

No. 19-1269

IN THE
Supreme Court of the United States

TCL COMMUNICATION TECHNOLOGY
HOLDINGS LIMITED, *et al.*,

Petitioners,

v.

TELEFONAKTIEBOLAGET LM ERICSSON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

**BRIEF OF *AMICI CURIAE*
TWENTY LEGAL SCHOLARS
IN SUPPORT OF PETITIONERS**

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INTEREST OF AMICI

Amici are scholars at universities throughout the country who focus on intellectual property, antitrust, and standard-setting. We have no personal interest in the outcome of this case,¹ but have a professional interest in seeing that the law develops in a reasoned and measured way.

SUMMARY OF ARGUMENT

This Court should grant TCL's petition for a writ of certiorari.

1. The Federal Circuit's decision requiring that juries decide what a promise to license patents on "fair, reasonable, and nondiscriminatory" (FRAND) terms means is premised on that court's conclusion that enforcing a FRAND commitment on a patent owner was the equivalent of and a "substitute" for a patent damages lawsuit of the sort that must be tried to a jury. It is not. It is a contract dispute over the terms of a license, or, as a minimum, a question of equitable estoppel. The Federal Circuit misunderstood the nature of the FRAND commitment, conflating a restitutionary remedy as part of a license dispute brought by the implementer with the

1. Counsel for both parties received notice of intent to file this brief at least 10 days before its due date. The parties have consented to the filing of this brief. 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.

very different case of a patent damages lawsuit brought by the patent owner. Properly understood, the nature and scope of the FRAND commitment is not equivalent to a patent infringement action and not something a jury must decide.

2. In requiring a jury in all FRAND cases, the Federal Circuit departed from the rule that has been applied in other circuits, including the Ninth Circuit and district courts in the Fifth and Seventh Circuits. It threw into disarray what was becoming a settled process for evaluating FRAND obligations.

3. If not corrected, the Federal Circuit's rule will have a variety of other undesirable procedural implications. Because the Circuit's decision depends on the conclusion that money paid under a FRAND commitment is compensation for an act of patent infringement, it threatens to turn every patent license dispute not just into a federal case but into a case that must go to the Federal Circuit, not the regional circuits. That has never been the law. It is inconsistent with this Court's limited approach to Federal Circuit jurisdiction in *Gunn v. Minton*, 133 S.Ct. 1059 (2013). But it flows inexorably from the faulty logic of the Federal Circuit's holding.

ARGUMENT

Standard-setting organizations (SSOs) serve an important function in the modern economy. They set standards that allow companies to build technology that works together. Modern communication would be impossible without them. Carl Shapiro, *Navigating the Patent Thicket: Cross Licenses, Patent Pools, and*

Standard Setting, in 1 Innovation Policy and the Economy 119, 119, 138 (Adam B. Jaffe et al. eds., 2001).

Setting an industry standard can create problems when that standard is arguably covered by one or more patents, however. Patent owners whose technology is used deserve to get paid. But patent owners whose technology is adopted as a standard can gain an enormous windfall because they can hold up implementers of that technology, threatening to shut down critical infrastructure that the entire industry has adopted unless they are paid an exorbitant fee. *See* Thomas F. Cotter, *Patent Holdup, Patent Remedies, and Antitrust Responses*, 34 J. CORP. L. 1151, 1152 (2009); Joseph Farrell et al., *Standard Setting, Patents, and Hold-Up*, 74 Antitrust L.J. 603, 604–05 (2007); Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 Tex. L. Rev. 1991 (2007).

Most SSOs balance those competing concerns by requiring participants to license their patents on FRAND terms. Patentees get paid, but in return for having their technology widely adopted as an industry standard they agree to forego the right to hold up implementers and to accept only a reasonable and nondiscriminatory license fee. That FRAND commitment is a license, though courts and commentators have sometimes differed on whether it is a binding contract or one implied through equitable doctrines of estoppel and acquiescence. *See* Mark A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 Calif. L. Rev. 1889 (2002). When the parties agree to a FRAND commitment but cannot agree on what payment would be “reasonable,” courts are frequently called upon to supply that missing term in the deal, just as courts supply missing terms

in other commercial contracts. But they are doing so to give effect to the commitment the patent owner made to the SSO – taking a fair price in exchange for adoption of their patented technology and foregoing the opportunity for holdup.

