No. 21-1565

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ERICSSON INC. AND
TELEFONAKTIEBOLAGET LM ERICSSON

Plaintiff-Appellee,

v.

SAMSUNG ELECTRONICS CO. LTD.,
SAMSUNG ELECTRONICS AMERICA, INC.,
AND SAMSUNG RESEARCH AMERICA

Defendant-Appellant.

On appeal from the U.S. District Court for the Eastern District of Texas
No. 2:20-cv-380-JRG

BRIEF OF 13 LAW, BUSINESS, AND POLITICAL SCIENCE PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

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CERTIFICATE OF INTEREST

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2. The full names of all real parties in interest, if the above entities are not the real parties in interest:

Not applicable.

3. Each entity's parent corporation and any publicly held corporation that owns ten percent or more of its stock:

Not applicable.

4. The names of all law firms, partners, and associates that have not entered an appearance in the appeal and appealed for the entity in the lower tribunal or are expected to appear for the entity in this court:

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5. Other than the originating case, the title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal:

Samsung Electronics Co., Ltd. v. Telefonaktiebolaget LM Ericsson, (2020) E 01 Zhi Min Chu No. 743, pending in the Wuhan Intermediate People's Court, Hubei Province, The People's Republic of China.

6. Any information required under Fed. R. App. P. 26.1(b) and (c) that identifies organizational victims in criminal cases and debtors and trustees in bankruptcy cases:

Not applicable.

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are professors in law, business, and political science who teach, research, and write in the areas of patent law and civil procedure, as well as on the law, policies, and economics of patent licensing. They have an interest in promoting continuity between the interrelated legal doctrines that secure reliable and effective property rights in the inventions that drive growth in innovation economies. They have no stake in the parties or in the outcome of this case. The names and affiliations of the *amici* are set forth for identification purposes only in Addendum A.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This Court should affirm the district court's order of an anti-interference injunction. Appellee Ericsson sets forth the specific legal framework governing anti-suit injunctions and international comity and

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[1] Counsel for *amici curiae* states pursuant to Fed. R. App. P. 29(a)(4)(E) that (1) no party's counsel authored this brief in whole or in part; (2) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and (3) no person, other than *amici curiae* or their counsel, contributed money that was intended to fund preparing or submitting this brief. All parties have consented to the filing of this brief pursuant to Fed. R. App. 29(a)(2).

how the district court properly followed the law in issuing its injunction. *Amici* provide two additional insights concerning the legal proceedings in the Wuhan court and in the licensing of standard-essential patents (SEPs) that further support the district court's injunction.

First, the Wuhan proceedings that Samsung brought against Ericsson illustrate a marked lack of due process and transparency. These failings in the rule of law correlate with economic issues in which the Chinese government has expressed strong national interests. While the Chinese legal system has generally improved over the past two decades, commentators and government officials recognize that independence, transparency, and due process are not yet the norm in all cases.

Those departures from these basic norms of the rule of law are evident in this case. Samsung did not serve Ericsson notice, nor even provide it informal notice, of the lawsuit Samsung filed in Wuhan until *after* Ericsson had filed its lawsuit in the district court. Samsung then obtained an ex parte anti-suit injunction from the Wuhan court. Again, Ericsson had neither notice of nor opportunity to participate in the process. This contrasts starkly with the notice to Samsung and the

opportunity for its arguments to be heard fully by the district court in its expedited proceedings, despite the holiday season and the COVID-19 pandemic.

Chinese courts have also departed from rule-of-law norms in other cases in which the Chinese government has significant domestic economic interests. This includes other cases concerning the determination of fair, reasonable, and non-discriminatory (FRAND) rates in the licensing of SEPs on mobile telecommunications, like in this case. China and its courts have adopted policies supporting Chinese companies that develop hardware for the mobile revolution, such as smartphone handsets. One such policy that is relevant to this case: reducing the royalty rates paid by Chinese companies for using patented technologies in making smartphones, such as 4G and 5G, when these patents are owned by U.S. or European companies. In fact, the Wuhan court justified its worldwide anti-suit injunction against Ericsson by asserting that allowing the lawsuit properly filed in the district court to proceed would result in Samsung having to "submit to unreasonable royalty rates" that "increase . . . operating costs." Appx566–67 (Defs.' Opp'n to Pls.' Appl. for Anti-interference Inj., Ex. 8, at 4–5). In other cases, Chinese courts have

also issued anti-suit injunctions in FRAND disputes involving domestic Chinese industrial policy interests while similarly disregarding basic norms of due process. *See, e.g.*, Appx251–324 (*InterDigital Tech. Corp. & Ors. v. Xiaomi Corp. & Ors.* (2020) 295 CS 2020 (India)).

