No. 00-139

In the Supreme Court of the United States

MICROSOFT CORPORATION, APPELLANT

v.

UNITED STATES OF AMERICA AND STATE OF NEW YORK, *ET AL.*, APPELLEES

On Appeal from the United States District Court for the District of Columbia

BRIEF OF SOFTWARE AND INFORMATION INDUSTRY ASSOCIATION AND COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION AS AMICI CURIAE SUPPORTING JURISDICTION

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INTEREST OF AMICI CURIAE

1. The Software and Information Industry Association is the world's largest trade association representing the interests of more than 1,000 firms in the software, information and Internet industry. Formed on January 1, 1999, through the merger of the 15-year-old Software Publishers Association (SPA) and the 30-year-old Information Industry Association, SIIA leads industry efforts in e-business, copyright, privacy, taxation and other public policy issues. SIIA's website is at www.siia.net. SIIA filed two *amicus* briefs in the district court explaining the industry's views of the liability and remedy issues.

The Computer & Communications Industry Association is an association of computer technology and telecommunications companies that range from small entrepreneurial firms to some of the largest enterprises in the industry. CCIA's members include equipment manufacturers, software developers, providers of electronic commerce, networking, telecommunications and on-line services, resellers, systems integrators, and third-party vendors. Its member companies employ nearly one million persons and generate annual revenues exceeding $300 billion. For 28 years CCIA has been the industry leader on many important policy issues, including supporting a balanced antitrust policy that ensures competition and a level playing field. CCIA participated as amicus curiae in the district court in this case, and in the proceedings examining the current Microsoft consent decree.

The amici and their members are acutely aware of market dynamics that lend special urgency to the final resolution of this case.[1] While legal constraints are stayed, Microsoft will continue to entrench and expand its monopoly, consolidating the

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[1] No counsel for a party authored this brief in any part, and no person or entity, other than the *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief. See S. Ct. R. 37.6. The parties have consented to the filing of this brief; copies of the consent letters have been filed with the Clerk.

gains from its illegal conduct. The information technology industry cannot afford to wait any longer for a final disposition of this case. Competition suffers, and its restoration becomes more difficult, every month that Microsoft postpones its day of reckoning.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court's decision in this case will determine whether competition or monopoly governs an industry that is vital to the Nation's economy in the 21st Century. Congress retained the direct appeal provision in the Antitrust Expediting Act, 15 U.S.C. § 29(b), for the very purpose of ensuring swift and accurate resolution of cases — such as this one — that have national significance both to the economy and to the effective enforcement of the federal antitrust laws.

The United States Department of Justice, 19 States, and the experienced district judge all recognized the exceptional economic importance of this case and the need for expeditious resolution of the status of Microsoft's monopoly. The legal issues in this case are equally significant. Their resolution will determine how and whether the federal antitrust laws protect competition in software and other high technology markets. For Microsoft to prevail, a court would have to agree that well-established competitive principles developed under the federal antitrust laws do not apply with full force to the software industry. Under Microsoft's view of the law, the manipulability of software would immunize a monopolist from liability for exclusionary suppression of competition from potential substitutes. Consumers would pay a heavy price for such a wholesale revision of antitrust principles.

This is the biggest government antitrust case in two decades and one of the most important Sherman Act cases ever litigated. Its resolution will have a profound effect on the national economy as well as on innovation in a vital sector of internet technology. As Microsoft itself has noted on other occasions, authoritative resolution of these issues is critical to millions of investors and to hundreds of thousands of people employed in

the software industry. If this case does not satisfy the requirements of the Antitrust Expediting Act, it is hard to envision a case that would. The federal government's request for expedited review — a request not made in this Court for nearly 17 years — should be granted.

1. Section 29(b) provides for the direct appeal of a government antitrust action when the district court certifies that "immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice." At the request of the United States and the States, the district court has made that certification.

The "impact" of this case "on the economic welfare of this nation," H.R. Rep. 93-1463, at 14 (1974), is beyond serious dispute. The government proved that the world's richest corporation has used a calculated campaign of anticompetitive conduct to maintain a monopoly that directly affects the nation's economic welfare. The need for expedition is just as plain. Microsoft continues to wield its operating systems monopoly to foreclose competing technologies that might reduce the strength and durability of the monopoly. At Microsoft's request, the district court has stayed its judgment, leaving the public without any protection and permitting Microsoft to continue its campaign to monopolize adjacent markets. It may be impossible to rectify the adverse consequences of that campaign if Microsoft succeeds in interjecting additional delay into the appellate process.

