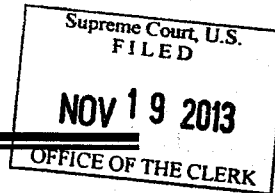


No. 13-290



IN THE
Supreme Court of the United States

ARTHREX, INC.,

Petitioner,

v.

SMITH & NEPHEW, INC., *ET AL.*,

Respondents.

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

REPLY FOR PETITIONER

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Smith & Nephew nowhere disputes the critical importance of the standard for indirect patent infringement under 35 U.S.C. § 271(b) and (c)—in particular, the need for clarity regarding the “willful blindness” doctrine adopted in *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060 (2011). Nor does it deny that the Federal Circuit has so diluted willful blindness that it is now less rigorous than the “recklessness” standard this Court intended it to “surpass[.]” *Id.* at 2070. Smith & Nephew offers no response, because none is possible.

In *Safeco Insurance Company of America v. Burr*, 551 U.S. 47 (2007), the Court held that a defendant is not even “reckless” where its conduct complies with a con-

struction of relevant legal requirements that is “not objectively unreasonable.” *Id.* at 70. A construction is not objectively unreasonable, the Court further held, where it was “sufficiently convincing *** to have persuaded the District Court to adopt it and rule in [the defendant’s] favor.” *Ibid.* In this case, the Federal Circuit nonetheless held Arthrex liable under the *higher* willful-blindness standard—*i.e.*, that there was such “a high probability” of infringement that Arthrex effectively *knew* there was infringement, *Global-Tech*, 131 S. Ct. at 2070—even though a respected district court judge found there was no infringement as a matter of law. That cannot be correct.

Smith & Nephew’s counsel has acknowledged that the law of indirect infringement “is in deep, deep instability.” IIT Chicago-Kent College of Law, Supreme Court Intellectual Property Review: Preview of 2013 Supreme Court Term, at 47:14-47:23 (Oct. 16, 2013) (James Dabney), <http://www.youtube.com/watch?v=5xiutVcCf7o>. Perhaps for that reason, he has publicly conceded that *this case* has “a very good chance of going up” for review. *Id.* at 44:21-44:46.

Smith & Nephew nevertheless asserts that “complex” issues of “bio-mechanical engineering” involved here counsel leaving this issue to the Federal Circuit’s patent-law “expertise.” Br. in Opp. 21-22. But this case requires no consideration of scientific questions. And the Federal Circuit’s *lack* of expertise regarding willful blindness—which applies beyond patent law—is what required this Court’s review in *Global-Tech* in the first place. Smith & Nephew’s other arguments—*e.g.*, that citation to specific cases is required to preserve *issues* for review, and that the jury’s verdict precludes review of the very legal

issues required to evaluate the evidentiary sufficiency of the verdict—likewise fail. Review is warranted.

I. THIS CASE IS AN APPROPRIATE VEHICLE

Smith & Nephew's primary contention—that this case is an inappropriate vehicle—falls short.

A. The Issue Is Properly Before The Court

“Any issue pressed or passed upon below *** is subject to this Court's broad discretion over the questions it chooses to take on certiorari.” *Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 530 (2002) (quotation marks omitted). Smith & Nephew claims Arthrex did not press “objective reasonableness” below because it did not cite *Safeco* in its merits brief. Br. in Opp. 16, 18-19. That is incorrect. Whether a party pressed the “issue”—and thus whether it is “properly before” the Court—“does not depend on citation to book and verse.” *Eddings v. Oklahoma*, 455 U.S. 104, 113 n.9 (1982). Arthrex unequivocally pressed the *substance* of the issue below, preserving it for review.

Safeco concerned the “recklessness” standard, which requires “action entailing an unjustifiably high risk *** that is either known or so obvious that it should be known.” 551 U.S. at 68 (quotation marks omitted). The Court held that, where the defendant had “a sufficiently convincing justification to have persuaded the District Court to adopt it and rule in [the defendant's] favor,” the defendant's position “was not objectively unreasonable”; consequently, such a case “falls well short of raising the ‘unjustifiably high risk’ of violating the statute necessary for reckless liability.” *Id.* at 69-70.

Arthrex's argument below tracked *Safeco*'s reasoning precisely. Arthrex urged that, under *Global-Tech*, a defendant cannot be willfully blind to infringement unless there was a “high probability of infringement.” C.A.

Br. 49. The district court's ruling of no infringement as a matter of law, Arthrex asserted, showed the sufficiently "high probability of infringement" was absent and, as a result, the "willful blindness standard has not been met." *Ibid.*¹ The petition cites (at 9) where Arthrex made that argument in its brief. And Arthrex reiterated the point at argument and on rehearing.² Smith & Nephew nowhere responds.

