
No. 2021-1565

**United States Court of Appeals
for the Federal Circuit**

ERICSSON INC. AND TELEFONAKTIEBOLAGET LM ERICSSON,
Plaintiffs-Appellees,

v.

SAMSUNG ELECTRONICS CO., LTD., SAMSUNG ELECTRONICS AMERICA,
INC., AND SAMSUNG RESEARCH AMERICA,
Defendants-Appellants.

Appeal from the U.S. District Court, Eastern District of
Texas, No. 2:20-CV-380, Judge J. Rodney Gilstrap

APPELLANTS' REPLY BRIEF

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Note: All quoted emphasis is added unless otherwise indicated.

INTRODUCTION

Ericsson does not dispute that Samsung fully complied with Chinese law, or that the Chinese court legitimately exercised its authority—both in exercising jurisdiction and in entering an antisuit injunction (ASI) in the first-filed action. Instead, peppering its brief with ad hominem attacks, Ericsson argues U.S. courts should not only ignore another sovereign’s legitimate judicial orders, but should actively work to undo them. Ericsson’s position disregards fundamental principles of comity, disowns decades of precedent on ASIs, and invites a spiral of dueling injunctions. The only substantive alternatives Ericsson offers—disregard foreign ASIs altogether or supplant a first-filed approach with a race-to-judgment approach—sow turmoil and judicial inefficiency by punting the inevitable clash of competing orders to a later stage.

To be clear, no one argues that Chinese courts, or U.S. courts, should “*impose* a one-way license on Ericsson” (e.g., EricssonBr.37); rather, the relief sought in China follows directly from enforcing Ericsson’s own voluntary FRAND commitment. Ericsson holds many patents in many countries where the law presumably entitles Ericsson to demand whatever licensing terms it sees fit, to threaten or seek

injunctions, or refuse to license altogether. However, in exchange for the benefits of including its technology in global wireless standards, Ericsson freely agreed to limit its options for its standard-essential patents. As the “FRAND” acronym denotes, Ericsson committed not to discriminate among willing licensees, and to offer *fair and reasonable rates*. That contractual commitment applies to *all* Ericsson’s 4G and 5G SEPs.

Samsung is a third-party beneficiary, and properly filed the first action in China to enforce Ericsson’s FRAND obligation by determining the appropriate rate. Having obtained jurisdiction, the Chinese court did as U.S. courts have done: it enjoined a party before it from taking two actions to thwart that court’s rate-setting. Ericsson could not **(1)** file duplicative claims elsewhere to adjudicate the *same* FRAND rate, or **(2)** seek *injunctions* elsewhere on FRAND-encumbered SEPs. The ASI is preliminary relief flowing directly from Ericsson’s FRAND commitment, and from the court’s uncontroversial ability to enjoin parties before it from filing duplicative or interfering claims elsewhere.

The Chinese court did not enjoin Ericsson lightly. The five-judge panel’s reasoned decision carefully weighs much the same factors U.S. courts consider. Appx572-574. The same panel considered Ericsson’s

later objections and rejected them in two additional reasoned opinions. Appx2068-2097 (*Samsung Elecs. Co. v. Telefonaktiebolaget LM Ericsson*, Wuhan Intermediate People’s Court of Hubei Province, Civil Ruling, (2020) E 01 Zhi Min Chu No. 743 (Mar. 10, 2021, reconsideration ruling)); Appx2098-2104 (Mar. 16, 2021, jurisdictional objection ruling). Ericsson received a full hearing in China on the ASI. The ASI in the first-filed action warrants respect unless the issuing court was illegitimate or clearly lacked authority or jurisdiction, or unless the ASI was contrary to fundamental U.S. public policy. None of those reasons exist here.

In defending the AASI, Ericsson offers no reason to question the Chinese court’s legitimacy, authority, or jurisdiction. Instead, Ericsson attacks ASIs generally—contending that U.S. litigation is categorically preferred over legitimate first-filed actions overseas, and ASIs are categorically illegitimate. Precedent rejects that view. U.S. courts issue ASIs in appropriate cases, and cannot expect comity from foreign courts that U.S. courts would not reciprocate. To be sure, as *Laker* illustrates, *substantive* public policy sometimes trumps comity. But Ericsson points to no *substantive* policy here. This case is about *who* interprets a Swedish

company's French-law contract obligation, owed to a Korean third-party beneficiary, to license its global SEP portfolio on FRAND terms.

Precedent and common sense confirm that the only workable rule is that courts should respect legitimate orders of the first court to acquire jurisdiction. Respect is not "surrender"; it is comity and recognition that conflicts would escalate infinitely if foreign courts' legitimate orders can be disregarded or countermanded lightly. Ericsson complains that ASIs encourage a race to file, but Ericsson's alternative is worse in every way.

Ericsson prefers a world with no ASIs and a race to judgment. Without ASIs, a SEP holder like Ericsson can bury a defendant in lawsuits around the world, despite its FRAND commitment. A defendant who loses even one injunction motion will be locked out of the entire market for standard-compliant products. Any defendant who cannot endure an injunction long enough for a court to determine a FRAND rate will necessarily settle at a supra-FRAND rate. That is the very holdup problem FRAND commitments exist to prevent, and is why courts adjudicating FRAND-rate-setting claims commonly bar competing SEP-based injunction claims. Ericsson and its amici want the power of SEP leverage without the responsibility of honoring FRAND obligations. They

fail to show why this Court should trample comity and precedent to bring that about.

