

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 OCTANE FITNESS, LLC, :

4 Petitioner, : No. 12-1184

5 v. :

6 ICON HEALTH & FITNESS, INC. :

7 - - - - - x

8 Washington, D.C.

9 Wednesday, February 26, 2014

10

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 10:17 a.m.

14 APPEARANCES:

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16 behalf of Petitioner.

17 ROMAN MARTINEZ, ESQ., Assistant to the Solicitor
18 General, Department of Justice, Washington, D.C.; for
19 United States, as amicus curiae, supporting
20 Petitioner.

21 CARTER G. PHILLIPS, ESQ., Washington, D.C.; on behalf
22 of Respondent.

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

2 (10:17 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument first this morning in Case 12-1184, Octane
5 Fitness v. ICON Health and Fitness, Incorporated.

6 Mr. Telscher.

7 ORAL ARGUMENT OF RUDOLPH A. TELSCHER

8 ON BEHALF OF THE PETITIONER

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

11 An exceptional case under Section 285
12 requires a court to assess the full range of traditional
13 equitable considerations, including the degree of
14 reasonableness of the merits by the plaintiff's action,
15 procedural aspects of the case, and evidence of economic
16 coercion. Frivolous and bad-faith cases are not
17 prerequisites to an award of fees under Section 285.

18 The Federal Circuit's test conflicts with
19 the statutory language, it violates established canons
20 of statutory construction, and it deprives district
21 courts of the discretion they need to effectively combat
22 abusive patent litigation practices.

23 Below, the Federal Circuit found that ICON's
24 claims require a C-channel structure and that ICON's
25 claim construction to the contrary was without merit;

1 appendix at A10. The Federal Circuit also affirmed the
2 district court's grant of summary judgment that no
3 reasonable juror could find, as a matter of law, that
4 Octane's structure had an equivalent to the C-channel;
5 appendix A13.

6 This means that ICON's infringement
7 allegations against Octane were meritless. This fact,
8 in combination with other undisputed evidence of
9 record -- namely the worthless nature of the patent,
10 evidence of economic coercion, and the fact that two
11 other elements of the claimed -- the core elements of
12 the claim were missing as well -- make this case
13 exceptional. And it's such that this Court should
14 reverse the district court and award fees on its own.

15 JUSTICE KENNEDY: You were talking about
16 economic coercion. Suppose it were reversed. Suppose
17 that Octane had the patent and sued ICON. Would the
18 analysis be precisely the same?

19 MR. TELSCHER: The analysis would be
20 primarily the same. The evidence of economic coercion
21 may be less. So, for example, if you're a smaller
22 competitor and you're suing a larger competitor, there
23 would be less opportunity for abuse. Knowing, if ICON
24 was the competitor with the weak patent, they would know
25 that their larger competitor would stand up to them. So

1 the opportunity for economic abuse would be less.

2 JUSTICE KENNEDY: I've been listening to
3 your adjectives -- this is a search for adjectives, in
4 part. I think you used the word meritless. What -- is
5 there a difference between merit -- meritlessness and
6 objectively baseless?

7 MR. TELSCHER: I don't know that the case
8 law is perfectly clear. In Christiansburg, this Court
9 did define meritless to the tune of it's unjustified and
10 without foundation.

11 JUSTICE KENNEDY: Because if we remand to
12 the district court, the district court's already said
13 it's not objectively baseless, it's not brought in bad
14 faith. I'm not quite sure what words we're going to
15 give to the district court if you're to prevail.

16 MR. TELSCHER: Well --

17 JUSTICE GINSBURG: You -- you had just said
18 that we should return it to the district court with
19 orders to require fee shifting. And how could that be
20 if the discretion is to be exercised by the district
21 court?

22 I can understand your asking for a remand,
23 but I can't understand your asking for a reversal and an
24 order that the fees be reimbursed.

25 MR. TELSCHER: We understand the tension

1 between the discretionary standard and asking for a remand
2 with a finding. However, there are cases that are
3 rare -- not that rare, but they are rare enough -- where
4 appellate courts look at a record and have a firm and
5 definite conviction that an award should be made such
6 that it would be an abuse of discretion --

7 JUSTICE GINSBURG: And you think this Court
8 is the proper court to look at the record and make that
9 determination, that the district court got it wrong when
10 the district court didn't think this was an exceptional
11 case.

12 MR. TELSCHER: On this record, yes, Your
13 Honor. The -- the Federal Circuit's finding is such
14 that the -- the infringement claim is meritless. As a
15 matter of law, the claim construction position had no
16 possibility of success under 35 U.S.C. Section 112,
17 paragraph (f).

18 JUSTICE SCALIA: Well, what do you -- what
19 do you want to add to meritless? Don't you have to add
20 something to meritless? I mean, every time you win the
21 summary judgment motion, that's a determination that the
22 claim is without merit, isn't it?

23 MR. TELSCHER: It is not, Your Honor.

24 JUSTICE SCALIA: Doesn't meritless just mean
25 without merit?

1 MR. TELSCHER: No, it -- for example, in
2 most patent cases, there is the Markman phase. So a
3 district court judge, as a matter of law, is required to
4 find on the claim construction. So there could be a
5 reasonable dispute about the meaning of a term that's
6 resolved against the plaintiff, so it -- just because
7 they lose a claim construction doesn't mean their
8 position was meritless.

9 JUSTICE SCALIA: Okay. I understand. Well,
10 all right. What -- what must be added to the word
11 meritless?

12 MR. TELSCHER: In our strong view --

13 JUSTICE SCALIA: That no -- no reasonable
14 judge could have found it to be with merit?

15 MR. TELSCHER: If someone brings a claim
16 construction position that's unreasonably weak, in our
17 view that qualifies under Section 285 and is consistent
18 with the words that other cases have used.

19 JUSTICE SCALIA: That -- that's not a
20 standard I would -- I would want to, you know -- you
21 realize how -- how differently various district courts
22 would operate if -- if you just say -- what was your
23 phrase? Unreasonably weak?

24 MR. TELSCHER: And yet, that's the --

25 JUSTICE SCALIA: You've got to give me

1 something tighter than that.

2 MR. TELSCHER: That is the standard,
3 however, that this Court used in Martin and in Pierce.

4 And if we're looking at -- if -- if we want
5 to make -- so -- so in -- for example, in most of these
6 cases what we're talking about is going to typically
7 involve the merits. And so if we say that the only way
8 you can get a fee award is to have a zero-merit,
9 frivolous case, it's impossible to show. It's
10 inconsistent with the statutory language.

11 So when we're looking at this from a
12 statutory context, on the merits, what should qualify?
13 And there comes a point at which a case goes from strong
14 to medium and it crosses into the territory of weak. It
15 gets weaker and weaker, and then it becomes frivolous.

16 This Court, even in Pierce, recognized that
17 the reasonableness standard was something more than
18 frivolous. And we think if Section 285 is to have any
19 teeth in deterring the abusive practices currently in
20 the system, something more than frivolousness is
21 required, and it is consistent with this Court's prior
22 precedent.

