Case No. 19-16122

In the
United States Court of Appeals
For The
Ninth Circuit

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

QUALCOMM INCORPORATED,
Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of California
No. 5:17-cv-00220-LHK

BRIEF OF *AMICUS CURIAE* TIMOTHY J. MURIS IN SUPPORT OF APPELLEE

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INTEREST OF *AMICUS CURIAE*

Amicus Timothy J. Muris has over forty-five years' experience working on antitrust law in the public and private sectors and as a professor. He held four positions at the Federal Trade Commission ("FTC") beginning in 1974 in the Office of Policy Planning. He was Chairman of the FTC from June 2001 to August 2004, and he is the only person to have directed both of the FTC's enforcement arms, the Bureau of Competition (1983-1985) and the Bureau of Consumer Protection (1981-1983).

Professor Muris is a Foundation Professor of Law at Antonin Scalia Law School at George Mason University, where he has taught since 1988. Prior to teaching at George Mason, Professor Muris respectively taught and was a Law & Economics Fellow at the University of Miami School of Law and University of Chicago Law School. He has written well over 100 books, monographs, articles, and other publications about law and economics, antitrust law, competition policy, consumer protection, and the federal budget. He is currently Senior Counsel at Sidley Austin LLP, where he advises clients on all aspects of antitrust enforcement.

Professor Muris has particular expertise in the intersection of antitrust law and intellectual property ("IP") in the standard-setting context, including filing multiple cases involving high technology, standard-setting, and single-firm conduct. While FTC Chairman, he issued a path-breaking report that helped usher in the modern era of patent reform. *See* Fed. Trade Comm'n, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy* (Oct. 2003), https://www.ftc.gov/sites/default/files/documents/reports/ promote-innovation-proper-balance-competition-and-patent-law-and-policy/innovationrpt.pdf.

While Deputy Counsel to the Presidential Task Force on Regulatory Relief in 1981, Professor Muris had the honor to assist in Assistant Attorney General ("AAG") William Baxter's fight to protect competition in the telecommunications industry by breaking up AT&T, and was privileged to work closely with AAG Baxter while Director of the FTC's Bureau of Competition in the Reagan Administration. Professor Muris is committed to ensuring that AAG Baxter's vision of an economic and non-political philosophy of antitrust enforcement

remains the mission of both the FTC and the Antitrust Division of the Department of Justice ("DOJ").

For this case, Professor Muris writes to provide historical context and perspective regarding why the FTC's claims against Qualcomm are consistent with traditional antitrust principles and do not require any novel application of §2 of the Sherman Act. Professor Muris also writes to respond specifically to the brief filed in this case by the Antitrust Division, on behalf of the United States, and to explain why the Division's current position is an historical anomaly that falls well outside the mainstream and fails to heed the lessons of *AT&T*.[1]

[1] All parties have provided their consent to the filing of this brief. No counsel of any party to this proceeding authored any part of this brief. The Innovators Network Foundation, a 501(c)(3) non-profit organization, contributed funding to this brief. No other person other than the *amicus curiae* or his counsel contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

Qualcomm is not the first case against an important technology company amidst renewed challenges from "authoritarianism and economic collectivism." Timothy J. Muris, *Prepared Remarks at the Annual Lecture of the European Foreign Affairs Review* (July 23, 2002), https://www.ftc.gov/public-statements/2002/07/competition-agencies-market-based-global-economy [hereinafter Muris, *Prepared Remarks*]. In 1981, at the height of the Cold War and a rising Japan, AAG William Baxter rejected political pressure and broke up the Ma-Bell monopoly said to be critical to America's nuclear defense systems. America's commitment to free enterprise and traditional principles of competition on the merits would not only unleash telecommunications innovation, but also contributed to the economic prosperity and freedom that helped bring down the Iron Curtain a decade later.

Baxter's faith in competition and innovation is as compelling today as it was then. Much of the innovation underlying the ongoing telecommunications and consumer technology revolution has been enabled by standards promulgated by standard-setting organizations ("SSOs"), which provide interoperability and other benefits. When a

patented technology is incorporated into an industry standard, the owner of that standard essential patent ("SEP") can potentially extract profits that reflect not just its *ex ante* value prior to incorporation, but also the significant additional value from inclusion in the standard. To constrain SEP owners from exploiting this market power opportunistically through "holdup," SSOs require that SEPs are licensed on fair, reasonable, and non-discriminatory ("FRAND") terms.