Second, this case raises serious policy concerns for innovation, highlighting the negative consequences of unfairly tilted playing fields in the development and licensing of standardized technologies. The key facts are undisputed: Samsung, an implementer of SEPs, filed a lawsuit, engaged in ex parte proceedings, and received an anti-suit injunction on Christmas Day without any notice to or participation by the SEP owner, Ericsson. This disregard for due process combined with an institutional bias towards implementers sheds light on Samsung's decision to file its lawsuit in Wuhan—an otherwise inconvenient forum with no connection to either the parties' contractual FRAND dispute or the patent infringement allegations asserted by Ericsson against Samsung.

If the Wuhan court is permitted to enjoin the lawful proceedings in U.S. district court, Samsung's litigation tactic in this case will provide a roadmap for other implementers of SEPs to displace neutral adjudication of FRAND disputes in favor of fora that pursue national political and

economic policies at the expense of due process. In the context of SEP licensing, implementers are uniquely positioned to forum shop. Owners of SEPs cannot simply file a patent infringement lawsuit when an implementer infringes their patents. Rather, SEP owners customarily offer licenses on FRAND terms and other terms of use, wait for a response, and then engage in laborious negotiations. These negotiations sometimes take many, many years, as in this case. By contrast, implementers can (and do) file lawsuits first, and sometimes they do so immediately after receiving an initial offer. *See Microsoft v. Motorola*, 2013 WL 2111217, *2 (W.D. Wash. Apr. 25, 2013).

If the Wuhan court's injunction is permitted to stand, implementers have a roadmap for creating a fundamentally unbalanced playing field in their favor. Any implementer seeking a lower royalty rate will simply sue SEP owners in Wuhan first, providing no notice of the lawsuit. They will then wait for the SEP owner to file suit at some point during the long, protracted negotiations, immediately obtain an anti-suit injunction without notice or ability to participate in the proceedings, and then force the SEP owner to litigate in a forum lacking basic respect for due process and with clear evidence of institutional bias in favor of the implementer.

Samsung's tactic also threatens to deny the U.S. courts their longstanding role in properly adjudicating controversies arising within their jurisdiction over U.S. patent rights. It threatens the fundamental principle of the rule of law that has been the historically unique hallmark of the U.S. patent system. The consequences cannot be understated. The U.S. patent system has successfully driven the U.S. innovation economy for two centuries and has been the gold standard globally for many other jurisdictions, including, ironically, China, which has adopted many historical features of the U.S. patent system in its own legal reforms in recent years. To avoid these negative consequences, this Court should affirm the anti-interference injunction.

ARGUMENT

I. THE ANTI-INTERFERENCE INJUNCTION ENSURES FAIR ADJUDICATION AND PREVENTS DISPLACING PROPER U.S. JURISDICTION WITH AN UNRELATED FORUM RIFE WITH DUE PROCESS CONCERNS

This case began as a straightforward dispute over negotiations for a cross license of Ericsson's and Samsung's patent portfolios for mobile-communications technology. But Samsung transformed it into a jurisdictional dispute between U.S. and Chinese courts. The district

court's anti-inference injunction restores proper jurisdiction and ensures that due process will govern this dispute going forward.

In recent years, Chinese courts generally have made laudable strides toward independence and impartiality in adjudicating disputes solely between private parties over private rights that do not implicate or contradict China's domestic economic interests. *See* Adam Mossoff, *Institutional Design in Patent Law: Private Property Rights or Regulatory Entitlements*, 92 S. CAL. L. REV. 921, 944 (2019). But Samsung's strategic lawsuit in Wuhan—a jurisdiction with virtually no connection to the parties or to their dispute—exploits less promising features of China's judicial system. Chinese courts do not enjoy the same independence that U.S. courts have under Article III of the U.S. Constitution. They can be subject to political control and, where cases implicate Chinese industrial policy, commentators and experts have observed that court decisions correlate with existing political priorities. *See* F. Scott Kieff, *Business, Risk, & China's MCF: Modest Tools of Financial Regulation for a Time of Great Power Competition*, 88 GEO. WASH. L. REV. 1281, 1295 (2020) ("The true risk-return calculus to doing business in China includes an account of how [the military-civil fusion] imposes obligations flowing in multiple

directions among personnel in Chinese courts and agencies, national leadership, national security apparatus, and state-owned or state-championed commercial firms."); Shaomin Li & Ilan Alon, *China's Intellectual Property Rights Provocation: A Political Economy View*, 3 J. OF INT'L BUS. POL'Y 60, 66 (2020) ("Since the party is above and dictates the law, the desire to strengthen [intellectual property rights] must be a party-led effort instead of following the rule of law.").

