

No. 14-

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IN THE  
**Supreme Court of the United States**

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STRYKER CORPORATION, STRYKER PUERTO RICO, LTD.,  
AND STRYKER SALES CORPORATION,  
*Petitioners,*

v.

ZIMMER, INC. AND ZIMMER SURGICAL, INC.,  
*Respondents.*

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

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**PETITION FOR A WRIT OF CERTIORARI**

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SHARON A. HWANG  
*Counsel of Record*  
DEBORAH A. LAUGHTON  
STEPHANIE F. SAMZ  
CAROLINE A. TEICHNER  
McAndrews, Held & Malloy, Ltd.  
500 West Madison Street, Suite 3400  
Chicago, Illinois 60661  
(312) 775-8000  
shwang@mcandrews-ip.com

*Counsel for Petitioners,*  
Stryker Corp., Stryker Puerto Rico, Ltd.,  
and Stryker Sales Corp.

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## QUESTIONS PRESENTED

The Patent Act provides that district courts “may increase . . . damages up to three times the amount found or assessed.” 35 U.S.C. § 284. Despite this permissive and discretionary language, the Federal Circuit requires, as a prerequisite to awarding enhanced damages under § 284, that a patentee prove by clear and convincing evidence that infringement was “willful,” meaning both that (1) there was an objectively high likelihood that the infringer’s actions constituted infringement, and (2) this likelihood was either known or so obvious that it should have been known to the accused infringer.

The questions presented are:

1. Has the Federal Circuit improperly abrogated the plain meaning of 35 U.S.C. § 284 by forbidding any award of enhanced damages unless there is a finding of willfulness under a rigid, two-part test, when this Court recently rejected an analogous framework imposed on 35 U.S.C. § 285, the statute providing for attorneys’ fee awards in exceptional cases?

2. Does a district court have discretion under 35 U.S.C. § 284 to award enhanced damages where an infringer intentionally copied a direct competitor’s patented invention, knew the invention was covered by multiple patents, and made no attempt to avoid infringing the patents on that invention?

## **PARTIES TO THE PROCEEDINGS**

The following were parties to the proceedings in the U.S. Court of Appeals for the Federal Circuit:

1. Stryker Corporation, Stryker Puerto Rico, Ltd., and Stryker Sales Corporation, petitioners on review, were plaintiffs-appellees below.
2. Zimmer, Inc. and Zimmer Surgical, Inc., respondents on review, were defendants-appellants below.

## **RULE 29.6 DISCLOSURE STATEMENT**

Petitioner Stryker Corporation has no parent corporation, and no publicly held company owns ten percent or more of its stock.

Petitioner Stryker Puerto Rico, Ltd. is an indirect wholly-owned subsidiary of Stryker Corporation, which is a publicly held company that owns ten percent or more of Stryker Puerto Rico, Ltd.'s stock.

Petitioner Stryker Sales Corporation is a wholly-owned subsidiary of Stryker Corporation, which is a publicly held company that owns ten percent or more of Stryker Sales Corporation's stock.

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Stryker Corporation, Stryker Puerto Rico, Ltd., and Stryker Sales Corporation (collectively, “Stryker”) respectfully petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Federal Circuit.

### **OPINIONS BELOW**

The Federal Circuit’s opinion (App. 26a-48a) is reported at 774 F.3d 1349 and its revised opinion (App. 3a-25a) is reported at 782 F.3d 649. The Federal Circuit’s order denying rehearing *en banc* (App. 1a-2a) is reported at 596 F. App’x 924. The opinion of the District Court denying Respondent’s motions for judgment as a matter of law and granting Petitioner’s motions for enhanced damages and attorneys’ fees (App. 49a-122a) is available at 2013 WL 6231533. The opinion of the District Court granting Petitioner’s motion for summary judgment of infringement (App. 123a-134a) is unreported. The opinion of the District Court construing patent claim terms (App. 135a-173a) is available at 2012 WL 333814.

### **JURISDICTION**

The Federal Circuit entered judgment on December 19, 2014, and denied rehearing *en banc* on March 23, 2015. App. 1a-2a, 26a-48a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## STATUTE INVOLVED

Section 284 of the Patent Act, 35 U.S.C. § 284, provides in pertinent part as follows:

Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court.

When the damages are not found by a jury, the court shall assess them. In either event the court may increase the damages up to three times the amount found or assessed. Increased damages under this paragraph shall not apply to provisional rights under section 154(d).

## STATEMENT OF THE CASE

This case raises important questions of law that implicate the key aims of the patent system: promoting and protecting innovation while deterring wholesale copying of patented inventions.

The Patent Act provides, in simple and discretionary terms, that district courts “may increase . . . damages up to three times the amount found or assessed.” 35 U.S.C. § 284. But the Federal

Circuit has effectively stripped district courts of the discretion to enhance patent damage awards for prevailing patentees by imposing a rigid willfulness framework on top of this otherwise flexible statute.

The plain language of § 284 is silent as to willfulness. Nevertheless, before even considering the propriety of enhanced damages, the Federal Circuit requires patentees to prove, by clear and convincing evidence, that an infringer's defenses were objectively unreasonable, and if so, that the infringer acted in subjective bad faith. The Federal Circuit then conducts a *de novo* review of the objective reasonableness of an infringer's defenses, giving no deference to the district court's assessment of an infringer's positions. Just last term, this Court wholly rejected an analogous framework imposed by the Federal Circuit on the discretionary statute governing attorneys' fee awards in patent cases, 35 U.S.C. § 285.

The Federal Circuit's current willfulness framework undermines the intended deterrent effect of § 284 by immunizing infringers from enhanced damages so long as they present at least one plausible defense at the post-trial appellate stage. In other words, under the Federal Circuit's rule, an adjudged infringer can copy a direct competitor's pioneering invention in bad faith but escape punitive damages simply by engaging skilled counsel to advance an unsuccessful but ultimately credible defensive argument on appeal, regardless of whether the infringer relied on or even knew about that defense prior to engaging in its infringing acts.



In this case, the District Court and jury both found that Petitioner Stryker proved willfulness by clear and convincing evidence. As a result, and given the egregiousness of Respondent Zimmer's infringement, the District Court exercised its discretion under § 284 to treble Stryker's damage award. On appeal, however, the Federal Circuit reviewed objective willfulness *de novo*, reversed, and vacated Stryker's treble damages, despite affirming for Stryker on all liability issues. This case vividly illustrates the tension between the discretionary enhancement scheme envisioned by Congress and the impermissible barriers to enhancement erected by the Federal Circuit.

