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IN THE SUPREME COURT OF THE UNITED STATES

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 OCTANE FITNESS, LLC, :
 Petitioner, : No. 12-1184
 v. :
 ICON HEALTH & FITNESS, INC. :
 - - - - - x

Washington, D.C.
 Wednesday, February 26, 2014

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

APPEARANCES:
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 behalf of Petitioner.
 ROMAN MARTINEZ, ESQ., Assistant to the Solicitor
 General, Department of Justice, Washington, D.C.; for
 United States, as amicus curiae, supporting the
 Petitioner.
 CARTER G. PHILLIPS, ESQ., Washington, D.C.; on behalf
 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 versus 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 in 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 the statutory
19 language, it violates established canons of statutory
20 construction, and it deprives District Courts of the
21 discretion they need to effectively combat abusive
22 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.

2 The Federal Circuit also affirmed the
3 District Court's grant of summary judgment that no
4 reasonable juror could find, as a matter of law, that
5 Octane's structure had an equivalent to the C-channel;
6 Appendix A13. 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 talking about economic
16 coercion. Suppose it were reversed. Suppose that
17 Octane had the patent and sued ICON. Would the analysis
18 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 --
5 is there a difference between 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 this -- this question is to be exercised by the
21 District Court?

22 I can understand you 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
2 remand with a finding. However, there are cases that
3 are rare -- not that rare, but they are rare enough --
4 where appellate courts look at a record and have a firm
5 and definite conviction that an award should be made
6 such 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 and
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 abuse of 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 dealing with a
24 term that could be read in many different ways:
25 exceptional. Right? Maybe that means one out of a

1 hundred; maybe it means ten out of a hundred. And why
2 shouldn't we give some deference to the decision of the
3 Court that was set up to develop patent law in a uniform
4 way? They 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, we're playing around with
2 words again.

3 MR. TELSCHER: Without substantial merit,
4 unreasonably weak, or low likelihood of success. I
5 think those are all ways of getting to the same point,
6 which is something less than zero merit will satisfy
7 under 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: Let's say that 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. What we're saying to
16 a district court judge, the guidance we would give them
17 is that this litigant, this plaintiff acted in
18 reasonable ways, and district court judges are called on
19 every single day to make those determinations.

20 JUSTICE ALITO: Compared to what? Compared
21 to the types of cases that the District Court hears on a
22 more regular basis?

23 MR. TELSCHER: District courts handle --

24 JUSTICE ALITO: Or patent cases?

25 MR. TELSCHER: I think all cases. Complex

1 litigation requires litigants to act reasonably in
2 procedural aspects and on the merits. I think --

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

10 (Laughter.)

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

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

24 MR. TELSCHER: Well, first of all,
25 Congress -- Congress has spoken and said that in

1 exceptional cases the district court should do this.
2 And I also -- I think if you went back 10 to 15 years
3 ago, perhaps the notion that district court judges had
4 not seen a lot of patent cases might be true. District
5 court judges see lots and lots of patent cases. Many of
6 those cases may not be decided on the merits. The only
7 thing that the Federal Circuit sees are the ones that
8 went to final conclusion. So I do think district court
9 judges see a lot of patent litigation. I also think --

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

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

20 JUSTICE SCALIA: Mr. Telscher, it occurs to
21 me that you really cannot answer the question of what
22 adjectives should be attached to "meritless." And the
23 reason you can't is, since it is a totality of the
24 circumstances test, that is only one factor and it
25 doesn't have to be an absolute degree of meritlessness.

1 Even in a -- I assume you would say that even in a very
2 close case, if there has been outrageous litigation
3 abuse by the other side, the court would be able to say:
4 My goodness, I've never seen lawyers behave like this.
5 You're going to pay the attorneys' fees for the other
6 side. Couldn't the court do that?

7 MR. TELSCHER: That's absolutely correct,
8 Your Honor.

9 JUSTICE SCALIA: So then how can we possibly
10 define "meritless"? We can't, because it goes up and
11 down, even in a case where it's a close case. It could
12 still be exceptional.

