

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 HIGHMARK INC., :

4 Petitioner, : No. 12-1163

5 v. :

6 ALLCARE HEALTH MANAGEMENT :

7 SYSTEMS, INC. :

8 - - - - - x

9 Washington, D.C.

10 Wednesday, February 26, 2014

11

12 The above-entitled matter came on for oral  
13 argument before the Supreme Court of the United States  
14 at 11:10 a.m.

15 APPEARANCES:

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17 Petitioner.

18 BRIAN H. FLETCHER, ESQ., Assistant to the Solicitor  
19 General, Department of Justice, Washington, D.C.;  
20 for United States, as amicus curiae, supporting  
21 Petitioner.

22 DONALD R. DUNNER, ESQ., Washington, D.C.; on behalf of  
23 Respondent.

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1 P R O C E E D I N G S

2 (11:10 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 next in Case 12-1163, Highmark v. Allcare Health  
5 Management Systems.

6 Mr. Katyal.

7 ORAL ARGUMENT OF NEAL K. KATYAL

8 ON BEHALF OF THE PETITIONER

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

11 The Federal Circuit applied a de novo  
12 without-deference standard to objective baselessness in  
13 Section 285 cases. That was wrong for three reasons.

14 First, this Court has already held that a  
15 unitary abuse-of-discretion standard should be applied  
16 in closely analogous cases in the Pierce and Cooter  
17 cases. Those cases, like this one, were ancillary  
18 appeals over attorneys' fees concerning the supervision  
19 of litigation, which is precisely what Section 285  
20 addresses.

21 Second, the text of the Act, and in  
22 particular its key words, "may" and "exceptional  
23 cases," imbued district courts with discretion. Indeed,  
24 up until this case, that was the way the Act applied for  
25 60 years.

1           And, third, the other factors this Court has  
2 looked to, such as a lack of law clarifying benefits,  
3 the positioning of the decision-maker, efficiency in  
4 avoiding distortion, cut in favor of unitary  
5 abuse-of-discretion review.

6           For those reasons, the case for such review  
7 even stronger here than it was in *Pierce* and *Cooter*. In  
8 *Pierce* and *Cooter*, this Court looked to -- for -- in  
9 *Pierce*, for example, this Court looked to EAJA and  
10 determined that, even though the text of the statute  
11 didn't compel a result, nonetheless, unitary  
12 abuse of discretion review was the appropriate standard.

13           And here --

14           CHIEF JUSTICE ROBERTS:           How -- how does  
15 abuse of discretion work with respect to a pure legal  
16 question?

17           MR. KATYAL:           I think this Court answered  
18 that both in *Pierce* and *Cooter*. It said if it's a truly  
19 pure legal question, then it is a -- that it is a --  
20 that -- that there isn't deference given to that in that  
21 circumstance.

22           Now, here the question presented is  
23 objective baselessness. And in the context of  
24 Section 285 determinations, that kind of retrospective  
25 look -- was the attorney acting reasonably or not --

1 Pierce and Cooter both say that's something that is  
2 always context-dependent. It always depends on the  
3 facts.

4 JUSTICE KAGAN: Well, would you explain that  
5 to me a little bit, Mr. Katyal. In a case in which the  
6 district court just uses an erroneous claim  
7 construction, you would concede that that's a pure legal  
8 question, so that would be an abuse of discretion?

9 MR. KATYAL: We would not, Your Honor. So  
10 certainly on the merits, if the question of claim  
11 construction went up to the Federal Circuit -- as it did  
12 here, for example, in 2009 -- the question there would  
13 be there would be no deference under the Federal  
14 Circuit's precedent in a -- most recently, Friday in the  
15 Lighting Ballast case.

16 But when the question is a 285 question, the  
17 retrospective look at objective baselessness of which  
18 claim construction forms a part --

19 JUSTICE KAGAN: No, but I -- I guess my  
20 first question was just if what -- if the district court  
21 says, Here's the appropriate claim construction, and  
22 in saying that, it's wrong.

23 MR. KATYAL: Yes.

24 JUSTICE KAGAN: Is that a legal question?

25 MR. KATYAL: As it goes up to the Federal

1 Circuit under existing precedent, they treat that as a  
2 legal question. We think this Court's decision in  
3 Markman suggests otherwise. It said it was a mixed  
4 question, a mongrel question of law and fact. And so  
5 when -- if the Court were ever to get into that ultimate  
6 question on the merits, we think that -- that the  
7 Markman analysis would control.

8 But here the question is a 285 question.

9 JUSTICE KAGAN: Okay. So let's just assume  
10 for a moment that an erroneous claim construction would  
11 be a mistake of law. Let's just assume that. And I  
12 understand you say that there's a question.

13 But if that's right, why is it not also true  
14 that a judge's statement that a litigant -- that a  
15 litigant's claim construction was unreasonable is not a  
16 similar mistake of law?

17 MR. KATYAL: For -- for exactly the reason  
18 that I think Pierce says, which is the question in a  
19 retrospective attorneys' fees case is not what the -- is  
20 not what was the law; it's rather, was the position that  
21 the party took reasonable.

22 And so, for example, in Pierce the question  
23 was under a certain statute, EAJA, do the words "shall"  
24 and "authorized" -- do they mean mandatory? And Justice  
25 White in dissent said that's a pure legal question.

1 That's something courts of appeals deal with all the  
2 time, district courts don't deal with it; we should give  
3 no deference to that. And Justice Scalia's opinion for  
4 the Court said, No, even there, that is something we're  
5 looking at that legal claim as situated within the  
6 particular contours of the case overall in deciding was  
7 that a reasonable argument or not.

8 JUSTICE KAGAN: But isn't the main thing the  
9 judge doing when it says that a claim construction is  
10 unreasonable is essentially measuring the delta between  
11 the actual -- the correct claim construction and the  
12 mistaken claim construction? And doesn't that seem to  
13 be, again, assuming that the claim construction itself  
14 is a question of law? Doesn't that itself seem to be a  
15 question of law?

