No. 18-956

IN THE

Supreme Court of the United States

GOOGLE LLC,

Petitioner,

v.

ORACLE AMERICA, INC.,

Respondent.

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

BRIEF OF AMICUS CURIAE
ENGINE ADVOCACY
IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. The Federal Circuit Has Displaced Regional Circuit Law in Copyright and Created New Opportunities for Forum Shopping. 3

A. The Decision Below Creates an "Intra-Circuit Split" Between Two Different Versions of Ninth Circuit Copyright Law. 4

B. The Nature of Federal Circuit Jurisdiction Enables Plaintiffs to Choose Their Preferred Version of Ninth Circuit Law. 5

C. Absent Supreme Court Intervention, this Intra-Circuit Split is Unlikely to Be Rectified. 7

II. The Intra-Circuit Split and Forum Shopping Are Particularly Harmful to Startups and Small Innovators, Which Are Critical to the Economy 9

A. The Intra-Circuit Split Created Below Particularly Causes Harm to Startups........ 10

B. This Type of Forum Shopping Favors Larger Entities, Who Own Patents. 13

C. This Forum Shopping May Create a New Type of Copyright Troll. 13

D. The Forum Shopping Enabled by the Decision Below is Contrary to the Federal Circuit's Purpose and Choice of Law Rationale. 15

CONCLUSION 16

TABLE OF AUTHORITIES

Page(s)

Cases

Atari Games Corp. v. Nintendo of Am., Inc.,
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Oracle Am., Inc v. Google LLC,
886 F.3d 1179 (Fed. Cir. 2018) 4

Panduit Corp. v. All States Plastic Mfg. Co.,
744 F.2d 1564 (Fed. Cir. 1984) 16

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28 U.S.C. § 1295(a)(1) 4

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J. John Wu and Robert D. Atkinson, *How Technology-Based Start-Ups Support U.S. Economic Growth*, Information Technology & Innovation Foundation (Nov. 2017), http://www2.itif.org/2017-technology-based-start-ups.pdf 12

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S. Rep. 97-275 (1981) 16

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INTEREST OF AMICUS CURIAE

Amicus Engine Advocacy ("Engine") is a non-profit technology policy, research, and advocacy organization that bridges the gap between policymakers and startups, working with government and a community of high-technology, growth-oriented startups across the nation to support the development of technology entrepreneurship.[1] Engine conducts research, organizes events, and spearheads campaigns to educate elected officials, the entrepreneur community, and the general public on issues vital to fostering technological innovation.

Engine seeks to bring to the Court's attention the perspective of high-technology startups on the impact of this case that are not likely to be fully presented by the parties. In particular, Engine submits this brief to highlight a novel form of forum shopping that is likely to arise from the decision below, as well as the damage to startups, small businesses, entrepreneurs, and innovators caused by this jurisdictional gamesmanship. Engine urges this Court to step in to prevent this copyright forum shopping from hindering American innovation and the economy as a whole.

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[1] Pursuant to Supreme Court Rule 37, the parties received timely notice of and have consented to the filing of this brief. Petitioner's blanket consent is on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than the amici or their counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The petition in this case arises from the Federal Circuit deciding a copyright appeal under Ninth Circuit law. Although the decision below is formally non-binding, its consequences are nationwide, critically damaging to the startups our economy relies on, and unlikely to be remedied by any other court before irreparable harm occurs.

In deciding this case, the Federal Circuit purported to apply Ninth Circuit law, but instead applied an amalgam of rules from different circuits. The result—the decision below—creates new rights not available under the Ninth Circuit's own interpretation of copyright law. This created an "intra-circuit split," in which the "Ninth Circuit" law that applies depends on whether the Ninth Circuit or Federal Circuit hears the appeal. To make matters worse, the Federal Circuit hears any case that contained a patent claim when filed, even when those claims are not appealed. This allows any plaintiff with a patent to forum shop, opting in to the Federal Circuit's version of Ninth Circuit law at will, merely by adding a patent claim.