23 CHIEF JUSTICE ROBERTS: We're deal -- we're
24 dealing with a term that could be read in many different
25 ways: exceptional. Right? Maybe that means 1 out of

1 100; maybe it means 10 out of 100. And why shouldn't we
2 give some deference to the decision of the court that
3 was set up to develop patent law in a uniform way? They
4 have a much better idea than we do about the
5 consequences of these fee awards in particular cases.
6 And since we're just -- as Justice Kennedy pointed
7 out -- dealing with adjectives -- you know, meritless,
8 frivolous, exceptional -- why don't give some deference
9 to their judgment?

10 MR. TELSCHER: Well, I think we need to look
11 at the basis of the judgment, which is grounded in the
12 fact that they've -- they've found constitutionally that
13 the -- the PRE standard was required. And I think this
14 Court's precedent in BE&K just two years earlier says
15 that the validity of fee-shifting statutes is not
16 governed by the PRE standard.

17 And if -- if the Court were to so hold, that
18 would throw into question all of the fee statutes of
19 this country because, accordingly, they presumptively
20 would have to have the sham litigation test to be
21 constitutional.

22 JUSTICE SOTOMAYOR: What is the difference
23 between the Federal Circuit's use of objective
24 reasonable -- objectively meritless and your standard?

25 MR. TELSCHER: To my way --

1 JUSTICE SOTOMAYOR: I know that you've been
2 arguing that they shouldn't be using subjective intent,
3 so I'm putting that aside. And you can tell me why
4 Kilopass doesn't answer that now.

5 But what's the difference you see?

6 MR. TELSCHER: To my way of thinking, when
7 you say meritless or baseless, it means there's
8 absolutely no foundation of zero merit. When we talk
9 about objectively unreasonable -- and, again, as this
10 Court found in Pierce -- it suggests something lesser
11 than frivolousness. And the reality of -- I think of
12 district court litigation is it's near impossible to
13 show that something is frivolous, that somebody had no
14 argument --

15 JUSTICE SCALIA: I don't understand your
16 answer to the question. How does the first part of the
17 Federal Circuit's test differ from your perception of
18 what meritless means?

19 MR. TELSCHER: We understand the first part
20 of the Federal Circuit's test to require zero merit or
21 frivolousness, which is what the district court -- she
22 used interchangeably "objectively baseless" and
23 "frivolousness." So we think frivolousness is too low
24 of a standard under 285.

25 JUSTICE KENNEDY: So would you say without

1 substantial merit? I mean, if we're playing around with
2 words again.

3 MR. TELSCHER: Without substantial merit,
4 unreasonably weak, or low likelihood of success, I think
5 those are all ways of getting to the same point, which
6 is something less than zero merit will satisfy under
7 285.

8 JUSTICE ALITO: You have several objections,
9 I take it, to what the Federal Circuit has said. One is
10 that you think objectively baseless is too low, correct?

11 MR. TELSCHER: Yes.

12 JUSTICE ALITO: You also don't think bad
13 faith is necessary.

14 MR. TELSCHER: Agreed.

15 JUSTICE ALITO: And do you also believe that
16 litigation misconduct taken in conjunction with a case
17 that is, let's say, of little merit, but perhaps not as
18 low as the standard that you have, that you're
19 suggesting, would justify an award of fees?

20 MR. TELSCHER: Yes. We believe litigation
21 misconduct, especially in consideration with a weak case
22 on the merits, makes for a strong candidate for
23 exceptional.

24 JUSTICE ALITO: Well, now I'm a -- say I'm a
25 district judge someplace and I rarely get a patent case.

1 How am I supposed to determine whether the case is
2 exceptional if the standard is take everything into
3 account, litigation misconduct, the strength of the
4 case, any indication of bad faith, and decide whether
5 it's exceptional? Exceptional compared to what? I have
6 very little basis for comparison. How do I do that?

7 MR. TELSCHER: So, I do not think it's a
8 numerical comparison. I think when we're talking about
9 an uncommon case, it's what would we expect of a
10 reasonable litigant. So in the normal course, a
11 plaintiff develops a product, they bring it to market,
12 they get a patent, they're successful. A defendant
13 recognizes the success. They look at the patent, and
14 they try to design around and a reasonable dispute
15 ensues. So that's a normal case.

16 What we're saying to a district court judge,
17 the guidance we would give them is that this litigant,
18 this plaintiff acted in reasonable ways, and district
19 court judges are called on every single day to make
20 those determinations.

21 JUSTICE ALITO: Compared to what? Compared
22 to the types of cases that the district court hears on a
23 more regular basis?

24 MR. TELSCHER: District courts handle --

25 JUSTICE ALITO: Or compared to patent cases?

1 MR. TELSCHER: I think all cases. Complex
2 litigation requires litigants to act reasonably in
3 procedural aspects and on the merits. I think --

4 JUSTICE ALITO: See, this is what I find
5 somewhat troubling about your "take everything into
6 account" standard. Most district court judges do not
7 see a lot of patent cases, and when they see one, it's
8 very unusual. So you've got these patent attorneys
9 showing up in court. They are different from other
10 attorneys.

11 (Laughter.)

12 JUSTICE ALITO: Sometimes they --
13 particularly if it's a very technical case, they speak a
14 different language. They do things differently. The
15 district judge is struggling to figure out how to handle
16 the case. And then the -- one -- one party wins, the
17 other party loses, and the party that wins says, this
18 was an exceptional case and you should award fees in my
19 favor under 285.

20 And the district judge says: How can I tell
21 whether this is exceptional? If I had had -- if I had
22 25 patent cases, I could make some comparisons. But I
23 don't have a basis for doing that.

24 Now, the Federal Circuit has a basis for
25 doing it.

1 MR. TELSCHER: Well, first of all,
2 Congress -- Congress has spoken and said that in
3 exceptional cases, the district court should do this.
4 And I also -- I think if you went back 10 to 15 years
5 ago, perhaps the notion that district court judges
6 haven't seen a lot of patent cases might be true.

7 District court judges see lots and lots of
8 patent cases. Many of those cases may not be decided on
9 the merits. The only thing that the Federal Circuit
10 sees are the ones that went to final conclusion. So I
11 do think district court judges see a lot of patent
12 litigation.

13 I also think --

14 JUSTICE ALITO: Is that really true?
15 There's nearly 700 district judges in the country.
16 If -- if we had a statistic about the average number of
17 patent cases that a district judge hears and receives
18 on, let's say, a 5-year period, what would it be?

19 MR. TELSCHER: I don't know what that number
20 is, Your Honor. But I know that district court judges
21 carry a widely varying docket of different areas of law
22 and are called upon to learn the law and assess the
23 reasonableness of those positions.

24 JUSTICE SCALIA: Mr. Telscher, it occurs to
25 me that you really cannot answer the question of what

1 adjectives should be attached to meritless. And the
2 reason you can't is, since it is a totality of the
3 circumstances test, that is only one factor and it
4 doesn't have to be an absolute degree of meritlessness.
5 Even in a -- I assume you would say that even in a very
6 close case, if there has been outrageous litigation
7 abuse by the other side, the court would be able to say:
8 My goodness, I've never seen lawyers behave like this.
9 You're going to pay the attorneys' fees for the other
10 side. Couldn't the -- couldn't the court do that?

