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

BRIEF OF *AMICUS CURIAE* FAIR STANDARDS ALLIANCE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*[1]

Amicus Fair Standards Alliance is an alliance of global companies, large and small, that advocates for fair licensing of standardized technology. The diversity and global reach of the Alliance's 47 members reflects the ubiquity and importance of technical standards in every sector of the global economy, where the evolution of the Internet of Things means that once stand-alone products like cars, thermostats, or lawn sprinklers are increasingly interconnected. Standardization is the oxygen that allows this innovation ecosystem to flourish. Abusive licensing practices by holders of standard-essential patents (SEPs) pollute the air.

FSA's members are active in a broad variety of sectors, such as automotive, energy, technology, and telecommunications, to name a handful. Members occupy different positions in the value chain, from component manufacturers to final suppliers of consumer goods, and include both holders of standard-essential patents (SEPs) and downstream innovators. The Alliance's members rank among the world's largest innovators, spending more than $150 billion on research and development per year developing technology, participating in standards development, and licensing SEPs to (or from) others. And FSA's diverse membership, including multinational

[1] Counsel of record for all parties received timely advance notice of the intent to file this brief and consented to the filing of the brief. S. CT. R. 37.2(a). No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund the brief's preparation or submission.

corporations and small enterprises, employs hundreds of thousands of workers worldwide, accounting for more than $2.2 trillion in aggregate sales annually. Collectively, Alliance members have more than 500,000 patents, including SEPs, that are either granted or pending.[2]

The Alliance works throughout the globe to promote key principles for licensing of standard-essential patents on a fair, reasonable, and non-discriminatory (FRAND) basis. FSA's diverse members are "united in the view that unfair and unreasonable SEP licensing practices pose a significant risk to the innovation eco-system, create barriers to entry for new market players, threaten to stifle the full potential for economic growth across major industry sectors, and ultimately harm consumer choice." *Fair Standards Alliance: An Introduction*, FAIR STANDARDS ALLIANCE 1–2 (Nov. 12, 2015), https://tinyurl.com/y9tff8xk ("FSA *Introduction*"). To counter the abuse of commitments to license standard-essential patents on fair, reasonable, and non-

[2] FSA's current members include AirTies, Apple, BMW, Bullitt, Bury, Cisco, Continental, Crosscall, Daimler, Dell, Denso, Emporia, Fairphone, Ford, Freebox, Google, Gramm Lins, Harman, Hitachi, Honda, HP, Hyundai, Intel, Juniper, Kamstrup, Landis+Gyr, Lenovo, Microsoft, Molex, N&M Consultancy, Nordic Semiconductor, Pearl Cohen, Sagemcom, Sequans, SierraWireless, Sky, Tech Law Associates, Deutsche Telecom, Telit, Tesla, TomTom, Toyota, U-blox, Valeo, Visteon, Volkswagen, and Wiko. The positions presented in this amicus brief are those of the FSA and do not necessarily reflect the detailed individual corporate positions of each member. Further information on the Alliance is available at http://www.fair-standards.org.

discriminatory terms, the Alliance promotes clear FRAND licensing principles and engages in dialogue with stakeholders, agencies and regulators across the globe regarding best practices for resolving FRAND licensing disputes.

The diverse members of *Amicus* Fair Standards Alliance—holders and licensors of SEPs, multinational corporations and small business, end-product and component manufacturers—are working towards building a much-needed consensus on principles for setting FRAND licensing terms. This proposed "standardization" of methodologies for defining FRAND licensing terms and resolving FRAND disputes allows for needed business flexibility in negotiations, while aiming to prevent abuses by SEP owners. Towards this end, the Alliance was a main proponent of a critical policy document, supported by over 50 organizations, establishing guidelines for the licensing of standard essential patents in the European Community: "Core Principles and Approaches for Licensing of Standard Essential Patents", commonly known as "CWA2". *See Core Principles and Approaches for Licensing of Standard Essential Patents,* FAIR STANDARDS ALLIANCE, https://fair-standards.org/cwa_/.[3]

Substantively, key FRAND principles include: making SEPs available to all companies seeking to manufacture and sell equipment related to a particular product at all levels of the supply chain, not

[3] Details on this agreement and the consultation process behind it are available at *The CEN and CENELEC Workshop*, CENCENELEC, https://tinyurl.com/y7e46w2v.

just the higher-value end products; considering the value of the patented invention apart from its inclusion in the standard and from its combination with other technologies not claimed in the patent; accounting for the smallest unit implementing the SEP; and avoiding royalty stacking. *See generally* FSA *Introduction*, *supra*, and *Key Principles*, FAIR STANDARDS ALLIANCE, https://fair-standards.org/key-principles/.