### **FACTS AND PROCEEDINGS BELOW**

This petition arises from a patent infringement lawsuit brought by an industry leader in the medical device field against its direct competitor. The patentee in this case asserted its patents not to extract licensing fees, but to protect its investment in innovation.

The District Court, which lived with this case for almost three years, summarized the facts as follows:

[P]ulsed lavage devices had, for years, served an important function in surgical procedures—cleaning out wounds and removing necrotic tissue from wound sites. Early-model pulsed lavage

devices were bulky and required a centralized power source. They had to be wheeled around a hospital, from one room to another. Stryker solved the problems associated with the size and power needs of pulsed lavage devices by designing a portable, disposable, battery-powered, hand-held pulsed lavage device. Zimmer's Manufacturing Manager and Rule 30(b)(6) witness agreed that Stryker products were "pioneering."

Zimmer had no answer for Stryker's new technology and saw its market share fall precipitously, to the point where Zimmer's presence in the pulsed lavage marketplace was at risk. Rather than relying on their own engineers to develop an alternative, Zimmer hired an independent contractor with no experience in pulsed lavage devices. In essence, Zimmer handed the independent contractor a copy of Stryker's product and said, "Make one for us." Under those conditions, it is not surprising that the finished Zimmer product turned out to look and function like Stryker's product. Nevertheless, Zimmer got its product to market quickly and in direct competition with Stryker. In doing so, it did not seek advice of outside patent counsel to assess the potential for infringement of

Stryker's patents, or to opine on the validity of Stryker's patents.

Once Zimmer introduced its competing product, there was fierce, direct market competition between Stryker and Zimmer. Zimmer constantly sought to lure customers away from Stryker and had a fair amount of success in doing so with its new product. Then, in 2007, Zimmer was forced to pull its product from the market due to technical problems. Zimmer had received so many complaints about its product that it decided to cease production entirely and not re-start production until December 2008, when it reentered the market. Upon reentering the market, Zimmer recaptured most of the market share it had forfeited by its year-plus absence.

App. 50a-52a.

Stryker filed suit in December 2010, alleging infringement of three patents, U.S. Patent Nos. 6,022,329 ("the '329 patent"), 6,179,807 ("the '807 patent"), and 7,144,383 ("the '383 patent").

On November 29, 2012, the District Court granted Stryker's motion for summary judgment of infringement as to all twenty asserted claims of the '807 and '383 patents and as to all but one claim element of the '329 patent. App. 123a-134a.

Importantly, even after the District Court found infringement on summary judgment, Zimmer made no effort to stop infringing Stryker's patents or to mitigate damages. The case then proceeded to trial on a single infringement issue relating to the '329 patent, Zimmer's invalidity defenses for all three patents-in-suit, Stryker's claim for willful infringement, and damages.

The District Court summarized the jury verdict as follows:

After two weeks of trial—featuring hundreds of exhibits and more than a dozen witnesses—and multiple days of deliberation, the jury returned a verdict unequivocally in Stryker's favor. In particular, the jury found: (1) that the Pulsavac Plus products infringed claim 2 of the 329 patent; (2) that Zimmer failed to establish any of its 22 invalidity contentions; and (3) that Stryker was entitled to \$70 million in lost profits. The jury also found that Zimmer willfully infringed the valid claims under the patents-in-suit.

App. 50a (internal citations omitted).

The District Court denied all of Zimmer's post-trial motions. App. 49a-122a. With respect to Zimmer's motion for JMOL of no willfulness, the District Court expressly reviewed both prongs of the

Federal Circuit's willfulness test and found in Stryker's favor on both. App. 73a-79a.

The District Court further observed the following:

Zimmer lost every argument it advanced at claim construction, then lost most of the disputed claims on summary judgment. It lost all of its remaining claims at trial. At the time the jury announced its verdict, Zimmer had not changed its product design. This is consistent with both the market and litigation strategy that Zimmer has followed for years. Zimmer chose a high-risk/high-reward strategy of competing immediately and aggressively in the pulsed lavage market and opted to worry about the potential legal consequences later. When Stryker sued, Zimmer's able counsel offered the most plausible defenses that were available to them given Zimmer's pre-litigation market conduct. *Ultimately, however, the trial proofs demonstrated that this was not a close case. The relative quality of the expert testimony on liability was notably favorable to Stryker.*

App. 52a-53a (emphasis added).

In analyzing Stryker’s motion for enhanced damages, the District Court considered the totality of the circumstances, including Zimmer’s admitted copying, its failure to investigate the scope of Stryker’s patents, and the long duration of its infringement. App. 116a-120a. The District Court again noted that “this was not a close case,” given that “[e]very major decision—from claim construction through post-verdict motions—went against Zimmer,” among many other considerations. App. 118a. Accordingly, the District Court exercised its discretion to treble Stryker’s damages award of \$70 million. App. 119a. The District Court separately granted Stryker’s motion for a finding of exceptional case under 35 U.S.C. § 285 and awarded Stryker its reasonable attorneys’ fees. App. 108a-110a.

On appeal, Zimmer did not challenge subjective willfulness but touted the objective reasonableness of some of its noninfringement and invalidity defenses. The Federal Circuit affirmed the District Court’s grant of summary judgment of infringement of the ‘807 and ‘383 patents, the jury’s finding of infringement of the ‘329 patent, the jury’s rejection of all 22 of Zimmer’s invalidity defenses, and the jury’s award of lost-profits damages. App. 8a-20a. However, the Federal Circuit reversed on willfulness, determining *de novo* that, although all of Zimmer’s defenses were unsuccessful, Zimmer had presented a reasonable defense as to each of the three patents-in-suit. App. 21a-24a. Having reversed on willfulness, the Federal Circuit summarily vacated the District Court’s treble damages award and vacated and remanded the

District Court's finding of exceptional case and award of attorneys' fees. App. 25a.

Stryker filed a petition for rehearing *en banc*, urging the Federal Circuit to reevaluate the appropriate standards for granting enhanced damages in light of this Court's *Octane Fitness* and *Highmark* decisions. The Federal Circuit denied the petition on March 23, 2015. App. 1a-2a.

