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 DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR HEWLETT-PACKARD COMPANY, CISCO SYSTEMS, INC., SUN MICROSYSTEMS, INC., AND ORACLE CORPORATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether deceptive conduct that significantly contributes to a defendant's acquisition of monopoly power violates Section 2 of the Sherman Act, 15 U.S.C. § 2.

2. Whether deceptive conduct that distorts the competitive process in a market, with the effect of avoiding the imposition of pricing constraints that would otherwise exist because of that process, is anticompetitive under Section 2 of the Sherman Act, 15 U.S.C. § 2.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

Cases—continued: Page

Miscellaneous:

INTEREST OF AMICI CURIAE[1]

Hewlett-Packard Company ("HP") is a provider of information technology ("IT") products, software, solutions and services to consumers, small and medium-sized businesses and large enterprises. Cisco Systems, Inc. ("Cisco") designs, manufactures and sells Internet Protocol-based networking and other products related to the communications and IT sectors and provides services associated with their products. Sun Microsystems, Inc. ("Sun") provides network computing infrastructure products and service solutions used in a wide range of industries. Oracle Corporation ("Oracle") develops, manufactures, distributes and services database and middleware software as well as applications software designed to help customers manage and grow their business operations.

All four firms participate in many standards development processes of the kind at the heart of this litigation between the Federal Trade Commission ("Commission") and Rambus Incorporated ("Rambus"). More specifically, HP, Cisco, Sun and Oracle (collectively, "Amici") are among many companies throughout the IT and communications sectors whose ability to innovate and succeed in new markets depends on broad accep-

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[1] Pursuant to this Court's Rule 37, amici state that no counsel for any party authored this brief in whole or in part, and no person or entity other than amici made a monetary contribution to the preparation or submission of the brief. Counsel of record for all parties were timely notified more than 10 days prior to filing and have consented to the filing of this brief. Letters of consent have been filed with the Clerk of the Court.

tance of open industry standards for interoperability among both competing and complementary products. Amici are concerned that the court of appeals' decision in this case rests on serious misunderstandings about the manner in which patent-related deception in the course of standards development can undermine the success of open standards efforts to Amici's great detriment and with resulting harm to competition and to the consuming public.

Amici are thus among many parties with a vital interest in the ability of antitrust enforcement authorities to act against abusive circumventions of the policies that standards development organizations ("SDOs") adopt to protect their processes from various kinds of anticompetitive patent holdup conduct. Two holdings on which the court of appeals' decision in this case rests foreclose any meaningful antitrust presence in this area: the court's narrow view of what constitutes monopolizing conduct in a standard-setting context, in sharp contrast to the view of the Third Circuit; and its adoption of a virtually insurmountable causation standard, with broad ramifications both for and beyond the standard-setting context.

For these reasons, Amici submit this brief in support of the Commission's petition for certiorari.

SUMMARY OF ARGUMENT

Recognizing both the positive and negative effects of including patented technologies in standards, SDOs adopt various disclosure and licensing policies designed to prevent patent owners from acquiring monopoly power over standardized markets. Deceptive conduct of the kind the Commission found in this case, enabling evasion of the SDO's policy of requiring an ex ante commitment to license on reasonable and non-discriminatory

("RAND") terms, results in the acquisition of monopoly power that would not otherwise have been acquired.

The court of appeals' holding that such an evasion did not constitute unlawful monopolization under Section 2 of the Sherman Act undermines the entire "open" standards effort. Withholding patent-related information in the manner found in this case distorts the competitive process for technology selection during standards development, precluding SDO participants from considering price-quality tradeoffs between competing technology alternatives. It thereby enables the patent owner to obtain monopoly power through means other than competition on the merits of its technology offering.

The court of appeals' decision conflicts with the law of the Third Circuit, which expressly holds that a patent owner's circumvention of a RAND license requirement of the same kind as involved in this case can constitute unlawful monopolization for Sherman Act purposes. The court of appeals' holding that unlawful monopolization did not occur here because the Commission failed to prove precisely what would have happened "but for" the deception found to have occurred creates an unprecedented and insurmountable burden of proof that is tantamount to antitrust immunity for such conduct. If allowed to stand, the holding below will preclude use of the Sherman Act against acts of monopolization in standards development processes.

