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 CIRCUIT

BRIEF OF *AMICI CURIAE* AMERICAN ANTITRUST INSTITUTE, CONSUMER FEDERATION OF AMERICA AND PUBLIC PATENT FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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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.

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INTEREST OF *AMICI CURIAE*

The American Antitrust Institute ("AAI") is a non-profit education, research and advocacy organization. Its mission is to advance the role of competition in the economy, protect consumers, and sustain the vitality of the antitrust laws. The Consumer Federation of America ("CFA") is the nation's largest consumer-advocacy group, with over 280 state and local affiliates representing consumer, senior citizen, low income, labor, farm, public power and cooperative organizations and more than 50 million individual members. The Public Patent Foundation, Inc. ("PPF") is a not-for-profit legal services organization that represents the public interest in the patent system, particularly against the harms caused by undeserved patents and unsound patent policy.

Each of these organizations (collectively, "*Amici*") regularly advocates on competition issues. *Amici* respectfully submit this brief because they believe that the court of appeals has made significant errors of law which, unless reversed, will effectively sanction exclusionary conduct in standard setting. This outcome would have unfortunate anticompetitive effects on consumers in the form of higher prices, reduced output and fewer benefits from innovation – all of which effects antitrust law is intended to prevent for the benefit of consumer welfare.[1]

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[1] Pursuant to this Court's Rule 37, *Amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than *Amici* or their counsel made a monetary contribution to the preparation or submission of the brief. Counsel of record for all parties were timely notified 10 days prior to filing. The written consent of the respondent to the filing of this brief is on file with the Clerk; the petitioner's consent letter is being filed herewith.

SUMMARY OF ARGUMENT

Standard setting pervades modern life. Our 21st century economy critically depends on its proper, reliable functioning. It affects a broad spectrum of matters, including safety, security, health and technology of all kinds; the list is virtually endless. Abuse of standard-setting processes through deception can undermine the procompetitive benefits and efficiencies from properly conducted standard setting and cause serious harm to competition and consumers, as demonstrated by this and other cases.

Amici endorse the arguments of the FTC and other *amici* addressing the errors of law made by the court of appeals. Unless reversed, its decision will encourage firms to engage in standard-setting distortions and will sow uncertainty throughout standard setting, as practiced both by private and government standard-setting organizations. This uncertainty will not only foster a more permissive standard-setting environment in which violations of standard-setting disclosure and licensing rules are likely to multiply, but also will undermine the activity of standard setting itself, as participants begin to decide that the inefficiencies outweigh the benefits and shun organized standard setting. Consumers, whose interests *Amici* principally represent in this matter, will thus be doubly harmed: standard-setting misconduct will raise the price of products used by millions of consumers in industries dependent on standard setting, and consumers will be deprived of the significant innovations and other efficiencies normally achieved by standard setting as this activity declines.

Private non-antitrust remedies are not an adequate substitute for government antitrust remedies because standard-setting participants who are victimized by abuses of the process lack the resources, legal tools and incentives to vindicate fully the public's interests in undistorted standard setting.

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REASONS FOR GRANTING THE PETITION

I. DISTORTIONS OF STANDARD SETTING CAUSE SIGNIFICANT ANTICOMPETITIVE AND CONSUMER HARM

Consumers rely on standards for thousands of products in their daily life. Standards are necessary for products to interconnect effectively, for the development of new products, and for the creation of new technologies. Standard-setting organizations ("SSOs"), which number in the thousands in the United States alone, are particularly important in high technology markets such as communications and computer hardware, including the computer memory technology at issue in this case.

As Professor Mark Lemley, one of the leading authorities on standard setting, concludes, "standardization has significant consumer benefits in many markets." Mark A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 Cal. L. Rev. 1889, 1896 (2002). And as the Commission stated in this case, "[c]ourts and commentators long have recognized that a fair, honest, and consensus-based standard-setting process can be beneficial to consumers, while substantial competitive concerns may arise when the standard-setting choices of the SSO's participants are distorted." Pet. App. 186a (citing *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500-501, 510 (1988) and 2 Hovenkamp et al., *IP and Antitrust*, §§ 35.4(a)(4), 35.5 (2006 Supp.)).

