UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

DOCKET NO. 9302

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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"10W(21))]TJ-20.635 -2.3 T

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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

alleged “imbalance” between intellectual property and antitrust in greater detail. But for now, let

Rambus’ patents, properly construed, extend

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

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

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 quo apard-ir fa0001-032 Tw(ndard.001 to decide0 2yg000ti5 -TD[e Feu4

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 Comm

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

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

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.

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.**

it without permission. There is a “national interest” that overrides intellectual property rights,

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

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:

Donald S. Clark
Secretary
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Washington, DC 20580

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

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