No. 19-16122

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION,

Plaintiff-Appellee,

v.

QUALCOMM INCORPORATED,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
THE HONORABLE LUCY H. KOH, DISTRICT JUDGE
CASE NO. 5:17-CV-00220-LHK

BRIEF OF 46 AMICI CURIAE LAW AND ECONOMICS SCHOLARS IN SUPPORT OF PETITION FOR REHEARING EN BANC

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Pursuant to Federal Rule of Appellate Procedure 29 and Ninth Circuit Local Rule 29-2, the undersigned 46 law and economics professors respectfully submit this brief amici curiae in support of the Federal Trade Commission's petition for rehearing en banc. All parties have consented to this filing.[1]

INTEREST OF AMICI CURIAE

Amici curiae are law and economics professors with expertise at the intersection of antitrust law, intellectual property law, and industrial organization economics.[2] They have decades of experience—in academia, private practice, and government service—studying exclusionary conduct and identifying anticompetitive behavior that violates the antitrust laws.

Amici have no personal interest in the outcome of this litigation, but they share a professional interest in seeing the antitrust laws applied consistently in accordance with settled precedent and sound economics. The panel's decision deviates from both. It breaks from decades of precedent holding that conduct aimed at, and harm caused to, customers and other third parties can unlawfully exclude

[1] Amici certify that no party or party's counsel authored this brief in whole or in part or contributed money that was intended to fund the preparation or submission of this brief, and no person or entity—other than amici or their counsel—authored the brief or made a monetary contribution to its preparation or submission.

[2] Appendix A lists the amici.

competitors and violate Section 2 of the Sherman Act, 15 U.S.C. § 2. And it departs from basic principles of economics by elevating the form of a monopolist's behavior over its impact on competition and consumers. Left unaddressed, the panel's decision will upend antitrust law in this Circuit, immunize large swaths of unlawful and anticompetitive behavior, and mislead lower courts and litigants about the reach of Section 2.

INTRODUCTION

This is one of the most important antitrust cases of the twenty-first century. The business practices at issue implicate products and technology that pervade the daily life of U.S. consumers. The legal questions are just as consequential: The resolution of this case will not only set competitive guideposts in the telecommunications industry, but it will also influence the reach of antitrust law across a U.S. economy increasingly threatened by the exercise of market power.[3] The stakes are, in a word, enormous.

Against that backdrop, a panel of this Court handed down a decision that is sweeping and profoundly flawed. It reversed the district court's judgment that Qualcomm violated Section 2 of the

[3] Isabel Cairó & Jae Sim, *Market Power, Inequality, and Financial Instability* 29-30 (Bd. of Governors of the Fed. Rsrv. Sys., Fin. & Econ. Discussion Series No. 2020-057, 2020).

Sherman Act, not because any of the district court's voluminous factual findings were erroneous, but because the district court purportedly committed legal errors. But it is the panel, not the district court, that misunderstood the law.[4]

On the basis of a two-year trial record and in hundreds of pages of factual findings, the district court found that (i) Qualcomm has monopoly power in the markets for CDMA and premium LTE chips used in mobile telecommunications devices, 1ER25-42;[5] (ii) manufacturers of those devices ("OEMs") like Apple and Samsung need Qualcomm chips even if they also wish to use a competitor's chips, 1ER27-28, 33-34; (iii) as part of its "no license/no chips policy" ("NLNC"), Qualcomm refuses to sell OEMs *any* Qualcomm chips unless the OEMs agree to pay artificially-inflated patent royalties on chips made by Qualcomm's *competitors*, 1ER33-34, 40-42, 76, 178-83; and (iv) those inflated patent royalties—which the district

[4] In the two months since it issued, the panel's decision has become a target of antitrust scholarship. *See, e.g.,* HERBERT HOVENKAMP, MARK D. JANIS, MARK A. LEMLEY, CHRISTOPHER R. LESLIE, & MICHAEL A. CARRIER, IP AND ANTITRUST: AN ANALYSIS OF ANTITRUST PRINCIPLES APPLIED TO INTELLECTUAL PROPERTY LAW, Chs. 13, 21, 35 (2020 Supp., forthcoming); Herbert Hovenkamp, *FRAND and Antitrust*, 106 CORNELL L. REV. (forthcoming 2020).

