

In The
Supreme Court of the United States

MICROSOFT CORPORATION,

Petitioner,

v.

i4i LIMITED PARTNERSHIP, *et al.*,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Federal Circuit**

**AMICI CURIAE BRIEF OF INTERNET RETAILERS
IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICI CURIAE*

Amici Curiae Crutchfield Corporation, J.C. Penney Corporation, Inc., L. L. Bean, Inc., Newegg, Inc., Overstock.com, Rent-A-Center, Inc., and the Retail Litigation Center, Inc. (collectively, the “Internet Retailers”) submit this brief in support of the Petitioner.¹ The Internet Retailers do not have an interest in the particular dispute between Microsoft and i4i. They do have an interest, however, in a level playing field where the same standard of proof applies to plaintiffs attempting to prove infringement as defendants attempting to prove invalidity, namely, a preponderance of the evidence.

Although the Internet Retailers are located from Maine (L. L. Bean) to California (Newegg), sell products as diverse as GPS devices (Crutchfield) and furniture (Rent-A-Center), and operate from over 1,000 retail stores (J.C. Penney) to none at all (Overstock.com), they all have one thing in common – increasingly, they face patent infringement lawsuits asserting broad and vague claims over the manner in which they operate their e-commerce web sites. Faced with expansive and expensive infringement claims,

¹ In accordance with S. Ct. R. 37.3(a), all parties have consented to the filing of this brief. The Petitioner and Respondents have filed consent letters with the Clerk. Pursuant to S. Ct. R. 37.6, counsel for *Amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amici* or its counsel made a monetary contribution to the preparation or submission of this brief.

the Internet Retailers would like the opportunity to prove by the usual standard of proof in a civil case, *i.e.*, a preponderance of the evidence, that these broad and vague claims are not worthy of a patent grant.



SUMMARY OF ARGUMENT

The statute governing patent invalidity, 35 U.S.C. § 282, makes no mention of a “clear and convincing” standard of proof. Elsewhere in the Patent Act, and indeed, in about 100 instances elsewhere in the U.S. Code, Congress has specified a clear and convincing standard of proof. The Court should not endorse the Federal Circuit’s rewrite of Section 282 to add a heightened standard of proof that Congress could have, but did not, include.

The decision of the Federal Circuit to place its thumb on the scale in patent cases by creating a heightened burden for proving invalidity cannot be justified as a matter of historical inertia. More importantly, it cannot be justified under the modern standards for imposing heightened standards of proof articulated by the Court in *Addington v. Texas*, 441 U.S. 418 (1979). Patent litigation is civil litigation. Thus, whether the issue is patent infringement or invalidity, the usual rules of civil litigation should apply, requiring each side to prove its case by a preponderance of the evidence.

Lower courts presumably impose a heightened standard of proof to invalidate a patent because they

are confident that the patents were subjected to a searching inquiry prior to issuance by the U.S. Patent and Trademark Office (“PTO” or “Patent Office”). That confidence is misplaced.

In at least 75% of the time in which the Patent Office reevaluates previously issued patents, it cancels or amends some or all of the claims. Overburdened patent examiners devote little time to each patent application as they try to churn through over 700,000 backlogged applications. Moreover, the lower standard of proof an applicant faces before the Patent Office, the presumptions in favor of granting an application, and the *ex parte* nature of the application process, lead inexorably to the issuance of patents, valid or otherwise.

The results are predictably disastrous – one district judge has estimated that one-third of the patent claims that are litigated should never have been approved. Nevertheless, the heightened burden of proof of invalidity in litigation, coupled with numerous practical impediments, such as the vague nature of many issued claims and the common district court requirement that defendants’ invalidity contentions be served early in the litigation, means that defendants rarely can challenge successfully the validity of even suspect patents.

Faced with the prospect of spending millions of dollars in a Sisyphean challenge to even the most dubious patent, defendants routinely settle such cases, passing on the costs of the settlements to

consumers, and, in the world of e-commerce, hesitating to upgrade or redesign their web sites for fear of being sued, yet again, for patent infringement. The Internet Retailers seek only a fair and balanced contest in which defendants must prove patent invalidity by the same standard under which plaintiffs must prove patent infringement.



ARGUMENT

THE COURT SHOULD APPLY THE USUAL PREPONDERANCE OF THE EVIDENCE STANDARD TO EVALUATE THE VALIDITY OF PATENTS.

A. The Statutory Language, Past Practice, And Public Policy Do Not Support Imposition Of A Heightened Standard To Evaluate The Validity Of Patents.

When defendants are sued for patent infringement under 35 U.S.C. § 271(a), plaintiffs must prove their case by a preponderance of the evidence. *See, e.g., Spansion, Inc. v. Int'l Trade Comm'n*, 2010 WL 5156992, *12 (Fed. Cir. Dec. 21, 2010) (citations omitted). Yet, when defendants challenge the validity of such patents under 35 U.S.C. § 282, judge-made law requires that they must prove their defense by clear and convincing evidence. *See, e.g., i4i L.P. v. Microsoft Corp.*, 598 F.3d 831, 848 (Fed. Cir. 2010), *cert. granted*, 2010 WL 3392402 (U.S. Nov. 29, 2010) (No. 10-290). The question is whether this asymmetry

can be justified based on the plain language of the statute, past practice, or public policy. The answer is “no.”

1. Plain Language. We begin with Justice Frankfurter’s three principles of statutory construction: “(1) Read the statute; (2) read the statute; (3) read the statute!” Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, BENCHMARKS 196, 202 (1967) (quoting Justice Frankfurter). One looks in vain for a heightened standard of proof in Section 282, which is a straightforward burden-shifting provision:

A patent shall be presumed valid. Each claim of a patent (whether in independent, dependent, or multiple dependent form) shall be presumed valid independently of the validity of other claims; dependent or multiple dependent claims shall be presumed valid even though dependent upon an invalid claim.

35 U.S.C. § 282. No one disputes that this language means that the party challenging the validity of a patent has the burden of proof, but the statute is indisputably silent on the standard necessary to overcome the presumption of validity. Section 282 *does* speak to the procedures necessary to prove invalidity, namely, that the defendant must provide at least 30 days notice prior to trial identifying the prior art that it intends to rely upon, so the statutory silence on the evidentiary standard speaks volumes. *Cf. Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003)

(“Its failure to do so is significant, for Congress has been unequivocal when imposing heightened proof requirements in other circumstances[.]”) (brackets added and citations omitted).

Further, one looks in vain for a preponderance of evidence standard in Section 271(a):

[W]hoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor, infringes the patent.

35 U.S.C. § 271(a) (brackets added). In other words, the statutory language does not specify the standard for proving either infringement or invalidity. There is no textual basis, then, for concluding that proof of invalidity must be more rigorous than proof of infringement.

If Section 282 does not contain a heightened standard of proof, the issue becomes whether the Court should add one. Justice Frankfurter again provides the answer:

But our problem is to construe what Congress has written. After all, Congress expresses its purpose by words. It is for us to ascertain – neither to add nor to subtract, neither to delete nor to distort.

62 Cases, More or Less, Each Containing Six Jars of Jam v. United States, 340 U.S. 593, 596 (1951). As the Court recently observed in another context, “we

ordinarily resist reading words or elements into a statute that do not appear on its face.” *Dean v. United States*, 129 S. Ct. 1849, 1853 (2009) (quotation omitted).

Congress certainly knows how to write a statute that contains a “clear and convincing” standard of proof. Indeed, elsewhere in the Patent Act, when a defendant asserts a defense to infringement based on an earlier inventor, Congress has expressly stated that “[a] person asserting the defense under this section shall have the burden of establishing the defense by clear and convincing evidence.” 35 U.S.C. § 273(b)(4) (brackets added).

It is well settled that “[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”

Duncan v. Walker, 533 U.S. 167, 173 (2001) (brackets in original and quoting *Bates v. United States*, 522 U.S. 23, 29-30 (1997); *Russello v. United States*, 464 U.S. 16, 23 (1983)).

Section 273(b)(4) is scarcely an outlier. On the contrary, as set forth in the attached Appendix, on approximately 100 instances scattered throughout the U.S. Code, Congress has seen fit to establish a clear and convincing standard of proof. The Court need not – and should not – go where Congress has

decided not to tread, and import the clear and convincing standard into Section 282.

Furthermore, because this is a case of statutory interpretation, if Congress disagrees with the Court's decision to interpret the statute as written – no more and no less – it can easily rectify the situation by amending Section 282 to add a clear and convincing standard of proof. “Even so, Congress, not this Court, has the responsibility for revising its statutes. Were we to alter our statutory interpretations from case to case, Congress would have less reason to exercise its responsibility to correct statutes that are thought to be unwise or unfair.” *Neal v. United States*, 516 U.S. 284, 296 (1996).