If the reasoning of the court of appeals in this case is not rejected, firms engaging in patent hold-up, like Rambus, henceforth undeterred by potential liability under Section 2, could cause extensive and varied anticompetitive harm. In the upstream technology market, collaborative standard setting that rests on competitive technology selection can function as an efficient substitute for the selection of interoperable technologies through direct market competition among proprietary technology rivals. Deceptive conduct can directly impair the efficient operation of the standard-setting process by depriving SSO participants of information needed to select the optimal technology, based on an evaluation of costs as well as benefits. Deceptive manipulation of standard setting can also harm competition in the downstream goods market. Unexpected licensing terms that contradict representations made during the standard-setting process might lead to licensing disputes that delay adoption and implementation of the standard in the downstream market; competition might be hampered as fewer market participants might choose to compete given higher-than-expected costs due to lock-in and switching costs; and higher licensing costs might cause standards-compliant goods to compete less effectively against goods that utilize rival technologies.

These types of anticompetitive harm in upstream technology markets and downstream goods markets invariably translate into consumer harm. The harm most often stems from violations of licensing (and, as in this case, disclosure) rules. Despite individual variations in SSO licensing and disclosure rules, SSOs typically require that participants agree to license any of their intellectual property that is "relevant," "essential" or that may otherwise "relate to" standards developed by the organization, on reasonable and non-discriminatory ("RAND") terms.[2] Unless the court's reasoning is rejected, opportunistic firms will more likely be able to evade SSO RAND or other licensing commitments and thereby charge unreasonable royalties and discriminate among licensees (e.g., discriminating against disfavored rivals). This in turn would raise prices and the costs of standards-compliant products. In addition, freed from antitrust impediments, such firms could impose a range of non-price terms, such as overly broad grantback demands – e.g., requiring licensees to license back royalty-free to the licensor all patents that they hold or will hold in the future, whether or not related to the standardized technology – and non-assertion clauses intended to prevent licensees from asserting their own

[2] Although "RAND" does not specify a price term, it has been relied upon by numerous SSOs as a framework for ex ante competition for standards and as a consensual basis for subsequent licensing fees and terms charged by the patentee whose intellectual property is adopted as a standard. *See*, *e.g.*, Lemley, *supra*, at 1913 (noting that RAND licensing is "one of the most common requirements SSOs impose" on owners of intellectual property who take part in standard setting).

intellectual property claims back against the licensor. Such terms impose significant constraints on competition and have been the focus of antitrust enforcement by, and are a continuing concern for, the DOJ and FTC. *See generally* U.S. Dep't of Justice & Fed. Trade Comm'n, *Antirust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* 92-93, 101 (2007).

It is therefore important to take the full measure of the consumer harm that may result from deceptive manipulation of standard setting in concrete terms and dimensions. And there should be no misapprehension about the magnitude of such harm. The body of case law on standard-setting abuse is growing and offers examples.[3]

- *Rambus.* The facts in *Rambus* itself illustrate the range and depth of consumer harm from deceptive manipulation of standard setting. First, Rambus contended before the Commission that "even if its conduct distorted the

[3] Before reviewing some examples of such harm, it should be noted that monopolization by its essence harms competition; thus, although *Amici* submit this brief principally to highlight actual anticompetitive effects of deceptive or other manipulation of standard setting, they stress that a factual finding of concrete anticompetitive effects from the alleged exclusionary conduct – e.g., increased prices and/or decreased output – is not necessary as a matter of law to a finding of monopolization. Here, for instance, Rambus argued before the Commission that its conduct had no anticompetitive effects because its royalty rates were "reasonable." Pet. App. 218a. But the Commission correctly pointed out, citing the court of appeals' own decision in the government's monopolization case against Microsoft, that "[d]eceptive conduct that confers durable market power by its essence harms competition, and claims that the offender has not yet behaved like a monopolist provide no shelter." *Id.* at 219a (citing, *inter alia*, *United States v. Microsoft Corp.*, 253 F.3d 34, 56-58, 76-77 (D.C. Cir. 2001)).

decisionmaking process at JEDEC, that did not have the effect of harming competition because the interests of JEDEC and its members were not necessarily aligned with the interests of the public as a whole." Pet. App. 186a. Rejecting this contention, the Commission found that:

> JEDEC comprises a broad range of industry participants – including, most importantly, the principal purchasers of both DRAM technologies and DRAMS. The technology choices made by the JEDEC members during the standard-setting process reflect the opinions of virtually the entire spectrum of economic actors who are directly impacted by JEDEC's standard-setting decisions.

