

No. 19-211

IN THE

Supreme Court of the United States

TIME WARNER CABLE, INC.; TIME WARNER
CABLE, LLC; TIME WARNER ENTERTAINMENT
COMPANY, L.P.; TIME WARNER ENTERTAINMENT-
ADVANCE/NEWHOUSE PARTNERSHIP;
TWC COMMUNICATIONS, LLC; AND TIME WARNER
CABLE INFORMATION SERVICES (KANSAS), LLC,

Petitioners,

v.

SPRINT COMMUNICATIONS COMPANY, L.P.,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Neither of the questions presented in the Petition is raised in the Federal Circuit's decision. The court did not sanction unapportioned damages awards or create a new rule for the written description requirement. The court simply applied established law to particular facts and concluded that the jury verdict was supported by substantial evidence. If this Court were to grant the Petition based on the Petitioners' questions, it would find that it must first reweigh questions of fact decided by the jury on such things as the meaning of "broadband" technology and the credibility of expert witnesses.

The questions presented in this case, properly stated, are:

1. Whether the Federal Circuit correctly affirmed the jury's reasonable royalty award as supported by substantial evidence where Sprint presented the jury with expert testimony and other evidence of multiple methodologies apportioning the incremental value of Petitioners' services attributable to Sprint's inventions.

2. Whether the Federal Circuit correctly affirmed the jury's finding that Sprint's patents are not invalid, where substantial evidence, including expert testimony, showed that the written descriptions are not limited to a single networking technology, but encompass a variety of broadband technologies.

CORPORATE DISCLOSURE STATEMENT

Respondent Sprint Communications Company, L.P., is wholly owned by Sprint Communications, Inc., either directly or indirectly.

Sprint Communications, Inc., is a wholly owned subsidiary of Sprint Corporation, which is a public company listed on the New York Stock exchange. SoftBank Corp., a public company listed on the Tokyo Stock Exchange First Section, owns 10% or more of the stock of Sprint Corporation.

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INTRODUCTION

Petitioners ask this Court to engage in fact-bound error correction. They first ask the Court to reexamine the Federal Circuit’s conclusion that the jury’s reasonable royalty award was based on the value of what was taken from Sprint, not the value of unpatented features. Petitioners then attempt to cast this case as one in a series in which the Federal Circuit has supposedly ignored principles of apportionment. But Petitioners cannot support either argument. Not only does this case not involve any departure from *Garretson v. Clark*, 111 U.S. 120 (1884), but Petitioners also fail to identify any series of reasonable royalty cases that do.

Undeterred, Petitioners attempt to bootstrap their request for review to an unrelated petition for certiorari filed two years ago. Pet.3. But the question presented in *Mentor Graphics Corp. v. EVE-USA, Inc.*, 870 F.3d 1298 (Fed. Cir. 2017), hinged on an apportionment dispute unique to a patentee’s ability to recover lost profits. This case has nothing to do with lost profits. Instead, Sprint sought and obtained what Congress has set as the floor for recovery in every patent case—a reasonable royalty. Whatever conflict allegedly exists at the Federal Circuit when apportioning lost profits, this case is not the vehicle to address it.

The Federal Circuit’s nonprecedential decision is also correct. The jury’s \$140 million reasonable royalty award is not the product of “overreaching,” Pet.1, but of Petitioners’ willful infringement of five Sprint patents to save itself billions. Sprint offered the jury multiple methodologies for determining a reasonable royalty, each one apportioned to account for the value of Sprint’s patented technology. In particular, Sprint submitted two real-world license agreements and a prior jury verdict, each one covering the same patented

technology at issue here and calling for the same royalty rate. And Sprint further presented a detailed breakdown of the cost to Sprint and the benefit to Petitioners from their deliberate decision to infringe Sprint's patents.

The Federal Circuit did not, as Petitioners allege, affirm the jury's reasonable royalty based on expert assurances of "general reasonableness." Pet.3-4. Applying established principles of apportionment, the court meticulously reviewed the record to determine whether the jury's reasonable royalty award was supported by reliable evidence. Its conclusion? "[T]he jury's verdict was supported by sufficient evidence and did not contravene the principles of apportionment." App.13-14. And after confirming that Sprint's evidence accounted for the incremental value of its patented technology, not the value of unpatented features, the court correctly left the final damages calculation to the jury, as required by the Seventh Amendment.

Petitioners tack onto their failed apportionment arguments a request to review the Federal Circuit's affirmance of the jury's written description verdict. Petitioners do not allege a split, however, nor do they challenge the settled law that compliance with the written description requirement is a question of fact for the jury. Instead, they accuse the panel majority of allowing Sprint to claim broad inventions simply because its patents did "not expressly exclude" them. Pet.4. But the majority neither adopted nor applied that standard. App.14-19. Rather, after a thorough review of the record, the majority confirmed that the evidence supported the jury's finding that the written descriptions of Sprint's patents are not limited to a single networking technology, but encompass a variety of broadband technologies.

No matter how they frame the questions, Petitioners are asking this Court to usurp the constitutionally mandated role of juries to find the facts and calculate damages. The Court should deny review.

STATEMENT OF THE CASE

A. Sprint's Inventions

For over a century, the Public Switched Telephone Network (“PSTN”) has been the cornerstone of our voice communication infrastructure. Hardwired into homes and businesses across the country and around the world, the PSTN uses circuit switching to set up an end-to-end path for each call. App.2-3. First, the user’s telephone connects to a switch, and based on the dialed number, the switch selects the next switch in the call path. Switch-by-switch, a user’s telephone is eventually connected to the dialed party along a fixed-circuit path. The connection occupies the entire bandwidth of that circuit for the duration of the call. This traditional “landline” network continues to connect millions of us to emergency services, businesses, friends, and family.

But modern data communications connect differently. Because data typically comes in bursts rather than a continuous stream, occupying an entire circuit path during periods where no data is being transmitted wastes bandwidth. App.3. Packet-based broadband technologies—such as asynchronous transfer mode (“ATM”) and internet protocol (“IP”)—increase the efficiency of data transmission, allowing multiple users to share circuits at the same time. App.3. These broadband technologies can be used to transmit all kinds of data, including voice communications.

Despite the efficiency of broadband technologies, a fundamental problem remained: how could voice calls

connect between the ubiquitous PSTN and these new packet networks? Enter Joe Christie, a Sprint engineer who in 1993 invented a pioneering telecommunications system that changed the industry. Mr. Christie and his team developed and patented methods of using network components and network architectures to allow the narrowband PSTN to “talk” to broadband packet networks, and vice versa. Simply put, “[t]he inventions allowed telephone calls and data to be transmitted between those two different networks seamlessly.” App.2.

