19-16122

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION,

Plaintiff-Appellant,

– v. –

QUALCOMM INCORPORATED, a Delaware Corporation

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE FAIR STANDARDS ALLIANCE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT'S PETITION FOR REHEARING EN BANC

CLEARY GOTTLIEB STEEN & HAMILTON LLP
Daniel Culley
2112 Pennsylvania Ave, NW
Washington, DC 20037
202-974-1500

Attorney for Fair Standards Alliance

October 5, 2020

CERTIFICATE OF INTEREST

Counsel for *Amicus Curiae* certifies the following:

1. The full name of every party or amicus represented by me is Fair Standards Alliance ASBL.

2. The party named above in (1) is the real party in interest.

3. The Fair Standards Alliance does not have a parent corporation, and no publicly held corporation owns 10% or more of the Fair Standards Alliance.

4. The names of all law firms and the partners or associates that appeared or are expected to appear for the *Amicus* now represented by me in this Court are: Daniel P. Culley, Cleary Gottlieb Steen & Hamilton LLP.

5. Counsel is not aware of any case pending in this or any other court or agency that will directly affect or be directly affected by this Court's decision in the pending appeal.

Dated: October 5, 2020

By: */s/ Daniel P. Culley*

CLEARY GOTTLIEB STEEN & HAMILTON LLP

Daniel P. Culley
2112 Pennsylvania Ave, NW
Washington, D.C. 20037
202-974-1500

Attorney for the Fair Standards Alliance

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STATEMENT OF INTEREST

Amicus Curiae Fair Standards Alliance ASBL (FSA) is an association of companies both large and small, focused on supporting standardization while preventing abusive licensing practices of Standards Essential Patents (SEPs) that harm industry and consumers.[1]

FSA members are innovators. They own more than 300,000 patents and patent applications, including SEPs, and develop and market innovative (standards practicing) products. FSA members have extensive experience developing, patenting, and licensing standards-related technologies and SEPs, including on a FRAND basis across a broad range of industries such as telecommunication, automotive, and semiconductor. FSA members spend more than $100 billion annually on R&D and innovation. In aggregate, FSA members employ more than three million people, and generate over a trillion dollars in annual revenues.

FSA advocates for policies that promote industry and consumer interests in preventing SEP licensing abuses. To that end, FSA has articulated key principles

[1] FSA submits this statement of its own accord. The positions and statements in this brief do not necessarily reflect the detailed individual corporate positions of each member. All Parties consented to filing of this brief. No counsel for any Party to this action participated in authoring any part of this brief; no person other than the *Amicus Curiae* or its counsel has contributed money intended to fund the preparation and submission of this brief.

it believes are necessary to license SEPs on fair, reasonable, and non-discriminatory (FRAND) terms.[2] FRAND commitments accomplish two key goals: (1) implementers can feel secure that they can get licenses on fair and reasonable terms, and (2) SEP holders receive appropriate remuneration for their inventions.

SUMMARY OF THE ARGUMENT

This case addresses whether a SEP holder that also competes in practicing the standardized technology may obtain and maintain market power by disregarding its own voluntary FRAND commitment to license all parties who wish to receive a license, including rivals.[3] Because standard setting involves competitors coming together to select particular technologies over competing alternatives, it inherently involves anticompetitive risks. And, because patents confer the right to exclude, SEPs necessarily confer the power to exclude rivals—

[2] *See Key Principles*, FSA, https://fair-standards.org/key-principles/ (last visited Oct. 5, 2020); *see also Core Principles and Approaches for Licensing of Standard Essential Patents*, CEN and CENELEC Workshop (June 2019), *available at* https://www.cencenelec.eu/news/workshops/Pages/WS-2019-014.aspx; *see generally Publication*s, FSA, https://fair-standards.org/publications/ (last visited Oct. 5, 2020).