Qualcomm refuses to play by these rules. While a company in Qualcomm's position should license its FRAND-encumbered SEPs to its modem chip competitors, Qualcomm does not. Instead, it licenses its SEPs only to original equipment manufacturers ("OEMs") and receives royalties based on the sales price of the handset—licenses that are a condition of purchasing its modem chips, where it enjoys a monopoly. While its SEPs contribute to a chip that is but one component of modern smartphones, Qualcomm's licensing demands claim a percentage of the overall smartphone's increasing value up to the $400 cap on the royalty base.

Qualcomm's preservation of its modem chip monopoly is the result of these exclusionary practices. Qualcomm makes the purchase of its

chips conditioned on taking a license—also known as the no-license, no-chips ("NLNC") policy. That NLNC policy allows it to load more of the combined price an OEM pays into the SEP license—a price paid by OEMs even if they buy from Qualcomm's modem chip rivals—and artificially reduce the price of its chips. Qualcomm thus taxes its modem chip rivals by increasing an OEM's all-in cost of purchasing their chips, reducing their revenues, and maintaining its monopoly.

Drawing on Professor Muris's vast experience, this brief makes two arguments to support the FTC's case against Qualcomm. In particular, Professor Muris seeks to explain why it is unnecessary to view this case as "a trailblazing application of the antitrust laws," *FTC v. Qualcomm*, 935 F.3d 752, 757 (9th Cir. 2019), in order to affirm.

First, the District Court's opinion fits squarely within traditional antitrust law. Qualcomm maintains its monopoly through exclusionary conduct that impairs its modem chip rivals and harms consumers and competition, violating §2 of the Sherman Act. Conditioning purchase of a monopoly product on taking a patent license is standard antitrust fare, ripe for examination under well-accepted antitrust principles,

especially the seminal decision in *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam).

Second, it is the position of the Antitrust Division, which filed a brief in this case, *see* Br. of the United States of America as Amicus Curiae in Supp. of Appellant and Vacatur, ECF No. 86 ("DOJ Br."), and not the FTC, that departs sharply from historical practices. The Antitrust Division abandoned the consensus among policymakers, SSOs, and courts concerning patent holdup in favor of an unprecedented position that impermissibly treats patents like natural rights—all of which underlie its position in this case. *See* Makan Delrahim, Ass't Attorney Gen., Antitrust Div., U.S. Dep't of Justice, *The "New Madison" Approach to Antitrust and Intellectual Property Law* 5, Remarks as Prepared for Delivery at University of Pennsylvania Law School (Mar. 16, 2018), https://www.justice.gov/opa/speech/file/1044316/download [hereinafter Delrahim, *The "New Madison"*] (arguing that "consistent with the fundamental right to exclude, from the perspective of the antitrust laws, a unilateral and unconditional refusal to license a patent should be considered *per se* legal"). Moreover, by raising national security concerns with the District Court's decision, the

Division's brief not only undermines decades of international advocacy by the DOJ and FTC against antitrust protectionism, but fails to heed the lesson of AAG Baxter and *AT&T*—all in favor of protecting a monopoly that neither deserves nor needs protection.

To promote continued innovation and the fundamental American principles of competition and free enterprise, the District Court's decision must be affirmed.

ARGUMENT

I. THE FEDERAL TRADE COMMISSION'S CASE FITS SQUARELY WITHIN TRADITIONAL ANTITRUST PRINCIPLES.

The District Court's decision and the merits briefs all cite to the seminal decision in *United States v. Microsoft Corp.*, 253 F.3d 34, the defining statement of modern antitrust enforcement in the New Economy. The specific facts and context of *Microsoft* illustrate why this case does not require any extension of antitrust principles. Instead, it reflects an appropriate use of antitrust law to prevent a monopolist from stifling innovation.

1. Like *Microsoft*, the case against Qualcomm is a paradigmatic monopoly maintenance case. While the tests for whether a monopolist's

practices are exclusionary vary with the specific conduct, plaintiffs must generally show that the monopolist's conduct excluded competitors ultimately to "harm the competitive *process* and thereby harm consumers." *Microsoft*, 253 F.3d at 58.

Applying this fundamental antitrust principle, the D.C. Circuit found that Microsoft had engaged in various acts that harmed the competitive process to preserve its monopoly in violation of §2. The central allegations against Microsoft concerned the exclusion of Netscape Navigator, an internet browser application. Besides competing with Microsoft's own Internet Explorer browser, Netscape was a potential competitor to Microsoft's Windows operating system monopoly by virtue of being "middleware," or a software product that, like an operating system, exposes its own Application Program Interfaces ("APIs") and upon which developers can rely in developing applications. *Id.* at 53.

Microsoft used several interrelated practices to harm Netscape and maintain its Windows monopoly. Most notably, Microsoft made design decisions to condition use of Windows on the use of its own browser, Internet Explorer. Microsoft also imposed restrictive licensing

provisions on computer manufacturers to impede them from installing Netscape on their machines, as well as entered into exclusive agreements that further hindered Netscape's ability to compete.