Having no legal basis to countermand the Chinese court's order, Ericsson falls back on rhetoric. According to Ericsson, the Chinese proceedings were "secret" (Brief at 1, 2, 3, 10, 11, 19, 39, 41, 42, 48, 49, 61), the ASI "attacks" the district court (*id.* at 1, 2, 3, 4, 11, 13, 15, 18, 19, 20, 21, 22, 26, 27, 28, 32, 34, 36, 41, 45, 46, 47, 48, 55, 60), and "*invade[d]* U.S.-court authority," (46) and the AASI was merely the district court's refusal to "*surrender.*" (1, 2, 20, 22, 31, 34). That drumbeat of invective runs through Ericsson's brief and follows Ericsson's strategy of inviting the district court to declare the Chinese judiciary illegitimate while Ericsson stops just short of saying so itself. Ericsson's amici show no similar restraint, and they mistake key facts—such as the case's chronology (thinking the Texas action was filed first) and the ASI's scope (thinking it enjoins Ericsson from pursuing infringement claims or IPR petitions against Samsung). Samsung's un rebutted evidence showed that Chinese courts and procedures are fair, and that applicable law and procedure were followed. OpeningBr.26. The Supreme Court and others have deferred to Chinese courts. OpeningBr.48. This Court should

decline Ericsson’s invitation to escalate a conflict with China, and should vacate the district court’s AASI.

ARGUMENT

I. The District Court’s Injunction Should be Vacated.

Ericsson was required to show “the need to prevent vexatious or oppressive litigation and to protect the court’s jurisdiction” sufficiently outweighed comity to warrant the extraordinary remedy of an AASI. *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 366 (5th Cir. 2003). The district court’s decision rests on error on both sides of that balance. Opening Br. §I. Ericsson’s arguments are unsound and largely unresponsive.

A. Ericsson’s Broadside Attack on Foreign Antisuit Injunctions Disregards Precedent and Undermines American Courts’ Ability to Issue Orders that Foreign Courts Will Respect.

Ericsson’s argument that U.S. courts should largely, if not categorically, disregard ASIs from foreign courts is astonishing. U.S. courts have issued ASIs applying to foreign proceedings for more than 100 years. *E.g.*, *Gage v. Riverside Trust Co.*, 86 F. 984, 994, 999 (C.C.S.D. Cal. 1898); *The Salvore*, 36 F.2d 712, 714 (2d Cir. 1929); Law-Professors-Amicus.¹³ It is “common ground” that U.S. federal courts *may* enjoin

those subject to their jurisdiction from pursuing duplicative foreign litigation. *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11, 16 (1st Cir. 2004). American courts have issued ASIs in FRAND litigation and elsewhere—with reasoning grounded in neutral principles, and with the reasonable expectation that foreign courts and litigants will respect those orders. *E.g.*, *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872 (9th Cir. 2012), *aff'g* 871 F.Supp.2d 1089 (W.D. Wash. 2012); *Huawei Techs. v. Samsung Elecs. Co.*, No. 3:16-CV-2787, 2018 WL 1784065 (N.D. Cal. Apr. 13, 2018); *TCL Commc'n Tech. Holdings v. Telefonaktiebolaget LM Ericsson*, No. 8:14-CV-341 (C.D. Cal. July 10, 2015) [Appx1080-1096].

The Chinese court issued its ASI with similar expectations, and likewise issued a reasoned decision. The panel considered factors including comity and balancing hardships, and explained why an ASI was necessary to protect against two specific types of interference. Appx572-573; *see* OpeningBr.19-20, 39-40; Law-Professors-Amicus.5, 17-25.¹ Ericsson fails to acknowledge that court's reasoning.

¹ That court's reconsideration order and jurisdictional order each likewise address Ericsson's arguments exhaustively. Appx2076-2097; Appx2101-2103.

Instead, Ericsson argues that American courts only issue injunctions directed to “absolutely ‘identical’” foreign litigation, and claims the Chinese court “flunks” that test because the case in Texas *includes* claims different from the case in China. EricssonBr.29. The argument makes no sense. “Identical” is not a test any court applies; it is a word Ericsson plucked from context. Courts may enjoin the pursuit of duplicative or interfering foreign litigation. The Chinese court’s ASI was tailored to precisely that end: it enjoined only duplicative claims on the same Ericsson FRAND obligation, and interfering SEP-based injunctive claims, while leaving Ericsson otherwise free to proceed. The Chinese court’s restraint in formulating the ASI is a virtue, not a reason to declare it “flunks” a nonexistent “identical” test.

Ericsson does not otherwise engage the Chinese court’s reasoning. Instead, it attacks the ASI simply because it is an ASI. Again, Ericsson does not contend the ASI, the Chinese court, or the Chinese proceedings are illegitimate. Samsung proved otherwise, OpeningBr.26, Appx628-637(Kong); Appx653-658(Rader), and Ericsson insisted “fairness of the Chinese courts is not at issue.” Appx697. Ericsson now tries to manufacture a “U.S. policy” or international “norm,” EricssonBr.18, 33,

against honoring *any* foreign ASIs. Ericsson contends that the U.S. Code’s causes of actions and remedies embody a national public policy against recognizing foreign-court ASIs. EricssonBr.33. That makes no sense, and Ericsson cites no authority for such a bold proposition. At a minimum, 35 U.S.C. §261 cuts strongly against any such policy, by providing that “patents shall have the attributes of personal property.” Patent property rights are strengthened, not weakened, when contractual encumbrances can be relied upon. Ericsson extracted value from its SEPs by entering a FRAND pledge in exchange for inclusion of its SEPs in global standards. The Chinese proceedings and ASI follow directly from that freely-entered contract. *Cf. Microsoft*, 696 F.3d at 883 (FRAND pledge is a “contractual umbrella over the patent claims”).

Ericsson colorfully equates ASIs with a “foreign invade[r’s]” demand that a domestic court “surrender jurisdiction.” EricssonBr.2, 20, 22, 46. The Supreme Court rejected a similar view of forum-selection clauses in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). Reversing the en banc Fifth Circuit, the Supreme Court repudiated “the argument that such clauses are improper because they tend to ‘oust’ a court of jurisdiction” as a “vestigial legal fiction,” and cautioned against

the “parochial concept that all disputes must be resolved under our laws and in our courts.” *Id.* at 9, 12.