[5] Citations to "_ER_" are to the excerpts of the record that Qualcomm filed on August 23, 2019. Dkt. Nos. 75-1 and 75-3. Citations to OP_ are to the panel decision, filed on August 11, 2020. Dkt. No. 255-1.

court called a "surcharge"—increase the costs to OEMs of using competitors' chips, reduce OEM purchases from Qualcomm's rivals, and thereby harm competing chip manufacturers in the form of lost revenues and scale economies, preventing competitors from eroding Qualcomm's chip monopolies, 1ER46, 184-86. For those reasons, the district court concluded Qualcomm unlawfully maintained its chip monopolies in violation of Section 2. 1ER216.

The panel brushed aside these detailed factual findings and reversed the district court. The panel's opinion rested largely on the erroneous premise that, because NLNC harms Qualcomm's customers, it neither "directly" impairs the opportunities of Qualcomm's rivals nor violates the antitrust laws. OP30-44. The panel's decision conflicts with decades of settled law, including multiple decisions of this Court, the Supreme Court, and sister circuits. It also conflicts with basic economics, which recognize that indirect exclusionary conduct can impair a rival's efficiency and restrict competition. Were the panel's opinion to become precedent, it would misdirect lower courts, exalt stylized assumptions over detailed market analysis, and hinder the effective enforcement of the antitrust laws. In short, this appeal raises questions of great urgency and exceptional importance that merit en banc review.

ARGUMENT

A claim of monopoly maintenance under Section 2 of the Sherman Act requires a showing that the defendant possessed monopoly power in a relevant market and maintained that monopoly "by engaging in exclusionary conduct as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001) (en banc) (quotation and citation omitted). The district court's undisturbed findings easily meet this standard.

The panel's decision reversing the district court departed from settled law in at least three ways. First, the panel ruled that the injuries Qualcomm inflicted on its OEM customers "are beyond the scope of antitrust law" because they unfolded outside of the relevant antitrust markets. OP31, 44. Second, it held that Qualcomm's imposition of a surcharge on rivals' products did not represent a "cogent theory of anticompetitive harm" because the relevant royalties were supposedly "chip-supplier neutral" and "by definition" involved only "potential harm[] to Qualcomm's *customers*." OP30, 36, 41, 49, 56. Third, it analyzed each constituent element of Qualcomm's conduct in isolation, despite the district court's finding that Qualcomm's dealings with its rivals and customers were two sides

of the same coin, and produced "compounding" and "cycl[ical]" anti-competitive effects. OP30-31. Any of those holdings, standing alone, would present a compelling issue for en banc review; collectively, they require it.

I. The Panel Erred When It Deemed Harm to Customers to be Outside the Relevant Market.

The panel rejected the FTC's primary theory of competitive harm on the grounds that Qualcomm implemented its NLNC policy through agreements with its customers, and harms to customers, "even if real, are not 'anticompetitive' in the antitrust sense—at least not *directly*—because they do not involve restraints on trade or exclusionary conduct in 'the area of effective competition.'" OP30 (citation omitted). Qualcomm's conduct, the panel reasoned, "involves potential harms to [its] *customers*, not its competitors, and thus falls outside the relevant antitrust markets." *Id.* at 49. This holding is contrary to basic tenets of antitrust law.

First, the most natural reading of the panel's ruling is as a declaration that *all* harms to customers occur outside relevant antitrust markets and therefore are *never* cognizable under Section 2. That turns antitrust law on its head. A market consists of sellers and buyers, and since OEMs are buyers of chips, they are key participants in the relevant markets in which Qualcomm and its rivals compete. *See Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's*

Health Sys., Ltd., 778 F.3d 775, 784 (9th Cir. 2015) ("Market definition thus perforce focuses on the anticipated behavior of buyers and sellers."); *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal.*, 190 F.3d 1051, 1057-58 (9th Cir. 1999) ("[O]ur opinions do use the phrase 'competitor or consumer' as a rough gloss on the . . . 'market participant' test."). "It is, accordingly, appropriate to examine the effect of the challenged pattern of conduct on consumers" when evaluating a Section 2 claim. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985); *cf. Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1519, 1525 (2019) (customers paying higher prices suffer antitrust injury under Section 2).

