No. 08-694

In the Supreme Court of the United States

FEDERAL TRADE COMMISSION,
PETITIONER

v.

RAMBUS INCORPORATED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Respondent Rambus is a monopolist in four markets for computer memory technologies. It achieved these monopolies through a process meant to be competitive: the deliberations and choices of a standard-setting organization (SSO), which sought to promote efficiency by standardizing computer memory chips. Petitioner the Federal Trade Commission determined – in factual findings *not* disturbed by the court of appeals – that Rambus corrupted that competitive process by deceiving SSO members about a pivotal aspect of their deliberations – the need to pay patent royalties if they chose Rambus technologies. The Commission further found that Rambus's deception and resulting monopoly harmed consumers because, in the absence of deception, the

SSO either would have chosen other technologies or would have imposed a requirement to limit Rambus to reasonable and nondiscriminatory (RAND) royalties.

The court of appeals concluded that this conduct was not unlawful monopolization on the basis of two errors of law that are of profound importance to antitrust enforcement, both in the standard-setting context and more generally: (1) an insistence that the Commission address causation by proving the precise market conditions that would result "but for" the misconduct; and (2) a cramped and confused view of this Court's case law regarding "anticompetitive effects." Rambus, attempting to distract this Court from the issues raised in the Petition, responds primarily with a fact-based defense of the outcome below, but misses the mark in numerous ways – relying on factual assertions that are either irrelevant or contrary to findings on which the ruling below was based; ignoring or mischaracterizing the findings on which the Commission's ruling rests; and touting the "idiosyncratic" nature of its deception (Opp. 29). The court below did not base its ruling on review of the factual record, but on sweeping legal pronouncements that will hamstring antitrust enforcement efforts and are contrary to fundamental antitrust principles. This Court's review is needed not only to resolve a conflict between the D.C. Circuit and the Third Circuit regarding the recurrent problem of deception that distorts industry standard-setting, but also to provide guidance on basic issues of causation and competitive effects in monopolization cases.

1. The Commission fully satisfied the elements for Sherman Act Section 2 (15 U.S.C. 2) liability by showing that Rambus acquired monopoly power and that its exclusionary conduct had made a significant contribution to the creation of that power. Pet. 14-26. It based that showing on three bedrock findings, which Rambus attempts to obscure: *first*, Rambus deceived SSO participants during the critical *ex ante* period about the prospective cost of using its technologies; *second*, given the pivotal importance to SSO participants of information about patent royalties, Rambus's deception contributed significantly to the SSO's choice of Rambus's technologies and hence to Rambus's attainment of monopoly; and *third*, Rambus's conduct harmed consumers by depriving them of cost savings that would have resulted from either (1) the choice of alternative technologies or (2) SSO participants' ability to extract concessions from Rambus, including a RAND commitment, as part of the competitive standard-setting process. These findings amply support Section 2 liability under a proper understanding of antitrust principles.

On the central issue of deception, Rambus attempts to distract the Court with irrelevancies. Starting by re-casting the questions presented, Rambus ignores the legal theory on which the Commission based Section 2 liability. This case is not about "failing to disclose * * * future patent intentions." Opp. (i). The Commission found that

Rambus had, through a combination of actions, statements, and failures to disclose information then within its knowledge, *deceived* SSO members into believing that they were free to adopt certain technologies without fear of patent claims and royalties. Pet. App. 136a-140a. Although Rambus disputes these findings, the court of appeals assumed them for purposes of its legal analysis. *Id*. at 11a, 14a, 20a. Accordingly, the various factual issues Rambus raises (Opp. 3-7), such as ambiguous SSO rules or the timing of its involvement in the SSO and its patent applications, are beside the point.[1]

2. The Commission based its ruling on a core finding that Rambus's deceptive conduct "contributed significantly to the acquisition of monopoly power." Pet. App. 34a; see also *id*. at 140a. Rambus ignores this finding and instead characterizes the Commission's extensive causation analysis as showing a "mere" causal link. Opp. 17. Such assertions are belied by the Commission's opinion, and should not be allowed to deflect from the court of appeals' fundamental legal error.

