

No. 15-1446

IN THE
Supreme Court of the United States

COMMIL USA, LLC,

Petitioner,

v.

CISCO SYSTEMS, INC.,

Respondent.

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

Brief of *Amici Curiae* Small Business Technology Council
and Affinity Labs of Texas, LLC in support of Petitioner

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Interest of *Amici Curiae*¹

Amici believe a strong and efficient patent system is essential to the United States economy. The Small Business Technology Council advocates for the 6,000 currently active, highly inventive firms that participate in the Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR) programs. Affinity Labs of Texas LLC is an inventor-led innovation consulting firm that works with inventors and innovators, helping them to develop their ideas and their intellectual property through company formation, manufacturing, licensing, and marketing.

Amici recognize, and have experienced firsthand, that patents level the playing field for start-up companies and individual inventors that challenge larger, more established companies in a given field. They have seen in practice that small businesses are responsible for creating 63% of all private sector jobs.² And yet small businesses cannot function or survive without a strong patent system.

¹ Counsel for *amici curiae* provided notice to all parties of regarding their intent to file this brief 10 days before its due date. All parties have consented to filing of this brief. No counsel for a party authored this brief in whole or in part, and no entity, other than *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

² Small Bus. Admin. Off. of Advocacy, *Frequently Asked Questions 1*, available at <http://1.usa.gov/1y1jgOO>.

An essential part of a strong patent system is the ability of patent holders to efficiently and reliably enforce their patents against infringers. This is particularly true when a small company or individual inventor with limited resources attempts to hold accountable a larger infringer with unlimited resources. *Amici* have experienced and seen the important role juries play in resolving patent infringement disputes. As a result, *amici* are well-suited to explain the importance of this Court's consideration of the issues set forth in the petition, and why further review is warranted.

Argument

The heart of the petition pertains to the sacrosanctity of the right to trial by jury in patent cases. Commil has tried its patent infringement claims against Cisco to a jury—twice. On both occasions, the jury determined that Cisco infringed Commil's valid claims. And yet the Petitioner is seeking review by this Court because the Federal Circuit reversed the jury's factual findings regarding infringement. *Amici* support Commil's petition, and request further review for the reasons below.

The Seventh Amendment of the United States Constitution guarantees the right to trial by jury in civil cases and that a jury's factual determinations will not be reexamined except in the limited exceptions allowed by the common law at the time of the Bill of Rights. Federal Rule of Civil Procedure 50 codified the limited authority of courts—district courts as well as federal courts of appeal—to reexamine jury verdicts. This Court, in *Reeves v.*

Sanderson Plumbing Products, delineated the standard for applying Rule 50, and specifically what evidence should be discarded. 530 U.S. 133, 149-51 (2000).

Since *Reeves*, the Courts of Appeals have not applied this standard uniformly. The Court of Appeals for the Federal Circuit, for instance, has demonstrated a greater willingness, and indeed, an eagerness, to reweigh the evidence than other circuit courts of appeals. This has resulted not only in a split among the courts of appeals in the application of *Reeves*, but it has impinged on the right to trial by jury in patent cases due to the Federal Circuit's unique jurisdiction. *Amici* are concerned not only that the jury's role in deciding patent cases is being impaired, but also that the right to a jury trial in patent cases is being eroded as well. *Amici*, therefore, support granting the petition in order to breathe life into the Seventh Amendment's guarantees in patent cases.

I. The Seventh Amendment's guarantee of trial by jury provides for the purest form of democracy and is of utmost importance.

The Founding Fathers recognized the critical importance of the civil jury trial to the Republic. "Trial by a jury of laymen rather than by the sovereign's judges was important to the founders because juries represent the layman's common sense, the 'passional elements in our nature,' and thus keep the administration of law in accord with the wishes and feelings of the community." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 343 (1979)

(Rehnquist, J., dissenting); Debra Lyn Bassett, *"I Lost at Trial – In the Court of Appeals!"*: *The Expanding Power of the Federal Appellate Courts to Reexamine Facts*, 38 Hous. L. Rev. 1129, 1131 (Winter 2001) ("One of the primary motivations behind the Declaration of Independence was the Crown's attempt to encroach upon the right to trial by jury."). As a result, the Founders codified the right to trial by jury in the Constitution:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. Const. amend. VII.