2. The controlling antitrust principles laid down by this Court's prior decisions are sufficient to dispose of all of the liability and remedy issues raised by this appeal. But whether and how those principles should be adapted to software and technological markets is a matter of unusual importance to the development of federal antitrust law. Only this Court can definitively guide application of the antitrust laws in this context and promote the unimpeded development of this critical sector of the national economy.

3. The issues in this appeal fall comfortably within the institutional capabilities of this Court. Microsoft's arguments all turn on application of settled law to historical facts that have been found and elucidated in extraordinary detail by the district court. This Court has decided many antitrust cases on larger records and may dispose of make-weight arguments summarily. Although Microsoft spills much ink in attempting to demonstrate that this is a big case, it obviously was Congress's assumption that large antitrust cases of exceptional importance would be resolved under Section 29(b). In addressing the merits of this case, the Court will have the benefit of the expertise of antitrust enforcement officials at the federal and state level, experienced counsel representing Microsoft, and knowledgeable amici curiae participating on both sides of the case. Little would be gained by allowing this case to be decided initially in the court of appeals, while the costs of delay are incalculable. The appeal accordingly should be retained.

ARGUMENT

I. THIS COURT SHOULD RETAIN JURISDICTION BECAUSE THIS CASE IS IMPORTANT TO THE NATIONAL ECONOMY AND TO ANTITRUST ENFORCEMENT IN A RAPIDLY EVOLVING INDUSTRY.

No one mourns the demise of this Court's direct appellate jurisdiction over *all* government antitrust cases, no matter how modest their significance. But the impact of certain exceptional cases on the economy justifies immediate and authoritative disposition by this Court. That is why Congress, when it amended the Expediting Act in 1974, provided for direct appeal of government antitrust cases where "immediate consideration * * * by the Supreme Court is of general public importance in the administration of justice." 15 U.S.C. § 29(b). There are no more important — or more rapidly changing — markets than the computer software market. If *this* case does not satisfy Section 29(b), none does.

A. Considerations of Practical and Economic Importance Should Guide the Discretion Granted By Section 29(b).

Had Congress wanted to limit this Court's review of government antitrust cases to cases meeting traditional standards for certiorari, it would have repealed the Antitrust Expediting Act in full. Microsoft proceeds as if that were what Congress did. Asserting that this case is "not confined to one or two legal issues of the sort this Court normally considers on certiorari," and that the legal questions it presents "are important only to resolution of th[is] particular case[]" (J.S. 19), Microsoft argues that the Court should exercise its "unqualified discretion" (J.S. 15) to dismiss this appeal. Those contentions nullify Section 29(b); without it, this Court already had unqualified discretion to grant certiorari — either "before" or "after judgment" in the court of appeals (28 U.S.C. § 1254(1)).

But Congress did *not* intend Section 29(b) "to duplicate or displace" 28 U.S.C. § 1254(1). H.R. Rep. 93-1463, *supra*, at 13-14. Rather, Congress deliberately separated a narrow class of government antitrust cases from those subject only to certiorari review, because "government antitrust cases" may "have an impact on the economic welfare of this nation" unrivaled by "other federal cases." *Id*. at 14.

The considerations informing Section 29(b) review are distinct from certiorari standards in two principal respects. First, Section 29(b) jurisdiction turns "not on the general significance of the legal issues presented," but rather on "the immediate economic impact of the case itself." R. STERN, E. GRESSMAN, S. SHAPIRO & K. GELLER, SUPREME COURT PRACTICE § 2.7, at 53 (7th ed. 1993).[2] Second, Section 29(b), while

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[2] This Court's prior practice under Section 29(b) confirms that the exercise of jurisdiction under that provision does not depend on the difficulty or general importance of the legal issues presented: in the *AT&T* appeals (No. 82-952, *et al.*, & No. 83-737), the Court affirmed *summarily* in per curiam orders issued without opinions.

affording "discretion," circumscribes the discretion it obliges the Court to exercise. In deciding whether to grant certiorari, this Court independently evaluates the weight to be afforded to the private and public interest in Supreme Court review of the case at hand and to the public interest in the efficient use of the Court's resources. By contrast, Congress in Section 29(b) set forth a standard specifically addressed to the importance of the case to the economy and to antitrust enforcement.

