No. 12-1163

IN THE

Supreme Court of the United States

HIGHMARK INC.,

Petitioner,

v.

ALLCARE HEALTH MANAGEMENT SYSTEMS, INC.,

Respondent.

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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether a district court's exceptional-case finding under 35 U.S.C. § 285, based on its judgment that a suit is objectively baseless, is entitled to deference.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner Highmark Inc.'s parent corporation is Highmark Health. No publicly held company owns ten percent or more of Highmark Inc.'s stock, and no publicly held company owns ten percent or more of Highmark Health's stock.

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OPINIONS BELOW

The District Court's opinion is reported at 706 F. Supp. 2d 713 (Pet. App. 44a). The Federal Circuit's decision is reported at 687 F.3d 1300 (Pet. App. 1a). The Federal Circuit's order denying rehearing *en banc* is reported at 701 F.3d 1351 (Pet. App. 179a).

JURISDICTION

The Federal Circuit entered judgment on August 7, 2012, and denied rehearing on December 6, 2012. Pet. App. 1a, 181a. On February 4, 2013, the Chief Justice extended the time to file the petition to April 5, 2013. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 285 of the Patent Act, 35 U.S.C. § 285, provides: "The court in exceptional cases may award reasonable attorney fees to the prevailing party."

INTRODUCTION

Section 285 of the Patent Act asks a court "to answer a single question—'Is this case exceptional?' " Pet. App. 213a; 35 U.S.C. § 285. In *Octane Fitness LLC* v. *Icon Health and Fitness, Inc.*, No. 12-1184, this Court will decide what it means for a case to be "exceptional." Regardless of which substantive standard the Court settles on in *Octane*, a district court's exceptional-case finding must be reviewed for abuse of discretion.

That result is dictated by the Court's decisions in *Pierce* v. *Underwood*, 487 U.S. 552 (1988), and *Cooter & Gell* v. *Hartmarx*, 496 U.S. 384 (1990). In *Pierce* and *Cooter*, this Court held that abuse of discretion is the appropriate standard of review for district court findings akin to the Section 285 exceptional-case determination. In so doing, it outlined several factors that are critical to determining whether a mixed question of law and fact should be reviewed deferentially. Each one cuts in favor of a deferential standard for exceptional-case findings.

Indeed, the case for deferential review is even stronger for Section 285 findings than it was in *Pierce* and *Cooter*. While the congressional language at issue in those cases merely permitted the inference that Congress intended district court findings to be viewed deferentially, the text of Section 285 clearly reflects Congress's intent to

commit the exceptional-case question to a district court's discretion. And while the Court in *Pierce* and *Cooter* lacked a "long history of appellate practice" to shed light on the standard-of-review question, appellate courts have long and consistently examined Section 285 fee awards through a deferential lens. Moreover, there is a compelling policy rationale for deferential review: It makes affirmance of fee awards more likely and thus helps dissuade patent "trolls" and others from pursuing the frivolous suits that are clogging federal court dockets and imposing a multi-billion-dollar drag on the U.S. economy.

This case is a perfect illustration of all of these points. After more than four years of discovery and litigation, and after a painstaking review of the case, *see* Pet. App. 44a-178a, the district court exercised its discretion and awarded fees, specifically concluding that Allcare had engaged in "the sort of conduct that gives the term 'patent troll' its negative connotation." Pet. App. 69a n.6. Yet the Federal Circuit disregarded the district court's exhaustive findings and reversed. In doing so, it relied on a newly minted claim-construction theory that Allcare did not advance and that is inconsistent with concessions made by Allcare's own expert. The Federal Circuit's decision was wrong and should be reversed.

STATEMENT

A. Background

Allcare is a patent assertion entity whose sole business is licensing U.S. Patent No. 5,301,105 (the '105 patent) through litigation and the threat of litigation. Allcare obtained the '105 patent for

$75,000 through an assignment from the inventor. The patent discloses a "health management system" meant to facilitate the interaction of a physician, patient, employer, bank, and insurance company. Pet. App. 3a. The primary patent claim at issue here covers a vague method of entering patient symptom data into a data processor for the purpose of "tentatively identifying" a proposed treatment. *Id.* The system is then supposed to indicate whether the proposed treatment appears on a list of procedures that must be manually reviewed for medical necessity (a process known as "utilization review") and, if so, to suspend payment until the necessary review is complete. *Id.*[1]

Following a failed effort to voluntarily license the '105 patent, Allcare turned to more underhanded means: It commissioned a company called Seaport Surveys to conduct misleading telephone "surveys" to try to identify companies using computer systems in the utilization review process. Pet. App. 45a; J.A. 467. A Seaport Surveys employee, reading from a script drafted by Allcare (Pet. App. 84a), would claim to be a "consultant" attempting to "identify organizations that are leaders in the electronic processing of authorizations and referral requests." J.A. 491-92. He would then ask a series of broad questions about the company's computer system capabilities. Allcare compiled a list of potential litigation targets based on the answers to those broad survey questions. J.A. 498-99.

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[1] As Judge Mayer observed in his dissent below, the '105 patent is probably invalid under Section 101's subject matter eligibility requirements. Pet. App. 41a-43a; *see Mayo Collaborative Servs.* v. *Prometheus Labs., Inc.*, 132 S. Ct. 1289 (2012); *Bilski* v. *Kappos*, 130 S. Ct. 3218 (2010).

In 2002, Allcare added a new target to its list: Highmark, a non-profit Blue Cross Blue Shield Plan that provides health insurance to its members. Allcare sent Highmark a letter claiming that it had commissioned an analysis of "Highmark's transaction processing systems" and that it believed these systems infringed the '105 patent. Pet. App. 45a-46a. (As it turned out, Allcare had never commissioned the purported analysis or done any other substantial pre-filing investigation. *See* Pet. App. 53a-66a.) In the correspondence that followed, Highmark pointed out that it could not possibly be infringing the patent because its computer system was not used for "tentatively identifying" proposed treatments, as the patent required. Publicly available information confirmed that point. Pet. App. 66a. Allcare nevertheless persisted in its demand for licensing fees and threatened a lawsuit that would lead to millions of dollars in legal fees and "substantial damages." Pet. App. 45a. Rather than acquiesce, Highmark sought a declaratory judgment of non-infringement and invalidity. Allcare counterclaimed for infringement of claims 52, 53, and 102 of the '105 patent. Pet. App. 5a, 47a.

After four years of costly and burdensome discovery, Highmark moved for summary judgment. Allcare did not even oppose summary judgment on claim 102, and eventually withdrew that claim with prejudice. Pet. App. 5a. The District Court then granted summary judgment for Highmark on claims 52 and 53, finding that Highmark's system plainly did not include at least one critical element of those claims. *See Lucent Techs., Inc.* v. *Gateway, Inc.*, 580 F.3d 1301, 1317 (Fed. Cir. 2009) ("To infringe a

method claim, a person must have practiced all steps of the claimed method.").

Specifically, claim element 52(c) required "entering * * * data symbolic of patient symptoms for tentatively identifying a proposed mode of treatment." Pet. App. 3a. The District Court found that that element required a physician to input a patient's symptoms into a computer system, which would respond with a list of potential treatments. Pet. App. 73a. But as Allcare's own expert admitted, and as Highmark consistently had pointed out from the outset, in Highmark's computer system the physician herself enters the symptoms *and* proposed treatment into the system. *Id.* A physician who uses Highmark's system is not, therefore, entering data "*for* tentatively identifying a proposed mode of treatment," because the physician has already identified the treatment herself. Pet. App. 75a-76a (emphasis added). Because this element was missing, Highmark could not infringe claim 52. Further, because claim 53 was dependent upon claim 52 and thus included all of its limitations, summary judgment was mandated on that claim as well.

Allcare appealed to the Federal Circuit, which summarily affirmed without a written opinion. *Highmark, Inc.* v. *Allcare Health Mgmt. Sys., Inc.*, 329 F. App'x 280 (Fed. Cir. 2009). Then-Chief Judge Michel chastened Allcare's counsel at argument that his position on infringement "makes no sense to me at all." J.A. 636.

B. The District Court's Fee Award

Highmark moved for fees under Section 285 of the Patent Act, which provides that a "court in exceptional cases may award reasonable attorney

fees to the prevailing party." 35 U.S.C. § 285. The District Court conducted an extensive review of the record, covering the ground from Allcare's inadequate pre-filing investigation to its assertion and eventual withdrawal of frivolous claims and defenses. After reviewing the travel of the case, the District Court concluded that it was exceptional under Section 285. Pet. App. 90a-92a.

The court relied on a broad range of considerations to support its finding. For example, it determined that Allcare had not adequately investigated its case before filing, and that an investigation would have shown that Highmark was not infringing Allcare's patent. Pet. App. 64a-66a. As the court put it, "Allcare had not done its homework when it began trolling for dollars and threatening litigation." Pet. App. 69a; *see also* Pet. App. 93a (noting that there was "no apparent investigation by counsel"). Even after litigation commenced, Allcare passed up an opportunity to have its expert inspect Highmark's system to determine whether it fell within the terms of the patent claims. Pet. App. 70a. The District Court likewise found that Allcare continued to pursue "meritless allegations after the lack of merit became apparent," Pet. App. 77a, and, indeed, after they were shown to be "without support" by Allcare's "own expert's report and deposition testimony." Pet. App. 78a. Allcare even "appear[ed] to acknowledge that it continued to pursue meritless allegations as insurance or leverage." *Id.*

Moreover, the District Court pointed to numerous instances of Allcare's "vexatious" and "deceitful" conduct over the course of the litigation. Pet. App. 90a. It found that Allcare had used the Seaport survey "as a ruse to identify potential targets for

licensing demands"; that it had asserted a frivolous res judicata defense; that it had changed its position several times on claim construction "[w]ithout reasonable explanation" and after court-ordered deadlines; and that it had made misrepresentations to another district court in order to get the case transferred to the Northern District of Texas. Pet. App. 69a, 82a-83a, 91a. In another order, the District Court clarified that Allcare had done all of this in subjective bad faith. Pet. App. 175a.

