No. 24-806

IN THE
Supreme Court of the United States

AUDIO EVOLUTION DIAGNOSTICS, INC.,

Petitioner,

—v.—

UNITED STATES, *et al.*,

Respondents.

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

BRIEF OF ISLAND INTELLECTUAL PROPERTY LLC AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The U.S. Court of Appeal for the Federal Circuit extensively grants one-word affirmances under its Local Rule 36. This practice is inconsistent with other courts of appeal.

Audio Evolution (this case) presents as its second question:

> 2. Whether this Court should find that the Federal Circuit is abandoning its role of articulating patent law precedent and bringing uniformity to patent law with its overuse of Federal Circuit Rule 36 to summarily affirm decisions of lower tribunals involving unsettled and complex issues of patent law.

In *Island Intellectual Property LLC v. TD Ameritrade, Inc.*, No. 24-461, Amicus Island, as petitioner there, similarly challenges the Federal Circuit's use of Local Rule 36 affirmances. [i]

Both *Audio Evolution* and *Island* are in the context of an appeal from a district court decision under 28 U.S.C. §1291. Separately, in *ParkerVision v. TCL Industries Holdings Co.,* No. 24-518,

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[i] The *Audio Evolution* Petition raises as its first question whether this Court should clarify the patent eligibility analysis required under *Alice* and *Mayo*. While *Island* also involves patent eligibility, its first question relates to whether patent cases should apply the same rules of civil procedure for summary judgment as other civil actions.

ParkerVision raises a similar challenge to use of Local Rule 36 affirmances in the context of an appeal from the PTAB under 35 U.S.C. §144.

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INTEREST OF AMICUS CURIAE

Amicus Curiae Island Intellectual Property, LLC ("Island") respectfully submits this *amicus curiae* brief in support of the Petition for Writ of Certiorari by *Audio Evolution Diagnostics, Inc.*, No. 24-806.[1] Amicus Island is itself a petitioner in *Island Intellectual Property LLC v. TD Ameritrade, Inc., et al.*, No 24-461 ("*Island*"), which raises a similar issue, and submitted an Amicus Brief in another pending petition raising a similar issue (No. 24-518). Amicus respectfully submits *Island* should be considered in conjunction with the present petition, as discussed herein.[2]

Island is an affiliate of Double Rock Corporation ("Double Rock"). Since the 1970s, Double

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[1] Pursuant to Rule 37.2, counsel of record for all parties received timely notice of the amicus curiae's intention to file this brief. In accordance with Rule 37.6, counsel for the amicus curiae certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than the amicus curiae or its counsel made a monetary contribution intended to fund the brief's preparation or submission.

[2] The *Island* Petition also raises as a second and separate issue, beyond the scope of the *Audio Evolution* Petition, the failure of the Federal Circuit and lower courts in patent cases to follow the normal rules of civil procedure on summary judgment. A similar issue has also been raised in two other pending petitions before the Court. See Petition for Writ of Certiorari, *Harris Brumfield v. IBG LLC*, No. 24-764 (U.S. filed Jan. 2, 2025) (Question 3); Petition for Writ of Certiorari, *Broadband iTV, Inc. v. Amazon.com, Inc.*, No. 24-827 (U.S. filed Jan. 31, 2025) (Sole Question).

Rock has been a leading commercially successful cash-management and technology solution provider to the banking, broker-dealer, qualified plan, and retail financial markets, with at times up to $125 billion in assets under management. The company was founded by Bruce Bent, who co-created the world's first money-market fund in 1970. Mr. Bent and his son, Bruce Bent II, are pioneers and industry leaders in the deposit sweep and insured cash deposit industry.

As pertinent to Island's Petition, and its interest in this case, Island owns three separate patents that were the subject of litigation before the Eastern District of Texas, an appeal under 28 U.S.C. §1291 to the Federal Circuit, petitions for rehearing/rehearing *en banc*, and, currently, a pending Petition for Certiorari to this Court in *Island*. No. 24-461 ("*Island* Pet."). The *Island* Petition raises as its second question presented:

> 2. Is it proper for the Federal Circuit to use its own unique Local Rule 36 to affirm district court rulings with one-word decision lacking explanation or analysis, when the grounds for affirmances are unclear in view of the arguments made on appeal?