Id. The effects of Rambus's conduct have therefore been widespread in the industry.

Second, as a corollary to Rambus's argument that any deception on its part resulted only in increased prices of technology, and that this did not constitute exclusionary conduct under Section 2 of the Sherman Act, Rambus contended before the Commission that "the royalties paid by DRAM manufacturers are mere wealth transfers, suggesting that the royalties impose only private costs that are irrelevant to overall social welfare." Pet. App. 217a. The Commission properly rejected this argument, explaining that it "fails to acknowledge any decline in DRAM output that might result from higher DRAM prices [, . . . and that r]educed output would constitute a deadweight loss that decreases overall social welfare and raises competitive concerns . . . ." *Id.* And, indeed, the Commission found that Rambus's conduct would result in higher DRAM prices and reduced output: thus, the Commission cited testimony by Complaint Counsel's economic expert that "(1) Rambus's conduct had substantially increased price in the relevant technology markets and (2) 'in the long run . . . those royalty costs would be passed on to consumers' with 'the effect of lowering output in the downstream DRAM market' and 'the effect of increasing the price.'" *Id.* n.622 (quoting testimony of R. Preston McAfee). The FTC's economic expert explained that "in the long run, higher royalty costs will lead to less DRAM production capacity and higher DRAM prices." *Id.* (citing evidence that Hyundai, a DRAM manufacturer, stated that "they pass on license fees and royalties to their customers" and that its DRAM prices to customers were a function of production costs).

Third, Rambus argued that its conduct had no anticompetitive effect because its royalty rates were reasonable. Pet. App. 218a. The Commission found, however, based on "substantial record evidence," that its rates were not reasonable. *Id.* n. 624. For instance, Rambus charged at least a 3.5% royalty on its DDR SDRAM technology, one of the subjects of its alleged concealment from JEDEC, whereas it generally has negotiated royalties between 1% and 2% for RDRAM (which also "cover all four of the technologies at issue in this proceeding, as well as additional proprietary technologies") – royalties that were "negotiated . . . in a setting in which licensees were aware of Rambus's patent position from the start, and consequently, were sheltered from hold-up." *Id.*

Fourth, anticompetitive harm from deceptive manipulation of standard setting may also take the form of increased switching costs after an industry has become 'locked in' to the use of a particular technology as the result of standardization. In *Rambus*, for instance, the Commission found that by the time Rambus revealed its intention to seek royalties on its technology, DRAM suppliers would have had to invest hundreds of millions of dollars to switch to alternative, non-infringing DRAM technologies. Furthermore, based on record evidence, the FTC concluded that the switching costs of producers of complementary goods, such as memory controllers, memory modules and motherboards, which must be compatible with industry-standard DRAM, would exceed those of the DRAM manufacturers. *See* Pet. App. 198a-201a. It should go without saying that such switching costs would ultimately be passed on to end-user consumers, who thereby would have to absorb the extra cost of Rambus's deception.

- *Unocal.* The FTC's case against Union Oil Co. of California further illustrates the extent of consumer harm from abuse of standard setting, in this instance also from deception. *In re Union Oil Co. of California* 138 F.T.C. 1, 2003 FTC LEXIS 19, *92 (Complaint) ("*Unocal*"). The FTC alleged that Unocal illegally acquired monopoly power in the technology market for reformulated gasoline ("RFG") by misrepresenting before the California Air Resources Board ("CARB") and standard-setting groups that its research was in the public domain. *Id.* at *92-93. The FTC alleged that at the same time, Unocal failed to disclose that it had pending patent claims on this research and that it intended to assert its proprietary claims in the future, once CARB incorporated the research into reformulated regulations. *Id.* at *93-94. This alleged deception – Unocal's intentionally creating the false and misleading impression that it had relinquished and would not enforce any relevant proprietary interests – allegedly enabled the company to obtain monopoly power for the technology to produce and supply California 'summertime' RFG and to charge exorbitant royalties. *Id.* at *94.

