

No. 12-1352

In the
Supreme Court of the United States

NOKIA INC. AND NOKIA CORP.,

PETITIONERS,

v.

INTERNATIONAL TRADE COMMISSION;
INTERDIGITAL COMMUNICATIONS, LLC; AND
INTERDIGITAL TECHNOLOGY CORPORATION,

RESPONDENTS.

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

**BRIEF OF HEWLETT-PACKARD CO., AMAZON.COM,
INC., AND RED HAT, INC. AS *AMICI CURIAE* IN
SUPPORT OF PETITIONERS**

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INTEREST OF *AMICI CURIAE*¹

As leading manufacturers and providers of high-technology products and services, *amici* collectively employ more than a hundred thousand American workers in manufacturing, retail, engineering, research, development, and other enterprises. Hewlett-Packard Co., which own tens of thousands of patents worldwide, has had to defend its domestic industries against unfair foreign trade practices. All *amici* have had to defend against patent infringement claims. *Amici* therefore have a strong interest in principled and consistent enforcement of the trade and patent laws that protects rather than penalizes domestic innovation and industry.

INTRODUCTION AND SUMMARY OF ARGUMENT

The International Trade Commission's ("ITC's") growing usurpation of the federal courts' authority over patent disputes warrants this Court's immediate attention. Congress gave the federal courts exclusive jurisdiction over the Patent Act, and the ITC jurisdiction over various trade disputes. Although some overlap between the two is inevitable, the ITC, with the Federal Circuit's blessing, has now reached well beyond its statutory role of protecting American

¹ Pursuant to Sup. Ct. R. 37.2(a), *amici* timely notified the parties of their intent to file this brief, and the parties have consented to the filing of this brief in letters filed herewith. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

industries and jobs from unfair trade practices. Indeed, by eliminating the statutory requirement that a complainant demonstrate a domestic industry tied to “articles protected by the patent,” as opposed to mere licensing alone, the ITC has transformed itself into a general patent enforcement venue for routine disputes that should be heard in a federal court.

The practical consequences of the ITC’s overreaching are extraordinarily important. As this Court has seen, our Nation’s patent system is broken and in need of repair. This Court, the Congress, and the Federal Circuit have begun to reform the system. But the ITC does not follow those reforms, and therefore allows itself to be used as an end-run around patent reform, especially for Patent Assertion Entities (“PAEs”)—outfits that do not provide goods or services, but instead assert patents against those that do.

For example, the ITC does not follow this Court’s holding that traditional equitable principles govern whether to impose a permanent injunction following a finding of patent infringement. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391-92 (2006). Under *eBay*, district courts rarely award injunctions to PAEs because their asserted injuries are adequately remedied by damages, not exclusion of participants from the marketplace. In contrast, the ITC routinely imposes injunctive relief in the form of exclusionary orders that bar the importation of infringing articles, or cease-and-desist orders that bar the distribution or sale of products already in this country.

The mere threat of such injunctive relief gives a complainant unfair holdup power based on its potential to disrupt a respondent's business. Many respondents in ITC actions cannot risk being enjoined, and therefore feel compelled to settle even meritless suits for inflated amounts that bear little if any relation to the value of the patented invention or the merit of the complainant's allegations. Instead of fulfilling its statutory mission to protect domestic industries from unfair trade practices, therefore, the ITC is now allowing patentees to use its process to *impose* litigation practices that this Court and others have found to be unfair. That harms the very American interests the ITC is supposed to protect. Now that the Federal Circuit has squarely affirmed the ITC's overreaching, this Court's review is needed.

REASONS FOR GRANTING THE PETITION

I. AS AN INTERNATIONAL TRADE FORUM, THE ITC'S JURISDICTION IS LIMITED TO PROTECTING DOMESTIC INDUSTRIES IN ARTICLES PROTECTED BY A PATENT.

A. All Domestic Industries, Including Those Premised On Licensing, Must Relate To Articles Protected By An Asserted Patent.

As the petition explains, the ITC has reached well beyond its role as an *international trade commission* and turned itself into a general patent enforcement forum. That transformation rests in large part on the ITC's elimination of the statutory requirement that a complainant prove a domestic industry in "articles protected by the patent."

