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No. 14-_____

Supreme Court, U.S.
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**In the
Supreme Court of the United States**

**SD-3C, LLC; PANASONIC CORPORATION; PANASONIC
CORPORATION OF NORTH AMERICA; TOSHIBA
CORPORATION; TOSHIBA AMERICA ELECTRONICS
COMPONENTS, INCORPORATED; SANDISK
CORPORATION,**

Petitioners,

v.

DAN OLIVER, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This is a companion case to *Panasonic Corporation, et al. v. Samsung Electronics Co., Ltd.*, No. 14-540 (petition for a writ of certiorari filed Nov. 12, 2014).

In 1999, Petitioners, a group of technology companies, came together to create the “SD Card” used in many consumer electronics products and to license their pooled intellectual property. They announced in 2000 that they would charge third parties, but not themselves, for the right to use the SD Card intellectual property, and they began licensing to third parties in 2003. In 2010, Samsung sued over the “permanent cost advantage” caused by this “discriminatory” licensing program. In 2011, this consumer class action was filed. The district court held both actions untimely, but the Ninth Circuit reversed.

The questions presented are:

(i) Whether the Ninth Circuit erred when it held that Petitioners are subject to antitrust suits seeking injunctive relief against the foundational terms of a decade-old standard setting and technology licensing arrangement for as long as third parties continue to make sales of goods embodying that technology?

(ii) Whether the Ninth Circuit erred when it treated its statute of limitations analysis as dispositive on the issue of laches, without considering the broader equitable issues associated with permitting challenges to long-settled business arrangements?

LIST OF PARTIES AND RULE 29.6 STATEMENT

Petitioners are SD-3C, LLC, Panasonic Corporation, Panasonic Corporation of North America, Toshiba Corporation, Toshiba America Electronics Components, Incorporated, and SanDisk Corporation. SD-3C, LLC is a limited liability Delaware company owned by members Panasonic Intellectual Property Corporation of America, SanDisk Corporation, and Toshiba America Electronic Components, Inc. Panasonic Corporation is a nongovernmental corporate party with no parent corporation, and no publicly-held corporation owns 10% or more of its stock. Panasonic Corporation is the corporate parent of Panasonic Corporation of North America and owns 10% of more of its stock. Toshiba Corporation is a nongovernmental corporate party with no parent corporation, and no publicly-held corporation owns 10% or more of its stock. Toshiba America Electronic Components, Inc. is wholly owned by Toshiba America, Inc., which is wholly owned by Toshiba Corporation. SanDisk Corporation is a nongovernmental corporate party with no parent corporation, and no publicly-held corporation owns 10% or more of its stock.

Respondents are Dan Oliver, Jeannie Oliver, Joe Solo, Bernard Gross, Susan Keelin, Walter Kvasnik, Kou Srimounghanch, Humberto Gonzalez, Samuel D. Leggett, Brian Albee, Mary Louise Fowler, Joe Show, Rhonda Schultz, all of whom began purchasing SD Cards for end use from retail outlets or from third-party licensees of SD Card intellectual property in various states since March 15, 2007. Respondents purport to represent a class of similarly situated indirect purchasers of SD Cards.

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OPINION BELOW

The decision below is reported at 751 F.3d 1081 (9th Cir. 2014). Pet. App. 1a-10a. The order denying rehearing *en banc* is unpublished. Pet. App. 20a-21a. The district court's decision dismissing the first amended complaint is unpublished. Pet. App. 11a-19a.

JURISDICTION

The court below entered judgment on May 14, 2014, and denied a timely rehearing petition on September 2, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

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

Section 16 of the Clayton Act, 15 U.S.C. § 26, provides in relevant part: "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws ... when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity"

INTRODUCTION

In this case and in *Samsung Electronics Co. v. Panasonic Corp.*, 747 F.3d 1199 (9th Cir. 2014) (“*Samsung*”), the Ninth Circuit allowed private antitrust plaintiffs to challenge the original structure and basic licensing practices of a standard setting organization and patent pool formed a decade before the suits. The court did so on an understanding of Sections 4B and 16 of the Clayton Act, 15 U.S.C. §§ 15b and 26, that is contrary to this Court’s precedents and that of several other circuits. The court’s decisions make it all but impossible for continuing collaborations such as joint ventures and standard setting organizations to obtain antitrust repose.

Both cases concern a collaboration among Petitioners Panasonic, SanDisk, and Toshiba to develop and standardize the “SD Card,” which has become the most popular format for removable flash memory in consumer devices like cameras and smartphones. Petitioners formed a joint venture in 1999 (incorporated as Petitioner SD-3C, LLC), which developed a formal SD Card specification (*i.e.*, a standard) adopted and issued in January 2000 by the “SD Association,” an open membership body. Pet. App. 118a-19a, 126a.

From the beginning of their collaboration, Petitioners publicly announced that, “[w]hile other flash card manufacturers will be required to pay the SD Association license fees and royalties which will be shared between [Panasonic], Toshiba and SanDisk,” those three companies would cross-license their patents to each other on a royalty-free basis. Pet. App. 161a (citation omitted). In 2003 the SD Association offered all comers a license to the necessary SD Card

IP for a fixed 6% royalty. Pet. App. 13a. The district court correctly recognized that the four-year Clayton Act limitations period to challenge those actions ended no later than 2007. Pet. App. 5a.

In *Samsung*, the Ninth Circuit nonetheless held that a 2010 suit by Samsung, one of the earliest and most important licensee manufacturers of SD Cards, was timely because SD-3C's ongoing collection of royalties under a 2003 license with Samsung and its 2006 proposal of a license amendment (which Samsung *rejected*) made the SD Card licensing program a "continuing violation" of the antitrust laws that kept the limitations period open. The court also held that the statute was tolled because before 2006, Samsung's damages were apparently "speculative."

As thoroughly explained in the petition filed in *Samsung*, both holdings conflict with precedents of this Court and of other circuits, which toll the limitations period for a "continuing conspiracy" only when the action challenges a "new and independent act" occurring within four years of suit, and not merely the continued receipt of benefits from, or "unabated inertial consequences" of, an earlier act.

