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1 P R O C E E D I N G S

2 (10:57 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next in Case 16-1011, WesternGeco
5 versus ION Geophysical.

6 Mr. Clement.

7 ORAL ARGUMENT OF PAUL D. CLEMENT

8 ON BEHALF OF THE PETITIONER

9 MR. CLEMENT: Mr. Chief Justice, and
10 may it please the Court:

11 Congress enacted Section 271(f) to
12 address this Court's decision in Deepsouth and
13 to prohibit a specific domestic act of
14 infringement with foreseeable foreign
15 consequences. Congress targeted a specific
16 domestic act, the supply of components from the
17 United States with a particular intent, that
18 the components be combined abroad in a way
19 that, if it happened in the United States,
20 would constitute infringement.

21 Congress provided a cause of action
22 for the domestic infringement and provided a
23 damages remedy that guaranteed the victim of
24 the infringement damages adequate to compensate
25 for the infringement.

1 The plain text of the Patent Act,
2 therefore, gives the victim of Section 271(f)
3 infringement an entitlement to adequate
4 damages, including lost profits. And the
5 presumption against extraterritoriality raises
6 no obstacle to that commonsense result.

7 There's no case of this Court that
8 applies the presumption to a damages provision,
9 and there's no case of this Court that applies
10 the presumption in a case of domestic injury
11 caused by domestic consequence -- conduct,
12 rather.

13 JUSTICE GINSBURG: Except there's one
14 feature of this that's -- I mean, it's one --
15 Congress, in 271(f), wanted the infringer to be
16 liable. And that's -- there's no doubt about
17 that.

18 But all of the activity occurs -- not
19 only does the activity occur abroad, this would
20 be the high seas, but the one who is causing
21 the injury is not the infringer; it's the
22 customer of the infringer. Do we have another
23 situation like that where -- where you can
24 collect from the infringer on the basis of
25 activity by the customer?

1 MR. CLEMENT: We -- we do, Justice
2 Ginsburg. The -- the general rule in a
3 domestic context is that you can sue the party
4 who's guilty of contributory infringement and
5 get lost profits for what they did, the
6 foreseeable consequences of what they did, even
7 if that's primarily damages that are caused by
8 their downstream direct infringer.

9 So I think it's helpful actually to
10 think about if this whole case happened on Lake
11 Michigan instead of on the high seas, we could
12 sue ION and only ION, not its customers who
13 practice the patent on Lake Michigan, and we
14 could recover our lost profits damages.

15 Now it's true that, in the domestic
16 case, the parties -- ION's customers who were
17 practicing the patent on Lake Michigan would
18 also be guilty of direct infringement. And
19 that's one difference. But that's exactly the
20 difference that Congress intended with Section
21 271(f).

22 They specifically created a form of
23 either contributory or inducement liability,
24 understanding that what was being induced was
25 the combination of components outside the

1 United States in a way that would constitute
2 infringement in the United States.

3 Now I do think it's important to
4 recognize, though, that what is the infringing
5 conduct is what ION does in the United States.
6 What the foreign combiners of the components do
7 on the high seas is not infringement of a U.S.
8 patent at all, which is why I think the
9 presumption against extraterritoriality is
10 really a misfit here.

11 And you have to resort to the general
12 principle, which is, in U.S. law, if somebody's
13 injured domestically by domestic conduct,
14 there's no rule that says that, in order to
15 calculate the compensatory damages to make them
16 whole, if you have to include in your
17 calculation some foreign thing, there's no rule
18 against that.

19 If I run over a French citizen on my
20 way to court this morning, I can't say, well, I
21 don't have to pay your hospital bills if
22 they're incurred in France because that would
23 be foreign and the presumption against
24 extraterritoriality --

25 JUSTICE GORSUCH: Mr. Clement, though,

1 the difference I wonder -- and I don't know,
2 but I wonder -- might be this: That, as
3 Justice Ginsburg indicated under 271(f), fine,
4 you get royalties because it's as if the -- the
5 bits were manufactured here. But you don't
6 have a -- a monopoly, a lawful monopoly, to use
7 this technology abroad. That doesn't belong to
8 you. That's outside the patent laws.

9 And so why would you get lost profits
10 by -- because of a third party's use entirely
11 abroad? That -- the lost profits aspect of the
12 damages is the bit that concerns me. And the
13 difference with the common law rule, for
14 example, might be because of the patent law's
15 territorial limits.

16 MR. CLEMENT: I don't think so,
17 Justice Gorsuch, and here's how I'd respond,
18 which is we're not collecting damages for the
19 combination itself. What we're doing is we are
20 collecting damages for the foreseeable
21 consequences of the domestic act of
22 infringement. And --

23 JUSTICE GORSUCH: Well, let's -- let's
24 just segregate out again the -- the royalties,
25 put those aside, okay?

1 MR. CLEMENT: Can -- can I --

2 JUSTICE GORSUCH: And just -- just
3 focus on the profits for me, okay?

4 MR. CLEMENT: Okay.

5 JUSTICE GORSUCH: And they arise from
6 a third party's use over which you have no
7 lawful monopoly. Your patent doesn't run to
8 the high seas, and so your uses aren't
9 protected there. So help me out with that
10 portion of the damages alone.

11 MR. CLEMENT: Sure. The -- the reason
12 that we can collect those damages, even though
13 that -- that conduct is not proscribed by a
14 U.S. patent, is because it is the reasonably
15 foreseeable result of domestic infringement.
16 And so it's no different from what this Court
17 faced in Dowagiac and Goulds, two century-old
18 cases, where what happened --

19 JUSTICE GORSUCH: It seems to me --

20 MR. CLEMENT: And I see skepticism --

21 JUSTICE GORSUCH: All right. Well,
22 here's the -- here's the degree of my
23 skepticism. I -- I have yet to see a case from
24 this Court at least where -- even under 271(a)
25 where the manufacture entirely takes place

1 here, third-party uses abroad give rise to lost
2 profit damages.

3 MR. CLEMENT: With all due respect,
4 Your Honor, that's Goulds. In Goulds, the
5 Canadian sales are allowed as part of the
6 compensation for the domestic making --

7 JUSTICE GORSUCH: In passing. The
8 Court doesn't even address the issue. We -- we
9 use the word "Canadian." That's all we've got.

10 MR. CLEMENT: But in Dowagiac, when
11 somebody comes into court and says I can
12 collect my damages against the Canadian
13 wholesaler, because of Goulds, this Court says:
14 Not so fast.

15 JUSTICE GORSUCH: Right.

16 MR. CLEMENT: Because you're suing a
17 wholesaler who did nothing in the United
18 States, nothing infringing, and they
19 specifically say that Goulds is different
20 because there the party, the -- the patent
21 holder, sued the right party, the party who
22 made the article in the United States and then
23 was guilty of infringement.

24 If I could get to your point about
25 reasonable royalty, though, I think it's very

1 important to show why that's not a way out
2 here, and my friend's concession on page 35 of
3 his brief, that you can take into account the
4 expected foreign use in calculating the rate
5 for the royalty, is a very damaging concession,
6 because reasonable royalties are not some
7 alternative to damages adequate to compensate
8 for the infringement. This is not like the
9 copyright context where statutory damages are
10 an alternative to actual damages.

11 Reasonable royalties are just a way of
12 calculating adequate damages. Indeed, they're
13 the preferred method when you have a patent
14 holder who voluntarily licenses the technology
15 to third parties.

16 Then you say: Okay, you voluntarily
17 licensed it for 20 cents the bit. That's what
18 we're going to impose as the reasonable royalty
19 to compensate you for the infringement.

