No. 07-924

IN THE

Supreme Court of the United States

MICROSOFT CORPORATION,
Petitioner,

v.

NOVELL, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a plaintiff who meets the multi-factor test established by this Court in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), has standing to sue under the federal antitrust laws.

RULE 29.6 STATEMENT

Respondent Novell, Inc. has no parent corporations, and no publicly held company owns 10% or more of Respondent's stock.

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STATEMENT OF THE CASE

Novell's Complaint, which at this stage of the proceedings is presumed to be true, alleges that Microsoft deliberately targeted and destroyed WordPerfect, the most popular word processing application during the early 1990s, for the unlawful purpose of obtaining and maintaining a monopoly in the market for personal computer ("PC") operating systems. (A13-A15.)

Microsoft specifically targeted WordPerfect and Novell's other office productivity applications because they threatened Microsoft's Windows monopoly. Novell's once-popular applications could perform well

on a variety of operating systems and afforded consumers an attractive alternative to Microsoft Windows. Novell's applications accordingly "offered competing operating systems the prospect of surmounting the applications barrier to entry and breaking the Windows monopoly." (A11-A13.)

Viewing "Novell as THE competitor to fight against—not in one area of our business, but all of them,"[1] Microsoft deliberately eliminated this threat by waging an anticompetitive campaign that destroyed Novell's applications. Microsoft recognized that destroying them would protect the applications barrier to entry vital to maintaining its operating systems monopoly. Microsoft particularly feared that WordPerfect, given its popularity in the critically important word processing market and its unique history of being ported to numerous platforms, could enable one of these platforms to become a genuine alternative to Windows.

The Fourth Circuit found that the allegations of Microsoft's specific intent to injure Novell "go beyond mere speculation. They are supported by internal Microsoft communications," including an e-mail by Microsoft Chairman Bill Gates, who "specifically suggested waiting to publish critical technical specifications of Windows 95 until 'we have a way to do a high level of integration [between Microsoft Office and Windows 95] that will be harder for [the] likes of . . . WordPerfect to achieve.' Otherwise, Gates noted, '[w]e can't compete with . . . WordPerfect/Novell.'" (A30 (alterations in original) (citations omitted).)

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[1] *Caldera, Inc. v. Microsoft Corp.*, 72 F. Supp. 2d 1295, 1302 (D. Utah 1999) (quoting March 26, 1993 e-mail from Jim Allchin of Microsoft).

The court below also emphasized an e-mail from another senior Microsoft executive, Jeff Raikes, in which he candidly admitted that the purpose behind Microsoft's strategy for controlling the market for office productivity applications was to protect Microsoft's monopoly in the market for operating systems:

> "If we own the key 'franchises' built on top of the operating systems, we dramatically widen the 'moat' that protects the operating system business . . . . We hope to make a lot of money off these franchises, but even more important is that they should protect our Windows royalty per PC."

(*Id.* (alteration in original) (citation omitted).)

Novell sued Microsoft for injuries caused by Microsoft's anticompetitive conduct. Count I of Novell's Complaint alleges that Microsoft maintained its monopoly in the operating systems market by mounting a series of anticompetitive attacks against Novell to reduce the threat that its popular applications posed to Windows. Count VI alleges that Microsoft unreasonably restrained trade by entering into exclusionary agreements with PC manufacturers, licensors, and distributors to block Novell's access to the distribution channels it needed.[2]

The district court rejected Microsoft's argument that Novell lacked antitrust standing because Novell was neither a consumer nor a competitor in the operating systems market, finding that "the Supreme Court has not established a litmus test for antitrust standing based upon a plaintiff's status. Rather, in

[2] The Fourth Circuit affirmed the district court's dismissal of Counts II through V as untimely. Those Counts are not subjects of the petition.

Associated General Contractors [*of California, Inc.*] *v. California State Council of Carpenters*, 459 U.S. 519 (1983) [("*AGC*")], the Court . . . articulated a series of factors to be considered . . . ." (A47.) The district court analyzed Novell's claims under the *AGC* factors and concluded that all of them were satisfied.[3] (A48-A50.)

