No. 08-694

IN THE

# Supreme Court of the United States

FEDERAL TRADE COMMISSION,

*Petitioner*,

v.

RAMBUS INCORPORATED,

*Respondent*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit**

**BRIEF FOR AMICI CURIAE HYNIX SEMICONDUCTOR INC., MICRON TECHNOLOGY INC., AND NVIDIA CORPORATION IN SUPPORT OF PETITIONER**


KENNETH L. NISSLY
SUSAN VAN KEULEN
TAD ALLAN
KENNETH R. O'ROURKE
DAVID T. BEDDOW
O'MELVENY & MYERS LLP

THEODORE G. BROWN III
TOWNSEND & TOWNSEND & CREW LLP

WALTER DELLINGER
*Counsel of Record*
SRI SRINIVASAN
MARK S. DAVIES
MEAGHAN MCLAINE
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
Telephone: (202) 383-5300

*Counsel for Amicus Curiae Hynix Semiconductor Inc.*


*(Additional Counsel Listed on Inside Cover)*

*Additional Counsel for Amici Curiae*

WILLIAM J. BAER
WILSON D. MUDGE
ARNOLD & PORTER LLP
555 Twelfth Street, N.W.
Washington, D.C. 20004
Telephone: (202) 942-5000
*Counsel for Amicus Curiae Micron Technology Inc.*

INDRA NEEL CHATTERJEE
ORRICK, HERRINGTON & SUTCLIFFE LLP
1000 Marsh Road
Menlo Park, California 94025
Telephone: (650) 614-7356
*Counsel for Amicus Curiae NVIDIA Corporation*

## QUESTION PRESENTED

Whether the D.C. Circuit erred in concluding, contrary to long-established principles of antitrust law (and in conflict with the Third Circuit), that a patent licensing firm incurs no antitrust liability when it deceives a standard-setting organization and thereby acquires a monopoly over a standardized technology without making concessions concerning its royalty rates.

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## INTEREST OF AMICI CURIAE[1]

The Federal Trade Commission ("FTC") unanimously decided that respondent Rambus Inc. ("Rambus"), a patent licensing firm, violated Section 2 of the Sherman Act when it used deception to acquire a monopoly over standardized computer memory technology without agreeing to license the technology on reasonable terms.[2] In reviewing the FTC's "landmark, 120-page opinion," *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 311 (3d Cir. 2007), the D.C. Circuit assumed the accuracy of the FTC's findings that (i) Rambus deceived the Joint Electron Device Engineering Council ("JEDEC") by secretly amending long-pending patent claims intentionally to cover the soon-to-be standardized SDRAM and DDR SDRAM technology; (ii) Rambus thereafter acquired monopoly power in four SDRAM and DDR SDRAM technology markets ("Rambus held over 90 percent of the market

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[1] Counsel of record for both parties received timely notice pursuant to Rule 37.2(a) of amici curiae's intention to file this brief, and the parties have consented to the filing. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae or its counsel made a monetary contribution to its preparation or submission.

[2] The relevant technology is an aspect of computer memory technology discussed in *Quanta Computer, Inc. v. LG Electronics, Inc.*, 128 S. Ct. 2109 (2008). As *Quanta* explains, "[t]he data processed by the computer are stored principally in random access memory, also called main memory." *Id.* at 2113. The technology here is a type of main memory called Dynamic Random Access Memory ("DRAM"). *See* Pet. App. 4a. "SDRAM" is Synchronous DRAM and "DDR SDRAM" is the faster Double Data Rate SDRAM. *See* Pet. App. 6a-7a.

share in the relevant markets"); and (iii) absent the deception of JEDEC, Rambus could have acquired its monopoly only if it had agreed *ex ante* to license the memory technology on reasonable and nondiscriminatory ("RAND") terms to all the organization's members. Pet. App. 12a, 14a, 114a, 147a. Taken together, these findings establish that Rambus deceptively acquired a monopoly by avoiding RAND terms and thereby violated Section 2 of the Sherman Act (15 U.S.C. § 2).