The Federal Circuit decision in this case fundamentally upset that balance by treating the FRAND commitment, not as a license or estoppel dispute, but as a mutant form of patent infringement remedy, one that it held must be set by a jury under the Seventh Amendment. This Court should correct that error.

I. A FRAND PAYMENT IS FUNDAMENTALLY UNLIKE A PATENT INFRINGEMENT SUIT AND IS NOT A FORM OF PATENT DAMAGES THAT MUST BE ASSESSED BY A JURY

The FRAND commitment is fundamentally an agreement by the patent owner that it will not sue for infringement anyone who agrees to pay a license on fair, reasonable, and nondiscriminatory terms. Sometimes that agreement is express, signed by parties on both sides. Sometimes it is required by SSOs and patent owners are deemed to have agreed to it by participating in the SSO. Lemley, *Standard-Setting Organizations*, *supra*, at 1909-15. Sometimes it arises as a form of estoppel or acquiescence, equitable doctrines that bar a patent owner from bringing claims inconsistent with their public commitment not to sue. *Arendi SARL v. Apple Inc.*, 832 F.3d 1355 (Fed. Cir. 2016); Robert P. Merges & Jeffrey M. Kuhn, *An Estoppel Doctrine for Patented Standards*, 97 Calif. L. Rev. 1, 50 (2009). Regardless how it arises, a FRAND commitment is a contract (express,

implied in fact, or implied in law), not a remedy for patent infringement.

For that reason, while they sometimes arise in the same cases, disputes over FRAND commitments don't look at all like patent infringement suits. A patent infringement suit requires a plaintiff to plead and prove the defendant has infringed one (or sometimes a few) issued United States patents. That in turn requires the court to construe the meaning and scope of the patent claims. *Markman v. Westview Instruments Corp.*, 517 U.S. 370 (1996). The defendant has the opportunity to demonstrate that the patent is invalid or unenforceable as well as to raise other defenses. And any remedy is limited to infringement in the United States. *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 441 (2007); *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518 (1972).

A FRAND dispute, by contrast, doesn't require the patentee to prove infringement.² It doesn't determine the scope of any patent claim. It doesn't allow the payor to challenge the validity of the patents at issue. It doesn't limit the payment only to activities that occur in the United States, but requires payment for worldwide conduct. See Mark A. Lemley & Carl Shapiro, *A Simple Approach to Setting Reasonable Royalties for Standard-Essential Patents*, 28 Berkeley Tech. L.J. 1135 (2013).

2. While SSOs normally require a FRAND commitment only for patents "essential" to practice a standard, patentees regularly overdeclare patents, including ones that are not actually essential. Indeed, when supposedly essential patents are asserted in court, the majority turn out not to cover the technology in the standard. Mark A. Lemley & Timothy Simcoe, *How Essential Are Standard-Essential Patents?*, 104 Cornell L. Rev. 607 (2019).

Most significant, the FRAND dispute isn't limited to one or a few patents, but requires payment for the patentee's entire portfolio, which frequently includes hundreds or even thousands of patents covering a particular standard, including patents that are almost certainly invalid or not infringed.³ Lemley & Shapiro, *Patent Holdup*, *supra*, at 2025-29 (documenting case studies in which thousands of patents are deemed essential to a single standard); Brad Biddle et al., *How Many Standards in a Laptop? (And Other Empirical Questions)* (2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1619440 (same).

The reason FRAND commitment disputes look so different than patent infringement lawsuits is that the very point of the FRAND commitment is to avoid patent litigation in circumstances where it wouldn't make any sense. Patentees with hundreds or thousands of patents that cover a complex standard could never resolve the scope, validity, and infringement of all those patents, much less replicate those same lawsuits in every country

3. See *Apple Inc. v. Telefonaktiebolaget LM Ericsson, Inc.*, 2015 WL 1802467 (N.D. Cal. Apr. 20, 2015) (“[t]here exists no legal basis upon which Apple may be compelled to take a license for Ericsson’s patents on a portfolio-wide basis.”); Lemley & Shapiro, *Simple Approach*, *supra*, at 1151 (“in a FRAND royalty arbitration, there is no need to determine the reasonable royalty on a patent-by-patent basis. Indeed, doing so would be exceedingly difficult and costly for large patent portfolios. The FRAND concept involves a reasonable rate for a party’s entire portfolio of standard-essential patents Patent law, by contrast, treats patents as individual rights, not portfolios. . . . Second, unlike the “reasonable royalty” concept used to calculate damages in patent infringement cases, the hypothetical negotiation for FRAND purposes does *not* assume that any particular patent, much less the entire standard-essential patent portfolio, is valid and infringed.”).

