

No. 13-896

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IN THE  
**Supreme Court of the United States**

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COMMIL USA, LLC,

*Petitioner,*

v.

CISCO SYSTEMS, INC.,

*Respondent.*

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**On Writ Of Certiorari  
To The United States Court Of Appeals  
For The Federal Circuit**

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**BRIEF FOR EMC CORPORATION,  
ACUSHNET COMPANY, CTIA – THE WIRELESS  
ASSOCIATION, DELL INC., DROPBOX, INC.,  
FACEBOOK, INC., GARMIN INTERNATIONAL, INC.,  
GOOGLE INC., HEWLETT-PACKARD COMPANY,  
INTEL CORPORATION, ORACLE CORPORATION,  
QVC, INC., RED HAT, INC., SAS INSTITUTE INC.,  
SYMMETRY LLC, VIZIO, INC., AND XILINX, INC.  
AS AMICI CURIAE IN SUPPORT OF RESPONDENT**

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## INTEREST OF AMICI CURIAE<sup>1</sup>

Just four Terms ago, this Court “h[e]ld that induced infringement under § 271(b) requires knowledge that the induced acts constitute patent infringement.” *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2068 (2011). This case presents the question whether an accused inducer’s evidence of a good-faith belief that the asserted patent is invalid—and thus that no one can be held liable for infringement—is probative of an absence of “knowledge that the induced acts constitute patent infringement.” *Ibid.* The court of appeals, in a straightforward application of *Global-Tech*, held that such evidence is relevant.

Perhaps recognizing the force of the court of appeals’ logic, Petitioner and its amici now challenge the central holding of *Global-Tech*, arguing that it “does not necessarily follow” from this Court’s reasoning. Pet. Br. 17; *see also, e.g.*, U.S. Br. 12 (asserting that *Global-Tech* did not “clearly resolve” whether a defendant “must additionally possess actual knowledge that the induced acts constitute infringement”).

Amici curiae represent a diverse collection of leading technology companies, and have a substantial interest in the correct resolution of that challenge. Collectively, amici own over 98,000 United States patents and recognize the importance of pro-

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<sup>1</sup> All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than amici or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

protecting valid intellectual property rights. But amici frequently are targeted by litigants with opportunistic accusations of inducing infringement of patents, despite amici's lack of knowledge that any valid patent has been infringed. And the constant drumbeat of such lawsuits—hundreds more annually than even just ten years ago—creates a significant drag on (and sometimes, in the cases of smaller companies, an existential threat to) their ability to engage and innovate in their lines of business.

The alleged conduct underlying such accusations of inducement might be distributing a product with a multitude of noninfringing uses that, when combined with another product, allegedly infringes a patent on the larger combination apparatus or system; selling a product that a purchaser uses to infringe a patent on a method, even though the product also has numerous admittedly noninfringing uses; or providing a service with noninfringing uses that users also may use to infringe a method patent. Because plaintiffs may file inducement lawsuits based on marketing even staple articles of commerce, amici frequently find some of their most widely used and essential products and services threatened by patent litigation.

Yet patentees (more often than not, so-called non-practicing entities) frequently assert patents whose application to the accused products is dubious. In these circumstances, amici often believe in good faith that, if the patent is construed narrowly, the product does not infringe but, if the patent is construed broadly enough to reach the product, the patent is invalid. In these circumstances, and many others, amici thus are forced to defend claims that

they induced others' acts of infringement, even when they reasonably believe that those actions do not infringe because the asserted patent, particularly if construed broadly enough to suggest infringement, is invalid.

### SUMMARY OF THE ARGUMENT

As a doctrine of *secondary* liability, inducement always has been a narrow exception to the rule that patent liability requires the defendant to practice each element of a valid patent. Because secondary liability thus extends the patent monopoly to sweep in noninfringers, unlike direct infringement it consistently has been understood to require a culpable mental state.

Many of the suits facing amici are brought by non-practicing entities, who routinely assert patents of questionable validity. Indeed, there are millions of patents in force in this country, many of which were issued before this Court's recent decisions correcting unduly relaxed standards for patent validity that were previously applied by the Patent Office and the lower courts. *See, e.g., Alice Corp. Pty. v. CLS Bank Int'l*, 134 S. Ct. 2347 (2014); *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. 2120 (2014); *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 132 S. Ct. 1289 (2012); *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398 (2007).

This is especially true of vague patents claiming computer-implementations of fundamental business concepts or foundational technologies. Such patents frequently are wielded by non-practicing entities, who, because they have no interest except to maximize the scope and power of their patents, propound

exceedingly broad interpretations of their claims in an attempt to monopolize commonplace productive activity in a particular field. These patents frequently appear ineligible, obvious, indefinite, or otherwise invalid if construed to cover amici's activities.

Liability for inducing infringement historically has been premised on the accused inducer's knowledge that the acts it encouraged would infringe an enforceable patent. *See, e.g., Wallace v. Holmes*, 29 F. Cas. 74, 79-80 (C.C.D. Conn. 1871) (first U.S. case recognizing liability for "inducing" infringement of a patent, and doing so based on the defendant's "express purpose" and "certain knowledge" of infringement). As this Court recognized in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005), it is important that the induced infringement doctrine "do[] nothing to compromise legitimate commerce or discourage innovation having a lawful promise." *Id.* at 937. Under the approach advocated by petitioner and the government, inducement liability threatens to stifle innovation by burdening legitimate commerce with costly and abusive patent lawsuits.

There are currently more than 2.3 million U.S. patents in force. *See* World Intellectual Prop. Org., Statistical Country Profiles: United States of America, *available at* [http://www.wipo.int/ipstats/en/statistics/country\\_profile/profile.jsp?code=US](http://www.wipo.int/ipstats/en/statistics/country_profile/profile.jsp?code=US). Whenever a technology company introduces a new product or service, or even proposes new ways of using older products or services, there inevitably is a background risk that some facet of the new product, service, or method implicates one or more of these 2.3 million patents. If countless patentees could hold

a productive company liable for inducement simply by sending a notice letter listing various patents and suggesting their “potential relevance” to the activities of the company’s *customers* (Pet. Br. 3), or even by offering such patents for sale to any number of companies, innovative firms such as amici would be exposed to potentially massive liability for acts beyond their control, despite the absence of any intent to induce infringement as required by *Global-Tech*.

