

No. 15-\_\_

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IN THE  
*Supreme Court of the United States*

PARKERVISION INC.,  
*Petitioner,*  
v.

QUALCOMM INCORPORATED,  
*Respondent.*

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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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## **QUESTIONS PRESENTED**

Whether and under what circumstances an inconsistency in expert testimony permits a court to set aside a jury verdict and grant the losing party judgment as a matter of law.

**RULE 29.6 DISCLOSURE STATEMENT**

Petitioner ParkerVision, Inc. has no parent company, and no publicly held corporation owns 10% or more of its stock.

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## INTRODUCTION

The Seventh Amendment guarantees the right to trial by civil jury, and further provides that “no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.” U.S. Const. amend. VII. This Court has interpreted that foundational principle to require courts to defer to jury findings that are supported by substantial evidence, *i.e.*, more than a mere scintilla.

Since its creation in 1982, the United States Court of Appeals for the Federal Circuit has played fast and loose with this standard in patent cases, overstepping its role as an appellate court by taking factual issues away from the jury. In *Dennison Manufacturing Co. v. Panduit Corp.*, 475 U.S. 809, 811 (1986), this Court noted the Federal Circuit’s penchant for appellate fact-finding when it vacated and remanded the Federal Circuit’s decision rejecting a district court’s factual determinations without even considering the standard of review. “Chastened by this public rebuke, the Federal Circuit studiously avoided at least overt fact-finding for years.” William C. Rooklidge & Matthew F. Weil, *Judicial Hyperactivity: The Federal Circuit’s Discomfort with its Appellate Role*, 15 Berkeley Tech. L.J. 725, 739 (2000).

“It would appear, however, that the court might now be backsliding . . . .” *Id.* at 739-40. Instead of expressly finding facts, the Federal Circuit now applies the standard of review in an outcome-driven, haphazard manner: “[W]hen the Federal Circuit believes the jury verdict was correct, it simply holds that the substantial evidence test was met. On the other hand, when the Federal Circuit believes the jury

verdict was wrong, it substitutes its opinion for that of the jury and simply states that the substantial evidence test was not met.” Ted D. Lee & Michelle Evans, *The Charade: Trying a Patent Case to All “Three” Juries*, 8 Tex. Intell. Prop. L.J. 1, 14 (1999).

These criticisms are not simply musings from academics or dissatisfied litigants. Respected Federal Circuit judges—including the longest-sitting judge on that court—have themselves noted the court’s tendency to “reweigh[] the evidence to reach [the court’s] preferred result, rather than considering whether substantial evidence as presented at the trial supports the verdict that was reached by the jury.” *PharmaStem Therapeutics, Inc. v. ViaCell, Inc.*, 491 F.3d 1342, 1381 (Fed. Cir. 2007) (Newman, J., dissenting); *see also, e.g., Mirror Worlds, LLC v. Apple Inc.*, 692 F.3d 1351, 1362 (Fed. Cir. 2012) (Prost, J., dissenting); *Becton, Dickinson & Co. v. Tyco Healthcare Grp., LP*, 616 F.3d 1249, 1266 (Fed. Cir. 2010) (Gajarsa, J., dissenting).

In this patent case, a jury awarded \$172.7 million to petitioner ParkerVision, Inc., a startup that invented revolutionary technology for receiving wireless signals. But the district court and the Federal Circuit threw that verdict out based on their own conclusion that because the sole expert witness testified “inconsistently” about how the accused devices work, the jury *could not* have found infringement.

That decision conflicts with those of other circuits as well as this Court’s precedents regarding the proper scope of judicial review of jury verdicts. This Court

should grant certiorari to establish a uniform standard on that frequently recurring question.

### **PETITION FOR A WRIT OF CERTIORARI**

ParkerVision respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

### **OPINIONS BELOW**

The Federal Circuit's opinion (Pet. App. 1a-31a) and order denying rehearing (Pet. App. 81a-88a), as well as the district court's opinion (Pet. App. 32a-80a), are unpublished.

### **JURISDICTION**

The Federal Circuit denied ParkerVision's timely petition for rehearing on October 2, 2015. Pet. App. 81a. On December 16, the Chief Justice granted ParkerVision's application to extend the time to file this petition to January 29, 2016. App. No. 15A632. On January 20, the Chief Justice granted petitioner's application to further extend time to file this petition to February 29. *Id.* This Court has jurisdiction under 28 U.S.C. § 1254(1).

### **STATEMENT OF THE CASE**

1. ParkerVision is a startup that in the 1990s invented revolutionary technology to receive wireless signals.

A little bit of technical background will set the stage for the case. Modern communication devices communicate using digital data, 1s and 0s, typically represented by pulses of electricity carried over wires.

For wireless communications, these electrical pulses are represented by a low-frequency “baseband” signal. But low-frequency signals do not travel very far through air, so in order to transmit these signals over a distance, the transmitting device must imprint the information from the baseband signal onto a higher frequency “carrier” signal. This modification of the carrier signal using the baseband signal information involves “up-converting” the baseband signal and “modulation” of the carrier signal. The modulated carrier signal and up-converted baseband signal information are then transmitted over the air to a receiving antenna. Once the antenna receives the carrier signal, the signal must be “down-converted” and “demodulated” so the receiving device can process the baseband signal. This is done using circuitry to manipulate the signal received to strip out the carrier signal, leaving only the baseband signal. To use an analogy: the baseband signal is a message; the modulated carrier signal is an envelope that can travel through the air. Up-converting and modulation put the message into the envelope; down-converting and demodulation remove the message from the envelope.

In the 1990s, Jeff Parker, ParkerVision’s founder, found a cache of home movies and was saddened that his father was always behind the camera, and therefore never in the picture. C.A. J.A. A10559-60. Parker thus sought to create “CameraMan,” a radio-controlled camera that automatically tracks a person holding a device (*e.g.*, a microphone) so that the person controlling the camera could also participate in the events being filmed. *Id.* A10208-10. Naturally, CameraMan utilized a radio (carrier) signal that told it

about the tracking device's movements so that the camera could make the necessary adjustments. *Id.* A10210.

CameraMan was a success: it earned approximately \$100 million in revenue, was widely adopted by news broadcasters, and won an Emmy award. *Id.* A10212, A10561. But the technology was too expensive for home use. Mr. Parker and his colleague David Sorrells, a self-taught electrical engineer, sought to invent a cheaper consumer version, which led to the patents-in-suit. *Id.* A10563.