The District Court's fee-shifting opinion spanned more than 55 pages. Pet. App. 44a-178a. And it concluded, after an extensive factual review, that Allcare had engaged in "the sort of conduct that gives the term 'patent troll' its negative connotation." Pet. App. 69a n.6. The record "firmly convince[d]" the court that Allcare's use of "frivolous" and "vexatious tactics" made the case exceptional under Section 285. Pet. App. 82a, 90a-92a.[2]

C. The Federal Circuit's Decision

The Federal Circuit reversed the District Court's fee award in part. Pet. App. 14a-31a. Although Section 285 says only that district courts may shift fees in "exceptional" cases, the Federal Circuit has grafted a number of rigid requirements onto the

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[2] The District Court initially imposed sanctions against Allcare's attorneys under Federal Rule of Civil Procedure 11, but later vacated those sanctions for procedural reasons and declined to re-impose them. Pet. App. 86a-90a, 99a-102a, 151a-52a. It took care to note that its decision to vacate the Rule 11 sanctions had "no bearing on the exceptional-case finding." Pet. App. 101a; *see also* Pet. App. 171a-78a (denying Allcare's motion to reconsider the attorney's fee award).

statute's language. In particular, it has permitted district courts to shift fees only when a party has (1) asserted a "frivolous claim," (2) engaged in "inequitable conduct before the Patent and Trademark Office," or (3) engaged in "misconduct during litigation." Pet. App. 8a. Fee-shifting cases in the first category have two further requirements. To qualify as "frivolous" under the Federal Circuit's precedent, a claim must be "objectively baseless" and "brought in subjective bad faith." Pet. App. 8a.

The Federal Circuit considered the "central issue" in Allcare's appeal to be whether the "infringement counterclaims against Highmark were frivolous." Pet. App. 8a. It approached that question "on a claim by claim basis," conducting a "single backwards-looking inquiry" into the "reasonableness" of each claim "in light of the full record." Pet. App. 12a-13a. And it reviewed the District Court's findings through a lens it had never before employed. In reviewing objective-baselessness findings, the Federal Circuit had long applied clear-error review. Pet. App. 207a-09a. The majority in this case abandoned that standard. Instead, it held that objective baselessness is "a question of law based on underlying mixed questions of law and fact and is subject to *de novo* review." Pet. App. 9a (internal quotation marks omitted). It thus reviewed the District Court's determination of objective reasonableness "without deference." *Id.*

Even without deference, the panel majority affirmed that Allcare's "claim 102 infringement litigation warranted an exceptional case finding." Pet. App. 14a. But it reversed the fee award as to claim 52. It held that Allcare's construction of claim 52 was not objectively baseless because there "was

support in the [patent] specification for Allcare's position." Pet. App. 20a. The majority admitted that Allcare had never "pointed to the specification as an argument in support of its theory." Pet. App. 21a. But, reviewing *de novo*, it held that its own hypothetical theory precluded an exceptional-case finding. Pet. App. 21a-22a. The panel majority also held that none of the instances of litigation misconduct found by the District Court separately warranted an exceptional-case finding. Pet. App. 24a. In the end, the majority remanded to the district court "for a calculation of attorneys' fees based on the frivolity of the claim 102 allegations only." Pet. App. 31a.

Judge Mayer filed a sharply worded dissent. He wrote that deferential review was required not just by Federal Circuit case law but also by this Court's decisions in *Cooter & Gell* v. *Hartmarx*, 496 U.S. 384 (1990), and *Pierce* v. *Underwood*, 487 U.S. 552 (1988). Pet. App. 31a, 37a-39a. He further decried the Federal Circuit's "increasing infatuation with *de novo* review of factual determinations," which is "an enormous waste of resources and vitiates the critically important fact-finding role of the district courts." Pet. App. 32a-33a (citing *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 575 (1985)). And he explained why deference is particularly appropriate in the exceptional-case context:

> As an appellate court, we are ill-suited to weigh the evidence required to make an exceptional case determination. In many cases, a trial court will declare a case exceptional only after spending months—and sometimes even years—reviewing the evidence, hearing testimony, and evaluating

> the conduct of the litigants. Its intimate familiarity with the facts of the case, and the parties involved, place it in a far superior position to judge whether or not a litigant's claims of infringement were objectively baseless.

Pet. App. 35a-36a. Finally, Judge Mayer demonstrated that—evaluated through the proper standard of review—this is an easy case: "Given that Allcare persisted in advancing infringement allegations that were both in direct conflict with the plain claim language and unsupported by the testimony of its own expert, the district court had ample grounds for concluding that Allcare's allegations of infringement of claim 52(c) were frivolous." Pet. App. 40a. He would have affirmed the fee award in full.

Highmark's subsequent petition for rehearing en banc was denied over the dissent of five judges, who again emphasized the inconsistency between the panel majority's decision and this Court's precedent. Pet. App. 190a-214a. This Court granted certiorari.

SUMMARY OF ARGUMENT

I. This case begins and ends with *Pierce* and *Cooter*. In those decisions, the Court addressed fee and sanction standards directly analogous to the Federal Circuit's "objective baselessness" test. And in both cases the Court held that appellate courts should review awards under such provisions for abuse of discretion. The Court explained that "issues involving * * * supervision of litigation"—including fee awards—are "common[ly]" given "abuse-of-discretion review." *Pierce*, 487 U.S. at 558 n.1. And it set forth many factors that cut in favor of unitary

abuse-of-discretion review in such cases, even if a particular case happens to implicate "purely legal issue[s]." *Id.* at 560. Every one of those factors favors abuse-of-discretion review here too.

Indeed, this is an *a fortiori* case. Section 285's text is even more suggestive of deference than the statutory texts at issue in *Pierce* and *Cooter*. Moreover, *Pierce* explained that standards of review can and should be derived from "a long history of appellate practice," 487 U.S. at 558, and here there is such a history: Courts long have reviewed exceptional-case findings under Section 285 and the Lanham Act for abuse of discretion. There is no reason to deviate from that history now. The two arguments the Federal Circuit offered for breaking from that historical practice, and flouting *Pierce* and *Cooter*, cannot bear the weight the court put on them.

II. Surveying this Court's standard-of-review jurisprudence more broadly, it is all the more clear that this case belongs in the category of cases that warrant deferential review. The exceptional-case inquiry shares key features with the issues this Court has held should be reviewed deferentially. And it looks nothing like the issues for which this Court has endorsed *de novo* review.

III. Finally, Section 285's role in deterring abusive patent litigation provides an additional reason for reviewing district court findings deferentially. The exceptional-case fee award is one of the few tools courts have for deterring patent assertion entities—better known as "patent trolls"—from pursuing frivolous claims in hopes of coercing settlements. District courts are in the best position to deploy that

tool effectively, and according them deference will help protect innovators from frivolous suits.

ARGUMENT

I. *PIERCE* AND *COOTER* REQUIRE A UNITARY ABUSE-OF-DISCRETION STANDARD OF REVIEW FOR SECTION 285 FEE AWARDS.

A. *Pierce* And *Cooter* Control This Case.

This Court has twice considered how appellate courts should review fee awards or sanctions in contexts functionally identical to the Section 285 "objectively baseless" inquiry adopted by the Federal Circuit.[3] Both times it has concluded that such awards should be reviewed for abuse of discretion. So too here.

1. In *Pierce*, the Court considered the proper standard of review for fee awards under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d). The EAJA authorizes courts to award attorney's fees upon finding that the United States' position was not "substantially justified." *Id.* A position is not substantially justified if it has no "reasonable basis in both law and fact," *Pierce*, 487 U.S. at 565—a standard effectively identical to the Federal Circuit's Section 285 test, which deems a position objectively baseless if "no reasonable litigant could believe it would succeed." *Old Reliable Wholesale, Inc.* v. *Cornell Corp.*, 635 F.3d 539, 544 (Fed. Cir. 2011).

With neither an "explicit statutory command" nor a "history of appellate practice" to guide it, *Pierce*, 487 U.S. at 558, this Court relied on considerations of

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[3] Any change to this inquiry precipitated by the Court's resolution of *Octane* would only create additional arguments in favor of abuse-of-discretion review. *See infra* at 35-37.

"sound judicial administration" to hold that a district court's substantial-justification finding is reviewable only for abuse of discretion. *Id.* at 563. In so doing, the Court recognized that whether a litigant's position was substantially justified will sometimes turn on "purely legal" issues. *Id.* at 560. It nevertheless held that abuse of discretion is the proper standard of review across the board.

Cooter was much the same. There, the Court considered the standard of review for decisions imposing Rule 11 sanctions. *See* 496 U.S. at 399-402. Rule 11 authorizes sanctions where an attorney advances a position that is not "warranted by existing law" or is lacking in "evidentiary support," Fed. R. Civ. P. 11(b)—again, a standard practically indistinguishable from the Federal Circuit's "objective baselessness."

