No. 21-

IN THE

Supreme Court of the United States

CISCO SYSTEMS, INC.,

Petitioner,

v.

SRI INTERNATIONAL, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Patent Act grants district courts discretion to enhance patent "damages up to three times the amount" awarded. 35 U.S.C. § 284. Under *Halo Electronics, Inc.* v. *Pulse Electronics, Inc.*, 579 U.S. 93, 110 (2016), enhancement is limited to "egregious cases of misconduct beyond typical infringement." The "conduct warranting enhanced damages" must relate to the defendant's alleged "infringement behavior" and has been "described … as willful, wanton, malicious, bad-faith, deliberate, consciously wrongful, flagrant, or—indeed—characteristic of a pirate." *Id.* at 103-104.

The district court rejected SRI's enhancement request because it found the threshold requirement of willful infringement not satisfied, as there was "no substantial evidence that Cisco's infringement was 'wanton, malicious, and bad-faith.'" App. 25a. Without reviewing that particular finding, the Federal Circuit reversed on willfulness. But rather than remand on enhancement, the Federal Circuit awarded enhanced damages by reaching back to a previously-vacated ruling that was not part of the judgment on appeal and where the prior district judge had not applied the *Halo* standard. As a result, the Federal Circuit imposed enhanced damages without any court ever finding that Cisco engaged in egregious infringement behavior.

The questions presented are:

(1) Whether enhanced damages under 35 U.S.C. § 284 may be awarded absent a finding of egregious infringement behavior; and

(2) Whether the court of appeals may award enhanced damages without first allowing the district court to exercise its discretion to decide that issue.

PARTIES TO THE PROCEEDING

All parties are named in the caption.

CORPORATE DISCLOSURE STATEMENT

Petitioner Cisco Systems, Inc. has no parent corporation. To the best of Cisco's knowledge and belief, and based on public filings with the Securities and Exchange Commission, as of March 16, 2022, no publicly held corporation owns 10% or more of Cisco's stock.

RELATED PROCEEDINGS

Cisco Systems, Inc. v. *SRI International, Inc.*, No. 19-619 (U.S.) (cert. denied Feb. 24, 2020).

SRI International, Inc. v. *Cisco Systems, Inc.*, Nos. 20-1685, 20-1704 (Fed. Cir.) (opinion and judgment issued September 28, 2021; rehearing denied January 4, 2022).

SRI International, Inc. v. *Cisco Systems, Inc.*, No. 17-2223 (Fed. Cir.) (opinion and judgment issued Mar. 20, 2019; panel rehearing granted-in-part and opinion amended July 12, 2019; rehearing en banc denied July 12, 2019).

SRI International, Inc. v. *Cisco Systems, Inc.*, No. 13-cv-1534 (D. Del.) (judgment entered May 25, 2017; judgment vacated-in-part on appeal in No. 17-2223 (Fed. Cir.); judgment on remand entered Apr. 1, 2020).

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PETITION FOR A WRIT OF CERTIORARI

Cisco Systems, Inc. ("Cisco") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The court of appeals' order denying rehearing (App. 145a-146a) is unreported. The opinion of the court of appeals (App. 1a-15a) from which this petition arises is reported at 14 F.4th 1323. The district court's opinion denying Respondent SRI International, Inc.'s ("SRI") motion to amend the judgment to reinstate the jury's verdict of willful infringement and award enhanced damages (App. 17a-27a) is unreported.

In a prior appeal, the court of appeals vacated the jury's verdict of willful infringement and the trial judge's original award of enhanced damages. The court of appeals' opinion in that prior appeal as modified on panel hearing (App. 29a-59a) is reported at 930 F.3d 1295. The trial judge's original opinion awarding enhanced damages (App. 61a-143a) is reported at 254 F. Supp. 3d 680.

JURISDICTION

The court of appeals issued its decision on September 28, 2021. App. 1a. Cisco timely petitioned for rehearing, which the court of appeals denied on January 4, 2022. App. 146a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

35 U.S.C. § 284 provides:

> Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court.
>
> When the damages are not found by a jury, the court shall assess them. In either event the court may increase the damages up to three times the amount found or assessed. Increased damages under this paragraph shall not apply to provisional rights under section 154(d).
>
> The court may receive expert testimony as an aid to the determination of damages or of what royalty would be reasonable under the circumstances.

INTRODUCTION

This Court held in *Halo Electronics, Inc.* v. *Pulse Electronics, Inc.*, 579 U.S. 93, 103 (2016), that "[a]wards of enhanced damages under the Patent Act … are not to be meted out in a typical infringement case, but are instead designed as a 'punitive' or 'vindictive' sanction for egregious infringement behavior." By any measure, this case falls well short of that standard. The trial judge herself observed at the close of evidence that "this case in terms of infringement has been like virtually every other case. There's nothing remarkable about this case when it comes to infringement." C.A.J.A. 22195. And a different district judge at a later stage of the case ruled that "[t]here is no substantial evidence that Cisco's infringement was 'wanton, malicious, and bad-faith.'" App. 25a.

The Federal Circuit nevertheless awarded $23.66 million in enhanced damages under 35 U.S.C. § 284. That outcome is the result of a series of errors by the Federal Circuit, which ultimately imposed enhanced damages in the absence of any finding of egregious infringement behavior and without any deference to the district judge currently assigned to this case.

Unless corrected, the Federal Circuit's decision will expand the availability of enhanced damages to cases of ordinary infringement, while eroding the district court's discretion to address enhancement in the first instance. The Federal Circuit awarded enhanced damages here based upon considerations, such as Cisco's litigation conduct, that are already addressed by the fee-shifting provisions of 35 U.S.C. § 285—and, in fact, were addressed in this case by an award of SRI's full attorneys' fees for the entire litigation. The Federal Circuit also eliminated the district court's discretion

entirely by awarding enhanced damages without allowing the currently presiding district judge to address that issue first.

