Nos. 19-16122

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION,

Plaintiff-Appellee,

v.

QUALCOMM INCORPORATED,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of California
The Honorable Lucy H. Koh (No. 5:17-cv-00220-LHK)

Brief of *Amicus Curiae* Open Markets Institute in Support of Plaintiff-Appellee

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INTEREST OF AMICUS CURIAE[1]

The Open Markets Institute (OMI) is a non-profit organization dedicated to promoting fair and competitive markets. It does not accept any funding or donations from for-profit corporations. Its mission is to safeguard our political economy from concentrations of private power that undermine fair competition and threaten liberty, democracy, and prosperity. OMI regularly provides expertise on antitrust law and competition policy to Congress, federal agencies, courts, journalists, and members of the public.

SUMMARY OF ARGUMENT

The Sherman Act bans monopolizing, attempting to monopolize, and conspiring to monopolize markets. Section 2 of the statute, "designed to curb the excesses of monopolists and near-monopolists, is the equivalent in our economic sphere of the guarantees of free and unhampered elections in the political sphere." *LePage's Inc. v. 3M*, 324 F.3d 141, 169 (3d Cir. 2003) (en banc).[2] *See also United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972) (Marshall, J.)

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[1] The parties consent to the filing of this brief. No counsel for any party authored this brief in whole or part. Apart from *amicus curiae*, no person contributed money intended to fund the brief's preparation and submission.

[2] "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony." 15 U.S.C. § 2.

("Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise."). The Sherman Act prohibits actual and potential monopolists from pursuing "the willful acquisition or maintenance of that power." *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966).

In a meticulous opinion, the district court found Qualcomm liable for monopolizing and restraining trade in the market for wireless modem chips and crafted a remedy to stop Qualcomm's exclusionary conduct, cure the effects of Qualcomm's illegal practices, and prevent their recurrence in the future. The court found that Qualcomm engaged in, among other exclusionary practices, an improper refusal to deal by declining to license its standard essential patents to rival chip makers. This was a repudiation of voluntary promises Qualcomm had made to standard setting bodies during the development of wireless standards. In order to secure the inclusion of its technology in the relevant technical standards, Qualcomm had pledged to offer licenses on fair, reasonable, and non-discriminatory (FRAND) terms to all comers. On finding Qualcomm liable for monopolization, the court prohibited Qualcomm from engaging in exclusive dealing and related practices with customers and ordered Qualcomm to license its standard essential patents on FRAND terms to its rivals. The district court's decision should be affirmed in its entirety.

The Sherman Act, as interpreted by the courts, prohibits actual and would-be monopolists from using their market dominance, superior financial power, or tortious or unethical practices to exclude and handicap rivals. Importantly, conduct undertaken by a monopolist can be illegal even if the same conduct is benign when undertaken by a firm without significant market power. *See Eastman Kodak Co. v. Image Tech. Services, Inc.*, 504 U.S. 451, 488 (1992) (Scalia, J., dissenting) (“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.”); *LePage’s*, 324 F.3d at 151–52 (“[A] monopolist is not free to take certain actions that a company in a competitive (or even oligopolistic) market may take, because there is no market constraint on a monopolist's behavior.”).

The courts have long held that deception can be the basis for a monopolization claim. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988); *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 176–78 (1965); *United States v. Microsoft Corp.*, 253 F.3d 34, 76–77 (D.C. Cir. 2001) (en banc). Through false statements to customers and other market participants, firms can damage the reputation of rivals and marginalize them and thereby obtain or maintain monopolistic control of a market. Given the lack of any offsetting public benefits from the dissemination of false information, deception can be actionable under the Sherman Act, as well as consumer protection and other laws. Maurice E. Stucke, *How Do (and Should) Competition Authorities Treat a Dominant Firm's Deception?*, 63 SMU L. Rev. 1069, 1072 (2010).

The Supreme Court has held that deception in the standard setting context can give rise to liability for monopolization. A major standard setting body and its agents can "affect the destinies of businesses and thus [have] the power to frustrate competition in the marketplace." *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 571 (1982). Because of the risk of collusion and exclusion in standard setting bodies, "private standard-setting by associations comprising firms with horizontal and vertical business relations is permitted at all under the antitrust laws only on the understanding that it will be conducted in a nonpartisan manner offering procompetitive benefits." *Allied Tube*, 486 U.S. at 506–07 (1988). Making false statements about a rival product seeking standard certification can give rise to Sherman Act liability (on both restraint of trade and monopolization grounds). *Hydrolevel*, 456 U.S. at 556.