This Court has safeguarded the Seventh Amendment's right to trial by jury for over 225 years.

The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts.

Jacob v. New York, 315 U.S. 752, 752-53 (1942). Indeed, this Court has recognized the essential role the jury system plays in democracy. *See, e.g., Powers v. Ohio*, 499 U.S. 400, 407 (1991) (“with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.”); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 618 (1991) (“[T]he jury system performs the critical governmental functions of guarding the rights of litigants and ensuring continued acceptance of the laws by all of the people”) (internal citations and quotations omitted).

Nor can there be any dispute that juries have decided patent cases for over two centuries. “[T]here is no dispute that infringement cases today must be tried to a jury, as their predecessors were more than two centuries ago.” *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996) (citing *Bramah v. Hardcastle*, 1 Carp. P. C. 168 (K. B. 1789)). In fact, juries decided patent cases even before the Seventh Amendment was adopted. “In 1790, before the adoption of the Seventh Amendment in 1791, the patent statute in this country provided only for the award of damages in an action at law, with the right to a trial by jury.” *In re Lockwood*, 50 F.3d 966, 976 n.12 (Fed. Cir. 1995) (citing *Root v. Railway Co.*, 105 U.S. 189, 191-92 (1881)).

In light of this history and the constitutional import, any restrictions on the right to trial by jury must be approached with extreme caution. This Court has explained that “maintenance of the jury as a fact-finding body is of such importance and

occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.” *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959) (quoting *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935)). That is why certiorari is warranted.

II. Review is warranted because the *Reeves* standard is critical to the Seventh Amendment’s Reexamination Clause, and the Federal Circuit’s application of *Reeves* is inconsistent with other circuit courts’ application.

The petition presents important issues of fundamental constitutional import that are worthy of this Court’s review. The Seventh Amendment prohibits review of factual findings except in limited situations, which are now set forth in Federal Rule of Procedure 50 and explained in *Reeves*. The courts of appeals have not applied this standard consistently.

A. *Reeves* carries out the Seventh Amendment’s guarantee that appellate courts will not reexamine factual determinations made by juries, except in limited circumstances as previously allowed by the common law.

The application of the standard in *Reeves* is of critical importance because it safeguards the constitutional guarantees of the Seventh Amendment. The Seventh Amendment includes two

clauses: (1) the Preservation Clause, and (2) the Reexamination Clause. The latter provides that “no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.” U.S. Const. amend. VII; *Int’l Terminal Operating Co. v. Nederl Amerik Stoom v. Maats*, 393 U.S. 74 (1968) (reversing court of appeals decision because “[u]nder the Seventh Amendment, that issue should have been left to the jury’s determination”). The Court has interpreted the Reexamination Clause to allow reviewing courts to vacate a jury’s verdict for insufficient evidence. *See, e.g., Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 658 (1935).³ But the Court has also explained that in ruling on a motion for a directed verdict, a court of appeals “could *not* itself determine the issues of fact and direct a judgment for the defendant, for this would cut off the plaintiff’s unwaived right to have the issues of fact determined by a jury.” *Id.* (emphasis added). Rule 50 codifies this principle. *See Unitherm Food Sys. Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 402 n.4 (2006) (“Indeed,

³ There is, of course, still historical disagreement over whether the common law even permitted this practice. *See, e.g., Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 452 (1996) (Scalia, J., dissenting) (“Cases of this Court reaching back into the early 19th century establish that the Constitution forbids federal appellate courts to ‘reexamine’ a fact found by the jury at trial and that this prohibition encompasses review of a district court’s refusal to set aside a verdict as contrary to the weight of the evidence.”); *Parsons v. Bedford*, 28 U.S. 433, 448 (U.S. 1830) (“The only modes known to the common law to re-examine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a venire facias de novo, by an appellate court, for some error”).

Rule 50 was drafted with such [Seventh Amendment] concerns in mind.”). This Court’s decision in *Reeves* about the proper standard for Rule 50 motions, therefore, is of constitutional significance.

