UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

DOCKET NO. 9302

IN THE MATTER OF

RAMBUS INCORPORATED

BRIEF *AMICUS CURIAE* OF

CITIZENS FOR VOLUNTARY TRADE

[PUBLIC]

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June 2, 2004

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INTEREST OF AMICUS CURIAE

CVT is a nonprofit, nonpartisan educational organization that applies free market principles and rational ethics to contemporary antitrust issues through filings with federal courts and agencies, policy papers, public commentaries, and a website (www.voluntarytrade.org). CVT scrutinizes the activities of the Federal Trade Commission and the Department of Justice which pertain to the enforcement of the antitrust laws. Since its founding in 2002, CVT and its officers have filed more than 20 formal comments and briefs in response to government antitrust cases.

CVT and its supporters have a common interest in the systematic and consistent application of the United States Constitution and the principles of the Declaration of Independence. Expansion of the antitrust laws—particularly Section 5 of the Federal Trade Commission Act—to include the nullification of lawfully-obtained patents poses a substantial threat to property rights guaranteed by the Constitution. More importantly, the economic and ethical principles used by the Commission in deciding this case will affect the future protection of all constitutional rights. Accordingly, CVT has a direct interest in ensuring that the Commission considers pro-reason, pro-capitalism viewpoints before rendering a final decision. CVT is confidant that the Commission will benefit from considering such views.

This brief presents a philosophical framework for analyzing and affirming the Initial Decision. CVT does not seek to introduce additional evidence into the already-substantial record, but rather to prompt philosophically-informed analysis of the key facts and arguments of the case from the perspective of rational ethics. Neither the parties nor Judge McGuire engaged in such philosophical analysis. CVT's brief is an explicit discussion of the ethical premises that were implied in the Initial Decision.

ARGUMENT

The FTC's complaint against Rambus should have been dismissed in January 2003, when the U.S. Court of Appeals for the Federal Circuit reversed the trial court's verdict in *Rambus v. Infineon Technologies AG*[1], which provided the fraud judgment that formed the basis of the Commission's June 2002 complaint. Indeed, the FTC should not have filed a complaint against Rambus in the first place. The *Infineon* case and other private litigation provided a constitutional framework for determining the proper scope of Rambus' intellectual property rights with reference to the JEDEC SDRAM standard. But the Commission insisted on pursuing a parallel, yet contradictory, course of litigation that leads to the current appeal of Judge McGuire's February 2004 order dismissing the Commission's complaint.

When the FTC issued its complaint in June 2002, Complaint Counsel likely believed it would quickly force Rambus to surrender without a hearing on FTC-dictated terms. More than 90% of FTC prosecutions end this way, but more importantly, Complaint Counsel could rely on the May 2001 *Infineon* verdict to show, almost effortlessly, that Rambus had committed fraud by manipulating JEDEC's patent-disclosure policy. Had the Federal Circuit not reversed that verdict, Rambus most likely would have settled with the Commission to save what was left of the company's intellectual property rights.

The Court of Appeals' decision put Complaint Counsel on the defensive. Having failed to secure a "default judgment" from Judge Timony against Rambus for the company's alleged document destruction, Complaint Counsel was forced, at trial before Judge McGuire, to argue in effect that reality was not real: That the facts underlying the Federal Circuit's decision exonerating Rambus' JEDEC-related conduct could now be re-interpreted to find the company guilty of antitrust violations under Section 5 of the FTC Act. While the criminal-law concept of

[1] 318 F.3d 1081 (Fed. Cir. 2003).

double jeopardy may not attach to the FTC's efforts, there is no doubt Complaint Counsel tried to take a second bite at the fraud apple in proceeding despite the Federal Circuit's clear and convincing opinion.

Now the Commission is faced with having to come up with an "exit strategy." Rambus has the offensive, so it won't settle. Overruling Judge McGuire's Initial Decision risks an onerous fight in the appellate courts that would expose the Commission's case as a political sham. And affirming the Decision would be an admission of defeat that would compromise the Commission's agenda of expanding antitrust's control over patent and intellectual property law.

Faced with such a choice, we respectfully submit that the best option is to act with integrity and admit error. The Commission must recognize Complaint Counsel's absolute failure to prove that Rambus committed an *objectively* illegal act. Far from meeting Complaint Counsel's—and various *amici's*—goal of using this case to clarify and expand Section 5's jurisdiction over conduct within standard-setting organizations, the Commission should acknowledge that the policy chaos that is antitrust cannot govern the private contractual relationships at the core of groups like JEDEC. Indeed, an honest assessment of the case unambiguously shows that antitrust has extended and exacerbated the Rambus-JEDEC dispute without bringing an iota of stability, certainty, or integrity to the DRAM market.

But beyond a broad policy failure, this proceeding demonstrates that bad ideas applied capriciously will corrupt the free market. Most of the analysis presented to the Commission, especially through other *amicus* briefs, has focused on the alleged necessity of standard-setting organizations within the technology industry. For the Commission to rule with a semblance of integrity in this case, it must first look at the *ideas*—the philosophy—underlying Complaint

Counsel's arguments. Only then will a final decision, against or for Rambus, rise above the policy chaos to command the public's respect.

