

No. 21-1267

IN THE
Supreme Court of the United States

CISCO SYSTEMS, INC.,

Petitioner,

v.

SRI INTERNATIONAL, INC.,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit**

**MOTION FOR LEAVE TO FILE AND
BRIEF OF COMCAST CORPORATION
AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER**

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**MOTION OF COMCAST CORPORATION
FOR LEAVE TO FILE BRIEF
AS *AMICUS CURIAE*
IN SUPPORT OF CISCO SYSTEMS, INC.**

Pursuant to this Court’s Rule 37.2, Comcast Corporation (“Comcast”) respectfully moves this Court for leave to file the attached brief as *amicus curiae* in support of the petition for a writ of certiorari to review the judgment of the Court of Appeals for the Federal Circuit in *SRI International, Inc. v. Cisco Systems, Inc.*, 14 F.4th 1323 (Fed. Cir. 2021).

Counsel for Comcast notified counsel of record for the parties to this case of Comcast’s intention to file this brief. Both parties have consented to the filing of this brief. Although counsel for respondent SRI International, Inc. received notice less than ten days in advance of this brief’s due date, as required under this Court’s Rule 37.2(a), respondent was not prejudiced—as shown by the fact that respondent has consented to the filing of this brief. Additionally, respondent on April 14, 2022 waived its right to respond to the petition for a writ of certiorari.

As detailed below, Comcast—through businesses including Xfinity, NBCUniversal, Sky, Comcast Business, and others—provides cable, Internet, telephone, content, and other services to individual and business consumers. Much of Comcast’s business depends on (and is driven by) technology, and Comcast inevitably finds itself embroiled in litigation regarding patents and other intellectual property. As a litigant, and a stakeholder in our Nation’s patent system, Comcast has a direct interest in a coherent and administrable

regime for awarding enhanced damages under the Patent Act. 35 U.S.C. § 284. Comcast believes its perspectives on the realities and drawbacks of the lower courts' current approach to enhanced damages will aid the Court in its consideration of the questions presented.

Accordingly, Comcast respectfully requests that the Court grant this motion for leave to file a brief as *amicus curiae*.

Respectfully submitted,

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April 18, 2022

QUESTION ADDRESSED BY *AMICUS CURIAE*

Whether enhanced damages under 35 U.S.C. § 284 may be awarded absent a finding of egregious infringement behavior.

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INTEREST OF *AMICUS CURIAE* *

Comcast Corporation creates incredible technology and entertainment that connects millions of people to the moments and experiences that matter most. Through businesses including Xfinity, NBCUniversal, Sky, Comcast Business, and others, Comcast provides cable, Internet, telephone, content, and other services to individual and business consumers. Much of Comcast's business depends on (and is driven by) technology, and Comcast inevitably finds itself embroiled in litigation regarding patents and other intellectual property. As a litigant, and a stakeholder in our Nation's patent system, Comcast has a direct interest in a coherent and administrable regime for awarding enhanced damages under the Patent Act. 35 U.S.C. § 284. This Court took a big step in the right direction in *Halo Electronics, Inc. v. Pulse Electronics, Inc.*, 579 U.S. 93 (2016), but—as the decision below and others illustrate—the lower courts are not following this Court's lead. Enhanced damages are being awarded in the absence of egregious infringement behavior, in contravention of both Section 284 and *Halo*. This Court's intervention is once again warranted.

* Counsel for *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus* or its counsel made a monetary contribution to this brief's preparation or submission. Counsel of record for all parties received notice and have consented to the filing of this brief.

SUMMARY OF ARGUMENT

This case presents a troubling and increasingly common scenario: a patent plaintiff brings a successful infringement claim, and then secures enhanced damages based on conduct that is neither egregious nor related to the actual infringement.

As this Court explained in *Halo Electronics, Inc. v. Pulse Electronics, Inc.*, 579 U.S. 93 (2016), enhanced damages under 35 U.S.C. § 284 are “punitive” or “vindictive” sanctions reserved for cases in which the “infringement behavior”—that is, the conduct challenged in the complaint—was “egregious.” *Id.* at 103. But lingering confusion about *Halo*’s standard has led to a dramatic increase in willful infringement findings, bringing enhanced damages awards up as well. As enhanced damages become increasingly routine, they are also becoming increasingly detached from their purpose: punishing and deterring *egregious infringement*.

