IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

NAPCO, INC., *Plaintiff,* v. LANDMARK TECHNOLOGY A, LLC, *Defendant.*	No. 1:21-cv-00025

BRIEF OF THE STATE OF NORTH CAROLINA
AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF

INTRODUCTION

The Constitution authorizes Congress to create a system "securing for limited times to . . . inventors the exclusive right to their respective . . . discoveries" in order to "promote the progress of science and useful arts." U.S. Const. art. I, § 8, cl. 8. Courts have long recognized that the incentive to create provided by the federal patent system plays a foundational role in the American economy. *See United States v. Line Material Co.*, 333 U.S. 287, 308-09 (1948). The careful balances built into that system have well-served North Carolina—and the nation as a whole—for more than two centuries.

But the viability of the patent system has been dangerously destabilized by a developing industry "in which firms use patents not as a basis for producing or selling goods but, instead, primarily for obtaining licensing fees." *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 396 (2006) (Kennedy, J., concurring). These firms—known as Non-

Practicing Entities ("NPEs"), or more colloquially as "patent trolls"—have weaponized the patent system in ways that stifle creativity and harm innovation. Between 2004 and 2012, the number of patent lawsuits in the United States more than doubled. Stephen Kiebzak, Greg Rafert & Catherine E. Tucker, *The Effect of Patent Litigation and Patent Assertion Entities on Entrepreneurial Activity*, 45 Research Policy 218, 218 (2016). And by some estimates, NPEs account for two-thirds of all patent lawsuits. *See* Brian Fung, *Patent Trolls Now Account for 67 Percent of All New Patent Lawsuits*, Wash. Post (July 15, 2014), https://wapo.st/3xMtgzl.

NPEs' business model is simple: acquire multiple patents and use them to extract nuisance-value settlements *en masse*. Defending against an even baseless patent-infringement suit can threaten to bankrupt small businesses, and can be hugely burdensome and expensive for larger businesses as well. Because of these costs, NPEs can extract significant licensing fees or settlements based on patents and claims that might never withstand the scrutiny of extended litigation. Evidence suggests that this behavior drains over $60 billion annually from productive firms. James Bessen, *The Evidence Is In: Patent Trolls Do Hurt Innovation*, Harv. Bus. Rev. (Nov. 2014), https://bit.ly/3eiTLoA. Not one dime of this money actually goes to "promot[ing] the progress of science and useful arts." U.S. Const. art. I, § 8, cl. 8.

In recent years, governmental actors across the country have sought to address this abuse of the patent system. The Supreme Court has repeatedly issued decisions that curtail abusive patent litigation. *E.g., TC Heartland LLC v. Kraft Foods Grp. Brands*

LLC, 137 S. Ct. 1514 (2017) (limiting the appropriate venue for patent suits under 28 U.S.C. § 1400, thereby hindering the ability of patent-infringement plaintiffs to forum shop, which had led to a cottage industry of patent troll litigation in a single judicial district in Texas); *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 553 (2014) (enabling successful defendants to more easily recover attorney's fees, rejecting the Federal Circuit's "unduly rigid" interpretation of the Patent Act's fee-shifting provision). Likewise, the Federal Trade Commission has issued policy recommendations to address "[n]uisance infringement litigation." *Patent Assertion Entity Activity: An FTC Study*, Fed. Trade Comm'n (Oct. 2016), https://bit.ly/3nKkHAD. The FTC has also brought enforcement actions directly against patent trolls. *See* Agreement Containing Consent Order ¶ 2, MPHJ Tech. Invs., LLC, No. 142 3003 (F.T.C. Nov. 6, 2014), https://www.ftc.gov/system/files/documents/cases/141106mphjagree.pdf.

And as relevant here, more than thirty states have enacted laws to protect their consumers and businesses from abusive patent-assertion tactics. Kristin Garr, *IP Protection for Startups*, 2018 B.C. Intell. Prop. & Tech. F. 1, 11 (2018). In 2014, North Carolina joined this growing trend when it enacted the Abusive Patent Assertions Act. N.C. Gen. Stat. §§ 75-140 to -145. The Act makes it unlawful for NPEs "to make a bad-faith assertion of patent infringement." *Id.* § 75-143(a).

The plaintiff in this case, NAPCO, Inc., sued Landmark Technology A, LLC, under the Act. Dkt. 15. In moving to dismiss NAPCO's claim, Landmark argues that the

Act is facially invalid because federal law preempts it and because the Act allegedly violates several other constitutional provisions. Dkt. 18 at 13-19.

