

No. 12-1352

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**In the Supreme Court of the United States**

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NOKIA INC., ET AL., PETITIONERS

*v.*

INTERNATIONAL TRADE COMMISSION, ET AL.

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

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**BRIEF FOR THE FEDERAL RESPONDENT IN  
OPPOSITION**

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## QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that the complainant in this case satisfied the domestic-industry requirements of 19 U.S.C. 1337(a)(2) and (3).

2. Whether, in reviewing the interpretation of a patent claim adopted by an International Trade Commission administrative law judge (ALJ), the court of appeals should give deference to the ALJ's resolution of subsidiary factual questions.

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## **OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1-36) is reported at 690 F.3d 1318. The court of appeals' order and accompanying opinion denying rehearing (Pet. App. 37-88) are reported at 707 F.3d 1295. The Notice of Final Determination of the International Trade Commission (Pet. App. 89-93) is unreported. The Final Initial Determination of the Administrative Law Judge (ALJ) (Pet. App. 94-376) is unreported. The Initial Determination of the ALJ (Pet. App. 380-393) is unreported.

## **JURISDICTION**

The judgment of the court of appeals was entered on August 1, 2012. Petitions for rehearing were denied on January 10, 2013. On April 1, 2013, the Chief Justice extended the time within which to file a peti-

tion for a writ of certiorari to and including May 10, 2013, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

#### STATEMENT

1. Section 337 of the Tariff Act of 1930 (Act), 19 U.S.C. 1337 (Section 1337), prohibits “[t]he importation into the United States, the sale for importation, or the sale within the United States after importation \* \* \* of articles that \* \* \* infringe a valid and enforceable United States patent.” 19 U.S.C. 1337(a)(1)(B)(i). The Act authorizes the International Trade Commission (ITC or Commission) to investigate any alleged violation of Section 1337. 19 U.S.C. 1337(b)(1). If the Commission finds a violation, it is required by statute to issue a remedial order (an exclusion order and/or a cease and desist order) unless, after consideration of certain public interest factors, it concludes that a remedial order should not issue. See 19 U.S.C. 1337(d). The remedies ordered by the Commission are prospective only, and the Commission is not authorized to award damages. See *ibid.* Final determinations of the ITC under Section 1337 are subject to review by the Federal Circuit. 28 U.S.C. 1295(a)(6); 19 U.S.C. 1337(c).

The prohibition on importation of infringing goods applies only if “an industry \* \* \* relating to the articles protected by the patent \* \* \* exists or is in the process of being established” in the United States. 19 U.S.C. 1337(a)(2). That prerequisite to exclusion of the infringing articles is commonly known as the “domestic industry” requirement. For purposes of Section 1337(a)(2), a domestic industry “shall be considered to exist if there is in the United States,

with respect to the articles protected by the patent,” either “(A) significant investment in plant and equipment; (B) significant employment of labor or capital; or (C) substantial investment in [the patent’s] exploitation, including engineering, research and development, or licensing.” 19 U.S.C. 1337(a)(3).

2. In September 2007, the ITC commenced an investigation based on a complaint filed by respondents InterDigital Communications, LLC, and InterDigital Technology Corporation. Pet. App. 90. As relevant here, the complaint alleged that petitioners had violated Section 1337 by importing into the United States, selling for importation into the United States, and selling within the United States after importation certain mobile telephone handsets and components that infringe certain claims of United States patents, including U.S. Patent Nos. 7,190,966 (the ’966 patent) and 7,286,847 (the ’847 patent). *Id.* at 1-2, 90; see *id.* at 103-105.

a. The patents at issue are directed to wireless cellular telephone technology and generally disclose a procedure by which a cellular telephone establishes contact with a cellular base station in order to initiate a call. Pet. App. 2. The claimed invention operates within a Code Division Multiple Access (CDMA) system, in which multiple cellular telephones are able to simultaneously access a single cellular base station within the same portion of the radio frequency spectrum by using codes to define different system channels to be used for control and communication. *Id.* at 2-3, 103-104. In such a system, signals originating in the same geographic area can interfere with each other, causing loss of data. *Id.* at 3, 104. In order to combat that problem and to reduce unnecessary pow-

er consumption, the patents in suit are directed toward a CDMA communication system that utilizes a “power ramp-up” strategy whereby a cellular telephone that is initiating a call transmits a short code using a lower-than-needed power signal to initiate contact with a base station, followed by successively higher-power transmissions until the phone receives a confirmation signal from the base station, at which point the phone fixes the current power level as the designated power level for future communications. *Id.* at 3-4, 106-116. By directing the transmission of short codes, which can be transmitted much more frequently than an access code of typical length and can therefore be detected more quickly by the base station, the method reduces transmission power overshoots. *Id.* at 7.