11 MR. TELSCHER: That's absolutely correct,
12 Your Honor.

13 JUSTICE SCALIA: So then how can we possibly
14 define meritless? We can't, because it goes up and
15 down, even in a case where it's -- it's a close case, it
16 could still be exceptional.

17 MR. TELSCHER: It's the degree of the
18 unreasonable nature of the case as one factor.

19 CHIEF JUSTICE ROBERTS: Do you agree with
20 the Solicitor General's test that fees are authorized
21 when they are -- I'm quoting -- "necessary to prevent
22 gross injustice"?

23 MR. TELSCHER: Yes, we do, Your Honor.

24 CHIEF JUSTICE ROBERTS: Well, now, I was
25 surprised at that because I would have thought your

1 friend on the other side would say that. I mean, gross
2 injustice sounds like a very tiny portion of cases;
3 lower than meritless. I mean it's -- injustice is bad
4 too. It's doesn't mean you just loss, but there's
5 something very unjust about it. Gross injustice, well,
6 it's just some more adjectives, and it's the test -- I
7 gather that's the test you adopt.

8 MR. TELSCHER: Well, it's certainly what
9 the -- what's -- what Congress said in the legislative
10 history and what was adopted by the courts.

11 CHIEF JUSTICE ROBERTS: Well, but you've
12 been up here for several minutes and you haven't even
13 used those particular -- or that adjective, which is
14 your test.

15 MR. TELSCHER: Section 285 is remedial, so
16 certainly in order to remedy something there must be
17 some level of injustice. I think consistent with the
18 notion that a case is exceptional and uncommon is the
19 notion that it's gross injustice, not justice. And to
20 my way of thinking, when somebody brings a very weak
21 case, which we believe this one was, and it costs
22 someone \$2 million to defend it, and they go through
23 that and they pay that price tag, a district court
24 should be able to find that that is gross injustice.
25 And I think it is, especially for many of the small

1 businesses in this country when they face these types of
2 suits.

3 JUSTICE KAGAN: Mr. Telscher, can I just
4 ask very quickly the factors that you would think a
5 court should consider. One is the degree to which the
6 case is meritless. Another, I presume, is bad faith.
7 Another is litigation misconduct. Is there anything
8 else or are those the three?

9 MR. TELSCHER: No, there -- there's more. I
10 think it's -- there's no exhaustive list and, for
11 example, even in this case -- and in Park-in-Theatres
12 where the court said other equitable consideration. We
13 believe it is a totality of the circumstances. Anything
14 that bears on the gross injustice and the uncommon
15 nature of the case.

16 So, for example, in this case, the fact that
17 Icon brought a patent that it, with all of its
18 resources, couldn't commercialize, was indisputably
19 worthless. To this day they've never made a product
20 under this patent. That's a factor that bears on the
21 equities of this case and the uncommon nature and is one
22 that doesn't fall neatly within those categories.

23 The fact that our client licensed under a
24 different patent that shows its linkage is another
25 factor that shows that what they are asserting isn't

1 reasonable. So I don't think there is a laundry list,
2 but the categories that you identified are the big ones.

3 JUSTICE GINSBURG: I think you -- you did
4 say if it's an exceptional case, the district court must
5 award fees, but the statute says may. So even in the
6 exceptional case, according to the statute, the district
7 court is not required to award fees. Or do you read may
8 to mean something else?

9 MR. TELSCHER: Certainly, there -- there has
10 been the issue of whether this determination is a
11 one- or two-step finding. My belief is that district
12 courts will look at all of the factors and make up their
13 mind whether it's exceptional and in that same step
14 award fees. There has been the notion that first we
15 determine a case is exceptional and then we make the
16 determination of whether fees should be granted. I'm
17 not sure once a court determines that a case is
18 exceptional, what other factor would bear on that -- on
19 that determination.

20 If there are no other questions, I'd like to
21 reserve the rest of my time for rebuttal.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.
23 Mr. Martinez.

24 ORAL ARGUMENT OF ROMAN MARTINEZ

25 FOR THE UNITED STATES, AS AMICUS CURIAE,

1 SUPPORTING THE PETITIONER

2 MR. MARTINEZ: Mr. Chief Justice, and may it
3 please the Court:

4 Section 285 grants district courts
5 discretionary authority to look at the totality of the
6 circumstances and award fees when necessary to prevent
7 gross injustice. Such awards can be proper in unusual
8 cases where the losing party has committed bad faith or
9 harassing conduct during the litigation, or has advanced
10 objectively unreasonable legal arguments, just as courts
11 had held under the 1946 statute. The Court should
12 restore this understanding of Section 285 and make four
13 additional points that we think will clarify the inquiry
14 for the district courts:

15 First and most importantly, the Court should
16 say that baselessness and bad faith do not both have to
17 be present in a case in order to justify a fee award;

18 Second, the Court should -- the Court should
19 say that district courts can grant fees based on a
20 combination of different factors even if no single
21 factor would necessarily support the award on its own;

22 Third, the Court should say that an
23 objectively unreasonable argument can trigger a fee
24 award, even if that argument is not so unreasonable that
25 it's actually considered frivolous;

1 And fourth, the Court should say that clear
2 and convincing evidence is not required.

3 I'd like to turn to Justice Scalia's
4 question and the discussion that occurred earlier about
5 the battle of the adjectives, so to speak. We think
6 that, as I said earlier, that the -- a fee award should
7 be appropriate or can be appropriate in a case in which
8 there's an objectively unreasonable litigating position
9 or objectively unreasonable arguments that are made in a
10 case. We appreciate that that's not a -- a 100 percent
11 precise, bright-line test, but we think it's similar
12 to -- it's, in fact, the same as what the Court has said
13 in other contexts, such as EAJA in the Pierce case --

14 JUSTICE SCALIA: No matter what other
15 factors exist, it has to be objectively unreasonable.

16 MR. MARTINEZ: I --

17 JUSTICE SCALIA: I mean, even if it is clear
18 from other factors that this is a shakedown, a big
19 country -- a big company trying to suppress a little
20 company, even if it's clear that there has been
21 outrageous litigation abuse, misconduct by attorneys?

22 MR. MARTINEZ: It is an important point,
23 Justice Scalia --

24 JUSTICE SCALIA: All of those things cannot
25 justify shifting the award unless it is objectively

1 unreasonable.

2 MR. MARTINEZ: No, Justice Scalia, that's
3 not our position.

4 JUSTICE SCALIA: Oh, okay.

5 MR. MARTINEZ: Our position is if the only
6 factor is an objectively unreasonable argument, that in
7 appropriate circumstances, that can be sufficient. We
8 believe very, very strongly that if there are other
9 factors present, that would only strengthen the case for
10 appeal.

11 JUSTICE BREYER: I see that. But, look,
12 what you listed in your brief on page 17, which I think
13 was nonexclusive: Willful infringement, litigation
14 misconduct, inequitable conduct by the patentee in
15 securing the patent, vexatious or unjustified
16 litigation, bad faith, the assertion of frivolous claims
17 and defenses. And then you cite cases which say all of
18 those in different instances have been sufficient,
19 either alone or together. Well, why don't we just copy
20 that? Isn't that your view?

