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IN THE SUPREME COURT OF THE UNITED STATES

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HALO ELECTRONICS, INC., :

Petitioner : No. 14-1513

v. :

PULSE ELECTRONICS, INC., :

ET AL., :

- - - - - x

and

- - - - - x

STRYKER CORPORATION, ET AL., :

Petitioners : No. 14-1520

v. :

ZIMMER, INC., ET AL., :

- - - - - x

Washington, D.C.

Tuesday, February 23, 2016

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:59 a.m.

APPEARANCES:

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Petitioners.

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4 Petitioners.

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6 Respondents.

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P R O C E E D I N G S

(10:59 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 14-1513, Halo Electronics v. Pulse Electronics and the consolidated case, 14-1520, Stryker Corporation v. Zimmer.

Mr. Wall.

ORAL ARGUMENT OF JEFFREY B. WALL

ON BEHALF OF THE PETITIONERS

MR. WALL: Mr. Chief Justice, and may it please the Court:

The Federal Circuit has developed such a -- a rigid test for enhanced damages in patent infringement cases that a large number of the worst infringers, even bad-faith copiers, are not -- are immunized from any enhancement.

The Federal Circuit has done that by moving away from historical practice in two key ways.

First, it's made the test all about recklessness rather than also intent.

Second, it judges recklessness based on legal defenses developed in litigation rather than the facts at the time of the infringement.

The net result, now that this Court in Octane and Highmark set aside a similarly artificial

1 test for fees is a one-of-its-kind, good for
2 patent-damages-only framework that does not track the
3 enhancement statute's text, history, or purposes.

4 It was not always this way. For nearly 150
5 years, district courts conducted a totality inquiry
6 subject to deferential review. And as part of that,
7 they said the nature of the infringement has to be more
8 than negligent if it's going to be an aggravating factor
9 that counsels in favor of an enhancement.

10 That --

11 JUSTICE GINSBURG: But is that -- is that
12 what you're advocating, to return to that, just as a
13 matter of discretion, for the district court and that's
14 it?

15 MR. WALL: In a word, yes. We do think that
16 there are principles to guide district courts'
17 discretion, because historically, district courts said
18 certain things. But the one agreed-upon principle I
19 think we all agree on, or at least Petitioners and the
20 PTO do, is the court said in the totality, if the
21 patentee wants to point to the nature of the
22 infringement and say that pulls you out of the mine run
23 of cases and that warrants an enhancement, it had to be
24 more than negligent. Had to be intentional or reckless
25 infringement, but based on the facts at the time.

1 It was a traditional, willfulness inquiry.
2 It was not the willfulness inquiry that the Federal
3 Circuit conducts, which looks at after-the-fact defenses
4 and not what were the facts facing the infringer at the
5 time of its --

6 JUSTICE ALITO: You -- you referred to the
7 nature of the infringement. Is that the only thing
8 that's involved here? Are any of the Petitioners asking
9 for enhanced damages based on litigation misconduct, for
10 example?

11 MR. WALL: Well, I think there was some
12 litigation misconduct here, and we cited in the district
13 court's opinion that Zimmer did conceal some things in
14 the run up to trial. So I think there -- there were
15 some other factors. But I think the major one here, for
16 instance, in Stryker, was the nature of the
17 infringement; that they hired an independent contractor,
18 they handed the contractor a patented product; they
19 said, essentially, Make one of these for us.

20 So --

21 JUSTICE ALITO: We have to decide whether
22 enhanced damages can be awarded solely based on
23 litigation misconduct. That would seem to be a separate
24 question. Or you said that the main thing involved is
25 the nature of the infringement. So what is the issue

1 before us?

2 MR. WALL: Yeah. I -- I don't want to say
3 that you have to. And I want to be careful about
4 litigation misconduct, because in a number of the older
5 cases, it was something like concealment, which was post
6 infringement but prelitigation, so it was a broader
7 category of misconduct.

8 But no. I think the only reason that we and
9 the PTO have pointed to the compensation cases and the
10 misconduct cases is just to show that for 150 years it
11 was a totality inquiry, and district courts were looking
12 at a lot of different things.

13 These cases are primarily about the nature
14 of the infringement. Most cases will be like that. I
15 think if the Court wanted to provide guidance to the
16 Federal Circuit about how to run the statute, it should
17 say go back to doing a totality inquiry, and here's some
18 of the principles that historically guided your exercise
19 of discretion. But I don't think you have to do that,
20 Justice Alito.

21 MR. WALL: I think you could --

22 CHIEF JUSTICE ROBERTS: Why is the --

23 MR. WALL: -- ordinarily --

24 CHIEF JUSTICE ROBERTS: Why is the nature of
25 the infringement so determinative under your view?

1 Yes, they copied it, but perhaps they had a,
2 you know, good-faith belief that this wasn't patented.
3 So the fact that they copied it doesn't seem to me to
4 automatically make it something which is suitable for
5 sanctions.

6 MR. WALL: So the products here were marked.
7 I mean, they were marked as patented. But I take your
8 point, Mr. Chief Justice, and I think --

9 CHIEF JUSTICE ROBERTS: Or they could have
10 had, you know, a good-faith belief that the patent
11 wasn't valid.

12 MR. WALL: Sure. And that's historically
13 how cases played out, and it's how they should play out
14 once this Court takes care of Seagate, which is both
15 parties come in at the enhancement stage; most of the
16 evidence has come in on infringement for liability or
17 damages.

18 And the patentee will say, you copied a
19 patented product and haven't shown any evidence that you
20 had a reasonable belief in invalidity.

21 And the defendant, if the patentee has
22 carried its burden, will say, no. I did some
23 investigation. I thought I wasn't infringing. I
24 thought it was invalid.

25 And a district court will make a judgment

1 call faced with those competing narratives about what
2 the right answer is based on the facts.

3 Our point is that that judgment call that
4 district courts were making for a very long time has
5 essentially been stripped from them because it no longer
6 matters. Even if you acted intentionally at the time,
7 as Zimmer did, what the Federal Circuit says is, if you
8 can hire good lawyers and come up with defenses in
9 litigation, you'll be off the hook.

10 And as Justice Breyer pointed out in the
11 Octane litigation -- and I now know it's true from
12 preparing for this case, you can -- a patent lawyer can
13 virtually always come up with some nonfrivolous defense
14 in litigation. And that's why, in effect, what you have
15 is almost a per se bar.

16 JUSTICE BREYER: That may be. But this is
17 my question on this.

18 The statute doesn't say anything. The
19 statute just says: In either event, the Court may
20 increase the damages up to three times the amount found
21 or assessed.

22 I don't get too much guidance from that.

23 Let me assume against you, assume against
24 you, that the history does not favor you. The history
25 insists upon willful.

1 Let me assume with you that there isn't good
2 ground for clear and convincing. Nothing suggests that.

3 But now, the hardest part for me -- and it
4 is hard. I don't have a clear answer -- is there are,
5 indeed, some preliminary in tests. If, for example, the
6 patentee has a flaw in his patent -- not enough to kill
7 it, but enough to make it pretty uncertain, a weak
8 patent. There are all kinds of things wrong with it.
9 No willfulness damages, irrespective, almost, of the
10 state of mind of the infringer.

11 So what could be said for that? You've read
12 their excellent briefs on both sides, and you know
13 perfectly well what can be said for that. And if I
14 summarize it -- and that's what I want your answer to.
15 Today's patent world is not a steam-engine world. We
16 have decided to patent tens of thousands of software
17 products and similar things where hardly anyone knows
18 what the patent's really about. A company that's a
19 start-up, a small company, once it gets a letter, cannot
20 afford to pay 10,000 to \$100,000 for a letter from
21 Counsel, and may be willing to run its chances.

22 You start saying, little company, you must
23 pay 10,000 to \$100,000 to get a letter, lest you get
24 willful damages against you should your bet be wrong.