in the world. And they shouldn't have to. Under a FRAND agreement, the patentee will agree to forego the right to bring a patent infringement lawsuit if the payor in turn agrees to pay a reasonable license fee *whether or not the patents are valid and infringed*. *Interdigital Commc'ns, Inc. v. ZTE Corp.*, 2014 WL 2206218 (D. Del. May 28, 2014) (refusing to allow counterclaims seeking to determine a FRAND royalty where the counterclaimants were unwilling to commit in advance to pay the royalty set by the court); *Apple Inc. v. Telefonaktiebolaget LM Ericsson, Inc.*, 2015 WL 1802467 (N.D. Cal. Apr. 20, 2015) (while Ericsson made a commitment to license all its patents on FRAND terms and have an arbitrator set the rate, Apple was not willing to commit to have an arbitrator set those terms); Lemley & Shapiro, *Simple Approach*, 28 Berkeley Tech. L.J. at 1151-52.

The fundamental differences between FRAND disputes and patent infringement litigation mean that the Seventh Amendment should not apply to those disputes merely because it is required in the very different case of a patent damages lawsuit. If the patentee seeks damages for past infringement, the calculation of those damages is made by the jury. The Seventh Amendment may require that result. But many aspects of the patent litigation process do not require a jury. *See Markman*, 517 U.S. at 370 (courts, not juries, determine the scope of patent claims); *Teva Pharms. USA v Sandoz, Inc.*, 574 U.S. 318 (2015) (courts, not juries, resolve factual disputes in claim construction); *Microsoft Corp. v. i4i LLP*, 564 U.S. 91 (2011) (Breyer, J., concurring) (noting that the "clear and convincing evidence" standard applies only to factual disputes, and many patent validity doctrines are legal, not factual); Mark A. Lemley, *Why Do Juries Decide If Patents Are Valid?*, 99 Va. L. Rev. 1673 (2013).

Not only were there no FRAND disputes in England in 1791, the closest analogies do not support the idea of a constitutional right to jury trial. A dispute over what payment is “fair, reasonable, and nondiscriminatory” is normally a dispute about the meaning of terms of a contract. As with other forms of contract cases, the court, not the jury, interprets the contract terms in most circumstances:

[In *Markman*] we concluded that it was proper to treat the ultimate question of the proper construction of the patent as a question of law in the way that we treat document construction as a question of law. *Id.*, at 388–391. But this does not imply an exception to Rule 52(a) for underlying factual disputes. We used the term “question of law” while pointing out that a judge, in construing a patent claim, is engaged in much the same task as the judge would be in construing other written instruments, such as deeds, contracts, or tariffs.

Teva, 574 U.S. at 325. And this Court pointed out there that even when subsidiary factual questions must be resolved, the ultimate question of patent claim construction, like the ultimate meaning of the contract, is a legal, not a factual question. *Id.* at 332.

In this case Ericsson and TCL were not directly parties to a contract at all. Rather, TCL is a beneficiary of Ericsson’s commitment to an SSO that it will only license its patent on FRAND terms, and it is seeking to enforce that promise by specific performance. *See Apple Corp. v. Motorola Mobility, Inc.*, 2012 WL 5416941 (W.D. Wis. Oct.

29, 2012) (“specific performance may be an appropriate remedy under the circumstances of this case. In fact, it may be the only appropriate remedy” in a FRAND case). Specific performance is a quintessential matter for judges, not juries.

Nor can patentees change that result by pointing to the fact that money changes hands. As this Court has noted, the “fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as ‘money damages.’” *Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988). Indeed, in the closest analog to FRAND proceedings, courts in hundreds of cases, including this Court in *Hartford-Empire v. United States*, 324 U.S. 570, 574 (1945), have compelled licensing on reasonable and nondiscriminatory terms over the last century as an antitrust remedy. See Jorge L. Contreras, *A Brief History of FRAND: Analyzing Current Debates in Standard-setting and Antitrust Through a Historical Lens*, 80 *Antitrust L.J.* 39 (2015). Those courts determined the reasonableness of a payment for patent rights, just as the district court does in a FRAND case. Judges, not juries, uniformly set those rates. *Id.* at 80-84.

