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 a Decision of the United States District Court for the Northern District of California,
No. 5:17-cv-00220-LHK · Honorable Lucy H. Koh

BRIEF OF *AMICUS CURIAE* CAUSE OF ACTION INSTITUTE IN SUPPORT OF DEFENDANT-APPELLANT QUALCOMM INCORPORATED

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae Cause of Action Institute ("CoA") is a nonprofit, nonpartisan government oversight organization that uses investigative, legal, and communications tools to educate the public on how government accountability, transparency, the rule of law, and principled enforcement of the separation of powers protect liberty and economic opportunity. As part of this mission, it appears as *amicus curiae* before federal courts. *See, e.g.*, *McCutcheon v. FEC*, 134 S. Ct. 1434, 1460 (2014).

CoA has a particular interest in challenging the Federal Trade Commission's ("FTC" or "Commission") ultra vires "expansion" of its enforcement powers. In order to fulfill this mission, CoA has defended businesses, *pro bono publica*, against FTC enforcement actions in federal courts, *see, e.g., LabMD v. FTC*, No. 1:14-cv-00810-WSD, 2014 WL 1908716 (N.D. Ga. May 12, 2014), *aff'd*, 776 F.3d 1275 (11th Cir. 2015); *FTC v. D-Link Systems*, No. 17-cv-00039-JD (N.D. Cal.), and before the Commission, *see, e.g., In re: LabMD, Inc.*, FTC Dkt. No. 9357.

[1] Pursuant to FRAP 29(a)(4)(E), *amicus curiae* states that no counsel for a party other than CoA authored this brief in whole or in part, and no counsel or party other than CoA made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae or its counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

CoA has also represented amici who chose to speak out against FTC overreach, *see LabMD, Inc. v. FTC*, 891 F.3d 1286 (11th Cir. 2018), and participated as an amicus in FTC matters in this Circuit, *see, e.g.*, *FTC v. AT&T Mobility*, 883 F.3d 848 (9th Cir. 2018) (en banc); *FTC v. AMG Capital Mgmt., LLC*, No. 16-17197, 2019 U.S. App. LEXIS 18551 (9th Cir. June 20, 2019).

CoA has a particular interest in ensuring that FTC does not stifle technological innovation by wrongly weaponizing its Section 5 "unfairness" powers to bring cases without any evidence of actual harm to consumers or to competition. *See also FTC v. D-Link Sys.*, No. 3:17-cv-00039-JD, 2017 WL 4150873, at *5-6 (N.D. Cal. Sep. 19, 2017) (dismissing "unfairness" count for failure to plead actual harm). FTC should not bring innovation-threatening cases (like this one) based on "simply a possibility theorem" untethered from credible evidence of actual harm. *See* Dissenting Statement of Commissioner Maureen K. Ohlhausen, *In the Matter of Qualcomm, Inc.*, File No. 141-0199, at 2 (January 17, 2017).[2]

SUMMARY OF ARGUMENT

A current FTC Commissioner has characterized the Order as a product of "judicial alchemy," which "is both bad law and bad public policy."[3] But it was FTC

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[2]https://www.ftc.gov/system/files/documents/cases/170117qualcomm_mko_dissenting_statement_17-1-17a.pdf

[3] Commissioner Christine S. Wilson, "A Court's Dangerous Antitrust Overreach," Wall Street Journal (May 28, 2019).

that provided the ingredients for this toxic mixture, which transmogrified an alleged breach of contract into an antitrust violation. On the merits, FTC's antitrust claims fail for the reasons set forth in Qualcomm's opening brief.[4] But the Order should not stand for myriad other independent reasons.

FTC exceeded its statutory authority in at least four ways.

First, an unprecedented, highly controversial antitrust enforcement action of international importance is not a "proper case," as required by Section 13(b).

Second, FTC lacks the antitrust authority over patents it asserts here. FTC cannot regulate under antitrust Qualcomm's patent licensing practices, which are already comprehensively regulated by the U.S. Patent and Trademark Office ("USPTO"), International Trade Commission ("ITC"), and the Federal Circuit. FTC's overreaching assault against Qualcomm is plainly repugnant to, and preempted by, patent law.[5]

Third, even if some permanent injunctive relief were appropriate, Section 13(b) does not authorize the mandatory injunctive relief the Order granted, including

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[4] CoA takes no position here on the broader question of how SSOs and their members should balance the interests of innovators like Qualcomm with those of implementers.

[5] CoA is not suggesting that antitrust has no role in policing certain SEP-related conduct not at issue here. Rather, CoA believes that FTC may not regulate under antitrust *the specific licensing practices at issue here*, which do not involve collusion with competitors.

its edict that Qualcomm must renegotiate its *existing licensing contracts* and license its SEPs to rival chipset makers. In any event, the injunction violates due process and is unenforceable for vagueness.

Fourth, FTC had no reason to believe that Qualcomm "is violating or is about to violate" antitrust law when it sued in 2017, as required by Section 13(b).

For these reasons, this Court should reverse the judgment below.

