No. 19-101

In the
Supreme Court of the United States

IMPERIUM IP HOLDINGS (CAYMAN), LTD.,
Petitioner,

v.

SAMSUNG ELECTRONICS CO., LTD., *et al.*
Respondent.

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

BRIEF OF US INVENTOR, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

US Inventor, Inc. ("US Inventor" or "*amicus*") is a non-profit association of inventors devoted to protecting the intellectual property of individuals and small companies. It represents its 13,000 inventor and small business members by promoting strong intellectual property rights and a predictable U.S. patent system through education, advocacy and reform. US Inventor was founded to support the innovation efforts of the "little guy" inventors, seeking to ensure that strong patent rights are available to support their efforts to develop their inventions, bring those inventions to a point where they can be commercialized, create jobs and industries, and promote continued innovation. Their broad experience with the patent system, new technologies, and creating companies, gives them a unique perspective on the important issues presented in the underlying petition.

While *amicus* is concerned about fairness for plaintiff-patentees, it is equally concerned about a well-functioning and efficient civil justice system that imposes the minimum social costs necessary to achieve equity and justice for all participants in the federal court system.

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[1] No counsel for a party authored this brief in whole or in part. No person or entity other than *Amicus* or its counsel made a monetary contribution to the preparation or submission of this brief. Consent for filing this *amicus* brief has been obtained from all parties.

SUMMARY OF ARGUMENT

This case presents an excellent vehicle to review the Federal Circuit's longstanding erroneous treatment of jury verdicts under substantial evidence review standards.

ARGUMENT

I. THE FEDERAL CIRCUIT USURPS BOTH PLAINTIFFS' AND DEFENDANTS' JURY RIGHT—WHOEVER ACHIEVED VICTORY AGAINST THE HOLDER OF THE BURDEN OF PROOF

The Federal Circuit decision, on the surface, might appear to support just defendants in patent cases. But that decision actually discriminates equally against both jury trial winning plaintiffs and defendants. Plaintiffs and defendants each suffer impairment of their Seventh Amendment rights. This Court can correct this error, and prevent its destabilizing effects from spreading to other circuits.

In the holding below, the Federal Circuit reversed the denial of judgment as a matter of law on patent invalidity by anticipation. Anticipation is a question of fact. The accused infringer (here, Respondent Samsung) bore the burden of proof under the high clear and convincing standard. The Federal Circuit's rationale in reversing centered on its conclusion that Samsung's expert testified that the prior art disclosed each element of the disputed patent claims. In other words, Samsung (through its expert) met its prima

facie burden of showing anticipation. The Federal Circuit thereafter searched for (but stated it did not find) specific testimony from Petitioner's expert that would confront and oppose any single element of this burden. And it searched for (but stated it did not find) recorded credibility attacks on isolated aspects of Samsung's expert testimony.

This approach is not just erroneous, but also destabilizes the civil justice system. The Federal Circuit, in effect, applied a categorical rule that a party who meets its prima facie burden must always win the trial. The only exception (under the Federal Circuit approach) is where the opponent elicits specific contradicting testimony, or specific indicia of incredibility tied directly to specific witness answers. Thus, the decision below reflects a categorical rule, tempered only by a burden-shift that has little to no precedent in our federal civil justice system.[2]

It takes little imagination to appreciate that this Federal Circuit approach hands *plaintiffs generally* (not just patent defendants) a powerful appellate tool for unwinding trial losses. Under the Federal Circuit's logic, no defendant can any longer try its case by holding the plaintiff to its proofs. It must do more. According to the Federal Circuit, this has to

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[2] One exception where the trier of fact properly handles a shifting burden is during assessment of discrimination within employment cases, where a plaintiff advances a claim only with indirect (not direct) evidence. *See, e.g., McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). This exception is notable for its rarity.

include meeting a shifted burden to elicit directly contrary testimony, and/or narrow demonstrations that specific witness answers lack credibility.

This is easily seen by considering that a plaintiff always bears a burden of proof. In contrast, defendants generally only bear a burden where they assert an affirmative defense (which does not necessarily happen at every trial). If the decision below is left standing, at least in matters to be appealed to the Federal Circuit, courts must always deem plaintiffs categorically to have won if all they did was meet their prima facie burden on their issue. The only exception is if the responding defendant met a burden of its own to show specific contrary evidence, or one particular type of credibility attack (from among many).

An apples-to-apples comparison is a hypothetical fraud case, asserted at trial. Just like Samsung's clear and convincing burden here, that plaintiff bears its own clear and convincing burden on the elements of fraud: a false or misleading statement, intent to deceive, reliance and damages. Imagine in this hypothetical case that the defendant believes the plaintiff's attempted proofs rely on untrustworthy witnesses. This defendant relies on the jury, with the assistance of attorney closing argument, to assume their traditional role as judges of credibility. That is, this defendant asks the jury to find flaws in witness manner and demeanor, to weigh witness interests in giving testimony, or scrutinize witness inconsistency with their own answers or other evidence. At the Federal Circuit, such traditional jury determinations will have no effect. This fraud plaintiff will always

win, so long as it has checked off all of the proverbial boxes to complete its prima facie case. The jury's general mandate to assess credibility means nothing in any federal cases appealed to the Federal Circuit.

