

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 HIGHMARK INC., :

4 Petitioner, : No. 12-1163

5 v. :

6 ALLCARE HEALTH MANAGEMENT :

7 SYSTEMS, INC. :

8 - - - - - x

9 Washington, D.C.

10 Wednesday, February 26, 2014

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

15 APPEARANCES:

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17 Petitioner.

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

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

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

2 (11:10 a.m.)

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

6 Mr. Katyal.

7 ORAL ARGUMENT OF MR. NEAL KATYAL.

8 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

13 And here --

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

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

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

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

3 JUSTICE KAGAN: Well, would you consider
4 that to be a little bit -- Mr. Katyal, in a case in
5 which the District Court just uses an erroneous-claim
6 construction, you would concede that that's a pure legal
7 question? So that would be an abuse of discretion?

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

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

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

22 MR. KATYAL: Yes.

23 JUSTICE KAGAN: Is that a legal question?

24 MR. KATYAL: As it goes up to the Federal
25 Circuit under existing precedent, they treat that as a

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

7 But here the question is a 285 question.

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

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

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

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

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

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

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

22 You've heard, and you've read the brief on
23 the other side, saying this is a claim construction
24 dispute. It's not a claim construction dispute. What
25 the district court found seven different times when it

1 imposed fees is that this is actually a dispute about
2 infringement and their inability to come up with any
3 theory whatsoever for why, why there was a infringement
4 violation.

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

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

23 I'd also say that, you know, even if --
24 beyond Pierce, beyond Pierce, we do think this is
25 essentially Pierce-plus, that this is a case in which

1 the text of the statute and its key words, "may in
2 exceptional cases," give the Court, I think, further
3 reason to return the standard to the way it has always
4 been interpreted for 60 years. And for 6 years, from
5 1946 to 1952, abuse of discretion deferential review was
6 used in objective baselessness cases.

7 In 1952, the -- the Congress codified
8 essentially those -- that interpretation. From 1952 to
9 1982, the regional circuits used it, like the D.C.
10 Circuit in the Oetiker case. After 1982, the Federal
11 Circuit used it time and again in cases such as Eon-Net.

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

16 JUSTICE SOTOMAYOR: If we undo --

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

22 MR. KATYAL: We think that it is hard in
23 that circumstance, and that's the one-way ratchet. We
24 don't place a lot of emphasis on that in our brief.
25 It's our last argument.

1 But we do think, essentially, it is hard to
2 overturn a district court's decision not to award fees,
3 whereas under the Federal Circuit's interpretation it's
4 really quite easy for the Federal Circuit to mint some
5 new theory as to why the position was reasonable that --
6 that the attorney took.

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

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

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

1 sentencing.

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

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

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

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

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

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

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

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

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

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

3 If there are no further questions.

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

6 ORAL ARGUMENT OF BRIAN H. FLETCHER.

7 FOR THE UNITED STATES, AS AMICUS CURIAE,
8 SUPPORTING PETITIONER

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

11 In this morning's first case, you will
12 decide what principles should guide a district court's
13 award of attorneys' fees under Section 285. Whatever
14 standard you choose to adopt in that case, we believe
15 that a district court's application to the particular
16 facts of a case before it ought to be reviewed under a
17 unitary abuse of discretion standard. That approach is
18 consistent with this Court's repeated statements that
19 decisions about the supervision of litigation ought to
20 be reviewed under a deferential standard. And in this
21 particular context, it's also supported by the text and
22 history of Section 285, by 60 years of consistent
23 appellate practice, and by the same sorts of practical
24 considerations that led this Court to adopt a similar
25 approach to very similar questions in *Pierce* and in

1 Cooter & Gell.

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

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

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

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

8 MR. FLETCHER: Well, that --

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

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

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

24 But what the Court said in *Pierce* and in
25 *Cooter & Gell* and what's also true here is that when the

1 question that the appellate court is answering is not
2 what is the law actually, but rather what could a party,
3 when it initiated this case and continued to litigate it
4 several years ago, could that party have reasonably
5 believed the law to be, that doesn't yield the same sort
6 of law-clarifying benefit.

7 In fact, in *Pierce* this Court said those
8 sorts of determinations are never going to be made clear
9 under any sort of review standard.

