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

IAN SIMMONS
Counsel of Record
SCOTT SCHAEFFER
BRIAN P. QUINN
O'MELVENY & MYERS LLP
1625 Eye Street N.W.
Washington, D.C. 20006
Telephone: (202) 383-5300
Facsimile: (202) 383-5414

MICHAEL D. HAUSFELD
SCOTT MARTIN
HAUSFELD LLP
33 Whitehall Street
14th Floor
New York, NY 10004
Telephone: (646) 357-1100
Facsimile: (212) 202-4322

Attorneys for Amici Curiae Law and Economics Scholars

TABLE OF CONTENTS

Page

INTEREST OF AMICI CURIAE 1

INTRODUCTION 2

ARGUMENT 5

I. The Panel Erred When It Deemed Harm to Customers to be Outside the Relevant Market..... 6

II. The Panel Erred In Dismissing Harms Caused by Supposedly "Chip-Supplier Neutral" Surcharges Imposed on Rival Products. 13

III. The Panel Wrongly Viewed Each Element of Qualcomm's Conduct—and the Harms It Caused—in Isolation. 16

CONCLUSION 19

APPENDIX A: LIST OF AMICI CURIAE 21

TABLE OF AUTHORITIES

Page(s)

Cases

Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal.,
190 F.3d 1051 (9th Cir. 1999) 7

Apple Inc. v. Pepper,
139 S. Ct. 1514 (2019) 7, 8, 9

Aspen Skiing Co. v. Aspen Highlands Skiing Corp.,
472 U.S. 585 (1985) 7, 12, 14

Caldera, Inc. v. Microsoft Corp.,
87 F. Supp. 2d 1244 (D. Utah 1999) 10

Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC,
148 F.3d 1080 (D.C. Cir. 1998) 18

Cascade Health Sols. v. PeaceHealth,
515 F.3d 883 (9th Cir. 2008) 11

City of Anaheim v. S. Cal. Edison Co.,
955 F.2d 1373 (9th Cir. 1992) 17

Cont'l Ore Co. v. Union Carbide & Carbon Corp.,
370 U.S. 690 (1962) 17

Eastman Kodak Co. v. Image Tech. Servs., Inc.,
504 U.S. 451 (1992) 14, 18

Forsyth v. Humana, Inc.,
114 F.3d 1467 (9th Cir. 1997) 9

Fortner Enters., Inc. v. U.S. Steel Corp.,
394 U.S. 495 (1969) 9

FTC v. AbbVie, Inc.,
__ F.3d __, 2020 WL 5807873 (3d Cir. Sept. 30, 2020) 12

TABLE OF AUTHORITIES
(continued)

Page(s)

Greyhound Comput. Corp. v. Int'l Bus. Machs. Corp.,
559 F.2d 488 (9th Cir. 1977) 15

Knutson v. Daily Review, Inc.,
548 F.2d 795 (9th Cir. 1976) 17

Lacey v. Maricopa Cty.,
693 F.3d 896 (9th Cir. 2012) 10

LePage's Inc. v. 3M,
324 F.3d 141 (3d Cir. 2003) (en banc) 10

Lorain Journal Co. v. United States,
342 U.S. 143 (1951) 9, 11

Lucas v. Citizens Commc'ns Co.,
244 F. App'x 774 (9th Cir. 2007) 7

Ohio v. American Express Co.,
138 S. Ct. 2274 (2018) 8

Pacific Bell Telephone Co. v. linkLine Communications, Inc.,
555 U.S. 438 (2009) 15

Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n,
814 F.2d 358 (7th Cir. 1987) 10, 14

Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.,
778 F.3d 775 (9th Cir. 2015) 7

Town of Concord, Mass. v. Boston Edison Co.,
915 F.2d 17 (1st Cir. 1990) 7

United Shoe Mach. Corp. v. United States,
258 U.S. 451 (1922) 10, 14

TABLE OF AUTHORITIES
(continued)

Page(s)

United States v. Dentsply Int'l, Inc.,
399 F.3d 181 (3d Cir. 2005) 14

United States v. Microsoft Corp.,
253 F.3d 34 (D.C. Cir. 2001) (en banc) .... passim