16 MR. KATYAL: We agree that's one of the  
17 things the judge is doing there, but it's not the only  
18 thing. Just as in *Pierce*, certainly the Court was  
19 interpreting the meaning of the statute, but they were  
20 doing it within the context of litigation. This case I  
21 think is a helpful example and -- to remove it from the  
22 abstract and just bring it down to here.

23 You've heard and you've read the brief on  
24 the other side saying this is a claim construction  
25 dispute. It's not a claim construction dispute. What

1 the district court found seven different times when it  
2 imposed fees is that this is actually a dispute about  
3 infringement and their inability to come up with any  
4 theory whatsoever for why -- why there was a  
5 infringement violation.

6 And what I think the logic of Pierce and  
7 Cooter is, is that if you give clever appellate lawyers  
8 like my friend the ability to go to the -- to go to a  
9 court of appeals and repackage what were essentially  
10 factual claims and claim they're legal -- here, claim  
11 construction -- then you're going to -- you're going to  
12 waste an enormous time of -- time and resources of the  
13 Federal Circuit as they seek to disaggregate, is this  
14 really, truly factual or is this really legal.

15 And you wouldn't want to have that, I think,  
16 for the reasons that this Court has said repeatedly,  
17 which is the whole goal in attorney fees cases is to  
18 avoid a second major litigation. And that's precisely  
19 what the Federal Circuit did here. It minted a whole  
20 new theory under this de novo without-deference  
21 standard. And that's the harm. That's the evil that I  
22 think all of the attorney fees cases are trying to  
23 address.

24 I'd also say that, you know, even if --  
25 beyond Pierce, beyond Pierce, we do think this is

1 essentially Pierce-plus; that this is a case in which  
2 the text of the statute and its key words, "may in  
3 exceptional cases," give the Court, I think, further  
4 reason to return the standard to the way it has always  
5 been interpreted for 60 years.

6           And for 60 years:           From 1946 to 1952,  
7 Abuse of discretion deferential review was used in  
8 objective baselessness cases; in 1952, the -- the  
9 Congress codified, essentially, those -- that  
10 interpretation; from 1952 to 1982, the regional circuits  
11 used it, like the D.C. Circuit in the Oetiker case;  
12 after 1982, the Federal Circuit used it time and again  
13 in cases such as Eon-Net.

14           It's this case that really is a dramatic  
15 departure from the way Section 285 has been interpreted,  
16 and indeed the way all attorney fee litigation has been  
17 interpreted.

18           JUSTICE SOTOMAYOR:           If we undo --

19           JUSTICE GINSBURG:           On your reading,  
20 Mr. Katyal, I take it that if the district court denies  
21 fees, there would be slim to no chance of getting that  
22 overturned on appeal if you're dealing with the abuse  
23 of -- abuse of discretion.

24           MR. KATYAL:           We think that it is hard in  
25 that circumstance, and that's the one-way ratchet. We

1 don't place a lot of emphasis on that in our brief.  
2 It's our last argument. But we do think, essentially,  
3 it is hard to overturn a district court's decision not  
4 to award fees, whereas under the Federal Circuit's  
5 interpretation, it's really quite easy for the Federal  
6 Circuit to mint some new theory as to why the position  
7 was reasonable that -- that the attorney took.

8 And, Justice Breyer, you said in the last  
9 argument, you said clever patent attorneys can always  
10 come up with a colorable argument, and you were  
11 referring at the district court stage --

12 JUSTICE GINSBURG: But if you leave it to the  
13 district court that way and the district court denies  
14 fees, isn't there a -- a risk of large disparities from  
15 district judge to district judge. One will say, yes, I  
16 think that this was uncommon, not run of the mine, so  
17 I'm going to award fees, and another one of them will  
18 say, no, I think it's pretty standard, so I won't award  
19 fees.

20 MR. KATYAL: We do think implicit in an  
21 abuse of discretion standard or Congress committing this  
22 to district court discretion will be some variation. We  
23 think this Court answered that problem in Koon, I think  
24 most particularly, in a case where the stakes were --  
25 you know, not to belittle this case -- but the stakes

1 were even higher there, criminal sentencing.

2 And what the Court said is, yes, there will  
3 be some disuniformity, but district court judges are  
4 better able to determine the mine-run case than will the  
5 court of appeals because they're able to assess the  
6 entirety of the litigation, rather than -- than one  
7 piece of it.

8 JUSTICE SOTOMAYOR: Mr. Katyal, if we were  
9 to overrule the Brooks Furniture standard -- you've just  
10 heard the argument where that issue is being presented  
11 to us in Octane. If we were to do that, how would that  
12 affect this case? Wouldn't it essentially moot the  
13 question because you wouldn't have this objective  
14 reasonableness test controlling the outcome?

15 MR. KATYAL: Well, it would certainly depend  
16 on how -- on how you did it, but our brief at pages 34  
17 to 37 say that if you adopt any variant of the  
18 petitioner's theory in Octane, the case here only gets  
19 stronger.

20 You have to, I think, ultimately reverse  
21 what the Federal Circuit said at page 9a of the petition  
22 appendix, which is objective baselessness must be  
23 determined de novo. We think that that's wrong for all  
24 the reasons we've been talking about. And even were you  
25 to change the standard in Octane, so long as objective

1 baselessness formed any part of the Section 285  
2 inquiry --

3 JUSTICE SOTOMAYOR: So when does that become  
4 a pure question of law?

5 MR. KATYAL: We think it never becomes a  
6 pure question of law. There -- there are -- we don't  
7 doubt that -- to answer the Chief Justice's question  
8 from before -- we don't doubt that there are some  
9 circumstances in which there are pure questions of law  
10 in Section 285 cases. For example, what does the Patent  
11 Act -- the Patent Clause in the Constitution mean, or  
12 what does a particular statute mean?

13 But when you're dealing with, for example,  
14 claim construction, that looks very much like the EAJA  
15 question that the Court was dealing with in Justice  
16 Scalia's opinion in *Pierce*. It's a retrospective  
17 collateral question about how reasonable was this  
18 argument at this particular time, in this particular  
19 case, with these particular parties, with this  
20 particular patent.