The enhanced damages award in this case is a prime example. The trial court doubled Cisco’s damages for reasons having nothing to do with the conduct found to be infringing, including Cisco’s size and its energetic defense strategy. It is well-established, however, that companies have no duty to investigate every patent their products might possibly infringe, and large “deep pocket” companies are particularly likely to be targeted with marginal infringement claims—including claims by patent assertion entities masquerading as small businesses. And a vigorous legal defense is both a constitutional right and an ethical duty and cannot itself warrant enhancement. Treating these factors unrelated to actual infringement as evidence of willful infringement resulted in \$24 million in enhanced damages—over and above

SRI’s actual damages—based on nothing like the “wanton and malicious pira[cy]” that Section 284 requires. *Halo*, 597 U.S. at 98.

Halo limited enhanced damages to cases involving “egregious infringement behavior,” but the award here was not based on “infringement behavior” at all. Cases like this one misinterpret *Halo*, and misapply the Patent Act, by severing enhanced damages from culpability. They also distort patent litigation by over-punishing infringers, over-compensating patentees, and stifling innovation—thwarting Congress’s three rationales for limiting judicial discretion over enhanced damages. This case presents an opportunity to refocus the standard for enhanced damages where it belongs: on the egregious character of the infringing conduct itself.

ARGUMENT

I. *Halo* Limited Enhanced Damages To Cases Of Egregious Infringement Behavior.

Section 284 of the Patent Act permits district courts to enhance patent infringement damages “up to three times the amount found or assessed.” 35 U.S.C. § 284. But as this Court held in *Halo Electronics, Inc. v. Pulse Electronics, Inc.*, 579 U.S. 93 (2016), that discretion has limits. *Halo* explained that Section 284 reserves enhanced damages for cases in which *the “infringement behavior”* is “willful, wanton, malicious, bad-faith, deliberate, consciously wrongful, flagrant, or—indeed—characteristic of a pirate.” *Id.* at 103–04 (emphasis added). The Court’s unanimous opinion underscored a longstanding principle of patent litigation: enhanced damages “are not to be meted out in a typical infringement case, but are instead designed as a ‘punitive’ or ‘vindictive’ sanction for egregious infringement behavior.” *Id.* at 103.

Halo explained that Section 284 reflects Congress’s tripartite rationale for limiting district courts’ discretion to multiply an infringement award.

First, enhanced damages are a disproportionate response to ordinary infringement. In fact, the “injustice” of punishing an ordinary infringer as harshly as a “wanton and malicious pirate” is the very reason Congress made enhanced damages discretionary instead of mandatory in the Patent Act of 1836. 579 U.S. at 97–98 (quoting *Seymour v. McCormick*, 57 U.S. 480 (1854)).

Second, enhanced damages no longer serve a compensatory function. Although courts once used en-

hanced damages to alleviate a winning party's litigation expenses, "[t]hat concern dissipated with the enactment in 1952 of 35 U.S.C. § 285," which provides a *separate* remedy for litigation costs incurred in "exceptional cases." 579 U.S. at 99. Attorneys' fees under Section 285 are the proper remedy for costs arising from "the unreasonable manner in which [a case] was litigated." *Id.* at 112 (Breyer, J., concurring).

Third, routine awards of enhanced damage stifle innovation. Multiplying reasonable royalties in "garden-variety cases," the Court said, "disrupt[s]" patent law's "careful balance" between property rights and the freedom to innovate, over-detering the "[r]efinement through imitation" that is "necessary to invention itself and the very lifeblood of a competitive economy." 579 U.S. at 109 (quoting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 146 (1989)). *Halo's* warning was clear: a patent law regime that is too quick to enhance damages not only over-punishes infringers and over-compensates patentees, but also undermines its own objective: "To promote the Progress of Science and useful Arts." U.S. CONST., art. I, § 8, cl. 8; *Halo*, 579 U.S. at 109.