Like the district court, the court of appeals declined to adopt Microsoft's "consumer-or-competitor" rule:

> We note that the Supreme Court has rejected the utility of the very type of bright-line approach on which Microsoft seeks to rely: "The infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will dictate the result in every case." *AGC*, 459 U.S. at 536.

(A19.)

The Fourth Circuit instead applied the *AGC* factors to the facts of this case.[4] The court of appeals

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[3] The district court found that (1) a direct causal connection existed between Microsoft's anticompetitive conduct and the damages Novell suffered; (2) Microsoft specifically targeted Novell for the purpose of maintaining Microsoft's operating systems monopoly (demonstrating that "Microsoft perceived Novell to be a competitor"); (3) Novell's injury was "self-evidently" the type protected by the antitrust laws; (4) Novell's claim was "straightforward"; (5) Novell was the only victim who could sue to recover for the losses sustained by WordPerfect and Quattro Pro; and (6) there was "no problem of speculative damages or complex apportionment of damages." (A48-A50.)

[4] In its factual analysis, the court of appeals recognized that technological markets behave differently from other markets: "[F]irms compete to dominate the market, and once dominance is achieved, threats come largely from outside the dominated market, because the degree of dominance of such a market tends

concluded that Novell had suffered antitrust injury that "can be traced to Microsoft's alleged antitrust violations."[5] (A31.) The lower court reasoned that: (1) Novell "plainly [alleged] an injury to *competition*" because Microsoft intentionally restrained competition in the operating systems market by preserving the applications barrier to entry into that market (A28); (2) the causal link between Microsoft's anticompetitive conduct and the injuries Novell suffered was "straightforward" because the anticompetitive conduct eroded WordPerfect's market share, thereby thwarting Novell's ability to lower the barrier to entry into the operating systems market and harming competition (A28-A29); and (3) "Microsoft specifically targeted [Novell's] products for destruction as a means to damage competition in the operating-systems market" (A30-A31).[6]

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to become so extreme." (A12.) The best example is this case, in which "Windows controlled more than 95% of the operating-system market" (*id.*), and Microsoft recognized that the threat to its monopoly could come from popular applications like WordPerfect (*see* A12-A15 & n.15, A30).

[5] Microsoft erroneously suggests that the Fourth Circuit would have found that Novell's claimed injury did not "flow[] from harm to competition in the PC operating system market," if only the court had examined the issue. (Pet. at 17.) The court of appeals undertook that very examination. The court correctly held that Novell's loss of market share from Microsoft's anticompetitive acts, which were designed to protect the "moat" surrounding its operating systems monopoly, harmed competition in the operating systems market by hindering a competing system's ability to partner with WordPerfect in surmounting the high barrier to entry that protected Microsoft's monopoly. (*See, e.g.*, A12-A15, A25 n.22, A28-A31, A33-A36.)

[6] Microsoft admits that Sun and Netscape, the respective owners of the Java programming environment and the Navigator web browser, which did not compete in the operating

The court of appeals further observed that Microsoft's intentional targeting of Novell "is evidence that Microsoft viewed Novell as a threat that could enable competitors to gain a foothold in the operating-systems market." (A34.) The court then determined that "Novell may be the best-situated plaintiff to assert these claims" and "[g]iven the apparent absence of a more-directly harmed party than Novell . . . , the *AGC* directness factors weigh in favor of finding antitrust standing here." (A35.) Finally, because Microsoft directly targeted Novell, the court concluded that there was no need to identify any more-directly injured parties and little risk of having to apportion Novell's damages among them. (A35-A36.)

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systems market, would have antitrust standing. (*See* A25 n.22.) The court of appeals found that the anticompetitive activities that harmed Java, Navigator, and Novell's applications are "undeniably similar":

> The hypothetical future capabilities of Java and Navigator do not meaningfully distinguish such products from Novell's applications . . . . As with Novell's office-productivity applications, the primary threat that Java and Navigator posed to Windows was not that they were competitors or potential competitors in the operating-system market . . . but rather that, from outside that market, they could enable an alternative operating system to compete with Windows.