The decision below has particularly dire consequences for software startups, a great proportion of which are within the Ninth Circuit. The intra-circuit split creates legal uncertainty that small companies are particularly ill-equipped to manage. It also increases development costs, forcing expensive compliance with a supposedly non-binding legal decision. These costs and uncertainty in turn reduce the investment that is critical to startup success. The split also places control of forum and precedent in the hands of patent owners, whether they are large

competitors or patent assertion entities seeking quick settlements.

Because the Ninth Circuit cannot directly review Federal Circuit decisions, and the forum of future appeals will be selected by plaintiffs, it will likely take a long time before the Ninth Circuit has any opportunity to address the errors in the decision below. The Federal Circuit is unlikely to revisit the decision, having already declined en banc review. And parties suing in other regional circuits can likely obtain a similar rule by opting in to Federal Circuit review. The result is a persistent decision with nationwide effect that causes disproportionate harm to startups and small companies.

The Court should grant the petition and repair the damage done by the decision below.

ARGUMENT

I. The Federal Circuit Has Displaced Regional Circuit Law in Copyright and Created New Opportunities for Forum Shopping.

The decision below is not simply a one-off, non-binding opinion by the Federal Circuit interpreting Ninth Circuit law. Rather, it creates an opportunity for forum shopping that will effectively give the decision below nationwide precedential value, causing irreparable harm to startups and damaging the innovation economy more generally unless the Supreme Court intervenes.

A. The Decision Below Creates an "Intra-Circuit Split" Between Two Different Versions of Ninth Circuit Copyright Law.

The decision below purports to apply Ninth Circuit law. *Oracle Am., Inc v. Google LLC*, 886 F.3d 1179, 1190 (Fed. Cir. 2018). However, it deviates significantly from Ninth Circuit precedent, effectively creating two different versions of Ninth Circuit law.

When the Federal Circuit decides claims not exclusively within its jurisdiction (for convenience, "non-patent claims"), it applies regional circuit law. *See* 28 U.S.C. § 1295(a)(1); *Atari Games Corp. v. Nintendo of Am., Inc.*, 975 F.2d 832, 837 (Fed. Cir. 1992). However, as detailed by Google and other amici, the court below instead cobbled together a new approach from several disparate circuits, contradicting binding Ninth Circuit precedent. *See* Peter S. Menell, *Rise of the API Copyright Dead?: An Updated Epitaph for Copyright Protection of Network and Functional Features of Computer Software*, 30 Harv. J. Law & Tec 305, 427 (2018); Petition at 11-15.

The result is an "intra-circuit split" where the Ninth Circuit and Federal Circuit provide divergent interpretations of substantive copyright law. This split creates uncertainty about whether APIs are copyrightable under Ninth Circuit law. The consequences of the split, however, reach far beyond the Ninth Circuit.

B. The Nature of Federal Circuit Jurisdiction Enables Plaintiffs to Choose Their Preferred Version of Ninth Circuit Law.

Because plaintiffs can easily select whether their cases will be appealed to the Ninth or Federal Circuit, they can shop for the version of Ninth Circuit Law that favors them. Any time non-patent claims are filed alongside patent claims, the appeal will be heard by the Federal Circuit, even if the patent claims are dismissed early, transferred to another court, or are not being appealed.[2] *Atari Games,* 975 F.2d at 837. In such cases, the Federal Circuit applies regional circuit law for the non-patent issues.

Some parties have suggested that because the Federal Circuit's decision below is technically not binding precedent even within the Ninth Circuit, the impact of the decision is minimal and the case is not a good candidate for review by this Court. *See, e.g.*, Brief for United States as Amicus Curiae at 22, *Google, Inc., v. Oracle America, Inc.*, 135 S. Ct. 2887 (2015) (No. 14-410). ("Second, the decision below has limited precedential value. The Federal Circuit's decision applying Ninth Circuit law would not bind a future Ninth Circuit panel, and it would bind future Federal Circuit panels only in cases arising within the Ninth Circuit."). *See also* Brief for Software Freedom Law Center and Free Software Foundation as Amici Curiae in Support of Respondent at 3, *Google, Inc. v. Oracle America, Inc.*, 135 S. Ct. 2887 (2015) (No. 14-410).