Comity requires a similar approach to foreign ASIs. The question is not whether an American court would have issued an ASI or even whether the ASI issued in the first-filed action was *correct*. It is whether there is a compelling reason to disregard or resist that foreign court’s order, let alone countermand it. Although U.S. courts have the power to issue ASIs and the “reciprocal” power to disregard or “resist” a foreign court’s ASI, *e.g.*, *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 929 (D.C. Cir. 1984), precedent and comity require restraint in both instances. Respect for a foreign court’s ASI is not “surrender,” *Ericsson Br.* 1, 2, 20, 22, 31, 34, but adherence to the time-honored principle that one nation’s courts should recognize the legitimate acts of another’s unless there is a strong reason not to, such as illegitimacy or fundamental public policy disagreement. *See Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895).

The D.C. Circuit’s “seminal” *Laker* decision, *see Quack*, 361 F.3d at 18, illustrates the degree of “foreign interference” appropriate to warrant an anti-antisuit injunction. As *Laker* explained, that case “represent[ed]

a *head-on collision* between the diametrically opposed antitrust policies of the United States and United Kingdom.” 731 F.2d at 916. The United States permits treble damages in antitrust actions. The United Kingdom not only does not, but actively seeks to thwart that remedy in other jurisdictions. In *Laker*, the United Kingdom passed the “British Protection of Trading Interests Act,” authorizing its executive to “require that any person conducting business in the United Kingdom *disobey all foreign orders and cease all compliance with the foreign judicial or regulatory provisions designated by the Secretary of State.*” *Id.* at 920. The British executive applied that disobedience mandate against “United States antitrust measures,” *id.*, and issued orders “prevent[ing] the British airline from complying with any requirements imposed by the United States District Court and prohibit[ing] the airlines from relying on their own commercial documents located within the United Kingdom to defend themselves against Laker’s charges” in the U.S. *Id.* The English court upheld the disobedience order, and issued an injunction that it acknowledged would make the antitrust claims in the U.S. “wholly untriable.” *Id.*

Against that backdrop, the *Laker* majority deemed an American court’s anti-interference injunction “purely *defensive*.” *Id.* at 938. The English court’s injunction was “purely *offensive*.” It was “not designed to protect English jurisdiction,” or allow a case in English court to proceed to judgment. *Id.* at 938. “Rather,” the court explained, “*the English injunction seeks only to quash the practical power of the United States courts to adjudicate claims under United States law against defendants admittedly subject to the courts’ adjudicatory jurisdiction.*” *Id.*

Ericsson distorts *Laker* throughout its brief by lifting phrases such as “purely offensive” and “purely defensive” to insinuate that *Laker* labels *all* ASIs “offensive” and *all* AASIs “defensive.” *E.g.*, EricssonBr.32, 45, 46, 47, 48, 50 (distorting *Laker*); *id.* at 25, 26, 29, 38 (similar). *Laker* supports reversal here, not affirmance. The Chinese court’s ASI is “defensive”: it protects the court’s rate-determination proceeding from the narrow categories of claims that would *necessarily interfere with it*—i.e., competing determinations and injunctions. If any injunction is “purely offensive,” it is the district court’s AASI, particularly in light of its overbreadth. *See* §II, *infra*.

Ericsson’s other policy arguments against respecting ASIs likewise distort the cases it cites. Ericsson string-cites American cases for a supposed “rule” against deferring to “a pending suit in a foreign court,” EricssonBr.22. Those cases concern *domestic* conflicts—between a state court, and either a federal court or another state court. *Bowne v. Joy*, 9 Johns. 221 (N.Y. 1812) (“foreign court” meant Massachusetts); *Renner & Bussard v. Marshall*, 14 U.S. 215 (1816) (Virginia and D.C.); *Stanton v. Embrey*, 93 U.S. 548 (1877) (state and federal courts); *Kline v. Burke Constr. Co.*, 260 U.S. 226 (1922) (same). In other words, they describe American federalism, not international norms. The Anti-Injunction Act, 28 U.S.C. §2283, restricts federal-court injunctions against state proceedings. The Supremacy Clause restricts state-court injunctions against federal proceedings. Federalism and the Full Faith and Credit Clause restrict state-to-state injunctions. The salient domestic analogy—which Ericsson ignores in that discussion—concerns coequal *federal courts*. See OpeningBr.55-56; §I.B, *infra*. Federal courts of appeals follow a first-in-time rule for intercircuit transfers, where the first court “to decide the jurisdictional issue” receives deference unless its analysis is

not “plausible.” *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817-19 (1988).

Ericsson likewise over-reads Indian and German orders from the *Interdigital-Xiaomi* litigation. EricssonBr.27-28. The Indian *Interdigital* order is TRO-like: a non-appealable, non-precedential “ad interim” trial-court ruling that does not “inhibit” the court from reaching a different result later. Appx323(¶81). The German *Interdigital* order—and the cited German *Nokia* order (EricssonBr.26)—are both from inferior Munich courts, and do not necessarily reflect German law, let alone international norms. EricssonBr. 26-28. Both German orders, moreover, reason that *German statutes* forbid foreign ASIs affecting German patents. *See* Appx1866; Appx1908 (both citing German Civil Code §823). Suffice it to say, the German Civil Code does not govern this appeal. No principle of American or international law treats foreign-court ASIs as presumptively suspect.

B. The District Court Erroneously Disregarded Comity.

Comity required the district court to treat the Chinese court’s ASI with the same respect American courts would demand for their own orders. Comity is particularly appropriate here, where the Chinese

court's reasoned order conforms with the approach American courts take to ASIs. Appx572-573; *see also* OpeningBr.19-20, 39-40; Law-Professors-Amicus.5, 17-25. It invokes the same principles, Appx569; Appx572, to serve the same purpose—protecting its legitimate rate-setting proceeding from duplicative rate-setting claims or interfering SEP-based injunctive claims. Appx573-575.