2. Past Practice. Imposing a heightened standard of proof on challenges to the validity of patents cannot be justified based on historical inertia. Dating back at least to the Great Depression, some, but not all, courts have invalidated patents based upon a preponderance of the evidence. *See, e.g., Standard Oil Co. v. Globe Oil & Refining Co.*, 82 F.2d 488, 493 (7th Cir. 1936) (“substantial preponderance of all the evidence”).

Although there is a presumption of validity under Section 282 of patents approved by the Patent Office, as then Judge Marshall explained, “[w]e cannot properly allow decisions of that office to alter the preponderance of the evidence on the question of validity.” *Gross v. JFD Mfg. Co.*, 314 F.2d 196, 198 (2d Cir. 1962) (citations omitted). Thus, prior to an

opinion of the Court of Customs and Patent Appeals, see *Astra-Sjuco v. ITC*, 629 F.2d 682, 688 (C.C.P.A. 1980) (whose precedents were adopted by the Federal Circuit when it was created, see *South Corp. v. United States*, 690 F.2d 1368 (Fed. Cir. 1982) (en banc)), federal appellate courts concluded that in the “usual case” the preponderance of the evidence standard should be used to evaluate the validity of a patent. *Rains v. Niaqua, Inc.*, 406 F.2d 275, 278 (2d Cir. 1969); see also *Dickstein v. Seventy Corp.*, 522 F.2d 1294, 1297 (6th Cir. 1975) (“in the usual patent case . . . a preponderance of evidence is sufficient to establish invalidity”) (ellipsis added and citations omitted). In cases like this one, in which the PTO did not consider the prior art introduced at trial, appellate courts routinely concluded that trial courts should not apply the higher, clear and convincing standard to test the validity of the patents-in-suit. See, e.g., *Baumstimler v. Rankin*, 677 F.2d 1061, 1068 (5th Cir. 1982); *Mfg. Research Corp. v. Graybar Elec. Co.*, 679 F.2d 1355, 1364 (11th Cir. 1982); cf. *Reeves Bros., Inc. v. U.S. Laminating Corp.*, 417 F.2d 869, 872 (2d Cir. 1969) (Kaufman, J.) (failure of PTO to consider prior art “severely undercuts the presumption” of validity).

To be sure, long ago, the Court occasionally employed language that suggested a heightened standard may be appropriate in some cases when evaluating patent invalidity. See *Mumm v. Jacob E. Decker & Sons*, 301 U.S. 168, 171 (1937) (“every reasonable doubt”) (citations omitted); *Radio Corp. of Am. v. Radio Eng’g Labs.*, 293 U.S. 1, 8 (1934) (“heavy

burden of persuasion” that is “more than a dubious preponderance”) (citation omitted). As later courts concluded, however, those cases were easily distinguished on the grounds that they “were cases in which priority of discovery of the same invention was the issue rather than invalidity by reason of relevant disclosures of the prior art.” *Univ. Inc. v. Kay Mfg. Corp.*, 301 F.2d 140, 148 (4th Cir. 1962). As noted, that application of the clear and convincing standard has been expressly codified for business method patents. *See* 35 U.S.C. § 273(b)(4) (clear and convincing standard when defendant asserts a defense to infringement based on an earlier inventor).

In short, before the Federal Circuit’s adoption of a heightened standard for evaluating patent invalidity regardless of whether the Patent Office had considered the cited prior art, courts often evaluated such disputes under a preponderance of the evidence standard. Thus, even if historical practice could ever justify rewriting the statute – which it cannot – the history of the application of Section 282 does not provide support for moving the goalposts of invalidity.

3. Public Policy. Imposition of a heightened standard by the Court cannot be justified as a matter of public policy. In holding that a heightened standard was appropriate in a civil commitment hearing, the Court described the role of the standard of proof:

The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to

“instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.” . . . The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.

Addington v. Texas, 441 U.S. 418, 423 (1979) (ellipsis added and quoting *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)). The Court could have been describing patent cases when it further observed:

At one end of the spectrum is the typical civil case involving a monetary dispute between private parties. Since society has a minimal concern with the outcome of such private suits, plaintiff’s burden of proof is a mere preponderance of the evidence.

Addington, 441 U.S. at 423. It is not surprising, therefore, that other intellectual property cases apply the “mere preponderance of the evidence” standard to evaluate invalidity. See *Medforms, Inc. v. Healthcare Mgmt. Solutions, Inc.*, 290 F.3d 98, 114 (2d Cir. 2002) (copyright); *Material Supply Int’l, Inc. v. Sunmatch Indus. Co.*, 146 F.3d 983, 990 (D.C. Cir. 1998) (trademark); cf. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 525 n.12 (1994) (considering the “closely related” patent and trademark standards to interpret copyright standard for assessing attorneys’ fees).

The intermediate standard – here, clear and convincing – may be “no stranger to the civil law[,]” *Addington*, 441 U.S. at 423 (quoting *Woodby v. INS*, 385 U.S. 276, 285 (1966)) (deportation) (brackets added and other citation omitted), but its “typical use . . . is in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant.” *Addington*, 441 U.S. at 423 (ellipsis added). Suffice it to say, patent disputes have little in common with quasi-criminal wrongdoing, deportation, or civil commitment, thereby warranting the imposition of a higher standard of proof.

In this case, all roads lead to Rome. The plain language of the statute, past practice, and public policy all lead inescapably to the conclusion that a preponderance of the evidence standard should be applied to evaluate both patent infringement and patent invalidity. Failure to apply the standard of proof even-handedly, moreover, significantly harms legitimate companies, such as the Internet Retailers, and their consumers, a point to which we now turn.

B. A Heightened Standard To Evaluate Patent Invalidity Protects Weak Patents And Harms Legitimate Companies And Consumers.

For the Internet Retailers, the standard of proof to invalidate a patent is not simply an abstract academic question. On the contrary, the Internet Retailers face a deluge of patent lawsuits asserting

wide-ranging and imprecisely-worded claims over broad swaths of e-commerce, often making invalidity, not non-infringement, the front line of defense. Allowing plaintiffs to prove infringement by a preponderance of the evidence, while requiring defendants to prove invalidity by clear and convincing evidence, tilts the battlefield in favor of “non-practicing entities” seeking a piece of the multi-billion dollar Internet economy without contributing new products or technology to it. If the application of the clear and convincing standard created a patent system in which reasonable royalties were paid by those infringing valid patents, that would be fine. That, however, is not the case.

1. Patent Reexamination. If the standard of proof reflects the degree of confidence society has in patents approved by the PTO, then it is readily apparent that even the PTO does not believe that patents should be placed on such a high pedestal. The Patent Act allows for two different mechanisms for PTO reexamination of patent validity, namely, *ex parte* reexamination proceedings, *see* 35 U.S.C. § 301, *et seq.*, and *inter partes* reexamination proceedings, *see* 35 U.S.C. § 311, *et seq.* “In PTO examinations and reexaminations, the standard of proof – a preponderance of evidence – is substantially lower than in a civil case.” *In re Swanson*, 540 F.3d 1368, 1377 (Fed. Cir. 2008) (citations omitted). Stripped of the higher standard of proof, patent claims are frequently invalidated upon reexamination because, despite the fact

that they were issued by the Patent Office, they do not pass legal muster.

In 92% of *ex parte* reexamination requests, and in 96% of *inter partes* reexamination requests, the Patent Office concludes that there is a “substantial new question of patentability” under 35 U.S.C. § 303 or 35 U.S.C. § 313, respectively. See U.S. Patent and Trademark Office, *Ex Parte Reexamination Filing Data* at 1 (Sept. 30, 2010) (“PTO *Ex Parte* Filing Data”) (available at http://www.uspto.gov/patents/stats/EP_quarterly_report_Sept_30_2010.pdf); U.S. Patent and Trademark Office, *Inter Partes Reexamination Filing Data* (Sept. 30, 2010) (“PTO *Inter Partes* Filing Data”) (available at http://www.uspto.gov/patents/stats/IP_quarterly_report_Sept_2010.pdf).

In *ex parte* reexaminations, only 23% of such reexaminations resulted in confirmation of all claims, while 12% resulted in the cancellation of all claims, and 65% resulted in the changing or cancellation of some claims. See PTO *Ex Parte* Filing Data at 2. In *inter partes* reexaminations, the results are even more dramatic. Only 11% of such reexaminations resulted in confirmation of all claims, while 47% resulted in the cancellation of all claims, and 42% resulted in the changing or cancellation of some claims. See PTO *Inter Partes* Filing Data. It belabors the obvious to state that one cannot have a high degree of confidence in a system in which 25% or less of all reexamined patents are found to be completely valid. Certainly, the Patent Office’s own statistics do not justify an enhanced level of trust in that office

that might arguably justify enhancing the evidentiary standard for invalidating patents in litigation.