A. China's Legal Policies and Recent Court Decisions Promote Its National Economic Interests in Lowering FRAND Licensing Rates in 5G Telecommunications Technologies at the Expense of Due Process

This case lies at the core of one such area of unique political and economic interest to China: technological innovation. *See* Central People's Government of the People's Republic of China*, 13th National Five-Year Plan for the Development of Strategic Emerging Industries*, Center for Security and Emerging Technology (CSET), 2, 56–57 (Nov. 29, 2016) (translation by CSET on Dec. 9, 2019), https://cset.georgetown.edu/research/national-13th-five-year-plan-for-the-development-of-strategic-emerging-industries/ (recognizing, among other next-generation technologies, the Internet of Things and artificial intelligence as key technologies for industrial transformation and

identifying intellectual property in 5 of the 69 goals in its 13th Five-Year Plan for the Development of Strategic Emerging Industries); Bryan Clark & Dan Pratt, *Weaponizing the 5G Value Chain*, HUDSON INSTITUTE, 2 (2020), https://www.hudson.org/research/16389-weaponizing-the-5-g-value-chain ("The lead in 5G implementation belongs [not to the U.S. but] instead to China's Huawei, which exploited a combination of regulatory protection, government subsidies, and capable technology to rapidly gain one-third of the global 5G market."). More specifically, this case concerns how much companies that implement patented technologies must pay to license those technologies. It involves a determination of FRAND royalty rates for SEPs covering mobile communication technologies, such as 4G or 5G. China has strong national interests in the outcomes of such disputes, since those disputes can affect how much companies with close state ties, like Huawei, must pay for a license to implement SEPs in their own telecommunications systems and mobile devices.

The U.S. government has recognized China's policy of pursuing lower royalty rates in advancing its own national economic interests. As one recent report explains, it is the policy in China to "force foreign companies" to accept "below-market royalty rates for licensed

technology." White House Office of Trade and Mfg. Pol'y, *How China's Economic Aggression Threatens the Technologies and Intellectual Property of the United States and the World* 11 (June 2018) (foreign companies must "make concessions such as . . . below-market royalty rates for licensed technology"). Chinese regulations force U.S. companies to "license technologies to Chinese entities . . . on non-market-based terms that favor Chinese recipients." U.S. Trade Representative, *Update Concerning China's Acts, Policies and Practices Related to Technology Transfer, Intellectual Property, and Innovation* 3 (Nov. 20, 2018) ("2018 USTR Report"). And "Chinese government officials have pressured foreign companies seeking to participate in the standards-setting process to license their technology or intellectual property on unfavorable terms." U.S. Trade Representative, *2019 Report to Congress on China's WTO Compliance* 36 (Mar. 2020) ("2019 USTR Report").

These well-established and widely recognized concerns have prompted Executive Branch action in recent years. The most well-known action was the former administration's trade war with China, which was directly (though not entirely) in response to "China's unfair trade practices related to the forced transfer of American technology and

intellectual property." 2018 USTR Report at 5. The U.S. has also filed actions at the World Trade Organization challenging "China's discriminatory technology licensing requirements." *Id.* at 29–30. And most recently, the Executive Branch has "recommended" that U.S. courts "take into account that patent holders in China face challenges in enforcing their patents and *securing appropriate compensation for the use of their patents*." 2019 USTR Report at A-33 (emphasis added).

More recently, President Biden has announced that he will continue to "confront China's economic abuses; counter its aggressive, coercive action; [ ] push back on China's attack on human rights, intellectual property, and global governance." *Remarks by President Biden on America's Place in the World* (Feb. 4, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/02/04/remarks-by-president-biden-on-americas-place-in-the-world/. And the Biden administration has said it will leave in place for now tariffs on Chinese imports that the U.S. used "as leverage to ensure China complied with the terms of the [2020 agreement ending the trade war], including . . . better protection of U.S. intellectual property." Bob Davis & Yuka Hayashi, *New Trade Representative Says U.S. Isn't*

Ready to Lift China Tariffs, Wall St. J. (Mar. 28, 2021), https://www.wsj.com/articles/new-trade-representative-says-u-s-isnt-ready-to-lift-china-tariffs-11616929200. These bipartisan concerns about China's economic policies favoring its own domestic companies, especially given its lack of respect for and discriminatory treatment of innovators in other countries, are serious and well founded.