II. Following *Halo*, Courts Routinely Award Enhanced Damages In The Absence Of Egregious Infringement.

Unfortunately, too many post-*Halo* decisions fail to heed the rationales articulated by this Court for cabining awards of enhanced damages. Lingering confusion about *Halo's* standard has left lower courts' Section 284 analyses mired in a loose concept of "willfulness" drawn from pre-*Halo* caselaw. *See Read Corp. v. Portec, Inc.*, 970 F.2d 816, 826 (Fed. Cir. 1992)

(approving of enhanced damages awards “where the infringement is willful”).

Over time, willfulness became entwined with enhanced damages in the caselaw—so much so that many courts conflate the two concepts altogether. As one district court recently pointed out, “plaintiffs and courts more often than not describe claims for enhanced damages brought under § 284 as ‘willful infringement claims’—despite the fact that “the words ‘willful’ and ‘willfulness’ do not appear in § 284.” *Zap-Fraud, Inc. v. Barracuda Networks, Inc.*, 528 F. Supp. 3d 247, 249 (D. Del. 2021) (quoting *Deere & Co. v. AGCO Corp.*, No. CV 18-827-CFC, 2019 WL 668492, at *3 (D. Del. Feb. 19, 2019)).²

Despite its prominence in the enhanced damages caselaw, willfulness is only loosely and ambiguously defined. *See Robert Bosch, LLC v. Pylon Mfg. Corp.*, 719 F.3d 1305, 1326 (Fed. Cir. 2013) (Reyna, J., dis-

² A similar mistake explains the unusual procedural history of this case. The Federal Circuit’s 2019 opinion conflated the standards for willful infringement and enhanced damages, causing the district court on remand to misstate the willfulness standard. *See SRI Int’l, Inc. v. Cisco Sys., Inc. (SRI III)*, No. CV 13-1534-RGA, 2020 WL 1285915, at *1 (D. Del. Mar. 18, 2020) (quoting *SRI Int’l, Inc. v. Cisco Sys., Inc. (SRI II)*, 930 F.3d 1295, 1309 (Fed. Cir. 2019)) (“The [Federal Circuit] made clear that the standard for willfulness that it wanted this Court to apply was whether ‘Cisco’s conduct rose to the level of wanton, malicious, and bad-faith behavior required for willful infringement.’”). The Federal Circuit’s 2021 opinion corrected this mistake, but accepted the *original* district court’s analysis of the evidence of willfulness as sufficient to support enhanced damages. *See SRI Int’l, Inc. v. Cisco Sys., Inc. (SRI IV)*, 14 F.4th 1323, 1330 (Fed. Cir. 2021).

senting) (“The definition of willful patent infringement has changed significantly over time”); *Cont’l Cirs. LLC v. Intel Corp.*, No. CV16-2026 PHX DGC, 2017 WL 2651709, at *7 (D. Ariz. June 19, 2017) (noting that since *Halo*, “the law concerning willfulness has been in a state of flux, and *Halo*’s effect on the pleading standard for willful infringement remains unclear”) (internal quotation marks omitted).

The most influential discussion of willfulness in modern patent law, from the Federal Circuit’s 1992 decision in *Read*, involves nine non-exclusive factors. 970 F.2d 816, 826–27. Between 2010 and 2020, “98.2% of all judges that assessed enhanced damages . . . looked to the *Read* factors.” Karen E. Sandrik, *An Empirical Study: Willful Infringement & Enhanced Damages in Patent Law After Halo*, 28 Mich. Tech. L. Rev. 61, 94 (2021). The *Read* factors include the infringer’s litigation conduct and its “size and financial condition.” *Read*, 970 F.2d at 827.

In *In re Seagate Technology, LLC*, 497 F.3d 1360 (Fed. Cir. 2007), the Federal Circuit made objective willfulness a threshold requirement for enhanced damages, citing *Read* as a key definitional source. *Id.* at 1368–69. But in this Court’s view, *Seagate* made it possible for a willful infringer to escape enhanced damages “solely on the strength of his attorney’s ingenuity,” prompting this Court to grant certiorari in *Halo*. *Halo*, 579 U.S. at 105.