20 JUSTICE BREYER: All that will
21 happen -- imagine you have the converse case.
22 I mean, if we can have a law like this, so can
23 every other country. And now an American firm
24 makes a part in some other country, all right?
25 And that happens more and more. They have

1 laboratories all over the world. They make a
2 part. They bring it back here. It doesn't
3 violate the patent law of the other -- of our
4 country, not at all. They sue to sell it all
5 over the place.

6 And suddenly a foreign patent holder,
7 in, say, Switzerland, has -- takes this
8 American company and obtains enormous profits
9 on the basis of the sales in the United States,
10 where those sales do not violate American law.

11 I mean, suppose 10 countries do this.
12 I try to think about that and I see chaos or
13 confusion. And at that point, I think part of
14 comity is, what happens if everybody does it?
15 And then I become uncertain about whether
16 there's no place for our concern with what
17 happens when we apply American law abroad.

18 MR. CLEMENT: Well, a couple --

19 JUSTICE BREYER: With effects abroad.

20 MR. CLEMENT: A couple of points,
21 Justice Breyer. First of all, this has been
22 the rule for basically 100 years.

23 JUSTICE BREYER: I know. I've read
24 the cases and I've read both sides and I think
25 you have an excellent case. And they also

1 point out that it's simply a different
2 situation or it's just passing and they did it
3 as -- you've read those too. Okay.

4 So I -- I -- I -- I -- you get a plus
5 for that, in my mind, and -- but not a total
6 plus because they get a plus too. All right.

7 So -- so I -- I -- I -- I -- I accept
8 the argument, but I think I know the argument.
9 Is there anything else?

10 MR. CLEMENT: The other thing is, I
11 mean, I -- I would say, you know, I get a
12 couple of pluses because this has also been the
13 rule -- this is -- but this has also been the
14 rule --

15 JUSTICE BREYER: Yes, yes.

16 MR. CLEMENT: -- in the copyright
17 context. And --

18 JUSTICE BREYER: Yes.

19 MR. CLEMENT: -- the world hasn't
20 ended in the copyright context.

21 JUSTICE BREYER: These --

22 MR. CLEMENT: And I think the key is,
23 here's the key, which is in all of these cases
24 what you need to have, before you can have any
25 of this liability, is a determination by the

1 legislature that some domestic act of
2 infringement is sufficiently serious that we're
3 going to provide full compensation, even if
4 that has some foreseeable increase abroad.

5 And if that creates some situation
6 where some country has a very idiosyncratic
7 view of what constitutes infringement, then
8 maybe governments --

9 JUSTICE BREYER: It's not
10 idiosyncratic. We cover, for example, computer
11 programs. The Europeans don't.

12 MR. CLEMENT: But --

13 JUSTICE BREYER: I mean, there --
14 there are different views all over the world.

15 Now what's bothering me are not the
16 cases, but I can't find that they are in your
17 favor 100 percent. So let's assume that I'm
18 right, that they're not clearly on your side.
19 They -- they may be open.

20 What's bothering me is the practical
21 problem that I brought up before of what
22 happens in respect to third-party behavior
23 where they are not violating the law and
24 damages are here, are calculated on the basis
25 of that. What happens if 10 countries do that,

1 if 20 countries do that?

2 I see three possible ways of trying to
3 deal with the problem. One way is what they
4 want.

5 Another way is through the notion of
6 proximate cause, because there's a D.C. case,
7 after Empagran, that takes that route. And
8 there may be a -- a -- a third route. I don't
9 know.

10 I'm posing a practical problem and
11 asking you what, if anything, you want to
12 respond with.

13 MR. CLEMENT: I want to respond with
14 two things, Your Honor: First of all is, if I
15 understand the concern to be double damages, I
16 think there are ways --

17 JUSTICE BREYER: No, it's not double
18 damages. It is the chaos that would ensue if
19 10 countries have the same rule that you are
20 advocating.

21 MR. CLEMENT: With all due respect,
22 there would be no chaos. And that is my
23 principal response. And we would have seen
24 chaos in some context if this were really a
25 problem.

1 And the reason we don't see chaos is
2 because every country, in order for there to be
3 the domestic act of infringement, has to say,
4 look, there's something about this that we
5 really don't want to happen in the United
6 States, and, if it happens in the United
7 States, we want to provide damages that make
8 the victim whole.

9 And I think it's a little odd to think
10 of every country doing this because my friend
11 on the other side concedes that you can have an
12 injunctive remedy to prohibit this kind of
13 domestic supply. And if you've got the
14 injunctive remedy, it wouldn't happen at all.
15 These foreign combinations would not have
16 happened.

17 And so the principle of damages that's
18 been around in the common law forever, and
19 hasn't caused international friction, is
20 there's no special rule when somebody injures
21 somebody domestically that says you can't
22 possibly look at any foreign evidence in order
23 to evaluate what would it take to put the party
24 back in the position they were.

25 I mean, at some level, this case is

1 pretty simple. Because of ION's domestic act
2 of infringement, my client has \$90 million less
3 in its wallet in Houston than it otherwise
4 would have if they had obeyed the law.

5 And there's nothing in the presumption
6 of extraterritoriality or concerns about
7 comity. I do think it is telling that, unlike
8 Empagran, unlike Kiobel, unlike many of this --
9 unlike Morrison, unlike many of these Court's
10 cases, there are no foreign governments filing
11 briefs here telling you, boy, would this be a
12 problem if this happens.

13 And I think that's, A, because it's
14 not a problem. And in some ways, I mean, it
15 would be more of a problem if the rule were the
16 other way. I think you would have more comity.

17 I mean, if you were to tell me that if
18 I hit the French Ambassador with my car in
19 Philadelphia that I'd pay less in damages than
20 I otherwise would because he's French and he's
21 probably going to have his medical bills paid
22 by a French hospital, I would say: I don't
23 think the French are going to be very pleased
24 about that.

25 I think they would think, no, there is

1 a domestic injury here and you compensate it
2 and you take the victim the way you find it,
3 which is the other problem with ION's
4 proposition here.

5 At times in their brief they seem to
6 say, if only my client had a different business
7 model, then maybe we could collect our lost
8 profit damages.

9 JUSTICE GORSUCH: I -- I -- I hear
10 that, but -- but the -- to the extent we're
11 talking about the injury here and the poor
12 French Ambassador, I -- I get that we're --
13 we're supposed to treat the manufacturer as if
14 it took place here, but how do we pretend that
15 the use on the high seas took place in Lake
16 Michigan?

17 That's where I'm struggling and I -- I
18 could still use your help.

19 MR. CLEMENT: So --

20 JUSTICE GORSUCH: I -- the high seas
21 and Lake Michigan are -- are just not the same
22 to me.

23 MR. CLEMENT: Well, two things, Your
24 Honor: One is, well, I think Congress made it
25 about as clear as it could in 271(f) that it

1 wanted you to treat the infringement on the
2 high seas as if it took place on Lake Michigan.

3 The second thing I would say, though,
4 is it just doesn't matter whether some action
5 by third parties that exacerbates damage is
6 independently lawful or unlawful.

7 I mean, if in hitting the French
8 Ambassador there is then an ambulance service
9 that takes the French Ambassador to the most
10 expensive hospital --

11 JUSTICE GORSUCH: Help -- help -- help
12 me out with just the language of the statute.
13 You say it's obvious from the language of the
14 statute.

15 What -- what -- what would you point
16 me to? What's your best textual argument to
17 show me that the use on the high seas is to be
18 treated as if it took place in Lake Michigan?

19 MR. CLEMENT: Because the violator of
20 271(f) is liable for either contributory or
21 inducing infringement, whether it's (f)(1) or
22 (f)(2), if they induce a combination that, if
23 the combination occurred in the United States,
24 would violate the patent laws here.

25 So, as the Court said in *Limelight*,

1 you effectively have a contributory
2 constructive infringement.