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

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

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

11 JUSTICE ALITO: Well, I'm just wondering, if
12 you put together the two arguments about what the
13 standard should be and what the standard of review
14 should be, whether there really is going to be any
15 meaningful review of what district courts do in this
16 situation. Maybe you could just describe for me what an
17 appellate decision would look like, saying that applying
18 the totality of the circumstances, the District Court
19 abused its discretion in awarding or not awarding fees.
20 What would an Appellate Court say?

21 MR. FLETCHER: So I think one thing that an
22 Appellate Court might say, as Justice Kagan alluded to
23 earlier, is that if the District Court has based its fee
24 award on a misunderstanding of the law, if it got the
25 claim construction wrong, if it misinterpreted the

1 relevant patent statutes, that would obviously be an
2 abuse of discretion.

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

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

1 standard of review applies to different parts of a
2 District Court's decision.

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

7 The last point that I think I'd like to
8 leave you with is the notion that I think there --
9 Justice Alito, earlier you suggested that the Federal
10 Circuit has expertise in patent law and special
11 expertise in patent law. And I frankly think that's the
12 strongest argument that the other side has. But I'd
13 urge you to look at Judge Moore's dissent from the
14 denial of rehearing en banc in this case, for she and
15 four of her colleagues on the Federal Circuit explained
16 that, when you're asking whether or not a party's
17 litigating position was objectively reasonable, the
18 Federal Circuit's expertise in patent law actually isn't
19 the relevant expertise. And she explains at length and
20 she cites a number of prior Federal Circuit decisions,
21 recognizing as well that the District Court who's lived
22 with the case and who's decided on the merits and who's
23 seen the parties and has spent sometimes years with the
24 parties is really in a better position to decide whether
25 or not the party's litigating position was reasonable.

1 For that reason, if the Court has no further
2 questions, we'd urge you to vacate the judgment below
3 and remand the case to the Court of Appeals, with
4 instructions to consider the District Court's award of
5 fees under the correct standard.

6 Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.
8 Mr. Dunner.

9 ORAL ARGUMENT OF DONALD R. DUNNER

10 ON BEHALF OF THE RESPONDENT

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

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

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

23 So the question is why -- why didn't the
24 Federal -- why did the Supreme Court apply the
25 traditional rule in Pierce and in Cooter? And the

1 answer certainly is not that they were fee cases,
2 because the Pierce case makes absolutely clear that it
3 was not enunciating a general rule for fee cases. It
4 said it couldn't enunciate a general rule.

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

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

19 JUSTICE SOTOMAYOR: Even if I assumed that
20 ultimately the claim that you made might have been --
21 might have had a basis, like the court below agreed, as
22 I read the District Court's decision, it wasn't basing
23 its decision merely on that. What it was basing it
24 on -- and it goes through a whole laundry list of things
25 that it thought constituted abusive litigation -- very

1 little prefiling investigation, continuous switch of
2 claims because of the lack of that investigation,
3 pursuing a theory that your expert didn't even agree
4 with.

5 That all sounds to me like a factual basis,
6 basically saying this litigation was abusive. And I
7 don't understand how that doesn't feed into the
8 "objective unreasonableness." Meaning that if you had
9 done the investigation you should have, you may have had
10 a claim or thought you had a claim, but you would have
11 learned much earlier that even your expert disputed
12 things and you're likely not to have brought the suit.

13 That's how I read the District Court's
14 decision.

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

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

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

5 There were four issues. Two of them
6 involved claim construction, and the third one involved
7 claim construction -- the one we lost on. The fourth
8 one was whether or not the -- the -- Allcare had a right
9 to rely on what happened in the Eastern District of
10 Virginia in which we had the same claim against a
11 different party and the two courts reached different
12 conclusions on the same issue on the same claim, which
13 alone should have -- should have found that it was
14 objectively reasonable but was not. And the -- the last
15 one was whether or not alleged misconduct,
16 misrepresentation to the Western District of
17 Pennsylvania before the case was transferred, whether
18 that was sanctionable, and the case law made clear that
19 was a legal question. The case law made absolutely
20 clear that you cannot look at conduct before another
21 tribunal to decide whether a different tribunal should
22 sanction you.

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

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

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

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

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

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

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

22 CHIEF JUSTICE ROBERTS: Well, but then it
23 would be four to three on one issue, then it has, as in
24 this case, conflicting cases within its own docket. So
25 I'm not sure it's succeeding in bringing about

1 uniformity.