Nevertheless, the D.C. Circuit set aside the FTC's decision, concluding that Rambus's deceptive avoidance of a RAND condition in acquiring a monopoly was not anticompetitive. Though purporting to apply "settled principles of antitrust law," Pet. App. 11a, the court of appeals' exoneration of Rambus under these circumstances in fact works a radical departure from those principles. Its decision is premised entirely on a misreading of this Court's decision in *NYNEX v. Discon*, 525 U.S. 128 (1998). The decision below also creates a conflict with the Third Circuit, which relied on the FTC's decision below in concluding correctly that deceptive avoidance of a RAND requirement *does* violate the antitrust laws. *Broadcom*, 501 F.3d at 297. Professors Hovenkamp, Janis and Lemley, authors of the leading treatise on intellectual property and antitrust, have declared the FTC's decision here "well-supported as a matter of law." 2 H. Hovenkamp et al., *IP & Antitrust* § 35-47 n.22.5 (2008 Supp.).[3]

[3] Additionally, the Commission of the European Communities has issued a Statement of Objections in parallel proceedings against Rambus. The Commission has not yet issued a final ruling. *See infra* at 20-21.

Amici include the major manufacturers of SDRAMs and of products using SDRAMs who, as principal targets of Rambus's patent "hold-up" scheme, have a substantial interest in the disposition of this case.[4] Describing the manufacturers' extensive investment in the standardized memory technology, the FTC found that "the DRAM industry was locked into the SDRAM and DDR SDRAM standards by 2000." Pet. App. 192a. At this point, the FTC noted "switching costs" for SDRAM alone "could have reached hundreds of millions of dollars." Pet. App. 197a-198a, 200a. After the investments were made and committed, Rambus launched a series of lawsuits against the major SDRAM manufacturers alleging, *inter alia*, patent infringement.[5] As the FTC observed in its decision, "Rambus has sued, or been sued by, several of the major DRAM manufacturers, including [amici] Hynix . . . and Micron." Pet. App. 53a. The FTC described the status of the "many actions involving Rambus and the major semiconductor companies," and discussed the lawsuits involving amici Hynix and

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[4] The Appendix *infra* provides further background on the amici.

[5] *See Rambus Inc. v. Hynix Semiconductor Inc.*, Nos. 5:00cv20905 (filed N.D. Cal. Aug. 29, 2000) and 5:05cv334 (filed N.D. Cal. Jan. 25, 2005); *Rambus Inc. v. Hitachi Ltd.*, Nos. 1:00cv29 (filed D. Del. Jan. 18, 2000), 1:00cv130 (filed D. Del. Feb. 29, 2000), 4:00cv1351 (filed N.D. Cal. Apr. 19, 2000), and 4:00cv1716 (filed N.D. Cal. Apr. 21, 2000); *Rambus Inc. v. Infineon*, No. 3:00cv524 (filed E.D. Va. Aug. 8, 2000); *Rambus Inc. v. Samsung Electronics Co.*, No. 5:05cv2298 (filed N.D. Cal. June 6, 2005); *Rambus Inc. v. Micron Tech. Inc.*, Nos. 1:00cv792 (filed D. Del. Aug. 28, 2000) and 5:06cv244 (filed N.D. Cal. Jan. 13, 2006); *Rambus Inc v. Nanya Technology Corp.*, No. 5:05cv334 (filed N.D. Cal. Jan. 25, 2005).

Micron. Pet. App. 57a-59a. Rambus has also recently initiated a patent infringement lawsuit in the Northern District of California against amicus NVIDIA Corporation, whose products use SDRAM, as well as a U.S. International Trade Commission investigation against NVIDIA also alleging patent infringement.[6]

Taking full advantage of the industry's enormous and irretrievable investment in the standardized technology, Rambus's litigation strategy—a strategy the Solicitor General has previously characterized as a patent "hold-up"—seeks to extract staggering amounts. Evidence before the FTC estimated "that Rambus DRAM royalties could total more than $8 billion over the six years between 2000 and 2006." Pet. App. 153a n.409. Rambus also claims damages going forward, pushing potential licensing revenue even higher.

## REASONS FOR GRANTING THE WRIT

The FTC and D.C. Circuit agree that, if not for Rambus's deceptive conduct, the standard-setting organization would have either (i) adopted standards not subject to Rambus patents, or (ii) selected standards covered by Rambus patents if (and only if) Rambus agreed to license the patented technology at RAND rates. As the FTC explains (Pet. 15-23 (Ques-

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[6] *See Rambus Inc. v. Nvidia Corp.*, No. 3:08cv3343 (filed N.D. Cal. July 10, 2008); Press Release, U.S. Int'l Trade Comm'n, ITC Institutes Section 337 Investigation on Certain Semiconductor Chips Having Synchronous Dynamic Random Access Memory Controllers and Products Containing Same (Dec. 5, 2008) (announcing Rambus's November 6, 2008 complaint, Inv. No. 337-TA-661), *available at* http://www.usitc.gov/ext_relations/news_release/2008/er1205ff1.htm.

tion 1)), it provided ample evidence of a causal connection between Rambus's deception and JEDEC's selection of a standard that Rambus now claims as its own. Amici fully support the FTC's request for review of the D.C. Circuit's onerous and erroneous understanding of the applicable causation standard.