Deception in the standard setting context can be especially pernicious. Because a standard can "eliminate[] alternative technologies[,]" *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 314 (3d Cir. 2007), deception during the standard selection stage can permit a firm to acquire a durable monopoly and inflict lasting harm on the public.

A monopoly's repudiation of its commitment to license standard essential patents on FRAND terms following the adoption and commercialization of a technical standard is a species of deception. In addition to constituting an improper refusal to deal as the district court concluded, such conduct amounts to a bait and switch—inducing the standard setting body's reliance by making a promise and later reneging on this promise. It is qualitatively different from competition on the merits, such as offering a superior product. *Microsoft*, 253 F.3d at 62. Indeed, this deception is a form of cheap exclusion—conduct that costs little to the offender and has no redeeming features. Susan A. Creighton et al., *Cheap Exclusion*, 72 Antitrust L.J. 975, 977, 989 –90 (2005). As such, firms that deceive a standard setting organization to obtain a monopoly can violate the Sherman Act. *Broadcom*, 501 F.3d at 314.

Once they have found liability in an antitrust case, district courts should fashion injunctive relief to advance three principal aims. They should stop the illegal conduct, restore competition in the restrained or monopolized markets, and prevent similar lawbreaking by the offender going forward. Indeed, the government has an affirmative obligation to obtain effective relief. *See F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 170 (2004) ("A

Government plaintiff, unlike a private plaintiff, must seek to obtain the relief necessary to protect the public from further anticompetitive conduct and to redress anticompetitive harm. And a Government plaintiff has legal authority broad enough to allow it to carry out this mission."). As the Supreme Court has recognized, effective remedies are critical following the finding of antitrust liability. *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 323 (1961).

Arguments for, or against, a particular remedy should be raised before the district court. *International Salt Co. v. United States*, 332 U.S. 392, 400–01 (1947), *overruled on other grounds by Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006). On appeal, the district court's choice of remedies is entitled to deference and should only be vacated for abuse of discretion. *E. g.*, *Maryland & Virginia Milk Producers Assn. v. United States*, 362 U.S. 458, 473 (1960); *United States v. National Lead Co.*, 332 U. S. 319, 334–35 (1947).

ARGUMENT

I. The Sherman Act Prohibits Exclusionary, Predatory, and Other Unfair Practices That Establish, Maintain, or Extend a Monopoly

The Sherman Act prohibits monopolizing, attempting to monopolize, and conspiring to monopolize markets. Section 2 of the statute is "the provision of the antitrust laws designed to curb the excesses of monopolists and near-monopolists."

LePage's Inc. v. 3M, 324 F.3d 141, 169 (3d Cir. 2003) (en banc).[3] The law prohibits actual and potential monopolists from "the willful acquisition or maintenance of that power." *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966). As a leading antitrust scholar has written:

> Instead of forcing the parties and the lower courts to ramble through the wilds of economic theory, the legislative intent of section 2 of the Sherman Act is to proscribe specific "means which make it impossible for other persons to engage in fair competition." Maurice E. Stucke, *Should the Government Prosecute Monopolies?*, 2009 U. Ill. L. Rev. 497, 535 (quoting 21 Cong. Rec. 3152 (1890)).

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[3] "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony." 15 U.S.C. § 2. The Supreme Court described the grand vision of the antitrust laws as follows:

> Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster. *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972) (Marshall, J.).

At the same time, the statute permits firms to compete through product improvement even if this conduct results in or maintains a monopoly. *Grinnell*, 384 U.S. at 570–71.