Anything other than a faithful application of the *Reeves* standard amounts to a violation of the Reexamination Clause of the Seventh Amendment. *See Reeves*, 530 U.S. at 149-51. Indeed, Rule 50 is now the most common subject for this Court’s jurisprudence on the Reexamination Clause. This case is a good vehicle for the Court to address both Rule 50 and the Seventh Amendment.

In addition to the petition’s constitutional underpinnings, this Court has recognized that federal appellate courts are ill-suited to review factual determinations at the district court level. In *Teva Pharmaceuticals USA v. Sandoz, Inc.*, this Court mandated greater deference to factual determinations made by a district court in resolving claim construction issues. *See* 135 S. Ct. 835, 836 (2015). The Court reached this conclusion, at least in part, because the Federal Circuit is ill-equipped to review those factual matters on appeal. “Federal Circuit judges ‘lack the tools that district courts have available to resolve factual disputes fairly and accurately,’ such as questioning the experts, examining the invention in operation, or appointing a court-appointed expert.” *Id.* at 837-39 (quoting *Lighting Ballast Control LLC v. Philips Electronics North Am. Corp.*, 744 F.3d 1272, 1311 (Fed. Cir. 2014) (en banc) (O’Malley, J., dissenting)); *see also Dennison Mfg. Co. v. Panduit Corp.*, 475 U.S. 809,

811 (1986) (vacating Federal Circuit's reversal of district court's factual findings relating to obviousness because Federal Circuit did not explicitly apply clearly erroneous standard on appeal). This conclusion applies with even greater force to factual matters presented at trial and resolved by a jury.

B. The Federal Circuit has reexamined jury verdicts in myriad patent cases of late.

Amici join the Petitioner because the Federal Circuit has recently set aside numerous jury verdicts based on disputes with the jury's factual determinations. The Federal Circuit has reversed nineteen jury verdicts on infringement and validity since 2011 alone. *See, e.g., Commil USA, LLC v. Cisco Sys., Inc.*, 813 F.3d 994, 997 (Fed. Cir. Dec. 28, 2015); *ParkerVision, Inc. v. Qualcomm Inc.*, 621 Fed. Appx. 1009, 1017 (Fed. Cir. 2015); *Mformation Techs., Inc. v. Research in Motion Ltd.*, 764 F.3d 1392, 1400 (Fed. Cir. 2014); *Phillip M. Adams & Assocs., LLC v. Dell Comput. Corp.*, 519 F. App'x 998, 1005 (Fed. Cir. 2013); *Mirror Worlds, LLC v. Apple Inc.*, 692 F.3d 1351, 1358 (Fed. Cir. 2012); *Cordis Corp. v. Boston Sci. Corp.*, 658 F.3d 1347, 1358 (Fed. Cir. 2011); *Smith & Nephew, Inc. v. Arthrex, Inc.*, 453 F. App'x 977, 981 (Fed. Cir. 2011); *Becton, Dickinson & Co. v. Tyco Healthcare Grp.*, 616 F.3d 1249, 1257-58 (Fed. Cir. 2010); *Calico Brand, Inc. v. Ameritek Imports, Inc.*, 527 F. App'x 987, 994 (Fed. Cir.), *decision clarified on reh'g* 547 F. App'x 966 (Fed. Cir. 2013); *ABT Sys., LLC v. Emerson Elec. Co.*, 797 F.3d 1350, 1357 (Fed. Cir.