## STATUTORY FRAMEWORK

### A. The Grafting Of Willfulness Onto 35 U.S.C. § 284

Treble damages have been a part of U.S. patent law since the Patent Act of February 21, 1793, which allowed a patentee to recover, in an action at law, "a sum, that shall be at least equal to three times the price, for which the patentee has usually sold or licensed to other persons, the use of [the invention] . . . ." Patent Act of 1793, Ch. 11, § 5. The Patent Act of 1800 also allowed a patentee to recover "a sum equal to three times the actual damages sustained by [the] patentee." Patent Act of 1800, Ch. 25, § 3. Under these provisions, treble damage awards were automatic.

Treble damages were committed to the discretion of the district court in 1836, and remained so through ensuing revisions of the Patent Act. *See* Patent Act of 1836, Ch. 357, § 14 ("[I]t shall be in the power of the court to render judgment for any sum

above the amount found . . . not exceeding three times the amount thereof, according to the circumstances of the case . . .” (emphasis added); *see also* Patent Act of 1870, Ch. 230, § 59.

The current statute, enacted in 1952 and codified at 35 U.S.C. § 284, also includes a discretionary enhanced damages provision: “[T]he court *may* increase the damages up to three times the amount found or assessed.” 35 U.S.C. § 284 (emphasis added). Notably, neither § 284 nor its predecessors have conditioned a district court’s discretion to enhance damages on willfulness, bad faith, or any other exceptional circumstances.

In the past, the Federal Circuit recognized that enhanced damages may be appropriate in a variety of circumstances. A finding of willful infringement was one such situation. *See, e.g., Johns Hopkins Univ. v. CellPro, Inc.*, 152 F.3d 1342, 1364–65 (Fed. Cir. 1998); *see also Amsted Indus. Inc. v. Buckeye Steel Castings Co.*, 24 F.3d 178, 183–84 (Fed. Cir. 1994); *SRI Int’l, Inc. v. Advanced Tech. Labs., Inc.*, 127 F.3d 1462, 1468–69 (Fed. Cir. 1997). Absent a finding of willful infringement, bad faith alone could also support an award of enhanced damages. *See, e.g., Yarway Corp. v. Eur-Control USA, Inc.*, 775 F.2d 268, 277 (Fed. Cir. 1985); *King Instruments Corp. v. Perego*, 65 F.3d 941, 947 (Fed. Cir. 1995). The Federal Circuit further recognized that enhanced damages could serve a compensatory purpose by allowing for discretionary increases where the amount of damages that could be proven by a successful plaintiff was inadequate to



compensate for the infringement. *See, e.g., King*, 65 F.3d at 951 n.6; *see also Sherman Indus., Inc. v. Proto-Vest, Inc.*, 732 F.2d 168 (Fed. Cir. 1984).

The Federal Circuit historically analyzed willfulness under the totality of the circumstances, which included “not only such aspects as the closeness or complexity of the legal and factual questions presented, but also commercial factors that may have affected the infringer’s actions. Aspects in mitigation, such as whether there was independent invention or attempts to design around and avoid the patent or any other factors tending to show good faith, should be taken into account and given appropriate weight.” *SRI*, 127 F.3d at 1465; *Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp.*, 383 F.3d 1337, 1342 (Fed. Cir. 2004) (*en banc*) (“Determination of willfulness is made on consideration of the totality of the circumstances.”); *nCube Corp. v. SeaChange Int’l, Inc.*, 436 F.3d 1317, 1323–24 (Fed. Cir. 2006).

If a basis for enhancing damages existed (such as willfulness, bad faith, or compensatory reasons), the Federal Circuit then applied a multi-factor discretionary test to determine whether, and to what extent, enhanced damages under § 284 were appropriate. *See, e.g., Read Corp. v. Portec, Inc.*, 970 F.2d 816, 826–28 (Fed. Cir. 1992). These factors accounted for a wide range of considerations, including: “whether the infringer deliberately copied the ideas or design of another”; the “[c]loseness of the case”; the “[d]uration of [the] defendant’s

misconduct”; and any “[r]emedial action by the defendant.” *Id.*

The willfulness landscape changed in 2007 with the Federal Circuit’s decision in *Seagate*. There, the *en banc* Federal Circuit announced that “an award of enhanced damages *requires* a showing of willful infringement.” *In re Seagate Tech., LLC*, 497 F.3d 1360, 1368 (Fed. Cir. 2007) (*en banc*) (emphasis added). The Federal Circuit also articulated a rigid and more stringent test for willful infringement that no longer considered the totality of the circumstances.

Under the new *Seagate* test, willfulness (and thus entitlement to seek enhanced damages) must be proven by first establishing with clear and convincing evidence that “the infringer acted despite an objectively high likelihood that its actions constituted infringement of a valid patent.” *Id.* at 1371. “The state of mind of the accused infringer is not relevant” to this first inquiry. *Id.* If the “threshold objective standard is satisfied,” then the patent owner must establish by clear and convincing evidence that “this objectively-defined risk . . . was either known or so obvious that it should have been known to the accused infringer.” *Id.* The *Seagate* court “[l]eft it to future cases to further develop the application of this standard.” *Id.*

“Future cases,” including this one, have established that “[o]bjective recklessness will not be found where the accused infringer’s ‘position is susceptible to a reasonable conclusion of no

infringement” or invalidity.<sup>1</sup> App. 22a (citing *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1310 (Fed. Cir. 2011)); see also *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 769 F.3d 1371, 1382 (Fed. Cir. 2014); *Spine Solutions, Inc. v. Medtronic Sofamor Danek USA, Inc.*, 620 F.3d 1305, 1319–20 (Fed. Cir. 2010). Indeed, the Federal Circuit has expressly held that arguments and theories developed solely for litigation and not previously known to the infringer can preclude a finding of objective recklessness, unless they are shown to be unreasonable by clear and convincing evidence. See *Global Traffic Techs. LLC v. Morgan*, Nos. 2014-1537, 2014-1566, 2015 WL 3513416, at \*7 (Fed. Cir. June 4, 2015). In short, under the current framework, the objective recklessness inquiry has become dispositive of willfulness. Even in circumstances involving egregious copying and bad faith, enhanced damages cannot be awarded unless the patentee can prove the absence of any plausible defensive arguments. See, e.g., App. 21a-24a.

