No. 08-694

IN THE
Supreme Court of the United States

FEDERAL TRADE COMMISSION,
Petitioner,
v.
RAMBUS INCORPORATED,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF FOR TWENTY SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *Amici Curiae* to file this brief. 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 *Amici Curiae* or their counsel made a monetary contribution to its preparation or submission. *Amici Curiae* submit their own individual views and not those of their clients or employers.

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INTEREST OF *AMICI CURIAE*

Amici Curiae are law professors and economists at U.S. law schools, business schools, and economics departments who specialize in antitrust, intellectual property, and/or innovation policy. *Amici Curiae* support the finding of the Federal Trade Commission that Rambus's participation in the Joint Electron Device Engineering Council ("JEDEC") without disclosure of Rambus's patents and patent applications — in contravention of JEDEC's policies — was a deceptive and unfair trade practice and a monopolization offense. *Amici Curiae* are concerned that the D.C. Circuit's crimped understanding of "anticompetitive effects" will prevent antitrust law from performing its necessary function in policing monopolistic conduct in standard-setting organizations and hence diminish the usefulness of private standard-setting in enhancing technological progress and consumer welfare.

SUMMARY OF ARGUMENT

This case raises a question of great public importance: whether a firm violates Section 2 of the Sherman Act when it participates in a standard-setting organization ("SSO"), deceives the SSO's members into believing that it does not have any relevant patents, and subsequently asserts its patent rights after the SSO adopts a standard infringing the patents. The court of appeals believed that such conduct would not violate Section 2 unless there were proof that, in the but-for world of full disclosure, the SSO would have chosen a different technology. The court of appeals failed to apprehend that, if the deception prevented effective bargaining over price, that also would cause an anticompetitive effect of concern to antitrust law. The decision of the court of appeals conflicts with the decisions of other circuits as well as this Court's own decisions. It also undermines the effectiveness of antitrust law in enhancing the efficient functioning of private standard-setting and hence diminishes the value of private standard-setting itself.

ARGUMENT

I. THE COURT OF APPEALS FAILED TO APPREHEND THAT STANDARD-SETTING INVOLVES COMPETITION ALONG MULTIPLE DIMENSIONS.

The court of appeals held that Rambus did not monopolize if it merely deceived other members of JEDEC into believing that Rambus had no relevant patents or patent applications when in fact it did, unless it could be shown that in the absence of that deception JEDEC would have chosen a different technology. *Rambus Inc. v. FTC*, 522 F.3d 456, 459 (D.C. Cir. 2008). The court believed that, without such a showing, there might be unfair deception and potentially even consumer harm, but not an "anticompetitive effect," as measured by harm to the competitive process. *Id.* at 463. *Amici Curiae* respectfully submit that the court of appeals misunderstood the nature of competition in standard-setting organizations ("SSOs") and hence misapplied the concept of "anticompetitive effect." In SSOs, competition occurs over both technological choice and price, and the suppression of information relevant to either factor prevents the market from performing competitively.

Economic literature shows that SSOs are crucibles of intense competition among purveyors of rival technologies. *See*, *e.g.*, Carl Shapiro & Hal Varian, *Information Rules: A Strategic Guide to the Network Economy* 227-259 (1999). For example, a Harvard Business School case study on the development of mobile Internet standards by the Institute of Electrical and Electronics Engineers ("IEEE") and the development of DSL standards depicts standard-setting as an "intensely competitive" process involving "energetic debate" among "warring factions." *See* Brian DeLacey, *et al.*, *Strategic Behavior in Standard-Setting Organizations*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=903214, at 1-2. Significantly, the Harvard study found that competition occurs on multiple dimensions including price/cost, technological quality, and backwards compatibility. *Id.* at 1.

In order to manage this intense competition, SSOs frequently adopt by-laws requiring such things as disclosure of patents or patent applications by SSO participants and commitments to license all covered technologies on reasonable and nondiscriminatory ("RAND") terms. *See generally* Mark A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 Cal. L. Rev. 1889, 1904-06 (2002). A recent empirical study found a strong positive correlation between patent disclosure obligations and mandatory RAND commitments. Benjamin Chiao, Josh Lerner, and Jean

Tirole, *The Rules of Standard-Setting Organizations: An Empirical Analysis*, 38 RAND J. Econ. 905 (2008). In other words, SSOs that are concerned about undisclosed patents are also concerned about the pricing of patent royalties. Such SSOs seek to ensure that competition occurs in the context of full disclosure and a commitment to reasonable pricing.