ARGUMENT

I. A NOVEL, UNPRECEDENTED, HIGHLY COMPLEX ANTITRUST MATTER WITH INTERNATIONAL IMPLICATIONS IS NOT A "PROPER CASE"

FTC's lawsuit against Qualcomm should be dismissed because this is not a "proper case" under Section 13(b), 15 U.S.C. § 53(b), and thus FTC lacked authority to seek permanent injunctive relief.[6] Section 13(b) may only be used to seek a permanent (as opposed to preliminary) injunction in a "proper case"; that is, a straightforward violation of the FTC Act requiring no application of the Commission's expertise to a novel regulatory issue through administrative proceedings. Here, however, FTC's wayward lawsuit against Qualcomm raises unprecedented, highly complex, novel questions of the appropriate limits of antitrust

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[6] The "proper case" question has been raised *sua sponte* by the Third Circuit. *See* Letter from Court Clerk, *FTC v. Wyndham*, No. 14-3514 (3d Cir. Feb. 20, 2015). More recently, Surescripts moved for dismissal of an FTC antitrust lawsuit on this basis. *See* MTD, *FTC v. Surescripts*, Case No. 1:19-cv-01080-JDG, Dkt. No. 31 (D.D.C. July 12, 2019).

law and policy that are of international importance and require in the first instance the specialized expertise of FTC's Chief Administrative Law Judge and current Commissioners. This is the antithesis of a "proper case." This is underscored by the degree to which this lawsuit has not only divided current and former Commissioners but also rendered FTC an outlier agency standing alone and at odds with every other federal agency, including its sister antitrust enforcer, DOJ.

Because FTC cannot meet its burden of demonstrating that this is a "proper case," it lacked authority to seek a permanent injunction and thus the district court lacked authority to enter one. *See La. Pub. Serv. Com v. FCC*, 476 U.S. 355, 374 (1986) ("agency literally has no power to act…unless and until Congress confers power upon it."). FTC exceeded its statutory authority here by bringing this action in federal court instead of FTC's in-house administrative process. FTC cannot read more power into the statute beyond that provided by Congress.

A. Section 13(b) Authorizes FTC to Bypass Its Administrative Process Only in A "Proper Case"

When Congress enacted the FTC Act in 1914 and authorized FTC through Section 5 of that Act to prohibit "unfair methods of competition," it "intentionally left development of the term 'unfair' *to the Commission* rather than attempting to define 'the many and variable unfair practices which prevail in commerce.'" *Atl. Refining Co. v. FTC*, 381 U.S. 357, 367 (1965) (emphasis added). "[T]he [FTC] Act's legislative history shows a strong congressional purpose not only to continue

enforcement of the Sherman Act by the Department of Justice and the Federal District Courts *but also to supplement that enforcement through the administrative process of the new Trade Commission*." *FTC v. Cement Inst.*, 333 U.S. 683, 692 (1948) (emphasis added). "FTC's administrative remedy[] is its traditional enforcement tool. Since its inception, the FTC Act has provided for administrative proceedings to remedy unfair methods of competition." *FTC v. Shire Viropharma, Inc*., 917 F.3d 147, 159 (3d Cir. 2019); *see Heater v. FTC*, 503 F.2d 321, 324 (9th Cir. 1974) (noting Commission's "educational purpose…[of] developing a body of administrative law").

The FTC Act's enforcement scheme gives FTC, "as a quasi-judicial tribunal, the ability to provide for the centralized and orderly development of precedent applying the regulatory statute to a diversity of fact situations." *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 998 (D.C. Cir. 1973). "While the FTC's special expertise may not be raised as a barrier inhibiting [appellate review], *it does and should inhibit the notion that a court may be injected into the pertinent subject-matter directly, without the benefit of FTC consideration*." *Id*. (emphasis added). Instead, Congress intended for FTC to use its administrative process (subject to Article III appellate review), *see* 15 U.S.C. §§ 45(b)-(c)—not federal district courts—to develop antitrust law (particularly novel, complex "rule of reason" cases).

In 1973, Congress augmented FTC's powers by authorizing it to seek injunctive relief in federal court in certain defined circumstances articulated in Section 13(b) of the FTC Act.[7] *See Shire*, 917 F.3d at 155. Section 13(b), the sole authority FTC relies on here, provides FTC with a mechanism for *temporarily* enjoining conduct violating "any provision of law enforced by" FTC, 15 U.S.C. § 53(b), pending completion of FTC's in-house administrative process, *see id.*; *see also FTC v. AMG Capital Mgmt., LLC*, 910 F.3d 417, 431-32 (9th Cir. 2018) (O'Scannlain, J., specially concurring).[8] Relevant here, the statute also provides that in "proper cases" FTC may seek a *permanent* injunction in federal court, without first proceeding through its administrative court. *See* 15 U.S.C. § 53(b). FTC is only authorized to bring this case if FTC can demonstrate that it is "proper" under Section 13(b).

B. A "Proper Case" Is a Routine, Straightforward Claim that Does Not Require FTC's Specialized Expertise in the First Instance

Straightforward matters that do not present novel issues of law and public policy, such as routine fraud and other deceptive-advertising cases, may be "proper"

[7] Before then, FTC could only seek temporary injunctive relief for violations of 15 U.S.C. § 52 *pending completion of FTC's administrative process*. *See FTC v. Nat'l Health Aids*, 108 F. Supp. 340, 341 (D. Md. 1952).

