No. 12-1184

IN THE

SUPREME COURT OF THE UNITED STATES

OCTANE FITNESS, LLC,

Petitioner,

v.

ICON HEALTH & FITNESS, INC,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF *AMICI CURIAE* ELECTRONIC FRONTIER FOUNDATION, APPLICATION DEVELOPERS ALLIANCE, ENGINE ADVOCACY, AND PUBLIC KNOWLEDGE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The Electronic Frontier Foundation ("EFF") is a non-profit civil liberties organization that has worked for more than 20 years to protect consumer interests, innovation, and free expression in the digital world. EFF and its 24,000 active members have a strong interest in helping the courts and policymakers to strike the appropriate balance between intellectual property and the public interest. As part of its mission, EFF has often served as *amicus* in key patent cases, including *Microsoft Corp. v. i4i Ltd. P'ship, et al.*, 131 S. Ct. 2238 (2011); *Bilski v. Kappos*, 130 S. Ct. 3218 (2010); *Quanta Computer, Inc. v. LG Elecs. Corp.*, 553 U.S. 617 (2008); *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398 (2007); and *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2005).

Engine Advocacy is a non-profit organization that supports the growth of technology entrepreneurship through economic research, policy analysis, and advocacy on local and national issues. As part of its advocacy efforts, Engine has built a coalition of more than 500 high-growth businesses and associa-

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or their counsel, made a monetary contribution intended to fund its preparation or submission. Letters of the Parties' general consent to the filing of amicus briefs are on file with the Court. Web sites cited in this brief were last visited on December 4, 2013.

tions, pioneers, innovators, investors, and technologists from all over the country, committed to taking action on the policy issues that affect the way they run their businesses. With the burden of litigation by patent assertion entities resting unfairly on the smallest—and most productive—businesses in the economy, Engine Advocacy, as the voice of startups in government, has a vested interest in leveling this litigation playing field.

The Application Developers Alliance ("Alliance") is a global association of more than 30,000 individuals and more than 140 companies who design and build apps, especially for use on mobile devices like smartphones and tablets. Apps run on software platforms, including Google's Android, Apple's iOS, and Facebook, and are sold or distributed through virtual stores like Apple's App Store, Google's Play Store, Amazon.com, and Handango. The Alliance was formed to promote continued growth and innovation in the rapidly growing app industry, and routinely speaks as the industry's voice to legislators and policy-makers.

Public Knowledge is a non-profit organization that is dedicated to preserving the openness of the Internet and the public's access to knowledge; promoting creativity through balanced intellectual property rights; and upholding and protecting the rights of consumers to use innovative technology lawfully. As part of this mission, Public Knowledge advocates on behalf of the public interest for a balanced patent system, particularly with respect to new and emerging technologies. Public Knowledge has served as *amici* in key patent cases, such as *Microsoft Corp. v. i4i Ltd. P'ship*, 131 S. Ct. 2238 (2011); *Bilski v. Kappos*, 130 S. Ct. 3218 (2010); *Quanta Computer, Inc. v. LG Elecs. Corp.*, 553 U.S.

617 (2008).

SUMMARY OF ARGUMENT

There has lately been much talk of patent litigation abuse. *See Congress Takes on Abusive Patent Suits,* N.Y. Times (Nov. 30, 2013);[2] Sam Gustin, *Congress Is Poised to Send Patent Trolls Back to Their Caves*, Time (Dec. 3, 2013);[3] Curt Bramble, *Patent Trolls Spell Trouble for America's Economy*, Reuters (Nov. 18, 2013);[4] Morris Panner, *Absent Patent Troll Reform, Silicon Valley's Innovation Leadership Could End*, Forbes (Nov. 11, 2013).[5] And it should be unsurprising that patent litigation abuse has garnered the attention of both the media and Congress: instances of such abuse have been increasingly—and dangerously—common. And not without treacherous effects. The financial harm that comes from the so-called patent troll problem is billions of dollars annually, and the problem is blamed for small businesses shutting their doors, for investors

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[2] Available at http://www.nytimes.com/2013/12/01/opinion/sunday/congress-takes-on-abusive-patent suits.html.

[3] Available at http://business.time.com/2013/12/03/congress-is-poised-to-send-patent-trolls-back-to-their-caves/?iid=biz-main-lead

[4] Available at http://blogs.reuters.com/great-debate/2013/11/18/patent-trolls-spell-trouble-for-americas-economy/

[5] Available at http://www.forbes.com/sites/realspin/2013/11/18/absent-patent-troll-reform-silicon-valleys-innovation-leadership-could-end/.

pulling out of deals, and—perhaps most dangerously—for an untold number of inventions that will never see the light of day.