The Alliance has filed amicus curiae briefs to explain the importance of technical standards to the global economy, why fair licensing of standard-essential patents matters, and how important judicial decisions, like the Federal Circuit's here, will frame the future of FRAND licensing negotiations. This is the Alliance's first amicus curiae appearance before this Court, and FSA writes here to impress upon the Court the urgency of granting review. If left standing, the Federal Circuit's rule allowing juries to set FRAND licensing terms will threaten the productivity and consumer welfare gains that standardization and interoperability promise. Instead of negotiating FRAND terms against the backdrop of reasoned judicial decisions, SEP holders will be encouraged to race to U.S. courthouses in search of high returns from black-box jury verdicts.

INTRODUCTION AND SUMMARY OF ARGUMENT

Standardization has been essential to economic growth and development since the dawn of industrialization, when Eli Whitney received a government contract to produce muskets, and—

building on the ideas of Honoré Blanc, the superintendent of French armories—used standardized, interchangeable parts to manufacture and deliver thousands of muskets. *Quality and the Beginning of Standardization,* QUALITY MAG. (Apr. 1, 2015), https://tinyurl.com/ycrn3ppd. Over the centuries that followed, and ever more so today, standards have emerged as important enablers for a competitive and dynamic global market where innovation and interoperability go hand in hand.

Standards are pervasive in today's interoperative world, where it is unimaginable that your laptop couldn't readily connect to wireless networks; your cell phone couldn't send messages to another device; or the corner ATM would be unable to communicate with a bank's accounting system. Thousands upon thousands of technical standards—set by companies working together in national and international organizations—allow countless different products made by different companies to connect and work together for the benefit of all, especially now with the emergence of the innovation eco-system commonly known as the Internet of Things.

Many companies work together to create standards. And once standards are adopted, SEP holders benefit from the opportunity to license their inventions to a much larger pool of potential licensees than they otherwise could have accessed. And in exchange, they promise to support widespread use of the standard through a voluntary commitment to license on fair, reasonable, and non-discriminatory terms. Such FRAND commitments are instrumental

for standards to be successful and widely taken up by the market.

Standard-setting organizations establish intellectual property rights policies, including requirements that SEP holders commit to licensing on a FRAND basis. Such general commitments are then realized in bilateral negotiations between the SEP holder and its putative licensees, and these negotiations take place in the shadow of the law.

The Alliance espouses the adoption of several key FRAND licensing principles to limit opportunities for standard-essential patent holders to abuse their extraordinary market power, and thereby promote increased adoption of standards. Standardization, in turn, spurs innovation that builds on the foundation of standardized technologies and ultimately, the production of more affordable interconnected products.

Key principles of functional FRAND licensing include fostering transparency that creates greater predictability in licensing terms and avoids discrimination against different licensees; use of a reasoned analysis to ensure that SEPs are valued for their own contributions apart from the value of contributions and inventions made by others; and encouraging dispute resolution processes based on transparent valuation guidelines that yield reasoned public decisions which can guide and encourage future negotiations.

The Alliance agrees with Petitioners that the decision below "misinterprets the Constitution, scrambles the allocation of responsibility between judge and jury, and injects substantial uncertainty

into suits seeking to enforce FRAND commitments." Pet. 14. Drawing upon its years of working to refine FRAND principles, and the licensing experiences of its broad and diverse membership, the Alliance writes to further explain how allowing U.S. juries to set licensing terms for FRAND commitments is not only plainly wrong as a matter of law, but will "increase gamesmanship and undermine the significant economy-wide benefits of FRAND obligations." Pet. 14. Black-box jury verdicts are the antithesis of the reasoned decisions based on transparent valuation metrics that should underpin FRAND licensing agreements.

Far from encouraging negotiations through publicly available reasoned judicial decisions that refine and elucidate FRAND principles, the Federal Circuit's rule will encourage SEP holders to race to US courthouses whenever there is a licensing dispute. And SEP holders will have every incentive to rely upon the erroneous ruling below to seek jury awards of high royalty rates that apply across global portfolios, a remedy beyond the pale of U.S. law. Frictions will arise between international courts; the costs of standardization will increase; and the innovation eco-system will be damaged by a rule that provides all the wrong signals. This Court's intervention is urgently needed to reverse the ruling below.