19 U.S.C. § 1337(a)(2), (3). Section 337's prohibitions on imported goods "apply only if an industry in the United States, relating to the articles protected by the patent . . . concerned, exists or is in the process of being established." *Id.* § 1337(a)(2). The statute repeats the requirement of "articles protected by the patent" by specifying that a complainant must show that it has made, "in the United States, with respect to the articles protected by the patent," either: "(A) significant investment in plant and equipment"; "(B) significant employment of labor or capital"; or "(C) substantial investment in its exploitation, including engineering, research and development, or licensing." *Id.* § 1337(a)(3). In other words, complainants may establish a domestic industry through a variety of "significant" or "substantial" investments (the economic prong) *if and only if* such investments also "relat[e] to the articles protected by the patent" (the technical prong).

The ITC once understood that, and applied the "articles protected by the patent" requirement to all means of establishing a domestic industry, including licensing. *See* Pet. 22. "In fact, in 1993, an administrative law judge ('ALJ') summarily rejected a complainant's argument that the existence of a licensing domestic industry did not require the complainant or his licensees to practice the asserted patents." Thomas Yeh, *The International Trade Commission and the Nonpracticing Entity: Reviving the Injury Requirement for Domestic Industries Based on Licensing*, 80 Geo. Wash. L. Rev. 1574, 1590 & n.132 (2012) (citing *Certain Integrated Telecomm. Chips & Prods. Containing Same, Including Dialing*

Apparatus, No. 337-TA-337, USITC Pub. 2670, at 99 (Mar. 9, 1993) (Initial Determination)).

Over time, however, the ITC decided to exempt licensing from the “articles protected by the patent” requirement. *See, e.g., In re Certain Semiconductor Chips with Minimized Chip Package Size & Prods. Containing Same*, No. 337-TA-432, Order No. 13, at 11-13 (Jan. 24, 2001) (Initial Determination). According to the ITC, substantial investment in licensing an asserted patent suffices, without more. *See id.* at 12. Thus, the ITC does not require the complainant to identify *any* licensed “articles protected by the patent”; such articles are irrelevant in its view so long as the complainant has satisfied the separate economic prong by making a substantial investment in trying to license the patent. *See* Pet. 18-19.

In this case, the Federal Circuit agreed with the ITC that a domestic industry “can be based on patent licensing alone.” Pet. App. 23. Under the majority’s view, the “articles protected by the patent” requirement is satisfied whenever “the patent covers the article that is the subject of the exclusion proceeding.” Pet. App. 55. But that eviscerates the “articles protected by the patent” requirement by conflating it with the merits of an infringement claim. The complainant *always* asserts that an accused article infringes the patent; otherwise, it would have no claim. But the domestic industry requirement looks to whether the *complainant* has a domestic industry related to articles protected by the patent, not whether the *respondent* has manufactured and imported such articles.

In addition to reading the “articles protected by the patent” requirement out of the statute by conflating the domestic industry requirement with the merits of a claim, the Federal Circuit’s decision to treat a *respondent’s* accused (and unlicensed) articles as proof of a *complainant’s* domestic industry only underscores how far that decision takes the ITC from its statutory mission. At most, a respondent’s accused articles might help to demonstrate that the *respondent* has a domestic industry in articles that practice the patent—a domestic industry the ITC should protect, not enjoin on behalf of a complainant with no such industry.

Neither the ITC nor the Federal Circuit has authority to read this express requirement out of a statute. *See, e.g., United States v. LaBonte*, 520 U.S. 751, 762 n.6 (1997). Their error is especially clear because the ITC now applies the “articles protected by the patent” requirement to some but not all of the statute’s enumerated domestic industries—the ITC applies the requirement to domestic industries based on investment in plant, equipment, or employment of labor, but *not* to licensing. *See, e.g., In re Certain Ground Fault Circuit Interrupters & Prods. Containing Same*, No. 337-TA-739, Commission Opinion, at 78 (June 8, 2012). That is indefensible because the statute expressly applies this requirement, twice, to *all* categories of domestic industries, including licensing.

