

No. 2021-1565

IN THE
United States Court of Appeals
FOR THE FEDERAL CIRCUIT

ERICSSON INC., TELEFONAKTIEBOLAGET LM ERICSSON,

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Texas
No. 2:20-CV-380, Judge J. Rodney Gilstrap

**RESPONSE BRIEF FOR APPELLEES ERICSSON INC.
AND TELEFONAKTIEBOLAGET LM ERICSSON**

Theodore Stevenson, III
Nicholas M. Mathews
McKool Smith, P.C.
300 Crescent Court, Suite 1500
Dallas, TX 75201
(214) 978-4000 (telephone)
(214) 978-4044 (facsimile)

Jeffrey A. Lamken
Counsel of Record
Michael G. Pattillo, Jr.
Rayiner I. Hashem
MOLOLAMKEN LLP
The Watergate, Suite 500
600 New Hampshire Avenue, N.W.
Washington, D.C. 20037
(202) 556-2000 (telephone)
(202) 556-2001 (facsimile)
jlamken@mololamken.com

*Counsel for Ericsson Inc. and Telefonaktiebolaget LM Ericsson
(Additional Counsel Listed on Next Page)*

Nicholas T. Matich
McKool Smith, P.C.
1717 K Street, N.W., Suite 900
Washington, D.C. 20006
(202) 221-6267 (telephone)
(212) 402-9444 (facsimile)

Elizabeth K. Clarke
MOLOLAMKEN LLP
300 N. LaSalle Street, Suite 5350
Chicago, IL 60654
(312) 450-6700 (telephone)
(312) 450-6701 (facsimile)

Christine M. Woodin
McKool Smith, P.C.
300 S. Grand Avenue, Suite 2900
Los Angeles, CA 90071
(213) 694-1200 (telephone)
(213) 694-1234 (facsimile)

Jennifer E. Fischell
MOLOLAMKEN LLP
430 Park Avenue
New York, NY 10022
(212) 607-8160 (telephone)
(212) 607-8161 (facsimile)

Blake H. Bailey
McKool Smith, P.C.
600 Travis Street, Suite 7000
Houston, TX 77002
(713) 485-7300 (telephone)
(713) 485-7344 (facsimile)

Samuel F. Baxter
McKool Smith, P.C.
104 E. Houston Street, Suite 300
Marshall, TX 75670
(903) 923-9000 (telephone)
(903) 923-9099 (facsimile)

Counsel for Ericsson Inc. and Telefonaktiebolaget LM Ericsson

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT****CERTIFICATE OF INTEREST**

Case Number 2021-1565

Short Case Caption Ericsson Inc. v. Samsung Electronics Co., Ltd.

Filing Party/Entity Ericsson Inc.; Telefonaktiebolaget LM Ericsson

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box.** Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 04/02/2021

Signature: /s/ Jeffrey A. Lamken

Name: Jeffrey A. Lamken

<p>1. Represented Entities. Fed. Cir. R. 47.4(a)(1).</p>	<p>2. Real Party in Interest. Fed. Cir. R. 47.4(a)(2).</p>	<p>3. Parent Corporations and Stockholders. Fed. Cir. R. 47.4(a)(3).</p>
<p>Provide the full names of all entities represented by undersigned counsel in this case.</p>	<p>Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.</p> <p><input checked="" type="checkbox"/> None/Not Applicable</p>	<p>Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.</p> <p><input type="checkbox"/> None/Not Applicable</p>
<p>Ericsson Inc.</p>		<p>See addendum.</p>
<p>Telefonaktiebolaget LM Ericsson</p>		<p>See addendum.</p>

Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

None/Not Applicable Additional pages attached

See addendum.		

5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court’s decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

None/Not Applicable Additional pages attached

See addendum.		

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

None/Not Applicable Additional pages attached

CERTIFICATE OF INTEREST
Addendum to Questions 3, 4, and 5

3. Parent Corporations and Stockholders. Fed. Cir. R. 47.4(a)(3). Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.

Ericsson Inc. is a Delaware corporation that is wholly owned by Ericsson Holding II Inc., which is also a Delaware corporation. Ericsson Holding II Inc. is wholly owned by Telefonaktiebolaget LM Ericsson.

Telefonaktiebolaget LM Ericsson is a publicly traded Swedish corporation that has no parent corporation. No publicly held company owns more than 10% of its stock.

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

McKool Smith, P.C.:

Jennifer L. Truelove

Erik Bruce Fountain (withdrawn)

5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

The decision in this case may affect or be directly affected by *Samsung Electronics Co., Ltd. v. Telefonaktiebolaget LM Ericsson*, E 01 Zhi Min Chu No. 743 (2020), currently pending in the People's Republic of China Wuhan Intermediate People's Court, Hubei Province.

TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF RELATED CASES	x
INTRODUCTION	1
ISSUES PRESENTED.....	4
STATEMENT OF THE CASE.....	4
I. Wireless Standards, SEPs, and FRAND Licensing	5
A. ETSI’s Wireless Communications Standards	5
B. The FRAND Commitment and Reciprocal Obligations	6
II. Proceedings Below.....	7
A. The Parties Reach an Impasse in Renewing Cross-Licenses.....	7
B. Ericsson Files Suit Where It Is Headquartered and Where Samsung Has a Substantial Presence.....	7
C. Samsung Secretly Files Suit in Wuhan and Obtains an <i>Ex Parte</i> Injunction Against U.S. Proceedings	10
1. Samsung Secretly Files an Incomplete Action in a Jurisdiction It Has Decried and That Lacks Connection to the Parties and Their Dispute	10
2. Samsung Obtains an <i>Ex Parte</i> Injunction To Prevent Ericsson from Pursuing U.S. Remedies	11
D. The U.S. District Court Issues a Defensive TRO and Preliminary Injunction To Protect U.S. Proceedings.....	13
SUMMARY OF ARGUMENT	18

ARGUMENT	20
I. The District Court Properly Granted a Defensive Injunction	22
A. The District Court Had Unquestioned Authority To Issue a Defensive Injunction To Protect U.S. Proceedings from Foreign Interference.....	22
B. The Defensive Anti-Interference Injunction Was Proper Under Fifth Circuit Law	31
C. Samsung’s Putative “Incorrect Assumptions” Fail To Establish an Abuse of Discretion.....	39
1. The District Court Correctly Understood the Wuhan Injunction.....	40
2. The District Court Understood the Procedural Disadvantage Samsung Had Imposed on Ericsson	41
3. The District Court Properly Considered the Inequitable Effect Samsung Imposed.....	44
D. The Defensive Injunction Does Not “Offend” Principles of Comity	45
II. The Anti-Interference Injunction’s Scope Was Commensurate With the Threat—and Well Within the Court’s Discretion.....	52
A. The Nationwide Anti-Interference Injunction Was an Appropriate Response to the Wuhan Court’s Nationwide Interference.....	53
B. The District Court Properly Required Samsung To Indemnify Ericsson for Violations of the Wuhan Injunction	56
C. The District Court Properly Permitted Ericsson To File Suits Related to Its 4G and 5G SEPs	59
CONCLUSION.....	62

TABLE OF AUTHORITIES

Page(s)

CASES

<i>Agora Syndicate, Inc. v. Robinson Janitorial Specialists, Inc.</i> , 149 F.3d 371 (5th Cir. 1998)	36
<i>Aleynikov v. Goldman Sachs Grp., Inc.</i> , 765 F.3d 350 (3d Cir. 2014)	56
<i>Amchem Prods. Inc. v. B.C. Workers' Comp. Bd.</i> , [1993] 1 S.C.R. 897 (Can.)	46
<i>Arlington Indus., Inc. v. Bridgeport Fittings, Inc.</i> , No. 2010-1377, 2011 WL 5275848 (Fed. Cir. Nov. 4, 2011)	62
<i>Associação Brasileira de Medicina de Grupo v. Stryker Corp.</i> , 891 F.3d 615 (6th Cir. 2018)	43
<i>Bethell v. Peace</i> , 441 F.2d 495 (5th Cir. 1971)	48
<i>Bowne v. Joy</i> , 9 Johns. 221 (N.Y. 1812)	22
<i>Bugliotti v. Republic of Argentina</i> , 952 F.3d 410 (2d Cir. 2020)	25, 34
<i>China Trade & Dev. Corp. v. M.V. Choong Yong</i> , 837 F.2d 33 (2d Cir. 1987)	24, 29, 48, 50
<i>Cohen v. Rothfield</i> , [1919] 120 LT 434 (Eng.) (appeal)	23, 25
<i>Colo. River Water Conserv. Dist. v. United States</i> , 424 U.S. 800 (1976)	34, 36
<i>Compagnie des Bauxites de Guinea v. Ins. Co. of N. Am.</i> , 651 F.2d 877 (3d Cir. 1981)	23, 48
<i>Compania Naviera Joanna SA v. Koninklijke Boskalis Westminster NV</i> , 569 F.3d 189 (4th Cir. 2009)	43

<i>The Corfu Channel</i> , Judgment, 1949 I.C.J. 4 (Apr. 9)	24
<i>Donovan v. City of Dallas</i> , 377 U.S. 408 (1964).....	23
<i>E.&J. Gallo Winery v. Andina Licores S.A.</i> , 446 F.3d 984 (9th Cir. 2006)	24
<i>eBay Inc. v. MercExchange, L.L.C.</i> , 547 U.S. 388 (2006).....	55
<i>Elecs. for Imaging, Inc. v. Coyle</i> , 394 F.3d 1341 (Fed. Cir. 2005)	48
<i>Ericsson, Inc. v. D-Link, Sys., Inc.</i> , 773 F.3d 1201 (Fed. Cir. 2014)	33, 35
<i>FDIC v. Maxxam, Inc.</i> , 523 F.3d 566 (5th Cir. 2008)	57, 58
<i>Fiber Sys. Int’l, Inc. v. Roehrs</i> , 470 F.3d 1150 (5th Cir. 2006)	54
<i>Friends for All Children, Inc. v. Lockheed Aircraft Corp.</i> , 746 F.2d 816 (D.C. Cir. 1984).....	57
<i>Gon v. First State Ins. Co.</i> , 871 F.2d 863 (9th Cir. 1989)	56
<i>Hilton v. Guyot</i> , 159 U.S. 113 (1895).....	47
<i>Hoechst Diafoil Co. v. Nan Ya Plastics Corp.</i> , 174 F.3d 411 (4th Cir. 1999)	42
<i>Houston Agric. Credit Corp. v. United States</i> , 736 F.2d 233 (5th Cir. 1984)	22, 40
<i>HTC Corp. v. Telefonaktiebolaget LM Ericsson</i> , No. 18-cv-243, 2019 WL 4734950 (E.D. Tex. May 22, 2019)	30, 52

<i>Huawei Techs. v. Samsung Elecs. Co.</i> , No. 16-cv-2787, 2018 WL 1784065 (N.D. Cal. Apr. 13, 2018)	<i>passim</i>
<i>Hyman v. Helm</i> , [1883] 49 LT 376 (Eng.) (appeal).....	23
<i>Innovation First Int’l v. Zuru, Inc.</i> , 513 F. App’x 386 (5th Cir. 2013)	43
<i>InterDigital Tech. Corp. v. Xiaomi Commc’ns Co.</i> , Landgericht München [Munich Regional Court I], Feb. 25, 2021, 7 O 14276/20 (Ger.).....	26, 27, 42
<i>Interdigital Tech. Corp. v. Xiaomi Corp.</i> , Delhi HC, Oct. 9, 2020, I.A. 8772/2020 in CS(COMM) 295/2020 (India)	26, 27
<i>IPCom GmbH & Co. KG v. Lenovo Tech. (U.K.) Ltd.</i> , [2019] EWHC (Pat) 3030 (Eng.)	27
<i>Iragorri v. United Techs. Corp.</i> , 274 F.3d 65 (2d Cir. 2001)	39
<i>Janvey v. Alguire</i> , 647 F.3d 585 (5th Cir. 2011)	22
<i>Kaepa, Inc. v. Achilles Corp.</i> , 76 F.3d 624 (5th Cir. 1996)	21, 49, 52
<i>Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara</i> , 335 F.3d 357 (5th Cir. 2003).....	23, 41
<i>Kline v. Burke Constr. Co.</i> , 260 U.S. 226 (1922).....	23
<i>Laker Airways Ltd. v. Sabena, Belgian World Airlines</i> , 731 F.2d 909 (D.C. Cir. 1984).....	<i>passim</i>
<i>Landis v. N. Am. Co.</i> , 299 U.S. 248 (1936).....	62