Prior to *Cooter*, some courts of appeals had applied three different standards of review to different kinds of Rule 11 questions—clear-error review of findings regarding the factual basis for a claim, *de novo* review of findings about whether a claim was "warranted by existing law," and abuse-of-discretion review of the amount of sanctions imposed. *Cooter*, 496 U.S. at 399. That approach mirrors the trifurcated standard the Federal Circuit adopted below for Section 285. *See* Pet. App. 9a-12a (reviewing bad-faith finding for clear error, objective baselessness *de novo*, and the fee award for abuse of discretion). And *Cooter* squarely rejected it. As in *Pierce*, the Court held that "*all* aspects" of a district court's decision to impose Rule 11 sanctions—including its "legal conclusions"—should be reviewed under a unitary, abuse-of-discretion standard. *Cooter*, 496 U.S. at 401 (emphasis added).

2. *Pierce* and *Cooter* control here. Like Section 285's exceptional-case standard—and the "objective baselessness" gloss put on it by the Federal Circuit—*Pierce*'s "substantial justification" and *Cooter*'s "warranted by existing law" are mixed questions of law and fact, arise in proceedings ancillary to the merits, and implicate "supervision of litigation" issues that district courts are best positioned to resolve. *Pierce*, 487 U.S. at 558 n.1, 560. Indeed, every one of the factors that led this Court to endorse a unitary, deferential review standard in *Pierce* and *Cooter* militates in favor of the same standard here.

Statutory Text. In *Pierce*, the Court found that the relevant statutory text "suggest[ed]," though it did "not compel[ ]," the conclusion that Congress meant for appellate courts to afford "some deference to the district court upon appeal." 487 U.S. at 559. Section 285's language is at least as suggestive of deference. The statute provides that courts "may" award fees, and "[t]he word 'may' clearly connotes discretion." *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517, 533 (1994). There is no question that the ultimate decision to award fees is confided to the district court's discretion. This grant of discretion implies a limitation on the scope of appellate review, as even the Federal Circuit acknowledges. *See*, *e.g.*, *Monolithic Power Sys., Inc.* v. *O2 Micro Int'l Ltd.*, 726 F.3d 1359, 1365 (Fed. Cir. 2013).

The phrase "exceptional cases," too, suggests deferential review. As discussed at length below, the ordinary meaning of "exceptional" denotes the kind of case-by-case, holistic judgment best left to district courts' discretion. *See infra* at 25-28. And the reference to exceptional "cases"—which focuses the inquiry on the overall course of the litigation rather

than on particular contentions—suggests a primary role for the district judge who has lived with a case since its inception.

Best-Positioned Decisionmaker. After gleaning what guidance they could from the relevant texts, *Pierce* and *Cooter* turned to the question whether " 'one judicial actor is better positioned than another to decide the issue in question.' " *Pierce*, 487 U.S. at 560 (quoting *Miller* v. *Fenton*, 474 U.S. 104, 114 (1985)). And in both cases, the Court determined that the district court was that judicial actor. In *Pierce*, the Court explained that "[s]ome of the elements that bear upon whether the Government's position '*was* substantially justified' may be known only to the district court":

> Not infrequently, the question will turn upon not merely what was the law, but what was the evidence regarding the facts. By reason of settlement conferences and other pretrial activities, the district court may have insights not conveyed by the record, into such matters as whether particular evidence was worthy of being relied upon, or whether critical facts could easily have been verified by the Government.

Id. Likewise, in *Cooter* the Court explained that "[a] district court's ruling that a litigant's position is factually well grounded and legally tenable for Rule 11 purposes is similarly fact specific." 496 U.S. at 403. For example, "to determine whether an attorney's prefiling inquiry was reasonable, a court must consider all the circumstances of a case. An inquiry that is unreasonable when an attorney has months to prepare a complaint may be reasonable

when he has only a few days before the statute of limitations runs." *Id.* at 401-02.

Exceptional-case findings, including objective-baselessness determinations, work exactly the same way. Courts evaluate objective baselessness through "a single backwards-looking inquiry into the reasonableness of the claims in light of the full record." *Highmark*, *Inc.* v. *Allcare Health Management Sys., Inc.*, 687 F.3d 1300, 1310-11 (Fed. Cir. 2012). And, just like in the EAJA and Rule 11 contexts, objective baselessness often turns on quintessentially factual considerations—for example, the amount of evidence supporting a given theory; the thoroughness of initial investigations; or whether and when particular arguments were advanced. In *ICU Medical, Inc.* v. *Alaris Medical Systems, Inc.*, 2007 WL 6137003 (C.D. Cal. 2007), *aff'd*, 558 F.3d 1368 (Fed. Cir. 2009), for example, the district court's objective-baselessness finding turned on a detailed analysis of the patent's prosecution history, the facts on the ground prior to the suit's filing, and the litigant's continued reliance on deficient arguments after becoming aware of their deficiencies. *Id.* at *4-*9. Likewise, in *Marctec, LLC* v. *Johnson & Johnson*, 2010 WL 680490 (S.D. Ill. 2010), *aff'd*, 664 F.3d 907 (Fed. Cir. 2012), the court's objective-baselessness finding turned on the litigant's baseless claim-construction arguments, mischaracterizations of fact and law made at various points throughout the litigation, and arguments that contradicted the litigant's evidence or were based on evidence the court had excluded. *Id.* at *3-*10.

A Section 285 objective-baselessness finding is thus precisely the kind of "supervision of litigation" issue—frequently bound up with factual and

temporal questions—that district courts are best positioned to resolve. *Pierce*, 487 U.S. at 558 n.1. District courts, which often live with a case for years, are on "the front lines of litigation" and intimately familiar with the way these cases progress. *Cooter*, 496 U.S. at 404. Appellate courts, which have only cold records and short oral arguments to go on, are far removed from the relevant context. Indeed, the Federal Circuit itself has made exactly this point: "Having only the briefs and the cold record, and with counsel appearing for us for only a short period of time, we are not in the position to second-guess the trial court's judgment." *Eon-Net LP* v. *Flagstar Bancorp*, 653 F.3d 1314, 1324 (Fed. Cir. 2011). Or, as this Court put it in *Cooter*: "Familiar with the issues and litigants, the district court is better situated than the court of appeals to marshal the pertinent facts and apply the fact-dependent legal standard." 496 U.S. at 402.

This case illustrates the point. With a complete grasp of the litigation as a whole, the district court, "in a thorough and well-reasoned opinion," Pet. App. 39a, provided a detailed analysis of the facts and legal arguments Allcare advanced at various stages of the suit. *See id.* at 44a-102a. It supported its objective-baselessness conclusion with specific findings related to the adequacy of Allcare's pre-filing investigation, the timing of Allcare's arguments, and the company's ever-changing positions. *See id.* at 51a-86a. In marked contrast, the Federal Circuit's conclusion that Allcare's suit was not objectively baseless turned on claim-construction arguments that the company never advanced, *see id.* at 21a, and that contradicted stipulations and ignored expert concessions,

see id. at 73a-74a, 133a. Moreover, the panel simply assumed—without analysis—that Allcare's *infringement* claim would not have been objectively baseless under the panel's new claim-construction theory. *See id.* at 22a. In the end, the district court was able to evaluate Allcare's suit in full view of the context. The court of appeals, by contrast, never had the bigger picture.

Efficiency Costs. *Pierce* and *Cooter* concluded that the inefficiencies accompanying *de novo* review also cut in favor of an abuse-of-discretion standard. As the Court put it in *Pierce*, "even where the district judge's full knowledge of the factual setting can be acquired by the appellate court, that acquisition will often come at unusual expense[.]" 487 U.S. at 560. It would require the appellate court "to undertake the unaccustomed task of reviewing the entire record, not just to determine whether there existed the usual minimum support for the merits determination made by the factfinder below, but to determine whether urging of the opposite merits determination was substantially justified." *Id.*

Pierce took pains to explain that such inefficiency occurs even when a fee award turns on a "purely legal issue governing the litigation." *Id.* Because fee awards are premised on the weakness of the opposing party's position, the Court explained, they are often sought in cases that settle or in which there is no appeal from the district court's merits adjudication. *Id.* Thus the court of appeals is forced to learn a case that would never come before it on the merits. Moreover, even if there is a merits appeal, *de novo* review still would "require the appellate court to invest substantial additional time." *Id.* That is so because the "separate-from-the-merits" fee appeal

asks an entirely different question than the merits appeal: "not what the law now is, but what the [losing party] was substantially justified in believing it to have been." *Id.* at 560-61.

That rationale, too, applies here. The objective-baselessness inquiry, just like the substantial-justification inquiry, requires appellate courts to have intimate familiarity with the entire progression of a case. And the nature of the two questions is identical: The court's task is "not just to determine whether there existed the usual minimum support for the merits determination made by the factfinder below, but to determine whether urging of the opposite merits determination was substantially justified." *Id.* at 560. *De novo* review in the Section 285 context therefore would require a substantial outlay of appellate resources regardless of whether there is an appeal of the merits. Conversely, reviewing exceptional-case findings for abuse of discretion "will streamline the litigation process by freeing appellate courts from the duty of reweighing evidence and reconsidering facts already weighed and considered by the district court." *Cooter*, 496 U.S. at 404.

