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FTC v. *Qualcomm* and the Need to Reboot Antitrust Goals

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FTC v. Qualcomm and the Need to Reboot Antitrust Goals

By: Beatriz Del Chiaro da Rosa

ABSTRACT

The antitrust community is facing a demanding question: Is antitrust enforcement ultimately about protecting consumers, competition, or both? This question has sparked debates about the ultimate goals of antitrust law. On one side of the debate, supporters of the consumer welfare standard; and on the other side, supporters of the Neo-Brandeisian standard of enforcement. At this crucial time in the debate of overarching antitrust goals, the Ninth Circuit's holding in Federal Trade Commission v. Qualcomm Incorporated, one of the most important antitrust cases in the twenty-first century, poses many issues for the consumer welfare standard and antitrust enforcement in the future.

Qualcomm Incorporated ("Qualcomm") is part of a multi-billion-dollar industry as a dominant supplier of baseband processors and a licensor of patents which enable communications in cell phones and tablets. The Federal Trade Commission brought a case against Qualcomm in response to alleged unreasonable restraints on competition and an unlawful maintenance of a monopoly. The Ninth Circuit reversed the district court's judgment against Qualcomm, and instead found, among other things, that harm to consumers is outside the relevant market in analyzing an antitrust violation. The Ninth Circuit's exclusion of consumers from an analysis of anticompetitive harm deviates from established precedent and has already caused a ripple effect distancing antitrust enforcement from its established goals and standards.

Qualcomm’s business practices in question in this case implicate technology present in the daily lives of most U.S. consumers. In reversing the district court’s holding, the Ninth Circuit misunderstood and misapplied fundamental principles of established antitrust law in reasoning that Qualcomm’s conduct “involves potential harm to customers, not its competitors, and thus falls outside the relevant markets.” This grave error is contrary to fundamental principles of antitrust law and could have significant implications by narrowing the interpretation of the Sherman Act for the foreseeable future.

*This note addresses the current debate about the ultimate goals of antitrust law, mainly focusing on the Consumer Welfare and the Neo-Brandeisian standards of antitrust enforcement. The lack of clarity and cohesion in antitrust debates about the goals of antitrust have rendered the realm vulnerable to judicial decisions, such as *FTC v. Qualcomm*, that misapply and misinterpret antitrust standards. This note delineates a potential solution for the lack of clarity as a call to the courts and academics to improve discourse by viewing the protection of consumers and competition as fundamental to antitrust enforcement.*

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PART I: INTRODUCTION

Antitrust aficionados are currently at a crossroads: stand guard with the accepted consumer welfare standard of antitrust enforcement, or, join forces with critics in arguing for a competition-oriented standard based on Neo-Brandeisian ideals. The lack of consensus in the antitrust realm has generated confusion in application of both standards. This absence of clarity is apparent in *FTC v. Qualcomm*, a leading patent technology case in which the Ninth Circuit panel determined that Qualcomm's activity "involves potential harms to Qualcomm's customers, not its competitors, and thus falls outside the relevant antitrust markets."¹ This is directly contrary to established antitrust theory which holds consumer welfare as a fundamental goal of antitrust law.²

It is common to say that antitrust has embraced a single standard: consumer welfare. However, the consumer welfare standard requires an analysis of two prongs: the impact of the challenged conduct on competition; and the impact of the challenged conduct on consumers.³ The Ninth Circuit panel incorrectly applied the consumer welfare standard by solely focusing on the impact that the challenged conduct has on competition in the market.⁴ Although impact on competition is one of the prongs which must be analyzed when conducting a Sherman Act Section 2 analysis, it is not the *only* consideration which antitrust enforcement must contemplate.⁵ The panel improperly neglected to contemplate the impact of the challenged conduct on consumers.⁶

The misnomer of "consumer welfare" has generated significant distress in antitrust law.⁷ Although the standard has been historically

¹ *FTC v. Qualcomm Inc.*, 969 F.3d 974, 1002 (9th Cir. 2020).

² See generally Brief of 46 Amici Curiae Law and Economics Scholars in Support in Support of Petition for Rehearing En Banc, at 13, *FTC v. Qualcomm Inc.*, 969 F.3d 974, 982 (9th Cir. 2020) (No. 19-16122) (citing *Lucas v. Citizens Commc'ns Co.*, 244 F. App'x 774, 776 (9th Cir. 2007)) [hereinafter Amicus Brief].

³ See, e.g. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (internal citations omitted) (emphasis added) (stating "[t]he antitrust laws, however, were enacted for 'the protection of competition, not competitors . . .'" (quoting *Brown Shoe Co. v. U.S.*, 370 U.S., at 320 (1962))).

⁴ See *Qualcomm Inc.*, 969 F.3d at 1002.

⁵ See, e.g. *Reiter*, 442 U.S. at 343; *Brunswick Corp.*, 429 U.S. at 488.

⁶ See, e.g. *Reiter*, 442 U.S. at 343; *Brunswick Corp.*, 429 U.S. at 488.

⁷ See, e.g. Lina M. Khan, *The End of Antitrust History Revisited*, 133 HARV. L. REV. 1655, 1656 (2020) (reviewing TIM WU, *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE* (2018)).

adopted as a guiding principle in antitrust enforcement,⁸ many critics of the consumer welfare principle have argued that harm to competition should be the primary focus of antitrust enforcement.⁹ Antitrust policy is currently navigating between two extremes of the ideological spectrum.¹⁰ On one end of the spectrum is Robert Bork's consumer welfare approach.¹¹ On the other end of the ideological spectrum is the Neo-Brandeisian approach, which argues that "the current theory of antitrust" is the major concern.¹²

This Note will dive into the current antitrust discourse pertaining to the goals of antitrust enforcement by shining a light on the lack of clarity that clouds antitrust enforcement today. Part II of this Note will address current antitrust enforcement and the case details of *FTC v. Qualcomm* in the light of current antitrust discussion about the goals of antitrust law. In highlighting the judicial error present in the Ninth Circuit panel's holding, Part III of this Note will provide history and context about the goals of antitrust, focusing on the consumer welfare and the Neo-Brandeisian standards of antitrust enforcement, and introduce what that dialogue amounts to today. Part IV of this note will discuss the errors in the Ninth Circuit's holding, and lay pavement for what this author believes is a possible solution to the current divide in antitrust enforcement as a call for clarity in the hopes of avoiding disastrous results from improperly applied standards of enforcement. In fact, the *FTC v. Qualcomm* decision has already influenced subsequent decisions in deviating even further from the consumer welfare standard.¹³ Instead of crossing swords over whether protecting consumers or protecting competition is more important, why not consider both?

⁸ See generally *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985) (stating that "... it is relevant to consider its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way.").

⁹ See Khan, *supra* note 7.

¹⁰ See Herbert Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?*, 45 J. CORP. L. 101, 102 (2019).

¹¹ *Id.* at 103.

¹² See Khan, *supra* note 7, at 1676.

¹³ See, e.g. Brief of Apple Inc. As Amicus Curiae in Support of Plaintiff-Appellant and Reversal, at 31 Regarding *Cont'l Auto. Sys. v. Avanci*, 485 F. Supp. 3d 712 (N.D. Tex. Sept. 10, 2020) (stating "[t]he district court's flawed decision here can be traced directly to the DOJ's misplaced efforts to curtail the application of antitrust law to patents are embraced in the Ninth Circuit's *Qualcomm* decision" in an Amicus Curiae Brief which addresses how this deviation impacts the consumer welfare standard).

PART II: ANTITRUST POLICY SETTING THE STAGE FOR *FTC v. QUALCOMM*

The framers of the Sherman Act have allowed the courts to shape antitrust policy as needed to fulfill the goals of antitrust law.¹⁴ The consensus in antitrust policy has been that the courts must balance the procompetitive justifications with the anticompetitive harms in evaluating claims of anticompetitive conduct.¹⁵ In evaluating anticompetitive harm, harm to consumers has long been accepted as relevant and has therefore been considered by courts.¹⁶ However this consensus has been challenged, requiring a reexamination into the goals and standards of antitrust law. Before we can look to the future of antitrust policy, we must look to the background and the formation of the policy as it stands today. In this section, this Note sets the stage for current antitrust enforcement, and discusses the case details of *FTC v. Qualcomm*.