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[2] There is an exception, not relevant here, in the rare case where the patent claims are dismissed without prejudice.

But the nature of Federal Circuit jurisdiction has created an incentive for a novel type of forum shopping. Any plaintiff with a patent can "opt in" to their preferred, Federal Circuit version of the law by simply including a patent claim in the complaint—even if it is unrelated to the other claims. This arguably renders the decision below even more dangerous than if it were always binding on the Ninth Circuit: by deciding whether their appeal will be heard by the Federal Circuit, each plaintiff gets to decide if the Federal Circuit's precedent applies to them.

Instances of forum shopping for the more favorable version of Ninth Circuit law have arguably already begun to surface. Shortly after the Federal Circuit copyrightability decision in *Oracle v. Google*, Cisco alleged copyright infringement of Command Line Interfaces (CLIs), which implicate the same aspects of copyright law as APIs. *See, e.g.*, Cisco's Notice of Mot. and Mot. for Partial Summ. J., *Cisco Systems, Inc. v. Arista Networks, Inc.* (N.D. Cal. Aug. 4, 2016) (No 14-05344) (ECF No. 348) (relying heavily on the Federal Circuit's copyrightability decision in this case). As one reporter noted at the time, Cisco's decision to include a patent claim in what was predominantly a copyright suit "will ensure Federal Circuit review." Joe Mullin, *From API to CLI—Cisco v. Arista Awaits a Jury Verdict Under the Oracle v. Google Shadow*, Ars Technica (Dec. 14, 2016, 10:15 AM), https://arstechnica.com/tech-policy/2016/12/cisco-v-arista-awaits-a-jury-verdict-under-the-oracle-v-google-shadow/. Legal analysts similarly commented that the *Cisco v. Arista* battle was beginning to "look a lot like Oracle v. Google." Scott Graham, *Cisco v. Arista IP Battle Starts to Look a Lot Like Oracle v. Google*, The Recorder (Aug. 26, 2016, 9:49 AM),

https://www.law.com/therecorder/almID/1202766017854/cisco-v-arista-ip-battle-starts-to-look-a-lot-like-oracle-v-google/. Although that case eventually settled, it demonstrates how parties may already be gaming jurisdiction to take advantage of this case.

Because the Ninth Circuit contains the heart of the software industry, harm to software companies in the Ninth Circuit alone would have serious consequences nationwide. François Candelon et al., *18 of the Top 20 Tech Companies Are in the Western U.S. and Eastern China. Can Anywhere Else Catch Up?*, Harvard Business Review (May 3, 2018), https://hbr.org/2018/05/18-of-the-top-20-tech-companies-are-in-the-western-u-s-and-eastern-china-can-anywhere-else-catch-up. But the effect of the decision below is not limited to the Ninth Circuit. As detailed in Google's petition, the decision below draws from the law of multiple circuits. Petition at 14. It is likely that, in the event a similar issue is appealed to the Federal Circuit from a district outside the Ninth Circuit, the Federal Circuit's interpretation of that law will look very similar to the decision below. This gives the decision below nationwide effect.

C. Absent Supreme Court Intervention, this Intra-Circuit Split is Unlikely to Be Rectified.

The intra-circuit split and forum shopping opportunities created by the decision below are essentially impossible to repair without Supreme Court intervention. These splits are extremely difficult to address because the structure of the federal

appellate courts limits the ability of the Ninth Circuit to reassert control over its copyright jurisprudence.

There is no direct route for Ninth Circuit review of the Federal Circuit's decisions, either by a 3-judge panel or en banc. This means the Ninth Circuit will never directly address the case below or future cases that are routed to the Federal Circuit.

Additionally, because plaintiffs get to choose the appellate forum, it is uncertain if and when the Ninth Circuit will have the opportunity to directly address the same issues as the Federal Circuit did in the decision below. Plaintiffs will generally opt in to the Federal Circuit, denying the Ninth Circuit the opportunity to engage in even parallel review.