Congress, in enacting the Sherman Act, recognized the distinction between growth through unfair methods versus growth through fair methods. It aimed to proscribe the former as monopolization and permit the latter as fair and beneficial competition on the merits. 21 Cong. Rec. 3151–52 (1890) (discussion among Senators Kenna, Edmunds, and Hoar on permissible versus impermissible acquisition of monopoly involving a hypothetical dealer of shorthorn cattle).[4]

The Sherman Act, as interpreted by the courts, prohibits actual and would-be monopolists from using their market dominance, superior financial power, or tortious or unethical practices to exclude and handicap rivals. Importantly, conduct undertaken by a monopolist can be illegal even if the same conduct is benign when undertaken by a firm without significant market power. *See Eastman Kodak Co. v. Image Tech. Services, Inc.*, 504 U.S. 451, 488 (1992) (Scalia, J., dissenting)

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[4] Senator Hoar stated, "I suppose, therefore, that the courts of the United States would say in the case put by the Senator from West Virginia that a man who merely by superior skill and intelligence, a breeder of horses or raiser of cattle, or manufacturer or artisan of any kind, got the whole business because nobody could do it as well as he could was not a monopolist, but that it involved something like the use of means which made it impossible for other persons to engage in fair competition, like the engrossing, the buying up of all other persons engaged in the same business." 21 Cong. Rec. 3152 (1890).

("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."); *LePage's*, 324 F.3d at 151–52 ("[A] monopolist is not free to take certain actions that a company in a competitive (or even oligopolistic) market may take, because there is no market constraint on a monopolist's behavior.").

First, under the Sherman Act, monopolists are not permitted to use their market dominance to perpetuate or extend their power. The exercise of monopoly power in an exclusionary manner can take several forms. A monopolist can coerce firms into accepting terms that exclude or marginalize rivals or simply refuse to deal with rivals as a means of handicapping their ability to compete.

Consider the Sherman Act's restriction on exclusive dealing by a monopolist. A monopolist can impose exclusivity on customers, distributors, and suppliers and use its power to marginalize competitors. Steven C. Salop, *Economic Analysis of Exclusionary Vertical Conduct: Where Chicago Has Overshot the Mark*, *in* How the Chicago School Overshot the Mark 141, 150 (Robert Pitofsky ed., 2008). As such, a monopolist cannot use exclusivity with customers, distributors, or suppliers to foreclose or impair rivals and entrench its monopoly. *McWane, Inc. v. FTC*, 783 F.3d 814, 840–42 (11th Cir. 2015); *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 286–89 (3d Cir. 2012); *United States v. Dentsply*

International, Inc., 399 F.3d 181, 191–97 (3d Cir. 2005). Through exclusivity with distributors, a monopolist can block or restrict rivals' access to customers and hinder them from competing on price and other dimensions. *See, e.g.*, *McWane*, 783 F.3d at 839 ("[T]he record evidence suggests that [McWane's exclusivity program] stunted the growth of Star—McWane's only rival in the domestic fittings market—and prevented it from emerging as an effective competitor who could challenge McWane's supracompetitive prices.").

Similarly, monopolists cannot use their control of an essential input to cripple competition in their own market or an adjacent market. While firms have broad freedom to decide with whom to deal, this right is qualified in the case of a monopolist because of its extraordinary power in the market. *Lorain Journal Co. v. United States*, 342 U.S. 143, 155 (1951). *See also United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) ("*In the absence of any purpose to create or maintain a monopoly*, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal[.]") (emphasis added). A monopolist cannot refuse to deal with a rival as a means of excluding it from a market. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 610–11 (1985).

Second, the Sherman Act prohibits monopolists from maintaining or acquiring their dominance through their superior financial power alone. An actual or aspiring monopolist *cannot* use its advantageous access to finance to price its products below the cost of production as a means of driving out rivals from the market. Christopher R. Leslie, *Predatory Pricing and Recoupment*, 113 Colum. L. Rev. 1695, 1717–18 (2013). Under the Supreme Court's current interpretation of the Sherman Act, corporations cannot resort to below-cost pricing that threatens to create a dangerous probability of recouping this upfront loss through greater market power in the future. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222–24 (1993). *See, e.g.*, *Spirit Airlines, Inc. v. Northwest Airlines, Inc.*, 431 F.3d 917, 950 (6th Cir. 2005) ("The trier of fact could reasonably find that Northwest recouped any losses from its predatory pricing quickly after Spirit left these routes. . . . [U]pon Spirit's exit, Northwest increased its prices on these routes to a multiple of seven from its prices during Spirit's presence.").