Below, we will examine the ideas of this case in the context of three branches of philosophy—economics, politics, and ethics. Our examination of each branch will focus on the fundamental questions that attend FTC proceedings: (1) What is the "public interest" and (2) what result will serve it best? Having stated our view that the complaint against Rambus should have been dismissed before trial, the answer to the second prong of that question is obvious. But the answer to the first prong requires a comprehensive examination of ideas, beginning with the *economics* of the case.

I. The Commission should not impose its own economic preferences on the DRAM market, nor attempt to choose between the competing Rambus and JEDEC business models.

The subject of this case is Rambus' alleged violations of JEDEC policy. But the *theme* of this case, from the standpoint of economics, is the conflict between the principals' business models. Without that conflict, the particular events giving rise to the case would be mere footnotes to the history of the DRAM industry.

Rambus' founders decided not to operate within the traditional framework of the DRAM industry, i.e. manufacturing memory directly while cross-licensing patents through JEDEC to ensure uniform standards. Instead, Rambus challenged the incumbent DRAM manufacturers to innovate using Rambus' inventions. By relying solely on intellectual property-licensing, Rambus risked everything: If its ideas failed to produce, or if another firm came along later with better ideas, Rambus had nothing to fall back on. The risk, however, was accompanied by the prospect of great reward should Rambus' inventions prove to be the catalyst for revitalizing DRAM technology, which they were according to Judge McGuire's Initial Decision.

JEDEC, which is dominated by the incumbent manufacturers, clearly resented Rambus' intrusion into their sphere. The most notable expression of enmity came in a memo written by Infineon executive Willi Meyer in March 1994, which labeled Rambus a "deadly menace to the established computer industry," because Rambus' modular DRAM design could allow "any garage firm [to] build any computer."[2] Meyer suggested a number of alternatives available to Infineon (or presumably other incumbent manufacturers) for dealing with Rambus—outside of simply licensing the company's intellectual property. These alternatives ranged from buying Rambus and dumping it to making Rambus intellectual property "public domain" by incorporating it into a JEDEC standard. According to Rambus, that's exactly what happened, as JEDEC incorporated certain features of Rambus' proprietary RDRAM into the open-standard SDRAM. Thus, the two economic models collided head-on.

While the courts were still sorting the wreckage, the FTC entered insisting that JEDEC's open standard was the better economic model. Complaint Counsel's case is built around the premise that JEDEC has a presumptive right to incorporate whatever technology it wants into its open standards, while patent-holders like Rambus should make every effort to accommodate JEDEC's wishes. The economic reasoning behind this is the view, trumpeted by JEDEC and other *amici*, that standard-setting organizations are an essential component of a free market because they allow interoperability within industries, and thus benefit the "public" by creating uniform product standards. Rambus is thus forced to demonstrate why its intellectual property-based business model doesn't harm JEDEC's FTC-backed model.

In our experience with the FTC, it is clear that once the Commission has determined the "best" business model for a particular industry, all dissent is outlawed under a presumption of a Section 5 violation. For example, in health care policy, the Commission has long maintained

[2] ID ¶ 834.

that physicians must not be allowed jointly to contract with health care purchasers (i.e. health maintenance organizations) unless the physicians are organized according to a business model approved by the Commission. A physician group that deviates from the approved model faces a Section 5 prosecution for a *per se* violation of the antitrust laws, meaning that the physicians may not introduce evidence demonstrating that their business model actually generated "pro-competitive" effects.[3] The Commission thus prevents physicians from innovating without advance permission from the government.

In this case, Complaint Counsel makes the same argument: Standard-setting is a "pro-competitive" business model, and any firm that dissents and experiments with a different model is subject to Section 5 prosecution. The argument is bolstered by nearly all of the *amici* filed in support of Complaint Counsel (including the brief of the allegedly neutral American Antitrust Institute), which repeatedly emphasize the supremacy of the standard-setting business model over Rambus' intellectual property model.

As a matter of policy, the current FTC considers patents to be a necessary evil at best. In recent hearings on the intersection of intellectual property and antitrust, Commission members have made no effort to hide their mistrust of patents. Robert Pitofsky, a former FTC chairman, expressed the incumbent Commission's view that intellectual property is a growing menace to antitrust regulation: "It should be a matter of concern that patent applications and patent grants in the United States are at an all-time high, and the patent rate per dollar of R&D is the highest since 1977. Serious problems arise when either regime — intellectual property protection or antitrust — is accorded disproportionate weight."[4] In the next section, we will discuss the

[3] *See* Department of Justice and Federal Trade Commission, *Statements of Antitrust Enforcement Policy in Health Care* (available at http://www.ftc.gov/reports/hlth3s.htm).
[4] Robert Pitofsky, *Antitrust and Intellectual Property: Unresolved Issues at the Heart of the New Economcy*, Address to the Antitrust, Technology and Intellectual Property Conference (March 2, 2001) (available at http://www.ftc.gov/speeches/pitofsky/ipf301.htm).

alleged "imbalance" between intellectual property and antitrust in greater detail. But for now, let us turn to the proper role of patents in a free market.