<i>Lenovo (U.S.) Inc. v. IPCom GmbH & Co. Kg,</i> Cour d’appel [CA] [regional court of appeal] Paris, civ., Mar. 3, 2020, 14/2020 (Fr.)	27
<i>Louisiana v. Union Oil Co.,</i> 458 F.3d 364 (5th Cir. 2006)	9
<i>Maule v. Murray,</i> 7 T.R. 470 (1798).....	22
<i>MedImmune, Inc. v. Genentech, Inc.,</i> 549 U.S. 118 (2007).....	36
<i>Microsoft Corp. v. Motorola, Inc.,</i> 696 F.3d 872 (9th Cir. 2012)	<i>passim</i>
<i>Moses v. CashCall, Inc.,</i> 781 F.3d 63 (4th Cir. 2015)	45
<i>MWK Recruiting Inc. v. Jowers,</i> 833 F. App’x 560 (5th Cir. 2020).....	<i>passim</i>
<i>Newby v. Enron Corp.,</i> 302 F.3d 295 (5th Cir. 2002)	34
<i>Nokia v. Cont’l,</i> Oberlandesgericht München [Munich Higher Regional Court], Dec. 12, 2019, 6 U 5042/19 (Ger.)	26, 27
<i>Pan Austl. Shipping Pty. Ltd. v. The Ship ‘Comandate’,</i> [2006] FCA 881 (Austl.).....	27
<i>Porter v. Lee,</i> 328 U.S. 246 (1946).....	54, 60
<i>Positive Software Sols., Inc. v. New Century Mortg. Corp.,</i> 619 F.3d 458 (5th Cir. 2010)	58
<i>Quaak v. Kylveld Peat Marwick Goerdeler Bedrijfsrevisoren,</i> 361 F.3d 11 (1st Cir. 2004).....	<i>passim</i>
<i>Renner & Bussard v. Marshall,</i> 14 U.S. 215 (1816).....	22

<i>The Salvore</i> , 36 F.2d 712 (2d Cir. 1929)	50
<i>SAS Inst., Inc. v. World Programming Ltd.</i> , 952 F.3d 513 (4th Cir. 2020)	46, 49, 53
<i>The Schooner Exch. v. McFaddon</i> , 11 U.S. (7 Cranch) 116 (1812)	24
<i>Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.</i> , 549 U.S. 422 (2007).....	43
<i>Spansion, Inc. v. ITC</i> , 629 F.3d 1331 (Fed. Cir. 2010)	54
<i>Sprint Commc’ns, Inc. v. Jacobs</i> , 571 U.S. 69 (2013).....	36
<i>Stanton v. Embrey</i> , 93 U.S. 548 (1876).....	22
<i>Takiguchi v. MRI Int’l, Inc.</i> , 611 F. App’x 919 (9th Cir. 2015)	61
<i>TCL Commc’n Tech. Holdings v. Telefonaktiebolaget LM Ericsson</i> , No. 14-cv-341, Dkt. 279-1 (C.D. Cal. June 29, 2015)	28
<i>TEC Eng’g Corp. v. Budget Molders Supply, Inc.</i> , 82 F.3d 542 (1st Cir. 1996).....	61
<i>Texas v. United States</i> , 809 F.3d 134 (5th Cir. 2015)	53
<i>United States v. N.Y. Tel. Co.</i> , 434 U.S. 159 (1977).....	34
<i>In re Unterweser Reederei GmbH</i> , 428 F.2d 888 (5th Cir. 1970)	31, 32, 48
<i>Unwired Planet Int’l Ltd. v. Huawei Techs. Co.</i> , [2017] EWHC (Pat) 711 (Eng.).....	51

<i>Unwired Planet Int’l Ltd. v. Huawei Techs. Co.</i> , [2017] EWHC (Pat) 2831 (Eng.)	49
<i>In re VoIP-PAL.com, Inc.</i> , No. 2021-112, 2021 WL 650626 (Fed. Cir. Feb. 19, 2021)	48
<i>Waffenschmidt v. MacKay</i> , 763 F.2d 711 (5th Cir. 1985)	53
<i>Wilton v. Seven Falls Co.</i> , 515 U.S. 277 (1995).....	36
<i>Wise v. Wilkie</i> , 995 F.3d 430 (5th Cir. 2020)	41

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. I	53
28 U.S.C. § 284	33
28 U.S.C. § 1332	33
28 U.S.C. § 1367	33
28 U.S.C. § 2201(a).....	33
35 U.S.C. § 271	33
35 U.S.C. § 271(a).....	9
35 U.S.C. § 287	33

RULES

Fed. R. App. P. 12.1(b)	62
Fed. R. Civ. P. 62.1(a)(3).....	62
Fed. R. Civ. P. 65(b)(2).....	15

OTHER AUTHORITIES

Black’s Law Dictionary (11th ed. 2019)56
Joseph Story, *Commentaries on the Conflict of Laws* (1834)24

STATEMENT OF RELATED CASES

No appeal in or from this civil action was previously before this or any other appellate court. The decision in this case may directly affect or be directly affected by *Samsung Electronics Co., Ltd. v. Telefonaktiebolaget LM Ericsson*, E 01 Zhi Min Chu No. 743 (2020), currently pending in the People's Republic of China Wuhan Intermediate People's Court, Hubei Province.

INTRODUCTION

Samsung’s effort to overturn the district court’s discretionary decision to protect its authority—through a defensive, anti-interference injunction—rests on a fun-house-mirror version of international norms. Samsung argues that the district court was required to surrender its constitutional and statutory authority over the case before it in view of an order issued by a court in Wuhan, China. It demands that the district court do nothing to protect that authority, as Samsung invokes the U.S. legal system to *attack* Ericsson’s U.S. patents, while simultaneously using a foreign decree to *prevent* Ericsson from invoking the U.S. legal system to vindicate its U.S. patent rights. Samsung insists the district court stand by, even though the parties and the dispute have a strong connection to it, in favor of a foreign jurisdiction with almost no connection to either. And Samsung insists the district court sit on its hands after Samsung brought the Wuhan suit and obtained the Wuhan injunction in secret. Courts have long rejected such theories and have protected themselves from efforts to undermine their lawful authority.

Ericsson and Samsung own numerous patents essential to the 4G and 5G standards (“SEPs”) and have entered into contractual commitments to license those patents on fair, reasonable, and non-discriminatory (“FRAND”) terms. Both manufacture cellular equipment that must comply with industry standards. Both have long cross-licensed each other’s SEPs. When negotiations to renew cross-licenses failed,

Ericsson filed a complaint in the Eastern District of Texas, where Ericsson Inc. is headquartered and Samsung has major operations. Ericsson seeks damages for Samsung's infringement of Ericsson's SEPs; a declaration that Samsung has breached its FRAND commitment in connection with the parties' negotiations over a cross-license, thereby forfeiting any right to a FRAND license from Ericsson; and a declaration that Ericsson complied with its FRAND commitment in connection with cross-license negotiations. Unbeknownst to Ericsson, however, Samsung had filed its own suit days before in Wuhan—where no part of the licensing dispute took place—seeking adjudication of a FRAND rate for a “one-way” Samsung license to use Ericsson's SEPs.

Under international norms recognized by the Supreme Court for over a century, those two cases should proceed in parallel, with neither court interfering with the other's sovereignty. But Samsung secretly urged the Wuhan court to issue an *ex parte* global anti-suit injunction. The district court responded with a protective injunction to maintain the status quo. It did not attempt to shut down the Wuhan case. It merely enjoined enforcement of the Wuhan court's injunction so *both* suits could proceed.

Attacking the district court's injunction, Samsung contends that U.S. courts must surrender their jurisdiction when there is a “first-filed action” in a foreign court. But the international norm is for parallel cases in courts of different sovereigns to

proceed undisturbed. When confronted by actions that would upset that norm, courts are empowered to issue anti-interference injunctions to protect their authority. Confronted by injunctions similar to the one the Wuhan court issued, other Nations' courts have protected their authority. The district court had no less authority to protect its jurisdiction here.

Samsung cannot show an abuse of discretion. Wuhan has almost no ties to the parties or the case. Samsung's suit there is deliberately partial: Samsung and Ericsson negotiated over a cross-license, but Samsung asked the Wuhan court to calculate a FRAND rate only for Ericsson SEPs, while excluding its own SEPs from that proceeding. The resulting suit cannot decide any rights, because Ericsson's FRAND commitment is *expressly conditioned* on Samsung providing Ericsson with reciprocal FRAND terms for Samsung SEPs; Ericsson has no obligation to offer Samsung the one-way license for which the Wuhan court allegedly will calculate a rate. Samsung's effort to forestall U.S. authority in favor of an incomplete foreign suit smacks of "litigious gamesmanship" intended to tilt the negotiation playing field.

Samsung disagrees with the district court's reading of the Wuhan injunction. But the district court properly concluded that the injunction threatened the proceedings properly before it. Samsung downplays its inequitable behavior in obtaining the Wuhan injunction in secret. But Samsung attacked similar Chinese proceedings

as “antithetical” to due process. And while Samsung attempts to aggrandize a mistake in the district court’s description of related ITC proceedings, the court was entitled to consider the inequity of Samsung seeking to prevent Ericsson from invoking U.S. proceedings to enforce its 4G and 5G patents, while reserving to itself the right to use those proceedings to assert its own patents and attack Ericsson’s. The Eastern District of Texas has an overwhelming interest in adjudicating this case; Wuhan has virtually none. It did not offend comity for the district court to issue a defensive injunction that merely restored the norm of parallel proceedings.

ISSUES PRESENTED

1. Whether the district court properly issued an anti-interference injunction to protect its jurisdiction over a case with strong connections to the U.S.
2. Whether the terms of the district court’s anti-interference injunction were permissible given the threat to its jurisdiction posed by the Wuhan injunction.

STATEMENT OF THE CASE

Plaintiffs are Telefonaktiebolaget LM Ericsson, a Swedish company, and Ericsson Inc., a Delaware company headquartered in Plano, Texas (collectively, “Ericsson”). Appx426(¶¶ 10-11). Ericsson is a leader in wireless communications. Appx430(¶ 25). Ericsson builds cellular infrastructure equipment used by carriers around the world; Ericsson equipment serves over one billion subscribers in 180

countries. *Id.* Ericsson invests \$4-5 billion yearly in innovation, Appx430(¶27), and holds more than 54,000 patents worldwide, Appx423(¶2).

Defendants are Samsung Electronics Co., Ltd., a Korean company, Samsung Electronics America, Inc., a New York company headquartered in New Jersey, and Samsung Research America, a California company headquartered in Mountain View, California (collectively, “Samsung”). Appx426-427(¶¶12-14). Samsung is the world’s largest mobile-phone maker and manufactures myriad other products. Appx424(¶5). Samsung’s Plano, Texas office employs over 1,000 people. Appx427(¶15).

I. WIRELESS STANDARDS, SEPs, AND FRAND LICENSING

A. ETSI’s Wireless Communications Standards

Today, cellular devices and networks use one or more of the 2G, 3G, 4G, or 5G wireless communications standards. Appx2; Appx423-424(¶¶3, 5). Developed by members of the European Telecommunications Standards Institute (“ETSI”), those standards specify how cellular phones and network infrastructure must operate, ensuring interoperability. Appx423-424(¶¶3, 5). Standards also incorporate advances to improve the speed, reliability, security, and energy efficiency of wireless devices and communications. *Id.*

ETSI members include companies that make infrastructure equipment, such as Ericsson, Samsung, and Nokia, as well as mobile-phone providers, such as Apple,

LG, and Samsung. Appx431(¶30). Thousands of engineers from ETSI members spend years working in technical committees to develop each standard. Appx431-432(¶31). Ericsson has made more than 60,000 contributions to the 2G, 3G, 4G, and 5G standards. Appx430(¶27).

B. The FRAND Commitment and Reciprocal Obligations

ETSI standards often incorporate patented technology. Appx432(¶32). Patents covering such technologies are called standard-essential patents (“SEPs”), because devices implementing standards necessarily infringe those patents. *Id.* To ensure fair access and to protect patent holders’ rights, ETSI has adopted an Intellectual Property Rights (“IPR”) policy. Appx432(¶33). Under the policy, companies holding patents that may be standard-essential can voluntarily declare that they are “prepared to grant licenses” on “fair, reasonable, and non-discriminatory” or “FRAND” terms and conditions. Appx431(¶30); Appx432-433(¶34). That declaration creates a contractual obligation, governed by French law, which can be enforced by third parties that implement the standard. Appx432(¶33). Ericsson and Samsung have both committed to license their SEPs on FRAND terms. Appx431(¶30); Appx427(¶15).

Pursuant to ETSI’s IPR Policy, Ericsson’s FRAND “undertaking is made subject to the condition that those who seek licenses agree to reciprocate.” Appx1243. Consequently, where a party has SEPs, Ericsson must license its SEPs on FRAND

terms only if the party is also willing to cross-license its own SEPs to Ericsson on FRAND terms. Appx1236-1237. Samsung likewise insists upon reciprocity. Appx1187-1190.

II. PROCEEDINGS BELOW

A. The Parties Reach an Impasse in Renewing Cross-Licenses

For years, Ericsson and Samsung cross-licensed each other's SEPs for the 2G, 3G, and 4G standards. Appx2. In February 2019, Ericsson contacted Samsung to negotiate a new license, as their existing cross-license would expire on December 31, 2020. *Id.*; Appx434(¶40). Consistent with the reciprocity conditions, the parties began negotiations for a cross-license covering both companies' SEPs. Appx2.

In July 2020, Ericsson offered Samsung a cross-license, specifying that Samsung would make a net balancing payment to Ericsson to reflect the greater value of Ericsson's patented technologies. Appx434(¶42). Samsung made a counteroffer, also for a cross-license (with a much smaller balancing payment), which Ericsson regarded as non-FRAND. Appx435(¶44). To resolve the impasse, Ericsson proposed that a third-party arbitrator determine binding FRAND cross-license terms. Appx435(¶45). Samsung refused. Appx435(¶46).

B. Ericsson Files Suit Where It Is Headquartered and Where Samsung Has a Substantial Presence

Ericsson sued Samsung on December 11, 2020, in the Eastern District of Texas, where Ericsson Inc. is headquartered and where Ericsson representatives

involved in negotiations with Samsung are based. Appx429(¶22); Appx1404. Many of Ericsson’s SEPs are U.S. patents. Appx436-437(¶¶48-55). Samsung has a major presence in the Eastern District, including a large R&D facility. Appx427(¶15). The U.S. is Ericsson’s and Samsung’s largest market. *See* Appx335; Appx388.