(*Id.*)

Microsoft attempts to blunt the force of this concession, but to no avail. The Fourth Circuit could not have overlooked the supposed "fact" (Pet. at 13 n.10) that Sun and Netscape were potential competitors in the PC operating systems market, because it is not a fact. In *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam) ("*Microsoft II*"), the district court determined, and the D.C. Circuit agreed, that middleware, like Java and Navigator, was not a substitute for a PC operating system and thus should not be included in that antitrust market. *Id.* at 53-54.

REASONS FOR DENYING THE WRIT

Microsoft posits a strict rule that only "consumers or competitors in the allegedly restrained market" have standing to sue under the antitrust laws. (Pet. at 7; *see also id.* at i, 8.) Microsoft then contends that the court below abandoned this supposed rule (*id.* at 7-9), thereby placing itself in conflict with courts of appeals in other circuits (*id.* at 10-12). The writ should be denied because there is no such rule or conflict. Microsoft misapprehends both the decision below and the decisions of other courts of appeals.

Microsoft's second ground for certiorari is the supposed need to correct those courts of appeals that have allegedly misread language from this Court's opinion in *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 483-84 (1982), about harms "inextricably intertwined" with an antitrust injury, to create an exception to the purported "consumer-or-competitor" rule. (Pet. at 14.) First, there is no such rule. Second, the court below mentioned only once the "inextricably intertwined" language from *McCready*, and certainly did not create or apply any supposed "exception" based on that language. This case therefore is ill-suited to resolving the questions that Microsoft raises about the analyses of other courts of appeals in other antitrust cases.

I. THE CIRCUIT CONFLICT THAT MICROSOFT TRIES TO MANUFACTURE IS PREMISED ON A RULE THAT DOES NOT EXIST

Microsoft traces its purported "consumer-or-competitor" standing rule to this Court's decision in *AGC*. That decision, we are told, held that the plaintiff had no antitrust injury and hence no standing because

"that plaintiff 'was neither a consumer nor a competitor in the market in which trade was restrained.' *AGC*, 459 U.S. at 539." (Pet. at 10.) But in *AGC*, the Court spurned any such mechanical rule for finding antitrust injury, recognizing instead that "the infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will dictate the result in every case." 459 U.S. at 536. "[I]t is simply not possible to fashion an across-the-board and easily applied standing rule which can serve as a tool of decision for every case." *Id*. at 536 n.33 (citation and internal quotation marks omitted).

The Court therefore directed the lower courts to "analyze each situation in light of the factors set forth in the text *infra*." *Id.* The factors to be considered include: "the nature of the [plaintiff's] injury" and whether the plaintiff was "injured by reason of a violation of the antitrust laws," the "character of the relationship between the alleged antitrust violation and the [plaintiff's] alleged injury, the potential for duplicative recovery or complex apportionment of damages," the "existence of more direct victims" of the alleged violation, and whether the defendant acted with "intent to harm the [plaintiff]."[7] *Id.* at 545-46.

As detailed in the Statement of the Case, the courts below analyzed Novell's Complaint under the *AGC*

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[7] The first two *AGC* factors—(1) whether the injury was of the type the antitrust laws were intended to remedy and (2) the causal connection between the antitrust violation and the harm to the plaintiffs (considering whether that harm was intended)—"together encompass the concept of 'antitrust injury.'" (A17-A18 (citing *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 110 n.5 (1986); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)).)

factors and concluded that Novell had standing. (*See* A19, A37, A47-A50.) The decisions below were as nuanced and as responsive to the circumstances as any other correct application of this Court's multi-factor *AGC* standing analysis. The Fourth Circuit emphasized that

> we address the limited issue of Novell's antitrust standing on these facts. We do not view our decision with respect to Novell as unduly expanding the universe of private antitrust plaintiffs. We recognize, as has the Supreme Court in its consideration of the scope of antitrust standing, that treble-damages suits under § 4 of the Clayton Act are not to be wielded indiscriminately. We merely hold that Novell, like the owners of the middleware products at issue in *Microsoft II*, is a member of a limited class of plaintiffs for whom the *AGC* factors support antitrust standing, even though they are outside the restrained PC operating-systems market.