Again, it is “common ground” that courts may enjoin parties before them from pursuing “*duplicative*” foreign litigation. *Quaak*, 361 F.3d at 16. American courts have long recognized that “the court *first securing jurisdiction* has the authority and power of enjoining the parties to the litigation from proceeding in another jurisdiction.” *Salvore*, 36 F.3d at 714. That neutral principle avoids infinitely escalating conflicts. OpeningBr.53-56; *Peck v. Jenness*, 48 U.S. (7 How.) 612, 624-25 (1849); *Laker*, 731 F.2d at 927 n.51 (citing *id.*); *Christianson*, 486 U.S. at 817-19.

Ericsson's attacks on that principle and its application here are unsound. Ericsson contends the Chinese court's injunction was “contrary to comity principles.” EricssonBr.46. But its only support is the argument that *all* antisuit injunctions offend comity. EricssonBr.46-47. Ericsson thus argues that anti-anti-suit injunctions must always be permitted

because they *restore* comity by nullifying ASIs. EricssonBr.46-47. As just explained, no authority supports Ericsson’s view that ASIs are *per se* offensive. §I.A, *supra*. And *Laker* refutes Ericsson’s suggestion that AASIs are *per se* favored or “purely defensive.” *Id.* Finally, Ericsson’s assertion that Samsung “nowhere suggests” the Chinese court applied comity standards is simply false. *Compare* EricssonBr.46, *with* OpeningBr.19-20, 52; *see* Appx569; Appx572-573; Law-Professors-Amicus.5, 17-25.

Samsung explained the first-filed principle is an important, but not rigid, principle and thus not always dispositive. OpeningBr.53-55. (citing cases). Nonetheless, Ericsson five times accuses Samsung of arguing for a rigid first-filed “rule.” EricssonBr.47-50&n.4. Ericsson heavily emphasizes a Third Circuit footnote explaining that the “first-to-file *rule*” for district courts does not apply internationally. *Compare* EricssonBr.48, *with* OpeningBr.55 (discussing same footnote). But after dispatching that strawman, Ericsson acknowledges American courts *do* consider the order of filing. EricssonBr.49-50.

Ericsson disparages the first-filed principle as “terrible policy,” lamenting a “race” to the courthouse. EricssonBr.50. Global standard-

setting practice makes some form of a “race” all but inevitable. Standard-setting organizations typically do not designate a forum for rate-setting disputes. There is no international MDL, and no global rate-setting tribunal. Where, as here, the parties cannot agree on a license or an arbitrator, the necessary result is thus some form of a “race.” OpeningBr.9-10; Law-Professors-Amicus.3-4, 7 & n.3, 10-11; *Apple, Inc. v. Motorola Mobility, Inc.*, No. 11-CV-178, 2012 WL 5416941, at *4 (W.D. Wis. Oct. 29, 2012); *Unwired Planet Int’l Ltd. v. Huawei Techs. (UK) Co.*, [2020] UKSC 37 ¶90 (Eng.) [Appx1831-1832].

In appropriate cases, American and Chinese courts have issued antisuit injunctions to ensure that FRAND rates can be adjudicated without interference. Law-Professors-Amicus.15. Here, Samsung filed first in one of two jurisdictions that will determine worldwide FRAND rates in the manner Ericsson championed in the U.K. in *Unwired Planet*. Having legitimately acquired jurisdiction over the parties and the dispute over Ericsson’s FRAND rate, and being the first court to do so, the Chinese court appropriately issued a narrow ASI.

Ericsson contends, however, that the world would be better with *no* foreign antisuit injunctions at all: “*When sovereigns confine themselves to*

their own cases,” Ericsson argues, “no ‘jurisdictional ping-pong’ results.” EricssonBr.50. Ericsson’s proposal is not the law, would only postpone and exacerbate jurisdictional conflicts, and would threaten technological standards by undermining FRAND commitments.

A world without antisuit injunctions invites SEP holders to circumvent FRAND commitments by filing lawsuits across the globe against willing licensees. Parties with broad portfolios can file lawsuits in every jurisdiction where they hold SEPs. Law-Professors-Amicus.10-12 (*Apple-Samsung* and *Vringo-ZTE* examples). A ten-way (or more) race to judgment or injunction would replace the two-way race to the courthouse Ericsson laments.

Ericsson never explains how that is other than “terrible policy.” It is not only inefficient; but grossly asymmetric. Every individual SEP permits the owner to leverage the *entire standard’s* value against implementers. OpeningBr.8. A company like Ericsson that owns thousands or more patents it believes to be SEPs can file thousands or more actions seeking injunctions against a willing licensee. And if Ericsson persuades even one judge to grant one injunction (preliminary or otherwise), it can shut the defendant’s wireless business down

nationwide—or worldwide depending on the defendant’s supply chain. Defendants, however, must win every single time to avoid that prospect. Once a defendant’s business is shut down, Ericsson can demand supra-FRAND royalties. In a world with no antisuit injunctions, a SEP holder’s FRAND pledge may be worthless to all but the rare defendant who can endure a multi-front patent war long enough to obtain a judgment enforcing that pledge. And even then, the question remains—which of myriad dueling court orders on the same issue should be followed?

Ericsson’s proposal to replace a two-way race to the courthouse with a chaotic ten-way-or-more race to judgment only punts the “race,” and invites inefficient, asymmetric, FRAND-negating patent warfare in the interim. To use Ericsson’s words, it is the height of inequity and hypocrisy to attack ASIs (which temporarily curtail litigation) while endorsing SEP-based injunctions (which shut down a defendant’s business in standard-complaint products). Ericsson’s anti-ASI agenda is “terrible policy,” EricssonBr.50, not the law, and no defense of the district court’s errors.

