No. -

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

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Whether a plaintiff who is not a participant (*i.e.*, a consumer or a competitor) in the market in which competition was allegedly restrained can have suffered the antitrust injury that is a prerequisite for standing to sue under the federal antitrust laws.

List of Parties and Rule 29.6 Statement

The parties to the proceedings before the United States Court of Appeals for the Fourth Circuit were petitioner Microsoft Corporation and respondent Novell, Inc.

Microsoft Corporation has no corporate parents, and no publicly-held company owns 10% or more of the stock of Microsoft Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Microsoft Corporation ("Microsoft") respectfully petitions for a writ of certiorari to review the October 15, 2007 judgment of the United States Court of Appeals for the Fourth Circuit.

Opinions Below

The decision of the court of appeals (A1–43) is reported at 505 F.3d 302. The decision of the district court on Microsoft's motion to dismiss (A44–55) is reported at 2005-1 Trade Cases (CCH) ¶ 74,830. The decision of the district court granting Microsoft's

motion for interlocutory appeal to the court of appeals (A56–58) is reported at 2005-2 Trade Cases (CCH) ¶ 74,899.

Jurisdiction

The court of appeals entered its judgment on October 15, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutory Provisions Involved

Section 4 of the Clayton Act, 15 U.S.C. § 15, and Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, are set out in the appendix hereto at pages A59 to A63.

Statement of the Case

This case raises a question of fundamental importance to the administration of the federal antitrust laws. A circuit split exists as to whether a plaintiff who is not a participant in the market in which competition was allegedly restrained can have suffered the antitrust injury that is a prerequisite for standing to sue under Section 4 of the Clayton Act. The Fourth Circuit held, in conflict with six other courts of appeals, that respondent Novell, Inc. ("Novell") had antitrust standing to seek treble damages for harm allegedly inflicted on its word processing and spreadsheet applications that neither competed nor had the potential to compete in the personal computer ("PC") operating system market. By granting standing to a non-participant in the market such as Novell, the Fourth Circuit has expanded the scope of the federal antitrust laws far

beyond what Congress mandated or what this Court's jurisprudence instructs.

Novell is a software company that briefly owned WordPerfect, a word processing application, and Quattro Pro, a spreadsheet application. Novell purchased these "office productivity applications" in 1994 and sold them in 1996. Novell's claims in this action are based exclusively on alleged injury to these products.

Microsoft is a software company that develops and sells, among other things, the Windows PC operating systems. Novell alleges that, at all relevant times, Microsoft was dominant in the PC operating system market, although other PC operating systems existed in 1994–96 and continue to exist.

It is undisputed that office productivity applications and PC operating systems are distinct classes of software products that exist in separate markets. As Novell asserted in its Complaint, PC operating systems are the "platforms" on which applications such as WordPerfect and Quattro Pro are designed to run.

A. Proceedings in the District Court

Novell brought this action in November 2004, seeking treble damages against Microsoft under the federal antitrust laws.[1] The Complaint set forth six

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[1] This action was originally filed in the District of Utah and was later transferred by the Judicial Panel on Multidistrict Litigation, pursuant to 28 U.S.C. § 1407, to the District of Maryland. The federal district courts had subject matter jurisdiction over Novell's claims under 28 U.S.C. §§ 1331 and 1337.

claims, two of which — Counts I and VI — are the subject of this petition.[2] Count I alleged monopolization of the PC operating system market, but asserted injury only to applications (WordPerfect and Quattro Pro) that competed in other markets. Count VI alleged exclusionary distribution agreements that violated 15 U.S.C. § 1 because they restrained competition in the PC operating system market, but again, Novell alleged injury only to its office productivity applications that competed outside the PC operating system market.

It is undisputed that Novell's claims arose before March 1996, when Novell sold its word processing and spreadsheet applications to Corel Corporation. As a result, each of Novell's claims is time-barred unless it was tolled by the filing of the action brought against Microsoft by the U.S. Department of Justice on May 18, 1998 (the "Government Action"),[3] which alleged harm to the PC operating system market and a purported market for internet browsers.[4]

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[2] Counts II through V in Novell's Complaint alleged anticompetitive conduct in purported markets for word processing applications and spreadsheet applications.

[3] *United States* v. *Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

[4] The statute of limitations for federal antitrust claims is four years. 15 U.S.C. § 15b. Under 15 U.S.C. § 16(i), a private antitrust claim may be tolled if "based in whole or in part on any matter complained of" in a federal government antitrust enforcement action.