The State of North Carolina submits this amicus brief to explain why the Court should reject Landmark's arguments and hold that the Act is facially constitutional. Nothing about the Act's simple rule against bad-faith assertions of patent infringement conflicts with federal law. There is no federal right to make a bad-faith patent assertion. And given the North Carolina General Assembly's clear intent to avoid conflicts with federal law, any statutory ambiguities should be resolved in favor of the Act's validity. In addition, the Act clearly complies with the constitutional provisions that Landmark briefly mentions as alternative grounds for striking down the Act.

ARGUMENT

I. The Act Is Not Facially Preempted By Federal Law.

Landmark argues that the Act conflicts with federal patent law and is therefore preempted. Dkt. 18 at 13-15. This argument is unpersuasive. The Act works in tandem—not in conflict—with federal law.

Federal patent law generally does not preempt state consumer-protection and unfair-competition claims, even when those state-law claims "rely on a substantial question of federal patent law." *Hunter Douglas, Inc. v. Harmonic Design, Inc.*, 153 F.3d 1318, 1333 (Fed. Cir. 1998), *overruled on other grounds by Midwest Indus., Inc. v. Karavan Trailers, Inc.*, 175 F.3d 1356, 1358-59 (Fed. Cir. 1999) (en banc). So long as state legislation does not specifically conflict with a provision of federal patent law, the

states are ordinarily free to regulate patent-assertion activity in order to protect competition and consumers. *See id.* at 1333-34.

Conflict preemption emerges only when (1) "it is impossible for a private party to comply with both state and federal requirements," or (2) "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Amgen, Inc. v. Sandoz Inc.*, 877 F.3d 1315, 1326 (Fed. Cir. 2017). Citing this second category of conflict preemption, Landmark argues that the Act is invalid because it poses an obstacle to the "purposes and objectives" of federal patent law. Dkt. 18 at 13-15.

A party must clear a "high threshold" to show preemption of this kind. *Chamber of Commerce v. Whiting*, 563 U.S. 582, 607 (2011) (plurality opinion). Purposes-and-objectives preemption "does not justify a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives." *Id.* This is because "such an endeavor would undercut the principle that it is Congress rather than the courts that preempts state law." *Id.*

Landmark claims that the Act presents a facial conflict with federal law in three ways. First, Landmark argues that the Act requires a lesser standard of proof than federal law merely because the Act is codified in the same chapter of the North Carolina General Statutes as the North Carolina Unfair and Deceptive Trade Practices Act ("UDTPA"). Dkt. 18 at 13. Second, Landmark argues that the Act could impose liability for patent assertions that fall short of being "objectively baseless"—the federal baseline for unlawful patent assertions. *Id.* at 14-15. Finally, Landmark argues that some of the Act's

discretionary bad-faith factors—primarily those involving the failure to provide certain information in a patent assertion—conflict with federal law's more generic notice requirements. *Id.* Landmark claims that because the Act contains no severability clause, these alleged conflicts doom the entire Act. *Id.* at 15.

For the reasons explained below, all of these arguments fail. The Act is fully consistent with federal law.

A. The Act should be interpreted to incorporate the federal standard of proof.

The State agrees that if violations of the Act could be established by only a preponderance of the evidence, the Act's standard of proof would be inconsistent with the clear-and-convincing standard established by the Federal Circuit.[1] But the Act is silent as to its standard of proof. And the Act's text explicitly calls for the Act to be interpreted consistently with federal law. A North Carolina court would therefore construe the Act to incorporate the federal standard of proof. Moreover, even if this Court were to disagree on this state-law question, the appropriate remedy would be to sever any inconsistent standard of proof and allow the rest of the Act to remain in force.[2]

---

[1] The Federal Circuit has appellate jurisdiction over the claims here. 28 U.S.C. § 1295(a)(1); *McCook Metals LLC v. Alcoa, Inc.*, 249 F.3d 330, 333 (4th Cir. 2001).

[2] Interpretation of the Act is a question of state law, so this Court's "role is to apply the governing state law, or, if necessary, predict how the state's highest court would rule on an unsettled issue." *Alig v. Quicken Loans Inc.*, 990 F.3d 782, 794 (4th Cir. 2021). This process extends to "apply[ing] the statutory construction rules applied by the state's highest court." *In re DNA Ex Post Facto Issues*, 561 F.3d 294, 300 (4th Cir. 2009).

