No. 19-16122

IN THE

United States Court of Appeals for the Ninth Circuit

FEDERAL TRADE COMMISSION,

Plaintiff-Appellee,

v.

QUALCOMM INCORPORATED, A DELAWARE CORPORATION,

Defendant-Appellant.

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

BRIEF OF *AMICUS CURIAE* ACT | THE APP ASSOCIATION IN SUPPORT OF APPELLEE

Amanda Tessar
PERKINS COIE LLP
1900 Sixteenth St, #1400
Denver, CO 80202-5255
Telephone: (303) 291.2357
Facsimile: (303) 291-2457
ATessar@Perkinscoie.com

Sarah E. Fowler
PERKINS COIE LLP
3150 Porter Dr.
Palo Alto, CA 94304
Telephone: (650) 838-4300
Facsimile: (650) 838-4350
SFowler@Perkinscoie.com

Corporate Disclosure Statement

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), *amicus curiae* ACT | THE APP ASSOCIATION certifies that it is not a corporation and has no stock. It therefore has no parent corporations or any publicly-held corporations that own 10% or more of stock.

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I. STATEMENT OF INTEREST[1]

Amicus curiae ACT | The App Association (the "Association") represents more than 5,000 small technology-development companies that create leading software and hardware solutions. The ecosystem the Association represents is valued at approximately $1.7 trillion and provides 5.9 million American jobs.[2] The Association is the leading global representative for the small-business innovator community on law and policy for standard-essential patents ("SEPs"). The Association cares deeply about wireless communication standards because they provide a baseline of functionality around which our members innovate, develop products, engage with customers, and create value for our industries and, ultimately, for consumers.

II. INTRODUCTION

As our world transitions to an increasingly connected global economy, with so-called "5G" and "Internet of Things" ("IoT") technologies now in the deployment stage, it has never been more critical to protect emerging markets and market participants from abusive practices relating to SEPs. It is a key mission of

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1 Both parties consent to the filing of this brief. Pursuant to FRAP 29(a)(4)(E), the Association certifies that its counsel authored this brief in whole, no party or party's counsel contributed money intended to fund preparing or submitting the brief, and no person—other than the Association and its members—contributed money that was intended to fund the preparation or submission of this brief.

2 *See, e.g.*, Online Platforms and Market Power, https://actonline.org/wp-content/uploads/Online-Platforms-and-Market-Power-Part-2-Innovation-and-Entrepreneurship-1.pdf.

the Association to represent the interests of innovators that develop, use, and deploy standardized technologies in next-generation products, while also respecting the rights and interests of SEP-holders to seek fair, reasonable, and non-discriminatory ("FRAND") royalties.

The Association is particularly concerned with protecting our members' ability (and legal right) to obtained standardized components that are fully licensed and readily usable, including for incorporation into downstream products, without further individualized transaction costs. The market reality is that there are *tens of thousands* of companies that incorporate and deploy wireless-enabled devices—but only a dwindling handful of suppliers of the cellular components for those devices. This combines to mean that FRAND licenses to a few companies could and would more efficiently capture all or nearly all the market for telecommunication-enabled devices than individualized licenses at the end-device level.

As the market continues its transition to 5G and IoT, all types of businesses and products—including small businesses with little familiarity with the technical details of telecommunications technologies—will incorporate and use wireless sensors and transmitters, including cellular chips, into their downstream devices. Industry "verticals" that have or very soon will adopt standardized wireless devices include medical, automotive, warehousing, household appliances, transportation, and energy, to name just a few examples.

Appellant's novel view that licenses are available only to "end-user" devices, rather than at the chip or component level, is contrary to the plain text of Appellant's FRAND commitments. Moreover, this view, if adopted, would undermine many of the reasons for, and efficiencies of, adopting wireless standards in the first instance. Appellant's approach would entail that "downstream" companies, including those that merely purchase and incorporate wireless components into their end products, must themselves become expert SEP licensing negotiators, skilled in evaluating complex cellular technologies, to operate their businesses. In short, Appellant's approach would require that warehouse managers, truck fleet operators, application developers, and a host of other similarly-situated individuals become responsible for evaluating tens of thousands of alleged SEPs and negotiating FRAND terms *as a condition to running their businesses*. Such an approach would badly damage incentives for such companies to deploy standardized technologies, to innovate on top of those technologies, and to extend U.S. leadership in the connected economy.[3] The district court correctly held that the clear text of the FRAND policies of ATIS and TIA do not admit of

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[3] The Association has direct experience with the deleterious effect of SEP abuses. For example, one of our members sought to develop a novel drone device (and associated software platform) for firefighting agencies, which would have enabled firefighters to monitor and address dangerous conditions. Concerns over after-the-fact SEP abuses ultimately swayed the member not to bring the product to market, however. In short, the company's inability to have certainty regarding product costs undermined an otherwise-innovative new business.

such absurd results.

The Association respectfully suggests that the far more efficient and rational interpretation of Appellant's FRAND commitment also happens to be the correct one. Innovative downstream companies, such as the Association's members, should be able to purchase and use fully-licensed components from their suppliers. That is the import of Appellant's FRAND promise.

As detailed below, at least four American courts (not counting the district court here) have noted the FRAND promise does *not* include secret, unstated exclusions limiting licenses to some slices of the market. Instead, the FRAND promises at issue here mean exactly what they say—*i.e.*, that a FRAND promisor must license to "all applicants" (TIA)[4] and to "applicants desiring to utilize the license for the purpose of implementing the standard" (ATIS).[5] The TIA and ATIS policies are simply not susceptible to Appellant's interpretation of only licensing to "some" applicants/licensees, but not others.

[4] Decl. of J. Milici in Support of FTC's Motion for Partial Summary Judgment on Qualcomm's SEP Licensing Commitments ("Milici Dec."), *FTC v. Qualcomm Inc.*, No. 5:17-cv-00220-LHK (N.D.Cal. Aug. 30, 2018), Ex. 1, ECF No. 792-2 ("TIA IPR Policy") ¶ 3.1.1(2)(b). TIA is unequivocal that refusals to license "competing modem-chip sellers" are prohibited; the TIA IPR Guidelines expressly note that "[a]n example of conduct that would constitute discrimination is a willingness to license all applicants *except for competitors of the licensor*." *Id.*, Ex. 30 ("TIA IPR Guidelines") ¶ 5 (emphasis added).