3 You're supposed to treat that foreign
4 infringement, even though, for reasons of
5 comity, we're not making the foreign
6 combination itself unlawful, we're supposed to
7 treat the domestic infringer just like they
8 induced a domestic act of infringement.

9 Of course, it doesn't stop there. I
10 mean, if you look at 281, which is the analog
11 of the cause of action issue at RJR, it says
12 for the infringement.

13 If you look at the 284, the provision
14 my friend wants you to look at and nothing
15 else, it says damages adequate to compensate
16 for the infringement.

17 There's no principle --

18 JUSTICE GINSBURG: What about -- what
19 about proximate cause? Wouldn't you have to
20 establish at least that the reason that -- that
21 you have -- that the sales that you lost to the
22 foreign, whatever the people who sweep the high
23 seas, that you would have gotten those
24 contracts if they didn't?

25 MR. CLEMENT: Absolutely. We have to

1 satisfy proximate cause. It provides
2 sufficient protection here. It's one way in
3 which I think 271(a) and 271(f) infringement is
4 different, because in the -- in the mine run
5 case of 271(f) infringement, it's going to be
6 very easy to show damages that are reasonably
7 foreseeable from the foreign combination
8 because, in order to be liable at all, you have
9 to intend or induce that very foreign
10 combination.

11 If I could reserve my time.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Mr. Tripp.

15 ORAL ARGUMENT OF ZACHARY D. TRIPP

16 ON BEHALF OF THE UNITED STATES, AS AMICUS

17 CURIAE, IN SUPPORT OF THE PETITIONER

18 MR. TRIPP: Mr. Chief Justice, and may
19 it please the Court:

20 I just have a few points I'd like to
21 make in follow-up to that. Of course, we're
22 asking the Court to reject the categorical rule
23 that a patentee can never be awarded damages
24 like these.

25 The Patent Act provides for damages

1 that are adequate to compensate for the
2 infringement, not damages that leave the victim
3 worse off than it would have been if the
4 infringement had never occurred.

5 If I could turn to the comity point
6 and the international relations point that
7 there were questions about, we're here as the
8 United States and we're supporting Petitioner.

9 The rule that we're advocating of full
10 compensation is already the rule that applies
11 basically everywhere else in U.S. law, in tort,
12 in contract, in copyright, that this Court
13 previously assumed applied in patent law as
14 well, and it hasn't given rise to any
15 significant foreign relations problems in -- in
16 any of those areas.

17 And -- and we don't think that there's
18 any reason to believe that it would here.

19 And I think one important piece of
20 that and one of the ways this is different for
21 actually regulating the conduct on the high
22 seas is that, if -- if U.S. law was actually
23 regulated, and the third parties on the high
24 seas, you'd have a different set of defendants.

25 The customers who actually did -- did

1 these surveys, they would be here right now
2 before -- before the Court, and they're not.

3 The only --

4 JUSTICE BREYER: Then maybe this is an
5 easy case, but what's in the back of my mind,
6 if I reverse the idea, see, France has this law
7 that you want here, right? Joe Smith goes to
8 France one day and he makes a tiny particle,
9 which it turns out violate's somebody else's
10 French patent. He ships it back to the United
11 States, where it forms a very small part of a
12 very large and valuable gizmo. And all of a
13 sudden, we discover that he's paying the entire
14 profit of the entire gizmo industry to some
15 French company that had a small patent on a
16 small part.

17 Now all I have to do is generalize
18 from that and I think, my God, we have a lot of
19 problems here. Now there should be some
20 principle in law that cuts that off so my
21 horrible example becomes just what you think it
22 is, a horrible example with no practical bite.

23 MR. TRIPP: Yes --

24 JUSTICE BREYER: I'm looking for that
25 principle.

1 MR. TRIPP: So I think there's two
2 pieces to that. I think one is that (f) is, I
3 think, narrower than you're describing in your
4 hypothetical. It doesn't go that far. It
5 reaches conduct that is basically tantamount to
6 actually just making the thing in -- in the
7 United States and then exporting it. This only
8 reaches the supply of all or a substantial
9 portion of the components or a component that
10 is especially designed and has no other
11 purpose, other -- other than for -- for use in
12 the invention. And, of course, you need to do
13 it with intent.

14 And then the other -- the other
15 principle that cuts off -- and I recognize the
16 -- the intuition that there may be situations
17 where it seems like the damages are running too
18 far afield from the wrongful conduct that
19 happened in -- either in the United States or
20 in France, in the hypothetical. All that we're
21 saying is the right way to approach that
22 problem is with the doctrines of causation in
23 fact and proximate cause that are tailor-made
24 to answer those kinds of questions.

25 JUSTICE BREYER: The D.C. Circuit did

1 that with Empagram follow-up in -- in a case
2 which you may not have read. Tell me if you
3 haven't read it; I'll stop.

4 MR. TRIPP: I'm not sure if I have or
5 not. I'm not sure what's the question on it.

6 JUSTICE BREYER: Well, they're --
7 they're using proximate cause to try to deal
8 with this. Does that ring a bell? Forget it.

9 MR. TRIPP: We -- so we think profit,
10 like as in an ordinary tort case in the French
11 tourist hypothetical, in order for her to prove
12 -- obtain recovery of lost wages, she needs to
13 prove that the lost wages were the proximate
14 cause -- were proximately caused by the
15 underlying tort. But her ability to recover
16 those wages does not depend on whether she
17 would have earned them in Florida or in France
18 because that is totally irrelevant to the
19 question at the damages stage, which is how big
20 an award does the court need to give to the
21 victim to compensate her, to get her back into
22 the position she -- that she would have been if
23 that tort had never occurred.

24 JUSTICE SOTOMAYOR: Well, you do --
25 you do have to prove, don't you, that -- that

1 this company would have, in fact, made that
2 sale abroad? What happens in a situation where
3 you need a license from a foreign government
4 and there's no evidence that you will
5 necessarily get that license?

6 MR. TRIPP: Well, I think --

7 JUSTICE SOTOMAYOR: Isn't that too
8 attenuated then?

9 MR. TRIPP: It may well be, and I
10 think that gets to an important point, which
11 actually in patent cases, it's quite difficult
12 to prove even causation in fact for lost
13 profits. If you look at the -- the
14 instructions in this case on -- even just on
15 causation in fact, they're in the JA from --

16 JUSTICE SOTOMAYOR: I have.

17 MR. TRIPP: Yeah, I mean, this is --
18 this is quite detailed and so you have -- you
19 have that. And then you have the proximate
20 cause overlay on top of it.

21 I think the other place that I think
22 is helpful to look at this is Professor
23 Yelderman's amicus brief, which does a nice job
24 of walking through the doctrine both of
25 causation in fact and proximate cause in the

1 Federal Circuit when dealing with problems that
2 are analogous to these. These are a robust
3 check.

4 But more than anything, what we're
5 saying is that the right way to approach it is
6 with that -- through that lens and not through
7 this ham-handed rule that basically, as soon as
8 you get across the international border, the
9 causal chain is automatically severed, no
10 matter what, no matter how clear the causal
11 link is. That rule, frankly, just -- just
12 doesn't make any sense, and we're asking the
13 Court to reject it.

14 JUSTICE KAGAN: Mr. Tripp, may I ask
15 about your theory for getting to that result,
16 which is different from Mr. Clement's theories,
17 and there are quite a number of theories over
18 on that side of the table. And some seem to
19 emphasize 271(f) and how that came to be and
20 what its particular terms are. Some seem to
21 emphasize that this is a damages provision that
22 we're talking about.

23 Why did you pick the one you picked
24 and why do you think it's better than the one
25 Mr. -- than the ones Mr. Clement picked, if

1 you still do?