There are two possible paths to the Ninth Circuit reviewing the same substantive law in a different case, but they are unlikely to avoid widespread harm. First, a party could sue over a purported API copyright in the Ninth Circuit and opt not to include a patent claim. However, this requires a plaintiff to deliberately choose a jurisdiction against its own interest or be unable to acquire a patent to assert. Second, a user of an API could seek a declaratory judgment that their use was noninfringing. For this to succeed, however, potential plaintiffs would need to make threats but not sue, giving up control of jurisdiction.

Neither of these is likely to occur in a short timeframe, and in the interim, innovators will suffer and startups will fail. As explained below, startups and small businesses are particularly harmed by the decision on review. They are also particularly ill-suited to maneuver a case into the Ninth Circuit to repair the law. Startups typically lack the resources to

defend lawsuits, let alone put themselves at risk in a declaratory judgment action when they haven't been sued—those resources are better spent developing products and services. This means the already-small pool of potential declaratory judgment plaintiffs is further reduced, and all who reuse APIs must wait and hope for a large entity to put itself at risk to help everyone.

Further, even if cases in some way addressing API copyrightability came before the Ninth Circuit, they would be unlikely to squarely address the same issues as the decision below, creating an even more complex patchwork of decisions and inconsistencies in the interpretation of Ninth Circuit copyright law. The Federal Circuit has already declined en banc review in this case. And absent a clear, direct Ninth Circuit case exactly on point, there is little reason to believe the Federal Circuit will choose to diverge from their own precedent, even where there is clarifying Ninth Circuit case law.

Because the Ninth Circuit has limited opportunities to repair the damage done by the decision below, and startups cannot afford the damage that will accrue in the meantime, the Court should grant the petition.

II. The Intra-Circuit Split and Forum Shopping Are Particularly Harmful to Startups and Small Innovators, Which Are Critical to the Economy.

New and young companies are a key part of the American economy. They act as a primary source of job creation and drive "economic dynamism" by injecting competition into markets and accelerating innovation.

Jason Wiens and Chris Jackson, *The Importance of Young Firms for Economic Growth*, Ewing Marion Kauffman Foundation (Sept. 13, 2015), https://www.kauffman.org/what-we-do/resources/entrepreneurship-policy-digest/the-importance-of-young-firms-for-economic-growth. The intra-circuit split and forum shopping opportunities created by the decision below disproportionately harm startups and small innovators, who are particularly susceptible to uncertainty and lack the resources to defend abusive litigation. Harm to young businesses reduces opportunities for employment and stifles competition and innovation nationwide, and the Court should grant certiorari to prevent this harm.

A. The Intra-Circuit Split Created Below Particularly Causes Harm to Startups.

This intra-circuit split creates both substantive legal risk and additional legal uncertainty that will harm startups, reduce investment, and ripple throughout the economy. The decision below particularly impacts startups, who often rely on APIs to leverage engineers' existing skill sets, accelerate development time, and compete with established companies.

i. The Proliferation of Jurisdictions Creates Burdens that Startups Cannot Bear.

Allowing multiple versions of Ninth Circuit copyright law to persist forces startups using APIs to attempt to comply with all versions in order to shield themselves from liability. At best, this imposes a significant strain on small companies, who dedicate

their already limited funding to product development, and often do not have the money to seek legal help until their businesses begin to turn a profit. At worst, these companies are placed in a lose-lose situation, unable to comply with conflicting legal regimes and at the mercy of potential plaintiffs who decide which law applies.