Island Pet., i. The *ParkerVision* Petition (No. 24-518) also raises as its sole question a similar issue in the context of an appeal from the PTAB under 35 U.S.C. §144.

As the *Island* Petition explains, the use of Local Rule 36 to issue a one-word affirmance, without any explanation of the basis, at least in *Island*'s case, left the parties (and the public) uncertain as to whether the Federal Circuit was saying that:

- in patent cases, the rules of summary judgment as set forth by this Court in *Tolan v. Cotton*, 572 U.S. 650, 651 (2014) (quoting and citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 255 (1986)) for some unspecified reason do not apply;

- this Court's full analysis, including step 2 from *Alice* and *Mayo*, are not required to be applied for some unspecified reason;

- the 1400 pages of historical facts that Island presented to the district court in opposition to the motion for summary judgment was not credible for some unspecified reason; or

- some other alternative, unspecified ground supported affirmance, as argued by the TD Ameritrade Respondents ("TD") in *Island* at the panel level (see TD Red Br., 34-48; *Island* Federal Circuit Recording of Oral Argument, 16:13-25:15), and again to this Court (*see* TD BIO, 13, 15-19, 23).

Island Pet., 40-41.

The failure of the Federal Circuit in *Island* to specify which of these bases (or any other bases) support the panel's decision, as in *Audio Evolution* (and other Rule 36 Judgments), deprives this Court of

the ability to review the Federal Circuit's decision with any clarity, contra to this Court's decision in *Cardinal Chemical Co. v. Morton Int'l*, 508 U.S. 83, 101-02 (1993). *Island* Pet., 40-41.

Here, Island is an example of a patent-owning stakeholder that, together with its related former and ongoing practicing entities, built, developed, and commercialized computer-implemented technology in the field of financial services and patented the results of its research and development. Although some portions of the businesses that commercialized the results of the patented technologies have since been sold and/or licensed, Island maintains a substantial interest and investment in the fruits of such research and development in the form of ownership of its substantial patent portfolio.

SUMMARY OF ARGUMENT

Granted.

While brevity in certain circumstances may be a virtue, one-word Rule 36 Judgments are not sufficient for the Federal Circuit to carry out its duties as an appellate court, let alone to develop the law as the sole Court of Appeals for all appeals of cases involving patent law.

An answer is not an explanation.

The Federal Circuit's extensive and imprecise use of Rule 36 Judgments is counter to the appellate practice of the other Court of Appeals, the understanding of great jurists of this Court's past, and sound administration of justice.

Audio Evolution is one of three pending petitions for a writ of certiorari to this Court that raises this important issue and presents a convincing case for this Court's review of the issue.

Amicus Island separately presented its own Petition (No. 24-461), raising as Question 2 a similar question in the same context as *Audio Evolution*, an appeal from an adverse judgment on patent eligibility from a district court under 28 U.S.C. §1291, that was affirmed by a Rule 36 Judgment. Separately, ParkerVision presented its own Petition (No. 24-518), raising a similar question as the sole question, but in the context of a Rule 36 Judgment affirming an adverse PTAB decision under 35 U.S.C. §144.

Island, Audio Evolution and *ParkerVision* are each currently pending before this Court. The

questions raised in these pending petitions follow at least twenty earlier petitions raising the same or similar issues. Rather than support summary denial (as asserted by Respondents in *Island* and *ParkerVision*), the large number of earlier petitions (and continuing flow of pending petitions) evidence the extensiveness of the problem, and the continuing need for this Court's supervision.

While *Island* and *Audio Evolution* have additional issues (also worthy of this Court's attention), Island previously submitted that its petition should be heard in conjunction with *ParkerVision* on the issue presented in this case, to provide the Court with a full range of context with respect to the problems associated with Rule 36 Judgments, whether the appeal comes to the Federal Circuit through 28 U.S.C. §1291 or 35 U.S.C. §144.

Island submits this Amicus Brief to urge the Court to consider the issues raised by each of these petitions, and not to reject any of these petitions until the Court has heard on the merits full briefing and arguments on whether Rule 36 Judgments are appropriate for appeals from district courts (like *Island* and *Audio Evolution*) or from the PTAB under 35 U.S.C. §144 (like *ParkerVision*). Rather than repeat in full the extensive arguments and support previously submitted to this Court by the parties and amicus in *Island* and *ParkerVision*, Island is focusing this brief on further developments and additional arguments not otherwise addressed by Island in its briefing on its petition, or its Amicus Brief in *ParkerVision*.