The biggest challenge to creating a consumer version of CameraMan was creating a better radio receiver, *i.e.*, a device that performs the demodulation and down-conversion steps in wireless communication to generate a usable baseband signal. *Id.* Existing receivers were either too large, too inefficient, or had insufficient range. *Id.* A10214.

Mr. Sorrells experimented with a technique called “voltage sampling” to generate the baseband signal. Voltage sampling was attractive because it involves relatively simple and compact circuitry: just a switch and a capacitor.<sup>1</sup> To take a sample of the carrier signal, the switch briefly closes, allowing part of the carrier signal to pass—and then opens, isolating that portion of the carrier for measurement in the

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<sup>1</sup> A switch is simply a means to open and close a circuit. When a switch is “open,” the circuit is broken; when it is “closed” current can flow through the circuit. A capacitor is a device on a circuit that stores energy and then discharges it.

capacitor. *See id.* A10268. Conventional wisdom held that the best way to generate the baseband signal using this technique was to maximize the voltage transferred out of the capacitor by minimizing the current.<sup>2</sup> Unfortunately, voltage sampling generates noisy, and therefore often unusable, baseband signals. *See id.* A10272-74.

Through rigorous experimentation, Mr. Sorrells discovered that the conventional wisdom about voltage sampling was wrong. Mr. Sorrells thus invented a new technology that he called “energy sampling.” *Id.* A10230.<sup>3</sup> Like voltage sampling, energy sampling uses a switch and a capacitor. But unlike voltage sampling, energy sampling transfers significant voltage *and* current out of the capacitor. *Id.* A10279. This new technology transfers significant energy from the carrier signal per sample, and continues to transfer energy out of the capacitor between samples. The resulting energy samples look nothing like voltage samples, and the technique generates high quality baseband signals. *See id.*; Pet. App. 2a.

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<sup>2</sup> Voltage and current are two related aspects of electricity. Voltage is the electrical potential difference between two points, while current is the flow of electric charge through an element. Analogizing to water: if there are two water tanks with different pressure in each, the voltage is analogous to that difference in pressure; the current is analogous to the rate at which water flows through a tube between the two tanks.

<sup>3</sup> At a high level energy can be measured as voltage x current x time.

The effects of energy sampling were dramatic. For example, Mr. Sorrells and his colleagues built two wireless receivers that were identical except that one used voltage sampling while the other used energy sampling. The voltage-sampling receiver had a working range of ten to twelve feet; the energy sampling receiver had a range of approximately 300 feet. C.A. J.A. A10230-34.

It was immediately apparent that energy sampling had implications far beyond a consumer version of CameraMan: it had the potential to substantially improve all wireless receivers, including those used in mobile phones and wireless routers. ParkerVision thus sought and obtained multiple patents for energy sampling technology, including the patents-in-suit.

While those patent applications were pending, ParkerVision entered into negotiations with respondent Qualcomm to license the energy sampling technology in Qualcomm's devices. *Id.* A10573-77. ParkerVision delivered a prototype chip embodying energy sampling to Qualcomm for testing. *Id.* A10582-83. Internal documents and e-mails showed that Qualcomm's staff thought ParkerVision's technology was potentially "revolutionary." *E.g., id.* A1349. The parties even exchanged proposals for a licensing arrangement that would have netted hundreds of millions of dollars in revenue for ParkerVision. But the negotiations ultimately fell apart. Pet. App. 3a.

Several years later, Qualcomm announced that it planned to use technology bearing a suspicious resemblance to energy sampling. Specifically,



Qualcomm's circuits down-convert carrier signals using switches housed inside a unit called a "double-balanced mixer", as well as capacitors located both in the mixer and in another unit called a "TX Filter."<sup>4</sup> ParkerVision obtained a sample of Qualcomm's product, had it reverse-engineered, and determined that Qualcomm was infringing the energy sampling patents. C.A. J.A. A10348-76 (describing the entire reverse-engineering process and results).

2. In 2011, ParkerVision sued Qualcomm for patent infringement. In October 2013, after claim construction, and after motions for summary judgment had been denied, the parties tried the case before a jury in two phases: liability (validity and infringement); and then damages (including willfulness). Pet. App. 3a-4a.

In the liability phase, four witnesses testified. The only infringement expert was ParkerVision's witness, Dr. Paul Prucnal, a professor of electrical engineering at Princeton University. Pet. App. 4a; C.A. J.A. A10707. Dr. Prucnal used an analysis of a representative Qualcomm product, called Magellan, to illustrate how the accused products infringe ParkerVision's patents. Pet. App. 4a. He concluded

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<sup>4</sup> "TX" means "transmit." Qualcomm would argue that the sole purpose of the capacitors in the "TX filter" is to prevent high-frequency transmissions from entering the receiving channel and distorting the baseband signal. See Pet. App. 6a. ParkerVision contends that the capacitors in the TX filter also sample energy. *Id.*

“[t]hat certainly Qualcomm’s products infringe the patents.” C.A. J.A. A10694.

The only claim limitation relevant to this petition is that the accused devices must generate the baseband signal with energy that is transferred from the carrier signal to a capacitor. The parties agreed, and the Federal Circuit confirmed, that this limitation would be met if ParkerVision could “show that the baseband signal is generated from the energy stored in [certain] capacitors” contained in the accused products. Pet. App. 6a-7a.

Dr. Prucnal testified unequivocally that Qualcomm’s devices generate the baseband signal with energy from the carrier signal stored in capacitors. For example, Dr. Prucnal testified on direct that Qualcomm’s devices use switches inside the double-balanced mixers, combined with capacitors located both in the mixers and the TX filter, to down-convert the carrier signal to the baseband signal in the manner specified in the energy sampling patents. See *id.* 5a-6a; C.A. J.A. A10804-08. He explained that in Qualcomm’s devices, “a substantial amount of the power” that was “transferred through the mixer from the carrier signal into the capacitors ends up on the output,” just as the patents teach. See C.A. J.A. A10807. He testified on redirect that “the energy from the baseband signal—from the carrier signal is transferred through the switch. It’s accumulated by the capacitor. And that energy is then used to generate the baseband signal following the capacitor.” *Id.* A11057.