ARGUMENT

Absent Immediate Review, The Threat Of Black-Box Jury Verdicts Seriously Jeopardizes FRAND Commitments Essential To Economic Growth And Innovation.

Whether, when disputes arise, a judge or jury should determine fair, reasonable, and non-discriminatory licensing terms for standard-essential patents is no arcane question of patent law. It is a pressing question, demanding the Court's attention, that impacts every nook and cranny of the modern economy.

A. Standardization Undergirds the Digital Age.

1. Technical standards are everywhere; as important to the economy as oxygen is to the air we breathe. Pervasive use of standards allows the products we use in daily life to connect with each other, and with a larger digital universe, creating what is often called the Internet of Things. The possibility of connecting any device with an on and off switch not only to the Internet, but also to one another, spans everything from cellphones to coffee makers; washing machines to wearable fitness devices; or even the jet engine of an airplane or the drill of an oil rig. *See* Jacob Morgan, *A Simple Explanation of 'The Internet of Things,'* FORBES (May 13, 2014), https://tinyurl.com/yawb95ja. From "smart cities" that

can help us reduce waste and improve efficient energy use, to technologies that can link your calendar, your car, traffic monitoring services, and your phone—so you know what time to leave for your meeting and the best route to take—the Internet of Things has vast potential to improve our life and promote growth and development.

We've come a long way since Eli Whitney's interchangeable musket parts. Since ATMs took hold in the 1970's, till present day—when there are more objects connected to the Internet than there are people—the Internet of Things has grown exponentially. Bernard Marr, *17 'Internet of Things' Facts Everyone Should Read*, FORBES (Oct. 27, 2015), https://tinyurl.com/ycsoarn4. One company estimates that the "Industrial Internet" (a synonym for the Internet of Things) will add over $10 trillion to global GDP in the first quarter of the 21st century. *Id.* Global data traffic has exploded as devices, machines, and humans become increasingly networked. "In 2015, over 20 billion devices and machines were connected, and this number is expected to have increased to half a trillion by 2030." Christoph Winterhofer, *A New Revolution in the Making*, ISOFOCUS MAG., Nov.–Dec. 2018, at 2, https://tinyurl.com/ybmbq78b.

For our devices to communicate and work seamlessly with one another, "digitalization and standardization must go hand in hand." *Id.* Technical standards provide "a common global language for product development," that allows "cell phones to communicate with each other anywhere in the world, … bank cards to fit into any cash machine, … consumers to buy a light bulb for just about any lamp

in any store, … for them to be able to plug that lamp into an electrical outlet," and so much more. *Why Technical Standards Are Essential in Product Development*, INST. ELECTRICAL & ELECTRONICS ENGINEERS, https://tinyurl.com/yd6qnnod (last visited June 3, 2020).

2. This "common global language" of technical standards is built by industry consensus through standard-setting organizations (SSOs), where many companies and market participant members work collectively to make the technical decisions necessary to promote product interoperability. Examples abound at the national, regional, and global levels, including the European Technical Standards Institute (ETSI) that developed the cellular network standards at issue in this case, Pet. 7; the Institute of Electrical and Electronics Engineers (IEEE) that provides the 802.11 set of standards (for wireless network connectivity), *see* Bradley Mitchell, *802.11 Standards Explained,* LIFEWIRE (Apr. 22, 2020), https://tinyurl.com/hzyxxsn; and over a thousand others. *See Standard Setting Organizations and Standards List*, CONSORTIUMINFO.ORG, https://tinyurl.com/ybhsaq6u (listing and categorizing 1120 organizations, with links to the standards they maintain); *see also generally* 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, 42–46 (2015) ("*Brief History of FRAND*") (summarizing the history of standard-setting organizations and the origins of FRAND commitments).

As SSO members agree upon a technical standard, firms that apply the standard make significant investments in research and development, manufacturing, training, etc., in reliance upon the promise of interoperability across a product category. Once this train is in motion, it is not easy to stop. A phenomenon referred to as lock-in can occur, where the cost of switching from the standardized technology to an alternative technology, or designing around the established standard, is at least prohibitive and probably not even possible. FED. TRADE COMM'N (FTC), THE EVOLVING IP MARKETPLACE: ALIGNING PATENT NOTICE AND REMEDIES WITH COMPETITION 28 (2011), https://tinyurl.com/z3h7hnw ("*Evolving IP Marketplace*"). For example, "since virtually all wireless laptops are configured to communicate with wireless local area networks using the IEEE 802.11 standard, there is no market for wireless routers that do not comply with that standard." William F. Lee & A. Douglas Melamed, *Breaking the Vicious Cycle of Patent Damages*, 101 CORNELL L. REV. 385, 429 (2016) ("*Breaking the Vicious Cycle*"). If you want to make and sell a wireless router, you are locked into that standard.