Handing any party (whether plaintiff or affirmative-defense-asserting defendant) such a powerful appellate tool undermines the interests of justice. The jury alone is supposed to be the judge of witness credibility. The jury instructions in this very case (like all cases) said so:

> You alone are to determine the questions of credibility or truthfulness of the witnesses. In weighing the testimony of the witnesses, you may consider the witness' manner and demeanor on the witness stand, any feelings or interest in the case, or any prejudice or bias about the case, that he or she may have, and the consistency or inconsistency of his or her testimony considered in the light of the circumstances. Has the witness been contradicted by other credible evidence? Has he or she made statements at other times and places contrary to those made here on the witness stand? You must give the testimony of each witness the credibility that you think it deserves.

(District Court ECF#250, at 4). Petitioner cited numerous decisions from other circuits confirming that, excepting the Federal Circuit, this is the law of the land. Pet. at 18-21.

Amicus therefore agrees with Petitioner that this Court should grant a writ of certiorari to address and eliminate a circuit split. This split imperils the interests of justice, and potentially gives losing plaintiffs *and* defendants an unjustified and destabilizing appellate tool that elevates a prima facie showing into a categorical and unavoidable jury win.

II. THE FEDERAL CIRCUIT'S LONGSTANDING ANNULMENT OF JURIES SHOWS THAT THIS COURT SHOULD GRANT THE PETITION

The Federal Circuit's approach in this case was not isolated, but rather is the latest decision among many where the Federal Circuit overreached to annul a jury verdict.

The rules that the Federal Circuit *should* follow to apply substantial evidence review of jury verdicts are so well established, they are noted within authoritative treatises:

> The reviewing court may not reweigh the evidence ***or reassess the credibility of witnesses***. Rather, it must view all the evidence, all reasonable inferences, and all credibility determinations ***in the light most favorable to the verdict***. If, in that light, the evidence is such that a rational finder of fact could come to the same conclusion, then there is sufficient evidence to support the verdict.

9 James W. Moore *et al.*, Moore's Federal Practice: Civil § 206.02 (3d ed. 2016) (emphasis added). Applied

here, this means that the jury's rejection of Samsung's testimony on credibility grounds should not have been overturned.

One Federal Circuit judge has repeatedly observed that other Federal Circuit judges do what they did here: "reweigh[] the evidence to reach the preferred result," rather than address jury verdicts under traditional substantial evidence review standards. *PharmaStem Therapeutics, Inc. v. ViaCell, Inc.*, 491 F.3d 1342, 1381 (Fed. Cir. 2007) (Newman, J., dissenting); *see also Med. Instrum. & Diagnostics Corp. v. Elekta AB*, 344 F.3d 1205, 1225 (Fed. Cir. 2003) (Newman, J., dissenting); *Malta v. Shulmerich Carillons, Inc.*, 952 F.2d 1320, 1331 (Fed. Cir. 1991) (Newman, J., dissenting).

Other judges on that court have also criticized their colleagues' tendency to structure legal standards to usurp the role of the fact finder. *See Highmark, Inc. v. Allcare Health Mgmt. Sys., Inc.*, 701 F.3d 1351, at 1362 (Fed. Cir. 2012) (Moore, J., dissenting from denial of reh'g en banc) (stating that "[w]e need to avoid the temptation to label everything legal and usurp the province of the fact finder with our manufactured *de novo* review); *see also Highmark, Inc. v. Allcare Health Mgmt. Sys., Inc.*, 687 F.3d 1300, 1357 (Fed. Cir. 2012) (Mayer, J., dissenting) (characterizing the Federal Circuit as "infatuated with *de novo* review of factual determinations."), *panel decision overruled at* 572 U.S. 559 (2015).

Other judges and scholars have observed the same thing: Federal Circuit panels persistently override