2015); *I/P Engine, Inc. v. AOL Inc.*, 576 F. App'x 982, 992 (Fed. Cir. 2014), *cert. denied*, 136 S. Ct. 54 (2015); *Inventio AG v. Otis Elevator Co.*, 497 F. App'x 37, 43 (Fed. Cir. 2012); *Alexsam, Inc. v. Gap, Inc.*, 621 F. App'x 983, 995 (Fed. Cir. 2015); *Sealant Sys. Int'l, Inc. v. TEK Glob., S.R.L.*, 616 F. App'x 987, 999 (Fed. Cir. 2015); *DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245, 1253 (Fed. Cir. 2014) (same); *ClearValue, Inc. v. Pearl River Polymers, Inc.*, 668 F.3d 1340, 1342 (Fed. Cir. 2012); *ArcelorMittal France v. AK Steel Corp.*, 700 F.3d 1314, 1323 (Fed. Cir. 2012); *Novozymes AI S v. DuPont Nutrition Biosciences APS*, 723 F.3d 1336, 1351 (Fed. Cir. 2013); *Centocor Ortho Biotech, Inc. v. Abbott Labs.*, 636 F.3d 1341, 1353 (Fed. Cir. 2011)).⁴ This extensive record warrants a concern that the Federal Circuit has repeatedly invaded the province of the jury as fact finders.

The following three cases exemplify the fact-finding nature of the Federal Circuit's review. In *Cordis* the Federal Circuit reexamined whether the jury's determination that an accused stent product

⁴ See, e.g., *Petition for a Writ of Certiorari, ParkerVision Inc. v. Qualcomm Inc.*, No. 15-1092 at 29-30 (Feb. 29, 2016). ParkerVision's petition further underscores that the issues in Commil's petition are ripe for review. See generally *id.* Commil's petition, nonetheless, is a better vehicle for this Court's review because, unlike the district court in *Parkervision*, the district court in *Commil* entered judgment that affirmed the jury's verdict and concluded that substantial evidence supported its finding of infringement. Compare *Parkervision, Inc. v. Qualcomm Inc.*, 27 F. Supp. 3d 1266, 1285 (M.D. Fla. 2014) with *Commil USA, LLC v. Cisco Sys.*, No. 2:07-CV-341, 2011 U.S. Dist. LEXIS 111056, at *5 (E.D. Tex. Sep. 28, 2011).

included an “undulating” section. 658 F.3d at 1357-59. After determining that the drawing of the stent that *both parties* “extensively relied” on was “unclear,” the Federal Circuit opted to rely on other photographs and engineering drawings, made its own determination about the geometry of the design, and concluded that the stent “lack[s] the change in direction required for literal infringement.” *Id.* at 1358. The Federal Circuit, in turn, disregarded the expert testimony from the patent holder and determined that the accused product did not infringe the asserted claim, like it did in the *Commil* case. *Id.* at 1358 (“Indeed, *absent the testimony of [the patent holder’s] expert* regarding troughs and crests, and the corresponding testimony concluding infringement, we find very little evidence to support the jury’s verdict that claim 25 was literally infringed.”) (emphasis added).

The Federal Circuit also reweighed an expert’s opinion in *ABT Systems* when it reversed a jury verdict of no invalidity. At issue in *ABT* was whether “at the time of the [patent holder’s] invention, a person of ordinary skill would have combined elements from several prior art references.” 797 F.3d at 1358. The jury had determined that the accused infringer had failed to prove as much by clear and convincing evidence at trial. *See id.* at 1354. The Federal Circuit recounted the patent holder’s expert’s testimony, and “his view” on the lack of a motivation to combine, but reached a contrary factual finding on appeal. “In *our* view, if, at the time of the invention claimed in the ’017 patent, a person of ordinary skill had looked at [the] Vogelzang [prior art reference], he or she would have found it nearly

obvious from that disclosure itself to set the periodic fan to run as a function of when the heating or cooling cycle ended.” *Id.* at 1360 (emphasis added). The Federal Circuit, thus, explicitly substituted its finding of fact for that of the jury’s (including with respect to factual determinations of non-obviousness, *id.* at 1361-62), and entered judgment of invalidity for the accused infringer. *See id.* at 1362.

Finally, in *John Hopkins v. Datascope Corp.*, the Federal Circuit again disagreed with the expert’s testimony about the structure and operation of an accused product, and reversed the jury’s finding of infringement. 543 F.3d 1342 (Fed. Cir. 2008). The patent holder’s expert in this case explained the structure and operation of an accused catheter. *Id.* at 1346-48, 1350-51. The jury found infringement, and the district court denied the accused infringer’s motion for judgment as a matter of law. *Id.* at 1344. The Federal Circuit ultimately disagreed with the expert’s testimony, not on *Daubert* grounds, but because it found portions of the expert’s testimony “incredible” based on its assessment of its own application of geometry. *Id.* at 1348. The jury’s determination of infringement, therefore, was reexamined and reversed. *Id.* at 1349.