2. PTO Problems. The principal reason advanced for imposing a clear and convincing standard in order to invalidate a patent is the expertise of the Patent Office in approving the patent in the first place. It is “appropriate to note that the rationale underlying the presumption – that the PTO, in its expertise, has approved the claim – seems much diminished” when the PTO never considered the prior art or the basis asserted for invalidating the patent. *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 426 (2007). Furthermore, when closely considering the actual patent application process, the claimed PTO expertise is revealed as a Potemkin village.

In 2003, the Federal Trade Commission (“FTC”) investigated the patent system and concluded that the clear and convincing standard was “unjustified” and “inappropriate” because “the ‘clear and convincing evidence’ burden can undermine the ability of the court system to weed out questionable patents[.]” FTC, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy*, 8, 10 (October 2003) (“FTC Report”) (available at <http://www.ftc.gov/os/2003/10/innovationrpt.pdf>) (brackets added). The FTC found that a patent examiner devoted an estimated “8 to 25 hours to read and understand each application, search for prior art, evaluate patentability, communicate with the applicant, work out the necessary revisions, and reach and write up conclusions.” *Id.* at 10. In other words, to become largely

impregnable in litigation behind the bulwark of the clear and convincing standard, the patent potentially worth \$200,000,000 in this case need only undergo on average one to three days of scrutiny by the PTO.

The situation has only worsened in recent years. Following the approval of business method patents by the Federal Circuit in *State Street Bank & Trust Co. v. Signature Fin. Group, Inc.*, 149 F.3d 1368 (Fed. Cir. 1998) – the principal class of patents asserted against the Internet Retailers – the number of patent applications has exploded. See *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 397 (2006) (Kennedy, J., concurring) (noting the “burgeoning number of patents over business methods”); *In re Bilski*, 545 F.3d 943, 992 (Fed. Cir. 2008) (Newman, J., dissenting) (noting that over 40,000 business method patent applications have been filed since *State Street*, and over 15,000 such patents have been issued), *aff’d sub nom. Bilksi v. Kappos*, 130 S. Ct. 3218 (2010); James Bessen & Michael J. Meurer, *Patent Failure* 8-9, 22 (2008) (estimated 200,000 patents cover software, approximately 11,000 of which cover some aspect of the Internet).

Patent applications have increased over 43% since 2003 to 509,367 applications filed in fiscal 2010. See PTO, Performance and Accountability Report, 126 (2010) (“PTO Performance Report”) (available at http://www.uspto.gov/about/stratplan/ar/2010/USPTO_FY2010PAR.pdf). Today, there are only 6,225 patent examiners, *id.* at 9, to handle the current backlog of 708,000 patent applications. PTO Press Release

(October 7, 2010) (available at http://www.uspto.gov/news/pr/2010/10_47.jsp?loc=interstitialskip). In fiscal 2010, the PTO finally disposed of 553,549 patent applications, and allowed a total of 264,119 patents. PTO Performance Report at 125. Without impugning the qualifications of the PTO's examiners, handling hundreds of thousands of patent applications on an assembly line basis is not a recipe for infallibility.

“Moreover, presumptions in PTO rules tend to favor the issuance of a patent.” FTC Report at 9 (citing PTO manuals and guidelines). The applicant has the upper hand from the beginning, as “[i]t is well settled that the PTO bears the initial burden of presenting a *prima facie* case of unpatentability.” *In re Sullivan*, 498 F.3d 1345, 1351 (Fed. Cir. 2007) (brackets added and quotation omitted). “If the PTO fails to meet this burden, then the applicant is entitled to the patent.” *In re Glaug*, 283 F.3d 1335, 1338 (Fed. Cir. 2002). Also, as noted above, the applicant's standard of proof before the PTO is simply the usual preponderance of evidence standard, *see In re Swanson*, 540 F.3d at 1377, and, as the FTC observed, “[i]t does not seem sensible to treat an issued patent as though it had met some higher standard of patentability.” FTC Report at 10 (brackets added).

Finally in this regard, the only participants in the *ex parte* patent application process are the applicant and the patent examiner. Notably absent from this process are individuals or companies with an economic incentive to challenge the patentability of an inventor's discovery, thereby standing as a

bulwark to prevent the public from having “to pay tribute to would-be monopolists without need or justification.” *Lear, Inc. v. Adkins*, 395 U.S. 653, 670 (1969).

Overburdened patent examiners cursorily consider thousands of patent applications, which are presumed to be valid unless proven otherwise and examined under a lower burden of proof, armed only with the supplications of the applicants who seek the patents. The results are predictable.

3. Unassailable Weak Patents. The bottom line, according to one district judge who regularly handles patent disputes in a jurisdiction synonymous with high-tech industry, is that “at least one-third of patent claims asserted in litigation should never have issued,” and that “most lawyers, academics, and judges would agree that far too many invalid patents slip through the PTO[.]” William Alsup, *Memo to Congress: A District Judge’s Proposal for Patent Reform: Revisiting the Clear and Convincing Standard and Calibrating Deference to the Strength of the Examination*, 24 Berkeley Tech. L.J. 1647, 1648 (2009) (brackets added).

Once issued, such feeble patents “benefit from the heavy thumb courts today put on the scale,” especially when the clear and convincing standard is applied in tandem with the summary judgment standard. Doug Lichtman & Mark A. Lemley, *Rethinking Patent Law’s Presumption of Validity*, 60 Stan. L. Rev. 45, 61 (2007); *see also Schoenhaus v.*

Genesco, Inc., 351 F. Supp. 2d 320, 323 (E.D. Pa. 2005) (“demonstrating entitlement to summary judgment in a patent case tends to be particularly difficult because patent disputes are generally very fact intensive”) (citation omitted). As the Federal Circuit reminds litigants, “[t]he burden of proving invalidity on summary judgment is high.” *Schumer v. Lab. Computer Sys.*, 308 F.3d 1304, 1316 (Fed. Cir. 2002) (brackets added); *see also Rambus Inc. v. Hynix Semiconductor Inc.*, 569 F. Supp. 2d 946, 994 (N.D. Cal. 2008) (noting that the clear and convincing evidence standard “is a high burden to meet, though it can be met,” denying summary judgment on invalidity). Thus, defendants rarely can avoid the millions of dollars in defense costs short of trial if their primary defense is that the patent is invalid. *Cf. Orion IP, LLC v. Hyundai Motor Am.*, 605 F.3d 967 (Fed. Cir. 2010) (invalidating patent on appeal only after years of litigation and adverse \$34,000,000 jury verdict).

Other practical barriers make it difficult to challenge the validity of broadly-worded patents asserted against the Internet Retailers. Notwithstanding the promise of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), that plaintiffs must allege a plausible claim against a specific defendant, in patent cases a different *de facto* rule governs – the plaintiff need only allege that it owns a patent and that the defendant infringes. *See McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354 (Fed. Cir. 2007); *cf. Fed. R. Civ. P. Form 18* (sample patent complaint requiring only

allegations of jurisdiction, ownership, infringement “by making, selling, and using” a device “embodying the patented invention,” notice of infringement, and demand for relief). Because many of the patents asserted against online retailers make no mention of the Internet, retailers have little idea why the plaintiffs believe they infringe the patents-in-suit until they receive the plaintiffs’ infringement contentions.

This knowledge, however, may come too late to conduct a comprehensive investigation into invalidating prior art. Many jurisdictions have adopted local patent rules, and they usually require defendants to serve their invalidity contentions shortly after receiving the plaintiffs’ infringement contentions. *See, e.g.*, N.D. Ga. Patent Local Rule 4.4(b) (30 days); N.D. Cal. Patent Local Rule 3-3 (45 days); E.D. Tex. Patent Local Rule 3-3 (45 days). Failure to meet this deadline may result in denial of leave to amend the invalidity contentions to incorporate newly discovered references. *See O2 Micro Int’l Ltd. v. Monolithic Power Sys., Inc.*, 467 F.3d 1355, 1365-66 (Fed. Cir. 2006) (approving local rules which require early notice of invalidity contentions and prohibit amendment based on new information developed in discovery without a showing of diligence). Thus, online retailers often must guess at the breadth of the asserted patents within a short time after being sued, and then scour the world for prior art to invalidate the patent, or face the risk that a later-discovered basis for challenging the patent will be excluded under the local patent rules.