Amici concentrate here on showing that the D.C. Circuit separately erred in holding that Rambus's deceptive avoidance of a RAND requirement failed to constitute anticompetitive conduct. *See* Pet. 23-26 (Question 2). Amici are well-placed to explain the importance of this aspect of the D.C. Circuit's decision because amici are principal targets of Rambus's patent hold-up and thus face the prospect of paying substantial sums in royalties to Rambus. Notably, had the D.C. Circuit concluded, as it should have, that Rambus's deceptive avoidance of a RAND requirement while acquiring a monopoly violates the Sherman Act, the court would have had no occasion to address whether the Commission had shown a sufficient connection between Rambus's deceptive conduct and JEDEC's technology choice. In that event, *both* of the possible outcomes of Rambus's deceptive conduct identified by the court would have violated the Sherman Act.

The Court should grant review to ensure that other licensing firms do not emulate Rambus and engage in deception designed to obtain a monopoly while evading industry requirements to agree to a RAND condition.

## I. This Case Raises The Critically Important Question Of Whether Antitrust Law Prohibits A Patent Licensing Firm From Acquiring Monopoly Power Through Deceptive Avoidance Of Licensing Concessions Concerning Royalty Rates

### A. Antitrust Law Proscribes Acquisition Or Maintenance Of Monopoly Power Through Deception

As this Court explained long ago, a monopoly acquired or maintained for "the legitimate purpose of reasonably forwarding personal interest and developing trade" or through other "normal methods of industrial development" is permissible because "freedom to contract" is "the essence of freedom from undue restraint on the right to contract" that is at the heart of the Sherman Act's protections. *Standard Oil Co. v. United States*, 221 U.S. 1, 58, 62, 75 (1911). But when a monopoly is acquired or maintained by resort to business methods "wholly inconsistent with the theory that they were made with the single conception of advancing the development of business power by usual methods," methods "which on the contrary, necessarily involved the intent to drive others from the field and to exclude them from their right to trade, and thus accomplish the mastery which was the end in view," the Sherman Act is violated. *Id.* at 76; *see also United States v. Aluminum Co. of Am.*, 148 F.2d 416, 429 (2d Cir. 1945) (Hand, J.) ("the origin of a monopoly may be critical in determining its legality").

Since *Standard Oil*, this Court has consistently reiterated the basic distinction between a lawful monopoly obtained or maintained as a result of competition on the merits, and an unlawful monopoly obtained or maintained through practices explained only by a design to exclude competitors from the market. *See*, *e.g.*, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) ("central message of the Sherman Act is that a business entity must find new customers and higher profits through internal expansion—that is, by competing successfully"; monopolist ski operator's decision to terminate joint marketing agreement harmed consumers, significantly harmed the competitor's business, and lacked justification in "any normal business purpose"); *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (in addition to "the possession of monopoly power in the relevant market," the offense of monopolization requires "'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'" (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966))).

Deception is not a legitimate business practice, and the Sherman Act bars the use of deception to acquire or maintain a monopoly. For example, in the leading case of *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc), Microsoft's Windows monopoly on Intel-compatible PC operating systems was threatened by the emergence of "middleware," software programs that allowed developers to write programs independently of the Windows system. Although Microsoft offered Java implementation tools, "Microsoft deceived Java developers regarding the Windows-specific nature of the tools," and "predicted that the effect of its actions would be to generate Windows-dependent Java applications that their developers believed would be cross-platform." *Id.* at 76, 77. "Unsurprisingly," the court observed, "Microsoft offers no procompetitive explanation for its campaign to deceive developers." *Id.* at 77. The D.C. Circuit held that "Microsoft's conduct related to its Java developer tools served to protect its monopoly of the operating system in a manner not attributable either to the superiority of the operating system or to the acumen of its makers, and therefore was anticompetitive." *Id.*

In accordance with these decisions, the leading antitrust treatise defines "monopolistic conduct" as acts that "(1) are reasonably capable of creating, enlarging or prolonging monopoly power by impairing the opportunities of rivals; and (2) that either (2a) do not benefit consumers at all, or (2b) are unnecessary for the particular consumer benefits claimed for them, or (2c) produce harms disproportionate to any resulting benefits." 3 P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 651a, at 96 (3d ed. 2008).

