

No. 20-769

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

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GS CLEANTECH CORPORATION, ET AL.,  
*Petitioner,*

v.

ADKINS ENERGY, LLC, ET AL.,  
*Respondent.*

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

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**MOTION FOR LEAVE TO FILE  
AND BRIEF OF *AMICUS CURIAE*  
MICHAEL E. MCCABE, JR.  
IN SUPPORT OF PETITIONER**

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January 4, 2021

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**MOTION FOR LEAVE TO FILE**  
***AMICUS CURIAE* BRIEF**

Application of the proper standard of review of inequitable conduct is of considerable importance to the Patent Bar. The inequitable conduct defense—which has been described as a “plague” and the “atomic bomb” of patent law—injures reputations and exposes patent practitioners to ethics investigations and professional disciplinary sanctions.

The USPTO’s bar counsel, the Office of Enrollment and Discipline, routinely investigates patent practitioners accused of inequitable conduct. Bar counsel, as well as others in the disciplinary process, including administrative law judges who serve as trial judges in USPTO disciplinary proceedings, tend to place significant weight on the decisions of Article III tribunals regarding inequitable conduct. All involved in the agency’s disciplinary process, most notably the patent practitioners whose livelihoods may depend on the outcome of the disciplinary process, would hope that the appellate court’s inequitable conduct decision is based on the correct standard of review.

Amicus Michael E. McCabe, Jr. is a patent attorney who has been practicing intellectual property law for 28 years. Amicus represents patent and other attorneys in USPTO-initiated ethics investigation and disciplinary proceedings, including matters involving allegations of inequitable conduct made in parallel federal court litigation. Amicus is well-suited to provide additional insight into the implications of the decision below for patent practitioners.

Counsel for petitioner consents to the filing of this brief. Counsel for the respective respondents were contacted within the time required by Rule 37.2 to seek their consent to the filing of this brief. Respondents ICM, Inc., David Vander Griend, Flottweg Separation Technology, Inc., Cardinal Ethanol, LLC, Big River Resources West Burlington, LLC, Big River Resources Galva, LLC, Lincolnland Agri-Energy, LLC, Little Sioux Corn Processors, LLLP, Guardian Energy, LLC, Western New York Energy, LLC, Southwest Iowa Renewable Energy, LLC, and Pacific Ethanol Magic Valley, LLC, through counsel, consent to the filing. In addition, Aemetis, Inc., Aemetis Advanced Fules, Homeland Energy Solutions LLC, Pacific Ethanol, Inc. and Pacific Ethanol Stockton, LLC, through counsel, consent to the filing. Counsel for Blue Flint Ethanol LLC also consents to the filing. The other respondents have not replied to the request for consent as of the time of filing. Thus, it appears not all respondents consent to the filing of this brief.

Wherefore, Mr. McCabe respectfully moves for leave to file the attached brief of Michael E. McCabe, Jr. as *amicus curiae* in support of petitioner.

Respectfully submitted,  
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**INTEREST OF *AMICUS CURIAE***

Amicus submits this brief to address concerns regarding unanticipated yet pragmatic consequences of the Federal Circuit's application of a highly deferential standard of review of factual and legal issues resolved on summary judgment. This action arose from a counterclaim of inequitable conduct, a defense that continues to be a "plague" on patent law. Amicus' experience in representing practitioners accused of professional misconduct in the delivery of patent legal services provides him with a unique perspective on how court decisions are used and relied upon by the USPTO both as grounds for instituting ethics investigations as well as substantive evidence in imposing professional discipline.

Summary judgment is often an effective and efficient procedural tool in resolving subsidiary issues of materiality and intent to deceive the Patent Office, and summary judgments uniformly are reviewed without deference. By applying abuse of discretion review, however, the Federal Circuit upsets national uniformity in decision making that is a hallmark of patent law. Application of abuse of discretion review, coupled with the natural consequences of a finding of inequitable conduct, harms patent practitioners who prepare and prosecute patent applications.

Amicus represents patent and trademark practitioners in ethics investigations and disciplinary proceedings before the USPTO and advises attorneys on compliance with the agency's professional conduct rules, including avoidance of inequitable conduct. Many such investigations and proceedings are initiated upon a court's issuance of an opinion which

“finds” that a patent practitioner engaged in misconduct. Even an accusation of inequitable conduct can cause significant reputational harm. A finding of inequitable conduct can end a patent attorney’s career. An Article III tribunal’s written decision on inequitable conduct will impact any subsequent attorney discipline conducted by the USPTO.