Rambus denies that the Commission found that its deception weighed heavily in the SSO's decision to select Rambus technologies. *Id.* The Commission's

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[1] Rambus's repeated protests that the Commission's case turns on ill-defined "future plans" are disingenuous. All of the deception found by the Commission concerned "inventions" that Rambus itself states it was "in possession of" during the entire time in question. Opp. 5.

opinion, however, reflects its thorough consideration of that issue and a clear conclusion. As the Commission explained, SSO members were keenly cost-conscious, and any proposal that would have entailed patent royalties would have been "strongly opposed." Pet. App. 151a-153a. In light of the *billions* of dollars in royalties that could accrue from choosing patented technologies (*id.* at 153a), and the existence of alternatives to each of the technologies, which some members preferred even apart from cost (*id*. at 153a-154a), the Commission concluded properly that "Rambus's course of deceptive conduct contributed significantly to Rambus's acquisition of monopoly power by distorting JEDEC's [*i.e.*, the SSO's] technology choices * * * ." *Id.* at 140a.

The court of appeals held that this showing of *significant contribution* to monopoly power was not enough, because the Commission had not determined that "JEDEC would have standardized other technologies had it known the full scope of Rambus's intellectual property," *id.* at 14a, and the court believed that avoiding a RAND commitment was not "antitrust harm. " *Id.* at 20a. As the Petition shows, however, the court's imposition of strict but-for causation finds no support in this Court's prior pronouncements, other federal appellate decisions, or legal commentary.[2] Pet. 16-19.

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[2] As described below, moreover, the Commission disagrees with the proposition that avoiding RAND assurances is not anti-competitive.

Although Rambus offers no support for a but-for causation standard, it nevertheless questions the "significantly contributed" causation standard, which Professors Areeda and Hovenkamp articulate as exclusionary conduct that "reasonably appear[s] capable of making a significant contribution to creating or maintaining monopoly power." 3 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 651g at 124 (3d ed. 2008) (Areeda & Hovenkamp).[3] Despite Rambus's denials, Opp. 27, other circuits,[4] not to mention the same court of appeals sitting *en banc*,[5] have adopted the Areeda & Hovenkamp articulation. Next, comparing two passages of that treatise, Rambus asserts that the articulation of the standard quoted by the Commission and relied upon by other courts concerns "conduct" and not

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[3] The reasoning of this commentary parallels the Court's in *Standard Oil Co. of California* v. *United States*, 337 U.S. 293, 309-310 (1949). See Pet. 17. Such general considerations about causation in complex antitrust litigation are pertinent regardless of the particular statutory provision at issue, and remain so despite changes in substantive standards applicable to requirements contracts. Cf. Opp. 18 & n.12.

[4] See, *e.g.*, *Instructional Sys. Dev. Corp.* v. *Aetna Cas. and Sur. Co.*, 817 F.2d 639, 649 (10th Cir. 1987) ("[W]e cannot say as a matter of law that the exclusionary practices alleged by ISDC could not have had a significant impact on Doron's maintenance of monopoly power."); see also Hewlett-Packard, *et al.* Br. 11-12.

[5] See *United States* v. *Microsoft Corp.*, 253 F.3d 34, 78-79 (D.C. Cir. 2001) (*en banc*).

"causation." Opp. 19-20. In fact, the two passages are substantially identical regarding the "significantly contributed" standard.[6]

Once the proper monopolization causation standard is understood, Rambus's complaints about the burden of proof and the Commission's ostensible efforts to shift it (Opp. 8, 14-15, 17) fall of their own weight. The Commission required Complaint Counsel to satisfy fully its burden of meeting the "significant contribution" standard. Pet. App. 140a, 149a-162a. That the Commission afforded Rambus the *additional* opportunity to avoid liability by establishing an "inevitability" defense is consistent with sound antitrust principles,[7] and does not shift the burden on the *prima facie* case.

3. Rambus also attempts to finesse the court of appeals' erroneous treatment of causation by asserting that the Commission failed to establish an adverse impact on the competitive process. Opp. 20-22. Rambus fails to recognize, however, that "competitive effect" and "causation" are intertwined.

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[6] If Rambus's point is that one passage includes the language "reasonably appears capable" and the other does not, its argument is wrong but also irrelevant, since the Commission found that Rambus's conduct contributed significantly to its achievement of monopoly. See Pet. App. 34a, 77a, 140a.