21 MR. MARTINEZ: I think our view is that
22 those are the kinds of circumstances --

23 JUSTICE BREYER: All right. Do you want to
24 add to that list, or to subtract?

25 MR. MARTINEZ: I think as long as the Court

1 makes clear that that is an illustrative list that I
2 think captures the kind of bad faith --

3 JUSTICE SCALIA: You want to add et cetera,
4 right?

5 MR. MARTINEZ: And add "or similar,"
6 "similar equitable" -- "similar inequitable conduct,"
7 which is what the Ninth Circuit said in the
8 Park-in-Theatres case, which I think all the parties
9 agree is a -- fairly captures what Congress intended to
10 incorporate from the cases decided in the late '40s.

11 CHIEF JUSTICE ROBERTS: So where does gross
12 injustice come from? I understood that to be your test.
13 You say, Fees are authorized when necessary to prevent
14 gross injustice to the defendant.

15 MR. MARTINEZ: I think --

16 CHIEF JUSTICE ROBERTS: Again, you have your
17 long laundry list that doesn't say anything about gross
18 injustice.

19 MR. MARTINEZ: Well, I think the long
20 laundry list reflects the kinds of circumstances in
21 which courts operating between 1946 and 1952
22 interpreting the prior statute, those are the
23 circumstances in which those courts had concluded that
24 there was a gross injustice. So in other words, we
25 think gross injustice is maybe the umbrella term and --

1 JUSTICE BREYER: You don't think it. Where
2 it comes from, which maybe you don't want to say, is the
3 Senate report on the bill, that is similar to this one
4 enacted in 1946. Still, there are some of us who think
5 that's a highly relevant consideration.

6 MR. MARTINEZ: We are comfortable saying
7 that and we -- and we do say that and we think it's
8 especially salient and worth relying on here, not just
9 because it's the legislative history, but also because
10 that same legislative history and that same gross
11 injustice language was repeatedly cited and talked about
12 in the 1946 to '52 cases.

13 JUSTICE KAGAN: But I think, Mr. Martinez,
14 what the Chief Justice is driving at is there's a bit of
15 a disconnect between your list of factors and those two
16 words. Gross injustice, I mean that's kind -- that's
17 really, really exceptional. That sounds like, shocks
18 the conscience. That sounds like something you've never
19 seen happen in the litigation system ever.

20 But then you're saying essentially ratchet
21 it down when you list all of these various factors. And
22 maybe that's -- that's right, we shouldn't be obsessed
23 with this word, gross injustice. It just seems a
24 disconnect between the two words and all the factors.

25 MR. MARTINEZ: Let me -- let me explain by

1 stepping back.

2 JUSTICE SCALIA: But it's in the Senate
3 report, so --

4 (Laughter.)

5 MR. MARTINEZ: Justice Kagan, we think that
6 the way to look at the statute is to try to figure out
7 what Congress understood the statute to mean in 1952.
8 And it's very clear and I think both sides agree that
9 Congress intended to essentially incorporate the -- the
10 thrust of the judicial opinions that had been issued
11 under the 1946 statute. Those opinions repeatedly
12 talked about gross injustice, drawing from the prior
13 legislative history, and when they awarded fees and then
14 when -- and when they discussed when fees would be
15 appropriate, the -- the circumstances that we list in
16 our brief are what they said would equate to gross
17 injustice.

18 So I think in the abstract you may be right,
19 that gross injustice is a broader standard or maybe it's
20 a little bit -- it's a, you know, only the most
21 exceptional of exceptional cases would be covered. But
22 in practice what Congress was looking at and what they
23 were responding to and what they were intending to put
24 in this statute was an idea of gross injustice that
25 reflected those bad faith, harassing, and unreasonable

1 situations that were presented earlier.

2 JUSTICE SCALIA: So if that's what you mean,
3 why don't you say exceptional injustice instead of gross
4 injustice?

5 MR. MARTINEZ: We're trying to tie the
6 interpretation of the statute to the language --

7 JUSTICE SCALIA: To the Senate -- to the
8 Senate report.

9 MR. MARTINEZ: Not just to the Senate
10 report, Justice Scalia, but to the judicial decisions.
11 And this Court has often looked to judicial decisions --
12 judicial decisions as a backdrop against -- against
13 which Congress legislates.

14 JUSTICE KENNEDY: It's a different statute.
15 Could we borrow from -- you mentioned EAJA. I take it
16 that's substantially justified?

17 MR. MARTINEZ: Yes, Your Honor. We think
18 that -- that --

19 JUSTICE KENNEDY: It's a different statute,
20 It was passed later, all of -- all those problems.

21 MR. MARTINEZ: We think that when -- when
22 the situation involves, say, just an objectively
23 unreasonable argument, we think that essentially the
24 same test would apply from the EAJA context.

25 JUSTICE SOTOMAYOR: So is there anything

1 other than the objectively baseless and bad faith of the
2 Brooks Furniture test that you would change? Doesn't
3 all of the other factors that the Court uses --
4 litigation misconduct, all of that other stuff --
5 encompass all the factors you're talking about?

6 MR. MARTINEZ: I think it does, but I think
7 it's -- it's very important if the Court were to go in
8 that direction, as long as it elaborates a couple of the
9 additional points that I mentioned earlier.

10 JUSTICE SOTOMAYOR: That it has to be a
11 combination, a combination of factors, and --

12 MR. MARTINEZ: Both, yes, right, that both
13 are not required, that it can be a combination of
14 factors, that when the Brooks Furniture test says
15 unjustified, that is a -- that embraces the concept of
16 objective unreasonableness.

17 JUSTICE SOTOMAYOR: By the way, I thought --
18 I thought the Federal Circuit said that you only use the
19 objective unreasonable if there isn't one of the other
20 things. So it seems to be saying that --

21 MR. MARTINEZ: I think they do, but I think
22 that catch-all category in which they apply the
23 two-pronged Brooks Furniture test covers potentially a
24 very wide array of cases, because it covers any case in
25 which perhaps there's bad faith conduct in bringing the

1 litigation, and also it covers the range of
2 circumstances in which frivolous or unreasonable
3 arguments are made.

4 JUSTICE SOTOMAYOR: And could you spend a
5 moment on clear and convincing, and -- because there's
6 not a whole lot in your briefs on that part of it,
7 although you do mention it in passing.

8 MR. MARTINEZ: Right. Yes, Justice
9 Sotomayor. As the Court well knows, the standard rule
10 in civil litigation is that -- that facts need to be
11 established by a preponderance of the evidence unless
12 Congress says otherwise. The i4i case, decided a few
13 terms ago, I think confirmed that general view.

14 Here, Congress did not say otherwise.
15 Congress did not embrace a clear and convincing
16 standard. There's nothing in the text or the history of
17 Section 285 that suggests that it did. Appreciate we
18 didn't have enough -- I wish we had had more time in our
19 brief to get into this issue, but I would just suggest
20 that if the Court wants to look more deeply, it can look
21 at Judge O'Malley's opinion in the Kilopass case, which
22 I think has a very thorough and very convincing
23 discussion of the clear and convincing evidence issue.