Microsoft moved to dismiss the Complaint. The district court held that Counts II through V were time-barred. It ruled that those claims could not benefit from the tolling provisions of the Clayton Act, 15 U.S.C. § 16(i), because, among other things, the purported markets for word processing applications and spreadsheet applications are "distinct" from the markets at issue in the Government Action. (A50–54.)

As to Counts I and VI, Microsoft contended that Novell lacked antitrust standing to assert those claims because Novell's office productivity applications were not actual or potential competitors in the PC operating system market. The district court recognized that Novell was seeking recovery "for damage not to . . . any . . . [PC] operating system but for damage to applications software," and acknowledged that "[c]ertainly, consumers and competitors in a given market are favored plaintiffs." (A51 (internal quotation marks omitted).) Nevertheless, the court held that Novell could proceed with Counts I and VI because those claims supposedly met other elements of "the multi-factored test" for antitrust standing established by *Associated Gen. Contractors of California, Inc.* v. *California State Council of Carpenters* (*AGC*), 459 U.S. 519 (1983). (A48.)

Microsoft moved for an order certifying the district court's antitrust standing ruling for interlocutory appeal under 28 U.S.C. § 1292(b). The district court granted that motion, noting that there was "substantial ground for difference of opinion" about the correctness of its ruling. (A57.) The court of appeals subsequently granted Microsoft's petition

for review. Thereafter, the district court granted a motion by Novell for entry of final judgment as to Counts II through V, allowing Novell to cross-appeal the dismissal of those claims. The court of appeals consolidated the two appeals.

B. Opinion of the Court of Appeals

On October 15, 2007, the court of appeals affirmed the district court, finding that Novell had antitrust standing to pursue claims for injury to its word processing and spreadsheet applications based on allegations of anticompetitive conduct in the PC operating system market. The court of appeals also affirmed the dismissal as time-barred of Novell's claims of anticompetitive conduct in purported markets for word processing and spreadsheet applications.

The court of appeals acknowledged that "Counts I and VI are indeed based on Microsoft's anticompetitive conduct in the PC operating-system market." (A8.) It also recognized that Novell's office productivity applications were outside that market (A37), as Novell itself had conceded. (A10–11.) Nevertheless, the court of appeals held that Novell had suffered antitrust injury and thus had standing to sue under the federal antitrust laws. In doing so, the court of appeals rejected Microsoft's contention that only consumers or competitors (actual or potential) in the market where competition was allegedly restrained can suffer antitrust injury.

Reasons for Granting the Petition

The issue of antitrust standing is fundamental to the proper administration of the antitrust laws,

and has resulted in divergent decisions by the courts of appeals. Granting antitrust standing to parties other than consumers or competitors in the allegedly restrained market, as the Fourth Circuit has done, significantly expands the class of potential plaintiffs permitted to seek treble damages under the federal antitrust laws. If left undisturbed, the decision of the court of appeals will extend the federal antitrust laws far beyond their intended scope.

This Court has observed that "Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages." *Blue Shield of Virginia* v. *McCready*, 457 U.S. 465, 477 (1982). Thus, a private plaintiff seeking treble damages under Section 4 of the Clayton Act must prove the existence of "*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (emphasis in original). This Court has made it clear that antitrust injury is a prerequisite of antitrust standing under Section 4. *Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U.S. 104, 110 n.5 (1986).

Novell alleged anticompetitive conduct in the PC operating system market but injury only to products that competed in purported markets for office productivity applications. The court of appeals held that even though Novell was not a participant in the market in which competition was allegedly restrained, it had suffered the antitrust injury that is a prerequisite for antitrust standing. That holding conflicts with decisions in several circuits holding

that only consumers and competitors in the allegedly restrained market can suffer antitrust injury. Moreover, by granting antitrust standing to parties other than consumers or competitors, the court of appeals ignored "the central interest [of the antitrust laws] in protecting the economic freedom of *participants in the relevant market*." *AGC*, 459 U.S. at 538 (emphasis added).

The circuits are sharply split over whether an exception to the consumer-or-competitor rule exists for plaintiffs whose injuries are "inextricably intertwined" with the injury suffered by a direct victim of an antitrust violation. *See McCready*, 457 U.S. at 484. The decision of the court of appeals is in line with decisions of a few circuits that have carved out such an exception. A majority of circuits have held that this Court's precedents mandate exactly the opposite result.