Dr. Prucnal explained that both the double-balanced mixers and the TX filter infringe ParkerVision's patents. Pet. App. 5a-6a. Thus, he explained that the double-balanced mixers were essentially energy samplers masquerading as prior art. *See* Trial Tr. Day Four, D. Ct. ECF No. 404, at 253. With regard to the capacitors in the TX filter, while Dr. Prucnal agreed "that if the capacitors in the accused products are used for TX filtering and not for energy sampling, then there is absolutely no infringement," C.A. J.A. A10990, he also stated his belief that "the choice of components within the filter was for more than one purpose," *id.* A10999, and that the filter was "also serving the purpose of transferring energy, which is what the patent is about," *id.* A11001. He explained that "the current just doesn't pass by the capacitor [in the TX filter], that there's a switch that is causing the capacitor to charge. The current goes into the capacitor. When the switch opens, the capacitor then discharges." *Id.* A11022. And he subsequently explained that the capacitors in the TX filter are "a necessary part of the energy transfer" because those capacitors "provide the charging when the switch is closed, the storing of the energy" containing the baseband signal. *Id.* A11058.

Although Dr. Prucnal's direct and redirect testimony was clear on the role the capacitors play in generating the baseband signal, his cross-examination testimony was not. Counsel for Qualcomm—seeking to establish that the switches in the mixers, alone, could generate the baseband signal without capacitor involvement, *see* Pet. App. 6a—focused on the wire that connects the switches to the capacitors and then

extends out to circuitry that processes the baseband signal. This wire is called the “baseband path.” The gist of Qualcomm’s position was that if the baseband signal exists on the baseband path at a point before the capacitors, then the capacitors cannot have played any role in generating that signal.

Qualcomm’s counsel asked, for example, whether “the mixer has generated the baseband signal before reaching what you designated or indicated as the capacitor.” C.A. J.A. A10943. Consistent with his direct testimony, Dr. Prucnal responded “That’s not exactly correct.” *Id.*

Subsequently, however, Qualcomm’s counsel repeatedly asked about the location of the “baseband” without specifying whether he meant the baseband *signal* or the baseband *path*. And Dr. Prucnal, having been admonished to answer counsel’s questions with a “yes” or “no,” often failed to clarify whether his answers referred to the signal or the path.

On the one hand, for example, in answer to counsel’s question asking whether “[a]t this point, that is coming out of the mixer and before hitting a capacitor, the output of the mixer includes the baseband signal that we’ve been talking about, correct?”, Dr. Prucnal answered “Yes,” but then explained that “This is *the signal path of the baseband signal*, that’s correct.” *Id.* (emphasis added). In the immediate follow-up question, counsel again asked about the “baseband” without clarifying whether he was asking about the baseband *signal* or the baseband *path* and Dr. Prucnal explained that “[t]his wire indicates where the baseband is.” *Id.*

On the other hand, Dr. Prucnal was not always so disciplined. Qualcomm's counsel pointed to a location between the mixer's switches and capacitors and asked if "the baseband" was there:

Q Let me restate my question, . . . Where I have drawn red circles . . . there you have the baseband, correct?

A That's the baseband, correct.

Q Yes. And that is before the current has reached the capacitor . . . correct?

A Yes.

*Id.* A10943-44. A few minutes later, Dr. Prucnal differentiated between the baseband signal and baseband path, clarifying that "the actual baseband *signal* on the baseband *path* is created *after* the capacitor resistor." *Id.* A10947 (emphasis added). But then, approximately two hours later, Dr. Prucnal agreed with Qualcomm's counsel's statement that "in Qualcomm's architecture, the double balanced mixture [sic, mixer] not only is capable of, it does, in fact, create the baseband before it hits the TX filter." *Id.* A10988.

A fair reading of the cross-examination is that counsel for Qualcomm repeatedly asked whether the "baseband" existed or had been created prior to the capacitor, and that Dr. Prucnal answered "yes" on multiple occasions. Whenever Dr. Prucnal had the opportunity to use his own words, however, he described the areas in question as the "baseband path" or the "wire," explaining that the actual baseband signal was not created until after the capacitor. Thus,

Dr. Prucnal's testimony was at times internally inconsistent, and certainly was not always clear.

What was clear, however, is that Qualcomm's vigorous cross-examination did not shake Dr. Prucnal's belief in infringement or cause him to recant his testimony concerning the role the capacitors play in generating the baseband signal. To the contrary, some of his strongest testimony on the issue came during redirect. *See, e.g., id.* A11057-58.

Based on the testimony, ParkerVision argued that Qualcomm's circuits infringe its patents because they use switches and capacitors in the same way as ParkerVision's energy sampling invention to achieve the same result, *i.e.*, to down-convert carrier signals to the baseband signal. *See* Pet. App. 6a. Qualcomm argued that the entire down-conversion process occurs without capacitor involvement, and that the capacitors in its circuits play a different role, *i.e.*, to filter out noise unrelated to the down-conversion process. *See id.*

The eight-person jury was highly educated; it included an engineer with a master's degree in electrical engineering, a computer scientist, a commercial litigator, a college nursing instructor, and a teacher. C.A. J.A. A10032, A10052-53, A10053-55, A10057, A10067, A10083-84, A10105-07. The jury "deliberated for more than ten hours over three days before returning its verdict" in ParkerVision's favor. Pet. App. 36a-37a. The jury found that ParkerVision's patents are valid, and that Qualcomm's products infringed them. In the damages phase, the jury awarded \$172.7 million in damages to ParkerVision,

but found that Qualcomm's infringement had not been willful. *Id.* 4a.

3. Qualcomm moved for judgment as a matter of law. Eight months after the trial, having picked its way through a cold record, the district court granted Qualcomm's motion as to infringement and denied it as to validity. Pet. App. 38a.<sup>5</sup>

As to infringement, the district court determined that Dr. Prucnal had conceded during cross-examination that the baseband signal is created before the current reaches any capacitors, and "agree[d] with Qualcomm that Dr. Prucnal's concessions during cross-examination as well as his direct testimony are fatal to ParkerVision's infringement case." *Id.* 67a (footnote omitted). The district court cited three Federal Circuit cases, *Becton*, 616 F.3d at 1257-58, *Johns Hopkins University v. Datascope Corp.*, 543 F.3d 1342, 1348-49 (Fed. Cir. 2008) and *Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059, 1065 (Fed. Cir. 1998), for the proposition that "where similarly complex technology has been at issue, testimony like that offered by Dr. Prucnal has been held insufficient to sustain an infringement verdict." Pet. App. 67a.