Wholly apart from the fact that this approach would gut the mental-state element of inducement, the standard propounded by petitioner badly distorts litigants’ incentives in patent litigation. It encourages some patent owners who are unwilling or unable to compete in the marketplace to indiscriminately send “notice letters” to all productive companies in the relevant industries, regardless of whether those companies or their customers infringe and regardless of the validity or invalidity of the patents. Such letters are already common, but the rule sought by petitioner would make them engines of strict liability, even for recipients who conduct good faith evaluations of the allegations and reach a different conclusion than a jury or court does. Such a regime self-evidently chills innovation, encourages defendants to cease productive activities (or pay exorbitant rents extorted by the threat of litigation) rather than challenging the validity of dubious patents, and cannot seriously be maintained as promoting the “Progress of . . . useful Arts.” U.S. Const. art. I, § 8, cl. 8.

As this Court held in *Global-Tech*, inducement liability under 35 U.S.C. § 271(b) requires that “the inducer must persuade another to engage in conduct *that the inducer knows is infringement.*” 131 S. Ct.

at 2065 (emphasis added). If the accused inducer reasonably believes that the patent is invalid or not infringed, and therefore that the party it is encouraging could not be liable for direct infringement, then the accused infringer does not act with knowledge that the encouraged party is committing patent infringement. This Court should adhere to its well-reasoned decision in *Global-Tech* and affirm the judgment of the court of appeals.

### ARGUMENT

The language of 35 U.S.C. § 271(b) does not specify in explicit terms the mental state required to “actively induce[] infringement,” but this Court has squarely held that “intent is required.” *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2065 (2011) (quotation marks omitted). In order to act with the requisite intent, moreover, the *Global-Tech* Court concluded that the “the inducer must persuade another to engage in conduct that the inducer *knows is infringement.*” *Ibid.* (emphasis added). When an alleged inducer in good faith believes that the patent is invalid or not infringed, and thus does not believe that its customers or users can be liable for directly infringing the patent, the alleged inducer does not “know that the induced acts constitute patent infringement.” *Id.* at 2063.

This conclusion not only follows inexorably from this Court’s explanations of the mental state required for inducement and the relationship between inducement and liability for direct infringement; it also ensures that the patent system fosters, rather than hinders, innovation. Innovators, of necessity, use basic, foundational techniques and technologies

commonly relied on by those working in the field as building blocks for further advances and innovations. Patentees (especially non-practicing entities) frequently accuse innovative companies of infringing patents that the patentees interpret as claiming those essential foundational practices or technologies. If those innovators have a good-faith belief that the claimed fundamental practices are in the prior art, obvious, or otherwise not patent-eligible, they should be able to market the use of their innovations without risking strict liability for patent infringement if a court later concludes that the practice has been validly patented.

**I. INDUCEMENT LIABILITY REQUIRES KNOWLEDGE THAT SOMEONE IS DIRECTLY INFRINGING A VALID PATENT.**

As this Court repeatedly has explained, “[t]he inducement rule . . . premises liability on purposeful, culpable expression and conduct.” *Global-Tech*, 131 S. Ct. at 2067 (quoting *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 937 (2005)). The *Grokster* Court correctly observed that “[t]he rule on inducement of infringement as developed in the early cases is no different today”: For the sale of a product or service with noninfringing uses to be the basis for inducement liability, the alleged inducer must have the “object of promoting its use *to infringe*.” 545 U.S. at 936 (emphasis added). What makes the defendant’s intent to encourage infringement “culpable” is the defendant’s *knowledge* that the actions induced, once completed, *will constitute an act of infringement*. *Id.* at 937, 940, 941. Thus, in *Global-Tech*, the Court clearly explained *what* an accused inducer must intend: “we now hold that in-

duced infringement under § 271(b) requires knowledge that the induced acts constitute patent infringement.” 131 S. Ct. at 2068.

That holding resolves this case, and compels rejection of petitioner’s strained attempt to rewrite this Court’s precedents. As petitioner and its amici recognize, liability for direct infringement requires that the asserted patent be valid. Pet. Br. 49; *accord, e.g.*, U.S. Br. 19; *Lazare Kaplan Int’l, Inc. v. Photoscribe Techs., Inc.*, 714 F.3d 1289, 1295 (Fed. Cir. 2013) (“[N]o accused products can be found liable for infringement of an invalid claim.”). And inducement liability requires that the predicate conditions for direct infringement be met: “where there has been no direct infringement, there can be no inducement of infringement under § 271(b).” *Limelight Networks, Inc. v. Akamai Techs., Inc.*, 134 S. Ct. 2111, 2117 (2014). Inducement liability also requires *knowledge* that the requirements to hold someone liable for direct infringement are met—i.e., that the induced act “constitute[s] patent infringement.” *Global-Tech*, 131 S. Ct. at 2068. Thus, without knowledge that the induced acts satisfy each element of a valid patent (*Limelight*, 134 S. Ct. at 2117), the mental-state requirement for inducement liability is not met. Evidence that an accused inducer possesses a good-faith belief that the patent is invalid thus is highly relevant to the question whether the defendant possessed the mental state necessary for inducement liability.



**A. *Global-Tech* Unambiguously Held That An Inducer Must Know That The Induced Acts Constitute Patent Infringement.**

Four Terms ago, this Court “consider[ed] whether a party who ‘actively induces infringement of a patent’ under 35 U.S.C. § 271(b) must *know* that the induced acts *constitute patent infringement*.” 131 S. Ct. at 2063 (emphasis added). The plain language of Section 271(b) is subject to two possible interpretations, the Court explained—it “may require merely that the inducer lead another to engage in conduct that happens to amount to infringement,” or it may “mean that the inducer must persuade another to engage in conduct that the inducer *knows is infringement*.” *Id.* at 2065 (emphasis added). The Court noted that “[b]oth readings are possible,” but did not suggest that any *other* interpretation of the text also was possible. *Ibid.*

Rather, “[f]inding no definitive answer in the statutory text,” the Court set out to determine which of the *two* possible “readings” to adopt. 131 S. Ct. at 2065. The Court thus examined the principles behind inducement, as expressed in its case law on secondary liability. *Id.* at 2065-67. Although the Court did not find a clear answer in the pre-1952 case law, it reiterated its previous holding in *Grokster* that liability for those who do not directly infringe must be grounded on “purposeful, culpable expression and conduct.” *Id.* at 2067 (quoting *Grokster*, 545 U.S. at 937).

