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In the Supreme Court of the United States

PANASONIC CORPORATION,
PANASONIC CORPORATION OF NORTH AMERICA,
AND SD-3C, LLC, PETITIONERS

v.

SAMSUNG ELECTRONICS CO., LTD., RESPONDENT

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 4B of the Clayton Act provides that private actions to enforce the antitrust laws “shall be forever barred unless commenced within four years after the cause of action accrued.” 15 U.S.C. § 15b. And in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971), this Court held that an antitrust “cause of action accrues” and this limitations period “begins to run when a defendant commits an act that injures a plaintiff’s business.”

The rule that the limitations period expires four years after accrual is subject to two exceptions. First, “[i]n the context of a continuing conspiracy to violate the antitrust laws,” “each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act.” *Ibid.* Second, “even if injury and a cause of action have accrued as of a certain date, future damages that might arise from the conduct sued on are unrecoverable if the fact of their accrual is speculative or their amount and nature unprovable.” *Id.* at 339.

Against this backdrop of *Zenith*’s “continuing conspiracy” and “speculative damages” exceptions, the question presented is:

Whether public standard-setting and patent-pool licensing agreements that long predate the Clayton Act’s four-year limitations period may indefinitely be subjected to antitrust challenge based on the defendants’ ongoing collection of royalties, where the plaintiff, a longtime licensee, delays filing suit to challenge those pre-limitations agreements until the market has come to depend upon the licensed technology.

**PARTIES TO THE PROCEEDING
AND RULE 29.6 STATEMENT**

Petitioners are Panasonic Corporation, Panasonic Corporation of North America, and SD-3C LLC. Panasonic Corporation, a nongovernmental corporate party, certifies that it has no parent corporation, and that no publicly held corporation owns 10% or more of its stock. Petitioner Panasonic Corporation of North America certifies that (a) Panasonic Corporation is its corporate parent; and (b) Panasonic Corporation is a publicly held corporation that owns 10% or more of its stock. Petitioner SD-3C LLC is a limited liability Delaware company owned by members Panasonic Corporation, SanDisk Corporation, and Toshiba Corporation, which are publicly held corporations.

Respondent is Samsung Electronics Co., Ltd., a publicly traded company, and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

The Ninth Circuit's decision in this case raises critical, recurring questions concerning the meaning of the "continuing violation" and "speculative damages" exceptions to the Clayton Act's four-year limitations period on private antitrust suits. See 15 U.S.C. § 15b; *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338-339 (1971). Those questions have deeply divided the circuits, and the decision below casts a shadow over tens of thousands of patent licenses governing technologies that millions of Americans use every day.

The district court dismissed as untimely Samsung's 2010 antitrust challenge to standard-setting and patent licensing agreements executed between 1999 and 2003. The Ninth Circuit reversed, even though Samsung: (i) knew of those agreements from the start; (ii) expressly alleged that the agreements caused it "permanent" injury in 1999; and (iii) waited to sue until 2010—seven years after Samsung signed its only license imposing the challenged royalty, and years after consumers embraced the relevant technology. The court first held that petitioners' attempts "to enforce" the 1999 and 2003 agreements in 2006—by continuing to collect royalties and offering an amended license that Samsung *rejected*—were "overt acts that restarted the statute of limitations." Pet. 10a. It then held that Samsung's damages were too "speculative" to pursue earlier, because Samsung could not "have known for certain" that it "would enter th[e] market" or that petitioners' products would "prove[] more popular than Samsung's." Pet. 11a.

In three key respects, this decision conflicts with this Court's precedents and adds to entrenched divi-

sion among the circuits, which “have implemented [*Zenith*] in a variety of ways and have not followed consistent principles.” ABA Section of Antitrust Law, *Proving Antitrust Damages* 71 (2d ed. 2010).

First, the Ninth Circuit deepened a six-circuit split over whether acts within four years of suit that carry out agreements entered outside that time frame restart the Clayton Act’s limitations period. At least three circuits have held that neither “[p]erformance of [pre-limitations] contracts during the limitations period,” nor receiving payments under such contracts, constitutes a “new and independent act” sufficient to “restart the period.” *E.g.*, *Varner v. Peterson Farms*, 371 F.3d 1011, 1019-1020 (8th Cir. 2004). These circuits have further held that the clock does not restart simply because the defendant “could have ceased causing the injury” by not performing. *E.g.*, *Barnosky Oils, Inc. v. Union Oil Co.*, 665 F.2d 74, 81 (6th Cir. 1981). By contrast, the Ninth Circuit and two other circuits have held that “an action taken under a pre-limitations contract [i]s sufficient to restart the statute of limitations so long as the defendant had the ability not to take the challenged action.” Pet. 8a. This conflict alone warrants review. *Infra* at 14-21.

Second, the Ninth Circuit split with at least seven circuits and this Court’s holdings that a plaintiff does not suffer “antitrust injury” where it is not personally harmed by, or stands to benefit from, the market impact of the challenged conduct. The court held that a 2006 license amendment was “an overt act that restarted the limitations period” (Pet. 10a) even though Samsung “refused to sign” the amendment (Pet. 5a) and paid royalties only under its “existing” 2003 license (Pet. 89a). The court thus found a continuing violation based on licensing obligations that Samsung

rejected. But as seven circuits have held, the antitrust injury prong of *Zenith*'s continuing violation exception requires a "plaintiff [to] show 'a causal connection between the defendant's [challenged] actions' and 'actual injury to the plaintiff's business.'" *World of Sleep, Inc. v. La-Z-Boy Chair Co.*, 756 F.2d 1467, 1478 (10th Cir. 1985) (emphasis added). This conflict too warrants review. *Infra* at 21-24.

Third, the Ninth Circuit broke with four circuits in its interpretation of *Zenith*'s "speculative damages" exception—which Samsung never even invoked. The court held that Samsung's damages would have been speculative before 2006 because Samsung did not "know[] for certain" that it "would enter th[e] market," or that petitioners' products would "prove[] more popular than Samsung's." Pet. 11a. But antitrust plaintiffs cannot "wait and see just how well the defendant does in the market" before filing suit. *E.g.*, *Brunswick Corp. v. Riegel Textile Corp.*, 752 F.2d 261, 271 (7th Cir. 1984). Further, Samsung alleged "permanent" injury as of 1999, and executed a 6% royalty agreement in 2003. Pet. 104a-107a. Thus, Samsung's alleged damages cannot have been "speculative" before 2006, and the decision below conflicts with several circuit decisions that strictly limit this *Zenith* exception to cases where the plaintiff can neither project its losses nor seek injunctive relief to avoid future damages. *Infra* at 24-29.

Beyond the foregoing conflicts, the decision below raises issues of paramount economic importance. The decision threatens to revive stale antitrust claims in a critical class of cases where repose is essential to innovation and product development. Patent licensing—and in particular standard-setting and patent-pooling agreements—are vital to our modern econo-

my. There are literally tens of thousands of these agreements, and they govern technologies used in every American home. Further, as all three branches of government and many distinguished commentators have recognized, such agreements are presumptively pro-competitive.