C. The District Court Erroneously Treated the Chinese Action as “Vexatious or Oppressive.”

The district court found the Chinese action “vexatious and oppressive” based on demonstrably false assumptions. OpeningBr.¶I.A Ericsson’s responses lack merit.

1. The District Court Relied on an Erroneous View of the Scope of the Chinese Injunction and Action.

The Chinese court’s ASI enjoins Ericsson from two specific types of filings: **(1)** duplicative rate-setting claims based on Ericsson’s FRAND commitment, and **(2)** claims for injunctive relief on SEPs. *See* Appx573-575 (injunction); Appx991; OpeningBr.20-21. The ASI does not bar Ericsson from proceeding in district court on virtually all counts, including most original counts, and all amended counts. The ASI and action in China overlap with at least Ericsson’s Count III (seeking declarations about Ericsson’s FRAND obligations) and any potential (but currently unpled) injunctive remedy for the infringement counts. Far from warranting an AASI, this is exactly where comity requires restraint.²

² Ericsson spends pages defending its original complaint’s flimsy assertion of diversity jurisdiction. EricssonBr.8-9. No domestic Samsung entities own ETSI-declared SEPs to license to Ericsson. Complete diversity is thus absent. *Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546,

The district court erroneously believed the Chinese court’s injunction would “prevent[its] case from moving forward,” Appx11, and undermine its “virtually unflagging obligation” to exercise jurisdiction, Appx8. Ericsson’s responses are unsound.

Ericsson contends the ASI “threatened all of Ericsson’s claims.” EricssonBr.34-35, 40-41. It did not. The Chinese court’s reasoned opinion explains the scope and purpose of the ASI—to prevent two specific types of interference with the Chinese court’s consideration of a rate. Appx573-575. Neither Samsung nor the Chinese court has ever suggested that Ericsson cannot litigate *Samsung’s* FRAND commitment, assert infringement, or calculate damages. Ericsson’s suggestion that the ASI “could easily be read” to suggest those things is unsupportable. EricssonBr.35, 41.

Ericsson fails to defend the district court’s erroneous reliance on an “unflagging obligation” to hear declaratory-judgment claims. EricssonBr.36. There is no such obligation. *Wilton v. Seven Falls Co.*, 515

552-55 (2005); *U.S. Motors v. Gen. Motors Eur.*, 551 F.3d 420, 422 (6th Cir. 2008). Ericsson’s original complaint concerns Swedish and Korean corporations’ French-law contract dispute, and should have never been in federal court before Ericsson’s amendment to add patent-infringement claims. *See Vantage Drilling Co. v. Su*, 741 F.3d 535 (5th Cir. 2014).

U.S. 277, 284, 286-88 (1995); 28 U.S.C. §2201 (“*may* declare”). Binding precedent rejects Ericsson’s argument that discretion under the Declaratory Judgment Act is limited to remedies. *Wilton*, 515 U.S. at 282 (“discretion ... whether and when *to entertain an action*”); *Matthews Int’l Corp. v. Biosafe En’g, LLC*, 695 F.3d 1322, 1328 n.3 (Fed. Cir. 2012) (“discretion ... whether or not to exercise declaratory judgment jurisdiction”). *Sprint Commc’ns, Inc. v. Jacobs*, 571 U.S. 69, 72 (2013) (cited EricssonBr.36) concerns only the *Younger* abstention doctrine, which is not at issue.

2. The District Court Relied on an Erroneous and Ultimately Irrelevant View of Chinese Procedures and Ericsson’s Rights in China.

Although the district court did not question the legitimacy of the Chinese court, it labeled the Chinese ASI as “inequitable” in “completely shifting the burden to the responding party.” Appx9. That is a basic misapprehension of Chinese procedure—and civil law courts generally. “[S]hifting the burden” erroneously presumes an adversarial “burden” not present in inquisitorial systems. OpeningBr.45-48. That China (like much of the world) follows an inquisitorial system is no basis for an AASI. Even Ericsson does not try to defend that rationale.

Instead, Ericsson charges that those proceedings were initially “secret.” That is misleading at best. Samsung undisputedly followed applicable law in pursuing *ex parte* procedures to obtain temporary relief at the outset of the case. The injunction application was only *ex parte* until the court granted initial relief. Ericsson notes that the Chinese court took several days to grant relief, EricssonBr.49, but ignores that it was under no injunction during that time and suffered no consequences.

The procedure followed in China is not meaningfully different from *ex parte* procedures in the U.S. Both countries permit temporary *ex parte* relief if the situation is urgent and notice may moot or hinder the court’s ability to provide relief. Appx635-636(¶18) (Kong); Fed. R. Civ. P. 65(b)(1). Ericsson well knows this as it obtained a TRO against Samsung without notice. Appx247; Appx19; OpeningBr.19, 24-25. Ericsson contends it “speaks volumes” that Samsung followed *ex parte* procedures “because other courts would respond.” EricssonBr.42. Ericsson did the same thing in Texas. Appx247. Ericsson, moreover, has now been fully heard in China. EricssonBr.12. That court’s reconsideration decision should answer any doubts about the fairness of that proceeding. Appx2068-2097.