The contractual dispute between Ericsson and Samsung over the proper FRAND rate—the rates that Samsung should pay for using Ericsson's SEPs in Samsung's mobile devices—directly implicates the concerns repeatedly and consistently raised by the U.S. government across different administrations. If the Wuhan court forces Ericsson to accept a royalty rate below what other courts would recognize as a proper FRAND rate, this outcome would benefit China's domestic economic interests. It would establish a key legal precedent that Chinese implementers like Huawei could invoke in claiming that they should also pay lower royalty rates for Ericsson's patent portfolio.

B. Other Jurisdictions Have Recognized China's Official Policies in Lowering FRAND Licensing Rates in 5G Telecommunications Technologies and Have Responded by Protecting the Integrity of Their Legal Proceedings

The U.S. is not alone in recognizing China's economic policy of favoring its own state-owned or state-dominated companies and its courts enforcement of this economic policy. Last year, the German Federal Court of Justice observed that "Chinese authorities" had "forced" an owner of SEPs on telecommunications technology "to grant preferential conditions" to "a state-owned Chinese company." *Sisvel v. Haier Deutschland GmbH* [BGH] [Federal Court of Justice] 5 May 2020, 36 KZR 17 (50, 101) (Ger.), http://eplaw.org/wp-content/uploads/2020/07/DE-FCJ-Sisvel-v-Haier-English.pdf.

Last year, the Delhi High Court in India called out the same failure of the Wuhan court to apply basic due process protections in issuing an anti-suit injunction against InterDigital Technology Corporation, a U.S. telecommunications company that licenses its SEPs covering mobile telecommunications technologies. *See Delhi HC Restrains Xiaomi from Enforcing Anti-Suit Injunction Order by Wuhan's Court Against Inter-Digital Technology Corporation*, KANOONIYAT (Oct. 10, 2020),

https://kanooniyat.com/2020/10/delhi-hc-restrains-xiaomi-from-enforcing-anti-suit-injunction-order-by-wuhans-court-against-interdigital-technology-corporation. In that case, after Chinese smartphone manufacturer Xiaomi filed a preemptive FRAND suit in Wuhan court, InterDigital filed a patent infringement lawsuit in India alleging Xiaomi's unauthorized use of InterDigital's Indian SEPs covering mobile telecommunications devices. Appx251–324 (*InterDigital*, 295 CS 2020, ¶¶ 6, 8).

Xiaomi responded to the Indian lawsuit by resorting to litigation tactics strikingly similar to Samsung's in this case. Xiaomi filed a motion in the Wuhan court requesting an anti-suit injunction and global determination of FRAND rates for all of InterDigital's SEPs. *See id.* ¶ 11. As with Ericsson, InterDigital was given *no* notice of Xiaomi's motion. Since InterDigital had no notice of the motion, Xiaomi proceeded ex parte in requesting that the Wuhan court issue an anti-suit injunction barring InterDigital from prosecuting the lawsuit it had filed in India. As in this case, InterDigital never had the opportunity to respond or to appear on its behalf before the injunction was issued. *See id.* ¶ 12.

Ultimately, the Delhi High Court intervened by granting an anti-interference injunction to InterDigital after the proper filings and procedures were followed for both parties. In granting InterDigital legal relief, the Delhi High Court described Xiaomi's strategic litigation tactics and the Wuhan court's ex parte proceedings as "disturbing," "less than fair, not only to the plaintiff, but also to this Court," and inconsistent with "the requirement of maintaining fairness in the proceedings." Appx251–324 (*InterDigital*, 295 CS 2020, ¶ 56).

Like the district court in this case, the Delhi High Court objected to the Wuhan court's attempt to shut down proper legal proceedings in India commenced by a legitimately filed lawsuit in which InterDigital sought a remedy for infringement of its Indian patents:

> [T]he Wuhan Court has effectively rendered it impossible for the plaintiff to continue to prosecute these proceedings. The inexorable sequitur is that this Court is also divested of the opportunity of adjudicating on the dispute, brought before it by the plaintiffs, which it has, otherwise, the jurisdiction to hear and decide. The order of the Wuhan Court, therefore, directly negates the jurisdiction of this Court, and infringes the authority of this Court to exercise jurisdiction in accordance with the laws of this country. *It is not open to any Court to pass an order, prohibiting a court, in another country, to exercise jurisdiction lawfully vested in it.* Any such decision would amount to a negation of jurisdiction, which cannot be countenanced.