The D.C. Circuit found that these actions constituted unlawful monopoly maintenance. By conditioning use of Windows on use of Internet Explorer, Microsoft "reduc[ed] the rivals' usage share and, hence, developers' interest in rivals' APIs as an alternative to the API set exposed by [Windows]." *Id.* at 66. Similarly, Microsoft's licensing restrictions "reduced rival browsers' usage share not by improving its own product but, rather, by preventing [computer manufacturers] from taking actions that could increase rivals' share of usage." *Id.* at 62.

The *Microsoft* case provides three important lessons to this appeal. *First*, rather than craft any special New Economy exception, the D.C. Circuit in *Microsoft* applied traditional antitrust principles, developed over a century of case law, to evaluate Microsoft's conduct. *Id.* at 50 (agreeing with Microsoft's concession that "anticompetitive conduct should [not] be assessed differently in technologically dynamic markets"). Established case law condemned Microsoft's exclusionary

conduct because Microsoft conditioned use of a monopoly product on use of a second product in ways that foreclosed competition.

Second, the D.C. Circuit rejected Microsoft's attempts to justify exclusionary conduct as incidental to the exercise of IP rights. In particular, Microsoft argued that its restrictions on computer manufacturers should be immune from liability simply because Microsoft was exercising valid copyrights. As the D.C. Circuit made clear, such an argument "is no more correct than the proposition that use of one's personal property, such as a baseball bat, cannot give rise to tort liability." *Id.* at 63; *see also FTC v. Actavis, Inc.*, 133 S. Ct. 2223, 2231 (2013) ("[P]atent and antitrust policies are both relevant in determining the 'scope of the patent monopoly'—and consequently antitrust law immunity—that is conferred by a patent.").

Third, Microsoft's coercive conditioning of a monopoly product (the operating system) on use of a second product (Internet Explorer) was unlawful because of its effects in the monopoly market for operating systems. Although most cases that condition use of the monopoly product on a second product revolve around harm in the market for the second product, there is no doctrinal bar to liability based on harm in

the monopoly product market, contrary to what Qualcomm appears to claim in this case. *See* Qualcomm Br. 41.

2. The case against Qualcomm mirrors the monopolization theory in *Microsoft*. Every other maker of modem chips and other component technology sells its products for one all-inclusive price, thereby recovering the value of its innovations. Qualcomm differs, requiring smartphone makers to pay for modem chips, over which it has monopoly power, and a separate licensing fee that is effectively a percentage of smartphone sales revenue for its SEPs.

Through its NLNC policy, Qualcomm conditions an OEM's purchase of its modem chips on taking a license to its SEPs. Because of Qualcomm's threat to cut off modem chip supply, OEMs have no choice but to pay much higher royalties for Qualcomm's SEPs than they otherwise would. As Qualcomm agreed to license its SEPs on FRAND terms, Qualcomm breaches this FRAND promise not only through these supra-competitive royalties, but also by refusing to license its modem chip competitors.

The table below illustrates how Qualcomm's unique licensing scheme forecloses competition from its modem chip rivals. In this

stylized illustration, the FRAND price for Qualcomm's IP in the relevant industry standards is $3. Under competition on the merits (i.e., without restraints), Qualcomm collects the patents' value on all modem chip sales (either its own or competitors') that incorporate those patents. Qualcomm's more efficient competitors are able to compete effectively by offering a lower all-in price ($18) than Qualcomm ($30).

Competitive Effects of NLNC[2]	Competition on the Merits		No-License, No-Chips Policy	
	Qualcomm	Competitors	Qualcomm	Competitors
Modem Chip Price	$27	$15	$12	$15
Qualcomm Royalty	$3	$3	$18	$18
All-In Price	$30	$18	$30	$33

Qualcomm's NLNC policy reverses this competitive result. By forcing each OEM customer to license its patents or risk losing critical modem chip supply, Qualcomm shifts part of its chip price to its royalty, reducing its nominal chip price and inflating the all-in price of *competitors'* products (from $18 to $33 in the illustration). While an

[2] This chart is taken from Timothy J. Muris, *Why the FTC Is Right to Go After Qualcomm for Manipulating Cell Phone Costs*, THE FEDERALIST (Mar. 4, 2019). The chart's figures are illustrative only; the precise numbers do not affect the mechanism the chart illustrates.

OEM's all-in cost of purchasing Qualcomm's chips remains unchanged (at $30), by shifting part of its modem chip price to the royalty, $15 in the example, Qualcomm obtains an advantage over more efficient chip competitors unrelated to competitive merits. These Qualcomm competitors, whose effective prices are inflated (to $33) by the royalty payment they do not control, are disadvantaged, reducing innovation and, in the extreme, exiting the market.