REASONS FOR GRANTING PETITIONS REVIEWING RULE 36 JUDGMENTS

I. Rule 36 Judgments Are Counter to the Basis of the Establishment of the Federal Circuit

When the Federal Circuit was founded in 1982, it followed "more than ten years of study and debate over reform of the appellate structure of the federal judiciary", including a report of a Commission including members appointed by Chief Justice Burger proposing the creation of a national appellate court. Historical Note, Federal Courts Improvement Act of 1982, 96 Stat. 25 (Apr. 2, 1982) ("Historical Note").

The Report issued by the Commission strongly urged that the proposed national appellate court should always issue at least some form of explanation for each case; failing to do so "provides the litigants and their counsel with less than their due". Commission on Revision of the Appellate System, *Structure and Internal Procedures: Recommendation for Change* 50 (June 1975) ("Report"). That explanation could come in one of many forms, and even be curt, but it must be informative. *Id.* at 49-51.

While Congress did not establish a national court of appeals in the form the Report recommended, it did establish the Federal Circuit as the thirteenth Court of Appeals with exclusive subject matter jurisdiction over appeals from the district courts involving patents (28 U.S.C. §1291) and appeals from

the U.S. Patent and Trademark Office (35 U.S.C. §144), with the Report as a backdrop. Historical Note.

The Founding Chief Judge of the Federal Circuit understood this canvas and promised that "[i]n our Court there will be an opinion explaining enough to tell you what the law is in every case. … We do not just render a one-worded decisions and go away". Hon. Howard T. Markey, first Chief Judge of the Federal Circuit, *The First Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit*, 100 F.R.D. 499, 511 (1983); *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.

Whatever commitment the Federal Circuit once had to provide "an opinion explaining enough to tell you what the law is in every case" has been usurped by the frequent use under its Local Rule 36 of one-word affirmances, so-called "Rule 36 Judgments". *Id.* These Rule 36 Judgments are not opinions, and do not offer any basis for the affirmance. *See Rates Tech., Inc. v. Mediatrix Telecom, Inc.*, 688 F.3d 742, 750 (Fed. Cir. 2012) ("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"); *see also TecSec, Inc. v. Int'l Bus. Machs.Corp.*, 731 F.3d 1336, 1343 (Fed. Cir. 2013). They merely affirm the judgments of lower tribunals without any explanation on what persuaded the

Federal Circuit to leave such judgments untouched. *See* Brief of Amicus Curiae the Bar Association for the District of Columbia Supporting Petitioner, *ParkerVision, Inc. v. TCL Industries Holdings Co., Ltd., et al.*, No 24-518 (U.S. Dec. 3, 2024) ("BADC Br."), 5 (explaining why "[t]he word 'affirmed' is not an opinion").

Rule 36 Judgments are not reserved for routine cases featuring routine or well-understood questions of law. As Professor Crouch demonstrated in an analysis of recent Rule 36 Judgments, the Federal Circuit uses the Rule even in cases raising important issues of patent law, leaving the public in the dark on what the law is. 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 ("Million Dollar Mysteries"). Specifically, he calls out seven recent examples—all from 2025—of Rule 36 Judgments that offered no guidance on important issues:

> *Lu v. Hyper Bicycles*, No. 24-1081 (Fed. Cir. Feb. 10, 2025): Left unanswered questions of "(1) the role of a defendant's admissions about using patented designs; and (2) whether proof of specific sales is required at summary judgment when the defendant acknowledges manufacturing accused products." *Id.*
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> *Wilson v. Corning*, No. 24-1065 (Fed. Cir. Feb. 10, 2025): Provided no guidance on whether "disgorgement of profits constitutes

legal or equitable relief for Seventh Amendment purposes" when profits are measured by "reasonable royalty" (which is normally an "undisputedly legal" remedy). *Id.*

Shell USA v. Scientific Design, No. 23-1937 (Fed. Cir. Feb. 7, 2025): Despite contentions that the Board improperly adopted a theory never advanced by the parties, provided no guidance on how the Board's ruling did not violate precedent holding that this is improper. *Id.*