“Repose is especially valuable in antitrust, where tests of legality are often rather vague” and “business practices can be simultaneously efficient * * * but also challengeable as antitrust violations.” Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 320a (2014 ed.). Under the decision below, however, any standard-setting organization (“SSO”) or patent pool that merely updates its standards, reaffirms its royalties, or enforces its longstanding licenses potentially subjects itself and its members to a perpetual risk of antitrust claims.

That result conflicts with Section 4B of the Clayton Act, *Zenith*, and the “basic objective * * * that underlies limitations periods”—“repose.” *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 187 (1997). Moreover, the question presented has significant implications for all contracts, licenses, and settlement agreements that involve long-term performance. And because licenses like those here are often national (or international) in scope and directly affect multiple industries, this case is an ideal vehicle for clarifying when *Zenith* subjects agreements to antitrust challenges outside the Clayton Act’s four-year limitations period. *Infra* at 29-36.

Finally, in a companion case, *Oliver v. SD-3C LLC*, 751 F.3d 1081, 1086-1087 (9th Cir. 2014), the same panel extended the decision below, holding that any sale of an SD card to a consumer-plaintiff restarts the limitations clock—even if the seller was a

third-party licensee and the sale occurred decades after any “overt act” by the defendants. The *Oliver* defendants will be filing a separate petition for certiorari on December 1, 2014. Certiorari should be granted in both cases, and they should be consolidated for argument.

OPINIONS BELOW

The decision below (Pet. 1a-13a) is reported at 747 F.3d 1199 (9th Cir. 2014). The order denying rehearing (Pet. 15a) and the district court’s decisions (Pet. 17a-41a) are unpublished.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1367. The court below entered judgment on April 4, 2014, and denied rehearing on June 30, 2014. On September 23, 2014, Justice Kennedy extended the time for seeking certiorari to November 12, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 4B of the Clayton Act provides in relevant part: “Any action to enforce any cause of action under section 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued.” 15 U.S.C. § 15b.

STATEMENT**A. Samsung's challenge to the SD Group's standard-setting and licensing activities**

This case arises out of Samsung's 2010 challenge to standard-setting and licensing activities concerning "SD Cards"—now "the dominant form" of "flash memory" used by "more than 400 brands" in "more than 8,000 models" of "cellular phones, digital cameras, audio players," and other "mobile electronics." Pet. 4a, 104a-105a. As Samsung alleges, "the origins of the SD Group's licensing scheme can be traced back to 1999." Pet. 47a.

That year, petitioner Panasonic Corporation made a "public announcement" that Panasonic, SanDisk, and Toshiba had formed an SD Group to "jointly develop" a new "flash memory card." Pet. 61a-62a, 67a-68a. The SD Group embodied its work in a "publicly issued" specification adopted by an "open membership body called the SD Association." Pet. 18a. And in its 1999 annual report, SanDisk announced that, "[w]hile other flash card manufacturers will be required to pay the SD Association license fees and royalties which will be shared between [Panasonic], Toshiba and SanDisk," those three companies would cross-license their patents to each other on a royalty-free basis. Pet. 103a-104a. Samsung alleges that, as of 1999, this licensing structure gave petitioners a "permanent cost advantage over other competing manufacturers." Pet. 104a.

"The SD Group members announced the establishment of the SD Association ('SDA') on January 6, 2000, at a joint press conference" (Pet. 68a), and created petitioner SD-3C to provide patent-pool licenses for technology essential to practicing the specifica-

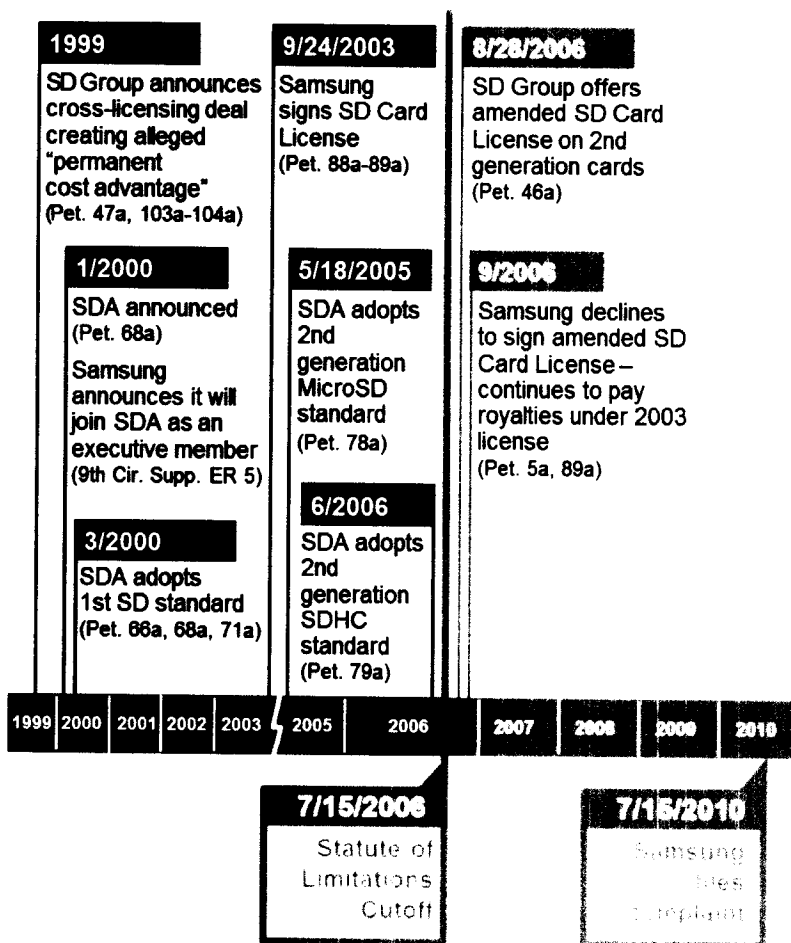
tion. Pet. 68a, 72a. Samsung was not just aware of these public activities. It joined the SD Association in 2000 (9th Cir. Supp. ER 5), and in 2003 it “signed the agreement” to license the covered technology from SD-3C at a 6% royalty. Pet. 88a, 45a. Thus, as of 2003, Samsung knew that it had to pay royalties that the SD Group’s members did not.

In 2006, the market migrated toward a second generation of SD technology, MicroSD and SDHC. Pet. 4a-5a. The SD Association adopted specifications for these formats in May 2005 and June 2006, respectively, and SD-3C offered to license them at the “same royalty” rate of 6%. Pet. 78a-79a, 83a.

Samsung “refused to sign the 2006 amendment.” Pet. 22a. Instead, it paid 6% royalties for second-generation SD technology under the “renewal provision” of its “existing” 2003 license. Pet. 89a, 46a, 53a. It was not until July 15, 2010—seven years after Samsung agreed to pay 6% royalties—that Samsung sued, alleging that petitioners’ activities violate Sections 1 and 2 of the Sherman Act and California’s Cartwright Act.