The anticompetitive analysis of Qualcomm's NLNC practice presents standard antitrust theory, analogous to *Microsoft*. As in *Microsoft*, Qualcomm has conditioned sale of a product in which it has monopoly power—modem chips—upon use of a second product—SEP licenses—to foreclose rivals from challenging the monopolist in its monopoly market—here, increasing the all-in cost OEMs face to purchase rivals' modem chips and reducing rivals' revenues. As in *Microsoft*, this foreclosure maintained Qualcomm's modem chip monopoly, as rivals could not exert the competitive pressure they would have but for the anticompetitive conduct. As in *Microsoft*, competition and resulting innovation suffer.

Contrary to Qualcomm's arguments, the District Court's finding that NLNC resulted in anticompetitive effects did not erroneously rely on inferences. The District Court found direct evidence that Qualcomm's conditioning the sale of its chipsets on accepting a separate SEP license increased its royalties. Op. 157-61. The District Court also found direct evidence that these higher royalties increase an OEM's all-in cost of purchasing rivals' chips and reducing their revenues. *Id.* at 185. Furthermore, the District Court found direct evidence of competitors exiting the market and those remaining in the market being "hobbled" by Qualcomm's practices, underscoring that Qualcomm maintained its monopoly. *Id.* at 202-08.

In light of this direct evidence, and again contrary to Qualcomm's arguments, the District Court had no need to infer the existence of harm in the modem market. That was proved directly. Rather, the District Court only inferred that Qualcomm's anticompetitive practices caused this harm. And it was absolutely entitled to do so. Under *Microsoft,* the District Court was required to find that Qualcomm's anticompetitive conduct "reasonably appear[s] capable" of contributing to the demonstrated maintenance of Qualcomm's monopoly position.

Microsoft, 253 F.3d at 79 (alteration in original) (quoting 3 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 651c, at 78 (1996 ed.)). And it so found. Op. 202-03.

II. THE ANTITRUST DIVISION'S POSITION IN THIS APPEAL IS AN HISTORICAL ANOMALY.

Nor does the Antitrust Division's brief weigh in favor of reversal. Republican and Democrat administrations, SSOs, and multiple courts have expressly recognized the economic reality of patent holdup. The Antitrust Division's new, contrary view reflects a fundamental misunderstanding of the economic issues, and it impermissibly treats patent rights as natural property rights. Moreover, this position appears to be unique to the Antitrust Division, as elsewhere in the DOJ it remains understood that "[t]he justification for patents is not that an inventor has a natural right to preclude others from making or using his invention, but that patent protection will ultimately benefit the public by providing an incentive to innovate." *See* Br. for the Federal Respondent at 13, *Oil States Energy Servs., LLC, v. Greene's Energy Grp., LLC,* 138 S. Ct. 1365 (2018), 2017 WL 4805230, at *13.

The Antitrust Division's discussion of national security issues also departs from antitrust norms. Modern antitrust is an economic

enterprise that eschews political considerations. The antitrust agencies have advocated this economic approach to foreign agencies accused of favoring national champions, especially in antitrust enforcement regarding IP. The Antitrust Division's *Qualcomm* position is in tension with decades of efforts to achieve convergence on this foundational principle.

Furthermore, not only does the Division fail to learn from the lesson of *AT&T*, but it miscalculates in thinking that monopoly protection of Qualcomm's anticompetitive practices is necessary to protect American interests. Despite Qualcomm's conduct, other companies are producing 5G technology. And, affirming the District Court's decision will not hinder Qualcomm's ability to compete for the next generation of smartphones given its extensive financial resources.

A. The Antitrust Division abandons the longstanding bipartisan consensus involving patent holdup

1. The Antitrust Division's views on patent holdup are well outside the mainstream. The Antitrust Division erroneously claims that there is no "economic or empirical evidence that hold-up is a real phenomenon," Delrahim, *The "New Madison*," *supra*, at 9, and that

SSOs—not just antitrust enforcers—should avoid "over-indulging" in allegedly tenuous *theories* of patent holdup, *id.* at 10.

These views undergird the Division's position in this case, and depart sharply from the previous bipartisan consensus. There is nothing wrong with the theory of patent holdup: as both the FTC and DOJ had long recognized, SEP holders have the incentive and ability to engage in holdup. U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* 35-36 (Apr. 2007) ("Before, or *ex ante*, multiple technologies may compete to be incorporated into the standard under consideration. … [*E*]*x post*, the owner of a patented technology necessary to implement the standard may have the power to extract higher royalties or other licensing terms that reflect the absence of competitive alternatives." (footnotes omitted)), https://www.ftc.gov/sites/default/files/documents/reports/antitrust-enforcement-and-intellectual-property-rights-promoting-innovation-and-competition-report.s.department-justice-and-federal-trade-commission/ p040101promotinginnovationandcompetitionrpt0704.pdf.