The Court then explained that *Aro Manufacturing Co. v. Convertible Top Replacement Co.*, 377 U.S. 476 (1964) (“*Aro II*”), had provided an answer in the

context of contributory infringement that was compatible only with the second possible interpretation, because “a violator of § 271(c) must know that the combination for which his component was especially designed was both patented and infringing.” *Global-Tech*, 131 S. Ct. at 2067 (quotation marks omitted). Because that requirement, which *Aro II* explicitly recognized, demands a greater degree of knowledge for secondary liability than would the first possible interpretation of Section 271(b), only the second possible interpretation could hew to the standard for contributory infringement.

The Court thus concluded that the second possible reading was correct: “[W]e now hold that induced infringement under § 271(b) requires knowledge that the induced acts *constitute patent infringement*.” 131 S. Ct. at 2068 (emphasis added).

Petitioner attempts to elide this explicit “hold[ing]” (131 S. Ct. at 2068), arguing principally that *Global-Tech* repeatedly mentioned that knowledge of the existence of a patent was required, and relied on cases so holding. Pet. Br. 17-28. But *Global-Tech* never stated that notice of a patent was *sufficient* in itself to satisfy the mental-state requirement of Section 271(b). Instead, the standard announced in *Global-Tech* requires “knowledge that the induced acts constitute patent infringement.” 131 S. Ct. at 2068.

To be sure, notice of a patent is *one* necessary component of that standard: A defendant cannot know that the induced acts are patent infringement if the defendant does not know that the patent exists

at all. But *Global-Tech* requires more than mere knowledge of a patent's existence.

*Global-Tech* addressed whether, viewing the evidence “in the light most favorable to” the patentee, a jury could conclude that the accused inducer in that case sufficiently knew “the infringing nature of the sales it encouraged [the direct infringer] to make.” 131 S. Ct. at 2071. The Court held that the inducer’s “willful blindness” to the fact that the product was covered by a valid patent sufficed. *Id.* at 2070-71. The Court found that the inducer there had “willfully blinded itself to the infringing nature of [the direct infringer]’s sales,” as demonstrated by the inducer’s decision to copy a product without investigating whether the product it copied was patented and, if so, whether that patent was valid—but instead to blind itself to that information by making a “decision not to inform the attorney from whom [it] sought a right-to-use opinion that the product to be evaluated was simply a knockoff of [the patentee]’s deep fryer.” *Id.* at 2071-72.

Contrary to petitioner’s suggestion, *Global-Tech*’s adoption of the willful-blindness standard does not “mak[e] it . . . *easier* to satisfy the intent requirement for inducement where the defendant lacks actual knowledge of the patent.” Pet. Br. 24 n.4. The infringer in *Global-Tech* copied a product it had specifically selected for copying because it did not contain patent markings. 131 S. Ct. at 2071. In so doing, the infringer willfully blinded itself to *every* material fact about the patent: its existence, its applicability to the infringer’s product, and its validity. *Ibid.* Rather than investigating *any* of these issues, the infringer took “deliberate actions” to avoid learning

them. *Id.* at 2070. And the infringer’s decision to copy a “superior product” whose sales “had been growing for some time” (*id.* at 2071) suggested that the infringer knew there was “a high probability” that the copied product was validly patented (*id.* at 2070).

Indeed, the *Global-Tech* Court made this point explicit, in a manner that conclusively forecloses petitioner’s attempted reinterpretation. In explaining why it deemed the dissent’s concerns about the willful-blindness standard unpersuasive, the Court observed that promotion of technological progress does not require protecting parties from inducement liability when they “actively encourage others to violate patent rights” and “take deliberate steps to remain ignorant of those rights despite a high probability that the rights exist *and are being infringed.*” 131 S. Ct. at 2069 n.8 (emphasis added). The only plausible reading of that passage is that it recognizes the need for inducement plaintiffs to prove that the defendant actually knew, or was willfully blind to, the fact of infringement. The Court then confirmed this understanding of the degree of willful blindness required for liability, concluding that the defendant in that case was liable because it “willfully blinded itself to *the infringing nature* of the sales it encouraged.” *Id.* at 2071 (emphasis added). *Global-Tech* thus makes clear that the willful-blindness standard, like the knowledge requirement itself, requires proof that the defendant’s culpable mental state encompasses not merely the existence of the patent but “the infringing nature” of the induced acts.

Nothing less suffices to establish inducement liability. Circumstances that might permit one to ar-

gue that a defendant had *knowledge of a patent* are not remotely sufficient to demonstrate that the defendant knew that some act it had encouraged would infringe that patent. Prior to *Global-Tech*, the Federal Circuit held that evidence that a handful of a corporation's 90,000 employees had received a spam marketing email that mentioned the relevant patent number is sufficient to demonstrate the defendant's knowledge of the patent. See *i4i Ltd. P'ship v. Microsoft Corp.*, 598 F.3d 831, 851 (Fed. Cir. 2010), *aff'd on other grounds*, 131 S. Ct. 2238 (2011). And other courts even permitted a citation to the asserted patent in the file history of any one of the defendant's thousands of patents and patent applications to establish the defendant's knowledge of that patent (and presumably every other patent similarly cited). See *Veritas Operating Corp. v. Microsoft Corp.*, 562 F. Supp. 2d 1141, 1277 (W.D. Wash. 2008).

There simply is no reasonable chain of inferences that could allow a jury to infer from the mere fact that the patent-in-suit had been cited by the PTO in the file history of one of the defendant's patent applications that the defendant read and analyzed the cited patent and developed actual knowledge that one or more of the thousands or millions of actions it was facilitating in the course of its business infringed one or more of the valid claims of the patent. Allowing evidence of mere knowledge of a patent to suffice to establish knowledge of infringement thus would effectively eviscerate *Global-Tech*.<sup>2</sup>

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<sup>2</sup> This case does not present the question—but it is also important to adhere to the pre-1952 understanding, codified in Section 271(b)—that the “knowledge” of a mere employee can-

Petitioner’s attempts to read this Court’s other precedents as undermining *Global-Tech*’s clear holding are unavailing. *Aro II* did not decide that the intent requirement could be met by mere knowledge of a patent’s existence. Instead, it made clear that knowledge of a patent was *required* for contributory infringement, not that such minimal notice would be *sufficient*. 377 U.S. at 488. And, in fact, the holding of *Aro II* is that “§ 271(c) does require a showing that the alleged contributory infringer *knew* that the combination for which his component was especially designed was *both* patented *and* *infringing*.” *Ibid.* (emphases added). That holding follows directly from the most natural reading of the contributory infringement subsection, which requires that the accused contributor “know[]” its product “to be especially made or especially adapted for use *in an infringement of such patent*.” 35 U.S.C. § 271(c) (emphasis added).