2 MR. TRIPP: Yeah, we absolutely do.
3 We're asking the rule -- affirmatively to adopt
4 this rule as a matter of Section 284, the
5 general damages provision that applies all
6 throughout the Patent Act. It applies
7 basically everywhere in American law and should
8 apply basically everywhere in the Patent Act as
9 well, and not just in the rare cases that come
10 up under 271(f).

11 I think one piece of that is that
12 really the point of (f) is to treat the supply
13 of components for assembly abroad the same way
14 as just making it here and then exporting it.
15 But that's an (a) case, and we think the rule
16 of damages should be the same in both of them.

17 And then I think in terms of our --
18 our theory, I think our -- our -- our principal
19 submission that once you get to compensatory
20 damages, right, you have a plaintiff that is
21 standing in front of the court and has already
22 proven its case under U.S. law. It's proven
23 that it's been wronged by the defendant.
24 Right? And then all the court is trying to do
25 is to compensate the victim, to get the victim

1 back into the position that it would have been
2 in if that legal wrong had never occurred.

3 And we think the focus of that inquiry
4 of compensatory damages, that's always domestic
5 because the victim is just standing right there
6 in front of the U.S. court.

7 JUSTICE GORSUCH: So -- so just to
8 follow up on this, would you -- would you agree
9 that the -- that the other alternative creates
10 a potential incongruity? Because, if we were
11 to rely on 271(f), we might be in a situation
12 where we're permitting greater damages for
13 someone who only partially manufactured, only
14 partially completed the -- the patent
15 infringement in this country, as compared to
16 someone under (a), who did the entire act here.

17 MR. TRIPP: Yes, I -- I think that's
18 right, and I think actually the -- the sort of
19 the quintessential, the easiest case are these
20 (a) cases that was Goulds and as this Court
21 understood it in Dowagiac, which is that there
22 was a manufacturer here followed by a sale
23 abroad, right. A manufacturer for export, I
24 think, is the easiest example of this, we use
25 it in our brief, is the Acme and copycat

1 example.

2 But, of course, it could also arise in
3 (f) cases, and I agree with Petitioner that
4 it's particularly likely to arise in (f) cases
5 because every (f) case has this intent element
6 where you're intending that it will be combined
7 abroad. That happens in some (a) cases but --
8 but not in all of them.

9 JUSTICE KAGAN: Mr. Clement has
10 another theory, which just says the presumption
11 against territoriality doesn't apply at all to
12 damages provisions.

13 Is there a real difference between
14 that and what you're saying? I mean, can you
15 imagine a damages provision where you would
16 say, yes, the presumption against
17 territoriality applies and this is an
18 extraterritorial application?

19 MR. TRIPP: So I don't think there's a
20 significant difference between the two. We're
21 talking about compensatory damages here. And I
22 think all that we're saying -- I think you
23 could look at it either way. You would
24 basically get to the same place, either say
25 that it's inapplicable or apply it and just say

1 that it doesn't change the rule.

2 JUSTICE KAGAN: So it's not something
3 special about this damages provision; you're
4 saying as to any damages provision?

5 MR. TRIPP: I -- I think our rule
6 would apply to any general compensatory damages
7 provision. I have not been able to think of
8 any situation where the focus of compensatory
9 damages would be doing anything other than
10 compensating the victim, and we think that is
11 always going to involve a domestic application
12 of the statute. You could come at that and
13 just say that it's inapplicable in that
14 context. I think it basically gets the same
15 results, and we don't -- wouldn't have a
16 problem with that.

17 JUSTICE KENNEDY: Is there --

18 JUSTICE ALITO: Well, what is the --
19 what is the domestic injury?

20 MR. TRIPP: The -- I mean, the
21 domestic legal wrong here is the infringement.

22 JUSTICE ALITO: The legal wrong, yeah.

23 MR. TRIPP: Yeah.

24 JUSTICE ALITO: But this is what makes
25 this case difficult, because there's such a gap

1 between the legal injury, which is --

2 MR. TRIPP: Yeah.

3 JUSTICE ALITO: -- ephemeral, and the
4 practical injury, which occurs completely
5 abroad.

6 MR. TRIPP: Yeah, so I think two
7 responses to that. So, first, the patent is a
8 property right, and we often think of the
9 invasion of a property right as -- as being
10 something significant, even if it doesn't have
11 additional tangible harm. But also more
12 fundamentally, it's quite common to hold a
13 tortfeasor responsible for the harm that it
14 causes when it sets into motion a series of
15 events by which the victim will be -- will be
16 hurt, even if they're not hurt at the time.

17 So, in the French tourist hypothetical
18 that -- that we've been discussing, imagine
19 that what happened was that she brings her car
20 to the shop, the brakes are broken, and the
21 shop doesn't repair the brakes. They
22 tortiously don't do anything and send her back
23 out on the road with a car with no brakes.

24 Of course, she could recover for her
25 lost wages that were caused by that tort, and

1 it would not matter -- if I could just finish
2 the answer to the question -- it -- and it
3 would not matter that the tort in a sense
4 didn't hurt her at the time. It set into
5 motion her injury and would be liable for the
6 whole thing.

7 JUSTICE KENNEDY: I had one question
8 the Chief Justice agreed I could ask.

9 Suppose the Petitioner had a foreign
10 subsidiary in the Bahamas and it used that in
11 order to conduct a sweeping operation, so it
12 sells -- it sells the device to the -- to the
13 subsidiary, and the subsidiary then uses it.
14 What -- what result?

15 MR. TRIPP: If the Petitioner under
16 the facts of the case was basically selling the
17 item to itself?

18 JUSTICE KENNEDY: Yes, as a foreign
19 subsidiary.

20 MR. TRIPP: I think maybe in that case
21 it would have difficulty proving lost profits
22 because I'm not sure how big a profit it would
23 get in a sale made to itself.

24 JUSTICE KENNEDY: But then the facts
25 are same; the subsidiary loses the job because

1 ION does it itself.

2 MR. TRIPP: I -- I think so long as
3 they could prove causation in fact and
4 proximate cause, that -- that if there's
5 infringement here, they're on the hook for the
6 whole thing.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Mr. Shanmugam.

10 ORAL ARGUMENT OF KANNON K. SHANMUGAM

11 ON BEHALF OF THE RESPONDENT

12 MR. SHANMUGAM: Thank you, Mr. Chief
13 Justice, and may it please the Court:

14 The presumption against
15 extraterritoriality applies with particular
16 force to the Patent Act. And as the government
17 recognized at least in its brief, the
18 presumption applies independently to remedial
19 provisions as well as substantive ones because
20 remedial provisions can create a similar risk
21 of conflict with foreign law.

22 Now, in our view, this case involves
23 the extraterritorial application of the
24 remedial provision in the Patent Act, Section
25 284, which by its terms has no extraterritorial

1 reach. And while the Act of infringement here
2 all of the parties now agree was concededly
3 domestic, our submission is that the damages
4 here were, in fact, foreign. And, indeed,
5 Petitioner repeatedly describes those damages
6 as foreign.

7 JUSTICE KENNEDY: Well, suppose there
8 were a different business model and what the
9 Petitioner did was to sell the device to
10 others, rather than to conduct the operation
11 itself. And it's about ready to sell to X, a
12 foreign company, and then ION sells the same
13 device and takes the sale away.

14 Would the Petitioner be entitled to
15 the lost profits from that sale?

16 MR. SHANMUGAM: Yes. The answer would
17 be different in that circumstance because the
18 situs of the injury in that circumstance would
19 be the United States, at least absent any
20 additional facts because I think you could add
21 facts to alter the analysis.