b. Respondent InterDigital (hereinafter respondent) filed a motion for a summary determination by the ITC administrative law judge (ALJ) that its licensing activities in the United States satisfy Section 1337’s domestic-industry requirement as to the patents at issue. Pet. App. 380. The ALJ issued an initial determination granting the motion. *Id.* at 380-393. The ALJ explained that “a Section [1337] complainant can satisfy the domestic industry requirement solely by demonstrating licensing activities related to the patent or patents asserted in the investigation.” *Id.* at 383. The ALJ concluded that respondent’s licensing activities were sufficient to satisfy the domestic-industry requirement of Section 1337. *Id.* at 385-392. The ITC denied petitioner’s petition for review of the ALJ’s decision. *Id.* at 377-379.

c. On August 14, 2009, the ALJ issued his final initial determination. Pet. App. 94-376. The ALJ con-

cluded that there had been no violation of Section 1337 because respondent had failed to demonstrate that petitioners had infringed the relevant patents. *Id.* at 8. On cross-petitions for review, the ITC affirmed the ALJ's finding that no violation of Section 1337 had occurred, but the ITC did not take a position on certain claim-construction questions or on the validity of the patents at issue. *Id.* at 89-93.

3. a. On August 1, 2012, a panel of the Federal Circuit reversed. Pet. App. 1-25. The court concluded that the ALJ had erred in construing certain limitations in the patent claims at issue, and it remanded the case to the ITC for further proceedings. *Id.* at 10-21, 25. Whereas the ALJ had construed the term "code" in the claims to "be synonymous with 'spreading code'" or a portion of a spreading code, *id.* at 148, the court of appeals held that "the term 'code' is broad enough to cover both a spreading code and a non-spreading code," *id.* at 11.

The court of appeals also rejected petitioners' alternative argument that respondent had not satisfied the domestic-industry requirement of Section 1337. Pet. App. 22-25. The court explained that Section 1337 "makes clear that the required United States industry can be based on patent licensing alone; it does not require that the articles that are the objects of the licensing activities (i.e., the 'articles protected by the patent') be made in this country." *Id.* at 23.

Judge Newman dissented from the court's claim-construction holding. Pet. App. 25-36. She would have upheld the ALJ's construction of the term "code" as limited to a spreading code. *Ibid.*

b. On January 10, 2013, the court of appeals denied petitioners' petition for rehearing en banc. Pet. App.

37a-38a. At the same time, the panel majority and Judge Newman issued additional opinions responding to arguments that petitioners had presented in their rehearing petition, including petitioners' contention that respondent had not satisfied the domestic-industry requirement of Section 1337. *Id.* at 39-88. The same panel majority that had issued the initial decision rejected that argument. The court explained that, in order for a complainant to establish the existence of a domestic industry under Section 1337(a)(3)(C), the complainant's "substantial investment in [the patent's] exploitation, including engineering, research and development, or licensing[,] must be 'with respect to the articles protected by the patent.'" *Id.* at 41 (first brackets in original). The court construed that language to "mean[] that the engineering, research and development, or licensing activities must pertain to the products that are covered by the patent that is being asserted." *Ibid.*

The court of appeals concluded that respondent had satisfied the domestic-industry requirement. Pet. App. 43-45. The court explained that, since 1993, respondent "has been engaged in research, development, engineering, and licensing of [CDMA] technology in the United States which work later transitioned into research, development, engineering, and licensing of Wideband CDMA technology." *Id.* at 43. The court observed that respondent's "proprietary technology is incorporated in the communications standards referred to as 3G," that respondent "is principally dedicated to research and licensing intellectual property in the cellphone industry," that respondent had "invested a total of approximately \$7.6 million in salaries and benefits for employees engaged in its licensing activi-