Petitioner reads much into *Aro II*’s explanation that the accused contributory infringers had “no defense with respect to” sales made after they received a letter notifying them that “anyone selling ready-made replacement fabrics for these automobiles would be guilty of contributory infringement of said patents.” 377 U.S. at 490 (quotation marks omitted); Pet. Br. 21-28. But the defendants in *Aro II* had not asserted that they believed the letter to be wrong.

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not be imputed to a corporate defendant. In *Cortelyou v. Charles Eneu Johnson & Co.*, 207 U.S. 196 (1907), this Court held that notice to the defendant’s employee was not attributable to the defendant for purposes of inducement liability because the employee “was not an officer or general agent of the defendant company.” *Id.* at 201.

Given the absence of any claim that the letter did not suffice to establish the defendants' knowledge that a valid patent was being infringed, there was no need to require further proof of the defendants' culpable knowledge. *See Aro II*, 377 U.S. at 488 (the issue was “not noticed by the parties,” and thus not raised by the petitioners—the accused contributory infringers—as a ground for reversal).

Petitioner's reading of *Aro II* also ignores the difference between the situations addressed by contributory infringement and inducement. “Before 1952, both the conduct now covered by § 271(b) (induced infringement) and the conduct now addressed by § 271(c) (sale of a component of a patented invention) were viewed as falling within the overarching concept of ‘contributory infringement.’” *Global-Tech*, 131 S. Ct. at 2066. These “complementary provisions together codified] the basic principles of contributory infringement developed by the courts before 1952.” Donald S. Chisum, 5 *Chisum on Patents* § 17.04[3] (punctuation omitted). Section 271(b) codified the aiding-and-abetting liability branch of pre-1952 “contributory infringement,” while Section 271(c) reflected the “usual situation in which contributory infringement arises” (S. Rep. No. 82-1979, at 8 (1952) (“Senate Report”))—that is, when one sells a product that is “especially made . . . for use in an infringement.” 35 U.S.C. § 271(c).

Unlike Section 271(b), Section 271(c) allows imposition of liability even in the absence of direct evidence that the defendant intended its article to be used in an infringing way. Under Section 271(c), the defendant's “intent to infringe” is conclusively “imput[ed]” from the fact that the defendant knows that

its article “is good for nothing else but infringement.” *Grokster*, 545 U.S. at 932 (internal quotation marks omitted). This Court has been clear, however, that such unlawful intent can be ascribed to the defendant only when the “alleged contributory infringer *knew* that the combination for which his component was especially designed *was both patented and infringing*.” *Aro II*, 377 U.S. at 488 (emphases added). In that situation, there is “no injustice in presuming or imputing an intent to infringe” under Section 271(c). *Grokster*, 545 U.S. at 932. When one sells a product with knowledge that it is “good for nothing else but infringement,” the obvious and inevitable consequence of that sale is that the product will be put to its intended, infringing purpose. *Ibid.* (internal quotation marks omitted).

But there can be no liability under Section 271(c) for the sale of a product that has substantial noninfringing uses—a “staple article or commodity of commerce.” 35 U.S.C. § 271(c). This exclusion was incorporated into Section 271(c) “to deny patentees control over staple goods used in their inventions.” *Dawson Chem. Co. v. Rohm & Haas Co.*, 448 U.S. 176, 200-01 (1980). Secondary liability in connection with the sale of staple articles of commerce—e.g., a general-purpose computer component—accordingly can be imposed only under Section 271(b). *See Grokster*, 545 U.S. at 935 n.10.

Thus, *Aro II*—which addressed contributory infringement—does not set the ceiling on the mental-state requirement for inducement. Because Section 271(b) can apply when an accused infringer sells a staple good, whereas Section 271(c) requires that the item be especially made to infringe, Congress re-



quired *a greater* mental-state showing for secondary liability under Section 271(b) so as to ensure patentees were not granted “control of staple goods.” *Dawson Chem.*, 448 U.S. at 201. As one of the drafters of the 1952 Act explained, in the course of distinguishing Section 271(b) and Section 271(c), “to make out a case of active inducement under paragraph (b)” based on the sale of a staple article of commerce, “*something more than mere knowledge of an intended infringing use* would have to be shown.” P.J. Federico, *Commentary on the New Patent Act*, 75 J. Pat. & Trademark Off. Soc’y 161, 214 (1993) (reprinted from Title 35, United States Code Annotated (West 1954)) (emphasis added). And this Court echoed that solicitude for preserving competition in the sale of staple goods, stating that liability for active inducement requires “evidence [that] *goes beyond* a product’s characteristics or the *knowledge that it may be put to infringing uses*, and shows statements or actions directed to promoting *infringement*.” *Grokster*, 545 U.S. at 935 (emphases added).

If Section 271(b) did not require knowledge that the induced acts constitute patent infringement, patentees would have little incentive ever to bring suits under Section 271(c): Defendants would be liable as inducers without any need to show that their products lack noninfringing uses. This result cannot possibly be squared with the prior case law or with Congress’s understanding that Section 271(c) addressed the “usual situation” in which secondary liability would arise. Senate Report at 8; *see also Grokster*, 545 U.S. at 932.

The structural relationship between Sections 271(b) and 271(c) requires that liability under *either*

provision be imposed only when the defendant had actual knowledge that the underlying acts constitute patent infringement, and that liability under Section 271(b)—precisely because it can restrain distribution of staple products with a vast multitude of noninfringing uses—may be imposed only when the defendant *also* took affirmative steps to encourage a use it knew to be patent infringement.