If a startup seeks to comply with the most restrictive version of the law—contrary to the binding precedent of the Ninth Circuit itself—the costs of compliance could be staggering. Such startups will have to hire more engineers to reinvent the wheel by creating new APIs and retrain both internal and external developers to use the newly re-invented wheel. They will also need to hire additional attorneys to monitor API use for potential infringement. To these vulnerable small businesses, every dollar spent in this way is a dollar lost to product development and growth. This result is not just costly, but ironic, because APIs were created precisely to alleviate the need for individual businesses to write different code every time they wanted to connect to a new service. *See* Bala Iyer and Mohan Subramaniam, *The Strategic Value of APIs*, Harvard Business Review (Jan. 7, 2015), https://hbr.org/2015/01/the-strategic-value-of-apis ("a firm without APIs that allow software programs to interact with each other is like the internet without the World Wide Web.")

The consequences of the decision below are exacerbated by the fact that a large percentage of the nation's startups—and in particular, technology startups—come from the Ninth Circuit. In 2016, the median state contained 1,800 technology-based startups, and California alone had 30,000. J. John Wu

and Robert D. Atkinson, *How Technology-Based Start-Ups Support U.S. Economic Growth*, Information Technology & Innovation Foundation at 39 (Nov. 2017), http://www2.itif.org/2017-technology-based-start-ups.pdf. And, as explained above, the decision below is not limited in its effect to the Ninth Circuit.

The decision below therefore places the operational and financial successes of startups nationwide at serious risk by forcing them to increase spending on both legal compliance and engineering.

ii. Additional Risk and Uncertainty Reduces Investment in Startups.

Technology startups depend heavily on external funding from angel investors, venture capitalists (VCs), and other institutional funds. These companies take up a significant portion of VC funding, with approximately 82% of VC-backed startups in 2016 coming from the information technology sector. Wu & Atkinson, *supra*, at 106.

Uncertainty over which version of regional circuit copyright law applies to startups will not only discourage startups from reusing APIs, but discourage venture capitalists from investing in startups that employ the specific types of uses for APIs impacted by the decision below. Given that over 70% of venture capital investments fail, venture capitalists are extremely strategic about the young businesses they choose to fund and are less likely to invest in startups with known legal risks. Deborah Gage, *The Venture Capital Secret: 3 Out of 4 Start-Ups Fail*, Wall Street Journal (Sep. 20, 2012), https://www.wsj.com/articles/SB10000872396390443720204578004980476429190. Coupled with studies that show legal risk is negatively

correlated with venture capital investment, venture capitalists are likely to treat uncertainty over the status of copyright law regarding APIs as a reason to steer away from startups that make use of existing APIs. *Cf.* Stephen Kiebzak et al., *The Effect of Patent Litigation and Patent Assertion Entities on Entrepreneurial Activity*, 45 Res. Pol'y 218, 230 (2016).

B. This Type of Forum Shopping Favors Larger Entities, Who Own Patents.

This forum shopping also disfavors small entities because Federal Circuit jurisdiction is predicated upon the assertion of a patent claim in the original complaint. This means it will be easier for companies that have patents, including larger, older entities, to forum shop. Small entities may not have the resources to file or purchase patents, which will make it more difficult for them to be heard by the Federal Circuit, even if they prefer to. The size of a company, as well as the number of patents it owns, should not determine what set of laws apply to them or what precedent they face in court.

C. This Forum Shopping May Create a New Type of Copyright Troll.

As we expect other amici will address in their briefs, the decision below is inconsistent with software developers' settled expectations on free reuse of APIs. This creates opportunities for a new analog of "patent assertion entities" ("PAEs," sometimes called "patent trolls") to emerge, in which an entity will attempt to profit by purchasing copyrights in original APIs, searching for instances of others reusing those APIs without a license, and suing for damages under the

Federal Circuit's ruling. *See* Michael Hussey, *Copyright Captures APIs: A New Caution for Developers*, TechCrunch (Nov. 3, 2015), https://techcrunch.com/2015/11/03/copyright-captures-apis-a-new-caution-for-developers/. This path would be particularly attractive to existing PAEs, who already own patents they can use to select or threaten Federal Circuit review. What is more, PAEs are notorious for selectively targeting small businesses and startups. Across PAE suits from 2005 to 2012, at least 55% of unique defendants had revenues of $10 million or less per year. Colleen Chien, *Startups and Patent Trolls*, 17 Stan. Tech. L. Rev. 461, 464 (2014).