Ericsson’s repeated quotation of counsel’s remarks in another case is likewise misleading. EricssonBr.4, 11, 42 (“antithetical,” all quoting Appx392). In that other case, Huawei sued Samsung in the United States, putting the determination of FRAND rates and obligations before the district court. Huawei subsequently filed actions in China, seeking patent injunctions, inconsistent with its FRAND pledge and its decision to file first in the U.S. 2018 WL 1784065, at *12. In *that* context, Samsung made the same arguments it makes here—that patent injunctions interfere with FRAND rate determinations and should be enjoined by the court in the first-filed action (there, the U.S. court). Samsung’s counsel correctly noted that procedures for obtaining *patent injunctions* in China differed from the U.S., such that *collateral estoppel* should not apply. That context is in the transcript excerpt Ericsson submitted below, Appx392, and the immediately-preceding page (which Ericsson omitted). Transcript, *Huawei Techs. Co. v. Samsung Elecs. Co.*, N.D. Cal. No. 3:16-CV-2787, Dkt. 254 at 19 (Mar. 16, 2018). Ericsson’s accusations of inconsistency are simply untrue, and cannot obviate comity.

Ericsson’s digression into hypothetical *forum non conveniens* motions practice is puzzling. EricssonBr.43, 19. Samsung explained that

the Supreme Court and others have recognized Chinese courts as legitimate, citing *forum non conveniens* cases where that question arose, OpeningBr.48. It is no answer that Ericsson believes it could defeat a hypothetical *forum non conveniens* motion from Samsung.

Ericsson's repeated contrast between "the U.S." and "Wuhan" is another distraction. EricssonBr.36-37. Ericsson does not dispute that the Chinese courts have jurisdiction over the parties and claims. That should end the matter. The question is not whether "Marshall" or "Wuhan" should decide the French-law FRAND dispute, but whether the ASI in the first-filed action warrants comity. Ericsson has 13,000 employees and a major manufacturing plant in China, has done business there since 1890, and its current sales in China are eight times more than in Sweden. Stu Woo, *Huawei Ban Puts Competitor in a Bind*, WALL ST. J. (Apr. 1, 2021) [<https://tinyurl.com/3aa9zdtk>].

China has established intellectual property courts, and is willing to resolve global rate-setting claims in the manner Ericsson and its spinoff successfully advocated in *Unwired Planet*. In *Unwired Planet*, the U.K. Supreme Court set worldwide rates even though the U.K. comprised only 1% of Huawei's market and 0.07% of ZTE's. Appx1813(¶37).

3. Ericsson's Arguments About *Samsung's* FRAND Obligations are Irrelevant.

Ericsson emphasizes that it had the right to condition any global license offer to Samsung on a reciprocal cross-license to Samsung's patents. It thus complains that Samsung's action in China would set a rate for only Ericsson's portfolio, and not Samsung's. That complaint runs throughout Ericsson's brief, and is irrelevant to this appeal. EricssonBr.37-38, 3, 6-7, 9, 10, 14, 29, 30, 35.

Ericsson's and Samsung's FRAND commitments are separate undertakings. Ericsson does not dispute that Samsung may enforce Ericsson's commitment as a third-party beneficiary. Nor does it dispute that the Chinese court has authority and jurisdiction to interpret Ericsson's contractual FRAND obligation and set a rate. That Ericsson's FRAND obligation is properly before the Chinese courts is enough to reject Ericsson's confused arguments about reciprocity.

Ericsson has a wealth of options to raise its concerns. If Ericsson believes reciprocity should affect the Chinese court's rate-setting, it can raise that in China, and has done so. Appx2077; Appx2092. If Ericsson believes the Chinese court should set a rate for *Samsung's* SEP portfolio in tandem with the rate for Ericsson's SEP portfolio, it can also raise that

in China, which it has not done. Ericsson’s decision to bring a declaratory judgment claim in Texas that *Samsung* has breached its own FRAND obligations regarding its own patents does not affect the analysis or somehow provide grounds to disregard the Chinese court’s legitimately-entered ASI in an action about *Ericsson’s* obligations.

4. The District Court Relied on an Erroneous View of Samsung’s ITC Complaint and Its Own Role As “Counterbalance[r].”

Ericsson concedes—as it must—that the district court erred when it believed Samsung had filed an ITC Complaint seeking injunctions for *standard-essential patents*. EricssonBr.44-45. That error was not trivial. A SEP-based injunction locks the defendant out of the entire market of standard-compliant products, and may force a settlement at supra-FRAND holdup rates. OpeningBr.8, 75. That is what the Chinese ASI sought to prevent Ericsson from doing to Samsung while the case was pending. Appx573-574. The district court erroneously thought Samsung *was* seeking SEP-based injunctions against Ericsson from the ITC, and understandably labeled that prospect as “the height of inequity (and hypocrisy).” Appx13. Indeed, the Chinese reconsideration order suggested disapproval of that same prospect, emphasizing that the ASI

was reasonable in part because Samsung was *not* seeking SEP-based injunctions against Ericsson. Appx2094; Appx2091. Unfortunately, the court was simply wrong about the facts, as all now agree. The error is not harmless as the district court plainly accorded weight to this misunderstanding.

Ericsson has no answer, so it grasps for other things *it* considers “hypocrisy” or “inequity.” Ericsson contends that *inter partes reviews* are inequitable and the court was “entitled to consider” that. EricssonBr.44. Neither Ericsson nor the district court said anything about IPRs below, which is reason enough to reject the argument. Discretionary rulings must stand or fall on their own reasoning; they cannot be affirmed on alternative grounds unless the reviewing court “can say as a matter of law that it would have been an abuse of discretion for the trial court to rule otherwise.” *Ashby v. McKenna*, 331 F.3d 1148, 1151 (10th Cir. 2003); *see also Manion v. Am. Airlines, Inc.*, 395 F.3d 428, 431 (D.C. Cir. 2004); *United States v. Thompson-Riviere*, 561 F.3d 345, 353 n.5 (4th Cir. 2009); *cf. Chamberlain*, 676 F. App’x at 987.

No such showing is even possible here. Invalidation of a patent (through IPR or otherwise) cannot lock Ericsson out of any market. If

Ericsson finds IPRs inequitable, its quarrel is with Congress or perhaps the Patent Office. Ericsson remains free to proceed with infringement claims, and Samsung is free to raise invalidity challenges. That is not “hypocrisy” or “inequity”; it is how patent litigation works.