In re Google, No. 23-2119 (Fed. Cir. Feb. 5, 2025): Left unresolved a "fundamental dispute over claim interpretation and prior art teaching" and "important questions about proper obviousness analysis under *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398 (2007), particularly regarding whether an examiner can rely on implicit suggestions to combine teachings when a reference expressly defines a term in a way that conflicts with the proposed combination." *Id.*

In re Soto, No. 23-2008 (Fed. Cir. Feb. 5, 2025): Did not address "a critical tension in obviousness jurisprudence – when does combining references with divergent underlying principles render their combination non-obvious?" *Id.*

Maxell v. Amperex Technology, No. 23-2285 (Fed. Cir. Jan. 15, 2025): Provided no clarity on

> the scope of when references are "analogous art" despite a "significant challenge to the PTAB's analogous art analysis" highlighting tensions in how broadly to define the relevant problem when assessing reasonable pertinence. *Id.*
>
> *Lynk Labs v. Home Depot*, No. 23-2185 (Fed. Cir. Jan. 14, 2025): Passed over the "important opportunity to clarify the analytical framework" of "legal impossibility arguments stemming from claim construction" rather than impossibility determination coming from "scientific or technical limitations". *Id.*
>
> *Ward Participations v. Samsung*, No. 24-1065 (Fed. Cir. Jan. 13, 2025): Failed to provide even a brief written opinion addressing significant written description issues raised in appeal. *Id.*
>
> *See Million-Dollar Mysteries*.

Relatedly, following the abrogation of *Chevron* deference in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), Converter Manufacturing questioned the propriety of the Federal Circuit issuing a Rule 36 Judgment in an appeal from the PTAB that raised important issues involving the burden of proof: enablement of prior art under Section 102 and 103. *See* Petition for Writ of Certiorari, *Converter Manufacturing, LLC v. Tekni-Plex, Inc.*, No. 24-866 (U.S. Filed Feb. 10, 2025) (Question 3) ("*Converter* Pet."); *see also* Dennis Crouch, *Federal Circuit's Rule 36 Affirmances: A Concerning Trend in Loper Bright*,

Patently-O (Oct. 17, 2024), https://patentlyo.com/patent/2024/10/circuits-affirmances-concerning.html (discussing *en banc* petition raising the same issue).

Similarly, *Island* raised important questions regarding summary judgment in patent cases (as noted in Question 1 of the *Island* Petition), as well as whether an analysis under *Alice*/*Mayo* Step 2 is required to find a claim invalid under 35 U.S.C. §101. The Federal Circuit's use of a Rule 36 Judgment in *Island* side-stepped providing any guidance on these important issues.

For present purposes, it does not matter whether the Federal Circuit was right or wrong in any of these affirmances. What matters is that the veil of Rule 36 blocks the development of patent law and prevents the public and this Court from understanding, or even knowing, the reasoning and rationale that guided the Federal Circuit on these important public policy considerations.

II. Bar Associations, Amicus, Commentators and the Media Continue to Raise Concerns Regarding the Use of Rule 36 Judgments.

Commentators, including a host of bar associations, public interest groups, law professors, and individual inventors, as amici before this Court and in the media, have sounded the alarm on the overuse of the Federal Circuit's Rule 36.

As Amicus Island previously explained, the use by the Federal Circuit of Rule 36 Judgments is extensive and contrary to the practice of other courts of appeals. "On average, over the past ten years, the Federal Circuit has issued one-word affirmances in approximately 35% of cases appealed from a district court or the USPTO." *Island* Pet., 41; *see also* Brief of Amicus Curiae Boston Intellecutal Property Law Association in Support of Petitioner, *Island Intellectual Property, LLC. v. TD Ameritrade, Inc.*, No. 24-461, 7(U.S. Nov. 22, 2024) ("BPLA Br.") (collecting statistics).[3]

Since 2011 to August of 2024, the rate is over 40% for appeals from PTAB decisions in inter partes review, post-grant review, and covered-business-