In *Unocal*, the FTC alleged that, "[b]ut for Unocal's fraud, [either] CARB would not have adopted RFG regulations that substantially overlapped with Unocal's patent claims [or] the terms on which Unocal was later able to enforce its proprietary interest would have been substantially different . . . or both." 2003 FTC LEXIS 19 at *114. In other words, had Unocal not engaged in fraud, CARB either would not have adopted the technology or Unocal would have negotiated away its monopoly power in the form of lower royalties. Significantly, this allegation by the FTC in *Unocal* is in substance the same "syllogism" – to use the term used below – that set the stage for the court of appeals' decision below, where the FTC acknowledged that but for Rambus's deception, JEDEC either would not have adopted a standard incorporating Rambus's claims (but instead an alternative standard, or no standard at all) or JEDEC would have extracted a RAND commitment from Rambus (but that the FTC could not rule with certainty which of these alternatives JEDEC would have chosen). Presumably, then, the court of appeals would have viewed *Unocal* as resting on the same "unjustified" assertion of anticompetitive harm as the court of appeals identified in this case. As a result, under the court of appeals' flawed rationale, the deceptive manipulation of the standard-setting process in *Unocal* would have escaped antitrust scrutiny.

Unocal offers a real world experiment showing the consumer harm that would have resulted in that case had the company's conduct been condoned under Section 2. Prior to the remedy, approximately 90% of the royalty charge was passed on to California consumers in the form of higher gas prices, according to Unocal's own expert. *See Unocal*, 2003 FTC LEXIS 19 at *96. The case was resolved in 2005 with a consent order in which Unocal agreed to cease enforcement of its patents. *See* Statement of the Federal Trade Commission, *In re Union Oil Co. of California*, Dkt. No. 9305 (June 10, 2005), *available at* http://www.ftc.gov/os/adjpro/d9305/050610statement 9305.pdf. The FTC estimated that, going forward, consumers would save over $500 million annually because of its enforcement action. *Id.*

The anticompetitive harm prevented by the FTC's intervention on antitrust grounds may also be viewed in terms of the higher cost that refiners would have had to pay in order to comply with the CARB reformulated gasoline (RFG) standard, over which Unocal asserted proprietary rights based on its patents, rather than an alternative EPA RFG standard. Evidence indicated that the EPA standard, under development at the time, was a feasible alternative. Based on evidence presented by an FTC technical expert, it has been calculated that the eight leading refiners in California would have borne additional capital costs of $1.5 billion to comply with CARB's RFG regulations, as compared with the capital cost they would have incurred to comply with the EPA rules. *See* Joseph Farrell et al., *Standard Setting, Patents, and Hold-Up*, 74 Antitrust L.J. 603, 619-21 (2007) (citing report of FTC technical expert).

- *Broadcom/Qualcomm*. Another example of the type of conduct at issue both in this case and in *Unocal* is evidenced in the litigation between Broadcom and Qualcomm, in which the Third Circuit held that Broadcom had stated a Section 2 claim based on Qualcomm's alleged patent ambush in making a false commitment to license on fair, reasonable, and non-discriminatory ("FRAND") terms. *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 314 (3d Cir. 2007).[4] It has been estimated that Qualcomm royalty rates of as much as five percent will have caused purchasers of "3G WCDMA/UMTS" mobile telephones worldwide to pay more than $6 billion more than they would have paid had

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[4] Specifically, Broadcom contended that Qualcomm violated its FRAND commitment after Broadcom sought a license from Qualcomm for the use of patents essential to WCDMA mobile wireless technology and the UMTS standard at issue. The case offers an example of the assertion of alleged discriminatory license terms against a disfavored rival: Broadcom competed with Qualcomm in the manufacture of UMTS chipsets and Qualcomm controlled the rights to the patents necessary for Broadcom to manufacture them. According to the complaint, examples of Qualcomm's alleged refusal to license its patents on FRAND terms included its demands for (1) royalties on unpatented components, (2) non-reciprocal patent rights, (3) double-royalties, (4) excessive royalty rates, and (4) anticompetitive information exchanges from potential UMTS licensees. *See Broadcom Corp. v. Qualcomm, Inc.*, 2006 U.S. Dist. LEXIS 62090, at *6-7 (D.N.J. 2006) (citing amended complaint), *aff'd in part and rev'd in part,* 501 F.3d 297 (3d Cir. 2007).