The term "patent" itself is somewhat misleading. A patent, Justice Joseph Story once said, is short for *letters-patent*, an instrument whereby the government grants "some right, privilege, or property, to a person who is thence called the Patentee."[5] (Ballonoff 402.) Letters-patent were traditionally a device used by English monarchs to control economic activity through the grant of state-sanctioned monopolies. In 1624, the English Parliament, seeking to curb monarchical power, enacted the Statute of Monopolies, which voided all Royal patents, with an exception for those patents granted to bona fide inventors of new items or processes. Working from this Statute the American Framers provided that Congress "promote the Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[6] This was not, however, a grant of general patent power, as that term was under common law. The Framers deliberately refrained from using the word "patent" to describe Congress's limited, enumerated powers, because they did not want the federal government to control the content or structure of economic markets, but rather sought to eliminate state barriers that would impede trade among individuals living in different states.

Patents granted under Article I, therefore, deal *exclusively* with individual property rights, and not any "general welfare" grants. Rambus' inventions unquestionably fall within the Constitution's protection, because they constitute unique, useful applications of practical knowledge. The Patent and Trademark Office recognized as much when they issued the Rambus patents at issue in this proceeding.

[5] Paul A. Ballonoff, *Limits to Regulation Due to Interaction of the Patent and Commerce Clauses*, CATO JOURNAL, Vol. 20, No. 3, at 402.
[6] U.S. Const. art. I, § 8.

Rambus' patents, properly construed, extend only to the scope of the company's unique inventions. This does not, however, grant to Rambus a *monopoly* over particular markets or sub-markets impacted by the inventions. The complaint alleges that Rambus' patents constitute monopolies over four separate technology markets within the DRAM product. Judge McGuire found that Rambus held "market power" over the four markets, but that this power was acquired due to the superior quality of Rambus' inventions (and Intel's choice of those inventions), not anti-competitive or illegal conduct. While Judge McGuire's analysis reached the correct result, the methodology remains economically flawed. The issue of "market power" is wholly irrelevant to defining the scope of Rambus' property rights. "Market power" is in fact nothing more than a red herring designed to create the illusion of misconduct on Rambus' part without having to prove that the company committed an illegal act.

Without Rambus' efforts, the "markets" at issue would not exist. This, in and of itself, renders moot all "market power" or monopoly analyses. "Patents on new inventions . . . do *not* constitute monopolies," economist George Reisman explained:

> True enough, [patents] reserve markets, or parts of markets, to the exclusive possession of the owner of the patents . . . and they do so by means of the use of physical force insomuch as it is against the law to infringe on these rights.
>
> None of these rights represent monopoly, however, because none of them is supported by the *initiation* of physical force. In all of these cases, the government stands ready to use physical force in defense of a preexisting property right established either by an act of personal creation or by the fact of distinct identity.[7] (Italics in original.)

Rambus neither possessed a monopoly nor acted like a monopolist. Quite the opposite, Rambus' business model was designed to produce better technology at a lower price relative to existing DRAM standards. The royalty rates that Rambus sought were lower than those typical in the industry. The Rambus objective was unambiguous: Innovation.

[7] George Reisman, CAPITALISM: A TREATY ON ECONOMICS 388 (1990).

The DRAM industry, however, as represented by JEDEC, valued its control over DRAM standards more than innovation. Intel's 1996 decision to back Rambus' technology was viewed by the DRAM manufacturers as a shot across the bow, as evidenced by Hyundai executive Farhad Tabrizi's September 1996 e-mail predicting that Intel's backing of Rambus would result in DRAM manufacturers "becom[ing] a foundry for all Intel activities,"[8] meaning that Intel would exercise control over the DRAM market. This argument drops an important piece of context: Intel was driving the demand for Rambus' technology *because* the incumbent DRAM manufacturers had failed to develop faster technology. Rambus' very existence was due to the "memory bottleneck" created by the DRAM industry's failure to keep pace with advances in the speed of Intel microprocessors. If the DRAM companies were to become a "foundry" for Intel because of Rambus, they would have themselves to blame, not Intel and certainly not Rambus.

For all the alleged "pro-competitive" benefits of standard-setting organizations, the record compellingly demonstrates JEDEC's failure collectively to develop technology that was equal or superior to Rambus' intellectual property. It was standard-setting that opened the door for Rambus by creating a culture of complacency, if not mediocrity, within the DRAM industry. JEDEC's practice of cross-licensing patents among its members clearly discouraged research and development. When Rambus arrived with its intellectual-property based business model, JEDEC's members awoke from their slumbers for the purpose of destroying the "deadly menace" posed by Rambus' investments in R&D. The proof is in JEDEC's actions: First they refused to allow Rambus to present its proprietary technology for standardization; second, they attempted to incorporate elements of the Rambus technology into the "open" SDRAM standard; and third, the principal DRAM manufacturers conjured price and production estimates designed to discourage the development of RDRAM, while simultaneously selling DDR-DRAM (a

[8] ID ¶ 526.

successor of SDRAM) below cost to gain industry-wide acceptance of the JEDEC standard. The latter actions have instigated a Department of Justice antitrust investigation of the DRAM manufacturers for price-fixing.