Ericsson acknowledges that it was not the district court’s role to somehow “balance” Ericsson’s global negotiating leverage against Samsung’s with an AASI. EricssonBr.45. But Ericsson offers no reason to doubt the district court’s repeated statements that it was in fact acting to “balance” the parties’ negotiating leverage. *See* OpeningBr.50-51 (quoting Appx10; Appx13; Appx14).

* * *

Ericsson was not required to participate in standard-setting or enter its agreement with ETSI. But having freely pledge to license its SEPs on FRAND terms, in exchange for inclusion of its technology in 4G and 5G standards, it must honor the obligations it voluntarily assumed. The Chinese ASI is a legitimate, direct consequence of Ericsson’s FRAND pledge. The district court erred in undoing that order, and its AASI should be vacated.

II. The District Court’s Injunction Should be Narrowed.

Ericsson’s brief all but admits that the district court’s injunction is overbroad. If this Court does not vacate the injunction, the reasons for narrowing it are straightforward. Equity and comity both require that any injunction in this context be no broader than absolutely necessary. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010); *Microsoft*, 696 F.3d at 887. The district court injunction’s nationwide scope, unprecedented indemnity provision, and open invitation to seek broad injunctions, all overreach any conceivable claim of necessity.

A. The Nationwide Injunction Overreaches Any Notion of “Protecting” the “Jurisdiction” of the Eastern District of Texas (Provisions 2 and 3).

The district court repeatedly stated that its injunction was limited to “the targeted purpose of allowing both suits to proceed without interference.” Appx13; Appx6; *see* Appx14 (“simply to preserve its jurisdiction); Appx7; Appx11; Appx8; Appx15. That is self-evidently not so. A *nationwide* injunction is not necessary to “protect [the] jurisdiction” of the Eastern District of Texas or “allow[] *both suits* to proceed without interference.”

Ericsson has no viable response. Its citations are far afield. EricssonBr.53. *Waffenschmidt v. MacKay*, 763 F.2d 711, 716 (5th Cir.

1985), is irrelevant: it holds only that courts may punish nonparties who abet violations of an injunction. *Texas v. United States*, 809 F.3d 134, 147, 188 (5th Cir. 2015), enjoins a federal immigration policy and holds only that nationwide injunctions may issue “in appropriate circumstances.” That general proposition is dubious. *DHS v. New York*, 140 S.Ct. 599, 599-600 (2020) (Gorsuch, J., joined by Thomas, J., concurring in stay of nationwide injunction).

More importantly, Ericsson cannot explain how *this* nationwide injunction is necessary or appropriate. Ericsson notes the Chinese ASI “was not limited to actions in the Eastern District of Texas.” EricssonBr.53. True, but empowering Ericsson to file duplicative or interfering claims elsewhere in the U.S. does not protect the district court’s jurisdiction or its professed “targeted purpose of allowing both suits to proceed without interference.” Appx13. Finally, Ericsson lets the mask slip when it characterizes the injunction as “preserv[ing] *the jurisdiction of U.S. courts and agencies.*” EricssonBr.56. That is plainly beyond the district court’s purview.³

³ As noted Ericsson elsewhere admits the district court had no legitimate role “balanc[ing]” Ericsson’s global negotiating leverage against Samsung’s with an AASI. EricssonBr.45.

B. The Indemnity Provision Should be Excised or Narrowed (Provision 3).

If the Chinese court sanctions Ericsson for violating the ASI anywhere in the United States, *sua sponte* or otherwise, Samsung must indemnify Ericsson. The power to punish contempt is “inherent in all courts” and “essential to the administration of justice.” *Michaelson v. United States*, 266 U.S. 42, 65 (1924); see OpeningBr.70-71. The AASI is “purely offensive,” *Laker*, 731 F.2d at 938 as interferes directly the Chinese court’s ability to enforce its own orders, in a way no U.S. court would tolerate.

Ericsson’s efforts to defend that provision illustrate why it is unsupportable. Ericsson contends that “indemni[t]y” injunctions are “routine,” but its two citations illustrate the opposite. EricssonBr.57-58. The injunction in *Gon v. First State Ins. Co.*, 871 F.2d 863, 864-65 (9th Cir. 1989) arose from a duty-to-defend claim in insurance litigation, and enforced an insurance policy requiring the insurer to pay legal expenses as they were incurred. In *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816, 830 (D.C. Cir. 1984), the court ordered an aircraft manufacturer to fund medical examinations for passengers in a plane crash, *as a remedy for the passengers’ tort claims*. Both orders

merely provided remedies for a cause of action. Neither order counteracted another court's sanctions. Ericsson has no cause of action or contract that would require Samsung to pay Ericsson's sanctions in China. Ericsson's resort to tenuous authority confirms that the indemnity is unprecedented.

Ericsson contends the indemnity is "not a sanction" because it is "forward-looking." EricssonBr.56. "Forward-looking" only confirms that provision's infirmity. On a "forward-looking basis," Samsung may be punished even if Samsung does *nothing*, wrongful or otherwise. Ericsson argues that *FDIC v. Maxxam, Inc.*, 523 F.3d 566 (5th Cir. 2008), and *Positive Software Sol'ns, Inc. v. New Century Mortg. Corp.*, 619 F.3d 458 (5th Cir. 2010), imply the ability to sanction *conduct* that might interfere with the district court's authority. EricssonBr.57-58. Again, the AASI's indemnity is automatic and requires no *conduct* by Samsung. The Chinese court need only fine or sanction Ericsson, "sua sponte ... or otherwise." Appx15.