4. ParkerVision appealed, and Qualcomm cross-appealed the denial of its motion as to validity. On appeal, the Federal Circuit went even further than the district court, holding that judgment as a matter of

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<sup>5</sup> In the alternative the district court held that Qualcomm was entitled to a new infringement trial. Pet. App. 38a.

law was appropriate with respect to both infringement and invalidity.<sup>6</sup>

The Federal Circuit analyzed the issue of infringement without acknowledging that in light of the jury's verdict, it was obligated to draw inferences in ParkerVision's favor and to disregard evidence undermining the jury's verdict. Indeed, the Federal Circuit conducted the entire analysis without citing a single case. *See* Pet. App. 5a-14a.

Instead, the court simply reweighed the evidence. It determined that "Dr. Prucnal's testimony is internally inconsistent" because he "testified that energy accumulated in the storage capacitor is used to generate a baseband signal 'following the capacitor' but admitted that the baseband already exists before the capacitor." *Id.* 8a. The court of appeals then stated that "ParkerVision made no attempt to reconcile the two strands of Dr. Prucnal's testimony at trial," and so "no reasonable jury could be satisfied that Dr. Prucnal's opinion, taken as a whole, provides a substantial basis for a finding of infringement." *Id.* 8a-9a. From there, the Federal Circuit offered several pages of its own views about why ParkerVision's

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<sup>6</sup> Because the Federal Circuit affirmed the district court's decision to grant Qualcomm's judgment as a matter of law, it did not consider the propriety of a new trial. Pet. App. 16a n.9. Also, the Federal Circuit's ruling as to invalidity is not an alternate ground to affirm because the Federal Circuit did not find all of the patent claims invalid, and so the infringement action remains viable even after the invalidity finding.



explanations for Dr. Prucnal's testimony were unpersuasive. *Id.* 10a-14a.

5. ParkerVision sought panel rehearing, arguing that the court of appeals had usurped the role of the jury by resolving inconsistencies in Dr. Prucnal's testimony in Qualcomm's favor. The Federal Circuit denied rehearing. *Id.* 81a.

Addressing ParkerVision's contention regarding the role of the jury, the Federal Circuit acknowledged that when there is an evidentiary basis for a jury's verdict, the jury is free to disregard contrary information. Pet. App. 86a (citing *Lavender v. Kurn*, 327 U.S. 645, 652 (1946), and *Presidio Components, Inc. v. Am. Tech. Ceramics Corp.*, 702 F.3d 1351, 1359 (Fed. Cir. 2012)). But the court held that this rule only applies if substantial evidence supports the verdict, and "[w]hen the party with the burden of proof rests its case on a witness's unexplained self-contradictory testimony, the court, in appropriate cases, may conclude that the evidence is insufficient to satisfy that standard." *Id.*

"[T]his is such a case," the Federal Circuit reasoned, because Dr. Prucnal "first stated that the capacitors are involved in the generating process, but then admitted on cross-examination that the baseband signal already exists before the current reaches the capacitors." Pet. App. 87a. The court determined that ParkerVision had failed to reconcile the inconsistency, and further decided that Dr. Prucnal's testimony supporting ParkerVision was "vague" while his testimony on cross-examination was not. *Id.* For these reasons, the Federal Circuit held that "no reasonable

finder of fact could come to a confident conclusion that the capacitors have a role in generating the baseband.” *Id.* 88a.

This petition followed.

### **REASONS FOR GRANTING THE WRIT**

This case provides a vivid illustration of the Federal Circuit’s tendency to disregard jury verdicts. Despite repeated calls from within that court to restore the proper balance between juries and appellate judges, the trend toward appellate fact-finding has persisted. Certiorari is the only way to restore that balance and to bring the Federal Circuit’s decisions into harmony with those of other courts.

#### **I. The Federal Circuit’s Willingness To Overturn Jury Verdicts Conflicts With Other Courts Of Appeals.**

The Federal Circuit’s decision in this case—and its broader willingness to overturn jury verdicts—is arguably consistent with the decisions of the Fifth Circuit, but conflicts with the decisions of other courts of appeals.

1. In its initial opinion, the Federal Circuit cited no caselaw whatsoever in the section setting aside the jury’s verdict. *See* Pet. App. 5a-14a. Instead, the court of appeals engaged in a naked reweighing of the evidence and found that it was insufficient to allow a jury to conclude that the capacitors in Qualcomm’s products play a role in generating the baseband signal. Although Dr. Prucnal had testified repeatedly during direct, cross, and redirect examination that Qualcomm’s products use both switches and capacitors

to generate the baseband signal, the Federal Circuit deemed this testimony insubstantial because other statements he made during cross-examination suggested that the baseband signal might exist before the current reaches the capacitors. The court of appeals rejected the jury's contrary resolution of this issue because "ParkerVision provided no explanation at trial for the inconsistencies in Dr. Prucnal's testimony." *Id.* 9a.

Addressing ParkerVision's petition for rehearing, the Federal Circuit paid lip service to the rule that juries are free to credit the testimony they find persuasive, and even acknowledged that a witness need not always testify consistently. Pet. App. 86a. But it then reiterated its view that "[w]hen the party with the burden of proof rests its case on a witness's unexplained self-contradictory testimony, the court . . . may conclude that the evidence is insufficient to satisfy" the "substantial evidence" standard. *Id.*

In support of its "unexplained inconsistency" rule, the Federal Circuit cited *Johns Hopkins University v. Datascope Corp.*, 543 F.3d 1342 (Fed. Cir. 2008). That case was about fragmentation catheters, which break up clots in blood vessels. Johns Hopkins had patented one such catheter that used a rotating wire shaped like a basket; the defendant had designed a catheter with an S-shaped wire. *Id.* at 1346. Hopkins' expert testified that as the wire in the defendants' device rotated, it would act essentially like a basket, and that it would expand to fill the entire vascular opening, thus scouring it of clots, just like the patented device. *Id.* at 1350-51 (Newman, J., dissenting). After hearing

from both sides and seeing demonstrations of the catheters, a properly instructed jury found infringement and the district court denied the defendant's motion for judgment as a matter of law. *Id.* The Federal Circuit reversed, determining that the testimony offered by Hopkins' witness failed to establish infringement because the S-shaped wire failed to operate like a basket when it was not rotating. The court concluded that the patents required the wire to have three-dimensional contact with the blood vessel before rotating, and thus held that the expert testimony failed to establish that an S-shaped wire that contacted the vessel only at two points could infringe. *See id.* at 1348 (majority op.).

Judge Newman dissented. She argued that "substantial evidence supported the jury verdict" and noted that the panel majority even "appear[s] to recognize that it was present." 543 F.3d at 1349-50. She explained that although there was certainly "evidence and argument on Datascope's side," it was not the province of the appellate court "to reweigh the evidence." *Id.* at 1351.