Appx251–324 (*InterDigital*, 295 CS 2020, ¶ 76) (emphasis added); *see* Appx233 (Pls.' Emergency Appl. for TRO, at 5); *see also* Appx1799–1857 (*Unwired Planet Int'l Ltd. v. Huawei Tech. Co. Ltd.*, [2020] UKSC 37, [90]) (stating that "English courts have jurisdiction" over infringement lawsuits addressing "UK patents" and over the adjudication of a FRAND rate for the use of these patents, and thus there is "no basis for declining jurisdiction").

More recently, the Regional Court of Munich considered and similarly rejected the worldwide anti-suit injunction issued by the Wuhan court against InterDigital, as the Wuhan court's order prohibited InterDigital from pursuing its claims for Xiaomi's infringement of its German patents. The court recognized both the palpable overreach by the Wuhan court's worldwide injunction and the lack of InterDigital's ability to participate in the proceedings in Wuhan as key factors in why this "Chinese decision would probably also not be recognizable in the Federal Republic of Germany." Appx1868–1922 (LG München I [Munich I District Court], Feb. 25, 2021, BeckRS 2021, 3995, ¶ 110 (case ID: 7 O 14276/20) (Ger.), https://www.gesetze-bayern.de/Content/Document/Y-300-Z-BECKRS-B-2021-N-3995 (translation by Kather Augenstein

Rechtsanwälte, https://www.katheraugenstein.com/wp-content/uploads/2021/03/2021-01-28-LG-Muenchen-I-7-O-14276-20-EN.pdf). The court explained that "the Chinese court quite obviously lacks international jurisdiction for this declaratory action against the [InterDigital] defendants, all of whom are domiciled in the United States of America, insofar as they do not enter an appearance before the court in Wuhan . . . ." *Id.*

In sum, neither the district court nor this Court is writing on a blank slate in evaluating Samsung's filings and the Wuhan court's processes and decisions. In affirming the district court's anti-interference order, this Court should reaffirm the fundamental principle of the rule of law invoked by the Delhi High Court and the Regional Court in Munich. This Court should expressly protect the fundamental legal norms that define proceedings in U.S. courts—transparency, fairness, and due process. Thus, as the Delhi High Court and the Regional Court in Munich did, this Court should reject the Wuhan court's assertion of exclusive power to decide a contractual and U.S. patent dispute and attempt to shut down a properly filed lawsuit in the federal court below.

C. China's Pursuit of its Domestic Economic Policies in Lowering FRAND Licensing Rates Threaten the Rule of Law and Stable Property Rights That are Necessary for Patents to Promote Innovation

The practices by the Wuhan court in the *InterDigital* case and in this case stand in marked contrast to how U.S. courts adjudicate patent disputes. The U.S. patent system has been tremendously successful in serving its constitutional function of promoting the useful arts. As economists and historians have recognized, stable political and legal institutions operating under the rule of law have been a key factor in that success by securing reliable and effective property rights for innovators. *See* Mossoff, *supra*, at 933–36; Stephen Haber, *Patents and the Wealth of Nations*, 23 GEO. MASON L. REV. 811, 834 (2016) (concluding from review of historical and economic evidence a "causal relationship between strong patents and innovation"); B. Zorina Khan, THE DEMOCRATIZATION OF INVENTION: PATENTS AND COPYRIGHTS IN AMERICAN ECONOMIC DEVELOPMENT, 1790-1920 (2005). Robust protection of intellectual property rights, and predictable adjudication of patent disputes, enable the innovation that results in economic growth and a flourishing society. Haber, *Patents and the Wealth of Nations, supra*, at 811 ("There is

abundant evidence from economics and history that the world's wealthy countries grew rich because they had well-developed systems of private property. Clearly defined and impartially enforced property rights were crucial to economic development . . . .").