Law-Clarifying Value. *Pierce* and *Cooter* also found it significant that the efficiency costs inherent in *de novo* review of fee awards and sanctions would fail to pay dividends in law-clarifying value. In both cases, the Court endorsed the general principle that "[o]ne of the 'good' reasons for conferring discretion on the trial judge is the sheer impracticability of formulating a rule of decision for the matter in issue." *Pierce*, 487 U.S. at 561 (internal quotation omitted); *see also Cooter*, 496 U.S. at 401. In *Pierce*, the Court concluded that "the question whether the

Government's litigating position has been 'substantially justified' is precisely such a multifarious and novel question, little susceptible, for the time being at least, of useful generalization." 487 U.S. at 562. It came to the same conclusion in *Cooter*, explaining that "[t]he issues involved in determining whether an attorney has violated Rule 11 likewise involve fact-intensive, close calls." 496 U.S. at 404 (internal quotation omitted).

Yet again, Section 285 findings are just the same. Each Section 285 case will involve different underlying facts. Each will turn on a different claim construction regarding a different patent. Each will require a different infringement analysis. And each will arise in a different litigation context. The question whether a case is exceptional, in short, "involve[s] multifarious, fleeting, special, narrow facts." *Pierce*, 487 U.S. at 561-62 (internal quotation omitted). And "because the number of possible situations is large, [the Court should be] reluctant either to fix or sanction narrow guidelines for the district courts to follow." *Id.* (internal quotation omitted). Effort expended in deciding an exceptional-case question *de novo* would be unlikely to produce a holding generalizable for future cases.

Distortion of Appellate Process. The temporal focus of the EAJA and Rule 11 inquiries created yet another problem with *de novo* review in *Pierce* and *Cooter*: Such plenary review would "strangely distort the appellate process." *Pierce*, 487 U.S. at 561; *Cooter*, 496 U.S. at 403-04. In practice, EAJA awards and Rule 11 sanctions typically turn on the reasonableness of a party's positions considered in their temporal and factual contexts. As a result, a holding that a party's position was or was not

reasonable at a given point in time may not accurately reflect the law as it is currently is. And where the state of the law remains unclear, a backwards-looking reasonableness holding would create confusing precedent for subsequent cases that squarely present the underlying question. *See Pierce*, 487 U.S. at 561; *Cooter*, 496 U.S. at 403-04.

De novo review of objective-baselessness findings would produce the same distortions. On the one hand, if intervening decisions have clarified the law, the question whether a position was baseless—at the time and in the context it was advanced—"is of entirely historical interest." *Pierce*, 487 U.S. at 561. On the other hand, if the law has yet to crystallize, an objective-baselessness ruling could "effectively establish the circuit law in a most peculiar, second-handed fashion." *Id.* *De novo* review would not promote orderly development of the law in either case.

Discouraging Collateral Appeals. Finally, *Cooter* pointed to a special reason to prefer deferential review for issues that arise in proceedings ancillary to the merits: "reducing the amount of satellite litigation" by "discourag[ing] litigants from pursuing marginal appeals." 496 U.S. at 404. This concern carries even greater weight in the context of attorney's fees. Appeals from fee awards are "one of the least socially productive types of litigation imaginable." *Hensley* v. *Eckerhart*, 461 U.S. 424, 442 (1983) (Brennan, J., concurring in part and dissenting in part). Reviewing fee-award decisions for abuse of discretion significantly reduces the incentives for fruitless appeals, while still protecting parties from serious error. *See Cooter*, 496 U.S. at 405 ("A district court would necessarily abuse its

discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.").

Moreover, even where collateral appeals are merited, abuse-of-discretion review simplifies them. Collateral litigation generally, and fee litigation specifically, "is often protracted, complicated, and exhausting." *Pennsylvania* v. *Del. Valley Citizens' Council*, 483 U.S. 711, 722 (1987). Such litigation, the Court has cautioned, "should be simplified to the maximum extent possible." *Id.* As *Pierce* recognized, reviewing fee awards under a unitary, deferential standard furthers the goal of ensuring "that 'a request for attorney's fees should not result in a second major litigation.' " 487 U.S. at 563 (quoting *Hensley*, 461 U.S. at 437). A unitary standard prevents needless litigation about which standard-of-review bucket a dispute belongs to. And a deferential standard ensures that appeals of fee awards focus on real errors, not minor quibbles. This is especially important in the fee context—a "sphere of judicial decisionmaking" in which this Court has cautioned against "appellate micromanagement." *Fox* v. *Vice*, 131 S. Ct. 2205, 2216 (2011).

3. *Pierce* and *Cooter*, in sum, hold that unitary, abuse-of-discretion review applies to determinations just like a Section 285 objective-baselessness finding. And the consideration that inspired the Federal Circuit here to undertake *de novo* review of objective-baselessness findings—namely, that some such findings may turn on legal issues—did nothing to change the result in *Pierce* and *Cooter*. Quite the contrary: *Pierce* explicitly recognized that "[i]n some cases, such as the present one, the attorney's fee determination will involve a judgment ultimately

based upon evaluation of the purely legal issue governing the litigation." 487 U.S. at 560. And the very question presented in *Cooter* was "whether the court of appeals must defer to the district court's *legal conclusions* in Rule 11 proceedings." 496 U.S. at 401 (emphasis added). The Court answered that question in the affirmative, adopting across-the-board abuse-of-discretion review.

In giving its answer, the Court recognized that appellate courts can reach and correct legal errors without the needless complications of a bifurcated (or trifurcated) review standard. As *Cooter* put it, unitary abuse-of-discretion review "would not preclude the appellate court's correction of a district court's legal errors" because "[a]n appellate court would be justified in concluding that, in making such errors, the district court abused its discretion." *Id.* at 402; *see also id.* at 405 (district court by definition abuses its discretion when it makes an error of law). Just so here. The objective-baselessness inquiry usually will involve factual questions, or legal questions bound up with factual ones. *See supra* at 17-19. But even if it sometimes does not, that is no warrant to review the district court's Section 285 finding *de novo*, any more than it was in *Pierce* or *Cooter*.

B. Deferential Review Here Follows *A Fortiori* From *Pierce* And *Cooter*.

The factors identified in *Pierce* and *Cooter* thus militate in favor of unitary abuse-of-discretion review in Section 285 cases. That actually understates the case, however. In fact, deferential review in this case follows *a fortiori* from *Pierce* and *Cooter* for two reasons.

1. First, Section 285's text is substantially *more* suggestive of unitary abuse-of-discretion review than the provisions in *Pierce* and *Cooter*.

a. Section 285 provides that "[t]he court in exceptional cases may award reasonable attorney fees to the prevailing party." 35 U.S.C. § 285. "Exceptional" means "[f]orming an exception," "not ordinary," "uncommon," or "rare"—in a word, unusual. Webster's New Int'l Dictionary 889 (2d ed. 1950); *see also Noxell Corp.* v. *Firehouse No. 1 Bar-B-Que Rest.*, 771 F.2d 521, 526 (D.C. Cir. 1985) (R.B. Ginsburg, J.) ("exceptional" means "uncommon, not run-of-the-mill"). And this Court has already held that a district court's decision that a case is unusual must be reviewed for abuse of discretion. *Koon* v. *United States*, 518 U.S. 81, 98-99 (1996). As the Court in *Koon* explained, "[t]o resolve th[e] question" whether a given case is "unusual enough for it to fall outside the heartland of cases * * * the district court must make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience." *Id.* at 98. Deferential review thus applies in order "to afford 'the district court the necessary flexibility to resolve questions involving multifarious, fleeting, special, narrow facts that utterly resist generalization.' " *Id.* at 99 (quoting *Cooter*, 496 U.S. at 404).

That makes sense. After all, a district court "may have a better 'feel' for the unique circumstances of the particular case before it," *United States* v. *Rivera*, 994 F.2d 942, 951-52 (1st Cir. 1993) (Breyer, C.J.), and " '[t]o ignore the district court's special competence * * * about the 'ordinariness' or 'unusualness' of a particular case' " would be to ignore " 'an important source of information, namely,

the reactions of the trial judge to the fact-specific circumstances of the case,' " *Koon*, 518 U.S. at 99 (quoting *Rivera*, 994 F.2d at 951). Appellate courts thus should defer to district courts' determinations as to "whether the given circumstances, as seen from the district court's unique vantage point, are usual or unusual, ordinary or not ordinary, and to what extent." *Rivera*, 994 F.2d at 951-52.[4]

The word "exceptional" in Section 285 also suggests a *unitary* standard of review—abuse of discretion across the board—to an even greater degree than the text at issue in *Pierce* and *Cooter*. In *Cooter*, this Court adopted a unitary standard despite the fact that Rule 11 itself broke out the possible grounds for sanction into multiple inquiries. *See* 496 U.S. at 399, 404-05. The case for a unitary standard here is much more straightforward. Section 285 asks only a "single question—'Is this case exceptional?' " Pet. App. 213a. Congress did not cleave exceptionality into rigid categories or announce various elements that must be present in an exceptional case. If a unitary standard was appropriate in *Cooter*, it is all the more appropriate for Section 285.

b. Section 285's history confirms that the word "exceptional" contemplates discretion and deferential review. The predecessor to Section 285, enacted in

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[4] Indeed, the Second Circuit reached the same conclusion with respect to another statute that uses the word "exceptional." *See United States* v. *DiSomma*, 951 F.2d 494, 497 (2d Cir. 1991) (analyzing "exceptional reasons" language of 18 U.S.C. § 3145(c)). The court explained that "exceptional" means "a unique combination of circumstances giving rise to situations that are out of the ordinary," and that "a case by case evaluation" by district court judges in the "full exercise of [their] discretion" is "essential." *Id.*

1946, provided that a court, "in its discretion, may award attorney's fees." 35 U.S.C. § 70 (1946); Pub. L. No. 79-587, 60 Stat. 778 (1946). The legislative history of that provision demonstrates that Congress intended a holistic inquiry, with no limitation on the ways in which a case can warrant a fee award. *See* S. Rep. No. 79-1503, at 2 (1946) ("The provision is * * * made general so as to enable the court to prevent a gross injustice to an alleged infringer."). As one court put it after surveying the legislative history, the "exercise of discretion" to award fees "should be bottomed upon a finding of unfairness or bad faith in the conduct of the losing party, or some other equitable consideration of similar force, which makes it grossly unjust that the winner of the particular law suit be left to bear the burden of his own counsel fees[.]" *Park-In-Theatres, Inc.* v. *Perkins*, 190 F.2d 137, 142 (9th Cir. 1951). Applying the 1946 provision, every court of appeals to address fee-award decisions reviewed them deferentially. *See, e.g.*, *Dixie Cup Co.* v. *Paper Container Mfg. Co.*, 174 F.2d 834, 837 (7th Cir. 1949); *Dubil* v. *Rayford Camp & Co.*, 184 F.2d 899, 903 (9th Cir. 1950).