The decision below is consistent with *Datascope*. But for the reasons stated in Judge Newman's dissent, that consistency only illustrates that something has gone awry in the Federal Circuit. Here, as in *Datascope*, an appellate panel acknowledged the evidence supporting the jury's verdict, but nevertheless felt free to disregard the verdict and substitute its own assessment of the evidence for the jury's. Indeed, the decision below goes even further than *Datascope*: there, the expert's testimony—taken

as true—was arguably insufficient to show infringement if the claims at issue required three-dimensional contact between the stationary wire and the blood vessel. Thus, the court of appeals did not have to doubt the expert’s testimony to enter judgment as a matter of law. Here, by contrast, Dr. Prucnal testified that Qualcomm’s devices use both switches and capacitors to generate the baseband signal—and the Federal Circuit simply refused to credit that testimony, even though the jury plainly had done so.

2. No other federal circuit court has adopted the Federal Circuit’s rule that an unexplained internal inconsistency in a witness’s testimony renders that testimony insubstantial on a motion for judgment as a matter of law.

The closest any federal court of appeals has come to endorsing the Federal Circuit’s view is the Fifth Circuit’s decision in *Doucet v. Diamond M Drilling Co.*, 683 F.2d 886 (5th Cir. 1982), which the Federal Circuit cited in denying the petition for rehearing. Pet. App. 87a. *Doucet* held that the burden of establishing negligence by a preponderance of the evidence “simply could not be met by the self contradictory testimony of a single witness, especially when that statement is balanced against all the uncontroverted evidence in this record.” *Id.* at 892. That uncontroverted evidence included a concession from the plaintiff himself that the equipment he claimed the defendant was negligent for using was commonplace in the industry, and that the alternative the plaintiff wanted the defendant to use was not designed for safety purposes at all. *Id.* at 891. *Doucet* is consistent with *Phillips v. Western Co.*

of *North America*, 953 F.2d 923, 927 (5th Cir. 1992), which reached a similar conclusion on similar facts with respect to an employee’s seaworthiness claim under the Jones Act.<sup>7</sup>

3. Four circuit courts, in cases similar to this one, have held that “in civil cases . . . conflicts in the testimony of a single witness are for the jury to resolve.” *Poertner v. Swearingen*, 695 F.2d 435, 437 (10th Cir. 1982). In *Poertner*, a medical malpractice case, a blood clot had injured the plaintiff. Had the clot developed in her neck, it should have been detected by the physician; but if it developed in her skull, then it would always have been inoperable. *Id.* at 435. The plaintiff’s sole expert testified that the clot most likely had developed in the neck. On cross-examination, he admitted that he was not able to say so “with a reasonable degree of medical probability.” *Id.* at 436. On redirect, he testified that he believed that an arteriogram taken earlier would have shown the clot

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<sup>7</sup> In a different context, courts of appeals have held that a party cannot defeat a motion for summary judgment by filing an affidavit that contradicts his prior deposition testimony without explaining the inconsistency. This Court recognized the consensus (without endorsing it) in *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 806 (1999), a case that the Federal Circuit cited (with a “*cf.*” signal) in its opinion denying the petition for rehearing, Pet. App. 87a. These cases address the so-called “sham affidavit” rule, and their holdings apply only to the summary judgment stage because there would be a unique potential for mischief if a party could defeat a motion for summary judgment simply by filing a conclusory, self-serving affidavit. But these holdings do not apply to trial testimony.

in the neck. *Id.* The district court entered a directed verdict for the defense on the issue of causation, and the Tenth Circuit reversed, agreeing with the plaintiff that “this inconsistency within the testimony of her expert witness is an issue of credibility for the jury to resolve.” *Id.* The court reached that conclusion even though the case before it was “the most extreme we have seen, inasmuch as plaintiff’s sole medical witness’s testimony appears contradictory and several defense experts testified the clot did not form in [the plaintiff’s] neck.” *Id.* at 437.

The Sixth Circuit applied similar reasoning to achieve the same result in *Teti v. Firestone Tire & Rubber Co.*, 392 F.2d 294 (6th Cir. 1968). There, a doctor who testified for the plaintiff in a personal injury action stated that there was a causal relationship between the accident in question and a subsequent surgery the plaintiff required. On cross-examination he admitted that he could not state that this relationship existed “with any degree of certainty.” *Id.* at 298.<sup>8</sup> The trial court entered a directed verdict for the defendant, but the Sixth Circuit reversed. It explained that “view[ing] the evidence most favorably toward plaintiff, we cannot say that the witness retreated from his testimony of a direct and probable causal relationship.” *Id.* To be sure, “[c]ounsel’s cross-examination was a skillful attempt to impeach the witness and destroy the

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<sup>8</sup> A second physician also testified for the plaintiff, but his testimony was equally equivocal.

strength of his testimony. However, a trial judge, in considering a motion for a directed verdict, must not usurp the function of a jury and determine the credibility of a witness or weigh the relative merits of a party's claim." *Id.*

*Teti* is consistent with the Sixth Circuit's longstanding precedent. See *Cincinnati, N.O. & T.P.R. Co. v. Rimmer*, 37 F.2d 668, 669-70 (6th Cir. 1930) (holding that it was the province of the jury to decide how much of the testimony "was really put in the mouth of the witness by a skillful cross-examining counsel," and to "reconcile, as well they could, conflicts and inconsistencies in the testimony"); *Rochford v. Penn. Co.*, 174 F. 81, 85 (6th Cir. 1909) (holding, when a witness testified inconsistently, that "whether the jury should believe the one statement or the other, or believe the witness at all, was a question for the jury").

In *Stevenson v. Union Pacific Railroad Co.*, 354 F.3d 739, 744 (8th Cir. 2004), the Eighth Circuit refused to enter judgment as a matter of law even though the plaintiff's sole expert witness effectively conceded on cross-examination that a different course of action by the defendant would not have prevented an accident. The court reasoned that "[t]he jury may use common sense in evaluating witness testimony and may disregard all or part of any witness's testimony, even that of an expert." *Id.* at 745. In that case, like this one, the plaintiffs introduced lay as well as expert testimony, and the court held that "[t]he jury was free to believe the lay testimony and disregard the expert's cross-examination testimony." *Id.*



In *Payton v. Abbott Labs*, 780 F.2d 147, 156 (1st Cir. 1985), a pharmaceutical products liability case, the plaintiff's two experts could not testify that the consumption of the relevant drugs (as opposed to the plaintiff's prior consumption of different drugs) probably caused her injuries—which was the legal standard; they could only attest to a possibility. The defendant argued that the plaintiff had therefore failed to present substantial evidence of causation. But the First Circuit held that while “[t]he expert testimony in this case was certainly not free of ambiguity and uncertainty,” it was “a matter for the jury to resolve any inconsistencies in expert testimony,” and affirmed a decision denying a directed verdict to the defense. *Id.*

The foregoing closely resemble this case. In each case, the allegedly inconsistent, contradictory, or weak testimony was the plaintiff's principal proof of liability, and the courts of appeals nevertheless deferred to the jury.