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[3] *See, also* 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-proceduralchallenge.html; 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); 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-sightrule-36-racket-cafc/id=105696; 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/markeyspromise-decisions.html; Dennis Crouch, *Justice is Not Silent: The Case Against One-Word Affirmances in the Federal Circuit*, Patently-O (Sept. 22, 2024), https://patentlyo.com/patent/2024/09 /appellate-decision-reasoning.html

method proceedings. *ParkerVision* Pet., 32; *see* Brief of Amicus Curiae Fair Inventing Fund in Support of *ParkerVision, Inc. v. TCL Industries Holdings Co., Ltd., et al*., No 24-518, 8-9 (U.S. Nov. 20, 2024) ("Fair Inventing Fund Br."); *see also* BADC Br. at 7. From the patent office generally, 38% of decisions have no opinion. Dennis Crouch, *Federal Circuit Outcomes from the Past Four Years,* Patently-O (Jan. 30, 2025), https://patentlyo.com/patent/2025/01/federal-circuit-outcomes.html (contrasting with other appeal court's use of "summary affirmance", which "always provide at least a brief explanation of the ruling and its justification. The Federal Circuit provides no opinion, just the judgment.")

As several commentators have pointed out, one-word affirmances are harmful not only to the actual litigants before the court, who deserve to know the basis for a ruling, but also to the development of patent law, and the legitimacy of the judicial system more broadly.

From the perspective of the patent owner and the public, as the Federal Circuit confirmed in *Rates* and *TecSec*, one-word affirmances make it impossible to know the actual basis of the Federal Circuit's affirmance. *See Rates Tech*, 688 F.3d at 750; *see also TecSec,* 731 F.3d at 1343. This intentional ambiguity leaves patent owners (and the public) in the dark. *See* Brief of The Association of Amicus Counsel as Amicus Curiae in Support of Petitioner, *Island Intellectual Property, LLC. v. TD Ameritrade, Inc.*, No. 24-461, 8 (U.S. Dec. 6, 2024) ("AAC Br. (*Island*)"); *see also* BPLA Br., 5, 8; *see also* Fair Inventing Fund Br., 9-10.

As the Association of Amicus Counsel puts it, the public has the perception that, for all intents and purposes, "the Federal Circuit … might just as well have been absent from the process." AAC Br. (*Island*), 11. This amounts to a "denial of due process", preventing patent owners from having "a fair chance at defending their patent rights to expressly take into account and indicate how the relevant evidence in its entirety affects the outcome." *Id.* at 8, 11; *see also* Brief of Amicus Curiae Harris Brumfield in Support of Petitioner, *ParkerVision, Inc. v. TCL Industries Holdings Co., Ltd., et al.*, No 24-518 (U.S. Dec. 06, 2024) ("Brumfield Br. (*ParkerVision*)"), 3; *accord* Report, 49 ("more than two-thirds of the attorneys surveyed" expressed the view that "the due process clause of the Constitution should be held to require courts of appeal to write 'at least a brief statement of the reasons for their decisions'").

One-word affirmances also inhibit and confuse the development of patent law. It is widely recognized that the Federal Circuit was founded "to tell you what the law is." Markey, 100 F.R.D. at 511; BPLA Br. (*Island*), 11. By overusing Rule 36, the Federal Circuit effectively frustrates its founding purposes of developing patent law. *See* Dennis Crouch, *From Chief Judge Markey's Promise To Rule 36*, *supra*. AAC Br. (*Island*), 7-8; BPLA Br., 11; BADC Br., 3, 6; Brumfield Br. (*ParkerVision*), 3; Brief for Amici Curiae Association for American Innovation, Paul Morinville, and Jeffrey Depp in Support of Petitioner, *ParkerVision, Inc. v. TCL Industries Holdings Co., Ltd., et al.*, No 24-518 (U.S. Dec. 6, 2024) ("Am. Inn. Br."), 9-10 (discussing broken feedback loop created by

Rule 36 affirmances of PTAB decisions). "Murky" and complex issues of law and fact are left undecided. BPLA Br., 4, 9; BADC Br., 6-7; *see also Million Dollar Mysteries*. This, despite the fact that the Federal Circuit once "required opinions" under Circuit Rule 18. *See* BADC Br., 8 (citing authority).