traditional substantial evidence review to substitute its own view of the facts in place of the jury's or trial court's. *See, e.g.*, *I/P Engine, Inc. v. AOL Inc.*, 576 Fed. Appx. 982, 996 (Fed. Cir. 2014) (Chen, J., dissenting); *Becton, Dickinson & Co. v. Tyco Healthcare Grp., LP*, 616 F.3d 1249, 1266 (Fed. Cir. 2010) (Gajarsa, J., dissenting); Gene Quinn, *Federal Circuit Ignores Jury Finding of Non-Obviousness*, IP Watchdog Blog (Aug. 21, 2014) (calling the *I/P Engine* decision "just another example of the Federal Circuit substituting its own decision for that of the decision maker at the district court level" after "facts found by a jury are ignored."); Mark A. Lemley, *Why Do Juries Decide If Patents Are Valid?*, 99 Va. L. Rev. 1673, 1735 n.279 (2013) ("The Federal Circuit has been criticized for usurping the district court's fact-finding role" (citing Ted L. Field, *Hyperactive Judges: An Empirical Study of Judge-Dependent "Judicial Hyperactivity" in the Federal Circuit*, 38 Vt. L. Rev. 625, 723 (2014); William C. Rooklidge & Matthew F. Weil, *Judicial Hyperactivity: The Federal Circuit's Discomfort with Its Appellate Role*, 15 Berkeley Tech. L.J. 725, 726 (2000)); Arti K. Rai, *Engaging Facts and Policy: A Multi-Institutional Approach to Patent System Reform*, 103 Colum. L. Rev. 1035, 1056 (2003); Arti K. Rai, *Specialized Trial Courts: Concentrating Expertise on Fact*, 17 Berkeley Tech. L.J. 877, 883 (2002) ("Ignoring conventional allocation-of-power principles that give trial courts primary authority over factual questions, the Federal Circuit has asserted power over fact."); Rooklidge & Weil, 15 Berkeley Tech. L.J. at 739-40 (2000); John R. Thomas, *On Preparatory Texts and Proprietary Technologies: The Place of Prosecution Histories in Patent Claim Interpretation*, 47 UCLA L. Rev. 183, 209–10 (1999)

("Seeking to expand its ability to regulate patent infringement disputes, the Federal Circuit sought an interpretive strategy that would provide it with unrestrained powers of review."); Ted D. Lee and Michelle Evans, *The Charade: Trying a Patent Case to All "Three" Juries*, 8 Tex. Intell. Prop. L.J. 1, 14 (1999); Gregory D. Leibold, *In Juries We Do Not Trust: Appellate Review of Patent-Infringement Litigation*, 67 U. Colo. L. Rev. 623, 625-26 (1996).

In summary, "[c]ommentators have accused the Federal Circuit of generally exercising too much power relative to that of the district court in patent cases." Ted L. Field, *Obviousness as Fact: The Issue of Obviousness in Patent Law Should Be a Question of Fact Reviewed with Appropriate Deference*, 27 Fordham Intell. Prop. Media & Ent. L.J. 555, 559 (2017). Those commentators are right. This case is but one example.

The Federal Circuit's notorious, longstanding tendency to misapply substantial evidence review exists in stark contrast to generally correct application of law at the regional circuit courts of appeals. *See, e.g.*, *Zellner v. Summerlin*, 494 F.3d 344, 371 (2d Cir. 2007) ("[T]he jury is free to believe part and disbelieve part of any witness's testimony."); *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."); *Payton v. Abbott Labs*, 780 F.2d 147 (1st Cir. 1985) ("The expert testimony in this case was certainly not free of ambiguity and uncertainty. But it is a matter for the jury to resolve any inconsistencies in expert testimony."); *Contractor*

Util. Sales Co. v. Certain-Teed Corp., 748 F.2d 1151, 1155 (7th Cir. 1984) ("Issues as to inconsistencies, conflicts, and credibility are for resolution by the jury."); *Poertner v. Swearingen*, 695 F.2d 435, 437 (10th Cir. 1982) (holding that "inconsistency within the testimony of [the plaintiff's] expert witness is an issue of credibility for the jury to resolve"); *Teti v. Firestone Tire & Rubber Co.*, 392 F.2d 294, 298 (6th Cir. 1968) ("[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."); *Chicago Great Western Ry. v. Smith*, 228 F.2d 180, 183 (8th Cir. 1955).

This circuit split is both pernicious and unnecessary. No jury decision gets appropriate stability and respect at the Federal Circuit, whether it favors a plaintiff or a defendant. This case particularly shows that jury decisions rejecting a proponent's prima facie case are unstable, and prone to being upended if the appellate court prefers an opposite outcome.

The Federal Circuit has also created a legal environment that is not just unstable; it is more costly and wasteful. If the Federal Circuit may replace a jury's factual determination with its own, then going forward the winner of a jury trial at the district court will have to try the case anew in the appeals court. This flies in the face of the proper division of labor between trial courts and courts of review. *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574-75 (1985); *Polaroid Corp. v. Eastman Kodak Co.,* 789 F.2d 1556, 1558 (Fed. Cir. 1986) ("This court reviews

judgments . . . we do not retry the case"); *Fromson v. Advance Offset Plate, Inc.*, 755 F.2d 1549, 1555 (Fed. Cir. 1985) ("Whatever [appellant] may have meant by 'full and independent review,' it cannot mean that this court may proceed as though there had been no trial"). "[T]he parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much." *Anderson*, 470 U.S. at 574-75. When the Federal Circuit misapprehends its role to assert more plenary review of the facts than the law otherwise allows, it does not reach a "better" result, only a different result with greater social costs. *Id.* ("Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources.").

In short, the Federal Circuit categorical rule makes tried outcomes less certain. This incentivizes appellate re-litigation of outcomes. The Federal Circuit should be reminded that the appellate court role does not include finding facts anew, or overturning jury credibility determinations.

CONCLUSION

Amicus submits that this Court should grant certiorari to determine whether the Federal Circuit's mistreatment of substantial evidence review should be reversed.

Respectfully submitted,

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