A. Antitrust Law and Monopolization: Increasing Brightness on a Poorly Lit Area of Antitrust Enforcement

Section 2 of the Sherman Act makes it is illegal to “monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations”¹⁷ To successfully establish a claim under Section 2 of the Sherman Act, a plaintiff must show that (1) the defendant has “monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.”¹⁸ Therefore, merely having monopoly power is not sufficient to be a violation of Sherman Act Section 2 if such power is a result of effectively engaging in market competition.¹⁹ One violates the Sherman Act when it acquires or maintains, or attempts to acquire or maintain, a monopoly by engaging in exclusionary conduct.²⁰

¹⁴ U.S. DEP’T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT (2008).

¹⁵ Michael A. Carrier, *The Four-Step Rule of Reason*, 33 *Antitrust* 50, 50–51 (2019).

¹⁶ *See, e.g. Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985) (stating that “. . . it is relevant to consider its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way.”).

¹⁷ 15 U.S.C. § 2.

¹⁸ *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

¹⁹ *See United States v. Aluminum Co. of Am.*, 148 F.2d 416, 430 (2d Cir. 1945) (Hand, J.) (“The successful competitor, having been urged to compete, must not be turned upon when he wins.”).

²⁰ *See United States v. Microsoft Corp.*, 253 F.3d 34, 58 (2001) (stating “[a] firm violates § 2 only when it acquires or maintains, or attempts to acquire or maintain, a

The Sherman Act attempts to create and to preserve a competitive market by banning unlawful and exclusionary conduct which results in the acquisition or maintenance of monopoly power.²¹

The framers of Section 2 of the Sherman Act did not include a definition of “monopolization” and instead left it undefined and with little guidance as to what amounts to prohibited conduct.²² Instead of providing clear delineations and definitions, Congress furnished an Act with “a generality and adaptability comparable to that found to be desirable in constitutional provisions”²³

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress²⁴

Congress “expected the courts to give shape to the statute’s broad mandate by drawing on the common-law tradition” while keeping in mind the statute’s goals.²⁵

Courts have consistently shaped antitrust prosecution by evolving as issues arise. For example, consider the shifts from per se illegality to a rule of reason approach to analysis. Per se illegality was the common form of analysis during most of the mid-twentieth century.²⁶ Under that approach certain types of conduct, such as horizontal price fixing and horizontal market allocation, are deemed per se illegal and thus a violation of antitrust laws.²⁷ Although the rule of reason approach had been formalized since the early 1900s in *Standard Oil Co. v. United States*,²⁸ in 1918, the

monopoly by engaging in exclusionary conduct “as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.”) (quoting *Grinnell*, 384 U.S. at 571).

²¹ U.S. DEP’T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT (2008), (stating “Section 2 achieves this end by prohibiting conduct that results in the acquisition or maintenance of monopoly power, thereby preserving a competitive environment that gives firms incentives to spur economic growth.”).

²² *Id.* (citations omitted).

²³ *Id.* (quoting *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 360 (1933)).

²⁴ *Id.* (quoting *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958)).

²⁵ *Id.* (quoting *Nat’l Soc’y of Pro. Eng’rs v. United States*, 435 U.S. 679, 688 (1978)).

²⁶ *Carrier*, *supra* note 15, at 50.

²⁷ *Id.*

²⁸ *See generally* *Standard Oil Co. v. United States*, 221 U.S. 1, 66 (1911) (stating “[i]f the criterion by which it is to be determined in all cases whether every contract,

Supreme Court recognized a need for a more comprehensive analysis of possible antitrust violations in *Chicago Board of Trade v. United States*.²⁹ A Rule of Reason analysis is a burden-shifting framework containing four steps.³⁰ First, the plaintiff must show a significant anticompetitive effect.³¹ Second, the burden shifts to the defendant to provide a procompetitive justification.³² Third, the burden shifts back to the plaintiff to show that the defendant's proffered procompetitive justification is not reasonably necessary to achieve the desired effects.³³ Fourth, the court balances the anticompetitive effects and procompetitive justifications.³⁴ In the 1970s, the Court shifted focus from looking at specific categories of conduct to also conducting an economic analysis.³⁵

Depending on the approach that courts take in evaluating and balancing the anticompetitive effects with the procompetitive justifications, the impact can be monumental not only for the parties of the cases but also in establishing precedent for future cases.³⁶ However, with the lack of established and unified ideals of the true purpose of antitrust, courts, like the Ninth Circuit panel in *FTC v. Qualcomm*, have deviated drastically from established precedent by misapplying or misunderstanding antitrust standards. This has led to tenuous holdings and ultimately contributes to the lack of understanding surrounding the goals of antitrust law.

B. FTC v. Qualcomm: A Tangled Web of Antitrust Standards

1. Qualcomm's Market Structure

Qualcomm is a leading cellular technology company which has made several important contributions to technological innovations in the world of modern cellular systems.³⁷ Some of Qualcomm's contributions have included third-generation ("3G") CDMA and fourth-generation ("4G")

combination, etc., is a restraint of trade within the intendment of the law, is the direct or indirect effect of the acts involved, then of course the rule of reason becomes the guide, and the construction which we have given the statute, instead of being refuted by the cases relied upon, is by those cases demonstrated to be correct.").

²⁹ Carrier, *supra* note 15, at 50.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.* at 50-51.

³⁴ *Id.* at 51.

³⁵ *Id.* at 50.

³⁶ See, e.g. Michael Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 BYU L. REV. 1265, 1266-67 (1999) (finding empirically that defendants win 96% of rule of reason cases).

³⁷ *FTC v. Qualcomm Inc.*, 969 F.3d 974, 982 (9th Cir. 2020).

LTE cellular standards, which are used in most modern cellphones and cellular devices commonly known as “smartphones.”³⁸ Qualcomm utilizes patents to protect and consequently profit from the innovations.³⁹ Qualcomm then licenses to original equipment manufacturers (“OEMs”) whose products utilize one of Qualcomm’s technologies protected by their patents.⁴⁰

As relevant to this case, Qualcomm’s patents include cellular standard essential patents (“SEPs”),⁴¹ non-cellular SEPs, and non-SEPs. Cellular SEPs are essential and necessary to practice certain cellular standards.⁴² Because SEP holders have the power to prevent industry participants from implementing standards by refusing to license, Standard Setting Organizations obligate patent holders to agree to license their SEPs on fair, reasonable and nondiscriminatory (“FRAND”) terms prior to their patents being incorporated.⁴³ Some of Qualcomm’s patents, SEPs and otherwise, deal with how cellular devices communicate with 3G and 4G cellular networks.⁴⁴ That is, it relates to CDMA and premium LTE technologies.⁴⁵ Other patents relate to noncellular applications and other cellular applications, such as multimedia, cameras and more.⁴⁶ Qualcomm generally offers “patent portfolio” options in which the customer receives access to all three types of the patents rather than selling individual patents.⁴⁷ Qualcomm profits greatly from this patent business.⁴⁸ Qualcomm’s patent portfolios are exclusively licensed at the smartphone OEM level, and the royalty rates on the CDMA and LTE patent portfolios are set as a percentage of the end-product sales price.⁴⁹

Qualcomm also successfully and profitably manufactures and sells modem chips, which enable cellular devices to practice CDMA and premium LTE technologies.⁵⁰ This allows communication across cellular networks.⁵¹ Qualcomm is unique because it is both in the SEP portfolio

³⁸ *See id.*

³⁹ *Id.*

⁴⁰ *Id.* (noting that the OEM products usually include cellphones, smart cars, and other products which include cellular applications).

⁴¹ *Id.* (explaining that “Cellular SEPs are patents on technologies that international standard-setting organizations (“SSOs”) choose to include in technical standards practiced by each new generation of cellular technology.”).

⁴² *Id.* at 983.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 984.

⁵⁰ *Id.* at 983.

