No. 24-726

IN THE
Supreme Court of the United States

DISH NETWORK L.L.C.,
Petitioner,

v.

DRAGON INTELLECTUAL PROPERTY LLC, ET AL.,
Respondents.

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

BRIEF FOR UNIFIED PATENTS, LLC AS AMICUS CURIAE SUPPORTING PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

STATUTES

OTHER AUTHORITIES

INTEREST OF THE *AMICUS CURIAE*[1]

Unified Patents, LLC ("Unified") is a membership organization dedicated to deterring non-practicing entities (NPEs), specifically patent assertion entities and their funders, that extract nuisance settlements from operating companies based on patents that are likely invalid. Unified's members are Fortune 500 companies, start-ups, automakers, cable providers, financial companies, open-source software developers, manufacturers, and others dedicated to reducing the drain on the economy caused by baseless litigation involving patents of dubious validity.

Unified studies the business models and practices of NPEs. Unified monitors ownership data, secondary-market patent sales, demand letters, and patent litigation, including administrative challenges. Unified also challenges patents that it believes are invalid. Unified acts independently from its members.

Patent litigation increasingly attracts lawyers and investors who view it as an investment opportunity; its financial incentives can encourage abuse. The Federal Circuit's decision permits those behind exceptional litigation to repeatedly escape liability for abusive behavior. The decision also imposes one-sided limitations on parties. Unified has an interest that the statute is read correctly to appropriately deter misconduct.

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[1] All parties received timely notice of Unified's intention to file this brief on January 31, 2025. No counsel for a party authored any part of this brief, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the brief's preparation or submission.

SUMMARY OF ARGUMENT

A. Departing from the statute's text, this Court's precedent, other circuits, and its own precedent, the Federal Circuit imposes extra-statutory limitations on a district court's discretion in awarding fees. In doing so, the decision undermines Section 285's aim to deter exceptional conduct and recompense those who suffer it. The decision is precedential. The *en banc* court declined review. Given the Federal Circuit's exclusive authority over patent cases, the decision is now binding on district courts nationwide. Thus, the questions presented are ripe for this Court's review.

B. Often, an attorney is responsible for a case's exceptionality. In patent cases in particular, the line between attorneys, clients, and investors often blurs; it is common for shell companies controlled by the lawyers to litigate cases. These shell companies are often owned—in name only—by unsophisticated laypersons unaware of the risks of bringing nuisance lawsuits. Other times, the attorneys themselves own the shell company, which holds no assets and is thus judgment-proof. The attorneys and agents use these companies to shield themselves from scrutiny and consequence. Holding categorically that attorneys can never be liable has undermined Section 285's deterrence purpose in circumstances like these.

C. The decision creates a strict standard regarding fees incurred from administrative proceedings. The opinion indicates that Section 285 only applies if a party accrues such fees involuntarily. This means that defendants can never recover administrative fees, while plaintiffs always can. This Court's precedent counsels a more discretionary approach that considers the timing of the proceeding and the overlap of issues.

ARGUMENT

A. The Court should grant *certiorari* to prevent further departure from its precedent on fee-shifting statutes, resolve a circuit split, and clarify the scope of § 285 now that new rules have been imposed on all district courts

Section 285, and other statutes like it, provide district courts broad discretion to deter exceptional conduct. Its text is simple:

> The court in exceptional cases may award reasonable attorney fees to the prevailing party.

35 U.S.C. § 285.

The text limits who may receive an award—"the prevailing party"; when they may receive an award—"in exceptional cases"; and what may be awarded—"reasonable attorney fees."

It does not limit who may be taxed. And it does not limit fees to "involuntary" actions. That is left to the sound discretion of the district court.

As this Court previously recognized, Section 285's ""text is patently clear. It imposes one and only one constraint on district courts' discretion to award attorney's fees in patent litigation: The power is reserved for 'exceptional' cases." *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 553 (2014). In *Octane Fitness*, this Court rejected an "unduly rigid" exceptional-case standard, finding that it "impermissibly encumber[ed] the statutory grant of discretion to district courts." *Id*. at 553.

Here, the Federal Circuit again ignores the statute's broad text. In doing so, it weakens a district court's ability to deter exceptional conduct. The decision limits who is liable, and it limits how.

