No. ________

# 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*

## PETITION FOR A WRIT OF CERTIORARI and APPENDIX VOLUME 1 OF 2


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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.

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.

## PARTIES TO THE PROCEEDING

Petitioner is the Federal Trade Commission. Respondent, who was the petitioner in the court of appeals below, is Rambus Incorporated.

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

## PETITION FOR A WRIT OF CERTIORARI

The Federal Trade Commission, pursuant to Section 16(a)(3) of the Federal Trade Commission Act (FTC Act), 15 U.S.C. 56(a)(3), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.[1]

[1] Section 16(a)(3) of the FTC Act provides, *inter alia*, that where (as is the case here) the Commission has been represented in the court of appeals by its own attorneys, it may be represented in like manner before this Court if the Solicitor General declines to file a petition for certiorari. 15 U.S.C. 56(a)(3). The Commission has exercised this authority on only three prior occasions. *See FTC* v. *Ind. Fed'n of Dentists*, 476 U.S. 447 (1986); *FTC* v. *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990); *FTC* v. *Schering-Plough*

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 522 F.3d 456. The order denying the Commission's petition for rehearing *en banc* (Pet. App. 380a-381a) is unreported. The Commission's opinions on liability (Pet. App. 27a-263a) and remedy (Pet. App. 264a-360a), the Commission's final order to cease and desist (Pet. App. 361a-379a), and the initial decision of the administrative law judge (Pet. App. 387a-979a) will be reported at 143 F.T.C. ___.

## JURISDICTION

The judgment of the court of appeals was entered on April 22, 2008. A timely petition for rehearing *en banc* was denied on August 26, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTORY PROVISIONS INVOLVED

Relevant portions of Section 2 of the Sherman Act, 15 U.S.C. 2, and Section 5 of the FTC Act, 15 U.S.C. 45, are set forth in an appendix to this petition. Pet. App. 382a-386a.

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*Corp.*, 548 U.S. 919 (2006). The Commission does so here because it believes that the decision below will have exceptionally serious adverse consequences for enforcement of the antitrust laws.

## STATEMENT

Rambus Incorporated (Rambus), a developer of computer memory technologies, is a monopolist. This case concerns Rambus's scheme to acquire monopoly power by deceiving the Joint Electronic Device Engineering Council (JEDEC) – a private standard-setting organization (SSO) – about Rambus's patent interests in technologies that JEDEC was considering for inclusion in industry-wide standards for computer memory technology, and Rambus's secret efforts to refine its patents to read on new JEDEC standards.[2] Rambus's conduct distorted the competitive process of choosing among alternative technologies for incorporation into JEDEC standards, by depriving JEDEC of the ability to assess the costs and benefits of those alternatives. It also prevented JEDEC from insisting that Rambus offer licenses on reasonable and non-discriminatory (RAND) terms as a precondition for the selection of its technology. As a result of JEDEC's unknowing selection of technologies in which Rambus was able to assert patent rights, Rambus acquired monopoly power in four technology markets. Rambus waited to assert its patent interests until the new standards had been widely implemented. Then, Rambus demanded stiff royalties from makers of the great majority of computer memory chips.

1. Standards have long played an important role in the Nation's economy. They encourage manufacturers to introduce new technologies and facilitate

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[2] A "standard" is a "set of technical specifications which either does, or is intended to, provide a common design for a product or process." See 2 Herbert Hovenkamp, Mark D. Janis & Mark A. Lemley, *IP and Antitrust* § 35.1a at 35-3 (2002).

the production and sale of interoperable products, particularly in high-technology industries. See generally Mark A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 Cal. L. Rev. 1889, 1896-1898 (2002). Without standards, the procompetitive benefit of sophisticated products and devices that work together – even when produced by different manufacturers – would be lost. See Daniel G. Swanson & William J. Baumol, *Reasonable and Nondiscriminatory (RAND) Royalties, Standards Selection, and Control of Market Power*, 73 Antitrust L. J. 1, 3 (2005). SSOs often include both manufacturers that intend to practice the standards and firms like Rambus, which develop and license technologies.

Private standard-setting is a competitive process. *Ex ante – i.e.*, before a standard has been adopted – there often are technological alternatives. SSO members commonly choose among several technologies offered by proponents vying for inclusion in the standard. See Joseph Farrell, John Hayes, Carl Shapiro & Theresa Sullivan, *Standard Setting, Patents, and Hold-Up*, 74 Antitrust L.J. 603, 609 (2007). Moreover, rates that patent holders will charge after participants choose a standard can be negotiated *ex ante*. Without an opportunity for *ex ante* negotiation, and in the absence of commitments by patent holders to charge RAND rates, those who practice the standard are vulnerable to later exploitation or "hold-up." This concern exists where, as here, high switching costs make alternative technologies impracticable. See George S. Cary, Larry C. Work-Dembowski & Paul S. Hayes, *Antitrust Implications of Abuse of Standard-Setting*, 15 Geo. Mason