None of these three cases was decided as a matter of claim construction. Instead, they involved factual issues about how products operated, or whether prior art references combined to make a claim obvious. These are quintessential fact disputes for the jury to resolve. *See, e.g., Markman*, 517 U.S. at 384 (assigning the question of whether an accused product falls within a properly construed claim to

the jury). The failure to honor the jury's determinations on these fact issues impinges on the Seventh Amendment's guarantee of trial by jury and prohibition against reexamining factual determinations made by juries.

This record of reversals has drawn a loud chorus of dissents. Judge Newman, who has served on the Federal Circuit since 1984, is perhaps the most vocal critic. In *John Hopkins*, for instance, Judge Newman emphasized her concern that "it is not our province to reweigh the evidence, when there was substantial evidence by which a reasonable jury could have reached its verdict." 543 F.3d at 1351 (Newman, J., dissenting). Chief Judge Prost echoed a similar dissatisfaction in *Mirror Worlds*, explaining that the patent holder "introduced ample evidence to allow a reasonable jury to determine that the required steps were performed," and further that the majority "casually brushes" the patent holder's evidence aside. 692 F.3d 1365 (Prost, J., dissenting). Judge Gajarsa expressed his concern that "[t]he majority climbs Jacob's Ladder in search of perfection in the jury verdict, but, by substituting its own fact finding for that of the jury, it fails to allow the jury to perform its proper function." *Becton*, 616 F.3d 1265 (Fed. Cir. 2010) (Gajarsa, J., dissenting). This trio of judges represents some of the most experienced members on the Federal Circuit.⁵

⁵ Judge Newman has served on the Federal Circuit since 1984; Chief Judge Prost joined the Federal Circuit in 2001; and Judge Gajarsa, now retired from the court, served for 15 years from 1997-2012.

These vocal dissents support this Court's further review, as was true in other cases from the Federal Circuit that this Court has recently reviewed. *See, e.g., Lighting Ballast Control LLC v. Philips Elecs. North Am. Corp.*, 744 F.3d 1272, 1311 (Fed. Cir. 2014) (O'Malley, J. dissenting, joined by Rader, C.J., Reyna, J., and Wallach, J.) (calling for *en banc* review of whether district courts should be afforded deference on claim construction to the extent fact finding is involved; this Court addressed that issue in *Teva Pharmaceuticals USA v. Sandoz, Inc.*, 135 S. Ct. 835 (2015)); *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 769 F.3d 1371, (Fed. Cir. 2014) (O'Malley, J., concurring, joined by Hughes, J.) (inviting *en banc* review "to reevaluate our standard for the imposition of enhanced damages;" this Court decided *Halo* in the 2015 term, No. 14-1513); *In re Cuozzo Speed Techs., LLC*, 778 F.3d 1271, 1286 (Fed. Cir. 2014) (Moore, J., dissenting) (arguing that claim construction in IPR proceedings should be same as district court litigation; this Court decided *Cuozzo* in the 2015 term, No. 15-446).

C. Other circuit courts of appeals apply *Reeves* in a manner different than the Federal Circuit.

The Federal Circuit's standard for reviewing jury verdicts stands alone. Other circuit courts of appeals more faithfully apply the *Reeves* standard and therefore discard evidence from a moving party that is contradicted, impeached, or offered from an interested witness. The following cases are representative, and the analysis in these cases would all lead to a different result in *Commil v. Cisco*, as

well as various other cases in the section above. Such a split in the application of Rule 50 justifies review, as it did in *Reeves*. 530 U.S. at 149 (“The Courts of Appeals have articulated differing formulations as to what evidence a court is to consider in ruling on a Rule 50 motion.”).