This suit differs from *Samsung* because the plaintiffs are not SD-3C licensees, or any kind of "direct purchaser" with standing to seek damages in a federal antitrust action. See *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977). They are purchasers of finished SD Cards—*i.e.*, "indirect purchasers" in the parlance of *Illinois Brick*. Their sole federal claim is for injunctive relief under Section 16 of the Clayton Act, 15 U.S.C. § 26, which allows one to sue for injunctive relief "against threatened loss or damage by a violation of the antitrust laws ... when and under the

same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity.”¹

Under Section 16, the timeliness of an injunctive relief action is governed by traditional “principles [of] injunctive relief,” and particularly the equitable doctrine of laches—not Section 4B’s statute of limitations. Nonetheless, the Ninth Circuit rotely extended its flawed limitations analysis from *Samsung* to hold that consumer purchasers of SD Cards can challenge the foundational terms of the SD-3C patent pool *forever*, or so long as SD Card products are being sold by anyone, including third parties. That additional leap vividly illustrates the implications of the panel’s errors in *Samsung*, and independently merits review for several reasons:

First, the Ninth Circuit’s limitations tests in both cases squarely conflict with this Court’s decision in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971), and decisions of several other circuits, by restarting the clock upon the accrual of new “damages” by the plaintiffs without any new, independent “overt acts” by the defendants. *Samsung* is bad enough: there the Ninth Circuit restarted the limitations period based on conduct that the defendants could not *avoid* short of abandoning the SD Card licensing structure, which Petitioners maintain is lawful and procompetitive. Here, the Ninth Circuit did not require any conduct by the defendants at all. It

¹ Plaintiffs seek damages under the laws of various states that have legislatively “repealed” *Illinois Brick*. Pet. App. 34a-35a. Their Section 16 claim is a hook to create federal jurisdiction over damages claims that would otherwise be confined to state courts.

held that Respondents' purchases of SD Cards from third party licensees and others down the distribution chain, at prices allegedly elevated by the royalties direct licensees paid to SD-3C, restarted the limitations period and defeated laches. But a sale by a third party obviously is not an "overt act" *by defendants*. Under *Zenith*, it therefore should have no part in either a statute of limitations or laches analysis.

Second, the decision below treats the accrual of new "damages" as restarting the clock for *injunctive relief* claims that unquestionably could have been brought earlier, and even when plaintiffs are indirect purchasers who lack standing to sue for damages under federal law. This turns the structure of the Clayton Act and federal antitrust policy upside down. Injunctive relief claims under Section 16 accrue *before* actions for damages accrue under Section 4, when loss or damage is merely "threatened." Their timeliness is measured not, as the Ninth Circuit effectively ruled, from the latest time at which a *different plaintiff* might be able to bring a damages claim. This ruling gives indirect purchasers who have no damages claims a right to piggyback on damages accrual principles that ought to be irrelevant to them.

Third, in direct conflict with this Court's intervening decision in *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1662 (2014), issued after the panel's decision, the Ninth Circuit treated its limitations analysis as dispositive and completely ignored the equitable dimension of laches, which requires considering the defendants' interests in repose and the reliance interests of third parties and the public. Although petitioners urged rehearing in

light of *Petrella*, the panel and *en banc* court denied review.

These errors threaten to eliminate any repose or stability for licensing arrangements that are crucial to the national economy and to technological progress. They also highlight the often-noted conflicts, confusion, and disarray among circuits concerning the “continuing violation” and “speculative damages” exceptions established in *Zenith* four decades ago, but that remain unresolved. See No. 14-540, *Samsung* Pet. 12-29. Certiorari should be granted in this case and in *Samsung*, and the cases should be consolidated for argument. At a minimum, this Court should summarily reverse this decision or grant, vacate, and remand it in light of *Petrella*.

STATEMENT OF THE CASE

A. The Formation and Development of SD-3C

In the late 1990s, Petitioners Panasonic, SanDisk, and Toshiba “enter[ed] into a joint venture ... to develop the SD Card format.” Pet. App. 44a. SD Cards are postage stamp-sized flash memory cards used in portable consumer electronic devices. In January 2000, Petitioners publicly announced the establishment of the SD Association, an open membership standard-setting organization. Pet. App. 126a. In March 2000, the Association published the first SD Card specification. Pet. App. 123a.

Petitioners formed SD-3C to license patents and other intellectual property necessary to manufacture SD Cards. *Id.* In March 2003, petitioners promulgated the SD Card License, which includes a 6% royalty payable to SD-3C by SD Card manufacturers on all SD Cards sold. Pet. App. 24a-25a, 48a. Petitioners do not

pay this royalty, but rather exchange their patents with one another on a royalty-free basis. *Id.* Respondents alleged that when, in 1999, they “enter[ed] into royalty-free cross-licenses with one another,” they obtained a “permanent cost advantage” over their competitors. Pet. App. 48a, 161a-62a, 169a-70a.

The SD Card format represented a significant technological advance over earlier products, and over the past decade “has become the *de facto* standard for ‘point and shoot’ cameras ... and other small consumer devices.” Pet. App. 43a. Naturally, SD Cards have improved and evolved continuously; they now include four card families available in three different form factors.²

In August 2006, SD-3C promulgated an amendment to the SD Card License (the “2006 Amendment”), which extended the license to smaller, second generation SD Cards and the same 6% royalty established in 2003. Pet. App. 109a.³ Samsung refused to sign that new license, but continues to pay royalties under the 2003 license, including for second generation SD Cards. Pet. App. 141a-42a. Numerous other

² See generally *Secure Digital*, Wikipedia, http://en.wikipedia.org/wiki/Secure_Digital (last visited Nov. 18, 2014) (describing history and application of the SD Card).

³ Respondents allege that the 2006 Amendment included a “fair market price” provision that served as a “minimum reference price for the calculation of licensees’ royalty obligations” under the SD Card License. Pet. App. 26a, 154a. But they do not allege that Petitioners ever set or communicated any “fair market price” to any licensees, and SD-3C “has not enforced [this Royalty Provision] since 2006.” Pet. App. 156a.

technology companies entered into SD Card Licenses and paid royalties to SD-3C.

B. District Court Proceedings

Samsung sued Panasonic and SD-3C (but not Toshiba or SanDisk) in 2010, in the aftermath of failed licensing negotiations with Panasonic. Samsung alleged that SD-3C's standard setting and patent licensing activities were an anticompetitive price-fixing conspiracy, the "price" being the 6% royalty. Pet. App. 105a.

Respondents filed a copycat complaint in 2011, purporting to represent a class of consumer "indirect purchasers" who first began purchasing SD Cards from SD-3C licensees (like Samsung) or downstream resellers on March 15, 2007. Pet. App. 23a-27a. Respondents filed their original complaint on March 15, 2011 (*see* Pet. App. 4a), and a First Amended Complaint ("FAC") in November 2011 (Pet. App. 96a). Respondents' FAC incorporated by reference Samsung's complaint and alleged the same claims—that Petitioners' standard setting and licensing activities violated Sections 1 and 2 of the Sherman Act and analogous state laws. Pet. App. 38a, 74a-94a.