[7] See Pet. App. 161a-162a (quoting 3 Areeda & Hovenkamp ¶ 650c at 69 (2d ed. 2002) ("The defendant may, of course, introduce its own proof of inevitability, superior skill, or business justification... .")).

Rambus states that the court of appeals "nowhere denied * * * that monopoly power might result from several factors, including exclusionary conduct." Opp. 16. But the court's reasoning dictates that conduct will not be labeled "exclusionary" unless the plaintiff can prove a but-for causal link between the conduct and a specified anticompetitive outcome. That test will never allow a finding of liability where a defendant's harmful conduct contributes significantly to achieving monopoly if other factors might have produced the same market structure. Such a test would be especially problematic in cases like this where deception contributes to uncertainty regarding the but-for outcome. In these circumstances, doubts should be resolved against the defendant. See 3 Areeda & Hovenkamp ¶ 651g at 124 (citing *Bigelow* v. *RKO Radio Pictures, Inc.,* 327 U.S. 251, 264 (1946)).

Rambus also ignores the Commission's showing that deception harmed competition by distorting a standard-setting process designed to serve consumer welfare through *ex ante* competition among rival technologies. Rambus's claims (Opp. 21-22, 25) that the Commission neither found that such competition existed nor that it was distorted are baseless. As the court of appeals recognized, "[b]efore an SSO adopts a standard, there is often vigorous competition among different technologies * * * ." Pet. App. 4a. As described by *Amici* Scholars, "[p]urveyors 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." Scholars Br. 7-8; see also Pet. 21.

The Commission found that Rambus's deceptive conduct thwarted that *ex ante* competitive process. Pet. App. 84a-86a, 138a-140a, 150a-156a, 187a-190a. Rambus effectively raised barriers for competing technologies by reducing the likelihood that they would be chosen, because their cost advantage (*i.e.*, lack of royalties) would not be understood. As the Scholars Brief (at 7) explains, "[d]eception 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." Thus, contrary to Rambus's assertions (Opp. 20-22), the Commission showed that Rambus's deception harmed both the competitive process and competition through exclusion of rivals and raising barriers to entry.[8]

Moreover, Rambus's deception harmed competition by obscuring vital price information, the "central

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[8] Because the Commission made extensive findings and carefully explained how Rambus's conduct harmed competition, there is no truth to Rambus's suggestion that the Commission would turn all deception into a Section 2 violation. See Opp. 21, 26. Rambus's citation to *Dippin' Dots* v. *Mosey*, 476 F.3d 1337, 1346-1347 (Fed. Cir. 2007), is off point for the additional reason that the but-for causation discussed there concerned causation to establish "actual fraud upon the PTO," *id.* at 1346, not the causation required to prove a Section 2 violation. See *Walker Process Equip., Inc.* v. *Food Mach. & Chem. Corp.*, 382 U.S. 172, 177 (1965).

nervous system of the economy." *United States* v. *Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150, 226 n.59 (1940). As seen in cases such as *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 692-693 (1978), "suppression of information about competition can be as anticompetitive as direct suppression of competition itself." Scholars Br. 11. Rambus attempts to discount the weight of authorities involving Sherman Act Section 1 (15 U.S.C. 1) liability. Opp. 23 n.17. This Court, however, has never defined competitive harm differently depending upon whether Section 1 or Section 2 proscribed the underlying conduct.

Accordingly, Rambus's deception harmed competition and, contrary to Rambus's claim, Professors Hovenkamp, Janis, and Lemley do not conclude otherwise. The current version of the cited treatise clarifies that the language on which Rambus relies (Opp. 20) applies where the SSO "would have approved the standard *unconditionally* even if it had known about the patent." 2 Herbert Hovenkamp, Mark D. Janis & Mark A. Lemley, *IP and Antitrust* § 35.5 at 35-47 (2009 Supp.) (emphasis added). But the Commission's undisturbed findings establish that JEDEC *could not* have approved a patented technology without the RAND condition. Pet. App. 114a, 136a, 187a-188a. The same treatise, with specific and favorable reference to the Commission's ruling in the present case, concludes that an overcharge attributable to deception by an SSO participant "can properly constitute competitive harm attributable to the nondisclosure." 2 Hovenkamp, *et al.,* § 35.5 at 35-48 & n.60.[9]