⁵¹ *Id.*

market, as well as the modem chip market.⁵² In the ten-year period of 2006 to 2016, Qualcomm possessed monopoly power in the CDMA modem chip market, “including over 90% of market share.”⁵³ From 2011 to 2016, Qualcomm also possessed monopoly power in the premium LTE modem chip market, “including at least 70% of market share.”⁵⁴ During these periods of monopoly power, Qualcomm used its power “to ‘charge monopoly prices on [its] modem chips.’”⁵⁵ In 2015 Qualcomm’s market position started to recede because competitors found ways to successfully compete.⁵⁶ However, even with a receding market position, Qualcomm still maintains approximately a 79% market share of the CDMA modem chip market, and a 64% share of the premium LTE modem chip market.⁵⁷

Rival chip manufacturers necessarily practice many of Qualcomm’s SEPs, and thus Qualcomm offers these rivals “CDMA ASIC Agreements” in which Qualcomm promises not to assert its patents, and in return, the rival companies promise not to sell their chips to unlicensed OEMs.⁵⁸ Qualcomm reinforces these requirements with a “no license, no chips” policy, under which Qualcomm refuses to sell modem chips to OEMs that do not also take licenses to practice Qualcomm’s SEPs.⁵⁹ The court of appeals characterizes OEMs as Qualcomm’s customers.⁶⁰

Several of these practices are frequently contested by Qualcomm’s OEM customers and rival chipmakers, who often complain of “Qualcomm’s practice of licensing exclusively at the OEM level and refusing to license rival chipmakers, its licensing royalty rates, its ‘no license, no chips’ policy, and Qualcomm’s sometimes aggressive defense of these policies and practices.”⁶¹ In January of 2017, the Federal Trade Commission sued Qualcomm alleging (1) tying in response to Qualcomm “conditioning the supply of baseband processors on licenses to FRAND-encumbered patents”; (2) refusals to deal in response to Qualcomm “refusing to license FRAND-encumbered patents to baseband processor competitors”; and (3) exclusive dealing, in response to Qualcomm’s

⁵² *Id.* (noting that “Nokia, Ericsson, and Interdigital have comparable SEP portfolios but do not compete with Qualcomm on the modem chip markets[,]” and that “Qualcomm’s main competitors in the modem chip markets . . . MediaTek, HiSilicon, Samsung LSI, ST-Ericsson, and VIA Telecom . . . do not hold or have not held comparable SEP portfolios.”).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* (citing *FTC v. Qualcomm Inc.*, 411 F. Supp. 3d 658, 800 (N.D. Cal. 2019)).

⁵⁶ *Id.* at 983–84.

⁵⁷ *Id.* at 984.

⁵⁸ *Id.*

⁵⁹ *Id.* at 985.

⁶⁰ *Id.*

⁶¹ *Id.*

restricted dealing with Apple.⁶² The FTC's allegations provide that Qualcomm's interrelated policies and business practices excluded competitors and thus harmed competition in violation of the Federal Trade Commission Act, 15 U.S.C. § 45(a), and sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2.⁶³

2. The Merits of Enforcement Against Qualcomm

After lengthy procedures spanning a course of two years, the district court ruled in favor of the Federal Trade Commission and found that the Commission properly asserted that Qualcomm violated Sections 1 and 2 of the Sherman Act, and Section 5 of the Federal Trade Commission Act.⁶⁴ The court then ruled that since the anticompetitive conduct is ongoing, an injunction is warranted to prevent more anticompetitive harm.⁶⁵

The district court's findings of fact and law are the result of a full rule of reason analysis conducted by investigating the anticompetitive conduct and the impacts.⁶⁶ The district court emphasized that "anticompetitive conduct is conduct that 'harm[s] the competitive process and thereby harm[s] consumers.'"⁶⁷ The district court also accentuated that conduct that solely harms competitors is not enough to be anticompetitive.⁶⁸ The district court further elaborated that "[a]nticompetitive conduct is behavior that tends to impair the opportunities of rivals and either does not further competition on the merits or does so in an unnecessarily restrictive way."⁶⁹ With this established foundation, the district court dove into a deep analysis of Qualcomm's anticompetitive practices.

The district court engaged in a lengthy and detailed discussion regarding Qualcomm's anticompetitive practices in patent license negotiations regarding several OEMs.⁷⁰ Regarding the anticompetitive conduct against OEMs allegations, the district court found that Qualcomm has engaged in substantial anticompetitive conduct.⁷¹ As the district court

⁶² Complaint for Equitable Relief at 31, *FTC v. Qualcomm Inc.*, 969 F.3d 974 (9th Cir. 2020) (No. 17-00220) (ECF. No. 1).

⁶³ *FTC v. Qualcomm Inc.*, 969 F.3d at 986.

⁶⁴ *See id.*

⁶⁵ *See FTC v. Qualcomm Inc.*, 411 F. Supp. 3d 658, 813 (N.D. Cal. 2019).

⁶⁶ *See id.* at 696-751.

⁶⁷ *Id.* at 696 (citing *United States v. Microsoft Corp.*, 346 U.S. App. D.C. 330, 253 F.3d 34, 58 (2001)).

⁶⁸ *Id.*

⁶⁹ *Id.* (citing *Cascade Health Sols. v. PeaceHealth*, 515 F.3d 883, 894 (9th Cir. 2008)).

⁷⁰ *See id.* (analyzing Qualcomm's conduct toward "(1) LGE, (2) Sony, (3) Samsung, (4) Huawei, (5) Motorola, (6) Lenovo, (7) BlackBerry, (8) Curitel, (9) BenQ, (10) Apple, (11) VIVO, (12) Wistron, (13) Pegatron, (14) ZTE, (15) Nokia, and (16) smaller Chinese OEMs.>").

⁷¹ *Id.* at 743.

explained, Qualcomm's refusal to sell its modem chips to an OEM until the OEM signed a patent license agreement, and refusal to sell its modem chips exhaustively, was anticompetitive.⁷² Qualcomm engaged in conduct which ultimately ensured that the OEMs would sign Qualcomm's license agreements which ultimately resulted in exclusivity.⁷³

The district court further discussed Qualcomm's refusal to license standard essential patents ("SEPs") to competing modem chip suppliers.⁷⁴ The court held that this practice is anticompetitive because it has prompted rivals to exit the market, impacted entry into the market, and hindered the success of competitors.⁷⁵ Qualcomm's rivals are threatened because they cannot sell modem chips without an assurance that Qualcomm will not sue for patent infringement.⁷⁶ This conduct also facilitates Qualcomm in charging unreasonably high royalty rates.⁷⁷ The district court analyzed in depth how Qualcomm's practices impacted market entry, promoted rivals' entry, and hurt rivals in the relevant market.⁷⁸

The district court then found that Qualcomm's FRAND Commitments required the company to license its modem chip SEPs to rivals, stating that "Qualcomm's FRAND commitments to two SSOs⁷⁹ require Qualcomm to license its SEPs to rivals."⁸⁰ The district court discussed in detail that Qualcomm used to license its SEPs to rivals, however, for solely financial reasons, stopped doing so because licensing its SEPs to OEMs is significantly "more lucrative."⁸¹ The district court therefore refused to accept Qualcomm's allegedly procompetitive justifications for the conduct of refusing to license to its rivals.⁸²

The district court also analyzed whether Qualcomm has an antitrust duty to license its SEPs to rival modem chip suppliers under the Sherman Act.⁸³ The court explained that although there is no general duty to aid

⁷² *See id.*

⁷³ *See id.*

⁷⁴ *Id.* at 744.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ The district court discussed Qualcomm's (1) 2008 refusal to license MediaTek; (2) 2011 refusal to license Project Dragonfly; (3) 2011 refusal to license Samsung; (4) refusal to license VIA; (5) 2004 and 2009 refusals to license Intel; (6) 2009 refusal to license HiSilicon; (7) refusal to license Broadcom; (8) refusal to license Texas Instruments; (9) 2015 refusal to license LGE; and (10) 2009 and 2018 refusals to license Samsung. *See id.* at 744–51.

⁷⁹ SSOs are standard setting organizations. *Id.* at 669.