Qualcomm licensed its technology on FRAND terms for the period 2003-2012.[5]

II. THE COURT OF APPEALS' DECISION INCREASES THE LIKELIHOOD OF DECEPTIVE MANIPULATION OF STANDARD SETTING

Amici agree with the Commission that the court of appeals erred by applying an overly strict standard of causation that requires the Commission to show that "but for" the deceptive conduct the standard-setting organization would have chosen a different standard, and by failing to recognize that the avoidance of a RAND commitment is itself an anticompetitive harm which may confer monopoly power. In this section *Amici* briefly elaborate on the reasons why the court of appeals' decision on these points is erroneous.[6] The twin errors of the court of appeals make it less likely that Section 2 could be used to police anticompetitive abuses in the standard-setting process, and thereby increase the likelihood that such abuses will occur – to the

[5] *See* Matthew Newman, *Qualcomm Rivals Say Fees Mean Billions in Overcharges*, San Diego Daily Transcript (Oct. 9, 2008), *available at* www.sddt.com/Search/article.cfm?SourceCode=20081009fam (reporting on submission to the European Union competition authority by various Qualcomm competitors and wireless manufacturers, including Broadcom, Texas Instruments, Ericsson and NEC Corp., and quoting one source that a reasonable royalty would be one percent instead of five percent).

[6] *See also* David Balto & Richard Wolfram, *It's Not Over Until It's Over*, Global Competition Review (May 20, 2008), *available at* http://www.globalcompetitionreview.com/news/free/article/9923/comment-rambus-v-ftc/ (identifying and analyzing errors in the decision of the court of appeals).

detriment of the competitive process and consumers. The court of appeals' decision will particularly hamper future Section 2 enforcement by the FTC in cases of deceptive manipulation of standard setting, as appeals against the FTC can generally be brought in the D.C. Circuit. *See* 15 U.S.C. § 45(c). The Antitrust Division of the Department of Justice and private litigants would continue to face a circuit split between the Third Circuit (*Broadcom v. Qualcomm*, 501 F. 3d 297 (3d Cir. 2007)) and the D.C. Circuit, albeit with a heightened risk that other circuits might follow the influential D.C. Circuit. [7]

A. The Court of Appeals Applied an Overly Strict Standard of Causation

The court of appeals held that "'an antitrust plaintiff must establish that the standard-setting organization would not have adopted the standard in question but for the misrepresentation or omission.'" *Rambus Inc. v. Federal Trade Commission*, 522 F.3d 456, 466 (D.C. Cir. 2008) (quoting 2 Hovenkamp et al., *IP & Antitrust* § 35.5 at 35-45

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[7] *Amici* recognize that in some cases the Court may consider it appropriate to await further ripening of a split among the circuits before granting certiorari to decide a particular issue. Here, however, based on the decision below, the FTC would be so hampered in pursuing deceptive manipulation of standard setting under Section 2 in the D.C. Circuit that awaiting such further ripening would leave consumers and the public interest especially unprotected.

(Supp. 2008)).[8] By holding that the FTC must demonstrate what would have occurred "but for" Rambus's deceptive conduct – i.e., whether JEDEC would have adopted an alternative technology or "merely" required a RAND commitment from Rambus – the court imposed a standard of causation on the government in monopolization actions that is far more strict than the "reasonably appears capable of making a significant contribution" standard endorsed by six federal circuit courts of appeal, including the D.C. Circuit itself in its *en banc* decision in *United States v. Microsoft*, 253 F.3d 34, 79 (D.C. Cir. 2001).[9] Moreover, the "but for" standard is inconsistent with this Court's decision in *Standard Oil Co. of California v. United States*, 337 U.S. 213, 309-10 (1949), where the Court explained:

> to demand that bare inference be supported by evidence as to what would have happened but for the practice that

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[8] Hovenkamp et al. also states, however, that "[i]f 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." 2 Hovenkamp et al., *IP & Antitrust* § 35.5 at 35-46 – 35-47 (Supp. 2008). The treatise adds that "[t]his was the conclusion in the FTC's *Rambus* decision" and "[a]ssuming the facts the FTC found were correct, we think it is well-supported as a matter of law." *Id.* at 35-47, n.22.5. *See* discussion at II B, *infra*.