21 And what Justice Scalia's opinion in *Pierce*  
22 says is that's not the type of question that we should  
23 be spending a lot of court of appeals' resources on.  
24 That's something that is dealt with on the merits, as it  
25 was here. The Federal Circuit dealt with the question

1 on the merits in 2009 -- but not something that you  
2 should have a second major litigation over.

3 If there are no further questions.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
5 Mr. Fletcher.

6 ORAL ARGUMENT OF BRIAN H. FLETCHER  
7 FOR UNITED STATES, AS AMICUS CURIAE,  
8 SUPPORTING PETITIONER

9 MR. FLETCHER: Mr. Chief Justice, and may it  
10 please the Court:

11 In this morning's first case, you will  
12 decide what principles should guide a district court's  
13 award of attorneys' fees under Section 285. Whatever  
14 standard you choose to adopt in that case, we believe  
15 that a district court's application to the particular  
16 facts of a case before it ought to be reviewed under a  
17 unitary abuse of discretion standard.

18 That approach is consistent with this  
19 Court's repeated statements that decisions about the  
20 supervision of litigation ought to be reviewed under a  
21 deferential standard. And in this particular context,  
22 it's also supported by the text and history of  
23 Section 285, by 60 years of consistent appellate  
24 practice, and by the same sorts of practical  
25 considerations that led this Court to adopt a similar

1 approach to very similar questions in Pierce and in  
2 Cooter & Gell.

3 I'd like to start, if I could, by focusing  
4 on a point that hasn't come up so far in the argument,  
5 which is we've heard a lot about why district courts are  
6 best situated to make the determination in a particular  
7 case that they've lived with, often for years at a time,  
8 of whether or not a particular litigating position is  
9 unreasonable. And we think that's true and a very good  
10 reason to accord deference here.

11 But we think another good reason to accord  
12 deference in this context is that applying de novo  
13 review requires a substantial expenditure of appellate  
14 resources. I think this case is a good example.

15 The Federal Circuit affirmed the district  
16 court's decision on the merits in an unpublished  
17 decision and, in fact, without written opinion. But  
18 when it reviewed the district court's award of fees  
19 under a de novo standard, it was required to engage in a  
20 lengthy analysis that produced a lengthy written  
21 opinion. And we think applying a de novo standard and  
22 requiring appellate courts, and the Federal Circuit in  
23 particular, to engage in that kind of review encourages  
24 collateral appeals and encourages the expenditure of  
25 resources on decisions that don't actually produce the

1 law --

2 JUSTICE ALITO: Well, you can make -- you  
3 can make that argument with respect to every legal issue  
4 that's raised on appeal. Well, if you have to decide  
5 whether the lower court was right, that's a lot of work.  
6 But if all you have to decide is whether the lower court  
7 abused its discretion in deciding if the law means what  
8 the lower court said it means, that's a lot less work.

9 MR. FLETCHER: Well, that --

10 JUSTICE ALITO: So that argument is a  
11 strange argument, unless there's something really  
12 special about the attorneys' fees context. And I guess  
13 that's your argument, there's something really special.

14 But why should it? I mean, you've got a lot  
15 of money involved. Why should we say, this is  
16 collateral litigation, even though it involves millions  
17 of dollars more than the claim in many other types of  
18 cases?

19 MR. FLETCHER: So let me say a couple of  
20 things about that, and one is, I think ordinarily when  
21 an appellate court applies a de novo standard and  
22 determines what the right answer is, that has benefits  
23 not just for the particular litigants before it, but  
24 also in clarifying the law for everyone going forward.

25 But what the Court said in Pierce and in

1 Cooter & Gell and what's also true here is that when the  
2 question that the appellate court is answering is not  
3 what is the law actually, but rather what could a party,  
4 when it initiated this case and continued to litigate it  
5 several years ago, could that party have a -- reasonably  
6 believed the law to be, that doesn't yield the same sort  
7 of law-clarifying benefit. In fact, in Pierce, this  
8 Court said those sorts of determinations are never going  
9 to be made clear under any sort of review standard.

10 JUSTICE ALITO: It can clarify what the  
11 law is. What's the difference between that situation  
12 and, let's say, deciding an issue of qualified immunity  
13 in a civil rights case or applying the -- applying AEDPA  
14 in a habeas case? The court can say this is what the  
15 law is, and then after that, as the second step,  
16 determine whether a particular interpretation of the law  
17 was reasonable. You could do the same thing here.

18 MR. FLETCHER: A court could do that here,  
19 and I suppose the Federal Circuit, if the case came to  
20 it on the -- the question was the District Court -- did  
21 it abuse its discretion or did it get it right in  
22 deciding that the party's position was unreasonable, the  
23 could -- the court -- Federal Circuit could decide the  
24 underlying question itself and then decide whether or  
25 not the district court was correct in concluding that a

1 party's position was reasonable or unreasonable.

2 But we think there's -- there's good reason  
3 not to do that here, and we think that, in these  
4 contexts, unlike in qualified immunity, unlike in AEDPA,  
5 the district court has particular expertise in the case  
6 and a long experience with the case, and -- and that  
7 requiring the Federal Circuit to engage in a thorough  
8 review of the entire record of the litigation and the  
9 entire proceedings of the litigation imposes a burden  
10 that just isn't justified.

11 JUSTICE ALITO: Well, I'm just wondering, if  
12 you put together your two arguments about what the  
13 standard should be and what the standard of review  
14 should be, whether there really is going to be any  
15 meaningful review of what district courts do in this  
16 situation.

17 Maybe you could just describe for me what an  
18 appellate decision would look like, saying that applying  
19 the totality of the circumstances, the district court  
20 abused its discretion in awarding or not awarding fees.  
21 What would an appellate court say.

22 MR. FLETCHER: So I think one thing that an  
23 appellate court might say, as Justice Kagan alluded to  
24 earlier, is that if the district court has based its fee  
25 award on a misunderstanding of the law, if it got the

1 claim construction wrong, if it misinterpreted the  
2 relevant patent statutes, that would obviously be an  
3 abuse of discretion.