The ITC’s heavy reliance on legislative history is unavailing. *See* Pet. 22-25. Even clear legislative history could not negate the unambiguous statutory requirement that the domestic industry relate to

articles protected by the patent. *See, e.g., 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 259 n.6 (2009). Moreover, the committee reports repeatedly reiterate the technical prong’s limitation on covered licensing. *See* S. Rep. No. 100-71, at 128-30 (1987). Congress even stressed that it did “not want to see this language used as a loophole to the industry requirement.” *Id.* at 130. But that is exactly what the ITC has done.

The ITC’s resort to deference fails for the same reason: the statute is clear on this question. Even if the ITC were entitled to deference on *how* to apply the technical prong to licensing, it would still be entitled to no deference on *whether* to apply that clear statutory requirement. *See, e.g., LaBonte*, 520 U.S. at 762 n.6 (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). The ITC has settled on, and the Federal Circuit has now affirmed, the most clearly indefensible position—that there is no technical prong whatsoever for licensing.

B. There Must Be A Relationship Between Licensing And Articles Protected By The Patent.

As explained above, a complainant’s licensing efforts must be related to actual articles protected by the patent. Domestic *manufacture* is not required. But there must be some connection between the licensing and actual articles *protected by* the patent, and that connection must consist of more than attempting to profit *ex post* from others’ independent activities—as the statutory text, structure, and purpose confirm.

“Words in a list are generally known by the company they keep.” *Logan v. United States*, 552 U.S. 23, 31 (2007). The three subsections describing the different types of domestic industries are all related to protecting American jobs and industry. Covered activities include manufacturing (plant and equipment), employment of labor, engineering, and research and development, in addition to licensing. 19 U.S.C. § 1337(a)(3).

The term “licensing” must be interpreted in that context, not in isolation. *Logan*, 552 U.S. at 31. Some licensing gives rise to domestic jobs and industry, such as by providing needed research and know-how to enable others to manufacture products protected by a patent. For example, the legislative history explains that universities and similar innovators may pursue ITC actions after licensing their inventions to companies that could bring the covered articles to market. *See* H.R. Rep. No. 100-40, at 157 (1987); S. Rep. No. 100-71, at 129. Unlike mere patent assertion, such licensing actually gives rise to a domestic industry under the terms of the statute by causing articles to be made. But other licensing only impairs productive activity and actual domestic industry by seeking to impose an *ex post* tax on existing activities the patentee did not facilitate in any way. Such licensees may seek damages in court, not windfall injunctive relief from the ITC.

Indeed, the ITC and the Federal Circuit have recognized that a complainant may not premise a domestic licensing industry on *litigation* expenses “targeted at financial gains, not at encouraging adoption of [the complainant’s] patented technology.”

Motiva, LLC v. ITC, No. 2012-1252, 2013 WL 1943205, at *4 (Fed. Cir. May 13, 2013). In that case, the ITC correctly found that a complainant's litigation expenses did not establish a licensing domestic industry. The Federal Circuit held that the complainant's investment in litigation could suffice "if it was substantial and directed toward a licensing program that would encourage adoption and development of articles that incorporated [complainant's] patented technology." *Id.* But "[t]he inventors looked forward to financial gains through . . . litigation, not hopes of stimulating investment or partnerships with manufacturers." *Id.*

For the reasons explained above, the ITC and the Federal Circuit are absolutely right to require a relationship between litigation expenses and productive activity concerning articles protected by the patent. But there is no basis for the ITC's refusal to apply that requirement to *other* licensing expenses. As discussed above, Congress required that *all* domestic industries be related to articles protected by the patent. Thus, the ITC has erred by treating licensing differently from all other domestic industries in this respect, and further erred by distinguishing even between different types of licensing expenditures.