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

15 CHIEF JUSTICE ROBERTS: Do you agree with
16 the Solicitor General's test that fees are authorized
17 when they are -- I'm quoting -- "necessary to prevent
18 gross injustice"?

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

20 CHIEF JUSTICE ROBERTS: Well now, I was
21 surprised at that because I would have thought your
22 friend on the other side would say that. I mean, gross
23 injustice sounds like a very tiny portion of cases,
24 lower than meritless. It's -- injustice is bad too.
25 It's doesn't mean you just loss, but there's something

1 very unjust about it. Gross injustice, well, it's just
2 some more adjectives, and it's the test -- I gather
3 that's the test you adopt.

4 MR. TELSCHER: Well, it's certainly what
5 Congress said in the legislative history and what was
6 adopted by the courts.

7 CHIEF JUSTICE ROBERTS: Well, but you've
8 been up here for several minutes and you haven't even
9 used those particular -- that adjective, which is your
10 test.

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

23 JUSTICE KAGAN: Mr. Telscher, could I just
24 ask very quickly the factors that you would think a
25 Court should consider. One is the degree to which the

1 case is meritless. Another I presume is bad faith.
2 Another is litigation misconduct. Is there anything
3 else or are those the three?

4 MR. TELSCHER: No, there's more. I think
5 it's -- there's no exhaustive list and, for example,
6 even in this case -- and in Park-In Theaters where the
7 Court said other equitable consideration. We believe it
8 is a totality of the circumstances, anything that bears
9 on the gross injustice and the uncommon nature of the
10 case. So, for example, in this case the fact that Icon
11 brought a patent that it, with all of its resources,
12 couldn't commercialize, was indisputably worthless, to
13 this day they've never made a product under this patent,
14 that's a factor that bears on the equities of this case
15 and the uncommon nature and is one that doesn't fall
16 neatly within those categories.

17 The fact that our client licensed under a
18 different patent that shows its linkage is another
19 factor that shows that what they are asserting isn't
20 reasonable. So I don't think there is a laundry list,
21 but the categories that you identified are the big ones.

22 JUSTICE GINSBURG: I think you did say if
23 it's an exceptional case the district court must award
24 fees, but the statute says may. So even in the
25 exceptional case, according to the statute, the district

1 court is not required to award fees? Or do you read
2 "may" to mean something else?

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

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

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.
16 Mr. Martinez.

17 ORAL ARGUMENT OF ROMAN MARTINEZ

18 FOR THE UNITED STATES, AS AMICUS CURIAE,

19 SUPPORTING PETITIONER

20 MR. MARTINEZ: Mr. Chief Justice, and may it
21 please the Court:

22 Section 285 grants district courts
23 discretionary authority to look at the totality of the
24 circumstances and award fees when necessary to prevent
25 gross injustice. Such awards can be proper in unusual

1 cases where the losing party has committed bad faith or
2 harassing conduct during the litigation or has advanced
3 objectively unreasonable legal arguments, just as courts
4 had held under the 1946 statute. The Court should
5 restore this understanding of Section 285 and make four
6 additional points that we think will clarify the inquiry
7 for the District Courts:

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

11 Second, the Court should -- the Court should say
12 that District Courts can grant fees based on a
13 combination of different factors even if no single
14 factor would necessarily support the award on its own;

15 Third, the Court should say that an
16 objectively unreasonable argument can trigger a fee
17 award even if that argument is not so unreasonable that
18 it's actually considered frivolous;

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

21 I'd like to turn to Justice Scalia's
22 question and the discussion that occurred earlier about
23 the battle of the adjectives, so to speak. We think
24 that, as I said earlier, that a fee award should be
25 appropriate or can be appropriate in a case in which

1 there's an objectively unreasonable litigating position
2 or objectively unreasonable arguments that are made in a
3 case. We appreciate that that's not a 100 percent
4 precise bright-line test, but we think it's similar
5 to -- it's in fact the same as what the Court has said
6 in other contexts, such as EJA in the Pierce case --

7 JUSTICE SCALIA: Now matter What other
8 factors exist? It has to be objectively unreasonable.
9 I mean, even if it is clear from other factors that this
10 is a shakedown, a big country -- a big company trying to
11 suppress a little company, even if it's clear that there
12 has been outrageous litigation abuse, misconduct by
13 attorneys?