Underscoring the fact-bound nature of the parties’ dispute, Petitioners contend that Sprint’s patents are limited to connecting calls along fixed paths using ATM technology. Pet.8. They are not. Sprint’s patents actually disclose inventions for routing communications between narrowband and broadband networks generally, including routing without a fixed end-to-end path. App.15-19. The specifications refer to “[b]roadband systems, *such as* Asynchronous Transfer Mode (ATM),” App.15 (alteration in original) (emphasis added), a statement that makes no sense if the inventions were limited to ATM only. The specifications repeatedly employ open-ended language to describe using “broadband” networks, not only ATM. CA-Appx189(10:51-55).¹ The specifications further explain that the networks on which the inventions operate “could be any type of telecommunications network that operates using network elements, signaling, and connections.” App.15 (quoting CA-Appx188(8:38-43)). Consistent with the specifications, Sprint’s patent claims are not limited to any particular broadband network, and cover the core technology used by Petitioners and

¹ “CA-Appx” refers to the Joint Appendix filed in the court of appeals, Fed. Cir. No. 17-2247 (filed Apr. 30, 2018), Dkt#71.

other Voice over Internet Protocol (“VoIP”) service providers to connect their broadband customers to the PSTN, a necessary feature of any commercial telephony service. App.17-19.

B. Time Warner Abandoned Its Sprint Partnership to “Go-It-Alone” and Save Billions

Petitioners first partnered with Sprint in 2003 to launch their digital voice service, with Sprint providing PSTN connectivity for Petitioners’ voice subscribers using Sprint’s patented broadband-to-PSTN technology. In 2009, however, Petitioners told Sprint that they intended to abandon the partnership. That is, Petitioners would start connecting to the PSTN by building their own nationwide “Go-It-Alone” broadband-to-PSTN network. Petitioners based their decision to Go-It-Alone, at least in part, on an estimated “2.6 Billion in savings” over their Sprint agreement. CA-Appx7534-7549; CA-Appx6223-6224; CA-Appx7295-7308.

By March 2010, Sprint executives had initiated talks with Petitioners about patent issues arising from Petitioners’ planned Go-It-Alone launch, including Petitioners’ need to obtain a patent license. CA-Appx7550-7553. These discussions ended without Petitioners taking a license, and Petitioners launched their Go-It-Alone network. CA-Appx1491-1492.

C. Litigation

Sprint sued Petitioners for patent infringement in the District of Kansas. Before trial, the court denied Petitioners’ motion for summary judgment that Sprint’s patents are invalid for not complying with the written description requirement of 35 U.S.C. § 112, ¶ 1 (now 35 U.S.C. § 112(a)). Petitioners also sought to exclude

testimony from Sprint's damages expert, which the court denied.

1. Damages

Sprint presented a range of potential reasonable royalties to the jury, each one supported by reliable methodology and apportioned to the incremental value attributable to Sprint's patented technology. As one approach, Sprint's damages expert considered comparable royalty agreements, including Sprint's agreements with two other telecommunication companies—VoiceGlo and Paetec. App.10-14; CA-Appx3982-3984; CA-Appx3987-3988. These two real-world agreements involved the same patented technology at issue here and called for royalties of approximately five percent of the companies' total VoIP revenue.² App.10-11 & n.3.

Sprint's damages expert also considered a previous litigation where a jury similarly awarded a five percent royalty on Vonage's VoIP revenue for its infringement of Sprint's inventions, including three of the same patents in this case. App.4-14. The 2007 Vonage verdict was plastered on the front page of the *Wall Street Journal*, was circulated within cable companies, and was well known to Petitioners by the time they began infringing Sprint's patents with their Go-It-Alone architecture in 2010. App.6; CA-Appx3984-3985; CA-Appx6415-6416; CA-Appx7337-7340. Even Petitioners' damages expert admitted that the Vonage verdict

² Attempting to discredit the VoiceGlo and Paetec agreements, Pet.10 n.2, Petitioners omit that the district court allowed Sprint's damages expert to use both agreements to support the five percent rate underlying his comparative methodology. CA-Appx58-59. Petitioners did not challenge the admissibility of either agreement before the court of appeals, nor do they ask this Court to review admissibility now. App.10-11 & n.3.

“would have been in the mix” during a 2010 hypothetical license negotiation between Sprint and Petitioners. CA-Appx5604-5605.

For the VoiceGlo and Paetec agreements, Sprint’s damages expert calculated a per-subscriber per-month rate—a metric that Sprint and Petitioners used in past agreements where Sprint connected Petitioners’ VoIP subscribers to the PSTN. App.10-12; CA-Appx4029; CA-Appx4083-4084. Using available Vonage financial information, he calculated a \$1.37 per-subscriber per-month royalty attributable to the value of Sprint’s inventions. CA-Appx4000-4002; CA-Appx4027-4030. Applying this rate over the period of Petitioners’ infringement, he calculated a total reasonable royalty of \$139.8 million. CA-Appx4025.

But that was not all. Sprint also provided the jury with several analytical methods to apportion away unpatented features and zero in on the value of Petitioners’ VoIP services specifically attributable to Sprint’s patents. In particular, Sprint’s accounting expert analyzed Petitioners’ financial information and provided a breakdown of Petitioners’ revenue and free cash flows on a per-subscriber per-month basis. CA-Appx4002-4003; CA-Appx3907-3939. The breakdown allowed Sprint’s damages expert to compare Petitioners’ anticipated incremental profits with the previous agreements and negotiations between Sprint and Petitioners for PSTN connectivity, as well as other reasonable royalty measures.

Using this breakdown together with detailed public reports, Sprint’s damages expert isolated and removed the profits that would have been attributable to providing traditional telephone services. CA-Appx4003-4007. He further isolated and removed VoIP digital services and features that were not part of traditional

telephone services. CA-Appx4007-4008. And he also considered what additional profits could be attributed to calls that do not interconnect with the PSTN, and therefore do not infringe Sprint's patents—there were none. CA-Appx4008-4009. He ultimately determined that \$12.82 of Petitioners' expected profits per-subscriber per-month was specifically attributable to Sprint's patents. CA-Appx4009-4012.

Sprint's damages expert also considered Sprint's "last offer" to Petitioners in May 2009 to discount its wholesale services an additional forty percent, just before Petitioners abandoned their partnership with Sprint and implemented their infringing Go-It-Alone architecture. App.13; CA-Appx4014-4017; CA-Appx3929-3939; CA-Appx7608-7620. Based on Sprint's last offer, he determined that Sprint stood to lose \$1.84 per-subscriber per-month if it licensed its patents to Petitioners as opposed to providing Petitioners wholesale PSTN connectivity. Petitioners, however, expected a cost savings of \$3.39 per-subscriber per-month in implementing Go-It-Alone instead of accepting Sprint's last offer. And in fact, Petitioners' actual cost savings in choosing to Go-It-Alone over Sprint's last offer was \$5.32 per-subscriber per-month.