In addition to violating the statute, the ITC's distinction between litigation and other licensing costs is arbitrary. When a patentee's efforts did not contribute to the manufacture of articles, and its licensing efforts are limited to demanding *ex post* a share of the profits from others' endeavors, there is no reason to distinguish between the costs of

attempting to secure licenses outside of litigation and the costs of proceeding with litigation. Both activities are “targeted at financial gains, not at encouraging adoption of [the complainant’s] patented technology.” *Id.*

In this case, there appears to be no evidence that InterDigital has licensed *any* articles, anywhere, that are covered by the asserted patents (much less that InterDigital did so as anything other than an attempt to profit *ex post* from others’ independent labors). Because the facts are so stark, this case provides an excellent vehicle for restoring the statutory requirement that all domestic industries be related to articles protected by an asserted patent. Even if there were some question as to exactly where to draw the line, this case would clearly fall on the wrong side of it.

II. THE QUESTION PRESENTED IS EXTREMELY IMPORTANT.

The domestic industry requirement is important because it anchors the ITC’s jurisdiction to its trade mandate. The ITC “is fundamentally a trade forum, not an intellectual property forum.” *John Mezzalingua Assocs., Inc. v. ITC*, 660 F.3d 1322, 1327-28 (Fed. Cir. 2011). Its “primary responsibility is to administer the trade laws, not the patent laws.” *Tandon Corp. v. ITC*, 831 F.2d 1017, 1019 (Fed. Cir. 1987). The federal courts, in contrast, have “exclusive jurisdiction” over the Patent Act. *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 162 (1989).

The ITC's elimination of the "articles protected by the patent" requirement for licensing has removed that anchor, resulting in a rapid change in the ITC's institutional character that has undermined patent law reforms, taxed instead of promoted American industry, and harbored abusive actions by PAEs.

**A. In Exceeding Its Statutory Authority,
The ITC Has Undermined Important
Patent-Law Reforms.**

It is no secret that our current patent system is deeply flawed. But even as this Court, Congress, and the Federal Circuit have sought to fix some of the obvious problems, including automatic injunctions, exorbitant damages, forum shopping, and mass joinder of unrelated defendants, the ITC has entrenched those unfair practices.

1. This Court has held that traditional equitable principles govern entitlement to equitable relief. *See eBay*, 547 U.S. at 391-94. As Justice Kennedy explained, that holding provides a critical protection to accused infringers because "an injunction, and the potentially serious sanctions arising from its violation, can be employed as a bargaining tool to charge exorbitant fees to companies that seek to buy licenses to practice the patent." *Id.* at 396-97 (Kennedy, J., concurring). Such holdup power would permit patent holders to capture a "greater amount of money than their invention is worth." Mark A. Lemley, *Ten Things to Do About Patent Holdup of Standards (and One Not to)*, 48 B.C. L. Rev. 149, 152 (2007).

Resulting settlements reflect not the value of an invention, but the ability to disrupt the licensee's business. That is "not a legitimate part of the value of a patent; it is a windfall to the patent owner that comes at the expense not of unscrupulous copyists but of legitimate companies doing their own R&D." Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 Tex. L. Rev. 1991, 2009 (2007).

Under *eBay*, PAEs in particular are generally not entitled to injunctions because damages provide an adequate remedy for their alleged injuries. *See, e.g.,* Colleen V. Chien, *Protecting Domestic Industries at the ITC*, 28 Santa Clara Computer & High Tech. L.J. 169, 173-74 & nn. 17-19 (2011). "[C]ourts have denied injunctions to PAEs about three-quarters of the time." Colleen V. Chien & Mark A. Lemley, *Patent Holdup, the ITC, and the Public Interest*, 98 Cornell L. Rev. 1, 10 (2012).

The ITC, however, has "undone many of the desirable consequences of *eBay*." *Id.* at 4. If the ITC finds a violation, it grants injunctive relief (in the form of exclusion or cease-and-desist orders) as a matter of course. *See Spansion, Inc. v. ITC*, 629 F.3d 1331, 1359-60 (Fed. Cir. 2010). As a result, many patentees now pursue an exclusion order to exert unfair leverage in settlement negotiations, and some even pursue parallel actions in the ITC and in court. *See* Chien & Lemley, 98 Cornell L. Rev. at 24 & n.96; Chien, 28 Santa Clara Computer & High Tech. L.J. at 185-86.

