Nos. 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, No. 5:17-cv-00220-LHK
Hon. Lucy H. Koh

BRIEF FOR THE AMERICAN ANTITRUST INSTITUTE AND PUBLIC KNOWLEDGE AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE

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The American Antitrust Institute is a nonprofit, non-stock corporation. It has no parent corporations, and no publicly traded corporations have an ownership interest in it.

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INTEREST OF *AMICI CURIAE*[1]

The American Antitrust Institute ("AAI") is an independent nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. It serves the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. AAI enjoys the input of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. *See* http://www.antitrustinstitute.org.

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[1] All parties consent to the filing of this amicus brief. No counsel for a party has authored this brief in whole or in part, and no party, party's counsel, or any other person—other than *amici curiae* or their counsel—has contributed money that was intended to fund preparing or submitting this brief. Individual views of members of AAI's Board of Directors or its Advisory Board may differ from AAI's positions.

Amici submit this brief because the federal government's ability to protect consumers from monopolization will be seriously undermined if this Court accepts Qualcomm's proposed standards for proving an anticompetitive effect in monopoly maintenance cases.

INTRODUCTION

Qualcomm manufactures and sells innovative chipset technology used to power the handsets of leading global smartphone original equipment manufacturers ("OEMs"), including Apple, Samsung and others. Based on substantial direct and indirect evidence, the district court found Qualcomm has obtained the "power to control prices or exclude competition" in two relevant chipset markets, CDMA modem chips and premium LTE modem chips. 6ER1187, 6ER1193-99, 6ER1204-07.

To the extent Qualcomm achieved this power as a consequence of a superior product, business acumen, or historic accident, the U.S. antitrust laws do not prohibit Qualcomm from collecting monopoly rents on the sale of its chipsets. However, the antitrust laws do prohibit Qualcomm from exercising its power by collecting a portion of those rents on the sale of its *rivals'* chipsets, thereby raising barriers to entry and insulating its chipset monopolies from competition. Qualcomm did so.

Qualcomm accomplished this feat by implementing a "No License No Chips" policy ("NLNC policy") that conditions access to chips on the purchase of Qualcomm's patent license. Qualcomm's patent license requires OEMs to pay an elevated royalty on standard-essential patents ("SEPs"), which Qualcomm promised two standard-setting organizations (SSOs) it would license on fair, reasonable, and non-discriminatory ("FRAND") terms. Qualcomm fortified its scheme by refusing to license rival chip manufacturers, a strategic breach of its FRAND commitment to offer a license to "all comers." It also imposed an exclusive dealing arrangement on Apple, locking up the market's most important customer. The collective impact of the interrelated elements of Qualcomm's conduct was to reduce competition by erecting entry barriers, impeding its rivals' ability to compete and preserving monopoly prices. 6ER1359-60.

The NLNC policy and the elevated royalty were mutually reinforcing. By conditioning the provision and ongoing supply of chipsets on the taking of a SEP license, Qualcomm ensured that it could charge elevated royalties without being challenged under contract law for breaching its bargained-for FRAND promise. Because OEMs require access to Qualcomm's chipsets to compete at all, challenging Qualcomm's FRAND breach at the expense of such access would be an act of self-sabotage.

At the same time, by transferring a portion of its monopoly rents from its chipsets onto its SEP license, Qualcomm ensured that its unchallengeable, supra-FRAND royalty would be imposed on *every* handset that practices the standard—even handsets that do so using *rivals*' chipsets. Qualcomm could use its SEPs as a vehicle for imposing a "surcharge" on every chipset sold by rivals because its SEPs, by definition, read on industry standards that every handset is required to practice. Thus, a SEP royalty necessarily must be paid for every handset sold with a chip inside.

Qualcomm's scheme would not have been sustainable if it had honored its SSO commitments to make SEP licenses "available to all applicants" as part of its FRAND contract. 6ER1291 (quoting Telecommunications Industry Association IPR policy). Offering a license to *all* applicants necessarily would require offering a license to rival-chipmaker applicants, too, as Qualcomm had done previously. 6ER1293. But in the aftermath of the Supreme Court's holding in *Quanta Computer, Inc. v. LG Elecs., Inc.*, 553 U.S. 617 (2008), Qualcomm no longer desired to live with its FRAND bargain. *Quanta* clarified that rivals' sales of chipsets containing Qualcomm's patented technology could exhaust Qualcomm's patent rights, forcing it to monetize its SEPs and negotiate royalties without the benefit of existential leverage over OEMs. *See* 6ER1295 (recounting Qualcomm statement to IRS). Qualcomm's strategic breach of its FRAND promise to license "all applicants" therefore contributed significantly to the success of the NLNC policy by ensuring OEMs remained beholden to Qualcomm.

Qualcomm's exclusive dealing arrangement with Apple sealed off any remaining gaps in the scheme that might allow competitive oxygen to seep into the market. By offering "transition funds" to Apple to offset Qualcomm's high royalty (including the supra-FRAND portion of the license fee) and requiring Apple to repay hundreds of millions in these rebates if Apple purchased a competing chipset, Qualcomm rendered Apple's use of a rival's chipset a "complete nonstarter." 6ER1263 (citing testimony of Apple's Vice President of Procurement). Locking up Apple foreclosed a substantial share of the market and prevented rivals from capitalizing on other benefits associated with winning Apple's business. 6ER1312-23.