What's more, Sprint presented un rebutted evidence that, when Petitioners launched their Go-It-Alone architecture in 2010, they had no available alternative to Sprint's patented technology. App.13; App.61. In other words, Petitioners' plans to Go-It-Alone and save billions hinged on infringing Sprint's patents.

In short, Sprint provided evidence "support[ing] a range of reasonable royalties, rather than a single value." *Summit 6, LLC v. Samsung Elecs. Co.*, 802 F.3d 1283, 1295-96 (Fed. Cir. 2015). Apportionment is not a one-size-fits-all formula, so Sprint presented the

jury with several “reliable and tangible” ways to separate the value of Sprint’s technology from nonpatented features. *Garretson*, 111 U.S. at 121; CA-Appx4019-4021. That Sprint’s damages expert conservatively favored his lowest estimate does not make the other methodologies window dressing. Pet.10-11. *See Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286, 1315 (Fed. Cir. 2014) (“It is common for parties to choose different, reliable approaches in a single case That one approach may better account for one aspect of a royalty estimation does not make other approaches inadmissible.”). Each one provided substantial evidence for the jury to attribute at least \$1.37 per-subscriber per-month to the incremental value of Sprint’s patents.

2. Written Description

Petitioners tried several ways to invalidate Sprint’s patents, but none rose to the level of “clear and convincing evidence,” *see Microsoft Corp. v. i4i Ltd. P’ship*, 564 U.S. 91, 102 (2011), including Petitioners’ written description defense. App.70-77; App.14-19. Sprint showed the jury how its specifications describe using “broadband” networks generally, not only ATM. App.15-19. And Sprint’s technical expert explained to the jury why a person of ordinary skill in this technology would have understood the patents’ use of the term “broadband” to include IP. App.16-19. Additionally, Sprint offered contemporaneous industry documents showing that, at the time of invention, the term “broadband” connoted both ATM and IP. CA-Appx5638-5661. Even Petitioners’ expert admitted that “IP networks [were] a form of broadband networks” when Sprint’s patents were filed. CA-Appx5246-5248.

3. Judgment and Appeal

After three weeks of trial, the jury found that Petitioners had willfully infringed each of Sprint's valid patents and awarded a reasonable royalty of \$139.8 million. App.2. The district court denied all of Petitioners' requests to redo the jury's factual findings. App.57 & n.2; App.84. In particular, the court rejected Petitioners' contention—limited to a footnote “devoid of argument”—that Sprint's damages theories were not apportioned to the incremental value of the infringed patents. App.62. And in holding that there was sufficient evidence for the jury to reject Petitioners' written description defense, the court noted that Petitioners did not challenge the instruction given to the jury that “[t]he specification need not describe in detail all possible examples to satisfy the written description requirement.” App.71-72; App.14.

In a record-intensive review on appeal, a majority panel of the Federal Circuit affirmed the jury's verdict in a nonprecedential opinion. App.2. Addressing apportionment at length, the majority found that “[t]he Vonage verdict did not stand alone,” but was supported by “two licenses from Sprint to other communications companies for the patented technology, both of which were for approximately five percent of the companies' VoIP revenue.” App.10. And Sprint's evidence showed that these two license agreements, as well as the Vonage verdict, “were based on the value of the patented technology and not the value of other aspects of the companies' VoIP technology that were not covered

by Sprint’s patents.”³ App.10-11. Indeed, “damages testimony regarding real-world relevant licenses ‘takes into account the very types of apportionment principles contemplated in *Garretson*.” App.12 (quoting *Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1227-28 (Fed. Cir. 2014)). The majority also held that the jury’s apportionment was supported by evidence showing the cost to Sprint and the benefit to Petitioners from its decision to Go-It-Alone and infringe Sprint’s patents. App.13.

The majority did not—as Petitioners and their lone amicus allege—hold it “sufficient” for the jury to hear an apportionment instruction and an expert’s apportionment incantation. Pet.12; Intel.12-13. Nor did the majority uphold the jury’s reasonable royalty award simply because the *Georgia-Pacific* talisman was invoked. Pet.13; Intel.12-13. Instead, the majority painstakingly considered the entire record, noting that “apportionment can be achieved in different ways,” including by considering rates from comparable licenses to the same patented technology. App.11-12; App.8-14. And the majority verified that Sprint had indeed complied with apportionment principles. App.9-14.

The majority also restated the longstanding principle that “[c]ompliance with the written description requirement presents a question of fact.” App.14 (citing *Ariad Pharm., Inc. v. Eli Lilly & Co.*, 598 F.3d 1336, 1355 (Fed. Cir. 2010) (en banc)). Considering the record, the majority held that the jury’s implicit

³ Petitioners do not challenge the majority’s holding that the VoiceGlo and Paetec agreements “were for the ‘same technology’ for the ‘same patents-in-suit,’” and any additional patents covered in those agreements and in *Vonage* did not include “technology materially different from the technology covered by the patents-in-suit.” App.11 n.3.

finding that Sprint’s specifications are not limited to ATM, but describe using “broadband” networks generally, was supported by substantial evidence. App.14-19. So too here, Petitioners mischaracterize the majority’s holding. The majority did not find the written description requirement satisfied simply because “IP technology is *not expressly excluded* from the call control specification.” Pet.13 (quoting App.15). Nor did the majority rely on expert testimony “to fill the gaps in the written specifications.” Pet.13. The majority faithfully adhered to the settled rule—which Petitioners do not challenge—that the written description issue requires “an objective inquiry into the four corners of the specification *from the perspective of a person of ordinary skill in the art*” to determine whether the specification “show[s] that the inventor actually invented the invention claimed.” *Ariad*, 598 F.3d at 1351, 1355 (emphasis added).

Judge Mayer would have reached a different finding than the jury on written description. App.22-26. His disagreement with the majority, however, was ultimately factual—he did not accuse the majority of upending written description law with a new rule as Petitioners allege. Pet.13.

Petitioners sought rehearing en banc. The panel reissued the nonprecedential decision with some minor modifications to the majority’s damages opinion. App.54-55. The court of appeals denied rehearing en banc without dissent. App.52-53.

REASONS FOR DENYING THE PETITION

The court of appeals’ decision raises neither of the questions Petitioners ask this Court to review. The court did not sanction unapportioned damages awards. And its apportionment ruling broke no new ground.