L. Rev. 1241, 1259-1260 (2008); Farrell *et al.*, *supra*, at 607.

Because of the potential for hold-up to extinguish the benefits of *ex ante* competition, many SSOs disfavor patented technologies and – like JEDEC – protect against hold-up and associated supra-competitive royalties by requiring patent holders to agree *ex ante* to charge RAND rates.[3] By imposing such constraints *ex ante*, SSOs ensure that the royalties charged by patent holders *ex post* – *i.e.*, after industry participants have chosen a standard and taken steps to implement it – are limited to rates commensurate with what they could have negotiated when they still faced competition from alternative technologies. See Cary *et al.*, *supra*, 1254-1255, 1259-60. A RAND requirement thus preserves the benefits of competition by ensuring that patent holders cannot secure the ability to charge monopoly prices. In the present case, Rambus's deceptive conduct thwarted JEDEC's procompetitive policies and undermined the competitive process of technology selection. See Farrell *et al.*, *supra*, at 609 ("Deceiving buyers or keeping them in the dark about the terms on which a technology will be available subverts the competitive process" to become a standard, which can lead to the "inefficient acquisition of market power that harms consumers.").

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[3] See Mark A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 Cal. L. Rev. 1889, 1905-1906 (2002); U.S. Department of Justice and Federal Trade Commission, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition,* at 47-53 (Apr. 2007), *available at* http://www.usdoj.gov/atr/public/hearings/ip/222655.pdf.

2. Rambus joined JEDEC in late 1991, when JEDEC was working on standards for a widely used form of memory – synchronous dynamic random access memory or "SDRAM." Pet. App. 87a-88a. Rambus understood that "'[t]he job of JEDEC is to create standards which steer clear of patents which must be used to be in compliance with the standard whenever possible.'" *Id.* at 115a (quoting Rambus's representative to JEDEC). But starting soon after it joined, Rambus pursued a strategy, supported by Rambus's most senior executives, that was designed to subvert those goals. *Id.* at 91a-104a.

JEDEC rules prohibit the inclusion of patented technologies in standards without prior assurances that a patent holder will license its technology on RAND terms. *Id.* at 114a. The rules ensure that *ex post* royalty terms will be comparable to those that could be negotiated *ex ante*, when there was competition among alternative technologies. Rambus, however, avoided those constraints. It led JEDEC to believe not only that it had no patent interests in technologies that JEDEC was debating for inclusion in the standards, but also that it was not seeking such patents. *Id.* at 33a-34a. As the Commission found, Rambus's deceptive course of conduct included several elements:

> Rambus sat silently when other members discussed and adopted technologies that became subject to Rambus's evolving patent claims. Rambus voted and commented on inclusion of [two specific technologies] without revealing that it was seeking patent coverage of those technologies, despite language on the ballot that called for disclosure of relevant patents. Rambus twice evaded direct questions

> about its patent portfolio, coupling a nonresponsive answer with a reminder that it previously had disclosed a patent (which lacked any claims then relevant to JEDEC's work). Rambus even provided JEDEC with a list of its patents that omitted the one patent Rambus believed covered JEDEC's work.

*Id.* at 136a-137a. Rambus also pursued a strategy of attending JEDEC standard-setting proceedings and using information about those discussions in order to perfect its patent rights:

> Rambus was engaged in a program of amending its applications to develop a patent portfolio that would cover JEDEC's standards. Rambus made full use of information gleaned from its JEDEC participation to accomplish this objective.

*Id.* at 137a. Through a succession of amendments to divisional and continuation applications that related back to a 1990 patent application, Rambus ensured that subsequently issued Rambus patents would cover four specific technologies that JEDEC discussed and ultimately selected for inclusion in industry-wide standards. *Id.* at 88a-104a.

Ultimately, JEDEC selected technologies over which Rambus was able to assert patent rights. *Id.* at 104a. It did so unknowingly, however, because it was ignorant of Rambus's patent interests and its secret efforts to acquire relevant patent rights. *Id.* at 129a-135a. Thus, JEDEC had no opportunity to weigh the cost of obtaining a license from Rambus in assessing alternative technologies. Nor, for the same reasons, could JEDEC preserve the benefits of *ex* *ante* competition and protect against *ex post* hold-up by obtaining a RAND commitment. *Id.* at 138a-140a, 150a-153a, 187a-190a.

Carrying out its strategy, Rambus did not disclose its patent interests while it was a member of JEDEC, or even for some time thereafter. Rather, it waited until industry members had become "locked-in" to the newly adopted standards because of the cost and delay of switching to alternatives. As Rambus's CEO explained to management, the strategy was to wait until industry members find that "getting around [Rambus patents] will be either extremely difficult or impossible." *Id.* at 103a-104a. Thus, because of Rambus's conduct, the *ex ante* competitive process for selecting technologies did not work: JEDEC could not enforce its rules against standardizing patented technologies without receipt of a RAND commitment. Having thwarted *ex ante* competition in this fashion, Rambus obtained unlawful monopoly power, and was able to, and did, demand supracompetitive royalties from those practicing the standard. *Id.* at 153a, 190a-211a, 218a-219a, 224a-225a.