[5] *Id.*, Ex. 2 ("ATIS IPR Policy") at ¶ 10.4.2.

Appellant's current views are extreme—and inconsistent with Appellant's own prior interpretations of the meaning of the FRAND promise. Appellant itself, as recently as 2009, sued a rival chipmaker in federal court, claiming that the rival chipmaker had breached its FRAND promise by refusing to grant Appellant a license to the rival's SEPs for Appellant's own chips.[6] In a similar vein, Appellant represented to the industry and world in a 2008 federal court filing that it was willing to grant FRAND licenses to "any interested company."[7] In 2007, Appellant actively touted to investors that its own practice of requiring fully exhaustive licenses to SEPs for its own chip sales *benefitted* Appellant's customers.[8] And all of this followed statements by Qualcomm to investors in 2005, addressing whether Appellant would retain the ability to obtain SEP licenses

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6 Qualcomm Opp. to Broadcom Motion to Dismiss, *FTC v. Qualcomm Inc.*, No. SACV05-0467-JVS (C.D.Cal. Jan. 20, 2009), ECF No. 1606 (asserting violation of FRAND based on competing chipset manufacturer's refusal to license Qualcomm); *see also* Order Granting FTC's Motion for Partial Summary Judgment, No. 5:17-cv-00220-LHK (N.D.Cal. Nov. 6, 2018), ECF No. 931, at 22-23 (noting Appellant's 1990s-era claim that another SEP-owner had violated FRAND by refusing to license Appellant).

7 *Broadcom Corp. v. Qualcomm Inc.*, No. 05-3350 (D.N.J. Feb. 29, 2008), Qualcomm's Counterclaims, ¶¶ 25, 56, 61, 77, ECF No. 139 ("Qualcomm, which owns a large portion of the intellectual property covering CDMA technology, operates a pro-competitive licensing model, in which it offers licenses on fair, reasonable and non-discriminatory terms to any interested company.").

8 Qualcomm NY Analyst Day presentation, Nov. 14, 2007, https://actonline.org/wp-content/uploads/Altman-NY-Analyst-Day-see-p.-231.pdf ("Qualcomm chipset customers benefit directly from the exhaustive cross licenses that Qualcomm has negotiated which reduce their royalty cost.").

protecting Appellant's own chipsets from rivals' patents, that "no company should be utilizing its patents to try to keep somebody else from the marketplace."[9] What is good for the goose must also be good for the gander.

Finally, Appellant's suggestion that the district court erred in applying competition law in the context of a claim for breach of the FRAND obligation is misplaced. Appellant's argument that a breach of contract may not give rise to antitrust liability has been soundly rejected by this Court.[10] As this and other courts have noted, FRAND serves as a necessary protection and "bulwark" so that standard-setting processes—including the "whitelisting" and "blacklisting" of technologies inherent therein—do not run afoul of the competition laws.

Where the FRAND obligation is breached, such as by Appellant's refusal to license suppliers, these critical competition law protections are undermined. Indeed, according to one U.S. court that evaluated the public impact of Appellant's practices, there is "a real and palpable likelihood the National Security interests will be jeopardized" due to Appellant's *exclusion* of competitors, contrary to

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[9] L. Lupin (Qualcomm Executive Vice President and General Counsel) Comments (June 6, 2005), https://investorshub.advfn.com/boards/read_msg.aspx?message_id=6590048.

[10] *Vernon v. S. Cal. Edison Co.*, 955 F.2d 1361, 1368 (9th Cir. 1992) (rejecting argument "that antitrust liability may not be predicated on conduct which also happens to create a contract dispute").

Appellant's arguments on appeal.[11]

III. BACKGROUND AND CONTEXT: WHY ENFORCEMENT OF THE FRAND PROMISE MATTERS TO THE ASSOCIATION

The Association's interest in restricting SEP abuse is straightforward: in today's economy, businesses incorporate, use, and rely on wireless communications functionality in all sorts of ways, and it is imperative to a healthy marketplace and fair competition that licenses to those technologies remain available on FRAND terms to all market participants.

In general, the Association's members' supply chains for wireless technologies begin with the modem chip manufacturers, who make and sell the components enabling and embodying standardized functionality. In some cases, the chips supplied by those manufacturers may be incorporated directly into end-user devices (often referred to as "original equipment manufacturer" or "OEM" devices), such as mobile handsets. But, in other situations or industries, those modem chips are combined with other components by so-called "module manufacturers" as part of standard-compliant circuit boards or as "embedded modules," providing more of a "plug-and-play" approach for their customers. Such modules themselves may then be incorporated into an end device, such as a router or IoT application, or they may be further embedded into more complex