In fact, monopolization claims are "fundamentally flawed" if they focus only on rivals. *Lucas v. Citizens Commc'ns Co.*, 244 F. App'x 774, 776 (9th Cir. 2007). As the panel itself recognized, courts must evaluate whether conduct harms "the competitive *process*, and thereby harm[s] consumers." OP25 (quoting *Microsoft*, 253 F.3d at 58). Conduct harms the "competitive process" if it "obstructs the achievement of competition's basic goals—lower prices, better products, and more efficient production methods"—all of which can be demonstrated by looking at impacts on "purchasers or consumers." *Town of Concord, Mass. v. Boston Edison Co.*, 915 F.2d 17, 21-22 (1st Cir. 1990) (Breyer, J.) (quotation and citation omitted); *see*

Apple, 139 S. Ct. at 1525 (the "central concern of antitrust" is "protecting consumers from monopoly prices") (quotation omitted). The panel's opinion repudiates these bedrock principles.[6]

Second, perhaps the panel's decision can be read more narrowly, as holding that Qualcomm's customer-facing patent licensing occurs outside the markets for modem chip sales and therefore does not cause a direct and cognizable harm in the relevant chip markets. OP30. On this reading, the panel did not categorically exclude harm to customers in monopolization cases, but instead adopted a blinkered view of the victims and effects of NLNC. It held that, because NLNC directly burdened "Qualcomm's *customers*, not its *competitors*," its damage was necessarily confined to the OEMs, whom the panel characterized as "outside the 'areas of effective competition'—the markets for CDMA and premium LTE modem chips." OP44. Because "the district court failed to identify how the

[6] *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018), does not hold otherwise. *AmEx* involved market definition in a Section 1 case (not a Section 2 monopolization case) in a very specific context: So-called "two-sided transaction" markets in which the defendant is a platform connecting two different sets of customers. And the *AmEx* Court still recognized that the "goal" of antitrust is to determine what is "harmful to the consumer." *Id.* at 2284 (quotation and citation omitted) (discussing rule of reason). The panel erred by reading *AmEx* as fundamentally rewriting the rules of antitrust law (and in particular Section 2) rather than seeking to apply those rules to an unusual two-sided transactional platform market. *See* OP30, 48.

policy *directly* impacted Qualcomm's competitors or distorted 'the area of effective competition,'" the panel reasoned, NLNC could not have harmed competition. *Id.* at 48 (emphasis added).

This narrower reading is equally flawed. Section 2 seeks out anticompetitive conduct regardless of form. *See Apple*, 139 S. Ct. at 1522-23. A monopolist need not aim its anticompetitive conduct directly at competitors to violate the antitrust laws, so long as the conduct has an exclusionary effect on rivals in the relevant market. Indeed, the cases have long recognized that a monopolist can engage in unlawful, anticompetitive exclusion of competitors by inflicting non-price harms on customers, as is the case with tying, coercive exclusive dealing, and certain most-favored-nation clauses. *See, e.g.*, *Fortner Enters., Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 498 (1969) (tying); *Lorain Journal Co. v. United States*, 342 U.S. 143, 152-53 (1951) (conditional refusal to deal with customers that also work with rivals); *Microsoft*, 253 F.3d at 61-62 (*de facto* exclusive dealing).

A monopolist likewise can violate the antitrust laws by imposing or threatening higher prices on customers, that in turn harm rivals by blunting the demand for the rivals' products or raising their costs. *See, e.g.*, *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1478 (9th Cir. 1997) ("[A]n increase in consumer prices caused by the asserted conduct [of diverting indigent patients to other hospitals and

threatening physicians who did not support hospital's monopoly] would constitute antitrust injury"), *overruled in part on other grounds by Lacey v. Maricopa Cty.*, 693 F.3d 896, 925-28 (9th Cir. 2012); *Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n*, 814 F.2d 358, 368 (7th Cir. 1987) (defendant unlawfully "raised the market price to its own advantage" by "rais[ing] its rivals' costs"); *see also United States v. Microsoft Corp.*, 56 F.3d 1448, 1452, 1462 (D.C. Cir. 1995) (approving consent decree prohibiting Microsoft from using its operating system monopoly to require computer manufacturers to pay a fee for every computer they manufactured including those that used a competing operating system); *Caldera, Inc. v. Microsoft Corp.*, 87 F. Supp. 2d 1244, 1249-51 (D. Utah 1999) (denying Microsoft's motion for partial summary judgment on related private monopolization claims).