Applying established principles of apportionment to particular facts, the court exhaustively reviewed the entire record—including real-world license agreements and negotiations with Petitioners centered on the very same Sprint inventions at issue here—and verified that the jury’s reasonable royalty award “was based on the value of what was taken from Sprint, not the value of unpatented features of Time Warner’s VoIP system.” App.12. *Garretson* requires no more than that. Dissatisfied that they must now pay Sprint a reasonable royalty for their willful infringement, Petitioners allege that the Federal Circuit is “internally divided.” Pet.14. But none of the cases cited shows a division when it comes to apportioning a reasonable royalty. And this case is an impossible vehicle to address whatever division allegedly exists at the Federal Circuit when it comes to apportioning lost profits.

Petitioners do not even bother to identify a written description split at the Federal Circuit. Nor do they challenge the settled rule—faithfully applied by the majority—that compliance with the written description requirement is a question of fact for the jury, considered from the perspective of a person of ordinary skill in the applicable technology. Instead, Petitioners string together snippets of the majority’s opinion to create the illusion of an erroneous rule. Petitioners cannot support this basis for review either—the majority did not create a new rule, but affirmed because Petitioners failed to prove invalidity by clear and convincing evidence at trial.

At bottom, Petitioners want this Court to reassess the Federal Circuit’s application of settled law to this factual record and set aside the jury’s verdict. This Court should deny review.

I. The Federal Circuit’s Nonprecedential Decision Applying Longstanding Principles of Apportionment to Particular Facts Is Not Cert-Worthy

A. The Federal Circuit Correctly Affirmed—Consistent with *Garretson*—that the Jury’s Reasonable Royalty Award Was Apportioned to the Value of Sprint’s Inventions

The damages question that Petitioners ask this Court to review is not presented by this case. In their effort to demonstrate otherwise, Petitioners misstate the Federal Circuit’s holding and reimagine a one-sided trial where the jury was required to decide all factual disputes in Petitioners’ favor.

The Federal Circuit did not “defy more than 150 years of this Court’s precedent limiting patent damages to the value of the patented feature.” Pet.15. What the court actually did was review all of Sprint’s evidence to make sure that the jury did not contravene principles of apportionment. App.8-14. In addition to the Vonage verdict, the jury had Sprint’s agreements with two other telecommunication companies. App.10-12. All three data points “were for the ‘same technology’ for the ‘same patents-in-suit.’” App.11 n.3. And like the Vonage verdict, both of Sprint’s real-world agreements called for royalties of approximately five percent of the companies’ total VoIP revenue. App.10. While Sprint’s damages expert used Vonage’s public financials to calculate a \$1.37 per-subscriber per-month rate—a benchmark that Sprint and Petitioners had used in their past service agreements for PSTN connectivity—“[t]he Vonage verdict did not stand alone.” App.10. And the jury also heard evidence that “those licenses, like the Vonage verdict, were based on

the value of the patented technology and not the value of other aspects of the companies' VoIP technology that were not covered by Sprint's patents." App.10-11.

The Federal Circuit also reviewed Sprint's evidence, breaking down the cost to Sprint and the benefit to Petitioners from Petitioners' decision to Go-It-Alone and infringe Sprint's patents. App.13. "[A] patent owner participating in a hypothetical negotiation would consider the profits on sales it might lose as a result of granting a license." *Asetek Danmark A/S v. CMI USA Inc.*, 852 F.3d 1352, 1362 (Fed. Cir. 2017). Here, the jury heard evidence that Sprint would have lost \$1.84 per-subscriber per-month by licensing its patents to Petitioners instead of selling them its wholesale PSTN connectivity. CA-Appx4016-4017.

Even more, Sprint introduced unrebutted evidence from which the jury could conclude that Petitioners did not have any reasonable noninfringing alternatives to Sprint's patented technology for connecting their subscribers to the PSTN. App.13; *see Sessions v. Romadka*, 145 U.S. 29, 45-46 (1892) (in estimating damages, "it is proper to consider the savings of the defendant in the use of the patented device over what was known and in general use for the same purpose anterior to the date of the patent"); *Carnegie Mellon Univ. v. Marvell Tech. Grp., Ltd.*, 807 F.3d 1283, 1304 (Fed. Cir. 2015) (considering available alternatives is "[a] key inquiry" in estimating a reasonable royalty rate).

Forgoing PSTN connectivity altogether was not an acceptable alternative for Petitioners—their subscribers would be unable to call or receive calls from the large number of people still tied to the PSTN. CA-Appx3216-3217; CA-Appx3781-3783. One alternative to infringement, however, would have been to take Sprint's last

best offer for wholesale PSTN connectivity. Instead, Petitioners chose to willfully infringe Sprint's patents and ultimately save \$5.32 per-subscriber per-month by implementing Go-It-Alone. CA-Appx4016-4017. "In light of all the evidence bearing on the damages award," App.13-14, the court did not err in confirming that the award "was based on the value of what was taken from Sprint, not the value of unpatented features of Time Warner's VoIP system." App.12.

Seeking to create the illusion of disobedience, Petitioners present the jury's damages award as capturing "unapportioned end-user service revenues." Pet.i. Petitioners' implication is that *Garretson* and its progeny categorically prohibit Sprint from apportioning the incremental value attributable to its patented inventions as a percentage of total VoIP revenue, or as a per-subscriber per-month rate. Pet.2-3, 10-11, 28. What's more, Petitioners fault Sprint for not counting each call between Petitioners' network and the PSTN, even though the parties never structured their past agreements that way. Pet.10, 28. Nor did Sprint's real-world agreements with other telecommunication companies require counting each call with the PSTN.

Nothing in this Court's precedent demands that patentees use a particular methodology or rigid rule to apportion damages in all cases. Pet.17-18. Take *Garretson* itself. The plaintiff there "proved the cost of his mop-heads, and the price at which they were sold, and claimed the right to recover the difference as his damages." *Garretson*, 111 U.S. at 121. That is, the plaintiff sought to recover the entire value of the whole mop-head, even though "it could not be pretended that the entire value of the mop-head was attributable to the feature patented." *Id.* at 121-22. The Court rejected plaintiff's methodology, instead holding that

patent owners “must in every case give evidence tending to separate or apportion the defendant’s profits and the patentee’s damages between the patented feature and the unpatented features.” *Id.* at 121. But *Garretson* did not impose any rigid rules as to *how* a patentee must “separate or apportion” the value of a patented invention. *Id.* And this Court certainly did not hold that the patentee must use a particular royalty base when apportioning a reasonable royalty rate.

Instead of requiring a rigid methodology, apportionment under this Court’s precedent turns on the particular facts of the case. *See Westinghouse Elec. & Mfg. Co. v. Wagner Elec. & Mfg. Co.*, 225 U.S. 604, 615-20 (1912) (“[W]hen it is impossible to make a mathematical or approximate apportionment,” “[o]n established principles of equity, and on the plainest principles of justice, the guilty trustee cannot take advantage of his own wrong.”); *Yale Lock Mfg. Co. v. Sargent*, 117 U.S. 536, 553 (1886) (affirming where “the master made proper allowances for all other causes which could have affected the plaintiff’s prices” and “the damages awarded are no greater than the testimony warranted”).