4 But I think even if the district court  
5 correctly conceived of the law, abuse of discretion  
6 review still leaves room for an appellate court to say  
7 that, although the district court had a wide range of  
8 options and has flexibility, this particular decision on  
9 these particular facts strays too far from that range.  
10 I think courts of appeals do that in the sentencing  
11 context, they do that in other contexts where they  
12 review district court decisions for abuse of discretion,  
13 and we think that performing that role, which  
14 abuse of discretion review comfortably accommodates,  
15 leaves plenty of room for the Federal Circuit to rein in  
16 any outlier district court decisions.

17 I think another point that's useful to keep  
18 in mind is the extent to which applying a de novo  
19 standard of review encourages collateral appeals. I  
20 think a theme of this Court's decisions about attorneys'  
21 fees has been that a dispute over fees should not give  
22 rise to a second major litigation, and I think applying  
23 a de novo standard encourages that, both in encouraging  
24 parties to take marginal appeals and also in leading to  
25 fights about which parts of the district court's

1 decision are factual, which parts are legal, which  
2 standard of review applies to different parts of a  
3 district court's decision.

4 I think all of those things are -- add to  
5 the burden of the collateral fee litigation in a way  
6 that does -- isn't justified by the benefit that de novo  
7 review provides.

8 The last point that I think I'd like to  
9 leave you with is the notion that I think there --  
10 Justice Alito, earlier you suggested that the Federal  
11 Circuit has expertise in patent law and special  
12 expertise in patent law. And I frankly think that's the  
13 strongest argument that the other side has.

14 But I'd urge you to look at Judge Moore's  
15 dissent from the denial of rehearing en banc in this  
16 case, where she and four of her colleagues on the  
17 Federal Circuit explained that when you're asking  
18 whether or not a party's litigating position was  
19 objectively reasonable, the Federal Circuit's expertise  
20 in patent law actually isn't the relevant expertise.  
21 And she explains at length and she cites a number of  
22 prior Federal Circuit decisions, recognizing as well  
23 that the district court who's lived with the case and  
24 who's decided on the merits and who's seen the parties  
25 and has spent sometimes years with the parties is really

1 in a better position to decide whether or not the  
2 party's litigating position was reasonable.

3 For that reason, if the Court has no further  
4 questions, we'd urge it to vacate the judgment below and  
5 remand the case to the court of appeals, with  
6 instructions to consider the district court's award of  
7 fees under the correct standard.

8 Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.

10 Mr. Dunner.

11 ORAL ARGUMENT OF DONALD R. DUNNER

12 ON BEHALF OF RESPONDENT

13 MR. DUNNER: May it please the Court, and  
14 Mr. Chief Justice -- I've got that reversed. My  
15 apologies.

16 Allcare agrees that Pierce and Cooter are  
17 highly relevant to this case, but we feel that those  
18 cases support Allcare and not Highmark, and let me  
19 explain.

20 The Pierce case starts out by talking about  
21 the -- the traditional rule. The traditional rule is  
22 that legal issues are reviewed de novo. And this  
23 Court's opinion in the Ornelas case reinforces that for  
24 probable cause cases.

25 So the question is why -- why didn't the

1 Federal -- why didn't the Supreme Court apply the  
2 traditional rule in Pierce and in Cooter? And the  
3 answer certainly is not that they were fee cases,  
4 because the Pierce case makes absolutely clear that it  
5 was not enunciating a general rule for fee cases. It  
6 said it couldn't enunciate a general rule.

7 On the other hand, what the -- what the  
8 Court did was, it looked at the specifics involved,  
9 which was the tribunal best qualified or best situated  
10 to decide the issues in the case. And it dealt  
11 specifically with three different points.

12 One, in the Pierce case, the EAJA statute  
13 was involved and the text of that statute had been  
14 changed from 1946 to 1952. It originally used the word  
15 "discretion." It changed it to "exceptional case." My  
16 colleagues on the other side argue that the word "may"  
17 suggests discretion. Well, the word "may" is not  
18 tethered to "exceptional"; it's tethered to award of  
19 fees. And everybody agrees that the district court has  
20 discretion in terms of what fees are -- are awarded.

21 JUSTICE SOTOMAYOR: Even if I assumed that  
22 ultimately the claim that you made might have been --  
23 might have had a basis, like the court below agreed, as  
24 I read the district court's decision, it wasn't basing  
25 its decision merely on that. What it was basing it on,

1 and it goes through a whole laundry list of things that  
2 it thought constituted abusive litigation -- very little  
3 prefiling investigation, continuous switch of claims  
4 because of the lack of that investigation, pursuing a  
5 theory that your expert didn't even agree with -- that  
6 all sounds to me like a factual basis, basically saying  
7 this litigation was abusive.

8 And I don't understand how that doesn't feed  
9 into the objective unreasonableness, meaning that if you  
10 had done the investigation you should have, you may have  
11 had a claim or thought you had a claim, but you would  
12 have learned much earlier that even your expert disputed  
13 things and you're likely not to have brought the suit.  
14 That's how I read the district court's decision.

15 MR. DUNNER: Your Honor, with due deference,  
16 there were four issues -- actually five because Allcare  
17 lost on one of the issues, the 102 claim. There were  
18 four issues that went up to the Federal Circuit, plus  
19 the one we lost on. None of them involved prefiling  
20 investigation.

21 What happened was the district court wrote a  
22 long opinion based on Rule 11. We asked for  
23 reconsideration. The district court dropped all the  
24 charges against the lawyers, left the charges against  
25 Allcare, and if you read the Federal Circuit opinion

1 starting at the appendix 19A and going through the  
2 pages, you'll see there were four issues, one of which  
3 was not prefiling investigation, none of which involved  
4 the points you're making.

5           There were four issues.           Two of them  
6 involved claim construction, and the third one involved  
7 claim construction -- the one we lost on. The fourth  
8 one was whether or not the -- the -- Allcare had a right  
9 to rely on what happened in the Eastern District of  
10 Virginia in which we had the same claim against a  
11 different party and the two courts reached different  
12 conclusions on the same issue on the same claim, which  
13 alone should have -- should have found that it was  
14 objectively reasonable but was not.