14 MR. MARTINEZ: It is an important point,
15 Justice Scalia.

16 JUSTICE SCALIA: All of those things cannot
17 justify shifting the award unless it is objectively
18 unreasonable.

19 MR. MARTINEZ: No, Justice Scalia, that's
20 not our position.

21 JUSTICE SCALIA: Oh, okay. Our position is
22 if the only factor is an objectively unreasonable
23 argument, that in appropriate circumstances that could
24 be sufficient. We believe very, very strongly that if
25 there are other factors present that would only

1 strengthen the case for appeal.

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

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

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

16 MR. MARTINEZ: I think as long as the Court
17 makes clear that that is an illustrative list that I
18 think captures the kind of bad faith --

19 JUSTICE SCALIA: You want to add "et
20 cetera," right?

21 MR. MARTINEZ: And add "or similar,"
22 "similar equitable," "similar and inequitable conduct,"
23 which is what the Ninth Circuit said in the
24 Park-in-Theaters case, which I think all the parties
25 agree fairly captures what Congress intended to

1 incorporate from the cases decided in the late Forties.

2 CHIEF JUSTICE ROBERTS: So where does gross
3 injustice come from? I understood that to be your test.
4 You say, "Fees are authorized when necessary to prevent
5 gross injustice to the defendant." I think, again, you
6 have your long laundry list that doesn't say anything
7 about gross injustice.

8 MR. MARTINEZ: Well, I think the long
9 laundry list reflects the kinds of circumstances in
10 which courts operating between 1946 and 1952
11 interpreting the prior statute, those are the
12 circumstances in which those courts had concluded that
13 there was a gross injustice. So in other words, we
14 think gross injustice is maybe the umbrella term and --

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

20 MR. MARTINEZ: We are comfortable saying
21 that and we do say that and we think it's especially
22 salient and worth relying on here, not just because it's
23 the legislative history, but also because that same
24 legislative history and that same gross injustice
25 language was repeatedly cited and talked about in the

1 1946 to '52 cases.

2 JUSTICE KAGAN: But I think, Mr. Martinez,
3 what the Chief Justice is driving at is there's a bit of
4 a disconnect between your list of factors and those two
5 words. Gross injustice, I mean that's -- that's really,
6 really exceptional. That sounds like "shocks the
7 conscience." That sounds like something you've never
8 seen happen in the litigation system ever. But then
9 you're saying essentially ratchet it down when you list
10 all of these various factors. And maybe that's right,
11 we shouldn't be obsessed with this word "gross
12 injustice." It just seems a disconnect between the two
13 words and all the factors.

14 MR. MARTINEZ: Let me -- let me explain by
15 stepping back.

16 JUSTICE SCALIA: But it's in the Senate
17 report, so --

18 (Laughter.)

19 MR. MARTINEZ: Justice Kagan, we think that
20 the way to look at the statute is to try to figure out
21 what Congress understood the statute to mean in 1952.
22 And it's very clear and I think both sides agree that
23 Congress intended to essentially incorporate the -- the
24 thrust of the judicial opinions that had been issued
25 under the 1946 statute. Those opinions repeatedly

1 talked about gross injustice, drawing from the prior
2 legislative history, and when they awarded fees and when
3 they discussed when fees would be appropriate, the
4 circumstances that we list in our brief are what they
5 said would equate to gross injustice.

6 So I think in the abstract you may be right
7 that gross injustice is a broader standard or maybe it's
8 a little bit -- you know, only the most exceptional of
9 exceptional cases would be covered. But in practice
10 what Congress was looking at and what they were
11 responding to and what they were intending to put in
12 this statute was an idea of gross injustice that
13 reflected those bad faith, harassing, and unreasonable
14 situations.

15 JUSTICE SCALIA: So if that's what you mean,
16 why don't you say "exceptional injustice" instead of
17 "gross injustice"?