Here, the Federal Circuit correctly determined that Sprint’s agreements with other telecommunication companies for the same patents and technology provide “strong support” for the jury’s apportionment. App.10-12; *see also* Jennifer L. Blouin & Melissa F. Wasserman, *Tax Solutions to Patent Damages*, 26 *Tex. Intell. Prop. L.J.* 1, 10-11 (2018) (“An existing comparable license represents an arm’s-length transaction between two parties that place a monetary value on the patent” and “may provide the best, measurable evidence in delineating the hypothetical negotiation.”). Those agreements are not “unapportioned” just because

they called for approximately five percent of the companies' total VoIP revenue. *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1338-39 (Fed. Cir. 2009) (“[S]ophisticated parties routinely enter into license agreements that base the value of the patented inventions as a percentage of the commercial products’ sales price.”); *Commonwealth Sci. & Indus. Research Organisation v. Cisco Sys., Inc.*, 809 F.3d 1295, 1303 (Fed. Cir. 2015) (“*CSIRO*”) (“[O]therwise comparable licenses are not inadmissible solely because they express the royalty rate as a percentage of total revenues, rather than in terms of the smallest salable unit.” (citing *Ericsson*, 773 F.3d at 1228)).

Nor do Sprint’s past service agreements and negotiations with Petitioners violate apportionment principles just because the parties used a per-subscriber per-month fee structure to pay for Sprint’s patented technology. Petitioners’ new rule would require the exclusion of real-world valuations “that—at least in some cases—may be the most effective method of estimating the asserted patent’s value.” *CSIRO*, 809 F.3d at 1303-04.

Apportionment is not a snipe hunt for “mathematical exactness.” *Dowagiac Mfg. Co. v. Minn. Moline Plow Co.*, 235 U.S. 641, 647 (1915). Instead, it requires “only reasonable approximation, which usually may be attained through the testimony of experts and persons informed by observation and experience.” *Id.* But weighing the parties’ admissible evidence and apportionment methodologies to calculate the actual incremental value of what Petitioners took from Sprint was properly left to the jury. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 353-54 (1998) (“[T]he common law rule as it existed at the time of the adoption of the Constitution’ was that ‘in cases where the amount of

damages was uncertain[,] their assessment was a matter so peculiarly within the province of the jury that the Court should not alter it.” (quoting *Dimick v. Schiedt*, 293 U.S. 474, 480 (1935)); *Dowagiac*, 235 U.S. at 649 (determining a reasonable royalty for patent infringement “was the province of the jury”).

With abundant evidence before it, the jury was instructed to determine a reasonable royalty “based on the incremental value that the patented invention adds to the end product.” App.12-13. And after certifying that Sprint’s real-world apportionment was “reliable and tangible, and not conjectural or speculative,” *Garretson*, 111 U.S. at 121, the court of appeals correctly declined Petitioners’ invitation to replace the jury’s factual findings with its own. App.13-14. So should this Court.

B. This Case Presents No Internal Split on Apportioning Reasonable Royalty Damages

Petitioners know this Court will not reweigh Sprint’s agreements with two other communication companies and a verdict against a third, each covering the same patented technology and calling for a similar percentage of total VoIP revenue. App.8-12. After all, testimony regarding real-world relevant licenses “takes into account the very types of apportionment principles contemplated in *Garretson*.” *Ericsson*, 773 F.3d at 1227-28. Nor will this Court reweigh the quantified cost to Sprint and benefit to Petitioners from their infringement. App.13; CA-Appx4014-4017; CA-Appx3929-3939. Nor will the Court reweigh Sprint’s un rebutted evidence that, at the time of the hypothetical negotiation, Petitioners did not have any alternative to Sprint’s patented technology for

connecting to the PSTN. App.13-14; App.61; *Sessions*, 145 U.S. at 45-46.

Instead, Petitioners seek review of a supposed “intra-circuit split” questioning “what counts” as apportionment. Pet.19. To get there, Petitioners compile a first list of cases where, after reviewing particular facts, the Federal Circuit held that apportionment evidence was lacking. Pet.20-21. And then Petitioners compile a second list of cases where the Federal Circuit allegedly affirmed damages awards “without scrutiny.” Pet.21-25.

But there is no split. That apportionment is satisfied in some cases and not others is not a conflict—it is the expected result when applying settled law to different facts.⁴ None of the cases on the “vacate” side of Petitioners’ imagined divide is inconsistent with the Federal Circuit’s apportionment analysis here. Pet.20-21.

In *VirnetX, Inc. v. Cisco Systems, Inc.*, 767 F.3d 1308 (Fed. Cir. 2014), for example, there was no prior history of the patentee providing the defendant with the very same patented technology on a per-device or per-subscriber basis. *Id.* at 1325-28. Nor was there evidence apportioning the expected cost to the patentee and the benefit to the defendant from infringement. App.13. And in *LaserDynamics, Inc. v. Quanta Computer, Inc.*, 694 F.3d 51 (Fed. Cir. 2012), the Federal Circuit confirmed that “[a]ctual licenses to the patented technology are highly probative as to

⁴ Intel acknowledges that the Federal Circuit continues to articulate the law of apportionment consistent with this Court’s precedent. Intel.5-6 (this Court’s precedent governs “at least on paper”). Intel’s quarrel is with the Federal Circuit’s application of settled law to particular facts in two cases where, in Intel’s view, the damages were too high. Intel.7-8.

what constitutes a reasonable royalty for those patent rights because such actual licenses most clearly reflect the economic value of the patented technology in the marketplace.” *Id.* at 79. LaserDynamic’s many licenses, however, called for lump-sum amounts under \$1 million and were irreconcilable with the six percent running royalty it presented at trial. *Id.* at 80-82.