Both suits are, at their core, attacks on the formation and structure of the SD Association and SD-3C, which enjoyed greater market success than another standard setting organization devoted to memory card technology (MMCA) backed by Petitioners' competitors, including Samsung. Pet. App. 44a-48a, 117a, 123a-24a. Samsung and Respondents laud MMCA as "a natural forum" to develop new card formats, but disparage SD-3C as an "anticompetitive SD Card patent pool, a tool by which [Petitioners] impose an entry fee on their rivals in the SD Card

market.” Pet. App. 44a, 25a. The “entry fee” is the 6% royalty adopted in 2003, which allegedly gave Petitioners an unfair “permanent cost advantage over competitors” because Petitioners do not need an SD-3C license to use the technology covered by their own pooled patents. Pet. App. 161a-62a, 170a.

Illinois Brick bars Respondents from seeking damages under federal law, because they have not purchased anything directly from Petitioners. They are, at most, “indirect purchasers” from SD-3C given the licensing fees paid by their sellers or an upstream licensee. Respondents seek an injunction under Section 16 of the Clayton Act, 15 U.S.C. § 26, to rescind the Petitioners’ cross-licenses and dissolve the SD-3C patent pool. Pet. App. 96a.

The district court dismissed both cases as untimely, noting that both complaints were premised on “the same basic underlying facts” concerning the late 1990s standard-setting process, the formation of SD-3C, and the 2003 license agreement (Pet. App. 16a-18a), and that even damages claims should have been brought by 2007 (Pet. App. 15a, 18a). The court rejected Respondents’ argument that their purchases of SD Cards from 2007 forward reopened the limitations period, emphasizing that “on a continuing violation theory” the clock “runs from the time of the last overt act made by the defendant, not from the last purchase made by a potential plaintiff.” Pet. App. 17a. The court noted that if each purchase from a third-party licensee reopened the period for suit, “there would essentially be no statute of limitations bar to indirect purchaser claims.” *Id.*

C. The Ninth Circuit's Decision

The Ninth Circuit reversed in both cases.

In *Samsung*, the court held that SD-3C's unsuccessful attempts to get Samsung to sign the 2006 SD Card license amendment constituted a new "overt act" sufficient to restart the statute of limitations on Samsung's claims, even though it is undisputed that (a) Samsung never signed that amendment, (b) the amended license has the same, allegedly discriminatory 6% license fee as the 2003 license that Samsung did sign, and (c) Samsung's theory of the case is rooted in the formation of SD-3C in 1999 and 2000. 747 F.3d at 1203-04. The court also held that *Zenith's* speculative damages exception tolled Samsung's claims because Samsung did not begin manufacturing SD Cards until 2006, even though Samsung itself alleged that the "permanent" "cost disadvantage" was created in 1999 and became tangible in the 2003 licenses it signed. *Id.* at 1204-05.

In this case, the Ninth Circuit recognized that the timeliness of Respondents' claims for injunctive relief is governed by the equitable doctrine of laches. But the court did not evaluate *any* equitable considerations. It simply applied a limitations analysis that built upon, and extended, the reasoning in its *Samsung* decision. Pet. App. 5a-9a.

The Ninth Circuit relied on this Court's decision in *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997), and various circuit decisions interpreting *Klehr*, for the proposition that *in a price-fixing case* each sale of a price-fixed product by a defendant is a new overt act that restarts the Clayton Act's limitations period for a direct purchaser to recover the damages associated with that sale. Pet. App. 7a-8a. The Ninth Circuit

applied that rule here, even though Respondents' only federal claim is one for injunctive relief against a longstanding patent joint venture, and the only price "fixed" is SD-3C's royalty rate for SD Card IP, which has been the same since 2003.

Furthermore, the Ninth Circuit did not apply *Klehr* to any direct sale *by Petitioners*, but to sales by *third parties*—SD Card licensees or resellers—from which Respondents allegedly "purchased SD cards on or after March 15, 2007." Pet. App. 8a. Unlike the district court, the Ninth Circuit saw no significance in the fact that the sales in question were by third-party licensees (and their distribution partners) rather than by Petitioners themselves.

As in *Samsung*, the court then held that Respondents' injunctive relief claim was timely because their "damages" were "speculative" under *Zenith*. Pet. App. 9a. According to the court, "[b]efore Plaintiffs purchased SD cards, it would have been pure speculation whether Plaintiffs would have been harmed by Defendants' alleged unlawful acts," and "Plaintiffs should not be penalized for failing to foresee earlier that they would enter the market for SD Cards and would therefore be harmed by Defendants' conduct." *Id.* The court reached this conclusion without mentioning: (1) this Court's holding in *Illinois Brick* that indirect purchasers lack standing to seek damages under federal law; or (2) Section 16's express statement that traditional "principles [of] injunctive relief" govern the timeliness of the claims it authorizes.

Petitioners sought rehearing *en banc* in both cases, explaining that the panel's decisions departed from precedents of the Ninth Circuit, other circuits, and this Court. Petitioners here also pointed out that the

panel's focus on a statute of limitations analysis, to the exclusion of broader equitable considerations, was inconsistent with this Court's decision in *Petrella*—which was issued after the panel opinions. The court of appeals denied both petitions without opinions. Pet. App. 20a-21a; No. 14-540, *Samsung* Pet. App. 15a.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decisions in these two companion cases break dramatically from the settled precedents of this Court and other circuits, and merit review. The *Samsung* petition explains the Ninth Circuit's core error: treating every step that a decade-old joint venture took to create the innovative SD Card, license the requisite pooled IP, and oversee its technical evolution as an endless series of new "overt acts" by the founders, forever restarting the statute of limitations. The decision here extends and aggravates that unprecedented expansion of antitrust exposure in at least three important respects.

First, the Ninth Circuit's holding fundamentally distorts and transforms the core principle in antitrust limitations jurisprudence since *Zenith*: that a new and independent "overt act" *by the defendant* triggers a new limitations period to recover damages resulting from that act, but does not reopen the limitations window for damages caused by the defendant's *past* acts. The whole point of *Zenith* and *Klehr* is that a limitations analysis focuses on the timing of the *defendant's* conduct rather than the date of plaintiff's injury. In keeping with that principle, several circuits clearly hold that the "unabated, inertial consequences" of a permanent business arrangement, such as the continued collection of licensing royalties, do not hold the limitations period open.