[8] Section 13(b)'s title ("Temporary restraining orders; preliminary injunctions") underscores its primary (and limited) purpose: authorizing FTC to bring an immediate halt to deceptive sales schemes and maintain the status quo in antitrust cases involving mergers.

cases eligible for permanent injunctive relief. *See, e.g., AMG*, 910 F.3d at 428 (allegedly deceptive consumer lending); *FTC v. H. N. Singer, Inc.,* 668 F.2d 1107, 1111 (9th Cir. 1982) ("routine fraud case"); *FTC v. Evans Prods. Co*., 775 F.2d 1084, 1085-86 (9th Cir. 1985) (deceptive advertising); *FTC v. World Travel Vacation Brokers*, 861 F.2d 1020, 1028 (7th Cir. 1988) (routine fraud). Likewise, courts have held that straightforward antitrust violations are sufficient to invoke Section 13(b)'s permanent injunction "proviso." *See, e.g., FTC v. Abbott Lab*., No. 92-1364, 1992 WL 335442, at *2 (D.D.C. 1992) (per se price fixing conspiracy).

But the proviso was not intended to be used in controversial and complex antitrust cases implicating important public policy issues and raising novel legal questions of first impression. *See id.* ("Federal Courts have shied away from accepting direct court actions by the Commission, such as this, if the offending conduct interjects the court into areas of Commission expertise involving the creation and monitoring of new concepts of unfair competitive trade practice."). Instead, Congress intended that such matters be pursued administratively.

Section 13(b)'s legislative history supports this conclusion. *See* S. Rep. No. 93-151, at 30-31 (1973). As a former FTC Commissioner explained: "The legislative history to the 13(b) [permanent injunction] proviso indicates that it is to be invoked only when the agency concludes that a case presents no issues warranting

detailed administrative consideration."[9] Roscoe B. Starek, III, Commissioner, FTC, "A New Age of Antitrust Enforcement: Antitrust in 1995," at 18-19 (Feb. 24, 1995);[10] *see FTC v. H. N. Singer, Inc.,* 668 F.2d 1107, 1110-11 (9th Cir. 1982) (legislative history of 13(b) "explained" Congress' "intent of the final clause of § 13(b)," including affording FTC "the ability, in the routine fraud case, to merely seek a permanent injunction," thus "routine fraud case is a proper case."); *FTC v. Int'l Diamond Corp*., No. C-82-0878-WAI(JSB)., 1983 WL 1911, at *2 (N.D. Cal. Nov. 8, 1983) (quoting Senate Report in concluding that "[t]he legislative history…[indicates] that Congress intended Section 13(b) to be limited to garden variety fraudulent acts and practices"); *U.S. v. Dish Network LLC*, 256 F. Supp. 3d 810, 984 (C.D. Ill. 2017) ("A proper case 'is a straightforward violation of section 5 [of the FTC Act] that required no application of the FTC's expertise to a novel regulatory issue through administrative proceedings.'" (quoting *World Travel*, 861 F.2d at 1028)).[11]

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[9] Before FTC's litigating position "evolved," FTC appeared to recognize this. *See FTC v. H. N. Singer, Inc*., No. C-80-3068-RFP., 1982 U.S. Dist. LEXIS 15622, at *23-24 (N.D. Cal. Oct. 26, 1982).

[10] https://www.ftc.gov/system/files/documents/public_statements/693791/19950224_starek_iii_reinventing_antitrust_enforcement-_antitrust_at_the_ftc_in_1995_and_beyond.pdf

[11] In another controversial FTC enforcement action, Judge Ambro in the Third Circuit observed at oral argument: "[W]hen you look at the legislative history it talks about fraud cases…. And the Seventh and the Ninth Circuit cases in Evans Products and in the Seventh Circuit cases[,] those were essentially fraud cases." Oral Arg. Tr.,

C. "Proper" Does Not Mean "Any"

Nonetheless, FTC's apparent position is that Section 13(b) provides it with *carte blanche* to evade its own administrative process and march into federal court seeking a permanent injunction in *any* case, for *any* reason.[12] But to reach this result requires reading the critical phrase "proper case" out of the statute. Courts "must give effect, if possible, to every word of the statute." *Bowsher v. Merck & Co.*, 460 U.S. 824, 833 (1983) (word "directly" modified statute's scope).

"Proper" does not mean "any." These words were not used by Congress interchangeably. Section 13(b) expressly distinguishes between the conditions under which FTC may seek *preliminary* injunctive relief (that is, "any person, partnership, or corporation is violating, or is about to violate, *any provision of law* enforced by" FTC), and those under which FTC may seek *permanent* injunctive relief ("in *proper cases*"). *See* 15 U.S.C. § 53(b) (emphasis added). "[W]hen the legislature uses certain language in one part of the statute and different language in another, the court [should] assume[] different meanings were intended." *Sosa v.*

FTC v. Wyndham Worldwide Corp., No. 14-3514 (3d Cir. March 3, 2015), at 33:16-22; *see also id*. at 35:8-15. Judge Ambro noted the intent of the statute allowing FTC to bypass administrative proceedings in such "proper cases" under the proviso was "to be done in a very small set of cases." *Id.* at 35:8-36:19.

[12] It is for this Court, and not FTC, to interpret Section 13(b)'s "proper case" requirement. Any litigating position FTC may advance here as to why *this* is a "proper case" deserves no deference. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988).