Filing a reexamination request with the PTO after being sued for patent infringement is no substitute for litigating the patent's validity in court. *See In re Columbia Univ. Patent Litig.*, 330 F. Supp. 2d 12, 16 (D. Mass. 2004) (noting that judicial proceedings are "far more adversarial than re-examination and re-issue proceedings before the PTO," and "have a significant advantage in reaching a correct result"). Also, reexamination requests are limited to "patents or printed publications," *see* 35 U.S.C. §§ 301, 311, and thus do not include all the grounds contained in 35 U.S.C. § 282 for invalidating a patent.

Even if defendants were prepared to surrender their fate to an *ex parte* process that considers some, but not all, of the grounds for invalidating a patent, there is the problem of timing. The average pendency of an *ex parte* reexamination proceeding is two years, while the average pendency of an *inter partes* reexamination proceeding is three years (and that determination then can be appealed to the Federal Circuit even if a single claim is rejected). *See* PTO *Ex Parte* Filing Data at 2; PTO *Inter Partes* Filing Data. Although the district court may stay the litigation pending the outcome of the reexamination, it need not do so. *Viskase Corp. v. Am. Nat'l Can Co.*, 261 F.3d 1316, 1328 (Fed. Cir. 2001). Thus, even if most reexaminations result in the amendment or cancellation of claims, it may come too late for most defendants.

Faced with a weak patent that, as a practical matter, cannot be challenged, in a case in which the

plaintiff claims that the patent is infringed by a company's e-commerce web site which sells millions, or billions, of dollars of goods or services, and faced with a plaintiff offering a license for less than the millions of dollars it would take to litigate the case to judgment and through appeal, the result is usually pre-ordained. See *Ohio Willow Wood Co. v. Thermo-Ply, Inc.*, 2011 WL 9501 (Fed. Cir. Jan. 4, 2011) (Moore, J., concurring) ("Patent litigations are among the longest, most time-consuming types of civil actions. . . . [T]he costs of patent litigation are enormous with an average patent case costing upwards of \$3 million for each side.") (ellipsis and brackets added and citation omitted). Defendants settle virtually all patent infringement lawsuits regardless of the validity of the patents-in-suit. Cf. Darren Cahr & Ira Kalina, *Of PACs and Trolls: How the Patent Wars May Be Coming to a Hospital Near You*, 19 *Health Lawyer* 15, 16 (Oct. 2006) ("The patent troll offers a license for under \$100,000. The end user makes a business decision – millions of dollars to defend a suit that might be lost, or \$100,000 or less for certainty? The end user takes a license").

The Court should not promote parasitic litigation by fortifying weak patents with a "protective moat, namely the presumption of validity in tandem with the clear and convincing standard of proof that is required to overcome that presumption." Alsup, 24 *Berkeley Tech. L.J.* at 1648. The loser in such a rigged system is not just the legitimate company that pays hundreds of thousands, or millions, of

dollars in tribute to “non-practicing entities,” but also consumers who ultimately pay the price in increased costs and decreased innovation. Paying license fees for invalid patents should not be a cost of doing business on the Internet.

4. Consumer Harm. When a patent is invalid, “the public parts with the monopoly grant for no return, the public has been imposed upon and the patent clause subverted.” *United States v. Singer Mfg. Co.*, 374 U.S. 174, 199 (1963) (White, J., concurring). Invalid patents “stifle, rather than promote, the progress of useful arts,” which, after all, is the very purpose of the patent system. *KSR*, 550 U.S. at 427. Internet retailers should not be required to scale back their continual efforts to improve their web sites for fear that such innovations will subject them to suit under an invalid, but largely unassailable, patent.

Furthermore, allowing invalid patents to flourish harms the public through increased costs passed on to consumers. *Id.* This too does not serve the patent laws’ goals or the interests of the public. Instead, it will hurt consumers through higher prices, and through delay of the spread of technology’s benefits, as online retailers divert millions of dollars from innovating their web sites to paying unworthy plaintiffs and unwarranted litigation costs.

The Internet Retailers are not asking for a free pass from infringement, but rather a fair path to invalidity. As a matter of statutory interpretation, public policy, historical practice, and fairness,

plaintiffs and defendants in patent litigation should be treated alike, and bear the same burden of proof on those issues assigned to them to prove. Both sides of the courtroom should be required to prove the claims for which they bear the burden of proof, *i.e.*, infringement for plaintiffs and invalidity for defendants, by a preponderance of the evidence.



CONCLUSION

Based upon the foregoing, the Court should vacate the judgment of the Federal Circuit.

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**U.S. Statutes Containing
“Clear and Convincing” Standard**

5 U.S.C. § 1214(b)(4)(B)(ii):

Corrective action under clause (i) may not be ordered if the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.

5 U.S.C. § 1221(e)(2):

Corrective action under paragraph (1) may not be ordered if the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.

6 U.S.C. § 1142(c)(2)(B)(ii):

Notwithstanding a finding by the Secretary of Labor that the complainant has made the showing required under clause (i), no investigation otherwise required under paragraph (A) shall be conducted if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior

8 U.S.C. § 1154(a)(2)(A)(ii):

[T]he alien establishes to the satisfaction of the Attorney General by clear and convincing evidence that the prior marriage (on the basis of which the alien obtained the status of an alien lawfully admitted for permanent residence) was not entered into for the purpose of evading any provision of the immigration laws.

8 U.S.C. § 1158(a)(2)(B):

Time limit: Subject to subparagraph (D), paragraph (1) shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States.

8 U.S.C.A. § 1160(e)(3)(B):

Standard for judicial review: Such judicial review shall be based solely upon the administrative record established at the time of the review by the appellate authority and the findings of fact and determinations contained in such record shall be conclusive unless the applicant can establish abuse of discretion or that the findings are directly contrary to clear and convincing facts contained in the record considered as a whole.

8 U.S.C. § 1182(a)(3)(B)(i)(VI):

[I]s a member of a terrorist organization described in clause (vi)(III), unless the alien can demonstrate by clear and convincing evidence that the alien did not know, and should not reasonably have known, that the organization was a terrorist organization;

8 U.S.C. § 1182(a)(3)(B)(iv)(IV)(cc):

[A] terrorist organization described in clause (vi)(III), unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization;

8 U.S.C. § 1182(a)(3)(B)(iv)(V)(cc):

[F]or membership in a terrorist organization described in clause (vi)(III) unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization; or

8 U.S.C. § 1182(a)(3)(B)(iv)(VI)(dd):

[T]o a terrorist organization described in clause (vi)(III), or to any member of such an organization, unless the actor can demonstrate by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization.

8 U.S.C. § 1182(n)(5)(D)(i):

The arbitrator shall make findings respecting whether a failure or misrepresentation described in subparagraph (B) occurred. If the arbitrator concludes that failure or misrepresentation was willful, the arbitrator shall make a finding to that effect. The arbitrator may not find such a failure or misrepresentation (or that such a failure or misrepresentation was willful) unless the complainant demonstrates such a failure or misrepresentation (or its willful character) by clear and convincing evidence. The arbitrator shall transmit the findings in the form of a written opinion to the parties to the arbitration and the Attorney General. Such findings shall be final and conclusive, and, except as provided in this subparagraph, no official or court of the United

States shall have power or jurisdiction to review any such findings.

8 U.S.C. § 1229a(b)(5)(A):

Any alien who, after written notice required under paragraph (1) or (2) of section 1229(a) of this title has been provided to the alien or the alien's counsel of record, does not attend a proceeding under this section, shall be ordered removed in absentia if the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable (as defined in subsection (e)(2) of this section). The written notice by the Attorney General shall be considered sufficient for purposes of this subparagraph if provided at the most recent address provided under section 1229(a)(1)(F) of this title.

8 U.S.C. § 1229a(c)(2)(B):

[B]y clear and convincing evidence, that the alien is lawfully present in the United States pursuant to a prior admission.

In meeting the burden of proof under subparagraph (B), the alien shall have access to the alien's visa or other entry document, if any, and any other records and documents, not considered by the Attorney General to be confidential, pertaining to the alien's admission or presence in the United States.

8 U.S.C. § 1229a(c)(3)(A):

In the proceeding the Service has the burden of establishing by clear and convincing evidence

that, in the case of an alien who has been admitted to the United States, the alien is deportable. No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

8 U.S.C. § 1229c(b)(1)(D):

[T]he alien has established by clear and convincing evidence that the alien has the means to depart the United States and intends to do so.

8 U.S.C. § 1252(f)(2):

Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.