On the first, the decision's reasoning is internally inconsistent. The panel decision concedes that "Section 285 is silent as to who can be liable for a fee award." Slip. Op. at 11. But instead of taking this silence for what it is—an invitation to district courts to decide who is liable—the court reads into it an implied restriction that protects attorneys from the consequences of their own exceptional conduct. In doing so, the panel essentially holds that fee-shifting provisions must "expressly identify counsel as liable" to apply to attorneys. *Id*. at 12. On the other hand, the panel noted that Section 285 *does* apply to *other kinds of* third parties, even though the statute is also silent on those. *Id*. at 13.

To reconcile these inconsistent conclusions, the opinion cites Fed. R. Civ. P. 11 and 28 U.S.C. § 1927. *Id*. But the sanctions in these provisions generally apply to all civil litigation. They s*upplement* rather than limit fee awards of specific causes of actions. Relying on them to rewrite Section 285 was improper. And, as discussed in Section B, *infra*, this sets a dangerous precedent because, in patent cases, the attorneys are too often responsible for a case's exceptionality.

The decision also departs from holdings of other Circuits regarding similarly broad fee shifting statutes. As the Petition points out, the Federal Circuit's decision is at odds with a Fifth Circuit decision involving the identical provision for trademark cases. Petition at 11–12. And in another case dealing with another fee-shifting provision that was silent on liability, the Seventh Circuit refused to limit liability to defendants, finding that Congress's concern in creating the fee-shifting statute was "to fashion the parameters of *eligibility* for fee awards, rather than to fix with precision the bounds of *liability* for such awards." *Charles v. Daley*, 846 F.2d 1057, 1064 (7th Cir. 1988) (emphasis in original); *c.f. Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754 (1989) (allowing fees against civil rights intervenors only if their action was frivolous, unreasonable or without foundation). While *Daley* involved a civil rights statute, its logic applies to Section 285, which also identifies who is eligible for the fee award, but not who is liable.

Many fee-shifting statutes are silent on liability.[2] Therefore, resolving this issue now will prevent further conflicting precedent among the circuits. *Ruckelshaus v. Sierra Club*, 463 US 680, 691 (1983) ("[S]imilar attorney's fee provisions should be interpreted *pari passu*.")

Because of the Federal Circuit's exclusive jurisdiction over patent cases, the challenged opinion binds all district courts. 28 U.S. Code § 1295. And the decision is absolute. On the first issue presented, the panel did not just hold that district courts may decline to tax fee awards against counsel, but that "liability for attorneys' fees awarded in § 285 does not extend to counsel."

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[2] *See, e.g.*, 15 U.S.C. § 1117(a) (identical fee-shifting language); 7 U.S.C. 2565 (identical fee shifting language); 17 U.S.C. §1323(d) ("[T]he court may award reasonable attorney's fees to the prevailing party."); 18 U.S.C. § 1836(b)(3)(D) ("In a civil action brought under this subsection with respect to the misappropriation of a trade secret, a court may . . . award reasonable attorney's fees to the prevailing party."); *see also, e.g.,* 33 U.S.C. § 1365(d); 29 U.S.C. § 1451(e); 42 U.S.C. § 1988.

101 F.4th 1366, 1372. And because administrative challenges under the America Invents Act are always "voluntary" (even if the sole result of a plaintiffs' abuse), the decision forecloses broad swaths of fees incurred by infringement defendants.

Practically, to some repeat players, patent litigation is a game of volume. For defendants, the cheapest way to fight back (by Congressional design) is to ask the Patent Office to review the patent's validity. If fee-shifting statutes are as fenced in as the Federal Circuit says, the repeat players will continue press their luck without real skin in the game, while defendants can only lose.

For all of these reasons, the questions presented are well-developed for this Court's review.

B. The panel's decision creates an extra-statutory loophole that may be exploited by counsel who are repeat players in exceptional cases

The panel held "that liability for attorneys' fees awarded under § 285 does not extend to counsel." Slip Op. at 10. Respectfully, this holding too broadly and categorically insulates lawyers who engage in bad faith conduct. It is also inconsistent with this Court's holding in *Roadway Express, Inc. v. Piper*, which observed that district courts could exercise their inherent power and tax attorney fees against counsel. 447 U.S. 752, 766–767 (1980). It makes little sense that district courts have authority to tax fees against counsel under their inherent power, but not a fee-shifting statute that leaves the question of liability to the courts.