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

20 JUSTICE SCALIA: To the Senate report.

21 MR. MARTINEZ: Not just to the Senate
22 report, Justice Scalia, but to the judicial decisions.
23 And this Court has often looked to judicial decisions --
24 judicial decisions as a backdrop against which Congress
25 legislates.

1 JUSTICE KENNEDY: It's a different statute.
2 Could we borrow -- you mentioned EJA. I take it that's
3 "substantially justified"?

4 MR. MARTINEZ: Yes, Your Honor. We think
5 that --

6 JUSTICE KENNEDY: It's a different statute.
7 It was passed later and all those problems.

8 MR. MARTINEZ: We think that when the
9 situation involves, say, just an objectively
10 unreasonable argument, we think that essentially the
11 same test would apply from the EJA context.

12 JUSTICE SOTOMAYOR: So is there anything
13 other than the objectively baseless and bad faith of the
14 Brooks Furniture test that you would change? Doesn't
15 all of the other factors that the Court uses --
16 litigation misconduct, all of that other stuff --
17 encompass all the factors you're talking about?

18 MR. MARTINEZ: I think it does, but I think
19 it's very important if the Court were to go in that
20 direction as long as it elaborates a couple of the
21 additional points that I mentioned earlier.

22 JUSTICE SOTOMAYOR: That it has to be a
23 combination, a combination of factors, and --

24 MR. MARTINEZ: Yes, right, that both are not
25 required, that it can be a combination of factors, that

1 when the Brooks Furniture test says unjustified, that
2 embraces the concept of objective unreasonable --

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

7 MR. MARTINEZ: I think they do, but I think
8 that catch-all category in which they apply the
9 two-pronged Brooks Furniture test covers potentially a
10 very wide array of cases, because it covers any case in
11 which perhaps there's bad faith conduct in bringing the
12 litigation and also it covers the range of circumstances
13 in which frivolous or unreasonable arguments are made.

14 JUSTICE SOTOMAYOR: Could you spend a moment
15 on clear and convincing, because there's not a whole lot
16 in your briefs on that part of it, although you do
17 mention it in passing.

18 MR. MARTINEZ: Right. Yes, Justice
19 Sotomayor. As the Court well knows, the standard rule
20 in civil litigation is that facts need to be established
21 by a preponderance of the evidence unless Congress says
22 otherwise. The i4i case decided a few terms ago I think
23 confirmed that general view.

24 Here Congress did not say otherwise.
25 Congress did not embrace a clear and convincing

1 standard. There's nothing in the text or the history of
2 Section 285 that suggests that it did. Appreciate we
3 didn't have enough -- I wish we had had more time in our
4 brief to get into this issue, but I would just suggest
5 that if the Court wants to look more deeply, it can look
6 at Judge O'Malley's opinion in the Kilopass case, which
7 I think has a very thorough and very convincing
8 discussion of the clear and convincing evidence issue.

9 JUSTICE ALITO: What is the difference
10 between -- you say the correct phrase is "objectively
11 unreasonable"?

12 MR. MARTINEZ: When we're dealing with just
13 that, a case that raises a weak legal argument.

14 JUSTICE ALITO: That's different from
15 objectively baseless. That's a little higher than
16 objectively baseless.

17 MR. MARTINEZ: It's not clear, Justice
18 Alito, how the Federal Circuit conceives of it. And let
19 me just explain why, I think they use the term
20 "objectively baseless." In some of their opinions when
21 they are talking about that term, they seem to use
22 "frivolous" as a synonym. In other cases when they're
23 talking about that term, they seem to use "objectively
24 unreasonable."

25 So we think there's a little bit of

1 confusion. We think the Pierce case makes very clear
2 that justified and reasonableness are the same thing and
3 that a reasonable argument is not the same as merely a
4 non-frivolous argument.

5 JUSTICE ALITO: And that's higher than the
6 Rule 11 standard?

7 MR. MARTINEZ: The Rule 11 standard, when it
8 comes to unreasonable arguments, is frivolous. And so
9 we think that it should be a little bit lower than that
10 standard and it should be closer to something like in
11 EJA.