3. The Federal Trade Commission issued a three-count administrative complaint in June 2002 which charged Rambus with (1) monopolization in four SDRAM technology markets, (2) attempted monopolization, and (3) engaging in unfair methods of competition, all in violation of Section 5 of the FTC Act, 15 U.S.C. 45. Pet. App. 45a. The complaint alleged that Rambus had engaged in a pattern of anticompetitive and exclusionary conduct comprising Rambus's failure to disclose that it was "actively working to develop" patents covering these technologies and "other bad-faith, deceptive conduct" that conveyed a "materially false and misleading impres-

sion" that it had no intellectual property rights in the relevant technologies. *Id.* at 45a-46a.

An administrative law judge (ALJ) rendered an initial decision and proposed order dismissing the complaint. Pet. App. 387a-879a. In July 2006, after conducting a *de novo* review of the entire record, including the ALJ's initial decision, the Commission issued its decision on liability. *Id.* at 27a-263a. Drawing on the standard of deception applicable under Section 5 of the FTC Act, the Commission set aside the ALJ's findings and conclusions other than those it specifically adopted. *Id.* at 59a, 73a-75a. Applying Section 2 of the Sherman Act, the Commission held that Rambus's course of deceptive conduct was "exclusionary," and that it "contributed significantly" to Rambus's acquisition of monopoly power in the relevant technology markets. *Id.* at 34a, 139a-140a (footnotes omitted).

Addressing the *ex ante* competition in which alternative technologies are considered in the standard-setting process, the Commission explained that an SSO cannot make a fully informed analysis of technological alternatives without accurate information about patent interests in technologies that the SSO is debating for inclusion. *Id.* at 84a. The Commission found that such information protects users of the standard against *ex post* "hold-up," either by guiding the SSO to a less costly alternative, or by allowing for an *ex ante* RAND commitment and an opportunity for *ex ante* negotiations. *Id.* at 83a-85a. In the present case, the Commission found that Rambus injured the *ex ante* competition among alternative technologies by deceptively "withh[olding] information that would have been highly material to the standard-setting process within

JEDEC." *Id.* at 139a. Because the deception "distort[ed] the selection of technologies and evade[d] protections designed by [JEDEC] to constrain the exercise of monopoly power," *id.* at 80a, the Commission ruled that Rambus's deception was "not competition on the merits" and therefore that it was exclusionary for purposes of Section 2. *Id.* at 86a, 140a, 145a-146a.

Having concluded that Rambus engaged in deceptive conduct that harmed the relevant competitive process, the Commission considered whether an adequate causal link existed between the deceptive conduct and Rambus's acquisition of monopoly power. *Id.* at 149a-159a. The Commission recognized that it was difficult to determine with certainty what choices JEDEC would have made in the absence of Rambus's deception, but concluded that, in a hypothetical "but for" world in which Rambus had not engaged in deception, there were two possible outcomes: either (1) JEDEC would have selected alternative technologies,[4] or (2) despite a bias against patented technologies, JEDEC would have selected Rambus technologies but, under JEDEC rules, required Rambus to make RAND assurances *ex ante*, thus preserving the benefits of competition from alternative technologies and protecting industry

[4] The Commission identified factors that supported this possibility. It found that alternative technologies were available and viable, including several that had been presented to JEDEC and some that major firms in the industry preferred. Pet. App. 153a-154a. After an extensive review of the competing technologies and Rambus's claim that its own were superior or less costly and would have been chosen even if Rambus had disclosed its interests, the Commission also concluded that "Rambus ha[d] not carried the burden of establishing its inevitability/superiority defense." *Id.* at 185a.

from patent hold-up *ex post*. *Id.* at 150a-153a. The Commission therefore did not eliminate completely the possibility that, if Rambus had disclosed its patent interests and efforts to perfect those interests, JEDEC might nevertheless have selected Rambus technologies. But, the Commission explained, "[n]o matter what the specific outcome might have been, the consequences of incorporating Rambus's patented technologies into the standards would have been identified and weighed *before* the standards were adopted, *when Rambus's technologies were competing with the alternatives.*" *Id.* at 188a-190a (emphasis in original).

On February 5, 2007, after supplementary briefing and oral argument on the question of remedy, the Commission issued an opinion on remedy (*id.* at 246a-360a) and a final order to cease and desist (*id.* at 361a-379a). The final order enjoined Rambus from making misrepresentations to standard-setting organizations, *id*. at 367a, and – for a period of three years from the date of the order – barred Rambus from collecting royalties for JEDEC-compliant products in excess of levels that the record suggested would have been expected had Rambus adhered to JEDEC's disclosure policy and engaged in *ex ante* negotiations with potential licensees, *id.* at 370a-371a.