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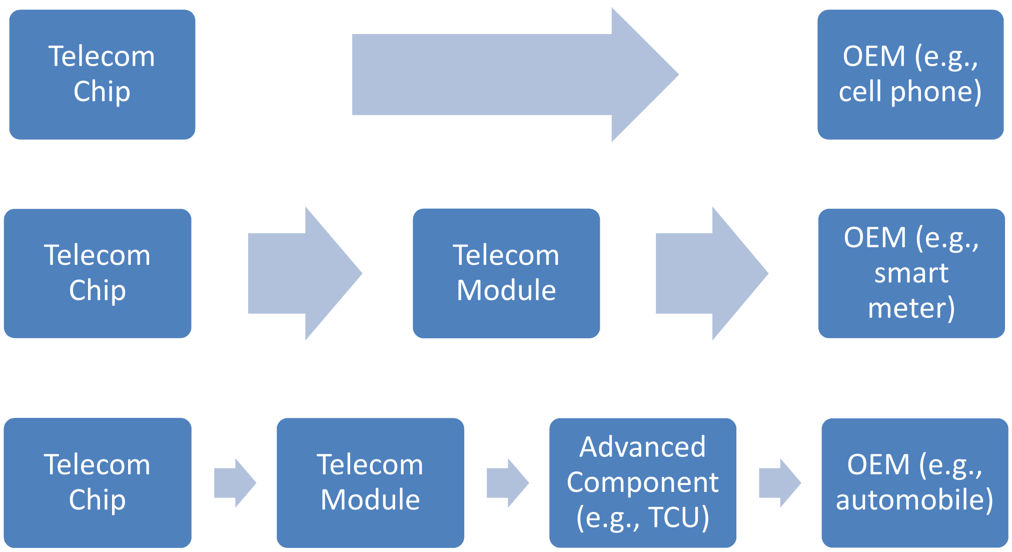
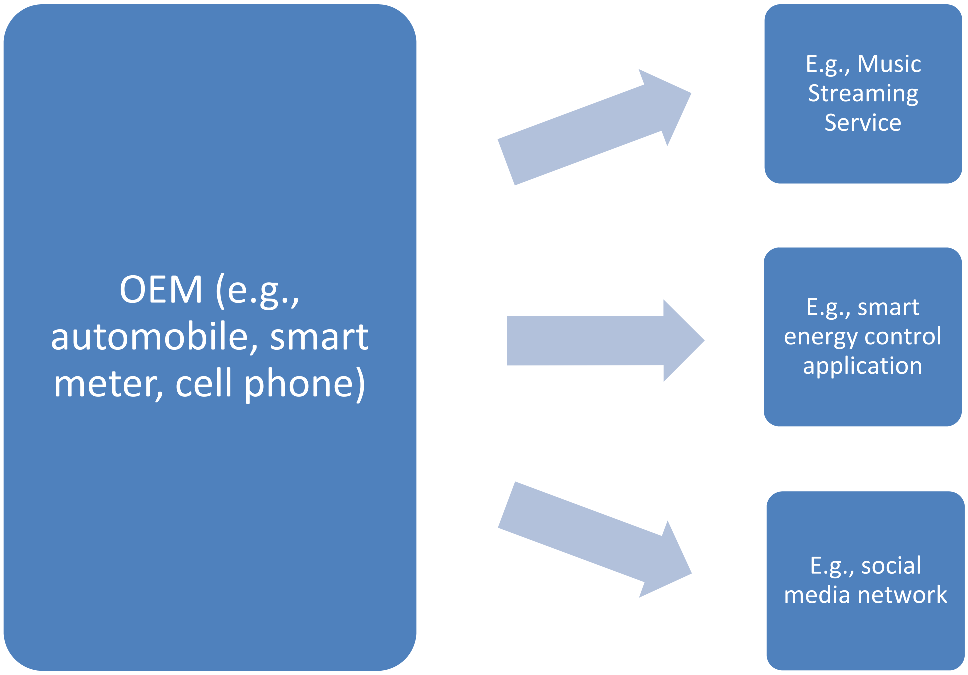
[11] *In re Certain Mobile Elec. Devices*, Inv. No. 337-TA-1065, ID, at 195-96 (October 30, 2018).

assembled devices. For example, an automotive telematics system, which incorporates a telecommunications module and is known as a telematics control unit or "TCU," provides users with data access for traffic, internet connectivity, and other useful applications. In turn, these more complex systems may then be further incorporated into an end device, such as a car. These various permutations, which often use identical telecommunications chips to provide cellular functionality, are shown below.



Critical for the Association, the standards ecosystem is not just about hardware. Rather, services or other industry users deploy, integrate, or build upon end/OEM devices in various ways, such as a software company that develops applications using mobile technologies for managing a warehouse or a retail business that uses telecommunication sensors and associated software applications to track inventory. In this way, the wireless chipsets enable communication standards for use in developing and facilitating OEM devices. The OEM devices themselves, in turn, can foster entire industries of further innovation.



Because component makers have particular expertise in standardized technologies, it is often most reasonable and practical for a downstream customer to rely on its upstream component maker(s) to negotiate and obtain any necessary SEP licenses. To take a particularly relevant example here, there have been only a small handful of modem chip suppliers in the telecommunications industry, so a few licenses among chip competitors could negate the need for individual licenses to the tens of thousands (or more) downstream companies that purchase and incorporate those modem chips into their end products. Likewise, suppliers that develop, manufacture, and sell the standardized components may be best positioned to evaluate patents covering those technologies and thus to negotiate regarding their validity, essentiality, and value. By contrast, a downstream company may have little or no expertise with the details of upstream wireless technologies and may therefore prefer to obtain fully-licensed components from the suppliers that design and manufacture those components.

Of course, in some cases, "downstream" companies such as OEMs or software service providers may seek to obtain their own SEP license. There can be various reasons for such business decisions, such as a preference to negotiate terms directly or to maintain an ability to use multiple suppliers regardless of each supplier's individual license status. The FRAND promise, made as part of participation in the standard-setting process, allows for *any* of these scenarios (and thus for the *market* to decide what is most efficient) by requiring the promisor to provide licenses to "applicants" without distinguishing, limiting, or carving out particular levels of the supply chain.

Contrary to Appellant's suggestion, this understanding of the FRAND obligation is entirely mainstream. For example:

- 50+ industry leaders and 70+ governmental and academic thought leaders have repeatedly banded together to voice views consistent with those here in a series of submissions to the entities such as the DOJ,[12] the

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[12] Multi-Association Letter to AAG Delrahim, http://www.ccianet.org/wp-content/uploads/2018/05/Multi-Assn-DOJ-White-Paper-053018.pdf; Industry Letter to AAG Delrahim, http://www.ccianet.org/wp-content/uploads/2018/01/Industry-Letter-to-DOJ-AAG.pdf; Letter to AAG Delrahim Regarding Speeches on Patents and Holdup,

FTC,[13] the Department of Commerce, and the USPTO.[14] These submissions included commentary that "[a] patentee's voluntary agreement to that bargain is not 'compulsory licensing.' Rather, it is a common feature of collaboration between industry participants to develop standards."[15]

- A recent workshop brought together 50+ companies that worked to document core principles for SEP-licensing, particularly for 5G.[16] These agreed-upon industry principles include that "[a] FRAND license should be made available to anybody that wants one to implement the relevant standard. Refusing to license some implementers is the antithesis of the FRAND promise. In many cases, upstream licensing can create significant efficiencies that benefit the patent holder, the licensee and the industry."[17]

- The companies and associations that have joined the Association in efforts to combat SEP abuses such as the refusal to license some industry participants represent *over $100B annually in R&D spending across a range of industries, own hundreds of thousands of patents (including SEPs), employ 50 million+ Americans, and contribute trillions of dollars to annual U.S. GDP*.[18]

In other words, in addition to being irrelevant given the clear language of the FRAND promise, it is also inaccurate to suggest that the obligation to license

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https://www.competitionpolicyinternational.com/wp-content/uploads/2018/05/DOJ-patent-holdup-letter.pdf.

