To: Members of the U.S. Senate Judiciary Committee: Chairman Dick Durbin (IL), Senator Patrick Leahy (VT). Senator Dianne Feinstein (CA), Senator Sheldon Whitehouse (RI), Senator Amy Klobuchar (MN), Senator Chris Coons (DE), Senator Richard Blumenthal (CT), Senator Mazie Hirono (HI), Senator Cory Booker (NJ), Senator Alex Padilla (CA), Senator Jon Ossoff (GA), Ranking Member Chuck Grassley (IA), Senator Lindsey Graham (SC), Senator John Cornyn (TX), Senator Mike Lee (UT), Senator Ted Cruz (TX), Senator Ben Sasse (NE), Senator Josh Hawley (MO), Senator Tom Cotton (AR), Senator John Kennedy (LA), Senator Thom Tillis (NC), Senator Marsha Blackburn (TN)

Subject: Nomination of Katherine Vidal for USPTO Director

We write concerning the nomination of Katherine Vidal, managing partner of the Silicon Valley office of Winston & Strawn, as Under Secretary of Commerce for Intellectual Property and Director of the U.S. Patent and Trademark Office (USPTO).

We are inventors dedicated to solving problems through innovation, commercializing new technologies, creating jobs, and improving our world. Together we hold more 7,000 patents covering a wide range of important fields including AI, IoT, 5G, power generation, energy storage, environment, materials, transportation, and biotechnology. However, we are struggling to compete ever since the USPTO has been shaped and controlled by corporate interests under the 2011 America Invents Act (AIA). In particular, the USPTO has shifted its focus from promoting innovation to revoking previously approved patents at the Patent Trial and Appeal Board (PTAB). As big tech and China advances, U.S inventors are increasingly blocked from competing by our very own patent office, which has been heavily politicized and influenced by the trillion-dollar corporations.

Based on our review of Ms. Vidal's record, including her recent testimony in the Senate Judiciary Committee, we find that her close ties to big tech along with other concerns, render her unfit to lead America's innovation agency. **We implore you to vote against her confirmation**. Our nation's well-being will be seriously jeopardized if she is confirmed as Director of the USPTO, at least for the following reasons.

- The vast majority of Vidal's professional experience has involved representing tech giants accused of stealing IP corporations like Apple, Microsoft, Netflix, Samsung, and Dell.
- Vidal is counsel in numerous pending PTAB cases, adverse to the inventor in each of them. These and hundreds of other cases filed by her clients create a conflict of interest, and directly violate the recent Supreme Court decision in *Arthrex* which requires an opportunity for Director review of patent invalidation decisions by the PTAB.
- Vidal's clients include 18% of all corporations who have sought to invalidate patents at the PTAB, including Apple (669), Samsung (576), Microsoft (224), Cisco (158), Micron (63), Netflix (41), Dell (40), Roku (36), HP (30). She is more heavily tied to big tech than any previous Director, even more than Michelle Lee of Google, on this record.
- The nominee is embedded in big tech culture. She resides in Silicon Valley near the headquarters of her biggest clients. She was married to Chip Lutton when he was Senior Vice President and Chief Counsel of Apple from 2001 to 2011. She was a vocal supporter

for creation of the PTAB from 2005 to 2011 while she was the top litigator for the top patent litigation firm Fish & Richardson. She endorsed Google attorney Michelle Lee for Director in 2014 and wrote a letter in support of Lee when she was forced to resign in 2017, stating that Lee "hired some of the most talented attorneys in this country to serve as PTAB judges and in other positions..". A number of these PTAB judges praised by Vidal worked for Apple at the same time as she did, joined the USPTO/PTAB where they set policy and/or rendered decisions highly favorable to Apple, and have recently returned to join Apple in senior positions. By all indications, Vidal expects to benefit from this lucrative revolving door, rather than curtail it.