Notwithstanding that an unreasonable, supra-FRAND royalty is part of the *mechanism* Qualcomm used to exclude competitors, this is a monopoly-maintenance case, not a rate-regulation case. The gravamen of Qualcomm's Section 2 violation is that it used an IP license required to practice industry standards to shield a chipset monopoly facing the prospect of competitive entry.

Importantly, the anticompetitive effects alleged and held to have been caused by Qualcomm's conduct arise because Qualcomm collects a portion of its all-in monopoly chipset price on the sale of rivals' chipsets. The proportion it collects there—i.e. the precise amount of the surcharge—bears on the magnitude of the anticompetitive effects caused by Qualcomm's scheme, but not the scheme's exclusionary nature and tendency. Qualcomm's scheme has exclusionary effects regardless of the amount of the surcharge. And Qualcomm's elevated SEP royalty therefore is properly understood not as an anticompetitive effect itself, but rather as evidence of one.

As a result of the interrelated elements of Qualcomm's conduct, the free market forces that otherwise would attract entry to compete down Qualcomm's monopoly chipset prices were prevented from operating. Qualcomm's conduct tampered with the market's mechanism for restoring competitive balance by preventing chipset rivals from efficiently driving down prices. It harmed competition by raising barriers to entry and thereby maintaining Qualcomm's monopoly.

The following illustration[2] shows hypothetical prices under competition on the merits compared to hypothetical prices under Qualcomm's scheme. Suppose that the all-in monopoly price is $30, which leads to a monopoly chipset price of $25 when a FRAND royalty of $5 is charged:

[2] Adapted from Timothy J. Muris, *Why the FTC Is Right to Go After Qualcomm for Manipulating Cell Phone Costs*, The Federalist (March 4, 2019).

	Competition on the Merits		No-License, No-Chips Policy	
	Qualcomm	Competitors	Qualcomm	Competitors
Modem Chip Price	$25	$16	$25	$16
Qualcomm Royalty	$5	$5	$15	$15
Qualcomm Exclusivity Rebate	$0	$0	$10	$0
All-In Price	$30	$21	$30	***$30***[3]

The illustration shows that if Qualcomm had charged a monopoly chipset price and a FRAND royalty, as were its right and voluntary contractual commitment, respectively, then Qualcomm would have faced pressure to drop its $30 all-in price to match its competitors' $21 all-in price. However, because Qualcomm imposed a surcharge on its SEP royalty along with an exclusivity rebate, Qualcomm was able to maintain its all-in monopoly price of $30 while forcing up the all-in costs of its rivals' products to the higher level of $31, at which they would not be viable. As a result, entry is deterred.

Qualcomm's conduct thus prevents the market's price-signaling mechanism from functioning properly and forestalls beneficial competition. The anticompetitive effect—artificially prolonging the duration of Qualcomm's monopoly—excludes competitors and prevents prices charged to OEMs and consumers from

[3] Note that competitors' all-in *costs* are raised to $31 under the NLNC policy. But no firm can profitably charge more than the monopoly *price* ($30). Thus, entry is not viable in this example.

falling below the monopoly price. If the court's award of prospective, injunctive relief is upheld, Qualcomm can continue to charge high chipset prices by innovating to offer a superior product. But the duration of Qualcomm's enjoyment of any chipset monopoly will be determined by the free market, instead of by Qualcomm.

SUMMARY OF ARGUMENT

On appeal, Qualcomm attempts to dissect and re-cast the FTC's allegations and aspects of the district court's holding to pigeonhole them into more favorable legal doctrine. It also invites the Court to raise the already onerous standards for federal government prosecutions of monopolization claims in a manner that would undermine enforcement of Section 2 of the Sherman Act. *Amici* urge this Court to decline the invitation and instead follow precedent, sound economic reasoning, and common sense. The district court's judgment that Qualcomm's interrelated practices collectively maintained its monopoly should be affirmed. 6ER1359.[4]

1. Qualcomm argues principally that the FTC and the district court did not adequately identify an anticompetitive effect. Its argument fails because it ignores the harm to competition caused by monopoly *maintenance*. Qualcomm falls into the so-called "Price-Up Trap"—a common analytical error that arises from faulty

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[4] This brief does not address all of the district court's liability findings on individual aspects of Qualcomm's conduct in isolation, none of which are necessary to sustain the court's judgment that Qualcomm's interrelated practices collectively maintained its monopoly unlawfully. 6ER1359. *Amici* nonetheless agrees with the FTC that the district court's opinion should be affirmed in its entirety.

benchmarking.[5] In a monopoly maintenance case, the relevant benchmark is a competitive price, not the pre-existing monopoly price, and the anticompetitive effect is not that prices rise or output falls but rather that pre-existing monopoly conditions persist. Qualcomm's failure to account for this dynamic causes it to make several analytical errors.

2. Qualcomm also argues that the court relied on insufficient evidence of harm to competition. However, Qualcomm presupposes monopolization standards that have no foundation in law, make no economic sense, and would foreclose future government prosecutions of monopoly maintenance. The federal courts of appeal have repeatedly rejected efforts to import similar standards accordingly, and this Court should do so here.