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

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

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

24 JUSTICE BREYER: Well, they do sometimes.

25 MR. DUNNER: Pardon?

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

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

23 MR. DUNNER: I'm not sure.

24 JUSTICE BREYER: Oh, I guarantee.

25 So I'm thinking that maybe claim

1 construction is like that very often. Factual matters
2 are there. Legal matters are there. And judges cannot
3 always separate the one from the other, or even if they
4 could, they don't feel it's worth the effort.

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

14 So the fact is, you're still better off,
15 which is the best tribunal to deal with the question.
16 I'm not saying we have a perfect answer because there's
17 not a perfect answer on our side, there's not a perfect
18 answer on their side. But there's a best answer, and I
19 suggest that the best answer is to let the legal issues
20 decided by the Court that gets tons of patent issues,
21 that has a lot more experience, as Justice Alito
22 mentioned in one of the points that he made, rather than
23 district court judges who may get a few cases, may get a
24 lot of cases, depending what district you're in.

25 CHIEF JUSTICE ROBERTS: Well, what about

1 Judge Moore's point that when you're talking about pure
2 issues of patent law maybe you're right, but when you're
3 talking about baselessness, that's something that the
4 district court actually have more experience with,
5 whether it's under EAJA, whether it's under EDPA,
6 whether it's under qualified immunity. That's an issue
7 they see all the time, so maybe they are more expert
8 than the Federal Circuit.

9 MR. DUNNER: Your Honor, on the question
10 broadly of objective baselessness, one might say that is
11 so, but on the question of objective baselessness in a
12 patent context, in the 285 context, where you've got
13 legal issues, where you've got claim construction
14 issues, they are certainly not better situated than the
15 Federal Circuit. And I submit that certainly claim
16 construction is a perfect example and the government, in
17 this case, acknowledges that claim construction, as it
18 calls it pure -- pure legal issues claim construction is
19 reviewed de novo. So that is a perfect example of how
20 district courts can disagree. And this case is poster
21 child for that because we had two different courts going
22 two different ways on exactly the same point, exactly
23 the same issue. And the Pierce case raised, there are
24 other considerations involved. There are a lot of
25 considerations involved, but others in terms of which

1 tribunal is better situated and the Pierce case pointed
2 out that the size of the fee involved can be very
3 important. And I'd like to address that just very
4 briefly. The size of the fee involved in patent cases,
5 as my daughters would say, humongous. Some of -- I've
6 been in two cases where the legal fees were \$30 million,
7 and when you've got legal fees like that --

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

10 (Laughter.)

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

13 (Laughter.)

14 CHIEF JUSTICE ROBERTS: Oh, no.

15 MR. DUNNER: The fact is, when you've got
16 fees like that, there is going to be an appeal.
17 Typically the appeal will be consolidated with a merits
18 appeal. Typically the Court will be dealing with the
19 issues, both of them in the same case, and as Judge Dyke
20 pointed out, having reviewed the merits decision, the;
21 285 decision often involves the same kind of questions,
22 and it is not an enormous burden on the courts to do
23 that. And given the amount of the fee, there's going to
24 be an appeal when you've got large legal fees regardless
25 of the standard of review. So you're not -- I don't

1 think you're going to get a meaningful number of
2 additional appeals that you otherwise would not get.
3 And the fact is that the size of the fees was
4 independently noted in Pierce as a factor.

5 On the Rule 11 issue in Cooter the -- this
6 Court talked about the fact that the district courts
7 were best suited to deal with those cases because they
8 were familiar with the local practices. The whole
9 purpose of the Federal Circuit is not to be concerned
10 with local practices but to be concerned with national
11 practices.

12 JUSTICE GINSBURG: Two of the items you
13 mentioned, one was venue, and the other was claim
14 preclusion, issue preclusion. The Federal Circuit is no
15 more expert in those areas than a district court would
16 be.

17 MR. DUNNER: On what kind of issues, Your
18 Honor?

19 JUSTICE GINSBURG: You mentioned the venue
20 question.

21 MR. DUNNER: Yes.

22 JUSTICE GINSBURG: And I was surprised. The
23 Court said, well, that's for the Pennsylvania court to
24 sanction.

25 MR. DUNNER: Yes.

1 JUSTICE GINSBURG: But you, I'm sure, have
2 read Mackfeld in the D.C. Circuit --

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

4 JUSTICE GINSBURG: -- one of the problems
5 there, one conduct that was considered unreasonable was
6 suing in a distant forum, very far from where the
7 defendants operated and claim preclusion and issue
8 preclusion come up in all kinds of cases, so there's
9 nothing expert about the Federal Circuit on those
10 issues.