Federal patent law requires "clear and convincing evidence" that a patent assertion was made in bad faith before liability may attach for patent-assertion activity. *Golan v. Pingel Ent., Inc.*, 310 F.3d 1360, 1371-72 (Fed. Cir. 2002). The Act, by contrast, does not specify a standard of proof. *See* N.C. Gen. Stat. §§ 75-140 to -145. It is true that the Act is codified in Chapter 75 of the North Carolina General Statutes, the same chapter as the UDTPA. *See id.* And courts have held that UDTPA claims generally require proof by a preponderance of the evidence. *See Georgia Pacific Consumer Products, LP v. Von Drehle Corp.*, 618 F.3d 441, 457 (4th Cir. 2010). But these general principles are the beginning, not the end, of the analysis.

A North Carolina court would likely interpret the Act to incorporate the federal standard of proof. Under North Carolina law, "[t]he primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent." *Dickson v. Rucho*, 737 S.E.2d 362, 368 (N.C. 2013). Likewise, North Carolina courts have long applied a presumption against construing a statute in a way that would make it unconstitutional. *See, e.g., St. George v. Hardie*, 60 S.E. 920, 925 (N.C. 1908) ("Every statute is to be construed with the light cast upon the language by the Constitution and other legislation. Such construction must be given the language, if possible, as will give it operation consistent with the Constitution and other statutes."). This presumption is strong: North Carolina courts "resolve all doubts in favor of [a statute's] constitutionality," and a "statute must be upheld unless its unconstitutionality clearly, positively, and unmistakably appears beyond a reasonable doubt or it cannot be

upheld on any reasonable ground." *State v. Mello*, 684 S.E.2d 477, 479 (N.C. Ct. App. 2009); *see also In re B.L.H.*, 852 S.E.2d 91, 95 (N.C. 2020) (noting that North Carolina courts also "avoid[ ]" statutory interpretations that "operate[ ] to defeat or impair the object of the statute"). And preemption is fundamentally a constitutional question: Preempted state laws are invalid because they violate the Supremacy Clause of the United States Constitution. *See Nat'l Federation of the Blind v. Lamone*, 813 F.3d 494, 508 (4th Cir. 2016) ("The Constitution's Supremacy Clause establishes that valid federal legislation can pre-empt state laws.").

Here, the Act states repeatedly that it should be interpreted consistently with federal law. *See* N.C. Gen. Stat. § 75-141(a)(3) ("The General Assembly also recognizes that North Carolina is preempted from passing any law that conflicts with federal patent law."); *id.* § 75-141(a)(4) ("North Carolina wishes to . . . encourage[e] the most efficient resolution of patent infringement claims without conflicting with federal law."); *id.* § 75-141(b) ("The General Assembly seeks . . . to respect federal law."). These provisions show that in passing the Act, the North Carolina General Assembly sought to chart a narrow, non-preempted course through federal patent law.

The Act's silence on the standard of proof must be interpreted in light of the legislature's express intent to ensure that the Act be consistent with federal law. This legislative intent, combined with North Carolina law's strong presumption against interpreting statutes to be unconstitutional, would lead a North Carolina court to interpret the Act to require the federal standard of proof: clear and convincing evidence.

This conclusion is bolstered by the Act's attenuated connection to the UDTPA's preponderance standard. The Act does not reference that standard, and, in fact, barely references the UDTPA at all. *See* N.C. Gen. Stat. §§ 75-140 to -145. Its only substantive relationship to the UDTPA is that the North Carolina Attorney General enforces the Act under his UDTPA authority.[3] *See id.* § 75-145(a). But no other part of the Act, including its private cause of action, makes any reference to the UDTPA. *See id.* § 75-145(b).[4]

Moreover, the preponderance standard is not a statutory feature of the UDTPA either. The standard does not appear in the UDTPA's text. N.C. Gen. Stat. §§ 75-1 to -49. Instead, North Carolina courts have construed the UDTPA to use the preponderance standard because that is the default standard that applies to civil claims in North Carolina. *See Adams v. Bank United of Texas FSB*, 606 S.E.2d 149, 154 (N.C. 2004). But that default standard does not apply when the legislature makes clear that another standard of proof should apply instead. *Id.* Under this principle, a North Carolina court would likely honor the General Assembly's explicit intent to harmonize the Act with federal law by construing the Act to incorporate the prevailing federal standard of proof.

---

[3] State Attorneys General have filed enforcement actions against Landmark under similar state laws. *See State of Washington v. Landmark Technology A, LLC*, 21-2-06348-5 SEA (King Cty Superior Ct.)