Why then does the FTC insist that standard-setting groups are a better business model than proprietary intellectual property? Because despite its demonstrated flaws, and even potential antitrust violations, JEDEC's economic model is closer to the antitrust ideal of "pure and perfect competition," and thus is considered more deserving of the Commission's protection than is Rambus. The concept of "pure and perfect competition" is well-known to members of the antitrust community. When the FTC refers to "competition" generally, it means "pure and perfect competition," which is explained by George Reisman as "the means by which prices are driven down either to 'marginal cost' or to the point where they exceed 'marginal cost' by whatever premium is necessary to 'ration' the benefit of plant and equipment operating at full capacity."[9] According to Reisman, under this theory, competition must satisfy several conditions: "uniform products offered by all the sellers in the same industry, perfect knowledge, quantitative insignificance of each seller, no fear of retaliation by competitors in response to one's actions, constant changes in price, and perfect ease of investment and disinvestment."[10]

Complaint Counsel's case is predicated on the belief that JEDEC represents a purer, more perfect form of competition worthy of protection under the antitrust laws. Under this belief, JEDEC's objectively vague patent disclosure policy has been afforded substantially greater weight by Complaint Counsel than by either the Federal Circuit or Judge McGuire. Complaint Counsel sees an "ideal" world where all JEDEC members are to share relevant R&D with one another in the interests of creating uniform standards. A uniform standard means that all JEDEC

[9] Reisman at 430.
[10] *Id.*

members are to produce the same products based on the same information, thus leaving DRAM manufacturers to compete exclusively on price and output, the sole factors that the FTC generally considers when engaged in antitrust analysis. This explains why FTC lawyers strive to define extremely narrow markets in merger review cases—market slices that make little common sense (i.e. "superpremium ice cream.")[11] "Pure and perfect competition" requires a *homogenous* product market. A dynamic, heterogeneous product market would prove impossible to model based on price and output alone, thereby thwarting the Commission's efforts to micromanage "competition" in quantitative terms.

The Rambus business model fractured the previously-homogenous DRAM industry by providing capital interests outside the incumbent manufacturers' circle with a say in DRAM's future development. If successful, Rambus' technology would give rise to the creation of new DRAM manufacturers and spark greater research and development competition. But a "pure and perfect competition" model looks solely at market conditions as they presently exist, with no eye to what they may become in the future. In fact, FTC models often rely on static assumptions regarding markets, and that's the case here. Complaint Counsel assumes that JEDEC would have avoided incorporating Rambus patents had they been disclosed in advance, and that a standard without such patents would have been adopted by the industry merely because it was the JEDEC standard. This is classic steady-state thinking. To begin with, the underlying assumption is false, because JEDEC members—especially the DRAM manufacturers—knew about Rambus' patents well before the SDRAM and DDR-DRAM standards were adopted. Second, as Judge McGuire explained in detail, JEDEC would have incorporated Rambus technologies in its standards anyway, because Rambus technologies were superior. Third, and most importantly, Complaint Counsel assumes that JEDEC would have avoided the Rambus

[11] *See In re Nestlé Holdings, Inc., et al.* (FTC Docket No. 4082) (2003).

patents simply to avoid paying royalties. In other words, DRAM manufacturers would not knowingly, in Counsel's view, take steps that would potentially raise the price of their product.

Under the "pure and perfect competition" model, the ideal seller keeps prices equal or just above "marginal cost," meaning the cost of labor and materials needed to produce an additional unit of a given product, such as DRAM. "Marginal cost" views prices as a means of rationing scarce resources to meet consumer demand, not as the objective value assigned to the mutual, voluntary exchange of private property. Accordingly, "marginal cost" attempts to define the "social" value of a product *without* considering the total actual cost of producing the product. The goal is to promote economic "efficiency" by maximizing output—thus minimizing "scarcity"—while keeping the consumer price as low as possible, to ensure maximum "social" value. The problem for companies like Rambus is that intellectual property often has *zero* marginal cost, as George Reisman explains:

> In the allegedly ideal world of price having to be set equal to marginal cost . . . there could be virtually no private research and development whatever, because of the zero marginal cost of using the result of using the results of research and development and thus the alleged obligation to charge nothing for its use.[12]

Patents, in other words, have no "social value" because they interfere with the maximizing of output and the minimizing of price. Note that patents represent ideas, not the physical means of production, and thus there is no "additional" cost to using a patent to produce one unit or 1,000,000 units.

JEDEC's standardization process is, at least in theory, an attempt to bring the FTC's "marginal cost" wet-dream into reality. Because the DRAM manufacturers control the standards, means of production, and presumably most of the pre-Rambus patents, JEDEC's patent disclosure and cross-licensing policies created the illusion that the "marginal cost" of

[12] Reisman at 433.

intellectual property was zero. Viewed against that standard, Rambus' attempts to collect modest royalties is seen by Complaint Counsel as "monopolistic," since Rambus is charging a price for something that—in a world of "pure and perfect competition"—has *no social value*, and thus no "reasonable" price above zero. And so, Complaint Counsel seeks an order to prevent Rambus from collecting *any* royalties on its patents, rather than simply requiring them to offer "reasonable and non-discriminatory" terms for licensing (as the JEDEC rules actually call for.) Complaint Counsel believes that Rambus is entitled to nothing as a matter of economic principle.

All discussion of "marginal cost" and "pure and perfect competition" merely describes an elaborate fiction constructed by Complaint Counsel and JEDEC to get around the objective economic principles at the heart of the case. When stripped of pretense, the residual facts are that Rambus holds lawfully-recognized patents, and that it accuses JEDEC members of infringing them. The gravamen of this case concerns Rambus' *property*, not the "social value" of patents relevant to DRAM. In a capitalist system, price represents the objective value that the buyer and seller mutually agree upon to conclude an economic exchange. Rambus is free to charge what it wants for the use of its patents, just as any buyer is free to offer what it wants to offer in exchange. Rambus is free to exclude buyers entirely, and buyers may exclude sellers (as a number of DRAM manufacturers actually did).