22 In our view, that hypothetical,
23 Justice Kennedy, is basically the fact pattern
24 of Goulds. And there is an established body of
25 law for determining the situs of the sale of a

1 product and where you are exporting a product
2 from the United States to a foreign country, at
3 least arguably the situs of the sale is the
4 United States. But this case --

5 JUSTICE KENNEDY: But isn't the situs
6 of the contract here? You have the contract to
7 conduct the sweep.

8 MR. SHANMUGAM: So there is
9 importantly no evidence in the record to that
10 effect. In fact, if you take a look at page
11 41A of the Petition Appendix, the Federal
12 Circuit says that there is no contention that
13 the service contracts were entered into in the
14 United States.

15 The only thing that you have
16 domestically here -- and we all agree that this
17 is true -- is the initial act of infringement.
18 And, indeed, there is an immediate factual
19 injury that takes place at the point of
20 infringement.

21 The patentee at that point could
22 potentially lose sales of a component if the
23 patentee, in fact, sold a competing version of
24 the component. That is not the fact pattern
25 here.

1 And there is also the loss of
2 royalties at that point. And that's where the
3 reasonable royalty remedy comes in to
4 compensate that immediate factual injury.

5 JUSTICE SOTOMAYOR: But, I'm sorry, I
6 didn't think damages were awarded for a
7 hypothetical. They're awarded for what you
8 lose.

9 And since this company didn't sell its
10 products, it only used them, why should it only
11 get the value of royalty, since that's not its
12 business? Its business was to sell products,
13 to sell its services, your point, abroad or
14 anywhere in the world where it could. And it
15 wasn't going to ship the part. It wasn't going
16 to permit someone to get a royalty, to pay a
17 royalty.

18 MR. SHANMUGAM: Justice Sotomayor,
19 Petitioner, in fact, did get a reasonable
20 royalty, to the tune of \$22 million, which
21 compensates for the act of infringement; that
22 is to say, the initial factual injury from
23 supplying the infringing component from the
24 United States.

25 And that is hypothetical only in the

1 sense that the way a reasonable royalty is
2 calculated, because, obviously, there was no
3 license and no actual royalty, looks at a
4 hypothetical negotiation. It looks at the
5 negotiation that the patentee and the infringer
6 would have conducted for a license for what
7 turns out to be the act of infringement.

8 JUSTICE SOTOMAYOR: Well, if the jury
9 wasn't permitted to find lost profits, because
10 then the royalty might be something different.

11 MR. SHANMUGAM: Well, in fact, in this
12 case, the jury awarded both. They awarded lost
13 profits on top of the reasonable royalty,
14 which, as my friend recognizes, is the
15 traditional default remedy to provide for full
16 compensation.

17 But I do want to address very briefly
18 Petitioner's suggestion in the reply brief and
19 at oral argument that somehow the recognition
20 that the calculation of the royalty could take
21 into account expected foreign use is somehow
22 contrary to our fundamental submission
23 concerning the lost profits damages here.

24 I would refer the Court to Judge
25 Toronto's very thoughtful opinion in the

1 Carnegie-Mellon case on this point, that's the
2 opinion that we cite on the page of the brief
3 that Mr. Clement cited, but I think that in
4 calculating the reasonable royalty, you
5 naturally look to the commercial value of the
6 component that's being supplied from the United
7 States.

8 And engaging in that but-for analysis,
9 of course, one of the things that makes the
10 component lucrative is the fact that ION's
11 customers would value it for its subsequent
12 use. But there you're not taking into account
13 actual foreign use. You're taking into account
14 the expected foreign use as a way of
15 determining the commercial value of the
16 component.

17 JUSTICE KENNEDY: But -- but it seems
18 to me that you're confining the right of the
19 Petitioner to decide how it's going to use its
20 own patent. Isn't it up to the Patent Owner to
21 decide how it's going to capitalize on its
22 patent?

23 MR. SHANMUGAM: The right that is
24 conferred by Section 271(f), Justice Kennedy,
25 is a limited right. We agree with Petitioner

1 and the government that 271(f) was enacted to
2 fill a gap to essentially overrule this Court's
3 holding in Deepsouth, but Congress in doing
4 that acted in a restrained and limited fashion,
5 consistent with the traditional territorial
6 scope of the patent laws.

7 As this Court recognized in its
8 opinion in Microsoft, Congress acted narrowly
9 to regulate only the act of supply from the
10 United States. This might be a different case
11 if Congress had acted more broadly, if Congress
12 had prohibited the foreign combination, or if
13 Congress had amended Section 284 to make
14 broader damages available.

15 But it's important, I think, to keep
16 in mind that Deepsouth itself didn't involve
17 this type of damages. If you go back and look
18 at the Court's opinion in Deepsouth, it is
19 clear that Laitram, the patent holder in that
20 case, was seeking an injunction and it was also
21 seeking lost profits from the lost sales of
22 deveining equipment. But it was not --

23 JUSTICE ALITO: Well, if Congress had
24 prohibited the foreign combination, wouldn't
25 that be the end of the case? Would you still

1 argue that you'd have to analyze whether the
2 damages provision applies extraterritorially?

3 MR. SHANMUGAM: Well, I think you
4 would, Justice Alito, for the reasons given in
5 your opinion for the Court in RJR Nabisco. In
6 other words, the analysis doesn't end simply
7 because the underlying substantive provision
8 has extraterritorial reach. You do have to go
9 on and conduct an independent analysis of the
10 remedial provision.

11 Now I think there would be a question
12 about whether the remedial provision, say,
13 sufficiently incorporates the substantive
14 provision, such that the remedial provision
15 should be read to reach extraterritorially as
16 well. That was the debate between the majority
17 and the dissent in RJR Nabisco.

18 JUSTICE ALITO: Well, there -- there
19 are differences between this case and RJR
20 Nabisco, which I won't go into, but if -- if
21 you have a liability provision that says there
22 is liability for acts that are committed
23 abroad, what sense does it make to say, well,
24 although Congress thinks there should be
25 liability for these acts committed abroad, we

1 have to analyze the -- the remedial provisions
2 separately to see whether they wanted any
3 remedy for these acts that are committed
4 abroad.

5 MR. SHANMUGAM: I do think, Justice
6 Alito, that that was an aspect of the scheme at
7 issue in RICO insofar as, in the first part of
8 the Court's opinion, the Court essentially
9 construed Section 1962 to reach
10 extraterritorially because certain predicate
11 acts reached extraterritorially.

12 But I do, if you'll allow me to
13 briefly --

14 JUSTICE ALITO: Well, just tell me why
15 it makes sense. And forget about RJR Nabisco
16 for a minute.

17 MR. SHANMUGAM: Well, that's --

18 JUSTICE ALITO: Why does that make any
19 sense whatsoever?

20 MR. SHANMUGAM: Well, I think that
21 that actually illustrates why this is an easier
22 case than RJR Nabisco, because what really
23 doesn't make any sense is to conclude that
24 Congress, in regulating only domestic
25 substantive conduct, intended to make foreign

1 damages available as well.

2 And, again, in DeepSouth, this sort of
3 lost profits damages for downstream foreign use
4 was certainly not at issue. Laitram was not
5 seeking to obtain lost profits for the use of
6 deveining equipment.

7 At most, they were seeking lost
8 profits for the lost sales. But, with your
9 leave, let me say just one thing about RJR
10 Nabisco, having been told to forget it. I do
11 want to address just one aspect of it, which is
12 the effort to distinguish it by Petitioner in
13 its reply brief.

14 I think Petitioner attempts to draw a
15 distinction between a provision that merely
16 creates a private right of action on the one
17 hand and a damages provision on the other.