Third, the Sherman Act bars monopolists from using a panoply of tortious or unethical acts to preserve or acquire their power. Such acts can be a form of "cheap exclusion"—conduct that involves minimal or no cost to the monopolist and lacks any redeeming qualities. Susan A. Creighton et al., *Cheap Exclusion*, 72 Antitrust L. J. 975, 977, 989–90 (2005). A monopolist cannot acquire or extend its dominance by engaging in widespread industrial sabotage or other acts of property destruction. *Conwood Co. v. U.S. Tobacco Co.*, 290 F.3d 768, 787–88 (6th Cir. 2002); *Byars v. Bluff City News Co.*, 609 F.2d 843, 854 n.30 (6th Cir. 1979). For example, the National Cash Register Company—a prominent monopolist a century ago—maintained its monopoly, in part, through acts of sabotage against the machines of rivals. Kenneth P. Brevoort & Howard P. Marvel, *Successful Monopolization Through Predation: The National Cash Register Company*, *in* Antitrust Law and Economics 85 (John B. Kirkwood ed., 2004). Among other forms of tortious or unethical exclusionary conduct, deception can be the basis for antitrust liability. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988); *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 176–78 (1965); *United States v. Microsoft Corp.*, 253 F.3d 34, 76-77 (D.C. Cir. 2001) (en banc).

Even as the Sherman Act prohibits monopolists from acquiring, maintaining, or extending their power through exclusionary, predatory, and other unfair methods, it allows them to compete through non-predatory price cutting and product improvements. Monopolists are, in general, free to cut prices (so long as they remain above cost), improve their products, and invest in plants and research and development. *See Grinnell*, 384 U.S. at 570–71 ("The offense of monopoly under [Section 2] of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."); *United States v. Aluminum Co. of America*, 148 F.2d 416, 430 (2d Cir. 1945) (Hand, J.) ("A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry.").

II. Repudiating a Patent Licensing Pledge to a Standard Setting Body Can Be Deceptive and Constitute Illegal Monopolization

The repudiation of a commitment to license standard essential patents on fair, reasonable, and non-discriminatory (FRAND) terms can be illegal monopolization through deception. Since deception lacks *any* redeeming social or economic qualities or cognizable justifications, it is attacked through numerous statutes (such as the Lanham Act and FTC Act), common law torts (such as product disparagement and fraud), state laws, and as applicable here the federal antitrust laws when a firm deceives in order to attain or maintain its monopoly. The courts have long held that false statements and other forms of deception can give rise to liability for monopolization. The repudiation of a FRAND licensing commitment following the adoption and commercialization of a technical standard is a species of deception. This conduct constitutes a bait and switch, in addition to an improper refusal to deal, and can give rise to liability for monopolization.

A. Monopolization by Deception Is Actionable Under the Sherman Act

The courts have long held that deception can be the basis of a monopolization claim. Through false statements to customers and other market participants, firms can damage the reputation of rivals and marginalize them and thereby obtain or maintain monopolistic control of a market. Among other harms, deception can frustrate comparison shopping, induce consumers to buy inferior goods and services, and allow dishonest sellers to succeed at the expense of honest rivals. Maurice E. Stucke, *How Do (and Should) Competition Authorities Treat a Dominant Firm's Deception?*, 63 SMU L. Rev. 1069, 1073-74 (2010). Given the lack of any offsetting public benefits, deception is actionable under the Sherman Act, as well as consumer protection and other laws. *Id.* at 1072.

Unlike other forms of exclusionary conduct, deception has no theoretical benefits. Deception "lacks any redeeming ethical, moral, or economic justifications, and trust in the marketplace is paramount[.]" *Id. See, e.g., Microsoft*, 253 F.3d at 77 ("Unsurprisingly, Microsoft offers no procompetitive explanation for its campaign to deceive developers."). It is "harmful behavior in both public and private settings—behavior that unambiguously fails to enhance any party's efficiency, provides no benefits (short or long-term) to consumers, and in its economic effect produces only costs for the victims and wealth transfers to the firm(s) engaging in the conduct." Creighton et al., *supra*, at 982.

The Supreme Court has long proscribed monopolies from attaining, maintaining, or extending their power through deception. In the early years of the Sherman Act, the Court held that false statements and other deception can constitute illegal restraints of trade and monopolization under the Sherman Act. *Nash v. United States*, 229 U.S. 373, 376–78 (1913). The Court observed that the dissemination of false information had been prohibited under the common law before the enactment of the Sherman Act in 1890. *Id.* at 377–78.