These issues have great importance and widespread consequences. The Federal Circuit upheld the jury's willfulness verdict in this case based solely on the supposed weakness of Cisco's trial defenses and the fact that the jury had found induced infringement. Those factors will be present whenever liability is found under 35 U.S.C. § 271(b), exposing defendants to the risk of enhanced damages in virtually every case of induced infringement. *Halo*'s requirement of egregious infringement behavior is a critical safeguard against enhanced damages in such run-of-the-mill cases of infringement. Furthermore, there have been a growing number of billion-dollar patent judgments—some of which have been increased even further with enhanced damages. Given the stakes, this is not an area where the law can afford to be muddled. Yet the Federal Circuit has thus far shown no willingness to act, including by denying Cisco's petition for rehearing in this case. This Court's review is urgently needed to maintain the proper bounds of enhanced damages and to restore the district court's primary responsibility in addressing these issues in the first instance.

STATEMENT

A. Parties

Petitioner Cisco is one of the world's leading producers of computer networking equipment. Respondent SRI is a research organization, which has sought to monetize its patent portfolio through licensing. C.A.J.A. 20525. This case involves SRI's assertion that Cisco infringed two patents concerning computer

network security: U.S. Patent Nos. 6,484,203 and 6,711,615.

Cisco undisputedly did not copy the patented technology from SRI and instead developed the accused network security products and services many years before learning of SRI's patents. App. 49a. The first time that Cisco learned of SRI's patents was when SRI sent Cisco a letter on May 8, 2012 seeking to initiate licensing discussions. *Id.*

B. Trial And Post-Trial Motions

After the parties' licensing discussions failed, SRI sued Cisco for patent infringement in September 2013. The case proceeded to a jury trial in May 2016. At trial, SRI argued that Cisco had willfully infringed SRI's patents based upon evidence that two Cisco engineers had not read the patents-in-suit themselves prior to their depositions. C.A.J.A. 22259-22260. The jury found that Cisco had willfully infringed SRI's patents, rejected Cisco's invalidity defenses, and awarded $23.66 million in damages. C.A.J.A. 17470-17477.

After trial, Cisco renewed its motion for judgment as a matter of law ("JMOL") that its infringement of SRI's patents was not willful. C.A.J.A. 18685-18687; App. 65a. SRI filed a motion seeking enhanced damages under 35 U.S.C. § 284 and attorneys' fees under 35 U.S.C. § 285. C.A.J.A. 28389-28393.

The trial judge denied Cisco's motion for JMOL of no willful infringement. App. 128a-129a. She held that the jury's finding of willful infringement was supported by substantial evidence because (1) "key Cisco employees did not read the patents-in-suit until their depositions"; and (2) "Cisco designed the products and services in an infringing manner and … instructed its

customers to use the products and services in an infringing manner." App. 129a. Those two pieces of evidence were the only support for the jury's willfulness finding that SRI identified in its post-trial briefing. C.A.J.A. 19793-19794.

The trial judge granted SRI's motion for enhanced damages and attorneys' fees. App. 138a-143a. She analyzed the issues of enhanced damages under § 284 and attorneys' fees under § 285 together because, in her view, there was an "overlap in the considerations the court should review under both statutes." App. 139a. The trial judge's analysis focused on Cisco's litigation conduct, which she stated "crossed the line in several regards" by aggressively pursuing its defenses in a manner that "created a substantial amount of work for both SRI and the court." App. 141a.

With respect to enhanced damages under § 284, the trial judge made no finding of egregious infringement behavior by Cisco, as required under this Court's decision in *Halo*. App. 138a-143a. Instead, she viewed the Federal Circuit's earlier decision in *Read Corp.* v. *Portec, Inc.*, 970 F.2d 816, 826-827 (Fed. Cir. 1992), as the "obligatory series of factors that a court should review in determining how to exercise its discretion" to enhance damages. App. 138a. Applying the *Read* standard, the trial judge concluded that "some enhancement is appropriate given Cisco's litigation conduct, its status as the world's largest networking company, its apparent disdain for SRI and its business model, and the fact that Cisco lost on all issues during summary judgment and trial, despite its formidable efforts to the contrary." App. 142a. She determined that "doubling of the damages award is appropriate" and awarded $23.66 million in enhanced damages. App. 142a; *cf.* App. 122a.

The trial judge also awarded SRI its full attorneys' fees for the entire litigation under § 285—totaling over $8 million. App. 142a & n.58. She explained that the award of attorneys' fees was based upon Cisco's litigation conduct and "the fact that the jury found that Cisco's infringement was willful." App. 141a-142a.

C. 2019 Federal Circuit Decision

Cisco appealed. A divided panel of the Federal Circuit affirmed the judgment of infringement and no invalidity, but vacated and remanded as to willfulness, enhanced damages, and attorneys' fees. App. 29a-59a.

The panel majority held that the basis for willful infringement that SRI advocated before the district court and which the trial judge adopted in her post-trial decision was insufficient to sustain the jury's willfulness finding. As to the testimony of Cisco's engineers, the panel majority explained:

> [I]t is undisputed that the Cisco employees who did not read the patents-in-suit until their depositions were engineers without legal training. Given Cisco's size and resources, it was unremarkable that the engineers—as opposed to Cisco's in-house or outside counsel—did not analyze the patents-in-suit themselves.

App. 48a-49a. The panel majority also rejected "[t]he other rationale offered by the [trial judge]" in support of the willfulness verdict—"that Cisco designed the products and services in an infringing manner and … instructed its customers to use the products and services in an infringing manner"—as "nothing more than proof that Cisco directly infringed and induced others to infringe the patents-in-suit. App. 49a.

Although the panel majority rejected the grounds on which SRI had presented its willfulness case at trial, SRI for the first time on appeal "identifie[d] additional evidence that purportedly support[ed] the jury's willfulness verdict," including evidence that predated Cisco's knowledge of SRI's patents. App. 48a.

The panel majority rejected SRI's willfulness arguments based upon Cisco's conduct before it was aware of SRI's patents, vacated the willfulness judgment, and remanded for further consideration of whether there was substantial evidence of willful infringement after Cisco had notice of SRI's patents. App. 50a-51a.