Commentators have rightfully laid blame for the rise in abusive patent litigation on many issues, such as dubious patent quality and the lack of transparency surrounding patent ownership. But *amici* find a significant concern drives much of the problem, particularly as it relates to the small businesses and startups it represents. That concern is the issue of this case: an inability to hold abusers accountable, due to an inappropriately high bar for attorney fee shifting, created by an overzealous Federal Circuit misinterpreting Section 285 of the Patent Act.

Read correctly, that section deters abusive and frivolous litigation by protecting defendants through the recovery of attorneys' fees and costs. But the Federal Circuit's erroneous interpretation fails to provide any substantial promise—or even hope—of recovering those fees and costs in even the most egregious infringement cases.

The consequence of the Federal Circuit's withering of Section 285 protection is the creation of an industry of patent abusers, decimating the very small businesses and startups that drive American innovation. The intimidating cost of patent litigation is often sufficient to defeat those small parties before they even enter the courthouse. These costs are not just legal fees – they are also the stress associated with litigation; employee time lost in deposition, discovery, and trial; and the stifling of productive output during the pendency of litigation. Thus, facing the threat of a lawsuit, a potential defendant finds itself with virtually no choice but to settle, even if it believes it has a meritorious noninfringement or invalidity case. And the proverbial analogy continues

full-circle: feeding a troll just emboldens that troll to act again, while blighting the innovators upon whom the trolls feed.

Respectfully, *amici* urge this Court to correct the Federal Circuit's misreading of the statute, and restore Section 285 to its intended purpose of deterring those improper and abusive cases that tarnish our American innovation economy.

ARGUMENT

I. BY MISREPRESENTING THE EXCEPTIONAL CASE STATUTE, THE FEDERAL CIRCUIT HAS FOSTERED AN INDUSTRY OF ABUSIVE PATENT LITIGATION THAT THREATENS SMALL BUSINESSES, STARTUPS AND AMERICAN INNOVATION.

Petitioner argued, and a likely number of other *amici* will discuss, the recent increase in litigation brought by patent assertion entities (PAEs), also known as non-practicing entities, patent monetizers, or, more colloquially, patent trolls. As Judge Posner of the Seventh Circuit put it, PAEs "are companies that acquire patents not to protect their market for a product they want to produce—patent trolls are not producers—but to lay traps for producers, for a patentee can sue for infringement even if it doesn't make the product that it holds a patent on." Richard A. Posner, *Why There Are Too Many Patents in America*, The Atlantic (July 12, 2012).[6] We write to offer a distinct and important perspective—that of

[6] Available at http://www.theatlantic.com/business/archive/2012/07/why-there-are-too-many-patents-in america/259725/.

small businesses and startups hit especially hard by PAE litigation trends.

A. The Federal Circuit's Overly Rigid Standard is Nearly Impossible to Meet, thus Rendering Section 285 Meaningless.

Section 285 provides that the district court may award attorneys' fees in "exceptional cases." 35 U.S.C. § 285. The Federal Circuit has imposed a rigid standard for accused infringers seeking fees under this section: "Absent misconduct in conduct of the litigation or in securing the patent, sanctions may be imposed against the patentee *only if* both (1) the litigation is brought in *subjective bad faith*, and (2) the litigation is *objectively baseless*." *Brooks Furniture Mfg., Inc. v. Dutailier Int'l, Inc.*, 393 F.3d 1378, 1381 (Fed. Cir. 2005) (emphasis added). As Petitioner argued, this standard is inconsistent with both congressional intent and with well-settled interpretations of the identical provision in the Lanham Act. *See*, *e.g.*, *Noxell Corp. v. Firehouse No. 1 Bar-B-Que Rest.*, 771 F.2d 521, 526 (D.C. Cir. 1985) ("Something less than 'bad faith,' we believe, suffices to mark a case as 'exceptional.'); Brief for Petitioner at 22-38, *Octane Fitness, LLC v. Icon Health & Fitness, Inc.,* Case No.12-1184 (2013) [hereinafter Pet'r Br.].