Amicus is Chair of the Ethics and Professional Responsibility Committee of the ABA Intellectual Property Law Section, the world’s largest organization of intellectual property professionals. Amicus has taught patent law at The Antonin Scalia Law School at George Mason University. Amicus created *IPethics & INSights*, a law blog focused on ethics and malpractice in patent and trademark law. Amicus frequently lectures to national, state and local bar organizations, law firms, and corporations on the USPTO’s professional conduct rules and inequitable conduct risks in patent prosecution. Amicus was appointed by the Virginia Supreme Court as teaching faculty for the Virginia Bar’s Harry L. Carrico Professionalism Course.<sup>1</sup>

### SUMMARY OF ARGUMENT

The remedy for inequitable conduct has been described as the “atomic bomb” of patent law. *Aventis Pharma S.A. v. Amphastar Pharma, Inc.*, 525 F.3d 1334, 1349-50 (Fed. Cir. 2008) (Rader, J., dissenting). Inequitable conduct—or “fraud on the Patent

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<sup>1</sup> This brief is filed under Supreme Court Rule 37. All counsel of record received notice at least ten days prior to the due date of amicus’ intention to file this brief under Rule 37.2. No part of this brief was authored, in whole or part, by counsel for any party. No person, entity, counsel or party made any monetary contribution toward the preparation or submission of this brief.

Office”—can cause extraordinary harm to patent owners. Enforcement of a patent procured by fraud exposes the patent owner to antitrust liability, *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 178 (1965); it can serve as a basis for attacking the attorney-client privilege, *In re Spalding Sports Worldwide, Inc.*, 203 F.3d 800, 807 (Fed. Cir. 2000) (en banc); it can result in an award of the infringer’s attorneys’ fees, *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545 (2014); and it can “infect” related patents, potentially laying waste to an entire patent family. *Consol. Alum. Corp. v. Foseco Int’l Ltd.*, 910 F.2d 804, 808-12 (Fed. Cir. 1990). The “habit of charging inequitable conduct in almost every major patent case has become an absolute plague.” *Burlington Indus., Inc. v. Dayco Corp.*, 849 F.3d 1418, 1422 (Fed. Cir. 1988).

Lesser known, but equally dangerous for members of the USPTO’s Patent Bar, a court decision finding inequitable conduct typically triggers an ethics investigation of any patent practitioners involved. The USPTO presumes the accuracy and correctness of an Article III court’s decision in initiating disciplinary investigations. A court decision “finding” improper conduct by a registered patent practitioner receives, even in passing, significant attention from everyone involved in the USPTO’s disciplinary system.

Patent practitioners accused of inequitable conduct may face a daunting task in defending themselves from an ethics complaint filed against them by the USPTO that is based on the findings in a separate Article III court proceeding in which they were not a party. A decision of a federal court finding inequitable conduct will be a centerpiece of any subsequent

disciplinary prosecution of the accused patent practitioners.

Application of the proper standard of appellate review ensures fairness while promoting uniformity and consistency in decision making, as Congress had intended in patent matters in creating the Federal Circuit. 28 U.S.C. §1295(a). National uniformity in the standard of reviewing summary judgment is particularly important in the field of patent law, which is practiced nationwide by tens of thousands of practitioners. Proper review provides reliability, uniformity, predictability and consistency for the members of the Patent Bar as well as the patent applicants and owners they represent.

## ARGUMENT

### I. THE COURT'S PRECEDENT CONFIRMS THE NEXUS BETWEEN ADVERSE COURT DECISIONS AND USPTO ATTORNEY DISCIPLINE BASED ON SUCH DECISIONS

Since the Supreme Court first applied the “unclean hands” doctrine to patent prosecution misconduct, federal court decisions in which such issues have been litigated have triggered separate practitioner ethics investigations and attorney disbarment proceedings conducted by the USPTO. The two cases that most clearly demonstrate the nexus between a court finding of inequitable conduct, and practitioner discipline predicated on the presumed correctness of the court decision, are *Hazel-Atlas Glass Co. v. Hartford-*

*Empire Co.*, 322 U.S. 238 (1944)<sup>2</sup> and *Kingsland v. Dorsey*, 338 U.S. 318, 320 (1949).