As discussed above, the *Converter* Petition squarely presents to this Court the problem of undue deference through Rule 36 Judgments following *Loper*. *Converter* Pet. (Question 3); *see also* Deborah Pollack-Milgate, *The Loper Loophole: Will Loper Bright Chip Away at Federal Circuit Rule 36 Summary Affirmances?*, Nat. L. Rev. (Jan. 17, 2025), https://natlawreview.com/article/loper-loophole-will-loper-bright-chip-away-federal-circuit-rule-36-summary (questioning, in light of *Loper*, *ParkerVision*, and *Converter Manufacturing*, whether the Federal Circuit will be able to continue "rubber-stamp the statutory interpretation and associated findings of the PTAB using Rule 36"); Amicus Brief of Alliance of U.S. Startups and Inventors for JOBS ("USIJ") in Support of Petitioner, *ParkerVision, Inc. v. TCL Industries Holdings Co., Ltd., et al.*, No 24-518 (U.S. Dec. 6, 2024), 11 (raising *Loper* in the context of *ParkerVision*).

Commentators frequently stress the value of reasoned decision-making and how one-word affirmances undermine the judiciary's legitimacy by failing to demonstrate such reasoning. The briefing is replete with examples of how opinion writing—providing a reasoned, written, opinion—improves the appellate process and faith in government. *See* BPLA

Br., 10-11 (pointing to Justice Brennan, Judge Kozinski, Chad M. Oldfather, and Thomas E. Baker); *id.*, 14 (pointing to Micah Schwartzman for four benefits of reasoned decision making); Brief of Injustice Pool, LLC as Amicus Curiae in Support of Petitioner, *ParkerVision, Inc. v. TCL Industries Holdings Co., Ltd., et al.*, No 24-518 (U.S. Nov. 20, 2024), 6 (written opinions "encourages consistency").

As the Boston Intellectual Property Law Association explains, it is "from the federal appellate judiciary's disclosure of the reasons for its decision on the merits" that public acceptance and "trust in the federal appellate judiciary" spring. BPLA Br., 14; Fair Inventing Fund Br., 10 (citations omitted) (opinions "build[] trust in judicial institution[s]").[4]

In contrast, regardless of the reason for issuing an opinion, and irrespective of the litigants in a case, affirmances without opinions reduce the legitimacy of the Federal Circuit and undermine public confidence in the judiciary. *See* BPLA Br., 12-14. As the Fair Inventing Fund put it, quoting the late Justice Ginsburg, "dispensing with *any* explanation risks 'the

[4] *See also* Dennis Crouch, *The Federal Circuit's Blind Spot: ParkerVision and the Problem of Invisible Reasoning*, Patently-O (Dec. 4, 2024), https://patentlyo.com/patent/2024/12/parkervision-invisible-reasoning.html (contrasting typical decision making, which "helps ensure accountability, enable meaningful review, and develop precedent", with "one word affirmances", which leave "parties and the public in the dark").

appearance of arbitrariness' and erodes the public's trust". Fair Inventing Fund Br.,10.

Additionally, like the subject of the *ParkerVision* Petition, many commentators have pointed out *that* Rule 36 violates the requirement under 35 U.S.C. §144 that "the Federal Circuit … **shall issue** to the Director **its** mandate and **opinion**". AAC Br. (*Island*), 12 (emphasis added); Fair Inventing Fund Br., 5-8; BADC Br., 3-5; Am. Inn. Br., 3; *see also* Dennis Crouch, *Wrongly Affirmed without Opinion*, 52 Wake Forest L. Rev. 561, 576-578 (2017).

These arguments and others are also reflected in the legal reporting on this issue, with the community and public watching these cases with interest.[5] As reflected by its denial of Island's Request

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[5] *See, e.g.,* Dennis Crouch, *Supreme Court Patent Challenges February 2025*, PatentlyO (Feb. 17, 2025), https://patentlyo.com/patent/2025/02/sotus-patent-2025.html (Discussing the pending challenges to the Federal Circuit's use of Rule 36 summary affirmances); Daniel Yannuzzi, *Patent Eligibility: The Call for Supreme Court Clarity and for an End to Summary Affirmances*, JDSupra (Feb. 6, 2025), https://www.jdsupra.com/legalnews/patent-eligibility-the-call-for-supreme-6531446/ (Discussing *Audio Evolution*, including the critiques lodged by observers against Rule 36 Judgments); Eileen McDermott, *ParkerVision is Latest to Petition SCOTUS for Review of CAFC's 'Heavy Reliance' on Rule 36*, IPWatchdog (Nov. 10, 2024), https://ipwatchdog.com/2024/11/10/parkervision-latest-petition-scotus-review-cafcs-heavy-reliance-rule-36/id=183059/; Adam Lidgett, *TD Ameritrade Urges High Court To Reject Patent Case*, Law360 (Nov. 25, 2024), https://www.law360.com/articles/

for Rehearing/Rehearing *en banc*, the Federal Circuit turns a blind eye to these arguments, and continues this challenged practice even in significant cases. *See Million-Dollar Mysteries*.