⁸⁰ *Id.* at 751.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 758.

competitors,⁸⁴ a refusal to cooperate with rivals can oftentimes constitute anticompetitive conduct and thus violate Section 2 of the Sherman Act.⁸⁵ In concluding that Qualcomm violated Section 2 of the Sherman Act, the court analyzed several factors and found the following facts to be relevant: (1) “Qualcomm terminated a voluntary and profitable course of dealing,”⁸⁶ (2) Qualcomm’s refusal to license was motivated by anticompetitive motives;⁸⁷ and (3) there is an existing market for licensing modem chip SEPs.⁸⁸ The court determined these factors were relevant because they were outlined in *Aspen Skiing Company v. Aspen Highlands Skiing Corporation*.⁸⁹

The district court also explained that Qualcomm’s exclusive deals with Apple, including the 2011 Transition Agreement (“TA”) and the 2013 First Amendment to Transition Agreement (“FATA”), violate the Sherman Act.⁹⁰ The court reasoned that the TA and FATA allowed Qualcomm to shrink rivals’ sales and prevent rivals from achieving positive network effects of working with Apple.⁹¹ This allowed Qualcomm to retain monopoly power in these markets and thus sustain QTL’s unreasonably steep royalty rates.⁹² The court also determined that Qualcomm’s exclusive deals with Apple resulted in a foreclosure of a substantial market share.⁹³

The court concluded that “Qualcomm’s licensing practices have strangled competition in the CDMA and premium LTE modem chip markets for years, and harmed rivals, OEMs, and end consumers in the process.”⁹⁴ The district court held Qualcomm to be in violation of Section 1 of the Sherman Act because of an unreasonable restraint of trade; and in violation of Section 2 of the Sherman Act because of exclusionary conduct.⁹⁵ Since Qualcomm’s actions violate both Sherman Act Section 1 and Section 2, the court found that Qualcomm is liable under the FTC Act, as violations of the Sherman Act also constitute “unfair methods of

⁸⁴ *Id.* (citing *Verizon Commc’ns. Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 411 (2004)).

⁸⁵ *Qualcomm*, 411 F. Supp. 3d at 758 (citing *Trinko*, 540 U.S. at 411).

⁸⁶ *Qualcomm*, 411 F. Supp. 3d at 759.

⁸⁷ *Id.* at 760.

⁸⁸ *Id.* at 762.

⁸⁹ *Id.*; see *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

⁹⁰ *Qualcomm*, 411 F. Supp. 3d at 762.

⁹¹ *Id.* at 762.

⁹² *Id.*

⁹³ *Id.* at 766.

⁹⁴ *Id.* at 812.

⁹⁵ *Id.*

competition.”⁹⁶ Injunctive relief was granted and judgment was entered in favor of the plaintiff.⁹⁷

The district court properly analyzed the Federal Trade Commission’s allegations, and addressed such allegations by considering Qualcomm’s market power⁹⁸ and the impact of the anticompetitive conduct on competition and on consumers.⁹⁹ Qualcomm’s conduct “unfairly tends to destroy competition itself.”¹⁰⁰ Defendant, Qualcomm, appealed the district court’s decision to the Ninth Circuit Court of Appeals.

3. Ninth Circuit: Competition, Confusion, Chips

The Ninth Circuit Court of Appeals panel vacated the district court’s judgment and subsequently reversed the worldwide injunction the district court had placed prohibiting many of Qualcomm’s business practices.¹⁰¹ The court of appeals held that “the district court went beyond the scope of the Sherman Act . . . “ and reversed the judgment.¹⁰²

After a thorough description of antitrust laws as they pertain to Section 1 and Section 2 of the Sherman Act, the court of appeals emphasized the importance of accurately defining the relevant market, which refers to “the area of effective competition.”¹⁰³ The court of appeals acknowledged that the district court properly defined Qualcomm’s relevant markets as “the market for CDMA modem chips and the market for premium LTE modem chips.”¹⁰⁴

Although the panel agreed with the district court’s definition of Qualcomm’s relevant market, the panel disagreed with the district court’s analysis.¹⁰⁵ The court of appeals determined that the district court’s anticompetitive impact analysis looked beyond the market definition, and instead considered a much larger and more broad market of general cellular services.¹⁰⁶ In such, the court of appeals specified that a substantial portion of the lower court’s ruling had relied on alleged economic harm to OEMs.¹⁰⁷ The panel considered OEMs to be Qualcomm’s customers, not its competitors, and thus was troubled by the district court’s consideration

⁹⁶ *Id.* at 812 (citing *F.T.C. v. Cement Inst.*, 333 U.S. 683, 693–94 (1948)).

⁹⁷ *Qualcomm*, 411 F. Supp. 3d at 820.

⁹⁸ *See generally id.* at 683-95.

⁹⁹ *See id.* at 812.

¹⁰⁰ *Id.* (citing *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993)).

¹⁰¹ *F.T.C. v. Qualcomm Inc.*, 969 F.3d 974, 982 (9th Cir. 2020).

¹⁰² *Id.*

¹⁰³ *Id.* at 992 (quoting *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2285 (2018)).

¹⁰⁴ *Qualcomm* 969 F.3d at 982 (quoting *Qualcomm*, 411 F. Supp. 3d at 683).

¹⁰⁵ *See Qualcomm*, 969 F.3d at 982.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 992.

of economic harm to OEMs.¹⁰⁸ The court of appeals therein stated that the harms to OEMs “are not ‘anticompetitive’ in the antitrust sense—at least not directly—because they do not involve restraints on trade or exclusionary conduct in ‘the area of effective competition.’”¹⁰⁹ The court of appeals subsequently criticized the district court’s analysis and framing of the issues. In a concerning interpretation of antitrust law, the court of appeals stated that “. . . actual or alleged harms to customers and consumers outside the relevant markets are beyond the scope of antitrust law.”¹¹⁰ After conducting a reframed analysis of the issues, and excluding OEMs from the relevant market,¹¹¹ the court of appeals determined that the Federal Trade Commission did not meet its burden as a plaintiff under the rule of reason in demonstrating that Qualcomm’s business practices have crossed the line to constitute “conduct which unfairly tends to destroy competition itself.”¹¹²

In making this conclusion, the court of appeals first provided that Qualcomm’s practice of exclusively licensing its SEPs at the OEM level did violate Section 2 of the Sherman Act because Qualcomm does not have a duty to license to rival chip suppliers.¹¹³ The court of appeals then provided that Qualcomm’s patent-licensing royalties and the “no license, no chips” policy do not undermine competition and are instead chip-supplier neutral.¹¹⁴ Lastly, the court of appeals panel determined that Qualcomm’s 2011 and 2013 agreements with Apple did not foreclose competition and noted that these agreements were voluntarily terminated by Apple a significant amount of time prior to this proceeding against Qualcomm.¹¹⁵ The court of appeals thus reversed the district court’s judgment and vacated the injunction.¹¹⁶

Although the court of appeals agreed with the district court’s definition of the relevant market, therein adopting the same definition in its own reasoning, the court of appeals rendered a judgement directly opposing the district court’s holding.¹¹⁷ The Ninth Circuit panel conveniently turned a blind eye to landmark cases which delineated that it

¹⁰⁸ *See id.*

¹⁰⁹ *Id.* (quoting *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2285 (2018)).

¹¹⁰ *Id.* at 993.

¹¹¹ *See generally id.* at 993–1005.

¹¹² *Id.* at 1005 (quoting *Spectrum Sports v. McQuillan*, 506 U.S. 447, 458 (1993)).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *See generally id.* at 992.

is appropriate to examine the impact on consumers when analyzing a Sherman Act Section 2 violation.¹¹⁸

By failing to consider price impacts on Qualcomm's consumers, the Ninth Circuit disregarded established precedent, specifically including statements by the Supreme Court in *Reiter v. Sonotone Corporation*.¹¹⁹ Ultimately, the Ninth Circuit's holding creates a slippery slope for monopolists to dodge antitrust liability if they are able to "exclude rivals through customer-oriented acts."¹²⁰ In fact, industry participants have pointed to subsequent judicial decisions as being influenced by the Ninth Circuit's holdings in *FTC v. Qualcomm*.¹²¹ The Ninth Circuit's decision also shines a spotlight on the lack of clarity about the fundamental goals of antitrust law, and ultimately, about the proper application of the consumer welfare standard. Although the panel deviated from precedent in failing to consider impact to consumers as relevant in determining a Sherman Act violation, the Ninth Circuit panel is not to blame for the confusion surrounding the goals of antitrust law.¹²² Instead, this author believes the cause for such confusion is the lack of clarity in the ongoing debate over fundamental antitrust goals.

PART III: CURRENT DEBATE: DISCONNECTED DIALOGUE AND DISCOURSE

In highlighting two extremes on the ideological spectrum of the debate, namely the consumer welfare standard and the Neo-Brandeisian standard, this Note addresses key concerns of supporters of each side. This section examines the current debate over the overarching goals of antitrust policy, emphasizing the disconnect between the actions of those ready to criticize the opposing view, but that fail to listen to the critiques directed at their own view. This section also addresses common issues in the

¹¹⁸ See Amicus Brief, *supra* note 2, at 7 (stating "[i]t is, accordingly, appropriate to examine the effect of the challenged pattern of conduct on consumers' when evaluating a Section 2 claim") (first quoting *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985); and then citing *cf. Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1519, 1525 (2019) (customers paying higher prices suffer antitrust injury under Section 2)).