- The nominee is a lawyer and a litigator. With all due respect to Ms. Vidal and the attorneys who sit on this committee, legal advocacy is a poor framework for running the nation's innovation agency. You generally don't confirm litigators to head the NTSB or FDA or NIH or other specialized agencies. The USPTO is supposed to be about innovation, not litigation. To our knowledge Vidal has no experience with inventing or R&D or launching a technology startup. She has never risked her life savings or raised capital from friends and family to bring a new product to market. For the last 10 years the USPTO has been myopically focused on dividing up the spoils of the past, while neglecting their mission of promoting future innovation. 100% of Vidal's experience centers around disputes over the rights of old technologies. We cannot continue down this same path.
- In response to questions from Senators Leahy and Cornyn, Vidal declined to commit to undertake notice-and-comment rulemaking to govern the PTAB. Instead, she affirmed that she would continue the controversial practice of precedential decisions and guidance for establishing PTAB procedures, stating that it "promotes fair and consistent results". She did not delineate or even provide examples of where she believed the America Invents Act applies and where it does not. She did not acknowledge the pending lawsuits on this topic, nor did she reference the statutes. For instance, Congress mandates in the AIA that the "Director shall prescribe regulations...setting forth the standards for the showing of sufficient grounds to institute a review under section 314(a)". What does this mean to the nominee? Specifically, she did not say whether or not the controversial NHK-Fintiv rule should be subject to notice-and-comment rulemaking. This rule lets the Patent Trial and Appeal Board decline to review a patent based on the progress of a parallel infringement case in a federal court or other agency. The resolution to this issue is critical to integrity of the patent system and future innovation.
- Vidal misapprehended the nature and magnitude of the questions raised by several Committee Members regarding large corporations gaining an unfair advantage at the PTAB over smaller competitors. She indicated it was her opinion that these disadvantages were not unique to the PTAB. However, inventors have raised numerous concerns over the unfair advantages provided to large corporations in hundreds of formal comments, a formal petition for rulemaking, and multiple litigations naming the USPTO as Defendant. For the first time in history, inventors have staged protests against the USPTO based solely on PTAB grievances. Vidal either doesn't understand these problems or is intent on ignoring them.
- Vidal told the committee she would "continue and build on the efforts...to expand access, outreach, and education to level the playing field". The thousands of inventors whose patents have been revoked by the PTAB are not suffering from lack of access, outreach, or

- education; rather they have pled and testified to numerous inequities, illegalities, and failures of the PTAB.
- Vidal also testified that a forthcoming pro bono program would "help offset the costs of PTAB procedures for those who cannot afford it". However, the proposed program is for appeals, not the AIA reviews which several Committee Members asked her to address.

All of the above gives concern that Kathi Vidal lacks understanding of or appreciation for the struggles and challenges inventors face. We go through the process of invention and discovery, patent prosecution, product development and commercialization, often forced to assert our patents against infringement and defend them against the well-heeled infringers who are regular customers of the PTAB. Inventors merely want to compete on the merits of our inventions. We want to play by the rules and be treated fairly, so we can contribute to improving our world through innovation. Kathi Vidal has shown no indication that she understands or cares about this fundamental purpose and mission of the agency she wishes to lead. If she is confirmed, we expect to continue languishing as the USPTO is consumed by corporate interests and disputes over old ideas.

We are the individuals addressed in Article 1, Section 8, Clause 8 of the Constitution that states "Congress shall have power to... promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries"; and in Title 35 of the United States Code. Every "new and useful process, machine, manufacture, or composition of matter" comes from us. We are "inventors". Thank you for considering our views.