Congress then codified those interpretations in Section 285. The provision was enacted in 1952 as part of a massive revision and codification of the Patent Act. Pub. L. No. 82-593, § 285, 66 Stat. 792, 813 (1952). And the authoritative commentary on the new provision recognized that Section 285 "is substantially the same as the corresponding sentence of the old statute, with the addition of 'in exceptional cases' *to express the intention of the old statute as shown by its legislative history and as interpreted by the courts*." P.J. Federico, *Commentary on the New Patent Act,* 35 U.S.C.A. 1, 56 (1954), *reprinted at* 75

J. Pat. & Trademark Off. Soc'y 161, 216 (1993) (emphasis added); *accord* S. Rep. No. 82-1979, at 30 (1952); *see also R.M. Palmer Co.* v. *Luden's Inc.*, 236 F.2d 496, 501 (3d Cir. 1956) ("The phrase 'exceptional circumstance' is not contained in the prior law, but confirms to the interpretation of the prior law by the cases." (internal citation omitted)). Congress, in short, intended "exceptional" to sweep in notions of discretion and deference.

c. By contrast, the EAJA provision at issue in *Pierce* asked the court to determine whether the United States' position was "substantially justified." 552 U.S. at 556 (quoting 28 U.S.C. § 2412(d)). And the portion of Rule 11 at issue in *Cooter* asked the court to determine, among other things, whether a litigant's argument was "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." 496 U.S. at 392 (quoting Fed. R. Civ. P. 11). Nothing about those textual formulations particularly suggests deference. And yet the Court held that deferential review applied to both. If so there, all the more so here.

2. There is a second reason this is an *a fortiori* case: "[A] long history of appellate practice," *Pierce*, 487 U.S. at 558, teaches that review of Section 285 fee awards should be deferential.

a. The Court's analysis in *Pierce* centered on considerations of sound judicial administration. *See id.* at 560. But the Court delved into those considerations largely because the EAJA lacked a "historical tradition." *Id.* at 558. In areas of law that have such a tradition, the Court wrote, the answer to the standard-of-review question "is provided by a long history of appellate practice." *Id.*

This is such a case. As discussed, the predecessor to Section 285 authorized the district court to award fees "in its discretion," and every court of appeals to address fee awards under that statute applied deferential review. *See, e.g.*, *Dixie Cup*, 174 F.2d at 837; *Dubil*, 184 F.2d at 903; *see supra* at 26-27. After Congress enacted Section 285 in 1952, the courts of appeals uniformly recognized that the new statute "ha[d] not done away with the discretionary feature" and therefore that under Section 285, as before, "the determination of the district court will not be upset unless there has been an abuse of discretion." *Hoge Warren Zimmermann Co.* v. *Nourse & Co.*, 293 F.2d 779, 783-84 (6th Cir. 1961); *accord Talon, Inc.* v. *Union Slide Fastener, Inc.*, 266 F.2d 731, 738-39 (9th Cir. 1959); *Colgate-Palmolive Co.* v. *Carter Prods. Co.*, 230 F.2d 855, 866 (4th Cir. 1956).

Indeed, *every* court of appeals had the opportunity to weigh in on the standard of review for Section 285 cases before the Federal Circuit was created in 1982. And the outcome was *unanimous*: Deferential review was the unwavering rule. *See Norton Co.* v. *Carborundum Co.*, 530 F.2d 435, 445 (1st Cir. 1976); *Larchmont Eng'g, Inc.* v. *Toggenburg Ski Ctr.*, 444 F.2d 490, 491 (2d Cir. 1971); *Hardinge Co.* v. *Laughlin Steel Corp.*, 275 F.2d 37, 37-38 (3d Cir. 1960); *Colgate-Palmolive*, 230 F.2d at 866 (4th Cir.); *Graham* v. *Jeoffroy Mfg., Inc.*, 253 F.2d 72, 78 (5th Cir. 1958); *Hoge Warren*, 293 F.2d at 783-84 (6th Cir.); *Technograph Printed Circuits Ltd.* v. *Methode Elecs., Inc.*, 484 F.2d 905, 909 (7th Cir. 1973); *Bolt, Beranek, & Newman, Inc.* v. *McDonnell Douglas Corp.*, 521 F.2d 338, 344 (8th Cir. 1975); *Schmidt* v. *Zazzara*, 544 F.2d 412, 414 (9th Cir. 1976); *Milgo*

Elec. Corp. v. *United Bus. Comm'cns, Inc.*, 623 F.2d 645, 666-67 (10th Cir. 1980); *Oetiker* v. *Jurid Werke GmbH*, 671 F.2d 596, 602 (D.C. Cir. 1982). Nor did that deferential standard disappear after 1982; the Federal Circuit also applied it for decades. *See, e.g.*, *Medtronic Navigation, Inc.* v. *BrainLAB Medizinische Computersysteme GmbH*, 603 F.3d 943, 953 (Fed. Cir. 2010); *Slimfold Mfg. Co.* v. *Kinkead, Inc.*, 932 F.2d 1453, 1459 (Fed. Cir. 1991).

b. Appellate review under the Lanham Act's identical fee provision has a similar history. Congress added the provision in 1975, *see* Pub. L. No. 93-600, § 3, 88 Stat. 1955 (1975), and used the same language as in Section 285: "The court in exceptional cases may award reasonable attorney fees to the prevailing party." 15 U.S.C. § 1117(a)(3). Equipped with Section 285 precedents, every court of appeals but one decided to review Lanham Act fee awards for abuse of discretion. *See Tamko Roofing Prods., Inc.* v. *Ideal Roofing Co.*, 282 F.3d 23, 30 (1st Cir. 2002); *Farberware Licensing Co.* v. *Meyer Mktg. Co.*, 428 F. App'x 97, 99 (2d Cir. 2011); *Securacomm Consulting, Inc.* v. *Securacom Inc.*, 224 F.3d 273, 279 (3d Cir. 2000); *Employers Council on Flexible Comp.* v. *Feltman*, 384 F. App'x 201, 205-06 (4th Cir. 2010); *National Bus. Forms & Printing, Inc.* v. *Ford Motor Co.*, 671 F.3d 526, 537 (5th Cir. 2012); *Johnson* v. *Jones*, 149 F.3d 494, 503 (6th Cir. 1998); *TE-TA-MA Truth Found.-Family of URI, Inc.* v. *World Church of the Creator*, 392 F.3d 248, 257 (7th Cir. 2004); *Blue Dane Simmental Corp.* v. *Am. Simmental Ass'n*, 178 F.3d 1035, 1043 (8th Cir. 1999); *National Ass'n of Prof'l Baseball Leagues, Inc.* v. *Very Minor Leagues, Inc.*, 223 F.3d 1143, 1146 (10th Cir. 2000); *Tire Kingdom, Inc.* v. *Morgan Tire & Auto, Inc.*, 253 F.3d

1332, 1335-36 (11th Cir. 2001); *ALPO Petfoods, Inc.* v. *Ralston Purina Co.*, 913 F.2d 958, 971 (D.C. Cir. 1990). Only the Ninth Circuit is an outlier. *See Earthquake Sound Corp.* v. *Bumper Indus.*, 352 F.3d 1210, 1216 (9th Cir. 2003).[5]

A six-decade "history of appellate practice" thus confirms that exceptional-case findings are reviewed deferentially. *Pierce*, 487 U.S. at 558. That makes this case easier than *Pierce*. There was no warrant for the Federal Circuit's departure from 60 years of precedent.

C. Efforts To Distinguish *Pierce* And *Cooter* Are Unavailing.

Against the striking and conclusive parallels between this case and *Pierce* and *Cooter*, the court below pointed to only two distinctions: that the Federal Circuit has expertise in patent appeals, Pet. App. 189a-90a, and that Section 285 awards may well be larger on average than EAJA awards, Pet. App. 187a. Neither comes close to taking this case outside the Court's on-point precedents.

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[5] The Ninth Circuit broke from the pack only because *Earthquake Sound* misread a prior circuit precedent, *Stephen W. Boney, Inc.* v. *Boney Services, Inc.*, 127 F.3d 821 (1997). *Boney* explained, correctly, that the appropriate legal standard for Lanham Act fee awards—for example, does it require bad faith?—is reviewed *de novo*. *Id.* at 825-26. But it also recognized that a "denial of a motion for attorney's fees under the Lanham Act should be reviewed for an abuse of discretion," and it ultimately reviewed the district court's finding for abuse of discretion. *Id.* at 825-27. *Earthquake Sound* misinterpreted that discussion and adopted *de novo* review of exceptional-case findings, effectively overruling *Boney* by accident.