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<sup>1</sup> In *Commil USA, LLC v. Cisco Systems, Inc.*, 135 S. Ct. 1920, 1928 (2015), this Court held that a defendant’s reasonable belief of patent invalidity is not a defense to a claim of induced infringement under 35 U.S.C. § 271(b). In particular, the Court explained that, “if belief in invalidity were a defense to induced infringement, the force of [the] presumption [of patent validity under 35 U.S.C. § 282(a)] would be lessened to a drastic degree, for a defendant could prevail if he proved he reasonably believed the patent was invalid. That would circumvent the high bar Congress is presumed to have chosen: the clear and convincing standard.” *Id.* at 1929. *Commil* does not directly address whether an adjudged infringer can defeat willfulness and enhanced damages by relying solely on a reasonable belief of invalidity.

The Federal Circuit long treated willfulness as a question of fact reviewed with deference to the factfinder, and this practice continued in the years immediately after *Seagate*. See, e.g., *Powell v. Home Depot U.S.A., Inc.*, 663 F.3d 1221, 1228 (Fed. Cir. 2011) (“Willfulness is a question of fact, and our review on appeal is ‘limited to asking whether [the jury’s] verdict is supported by substantial evidence.’”) (quoting *i4i Ltd. P’ship v. Microsoft Corp.*, 598 F.3d 831, 859 (Fed. Cir. 2010)). Then, in 2012, a panel of the Federal Circuit changed course and held that “the objective determination of recklessness, even though predicated on underlying mixed questions of law and fact, is best decided by the judge as a question of law subject to *de novo* review.” See *Bard Peripheral Vascular, Inc. v. W.L. Gore & Assocs., Inc.*, 682 F.3d 1003, 1007–08 (Fed. Cir. 2012).

In summary, prior to considering whether enhanced damages may be awarded under 35 U.S.C. § 284, the Federal Circuit now requires a finding of willfulness based on a two-part objective/subjective test requiring clear and convincing evidence, where the objective prong is reviewed *de novo* and cannot be met barring a complete absence of plausible defenses on appeal.

**B. The Parallel Prejudgment Interest  
and Exceptional Case  
Jurisprudence**

While this Court has not yet provided guidance to the Federal Circuit regarding the

enhanced damages language of § 284, it has analyzed the prejudgment interest language of that provision, which reads: “Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement . . . together with interest and costs as fixed by the court.” 35 U.S.C. § 284. In *General Motors Corp. v. Devex Corp.*, 461 U.S. 648, 653 (1983), the Court refused to impose a common law standard of exceptionality onto the prejudgment interest statute, holding that “[o]n the face of § 284, a court’s authority to award interest is not restricted to exceptional circumstances, and there is no warrant for imposing such a limitation. When Congress wished to limit an element of recovery in a patent infringement action, it said so explicitly.” The Court observed that, while § 285 expressly provides that a court can award attorneys’ fees to a prevailing party only “in exceptional cases,” the power to award interest under § 284 was “not similarly restricted.” *Id.*

This Court has also given clear instructions on interpreting the attorneys’ fees provision of § 285. Although the availability of attorneys’ fees under the terms of the statute is more limited than prejudgment interest, the *Brooks Furniture* test that the Federal Circuit had used to determine what constituted an “exceptional case” under § 285 was held to be too narrow. *Brooks Furniture* imposed a two-part objective-subjective inquiry similar, if not identical, to the *Seagate* test for willfulness. See *Brooks Furniture Mfg., Inc. v. Dutailier Int’l, Inc.*, 393 F.3d 1378, 1381 (Fed. Cir. 2005) (“A case may be deemed exceptional . . . [a]bsent misconduct in

conduct of the litigation or in securing the patent . . . only if both (1) the litigation is brought in subjective bad faith, and (2) the litigation is objectively baseless.”); *see also iLOR, LLC v. Google, Inc.*, 631 F.3d 1372, 1377 (Fed. Cir. 2011) (“The objective baselessness standard for enhanced damages and attorneys’ fees against a non-prevailing plaintiff under *Brooks Furniture* is *identical* to the objective recklessness standard for enhanced damages and attorneys’ fees against an accused infringer for § 284 willful infringement actions under [*Seagate*].” (emphasis added)). The Federal Circuit also reviewed the objective prong of the *Brooks Furniture* test *de novo*, a standard of review it likewise applied to the *Seagate* test. *See Highmark, Inc. v. Allcare Health Mgmt. Sys., Inc.*, 687 F.3d 1300, 1309 (Fed. Cir. 2012).

Last year, this Court overturned the Federal Circuit’s § 285 framework in its entirety, including both the *Brooks Furniture* test and *de novo* review of exceptional case determinations. *See Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749 (2014); *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744 (2014).

In *Octane Fitness*, this Court concluded that the *Brooks Furniture* test was “unduly rigid,” especially given the “inherently flexible” and discretionary nature of § 285. *See* 134 S. Ct. at 1755–56. The Court noted that the text of § 285 “is patently clear” and “imposes one and only one constraint on district courts’ discretion to award attorney’s fees in patent litigation: The power is

reserved for ‘exceptional’ cases.” *Id.* Under § 285, “[d]istrict courts may determine whether a case is ‘exceptional’ in the case-by-case exercise of their discretion, considering the totality of the circumstances.” *Id.* at 1756. The Court explained that “a case presenting *either subjective bad faith or exceptionally meritless claims* may sufficiently set itself apart from mine-run cases to warrant a fee award.” *Id.* at 1757 (emphasis added).

In *Highmark*, the companion case to *Octane Fitness*, the Court held that district courts’ exceptional case determinations under § 285 must be reviewed for abuse of discretion, not *de novo*. 134 S. Ct. at 1748. The Court explained that, “as a matter of the sound administration of justice, the district court is better positioned to decide whether a case is exceptional because it lives with the case over a prolonged period of time,” especially because “the [exceptionality] question is ‘multifarious and novel, not susceptible to useful generalization of the sort that *de novo* review provides.” *Id.* at 1748–49 (internal citations and quotation marks omitted).

Individual Federal Circuit judges disagree on how this Court’s *Octane Fitness* and *Highmark* decisions pertaining to the *Brooks Furniture* test and § 285 impact the Federal Circuit’s formerly “identical” willfulness jurisprudence and its interpretation of § 284. See *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 780 F.3d 1357, 1362–64 (Fed. Cir. 2015) (O’Malley, J., joined by Hughes, J., dissenting). The Court’s guidance is required to clarify this uncertainty.