¹¹⁹ See *Reiter v. Sonotone Corp.* 442 U.S. 330, 343 (1979) (citing ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 66 (1978)).

¹²⁰ Amicus Brief, *supra* note 2, at 13.

¹²¹ See, e.g., Brief of Apple Inc. as Amicus Curiae in Support of Plaintiff-Appellant and Reversal at 31, *Cont'l Auto. Sys., Inc. v. Avanci, L.L.C.*, 485 F. Supp. 3d 712 (N.D. Tex. 2020) (No. 19-cv-02933) ("The district court's flawed decision here can be traced directly to the DOJ's misplaced efforts to curtail the application of antitrust law to patents are embraced in the Ninth Circuit's *Qualcomm* decision.").

¹²² See *infra* Part III and Part IV.

debate, including that competition and consumers are talked about separately too frequently.

A. Current Dialogue: Market Competition, Consumers, and General Goals of Antitrust

The lack of harmony in the antitrust community has caused a lack of clearness in applying any standard because different standards can yield different results. If the ultimate goal of antitrust is undefined, a lack of consensus in the application of standards in analyzing potential antitrust violations will certainly result.

Market competition provides various benefits to the economy and to consumers because it pushes companies to reduce costs and to improve the quality of their products.¹²³ It also stimulates new product designs and increases consumer education.¹²⁴ Competition ultimately results in increased consumer welfare.¹²⁵ The Antitrust Modernization Commission reported to Congress in 2007 that “‘the state of antitrust laws’ was ‘sound’”¹²⁶ and concluded that “‘the existing statutes were sufficiently flexible to address emerging issues, and that courts, antitrust agencies, and practitioners were now in proper agreement that ‘consumer welfare’ was the ‘unifying goal of antitrust law.’”¹²⁷

Courts have historically considered consumer welfare as a leading concern in evaluating possible antitrust violations.¹²⁸ In evaluating a Sherman Act Section 2 claim, “[i]t is . . . appropriate to examine the effect of the challenged pattern of conduct on consumers.”¹²⁹ However, in recent years, there has been a rift over the goals, purposes, and values of antitrust law.¹³⁰ During the last ten years, some professionals in the antitrust field have grown skeptical and critical of the consumer welfare standard and of

¹²³ U.S. DEP’T OF JUST., COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT 7 (2008), <https://www.justice.gov/sites/default/files/atr/legacy/2009/05/11/236681.pdf>.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Khan, *supra* note 7, at 1655 (citing ANTITRUST MODERNIZATION COMM’N, REPORT AND RECOMMENDATIONS (2007), https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf).

¹²⁷ Khan, *supra* note 7, at 1655 (citing ANTITRUST MODERNIZATION COMM’N, REPORT AND RECOMMENDATIONS at 35).

¹²⁸ *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985) (stating that “it is relevant to consider its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way.”).

¹²⁹ *Id.*

¹³⁰ Khan, *supra* note 7, at 1656.

the effects of increased concentration of the market.¹³¹ Although this is not the first time in antitrust history that the Chicago School has been challenged,¹³² the consumer welfare framework, and the dominant neoclassical principles of the framework, remain the primary source of antitrust doctrine.¹³³ It is important to note, however, that with the development and growth of antitrust as a body of law, antitrust policy under the consumer welfare principle is currently at a crossroads and navigating between two extremes: Bork's consumer welfare standard, and the Neo-Brandeisian approach to antitrust law. The one thing these two ideological extremes share is that both belittle the importance of increased outputs and low prices as the fundamental goal of antitrust.¹³⁴

On one end of the ideological spectrum is Robert Bork's consumer welfare approach.¹³⁵ Bork's consumer welfare standard has been widely adopted by courts since its emergence in Bork's publication *The Antitrust Paradox*, in 1978.¹³⁶ Bork's use of the terminology "'consumer welfare' referred to the sum of the welfare, or surplus, enjoyed by both consumers and producers."¹³⁷ Bork expressed that "[t]he whole task of antitrust can be summed up as the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss to consumer welfare."¹³⁸ Much of Bork's arguments rely on the concept that "consumer welfare and efficiency [go] hand in hand—that the consumer interest was in efficiency."¹³⁹ Bork traditionally used the term

¹³¹ *Id.* at 1671; The author, Lina Khan, also points to several examples of publications in prior years evidencing criticism and skepticism of current antitrust standards. *Id.* at 1671 n.66 (first citing *see, e.g.,* BARRY C. LYNN, CORNERED: THE NEW MONOPOLY CAPITALISM AND THE ECONOMICS OF DESTRUCTION (2010); then, *e.g.,* Lina Khan, *Obama's Game of Chicken*, WASH. MONTHLY (Nov. 9, 2012), <https://washingtonmonthly.com/2012/11/09/obamas-game-of-chicken/>; then, *e.g.,* Lina Khan & Sandeep Vaheesan, *How America Became Uncompetitive and Unequal*, WASH. POST (June 13, 2014), https://www.washingtonpost.com/opinions/how-america-became-uncompetitive-and-unequal/2014/06/13/a690ad94-ec00-11e3-b98c-72cef4a00499_story.html; then, *e.g.,* Barry C. Lynn, *Killing the Competition*, HARPER'S MAG. (Feb. 2012), <https://harpers.org/archive/2012/02/killing-the-competition>; and then, *e.g.,* Barry C. Lynn & Phillip Longman, *Who Broke America's Jobs Machine?*, WASH. MONTHLY (Mar. 30, 2010), <https://washingtonmonthly.com/2010/03/30/who-broke-americas-jobs-machine-3/>).

¹³² *Id.* at 1665 (noting that "the Chicago School has not gone unchallenged . . .").

¹³³ *See* HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 15 (2006).

¹³⁴ *See id.*

¹³⁵ *See id.*

¹³⁶ *See* BORK, *supra* note 119, at 66, 97 (1978).

¹³⁷ Hovenkamp, *supra* note 10, at 65 (quoting BORK, *supra* note 119, at 90).

¹³⁸ BORK, *supra* note 119, at 91.

¹³⁹ Daniel A. Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, 79 ANTITRUST L.J. 835, 837 (2014).

“consumer welfare” to describe something that most economists refer to as “general welfare” or “total welfare.”¹⁴⁰ General welfare, as traditionally understood by economists, is “welfare that includes the surplus, or wealth net of costs, enjoyed by everyone affected, including producers and consumers as well as others.”¹⁴¹ However, most people today view the consumer welfare principle as encouraging “markets to produce output as high as is consistent with sustainable competition, and prices that are accordingly as low.”¹⁴² Bork was not concerned with a standard that favored producers so strongly because in a perfect competition model, producer gains are leveled away over time and ultimately benefit consumers.¹⁴³ The overall goal of the consumer welfare principle is to “encourage markets in which output, measured by quantity, quality, or innovation, is as large as possible consistent with sustainable competition.”¹⁴⁴

On the other end of the ideological spectrum is the “Neo-Brandeisian” approach.¹⁴⁵ Critics of Bork’s consumer welfare standard have argued that “[g]rowing signs that the current approach to antitrust has failed even on its own terms, then, have created an opening for the Neo-Brandeisian scholars to revisit foundational questions and make the case for recovering an approach to antitrust that is rooted in its antimonopoly values.”¹⁴⁶ Neo-Brandeisian scholars argue that the current antitrust theory is the major concern.¹⁴⁷ Notably, the Neo-Brandeisian approach also views markets to be fragile and easily susceptible to collusion and monopolization.¹⁴⁸ The Neo-Brandeisian approach’s main assumption that “individuals in our society would really be better off in a world characterized by higher prices but smaller firms” remains relatively untested.¹⁴⁹ The Neo-Brandeisian approach oftentimes considers low prices to be problematic when these

¹⁴⁰ Herbert Hovenkamp, *On the Meaning of Antitrust’s Consumer Welfare Principle*, REVUE CONCURRENTIALISTE, Jan. 17, 2020, at 1 (stating “Bork, however, used the term ‘consumer welfare’ to describe something that most economists refer to as ‘general welfare’ or ‘total welfare.’”).