3. The district court correctly recognized that Qualcomm's conduct is properly understood as a form of raising-rivals-costs foreclosure, not a form of predatory pricing. Qualcomm emphasizes that the FTC alleges its royalties are unreasonably high, yet does not allege a margin squeeze, tying, monopoly leveraging, patent hold-up, or other 'price-based' claims. It warns the Court against chilling procompetitive price-setting behavior. But every antitrust violation affects

[5] Steven C. Salop, *The First Principles Approach to Antitrust*, Kodak, *and Antitrust at the Millennium*, 68 Antitrust L.J. 187, 194 (2000) [hereinafter "*First Principles Approach*"] ("***The Price-Up Trap*:** Mistaking a firm's inability to profitably raise price above the current level for an inability to exercise market power by preventing competitors' conduct that otherwise would reduce price below the current level, thereby mislabeling a maintenance of market power as a lack of market power").

prices—that is not a distinguishing feature of Qualcomm's conduct. And chilling price-setting behavior is a concern when it discourages discounting, which benefits consumers, but this case involves surcharges, which only make products more expensive for consumers. Indeed, simple illustrations can show Qualcomm's conduct has invariable exclusionary tendencies regardless of the amount of the royalty surcharge. It therefore is properly evaluated under the traditional rule of reason, not a heightened test.

ARGUMENT

I. THE ANTICOMPETITIVE EFFECT OF MONOPOLY MAINTENANCE IS THE PERPETUATION OF INCUMBENT MONOPOLY POWER

A. Qualcomm Falls Into the "Price-Up Trap"

Qualcomm argues the challenged conduct did not necessarily have an exclusionary anticompetitive effect. *See, e.g.*, Qualcomm Brief 37, 57 ("Q. Br."). It repeatedly and emphatically insists the court did not find any evidence "Qualcomm's actions *in fact* substantially injure competition," *id*. at 23, and "actually caused," *id*. at 71, "'reduced output, increased prices, or decreased quality in the relevant market.'" *Id*. at 70 (quoting *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018)). However, Qualcomm's arguments fail to assimilate the legal and economic implications of being charged with monopoly maintenance. *See* 6ER1368-69; *United States v. Microsoft Corp*., 253 F.3d 34, 56 (2001) ("[T]his case is not about Microsoft's initial acquisition of monopoly power. It is about Microsoft's efforts to maintain this position through means other than competition on the merits.").

The key distinction is that, "In monopoly maintenance cases, the dominant firm does not use exclusionary conduct literally to raise its profits. Instead, it maintains its profits at the supracompetitive level and *avoids profit reductions*[.]" Steven C. Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard*, 73 Antitrust L.J. 311, 359 (2006) (emphasis added). Consequently, the anticompetitive effect of maintaining an incumbent monopoly is that output does not increase and prices do not fall in response to attempted entry. *Id*. at 359-60.

All of Qualcomm's effects arguments apply the wrong competitive benchmark and thus begin from a false premise. *Id*. (characterizing this error as a variant of the "Cellophane fallacy"); *see also* Salop, *First Principles Approach*, *supra*, at 196-98. Here, the proper benchmark is the lower market price that would prevail if Qualcomm had not implemented the NLNC policy, charged a supra-FRAND royalty, refused to license all applicants, and imposed exclusivity arrangements.

Qualcomm's lead argument is that the per-phone surcharge on sales of rivals' chipsets theoretically could be passed on, or absorbed by the OEM itself, if OEMs' demand for chipsets is inelastic. Q. Br. at 58-60. Qualcomm contends that the prospect of pass-on creates ambiguity as to whether the surcharge raises entry barriers. *Id*. But this argument fails when measured against the correct benchmark. Because Qualcomm sets a monopoly all-in price for its chipsets and SEP licenses, the price would fall absent the restraints.

Consider the aforementioned hypothetical illustration, discussed *supra*. Under conditions in the far-right column of the table, which depicts the NLNC policy in operation, the rival would have to pass on a $15 royalty on top of its $16 chipset cost to defeat the surcharge. The all-in cost to the OEM would be $31—$1 *more* than Qualcomm's $30 monopoly price, depicted in the adjacent column.

Properly benchmarked, the tendency of Qualcomm's conduct to raise entry barriers does not "depend[] on how the market responds to the tax." Q. Br. 59. We know how the market would respond if a rival tried to charge an all-in price that equals or exceeds the monopoly price after pass-on. Demand for its product would sputter or decline. *Cf.* Richard Posner, Economic Analysis of Law 279 (7th ed. 2007) (explaining why monopolist does not charge more than the profit-maximizing monopoly price). By contrast, under competition on the merits, entry by efficient chipset competitors would force down the all-in price below $30, perhaps to the competitors' $21 price. Entry barriers thus are raised by the tax regardless of whether pass-on theoretically would be possible in a competitive market.

Qualcomm's second and third arguments focus on the fact that its royalty surcharge applies equally to all OEMs—that is, each chipset rival is "taxed" in the same amount. Q. Br. 63. Because the tax is applied uniformly, Qualcomm argues, "there is no reason it would tip the competitive balance when an OEM decides which chip supplier to use." *Id*. Most immediately, this argument ignores the economic reality that all-in costs rather than nominal costs govern both entry and purchasing decisions. But it is also incorrect because Qualcomm again fails to heed the implications of its incumbent monopoly.