United States v. Microsoft Corp.,
56 F.3d 1448 (D.C. Cir. 1995) 10

Verizon Comm'cns Inc. v. Law Offices of Curtis V. Trinko, LLP,
540 U.S. 398 (2004) 18

Statutes

15 U.S.C. § 2 2

Other Authorities

Herbert Hovenkamp,
FRAND and Antitrust, 106 CORNELL L. REV. (forthcoming 2020) 3

Isabel Cairó & Jae Sim,
Market Power, Inequality, and Financial Instability (Bd. of Governors of the Fed. Rsrv. Sys., Fin. & Econ. Discussion Series No. 2020-057, 2020) 2

Treatises

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 (2020 Supp., forthcoming) 3

PHILLIP E. AREEDA & DONALD F. TURNER,
ANTITRUST LAW (1978) 12

TABLE OF AUTHORITIES
(continued)

Page(s)

PHILLIP E. AREEDA & HERBERT HOVENKAMP,
ANTITRUST LAW (4th ed. 2013-2018) 17

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]" anticompetitive 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,

/s/ *Ian Simmons*

IAN SIMMONS
Counsel of Record
SCOTT SCHAEFFER
BRIAN P. QUINN
O'MELVENY & MYERS LLP
1625 Eye Street N.W.
Washington, D.C. 20006
(202) 383-5300

MICHAEL D. HAUSFELD
SCOTT MARTIN
HAUSFELD LLP
33 Whitehall Street
14th Floor
New York, NY 10004
(646) 357-1100

Counsel for Amici Curiae

APPENDIX A: LIST OF AMICI CURIAE[11]

Mark A. Lemley
William H. Neukom Professor of Law and Director of Program in Law, Science & Technology
Stanford Law School

A. Douglas Melamed
Professor of the Practice of Law
Stanford Law School
Former Acting Assistant Attorney General, Antitrust Division, U.S. Department of Justice

Steven Salop
Professor of Economics and Law
Georgetown University Law Center

* * * *

John Allison
Mary John and Ralph Spence Centennial Professor of Business Administration Emeritus
University of Texas, Austin

Jonathan B. Baker
Research Professor of Law
American University Washington College of Law
Former Director of the Bureau of Economics, U.S. Federal Trade Commission

James Bessen
Lecturer and Executive Director of the Technology & Policy Research Initiative
Boston University School of Law

---

[11] Institutions for identification purposes only. Amici sign in their individual capacities.

B. Douglas Bernheim*^
Edward Ames Edmonds Professor of Economics and Chair
Trione Chairmanship, Department of Economics
Stanford University

Anu Bradford
Henry L. Moses Professor of Law and International Organization
Columbia Law School

Stephen Calkins
Professor of Law and Director of Graduate Studies
Wayne State University Law School
Former General Counsel, U.S. Federal Trade Commission

Michael Carroll
Professor of Law and Faculty Director, Program on Information
Justice and Intellectual Property
American University Washington College of Law

Peter C. Carstensen
Fred W. & Vi Miller Chair in Law Emeritus
University of Wisconsin Law School

William Comanor
Professor of Health Policy and Management, Economics
University of California, Los Angeles
Former Chief Economist and Director of the Bureau of Economics,
U.S. Federal Trade Commission

Jorge L. Contreras
Presidential Scholar and Professor of Law
The University of Utah S.J. Quinney College of Law

Thomas F. Cotter
Briggs and Morgan Professor of Law
University of Minnesota School of Law

Stacey Dogan
Professor of Law
Boston University School of Law

Erika M. Douglas
Assistant Professor of Law
Temple University, Beasley School of Law

Nicholas Economides
Professor of Economics
NYU Stern School of Business

Samuel F. Ernst
Professor of Law
Golden Gate University

Aaron Edlin
Richard W. Jennings Professor of Law
Berkeley Law School
Professor of Economics
University of California, Berkeley