## REASONS FOR GRANTING THE PETITION

This case warrants *certiorari* review because the Federal Circuit’s treatment of enhanced damages is inconsistent with the plain language of 35 U.S.C. § 284 and this Court’s precedent. Specifically, the Federal Circuit has improperly grafted a rigid willfulness requirement onto § 284, the discretionary enhanced damages statute. The plain text of § 284 “unambiguously omits any such requirement.” *Seagate*, 497 F.3d at 1377 (Gajarsa, J., joined by Newman, J., concurring). This Court should grant *certiorari* to clarify that the Federal Circuit must “adhere to the plain meaning of the statute and leave the discretion to enhance damages in the capable hands of the district courts.” *See id.*

In addition, the Federal Circuit’s willfulness framework cannot be reconciled with this Court’s precedents interpreting related provisions, including a pair of decisions last term concerning the availability of attorneys’ fees under 35 U.S.C. § 285. Moreover, the Federal Circuit’s existing jurisprudence utterly negates the intended deterrent effect of § 284 because even bad-faith infringers can defeat enhanced damages on appeal simply by retaining skillful counsel to create a merely reasonable post-suit defense, regardless of whether such defense is correct, and regardless of whether the infringer was even aware of or relied upon such defense prior to engaging in its infringing acts.

The district court, not the appellate court, is best suited to assess the propriety of enhancing



damages in a given case. In the past, the Federal Circuit’s approach to enhanced damages appropriately placed the balance of authority in the factfinder’s hands. Over time, however, a series of Federal Circuit decisions has shifted that balance away from the district court and the jury and toward the appellate court. As a consequence, district courts’ discretionary awards of enhanced damages have, for all intents and purposes, been subject to *de novo* review in every respect. The judges of the Federal Circuit clearly disagree about the correctness of the existing law, but the court as a whole appears unwilling to reconsider the issue. This Court’s guidance is required to resolve that dispute.

**I. WILLFULNESS SHOULD NOT BE A PREREQUISITE FOR ENHANCED DAMAGES**

**A. The Federal Circuit’s Enhancement Regime Is Unsupportable Given The Plain Language Of § 284**

The § 284 analysis should begin and end with the text of the statute. *Cf. Octane Fitness*, 134 S. Ct. at 1755. The Federal Circuit’s interpretation of § 284 as requiring a predicate finding of willfulness is inconsistent with the statutory text, which states only that “the court may increase the damages up to three times the amount found or assessed.” 35 U.S.C. § 284. This text is “patently clear”—it allows for enhanced damages at the district court’s

discretion, with no additional restrictions. *Cf. Octane Fitness*, 134 S. Ct. at 1755.

Despite the plain language of § 284, the Federal Circuit has ruled that district courts cannot exercise their discretion to enhance damages unless a patentee has first proven willfulness by clear and convincing evidence. *See Seagate*, 497 F.3d at 1368, 1371. Moreover, the Federal Circuit has instituted a rigid, two-prong test for willfulness under which patentees must first show that an infringer had no objectively reasonable defenses before the infringer's bad faith can even be considered. *See id.* at 1371. Worse still, the infringer can rely on defenses devised solely for litigation, *see Global Traffic*, 2015 WL 3513416, at \*7, and the Federal Circuit will review the reasonableness of those defenses *de novo* on appeal. *See Bard*, 682 F.3d at 1007. The Federal Circuit's rigid and inflexible willfulness framework is so demanding that it renders enhanced damages under § 284 largely unattainable. *Cf. Octane Fitness*, 134 S. Ct. at 1756–58.

In enacting § 284, Congress could not have envisioned this rigid regime that finds no support in the plain language of the statute. Indeed, when § 284 was reenacted as part of the America Invents Act in 2011, Congress decided not to include the *Seagate* standard for willfulness, after explicitly considering the issue. *See* S. Rep. No. 111-18, at 94–95 (2009); S. 23, 112th Cong. (Jan. 25, 2011). An initial version of the statute had included such a ratification but prompted serious opposition, and

ultimately this provision was removed from the bill in order to ensure passage.

In keeping with the statutory text, § 284 should be interpreted as written to allow district courts to consider the totality of the circumstances in determining whether, and by how much, to enhance patent damages.

**B. The Federal Circuit’s Grafting of a Willfulness Requirement Onto § 284 Is Flatly Inconsistent With Parallel Supreme Court Cases**

Although this Court has not yet interpreted the enhanced damages portion of § 284, it has established guideposts in its reading of the prejudgment interest portion of § 284 in its *General Motors* decision. The relevant text of § 284 states that “[u]pon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement . . . together with interests and costs as fixed by the court.” 35 U.S.C. § 284. Prior to *General Motors*, the appellate courts had reached differing conclusions as to whether an award of prejudgment interest under § 284 should be confined to cases in which the so-called *Duplate* standard was satisfied. *See General Motors*, 461 U.S. at 650–53. This Court held that the language of § 284 was clear and did not incorporate any such restriction:

We have little doubt that § 284 does not incorporate the *Duplate* standard.

Under that standard, which evolved as a matter of federal common law, prejudgment interest could not be awarded where damages were unliquidated absent bad faith or other exceptional circumstances. By contrast, § 284 gives a court general authority to fix interest and costs. On the face of § 284, a court's authority to award interest is not restricted to exceptional circumstances, and there is no warrant for imposing such a limitation.

*Id.* at 653.

This same analysis applies equally to the enhanced damages component of § 284. Like the prejudgment interest language, the enhanced damages language does not restrict district courts' discretion to exceptional circumstances. Because the plain text of § 284 regarding enhanced damages includes no limiting language whatsoever, the Federal Circuit's continued grafting of a rigid willfulness requirement onto § 284 conflicts with the principles established by this Court in *General Motors*.

Equally troubling, the Federal Circuit's enhancement regime is also inconsistent with this Court's opinion in *Octane Fitness*, interpreting the awarding of attorneys' fees under 35 U.S.C. § 285. Like § 284, § 285 gives district courts discretion to award "reasonable attorney fees to the prevailing party," but unlike § 284, § 285 limits this discretion

to “exceptional cases.” Based on the statutory language alone, district courts are *less* constrained in their discretion to award enhanced damages than they are in their discretion to award attorneys’ fees. Yet this Court has already ruled that, under § 285, “[d]istrict courts may determine whether a case is ‘exceptional’ in the case-by-case exercise of their discretion, considering the totality of the circumstances.” *Octane Fitness*, 134 S. Ct. at 1756. *A fortiori*, district courts must have at least that same discretion under the less restrictive § 284.