III. Rule 36 Judgments Have Been, and Continue To Be, a Pervasive Problem Often Raised to This Court, and Requiring this Court's Guidance Via the Present Petition, *Island*, and/or *ParkerVision*

Since 2018, this Court has been presented with at least twenty separate petitions for certiorari asking for review of the Federal Circuit's unique and aberrant use of Rule 36 Judgments. Charles R. Macedo et al., *Island Petition Highlights Patent Decisions Increasingly Deviate from Civil Procedure Norms*, IPWatchdog (Jun. 20, 2024, 6:15 PM), https://ipwatchdog.com/2024/06/20/patent-decisions-deviate-civilprocedure-norms/id=178166/; *see also* BADC Br., 9-10 (identifying 27). To date, the Court has not granted any of these Petitions.

Respondents in *Island* and *ParkerVision* have argued that because this Court has turned down so

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2264631/td-ameritrade-urges-high-court-to-reject-patent-case (Summarizing *Island Intellectual Property LLC v. TD Ameritrade, Inc.* and the argument against Rule 36 judgments); Hannah Albarazi, *Justices Urged To Review Fed. Circ.'s 1-Word PTAB Decisions,* Law360 (Nov. 8, 2024), https://www.law360.com/articles/2258777/justices-urged-to-review-fed-circ-s-1-word-ptab-decisions (Summarizing the *ParkerVision* Petition, and argument against the use of Rule 36 orders).

many similar petitions in the past, it should do so again now. However, this argument misses the bigger point: Rule 36 Judgments are a problem that is not going away. The Federal Circuit keeps issuing Rule 36 Judgments, and dozens of litigants feel that doing so is wrong and need this Court's guidance. Unless and until this Court addresses the issue head on, the objected to conduct will continue, and parties and the public will continue to feel aggrieved by such conduct. The persistent use of Rule 36 Judgments, if left unaddressed, will continue to "erode[] public confidence that each of its decision has a principled justification." *Audio Evolution* Pet., 40.

Today, this Court has three pending petitions expressly raising this issue, and a fourth pending petition implicating this issue, by determined and well represented parties again asking for this Court to weigh in on whether the parties and the public are entitled to an explanation for an appellate court's decision (whether it be to affirm or reverse).

IV. The Court Should Not Deny Any of These Petitions Until It Hears Arguments on the Merits

Question 2 in *Island*, Question 2 here in *Audio Evolution*, and the sole Question in *ParkerVision* all ask this Court to curtail the Federal Circuit's misuse of Rule 36 Judgments. "When different cases presenting substantially the same issue come before the Court at the same time, the Court may grant review in one case and simply hold the petition or jurisdictional statement in the other case for

summary disposition in light of the decision ultimately rendered in the first case." Steven M. Shapiro, et al., *Supreme Court Practice* §14.6, 780 (10th ed. 2013).

To the extent the Court does not, in the first instance, grant certiorari, and vacate and remand with instructions for the Federal Circuit to issue an opinion explaining the basis for its Rule 36 Judgments below, Island urges this Court not to deny any of these petitions without first hearing arguments on the merits against the use of Rule 36 Judgments by the Federal Circuit.

Given the substantial overlap in the issues involved in these petitions, Island urges this Court to accept at least one of these petitions and to hold in abeyance the remaining petitions unless and until it resolves this important and recurring issue on the merits.

CONCLUSION

For the foregoing reasons and those set forth in *Island* and *ParkerVision*, this Court should grant certiorari to consider the impropriety of the Federal Circuit's use of Rule 36 Judgments, whether by granting the present petition, the *Island* Petition, and/or the *ParkerVision* Petition, and by holding the other petitions in abeyance until this Court issues its decision on the merits.

Respectfully submitted,

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