In a free market, JEDEC can maintain its cross-licensing policy, but it must do so assuming the risk that an outside firm, like Rambus, might develop patents and seek royalties from manufacturers. Rambus also assumes the risk that its technology will not be adopted or that the capital market won't finance research and development unless Rambus can manufacture its own products. In a free market, however, one does *not* find the FTC, or any government agency,

selectively prosecuting one marketplace actor based on the agency's belief that there is a more efficient way for the market to operate (especially when that belief is based on a false principle.)

No doubt, Complaint Counsel and JEDEC will persist in maintaining that regardless of economic merit, Rambus must be punished by the Commission for violation of JEDEC's patent disclosure policy, thus fraudulently having obtained ascendancy over the JEDEC SDRAM standard. This, however, is a political argument, not an economic one.

II. The Commission lacks the constitutional authority to retry a case properly decided by the Article III courts.

Complaint Counsel has proposed a broad reading of Section 5 that would, in effect, give the FTC parallel and, if need be, superior jurisdiction over federal patent law in order to protect standard-setting organizations from being manipulated by "unscrupulous" patent-holders. This reading, which appears nowhere in existing law, transforms all nominally private disputes between standard-setters and patent-holders into "public" matters subject to the FTC's authority. Rambus has already argued, quite persuasively, that Section 5 should not be extended this way. To Rambus' objections, we suggest simply that the argument be taken to its logical conclusion: Section 5 should not exist, because it is not a valid exercise of Constitutional power.

Section 5 of the Federal Trade Commission Act authorizes the Commission to punish "unfair methods of competition . . . and unfair or deceptive acts or practices in and affecting commerce."[13] The Commission is authorized to specify which acts are prohibited by Section 5; to appoint staff to investigate potential violations; to decide whether to prosecute a particular person or company, to conduct hearings before a Commission-appointed administrative law judge to decide questions of fact and law; to issue a final order that is presumed correct on appeal; and to monitor compliance with issued final orders. This is a remarkable concentration

[13] 15 U.S.C. § 45(a)(1).

of authority in an agency that is supposed to function under a Constitution that creates a government of *limited* powers.

The FTC's total authority cannot be reconciled with the text of the Constitution or the clearly expressed intent of the Framers. In *Federalist No. 47*, James Madison explicitly states the necessity of separation-of-powers under the Constitution: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny." Madison quotes Montesquieu's position that "[t]here can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates [or] if the power of judging be not separated from the legislative and executive powers." The FTC can cloak itself in contemporary judicial precedent all that it wants to, but the metaphysical truth is that the Commission is, in its construction and exercise of power, a body foreign to the Constitutional scheme. It has no place in a free society.

In this case alone, the Commission, through Complaint Counsel, has sought to usurp Congress's exclusive power to regulate patent policy, the Patent and Trademark Office's authority to examine and issue patents, the Federal Circuit's jurisdiction over patent appeals, the judiciary's power to try all civil cases brought by the United States as a party, and, most importantly, the Constitution's clear and unambiguous due process protections with respect to Rambus. These extra-constitutional excursions are neither justified, nor justifiable.

Article I of the Constitution vests "all legislative Powers" with Congress, including the power to determine patent policy. The duty of the Executive Branch, under Article II, is to "faithfully execute" the policies that Congress enacts. The FTC, as an agency of the Executive

Branch, cannot decide for itself whether a patent is invalid or unenforceable. Congress has assigned that function exclusively to the Patent and Trademark Office.

Moreover, the Commission may not constitutionally initiate and adjudicate a prosecution over alleged malfeasance regarding patents, or any other area of federal law. The Constitution's framework is clear and unambiguous: All exercise of "judicial power" is reserved to courts established under Article III. These courts must be composed of judges appointed for life, subject to removal exclusively upon impeachment, and functionally independent of the Executive and Legislative branches. The Commission does not meet the Article III requirements. Commission members are appointed for limited terms, subject to removal for cause by the President, and the Commission is treated as an "independent agency" of the Executive Branch. This classification is inconsistent with the Framers' definition of limited government.

This case amply demonstrates the necessity of adhering to the constitutional separation-of-powers mandate, particularly with regard to Rambus' right to due process. First, the Commission issued its complaint while the *Infineon* fraud verdict was under appeal; this was a deliberate attempt to cut the Federal Circuit off at the pass before it could issue a ruling that would moot the Commission's complaint. Second, Complaint Counsel went to extraordinary lengths to prevent Rambus from defending itself; this included Counsel's failed motion for "default judgment" and Judge Timony's imposition of "rebuttable adverse inferences" against Rambus. Properly, Judge McGuire ignored these "inferences." Complaint Counsel and the Justice Department succeeded, regrettably, in preventing Rambus from introducing evidence of an alleged conspiracy between DRAM manufacturers, evidence that directly undermined Complaint Counsel's arguments. Finally, as Rambus has argued, Complaint Counsel improperly

changed their prosecution theory in order to circumvent the Federal Circuit's *Infineon* decision. Counsel argued at trial that it was not necessary to prove that Rambus violated any actual duty to JEDEC, but only that the company engaged in "unethical" or "deceptive" conduct. The foregoing due process abuses occurred under the direction of an agency that exercises "judicial power" without being held to the same constitutional and legal standards as Article III courts.