The panel majority's analysis conflated the standard for a willful infringement finding by a jury with the standard for enhanced damages under *Halo*. In particular, the panel majority described the relevant question as whether "Cisco's conduct rose to the level of wanton, malicious, and bad-faith behavior *required for willful infringement*." App. 48a (emphasis added). The panel majority further reiterated that the district court "should bear in mind the standard for willful infringement" in its analysis on remand. App. 50a.

Because the panel majority vacated the jury's willfulness verdict, it did "not reach the propriety of the [trial judge's] award of enhanced damages," which it instead vacated and remanded "for further consideration along with willfulness." App. 51a. The panel majority initially upheld the trial judge's award of attorneys' fees that was predicated, in part, on the vacated willfulness finding. *SRI Int'l, Inc.* v. *Cisco Sys., Inc.*, 918 F.3d 1368, 1383-1384, *withdrawn & replaced by* 930 F.3d 1295 (Fed. Cir. 2019). However, after Cisco petitioned for rehearing, the court granted panel rehearing

and issued a corrected opinion that "vacate[d] the district court's award of attorneys' fees and remand[ed] for further consideration along with willfulness." App. 52a-53a.

Judge Lourie dissented. App. 56a-59a. In his view, Cisco should have prevailed in the litigation because SRI's patents are invalid under 35 U.S.C. § 101 and this Court's decision in *Alice Corporation Party Ltd.* v. *CLS Bank International*, 573 U.S. 2018 (2014). App. 59a ("I would find the claims to be directed to an abstract idea at *Alice* step one, without an inventive concept at step two, and reverse the district court's finding of eligibility. Because I would find the claims at issue to be ineligible, I would not reach the remaining issues in the case.").[1]

D. Remand Proceedings

The trial judge retired while the case was on appeal, and the case was reassigned to a different district judge on remand.[2] When the case returned to the district court, SRI moved to amend the judgment to reinstate the jury's willfulness finding and award enhanced damages. C.A.J.A. 28657. SRI also filed a motion for attorneys' fees, which sought to reinstate the trial

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[1] Cisco filed a petition for a writ of certiorari seeking review of the Federal Circuit's patent-eligibility determination. *See Cisco Sys., Inc.* v. *SRI Int'l, Inc.*, No. 19-619 (U.S.). This Court denied Cisco's petition on February 24, 2020.

[2] Judge Sue Robinson presided over the trial but retired during the pendency of the first appeal. The case was reassigned to Judge Richard Andrews on remand. For clarity, this petition refers to Judge Robinson as "the trial judge" and Judge Andrews as "the district court."

judge's original award of SRI's full attorneys' fees for the entire litigation. C.A.J.A. 28674.

1. Willfulness and enhanced damages

a. Willfulness standard

The district court on remand recognized that the jury's willfulness finding is a separate analysis governed by a different legal standard from the court's ultimate decision to award enhanced damages. App. 17a-18a; C.A.J.A. 29296, 29314-29315. The district court further observed that the Federal Circuit's articulation of the willfulness standard in this case had conflated willfulness with the standard for enhanced damages under *Halo*. C.A.J.A. 29296; App. 18a n.1. Nevertheless, the district court heeded the Federal Circuit's admonition that it was to "bear in mind the standard for willful infringement" set forth in the court of appeals' decision (App. 50a), and it understood that it was required to follow the Federal Circuit's articulation of the standard for willful infringement as the law of the case (App. 17a). The district court explained:

> The Court of Appeals made clear that the standard for willfulness that it wanted this Court to apply was whether "Cisco's conduct rose to the level of wanton, malicious, and bad-faith behavior required for willful infringement."

App. 18a.

SRI at the time agreed with that articulation of the standard for willful infringement. Indeed, SRI embraced that articulation of the willfulness standard at oral argument before the district court:

> THE COURT: … So in terms of a standard for willfulness that I should be using in deciding this, what adjectives would you use at this point in the case?
>
> [SRI'S COUNSEL]: Well, you know, I mean, we can go back to the Halo standard here, you know, willful, wanton.
>
> THE COURT: Well, so I mean, just as a matter of interest, that's not actually the standard for willfulness, is it? That's the standard for enhanced damages?
>
> [SRI'S COUNSEL]: No, that's the standard for -- well, no, I think it's both, I guess is the way I would characterize it. You have to find somebody who, with knowledge of the patent, either knew or had reason to believe that they were infringing a valid claim and proceeded any way. And a reasonable -- the implication being a reasonable person would not have done this.
>
> THE COURT: Well, so in any event, in the Federal Circuit opinion on appeal, at least once, maybe twice the Court made it pretty clear that the standard for willfulness that it was using was whether the behavior was "wanton, malicious and bad faith."
>
> Do you agree that that's the standard I should be using here?
>
> [SRI'S COUNSEL]: I think you can describe it colloquially that way. Sure. And it is and it was.

C.A.J.A. 29296-29297. Cisco clarified that "willfulness and enhancement are different legal concepts with

different legal standards," but agreed that the Federal Circuit's articulation of the standard for willfulness from the prior appeal was controlling on remand. C.A.J.A. 29314-29315.

b. Willfulness verdict

Because the Federal Circuit rejected the grounds on which SRI had presented its willfulness case at trial, SRI pivoted to a new strategy on remand. SRI argued that the jury could have found willful infringement based upon the supposed weakness of Cisco's trial defenses. C.A.J.A. 28661-28664.

The district court recognized that SRI's "actual arguments to the jury" in support of willfulness "were based on considerations that have been rejected by the Court of Appeals." App. 24a n.6. The district court further noted that SRI had not previously argued that the jury's willfulness verdict was supported by the weakness of Cisco's trial defenses. App. 24a n.5.

Still, the district court considered SRI's new argument that the jury could have reasonably found that Cisco willfully infringed SRI's patents in view of the supposed weakness of Cisco's trial defenses. App. 23a-24a. The district court noted that SRI's argument was inconsistent with the trial judge's contemporaneous assessment of Cisco's trial defenses, which she described as "good" and "reasonable." App. 23a. Indeed, as the trial judge explained:

> [I]n my world, this case in terms of infringement has been like virtually every other case. There's nothing remarkable about this case when it comes to infringement.