In a monopoly maintenance case, the competitive balance necessarily has already tipped. The anticompetitive effect of a maintenance offense is that the competitive balance is prevented or delayed from being *restored*. While it may be the case, as Qualcomm points out, that conduct that raises rivals' costs does not necessarily also distort competition, this is because most markets are competitive. And in competitive markets, rivals "may be able to substitute to alternative cost-effective inputs," or "they may have a sufficient number of alternative customers or distributors to remain a strong competitive constraint." Steven C. Salop, *The Raising Rivals' Cost Foreclosure Paradigm, Conditional Pricing Practices, and the Flawed Incremental Price-Cost Test*, 81 Antitrust L.J. 371, 378 (2017) [hereinafter "*Raising Rivals' Cost Foreclosure*"]. In addition, "there may be sufficient competition from other non-excluded competitors or substitute products." *Id.*

But if a "dominant firm excludes all significant fringe rivals … and entrants, the dominant firm would not face any competitive threats." Jonathan B. Baker, *Exclusion as a Core Competition Concern*, 78 Antitrust L.J. 527, 565 n.190 (2013); *see also Spirit Airlines, Inc. v. Northwest Airlines, Inc.*, 431 F.3d 917, 951 (6th Cir. 2005) ("[I]n a concentrated market with very high barriers to entry, competition will not exist without competitors."); Salop, *Raising Rivals' Cost Foreclosure Paradigm*, *supra*, at 391.

Among other things, this "simple economic idea," Baker, *supra*, at 565 n.190, belies Qualcomm's effort to distinguish *Premier Electrical*, Q. Br. 64-65, which involved a market-wide "tax" under conditions of mere "market power" owing to price-fixing. Qualcomm emphasizes that *Premier Electrical* is a Section 1 case, but here a dominant firm is alleged and held to have possessed "monopoly power." 6ER1199-1200, 6ER1207. A firm with monopoly power that imposes an across-the-board "tax" that only affects its rivals has an even greater likelihood of disproportionately harming competitors and consumers than does a subset of colluding firms. *Cf.* 6ER1190 ("monopoly power" typically presents with a larger market share than "market power"). That is particularly true where, as here, the monopolist doubles as the tax collector. Salop, *Raising Rivals' Cost Foreclosure Paradigm*, *supra* at 377 (anticompetitive conduct that allows simultaneous recoupment of profits while injuring rivals is "more likely to succeed" and "to be attempted").[6]

II. THE COURT APPLIED THE PROPER LEGAL STANDARDS AND RELIED ON EVIDENCE SUFFICIENT TO ESTABLISH MONOPOLY MAINTENANCE

Qualcomm's challenges to the sufficiency of the evidence of an anticompetitive effect also are unavailing. Unable to succeed under the standards of proof enshrined in case law, Qualcomm seeks to persuade this Court to raise the government's burden. But Qualcomm's proposed standards contravene modern law and economics and, if accepted, would render Section 2 of the Sherman Act a dead letter. The federal circuit courts have repeatedly rejected defendants' attempts to import similar standards accordingly.

A. The Government Must Show Qualcomm's Conduct Had a Probable Anticompetitive Effect by a Preponderance of the Evidence, Not an Actual Anticompetitive Effect by Definitive Proof

Qualcomm asks this Court to require the federal government to demonstrate with definitive proof that Qualcomm's conduct "actually" maintained its chipset monopoly power. *See, e.g.*, Q. Br. 69 (court did not find "actual evidence" of anticompetitive effect); *id*. at 23 (court did not find "Qualcomm's actions *in fact*

[6] Qualcomm's attempt to distinguish *Caldera* repeats many of the same errors. *See, e.g.*, Q. Br. 66 (ignoring that competitive balance already tipped); *id.* at 67 (ignoring monopoly price ceiling); *see also* FTC Br. 40-42.

substantially injure competition") (emphasis in original); *id*. at 57 (did not find Qualcomm "in fact caused any . . . 'outcome' in the market").

Ironically, the district court found direct price and output evidence of monopoly *maintenance*, which Qualcomm ignores because it falls into the "Price-Up Trap." *See infra* Part II.C. But regardless, direct evidence of an actual anticompetitive effect is not the standard for proving a Sherman Act violation under the rule of reason, whether under Section 1 or Section 2. *Microsoft*, 253 F.3d at 69 (same rule of reason framework applies under both Section 1 and Section 2 of the Sherman Act); *accord McWane, Inc. v. FTC*, 783 F.3d 814, 836 (11th Cir. 2015); *ZF Meritor, LLC v. Eaton Corp*., 696 F.3d 254, 271 (3d Cir. 2012), *cert. denied*, 133 S. Ct. 2025 (2013).

Conduct is anticompetitive under the Sherman Act if it "*tends to* impair the opportunities of rivals and either does not further competition on the merits or does so in an unnecessarily restrictive way." *Cascade Health Sols. v. PeaceHealth*, 515 F.3d 883, 894 (9th Cir. 2008) (emphasis added); *O'Bannon v. NCAA*, 802 F.3d 1049, 1066 (9th Cir. 2015) (harm to competitive process evidenced by an "injury of the type the antitrust laws were intended *to prevent*") (emphasis added); *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 488 (1992) (Scalia, J., dissenting) ("exclusionary or anticompetitive behavior[] threatens to defeat *or forestall* the corrective forces of competition.") (emphasis added).