B. District Court proceedings

The district court dismissed Samsung’s First Amended Complaint on limitations grounds, but allowed Samsung to replead. Pet. 28a-41a. The Second Amended Complaint (“SAC”) alleged that two acts rendered Samsung’s antitrust claims timely as to all of petitioners’ standard-setting and licensing activities from 1999 forward: (1) petitioners’ offer of the 2006 license amendment, which Samsung rejected; and (2) petitioners’ continued collection of royalties under Samsung’s 2003 license. This chart details the key events:



In 2012, the district court dismissed the SAC with prejudice. As the court found, Samsung "repeatedly" alleged "that the 'origins of the SD Group's licensing scheme can be traced back to 1999,'" and that the original 1999 "cross-licensing agreement" "gave [the SD Group's members] a *permanent* cost advantage." Pet. 22a, 24a-25a (quoting SAC). The court also held that petitioners' "extension of the original license" to second-generation technology was not a "new and independent" act[]," but "merely a reaffirmation" of pre-

limitations conduct—“the implementation of the contract terms originally agreed to” in 2003. Pet. 24a.¹

C. Ninth Circuit proceedings

The Ninth Circuit reversed, citing two grounds.

First, it announced that under *Zenith*’s “continuing violation” doctrine, petitioners’ attempts “to enforce” the 1999 and 2003 agreements—by continuing to collect royalties and offering a 2006 amendment that Samsung rejected—were “overt acts that restarted the statute of limitations.” Pet. 8a-10a. The court acknowledged that “Samsung refused to sign” the 2006 amendment, which “imposed the same 6 percent royalty” as the 2003 license. Pet. 5a, 9a. Yet the court disregarded Samsung’s allegations that it paid royalties only under the “renewal provision of its existing SD Card license.” Pet. 89a; see Pet. 9a-10a (“even if the 2006 license was merely a restatement of the 2003 license, the application of the licenses to Samsung when it began to make SD cards in the fall of 2006 was also an overt act that restarted the limitations period”). The court thus found a continuing violation based on the 2003 license, the *rejected* 2006 amendment, and the fact that Samsung began paying royalties in November 2006. Pet. 5a, 8a-10a.

According to the court, the “new and independent act” and “new and accumulating injury” requirements were “meant to differentiate those cases where a continuing violation is ongoing * * * from those where *all* of the harm occurred at the time of the initial violation.” Pet. 6a-7a (emphasis added). “[T]he latter type

¹ The court dismissed Samsung’s state law claims on the same basis. Pet. 25a-26a.

of case,” the court asserted, “is the exception, not the rule.” Pet. 7a. And outside those rare circumstances, “an action taken under a pre-limitations contract [is] sufficient to restart the statute of limitations *so long as the defendant had the ability not to take the challenged action, even if that would have required breaching the allegedly anti-competitive contract.*” Pet. 8a (emphasis added).

The court thus found it critical that the 2003 license “did [not] foreclose future agreements on different terms,” and “did not permanently and finally control the acts of the SD Defendants.” Pet. 9a, 10a. Because the earlier contract’s effects were not altogether irreversible—whether by failing to enforce the contract or outright breach—they remained actionable indefinitely.

Second, although Samsung had not advanced the theory, the court held the suit timely because any damages before 2006—when Samsung began making SD cards—would have been “speculative” and “could not be proved within four years of the [challenged] conduct.” Pet. 10a. Ignoring Samsung’s allegation that petitioners’ agreements created a “permanent” “cost disadvantage” in 1999 (Pet. 104a, 106a), the court announced that, as of “the time of the initial wrong,” Samsung’s alleged harm “was speculative.” Pet. 11a.

Further, although Samsung knew the precise amount of its cost disadvantage upon signing the 2003 license—a 6% royalty—the court dismissed this fact because “neither Samsung nor the SD Defendants could have known for certain [then] whether Samsung would enter [the SD Card] market.” Pet. 11a. “SD cards proved more popular than Samsung’s

[products],” the court announced, and “[t]he law does not require a potential plaintiff to foresee” such “rapid technological changes * * * to recover.” *Ibid.*

The court did not explain how Samsung’s decision to wait until 2006 to begin “mak[ing] SD cards” (Pet. 10a) prevented it from suing by August 2007 (four years from signing the 2003 license), or from estimating future damages before 2010. Pet. 10a-11a. Nor did the court explain why Samsung could not have sought injunctive relief by 2007—thus avoiding any future damages. Instead, the court adopted a view of *Zenith*’s speculative damages exception that leaves the accrual of antitrust injury solely within the plaintiff’s control.

Petitioners sought rehearing en banc, explaining that the decision conflicted with precedent. The court called for a response, but denied review. Pet. 14a-15a.

Weeks later, in *Oliver*, the same panel extended the decision below to the claims of a putative class of indirect purchasers filed even later, in 2011, and seeking injunctive relief. *Oliver* held that every purchase of an SD card constitutes a “new overt act” under *Zenith*, even if the seller was a third-party licensee, not a defendant. 751 F.3d at 1086-1087. Further, the court held that the statute was tolled because the consumer-plaintiffs’ damages would have been too speculative to pursue before they purchased the products—even though indirect purchasers lack standing to sue for damages under federal law. *Ibid.* Rehearing was denied. Petitioners and the other defendants in *Oliver* will be seeking certiorari there too, and request that the Court consider *Samsung* and *Oliver* together.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit's expansive interpretation of *Zenith's* exceptions deepens several entrenched circuit splits.

In the 43 years since this Court decided *Zenith*, the circuits have become intractably divided over the meaning of its “continuing violation” and “speculative damages” exceptions. That entrenched division is on full display here, and warrants review.

Under *Zenith's* general rule, “a cause of action accrues” and the Clayton Act’s four-year limitations period “begins to run when a defendant commits an act that injures a plaintiff’s business.” 401 U.S. at 338. The limitations period expires four years later, with two exceptions. First, “[i]n the context of a continuing conspiracy to violate the antitrust laws,” “each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act.” *Ibid.* Under this “continuing violation” exception, each “independent, new predicate act” “that is part of the violation and that injures the plaintiff * * * starts the statutory period running again.” *Klehr*, 521 U.S. at 189-190.

Second, “even if injury and a cause of action have accrued as of a certain date, future damages that might arise from the conduct sued on are unrecoverable if the fact of their accrual is speculative or their amount and nature unprovable.” *Zenith*, 401 U.S. at 339. Claims for such damages accrue when they become “provable” (*id.* at 341)—*i.e.*, “definite enough to support a recovery.” *Areeda & Hovenkamp*, *supra*, ¶ 320d.

Since *Zenith* was decided, commentators have described its exceptions as “obscure,”² “ambiguous,”³ “murk[y],”⁴ “unclear,”⁵ “imprecise[,] and confusing.”⁶ The “circuit courts have not been able to agree * * * on how to interpret and apply” *Zenith*.⁷ The case law is “inconsistent,”⁸ epitomized by “confusion”⁹ and “void of any clear, coherent * * * consensus.”¹⁰ In sum, the time has come for this Court to address the circuits’ “nonuniform construction of a statute, by

² Areeda & Hovenkamp, *supra*, ¶ 320d.

³ Malcolm E. Wheeler & Robert J. Jones, *The Statute of Limitations for Antitrust Damage Actions: Four Years or Forty?*, 41 U. Chi. L. Rev. 72, 72 (1973).

⁴ Milton Handler, *Twenty-Fourth Annual Antitrust Review*, 72 Colum. L. Rev. 1, 42 (1972).