Ericsson’s original complaint alleged that Samsung breached its contractual obligations to negotiate in good faith and offer FRAND terms for cross-licensing its SEPs to Ericsson. *See* Appx214-217(¶¶45-64); Appx1-2. Invoking diversity jurisdiction, Appx206(¶¶15-16), Ericsson sought damages, specific performance, and declarations that Samsung violated, and Ericsson complied with, FRAND obligations, Appx217-220(¶¶65-77 & Prayer for Relief). An Ericsson negotiator based in Texas promptly gave his Samsung counterparty a copy of the complaint. Appx394(¶4).

Once the parties’ cross-license expired on December 31, 2020, Ericsson amended its complaint to assert federal claims for infringement of eight U.S. patents. Appx422. Samsung thus concedes subject-matter jurisdiction. Br.x. Nonetheless, Samsung asserts in its Statement that Ericsson’s *original* complaint “Manufacture[d] Diversity Jurisdiction” by naming Ericsson’s and Samsung’s U.S. subsidiaries to “gain[] a toehold in the Eastern District of Texas” until Ericsson’s federal infringement claims ripened. Br.14-17; *see* Br.x-xi, 62-63. That accusation, never made

below and asserted without supporting argument or facts, is frivolous. Parties are “nominal” and can be “disregarded” for diversity-jurisdiction purposes *only* if they have “no real interest in the dispute.” *Louisiana v. Union Oil Co.*, 458 F.3d 364, 366 (5th Cir. 2006). Samsung never attempts to show the U.S. entities here—plaintiff Ericsson Inc., a Delaware and Texas corporation, and defendants Samsung Electronics America, Inc. (“SEA”), a New York and New Jersey corporation, and Samsung Research America (“SRA”), a California corporation, Appx205(¶¶9, 12-13)—lack a genuine interest.

Nor could it. The original complaint sought declarations that Ericsson complied with FRAND in negotiations over a cross-license, and specific performance of Samsung’s obligation to offer Ericsson a FRAND license. Appx220. Ericsson Inc., SEA, and SRA have a strong interest in those claims because they each “import[]” and “sell[]” products implementing 4G and 5G standards in the U.S.; they risk liability for infringing U.S. SEPs absent a license. *See* 35 U.S.C. §271(a). “Ericsson Inc.” thus “requires a license on FRAND terms” to Samsung’s SEPs, Appx207(¶20), and SEA and SRA require a license on FRAND terms to Ericsson’s SEPs, Appx206-207(¶¶18-19). They are proper parties. Samsung’s contrary accusation is not colorable.

C. Samsung Secretly Files Suit in Wuhan and Obtains an *Ex Parte* Injunction Against U.S. Proceedings

1. *Samsung Secretly Files an Incomplete Action in a Jurisdiction It Has Decried and That Lacks Connection to the Parties and Their Dispute*

In the meantime, Samsung secretly filed suit against Ericsson in China—in the Wuhan Intermediate People’s Court of Hubei Province. Appx2. Samsung did not notify Ericsson of the Wuhan lawsuit when it was accepted for filing on December 7, 2020. Appx3. It did not notify Ericsson when a panel was assigned on December 11, 2020 (the same day Ericsson filed its complaint in the Eastern District of Texas). *Id.* Because the Wuhan filings are not available electronically, Ericsson had no access to information regarding the suit. *Id.* n.4.

While Ericsson’s U.S. suit seeks to resolve the parties’ reciprocal obligations with respect to negotiations over cross-licenses, Samsung’s Wuhan suit requests determination of a “one-way” FRAND royalty for just Ericsson SEPs, without cross-licenses for Samsung SEPs. Appx2; Appx11-12 & n.10. Samsung’s suit thus avoids putting Samsung’s own SEPs or FRAND commitments before the Wuhan court.

Samsung identified no connection between the dispute and Wuhan. None of the parties’ negotiators reside in Wuhan and no negotiations took place there. Appx1404(12:13-24). Neither party has a major presence in Wuhan. *Id.*; *see also* Appx334-340; Appx388. China is Samsung’s **30th** largest market for cellular devices. Appx1404-1405(12:25-13:1); *see* Appx334-340. Samsung, moreover, had

previously told a U.S. district court that the Chinese court system is “antithetical to the United States judicial system,” and that “there’s no due process requirements like the[re] are in this country.” Appx392.

2. *Samsung Obtains an Ex Parte Injunction To Prevent Ericsson from Pursuing U.S. Remedies*

On December 14, 2020—three days *after* Ericsson filed its U.S. suit—Samsung filed a “Behavior Preservation Application” in Wuhan, seeking an anti-suit injunction to prevent Ericsson from seeking relief relating to its 4G and 5G SEPs anywhere else in the world. Appx3; *see* Appx978-980. Samsung included a copy of Ericsson’s Texas complaint. Appx721; Appx724-745.

To keep the application secret, Samsung asked the Wuhan court to “hold the service” until after the injunction issued. Appx3; Appx9; *see* Appx713; Appx715. If the application became known, Samsung warned, other courts would act to prevent enforcement of the anti-suit injunction. Appx3. The “legal opinions of [Samsung’s] UK, German and Indian counsels,” Samsung advised, indicated a “high” and “realistic probability” that other courts would grant a “pre-emptive interim injunction” to protect their authority. Appx714. Even when Samsung notified Ericsson of the Wuhan suit on December 17, 2020, it kept the application secret. Appx3; Appx394(¶6).

On December 25, 2020, the Wuhan court issued its injunction. Appx4. That injunction prohibits Telefonaktiebolaget LM Ericsson and its affiliates—including Ericsson Inc., which is not a party to the Wuhan suit—from:

- “[A]pplying for any preliminary and permanent injunctive relief or administrative measures” against Samsung relating to its 4G and 5G SEPs from any other court or agency in the world. Appx4; *see* Appx573-575.
- “[R]equesting” that any court “adjudicate the licensing terms” for its 4G and 5G SEPs, including the “royalty rate” and “royalty amount.” Appx574.
- Seeking a determination that Ericsson had “fulfilled [its] FRAND obligations” in negotiating with Samsung. *Id.*

The Wuhan injunction also ordered Ericsson to “immediately withdraw or suspend such claims that have already been filed,” and prohibited Ericsson from seeking to force Samsung to seek withdrawal of the injunction or precluding its enforcement. Appx574-575. The injunction, which threatens substantial fines, was to remain in effect “*for the duration*” of the Wuhan case. Appx5 (emphasis added); Appx573; Appx575.

The Wuhan court did not notify Ericsson until the day its injunction issued—December 25, 2020. Appx2-3; Appx5; *see* Appx369-370. It gave Ericsson five days to “apply for reconsideration,” Appx575, which Ericsson did, Appx1480(88:10-11); Appx1486-1487(94:25-95:1). That request was recently denied.

D. The U.S. District Court Issues a Defensive TRO and Preliminary Injunction To Protect U.S. Proceedings

On December 28, 2020, Ericsson filed an emergency application in the Eastern District of Texas to prevent Samsung from interfering with the action pending there. Appx225. The court granted a temporary restraining order, invited briefing from Samsung, and set a hearing on Ericsson's preliminary-injunction request. Appx17-20. Following the hearing, it issued a defensive, anti-interference preliminary injunction. Appx15-16.

The court emphasized the "well established" principle "that a federal court is empowered to issue injunctions to protect its jurisdiction." Appx5. The court distinguished the relief Ericsson requested, which sought to *preserve* the authority of *each court*, from the injunction Samsung procured in Wuhan:

Ericsson is *not* seeking an anti-suit injunction to prevent the Chinese Action from proceeding. Rather, Ericsson is seeking an anti-anti-suit injunction (sometimes called an anti-interference injunction) to prevent Samsung from attempting to enforce the [Wuhan anti-suit injunction] and *thereby interfering* with [the district court's] exercise of its own jurisdiction.

Appx7 (emphasis added).

Consistent with Fifth Circuit law, the court considered "'principles of international comity,'" "the need to 'prevent vexatious or oppressive litigation,'" and the need "'to protect the court's jurisdiction'" over cases properly before it. Appx6. The court found that enforcement of the Wuhan injunction would interfere with its

“compelling interest in ensuring that litigation within its legitimate jurisdiction proceed in this forum.” Appx8. Enforcement would not merely “frustrate and delay” adjudication of causes of action before it, but would “prohibit[] their adjudication” altogether. Appx10-11. It would bar litigation of “causes of action properly raised in this Court and *not raised in the Chinese Action.*” Appx11. The court acknowledged that some of Ericsson’s causes of action might not be covered by the Wuhan injunction, but held that “the inability for this Court to hear one or many causes of action equally offends the efficient adjudication of such issues.” Appx11 n.8.

The Wuhan proceedings, the district court continued, would not be adversely affected by an injunction allowing Ericsson’s U.S. suit to proceed. Appx8. The claims before each court “are different.” *Id.* The parties had been negotiating a reciprocal cross-license. But Samsung’s action in Wuhan sought a one-way rate determination *only* for *Ericsson’s* 4G and 5G SEPs, excluding Samsung’s SEPs from the case. Appx11-12; *see* Appx517-518. Ericsson’s suit, by contrast, asked the U.S. court “to look at the parties’ *pre-suit negotiation conduct* and determine whether *the parties* breached or complied with their *mutual* FRAND obligations.” Appx11-12 (emphasis added). The “Wuhan Court is asked to provide [an Ericsson-only] number,” while “[t]his Court is asked to evaluate [both parties’] conduct.” Appx12. At the hearing, Samsung itself had distinguished the Chinese action, which

it described as limited to “set[ting] a rate which is FRAND,” Appx1492(100:1), from the U.S. claims “deal[ing] with the conduct of the parties,” such as “breach of contract, [and] breach of good faith,” Appx1493(101:16-19). Samsung agreed that “[w]hether [Ericsson’s] conduct was FRAND,” and “what the actual FRAND rate is as a matter of dollars and cents,” are distinct. Appx1496(104:10-15).

Because the issues are different, the court found, “the causes of action [in the U.S. court] have no implication on the speedy and efficient determination of the issues raised before the Wuhan Court.” Appx11. “The Wuhan Court can continue to adjudicate the claims that Samsung has brought before it, pursuant to its laws and its rules of civil procedure.” *Id.* The fact that “both Courts can properly exercise jurisdiction over the respective causes of action brought before them” weighed strongly in favor of the anti-interference injunction. Appx8.

The balance of hardships likewise favored a protective injunction. Enforcement of the Wuhan injunction would deprive Ericsson—“[w]ithout notice or an opportunity to be heard”—of its “right to attempt to obtain redress for claims it has the right to bring under the laws of the United States.” Appx9. At the hearing, Samsung had agreed that the Wuhan court had “imposed a preliminary injunction *ex parte*.” Appx1437(45:1-6).¹ It did “not dispute[.]” that “Ericsson had no notice” of

¹ Under Federal Rule of Civil Procedure 65(b)(2), *ex parte* TROs expire automatically at the end of 14 days. The *ex parte* Wuhan injunction was in place for months until the Wuhan court denied reconsideration, and will remain in place indefinitely.

the Wuhan litigation “until well after [Ericsson] filed” its complaint in the Eastern District. Appx1452(60:19-24). Samsung would suffer no hardship from proceeding in both courts: It had “agreed on the record . . . that parallel actions are inevitable” and “readily admitted” that Ericsson’s U.S. action was not “vexatious or oppressive.” Appx10 (citing Appx1428(36:4-10); Appx1468(76:18-21)).

The district court rejected Samsung’s rationalizations for the Wuhan injunction. It had no doubt the “real motivation” for procuring the Wuhan injunction was to “put Ericsson in a weaker negotiating position.” Appx10. The parties had been negotiating reciprocal cross-licenses. But the Wuhan suit put only the value of Ericsson’s SEPs at issue, and restrained only Ericsson’s ability to assert its patents. Appx11-12. The Wuhan injunction would “prevent Ericsson from seeking injunctive relief relating to its 4G and 5G SEPs in any tribunal in the world except in the Wuhan Court,” while not limiting Samsung’s options. Appx12. Indeed, Samsung thereafter asserted patents against Ericsson in the U.S. International Trade Commission (“ITC”), and challenged Ericsson patents in the U.S. Patent and Trademark Office (“PTO”). Allowing Samsung to “seek redress of its claims” in the U.S., while “[tying] Ericsson’s hands from doing the same,” “would be the height of inequity (and hypocrisy).” Appx13.

The district court entered a defensive anti-interference injunction prohibiting Samsung from:

- (1) Taking “action in the Chinese Action that would interfere with this Court’s jurisdiction to determine whether Ericsson or Samsung have met or breached their FRAND obligations” relating to their 4G and 5G SEPs or “with any other cause of action before this Court”; and
- (2) Taking “action in the Chinese Action that would deprive Ericsson” of its “rights to assert the full scope” of U.S. patent rights “in the United States.”