[4] For this reason, Landmark is also wrong that a person bringing a claim under the Act must also satisfy the UDTPA's requirements for proving an unfair and deceptive trade practice. *See* Dkt. 18 at 5-6. Nothing about the Act's cause of action for abusive patent assertion activity relies on the UDTPA or incorporates the UDTPA's standards for proving an unfair-and-deceptive-trade-practices claim. Instead, the Act makes it *independently* unlawful to make a bad faith patent assertion. A claim under the Act is therefore judged according to the Act's requirements alone.

But even if this Court disagrees with that conclusion, the Act as a whole would still survive, because any inconsistent state standard could be easily severed. As a general rule, North Carolina courts "sever the unconstitutional provisions and uphold the constitutional provisions to the extent possible." *State v. Singletary*, 786 S.E.2d 712, 720 (N.C. Ct. App. 2016) (citing *Fulton Corp. v. Faulkner*, 481 S.E.2d 8, 10 (N.C. 1997)). And while Landmark makes much of the absence of an explicit severability clause in the Act, "the absence of a severability clause is not necessarily conclusive." *Appeal of Springmoor, Inc.*, 498 S.E.2d 177, 185 (N.C. 1998). Rather, under North Carolina law, "[t]he test for severability is whether the remaining portion of the legislation can stand on its own and whether the General Assembly would have enacted the remainder absent the offending portion." *State v. Webb*, 591 S.E.2d 505, 511 (N.C. 2004).

Here, both parts of this test are easily satisfied—in no small part because the "provision" that must be "severed" does not even appear in the statutory text. There is therefore little doubt that the remainder of the Act can stand without the implied preponderance standard. Nothing in the Act's text would change. And no part of the Act's application would change other than the quantum of proof required to show a violation. Indeed, because a law's standard of proof is rarely vital to an overall statutory scheme, courts routinely sever unconstitutional standards of proof. *See, e.g.*, *Pruitt v. State*, 834 N.E.2d 90, 110 (Ind. 2005); *State v. Rupert*, 802 P.2d 511, 515 (Kan. 1990); *In re Farrell*, 648 P.2d 401, 403 (Or. Ct. App. 1982).

In addition, there can be little doubt that the General Assembly would have passed the Act without the preponderance standard. After all, the Act repeatedly emphasizes the General Assembly's desire for the Act to be interpreted consistently with federal law. *See supra* at 8. These statements of legislative intent provide strong evidence that the General Assembly would have embraced the federal standard of proof, if necessary to ensure the Act could be harmonized with federal law. Thus, even assuming that the Act requires a standard of proof that conflicts with federal law, that standard is severable.

Indeed, Landmark has already lost on this exact preemption argument in another federal district court. *See Landmark Tech., LLC v. Azure Farms, Inc.*, 2020 WL 1430088 (D. Or. Mar. 24, 2020). There, as here, the state law did not "specify a burden of proof," but a violation of its provisions was considered to violate Oregon's Unfair Trade Practices Act, which used a preponderance standard. *Id.* at *3. Because federal law requires clear and convincing evidence, the magistrate judge recommended that the district court rule that the Oregon law was facially preempted. *Id.* But the district court rejected that recommendation, concluding as a matter of Oregon law that the lower standard of proof could be severed. *See id.* at 4. Landmark suggests that the Oregon district court merely opted to rule on a "narrower ground" than the magistrate judge's recommendation. Dkt. 18 at 15 n.9. In reality, the district court expressly rejected the magistrate judge's reasoning and concluded that the Oregon law "is not preempted in its entirety." *Landmark*, 2020 WL 1430088, at *4, *5.

"[F]acial invalidation is strong medicine that serves as a last resort." *United States v. Miselis*, 972 F.3d 518, 541 (4th Cir. 2020). And "completely eliminating the state law cause of action would do far greater violence to likely legislative expectations than severing the standard of proof." *Landmark*, 2020 WL 1430088, at *4. Thus, if the Court concludes that the Act cannot be interpreted to incorporate the federal standard of proof, it should opt to sever the state standard, rather than invalidate the entire Act.

B. The Act's discretionary bad-faith factors do not create a facial conflict with federal law.

Landmark next argues that the Act's discretionary bad-faith factors are facially preempted because they do not demonstrate "objective baselessness," which is required to state a bad-faith assertion claim under federal patent law.[5] *Globetrotter Software, Inc. v. Elan Computer Grp., Inc.*, 362 F.3d 1367, 1368 (Fed. Cir. 2004). This argument fails.