The Federal Circuit's mistake can be traced to its reliance on *Prof'l Real Estate Investors v. Columbia Pictures Industries*, 508 U.S. 49 (1993) [hereinafter *PRE*]; *see also* Pet'r Br. at 23-25. In *Brooks*, the appeals court directly imported its test for "exceptional case" from *PRE*. *See* 393 F.3d at 1381; *see also Aspex Eyewear Inc. v. Clariti Eyewear, Inc.*, 605 F.3d 1305, 1314 (Fed. Cir. 2010). But the Federal Circuit's

reliance on *PRE* was entirely inappropriate. In *PRE*, this Court considered when the First Amendment provides litigation activity immunity from antitrust liability. *See* 508 U.S. at 56. However, Section 285 of the Patent Act does not raise these First Amendment concerns, so it need not be construed so narrowly. *See Premier Elec. Const. Co. v. Nat'l Elec. Contractors Ass'n, Inc.*, 814 F.2d 358, 373 (7th Cir. 1987) (firmly rejecting the argument that the *Noerr-Pennington* doctrine places limits on fee-shifting).

By wrongfully equating the Patent Act's "exceptional case" standard with *PRE*'s strict First Amendment test, the Federal Circuit has made Section 285 almost irrelevant. Indeed, the appeals court construes Section 285 so narrowly that it provides *less* protection to accused infringers than Federal Rule of Civil Procedure 11. *See Storey v. Cello Holdings, LLC*, 347 F.3d 370, 387 (2d Cir. 2003) (the Rule 11 standard "is objective unreasonableness, and is not based on the subjective beliefs of the person") (citation omitted); *Smith v. Ricks*, 31 F.3d 1478, 1488 (9th Cir. 1994) (counsel cannot "avoid the sting of Rule 11 sanctions by operating under the guise of a pure heart and empty head") (citation omitted). Unsurprisingly then, Section 285 has fallen into almost complete disuse. From 2005-2012, attorneys' fees were awarded in less than two percent of patent cases. *See* Colleen V. Chien, *Reforming Software Patents*, 50 Hous. L. Rev. 325, 377 (2012).

In addition to rendering Section 285 irrelevant, the Federal Circuit's interpretation also makes it superfluous. Even aside from Rule 11, the common law already allows courts to award fees based on a finding of bad faith. Henry Cohen, *CRS Report for Congress: Awards of Attorneys' Fees by Federal Courts and Federal Agencies* (Congressional Re-

search Service 2008)[7] at CRS-4, (citing *Hall v. Cole,* 412 U.S. 1, 5 (1973) ("[I]t is unquestioned that a federal court may award counsel fees to a successful party when his opponent has acted 'in bad faith, vexatiously, wantonly, or for oppressive reasons . . . .'") (internal citations omitted)). Thus, Section 285 as currently interpreted provides no value over what the common law already contemplates. This could not possibly be what Congress intended when it enacted Section 285.

B. The Direct Consequences of a Virtually Unreachable Exceptional Case Standard is the Rise of Abusive Litigation Seeking to Extract Undue Settlements.

In its opening brief, Petitioner points out that the rigid test imposed by *Brooks* is particularly harmful now, when "litigation abuse by some patentees is a grave and growing national problem." (Pet'r Br. at 16.) Petitioner underestimates the relationship between the *Brooks* test and the growth of this problem. In fact, *Brooks'* rigid standard has directly led to the dangerous rise in litigation abuse.

By simply raising a credible threat of extended litigation, a PAE can pressure a defendant to settle regardless of the merits of the underlying infringement allegations. *See* David L. Schwartz, *The Rise of Contingent Fee Representation in Patent Litigation*, 64 Ala. L. Rev. 335, 370 (2012) ("It is not uncommon for settlement demands to be in the range of $100,000 or $250,000, even though the cost of litigat-

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[7] Available at http://www.fas.org/sgp/crs/misc/94-970.pdf.

ing the case for an accused infringer would be close to one million dollars per year. Sometimes the demands are as low as $5,000 or $10,000."). PAEs often emphasize the cost of litigation, rather than the value of the patent, when making settlement demands. *See*, *e.g.*, Letter from Aeton Law Partners to Danny Seigle, Director of Operations of FindTheBest (May 30, 2013)[8] (letter from PAE threatening "protracted discovery"). The PAE business model has thereby created a "questionable market for the settlement of lawsuits involving weak, outdated or irrelevant patents." Robert P. Merges, *The Trouble With Trolls: Innovation, Rent-Seeking, and Patent Law Reform*, 24 Berkeley Tech. L.J. 1583, 1583 (2009).