8 U.S.C. § 1255(e)(3):

Paragraph (1) and section 1154(g) of this title shall not apply with respect to a marriage if the alien establishes by clear and convincing evidence to the satisfaction of the Attorney General that the marriage was entered into in good faith and in accordance with the laws of the place where the marriage took place and the marriage was not entered into for the purpose of procuring the alien's admission as an immigrant and no fee or other consideration was given (other than a fee or other consideration to an attorney for assistance in preparation of a lawful petition) for the filing of a petition under section 1154(a) of this title or subsection (d) or (p) of section 1184 of this title with respect to the alien spouse or alien son

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or daughter. In accordance with regulations, there shall be only one level of administrative appellate review for each alien under the previous sentence.

8 U.S.C. § 1255a(f)(4)(B):

Standard for judicial review: Such judicial review shall be based solely upon the administrative record established at the time of the review by the appellate authority and the findings of fact and determinations contained in such record shall be conclusive unless the applicant can establish abuse of discretion or that the findings are directly contrary to clear and convincing facts contained in the record considered as a whole.

8 U.S.C. § 1324a(a)(6)(C)(ii):

Rebuttal of presumption: The presumption established by clause (i) may be rebutted by the employer only through the presentation of clear and convincing evidence that the employer did not know (and could not reasonably have known) that the individual at the time of hiring or afterward was an alien not authorized to work in the United States.

8 U.S.C.A. § 1409(a)(1):

[A] blood relationship between the person and the father is established by clear and convincing evidence

8 U.S.C. § 1448(a):

Public ceremony: A person who has applied for naturalization shall, in order to be and before being admitted to citizenship, take in a public

ceremony before the Attorney General or a court with jurisdiction under section 1421(b) of this title an oath (1) to support the Constitution of the United States; (2) to renounce and abjure absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which the applicant was before a subject or citizen; (3) to support and defend the Constitution and the laws of the United States against all enemies, foreign and domestic; (4) to bear true faith and allegiance to the same; and (5)(A) to bear arms on behalf of the United States when required by the law, or (B) to perform non-combatant service in the Armed Forces of the United States when required by the law, or (C) to perform work of national importance under civilian direction when required by the law. Any such person shall be required to take an oath containing the substance of clauses (1) to (5) of the preceding sentence, except that a person who shows by clear and convincing evidence to the satisfaction of the Attorney General that he is opposed to the bearing of arms in the Armed Forces of the United States by reason of religious training and belief shall be required to take an oath containing the substance of clauses (1) to (4) and clauses (5)(B) and (5)(C) of this subsection, and a person who shows by clear and convincing evidence to the satisfaction of the Attorney General that he is opposed to any type of service in the Armed Forces of the United States by reason of religious training and belief shall be required to take an oath containing the substance of said clauses (1) to (4) and clause (5)(C). The term "religious training and belief" as used in this section shall mean

an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. In the case of the naturalization of a child under the provisions of section 1433 of this title the Attorney General may waive the taking of the oath if in the opinion of the Attorney General the child is unable to understand its meaning. The Attorney General may waive the taking of the oath by a person if in the opinion of the Attorney General the person is unable to understand, or to communicate an understanding of, its meaning because of a physical or developmental disability or mental impairment. If the Attorney General waives the taking of the oath by a person under the preceding sentence, the person shall be considered to have met the requirements of section 1427(a)(3) of this title with respect to attachment to the principles of the Constitution and well disposition to the good order and happiness of the United States.

8 U.S.C. § 1612(a)(2)(H)(ii):

[W]ith respect to whom the Commissioner of Social Security lacks clear and convincing evidence that such individual is an alien ineligible for such benefits as a result of the application of this section.

10 U.S.C. § 850a(b):

The accused has the burden of proving the defense of lack of mental responsibility by clear and convincing evidence.

10 U.S.C. § 949k(b):

Burden of proof – The accused in a military commission under this chapter has the burden of proving the defense of lack of mental responsibility by clear and convincing evidence.

11 U.S.C. § 502(k)(2):

The debtor shall have the burden of proving, by clear and convincing evidence, that –

(A) the creditor unreasonably refused to consider the debtor’s proposal; and

(B) the proposed alternative repayment schedule was made prior to expiration of the 60-day period specified in paragraph (1)(B)(i).

12 U.S.C. § 5567(c)(3)(B):

Rebuttal evidence: Notwithstanding a finding by the Secretary of Labor that the complainant has made the showing required under subparagraph (A), no investigation otherwise required under paragraph (2) shall be conducted, if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

12 U.S.C. § 5567(c)(3)(C):

Evidentiary standards: The Secretary of Labor may determine that a violation of subsection (a) has occurred only if the complainant demonstrates that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint. Relief may not be

ordered under subparagraph (A) if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

15 U.S.C. § 2087(b)(2)(B)(ii):

Notwithstanding a finding by the Secretary that the complainant has made the showing required under clause (i), no investigation otherwise required under subparagraph (A) shall be conducted if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

15 U.S.C. § 2087(b)(2)(B)(iv):

Relief may not be ordered under subparagraph (A) if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

15 U.S.C. § 6604(a):

In general: In any Y2K action in which punitive damages are permitted by applicable law, the defendant shall not be liable for punitive damages unless the plaintiff proves by clear and convincing evidence that the applicable standard for awarding damages has been met.

15 U.S.C. § 6604(b)(3):

No cap if injury specifically intended: Paragraph (1) does not apply if the plaintiff establishes by

clear and convincing evidence that the defendant acted with specific intent to injure the plaintiff.

18 U.S.C. § 17(b):

Burden of proof. – The defendant has the burden of proving the defense of insanity by clear and convincing evidence.

18 U.S.C.A. § 924(d)(1):

Any firearm or ammunition involved in or used in any knowing violation of subsection (a)(4), (a)(6), (f), (g), (h), (i), (j), or (k) of section 922, or knowing importation or bringing into the United States or any possession thereof any firearm or ammunition in violation of section 922(l), or knowing violation of section 924, or willful violation of any other provision of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, or any firearm or ammunition intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1986 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter: *Provided*, That upon acquittal of the owner or possessor, or dismissal of the charges against him other than upon motion of the Government prior to trial, or lapse of or court termination of the restraining order to which he is subject, the seized or relinquished

firearms or ammunition shall be returned forthwith to the owner or possessor or to a person delegated by the owner or possessor unless the return of the firearms or ammunition would place the owner or possessor or his delegate in violation of law. Any action or proceeding for the forfeiture of firearms or ammunition shall be commenced within one hundred and twenty days of such seizure.

18 U.S.C. § 924(d)(2)(C):

Only those firearms or quantities of ammunition particularly named and individually identified as involved in or used in any violation of the provisions of this chapter or any rule or regulation issued thereunder, or any other criminal law of the United States or as intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure, forfeiture, and disposition.

18 U.S.C. § 3143(a):

Release or detention pending sentence. – (1) Except as provided in paragraph (2), the judicial officer shall order that a person who has been found guilty of an offense and who is awaiting imposition or execution of sentence, other than a person for whom the applicable guideline promulgated pursuant to 28 U.S.C. 994 does not recommend a term of imprisonment, be detained, unless the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under

section 3142(b) or (c). If the judicial officer makes such a finding, such judicial officer shall order the release of the person in accordance with section 3142(b) or (c).

18 U.S.C. § 3143(a)(2)(B):

[T]he judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to any other person or the community.

18 U.S.C. § 3143(b)(1)(A):

(A) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c) of this title; and

18 U.S.C. § 3148(b)(1)(B):

[C]lear and convincing evidence that the person has violated any other condition of release; and

18 U.S.C. § 3524(e)(1):

In any case in which the Attorney General determines that, as a result of the relocation of a person and a child of whom that person is a parent in connection with protection provided under this chapter, the implementation of a court order with respect to custody or visitation of that child would be substantially impossible, the Attorney General may bring, on behalf of the person provided protection under this chapter, an action to modify the court order. Such action may be brought in the district court for the district in which the parent resides who would not be or

was not relocated in connection with the protection provided under this chapter. In an action brought under this paragraph, if the Attorney General establishes, by clear and convincing evidence, that implementation of the court order involved would be substantially impossible, the court may modify the court order but shall, subject to appropriate security considerations, provide an alternative as substantially equivalent to the original rights of the nonrelocating parent as feasible under the circumstances.

18 U.S.C. § 3559(c)(3)(A):

Robbery in certain cases. – Robbery, an attempt, conspiracy, or solicitation to commit robbery; or an offense described in paragraph (2)(F)(ii) shall not serve as a basis for sentencing under this subsection if the defendant establishes by clear and convincing evidence that –

- (i) no firearm or other dangerous weapon was used in the offense and no threat of use of a firearm or other dangerous weapon was involved in the offense; and
- (ii) the offense did not result in death or serious bodily injury (as defined in section 1365) to any person.