The "inextricably intertwined" formulation is frequently relied on by plaintiffs to prevent dismissal of antitrust claims they have no standing to assert, resulting in substantial and unjustified costs to defendants and the federal court system. *Cf. Bell Atlantic Corp.* v. *Twombly*, 127 S. Ct. 1955, 1967 (2007) (noting that "proceeding to antitrust discovery can be expensive" and "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings"). A bright-line rule that limits antitrust standing to consumers or competitors in the allegedly restrained market would help prevent "the antitrust laws [from] becom[ing] a treble-damages sword rather than the shield against competition-destroying conduct that Congress meant

them to be." *NicSand, Inc.* v. *3M Co.*, 507 F.3d 442, 450 (6th Cir. 2007).[5]

Delineating the type of injuries that give rise to a cause of action under the federal antitrust laws is a foundational issue that speaks to the very purpose of those laws. It has been more than 30 years since this Court articulated the rule in *Brunswick* requiring a plaintiff to have suffered antitrust injury in order to have standing to sue under Section 4 of the Clayton Act. The uncertainty that has arisen in recent years about the antitrust injury requirement, as evidenced by the circuit split regarding the meaning of the "inextricably intertwined" language in *McCready* (*see* pp. 14–15, *infra*), makes review by this Court all the more appropriate.

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[5] The court of appeals quoted out of context this Court's observation that it is "virtually impossible to announce a black-letter rule that will dictate the result in every case." (A19 (quoting *AGC*, 459 U.S. at 536).) The *AGC* Court was discussing the multifaceted inquiry into antitrust *standing*, not the antitrust injury that is a prerequisite for such antitrust standing. Moreover, while it is true that alleged 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," *AGC* 459 U.S. at 540, nothing in this Court's jurisprudence suggests that the "bright-line" requirement that a plaintiff be a consumer or competitor in the allegedly restrained market should be erased in favor of an elastic line that can be stretched beyond recognition.

I. The Court of Appeals' Decision Conflicts with Decisions of Other Courts of Appeals and Is Contrary to this Court's Antitrust Standing Decisions

Because the antitrust laws are intended to protect "participants in the relevant market," *AGC*, 459 U.S. at 538, it follows that antitrust injury can only be suffered by participants in the allegedly restrained market. *See Brunswick*, 429 U.S. at 489. In explaining why plaintiff in *AGC* had not suffered antitrust injury, this Court stated that plaintiff "was neither a consumer nor a competitor in the market in which trade was restrained." *AGC*, 459 U.S. at 539.

Accordingly, a number of circuits have held that only consumers or competitors in the relevant market[6] can suffer the antitrust injury that is a prerequisite for antitrust standing:

- *SAS of Puerto Rico, Inc.* v. *Puerto Rico Tel. Co.*, 48 F.3d 39, 44 (1st Cir. 1995) — "[T]he presumptively 'proper' plaintiff is a customer who obtains services in the threatened market or a competitor who seeks to serve that market."[7]

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[6] Some courts of appeals have articulated the consumer-or-competitor rule as providing that only "market participants" can suffer antitrust injury.

[7] In *SAS*, Judge Boudin suggested that a party outside the allegedly restrained market might have antitrust standing in the rare case where no consumer or competitor in the market had "the incentive or ability to sue." 48 F.3d at 45. This potential exception, even if valid, is plainly not relevant here. Microsoft has faced more than 100 private antitrust suits

(footnote continued)

- *Barton & Pittinos, Inc.* v. *SmithKline Beecham Corp.*, 118 F.3d 178, 179 (3d Cir. 1997) (Alito, J.) — "[T]he injury alleged by [plaintiff] is not the type of injury that the antitrust laws were intended to prevent because [plaintiff] was not a competitor or a consumer in the market in which trade was allegedly restrained."
- *Norris* v. *Hearst Trust*, 500 F.3d 454, 466 (5th Cir. 2007) — "Plaintiffs are neither consumers . . . nor competitors . . . in the relevant market. Plaintiffs have not suffered antitrust injury."
- *Illinois ex rel. Ryan* v. *Brown*, 227 F.3d 1042, 1046 (7th Cir. 2000) — "Antitrust standing is limited in several ways: the plaintiffs must not be too remote from the injury, and so normally only consumers or competitors have standing . . . ."
- *S.D. Collectibles, Inc.* v. *Plough, Inc.*, 952 F.2d 211, 213 (8th Cir. 1991) — "[S]tanding is generally limited to actual market participants, that is, competitors or consumers."
- *Florida Seed Co.* v. *Monsanto Co.*, 105 F.3d 1372, 1374 (11th Cir. 1997) — "Basically, a plaintiff must show that it is a customer or competitor in the relevant antitrust market."

(footnote continued)
brought by consumers, competitors and potential competitors in the PC operating system market. It has paid billions of dollars in settlements to actual market participants.