⁵ Ronald M. St. Marie, Note, *Avoiding the Antitrust Statute of Limitations Under Zenith: A Decade of Inconsistency*, 55 S. Cal. L. Rev. 255, 267 (1981).

⁶ Carli McNeill, Note, *Seeing the Forest: A Holistic View of the RICO Statute of Limitations*, 85 Notre Dame L. Rev. 1231, 1249 n.121 (2010).

⁷ Harry M. Bainbridge, Note, *The Recovery of Future Damages in a Continuing Antitrust Conspiracy: From Lawlor to Zenith and Beyond*, 55 Notre Dame L. Rev. 117, 118 (1979).

⁸ Areeda & Hovenkamp, *supra*, ¶ 320a.

⁹ Robert Brina, Note, *Complexities of Accrual: The Antitrust Statute of Limitations in a Contractual Context*, 31 UCLA L. Rev. 1061, 1068 (1984).

¹⁰ St. Marie, *supra* note 5, at 291.

which Congress intended to create a uniform statute of limitations.”¹¹

A. The circuits are divided over whether continued contractual performance is an independent “overt act” under *Zenith*.

First, the circuits are divided over the meaning of *Zenith*’s “continuing” violation exception. This division concerns both what acts qualify as independent “overt acts,” and what injuries qualify as new “anti-trust injury.” “Although the lower courts have uniformly recognized that a continuing violation may renew the running of the statute of limitations, they have implemented this concept in a variety of ways and have not followed consistent principles.” *Proving Antitrust Damages, supra*, at 71. There is no “satisfactory test for determining the accrual date for a continuing cause of action.” *Id.* at 72.

Most circuits require plaintiffs asserting a continuing violation to allege “a new and independent act that is not merely a reaffirmation of a previous act” and that “inflict[s] a new and accumulating injury on the plaintiff.” *E.g.*, *Z Techs. Corp. v. Lubrizol Corp.*, 753 F.3d 594, 600 (6th Cir. 2014) (quotations omitted); *Varner*, 371 F.3d at 1019 (8th Cir.); *Champagne Metals v. Ken-Mac Metals, Inc.*, 458 F.3d 1073, 1088 (10th Cir. 2006); see also *Al George, Inc. v. Envirotech Corp.*, 939 F.2d 1271, 1274 (5th Cir. 1991) (requiring “some injurious act actually occurring during the limitations period, not merely the abatable but unabated inertial consequences of some pre-limitations action” (emphasis omitted)). The Third Circuit, by contrast,

¹¹ *Wheeler & Jones, supra* note 3, at 72.

“reject[s] [this] standard” as “inconsistent with controlling precedent.” *West Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 106 (3d Cir. 2010). According to that court, the continuing violation exception renders suit timely even when “the acts that occurred within the limitations period were reaffirmations of decisions originally made outside the limitations period.” *Id.* at 107.

The circuits are even more divided over whether the types of acts that the Ninth Circuit deemed “overt acts” can restart the limitations clock. According to the Ninth Circuit (and two others), “collecting * * * payments” “under a pre-limitations contract” is an “overt act” that gives rise to a continuing violation under *Zenith*. Pet. 8a; accord *West Penn*, 627 F.3d at 106-107 (3d Cir.); *Nat’l Souvenir Ctr. v. Historic Figures, Inc.*, 728 F.2d 503, 510, 514 (D.C. Cir. 1984). But at least three circuits expressly reject that view. *Varner*, 371 F.3d at 1020 (8th Cir.); *Grand Rapids Plastics, Inc. v. Lakian*, 188 F.3d 401, 406 (6th Cir. 1999); *Kaiser Alum. & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1053 (5th Cir. 1982). Only this Court can resolve this entrenched split.

1. Consistent with this Court’s direction that the Clayton Act’s limitations period is restarted only by “an independent, new predicate act” (*Klehr*, 521 U.S. at 190), the Eighth, Sixth, and Fifth Circuits all hold that an antitrust defendant’s performance of a pre-limitations agreement merely reaffirms pre-limitations conduct—and thus is not an “overt act” under *Zenith* that restarts the limitations period.

In *Varner*, for example, the plaintiffs were farmers who entered supply contracts with the defendant in 1996, but waited more than four years to challenge

the contracts as illegal tying agreements. 371 F.3d at 1018-1020. The Eighth Circuit refused to apply the continuing violation exception, finding the suit time-barred.

As the court explained, “[p]erformance of the alleged anticompetitive contracts during the limitations period is not sufficient to restart the period.” *Id.* at 1020. “[W]hen a complaining party was fully aware of the terms of an agreement when it entered into the agreement, an injury occurs only when the agreement is initially imposed” and “the limitations period typically is not tolled by the requirements placed on the parties under the agreement.” *Ibid.* Absent “new overt acts, other than enforcement of the initial contracts,” the “mere fact that plaintiff made [contractual] payments to defendant” within the limitations period does not restart the clock. *Ibid.*

The Sixth Circuit adheres to a similar approach. In *Lakian*, for example, the defendants entered into illegal agreements in 1989 and 1990, and payments continued thereunder until 1995. 188 F.3d at 405-406. The plaintiff sued in 1996, “argu[ing] that each payment * * * was an independent wrongful act that [re-]started the statute of limitations.” *Id.* at 406.

The court disagreed, explaining that “the individual payments” were “only a manifestation of the previous agreement,” not “a ‘new and independent act.’” *Ibid.* As the court explained, “the focus is on the timing of the *causes of injury*, i.e., the defendant’s overt acts, as opposed to the *effects* of the overt acts.” *Ibid.* (emphasis added, quotations omitted). And since the challenged overt acts merely enforced pre-limitations agreements, the suit was time-barred. *Id.* at 407; accord *Z Techs.*, 753 F.3d at 600 (“benefits accrued as

the result of an initial wrongful act are not treated as 'independent acts'"); *Barnosky Oils*, 665 F.2d at 81; see also *Kahn v. Kohlberg, Kravis, Roberts & Co.*, 970 F.2d 1030, 1041 (2d Cir. 1992) (applying antitrust principles to the Investment Advisors Act and holding that "performance under the contract merely affects damages and does not give rise to a new cause of action"; "[t]he possibility of rescinding the contract * * * does not make the subsequent payments new wrongs").

Finally, in *Kaiser*, the Fifth Circuit rejected the view "that [a party's] continued receipt of benefits under the contract constitutes a continuing violation of the antitrust laws." 677 F.2d at 1052. After the plaintiff there sued for breach, the defendant counterclaimed that the contract contained an illegal tying arrangement. *Id.* at 1048. But the contract was executed outside the four-year limitations period. *Id.* at 1051. The court thus found the claim time-barred, explaining: "To the extent that [the counterclaim defendant] received benefits under the contract, such receipts were merely 'the abatable but unabated inertial consequences of some pre-limitations action,' rather than from 'some injurious act actually occurring during the limitations period.'" *Id.* at 1053; accord *City of El Paso v. Darbyshire Steel Co.*, 575 F.2d 521, 523 (5th Cir. 1978).