13 Comments to FTC, https://www.ftc.gov/policy/public-comments/2018/08/20/comment-ftc-2018-0055-d-0031.

14 Comments to Department of Commerce and USPTO, http://actonline.org/wp-content/uploads/Multi-Stakeholder-Letter-re-DOJ-USPTO-Policy-Statement-042219.pdf.

15 Industry Letter to AAG Delrahim, *supra* n.12 at 2.

16 Core Principles and Approaches for Licensing of SEPs, CEN-CENELEC CWA 9500, ftp://ftp.cencenelec.eu/EN/News/WS/2019/SEP2/WS-SEP2-CWA95000-final-draft.pdf.

17 *Id*. at 9, 32-33.

18 Comments to Department of Commerce and USPTO, http://actonline.org/wp-content/uploads/Multi-Stakeholder-Letter-re-DOJ-USPTO-Policy-Statement-042219.pdf (citing figures).

suppliers is at odds with industry views. As discussed below, it is only recently that Appellant (and a few aligned, licensing-focused SEP owners) have sought to incorrectly claim that their own self-serving new views are the industry norm.

IV. REFUSAL TO LICENSE SUPPLIERS IS ANATHEMA TO FRAND

A. Consistent with Precedent, the District Court Correctly Rejected Appellant's Invitation to Read Hidden Exclusions into the TIA and ATIS Agreements

The FRAND commitment was not originally developed in the standard-setting context. Rather, obligations to license on reasonable and non-discriminatory terms were developed in the mid-20th century as a *market-access* remedy for anticompetitive conduct under American antitrust laws.[19] Notably, courts—including the U.S. Supreme Court—imposed requirements to license patents on reasonable terms to "all applicants" through remedial orders. *See, e.g.*, *Hartford Empire v. U.S.*, 323 U.S. 386, *modified by* 324 U.S. 570, 574 (1945) (imposing requirement to license "all applicants to make, use, or sell the patented machines at reasonable royalties").

It was not until later that the FRAND obligation was borrowed for use by

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[19] A detailed historical analysis is presented by noted FRAND academic Jorge Contreras in *A Brief History of FRAND: Analyzing Current Debates in Standard-Setting and Antitrust through a Historical Lens*, 80 Antitrust L.J. 39 (2015). Professor Contreras collects and discusses competition law cases imposing FRAND obligations, *id.* at 49-51, and how (beginning in about 1956) this caselaw-based licensing obligation migrated into a voluntary contractual commitment of American standards-setting bodies.

standard-setting organizations. These organizations adopted the FRAND approach of competition law so as to *proactively* address competitive risks associated with standard-setting (*i.e.*, the voluntary licensing promise mooted any need for *ex post* application of competition law-based licensing remedies). While the circumstances giving rise to the FRAND commitment are quite different for standard-setting (*e.g.*, they are voluntary for participants who wish to contribute technologies to be included in standards) than in the historical competition matters from which FRAND originally derives, the language of the particular commitments to license on reasonable terms has been identical or nearly so. Notably, in the historical matters, the Supreme Court and many lower courts regularly applied such FRAND obligations as market-access tools without accepting or applying unstated exceptions.[20]

As such, it is not surprising that this Court—when called upon to evaluate and apply FRAND licensing policies in 2012—found that an SEP-holder subject to FRAND obligations *cannot* refuse to license some applicants:

> A FRAND promise to "grant a license to an unrestricted number of applicants on a worldwide, non-discriminatory basis and on reasonable terms and conditions to use the patented material necessary … *admits of no limitations as to who or how many applicants could receive a license* …."[21]

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[20] Contreras, *supra* n.19 at 74 (collecting cases).

[21] *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 884 (9th Cir. 2012) (emphasis added). This decision evaluated SDO language quite similar to the TIA policy.

Lest there be any doubt, the Court repeated this holding a few years later, in 2015:

> To mitigate the risk that a SEP holder will extract more than the fair value of its patented technology, many SDOs require SEP holders to agree to license their patents on 'reasonable and non-discriminatory' or 'RAND' terms. Under these agreements, *an SEP holder cannot refuse a license to a manufacturer who commits to paying the RAND rate*.[22]

The Court, in *Microsoft*, clearly explained how and why FRAND includes a "requirement to negotiate licenses with *all seekers*."[23]

The Federal Circuit has also confirmed that the FRAND promise does not allow the party making the FRAND promise to refuse licenses. Specifically, in addressing the application of *Georgia-Pacific* factors in the context of SEPs under the IEEE FRAND policy, the court noted:

> [T]he licensor's established policy and marketing program to maintain his patent monopoly by not licensing others to use the invention [is not relevant for SEPs]. [...] *Because of [the] RAND commitment [...] it cannot have that kind of policy for maintaining a patent monopoly*."[24]

Additionally, in evaluating the FRAND policy of another telecommunication standard-setting organization, ETSI, a recent California district court decision

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But the TIA IPR policy is even more express that "*all* applicants" (¶ 3.1.1(2)(b)) are entitled to a license than the SDO policy addressed in *Microsoft*.

[22] *Microsoft Corp. v. Motorola, Inc.*, 795 F. 3d 1024, 1031 (9th Cir. 2015) (emphasis added).

[23] *Id.* (emphasis added).