The Ninth Circuit got that wrong in *Samsung* by treating the normal, ongoing business of a lawful joint venture as new and independent “overt acts” by alleged conspirators. It went much further here, holding that any purchase *by the plaintiff* constitutes an overt act *by the defendant*, even when the plaintiff purchased the goods from someone other than the defendant, like a third party licensee or intermediary. That holding practically reverses *Zenith’s* rule and makes the defendant’s overt acts irrelevant. So long as the SD Card licensing structure persists, licensees make SD Card products, and consumers buy them, Petitioners remain subject to suit.

Second, the court’s holding inverts federal antitrust policy, misunderstands the structure of the Clayton Act, and precludes the repose the Clayton Act contemplates by allowing injunctive claims long after damages actions are time-barred. In *Petrella*, this Court held that courts must heed how Congress structured the right to sue when evaluating the timeliness of an injunctive relief claim. 134 S. Ct. at 1974-75. Section 16 of the Clayton Act exists to permit a federal suit for injunctive relief *before* damages are incurred, *i.e.*, as soon as loss or damage is “threatened.” 15 U.S.C. § 26. Section 16 further provides that the timeliness of the claims it authorizes is governed by equitable principles. The Ninth Circuit’s use of damages accrual principles to extend indefinitely the time for filing a Section 16 claim cannot be reconciled with the statute, *Petrella*, or *Klehr* itself, which rejected a continuing violation analysis that would allow suits “indefinitely” and thus “conflict[] with a basic objective—repose—that underlies limitations periods.” 521 U.S. at 187.

Under the Ninth Circuit's holding, any joint business arrangement—even one that is decades old and deeply woven into the fabric of the economy—is vulnerable to being unwound simply because it enjoys continued success in producing goods consumers wish to buy. Nothing new, different and unlawful is required to justify the challenge. And the court's holding that Respondents can sue now because their “damages” were previously “speculative” makes matters worse, because this independent tolling ground is now satisfied by a mere allegation that plaintiffs had not purchased SD Cards earlier. Inasmuch as there are new purchasers of SD Cards every day, the decision below suggests an endless limitations period.

It is particularly illogical that this perpetual right of action, grounded in damages accrual principles, is for the benefit of “indirect purchasers”—*i.e.*, consumers who under *Illinois Brick* have no federal cause of action for damages. It is a *non sequitur* to say, as the Ninth Circuit did, that because a damages action Respondents *do not have* would have been timely, their action for injunctive relief must also be timely. Whatever logic there may be in allowing plaintiffs with timely damages claims to seek injunctions too surely does not apply to plaintiffs who, as a matter of federal antitrust policy, are not allowed to sue for damages.

Third, the Ninth Circuit's analysis conflicts with decisions of other circuits and this Court's recent decision in *Petrella* by treating the technical limitations analysis as dispositive of laches in a case for injunctive relief. The analogous limitations period is a guide. But as *Petrella* makes clear, a laches analysis must also account for prejudice to the defendant, the broader public interest, and any other traditional equitable

factors. The Ninth Circuit ignored those considerations, even though Petitioners urged rehearing given this Court's intervening decision in *Petrella*.

These are issues of great public importance, and the Ninth Circuit decisions addressing them merit review and reversal by this Court. "Repose is especially valuable in antitrust, where tests of legality are often vague," "business practices can be simultaneously efficient ... but also challengeable as antitrust violations," and innocent third parties often develop substantial reliance interests. Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 320a (4th ed. 2013). The Ninth Circuit's holdings effectively mean that for continuing collaborations there can never be repose.

The context of these two cases provides a vivid illustration of the dangers of such a regime. Technology standards contribute enormously to consumer welfare and competition in the modern economy, and patent pools can be effective means for the broad dissemination of essential complementary patented technology and for efficient production of products that implement the standard. If the foundational terms of a pool license may be attacked *forever* and *enjoined* by any downstream consumer that purchases a product incorporating the technology, then incentives to invest in complementary technologies and collaborative, procompetitive standardization will be greatly reduced.

Certiorari should be granted in both cases, and they should be consolidated for argument. Petitioners also respectfully submit that the Ninth Circuit's

misapplication of *Zenith* and *Klehr* is clear enough to warrant summary reversal or, at least, to “GVR” in light of *Petrella* so the Ninth Circuit can revisit its decision under the equitable analysis *Petrella* and Section 16 require.

I. THE NINTH CIRCUIT’S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS BY TREATING ANY SALE TO THE PLAINTIFF AS A NEW “OVERT ACT” BY DEFENDANTS

More than forty years ago this Court held in *Zenith* that an antitrust damages “cause of action accrues,” and the Clayton Act statute of limitations begins to run, “when a defendant commits an act that injures a plaintiff’s business.” 401 U.S. at 338. “In the context of a continuing conspiracy[,] ... [this] mean[s] that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act.” *Id.* In *Klehr*, this Court restated those principles, emphasizing that a new overt act by the defendant creates a new limitations period to sue for the damages resulting from that act, “[b]ut ... the commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period.” 521 U.S. at 189.

As the petition in *Samsung* explains (at 14-21), most circuits applying those principles have held that the mere “unabated inertial consequences of some pre-limitations action” by defendants do not restart the clock, even if the plaintiff continues to suffer harm. *Poster Exchange, Inc. v. Nat’l Screen Serv. Corp.*, 517 F.2d 117, 128 (5th Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976). A new limitations period requires “a new and

independent act that is not merely a reaffirmation of a previous act” and that “inflict[s] a new and accumulating injury on the plaintiff.” *Z Techs. Corp. v. Lubrizol Corp.*, 753 F.3d 594, 600 (6th Cir. 2014) (internal quotation marks omitted). Thus, merely continuing to collect money under an existing contract does not restart the clock. *See, e.g., Varner v. Peterson Farms*, 371 F.3d 1011, 1020 (8th Cir. 2004); *Grand Rapids Plastics, Inc. v. Lakian*, 188 F.3d 401, 406 (6th Cir. 1999), *cert. denied*, 529 U.S. 1037 (2000); *Kaiser Alum. & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1053 (5th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983).

In *Samsung* the Ninth Circuit broke with that body of law and joined the minority position, espoused most clearly by the Third Circuit, that the limitations period reopens even when “the acts that occurred within the limitations period were reaffirmations of decisions originally made outside the limitations period.” *W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 107 (3d Cir. 2010), *cert. denied*, 132 S. Ct. 98 (2011). The Ninth Circuit’s view is now that “collecting royalty payments” restarts the limitations period so long as the contract does not “permanently and finally control the acts of the [defendants].” *Samsung*, 747 F.3d at 1203-04.