25 We have one more path leading us to national

1 monopoly by Google and Yahoo or their equivalence, and
2 the patent statute is not designed to create monopolies
3 throughout the United States. It's designed to help the
4 small businessman, not to hurt him. So leave those
5 words for interpretation to the expert court, and in
6 this area it may well be the Federal Circuit.

7 MR. WALL: I --

8 JUSTICE BREYER: Have I stated the
9 argument --

10 MR. WALL: I --

11 JUSTICE BREYER: -- pretty much the way it
12 is?

13 All right. If I have, I would like your
14 response to it.

15 MR. WALL: I think you have stated the best
16 possible version of Respondents' argument, and I'm happy
17 with your assumptions. The PTO embraces them, and we
18 are not living in a steam-engine world.

19 It's a high bar to carry, and I don't think
20 patentees are often going to be able to do it. And what
21 you -- you rightly said, I think that is what
22 Respondents have -- that's been their strategy in this
23 Court, is that --

24 JUSTICE BREYER: Not just their strategy.

25 MR. WALL: It's --

1 JUSTICE BREYER: We have all kind of amicus
2 briefs that say that's the truth. And indeed, thousands
3 and thousands and thousands of small businessmen are
4 trying to break into businesses that they just can't do
5 without software. And when you have tens or hundreds of
6 thousands of patents on software by other companies,
7 that means we can't break in.

8 MR. WALL: Justice Breyer, the sky didn't
9 fall for a century and a half, and it's not going to
10 fall if you reverse the Federal Circuit's framework,
11 just as it didn't fall after Octane and Highmark in the
12 fees context.

13 You've got to show as a patentee, you've got
14 to --

15 JUSTICE BREYER: It hasn't fallen. Go look
16 at the market shares of the different companies that are
17 seriously involved in software.

18 MR. WALL: Justice Breyer, showing intent or
19 recklessness based on the facts at the time is not going
20 to be easy. The intent box is copying patented
21 products. And I don't think we have a lot of dispute,
22 that where people are copying patented products in
23 absence of a reasonable belief in invalidity, it doesn't
24 matter whether they're making software -- software or --

25 JUSTICE BREYER: Okay. Then are you

1 satisfied --

2 MR. WALL: -- carriageware.

3 JUSTICE BREYER: -- with this? You've just
4 used a word that might help: "reasonable belief." We
5 say that where a company is small, where it is small and
6 wants to run the risk, follow the Federal Circuit rule,
7 in order to show willfulness -- because it's
8 reasonable -- in order to show willfulness, you have to
9 show that that infringer not only didn't know it was
10 faulty, but also was a big company that was pretty used
11 to getting these lawyers' opinions, and also pretty used
12 to asking their own experts whether it really was a good
13 patent or not. And they didn't do it here. What about
14 something like that?

15 MR. WALL: Justice Breyer, we tried in
16 opening brief to embrace the full totality of
17 circumstances, including the strength of the patent, the
18 kind of notice, what's commercially reasonable in the
19 industry.

20 The one point I just want to make, because I
21 think it's very important, is to get into the
22 recklessness box at common law, and traditionally, you
23 had to show an objectively high risk. So as a patentee,
24 you've got to show to the judge, not just that
25 infringement occurred, but that a reasonable person

1 looking at it would have said there is a very high risk
2 that what I am doing is unlawful because it trenches on
3 someone else's valid patent.

4 That's a pretty high bar. You're not going
5 to be able to satisfy that. You shouldn't be able to
6 satisfy that in a lot of cases.

7 I think the strength of the PTO's argument
8 is when you can show that, the district court should be
9 able to make a judgment call about enhancement. And the
10 fact that it can't shows you that you've really skewed
11 the incentives. Because on the other side of the parade
12 of horrors you're worried about are the people who can
13 infringe, knowing that they can discount by the
14 probability that they'll be found to have infringed in
15 litigation with virtually no back-end penalty, even if
16 they were a very bad infringer, as Zimmer was here.

17 JUSTICE SOTOMAYOR: Tell me how you
18 articulate this. And I ask because the SG is talking
19 about describing it as egregious conduct.

20 You're saying something about willfulness
21 and recklessness. And I don't know if this is all a
22 matter of semantics, but I think the SG is right. Even
23 if you give discretion to the district courts to make a
24 judgment of when to enhance penalties, we have to give
25 them some guidance.

1 MR. WALL: Yes.

2 JUSTICE SOTOMAYOR: It can't be that they
3 can give enhanced penalties on whim.

4 MR. WALL: That's right.

5 JUSTICE SOTOMAYOR: All right? So if it's
6 not whim, what is it? How do we articulate a test that
7 protects what Justice Breyer is concerned about, which I
8 think is a legitimate concern, but doesn't entrench a
9 position that just favors you?

10 MR. WALL: No. No, I --

11 JUSTICE SOTOMAYOR: And by that, I mean, you
12 know --

13 MR. WALL: Right.

14 No, I think there's a little bit of daylight
15 between us and the government, in the sense that we
16 think the statute was invoked for various purposes and
17 not just to punish infringement. But to the extent that
18 you invoke the statute to punish infringement, I think
19 there is no daylight between our position and the
20 government's.

21 JUSTICE SOTOMAYOR: So how do --

22 MR. WALL: And I think what you can say --

23 JUSTICE SOTOMAYOR: Help me --

24 MR. WALL: -- that the guidance is, in the
25 lion's share of cases, what the parties are really

1 debating is the nature of the infringement. That needs
2 to be intentional or reckless based on the facts as they
3 were known to the infringer. And as part of whether the
4 infringer --

5 JUSTICE SOTOMAYOR: No, but that -- that --

6 MR. WALL: -- is acting --

7 JUSTICE SOTOMAYOR: -- you know, that these
8 tests understands life a little -- is more --

9 MR. WALL: Sure.

10 JUSTICE SOTOMAYOR: -- complex than that.

11 Okay? Because you can often use the conduct of someone,
12 after the time, to reflect what they thought. And so if
13 you're saying that someone is withholding information,
14 you might be able to infer that there wasn't good faith
15 at the beginning.

16 MR. WALL: Sure.

17 JUSTICE SOTOMAYOR: So your articulation
18 doesn't really give life to the complexity of this
19 inquiry.

20 MR. WALL: So -- and to add, then, a little
21 more, I think what you ought to be taking into account
22 is, for instance, the strength of the notice. Some of
23 these letters are just form letters. They really are
24 nothing more than a license.

25 JUSTICE SOTOMAYOR: This is all the Read

1 Corporation factors that the district court here did in
2 the Stryker case.

3 MR. WALL: I think that's right. I think
4 some of them will matter more than others. But some
5 claim letters are very fulsome. They have a --

6 JUSTICE SOTOMAYOR: I don't want to adopt
7 that test. How do I articulate this in a more
8 generalized way?

9 MR. WALL: I think what you would say is
10 that in judging whether a reasonable person would have
11 thought that there was a really high risk, you've got to
12 take account of both the strength of the notice, what
13 kind of notice were they on of the patent, and what
14 would have been commercially reasonable in the industry
15 as it exists. And I think that -- those factors and
16 those limitations are going to take account of the vast
17 bulk of what Justice Breyer and what Respondents are --
18 are concerned about.

19 JUSTICE ALITO: Are courts going to be able
20 to assess the state of mind of the infringer at the time
21 of the infringer's conduct without getting into
22 communications with the -- with the company's attorneys?

23 MR. WALL: Yes, Justice Alito, and they did
24 historically. And I mean, I would -- I would point the
25 Court to a case like Consolidated Rubber and Judge

1 Learned Hand's opinion. He said, look, you know, the
2 patent was open to doubt for a period of time, and so no
3 enhancement. But at some point here, the facts changed
4 and the infringer knew about them. It reasonably should
5 have known the patent was valid. We start the
6 enhancement running, and then we get some misconduct on
7 the back end like we had in this case. And so he says,
8 I'm rolling it all in. This was more than negligent,
9 and here's the enhancement I'm going to give.