The House Report "emphasized that the fact that the Supreme Court is accorded th[e] option" of remanding the case to the court of appeals "does not mean that the Supreme Court is intended to have a free and absolute discretion to hear or not hear a case on direct review." H.R. Rep. 93-1463, at 13. The Report drew the very contrast with certiorari that Microsoft would have this Court ignore (*id*. at 14; emphasis added)):

> Section 1254 does bestow on the Supreme Court an unqualified discretion to hear or not hear a case. *The Committee amendment does not.*

Rather, the standard set out in Section 29(b) is not mere surplusage, but has the independent significance that its inclusion in the statute suggests (*ibid*.; emphasis added):

> It is intended that the Supreme Court *hear* cases on direct review that are of general public importance in the administration of the antitrust laws.

Accordingly, the discretion that Section 29(b) confers is not "unfettered" (J.S. 16), as Microsoft maintains in reliance on inapposite authority pertaining to interlocutory appeals. Rather, the statute gives this Court discretion only to determine whether the case before it *satisfies* the stated criterion: whether the "general public importance" of the case supports "immediate consideration." Section 29(b) does not envision reopening the policy judgment of whether a case that *meets* this standard is

worthy of this Court's attention. This case plainly meets that standard, and jurisdiction should be retained.[3]

B. Rapid and Conclusive Resolution of this Case Is Exceptionally Important to the National Economy.

1. Microsoft concedes (J.S. 30) the "importance of th[is] case[]" to "the Nation's economy." The court of appeals also recognized the "exceptional importance" of the case in ordering en banc (but not expedited) consideration of this appeal before it was certified to this Court. J.S. App. A311, A312.

As Microsoft Chairman Bill Gates has stated, "there's a pretty broad recognition of the fact that information of all types will be software driven." Remarks of Bill Gates to 2000 Microsoft Financial Analyst Meeting, July 27, 2000, http://www.microsoft.com/msft/speech/analystmtg2000/gatestranscript2000.htm ("Gates Analyst Remarks"). Microsoft's dominance within the software industry is striking: its revenues exceed those of the next *six* largest firms combined, see *Fortune 1000*, FORTUNE, Apr. 17, 2000, at F-59, and dwarf those of the next *hundred* firms when only personal computer software is taken into account. See *Computers – Compatibility at Expense of Security*, Raleigh News & Observer, May 29, 2000, at D4; *The 1999 Softletter 100*, http://www.softletter.com/99sl100.pdf. The future of competition in the markets Microsoft currently dominates is of critical economic importance.

2. Speedy disposition of this appeal is necessary to limit the damage that Microsoft's anticompetitive practices continue to inflict on information technology markets. That danger is

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[3] In determining whether an appeal has sufficient "public importance" to antitrust enforcement, the Court should give "due weight" to the views of politically accountable institutions. H. Rep. 93-1463, at 14. The position of the United States and 19 States strongly corroborates its "public importance," and the "weight" accorded the views of the Department of Justice should be substantial in light of the Department's restraint in invoking Section 29(b). The Justice Department has not invoked Section 29(b) since 1983.

particularly acute given Microsoft's successful request for a stay of all of the protective provisions of the injunction in this case. Microsoft itself has recognized that software markets move at a "lightening [*sic*] pace." Microsoft Mem. Supp. Prop. Judg't 10 (D.D.C. May 10, 2000).

The fate of the formerly dynamic Internet browser market starkly illustrates the dangers of a Microsoft blitzkrieg aimed at totally unprotected adjacent industries. The exclusionary activity condemned in this case quickly vaulted Microsoft from a 5% share of the Internet browser market to a 50% share by the time of trial. J.S. App. A225-A226. Indeed, *since this case was filed*, Microsoft's share of the browser market went from less than 50% to a monopolistic *86%*. See *Microsoft Share Surges in Web Browser Market*, WALL. ST. J., June 27, 2000, at B8.

At the same time, Microsoft's operating systems monopoly has remained stable — indeed, has grown in share and power — over the past ten years. Bill Gates puts it best: Microsoft "has dominated operating systems for several generations." Pontin, *Bill Gates Unplugged*, RED HERRING, forthcoming Sept. 2000, reprinted at http://www.redherring.com/mag/issue82/mag-gates-82-home.html. Its monopoly in productivity applications also has been stable for years. In that respect, the "new economy" is not meaningfully different from the "old" one. Exclusionary conduct successfully entrenches monopolies. Microsoft again and again has relied on factually unfounded hyperbole to claim that its Windows monopoly is threatened, but neither the AOL/Netscape merger nor the emergence of Linux has made any difference on the desktop. As Bill Gates recently observed, "AOL has an announcement a day," Pontin, *supra*, but press releases do not undermine Microsoft's monopoly.