18 But, as you will recall in the latter
19 part of the Court's opinion, the Court
20 addressed Section 1964(c). That provision both
21 creates the private right of action and
22 provides for treble damages. And in the
23 Court's discussion of the risk to comity from
24 that provision, the Court discussed not only
25 the fact that you'd be creating a private right

1 of action in contexts where foreign governments
2 might not do likewise but also cited the risk
3 of treble damages.

4 And although there were no amicus
5 briefs in that case and, indeed, The European
6 Community was a plaintiff in that case, the
7 Court looked back to Empagran and the amicus
8 briefs that were filed in Empagran as support
9 for the proposition that damages provisions, no
10 less than substantive provisions, can give rise
11 to comity concerns. What this Court --

12 JUSTICE BREYER: What are they?

13 MR. SHANMUGAM: Well --

14 JUSTICE BREYER: I mean, that's --
15 that's where I'm -- I'm having trouble to be --
16 actually, to be specific. I can imagine a
17 problem if a large British or French or Swiss
18 company, which makes items sold all over the
19 world, farms out through a -- through a branch
20 in North Carolina and makes a tiny part which
21 it turns out infringes someone else's American
22 patent.

23 And, as a result for that -- of that,
24 that French or British or Spanish company must
25 pay to that North Carolina firm its profits

1 from billions of dollars of sales across the
2 world.

3 Now that's not just hypothetical
4 because an amicus brief cites to us the Marvel
5 case where that really happened. Okay? I can
6 see how that would, in fact, upset foreign
7 countries a lot, because, after all, it wasn't
8 even a violation of any foreign patent law.
9 And I can imagine them having similar statutes
10 which then cause more problems.

11 And that's all in your favor. Yeah.
12 But there is a principle of law that should
13 deal with that and it's called proximate cause.
14 And that's why I brought up the Empagran case
15 below. They didn't seem -- your opponents here
16 did not seem very willing to embrace it. But
17 doesn't -- why doesn't that work? I mean, the
18 problem is one of proximate cause and knowing
19 where to cut it off. And take comity into
20 account when you apply proximate cause. Don't
21 have an absolute rule. I thought that would be
22 a fallback position for them.

23 MR. SHANMUGAM: So I have several
24 responses to the various aspects of your
25 question, so let me attempt at least four of

1 them if I can get them out.

2 The first is that while there is a
3 substantial cleavage between Petitioner and the
4 government, I think that if you look at
5 Petitioner's reply brief in particular, it is
6 clear that Petitioner, like the government,
7 thinks that the same rule should apply to
8 Section 271(f) as to Section 271(a).

9 And, indeed, if you look at the first
10 10 pages of the reply brief in this argument,
11 an excursus about legal injury, the implication
12 would be the same in the 271(a) context. So,
13 to the extent that you cite perhaps a simpler
14 hypothetical in the 271(a) context, the rule, I
15 think, would have to be the same, and that's
16 why this case is so important.

17 I think, second, your hypothetical
18 earlier was exactly on point. At page 49 of
19 our brief, we give the example of computer
20 software. And as this Court will be aware from
21 the Alice case, there are very real limitations
22 under American law on the patentability of
23 computer software, but other countries, such as
24 Japan, have a different rule. And so you could
25 have the very same comity concern that you laid

1 out 20 minutes ago, where you have a foreign
2 country that, say, because an American company
3 engages in testing in that country, seeks to
4 impose liability for the downstream production
5 of the same product or downstream foreign uses.
6 And --

7 JUSTICE GINSBURG: But the liability
8 is -- is imposed on a U.S. entity. There's
9 nothing in this picture that regulates anything
10 that occurs abroad. The question is the
11 damages that flow from domestic conduct and not
12 regulation of conduct elsewhere.

13 MR. SHANMUGAM: I mean, to be fair,
14 Justice Ginsburg, I think that what Petitioner
15 is trying to do in this case is effectively to
16 hold us secondarily liable for what would be or
17 what might not be an act of foreign direct
18 infringement.

19 But I think that the concern that this
20 case presents is exactly the concern that Your
21 Honor stated in the opinion for the Court in
22 the Microsoft case; namely, in the Court's own
23 words, converting a single act of supply from
24 the United States into a springboard for what
25 would effectively be worldwide damages. And

1 the Court was citing the brief filed by my
2 learned friend Mr. -- Mr. Clement on behalf of
3 the United States when it said that. That is
4 exactly what is going on here.

5 And the last point I wanted to make in
6 response to your point, Justice Breyer, is the
7 one thing that we haven't heard anything about
8 in any of Petitioner's filings or at oral
9 argument is the fact that Petitioner and its
10 many, many corporate affiliates hold patents in
11 numerous countries around the world. And that
12 is the remedy in this circumstance, where what
13 you're talking about is a downstream foreign
14 use or downstream foreign infringement.

15 And, yes, this case arises in the
16 context of the high seas, but as we point out
17 and as the amicus brief on behalf of the
18 technology industry points out as well, even in
19 the high seas context, you do have a remedy.
20 You can go to the countries where the ships are
21 flagged and prosecute your patents.

22 And as we point out in our brief,
23 Petitioner and its affiliates have patents in
24 all these countries. Now I will say that those
25 countries could reach different judgments. In

1 fact -- and this is not in the briefs, but I
2 think this is established on the facts of this
3 case -- Petitioner's corporate affiliates
4 sought patents elsewhere; they sought patents
5 from the European Community. And they actually
6 abandoned the patent that is the equivalent to
7 the primary patent at issue in this case, the
8 '520 patent.

9 And I just think that that reflects
10 the fact that there could be different
11 judgments in different countries. And what
12 Petitioner is really trying to do in this case
13 is precisely what this Court ought to be
14 concerned about. It's attempting to convert an
15 American court, here the Eastern District of
16 Texas, into a one-stop shop for worldwide
17 damages.

18 JUSTICE GINSBURG: That is a different
19 --

20 JUSTICE KENNEDY: Well, your -- your
21 position is that the Petitioner is not entitled
22 to full compensation for its injury? That's
23 your position?

24 MR. SHANMUGAM: Petitioner is not
25 entitled to compensation for foreign damages;

1 in other words --

2 JUSTICE KENNEDY: Which in the full
3 compensation for its injury, your whole
4 position is that this Petitioner is not
5 entitled to full compensation for his injury,
6 yes or no?

7 MR. SHANMUGAM: Yes, as a consequence
8 of the application of the presumption against
9 extraterritoriality. And I really do think
10 that this Court established in RJR Nabisco that
11 provisions that afford relief are no different
12 from substantive provisions, jurisdictional
13 provisions, the other types of provisions to
14 which this Court has applied the presumption.

15 Now I will say, Justice Kennedy, that
16 our submission here is a modest one. I think
17 you can have reassurance that a rule in our
18 favor in this case is not going to create
19 problems for other statutes, and it may leave
20 the door open for damages of the sort we were
21 discussing earlier, damages of the type that
22 were at issue in the Goulds case, where you
23 have, for instance, the shipment of a product
24 from the United States abroad.

25 Our test is quite simple. In

1 determining whether damages are foreign or
2 domestic, you should look to the situs of the
3 factual injury and you should also look to
4 whether there is subsequent substantial foreign
5 conduct after the act of infringement that
6 gives rise to the injury.

7 And this case is a very
8 straightforward case on the facts to apply that
9 principle because everything relevant after the
10 initial act of infringement took place abroad.
11 What Petitioner is trying to obtain here is
12 lost profits damages for losing out on
13 contracts to perform entirely foreign surveys.
14 And that's because --

15 JUSTICE GINSBURG: Isn't that exactly
16 how the copyright law is applied under the
17 so-called predicate act doctrine? The
18 copyright owner can get damages flowing from
19 the exploitation abroad of domestic acts of
20 infringement. Isn't this an application to the
21 patent field of the same doctrine?