In 2011, the FTC also unanimously endorsed a report highlighting how "an entire industry" could be "susceptible" to the "particularly acute" concern of holdup, with "higher prices" and "discourage[d] standard setting activities and collaboration, which can delay innovation." Fed. Trade Comm'n, *The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition* 234 (Mar. 2011), https://www.ftc.gov/sites/ default/files/documents/reports/evolving-ip-marketplace-aligning-patent-notice-and-remedies-competition-report-federal-trade/ 110307patentreport.pdf.

Others agree. The National Research Council of the National Academies concluded that "a FRAND commitment should limit a licensor's ability to seek injunctive relief." Nat'l Research Council, Nat'l Acads., *Patent Challenges for Standard-Setting in the Global Economy* 3 (2013), https://sites.nationalacademies.org/cs/groups/pgasite/documents/webpage/pga_178867.pdf. And the European Commission ("EC") explains in its Article 101 guidelines that "FRAND commitments can prevent IPR holders from making the implementation of a standard difficult by refusing to license or by requesting unfair or unreasonable fees (in other words excessive fees) after the industry has been locked-in

to the standard." European Comm'n, *Guidelines on the Applicability of Article 101 on the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements*, 2011 O.J. (C 11) 1, 60.

Most tellingly, the SSOs themselves clearly believe a patent holdup problem exists—evident in both the existence of FRAND policies and recent modifications to those policies. This behavior, designed to prevent supra-competitive royalties, also reflects the harm associated with the threat of patent holdup itself. That is, even the threat of holdup increases the costs to market participants of avoiding holdup through contractual and other mechanisms. Timothy J. Muris, *Bipartisan Patent Reform and Competition Policy*, Am. Enter. Inst. Report 9 (May 2017), https://www.aei.org/wp-content/uploads/2017/05/Bipartisan-Patent-Reform-and-Competition-Policy.pdf.

Courts also recognize the holdup problem. As one stated, patent holdup is not theoretical, but instead "is a substantial problem that [F]RAND is designed to prevent." *In re Innovatio IP Ventures, LLC Patent Litig.*, No. 11 C 9308, 2013 WL 5593609, at *9 (N.D. Ill. Oct. 3, 2013). Similarly, in *Microsoft v. Motorola* on an interlocutory appeal before the case was tried, this Court made clear that "once a standard

has gained such widespread acceptance that compliance is effectively required to compete in a particular market, anyone holding a standard-essential patent could extract unreasonably high royalties from suppliers of standard-compliant products and services." *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 876 (9th Cir. 2012).

And the facts fit the theory. Following a jury trial, the District Court in *Microsoft v. Motorola* rejected the argument that "hold up does not exist in the real world," explaining that this argument "does not trump the evidence presented by Microsoft that hold up took place in this case." *Microsoft Corp. v. Motorola, Inc.*, No. C10-1823JL R, 2013 WL 5373179, at *7 (W.D. Wash. Sept. 24, 2013). This Court affirmed, holding that "[t]he evidence that the rates Motorola sought were significantly higher than the [F]RAND rate found by the court suggested that Motorola sought to capture more than the value of its patents by inducing holdup." *Microsoft Corp. v. Motorola, Inc.*, 795 F.3d 1024, 1046 (9th Cir. 2015).

The available evidence from litigation strongly supports patent holdup. As the table below summarizes, recent litigation awarded FRAND rates that were orders of magnitude lower than those

demanded. These cases are likely the tip of the iceberg, as most FRAND disputes and licensing negotiations do not end in court.

Case	SEP portfolio litigated	Plaintiff 'ask'	Defendant 'ask'	Court-determined RAND rate (for SEP portfolio)
Microsoft v. Motorola	24 H.264 and 802.11 SEPs	H.264 SEPs: 2.25% of price of end product (e.g. $6.25 per xBox unit) 802.11 SEPs: 2.25% of price of end product	H.264 SEPs: Between $0.00065 and $0.00204 per unit 802.11 SEPs: Between $0.03 and $0.06 per unit	H.264 SEPs: $0.00555 per end product unit 802.11 SEPs: $0.03471 per end product unit (Upheld by appellate court)
Ericsson v. D-Link	3 802.11(n) SEPs	$0.50 per end product (or $0.50 per implementing component chip)	Unclear	District court: $0.15 per unit. Appellate court: overruled district court, sent back to district court to determine reduced rate
In re Innovatio	19 802.11 SEPs	6% of an adjusted price of the implementing end product (e.g., $16.17 per tablet)	Between $0.0072 cents and $0.0309 per implementing chip	$0.0956 per chip
RealTek v. LSI	2 802.11 SEPs	Injunction	Zero royalty	0.19% of chip price, or approx. $0.0019 to $0.0033 per unit.
Huawei v. InterDigital (China)	'Several' 2G, 3G and 4G SEPs	Unknown	Unknown	Reportedly, 0.19% of Huawei's end product price (no official published decision)