REASONS FOR GRANTING THE PETITION

A. The Court of Appeals' Decision Undermines Core Safeguards Against Anticompetitive Abuse of Standards Development Processes.

SDOs often incorporate technologies subject to patent protection in their standards. Participants have long recognized the potential for both positive and negative effects from this practice. On the one hand, patented technologies can enhance the quality of a standard, or add valuable capabilities to it, and thereby promote both competition and innovation in affected new markets. On the other hand, a patent's incorporation in a standard can enable the patent owner to obtain monopoly power over the affected market. When a standard is designed such that a license to a particular patent is essential to complying with the standard, the owner of that patent can control access to that standard. Especially in markets with significant network effects, that control can leverage the collective investments of many competitors in the standardized technology, not merely the invention for which the patent was granted.

SDOs employ a variety of disclosure and licensing policies aimed at facilitating informed consideration of these technologies during standards development to maximize the potential for positive effects and minimize the potential for negative effects. Many SDOs employ policies similar to the JEDEC policies at issue in this case;[2] some SDOs are experimenting with new policies

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[2] *See, e.g.*, U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* 36, 42 (2007) ("To mitigate this type of hold up, some SSOs require participants to disclose the existence of IP rights that may be infringed by the potential users of a standard in development. SSOs also may require SSO members to commit to license any of their IP that is essential to an SSO standard on 'reasonable and nondiscriminatory' ('RAND') terms. Some SSOs and SSO members would like to further mitigate hold up by requiring IP holders to commit to specific licensing terms before selecting a particular technology as part of a standard."), *available at* http://www.usdoj.gov/atr/public/hearings/ip/222655.pdf; Mark A.

entailing additional requirements but all in furtherance of the same objectives.[3] SDOs depend on participants' good-faith, voluntary compliance with these policies but also upon the availability of antitrust consequences when violations threaten anticompetitive effects. The court of appeals decision in this case addressed a critical issue in this regard: the proper treatment under antitrust law of a patent owner's deceptive circumvention of these policies.

Amici take no position on whether Rambus did engage in deception in the course of the relevant JEDEC proceedings. But the court of appeals accepted for its analysis the Commission's conclusions that "willful" deception occurred; that it thus enabled Rambus to evade both JEDEC's policy on ex ante disclosure of patent claims and JEDEC's policy on ex ante license commitments; that it thereby resulted in withholding from the decision-makers the fact that the proposed standard may infringe Rambus's evolving patent rights as well as

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Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 Cal. L. Rev. 1889, 1904-06, 1973-75 (2002) (examining various disclosure and licensing policies SDOs have adopted concerning the inclusion of intellectual property rights in standards development).

[3] *See, e.g.*, Business Review Letter from Thomas O. Barnett, Assistant Attorney Gen., U.S. Dep't. of Justice, to Michael A. Lindsay, Dorsey & Whitney LLP (Apr. 30, 2007) (SDO adopting a policy of voluntary disclosure of proposed licensing terms), *available at* http://www.usdoj.gov/atr/public/busreview/222978.pdf; Business Review Letter from Thomas O. Barnett, Assistant Attorney Gen., U.S. Dep't. of Justice, to Robert A. Skitol, Drinker Biddle & Reath LLP (Oct. 30, 2006) (SDO adopting a policy on mandatory disclosure of proposed licensing terms), *available at* http://www.usdoj.gov/atr/public/busreview/219380.pdf.

precluding participants from obtaining ex ante commitments on license terms. *See* Pet. App. 8a-14a. The panel also did not dispute the Commission's determination that Rambus thereby obtained the ex post ability to charge higher royalties than it otherwise could have charged. The heart of the problem is the panel's holding that none of this matters because the Commission did not precisely delineate the "but-for" world, specifically whether JEDEC would have adopted a different standard had the deception not occurred. *Id.* at 18a-20a.