Justice Alito endorsed the consumer-or-competitor rule during his tenure on the Third Circuit. In *Barton & Pittinos*, he wrote that where a plaintiff is "not a competitor or a consumer in the market in which trade was allegedly restrained," the "alleged injury is not 'antitrust injury,' meaning injury 'of the type that the antitrust statute was intended to forestall.'" 118 F.3d at 184 (quoting *AGC*, 459 U.S. at 540).[8] This is the bright-line rule advocated by Microsoft in the lower courts.

The decision of the court of appeals is squarely at odds with the decisions set forth above of six other circuits that have embraced the consumer-or-competitor rule.[9] The court of appeals recognized that Novell was not a consumer or competitor in the PC operating system market. (A36.) Novell could

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[8] In its decision below, the Fourth Circuit opined that the Third Circuit's decision in *Carpet Group Int'l, Inc.* v. *Oriental Rug Importers Ass'n*, 227 F.3d 62 (3d Cir. 2000), had "explicitly moved away" from *Barton & Pittinos*'s holding. (A21); *see Carpet Group Int'l*, 227 F.3d at 76–77 (stating in dicta that there is an exception to the consumer-or-competitor rule where plaintiff's "harm is 'inextricably intertwined' with the defendant's wrongdoing"). Even assuming that to be so, the Third Circuit has recently returned to the rule articulated by Justice Alito, holding in 2007 that even under the "inextricably intertwined" formulation, "plaintiffs and defendants [must be] in the business of selling goods or services in the same relevant market." *Broadcom Corp.* v. *Qualcomm Inc.*, 501 F.3d 297, 320–21 (3d Cir. 2007).

[9] In fact, the Fourth Circuit itself adhered to the majority position before the abrupt about-face that gave rise to this petition. *See White* v. *Rockingham Radiologists, Ltd.*, 820 F.2d 98, 104 (4th Cir. 1987); *Thompson Everett, Inc.* v. *Nat'l Cable Adver., L.P.*, 57 F.3d 1317, 1325 (4th Cir. 1995).

not have suffered injury in that market, and did not claim to have done so. Instead, Novell alleged that Microsoft engaged in anticompetitive conduct in the PC operating system market that caused injury to Novell's office productivity applications, which did not compete, and had no potential to compete, in that market. In ruling that Novell nonetheless had suffered antitrust injury, the court of appeals relied on a purported exception to the consumer-or-competitor rule for a plaintiff whose injury is "inextricably intertwined" with injury suffered by a direct victim of an antitrust violation. (A23–24.)[10]

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[10] The court of appeals also erroneously drew support for its rejection of the consumer-or-competitor rule from the Government Action. There, Microsoft was alleged to have engaged in anticompetitive conduct directed toward Netscape's Navigator web browsing software and Sun Microsystems' Java technology in order to protect its PC operating system monopoly. *Microsoft Corp.*, 253 F.3d at 53–55. The Fourth Circuit reasoned that although Sun and Netscape were neither consumers nor competitors in the PC operating system market, they "would have had standing to sue Microsoft privately under § 4." (A24–25.)

This overlooks the fact that, unlike Novell, both Netscape and Sun Microsystems were potential competitors of Microsoft in the PC operating system market, which is why Microsoft was found liable in the Government Action for its actions directed against those two products. *See Microsoft Corp.*, 253 F.3d at 79. As the Third Circuit recently explained, the products at issue in the Government Action were "nascent competitive threats" entitled to the protection of the Sherman Act. *Broadcom*, 501 F.3d at 320. The Third Circuit found that the Government Action was "inapposite" where — as here — "there is no allegation that [plaintiff] has sought, seeks, or ever will seek to enter the" relevant market. *Id.*

The decision of the court of appeals is in line with decisions by a minority of circuits that have found that *McCready* carves out such an exception. *E.g.*, *Southaven Land Co.* v. *Malone & Hyde, Inc.*, 715 F.2d 1079, 1086–87 (6th Cir. 1983); *American Ad Mgmt., Inc.* v. *Gen. Tel. Co. of California*, 190 F.3d 1051, 1057 n.5 (9th Cir. 1999); *Reazin* v. *Blue Cross & Blue Shield of Kansas, Inc.*, 899 F.2d 951, 963 (10th Cir. 1990). The First Circuit has noted the existence of a circuit split on this issue. *Sullivan* v. *Tagliabue*, 25 F.3d 43, 49 (1st Cir. 1994); *see also Daniel* v. *American Bd. of Emergency Med.*, 428 F.3d 408, 451 (2d Cir. 2005) (Katzmann, J., concurring in part) ("courts do indeed dispute the circumstances under which a party that is neither a competitor nor a consumer may demonstrate antitrust injury").