11 MR. DUNNER: Your Honor, I have to
12 acknowledge that on an issue of whether or not a conduct
13 in a different circuit should be sanctionable in another
14 circuit, the Federal Circuit is certainly not more
15 expert on that kind of an issue than another court.
16 That -- that is merely an example of what happened in
17 this particular case.

18 I will note that the Federal Circuit cited a
19 number of cases which held exactly that.

20 And, moreover, what happened in this case
21 was that even the District Court -- Judge Means in the
22 Northern District of Texas -- noted that the
23 Pennsylvania District Court itself did not seem to place
24 very great reliance on it. It probably was the least
25 significant of all the factors in the case.

1 And so I would say it is merely an example
2 of a legal issue. And there will be some legal issues
3 in which the Federal Circuit may not be more expert than
4 others, but there will be a lot of legal issues, since
5 we're dealing with conduct in patent cases, on which the
6 Federal Circuit is the most expert court.

7 And, in any event, we're talking about how
8 can we get uniformity of decision-making in the 285
9 area, and you've got both Rule 11 and the EAJA cases
10 went to 13 circuits, the 285 issues go to one circuit.
11 So it is much better to have a single court ruling on
12 those questions than to have multiple District Courts.

13 JUSTICE SCALIA: Well, you know, once you --
14 once you have a statute that confers discretion on a
15 District Court, you don't expect uniformity of
16 decision-making. It gives the District judge a broad --
17 broad discretion, and some will come out at the top and
18 some will come out at the bottom. And they will all
19 be -- be affirmed by the Court of Appeals.

20 So what makes you think that -- that this
21 statute, which clearly confers discretion, envisions
22 uniformity --

23 MR. DUNNER: Let me --

24 JUSTICE SCALIA: -- as part of the District
25 Courts?

1 MR. DUNNER: Let me --

2 JUSTICE SCALIA: It seems to me it quite
3 clearly doesn't.

4 MR. DUNNER: Let me address that, Your
5 Honor.

6 The -- there's a lot of argument in the
7 opposing briefs on the textual issue and the legislative
8 history, and they cite the legislative history of
9 Section 70, the predecessor statute in 285, and they
10 talk about the reviser's note and P.J. Federico's
11 commentary as to what the new words meant. And the new
12 word -- the new words meant that they were focusing on
13 Section 70 as it had been interpreted by the courts.

14 So what do you see when you look at the
15 courts? We have -- I have examined every appellate
16 decision from 1946 to 1952 dealing with Section 70.
17 There are 19 of them. And not a single one said legal
18 issues are reviewed with deference. Not a single one.
19 A lot of them use discretionary language, but none said
20 legal issues are reviewed with deference.

21 And moreover --

22 JUSTICE SCALIA: Well -- well, you -- you
23 acknowledge that a lot of these cases -- probably most
24 of these cases do not involve exclusively legal issues.
25 Right?

1 MR. DUNNER: Exactly, Your Honor.

2 JUSTICE SCALIA: And so in -- in all of
3 those cases you're not going to get uniformity because
4 their -- you acknowledge that in -- in the nonlegal
5 issues there is discretion in the District Court. So
6 you're going to have some District Courts coming out
7 some ways, other District Courts coming out the other
8 way, and they will all be affirmed.

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

11 MR. DUNNER: Your Honor --

12 JUSTICE SCALIA: You're -- you're creating
13 uniformity in one narrow aspect of -- of this decision,
14 that involving legal claims, but there are many other
15 aspects of the decisions that will destroy whatever
16 uniformity you're trying to achieve.

17 MR. DUNNER: Your Honor, I hadn't finished
18 my point, so let me just finish it, which is a response
19 to your point.

20 And that is these 19 cases between 1946 and
21 1952, many of them gave -- gave a test, and they said
22 the issue is abuse of discretion or the disjunctive or a
23 legal error. And so all of these cases, none of them
24 said legal issues are reviewed deferentially. And all
25 I'm saying is that if you look at the legislative

1 history, if you look at the textual change of the
2 statute, those cases in between were concerned that the
3 District Courts were -- were construing with deference
4 too loosely, and they tightened it up with the
5 "exceptional case" language. But they also said it --
6 that legal questions are reviewed de novo. And all I'm
7 saying is if you look at the statute, we want the
8 District Courts to rule on the facts. We want the
9 Federal Circuit to give deference to the ruling on the
10 facts. But when they get into the legal area, when they
11 make legal decisions, we think it should be reviewed
12 de novo.