¹⁴¹ Hovenkamp, *supra* note 10, at 65.

¹⁴² *Id.* at 66 (Noting “[i]f total welfare is to be regarded as the baseline, the [consumer welfare] principle redistributes a certain amount of wealth away from producers and towards consumers.”).

¹⁴³ *Id.* (citing ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 98–99 (1978))

¹⁴⁴ *Id.* at 67

¹⁴⁵ *Id.*

¹⁴⁶ Khan, *supra* note 7, at 1676.

¹⁴⁷ *Id.*

¹⁴⁸ Hovenkamp, *supra* note 10, at 67.

¹⁴⁹ *Id.* Hovenkamp explains that “[t]he neo-Brandeisians still face the formidable task of providing evidence that most citizens believe they would be better off in a world of higher cost smaller firms selling at higher prices, their market behavior notwithstanding.”

prices are a result of large firms.¹⁵⁰ A general theme of the emerging Neo-Brandeisian movement is “greater production for small business, nearly always at consumers’ expense.”¹⁵¹

Interpreting congressional intent in passing the Sherman Act is no easy task, and as such has sparked numerous debates since the Sherman Act was passed.¹⁵² These debates are somewhat unavoidable because Congress did not use the terms “competition” or “competitive process,” and thus did not define such terms.¹⁵³ Therefore, it cannot be “obvious that consumer protection is a superior goal to economic efficiency . . . [nor] that the welfare of consumers must trump the welfare of society.”¹⁵⁴ Although it is not feasible to delineate the true goal, it is possible to determine that the dominant goal, which has more widespread support and has been most relied upon thus far, that being the protection of consumers.¹⁵⁵

Case law also supports protection of consumers as the main goal, and by the 1990s, “most courts had embraced consumer protection”¹⁵⁶ “[W]hen judges address the goals of the antitrust laws in a sell-side case or defined critical terms like ‘anticompetitive,’ they ordinarily say that their aim is to prevent injury to consumers”¹⁵⁷ In fact, since 1979, when the Supreme Court stated that the Sherman Act is a “consumer welfare prescription”,¹⁵⁸ consumer welfare has been the stated goal and purpose of antitrust laws in the United States.¹⁵⁹

However, prior to a widespread acceptance of the consumer welfare standard, the broad understanding of the goals of antitrust was that “competition was the original and practical goal of U.S. competition laws, that is, antitrust.”¹⁶⁰ Prior to the acceptance of Bork’s standard, courts also repeatedly proclaimed that “competition” was the “goal of U.S.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² See John B. Kirkwood, *The Essence of Antitrust: Protecting Consumers and Small Suppliers From Anticompetitive Conduct*, 81 *FORDHAM L. REV.* 2425, 2426–27 (2013).

¹⁵³ *Id.* at 2427 (citing PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* 101 (rev. ed. 1997) (stating “The members of Congress who enacted the Sherman Act wanted to preserve ‘competition,’ although they never defined that term”).

¹⁵⁴ *Id.* at 2428.

¹⁵⁵ *Id.* at 2428–30 (describing how “[t]he legislative histories of the principal antitrust laws express more support for this goal than for any other.”).

¹⁵⁶ *Id.* at 2430.

¹⁵⁷ *Id.*

¹⁵⁸ *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (citing ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 66 (1978)).

¹⁵⁹ Barak Orbach, *How Antitrust Lost Its Goal*, 81 *FORDHAM L. REV.* 2253, 2254 (2013).

¹⁶⁰ *Id.* at 2255.

competition laws.¹⁶¹ Since the time when Bork’s consumer welfare standard was accepted by the courts, courts have not addressed the specific meanings of the term, and this has resulted in a great amount of ambiguity.¹⁶²

This Neo-Brandeisian “effective competition” standard gained force, with policy-makers and academics calling the replacement of the Consumer Welfare Standard with the Neo-Brandeisian Effective Competition Standard.¹⁶³ Lina Khan, a prominent voice against the

¹⁶¹ *Id.* at 2270 (referencing, *see e.g.*, *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 398 (1978), which stated “[b]y enacting the Sherman Act] Congress . . . sought to establish a regime of competition as the fundamental principle governing commerce in this country.”); *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972) (“Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster.”); *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963); *Brown Shoe Co. v. United States*, 370 U.S. 294, 330 (1962) (“[A]ntitrust laws . . . are intended primarily to preserve and stimulate competition.”); *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958) (“The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade [T]he policy unequivocally laid down by the Act is competition.”); *Standard Oil Co. v. FTC*, 340 U.S. 231, 248–49 (1951) (“The heart of our national economic policy long has been faith in the value of competition. In the Sherman and Clayton Acts, as well as in the Robinson-Patman Act, ‘Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent.’” (quoting *A.E. Staley Mfg. Co. v. FTC*, 135 F.2d 453, 455 (7th Cir. 1943)); *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918) (“The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.”); *N. Sec. Co. v. United States*, 193 U.S. 197, 331 (1904) (“[T]he anti-trust act[] has prescribed the rule of free competition among those engaged in [interstate] commerce.”)).

¹⁶² Orbach, *supra* note 158, at 2254-55.

¹⁶³ John M. Newman, Reactionary Antitrust, *CONCURRENCES REV.*, Nov. 2019, at 66–67 (stating “. . . a handful of academics began to follow suit. Maurice Stucke and Marshall Steinbaum produced a white paper in 2018 arguing against the consumer welfare standard. ‘It is imperative,’ they wrote, ‘that the consumer welfare standard be replaced, and in this paper, we present an alternative: the effective competition standard.’”) (citing M. Steinbaum & M. E. Stucke, *The Effective Competition Standard: A New Standard for Antitrust* 1 (2018), <http://rooseveltinstitute.org/wp-content/uploads/2018/09/The-Effective-Competition-Standard-FINAL.pdf>); *see* Marshall Steinbaum & Maurice E. Stucke, *The Effective Competition Standard: A New Standard for Antitrust*, 86 U. CHI. L. REV. 595, 596 (2019) (stating “To tackle today’s market power problem, we offer an effective competition antitrust standard to replace the prevailing consumer welfare standard, which courts and scholars have interpreted differently (and at times inconsistently). The effective competition standard restores the primary aim of the antitrust laws—namely, the dispersion and deconcentration of significant private power wherever

consumer welfare standard and in favor of Neo-Brandeisian ideals, has stated how antitrust law would not be the only area of law that would need to change for effective enforcement of this type.¹⁶⁴ Instead, a “host of other legal reforms and interventions – including renewing labor law and protecting workers’ organizations, reinvigorating public utility regulations, and adopting public options – [would] also be needed to achieve the antimonopoly goals of rebalancing power and checking private domination.”¹⁶⁵

Consumer welfare supporters would go as far as to argue that monopolization claims under Section 2 of the Sherman Act that focus exclusively on competitors and rivals are fundamentally flawed.¹⁶⁶ The Neo-Brandeisians, however, would adamantly disagree with consumer-welfare supporters that focusing exclusively on competitors and rivals is erroneous.¹⁶⁷ The Neo-Brandeisians instead would argue that focusing on competition itself, rather than on consumers, is the preferred standard in evaluating monopolization claims.¹⁶⁸ This divide among theories of antitrust has increased movement in the general discussion regarding the fundamental goal of antitrust law. Ultimately, antitrust enthusiasts are facing the inquiry: is the goal of antitrust law to protect *competition* or *consumers* or *both*?

B. Current Discourse: Standstill from a Disconnected Debate

Engaging in scholarly debates about the goals of antitrust enforcement should not be challenging. After all, those voicing their concerns about the current state of antitrust deserve to be heard and to have their trepidations addressed. However, the problem is that neither side truly listens to the arguments of the other. Unsubstantiated dismissal of productive debates paired with sustained attacks on antitrust enforcement institutions¹⁶⁹ have upended the professionalism and respect necessary to productively answer whether protecting competition or protecting consumers is the ultimate

in the economy it is to be found, including throughout supply chains and in the labor market.”).

¹⁶⁴ See Khan, *supra* note 7, at 1682.

¹⁶⁵ *Id.*

¹⁶⁶ Amicus Brief, *supra* note 2 at 13 (citing Lucas v. Citizens Commc’ns Co., 244 F. App’x 774, 776 (9th Cir. 2007)).