### B. Rambus Acquired Its Monopoly Through Deception

Applying settled principles of antitrust law, the FTC concluded that Rambus had violated the Sherman Act. Because "Rambus does not dispute the nature of the relevant markets or that its patent rights in the four relevant technologies give it monopoly power in each of those markets," the "critical question" is whether Rambus "acquired its monopoly power in the relevant markets unlawfully." Pet. App. 12a-13a. It did. Rambus's deception of the semiconductor industry's standard-setting organization was not competition on the merits.

In particular, advances in SDRAM technology threatened Rambus's plan to profit from its proprietary Rambus DRAM ("RDRAM") product.[7] Pet. App. 37a, 38a-39a. Rather than compete in the SDRAM technology markets on the merits, Rambus sought to amend its pending patent claims related to RDRAM technology to cover the SDRAM technology already being discussed by JEDEC. Pet. App. 81a-104a. By all accounts, JEDEC would not knowingly incorporate patented technology into a standard without RAND assurances. Pet. App. 114a; *see* Pet. App. 14a. Despite an express obligation to disclose pending patents and patent applications, Pet. App. 23a, and despite an obligation to participate in the standard-setting process in good faith, Pet. App. 111a-112a, Rambus did not disclose its patent filings.[8] Because of Rambus's deception, JEDEC standardized the SDRAM and DDR SDRAM technology unaware of its true cost and without obtaining RAND concessions from Rambus.

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[7] Rambus disclosed its patented RDRAM technology to the industry (Pet. App. 126a), and, although RDRAM was rejected as the industry standard (Pet. App. 39a), Rambus nevertheless has made millions from licensing its RDRAM technology.

[8] For example, the FTC noted that Rambus filed a patent amendment to claim "programmable CAS latency" just one week before JEDEC decided to include programmable CAS latency in the SDRAM standard. Pet. App. 95a-96a. The FTC also pointed to documents and testimony by Rambus officials indicating that "the company believed it should have disclosed its patent filings" (Pet. App. 115a), testimony that "disclosure of patents and patent applications was expected" (Pet. App. 118a), and the reactions of JEDEC participants to past instances of failure to disclose patents and patent applications (Pet. App. 120a-124a).

The FTC applied settled antitrust law to Rambus's deceptive conduct and concluded that Rambus had violated the Sherman Act. Pet. App. 69a-219a. The FTC explained that Rambus's deception of JEDEC "obscure[d] the relative merits of alternatives and prevent[ed] the efficient selection of preferred technologies." Pet. App. 72a. "Under Section 2 case law, these circumstances suggest exclusionary conduct: deceptive behavior that hides the price of a patented technology is not 'competition on the merits,' and deception that thwarts informed choice is not competition on the 'basis [of] efficiency.'" Pet. App. 86a (quoting *Aspen*, 472 U.S. at 605).

### C. The Court of Appeals' Decision Was Based On A Fundamental Misapplication Of This Court's Decision In *NYNEX v. Discon*

Accepting that Rambus had deceived the standard-setting organization (Pet. App. 14a), the court of appeals exempted the deception from antitrust scrutiny. In the court's view, "an otherwise lawful monopolist's use of deception simply to obtain higher prices normally has no particular tendency to exclude rivals and thus to diminish competition." Pet. App. 16a. In finding that principle applicable to this case, the court of appeals relied entirely on this Court's decision in *NYNEX v. Discon*, 525 U.S. 128 (1998). *See* Pet. App. 16a-20a. The court of appeals fundamentally erred in applying *NYNEX* to the much different circumstances of this case.

*NYNEX* involved the business of removing obsolete telephone equipment. NYNEX, a regulated monopoly, engaged in a scheme whereby it chose more expensive removal services, passed the higher prices on to "telephone consumers in the form of higher regulatory-agency-approved telephone service charges," and received a "special rebate" from the selected removal services business at the end of the year. *Id.* at 132. A competing removal services business, Discon, alleged that when it refused to participate in this fraudulent scheme, NYNEX refused to do business with it. The question presented was "whether the antitrust rule that group boycotts are illegal *per se* as set forth in *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959), applies to a buyer's decision to buy from one seller rather than another, when that decision cannot be justified in terms of ordinary competitive objectives." 525 U.S. at 130. The Court ruled that the group boycott *per se* rule did not apply because "precedent limits the *per se* rule in the boycott context to cases involving horizontal agreements among direct competitors." *Id.* at 135. Instead, the plaintiff "must allege and prove harm, not just to a single competitor, but to the competitive process, *i.e.*, to competition itself." *Id.*