Especially when public authorities incorporate standards into legislation, their importance is elevated. "They act as gatekeepers not only to potentially lucrative commercial markets, as they do in the context of voluntary consensus standards, but as gatekeepers to the *only* market in the industry: one that is defined by government." Jorge L. Contreras, *Essentiality and Standards-Essential Patents*, *in* THE CAMBRIDGE HANDBOOK OF TECHNICAL

STANDARDIZATION LAW: COMPETITION, ANTITRUST, AND PATENTS 209, 212 (Jorge L. Contreras ed., 2017) ("*Essentiality*") (discussing ETSI's European telecommunication standards).

3. The process of establishing a standard requires members of standard-setting organizations to collectively determine which technologies are required to implement it. Standard-essential patents, or SEPs, are patents that cover technologies needed to practice a given standard, so that one cannot build a standard-compliant device without implementing the invention covered by the SEP. A "truly" standard-essential patent "is, by definition, practiced by everyone that uses the relevant standard." RPX CORP., STANDARD-ESSENTIAL PATENTS: HOW DO THEY FARE? 1 (2014), https://tinyurl.com/ycf5umzq.

The large majority of standard-setting organizations have adopted policies setting disclosure or licensing obligations (or both) for participants holding patents deemed essential to the implementation of that organization's standards. *See* Jorge L. Contreras, *Essentiality*, *supra*, at 209;[4] *see also* Mark A. Lemley & Timothy Simcoe, *How Essential Are Standard-Essential Patents?*, 104 CORNELL L. REV. 607, 609–10 & nn.12–13 (2019) (*How Essential?*) (discussing how SEPs are awarded and under what conditions). Participation in a standard-setting organization requires acceptance of its patent licensing obligations in exchange for having input to and information about the technical decisions made

[4] Each organization has its own definition of essential, and these definitions have evolved over time. *See id*. at 210–16.

for the standard. SSOs adopt the FRAND approach, along with other intellectual property rights policies, to *proactively* avoid the competitive risks that would otherwise be associated with standard-setting, given the tremendous market power that accompanies award of a SEP.

Such competitive risks arise because companies that implement technical standards become locked-in to a particular design and its associated SEPs even before they have begun to implement the technology, and thus do not have the freedom to choose a competing design. Such lock-in occurs because of "the enormous group coordination and decision-making costs that the SSO and its members have incurred to develop and adopt the standard, and that would have to be incurred again to change or replace it." Lee & Melamed, *Breaking the Vicious Cycle*, *supra*, at 429; *see also* Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 TEX. L. REV. 1991, 2016 (2007) (acknowledging the near impossibility of designing around a chosen technical standard ex post, even though an alternative standard could have been adopted ex ante).

To further complicate things, the difficulties of changing standards to design around their corresponding SEPs do not arise in a straightforward one-device-per-standard-per-patent pattern. Rather, the technical standards that underpin our interconnected world form an intricate web where modern devices typically incorporate many different standardized technologies, some of which can interact with each other. Moreover, each standard may be

covered by thousands of SEPs, held by hundreds of patent owners.

A 2010 study found, for instance, that at least 251 technical interoperability standards applied to a modern laptop computer. *See* Brad Biddle et al., *How Many Standards in a Laptop? (And Other Empirical Questions)* 1 (Sept. 10, 2010), https://tinyurl.com/ycyys4jv. What's more, a complex product like a smart phone will likely implement not only mobile communications standards, but many other standards including those related to data communications (96 standards), and local area networks (LAN) (325 standards). Justus Baron & Tim Pohlmann, *Mapping Standards to Patents Using Declarations of Standard-Essential Patents*, 27 J. ECON. & MGMT. STRATEGY 504, 518 (2018). Each standard means many more SEPs; "[c]omplex standards like WiFi and 3G wireless communications attract hundreds and even thousands of declared SEPs." Lemley & Simcoe, *How Essential?*, *supra*, at 611.

In sum, the interconnected world we live in today would not exist without countless technical standards generated through consensus. These standards are covered by the countless more standard-essential patents needed to implement them. And the even-more interconnected future that we envision—of smart homes, driverless cars, and integrated devices that can monitor and improve our health—will be even more dependent upon widespread standardization.