(A36-A37.)

Microsoft contends that the Fourth Circuit's application of the *AGC* factors here generates a sharp conflict with other courts of appeals that supposedly "have held that only consumers or competitors in the relevant market can suffer" an antitrust injury. (Pet. at 10 (footnote omitted).) But there is no such conflict because there is no such rule. Microsoft simply misapprehends its authorities.

Microsoft relies heavily on *SAS of Puerto Rico, Inc. v. Puerto Rico Telephone Co.*, 48 F.3d 39, 44 (1st Cir. 1995), which stated that "the *presumptively* 'proper' plaintiff is a customer who obtains services in the

threatened market or a competitor who seeks to serve that market." (*Quoted in* Pet. at 10 (emphasis added).) "But," as the *SAS* court went on to observe, "'*presumptively*' does not mean always; there can be exceptions, for good cause shown." 48 F.3d at 45 (emphasis added). The court explained—in another passage Microsoft omits—that SAS would have the requisite antitrust injury if it "is a competitor or consumer in the market threatened by the alleged violation *or has any other protectable interest under the antitrust law*." *Id.* (emphasis added).

Although the First Circuit noted initially that SAS was neither "a competitor [n]or [a] consumer in the market threatened by the alleged violation," the court went far beyond this superficial aspect of SAS's claim to conclude that "the connection here between 'antitrust' and 'injury' is suspect in more ways than one." *Id*. At bottom, SAS lacked antitrust injury because its alleged harm bore no connection to any anticompetitive conduct and it had no "other protectable interest under the antitrust law." *Id*. As the court observed, in accordance with *AGC*, the antitrust injury requirement "reflects an unwillingness to award antitrust damages to one who suffered from procompetitive or irrelevant effects of an otherwise anticompetitive transaction." *Id*. at 43-44. By contrast, Novell was a victim who directly suffered from effects of Microsoft's conduct that were both intended and anticompetitive.

The First Circuit also ruled that SAS lacked standing because there were more direct victims of the alleged violation, insofar as it "was not a violation directed against SAS." *Id.* at 46. SAS was only "incidentally connected" to the defendant's conduct and was only "incidentally injured." *Id.* at 45. Any

harm SAS suffered was merely the "coincidental[]" result of SAS's "happenstance" status as the supplier to the violator. *Id*. at 44. Novell's harm, on the other hand, was anything but incidental—Microsoft intentionally targeted Novell and WordPerfect *by name* and Novell was *the* direct victim of the harm for which it seeks recovery.

Microsoft's other authorities, just like *SAS*, qualify their analyses in similar terms and belie the inflexible rule that Microsoft would extract from them. For example, *Illinois ex rel. Ryan v. Brown*, 227 F.3d 1042, 1046 (7th Cir. 2000), merely noted that "*normally* only consumers or competitors have standing, not unions, shareholders, or others further removed." (*Quoted in* Pet. at 11 (emphasis added).) Similarly, *S.D. Collectibles, Inc. v. Plough, Inc.*, 952 F.2d 211, 213 (8th Cir. 1991), did no more than observe that "standing is *generally* limited to actual market participants, that is, competitors or consumers." (*Quoted in* Pet. at 11 (emphasis added).) And in *Florida Seed Co. v. Monsanto Co.*, 105 F.3d 1372, 1374 (11th Cir. 1997), the Eleventh Circuit noted that, "*[b]asically*, a plaintiff must show that it is a customer or competitor in the relevant antitrust market." (*Quoted in* Pet. at 11 (emphasis added).)[8]

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[8] Microsoft elsewhere cites (Pet. at 14) the opinion of a single judge in *Daniel v. American Board of Emergency Medicine*, 428 F.3d 408 (2d Cir. 2005), who noted that "there is agreement that competitors and consumers constitute a baseline set of parties that generally *do* meet these tests." *Id.* at 451 (Katzmann, J., concurring in part and dissenting in part) (underlining added). Of course, a general "baseline" set is not an *exclusive* set. Judge Katzmann further observed that courts "dispute the circumstances" under which a non-consumer or a non-competitor has antitrust injury. That observation confirms that such a plaintiff can have standing, and that, as *AGC* holds, the inquiry is