Part of the reason for this insistence on pre-adoption patent disclosure and RAND commitment is that adoption of a standard brings the competitive process to a virtual close, and creates barriers that prevent it from re-starting. Even if a standard turns out to be suboptimal, either for technological reasons or because of excessive patent royalty demands, inertia (in the form of ongoing investments both by those firms producing to the standard and by consumers using it) often impedes switching to a new standard. *See generally* Joseph Farrell & Garth Saloner, *Standardization, Compatibility, and Innovation*, 16 RAND J. Econ. 70, 71 (1985) (reporting that "'excess inertia' impedes the collective switch from a common standard or technology to a possibly superior new standard or technology"). This Court's prior opinions show its familiarity with monopolistic lock-ins. In *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 473 (1992), this Court found that customers may become locked into a primary equipment manufacturer's monopoly pricing in parts and service aftermarkets because of information and switching costs. In the same way, adoption of a suboptimal standard because of imperfect information (occasioned, for example, by deception) can lead to durable monopoly power.

The upshot is that, by practicing deception, including deceptive nondisclosure of patents, patentees can misuse the SSO process as a means to gain a monopoly. The FTC found that, even though JEDEC did not have an express RAND policy, Rambus deceived JEDEC into believing that it did not have any relevant patents or patent applications when in fact it did. This deception allowed Rambus to avoid the competition that would have occurred in the but-for world. Rambus effectively removed the competition that would have occurred over price (*i.e.*, royalty payments) by falsely implying that the cost of the relevant technologies was zero. In the but-for world, competition among technologies could have forced Rambus to license on RAND terms. Deception over price excludes equally efficient competitors already in the market and deters innovation and entry by rivals who might be competitive at the "real" price that the deception conceals.

The court of appeals assumed, without deciding, that, "if Rambus's more complete disclosure would have caused JEDEC to adopt a different (open, non-proprietary) standard, then its failure to disclose harmed competition and would support a monopolization claim." 522 F.3d at 463. It held, however, that Rambus would not be guilty of monopolization if its deception merely thwarted JEDEC's ability to demand "RAND assurances, with an opportunity for *ex ante* licensing negotiations." 522 F.3d at 463. The court failed to apprehend that an SSO's choice of technology and the price of the technology are interdependent. If the SSO is aware that the price of the technology is high, it will shift to a different technology, if one is available. Purveyors of different technologies compete against each other to persuade the SSO that their total package — consisting of the quality, price, reverse-compatibility and other competitive vectors — is superior to that of their rivals. If price seems to be the obstacle to adoption, the purveyor may preannounce a set royalty, commit to subsequent determination of the royalty by a neutral arbitrator following RAND principles, or otherwise assure the SSO that its price is superior to that of its rivals. It is this sort of full competition over the range of quality and price dimensions that Rambus thwarted through its deceptive conduct.

II. DECEPTIVE CONDUCT THAT SUPPRESSES PRICE COMPETITION IN AN SSO GIVES RISE TO ANTITRUST LIABILITY.

The court of appeals believed that, if Rambus merely deceived JEDEC about its patents and was therefore able to charge a higher price than it otherwise could have, it could not be liable for monopolization under Section 2 of the Sherman Act. The court believed that such deception "has no particular tendency to exclude rivals and thus diminish competition." 522 F.3d at 464. It found that this conclusion was dictated by *NYNEX Corp. v. Discon*, 525 U.S. 128 (1998). *Id. Amici Curiae* respectfully submit that the court of appeals misunderstood the reach of *NYNEX*.

In *NYNEX*, plaintiff Discon alleged that NYNEX's subsidiary, New York Telephone, conspired with AT&T Technologies — a provider of telephone switching equipment removal services — to fool rate regulators and thereby increase prices to consumers. According to Discon, New York Telephone and AT&T agreed that AT&T would charge New York Telephone inflated prices for removal services, that New York Telephone would then receive regulatory permission to charge higher prices, and that AT&T would then secretly rebate the overcharges to New York Telephone at year's end. *Id.* at 131-32. This Court found that Discon did not state a claim of *per se* illegal boycott under Section 1 of the Sherman Act because the "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. The relevant market for removal services remained fully competitive. *Id.* at 138-39. Hence, this Court found no harm to "the competitive process." *Id.* at 136. The harm to consumers arose from fraud, not from the suppression of competition.