24 JUSTICE ALITO: What is the difference
25 between -- you say the correct phrase is objectively

1 unreasonable?

2 MR. MARTINEZ: When we're dealing with just
3 that, a -- a case that raises a weak legal argument.

4 JUSTICE ALITO: That's different from
5 objectively baseless. That's a little higher than
6 objectively baseless?

7 MR. MARTINEZ: It's not clear, Justice
8 Alito, how the Federal Circuit conceives of it, And let
9 me just explain why. I think they use the term
10 objectively baseless. In some of their opinions when
11 they are talking about that term, they seem to use
12 frivolous as a synonym. In other cases when they're
13 talking about that term, they seem to use objectively
14 unreasonable. And so we think there's a little bit of
15 confusion.

16 We think the Pierce case makes very clear
17 that justified and reasonableness are the same thing,
18 and to -- that a reasonable argument is not the same as
19 merely a non-frivolous argument.

20 JUSTICE ALITO: And that's higher than the
21 Rule 11 standard?

22 MR. MARTINEZ: The Rule 11 standard, when it
23 comes to unreasonable arguments, is frivolous. And so
24 we think that it should be a little bit lower than that
25 standard and it should be closer to something like in

1 EAJA.

2 The -- I would like to get to the Chief
3 Justice's question earlier about why not defer to the
4 Federal Circuit's view on this statute, and I think two
5 principal reasons. First of all, I don't think the
6 Federal Circuit's view really has any basis in either
7 the text or the history of -- of the -- of Section 285.
8 So that's reason number one.

9 Reason number two is I think if the Federal
10 Circuit had had a consistent view over its history or if
11 the Federal Circuit were not internally divided on this
12 issue, that may be a consideration. Deference might be
13 more appropriate. But here there is no consistent
14 history and the Federal Circuit, as we've seen in
15 Kilopass, is divided.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.
17 Mr. Phillips.

18 ORAL ARGUMENT OF CARTER G. PHILLIPS

19 ON BEHALF OF THE RESPONDENT

20 CHIEF JUSTICE ROBERTS: Mr. Phillips.

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

23 I'd like to start with the objective
24 baseless issue in this particular case, because it seems
25 to me the district court has done a very thorough job of

1 analyzing every element of this case. The district
2 judge obviously presided over the entirety of this
3 litigation, analyzed the case for purposes of summary
4 judgment, and then reanalyzed the case for purposes of
5 analyzing the merits of -- of the claim and to -- and
6 whether or not this would be an exceptional case.

7 To be sure, it applied the Brooks standard,
8 but basically what it analyzed was just simply whether
9 there was an objectively legitimate basis for the
10 decision. It's not that it has zero merit. Counsel
11 keeps saying zero merit is objectively baseless. That's
12 not the standard. This Court held in PRE that
13 objectively baseless means that there has to be probable
14 cause -- that it lacks probable cause to go forward,
15 that it has to be reasonably possible.

16 CHIEF JUSTICE ROBERTS: Well, in PRE, of
17 course, we were concerned about infringing on First
18 Amendment rights, and that's not the case here.

19 MR. PHILLIPS: Well, I think you could argue
20 that there is at least a First Amendment concern that's
21 in here. But -- but in any event, what it seems to me
22 you really --

23 CHIEF JUSTICE ROBERTS: First Amendment
24 concern, what, to bring a patent case?

25 MR. PHILLIPS: Well, access to the courts,

1 access to the courts. Any time you talk about imposing
2 multimillion dollar fee awards at the end of the
3 litigation, particularly if you do it on a fairly
4 arbitrary basis --

5 JUSTICE SCALIA: Do you think Congress could
6 not require the loser to pay -- in all cases?

7 MR. PHILLIPS: Oh, I have no doubt that
8 Congress could --

9 JUSTICE SCALIA: -- in all cases?

10 MR. PHILLIPS: Well, I'm not sure about in
11 all cases.

12 JUSTICE SCALIA: I mean, if it can do that,
13 there's certainly no First Amendment problem.

14 MR. PHILLIPS: Well, I'm not sure I concede
15 that in all cases. I do think in the run-of-the-mill
16 cases, but when you're talking about a situation where
17 you're talk -- where the assertion is that the conduct
18 of the litigation, the bringing of the litigation itself
19 is inappropriate --

20 JUSTICE SCALIA: That's the English rule. It
21 used to be our rule. I don't see how you can possibly
22 say that it's unconstitutional to make the loser pay.

23 JUSTICE KENNEDY: This is not your best
24 argument.

25 MR. PHILLIPS: It is not my best argument, I

1 appreciate that, Justice Kennedy.

2 (Laughter.)

3 MR. PHILLIPS: On the other hand, if you --
4 if you go back and look at Christiansburg,
5 Christiansburg, in that case the court also didn't treat
6 it as a First Amendment issue, but it still recognizes
7 an important policy of -- of trying not to have too much
8 interference with access to the courts.

9 In any event, objectively baseless is a
10 standard that every court knows how to use and it goes
11 directly to the ultimate --

12 JUSTICE SOTOMAYOR: How different is this
13 from sanctionable misconduct? It seems to me that under
14 the way you're articulating things, the conduct has to
15 be sanctionable before you can give attorneys' fees
16 under this provision. So why bother having the
17 provision?

18 MR. PHILLIPS: Well, because the provision
19 was enacted in 1952, Justice Sotomayor, long before this
20 kind of litigation -- these kind of rules that would
21 have rendered the litigation sanctionable existed, and
22 so as a consequence of that -- and I think it's
23 important to put it in context. Because, you know, when
24 Congress did this initially in 1946, to be sure, it's
25 the Senate report that talks about gross injustice, but

1 it is the decisions of the courts that adopted that
2 approach of gross injustice. And then when Congress, in
3 1952, incorporates the exceptional case standard, the
4 revisor's notes say it's designed to go back to the
5 legislative history and the decisions that have been
6 interpreting that.

7 JUSTICE BREYER: Why does it always have to
8 be objectively baseless? I mean, I've read enough cases
9 in this area to be able to approach it as a district
10 court judge who's not expert.

11 I patent the following: For a computer,
12 enter somebody's name; ask phone number, and they'll
13 give you the phone number if you put in the right city.
14 That puts some lists in the computer. They can patent
15 that? Well, you add a couple of things, and then,
16 apparently, you can have an argument that they can
17 patent it. Okay? Because it'll be very abstract
18 language. It will be able to patent almost anything.
19 No, you can't finally, but objectively baseless? Patent
20 attorneys are very brilliant at figuring out just how to
21 do this. So we're never going to have attorneys' fees
22 in a suit if that's your standard.

23 MR. PHILLIPS: Well --

24 JUSTICE BREYER: But you could couple that
25 with just barely over the line. What line? This vague

1 line, no one knows what it is. In addition, all they
2 did was say, We don't want to go to court and cost you
3 \$2 million. Please send us a check for 1,000, we'll
4 license it for you. They do that to 40,000 people, and
5 when somebody challenges it and goes to court, it costs
6 them about 2 million because every discovery in sight.
7 Okay? You see where I'm going?