Smith & Nephew complains that the certiorari petition uses different "characterization[s]" of the "willful blindness" arguments. Br. in Opp. 19-20. In the court of appeals, Arthrex was defending judgment in its favor on several fronts. It "should not be surprising" that Arthrex's arguments "were much less detailed than the arguments it now makes" on the single issue pressed in its petition. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 120 (1988) (plurality opinion of O'Connor, J.). And Arthrex can raise additional arguments in this Court in support of the *issue* it pressed below: "[O]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (quotation marks omitted).

¹ That does not, as Smith & Nephew claims, add "a third requirement" to *Global-Tech*'s two-pronged willful-blindness standard. Br. in Opp. 21. Arthrex urges only that one of the prongs—the "*high probability*" that infringement "exists," *Global-Tech*, 131 S. Ct. at 2070 (emphasis added)—cannot be met where it is objectively reasonable to believe the conduct is not infringing. See Pet. 16-17.

² Arthrex urged that a "reasonable belief" there was no direct infringement precludes liability for indirect infringement. C.A. Oral Arg., at 29:06-29:45 (Nov. 8, 2012), <http://www.cafc.uscourts.gov/oral-argument-recordings/2012-1265/all>. And Arthrex's rehearing petition invoked *Safeco* in support. C.A. Pet. for Reh'g En Banc, at 7-8.

Smith & Nephew asserts that Arthrex's "procedural default is evident" because the opinion below did not "cite *Safeco* or consider the theory of non-liability" raised in the petition. Br. in Opp. 19. But this Court may review any issue that was "pressed *or* passed upon below." *Verizon*, 535 U.S. at 530 (emphasis added). A lower court cannot preclude further review by "choos[ing] to ignore in its opinion" an issue pressed by a party. *Dye v. Hofbauer*, 546 U.S. 1, 3 (2005) (per curiam).

B. Respondents' Plea For Deference To The Federal Circuit Is Unwarranted

Claiming that this case involves "complex questions of anatomy and bio-mechanical engineering," Smith & Nephew pleads that it should be left to the Federal Circuit's "special expertise" in patent law. Br. in Opp. 21-22. But the issue here—the proper standard for "willful blindness"—involves no scientific questions. Nor does the Federal Circuit have special expertise concerning willful blindness—which is why review was required in *Global-Tech*. See *Global-Tech*, 131 S. Ct. at 2071 ("The test applied by the Federal Circuit *** departs from the proper willful blindness standard ***."). And the suggestion that the Federal Circuit might invoke its "expertise" to develop a patent-law-specific application of willful blindness, see Br. in Opp. 22, counsels review. This Court has unequivocally rejected efforts to transmogrify general legal principles into creatures unique to patent law. See, e.g., *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 392-393 (2006) (rejecting patent-specific injunction standard).

Smith & Nephew also claims that "[t]he Court should not accept one litigant's declaration that the [*Global-Tech*] standard"—as applied by the Federal Circuit—"has failed." Br. in Opp. 30. But Arthrex is not alone:

Others recognize that the Federal Circuit has watered down *Global-Tech*'s standard to mere "recklessness," or worse. Petition for a Writ of Certiorari at 33, *Artesyn Techs., Inc. v. SynQor, Inc.*, No. 13-375 (Sept. 23, 2013).

Nor does the Court need to "await for more experience with how the [purely] subjective standard works in practice." Br. in Opp. 30. This Court is intimately familiar with the practical problems subjective standards present. In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court recounted the "substantial costs [that] attend the litigation" of a defendant's "subjective" state of mind. *Id.* at 816. It found those costs so great that "public policy" "mandate[d]" replacing the subjective qualified-immunity standard with an "objective reasonableness" standard. *Id.* at 813, 818. As explained in the petition (at 25-27), the same considerations apply to indirect patent infringement, and require prompt review. Smith & Nephew offers no response.

Smith & Nephew also urges that "[t]he decision below is unreported," and "does not purport to characterize, extend, or alter any principle of induced or contributory liability for patent infringement." Br. in Opp. 29. But as Smith & Nephew's counsel has explained—in successfully obtaining review of an unpublished Federal Circuit decision—"this Court has not hesitated to grant certiorari in cases with unpublished appellate opinions that have applied settled circuit law" in conflict with other "important [decisions] of federal law." Petition for a Writ of Certiorari at 27-28, *KSR Int'l Co. v. Teleflex Inc.*, No. 04-1350 (April 6, 2005). That is the case here: The decision below cannot be reconciled with *Safeco* or the Federal Circuit's own law regarding willful infringement. See Pet. 13-23; pp. 8-12, *infra*. The Court should address

the Federal Circuit's construction of this critical element of liability.