[3] Although the FTC did not seek rehearing regarding Qualcomm's duty to deal with rivals, once rehearing is granted the court is empowered to re-examine all arguments preserved for appeal below. *See, e.g.*, *Summerlin v. Stewart*, 309 F.3d 1193, 1193 (9th Cir. 2002) (citing 28 U.S.C. § 46(c)); *Valerio v. Crawford*, 306 F.3d 742, 758 (9th Cir. 2002).

market power that would not exist absent the standard—unless restrained. The tool standard setting organizations (SSOs) use to prevent conferring this market power on SEP owners is a commitment to license those SEPs on FRAND terms. Unless that commitment requires a SEP owner to license all-comers, including rivals, it cannot do its job: stopping standardization of a technology from conferring the power to exclude rivals of the owner of that technology.

The law has long recognized these risks, and so requires that SSOs provide safeguards to facilitate standardization's procompetitive benefits. Understanding the important role that FRAND commitments play in preventing anticompetitive effects from and protecting procompetitive benefits of standard setting explains why violating FRAND commitments can, in addition to creating contractual liability, exclude competitors in violation of the antitrust laws.

The panel, by contrast, focused only on FRAND commitments limiting royalties that SEP owners can charge, ignoring how FRAND commitments prevent them from acquiring *market power*. The panel then applied the principle that conduct that merely enhances the ability to exploit pre-existing market power in a product market by charging higher prices does not violate the antitrust laws. But that narrow rule regarding exploitation of pre-existing market power has never applied to wrongful conduct that allows a monopolist to acquire market power or to use existing market power to exclude rivals. *See, e.g.*, *Conwood Co.,* *L.P. v. U.S. Tobacco Co.*, 290 F.3d 768, 783–84 (6th Cir. 2002) (monopolist increasing rivals' costs by misrepresenting their sales strength in violation of its duties as a category manager). Thus, other courts have recognized that the wrongful conduct of breaching a FRAND commitment, including by refusing to license rivals, reduces competition among products practicing the standardized technology and thus is anticompetitive conduct for purposes of sustaining a monopolization claim. *See Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 314 (3d Cir. 2007).

Effective antitrust enforcement of FRAND commitments provides industry participants the confidence that they will not, after the fact, be excluded by competitors who own SEPs. Without these restraints, standard setting would forego vigorous competition among products practicing the standard. But, if they are confident FRAND commitments will be effectively upheld, stakeholders will be willing to invest in innovations to differentiate their products, while consumers benefit from both the interoperability of and competition between those products.

ARGUMENT

A. The panel's opinion ignores the key role of FRAND commitments in maintaining competition among products practicing standardized technologies, as the Ninth Circuit has previously recognized.

As the Ninth Circuit recently explained, the relationship between standard setting and competition is inescapable:

> The development of standards [] creates an opportunity for companies to engage in anti-competitive behavior. Most notably, once a standard becomes widely adopted, SEP holders obtain substantial leverage over new product developers, who have little choice but to incorporate SEP technologies into their products.

Microsoft Corp. v. Motorola, Inc., 795 F.3d 1024, 1030–31 (9th Cir. 2015).

Before an SSO adopts a standard, technologies compete to be included in the standard. During that process, SSO members—including competitors at various levels of the value chain— collaborate, choosing some technologies over alternatives. For a widely-adopted standard, standard setting increases demand for the selected technology, but eliminates demand for the alternatives not selected. Standardization thus deprives market participants of the choice of competing technologies. Courts have therefore long recognized that standard setting "can be rife with opportunities for anticompetitive activity." *See Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 571 (1982).

A patent that reads on technology incorporated into a standard and is thus essential to practicing it is called a standard essential patent, or SEP. Because the patent confers exclusivity, only firms able to license that SEP can be market participants. Without constraining SEP licensing terms, standard setting would confer not just financial rewards on the SEP owner, but additional *market power*: It would hand the keys to entry to SEP owners interested in preventing potential rivals from entering the market or competing effectively. *See Broadcom v.*

Qualcomm, 501 F.3d at 314. As the Supreme Court has explained, "the power to control prices or exclude competition" is the definition of market power. *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966) (citation omitted).

But, with safeguards against increasing market power, standard setting fosters competition among products practicing the standard by creating interoperability. *See Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 506–07 (1988). Users of the standard also further develop technologies incorporating standardized functionality, creating more sophisticated and complex products to serve myriad downstream markets.