Yet the Fifth Circuit previously followed a different rule. In *Imperial Point Colonnades Condominium, Inc. v. Mangurian*, 549 F.2d 1029 (5th Cir. 1977), the court examined cases where "a contract in the pre-limitations period * * * continued in force into the limitations period." *Id.* at 1036. Noting that "courts' reactions to these kinds of cases have been mixed," the court found that (in 1977) "the majority, particu-

larly in more recent cases, favors the view that the plaintiff's cause of action * * * continues to accrue for as long as the defendant takes advantage of the contract" by collecting payments. *Ibid.* Thus, a new claim "accrue[d] upon the commission of each such act of collection." *Id.* at 1043. The next year, however, the Fifth Circuit reversed course, distinguishing *Imperial Point* as a case involving "speculative damages" and adopting its current view that collecting contract revenues is "merely 'the abatable but unabated inertial consequence[] of some pre-limitations action.'" *Kaiser*, 677 F.2d at 1053.

"More recently," an ABA treatise explains, "courts seem to have retreated from" *Imperial Point* and other cases holding "that a plaintiff's cause of action continues to accrue so long as the defendant continues to receive the benefits of an allegedly unlawful agreement." *Proving Antitrust Damages, supra*, at 71. Indeed, as shown above, three circuits have since held that the defendant's performance of a pre-limitations contract does not restart the clock—even where the defendant continues to collect contractual payments.

2. In conflict with the foregoing decisions, however, three circuits hold that a defendant's performance of a pre-limitations agreement *is* an overt act sufficient to restart the limitations period.

For instance, in *National Souvenir Center v. Historic Figures, Inc.*, 728 F.2d 503, 506 (D.C. Cir. 1984), the D.C. Circuit addressed tying and monopolization claims arising from museum franchise contracts that required the franchisees to lease wax figures for their museums. The franchisor argued that the contracts "were executed well over four years before" the franchisees sued, and the district court agreed, dismiss-

ing both claims because it found no “new ‘overt acts’ within the limitations period.” *Id.* at 509.

The D.C. Circuit largely reversed. On the tying claim, the court held that “the ‘overt act’ requirement may be satisfied merely by the parties continuing to maintain contractual relationships that directly affect competition in the tied product market.” *Id.* at 510. Similarly, on the monopoly claim, the court held that “[r]equiring [the franchisees] to continue paying rent” under the parties’ pre-limitations lease was an overt act with “continuing allegedly ‘anticompetitive’ effect[s].” *Id.* at 514. Applying these principles to the relevant contracts, the court held the tying claim late, but the monopoly claim timely.

The Third Circuit has adhered to the same rule in several cases. Most recently, in *West Penn*, the court expressly rejected other circuit decisions holding that “‘reaffirmations’ of acts done or decisions made outside the limitations period” do *not* restart the statute of limitations. 627 F.3d at 106 (3d Cir. 2010) (citing *Lakian*, 188 F.3d at 406). Instead, the court reaffirmed its prior holdings that “acts that allegedly occurred within the limitations period [that] were merely manifestations of” an agreement “outside the limitations period” restart the clock. *Ibid.*

In *Harold Friedman Inc. v. Thorofare Markets Inc.*, 587 F.2d 127, 139 (3d Cir. 1978), for example, the court held that the defendant’s acts of exclusion under “exclusivity clause[s]” in pre-limitations leases were overt acts that “may serve as a basis for [the] antitrust suit.” Relying on the Fifth Circuit’s since-superseded *Imperial Point* decision, the court rejected the view that, because “the [exclusivity clauses] were executed outside the statutory period,” they “barr[ed]

suit for injurious acts committed under them within the period.” *Ibid.*; accord *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1172 (3d Cir. 1993); see also *Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705, 714 (11th Cir. 1984) (per curiam) (noting that the timeliness of claims challenging activities occurring “more than four years” before suit was uncontested “because each payment under a contract which constitutes an illegal tie is new injury”).

Below, the Ninth Circuit joined these circuits in holding that “an action taken under a pre-limitations contract [i]s sufficient to restart the statute of limitations so long as the defendant had the ability not to take the challenged action.” Pet. 8a. Because Samsung’s 2003 license “did not permanently and finally control the acts of the SD Defendants” (Pet. 10a), petitioners’ continued collections of licensing royalties were “overt acts that restarted the statute” (Pet. 9a-10a). In other words, there is a continuing violation unless “*all* of the harm occurred at the time of the initial violation.” Pet. 7a (emphasis added).

That holding directly conflicts with the decisions of the Eighth, Sixth, and Fifth Circuits—all of which require more than that a party to the contract “could have ceased causing the injury at any time.” *Bar-nosky Oils*, 665 F.2d at 81. As those circuits recognize, “[p]erformance of the alleged anticompetitive contracts during the limitations period is not sufficient to restart the period”—it is not a “new and independent act.” *Varner*, 371 F.3d at 1019-1020. The Ninth Circuit’s rule eviscerates the Clayton Act’s four-year limitations period for any claim challenging a pre-limitations contract whose performance extends

into the limitations period, denying repose whenever the contract's effects are not entirely irreversible.

The Ninth Circuit's decision thus exacerbates an entrenched split on whether contractual performance is an independent act that restarts Section 4B's limitations period. Three circuits say no; three say yes. Only this Court can resolve this important question.

B. The decision below also conflicts with the “antitrust injury” decisions of seven circuits and this Court.

Certiorari is also warranted to address the Ninth Circuit's break with several circuits' and this Court's “antitrust injury” precedents. The court held that the 2006 amended license was a second act that caused “new anti-competitive harm.” Pet. 10a. But Samsung admittedly “refused to sign” that amendment (Pet. 5a), and paid royalties only under the “renewal provision of its existing [2003] License,” which allegedly caused it “permanent” harm. Pet. 89a, 103a-104a, 112a. Thus, the proffered 2006 amendment did *not directly injure Samsung. And insofar as Samsung alleges that the amendment injured competition in the market by imposing restrictions more onerous than the 2003 license, that would have benefited Samsung—by subjecting Samsung's competitors to terms that do not restrain Samsung.* The court below thus split with extensive circuit precedent holding that a plaintiff suffers no antitrust injury where it was not personally harmed by, or stands to benefit from, the challenged anticompetitive act.

1. First, the decision below conflicts with at least seven circuits' decisions holding that “a plaintiff must show ‘a causal connection between the defendant's actions violative of the Sherman Act and the actual

injury to *the plaintiff's* business.” *World of Sleep*, 756 F.2d at 1478 (10th Cir.) (emphasis added). If the “[p]laintiff would have suffered the same injury without regard to the allegedly anticompetitive acts of Defendants,” it “has not suffered an antitrust injury.” *Hodges v. WSM, Inc.*, 26 F.3d 36, 38 (6th Cir. 1994) (citation omitted). The First, Third, Fourth, Fifth, Sixth, Eighth, and Tenth Circuits have all issued decisions to this effect. See *ibid.*; *Jebaco, Inc. v. Harrah's Operating Co.*, 587 F.3d 314, 321 (5th Cir. 2009); *ACT, Inc. v. Sylvan Learning Sys., Inc.*, 296 F.3d 657, 670 (8th Cir. 2002); *SAS of Puerto Rico, Inc. v. Puerto Rico Tel. Co.*, 48 F.3d 39, 45 (1st Cir. 1995); *Thompson Everett, Inc. v. Nat'l Cable Adver., LP*, 57 F.3d 1317, 1325 (4th Cir. 1995); *Alberta Gas Chemicals Ltd. v. E.I. Du Pont de Nemours & Co.*, 826 F.2d 1235, 1241-1242 (3d Cir. 1987); *World of Sleep*, 756 F.2d at 1478 (10th Cir.).