Withholding patent-related information in the manner found in this case corrupts the competitive process for technology selection during standards development. It thereby precludes any reliable determination of whether the same or a different standard would have emerged had the information been disclosed. More fundamentally, deception of this kind wholly forecloses informed consideration of cost-quality tradeoffs among competing technology options, enabling the patent owner to win and thereby obtain monopoly power through means other than competition on the merits of its technology offering.[4]

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[4] *See* Joseph Farrell et al., *Standard Setting, Patents, and Hold-Up: A Troublesome Mix*, 74 Antitrust L.J. 603, 657 (2007) ("A defendant may argue that deception is harmless if its effect is to cause the patented technology to be adopted and if that technology is superior to the alternatives. But this argument is flawed, for two fundamental reasons .... First, deception undermines the process of technology competition as a means of selecting the best technology at a competitive price . . . even if, after the market test is subverted, there are other reasons to hope that the best technology was adopted. Second, deception typically enriches the deceptive party at the expense of others, even if it does not alter the technology that is selected for the standard. A rule under which there would be no

The Commission found that "but for" Rambus's deception JEDEC "either would have excluded Rambus's patented technologies" from its DRAM standards "or would have demanded RAND assurances, with an opportunity for *ex ante* licensing negotiations." Pet. App. 9a-10a. The court of appeals erred in rejecting the latter scenario as one resulting in acquisition of monopoly power that would not otherwise be obtained. The fundamental purpose of policies that seek license commitments regarding patents essential to proposed specifications before the standard is adopted is to prevent patent owners from obtaining monopoly power they would not otherwise obtain, power to engage in patent holdup conduct against locked-in standards implementers.[5] Deception that enables evasion of those policies undermines the entire open standards effort, threatening mo-

antitrust liability if the defendant's patent covered the best technology would effectively allow any owner of superior technology to engage in deceptive behavior to augment its market power through opportunism.").

[5] *See Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 314 (3d Cir. 2007) ("Firms may become locked in to a standard requiring the use of a competitor's patented technology. The patent holder's [intellectual property rights], 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."). *See also* David G. Swanson & William J. Baumol, *Reasonable and Nondiscriminatory (RAND) Royalties, Standards Selection, and Control of Market Power*, 73 Antitrust L.J. 1, 15 (2005) ("One natural solution to the problem of *ex post* market power is for prospective licensees to negotiate contracts in advance of standard selection, when the market is at its most competitive and proponents of alternative technology are actively vying with each other for advantage.").

nopolization of what would otherwise be a robustly competitive standardized market.

The court of appeals incorrectly concluded that the deception found in this case "cannot be said to have had an effect on competition" if the sole consequence was "JEDEC's loss of an opportunity to seek favorable licensing terms . . . ." Pet. App. 20a. As indicated above, evasion of ex ante protections against ex post patent holdup can defeat the whole procompetitive objective of an open standards effort. And, more specifically, supracompetitive royalties translate into costs and prices of standardized products that could preclude wide acceptance of the adopted standard and exclude many firms from the standardized market. There is also potential for discriminatory royalties that could undercut the viability of disfavored licensees. Finally, the ability of patent owners to evade these ex ante protections against ex post holdup outcomes and to do so without antitrust consequence would inevitably diminish confidence in and thus support for otherwise procompetitive standards development processes generally.

B. The Court of Appeals' Decision Conflicts with Third Circuit Precedent.

The court of appeals completely disregarded the connection between ex ante deception and the acquisition as well as exercise of ex post monopoly power in a scenario where the "only" effect of the ex ante deception is to enable evasion of ex ante RAND license requirements. That disregard stands in sharp contrast to the Third Circuit's holding in *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 314 (3d Cir. 2007), that allegations of a patent owner's evasion of ex ante RAND license policies state a claim under Section 2 of the Sherman Act for unlawful monopolization. As the Third Circuit emphasized therein, such license policies are "important safeguards against monopoly power"; deceptive evasion of them "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 of appeals' decision in this case flatly rejects these propositions, thereby creating a serious circuit conflict.