ties” between 1993 and 2006, that respondent had “received almost \$1 billion in revenues from portfolio licenses (including the patents in suit) relating to its cellphone technology, which includes about \$400 million attributable to licenses to its 3G technology,” and that “[t]he record also reveals substantial investment by [respondent] in the research and development that led to the patents in suit.” *Id.* at 43-44. The court further explained that, “as of the time this case was tried, [respondent] had 24 revenue-producing licenses to its U.S. patents, including the patents at issue, with major manufacturers of wireless devices, including Samsung, LG, Matsushita, Apple, and RIM.” *Id.* at 45. Relying on the legislative history of the 1988 amendment that had added the operative language of Section 1337(a), the court of appeals also noted that Section 1337 “does not require actual production of the article in the United States if it can be demonstrated that significant investment and activities of the type enumerated [in subparagraph (C)] are taking place in the United States.” *Id.* at 52 (quoting H.R. Rep. No. 40, 100th Cong., 1st Sess. Pt. 1, at 157 (1987); S. Rep. No. 71, 100th Cong., 1st Sess. 129 (1987)).

Judge Newman again dissented. *Pet. App.* 56-88. She would have held that, where a complainant’s licensing activities authorize the importation of patented goods that were manufactured abroad, rather than the production of patented articles within the United States, those licensing activities do not establish the existence of a “domestic industry” for purposes of Section 1337. See *id.* at 58, 88.

#### ARGUMENT

Petitioners ask this Court to review both (1) the court of appeals’ interpretation of the domestic-

industry requirement in 19 U.S.C. 1337 and (2) the Federal Circuit's application of a de novo standard of review to factual findings that bear on the construction of disputed patent claims. Review of the first question is not warranted because the court of appeals correctly upheld the ALJ's determination that respondent had satisfied the domestic-industry requirement here, and petitioner's contrary arguments reflect a misunderstanding of the court's opinion. Review of the second question is also not warranted at this time. As petitioners note (Pet. 15-16), the Federal Circuit has granted rehearing en banc in a different case to reconsider the proper standard of review for subsidiary factual determinations made in the course of claim construction. This Court should not pre-empt the Federal Circuit's consideration of that question, particularly because petitioners did not raise the issue in the court of appeals.

1. The court of appeals correctly upheld the ALJ's determination that respondent satisfied Section 1337's domestic-industry requirement. Petitioners' contrary arguments rest on a misunderstanding of the court of appeals' analysis. This Court's review is not warranted.

a. Section 1337 allows a complainant to seek patent-protection relief from the ITC when "an industry in the United States, relating to the articles protected by the patent, \* \* \* exists or is in the process of being established." 19 U.S.C. 1337(a)(2). Subparagraphs (A), (B), and (C) of Section 1337(a)(3) identify three alternative circumstances in which "an industry in the United States shall be considered to exist." The provision at issue in this case is Subparagraph (C), which states that a domestic industry exists

“if there is in the United States, with respect to the articles protected by the patent, \* \* \* substantial investment in [the patent’s] exploitation, including engineering, research and development, or licensing.” 19 U.S.C. 1337(a)(3)(C).

i. In holding that the requirements of Subparagraph (C) were satisfied here, the court of appeals surveyed the record evidence and observed that respondent had “invested a total of approximately \$7.6 million in salaries and benefits for employees engaged in its licensing activities, and it received almost \$1 billion in revenues from portfolio licenses (including the patents in suit) relating to its cellular technology, which includes about \$400 million attributable to licenses to its 3G technology.” Pet. App. 43-44. The court further observed that “[t]he record also reveals substantial investment \* \* \* in the research and development that led to the patents in suit.” *Id.* at 44; see *id.* at 45 n.2 (noting that “[respondent’s] investment included substantial research and development leading to the patents in suit as well as licensing activity”). The court of appeals found it to be undisputed that respondent’s “investment in exploitation of its intellectual property” was “substantial” within the meaning of Subparagraph (C). See *id.* at 44.

The court of appeals then addressed the question whether that investment was “with respect to the articles protected by the patent,” as Section 1337(a)(3) requires. Pet. App. 44. The court found “[t]hat requirement [to be] satisfied in this case because the patents in suit protect the technology that is, according to [respondent’s] theory of the case, found in the products that it has licensed and that it is attempting

to exclude.” *Ibid.* That conclusion is correct and does not warrant this Court’s review.

ii. Petitioners contend that, in cases where licensing activities are used to satisfy the domestic-industry requirement, the statute’s “‘articles protected by the patent’ language [will be] a nullity under the Federal Circuit’s reading.” Pet. 13. Petitioners also advance the related argument that, while Section 1337 complainants engaged in domestic manufacturing must satisfy both “economic” and “technical” requirements, the court of appeals’ approach allows companies that license to obtain an exclusion order based on an “economic” showing alone. See Pet. 18-19. Those arguments are incorrect. Under the court of appeals’ approach, the statute’s references to “articles protected by the patent” will play the same meaningful role under Subparagraph (C) that it performs under Subparagraphs (A) and (B).