The Fifth Circuit’s decision in *Wellogix, Inc. v. Accenture* stands in stark contrast to the Federal Circuit’s analysis of the jury verdict in *Commil v. Cisco* and other jury verdicts above. 716 F.3d 867 (5th Cir. 2013). In *Wellogix*, the jury returned a \$26.2 million verdict for compensatory damages for Accenture’s trade secret misappropriation, along with a remitted award of \$18.2 million for punitive damages. *Id.* at 874. The Fifth Circuit deferred to the jury’s factual finding, notwithstanding its skepticism of the jury’s conclusions. “Had we sat in the jury box, we may have decided otherwise. ‘But juries are not bound by what seems inescapable logic to judges.’” *Id.* at 872 (quoting *Morissette v. United States*, 342 U.S. 246, 276 (1952)). More particularly, Wellogix relied on expert testimony to support its claim for trade secret misappropriation, while Accenture did not offer expert testimony in rebuttal. *Id.* at 877-78. While Accenture maintained on appeal that Wellogix’s expert’s testimony was insufficient to establish that Accenture acquired Wellogix’s trade secrets, the Fifth Circuit deferred to the wide latitude of experts to offer opinions and concluded that “the jury was reasonable in crediting his testimony.” *Id.* at 876. The court reached the same conclusion when it rejected Accenture’s claim that the expert’s testimony about Accenture’s use of the

trade secrets could not support the jury's verdict. *See id.* at 877-78.

The Seventh Circuit's analysis in *Davis v. Wisconsin Department of Corrections* also demonstrates an application that conflicts with that adopted by the Federal Circuit in *Commil v. Cisco*. 445 F.3d 971 (7th Cir. 2006). The defendant in *Davis* sought to reverse a jury verdict based on an employment discrimination claim. *See id.* at 972. A core issue at trial and on appeal was whether a Department of Corrections memo contained a typographical error. *Id.* at 975. The defendants' witnesses testified that it did. The Seventh Circuit refused to "reweigh the evidence or second-guess the jury's credibility determinations." *Id.* at 978. Specifically, the court applied *Reeves* and explained that the testimony from the defendants' four witnesses is of the sort that is "generally disregard[ed] when reviewing denials of posttrial relief because it is neither uncontradicted (the DOC memo contradicts it) nor d[id] it come from disinterested witnesses." *Id.*

Certainly additional similar cases exist from other circuit courts. But these two examples are representative of the conflicting application of *Reeves* among the Courts of Appeal. Had the Federal Circuit deferred to *Commil's* expert as the Fifth Circuit did in *Wellogix*, the jury verdict would have been affirmed. Similarly, the Seventh Circuit in *Davis* disregarded evidence from the party moving under Rule 50 that was contradicted or from interested witnesses, while the Federal Circuit considered both forms of evidence in reaching its

decision to reverse the jury verdict in *Commil v. Cisco*.

III. The right to trial by jury in patent cases is otherwise being eroded.

Every constitutional right requires vigorous protection from this Court. *Amici* join the petition because patent holders' Seventh Amendment rights are currently in disfavor in the Federal Circuit and need forceful protection. In addition to the issues set forth above and in the Petitioner's brief with respect to reexamination of juries' fact findings, patent holders are slowly losing their right to trial by jury on the issues of validity and compensatory damages for past and future infringement.

Patent holders can no longer expect to have a jury decide an infringer's defense of invalidity. In 2011, Congress created the *inter partes* review (IPR) procedure in the Leahy-Smith America Invents Act, which affords interested parties—most often accused infringers—the ability to challenge a patent's validity in front of an Article I agency: the Patent and Trial Appeal Board (PTAB). Pub. L. 112-29, 125 Stat. 284 (2011). The IPR procedure sits in blunt contrast to an accused infringer's traditional method of challenging the validity of a patent. A petitioner in the IPR procedure has a lower burden of proof,⁶ can

⁶ Compare 35 U.S.C. §316(e) (setting burden of proof in IPR proceedings as preponderance of evidence), with *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 111 (2011) (requiring burden of clear and convincing evidence in district court).

obtain a broader construction of the claims,⁷ and, most critically, is allowed to place factual determinations in the hands of three administrative judges at the PTAB instead of the ladies and gentlemen of the jury.