The *Broadcom* court observed that, "even if" Qualcomm's technology "was the only candidate for inclusion in the standards, it still would not have been selected by the relevant SDOs absent a FRAND commitment"; in short, the allegations of Broadcom's complaint "foreclose[d] the possibility" that the Qualcomm technology's "inclusion in the standard was inevitable." *Id.* at 316. That is in essence another way of describing the second but-for scenario that the D.C. Circuit rejected as an unlawful monopolization result: had JEDEC known of Rambus's patent position, it would not have adopted Rambus technologies into its standards absent Rambus's acceptance of license strictures required under JEDEC's RAND policy.

As the Third Circuit recognized, "most SDOs require firms supplying essential technologies for inclusion in a prospective standard to commit" to RAND license terms; and this is both to "guard against anticompetitive patent holdup" and because the presence or lack of such a commitment is "a key indicator of the cost of implementing a potential technology." *Id.* at 313. We respectfully submit that this pervasive use of RAND policies for these central purposes throughout the standards development community highlights the mischief of the D.C. Circuit's failure to recognize the role of these policies in avoiding monopoly outcomes and thus the importance of resolving the circuit conflict in this respect.

C. The Court of Appeals Adopted a Causation Standard Tantamount to Antitrust Immunity for Anticompetitive Conduct of the Kind Found in this Case.

Where deception has corrupted a standards development decision-making process in the manner found in this case, requiring the Commission or any other antitrust plaintiff to prove what the decision would have been but for the deception as a condition to any remedy has the effect of placing anticompetitive conduct of this kind beyond the practical reach of the antitrust laws. It is a burden that could rarely be met in light of inherent problems in predicting how a variety of considerations would have influenced a variety of participants in the affected proceedings. On the other hand, the patent owner that deliberately deceives a standards body in the manner found here is engaging in conduct that can be presumed to contribute to the owner's acquisition of monopoly power it would not otherwise obtain; and the party engaging in such conduct can be presumed to believe it will do so. Thus, upon plaintiff's proof of the deception, the burden should shift to the patent owner to prove the absence of materiality.[6]

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[6] An example of allocating burdens in that manner is *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001). There, on findings that the defendant engaged in deceptive conduct to maintain monopoly power, the D.C Circuit declined to require the plaintiff "to reconstruct the hypothetical marketplace absent" the deception; instead, to "some degree," the defendant should "suffer the uncertain consequences of its own undesirable conduct." *Id.* at 79 (quoting III Phillip E. Areeda & Herbert Hovenkamp, *Antitrust*

The leading antitrust treatise explains that requiring a plaintiff to submit "strict" proof of what would have occurred in the marketplace absent the alleged anticompetitive conduct would establish an insurmountable burden. As the authors explain, "Many exclusionary practices . . . are one-of-a-kind situations in which it is *impossible* to prove that . . . without the defendant's anticompetitive destruction of its rival the market would have become more competitive. Once the challenged events have occurred, the alternative reality can *never* be recreated." III Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 657a at 162 (3d ed. 2008) (emphasis added). Because of this impossibility, the authors continue, "[i]t is enough [for plaintiffs] to show that anticompetitive consequences are a naturally-to-be-expected outcome of the challenged conduct." *Id.*

That causation standard is entirely consistent with what five other courts of appeals have required of plaintiffs asserting monopolization claims. *See, e.g., Taylor Publ'g Co. v. Jostens, Inc.*, 216 F.3d 465, 475 (5th Cir. 2000) ("'Exclusionary' conduct is conduct, other than competition on the merits or restraints reasonably 'necessary' to competition on the merits, that reasonably ap-

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Law ¶ 650c at 69 (2d ed. 1996)). "It is inherently difficult to determine how [a standards development body] *would have* behaved in a but-for world" and "a burden of proof regarding what would have happened in the absence of deceptive conduct by the patent holder may be hard for either party to meet." Farrell, *supra* note 4, at 653-54 (emphasis in original). But "[a] firm's actions can illuminate what it thought the effects of its choices would be, and this can offer substantial evidence on causation. For instance, the patent holder may have delayed asserting its patents . . . until switching costs grew. Such conduct may be hard to explain if the patent holder were confident that full disclosure would have no effect." *Id.* at 654.