Even if the FRAND commitment were to arise in a classic patent infringement dispute there would be no constitutional entitlement to a jury trial. A patentee who has made a FRAND commitment on which implementers have relied is equitably estopped from going back on that commitment and seeking more than a fair, reasonable, and nondiscriminatory royalty. *Arendi SARL v. Apple Inc.*, 832 F.3d 1355 (Fed. Cir. 2016). Equitable estoppel is, as its name suggests, an equitable defense. But it has been long recognized as available in actions at law, see

Wehrman v. Conklin, 155 U. S. 314, 327 (1894). This Court held in *Petrella v. Metro Goldwyn-Mayer, Inc.*, that “the doctrine of estoppel may bar the copyright owner’s claims completely, eliminating all potential remedies.” 572 U.S. 663 (2014).

The Federal Circuit misread the nature of the FRAND commitment, the Seventh Amendment, and the equitable nature of the dispute in concluding that the meaning of the FRAND promise must be decided by a jury as a matter of constitutional law.

II. THE FEDERAL CIRCUIT’S RULING DEPARTS FROM THE RULE IN OTHER CIRCUITS AND THE UNIVERAL PRACTICE

Another measure of the Federal Circuit’s error is that other Circuits don’t treat the explication of FRAND terms as requiring a jury trial or requiring a patent damages analysis.

Before the Federal Circuit’s decision, judges, not juries, regularly interpreted the meaning of FRAND terms. *See, e.g., Microsoft Corp. v. Motorola, Inc.*, 2013 WL 2111217 (W.D. Wash. Apr. 25, 2013), *aff’d*, 795 F.3d 1024, 1040 (9th Cir. 2015); *In re Innovatio IP Ventures, LLC Patent Litigation*, 2013 WL 5593609 (N.D. Ill. Oct. 3, 2013); *u-Blox AG v. InterDigital, Inc.*, 2019 WL 555029 (S.D. Cal. Feb. 12, 2019) (“Absent an agreement between the parties, the Court will issue a judgment that sets the applicable FRAND terms and conditions.”); *Apple Corp. v. Motorola Mobility, Inc.*, 2012 WL 5416941 (W.D. Wis. Oct. 29, 2012).

When those courts decide the meaning of a FRAND term, they do not simply apply patent law. In *Microsoft v. Motorola*, the district court deliberately departed from the rules of patent law to consider the technical contribution of the patents and on the problem of royalty stacking of different patents. *Microsoft Corp. v. Motorola, Inc.*, 2013 WL 2111217 (W.D. Wash. Apr. 25, 2013). The Ninth Circuit approved this methodology, noting that, while “this is not a patent law action,” “the Federal Circuit’s patent law methodology can serve as guidance in contract cases on questions of patent valuation.” *Microsoft Corp. v. Motorola, Inc.*, 795 F.3d 1024, 1040 (9th Cir. 2015). Similarly, the *Innovatio* court created its own set of principles, drawing on *Microsoft*, to decide the value of a FRAND license. *In re Innovatio IP Ventures, LLC Patent Litigation*, 2013 WL 5593609 (N.D. Ill. Oct. 3, 2013); see 2 Herbert Hovenkamp et al., *IP and Antitrust* §35.05[B][3] (3d ed. 2019) (collecting cases and explaining the courts’ approaches). But borrowing from and changing some patent law rules to use as “guidance in contract cases” is a far cry from declaring, as the Federal Circuit here did, that the FRAND remedy *is* a patent remedy.

Indeed, even when the issue of FRAND commitments actually arose in a patent damages dispute, the Federal Circuit itself has previously held that FRAND cases were fundamentally different than normal patent infringement cases. In *Ericsson v. D-Link*, 773 F.3d 1201 (Fed. Cir. 2014), the Federal Circuit observed that

In a case involving FRAND-encumbered patents, many of the *Georgia-Pacific* factors simply are not relevant; many are even contrary to FRAND principles. For example, factor

4 is “[t]he licensor’s established policy and marketing program to maintain his patent monopoly by not licensing others to use the invention or by granting licenses under special conditions designed to preserve that monopoly.” *Georgia-Pacific*, 318 F.Supp. at 1120. Because of Ericsson’s FRAND commitment, however, it cannot have that kind of policy for maintaining a patent monopoly. Likewise, factor 5— “[t]he commercial relationship between the licensor and licensee”—is irrelevant because Ericsson must offer licenses at a *non-discriminatory* rate. *Georgia-Pacific*, 318 F.Supp. at 1120; see *Microsoft*, 2013 WL 2111217, at *18.