18 U.S.C. § 3559(c)(3)(B):

Arson in certain cases. – Arson shall not serve as a basis for sentencing under this subsection if the defendant establishes by clear and convincing evidence that –

- (i) the offense posed no threat to human life; and

- (ii) the defendant reasonably believed the offense posed no threat to human life.

18 U.S.C. § 3559(e)(2)(3):

Nonqualifying felonies. – An offense described in section 2422(b) or 2423(a) shall not serve as a basis for sentencing under this subsection if the defendant establishes by clear and convincing evidence that –

- (A) the sexual act or activity was consensual and not for the purpose of commercial or pecuniary gain;
- (B) the sexual act or activity would not be punishable by more than one year in prison under the law of the State in which it occurred; or
- (C) no sexual act or activity occurred.

18 U.S.C. § 3563(b)(21):

[B]e ordered deported by a United States district court, or United States magistrate judge, pursuant to a stipulation entered into by the defendant and the United States under section 238(d)(5) of the Immigration and Nationality Act, except that, in the absence of a stipulation, the United States district court or a United States magistrate judge, may order deportation as a condition of probation, if, after notice and hearing pursuant to such section, the Attorney General demonstrates by clear and convincing evidence that the alien is deportable;

18 U.S.C. § 3600(a)(10)(iii):

[O]f clear and convincing evidence that the applicant's filing is done solely to cause delay or harass.

18 U.S.C. § 3626(a)(3)(E):

The three-judge court shall enter a prisoner release order only if the court finds by clear and convincing evidence that –

- (i) crowding is the primary cause of the violation of a Federal right; and
- (ii) no other relief will remedy the violation of the Federal right.

18 U.S.C. § 3771(a)(3):

(3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.

18 U.S.C. § 4243(d):

Burden of proof. – In a hearing pursuant to subsection (c) of this section, a person found not guilty only by reason of insanity of an offense involving bodily injury to, or serious damage to the property of, another person, or involving a substantial risk of such injury or damage, has the burden of proving by clear and convincing evidence that his release would not create a substantial risk of bodily injury to another person or serious damage of property of another due to a present mental disease or defect. With respect to

any other offense, the person has the burden of such proof by a preponderance of the evidence.

18 U.S.C. § 4243(h):

Limitations on furloughs. – An individual who is hospitalized under subsection (e) of this section after being found not guilty only by reason of insanity of an offense for which subsection (d) of this section creates a burden of proof of clear and convincing evidence, may leave temporarily the premises of the facility in which that individual is hospitalized only –

18 U.S.C. § 4246(d):

Determination and disposition. – If, after the hearing, the court finds by clear and convincing evidence that the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall commit the person to the custody of the Attorney General. The Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment. The Attorney General shall make all reasonable efforts to cause such a State to assume such responsibility. If, notwithstanding such efforts, neither such State will assume such responsibility, the Attorney General shall hospitalize the person for treatment in a suitable facility, until –

19 U.S.C. § 1592(e)(2):

[I]f the monetary penalty is based on fraud, the United States shall have the burden of proof to establish the alleged violation by clear and convincing evidence;

19 U.S.C. § 1593a(i)(2):

[I]f the monetary penalty is based on fraud, the United States shall have the burden of proof to establish the alleged violation by clear and convincing evidence; and

20 U.S.C. § 1092(f)(4)(B)(iii):

If there is clear and convincing evidence that the release of such information would jeopardize an ongoing criminal investigation or the safety of an individual, cause a suspect to flee or evade detection, or result in the destruction of evidence, such information may be withheld until that damage is no longer likely to occur from the release of such information.

20 U.S.C. § 1412(a)(17)(C):

Prohibition against supplantation and conditions for waiver by Secretary: Except as provided in section 1413 of this title, funds paid to a State under this subchapter will be used to supplement the level of Federal, State, and local funds (including funds that are not under the direct control of State or local educational agencies) expended for special education and related services provided to children with disabilities under this subchapter and in no case to supplant such Federal, State, and local funds, except that, where the State provides clear and convincing

evidence that all children with disabilities have available to them a free appropriate public education, the Secretary may waive, in whole or in part, the requirements of this subparagraph if the Secretary concurs with the evidence provided by the State.

20 U.S.C. § 6736(c)(1):

General rule: Punitive damages may not be awarded against a teacher in an action brought for harm based on the act or omission of a teacher acting within the scope of the teacher's employment or responsibilities to a school or governmental entity unless the claimant establishes by clear and convincing evidence that the harm was proximately caused by an act or omission of such teacher that constitutes willful or criminal misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed.

20 U.S.C. § 9578(a)(3):

[T]he appointment of such employee is necessary (as determined by the Director on the basis of clear and convincing evidence) to provide the Institute or the office, board, committee, or center with scientific or technical expertise which could not otherwise be obtained by the Institute or the office, board, committee, or center through the competitive service; and

21 U.S.C. § 333(b)(4)(B):

If, in an action brought under paragraph (2) against a manufacturer or distributor relating to the conviction of a representative of such manufacturer or distributor for the sale, purchase, or

trade of a drug or the offer to sell, purchase, or trade a drug, it is shown, by clear and convincing evidence –

(i) that the manufacturer or distributor conducted, before the institution of a criminal proceeding against such representative for the violation which resulted in such conviction, an investigation of events or transactions which would have led to the reporting of information leading to the institution of a criminal proceeding against, and conviction of, such representative for such purchase, sale, or trade or offer to purchase, sell, or trade, or

(ii) that, except in the case of the conviction of a representative employed in a supervisory function, despite diligent implementation by the manufacturer or distributor of an independent audit and security system designed to detect such a violation, the manufacturer or distributor could not reasonably have been expected to have detected such violation,

the conviction of such representative shall not be considered as a conviction for purposes of paragraph (2).

22 U.S.C. § 1972:

[T]he Secretary of State, unless there is clear and convincing credible evidence that the seizure did not meet the requirements under paragraph (1) or (2), as the case may be, shall immediately take such steps as are necessary –

- (i) for the protection of such vessel and for the health and welfare of its crew;
- (ii) to secure the release of such vessel and its crew; and
- (iii) to determine the amount of any fine, license, fee, registration fee, or other direct charge reimbursable under section 1973(a) of this title.

22 U.S.C. § 6082(a)(2):

Presumption in favor of the certified claims: There shall be a presumption that the amount for which a person is liable under clause (i) of paragraph (1)(A) is the amount that is certified as described in subclause (I) of that clause. The presumption shall be rebuttable by clear and convincing evidence that the amount described in subclause (II) or (III) of that clause is the appropriate amount of liability under that clause.

25 U.S.C. § 458aaa-6(a)(2)(D):

Hearings: In any hearing or appeal involving a decision to reassume operation of a program, service, function, or activity (or portion thereof), the Secretary shall have the burden of proof of demonstrating by clear and convincing evidence the validity of the grounds for the reassumption.

25 U.S.C. § 458aaa-6(d):

Burden of proof: With respect to any hearing or appeal or civil action conducted pursuant to this section, the Secretary shall have the burden of demonstrating by clear and convincing evidence the validity of the grounds for rejecting the offer

(or a provision thereof) made under subsection (b) of this section.

25 U.S.C. § 458aaa-17:

In any appeal (including civil actions) involving decisions made by the Secretary under this part, the Secretary shall have the burden of proof of demonstrating by clear and convincing evidence –

- (1) the validity of the grounds for the decision made; and
- (2) that the decision is fully consistent with provisions and policies of this part.

25 U.S.C. § 458aaa(a)(3):

Gross mismanagement: The term “gross mismanagement” means a significant, clear, and convincing violation of a compact, funding agreement, or regulatory, or statutory requirements applicable to Federal funds transferred to an Indian tribe by a compact or funding agreement that results in a significant reduction of funds available for the programs, services, functions, or activities (or portions thereof) assumed by an Indian tribe.

25 U.S.C. § 1912(e):

Foster care placement orders; evidence; determination of damage to child: No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian

custodian is likely to result in serious emotional or physical damage to the child.

25 U.S.C. § 2012(g)(2)(B)(ii):

Exception: The Secretary shall disapprove, or approve with a modification, a request for authorization to provide a post differential rate if the Secretary determines for clear and convincing reasons (and advises the board in writing of those reasons) that the rate should be disapproved or decreased because the disparity of compensation between the appropriate educators or positions in the Bureau school, and the comparable educators or positions at the nearest public school, is –

25 U.S.C. § 2012(g)(2)(B)(iv)(II):

[T]he Secretary or the supervisor, respectively, determines for clear and convincing reasons (and advises the board in writing of those reasons) that there is no disparity of compensation that would affect the recruitment or retention of employees at the school after the differential is discontinued or decreased.