The FTC's administrative hearing process presents a conveniently powerful weapon which activist regulators arbitrarily may use to impose their will upon businesses. This is especially true in this case, where the Commission's rules create a more prosecution-friendly climate than the Article III courts' do. For instance, the Federal Circuit judged the fraud claims in the *Infineon* case according to Virginia's fraud statute, the same standard used in the district court. There are six concise elements that must be proved—by clear and convincing evidence—to establish fraud. Complaint Counsel's case, however, relies on subjective standards of antitrust liability that need only be proved by a preponderance of the evidence.[14] Rambus need not have known *ex ante* that its actions might subject it to antitrust liability, for Section 5, in the Commission's view, lends itself to multiple interpretations depending on the allegations of a particular case. Rambus is put in an unjust position: It is forced to defend the same conduct twice, once under objective rules, and once under subjective standards that can be amended to suit the government's needs-of-the-moment.

The graveman of the case is not only based on the due process owed to Rambus, but also on the unconstitutionally subjective nature of the entire antitrust scheme. This case demonstrates—better than any in recent memory—that antitrust is in direct conflict with objective law. In sum, a private contract dispute that was settled according to the objective rules governing patent law, was transformed and retried as a "public interest" matter by a tribunal without jurisdiction to do

[14] ID, pp. 241-243.

so. No amount of spinning from Complaint Counsel or lobbying by JEDEC and supporting *amici* can make this case anything other than what it is: A disagreement over the meaning of a voluntary, private contract.

The Federal Circuit held JEDEC's patent disclosure policy to be "staggering [in its] lack of defining details" and concluded that the policy was too subjective to enforce against Rambus:

> A [patent] policy that does not define clearly what, when, how, and to whom the members must disclose does not provide a firm basis for the disclosure duty necessary for a fraud verdict. Without a clear policy, members form vaguely defined expectations as to what they believe the policy requires — whether the policy in fact so requires or not.[15]

But Complaint Counsel and Infineon claim that Rambus can be found liable merely because some documents show the company held a *subjective belief* that it knew, while in JEDEC, that some of its pending patents covered the SDRAM standard. In other words, Rambus should not be judged according to what JEDEC policy says, but what some Rambus employees may have *thought* that it said. The Federal Circuit properly rejected this nonsensical line of reasoning:

> The JEDEC policy, though vague, does not create a duty premised on subjective beliefs. JEDEC's disclosure duty erects an objective standard. It does not depend on a member's subjective belief that its patents do or do not read on the proposed standard. Otherwise the standard would object a member from disclosure, if it truly, but unreasonably, believes its claims do not cover the standard.[16]

In its *amicus* brief, JEDEC argues that the Commission should disregard the Federal Circuit's ruling entirely and impose what JEDEC now claims was the proper interpretation of its patent policy when Rambus was a member. JEDEC argues that Judge McGuire committed reversible error by ignoring the *dissent* in *Infineon,* a remarkable position to take given that the dissent is not controlling law, rather the majority opinion is, and that the Commission has no authority whatsoever to overrule binding Federal Circuit precedent.

[15] 318 F.3d at 1102.
[16] *Id.* at 1104.

But the large and portentous problem inherent in JEDEC's argument is that it calls for the Commission to use Section 5 to, in essence, "fill in the blanks" left by the vagueness of JEDEC's own policy. JEDEC dismisses the Federal Circuit's interpretation as subjective, but then insists on using an even *more* subjective standard:

> There are few statutes or regulations that are so clear and precise that there can never be differing views about their scope or requirements. Yet such statutes are construed by courts and agencies, and enforced, except in extreme cases. **The Federal Trade Commission Act itself speaks in broad strokes about "unfair methods of competition," but it is still an enforceable, important instrument to protect fair competition and consumers despite frequently varying views about how it should be applied.**
>
> Likewise, a contract is not held unenforceable in toto simply because two or more contracting parties express different views about specific provisions. Instead, the disputed provisions are construed in accordance with the parties' overall purposes.[17] (Emphasis added.)

If the Federal Circuit's application of the objective definition of fraud to JEDEC's vague patent policy is inadequate, how then can JEDEC say the FTC's vaguer application of "unfair competition"—a phrase with no intrinsic meaning—will provide a more just outcome? The answer, of course, is that JEDEC is pragmatically arguing the most convenient position available, dispensing with legal context and currying favor with the Commission in its efforts to insert the protection of standard-setting organizations into the "broad strokes" of Section 5.

Relying on the FTC to "protect fair competition" will lead to nothing but policy chaos. Forcing new market entrants like Rambus to deal with dueling governments—the constitutional judicial framework and the subjective administrative system—is a sure-fire prescription for a chilling effect on innovation. Under Complaint Counsels' and JEDEC's "broad strokes," any company that comes into contact with a standard-setting organization automatically surrenders control over its patents to the whims of the organization and, if need be, regulators. On this

[17] Br. of JEDEC Solid State Technology Association at 27-28.

view, the judicial system provides no protection from a Section 5 complaint, even when the facts and objective legal principles remain unchanged.