To enable these benefits, SEP owners must voluntarily commit to license their SEPs to all comers on FRAND terms. *See Research in Motion Ltd. v. Motorola, Inc.*, 644 F. Supp. 2d 788, 795–96 (N.D. Tex. 2008) ("FRAND commitments are intended as a 'bulwark' against the unlawful accumulation of monopoly power that antitrust laws are designed to prevent."). The FRAND commitment can only work effectively if it prevents the SEP owner from ever possessing power to exclude that being selected as the standardized technology confers (by denying rivals licenses to SEPs) in the first place. Hence the panel's application of *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998) was in error: It is not that a SEP owner acquires market power by being selected as part of the standard, and the FRAND commitment somehow regulates the exercise of that market power; rather, the SEP owner is selected as part of the standard because it made a FRAND commitment to forego exercising the market power that otherwise would be conferred by the inclusion of its patent in the standard. When the SEP holder then breaches its commitment and takes back that power to exclude, it acquires and abuses the market power it had agreed to forego.

That is why, in previously interpreting IPR policies, the Ninth Circuit has found a requirement to license all comers, holding that a similar policy's "language admits of no limitations as to who or how many applicants could receive a license." *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 884 (9th Cir. 2012). Rather, SEP holders must "offer RAND licenses to all seekers" and "cannot refuse a license to a manufacturer who commits to paying the RAND rate." *Microsoft*, 795 F.3d at 1031, 1033; *see also Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1231 (Fed. Cir. 2014) (SEP holders must license "an unrestricted number of applicants").

The District Court therefore found that the TIA and ATIS IPR policies required licensing all comers. Order Granting FTC's Motion for Partial Summary Judgment at 25, *FTC v. Qualcomm Inc.*, No. 5:17-cv-00220-LHK (N.D. Cal. Nov. 6, 2018), ECF No. 931.

B. The Ninth Circuit should apply the reasoning of the Third Circuit's opinion in *Broadcom v. Qualcomm* to affirm liability here, recognizing the panel's focus on strictly applying refusal-to-deal case law and on

NYNEX **failed to consider Qualcomm's voluntary assumption of a FRAND commitment.**

In *Broadcom v. Qualcomm*, the Third Circuit confronted similar facts: to secure its place in a previous generation of wireless standards, Qualcomm made a FRAND commitment, then breached that commitment by failing to license its rival, Broadcom. 501 F.3d at 304–05. Recognizing how the FRAND commitment ensures that standardization of a technology does not extinguish competition between technologies, the Third Circuit held that the breach was conduct other than "competition on the merits" and thus violated Section 2 of the Sherman Act. *Id.* at 308, 314. Notwithstanding this directly applicable precedent, the panel opinion expressed concerns that compulsory sharing of intellectual property would dull innovation incentives, unnecessarily expanding antitrust law. Opinion at 32, *FTC v. Qualcomm Inc.*, No. 19-16122 (9th Cir. Aug. 11, 2020), ECF No. 255 ("OP_"). These concerns, while legitimate in some contexts, failed to consider the difference between involuntarily imposing terms of dealing on a firm and holding a firm to commitments it has already made.

1. The panel's application of refusal-to-deal case law fails to distinguish the policy differences between involuntary sharing versus holding monopolists to voluntarily-agreed commitments.

The panel's strict application of antitrust refusal-to-deal case law dismissed the FRAND commitment's role in ensuring that SEP owners cannot control entry. OP32. Those cases expressed concern that forcing a monopolist to *involuntarily* share the fruits of its investments may deter it from making those investments in the first place. *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407–08; *In re Indep. Serv. Orgs. Antitrust Litig.*, 203 F.3d 1322, 1327–28 (Fed. Cir. 2000). They also identified a business's ability to select its trading partners as necessary to accommodate the many legitimate reasons a business relationship might come to an end. *See Trinko*, 540 U.S. at 414. Finally, they express concern that mandating a duty to deal would be "beyond the practical ability of a judicial tribunal to control . . . when compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency" by "requir[ing] antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing." *Id.* at 408, 414–15 (citations omitted).