Consequently, unlawful monopoly maintenance is proven if the arrangement's "'probable' effect is to 'foreclose competition,'" not its certain effect. *Omega Envt'l, Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1162 (9th Cir. 1997) (quoting *Tampa Elec. Co. v. Nashville Coal Co*., 365 U.S. 320, 327 (1961)); *Twin City Sportservice, Inc. v. Charles O. Finley & Co*., 512 F.2d 1264, 1275 (9th Cir. 1975) ("*Finley I*") (*Tampa Electric* test applies to Section 1 of the Sherman Act); *Omega*, 127 F.3d at 1162 (*Tampa Electric* applies "under the antitrust rule of reason") (citing *Twin City Sportservice, Inc. v. Charles O. Finley & Co*., 676 F.2d 1291, 1302 (9th Cir. 1982) ("*Finley II*")).

Indeed, the rule of reason is the operative rule in antitrust cases when "it cannot be said with certainty that a challenged practice is inherently anticompetitive." *GTE Sylvania, Inc. v. Cont'l T. V., Inc.*, 537 F.2d 980, 1001 (9th Cir. 1976), *aff'd,* 433 U.S. 36 (1977). And for 100 years, "[t]he true test of legality" under the rule of reason has required courts to consider "the nature of the restraint and its effect, *actual or probable*." *Id*. (quoting *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918) (Brandeis, J.) (emphasis added)).

Even an "actual" anticompetitive effect under the rule of reason must be proven only by a preponderance of the evidence, *Theme Promotions, Inc. v. News Am. Mktg. FSI*, 546 F.3d 991, 1001-03 (9th Cir. 2008), which "simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence." *Concrete Pipe & Prods. v. Constr. Laborers Pension Tr.*, 508 U.S. 602, 622 (1993) (internal quotation omitted).

Qualcomm's "certainty" standard for proving an "actual effect" would eviscerate the prophylactic mission of government Section 2 enforcement. Unlike private plaintiffs, government enforcers are permitted to seek prospective injunctive relief for Section 2 violations without the burden of proving antitrust injury. This makes sense, because "to delay suit until harm has actually occurred would be to increase the social cost of monopoly unnecessarily." III Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law, ¶651d1, at 80 (2d. ed. 2000). "To some degree, 'the defendant is made to suffer the uncertain consequences of its own undesirable conduct.'" *Microsoft*, 253 F.3d at 79 (quoting Areeda & Hovenkamp, *supra* ¶651c, at 78 (1996)).

By analogy, "the private plaintiff may sue the drunken driver only to recompense a completed wrong," whereas "the government may arrest and condemn the drunken driver who has not yet caused harm to anyone." Areeda & Hovenkamp, *supra* ¶651d1, at 80. "The point is that drunken driving is highly likely to cause social harm, and it is less costly to arrest such a driver before rather than after that harm occurs." *Id.*; *see Microsoft,* 253 F.3d at 80. So too with monopolization.

Accordingly, the argument that monopoly maintenance requires definitive proof of an "actual" anticompetitive effect "in fact" has been roundly rejected by courts of appeal. *See, e.g.*, *McWane,* 783 F.3d at 836 ("The governing Supreme Court precedent speaks not of 'clear evidence' or definitive proof of anticompetitive harm, but of 'probable effect.'"); *Microsoft*, 253 F.3d at 79-80; *cf. Re/Max Int'l v. Realty One, Inc*., 173 F.3d 995, 1020 (6th Cir. 1999) ("Obviously, if a monopolist successfully uses its power to prevent competition from ever entering the marketplace, the losing competitor's antitrust claim should not be dismissed simply because the monopolist's prices remained constant[.]").

B. The Government Must Show the Challenged Conduct Reasonably Appears Capable of Contributing to Monopoly Maintenance, Not that Monopoly Maintenance Is Precisely Attributable to the Conduct

Qualcomm also proposes an "actual causation" standard that builds upon the faulty foundation of its "actual effect" standard to try to further elevate the government's burden of proof. It would require government plaintiffs to prove causation by calculating a numerical foreclosure rate in a but-for world and by affirmatively disproving that alternative explanations for exclusion, even if unsupported by fact-findings, *could have* caused the monopoly to persist naturally rather than artificially. *See, e.g.*, Q. Br. 76-77, 83, 101-02 ("impermissibl[e]" to find causation without "a quantification"; "no antitrust claim" without but-for-world evidence).

The law requires nothing of the sort. "[N]o government seriously concerned about the evil of monopoly would condition its intervention solely on a clear and genuine chain of causation from an exclusionary act to the presence of monopoly."

Areeda & Hovenkamp, *supra* ¶651f, at 83; *see Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969) (the government "need not exhaust all possible alternative sources of injury"). And there is "no case … standing for the proposition that, as to § 2 *liability* in an equitable enforcement action, plaintiffs must present direct proof that a defendant's continued monopoly power is precisely attributable to its anticompetitive conduct." *Microsoft*, 253 F.3d at 79 (emphasis in original).

