No. 19-832

IN THE

Supreme Court of the United States

APPLE INC.,

Petitioner,

v.

VIRNETX INC., LEIDOS, INC.,

Respondents.

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

REPLY BRIEF FOR PETITIONER

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REPLY

I. The Federal Circuit's Settled Position That Apportionment Of Damages Is Not Required In Prior License Cases Warrants This Court's Review.

This Court long ago held that patent damages must reflect the value of the patented invention in "every case." *Garretson v. Clark*, 111 U.S. 120, 121 (1884). As the petition (at 18-21, 31-34), amicus briefs supporting Apple, and academic articles (Pet.20, 31-32 & n.2) explain, *Garretson* reflects a foundational precept of an economically sound patent system. But over the past five years, the Federal Circuit has created a gaping loophole that facilitates massive damages in patent cases where the damages claims are based on prior licenses, regardless of whether those licenses reflect the invention's contribution to the end-product. Pet.18-31.

The Court has not needed to examine apportionment of patent damages in over one hundred years, *see Dowagiac Mfg. Co. v. Minn. Moline Plow Co.*, 235 U.S. 641 (1915), since, until relatively recently, the lower courts have been faithful to *Garretson*'s command. Yet by soliciting the Solicitor General's views in a closely related apportionment case just a few terms ago (Pet.19), the Court has already recognized the importance of reviewing the Federal Circuit's current caselaw in this area. And with the Federal Circuit now using its Rule 36 procedures to reject challenges to its apportionment methodology, parties will soon stop complaining about the practice. Now is

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