4. The court of appeals granted Rambus's petition for review and vacated the Commission's order. Pet. App. 5a, 26a. The court of appeals wrote that it was guided by two antitrust principles – *first*, to be condemned as exclusionary, the conduct of a monopolist must have "anticompetitive effect" (*i.e*., it must harm the "competitive process" and thereby harm consumers); and *second*, the antitrust plaintiff – including

the Government – bears the burden of proving the anticompetitive effect of the challenged conduct. *Id.* at 13a.

The court considered the Commission's finding that, in a hypothetical "but for" world in which Rambus disclosed its patent interests and efforts to perfect those interests, there would have been two possible outcomes: JEDEC would have either (1) chosen other, potentially non-patented technologies, or (2) selected Rambus technologies anyway, but with prior RAND commitments and an opportunity for *ex ante* negotiations. *Ibid.* The court held that, in failing to find which of these alternatives would have occurred, the Commission had failed to make an adequate finding that the deceptive course of conduct had an anticompetitive effect. *Id.* at 13a-14a, 19a, 20a.

The court of appeals based this holding on two conclusions. First, although it was willing to assume that the first possibility (*i.e.*, preventing the choice of other, nonpatented technologies) would be "indeed anticompetitive" (*id.* at 14a), the court emphasized that the Commission had not found that this result would necessarily have occurred. *Ibid.* Second, the court of appeals concluded that the second possibility (*i.e.*, avoiding a RAND commitment) could not be said to harm competition and therefore did not give rise to a violation of Section 2. *Id.* at 13a, 20a.

For the latter conclusion, the court of appeals relied on its reading of *NYNEX Corp.* v. *Discon, Inc.*, 525 U.S. 128 (1998), which it viewed as controlling authority. Pet. App. at 20a. According to the court of appeals, under *NYNEX* "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." *Id.* at 16a. Applying this reasoning, the court concluded that the hypothetical possibility that Rambus's deception merely avoided a RAND commitment was enough to insulate Rambus from Section 2 liability. *Id.* at 20a. As for the Commission's reliance on the Third Circuit's decision in *Broadcom Corp.* v. *Qualcomm Inc.*, 501 F.3d 297 (3d Cir. 2007), which had described the Commission's ruling in the present case as a "landmark" (*id.* at 311), the court of appeals concluded that *Broadcom* either does not help the Commission "in view of [the Commission's] inability to find that Rambus's behavior caused JEDEC's choice," or it "conflicts with *NYNEX*" to the extent it "rested on a supposition that there is a cognizable violation of the Sherman Act where a lawful monopolist's deceit has the effect of raising prices (without an effect on competitive structure)." Pet. App. 19a.

The court of appeals vacated the final order to cease and desist on these bases.[5]

## REASONS FOR GRANTING THE PETITION

The court of appeals' doubly erroneous approach to the issue of causation and competitive effects in

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[5] Addressing possible further Commission proceedings under Section 5 of the FTC Act, the court noted in *dicta* purported weaknesses in the evidence of deception (Pet. App. 20a-26a), but did not make any determination whether the Commission's factual findings were supported by substantial evidence. Of course, this Court has held that the Commission's findings that conduct is deceptive under Section 5 of the FTC Act are entitled to great deference. See *Ind. Fed'n of Dentists*, 476 U.S. at 454; *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 386 (1965).

Section 2 monopolization cases greatly undermines the ability of antitrust enforcement agencies to prevent exclusionary practices that engender monopolies and harm consumers. First, the court of appeals failed to recognize that the Commission had fully satisfied the elements of Section 2 by showing that Rambus had acquired monopoly power by exclusionary conduct – that is, conduct other than competition on the merits – and that such conduct had made a significant contribution to the creation of that power. No more stringent showing of causation is necessary to establish a Section 2 violation. Second, the court of appeals erred in faulting the Commission for failing to show that Rambus's deception had anticompetitive effects simply because of uncertainty about which of two possible consequences – namely, that JEDEC would have adopted an alternative technology or it would have required a RAND commitment – would have occurred but for that misconduct. In a case like this, the burden of any uncertainty regarding the "but for marketplace" falls on the defendant, not the Government. Further, the court of appeals ignored the Commission's detailed showing that Rambus's misconduct had seriously disrupted the competitive process in which technologies compete for inclusion in industry standards.

The court of appeals compounded these errors with respect to causation by failing to acknowledge that deceptively avoiding imposition of a RAND commitment – a commitment that is designed to preserve the benefits of *ex ante* competition and preclude "hold-up" when patented technologies that are incorporated into a standard confer monopoly power – represents consumer harm with which the antitrust laws are properly concerned. That error creates a conflict between the decision of the court below and a recent ruling of the Third Circuit.