Sincerely,

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| Troy, OH | Portland, OR | Philadelphia, PA | Pawtucket, RI |
| Kamal Fernando | Roseanne Mcdonald | Jonathon Landell | John Peterson |
| Dayton, OH | Days Creek, OR | Wampum, PA | Kingston, RI |
| Michael Greer | Siva Narendra | James Lipscomb | David Barker |
| North Royalton, OH | Portland, OR | Kennett Square, PA | Clover, SC |
| Michael Hoeting | Michael Peterson | Robert May | Jovan Goings |
| Cincinnati, OH | Portland, OR | Pittsburgh, PA | Georgetown, SC |
| Ron Koch | John Powers Jr. | Walter Mruk | Margaret Noel Goldman |
| Columbus, OH | Gresham, OR | Upper Black Eddy, PA | Bluffton, SC |
| Farid Masri | Mark Thoreson | Edward Oles | Christina Maxwell |
| Dublin, OH | Madras, OR | Ligonier, PA | Greenville, SC |
| David Montgomery | John Aiken | Bonnie Pastman | Scott Nedderman |
| Hudson, OH | Monroeville, PA | Jenkintown, PA | Liberty Hill, SC |
| Steven Orosz Oregon, OH | Alison Beard Lebanon, PA | Vincent Samudosky | Greg Owoc |
| Sami Sarrouh | | West Mifflin, PA | Greenville, SC |
| Westlake, OH | Bruce Bernstein Wynnewood, PA | Arthur Schmidt Emmaus, PA | Greenville, SC Adrian Pelkus Lexington, SC |
| | Bruce Bernstein | Arthur Schmidt | Adrian Pelkus |
| Westlake, OH Brett Deemer | Bruce Bernstein Wynnewood, PA Roman Bielski | Arthur Schmidt Emmaus, PA Thomas Shearer | Adrian Pelkus Lexington, SC Robert Rife |
| Westlake, OH Brett Deemer Yukon, OK Archibald Miller Facs | Bruce Bernstein | Arthur Schmidt | Adrian Pelkus |
| | Wynnewood, PA | Emmaus, PA | Lexington, SC |
| | Roman Bielski | Thomas Shearer | Robert Rife |
| | Coopersburg, PA | Ligonier, PA | Mount Pleasant, SC |
| | Donald Boles | Mark A Sokalski | Timothy Trunkle |
| Westlake, OH Brett Deemer Yukon, OK Archibald Miller Facs Tulsa, OK Troy Norred | Bruce Bernstein Wynnewood, PA Roman Bielski Coopersburg, PA Donald Boles Kintnersville, PA Richard Brunner | Arthur Schmidt Emmaus, PA Thomas Shearer Ligonier, PA Mark A Sokalski Carnegie, PA Stephen A Vasko Ii | Adrian Pelkus Lexington, SC Robert Rife Mount Pleasant, SC Timothy Trunkle Charleston, SC Bill Ward |
| Westlake, OH Brett Deemer Yukon, OK Archibald Miller Facs Tulsa, OK Troy Norred Ada, OK Chad Parks | Bruce Bernstein Wynnewood, PA Roman Bielski Coopersburg, PA Donald Boles Kintnersville, PA Richard Brunner Coatesville, PA Eric Canfield | Arthur Schmidt Emmaus, PA Thomas Shearer Ligonier, PA Mark A Sokalski Carnegie, PA Stephen A Vasko li Pittsburgh, PA Doug Vensel | Adrian Pelkus Lexington, SC Robert Rife Mount Pleasant, SC Timothy Trunkle Charleston, SC Bill Ward Ravenel, SC David Wegener |