The reasons for Microsoft's success in excluding competition, and for the resultant urgency in bringing this case to a rapid conclusion, are well-known. Anticompetitive actions have greatly magnified effects in markets, like software markets, that are susceptible to "network effects." See J.S. App. A62-A63. See generally Lemley & McGowan, *Legal Implications of*

Network Economic Effects, 86 CAL. L. REV. 479 (1998). As the Windows monopoly illustrates, the popularity of a dominant software product tends to feed on itself: individuals are more likely to buy the dominant product so that they can share data with other users; employers are more likely to equip their computers with it so that they can find employees trained to operate it; and developers are more likely to write complementary software for the dominant product, making it all the more attractive for consumers. In Bill Gates' words, "the leading platform [is] significantly more popular than the number two platform because of the dynamics of software availability." Gates Analyst Remarks, *supra*. Software markets are thus prone to "tip" decisively toward a particular product once it achieves a critical market share and thereafter "lock in" users so that a monopoly may be insulated from effective competition for a substantial period. These conditions geometrically increase the harms that flow from anticompetitive conduct. And they make it imperative to rapidly adjudicate and effectively remedy antitrust violations while competition still can be restored.

3. Microsoft has made no secret that it plans to expand upon the conduct that originally necessitated this action: binding applications to the monopoly operating system to prevent complements from becoming partial substitutes for the monopoly product.[4] At this moment, Microsoft is ruthlessly extending its anticompetitive practices to other software markets. Bill Gates has declared: "We are a very predictable company. What we did with Windows on the desktop, we're doing with

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[4] In pursuing this conduct, Microsoft has shown little concern about the consequences of antitrust enforcement. It dismissed the 1995 consent decree as accomplishing no "change [in its] business practices at all," Gov't Ex. 940, at 15. Unsurprisingly, Microsoft also has announced that it does not view the present case as a reason to change its anticompetitive business practices. See, *e.g.*, Grimaldi, *Microsoft Defends Its Practices; CEO Ballmer Sees No Need to Change*, WASH. POST, Apr. 19, 2000, at E1; Uimonen, *Gates Says Court Case Won't Affect Business*, NETWORK WORLD FUSION, 2000 WL 9442689 (June 13, 2000).

Windows NT [now Windows 2000] on the server" computers that power Internet and network computing. Kirkpatrick, *He Wants All Your Business and He's Starting to Get It*, FORTUNE, May 26, 1997, at 58 (quoting Gates). Given an extra year or two of untrammeled predation resulting from a detour to the court of appeals, Microsoft is likely to lock up, or at least to "tip," additional markets to insulate its monopoly.

To avoid the perceived threat to Windows from streaming media, see Findings ¶¶ 104-114; Gov't Ex. 1368, Microsoft is now duplicating the tying arrangement it used to gain a monopoly over Internet browsers, this time tying a media player to Windows. *E.g.*, Holmes, *Microsoft May Be Testing the Limits Again*, L.A. TIMES, May 10, 2000, at A1. The company has also undertaken to redesign its Office applications to favor handheld computers that run on Windows as opposed to other operating systems such as the one used by the Palm Pilot. See Gov't Rem. Ex. 1-2. Indeed, Microsoft has identified the Internet browser, the Web server, and streaming media as "core Windows technologies" that it views as rightfully part of its permanent monopoly. See Summary Response to Proposed Remedy 22 (D.D.C. May 19, 2000).

Microsoft now is trying to intermingle the code of the monopoly product with the code of server software: 40% of the functionality of the desktop version of Windows 2000 is useless without a Windows 2000 server. See *Ballmer Is Bullish on Windows 2000*, PC WEEK, Nov. 19, 1999, http://www.zdnet.-com/pcweek/stories/news/0,4153,1018247,00.html. European competition authorities have expressed concern that this "permits only Microsoft products to be fully inter-operable." See Hargreaves, *Brussels Starts to Probe Microsoft's Windows 2000*, FIN. TIMES, Feb. 10, 2000, at 1 (quoting Commissioner Mario Monti).