II. IF UNCHECKED BY AN ANTI-INTERFERENCE INJUNCTION ISSUED ACCORDING TO THE NORMS OF DUE PROCESS AND THE RULE OF LAW, THE STRATEGIC LITIGATION TACTICS IN THIS CASE WILL SPREAD AND WILL UNDERMINE THE PATENT SYSTEM'S FUNCTION OF PROMOTING INNOVATION

If the district court's anti-interference injunction is reversed, the litigation tactics and proceedings in the Wuhan court threaten to become a template for displacing dispassionate and disinterested adjudication of patent disputes that U.S. courts otherwise provide. SEP owners like Ericsson commit in the standard development process to license their patents on FRAND terms. *TCL Commc'n Tech. Holdings Ltd. v. Telefonaktiebolaget LM Ericsson*, 943 F.3d 1360, 1364 (Fed. Cir. 2019). Pursuant to this contractual commitment, they must be "prepared to offer" a license on FRAND terms to any implementer. *Id.* As a result, SEP owners like Ericsson generally must make at least one licensing offer before resorting to litigation, and generally do engage in extensive

negotiations before filing any lawsuit asserting either contractual breach or patent infringement claims. *Id.* at 1364–65.

If this Court reverses the district court, this case will be prologue to every future FRAND licensing negotiation or dispute. The strategy employed by Samsung—receiving a FRAND licensing offer, negotiating a license, and preemptively filing a lawsuit without formal or informal notice in a jurisdiction that does not follow due process norms—will occur in every negotiation between an SEP owner and an implementer. Such a strategy creates an unlevel playing field in which implementers have more incentives to hold out in FRAND negotiations for an offer that is more favorable to them—a substantially lower royalty rate. If they fail to receive one, they play the "ace in their sleeve": they can seek a worldwide anti-suit injunction and a worldwide FRAND determination from a court that provided no notice to the SEP owner in a jurisdiction institutionally biased in favor of lower FRAND rates.

This undermines the incentives created by the U.S. patent system in which innovators receive full, fair, and balanced protection for their patents. Innovators risk enormous R&D investments over many years in exchange for a reliable and effective property right that they can

commercialize in the innovation markets created by their inventions. The strategy adopted by Samsung in this case, which will proliferate among implementers if it succeeds, vitiates this patent bargain. *See* Richard A. Epstein & Kayvan B. Noroozi, *Why Incentives for "Patent Holdout" Threaten to Dismantle FRAND, and Why It Matters*, 32 BERKELEY TECH. L. J. 1381 (2017).

The facts and proceedings in this case represent an especially stark example of this risk. Samsung has provided no evidence that the Wuhan court is the best forum for adjudicating its dispute with Ericsson under the well-established legal factors relevant to making that determination. For example, Samsung cited no evidence in the proceedings below that Wuhan is a principal place of business for either party, that it has been (or is) the location of their business dealings, or that China has such a significant interest in this particular contractual dispute between Samsung and Ericsson that the Wuhan proceedings should take precedence over the properly filed and noticed proceedings in federal court in the Eastern District of Texas. Appx498–504 (Defs.' Opp. to Pls.' Appl. for Anti-interference Inj., at 6–12). Indeed, Samsung confessed in a separate case before another court that it was not possible for Samsung

to receive a "full and fair FRAND determination" in Chinese court. *See* Appx239 (Pls.' Emergency Appl. for TRO, at 11). If this is true for Samsung in another, unrelated case, it is equally true for Ericsson in this case.

Like the district court, this Court should take Samsung at its word that it is impossible for Ericsson to receive a "full and fair" hearing before the Wuhan court. It is undeniable that Ericsson had neither notice nor an opportunity to participate in the proceedings before the Wuhan court issued its anti-suit injunction on Christmas Day. While the Chinese legal system has taken great strides in recent years in its institutional and legal reforms, this case represents exactly how its courts can still fall woefully short of the aspirational ideals of due process and substantive fairness. A patent system can function in promoting innovation only within a legal system that consistently follows basic norms of due process, provides neutral arbitration via a commitment to the separation of powers, and reflects at its core the rule of law. *See* Stephen Haber, *Innovation, Not Manna From Heaven*, HOOVER INSTITUTION, 4 (2020), https://www.hoover.org/sites/default/files/research/docs/humanprosperityproject_haber.pdf (identifying successful driver of U.S. innovation

economy in the "legal technology of a patent of invention as a tradable property right" and "the governance technologies of federalism and judicial independence"). This is an ideal case to reaffirm the importance of these fundamental principles.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that this Court should affirm the district court's anti-interference injunction.

April 9, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief of *amici curiae* complies with Fed. Cir. Rule 29(a)(5) because it has 4,226 words, excluding those parts of the brief exempted by Fed. Cir. Rule 32(b)(2).

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ADDENDUM A[2]

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