In applying the principle against deception by dominant firms, the Supreme Court has held that the fraudulent procurement of a patent from the Patent and Trademark Office can constitute illegal monopolization. *Walker Process*, 382 U.S. at 176–78. The Court acknowledged that patents are special dispensations of public monopoly and stated, "A patent . . . is an exception to the general rule against monopolies and to the right to access to a free and open market." *Id.* at 177 (quoting *Precision Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806, 816 (1945)). Given the exceptional nature of patents, "the public [has] a paramount interest in seeing that patent monopolies spring from backgrounds free from fraud or other inequitable conduct and that such monopolies are kept within their legitimate scope." *Id.*

Two important appellate decisions on monopolization in the past 20 years involved allegations of exclusionary deception. The D.C. Circuit found Microsoft liable for monopolization for falsely telling Java developers that applications written for Windows would be compatible with other operating systems as well and thereby inducing the developers to write applications for Windows instead of rival operating systems. *Microsoft*, 253 F.3d 76–77. The Sixth Circuit affirmed a jury verdict against the dominant manufacturer of smokeless tobacco, in part, because it had deceived retailers about the popularity and quality its own as well as rival products and thereby discouraged stores from carrying competitor's items. *Conwood*, 290 F.3d at 785–91.

Other courts of appeals have also proscribed a monopolist's use of deception to acquire, maintain, or extend its dominance. This Court has held that a monopolist's false statements and omissions can give rise to liability under the Sherman Act. *American Professional Testing Service, Inc. v. Harcourt Brace Jovanovich Legal & Professional Publications, Inc.*, 108 F.3d 1147, 1152 (9th Cir. 1997). *See also In re Warfarin Sodium Antitrust Litigation*, 214 F.3d 395, 397, 402 (3d Cir. 2000) (holding that class plaintiffs had standing to sue DuPont to enjoin its dissemination of deceptive information about a rival generic drug to the public and medical providers). One court has held that "[f]alse, misleading and deceptive advertising" is "not fair competition" and, as such, is unreasonable for a monopolist to use under the Sherman Act. *International Travel Arrangers, Inc. v. Western Airlines, Inc.*, 623 F.2d 1255, 1268 (8th Cir. 1980). *See also West Penn Allegheny Health System, Inc. v. UPMC*, 627 F.3d 85, 109 (3rd Cir. 2010) (listing several forms of exclusionary conduct including "making false statements about a rival to potential investors and customers").

B. Monopolization by Deception Is of Particular Concern in the Standard Setting Context

The Supreme Court has also held that deception in the standard setting context can give rise to liability for monopolization. A major standard setting body and its agents can "affect the destinies of businesses and thus [have] the power to frustrate competition in the marketplace." *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 571 (1982). Because of the risk of collusion and exclusion in standard setting bodies, "private standard-setting by associations comprising firms with horizontal and vertical business relations is permitted at all under the antitrust laws *only on the understanding that it will be conducted in a nonpartisan manner offering procompetitive benefits*." *Allied Tube*, 486 U.S. at 506–07 (1988) (emphasis added).[5]

[5] The Supreme Court recognized the potentially exclusionary effects of standard certification in an earlier case as well. *See Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 659–60 (1961) ("The conspiratorial refusal to provide gas for use in the plaintiff's Radiant Burner(s) (because they) are not approved by [the American Gas Association] therefore falls within one of the

Consequently, the Court has held that false statements about the product for which a firm seeks standard certification can be the basis for a Sherman Act claim (on both restraint of trade and monopolization grounds). *Hydrolevel*, 456 U.S. at 556. If a firm uses the apparent authority of a standard setting organization to make false statements that exclude a rival, the standards body itself can be liable for the illegal exclusion. *Id.* at 577–78.[6]

Deception in the standard setting context can be especially pernicious. Because a standard can "eliminate[] alternative technologies[,]" *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 314 (3d Cir. 2007), deception during the standard selection stage can permit a firm to acquire a durable monopoly through unfair conduct and inflict lasting harms on the public.

C. Breaking a FRAND Commitment to a Standard Setting Body Is a Form of Monopolization by Deception

A monopoly's repudiation of its commitment to license standard essential patents on fair, reasonable, and non-discriminatory following the adoption and commercialization of a technical standard is illegal monopolization. In addition to

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classes of restraints which from their nature or character (are) unduly restrictive, and hence forbidden by both the common law and the statute.") (internal quotes omitted).