This case is an appropriate vehicle for the Court to provide much-needed guidance on the appropriate standard of causation and the scope of actionable competitive harm in a Section 2 monopolization case – matters that the Court has not previously addressed directly, and which are of great importance to antitrust jurisprudence. For purposes of its disposition of the case, the court of appeals accepted the Commission's findings regarding Rambus's deception in an industry standard-setting process, yet announced sweeping rules that would immunize such deception from antitrust liability in most circumstances. Those rulings not only deprive consumers of the procompetitive benefits of properly-conducted standard-setting, but also place undue limitations on Section 2 claims generally.

## I. THE COURT OF APPEALS ERRED IN ITS CONCLUSIONS RESPECTING CAUSATION

1. To prove unlawful monopolization under Section 2, a plaintiff must establish two elements: "(1) the possession of monopoly power in the relevant market and (2) 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." *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-571 (1966); see *Verizon Commc'ns Inc.* v. *Law Offices of*

*Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004); *Eastman Kodak Co.* v. *Image Tech. Servs., Inc.*, 504 U.S. 451, 481 (1992); *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 596 n.19 (1985). In the present case, there is no dispute that Rambus acquired monopoly power. Pet. App. 12a. The only question is whether Rambus engaged in "exclusionary" conduct, *Aspen Skiing*, 472 U.S. at 605 & n.32, which had a sufficient causal connection to the acquisition of monopoly power. See Pet. App. 12a-13a.

In addressing the second required element, the court of appeals stated that, in order to be deemed "exclusionary," the challenged conduct must have "anticompetitive effect," which the government has the burden of establishing. *Id.* at 13a. As the court viewed this burden, the Commission had to show that Rambus's deceptive conduct had resulted in effects that are anticompetitive in comparison with any possible alternative outcome. *Id.* at 13a-14a. Citing the Commission's acknowledgment that one possible outcome in the absence of deception was the adoption of Rambus technologies with a RAND commitment, and holding that the avoidance of a RAND commitment is not "anticompetitive," the court of appeals concluded that "the Commission failed to demonstrate that Rambus's conduct was exclusionary." *Id.* at 20a.

The court's causation analysis – which would effectively impose a strict "but for" causation test for Section 2 cases – finds no support in this Court's prior pronouncements. On the contrary, as the Court explained in *Standard Oil Co. of California* v. *United States*:

> [T]o demand that bare inference be supported by evidence as to what would have happened but for the adoption of the practice that was in fact adopted * * * would be a standard of proof, if not virtually impossible to meet, at least most ill-suited for ascertainment by courts.

337 U.S. 293, 309-310 (1949) (applying Section 3 of the Clayton Act, 15 U.S.C. 14). Antitrust scholars and other appellate tribunals have voiced similar concerns. As Professors Areeda and Hovenkamp have cautioned, "monopoly power will almost certainly be grounded in part in factors other than a particular exclusionary act." 3 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 651g at 124 (3d ed. 2008) (Areeda & Hovenkamp). Thus, they explain, exclusionary conduct should include any conduct other than competition on the merits, or that is "necessary" to competition on the merits, that "reasonably appear[s] capable of making a significant contribution to creating or maintaining monopoly power." *Ibid.*; see *Barry Wright Corp.* v. *ITT Grinnell Corp.,* 724 F.2d 227, 230 (1st Cir. 1983) (Breyer, J.); *United States* v. *Microsoft Corp.*, 253 F.3d 34, 78-79 (D.C. Cir. 2001) (*en banc*).

The Commission engaged in a careful causation analysis in this case, fully in keeping with this

Court's teachings, which the court of appeals ignored. See Pet. App. 149a-161a. In findings that the court of appeals did not dispute, the Commission concluded that, given JEDEC members' desire to avoid patent royalties to keep costs low and the availability of technological alternatives, Rambus's deception was likely to weigh heavily in JEDEC's choice of technologies for inclusion in the proposed standards. *Id.* at 150a-156a. The Commission further found that there was a clear and undisputed causal link between the choice of Rambus technologies by JEDEC and the monopoly power in multiple technology markets that Rambus admittedly acquired. *Id.* at 156a-161a. As for Rambus's argument that other factors *might* have allowed it to achieve monopoly in any event,[6] the Commission explained that "[e]xclusionary conduct need not be the exclusive cause of the monopoly position," and quoted Areeda and Hovenkamp's observation that "'[b]ecause monopoly will almost certainly be grounded in part in factors other than a particular exclusionary act, no government seriously concerned about the evil of monopoly would condition its intervention solely on a clear and genuine chain of causation from an exclusionary act to the presence of

[6] The Commission extensively reviewed Rambus's claim that JEDEC would have selected the Rambus technologies anyway because of their alleged superiority or lower cost, and found that Rambus had not adequately supported its claim. Pet. App. 161a-185a; see also note 4 *supra*.

monopoly.'" *Id.* at 160a (quoting 3 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 651f at 83 (2d ed. 2002)).