Below, however, the Ninth Circuit held that the 2006 amended license was “an overt act that restarted the limitations period” (Pet. 10a), even though Samsung “refused to sign” it (Pet. 5a) and paid 6% royalties for second-generation SD technology under the automatic “renewal provision” of its “existing” 2003 license. Pet. 89a, 46a-47a. Samsung’s alleged injury stemmed from the original royalty-free cross-license—which became “permanent” in 1999 (Pet. 103a-104a)—together with its preexisting 6% royalty, which Samsung agreed to pay in 2003 and kept “renew[ing]” (Pet. 89a). As the district court explained, “extension of the original license terms to the new generation of products is the implementation of the contract terms originally agreed to by the parties in 2003.” Pet. 24a. Thus, the only personalized harm that Samsung can allege traces to the 1999 and 2003

agreements, not the 2006 amendment that Samsung never signed.

2. In addition, Samsung could only have benefited insofar as other competitors, unlike Samsung, allegedly signed the 2006 amended license. Pet. 89a. Because Samsung kept paying royalties under its existing license, it was free from any new licensing restrictions. If anything, therefore, Samsung gained a competitive *advantage* from the 2006 license, and the circuits “have routinely rejected claims of antitrust violations that may very well be violations when the claimants stood to gain from the anticompetitive conduct.” *Static Control Components, Inc. v. Lexmark Int’l, Inc.*, 697 F.3d 387, 407 (6th Cir. 2012), *aff’d on other grounds*, 134 S. Ct. 1377 (2014).

In *Stratmore v. Goodbody*, 866 F.2d 189 (6th Cir. 1989), for example, the plaintiff challenged a clause in its horse-breeding agreement that barred it from auctioning its breeding rights. But since the clause’s most plausible effect was “unnaturally *high* prices”—which “actually tend[ed] to *benefit*” sellers like the plaintiff—the court found “no antitrust injury.” *Id.* at 192-193. Decisions of the First, Second, and Seventh Circuits are in accord. *E.g.*, *Sterling Merch., Inc. v. Nestle, S.A.*, 656 F.3d 112, 123 (1st Cir. 2011); *Freedom Holdings, Inc. v. Cuomo*, 624 F.3d 38, 52 n.14 (2d Cir. 2010); *O.K. Sand & Gravel, Inc. v. Martin Marietta Techs., Inc.*, 36 F.3d 565, 572-573 (7th Cir. 1994). The decision below conflicts with these precedents.

3. It also conflicts with this Court’s antitrust injury precedents. The Ninth Circuit’s reliance on a license that Samsung never signed contravenes this Court’s teaching that only new acts “that injure[] the

plaintiff” can “start[] the statutory period running again.” *Klehr*, 521 U.S. at 189. The decision also conflicts with this Court’s holdings that plaintiffs do not suffer antitrust injury where they “would have suffered the identical ‘loss’” in the absence of the alleged anticompetitive act. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487 (1977). And again, insofar as the amended 2006 license is more onerous than Samsung’s license, Samsung benefitted from the changes. Yet this Court has repeatedly held that a firm “has not suffered ‘antitrust injury’” where it is “benefited rather than harmed” by the challenged conduct. *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 336-337 (1990); accord *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 583 (1986) (firms that “actually benefit” from conduct that is otherwise “harmful to competition” cannot recover).

Review is warranted.

C. The Ninth Circuit’s expansive view of the “speculative damages” exception breaks with at least four circuits and this Court’s precedents.

Certiorari is also warranted to address the Ninth Circuit’s expansive reading of *Zenith*’s “speculative damages” exception—which, for good reason, Samsung never invoked. That exception applies only in “the rare case in which the damages caused by an antitrust injury are so speculative that the court is unwilling to estimate them” or they cannot reasonably be projected. *Higgins v. N.Y. Stock Exch., Inc.*, 942 F.2d 829, 832 (2d Cir. 1991); see *Zenith*, 401 U.S. at 339-340. But under the decision below, plaintiffs can now wait more than four years after their claim accrues to see how the market plays out. That result

threatens to convert the speculative damages exception into the rule, and conflicts with the decisions of at least four circuits and this Court.

1. In *Brunswick*, for example, the Seventh Circuit rejected a speculative damages argument even though “[c]alculating [the plaintiff’s] damages” at the time of the alleged anticompetitive act “would have required predicting [the defendant’s] success in selling [its product].” 752 F.2d at 270-271. The plaintiff there alleged that the defendant procured a patent by fraud and then monopolized the production of the claimed product by excluding the plaintiff from the market. *Id.* at 264. The plaintiff sued more than four years later, invoking the speculative damages exception. *Id.* at 268. But as the court held, “[e]xclusion from a market is a conventional form of antitrust injury that gives rise to a claim for damages as soon as the exclusion occurs”—“even though * * * the victim’s losses lie mostly in the future.” *Id.* at 271. Moreover, the plaintiff could have timely sought equitable relief—“an assignment of [the defendant’s] patent rights”—thus enabling it “to obtain the future profits generated by the patent.” *Ibid.* In short, “the statute of limitations is not tolled simply in order to wait and see just how well the defendant does in the market from which he excluded the plaintiff.” *Ibid.* “Otherwise it would be tolled indefinitely in a very large class of antitrust suits.” *Ibid.*

The Eighth Circuit too has refused to apply the speculative damages exception where a plaintiff could have timely sued and “won equitable relief” that “precluded future damages.” *Midwestern Mach. Co. v. Nw. Airlines, Inc.*, 392 F.3d 265, 276 (8th Cir. 2004). In *Midwestern*, airline passengers challenging a merger sought “to restart the statute of limitations be-

cause [they] could not forecast future damages” within the limitations period. *Id.* at 276. The court disagreed, explaining that they “could have established [their] injury,” if not the precise “scope and extent of the[ir] future damages,” earlier. *Ibid.* Further, the passengers “could have precluded future damages” by “obtaining [equitable relief] within four years.” *Ibid.* “Refusing to extend the statute of limitations in [such circumstances],” the court explained, “ensures that the statute continues to have meaning.” *Ibid.*; accord *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1051 (8th Cir. 2000).

The Sixth Circuit agrees. The plaintiff in *Lakian* argued that damages under contracts for automotive work were too speculative to support a timely suit because the contracts did not establish quantities, only prices. 188 F.3d at 406. The court disagreed, holding “that a plaintiff’s own projections and experience” are “sufficient to provide a reasonable basis for calculating damages.” *Id.* at 406-407. If the plaintiff believed that it “could not present sufficiently exact evidence of damages within [the limitations period], [it] could have filed suit and requested a stay.” *Id.* at 407. Thus, the plaintiff “acted at [its] risk in waiting until the statute of limitations had run.” *Ibid.*; accord *Barnosky Oils*, 665 F.2d at 83; *Kabealo v. Huntington Nat’l Bank*, 17 F.3d 822, 827-828 (6th Cir. 1994).