Alvarez-Machain, 542 U.S. 692, 711 n.9 (2004) (cleaned up). The word "proper" performs a limiting function.[13] As the Fifth Circuit explained, construing the similar phrase "in a proper case" in Federal Rule of Civil Procedure 19, it "clearly does not mean…*whenever*[.]" *Eikel v. States Marine Lines, Inc.*, 473 F.2d 959, 962 (5th Cir. 1973).

In a factually inapposite *preliminary*-injunction appeal in a deceptive-advertising case, this Court has given *Chevron* deference to FTC's *litigating position* that it may seek a *permanent* injunction pursuant to Section 13(b) in any case involving a law enforced by FTC.[14] *See Evans Prods.*, 775 F.2d at 1086-87. *But cf. Price v. Stevedoring Servs. of Am.*, 697 F.3d 820, 825-32 (9th Cir. 2012) (en banc) (agency litigating positions ineligible for *Chevron* deference). But this Court has not approved the use of Section 13(b) to bring a direct federal court proceeding for a permanent injunction in a complex, novel, and unsettled Sherman Act setting. Nor should it. *Cf. FTC v. Credit Bureau Center, LLC*, ---F.3d---, 2019 WL 3940917, at

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[13] *Cf. Frantz v. CBI Fairmac Corp.,* 229 Va. 444, 450 (Va. 1985) ("the phrase, 'in any proper case,' limits, rather than expands" statute).

[14] "Stare decisis compels adherence only if the prior court reached a factually indistinguishable decision." *Cal. Cmtys. Against Toxics v. EPA*, 928 F.3d 1041, 1052 (D.C. Cir. 2019) (cleaned up). This language in *Evans Products* is also arguably dicta because it was unnecessary to this Court's holding that FTC must have evidence of current or likely future violations to obtain an injunction. *See* 775 F.2d at 1087-89.

*5-18 (7th Cir. August 21, 2019) (routine-fraud case overruling circuit precedent holding that § 13(b)'s permanent injunction "proviso" authorized money damages).

"The text of § 13(b) limits injunctive relief to 'proper cases[.]'" *AMG*, 910 F.3d at 428 (allegedly deceptive consumer lending is "proper case"). Former FTC authorities agree: "[B]y its terms, the statute limits the availability of injunctive relief to 'proper cases.'" J. Howard Beales III, Timothy J. Muris, *Striking the Proper Balance: Redress Under Section 13(b) of the FTC Act*, 79 ANTITRUST L.J. 1, 28 (2013). "The very inclusion of the phrase 'in proper cases' suggests that there are some **improper cases** in which the FTC should not be seeking a permanent injunction in the courts." *Id*. (emphasis in original). *Accord* John Carley, *Recent Legislative and Judicial Developments Affecting the Federal Trade Commission,* 51 ANTITRUST L.J. 661, 663 (1982) (former FTC General Counsel). Because at the least the word "proper" cannot mean "any," the question whether a case is "proper" should be answered on a case-by-case basis.

D. This Case is the Antithesis of a "Proper Case"

Whatever the outer reach of "proper case" may be, *this* case does not approach it. If there was ever an "improper" case outside the ambit of Section 13(b), this is it.

The following illustrative examples underscore why:

- The Motions Panel, in granting Qualcomm's stay motion, highlighted this case's novelty in framing the ultimate merits inquiry: "Whether the district

court's order and injunction represent a trailblazing application of the antitrust laws, or instead an improper excursion beyond the outer limits of the Sherman Act[.]" 2ER280.

- The Order's "duty to deal" and "surcharge" liability theories expand antitrust law in novel, unprecedented ways contrary to law. *See* Qualcomm Br. 44-155.
- Accordingly, a current Commissioner has characterized the Order as a product of "judicial alchemy," which "is both bad law and bad public policy."[15]
- As Commissioner Ohlhausen's dissent from the 2-1 vote authorizing this litigation noted, this case presents an "extraordinary situation."[16]
- The Motions Panel found that "this case is unique, as the government itself is divided about the propriety of the judgment and its impact on the public interest."[17] 2ER280.
- "DOJ posits that the injunction has the effect of *harming* rather than *benefiting* consumers." 2ER280 (emphasis in original); *see* 2ER325.

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[15] Commissioner Christine Wilson, "A Court's Dangerous Antitrust Overreach," Wall Street Journal (May 28, 2019).

[16] Dissenting Statement of Commissioner Maureen Ohlhausen, *In the Matter of Qualcomm, Inc*., File No. 141-0199, at 1 (January 17, 2017); *see* 2ER279n.1.

[17] "[W]hile the FTC prosecuted this antitrust enforcement action, the DOJ filed a statement of interest expressing its stark disagreement that Qualcomm has any antirust duty to deal with rival chip suppliers." 2ER278; *see* 2ER350.

- "[T]he Department of Defense and Department of Energy aver that the injunction threatens national security[.]" 2ER280; *see* 2ER312; 2ER318.
- CFIUS posits: "Reduction of Qualcomm's long-term technological competitiveness and influence in standard setting would significantly impact U.S. national security."[18]
- The amicus brief filed by the Honorable Paul R. Michel, former Chief Judge of the Federal Circuit, underscores the controversial nature of this action and FTC's liability theories. *See* Dkt. No. 24-2 at 8-10,12-16.
- FTC did not even attempt to seek a TRO or preliminary injunction in this case, which would have been expected if (counterfactually) FTC had any evidence of actual harm to competition (or if liability was clear-cut).[19]
- Waves of amicus briefs in the district court and this Court reflecting diverse viewpoints highlight the complexity, novelty, and global importance of the issues.