The attorney carveout creates an easy loophole for repeat players to exploit. According to one study, roughly one-third of all Section 285 awards go unpaid or unsettled. Adam Shartzer & Josh Carrigan, Patent Fee- Shifting Often Leaves Prevailing Parties Unpaid, Law360 (Dec. 8, 2022), https://www.law360.com/articles/1556062/. The vast majority of unpaid fee awards are the responsibility of shell company plaintiffs whose only business is patent monetization—such plaintiffs are known as a non-practicing entities, or NPEs. "NPEs account for almost 90% of the cases where "NPEs account for almost 90% of the cases where fees were assessed but never paid." *Id.*

This is no theoretical concern. In courts who permit it, discovery into third-party funding has revealed that repeat players—including the attorneys themselves—often control and benefit from these NPE campaigns. Amicus presents two case studies involving repeat offenders behind suspected file-and-settle NPEs who use the cost of defense, not the merits of a claim, to leverage payouts, and where attorneys control the case or even have a controlling interest. Unfortunately, these are not isolated cases. *See* Petition at 26; *see also Symbology Innovs., LLC v. Valve Corp.*, No. 2:23-cv-00419, 2025 WL 364075 at *8 (E.D. Tex. Jan. 31, 2025) (observing that plaintiff's sanctioned counsel had appeared in Eastern District of Texas "in over 200 patent cases in the last four years"). These examples demonstrate how sophisticated schemes to avoid liability under Section 285 and other sanctions will get if district court discretion is needlessly limited.

1. Case Study: IP Edge and Mavexar

The District Court of Delaware found that two unnamed parties run by lawyers, IP Edge and Mavexar, concocted a scheme designed to shield themselves from liability for exceptional litigation. First, they and their local attorneys would identify patents and plan a litigation campaign. Then they would identify and convince an unsophisticated layperson to act as the owner of a newly formed limited liability company (LLC), promising these individuals a small percentage as passive income. Finally, they would file many suits in the LLC's name. The LLC would be the named plaintiff, while IP Edge, Mavexar, and counsel handled everything from filing to settlement. For their part, counsel rarely if ever met with the owners, who were often unaware of settlements, motions, or dismissals; instead, counsel worked directly with or for IP Edge and Mavexar. With this scheme, in the event someone did in fact pierce the veil or seek fees from the "owners", the unwitting Average Joe would be on the hook, not the sophisticated attorneys and agents who ran the campaigns.

As summarized by the Federal Circuit, the District of Delaware found that these nonparties:

> created [multiple] plaintiff LLCs, recruited outside individuals to serve as their sole owners; assigned patents to the plaintiff LLCs for little or no consideration; retained the rights to the majority of royalties and settlement proceeds; and reported a complete assignment to the [PTO]—all without disclosing IP Edge's ongoing rights in any pa-

> tent-related proceedings. . . . IP Edge and Mavexar then directed infringement litigation asserting those patents — including overseeing the attorneys and agreeing to settlements — with seemingly little to no input from the plaintiff LLCs' owners.

Backertop Licensing LLC v. Canary Connect, Inc., 107 F.4th 1335, 1338 (Fed. Cir. 2024) (citations omitted). The district court also found that Backertop's attorneys were attorneys were "filing, settling, and dismissing litigation **at the direction of Mavexar, a non-legal consulting firm, without the informed consent of the plaintiff LLCs' owners**," who was a paralegal in Backertop's case. *Id*. (emphasis added) (citations omitted). As this scheme unraveled, the attorneys sought to withdraw, citing an inability to communicate with their client. *Id*. at 1339–40.

In a hearing involving another IP Edge/Mavexar entity, Swirlate, the district court observed that litigation counsel began working on the cases with IP Edge and Mavexar before the plaintiff was even created. Hearing Transcript, *Swirlate IP LLC v. Lantronix, Inc.*, No. 1:22-cv-00249-CFC, Dkt. #42, 5:19-6:22 (D. Del. Sep. 19, 2024) ("Swirlate Hearing Tr."). Regarding Swirlate's counsel, the district court lamented "that the interests that he was representing were Mavexar's and IP Edge's, only secondarily Swirlate." *Id*. at 514:14–515:4.

As the Petition indicates, discovery in cases involving Nimitz Technologies LLC, Lamplight Licensing LLC and Mellaconic IP LLC uncovered similar schemes. *See Nimitz Technologies LLC v. CNET Media,* *Inc.*, No. CV 21-1247-CFC, 2023 WL 8187441 (D. Del. Nov. 27, 2023); *see also* Petition at 26.

In almost all of these cases, the official owners of these LLCs were laypersons unfamiliar with the nuances of patent law. Some were under the impression that they were *Mavexar's* clients, and the patent-holding companies created in their names would "assume all the risk" and receive a tiny portion of any proceeds, while IP Edge and Mavexar acted on their behalf. *Id.*, at *32.