The context of the present case amply demonstrates the error of imposing a more stringent causation standard. Standard-setting proceedings typically involve numerous participants who, before reaching agreement on which technologies to include in industry-wide standards, must consider a selection of competing technologies and a complex set of trade-offs between their costs and relative performance. It is exceedingly difficult – if not impossible – to hypothesize with any degree of certainty which factors constituted a "but for" cause of the resulting standard, in the sense that a different standard would necessarily have been chosen if such factors were altered. The Commission properly concluded, however, that Rambus obtained monopoly power and that its deception contributed significantly to that result. The court of appeals erred in requiring more.

2. In addition to ignoring the Commission's showing regarding the causal connection between Rambus's misconduct and its acquisition of monopoly power, the court of appeals faulted the Commission for failing to make a definitive finding that Rambus's conduct resulted in a specific effect that the court would accept as "anticompetitive" – *i.e.*, the choice of Rambus technologies over available alternatives. Pet. App. 13a-14a, 19a. As noted above, the Commission acknowledged that, although JEDEC's choice of alternative technologies was one possible

outcome in the "but for" world in which Rambus had not engaged in deception, a second possibility was that JEDEC might have chosen Rambus technologies, but subject to RAND commitments and the opportunity for *ex ante* negotiation – constraints that would have preserved *ex post* the benefits of *ex ante* competition among alternative technologies. See *id.* at 14a (citing Commission Remedy Opinion, Pet. App. 284a-285a).[7]

The court of appeals erred in supposing that a Section 2 tribunal must identify a particular anti-competitive effect in order to find liability. This follows from the causation principles discussed above: just as monopoly may have multiple causes, conduct may have a variety of anticompetitive effects. As Professors Areeda and Hovenkamp have written, the inherent difficulties that adjudicators

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[7] As the court of appeals' decision recognizes, the Commission addressed this uncertainty chiefly in its Remedy Opinion, in which it held that a more stringent showing of causation is necessary to justify certain remedies, such as the arguably "structural" relief of royalty-free licensing. See Pet. App. 280a-286a; see also 3 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 653b at 144-145 (3d ed. 2008). That discussion responded to Rambus's own argument that a stronger causal connection was required to justify such relief than to support Section 2 liability. See Pet. App. 281a-282a (quoting brief to the Commission; also citing *United States v. Microsoft Corp.*, 253 F.3d 34, 111 (D.C. Cir. 2001) (*en banc*), and *Massachusetts* v. *Microsoft Corp.*, 373 F.3d 1199, 1233 (D.C. Cir. 2004)). Accordingly, the Commission's holding with regard to remedy has no bearing on the proper standard of causation for purposes of Rambus's liability under Section 2.

face in ascertaining the "but for" world make it appropriate that a defendant at times "suffer the uncertain consequences of its own undesirable conduct." Areeda & Hovenkamp, *supra*, ¶ 651g at 124; see also *id.* ¶ 653b at 145 ("Doubts about the conduct's contribution to the monopoly should be resolved against the monopolist.").

Nor do this Court's precedents support the court of appeals' approach. Rather, the "anticompetitive effect" that courts must find in a Section 2 case is "harm, not just to a single competitor, but to the competitive process, *i.e.,* to competition itself." *NYNEX Corp.* v. *Discon, Inc.*, 525 U.S. 128, 135 (1998). In the present case, the misconduct that the Commission found – and that the court of appeals assumed for purposes of its legal analysis – interfered directly and materially with the relevant competitive process – *i.e*., the *ex ante* competition among technologies for inclusion in the JEDEC standard.

The JEDEC process, like that of many SSOs, is structured to permit industry members to assess competing technologies in terms of both technical features and costs, and to make trade-offs based on numerous considerations – including whether a given technology is patented and, if so, whether the patent holder is willing to make an *ex ante* commitment to license on reasonable terms. This competitive process ensures that industry participants will continue to enjoy the benefits of *ex ante* competition among alternative technologies, either through the use of unpatented technologies or by the guarantee of RAND terms. The JEDEC process can achieve these efficiency-enhancing goals, however, only if participants have accurate information about the features and costs of competing technologies. As the Commission recognized, deception can have "'an anticompetitive effect,' [by] distorting choices [and] obscur[ing] the relative merits of alternatives * * *." Pet. App. 72a (quoting *California Dental Ass'n* v. *FTC*, 526 U.S. 756, 771 n.9 (1999)). Further, although deception may be self-correcting in other commercial contexts, the Commission explained that, in industry standard-setting proceedings, deception can "cause[] lasting competitive harm by obscuring crucial information, known only to one industry member, until it is too late to counteract the consequences." Pet. App. 79a.