The Act provides that "[a] court may consider" certain factors "as evidence that a person has made a bad-faith assertion of patent infringement," and then includes a list of eleven specific factors and a twelfth residual category that allows for "[a]ny other factor the court finds relevant." N.C. Gen. Stat. § 75-143(a), (a)(1)-(12). The Act also includes a list of factors that a court "may consider . . . as evidence that a person has *not* made a

[5] There is significant debate about whether the Federal Circuit has established unduly stringent standards for determining whether state-law claims for bad-faith patent assertions are preempted. *See* Paul Gugliuzza, *Patent Trolls and Preemption*, 101 Va. L. Rev. 1579, 1584 (2015) (arguing that the Federal Circuit's standards cannot be reconciled with the Supreme Court's preemption precedents). Although this brief assumes that those standards apply, the State reserves the right to contest them in future proceedings.

bad-faith assertion of patent infringement," which similarly ends with a catch-all category. *Id.* § 75-143(b), (b)(1)-(7) (emphasis added).

Landmark argues that these provisions "would allow courts to impose liability for conduct that has no bearing" on the "objective baselessness" of a patent infringement claim. Dkt. 18 at 14. In support, Landmark cites two of the Act's discretionary factors that may be evidence of a bad-faith assertion: the failure of an asserting party to list the name and address of the patent owner, and the residual category allowing a court to consider "[a]ny other factor" that it finds relevant. *See id.* at 14 (citing N.C. Gen. Stat. § 75-143(a)(1) and (a)(12)). But Landmark's arguments fall flat because they misapprehend federal patent law, conflict preemption, and the Act.

First, Landmark's argument overlooks that federal patent law also requires a showing of *subjective* bad faith before liability may attach to a patent assertion. *See Dominant Semiconducters Sdn. Bhd. v. OSRAM GmbH*, 524 F.3d 1254, 1260 (Fed. Cir. 2008) ("Bad faith includes separate objective and subjective components."). Here, even assuming that some of the Act's discretionary factors do not bear on whether the patent assertion is *objectively* baseless, they may still be relevant to assessing a party's subjective bad-faith. *See Landmark*, 2020 WL 1430088, at *5 (noting that the Oregon statute's "individual bad faith factors . . . may very well apply to subjective bad faith" and therefore did not create a conflict with federal law). For example, under the Act, a reviewing court might consider the failure to provide basic information about the patent

as relevant to the asserting party's subjective belief that infringement had occurred. *See* N.C. Gen. Stat. § 75-143(a)(1).

Second, Landmark's argument that every statutory factor must speak directly to objective baselessness cannot be squared with the Federal Circuit's repeated statements that neither subjective bad faith nor objective baselessness "need be a required element of a state tort law for that cause of action to stave off preemption by federal patent law." *Hunter Douglas*, 153 F.3d at 1336-37. Instead, "to avoid preemption, 'bad faith must be alleged and ultimately proven" in a particular case, "even if bad faith is not otherwise an element of the tort claim.'" *Globetrotter*, 362 F.3d at 1374 (quoting *Zenith Elecs. Corp. v. Exzec, Inc.*, 182 F.3d 1340, 1355 (Fed. Cir. 1999)). Applying these principles, the Oregon district court rejected this same argument made by Landmark when it challenged a similar law. 2020 WL 1430088, at *5 (noting that the Federal Circuit's "precedents resist the broad application of conflict preemption that [Landmark] seeks here").

Finally, Landmark's argument misapprehends the standards that apply on a facial challenge. A statute is facially unconstitutional only when "no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). In the preemption context, this means that "a state law is not per se preempted unless every fact situation that would satisfy the state law is in conflict with federal law." *Hunter Douglas*, 153 F.3d at 1335 (citing *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 580 (1987)). For example, in *California Coastal Commission*, the Supreme Court upheld state permitting regulations against a facial preemption challenge

because there was "a *possible* set of permit conditions not in conflict with federal law." 480 U.S. at 593 (emphasis added).

Landmark cannot satisfy the facial preemption standard here. The Act provides a list of factors that a court *may* consider, each of which turns on questions of fact that may or may not apply in a given case. *See* N.C. Gen. Stat. §§ 75-143(a)(1)-(12). These factual considerations are designed to inform a court's ultimate legal conclusion about whether a patent assertion was made in bad faith. *See id.* § 75-143(a) (stating that the factors may be considered "as evidence" of a bad-faith assertion). As long as a court's ultimate finding of liability under the Act rests on a legal conclusion that the patent assertion was made in subjective bad faith and was objectively baseless, there is no conflict with federal law. *Globetrotter*, 362 F.3d at 1374; *see also Landmark*, 2020 WL 1430088, at *5 (holding that when a statute "provides individual bad faith factors that . . . are not required but are merely issues that a court may consider . . . the statutory factors do not create a conflict with federal patent law").