The Court acknowledged that NYNEX's "behavior hurt consumers by raising telephone service rates." *Id.* at 137. "But that consumer injury," the Court observed, "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 . . . combined with a deception worked upon the regulatory agency that prevented the agency from controlling [the monopolist's] exercise of its monopoly power." *Id.* at 136. The Court declined to apply the *per se* rule to a decision that, "though not made for competitive reasons, composes part of the regulatory fraud" because to do so "would transform cases involving business behavior that is improper for various reasons, say, cases involving nepotism or personal pique, into treble-damages antitrust cases." *Id.* at 137. Such a "*per se* rule," the Court explained, "would discourage firms from changing suppliers—even where the competitive process itself does not suffer harm." *Id.*

Unlike this case, *NYNEX* had nothing to do with deception used to acquire or maintain monopoly power. *NYNEX*, by its own terms, involved "market power that is *lawfully* in the hands of a monopolist." *Id.* at 136. As the court of appeals recognized, *NYNEX* thus instructs that "an *otherwise lawful monopolist's* use of deception *simply to obtain higher prices* normally has no particular tendency to exclude rivals and thus to diminish competition." Pet. App. 16a (emphasis added). The court of appeals' error was in understanding Rambus to be an "otherwise lawful monopolist" that used deception "simply to obtain higher prices." Rather, Rambus's deception enabled it to *obtain* monopoly power over standardized technology without any RAND commitment.

There was no suggestion in *NYNEX* that the challenged deception enabled the monopolist to charge a monopoly price (*i.e.*, the price the monopolist would charge through the exercise of monopoly power without any regulatory constraint). The monopolist's deception led instead to the determination of a different price by the regulator—a consequence that was unlawful, but not under antitrust rules. Here, by contrast, Rambus's deception enabled it to gain monopoly power without a RAND requirement, and thus to charge monopoly prices without constraint. Indeed, Rambus has gained the power to charge full monopoly rents that amount to billions of dollars. Nothing in

*NYNEX* requires antitrust law to ignore deception that creates an unregulated monopolist and allows it to extract full monopoly profits. To the contrary, this Court defines monopoly power as "the power to control prices or exclude competition," *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956), and here, Rambus's deception gave it the ability to "exclude competition" and "to control prices" without being constrained by any RAND condition. *See Microsoft*, 253 F.3d at 51 ("[A] firm is a monopolist if it can profitably raise prices substantially above the competitive level.").

## II. The Court Of Appeals' Decision Conflicts With The Third Circuit's Decision In *Broadcom*

The decision below would warrant the Court's review even if it were not in conflict with a decision from another court of appeals. The Court has often granted certiorari to address important issues of antitrust law absent a circuit conflict. Indeed, after the Court invited the views of the Solicitor General in *NYNEX*, the Solicitor General unsuccessfully urged against review on the ground that there was "no conflict with decisions of this Court or other courts of appeals." Br. for the United States as Amicus Curiae, No. 96-1570, at 6. More recently, the Solicitor General successfully urged the Court to accept an antitrust case even though there was no circuit conflict. *See* Br. for the United States as Amicus Curiae, *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, No. 05-381, at 19-20 & n.13 ("Although there is no square circuit conflict on the standard for predatory bidding claims, there is a growing body of academic literature, stimulated in part by this case, that discusses the subject of predatory licensing."). Furthermore, in this case, the court of appeals' decision effectively constrains the FTC's enforcement efforts nationwide because almost any defendant to an FTC action can seek review in the D.C. Circuit. *See* Pet. 26. A circuit conflict is not necessary for the Court to grant review here.

In any event, the D.C. Circuit's decision conflicts with the Third Circuit's decision in *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297 (3d Cir. 2007). *Broadcom*, like this case, involved "deceptive conduct" by a patent owner that induced "relevant [standard-setting organizations] to incorporate a technology into [the] standard that they would not have considered absent a [RAND] commitment." *Id.* at 315. In particular, Qualcomm owned patents that gave it monopoly power over cellular telephones using CDMA ("code division multiple access") technology. The CDMA phone technology was threatened by a different technology, GSM ("global system for mobility"), just as Rambus's RDRAM technology in this case was threatened by the evolving SDRAM standard. Qualcomm got a variant of its technology, "wideband CDMA," incorporated into the latest GSM standard in an effort to give it monopoly power over that standard. *See id.* at 303-04. Moreover, just as all agree that JEDEC would have adopted a different standard if Rambus had disclosed its patent position but refused to agree to RAND terms, "Broadcom alleged [that the standard-setting organization] included Qualcomm's proprietary technology in the [GSM] standard only after, and in reliance on, Qualcomm's commitment to license that technology on [RAND] terms." *Id.* at 304. Qualcomm, however, reneged on its promise and demanded non-RAND royalties just as Rambus deceived JEDEC and now demands non-RAND royalties. Broadcom, like the FTC here, argued that the "intentional acquisition of monopoly power through deception of [a standard-setting organization] violates antitrust law." *Id.*