The Antitrust Division's view on "symmetry"—namely, that holdout is an equally if not more serious problem than holdup—overlooks a key dynamic of modern technology. Only the SEP holder can exploit lock-in from standard-setting to price the SEP above the underlying *ex ante* value of the patent. By contrast, there is no such asymmetry in the typical contractual holdout scenario. Either party

can seek a bargaining advantage by threatening litigation costs on the other through holdout, which can represent opportunistic behavior that violates contractual obligations of good faith. *See* Timothy J. Muris, *Opportunistic Behavior and the Law of Contracts*, 65 MINN. L. REV. 521, 552-72 (1981).

2. The Antitrust Division's new stance regarding patent rights appears to be rooted in a flawed conception that these rights constitute natural property rights. *See* Delrahim, *The "New Madison," supra*, at 2-5. That is, a patent right constitutes an individual patentee's right to the fruits of its mental labor.

Patents are not natural rights. The government indisputably grants these rights to an individual. At the very least, they are not inherently excludable as is natural property, because the government must define the rights' scope. Within a natural rights perspective, such as Locke's, natural rights derive from a state of nature. John Locke, *Two Treatises of Government* (1690). For patents to be natural rights, therefore, the government must exist in the state of nature. But for natural rights theorists like Locke, government begins only when the state of nature ends.

Likening exclusive rights granted to patentees to a natural property right is also untenable legally, as it ignores the uncontroversial, utilitarian framework for the patent grant long adopted by the Supreme Court. *See, e.g.*, *Graham v. John Deere Co. of Kan. City*, 383 U.S. 1, 9 (1966). Exclusive rights exist not to bestow upon patentees a moral right but to promote society's best interests. Thus, patents are subject to doctrines like novelty, non-obviousness, and many others that ensure that protections for market competition balance patents' incentives.

Suggesting that any diminished return to patent holders reduces innovation and welfare "is inconsistent with both sound economic analysis and the policies animating patent law," as "FRAND commitments that reduce excessive royalties further the policies of both the antitrust laws and the patent laws." A. Douglas Melamed & Carl Shapiro, *How Antitrust Law Can Make FRAND Commitments More Effective*, 127 YALE L.J. 2110, 2121 (2018). It is also inconsistent with the Supreme Court's clear reminder that patents "involv[e] public rights." *Oil States Energy Servs.*, 138 S. Ct. at 1373.

B. Claiming Qualcomm needs monopoly protection wrongly inserts non-competition values into antitrust.

1. The final flaw in the Antitrust Division's brief may prove the most dangerous. After decades of incorporating political and other non-economic purposes into antitrust, the consumer welfare standard emerged, focusing on the economic well-being of consumers, as a needed antidote for competition policy gone awry. Geopolitical concerns do not end the need to maintain antitrust law's thoroughly economic approach. Makan Delrahim, Ass't Attorney Gen., Antitrust Div., U.S. Dep't of Justice, *Antitrust and the Digital Economy: New Challenges for International Cooperation?*, Remarks at Bocconi University in Milan (May 25, 2018), https://www.justice.gov/opa/speech/file/1066446/download.

Nevertheless, the Antitrust Division criticizes the District Court for failing to consider alleged national security implications. Although the Division attempts to cabin this view within a discussion of remedies, doing so only exacerbates its flaws: no company should be encouraged to monopolize an important market and then be allowed to

claim a preferential antitrust remedy precisely because it is the only game in town.

The Antitrust Division's claim that the District Court should have considered national security to craft its remedy also contradicts decades of advocacy from the DOJ and the FTC against using competition law to promote a "national champion" or a "company protected from competition by discriminatory antitrust enforcement," which can "sap local economies of energy and entrepreneurship." Makan Delrahim, Ass't Attorney Gen., Antitrust Div., U.S. Dep't of Justice, *International Antitrust Policy: Economic Liberty and the Rule of Law* 13, Remarks as Prepared for Delivery at NYU School of Law and Concurrences (Oct. 27, 2017), https://www.justice.gov/opa/speech/file/1007231/download.