The results of this new venue for validity disputes have been dramatic. The invalidation rate at the PTAB has been so high⁸ that the PTAB panels have been referred to as “death squads, killing property rights.” Peter J. Pitts, *Patent Death Squads vs. Innovation*, Wall St. J. June 10, 2015, *available at* <http://on.wsj.com/1MsqErB>. The Former Chief Judge at the PTAB embraced such a designation because it fits the mission for the PTAB: “If we weren’t, in part, doing some ‘death squadding,’ we would not be doing *what the statute calls on us to do*.” Ryan Davis, *PTAB’s ‘Death Squad’ Label Not Totally Off-Base, Chief Says*, IPLaw360, Aug. 14, 2014, *available at* <http://www.law360.com/articles/567550/ptab-s-death-squad-label-not-totally-off-base-chief-says> (emphasis added). Such a characterization underscores the fundamental importance of the jury system. Juries have no such

⁷ Compare 37 C.F.R. §42.100(b) (applying broadest reasonable construction in IPR proceedings) & *Cuozzo Speed Techs. v. Lee*, -- U.S. ---, No. 15-446 (June 20, 2016), with *Phillips v. AWH Corp.*, 415 F. 3d 1303, 1314 (Fed. Cir. 2005) (construing claims based on their ordinary meaning based primarily on the patent’s specification).

⁸ The PTAB has invalidated all or some challenged claims in over 85% of IPRs that have been decided. See U.S. Patent & Trademark Office, Patent Trial and Appeal Board Statistics, 2, 10 (Apr. 20, 2016), *available at* <http://1.usa.gov/24KQcLw>.

agendas; juries are made up of citizens who are called upon to resolve the particular factual disputes of a case between two parties.

The creation of the IPR procedure and its high-kill rate has shifted disputes from juries in district court to administrative judges at the PTAB. To be sure, the IPR process is not a traditional examination or reexamination that the Patent Office has historically undertaken; an “*inter partes* review is a trial, adjudicatory in nature and constituting *litigation*.” *ScentAir v. Prolitec*, IPR2013-00179, Paper 9, at 4 (PTAB April 16, 2013) (emphasis added). Indeed, over 80% of all petitions for IPR are associated with co-pending district court litigation. Matt Cutler, *3 Years of IPR: A Look at the Stats*, IPLaw360, Oct. 9, 2015) *available at* <http://www.law360.com/articles/699867/3-years-of-ipr-a-look-at-the-stats>. Thus, patent holders are now effectively denied a right to a jury’s determination of an accused infringer’s invalidity defense.⁹

Jury determinations of damages in patent cases have also not been protected as of late. “By the law the jury are judges of the damages.” *Feltner, Jr. v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 352 (1998). In patent cases, juries are tasked with the quintessential fact issue of what the parties would have agreed to during a “hypothetical negotiation” involving a willing licensor and willing licensee based on fifteen non-exclusive factors. *See, e.g.*,

⁹ The Constitutionality of the IPR procedure is at issue in a separate petition. *See* Petition for a Writ of Certiorari, *MCM Portfolio, LLC v. Hewlett-Packard Co.*, No. 15-1330.

Lucent Techs., Inc. v. Gateway, Inc., 580 F.3d 1301, 1324-25 (Fed. Cir. 2009). And yet the Federal Circuit has shown the same willingness to reexamine factual determinations regarding damages awards as it has for infringement and validity determinations. *See supra* at Sec. II.B.

Since 2009, the Federal Circuit has reexamined and reversed at least eight jury determinations on damages.¹⁰ When these decisions are added to the eighteen recent decisions vacating jury findings of infringement and validity, the sum reflects a slow and significant erosion of the Seventh Amendment's guarantee that juries—and not appellate courts—decide factual issues in civil patent cases.