None of the cases cited by petitioner undermines the requirement that the accused inducer must know that the induced acts constitute patent infringement. Knowledge of infringement was not disputed in *Grokster*; it was incontrovertible in that case that the online service providers knew they were facilitating massive amounts of copyright infringement. *See* 545 U.S. at 920 (“individual recipients of Grokster’s and StreamCast’s software . . . have prominently employed those networks in sharing copyrighted music and video files without authorization”). These underlying acts of copyright infringement were clear and undeniable. But in patent cases, direct infringement is often not so clearly defined. Whether an asserted patent is valid and infringed may turn on complex issues of claim construction that (in light of this Court’s decision in *Teva Pharmaceuticals USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 837 (2015)) may require resolution of disputed factual questions. And patent claims today are often vague, overbroad, or both—“[b]road, to the point of inherently ambiguous”—such that it can be extraordinarily difficult to determine the scope of the claimed invention from a review of the patent. *Enzo Biochem, Inc. v. Applera Corp.*, 605 F.3d 1347, 1348 n.2 (Fed. Cir. 2010) (Plager, J., dissenting from denial of panel rehear-

ing). In part for that reason, liability for inducing infringement of a patent always has required knowledge of infringement.

*Cortelyou* affords petitioner no support. *Contra* Pet. Br. 26-27. In that case, the defendant had supplied ink to a customer for use in a patented duplicating machine that the customer had purchased from the patentee, subject to a license prohibiting the use with the machine of any ink other than that sold by the patentee. 207 U.S. at 198-99. The question presented was whether the defendant was liable for induced infringement on these facts. *Id.* at 199. There was no dispute that the machine at issue was subject to the patent and to the restriction prohibiting use with the defendant's ink. The Court nonetheless held that there could be no secondary liability because there was "no sufficient evidence of notice" to the accused inducer that the use of its ink by the purchaser was a breach of the purchaser's license agreement and therefore constituted infringement. *Id.* at 200. *Cortelyou* thus involved the question of the mental state necessary to support potential liability for inducing violation of a license restriction applicable to an indisputably patented product; its only relevance here is that it confirms the fundamental point that there can be no inducement liability absent knowledge of patent infringement.

A few years later, this Court faced a factually similar case, except that the ink seller did have notice of the license and sold the ink (1) with "knowledge that under the license [the license holder] could not use the ink . . . without *infringement*," and (2) with the expectation that the ink would be used in the patented machine. *Henry v. A.B. Dick*

*Co.*, 224 U.S. 1, 49 (1912) (emphasis added), *overruled on other grounds by Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502 (1917); see also *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 33-34 (2006). On those facts the Court found the ink seller liable for what was then known as “contributory infringement” (but would, under modern terminology, be viewed as active inducement). *A.B. Dick*, 224 U.S. at 48 (quotation marks omitted). The Court rejected the proposition that secondary liability for infringement could be based solely on the sale of a staple article that could be put to “an infringing use.” *Ibid.* The Court held instead that there must be an “intent and purpose that the article sold will be so used.” *Ibid.* Thus, contrary to petitioner’s interpretation (Pet. Br. 25-26), *A.B. Dick* required knowledge that the induced acts would constitute patent infringement.

Petitioner also ignores the myriad pre-1952 cases holding that “active inducement” requires a purpose to infringe. For example, in the first case to use the phrase, the so-called “Button-Fastener Case,” the Sixth Circuit considered a charge that defendants “actively induced” infringement by persuading plaintiff’s customers “to infringe . . . with the malicious purpose of causing them to violate their licenses.” *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.*, 77 F. 288, 297 (6th Cir. 1896). The court allowed the charge to stand because “[i]t is the *knowledge* that the [goods] made and sold by defendants are to be used *for the purpose of infringing*, coupled with the active intent that they shall be so used, which . . . constitutes contributory infringement.” *Ibid.* (emphases added).

Proof that the accused inducer had knowledge that the use it encouraged was infringing is thus essential to the imposition of liability under Section 271(b). Imposing liability solely on the basis of a defendant's encouragement of an act that turns out to infringe a valid patent (but was not known to do so *ex ante*) essentially converts Section 271(b) into a strict liability statute, much like Section 271(a). Whatever the merit of holding persons strictly liable for the infringing products they themselves make, use, or sell, and for the infringing methods they themselves perform, there is simply no warrant in law or policy for imposing strict liability on a producer of staple articles of commerce in the absence of culpable intent. Congress made that policy judgment in 1952, and it is even more justified today, as the capabilities and uses of the fundamental building blocks of modern technological advances—microprocessors, operating systems, Internet portals, and the like—continue to expand at exponential rates and in unpredictable ways.

**B. A Defendant Who Encourages Another In The Good-Faith Belief That The Patent Is Invalid Does Not Know That The Acts He Encourages Constitute Patent Infringement.**

*Global-Tech* requires that an accused inducer know that “the induced acts constitute patent infringement”—i.e., that the induced acts would support liability for direct infringement under Section 271(a). 131 S. Ct. at 2068. And just last Term, this Court held that to “constitute infringement” under Section 271(a), “all the steps” claimed in the patent must be “carried out.” *Limelight*, 134 S. Ct. at 2117.

As petitioner admits, “there can be no liability for infringement of an invalid patent.” Pet. Br. 49 (emphasis omitted); *accord* U.S. Br. 19 (“[I]f the patent is actually found to *be* invalid, neither the direct infringer nor the person who induces that infringement can be held liable under the Patent Act.”). “[A]n *invalidated* patent carries with it no such right” to exclude. *FTC v. Actavis, Inc.*, 133 S. Ct. 2223, 2231 (2013). To serve as the basis for an infringement finding, therefore, a patent must meet “the conditions and requirements” of patentability Congress set forth. 35 U.S.C. § 101.