Assuming Broadcom's allegations of Qualcomm's deceptive conduct to be true—much as the D.C. Circuit's Section 2 holding assumes the FTC's findings of deception to be correct—the Third Circuit held that a "firm's deceptive [RAND] commitment to [a standard-setting organization] may constitute actionable anticompetitive conduct." *Id.* at 315. The Third Circuit noted that anticompetitive conduct "may take a variety of forms," but "is generally defined as conduct to obtain or maintain monopoly power as a result of competition on some basis other than the merits." *Id.* at 308. The court described the FTC's decision in this case as a "landmark, 120-page opinion," *id.* at 311, and related its "extensive discussion of deceptive conduct in the standard-setting context and the factors that make such conduct anticompetitive under § 2 of the Sherman Act," *id.* at 312. Agreeing with the FTC's decision here, the Third Circuit held that "[d]eception in a consensus-driven private standard-setting environment harms the competitive process by obscuring the costs of including proprietary technology in a standard and increasing the likelihood that patent rights will confer monopoly power on the patent holder." *Id.* at 314. The court explained that "[d]eceptive [RAND] commitments, no less than deceptive nondisclosure of [patent rights], may result in such harm." *Id.* The court believed its holding to "follow[] directly from established principles of antitrust law and [to] represent[] the emerging view of enforcement authorities and commentators, alike." *Id.*

Of particular relevance, the Third Circuit held that Qualcomm's "deceptive conduct"—*i.e.*, "induc[ing] relevant [standard-setting organizations] to incorporate a technology into the … standard that they would not have considered absent a [RAND] commitment"—amounted to "anticompetitive conduct." *Id.* at 315. That holding conflicts with the D.C. Circuit's holding below that Rambus did *not* engage in anticompetitive conduct by deceiving JEDEC in a manner that led JEDEC to adopt standards covered by Rambus patents without any RAND commitment from Rambus. The D.C. Circuit's rationale below—*viz.,* that evading a RAND requirement amounts to a "use of deception simply to obtain higher prices" and thus fails to qualify as anticompetitive, Pet. App. 16a—would apply equally to the circumstance in *Broadcom*. But the Third Circuit concluded, in conflict with the D.C. Circuit below, that deception concerning a RAND requirement that enables acquisition of monopoly power is anticompetitive. That the two circuits reached sharply different results on that issue while both purporting to apply "settled principles of antitrust law" (Pet. App. 11a) or "established principles of antitrust law" (*Broadcom*, 501 F.3d at 314) confirms the need for this Court's review of the application of antitrust principles to deceptive conduct in the standard-setting context.

## III. The Decision Below Encourages Undesirable Patent Hold-Up Schemes And Discourages Beneficial Standard-Setting Activities

This case affords the Court a favorable vehicle for addressing whether deceptive avoidance of a RAND requirement can violate the Sherman Act. The case was resolved after extensive administrative proceedings and compilation of a complete and robust factual record.[9] The court of appeals resolved the case solely on a question of law—whether deceptive conduct enabling the acquisition of monopoly power free from a RAND requirement constitutes anticompetitive conduct. *See* Pet. App. 14a (assuming deceptive conduct); *id.* at 19a ("conclusion that the Commission failed to demonstrate that Rambus inflicted any harm on competition requires vacatur of the Commission's orders"). And the court made clear that its holding turned on its reading of this Court's decision in *NYNEX*. *See* Pet. App. 19a (stating that *Broadcom* "conflicts with *NYNEX*"); *id.* at 20a (stating that the view of "[s]cholars in the field" is inconsistent with *NYNEX*). As a result, this case squarely presents, in a posture well-suited for resolution by this Court, the question whether deception enabling the acquisition of monopoly power through evasion of RAND constraints qualifies as anticompetitive conduct.