To deploy such arguments, particularly in the context of a 5G technology race against China, could mislead foreign readers about America's commitment to consumer welfare. When non-antitrust concerns are clothed in language of "national security," the implication to foreign agencies is that Qualcomm is an important American technology company that deserves preferential treatment from American enforcers.

DOJ's view of American interests is also mistaken. The consumer welfare revolution in antitrust was part of a broader movement to establish a global, rules-based economic order in light of the "remarkable chance to establish the primacy of markets as engines for economic progress around the globe." Muris, *Prepared Remarks*, *supra*. That competition law avoids incorporating any one country's political concerns is a crucial predicate of this vision. The Antitrust Division's nearsighted approach may thus harm both the American-led international economic order, as well as American companies abroad.

2. Given these consequences, it is unsurprising that previous leaders of the Antitrust Division took a different path when confronted with similar circumstances. In 1969, the outgoing Johnson Administration sued IBM, seeking *structural* relief. IBM, unsurprisingly, was involved in multiple defense related projects, including the Defense Calculator and Semi-Automatic Ground Environment ("SAGE"), America's computerized air defense system. *See* United States Memorandum on the 1969 Case at 31 n.27, *United States v. IBM Corp.*, No. 72-344 (S.D.N.Y. Oct. 5, 1995).

In 1974, the Antitrust Division sued another American industrial giant, AT&T. As with IBM, the Antitrust Division sought structural remedies—namely, breakup of the entire Ma-Bell system. Like IBM, AT&T was also of strategic importance to our political economy. Unlike IBM, the national security concerns were made loudly and often: in a letter to Attorney General William French Smith, Defense Secretary Caspar Weinberger wrote that "a great deal of the current capability for communications command and control of our strategic weapons" depend upon AT&T's national network, which was therefore "essential to defense command and control." Letter from Caspar Weinberger, Sec'y of Def., to William French Smith, Attorney Gen. (Feb. 21 1981).

Coming at the height of the Cold War, it is hard to imagine a more serious national security argument. Indeed, the similarities between *AT&T* and *Qualcomm* are striking:

Comparison of *AT&T* and *Qualcomm* cases		*United States v. AT&T* (1974)	*FTC v. Qualcomm* (2017)
Geopolitical Challenges	New Economic-Technological Rival to U.S.?	Yes—rising Japan	Yes—rising China
	Political-Ideological Rival to U.S.?	Yes—Communism (Russia, China)	Yes—Authoritarianism (Russia, China)
Significance of Enforcement Action	Fortune 200 Communications and Technology Company?	Yes—22nd largest U.S. Company (1981) and largest communications provider with computing and semiconductor business (Bell Labs)	Yes—137th largest U.S. Company (2019) and largest LTE modem chip provider with large SEP portfolio (Qualcomm licensing)
	Critical National Security Concerns Expressed?	"[T]he American Telephone and Telegraph network is the most important communications network we have to service our strategic systems in this country."[3]	"Accordingly, a reduction in Qualcomm's leadership in 5G innovation and standard-setting, 'even in the short-term,' could 'significantly impact U.S. national security' by enabling foreign-owned firms to expand their influence."[4]

As AAG Baxter and his colleagues helped lead the new antitrust revolution, the *AT&T* and *IBM* cases immediately tested their commitment to the economic approach to antitrust. In both, Baxter's

[3] *Hearing on S. 694 Before the S. Comm. on Armed Services,* 97th Cong., 1st sess. (Mar. 23, 1981) (statement of Caspar Weinberger, Sec'y of Def.).

[4] Statement of Interest of the United States of America at 2, *FTC v. Qualcomm Inc.*, No. 5:17-cv-00220 (N.D. Cal. May 2, 2019).

convictions held firm. Unlike *Qualcomm*, the *IBM* case was weak on the merits, *see, e.g.*, William E. Kovacic, *Designing Antitrust Remedies for Dominant Firm Misconduct*, 31 CONN. L. REV. 1285, 1289 (1999), and Baxter dropped it, stating that, with all the evidence now painstakingly gathered, the case attempted to "push the boundaries of antitrust prosecution beyond what the law provides," Edward T. Pound, *Why Baxter Dropped the I.B.M. Suit*, N.Y. TIMES (Jan. 9, 1982).

Any inclination that Baxter's dropping *IBM* was politically motivated is belied his handling of *AT&T*. Baxter's message was simple: he would litigate *AT&T* "to the eyeballs." *Baxter on AT&T*, N.Y. TIMES (Apr. 12, 1981). The pressure to drop the case was intense, as when Defense Secretary Weinberger testified before Congress that AT&T was "the most important communication network we have to service our strategic systems in this country." *Weinberger Defends A.T.&T.*, N.Y. TIMES (Apr. 9, 1981). Commerce Secretary Malcolm Baldrige also pressured Baxter to drop the case to ensure that AT&T remained the dominant global telecommunications company. Warner & Taylor, *Cabinet Council Is Debating AT&T Case, May Recommend U.S. Drop Antitrust Suit*, WALL ST. J. (June 19, 1981).