Robin Feldman
Arthur J. Goldberg Distinguished Professor of Law, Albert Abramson '54 Distinguished Professor of Law Chair, and Director of the Center for Innovation
University of California Hastings College of the Law

Harry First
Charles L. Denison Professor of Law
New York University School of Law
Former Chief, Antitrust Bureau of the Attorney General of the State of New York

Eleanor Fox
Walter J. Derenberg Professor of Trade Regulation
New York University School of Law

Andrew I. Gavil
Professor of Law
Howard University School of Law
Former Director of the Office of Policy Planning, U.S. Federal Trade Commission

Richard J. Gilbert
Emeritus Professor of Economics, Chair of Berkeley Competition Policy Center
University of California, Berkeley
Former Deputy Assistant Attorney General for Economics, Antitrust Division, U.S. Department of Justice

Warren Grimes
Irving D. and Florence Rosenberg Professor of Law
Southwestern Law School

Erik Hovenkamp
Assistant Professor of Law
USC Gould School of Law

Herbert Hovenkamp
James G. Dinan University Professor
University of Pennsylvania Law School and the Wharton School

John Kwoka
Neal F. Finnegan Distinguished Professor of Economics
Northeastern University
Former Economist, Economic Policy Office, Antitrust Division, U.S. Department of Justice
Former Economist, Bureau of Economics, U.S. Federal Trade Commission

Robert H. Lande
Venable Professor of Law
University of Baltimore School of Law

Marina Lao
Edward S. Hendrickson Professor of Law
Seton Hall University School of Law
Former Director, Office of Policy Planning, U.S. Federal Trade Commission

Christopher Leslie
Chancellor's Professor of Law
University of California, Irvine School of Law

Yvette Joy Liebesman
Professor of Law
St. Louis University Law School

Phillip R. Malone
Professor of Law and Director, Juelsgaard Intellectual Property and Innovation Clinic
Stanford Law School
Former Trial Attorney, Antitrust Division, U.S. Department of Justice

Leslie M. Marx^
Robert A. Bandeen Professor of Economics
Duke University Fuqua School of Business
Former Chief Economist, U.S. Federal Communications Commission

John M. Newman
Associate Professor
University of Miami School of Law
Former Trial Attorney, Antitrust Division, U.S. Department of Justice

Roger Noll
Emeritus Professor of Economics
Stanford University

Mark R. Patterson
Professor of Law
Fordham University School of Law

Barak D. Richman
Katharine T. Bartlett Professor of Law and Professor of Business Administration
Duke University

Daniel Rubinfeld*
Robert L. Bridges Professor of Law (Emeritus)
Berkeley Law School
Professor of Economics (Emeritus)
University of California, Berkeley
Professor of Law
New York University School of Law
Former Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice

Joshua Sarnoff
Professor of Law
DePaul University College of Law

Jason M. Schultz
Professor of Clinical Law
New York University School of Law

Sean P. Sullivan
Associate Professor of Law
University of Iowa College of Law

Fiona Scott Morton*
Theodore Nierenberg Professor of Economics
Yale School of Management
Former Deputy Assistant Attorney General for Economics, Antitrust Division, U.S. Department of Justice

Spencer Weber Waller
Professor of Law, Director of Institute for Consumer Antitrust Studies, Justice John Paul Stevens Chair in Competition Law
Loyola University of Chicago School of Law

Lawrence J. White
Robert Kavesh Professor of Economics
NYU Stern School of Business
Former Director (Chief Economist), Economic Policy Office, Antitrust Division, U.S. Department of Justice

Ramsi Woodcock
Assistant Professor
University of Kentucky College of Law
University of Kentucky Gatton College of Business and Economics

---

* 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

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 19-16122

I am the attorney or self-represented party.

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).

I certify that this brief *(select only one)*:

[ ] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[x] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
  [ ] it is a joint brief submitted by separately represented parties;
  [ ] a party or parties are filing a single brief in response to multiple briefs; or
  [ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated ____________.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature *s/Ian Simmons* **Date** 10/5/2020

(use "s/[typed name]" *to sign electronically-filed documents)*

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*
IAN SIMMONS
Counsel for Amici Curiae