*Hazel-Atlas* involved a patent application on a method for making glass. 322 U.S. at 240. The Patent Office rejected the application. To overcome the rejection, patent attorneys wrote an article that discussed the virtues of the invention. They provided the article to an expert in the industry. The expert, who evidently agreed with the contents of the article, adopted the article as his own—it was published under the expert’s name. The practitioners provided the Patent Office with the article in support of patentability. The Office reversed itself and issued a patent.

In later infringement litigation brought by Hazel-Atlas, a district court found no infringement of its glass making patent, but the circuit court reversed, finding the patent valid and infringed. The circuit court relied extensively on the expert’s article. *Id.* at 241.

The infringer from the patent case later learned about the authorship of the expert’s article. They filed in the circuit court a motion to vacate the judgment based on fraud. The circuit court denied the motion. The Supreme Court reversed.

The Court held that the patent owner was barred by unclean hands from enforcing its patent. *See id.* at 250. The Court found that the patent attorneys were

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<sup>2</sup> *Hazel-Atlas* applied the defense of “unclean hands” to practitioner misconduct before the Patent Office. Some years later, courts adopted the term “inequitable conduct,” which amounts to unclean hands during patent prosecution. *Consol. Alum. Corp. v. Foseco Int’l Ltd.*, 910 F.2d 804, 812 (Fed. Cir. 1990).

engaged in a “deliberately planned and carefully executed scheme to defraud not only the Patent Office, but the Circuit Court of Appeals.” *Id.* at 245. The Court held that the fraud on the Patent Office and the courts “calls for nothing less than a complete denial of relief . . . for the claimed infringement of the patent thereby procured and enforced.” *Id.* at 251.

After the Supreme Court decision, the USPTO’s Office of Enrollment and Disbarment (now Office of Enrollment and Discipline) issued an order to show cause why the attorneys who were involved in prosecuting Hazel-Atlas’ patent should not be suspended or disbarred. The show cause order was predicated on the Supreme Court’s decision:

Whereas it was found by the Supreme Court of the United States in its decision in the case of *Hazel-Atlas Glass Company v. Hartford-Empire Company*, 1944, 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250, that fraud was practiced on the United States Patent Office during the prosecution of the patent application of Karl E. Peiler, . . . which fraud consisted in the preparation and presentation to the United States Patent Office of an article . . . naming one William P. Clarke as the author, who in fact was not the author of said article, and

Whereas it appears from said decision and the record of the case before the Supreme Court . . . and the records of the Patent Office, that you participated in the preparation of said article and/or the presentation thereof to the United States Patent Office during the

prosecution of said patent application knowing that said article was not written by said William P. Clarke, and with the purpose of deceiving the Patent Office as to the authorship of said article and influencing the action of the Patent Office on said application; and that you thereby perpetrated or participated in the perpetration of a fraud on the United States Patent Office.

Now therefore, you are hereby ordered to show cause . . . why, in view of the above, you should not be suspended or excluded from further practice before the United States Patent Office for gross misconduct.

*Hatch v. Ooms*, 69 F.Supp. 788, 790-91 (D.D.C. 1947).

After an administrative disciplinary process, the Patent Office disbarred four patent attorneys found to have been involved in the submission of the expert article. The district court affirmed. *Id.* at 803.

A divided panel of the D.C. Circuit reversed. *Dorsey v. Kingsland*, 173 F.2d 405 (D.C. Cir. 1949). The circuit court held that the punishment of disbarment was “excessive” and the Patent Office disbarment “process” was a “kangaroo court” and “so-called tribunal” that deprived a “venerable man” of “a valuable right of honor” and that cast “an irremovable aspersion . . . upon his character as long as the judgment stands.” 173 F.2d at 407-08

The Supreme Court reversed. *Kingsland v. Dorsey*, 338 U.S. 318, 320 (1949). The Court held that the “charge of unfairness in the hearings is, we think,



wholly without support.” *Id.* The Court affirmed the district court order by reference. *See id.*

The dissent criticized the Patent Office proceedings as fundamentally unfair in that they were premised on the presumed correctness of the Supreme Court’s decision. In fact, the only evidence was the records from the court case. The dissent explained that the Patent Office “approached its duty upon the premise that” the *Hazel-Atlas* decision was correct and established the practitioner’s guilt. *Id.* at 325 (Jackson and Frankfurter, JJ., dissenting). The dissent urged courts “should not fear to protect a lawyer against loss of his right to practice on such a record as this.” *Id.* at 326.