In *Norris v. Hearst Trust*, 500 F.3d 454, 466 (5th Cir. 2007), the Fifth Circuit did not—because it could not—stop its analysis with the observation that "[p]laintiffs are neither consumers . . . nor competitors" of the defendants. (*Quoted in* Pet. at 11.) The circumstance-driven *AGC* analysis required the court to go further and consider whether the plaintiffs could establish harm to competition, the directness of their injury, and whether they were adversely affected by an anticompetitive aspect of the defendants' conduct. 500 F.3d at 466-68. Ultimately, the court affirmed dismissal of the plaintiffs' claims because the plaintiffs failed even to allege that the challenged acts of the defendants "had anything to do with, or even came about before," the harm experienced by the plaintiffs. *Id.* at 468.

Barton & Pittinos, Inc. v. SmithKline Beecham Corp., 118 F.3d 178, 184 (3d Cir. 1997), affirmed dismissal of a claim because the plaintiff, who was neither a consumer nor a competitor in the restrained market, failed to plead a proper "antitrust injury." The Third Circuit subsequently explained that "*Barton & Pittinos* arguably rests on an overstated premise," and that the notion that only consumers or competitors can suffer antitrust injury, "if construed as an absolute (which arguably it need not be), may in some circumstances lead to results that conflict with Supreme Court and other precedent." *Carpet Group Int'l v. Oriental Rug Importers Ass'n, Inc.*, 227 F.3d 62, 76 (3d Cir. 2000) (ruling that rug brokers, who were neither consumers nor competitors of the defendants, had standing to assert an antitrust claim against an association of rug importers).

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necessarily fact-intensive and dependent upon the circumstances of each case. *See id.*

Microsoft insinuates that the Third Circuit has abandoned its nuanced analysis in *Carpet Group* and adopted an ironclad rule limiting antitrust injury to consumers and competitors. (*See* Pet. at 12 n.8 (citing *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 320-21 (3d Cir. 2007)).) *Broadcom* fashioned no such rule. The court there merely declined to extend the "inextricably intertwined" analysis to the circumstances of *Broadcom*. 501 F.3d at 320-21. Rather than relying on Microsoft's simplistic and rigid rule, the Third Circuit characterized the plaintiff's theory of antitrust standing as "highly attenuated," *id.* at 319, and applied the five-factor balancing test, *id.* at 320. The court concluded that (1) the plaintiff lacked antitrust standing; (2) there were "simply insufficient factual allegations" of the defendant's intent to harm the plaintiff in the markets in which the plaintiff competed; (3) "[a]ny causal connection . . . [wa]s highly speculative"; (4) the plaintiff's injury was "extremely remote"; and (5) "there [wa]s no apparent reason why [the defendant's] competitors in the [relevant] markets could not assert a monopoly maintenance claim." *Id.* at 320-21.

Microsoft's parting shot is that the Court should grant plenary review because "[t]he First Circuit has noted the existence of a circuit split on this issue." (Pet. at 14 (citing *Sullivan v. Tagliabue*, 25 F.3d 43, 49 (1st Cir. 1994)).)[9] If, as *Sullivan* supposed, there was a split fourteen years ago, it was evidently neither significant nor in exigent need of resolution. Furthermore, the *only* appellate decision the First Circuit cited for its statement was decided *prior* to this Court's decision in *AGC* and was based on the so-

[9] The other opinion cited by Microsoft on this point is discussed in note 8, *supra*.

called "target area" rationale, which this Court rejected in *AGC*, 459 U.S. at 536 n.33, 536-45. *See Sullivan*, 25 F.3d at 49 (citing *Bichan v. Chemetron Corp.*, 681 F.2d 514, 519 (7th Cir. 1982)). Finally, the First Circuit concluded that it need not resolve whether a plaintiff who is neither a consumer nor a competitor can suffer antitrust injury, because the plaintiff in *Sullivan* was unable to establish antitrust injury in any event. *Id.* at 47-50.