This "questionable market" is driven by what has become a largely irrelevant Section 285. A potential defendant who faces a lawsuit with no hope of remuneration and the prospect of mounting legal bills or an escape route for a fraction of those bills will almost always chose the escape route even where that payment is not justified. In the present case, Octane had the will and the resources to fight back, but we have no way of knowing how many companies made the other choice. Ensuring that Section 285 empowers defendants will incentivize more companies like Octane to take on these suits, invalidating patents of questionable quality and chilling the dangerous increase of often-meritless litigation and the rise in the "questionable market" of settlements.

It is not just the "questionable market" of settlements that has grown in the face of a weak Sec-

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[8] Available at https://trollingeffects.org/demand/lumen-view-technology-2013-05-30.

tion 285. It is also the amount of patent litigation itself, which has dramatically increased in recent years. Chris Barry, *et al.*, PricewaterhouseCoopers, *2012 Patent Litigation Survey* 6 (2012) [hereinafter PWC 2012].[9] There were 4,015 patent actions filed in 2011, compared to fewer than 3,000 such actions filed in in 2009. *Id.* That number reached 5,189 in 2012. Chris Barry, *et al.*, PricewaterhouseCoopers, *2013 Patent Litigation Survey* 6 (2013) [hereinafter PWC 2013].[10]

While all patent litigation has increased, litigation by patent assertion entities has exploded. PAEs accounted for only about five percent of patent litigation in 2000-2002. James Bessen, Jennifer Ford and Michael Meurer, *The Private and Social Costs of Patent Trolls*, Boston Univ. School of Law, Working Paper No. 11-45 (2011) [hereinafter Bessen 2011], at 6-7.[11] This figure increased to about 22 percent in 2007, and then to almost 40 percent in 2011. Sara Jeruss, Robin Feldman & Joshua Walker, *The Amer-*

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[9] Available at http://www.pwc.com/us/en/forensic-services/publications/2012-patent-litigation-study.jhtml.

[10] Available at http://www.pwc.com/en_US/us/forensic-services/publications/assets/2013-patent-litigation-study.pdf. The 2011-2012 figures are likely impacted by the new joiner rules of the America Invents Acts of 2011 (which made it harder for PAEs to sue multiple defendants in a singe suit). But even accounting for that change, there has been a drastic and sustained increase in PAE litigation since 2004.

[11] Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1930272.

ica Invents Act 500: Effects of Patent Monetization Entities on US Litigation, 11 Duke L. & Tech. Rev. 357, 361, 381 (2012).[12] In 2012, *61 percent* of new patent actions were brought by PAEs. Colleen V. Chien, *Patent Assertion Entities*, presentation to the December 10, 2012 DOJ/FTC Hearing on PAEs, slides 23-24.[13]

The explosive growth in PAE litigation is driven by weak, opportunistic lawsuits. This phenomenon emerges out of the PAE business model itself. For operating companies, patent litigation is very risky because it can provoke countersuits and cause reputational harm in the marketplace. In contrast, PAEs cannot be countersued or impugned since they do not make anything. This means that it can be economical for a PAE to bring suit, and rational for the defendant to settle, regardless of the merits. The lack of any hope of remuneration at the conclusion of a suit—no matter how absurd the lawsuit may be—further incentivizes defendants to take a settlement instead of raising meritorious defenses.

This is reflected in the results of PAE litigation. When rare cases are litigated to judgment, PAEs lose far more often than they win. Indeed, from 1995 to 2012, PAEs lost more than 75 percent of cas-

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[12] Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2158455.

[13] Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2187314. A recent study by the General Accounting Office suggests that the percentage of new patent actions filed by PAEs is lower. The discrepancy would appear to be due to a different definition of PAE (a much narrower definition in the GAO's case).

es decided on the merits. *See* PWC 2013 at 5. And the PAE suits typically faced by startups and app developers represented by *amici*—cases where PAEs assert software-related patents—tend to be the worst of all. From 1995-2012, PAEs alleging infringement of software patents lost approximately *85 percent* of cases decided on the merits. *Id.* at 18. Other studies have confirmed that the most aggressive PAEs bring the weakest cases. Non-practicing entities that assert the same patent in more than eight cases lose more than 90 percent of the time. *See* John R. Allison et al., *Patent Quality and Settlement Among Repeat Patent Litigants*, 99 Geo. L.J. 677, 681 (2011).

With such a poor record of success on the merits, why is the PAE business model flourishing? The answer is that PAEs don't need to bring objectively meritorious suits to make money. Instead, they use the cost of litigation as a weapon to extract settlements. Defending a patent case is extraordinarily expensive. Indeed, while all federal litigation is costly, patent litigation is in a league of its own; some have referred to patent litigation as "the sport of kings".[14] Defending a patent suit can easily cost over $2 million. *See* Fabio Marino & Teri Nguyen, *Are Patent Trolls Now Zeroed In On Start-Ups?*, Forbes (Jan. 17, 2013)[15] (citing survey data compiled by the American Intellectual Property Law Association).