4. Other courts of appeals adjudicating slightly different facts have likewise refused to adopt the Federal Circuit's rule that an unexplained inconsistency renders testimony insubstantial as a matter of law.

The Seventh Circuit has been emphatic that “[a] district court can disregard testimony only if reasonable persons could not believe it because it contradicts indisputable physical facts or laws.” *Whitehead v. Bond*, 680 F.3d 919, 925 (7th Cir. 2012) (quotation marks omitted). “Evidence is incredible as a matter of law only when it would have been physically

impossible for the witness to observe that which he claims occurred, or impossible under the laws of nature for the occurrence to have taken place at all.” *Id.* at 926 (quotation marks omitted). On the other hand, “[d]iscrepancies arising from impeachment, *inconsistent prior statements*, or the existence of a motive do not render witness testimony legally incredible.” *Id.* (quotation marks omitted) (emphasis added). Indeed, “[w]hen faced with conflicting, or even inconsistent testimony, the jury is free to believe one side over another.” *Thomas v. Cook Cty. Sheriff’s Dep’t*, 604 F.3d 293, 302 (7th Cir. 2010); *see also Kraushaar v. Flanigan*, 45 F.3d 1040, 1054 (7th Cir. 1995) (“[A] factfinder may believe some parts of a witness’s testimony while rejecting other parts.”)

In the Seventh Circuit, deference to a jury verdict is especially strong where, as here, the opposing party on cross-examination “repeatedly pointed out the inconsistencies and weaknesses in the . . . testimony.” *Whitehead*, 680 F.3d at 927. “When a jury has chosen to credit crucial testimony with full knowledge of the many faults of the witness providing it, we have no basis to interfere, as the jury is the final arbiter on such questions.” *Id.* (quotation marks omitted).

The Second Circuit has held that in ruling on a motion for judgment as a matter of law under Federal Rule of Civil Procedure 50, “the court must bear in mind that the jury is free to believe part and disbelieve part of any witness’s testimony.” *Zellner v. Summerlin*, 494 F.3d 344, 371 (2d Cir. 2007). In adjudicating these motions, courts must “disregard all evidence favorable to the moving party that the jury is not required to

believe,” *i.e.*, anything other than “[i]ncontrovertible evidence . . . such as a relevant videotape whose accuracy is unchallenged” that “so utterly discredits the opposing party’s version that no reasonable juror could fail to believe the version advanced by the moving party.” *Id.* (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151 (2000)).

5. Courts adjudicating civil appeals routinely cite criminal cases when explaining the proper deference to a jury’s decision to credit testimony. Courts in such cases have roundly rejected the Federal Circuit’s rule that unexplained inconsistencies in testimony prevent the jury from crediting that testimony. *See United States v. Lara*, 181 F.3d 183, 204 (1st Cir. 1999) (“[J]urors are not required to discard testimony that appears to contain internal inconsistencies, but may credit some parts of a witness’s testimony and disregard other potentially contradictory portions.”); *Dirring v. United States*, 328 F.2d 512, 514 (1st Cir. 1964) (contradiction between direct and cross-examination testimony “ordinarily leaves merely a question of fact, with the jury free to decide what to accept as the truth.”); *United States v. Praddy*, 725 F.3d 147, 152 (2d Cir. 2013) (“The jury is free to believe part, and to disbelieve part, of any given witness’s testimony.”); *United States v. O’Connor*, 650 F.3d 839, 855 (2d Cir. 2011) (“[W]hen testimonial inconsistencies are revealed on cross-examination, the jury [i]s entitled to weigh the evidence and decide the credibility issues for itself.”) (quotation marks omitted); *United States v. Boone*, 279 F.3d 163, 189 (3d Cir. 2002) (“A jury is free to believe part of a witness’ testimony and disbelieve another part of it. Thus, a

witness' testimony is not insufficient to establish a point simply because he or she later contradicts or alters it.") (citation omitted); *United States v. Barber*, 442 F.2d 517, 522 (3d Cir. 1971) ("Even where the different parts of a witness' testimony are inconsistent, it is for the jury to reconcile the conflicting statements and determine which shall prevail.") (quotation marks omitted); *Drennen v. United States*, 375 F. App'x 299, 305 (4th Cir. 2010) ("[I]t seems axiomatic that . . . a jury[] may accept all, part, or none of a paid expert's opinion."); *Kowalchuk v. United States*, 176 F.2d 873, 876 (6th Cir. 1949) ("The contradiction in the testimony of this witness did not destroy his entire testimony or cause it to be taken from the consideration of the jury. It was for the jury to determine whether they believed the witness in whole or in part, and in the case of contradictory testimony to accept that portion which it considered worthy of belief and reject the remainder."); *United States v. Schroeder*, 433 F.2d 846, 850 (8th Cir. 1970) ("Schroeder contends that Lindholm's testimony was contradictory and unbelievable . . . The question of who to believe, however, is for the jury.").

6. Qualcomm's best answer to the split will be to argue that the Federal Circuit itself acknowledges the general rule that inconsistent testimony is not inherently insubstantial. This argument has several fatal flaws.

First, controversial Federal Circuit precedent drove the district court to set aside the jury verdict. Pet. App. 67a. The district court relied on *Datascope*, the fragmentation catheter case discussed above, as

well as *Becton*, 616 F.3d at 1257-60, which overturned a jury’s finding of infringement because the court of appeals decided—in the face of contrary expert testimony—that a hinge could not reasonably be regarded as a “spring.” *Becton* drew a dissent from Judge Gajarsa, arguing that “[t]he majority climbs Jacob’s Ladder in search of perfection in the jury verdict, but, by substituting its own fact finding for that of the jury, it fails to allow the jury to perform its proper function.” *Id.* at 1266.<sup>9</sup>

Second, to the extent the Federal Circuit acknowledged the legal standard in this case, it did so to camouflage its fact-finding exercise as legal analysis. Tellingly, the Federal Circuit’s initial opinion did not discuss the standard of review. *See* Pet. App. 5a-14a. Instead, it did exactly what this Court disparaged in *Dennison Manufacturing Co. v. Panduit Corp.*, 475 U.S. 809, 811 (1986): it “did not mention” the standard; it did not “explicitly apply” the standard to the jury’s verdict, and “did not explain why, if it was of that view,” the standard had no applicability. It was only after ParkerVision sought rehearing that the Federal Circuit added the window-dressing of a few citations. Pet. App. 86a. But the Federal Circuit cannot evade this Court’s review by paying lip-service to the legal standard while violating it.