Though large institutional innovators may have the financial resources to defend lawsuits while continuing to innovate, smaller startups are far less likely to have the bandwidth, energy, or funding to endure litigation. Small businesses and startups run a lean operation and generally must allocate their already limited funds efficiently in order to stay afloat until they bring their products or services to market. Examples of startups being forced to lay off employees and losing millions in valuation as a result of litigation are also common. *See* Joe Mullin, *New Study Suggests Patent Trolls Really Are Killing Startup*s, Ars Technica, (June 11, 2014, 5:55 PM), https://arstechnica.com/tech-policy/2014/06/new-study-suggests-patent-trolls-really-are-killing-startups/. Not only are smaller companies far more likely to build applications that rely on large company APIs than vice versa, the size of the average seed/angel round is small enough that litigation of any type, be it offensive or defensive, is effectively impossible. *See, e.g.*, Jeffrey Sohl, *The Angel Investors Market in*

2015: A Buyer's Market, Center for Venture Research (May 25, 2015), https://paulcollege.unh.edu/sites/default/files/resource/files/full-year-2015-analysis-report.pdf (finding that the average angel deal size in 2015 was only $345,390, including deals for biotech, industrial, and energy companies which tend to have higher capital needs than software startups).

This vulnerability makes them a prime target for litigious plaintiffs hoping for easy settlements as startups may "rationally decide to settle" if the estimated cost of litigation exceeds the settlement amount, even if they reasonably believe they could prevail in court. Federal Trade Commission (FTC), *Patent Assertion Entity Activity* at 20 (Oct. 2016), https://www.ftc.gov/system/files/documents/re ports/patent-assertion-entity-activity-ftc-study/p131203_patent_assertion_entity_activity_an_ftc_study_0.pdf. The danger of such opportunistic abuse amplifies the need for Supreme Court review of the decision below.

D. The Forum Shopping Enabled by the Decision Below is Contrary to the Federal Circuit's Purpose and Choice of Law Rationale.

The decision below creates an opportunity for forum shopping that is not just destructive, but contrary to the policy underlying the Federal Circuit itself and its rules governing non-patent matters. The Federal Circuit was established to consolidate patent review and mitigate forum shopping on patent issues between the regional circuit courts. *See* Peter S. Menell, *API Copyrightability Bleak House: Unraveling and Repairing the Oracle v. Google Jurisdictional*

Mess, 31 Berkeley Tech. L.J. 1515, 1580 (2016). Congress explicitly chose *not* to do the same in other areas of law, including copyright. *See* S. Rep. 97-275 (1981) ("appeals of district court decisions in cases involving copyrights or trademarks and none of the other issues will continue to go to the regional appellate courts"). *See also* Menell, 31 Berkeley Tech. L.J. at 1586 ("Congress retained the federalist judicial structure for non-patent issues"). And as the Federal Circuit itself articulated when first applying regional circuit law to procedural matters, litigants "should not be required to practice law and to counsel clients in light of two different sets of law for an identical issue due to the different routes of appeal." *Panduit Corp. v. All States Plastic Mfg. Co.*, 744 F.2d 1564, 1574 (Fed. Cir. 1984).

In the decision below, the Federal Circuit violates both policies. By misapplying Ninth Circuit law and effectively creating a Federal Circuit version of copyright law, it encourages forum shopping and places litigants in the exact situation the *Panduit* court sought to avoid.

CONCLUSION

The decision below creates a new, dangerous copyright rule and gives plaintiffs the opportunity to forum shop for that rule between the Ninth Circuit and the Federal Circuit. The jurisdictional gamesmanship that follows harms all, but comes particularly at the expense of startups, small businesses, and individual entrepreneurs and innovators. The regional circuit courts are unlikely to repair the damage done below before irreparable harm occurs, and there is no reason to believe the Federal

Circuit will revisit its own precedent. This Court should grant certiorari to repair this split and avoid the nationwide harm that results.

Respectfully submitted,

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