Under this rule, so long as the allegedly anticompetitive conduct is *abatable* by the defendants—*i.e.*, so long as defendants have the power to abandon their licensing structure—the “decision to enforce the contract” does not qualify as a mere continuation or reaffirmation of an earlier act. *Id.* at 1204. *Accord W. Penn*, 627 F.3d at 106-07; *Nat’l Souvenir Ctr. v. Historic Figures, Inc.*, 728 F.2d 503,

510, 514 (D.C. Cir.), *cert. denied*, 469 U.S. 825 (1984). Hence, SD-3C's continued collection of royalties under a licensing structure established between 1999 and 2003 and the application of the same licensing structure to new SD Cards continuously restarted the limitations period.⁴ *Samsung*, 747 F.3d at 1203-04.

The petition in *Samsung* explains why that conflict, and the broader confusion in the law surrounding *Zenith's* exceptions, merits review. The Ninth Circuit's decision in this case, however, went even further. It held that the limitations period was reopened by the alleged injury inherent in any purchase of an SD Card by a consumer—even though the SD Cards in question were purchased from third party licensees (like Samsung) or their distribution partners, and therefore involved no “overt act” *by the defendants* at all.

This is a radical break from settled law. Prior to the Ninth Circuit's opinion in this case, “[a]ll courts that have written on the subject agree that it is the last overt act *of the defendant*, not any act of the plaintiff, that triggers the statute of limitations.” *Kabealo v. Huntington Nat'l Bank*, 17 F.3d 822, 828 (6th Cir.) (emphasis added), *cert. denied*, 513 U.S. 812 (1994). Under this Court's foundational decision in *Zenith*, “the focus is on the timing of the causes of injury, *i.e.*, the defendant's overt acts”—*not* on the timing of the injury itself. *Varner*, 371 F.3d at 1019 (internal

⁴ The Ninth Circuit also noted that SD-3C had proposed an amendment to the license, to extend its royalty terms to the new Micro-SD format. But since Samsung *rejected* that proposal, and continued paying royalties only under its original 2003 license, only the former agreement is relevant.

quotation marks omitted).⁵ Judicial refinements of the *Zenith* rule build on the understanding that the proper focus is on the acts of the defendant. For example, the court below purported to apply the rule that an overt act that is “new and independent” and “not merely a reaffirmation of a previous act” is necessary to restart the limitations period. Pet. App. 7a (quoting *Pace Indus., Inc. v. Three Phoenix Co.*, 813 F.2d 234, 238 (9th Cir. 1987)). It is the act of the defendant that must be “new and independent,” not its effects.

The court below attempted to shoe-horn this case into a rule derived from naked price-fixing cases and cited by this Court in *Klehr* (a RICO case) that “each time a defendant sells its price-fixed product, the sale constitutes a new overt act causing injury to the purchaser and the statute of limitations runs from the date of the act.” *Id.* But that rule is *expressly* about an act of the defendant—its sale of the price-fixed product—and therefore cannot justify the Ninth Circuit’s reliance on downstream purchases by the plaintiffs. *Klehr*’s reasoning cannot be extended to cases, like this one, involving the continued administration of decade-old formal industry collaborations.

Naked price-fixing conspiracies often trigger

⁵ See also *Kaiser Aluminum & Chem. Sales, Inc.*, 677 F.2d at 1051 (“[T]he continuing conspiracy or continuing violation exception ... permits a cause of action to accrue whenever the defendant commits an overt act in furtherance of an antitrust conspiracy.”); *DXS, Inc. v. Siemens Med. Sys., Inc.*, 100 F.3d 462, 467 (6th Cir. 1996) (“An antitrust cause of action accrues and the limitation period commences each time a defendant commits an act that injures the plaintiff’s business.”); *Champagne Metals v. Ken-Mac Metals, Inc.*, 458 F.3d 1073, 1090 (10th Cir. 2006) (same).

Zenith's “continuing violations” exception because they usually (though not necessarily) require ongoing anticompetitive conduct to keep prices fixed. See *Lubrizol*, 753 F.3d at 599 (explaining that “continuing violations” are frequently found in price-fixing cases because “each price increase requires further collusion between multiple parties to maintain the monopoly”); *Midwestern Mach. Co. v. Nw. Airlines, Inc.*, 392 F.3d 265, 269 (8th Cir. 2004) (“The typical antitrust continuing violation occurs in a price-fixing conspiracy, ... when conspirators continue to meet to fine-tune their cartel agreement.”). Upon this understanding, “[t]he statute is ... tolled as long as such qualifying acts continue to be committed.” *Areed*, *supra* ¶ 320c. The dictum from *Klehr* the panel cited, Pet. App. 7a, is clearly written from this perspective, as it emphasizes “the commission of a separate new overt act,” and presumes the plaintiff is not trying “to recover for the injury caused by old overt acts outside the limitations period.” 521 U.S. at 189.

Most circuits, however, *do not* read *Klehr* to establish a rule that every sale of a product by a conspirator restarts the limitations period—much less a sale by a third party. Simply charging supracompetitive prices is, after all, the quintessential “unabated inertial consequence” of almost every antitrust violation. “[P]rofits, sales, and other benefits accrued as the result of an initial wrongful act are not treated as ‘independent acts,’” but instead “are uniformly viewed as ‘ripples’ caused by the initial injury.” *E.g., Lubrizol*, 753 F.3d at 600.

That is the sensible rule here, where the supposed “price-fixing” is not the ongoing efforts of a cartel to

inflate a market price, but merely Petitioners' exchange of royalty free cross-licenses to their own pooled IP in 1999, and SD-3C's offer of a license to the public to that same IP in 2003 for a 6% royalty. Cf. *Texaco, Inc. v. Dagher*, 547 U.S. 1, 6 (2006) (noting that while joint venture pricing "may be price fixing in a literal sense, it is not price fixing in the antitrust sense"). Respondents themselves referred to that disparity as a "permanent cost advantage" in their complaint. Pet. App. 161a-62a, 170a. They cannot in the same breath cast it as "the commission of a separate new overt act" every day that Petitioners operate under the same business model and every time an SD Card is sold. *Klehr*, 521 U.S. at 189.