22 MR. SHANMUGAM: Yes and no, Justice
23 Ginsburg.

24 In the copyright context, the reason
25 why you can obtain profits for things that take

1 place abroad is because the copyright law makes
2 infringers' profits available.

3 And as Judge Hand explained in the
4 original opinion on this issue, infringers'
5 profits are -- are an equitable remedy. They
6 are a form of disgorgement. And they rely on
7 the legal fiction that you impose a
8 constructive trust on infringing articles so
9 that whatever happens to those articles, you
10 have a constructive trust on the profits as
11 well.

12 In 1946, Congress amended the
13 predecessor to Section 284 to eliminate that
14 form of profit, to eliminate infringers'
15 profits. And what you can't get even under the
16 Copyright Act is the sort of lost profits that
17 are at issue here, the lost profits of the
18 copyright holder. And I would refer this Court
19 to Judge O'Scannlain's opinion for the Ninth
20 Circuit in the Los Angeles News Service case,
21 which draws this distinction and makes that
22 distinction clear.

23 Again, we come back to the sort of
24 fundamental proposition that this Court has
25 taught in RJR Nabisco that you have to apply

1 the presumption to remedial provisions. There
2 is no indication on the face of Section 284
3 that in -- that it provides for
4 extraterritorial damages. All it provides, as
5 Justice Kennedy pointed out, is that you're
6 allowed to obtain damages adequate to
7 compensate for the infringement.

8 That language, while broad on its
9 terms, does not overcome the presumption
10 against extraterritoriality. And so then you
11 have to proceed to the second step. And,
12 again, as this Court laid out in RJR Nabisco,
13 at the second step, what you do is you look at
14 the focus of the relevant provision. The focus
15 of Section 284 is damages. And you determine
16 whether the damages are foreign or domestic.

17 No different from what the Court did
18 at the second step in RJR Nabisco, which was to
19 determine whether the factual injury, because
20 that statute -- statute was worded in terms of
21 injury, is foreign or domestic.

22 And -- and in -- again, in this case,
23 it is very easy to conceive of why the damages
24 are foreign because there really are two
25 distinct factual injuries here.

1 And since we're talking about car
2 crashes this morning, let me give you an
3 example. If, for instance, I was driving to
4 the Court this morning, I was driving over the
5 Roosevelt Bridge, and I crashed into somebody
6 on a motorcycle, and that individual was
7 concussed, the individual then got off the
8 motorcycle and wandered down the bridge,
9 perhaps across the Potomac and across the state
10 line into the District of Columbia, and then
11 got hit by another car, you would say that that
12 person had two injuries, the person had the
13 immediate injury, the concussion, and then had
14 the downstream injury, having, say, their foot
15 run over by another driver.

16 And here our argument is that the
17 downstream injury is entirely foreign. And
18 again, critically, it relies on the intervening
19 conduct of third parties that would constitute
20 an act of direct infringement.

21 Suppose that the ships in question
22 were all Norwegian ships, at least one of them
23 was a Norway-flagged ship. And assume that
24 Norway had coterminous patent laws with the
25 United States. In this case, Norway would have

1 the ability to impose liability for direct
2 infringement on our customers, the ones who
3 engaged in not just the combination but the
4 downstream use, and Norway would be able to go
5 after us under its equivalents to Section
6 271(b) and 271(c) as a --

7 JUSTICE KENNEDY: I'll think about
8 your hypo, but it seems to me as if you got
9 back in the car and then hit him when he went
10 -- in Virginia.

11 (Laughter.)

12 MR. SHANMUGAM: Well, critically --

13 JUSTICE KENNEDY: That -- that -- that
14 would be more like what happened in this case.

15 MR. SHANMUGAM: We did nothing
16 further, Justice Kennedy. Keep in mind that
17 Section 271(f) regulates only the act of
18 supply. And, indeed, there is no further
19 requirement under Section 271(f) that the
20 combination actually occur.

21 I heard my friend, Mr. Clement,
22 suggest at one point in his argument that
23 Section 271(f) has, as an element, some
24 additional act of inducement. He referred to
25 whether the parties induced a combination

1 abroad.

2 All that the relevant provision here
3 271(f)(2) does, is to regulate the supply with
4 an intent that a combination occur. Indeed, in
5 this case, as to a percentage of the DigiFINs
6 at issue, there was no ultimate subsequent
7 combination.

8 And so, again, all that we're saying,
9 and I think that this is a submission that
10 flows directly from the language of Section
11 271(f), is all Congress did was regulate the
12 domestic act of supply, consistent with the
13 traditionally territorial nature of the patent
14 laws.

15 And so all you get is damages for that
16 act of supply --

17 JUSTICE KAGAN: Mr. --

18 MR. SHANMUGAM: -- for the initial act
19 of supply.

20 JUSTICE KAGAN: Mr. Shanmugam, what
21 struck me about your hypo is that it's a
22 classic law school proximate-cause hypo. I
23 mean, that's what that hypo is.

24 And it suggests that if there's a
25 problem here, it's a problem about where you

1 draw the causal line. It's not a problem about
2 some categorical extraterritoriality rule.

3 MR. SHANMUGAM: So I do want to
4 address that, Justice Kagan.

5 I think that in my hypothetical, I'm
6 willing to concede that for purposes of
7 proximate causation and going back to Palsgraf
8 and all those wonderful cases, that I could be
9 held liable for both of those injuries.

10 And, to be sure, this analysis is not
11 entirely disconnected from causation because,
12 as I indicated earlier, the fact that there is
13 subsequent foreign conduct matters to the test.

14 What makes this case different from
15 the earlier French ambassador hypothetical is
16 that the injury is immediate. It may very well
17 be that you need to have further treatment, but
18 there is not subsequent conduct.

19 I will say --

20 JUSTICE BREYER: Well, you could -- go
21 ahead.

22 MR. SHANMUGAM: I do want to address
23 any suggestion that causation is somehow the
24 solution here by making a couple of points.
25 The first is that with regard to proximate

1 causation, the Federal Circuit has adopted a
2 quite expansive test which requires only mere
3 foreseeability, I would refer the Court to an
4 en banc opinion called Rite-Hite, which sets
5 out that test. There is no proximate causation
6 argument in this case.

7 Professor Yelderman in his amicus
8 brief suggests that this is an easy case for
9 proximate causation. So I don't know that
10 proximate causation, at least under the
11 existing state of the law, unless this Court
12 wants to address that down the road, is going
13 to provide much solace to companies like my
14 client.

15 We do have an argument that Justice
16 Sotomayor adverted to, that there is not
17 sufficient but-for causation here. That is an
18 issue that remains to be resolved on remand.
19 And in the event that this Court were to
20 reverse, it certainly should remand to the
21 Federal Circuit, so that it can address that
22 issue.

23 JUSTICE BREYER: It doesn't quite
24 answer it, because the -- your client, I don't
25 want to prejudice your client, but it didn't

1 seem to me he was the strongest case for your
2 argument.

3 I mean, the damages here are pretty
4 closely related, I think, but I can easily
5 imagine cases where it's not.

6 And so it's come -- the -- the
7 proximate cause thing, yes, it's true, if you
8 have a tough proximate-cause law, tough, you
9 will stop people from being fully compensated,
10 but the reason you do it is because you're
11 afraid with 92 district courts and juries and
12 so forth, it'll get out of control and be a
13 kind of major problem with other countries.

14 MR. SHANMUGAM: Well that --

15 JUSTICE BREYER: The argument the
16 other way -- and that's argument for you, say:
17 Just cut it off. The argument the other way is
18 there are cases that will deserve it, deserve
19 the damages. And that's --

20 MR. SHANMUGAM: I --

21 JUSTICE BREYER: -- anything you want
22 to say about that.

23 MR. SHANMUGAM: I would like to say
24 two things about that, Justice Breyer:

25 I mean, the first is that this Court

1 has crossed that bridge. And I would cite this
2 Court's opinion in Empagran for the
3 proposition, the modest proposition that these
4 sorts of damages awards can create comity
5 concerns.