Petitioners’ reliance on *Lucent* further undermines their supposed split. Pet.21. There, the Federal Circuit examined the relevant *Georgia-Pacific* factors and determined that the jury’s damages award was “not supported by substantial evidence,” but was instead “based mainly on speculation or guesswork.” *Lucent*, 580 F.3d at 1335. But the court also held that, “even when the patented invention is a small component of a much larger commercial product, awarding a reasonable royalty based on either sale price or number of units sold can be economically justified.” *Id.* at 1339. That is “how sophisticated parties routinely enter into license agreements.” *Id.*

Petitioners also mischaracterize the “anything-goes” side of their supposed split. Pet.21-25. In *Exmark Manufacturing Co. v. Briggs & Stratton Power Products Group, LLC*, 879 F.3d 1332 (Fed. Cir. 2018), the Federal Circuit noted that using infringing lawn mower sales as the royalty base for Exmark’s invention was “consistent with the realities of a hypothetical negotiation and accurately reflects the real-world bargaining that occurs, particularly in licensing.” *Id.* at 1349. In particular, Exmark presented a real-world agreement providing “an effective royalty of 3.64% of the sales of the accused mowers.” *Id.* But the court ultimately vacated the jury’s damages award because Exmark’s expert had “plucked” a higher rate of 5% “out of nowhere,” without tying the rate to the

evidence. *Id.* at 1351. As Petitioners admitted here in their request for rehearing en banc, *Exmark* “requires review of the damages testimony to confirm the *Georgia-Pacific* analysis actually apportioned away the value any unpatented features provide.” *See* Fed. Cir. No. 17-2247, Dkt#88 at 20. That is hardly the “anything-goes approach to apportionment” that Petitioners now paint it to be, Pet.21-22, but rather accurately describes what the court of appeals did here.

Petitioners misrepresent *AstraZeneca AB v. Apotex Corp.*, 782 F.3d 1324 (Fed. Cir. 2015), as holding “that no apportionment was necessary.” Pet.22-23. While determining that the pharmaceutical product as a whole was an appropriate royalty base because the infringed patents covered the combined elements of the entire formulation, the Federal Circuit still scrutinized the record to determine whether the district court had appropriately “account[ed] for the relative value of the patentee’s invention in comparison to the value of the conventional elements recited in the claim, standing alone.” *AstraZeneca*, 782 F.3d at 1338. That is, the Federal Circuit faithfully applied the settled principle that a damages award must compensate the patentee for “the approximate incremental benefit derived from his invention,” and nothing more. *Id.* (quoting *Ericsson*, 773 F.3d at 1233).

Petitioners lump this case with their “anything-goes” pile and accuse the Federal Circuit of holding that apportionment is satisfied so long as “the jury was given an apportionment instruction, and . . . the parties presented some evidence bearing on the value of Sprint’s patents.” Pet.23. But the court neither adopted nor applied that standard. Petitioners wholly ignore the court’s careful consideration of the entire

record—including real-world agreements and negotiations for the same patented technology⁵—to confirm that “the jury’s damages award was based on the value of what was taken from Sprint.” App.8-14. What’s more, Petitioners have not pointed to any opinion or scholarship identifying *Exmark* and *AstraZeneca* as endemic of an intra-circuit split on apportioning reasonable royalties, let alone singling out this case as exacerbating the alleged split. And no court has cited the majority’s nonprecedential opinion for Petitioners’ imaginary rule.

C. This Case Is a Poor Vehicle to Review Apportionment

Unable to show an intra-circuit split for apportioning reasonable royalties, Petitioners piggyback their request for review onto *EVE-USA*, 870 F.3d 1298. Pet.24-26. As Petitioners acknowledge, *EVE-USA* involved apportioning lost profits, not reasonable royalties. Pet.24. And that distinction is a critical difference here. The core issue in *EVE-USA* was whether, under the particular facts of that case, application of the *Panduit*

⁵ Intel’s concern about suits by nonpracticing entities on patents covering components or features of its computer chips, such as the *Future Link* case, Intel.16-19, may be real, but is misplaced here. Sprint is not a nonpracticing entity—far from it. Sprint provided the same service covered by its patents to Petitioners to allow them to connect their cable subscribers to the PSTN. That is, until Petitioners decided to Go-It-Alone and willfully infringe Sprint’s patents and save billions. Nor do Sprint’s patents relate merely to a small component of a chip, but instead created the technology that allows telecom companies to connect broadband calls to the PSTN and vice versa, which provides tremendous value to their customers and those companies. If this Court wishes to address Intel’s concerns, it should wait for another case—perhaps one that Intel does not settle—rather than trying to make this case fit into Intel’s argument.

factors—including “demand for the patented product” (factor one) and an “absence of acceptable noninfringing substitutes” (factor two)—properly accounted for apportioning a patentee’s lost profits between patented and unpatented features. *EVE-USA*, 870 F.3d at 1300 (Stoll, J., concurring) (quoting *Panduit Corp. v. Stahl Bros. Fibre Works, Inc.*, 575 F.2d 1152, 1156 (6th Cir. 1978)). Indeed, the *EVE-USA* dissent plainly acknowledged that its disagreement with the panel decision was inexorably tied to lost profits and the *Panduit* factors, arguing that, “[s]ince the factual findings necessary to satisfy the *Panduit* factors are a necessary predicate for lost profits, the result here is that true apportionment will never be required *for lost profits.*” *Id.* at 1300-04 (Dyk, J., dissenting) (emphasis added). It is therefore unsurprising that Synopsis’s petition to this Court was also limited to whether but-for causation under *Panduit*, without more, satisfies apportionment for lost profits. *See EVE-USA, Inc. v. Mentor Graphics Corp.*, No. 17-804, Pet.i (U.S. Nov. 30, 2017).

This case has nothing to do with lost profits, the *Panduit* factors, or whether but-for causation satisfies principles of apportionment. Whatever division allegedly exists at the Federal Circuit when it comes to apportioning lost profits, this case is an impossible vehicle to address it. Indeed, no Federal Circuit judges dissented from the denial of rehearing en banc, let alone made the strained connection between apportioning lost profits in *EVE-USA* and the reasonable royalty award here. If this Court wishes to consider apportionment of lost profits, it should wait for a lost profits case.

This case is also a particularly poor vehicle to address apportionment in the reasonable royalty context.

Apportionment here did not turn on a new legal rule or an erroneous application of *Garretson*. Rather, the court of appeals confirmed that the jury’s award was based on the incremental value of Sprint’s patented technology after examining the totality of the evidence, including real-world agreements covering the same patents, as well as detailed breakdowns of the cost to Sprint and the benefit to Petitioners from their decision to Go-It-Alone in connecting subscribers to the PSTN. App.9-14. To grant Petitioners the relief they seek, this Court would first have to reject the jury’s implicit findings as to each of Sprint’s apportionment methodologies, and then—based on a cold reading of the transcript and evidence—reweigh the evidence and make its own factual findings in favor of Petitioners. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (“Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge”); *Feltner*, 523 U.S. at 353-54. This is not a case about whether or when apportioning a reasonable royalty is required, but whether the jury made “erroneous factual findings” in crediting Sprint’s vetted apportionment over Petitioners’ damages theories. Sup. Ct. R. 10.