Especially considering that most PAEs ultimately benefit only from damages (because an exclusion order would block the very articles they

seek to license), PAEs' solo or parallel ITC actions are almost *per se* abusive. See, e.g., Alan Devlin, *Improving Patent Notice and Remedies: A Critique of the FTC's 2011 Report*, 18 Mich. Telecomm. & Tech. L. Rev. 539, 564 (2012). By offering PAEs this powerful tool that they can use to force extortionate settlements, the ITC is effectively facilitating recovery of *unreasonable* royalties—even though it lacks authority to award even *reasonable* royalties. (The ITC may award only injunctive relief, not damages, which are available only in court. See 19 U.S.C. § 1337.)

Overcompensation through holdup power is not simply inequitable between the parties; it “can reduce efficiency and stifle innovation,” contrary to the public interest. Carl Shapiro, *Patent Reform: Aligning Reward and Contribution*, 8 Nat'l Bureau of Econ. Res. 111, 113, *in* *Innovation and the Economy* (2007). Holdup power “discourages innovation” because “the victims of holdup are frequently firms that have made significant R&D investments themselves.” Lemley & Shapiro, 85 Tex. L. Rev. at 2010. The excess royalties do little to stimulate innovation by patent holders but instead “act as a tax on new products incorporating the patented technology, thereby impeding rather than promoting innovation.” *Id.* at 1993; *see also* Chien & Lemley, 98 Cornell L. Rev. at 20.

The consequences of holdup power are especially acute in “the information technology sector,” where a complex product “can easily be covered by dozens or even hundreds of different patents” relating to small components or features of the product. Lemley &

Shapiro, 85 Tex. L. Rev. at 1992-93. Patent holdup “impose[s] significant social welfare costs by restricting otherwise lawful conduct” inhering in a product’s *non*-infringing features. Mark A. Lemley & Philip J. Weiser, *Should Property or Liability Rules Govern Information?*, 85 Tex. L. Rev. 783, 787 (2007). That “may inhibit investment” by innovative companies that wish to reduce litigation exposure. Thomas F. Cotter, *Patent Holdup, Patent Remedies, and Antitrust Responses*, 34 J. Corp. L. 1151, 1169 (2009). Thus, even where infringement has occurred, “the harm to consumers and competition from an exclusion order is greater than the contribution made by the individual infringing component.” Chien & Lemley, 98 Cornell L. Rev. at 6.

From a PAE’s perspective, an exclusion order therefore amounts to winning the lottery based on the happenstance (from the patentee’s perspective) that someone else developed and marketed an accused product that succeeded where the PAE may have never even tried. From a defendant’s perspective, however, this is no lottery; it is highway robbery. In a lottery, everyone pays the same amount for a ticket and the lottery pays winners selected at random. But here, the least deserving claim the prize and confiscate it from the most deserving: the holders of trivial patents with little or no value to the public can hold up companies that have successfully developed and marketed important, innovative products based on the products’ *non*-infringing features. That turns the patent system’s fundamental objective—to encourage and reward innovation—on its head.

2. In parallel with this Court's injunction reforms, the Federal Circuit has tried over the past few years to tame "the systematic overcompensation of patent owners" with excessive damages. Lemley & Shapiro, 85 Tex. L. Rev. at 1994. The Federal Circuit has done so by holding that damages must be economically rational, meaning that they must not exceed the portion of a product's value that is attributable to the patented invention. See *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1311-21 (Fed. Cir. 2011); accord *Garretson v. Clark*, 111 U.S. 120, 121 (1884).

In most cases, a reasonable royalty is calculated by multiplying a royalty base (such as sales) by a royalty rate (that reflects the patented invention's contribution to the overall design, manufacture, and sale of the product). When only one feature of a broader product infringes, such as a date-picker feature in an office software package, the royalty base may not include the product's entire market value unless the patented feature "is the basis for customer demand." *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1336 (Fed. Cir. 2009) (citation and quotation marks omitted); accord *Garretson*, 111 U.S. at 121. "[C]alculating a royalty on the entire product carries a considerable risk that the patentee will be improperly compensated for non-infringing components of that product." *LaserDynamics, Inc. v. Quanta Computer, Inc.*, 694 F.3d 51, 67 (Fed. Cir. 2012). The Federal Circuit has also held that the royalty rate, like the royalty base, must be tied to the specific patented invention at issue, not an arbitrary percentage. *Uniloc*, 632 F.3d at 1315, 1317-18.