This erosion of the jury's province is even more evident with respect to damages for future infringement. In the wake of this Court's *eBay* decision, the Federal Circuit was asked to decide

¹⁰ *See Warsaw Orthopedic, Inc. v. NuVasive, Inc.*, 778 F.3d 1365 (Fed. Cir. 2015) (vacating jury's award of \$101 million damages); *Ericsson, Inc. v. D-Link Sys.*, 773 F.3d 1201, 1225-35 (Fed. Cir. 2015) (vacating \$10 million jury verdict); *VirnetX, Inc. v. Cisco Sys.*, 767 F.3d 1308, 1325-1334 (Fed. Cir. 2015) (vacating jury's award of \$368 million); *LaserDynamics, Inc. v. Quanta Computer, Inc.*, 694 F.3d 51, 75-82 (Fed. Cir. 2012) (vacating jury's determination of \$8.5 million); *Whitserve, LLC v. Computer Packages, Inc.*, 694 F.3d 10, 26-34 (Fed. Cir. 2012) (vacating \$8.3 million jury award); *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1311-1322 (Fed. Cir. 2011) (vacating \$388 million jury determination); *Wordtech Sys. v. Integrated Networks Solutions, Inc.*, 609 F.3d 1308, 1318-22 (Fed. Cir. 2010) (vacating jury award of \$250,000); *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1323-39 (Fed. Cir. 2009) (vacating jury determination of \$357 million).

whether a patent holder enjoys a Seventh Amendment right to a jury trial after a district court prescribed an ongoing royalty for future acts of infringement. *Paice v. Toyota Motor Corp.*, 504 F.3d 1293 (Fed. Cir. 2007), *reh'g en banc denied*. The Federal Circuit rejected the patent owner's Seventh Amendment argument, and summarily concluded that "the fact that monetary relief is at issue in this case does not, standing alone, warrant a jury trial." *Id.* at 1316. Patent owners, therefore, have been denied the right to trial by jury for damages for future infringement.

Such a conclusion conflicts with this Court's law. This Court explained in *Feltner* that compensatory damages are "traditionally associated with legal relief," and therefore subject to the Seventh Amendment's guarantee to trial by jury. *See Feltner*, 523 U.S. at 352.¹¹ This finding is consistent with this

¹¹ This Court applies a two-prong test to determine if a right to trial by jury attaches to a cause of action. *See, e.g., Tull v. United States*, 481 U.S. 412, 417 (1987). First, "a court must compare the action with the analogous action brought in the courts of England during the eighteenth century, prior to the merger of law and equity. Second, a court must look to the remedy sought and determine whether it is legal or equitable in nature." *See id.* (internal citations omitted). As set forth above, the first prong is clearly satisfied, as this Court explained that "there is no dispute that infringement cases today must be tried to a jury, as their predecessors were more than two centuries ago." *Markman*, 517 U.S. at 376. An analysis of the second prong makes clear that compensatory damages for future infringement is legal, not equitable, in nature. *See generally* Ronald J. Schutz & Patrick M. Arenz, *Unchartered Waters: Determining Ongoing Royalties for Victorious Patent Holders Denied an Injunction*, *The Sedona Conference Journal*, Vol. XI (Fall 2010).

Court's *eBay* decision, which explained that an injunction is unavailable if a patent holder fails to prove, among other things, that "remedies available at law, such as monetary damages, are adequate to compensate." See *eBay, Inc. v. MercExchange, LLC*, 547 U.S. 388, 390 (2006). Quite simply, an award of an ongoing royalty is compensation for future acts of patent infringement as an alternative remedy to an injunction, and patent owners are now denied the right to have a jury decide that award.

It is true that issues over a Seventh Amendment right to trial by jury on validity, past damages, and future damages is beyond the scope of the petition for review in this case. But *amici* offer these considerations, and *amici's* concern about widespread threats to trial by jury in patent cases, in support of the petition to avoid "death by a thousand cuts." Unless this Court zealously guards the right to trial by jury, as it guards the constitutional guarantees of other amendments enshrined in the Bill of Rights, the Seventh Amendment guarantee will effectively vanish in patent cases.

Conclusion

President Abraham Lincoln famously remarked that the patent system added the "fuel of interest to the fire of genius." This recognition will only remain true if patent holders are able to efficiently and reliably enforce their patents to stop unauthorized infringement. Trial by jury, as secured by the Seventh Amendment, is and always has been the

greatest avenue for ensuring such enforcement. The petition should be granted and the judgment of the court of appeals should be reversed.

Respectfully submitted,

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