviews as

"fundamentally adjudicative proceedings . . . to which sovereign immunity applies").

In sum, ParkerVision's collateral attack on inter partes review is irrelevant to the narrow question before the Court and adds no weight to ParkerVision's petition.

III. This Case Is a Poor Vehicle for Deciding the Question Presented

ParkerVision's failure to press its Rule 36 challenge below, as well as the irrelevance of the Rule 36 challenge to the ultimate outcome of the cases, make ParkerVision's petition an exceptionally poor vehicle for deciding the question presented.

A. ParkerVision Failed To Press Its Challenge to Federal Circuit Rule 36 Below

"Ordinarily, this Court does not decide questions not raised or resolved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (*per curiam*); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."). "These principles help to maintain the integrity of the process of certiorari." *Taylor v. Freeland & Kranz*, 503 U.S. 638, 646 (1992). "[E]ven constitutional objections may be waived by a failure to raise them at a proper time." *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 143 (1967).

No lower court in this case has previously considered the question presented in the certiorari petition because ParkerVision did not seek rehearing or *en banc* review of the Federal Circuit's decisions.

But this Court is "a court of final review and not first view, and it does not ordinarily decide in the first instance issues not decided below." *City of Austin, Texas v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 76 (2022) (quoting *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012)) (internal quotation marks omitted). Because ParkerVision could have sought to have the Federal Circuit consider the question presented in the first instance but did not do so, this case provides a poor vehicle to challenge the Federal Circuit's practice.

Moreover, ParkerVision's actions contradict the post-Rule-36 regime proposed in its own petition. ParkerVision suggests that the Federal Circuit can self-police "opinion" adequacy: "If an opinion is too concise, a party can raise the issue whether the document qualifies as an 'opinion' with the *en banc* Federal Circuit, which can administer the line." Pet. 23. Yet ParkerVision failed below to provide the Federal Circuit with the chance to "administer" its own rules *en banc* and consider ParkerVision's challenge to Rule 36.

The Court has long recognized that "courts of appeals have supervisory powers" to establish "procedural rules governing the management of litigation." *Thomas v. Arn*, 474 U.S. 140, 146 (1985). It follows that the Federal Circuit at least should have the opportunity to assess any alleged statutory non-compliance by one of its rules before oversight by this Court. Because ParkerVision failed to provide such opportunity below, its petition is a poor vehicle for consideration of the issue.

B. The Question Presented Will Make No Difference in the Outcome of the Cases

ParkerVision offers no reason for this Court to resolve a question that would neither alter the disposition of the cases below, nor provide any new legal insight.

1. In its petition, ParkerVision only challenges "the Federal Circuit's practice, under Federal Circuit Rule 36(a), of summarily affirming PTAB decisions without issuing opinions." Pet. i. ParkerVision does not challenge any part of the PTAB decisions affirmed by the Federal Circuit, and thus has waived any such challenge. *Taylor*, 503 U.S. at 645 (holding that issues not raised in a petition for a writ of certiorari are waived); *Parke v. Raley*, 506 U.S. 20, 28 (1992) ("We ordinarily do not reach issues not raised in the petition for certiorari."). As a result, the maximum relief for ParkerVision in this case is a remand to the Federal Circuit to issue written decisions affirming the PTAB's cancellation of the claims-at-issue.

The Court normally will deny review if resolution of the question "is irrelevant to the ultimate outcome of the case before the Court." Eugene Gressman et al., Supreme Court Practice, § 4.4.(F) (11th ed. 2019); *see also The Monrosa v. Carbon Black Exp., Inc.*, 359 U.S. 180, 184 (1959) ("While this Court decides questions of public importance, it decides them in the context of meaningful litigation."). Irrespective of what the Court decides, answering the question presented by ParkerVision here will have no impact on the ultimate outcome of the cases below. As such, a decision on ParkerVision's question presented would, in effect, provide only advisory relief. For at least this reason,

the Court should "await a day when the issue is posed less abstractly." *The Monrosa*, 359 U.S. at 184.

2. Further, the Federal Circuit's affirmances in these cases did not shortchange the "body of coherent, predictable law around which public and private actors can orient their decision-making" as ParkerVision suggests. Pet. 20. Prior to the oral hearings below, the Federal Circuit—including two of the same judges that heard the below cases—issued a 22-page precedential decision rejecting the same legal and procedural grounds raised by ParkerVision. *See Parkervision, Inc. v. Vidal*, 88 F.4th 969, 978-80 (Fed. Cir. 2023) (construing "storage element" and rejecting ParkerVision's argument that the PTAB abused its discretion in "considering Intel's reply arguments"). At the oral hearings below, the Federal Circuit panel expressly alerted ParkerVision to this overlap, asking: "Did our December 2023 decision address one or the other or both of the two points you are now making?" (Pet. App. 91a); and "How is this different from our December 2023 opinion?" (Pet. App. 94a). As such, in this matter, ParkerVision has received express guidance from the Federal Circuit as to the reasons underlying its decisions.

Remanding to require the Federal Circuit to recycle the same pertinent holding issued in *ParkerVision v. Vidal* would do nothing to increase the corpus of "predictable law" extolled by ParkerVision. Pet. 21. For this additional reason, the present petition represents a poor vehicle for deciding the question presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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