Halo rejected *Seagate*’s objective willfulness requirement as “an artificial construct.” 579 U.S. at 109. The Court acknowledged that “willfulness has always been a part of patent law,” but declined to ground its analysis of Section 284 in willfulness itself. *Ibid.* The key concept, the Court explained, is not will-

fulness per se but the culpability of the infringing behavior. Sufficiently culpable infringing behavior “has been variously described,” not only as “willful,” but also as “wanton, malicious, bad-faith, deliberate, consciously wrongful, [or] flagrant.” *Id.* at 103–04. But whatever the descriptor, *Halo* made clear that the relevant *behavior* for the purposes of enhanced damages is “infringement behavior.” *Ibid.*

Nevertheless, courts have interpreted *Halo* as endorsing *Seagate*’s subjective willfulness analysis, which is heavily influenced by *Read*’s expansive concept of willfulness. *See, e.g., WesternGeco L.L.C. v. ION Geophysical Corp.*, 837 F.3d 1358, 1362 (Fed. Cir. 2016). Consequently, courts and juries evaluating willfulness continue to rely on factors *other than* the egregiousness of the complained-of infringement, including conduct that occurs *after* the filing of the complaint. *See, e.g., Boston Sci. Corp. v. Cordis Corp.*, 838 F. Supp. 2d 259, 279 (D. Del. 2012), *aff’d*, 497 F. App’x 69 (Fed. Cir. 2013) (finding that defendant’s “litigation conduct[] weigh[s] heavily in favor of enhancement”); *Powell v. Home Depot U.S.A., Inc.*, 715 F. Supp. 2d 1285, 1297 (S.D. Fla. 2010), *aff’d*, 663 F.3d 1221 (Fed. Cir. 2011) (finding that “Home Depot’s misconduct as a party to this litigation . . . favors enhancement”).

As a result, willfulness findings have increased dramatically, bringing enhanced damages awards up as well. Even before *Halo*, more than 90% of patent complaints alleged willfulness. Kimberly A. Moore, *Empirical Statistics on Willful Patent Infringement*, 14 Fed. Cir. Bar. J. 227, 232 (2004). In the three years following *Halo*, willfulness findings in district courts rose almost 30%. Sandrik, 28 Mich. Tech. L. Rev. at

92. Willfulness is now found in almost two-thirds of cases that decide the merits of a willfulness claim. *Ibid.* Since *Halo*, judges find willfulness in bench trials 18.6% more often, and juries 6% more often. *Id.* at 65. And enhanced damages awards in cases involving a prior finding of willfulness rose 8.7%, to 69%. *Id.* at 94. Since plaintiffs assert willfulness in virtually every case, this trend is likely to continue.

Despite *Halo*'s warnings, enhanced damages are becoming routine, and increasingly detached from their intended function. This case presents an opportunity to refocus enhanced damages on their purpose: punishing and deterring egregious infringement.

III. The Court Should Confirm That Enhancement Is Unavailable In The Absence Of Egregious Infringement

The decision below is, unfortunately, a textbook example of the excesses of post-*Halo* enhanced damages. In a 2017 trial, a jury found that Cisco infringed SRI's patents and awarded nearly \$24 million in compensatory damages (in the form of a reasonably royalty). The trial court doubled those damages as an enhancement under Section 284, citing Cisco's "status as the world's largest networking company" and its energetic defense strategy. *SRI Int'l, Inc. v. Cisco Sys., Inc.* (*SRI I*), 254 F. Supp. 3d 680, 723 (D. Del. 2017). Under *Halo*'s construction of Section 284, neither is a proper basis for "punitive' or 'vindictive' sanction[s]." 579 U.S. at 103.

First, a company's size has no bearing on the egregiousness of its infringement behavior. *SRI I*, 245 F. Supp. 3d at 723. While *Read* included a company's

“size and financial condition” among nine factors potentially relevant to “the egregiousness of the defendant’s conduct,” 970 F.2d at 826–27, *Halo* has since made clear that the egregiousness analysis should focus on “*infringement* behavior.” 579 U.S. at 103 (emphasis added). This keeps enhanced damages centered on “culpability,” a concept unrelated to an infringer’s size. *Id.* at 105. A large company may infringe innocently and a small one egregiously, or vice-versa. In high-tech fields like Comcast’s (and Cisco’s), product development is typically a large-scale, distributed effort involving vast numbers of employees and outside vendors. Further, consistent with the facts in *SRI*, typically the company develops the accused products and services many years before learning of the allegedly infringed patents, and there are no allegations of copying. The trial court acknowledged as much by noting of Cisco’s conduct that “this case in terms of infringement has been like virtually every other case.” *SRI Int’l, Inc. v. Cisco Sys., Inc. (SRI III)*, No. CV 13-1534-RGA, 2020 WL 1285915, at *3 (D. Del. Mar. 18, 2020). *A priori*, the defendant’s size says nothing about the egregiousness of any infringing conduct.