To establish a domestic industry under Subparagraph (A), a complainant must show both that it has made a “significant investment in plant or equipment,” and that its investment was “‘with respect to the articles protected by the patent’ in question.” Pet. App. 40. As the court of appeals explained, the latter requirement “will typically be met if the investment in plant and equipment is directed at production of articles protected by the patent.” *Ibid.* Similarly under Subparagraph (B), “the ‘significant employment of labor or capital’ that is required to show the existence of a domestic industry must exist ‘with respect to the articles protected by the patent.’” *Ibid.* “That requirement will likewise typically be met by a showing that significant labor or capital is being expended in the production of articles protected by the patent.”

*Ibid.* Thus, under both Subparagraphs (A) and (B), a complainant seeking to establish the existence of a domestic industry must show *both* that its economic investment is “significant” *and* that the investment relates to goods protected by the same patent or patents that the imported goods are alleged to infringe.

As the court of appeals further explained, “[a]pplying the same analysis to Subparagraph (C) \* \* \* produces a parallel result that is consistent with the Commission’s and this court’s statutory construction.” Pet. App. 40-41. “[J]ust as the ‘plant or equipment’ referred to in subparagraph (A) must exist with respect to articles protected by the patent, such as by producing patented goods, the research and development or licensing activities referred to in subparagraph (C) must also exist with respect to articles protected by the patent, such as by licensing protected products.” *Id.* at 41. Petitioners therefore are wrong in arguing (Pet. 18-19) that the court of appeals’ approach allows licensors to establish a domestic industry based on an “economic” showing alone. Rather, the Federal Circuit held that, no matter how substantial a company’s economic investment in patent-licensing generally, the investment will not satisfy Subparagraph (C) unless the licensing is directed at articles protected by the specific patents that are asserted as grounds for exclusion of the imported goods.

iii. Petitioners emphasize (see, *e.g.*, Pet. 18) the court of appeals’ statement in its initial opinion that Section 1337’s domestic-industry requirement may be satisfied “based on patent licensing alone.” Pet. App. 23. That statement was linked, in the same sentence

of the court's initial opinion, to the further observation that Section 1337(a)(3) "does not require that the articles that are the objects of the licensing activities (i.e., the 'articles protected by the patent') be made in this country." *Ibid.* Petitioners do not contest that aspect of the court of appeals' analysis or endorse the position taken in Judge Newman's dissent below that a Section 1337(a)(3) "domestic industry" requires domestic manufacture of patented goods. See *id.* at 44 & n.1; *id.* at 58, 88 (Newman, J., dissenting).

Fairly read in their entirety, the court of appeals' opinions in this case do not suggest that *all* licensing activities will suffice to establish a domestic industry for purposes of Subparagraph (C). Rather, the complainant must demonstrate both that its economic investment is substantial, see Pet. App. 45 n.2, and that the relevant licensing pertains to the same patent or patents that the imported goods are alleged to infringe, see *id.* at 41.

iv. In addition to holding that petitioners had engaged in substantial licensing activities "with respect to the articles protected by the patent," the court of appeals found that respondent had made "substantial investment \* \* \* in the research and development that led to the patents in suit." Pet. App. 44; see *id.* at 45 n.2 (finding that "[respondent's] investment included substantial research and development leading to the patents in suit as well as licensing activity"). Petitioners do not address that alternative rationale for holding Subparagraph (C) to be applicable here. For that reason as well, this case is an unsuitable vehicle for addressing petitioners' contention that "licensing alone" is insufficient to establish the existence of a Section 1337(a)(3) domestic industry.

