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December 16, 2021

Hon. Scott S. Harris
Clerk
Supreme Court of the United States
One First Street, N.E.
Washington, DC 20543

Re: **Apple Inc. v. Optis Cellular Technology, LLC, No. 21-118**

Dear Mr. Harris:

In light of Apple's opposition, the private respondents respectfully submit this brief reply in support of their request for a first extension of time.

I was retained to prepare this brief in opposition after the Court's request for a response from the private respondents, which was issued November 23, 2021. Our previous letter lays out the two December oral arguments and other commitments between November 23 and December 22 that justify the additional time. Apple does not dispute that these competing commitments are good cause for a first extension under the Court's ordinary standards.

Rather, Apple contends that these considerations must yield to Apple's desire to have the petition considered at the January 14 conference and, if the petition is granted, to have oral argument this Term. Setting aside the question whether Apple's petition has merit, the possibility that consideration at the January 14 conference would lead to oral argument this Term is already extremely small—at best. Last Term, the Court heard 12 arguments in April. In all but one of those cases, the Court granted certiorari at the first January conference. The sole exception, *PennEast*, was atypical in several respects: it had already been the subject of a CVSG; the United States had filed a brief recommending certiorari on December 8; the petition was considered at the third January conference; and certiorari was granted on February 3 (with an added question) on unusually expedited terms.

In recent Terms more generally, when cases were granted at the second January conference and heard in April, they either had been considered at the first January conference and relisted, or were expedited in some way.

This case has not previously been expedited in any way. Apple took the full 150 days to file its petition. The government took two extensions—the second one with Apple's consent—before filing its brief in opposition. Then, rather than consider the case at the December 3 conference, the Court determined that it first wanted to receive a response from the private respondents. And the Court set a standard due date for that brief—well after the cutoff for consideration at the first January conference (and, indeed, for consideration at the second January conference without a waiver of the 14-day period).

Apple's reasons for now insisting that the Court must hold open even the remote possibility of an argument this Term, notwithstanding the impact on the private respondents' ability to prepare the brief the Court has requested, are not well taken. This case is about whether the Federal Circuit can review a decision by the Director of the Patent and Trademark Office not to consider the patentability of patent claims in an inter partes review. Thus, even the "potential consideration" of the patents' merits that Apple posits would come far in the future, after a long chain of contingencies: Apple would first need this Court to direct the Federal Circuit to hear Apple's appeal; the Federal Circuit to receive briefing and argument on the substance of Apple's appeal, and rule in Apple's favor; and the Director then to exercise her discretion to institute an inter partes review.

While the private respondents would certainly have been willing to discuss an extension of less than 30 days, Apple acknowledges that there is no shorter extension to which it can agree—not even a one-week extension with Christmas in the middle.

Given the choice between the requested extension or none, the Court should grant the requested extension.

Respectfully submitted,

/s/ William M. Jay

William M. Jay

cc: Catherine M.A. Carroll, Esq.
Hon. Elizabeth B. Prelogar, Solicitor General of the United States