Petitioners are aware of no other decision that suggests that downstream sales, not by the defendants but instead by their *licensees, customers or further downstream distribution partners* can restart the clock, even if the defendant itself has not committed "a separate new overt act" for a decade. That notion is irreconcilable with *Zenith*, and the district court correctly recognized that under such a rule "there would essentially be no statute of limitations bar to indirect purchaser claims." Pet. App. 17a. The Ninth Circuit's reasoning means that a party that contributes its intellectual property to a patent pool with licensing terms like those of SD-3C is potentially exposed to antitrust liability *forever*, so long as third parties continue to license pooled patents and sell products to consumers. That result extends the "limitations period to many decades, and so beyond any limit that Congress could have contemplated." *Rotella v. Wood*, 528 U.S. 549, 554 (2000) (citing *Klehr*, 521 U.S. 179).

This error is plain enough to merit summary reversal if the Court does not otherwise grant review.

II. THE NINTH CIRCUIT'S DECISION IMPROPERLY APPLIES DAMAGES ACCRUAL PRINCIPLES IN A SUIT FOR INJUNCTIVE RELIEF

Review is also warranted to address the conflict between the decision below and the structure and purpose of Section 16 of the Clayton Act, 15 U.S.C. § 26, as this Court and others have previously understood it. To our knowledge, until the Ninth Circuit's decision in this case, no court has ever applied *Zenith's* "continuing violation" and "speculative damages" exceptions to revive a tardy claim for *injunctive relief* under Section 16. And for good reason.

As this Court recently explained in *Petrella*, when assessing the timeliness of a suit for injunctive relief a court must be sensitive to how Congress structured the right to sue. 134 S. Ct. at 1967. *Zenith's* exceptions are grounded in accrual principles under Section 4 of the Clayton Act, which gives "[a]ny person who shall be injured in his business or property" a right to sue for damages. 15 U.S.C. § 15. Under that provision, "a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business." *Zenith*, 401 U.S. at 338. "This much is plain from the treble-damage statute [*i.e.*, Section 4] itself." *Id.*

But Respondents are not suing for injury to their business or property under Section 4. They lack standing to do so under *Illinois Brick*. Respondents' only federal cause of action derives from Section 16. A claim under Section 16 accrues at an entirely different

time and in an entirely different way than an action for treble damages under Section 4.

Section 16 is prospective in nature and requires only “threatened loss or damage by a violation of the antitrust laws,” 15 U.S.C. § 26, not any specific injury to “business or property.” See *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251 (1972); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 131 (1969). “[I]t is the threat of harm, not actual injury, that justifies equitable relief.” *Cargill, Inc. v. Montfort of Colorado, Inc.*, 479 U.S. 104, 126 (1986). Section 16 thus permits *earlier* challenges to anticompetitive conduct that may not be possible under Section 4, which requires the plaintiff to wait until it actually suffers injury.

Against this backdrop, the Ninth Circuit’s focus on Respondents’ accrual of new “damages” makes no sense. It is inconsistent with the Clayton Act’s structure and produces results that Congress obviously did not intend. Because a Section 16 action exists to stave off injury *before* it occurs and “is not dependent on the existence of actual or measurable injury,” Areeda, *supra* ¶ 326a, why should damages accrual rules justify an injunctive relief claim that could have been brought a decade ago? And why should it matter that the amount of damages might have been “speculative” earlier, when Section 16 does not authorize recovery of damages at all? The Ninth Circuit’s reasoning inverts the intended temporal relationship between the damages and injunction provisions, effectively holding that a claim for injunctive relief re-accrues until the last possible date to file for damages rather than, as the statute actually provides, when loss or damage is “threatened.”

The indirect purchaser context of this case makes the Ninth Circuit's error even more apparent. The new "damages" that Respondents allegedly suffered (and that allegedly became non-"speculative") when Respondents purchased SD Cards from third parties are not just irrelevant to their cause of action—they cannot be recovered under federal law at all, because Respondents lack standing to sue for them. This Court made clear in *Illinois Brick* that federal antitrust policy vests the damages remedy in direct purchasers in all but a handful of exceptional circumstances, none present here. 431 U.S. at 746. Yet the decision below allows end consumers to sue any supplier of components or intellectual property that found their way into the product, and attempt to unwind decades-old business arrangements—long after the claims of the directly injured customers or competitors are time-barred. That holding stands federal antitrust policy on its head.

The Ninth Circuit worried that individual consumers may not have experienced or even anticipated a direct and personal injury until they decided to purchase an SD Card. That is undoubtedly true for some consumers—and it provides another reason not to accept the Ninth Circuit's reasoning. The legality of public, formal collaborations like SD-3C is typically assessed *at their formation* using a merger-like analysis focused on market structure, terms of the venture, and anticompetitive potential. *See generally* U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidelines for Collaborations Among Competitors* (2000); Areeda, *supra* ¶ 320c5.

Every argument advanced by Samsung and Respondents was available to *someone* in 2003, 2004,

2005 or 2006, and could have been asserted under Section 16. The fact that others had no reason to sue in 2006 (the unborn, those too young to buy cameras and cellphones, those who simply never did) should not justify perpetual suits for injunctive relief. The timeliness of a Section 16 action challenging a public collaboration or joint venture should be assessed relative to when that action could have served its prospective, preventative function—to avoid a “threatened loss or damage by a violation of the antitrust laws”—not relative to the latest injury the collaboration causes.

An influential Eighth Circuit decision holds that *Zenith’s* “continuing violation” and “speculative damages” exceptions cannot be applied in cases (including those seeking injunctive relief under Section 16) that challenge the legality of a merger. *See Midwestern Mach.*, 392 F.3d at 271. Similarly, leading commentators have recognized that “[m]aking post-merger purchases or sales the basis for a ‘continuing violation’ exception would effectively abolish the statute of limitation for merger. Virtually every firm contemplates that its merger will result in ongoing sales.” Areeda, *supra* ¶ 320c5.

This case law provides an important analogy, because Respondents’ substantive theory is highly akin to a merger challenge. It is grounded in SD-3C’s formation in 1999, the combined market power of its founders at that time, and the 6% royalty of the SD-3C license publicly announced by 2003. Those decade-old acts—not any new or independent acts by Petitioners—are the cause of the Petitioners’ alleged “permanent cost advantage” over rivals, *i.e.*, the “entry fee” their competitors must pay for SD Card IP. Pet.

App. 25a-26a, 161a-62a. Like a merger, the formation of the SD Group, the SD Association and SD-3C were permanent changes in the structure of the relevant market. Any legitimate antitrust challenge to those market changes could have and should have been asserted as they unfolded.