## II. THE USPTO INVESTIGATES AND DISCIPLINES ATTORNEYS WHO ARE ALLEGED TO HAVE ENGAGED IN INEQUITABLE CONDUCT

To understand the importance of court decisions on subsequent attorney disciplinary actions, it is helpful to understand the mechanics of the USPTO’s disciplinary processes and practices.

Registered patent practitioners (among others) are subject to the disciplinary jurisdiction of the USPTO. 37 C.F.R. §11.19(a). A practitioner may be disciplined for any violation of the USPTO Rules of Professional Conduct. *Id.* at §11.19(b)(1)(iv). The USPTO professional conduct rules generally track the ABA Model Rules of Professional Conduct. 37 C.F.R. §11.101-11.901.

The USPTO may commence an ethics investigation when it receives “information or evidence from any source suggesting possible grounds for discipline.” 37

C.F.R. §11.22(a). A court decision finding that a patient practitioner engaged in inequitable conduct is typical of the information that OED relies upon as justification to open an ethics investigation.

The OED investigation process can last for many months as its investigators issue questions and document requests to the practitioner and others who reasonably may have relevant information. 37 C.F.R. §11.22(f). Practitioners must cooperate with the government's investigation, and the failure to cooperate is itself an ethical violation. 37 C.F.R. §11.801(b). OED investigations disrupt a practitioner's practice and often produce feelings of apprehension and fear. *See* 77 Fed. Reg. 457, 458 (Jan. 5, 2012) (OED investigation "typically triggers anxiety for the practitioner, may interfere with the practitioner's practice, and may cause the practitioner to incur legal expenses in responding to investigative inquiries by OED.")

At the conclusion of the investigation, the OED Director refers the matter to a "Committee on Discipline." The "Committee" decides whether probable cause exists that a practitioner violated any ethics rules. 37 C.F.R. §11.23(b)(1). The Committee review process is conducted in secret. What "information" the OED Director provides the Committee, or the Committee's deliberations, are not discoverable. 37 C.F.R. §11.23(c).

Upon approval of the Committee, the OED Director files a complaint for discipline. Once a complaint is filed, an ALJ is assigned, and the case proceeds with pleadings, discovery, depositions, and motions practice. 37 C.F.R. §11.43, 11.51, 11.53. In due course, the ALJ holds an evidentiary hearing. 37 C.F.R. §11.44. However, the rules of evidence do not apply, with the

limited exception that “the hearing officer shall exclude evidence that is irrelevant, immaterial, or unduly repetitious.” 37 C.F.R. §11.50. Moreover, “all papers in the file of a disciplinary investigation [] are admissible without extrinsic evidence of authenticity.” *Id.* at §11.50(c). Typically, the entire investigatory file from the OED, including OED’s requests for information and the practitioner’s answers to those requests, is considered by the ALJ.

After a hearing and post-hearing briefs, the ALJ issues an initial decision which becomes a final action of the agency if not appealed within thirty days. 37 C.F.R. §11.54. The initial decision includes the ALJ’s findings of fact, conclusions of law, and any recommended disciplinary sanction, ranging from probation to disbarment from appearing or practicing before the USPTO in any patent, trademark or non-patent matter. *Id.*

Either party dissatisfied with the ALJ’s initial decision has 30 days to file an appeal brief with the USPTO Director. 37 C.F.R. §11.55(a). The USPTO Director “will decide the appeal on the record made before the [ALJ].” *Id.* at §11.55(f).

An Article III court decision finding practitioner wrongdoing, such as a finding of inequitable conduct, is an important document in each of the above-noted parts of the USPTO’s disciplinary process. Indeed, each person or entity that participates in the agency’s disciplinary process will consider and rely upon the court decision as part of any subsequent investigation or formal disciplinary action.

First, the OED Director will likely open an investigation based on the findings made in a court decision.