1. The majority below theorized that because the Federal Circuit has more patent-law experience than district courts, there is less reason to defer in fee-award cases. Pet. App. 189a-90a. But that argument rests on an ahistorical view of congressional intent. Congress enacted Section 285 in 1952, thirty years before it created the Federal Circuit. It plainly did not intend to create a special role for a court that did not even exist yet. The Federal Circuit's contrary theory implies that the standard of review suddenly changed in 1982 when Congress created that court.

To the extent that expertise matters, *Pierce* and *Cooter* make clear that the *relevant* expertise is the kind *district* courts have: general expertise in the conduct of litigation, and specific expertise in the litigation at issue. *See Pierce*, 487 U.S. at 561; *Cooter*, 496 U.S. at 404. After all, objective baselessness is a mixed question, often bound up with facts and temporal issues, that requires a full assessment of the course of the litigation. *See supra* at 17-19. A district court is ideally suited to understand that full picture and compare the litigant's behavior, and the strength of his positions, to those of litigants in other cases. The court of appeals is not. The Federal Circuit's expertise in substantive patent law does little to help a panel compare one case to another when the two cases necessarily will involve different patents, different claim constructions, and different theories of infringement. Put another way, the very fact that fee-award determinations involve "multifarious, fleeting, special, narrow facts that utterly resist generalization," *Pierce*, 487 U.S. at 561, means the

district court's unique knowledge of the litigation at hand trumps the Federal Circuit's patent know-how.

Even if the Federal Circuit's patent expertise puts some marginal weight on the *de novo* side of the scale, it by no means outweighs all of the *Pierce* and *Cooter* factors on the other side. The Court has repeatedly rejected the proposition that patent cases should be subject to special rules. *See, e.g.*, *eBay, Inc.* v. *MercExchange, LLC*, 547 U.S. 388, 391 (2006) (noting that "familiar principles apply with equal force to disputes arising under the Patent Act"). The same should be true here.[6]

2. The size-of-the-award argument fares no better. True, *Pierce* noted that the small size of the average EAJA award cut in favor of a deferential standard. 487 U.S. at 563. But this consideration was not even mentioned in *Cooter*, and *Pierce* in no way suggests it is outcome-determinative. Nor should it be. If the

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[6] In any event, a Federal Circuit panel will not always have significantly more patent expertise than the district court. A handful of district courts handle a disproportionate share of the nation's patent litigation. During a recent year, more than one-third of all patent suits were filed in just two districts, and more than half were filed in just five. *See* Judicial Business of the United States Courts, 2011 Report, Table C-7, *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/appendices/C07Sep11.pdf. And patent cases increasingly are overseen by district judges who have chosen to specialize in the area. *See* An Act to Establish a Pilot Program in Certain United States District Courts to Encourage Enhancement of Expertise in Patent Cases Among District Judges, Pub. L. No. 111-349, 124 Stat. 3674 (2011). On the flip side, many Federal Circuit judges come to the bench without expertise in patents or a technical background. T. Holbrook, *Patents, Presumptions, and Public Notice*, 86 Ind. L.J. 779, 781-82 (2011).

best-situated decisionmaker is the district court, larger awards should militate *in favor* of deference, not against it. After all, if the stakes are high, that is all the more reason to defer to the decisionmaker most likely to reach the right outcome.

Anyway, if Section 285 awards are large, that is because too often patentees use the threat of drawn-out and massively expensive litigation to force unneeded licenses and lump-sum settlements from non-infringing parties. *See infra* at 44-47. Litigious patentees should not be permitted to ratchet up the costs of litigation and then claim that the size of Section 285 fee awards requires the court of appeals to increase its workload to protect them from reallocation of those very litigation costs.

D. Deferential Review Applies Under *Pierce* And *Cooter* No Matter What Merits Standard This Court Adopts In *Octane*.

The preceding discussion assumes the continued viability of the Federal Circuit's "objective baselessness" test under Section 285. This Court, however, has granted certiorari in *Octane Fitness LLC* v. *Icon Health & Fitness, Inc.*, No. 12-1184, to determine the appropriate test. Whatever the Court decides in *Octane*, it will not change the outcome here: Any other merits test the Court might adopt would only make it *more* apparent that deferential review applies.

1. Section 285 authorizes fee-shifting in "exceptional cases." 35 U.S.C. § 285. The Federal Circuit has since added its own gloss to that standard. It holds that a case can be deemed "exceptional" for various types of misconduct. *Brooks Furniture Mfg., Inc.* v. *Dutailier Int'l, Inc.*, 393 F.3d

1378, 1381 (Fed. Cir. 2005). Apart from misconduct, a case can be exceptional if it meets two requirements: It must be "objectively baseless"—that is, " 'so unreasonable that no reasonable litigant could believe it would succeed' "—and it must be brought in bad faith. *Old Reliable*, 635 F.3d at 544 (citation omitted).

The Federal Circuit held below that objective-baselessness findings are reviewed *de novo*, Pet. App. 9a, and Petitioner has explained why that is wrong. Accordingly, if this Court in *Octane* affirms the Federal Circuit's objective-baselessness subtest—or even adopts a test for exceptionality that turns *exclusively* on whether the litigant's position is objectively baseless—deferential review follows for the reasons already discussed.

2. If the Court instead jettisons objective baselessness and adopts an even more discretionary formulation for Section 285, then deferential review follows necessarily.

For example, the Court could hold in *Octane* that district courts are not constrained to apply a rigid multi-pronged test, but may instead consider a range of "nonexclusive factors" in determining whether fee-shifting is warranted. *Fogerty*, 510 U.S. at 534 n.19. Such an inquiry is arguably more consistent with Section 285's open-ended text, which contains no hint that Congress wanted to limit fee awards to vexatious claims. Indeed, had Congress intended fee-shifting to be so limited, "no new statutory provision would have been necessary," for courts have inherent power to assess fees against parties who put forward "groundless contentions" in bad faith. *Newman* v. *Piggie Park Enters., Inc.*, 390 U.S.

400, 402 n.4 (1968) (per curiam); *see also Noxell Corp.*, 771 F.2d at 526 (R.B. Ginsburg, J., joined by Scalia, J.) (Lanham Act's exceptional-case language should not be construed "rigidly" or limited "to the rare case in which a court finds that the plaintiff 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons' " because fee-shifting is "always available" in such cases). An open-ended inquiry likewise would hew more closely to Section 285's "exceptional *cases*" verbiage than does the objective-baselessness test. The Federal Circuit applies the latter test on a "claim by claim" basis, Pet. App. 13a, which conflicts with the broad textual focus on "cases" and with Congress's preference for treating fee-shifting cases "as an inclusive whole, rather than as atomized line-items." *Commissioner, INS* v. *Jean*, 496 U.S. 154, 161-62 (1990).

If the Court adopts a more open-ended test in *Octane*, each factor considered in *Pierce* and *Cooter*—statutory text, best-positioned decision-maker, efficiency costs, law-clarifying value, distortion of the appellate process, simplification of collateral appeals—still would cut in favor of deferential review here; nothing about that analysis would change. On the flip side, the only consideration that led the Federal Circuit to institute *de novo* review in the first place—that Section 285 has a "threshold objective prong" that warrants its own, separate standard of review, Pet. App. 9a—would evaporate. District courts would be applying a single, unitary test, considering whether the case is exceptional in light of all the circumstances. It only makes sense that such a determination would be reviewed under a single, unitary, abuse-of-discretion standard. After all, any district-court determination

that takes into account all the events of a long litigation will by necessity involve "the consideration of unique factors that are 'little susceptible * * * of useful generalization.' " *Koon*, 518 U.S. at 99 (quoting *Cooter*, 496 U.S. at 404). And the fact that the analysis may sometimes involve legal questions "does not mean, as a consequence, that parts of the review must be labeled de novo while other parts are labeled an abuse of discretion." *Id.* at 100.

II. THIS CASE FITS NEATLY IN THE CATEGORY OF CASES IN WHICH THIS COURT HAS ENDORSED DEFERENTIAL REVIEW.

With such close analogues in *Pierce* and *Cooter* and clear guidance from statutory text and historical practice, the Court need look no further to resolve this case. The broader landscape of standard-of-review cases, though, only confirms that Section 285 exceptional-case findings fit squarely in the category of issues reviewed deferentially, and have little in common with the kinds of issues reviewed *de novo*.

1. This Court has described the circumstances in which "deferential review of mixed questions of law and fact is warranted," *Salve Regina College* v. *Russell*, 499 U.S. 225, 233 (1991), in terms that fit this case precisely. In *Salve Regina*, the Court explained that "it is 'especially common' for issues involving supervision of litigation to be reviewed for abuse of discretion." *Id.* (quoting *Pierce*, 487 U.S. at 558 n.1). Moreover, the Court added, "[w]e have held that deferential review of mixed questions of law and fact is warranted when it appears that the district court is 'better positioned' than the appellate court to decide the issue in question" and when "probing

appellate scrutiny will not contribute to the clarity of legal doctrine." *Id.* (quoting *Miller*, 474 U.S. at 114).