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[14] Rudolph Telscher, *Patent Litigation: The Sport of Kings* (2012), available for purchase at http://www.amazon.com/Patent-Litigation-The-Sport-Kings-ebook/dp/B00AR5I0GY.

[15] Available at http://www.forbes.com/sites/ciocentral/2013/01/17/are-patent-trolls-now-zeroed-in-on-start-ups/.

For small patent cases—defined as suits with less than $1 million at stake—the cost of defense still averages over $600,000. *Id.* While defendants face massive costs, PAEs can litigate far more cheaply. As Chief Judge Randall Rader of the Federal Circuit explained, the "problem stems largely from the fact that, in our judicial system, patent trolls have an important strategic advantage over their adversaries: they don't make anything. So in a patent lawsuit, they have far fewer documents to produce, fewer witnesses and a much smaller legal bill than a company that does make and sell something." Randall R. Rader, Colleen V. Chien, David Hricik, *Make Patent Trolls Pay in Court*, N.Y. Times (June 7, 2013).[16] A properly implemented Section 285 would help put the parties back on even footing by giving defendants leverage to take on the meritorious legal fights.

C. Small Businesses and Startups, Without any Real Protection from Section 285, Bear the Brunt of Harm from Abusive Patent Litigation.

This litigation explosion particularly burdens small companies, which are often the targets of these suits. A recent study has found that nearly 75 percent of venture capitalists have had their portfolios impacted by litigation from a patent troll. Colleen Chien, New Am. Found., *Patent Assertion and*

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[16] Available at http://www.nytimes.com/2013/06/05/o ble at http://www.nytimes.com/2013/06/05/opinion/make-patent-trolls-pay-in-court.html.

Startup Innovation 10 (Sept. 2013).[17] More than half of the defendants involved in litigation brought by patent PAEs are companies with annual revenues of $10 million or less. *Id.* at 11. Professor Chien noted:

> Although large companies tend to dominate patent headlines, most unique defendants to PAE suits are small. Companies with less than $100M annual revenue represent at least 66% of unique defendants and the majority of them make much less than that: at least 55% of unique defendants in PAE suits make under $10M per year. Suing small companies appears [to] distinguish PAEs from operating companies, who sued companies with less than $10M of annual revenue only 16% of the time, based on unique defendants.

Id. at 1-2.

For a large company, being hit by a weak patent lawsuit is an expensive inconvenience.[18] But for

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[17] Available at http://www.newamerica.net/publications/policy/patent_assertion_and_startup_innovation.

[18] Even for large companies, these expenses can quickly add up. In just the last five years, some companies have been hit with over 100 patent lawsuits brought by PAEs. *See* Patent Freedom, *Most Pursued Companies*, available at https://www.patentfreedom.com/about-npes/pursued/ (listing 10 companies sued over 100 times each since 2009). Although big companies can usually absorb the cost

a small company, a single patent suit can be devastating. With defense costs running into the millions, most of these targets are unable to mount an adequate defense. Also, in a small company, key management and engineers must deal with a PAE claim. *See* Colleen Chien, *Startups and Patent Trolls*, 10-13 Santa Clara Univ. School of Law, Legal Studies Research Paper Series, Accepted Paper No. 09-12, (2012). Litigation-based legal expenses can kill small startups entirely, and the mere threat of those expenses can chill innovation.

In another troubling trend, small companies increasingly find themselves targeted by PAEs based on their use of basic technologies, such as using a scanner or wireless Internet. Joe Mullin, *Patent Trolls Want $1,000—For Using Scanners*, Ars Technica (Jan. 2, 2013) (stating "2012 may go down as the year of the user").[19] One analysis has found that the top ten patent litigation campaigns over the past three years (as determined by number of named defendants) all involved users and implementers, rather than manufacturers or sellers, of a technology. Chien, *Patent Assertion and Startup Innovation*, *supra*, at 12. Small companies are particularly vulnerable to such lawsuits as they are unlikely to have been able to negotiate indemnity protection. *Id.* at 13. Oftentimes these companies are not technology companies and have little to no experience in navigating the patent system; they are caught unaware

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of settling and defending these cases, the cumulative cost is staggering.