v. Before 1988, Section 1337 required a showing that “the effect or tendency” of the infringing activity “is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry.” 19 U.S.C. 1337(a) (1982). The statute did not explain, however, what would qualify as “an industry, efficiently and economically operated, in the United States.” The ITC “customarily defined the domestic industry in patent-based investigations as the domestic operations of the patent owner and its licensees devoted to the exploitation of the patent.” *In re Certain Elec. Chromatogram Analyzers & Components Thereof*, USITC Inv. No. 337-TA-251, Initial Determination, 1987 WL 450978, at \*25 (Apr. 9, 1987), aff’d with modifications to other portions of opinion, 0087 WL 1417566, at \*1 (Aug. 1, 1987). The ITC further explained that such exploitation was “not limited to manufacturing per se but may encompass distribution, research and development, and sales.” *Ibid.*

In 1988, Congress amended Section 1337(a) in order to clarify the domestic-industry requirement. See H.R. Rep. No. 581, 99th Cong., 2d Sess. Pt. 1, at 109-112 (1986); Omnibus Trade and Competitiveness Act of 1988 (1988 Act), Pub. L. No. 100-418, § 1342, 102 Stat. 1212-1213. The 1988 Act codified the Commission’s existing interpretation of the statute by adding Sections 1337(a)(3)(A) and (B). Congress also expanded the operative definition of domestic industry by adding Subparagraph (C). 1988 Act § 1342(a). As the court of appeals explained, see Pet. App. 46-54, Congress intended to extend protection to “innovators who did not actually produce goods in this country, but who were injured by the importation of goods that

incorporated the technology that they had invented or sought to license.” *Id.* at 46. The congressional reports that accompanied the bill explained that the amended provision would “not require actual production of the article in the United States if it [could] be demonstrated that significant investment and activities of the type enumerated”—including licensing—“are taking place in the United States.” H.R. Rep. No. 40, 100th Cong., 1st Sess. Pt. 1, at 157 (1987); S. Rep. No. 71, 100th Cong., 1st Sess. 129 (1987). The determination that respondent satisfied the domestic-industry requirement here is consistent with that understanding.

b. In *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006), this Court addressed the scope of federal courts’ equitable power to issue injunctions in patent-infringement suits. The Court explained that, “[a]ccording to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief,” and it found nothing in the Patent Act that would justify a different test in the infringement context. *Id.* at 391-394. Petitioners and their amici argue (*e.g.*, Pet. 14, 26-30) that the court of appeals’ decision “improperly expands the ITC’s authority well beyond its traditional role” by “allow[ing] companies that license but do not practice their patents \* \* \* to avoid the consequences of this Court’s *eBay* decision.” Pet. 26. Petitioners further assert that the court of appeals’ decision will create “enormous incentives for companies to turn from the Article III courts to the ITC to seek remedies unconstrained by *eBay*.” Pet. 29. Those arguments provide no sound reason to reject the court of appeals’ analysis of Section 1337(a)(3)’s

domestic-industry requirement or to grant certiorari here.

i. Petitioners acknowledge that “*eBay* does not apply” in ITC proceedings. Pet. 28. Rather, the ITC’s authority to issue an exclusion order is governed by statute. Section 1337(d)(1) provides:

If the Commission determines, as a result of an investigation under this section, that there is a violation of this section, it shall direct that the articles concerned, imported by any person violating the provision of this section, be excluded from entry into the United States, unless, after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry.

19 U.S.C. 1337(d)(1).

Thus, if the ITC finds that a violation of Section 1337 has occurred, it is required to issue a remedial order unless it concludes that specified public-interest criteria warrant a different result. Those criteria overlap, but are not coextensive, with the authority of courts to consider “the public interest” as one of four factors used to determine whether injunctions should issue. See *eBay*, 547 U.S. at 391. Because the ALJ found that petitioners had not violated Section 1337, and the Commission affirmed that finding, neither has applied Section 1337(d)(1) to the facts of this case.

ii. Although the traditional four-factor test for injunctive relief does not apply to ITC proceedings, the ITC’s enforcement authority is subject to distinct limitations that do not apply in district court. Of par-

particular relevance here, the ITC is authorized to grant relief under Section 1337 “only if an industry in the United States, relating to the articles protected by the patent \* \* \* , exists or is in the process of being established.” 19 U.S.C. 1337(a)(2). Although the circumstances identified in Section 1337(a)(3)(A)-(C) might be relevant to a district court’s discretionary decision whether to issue an injunction in an infringement suit, proof that a Section 1337 “domestic industry” exists is not a legal prerequisite to a court’s grant of injunctive relief.\*

Petitioners contend that the Federal Circuit’s decision “eviscerates [the domestic-industry] requirement and vastly expands the ability of companies to divert these kinds of patent disputes into the ITC.” Pet. 29. Although nominally premised on *eBay*, that assertion is in substance simply a reformulation of petitioners’ basic argument that the court below gave Subparagraph (C) of Section 1337(a)(3) an unduly expansive scope. For the reasons set forth above (see pp. 8-12, *supra*), that argument reflects a misunderstanding of the court of appeals’ opinion.