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<sup>9</sup> In a footnote, the district court cited *Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059, 1065 (Fed. Cir. 1998), for the proposition that “the patentee’s concessions may be sufficient to grant a defendant’s JMOL motion.” Pet. App. 68a n.4. That case is not about inconsistent testimony, and is irrelevant.

Third, the issue is far broader than just this case. Time and again, the Federal Circuit has demonstrated its willingness to set aside jury verdicts because it determines that substantial evidence does not support them—often based on nothing more than a disagreement with the jury’s factual assessments. It has done so with regard to findings of infringement. *See, e.g., Commil USA, LLC v. Cisco Sys., Inc.*, No. 2012-1042, 2015 WL 9461594, at \*3 (Fed. Cir. Dec. 28, 2015); *Mformation Techs., Inc. v. Research in Motion Ltd.*, 764 F.3d 1392, 1400 (Fed. Cir. 2014); *Phillip M. Adams & Assocs., LLC v. Dell Comput. Corp.*, 519 F. App’x 998, 1005 (Fed. Cir. 2013); *Mirror Worlds, LLC v. Apple Inc.*, 692 F.3d 1351, 1358 (Fed. Cir. 2012); *Cordis Corp. v. Boston Sci. Corp.*, 658 F.3d 1347, 1358 (Fed. Cir. 2011); *Smith & Nephew, Inc. v. Arthrex, Inc.*, 453 F. App’x 977, 981 (Fed. Cir. 2011); *Becton*, 616 F.3d at 1257-58; *Calico Brand, Inc. v. Ameritek Imports, Inc.*, 527 F. App’x 987, 994 (Fed. Cir.), *decision clarified on reh’g* 547 F. App’x 966 (Fed. Cir. 2013) (setting aside willful infringement finding). And it has done so with regard to validity. *See, e.g., ABT Sys., LLC v. Emerson Elec. Co.*, 797 F.3d 1350, 1357 (Fed. Cir. 2015) (reversing jury finding of non-obviousness); *I/P Engine, Inc. v. AOL Inc.*, 576 F. App’x 982, 992 (Fed. Cir. 2014), *cert. denied*, 136 S. Ct. 54 (2015) (same); *Inventio AG v. Otis Elevator Co.*, 497 F. App’x 37, 43 (Fed. Cir. 2012) (same); *Alexsam, Inc. v. Gap, Inc.*, 621 F. App’x 983, 995 (Fed. Cir. 2015) (reversing jury finding against anticipation); *Sealant Sys. Int’l, Inc. v. TEK Glob., S.R.L.*, 616 F. App’x 987, 999 (Fed. Cir. 2015) (same); *DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245, 1253 (Fed. Cir. 2014)

(same); *ClearValue, Inc. v. Pearl River Polymers, Inc.*, 668 F.3d 1340, 1342 (Fed. Cir. 2012) (same); *ArcelorMittal France v. AK Steel Corp.*, 700 F.3d 1314, 1323 (Fed. Cir. 2012) (setting aside jury finding of anticipation); *Novozymes A/S v. DuPont Nutrition Biosciences APS*, 723 F.3d 1336, 1351 (Fed. Cir. 2013) (setting aside jury finding of sufficient written description); *Centocor Ortho Biotech, Inc. v. Abbott Labs.*, 636 F.3d 1341, 1353 (Fed. Cir. 2011) (same).

These eighteen decisions are just a sampling from recent years. Some have provoked sharp dissents recognizing that the Federal Circuit has not been faithful to the substantial evidence standard. *See, e.g., Becton*, 616 F.3d at 1266 (Gajarsa, J., dissenting); *Mirror Worlds*, 692 F.3d at 1362 (Prost, J., dissenting) (“Without justification, the majority reads two new limitations into [the patent claim]—one of which is not even urged by either party—and then holds that Mirror Worlds’ evidence does not show that those limitations are met.”); *PharmaStem Therapeutics, Inc. v. ViaCell, Inc.*, 491 F.3d 1342, 1381 (Fed. Cir. 2007) (Newman, J., dissenting) (criticizing the majority for “reweighing the evidence to reach [the majority’s] preferred result, rather than considering whether substantial evidence as presented at the trial supports the verdict that was reached by the jury”);<sup>10</sup> *I/P*

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<sup>10</sup> Judge Newman has been dissenting from the Federal Circuit’s appellate fact-finding for decades. *See, e.g., Malta v. Shulmerich Carillons, Inc.*, 952 F.2d 1320, 1331 (Fed. Cir. 1991) (Newman, J., dissenting) (observing that the panel’s “rejection of the jury verdict and *de novo* determination of the factual issue of

*Engine*, 576 F. App'x at 996 (Chen, J., dissenting) (arguing that the majority “fails to accord sufficient deference to the jury’s findings of fact” by applying its “common sense” to deem patent claims obvious). These dissents suggest that the decision below stems from a deep-seated skepticism within the Federal Circuit about the role of juries in patent cases—and not from case-specific factors.

Commentators have confirmed the Federal Circuit is uniquely hostile to jury findings. “In patent-infringement cases, the CAFC has been appointed the ringleader, and the trial is becoming more of a sideshow every day.” Gregory D. Leibold, *In Juries We Do Not Trust: Appellate Review of Patent-Infringement Litigation*, 67 U. Colo. L. Rev. 623, 625-26 (1996); see also Rooklidge, *supra* (arguing that the Federal Circuit is “backsliding” toward naked appellate fact-finding); Lee & Evans, *supra* (observing that “when the Federal Circuit believes the jury verdict was wrong, it substitutes its opinion for that of the jury and simply states that the substantial evidence test was not met”).

In light of the Federal Circuit’s intransigence, and its efforts to disguise what it is doing, certiorari is the only way to bring uniformity to the law.

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infringement is contrary to the law governing appellate review of jury verdicts”); *Medical Instrumentation & Diagnostics Corp. v. Elekta AB*, 344 F.3d 1205, 1225 (Fed. Cir. 2003) (Newman, J., dissenting) (“As the appellate tribunal, our obligation is . . . not to strain for ways to reject the verdict.”).