But the Supreme Court has also recognized that the right to refuse to deal is not unlimited, because the policy concerns motivating that right are not always present. *Id.* at 408. Thus, the Supreme Court has recognized that circumstances where a monopolist terminates an existing course of dealing cause less concern, because the existing contract has set terms of dealing and ensures the desired product already exists. *Id.* at 409–10 (discussing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 (1985)). In *Aspen Skiing*, that existing contract left the Court only with the concern that the end of the business relationship might be motivated by legitimate factors other than anticompetitive gain, a concern addressed by the fact that continuing with the deal would have been more profitable in the short run. *See Trinko*, 540 U.S. at 409. Similarly, where a monopolist provided an upstream service to customers that purchased additional services from it in a downstream market, but refused to provide the same service to customers that did not, the Supreme Court also found these concerns allayed by the benchmark of the first group of customers. *See id.* at 410 (discussing *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973)).

Violating a voluntarily-assumed FRAND commitment fits comfortably within the boundaries of these cases. As in cases involving pre-existing dealing, a court need not worry about acting as a central planner by identifying the proper price: the SEP owner has assumed a commitment to supply under particular terms. *See, e.g.*, *Microsoft*, 795 F.3d at 1034. Nor need a court enforcing a FRAND commitment worry about preempting a SEP owner's right to select the parties with which it will deal: the SEP owner has voluntarily agreed to deal with all parties. *See id.* at 1031. As the Ninth Circuit observed in *Microsoft v. Motorola*, a SEP owner who accepts a FRAND commitment makes a bargain, accepting limits on patent exclusivity in exchange for having its technology incorporated into the standard. *Microsoft v. Motorola*, 696 F.3d at 885. It does not offend public policy to hold a SEP owner to its commitments.

The panel distinguished this case law on the grounds that avoiding patent exhaustion is a legitimate motivation to avoid dealing with rivals and on the short-term profitability of that decision. OP34–35. But "patent exhaustion" is simply another name for a license to rivals that actually effectuates what they need, the ability to deal unencumbered with downstream customers. *See id.* The logic is perverse: refusing to deal with rivals is justified because the monopolist wants to control the terms on which rivals deal with customers. Thus, no other court has recognized avoiding patent exhaustion as a legitimate business justification for otherwise anticompetitive conduct. Similarly, in concluding that refusing to deal was "far more lucrative" and so did not sacrifice profits in the short term, the panel failed to recognize that it was more lucrative only because rivals had been excluded.[4] *See id.* at 35. A refusal should not be treated more leniently because it succeeds in excluding competition quickly. Finally, the panel failed to recognize that a short-term profit-sacrifice is only necessary to ensure that legitimate reasons for ending a business relationship are not impinged, see *Trinko*, 540 U.S. at 414, a concern not present where the monopolist has already voluntarily agreed to deal with all comers. *See Microsoft*, 795 F.3d at 1031.

2. The rule the FTC urges does not implicate the concerns in the Supreme Court's NYNEX decision, as the panel erroneously concluded.

The *NYNEX* case involved a single buyer choosing a single supplier from

[4] Should Qualcomm contend that OEM-level licensing was more lucrative because it used the end-device price as the royalty base, this is a red herring.

among two options, and the buyer allegedly making its choice based on the supplier's willingness to participate in regulatory fraud. Conceding higher prices, the Supreme Court nonetheless found the resulting "consumer injury naturally flowed not so much from a less competitive market for removal services, as from the exercise of market power that is lawfully in the hands of a monopolist . . . that prevented the agency from controlling New York Telephone's exercise of its monopoly power." *NYNEX*, 525 U.S. at 136 (emphasis omitted). But far from the revolutionary implications the panel gives *NYNEX*, the case simply restated a well-worn proposition: To be an antitrust violation, conduct must create or sustain market power. *Id.* at 137 (citing 3 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 651d, at 80 (1996)).