2. Petitioners ask (Pet. 30-38) this Court to consider whether or when the Federal Circuit should apply a deferential standard of review to subsidiary findings of fact made by the ITC or a district court in the

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\* The ITC’s authority under Section 1337 is subject to an additional limitation that does not apply in infringement suits seeking injunctive relief. The court in an infringement suit has authority to enjoin the manufacture and sale of infringing articles even where that manufacture and sale occurs wholly within the United States. Under Section 1337, by contrast, the ITC is authorized only to address offenses involving the *importation* of infringing articles, not to restrict purely domestic conduct.

course of construing patent claims. Although that issue is an important one, this Court's review is not warranted in this case.

a. Petitioners did not raise this issue in the court of appeals, including in their petition for rehearing en banc, and the Federal Circuit accordingly did not discuss the standard-of-review question in either of its opinions in this case. This Court generally does not consider questions neither pressed nor passed on below. *United States v. Williams*, 504 U.S. 36, 43 (1992); see *Adarand Constrs., Inc. v. Mineta*, 534 U.S. 103, 109 (2001) (per curiam). Petitioners do not present any compelling reason to depart from that practice here.

b. As petitioners acknowledge (Pet. 15, 37), the Federal Circuit has already granted rehearing en banc in *Lighting Ballast Control LLC v. Philips Electronics North America Corp.*, 500 F. Appx. 951 (2013) (en banc order), to reconsider the appropriate standard of review for district-court factual findings pertinent to the construction of disputed patent claims. Oral argument before the en banc court is scheduled for September 13, 2013. As explained in the United States' amicus brief filed in this Court in *Retractable Technologies, Inc. v. Becton, Dickinson & Co.*, No. 11-1154, since the Federal Circuit's decision in *Cybor Corp. v. FAS Techs., Inc.*, 138 F.3d 1448, 1456 (1998), that court has applied de novo review to all aspects of claim-construction decisions, "including any allegedly fact-based questions."

In *Lighting Ballast Control*, the United States has submitted a brief as amicus curiae to the en banc Federal Circuit. That brief argues that *Cybor* should be overruled and that district-court factual findings

that bear on patent-claim construction, like other district-court findings of fact, should be reviewed under a deferential standard. There is no reason for this Court to pretermitt the Federal Circuit's consideration of that question, however, now that the court of appeals has granted en banc review to reconsider the *Cybor* rule.

c. *Cybor* and *Lighting Ballast Control* both involve appellate review of subsidiary factual findings made by a district court in the course of construing disputed patent claims. The vast majority of other cases in which claim-construction disputes have reached the Federal Circuit have similarly involved litigation initially commenced in district court. In this case, by contrast, the challenged claim-construction decision was made by an ITC ALJ and left undisturbed by the ITC itself.

If the en banc Federal Circuit in *Lighting Ballast Control* ultimately holds that district court factual findings should be reviewed deferentially in this context, that holding would logically support a similar deferential standard of review for analogous agency factual findings. Nevertheless, judicial review of agency action often implicates distinct administrative-law doctrines. An agency's interpretation of ambiguous statutory language, for example, may be entitled to judicial deference, see, e.g., *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-843 (1984), even though a similar interpretation adopted by a district court would be reviewed de novo on appeal. The potential applicability of doctrines specific to review of agency action makes this case an unsuitable vehicle for determining the appropriate standard of review in the

more typical case where the challenged claim construction is performed initially by a district court.

d. The Court should also reject petitioners' alternative suggestion that it hold the petition for a writ of certiorari pending the en banc court of appeals' resolution of *Lighting Ballast Control*. As noted above, petitioners failed to raise the standard-of-review issue before the court of appeals, including in their rehearing petition. Petitioners previously asked the court of appeals to withdraw its mandate and to hold this case pending its rehearing decision in *Lighting Ballast*. The court of appeals denied that request, and there is no reason for this Court to effectively overrule that decision.

#### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2013