## II. The Federal Circuit's Willingness To Overturn Jury Verdicts Conflicts With This Court's Precedents.

1. This Court's precedents establish that when "there is an evidentiary basis for the jury verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion." *Lavender v. Kurn*, 327 U.S. 645, 653 (1946). "[T]he appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." *Id.* "Only when there is *a complete absence* of probative facts to support the conclusion reached (by the jury) does a reversible error appear." *Basham v. Pennsylvania R. Co.*, 372 U.S. 699, 700-01 (1963) (quotation marks omitted) (emphasis added).

The Court has further explained that in adjudicating a motion for judgment as a matter of law, an appellate court "should review all of the evidence in the record," but "[i]n doing so," it "must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves*, 530 U.S. at 150. Indeed, the court "must disregard all evidence favorable to the moving party that the jury is not required to believe." *Id.* at 151. That means the court should consider "evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses." *Id.* (quotation marks omitted).

In this case, the jury's verdict had an evidentiary basis. Dr. Prucnal testified repeatedly that the generating limitation was met because Qualcomm's products use switches and capacitors in the double-balanced mixer, as well as capacitors in the TX filter, to sample relatively large amounts of energy from the incoming carrier signal and generate the baseband signal.

On cross-examination, Dr. Prucnal was asked about the TX filter. He explained that while the capacitors in the TX filter remove transmission signals, they also play a role in generating the baseband signal. Qualcomm's counsel insisted that the TX filter plays no role in generating the baseband signal, but Dr. Prucnal never conceded that point. Moreover, Qualcomm never put on its own expert witness to explain otherwise.

That testimony stood alongside other evidence that Qualcomm knew about ParkerVision's energy-sampling technology and was interested in using it. Indeed, Qualcomm had negotiated with ParkerVision to license the technology, but the negotiations had ultimately failed.

This evidence was sufficient to enable a reasonable jury to conclude that Qualcomm infringed. In light of what the jury knew, it makes perfect sense that Qualcomm would attempt to use double-balanced mixers and the TX filter to replicate the function of the energy sampler: Qualcomm knew about ParkerVision's technology and its patents. It would have been foolish for Qualcomm to make a circuit that was identical to ParkerVision's patent drawings. So Qualcomm sought

to vary its design just enough to exploit the benefits of energy sampling while maintaining a plausible argument that the capacitors in the circuit perform a different function.

Unfortunately for Qualcomm, the jury rejected that very argument. To the extent any evidence in the record supported it, the court of appeals was required to disregard that evidence in adjudicating Qualcomm's motion for judgment as a matter of law. Because the court of appeals refused to do so—and reached a contrary result essentially by deeming Dr. Prucnal not to be credible—its decision should be reversed.

2. More broadly, the decision below bucks a trend in this Court's cases harmonizing patent practice with civil litigation generally. This Court has repeatedly admonished the Federal Circuit to apply traditional appellate standards of review in patent cases. Whether the Federal Circuit refuses to do so expressly—as it has in the past—or stealthily, as it does in so many jury cases like this one, the stakes and the need for this Court's review are the same.

In *Teva Pharmaceuticals USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 836 (2015), this Court acknowledged that “[t]he Federal Circuit reviews the claim construction decisions of federal district courts throughout the Nation, and we consequently believe it important to clarify the standard of review that it must apply when doing so.” The Federal Circuit had been reviewing claim construction decisions *de novo*. In holding that the Federal Circuit was bound to apply the more deferential “clear error” standard to the evidentiary underpinnings of claim construction, this

Court noted that an exception to the normal rule “would tend to undermine the legitimacy of the district courts . . ., multiply appeals . . ., and needlessly reallocate judicial authority.” *Id.* at 837 (quotation marks omitted). The Court emphasized that deferential review “is ‘particularly’ important where patent law is at issue” because the fact-finder “has a comparatively greater opportunity to gain . . . familiarity” with the “specific scientific problems and principles” at issue “than an appeals court judge.” *Id.* at 838 (quotation marks omitted). All of the same considerations apply here.

*Teva* is the most recent in a line of cases attempting to bring the Federal Circuit’s practice into line with other appellate courts. *See Dickinson v. Zurko*, 527 U.S. 150, 165 (1999) (holding that the Federal Circuit must apply the “substantial evidence” standard to Patent & Trademark Office decisions, rather than more searching “clear error” review); *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744, 1748 (2014) (holding that the Federal Circuit must apply the “[t]raditional” abuse of discretion standard, rather than de novo review, to certain attorney fee determinations in patent cases); *eBay v. MercExchange, LLC*, 547 U.S. 388, 394 (2006) (holding that the ordinary test for permanent injunctions applies in patent cases). This Court’s intervention has so often been necessary because the Federal Circuit has repeatedly taken exception to traditional standards and procedures.

That is precisely what the Federal Circuit did here. By applying a watered-down version of

substantial evidence review, the Federal Circuit has undermined the integrity of the jury and the finality of its factual judgments. Certiorari is warranted to restore the proper balance between juries and judges in patent litigation.

### **III. The Question Presented Is Surpassingly Important.**

Finally, certiorari is warranted because the question presented is extremely important. In every trial, there is some conflict in the evidence—otherwise, the case would have been decided by dispositive motion. It is well-settled that when the conflict is between two witnesses, it is the jury’s responsibility to credit one over the other. But that is not the only conflict that frequently arises at trials. In many cases, like this one, the conflict is not between multiple witnesses’ testimony, but between multiple statements by a single witness. This Court has not yet ruled explicitly as to whether the jury has the power to resolve such conflicts, but it should.

The lingering ambiguity is especially acute in patent cases. Over the last five years, the percentage of patent cases decided by jury increased to 67%. *See* PriceWaterhouseCoopers, 2015 Patent Litigation Study 6 (May 2015), <https://www.pwc.com/us/en/forensic-services/publications/assets/2015-pwc-patent-litigation-study.pdf>. The decision below, and others like it, cast a shadow of unpredictability over all of those cases. It will be impossible for innovators, prospective infringers, the bar, and the bench to know when a jury verdict will be final, or when a panel of judges examining a cold record years later will impose

a different conclusion. That reality threatens not only the parties' Seventh Amendment rights, but also the future of innovation—especially for small startups like ParkerVision that risk millions of dollars innovating and rely on their intellectual property in order to survive.

### CONCLUSION

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

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