Swirlate's owner is a stay-at-home mother. Swirlate Hearing Tr. at 11:22-12:3. Swirlate's owner testified that patent monetization was presented "as a business opportunity from a friend" after she expressed a desire to go back to work. *Id*. at 12:18-13:23. According to this testimony, Mavexar would advance costs for the cases. *Id*. at 15:1-8. She was under the impression that the only risks were acting as a witness and owing money from cost advancements, but she was assured that "they [Mavexar] are very good, and they try their very best not to put their clients in the position." *Id*. at 15:9-16:12. Mavexar handled the LLC creation, paid its owner through her personal account directly, and provided her with tax forms reflecting her income. *Id*. at 16:21-18:17.

Nimitz's owner could not answer a single question about its patent or how Nimitz came to acquire it, only that Mavexar somehow acquired it and, in exchange, he would "assume liability." *Nimitz*, 2023 WL 8187441 at *3, *31. As in Swirlate, Nimitz's counsel began preparing claim charts for complaints before Nimitz was even created. *Id*. at *5. And counsel had not had a single communication with the owner, the "sole natural person associated with Nimitz," before filing eleven cases and settling seven of them. *Id.* at *30.

Mellaconic's owner is a proprietor of a food truck and restaurant" *Id.* at *10." Mellaconic owns only patents and patent applications, including one asserted in 44 cases across nine district courts. *Id.* at *11. Mellaconic's owner had not reviewed the patents and paid nothing to acquire them. *Id.* at *11-13. The owner testified that he was approached by an individual with Mavexar who "pushed [him] with the opportunity, selling the patents" and told him it would be a way "to make passive income." *Id.* at *11 (internal quotations omitted). He receives 5% of the proceeds from any patent litigation and apparently assumes all liability should things go wrong. *Id.* at *11-12; *see also id.* at *12 n.10.

Lamplight's owner makes her living in healthcare. *Id.* at *23–24. Like the other IP Edge/Mavexar entities, Lamplight only owns patents and has no employees, just an owner. *Id.* at *18–19, 26. And Lamplights attorney had not spoken with her before filing six cases, and moving to dismiss four of them, in Lamplight's name. *Id.* at *24.

These cases are just of the tip of the iceberg. IP Edge is reportedly related to over 200 patent owners that have been involved in *over 4,500* cases over ten years. *See* RPX Empower, IP Edge LLC, available at https://insight.rpxcorp.com/entity/1034412-ip-edge-llc. And they are not the only patent monetizers who set up patent holding companies as liability shields.

Under the Federal Circuit's decision, the only persons within the court's sanctioning power under Section 285 in these cases are LLCs with no assets other than patents. In some cases, where there even is an attempt to recover fees, it would be the unsophisticated owners, who are likely judgment proof, that are liable under the Federal Circuit's ruling. The repeat players—i.e., the controlling attorneys—then continue to profit without consequence.

2. Case Study: Ramey Law

In *California Innovations*, former counsel Mr. William Ramey was accused repeatedly of incompetent representation. *California Innovs. Inc. v. Ice Rover, Inc.*, No. 22-CV-01986, Dkt. #58 at 1-2 (D. Colo. Nov. 11, 2023). The court ordered Mr. Ramey to identify the "number of times in the past three years that Mr. Ramey, Ramey LLP, or the clients of Ramey LLP have been sanctioned by any court or bar disciplinary body, including any public or private censures, and any orders to pay attorney's fees for any reason," as well as pending motions. *Id.* at 3.

Mr. Ramey identified six cases where he was counsel and a court issued Section 285 sanctions and nine cases with pending fee motions in the relevant timeframe. *See California Innovs.*, Dkt. #61-1, ¶–11 (Dec. 14, 2023). His former client's new counsel identified two additional Section 285 sanctions. *Id.*, Dkt. #66, ¶ 4.

In one of these cases, *WPEM, LLC v. SOTI Inc*, the district court discovered that the LLC's corporate representative, registered agent, and managing member was an attorney with Mr. Ramey's firm, then Ramey & Schwaller. Hearing Transcript, No. 18-cv-00156, Dkt. #51, 24:24-25:1, 24:16-18, 24:19-20, 28:22-25 (E.D. Tex.

Nov. 26, 2019).[3] Similar ties between patent-holding LLC and law firm existed for others. *Id.* at 25:10-27:11.