App. 23a (quoting C.A.J.A. 22195). The district court nevertheless gave SRI the benefit of the doubt and

presumed that the jury could have found that Cisco's trial defenses were not reasonable "depending upon its evaluation of [witness] credibility and the evidence." App. 24a.

However, the district court also explained that there was significant evidence demonstrating that Cisco's infringement was not willful, including that Cisco did not copy from SRI, attempt to conceal its conduct, or act outside the standards of commerce for its industry. App. 21a-22a, 25a. Viewing the record as a whole, the district court concluded that there was no basis to uphold the jury's willfulness verdict or award enhanced damages:

> [T]here was not substantial evidence to support the verdict of willful infringement. There is no substantial evidence that Cisco's infringement was "wanton, malicious, and bad-faith." Thus, I will deny the motion to amend the willfulness judgment and award enhanced damages.

App. 25a.

2. Attorneys' fees

The district court on remand awarded SRI its full attorneys' fees for the entire litigation. App. 26a-27a. That award was based entirely on Cisco's litigation conduct, which the court believed reflected that Cisco had "over-aggressively defended" the case. App. 27a.

E. 2021 Federal Circuit Decision

SRI appealed the district court's denial of its motion to reinstate the willfulness verdict and enhanced

damages.[3] Despite previously advocating the willfulness standard applied by the district court, SRI argued on appeal that the district court on remand had evaluated the jury's willfulness verdict under an incorrect legal standard that conflated willfulness with enhanced damages. Appellant's C.A. Br. 33, 56-60. SRI further sought to have the Federal Circuit reinstate the trial judge's previously-vacated award of enhanced damages, rather than remand to allow the currently-presiding district judge to address enhancement in the first instance. Appellant's C.A. Br. 60-69. In addition to addressing SRI's arguments on the merits, Cisco argued that the Federal Circuit lacked jurisdiction to reinstate the trial judge's previously-vacated enhancement decision, since that decision was not part of the judgment from which SRI's appeal arose. Cross-Appellant's C.A. Br. 57-58.

The Federal Circuit reversed the district court's determination that the jury's willfulness verdict was not supported by substantial evidence. App. 10a. The court recognized that its decision in the prior appeal had caused "confusion" by conflating the standard for a jury's finding of willful infringement with the standard for enhanced damages under *Halo*. *Id.* The court sought to "clarify" that willfulness and enhancement are governed by different standards. *Id.* It explained that "the concept of 'willfulness' requires a jury to find no more than deliberate or intentional infringement," which is a lower standard than the requirement of egregious infringement behavior for enhanced damages under *Halo*. *Id.* (quoting *Eko Brands, LLC* v. *Adrian*

[3] Cisco cross-appealed the award of attorneys' fees, which the Federal Circuit affirmed. App. 13a-15a. Cisco does not seek review of that aspect of the Federal Circuit's decision.

Rivera Maynes Enters., Inc., 946 F.3d 1367, 1378 (Fed. Cir. 2020)). Under that lower standard, the Federal Circuit held that there was sufficient evidence to uphold the jury's willfulness verdict based upon the supposed weakness of Cisco's trial defenses and the jury's finding of induced infringement. *Id.*

The Federal Circuit then proceeded to address the issue of enhanced damages. The court explained that its discussion of "wanton, malicious, and bad-faith behavior" in the first appeal referred to the *Halo* standard for "conduct warranting enhanced damages." App. 9a-10a. Yet the Federal Circuit refused to heed the district court's express finding of no "wanton, malicious, and bad-faith" infringement on the issue of enhanced damages because the district court—adopting the discussion from the Federal Circuit's prior opinion—characterized its analysis as addressing willfulness, rather than enhancement. App. 12a-13a.

The Federal Circuit then concluded that the district court had not reached the question of enhancement as part of the judgment on appeal, and instead reached back to the *trial judge's* original enhancement decision that had been vacated in the prior appeal. The Federal Circuit identified no finding in that earlier ruling that Cisco had engaged in any egregious infringement behavior. Nonetheless, the court simply deferred to the trial judge's assessment

> that enhanced damages were appropriate "given Cisco's litigation conduct, its status as the world's largest networking company, its apparent disdain for SRI and its business model, and the fact that Cisco lost on all issues during summary judgment and trial, despite its formidable efforts to the contrary."

App. 11a (quoting App. 142a). The Federal Circuit concluded that vacating and remanding to allow the currently-presiding district judge to decide the issue of enhancement "would serve little purpose given that the [trial judge] already properly considered this issue." App. 12a. The Federal Circuit never acknowledged Cisco's challenge to the court's jurisdiction to address the trial judge's previously-vacated decision or explained how that issue was properly part of SRI's appeal.

Cisco timely petitioned for rehearing, which the Federal Circuit denied. App. 145a-146a.

REASONS FOR GRANTING THE PETITION

The Federal Circuit's decision in this case conflicts with two core tenets of *Halo*. The decision greatly expands the scope of enhanced damages under § 284 by permitting enhancement in the absence of any finding of egregious infringement behavior. The factors on which the Federal Circuit relied to impose enhanced damages have nothing to do with the egregiousness of Cisco's infringement and encroach on the separate fee-shifting provisions of 35 U.S.C. § 285. Indeed, the *same* litigation conduct that was the basis for the Federal Circuit's award of enhanced damages under § 284 was also the basis on which the district court awarded attorneys' fees under § 285—causing Cisco to pay twice for the same litigation conduct.

The Federal Circuit's decision also is contrary to *Halo*'s division of responsibility between district courts and the court of appeals with respect to enhanced damages. *Halo* mandates that enhancement under § 284 is within the district court's discretion. Yet the Federal Circuit here never permitted the presiding district

judge to exercise that discretion—and there is every indication that there would have been a different outcome on enhanced damages if he had. Moreover, the Federal Circuit's approach in this case is out of step with other circuits, which recognize that the currently presiding district judge may decide issues differently from a previous judge assigned to the case.