13 JUSTICE BREYER: The problem with -- the
14 problem is -- the one I think that -- that really seems
15 to be at the heart of what you have to decide is it
16 worth saying to the Court of Appeals: Start
17 distinguishing between which of the two categories it
18 falls into. Because the statement that you read, most
19 lawyers would agree with that statement as a general
20 principle.

21 And then the question becomes, well, it's
22 work to decide whether this is purely legal or whether
23 it's legal factual mixed and sometimes it's one and
24 sometimes the other and they are really no key to it
25 exactly.

1 So what you're doing is saying, in an area
2 where there are a lot of the deferential kind -- and
3 some of the nondeferential kind, we want to say the
4 Federal Circuit and all the District Courts have to stop
5 and figure that thing out. Well, the other side says,
6 look, just leave it to the District Court and tell them
7 to review.

8 Theirs is simpler. What do you say?

9 MR. DUNNER: Justice Breyer, my response is
10 that in many cases there won't be a problem
11 distinguishing between law and fact. When there is a
12 problem -- there will be some cases where there may be
13 difficulty distinguishing between law and fact, and what
14 Pierce says and what Cooter says and what a lot of cases
15 say is which is the best tribunal, the District Court or
16 the Appellate Court, to deal with it? And all I'm
17 saying is there are all the factors --

18 JUSTICE SOTOMAYOR: I'm sorry. I'm -- I'm a
19 little confused. With respect to winning or losing the
20 case, you're going to get de novo review because the
21 Federal Circuit here looked at the claim construction,
22 under de novo review, agreed with the District Court
23 that it had construed the claim properly and that you
24 lost. So you got de novo review.

25 The issue on a reasonable ground to pursue

1 the litigation, whether it was objectively reasonable or
2 not, I think that's Justice Breyer's point, which it
3 generally has factors that are independent of winning or
4 losing, and that's why I kept going back to what the
5 District Court said in this case, which you seem to
6 ignore. It, at one point, recognizes that your claim
7 was a difficult one, but it says that doesn't excuse the
8 fact that you maintained the 52C claim, the one at issue
9 here, even after both the master -- special master and
10 your expert had said a particular claim wasn't
11 sustainable. And it continued with a long example of
12 behavior examples, multiple ones, that it found
13 unreasonable, having nothing to do with the ultimate
14 reasonableness of your last argument before the
15 Appellate Court.

16 So, again, I ask the question: Why should
17 this objective reasonableness be considered a pure
18 question of law? Because it's not about right or wrong
19 and legal answer; it's about behavior during litigation.

20 MR. DUNNER: Your Honor, there are -- there
21 are two facets to the answer I would give to that
22 question.

23 One is that all of the points you made about
24 what the District Court found were not issues on appeal.
25 The District Court found lots of things, but the four

1 issues that went up on appeal did not deal with all the
2 facts you're talking about. They dealt with legal
3 issues. There was no prefiling investigation issue.

4 The Federal Circuit expressly found that, in
5 a footnote in its opinion, there was no prefiling
6 investigation issue in the final decision on appeal
7 because the District Court made multiple decisions. One
8 was a Rule 11 decision in which he didn't provide a safe
9 harbor for anybody, and we went in and we asked them to
10 reconsider it, and he changed his opinion and dropped
11 everything against the attorneys.

12 The -- what went up to the Court were four
13 issues, and they were four legal issues. And all I'm
14 saying is that -- that Scott versus -- versus Harris and
15 Justice Souter, in his comparing opinion in the PRE
16 case, said the same thing, that objective reasonableness
17 is a legal issue reviewed de novo, and if you want
18 uniformity, if you want predictability, the best way to
19 avoid chilling -- avoid chilling not only patentees but
20 accused infringers from being willing to go to court for
21 fear that they may have to pay 30 or 20 or 10 million
22 dollars and the accused infringer from defending against
23 it, is to have predictability. To have uniformity in
24 decision-making, which you get from having a single
25 court reviewing those cases. And that single court is

1 the Federal Circuit.