This Court's recent patent decisions confirm the importance of assuring that Rambus be denied the outsized reward it seeks. Rambus "use[s] patents not as a basis for producing and selling goods but, instead, primarily for licensing fees." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 396 (2006) (Kennedy, J., concurring).[10] And just last Term, the Court empha-

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[9] Pet App. 420a-421a ("The 54 day administrative hearing produced a voluminous evidentiary record including 44 live witnesses, 1,770 admitted exhibits, nearly 12,000 pages of trial transcript, and hundreds of pages of deposition transcripts.").

[10] "Rambus does not manufacture any memory devices itself, but relies instead on licensing its patent portfolio for revenue." *Rambus Inc. v. Infineon Techs. AG*, 318 F.3d 1081, 1084 (Fed. Cir. 2003).

sized that the purpose of patent law is "'not the creation of private fortunes for the owners of patents.'" *Quanta Computer, Inc. v. LG Elecs., Inc.*, 128 S. Ct. 2109, 2116 (2008) (quoting *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 511 (1917)). The D.C. Circuit's decision enables patent licensing firms to reap enormous unearned rewards, precisely the result disapproved by recent decisions of this Court.

Not only does the decision below allow massive unwarranted profits for a patent licensing firm, it does so at the expense of well-functioning standard-setting organizations. In *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501 (1988), this Court explained that when "private associations promulgate . . . standards based on the merits of objective expert judgments and through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition, those private standards can have significant procompetitive advantages."[11] In the twenty years since *Allied Tube*, standard-setting organizations have gained widely-acknowledged economic importance. D. Swanson & W. Baumol, *Reasonable and NonDiscriminatory (RAND) Royalties, Standards Selection, and Control of Market Power*, 73 Antitrust L.J. 1, 1 (2006) (legal rules that govern a private standard-setting organization's decision to adopt standards in

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[11] In *Allied Tube*, this Court rejected the petitioner's argument that its efforts to affect the standard-setting process of a private association were immune from antitrust liability because the standards had been "widely adopted into law by state and local governments." 486 U.S. at 495.

which private parties own intellectual property rights are "critical for the long-run prospects of the economy").

The Federal Circuit recently explained why enforcement of RAND requirements is critical to the success of standard-setting organizations. *Qualcomm Inc. v. Broadcom Corp.*, 548 F.3d 1004 (Fed. Cir. 2008). Quoting extensively from the Third Circuit's *Broadcom* decision, the Federal Circuit explained that "[b]y failing to disclose relevant intellectual property rights ('IPR') to an SSO [standard-setting organization] prior to the adoption of a standard, a patent holder is in a position to 'hold up' industry participants from implementing the standard." *Id.* at 1010 (internal quotation marks omitted). "In order to avoid 'patent hold-up,' many SSOs require participants to disclose and/or give up IPR covering a standard." *Id.* (citing M. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 Cal. L. Rev. 1889, 1902 (2002)); *see also* Swanson & Baumol, *supra*, at 3-4 ("adopting standards that depend on private IP rights carries the risk of creating a degree of market power that distorts competition and generates returns in excess of those contemplated by the IP laws").

It bears noting in this regard that the Solicitor General already has informed the Court that Rambus's deceptive conduct amounts to an archetypical "patent hold-up." In *eBay v. MercExchange*, the United States noted that a "hold-up scenario might arise, as one example, in the case of the implementation of industry standards." Br. of United States as Amicusc Curiae, *eBay Inc. v. MercExchange, L.L.C.*, No. 05-130, at 21 n.19. To illustrate a patent hold-up, the United States cited a description of Rambus's deceptive actions and delayed lawsuits against SDRAM manufacturers. *Id.* (citing *Infineon*, 318 F.3d at 1107-09 (Prost, J., dissenting in part)); *see also Infineon*, 318 F.3d at 1108 (Prost, J., dissenting in part) ("Even after withdrawing from JEDEC, Rambus continued to furtively pursue its scheme to patent the evolving SDRAM standard by receiving reports from undisclosed attendees at JEDEC meetings named 'Deep Throat' and 'Secret Squirrel.'").

Rambus's high-profile effort to hold-up the computer memory technology industry after deceiving its standard-setting organization has attracted considerable scholarly attention and condemnation. For example, the leading treatise on the intersection of antitrust law and intellectual property recounts at length and with approval the FTC's investigation into Rambus.[12] So, too, the leading antitrust treatise devotes thirteen printed pages to this case and an additional five pages to *Broadcom*. Areeda, *supra*, ¶ 712, at 351-69. Indeed, the court of appeals was compelled to acknowledge that its holding was in conflict with the view of "[s]cholars in the field." Pet. App. 19a.