The rule that mergers and other public joint ventures must be challenged at their inception necessarily means that some persons who are later affected will never be able to litigate—or, put differently, that a cause of action for some potential plaintiffs is time-barred before it accrues. But that is no different from how litigants who suffer a late injury are often prevented from challenging federal regulations when the window for review closed long ago. *See, e.g., Nack v. Walburg*, 715 F.3d 680, 685-86 (8th Cir. 2013), *cert. denied*, 134 S. Ct. 1539 (2014); *CE Design, Ltd. v. Prism Business Media, Inc.*, 606 F.3d 443, 450 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 933 (2011). And it is the necessary consequence of placing some limit (*any* limit) on the timeliness of antitrust suits, when the economic consequences of an alleged antitrust violation often continue to ripple outward and affect new potential plaintiffs indefinitely. The alternative, as this case illustrates, is a regime in which there can *never* be repose concerning the legality of important business collaborations.

This Court stressed in *Klehr* that Congress would not have intended any understanding of a limitations provision that would “conflict[] with a basic objective—repose—that underlies limitations periods.” 521 U.S. at 187. As the district court recognized, the theory embraced by the Ninth Circuit here means that there is absolutely no repose in actions brought by indirect

purchasers—the least favored plaintiffs under federal law. See, e.g., *Kansas v. UtilCorp United, Inc.*, 497 U.S. 199, 211-12 (1990) (“Our decisions in *Hanover Shoe* and *Illinois Brick* often deny relief to consumers who have paid inflated prices because of their status as indirect purchasers.”). That cannot be what Congress intended.

Review is warranted to clarify that *Zenith’s* exceptions for “continuing violations” and “speculative damages” are inapplicable when assessing the timeliness of an indirect purchaser’s injunctive relief claim under Section 16, and to ensure that claims for such extraordinary relief adhere to the Clayton Act’s text and purpose.

III. THE NINTH CIRCUIT’S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS BY DISREGARDING THE EQUITABLE DIMENSIONS OF LACHES

Finally, the Ninth Circuit broke from settled law in treating its analysis of federal statute of limitations principles as dispositive of the issue of *laches*, in a suit that seeks only equitable relief under Section 16 and is thus not governed by Section 4’s limitations period for damages claims. See *Russell v. Todd*, 309 U.S. 280, 287 (1940); Areeda, *supra* ¶ 320g (“The §4B limitation period applies only to damages actions.”). That approach squarely conflicts with decisions of other circuits and with this Court’s intervening decision in *Petrella*, as emphasized by Petitioners in seeking rehearing. The analogous statute of limitations is a helpful guide for whether a delay in bringing suit is prejudicial, but a proper laches analysis requires broader equitable considerations—such as whether a

challenge to long-established business arrangements would unfairly prejudice reliance interests of the defendants, third parties, or the general public.

Laches is “principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties.” *Galliker v. Cadwell*, 145 U.S. 368, 373 (1892). This Court recently explained in *Petrella* that “the consequences of a delay in commencing suit may be of sufficient magnitude to warrant, at the very outset of the litigation, curtailment of the relief equitably awardable,” even if (unlike here) the statute of limitations for parallel damages actions at law has yet to expire. 134 S. Ct. at 1977. As an example, *Petrella* cited *Chirco v. Crosswinds Communities, Inc.*, 474 F.3d 227, 235–36 (6th Cir.), *cert. denied*, 551 U.S. 1131 (2007), in which the Sixth Circuit held that laches barred an injunctive relief claim that would have required the destruction of a housing project when the defendant had already constructed 168 units and sold 141 of them, and 109 families had moved in. As this Court emphasized, the “unjust hardship” upon the defendants and “innocent third parties” justified denying injunctive relief, and “threshold dismissal.” *Id.* at 20–21.⁶

The holding in *Chirco* reflects longstanding traditions of equity across many areas of law. Laches

⁶ See also *Southside Fair Hous. Comm. v. City of New York*, 928 F.2d 1336, 1353–56 (2d Cir. 1991) (barring claim to set aside a sale of land associated with a development project that had been public for a decade); *Armstrong v. Maple Leaf Apartments, Ltd.*, 622 F.2d 466, 474 (10th Cir. 1979) (laches barred an action to cancel deeds after the grantees had constructed buildings), *cert. denied*, 449 U.S. 901 (1980).

will often bar false advertising or trademark challenges, when the defendant has already invested substantially in its marketing campaign.⁷ Injunctions are also often denied in patent cases if they would interfere with the availability of products that consumers have come to rely upon. *See, e.g., Apple Inc. v. Samsung Elecs. Co.*, 735 F.3d 1352, 1373 (Fed. Cir. 2013).

As noted earlier, the Eighth Circuit applied laches to bar equitable relief sought by plaintiffs challenging the acquisition of an airline as violative of Section 7 of the Clayton Act. *Midwestern Mach.*, 392 F.3d at 277. Plaintiffs brought their challenge eleven years after the acquisition, and during that time the merged airline became privately-held and then publicly traded again. *Id.* Even though the merged airline allegedly continued to overcharge consumers because of the merger, the Eighth Circuit held that allowing the suit would prejudice the airline's shareholders, who had no reason to believe when they made their investments that the acquisition could be challenged so long after its consummation. *Id.*; *see also Ginsburg v. InBev NV/SA*, 623 F.3d 1229, 1235 (8th Cir. 2010) (laches barred

⁷ *See, e.g., Conopco, Inc. v. Campbell Soup Co.*, 95 F.3d 187, 192 (2d Cir. 1996) (laches barred claim for injunction against comparative ads, even though claim was filed within the limitations period for damages, because defendant had "committed massive resources to best exploit a marketing strategy which it chose a half dozen years ago."); *Pro Football, Inc. v. Harjo*, 565 F.3d 880, 883-85 (D.C. Cir. 2009) (trademark challenge barred by laches given the defendant's economic investments); *Bridgestone/Firestone Research, Inc. v. Auto. Club*, 245 F.3d 1359, 1363 (Fed. Cir. 2001) ("[C]ontinued commercial use and economic promotion of a mark over a prolonged period adds weight to the evidence of prejudice.").

indirect purchasers' Section 16 claim to divest a merger between two beverage companies brought two months after the announcement of the merger and less than two weeks before closing, as even that brief delay was "inexcusable" "[w]hen dealing with transactions of this nature"). Similarly, in *Kloth v. Microsoft Corp.*, 444 F.3d 312 (4th Cir. 2006), the Fourth Circuit held that Section 16 claims for injunctive relief by indirect purchasers were barred by laches even though originally filed within four years of the consumers' purchases. Laches applied because plaintiffs delayed pursuing their equitable claims and in the meantime the "competitive landscape" had been comprehensively evaluated and addressed in a similar government antitrust case. *Id.* at 326.