And a monopolist can engage in anticompetitive and exclusionary conduct by conditioning lower customer prices on agreements not to deal with rival suppliers or threatening higher prices for customers who choose to deal with rival suppliers. *See, e.g., United Shoe Mach. Corp. v. United States*, 258 U.S. 451, 455, 457 (1922) (reduced royalty "for lessees who agree not to use" rival); *LePage's Inc. v. 3M*, 324 F.3d 141, 154, 157-59 (3d Cir. 2003) (en banc) (discounts and rebates "designed to induce" exclusion of rival; higher

prices when purchasing rivals' products); *Cascade Health Sols. v. PeaceHealth*, 515 F.3d 883 (9th Cir. 2008) (bundled discounts).

In *Microsoft*, the D.C. Circuit's seminal monopolization case, Microsoft imposed licensing requirements on its customers that prevented rivals from capturing share in the browser market (not the relevant antitrust market). 253 F.3d at 62. By hindering rival browsers, Microsoft reduced the likelihood that those browsers could aid Microsoft's competitors in the separate operating system market where Microsoft held a monopoly (the relevant market). *Id.* Even though the harm to competitors in the relevant market was indirect and uncertain, the unanimous en banc court held that Microsoft's conduct violated Section 2. *Id.* at 61-62.

Similarly in *Lorain Journal*, a local newspaper—the indispensable advertising medium in Lorain, Ohio—refused to print advertisements from customers who also marketed on a local radio station. 342 U.S. at 149. Because customers could not afford to give up newspaper advertising, they stopped using radio, threatening the radio station's existence. *Id.* at 152-53. Although the newspaper directed its actions at customers, it violated Section 2 because competitors and competition ultimately suffered. *Id.* at 152-56.

What mattered in each of these cases was that the monopolist used its power over customers to prevent them from switching to rival suppliers, or to otherwise suppress demand for rival products

in the relevant market. The impairment of rivals' opportunities and efficiencies is blackletter exclusionary conduct that violates Section 2. *Aspen Skiing*, 472 U.S. at 605 & n.32 (citing 3 PHILLIP E. AREEDA & DONALD F. TURNER, ANTITRUST LAW 78 (1978)).

So too here. The district court found that Qualcomm used its monopoly power to effectuate the NLNC policy and artificially raise the costs to OEMs of purchasing chips from rivals, thereby suppressing demand for those rival chips. 1ER81. The panel's formalistic market analysis simply cannot be squared with the competitive realities as reflected in the district court's undisturbed factual findings. *See FTC v. AbbVie, Inc.*, __ F.3d __, 2020 WL 5807873, at *19 (3d Cir. Sept. 30, 2020) ("elevat[ing] form over substance" is an error of law "because companies could avoid liability for anticompetitive" conduct "simply by structuring" exclusionary conduct a certain way).

Third, the panel would be wrong even if injured OEM customers were outside the relevant chip markets altogether, because the effect of Qualcomm's NLNC policy was to harm competitors and competition in the relevant markets. It is well established that a monopolist may violate Section 2 if it uses out-of-market third parties as the fulcrum for its exclusion of rivals in the relevant market. Indeed, that was what *Microsoft* was all about: Microsoft used licensing restrictions and other anticompetitive conduct to impede

the use of third-party products in one market (browsers) as the first step in a scheme to unlawfully maintain its monopoly in a different market (operating systems). 253 F.3d at 61.

* * * * *

The panel's decision calls into question this entire body of law, allowing artful and sophisticated monopolists to dodge liability so long as they work to exclude rivals through customer-oriented acts. Its emphasis on forms and labels at the expense of detailed analysis of actual competitive effects will stymie Section 2 enforcement, at the very moment concerns about dominant firm behavior and customer-as-fulcrum conduct are growing. And it will cause no end of confusion for district courts that have to reconcile the panel opinion with the precedents it directly contradicts.