Because the court of appeals here rejected the consumer-or-competitor rule so categorically, this case provides an ideal opportunity for this Court to resolve the circuit split and clarify the proper reach of the federal antitrust laws.

II. The Court of Appeals Misunderstood this Court's Decision in *McCready*

The 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 have expanded antitrust standing beyond any reasonable limit. Such a broad reading of *McCready* is not supported by the facts of the case itself. As this Court noted in *AGC*, and as the Fourth Circuit acknowledged (A23), plaintiff in *McCready* *was* a consumer in the allegedly restrained market. *AGC*, 459 U.S. at 538.

McCready's observation that Section 4 "does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers," 457 U.S. at 472, was clarified in *AGC* to be merely a "paraphras[e] of the language of § 4" that "added nothing to the even broader language that the statute itself contains." 459 U.S. at 529 n.19. As the Court in *AGC* made clear, the question of whether a party "may recover for the injury it allegedly suffered . . . cannot be answered simply by reference to the broad language of § 4." *Id.* at 535.

Other courts of appeals have properly concluded that *McCready*'s "inextricably intertwined" language was never intended as a legal test for antitrust standing. As Judge Boudin wrote in *SAS*, "[q]uite apart from difficulties in application, such a test would certainly be very hard to square with the longstanding limitations on claims by stockholders, employees and even indirect purchasers." 48 F.3d at 46. Judge Boudin also observed that this Court subsequently "reinterpreted the phrase as a legal conclusion" signifying that the plaintiff must be a consumer or competitor in the restrained market. *Id.* (citing *AGC*, 459 U.S. at 539; *Atlantic Richfield Co.* v. *USA Petroleum Co.* (*ARCO*), 495 U.S. 328, 345 (1990)). The Fifth Circuit also has adopted this interpretation of the "inextricably intertwined" language in *McCready*. *See Norris*, 500 F.3d at 467 & n.18.

Moreover, decisions of courts of appeals which hold that a plaintiff can rely on the "inextricably intertwined" formulation to establish antitrust standing without showing that the plaintiff was a participant in the allegedly restrained market are in

direct conflict with this Court's precedents. *See, e.g.*, *Southaven*, 715 F.2d at 1086–87 (antitrust injury can be established if plaintiff was used "as a fulcrum, conduit or market force to injure competitors or participants in the relevant product and geographical markets"); *Ostrofe* v. *H.S. Crocker Co.*, 740 F.2d 739, 745–46 (9th Cir. 1984) (antitrust injury can be established if injury to plaintiff was necessary to achievement of defendants' anticompetitive objective). The Court in *Brunswick* held that antitrust injury must "flow[] from that which makes defendants' acts unlawful." 429 U.S. at 489.

An analysis of whether an injury is "inextricably intertwined" does not dispense with the requirement that the injury arise from the anticompetitive effects of an antitrust violation. *See ARCO*, 495 U.S. at 345; *SAS*, 48 F.3d at 46; *see also* 2A Phillip E. Areeda et al., ANTITRUST LAW ¶ 339f (3d ed. 2007) (McCready's injury was antitrust injury because it "flowed from that which made the defendant's conduct illegal, which in this case was the disruption of competition between psychiatrists and psychologists"). Injuries that do not flow from harm to competition in the relevant market are precisely the sort of "tangential" injuries that the antitrust laws are not intended to cover. *See McCready*, 457 U.S. at 477. Accordingly, antitrust injury must be "attributable to an anti-competitive aspect of the practice under scrutiny." *ARCO*, 495 U.S. at 334.

The court of appeals failed to establish any such connection. It merely noted that Novell had alleged anticompetitive conduct by Microsoft in the PC operating system market and claimed that injury

to Novell's office productivity applications was causally related to that conduct. (A28–30.) For example, the court found that Microsoft's alleged efforts to foreclose distribution channels for Novell's word processing and spreadsheet applications "would have naturally tended to decrease" Novell's share of the purported markets for those applications. (A29.) Critically, however, the court of appeals did not examine whether Novell's claimed injury flowed from harm to competition in the PC operating system market.[11] Had it done so, it would have concluded that the claimed injury to Novell's office productivity applications did not flow from competitive conditions in the PC operating system market. Such attenuated injury is not within the intended scope of protection of the antitrust laws. Those circuits that have held otherwise — including the court of appeals here — have missed that essential point.

[11] Insofar as Novell may have suffered injury from anticompetitive conduct by Microsoft in purported markets for office productivity applications, Novell asserted such claims in Counts II through V of the Complaint. The court of appeals properly held that those claims were time-barred. (A43.)

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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