Because a defendant cannot be liable for inducing an “action that did not violate the plaintiff’s legal rights” (*Limelight*, 134 S. Ct. at 2119), and performing all the steps of an *invalid* patent does not violate the plaintiff’s legal rights, a defendant cannot be liable for inducement unless the patent is valid. Thus, petitioner recognizes that one cannot induce infringement of an invalid patent because “a finding of invalidity” implies that there can be “no liability” for infringement. Pet. Br. 36.<sup>3</sup>

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<sup>3</sup> That a court is *capable* of determining separately whether a patent is valid and whether all of its elements have been performed by one actor (Pet. Br. 46-50; U.S. Br. 19-26) is of no moment. In many contexts, courts can determine whether one necessary liability element has been met separately from determining whether another element is also met. It may make sense for courts to address some issues before others, or to leave determinations on certain issues standing even if not strictly necessary to the judgment. Those are prudential decisions, governed by the relative “difficult[y]” of resolving the issues and other “countervailing concerns.” *Cardinal Chem. Co. v. Morton Int’l, Inc.*, 508 U.S. 83, 99 (1993). They do not imply that a defendant can know that he is infringing a plaintiff’s legal right

But inducement also requires “conduct that the inducer *knows is infringement.*” *Global-Tech*, 131 S. Ct. at 2065 (emphasis added). Because performing all the elements of a valid patent claim—and *only* performing all the elements of a valid patent claim—is direct patent infringement, inducement requires knowledge that the induced acts meet that definition. Put another way, an inducer must not only “violate the plaintiff’s legal rights,” but *know* that he violated the plaintiff’s legal rights. *Limelight*, 134 S. Ct. at 2119.

This conclusion is bolstered by evidence that, in enacting Section 271(b), Congress equated “actively inducing” with civil “aiding and abetting” liability, which itself requires knowledge that the underlying conduct is a legal breach of duty. The Senate Report, in discussing Section 271, states that “[p]aragraph (b) recites in broad terms that one who aids and abets an infringement is likewise an infringer.” Senate Report at 8. The report later says that “[o]ne who actively induces infringement as by aiding and abetting the same is liable as an infringer.” *Id.* at 28. The House Report uses identical language. H.R. Rep. No. 82-1923, at 9, 28 (1952). Thus, the basic understanding of Congress was that “actively inducing infringement” was similar to “aiding and abetting infringement”—and this codified meaning controls today.

Civil aiding-and-abetting liability, as invoked by Congress in enacting Section 271(b), requires actual knowledge of the rights violated. Section 876(b) of

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without knowing that the plaintiff has such a right in the first place.

the First Restatement of Torts (which is the relevant treatise for purposes of establishing the common-law backdrop to the 1952 Patent Act, *see Field v. Mans*, 516 U.S. 59, 70 (1995)) states that a third party is liable for another’s breach of duty “if he . . . *knows* that the other’s conduct *constitutes a breach of duty* and gives substantial assistance or encouragement to the other.” Restatement (First) of Torts § 876(b) (1939) (emphasis added). Knowledge of the wrong—here, knowledge of infringement—thus was a prerequisite to civil aiding-and-abetting liability at the time Section 271(b) was enacted.<sup>4</sup>

That patent validity may sometimes ultimately be a question of law does not change this knowledge requirement. In tort, for example, “the existence and scope or range of [a] duty” is “an issue of law for the court.” 57A Am. Jur. 2d *Negligence* § 78. To be liable as an inducer in tort, however, the defendant must know the answer to that legal question—he must know that the induced action “constitutes a breach of duty.” Restatement (First) of Torts § 876(b).

In other contexts as well, a defendant’s belief about legal issues often is relevant to whether the

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<sup>4</sup> The First Restatement of Torts, rather than the Second, supplies the pertinent standard. The “pre-1952 case law” is the relevant body of precedent (*Global-Tech*, 131 S. Ct. at 2066), and the First Restatement reflects the common-law doctrine that Congress was codifying in 1952. *See* 2B Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 50:2 (7th ed. 2012). Moreover, “modern Restatements” do not always accurately “describ[e]” even “the current state of the law.” *Kansas v. Nebraska*, No. 126, Orig., slip op. at 1 (U.S. Feb. 24, 2015) (Scalia, J., concurring in part and dissenting in part).



defendant can satisfy a scienter requirement. For example, this Court has interpreted statutory language requiring that a defendant “knowingly” act in a manner “not authorized by [the statute] or the regulations” as requiring that the defendant “knew that his [conduct] was in a manner unauthorized by statute or regulations.” *Liparota v. United States*, 471 U.S. 419, 420, 433 (1985) (quotation marks omitted). Indeed, even statutes requiring only “willful” conduct, which is satisfied by mere recklessness rather than actual knowledge in the civil context (*Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57 (2007)), necessitate proof that the defendant’s culpable mental state extends to the question whether the conduct at issue violates the law. *See, e.g., id.* at 69; *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 132-35 (1988); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 125-28 (1985).

Petitioner argues that a defendant who has not practiced the patent need only “kn[ow] of the patent’s *potential* applicability”—a requirement satisfied by receipt of “a notice letter”—to be liable for inducement. Pet. Br. 14 (emphasis added). But “potential applicability” does not suffice, even for the lesser standard of willfulness. *Thurston*, 469 U.S. at 127-28; *McLaughlin*, 486 U.S. at 132-33. In *McLaughlin*, for example, the Court expressly rejected the suggestion that a defendant’s knowledge that the potential for statutory liability “was in the picture” could suffice to establish recklessness. 486 U.S. at 132 (citation omitted). *A fortiori*, such knowledge is insufficient to establish actual knowledge of infringement. Liability for actual inducement requires proof that the defendant *at least* had knowledge that the patent

claims validly cover the particular acts the defendant allegedly encouraged.

**II. EXPANDING SECONDARY LIABILITY TO REACH THOSE WHO ACT WITH A GOOD-FAITH BELIEF OF INVALIDITY WOULD STIFLE COMPETITION AND INNOVATION.**

An accused inducer who believes in good faith that the asserted patent is invalid lacks the intent to infringe required by *Global-Tech*. This result advances the constitutionally mandated goal of the patent system: promotion of the “Progress of . . . useful Arts.” U.S. Const. art. I, § 8, cl. 8. An innovative technology company that does not practice the patent should not be held liable when it, in good faith, encourages others to practice a patent it believes invalid.

The modern realities of patent litigation often make it impossible for productive companies, especially technology companies, to operate without fear of infringement lawsuits. There are over 2.3 million U.S. patents in force. *See* World Intellectual Prop. Org., Statistical Country Profiles: United States of America, *available at* [http://www.wipo.int/ipstats/en/statistics/country\\_profile/profile.jsp?code=US](http://www.wipo.int/ipstats/en/statistics/country_profile/profile.jsp?code=US). Many of these patents are invalid under current law. For decades, the USPTO had applied standards that have since been overruled or materially clarified by recent case law. For example, the USPTO granted numerous patents on computer-implemented abstract ideas in reliance on *State Street Bank & Trust Co. v. Signature Financial Group*, 149 F.3d 1368 (Fed. Cir. 1998). Last Term, this Court clarified that computer-implemented claims drawn to abstract ideas, such as fundamental economic practices, are patent-ineligible under 35 U.S.C. § 101. *Alice Corp.*

*Pty. v. CLS Bank Int'l*, 134 S. Ct. 2347 (2014). Only since *Alice* has the USPTO begun to reject some abstract patents in the computer field. See USPTO, 2014 Interim Guidance on Patent Subject Matter Eligibility, 79 Fed. Reg. 74,618 (Dec. 16, 2014).