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

4 If there are no further questions, I rest.

5 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

6 Mr. Katyal, you have nine minutes remaining.

7 REBUTTAL ARGUMENT OF MR. NEAL KATYAL

8 ON BEHALF OF THE PETITIONER

9 MR. KATYAL: Thank you.

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

15 We warned, of course, that the de novo
16 standard would become a magnet for litigation and
17 encourage 285 losers to roll the dice, hoping that they
18 can repackage a factual dispute as a legal one in the
19 Court of Appeals. And Pierce and Cooter warn against
20 that and say that's a waste of resources as, Justice
21 Breyer, you're picking up on.

22 And, Justice Sotomayor, they say you've
23 already had a merits determination as there one here.
24 This case proves that.

25 You heard Mr. Dunner say, quote, There were

1 no factual issues in this case, and he talks about the
2 Trigon ruling from the Eastern District of Virginia. As
3 the district court here found, Petition Appendix 63A,
4 Trigon was irrelevant because the question was
5 infringement, not claim construction. And that was why
6 sanctions were imposed. And if there's any doubt,
7 here's what Allcare's own lawyer told the Federal
8 Circuit in 2009. These are his opening words, quote:
9 Summary judgment was granted at the district court in
10 this case for two reasons. First, it was held there was
11 a lack of evidence from which a reasonable finder of
12 fact could determine the step at 52C; and secondly, the
13 district court held even if there was evidence that
14 Step 52C was performed, there was insufficient evidence
15 of direction or control.

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

19 Answer from Allcare's lawyer: I would
20 disagree that claim construction ought to be revisited
21 at this level. In 1999, this Court expressly stated it
22 was inappropriate to sua sponte revisit it.

23 Now, I'm sorry to belabor the facts here,
24 but I think they illustrate the wisdom of Justice
25 Scalia's opinion in *Pierce*, as followed by Cooter and

1 Koon, which is clever lawyers can always make arguments
2 on appeal, make them look -- make them look legal when
3 they were factual. This case is an Example A of that.

4 Now, my friend on the other side has said
5 that -- that there wasn't history from 1946 to 1952. We
6 encourage the Court to look to the -- to the cases cited
7 at pages 11 to 13 of our brief, and in particular to
8 look at Warison v. Hofberger, a Fourth Circuit case,
9 which says that in evaluating whether there's, quote, no
10 reasonable ground for the prosecution of a motion, the
11 Court says it, quote, cannot be said there was abuse of
12 discretion.

13 In many of these cases, they refer to the
14 abuse of discretion standard. And, of course,
15 Mr. Dunner is right, that if it's a pure issue of law,
16 that is something as to which there is a deference. But
17 when the question looks, as it does here, as it does in
18 285 cases, about objective baselessness whether a
19 litigating position was reasonable after the fact in
20 collateral attorney fee litigation, this Court has
21 always said in all of these cases that abuse of
22 discretion deferential review is appropriate.

23 Now, Justice Alito, you had referred to the
24 size of the award here, and to be sure, it is different
25 than Pierce. It's not different, of course, than Cooter

1 because in Cooter we're talking about Rule 11 sanctions
2 which can devastate an attorney's livelihood. And
3 nonetheless, the Court in Cooter said they would
4 apply -- apply deferential abuse of discretion review
5 there.

6 I think the best answer to that is Koon
7 itself. In Koon, the stakes were really high, jail
8 time, and what the Court said is defer to the district
9 court because the district court has the best
10 perspective, the kind of bird's eye view, a front seat,
11 on litigation.

12 And that's why this case is different, than
13 for example, Scott v. Harris or, Justice Alito, the
14 qualified immunity cases, because in both of those,
15 those questions involved things as to which the district
16 court doesn't have a court side or ringside, whatever
17 term we want to use, seat. They are not present. They
18 are not there at the scene of the crime. They are not
19 there when law enforcement is conducting whatever
20 operation or something like that.

21 Scott v. Harris, same thing, it's not a
22 qualified immunity case. It's a summary judgment case,
23 and the words, as our brief points out at page 24, say,
24 If there is no factual dispute, then you evaluate it on
25 the law. We -- we agree with that.

1 The question is here, where there are
2 factual disputes, as there are in all objective
3 baselessness cases, what is the appropriate standard.
4 This Court's answered it several times in *Pierce*,
5 *Cooter*, and *Koon*, unitary abuse of discretion review.

6 If there are no further questions.

7 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

8 The case is submitted.

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

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