Granting the Commission broader control over patent policy does nothing to help consumers. Indeed, the concepts of "consumer protection" and "fair competition" imply an economic system that is based on central planning and heavy regulation, not a free market based on voluntary mutual trade and private property rights. The Framers understood this explicitly, and they limited the government's powers accordingly.

Consider the Commerce Clause, which supposedly authorizes the FTC Act and the Commission's powers thereunder. The power to "regulate Commerce . . . among the several States" does *not* authorize the Executive Branch to supersede the judicial branch's power to interpret the meaning of disputed contracts and impose its own economic viewpoints in order to promote "fair competition." Such a construction of the Commerce Clause would be an invitation for the Executive to exercise the type of general patent power that the English monarchy claimed prior to the Statute of Monopolies. As Paul Ballonoff explains, the general patent power incorporates a government's right to "control and allocate markets," and the Framers expressly rejected this idea:

> The U.S. Constitution was written with the market revolution in England in mind, in which the power of the Crown to establish economic monopolies, then known generally as patents, was severely restricted by the 1624 *Statute of Monopolies*. The patent power then was a very general power to intervene in commerce and allocate markets. Thus, the commerce clause, the patent clause, and the welfare language have a common origin. Following the 1624 Parliament's precedent, the Constitution gives the federal government only the highly restricted patent power that we know today by that name. This result implies that much of the commerce power as currently understood was specifically proscribed. These arguments suggest that much current federal economic regulation requires exercise of a general patent power that the federal government does not possess, and may thus be unconstitutional.[18]

[18] Ballonoff, *Limits to Regulation*, at 401.

The term "regulate" in the Commerce Clause means "to make regular," that is to say, "If you want to trade or exchange with others, here is how you must go about it."[19] (Barnett 303.) The making and enforcement of private contracts certainly falls under this regulatory power, but only to the extent that Congress enacts neutral, objective rules for all parties to follow. When a party to a transaction is afforded special treatment by the government, that is an exercise of general patent power, not commercial regulation.

Complaint Counsel, in effect, would have the Commission exercise general patent power over the DRAM industry by authorizing JEDEC to act as a quasi-monopoly, like a feudal overlord controlling the economic destiny of his vassals. By expanding Section 5 to include the protection of standard-setting organizations from conduct that is *perfectly legal* under fraud statutes, JEDEC and similar groups can wield the state's political power in the service of their own ends, namely maintaining control over industry standards in the face of upstart challengers.

None of this should come as a surprise. Antitrust laws were conceived as a means of protecting politically-connected interests from competition. Contrary to the widespread myth that antitrust laws were enacted as a form of "consumer protection" to thwart rampant cartels and trusts, the truth, as explained by economists Donald Boudreaux and Thomas DiLorenzo, was that during the nineteenth century, "The political impetus for some kind of antitrust law came from the farm lobbies of mostly midwestern, agricultural states, such as Missouri. Rural cattlemen and butchers were especially eager to have statutes enacted that would thwart competition from the newly centralized meat processing facilities in Chicago."[20] These industries, the authors explain, were not suffering from monopolization or cartelization. Those became after-the-fact rationalizations, created largely by modern economists. Antitrust has always been a protectionist

[19] Randy E. Barnett, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 303 (2004).
[20] Donald J. Boudreaux and Thomas J. DiLorenzo, *The Protectionist Roots of Antitrust*, THE REVIEW OF AUSTRIAN ECONOMICS, Vol. 6, No. 2, at 93 (1993).

institution that rewards less efficient "political entrepreneurs" at the expense of innovative economic entrepreneurs. Rambus is simply the latest in a long string of targets dating back to Alcoa and Standard Oil.

III. Rambus must not be punished for failing to accept the unjust ethical duty that Complaint Counsel and JEDEC seek to impose.

Although economics and politics play important roles in this case, Complaint Counsel's arguments against Rambus ultimately come down to a question of *ethics*, namely, did Rambus have an *ethical duty* to disclose certain patent applications while a member of JEDEC? This question goes beyond the legal analysis performed by the Federal Circuit or the economic theories used to justify Complaint Counsel's position. The issue, from the Commission's perspective, is whether Rambus' alleged malfeasance was a crime against the "public interest." This is the ethical standard by which the FTC claims to judge all cases before it.

In the thousands of pages of documents generated in this case, the most ethically revealing argument was made by the *amici* group of standard-setting organizations led by the Consumer Electronics Association (CEA). The CEA brief opens with a paragraph that tells the reader, in unmistakable terms, the moral standards of Complaint Counsel and its supporters:

> Standards are vital to government procurement, national competitiveness, and the efficiency and safety of society. Standards are created by voluntary, self-governing organizations that have no enforcement power to police the conduct of their members. In the technology sector, the implementation of standards is often likely to result in the infringement of the patents of members and/or non-members. **If the owners of such patents are unwilling to license their patents to those that wish to implement the standard, then the standard will fail, and the benefits to the national interest and society that the failed standard would have supplied will be lost.**[21] (Emphasis added.)

The CEA message is a warning shot across the bow of the ship of Rambus and future innovators: The standard-setting process is bigger than you are, and you have no right to try to improve upon

[21] Br. of Consumer Electronics Association, et al., at 3.

it without permission. There is a "national interest" that overrides intellectual property rights, and this interest cannot be restrained by constitutional provisions or judicial courts that refuse to acknowledge the "essential" need for standards.