15           And the -- the last one was whether or not  
16 alleged misconduct, misrepresentation to the Western  
17 District of Pennsylvania before the case was  
18 transferred, whether that was sanctionable, and the case  
19 law made clear that was a legal question. The case law  
20 made absolutely clear that you cannot look at conduct  
21 before another tribunal to decide whether a different  
22 tribunal should sanction you.

23           Every one of those issues -- the three claim  
24 construction issues were legal issues; and the --  
25 whether the -- whether they could rely on res judicata

1 or collateral estoppel based on the Eastern District of  
2 Virginia case was a legal issue; and the question of  
3 whether the alleged misconduct in Pennsylvania could be  
4 sanctionable was also a legal issue. We had no factual  
5 issues in this case.

6 And I suggest you look at the pages starting  
7 with 19A and read the Court's opinion and they basically  
8 said, contrary to Mr. Katyal's comment, the issue was  
9 one of claim construction, it was not one of  
10 infringement. There was a special master in the case,  
11 and the special master first gave a claim construction  
12 favorable to Allcare. And then in a summary judgment  
13 hearing, he changed his opinion, and Judge Dyk's opinion  
14 for the majority of the court basically notes this, that  
15 he changed his view and he came out with a different  
16 view.

17 But the issue was, is, and always a claim  
18 construction issue. And even they concede that claim  
19 construction issues are reviewed de novo.

20 Now, a point has been made about pure issues  
21 of law and impure issues of law. They don't use  
22 "impure," but I assume that's the converse of a pure  
23 issue of law. And they say that only certain kinds of  
24 things are pure issues of law, and it does not include  
25 objective baselessness.

1           Well, I suggest that the Court look at  
2 Scott v. Harris. Scott v. Harris says expressly that  
3 objective reasonableness is a pure issue of law reviewed  
4 de novo when it's separated from its factual components.  
5 And it is our position that the factual components are  
6 reviewed deferentially. We're not arguing to the  
7 contrary. All we're saying is when you've got a legal  
8 issue, the best court situated to deal with the legal  
9 issue and to avoid problems like we had with the Eastern  
10 District of Virginia on the same claim, same issue,  
11 going a different way from the Northern District of  
12 Texas will be avoided.

13           The whole purpose of the formation -- this  
14 was discussed in the Octane case. The whole purpose of  
15 the formation was -- of the Federal Circuit was to  
16 provide uniformity, to provide predictability. When  
17 you've got 94 district courts and hundreds of district  
18 court judges going different ways, some of which are  
19 friendly to patents, some of which are hostile to  
20 patents, the best tribunal to rule on the patent -- on  
21 the legal issues, the patent issues, is the Federal  
22 Circuit.

23           CHIEF JUSTICE ROBERTS:           Well, but then it  
24 reads four to three on one issue, then it has, as in  
25 this case, conflicting cases within its own docket. So

Official

1 I'm not sure it's succeeding in bringing about  
2 uniformity.

3 MR. DUNNER: Your Honor, I -- I apologize.  
4 I missed that point.

5 CHIEF JUSTICE ROBERTS: Well, I'm just  
6 saying, the point -- you're quite correct, the Federal  
7 Circuit was established to bring about uniformity in  
8 patent law, but they seem to have a great deal of  
9 disagreement among themselves and are going back and  
10 forth in particular cases, in this area specifically,  
11 about what the appropriate approach is.

12 MR. DUNNER: Your Honor, they do have  
13 disagreement. This was a six-five case, and there are  
14 other cases. The case, Lighting Ballast that was just  
15 decided, was a six-four case, and the Akamai case which is coming in  
16 April was a six-to-five case. The fact is, that you  
17 still have a single tribunal. That's the way a court  
18 should operate. When they go en banc, you get a  
19 divergence of views. It's like the Supreme Court. You  
20 have lots of dissenting opinions, concurring opinions,  
21 but it's a single body, and a single body that has  
22 jurisdiction over all the 285 cases is better situated  
23 than to have lots of district court judges ruling on  
24 questions of law. We're only talking about questions of  
25 law.

1 JUSTICE BREYER: Well, they do sometimes. I  
2 mean --

3 MR. DUNNER: Pardon?

4 JUSTICE BREYER: There are a lot of areas of  
5 the law where they do. I mean, Holmes thought  
6 reasonableness, given undisputed facts, is really a  
7 question of law. Probable cause matters are really  
8 questions of law, if the facts are undisputed. Cases  
9 all over the law, there was a case we had -- I had, I  
10 saw once, it said, is an Eclectus Parrot a wild bird for  
11 purposes of a statute that says wild birds cannot be  
12 imported, and the judges there said, Well, is this  
13 characteristic factual? Da, da, da. And is this  
14 characteristic really -- if you really put your mind to it,  
15 you'd have to say that was legal; does "wild" mean in  
16 the country of origin or in the country of import?

17 You know, so you could separate it. But  
18 there are many, many areas of the law where judges don't  
19 bother to separate the two things. And isn't claim  
20 construction like that? I mean, you have a case and the  
21 claim constructionist always has in mind what this  
22 infringing item might be in respect to the claim, and so  
23 the judge is always looking at that and doesn't often  
24 separate law and fact. I mean, am I -- you know this  
25 area better than I do.

1 MR. DUNNER: I'm not sure, Your Honor.

2 JUSTICE BREYER: Oh, I guarantee.

3 (Laughter.)

4 JUSTICE BREYER: So I'm thinking that maybe  
5 claim construction is like that very often. Factual  
6 matters are there, legal matters are there, and judges  
7 cannot always separate the one from the other, or even  
8 if they could, they don't feel it's worth the effort.

9 MR. DUNNER: Your Honor, there are times  
10 when it may be difficult to separate facts from law, and  
11 in the Markman case, the Court talked about it as being  
12 a mongrel type of situation. But the fact is that in  
13 many cases you can separate them, and moreover, the fact  
14 that it is a mixed question of fact and law, which has  
15 been bandied around in the briefs, does not itself  
16 determine whether it's de novo or discretionary as -- as  
17 has been -- as was mentioned specifically in the Pierce  
18 case.