Rambus's situation is entirely different. *NYNEX* principally involved a claim of *per se* illegal group boycott under Section 1 of the Sherman Act, not a claim of monopolization under Section 2. This Court rejected extension of the group-boycott rule of *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959), to circumstances involving deceptive conduct in the choice of suppliers. This Court did not reach the conspiracy to monopolize claim, leaving the resolution of that claim to the court of appeals. 525 U.S. at 140.[2]

More fundamentally, there is a critical distinction between deception of a public utility commission and deception of the members of an SSO. Unlike public utility commissions, SSOs are not regulators. As noted in the previous section, they are crucibles of competition between rival technology purveyors. In other words, SSOs function as markets. Deception in the process of standard-setting prevents the competitive market for technology from functioning efficiently, just as artificial "packing" of SSOs with sympathetic voters prevents the SSO from functioning properly. *See Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988) (finding potential antitrust violation in packing of SSO). Whereas NYNEX did not suppress competition in order to acquire monopoly power, Rambus's deception prevented effective competition between Rambus and rival technology purveyors and thus enabled Rambus to obtain monopoly power. It is immaterial (except, perhaps, to a private damages claim) whether, in the but-for world, Rambus would have had to charge a lower price or would have seen its technologies rejected in favor of

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[2] The court of appeals then remanded the case to the district court. The district court allowed Discon to assert a rule of reason claim under Section 1 of the Sherman Act and a monopolization claim under Section 2 of the Sherman Act, but subsequently granted summary judgment in favor of defendants because of Discon's failure to prove a relevant market. *Discon, Inc. v. NYNEX, Inc.*, 86 F. Supp. 2d 154, 163 (W.D.N.Y. 2000).

rivals' technologies. Through its deception, Rambus suppressed both of these alternative paths.

The nub of the court of appeals' error was its failure to acknowledge that the suppression of information about competition can be as anticompetitive as direct suppression of competition itself. The value of information about price in the functioning of competitive markets has been central to many of this Court's antitrust precedents. For example, in *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), this Court invalidated an ethical canon that prevented engineers from negotiating over the price of their services until a customer had selected an engineer for a project. This Court affirmed the District Court's finding that the ban "'impedes the ordinary give and take of the market place,' and substantially deprives the customer of 'the ability to utilize and compare prices in selecting engineering services.'" *Id.* at 692-93.

Similarly, in *California Dental Association v. FTC*, 526 U.S. 756 (1999), the Court recognized as "unexceptionable" the principle that "'price advertising is fundamental to price competition,' and that '[r]estrictions on the ability to advertise prices normally make it more difficult for consumers to find a lower price and for dentists to compete on the basis of price.'" *Id.* at 773. While the Court found a disputable fact as to whether the kind of advertising at issue was sufficiently verifiable to be truthful, it expressed no doubt that the suppression of truthful information about price could have serious anticompetitive effects. If Rambus deceptively suppressed truthful information about price (implying that the price of the standardized technologies was zero when in fact it was substantial), it thereby clearly impaired the functioning of the competitive system of selecting standards.

The court of appeals appears to have believed that deceptive acts do not create harm to competition within the meaning of the antitrust laws unless those acts exclude competitors — for example, by preventing the adoption of rival technologies. This Court has never so limited the concept of competitive harm. It has defined monopoly power as the "the power to control prices *or* exclude competition," *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956) (emphasis added), and has condemned such power when it is obtained by impairing the processes of competition. *See, e.g.*, *NYNEX*, 525 U.S. at 135 (holding that "plaintiff here must allege and prove harm, not just to a single competitor, but to the competitive process"); *Jefferson County Pharm. Ass'n, Inc. v. Abbott Labs.*, 460 U.S. 150, 178 n.7 (1983) (describing the goal of the Sherman Act as the "protection of the competitive process"). If a firm obtains the power to control prices by deceptive conduct that thwarts competition over prices, the monopoly power is the result of conduct other than competition on the merits and is therefore unlawful.

The court of appeals' reasoning has the dangerous potential to contract the meaning of "anticompetitive effect" to the point that antitrust law is incapable of policing monopoly-producing behavior in SSOs. Deception in SSOs can thwart the competitive functioning of SSOs as technology markets and produce monopoly pricing under circumstances where competitive pricing might have obtained. Antitrust law can play a role in preventing this from happening. Nothing in this Court's precedents suggests otherwise.

III. ANTITRUST REGULATION OF DECEPTION IN SSOs RAISES ISSUES OF GREAT NATIONAL IMPORTANCE.

The Rambus case is important standing alone. Hundreds of millions of dollars in royalties are at issue. Far more important, however, is clarifying the relationship between antitrust law and private ordering in the SSO context. The circumstances raised by this case are likely to be repeated in many varied forms.