Second, OED investigators will typically build their inquiry around the court decision. It is not unusual, for example, for OED investigator questions to quote at length relevant portions of the decision that triggered their investigation. *See, e.g., Hatch*, 69 F.Supp. at 790-91 (investigation predicated on *Hazel-Atlas* decision).

Third, if OED decides to pursue professional discipline, such as a license suspension or disbarment, they may provide whatever information they wish to the Committee on Discipline. Plainly the prosecutor in this secret proceeding has a strong incentive to ensure the Committee is aware of the court decision. It would also be naïve to believe that this secret panel would not consider the court's decision as part of its determination of probable cause. *Kingsland*, 338 U.S. at 325 (records from court cases were the "sole evidence to support the direct" disciplinary case against accused patent practitioner) (Jackson and Frankfurter, JJ., dissenting).

Fourth, the OED Director will rely upon whatever court decision prompted its investigation in subsequent disciplinary litigation before an ALJ appointed by the PTO Director. For example, the OED Director will typically plead in the complaint the facts underlying the prior court case and may even reference or quote from the Article III court decision. OED has used findings from patent litigation against practitioners in subsequent disciplinary proceedings. *See, e.g., In re Tendler*, Proc. No. D2013-17, 1399 O.G. 43 (USPTO Dir. Jan. 8, 2014) (four-year suspension predicated on inequitable conduct); *In re Mahalek*, Proc. No. D2016-31, 1436 O.G. 249 (USPTO Dir. Mar. 28, 2017) (18-month suspension arising from litigating

patent procured by inequitable conduct); *In re Gibbons*, Proc. No. D2016-15, 1438 O.G. 343 (USPTO Dir. May 30, 2017) (18-month suspension arising from litigating patent procured by inequitable conduct).

Fifth, the ALJ will invariably consider the federal court's decision as evidence. The "standards" for the introduction of evidence in a USPTO disciplinary proceeding are lax. To be sure, the "rules of evidence prevailing in courts of law and equity are not controlling in hearings in disciplinary proceedings." 37 C.F.R. §11.50(a). The only limitation on evidence is on the grounds of relevance, materiality, or undue repetition. *Id.*

Sixth, if an appeal is filed, then the USPTO Director issues a final decision. 37 C.F.R. §11.55-11.56. The final decision is solely based on the record before the ALJ, which will invariably include the decision of the federal court.

Seventh, if further review of a final agency decision is sought, the record from the USPTO (which will include the underlying Article III court decision that triggered the discipline) will be reviewed by the Eastern District of Virginia, and thereafter, the Federal Circuit. 35 U.S.C. §32; 37 C.F.R. §11.57(a). Such federal court review of a final agency decision is, under the Administrative Procedures Act, based upon the administrative record. The district and circuit court reviewing a final agency decision imposing discipline may also consider the separate court decision from which the disciplinary case arose.

### III. APPLICATION OF DE NOVO OR CLEAR ERROR REVIEW TO FACT OR LAW FINDINGS UNDERLYING INEQUITABLE CONDUCT PROMOTES DECISIONAL ACCURACY AND UNIFORMITY

The circuit court here applied abuse of discretion review on the key issues leading to its finding of inequitable conduct—materiality and intent to deceive.

First, the court found on summary judgment that the patents-in-suit were invalid. The invalidity summary judgment was never withdrawn and it formed the basis for the circuit court’s materiality finding. Like all issues of law, the district court’s summary judgment of invalidity should have been reviewed *de novo*, with all reasonable inferences drawn in favor of the non-moving party. *Teleflex, Inc. v. Ficosa N. Am. Corp.*, 299 F.3d 1313, 1323 (Fed. Cir. 2002). However, contrary to this universal rule, the circuit court reviewed materiality for abuse of discretion.

Second, the district court held an inequitable conduct bench trial. Since summary judgment resolved materiality, the bench trial focused on intent. The circuit court failed to review the district court’s factual findings underlying intent under the clear evidence standard of Fed. R. Civ. P. 52(a). *See Star Scientific, Inc. v. R.J. Reynolds Tobacco Co.*, 537 F.3d 1357 (Fed. Cir. 2008). Instead, the circuit court applied abuse of discretion review.