In sum, Landmark has failed to identify any facial conflict between the Act and federal law.

C. The Act's discretionary factors relating to the information contained in a patent assertion do not create a facial conflict with federal law.

Landmark also alleges that certain bad-faith factors conflict with federal laws on the notice a patent holder must provide. Landmark again fails to demonstrate *facial* preemption.

Landmark first challenges subsections (a)(1) and (a)(3) in the list of bad faith factors. Subsection (a)(1) authorizes courts to consider as evidence of bad faith the failure to provide certain factual information in a demand letter. N.C. Gen. Stat § 75-143(a)(1). And subsection (a)(3) allows courts to consider the failure to provide the information described in subsection (a)(1) upon an alleged infringer's request. *Id.* § 75-143(a)(3). Landmark argues that these provisions conflict with 35 U.S.C. § 287, which imposes certain federal notice requirements on those claiming patent infringement. Dkt. 18 at 14.

Again, a state law is facially preempted only if there is no set of facts under which the law would be valid. *Hunter Douglas*, 153 F.3d at 1335. Here, because the Act's bad-faith factors are discretionary, Landmark's argument that a court could theoretically base a finding of bad faith exclusively on the failure to supply information described in subsections (a)(1) and (a)(3) is purely speculative. Under the Act's plain terms, a court could reject a plaintiff's allegation of bad faith even if the asserting party failed to provide that information. *See* N.C. Gen. Stat. § 75-143(a). Likewise, a court could find bad faith even if such information were provided. *See id.* Under the facial preemption test, these possibilities end the analysis.

In addition, the Act contains safeguards that make it unlikely that a court could rely on only the lack of information set out in subsections (a)(1) and (a)(3) to conclude that a patent assertion was made in bad faith. Specifically, the Act states that "nothing" in its provisions "shall be construed to deem it an unlawful practice for any person who

owns or has the right to license or enforce a patent to . . . [a]dvise others of that ownership or right of license or enforcement[,] [c]ommunicate to others that the patent is available for license or sale[,] [n]otify another of the infringement of the patent" or "[s]eek compensation on account of past or present infringement or for a license to the patent," provided that "the activities are not carried out in bad faith." *Id.* § 75-143(d). And in the unlikely event that a reviewing court premised a finding of bad faith solely on these factors, such a decision could be subject to an as-applied challenge.

There is an additional weakness in Landmark's argument about 35 U.S.C. § 287: it misconstrues the scope of the federal notice requirement. As relevant here, section 287 states that "no damages shall be recovered by the patentee in any action for infringement, except on proof that the infringer was notified of the infringement and continued to infringe thereafter." 35 U.S.C. § 287(a). In other words, section 287 merely establishes a notice requirement as a prerequisite to recovering damages for patent infringement. But it does not purport to otherwise insulate a patent-holder from liability for making a patent assertion in bad faith. In fact, the Federal Circuit has held that a patent holder *can* be held liable under other state and federal laws for sending a notice under section 287(a) "in bad faith." *Zenith*, 182 F.3d at 1354-55. By definition, then, a notice may comply with 35 U.S.C. § 287 and also be objectively baseless. *See Globetrotter*, 362 F.3d at 1374. For this reason, as the Oregon District Court has held, section 287 is simply beside the point. *See Landmark*, 2020 WL 1430088, at *5 (rejecting argument that Oregon's bad-faith patent assertion act conflicted with 35 U.S.C. § 287).

These same flaws are present in Landmark's argument that the bad-faith factors described in subsections (a)(4) and (a)(5) conflict with section 287's notice requirement. These two subsections relate to the reasonableness of the assertion's monetary demand or deadline. N.C. Gen. Stat. § 75-143(a)(4) (allowing a court to consider whether "[t]he person demands payment of a license fee or response within an unreasonably short period of time"); *id.* § 75-143(a)(5) (allowing a court to consider whether "[t]he person offers to license the patent for an amount that is not based on a reasonable estimate of the value of the license, or the person offers to license the patent for an amount that is based on the cost of defending a potential or actual lawsuit"). These factors will often relate directly to a patent-holder's subjective bad faith. And, again, nothing in federal law protects bad-faith patent assertions. Thus, while these factors might not be evidence of bad faith in a given case, they may well serve as compelling evidence of such bad faith in other cases. These principles preclude a finding of facial preemption.