Unless corrected, the Federal Circuit's decision in this case will have sweeping consequence—both by expanding the availability of enhanced damages and by eroding the district court's discretion to address enhancement in the first instance. These issues are of particular significance given the growing number of billion-dollar patent damages awards, which now carry a risk of unwarranted enhancement under the Federal Circuit's decision here. This case is a good vehicle for addressing these issues since it illustrates the problems that arise when *Halo*'s standard of egregious infringement behavior is not applied and when the district court is not given the opportunity to exercise its discretion to address enhancement in the first instance.

I. THE COURT SHOULD GRANT REVIEW TO RESTORE *HALO*'S REQUIREMENT OF EGREGIOUS INFRINGEMENT BEHAVIOR FOR ENHANCEMENT

A. Enhanced Damages Under *Halo* Require "Egregious Infringement Behavior"

Enhanced damages under the Patent Act are "not to be meted out in a typical infringement case, but are instead designed as a 'punitive' or 'vindictive' sanction for egregious infringement behavior." *Halo Elecs., Inc.* v. *Pulse Elecs., Inc.*, 579 U.S. 93, 103 (2016). "The sort of conduct warranting enhanced damages has been variously described … as willful, wanton, malicious, bad-

faith, deliberate, consciously wrong, flagrant, or—indeed—characteristic of a pirate." *Id.* at 103-104.

Under *Halo*, egregiousness must be based on the defendant's "infringement behavior," not the manner in which it litigated the case. 579 U.S. at 103. Indeed, *Halo* rejected the Federal Circuit's prior two-pronged approach to enhancement, which in addition to the defendant's subjective state of mind required a finding of objective willfulness based upon the reasonableness of a party's litigation defenses. *Id.* at 105. *Halo* further clarified that enhanced damages are not to compensate for "costs attendant to litigation," noting that the concern animating early cases doing so had "dissipated with the enactment in 1952 of 35 U.S.C. § 285, which authorized district courts to award reasonable attorney's fees to prevailing parties in 'exceptional cases' under the Patent Act." *Id.* at 99. Justice Breyer's *Halo* concurrence similarly described the Court as holding that "enhanced damages may not 'serve to compensate patentees' for infringement-related costs or litigation expenses" because the Patent Act allows for both through compensatory damages prior to enhancement as well as through attorneys' fees under § 285. *Id.* at 112.

B. The Federal Circuit Awarded Enhanced Damages Without Any Finding Of Egregious Infringement Behavior

This is not a case that could support an award of enhanced damages under *Halo*. Cisco undisputedly did not copy from SRI. App. 49a; C.A.J.A. 18736-18737. The trial judge made no finding of egregious infringement behavior; indeed, her assessment was that "this case in terms of infringement has been like virtually every other case." C.A.J.A. 22195. The district court

on remand similarly found that "[t]here is no substantial evidence that Cisco's infringement was 'wanton, malicious, and bad-faith.'" App. 25a. Those findings should have foreclosed enhancement under *Halo*. But the Federal Circuit committed a series of errors that ultimately resulted in an improper award of enhanced damages anyway.

The Federal Circuit's initial error occurred in how it described the standard for reviewing a jury's willfulness finding in its 2019 decision. Following *Halo*, the Federal Circuit at times has distinguished between the showing necessary to sustain a jury's factual finding of willful infringement and the standard applied to the district court's discretionary determination to award enhanced damages. For example, while the Federal Circuit has explained that "the concept of 'willfulness' requires a jury to find no more than deliberate or intentional infringement," it has recognized that enhancement is a separate analysis that requires consideration of "whether an accused patent infringer's conduct was 'egregious behavior' or 'worthy of punishment.'" *Eko Brands*, 946 F.3d at 1378.

By contrast, the Federal Circuit's 2019 decision in this case conflated the standard for a jury's factual finding of willfulness with the standard for enhanced damages under *Halo* by describing the relevant question for evaluating the jury's willfulness verdict as whether "Cisco's conduct rose to the level of wanton, malicious, and bad-faith behavior *required for willful infringement*." App. 48a (emphasis added).

The district court on remand recognized that description of the willfulness standard failed to distinguish between the jury's factual determination of willful infringement and the court's discretionary determi-

nation on enhancement. App. 18a n.1; C.A.J.A. 29296. The district court nevertheless recognized that it was bound by the Federal Circuit's 2019 decision (App. 17a-18a) and faithfully followed the Federal Circuit's admonition that it "should bear in mind the standard for willful infringement" in its analysis on remand (App. 17a; App. 50a).

When this case returned on appeal for a second time, the Federal Circuit recognized that its prior description of what is "required for willfulness" had caused "confusion." App. 10a. The court then sought to "clarify" that its prior discussion of "wanton, malicious, and bad-faith" behavior meant to refer to the standard for enhanced damages under *Halo*, not the standard for reviewing a jury's factual finding of willfulness. *Id.* Despite recharacterizing its prior statement as addressing enhancement, the Federal Circuit refused to credit the district court's remand finding of no "wanton, malicious, and bad-faith" infringement on the issue of enhanced damages because the district court—adopting the discussion from the 2019 Federal Circuit decision—characterized its analysis as part of willfulness, rather than enhancement. App. 12a-13a.

The net result of the Federal Circuit's two decisions in this case is to eliminate the requirement of assessing the egregiousness of the defendant's infringement behavior before awarding enhanced damages. Neither the trial judge nor the district court on remand made any finding of egregious infringement behavior. App. 17a-27a; App. 61a-143a. And the Federal Circuit identified no such finding in its decision imposing enhanced damages. App. 1a-15a.

C. The Trial Judge's Previously-Vacated Enhancement Decision Was Not Based On Any Finding Of Egregious Infringement Behavior

The Federal Circuit improperly relied upon the trial judge's previously-vacated decision awarding enhanced damages to justify its decision to impose enhanced damages in the second appeal. App. 10a-13a. But even assuming that the Federal Circuit could properly reach back to the trial judge's original decision (it could not, *see infra* pp. 23-29), the trial judge's analysis does not cure the lack of any finding of egregious infringement behavior.

On the contrary, the trial judge made no finding of egregious infringement behavior and her original enhancement decision to award enhanced damages was based on factors unrelated to Cisco's infringement behavior. As the trial judge explained,

> some enhancement is appropriate given Cisco's litigation conduct, its status as the world's largest networking company, its apparent disdain for SRI and its business model, and the fact that Cisco lost on all issues during summary judgment and trial, despite its formidable efforts to the contrary.