Yet even post-*Halo*, courts have continued to treat large companies as inherently more deserving of enhanced damages. *See, e.g., Arctic Cat Inc. v. Bombardier Recreational Prods., Inc.*, 198 F. Supp. 3d 1343, 1352 (S.D. Fla. 2016), *aff’d*, 876 F.3d 1350 (Fed. Cir. 2017) (finding enhanced damages “particularly warranted” where the infringer was “a multi-billion dollar enterprise and the market leader”); *Barry v. Medtronic, Inc.*, 250 F. Supp. 3d 107, 116 (E.D. Tex.

2017) (noting, without explanation, that the infringer’s high revenue “weighs in favor of enhancement”).

This practice amounts to a presumption that every large company found to have infringed a patent has done so willfully and compensatory damages should be enhanced. Such a presumption has no basis in law or fact.³ There is no affirmative duty to become aware of potentially infringed patents. Indeed, any attempt to do so would be an exercise in futility. In 2016, when *Halo* was decided, there were “more than 2,500,000 [active] patents.” *Halo*, 579 U.S. at 113 (Breyer, J., concurring). By 2019, according to the U.S. Patent and Trademark Office, that number had grown to nearly 3 million.⁴

The impracticability of becoming aware of every relevant patent in a given field is one reason Congress added Section 298 to the Patent Act in 2011. *See Halo*, 579 U.S. at 111–12 (Breyer, J., concurring). Section 298, enacted post-*Read*, prohibits courts from considering an infringer’s decision not “to obtain the advice of counsel with respect to any allegedly infringed patent” as evidence of willful infringement. 35 U.S.C. § 298 (2011). This means that companies need not

³ Ironically, the Federal Circuit recognized this in its 2019 opinion in this case, which noted that, “[g]iven Cisco’s size and resources, it was unremarkable” that its engineers did not analyze SRI’s patents until their depositions. *SRI II*, 930 F.3d at 1309.

⁴ Statement of Andrew Hirshfeld, Commissioner for Patents, U.S. Patent and Trademark Office (Oct. 30, 2019), <https://www.judiciary.senate.gov/imo/media/doc/Hirshfeld%20Testimony.pdf>.

spend their limited resources examining the millions of issued patents to identify those that are potentially relevant. Nor should it; the associated expenses alone would significantly impede the innovation that patent law exists to encourage. *Halo*, 579 U.S. at 111–12 (Breyer, J., concurring).

This is particularly true for large companies, who are especially likely to be targeted with marginal infringement claims seeking windfall settlements or licensing fees. *Ibid.* As Justice Breyer recognized in concurrence in *Halo*, many patent assertion entities—or trolls—“use patents primarily to obtain licensing fees, . . . generat[ing] revenue by sending letters to tens of thousands of people asking for a license or settlement on a patent that may in fact not be warranted.” *Id.* (internal alterations omitted). “[T]he risk of treble damages,” Justice Breyer warned, “can encourage [a] company to settle” frivolous claims—or worse, to “abandon” innovative activity altogether. *Id.* at 113–14.

Second, a party’s “litigation conduct”—including, as in the case below, an energetic but ultimately unsuccessful defense against allegations of infringement—is an equally improper basis for enhanced damages. For one thing, a vigorous legal defense is both a constitutional right and an ethical duty.

The First Amendment protects “objectively reasonable effort[s] to litigate” as part of the right to petition the government for redress. *Pro. Real Est. Invs., Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 57 (1993); see also *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). This right protects even “vigorous advocacy, certainly of lawful

ends, against governmental intrusion.” *NAACP v. Button*, 371 U.S. 415, 429 (1963).