In addition, many patents issued before this Court's decision in *KSR International Co. v. Teleflex Inc.*, 550 U.S. 398 (2007), were obvious under 35 U.S.C. § 103 but erroneously allowed based on "a formalistic conception of the words teaching, suggestion, and motivation, or by overemphasis on the importance of published articles and the explicit content of issued patents." *Id.* at 418. And commentators have suggested that the USPTO erroneously granted numerous indefinite claims before this Court decided *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. 2120 (2014). See, e.g., Lisa Larrimore Ouellette & Jonathan Masur, *How Will Nautilus Affect Indefiniteness at the PTO?*, PatentlyO (June 5, 2014), <http://patentlyo.com/patent/2014/06/nautilus-affect-indefiniteness.html>.

Patents issued before *Alice*, *KSR*, or *Nautilus* that appear invalid under at least one of those precedents share a common flaw: They purport to monopolize inventions of abstract, broad, or uncertain scope. That vice makes them particularly useful tools for non-practicing entities to wield against large numbers of productive companies that develop and market new and innovative technologies. In implementing their new ideas and bringing products to market, innovators often need to use foundational practices and technologies. Thus, productive technology companies—the companies that provide the products and services that constantly make our lives easier and more enjoyable, and that in the process

foster economic growth and create jobs—commonly find themselves accused of encouraging the infringement of numerous patents of dubious validity.

Just as an innovator’s good-faith belief that its technologies do not practice a patent shields it from liability for indirect infringement, if an innovator has a good-faith belief that the claimed technologies and practices are in the prior art—or only predictably different from the prior art—the innovator should be able to market its product without risking secondary liability for patent infringement. *See KSR*, 550 U.S. at 417. The same is true if the innovative company finds itself threatened with a lawsuit accusing it of infringing a patent that appears to claim an abstract idea: The company should be able to encourage others to use its innovation rather than finding itself, and everyone else in the industry, chilled from launching its product in fear of accruing inducement damages. *See Alice*, 134 S. Ct. at 2357.

Similarly, if the threatened patent does not appear sufficiently clear to provide reasonable certainty regarding its metes and bounds, the company should not be coerced into ceasing all promotion and user support for its products so as to avoid potential inducement liability. The risk of uncertainty should fall on the patentee, not on the accused inducer (often skilled in the art) who lacks reasonable certainty regarding the patent’s scope and validity. *See Nautilus*, 134 S. Ct. at 2129. “[B]ecause so many patents are invalid, . . . it is not reasonable to assume that merely because a defendant is aware of the existence of a patent, he intended to infringe it.” Mark A. Lemley, *Inducing Patent Infringement*, 39 U.C. Davis L. Rev. 225, 243 (2005).

Indeed, patentees are in the best position to ensure that their patents validly claim and clearly define the subject matter of their inventions. Thus, as between defendants and patentees, the consequences of uncertainty and complexity in assessing whether a patent is valid should fall on patentees, particularly in light of the principle that “the public . . . has a paramount interest in seeing that patent monopolies . . . are kept within their legitimate scope.” *Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 134 S. Ct. 843, 851 (2014) (quotation marks omitted).

When it is unclear whether a patent is valid, the law should encourage competitors to enter the market and challenge the patent. Because “[i]nvalid or overbroad patents disrupt” the “proper balance between exclusivity and competition” by “discouraging follow-on innovation, preventing competition, and raising prices through unnecessary licensing and litigation,” FTC, *The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition* 1 (2011), it is patentees—not competitors—that should bear the risk of uncertain validity. See Timothy R. Holbrook, *The Intent Element of Induced Infringement*, 22 Santa Clara Computer & High Tech. L.J. 399, 408 (2006) (allowing market entry upon a belief of invalidity is “pro-competitive”).

Permitting market participation upon showing a good-faith belief in invalidity also improves the patent system itself, by “creat[ing] incentives to challenge otherwise potentially invalid patents” (Holbrook, *supra*, at 408), challenges that this Court has recognized have great “importance to the public at large.” *Cardinal Chem.*, 508 U.S. at 100. When good-faith belief in invalidity is relevant to liability, potential inducers have additional incentive to thor-

oroughly investigate any patent allegedly infringed by the induced conduct prior to the commencement of an infringement suit. And if that investigation shows that the patent might be invalid on one or more grounds, it will be in the accused inducer's interest to bring those grounds promptly to the attention of USPTO, a court, or both, not only in the hopes of invalidating the patent but also to create an evidentiary record that it had a good-faith belief that the asserted patent was invalid. These challenges have proven critical to weeding out invalid patents. For example, 77 percent of final Inter Partes Review decisions invalidate *all* claims under review. Brian J. Love & Shawn Ambwani, *Inter Partes Review: An Early Look at the Numbers*, 81 U. Chicago L. Rev. Dialogue 93, 94 (2014).

The result is prompt, thorough investigation of precisely those patents most deserving of it—patents of dubious validity being asserted to exclude businesses from a market. But that incentive to try to cull the “patent thicket” is diminished when an investigation that has ripened into a good-faith belief that a patent is invalid is not even relevant to a claim that a business knowingly induced another's infringement of a valid patent.

Patentees should not be able to subject third parties who do not even practice the relevant patents to potentially ruinous liability, simply by sending hundreds or thousands of notice letters suggesting the potential relevance of countless patents whose applicability, scope, or validity is dubious—as petitioner advocates, *see* Pet. Br. 3, 14, 16. This is not only because patent claims often reflect a convoluted combination of legal and technical jargon, *see Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 389

(1996), but also because patents often are drafted in a purposefully vague manner, precisely because vague claims can aid the patentee in litigation. Christopher A. Cotropia, *The Folly of Early Filing in Patent Law*, 61 *Hastings L.J.* 65, 117 (2009).