¹⁶⁷ Steinbaum & Stucke, *supra* note 163, 601–602.

¹⁶⁸ See *id.*

¹⁶⁹ JOINT SUBMISSION OF ANTITRUST ECONOMISTS, LEGAL SCHOLARS, AND PRACTITIONERS TO THE HOUSE JUDICIARY COMMITTEE ON THE STATE OF ANTITRUST LAW AND IMPLICATIONS FOR PROTECTING COMPETITION IN DIGITAL MARKETS (May 15, 2020) [hereinafter Joint Submission].

goal of antitrust. Instead, this reactionary and hostile atmosphere has resulted in proposals for changes to fall on deaf ears.¹⁷⁰

A significant problem in the current discourse is that competition and consumers are talked about separately all too frequently.¹⁷¹ But, in reality, the consumer welfare standard is not solely about protecting consumers.¹⁷² Sometimes it even seems that supporters of the consumer welfare standard attempt to separate the two yet end up using them both interchangeably. For example, consider the *Joint Submission of Antitrust Economists, Legal Scholars and Practitioners to the House on the State of Antitrust Law and Impact on Antitrust and Protecting Competition in Digital Markets*.¹⁷³ In the title, the authors emphasize “protecting competition” however, in the arguments, the authors state that “[t]hrough discussion and debate among jurists, scholars, economists, and government enforcers, antitrust law adopted a disciplined method of analyzing competition that is guided by a straightforward question: ‘Is the challenged conduct likely to make consumers better or worse off?’”¹⁷⁴ In support of the consumer welfare standards, the authors of the aforementioned Joint Submission emphasize that the implementation of the welfare standard by courts has allowed the “vague concept of ‘protecting competition’ embodied in the antitrust laws” to have meaning through common economics.¹⁷⁵

Although many argue vehemently that the consumer welfare standard fulfills its purpose as antitrust enforcement standard, it is not surprising that some antitrust commentators are calling for reform. Most critiques of the consumer welfare standard argue that the current standard has failed to deliver preferred outcomes and that the standard is “. . . illogical, paradoxical, or otherwise unworkable.”¹⁷⁶ Such critics often point to empirical studies showing an increase in market concentration in recent

¹⁷⁰ *See id.*

¹⁷¹ *See* Sam Bowman, *The Consumer Welfare Standard: Bringing Objectivity to Antitrust*, INTERNATIONAL CENTER FOR LAW AND ECONOMICS, at 1 (February 2021), <https://laweconcenter.org/wp-content/uploads/2021/02/tldr-Consumer-Welfare-Standard.pdf> (stating “[i]n antitrust law, the Consumer Welfare Standard (CWS) directs courts to focus on the effects that challenged business practices have on consumers, rather than on alleged harms to specific competitors.”).

¹⁷² *See, e.g.,* United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (finding Microsoft liable for conduct that harmed a rival).

¹⁷³ Joint Submission, *supra* note 169.

¹⁷⁴ *Id.* at 5.

¹⁷⁵ *Id.*

¹⁷⁶ Newman, *supra* note 163, at 68 (discussing Rebecca Haw Allensworth who, in an article in 2016, observed that “neoclassical antitrust discourse all too often glosses over the tradeoffs that the consumer-welfare analysis necessarily entails.”) (Citing Rebecca Haw Allensworth, *The Commensurability Myth in Antitrust*, 69 VAND. L. REV. 1 (2016)).

years.¹⁷⁷ Lina Khan has stated that given the current technology market, and the “dominance of a small number of technology platforms, certain aspects of which seem to exhibit natural monopoly features, and the revival of antitrust as an antiworker tool—recognizing competition as one among several mechanisms for checking concentrated private power is especially critical.”¹⁷⁸

Some scholars have gone as far as to call for the rejection of the consumer welfare standard, arguing that it is “theoretically flawed and unrigorous from the start.”¹⁷⁹ Mark Glick, a prominent critic of the consumer welfare standard, has stated that the welfare standard is “defective and inappropriate . . . as an antitrust policy goal.”¹⁸⁰ These criticisms have sparked debates and have raised internal critiques that should be addressed by the proponents of the consumer-welfare standard.¹⁸¹ The issues raised by critics of the consumer welfare standard go beyond theoretical implications, and have true repercussions in real cases.¹⁸² John Newman notes that “the need to avoid grappling with these issues is prompting courts to develop insurmountable hurdles for plaintiffs.”¹⁸³ These hurdles are evidenced in *FTC v. Qualcomm*.

PART IV: *FTC v. QUALCOMM* AND THE URGENT CALL FOR CLARITY

The Ninth Circuit’s misapplication of antitrust principles in *FTC v. Qualcomm* illustrates how the lack of clarity in standards has real-world repercussions, distancing antitrust enforcement from the long-accepted consumer welfare standard. This misapplication of standards adds to the lack of clarity of the goals of antitrust and will impact antitrust enforcement in the future. This section of this Note provides an analysis of the lack of consideration of harm to consumers by the Ninth Circuit Panel. This section also addresses the urgent need for better and more productive debate to save antitrust enforcement from slipping down the same slippery slope as the Ninth Circuit in *FTC v. Qualcomm*.

¹⁷⁷ See Khan, *supra* note 7, at 1671 (reviewing TIM WU, *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE* (2018)).

¹⁷⁸ See *id.* at 1664.

¹⁷⁹ Mark Glick, *The Unsound Theory Behind the Consumer (and Total) Welfare Goal in Antitrust*, 63 ANTITRUST BULL. 455, 455 (2018).

¹⁸⁰ Newman, *supra* note 163, at 68.

¹⁸¹ See *id.* at 71 (stating that “[t]he unifying theme across their contributions is that neoclassical antitrust is not ‘coherent,’ or at the very least not as coherent as the antitrust orthodoxy tends to assume.”).

¹⁸² *Id.* at 72

¹⁸³ *Id.*

A. *FTC v. Qualcomm: Misapplied Standards*

The Ninth Circuit panel applied an erroneous standard in evaluating Qualcomm's business practices, and improperly disregarded the impact of Qualcomm's business practices on consumers, generating unclear precedent which will likely misdirect lower courts.¹⁸⁴ The panel disregarded the district court's findings of fact and instead determined that because the "no license no chips" policy possibly harms Qualcomm's customers, not its competitors, the policy does not directly impair the opportunities of Qualcomm's rivals and therefore does not violate Sherman Act Section 2.¹⁸⁵ The panel acknowledged that the district court properly defined the relevant markets, however, the panel opinion also maintains that:

Nevertheless, its analysis of Qualcomm's business practices and their anticompetitive impact looked beyond these markets to the much larger market of cellular services generally. Thus, a substantial portion of the district court's ruling considered alleged economic harms to OEMs—who are Qualcomm's customers, not its competitors—resulting in higher prices to consumers. These harms, even if real, are not 'anticompetitive' in the antitrust sense—at least not directly—because they do not involve restraints on trade or exclusionary conduct in 'the area of effective competition.'¹⁸⁶

This holding is contradictory to the already settled principle that consumer welfare as the "unifying goal of antitrust law."¹⁸⁷ By failing to consider price impacts on consumers, the Ninth Circuit disregarded established precedent, including statements by the Supreme Court in *Reiter v. Sonotone Corporation*.¹⁸⁸ Ultimately, the panel turned a blind eye to landmark cases which delineated that it is appropriate to examine the impact on consumers when analyzing a Sherman Act Section 2 violation.¹⁸⁹

¹⁸⁴ See Amicus Brief, *supra* note 2, at 9-10.

¹⁸⁵ *Id.*

¹⁸⁶ *FTC v. Qualcomm*, 969 F.3d 974, 991-92 (9th Cir. 2020) (quoting *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2285 (2018)).

¹⁸⁷ ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS (2007) at 35.

¹⁸⁸ *Reiter v. Sonotone Corp.* 442 U.S. 330, 343 (1979) (citing ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 98-99 (1978)).