4. Rambus's refusal to acknowledge that SSOs are "crucibles of competition between rival technology purveyors" (Scholars Br. 10) also infects its efforts to defend the court of appeals' erroneous analysis of RAND commitments. Opp. 22-25. Attempting to liken the present case to *NYNEX Corp.* v. *Discon, Inc.*, 525 U.S. 128 (1998), in which the defendant engaged in deception to inflate its prices *after* it had lawfully achieved a monopoly, Rambus, like the court below, paints its avoidance of RAND commitments as "mere" harm to consumers through higher prices. Opp. 24. By contrast to *NYNEX*, Rambus's deception was not a mere matter of prices, but a distortion of the competitive standard-setting process. It does not follow that *NYNEX* immunizes such conduct from liability, as Rambus seems to contend. See Opp. 23-24. Such a startling reformulation of the fundamental principles of antitrust injury addressed in *NYNEX* has never been adopted by any other appellate tribunal.

Rambus suggests that no competition was lost, because the Commission did not find that there necessarily would have been *ex ante* bargaining for

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[9] Despite Rambus's objection (Opp. 25 n.20), the citation to the Commission's ruling makes clear that the treatise writers agree that this principle applies here. The introductory language to the paragraph in question evidently indicates that they would also apply it even where the SSO does not require licensure.

specific prices. Opp. 25. Such reasoning ignores the competitive nature of the standard-setting process as a whole, which affords the opportunity for various trade-offs in technology selection, general pricing constraints, and an opportunity for bargaining, *all* of which exist *before* industry is locked into a particular technology, but not after. That is what a RAND commitment is all about. As Professor Elhauge has explained, "[i]n all anticompetitive conduct cases, it is true that with competition buyers might either have bought elsewhere *or* used the competitive alternatives as leverage for lower prices." Einer Elhauge, *Disgorgement as an Antitrust Remedy*, 76 Antitrust L.J. (forthcoming 2009).[10] Accordingly, as he concludes, the court of appeals' "reliance on *NYNEX v. Discon* was quite mistaken." *Id*.

5. Rambus makes two arguments, both invalid, attempting to demonstrate that the decision below does not merit review.

First, Rambus's efforts to reconcile the decision below with *Broadcom Corp.* v. *Qualcomm Inc*., 501 F.3d 297 (3d Cir. 2007), are based on the unwarranted assumption, drawn from facts alleged in Broadcom's complaint, that the Third Circuit would require a showing that "the misconduct actually caused incorporation of patented technology into a standard." Opp. 27. *Broadcom* did not adopt such a requirement. To the contrary, the Third

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[10] Manuscript at 7-8 n.24 (Jul. 28, 2008), available at http://lsr.nellco.org/harvard/olin/papers/613.

Circuit concluded 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." 501 F.3d at 314 (emphasis added). By contrast, the court below exonerated Rambus despite the Commission's finding that Rambus's deceptive course of conduct tilted the playing field, thus increasing the likelihood that JEDEC would choose Rambus technologies. See Pet. App. 18a-19a.

Second, Rambus attempts to dismiss the impact of the ruling below on industry standard-setting and on antitrust enforcement. Opp. 27-28. The intense concerns of the many SSOs and other industry participants appearing as *amici* in this case – entities most familiar with the dynamics of standard- setting – cannot be dismissed as "theoretical." Opp. 29. Although SSOs have varying approaches to intellectual property and disclosure obligations, it is the court below that "paint[ed] with a broad brush" (*ibid.*), setting down a rule of law that forecloses liability unless a plaintiff can identify the precise "but for" result of a complex standard-setting process, even *assuming* that the defendant has engaged in deception that corrupted the process and achieved a monopoly. This ruling will not only hamper the efforts of the Commission[11] and others to stop monopolization through manipulation of SSO activities, but has broader implications for Section 2 law on a vital topic – causation – that this Court has not previously addressed squarely. Guidance is thus needed, and the present case affords a highly suitable vehicle.

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[11] Rambus's suggestion that the Commission will not be constrained by the ruling below (Opp. 27-28) rings hollow. The Commission routinely brings complex antitrust cases such as this as administrative litigation, and in today's global economy there will be few respondents that will not have their choice of circuits under 15 U.S.C. 45(c).

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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