12 The -- I would like to get to the Chief
13 Justice's question earlier about why not defer to the
14 Federal Circuit's view on this statute, and I think two
15 principal reasons. First of all, I don't think the
16 Federal Circuit's view really has any basis in either
17 the text or the history of the -- of Section 285. So
18 that's reason number 1.

19 Reason number 2 is I think if the Federal
20 Circuit had had a consistent view over its history or if
21 the Federal Circuit were not internally divided on this
22 issue, that may be a consideration. Deference might be
23 more appropriate. But here there is no consistent
24 history and the Federal Circuit, as we've seen in
25 Kilopass, is divided.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.
2 Mr. Phillips.

3 ORAL ARGUMENT OF CARTER G. PHILLIPS
4 ON BEHALF OF THE RESPONDENT

5 CHIEF JUSTICE ROBERTS: Mr. Phillips.

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

8 I'd like to start with the objective
9 baseless issue in this particular case, because it seems
10 to me the district court has done a very thorough job of
11 analyzing every element of this case. The district
12 judge obviously presided over the entirety of this
13 litigation, analyzed the case for purposes of summary
14 judgment, and then reanalyzed the case for purposes of
15 analyzing the merits of the claim and whether or not
16 this would be an exceptional case.

17 To be sure, it applied the Brooks standard,
18 but basically what it analyzed was just simply whether
19 there was an objectively legitimate basis for the
20 decision. It's not that it has zero merit. Counsel
21 keeps saying zero merit is objectively baseless. That's
22 not the standard. This Court held in PRE that
23 objectively baseless means there has to be probable
24 cause -- that it lacks probable cause to go forward,
25 that it has to be reasonably possible.

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

4 MR. PHILLIPS: Well, I think you could argue
5 that there is at least a First Amendment concern that's
6 in here; but in any event, what it seems to me --

7 CHIEF JUSTICE ROBERTS: First Amendment
8 concern, what, to bring a patent case?

9 MR. PHILLIPS: Well, access to the courts,
10 access to the courts. Any time you talk about imposing
11 multimillion dollar fee awards at the end of the
12 litigation, particularly if you do it on a fairly
13 arbitrary basis.

14 JUSTICE SCALIA: Do you think Congress could
15 not require the loser to pay in all cases?

16 MR. PHILLIPS: Well, I have no doubt that
17 Congress could -- well, I'm not sure about in all cases.

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

20 MR. PHILLIPS: Well, I'm not sure I concede
21 that in all cases. I do think in the run-of-the-mill
22 cases, but when you're talking about a situation where
23 the assertion is that the conduct of the litigation, the
24 bringing of the litigation itself is inappropriate --

25 JUSTICE SCALIA: That's an English rule. It

1 used to be our rule. I don't see how you can possibly
2 say that it's unconstitutional to make the loser pay.

3 JUSTICE KENNEDY: This is not your best
4 argument.

5 (Laughter.)

6 MR. PHILLIPS: It is not my best argument, I
7 appreciate that.

8 On the other hand, if you -- if you go back
9 and look at Christiansburg, Christiansburg, in that case
10 the Court also didn't treat it as a First Amendment
11 issue, but it still recognizes an important policy of
12 trying not to have too much interference with access to
13 the courts.

14 In any event, objectively baseless is a
15 standard that every court knows how to use and it goes
16 directly to the ultimate --

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

23 MR. PHILLIPS: Well, because the provision
24 was enacted in 1952, Justice Sotomayor, or long before
25 this kind of litigation, these kind of rules that would

1 have rendered the litigation sanctionable existed, and
2 so as a consequence of that -- and I think it's
3 important to put it into context because, you know, when
4 Congress did this initially in 1946, to be sure, it's
5 the Senate report that talks about gross injustice, but
6 it is the decisions of the courts that adopted that
7 approach of gross injustice. And then when Congress, in
8 1952, incorporates the exceptional case standard, the
9 revisor's notes say it's designed to go back to the
10 legislative history and the decisions that have been
11 interpreting that.