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[18] Letter Re: CFIUS Case 18-036, at 2 (Mar. 5, 2018), http://online.wsj.com/public/resources/documents/cfiusletter.pdf

[19] As FTC's Operating Manual explains, "[i]njunctions should not normally be sought in those cases where…the law is very unclear," noting that "novel issues of law and remedy should generally be left for administrative proceedings." Judicial Enforcement, Ch. 11, §.5.5, p.23, FTC Operating Manual, at https://web.archive.org/web/20190119105014/https://www.ftc.gov/sites/default/files/attachments/ftc-administrative-staff-manuals/ch11judiciaryenforcement.pdf.

This case is the exact opposite of what Congress intended Section 13(b)'s permanent-injunction proviso to be used for. The tactical decision made by only two Commissioners on the eve of the new Administration (over a vigorous dissent) to sue in federal court to effectively deprive the current Commission appointed by the current Administration of any opportunity to evaluate the merits of FTC's case (with the benefit of the FTC Chief ALJ's Initial Decision and subject to independent Article III review) would, if rewarded, set a dangerous precedent.[20]

FTC is not a legislative body unto itself, but instead must carry out Congress's intent. FTC has not done so here. "FTC's understandable preference for litigating under Section 13(b), rather than in an administrative proceeding, does not justify its expansion of the statutory language." *Shire*, 917 F.3d at 159. Because this is not a "proper case," FTC lacked authority to sue in federal court.

II. FTC's Antitrust Assault Against Qualcomm Conflicts With, and is Preempted By, Federal Patent Law

There is no blanket rule that all matters involving patents are outside the scope of antitrust law. *See, e.g., FTC v. Actavis*, 570 U.S. 136, 149 (2013) (Breyer, J.) (patent-related settlements). But FTC cannot regulate all patent matters under

[20] If the Commission proceeded administratively here, Qualcomm could have obtained review in the D.C. Circuit. *See* 15 U.S.C. § 45(c). Interestingly, FTC's filing this case in the Ninth Circuit allowed it to avoid the binding D.C. Circuit precedent of *Rambus, Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008). *Cf.* Qualcomm Br. 42, 101.

antitrust. *See* Matthew Sipe, *Patents V. Antitrust: Preempting Conflict,* 66 AM. U.L. REV. 415 (2016). Controlling law holds that some matters are beyond the reach of antitrust law because of the existence of conflicting regulatory schemes. *See Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264 (2007) (Breyer, J.) (securities laws preempt antitrust laws, including Sherman Act). Whatever antitrust authority FTC may have to police patent-related conduct, it cannot launch an antitrust assault on Qualcomm's SEP licensing practices based on overreaching "duty to deal" and "surcharge" liability theories untethered from, and in conflict with, existing patent law. *Cf.* Sipe, *supra*, at 470-72. FTC lacks authority to regulate such practices due to the "clear incompatibility" between the patent law and FTC's liability theory under the analysis of *Credit Suisse Sec. LLC v. Billing*.[21] *See* 551 U.S. at 275-76.

In *Billing*, securities buyers filed an antitrust lawsuit against underwriting firms that market and distribute newly-issued securities. *See id.* at 269. The underwriters moved to dismiss the antitrust claims, arguing that the federal securities laws implicitly precluded application of the antitrust laws. *Id.* at 270. The Supreme Court identified a four-part test for implied antitrust immunity: (1) the existence of regulatory authority under other law to supervise the activities in question; (2) evidence that the responsible regulatory entities exercise that authority; (3) a

[21] This Court may reject FTC's overreach here on this basis. *Cf. Teague v. Lane,* 489 U.S. 288, 300 (1989) (reaching merits of argument only raised by amicus).

resulting risk that the other law and antitrust laws, if both applicable, would conflict; and (4) the possible conflict between the laws with respect to practices squarely within an area of activity that the other law seeks to regulate. *See id.* at 275-76. Applying these factors, the Court held that the federal securities laws implicitly precluded application of the antitrust laws to the conduct at issue. *See id.* at 285.

Application of the *Billing* factors to FTC's overreach here confirms that FTC lacks authority to regulate Qualcomm's SEP-licensing practices under antitrust.

A. Congress Delegated to Other Agencies Authority to Regulate

The Constitution's Patent Clause grants Congress the enumerated power "[t]o promote the progress of science…by securing for limited times to…inventors the exclusive right to their respective…discoveries." U.S. CONST., Art. I, § 8, cl. 8. Congress has long exercised that power, giving different agencies, such as USPTO, ITC, and the Federal Circuit,[22] comprehensive statutory authority to regulate "all of the activities here in question." *See Billing*, 551 U.S. at 276; Sipe, *supra*, at 425-35.