10 JUSTICE ALITO: Well, this -- you see, you
11 had the case where at the time when the -- the question
12 of enhanced damages is decided, the judge can see that
13 the defense was able to -- with the help of good
14 lawyers, was able to put on an objectively reasonable,
15 although unsuccessful, defense. How are you going to be
16 able to show that the infringer did not have that same
17 information at the time of the conduct in question?

18 MR. WALL: Well, I think in the typical --
19 the -- the intent cases are -- are fairly easy because
20 they're generally copying. I think in the typical
21 recklessness case, the infringer will come in and say,
22 here's the fulsome claim letter I sent you. It's
23 actually got a claim chart. It maps on the infringement
24 to the patent. I reached out to you. You never
25 responded and you continued to infringe.

1 And I think at that point, then, the
2 defendant has got to say, okay, I did something, but it
3 isn't in talking to a lawyer. I talked to my engineers.
4 I looked at the -- the specifications in the patent.
5 You're -- you're limited to devices with four wheels,
6 and I have three. I think there are lots of things that
7 are commercially reasonable depending on the
8 circumstances, and I honestly do think if you -- if you
9 go back and look through the cases historically, that
10 what good judges and courts were doing for a long time
11 before the Federal Circuit essentially stripped
12 discretion from them, and having taken the bar too low
13 in Underwater Devices overcompensated in Seagate. We
14 think the bar ought to be high. We just don't think it
15 ought to be arbitrarily high as it is now.

16 If I could reserve the rest of my time.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.

18 Mr. Martinez.

19 ORAL ARGUMENT OF ROMAN MARTINEZ

20 FOR UNITED STATES, AS AMICUS CURIAE,

21 SUPPORTING THE PETITIONER

22 MR. MARTINEZ: Mr. Chief Justice, and may it
23 please the Court:

24 We agree with the Federal Circuit and with
25 all the parties to this case that mere negligence is not

1 enough to trigger enhanced damages. But the
2 Federal Circuit is wrong to categorically bar such
3 damages whenever an infringer presents an objectively
4 reasonable defense at trial. That rule creates an
5 arbitrary loophole that allows some of the most
6 egregious infringers to escape enhanced damages.

7 JUSTICE KENNEDY: The enhanced damages that
8 we're discussing really is almost entirely punitive if
9 the octane standard for attorneys' fees remains in
10 effect. In other words, an octane standard is -- gives
11 a judge much more latitude to impose -- to award
12 attorneys' fees when there's been unnecessary
13 resistance. So all we're talking about is punitive
14 damages.

15 MR. MARTINEZ: I -- I --

16 JUSTICE KENNEDY: And you -- and you want to
17 just basically dismantle the willfulness structure that
18 the court of appeals has established; is that correct?

19 MR. MARTINEZ: No. I think that's not
20 correct. I think the Federal Circuit, in our view, took
21 the law in a good direction or a better direction when
22 it reversed its Underwater Devices standard which it
23 said was akin to negligence, and it tried to tighten the
24 law versus -- about willfulness up to make it harder to
25 get enhanced damages.

1 We think that was a step in the right
2 direction, but we think that they made two important
3 mistakes when they did that. The first one is
4 essentially that they said that in a case where you have
5 subjective intent, that, in and of itself, is not enough
6 to establish a case for enhanced damages. Essentially
7 that you have to prove recklessness under an objective
8 standard in each and every case.

9 We don't think that's consistent with the
10 history of the statute, with the purpose of the statute,
11 with the way punitive damages have -- have always been
12 considered, with the way willfulness has always been
13 interpreted. So we think that's wrong.

14 The second mistake we think that the
15 Federal Circuit made is with respect to how the
16 recklessness inquiry is supposed to happen. So
17 recklessness, everyone agrees, is an objective inquiry.
18 And in every other area of law where courts are
19 conducting an objective inquiry, what you -- what you're
20 supposed to do is you're supposed to take a reasonable
21 man, and you put him in the -- the actual person who is
22 accused of wrongdoing, in his shoes. And you take what
23 that actual person knew, and you figure out whether a
24 reasonable man in that person's shoes would have thought
25 that there was a very high risk that the conduct at

1 issue was unlawful.

2 And what the Federal Circuit does is not
3 that. What they are essentially doing is taking the
4 reasonable man and giving him the benefit of
5 omniscience, giving him the benefit of hindsight and
6 saying, what facts do we know at the time of trial? And
7 now that we know these facts at the time of trial,
8 should we retroactively sort of --

9 JUSTICE BREYER: I didn't think they were
10 doing that. I thought what they were doing was saying,
11 we are not going to allow punitive damages in a case
12 where the patent is so weak. And so we're really not
13 looking at state of mind.

14 And the reason that we're doing that is the
15 reason I said previously. And the reason that we're not
16 leaving it up to 475 trial judges is because those 475
17 trial judges don't see patent cases very much. And
18 where they have a pretty good idea of how employment
19 law, tort law, and all kinds of other law works, they
20 don't have that, a good idea in respect to patent law.

21 And we, the Federal Circuit, do. That's why
22 we are created. And we are afraid that if we do not use
23 this objective standard, what we will see is a major
24 effect discouraging invention because of fear that if we
25 try to invent, we'll get one of these letters and we

1 can't afford \$100,000 for an opinion.

2 Now, I've just repeated the same argument.
3 But we did create the government, that expert court to
4 make such determinations in the face of language that
5 seems to allow it, and so what is wrong with they're
6 doing what they were paid to do?

7 MR. MARTINEZ: I think there are -- there
8 are a couple things that are wrong with -- with that.
9 Because I think the first thing that they're paid to do
10 is to look to the text and history of the statute. And
11 the text is -- as you said, doesn't provide a
12 categorical -- is silent. It doesn't provide the kind
13 of categorical bar that the Federal Circuit is asking
14 for.

15 And the history of the statute affirmatively
16 undermines that categorical bar because the history
17 makes clear that subjective bad intent, the -- the
18 wanton and malicious pirate that this Court talked about
19 in the Seymour case, that is a sufficient basis to
20 enhance damages.

21 With respect to the recklessness standard,
22 the fact that -- that recklessness is objective, we all
23 agree with that. But there's no reason to conduct the
24 objective analysis in a different way in this context
25 from the way that it's conducted in every other context.

1 And imagine a police search. A police
2 search --

3 JUSTICE BREYER: But I just gave you the
4 reason. Now, you can say that you don't agree with that
5 reason and give me a reason why it's wrong, but just to
6 say it's no reason is disturbing.

7 MR. MARTINEZ: Well, I think -- I think that
8 the reason you gave is that -- I think, of concern that
9 we share, which is that we think it's important in cases
10 where a patent is of questionable validity. We think
11 it's important to encourage people in certain cases to
12 challenge the patent or to make sure that innovation is
13 not being stifled. And we think that the ordinary
14 standard test for recklessness in our test accommodates
15 that concern because it would treat a reasonable
16 good-faith belief that a patent is invalid or that
17 infringement is not occurring as a reason to conclude
18 that enhanced damages are off the table.

19 CHIEF JUSTICE ROBERTS: As I read your brief
20 and the Petitioner's brief, I got the sense that there
21 was quite a bit of difference between the two. The
22 government seems to be taking a much higher standard
23 before these punitive damages, or however you want to
24 describe them, would be allowed. You use terms like
25 "egregious" a lot. Your friend uses terms like, you

1 know, "intentional," more than mere negligence. Is that
2 perception -- do you think that perception is an
3 accurate one?

4 MR. MARTINEZ: I think there's some minor
5 difference. Let me explain how we see our standard and
6 maybe what the differences are.