The circuit court disregarded its obligation to review independently the district court’s decision. “The obligation of responsible appellate jurisdiction implies the requisite authority to review independently a lower court’s determination.” *Salve Regina College v.*

*Russell*, 499 U.S. 225, 231 (1991). This Court has recognized that “[i]ndependent appellate review of legal issues best serves the dual goals of doctrinal coherence and economy of judicial administration.” *Id.* The Court in *Salve* observed that:

Courts of appeals are structurally suited to the collaborative juridical process that promotes decisional accuracy. With the record having been constructed below and settled for purposes of the appeal, appellate judges are able to devote their primary attention to legal issues. As questions of law become the focus of appellate review, it can be expected that the parties’ briefs will be refined to bring to bear on the legal issues more information and more comprehensive analysis than was provided for the district judge.

*Id.*

*De novo* review of questions of law fosters “consistency and predictability.” *Pierce v. Underwood*, 487 U.S. 552, 585 (1988) (White, J., dissenting in part). Like respect for precedent, application of a uniform standard of appellate review “promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

Predictability in the law, consistency in the interpretation of the law, and respect for precedent are all matters of great significance to the patent community. In inequitable conduct and other legal areas arising

from representation before the Patent Office, it is particularly important for the nation's thousands of members of the Patent Bar that the standards of review are consistently applied. *Sperry v. Florida*, 373 U.S. 379 (1963) (“No state law can hinder or obstruct the free use of a license granted under act of Congress”) (citation omitted).

The harm potentially caused by the Federal Circuit's application of an incorrect standard of review is further exacerbated by the fact that the Federal Circuit is the only appellate court (other than this Court) to review district court decisions in patent cases. 28 U.S.C. §1295. *De novo* appellate review of summary judgment “necessarily entails a careful consideration of the district court's legal analysis, and an efficient and sensitive appellate court at least will naturally consider this analysis in undertaking its review.” *Salve*, 499 U.S. at 232. Trial judges “often must resolve complicated legal questions without benefit of ‘extended reflection [or] extensive information.’” *Id.* at 231-32 (citation omitted). And a significant, if not overriding, benefit of multijudge panels employing the proper standard of review is that the review process “permits reflective dialogue and collective judgment.” *Id.* Addressing the importance of such independent review, the Court noted:

Without adequate study there cannot be adequate reflection; without adequate reflection there cannot be adequate discussion; without adequate discussion there cannot be the fruitful interchange of minds which is indispensable to thoughtful, unhurried decisions and its



formulation in learned and impressive opinions.

*Dick v. New York Life Ins. Co.*, 359 U.S. 437, 458-59 (1959) (Frankfurter, J., dissenting).

Proper appellate review further protects the liberty interests of patent practitioners who find themselves accused of ethical violations predicated on a court decision. Disbarment “is a punishment or penalty imposed on the lawyer,” and practitioners charged with ethics violations are “entitled to procedural due process.” *In re Ruffalo*, 390 U.S. 544, 550 (1968). Such due process interests, especially in the absence of the participation of the practitioner in the underlying decision from which discipline flows, are best protected when the appellate court reviews the district court’s determinations and rules on them applying the proper standard of review.

Abuse of discretion review could lead to materially inconsistent results in patent cases. For example, assume two different judges hold identical bench trials on inequitable conduct. Each court considers the same facts, evidence, law, parties, witnesses and arguments. In one case, the district court rules on summary judgment that information withheld from the Patent Office is *not* material as a matter of law. In the other case, however, the district court concludes, also on summary judgment, the same information *is* material as a matter of law.

Application of an abuse of discretion review standard, as what occurred below, could result in the circuit court’s affirmances of both decisions. Indeed, applying a discretionary review standard, the Federal Circuit

could conclude that the same reference is both material and not material as a matter of law.

The Federal Circuit was created to avoid lack of uniformity in patent jurisprudence. *Markman v. Westview Inst., Inc.*, 517 U.S. 370, 390 (1996) (“It was just for the sake of such desirable uniformity that Congress created the Court of Appeals for the Federal Circuit as an exclusive appellate court for patent cases”). The failure to follow national norms for standards of review harms the Patent Bar by leading to inconsistent decisions on important issues of national consequence.

### CONCLUSION

For the reasons set forth above, amicus respectfully asks that the Court grant the petition for writ of certiorari to correct the standard of reviewing factual findings of materiality and intent, as well as the standard of reviewing summary judgment.

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