II. THE JURY VERDICT AND INSTRUCTIONS DO NOT PRECLUDE REVIEW

Smith & Nephew urges that review is foreclosed because the jury's verdict "is binding on petitioner." Br. in Opp. 28. According to it, infringement is a question of fact, and the jury found that Arthrex "was 'willfully blind' to" infringement. *Id.* at 25-26.³

That is wrong. In *Global-Tech* itself, a jury had found the defendant liable for induced infringement. 131 S. Ct. at 2064. But that did not preclude the Court from reconsidering the proper standard of intent. See *id.* at 2068. *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), specifically holds that review for evidentiary sufficiency must be assessed under the law as "*properly formulated*"—not under the law as given to the jury. *Id.* at 513 (emphasis added).

Consequently, whether a reasonable jury "could have reached verdicts of infringement" on the facts of this case requires the Court to determine the "correct application of the law of infringement," *C.R. Bard, Inc. v. M3 Sys., Inc.*, 157 F.3d 1340, 1362 (Fed. Cir. 1998), including willful blindness. The question here is whether a jury can find the "sufficiently high" probability of infringement

³ To the extent Smith & Nephew suggests the jury found that Arthrex had *actual knowledge* of infringement, that is incorrect. See Br. in Opp. 3, 8-9, 23-24. The verdict form and jury instructions do require "knowledge of infringement," but the instructions made clear that "willful blindness" will satisfy that element for both contributory and induced infringement. See Br. in Opp. App. 7a-8a. The Federal Circuit, moreover, upheld liability *only* on a willful-blindness theory. See Pet. App. 8a-10a; *id.* at 12a (Clevenger, J., dissenting). Accordingly, only "willful blindness" is before this Court.

required for willful blindness when there is an objectively reasonable construction of a patent under which there is no infringement—a construction so reasonable the district court agreed with it. See Pet. 16-21. The jury’s findings cannot preclude review of that important legal issue. Nor was Arthrex required to “challenge the correctness of the jury instructions.” Br. in Opp. 25. A defendant need not “object to jury instructions that expressed the defense differently” to preserve a sufficiency challenge “under the properly formulated defense.” *Boyle*, 487 U.S. at 513-514.⁴

III. SMITH & NEPHEW’S MERITS ARGUMENTS FAIL

A. The Objective-Unreasonableness Standard Is Consistent With Patent Law

Smith & Nephew contends that imposing an objective-unreasonableness threshold for willful blindness, before considering the defendant’s subjective understanding, is “contrary to” “patent precedent.” Br. in Opp. 22-25. That is wrong.

1. As the petition explained (at 21-23), the Federal Circuit—citing *Safeco*—already requires a “threshold” showing of objective unreasonableness under the recklessness standard for willful infringement. See *In re Seagate Tech., LLC*, 497 F.3d 1360, 1370-1371 (Fed. Cir. 2007) (en banc). That “entails an objective assessment of potential defenses based on the risk presented by the patent.” *Bard Peripheral Vascular, Inc. v. W.L. Gore &*

⁴ Smith & Nephew appears to insinuate, without directly arguing, that the petition does not challenge the jury’s verdict on contributory infringement, and is limited to the induced infringement verdict. See Br. in Opp. 17, 25. The petition, however, seeks review for both types of “indirect infringement,” Pet. 11, and its arguments address the standards applicable to contributory and induced infringement alike, see, e.g., *id.* at 13 n.2.

Assocs., Inc., 682 F.3d 1003, 1006 (Fed. Cir. 2012), cert. denied, 133 S. Ct. 932 (2013). If any infringement or invalidity defense was objectively reasonable, the defendant's subjective beliefs do not matter; there is no willfulness as a matter of law. Smith & Nephew's suggestion that patent law never uses an objective standard "regardless of what a defendant's *actual* knowledge *** may have been at *relevant* times," Br. in Opp. 17, defies Federal Circuit precedent. The petition addresses that at length, Pet. 21-23; Smith & Nephew ignores it. The inconsistency between the Federal Circuit's approach here and its approach to willful infringement further supports review.