| Richard Bronk | Peter Brown | Gary Liu | Jason Weaver |
|-------------------|----------------------|------------------|---------------------|
| Knoxville, TN | Austin, TX | Plano, TX | Dallas, TX |
| Dale Burress | Donald Bushby | Joshua Lopez | David Wesson |
| Corryton, TN | Spring, TX | Austin, TX | Fort Worth, TX |
| John Cleaves | Brian Byrne | Kevin Love | Peter Wright |
| Harriman, TN | Plano, TX | Leander, TX | Dallas, TX |
| Bryan Crosby | Guillermo Collins | Joseph Magee | Michael Wuensch |
| Knoxville, TN | Houston, TX | Spring, TX | Carrollton, TX |
| Dale Dorsett | William Dennis | Jason Mcintyre | Jon Yamamoto |
| Oakland, TN | Garland, TX | San Antonio, TX | Dallas, TX |
| Martin Lombardini | Timothy Dorney | Vern Miller | Craig Zale |
| Franklin, TN | Plano, TX | Lewisville, TX | Allen, TX |
| Kenneth Smith | William Feick | David Monroe | Richard Conder |
| Memphis, TN | New Braunfels, TX | San Antonio, TX | Richfield, UT |
| Jeremy Suelflow | Carrie Geis | Paul Morinville | Craig Davies |
| Franklin, TN | Plano, TX | Georgetown, TX | Centerville, UT |
| Eddie Turner | Alan Goodwin | Carter Neale | E.C. Despain |
| Sevierville, TN | Waxahachie, TX | Granbury, TX | Sandy, UT |
| Kyle Adams | James Halvorson | Tom Pierson | Thomas Doman |
| Dallas, TX | Allen, TX | Fresno, TX | Pleasant Grove, UT |
| Ford Albritton | William Hamilton | Norberto Ponce | Darrel Judd |
| Dallas, TX | Houston, TX | Brownsville, TX | Pleasant Grove, UT |
| John Almeida | Allen Hill | Bertram Poole | Dr. Thomas Sawyer |
| Plano, TX | Gunter, TX | Euless, TX | Sandy, UT |
| Frank Armstrong | Larry Hornbeck | Robyn Readicker | Tiffany Burtt |
| Terrell, TX | Van Alstyne, TX | Grapevine, TX | Purcellville, VA |
| James Ashmore | Samuel Irby | Brian Reid | Dr Jim E Fulbrook |
| Grand Prairie, TX | Garland, TX | Plano, TX | Fairfax, VA |
| Richard Aubert | Corey Jones | Kevin Roddy | Mark Gordon |
| Copperas Cove, TX | Plano, TX | Houston, TX | Vienna, VA |
| David Ayers | Paul Kiefer | Michael Shore | Mark Gottlieb |
| Sugar Land, TX | Austin, TX | Corsicana, TX | Fairfax Station, VA |
| Alan Beckley | Jeffrey Kochelek | Roy Smith | Kam Kamrani |
| Plano, TX | Dripping Springs, TX | Sugar Land, TX | Centreville, VA |
| Nate Bernklau | Mary Kurtz | Ross Teggatz | Na Kamrani |
| Keller, TX | Spring, TX | The Colony, TX | Centreville, VA |
| Biff Bigbie | Tom Le | Stephen Tribbett | Josh Malone |
| Lindale, TX | Arlington, TX | Carrollton, TX | Alexandria, VA |
| Elliott Brackett | John Li | Steven Ward Sr | Michael Script |
| Dallas, TX | Houston, TX | Shepherd, TX | Arlington, VA |
| | | | |

Hayley Sterling John Adrain James Manlove Moshe Wilshinsky Sterling, VA Spokane, WA Port Orchard, WA Battle Ground, WA John Waddell Kenneth Beechie Gustavo Marin Michael Worden Suffolk, VA Tacoma, WA Point Roberts, WA Everett, WA William Wells Fritz Braunberger **Todd Miner** Brian Burmaster Williamsburg, VA Mineral, WA Richland, WA Milwaukee, WI Paul Hayes Benjamin Brigham Shawna Palmer Jack Garczynski Saint Thomas, VI Bellingham, WA Bellevue, WA Milwaukee, WI Steven Rogers Alan Burnett Leonid Rozenboim Danin Jensen Christiansted, VI Bellevue, WA Milwaukee, WI Bellevue, WA Leslie Adami Michael Fischer **Dusty Rylands** James Lutz Killington, VT Marysville, WA Federal Way, WA Pewaukee, WI Leonard Duffy Judd Hamilton **Dusty Rylands** Steven Marguardt Hinesburg, VT Seattle, WA Auburn, WA Rhinelander, WI Schumann Rafizadeh Lloyd Koerner Tye Trepanier Jack Wilson Hartland 4 Corners, VT Zillah, WA Camas, WA Pewaukee, WI Harry Curlett Cody, WY