Pierce and *Cooter* are prime examples of such cases, but there are many more. In the fee-shifting context specifically, the Court has long reviewed all kinds of awards for abuse of discretion on the ground that "the district court's superior understanding of the litigation" militates in favor of "substantial deference." *Fox*, 131 S. Ct. at 2216 (internal quotation omitted). For instance, this Court deferentially reviews fee awards issued under the Civil Rights Attorney's Fees Awards Act, *see Hensley*, 461 U.S. at 437, and the Copyright Act, *cf. Fogerty*, 510 U.S. at 534, as well as fee awards based on the district courts' inherent authority, *see Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 45-46, 55 (1991). The Court also affords deference to district courts' decisions to award (or deny) enhanced damages under the Patent Act. *See Topliff* v. *Topliff*, 145 U.S. 156, 174 (1892). And in the supervision-of-litigation context more generally, this Court deferentially reviews district courts' decisions on, among other things, discovery sanctions, *see National Hockey League* v. *Metro. Hockey Club, Inc.*, 427 U.S. 639, 642 (1976); *forum non conveniens* determinations, *see Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 257 (1981), certifications for appeal, *see Curtiss-Wright Corp.* v. *Gen. Elec. Co.*, 446 U.S. 1, 8, 10-11 (1980), and the promulgation of local procedural rules, *see Frazier* v. *Heebe*, 482 U.S. 641, 645 (1987). *See generally* S. Childress & M. Davis, 1 *Federal Standards of Review* §§ 4.11-4.20 (4th ed. 2010). This case fits within the "supervision of litigation" category generally and the fee-award category specifically.

The Section 285 exceptional-case inquiry also shares important characteristics of other kinds of deferential-review cases. Deferential review, for example, extends to "reasonableness" determinations in negligence cases. *See Cooter*, 496 U.S. at 402 (noting that negligence findings are "generally reviewed deferentially" (citing, *inter alia*, *McAllister* v. *United States*, 348 U.S. 19, 20-22 (1954)). Objective baselessness requires a very similar analysis. Just like in classic negligence cases, the objective-baselessness inquiry turns on the "reasonablen[ess]" of a party's litigation behavior. *Old Reliable*, 635 F.3d at 544.

2. The cases endorsing a *de novo* standard of review, on the other hand, are cut from a wholly different cloth. Most involve unalloyed issues of law entirely divorced from the kinds of fact-based considerations involved in exceptional-case findings. *See, e.g.*, *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 948 (1995). In *Salve Regina*, for instance, the Court held that a district court's determination of state law is subject to *de novo* review. 499 U.S. at 231. In so doing, it relied on the quintessentially legal nature of that inquiry and emphasized the special federalism considerations at stake. *See id.* at 231-34. In particular, the Court found that deferential review would be inconsistent with *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938), because it would "invite[ ] divergent development of state law among the federal trial courts even within a single State," and because it would "create a dual system of enforcement of state-created rights, in which the substantive rule applied to a dispute may depend on the choice of forum."

Salve Regina, 499 U.S. at 234. No such considerations are at work here.

The few *de novo* cases that involve mixed questions of law and fact also look very different from this case in at least three ways. They generally involve constitutional overtones. They are not ancillary to the merits in the same sense as fee litigation. And they do not pose the concerns about distortion of the appellate process and multiplicative litigation that helped drive *Pierce* and *Cooter* to endorse deferential review.

In *Ornelas* v. *United States*, for example, the Court held "as a general matter" that "determinations of reasonable suspicion and probable cause should be reviewed *de novo*." 517 U.S. 690, 699 (1996). This holding was based largely on the Fourth Amendment consequences of authorizing warrantless searches. *Id.* at 697-99. And it turned on the practicalities of law enforcement. *Id.* In particular, the Court thought it important to provide law-enforcement officers both with incentives to use the warrant process and with a uniform set of rules on which to rely. *See id.* Even then, *Ornelas* did not endorse *de novo* review, full stop. It emphasized instead that "a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers." *Id.* at 699; *see also id.* at 704 (Scalia, J., dissenting) (pointing out that the majority's standard left room for deference to district courts).

In *Cooper Industries, Inc.* v. *Leatherman Tool Group, Inc.*, the Court similarly held that the

"constitutionality of [a] punitive damages" award should be reviewed *de novo*. 532 U.S. 424, 431 (2001). Like *Ornelas*, *Cooper* involved an important constitutional question and issues of fair notice. *See id.* at 434-37; *see also Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 503-11 (1984) (independent fact review in First Amendment cases "reflects a deeply held conviction that judges * * * must exercise such review in order to preserve the precious liberties established and ordained by the Constitution"). Accordingly, the Court found that "[c]onsiderations of institutional competence * * * fail[ed] to tip the balance in favor of deferential review." *Cooper*, 532 U.S. at 440.

In both of these cases, the concerns animating *Pierce* and *Cooter* are largely absent. They do not implicate the kind of fact-intensive, "supervision of litigation" issues which district courts are best positioned to decide. They do not have the same potential to distort the appellate process because the appellate court can make law in the usual manner, without referring back to the state of doctrine at a time past. And to the extent *de novo* review reduces efficiency in the reasonable-suspicion and punitive-damages contexts, that sacrifice is justified by constitutional considerations that are inapplicable here. *See Cooper*, 532 U.S. at 433-34; *Ornelas*, 517 U.S. 697-99. Nor is this a criminal case, in which *de novo* review might "prevent a miscarriage of justice that might result from permitting the verdict of guilty to rest upon the legal determinations of a single judge." *Id.* at 705 (Scalia, J., dissenting).

3. While cases like *Salve Regina*, *Ornelas*, and *Cooper* are readily distinguishable, they are at least relevant to the standard-of-review issue. That is

more than can be said for the primary case on which the Federal Circuit based its decision to endorse a *de novo* standard: *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993) (*PRE*).

In *PRE*, the Court addressed the so-called "sham exception" to the *Noerr-Pennington* doctrine, which provides that private entities are immune from antitrust liability for attempts to influence the enactment of laws. At issue was the proper test for determining whether litigation qualifies as sham litigation, and the Court adopted a substantive standard similar to the Federal Circuit's objective-baselessness test. To qualify as sham, the Court held that litigation must be both "objectively baseless"—that is, there must be an absence of "probable cause"—and brought in subjective bad faith. *See id.* at 60-62.

The opinion contains just one line that appears to concern the standard of review: "Where, as here, there is no dispute over the predicate facts of the underlying legal proceeding, a court may decide probable cause as a matter of law." *Id.* at 63. To be sure, standing alone, that sentence may seem relevant. But context makes clear that the Court's statement was not about standards of review at all; it was about whether a judge—as opposed to a jury—can make a probable-cause finding for purposes of the sham exception. *See id.* (citing four cases, all holding that when facts are undisputed judges may decide probable cause rather than submit the issue to the jury). Indeed, *PRE* does not even cite standard-of-review cases such as *Pierce* or *Cooter*, let alone purport to overrule or try to distinguish them.

Apart from its failure to address the relevant issue, *PRE* contains an explicit caveat that squarely distinguishes this case: "*Where, as here, there is no dispute over the predicate facts of the underlying legal proceeding*, a court may decide probable cause as a matter of law." *PRE*, 508 U.S. at 63 (emphasis added). This case presents a marked contrast. Whereas the facts in *PRE* were essentially stipulated, *see id.* at 54 (noting that PRE did not even "challenge the district court's finding that * * * the suit was not baseless" (internal quotation and alteration omitted)), Highmark and Allcare disagree as to nearly all of the relevant facts—including, for example, the characteristics of Highmark's system, the adequacy of Allcare's pre-filing investigation, and the background of the patent. Pet. App. 51a-86a.

PRE is inapposite for yet a third reason: Like *Ornelas* and *Cooper*, it has constitutional undertones. *PRE* addressed the scope of antitrust liability for filing lawsuits in light of the First Amendment right to petition courts for redress. *See* 508 U.S. at 56. But the right-to-petition line of cases has nothing to do with statutory provisions, like Section 285, that "merely authorize the imposition of attorney's fees on a losing plaintiff." *BE&K Constr. Co.* v. *NLRB*, 536 U.S. 516, 537 (2002). Such provisions do not raise constitutional concerns at all. *See Premier Elec. Const. Co.* v. *Nat'l Elec. Contractors Ass'n, Inc.*, 814 F.2d 358, 373 (7th Cir. 1987) (Easterbrook, J.) (the proposition that the Constitution "prohibits or even has anything to say about fee-shifting statutes in litigation seems too farfetched to require extended analysis"); *cf. Bill Johnson's Rests., Inc.* v. *NLRB*, 461 U.S. 731, 743 (1983) ("baseless litigation is not immunized by the

First Amendment right to petition"). And even if Section 285 did somehow implicate the First Amendment, so would Rule 11. Yet *Cooter* still found that deference was due.

III. THE DECISION BELOW EXACERBATES ABUSIVE PATENT LITIGATION'S DRAG ON INNOVATION AND ECONOMIC GROWTH.

Finally, there are weighty policy reasons to reject the Federal Circuit's *de novo* standard of review. The standard emboldens patent trolls (and others) to file, and drag out, baseless litigation. And it exacerbates the economic losses caused by such litigation. These effects undermine core policies embodied in the Patent Act.