25 U.S.C. 2206(a)(4):

Special rule relating to survival: In the case of intestate succession under this subsection, if an individual fails to survive the decedent by at least 120 hours, as established by clear and convincing evidence –

(A) the individual shall be deemed to have predeceased the decedent for the purpose of intestate succession; and

(B) the heirs of the decedent shall be determined in accordance with this section.

25 U.S.C. § 2504(b)(2)(B)(ii):

shall determine that the school is eligible for assistance under this part, unless the Secretary finds by clear and convincing evidence that the services to be provided by the Indian tribe or tribal organization will be deleterious to the welfare of the Indians served by the school.

26 U.S.C. § 47(d)(3)(D):

Determination of percentage of completion. – The determination under subparagraph (C)(i) of the portion of the overall cost to the taxpayer of the rehabilitation which is properly attributable to rehabilitation completed during any taxable year shall be made, under regulations prescribed by the Secretary, on the basis of engineering or architectural estimates or on the basis of cost accounting records. Unless the taxpayer establishes otherwise by clear and convincing evidence, the rehabilitation shall be deemed to be completed not more rapidly than ratably over the normal rehabilitation period.

26 U.S.C. § 280G(b)(2)(C):

Treatment of certain agreements entered into within 1 year before change of ownership. – For purposes of subparagraph (A)(i), any payment pursuant to –

(i) an agreement entered into within 1 year before the change described in subparagraph (A)(i), or

(ii) an amendment made within such 1-year period of a previous agreement,

shall be presumed to be contingent on such change unless the contrary is established by clear and convincing evidence.

26 U.S.C. § 280G(b)(4):

Treatment of amounts which taxpayer establishes as reasonable compensation. – In the case of any payment described in paragraph (2)(A) –

(A) the amount treated as a parachute payment shall not include the portion of such payment which the taxpayer establishes by clear and convincing evidence is reasonable compensation for personal services to be rendered on or after the date of the change described in paragraph (2)(A)(i), and

(B) the amount treated as an excess parachute payment shall be reduced by the portion of such payment which the taxpayer establishes by clear and convincing evidence is reasonable compensation for personal services actually rendered before the date of the change described in paragraph (2)(A)(i).

For purposes of subparagraph (B), reasonable compensation for services actually rendered before the date of the change described in paragraph (2)(A)(i) shall be first offset against the base amount.

26 U.S.C. § 1260(e):

Net underlying long-term capital gain. – For purposes of this section, in the case of any

constructive ownership transaction with respect to any financial asset, the term “net underlying long-term capital gain” means the aggregate net capital gain that the taxpayer would have had if –

- (1) the financial asset had been acquired for fair market value on the date such transaction was opened and sold for fair market value on the date such transaction was closed, and
- (2) only gains and losses that would have resulted from the deemed ownership under paragraph (1) were taken into account.

The amount of the net underlying long-term capital gain with respect to any financial asset shall be treated as zero unless the amount thereof is established by clear and convincing evidence.

26 U.S.C. § 7409(b):

Adjudication and decree. – In any action under subsection (a), if the court finds on the basis of clear and convincing evidence that –

- (1) such organization has flagrantly participated in, or intervened in (including the publication or distribution of statements), any political campaign on behalf of (or in opposition to) any candidate for public office, and
- (2) injunctive relief is appropriate to prevent future political expenditures, the court may enjoin such organization from making political expenditures and may grant such other relief as may be appropriate to ensure

that the assets of such organization are preserved for charitable or other purposes specified in section 501(c)(3).

28 U.S.C. § 592(a)(2)(B)(ii):

The Attorney General shall not base a determination under this chapter that there are no reasonable grounds to believe that further investigation is warranted, upon a determination that such person lacked the state of mind required for the violation of criminal law involved, unless there is clear and convincing evidence that the person lacked such state of mind.

28 U.S.C. § 2244(b)(2)(B)(ii):

[T]he facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(1):

In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254(e)(2)(B):

[T]he facts underlying the claim would be sufficient to establish by clear and convincing

evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2255(h)(1):

[N]ewly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

28 U.S.C. § 2639(b):

In any civil action described in section 1581(h) of this title, the person commencing the action shall have the burden of making the demonstration required by such section by clear and convincing evidence.

29 U.S.C.A. § 464(b):

Presumptions of validity or invalidity of trusteeship: In any proceeding pursuant to this section a trusteeship established by a labor organization in conformity with the procedural requirements of its constitution and bylaws and authorized or ratified after a fair hearing either before the executive board or before such other body as may be provided in accordance with its constitution or bylaws shall be presumed valid for a period of eighteen months from the date of its establishment and shall not be subject to attack during such period except upon clear and convincing proof that the trusteeship was not established or maintained in good faith for a purpose allowable under section 462 of this title. After the expiration of eighteen months the trusteeship shall be

presumed invalid in any such proceeding and its discontinuance shall be decreed unless the labor organization shall show by clear and convincing proof that the continuation of the trusteeship is necessary for a purpose allowable under section 462 of this title. In the latter event the court may dismiss the complaint or retain jurisdiction of the cause on such conditions and for such period as it deems appropriate.

29 U.S.C. § 721(a)(10)(C)(i)(II):

[T]he number of individuals determined, on the basis of clear and convincing evidence, to be too severely disabled to benefit in terms of an employment outcome from vocational rehabilitation services;

29 U.S.C. § 722(a)(2):

Presumption of benefit:

(A) Demonstration: For purposes of this section, an individual shall be presumed to be an individual that can benefit in terms of an employment outcome from vocational rehabilitation services under section 705(20)(A) of this title, unless the designated State unit involved can demonstrate by clear and convincing evidence that such individual is incapable of benefiting in terms of an employment outcome from vocational rehabilitation services due to the severity of the disability of the individual.

(B) Methods: In making the demonstration required under subparagraph (A), the designated State unit shall explore the individual's abilities, capabilities, and capacity to perform in work situations, through the use of trial work experiences, as described in section 705(2)(D) of this title, with appropriate supports provided through the designated State unit, except under limited circumstances when an individual cannot take advantage of such experiences. Such experiences shall be of sufficient variety and over a sufficient period of time to determine the eligibility of the individual or to determine the existence of clear and convincing evidence that the individual is incapable of benefiting in terms of an employment outcome from vocational rehabilitation services due to the severity of the disability of the individual.

29 U.S.C. § 722(a)(3)(A)(ii):

[P]resumed to be eligible for vocational rehabilitation services under this subchapter (provided that the individual intends to achieve an employment outcome consistent with the unique strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice of the individual) unless the designated State unit involved can demonstrate by clear and convincing evidence that such individual is incapable of benefiting in terms of an employment outcome from vocational rehabilitation services due to the severity of the disability of the individual in accordance with paragraph (2).

29 U.S.C. § 722(c)(5)(F)(ii):

[N]ot overturn or modify the decision of the hearing officer, or part of the decision, that supports the position of the applicant or eligible individual unless the reviewing official concludes, based on clear and convincing evidence, that the decision of the impartial hearing officer is clearly erroneous on the basis of being contrary to the approved State plan, this chapter (including regulations implementing this chapter) or any State regulation or policy that is consistent with the Federal requirements specified in this subchapter.

29 U.S.C. § 1322(c)(4):

Determinations under this subsection shall be made by the corporation. Such determinations shall be binding unless shown by clear and convincing evidence to be unreasonable.

29 U.S.C. § 1344(f)(4):

Determinations under this subsection shall be made by the corporation. Such determinations shall be binding unless shown by clear and convincing evidence to be unreasonable.

29 U.S.C. § 6711(c):

Limitations on applicability of prohibitions. – Subsections (a) and (b) do not apply if the government shows, by clear and convincing evidence, that a payment received under this chapter is not used to pay for any part of the program or activity with respect to which the allegation of discrimination is made.

35 U.S.C. § 273(b)(4):

Burden of proof. – A person asserting the defense under this section shall have the burden of establishing the defense by clear and convincing evidence.

36 U.S.C. § 220527(b)(1):

An organization or person may file a complaint under subsection (a) of this section only after exhausting all available remedies within the national governing body for correcting deficiencies, unless it can be shown by clear and convincing evidence that those remedies would have resulted in unnecessary delay.