App. 142a.[4]

That analysis is no substitute for a finding of egregious infringement behavior. None of those identified factors is a measure of the culpability of Cisco's

[4] The trial judge's characterization that "Cisco lost on all issues" at trial is not accurate. For example, as the district court on remand recognized, "Cisco's damages defense at trial succeeded in obtaining a 3 ½% royalty rate rather than SRI's requested 7 ½% royalty rate." App. 23a n.3.

infringement; indeed, most of those factors relate to Cisco's litigation conduct, which are not the proper subject of enhanced damages under § 284. *See Halo*, 579 U.S. at 99 (explaining that § 285, rather than § 284, is the appropriate vehicle for addressing "costs attendant to litigation"); *id.* at 112 (Breyer, J., concurring) ("[E]nhanced damages may not 'serve to compensate patentees' for infringement-related costs or litigation expenses."). Cisco's "status as the world's largest networking company" (App. 142a) is not a basis for enhancement because enhanced damages are based on what the defendant did, not who the defendant is. And Cisco's "apparent disdain for SRI and its business model" (*id.*) does not justify enhancement either. Cisco's infringement was not motivated by any animus for SRI or its business model; indeed, Cisco undisputedly developed the accused products and services independently years before ever learning of SRI's patents. App. 49a.

Unless corrected, the Federal Circuit's decision to award enhanced damages based upon these factors in the absence of any finding of egregious infringement behavior will greatly expand the availability of enhanced damages far beyond their proper scope under *Halo*. This case distinctly illustrates that risk due to the overlap between the enhanced damages award under § 284 and the award of attorneys' fees under § 285. Having already fully compensated SRI for Cisco's litigation conduct through an award of all of its attorneys' fees for the entire litigation, the Federal Circuit nevertheless allowed SRI to recover again for *the same litigation conduct* under § 284. *Compare* App. 11a-13a (awarding enhanced damages based upon "Cisco's litigation conduct"), *with* App. 13a-15a (awarding attorneys' fees for the same litigation conduct). This Court's

review is needed to confine enhanced damages under § 284 to their proper scope as a punishment for egregious infringement behavior, not compensation for other ancillary issues unrelated to the defendant's infringement.

II. THE COURT SHOULD GRANT REVIEW TO PROTECT THE DISTRICT COURT'S DISCRETION TO ADDRESS ENHANCED DAMAGES IN THE FIRST INSTANCE

A. *Halo* And The Patent Act Commit Enhancement Decisions To The District Court's Discretion

Section 284 "commits the determination whether enhanced damages are appropriate to the discretion of the district court." *Halo*, 579 U.S. at 107 (quotation marks omitted). That discretion is necessary to protect the "'careful balance'" of policy considerations that animate the Patent Act. *Id.* at 109. The district court is in the best position to exercise its discretion "to take into account the particular circumstances of each case in deciding whether to award damages, and in what amount." *Id.* at 106.

Here, the Federal Circuit concluded that the district court on remand "did not conduct an analysis of enhancement because it entered JMOL of no willful infringement." App. 12a. That should have been the end of the Federal Circuit's analysis and required a remand to the district court to address enhancement in the first instance. Indeed, the court of appeals cannot properly decide matters committed to the district court's discretion that it acknowledges the district court did not reach. *See Sprint/United Mgmt. Co.* v. *Mendelsohn*, 552 U.S. 379, 386-387 (2008) (explaining that the court of appeals should not have addressed matters

committed to the district court's discretion and "should have allowed the District Court to make these [discretionary] determinations in the first instance"); *Koon* v. *United States*, 518 U.S. 81, 113-114 (1996) (remand necessary to permit district court to address discretionary determination where it was not clear that the district court would have reached the same outcome as its prior determination).

B. The Federal Circuit's Award Of Enhanced Damages Based Upon The Trial Judge's Previously-Vacated Decision Warrants Review

Rather than remanding, the Federal Circuit reached back to impose enhanced damages based upon the trial judge's original enhancement decision that was vacated during the first appeal. App. 10a-13a. The Federal Circuit acknowledged that its decision to do so "may seem inappropriate" (App. 12a n.2)—and it was. The court of appeals disregarded the significance of its prior vacatur of the trial judge's original enhancement decision and, contrary to the approach taken by other circuits, stripped the currently presiding district judge of the ability to address matters committed to his discretion. The trial judge's previously-vacated decision was also outside the scope of SRI's appeal arising from the district court's decision on remand. This Court's review is needed to preserve the district court's ability to decide matters within its discretion in the first instance.

1. The district court was not bound by the trial judge's previously-vacated decision

The Federal Circuit refused to remand to permit the district court to address enhancement in the first instance because, in its view, that "would serve little

purpose given that the [trial judge] already properly considered this issue." App. 12a. That is both substantively and procedurally incorrect. As discussed (*supra* pp. 21-23), the trial judge's original decision was not based on any finding of egregious infringement behavior and therefore does not properly support enhancement. And as a procedural matter, that reasoning cannot be reconciled with the fact that the Federal Circuit vacated the trial judge's original enhancement decision during the first appeal.