Appx15 (footnote omitted). The court ordered that Samsung indemnify Ericsson for fines imposed to enforce the Wuhan anti-suit injunction insofar as they were imposed against Ericsson for engaging in otherwise lawful U.S. litigation over “claims relating to the 4G and 5G SEPs identified or involved in this case.” *Id.*

The court deemed the indemnification provision critical to address its “concern that Samsung may seek the imposition of substantial fines in the Chinese Action for the purpose of creating economic leverage against Ericsson to achieve practically what it may not be able to obtain legally.” Appx14. Indemnification was especially necessary given the risk of *ex parte* communications. Samsung had agreed that, in Chinese proceedings, “the judge can call either side and meet with them separately.” Appx1476(84:8-10). Thus, there would be “[n]o record” if Samsung suggested to the Chinese court that a penalty be imposed. Appx1417(25:5). The indemnity would “put both parties in the same position.” Appx1418(26:18-19). Samsung would not “have a sword and [Ericsson] be unarmed” in what should be “parallel litigation.” Appx1441(49:5-7).

After the district court issued its order, Samsung filed a “notice to clarify” that the ITC proceeding referenced in the order did not involve SEPs. Appx1501-1502. Ericsson responded, explaining why the clarification is “irrelevant to the scope of the” anti-interference injunction. Appx1545.

This appeal followed.

SUMMARY OF ARGUMENT

I.A. Under centuries-old principles, cases in courts of different Nations ordinarily proceed concurrently. Where one court disturbs that norm with an anti-suit injunction, other courts are authorized to respond with orders to protect their jurisdiction. Courts worldwide issue injunctions similar to the one the district court issued here; courts in Germany and India took identical action in response to an indistinguishable injunction by the same Wuhan court. Samsung is wrong to suggest that U.S. courts would have enjoined foreign litigation under the same circumstances—especially given that the Wuhan action is unlikely to produce a binding outcome, since it involves calculating FRAND terms for a one-way license, while the contract entitles Ericsson to insist on a two-way cross-license.

I.B. The protective injunction was appropriate under governing Fifth Circuit law. The district court properly concluded that enforcement of the Wuhan injunction would frustrate important congressional policies by barring Ericsson from seeking patent and declaratory-judgment remedies Congress empowered federal courts to

grant. The Wuhan injunction threatened all of Ericsson's claims, including claims not raised in Wuhan. Enforcement of the Wuhan injunction also would have been vexatious and oppressive, denying Ericsson remedies available in the U.S. but not in China. And the equities favored a protective injunction—Samsung obtained the Wuhan injunction in secret without Ericsson's participation. The Wuhan injunction also left Samsung free to file enforcement actions with respect to its SEPs all over the world while tying Ericsson's hands with respect to enforcement of Ericsson SEPs.

I.C. Samsung nitpicks the district court's analysis but fails to show abuse of discretion. The court reasonably found the Wuhan injunction—a decree of indefinite duration—threatened many if not all of Ericsson's U.S. claims. Samsung's contrary arguments are wrong and employ the wrong test. The court also correctly evaluated the inequity and prejudice to Ericsson from Samsung obtaining a lopsided anti-suit injunction in secret from the Wuhan court. Samsung's comparison to *forum non conveniens* underscores why the district court acted within its discretion. Had Samsung filed such a motion here, it certainly would not have prevailed. Samsung should not be permitted to accomplish the same result through an anti-suit injunction. While Samsung notes an error in the description of a related ITC case, the district court's point was correct: The Wuhan injunction left Samsung free to file injunctive actions in the U.S. while denying Ericsson that same U.S. remedy.

I.D. The district court correctly concluded that comity did not require it to surrender its jurisdiction to the Wuhan court. A court’s authority to issue a protective injunction in response to a foreign court’s overreach reflects comity principles. Samsung’s attempt to conjure a rule that district courts must defer to “first-filed” foreign actions falls short. Courts have long rejected any such rule. And the notion that China is an especially appropriate forum because it will adjudicate FRAND rates on a global basis is a fiction. No court will impose contracts on parties without consent, and Ericsson does not consent to the one-way rate Samsung seeks. Where parties consent, however, U.S. courts can impose FRAND licenses.

II. The scope of the district court’s anti-interference injunction is supported by Fifth Circuit precedent and necessary for its efficacy. Without nationwide reach, indemnification, and permission for Ericsson to seek U.S. injunctive relief, the injunction would not remedy the Wuhan court’s interference with U.S. courts’ and agencies’ lawful jurisdiction. The district court properly restored the status quo with an injunction narrowly tailored to address Samsung’s overreach in procuring the Wuhan injunction, but which avoids interfering with the Wuhan litigation on the merits.

ARGUMENT

District courts have unquestioned authority to issue orders to protect their jurisdiction—their authority to grant relief in cases properly before them—from out-

side interference. The longstanding norm is that proceedings in the courts of different Nations, even related proceedings, may proceed in parallel. Anti-interference injunctions like the one the district court entered here reflect that principle. When the same Wuhan court issued an almost indistinguishable injunction seeking to claim exclusive jurisdiction over an SEP dispute in the past, German and Indian courts issued decrees to protect the rights of the patentees to seek relief in their courts. The district court had no less authority here.

The district court did not foreclose Samsung's Wuhan suit. It allowed that case to proceed. It merely protected its authority to adjudicate a dispute properly before it. That was especially appropriate as both parties and the dispute have strong connections to the Eastern District of Texas—and virtually no connection to Wuhan.

Samsung attempts to rewrite centuries of law to suggest a “first-to-file” system under which one Nation's courts may halt proceedings in other Nations. That proposed rule has been repeatedly rejected. Samsung assails the district court's description of the Wuhan injunction, its analysis of Chinese procedure, and the details of a related ITC case that Samsung filed. But those arguments show neither reversible error nor an abuse of discretion. The district court's injunction was no broader than necessary to allow Ericsson's U.S. claims to proceed.

Standard of Review. Under governing Fifth Circuit law, the issuance of a preliminary injunction is reviewed for abuse of discretion. *Kaepa, Inc. v. Achilles*

Corp., 76 F.3d 624, 626 (5th Cir. 1996). Factual findings “‘are not overturned unless “clearly erroneous.”’” *Houston Agric. Credit Corp. v. United States*, 736 F.2d 233, 235 (5th Cir. 1984). Legal conclusions are reviewed *de novo*. See *Janvey v. Alguire*, 647 F.3d 585, 592 (5th Cir. 2011).

I. THE DISTRICT COURT PROPERLY GRANTED A DEFENSIVE INJUNCTION

Samsung’s argument begins with a false narrative of international norms and Fifth Circuit law. Samsung treats it as routine for one Nation’s courts to assert exclusive authority and prohibit other courts from adjudicating claims. Br.36-37. It then rewrites Fifth Circuit law to forbid district courts from responding to such overreaching unless the foreign court’s “exercise of jurisdiction is improper or fundamentally unfair (to the point of being illegitimate).” Br.51. Both suppositions are wrong. Under settled law, the district court’s exercise of authority to protect proceedings and the rights of the parties before it was unquestionably proper.

A. The District Court Had Unquestioned Authority To Issue a Defensive Injunction To Protect U.S. Proceedings from Foreign Interference

1. Courts have long followed the “rule” that they will not surrender jurisdiction notwithstanding the “pendency of a suit in a *foreign* court” even if it involves the same parties and claims. *Bowne v. Joy*, 9 Johns. 221 (N.Y. 1812) (citing *Maule v. Murray*, 7 T.R. 470 (1798)); see *Renner & Bussard v. Marshall*, 14 U.S. 215, 217 & n.a (1816); *Stanton v. Embrey*, 93 U.S. 548, 554 (1877). Conversely,

courts ordinarily will not “interfere with or try to restrain proceedings in another” Nation’s courts. *Compagnie des Bauxites de Guinea v. Ins. Co. of N. Am.*, 651 F.2d 877, 887 (3d Cir. 1981) (citing *Donovan v. City of Dallas*, 377 U.S. 408, 412 (1964)), *aff’d sub nom. Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982); *Hyman v. Helm*, [1883] 49 LT 376, 380 (Eng.) (Bowen LJ) (appeal) (Appx1557-1561). Such “interfere[nce]” would “clash” with fundamental principles of sovereignty. *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 372-73 (5th Cir. 2003); *Cohen v. Rothfield*, [1919] 120 LT 434, 434 (Eng.) (Scrutton LJ) (appeal) (Appx1554-1556) (injunctions against pursuit of foreign proceedings “exercised with great caution, to avoid even the appearance of undue interference with another court”).

Instead, when parallel cases are filed in courts of different sovereigns, “[e]ach court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court.” *Kline v. Burke Constr. Co.*, 260 U.S. 226, 230 (1922); see *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11, 16-20 (1st Cir. 2004) (“presumption in favor of concurrent jurisdiction”). “[P]arallel proceedings”—even “on the same in personam claim”—“should ordinarily be allowed to proceed simultaneously, at least until a judgment is reached in one which can be pled as *res judicata* in the other.” *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 926-27 (D.C. Cir. 1984); see, e.g., *Karaha*,

335 F.3d at 372 n.59 (citing *Laker*); *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 35 (2d Cir. 1987) (same). Each Nation’s courts exercise “independent sovereign power” and have “exclusive and absolute” jurisdiction over cases within their borders. *The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812); see Joseph Story, *Commentaries on the Conflict of Laws* § 8 (1834); *The Corfu Channel*, Judgment, 1949 I.C.J. 4, 35 (Apr. 9) (Appx1993-2067). “For this reason, injunctions restraining litigants from proceeding in courts of independent countries are rarely issued.” *Laker*, 731 F.2d at 927; *E.&J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984, 989 (9th Cir. 2006) (anti-suit injunctions to “‘be used sparingly’”); *MWK Recruiting Inc. v. Jowers*, 833 F. App’x 560, 564 (5th Cir. 2020) (“‘extraordinary remedy’” that should not be “commonplace”).

Samsung never reconciles the Wuhan injunction with those principles. That injunction proscribes Ericsson’s ability to pursue its U.S. claims, requiring it to “withdraw or suspend” claims “that have already been filed.” Appx574. It bars Ericsson from seeking statutorily authorized injunctive relief on its 4G and 5G SEPs. *Id.* It forecloses any effort to “adjudicate the licensing terms” for Ericsson’s 4G and 5G SEPs, including “royalty rate” and “royalty amount.” *Id.* And it bars Ericsson from seeking a determination that it had “fulfilled [its] FRAND obligations” in negotiating with Samsung—precisely what Ericsson had sought. *Id.* Samsung never argues the suit in the Eastern District is so “vexatious or oppressive” as to justify

foreign-court interference. To the contrary, Samsung agreed these proceedings were “[a]bsolutely not” oppressive or vexatious. App1468(76:21-24). While Samsung asserts that allowing Ericsson to pursue such claims “would plainly interfere with the global rate-setting action” the Wuhan court would allegedly conduct, Br.36, nothing about Ericsson’s U.S. suit impedes the Wuhan court’s ability to address Samsung’s claims.

Samsung’s assertion that the existence of overlapping issues “plainly threaten[s] interference with the Chinese action,” Br.44, defies international norms. “‘The general rule . . . is that concurrent proceedings regarding the same question are tolerated.’” *Bugliotti v. Republic of Argentina*, 952 F.3d 410, 415 (2d Cir. 2020). Overlapping issues are not “‘exceptional circumstances’” that justify departure from the norm but are “‘generally present as a result of parallel litigation.’” *Id.*; see *Laker*, 731 F.2d at 928; *Cohen*, 120 LT at 436 (Eve J) (Appx1556) (existence of “overlap[ping]” issues in parallel cases is “quite insufficient” for anti-suit injunction).

2. Samsung ignores “[t]he logical reciprocal of the parallel proceeding rule”: Where a foreign Nation’s court reaches across the border to interfere with lawsuits here, this Nation’s courts may protect the parties and matter before them. *Laker*, 731 F.2d at 929. “Just as” the law “counsels against” interfering with “concurrent jurisdiction,” it “authorizes *the domestic court to resist the attempts of a foreign*

court to interfere with an in personam action before the domestic court.” *Id.* (emphasis added).

When a foreign court “attempts to carve out exclusive jurisdiction over concurrent actions” by enjoining litigation here, domestic courts may issue injunctions to “conserve [their] ability to reach a judgment.” *Laker*, 731 F.2d at 929-30; *see id.* at 938 (distinguishing “*defensive*” and “*offensive*” injunctions); *Quaak*, 361 F.3d at 20-21 (affirming “defensive injunction that sought only to preserve the court’s ability to adjudicate the claims before it”). “Our courts are not required to stand by” when a foreign court “attempts to close a courthouse door” that Congress, exercising “territorial jurisdiction, has opened.” *Laker*, 731 F.2d at 936. Courts worldwide recognize the legitimacy of defensive injunctions against foreign efforts to restrict domestic relief. Appx1116; *see, e.g., Nokia v. Continental*, Oberlandesgericht München [Munich Higher Regional Court], Dec. 12, 2019, 6 U 5042/19 (Ger.), translation at 8 (Appx1858-1867) (granting anti-interference injunction “as a defense against” interference with enforcement of German “patent rights in Germany”).² Anti-interference injunctions “merely serve[] as a defense against”

² *See also InterDigital Tech. Corp. v. Xiaomi Commc 'ns Co.*, Landgericht München [Munich Regional Court I], Feb. 25, 2021, 7 O 14276/20 (Ger.), translation at 39 (Appx1868-1922) (confirming anti-interference injunction to ensure patentee is not “deprived of his right[s]” to “enforcement”); *Interdigital Tech. Corp. v. Xiaomi Corp.*, Delhi HC, Oct. 9, 2020, I.A. 8772/2020 in CS(COMM) 295/2020 ¶76 (India) (Appx252-324) (granting anti-interference injunction to protect “jurisdiction of

encroachments on domestic authority and thus “do not constitute an interference with the sovereign rights” of other Nations. *Nokia*, No. 6 U 5042/19, *supra*, translation at 8 (Appx1865).