7 We think our standard covers three different
8 buckets of cases. The first bucket -- and this is borne
9 out by the history -- the first bucket are cases in
10 which there's intentional conduct or bad-faith conduct
11 under a subjective standard, a subjective analysis.
12 That's bucket number one. But --

13 CHIEF JUSTICE ROBERTS: Just a -- for one
14 just brief moment. By "intentional," you mean
15 intentional infringement, not intentional --

16 MR. MARTINEZ: No. Intentional conduct by a
17 person who believes that he is infringing a valid
18 patent.

19 CHIEF JUSTICE ROBERTS: Okay.

20 MR. MARTINEZ: In other words, if you have a
21 good-faith belief that the patent is not valid and that
22 belief's reasonable, we don't think you're an
23 intentional infringer.

24 The -- the second bucket covers recklessness
25 cases. And we all agree that recklessness is judged by

1 an objective standard. Where we disagree with the other
2 side is we think it's judged based on the facts and the
3 circumstances that are known to the actual infringer at
4 the time of infringement.

5 And then the third bucket that we think
6 is -- would qualify for enhanced damages are cases
7 involving other types of egregious misconduct not having
8 to do with the infringement itself. For example, if
9 there's corporate espionage, if one of the parties
10 destroyed evidence.

11 I think the difference between us and
12 Petitioner is very minor. I think they would also allow
13 enhanced damages for certain purely compensatory
14 purposes, even when a case did not fall into the other
15 three buckets.

16 We -- we can have a -- a interesting
17 historical discussion about whether or not that -- that
18 basis for damages is warranted or not. I don't think
19 the Court needs to resolve that in this case, because
20 it's not presented. But we do think our test is limited
21 to those three buckets: Essentially, intentional
22 conduct, reckless conduct, and other types of egregious
23 litigation misconduct.

24 We think that -- that that test is --

25 JUSTICE SOTOMAYOR: That avoids the use of

1 the word "willfulness."

2 MR. MARTINEZ: Excuse me?

3 JUSTICE SOTOMAYOR: That avoids the use of
4 the word "willfulness."

5 MR. MARTINEZ: Right. And I think -- we
6 think there is --

7 JUSTICE SOTOMAYOR: But the bucket is there.

8 MR. MARTINEZ: There's a sort of semantic
9 element to this case. I think if you wanted to use
10 that -- those three buckets to encompass willfulness, I
11 think we wouldn't stand in the way of that. I think the
12 problem that we see with what the Respondents are trying
13 to do is that they're looking to the history, the
14 pre-1952 cases, and they're taking the word "willful"
15 out of that. They're plucking that word out, and then
16 they're defining it in a way that's at odds with the way
17 in which willfulness or the way in which the standard
18 was applied before 1952.

19 We think if -- if history is the
20 justification for imposing a willfulness requirement in
21 the first place, history has to provide the guide for
22 interpreting what willfulness means or what the standard
23 is.

24 And I think that -- that one of the ironies
25 of the Respondents' position is that they agree that

1 this statute is -- Section 284 is trying to get at
2 culpable infringers. It's -- the touchstone is
3 culpability.

4 And they agree that recklessness is culpable
5 enough to get you into enhanced damages world. And yet,
6 everyone agrees, everyone in the civil law and the
7 criminal law, intentional misconduct has always been
8 considered worse than reckless conduct. And yet, their
9 test would allow a class of intentional infringers to
10 essentially get out of jail free based on their ability
11 to hire a lawyer and come up with a -- a post hoc
12 defense and present that defense at trial.

13 JUSTICE KAGAN: Can I ask --

14 JUSTICE SOTOMAYOR: Why isn't that post hoc
15 defense necessarily -- you're almost reading it as
16 unreasonable, by definition.

17 MR. MARTINEZ: I think it's possible to
18 imagine -- let me -- let me make it concrete.

19 Imagine a case in which there's intentional
20 violation or a reckless violation based on the facts
21 known at the time. And later the -- the person is sued,
22 the infringer is sued, and he hires a law firm that
23 scours the world, and they find the library in Germany
24 that has a Ph.D. dissertation that has some patents that
25 arguably anticipated the invention at issue. So that's

1 a new fact. It wasn't in anyone's head. No one was
2 aware of it at the time the infringement occurred.

3 And maybe that law firm then puts together a
4 reasonable but wrong theory under which the patent is
5 invalid in light of that prior art. We think that's a
6 case in which the -- the conduct was culpable at the
7 time of -- of infringement, and we think that's a case
8 that would warrant enhanced damages.

9 CHIEF JUSTICE ROBERTS: Justice Kagan, did
10 you have a question?

11 JUSTICE KAGAN: Besides the -- if you were
12 doing this just on policy -- very odd, but you know, we
13 have a test that everybody's off of at this point.
14 And -- and maybe some viewed that what happened in 1952,
15 for some of the reasons that Justice Breyer gave, is
16 perhaps not the most relevant thing. If you were doing
17 it just on policy, would you come up with this same
18 test?

19 MR. MARTINEZ: Yes. We would, and the PTO
20 would. We think that the -- the policy concern that
21 Congress had in mind of ensuring deterrents and
22 punishment is -- outweighs some of the considerations
23 that have been raised by Justice Breyer and others.

24 As long as we realize that as long as you
25 have a good-faith and reasonable defense, that will be a

1 defense to liability. And as long as we realize that
2 you need to have the kind of intentional or reckless
3 conduct that -- you know, it's a very high standard --
4 you need to have that kind of conduct in order to
5 warrant enhanced damages.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 Mr. Phillips.

8 ORAL ARGUMENT OF CARTER G. PHILLIPS

9 ON BEHALF OF THE RESPONDENTS

10 MR. PHILLIPS: Thank you, Mr. Chief Justice,
11 and may it please the Court:

12 Before I get into the substance of my
13 argument, one point that seems to me to cry out, at
14 least in response to the characterizations by my -- from
15 Mr. Wall where he repeatedly described Zimmer's conduct
16 as copying the invention in this case, what -- what the
17 Zimmer Corporation copied was the product itself.
18 The -- the patent wasn't released or issued until two
19 years of that initial copying.

20 There's nothing inherently wrong with
21 finding that a competitor has built a new product, not
22 know anything about the patents or any patentability, no
23 evidence of any patents, and think you're going to copy
24 it --

25 CHIEF JUSTICE ROBERTS: Well, I thought you

1 said --

2 MR. PHILLIPS: -- and improve on it.

3 I'm sorry?

4 CHIEF JUSTICE ROBERTS: I thought you said
5 the product was marked.

6 MR. PHILLIPS: After 2000, it was marked.
7 But the -- but the actions taken by Zimmer at the time
8 were 1998, two years before the patent even issued. I
9 just want to clarify that.

10 I also want to go back to the point that --
11 that --

12 JUSTICE GINSBURG: There had been a patent
13 application, though?

14 MR. PHILLIPS: Right. But there was no
15 evidence whatsoever that -- that Zimmer at that time had
16 any knowledge of anything in the patent -- in the --

17 JUSTICE SOTOMAYOR: I'm sorry. Doesn't the
18 statute exempt out enhanced damages for pending
19 applications?

20 MR. PHILLIPS: Yes, it does.

21 JUSTICE SOTOMAYOR: So why are you here?

22 MR. PHILLIPS: If -- no, no, no. It's --
23 all I'm suggesting is that -- that it's a
24 mischaracterization of the -- of the facts to say that
25 this involves purely copying, beginning from the very

1 outset of the process.

2 That's not to say that there couldn't be an
3 argument somewhere along the line that they -- that
4 there -- there might have been an argument of
5 willfulness. But this is not a classic copying case. I
6 mean, in a lot of ways this case comes down to sort of
7 trolls versus pirates in terms of how you want to
8 analyze it. And our view is -- and -- and I thought the
9 example that the Solicitor General's office just offered
10 you tells you everything you should know about it.

11 His -- his criticism is that a good lawyer
12 is hired and goes off and searches in the German
13 libraries and finds some basis upon which to challenge
14 legitimately the validity of that patent.

15 Now, if it had turned out that in those
16 German sources they had, in fact, demonstrated that that
17 patent was invalid, the position of the world would be
18 that's great, because this patent should be declared
19 invalid and the monopoly that attaches to it should be
20 declared null and void and unenforceable.