Cases involving another plaintiff identified in *California Innovations*, Traxcell LLC, revealed that these funders and law firms have an even greater interest in the case than the LLCs themselves. As summarized by a bankruptcy court, a district court had awarded Section 285 fees to multiple defendants in different cases asserted by Traxcell. *In Re Traxcell Techs., LLC*, 657 BR 453, 457 (Bankr. W.D. Tex. 2024). Traxcell appealed the fee orders, lost, and was ordered to transfer its patents to Verizon in state court. *Id.* at 457. Traxcell tried to sue Verizon for patent infringement again, but these were dismissed in light of the state court's receivership order. *Id.* at 457–58.

In dismissing Traxcell's Chapter 11 filing as filed in bad faith, the bankruptcy court noted that Traxcell was structured to receive hardly any proceeds—only 5% — while the "funder," AiPi, and law firm enjoyed the remaining 95%. *Id.* at 457. Indeed, Traxcell listed its litigation counsel as its largest creditor, with a $1.9 million claim. *Id.* at 458. The amount owed to AiPi was, suspiciously, "unknown." *Id.* at 458. Despite its patents generating about $3.5 million in litigation and licensing, Traxcell's "debt" to funder and counsel rendered it unable to satisfy any judgment creditor, which included defendants who had filed successful 285 motions and were owed about $1.3 million in fees. *Id.*[4]

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[3] The Federal Circuit affirmed the fee award without addressing the LLC's ties to the firm. 837 F. App'x 773, 774 (Fed. Cir. 2020).

[4] Traxcell has filed another case to enjoin the Verizon fee order, arguing that the district court lacked subject matter jurisdiction. Complaint, *Traxcell Techs., LLC v. Cellco Partnership*, 6:24-mc-

Section 285 fees are supposed to be for "the rare case." *Octane Fitness*, 572 U.S. at 555. So when one lawyer is involved more than a dozen cases with sanctions or fee motions in just three years, it raises eyebrows. *California Innovs.*, Dkt. #61-1, ¶ 10 (Ramey Decl.).[5] When the "party" is little more than a legal fiction, and counsel is responsible for the exceptional litigation positions, courts can only deter misconduct by holding that counsel liable.

3. Summary

The "essential goal" of fee-shifting statutes, "to do rough justice," is unattainable when the prevailing party faces a penniless puppet. *Fox v. Vice*, 563 U.S. 826, 837 (2011). Drawing bright-line exemptions from fee liability in Section 285 seems unwise in a system where one attorney can be linked to a half-dozen Section 285 awards over just 3 years, and where the only natural persons within the district court's grasp are laypersons lured in with promises of passive income while agents and counsel handle the entire litigation.

Individual attorneys and firms are often the common denominator among exceptional patent cases. Fee-

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00613, Dkt. #1 (W.D. Tex. Dec. 2, 2024). According to Cellco, this same theory was rejected by a state court. Motion to Dismiss, Dkt. 14 at 13 (Dec. 27, 2024). In its appeal disputing the fees, Traxcell never raised this theory. Opening Brief, *Traxcell Techs. LLC v. AT&T Inc.*, No. 2023-1246, Dkt. #34 at 2 (Fed. Cir. Apr. 10, 2023).

[5] Ultimately, Mr. Ramey was not sanctioned in *California Innovations*, which devolved into whether the funder failed to provide discovery support. *Compare id.*, Dkt. #61-1 at ¶ 4, *with id.,* Dkt. #66 at ¶ 1. Instead of untangling how attorney and funder could confuse who was responsible for the actual litigating, the district court withdrew its show-cause order. *Id.*, Dkt. #69.

shifting statutes should not be restrictively construed as powerless against these repeat players. But that now the rule binding on all district courts in patent cases. Holding that Section 285 can never reach such counsel regardless of district court discretion undermines "elemental notions of fairness," which "dictate that one who causes a loss should bear the loss." *Owen v. Independence*, 445 U.S. 622, 654 (1980).

C. The decision's involuntariness requirement departs from this Court's precedent, which permits fee-shifting of reasonable administrative fees intimately tied to the district court action

The panel decision raises an important question about when fees in related administrative challenges are recoverable under Section 285. The line drawn by the Federal Circuit in this case—involuntariness—essentially makes the answer "always" for plaintiffs and "never" for defendants in patent cases. In doing so, the panel decision court has created inconsistent precedent that diverges from a more holistic standard outlined in *Amneal Pharms. LLC v. Almirall, LLC*, 960 F.3d 1368 (Fed. Cir. 2020).