Other courts have issued protective injunctions to address a decree from the same Wuhan court nearly indistinguishable from the one here. India’s Delhi High Court issued an injunction to address the Wuhan court’s attempt to seize exclusive jurisdiction over another FRAND dispute. *Interdigital Tech. Corp.*, CS(COMM) 295/2020 ¶¶ 1-39, 75-76 (Appx252-276; Appx321). A German court, dealing with the same Wuhan injunction, followed suit, declaring the decree was “not to be recognized in Germany.” *InterDigital Tech. Corp.*, 7 O 14276/20, *supra*, translation at 39 (Appx1906); *see* Appx985. As the German regional court panel explained, the Wuhan injunction “threatened” patent holders and created a “coercive situation” that limited the freedom of companies holding German patents to protect their rights in Germany. *InterDigital Tech. Corp.*, 7 O 14276/20, *supra*, translation at 39

[Indian] Court”); *Pan Austl. Shipping Pty. Ltd. v. The Ship ‘Comandate’*, [2006] FCA 881 ¶31 (Austl.) (Appx1935-1948) (anti-interference injunction to protect right to “pursue[.]” claims under Australian law); *IPCom GmbH & Co. KG v. Lenovo Tech. (U.K.) Ltd.*, [2019] EWHC (Pat) 3030 ¶¶ 52-54 (Eng.) (Appx1098-1109) (anti-interference injunction to protect English proceedings); *Lenovo (U.S.) Inc. v. IPCom GmbH & Co. Kg*, Cour d’appel [CA] [regional court of appeal] Paris, civ., Mar. 3, 2020, 14/2020 ¶36 (Fr.) (Appx1923-1934) (requiring party to withdraw request for anti-suit injunction that constituted “manifestly unlawful disturbance”).

(Appx1906). The U.S. district court had no less authority to protect its jurisdiction and the parties before it here.

Samsung knows that rule—which is why it urged the Wuhan court to withhold service (*i.e.*, notice) of its application for the injunction. If the application became known, Samsung warned, there was a “high” probability other courts would issue “pre-emptive interim injunction[s]” to protect their authority to grant relief. Appx714; *see* Appx303-317.

3. Seeking to normalize the Wuhan decree it procured, Samsung urges that *U.S.* courts would interfere with foreign proceedings just as the Wuhan court interfered with U.S. proceedings here. *See* Br.3, 40-41; *see* Professors’ Br.15-16 (Fed.Cir.Dkt. 23). The three cases it cites show no such thing.

TCL Communication Technology Holdings, Ltd. v. Telefonaktiebolaget LM Ericsson, No. 14-cv-341, Dkt. 279-1 (C.D. Cal. June 29, 2015), involved a “mutual agreement” between the parties to stay foreign suits in favor of a “global resolution” of their FRAND dispute in the U.S. *Id.* at 11. That consensual resolution provides no support where the propriety of the interference is disputed.

And *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872 (9th Cir. 2012), and *Huawei Technologies v. Samsung Electronics Co.*, No. 16-cv-2787, 2018 WL 1784065 (N.D. Cal. Apr. 13, 2018), undermine Samsung’s position. Those cases invoke the generally accepted view that parties seeking to enjoin foreign suits must

make a “threshold” showing that “‘the parties and the issues are the same’ in both the domestic and foreign actions” such that the domestic action “‘is *dispositive* of the [foreign] action to be enjoined.’” *Microsoft*, 696 F.3d at 882 (emphasis added); *see Huawei*, 2018 WL 1784065, at *8, *10; *accord Quaak*, 361 F.3d at 18; *China Trade*, 837 F.2d at 35; *MWK*, 833 F. App’x at 564-65 (must consider whether actions are legally “duplicative”). Efforts to litigate absolutely “identical” or “duplicative” actions, some authorities reason, may sometimes constitute “‘vexatious’ litigation.” *Laker*, 731 F.2d at 928 & n.55. But if the suits are not duplicative, U.S. courts will “go no further and refuse the issuance of an international antisuit injunction.” *Quaak*, 361 F.3d at 18; *cf.* Professors’ Br.15 (conceding that action pending before court must be “dispositive of the foreign action” to be enjoined).

Samsung never suggests that the Wuhan injunction would be issued by U.S. courts under that standard—because it flunks the test. The U.S. action extends well beyond the case Samsung filed in Wuhan. The Wuhan case seeks determination of one-way “royalty rates” solely for a license to *Ericsson* SEPs; Samsung excluded its own SEPs from that case. Appx410. The U.S. case, by contrast, addresses the parties’ compliance with their FRAND obligations in negotiations over “a *cross-license*” to both parties’ SEPs. Appx12 n.10; *see* Appx480; Appx442-445. Whereas the Wuhan case involves forward-looking royalty *numbers*, the U.S. case involves *conduct*: compliance with FRAND obligations by “offering a license on FRAND terms” or

“negotiating in good faith towards a FRAND license.” *HTC Corp. v. Telefonaktiebolaget LM Ericsson*, No. 18-cv-243, 2019 WL 4734950, at *6 (E.D. Tex. May 22, 2019); *see* Appx12. The district court case also seeks damages for past infringement. Appx481. The Wuhan action does not. Samsung thus *concedes* that this action is not “vexatious or oppressive,” and that the Wuhan action cannot be dispositive of this one. Appx10.

The Wuhan action thus concerns less than half the controversy here: Samsung’s suit there seeks a FRAND rate for a license from Ericsson to Samsung, not the two-way cross-license that the parties were negotiating. *See* pp. 6-7, *supra*; Appx12 n.10. For that reason, the Wuhan case cannot even produce the binding global license Samsung purports to seek there. Ericsson’s FRAND commitment (like Samsung’s) is “made subject to the condition that those who seek licenses agree to reciprocate.” Appx1237. Ericsson must offer Samsung FRAND terms only if Samsung reciprocates with a FRAND cross-license to its own SEPs. *See* pp. 6-7, *supra*. The one-way license rate Samsung seeks from the Wuhan court thus cannot result in a license; Ericsson has no obligation to enter a one-way licensing agreement. Appx211; *see* Appx12 n.10. It is doubtful the Wuhan case can provide a meaningful result, let alone dispose of this action. A U.S. court likely would not even entertain a suit seeking to enforce half of a bilateral contractual commitment. Samsung’s suggestion that U.S. courts would go further to invoke such a suit to

enjoin *another* sovereign from adjudicating disputes respecting patents *that* sovereign issued defies credulity.

Samsung also ignores the inequitable effect of the Wuhan injunction. Ericsson and Samsung need licenses for each other's SEPs. The Wuhan injunction Samsung obtained, however, would "prevent Ericsson" alone "from seeking injunctive relief relating to its 4G and 5G SEPs," while leaving Samsung free to pursue injunctions around the globe to halt sales of Ericsson products. Appx12. The district court recognized the "hypocrisy" of such a decree, and that its unbalanced impact could force Ericsson to surrender its U.S. rights without a proper adjudication. Appx12-13. Samsung never suggests U.S. courts would issue such an unbalanced injunction, and *Microsoft* and *Huawei* reject such one-sided pressure tactics. *Microsoft*, 696 F.3d at 886; *Huawei*, 2018 WL 1784065, at *10.

B. The Defensive Anti-Interference Injunction Was Proper Under Fifth Circuit Law

The district court's anti-interference injunction was a proper exercise of discretion. Confronted with Samsung's effort to wrest away district court authority relating to Ericsson's 4G and 5G SEPs, the court reasonably defended its lawful power to resolve the case before it. In the Fifth Circuit, courts may issue anti-suit relief, even to *proscribe a foreign action*, where that action would "frustrate a policy" of the U.S. courts; be "vexatious [and] oppressive"; or "prejudice other equitable considerations." *In re Unterweser Reederei GmbH*, 428 F.2d 888, 890

(5th Cir. 1970), *aff'd on reh'g*, 446 F.2d 907 (5th Cir. 1971) (en banc) (per curiam), *rev'd on other grounds sub nom. M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). Any “one of” those “‘*Unterweser* factors’” is sufficient; those considerations are then weighed against any resulting intrusion on “international comity.” *Microsoft*, 696 F.3d at 881; *MWK*, 833 F. App’x at 562. The *Unterweser* factors, which Samsung barely addresses, amply support the district court’s protective injunction.

Moreover, *Unterweser* overstates the necessary showing here. “[D]efensive” injunctions seeking only to restore the norm of parallel proceedings and “preserve the district court’s” authority—like the order here—are more easily justified than “offensive” injunctions that would foreclose relief in foreign courts. *Laker*, 731 F.2d at 938 (emphasis omitted). That injunctions are reserved for “extraordinary” situations, Br.36, adds nothing. Samsung cites no court that has ever refused to protect itself from foreign court interference on such a theory; and a foreign court’s effort to deny U.S. courts their ability to adjudicate matters within their jurisdiction is exceptional regardless. *E.g.*, *Quaak*, 361 F.3d at 20; *see also Laker*, 731 F.2d at 929; *Microsoft*, 696 F.3d at 881, 889; *Unterweser*, 428 F.2d at 890. Application of ordinary standards for anti-interference injunctions confines that relief to exceptional cases. *MWK*, 833 F. App’x at 562.

1. Frustration of Policy. The district court’s injunction was an appropriate response to a decree that would frustrate U.S. policy. Congress empowered federal courts to adjudicate infringement of U.S. patents and to enjoin infringement. 35 U.S.C. §§ 271, 287. Congress authorized them to issue declaratory judgments. 28 U.S.C. § 2201(a). And Congress granted supplemental and diversity jurisdiction to adjudicate contract claims, including breaches of FRAND obligations. *Id.* §§ 1332, 1367.

Enforcement of the Wuhan injunction “frustrate[s]” those congressional decisions. Appx11. Clause 1 of the Wuhan injunction prohibits Ericsson from seeking an injunction for the SEPs asserted here, despite Congress’s determination that federal courts have injunctive authority. Appx4. Clause 3 prohibits Ericsson from requesting that courts “adjudicat[e] the licensing terms (including the royalty rate) *or royalty amount*” for Ericsson 4G and 5G SEPs. *Id.* (emphasis added). That threatens even damages for infringement under § 284—which are no less than a reasonable royalty—as FRAND “limits” reasonable royalties for any SEP. *Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1231 (Fed. Cir. 2014). And Clause 4 prohibits Ericsson from filing a case “to determine whether [Ericsson] fulfilled [its] FRAND obligations,” Appx4, even though Congress authorized district courts to issue such declaratory relief, 28 U.S.C. § 2201(a).

The effort to deny Ericsson Inc.—a U.S. citizen and U.S. patentee—the right to seek relief Congress made available “frustrate[s]” Congress’s policy and U.S. law. Federal courts have unquestioned authority to resist foreign efforts to “supersede the right and obligation of the United States courts” to adjudicate matters properly before them. *Laker*, 731 F.2d at 935-36; *Quaak*, 361 F.3d at 20-21. They may defend the “‘virtually unflagging obligation of the federal courts to exercise the jurisdiction given them.’” Appx8 (quoting *Colo. River Water Conserv. Dist. v. United States*, 424 U.S. 800, 817 (1976)); see *Bugliotti*, 952 F.3d at 414-15 (district court defies its “‘unflagging obligation to exercise its jurisdiction’” and abuses its discretion in “‘surrender[ing]’” jurisdiction to foreign court absent “‘exceptional circumstances’”). That authority has a long pedigree: The first Judiciary Act of 1789 authorized federal courts to “‘issue all writs necessary or appropriate in aid of their respective jurisdictions,’” *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 172 (1977), including “injunction[s] to preserve and protect [their] jurisdiction,” *Newby v. Enron Corp.*, 302 F.3d 295, 300-01 (5th Cir. 2002).

The district court’s exercise of that authority was particularly warranted to resist the extreme intrusion on federal authority Samsung sought to impose. **First**, the Wuhan court’s injunction threatened all of Ericsson’s U.S. claims in the Eastern District. The Wuhan injunction does not merely proscribe injunctive relief. It bars any “adjudicat[ion of] the licensing terms (including the royalty rate) or royalty

amount . . . of [Ericsson] 4G and 5G SEPs,” as well as Ericsson’s compliance with its FRAND obligations. Appx4. Because calculating damages requires determining reasonable royalties in view of “limits” imposed by FRAND commitments, *see Ericsson*, 773 F.3d at 1231, that language could easily be read to preclude calculating damages, too. P. 33, *supra*.

The Wuhan injunction would also foreclose Ericsson’s contract and declaratory-judgment claims (Counts I-V), including Ericsson’s charge that **Samsung** breached its FRAND obligations. As explained above (at 6-7), Ericsson’s and Samsung’s FRAND obligations are reciprocal; neither has an obligation to comply with FRAND obligations absent the other’s compliance. There is thus no way to adjudicate Ericsson’s claim that Samsung breached its FRAND commitment, *see* Appx440-445; Appx480, without deciding whether Ericsson met the condition that it comply with FRAND as well—a condition Ericsson cannot litigate under Clause 4 of the Wuhan injunction. Moreover, Ericsson’s and Samsung’s offers were both for **cross-licenses** that included a net balancing payment reflecting the difference in value between Ericsson’s SEPs and Samsung’s SEPs. *See* p. 7, *supra*. Whether the cross-license Samsung offered was FRAND thus requires determining the value of both Ericsson’s and Samsung’s SEPs. But the Wuhan injunction’s Clause 3 forecloses royalty determinations for Ericsson SEPs. *See* Appx4.