21 The fact that they found it and it turns out
22 not to get you over the hump shouldn't be, by any
23 stretch of the imagination, lead to a -- to a standard
24 of the law that discourages us from going out and trying
25 to find both the limits of the metes and bounds of the

1 patent itself as -- as defined by the -- by the patent
2 holder, and to challenge the invalidity of those patents
3 under all circumstances.

4 And Justice Breyer, I mean, that goes to the
5 core point that you were making. We're not talking
6 about a situation here where it's obvious when something
7 is infringed. There are thousands of patents, hundreds
8 of thousands of patents. There are lots of entities
9 creating new products every day, new services, if you
10 want to go beyond the products and the patent law,
11 and --

12 JUSTICE BREYER: My empirical information --
13 I mean my empirical information -- ha, ha, ha, laughs
14 slightly -- is -- is coming out of the briefs, which you
15 do have to admit has an interest.

16 The -- the -- I have -- I have assumed, and
17 is there stuff that I could look at to back this up --
18 that in a world of patent and copyright protection, I
19 think it's unfortunate that Congress hasn't passed a
20 special regime for those kinds of patents, but they
21 haven't.

22 In that such -- in that a world like that,
23 we're seeing more and more companies that have more and
24 more, and continuously more patents. And if all that
25 happens is you send a letter to somebody who has

1 something that's trying to break into the industry, and
2 they don't have enough money to hire many lawyers, that
3 becomes a serious barrier, and that the government's
4 rule in your view, and the opponent's rule in your view,
5 will raise those barriers to entry.

6 Now, that's a very elementary kind of
7 assumption. And I do admit it's supported by the briefs
8 on your side.

9 And is there anything you would refer me to
10 that would suggest that maybe I have a point, and your
11 briefs have a point?

12 MR. PHILLIPS: Well, the -- the briefs that
13 I thought were particularly effective, Justice Breyer,
14 are the amicus brief of public knowledge and --

15 JUSTICE BREYER: Of course. I've looked
16 through them, and I understand they're effective. I
17 just feel a little bit more comfortable when I can read
18 something that isn't participating in the litigation,
19 and it, too, bears out this view.

20 MR. PHILLIPS: Well, Professor Lumley has
21 written on the subject repeatedly, and he --

22 JUSTICE BREYER: Lumley has also said quite
23 a lot that he's worried about lawyers coming in and
24 inventing various things that make the patent look weak
25 after the event. You see? I mean, he --

1 MR. PHILLIPS: Right. But --

2 JUSTICE BREYER: He is not totally with you
3 on this.

4 MR. PHILLIPS: But there are -- but there
5 are two separate issues here. Let's -- so, and I'll
6 take those in turn.

7 The first one is, is there empirical
8 evidence that there is a significant amount of activity
9 out there in which patents are asserted in -- in more or
10 less specific ways. You'll recall the example given
11 by -- by my friend was you receive a letter that
12 identifies the precise claims, identifies exactly how
13 you infringe it, and it's ignored. Well, I can assure
14 you, that is not the standard letter, and that's not the
15 kind of letters that are involved in this case.

16 The letter we got said, we have patents,
17 would you like to -- would you like to pay a royalty for
18 those patents. It didn't identify the claims. It
19 didn't tell us anything about them. We handed them to
20 an engineer. The engineer looked at them and said, "It
21 looks the same as the product we're already producing."
22 Put it aside. We went forward with it, and we find out
23 later we --

24 JUSTICE BREYER: Is there a way of
25 compromising this in this way? To say to the circuit,

1 we see your point. Okay? And by and large, we accept
2 it, but there can be very big companies that make a
3 habit of getting those letters and giving the things to
4 engineers, as we saw right now in this case. And where
5 something like that goes on normally, then a refusal
6 deliberately to do it for fear it comes back with the
7 wrong answer. Or you do do it and you get the wrong
8 answer and you go ahead anyway.

9 That may be worth willful damages even
10 though, in fact, there was a slight flaw with this
11 patent.

12 MR. PHILLIPS: Justice Breyer --

13 JUSTICE BREYER: What about that? Giving
14 them some leeway around the edges?

15 MR. PHILLIPS: Justice Breyer, I understand
16 the desire to always be in a position where you can sort
17 of catch that one party that's out there, and I think
18 the real issue there is twofold. One is, is it worth
19 the candle to go -- I mean, you really need to go find
20 that one --

21 JUSTICE BREYER: Well, leave it to the
22 circuit to decide.

23 MR. PHILLIPS: -- entity -- the circuit's
24 already decided. I think that's --

25 JUSTICE BREYER: Well, I have -- they have

1 that squarely facing them, where they had -- where
2 they -- and they did? Did they have that issue that --

3 MR. PHILLIPS: Well, I mean, they had the
4 facts in this case where the -- where if -- if you -- if
5 you accept, obviously, the plaintiffs' version of it,
6 there -- there was a fair amount of information --

7 JUSTICE BREYER: And your other point. You
8 were just about to make a second point. Do -- do you
9 remember? See, for one thing it's easy -- it was a good
10 point, too.

11 (Laughter.)

12 MR. PHILLIPS: I always -- I always
13 appreciate it when you anticipate I'm going to make a
14 good point before I make the good point, but --

15 JUSTICE SOTOMAYOR: Mr. Phillips, I -- I --
16 there's a whole lot of worry articulated by
17 Justice Breyer and reflected in your briefs about
18 protecting innovation.

19 MR. PHILLIPS: Yes, Your Honor.

20 JUSTICE SOTOMAYOR: But there's not a whole
21 lot of worry about protecting the patent owner. I can't
22 forget that historically enhanced damages were
23 automatic, and they were automatic because of a policy
24 judgment that owning a patent entitled you to not have
25 people infringe willfully or not willfully. And I

1 accept that at some point there was a different judgment
2 made that -- that good-faith infringers should be
3 treated differently than other infringers, willful
4 infringers.

5 But I don't know that that swung things so
6 far the other way that it can only be that, if you come
7 up with something, any defense whatsoever in the
8 litigation that's not frivolous, that that gets you out
9 of enhanced damages.

10 MR. PHILLIPS: But let me just say --

11 JUSTICE SOTOMAYOR: If I'm there --

12 MR. PHILLIPS: -- I think that -- but I
13 guess --

14 JUSTICE SOTOMAYOR: If I'm there --

15 MR. PHILLIPS: Right.

16 JUSTICE SOTOMAYOR: -- and I don't think
17 that the Seagate test is -- is -- is appropriate but I
18 am still in the balance of how do we get --

19 MR. PHILLIPS: Right.

20 JUSTICE SOTOMAYOR: -- a similar protection
21 without an artificial test that I don't think is
22 right --

23 MR. PHILLIPS: Right.

24 JUSTICE SOTOMAYOR: -- where -- where do I
25 go?

1 MR. PHILLIPS: Well, let -- let me at least
2 correct one portion of the statement because you said
3 that -- enough to put forward that it's not frivolous.
4 I -- I don't think that's the appropriate standard.

5 Objective reasonableness is the requirement
6 that the Federal Circuit has looked at, and I think
7 that's more than simply the ability to satisfy Rule 11.
8 I think there has to be a substantial defense. And
9 substantial defenses were put forward in both of these
10 cases. Indeed these were, in both instances, close
11 cases. So I would hope that that's where the Court
12 would -- would focus its attention.

13 JUSTICE SOTOMAYOR: Well, the different
14 court called it differently in the second case.

15 MR. PHILLIPS: Right. But again, I think
16 it's important to look at the -- the way the court of
17 appeals analyzed it. And the reality is I think if
18 you -- and it's the reason why you have to have an
19 experienced, an expert court of appeals looking at these
20 issues on an objective -- on the -- on the basis of an
21 objective analysis because they are the ones who have
22 seen these kinds of claim-construction issues, have seen
23 these kinds of infringement issues. They're in the best
24 position to be able to say, this is objectively
25 reasonable and, therefore, not something on which

1 enhanced damages should be added.