pears capable of making a significant contribution to creating or maintaining monopoly power." (citation omitted)); *PSI Repair Servs. v. Honeywell, Inc.*, 104 F.3d 811, 822 (6th Cir. 1997) (citing III Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 626c (1978)); *Morgan v. Ponder*, 892 F.2d 1355, 1363 (8th Cir. 1989) (exclusionary conduct must be "capable of materially impacting on an equally efficient plaintiff's viability."); *Instructional Sys. Dev. Corp. v. Aetna Cas. & Sur. Co.*, 817 F.2d 639, 649 (10th Cir. 1987) ("In order to raise a section 2 violation, . . . the exclusionary conduct must appear reasonably capable of contributing significantly to creating or maintaining monopoly power." (citation omitted)); *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 230 (1st Cir. 1983) (Breyer, J.) (citing III Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 626 at 83 (1978)). *See also, e.g.*, *Town of Concord, Massachusetts v. Boston Edison Co.*, 915 F.2d 17, 21 (1st Cir. 1990) (Breyer, J.) (quoting *Barry Wright*, 724 F.2d at 230).[7]

In sum, the causation standard the court of appeals applied in this case is contrary to the precedent within five other circuits. The court of appeals held that the

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[7] In the latest version of the Areeda antitrust treatise, the authors' causation standard for monopolization remains unchanged: "In order to satisfy any conduct component of the monopolizing offense, the conduct in question *must be capable of making a significant contribution to the creation, maintenance, or expansion of monopoly power.*" III Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 650 at 90 (3d ed. 2008) (emphasis added). *See also id.* ¶ 650c at 92-93 ("[P]laintiff generally has the burden of pleading, introducing evidence, and presumably proving by a preponderance of the evidence that anticompetitive behavior has contributed significantly to the achievement or maintenance of the monopoly.").

Commission failed to establish that Rambus engaged in exclusionary conduct because the Commission could only delineate in the alternative what would have occurred but for the deception: "JEDEC either would have excluded Rambus's patented technologies from the JEDEC DRAM standards, or [JEDEC] would have demanded RAND assurances, with an opportunity for *ex ante* licensing negotiations." Pet. App. 9a-10a. The court held the Commission's inability to exclude the possibility that JEDEC would have sought RAND licensing terms from Rambus absent the deception to be fatal to its monopolization claim. *Id.* at 20a. As the court explained, "[I]f JEDEC, in the world that would have existed but for Rambus's deception, would have standardized the very same technologies, Rambus's alleged deception cannot be said to have had an effect on competition in violation of the antitrust laws." *Id.*

As explained above, requiring a plaintiff to establish what would have occurred absent the alleged misconduct is tantamount to antitrust immunity for antitrust defendants that engage in the types of deceptive conduct found by the Commission to have occurred in this case. The court of appeals' adoption of a heightened burden of proof – one that compels a plaintiff to recreate the competitive conditions "but for" the challenged conduct – is an "impossible" burden for any antitrust plaintiff to meet. III Areeda & Hovenkamp, *Antitrust Law* ¶ 657a at 162. In the context of standard setting, moreover, the court of appeals' causation standard is all the more onerous given the confluence of ever-evolving circumstances surrounding a standard's development and the complexity of predicting the decision making of SDO participants in the absence of the deception.

D. The Court of Appeals Interpreted this Court's *Discon* Decision in a Manner that Precludes Use of the Sherman Act Against Acts of Monopolization in Standards Development Processes.

The court of appeals held that if the deception at issue "merely" enabled Rambus to avoid compliance with JEDEC's RAND policy, it could not constitute unlawful monopolization because "an otherwise lawful monopolist's end-run around price constraints . . . does not alone present a harm to competition in the monopolized market." Pet. App. 20a. In so holding, the court relied heavily on this Court's opinion in *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998), and particularly on the rejection therein of Discon's argument that consumer harm from higher telephone service rates as a result of a challenged fraudulent scheme could suffice to prove an anticompetitive effect for Sherman Act purposes. The featured quote from the *Discon* opinion was as follows:

> We concede Discon's claim that the [defendants'] behavior hurt consumers by raising telephone service rates. But that 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, namely, New York Telephone, combined with a deception worked upon the regulatory agency that prevented the agency from controlling New York Telephone's exercise of its monopoly power.

Id. at 136 (emphasis in original).