The Federal Circuit's vacatur of the trial judge's original enhancement decision in the first appeal "effectively wiped the slate clean." *Pepper* v. *United States*, 562 U.S. 476, 507 (2011). The district court was not—and is not—bound to reach the same conclusion on enhancement that the trial judge reached. It is free to exercise its discretion and revisit issues within the scope of the previously-vacated decision, since the law-of-the-case doctrine does not apply to vacated decisions. *Id.*

Nor does the fact that the case was reassigned to a new district judge on remand alter the analysis. Contrary to the Federal Circuit's decision in this case, most other circuits recognize that a new district judge is free to decide issues differently from the previous judge assigned to the case. *See, e.g.*, *In re Agent Orange Prod. Liab. Litig.*, 733 F.2d 10, 13 (2d Cir. 1984) ("It is well established that the interlocutory orders and rulings made pre-trial by a district judge are subject to modification by the district judge at any time prior to final judgment, and may be modified to the same extent if the case is reassigned to another judge."); *United States ex rel. Petratos* v. *Genentech Inc.*, 855 F.3d 481, 493 (3d Cir. 2017) (holding that the transfer from one judge to another does "'not limit the power of trial

judges from reconsidering issues previously decided by a predecessor judge'"); *Cannon* v. *Principal Health Care of La.*, 87 F.3d 1311 (5th Cir. 1996) (per curiam) (permitting reconsideration by reassigned judge); *Reed* v. *Rhodes*, 179 F.3d 453, 473 (6th Cir. 1999) (new judge's reconsideration of previous judge's ruling was not abuse of discretion); *Amarel* v. *Connell*, 102 F.3d 1494, 1515 (9th Cir. 1996) (new judge can modify prior judgments); *Rimbert* v. *Eli Lilly & Co.*, 647 F.3d 1247, 1253 (10th Cir. 2011) (noting when a new judge is assigned to a case, it is within his or her discretion to revisit issues of discretion); *Langevine* v. *District of Columbia*, 106 F.3d 1018, 1020 (D.C. Cir. 1997) (reassigned judge had ability to reconsider prior decision); *see also* Fed. R. Civ. P. 54(b) (recognizing that interlocutory orders and decisions "may be revised at any time" prior to the entry of final judgment). *But see HK Sys., Inc.* v. *Eaton Corp.*, 553 F.3d 1086, 1089 (7th Cir. 2009) (noting in dicta that the law of the case counsels against reconsideration of a prior judge's decision by judge on reassignment).

Here, there is every reason to think that the district judge currently assigned to this case would reach a different result on the question of enhancement from the trial judge. Indeed, the district court on remand all but said so, holding that "[t]here is no substantial evidence that Cisco's infringement was 'wanton, malicious, and bad-faith.'" App. 25a. There have also been significant changed circumstances since the trial judge's original enhancement decision, including the Federal Circuit's express rejection of the basis on which the trial judge upheld the jury's willfulness verdict that was the predicate to her decision to award enhanced damages. App. 46a-51a; *see supra* p. 7. There is thus no basis to assume, as the Federal Circuit did (App. 12a), that a

remand to the district court to address enhanced damages would inevitably result in the district court reaching the same conclusion as the trial judge originally did.

2. The trial judge's previously-vacated decision was not properly within the scope of SRI's appeal

The Federal Circuit's decision to review the trial judge's original enhancement decision was also improper because it was outside the Federal Circuit's jurisdiction in SRI's appeal from the district's court's decision on remand.

The district court on remand entered judgment "in favor of Cisco Systems, Inc. and against SRI International, Inc. on the issue of willful infringement" and thus awarded no enhanced damages. C.A.J.A. 10. Because the district court awarded no enhanced damages on remand, the trial judge's original decision awarding enhanced damages was necessarily *not* part of the new judgment entered on remand. *See Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949) (prior district court decisions merge into the final judgment where they are "steps towards final judgment," but not when they do "not make any step toward final disposition of the merits of the case").[5] Because the court of

[5] For example, a party may not appeal the denial of summary judgment following trial because that decision does not merge into the final judgment. *See Comaper Corp.* v. *Antec, Inc.*, 596 F.3d 1343, 1347 (Fed. Cir. 2010) ("A denial of summary judgment is not properly reviewable on an appeal from a final judgment entered after trial."); *see also Cheffins* v. *Stewart*, 825 F.3d 588, 596-597 (9th Cir. 2016) ("[W]e do not review the denial of summary judgment when the case has gone to trial."); *Bunn* v. *Oldendorff Carriers GmbH & Co.*, 723 F.3d 454, 460 n.3 (4th Cir. 2013) ("It is well settled that we will not review, under any standard, the pretrial

appeals in an appeal from a final judgment can address only those issues within the scope of the final judgment that is appealed, the trial judge's original enhancement decision was outside the Federal Circuit's jurisdiction in SRI's appeal from the judgment entered on remand. *See* 28 U.S.C. § 1295(a)(1) (defining the Federal Circuit's jurisdiction to include appeals "from a final decision of a district court of the United States" in cases arising under the Patent Act).

That conclusion is reinforced by the scope of SRI's notice of appeal. Consistent with the scope of the new judgment entered on remand, SRI's notice of appeal following the district court's decision on remand never identified the trial judge's original enhancement decision as part of its appeal. C.A.J.A. 29368. A notice of appeal must "designate the judgment … from which the appeal is taken." Fed. R. App. P. 3(c)(1)(B). "The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs* v. *Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) (per curiam). SRI's notice of appeal here addressed only the April 1, 2020 final judgment entered on remand. C.A.J.A. 29368. As discussed (*supa* pp. 27-28), that new judgment entered on remand necessarily excluded the trial judge's original enhancement

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denial of a motion for summary judgment after a full trial and final judgment on the merits." (quotation marks omitted)). The trial judge's original decision awarding enhanced damages was not reviewable on appeal from the district court's final judgment on remand for the same reason; it was not a "step toward final disposition of the merits of the case," *Cohen*, 337 U.S. at 546, because the final judgment entered on remand did not award enhanced damages.

decision because it awarded no enhanced damages. Moreover, SRI only purported to appeal orders "adverse to SRI," which the trial judge's original enhancement decision was not. C.A.J.A. 29368.

Cisco challenged the court of appeals' jurisdiction to address the trial judge's previously-vacated decision in its principal appeal brief and its petition for rehearing. Cross-Appellant's C.A. Br. 56-58. The Federal Circuit never addressed Cisco's jurisdictional challenge or explained how it had jurisdiction to address decisions outside the scope of the judgment on appeal.

* * *

These procedural irregularities are a symptom of the deeper problem with the Federal Circuit's decision. The Federal Circuit's approach reflects a fundamental disregard for the division of responsibility between the district court and the court of appeals on the issue of enhanced damages. This Court's review is warranted to ensure that the issue of enhanced damages remains committed to the district court's discretion, as *Halo* and § 284 require.