USPTO has responsibility for examining patent applications and granting patents. 35 U.S.C. § 2. The federal Patent Statute comprehensively regulates issues of patentability, *see, e.g.,* 35 U.S.C. § 101 (patentable subject matter); *id.* § 101, 112 (utility); *id.* § 102 (novelty); *id.* § 103 (nonobviousness), as well as the timing and

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[22] *See* Sipe, *supra*, at 434 ("By engaging in quasi-agency functions, the Federal Circuit further contributes to the preemption of antitrust law under the analysis of *Credit Suisse*.").

nature of disclosure of patents and patent applications, *see id.* § 122 (confidentiality and publication); *id.* § 102(b) (on-sale bar). Patent law specifically addresses patent licensing practices, providing that "[n]o patent owner…shall be…deemed guilty of misuse or illegal extension of the patent right by reason of…refusing to license…the patent[.]" 35 U.S.C. § 271(d)(4).

Similarly, Congress delegated to the ITC authority to investigate and rule on "[u]nfair methods of competition" relating to patents, *see* 19 U.S.C. § 1337(a)(1)(B)(i), and obtain injunctive relief in the form of exclusion and cease-and-desist orders, *id.* § 1337(d)(2),(f).

The Federal Circuit has broad jurisdiction over most patent matters, including ITC and PTAB appeals. 28 U.S.C. § 1295.

Therefore, the first *Billing* factor, "the existence of regulatory authority under…[other] law to supervise the activities in question," 551 U.S. at 275, is met.

B. Other Agencies Actively Supervise SEP Licensing Issues

USPTO, ITC, and the Federal Circuit actively supervise patent-related matters, including SEP licensing practices, through developing and enforcing patent law. *See* Sipe, *supra*, at 438-50. They "ha[ve] continuously exercised…legal authority to regulate conduct of the general kind now at issue" and "defined in detail" permissible practices. *See Billin*g, 551 U.S. at 277.

Further, under patent law, equitable defenses to patent infringement, such as patent misuse and equitable estoppel, and statutory limits on these defenses, *see* 35 U.S.C. § 271(d)(4)-(5), are applicable in the FRAND-encumbered SEP context. *See generally* Sipe, *supra*, at 438-50. Patent misuse doctrine has long been applied to allegedly anticompetitive patent-licensing practices, including license royalties. *See, e.g., U.S. Philips Corp. v. ITC*, 424 F.3d 1179, 1197-99 (Fed. Cir. 2005). Any purported patent hold-up issues associated with FRAND-encumbered SEPs could be addressed by the equitable estoppel defense to infringement claims, coupled with USPTO's recordation requirements. *See* Sipe, *supra*, at 445-47.

Patent regulatory supervision of SEP licensing practices may lead to different outcomes than antitrust law; for example, patent law may provide patent holders greater freedom to license than antitrust might otherwise allow. But under *Billing*, matching outcomes are beside the point; instead, the focus is on actual or potential conflicts. *See* 551 U.S. at 275-76, 282-85. The second *Billing* factor, "evidence that the responsible regulatory entities exercise that authority," *id.* at 275, is satisfied.

C. FTC's Antitrust Regulation Conflicts with Patent Law

The third *Billing* factor is whether there is "a resulting risk that" two different regulatory schemes enforced by different agencies, "if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct." 551 U.S. at 275-76. The *Billing* Court did not require inconsistent

standards *as applied to the alleged underlying conduct* to conclude that this factor was met, instead assuming *arguendo* violations of both the securities laws and antitrust laws. *See id*. at 279. The third *Billing* factor is therefore satisfied by a showing of *potential* (not necessarily *actual*) conflict. *See id.* at 280-84. In fact, the remedy ordered by the district court here undermines Congress's intent to promote innovation by setting this patent regime.

This risk (and reality) of conflict is illuminated through the lens of five principles the *Billing* Court focused on to determine that the third factor was met, *see* 551 U.S. at 279-83 (illustrating principles), all of which apply here, as discussed below.

1. FTC Lacks Intellectual Property Expertise

Under *Billing*, a "need for [industry]-related expertise" to effectively regulate, 551 U.S. at 283, 285, weighs in favor of preclusion. Where permitting two separate regulatory regimes undermines consistency and creates a risk of arbitrary enforcement, *see id.* at 281-82, conflict is more likely. So too here.

Effective administration of patent law requires deep understanding of the relevant technology and the economics of innovation—an expertise the USPTO, ITC, and the Federal Circuit have developed. *See* Sipe, *supra*, at 460-63. By contrast, FTC is a generalist agency. "It is…a difficult task for an antitrust regulator

or court to identify and distinguish anticompetitive patent licenses from neutral or welfare-increasing behavior."[23]

2. Antitrust Law is Inconsistent with Patent Law As Applied Here

At least as applied here, imposition of antitrust liability directly conflicts with patent law. For example, the Order found that "Qualcomm has an antitrust duty to license its SEPs to rival modem chip suppliers," 1ER142:16-17, and the injunction mandates that "Qualcomm must make exhaustive SEP licenses available to modem-chip suppliers," 1ER230:7-8. But the Patent Statute provides that refusal to license patent rights cannot constitute patent misuse or illegal extension of the patent rights. 35 U.S.C. § 271(d)(4); *see also In re Indep. Serv. Orgs. Antitrust Litig*., 989 F. Supp. 1131, 1135 (D. Kan. 1997) ("[S]ection 271(d)(4) should be interpreted to apply to antitrust claims."). *But cf. Image Tech. Servs. v. Eastman Kodak Co.,* 125 F.3d 1195, 1214 n.7 (9th Cir. 1997) (§ 271(d) does not preclude antitrust claims). Indeed, Section 201 of the 1988 amendments to the Patent Act, which added 35 U.S.C. § 271(d)(4), is titled "Permissible Acts by Patent Owner." 102 Stat. 4676 (Nov. 19, 1988).