The FTC previously has had to contend with a computer manufacturer's misrepresentation that it had no relevant patents when it did, *see In re Dell Computer Corp.*, 121 F.T.C. 616 (1996) (consent degree regarding FTC's allegation that Dell Computer failed to disclose its patent rights to the Video Electronics Standards Association despite the group's "affirmative disclosure requirements"), an oil company's misrepresentations to the California Air Resources Board ("CARB") and to competing gasoline refiners that it lacked or would not assert patent rights over reformulated gasoline standards that CARB was considering adopting, *see In re Union Oil Co. of Cal.*, No. 9305 (F.T.C. Mar. 4, 2003), available at http://www.ftc.gov/os/adjpro/d9305/030304unocaladmincmplt.pdf, and an Ethernet technology company's reneging on its SSO commitment to charge no more than a specified royalty for use of its patents. *In re Negotiated Data Solutions*, FTC File No. 051 0094, http://www.ftc.gov/os/caselist/0510094/080923ndsdo.pdf. In March 2008, the American Antitrust Institute filed a petition with the FTC alleging that a patent licensing company committed patent hold-up by reneging on a commitment to an SSO to license on RAND terms its intellectual property essential to the standard. *See* American Antitrust Institute Request for Investigation of Rembrandt, Inc. for Anticompetitive Conduct that Threatens Digital Television Conversion (March 26, 2008), available at http://www.ftc.gov/os/aai.pdf. Given the economic significance of standardization in an information-based economy and the potential for manipulating SSOs in order to acquire durable monopoly power, we expect to see many more such cases.

As the court of appeals acknowledged, its decision may conflict with the Third Circuit's decision in *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297 (3d Cir. 2007), which in turn relied heavily on the FTC's decision in this case. *See id.* at 311. In *Broadcom*, the court held that a patentee's deceptive promise to an SSO that it would license its technology on RAND terms, "coupled with [the organization's] reliance on that promise when including the technology in a standard," violated Section 2 of the Sherman Act. *Id.* at 314. The court of appeals here held that "to the extent that [the Third Circuit's *Broadcom* decision] may have rested on a supposition that there is a cognizable violation of the Sherman Act when a lawful monopolist's deceit has the effect of raising prices (without an effect on competitive structure), it conflicts with *NYNEX*." 522 F.3d at 466. Although *Amici Curiae* disagree that a monopolist's deception of an SSO in a manner that quashes price competition over patent rights has no "effect on competitive structure," *Amici Curiae* do believe that *Broadcom* and this case are in conflict and that this Court's intervention is therefore appropriate.[3]

Intervention by the Court to clarify the relationship between antitrust law and private ordering in the standardization context is also important to the development of SSO rules and practices. Empirical studies have found a wide variety in SSO rules and practices on such matters as the disclosure of patents, compulsory licensing, RAND obligations, and commitment of disputes to a neutral arbitrator. *See* Lemley, 90 Cal. L. Rev. at 1904-06; Chiao, Lerner & Tirole, *supra* at Table 1; II Herbert Hovenkamp, Mark D. Janis, & Mark A. Lemley, *IP and Antitrust* § 35.6c1, at 35-58 (2007 Supp.) (noting that SSO rules are "extraordinarily diverse"). SSOs are struggling to create the optimal mix of rules, practices, and cultures that encourage beneficial standardization without creating excessive market power in patent holders. Ultimately, it is in the interests of both the courts and consumers to defer to private ordering and limit antitrust interventions to cir-

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[3] The court of appeals' decision also conflicts with the D.C. Circuit's own *en banc* decision in *United States v. Microsoft*, 253 F.3d 34, 76-77 (D.C. Cir. 2001), where the court found that Microsoft's deception of developers into using "polluted Java" was anticompetitive and supported a finding of liability.

cumstances where private ordering has failed. Clarifying the relationship between antitrust and SSO rules will provide a more predictable framework for the operation of private norms and therefore enhance their value.[4] Conversely, failure to clarify the antitrust liability norms creates doubt as to the effectiveness of the private ordering and hence diminishes the incentives of parties to invest resources in hammering out private norms. Clarification of antitrust's role in SSOs could thus spur the development of more effective SSO policies and diminish the need for further antitrust intervention in the future.

An unintended and perverse side-effect of excessive antitrust laxity in policing SSO behavior could be the need for greater governmental involvement in standard-setting. If antitrust law fails to police market failures adequately and SSO processes lose their integrity as a result, the impetus for a heavier regulatory hand in standard-setting may become irresistible. *Amici Curiae* submit that, where possible, it is preferable to allow standard-setting norms

[4] In some contexts, the lack of clarity in public norms may increase the value of private ordering, since parties can mutually gain by eliminating uncertainty through private contract. Antitrust liability is non-waivable, however. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985) ("[I]n the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy."). Since there is no option to bargain around antitrust liability, clarification of antitrust norms facilitates private bargaining by making clear under what circumstances the private norms will be respected.

and practices to evolve privately and organically. Antitrust's role should not be to replace private ordering in standard-setting but to bolster it. Unfortunately, the court of appeals' decision undermines this important antitrust function and exposes standard-setting to the potential for more heavy-handed intervention.

CONCLUSION

Amici Curiae urge the Court to grant the petition and reverse the judgment of the court of appeals.

Respectfully submitted,

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