Microsoft is mounting a comprehensive effort to tie its desktop monopoly products to "back-end computers," *i.e.*, servers. Buckman, *Microsoft, Advertisers Target the Wireless Web*, WALL ST. J, July 24, 2000, at B1. Most strikingly, only

two days after the district court's conduct remedies were stayed, Microsoft announced its ".NET" initiative, a sweeping new plan to yoke Internet server software to Windows. Markoff, *Microsoft Plans to Shift Product Focus to the Internet*, N.Y. TIMES, June 23, 2000, at C1. Microsoft characterizes ".NET" as an adoption of the open Internet computing standards that the acquisition of the browser monopoly was intended to derail. In reality, however, ".NET" is simply the continuation of the familiar "embrace, extend, extinguish" strategy (11/9/98 (p.m.) Tr. 53 (McGeady)) under which Microsoft pretends to embrace open Internet standards, but adds extensions to produce "polluted" Windows-specific protocols to supplant the cross-platform ones. Gov't Ex. 259, at MS7 033448 (Java). As Bill Gates has explained, "What we do is take industry standards and drive them forward," Pontin, *supra*, *i.e.*, into Microsoft-proprietary dead-ends; "we've taken very directly the [relevant] parts from Windows * * * and simply are now creating those as Internet-based services." Gates Analyst Remarks, *supra*. This new Windows "platform * * * partly runs on the client and partly runs as a service" on Internet servers. *Ibid.* The entire point of ".NET" is to "build web services that take particular advantage of * * * Windows operating systems" — that is, that use the "edge" provided by the Windows monopoly in a variety of ways to foreclose competition in the Internet server and applications markets. Schlender, *Damn the Torpedoes! Full Speed Ahead,* FORTUNE, July 10, 2000, at 98, 110.

Success in this anticompetitive undertaking would preserve the Windows monopoly from the threat of erosion from the growth of applications that locate computing logic on an Internet-enabled server rather than on a desktop. The head of Microsoft's Windows Division has made clear that "we want Windows to be the operating system you would use to deliver those services." Remarks of Brian Valentine to 2000 Microsoft Financial Analyst Meeting, July 27, 2000, http://www.microsoft.com/msft/speech/analystmtg2000/valentinetranscript2000.htm. Users of non-Microsoft software would be "second-class citizens" for distributed Internet computing as

well as on the desktop. Markoff, *supra*, at C17. Infusing Windows operating system code in applications products also capitalizes on the stay of the structural remedies to blur "the current division between the Windows operating system and the rest of the company," David Streitfeld, *At Microsoft, A Strategic Sales Shift*, WASH. POST, June 23, 2000, at E1, in order to complicate the divestiture later.

Industry observers recognize that Microsoft's effort "to leverage its dominance in PC operating systems to establish Windows as a core internet technology," Foremski, *Microsoft Plans Fundamental Strategy Shift*, FIN. TIMES, June 22, 2000, at 22, "continu[es] the very strategy that caused the government to initially file its antitrust suit." Alexander, *Microsoft's Vision*, MPLS. STAR TRIB., June 23, 2000, at 1D. This attempt to use the current monopoly as the germ for "a sort of Windows for the Internet" has the potential to render the district court's "remedies * * * obsolete" if the appeal takes long enough. *Winternet*, THE ECONOMIST, July 1, 2000, at 62, 63. Microsoft, in short, is "applying every bit of technological leverage throughout the company to influence as much of the infotech industry as it can" before this case is finally resolved. Schlender, *supra*, at 110.

During the two to three years it would take this case to wind to a conclusion were it first remanded to the court of appeals, Microsoft could extinguish competition in these markets just as easily as it did in the browser market during the two years this case was pending in the district court.[5] Timely

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[5] If this Court remanded this appeal, briefing in the court of appeals would be complete no earlier than January or February 2001, argument might be heard in April, and the case decided no earlier than the fall. Cases *reheard* en banc in the D.C. Circuit routinely consume a year or more from panel disposition to en banc decision, despite the head start afforded by the initial hearing. See Ginsburg & Falk, *The Court En Banc: 1981-1990*, 59 GEO WASH. L. REV. 1008, 1021 n. 65 (1991). (More recent cases conform to this pattern.) A petition for certiorari then would be due near the end of the year,

entry of a forward-looking decree can prevent anticompetitive market effects. It is much more difficult to try to restore competition after Microsoft locks in more users in more markets.