[6] In another case, the Supreme Court held that a firm's opportunistic and unethical conduct before a standard setting body can be the basis for liability under Section 1 of the Sherman Act. *Allied Tube*, 486 U.S. at 492.

constituting an improper refusal to deal as the district court concluded, such conduct amounts to a bait and switch that violates the Sherman Act. It is qualitatively different from competition on the merits, such as offering a superior product.

Technical standards facilitate interoperability and allow manufacturers, large and small, to produce compatible products. Jay P. Kesan & Carol M. Hayes, *FRAND's Forever: Standards, Patent Transfers, and Licensing Commitments*, 89 Ind. L.J. 231, 237 (2014). Standards, such as Wi-Fi and 4G, are foundational to the modern digital economy. *See* George S. Cary et al., *The Case for Antitrust Law to Police the Patent Holdup Problem in Standard Setting*, 77 Antitrust L.J. 913, 914 (2011) ("Without industry standards, much of what we take for granted—such as being able to access the Internet from a wide array of networking devices—would not be possible.").

The potential risks and costs of standard setting cannot be ignored, however. As the Supreme Court has acknowledged, standard setting heightens the risk and harm of exclusionary conduct. *Hydrolevel*, 456 U.S. at 571. The threat of exclusionary and opportunistic conduct is real because "[a]greement on a product standard is, after all, implicitly an agreement not to manufacture, distribute, or purchase certain type of products." *Allied Tube*, 486 U.S. at 500. A successful standard "eliminates alternative technologies." *Broadcom*, 501 F.3d at 314.

Patent holdup is one monopolistic threat arising from standard setting. Once a standard is widely adopted and commercialized, manufacturers of both consumer products and components will generally tailor their products so that they comply with public rules on health and safety and are interoperable with existing devices and infrastructure. Firms trying to circumvent an industry standard will face extraordinary challenges. To make products that can be widely used, implementers must comply with the standard, including any proprietary elements essential to practice the standard. Accordingly, owners of standard essential patents have a monopoly position because implementers *cannot* design around the patent once they have committed to and invested in manufacturing standard-compliant products. Jorge L. Contreras, *A Market Reliance Theory for FRAND Commitments and Other Patent Pledges*, 2014 Utah L. Rev. 479, 489. These patent owners can extract monopolistic royalties and exclude infringing products from the market through injunctions—power they did not have before the adoption of the standard when they faced competition from proprietary and non-proprietary technologies. *Rambus Inc. v. FTC*, 522 F.3d 456, 459 (D.C. Cir. 2008).

To guard against this threat, standard setting organizations often require potential owners of standard essential patents to license their patents on FRAND or royalty-free terms. Standards bodies, including the two organizations in which Qualcomm participated, commonly refuse to consider proprietary technologies if the owners do not commit to licensing the relevant patents on FRAND (or royalty-free, non-discriminatory) terms. Mark A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 Calif. L. Rev. 1889, 1906 (2002). Requiring upfront licensing pledges is an example of a safeguard "to prevent the standard-setting process from being biased by members with economic interests in restraining competition." *Allied Tube*, 486 U.S. at 509.

With FRAND licensing requirements, standard setting bodies and their members can evaluate and compare the features and approximate cost of technologies seeking inclusion in the standard. While the owner of a standard essential patent can possess monopoly power, a FRAND or other licensing requirement "constrain[s] the exercise of monopoly power." *Broadcom*, 501 F.3d at 312. For the owner of this patent, the voluntarily foregone monopoly royalties can often be more than made up through fair, non-discriminatory royalties paid by manufacturers on countless standard-compliant products and components. Cary et al., *supra*, at 920. In other words, for the owner of a patent incorporated into a standard in exchange for a FRAND licensing pledge, the gain in royalty volumes can more than offset the reduction in unit-specific royalty margins.