[24] *Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1230 (Fed. Cir. 2014) (emphasis added).

found that ETSI's FRAND policy "plainly states that any willing licensee is entitled to license Qualcomm's intellectual property at a FRAND rate."[25]

These precedents are consistent with the practice and public positions of many standard-setting organizations. For instance, 3GPP (of which ATIS is a part) is the key industry organization for development of cellular standards, and 3GPP notifies its members, participants, and the public at large that all of its members' FRAND policies (including the ATIS policy at issue here) "require IPR holders to make licences available to *all third parties*."[26]

These cases and authorities are likewise consistent with general principles of California contract law even outside the context of FRAND. In short, California courts do not read unstated exclusions into contracts.[27]

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[25] *Apple Inc. v. Qualcomm, Inc.*, No. 3:17-cv-00108-GPC-MDD (S.D.Cal. Sept. 7, 2017), Dkt. 141, Order Denying Anti-Suit Injunction.

[26] *See* https://www.3gpp.org/contact/3gpp-faqs#L5 ("All Individual Members of 3GPP abide by the IPR policies of the [3GPP-member SDO] to which they belong; *all such policies are broadly similar … and require IPR holders to make licences available to all third parties*, whether or not they are 3GPP Individual Members, under fair, reasonable and non-discriminatory (FRAND) terms.") (emphasis added). Indeed, given *Apple*, *supra* n.25, and 3GPP's own statements about the effect of its members' (including ETSI's) IPR policies, Appellant's assertions about the need for "compatibility" among 3GPP-member patent policies (*e.g.*, Appellant's Opening Brief, at 137-138) would appear to *contradict* Appellant's position.

[27] *See, e.g., Nat'l Union Fire Ins. Co. v. Lynette C.*, 228 Cal. App. 3d 1073, 1079 (Cal. App. 1991) ("an insured" means "any insured under the policy"); *Gerdlund v. Elec. Dispensers Int'l*, 190 Cal. App. 3d 263, 273-74 (Cal. App. 1987) (contract providing for termination "at any time and for any reason" cannot have conditions added limiting the termination right to "any good

Appellant's invitation to disrupt all of these precedents should be declined. It should be no surprise to anyone, much less Appellant, that a FRAND promise does not include unstated exclusions for companies at some levels of the supply chain.

B. The District Court's Rejection of Hidden Exclusions to FRAND Aligns with Longstanding Agency Guidance and International Authorities

U.S. agencies have long supported that FRAND requires that licenses be available to any third party that seeks one. For example, in 2013, the FTC resolved an enforcement action involving Google and Motorola relating to SEPs and efforts to exclude competitors from the marketplace. As the FTC publicly stated at the time—well before the case here was filed and as a notification to the marketplace—"[b]y making a FRAND commitment, a SEP holder voluntarily chooses to license its SEPs to *all implementers* of the standard on fair and reasonable terms."[28]

Historically, the U.S. DOJ had also been aligned with the FTC's FRAND positions. For example, in 2015, the DOJ opined that an SDO provision clarifying the obligation to license component suppliers "has the potential to facilitate

reason") (citations omitted); *Turner v. Met. Life Ins. Co.*, 56 Cal. App. 2d 862, 869 (1943) (contract specifying benefits to an employee's "children" cannot be interpreted to exclude illegitimate ones).

[28] FTC, *Statement Re In the Matter of Motorola Mobility LLC and Google Inc.*, File No. 121-0120, No. C-4410 (July 23, 2013) (emphasis added).

implementation of IEEE standards, to the benefit of consumers, and is unlikely to cause competitive harm."[29] The DOJ also still posts on its website a 2012 speech to SDOs by the then-acting Head of Antitrust explaining that "a patent holder who participates in the standard-setting activities and makes a F/RAND licensing commitment is implicitly saying that she will license the patent claims that must be used to implement the standard to *any licensee* that is willing and able to comply with the licensing terms embodied in the commitment."[30]

Foreign authorities interpret the FRAND obligation the same way. For example, the European Commission's Horizontal Guidelines provide:

> In order to ensure effective access to the standard, the IPR policy would need to require participants wishing to have their IPR included in the standard to provide an irrevocable commitment in writing to offer to license their essential IPR to *all third parties* on fair, reasonable and non-discriminatory terms.[31]

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[29] DOJ, Business Review Letter 15-1, IEEE (Feb. 2, 2015), at 14, http://www.justice.gov/atr/public/busreview/311470.htm.

[30] R. Hesse (Acting Assisting Attorney General from 2012-2016), DOJ, Six 'Small' Proposals for SSOs Before Lunch (October 10, 2012) (emphasis added), http://www.justice.gov/atr/public/speeches/287855.pdf. The Association appreciates that the historical agency approach (spanning prior administrations from both sides of the aisle) has been revised under the current AAG for Antitrust. The Association and many others have expressed concerns with the current AAG's break with mainstream SEP precedent and policy, *see supra* n.12, and the Association remains hopeful that the DOJ will soon return to its prior approach in alignment with that of the FTC and applicable U.S. precedent.

[31] European Commission, *Communication from the Commission—Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements*, ¶¶ 285-287 (emphasis added).

The European Commission, in enforcing the competition laws against one SEP owner in 2014, likewise found:

> On the basis of that [FRAND] commitment, manufacturers of GPRS-compliant products can reasonably expect that Motorola makes its SEPs available on FRAND terms and conditions to *all implementers*.[32]

And the European Court of Justice—the European equivalent of the U.S. Supreme Court—held in 2015:

> [An] undertaking to grant licenses on FRAND terms creates legitimate expectations on the part of third parties that the proprietor of the SEP will in fact grant licenses on such terms.[33]

Likewise, in Korea, competition authorities concluded that FRAND requires that "access to and use of cellular SEPs should be guaranteed for the modem chipset manufacturers in accordance with the purposes of standard-setting and FRAND commitments." *See* Korea FTC, Decision No. 2017-0-25, *In re Alleged Abuse of Market Dominance of Qualcomm Inc.*, ¶ 235 (Jan. 20, 2017).

C. The District Court's Rejection of Hidden Exclusions to FRAND Aligns with Appellant's Own Behavior and Judicial Admissions

Appellant claims that it has never granted exhaustive chip-level licenses.

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[32] European Commission, C*ase AT.39985—Motorola—Enforcement of GPRS Standard Essential Patents*, European Commission ¶ 294 (April 29, 2014) (emphasis added).