Several other *Georgia-Pacific* factors would at least need to be adjusted for FRAND-encumbered patents—indeed, for SEP patents generally. For example, factor 8 accounts for an invention’s “current popularity,” which is likely inflated because a standard requires the use of the technology. *Georgia-Pacific*, 318 F.Supp. at 1120. Factor 9—“utility and advantages of the patented invention over the old modes or devices,” J.A. 225—is also skewed for SEPs because the technology is used because it is essential, not necessarily because it is an improvement over the prior art. Factor 10, moreover, considers the commercial embodiment of the licensor, which is also irrelevant as the standard requires the use of the technology. Other factors may also need to be adapted on a case-by-case basis depending on the technology at issue. Consequently,

the trial court must carefully consider the evidence presented in the case when crafting an appropriate jury instruction. In this case, the district court erred by instructing the jury on multiple *Georgia-Pacific* factors that are not relevant, or are misleading, on the record before it, including, at least, factors 4, 5, 8, 9, and 10 of the *Georgia-Pacific* factors.

Id. at 1230-31 (emphasis in original).

Other courts emphasize that a FRAND payment is not simply a payment of patent royalties. Indeed, courts have regularly held that a binding FRAND commitment precludes resort to normal patent remedies. See, e.g., *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872 (9th Cir. 2012) (affirming injunction barring patentee that had made FRAND commitment from seeking an injunction in German courts, where injunctive relief is automatic); *Apple Corp. v. Motorola Inc.*, 757 F.3d 1286 (Fed. Cir. 2014); *Realtek Semiconductor Corp. v. LSI Corp.*, 2013 WL 2181717 (N.D. Cal. May 20, 2013) (granting preliminary injunction against patentee proceeding with ITC action in violation of FRAND commitment); Lemley & Shapiro, *Simple Approach*, *supra*, at 1151-52; Jay P. Kesan & Carol M. Hayes, *FRAND's Forever: Standards, Patent Transfers, and Licensing Commitments*, 89 Ind. L.J. 231, 304-14 (2014).

These courts have not generally confronted a Seventh Amendment challenge to their conduct, so there is no express circuit split on the question decided by the Federal Circuit here. But it is evidence of just how far the Federal Circuit's decision here departs from the norm that every court to have decided what a FRAND commitment means

has treated that question as one for the judge, not for the jury. Those opinions are careful and thoughtful; they sometimes run into the hundreds of pages detailing the factors that go into setting a FRAND rate in a particular case. *E.g.*, *Microsoft Corp. v. Motorola, Inc.*, 2013 WL 2111217 (W.D. Wash. Apr. 25, 2013), *aff'd*, 795 F.3d 1024, 1040 (9th Cir. 2015); *In re Innovatio IP Ventures, LLC Patent Litigation*, 2013 WL 5593609 (N.D. Ill. Oct. 3, 2013). Under the Federal Circuit’s approach here, those careful analyses must be swept away, replaced by the black box of a jury verdict. That is inconsistent with how prior courts have treated the FRAND commitment.

III. TREATING FRAND AS A PATENT DAMAGES CALCULATION WILL UPEND OTHER LONG-STANDING PROCEDURAL RULES

If the Federal Circuit’s conclusion stands, it will throw well-established procedural doctrines into confusion. Congress vested the Federal Circuit with exclusive jurisdiction over “an appeal from a final decision of a district court of the United States . . . in any civil action arising under, or in any civil action in which a party has asserted a compulsory counterclaim arising under, any Act of Congress relating to patents” 28 U. S. C. §1295(a)(1) (emphasis added). Section 1338(a), in turn, provides in relevant part that “[t]he district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents”

In *Christensen v. Colt Indus.*, 486 U.S. 800 (1986), this Court held that those statutes extend the exclusive jurisdiction of the federal district courts, and hence of the Federal Circuit “to those cases in which a well-pleaded

complaint establishes either that federal patent law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal patent law, in that patent law is a necessary element of one of the well-pleaded claims." *Id.* at 809.