Once a standard is commercialized, a standard essential patent owner's breaking of a FRAND commitment, whether by demanding monopolistic royalties or refusing to license certain firms,[7] can constitute illegal exclusion by deception. Standard setting organizations often include a patented technology in a standard on the reliance of the patent owner's FRAND or other licensing pledge. Kesan & Hayes, *supra*, at 281–82. A patent owner that secures inclusion in a standard through a FRAND licensing commitment and subsequently breaks this pledge is engaging in a form of bait and switch. Robert P. Merges & Jeffery M. Kuhn, *An Estoppel Doctrine for Patented Standards*, 97 Calif. L. Rev. 1, 11–13 (2009).[8]

In a standard setting environment, this type of behavior is not only opportunistic and unethical but "harms the competitive process by obscuring the

[7] On a motion for summary judgment by the FTC, the district court correctly ruled that the relevant FRAND licensing commitments require Qualcomm (and other owners of standard essential patents) to license all comers, including modem chip makers. *FTC v. Qualcomm Inc.*, 2018 WL 5848999, *15 (N.D. Cal. 2018). A refusal to license a class, such as modem chip suppliers, "violates the non-discrimination obligation." *Id.* at *14.

In analyzing an almost identical intellectual property policy of another standard setting body, the Ninth Circuit concluded, "This language admits of no limitations as to who or how many applicants could receive a license ('unrestricted number of applicants') or as to which country's patents would be included ('worldwide,' 'the patented material necessary')." *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 884 (9th Cir. 2012).

[8] In a related practice with similar effects to bait-and-switch licensing pledges, a firm intentionally conceals the relevant patents it owns during the standard setting process. If the adopted standard reads on these undisclosed patents, the patentee sues manufacturers of standard-compliant products for monopolistic royalties and threatens to obtain injunctions to exclude their products from the market. This practice has been dubbed a "snake-in-the-grass" strategy. Merges & Kuhn, *supra*, at 13–15.

costs of including proprietary technology in a standard and increasing the likelihood that patent rights will confer monopoly power on the patent holder." *Broadcom*, 501 F.3d at 314. By making and breaking a FRAND pledge following the adoption of a standard, an owner of a standard essential patent can "affect the destinies of businesses and . . . frustrate competition in the marketplace." *Hydrolevel*, 456 U.S. at 571. This behavior undermines trust in the fairness of standard setting activities and the credibility of commitments made in this context and can deter broad participation in future standard setting endeavors. D. Bruce Hoffman & Joseph J. Simons, *Known Unknowns: Uncertainty and Its Implication for Antitrust Policy and Enforcement in the Standard-Setting Context*, 57 Antitrust Bull. 89, 103 (2012).

Deception in the standard setting context can help a firm attain monopoly power. This conduct qualifies as "willful" conduct proscribed under established Supreme Court precedent. *Grinnell*, 384 U.S. at 570. Indeed, it is a form of cheap exclusion—conduct that costs little to the offender and has no redeeming features. As such, firms that use false licensing pledges to a standard setting organization to obtain monopoly power can violate the Sherman Act. *Broadcom*, 501 F.3d at 314.

III. District Courts Have an Obligation to Fashion Effective Antitrust Relief to Remedy and Prevent Future Monopolization by the Offender

In antitrust cases, district courts should fashion injunctive relief to advance three principal aims. The courts should stop the illegal conduct, restore competition in the restrained or monopolized markets, and prevent similar lawbreaking by the offender going forward. Indeed, the government has an affirmative obligation to obtain effective relief. *See F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 170 (2004) ("A Government plaintiff, unlike a private plaintiff, must seek to obtain the relief necessary to protect the public from further anticompetitive conduct and to redress anticompetitive harm. And a Government plaintiff has legal authority broad enough to allow it to carry out this mission."). As the Supreme Court has recognized, effective remedies are critical. *See United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 323 (1961).[9] The district court is the proper venue for arguing for, or against, specific remedies. On appeal, the district court's

[9] As the Supreme Court has stated:

> [I]t would be a novel, not to say absurd, interpretation of the Anti-Trust Act to hold that after an unlawful combination is formed and has acquired the power which it has no right to acquire, namely to restrain commerce by suppressing competition, and is proceeding to use it and execute the purpose for which the combination was formed, it must be left in possession of the power that it has acquired, with full freedom to exercise it. *Northern Securities Co. v. United States*, 193 U.S. 197, 357 (1904).

decision on remedies is entitled to deference and should only be vacated for abuse of discretion.

The district court's injunctive relief should advance three broad aims. First, it should stop the anticompetitive conduct at issue. *See Grinnell*, 384 U.S. at 577 ("We start from the premise that adequate relief in a monopolization case should put an end to the combination[.]"). Through its injunction, the court should stamp out the illegal conduct. *See, e.g.*, *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295, 346–47 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954) ("Where a defendant has monopolized commerce in violation of § 2, the principal objects of the decrees are to extirpate practices that have caused or may hereafter cause monopolization[.]").

