

1 his lawyer can come along at the end and raise some kind
2 of doubt about the patent's validity, the fact that -- I
3 forget whether it was Mr. Smith or Mr. Jones -- but the
4 fact that --

5 MR. PHILLIPS: Well, one of them.

6 (Laughter.)

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

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

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

1 MR. PHILLIPS: Okay.

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

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

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

1 and services in this country. And that's the price
2 you'd have to pay to get at the -- at the really bad
3 actor.

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

13 (Laughter.)

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

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

23 MR. PHILLIPS: Right.

24 JUSTICE BREYER: And that's why I'm looking
25 for is there some way we can get the real worst ones

1 without destroying what you don't want to have destroyed
2 and yet, where he's really worried about the real worst
3 ones?

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

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

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

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

1 or, you know, trolls, and it is a serious one or it's
2 less serious one. And you have these standards to
3 apply, and -- and the district court will exercise the
4 discretion.

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

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

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

24 That's the court that has the experience and
25 expertise, and I would hope under these circumstances,

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

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

13 CHIEF JUSTICE ROBERTS: Thank you,
14 Mr. Phillips.

15 Mr. Wall, you have four minutes remaining.

16 REBUTTAL ARGUMENT OF JEFFREY B. WALL

17 ON BEHALF OF THE PETITIONERS

18 MR. WALL: Mr. Chief Justice, I have two
19 fairly simple points.

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

1 Halo.

2 And we've done it in a couple of different
3 ways.

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

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

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

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

24 And the second point I just want to make
25 quickly is we do have the evidentiary burden and

1 standard of review in this case. I think it's clear
2 that the -- there isn't any basis for the clear and
3 convincing standard. On the standard of review, I think
4 Highmark resolves and I think Pierce v. Underwood
5 resolves it.

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

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

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

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

24 JUSTICE ALITO: One point Mr. Phillips
25 brought up that you didn't address in your initial

1 argument, maybe you could say a word about it, is
2 Section 298 of the American -- America Invents Act.

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

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

16 Now, the defendant maybe --

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

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

25 And as Pulse candidly, and I think honestly,

1 concedes in its brief, you can read 298 to have effect
2 on either side's view of the -- how you ought to treat
3 the enhancement statute. So I don't think 298 cuts
4 either way.

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

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.

12 The case is submitted.

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

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