2 What I think it's important to put in
3 context, because you're going through the history of
4 this, is to -- is, again, to look at the difference
5 between Section 284 as it evolved and the -- and the
6 meaning of Section 285.

7 I mean, this Court last term said
8 Section 285 has now -- has now -- it's not essential or
9 effective. It has completely made the enhanced damages
10 purely punitive because every other piece of conduct
11 goes into the portion that talks about whether you get
12 the attorneys' fees.

13 CHIEF JUSTICE ROBERTS: Well, you are --

14 MR. PHILLIPS: That's what makes an
15 extraordinary case.

16 Yes, Your Honor. I'm sorry.

17 CHIEF JUSTICE ROBERTS: We are, after all,
18 dealing with statutory language. And I'm not sure it's
19 been quoted yet. It says, "The Court may increase the
20 damages up to three times the amount found or assessed."
21 Period.

22 MR. PHILLIPS: Right.

23 CHIEF JUSTICE ROBERTS: And yet the Federal
24 Circuit standard, you've got -- you know, you've got
25 heightened burdens of proof, particularly articulated.

1 I mean, the way we -- the -- courts have been used to
2 dealing with discretionary standards for a long time.
3 And the way it works is, historically, you know, the
4 exercise of discretion in a lot of cases that, you know,
5 wears a channel which kind of confines the exercise of
6 discretion. And I think the other side's argument is
7 based on that history.

8 MR. PHILLIPS: Right. And --

9 CHIEF JUSTICE ROBERTS: Over time, this is
10 what discretion has -- has given us in this area, and
11 therefore, you get beyond that, it's an abuse. But to
12 erect this fairly elaborate standard on the basis of
13 that language I think is surprising.

14 MR. PHILLIPS: I -- I -- I understand that,
15 and that's why I think you have to take it one step at a
16 time.

17 First of all, you -- you quoted one portion
18 of the language of -- of 284. The portion that I focus
19 on particularly is the -- you begin with damages
20 adequate to compensate for the infringement. So the --
21 284 is now -- and, you know, since 1952, has been
22 focused exclusively on the infringement. It's not any
23 other kind of ancillary conduct. It's only enhanced
24 damages for the infringement because those are the
25 only -- you know, that -- those damages are one and the

1 same.

2 Then you get to the point where Seagate
3 says, if we don't have a strong enough standard of
4 recklessness and willfulness and an objective standard
5 that can be examined by us independently, the downside
6 risks and the harm to the economy is -- is very
7 substantial. There have been -- there are huge numbers
8 of these letters being sent, litigation. It skews every
9 aspect of it.

10 And then Congress comes back in the America
11 Invents Act, and through the process leading up to the
12 America Invents Act, Seagate comes into being, and --
13 and the -- and the Federal Circuit takes a very hard
14 look at it.

15 Congress looks at that and says, we're not
16 going to change Section 284 because, in light of
17 Seagate, that willfulness standard, which is the
18 standard the Court was very explicit about, that helped
19 solve the problem that all of us had been concerned
20 about.

21 The Congress didn't just leave it at -- at
22 where you have to infer this from silence or inaction by
23 Congress. Congress passed the Section 298. And in
24 Section 298 it talks about opinions of counsel and what
25 role they play in the willfulness determination.

1 It seems to me, in order to give Section 298
2 any significant meaning, you have to have concluded,
3 then, that 284 necessarily incorporates a standard of
4 willfulness even though, obviously, it's not in the
5 language, but that's --

6 JUSTICE KAGAN: But I don't know how far
7 that gets you, Mr. Phillips, because Mr. Martinez just
8 told us that he'd be happy to call willfulness his test.

9 And willfulness has meant different things
10 to different people here.

11 MR. PHILLIPS: Yes.

12 JUSTICE KAGAN: And there's nothing that
13 Congress did that suggests that, when it used that word
14 "willfulness," it really meant the Seagate test.

15 MR. PHILLIPS: Well, the only test in front
16 of it at the point -- at that point in time was Seagate
17 because Seagate was the definition of what 284 was about
18 and what the standard of willfulness was about.

19 But I think what's equally important,
20 Justice Kagan, is -- I'll -- I'll concede that
21 willfulness can have a lot of different meanings, but
22 the meaning that the Seagate court adopted was the --
23 was the meaning this Court adopted in Safeco. And it's
24 interesting because my friends did not -- didn't say the
25 word "Safeco" at all in their 25 minutes of

1 presentation.

2 But -- and this is why it's not such a big
3 jump, Mr. Chief Justice, because what -- what Seagate
4 said is what's -- what's the best source for trying to
5 come up with a sensible way of applying willfulness?
6 And -- and they looked at Safeco, and they said, you
7 know, the -- the best way to do it is with a
8 recklessness standard. That's an objective
9 determination. And the fact that there may be
10 subjective, bad -- bad intent is off the table. I mean,
11 that's footnote 20 of the Safeco opinion, and the Court
12 said --

13 JUSTICE GINSBURG: Can we -- can we --

14 MR. PHILLIPS: -- that's the best way to
15 enforce this statute.

16 JUSTICE GINSBURG: Can we at least peel off
17 the clear and convincing evidence that seems to come out
18 of nowhere and the -- the -- the standard is de novo
19 review rather than abuse of discretion?

20 MR. PHILLIPS: I would -- I would
21 desperately ask you not to take out de novo review
22 because it -- we're talking about an objective standard;
23 it's really almost -- it's essentially a question of
24 law. The issue is, is there an objectively reasonable
25 basis for what's been done here? I don't believe that's

1 a -- that's a --

2 JUSTICE GINSBURG: But --

3 MR. PHILLIPS: -- standard that you can
4 deferentially --

5 JUSTICE GINSBURG: -- how about clear and
6 convincing evidence? You've been --

7 MR. PHILLIPS: Well, the -- the clear and
8 convincing standard, I don't think is -- is -- is
9 particularly relevant to the -- how this case got
10 decided. Because at the end of the day, it's not
11 because it was clear and convincing. At the end of the
12 day, it was because there was objectively reasonable
13 defenses that were put forward in both of these cases.

14 In a proper case, obviously you -- you'd
15 have to fight that fight. The only thing I can say --
16 well, that's not the only thing. There's two things you
17 can say in defense of clear and convincing. First, it
18 was in existence in 1985. Congress passed The America
19 Invents Act, didn't modify it, and so may have, in that
20 sense, either acquiesced or ratified it under those
21 circumstances.

22 And second, we're talking about punitive
23 damages. And therefore, under normal circumstances,
24 it's certainly not a matter of indifference when you're
25 talking about allowing a plaintiff to go forward and --

1 and just skew completely the entire litigation process
2 as a consequence of having access to treble damages. In
3 that context, some heightened standard might make sense.
4 In this context, it's hard for me to get excited about
5 it one way or the other, because these are not really
6 factual questions. If you were in a subjective intent
7 standard, that would be a different issue.

8 In the context of objective --

9 JUSTICE GINSBURG: But you can't have abuse
10 of discretion.

11 MR. PHILLIPS: I'm sorry?

12 JUSTICE GINSBURG: You -- you care about
13 de novo review in the Federal Circuit rather than
14 testing the district court's determination for abuse of
15 discretion.

16 MR. PHILLIPS: Yes, Justice Ginsburg. I
17 think it is critical -- there are two elements of this
18 that are absolutely critical. And I suppose, in some
19 ways, it goes to the question you asked,
20 Justice Sotomayor. What are you -- what are the
21 absolute critical elements that you need to take out of
22 Seagate to apply in these cases? And candidly, both
23 would lead you to affirm in both instances on the facts
24 of these cases.

25 One, you need to have an objective

1 assessment of whether or not there is a reasonably
2 objective set of circumstances that allow the defendant
3 to say this -- either these patents are invalid, or we
4 do not infringe those patents.