19 So the fact is you're still better off;  
20 which is the best tribunal to deal with the question?  
21 I'm not saying we have a perfect answer because there's  
22 not a perfect answer on our side, there's not a perfect  
23 answer on their side. But there's a best answer, and I  
24 suggest that the best answer is to let the legal issues  
25 decided by the court that gets tons of patent issues,

1 that has a lot more experience, as Justice Alito  
2 mentioned in one of the points that he made, rather than  
3 district court judges who may get a few cases, may get a  
4 lot of cases, depending what district you're in.

5 CHIEF JUSTICE ROBERTS: Well, what about  
6 Judge Moore's point that when you're talking about pure  
7 issues of patent law maybe you're right, but when you're  
8 talking about baselessness, that's something that the  
9 district courts actually have more experience with,  
10 whether it's under EAJA, whether it's under AEDPA,  
11 whether it's under qualified immunity. That's an issue  
12 they see all the time, so maybe they are more expert  
13 than the Federal Circuit.

14 MR. DUNNER: Your Honor, on the question  
15 broadly of objective baselessness, one might say that is  
16 so. But on the question of objective baselessness in a  
17 patent context, in a 285 context, where you've got legal  
18 issues, where you've got claim construction issues, they  
19 are certainly not better situated than the Federal  
20 Circuit.

21 And I submit that certainly claim  
22 construction is a perfect example, and the government,  
23 in this case, acknowledges that claim construction, as  
24 it calls it pure claim construct -- pure legal issues,  
25 claim construction is reviewed de novo. So that is a

1 perfect example of how district courts can disagree.  
2 And this case is poster child for that because we had  
3 two different courts going two different ways on exactly  
4 the same point, exactly the same issue.

5 And the Pierce case raised, there are other  
6 considerations involved, there are a lot of  
7 considerations involved, but others in terms of which  
8 tribunal is better situated. And the Pierce case  
9 pointed out that the size of the fee involved can be  
10 very important. And I'd like to address that just very  
11 briefly.

12 The size of the fee involved in patent  
13 cases, as my daughters would say, humongous. Some of --  
14 I've been in two cases where the legal fees were  
15 \$30 million, and when you've got legal fees like that --

16 CHIEF JUSTICE ROBERTS: Well, you've got to  
17 stop charging such outrageous fees.

18 (Laughter.)

19 MR. DUNNER: That's the way it used to be  
20 with you, Your Honor.

21 (Laughter.)

22 CHIEF JUSTICE ROBERTS: Oh, no.

23 MR. DUNNER: The fact is, when you've got  
24 fees like that, there is going to be an appeal.  
25 Typically, the appeal will be consolidated with the

1 merits appeal. Typically, the Court will be dealing  
2 with the issues, both of them in the same case. And as  
3 Judge Dyk pointed out, having reviewed the merits  
4 decision, the 285 decision often involves the same kind  
5 of questions, and it is not an enormous burden on the  
6 courts to do that.

7           And given the amount of the fee, there's  
8 going to be an appeal when you've got large legal fees  
9 regardless of the standard of review. So you're not --  
10 I don't think you're going to get a meaningful number of  
11 additional appeals that you otherwise would not get.

12           And the fact is that the size of the fees  
13 was independently noted in Pierce as a factor. On the  
14 Rule 11 issue in Cooter the -- this Court talked about  
15 the fact that the district courts were best suited to  
16 deal with those cases because they were familiar with  
17 the local practices. The whole purpose of the Federal  
18 Circuit is not to be concerned with local practices but  
19 to be concerned with national practices.

20           JUSTICE GINSBURG:           Two of the items that you  
21 mentioned, one was venue, and the other was claim  
22 preclusion, issue preclusion, the Federal Circuit is no  
23 more expert in those areas than a district court would  
24 be.

25           MR. DUNNER:           On what kind of issues, Your

1 Honor?

2 JUSTICE GINSBURG: The -- you mentioned the  
3 venue question.

4 MR. DUNNER: Yes.

5 JUSTICE GINSBURG: And I was surprised. The  
6 Court said, well, that's for the Pennsylvania court to  
7 sanction.

8 MR. DUNNER: Yes.

9 JUSTICE GINSBURG: But you, I'm sure, have  
10 read Noxell case in the D.C. Circuit --

11 MR. DUNNER: Written by you, Your Honor.

12 JUSTICE GINSBURG: -- one of the problems  
13 there, one of the conduct that was considered  
14 unreasonable was suing in -- in a distant forum, very  
15 far from where the defendants operated. And claim  
16 preclusion and issue preclusion come up in all kinds of  
17 cases, so there's nothing expert about the Federal  
18 Circuit on those issues.

19 MR. DUNNER: Your Honor, I have to  
20 acknowledge that on an issue of whether or not a conduct  
21 in a different circuit should be sanctionable in another  
22 circuit, the Federal Circuit is certainly not more  
23 expert on that kind of an issue than another court.  
24 That -- that is merely an example of what happened in  
25 this particular case.

1 I will note that the Federal Circuit cited a  
2 number of cases which held exactly that. And, moreover,  
3 what happened in this case was that even the district  
4 court -- Judge Means in the Northern District of  
5 Texas -- noted that the Pennsylvania district court  
6 itself did not seem to place very great reliance on it.  
7 It probably was the least significant of all the factors  
8 in the case.

9 And so I would say it is merely an example  
10 of a legal issue. And there will be some legal issues  
11 in which the Federal Circuit may not be more expert than  
12 others, but there will be a lot of legal issues, since  
13 we're dealing with conduct in patent cases, on which the  
14 Federal Circuit is the most expert court.

15 And, in any event, we're talking about how  
16 can we get uniformity of decision-making in the 285  
17 area, and you've got both Rule 11 and the EAJA cases  
18 went to 13 circuits, the 285 issues go to one circuit.  
19 So it is much better to have a single court ruling on  
20 those questions than to have multiple district courts.

21 JUSTICE SCALIA: Well, you know, once you --  
22 once you have a statute that confers discretion on a  
23 district court, you don't expect uniformity of  
24 decision-making. It gives the district judge a broad --  
25 broad discretion, and some will come out at the top and

1 some will come out at the bottom. And they will all  
2 be -- be affirmed by the court of appeals.