This Court should grant *certiorari* and clarify that § 284, like § 285, must be interpreted to allow district courts the discretion to consider the full range of relevant circumstances in determining when, and to what extent, enhanced damages are appropriate in any given case.

### **C. The Judges Of The Federal Circuit Disagree About The Propriety of Grafting Willfulness Onto § 284**

The need for this Court’s guidance is further underscored by the Federal Circuit’s confusion and disagreement over the proper interpretation of the enhanced damages language of § 284. In *Seagate*, two Federal Circuit judges wrote separately to express their view that willfulness should not be a prerequisite to an award of enhanced damages; rather, under § 284, the district court should have flexibility to enhance damages in appropriate circumstances. *See Seagate*, 497 F.3d at 1376–84

(Gajarsa, J., joined by Newman, J., concurring). These judges noted that, because “the language of the statute unambiguously omits” a willfulness requirement and “because there is no principled reason for continuing to engraft a willfulness requirement onto section 284,” the Federal Circuit “should adhere to the plain meaning of the statute and leave the discretion to enhance damages in the capable hands of the district courts.” *Id.* at 1377, 1381.

More recently, four other members of the Federal Circuit have recognized that the Federal Circuit’s interpretation of § 284 has gone seriously awry. *See Halo*, 780 F.3d at 1359 (Taranto, J., joined by Reyna, J., concurring) (“To begin with, there are fundamental questions about the substantive standards. One is whether willfulness should remain a necessary condition for enhancement under § 284’s ‘may’ language . . . .”);<sup>2</sup> *id.* at 1362–63 (O’Malley, J., joined by Hughes J., dissenting) (“Because § 284 also places the inquiry squarely within a trial court’s discretion, we should rethink the extent to which we are authorized to impose restrictions on the manner

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<sup>2</sup> The Federal Circuit issued its order denying Halo’s petition for rehearing *en banc* on the same day as its order denying Stryker’s *en banc* petition. As Judge Taranto noted in *Halo*, the issues presented there were narrower and did not raise the basic question of whether an absolute willfulness requirement should be grafted onto § 284 in the first place. *See Halo*, 780 F.3d at 1358 (Taranto, J., joined by Reyna, J., concurring). Stryker’s petition for rehearing *en banc*, on the other hand, squarely raised the issue.

in which that discretion is exercised, outside the normal restrictions imposed by the Federal Rules of Evidence and application of the abuse of discretion standard. We should now assess whether a flexible test similar to what we have been told to apply in the § 285 context is also appropriate for an award of enhanced damages.”). Yet despite recognition from a number of Federal Circuit judges that the court’s restrictions on § 284 enhanced damages are misplaced, the Federal Circuit appears unwilling to remedy the situation, having rejected the opportunity to reconsider the issue, including in this case. *Certiorari* is required to return to district courts the discretion conferred by Congress to award enhanced damages in appropriate circumstances.

## **II. THE *SEAGATE* FRAMEWORK FOR WILLFULNESS CANNOT STAND**

At a minimum, the Federal Circuit’s existing willfulness framework is impermissibly rigid and unduly hinders patent owners’ ability to secure enhanced damages, even in the face of flagrant, bad-faith infringement. Congress could not have intended the deterrent effect of enhanced damages to be diluted by a burdensome willfulness framework.

### **A. *Seagate* Undermines The Deterrent Power Of Enhanced Damages**

The prospect of enhanced damages is meant, at the very least, to dissuade would-be infringers

from copying patented inventions. Innovators like Stryker commonly spend years and invest enormous sums of money developing pioneering inventions. The ability to recover enhanced damages for patent infringement serves as an added assurance that a patentee's investment will be protected from wholesale copying, especially by direct competitors.

But the existing *Seagate* framework dilutes this intended deterrent effect of § 284. As happened here, infringers who have knowingly copied a patented invention can defeat willfulness and enhanced damages so long as their appellate counsel is able to convince the Federal Circuit of the mere plausibility of their defenses on appeal under the court's *de novo* review. Ordinarily, competent defense counsel can easily devise at least one minimally "reasonable" defense for litigation, particularly since it is already understood that a reasonable defense in the enhanced damages context is something less than a winning one. *See, e.g., Spine Solutions, Inc. v. Medtronic Sofamor Danek USA, Inc.*, 620 F.3d 1305, 1319–20 (Fed. Cir. 2010). Indeed, the Federal Circuit regularly affirms on validity but reverses on willfulness based on an adjudged infringer's "reasonable belief of patent invalidity." *See, e.g., App. 21a-24a; Innovention Toys, LLC v. MGA Entm't, Inc.*, No. 2014-1731, 2015 WL 1917997, at \*6 (Fed. Cir. Apr. 29, 2015); *Spine Solutions*, 620 F.3d at 1319–20. Under current law, the presumption of patent validity under 35 U.S.C. § 282(a) does not even come into play when considering the objective reasonableness of an invalidity defense. As such, objective reasonableness



is a very low threshold for an infringer to meet.

In stark contrast, patentees shoulder a far more onerous burden in showing that a defendant has proffered no objectively reasonable defenses, especially when this must be demonstrated by clear and convincing evidence. Indeed, as happened in this case, infringers can strategically select willfulness defenses for appeal that were not presented in district court proceedings, thereby rendering the district court's analysis incomplete and making it seem as though the district court failed to review the objective reasonableness of the infringer's specific defenses. *Compare* App. 73a-79a, *with* App. 21a-24a. So long as an infringer can present a minimally reasonable, *post-hoc* defense, district courts are categorically precluded from taking bad faith into account or considering enhanced damages. This situation is unfair to patentees who have invested in innovation, and Congress could not have intended that § 284 would be gutted of its deterrent power in this way.

**B. *Seagate* Has Created An Artificial And Unmanageable “Evidentiary Wall”**

Willfulness under *Seagate* does not carry its ordinary meaning. Willfulness speaks to the “will”—the state of mind—of the infringer. Starting with *Seagate*, however, the Federal Circuit has required patentees prove what it calls “objective” willfulness by clear and convincing evidence before the

factfinder may consider any evidence of subjective willfulness. *See, e.g., Powell*, 663 F.3d at 1236. Consequently, even in cases involving significant evidence of bad faith (like this one), district courts must completely ignore any such evidence in determining whether an infringer’s conduct was objectively willful. This “evidentiary wall . . . between the objective and subjective portions of the inquiry . . . preclude[s] considerations of subjective bad faith—no matter how egregious—from informing [the] inquiry of the objective baselessness of a claim and preclude[s] the weakness a claim or defense from being indicative of a parties’ [sic] subjective bad faith.” *Halo*, 780 F.3d at 1362 (O’Malley, J., joined by Hughes, J., dissenting); *see also Global Traffic*, 2015 WL 3513416, at \*7 (reversing willfulness finding because the district court considered the “ample evidence” of the accused infringers’ knowledge of the patent in assessing *Seagate’s* objective prong).