5 And two, you have to have that reviewed
6 nondeferentially by the Federal Circuit in order to
7 ensure that the 500 or 400 -- I forget how many district
8 court judges there are -- do not sort of go off on a
9 tangent and -- and that we get the consistent review by
10 the objective and expert body that the Federal Circuit
11 is.

12 JUSTICE ALITO: The recklessness decision
13 here seems different from those that generally come up.
14 But maybe you can provide an example where this occurs
15 outside of this context.

16 Usually, to determine whether someone was
17 reckless, you have to assess the -- the nature of the
18 risk, the severity of the risk. And in the typical tort
19 case, the severity of the risk may seem greater at the
20 time of trial than it did at the time of the
21 tortfeasor's action, because someone has been harmed.
22 But in this situation, the -- the degree of the risk
23 seems smaller at the time of the determination of
24 enhanced damages than it may have been at the time of --
25 of the infringement. And I can't think of another --

1 because it's a legal risk. And the first determination
2 may not have been made with the assistance or very
3 intense analysis by attorneys, and then the latter time,
4 the attorneys are very much involved.

5 Is there any other situation where a
6 recklessness determination has those characteristics?

7 MR. PHILLIPS: Well, I think -- I think the
8 copyright would probably be the other one that sort of
9 attends to it in the same way, because it's essentially
10 the same kind of an inquiry. I mean, part of the
11 problem is it's the nature of the continuing tort
12 action, and it's also the fact that the infringement
13 determination is -- is a matter of strict liability.
14 So -- but, you know, there are a thousand obviously
15 different ways of -- different situations that can
16 arise.

17 But, you know, if you're in a situation
18 where you've -- you've come out with a product, you
19 think it's a perfectly good product. You may or may not
20 have been looking at patents. You didn't see anything
21 that creates a problem for it. You -- you put the --
22 you put it in the market. Two, three years later
23 somebody sends you a letter. And then -- and the letter
24 is not very specific. Maybe -- and then -- so you say,
25 I don't -- I don't see anything here. I don't envision

1 a problem. You keep going forward. You get -- and then
2 you get a very specific letter. And you look at that,
3 and you say, well, gee, okay. I see that.

4 I mean, part of the problem with the notion
5 of looking at these things and saying we're not going to
6 have a post hoc analysis is it's almost impossible to
7 define post hoc from win.

8 JUSTICE BREYER: How does it work in tort
9 law?

10 MR. PHILLIPS: Well, in tort law --

11 JUSTICE BREYER: I mean, you can imagine
12 situations where when the actor takes a risk, it looks
13 tremendously great. But by the time trial is over, it
14 was pretty small. It happened, but, you know, the
15 eggshell skull. He thought almost certainly he had one.
16 And he did, but the chances of his having one were a
17 million to one against it. Punitives, how does the
18 reckless -- do you have any idea?

19 MR. PHILLIPS: Well, you take -- I mean,
20 obviously, you take the -- the plaintiff as you --

21 JUSTICE BREYER: Yeah. But it turns out as
22 you found it, it wasn't very bad. And what you thought
23 you were going to find, then, was just terrible. This
24 must come up.

25 MR. PHILLIPS: Right, but I -- my guess is

1 in those circumstances, Justice Breyer, there aren't
2 punitive damages.

3 JUSTICE BREYER: There are?

4 MR. PHILLIPS: There are not, because --

5 JUSTICE BREYER: There are not.

6 MR. PHILLIPS: -- normally act reasonably
7 on --

8 JUSTICE BREYER: Well, then we would have
9 a -- an analogy on your side, because the other way, it
10 would be an analogy on the other side.

11 MR. PHILLIPS: Well, let my friend on the
12 other side come forward with tort cases in which the
13 eggshell plaintiff gets punitive damages because the
14 defendant overreacted.

15 JUSTICE KENNEDY: Is there any way to allow
16 some consideration for a subjective intent to infringe
17 in an egregious case, as an additional element for -- as
18 an additional way to define willfulness without
19 completely wrecking the Seagate standard?

20 MR. PHILLIPS: I -- I think if you -- if you
21 are in a situation where you're past recklessness, that
22 is, there is no defense, there's no objective, they have
23 no -- you know, this is a true pirate. No objectively
24 reasonable argument. They -- they saw the product; they
25 built it. Maybe they don't operate within the United

1 States. They just sell here. They operate outside the
2 United States, think they'll never get caught, et
3 cetera. And in those circumstances, they don't have a
4 defense. And then you also can prove that they acted
5 with absolute intent and knowledge of the patent, et
6 cetera, you know, then the question -- would you take
7 that to the -- to the max, to three times? Because
8 that's where the discretion lies in this report.

9 JUSTICE KAGAN: No. But take a case
10 where -- take a case where there's somebody who
11 absolutely wants to copy a product. He says,
12 Mr. Jones --

13 MR. PHILLIPS: Copy a product or copy a
14 patent?

15 JUSTICE KAGAN: A patented product.

16 MR. PHILLIPS: Okay.

17 JUSTICE KAGAN: All right? So same thing,
18 let's call it.

19 Mr. Jones sells a product that involves a
20 patent, and it's selling very well. And Mr. Smith comes
21 along and says I want to copy that patent and that
22 product and sell the same thing so that I can reap those
23 profits too, and -- and does that.

24 Now, the Seagate's test says that as long as
25 his lawyer can come along at the end and raise some kind

1 of doubt about the patent's validity, the fact that -- I
2 forget whether it was Mr. Smith or Mr. Jones -- but the
3 fact that --

4 MR. PHILLIPS: Well, one of them.

5 (Laughter.)

6 JUSTICE KAGAN: The fact that he went and
7 said I am going to copy this patent so that I can reap
8 the benefits of some other person's work, that doesn't
9 make a difference. And that's, I think, the question
10 that Justice Kennedy was asking. It seems to stick in
11 the craw a bit.

12 MR. PHILLIPS: Right. Well, one answer to
13 Justice Kennedy is there is a role for that kind of
14 subjective bad faith, but it's only after you make the
15 determination that --

16 JUSTICE KAGAN: Right. But that's not
17 enough. Because, you know, if I'm Mr. Jones and I'm
18 saying is it worth my while to go copy this patent, and
19 I think, you know what? A lot of patents are not valid.
20 I'll take this risk. I will -- I will make a lot of
21 money selling this patented product, and if somebody
22 calls me on it, I'll go hire myself a lawyer, and that
23 lawyer will come up with some kind of argument about why
24 the patent is not valid after all.

25 MR. PHILLIPS: Okay.

1 JUSTICE KAGAN: That seems like it's a
2 bad -- that seems like a bad incentive.

3 MR. PHILLIPS: Right. Justice Kagan, the --
4 two basic points I would make to that. First of all,
5 the -- I don't remember if it's Mr. Jones or Mr. Smith,
6 but the bad actor, we'll call it -- the bad actor in
7 that circumstance obviously has to pay the full
8 compensation for the infringement, which is in some
9 instances, tens of millions of dollars, will almost
10 certainly be subject to attorneys' fees under
11 Section 285. So it's not as though you're getting a
12 pass under that -- in that situation.

13 Now, I understand the desire to -- to have
14 enhanced damages against that particular bad actor.
15 That's why I say in a lot of ways, this case comes down
16 to what do you worry about more, pirates or trolls? My
17 assessment of this, and I think it's borne out by the
18 way the Federal Circuit has looked at this problem, is
19 that there are not that -- there are not very many
20 pirates out there. And if you keep a rule that is
21 designed simply to get the one in a million pirates -- I
22 would call them unicorns -- but one in a million
23 pirates, you'd end up with a rule that will allow the
24 trolls to go after every legitimate producer of products
25 and services in this country. And that's the price

1 you'd have to pay to get at the -- at the really bad
2 actor.