12 JUSTICE BREYER: Why does it always have to
13 be objectively based? I've read enough cases in this
14 area to be able to approach it as a district court judge
15 who's not expert. I patent the following: For a
16 computer, enter somebody's name. Ask phone number. And
17 they'll give you the phone number if you put in the
18 right city. That puts a list in the computer. They can
19 patent that? Well, you add a couple of things and they
20 apparently -- you can have an argument that they can
21 patent it. Okay? Because it'll be very abstract
22 language. It will be able to patent almost anything.
23 No, you can't finally, but objectively baseless? Patent
24 attorneys are very brilliant at figuring out just how to
25 do this. So we're never going to have attorneys' fees

1 in a suit if that's your standard.

2 But you could couple that with just barely
3 over the line. What line? This vague line, no one
4 knows what it is. In addition, all they did was say:
5 We don't want to go to court and cost you \$2 million.
6 Please sent us a check for a thousand, we'll license it
7 for you. They do that to 40,000 people, and when
8 someone challenges it and goes to court, it costs them
9 about 2 million because every discovery in sight. Okay?
10 You see where I'm going?

11 MR. PHILLIPS: Yes.

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

19 MR. PHILLIPS: I think the problem with the
20 approach you propose there, Justice Breyer, is you're
21 trying to deal with a very small slice of the problem of
22 litigation. What you've described --

23 JUSTICE BREYER: I know, but I -- of course
24 it may be a small slice of litigation, but it is a slice
25 that costs a lot of people a lot of money --

1 MR. PHILLIPS: But the problem --

2 JUSTICE BREYER: -- and so I would like to
3 know if I do run across that small slice why cannot I,
4 the district judge, say, I've see all these things,
5 taken together they spell serious injustice, and
6 therefore, I'm shifting the fees. Okay?

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

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

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

1 district judge who's spent weeks studying this thing,
2 but at the end of the day, suppose he finds there's
3 nothing there?

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

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

20 (Laughter.)

21 MR. PHILLIPS: It usually comes through in
22 the opinions, actually.

23 JUSTICE BREYER: Yes.

24 You see the problem. I don't see why --

25 MR. PHILLIPS: But, Justice Breyer, you

1 know, the case you have in front of you, though, is not
2 a case like that.

3 JUSTICE BREYER: Well, let's send it back
4 and tell them that they were imposing a standard that
5 was too narrow, that didn't take count of all the
6 circumstances where something could be unusually unjust,
7 and then let them, no clear and convincing, but it's up
8 to you, district judge. You're the expert on
9 litigation. You 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: -- and clear and
19 convincing evidence, I think to leave out that piece of
20 it when it all comes out of that one paragraph in the
21 Brooks Furniture case, so I think once the case is
22 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 these case.
4 They all come out of the Federal Circuit, but it seems
5 to me you ought to hear -- you ought to grant separately
6 on the question of the standard of review or the
7 standard of proof at the appropriate time.

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

13 MR. PHILLIPS: I read that opinion.

14 JUSTICE GINSBURG: Why don't we say, well,
15 we have it there in the Lanham Act, the same words.

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

25 The legislative history of the Lanham Act,

1 which this Court apparently was willing to read for
2 those purposes at that time, doesn't -- doesn't remotely
3 suggest that. And the Court didn't take into account in
4 that opinion the standards under the Patent Act in
5 interpreting the Lanham Act, so it seems to me you could
6 make the argument the opposite way, which is that the
7 Lanham Act ought to be interpreted the way I propose.

8 JUSTICE GINSBURG: We look to the text and
9 the text is identical in both. The legislative
10 history, some people like it, some people don't. But
11 the text is identical. So I think it would be odd to do
12 the very same words in the context of the Lanham Act one
13 way and a different way in the context of the Patent
14 Act.

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

21 The alternative is there is a different
22 history. Patent litigation and trademark litigation are
23 very, very different in the impact that they have. And
24 as a consequence, you could, in fact, say that Congress
25 didn't intend that.