Second, the court's relief should restore competition in the restrained or monopolized markets. The injunction should seek to undo the effects of the collusive, exclusionary, or predatory conduct. The court's relief should "pry open to competition a market that has been closed by defendants' illegal restraints." *Ford Motor Co. v United States*, 405 U.S. 562, 577–78 (1972) (citation omitted). In an antitrust case, the relief must "restore competition." *du Pont*, 366 U.S. at 326. *See also Grinnell*, 384 U.S. at 577 (stating that "adequate relief in a monopolization case should . . . break up or render impotent the monopoly power.”). The remedy should “cure the ill effects of the illegal conduct[.]” *Ford*, 405 U.S. at 575 (citation omitted).

Third, the remedy should prevent a recurrence of similar practices in the future. The offender should be barred from engaging in restraints of trade or exclusionary practices again. *See United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953) (“The purpose of an injunction is to prevent future violations”). *See also National Society of Professional Engineers v. United States*, 435 U.S. 679, 697 (1978) (“Having found the Society guilty of a violation of the Sherman Act, the District Court was empowered to fashion appropriate restraints on the Society's future activities both to avoid a recurrence of the violation and to eliminate its consequences.”) (citation omitted). Critically, the district court is not required to enjoin only the offending practice: it has the authority to prohibit similar and related conduct going forward too. *See International Salt Co. v. United States*, 332 U.S. 392, 400 (1947), *overruled on other grounds by Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006) (“When the purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed.”).

To effectuate the aims of the Sherman Act, the Supreme Court has directed district courts to craft remedies that are broad enough to be effective. *See National Society of Professional Engineers*, 435 U.S. at 697–98 (“In fashioning a remedy, the District Court may, of course, consider the fact that its injunction *may impinge upon rights that would otherwise be constitutionally protected, but those protections do not prevent it from remedying the antitrust violations*.") (emphasis added); *United States v. Loew's Inc.*, 371 U.S. 38, 53 (1962), *overruled on other grounds by Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006) ("To ensure… that relief is effectual, otherwise permissible practices connected with the acts found to be illegal must sometimes be enjoined.").

District courts should be mindful of the risk that, by issuing an unduly narrow remedy, the result is "the Government has won a lawsuit and lost a cause." *du Pont*, 366 U.S. at 324 (citation omitted). Consequently, the Supreme Court directed district courts to strike as broadly as necessary for the remedy to be effective:

> A trial court upon a finding of a conspiracy in restraint of trade and a monopoly has the duty to compel action by the conspirators that will, so far as practicable, cure the ill effects of the illegal conduct, and assure the public freedom from its continuance. Such action is not limited to prohibition of the proven means by which the evil was accomplished, but may range broadly through practices connected with acts actually found to be illegal. *United States v. United States Gypsum Co.*, 340 U.S. 76, 88–89 (1950).

And when crafting remedies, district courts should apply the principle that “once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor.” *du Pont*, 366 U.S. at 334.

Arguments for, or against, particular remedies are directed to district judges rather than appellate courts. The Supreme Court has stated, “The framing of decrees should take place in the District rather than in Appellate Courts. They are invested with large discretion to model their judgments to fit the exigencies of the particular case.” *International Salt*, 332 U.S. at 400–01 (1947). An injunction should only be judged for whether “the relief represents a reasonable method of eliminating the consequences of the illegal conduct.” *National Society of Professional Engineers*, 435 U.S. at 698. A district court’s selection of injunctive relief is entitled to substantial deference. Accordingly, a district court’s choice of remedies should be affirmed in the absence of a showing of an abuse of discretion. *E. g.*, *Maryland & Virginia Milk Producers Assn. v. United States*, 362 U.S. 458, 473 (1960); *United States v. National Lead Co.*, 332 U. S. 319, 334–335 (1947); *United States v. Crescent Amusement Co.*, 323 U. S. 173, 185, 190 (1944).

CONCLUSION

The Court should affirm the district court's decision.

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Respectfully submitted,

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FOR THE NINTH CIRCUIT

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I hereby certify that on this date, I caused a true and correct copy of the foregoing to be served on counsel of record for all parties via ECF.

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