Likewise, in *Charlotte Telecasters, Inc. v. Jefferson Pilot Corp.*, 546 F.2d 570 (4th Cir. 1976), the plaintiff alleged that a competitor conspired with a city to prevent it from receiving a television franchise license. The plaintiff sued over four years later, invoking *Zenith*’s speculative damages exception and arguing that “its loss of future profits could not be ascertained” sooner because its damages “would depend on the

number of subscribers to its cable television system.” *Id.* at 573. The Fourth Circuit was “not persuaded.” *Ibid.* Because the plaintiff “introduced no proof that cast doubt on its [market] projections or indicated that they were speculative,” it could have relied on projections and sued earlier. *Ibid.*

Breaking with these circuits, the court below held that Samsung’s pre-2006 damages were speculative because it could not “have known for certain” that it “would enter th[e] market” or that petitioners’ products would “prove[] more popular than Samsung’s.” Pet. 11a. Yet Samsung executed a 6% royalty agreement in 2003—seven years before it sued—and certainly could have projected its losses before 2006. The Ninth Circuit could declare that Samsung’s harm “was speculative at the time of the initial wrong” (Pet. 11a) only by ignoring Samsung’s own allegation that petitioners’ agreements gave them a “permanent cost advantage” over Samsung by 1999 (Pet. 103a-104a, 112a). And even if Samsung did not know the precise “scope and extent” of its losses, it knew that it was injured before 2006 and could have sought equitable relief “preclud[ing] future damages.” *Midwestern*, 392 F.3d at 276. Indeed, Samsung has sought “injunctive relief” here. Pet. 122a. The request simply comes too late.

Samsung delayed filing suit until 2010—11 years after learning of petitioners’ agreements, and seven years after entering its 2003 license. But “the statute of limitations is not tolled simply in order to wait and see just how well the defendant does in the market.” *Brunswick*, 752 F.2d at 271. And this Court’s review is warranted to resolve the sharp conflict between the Ninth Circuit’s decision and several circuits’ decisions that strictly limit *Zenith*’s speculative damages ex-

ception to situations where the plaintiff can neither project losses nor seek injunctive relief to avoid future damages.

2. The Ninth Circuit’s decision to excuse Samsung’s delay also conflicts with this Court’s own precedents, including *Zenith*’s core holding—that the limitations period may be restarted only when necessary to ensure that “the antitrust laws fully protect the victims of the forbidden practices as well as the public.” 401 U.S. at 340 (quotations omitted).

Because “[t]he vagaries of the marketplace usually deny us sure knowledge of what plaintiff’s situation would have been in the absence of the defendant’s antitrust violation,” juries routinely estimate counterfactual antitrust damages. *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566 (1981). Provided a “jury may make a just and reasonable estimate of the damage based on relevant data,” damages are not too speculative. *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264 (1946).

Moreover, mere “uncertainty as to the extent of the damage,” but not “as to the fact of damage,” will not render an antitrust plaintiff’s damages too speculative. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931); see Areeda & Hovenkamp, *supra*, ¶ 320d. In sum, “[t]he liberality of the courts in accepting proof of the amount of damages generally make[s] it very difficult for a plaintiff to demonstrate that future damages could not have been proved.” 4 *Antitrust Counseling and Litigation Techniques* § 42.04[1], at 42-77 (2014 ed.).

3. Leading commentators agree that, because courts applying this *Zenith* exception face significant difficulties in “determin[ing] the point at which a hy-

pothetical earlier judge would have held the plaintiff's claim to be too speculative," "the simplicity of the ordinary accrual rule" is "preferable" in "close cases." Areeda & Hovenkamp, *supra*, ¶ 320d. In light of these "difficulties," the "courts have construed [the speculative damages exception] narrowly." *Proving Antitrust Damages*, *supra*, at 69.

But not the Ninth Circuit, which applies the exception even where the plaintiff had full knowledge of the alleged violation from the outset and alleges that it initially caused "permanent" harm. Pet. 103a-104a. Review is urgently needed.

II. The decision below raises questions of paramount importance, and this case provides an ideal vehicle to resolve them.

Beyond the foregoing conflicts, the decision below raises issues of critical importance to antitrust law, patent licensing, standard-setting and patent-pooling practices, and the economy. If the Ninth Circuit is correct, then every act that reaffirms a patent license, technology standard, or related royalty can potentially revive stale antitrust claims—without regard to the need for certainty and repose to those whose livelihoods depend on the underlying agreements. Moreover, the commonplace nature of the agreements here—which are presumptively procompetitive—confirms that this case provides an ideal vehicle for the Court to intervene.

A. Standard setting and patent pooling are vital to our modern economy.

Standard-setting and patent-pooling agreements govern myriad technologies that Americans use every day—e.g., computers, smartphones, cameras, televisions, the Internet, and anything on WiFi networks.

Such products incorporate hundreds or thousands of technological standards and patented technologies. See generally Mark A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 Cal. L. Rev. 1889, 1896 (2002).

SD cards alone are “used by more than 400 brands across dozens of product categories and in more than 8,000 models” of mobile electronics. Pet. 105a. But the effects of the ruling below will extend far beyond SD cards, and it is difficult to overstate them. As one commentator notes: “without standardization there wouldn’t be a modern economy.” James Surowiecki, *Turn of the Century*, *Wired*, Jan. 2002, at 85.

The Justice Department agrees, explaining that “technical standards” are “essential to the efficient functioning of our national economy.”¹² And standards and patent-pool licenses are commonplace for good reason. In an era when information crosses the globe in seconds, technologies need to be interoperable—to “talk” with each other. That requires private bodies to set “interface” standards to which manufacturers may conform their products. Lemley, *supra*, at 1893.

It also requires efficient means of cross-licensing those products’ patented components. Without “a patent pool to share their intellectual property” through “joint licensing,” manufacturers can get tangled in a “patent thicket”—a “lose-lose” scenario where high “transaction costs,” “royalties,” and “[l]itigation risks” can “raise prices and discourage innovation.” Richard

¹² http://www.justice.gov/atr/public/press_releases/2004/204345.htm.

J. Gilbert, *Ties That Bind: Policies to Promote (Good) Patent Pools*, 77 Antitrust L.J. 1, 2-3 (2010). Package licensing is not only “simpler”; it “avoids the danger of paying for some patent rights that turn out to be useless without other complementary rights.” Carl Shapiro, *Navigating the Patent Thicket: Cross Licenses, Patent Pools, and Standard Setting*, in 1 Innovation Policy and the Economy 119, 134 (2001).

It is thus no surprise “that in the U.S. today there are hundreds of ‘traditional’ standards developing organizations,” “hundreds more ‘non-traditional’ [organizations],” over “49,000” private standards,¹³ and 900-plus organizations that “develop, promote and/or support information and communications technology standards” alone.¹⁴ With these organizations come scores of patent pools that facilitate the practice of related patents—which increases competition in the manufacture and supply of standards-compliant products.

Many SSOs, moreover, adopt multiple generations of standards as technology evolves—leading to updated licenses. For example, the Institute of Electrical and Electronics Engineers established the 802.11 standard for operating wireless local area networks in the 1990s, and it has since published more than a dozen updates.¹⁵ Similarly, since 1998 the European Telecommunications Standards Institute has been

¹³ http://www.ansi.org/standards_activities/domestic_programs/overview.aspx?menuid=3#1.