Conduct that undermines the very process through which market participants seek to achieve efficient results should be recognized as "anticompetitive" or "exclusionary" for Section 2 purposes, as a matter of law. Cf. *FTC* v. *Ind. Fed'n of Dentists*, 476 U.S. 447, 461-462 (1986) ("A concerted and effective effort to withhold (or make more costly) information desired by consumers for the purpose of determining whether a particular purchase is cost justified is likely enough to disrupt the proper functioning of the price-setting mechanism of the market that it may be condemned even absent proof that it resulted in higher prices * * * ."). Such conduct "'tends to impair the opportunities of rivals'" by misleading economic decision-makers about the relative merits of the rivals' products and is not "'competition on the merits.'" *Aspen Skiing Co.*, 472 U.S. at 605 n.32 (quoting 3 Phillip E. Areeda & Donald F. Turner, *Antitrust Law* ¶ 626b at 78 (1978)). The court of appeals erred in ignoring the corruptive effect of Rambus's deception on the competitive process.

## II. THE COURT OF APPEALS TOOK AN IMPROPERLY NARROW VIEW OF COMPETITIVE EFFECTS

The court's errors respecting causation were compounded by its further error of dismissing JEDEC members' loss of the ability to secure a RAND commitment from Rambus as a mere matter of price that has no competitive significance and therefore is not exclusionary. Citing *NYNEX Corp.* v. *Discon, Inc.*, 525 U.S. 128, as controlling authority, the court of appeals ruled that deception that allowed Rambus, as a "lawful monopolist," to charge higher prices is not an "anticompetitive effect." Pet. App. 16a, 20a. In applying that precept here, the court of appeals begged the question whether the means by which Rambus acquired its monopoly were "lawful." It also ignored the pivotal role of JEDEC's RAND policy in the relevant competitive process – *i.e.*, it is a key element of the competition to become the standard and a principal means by which the benefits of *ex ante* competition are preserved.

By contrast to the facts of the present case, in *NYNEX* the deception played no role in the process by which New York Telephone had obtained its monopoly, and thus there was no basis for concluding that New York Telephone had acquired monopoly power through unlawful means. *NYNEX* addressed allegations that a lawful monopoly provider of regulated telephone services had created the false appearance that its costs had increased when it purchased certain "removal services" at a higher cost from AT&T Technologies – which had offered NYNEX rebates that it concealed from state regulators – rather than at a lower cost from Discon, which refused to participate in the rebate scheme. Although conceding that NYNEX's behavior harmed consumers by raising their telephone rates, the Court said "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." *NYNEX*, 525 U.S. at 136 (emphasis in original).

The court of appeals' reliance on *NYNEX* is misplaced. As emphasized above, the guarantee of RAND terms was a pivotal part of the tradeoff that JEDEC members made in assessing the costs and benefits of alternative technologies that were competing for inclusion in an industry-wide standard.

The RAND requirement was the means by which JEDEC sought to preserve the benefits of *ex ante* competition, even when it selected a patented technology. Insofar as Rambus's deception of JEDEC members permitted it to avoid giving a RAND commitment, that was not the *ex post* exercise of market power by a lawful monopolist; it was the very mechanism by which Rambus secured its monopoly.

JEDEC's RAND requirement would have ensured that JEDEC members realized the benefits of *ex ante* competition among competing technologies – if an unpatented technology was not selected, then the imposition of RAND terms on a patent-holder would constrain that firm, who otherwise would be able to charge supracompetitive royalties. That outcome protects customers from patent hold-up, and its avoidance results in consumer harm.[8] The court of appeals' conclusion that the Commission failed to

[8] See *Town of Concord* v. *Boston Edison Co.*, 915 F.2d 17, 21-22 (1st Cir. 1990) (Breyer, C.J.) (anticompetitive conduct "harms the [competitive process] when it obstructs the achievement of competition's basic goals – lower prices, better products, and more efficient production methods."), cert. denied, 499 U.S. 931 (1991); 2 Herbert Hovenkamp, Mark D. Janis & Mark A. Lemley, *IP and Antitrust* § 35.5 at 35-46 to 35-47 (Supp. 2007) ("If an antitrust plaintiff can show that the patent owner would have licensed the patent at a competitive rate had it been forced to disclose the patent before the organization acted but charged a higher rate because of the nondisclosure, we think that overcharge can properly constitute competitive harm attributable to the nondisclosure.").

show anticompetitive effects is incorrect, even under its own flawed premise.

## III. REVIEW IS NEEDED TO CLARIFY AND ENSURE UNIFORMITY ON FUNDAMENTAL ISSUES OF ANTITRUST JURISPRUDENCE

1. Review is necessary in order to clarify the governing standards of causation in Section 2 cases. The ruling below erroneously departed from the causation standard that other authorities support, and which the Commission correctly applied – namely, that exclusionary conduct includes any "conduct other than competition on the merits, or other than restraints reasonably 'necessary' to competition on the merits, that reasonably appear[s] capable of making a significant contribution to creating or maintaining monopoly power." 3 Areeda & Hovenkamp, *supra*, ¶ 651g at 124. See *Barry Wright Corp.*, 724 F.2d at 230; *Microsoft*, 253 F.3d at 79.