One reason that an ability to draft such “inherently ambiguous” claims is “a prized talent” is that vague patents that may appear narrow when prosecuted can, once granted, be wielded broadly in infringement suits. *Enzo Biochem*, 605 F.3d at 1348 n.2 (Plager, J., dissenting from denial of panel rehearing). As a result of this strategic motte-and-bailey claim drafting, oftentimes a productive technology company faced with an accusation of patent infringement will believe in good faith that its product does not infringe the patent, if the patent is construed narrowly to avoid the prior art; but that, if the patent is construed broadly enough to reach the accused product, then it is invalidated by prior art. *See, e.g.*, Appellees Br. 38, *Calypso Wireless, Inc. v. T-Mobile USA, Inc.*, 586 F. App’x 707 (Fed. Cir. 2014) (per curiam). In these circumstances, belief in noninfringement and invalidity run together—and a standard that elevates a belief in noninfringement over a belief in invalidity will be incoherent.

Petitioner’s and the government’s solution is to eliminate the need to prove *any* knowledge of infringement—including validity—in favor of allowing patentees to “confer the requisite knowledge on the inducer” (U.S. Br. 18) by having a “discussion” with the accused inducer or sending it “a notice letter” informing it of the patent (Pet. Br. 16). Under that approach, such commonplace notice letters—and the vague, abstract, or overbroad patents upon which they often rely—would chill innovation. The threat

of patent lawsuits, even if never actually filed, can cause companies to divert their investments from the most efficient technologies to alternatives that carry less benefit but also less risk of facing patent liability. *See, e.g.*, James Bessen, Jennifer Ford & Michael J. Meurer, *The Private and Social Costs of Patent Trolls*, Regulation, Winter 2011-2012, at 26, 31; James Bessen, *The Evidence Is In: Patent Trolls Do Hurt Innovation*, Harv. Bus. Rev., July 2014, available at <https://hbr.org/2014/07/the-evidence-is-in-patent-trolls-do-hurt-innovation> (collecting recent research).

This risk is especially acute for start-ups: The threat of a patent lawsuit can chill investment, and patentees can time their lawsuits to capitalize on this vulnerability. *See, e.g.*, Catherine Tucker, *The Effect of Patent Litigation and Patent Assertion Entities on Entrepreneurial Activity*, at 4-5 (MIT Sloan School Working Paper 5095-14, 2014), available at <http://ssrn.com/abstract=2457611>. When companies can instead respond to notice letters by researching and relying on a good-faith belief in the invalidity of the asserted patents, patentees are forced to be more scrupulous about making infringement accusations and companies can proceed to market their accused products without undue fear.

Moreover, adhering to *Global-Tech*'s requirement of knowledge that the induced acts give rise to patent liability will not unfairly constrain the legitimate enforcement rights of patentees or undermine the value of clearly valid patents. As an initial matter, in every case of induced infringement, a patentee has available to it the option of seeking relief against the direct infringer under a standard of strict liability. *Global-Tech*, 131 S. Ct. at 2065 n.2. Because "a di-



rect infringer’s knowledge or intent is irrelevant,” the patentee can prove its case by showing nothing more than “the unauthorized use of a patented invention.” *Ibid.* But if a patentee elects to sue third parties under a theory of secondary liability, it must do so under a “fault-based” regime. *Grokster*, 545 U.S. at 934.

Imposing liability upon those who do *not* use a patented invention can be justified only in “instances of more acute fault than the mere understanding that some of one’s products will be misused”—i.e., used in a manner that happens to infringe. *Grokster*, 545 U.S. at 932-33. As *Global-Tech* establishes, the “fault-based” regime of inducement liability requires that the defendant know that the induced conduct infringes a valid patent. Under this rubric, where a defendant has good basis to question a patent’s validity, it is entirely appropriate to demand that the patentee, in proving that the accused inducer knew that the induced conduct infringes, establish also that the accused inducer had no reasonable belief that the asserted patent is invalid. And where there is no objectively reasonable basis for challenging its validity, the patentee will prevail—perhaps as a matter of law.

But patents of “suspect validity” frequently are pressed in litigation and it is precisely those patents that are most harmful to innovation. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 397 (2006) (Kennedy, J., concurring). For example, a patent that appears to claim an abstract idea with no “inventive concept” will “foreclose[]” much “future innovation,” in exchange for a relatively miniscule “contribution of the inventor.” *Mayo Collaborative Servs.*

v. *Prometheus Labs., Inc.*, 132 S. Ct. 1289, 1294, 1303 (2012) (quotation marks omitted). So too with patents on obvious inventions, which “stifle, rather than promote, the progress of useful arts.” *KSR*, 550 U.S. at 427. Precluding inducement liability with respect to patents that defendants believe in good faith to fall in these categories is fully consistent with the promotion of innovation in the “useful Arts.” U.S. Const. art. I, § 8, cl. 8.

Finally, the mental-state requirement for inducement operates only as long as liability for patent infringement with respect to the induced acts is in doubt. Should a patentee establish with finality that the induced conduct does infringe a valid patent, then forward-looking relief may be available immediately, because from that point forward the defendant would know that it is inducing infringement of a valid patent. In that circumstance, “there is no reason to shield [the accused inducer] from prospective relief.” Holbrook, *supra*, at 406.

This system of liability thus provides patentees who truly believe that their patents are valid and infringed with incentives to sue, and bring the case expeditiously to conclusion. Unscrupulous non-practicing entities who use dubious patents to sue productive companies in the hopes of coercing them into settling rather than incurring the enormous expense of patent litigation, however, will derive less benefit from their lawsuits. See, e.g., Robin Feldman, *Patent Demands & Startup Companies: The View from the Venture Capital Community*, at 4-5 (UC Hastings Research Paper No. 75, 2013), available at <http://ssrn.com/abstract=2346338>. That is how “rules of fault-based liability” should operate (*Grok-*

*ster*, 545 U.S. at 934)—as a sometimes necessary but always circumscribed tool to stop clear infringements, without imposing secondary liability on those who neither themselves infringe nor encourage activity that they know “constitute[s] patent infringement” (*Global-Tech*, 131 S. Ct. at 2068).

**CONCLUSION**

The judgment of the Federal Circuit should be affirmed.

Respectfully submitted.

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