B. The Global Economic Benefits of Standardization Are Predicated on Enforcement of a SEP Owner's Commitment to License on FRAND Terms.

Because consensus-based standards often incorporate standard-essential patented technologies, market participants face a high number of licensing demands and negotiations for every product. The risk of being "held up" by every SEP owner undermines incentives to develop and market products. Innovation based on standardization and interoperability thus depends on honoring the commitment to fair and rational licensing terms for SEPs. FRAND licensing terms allow patent-holders to benefit from their technical contributions to the standard. At the same time, enforcing FRAND commitments ensures that SEP holders will not exploit the extraordinary market power they have been granted by virtue of the consensus decision of SSO members to include their technology in the standard.

1. The need to appropriately reward innovation while preventing abuse of market power led SSOs to require FRAND licensing commitments as a condition of participating in the standard setting process. The commitment to license a SEP on fair, reasonable, and non-discriminatory terms is "made *voluntarily* by participants in standards-development activities … to induce others to adopt their patented technology in a standard." Contreras, *Brief History of FRAND*, *supra*, at 45. It seeks to ensure that a licensor's compensation is based on the value of its inventions absent standardization, not the value created by the

consensus decision to include the patented technology in a standard, which would otherwise incorporate investments made by implementers of that standard.

The FRAND licensing commitment promotes broad adoption of the standard, with concomitant economic gains. On the flipside, refusal to comply with that commitment and license on fair, reasonable and nondiscriminatory terms can pose a significant risk to innovation and create barriers to entry for new market players, with consumers being the ultimate losers. If a given standard cannot be implemented without use of a SEP, the SEP holder could potentially block a user of that standardized technology from the market altogether, a phenomenon described as patent hold-up. *See generally* Lemley & Simcoe, *How Essential?*, *supra*, at 610 & n.13. The FRAND quid pro quo (a SEP owner's promise to license at FRAND rates in exchange for participating in setting the standard) arose precisely because standard-setting organizations recognized the potential for SEP holders to extract unreasonably high royalties due to threats of hold-up and the lock-in effects of their decisions to include specific technologies in their standards. *See* Contreras, *Brief History of FRAND*, *supra*, at 42; FTC, *Evolving IP Marketplace, supra*, at 22.

This critical FRAND commitment is ordinarily defined in only general terms. FTC, *Evolving IP Marketplace, supra*, at 22–23. The specific terms of FRAND licenses are negotiated case-by-case and the scenarios of negotiating FRAND licensing terms for standard-essential patents can be quite complicated. Ideally negotiations yield a happy result for both parties—but sometimes negotiations break down, and

disputes arise, including litigation like this case. How these disputes are resolved—and how well that process helps form precedent and legal rules—will create the "shadow of the law" under which future negotiations occur.

The law is still evolving. Assessing what constitutes FRAND licensing terms involves many factors, including "looking at the importance of the SEPs to the standard and the importance of the standard and the SEPs to the products at issue." *Microsoft Corp. v. Motorola, Inc.*, No. C10-1823JLR, 2013 U.S. Dist. LEXIS 60233, at *19 (W.D. Wash. Apr. 25, 2013). Also important is the choice of royalty base, to avoid a problem known as "royalty stacking."

2. The district court judge in this case contributed to the evolution of the case law when he issued an extensive one-hundred-plus page decision setting a FRAND rate for a portfolio of alleged SEPs. Transparent and reasoned procedures for resolving FRAND disputes—including the issuance of judicial decisions—can help crystallize issues and guide future negotiations. Further development of the law through careful written judicial decisions is needed to bring needed clarity and predictability to industry understanding of FRAND rates.

Recourse to a reasoned decision-making process is important when disputes arise. Disputes in SEP cases are often very complex. If negotiations reach an impasse, the ideal is a fair, reasoned and transparent process where judicial decision-makers have authority to obtain and serve as gate-keepers of evidence of the specific standard, the SEPs of the standard, their value, and licensing practices in the related

industries. Publication of precedential decisions by these reasoned decision-makers allows guidance for future courts or company negotiators.

The ruling below jeopardizes these principles. Allowing U.S. juries to set license rates without "showing their work" eviscerates transparency and generates no reasoned decision that can inform future negotiations and dispute resolution. Recourse to unpredictable decision-makers with no expertise or context is far from the sort of process that fosters the development of consistent, reasonable FRAND precedent. Such precedent is desperately needed to support parties' ability to negotiate and enter licensing agreements "in the shadow of the law" that is well-reasoned and correctly incorporates the economic concerns underlying the FRAND commitment.