It would make little sense to crack down on excess compensation in district court cases only to re-open (and aggravate) it by conferring the unilateral holdup power that comes with ITC exclusionary orders. Even the largest damages awards are subject to a judicial check, but once the ITC grants an exclusionary order, the patentee replaces the court as the ultimate decisionmaker by unilaterally deciding what it will accept as a reasonable royalty. “There is no reason in law or policy to give such power to a patent owner.” Lemley & Shapiro, 85 Tex. L. Rev. at 2010.

3. Five years ago, the Federal Circuit started using its mandamus power to restrict the rampant, unabashed forum shopping that had become common in patent cases. *See In re TS Tech USA Corp.*, 551 F.3d 1315 (Fed. Cir. 2008). Some plaintiffs responded by joining numerous defendants (sometimes dozens) together in a single suit and arguing that venue was appropriate as to all because one of the defendants was located in that venue. *See In re Google Inc.*, 412 F. App’x 295, 295 n.1 (Fed. Cir. 2011). Even apart from its venue implications, that practice tends to be unwieldy and to deprive individual defendants of the right to control their defense and even to advance company-specific defenses. *See In re EMC Corp.*, 677 F.3d 1351, 1355 (Fed. Cir. 2012). Accordingly, Congress responded by barring plaintiffs from joining multiple, unrelated defendants together in a single action. *See* 35 U.S.C. § 299.

In contrast, the ITC not only *allows* complainants to join as many respondents as they

wish in a single action, *see* Chien, 28 Santa Clara Computer & High Tech. L.J. at 175, it even *requires* joinder of multiple respondents if a complainant seeks an exclusion order against downstream products. *See Kyocera Wireless Corp. v. ITC*, 545 F.3d 1340, 1357-58 (Fed. Cir. 2008). Thus, while defendants in district court litigations may seek transfer out of inconvenient forums, or to sever themselves from unwelcome co-parties, respondents before the ITC have no option but to cope with the pressures of a mass adjudication.

4. In light of these practical consequences, the agency's process is now working at cross-purposes with important congressional and judicial reforms. That makes it all the more implausible to conclude that Congress intended to delegate such authority to the agency. Federal agencies have only the authority delegated to them by Congress, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125-26 (2000), and may not do indirectly what they cannot do directly. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 829, 836 (1995). Thus, when an agency asserts authority traditionally exercised by another governmental entity, a reviewing court must carefully consider the overall regulatory context. *See Brown & Williamson*, 529 U.S. at 133, 137. And the court must reject any assertion of authority that conflicts with other Acts of Congress or the traditional prerogatives of other parts of the government, unless Congress has clearly expressed an intent to delegate such authority to the agency. *See, e.g., id.* at 133; *Am. Bar Ass'n v. FTC*, 430 F.3d 457, 471 (D.C. Cir. 2005).

Here, Congress has clearly *denied* the ITC authority to act as a general patent tribunal by limiting its mandate to the protection of domestic industries from unfair imports, as explained above. And that conclusion is confirmed by the extent to which the ITC would negate essential patent reforms in such a broad swath of cases. Congress does not “hide elephants in mouseholes.” *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001).

B. PAEs Are Flocking To The ITC.

These concerns are not theoretical. The ITC’s rewriting of its statute—and its reintroduction of holdup leverage for PAEs—has contributed to explosive growth in its docket, promoting the existing and growing “industry . . . in which firms use patents not as a basis for producing and selling goods but, instead, primarily for obtaining license fees.” *eBay*, 547 U.S. at 396 (Kennedy, J., concurring).