Thus, there is no rule limiting antitrust injury to consumers and competitors, and there is no conflict among the circuits in applying the standing doctrines established by this Court. None of the cited decisions, nor any of those that supposedly conflict with them, requires that antitrust injury must be determined by any method other than analysis of the *AGC* factors. Microsoft itself concedes that this is the correct approach[10] and the Fourth Circuit followed that path here. As the court below explained, "[i]t may be *more likely* that a consumer or competitor in the relevant market will suffer an antitrust injury," but that "does not necessarily preclude, however, a party who is neither from having an antitrust injury. Thus, like the Supreme Court in *AGC*, we do not stop our analysis merely because Novell is neither a competitor nor a consumer." (A19 n.19 (emphasis added).)[11]

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[10] (*See* Pet. at 9 n.5 ("[A]lleged injuries must be analyzed on a case-by-case basis to determine whether they are 'of the type that the antitrust statute was intended to forestall.'" (quoting *AGC*, 459 U.S. at 540)).)

[11] Microsoft—but not the Fourth Circuit—believes that the decision below represented an "abrupt about-face" from the court of appeals' prior decisions. (Pet. at 12 n.9.) As the court explained, "[c]areful consideration of those [prior] cases . . .

II. THIS CASE IS AN UNSUITABLE VEHICLE FOR CONSIDERING THE "INEXTRICABLY INTERTWINED" LANGUAGE BECAUSE THE COURT BELOW DID NOT BASE ITS DECISION ON IT

Microsoft's second ground for certiorari is the supposed need to correct "[t]he Fourth Circuit and other courts of appeals that have construed the 'inextricably intertwined' language in *McCready* to create an exception to the consumer-or-competitor rule." (Pet. at 14.) This argument has two fatal flaws.

First, there is no such "consumer-or-competitor rule." Second, this case is wholly unsuited for considering application of the "inextricably intertwined" language upon which Microsoft focuses. Notably absent from Part II of Microsoft's petition is *any citation to the use (or supposed misuse) by the court below of the "inextricably intertwined" language*. The Fourth Circuit only cited that formulation once, when it quoted several passages from *McCready* in the course of describing the facts and findings in that case. (A24.) Otherwise, the court never mentioned that language and it certainly never suggested that the formulation provided the basis for any exception to any rule. Microsoft's complaint appears to be about the decisions of *other* courts that have supposedly expanded on the "inextricably intertwined" language in ways that Microsoft disfavors. It is revealing that, when discussing this alleged depar-

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reveals that they do not provide direct support for the position Microsoft advances." (A21; *see also* A22-A23.) In any event, supposed conflict within a circuit is fodder for that court sitting en banc, not this Court.

ture from proper doctrine or an alleged circuit split on this issue, Microsoft cites *only* the decisions of *other* courts, not the decision below. (*See, e.g.*, Pet. at 8-9, 15-16.)

Microsoft is compelled to rummage through the decisions of other courts for one simple reason: the Fourth Circuit did not rely on the "inextricably intertwined" formulation in finding that Novell has antitrust standing. Instead, the court of appeals noted that, in *McCready*, this Court "focused not on" whether the plaintiff was a consumer or a competitor, "but rather on the directness of the plaintiff's injury and the fact that her loss was of the type the antitrust laws were intended to prevent." (A23 (citing *McCready*, 457 U.S. at 478).) Furthermore, the *McCready* opinion "specifically contemplates a party other than a consumer or competitor having antitrust standing." (A24 (citing *McCready*, 457 U.S. at 481 n.21).) The decision below took the same approach, and did not rely upon any supposed "inextricably intertwined" exception to any purported "consumer-or-competitor rule," in finding Novell has antitrust standing.

Therefore, even if the question were otherwise worthy of this Court's attention, which is dubious, this case is an inappropriate vehicle for considering some other courts' application (or misapplication) of the "inextricably intertwined" formulation that concerns Microsoft.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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