3 JUSTICE BREYER: See, the question -- I know
4 this is not exactly a question that we've seen in your
5 briefs, but we see countering in your brief, is there
6 was a company. And the company made, I think, cotton
7 goods. And an individual thought that he could make a
8 lot of money by taking those cotton goods and the
9 machinery that they were used and selling it all over
10 the United States. And so he did it. I think it was
11 Alexander Hamilton.

12 (Laughter.)

13 JUSTICE BREYER: I'm not sure. And as a
14 result, New England grew rich.

15 Now, supposed he'd gotten a letter one day
16 that said, we have a patent. We have a patent. And it
17 would have cost him \$10 million to look into it, and he
18 didn't have all the money so he thought he'd run his
19 changes. Suddenly I'm not so sure which way the
20 equities would work out. That's your point. Both of
21 you have a point.

22 MR. PHILLIPS: Right.

23 JUSTICE BREYER: And that's why I'm looking
24 for is there some way we can get the real worst ones
25 without destroying what you don't want to have destroyed

1 and yet, where he's really worried about the real worst
2 ones?

3 MR. PHILLIPS: And I think the answer, at
4 the end of the day, is Congress made the choice, I
5 think --

6 JUSTICE BREYER: They just used the word
7 "willful." I'm not --

8 MR. PHILLIPS: No, no. But it did it
9 against the backdrop of the -- of the Seagate standard.
10 Because Seagate clearly made a judgment that as between
11 a raft of claims by nonpracticing entities arising out
12 of a raft of letters and everything that goes with that,
13 between that and the risk of a true pirate out there,
14 that Congress -- that it thought the better answer
15 clearly was that we should -- we should protect and --
16 and limit the -- the scope of the patents and make sure
17 that they are being properly challenged in a --

18 CHIEF JUSTICE ROBERTS: But the -- the --
19 the choice is reflected in the statute, which leaves a
20 lot of discretion to the district courts. And a lot of
21 the arguments we've heard today are the sort of
22 arguments that can be made to the district court's
23 discretion in a particular case. Saying, you know,
24 this -- this is one of those pirates or, you know,
25 trolls, and it is a serious one or it's less serious

1 one. And you have these standards to apply, and -- and
2 the district court will exercise the discretion.

3 And if it's out of the channel of
4 discretion, then the Court can review it on that basis.

5 MR. PHILLIPS: Mr. Chief Justice, I think
6 the problem with that is -- is that it -- unless you
7 come up with -- I mean, I -- you know, recklessness --
8 I -- or egregiousness -- I don't know what
9 "egregiousness" means, and I don't know how you -- how
10 you evaluate that on review.

11 I do know what it means to -- to take an
12 objectively reasonable position. More than simply
13 something that's beyond frivolous, it is a substantial
14 argument that either the patent doesn't extend to -- to
15 my particular product or the patent itself is invalid.
16 And circumstances where -- where that is true, my hope
17 would be that the Court, recognizing the extraordinary
18 importance of limiting patents and the monopolies that
19 flow from there, would drive the legal decision in this
20 context -- of the legal standard in this context exactly
21 where the -- where the Court adopted it in Seagate.

22 That's the court that has the experience and
23 expertise, and I would hope under these circumstances,
24 in this very unusual situation, because patent law in
25 this context I do think is very different than almost

1 any other tort context, I would hope in the one -- in
2 the -- in the decidedly one-sided approach that 284 is,
3 where it only gives to the plaintiffs the ability to do
4 what they can do and what they want, that the Court
5 would adopt the kind of rigorous objective standard that
6 allows both for the -- both for the determination that
7 the -- that the patent is invalid or doesn't infringe,
8 and that that's examined on an objective basis.

9 If there are no further questions, Your
10 Honors, I urge the Court to affirm.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 Mr. Phillips.

13 Mr. Wall, you have four minutes remaining.

14 REBUTTAL ARGUMENT OF JEFFREY B. WALL

15 ON BEHALF OF THE PETITIONERS

16 MR. WALL: Mr. Chief Justice, I have two
17 fairly simple points.

18 The first is, as we and the PTO and many of
19 Respondents' amici recognize, the system as it currently
20 stands is out of balance. And we have tried, and I
21 believe we have succeeded, in crafting an approach that
22 balances the Court's concerns with the need to respect
23 the rights of patentees, including small companies like
24 Halo.

25 And we've done it in a couple of different

1 ways.

2 Reasonable, good-faith efforts to -- to
3 challenge patents are not going to result in enhanced
4 damages. And intent and recklessness are not going to
5 be and should not be easy to show.

6 Now, the Federal Circuit hasn't adopted a
7 contrary approach based on its expertise. It thought it
8 had to in light of this Court's decision in *Safeco*,
9 which it has misread. *Safeco* says if you adopt a
10 reasonable view of the law at the time, you're not
11 acting willfully. It doesn't say if you subjectively
12 and correctly believe that you are violating the law,
13 you are held not to be willful because you have hired a
14 good lawyer and come up with a defense later.

15 And that approach is what has skewed the
16 incentives in the patent system and taken us out of
17 balance.

18 Our approach incentivizes good, commercially
19 reasonable behavior under the full set of circumstances
20 at the discretion of the district court. Their approach
21 is incentivizing good litigation.

22 And the second point I just want to make
23 quickly is we do have the evidentiary burden and
24 standard of review in this case. I think it's clear
25 that the -- there isn't any basis for the clear and

1 convincing standard. On the standard of review, I think
2 Highmark resolves and I think Pierce v. Underwood
3 resolves it.

4 These are determinations bound up with the
5 facts, and just as the Court said in Pierce, whether a
6 litigating position is substantially justified is a
7 mixed question of fact and law. So too the questions
8 here. These should be reviewed for abuse of discretion,
9 and it's very important for the Court to say that.

10 Halo should go back to the district court
11 and be analyzed under the right standard so the
12 evidentiary burden matters.

13 In Stryker the district court actually got
14 to the discretionary way, did it, and on appeal, Zimmer
15 never challenged that as an abuse of discretion. It
16 just argued about the objective prong.

17 When this Court takes that out of the
18 analysis, as it should, there's no basis to disturb the
19 district court's discretionary ruling. As the Court
20 knows from looking at it, it's a thorough and reasonable
21 opinion. So --

22 JUSTICE ALITO: One point Mr. Phillips
23 brought up that you didn't address in your initial
24 argument, maybe you could say a word about it, is
25 Section 298 of the American -- America Invents Act.

1 Under your -- under your reading, could
2 evidence of the failure to obtain or introduce advice of
3 counsel be used to prove that the defendant infringed in
4 bad faith?

5 MR. WALL: No. The patentee cannot put that
6 at issue affirmatively. All 298 does is it dealt with
7 a -- that very narrow problem. And when the patentee
8 comes in and wants to show intent or recklessness, it
9 can point to your copying of the patent. It can point
10 to the fact that it gave you really extensive, very
11 detailed notice. It tried to license with you. You
12 didn't do anything. It cannot put at issue whether you
13 talked to counsel.

14 Now, the defendant maybe --

15 JUSTICE ALITO: How do you get to that point
16 under the language of 298?

17 MR. WALL: Because 298 just says when you're
18 proving of willfulness, whether it's a factor as it is
19 in our approach, whether it's the end-all, be-all as it
20 is in their approach, whenever the patentee is trying to
21 prove that up, you can't affirmatively put that at
22 issue.

23 And as Pulse candidly, and I think honestly,
24 concedes in its brief, you can read 298 to have effect
25 on either side's view of the -- how you ought to treat

1 the enhancement statute. So I don't think 298 cuts
2 either way.

3 And I would just stress for the Court that
4 Congress at the time looked at putting "willfully" in
5 the statute, and it looked at putting something
6 virtually identical to Seagate in the statute. It
7 didn't do either one, so I don't think it can be taken
8 to have ratified the Federal Circuit's current approach.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.

10 The case is submitted.

11 (Whereupon, at 11:59 a.m., the case in the
12 above-entitled matter was submitted.)

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