Samsung’s assertion that the “unflagging obligation” to exercise jurisdiction under *Colorado River* does not apply to declaratory relief, Br.43, is thus beside the point and wrong. The district court here did not merely protect its declaratory-relief authority; it preserved authority to adjudicate patent-infringement claims, injunctive relief and damages, and breach-of-contract claims. And declaratory-judgment claims are not exempt from the district court’s “virtually unflagging” obligation to exercise jurisdiction. *See, e.g., Sprint Commc’ns, Inc. v. Jacobs*, 571 U.S. 69, 72 (2013). Under *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995), district courts may in their discretion **deny relief** based on factors such as “usefulness of the declaratory judgment remedy, and the fitness of the case for resolution.” *Id.* at 289. But nothing exempts courts from exercising that discretion to make “decisions about the propriety of” declaratory relief. *Id.* at 289-90; *see, e.g., Agora Syndicate, Inc. v. Robinson Janitorial Specialists, Inc.*, 149 F.3d 371, 372-74 (5th Cir. 1998); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 136-37 (2007) (remanding for court to consider appropriateness of declaratory relief).

Second, the U.S. has a “compelling interest” in providing a U.S. forum for a case with overwhelming ties to the U.S., in a district “where both parties have a significant presence”—Ericsson Inc. is headquartered in the Eastern District and Samsung maintains a large office there—and where the conduct at issue occurred. Appx8; Appx10; *see* Appx429(¶22); Appx1404. The U.S. is the largest market for

both companies. *See* pp. 7-8, *supra*. Ericsson seeks damages for infringement of *U.S.* patents based on Samsung's conduct *in the U.S.* Appx445-480 (Counts VI-XII).

Wuhan, by contrast, has little connection to or interest in the dispute. Appx1404-1405(12:9-13:1). No infringement claims involving Chinese patents have been filed. China is not a major market for Samsung. Appx1404-1405(12:25-13:1); *see* Appx334-340. No negotiations took place in Wuhan. Appx1404-1405(12:25-13:1). Indeed, as explained above (at 30-31), the reciprocity condition of Ericsson's FRAND commitment renders the Wuhan court's interest in determining a one-way rate for Ericsson patents illusory, as the court cannot legally impose a one-way license on Ericsson.

2. Vexatious and Oppressive. Nor did the district court abuse its discretion in finding enforcement of the Wuhan injunction "vexatious or oppressive." Appx8. In deciding whether foreign action is "vexatious or oppressive," the Fifth Circuit considers (1) whether it produces inequitable hardship; (2) whether it frustrates or delays the district court proceedings; and (3) the extent to which the domestic and foreign cases overlap. *See MWK*, 833 F. App'x at 562. Enforcement of the Wuhan injunction would not merely "frustrate" and "delay" the Texas case; it threatens to halt the case entirely. That imposes "inequitable hardship" on Ericsson,

“depriv[ing]” Ericsson “of the right to attempt to obtain redress for claims it has the right to bring under the laws of the United States.” Appx9.

Ericsson would be deprived of “remed[ies] sought in the domestic forum” unavailable in Wuhan. *Laker*, 731 F.2d at 930. The U.S. case presents infringement claims absent in the Wuhan case. The contract and declaratory-judgment claims in the U.S. case involve compliance with FRAND obligations in negotiations for a *reciprocal cross-license*, while the Wuhan case only involves computation of a *one-way* FRAND rate to *Ericsson’s* SEPs alone. Appx12 & n.10. The “legal questions” in the proceedings thus are different, and a decision in the Wuhan case “is unlikely to obviate” the U.S. suit. Appx11-12 & n.10. Nearly all the remedies Ericsson seeks here are unavailable in the Wuhan suit, including damages for infringement of Ericsson’s U.S. patents and adjudication of the parties’ compliance with FRAND obligations in their negotiations over a cross-license. Appx480-481(Prayer for Relief). Because the Wuhan injunction sweeps wider than the case Samsung filed there, its enforcement would foreclose Ericsson from obtaining those remedies in the U.S. despite their unavailability in Wuhan. *See* pp. 34-35, *supra*. That makes the need for a defensive injunction “particularly” pressing. *Laker*, 731 F.2d at 929-30. By contrast, Samsung has “readily admitted” that “parallel actions” would not be vexatious or oppressive to it, and that adjudication here is inevitable regardless. Appx10 (citing Appx1428(36:4-10); Appx1468(76:18-21)).

3. Equitable Principles. The district court properly found that “equitable principles” supported its injunction. Appx12-13. Samsung displayed “litigious gamesmanship.” Appx13. Had Samsung believed Wuhan was the better forum for this dispute, it would have filed a *forum non conveniens* motion in the district court. But that would have failed—“the lawsuit’s bona fide connection . . . to the forum of choice,” “residence” of the parties, “availability of witnesses or evidence,” and similar relevant factors, *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 72 (2d Cir. 2001), all clearly favor the U.S., *see pp. 36-37, supra*.

Instead, Samsung sued in China secretly and sought an *ex parte* injunction, asking the Wuhan court not to notify Ericsson. Appx9-10. Samsung only put Ericsson’s SEPs at issue, not its own. Samsung pursued that strategy to “put Ericsson in a weaker negotiating position when it comes to cross licensing its 4G and 5G SEPs.” Appx10. Nothing requires a U.S. district court to relinquish jurisdiction to allow Samsung to preserve “unfair economic leverage gained through litigious gamesmanship.” Appx13.

C. Samsung’s Putative “Incorrect Assumptions” Fail To Establish an Abuse of Discretion

Samsung does not deny the district court applied the correct legal standard. *See Br.38*. Instead, it points to three supposedly “incorrect assumptions” underlying the conclusion that enforcement of the Wuhan injunction would be “vexatious and

oppressive.” *Id.* Those unmeritorious quibbles do not approach the high bar for overturning a preliminary injunction. *See Houston Agric.*, 736 F.2d at 235.

1. *The District Court Correctly Understood the Wuhan Injunction*

Samsung asserts that the district court “misapprehended” the Wuhan injunction’s “scope,” challenging its conclusion that the injunction threatened to prevent the U.S. case from proceeding. Br.4, 38-42. But Samsung’s contention that some small piece of that case could proceed is irrelevant and mistaken. It is irrelevant because the district court ruled that, *even if* “not all causes of action before this Court are enjoined by the” Wuhan injunction, the court would *still* issue the anti-interference injunction to preserve its authority over the whole case, including all the causes of action Ericsson joined. Appx11 n.8. Samsung never shows that to be an abuse of discretion.

Regardless, as explained above, the Wuhan injunction threatens *every claim* in Ericsson’s Amended Complaint. *See pp. 34-35, supra.* Samsung asserts that the claims charging Samsung with breaching its FRAND obligations, as well as damages claims for infringement, can proceed. But the Wuhan injunction could reach those claims for the reasons above. Samsung offers no *argument* to support the contrary assertion. Reproducing a slide it used at the hearing below (Br.42), it merely states those portions can proceed. Samsung’s position is thus not merely

wrong but waived. It cannot provide the missing argument for the first time in reply. *Wise v. Wilkie*, 955 F.3d 430, 437 (5th Cir. 2020).

Moreover, because injunctions are addressed to threatened harm, the district court was entitled to consider the risk the Wuhan court might read its order broadly. *See Karaha*, 335 F.3d at 369. As the district court found, “Samsung furnished Ericsson’s [U.S.] Complaint to the Wuhan Court and specifically asked for an injunction preventing this case from moving forward.” Appx11. While Samsung disputes that characterization, Br.42, its injunction application included a copy of the U.S. complaint, describing it as “a repeated lawsuit based on the same portfolio, patent licensing negotiation facts, and legal issues” as the Wuhan case. Appx721; Appx982. It asserted that the Wuhan suit would resolve “*all* the parties’ previous disputes regarding Ericsson’s 4G and 5G patents,” rendering any suit by Ericsson “unnecessary” and a “repeated lawsuit.” Appx989. It was not clear error for the district court to conclude that the Wuhan injunction threatened many if not all the U.S. claims. Appx11. Samsung offers no basis for overturning the district court’s exercise of discretion to protect the proceedings before it.

2. *The District Court Understood the Procedural Disadvantage Samsung Had Imposed on Ericsson*

Samsung argues that the district court overstated the unfairness resulting from Samsung’s secretive maneuvering in Wuhan. Br.45-48. But Samsung never disputes that “Ericsson had no notice” of the Wuhan suit “until well after” Ericsson

filed and notified Samsung of this suit. Appx1452(60:19-24). Samsung agreed that the Wuhan court “imposed a preliminary injunction ex parte,” without providing Ericsson opportunity to oppose. Appx1437(45:1-6). Nor can Samsung contest the resulting prejudice. Samsung urged the Wuhan court to keep the injunction application secret precisely because there was a “high” “probability” that other courts would issue defensive injunctions if Ericsson learned of the application and sought relief. Appx714. That Samsung had to keep the application secret because other courts would respond speaks volumes.

Samsung urges that the district court failed to appreciate Ericsson’s right to seek “reconsideration.” Br.45-46. But the possibility of reconsideration does not eliminate prejudice from being denied the opportunity to be heard in the first place. *See Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 422 (4th Cir. 1999). A German court faced with a nearly identical Wuhan injunction came to the same conclusion. *See InterDigital*, No. 7 O 14276/20, *supra*, translation at 31 (Appx1898). Samsung’s discursions on inquisitorial systems and burdens of proof are beside the point. Br.46-47. They are inapt coming from a company that decried Chinese courts as “antithetical to the United States judicial system” and lacking “due process requirements like the[re] are in this country.” Appx392. None rebut the district court’s concern that reconsideration is no substitute for the opportunity to be heard in the first instance. Appx9.

Samsung's citation of *forum non conveniens* cases supports the decision below. Br.48. "Given the 'virtually unflagging obligation of the federal courts to exercise the jurisdiction given them,' . . . *forum non conveniens* should be invoked only in 'rather rare cases.'" *Associação Brasileira de Medicina de Grupo v. Stryker Corp.*, 891 F.3d 615, 618 (6th Cir. 2018). While U.S. courts "regularly defer to Chinese courts" on *forum non conveniens* grounds, Br.48; *see Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 435-36 (2007), they do so where the U.S. contacts are so tenuous it is unclear the district court has jurisdiction. *Innovation First Int'l, Inc. v. Zuru, Inc.*, 513 F. App'x 386, 388-89 (5th Cir. 2013) (events took place in China and evidence in China); *Compania Naviera Joanna SA v. Koninklijke Boskalis Westminster NV*, 569 F.3d 189, 201 (4th Cir. 2009) (collision "in Chinese territorial waters").

That rule, and this case's tenuous connection to China compared to its strong connection to the U.S., mean that Samsung would not have prevailed on *forum non conveniens* in district court. *See pp. 36-37, supra.* That is why Samsung circumvented the district court's discretion to decide whether this suit should be litigated in Wuhan, and attempted to force abstention by obtaining an injunction from a foreign court. The district court was not required to allow itself to be strong-armed in that manner.

3. *The District Court Properly Considered the Inequitable Effect Samsung Imposed*

The district court properly considered the fact that Samsung sought to restrict Ericsson’s access to U.S. proceedings but left itself free to pursue them at will. “*If* Samsung can seek redress of its claims through injunctive relief in the United States,” the court found, “it would be the height of inequity . . . to allow the [Wuhan injunction] to tie Ericsson’s hands from doing the same.” Appx13 (emphasis added).

Samsung complains that the district court, in illustrating that inequity, erroneously stated that Samsung had asserted 4G and 5G *SEPs* in the ITC. The point remains: Samsung and Ericsson both seek to license each other’s SEPs, but Samsung seeks to deny Ericsson a U.S. remedy (injunctive relief) that Samsung preserves for itself. And Samsung has attacked Ericsson 4G and 5G SEPs through IPRs in the U.S., *see Samsung Elecs. Co. v. Telefonaktiebolaget LM Ericsson*, IPR Nos. 2021-487, -447, -446, -486 (Jan. 29, 2021), -730 (Mar. 26, 2021), but seeks to foreclose Ericsson from asserting those same SEPs as a basis for injunctive relief in the U.S. The court was entitled to consider the “inequity” of that result. Appx12-13.

Samsung also accuses the district court of having “conducted independent research.” Br.48-49. But Samsung filed the ITC complaint “the day of the hearing” in district court, without informing the court about that impending suit. *Id.*

Samsung's lack of candor about facts relevant to the court's consideration of the preliminary injunction reflects poorly on Samsung, not the court.

Nor is it true that the district court imposed the protective "injunction . . . to 'balance' Ericsson's global negotiating leverage against Samsung's." Br.50. Far from relying on a mistaken "legal principle that all parties to a negotiation should have equal leverage," *id.*, the court found that Samsung's "litigious gamesmanship" sought to force Ericsson to settle without exercising its legal rights, Appx13. Neutralizing gamesmanship and "external pressure" to settle a case "before the litigation is complete" can support protective decrees. *Microsoft*, 696 F.3d at 886; *Moses v. CashCall, Inc.*, 781 F.3d 63, 82 (4th Cir. 2015).