8 MR. PHILLIPS: Yes.

9 JUSTICE BREYER: And so I do not see why you
10 couldn't have an exceptional case where attorneys' fees
11 should be shifted. But if I'm honest about it, I cannot
12 say it's objectively baseless. I can just say it's
13 pretty close to whatever that line is, which I can't
14 describe and look at all this other stuff. Are you
15 going to say that I can't shift?

16 MR. PHILLIPS: I think the problem with the
17 approach you propose there, Justice Breyer, is you're
18 trying to deal with a very small slice of the problem of
19 litigation. You know, what you've described --

20 JUSTICE BREYER: No, no, but I'm -- of course,
21 it may be a small slice of litigation, but it is a slice
22 that costs a lot of people a lot of money.

23 MR. PHILLIPS: But the problem --

24 JUSTICE BREYER: And so I would like to know
25 if I do run across that small slice why cannot I, the

1 district judge, say, I've see all these things, taken
2 together they spell serious injustice, and therefore,
3 I'm shifting the fees. Okay?

4 Why can I not do that even though, as I've
5 just said and repeat, I cannot in honesty say it's
6 frivolous given the standards for patenting that seem to
7 be administered?

8 MR. PHILLIPS: Because when Congress enacted
9 the statute, adopted the exceptional-case standard, it
10 meant, essentially, to require that the litigation be
11 unjustified and vexatious. Unjustified means that it is
12 baseless. That's the understanding that existed all
13 along. It has to have -- it's not that it has zero
14 merit, but it has to have enough merit to be -- to
15 satisfy the standards of probable cause.

16 JUSTICE KENNEDY: Well, baseless is at the
17 end of the day -- I mean, you have a case that involves
18 a straight stroke rail that at one end goes in an
19 elliptical arc, and the district judge had to figure
20 this out with all the experts. After he goes through
21 all the underbrush, he finds there's nothing there. And
22 it's hard to say that that's objectively baseless to a
23 district judge who's spent weeks studying this thing.
24 But at the end of the day, suppose he finds there's
25 nothing there?

1 MR. PHILLIPS: Well, if at the end of the
2 day there's nothing there, then I think it is
3 objectively baseless, even though they've gone through
4 the litigation. But what the district judge --

5 JUSTICE BREYER: Not nothing there. It's
6 highly abstract language. I gather you, like I, have
7 read some of these claims. They are very hard to
8 understand and when you get to the bottom of it, the
9 abstract nature of the language, plus the fact that it
10 has something to do with computer input, plus the fact
11 that, you know, you suspect very strongly it's baseless,
12 but you really don't like to say something that isn't
13 true and you can say, well, I could see how somebody
14 might think there was something to this claim, just in
15 that tone of voice, which you can't write down that tone
16 of voice. You see?

17 (Laughter.)

18 MR. PHILLIPS: It usually comes through in
19 the opinions, actually.

20 JUSTICE BREYER: Yes.

21 You see the problem. I don't see why it
22 shouldn't be --

23 MR. PHILLIPS: But, Justice Breyer, you
24 know, the case you have in front of you though is not a
25 case like that.

1 JUSTICE BREYER: Well, let's send it back
2 and tell them that they were imposing a standard that
3 was too narrow, that was -- didn't take count of all the
4 circumstances where something could be unusually --

5 MR. PHILLIPS: But see --

6 JUSTICE BREYER: -- unjust, and then let
7 them, no clear and convincing, but it's up to you,
8 district judge. You're the expert on litigation. You
9 decide.

10 MR. PHILLIPS: Can I say two things about
11 that? First of all, the clear and convincing evidence
12 issue is not in the case. It wasn't -- they didn't seek
13 certiorari on that issue. You know, if the Court --

14 JUSTICE GINSBURG: If the Court is dealing
15 with the Federal Circuit's test and it's got these two
16 things, baseless and --

17 MR. PHILLIPS: Subjective --

18 JUSTICE GINSBURG: -- subjectively, and
19 clear and convincing evidence, I think to leave out that
20 piece of it when it all comes out of that one paragraph
21 in the Brooks Furniture case, so I think once the case
22 is before us, if we leave out that one piece --

23 MR. PHILLIPS: I don't -- well, Justice
24 Ginsburg, I do not believe that the clear and convincing
25 evidence standard is fairly subsumed within the question

1 of whether or not the objective baselessness standard
2 ought to be applied, any more than the second case
3 you're going to hear today is subsumed by this case.
4 Those are -- I mean, they all come out of the Federal
5 Circuit, but it seems to me you ought to hear -- you
6 ought to grant separately on the question of the
7 standard of review or the standard of proof at the
8 appropriate time.

9 JUSTICE GINSBURG: Well, why don't why don't
10 we just take -- there's another statute, as you know,
11 that has identical wording, the Lanham Act, and that
12 says exceptional means not run of the mine, uncommon.
13 And then there's a nice illustration, a case from the
14 D.C. Circuit.

15 MR. PHILLIPS: I read that opinion.

16 JUSTICE GINSBURG: Why don't we say, Well,
17 we have it there in the Lanham Act, the same words.

18 MR. PHILLIPS: Right. But there are a
19 couple of reasons for that. One is obviously this
20 statute was passed long before the Lanham Act was
21 enacted and against a very different backdrop, and
22 Congress clearly, in literally sticking its toe in the
23 water of allowing prevailing defendants to get fees from
24 plaintiffs in a situation was pretty unprecedented at
25 that point in time, set the standard very high and

1 intended for it to prevent gross injustice.

2 The legislative history of the Lanham Act,
3 which this Court apparently was willing to read for
4 those purposes at that time, doesn't -- doesn't remotely
5 suggest that. And the Court didn't take into account in
6 that opinion the -- the standards under the Patent Act
7 in interpreting the Lanham Act. So it seems to me you
8 could make the argument the opposite way --

9 JUSTICE GINSBURG: But you just look to --

10 MR. PHILLIPS: -- which is that the Lanham
11 Act ought to be interpreted --

12 JUSTICE GINSBURG: You look to the text --

13 MR. PHILLIPS: -- the way I propose.

14 JUSTICE GINSBURG: -- and the text is
15 identical in both. The legislative history, some people
16 like it, some people don't. But the text is identical.
17 So I think it would be odd to construe the very same
18 words in the context of the Lanham Act one way and a
19 different way in the context of the Patent Act.

20 MR. PHILLIPS: Well, I -- I -- two answers
21 to that. One is, you know, if you -- if you want to --
22 if you want to interpret them in tandem, I would say you
23 should interpret the Patent Act in the strict way that
24 Congress intended it to be interpreted in 1952, and the
25 Lanham Act should follow that.

1 The alternative is there is a different
2 history. Patent litigation and trademark litigation are
3 very, very different in the impact that they have. And
4 as a consequence, you could in fact say that Congress
5 didn't intend that.

6 But -- but, you know, I -- that seems to me,
7 in some ways, the tail wagging the dog, and that -- and
8 that's a mistake.