The court of appeals thereby seriously misused the *Discon* decision in two respects. First, unlike New York Telephone, Rambus was not a "lawful monopolist" at the time of its deception – it obtained monopoly power as a direct result of evading JEDEC's RAND policy. Second, in contrast to Discon's failure to present evidence or even a plausible story of competitive harm, the Commission in this case found the deceptive conduct at issue to present "grave implications for competition" in its subversion of JEDEC's standard-setting process and resulting monopolization of markets for four technologies incorporated into the JEDEC standards. Pet. App. 31a.

As already discussed above, *supra* at 7, the fundamental purpose of JEDEC's RAND policy was to prevent a patent holder from obtaining monopoly power as a result of the incorporation of the patent holder's technology into a final standard. So, even if the "but for" scenario would have been the same incorporation of Rambus technologies into JEDEC standards but subject to RAND license commitments, Rambus would not have thereby acquired monopoly power. The classic definition of monopoly power is "the power to control prices or exclude competition." *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 391 (1956). A RAND license commitment would have prevented Rambus from possessing that kind of power.[8] Conversely, the avoid-

[8] Monopoly is not a "natural consequence" of the standardization of a patented technology. *Broadcom*, 502 F.3d at 317. A high market share does not alone confer market power when pricing discretion is contractually constrained. *See, e.g.*, *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 498 (1974); *Nat'l Reporting Co. v. Alderson Reporting Co.*, 763 F.2d 1020, 1024-25 (8th Cir. 1985); *Ticketmaster Corp. v. Tickets.Com, Inc.*, 2003 U.S. Dist. LEXIS 6484, at *11 (C.D. Cal. 2003); *Alabama Ambulance Serv. v. City of Phenix City, Alabama*, 71 F. Supp. 2d 1188, 1195-96 (M.D. Ala. 1999); *Kirk-Mayer, Inc v. Pac Ord, Inc.*, 626 F. Supp. 1168, 1170-71 (C.D. Cal. 1986).

ance of any such commitment has enabled Rambus to impose supra-competitive royalties; it has also enabled Rambus to impose discriminatory license terms or indeed even to deny licenses altogether, thereby effectively blocking entry into the standardized markets and excluding or impeding competition generally. In short, even if the "but for" scenario would have been standardization of the Rambus technologies subject to RAND commitments, deception enabling Rambus to avoid those commitments is properly deemed to constitute unlawful monopolization. In that scenario, Rambus never was a "lawful" monopolist in the way New York Telephone was before as well as after the events giving rise to the *Discon* litigation.

The sole question addressed in *Discon* was "whether the antitrust rule that group boycotts are illegal per se . . . 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." *Discon*, 525 U.S. at 130; *see also id.* at 133. The core holding was that the per se rule did not apply to that situation; and, as a result, "plaintiff here must allege and prove harm, not just to a single competitor, but to the competitive process, i.e., to competition itself." *Id.* at 135. The Court declined to consider whether Discon's complaint should be dismissed altogether for failure to allege any harm to competition generally. *See id.* at 140. Herein lies the second reason why *Discon* is completely inapposite to the Commission's case against Rambus.

The Commission never asserted any argument that the Rambus conduct at issue should be subject to a rule of per se illegality. The Commission's complaint included extensive allegations of anticompetitive effects, *see, e.g.*, Complaint ¶¶ 119-20, *In re Rambus Inc.*, 2002 FTC LEXIS 31 (F.T.C. 2002) (No. 9302), *available at* http://www.ftc.gov/os/adjpro/d9302/020618admincmp .pdf, and the Commission's opinion on liability found such effects to have occurred, Pet. App. 136a-140a. As detailed earlier in this amicus brief, *supra* at 6-8, deception that enables evasion of ex ante RAND license strictures can be expected to harm competition in a multitude of ways: undermining the whole competitive process for technology selection during the standards development process; enabling the patent owner to win and thereby obtain monopoly power through means other than competition on the merits of its technology offering; allowing monopolization of what would otherwise be robustly competitive standardized markets; raising barriers to entry and thereby excluding many firms from the affected markets altogether; and diminishing confidence in and thus support for otherwise procompetitive standards development processes generally.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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