3 So what makes you think that -- that this  
4 statute, which clearly confers discretion, envisions  
5 uniformity --

6 MR. DUNNER: Let me --

7 JUSTICE SCALIA: -- on the part of the  
8 district courts?

9 MR. DUNNER: Let me --

10 JUSTICE SCALIA: It seems to me it quite  
11 clearly doesn't.

12 MR. DUNNER: Let me address that, Your  
13 Honor.

14 The -- there's a lot of argument in the  
15 opposing briefs on the textual issue and the legislative  
16 history, and they cite the legislative history of  
17 Section 70, the predecessor statute in 285, and they  
18 talk about the reviser's note and P.J. Federico's  
19 commentary as to what the new words meant. And the new  
20 word -- the new words meant that they were focusing on  
21 Section 70 as it had been interpreted by the courts.

22 So what do you see when you look at the  
23 courts? We have -- I have examined every appellate  
24 decision from 1946 to 1952 dealing with Section 70.  
25 There are 19 of them. And not a single one said legal

1 issues are reviewed with deference. Not a single one.  
2 A lot of them use discretionary language, but none said  
3 legal issues are reviewed with deference. And  
4 moreover --

5 JUSTICE SCALIA: Well -- well, you -- you  
6 acknowledged that a lot of these cases -- probably most  
7 of these cases do not involve exclusively legal issues.  
8 Right?

9 MR. DUNNER: Exactly, Your Honor.

10 JUSTICE SCALIA: And so in -- in all of  
11 those cases you're not going to get uniformity, because  
12 their -- you acknowledge that in -- in the nonlegal  
13 issues, there is discretion in the district court. So  
14 you're going to have some district courts coming out  
15 some ways, other district courts coming out the other  
16 way, and they will all be affirmed.

17 So the -- it seems to me -- this does not  
18 strike me as an area where Congress expected uniformity.

19 MR. DUNNER: Your Honor --

20 JUSTICE SCALIA: You're -- you're creating  
21 uniformity in one narrow aspect of -- of this decision,  
22 that involving legal claims, but there are many other  
23 aspects of the decisions that will destroy whatever  
24 uniformity you're trying to achieve.

25 MR. DUNNER: Your Honor, I hadn't finished

1 my point, so let me just finish it, which is a response  
2 to your point. And that is these 19 cases between 1946  
3 and 1952, many of them gave -- gave a test, and they  
4 said the issue is abuse of discretion or -- the  
5 disjunctive or -- a legal error. And so all of these  
6 cases, none of them said legal issues are reviewed  
7 deferentially. And all I'm saying is that if you look  
8 at the legislative history, if you look at the textual  
9 change of the statute, those cases in between were  
10 concerned that the district courts were -- were  
11 construing "with deference" too loosely, and they  
12 tightened it up with the "exceptional case" language.

13 But they also said that it -- that legal  
14 questions are reviewed de novo. And all I'm saying is  
15 if you look at the statute, we want the district courts  
16 to rule on the facts. We want the Federal Circuit to  
17 give deference to their ruling on the facts. But when  
18 they get into the legal area, when they make legal  
19 decisions, we think it should be reviewed de novo --

20 JUSTICE BREYER: The problem with -- the  
21 problem is -- the one I think that -- that really seems  
22 to me at the heart of what you have to decide, is it  
23 worth saying to the court of appeals start  
24 distinguishing between which of the two categories it  
25 falls into. Because the statement that you read, most

1 lawyers would agree with that statement as a general  
2 principle.

3 And then the question becomes, well, it's  
4 work to decide whether this is purely legal or whether  
5 it's legal/factual mixed and sometimes it's one and  
6 sometimes the other and they are really no key to it  
7 exactly.

8 So what you're doing is saying, in an area  
9 where there are a lot of the deferential kind and some  
10 of the nondeferential kind, we want to say the Federal  
11 Circuit and all the district courts have to stop and  
12 figure that thing out, while the other side says, look,  
13 just leave it to the district court and tell them to  
14 review.

15 Theirs is simpler. What do you say?

16 MR. DUNNER: Justice Breyer, my response is  
17 that in many cases, there won't be a problem  
18 distinguishing between law and fact. When there is a  
19 problem -- there will be some cases where there may be  
20 difficulty distinguishing between law and fact, and what  
21 Pierce says and what Cooter says and what a lot of cases  
22 say is which is the best tribunal, the district court or  
23 the appellate court, to deal with it? And all I'm  
24 saying is there are all these factors --

25 JUSTICE SOTOMAYOR: I'm sorry. I'm -- I'm a

1 little confused. With respect to winning or losing the  
2 case, you're going to get de novo review because the  
3 Federal Circuit here looked at the claim construction,  
4 under de novo review agreed with the district court that  
5 it had construed the claim properly and that you lost.  
6 So you got de novo review.

7 The issue on a reasonable ground to pursue  
8 the litigation, whether it was objectively reasonable or  
9 not, I think that's Justice Breyer's point, which it  
10 generally has factors that are independent of winning or  
11 losing, and that's why I kept going back to what the  
12 district court said in this case, which you seem to  
13 ignore. It, at one point, recognizes that your claim  
14 was a difficult one, but it says that doesn't excuse the  
15 fact that you maintained the 52(c) claim, the one at  
16 issue here, even after both the master -- special master  
17 and your expert had said a particular claim wasn't  
18 sustainable. And it continued with a long example of  
19 behavior -- examples, multiple ones, that it found  
20 unreasonable, having nothing to do with the ultimate  
21 reasonableness of your last argument before the  
22 appellate court.

23 So, again I ask the question: Why should  
24 this objective reasonableness be considered a pure  
25 question of law? Because it's not about right or wrong

1 and legal answer; it's about behavior during litigation.

2 MR. DUNNER: Your Honor, there are -- there  
3 are two facets to the answer I would give to that  
4 question.

5 One is that all of the points you made about  
6 what the district court found were not issues on appeal.  
7 The district court found lots of things, but the four  
8 issues that went up on appeal did not deal with all the  
9 facts you're talking about. They dealt with legal  
10 issues.