II. The Panel Erred In Dismissing Harms Caused by Supposedly "Chip-Supplier Neutral" Surcharges Imposed on Rival Products.

The panel also held that the imposition of artificially inflated royalties as a result of Qualcomm's NLNC policy "fails to state a cogent theory of anticompetitive harm" because the royalties are "'chip-supplier neutral' and do not undermine competition in the relevant antitrust markets." OP41, 56. The panel reasoned that a neutral surcharge "by definition" merely "involves potential harms to Qualcomm's *customers*" in the form of higher prices, which is not

cognizable harm. OP49; *see also id.* at 30, 45-47. These holdings conflict with well-established legal principles and rest on a misunderstanding of the district court's findings.

As discussed, harms imposed on customers can violate Section 2 if they have exclusionary effects on rivals in the relevant market. This is true even if a monopolist's conduct is nominally "neutral." In *Aspen Skiing*, for example, the Court held unlawful a ski resort's refusal to continue a joint marketing arrangement with a competitor even though the refusal harmed both the defendant and the competitor. *See* 472 U.S. at 605 (short term profit loss); *see also United Shoe*, 258 U.S. at 456-58 (universal fee); *Premier Elec.*, 814 F.2d at 368 (raising all market prices).

Facially "neutral" conduct might be acceptable in some circumstances, but not where, as here, a monopolist uses the conduct to injure competition. "Behavior that otherwise might comply with antitrust law may be impermissibly exclusionary when practiced by a monopolist." *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 187 (3d Cir. 2005); *see Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 488 (1992) (Scalia, J., dissenting) (a monopolist's "activities are examined through a special lens: Behavior that might otherwise not be of concern to the antitrust laws—or that might even be viewed as procompetitive—can take on exclusionary connotations when practiced by a monopolist."); *Greyhound Comput.*

Corp. v. Int'l Bus. Machs. Corp., 559 F.2d 488, 498 (9th Cir. 1977) (similar). Neutral in theory does not mean neutral in practice, as the panel appears to have assumed.

In any event, Qualcomm's surcharge was not "neutral" for two reasons. First, the panel ignored the district court's factual findings that Qualcomm in its licensing agreements offset patent royalty surcharges by providing chip rebates when the OEM purchased Qualcomm chips. 1ER50, 80-81. Qualcomm provided no offset to its patent royalties when an OEM bought chips from Qualcomm's rivals. In that way, Qualcomm increased the patent royalty and reduced demand for rivals' chips, without reducing demand for its own chips at the same time.[7] 1ER45, 52-53, 81. Second, the panel ignored the district court's factual findings that the entire royalty surcharge is paid to Qualcomm. NLNC thus creates a royalty sur-

[7] The panel said that Qualcomm used its inflated licensing royalties to cut prices on its chips and thus characterized the rebates as a lawful "margin squeeze" under *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 555 U.S. 438 (2009). OP46-48. But the panel has it backward. Qualcomm did not use inflated royalties to enable chip price cuts; it used the price cuts to enable increases in patent royalties, and thus increases in the costs to OEMs of using rival chips, all without pushing the all-in price of its own chips above the monopoly price. This case is about raising rivals' costs, not a margin squeeze.

charge that is anything but neutral: It reduces demand for competitors' chips and therefore reduces competitors' revenues, while boosting Qualcomm's revenues at its customers' expense. 1ER185.[8]

NLNC violates Section 2 because it creates a royalty surcharge that harms chip competitors and protects Qualcomm's chip monopoly. As the district court correctly found, the surcharge reflects Qualcomm's monopoly power over chips, not the value of Qualcomm's patents.