¹⁴ <http://www.consortiuminfo.org/links/linksall.php>.

¹⁵ *In re Innovatio IP Ventures, LLC Patent Litig.*, 2013 WL 5593609, *3 (N.D. Ill. Oct. 3, 2013).

collaborating with other SSOs to produce and update mobile phone networking standards, including 3G UMTS and 4G LTE.¹⁶

High-tech companies thus understand that patent-pooling programs based on an initial specification will extend to future generations of the same technology—producing “positive network effects, including an increase in the value of products as interoperable products become more widely used.” Herbert Hovenkamp et al., *IP & Antitrust* § 35.2b (2010). And as firms join the collaborative effort and invest in successive generations of the technology, the firms’ reliance interests increase.

All three branches of government and many distinguished commentators have recognized the pro-competitive benefits of industry standards, licensing, and patent pools. As the Justice Department and Federal Trade Commission have explained: “Industry standards are widely acknowledged to be one of the engines driving the modern economy.” *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* 33 (2007).¹⁷ Such standards “make products less costly”; “increase innovation, efficiency, and consumer choice”; “foster public health and safety”; “serve as a ‘fundamental building block for international trade’; and “make networks, such as the Internet and wireless telecommunications, more valuable.” *Ibid.*

Likewise, Congress has recognized that “tens of thousands of voluntary consensus standards” have

¹⁶ <http://www.etsi.org/standards>.

¹⁷ <http://www.justice.gov/atr/public/hearings/ip/222655.pdf>.

“allow[ed] the national economy to operate in a more unified fashion.” Standards Development Organization Advancement Act of 2004, Pub. L. No. 108-237 § 104, 118 Stat. 661, 663 (limiting review of qualifying SSO activities to antitrust’s rule of reason). And this Court itself has observed that “private standards can have significant procompetitive advantages.” *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501 (1988).

Similarly, by “integrating complementary technologies, reducing transaction costs, clearing blocking positions,” “avoiding costly infringement litigation,” and “promoting the dissemination of technology,” “[c]ross-licensing and pooling arrangements are often procompetitive.” DOJ/FTC *Antitrust Guidelines for the Licensing of Intellectual Property* § 5.5 (1995).¹⁸ By “ensur[ing] [product] interoperability,” standard-setting and patent-pooling agreements “facilitate the sharing of information among purchasers of products from competing manufacturers, thereby enhancing the utility of all products and enlarging the overall consumer market.” *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 308 (3d Cir. 2007); see also *Standard Oil Co. v. United States*, 283 U.S. 163, 171 & n.5 (1931) (pooling arrangements keep patents from “[being] ‘blocked,’ by another unexpired patent which covers a vitally related feature”). By contrast, “[t]he absence of standards for new technology can easily result in a ‘Tower of Babel’ effect that increases costs, reduces utility, and frustrates consumers.” *Princo Corp. v. ITC*, 616 F.3d 1318, 1335 (Fed. Cir. 2010).

¹⁸ <http://www.justice.gov/atr/public/guidelines/0558.htm#t55>.

In sum, standards, patent pools, and related licensing agreements “play[] an important role in various American industry sectors.” Hovenkamp et al., *supra*, § 34.2. Yet the decision below casts a shadow over such agreements, warranting review.

B. The decision below threatens to deter procompetitive standard-setting and patent-pooling activity.

Unless innovators are willing to forgo enforcing their licenses and extending them to next-generation technology, the Ninth Circuit’s decision threatens to indefinitely deprive them of “repose”—the “basic objective” of “limitations periods.” *Klehr*, 521 U.S. at 187. Under that decision, the Clayton Act’s clock restarts whenever a defendant receives royalties under a longstanding license or extends it to later versions of established technology. And since standard-setting and patent-pooling agreements are often national or international in scope, the Ninth Circuit’s rule could end up governing all cases challenging such agreements. 15 U.S.C. § 22 (“antitrust [suits] against a corporation may be brought * * * in any district wherein it may be found or transacts business”).

That would have disastrous consequences for high-tech markets, consumers, and ultimately the whole economy. If manufacturers that rely on voluntary standard-setting and public patent-pooling agreements become subject to indefinite antitrust exposure, whole industries will be less likely to develop interoperability standards that benefit consumers. Similarly, investors will think twice if patent licensing programs may be unwound decades after they are set up, potentially making investments unrecoverable and creating future patent exposure. The Ninth Cir-

cuit's approach thus threatens to discourage investment in key markets.

Our point is not that the Court could here address the competitive effects of standard-setting and patent-pooling agreements on the merits. It is that “certainty” as to “potential liabilities” and *how long* such agreements may be challenged (*Rotella v. Wood*, 528 U.S. 549, 555 (2000)) is critical to competition, investment, and product development. The decision below upsets settled law and expectations on that issue, and promises to deter standard-setting and patent-pooling agreements. That is particularly troubling given that such agreements are critical to industries with a collective GDP of trillions of dollars. Bureau of Econ. Analysis, U.S. Dep’t of Commerce, *Gross Domestic Product By Industry* (April 25, 2014) (the information-communications-technology producing industries had a GDP of \$1.6 trillion in 2012).¹⁹

“Repose is especially valuable in antitrust, where tests of legality are often rather vague,” “business practices can be simultaneously efficient” and “also challengeable as antitrust violations,” “damages are punitively trebled,” and facts are often “hard to reconstruct long afterwards.” Areeda & Hovenkamp, *supra*, ¶ 320a. Moreover, “it is especially important that antitrust challenges be timely made” “in the case of ‘public’ acts”—so as to “minimiz[e] the social costs of any antitrust violation” while “giving the parties repose for conduct that is lawful.” *Ibid.* Here, however, Samsung seeks to enjoin agreements executed between 1999 and 2003. Pet. 122a-123a. The Ninth

¹⁹ <http://www.bea.gov/iTable/iTable.cfm?ReqID=51&step=1#reqid=51&step=51&isuri=1&5114=a&5102=15>.

Circuit's decision threatens both those agreements and similar ones governing technologies found in virtually every American home.

C. The widespread use of standard-setting and patent-pooling agreements make this case an ideal vehicle to address the meaning of *Zenith*.

The widespread use of standard-setting and patent-pooling licensing agreements makes this case an ideal vehicle to address the circuit splits discussed in Part I. As the cases discussed there illustrate, the question presented implicates agreements in virtually every economic sector—agriculture, airlines, automotive, computers, construction, energy, health care, and textiles, to name a few.

The standard-setting and patent-pooling agreements here, however, are but a handful of literally tens of thousands of similar agreements covering myriad technologies. Thus, a decision from the Court here would settle the limitations issues for a broad swath of high-value contracts.

CONCLUSION

Zenith itself involved high-tech patent pools. But 43 years have passed since this Court squarely addressed when acts in furtherance of pre-limitations agreements can restart the Clayton Act's limitations period, and standard-setting and patent-pooling agreements are exponentially more important today. The question presented has never been more critical, it has deeply divided the lower courts, and this case presents an ideal opportunity to resolve it.

Certiorari should be granted.

Respectfully submitted.

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