The Supreme Court made clear its motivation: to hold otherwise "would transform cases involving business behavior that is improper for various reasons, say, cases involving nepotism or personal pique, into treble-damages antitrust cases . . . [and] discourage firms from changing suppliers—even where the competitive process itself does not suffer harm." *Id. NYNEX* is thus a narrow rule, applying where wrongful conduct changes one competitive option for another in a manner not leading to acquiring or maintaining monopoly power.

This case, by contrast, does not involve switching suppliers where a firm would simply use one or the other: It involves conduct that has limited the number of firms able to sell products practicing the standard. Contrary to the panel's characterization, nowhere does the FTC ask for antitrust courts to serve as the royalty police. The FTC has focused on conduct it alleges enhances Qualcomm's ability to exclude rivals: denying those rivals exhaustive licenses, and then imposing restraints that set the terms on which customers may deal with those rivals. *See* Petition of the Federal Trade Commission for Rehearing *En Banc* at 7, *FTC v. Qualcomm Inc.*, No. 19-16122 (9th Cir. Sept. 25, 2020), ECF No. 256 ("*FTC Brief*"). And the District Court found that the conduct had in fact excluded competitors. Findings of Fact and Conclusions of Law at 114–24, *FTC v. Qualcomm Inc.*, No. 5:17-cv-00220-LHK (N.D. Cal. May 21, 2019), ECF No. 1490 ("DCO_").

Unlike wrongful conduct that has no impact on the competitive process, even after *NYNEX*, courts have never shied from applying Section 2 to wrongful conduct that *creates or maintains* monopoly power. *See Conwood*, 290 F.3d at 783–84 (monopolist increasing rivals' costs by misrepresenting their sales strength in violation of its duties as a category manager). Thus, given that a SEP owner voluntarily assumes a duty to "license [] a manufacturer who commits to paying the RAND rate," *Microsoft*, 795 F.3d at 1031, there is no reason Section 2 should not reach a failure to uphold that duty which creates or maintains market power. Courts have thus identified how violating a FRAND commitment allows a

SEP owner not only to exploit its existing market power, but also to arrogate to itself additional market power not the result of its own efforts. *See Apple, Inc. v. Motorola, Inc.*, 869 F. Supp. 2d 901, 913 (N.D. Ill. 2012) (Posner, J.) (FRAND obligation confines the patentee's demands "to the value conferred by the patent itself as distinct from the additional value—the hold-up value—conferred by the patent's being designated as standard-essential."), *rev'd in part on other grounds*, 757 F.3d 1286 (Fed. Cir. 2014). It is this impact, on rivals' ability to sell products, that the FTC targets. *FTC Brief* at 10.

3. The Ninth Circuit should reject the panel's reasoning and adopt the rationale of the Third Circuit in Broadcom v. Qualcomm.

Whether one uses the label "refusal to deal" or not, SEP holders are not immune from well-established principles of antitrust law: a defendant that (1) possesses monopoly power in the relevant market and (2) has acquired, enhanced, or maintained that power with anticompetitive conduct "as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident" violates Section 2 of the Sherman Act. *Trinko*, 540 U.S. at 407 (quoting *Grinnell*, 384 U.S. at 570–71). Courts have long held that misconduct in the standard setting process that restrains competition is anticompetitive conduct. *See Allied Tube*, 486 U.S. at 509.

The Third Circuit's decision in *Broadcom v. Qualcomm* can be readily applied here. In that case, concerning the same Defendant's conduct relative to a previous generation of wireless standards, the Third Circuit recognized how standardization eliminates competition between technologies, but relies on FRAND commitments to maintain competition between products practicing the standard. *Broadcom v. Qualcomm*, 501 F.3d at 314 ("Although a patent confers a lawful monopoly over the claimed invention, its value is limited when alternative technologies exist.") (citations omitted). Because "adoption of the standard eliminates alternatives to the patented technology," the "patent holder's IPRs, if unconstrained, may permit it to demand supracompetitive royalties. It is in such circumstances that measures such as FRAND commitments become important safeguards against monopoly power." *Id.* (citing Daniel G. Swanson & William J. Baumol, *Reasonable and Nondiscriminatory (RAND) Royalties, Standards Selection, and Control of Market Power*, 73 Antitrust L.J. 1, 5, 10–11 (2005)).