III. THE QUESTIONS PRESENTED WARRANT THIS COURT'S REVIEW BECAUSE THE FEDERAL CIRCUIT'S DECISION WILL HAVE SIGNIFICANT CONSEQUENCES BEYOND THIS CASE

Unless corrected, the consequences of the Federal Circuit's decision in this case will be widespread and severe. The Federal Circuit upheld the jury's willfulness finding in this case based solely on the supposed weakness of Cisco's trial defenses and the fact that the jury found induced infringement under 35 U.S.C. § 271(b). App. 6a-10a. Those factors will be present in virtually every patent case where a defendant is found

liable for induced infringement at trial on the theory that the jury must have found the losing party's defenses to be weak. The Federal Circuit articulated no limiting principle to constrain its decision here.[6]

Halo's requirement of egregious infringement is a critical safeguard to prevent enhancement in ordinary cases of infringement that nevertheless satisfy the low threshold that the Federal Circuit has set for sustaining a jury's finding of willful infringement. Because enhancement is for the district court, not the jury, to decide, the court is not limited to the trial record and can consider issues that were outside the jury's consideration when exercising its discretion under § 284.

For example, where, as here, the jury's willfulness finding was purportedly based upon the weakness of a party's trial defenses, a district court when addressing enhancement should be able to consider the totality of the defenses in the case, including those that were not presented to the jury because they were resolved as a matter of law before trial. That evidence would have directly rebutted the purported basis for the jury's willfulness verdict here. Cisco had other defenses in the case that were not presented to the jury, including a defense that SRI's patents were invalid under

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[6] To make matters worse, under the Federal Circuit's reasoning, a plaintiff may justify a willfulness verdict after the fact based upon different grounds than it presented for its willfulness case at trial—as SRI did here. App. 24a nn.5-6 (explaining that SRI had not previously argued that the jury's willfulness verdict was supported by the supposed weakness of Cisco's trial defenses before the case returned to the district court on remand and noting that SRI raised the argument only because "all of SRI's actual arguments to the jury were based on considerations that have been rejected by the Court of Appeals" in its 2019 decision); *see supra* p. 7.

35 U.S.C. § 101 that—although ultimately unsuccessful—was meritorious enough to draw a dissent from Judge Lourie in the first appeal (App. 56a-59a). By focusing exclusively on the jury's finding of willful infringement without considering the broader question of whether Cisco engaged in egregious infringement behavior, the Federal Circuit's decision in this case permits enhancement based on a materially incomplete analysis. This Court's review is warranted so that *Halo*'s standard of egregious infringement behavior remains a meaningful analysis that "take[s] into account the particular circumstances of each case in deciding whether to award [enhanced] damages, and in what amount." 579 U.S. at 106.

This is also an appropriate time for the Court to address enhanced damages in patent cases. In 2020, "a record $4.7 billion in damages were awarded" in patent cases. Geneva Clark, *Patent Litigation Report* 19, Lex Machina (Mar. 2021). Because enhanced damages are a multiple of the base damages award under § 284, the growing size of these awards raises the threat of significant enhanced damages. For example, in *Juno Therapeutics, Inc.* v. *Kite Pharma, Inc.*, 10 F.4th 1330, 1334 (Fed. Cir. 2021), the district court awarded 0.5x enhanced damages under § 284, adding $390 million to the judgment. And in *Centripetal Networks, Inc.* v. *Cisco Systems, Inc.*, 492 F. Supp. 3d 495, 604 (E.D. Va. 2020), the district court awarded 2.5x enhanced damages, which added over $1.1 billion to the judgment. This Court's review is warranted to ensure that those stiff penalties are "reserved for egregious cases of culpable behavior," *Halo*, 579 U.S. at 104, as the size of patent verdicts continues to increase.

Despite the importance of these issues, the Federal Circuit summarily denied Cisco's rehearing petition

(App. 145a-146a) and has given no indication that it will act to address these issues. Given the stakes, it is critical for this Court to provide clarity now on the standard for enhancement and the respective roles of the district court and the court of appeals in making those determinations.

IV. THIS CASE IS A GOOD VEHICLE FOR ADDRESSING THE QUESTIONS PRESENTED

Both questions presented are squarely presented in this case, and the history of this case makes it a good vehicle for addressing them. For example, because the trial judge characterized this case as "like virtually every other case" in terms of infringement (App. 23a; C.A.J.A. 22195) and the district court on remand acknowledged that "[t]here is no substantial evidence that Cisco's infringement was 'wanton, malicious, and bad-faith'" (App. 25a), this case squarely presents the question of whether enhanced damages can be awarded in the absence of a district court finding of egregious infringement behavior. It also clearly presents the tension between §§ 284 and 285 that has been created by the Federal Circuit's decision to award enhanced damages in the absence of egregious infringement behavior, since the same litigation conduct that was the basis for the award of enhanced damages under § 284 was also the basis for the award of attorneys' fees under § 285. App. 141a-142a. And this case is also a good vehicle for addressing the relative roles of the district court and the court of appeals in addressing enhanced damages, since it is clear from the district court's determination on remand that Cisco's infringement was not "wanton, malicious, and bad-faith" (App. 25a) that it would not have enhanced damages if it had been given the opportunity to address that question.

V. IN THE ALTERNATIVE, THIS COURT SHOULD SUMMARILY REVERSE

The Federal Circuit's decision in this case is clearly contrary to *Halo* with respect to both the substantive standard for enhanced damages and the division of responsibility between the district court and the court of appeals in deciding enhancement. Moreover, having already found that "[t]here is no substantial evidence that Cisco's infringement was 'wanton, malicious, and bad-faith'" (App. 25a), there can be no doubt as to how the currently presiding district court judge would resolve the issue of enhancement. Indeed, neither SRI on appeal nor the Federal Circuit identified any basis for holding that the district court's assessment that Cisco's conduct was not "wanton, malicious, and bad-faith" was an abuse of discretion. App. 1a-15a; Appellant's C.A. Br. 1-69. In the event that the Court does not grant plenary review of the questions presented, it should summarily reverse the Federal Circuit's egregious misapplication of *Halo*.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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