In holding that "the release payment [of a fair, reasonable, and nondiscriminatory license] functions as a substitute for patent infringement damages," that "the release payment is in substance compensation for past patent infringement," and that "it is hard to see how a payment for TCL's past unlicensed sales is in substance materially different from damages for past patent infringement," *TCL v. Ericsson*, slip op. at 22, 23, the Federal Circuit necessarily held that the patentee's right to relief is a question of federal patent law.

As noted above, we believe that conclusion is wrong. But if it is not reversed, it means that the Federal Circuit believes every dispute over the meaning of a FRAND commitment is at base a claim sounding in patent law. That in turn means those claims must be filed in federal, not state court, and that all appeals from those decisions will go to the Federal Circuit.⁴

4. In *Gunn v. Minton*, 133 S.Ct. 1059 (2013), this Court held that legal malpractice claims didn't trigger exclusive patent jurisdiction because, "though the state courts must answer a question of patent law to resolve Minton's legal malpractice claim, their answer will have no broader effects. It will not stand as binding precedent for any future patent claim; it will not even affect the validity of Minton's patent." But the Federal Circuit has held that any issue of infringement or validity of a patent that remains in force causes a case to "arise under" federal law for

That is not how FRAND claims are treated today. Like any license dispute, a dispute over what terms are “fair and reasonable” is a contract claim that courts treat as a matter of state, not federal, law. *E.g. Microsoft Corp. v. Motorola, Inc*, 795 F.3d 1024, 1040 (9th Cir. 2015) (applying Washington law to FRAND dispute). Some of these disputes are litigated today in state court. *See* Jorge Contreras, *Fixing FRAND: A Pseudo-Pool Approach to Standards-Based Patent Licensing*, 79 Antitrust L.J. 47, tbl. 1 (2013) (listing cases). Many of those cases are litigated in federal court, but that’s because there is diversity jurisdiction or some other federal claim along with the license disputes. And appeals from those cases today go to the regional circuits, not to the Federal Circuit. *See, e.g., Microsoft Corp. v. Motorola, Inc*, 795 F.3d 1024, 1040 (9th Cir. 2015) (noting jurisdictional dispute over which court had jurisdiction and resolving it favor of the regional circuits); *HTC Corporation et al. v. Telefonaktiebolaget LM*, No. 19-40643 (5th Cir. 2020) (pending). But if the Federal Circuit’s decision here stands, we can expect to see parties removing their FRAND license disputes to federal court and all appeals

the purpose of triggering Federal Circuit jurisdiction. *See Jang v. Boston Scientific Corp.*, 767 F.3d 1334, 1337 (Fed. Cir. 2014); Paul R. Gugliuzza, *Rising Confusion About “Arising Under” Jurisdiction in Patent Cases*, 69 Emory L.J. 459, 485 (2019) (“[T]he Federal Circuit has continued to [a]ssert . . . that case-specific issues of patent infringement or validity trigger arising under jurisdiction any time the relevant patents might be asserted in future infringement litigation (unlike in *Gunn* where the relevant patent had already been invalidated.”). And if a FRAND claim is no different from a claim seeking damages for patent infringement, then it, too, must arise under federal patent law under Federal Circuit precedent.

going to the Federal Circuit even though the dispute is at its core about the meaning of a contract. That will throw FRAND precedent into further disarray. And it will affect a significant number of pending cases. *See* Contreras, *Fixing FRAND, supra*, at tbl. 1 (listing all FRAND disputes as of 2013); Timothy Simcoe et al., *Competing on Standards? Entrepreneurship, Intellectual Property, and Platform Technologies*, 18 J. Econ. & Management Strategy 775, 787 (2012) (identifying a total of 949 standard-essential patents litigated in recent years).

This jurisdictional confusion is unnecessary and counterproductive. It is the opposite of the uniformity the creation of the Federal Circuit was supposed to accomplish.

CONCLUSION

This Court should grant the petition for writ of certiorari to correct the Federal Circuit's error in applying the Seventh Amendment and avoid the circuit splits and jurisdictional confusion that will result if that error is left uncorrected.

Respectfully Submitted,

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APPENDIX

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