C. Allowing U.S. Juries to Set FRAND Licensing Terms Will Stall Development of the Law Needed to Guide Business Negotiations.

The Alliance agrees with Petitioners that the Federal Circuit's rule is wrong as a matter of U.S. constitutional law. *See* Pet. Part I.B. The Alliance also roundly endorses Petitioners' argument that the Federal Circuit was unequivocally wrong in conflating the global release payment here with legal damages for patent infringement, and that the "scope of the release payment [here] extended far beyond what U.S.

patent law provides." Pet. 19.[5] The Alliance can attest, from extensive experience, that the practical consequences are as grave as these legal errors. Allowing U.S. juries to determine FRAND licensing terms will threaten the functioning of the innovation ecosystem, with consumers being the ultimate victims.

Infringement was never proved here and "the release payment applied with no regard to whether TCL actually infringed a valid patent." Pet. 19. TCL sought only specific performance of Ericsson's acknowledged commitment to license at FRAND rates. Setting a FRAND royalty rate for a large patent portfolio can implicate additional concepts than are typically needed to determine a "reasonable royalty rate" for patent infringement for one or a small handful of patents, such as the need to consider a "top-down" methodology to consider the overall royalty burden for a standard or a product. This methodology "begin[s] with the aggregate royalty that should be payable with respect to all SEPs covering a particular standard, and then allocate[s] a portion of the total to individual SEPs." Jorge L. Contreras, *Aggregated Royalties for Top-Down FRAND Determinations: Revisiting "Joint Negotiation,"* 62 ANTITRUST BULL.

[5] In the Alliance's view, no U.S. court—whether judge or jury—should be setting global licensing terms for worldwide patent portfolios absent the prospective licensee's clear and unequivocal agreement. Here, the parties made a "mutual request that their license dispute be resolved by crafting a global license with FRAND terms, to be imposed on the parties in the form of an injunction." Pet. 10. Because of this party agreement, this case does not present the complicated legal questions that arise from having courts of one jurisdiction set extraterritorial licensing terms that apply across other jurisdictions.

690, 690 (2017). Starting from the top—with a reasonable aggregate royalty determination—helps to avoid a phenomenon known as "royalty stacking," where "(1) the cumulative royalties paid for patents incorporated into a standard exceed the value of the feature implementing the standard, and (2) the aggregate royalties obtained for the various features of a product exceed the value of the product itself." *Microsoft Corp. v. Motorola, Inc.*, 795 F.3d 1024, 1031 (9th Cir. 2015) (citing, *inter alia*, Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 TEX. L. REV. 1991, 2010–13 (2007)).

Courts across the globe are working to build a body of precedent on these and other methodologies for calculating FRAND royalties. For every litigated dispute and resulting decision, there are thousands of negotiations taking place in its shadow. Published judicial decisions contribute to an evolving consensus on the key substantive principles governing FRAND royalties. That was the standards community's hope for this case—where the bulk of the party and amicus briefing before the Federal Circuit focused on disputed questions about how to calculate the FRAND rate that Ericsson had committed to charging. But instead of providing sorely-needed precedent to guide future FRAND negotiations, the Federal Circuit undermined the entire process.

Letting U.S. juries set FRAND licensing terms through black-box verdicts provides all the wrong incentives. There will be no precedent-setting decisions or reasoned judicial analyses that can help to create a governing body of FRAND principles and guide negotiations. Far from encouraging

negotiations, the Federal Circuit's ruling will instead encourage litigation when a licensing dispute arises. Even the threat of such behavior, coupled with the tremendous unpredictability of allowing juries to set complex contractual terms, will grant SEP holders more leverage than they already hold to extract excessive royalties that "act as a tax on new products incorporating the patented technology, thereby impeding rather than promoting innovation." Lemley & Shapiro, *Patent Holdup*, *supra*, at 1993. And the final bill will be paid by consumers.

Ultimately, allowing the Federal Circuit's ruling to stand transforms the FRAND commitment from "a shield that preserves open access to standardized technologies" to a "sword to bully companies into … paying excessive royalties."[6] This Court's intervention is urgently needed to ensure that key FRAND principles are not turned upside down.

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[6] Apple, Remarks for ITU Patent Roundtable (Oct. 10, 2012), https://tinyurl.com/y9nv5b6b.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

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