1. This Court recognized more than 40 years ago "that patent litigation is a very costly process." *Blonder-Tongue Labs., Inc.* v. *Univ. of Ill. Found.*, 402 U.S. 313, 334, 336 (1971). When the Court made that observation, the average cost of defending a patent suit was "about $50,000." *Id.* at 335. The situation is far worse today: The average cost of defending a patent suit with less than $1 million at stake is $700,000; the average cost of defending a patent suit with $1 to $10 million at stake is $2 million; and the average cost of defending a patent suit with more than $25 million at stake is $5.5 million. Am. Intellectual Property Law Ass'n, *Report of the Economic Survey 2013* at 34.

More than half of these costs are incurred during discovery, before summary judgment can weed out meritless claims. *See id.* (cost through end of discovery is $350,000 for suits with $1 million at stake; $1 million for suits with $1 to $10 million at stake; and $3 million for suits with more than $25

million at stake). Yet patent trolls structure their businesses to avoid these exorbitant costs. Unlike most other patent litigants, trolls pursuing infringement suits "do not risk disruption to their core business" because "patent enforcement is their core business." C. Chien, *Of Trolls, Davids, Goliaths, and Kings: Narratives and Evidence in the Litigation of High-Tech Patents*, 87 N.C. L. Rev. 1571, 1579 (2009). Patent trolls have few documents to produce in discovery because they manufacture no products and hire few employees. *See* J. Bessen & M. Meurer, *The Direct Costs from NPE Disputes* 29 (forthcoming 99 Cornell L. Rev. 2014).[7] They do not fear counterclaims for infringement because they do not practice their patents. *See id.* And they shift their only risk of litigation—their attorney's fees—onto their attorneys through widespread use of contingency fee arrangements. *See* D. Schwartz, *The Rise of Contingent Fee Representation in Patent Litigation*, 64 Ala. L. Rev. 335, 370 (2012). As a result, "patent trolls have nothing to lose and much to gain by litigating aggressively." B. Yeh, Cong. Research Serv., R42668, *An Overview of the "Patent Trolls" Debate* 13 (2012).

The businesses sued by trolls, by contrast, cannot avoid massive litigation costs in defending frivolous infringement claims. Trolls therefore regularly demand hold-up settlements from innocent defendants, at amounts carefully calibrated below the cost of defending against even a meritless infringement suit. They often "propose settlement amounts * * * in the range of $100,000 or $250,000"—a substantial (and sometimes crippling)

[7] *Available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2091210.

sum for a business that has done nothing wrong, but far lower than the millions "it will cost an accused infringer to defend itself." Schwartz, *supra*, at 370. Recognizing that the economically rational approach is to settle, many businesses are forced to do so without the troll even having to file suit. Because of this economic reality, "[a]n industry has developed in which firms use patents not as a basis for producing and selling goods but, instead, primarily for obtaining licensing fees." *eBay*, 547 U.S. at 396 (Kennedy, J., concurring).

That industry is booming. Trolls extort settlements from an astonishing number of businesses; one estimate pegs the number of threatened suits by trolls at 50 times the number of actual suits. C. Chien, *Patent Assertion Entities: Presentation to the DOJ/FTC Hearing on PAEs* (Dec. 10, 2012). And while they often manage to obtain pre-litigation settlements, troll-driven litigation has exploded too. In 2012, suits by patent trolls accounted for 62 percent of all infringement suits. C. Chien, *Patent Trolls by the Numbers*, Patently-O, Mar. 14, 2013.[8] Suits by trolls fail on the merits the vast majority of the time; patent trolls win only 8 percent of their suits litigated to judgment.

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[8] *Available at* http://www.patentlyo.com/patent/2013/03/chien-patent-trolls.html. Some commentators attribute the increase in the raw number of suits by trolls in part to changes in joinder rules by the America Invents Act, which limits the number of unrelated defendants who can be named in an infringement suit. *See* C. Cotropia *et al.*, *Patent Assertion Entities (PAEs) Under the Microscope* 4 (Illinois Public Law and Legal Theory Research Paper No. 14-17, 2013) (citing 35 U.S.C. § 299), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2346381.

J. Allison *et al.*, *Patent Quality and Settlement Among Repeat Patent Litigants*, 99 Geo. L.J. 677, 693-94 (2011). But that has not stopped them. In 2012, 5,189 patent cases were filed—29 percent more than in 2011 and the highest number ever recorded. Judicial Business of the United States Courts, *2012 Annual Report of the Director* Table C-7.[9]

The costs to the nation from this activity are enormous. A recent study estimates firms incurred $29 billion in direct costs to defend against trolls in 2011, a more than 400 percent increase from 2005. *See* Bessen & Meurer, *supra*, at 42, 48. But the total wealth lost by firms facing these suits—not just direct costs, but also lost opportunities, inability to conduct research and development, business failure, and more—is far higher. One study put the aggregate loss of wealth to firms between 1990 and 2010 at over half a *trillion* dollars. J. Bessen *et al.*, *The Private and Social Costs of Patent Trolls* 4 (Boston Univ. Sch. of Law Working Paper No. 11-45, 2011).[10] From 2007 through October 2010, the lost wealth soared to over $83 billion per year—an amount exceeding one-quarter of annual U.S. industrial research and development spending. *Id.* at 16-17. Because the bulk of these costs are not offset by transfers to trolls or independent inventors, they represent deadweight loss—lost wealth the nation can never recover. *Id.* at 19.

These massive disincentives to American business undercut the *raison d'etre* of patent law. The

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[9] *Available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/C07Sep12.pdf.

[10] *Available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1930272.

Constitution grants Congress patent authority "[t]o promote the Progress of * * * useful Arts," U.S. Const., Art. I, § 8, cl. 8, and Congress enacted the Patent Act "as a means of encouraging innovation." *Bilski* v. *Kappos*, 130 S. Ct. 3218, 3236 (2010). That is not what is happening on the ground. Firms must now "factor in the likelihood that [a troll] will later emerge and demand royalties or bring costly litigation, directly reducing returns on investment." Yeh, *supra*, at 7. Accordingly, "manufacturers may find that some R&D projects, features, and product improvements are simply not worth doing, even if beneficial to consumers." *Id.* Startups and other small companies, a favorite target of patent trolls, are at particular risk. Because they are "uniquely vulnerable," such companies report outsized negative impacts on hiring, innovation, and operations caused by patent trolls' demands. C. Chien, *Startups and Patent Trolls* 10-13 (Santa Clara Univ. Sch. of Law Legal Studies Research Paper No. 09-12, Sept. 2012).

2. Correctly calibrating the standard of review for Section 285 fee awards certainly cannot eliminate all these harms. But it can make a real difference at the margins. That is so because the Federal Circuit's *de novo* standard of review exacerbates the asymmetry of incentives that inspires trolls to bring suit and innocent defendants to settle.

As discussed above, patent trolls lack any major disincentive to litigate. The possibility of being saddled with the defendant's attorney's fees thus is often the sole consideration dissuading a troll from pursuing a meritless suit. And the Federal Circuit's *de novo* standard reduces the chance of such a fee award because, as a practical matter, it operates as a one-way ratchet: If the district court declines to

impose fees, that decision will almost never be reversed because the party seeking fees would have to prove a negative—that there are no colorable legal arguments at all that could have supported the trolls' claims. By contrast, if the district court imposed a fee award, the troll's attorneys could undo it under the Federal Circuit's approach by simply dreaming up some colorable legal argument that *could* have been, but was not, advanced below. It will be all too easy for the Federal Circuit to throw out fee awards, while the odds that it would *impose* a fee award denied below would be vanishingly small.

That is not just supposition. It is what happened in this very case: The Federal Circuit reversed the district court's objective-baselessness finding as to claim 52 only after concocting an argument never advanced by Allcare in the district court or on appeal. *See* Pet. App. 21a. And the run of cases since *Highmark* was decided below likewise suggest that the *de novo* standard favors trolls. In that brief time, the Federal Circuit has reviewed a district court's determination that a claim was objectively baseless three times, and in two of the three cases it has reversed that determination and vacated the fee award. *See Taurus IP, LLC* v. *DaimlerChrysler Corp.*, 726 F.3d 1306 (2013) (affirming); *Precision Links Inc.* v. *USA Prods. Grp., Inc.*, 527 F. App'x 852 (2013) (reversing); *Checkpoint Sys., Inc.* v. *All-Tag Sec. S.A.*, 711 F.3d 1341 (2013) (reversing). In both of those cases the Federal Circuit concluded, as here, that a litigant's meritless position had some theoretical support and thus was not "objectively baseless." *Precision Links*, 527 F. App'x at 855; *Checkpoint Sys.*, 711 F.3d at 1347-48. In that same span of time, the Federal Circuit has not once

reversed a district court's *denial* of fees and decided for itself that litigation was objectively baseless.

3. Patent trolls are not the only parties dragging out baseless litigation to exhaust their opponents' resources. Accused infringers—often large corporations—likewise use such abusive tactics to harass their smaller competitors. In particular, many "corporations see start-ups as easy fodder for a 'scorched-earth' strategy of stealing their patents and fighting an infringement suit in the hope of exhausting a plaintiff's funds." G. Magliocca, *Blackberries and Barnyards: Patent Trolls and the Perils of Innovation*, 82 Notre Dame L. Rev. 1809, 1818 (2007).

Section 285 accordingly stands as a bulwark against abusive litigation, by patentees and accused infringers alike. The Federal Circuit's standard of review, however, will "tie the trial court's hand," Pet. App. 213a, substantially weakening Section 285's deterrent effects. That court's *de novo* standard is not just bad law; it also makes for bad policy that undermines the very goals of America's patent system.

CONCLUSION

For the foregoing reasons, the Federal Circuit's judgment should be reversed.

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