9 JUSTICE SOTOMAYOR: Mr. Phillips --

10 MR. PHILLIPS: Justice Breyer --

11 JUSTICE SOTOMAYOR: Please --

12 MR. PHILLIPS: The one thing I do want to
13 say, Justice Breyer, in -- in response to -- to your
14 argument about why don't you leave it for the district
15 court in that -- in that circumstance. The problem is,
16 is what you're saying to plaintiffs who bring patent
17 litigation with -- with, in this case, counsel's advice
18 and experts' advice. They got the machines. They did
19 everything you'd want a litigant to do before bringing a
20 litigation. They handled the case. They spend more
21 money on legal fees as the plaintiff than the defendants
22 did in this case. They have to hire an expert. They
23 put in -- in play the validity of their patent.

24 There are lots of disincentives for
25 plaintiffs to bring in this case. And at the end of the

1 process, based on a completely indeterminate standard,
2 the district court would then retain authority to say, I
3 conclude that what you did here is unreasonable.

4 JUSTICE BREYER: That's true, but you could
5 then appeal. I mean, you're making an argument on the
6 merits there. And really the question is, is who's
7 better suited to figure out whether this is a -- whether
8 this is a really special case.

9 And if, you know, of course, you're right.
10 Plaintiffs are often right in these things, and
11 sometimes they are wrong. So -- and they costs
12 everybody a lot of money. So you go to the Federal
13 Circuit and ask them to review it for an abuse of
14 discretion.

15 JUSTICE SCALIA: Mr. Phillips, their lawyers
16 might well have given them different advice if they
17 didn't know that, Hey, nothing to lose, given the test
18 that the Federal Circuit has, you know.

19 MR. PHILLIPS: Well, I mean, the idea that
20 there's nothing to lose --

21 JUSTICE SCALIA: Hey, I would give -- I
22 would give the same advice. Bring the suit.

23 MR. PHILLIPS: Justice Scalia --

24 JUSTICE SCALIA: This guy is a possible
25 competitor, sue him. Hey, there's nothing to lose.

1 MR. PHILLIPS: But there is something to
2 lose. First of all, as I say, the plaintiff -- this --
3 you know, there's a reason why you don't see
4 advertisements on television when Saiontz & Kirk says,
5 If you think your patent has been infringed, call us.

6 Why? Because there's not a long line of
7 people who can bring plaintiffs' patent cases. They are
8 expensive to litigate, and the ultimate effect -- and
9 you have to get an expert, and -- and at the end, you
10 put your patent into validity.

11 JUSTICE SCALIA: If it goes to litigation,
12 yes. But if -- if the alternative for the defendant is
13 either, you know, spend \$2 million defending or pay off
14 the \$10,000 that -- that the plaintiff demands to go
15 away, hey, that's an easy call.

16 MR. PHILLIPS: Well, I mean, I don't know
17 whether that's an easy call for the defendant. Doesn't
18 make the -- it doesn't make the decision for the
19 plaintiff all that easy to -- at the beginning of the
20 process because, as I say, it's both expensive and it
21 puts the validity of the patent at issue.

22 And in most cases, you know, the Federal
23 Circuit, long time ago -- or not that long ago said that
24 the inequitable conduct, that is challenging what the
25 plaintiff did before the PTO had become a plague of

1 patent litigation. So plaintiffs who walk into court
2 under those circumstances are not doing it without risk.

3 JUSTICE BREYER: Yeah, but the -- the
4 difficulty here, I not -- see it from my point of view
5 for a second. Of course I think that -- that there's no
6 plaintiff/defendant necessary difference of who can act
7 badly.

8 MR. PHILLIPS: Of course.

9 JUSTICE BREYER: All right. And -- and so
10 the question is really who is likely most to know. And
11 I think probably the district court. But then if you
12 give the power to the district court, there's a problem,
13 of course, that you'll abuse it.

14 So I say, Well, then go to the Federal
15 Circuit, and say they have. You see, well, there's
16 another way of approaching it, and that is have definite
17 standards, which is what you want. And then the
18 difficulty with definite standards is I can't think of a
19 set of definite standards that doesn't do what you don't
20 want to have happen, that it leans one way or the other.

21 I mean, it looks as if, you see, the Federal
22 Circuit's current standards leaned pretty much against
23 the person who was sued. And it looks like the --
24 the -- and so the government comes up, well, we can't do
25 better than this. It's a long list.

1 And -- and nobody's been able to think of
2 some, so then I say, Okay, let's try the first approach,
3 which is what we do with the Lanham Act. That's the
4 whole long story.

5 And what you would like to say, I'd like to
6 listen.

7 MR. PHILLIPS: Right. And the answer to
8 that is that the standards for inequitable conduct are
9 reasonably well set. They get applied pretty routinely,
10 and they create exceptional-case determinations.

11 Litigation misconduct, the standards are
12 pretty well set, pretty well understood, and they give
13 rise to the exceptional-case determinations and award of
14 attorneys' fees.

15 This case is unusual in the sense that all
16 it deals with is that bucket that talks about whether or
17 not you had a substantial basis for putting before the
18 Court this litigation in the first instance. And --

19 JUSTICE KAGAN: Mr. Phillips, I realize that
20 you have this argument that this statute was before
21 Rule 11, so the superfluity argument doesn't work.

22 But just as a matter of fact, would your
23 standard give the court authority to order fees in any
24 case in which it does not have authority by virtue of
25 either Rule 11 or its inherent authority?

1 MR. PHILLIPS: Are -- are you -- are you
2 asking me that just about the baseless litigation or all
3 of 285? Because clearly, inequitable conduct, willful
4 infringement, and -- and certain forms of litigation
5 misconduct, which might -- might create a basis for fees
6 against the lawyer, might not actually operate against
7 the -- against the party where that obviously 285
8 operates against the party. So there's a whole range
9 of -- of behavior that is controlled by 285 that has
10 nothing to do with Rule 11, et cetera.

11 So, yeah, I mean, there -- there's clearly
12 some overlap between them, but that -- that overlap
13 shouldn't be shocking because, again, 285 was enacted in
14 1952, and Rule 11 didn't come into being a serious force
15 until 1983.

16 JUSTICE KAGAN: But let me make sure I
17 understand you. Give me an example of a case in which
18 under your standard, 285 could be used to order a
19 payment of fees, but Rule 11 and inherent authority
20 would not allow.

21 MR. PHILLIPS: Again, I mean, the -- the
22 clear one -- again, if you're only talking about the
23 baselessness component, I don't know that there is one
24 like that.

25 If you're talking about inequitable conduct,

1 they would all be because Rule 11 will never reach
2 inequitable conduct involving the Patent and Trademark
3 Office because it's completely irrelevant to that. So
4 the -- the statutes do have some overlap, but they don't
5 have complete correspondence.

6 But that -- but to me, that's the key.

7 JUSTICE KAGAN: Inequitable conduct to the
8 Trademark Office, but not with respect to the suit
9 itself?

10 MR. PHILLIPS: Right. Right. There is
11 patent misconduct.

12 JUSTICE KAGAN: So there's nothing --

13 MR. PHILLIPS: There is --

14 JUSTICE KAGAN: There's nothing with respect
15 to the suit itself that Rule 11 and inherent authority
16 wouldn't get you anyway.