11 There was no prefiling investigation issue.  
12 The Federal Circuit expressly found that, in a footnote  
13 in its opinion, there was no prefiling investigation  
14 issue in the final decision on appeal. Because the  
15 district court made multiple decisions. One was a  
16 Rule 11 decision in which he didn't provide a safe  
17 harbor for anybody, and we went in and we asked them to  
18 reconsider it, and he changed his opinion and dropped  
19 everything against the attorneys.

20 The -- what went up to the court were four  
21 issues, and they were four legal issues. And all I'm  
22 saying is that -- that Scott v. -- v. Harris, and  
23 Justice Souter, in a concurring opinion in the PRE  
24 case, said the same thing, that objective reasonableness  
25 is a legal issue, reviewed de novo, and if you want

1 uniformity, if you want predictability, the best way to  
2 avoid chilling -- avoid chilling not only patentees but  
3 accused infringers from being willing to go to court for  
4 fear that they may have to pay 30 or 20 or \$10 million,  
5 and the accused infringer from defending against it, is  
6 to have predictability, to have uniformity in  
7 decision-making, which you get from having a single  
8 court reviewing those cases. And that single court is  
9 the Federal Circuit.

10 And I -- I submit that those are the two  
11 answers to your questions. I hope I've satisfied you.

12 If there are no further questions, I rest.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.

14 Mr. Katyal, you have nine minutes remaining.

15 REBUTTAL ARGUMENT OF NEAL K. KATYAL

16 ON BEHALF OF PETITIONER

17 MR. KATYAL: Thank you.

18 I -- I'd like to pick up on Justice  
19 Sotomayor's question about the facts of this case,  
20 because I think what you heard from Mr. Dunner  
21 illuminates our position on why the Federal Circuit's de  
22 novo standard is so problematic.

23 We warned, of course, that the de novo  
24 standard would become a magnet for litigation and  
25 encourage 285 losers to roll the dice, hoping that they

1 can repackage a factual dispute as a legal one in the  
2 court of appeals. And Pierce and Cooter warn against  
3 that and say that's a waste of resources as, Justice  
4 Breyer, you're picking up on.

5 And, Justice Sotomayor, they say, you've  
6 already had a merits determination, as their one here.

7 This case proves that. You heard Mr. Dunner  
8 say, quote, There were no factual issues in this case,  
9 and he talks about the Trigon ruling from the Eastern  
10 District of Virginia. As the district court here found,  
11 Petition Appendix 63A, Trigon was irrelevant because the  
12 question was infringement, not claim construction. And  
13 that was why sanctions were imposed. And if there's any  
14 doubt, here's what Allcare's own lawyer told the Federal  
15 Circuit in 2009. These are his opening words, quote:  
16 Summary judgment was granted at the district court in  
17 this case for two reasons. First, it was held there was  
18 a lack of evidence from which a reasonable finder of  
19 fact could determine the step of 52(c); and secondly,  
20 the district court held even if there was evidence that  
21 step 52(c) was performed, there was insufficient  
22 evidence of direction or control.

23 Question from the Court: This really seems  
24 like it's a claim construction issue for us as to the  
25 meaning of this claim.

1           Answer from Allcare's lawyer:           I would  
2 disagree that claim construction ought to be revisited  
3 at this level. In 1999, this court expressly stated it  
4 was inappropriate to sua sponte revisit it.

5           Now, I'm sorry to belabor the facts here,  
6 but I think they illustrate the wisdom of Justice  
7 Scalia's opinion in *Pierce*, as followed by Cooter and  
8 Koon, which is clever lawyers can always make arguments  
9 on appeal, make them look -- make them look legal when  
10 they were factual. This case is example A of that.

11           Now, my friend on the other side has said  
12 that -- that there wasn't history from 1946 to 1952. We  
13 encourage the Court to look to the -- to the cases cited  
14 at pages 11 to 13 of our brief, and in particular to  
15 look at *Orrison v. Hoffberger*, a Fourth Circuit case,  
16 which says that in evaluating whether there's, quote, no  
17 reasonable ground for the prosecution of a motion, the  
18 court says it, quote, cannot be said there was abuse of  
19 discretion.

20           In many of these cases, they refer to the  
21 Abuse of discretion standard. And, of course,  
22 Mr. Dunner is right, that if it's a pure issue of law,  
23 that is something as to which there isn't deference.  
24 But when the question looks, as it does here, as it does  
25 in 285 cases about objective baselessness, whether a

1 litigating position was reasonable after the fact in  
2 collateral attorney fee litigation, this Court has  
3 always said in all of these cases that  
4 abuse-of-discretion deferential review is appropriate.

5 Now, Justice Alito, you had referred to the  
6 size of the award here, and to be sure, it is different  
7 than Pierce. It's not different, of course, than Cooter  
8 because in Cooter we're talking about Rule 11 sanctions  
9 which can devastate an attorney's livelihood. And  
10 nonetheless, the Court in Cooter said they would  
11 apply -- apply deferential abuse of discretion review  
12 there.

13 I think the best answer to that is Koon  
14 itself. In Koon, the stakes were really high, jail  
15 time, and what the Court said is defer to the district  
16 court because the district court has the best  
17 perspective, the kind of bird's eye view, a front seat  
18 on litigation.

19 And that's why this case is different, than  
20 for example, Scott v. Harris or, Justice Alito, the  
21 qualified immunity cases. Because in both of those,  
22 those questions involved things as to which the district  
23 court doesn't have a courtside or ringside, whatever  
24 term we want to use, seat. They are not present. They  
25 are not there at the scene of the crime. They are not

1 there when law enforcement is conducting whatever  
2 operation or something like that.

3 Scott v. Harris, same thing, it's not a  
4 qualified immunity case; it's a summary judgment case.  
5 And the words, as our brief points out at page 24, say,  
6 If there is no factual dispute, then you evaluate it on  
7 the law. We -- we agree with that.

8 The question is here, where there are  
9 factual disputes, as there are in all objective  
10 baselessness cases, what is the appropriate standard.  
11 This Court's answered it several times in Pierce,  
12 Cooter, and Koon, unitary abuse of discretion review.

13 If there are no further questions.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.

15 The case is submitted.

16 (Whereupon, at 12:00 p.m., the case in the  
17 above-entitled matter was submitted.)

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