38 U.S.C. § 1154(b):

In the case of any veteran who engaged in combat with the enemy in active service with a military, naval, or air organization of the United States during a period of war, campaign, or expedition, the Secretary shall accept as sufficient proof of service-connection of any disease or injury alleged to have been incurred in or aggravated by such service satisfactory lay or other evidence of service incurrence or aggravation of such injury or disease, if consistent with the circumstances, conditions, or hardships of such service, notwithstanding the fact that there is no official record of such incurrence or aggravation in such service, and, to that end, shall resolve every reasonable doubt in favor of the veteran. Service-connection of such injury or disease may be rebutted by clear and convincing evidence to the contrary. The reasons for granting or denying service-connection in each case shall be recorded in full.

38 U.S.C. § 2411(c):

A finding under subsection (b)(3) shall be made by the appropriate Federal official. Any such finding may only be made based upon a showing of clear and convincing evidence, after an opportunity for a hearing in a manner prescribed by the appropriate Federal official.

42 U.S.C. § 247d-6d(c)(3):

Proof of willful misconduct: In an action under subsection (d) of this section, the plaintiff shall have the burden of proving by clear and convincing evidence willful misconduct by each covered person sued and that such willful misconduct caused death or serious physical injury.

42 U.S.C. § 300aa-22(b)(2)(B):

[B]y clear and convincing evidence that the manufacturer failed to exercise due care notwithstanding its compliance with such Act and section (and regulations issued under such provisions).

42 U.S.C. § 666(a)(5)(J):

Temporary support order based on probable paternity in contested cases: Procedures which require that a temporary order be issued, upon motion by a party, requiring the provision of child support pending an administrative or judicial determination of parentage, if there is clear and convincing evidence of paternity (on the basis of genetic tests or other evidence).

42 U.S.C. § 4605(c):

Exceptional and extremely unusual hardship: If a displacing agency determines by clear and convincing evidence that a determination of the ineligibility of a displaced person under subsection (a) of this section would result in exceptional and extremely unusual hardship to an individual who is the displaced person's spouse, parent, or child and who is a citizen of the United States or an alien lawfully admitted for permanent residence in the United States, the displacing agency shall provide relocation payments and other assistance to the displaced person under this chapter if the displaced person would be eligible for the assistance but for subsection (a) of this section

42 U.S.C. § 5851(b)(3)(B):

Notwithstanding a finding by the Secretary that the complainant has made the showing required by subparagraph (A), no investigation required under paragraph (2) shall be conducted if the employer demonstrates, by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of such behavior.

42 U.S.C. § 6313(a)(6)(A)(ii)(II):

More stringent standard: Subclause (I) shall not apply if the Secretary determines, by rule published in the Federal Register, and supported by clear and convincing evidence, that adoption of a uniform national standard more stringent than the amended ASHRAE/IES Standard 90.1 for the product would result in significant additional

conservation of energy and is technologically feasible and economically justified.

42 U.S.C. § 6314(a)(4)(B):

If such an industry test procedure or rating procedure for small commercial package air conditioning and heating equipment, large commercial package air conditioning and heating equipment, very large commercial package air conditioning and heating equipment, packaged terminal air conditioners, packaged terminal heat pumps, warm-air furnaces, packaged boilers, storage water heaters, instantaneous water heaters, or unfired hot water storage tanks is amended, the Secretary shall amend the test procedure for the product as necessary to be consistent with the amended industry test procedure or rating procedure unless the Secretary determines, by rule, published in the Federal Register and supported by clear and convincing evidence, that to do so would not meet the requirements for test procedures described in paragraphs (2) and (3) of this subsection.

42 U.S.C. § 6314(a)(5)(B):

If the test procedure requirements of NEMA Standards Publication MG-1987 and IEEE Standard 112 Test Method B for motor efficiency are amended, the Secretary shall amend the test procedures established by subparagraph (A) to conform to such amended test procedure requirements unless the Secretary determines, by rule, published in the Federal Register and supported by clear and convincing evidence, that to do so would not meet the requirements for test

procedures described in paragraphs (2) and (3) of this subsection.

42 U.S.C. § 6314(a)(7)(B)(i):

If Air-Conditioning and Refrigeration Institute Standard 810-2003 is amended, the Secretary shall amend the test procedures established in subparagraph (A) as necessary to be consistent with the amended Air-Conditioning and Refrigeration Institute Standard, unless the Secretary determines, by rule, published in the Federal Register and supported by clear and convincing evidence, that to do so would not meet the requirements for test procedures under paragraphs (2) and (3).

42 U.S.C. § 6727(a)(2)(A):

The provisions of paragraph (1) of this subsection shall not apply where any State government or unit of local government demonstrates, by clear and convincing evidence, that the program or activity with respect to which the allegation of discrimination has been made is not funded in whole or in part with funds made available under this subchapter.

42 U.S.C. § 11603(e)(2):

In the case of an action for the return of a child, a respondent who opposes the return of the child has the burden of establishing –

- (A) by clear and convincing evidence that one of the exceptions set forth in article 13b or 20 of the Convention applies; and

(B) by a preponderance of the evidence that any other exception set forth in article 12 or 13 of the Convention applies.

42 U.S.C. § 14503(e)(1):

(1) General rule: Punitive damages may not be awarded against a volunteer in an action brought for harm based on the action of a volunteer acting within the scope of the volunteer's responsibilities to a nonprofit organization or governmental entity unless the claimant establishes by clear and convincing evidence that the harm was proximately caused by an action of such volunteer which constitutes willful or criminal misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed.

42 U.S.C. § 14924(e)(4):

Failure to comply with certain requirements: A failure to comply with the requirements of section 14923(b)(1)(A)(ii) of this title shall constitute a serious failure to comply under subsection (c)(1)(B) of this section unless it is shown by clear and convincing evidence that such noncompliance had neither the purpose nor the effect of determining the outcome of a decision or proceeding by a court or other competent authority in the United States or the child's country of origin.

45 U.S.C. § 905(b):

Submission of findings to bankruptcy court: If the Commission finds that the plan submitted under this section is feasible, it shall submit its finding to the bankruptcy court. Within 10 days

after the date of such submission, the bankruptcy court shall, after a hearing, determine whether such plan is fair and equitable to the estate of the Milwaukee Railroad. The Commission's determination with respect to that issue shall be rebutted only by clear and convincing evidence.

47 U.S.C. § 532(f):

In any action brought under this section in any Federal district court or before the Commission, there shall be a presumption that the price, terms, and conditions for use of channel capacity designated pursuant to subsection (b) of this section are reasonable and in good faith unless shown by clear and convincing evidence to the contrary.

47 U.S.C. § 551(h):

Disclosure of information to governmental entity pursuant to court order: Except as provided in subsection (c)(2)(D) of this section, a governmental entity may obtain personally identifiable information concerning a cable subscriber pursuant to a court order only if, in the court proceeding relevant to such court order –

- (1) such entity offers clear and convincing evidence that the subject of the information is reasonably suspected of engaging in criminal activity and that the information sought would be material evidence in the case; and
- (2) the subject of the information is afforded the opportunity to appear and contest such entity's claim.

49 U.S.C. § 28103(a)(1):

Limitations. – (1) Notwithstanding any other statutory or common law or public policy, or the nature of the conduct giving rise to damages or liability, in a claim for personal injury to a passenger, death of a passenger, or damage to property of a passenger arising from or in connection with the provision of rail passenger transportation, or from or in connection with any rail passenger transportation operations over or rail passenger transportation use of right-of-way or facilities owned, leased, or maintained by any high-speed railroad authority or operator, any commuter authority or operator, any rail carrier, or any State, punitive damages, to the extent permitted by applicable State law, may be awarded in connection with any such claim only if the plaintiff establishes by clear and convincing evidence that the harm that is the subject of the action was the result of conduct carried out by the defendant with a conscious, flagrant indifference to the rights or safety of others. If, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, this paragraph shall not apply.

49 U.S.C. § 42121(b)(2)(B)(ii):

Showing by employer. – Notwithstanding a finding by the Secretary that the complainant has made the showing required under clause (i), no investigation otherwise required under subparagraph (A) shall be conducted if the employer demonstrates, by clear and convincing evidence,

that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

49 U.S.C. § 42121(b)(2)(B)(iv):

Prohibition. – Relief may not be ordered under subparagraph (A) if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

49 U.S.C. § 60129(b)(2)(B)(ii):

Showing by employer. – Notwithstanding a finding by the Secretary of Labor that the complainant has made the showing required under clause (i), no investigation otherwise required under subparagraph (A) shall be conducted if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

49 U.S.C. § 60129(b)(2)(B)(iv):

Prohibition. – Relief may not be ordered under subparagraph (A) if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior.