In staying the course, Baxter's faith in markets was rewarded. The telecommunications industry continued to flourish. And the principles of competition and free enterprise would prevail over collectivism and cronyism with the fall of the Soviet Union. Amidst all of the claims about catastrophe from Qualcomm and its amici, *see, e.g.*, Qualcomm Br. 123-25, we would do well to heed this important lesson in American history.

3. Here, national security concerns are unpersuasive even on their own terms. The Antitrust Division's argument appears to be that the District Court "should have considered whether the remedy would impair unduly Qualcomm's ability to … supply the military and other national security actors." DOJ Br. 32-33. In support, the Antitrust Division appeals to statements from the Departments of Defense and Energy, as well as this Court's own partial stay decision acknowledging the existence of these concerns. *Id.* at 3-4. The Antitrust Division also highlights the Committee on Foreign Investment in the United States' ("CFIUS") decision on national security grounds to prevent Broadcom from acquiring Qualcomm. *Id.* at 3.

Given the unprecedented nature of the Antitrust Division's decision to raise national security formally, a detailed and sustained discussion of the specific harms to national security resulting from the District Court's decision was necessary. But the brief fails to provide such a discussion. Instead, it argues summarily that "diminishment of Qualcomm's competitiveness in 5G innovation and standard-setting could harm U.S. national security." *Id.* at 32.

That argument is at the least overbroad, as it implies that a loss in Qualcomm's competitiveness even from competition on the merits would also raise national security issues. Furthermore, CFIUS's decision to intervene in the Broadcom acquisition is obviously inapposite, as it concerned transferring ownership of Qualcomm to a foreign entity, not the behavioral remedy at issue here.

The better view is that the loss of innovation *from Qualcomm's anticompetitive conduct*, giving Qualcomm monopoly protection, is as much, if not more, a national security issue. *See, e.g.*, Michael Chertoff, *Qualcomm's Monopoly Imperils National Security*, WALL ST. J. (Nov. 24, 2019) (article by former Secretary of Homeland Security). This, in turn, raises the crucial underlying factual predicate of the national security

argument: that "Qualcomm's leadership in developing 5G technology" is somehow the only hope for the United States and its allies against China. Qualcomm Br. 25.

But that is not true either. Intel, Samsung, and Media Tek (among others) are making strides in 5G and beyond that will only accelerate once Qualcomm's anticompetitive conduct ends. Thus, Intel recently announced that it will partner with Sony and NTT to work on *6G* mobile network technology. *Beyond 5G: Sony, NTT and Intel to form 6G partnership*, Nikkei Asian Rev. (Oct. 31, 2019), https://asia.nikkei.com/ Business/Technology/Beyond-5G-Sony-NTT-and-Intel-to-form-6G-partnership.

The harm Qualcomm complains about reduces to receiving less for its SEP licenses and market power over modem chips. Yet Qualcomm is extremely well capitalized with over $12 billion in cash, cash equivalents, and marketable securities on its balance sheet at the end of its last fiscal year—more than half of its annual revenues. QUALCOMM Inc., Annual Report (Form 10-K) (Sept. 29, 2019). Indeed, Qualcomm's financial position has been so strong that since 2015 it has authorized double that amount in stock buybacks,

Qualcomm Inc., Press Release, *Qualcomm Announces New $10 Billion Stock Repurchase Authorization* (May 9, 2018), https://www.qualcomm.com/news/releases/2018/05/09/qualcomm-announces-new-10-billion-stock-repurchase-authorization, notwithstanding large penalties from other regulators condemning its anticompetitive behavior.

CONCLUSION

America will succeed in future generations of telecommunications standards in the same way, and for the same reason, that AAG Baxter broke up AT&T: because America has an unrivaled system of free enterprise and protection of competition on the merits. Rather than seek special treatment, Qualcomm should play by the rules and focus on contributing to American innovation without illegally excluding its rivals. That, and only that, is the public interest that should concern the antitrust laws.

Dated: November 29, 2019 SIDLEY AUSTIN LLP

By: /s/ David R. Carpenter
David R. Carpenter
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CERTIFICATE OF SERVICE

I hereby certify that on November 29, 2019, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to all registered attorneys of record.

By: /s/ David R. Carpenter
David R. Carpenter
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FOR THE NINTH CIRCUIT

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