[33] European Court of Justice, *Huawei Techs. Co. v. ZTE Corp.*, C-170/13, E.C.R. 477 (2015).

Qualcomm Opening Brief, at 3. This suggestion is inconsistent with both patent law precedent and Appellant's own prior activities and conduct.

The Supreme Court clarified in *Quanta* that patent exhaustion applies based on an authorized sale regardless of whether a license purports to be "non-exhaustive."[34] It expressly cautioned that an "an end-run around exhaustion"—such as the supposedly "non-exhaustive licenses" that Appellant claims exist here—is simply impermissible. Such an approach "would violate the longstanding principle that, when a patented item is 'once lawfully made and sold, there is no restriction on [its] use to be implied for the benefit of the patentee.'"[35]

Appellant seeks to characterize *Quanta* as changing the law, but the *Quanta* court emphasized the opposite, noting that its decision was squarely in line with "longstanding" exhaustion law.[36] As such, the reality is that all of Appellant's many dozens of (admitted) chip-level licenses over the past decades were legally exhaustive, regardless of whether Appellant realized it or what position it takes on that issue now.

This comports with Appellant's historical position on the issue, moreover.

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[34] *Quanta Comp., Inc. v. LG Elecs., Inc.*, 553 U.S. 617, 625 (2008).

[35] *Id.* at 630.

[36] *Id.* at 625 ("The longstanding doctrine of patent exhaustion provides that the initial authorized sale of a patented item terminates all patent rights to that item. This Court first applied the doctrine in 19th-century cases.").

As the current President of Appellant's licensing business colorfully and publicly proclaimed in 2007, "*Saying [Qualcomm] refuse[s] to license competitors is like saying McDonald's refuses to sell hamburgers [...] It's nuts. It's crazy*."[37] As to the flip-side of the coin, Appellant long has sought and successfully obtained *for itself* chip-level licenses from other SEP owners that it agrees are exhaustive—even as it now denies that the licenses that it *gives* are exhaustive.[38]

Appellant seeks to brush such issues aside by creating a new and unique rule exempting its own *cross*-licenses from otherwise-applicable FRAND obligations. According to Appellant, cross-licensees must be treated differently because they protect Appellant from lawsuits brought by its licensees. Qualcomm Opening Brief, at 137. But this does not follow; if Appellant's interests were simply to avoid direct actions by licensees, then Appellant surely would have used the same (purportedly) "non-exhaustive" license approach that Appellant claims to have

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[37] Gittlesohn, J., *Battle of Tech Heavyweights*, Orange County (Cal.) Reg. 1 2007 WLNR 30244838 (5/1/07).

[38] Appellant advertised its commercial advantage from these competitor licenses in providing "pass through" (*i.e.*, exhaustive) licenses. *See* Qualcomm NY Analyst Day presentation, *supra* n.8, at 14 ("Qualcomm Lowers Overall IP Cost … Qualcomm has proactively acquired exhaustive licenses from its licensees and others that allow Qualcomm to pass through a significant number of 3rd party intellectual property rights to Qualcomm's chipset/software customers. This reduces potential royalty stacking for Qualcomm customers because they do not need to pay additional royalties to the 3rd parties for use of the licensed patents in devices that include Qualcomm chips/software.").

used for its own licenses to chip suppliers. But Appellant instead demanded exhaustive SEP licenses for its own chips and then advertised that fact to its investors as a competitive advantage over its rivals.

Finally, and even more significantly, Appellant fails to mention that it has repeatedly represented to the U.S. courts that FRAND promises *require* licenses to chipmakers (indeed, to any party seeking a license), despite its recent refusals to do so itself.[39] Appellant even went so far as to sue a rival chipmaker for a *supposed breach of FRAND based on the rival's refusal to license Appellant*.[40] In the face of these judicial admissions, Appellant's arguments that the district court's order was somehow novel or contrary to historical practices ring hollow.

D. Appellant's *Amici* Cannot Alter the FRAND Commitment's Plain Language

As the district court noted in its decision, "[f]ollowing Qualcomm's lead, other SEP licensors like Nokia … have concluded that licensing only OEMs is more lucrative, and [have now] structured their practices accordingly." *FTC v.*

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[39] Order Granting FTC's Motion for Partial Summary Judgment, No. 5:17-cv-00220-LHK (N.D.Cal. Nov. 6, 2018), ECF No. 931, at 22-23 (noting Appellant had demanded a license for itself because FRAND requires that licenses be available to, in Appellant's words, "all industry participants"); *see also*, *e.g.*, Qualcomm's Counterclaims, No. 05-3350 (D.N.J. Feb. 29, 2008), ¶¶ 25, 56, 61, 77 ("Qualcomm … offers licenses on fair, reasonable and non-discriminatory terms *to any interested company*."; "Qualcomm has repeatedly offered [a competitor] license terms for Qualcomm's UMTS patents that comply with FRAND and are at least as favorable as the terms Qualcomm has offered to other chipset licensees.").

[40] No. SACV05-0467-JVS (C.D.Cal. Jan. 20, 2009), ECF No. 1606.

Qualcomm Inc., No. 17-cv-220-LHK, Findings of Fact and Conclusions of Law (May 21, 2019) ("Order"), at 130. The district court found the trial testimony from such companies "not credible." Order, at 131-132. *Amici* briefs from these same companies likewise offer no credible basis now for overturning the district court's decision.