[19] Available at http://arstechnica.com/tech-policy/2013/01/patent-trolls-want-1000-for-using-scanners.

for using basic, off-the-shelf technology. "Indeed, many businesses have stopped adopting technology altogether to avoid patent infringement claims—for example, scanning to a USB stick to avoid infringing a PDF machine patent, not offering Wi-Fi to customers to avoid Wi-Fi patents, or, in some cases exiting the business or business line." *Id.* at 12.

This explosion of litigation has been costly. According to a congressional study, PAE activity cost defendants and licensees $29 billion in 2011, a 400 percent increase over $7 billion in 2005, and the losses are mostly deadweight, with less than 25 percent flowing to innovation and at least that much going towards legal fees. Brian T. Yeh, Cong. Research Serv., R42668, *An Overview of the "Patent Trolls" Debate*, at Summary and 2 (2012) [hereinafter Yeh][20] (citing James Bessen & Michael Meurer, *The Direct Costs from NPE Disputes* 2, 18-19, (Boston Univ. School of Law, Law and Economics Research Paper No. 12-34 (2012) [hereinafter Bessen 2012]).[21] This research shows that that PAE lawsuits "are associated with half a trillion dollars of lost wealth to defendants from 1990 through 2010. During the last four years the lost wealth has averaged over $80 billion per year." Bessen 2011, *supra*, at 2. And it's not just the economy that feels the pinch, it's the U.S. Patent system as a whole. Colleen Chien & Edward Reines, *Why Technology Customers Are Being Sued En Masse for Patent Infringement & What Can Be Done,* Santa Clara Law Digital Commons, at 4

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[20] Available at https://www.eff.org/sites/default/files/R42668_0.pdf.

[21] Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2091210.

(Aug. 30, 2013).[22]

D. The Correct Standard Would Permit Fee Shifting Whenever A Plaintiff Brings an Objectively Weak Case or Uses the Cost of Defense as a Weapon.

Once stripped of the Federal Circuit's unnecessarily rigid and stringent conditions, Section 285 will be a useful tool for courts to reduce abusive patent litigation. Before its error in *Brooks*, the Federal Circuit applied a more flexible test that considered the totality of circumstances. *See*, *e.g.*, *Multiform Desiccants, Inc. v. Medzam, Ltd.*, 133 F.3d 1473, 1481–82 (Fed. Cir. 1998). If district courts are given the flexibility to consider all the circumstances when applying Section 285, they will be able to shift fees to deter PAEs that bring weak cases and leverage the cost of litigation to extract settlements. As noted above, the most active PAEs tend to bring the weakest cases. *See* Allison, *supra*, at 681 (finding that the most aggressive PAEs lose over 90% of their cases). So a more flexible test, even when applied relatively sparingly, could still have a large impact.

II. THIS COURT'S ANALYSIS OF SECTION 285 MUST PROCEED INDEPENDENT OF CONGRESSIONAL REFORM.

In its opposition to the Petition for Certiorari, the Respondent argued that Petitioner is seeking relief that should come from Congress. Not so. Re-

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[22] Available at http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1799&context=facpubs.

spondent is confusing two issues: so-called fee shifting provisions that are currently pending before Congress and the law that Congress has already passed. The issue in this case is the latter, on which Congress has already spoken when it enacted Section 285.

To be sure, the recent push for legislative reforms—in general, and fee-shifting more specifically—highlights a perception among stakeholders that the current state of the law fails to address the growing "patent troll" problem. For instance, 60 law professors recently wrote:

> In short, high litigation costs and a widespread lack of transparency in the patent system together make abusive patent enforcement a common occurrence both in and outside the technology sector. As a result, billions of dollars that might otherwise be used to hire and retain employees, to improve existing products, and to launch new products are, instead, diverted to socially wasteful litigation.

Professors' Letter in Support of Patent Reform Legislation (Nov. 25, 2013).[23]

The political questions surrounding the costs of PAE litigation and what legislative reforms may happen to curb those costs, however, are irrelevant to the determination of the contours of Section 285, which Congress first passed in 1946 and then amended in the Patent Act of 1952. Moreover, it is

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[23] Available at https://www.eff.org/files/2013/11/25/prof_ltr_nov_25_0.pdf.

unclear what—if anything—Congress will do in response to the recent political pressure, and this Court would respectfully be remiss to not address the question now.

CONCLUSION

Amici respectfully urge this Court to return Section 285 to its original moorings by giving lower courts the necessary discretion and flexibility to grant fee awards.

Dated: December 9, 2013

Respectfully submitted,

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