Finally, if this Court concludes that any single bad-faith factor is facially preempted, that factor should be severed from the remaining parts of the Act. North Carolina law requires courts to sever unconstitutional statutory provisions unless the remaining parts of the law cannot stand on their own, or the General Assembly would not have enacted the legislation without the unconstitutional provision. *See supra* at 10. Here, nothing in the Act indicates that any one factor is central to the legislative scheme. Thus, if this Court concludes that a factor is facially invalid, the solution would be to

exclude consideration of that factor rather than "completely eliminating the state law cause of action." *Landmark*, 2020 WL 1430088, at *4.

For these reasons, Landmark has failed to satisfy the heavy burden of demonstrating facial preemption.

II. The Act Does Not Violate The First Amendment.

Landmark also claims that the Act facially violates the First Amendment. Def. Dkt. 18 at 16-18. For similar reasons, this argument also fails.

As discussed above, under Federal Circuit law, the federal patent laws do not preempt state laws that impose tort liability for patent assertions that are objectively baseless and made in subjective bad faith. *See supra* Part I.B. This standard mirrors the standard for when state laws may, consistent with the First Amendment, impose tort liability for sham pre-litigation communications, including allegations of patent infringement. *See Globetrotter*, 362 F.3d at 1375-77 (tracing this rule to the First Amendment principles established in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961)). For this reason, the Federal Circuit has explained that its "decision to permit state-law tort liability for only objectively baseless allegations of infringement rests on both federal preemption *and the First Amendment*." *Id.* at 1377 (emphasis added).

Here, because the *Globetrotter* rule is based on both federal preemption principles *and* the First Amendment, Landmark's First Amendment claim fails for all the same reasons that its preemption claim does. *See supra* Part I.B. In particular, the Act's

discretionary factors may validly be considered to determine the ultimate legal question whether the infringement allegation was objectively baseless and made in subjective bad faith. *See Globetrotter*, 362 F.3d at 1377.

In addition, Landmark's separate argument that the Act unconstitutionally compels speech is makeweight. Dkt. 18 at 17-18. The Act plainly does not compel anyone to say anything. After all, the Act does not *require* anyone to send a patent assertion. And in any event, the Act's factors are wholly discretionary. Thus, the Act does not create a "compulsion from the state" to convey a particular message. *See Wash. Post v. McManus*, 944 F.3d 506, 515 (4th Cir. 2019).

III. The Act Does Not Violate The Equal Protection Clause.

Landmark next argues that the Act violates the Equal Protection Clause because it exempts certain patent owners from its restrictions. Dkt. 18 at 18-19. In support, Landmark notes that the Act does not apply to institutions of higher education or their affiliates; to nonprofit research organizations or their affiliates; or to "operating entit[ies]"—a person or business "primarily engaged in" research, manufacturing, or the provision of goods or services, rather than patent licensing. N.C. Gen. Stat. §§ 75-142(5), -143(c). Landmark argues that these exceptions "make[ ] no rational sense, since virtually all U.S. patents are owned by so-called 'operating' entities." Dkt. 18 at 18.

Under rational-basis review—the standard that Landmark agrees applies here, *see id.*—"[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Lehnhausen v. Lake Shore Auto Parts Co.*,

410 U.S. 356, 365 (1973) (quoting *Madden v. Commonwealth of Kentucky*, 309 U.S. 83, 88 (1940)). Landmark cannot carry this burden, because the Act's distinctions are clearly rational.

Evidence suggests that NPEs account for the overwhelming majority of patent litigation. *See* Fung, *supra* at 2. And research demonstrates that, "when settlement fails and cases go to judgment," NPEs overwhelmingly lose. John Allison, Mark Lemley & Joshua Walker, *Patent Quality and Settlement Among Repeat Patent Litigants*, 99 Geo. L.J. 677, 689, 694 (2011) (demonstrating that NPEs file more lawsuits than operating entities and achieve settlements in about 90 percent of their cases, winning only 9.2 percent of those that go to judgment, while operating entities win 50 percent of those cases). The North Carolina legislature could rationally infer from this data that NPEs can extract significant settlements or licensing fees based on weak infringement claims. Indeed, Landmark's assertion that operating entities own most U.S. patents, if true, only reinforces the rationality of the Act's decision to address the disproportionate abuse of the patent system by NPEs.