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[23] Douglas H. Ginsburg and Joshua D. Wright, *A Bargaining Model v. Reality in* FTC v. Qualcomm*: A Reply to Kattan & Muris*, at 13 (May 15, 2019), *available at* https://ssrn.com/abstract=3389476.

Licensing practices specifically permitted under patent law should not form the basis for antitrust liability. *Cf. Simpson v. Union Oil Co.*, 377 U.S. 13, 24 (1964) ("The patent laws…are in pari materia with the antitrust laws and modify them pro tanto."). The Order wrongly faults Qualcomm for exercising its clear rights under patent law, showcasing why antitrust liability should be precluded here.[24]

Actual conflicts have also emerged in prior FTC consent orders against SEP holders. *See, e.g., In re Motorola Mobility LLC and Google Inc.*, FTC File No. 121-0120, Dissenting Statement of Commissioner Maureen Ohlhausen, at 3 (Jan. 3, 2013) ("The Order contradicts the decisions of federal courts,…SSOs..., and other stakeholders….").[25] "[O]ne of the effects of those decisions was to create conflict between the FTC and other federal institutions," including "between the FTC and the ITC and federal courts[.]"[26]

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[24] *See* Makan Delrahim, Assistant Attorney General, Antitrust Division, DOJ, "Take It to the Limit: Respecting Innovation Incentives in the Application of Antitrust Law," at 8 (Nov. 10, 2017) ("A patent holder cannot violate the antitrust laws by properly exercising the rights patents confer, such as…refusing to license such a patent."), https://www.justice.gov/opa/speech/file/1010746/download

[25] http://ftc.gov/os/caselist/1210120/130103googlemotorolaohlhausenstmt.pdf.

[26] Remarks of Maureen Ohlhausen, Commissioner, Federal Trade Commission Interaction of IP and Antitrust: A US-China Comparative Perspective, at 5-6 (June 17, 2013), https://www.ftc.gov/sites/default/files/documents/public_statements/recent-developments-intellectual-property-and-antitrust-laws-united-states/130617intellectualpropertyantitrust.pdf.

These conflicts reflect a broader pattern, which extends to remedies. Under the Patent Act, proof of irreparable harm is required for injunctive relief. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). Section 13(b) of the FTC Act, however, has been deemed to use a different injunction standard. *See FTC v. Consumer Def., Ltd. Liab. Co.*, 926 F.3d 1208, 1212-14 (9th Cir. 2019).

3. FTC Regulation Damages Innovation

Under *Billing*, "clear repugnancy" is more likely where, as here, overlapping regulation potentially damages a specialized industry. *See* 551 U.S. at 179.

This lawsuit "by its mere issuance, will undermine U.S. intellectual property rights…worldwide."[27] The scope of judicially imposed remedies in alleged monopolization cases (like this one) "often have far-reaching effects and can re-shape entire industries"; "an overly broad remedy could result in reduced innovation, with the potential to harm American consumers[.]" 2ER353-2ER356. FTC's efforts to micromanage Qualcomm's chip licensing practices punish and deter innovation and damage the U.S. tech industry, further counseling in favor of preclusion (and is an additional reason this is not a "proper case").

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[27] Dissenting Statement of Commissioner Maureen Ohlhausen, *In the Matter of Qualcomm, Inc.*, File No. 141-0199, at 1 (January 17, 2017).

4. Potential Future Conflicts

There is a broader inherent potential conflict between patent and antitrust law. *See U.S. v. Westinghouse Elec. Corp.*, 648 F.2d 642, 646-67 (9th Cir. 1981). "The conflict between the antitrust and patent laws arises in the methods they embrace that were designed to achieve reciprocal goals." *SCM Corp. v. Xerox Corp.*, 645 F.2d 1195, 1203 (2d Cir. 1981). "The point of antitrust law is to encourage competitive markets to promote consumer welfare. The point of patent law is to grant limited monopolies as a way of encouraging innovation." *Actavis,* 570 U.S. at 161 (Roberts, J., dissenting).

In some cases, these two legal constructs can be reconciled. But this requires the exercise of restraint and discretion by FTC, absent here. At least with respect to the specific SEP-licensing practices at issue here, FTC's views of the law will continue to collide and conflict with that of its sister agencies, federal courts, and the Patent Act. This weighs in favor of preclusion of antitrust liability. *Cf. Billing*, 551 U.S. at 273, 280-81.

5. No Enforcement-Related Need

Finally, preclusion is appropriate where, as here, "any enforcement-related need for an antitrust lawsuit is unusually small." *See Billing*, 551 U.S. at 283.

First, the USPTO, ITC, and the Federal Circuit already actively supervise and enforce the boundaries SEP holders must abide by. *See, e.g., Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286, 1331-32 (Fed. Cir. 2014).

Second, sophisticated, well-resourced private parties and SSOs are fully capable of vindicating their legal rights under patent and contract law without the aid of FTC.[28] These sophisticated parties have shown themselves capable of protecting their interests through patent litigation without need to resort to the FTC Act.

There is simply no need for antitrust intervention here.