Nor is this case an appropriate vehicle to address the role of the *Georgia-Pacific* factors in apportioning a reasonable royalty. *See Georgia-Pacific Corp. v. U.S. Plywood Corp.*, 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970). For one, the Federal Circuit affirmed the jury’s damages award not simply because Sprint’s damages expert considered the *Georgia-Pacific* factors, but because the totality of the evidence showed that Sprint complied with principles of apportionment. App.9-14; *see also Ericsson*, 773 F.3d at 1230 (“[W]e have never described the *Georgia-Pacific* factors as a talisman for

royalty rate calculations . . .”). While disparaging the *Georgia-Pacific* factors before this Court, Pet.23, Petitioners did not challenge the district court’s jury instructions on damages, which identified the *Georgia-Pacific* factors for the jury’s potential consideration. App.13; CA-Appx748-751. And the district court expressly instructed the jury that a “reasonable royalty award must be based on the incremental value that the patented invention adds to the end product,” which requires “a determination of the value added by the patented features.” CA-Appx748-749. Not to mention that Petitioners’ damages expert also relied on the *Georgia-Pacific* factors in his own analysis. CA-Appx5516; CA-Appx5542-5543.

Petitioners complain “of massive, unapportioned damage awards” that threaten to “quickly drive productive endeavors out of business.” Pet.27. But Petitioners’ overwrought predictions belie their own willful infringement here, which was predicated on their calculated decision to Go-It-Alone and save billions. The patent damages statute, 35 U.S.C. § 284, provides aggrieved patentees “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” (emphasis added). This Court has recognized that in enacting § 284, “Congress sought to ensure that the patent owner would in fact receive full compensation for ‘any damages’ he suffered as a result of the infringement.” *Gen. Motors Corp. v. Devex Corp.*, 461 U.S. 648, 654-55 (1983) (quoting H.R. Rep. No. 1587, 79th Cong., 2d Sess., 1 (1946)). And the right to full compensation for patent infringement is critical to protecting innovation. William M. Landes & Richard A. Posner, *The Economic Structure of Intellectual Property Law* 13 (Harvard Univ. Press 2003) (“[A] firm is less likely to expend resources on developing a new

product if competing firms that have not borne the expense of development can duplicate the product and produce it at the same marginal cost as the innovator; competition will drive price down to marginal cost and the sunk costs of invention will not be recouped.”).

Seeking to undo the Federal Circuit’s fact-bound analysis, Petitioners and Intel ask this Court to create a new rule for apportioning damages. Under their rigid rule, most real-world methodologies would be prohibited simply because otherwise comparable data points apportion the incremental value of patented technology as a portion of an entire product or service. Pet.28; Intel.7-8. But this Court has never endorsed such a strict formula.⁶ And § 284 entitles Sprint to at least a reasonable royalty, consistent with what others have paid for the same patents. If infringers, under the guise of one-size-fits-all apportionment, can sidestep a reasonable royalty and pay something less than legitimate licensees have agreed to pay, the consequences to innovation would be disastrous. Willful infringers like Petitioners would have nothing to lose and everything to gain by simply taking what they want. That is precisely the “heads-I-win, tails-you-lose” result that Congress sought to avoid in enacting § 284. *Panduit*, 575 F.2d at 1157-58 (citation omitted).

Time and again, this Court has admonished the Federal Circuit to “eschew any rigid formula,” not just when applying § 284, but in all patent contexts. *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1934

⁶ A rigid rule would undoubtedly benefit Intel when it is sued for infringement, but it would also mean that in many cases, patent owners like Sprint would—in contravention of § 284—receive lower royalties from willful infringers like Petitioners than a licensee who agrees to a commercial transaction in an arm’s length negotiation.

(2016); *see also* *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 554-55 (2014) (rejecting the Federal Circuit’s “exceptional” case rule under 35 U.S.C. § 285 as “overly rigid”); *Nautilus, Inc. v. Biosig Instruments, Inc.*, 572 U.S. 898, 901 (2014) (rejecting strict “insolubly ambiguous” test under 35 U.S.C. § 112(b)); *Bilski v. Kappos*, 561 U.S. 593, 603-04 (2010) (rejecting strict application of “machine-or-transformation test” under 35 U.S.C. § 101); *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 418-19 (2007) (rejecting “rigid” application of “teaching, suggestion, or motivation” test under 35 U.S.C. § 103); *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 390 (2006) (rejecting rigid, patent-specific rule for injunctive relief). Apportionment is no different, and the Federal Circuit correctly applied the principles of *Garretson* to specific facts. This Court should deny review.

II. The Federal Circuit’s Fact-Bound Application of Settled Written Description Law Does Not Warrant This Court’s Review

A. The Federal Circuit Did Not Create the New Written Description Rule that Petitioners Say It Did

The standard for assessing compliance with the written descriptions has been settled patent law for at least a half century. And nearly a decade ago, the Federal Circuit considered this issue en banc and reaffirmed the established understanding of the written description requirement—“the description must ‘clearly allow persons of ordinary skill in the art to recognize that [the inventor] invented what is claimed.’” *Ariad*, 598 F.3d at 1351 (citation omitted). It explained that the “test for sufficiency is whether the disclosure of the application relied upon reasonably conveys to those

skilled in the art that the inventor had possession of the claimed subject matter as of the filing date.” *Id.*

Petitioners do not challenge this standard or even contend that it is inconsistent with this Court’s precedents. Instead, Petitioners try to cast the majority as creating a different and looser standard. It did not. Not even Judge Mayer in dissent alleged that the majority created a new written description standard. Instead, Judge Mayer disagreed with the jury’s factual finding.

To create an issue for this Court, Petitioners characterize the majority’s decision as holding that 35 U.S.C. § 112(a) is not met only when the specification expressly excludes technology and then the patentee tries to claim that technology. Pet.i, 1, 4. But the majority made no such rule. Instead, the court undertook a careful review of the record and, applying established law, considered whether substantial evidence supported the jury’s verdict that the written description requirement of § 112 was met. In so doing, the majority identified evidence and testimony supporting the verdict—it did not rely solely on a finding that the specification did not exclude IP technology from the invention. App.15-19.

The majority identified specific disclosure in the specifications supporting the claims and showing that the invention could be operated on any type of telecommunications network and was not limited to ATM technology. App.15-17. For instance, the majority noted that the specification stated that “the network on which the invention operates ‘could be any type of telecommunications network that operates using network elements, signaling, and connections,’” and that the specification generally “refers to ‘[b]roadband systems.” App.15. The court also cited testimony from Sprint’s technical expert that a person of ordinary skill

in the art at the time of the application “would have understood the use of the term ‘broadband’ to include IP as well as ATM technology.” App.16. The majority also noted that the expert further supported this view by explaining portions of the specification that would have been understood to encompass ATM and portions that would have been understood to encompass IP. App.16. Petitioners’ characterization of the majority’s opinion simply ignores the extensive discussion of the evidence spanning many pages. App.15-19.