This objective/subjective distinction is not only unduly restrictive, but it is also an “artificial and awkward construct” that causes confusion and is easily misapplied. *Halo*, 780 F.3d at 1362 (O’Malley, J., joined by Hughes, J., dissenting). Infringement does not occur in a vacuum; rather, a particular party infringes a particular patent under particular circumstances. In this case, for example, Zimmer admitted copying Stryker’s product, knowing that it was patented. The objective reasonableness of Zimmer’s defenses, to the extent relevant, thus should have been evaluated in light of Zimmer’s admitted copying. Under the Federal Circuit’s

existing willfulness framework, however, the objective inquiry was performed without considering Zimmer's bad faith or actual reliance on its proffered defenses.

Indeed, "subjective" considerations often are quite relevant to objective ones. Only nonobvious inventions can be patented, for instance, and it is well-established that copying constitutes objective evidence of nonobviousness. Yet because copying itself seems like a subjective consideration, courts have often ignored it in considering objective willfulness. Indeed, that appears to be what the Federal Circuit did here. Theoretically, perhaps, this should not happen, but the rigid and artificial distinction *Seagate* creates makes such mistakes common.

This result is incompatible with the principles this Court articulated for exceptional case determinations under § 285, where "a case presenting *either* subjective bad faith *or* exceptionally meritless claims may sufficiently set itself apart from mine-run cases to warrant a fee award." *Octane Fitness*, 134 S. Ct. at 1757 (emphasis added). Given that § 284 imposes even fewer constraints on district courts' discretion than § 285, courts should be entitled to weigh objective and subjective considerations as appropriate under the circumstances in assessing willfulness, just as they are entitled to do in assessing exceptional case. Presently, however, the Federal Circuit's willfulness framework is driven almost entirely by objective considerations reviewed in a vacuum.

The Federal Circuit purportedly relied on this Court's decision in *Safeco Insurance Co. of America v. Burr*, 551 U.S. 47 (2007), which dealt with "willful" violations of the Fair Credit Reporting Act, as the basis for *Seagate's* evidentiary wall. In *Safeco*, this Court rejected the argument that "evidence of subjective bad faith can support a willfulness finding" where a party had adopted an "objectively reasonable" reading of the statute. *Id.* at 70 n.20. The Court explained that "Congress could not have intended [liability for willfulness] for those who *followed* an interpretation that could reasonably have found support in the courts, whatever their subjective intent may have been." *Id.* (emphasis added). The Court thus considered whether the accused willful parties *actually* operated under an objectively reasonable interpretation of the statute *at the time of their disputed conduct*, not whether they devised that reasonable interpretation after the fact.

Over time, the Federal Circuit has expanded the *Seagate* test to permit reasonable *post-hoc* defenses to preclude a finding of willfulness, regardless of whether the infringer was aware of those defenses prior to engaging in infringement. Compare *i4i Ltd. P'ship v. Microsoft Corp.*, 598 F.3d 831, 860 (Fed. Cir. 2010) ("Based on its own assessment of the evidence and Microsoft's defenses, the jury was free to decide for itself whether Microsoft reasonably believed there were any substantial defenses to a claim of infringement."), with App. 21a-24a; *Global Traffic*, 2015 WL 3513416, at \*7; *Halo*, 769 F.3d at 1382. This is inconsistent with *Safeco*, which presumed that the defendant

adopted an “objectively reasonable” reading of the statute prior to engaging in the disputed conduct. *See* 551 U.S. at 70 n.20.

### C. *Seagate* Improperly Strips District Courts Of Discretion

Even if willfulness is properly a prerequisite for enhanced damages in patent cases, district courts should have discretion to consider all relevant evidence—objective, subjective, or anything in between—in making willfulness determinations, and to weigh that evidence accordingly. *Accord Octane Fitness*, 134 S. Ct. at 1757 (“[A] case presenting either subjective bad faith or exceptionally meritless claims may sufficiently set itself apart from mine-run cases to warrant a fee award.”); *see also Knorr-Bremse*, 383 F.3d at 1347 (“[P]recedent . . . authorizes the trier of fact to accord each factor the weight warranted by its strength in the particular case. We deem this approach preferable to abstracting any factor for per se treatment, for this greater flexibility enables the trier of fact to fit the decision to all of the circumstances.”).

The Federal Circuit has already devised a multi-factor, discretionary test for enhanced damages that accounts for the relevant willfulness considerations. Under existing Federal Circuit jurisprudence, the so-called *Read* test comes into play only after willfulness has been found and the district court is considering whether and by how

much to enhance damages. *See Read*, 970 F.2d at 826–28. In *Read*, the Federal Circuit noted that “[t]he paramount determination in deciding to grant enhancement and the amount thereof is the egregiousness of the defendant’s conduct based on all the facts and circumstances.” *Id.* at 826. The Federal Circuit then articulated a list of factors for district courts to consider in deciding whether to enhance damages. *See id.* at 827. These include:

1. “[W]hether the infringer deliberately copied the ideas or design of another.”
2. “[W]hether the infringer, when he knew of the other’s patent protection, investigated the scope of the patent and formed a good-faith belief that it was invalid or that it was not infringed.”
3. “[T]he infringer’s behavior as a party to the litigation.”
4. “[D]efendant’s size and financial condition.”
5. “Closeness of the case.”
6. “Duration of [the] defendant’s misconduct.”
7. “Remedial action by the defendant.”
8. “Defendant’s motivation for harm.”
9. “Whether defendant attempted to conceal its misconduct.”

*Id.* The Federal Circuit acknowledged that consideration of these factors was “in line with punitive damages considerations in other tort contexts.” *Id.* at 827–28.