The court of appeals' departure from this standard will impede effective Section 2 enforcement and is likely to lead to inconsistent results in monopolization cases. Commission enforcement efforts under Section 2 will be particularly stymied, because its adjudicative decisions are subject to review in any judicial circuit in which a respondent resides or does business. 15 U.S.C. 45(c). Thus, any respondent in a Commission Section 2 case presumably would seek review in the D.C. Circuit, if the decision of the court of appeals stands. For other litigants, inconsistent approaches to causation issues in the various circuits could lead to anomalous and inconsistent results, depending upon where a Section 2 case is brought.

2. The holding of the court of appeals is also at odds with the Third Circuit's recent decision in *Broadcom Corp.* v. *Qualcomm Inc.*, 501 F.3d 297 (3d Cir. 2007). In *Broadcom*, the Third Circuit, adopting the Commission's reasoning in the present case, *id*. at 311, ruled that allegations that a patent holder deceived an SSO about the terms on which it would license its technologies stated a cause of action under Section 2. *Id*. at 314. Rejecting a district court's conclusion that a RAND commitment lost due to a defendant's deception is not a proper basis for antitrust liability, the Third Circuit ruled that, in the context of SSO deliberations, misrepresentations regarding the cost of implementing a given technology harm the competition to become the standard and increase the likelihood that patent rights will confer monopoly power on the patent holder. *Id.* at 313-14. The Third Circuit highlighted the role of RAND commitments as part of this competitive process. Specifically, it reasoned, RAND commitments are a "key indicator" of the cost of implementing a potential technology and, therefore, in the "critical period" that precedes adoption of a standard, efforts to obscure that information interfere with a properly functioning price-setting mechanism. *Id.* at 313. Based on this analysis, the court in *Broadcom* concluded that a RAND commitment lost due to

deception is a proper basis for liability under Section 2. *Id.* at 313-314 (citing, *inter alia*, *Ind. Fed'n of Dentists*, 476 U.S. at 461-462).

The court below distinguished *Broadcom,* observing that it may have "rested on the argument that the deceit lured the SSO away from non-proprietary technology." Pet. App. 19a.[9] It is clear, however, that the Third Circuit viewed competitive harm in terms of the impact of Qualcomm's deceit on the competitive standard-setting process, and not – as the court below did – on the specific "but for" outcome of the SSO's choice. *Broadcom*, 501 F.3d at 308-314. This distinction is the crux of the court of appeals' rejection of the Commission's decision in the present case. By contrast to the court in *Broadcom*, the court of appeals failed to recognize that JEDEC's choice of

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[9] *Broadcom* involved an appeal from an order granting the defendant's motion to dismiss the action on the pleadings. The complaint at issue alleged that an SSO relied upon an SSO participant's false promise in choosing a technology, a reliance that the Third Circuit noted but did not deem determinative. *Broadcom*, 501 F.3d at 314, 315. Nowhere does the Third Circuit suggest that deception must be the "sole" or "but for" cause of the SSO's choice. In fact, the opinion says that deception can be anticompetitive in the SSO context because it "increas[es] the *likelihood* that patent rights will confer monopoly power on the patent holder." *Id.* at 314 (emphasis added). Despite the differences in the procedural status of the two matters, the Third Circuit and the Commission agree that, for Section 2 purposes, competitive harm in a standard-setting context must be determined by assessing the impact of the challenged conduct on the competitive process of technology selection. *Id*. at 308-314.

Rambus patented technologies, without an *ex ante* RAND commitment, would be anticompetitive in effect because it would eliminate the protection against *ex post* patent hold-up afforded by JEDEC's competitive process. The court rejected *Broadcom* "to the extent that it 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) * * *." Pet. App. 19a. According to the court of appeals, such a reading of Section 2 "conflicts with *NYNEX*." *Ibid.*

Antitrust law is thus confronted with an inconsistent set of rules. The conflict cuts to the core of the analysis of harm to the competitive process, and threatens particular confusion regarding the conduct of participants in industry-wide standard-setting.[10] This uncertainty – and the risk that SSOs will be viewed as vehicles for patent holders to manipulate the standard-setting process to obtain supracompetitive royalties – inevitably will discourage participation in standard-setting proceedings.[11] More broadly,

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[10] The legal rules that govern a private SSO's decision to adopt standards in which private parties hold intellectual property rights are "critical for the long-run prospects of the economy." Daniel G. Swanson & William J. Baumol, *Reasonable and Nondiscriminatory (RAND) Royalties, Standards Selection, and Control of Market Power*, 73 Antitrust L. J. 1(2005).

[11] The Commission recognized this, citing a contemporaneous letter of a JEDEC member, saying that such conduct "'can destroy

however, the court of appeals' erroneous failure to recognize harm to the competitive process abrogates fundamental principles of Section 2 jurisprudence, thereby placing undue limitations on Section 2 claims, and will therefore ultimately harm consumers. Review by this Court is merited.

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the work of JEDEC. If we have companies leading us into their patent collection plates, then we will no longer have companies willing to join the work of creating standards.'" Pet. App. 67a & n.120.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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