In accordance with the prophylactic purpose of Section 2 and the probable-effect test, the government must show only that the defendant's conduct "'reasonably appears capable of making a significant contribution to maintaining monopoly power.'" *Microsoft*, 253 F.3d at 79 (quoting Areeda & Hovenkamp, *supra* ¶651c, at 78); *see Retractable Techs., Inc. v. Becton Dickinson & Co.*, 842 F.3d 883, 891 (5th Cir. 2016) (approving same test for causation); *McWane*, 783 F.3d at 833 (same); *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 830 (6th Cir. 2011) (same); *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 187 (3d Cir. 2005) (same); *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publications, Inc.*, 63 F.3d 1540, 1550 (10th Cir. 1995) (same); *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1182 (1st Cir. 1994) (same).

A requirement that plaintiffs quantify the precise amount of foreclosure has been rejected because, under the rule of reason, "The test is … whether the challenged practices bar a substantial number of rivals or severely restrict the market's ambit." *Dentsply*, 399 F.3d at 191; *see ZF Meritor,* 696 F.3d at 283. A numerical foreclosure-rate requirement would yield false negatives whenever a dominant firm harms competition by "'slow[ing] the rival's expansion'" without inducing exit, thereby producing "'[c]onsumer injury [that] results from the delay that the dominant firm imposes on the smaller rival's growth.'" *Dentsply*, 399 F.3d at 191 (quoting XI Areeda & Hovenkamp, *supra*, ¶1802c, at 64); *see also Microsoft*, 253 F.3d at 71 (finding liability where monopolist's exclusionary conduct kept usage of rival product "below the critical level necessary for … any other rival to pose a real threat to [its] monopoly"); Salop, *Raising Rivals' Cost Foreclosure Paradigm*, *supra* at 387 n.66 ("[T]he monopolist might do better by accommodating small scale entry while maintaining a high price." (citing economic literature)).

A demand that plaintiffs reconstruct the but-for world absent the defendant's conduct also has been rejected, because it would convert a recurring "proof problem" into an insurmountable defense. *Microsoft*, 253 F.3d at 79. Typically, "neither plaintiffs nor the court can confidently reconstruct a product's hypothetical technological development in a world absent the defendant's exclusionary conduct." *Id*. Yet, courts cannot solve for this problem by limiting the scope of the antitrust laws or exonerating socially harmful conduct—that would be "inimical to the purposes of the Sherman Act." *Id*. (rule requiring that "liability turn on a plaintiff's ability or inability to reconstruct the hypothetical marketplace … would only encourage monopolists to take more and earlier anticompetitive action").

C. The Court had Ample Evidence on Which to Base Its Finding of an Anticompetitive Effect

In addition to insisting on unavailable and unnecessary evidence, Qualcomm urges the Court to disaggregate or ignore the available, relevant evidence. *See, e.g.*, Q. Br. 23 (that conduct disadvantaged rivals does not necessarily show harm to the competitive process); *id*. 37 ("high prices" to customers and "outsized profits" do not necessarily show harm to the competitive process either); *see also id*. 67 (isolating patent licenses); *id*. 81 (isolating surcharge); *id*. 102 (chip-threats); *id*. 105 (de facto exclusives).

Most striking, because Qualcomm falls into the "Price-Up Trap," it misses that the court found direct price and output evidence tending to show monopoly maintenance. As the Eleventh Circuit has explained, evidence that "an incumbent monopolist already charg[es] supracompetitive prices," coupled with evidence that "prices did not fall" in response to attempted entry, is "powerful evidence of anti-competitive harm" in a monopoly maintenance case. *McWane, Inc. v. FTC*, 783 F.3d 814, 838-39 (11th Cir. 2015).

Here, the district court made factual findings to just that effect, none of which were clearly erroneous. *See, e.g.*, 6ER1197-98 (finding MediaTek's 2015 entry exerted downward price pressure on Qualcomm's CDMA adder but "Despite MediaTek's entry, Qualcomm still retains a dominant share of the CDMA modem chip market"); *see also* 6ER1192, 6ER1194-95, 6ER1204-06.

Qualcomm also violates the rule that a plaintiff "should be given the full benefit of [its] proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962); *see City of Anaheim v. S. Cal. Edison Co.*, 955 F.2d 1373, 1376 (9th Cir. 1992). Qualcomm, for example, emphasizes that neither high prices to OEMs (passed on to consumers) nor harm to rivals independently show harm to the competitive process. But Qualcomm elides what they tend to show *together*. That conduct both excludes rivals and results in higher prices for consumers is a very strong predictor of its harm to the competitive process.

Indeed, this is sufficient to establish a prima facie case. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985) (it is appropriate to examine the effect on consumers, effect on rivals, and effect on excluding firm); *see also* Andrew I. Gavil, *Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance*, 72 Antitrust L.J. 1, 26-27 (2004) (surveying patterns in dominant firm distribution cases and observing that "in every case in which the plaintiff prevailed, … *the interests of rivals and consumers were aligned*, i.e., both rivals and consumers would be worse off in the long run as a consequence of the dominant firm's distribution strategy") (emphasis in original). The evidence before the district court showed that rivals' and consumers' interests are aligned here. 6ER1380-81.

Qualcomm also ignores relevant industry structure and intent evidence. Courts appropriately infer an increased likelihood of harm to competition when exclusionary conduct is practiced by an incumbent monopolist. *Kodak*, 504 U.S. at 488 (Scalia, J., dissenting) (law views incumbent monopolist's activities through "a special lens" because "[b]ehavior that might otherwise not be of concern … can take on exclusionary connotations"); *see LePage's, Inc. v. 3M*, 324 F.3d 141, 151-52 (3d Cir. 2003); *Dentsply*, 399 F.3d at 187.