Finally, the importance of this case is underscored by the European Commission's parallel investigation into Rambus's conduct. The Commission of European Communities has publicly confirmed that it sent a Statement of Objections to Rambus on July 30, 2007. *See* Press Release, European Commission, Antitrust: Commission Confirms Sending a Statement of Objec-

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[12] *See* 2 H. Hovenkamp et al., *IP & Antitrust* § 35-47 n.22.5 (2008 Supp.) ("Assuming the facts the FTC found were correct, we think it is well-supported as a matter of law.").

tions to Rambus (Aug. 23, 2007).[13] A Statement of Objections is a formal step in Commission antitrust investigations in which the Commission informs the parties concerned in writing of the objections raised against them. In a press release confirming the issuance of the Statement of Objections, the Commission described DRAM, JEDEC, and Rambus's patent litigation. The Commission noted that "[t]his is the first time that the Commission is dealing with a 'patent ambush' under EC antitrust law," and that applying antitrust law to the issue reflected "well-established general case-law under Article 82 of the Treaty." *Id.* Issuing a Statement of Objections does not "prejudge the final outcome of the procedure," *id.*, and the Commission has not yet finally ruled on the Statement of Objections.

* * *

This is a case of pivotal importance to the new economy. After extensive and landmark proceedings, the FTC concluded that Rambus's conduct was anticompetitive and violated the Sherman Act. Because Rambus obtained its monopoly and avoided a RAND requirement not by competition on the merits but via deception, straightforward application of this Court's settled antitrust case law confirms the FTC's conclusion. The D.C. Circuit reached a different result solely on the strength of an inapposite decision of this Court and in direct conflict with the Third Circuit. By exempting from antitrust scrutiny a patent licensing firm's deception of a standard-setting organization, the decision below exempts highly undesirable patent

[13] *Available at* http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/330&form.

hold-up schemes from antitrust scrutiny and chills the sound operation of vital standard-setting organizations. The decision below is as wrong as it is important. Review is warranted.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

KENNETH L. NISSLY
SUSAN VAN KEULEN
TAD ALLAN
KENNETH R. O'ROURKE
DAVID T. BEDDOW
O'MELVENY & MYERS LLP

THEODORE G. BROWN III
TOWNSEND & TOWNSEND & CREW LLP

WALTER DELLINGER
*Counsel of Record*
SRI SRINIVASAN
MARK S. DAVIES
MEAGHAN MCLAINE
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, DC 20006
Telephone: (202) 383-5300

*Counsel for Amicus Curiae Hynix Semiconductor Inc.*

WILLIAM J. BAER
WILSON D. MUDGE
ARNOLD & PORTER LLP
555 Twelfth Street, N.W.
Washington, D.C. 20004
Telephone: (202) 942-5000
*Counsel for Amicus Curiae Micron Technology Inc.*

INDRA NEEL CHATTERJEE
ORRICK, HERRINGTON & SUTCLIFFE LLP
1000 Marsh Road
Menlo Park, California 94025
Telephone: (650) 614-7356
*Counsel for Amicus Curiae NVIDIA Corporation*

## APPENDIX

Amicus curiae Hynix Semiconductor Inc. ("Hynix"), including its subsidiaries, is one of the world's largest manufacturers of semiconductors. Hynix's principal place of business is Ichon, Korea.[1] Hynix designs, develops, manufacturers and markets semiconductor memory products, including synchronous DRAM products, principally for use in personal computers. Between June 2000 and December 2007, Hynix made U.S. SDRAM and DDR SDRAM sales of approximately $8.3 billion.[2]

Micron Technology Inc. ("Micron"), based in Boise, Idaho, is one of the world's leading companies in the design, manufacture, and sale of advanced semiconductors including synchronous DRAM. Micron employs more than 17,000 people both in the United States and overseas, and maintains membership in a wide variety of standard-setting organizations. Micron's fiscal year 2008 sales of synchronous DRAM in the United States totaled approximately $1 billion.

NVIDIA Corporation ("NVIDIA") manufacturers and sells products (graphics processing units) that use, or interface with, JEDEC-compliant dynamic random access memory. NVIDIA does not manufacture memory. Rambus has asserted numerous patents against NVIDIA, including some that purport to descend from the original RDRAM application.

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[1] Prior to April 2, 2001, Hynix was named Hyundai Electronics Industries Co. Limited.

[2] Stipulation of Parties in 00-20905 (N.D. Cal.) entered in (March 14, 2006).