III. The Panel Wrongly Viewed Each Element of Qualcomm's Conduct—and the Harms It Caused—in Isolation.

The foregoing errors trace back to a foundational flaw in the way the panel "reframe[d] the issues to focus on the impact, if any, of Qualcomm's practices in . . . the markets for CDMA and premium LTE modem chips." OP31. That reframing was necessary, the panel explained, because antitrust law limits the scope of a court's inquiry to practices that harm competition in the relevant antitrust markets. OP31. In the panel's view, the district court ran afoul of that principle when "its analysis of Qualcomm's business practices and

[8] Qualcomm's scheme also deprives competitors of minimum viable scale, inhibits their access to key distribution channels, and prevents them from gaining the exposure to OEM engineering teams needed to become viable—all of which reduce their ability to compete and maintain Qualcomm's monopolies. The district court documented those harms as well. 1ER96, 99, 200.

their anticompetitive impact looked beyond the[] [relevant markets] to the much larger market of cellular services generally." OP30. In other words, the panel thought the district court erred by looking at the whole picture instead of a narrow slice.

But it is the panel, not the district court, that departed from decades of settled precedent in this Circuit and in the Supreme Court that prohibits "tightly compartmentalizing the various factual components" of a monopolist's conduct. *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962) ("In [monopolization and conspiracy] cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each."); *City of Anaheim v. S. Cal. Edison Co.*, 955 F.2d 1373, 1376 (9th Cir. 1992) ("[I]t would not be proper to focus on specific individual acts of an accused monopolist while refusing to consider their overall combined effect" given "the 'synergistic effect' of the mixture of the elements."); *Knutson v. Daily Review, Inc.*, 548 F.2d 795, 56 F.3d 1448 (9th Cir. 1976) (similar).[9]

[9] "In a monopolization case conduct must always be analyzed 'as a whole.' A monopolist bent on preserving its dominant position is likely to engage in repeated and varied exclusionary practices. Each one viewed in isolation might be viewed as de minimis or an error in judgment, but the pattern gives increased plausibility to the claim." PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 310c7 (4th ed. 2013-2018).

Congress drafted Section 2 of the Sherman Act in broad terms to ensure it remained a nimble and adaptable tool against the nearly limitless and inventive ways monopolists may seek to exclude rivals. *Verizon Comm'cns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004). Neither Congress nor the courts have attempted to cabin monopolization offenses to a certain set of acts aimed at a certain class of victims. *Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1087 (D.C. Cir. 1998) ("'Anticompetitive conduct' can come in too many different forms, and is too dependent upon context, for any court or commentator ever to have enumerated all the varieties.").

The panel's "reframing" of antitrust law—focusing exclusively on "direct" competitor harm and holding that injuries inflicted on customers are not cognizable anticompetitive harms—is inconsistent with precedent and sound economics, as discussed above. It contradicts well-established antitrust principles, exalts form over substance, and creates artificial distinctions between conduct that is "anticompetitive" in fact but not as a matter of law. *See Eastman Kodak Co.*, 504 U.S. at 466-67 ("Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law."). If not corrected, the end result will be a diminished role for antitrust in many markets, and less

scrutiny of concededly anticompetitive conduct so long as the customer is the fulcrum of the scheme. It will also mean decades of chaos in this Circuit, as parties use the panel's inconsistent rulings to their advantage and district courts try to navigate the inconsistences in Ninth Circuit law that the panel's decision creates.[10]

CONCLUSION

For the foregoing reasons, the petition for rehearing en banc should be granted and the judgment of the district court should be affirmed, at least as it relates to Qualcomm's "no license, no chips" policy.

[10] Given space limitations, amici are unable to address other errors in the panel's decision that merit en banc review, including its confused treatment of the rule of reason and its application to claims under Sections 1 and 2 of the Sherman Act. *See, e.g.*, OP27-28. No inference should be drawn about amici's views of issues not addressed in this brief.

Dated: October 5, 2020

Respectfully submitted,

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* Retained in connection with unrelated settled disputes or litigation against Qualcomm. Participation as amicus in this case reflects professional views and not necessarily the views of any current or former client.

^ No involvement in this litigation between Federal Trade Commission and Qualcomm, but a partner at Bates White, LLC. Bates White staff supported Dr. Carl Shapiro, who served as an expert for the Federal Trade Commission in the litigation below. Participation as amicus in this case reflects professional views and not necessarily the views of any current or former client.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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This brief contains 4,199 **words,** excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2020, I electronically filed the foregoing Brief of Amici Curiae with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all interested parties in this case are registered CM/ECF users.

I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

Dated: October 5, 2020

/s/ *Ian Simmons*
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