And while intent is not a stand-alone basis for antitrust liability, "Evidence of the intent behind the conduct of a monopolist" is relevant if it "helps us understand the likely effect of the monopolist's conduct." *Microsoft*, 253 F.3d at 59; *McWane*, 783 F.3d at 840; *see Aspen Skiing*, 472 U.S. at 602 ("no monopolist monopolizes unconscious of what he is doing"). Here the court found ample evidence of exclusionary intent that informs the conduct's likely effect. *See, e.g.*, 6ER1318 (Qualcomm sought exclusivity from Apple to prevent a "license fight" (quoting Qualcomm CDMA Technologies Vice President of Sales)); 6ER1374-76 (contemporaneous documents show Qualcomm knew it could incur antitrust liability).

Qualcomm also ignores the evidentiary implications of its lack of any cognizable efficiency justification for its anticompetitive conduct. On appeal, Qualcomm emphasizes that IP licensing, in isolation, is procompetitive. Q. Br. 40. And it notes that "an" alternative to its current licensing model would be to issue two kinds of licenses instead of one, which it calls "multi-level licensing." *Id*. 12-13. And it states, without evidence, that licensing rival manufacturers pursuant to its FRAND obligation necessarily "would" lead to multi-level licensing, which it says is inefficient. *Id*. 44.

But Qualcomm's arguments contravene the basic premise of standard setting, which is that SSOs require FRAND commitments to make licensing efficient. And even if avoiding multi-level licensing would yield cost-savings to Qualcomm, Qualcomm has failed to explain why the efficiency of avoiding its voluntarily assumed FRAND obligation ought to count as a cognizable pro-competitive benefit let alone one that would outweigh the harm of preserving its monopoly. Qualcomm also does not explain why it is necessary to collect chipset rents on SEPs to avoid multi-level licensing, or why the free market would not reveal the most efficient licensing regime after the remedy is imposed.

Regardless, the trial court found Qualcomm's efficiency justifications to be non-credible and pretextual, 6ER1374, findings which are reviewed under a clearly erroneous standard and entitled to "special deference" after a bench trial. *McClure* *v. Thompson*, 323 F.3d 1233, 1241 (9th Cir. 2003). And as the FTC points out, Qualcomm has not challenged those findings on appeal. FTC Br. 35.

The absence of cognizable efficiencies, coupled with the FTC's direct pricing and output evidence, the alignment of rival and consumer interests, industry structure evidence, intent evidence, and economic theory all more than support the district court's reasonable inferences from fact-finding on the question of anticompetitive effect.

Qualcomm calls these inferences "logical leaps," but drawing logical economic conclusions from market facts in antitrust cases is routine and necessary. *See Continental Ore*, 370 U.S. at 700-01 (where "different inferences might reasonably be drawn … it is the [fact-finder] which weighs the contradictory evidence and inferences and draws the ultimate conclusion as to the facts" (internal quotation omitted)); *cf. Kodak*, 504 U.S. at 468-69; *Aspen Skiing*, 472 U.S at 604; *see also United States v. Elliott*, 322 F.3d 710, 715 (9th Cir. 2003) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."). And "[t]he easiest case is conduct that clearly injures rivals and has no business justification." Areeda & Hovenkamp, *supra*, ¶651d2, at 81 ("In that case consumer harm can be inferred from the injury to competitors itself"; "About the best that can be said for such an action is that it might fail and result in no harm at all, but in no case will it produce a social benefit.").

III. QUALCOMM MAKES A CATEGORY ERROR IN COMPARING THIS CASE TO PRICE-BASED MONOPOLIZATION CLAIMS

Qualcomm also argues that the Court should view this case as though it were analogous to predatory pricing, emphasizing that the shifting of a portion of the all-in price from chipsets onto SEP licenses can result in a nominal lowering of the chipset price. It urges the court to adopt stricter standards than the traditional rule of reason requires for fear of chilling procompetitive price reductions. *E.g.*, Q. Br. 38-39, 61-62, 73.

Qualcomm's argument fails because, among other reasons, it purports to locate the anticompetitive effect of Qualcomm's conduct in the amount Qualcomm charges for its SEP royalty, rather than in the fact that the royalty imposes a tax on rivals' sales. *E.g.*, Q. Br. 37 ("At bottom, the Court concluded that … prices are too high"). But Qualcomm can label the challenged conduct as "price-based" only in the most facile sense—that it has an impact on prices, like any antitrust violation. Here Qualcomm's higher SEP royalties are a *consequence* of imposing a tax that only affects rivals, and they serve as the mechanism for imposing it. The elevated royalties are evidence of an anticompetitive effect, not the anticompetitive effect itself.

"There are two overarching law and economics paradigms for analyzing exclusionary conduct in antitrust—predatory pricing and raising rivals' costs (RRC) foreclosure." Salop, *Raising Rivals' Cost Foreclosure Paradigm*, *supra*, at 371;

Gavil, *supra*, at 14-15 (explaining that difference is former paradigm presumes a "two-step process" where profits are first sacrificed and later recouped). This Court recognizes both. *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1478 (9th Cir. 1997) (RRC foreclosure constitutes an antitrust violation); *Cascade Health Sols*, 515 F.3d at 898 (pricing below cost with a probability of recoupment constitutes an antitrust violation).