The Third Circuit considered the same argument that Defendant-Appellee advances here: forcing it to live up to the FRAND commitment to license rivals imposes an antitrust duty to deal. *Id.* at 316. The Third Circuit rejected that analogy, distinguishing past cases on the basis that "Qualcomm is alleged to have actively marketed its WCDMA technology for inclusion in an industry-wide standard, and to have voluntarily agreed to license that technology on FRAND terms." *Id.* The case law concerning SEPs licensing is thus distinguishable from cases holding that a refusal to share one's technology cannot not constitute an antitrust law violation.

The panel opinion brushed off this precedent in a summary paragraph, arguing the FTC had alleged neither: (1) intentional deception of SSOs on the part of Qualcomm; nor (2) that Qualcomm had charged discriminatorily higher royalty rates. OP38–39. The first rationale unjustifiably turns the "intentional deception" of the *Broadcom v. Qualcomm* opinion—Qualcomm intentionally, not accidentally, promised FRAND terms and then demanded non-FRAND terms, including by denying exhaustive licenses to rivals—into a specific intent requirement with no parallel in antitrust law. As the panel opinion recognizes, there is no dispute that Qualcomm promised to license its patents on FRAND terms. OP16; *see also* DCO133 (holding that FRAND commitments required Qualcomm to license rivals and finding Qualcomm refused to do so). Separately, as the FTC explains, that a royalty scheme might be facially neutral does not prevent it from in reality including part of the cost of the downstream product; because the customer of the SEP holder's product cares only about the total price of the chipset and license, the split between the chipset and license is arbitrary. *FTC Brief* at 14.

The panel's reliance on the D.C. Circuit's opinion in *Rambus Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008), to insist that high royalties do not harm competition is another example of the panel failing to spot exclusionary power.

Unlike Qualcomm, Rambus only had a licensing business and did not compete with downstream product manufacturers. *Id.* at 458–59. It therefore lacked rivalry with them and thus the incentive to exclude them. In explaining the difference, the D.C. Circuit in fact approvingly characterized the violation of a duty that excluded rivals in *Conwood* as "a good illustration of the type of exclusionary conduct that will support a [Section] 2 violation." *Id.* at 464 (quoting *Le Page's v. 3M*, 324 F.3d 141, 153 (3d Cir. 2003)).

CONCLUSION

For the reasons above, *Amicus* urges the Ninth Circuit to grant rehearing and support the district court's application of Appellant's FRAND obligations to require licensing to all applicants, including rivals. Many FSA members participate heavily in standardization efforts; all are innovators. FSA sees no risk that antitrust enforcement here will hurt standard-setting efforts or innovation. Enforcing FRAND commitments instead supports future standard-setting efforts by assuring market participants they will not be excluded by competitors who own SEPs, allowing them to select the technologies they believe will work best.

Dated: October 5, 2020

Respectfully submitted,

CLEARY GOTTLIEB STEEN & HAMILTON LLP

By: */s/ Daniel P. Culley*
Daniel P. Culley
CLEARY GOTTLIEB STEEN & HAMILTON LLP
2112 Pennsylvania Ave, NW
Washington, D.C. 20037
202-974-1500

Attorney for the Fair Standards Alliance

CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2020, I electronically filed the foregoing brief and all attachments with the Clerk of Court of the United States Court of Appeals for the Ninth Circuit through the appellate CM/ECF filing system.

By: *_/s/ Daniel P. Culley_*
Daniel P. Culley
CLEARY GOTTLIEB STEEN & HAMILTON LLP
2112 Pennsylvania Ave, NW
Washington, DC 20037
(202) 974-1500

Attorney for the Fair Standards Alliance

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Circuit Rule 29-2(c)(2) because the main body of the brief does not exceed 4200 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 for Windows with Times New Roman font size 14.

Dated: October 5, 2020

By: */s/ Daniel P. Culley*
Daniel P. Culley
CLEARY GOTTLIEB STEEN & HAMILTON LLP
2112 Pennsylvania Ave, NW
Washington, D.C. 20037
202-974-1500

Attorney for the Fair Standards Alliance