[9] *See, e.g., Taylor Publ'g Co. v. Jostens, Inc.*, 216 F.3d 465, 475 (5th Cir. 2000); *PSI Repair Servs., Inc. v. Honeywell, Inc.*, 104 F.3d 811, 822 (6th Cir. 1997); *Morgan v. Ponder*, 892 F.2d 1355, 1363 (8th Cir. 1989); *Instructional Sys. Dev. Corp. v. Aetna Cas. & Sur. Co.*, 817 F.2d 639, 649 (10th Cir. 1987); *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 230 (1st Cir. 1983) (Breyer, J.).

> was in fact adopted or to require firm prediction of an increase of competition as a probable result of ordering the abandonment of the practice would be a standard of proof, if not virtually impossible to meet, at least most ill-suited for ascertainment by courts.

The "but for" standard sets the bar too high, given the difficulty of establishing with confidence the chain of causation in monopolization – and this rationale applies with even more reason to an injunctive action by the government based on a claim of monopolization.

As the Areeda & Hovenkamp treatise observes,

> Because 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 exclusionary act to the presence of monopoly. And so it is sometimes said that doubts should be resolved against the person whose behavior created the problem.

3 Philip Areeda & Herbert Hovenkamp, *Antitrust Law*, ¶ 651g (3d ed. 2008).

Under the court of appeals' reasoning, Section 2 monopolization cases for deceptive manipulation of standard setting could be brought only where the government could reconstruct what would have occurred in the inherently uncertain counterfactual world and determine that an SSO would have adopted an alternative technology. Given that one of the essential purposes of an SSO is to ensure that any technology that is selected is subject to RAND (or even royalty-free) licensing, it may well be difficult to disprove the alternative possibility that but for the deception, the deceiver's technology would have been selected in any event – but subject to the RAND commitment that the deceiver has sought to avoid.

Moreover, the court of appeals attaches no limiting principle to its higher burden on causation: it did not say that it applies only in the case of standard setting in circumstances similar to those in *Rambus*. The court's demanding "but for" standard therefore arguably could apply to any monopolization action. This result, which is inconsistent with controlling and other precedent, could severely impair all government monopolization enforcement under Section 2 of the Sherman Act and allow significant consumer harm to go unredressed.

B. The Court of Appeals Failed to Recognize That Deception That Enables the Avoidance of a RAND Commitment Facilitates the Acquisition of Monopoly Power

The court of appeals also erred in failing to understand how deception can be used to acquire monopoly power in standard setting. *Amici* agree with the FTC that deceptively avoiding imposition of a RAND commitment, by failing to disclose intellectual property relevant to the standard, facilitates the acquisition of monopoly power and causes anticompetitive harm.

It is immaterial to a claim of monopolization that the FTC could not prove that, but for Rambus's deception, JEDEC would have adopted an alternative technology for the standard rather than have obtained a RAND commitment from Rambus. Rambus's deceptive non-disclosure distorted the competitive process for the standard, wherein SSO participants considered ex ante pricing assurances and other technological factors in deciding on a standard. Under the particular rules of JEDEC, participants were required to disclose their intellectual property relevant to the standard and then commit, upon demand, to license that IP on RAND terms in exchange for the SSO's possible inclusion of that IP in the standard. If a participant refused, upon disclosure and demand, to make a RAND commitment, *then JEDEC prohibited incorporating its relevant IP into the standard*. *See* Pet. App. 114a. The clear purpose of this rule – to ensure competition for the standard on price, technology and all other relevant factors – undercuts the court of appeals' reasoning that competition is undiminished if deception merely allowed Rambus to charge a higher royalty than if it had made the required disclosure.

Rambus acquired monopoly power by virtue of its deceptive non-disclosure; had it made the necessary disclosure, it would have been asked to provide a RAND assurance, and by providing that assurance, it would have negotiated away the monopoly power that was instead conferred on it. And had it not deceptively failed to disclose its relevant IP interests, and then refused to make a RAND licensing commitment, it would have triggered the JEDEC prohibition against incorporating a participant's technology in a standard if it refuses to make the licensing commitment. Thus, in neither case would Rambus have obtained monopoly power. Only by 'gaming' the rules for competition for the standard was Rambus able to obtain monopoly power – not on the merits, but through deception.