"Sometimes the choice of paradigm is obvious." Salop, *Raising Rivals' Cost Foreclosure Paradigm*, *supra*, at 371-73 (explaining why *Conwood v. U.S. Tobacco Co.*, 290 F.3d 768, 776–79 (6th Cir. 2002), was obviously RRC foreclosure and *Utah Pie Co. v. Cont'l Baking*, 386 U.S. 685, 697 (1967), was obviously predatory pricing). "However, other conduct may not be so obvious." *Id*. (discussing "conditional pricing practices," whereby firms reduce their all-in price in exchange for exclusivity, and concluding that some fit the predatory pricing paradigm but most fit the RRC foreclosure paradigm).

The Third Circuit grappled with choosing the proper paradigm in the context of loyalty rebates in *ZF Meritor,* 696 F.3d at 254. Much like Qualcomm here, Eaton argued that "principles from the predatory pricing case law apply in this case because Plaintiffs' claims are, at their core, no more than objections to Eaton offering prices[.]" *Id*. at 273.

ZF Meritor argued that competitive harm was not primarily caused by "the exclusionary effect of Eaton's prices," but rather by the effect of "block[ed] customer access to [rivals'] products, thereby ensuring that [rivals] would be unable to build enough market share to pose any threat to Eaton's monopoly." *Id*. at 277; *see* 6ER1279 (Qualcomm's "tactics … generally result in exclusivity" and "enable Qualcomm to continue to collect its unreasonably high royalty rates on rivals' chips").

The Third Circuit identified the proper question as whether "price is the clearly predominant mechanism of exclusion." 696 F.3d. at 275. The court held it was not. Although the court "recognize[d] that Eaton's rebates were *part of* Plaintiffs' case," it found this was not a case where "the defendant's pricing itself operated as the exclusionary tool." *Id*. at 277, 279 (emphasis added). Rather, "other firms may be driven out not because they cannot compete on a price basis, but because they are never given an opportunity to compete, despite their ability to offer products with significant customer demand." *Id*. at 281; *see also LePage's*, 324 F.3d at 151, 154 (distinguishing predatory pricing claims, which require proof of below-cost prices, from "pricing practices" like bundled rebates that "effectuat[e] exclusive dealing arrangements because of the way in which they [are] structured").

This case is far easier than *ZF Meritor*. Whereas *ZF Meritor* at least facially involved discounts, which often benefit consumers, this case involves surcharges, which make products more expensive and only tend to make consumers worse off. Indeed, *amici* are unaware of any case in which the predatory pricing paradigm has been applied to conduct that increased prices to consumers, as the surcharge did here. 6ER1349, 6ER1351, 6ER1364, 6ER1370, 6ER1381, 6ER1394. The animating concern that prompted the Supreme Court to adopt a price-cost test for predatory pricing—fear that it might harm consumer welfare by discouraging discounting—is absent. *See generally Brooke Group. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

Qualcomm's efforts to define the operative anticompetitive effect as the high royalty in the licensing market rather than raised entry barriers in the chipset market are further belied by the fact that Qualcomm's scheme has exclusionary tendencies without regard to the amount of the royalty. The magnitude of Qualcomm's surcharge bears only the degree of anticompetitive harm caused, not its unfailingly anticompetitive nature.

Recall the hypothetical illustration, *supra*, comparing Qualcomm's conduct to competition on the merits. The illustration (reproduced again here) shows Qualcomm using the combined effects of the NLNC policy, SEP license, and exclusivity arrangements to impose an elevated royalty ($15) that taxes only rivals, and effectively raises rivals' all-in costs ($31), forcing it to match Qualcomm's monopoly price ($30):

	Competition on the Merits		No-License, No-Chips Policy	
	Qualcomm	Competitors	Qualcomm	Competitors
Modem Chip Price	$25	$16	$25	$16
Qualcomm Royalty	$5	$5	***$15***	***$15***
Qualcomm Exclusivity Rebate	$0	$0	$10	$0
All-In Price	$30	$20	***$30***	***$30***[7]

Now consider another illustration, which shows Qualcomm charging a higher nominal chip price ($30) and reducing its SEP royalty accordingly ($10):

	Competition on the Merits		No-License, No-Chips Policy	
	Qualcomm	Competitors	Qualcomm	Competitors
Modem Chip Price	$25	$16	***$30***	$16
Qualcomm Royalty	$5	$5	***$10***	***$10***
Qualcomm Exclusivity Rebate	$0	$0	$10	$0
All-In Cost	$30	***$21***	$30	***$26***

Notwithstanding the reduced royalty, competition is still seriously injured, because the market price is artificially prevented from falling past $26 to more closely approach the competitors' $21 price under competition on the merits.

Qualcomm's argument fails because, as these illustrations show, the amount of the surcharge has no bearing on the exclusionary nature of the restraint. The tax

[7] *See supra* note 3.

can keep changing, but its anticompetitive tendency remains the same. Qualcomm's conduct thus fits the RRC foreclosure paradigm and should be reviewed under the rule of reason, not a heightened standard fit for predatory pricing claims.

CONCLUSION

For all of the foregoing reasons, the district court's opinion should be affirmed.

Respectfully submitted,

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Dated: November 29, 2019