Regulating NPEs is rational for another reason as well. Unlike operating entities, NPEs build their entire business model on using their patent rights to extract settlements and licensing fees. This business model may lead defendants to conclude that settlement or licensing is preferable to defending against even a bad-faith infringement action. And unlike most operating entities, which have stable revenue streams, NPEs have every incentive to make bad-faith infringement demands. For this reason, the General

Assembly could rationally conclude that the fundamental business model of NPEs warrants more stringent regulation.

IV. The Act Does Not Violate The Dormant Commerce Clause.

Finally, Landmark argues that the Act violates the Dormant Commerce Clause. "A state statute may discriminate against interstate commerce in one of three ways: 'facially, in its practical effect, or its purpose.'" *Colon Health Ctrs. of Am., LLC v. Hazel*, 813 F.3d 145, 152 (4th Cir. 2016) (quoting *Envtl. Tech. Council v. Sierra Club*, 98 F.3d 774, 785 (4th Cir. 1996)). Landmark argues that because the Act limits its protections to "North Carolina person[s]" accused of patent infringement, it facially discriminates against out-of-state commerce. Dkt. 18 at 19 (citing N.C. Gen. Stat. § 75-142(6)).

Landmark misunderstands the Dormant Commerce Clause. North Carolina's police power is not global; the State could hardly purport to protect, for example, California persons from New York NPEs. Facial discrimination under the Dormant Commerce Clause occurs only when a law discriminates against out-of-state *commerce*. That is, a "plaintiff[ ] must demonstrate that the challenged statute . . . would negatively impact interstate commerce to a greater degree than intrastate commerce." *Colon Health Ctrs. of Am., LLC v. Hazel*, 733 F.3d 535 (4th Cir. 2013). Here, for example, the Act would be facially discriminatory if it applied one set of rules to North Carolina NPEs who target North Carolina persons, and a different set of rules to Virginia NPEs who target North Carolina persons. It does not.

To argue otherwise, Landmark relies on *Yamaha Motor Corp., U.S.A. v. Jim's Motorcycle, Inc.*, 401 F.3d 560 (4th Cir. 2005), but that reliance is misplaced. *Yamaha* invalidated a Virginia law that allowed an existing motorcycle dealership to challenge the establishment of a new dealership anywhere in the state, even outside of the protesting dealership's market. The Fourth Circuit held that the law imposed "heavy burdens predominantly on out-of-state interests," primarily by creating a "barrier to market entry," and suggested that it would have upheld the regulation if there was a geographical restriction on protest rights. *Id.* at 571, 573. These facts are far afield from the circumstances of this case: the Act does not predominantly burden out-of-state interests, create a barrier to market entry, or involve geographic boundaries. Thus, *Yamaha* has no application here. *See Brown v. Hovatter*, 561 F.3d 357, 366-67 (4th Cir. 2009).

Nor does Landmark—a North Carolina LLC—have standing to raise this claim in any event. Even if the law did discriminate against out-of-state commerce, Landmark would not be injured by that discrimination. In-state plaintiffs like Landmark have standing to raise Dormant Commerce Clause claims only if the regulation "involve[s] impediments to in-state plaintiffs' access to out-of-state markets, restrictions on the ability of out-of-state entities to make use of in-state plaintiffs' services, or burdens on out-of-state entities which [are] passed on to in-state plaintiffs." *City of Los Angeles v. Cnty. of Kern*, 581 F.3d 841, 848-49 (9th Cir. 2009). In other words, they must claim an injury that is "tied to a barrier imposed on interstate commerce." *Id.* at 848. Landmark makes no such allegations here.

CONCLUSION

For the foregoing reasons, the State of North Carolina respectfully requests that this Court hold that the Abusive Patent Assertions Act is facially constitutional.

Respectfully submitted this, the 14th day of May, 2021.

JOSHUA H. STEIN
Attorney General

W. Swain Wood
First Assistant Attorney General and
General Counsel

By: /s/ Ryan Y. Park
Ryan Y. Park (State Bar #52521)
Solicitor General
rpark@ncdoj.gov

North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
(919) 716-6400

CERTIFICATE OF SERVICE

I, Ryan Y. Park, hereby certify that on this the 14th day of May, 2021, a true and correct copy of the foregoing document was transmitted via the CM/ECF system, which automatically sends notice and a copy of the filing to all counsel of record.

/s/ Ryan Y. Park
Ryan Y. Park

WORD COUNT CERTIFICATION

I hereby certify that the foregoing document contains fewer than 6,250 words according to the word count feature in Microsoft Word and is therefore in compliance with the word limitation set forth in L.R. 7.3(d)(1).

This, the 14th day of May, 2021.

/s/ Ryan Y. Park
Ryan Y. Park