The ITC’s own statistics show that “PAEs are flocking to the ITC, both because of the relaxed domestic industry requirement and because courts are no longer a sure bet for injunctions.” Chien & Lemley, 98 Cornell L. Rev. at 26-27 (footnotes omitted). “The number of new Section 337 investigations has increased by over 530% from FY 2000 and FY 2011.” ITC, *Facts & Trends Regarding USITC Section 337 Investigations* 1 (2012), available at <http://www.itcblog.com/wp-content/uploads/2012/07/NPEfactsJuly2012.pdf> (“ITC, 2012 *Facts & Trends*”). The ITC recently confirmed that “Section 337 investigations . . . are expected to remain at elevated levels.” ITC, *Facts & Trends Regarding USITC Section 337 Investigations* 1 (2013) available

at http://www.usitc.gov/press_room/documents/featured_news/337facts.pdf (“ITC, 2013 *Facts & Trends*”).

Between January 2011 and June 2012, PAEs brought more than a quarter of Section 337 patent cases. More telling, “nearly half of the total respondents appearing before the ITC were there because of a PAE-initiated case.” Testimony of Colleen V. Chien before the House Committee on the Judiciary, *The International Trade Commission and Patent Disputes*, at 2 (July 18, 2012) (“Chien Testimony”) available at <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1437&context=facpubs>; Chien & Lemley, 98 *Cornell L. Rev.* at 22-23. The reason is that PAEs typically join numerous respondents in a single action (*see* ITC, 2013 *Facts & Trends* 4), to the point where they now account for nearly half of all ITC investigations of respondents.

The ITC’s contention that only several PAEs have prevailed before the ITC, *see* ITC, 2013 *Facts & Trends* 3, misses the point. The mere threat of an injunction often causes respondents to settle at a premium rather than risk an injunction by defending themselves, even against meritless suits. Indeed, ITC investigations brought by PAEs settle at higher rates than others. *See id.*

That is also true in court. PAEs “overwhelmingly lose at trial” in district court actions. Colleen V. Chien, *Reforming Software Patents*, 50 *Hous. L. Rev.* 325, 381 (2012). But that did not prevent this Court from granting certiorari in *eBay*.

The bottom line is that, instead of protecting American jobs from unfair trade practices, the ITC is now imposing unfair litigation practices, to the detriment of the very domestic industries it is supposed to protect. Indeed, “[t]hrough Section 337 was created to keep foreign pirates out of American markets, recent PAE cases have targeted domestic companies almost twice as often as foreign respondents (209 times vs. 123 times).” Chien Testimony at 3. Companies from four States (California, New Jersey, New York, and Texas) “have together been named [as respondents] more times than companies in the rest of the world.” *Id.*

Just last year, then-Chairman of the Federal Trade Commission Jon Leibowitz described the modern-day ITC as “a forum for patent hold-up, patent gaming and patent mischief.” Remarks of FTC Chairman Jon Leibowitz, Geo. L. Global Antitrust Enforcement Symposium, at 8 (Sept. 19, 2012), *available at* <http://www.ftc.gov/speeches/leibowitz/120919jdlgeorgetownspeech.pdf>. The ITC has, however, proven unable to police even the most egregious abuses. For example, a foreign PAE recently moved to terminate an ITC investigation because the respondents had shown, after collectively incurring millions of dollars in litigation expenses, that the complainant’s basis for filing the complaint was frivolous. *See In re Certain Automotive GPS Navigation Sys., Components Thereof, & Prods. Containing Same*, No. 337-TA-814, Order Nos. 8 and 9 (May 8, 2012). Because the complainant withdrew its complaint within a safe-harbor period, however, the ALJ determined that he was powerless to impose sanctions. *See id.*; Notice of Commission Not to

Review the ALJ Order Nos. 8 and 9 (June 7, 2012). PAEs have nothing to lose from filing abusive Section 337 complaints in hopes that a respondent will settle to avoid the threat of an exclusion order, or to avoid spending millions of dollars defending the action.

Now that the Federal Circuit has affirmed the ITC's expansive view of its jurisdiction, the trend toward more ITC filings is bound to continue, especially by PAEs. Because the ITC's rewriting of its statute gives PAEs an end-run around general principles of patent law, including *eBay*, this Court should grant review for the same basic reasons it granted review in *eBay*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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