And counsel for litigants in patent cases, including accused infringers, have an ethical duty to zealously represent their clients’ interests—including, at times, through litigation strategies that may prove costly and time-consuming. *See, e.g.*, Model Rules of Pro. Conduct, Preamble ¶¶ 8–9 (Am. Bar Ass’n 2020) (“[A lawyer has an] obligation zealously to protect and pursue a client’s legitimate interests”; “when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done”); Delaware Rules of Pro. Conduct, Preamble ¶¶ 8–9 (similar).

Moreover, a patent defendant’s litigation strategy is simply irrelevant to the egregiousness of its infringement. A company defending itself against accusations of patent infringement is not *thereby* infringing. Indeed, the act of defending a lawsuit is diametrically opposed to the affirmative, intentional trespass—the “pira[cy]”—for which *Halo* reserved enhanced damages. 579 U.S. at 104.

Even under *Read*, litigation conduct is not prima facie evidence of willfulness, but rather “a factor to be weighed in assessing the level of a defendant’s culpability *where an infringement is found willful*.” 970 F.2d at 830 (emphasis added). As *Read* noted, “other sanctions are generally available for litigation misconduct”—namely, attorney’s fees under Section 285. *Id.* at 830 n.10. Indeed, the hallmarks of an “exceptional” case for the purposes of fee awards under Section 285 are (1) a weak legal case and (2) unreasonable litiga-

tion conduct. *Octane Fitness v. ICON Health & Fitness*, 134 S. Ct. 1749, 1756 (2014). SRI was awarded its fees; using the same factors to enhance damages is double-counting.

This case illustrates the loose and incoherent logic driving the post-*Halo* spike in enhanced damages awards. The original trial court’s cursory enhancement analysis conflated *Halo*’s articulation of the enhancement standard with the already hazy concept of willfulness—even referring to enhanced damages as “the willfulness award under § 284.” *SRI I*, 254 F. Supp. 3d at 723. Treating Cisco’s size and defense strategy as evidence of willfulness resulted in \$24 million in enhanced damages—over and above SRI’s actual damages—based on nothing like the “wanton and malicious pira[cy]” that Section 284 requires. *Halo*, 579 U.S. at 98.

Enhanced damages awards based on factors like a defendant’s size or litigation strategy misinterpret *Halo* by severing enhanced damages from the “culpability” of the infringement itself. 579 U.S. at 105. Culpability, *Halo* explained, is a function of the “egregious[ness] of the infringing conduct, and “is generally measured against the knowledge of the actor at the time of the challenged conduct.” *Id.* at 104–05. This means the “egregious infringement behavior” required to support enhanced damages has to be established by the defendant’s *pre*-complaint conduct (its infringing acts)—not its *response* to the infringement allegations. *See Seagate*, 497 F.3d at 1374 (“[At the time] a complaint is filed, a patentee must have a good faith basis for alleging willful infringement. Fed. R. Civ. Pro. 8, 11(b). So a willfulness claim asserted in the original complaint must necessarily be grounded

exclusively in the accused infringer’s pre-filing conduct.”). This Court has warned against enhancement based on conduct that is not “egregious infringement behavior”—or even infringement behavior at all. *Halo*, 579 U.S. at 103.

Awards like this one also thwart Congress’s three rationales for limiting judicial discretion over enhanced damages. The trial court’s award unjustly subjects a defendant whose actual infringement was not “wanton and malicious” to punishment intended for “pirate[s].” *Halo*, 579 U.S. at 104. It justifies that punishment with reference to the accused infringer’s thorough legal defense—conduct for which Section 285 already provides a remedy. And it sends a clear message to other accused infringers: defending too vigorously will only multiply your losses. Innovation, and the innovation economy, will suffer as a result.

* * *

Halo underscored a core principle of patent law: the *limits* on patent rights are as important to innovation as the rights themselves. As Justice Breyer explained in concurrence, “there are patent-related risks”—systemic risks—to routine enhanced damages awards. *Id.* at 114. As enhanced damages drift ever further from the deterrence of “egregious infringement behavior,” they begin to deter the very behavior patent law exists to encourage: the “refinement through imitation” that is “necessary to invention itself.” *Id.* at 103, 109 (majority opinion). The Court should take this opportunity to refocus the standard for enhanced damages where it belongs: on the egregious character of the pre-complaint infringing conduct.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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April 18, 2022