17 MR. PHILLIPS: Well, litigation misconduct
18 is something that may or may not go against the party,
19 depending on which rule it is and how it plays out. So
20 there -- and the courts have long recognized that
21 certain forms of vexatious behavior by litigants may
22 lead you to a particular -- to -- to determine that
23 something's an exceptional case. So there -- there seem
24 to me clearly there might be.

25 What I'm -- what I am conceding is that I --

1 I can't envision a situation where you have brought what
2 a court has said is objectively baseless litigation in
3 the first instance that might not have been actionable
4 under Rule 11. The question would be -- it would be --
5 at this -- at this stage it would go immediately against
6 the party as opposed to potentially against the lawyer.
7 And -- and to that extent, it obviously provides broader
8 relief, depending on which of the two parties might
9 actually have more resources.

10 JUSTICE GINSBURG: What about the inherent
11 authority -- Justice Kagan brought this up -- not just
12 Rule 11, but inherent authority when the court finds
13 that the litigation is baseless and brought in bad
14 faith? It seems to me that your standard is the same as
15 what the Court could do without any statute. Are there
16 other pieces --

17 MR. PHILLIPS: Well, today -- today
18 that's -- I think that may be true. I don't think that
19 was true in 1946 and then again in 1952. The -- the
20 whole notion of shifting fees to a -- to a losing
21 plaintiff was -- was all but unprecedented at the time.
22 And the best evidence we have of -- of the circumstances
23 in which Congress wanted to have those fees imposed
24 is -- is to prevent a gross injustice. And it seems to
25 me nothing better suits that test than something that is

1 objectively baseless, as -- as just that one bucket
2 within which 285 operates. The other buckets,
3 obviously, equally involve situations of gross
4 injustice.

5 JUSTICE SOTOMAYOR: So where does the bad
6 faith come in?

7 MR. PHILLIPS: I'm sorry?

8 JUSTICE SOTOMAYOR: Where does the bad faith
9 come in? Rule 11 doesn't include bad faith. It just --

10 MR. PHILLIPS: I mean, we -- we obviously
11 have, because it's in the Federal Circuit's standard,
12 we -- we embrace it, but the reality is we -- I don't
13 need to win the bad faith argument if this Court
14 concluded that bad faith is -- it shouldn't be an
15 independent factor. That would -- that would not bother
16 me because the district judge already found that this is
17 objectively not baseless, so there ought to be a basis
18 for affirmance on that ground alone.

19 Alternatively, the Court obviously could
20 wait for another case in which to take up that issue.
21 I -- I -- but we don't need to win that in order to
22 prevail on this particular case, and it certainly
23 wouldn't cause me any heartburn if the Court were to --
24 to jettison that part of it.

25 JUSTICE SOTOMAYOR: Would you address the

1 clear and convincing?

2 MR. PHILLIPS: Yeah, I -- well.

3 JUSTICE SOTOMAYOR: I know your argument
4 that it's not --

5 MR. PHILLIPS: It's not in the -- that it's
6 not before us. I mean, the rationale of clear and
7 convincing obviously is that -- is whether you assume
8 that the patent is being implemented in good faith or being
9 -- being brought in good faith and therefore creates
10 sort of a presumption in favor of the -- of infringement
11 and legitimacy; and then clear and convincing evidence
12 is obviously designed to make it harder to get over that
13 hurdle.

14 Again, I -- I'm not here to defend the clear
15 and convincing evidence standard. I -- I read the
16 concurring opinion in the Federal Circuit as well and --
17 but it seems to me clearly not in this case. It's not
18 subsumed by the question presented and that's -- that's
19 an issue that the Court ought to wait for another day.
20 Hopefully I won't have to defend it at that time.

21 (Laughter.)

22 MR. PHILLIPS: If there are no further
23 questions, Your Honors, I'd urge you to affirm. Thank
24 you.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Mr. Telscher, you have 3 minutes remaining.

2 JUSTICE KENNEDY: Take -- take your time,
3 take your time.

4 REBUTTAL ARGUMENT OF RUDOLPH A. TELSCHER

5 ON BEHALF OF THE PETITIONER

6 MR. TELSCHER: Thank you. What we're all
7 really talking about here is how extreme should the test
8 be for an exceptional case. I mean, that's what this
9 boils down to. Should it be at the extreme of
10 frivolousness, or what we believe objectively baseless
11 means the same thing -- that's how the district court
12 used it -- or should it be something lesser that's
13 practical.

14 The plain meaning of exceptional doesn't
15 mean extreme. As the D.C. Circuit found in Noxell, it's
16 not a hardly ever rule. So when we look at the plain
17 meaning it doesn't signal extreme. When we consider the
18 larger objectives of the Patent Act which this Court has
19 discussed in numerous cases. You look at Pope and Lear,
20 where this Court said there's an important public
21 interest in making sure, quote, worthless patents are
22 not used to restrain trade.

23 Four weeks ago in Medtronic this Court found
24 that we should have a paramount interest in making sure
25 the bounds of patents are not unreasonably stretched to

1 get royalties. And so when we consider the larger
2 objective, what we're looking for is a balance, and if
3 you look to this Court's precedent in Martin, where
4 there was no standard, what this Court found is when you
5 look to the larger objectives and you want to encourage
6 good conduct and you want to discourage bad conduct, you
7 set it at reasonable. You don't set it at the extreme
8 of frivolousness, which smart lawyers know how not to do
9 that, how not to get sanctioned under Rule 11.

10 And in the complex world of patent cases
11 it's not hard to avoid frivolous cases. So setting an
12 extreme standard would defeat the whole purpose of the
13 Act and it's inconsistent with the language.

14 On the topic of injustice versus gross
15 injustice, I found that very interesting, because
16 certainly exceptional, there's nothing about it that
17 signals gross injustice versus injustice. And to the
18 extent -- because I think the question was asked by one
19 of the Justices, well, doesn't that -- that signal
20 extreme conduct? I don't know that it does or doesn't,
21 but certainly the plain meaning of the statute doesn't.

22 And so to the extent that gross injustice,
23 as used in this Court's opinion, it has to signal
24 something other than the extreme conduct. We could debate
25 whether winning a hard-fought case and spending

1 2 million is injustice. Certainly, in my view, if you
2 defend a case and spend \$2 million, especially one like
3 this where every core element was missing, that's gross
4 injustice.

5 But I don't know what the standard is,
6 justice or injustice -- or gross injustice. It's just
7 not extreme, and that's how this Court's opinion need to
8 be written if we're going to discourage the maintenance
9 of unreasonable cases.

10 And there's not 15 amici briefs and some of
11 the largest technologies companies in this country
12 before this Court if it weren't the case that there's a
13 problem. These are companies with a self-interest in a
14 strong patent system. They have patents; they sue. And
15 yet they are here telling this Court to not pick an
16 extreme standard.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.

18 The case is submitted.

19 (Whereupon at 11:09 a.m., the case in the
20 above-entitled matter was submitted.)

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