¹⁸⁹ Amicus Brief, *supra* note 2, at 7 (stating "[i]t is, accordingly, appropriate to examine the effect of the challenged pattern of conduct on consumers' when evaluating a Section 2 claim") (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605

The Ninth Circuit panel's divergence from precedent in this case has larger implications because it suggests that "*all* harms to customers occur outside the relevant antitrust markets and therefore are never cognizable under Section 2."¹⁹⁰ The holding disregards and removes impacts to consumers from a court's analysis as to whether the challenged conduct violates antitrust law.¹⁹¹

Even if the Ninth Circuit panel's holding is read more narrowly, the implications are still problematic.¹⁹² If the holding is read such that "Qualcomm's customer-facing patent licensing occurs outside the markets for modem chip sales and therefore [does] not cause a direct and cognizable harm in the relevant chip markets,"¹⁹³ this reading suggests that the harm Qualcomm caused to its customers was confined to the OEMs.¹⁹⁴ However, the Ninth Circuit excluded the OEMs from the relevant market for CDMA and premium LTE Modem Chips, stating that they are "outside the 'areas of effective competition'"¹⁹⁵ The panel explained that ". . . the district court failed to identify how the policy directly impacted Qualcomm's competitors or distorted the area of effective competition."¹⁹⁶ The panel reasoned that the "no license no chip" policy could not have harmed competition since the harm was to OEMs that are "outside the relevant antitrust market."¹⁹⁷ However, the panel's understanding of what is required to violate the Sherman Act is not proper: "[a] monopolist need not aim its anticompetitive conduct directly at competitors to violate the antitrust laws, so long as the conduct has an exclusionary effect on rivals in the relevant market."¹⁹⁸

This apparent "directness" test which the Ninth Circuit delineates is not in accordance with antitrust case law.¹⁹⁹ Instead, quite the opposite is true; for example, previous cases dictate that a monopolist can engage in anticompetitive conduct, such as exclusion of competitors, "by inflicting non-price harms on customers, as is the case with tying, coercive exclusive

(1985)); *But cf.* Apple Inc. v. Pepper, 139 S. Ct. 1514, 1519-25 (2019) (stating customers paying higher prices suffer antitrust injury under Section 2)).

¹⁹⁰ See Amicus Brief, *supra* note 2, at 6.

¹⁹¹ See *id.*

¹⁹² See *id.* at 9.

¹⁹³ *Id.* at 8.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* (internal citations omitted).

¹⁹⁶ *Id.* at 8-9 (quoting *FTC v. Qualcomm Inc.*, 969 F.3d 974, 1001 (9th Cir. 2020)).

¹⁹⁷ *FTC v. Qualcomm*, 969 F.3d 974, 1001 (9th Cir. 2020).

¹⁹⁸ See Amicus Brief, *supra* note 2, at 14.

¹⁹⁹ See *id.*

dealing, and certain most-favored nation clauses.”²⁰⁰ Therefore, the new test-like requirement for “direct” anti-competitiveness is flawed.²⁰¹

Regardless of how broadly or narrowly the Ninth Circuit panel’s holding is interpreted, it illustrates a lack of clarity in the goals and the application of standards in antitrust law. It is possible that this is a court stepping away from the consumer welfare standard to what appears to be a standard focused on competition. Courts are being asked to choose which standard to apply, and ultimately must choose “among multiple, incommensurable, and often conflicting values.”²⁰² This makes antitrust enforcement vulnerable to unfounded decisions that deviate from precedent and that are more easily influenced by politics.²⁰³

B. Competition and Consumers: A Call for Better Debates

Ultimately, current discourse about the goals of antitrust law and the appropriate enforcement standards do not benefit the antitrust community. Neither side truly listens nor reflects on the criticisms of the other.

Rather than welcoming the critiques of the standard, supporters of the consumer welfare approach react harshly to the critiques. The supporters of the consumer welfare standard often shift the burden of proof to the critics of the standard, insisting that they produce reliable evidence that “. . . (1) market power in the United States has increased, (2) the increase was the result of lax antitrust enforcement, (3) any enforcement failures directly resulted from the adoption of the consumer-welfare framework, and (4) such failures can be corrected only by completely rejecting the consumer-welfare standard.”²⁰⁴ This is an extremely burdensome standard of proof which does not contribute to constructive dialogue among either group of antitrust enthusiasts.²⁰⁵ Even when supporters of the consumer

Id. (referencing *Fortner Enters., Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 498 (1969) (tying)); *Lorain Journal Co. v. United States*, 342 U.S. 143, 152-53 (1951) (conditional refusal to deal with customers that also work with rivals); *United States v. Microsoft Corp.*, 253 F.3d 34 61-62 (2001) (de facto exclusive dealing).

²⁰¹ See Amicus Brief, *supra* note 2, at 16-18.

²⁰² See Tim Wu, *After Consumer Welfare, Now What? The “Protection of Competition” Standard in Practice 2* (Columbia Law School Scholarship Archive, Working Paper N. 14-608, 2018) (citing Ginsburg, Bork’s “Legislative Intent” and the Courts, 79 ANTITRUST L.J. 941, 950 (2014)), https://scholarship.law.columbia.edu/faculty_scholarship/2291.

²⁰³ See generally Joshua D. Wright, Elyse Dorsey, Jonathan Klick, Jan M. Rybnicek et al., *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust* 51 ARIZ. ST. L. J. 293, 351 (2019) (“At its core, the consumer welfare standard provides a coherent, workable, and objective framework to replace the multiple, and often contradictory, vague social and political goals that governed antitrust prior to the modern era.”).

²⁰⁴ Newman, *supra* note 163, at 70.

²⁰⁵ See *id.*

welfare standard attempt to respond to direct critiques of the standard, it is reactionary and unreceptive.²⁰⁶

Supporters of the consumer welfare standard are right in arguing that impacts on consumers must be considered in evaluating antitrust violations. The *FTC v. Qualcomm* decision illustrates the drastic changes that can occur by solely focusing on competition and completely discarding consumers from contemplation. It is true that conduct that increases costs to consumers but nevertheless does not harm competition, is not considered anticompetitive.²⁰⁷ Thus, harm to consumers cannot be the *only* consideration a court addresses. However, that is not what the consumer welfare standard stands for. The misnomer of “consumer welfare” has generated confusion because the standard does not solely focus on consumers.²⁰⁸ Instead, impact on competition must *also* be analyzed. Ultimately, both consumers and competition should be evaluated, and a better verbalization of the standards must be laid out. Instead of saying that antitrust is solely focused on the welfare of consumers, we should say that antitrust must balance the procompetitive justifications with the anticompetitive harm to consumers and to competition in general.

Rather than shying away from constructive debates, both sides of the ideological spectrum should take this opportunity to clarify their standards and to constructively work towards clear policymaking. This does not mean that both sides need to ultimately agree on an absolute goal of antitrust. Doing so would be very difficult given the multiplicity of possible goals to choose from.²⁰⁹ Instead, it means that the unconstructive, reactionary, and debilitating debate currently in the air is not helpful to the judiciary in making decisions that have lasting implications.

²⁰⁶ See, e.g., Joshua D. Wright et al., *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust* 51 ARIZ. ST. L.J. 293 (2019).

²⁰⁷ See, e.g., *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 294 (2d Cir. 1979) (stating “[s]etting a high price may be a use of monopoly power, but it is not in itself anticompetitive.”).

²⁰⁸ See, e.g., Khan, *supra* note 7, at 1656.

²⁰⁹ See e.g. Wu, *supra* note 202, at 7 (noting that “[a]s antitrust has spread overseas, other nations have tended to also highlight a multiplicity of goals. For example, when the International Competition Network first surveyed its members to identify what they viewed as the goals of antitrust, some of the answers included “Ensuring an effective competitive process;” “Promoting consumer welfare;” “Enhancing efficiency;” “Ensuring economic freedom;” “Ensuring a level playing field for small and mid-sized enterprises;” “Promoting fairness and equality” and others.”).

PART V: CONCLUSION

In conclusion, the antitrust realm deserves better: better discussions about goals and standards; better explanations and delineations of such standards; and better judicial opinions that properly apply the delineated standards to reach proper antitrust goals, *whatever* those goals might be. The Ninth Circuit's decision in *FTC v. Qualcomm* exemplifies the lack of cohesiveness and clarity in antitrust goals and standards of analysis. In determining whether that harm to Qualcomm's consumers should not be considered, the court of appeals rejected consumer welfare, which has long been considered a central premise of antitrust law. To avoid decisions like this in the future, the current dialogue among antitrust stakeholders must become more constructive and productive, rather than remain intolerant and at a standstill. This is a call upon academics, policymakers, and the judiciary to clarify the standards and engage in more beneficial debates for the benefit of competition *and* consumers.