The Ninth Circuit did not address these equitable considerations at all. It reversed solely on mistaken notions of damages accrual. That is not only wrong as a technical matter—it confuses the standards of Section 16 with those of Section 4. And it is especially pernicious in a case like this one, which involves the legality of public collaborations such as mergers or joint ventures. Collaborations such as SD-3C "normally lead to progressive integration of [] assets and operations ... and to investment and other business decisions that are contingent on the new situation." Areeda, *supra* ¶ 320g. Petitioners publicly formed SD-3C, published the SD Card specification, openly established a standard setting organization, and began licensing the essential SD Card patents all before 2003—more than 8 years before this suit was filed. Since then, Petitioners and numerous third parties have invested substantially in product design, manufacturing capacity, and the development of

improved or complementary technologies—all in reliance on the SD Card standard and the promise, through SD-3C, that the requisite intellectual property will remain available on disclosed, common terms.

One licensee (Samsung) and a putative class do not like those terms, and they have certain rights to challenge them, but only on a timely basis. Because “assessing antitrust consequences is often difficult, and reasonable minds might differ” about whether a particular combination or joint venture is lawful, “[i]t is especially important that antitrust challenges be timely made, thus minimizing the social costs of any antitrust violation but giving the parties repose for conduct that is lawful.” *Id.* ¶ 320a.

The Ninth Circuit’s myopic focus on damages accrual—in a case where damages are not even recoverable—leaves no room for consideration of these traditional equities, and no room at all for the repose that Congress obviously intended. It is flatly inconsistent with this Court’s recent decision in *Petrella*, and merits review or at least an order granting, vacating, and remanding the Ninth Circuit’s decision.

IV. THESE DECISIONS PRESENT ISSUES OF NATIONAL IMPORTANCE THAT MERIT REVIEW BY THIS COURT

This case and *Samsung* raise issues of great national importance that merit review. The petition in *Samsung* details the widespread conflicts and confusion among the circuits in applying *Zenith*’s “continuing violation” and “speculative damages” exceptions, announced over forty years ago. This Court’s attention to this area of the law is sorely needed, and long overdue.

The particular context of these two cases heightens their importance. Respondents challenge the existence and original terms of a formal and public industry collaboration, particularly a standard-setting body and patent pool. This was never a secret cartel that only time and chance uncovered. It is an open standards-setting effort that is common in many markets and which this Court has recognized “can have significant procompetitive advantages.” *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501 (1998)

As “one of the engines driving the modern economy,” standards “make products less costly for firms to produce and more valuable to consumers” and “increase innovation, efficiency, and consumer choice ... by allowing products to interoperate.” U.S. Dep’t of Justice & Fed. Trade Comm’n, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* 33 (2007) (“2007 FTC Report”). And yet “the point of a standard-setting organization is in fact for competitors to engage in an agreement.” Herbert Hovenkamp et al., *IP and Antitrust: An Analysis of Antitrust Principles Applied to Intellectual Property Law* § 35.2 (2d ed. 2009). As such, the risk of conspiracy claims is ever-present.

Often, as here, an industry-wide technology standard requires a joint venture to pool and license the necessary intellectual property. *See generally*, Josh Lerner & Jean Tirole, *Efficient Patent Pools*, 94 Am. Econ. Rev. 691, 691 (2004) (“[i]nnovations in computer hardware, software, and biotechnology often build on a number of other innovations owned by a diverse set of owners,” leading to “severe” patent thicket problems that can be alleviated by pooling).

Patent pools clear patent thickets by allowing a manufacturer to license all underlying inventions at once. See *U.S. Philips Corp. v. Int'l Trade Comm'n*, 424 F.3d 1179, 1193 (Fed. Cir. 2005), *cert. denied*, 547 U.S. 1207 (2006); see also *Standard Oil Co. v. United States*, 283 U.S. 163, 171 (1931) (“An interchange of patent rights and a division of royalties according to the value attributed by the parties to their respective patent claims is frequently necessary if technical advancement is not to be blocked If the available advantages are upon on reasonable terms to all manufacturers desiring to participate, such interchange may promote ... competition.”). Patent pools like SD-3C containing only essential patents are not just potentially procompetitive, they “*are always welfare increasing*.” Daniel Quint, *Pooling with Essential and Nonessential Patents*, 6 Am. Econ. J. Microeconomics 23, 25 (2014) (emphasis added). Yet, as this case shows, patent pools can also easily be characterized as cartels, though such claims will unlikely succeed.

Firms that undertake such public collaborations with obvious procompetitive potential but also some measure of antitrust risk should not be forever subject to antitrust suits that attacks the very existence of the firms’ longstanding collaboration. Pool participants and the licensees that invest and build their businesses upon the pool are entitled to proceed with confidence once a reasonable time for antitrust challenges has passed. The same is true of consumers who rely on the stability of a standard, and the legality of their seller’s license to the essential IP, when they purchase products that use the technology.

The Ninth Circuit’s holding that there can *never* be

repose concerning the original legality of a standard-setting process and patent pool so long as the relevant products continue to be sold threatens to undermine the stability and confidence necessary for marketplace acceptance of these ventures. 2007 FTC Report at 35. Permitting an antitrust suit brought many years after the successful development of a standard and the broad licensing of patented standards-essential technology through a pool arrangement would be a perverse result. Licensees and consumers would be exposed to enormous “sunk costs.” *Id.*

Without the pool license, the manufacture, sale, or use of products implementing the standard may suddenly become patent infringement. The sunk investments of licensees and consumers would yield patent owners “the power to extract higher royalties or other licensing terms that reflect the absence of competitive alternatives.” *Id.* at 36. The prospect of this happening *forever* would surely discourage investment in common standards and interoperable technology.

The SD Card standard was developed in 1999. Petitioners began licensing the essential patents in 2003. The stability provided by SD-3C paved the way for countless technological innovations and increased interoperability between consumer electronics. The Ninth Circuit’s decision considers only the interests of a group of indirect purchasers, and entirely ignores the interests of defendants, SD-3C licensees, and the general public in repose. These cases provide an attractive vehicle for this Court to clarify the principles that govern the timeliness of structural attacks on joint ventures that yield widespread procompetitive benefits to the national and international economy.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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