2. Smith & Nephew's invocation of *Leeds & Catlin Co. v. Victor Talking Machine Co.*, 213 U.S. 325 (1909), is similarly unsupported. It describes that decision as affirming a contempt order for violating a preliminary injunction against contributory infringement where the defendant had "non-frivolous defense theories." Br. in Opp. 23-24. But *contempt* is a different animal from *infringement*. And the petitioner never raised, and the Court never considered, whether one can be liable for indirect infringement under a willful-blindness theory if it was objectively reasonable to believe the uses would not be infringing. Even if *Leeds & Catlin* "assum[ed]" an answer to that question, "such assumptions *** are not binding in future cases that directly raise the question[]." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990). That Smith & Nephew's sole authority is a 104-year-old case that does not even address the question presented speaks volumes.

3. Smith & Nephew's argument also defies this Court's decisions. "This Court," Smith & Nephew argues, "has never held that misunderstanding of 'legal

requirements, as distinct from lack of knowledge of *facts*, was a defense to liability” for indirect patent infringement. Br. in Opp. 27. But this Court *has* held just that, *twice*. In *Aro Manufacturing Co. v. Convertible Top Replacement Co.*, 377 U.S. 476 (1964), the Court considered whether the “knowing” requirement for contributory infringement under 35 U.S.C. § 271(c) required knowledge of the *facts* regarding how a product was being used, or whether it required knowledge that the use “constituted *infringement*” of the patent. *Id.* at 488 (emphasis added). It held the latter: A party cannot be liable for contributory infringement unless it “knew that the combination for which [its] component was especially designed was both patented and infringing.” *Ibid.* *Global-Tech* likewise held that induced infringement under 35 U.S.C. § 271(b) requires more than factual knowledge of *conduct* “that happens to infringe a patent”; it “requires knowledge that the induced acts *constitute* patent *infringement*.” 131 S. Ct. at 2068 (emphasis added). Smith & Nephew’s defiance of those cases—and their holdings that uncertainty about *infringement* “exonerate[s] the petitioner from liability,” Br. in Opp. 24—underscores the need for review.

B. The Decision Below Cannot Be Reconciled With *Safeco*

Finally, Smith & Nephew urges that *Safeco* is inapposite because the statute there required a “willful” violation, a term “that often *does* excuse mistakes of law.” Br. in Opp. 31. It contends that the statutory provisions governing indirect infringement, 35 U.S.C. § 271(b) and (c), by contrast, do not use the term “willful.” *Id.* at 32.

That distinction ignores *Aro* and *Global-Tech*, which interpreted the “knowing” element of § 271(b) and (c) to require not just knowledge of facts, but knowledge that

the circumstances “constituted *infringement*” of the patent. *Aro*, 377 U.S. at 488 (emphasis added); see *Global-Tech*, 131 S. Ct. at 2068. That requires applying law to facts—just as determining whether the defendant’s conduct violated the FCRA in *Safeco* required applying law to facts. See 551 U.S. at 68.

Smith & Nephew repeats that error when claiming that, unlike *Safeco*, “*Global-Tech* spoke in terms of a defendant’s knowledge of *facts*, not *law*.” Br. in Opp. 32. When describing the standard of willful blindness that had been articulated by courts of appeals in other contexts, *Global-Tech* did state that it requires a “high probability that a fact exists.” 131 S. Ct. at 2070. But *Global-Tech* went on to hold that willful blindness to infringement requires “a high probability” that a product was “patented” *and* the uses were “infringing.” *Id.* at 2072.⁵ That is just like *Safeco*, which involved a determination whether there was an “‘unjustifiably high risk’ of violating the statute necessary for reckless liability.” 551 U.S. at 70.

Smith & Nephew proves the point. It urges that *Safeco* merely held that the “defendant’s violation of the FCRA was not ‘willful’”—it did “*not* hold that such a mistaken ‘understanding’ of the FCRA meant that no violation of the FCRA had occurred at all.” Br. in Opp. 32. But the same principle applies here. Arthrex does not urge (in this Court) that no infringement of Smith & Nephew’s patent occurred at all. Arthrex argues only that it could not have been willfully blind to infringement,

⁵ The structure of *Global-Tech* confirms that. The Court first held that induced infringement “requires knowledge that the induced acts constitute patent infringement.” 131 S. Ct. at 2068. It then held that such “knowledge” could be shown “under the doctrine of willful blindness.” *Ibid.*

as required for liability under § 271(b) and (c), because it was objectively reasonable to believe the uses were non-infringing.

Smith & Nephew simply cannot explain why compliance with an objectively reasonable understanding should preclude a finding of recklessness under *Safeco*, yet cannot preclude liability under the willful-blindness standard, which “surpasses recklessness.” *Global-Tech*, 131 S. Ct. at 2070. That is because there is no explanation. Review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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