D. The Defensive Injunction Does Not "Offend" Principles of Comity

The district court correctly found that "international comity is not offended by the issuance of an anti-interference injunction which seeks to preserve the ability for litigation to proceed in parallel." Appx13 (citing *Laker*, 731 F.2d at 926-27). Samsung's contrary argument rests on the false premise that federal courts violate comity by defending their authority to adjudicate cases before them whenever the foreign action was filed first—here, by a few days, without notice until after the district court action was filed. *E.g.*, Br.2, 18, 33, 53-56; *see* Professors' Br.26-27. The contention is especially unfounded here, given the U.S. court's overwhelming connections to the dispute and the foreign court's scant connections.

1. Samsung overlooks a precondition to comity. When a foreign-court order invades U.S.-court authority in violation of comity principles, the party that sought the foreign order cannot invoke comity to prevent U.S. courts from protecting themselves. *Quaak*, 361 F.3d at 21; *SAS Inst., Inc. v. World Programming Ltd.*, 952 F.3d 513, 525 (4th Cir. 2020). Here, Samsung urges that comity precluded the district court from protecting itself unless stringent standards are met. Br.51. But it nowhere suggests the Wuhan court invoked those standards before attempting to wrest authority from U.S. courts. Samsung conceded that the U.S. proceedings are “[a]bsolutely not” oppressive or vexatious. Appx1468(76:21-24). Having procured an injunction contrary to comity principles, it cannot invoke comity to prevent the district court from protecting itself from the resulting interference. *See, e.g., Quaak*, 361 F.3d at 20-21. A foreign injunction “specifically intended to interfere with and terminate” a U.S. lawsuit is “not entitled to comity” from U.S. courts “by any definition.” *Laker*, 731 F.2d at 938; *see Amchem Prods. Inc. v. B.C. Workers’ Comp. Bd.*, [1993] 1 S.C.R. 897, 902 (Can.) (Appx1949-1992) (“[A] foreign court, not having, itself, observed the rules of comity, cannot expect its decision to be respected on the basis of comity.”); pp. 25-28, *supra*.

The district court’s decision to ensure both proceedings can continue in parallel does not “[o]ffen[d]” comity, Br.51; *it arises out of* comity principles, pp. 22-28, *supra*. The international norm in favor of parallel proceedings flows from

the “deference and mutual respect” courts of different Nations owe each other to avoid interfering in each other’s domestic affairs pursuant to those principles of comity. *Laker*, 731 F.2d at 928. Comity is not offended when the court of one Nation acts to protect itself from another court’s “attempts to carve out exclusive jurisdiction” through an anti-suit injunction, because it is “the foreign injunction which creates” international conflict in the first place. *Id.* at 930, 939.³

2. Samsung attempts to invent a rule that U.S. courts must tolerate such intrusions if imposed by a “foreign court having jurisdiction over the first-filed action.” Br.2; *see id.* at 18, 33, 53-56; *see also* Professors’ Br.13-14. Samsung told this Court the opposite in litigation against Huawei, urging “The Timing Of The Parties’ Pleadings Is *Irrelevant*.” Samsung C.A. Br.36-37 in *Huawei Techs. Co. v. Samsung Elecs. Co.*, No. 18-1979 (Fed. Cir. filed Aug. 27, 2018) (reproduced Appx1055-1056) (emphasis added). Samsung admitted below that “first filed” is not dispositive as to foreign lawsuits, Appx1451(59:21-24), and the district court properly rejected any such rule, Appx1. There is no “first-filed principle” (Br.54) in suits before separate sovereigns. *See Laker*, 731 F.2d at 927 (“The mere filing of a suit in one forum does not cut off the preexisting right of an independent forum to regulate matters subject to its prescriptive jurisdiction.”); *Microsoft*, 696 F.3d at 887

³ Another precondition for comity, that “due notice” was given to the party affected by the foreign order, *Hilton v. Guyot*, 159 U.S. 113, 166-67 (1895), was also absent here.

(“The order in which the domestic and foreign suits were filed . . . [is] not dispositive.”).

Samsung analogizes to a rule “favoring the forum of the first-filed case” when *two or more federal district courts* hear overlapping litigation. Br.55; see *Elecs. for Imaging, Inc. v. Coyle*, 394 F.3d 1341, 1347 (Fed. Cir. 2005); *In re VoIP-PAL.com, Inc.*, No. 2021-112, 2021 WL 650626, at *1 (Fed. Cir. Feb. 19, 2021). But that rule “*has never been applied*, and in fact it *was never meant to apply*[,] where the two courts involved *are not courts of the same sovereignty*.” *Compagnie des Bauxites*, 651 F.2d at 887 n.10 (emphasis added).

Comity and U.S. law defy any such notion. Allowing the first court to seize jurisdiction, and to enjoin all other sovereign courts, would “destroy the principle of concurrent jurisdiction.” *Laker*, 731 F.2d at 929 n.63. It would render interference with other sovereigns the default, rather than the exception. *MWK*, 833 F. App’x at 564-65. Court after court has held that first-filed status cannot be given such weight in the international anti-suit context. See *Laker*, 731 F.2d at 929 n.63; *Compagnie des Bauxites*, 651 F.2d at 887 n.10; *China Trade*, 837 F.2d at 36; see also *Unterweser*, 428 F.2d at 890 (upholding injunction against prior-filed English action); *Bethell v. Peace*, 441 F.2d 495, 496 (5th Cir. 1971) (similar). It does not prevent district courts from protecting their authority, much less where the “prior” suit was filed just days earlier and kept secret until after the U.S. suit was filed.

Samsung's authorities are not to the contrary. In *Kaepa*, the Fifth Circuit upheld an anti-suit injunction in part because the case had been “long and firmly ensconced” in the U.S. court such that permitting the foreign suit would “entail ‘an absurd duplication of effort.’” 76 F.3d at 627-28. Samsung nowhere argues the then-days-old and still-secret Wuhan case was “firmly ensconced” when Ericsson sought relief in district court; nor would the two very different cases result in “absurd duplication of effort.” See pp. 29-31, *supra*. In *Unwired Planet International Ltd. v. Huawei Technologies Co.*, [2017] EWHC (Pat) 2831 (Eng.) (Appx1562-1567), the U.K. court indicated it would have issued an anti-suit injunction where a party initiated proceedings in China to “relitigate matters that the UK court ha[d] **already decided**” and entered judgment upon. *Id.* ¶7 (Appx1564) (emphasis added). Preventing a party from undermining a final judgment is a well-established basis for injunctive decree, see, e.g., *SAS*, 952 F.3d at 524, 529; foreclosing pre-judgment parallel proceedings in different Nations is not, see pp. 22-25, *supra*.

Filing order might matter if it “‘raises the concern that [a party] is attempting to evade the rightful authority of the district court.’” *Microsoft*, 696 F.3d at 887. Here, Ericsson could not have brought the U.S. suit to “evade” the Chinese court’s

jurisdiction—Ericsson did not know about the Wuhan case when it filed this action. Not one of Samsung’s cases creates the first-filed rule it demands.⁴

3. Samsung purports to seek a “neutral principle” to “resolve conflicts” when “courts of two sovereign nations have jurisdiction over the same controversy.” Br.54 (emphasis omitted). But there is an established “neutral principle” to resolve such conflicts: the “principle of concurrent jurisdiction.” *Laker*, 731 F.2d at 929 n.63. When sovereigns confine themselves to their own cases, no “‘jurisdictional ping-pong,’” Br.55, results. Because “both Courts can properly exercise jurisdiction over the respective causes of action brought before them,” both suits should proceed, and filing order is “not dispositive.” Appx8. U.S. law “has not departed so far from common sense that it is reversible error for a court not to capitulate to a foreign judgment . . . designed to prevent the court from resolving legitimate claims placed before it.” *Laker*, 731 F.2d at 939.

Samsung’s contrary first-filed rule is terrible policy. It would encourage parties to race to their chosen forums and obtain global injunctions. The result would be the “endless[]” escalation of conflicts Samsung predicts (Br.54), as courts of each Nation rush to seize exclusive jurisdiction at the expense of others. It would encourage the gamesmanship Samsung engaged in here, attempting to supersede U.S.

⁴ Samsung cites *The Salvore*, 36 F.2d 712 (2d Cir. 1929), as supporting a first-to-file rule. But Second Circuit precedent clearly holds that first-to-file is not dispositive. See *China Trade*, 837 F.2d at 36.

actions encompassing the whole dispute with a foreign action covering just the fraction it deems advantageous. *See* pp. 30-31, *supra*.

4. Finally, Samsung argues that China is an especially appropriate forum. Br.2, 52. The U.S court’s overwhelmingly greater connection to the dispute and the parties, and the partial nature of Samsung’s suit, demonstrate the opposite.

Samsung claims that China “is one of two jurisdictions (the other is the United Kingdom) that will determine worldwide FRAND rates without requiring bilateral consent.” Br.2. That is false. As Ericsson explained below, “[n]o court, whether here or in China, can simply create binding contracts for private parties without their express consent.” Appx697. It submitted an affidavit of a retired Chinese judge specializing in intellectual property in support. *See* Appx1257. Samsung has never refuted that or explained how a Chinese court could impose a one-way rate on Ericsson when Ericsson’s FRAND commitment is conditioned on reciprocity.

U.K. courts will not impose licenses without consent either. In *Unwired Planet International Ltd. v. Huawei Technologies Co.*, [2017] EWHC (Pat) 711 ¶¶793-794 (Eng.) (Appx1568-1733), the U.K. court issued a domestic injunction ***as a remedy for infringement*** because the infringer would not consent to a global license.

Samsung has no support for the theory that the Wuhan court—or any other court—could impose a global license on Ericsson without its consent.⁵

Regardless, U.S. courts have “subject matter jurisdiction” to declare FRAND terms on a global basis with consent. *HTC*, 2019 WL 4734950, at *5; *see Microsoft*, 696 F.3d at 884. Nothing about power to declare FRAND terms globally supports foreclosing claims that Congress authorized in U.S. courts in favor of a lawsuit in China.

II. THE ANTI-INTERFERENCE INJUNCTION’S SCOPE WAS COMMENSURATE WITH THE THREAT—AND WELL WITHIN THE COURT’S DISCRETION

Samsung argues that the district court “overreached” by (1) protecting Ericsson’s ability to assert its patent rights—including injunctive relief for infringement—throughout the U.S., rather than just in the Eastern District of Texas; and (2) requiring that Samsung indemnify Ericsson if Ericsson is fined by the Wuhan court for lawfully litigating claims in the U.S. Br.64-75. Samsung fails to show an abuse of discretion. *See Kaepa*, 76 F.3d at 626.

⁵ Samsung’s suggestion (Br.12-13, 52) that Ericsson took the opposite position in *Unwired Planet* is baseless. Ericsson argued only that global license offers (rather than country-by-country licenses) could be FRAND. Appx1327-1331. Ericsson nowhere endorsed anti-suit injunctions, nor did the U.K. court issue one.

A. The Nationwide Anti-Interference Injunction Was an Appropriate Response to the Wuhan Court’s Nationwide Interference

Samsung insists without citation that there was no “basis in law or equity” for an anti-interference injunction that extends beyond the Eastern District of Texas, Br.67, or protects Ericsson’s right to petition for “redress of grievances” before U.S. government agencies, U.S. Const. amend. I. The law recognizes, however, that nationwide injunctions may issue in “appropriate circumstances.” *Texas v. United States*, 809 F.3d 134, 188 & n.211 (5th Cir. 2015); see *Waffenschmidt v. MacKay*, 763 F.2d 711, 716 (5th Cir. 1985). Where a foreign court decree seeks to “undermine” a company’s ability “to enforce” its U.S. legal rights “in U.S. courts” generally, federal courts may respond by protecting those rights nationwide. *SAS*, 952 F.3d at 524-25 (affirming nationwide defensive injunction).

Nor can Samsung rely on the assertion that “‘the sweep of an injunction should be no broader than necessary to avoid the harm on which [it] is predicated.’” Br.64 (quoting *Microsoft*, 696 F.3d at 887). The district court’s anti-interference injunction meets that standard. The Wuhan injunction was not limited to actions in the Eastern District of Texas; it barred Ericsson from seeking relief “before any courts, customs offices, or administrative enforcement agencies” anywhere besides the Wuhan court. Appx4. The district court’s anti-interference injunction responded by prohibiting Samsung from enforcing that decree to deprive Ericsson of the ability to assert its U.S. patent rights “before any Article III Court, customs office, or

administrative agency in the United States.” Appx15. The sweep of the district court’s anti-interference injunction is commensurate with the sweep of the Wuhan anti-suit injunction’s interference with U.S. authority. *See Fiber Sys. Int’l, Inc. v. Roehrs*, 470 F.3d 1150, 1159 (5th Cir. 2006) (injunctions should “‘remedy the specific action necessitating the injunction’”). The district court’s anti-interference injunction also “restore[d] the *status quo*” that existed before Samsung provided an injunction that disturbed it—a legitimate exercise of equitable discretion. *Porter v. Lee*, 328 U.S. 246, 251 (1946).

Samsung’s assertion that, insofar as “the Chinese injunction threatens other tribunals’ jurisdictions, those other tribunals are the proper places to make those arguments,” Br.66, has it backwards. If Samsung thought proceedings in a particular U.S. tribunal would improperly threaten Wuhan proceedings, Samsung should raise that with the U.S. tribunal rather than seeking a foreign coercive decree. And Samsung nowhere explains how tribunals like the ITC, with limited statutory authority, could grant Ericsson protection from the Wuhan injunction regardless. *See Span- sion, Inc. v. ITC*, 629 F.3d 1331, 1359 (Fed. Cir. 2010).