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

4 JUSTICE SOTOMAYOR: Mr. Phillips --

5 MR. PHILLIPS: Justice Breyer --

6 JUSTICE SOTOMAYOR: -- please --

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

19 There are lots of disincentives for
20 plaintiffs to bring in this case. And at the end of the
21 process, based on a completely indeterminate standard,
22 the district court would then retain authority to say, I
23 conclude what you did here is unreasonable.

24 JUSTICE BREYER: That's true, but you could
25 then appeal. I mean, you're making an argument on the

1 merits there. And really the question is, is who's
2 better suited to figure out whether this is a -- whether
3 this is a really special case.

4 And if, you know, of course, you're right.
5 Plaintiffs are often right in these things, and
6 sometimes they are wrong. So it costs everybody a lot
7 of money. So you go to the Federal Circuit and ask them
8 to review it for an abuse of discretion.

9 JUSTICE SCALIA: Mr. Phillips, their lawyers
10 might well give them different advice if they didn't
11 know that Hey, nothing to lose, given the test that the
12 Federal Circuit has, you know.

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

15 JUSTICE SCALIA: Hey, I would give -- I
16 would give the same advice. Bring the suit.

17 MR. PHILLIPS: Justice Scalia --

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

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

25 Why? Because there's not a long line of

1 people who can bring plaintiffs' patent cases. They are
2 expensive to litigate, and the ultimate effect -- and
3 you have to get an expert, and -- and at the end, you
4 put your patent into validity.

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

10 MR. PHILLIPS: Well, I mean, I don't know
11 whether that's an easy call for the defendant. Doesn't
12 make the -- it doesn't make the decision for the
13 plaintiff all that easy to -- at the beginning of the
14 process because, as I say, it's both expensive and it
15 puts the validity of the patent at issue.

16 And in most cases, you know, the Federal
17 Circuit, long time ago -- or not that long ago said that
18 the inequitable conduct, that is challenging what the
19 plaintiff did before the PTO had become a plague of
20 patent litigation. So plaintiffs who walk into court
21 under those circumstances are not doing it without risk.

22 JUSTICE BREYER: Yeah, but the -- the
23 difficulty here, I not -- see it from my point of view
24 for a second. Of course I think that -- that there's no
25 plaintiff/defendant necessary difference of who can act

1 badly.

2 MR. PHILLIPS: Of course.

3 JUSTICE BREYER: All right. And -- and so
4 the question is really who is likely most to know. And
5 I think probably the district court.

6 But then if you give the power to the
7 district court, there's a problem, of course, that
8 you'll abuse it.

9 So I say, Well, then go to the Federal
10 Circuit, and say they have. You see, well, there's
11 another way of approaching it, and that is have definite
12 standards, which is what you want.

13 And then the difficulty with definite
14 standards is I can't think of a set of definite
15 standards that doesn't do what you don't want to have
16 happen, that it leans one way or the other.

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

22 And -- and nobody has been able to think of
23 some, so then I say, Okay. Let's try the first
24 approach, which is what we do with the Lanham Act.
25 That's the whole long story.

1 And what you would like to say, I'd like to
2 listen.

3 MR. PHILLIPS: Right. And the answer to
4 that is that the standards for inequitable conduct are
5 reasonably well set. They get applied pretty routinely,
6 and they create "exceptional case" determinations.

7 Litigation misconduct, the standards are
8 pretty well set, pretty well understood, and they give
9 rise to the "exceptional case" determinations and award
10 of attorney fees.

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

15 JUSTICE KAGAN: Mr. Phillips, I realize that
16 you have this argument that this statute was before
17 Rule 11, so the -- the super fluidity argument doesn't
18 work.

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

23 MR. PHILLIPS: Are -- are you -- are you
24 asking me that just about the baseless litigation or all
25 of 285? Because clearly, inequitable conduct, willful

1 infringement, and -- and certain forms of litigation
2 misconduct, which might -- might create a basis for fees
3 against the lawyer might not actually operate against
4 the -- against the party where that obviously 285
5 operates against the party. So there's a whole range
6 of -- of behavior that is controlled by 285 that has
7 nothing to do with Rule 11, et cetera.