III. PRIVATE NON-ANTITRUST REMEDIES ARE NOT ADEQUATE TO POLICE DECEPTIVE MANIPULATION OF STANDARD-SETTING

The court of appeals' decision substantially limits the opportunity of private litigants and the government to obtain antitrust redress of deceptive manipulation of standard setting. The effect on government enforcement is particularly troubling because consumers critically depend on the government to protect their interests through Section 2 enforcement in this area.

Private litigation is already an imperfect substitute for government enforcement with respect to the type of conduct at issue in this case for a number of reasons:

First, the interests of the firms facing abusive license demands do not always coincide entirely with the interests of consumers. As noted above, firms may be able to pass on license fees into end product prices and may be willing to do so as long as they do not pay a fee higher than their rivals. "[W]hen a standard used in a fairly competitive industry is subject to *uniform* hold-up [as here, and as distinguished from hold-up of a single firm], direct buyers may bear little of the costs, which falls primarily on final consumers."[10] And as indirect purchasers, end-user consumers would have no claim for antitrust damages in federal court. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). Thus, "private litigation may not vindicate the same set of public interests that are addressed by [government enforcement of] the Sherman Act or Section 5 of the FTC Act." Alden F. Abbott & Theodore A. Gebhard, *Standard-Setting Disclosure Policies: Evaluating Antitrust Concerns in Light of* Rambus, Antitrust, Summer 2002, at 29, 33.

Second, the firms facing such licensing demands may have a variety of arrangements with the firm engaging in the opportunistic conduct and such arrangements may contradict and outweigh the incentive to attack this opportunistic conduct. Practitioners in private antitrust litigation often observe that the "small victims" in the market bring these cases because the larger victims may have a variety of arrangements with the antitrust violator that they do not want to place at risk.

Third, the non-antitrust legal remedies for the firms facing licensing demands may be inadequate.

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[10] Joseph Farrell et al., *supra*, at 645. As the authors explain, the reason for this is that "[i]f each direct buyer knows that its rivals are paying as high a royalty as it is, pass-through can largely immunize it against economic loss from high running royalties. Thus, the direct buyers, who might otherwise be the best guardians against gratuitous insertion of patents in standards, or against excessive royalties from such patents, may bear very little of the harm. . . . Thus, consumers are not, in general, well protected by the self-interest of direct technology buyers." *Id.*

As former FTC Competition Bureau Director Creighton has observed, business torts for fraud and other claims are not necessarily well-designed to protect the competitive process. *See* Susan A. Creighton *et al.*, *Cheap Exclusion*, 72 Antitrust L.J. 975, 993-94 (2005). In the standard-setting area in particular, because of collective action and free-rider problems, and possible defenses not available in a government action, "standard-setting participants, victims though they may be, [are] imperfect substitutes for government antitrust enforcement." *Id.* at 994.

Fourth, the firms subject to the licensing demand may not have the resources or assets necessary to vindicate their rights in court. As the *amicus curiae* brief of the SSOs points out, SSOs themselves have little ability to engage in litigation to police abuses of the standard-setting process. *See* Brief of *Amici Curiae* in Support of Petition for Writ of Certiorari of Advanced Media Workflow Association (AMWA) et al. 26-28. Moreover, the firms making the licensing demands may initially focus on relatively weak market participants, hoping to extract a favorable settlement from those unable to mount the litigation battle. Some firms may have no choice but to capitulate to the anticompetitive conduct, the cost of which may eventually be passed on to the end consumer.

Finally, the firms facing licensing demands may also hold patents essential to the standard and be in a position to profit from engaging in comparable opportunistic conduct. In other words, those who are best positioned to bring a private cause of action may prefer to divide the "monopoly spoils" with other essential patent holders by also engaging in opportunistic conduct, as this may be a more profitable strategy than filing a lawsuit to rein in the conduct of others.

In short, the decision below threatens to seriously impair antitrust enforcement against standard-setting abuse, and private litigants, armed only with business torts or other non-antitrust remedies, would be unlikely to vindicate the public interest.

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CONCLUSION

In order to deter firms from acquiring monopoly power through deception in the standard-setting process and to prevent significant resulting consumer harm, *Amici* urge the Court to grant the petition and reverse the judgment of the court of appeals.

Respectfully submitted,

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