D. The Possible and Actual Conflicts Affect Practices Squarely Within the Heartland of Patent Law

The fourth *Billing* factor is whether "the possible conflict [between two regulatory regimes] affect[s] practices that lie squarely within an area of…activity that the…[other] law seeks to regulate." *Billing*, 551 U.S. at 276.

Here, the licensing of FRAND-encumbered SEPs is within the heartland of patent law. *See* 35 U.S.C. §§ 261, 271(d)(4)-(5), 284. All *Billing* factors are met, and FTC's misguided efforts to apply antitrust law here should be rejected.

[28] FRAND commitments are binding contracts. If a company believes a SEP holder violated its FRAND commitments, it can sue for breach of contract.

III. SECTION 13(B) DOES NOT AUTHORIZE MANDATORY INJUNCTIVE RELIEF

The injunction is also invalid because Section 13(b) does not authorize mandatory injunctive relief.[29] Although the Ninth Circuit has not decided this question yet, *see FTC v. Neovi, Inc.*, 604 F.3d 1150, 1160 & n.10 (9th Cir. 2010), the FTC Act forecloses this.

The Order requires Qualcomm (and other third parties) to take a number of affirmative actions: "Qualcomm ***must*** negotiate or renegotiate license terms," 1ER228:24 (emphasis added); "Qualcomm ***must*** make exhaustive SEP licenses available to modem-chip suppliers," 1ER230:7 (emphasis added); "Qualcomm ***shall*** report to the FTC," 1ER233:1 (emphasis added).

By definition, this is mandatory injunctive relief, which the district court lacked authority to impose.[30] The Order's own characterization of its injunction confirms this. For instance, it "require[es] Qualcomm to renegotiate its existing patent license agreements," 1ER229:12, acknowledging that "this remedy does not merely proscribe future Qualcomm conduct, and will require Qualcomm to negotiate

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[29] *See generally* BLACK'S LAW DICTIONARY 855 (9th ed. 2009) (defining "prohibitory injunction" as one that "forbids or restrains an act," and "mandatory injunction" as one that "orders an affirmative act or mandates a specified course of conduct").

[30] *Cf. FTC v. Lake*, 181 F. Supp. 3d 692, 704 (C.D. Cal. 2016) (rejecting mandatory injunction).

many licenses," 1ER230:2-4. It further "require[s] Qualcomm to license its SEPs to rival modem chip suppliers on FRAND terms[.]" 1ER230:12.

Congress specifically provided mandatory injunctive relief under Section 5 of the FTC Act but only for violations of Commission final orders. "In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate **in the enforcement of such final orders of the *Commission***." 15 U.S.C. § 45(l) (emphasis added). Similarly, Section 19 of the FTC Act specifically provides that district courts may award relief such as "rescission or reformation of contracts," *see* 15 U.S.C. § 57b(b), under circumstances that do not obtain here, *see* 15 U.S.C. § 57b(a). *Cf.* 2ER279 ("injunction requires Qualcomm to enter new contractual relationships and renegotiate existing ones"). This extraordinary type of injunctive relief, however, is not provided in Section 13(b), which only authorizes preliminary or permanent injunctive relief where an entity is about to violate or is violating the FTC Act. 15 U.S.C. § 53(b). If Congress intended to provide district courts with the authority to order mandatory injunctive relief under Section 13(b), it would have expressly so provided, as it did in Section 5(l). *See Credit Bureau*, 2019 WL 3940917, at *7 ("The absence of similar language in section 13(b) is conspicuous."). It did not.

In any event, the injunction is unenforceably vague. *See LabMD*, 894 F.3d at 1236-37. It requires Qualcomm to renegotiate licenses "free from the threat of lack

of access to or discriminatory provision of modem chip supply or associated technical support or access to software," 1ER228:25-26, and "make exhaustive SEP licenses available to modem-chip suppliers on fair, reasonable, and non-discriminatory…terms and to submit, as necessary, to arbitral or judicial dispute resolution to determine such terms," 1ER230:7-9. But it "says precious little about how this is to be accomplished…[and] effectually charges the district court with managing the overhaul. This is a scheme Congress could not have envisioned." *LabMD*, 894 F.3d at 1237.

IV. SECTION 13(B) CAN ONLY BE USED WHEN A COMPANY "IS VIOLATING, OR IS ABOUT TO VIOLATE" THE FTC ACT

Under Section 13(b), a permanent injunction may not issue unless FTC can show that a company "is violating, or is about to violate" the FTC Act. 15 U.S.C. § 53(b). "'[I]s' or 'is about to violate' means what it says—the FTC must make a showing that a defendant is violating or is about to violate the law." *Shire*, 917 F.3d at 159. Section 13(b) is "unambiguous" on this point: "it prohibits existing or impending conduct." *Id.* at 156. Thus, "[p]ast wrongs are not enough for the grant of an injunction; an injunction will issue only if the wrongs are ongoing or likely to recur." *Evans Prods.*, 775 F.2d at 1087. This is true regardless of whether any alleged "injury flowing from that violation" may be "continuing today." *Id.* at 1088.

Here, this condition was not met. *See* Qualcomm Br. 115-21. If FTC wanted to use Qualcomm's alleged past conduct as a "test case" to "expand" its powers, it should have sued Qualcomm in-house, as authorized by 15 U.S.C. § 45(b).

CONCLUSION

This Court should reverse the judgment below.

Respectfully submitted,

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