Amicus Nokia, following Appellant, argues that the 3GPP process requires "compatibility" among IPR policies. Even supposing for the moment that compatibility interests might alter the plain text of the ATIS and TIA policies, Nokia's arguments about 3GPP would appear to *contradict* Appellant's position. Compatibility interests, like the policies' clear language, also would support that the FRAND promise requires its maker to license all takers. As mentioned above, 3GPP's own public position is that all of its constituent groups' FRAND policies require licensing to all third parties.[41] Likewise, in that same vein, Nokia ignores

[41] *See supra*, n.26. Nokia also argues that "equipment" under the ETSI policy is limited to only OEM devices because the ETSI policy requires that licenses be available to devices that "fully conform" to a standard. Nokia Corrected Brief, at 14-15. Nokia goes too far. ETSI standards exist to promote networks, not individual devices. As such, there is no single device that practices each and every element of the standard because the network is made up of receivers, transmitters, basestations, antennas, and other devices that work together. Nokia's attempt to re-imagine the ETSI policy of requiring licenses to any devices that *conform* with the standard (*i.e.*, that are compliant with the portions of the standard relevant to their function) as instead a restriction for licenses to devices that do not *embody* each and every element of the network would make ETSI's policy meaningless and eliminate the obligation to license anyone at all, OEMs or otherwise. Such an absurd interpretation cannot be correct.

both the recent *Apple* decision[42] finding that ETSI's policy *does* require licensing of any willing licensee and that the Director-General of ETSI, who shepherded the original development and adoption of the ETSI FRAND policy, has published two detailed whitepapers explaining how and why the ETSI policy was always intended to apply to any applicant, regardless of their level in the supply chain.[43]

Equally important, and as the district court found, "Nokia['s] … contemporaneous documents and statements contradict Nokia's … self-serving and made-for-litigation justifications for refusing to license modem chip suppliers." Order, at 131. For example, Nokia itself sought antitrust sanctions against Appellant in 2006 for failing to exhaustively license a rival chip-maker, Texas Instruments. Order, at 131. Nokia explained at that time that the requirement that exhaustive licensing apply to suppliers, such as Texas Instruments, was critical to competition throughout the supply chain because it allows rival chipmakers to achieve necessary "economies of scale" to succeed as an alternative source of supply.[44] Nokia now claims that its earlier filing did not actually mean what it

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42 *Apple*, *supra* n.25.

43 K. Rosenbrock, *Licensing At All Levels Is The Rule Under The ETSI IPR Policy* (Nov. 3, 2017), *at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3064894; K. Rosenbrock, *Why the ETSI IPR Policy Requires Licensing to All* (August 2017), http://www.fair-standards.org/wp-content/uploads/2017/08/Why-the-ETSI-IPR-Policy-Requires-Licensing-to-All_Karl-Heinz-Rosenbrock_2017.pdf.

44 Milici Dec., Ex. 25.

said, but like Nokia's testimony at trial, this is just "not credible."

Amicus Dolby similarly seeks to portray refusals to license component makers as consistent with FRAND obligations. But Dolby's submission, like those from InterDigital and other *amici*, is riddled with errors. For example, Dolby suggest that this case is the first time that the FTC or other agencies have suggested that FRAND includes an obligation to license suppliers. Dolby *Amicus* Br., at 18. But, as described above, both the FTC and DOJ (and international authorities) have long provided exactly such guidance, including in prior FTC enforcement actions.[45]

Dolby also argues that a regime that allows suppliers to obtain licenses could require Dolby to parse through its patent portfolio to determine which patents must be licensed at the component-level and which must be licensed at the OEM-level. Dolby *Amicus* Br., at 6. The district court's Order here requires no such thing, either explicitly or implicitly.

First, cellular standards are implemented at the chip level,[46] and the Order addresses only those patents that have been declared essential to cellular standards. Second, regardless of whether particular declared SEPs are drafted at a device or

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[45] *See, e.g.*, *supra*, nn.28-29.

[46] *E.g., GPNE Corp. v. Apple, Inc.*, No. 12-CV-02885-LHK, 2014 WL 1494247, at *13 (N.D.Cal. Apr. 16, 2014) ("[A]s a matter of law that in this case [involving 3G and 4G alleged SEPs], the baseband processor is the proper smallest salable patent-practicing unit.").

network level, such SEPs can be exhaustively licensed to suppliers, such as chipmakers, for the benefit of the entire supply chain. This is demonstrated, for example, by the exhaustive cross-licenses to Appellant's own chip business. Order, at 127-128.

It never has been the law that only *directly infringing* devices may become licensed, moreover; an exhaustive license to any device or network-level SEPs in Appellant's portfolio would protect rival chipmakers from claims of both direct infringement (*i.e.*, by themselves) and indirect infringement (*i.e.*, by their customers).

Amicus Alliance for US Startups ("AUS") claims that limiting Appellant's anticompetitive conduct would be bad for standardization. As purported evidence for this claim, AUS argues that one SSO's FRAND policy's (specifically, the IEEE's) component-licensing requirement has been "highly disruptive." AUS Br., at 7. But AUS cites a discredited paper based on incorrect data. It has been empirically demonstrated in a series of three other studies (by the very entity whose data was incorrectly presented) that development at IEEE—the largest and most prolific SSO on the planet—has thrived since its updated FRAND policy was published.[47] Indeed, the IEEE itself says that its development process has been

[47] IPLytics, *Empirical study on patenting and standardization activities at IEEE* (March 2017), https://www.iplytics.com/wp-

undisturbed by any disputes relating to its FRAND policy.[48]

V. APPELLANT'S VIOLATION OF FRAND OBLIGATIONS RIGHTLY IMPLICATES COMPETITION LAW

A. Breach of the FRAND Promise Harms Competition at a Critical Time for Deployment of Next-Generation Standards

Appellant seeks to insulate its conduct from sanctions under the competition laws by characterizing its refusal to license as merely a contractual breach. But this Court long ago rejected such reasoning.[49]

The reality, as carefully documented in the district court's extensive findings, is that SEP abuse is a real-world problem facing the Association's members at a critical time of industry development. SEP abuse is a particularly sensitive competition law problem because the standard-setting process inherently involves competitors and other participants "whitelisting" some technologies (including them in the standard) and "blacklisting" others (not including them).

Once a particular patented technology is incorporated into a standard,

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content/uploads/2018/01/IPlytics_2017_Patenting-and-standardization-activities-at-IEEE.pdf; IPlytics, *IEEE's Empirical Record of Success and Innovation Following Patent Policy Updates* (April 2018), https://www.iplytics.com/wp-content/uploads/2018/04/IPlytics_Report-on-IEEE-activities_2018.pdf; IPLytics, *Empirical Analysis of Technical Contributions to IEEE 802 Standards After the Patent Policy Update* (2019), https://www.iplytics.com/wp-content/uploads/2019/01/IEEE-contribution-anaylsis_IPlytics-2019.pdf.