In *Amneal*, the Federal Circuit indicated that fees would be allowed where "Patent Office 'proceedings substituted for the district court litigation on all issues considered by the PTO and the Board'" with respect for "fees incurred *after* the filing of a civil action." 960 F.3d 1368, 1372. In other words, the standard set in *Amneal* involved two factors: overlap and timing. While the *Amneal* court rejected the fee request because the administrative fees in that case were incurred "before this court has ever asserted its jurisdiction," it stressed that fees *could be* recovered for proceedings "'intimately tied to the resolution of the judicial action and necessary to the attainment of the results Congress sought to promote by providing for fees.'" *Amneal*, 960 F.3d at 1372 (quoting *Sullivan v. Hudson*, 490 U.S. 877, 888 (1989)).

The panel opinion in this case conflates the timing factor of *Amneal* with whether the action was voluntary. Slip. Op. at 8. But voluntariness is not the standard under Section 285—reasonableness is. Had the panel followed its own precedent in *Amneal*, it would have reached the same conclusion a previous panel reached in *PPG Indus., Inc. v. Celanese Polymer Specialties Co.*, 840 F.2d 1565 (Fed. Cir. 1988). In *Celanese*, the court found that a party was entitled to fees in a reissue proceeding that the defendant attended after the district case began, would "replace the district court litigation," and involved "precisely the same type of work." 840 F.2d 1565 at 1568. By departing from *Celanese*, the Federal Circuit's current decision creates confusing and conflicting precedents.

In this case, as in many patent cases, the fees were incurred in a related *inter partes* review (IPR) proceeding filed after the lawsuit began. The IPR was so "intimately tied to the resolution of the judicial action" that it resolved the suit. See *Dragon Intell. Prop., LLC v. Apple Inc.*, 700 F. App'x 1005, 1006 (Fed. Cir. 2017) (infringement appeal "moot" after PTAB invalidity decision affirmed). As the dissenting opinion recognized, the IPR replaced the invalidity portion of the district court case. This is not the odd case out— every year, over a thousand challenges like this are filed, primarily to streamline litigation. Unified Patents, *Patent Dispute: Year in Review*, p. 2 (Jan. 8, 2024), https://www.unifiedpatents.com/insights/2025/1/10/patent-dispute-report-2024.

That IPRs substitute—less expensively—for district courts on the highly technical issue of invalidity is consistent with their Congressional purpose. *See* H.R. Rep. No. 112-98, pt. 1, p. 48 (2011) (Inter partes review is a "quick and cost effective alternativ[e] to litigation"). Indeed, defendants are estopped from pursuing theories they "raised or reasonably could have raised" in an IPR. 35 U.S.C. § 315(e)(2).

Given their purpose and ability to moot a district court case, IPRs are "intimately tied to the resolution of the judicial action and necessary to the attainment of the results Congress sought to promote by providing for fees," under Section 285 and, therefore, "should be considered part and parcel of the action for which fees may be awarded." *Hudson*, 490 U.S. at 888. Further, as in EAJA cases, district courts in patent cases retain jurisdiction over the suit while the related administrative proceeding is pending. *Id*. at 887–88. And because district courts may, and often do, stay their cases in light of a co-pending IPR, the claim often "'depends for its resolution upon the outcome of the administrative proceedings.'" *Id*. at 882.

The panel's new line also creates a double standard: a patentee who opposes an IPR challenge is involuntary and, therefore, may be able to recover fees, while a defendant/challenger will be considered voluntary, even if the need to raise that same defense was not. Such a lopsided application of Section 285 is untenable under both this Court's precedent and Federal Circuit precedent. *See Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994) ("Prevailing plaintiffs and prevailing defendants are to be treated alike, but attorney's fees are to be awarded to prevailing parties only as a matter of the court's discretion"); *see also Eltech Sys. Corp. v. PPG Indus., Inc.*, 903 F.2d 805, 811 (Fed. Cir. 1990) ("[T]here is and should be no difference in the standards applicable to patentees and infringers who engage in bad faith litigation.").

Certiorari is therefore appropriate, as only this Court can set the correct standard and prevent future imbalance in applications of Section 285.

CONCLUSION

The petition should be granted to (1) identify the circumstances in which Section 285 allows district courts to tax fees on non-parties, including counsel, responsible for exceptional cases, and (2) clarify whether and when fee-shifting statutes allow the recovery of related administrative fees.

Respectfully submitted.

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