In background sections, Ericsson's brief cites the district court's questions at oral argument to suggest the district court was concerned about *ex parte* contacts. EricssonBr.17. Those arguments are not

preserved, *Fox Factory, Inc. v. Sram, LLC*, 944 F.3d 1366, 1379 (Fed. Cir. 2019) (citing cases), and also meritless because questions at argument are not the court's order. *United States v. Brown*, 34 F.3d 569, 572 (7th Cir. 1994); *Commonwealth v. Colon*, 598 N.E.2d 1143, 1145 (Mass. App. Ct. 1992). And if the district court silently assumed that only *ex parte* contact from Samsung could prompt the Chinese court to fine Ericsson, that guilty-until-proven-innocent approach only exacerbates the abuse of discretion.

Ericsson's remaining arguments only scoff and argue waiver. The indemnity prevents the Chinese court from enforcing its own orders in a way no American court would tolerate, and punishes Samsung automatically for the actions of others. Ericsson calls this "rich" and a "throwaway line" before returning to its refrain that foreign antisuit injunctions warrant no respect from other courts. Ericsson Br.58-59. Ericsson's waiver suggestion is wrong. Samsung expressly objected to overbreadth, specifically including the requirement of indemnity for actions Ericsson took in other courts or for sanctions imposed *sua sponte*. Appx504-506; Appx1316-1317.

C. The District Court Overreached by Nullifying the Chinese Court’s Injunction Against Claims for Injunctive Relief on FRAND-Encumbered SEPs (All Provisions).

Samsung explained that the Chinese court’s order enjoining Ericsson from seeking *injunctive* relief on FRAND-encumbered SEPs was (1) reasonable, and (2) not at issue in the district court because Ericsson has not tried to seek injunctions on SEPs. OpeningBr.71-75.

The district court nonetheless nullified that part of the ASI based on the belief (which all now agree was wrong) that *Samsung* had made such claims against Ericsson in the ITC, so that intervention was necessary to prevent “inequity (and hypocrisy).” Once the district court’s mistake is corrected, no justification remains for that aspect of the district court’s injunction. Ericsson tellingly offers no such justification. Ericsson does not dispute that a claim for injunctive relief on a SEP exerts holdup pressure on a defendant by threatening to lock it out of the entire market for standard-compliant products. Ericsson only suggests that Samsung can oppose a patent injunction “in a district court” and take comfort in the *eBay* factors. EricssonBr.60. As Ericsson surely knows—and betrays in its reference to “agencies” in the very next sentence—the ITC offers no such assurance. *Spansion v. ITC*, 629 F.3d

1331, 1359 (Fed. Cir. 2011) (“this court holds that *eBay* does not apply to Commission remedy determinations under Section 337.”).

At a minimum, the AASI should be vacated to the extent it interferes with the Chinese court’s ASI against Ericsson’s pursuit of actions for injunctive relief.

III. The District Court’s Injunction Should Not Remain in Place.

Ericsson cannot support its request that the Court leave the AASI in place *even if* the Court finds error. Ericsson Br.61-62. The normal rule is erroneously-issued injunctions must be vacated, even if the trial court could in theory issue an injunction on different reasoning. *Ridgely v. FEMA*, 512 F.3d 727, 735 (5th Cir. 2008) (“*we must vacate*” erroneously-issued injunction, though “the possibility remains” injunction could be justified); *Flood v. ClearOne Commc’ns, Inc.*, 618 F.3d 1110, 1124 (10th Cir. 2010) (Gorsuch, J.) (“*we must vacate*” erroneously-issued injunction; expressing “no views on whether a new and different order should or shouldn’t be entered”); *Chamberlain Grp. v. Techtronic Indus.*, 676 F. App’x 980, 987 (Fed. Cir. 2017) (“*we must vacate*” preliminary injunction; declining to reach alternative arguments).

That normal rule is consistent with the extraordinary nature of injunctions and with the movant's burden of proof. *Monsanto*, 561 U.S. at 166; *Winter v. NRDC*, 555 U.S. 7, 24 (2008). Ericsson notes injunctions are discretionary, EricssonBr.61, but that counsels in favor of vacatur, because discretionary rulings must stand or fall on their own reasoning unless the reviewing court "can say as a matter of law that it would have been an abuse of discretion for the trial court to rule otherwise." *Ashby*, 331 F.3d at 1151; *Manion*, 395 F.3d at 431; pp.28-29, *supra*. Ericsson makes no such showing here.

In isolated cases, reviewing courts have exercised discretion to leave insufficiently-explained injunctions in place while ordering expedited remands to supply missing explanations. *Allied Marketing Grp. v. CDL Marketing, Inc.*, 878 F.2d 806, 814 (5th Cir. 1989) remanded on those terms where the court could not "say at this point in time that the district court committed reversible error." Ericsson's cited cases are no different. *TEC Eng'g Corp. v. Budget Molders Supply, Inc.*, 82 F.3d 542, 546 (1st Cir. 1996) (citing *Allied*); *Takiguchi v. MRI Int'l Inc.*, 611 F.

App'x 919, 920 (9th Cir. 2015) (remand for clarification).⁴ None allowed a losing appellee to keep an erroneously-issued injunction while it tried again in district court, as Ericsson asks. EricssonBr.62. The injunction should be vacated.

CONCLUSION

The district court's AASI should be vacated or narrowed.

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Respectfully submitted,

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⁴ *Arlington Indus. v. Bridgeport Fittings, Inc.*, No. 2011-1377, 2011 WL 5275848 (Fed. Cir. Nov. 4, 2011) granted an *unopposed* motion in a case not involving injunctions.

**CERTIFICATE OF COMPLIANCE WITH
TYPE-VOLUME LIMITATION**

This brief complies with the type-volume limitations of Fed. Cir. Rule 32 and Fed. R. App. P. 32. According to the word processing system used to prepare it, the brief contains 6,984 words.

/s/ John C. O'Quinn