The *Read* test allows district courts to consider both objective and subjective factors under the totality of the circumstances. Moreover, the *Read* test accounts for situations where enhanced damages might be inappropriate because an infringer had, in good faith, espoused an objectively reasonable defense *before* knowingly copying a patented invention. *See id.* at 827. The test also gives district courts discretion to decide how much to enhance damages, thereby allowing courts to fashion an award commensurate with the infringer’s degree of culpability. *See id.* at 828. Applying the *Read* test for enhancement in the first instance would better ensure that infringers are spared from enhanced damages when they proactively investigate known infringement risks, but not when they copy first in bad faith and concoct “reasonable” defenses later.

#### **D. Willfulness Should Be Reviewed With Deference To The Factfinder**

The Federal Circuit’s rigid framework governing enhanced damages awards impermissibly constrains the discretion that the Patent Act gives district courts in numerous respects and represents an unjustified attempt to control their decision-making at the appellate level. This increase in constraints on district court authority has been

accompanied by a complementary development in the standard by which district court decisions are reviewed. The Federal Circuit now engages in *de novo* review of district court findings on objective willfulness, notwithstanding a district court's greater familiarity with the case, proximity to evidence and experts, and ability to assess the overall picture on questions like validity and infringement. *See Bard*, 682 F.3d at 1007. Regardless of whether *Seagate* is the proper threshold for enhanced damages, the objective prong should still be reviewed with deference. For many of the same reasons this Court last term rejected *de novo* review of exceptional case determinations under § 285 and instead imposed an abuse-of-discretion standard, *see Highmark*, 134 S. Ct. at 1748–49, appellate review of district court findings on willfulness should be deferential.

Like § 285 exceptional case determinations, objective willfulness determinations require the district court to evaluate the strength and reasonableness of a party's litigating positions. *See Octane Fitness*, 134 S. Ct. at 1756; *Lee v. Mike's Novelties, Inc.*, 543 F. App'x 1010, 1017 (Fed. Cir. 2013) (finding no objective willfulness where evidence on infringement was "close"); *DePuy Spine, Inc. v. Medtronic Sofamor Danek, Inc.*, 567 F.3d 1314, 1336–37 (Fed. Cir. 2009) (finding no willfulness where defendant "presented a substantial question of noninfringement under the doctrine of equivalents"). Indeed, many of the same considerations will likely factor into both the district court's objective willfulness and exceptional case analyses. These analyses benefit from the district court's long-term,



in-depth familiarity with the parties and issues in a given case. In contrast, the Federal Circuit's exposure to a case is limited to reviewing the parties' briefing and conducting a single oral argument. It makes little sense (and could lead to conflicting, even absurd, results) to allow the Federal Circuit to review the same set of considerations once with deference for purposes of exceptional case and again *de novo* for purposes of willfulness.

The judges of the Federal Circuit disagree over the proper standard of review for objective willfulness. Several judges have criticized the use of *de novo* review of objective willfulness. *See, e.g., Halo*, 780 F.3d at 1361–64 (O'Malley, J., joined by Hughes, J., dissenting); *Halo*, 769 F.3d at 1385–86 (O'Malley, J., joined by Hughes, J., concurring); *Highmark, Inc. v. Allcare Health Mgmt. Sys., Inc.*, 701 F.3d 1351, 1357 n.1 (Fed. Cir. 2012) (Moore, J., joined by Rader, C.J., O'Malley, J., Reyna, J., Wallach, J., dissenting); *Id.* at 1367 n.5 (Reyna, J., joined by Moore, J., O'Malley, J., Wallach, J., dissenting); *Highmark*, 687 F.3d at 1320–21 (Mayer, J., dissenting-in-part). But as with other aspects of the *Seagate* regime, the Federal Circuit has refused to consider the issue *en banc*. App. 1a-2a (denying petition for rehearing *en banc*); *see also Bard Peripheral Vascular, Inc. v. W.L. Gore & Assocs., Inc.*, No. 2014-1114 (Fed. Cir. Apr. 8, 2015) (same); *Halo*, 780 F.3d at 1358 (same). Because of the Federal Circuit's exclusive jurisdiction over patent appeals, there will be no opportunity for other circuits to provide guidance on this issue. Given the Federal Circuit's failure to resolve this dispute internally,

this Court should intervene to provide the necessary guidance.

**III. THIS CASE SQUARELY PRESENTS AN IMPORTANT ISSUE OF LAW ON WHICH THE SUPREME COURT'S GUIDANCE IS NEEDED**

The issues raised in this case are legal ones appropriate for this Court's review. They turn not on complex fact-finding but on the appropriateness of the Federal Circuit's rules for enhanced damages in light of the statutory text and the principles this Court has announced in parallel patent law contexts. At issue is a body of law that has, over the last eight years, progressively moved away from its statutory foundation.

A number of judges on the Federal Circuit have repeatedly called attention to the problems raised by *Seagate* and its progeny, but the court as a whole has been unwilling to revisit the issue and appears from its record in cases like this simply to oppose the policy reflected in the statute allowing for such awards. The statute is open-ended, yet this Court has never opined on the considerations that should be brought to bear in making enhanced damages awards. This Court's guidance is needed.

These issues implicate the basic deterrent and compensatory aims of the patent system. Enhanced damages need not be awarded routinely to be effective, but they must clearly be available in cases

of bad faith.

Undoubtedly, the provisions of the Patent Act can be abused by vexatious litigants pressing weak claims. But they can also be abused by unscrupulous copyists determined to profit from the inventions of another. This is a case involving patents held by a pioneering inventor, infringement by a direct competitor, and copying of inventions known to be patented. It is far removed from the concerns voiced in other contexts about patent “trolls.” It involves the core concerns of the patent system and the principles essential to its basic operation.

In recent years, this Court has repeatedly rejected the Federal Circuit’s attempt to impose rigid and mechanical rules in various areas of patent law. *See, e.g., Octane Fitness*, 134 S. Ct. at 1756 (attorneys’ fees); *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 835 (2015) (claim construction); *Bilski v. Kappos*, 561 U.S. 593, 604 (2010) (patentable subject matter); *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 415 (2007) (obviousness). Enhanced damages represents another area in which the Federal Circuit has gone astray, especially in light of the broad and flexible language of § 284.

**CONCLUSION**

For all the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

SHARON A. HWANG  
*Counsel of Record*  
DEBORAH A. LAUGHTON  
STEPHANIE F. SAMZ  
CAROLINE A. TEICHNER  
McAndrews, Held & Malloy, Ltd.  
500 West Madison Street  
Suite 3400  
Chicago, Illinois 60661  
(312) 775-8000  
shwang@mcandrews-ip.com

*Counsel for Petitioner*

June 2015