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

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

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

22 If you're talking about inequitable conduct,
23 they would all be because Rule 11 will never reach
24 inequitable conduct involving the Patent and Trademark
25 Office because it's completely irrelevant to that. So

1 the -- the statutes do have some overlap, but they don't
2 have complete correspondence.

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

4 JUSTICE KAGAN: Inequitable conduct to the
5 trademark office, but not with respect to the suit
6 itself?

7 MR. PHILLIPS: Right. Right. There is
8 patent misconduct.

9 JUSTICE KAGAN: So there's nothing --

10 MR. PHILLIPS: There is --

11 JUSTICE KAGAN: There's nothing with respect
12 to the suit itself, then Rule 11 and inherent authority
13 wouldn't get you anyway?

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

22 What I'm -- what I am conceding is that I --
23 I can't envision a situation where you have brought what
24 a court has said is objectively baseless litigation in
25 the first instance that might not have been actionable

1 under Rule 11. The question would be -- it would be at
2 this -- at this stage it would go immediately against
3 the party as opposed to potentially against the lawyer.
4 And -- and to that extent, it obviously provides broader
5 relief, depending on which of the two parties might
6 actually have more resources.

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

14 MR. PHILLIPS: Well, today -- today
15 that's -- I think that may be true. I don't think that
16 was true in 1946 and then again in 1952.

17 The -- the whole notion of shifting fees to
18 a -- to a losing plaintiff was -- was all but
19 unprecedented at the time. And the best evidence we
20 have of -- of the circumstances in which Congress wanted
21 to have those fees imposed is -- is to prevent a gross
22 injustice. And it seems to me nothing better suits that
23 test than something that is objectively baseless, as --
24 as just that one bucket within which 285 operates. The
25 other buckets, obviously, equally involve situations of

1 gross injustice.

2 JUSTICE SOTOMAYOR: So where does the bad
3 faith come in?

4 MR. PHILLIPS: I'm sorry?

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

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

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

22 JUSTICE SOTOMAYOR: Would you address the
23 clear and convincing?

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

25 JUSTICE SOTOMAYOR: I know your argument

1 it's not.

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

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

18 (Laughter.)

19 MR. PHILLIPS: If there are no further
20 questions, Your Honors, I'd urge you to affirm. Thank
21 you.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.
23 Mr. Telscher, you have 3 minutes remaining.

24 JUSTICE KENNEDY: Take your time, take your
25 time.

1 REBUTTAL ARGUMENT OF RUDOLPH A. TELSCHER

2 ON BEHALF OF THE PETITIONER

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

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

19 4 weeks ago in Medtronic this Court found
20 that we should have a paramount interest in making sure
21 the balance of patents are not unreasonably stretched to
22 get royalties.

23 And so when we consider the larger
24 objective, what we're looking for is a balance, and if
25 you look to this Court's precedent in Martin, where

1 there was no standard, what this Court found is when you
2 look to the larger objectives and you want to encourage
3 good conduct and you want to discourage bad conduct, you
4 set it at "reasonable." You don't set it at the extreme
5 of "frivolousness," which smart lawyers know how not to
6 do that, how not to get sanctioned under Rule 11; and in
7 the complex world of patent cases it's not hard to avoid
8 frivolous cases. So setting an extreme standard would
9 defeat the whole purpose of the Act and it's
10 inconsistent with the language.

11 On the topic of injustice versus gross
12 injustice, I found that very interesting, because
13 certainly "exceptional," there's nothing about it that
14 signals gross injustice versus injustice. And to the
15 extent -- because I think the question was asked by one
16 of the Justices, well, doesn't that signal extreme
17 conduct? I don't know that it does or doesn't, but
18 certainly the plain meaning of the statute doesn't; and
19 so to the extent that "gross injustice" as used in this
20 Court's opinion, it has to signal something other than
21 the extreme conduct. We can debate whether winning a
22 hard-fought case and spending 2 million is injustice.
23 Certainly, in my view, if you defend a case and spend
24 \$2 million, especially one like this where every core
25 element was missing, that's gross injustice.

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

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

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.
14 The case is submitted.

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

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