[48] *See* K. Karachalios. "IEEE's Continued Leadership in Standardization" IEEE-SA Document (2017), http://works.bepress.com/konstantinos-karachalios/1/.

[49] *Vernon*, 955 F.2d at 1368 (conduct can both breach a contract and be anticompetitive).

alternative technologies are no longer viable options. The SEP owner whose technology was selected will be in a stronger negotiating position because any party that wishes to implement the standard must use the SEP owner's patented technology. FRAND promises were designed to address this enhanced market power by ensuring that licenses are available to market participants on reasonable terms. Accordingly, where licenses are unavailable in violation of FRAND undertakings, it is no surprise that the competition laws are implicated.

The district court saw through Appellant's misdirections, finding Appellant's arguments "not credible," "pretextual," and a mere "litigation justification" contrary to Appellant's own out-of-court assertions. Order, at 132 *et seq*. The court's Order meticulously documents factual findings about how Appellant's practices harmed competition in the telecommunication market, successfully removing a series of domestic rivals (*i.e.*, alternative sources of supply for the Association's members and all other market participants). And the district court expressly addressed the potential harm to competition in 5G markets if Appellant's illegal conduct were permitted to continue during the market's ongoing transition from 4G/LTE to 5G. In particular, the Order notes that the practices that are the focus of Appellant's appeal were viewed by Appellant as integral to anticompetitive efforts to dominate emerging 5G markets. Order, at 200-01.

Appellant's reliance on *Trinko*[50] and *Aspen Skiing*[51] is misplaced. Both cases addressed the question of whether a refusal to deal, standing alone, can result in an inference of anticompetitive intent sufficient to give rise to antitrust liability. Such an inference is not required here since there is significant independent evidence of Appellant's anticompetitive intent. Moreover, Appellant here made an irrevocable commitment to license its competitors and others in return for a significant benefit (*i.e.*, having its technology included in an industry standard and thereby obtaining the benefits that go with that). As such, this case is not similar to *Aspen Skiing*, where the defendant was not under any obligation to continue dealing with the other party, nor *Trinko*, where the defendant would not have dealt with the other party "absent statutory compulsion."[52] Appellant cannot rely on either case to escape liability here.

Because Appellant voluntary promised to deal with its rivals by agreeing to license third-party applicants, this case is fundamentally different than *Trinko*, where the defendant would not ever have dealt with its rivals "absent statutory compulsion."[53] Likewise, here—and again precisely because of Appellant's

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50 *Verizon Comm'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).

51 *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

52 *Trinko,* 540 U.S. at 409.

53 *Trinko,* 540 U.S. at 409.

promise to license rivals on reasonable terms—there is no issue of creating incentives to free-ride or of unfairly forcing Appellant to share the rewards of its innovation.[54] And there is no risk of collusion attendant to requiring Appellant to license rivals, as the licensing of rivals does not involve ongoing co-marketing, joint sale of consumer products, or anything else other than arms-length competition.[55]

B. Refusals to License Harm Standardization and American Interests

Appellant argues that the practices found to be anticompetitive by the district court should be excused because Appellant promotes U.S. leadership in the development of worldwide standards. Qualcomm Opening Br., at 34, 123-25. Even assuming that the competition laws and U.S. courts provide special exceptions for "national champion" companies, this argument has little basis in fact. While Appellant is undoubtedly an important player in telecommunications development, the suggestion that Appellant is the only company (much less the only U.S. company) situated to develop and promote future cellular technologies is, at best, overstatement. 5G development is and has been exceedingly collaborative, with hundreds of American and foreign companies working together. Cellular development will continue (and will continue to include Appellant) even if

[54] *Id*. at 407-408.

[55] *Aspen Skiing*, 472 U.S. at 589-590.

the Court rejects Appellant's FRAND arguments here.

The DOJ's position appears to be based on the (incorrect) assumption that requiring Appellant to sell chips at fair prices (including compensation for the value of patents, as permitted by the Order) or to license rivals in return for FRAND compensation (also as permitted by the Order) would undermine national interests in 5G development and standard-setting. But 5G standards have already been published.[56] And, while development is always ongoing, there is *no* factual or causal link in the record or that can be established to show that Appellant's cellular development will cease if it is permitted "only" fair (rather than unfair monopoly) compensation.[57] Moreover, national security experts (from both sides of the aisle)—like the International Trade Commission decision noted above—have explained that it is *against* national security interests and longstanding U.S. policy to promote a single U.S. source for 5G chipsets.[58]

As the DOJ itself readily admits, Appellant remains a leading chip supplier, with heavy incentives to continue development. The DOJ provides no basis—nor

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[56] *See* https://www.3gpp.org/release-15.

[57] *See also* J. Kattan, *The Qualcomm Case and U.S. National Security*, at 6-8, https://actonline.org/wp-content/uploads/The-Qualcomm-Case-and-National-Security_Final.pdf.

[58] M. Chertoff (former U.S. Secretary of Homeland Security), *Qualcomm's Monopoly Imperils National Security*, https://www.wsj.com/articles/qualcomms-monopoly-imperils-national-security-11574634436 (November 24, 2019). As the author notes, the government has a general policy to avoid sole-supplier situations. *E.g.*, 2 C.F.R. §200.320.

is there any in the record—to conclude that there would be any impact on the sale of 5G cellular chips if the Order is affirmed.

VI. CONCLUSION

The district court's Order protects competition and access to SEP licenses at a crucial time. The harm to the marketplace and consumers associated with SEP abuse justifies carefully tailored competition law remedies, including those entered here.

DATED: November 27, 2019

PERKINS COIE LLP

By: *<u>/s/ Amanda Tessar</u>*
Amanda Tessar

ATTORNEY FOR AMICUS CURIAE
ACT | THE APP ASSOCIATION

CERTIFICATE OF SERVICE

On November 27, 2019, the undersigned caused the foregoing document to be filed electronically by using the Court's CM/ECF system. All parties are represented by registered CM/ECF users and will be served by the appellate CM/ECF system.

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