The district court was also permitted to ensure that the “unbalanced economic pressure” resulting from the Wuhan decree would not have the practical effect of preventing Ericsson from pursuing its case “on the merits.” Appx13-14; pp. 34-38, *supra*. Samsung protests that, without the Wuhan injunction, Ericsson can use U.S.

suits to “force Samsung to take a license at holdup rates.” Br.73. U.S. law, however, is calibrated to prevent that. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 394 (2006). Regardless, as the district court found, the Wuhan injunction enables Samsung to do exactly that to Ericsson, leaving **Samsung** free to enforce **its SEPs** while tying Ericsson’s hands. Appx12-14; Appx1441(49:5-7). Samsung could apply that pressure across the country. On January 29, 2021, Samsung filed IPR petitions in the PTO seeking to invalidate Ericsson 4G and 5G SEPs, including two patents Ericsson asserted here. *See Samsung*, IPR Nos. 2021-487, -447, -446, -486. Samsung seeks to use U.S. forums to **attack** Ericsson patents, including the patents in this case, while restraining Ericsson’s access to U.S. courts and agencies to assert those patents. The district court’s injunction simply restores both parties’ ordinary ways of protecting their rights before both relevant sovereigns.

Nor is there is any inconsistency between the injunction’s nationwide scope and the district court’s effort “to preserve its jurisdiction,” while “allowing both [the U.S. and Chinese] suits to proceed without interference.” Br.64-65 (quoting Appx13-14). The court explained that it had limited relief to “preserv[ing] the ability for litigation to proceed in parallel” in both the U.S. and China, Appx13, as opposed to taking more drastic measures and “insert[ing] itself into” the Wuhan action, Appx14. Nothing about the injunction’s scope is inconsistent with that “targeted

purpose.” Appx13. It “preserve[s]” the jurisdiction of U.S. courts and agencies to “proceed in parallel,” without interfering with the Wuhan action. *Id.*

B. The District Court Properly Required Samsung To Indemnify Ericsson for Violations of the Wuhan Injunction

Samsung argues the district court should not have required it to indemnify Ericsson for fines the Wuhan court might impose as a result of Ericsson’s U.S. efforts “to lawfully litigate or adjudicate claims relating to the 4G and 5G SEPs identified or involved in this case.” Appx15. Samsung again fails to show an abuse of discretion.

1. Samsung errs by deeming the indemnification provision a “sanction” for conduct Samsung undertook in Wuhan. Br.68. It is not a “sanction,” and the district court never suggested it was. Sanctions are penalties for *past* misconduct. *See Sanction*, Black’s Law Dictionary (11th ed. 2019). The indemnification provision does not punish Samsung for anything that has already happened. It is a *forward-looking* measure necessary to protect Ericsson; Samsung may never pay anything. “[W]here an order for the payment of money is forward-looking and involves an amount that cannot be calculated with specificity” at the time it is entered, “it is equitable” relief, and may take the form of an “injunction.” *Aleynikov v. Goldman Sachs Grp., Inc.*, 765 F.3d 350, 356-57 (3d Cir. 2014). Samsung calls such relief “unprecedented,” Br.68, but courts routinely issue injunctions requiring one party to indemnify another for costs it may incur in the future. *See, e.g., Gon v. First*

State Ins. Co., 871 F.2d 863, 866 (9th Cir. 1989); *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816, 830 (D.C. Cir. 1984).

The district court explained why that was necessary here. Samsung could “seek the imposition of substantial fines in the Chinese Action for the purpose of creating economic leverage against Ericsson to achieve practically what it may not be able to obtain legally”—the withdrawal of Ericsson’s U.S. lawsuit, foreclosing Ericsson’s ability to obtain relief Congress authorized Ericsson to seek in district court. Appx14.⁶ The indemnification provision was particularly necessary because *ex parte* communications are permitted in Chinese proceedings. Consequently, there would be “[n]o record” if Samsung asked the Chinese court to impose a penalty. Appx1417(25:5). The indemnity, by contrast, would “put both parties in the same position of precariousness.” Appx1418(26:18-19).

The cases Samsung invokes show that the indemnification provision would be permissible *even if* it were a sanction. In *FDIC v. Maxxam, Inc.*, 523 F.3d 566 (5th Cir. 2008) (cited Br.68), the Fifth Circuit reversed a district court’s award of sanctions for conduct in an “administrative proceeding” separate from proceedings before the district court. *Id.* at 593. The court of appeals stressed that the court’s

⁶ Samsung’s claim that “[t]he court’s reference to ‘what [Samsung] may not be able to obtain legally’ is inexplicable except as an insinuation that the Chinese courts may behave illegitimately,” Br.69, misreads the opinion. The court meant only that fines could force Ericsson to withdraw its suit, where Samsung could not “obtain legally” a *dismissal of the suit by the district court*.

inherent powers “did not grant a district court the power to police the administrative courts . . . *when those courts do not threaten the court’s own judicial authority or proceedings.*” *Id.* (emphasis added). It distinguished situations—like those here—where the conduct might “directly interfere with the district court’s authority.” *Id.* at 952. Likewise, *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 619 F.3d 458 (5th Cir. 2010) (cited Br.68), acknowledged that courts have the “power to sanction conduct” where “‘essential to preserve the authority of the court.’” *Id.* at 460. The Fifth Circuit explained that such “power” thus “does not extend to collateral proceedings” if those proceedings “‘do not threaten the court’s own judicial authority.’” *Id.* at 460-61. Here, the indemnification provision was appropriate precisely to avoid efforts to enforce the Wuhan injunction that would “threaten the [district] court’s own judicial authority or proceedings,” *Maxxam*, 523 F.3d at 593, and “prejudice[] Ericsson’s right to assert lawful causes of action,” Appx13.

2. Samsung’s throwaway line that the indemnification provision violates due process by “punish[ing]” Samsung for doing “what the law plainly allows [it] to do” in China, Br.70 (quotation marks omitted), is rich. Any penalties the Wuhan court imposed on Ericsson under its injunction would likewise “punish” Ericsson for doing “what the law plainly allows [it] to do”—enforce its rights in U.S. courts.

Samsung objects that requiring it to “bear the consequences” of an injunction it procured “blocks the Chinese court’s ability to enforce its order”; that court, Samsung insists, is “entitled” to greater “respect.” Br.70. But the whole problem here is that Samsung procured a foreign-court order to “block” the U.S. court’s ability to adjudicate this case. The U.S. court was “entitled” to far greater “respect” than Samsung gave it. Samsung’s argument reduces to the complaint that the indemnification order actually protects Ericsson from the effects of the Wuhan injunction, ensuring that “both proceedings can progress on the merits.” Appx14. That the indemnification order works as intended is a reason to uphold it, not overturn it.

Samsung’s passing complaint about the “indemnity provision’s breadth,” Br.69, is waived and meritless. Pressed by the district court to suggest a more tailored approach, Samsung offered nothing. Appx1475-1476(83:21-84:4). The court did not clearly err in finding that indemnification was the most narrowly targeted means of addressing its concern that Samsung might “leverage” the Wuhan injunction’s fines provisions to deprive U.S. courts of the ability to resolve Ericsson’s claims. Appx14.

C. The District Court Properly Permitted Ericsson To File Suits Related to Its 4G and 5G SEPs

Samsung argues it should be able to “enforce the Chinese court’s injunction against claims for injunctive relief on Ericsson’s 4G and 5G SEPs” because Ericsson is not currently seeking such relief. Br.71-72. But Samsung thought such claims

were sufficiently likely to warrant asking the Wuhan court to prohibit them. Appx4. The district court simply “restore[d] the *status quo*,” so Ericsson could seek relief that U.S. law permits. *Porter*, 328 U.S. at 251. Regardless, if Ericsson will not bring such claims, Samsung suffers no effects from the portion of the anti-interference injunction protecting their assertion.

That portion of the district court’s order is hardly “an unnecessary affront to the Chinese court.” Br.72. The district court’s action to protect its own jurisdiction, and “to preserve the ability for litigation to proceed in parallel,” Appx13, is no commentary on the legitimacy of the Chinese proceedings. Having procured a foreign injunction that is itself “an unnecessary affront” to U.S. courts and agencies that lawfully entertain requests for injunctive relief for patent infringement, Samsung is ill-positioned to complain. *See pp. 34-35, supra.*

Samsung’s reasons why such injunctions would be problematic—that they “might force Samsung to take a license at holdup rates, preempting the Chinese court’s rate-setting adjudication,” Br.73—are misplaced. In considering whether to grant Ericsson an injunction, a *district court* could consider those arguments. Indeed, Samsung asserts that “American courts” recognize the same principles regarding FRAND-encumbered patents as foreign courts, Br.73-74, and that the U.S. Supreme Court’s “*eBay* factors” will “nearly always favor money damages” rather than injunctive relief, Br.75. None of that, however, justifies Samsung procuring an

anti-suit injunction from a *foreign court* to preemptively take that decision away from the U.S. courts and agencies lawfully tasked with adjudicating such issues. The district court did not abuse its discretion in preserving U.S. sovereign authority against that overreach.

* * * * *

The district court’s legal authority to issue the anti-interference injunction is unchallenged. All of Samsung’s arguments concern the district court’s exercise of its broad discretion, not its power to grant relief. Consequently, were this Court to identify any error warranting further consideration by the district court, the proper remedy would not be to vacate the injunction, as Samsung requests. Br.76. It would be to “leave the preliminary injunction in place” while “remand[ing] the case to the district court for further” consideration. *TEC Eng’g Corp. v. Budget Molders Supply, Inc.*, 82 F.3d 542, 546 (1st Cir. 1996); *see also Takiguchi v. MRI Int’l, Inc.*, 611 F. App’x 919, 920 (9th Cir. 2015).

It is the district court that must exercise discretion in the first instance. Vacatur pending that exercise could preclude it entirely and harm Ericsson irreparably. The district court found an emergency TRO necessary “to prevent Samsung from interfering with this action or attempting to prevent Ericsson from asserting the full scope of its patent rights.” Appx5. Samsung obtained an injunction from the Wuhan court in secret and initiated other litigation bearing on this case without in-

forming the district court. Lifting the district court's injunction, even momentarily, would allow Samsung to engage in further litigious gamesmanship, such as rushing to the Wuhan court for enforcement to cripple Ericsson and preclude remand proceedings altogether. Remand without vacatur would protect the status quo while the district court conducts any necessary reconsideration.

Alternatively, this Court could stay the mandate and allow Ericsson to seek an indicative ruling from the district court in light of this Court's decision. *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936) (courts have "inherent" "power to stay proceedings"). Were the district court to indicate it would grant the injunction again, Fed. R. Civ. P. 62.1(a)(3), this Court could remand to the district court for that purpose and then review the resulting decision. *See* Fed. R. App. P. 12.1(b); *Arlington Indus., Inc. v. Bridgeport Fittings, Inc.*, No. 2010-1377, 2011 WL 5275848, at *1 (Fed. Cir. Nov. 4, 2011).

CONCLUSION

The district court's grant of a preliminary injunction should be affirmed.

April 2, 2021

Theodore Stevenson, III
Nicholas M. Mathews
McKool Smith, P.C.
300 Crescent Court, Suite 1500
Dallas, TX 75201
(214) 978-4000 (telephone)
(214) 978-4044 (facsimile)

Nicholas T. Matich
McKool Smith, P.C.
1717 K Street, N.W., Suite 900
Washington, D.C. 20006
(202) 221-6267 (telephone)
(212) 402-9444 (facsimile)

Christine M. Woodin
McKool Smith, P.C.
300 S. Grand Avenue, Suite 2900
Los Angeles, CA 90071
(213) 694-1200 (telephone)
(213) 694-1234 (facsimile)

Blake H. Bailey
McKool Smith, P.C.
600 Travis Street, Suite 7000
Houston, TX 77002
(713) 485-7300 (telephone)
(713) 485-7344 (facsimile)

Samuel F. Baxter
McKool Smith, P.C.
104 E. Houston Street, Suite 300
Marshall, TX 75670
(903) 923-9000 (telephone)
(903) 923-9099 (facsimile)

Respectfully submitted,

/s/ Jeffrey A. Lamken
Jeffrey A. Lamken
Counsel of Record
Michael G. Pattillo, Jr.
Rayiner I. Hashem
MOLOLAMKEN LLP
The Watergate, Suite 500
600 New Hampshire Avenue, N.W.
Washington, D.C. 20037
(202) 556-2000 (telephone)
(202) 556-2001 (facsimile)
jlamken@mololamken.com

Elizabeth K. Clarke
MOLOLAMKEN LLP
300 N. LaSalle Street, Suite 5350
Chicago, IL 60654
(312) 450-6700 (telephone)
(312) 450-6701 (facsimile)

Jennifer E. Fischell
MOLOLAMKEN LLP
430 Park Avenue
New York, NY 10022
(212) 607-8160 (telephone)
(212) 607-8161 (facsimile)

Counsel for Ericsson Inc. and Telefonaktiebolaget LM Ericsson

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) and Fed. Cir. R. 32(b) because this brief contains 13,991 words as measured by the word count function of Microsoft Word, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Fed. Cir. R. 32(b)(2).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

April 2, 2021

/s/ Jeffrey A. Lamken
Jeffrey A. Lamken

*Counsel for Ericsson Inc. and
Telefonaktiebolaget LM Ericsson*