6 And, yes, we're not necessarily
7 dealing with treble damages, though, of course,
8 enhanced damages are available in patent cases
9 and were, in fact, awarded here. But what we
10 are dealing with is the very real risk that
11 American juries in patent cases award much
12 bigger damages awards than courts do in other
13 countries.

14 And so, even leaving aside the fact
15 that other countries could have totally
16 different substantive patent laws, the risk of
17 run-away jury awards here certainly does
18 present substantial comity concerns.

19 And I think that that is really, you
20 know, fundamentally the reason why the
21 presumption should apply. And I think that the
22 problem that the other side has, which was
23 illustrated by Justice Gorsuch's question, is
24 that it can't point to anything that overcomes
25 the presumption.

1 Sure, Congress was thinking about the
2 possibility of eventual foreign combinations
3 when it enacted Section 271(f), but what it
4 didn't do was to attempt to regulate abroad.

5 And this Court in Morrison and RJR has
6 made clear that it is not sufficient to
7 overcome the presumption simply that Congress
8 might have contemplated the possibility of
9 downstream foreign activity. Congress has to
10 give a clear and unmistakable indication of its
11 desire to have extraterritorial reach.

12 It doesn't have to necessarily do so
13 in the language of the statute, though this
14 Court made clear in RJR Nabisco that it would
15 be a rare case where the presumption is
16 overcome in the absence of explicit statutory
17 language.

18 JUSTICE SOTOMAYOR: I'm sorry, did you
19 say earlier that if this sensor was
20 manufactured and sold from the United States to
21 someone abroad, you, the infringer, would be
22 liable for that sale, correct?

23 MR. SHANMUGAM: So the -- yes.

24 JUSTICE SOTOMAYOR: All right. So if
25 the infringer knows that the only way that this

1 product is going to be sold is tied to
2 services, why isn't -- why aren't they
3 responsible for that deprivation of the use of
4 the product?

5 MR. SHANMUGAM: Because the damages
6 are foreign. And to be sure, it is an element
7 of liability that you have to have this
8 foreign-oriented intent. Under Section 271(f),
9 you have to have an intent that the combination
10 ultimately occur.

11 And we're obviously not disputing
12 before this Court --

13 JUSTICE SOTOMAYOR: Well, the -- the
14 statute by its own is -- is addressing a
15 combination, an intent to have the infringement
16 completed abroad. So we know it applies
17 extraterritoriality -- with extraterritoriality
18 in that situation.

19 MR. SHANMUGAM: No. I mean, I think
20 that everyone agrees, and I think it's a better
21 reading of this Court's opinion in Microsoft
22 that Section 271(f) by its terms regulates only
23 domestic conduct. The Court --

24 JUSTICE SOTOMAYOR: Yes.

25 MR. SHANMUGAM: -- did invoke the

1 presumption, but it invoked the presumption to
2 reject a reading that would have given Section
3 271(f) effectively extraterritorial effect.

4 But again, just to be clear, I don't
5 think that Petitioner's argument ultimately
6 depends on Section 271(f). I think that
7 Petitioner's bottom line is that not only are
8 the Federal Circuit's decision in this case,
9 but also its earlier decisions in cases, such
10 as Power Integrations and Carnegie-Mellon, a
11 case where a jury awarded 1.17 billion dollars
12 in a reasonable royalty for foreign sales,
13 those decisions would also have to come out the
14 other way.

15 To the extent that Petitioner is
16 relying on Section 271(f), that's really
17 window-dressing on its argument because, at
18 bottom, the rule would be the same under
19 Petitioner's interpretation in the 271(f) or
20 the 271(a) context.

21 And critically we all agree that
22 271(f) was designed to overturn this Court's
23 decision in Deepsouth, but the way that
24 Congress did that was to regulate a form of
25 domestic conduct, a form of domestic conducts

1 -- domestic conduct that as a result of this
2 Court's decision in Deepsouth did not in and of
3 itself constitute infringement.

4 Congress was certainly not thinking
5 about making available this sort of downstream
6 damages. And to get back to what I think was
7 really sort of driving your question with
8 respect, Justice Sotomayor, the answer to all
9 of this is that Petitioner can go to foreign
10 courts and obtain damages if Petitioner has
11 foreign patent rights and if the law of those
12 respective jurisdictions permits it.

13 And there is a mechanism in place, the
14 WIPO process, that streamlines and makes it
15 easier for companies in Petitioner's position
16 to obtain those patents and to enforce them
17 abroad.

18 We'd ask that the judgment be
19 affirmed. Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Three minutes, Mr. Clement.

23 REBUTTAL ARGUMENT OF PAUL D. CLEMENT
24 ON BEHALF OF THE PETITIONER.

25 MR. CLEMENT: Thank you, Mr. Chief

1 Justice.

2 I would just like to clarify two
3 details and make a couple of points. One
4 detail, my friend mistakenly referred to this
5 case being brought in the Eastern District of
6 Texas. It was, in fact, brought in the
7 Southern District of Texas, where both of these
8 companies are located.

9 It may be a pedantic point, but the
10 Eastern District of Texas has a certain
11 implication to it that I wanted to clarify.

12 (Laughter.)

13 MR. CLEMENT: The second point is that
14 -- just to be crystal clear, and my friend
15 concedes this in Footnote 3 of the red brief,
16 but there were not royalties and lost profits
17 on the same components. The lost profits
18 damages for those particular components we got
19 only lost profit damages. And the reasonable
20 royalties are only calculated on other units.

21 And I think the concession that you
22 can take into account the expected foreign use
23 for calculating the royalty really gives the
24 game away, because calculating reasonable
25 royalties is just another counterfactual

1 exercise, determine -- that -- the whole point
2 of which is to determine what would my client's
3 position be in the absence of the infringement
4 in the United States. And there's no reason to
5 treat those two situations differently.

6 I'm, of course, happy to win this case
7 on any of the three theories we present in our
8 brief or on the government's theory. I would
9 say, though, that Justice Alito's question is
10 the reason that I do think the better way to
11 resolve this case is to say cleanly once and
12 for all: The presumption does not apply to
13 damages provisions. Because if you walked my
14 friend's theory through and applied the
15 extraterritoriality principles woodenly to a
16 generic damages provision that complimented an
17 expressly extraterritorial liability provision,
18 it would -- you'd end up saying: Well, this is
19 a foreign application and I guess I can't give
20 damages, even though Congress made this
21 expressly extraterritorial.

22 And that's not a trivial concern. I
23 mean, Congress acted to overturn this Court's
24 decision in EEOC versus Aramco and applied
25 Title VII abroad. And it supplements it with a

1 generic damages provision.

2 It would be really weird if you
3 couldn't get damages for that expressly
4 extraterritorial application. And I think it
5 would be just as weird, with all due respect,
6 to say that you couldn't get compensatory
7 damages for the full amount of the loss in a
8 271(f) case because the foreign combination
9 occurred abroad.

10 Congress understood what it was doing.
11 It was imposing liability on a domestic actor
12 for combinations that intentionally took place
13 abroad. And I do think proximate cause is the
14 solution to a lot of the problems, but
15 proximate cause isn't going to be a lot of help
16 to defendants in 271(f) cases because if you
17 have to intend or induce the foreign
18 combination, I would say it's reasonably
19 foreseeable.

20 So we think you should reverse the
21 decision below. Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel. The case is submitted.

24 (Whereupon, at 11:57 a.m., the case
25 concluded.)

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