Those who would consider "national interest" the proper moral standard for government action should recall the Act which separated America from the British monarchy:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.

The Declaration of Independence identifies the objective existence of *individual rights*, and the Constitution secures these rights through a precise delineation of legislative, executive, and judicial functions. At all times, however, the government is an *agent* of the people, not an entity unto itself with independent interests. The "pursuit of Happiness" the Declaration refers to are the individual pursuits of each man, not any collective or "national" pursuit deemed worthy of protection at a given moment.

The only true "public interest"—the only interest common to all rational individuals—is freedom itself. This includes the freedom to enter into mutually beneficial social relationships, such as a corporation or a standard-setting organization. Freedom also requires a means of settling disputes that may arise from such relationships, such as corporate bylaws or patent disclosure policies. But freedom does not entail handing power over men to the whims of an arbitrary authority. That is nothing more than tyranny.

As demonstrated above, Complaint Counsel's economic and political objective is to strengthen JEDEC's power for the purpose of compelling Rambus, and by extension future DRAM innovators, to incorporate their technologies in "open" standards, regardless of the actual text or meaning of JEDEC's actual patent policy. The CEA brief puts these objectives in starkly

collectivist terms: "The efficient operation of the standard setting process is *vital to the national interest . . .*", "Congress has acted to facilitate the creation and adoption of standards, and to *make federal agencies dependent on those standards*," and so forth (italics added.) Here the charge isn't that Rambus actions harmed consumers, but that they harmed *governmental* interests. But why should the government's claim to need standards forcibly alter the contractual relationship between Rambus and JEDEC, as it were? It should not, but that is not what Complaint Counsel, JEDEC, and the CEA *amici* want. Instead, they contend that there is a conflict between intellectual property and antitrust principles that requires the Commission's intervention to remedy the "imbalance" between the two ideals.

There is no imbalance. Patents are a form of property rights given explicit protection in the Constitution. Antitrust is a nineteenth century economic fiction, kept alive today by a large and vigorous antitrust bar. The Commission itself is a collection of antitrust lawyers and advocates, one interest group in the crowded Washington fray. While the Commission, and Complaint Counsel for that matter, may not have direct conflicts-of-interest, in the traditional legal sense, they do harbor a profound *ethical* conflict: They are individuals who have based their livelihoods on the existence and expansion of antitrust, and they are the same people charged with creating and changing the rules without meaningful constitutional supervision.

This conflict is rooted in an even deeper philosophical contradiction: The idea that free markets—capitalism—can somehow be justified on *collectivist* grounds. The Platonic theory of "pure and perfect competition," the Commission's blatant disregard for constitutional authority, and the CEA brief's invocation of "national interest"—all are failed attempts to evade the reality that one genuine dispute at the heart of this case, the disagreement between Rambus and JEDEC over the latter's patent-disclosure policy, was decided in an impartial, objective manner by the

Federal Circuit in January 2003. Since then, all of the Commission's proceedings have been a dog-and-pony show designed to undermine the moral authority of the Court of Appeals' decision.

If the Commission insists on maintaining the contradiction, however, and reverses Judge McGuire's Initial Decision, then Rambus faces the prospect of losing more than a decade's worth of investment in its intellectual property to the collectivist howls of the standard-setting mob. The "public interest" is a corollary of and an incentive to mob action; anything can justify the *whims* of a self-anointed group that claims to represent the interests of everyone. But the government of the United States was constituted to protect individual rights and reject factionalism. A final decision against Rambus would turn this principle upside-down and sacrifice Rambus' rights—to its patents, to due process, to liberty itself—for the sake of insulating JEDEC from the consequences of its own freely-chosen actions with respect to its standard-setting activities. We state with certainty that there is nothing in the Constitution or the *objective* laws of this nation which compel, or permit, such an outcome.

CONCLUSION

This brief is not an attempt to justify every business decision made by Rambus. We do not claim expertise in the field of DRAM design, nor do we contend that Rambus should prevail in all of its pending patent litigation. The views expressed herein relate solely to this proceeding and the authority of the Commission to conduct it. Rambus would admit they have made errors in judgment with respect to JEDEC, but none of these errors constitute grounds for the federal persecution under which the company now finds itself.

Judge McGuire and Rambus have advanced a coherent and complete rebuttal to all of the charges levied by Complaint Counsel. Nothing in Counsel's appeal brief, nor anything contained in the numerous briefs of *amici*, impeaches the correctness of the Initial Decision. Accordingly, it is time to end this case once and for all, so that Rambus *and* JEDEC can get back to their private litigation and, hopefully, back to the business of designing and producing DRAM.

The Initial Decision should be affirmed and entered as the final decision of this Commission.

Submitted for Your Consideration,

/s/

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Dated: June 2, 2004

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 2, 2004, I caused true and correct copies of the foregoing Motion for Leave to File Amicus Curiae Brief and accompanying Brief of Amicus Curiae Citizens for Voluntary Trade to be served as described below.

Service by hand delivery of paper copies, including an original, signed version, and 12 photocopies, and by electronic mail, was provided to:

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Washington, DC 20580

Service of one copy was provided, by First Class mail, postage prepaid, to:

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