Petitioners argue that the claims are “much broader” than the specifications, mostly because the specifications “never discuss or even mention IP technology.” Pet.8. The claims also do not mention IP technology, but both the written description and the claims encompass IP. Even Petitioners’ expert acknowledged that the specifications disclosed broadband networks and that IP was a form of broadband networks. CA-Appx5246-5248 (admitting that, “[a]t the time,” “IP networks [were] a form of broadband networks”). Petitioners also never objected to the jury instruction, which included the explanation that “[t]he specification need not describe in detail all possible examples to satisfy the written description requirement.” App.72. As a result, Petitioners have no basis to argue that the specifications had to describe all possible examples of broadband technologies, particularly when one of ordinary skill in the art would have understood the different types of broadband technologies, as both parties’ experts acknowledged.

The Federal Circuit has long recognized that “the purpose of the written description requirement is to ‘ensure that the scope of the right to exclude, as set forth in the claims, does not overreach the scope of the inventor’s contribution to the field of art as described

in the patent specification.” *Ariad*, 598 F.3d at 1353-54 (citation omitted). Here, the jury implicitly and correctly determined that the Sprint inventors did not overreach, and the Federal Circuit reviewed the evidence to confirm that substantial evidence supported the verdict. Nothing about the majority’s confirmation that evidence supported a finding that the written description requirement was met warrants this Court’s attention.

B. There Is No Intra-Circuit Split on Written Description

Petitioners characterize the written description requirement as being an area of law “where the Federal Circuit has repeatedly departed from this Court’s precedents and the statutory mandate, and remains internally divided.” Pet.14. Petitioners say they seek this Court’s intervention because the written description requirement has “eroded in the Federal Circuit’s hands.” Pet.4-5, 29. Yet, aside from citing *Ariad* for the legal standard, Petitioners cite *no* decision from the Federal Circuit on written description other than the instant one. One case cannot be an “erosion” or show an intra-circuit split. And the dissent disagreeing on the particular facts of this case does not show a court “internally divided.”

It is far from clear what exactly Petitioners are challenging with respect to the Federal Circuit’s written description law or what it seeks from this Court. Even assuming Petitioners did challenge the well-established law on written description, Petitioners do not state what the law should be. Instead, Petitioners merely state: “A ruling from this Court that § 112(a) requires more from a written description than merely ‘thinking about’ and ‘not affirmatively excluding’ what is ultimately claimed would accomplish

a necessary course correction.” Pet.34. Since the Federal Circuit has never held that this is sufficient, no such statement is necessary. And given that the court’s decision is nonprecedential, it cannot be cited as precedent establishing a new off-course standard.

With their cries of “erosion” and request for a “course correction,” Petitioners seem to be suggesting that the Federal Circuit has abdicated its responsibility for assuring compliance with the written description requirement. Pet.29, 34. It has not. Any concern about whether the Federal Circuit polices the written description requirement can be put to rest with the many cases where the court has held, even recently, that the requirement has not been met. *See, e.g., Quake v. Lo*, 928 F.3d 1365 (Fed. Cir. 2019) (affirming decision that claims were unpatentable for lack of written description); *Neology, Inc. v. ITC*, 767 F. App’x 937 (Fed. Cir. 2019) (affirming invalidity because of insufficient written description); *D Three Enters., LLC v. SunModo Corp.*, 890 F.3d 1042 (Fed. Cir. 2018) (affirming finding of no written description support); *Knowles Elecs. LLC v. Cirrus Logic, Inc.*, 883 F.3d 1358 (Fed. Cir. 2018) (finding substantial evidence supporting determination that claims lacked written description support); *Rivera v. ITC*, 857 F.3d 1315 (Fed. Cir. 2017) (affirming invalidity for lack of written description support); *Cisco Sys., Inc. v. Cirrex Sys., LLC*, 856 F.3d 997 (Fed. Cir. 2017) (holding claims unpatentable for lack of written description support); *Amgen Inc. v. Sanofi*, 872 F.3d 1367 (Fed. Cir. 2017) (reversing holding of no invalidity based on written description), *cert. denied*, 139 S. Ct. 787 (2019); *Abbvie Deutschland GmbH & Co. v. Janssen Biotech, Inc.*, 759 F.3d 1285 (Fed. Cir. 2014) (affirming that claims were invalid based on the written description requirement); *Novozymes A/S v. DuPont Nutrition Biosciences APS*, 723 F.3d 1336

(Fed. Cir. 2013) (affirming court's grant of JMOL that claims were invalid for failing the written description requirement).

Nothing about the Federal Circuit's review and enforcement of the written description requirement warrants this Court's time and attention.

C. The Fact-Bound Nature of This Case Makes It a Poor Vehicle to Consider the Written Description Standard

It has been long settled that whether the written description requirement has been met is a question of fact. *Ariad*, 598 F.3d at 1351. Highlighting the factual nature of the written description inquiry, the Federal Circuit has explained that “the level of detail required to satisfy the written description requirement varies depending on the nature and scope of the claims and on the complexity and predictability of the relevant technology.” *Id.* Petitioners do not challenge this settled law. Rather, Petitioners try to disguise their factual challenge by alleging that the majority created a new written description standard. But, at bottom, Petitioners' complaint is with the facts as found by the jury. And if this Court were to take review of the written description issue, it would find itself having to reweigh evidence presented to the jury and supplant the jury's credibility determinations to find that the specifications were limited to one particular type of networking technology as Petitioners allege. Does this Court want to be faced with making factual decisions about what concepts such as “broadband” and “network” meant at the time of the application in 1994? Those factual determinations properly remain with the jury.

Under the Seventh Amendment, Sprint was entitled to have the factual question of written description

decided by a jury. U.S. Const. amend. VII. In addition to protecting the right to a jury trial in civil cases, the Seventh Amendment also limits a reviewing court's power to disturb a jury's finding on the weight and credibility to give evidence at trial. As this Court has said, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . ." *Anderson*, 477 U.S. at 255. In reviewing a jury verdict, a court of appeals "should review all of the evidence in the record" and "draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). The majority faithfully followed those principles here.

Petitioners allege that the "Federal Circuit allows creative plaintiffs to claim more than they disclosed by backfilling in later litigation with ex post reasoning from hired-gun experts." Pet.33. No such thing happened here. It is not contested that the sufficiency of the written description is viewed from the perspective of one of ordinary skill in the art. Pet.30, 34. While Petitioners criticize the use of expert testimony, Pet.33, *both* parties presented expert testimony on how one of ordinary skill in the art would have understood the patent specifications. Petitioners' expert even conceded that, at the time of the invention, IP networks were a form of broadband networks, undercutting Petitioners' argument that broadband networks were limited to ATM. CA-Appx5246-5248. The jury was entitled to make its own credibility determinations and inferences based on the evidence presented. There is no reason to take this case to supplant that proper role of the jury.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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