Microsoft's assertion (J.S. 2) that "[t]here are no exigent circumstances that justify" immediate review purposely ignores the speed with which Microsoft's predatory practices have swallowed competitive software markets. In the context of Microsoft's continuing activities, and its insistence on a stay of all public protection pending appeal, its effort to induce this Court to add to the delay should be seen for what it is: a transparent effort to outrun the law. This Court should not condone Microsoft's strategy of hampering law enforcement through delay.

4. The unsettling impact of this suit on the information technology industry adds to the special public importance of this appeal. Until they know for sure whether Microsoft will be split up, and whether its practices will be restrained by an antitrust decree, participants in the information technology industry cannot undertake effective planning. This uncertainty is especially devastating in an industry as dynamic as this one.

The unresolved status of this suit also has disrupted capital markets. Investors are unsure how this case will ultimately affect the structure of the information technology industry, and thus cannot reasonably apportion investments between Microsoft and other firms. Fluctuations of information technology securities in response to news events throughout this litigation produce pure deadweight losses. Providing an authoritative resolution of this case as soon as reasonably possible is of unique importance to investors, commercial creditors, and businesses that deal with Microsoft and others in this industry.

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and would be conferenced no earlier than February 2002. If certiorari were then granted, the case likely would be argued in Fall 2002 and decided in Spring 2003.

II. THIS CASE RAISES ISSUES OF LAW FUNDAMENTAL TO THE APPLICATION OF THE SHERMAN ACT TO A VITAL INDUSTRY.

Although the extraordinary economic impact of this appeal, standing by itself, justifies retaining jurisdiction, the legal questions presented are also unusually important. This Court frequently has intervened to affirm fundamental antitrust principles in monopolization cases, see, *e.g.*, *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) (citing numerous prior Supreme Court precedents), or to bolster application of those principles in markets that otherwise might be exposed to anticompetitive abuse. See, *e.g.*, *Eastman Kodak Co.* v. *Image Technical Services, Inc.*, 504 U.S. 451 (1992).

This case is especially important to the development of antitrust law given the inherent manipulability of software. While the physical boundaries of tangible goods are readily discerned and largely immutable, software is constructed from code that can be "grouped or constituted in an infinite number of ways." P. AREEDA & H. HOVENKAMP, ANTITRUST LAW 903 (2000 Supp.). The synthesis of software code can yield innovation, but also can be misused to stifle innovation and competition. See Amicus Brief of Lawrence Lessig 21-22, 26-27 (D.D.C. Feb. 1, 2000) ("Lessig Br."). This makes it especially important to determine reliably whether two products allegedly tied together in violation of Section 1 of the Sherman Act in fact are separate products. See *Kodak*, 504 U.S. at 462-463.

As this case illustrates, however, software is especially adaptable to product bundling as a tool for *perpetuating* monopoly power. The owner of a monopoly software product may be in a position to engage in "monopoly bundling" by merging the code of that product with other, previously distinct applications to choke off potential substitutes and to reinforce the barrier to entry resulting from network effects. See Meese, *Monopoly Bundling in Cyberspace: How Many Products Does Microsoft Sell?*, ANTITRUST BULL., Spr. 1999, at 108. That was

Microsoft's goal in bundling Explorer with Windows: not merely to monopolize a new product, but to discourage (and ultimately to prevent) software developers from gearing applications to Navigator as a middleware platform, which might have threatened Microsoft's operating systems monopoly.

Courts and commentators have approached this problem in different ways. A panel of the D.C. Circuit concluded, albeit in dictum, that the merger of applications should be immune from antitrust review so long as "there is a *plausible* claim that it brings *some* advantage" to consumers. *United States* v. *Microsoft Corp.*, 147 F.3d 935, 950 (D.C. Cir. 1998) (emphasis added).[6] That "makes the 'separate products' requirement quite useless," AREEDA & HOVENKAMP, *supra*, at 560; an operating systems manufacturer "that wishes to disadvantage makers of a particular sort of application can simply redesign its own application [and] point to benefits." Meese, *supra*, at 110. Other judges focus on whether merged "products * * * are separate from the buyer's perspective," *Microsoft*, 147 F.3d at 960 (Wald, J., concurring in part and dissenting in part), or whether "a valid, not insignificant, technological improvement has been achieved by the integration," *Caldera, Inc.* v. *Microsoft Corp.*, 72 F. Supp. 2d 1295, 1325 (D. Utah 1999).

Professor Lessig has proposed a "presumption" that "two software products combined in a 'new way' * * * [are] a 'single product,'" subject to a showing by the plaintiff that "the particular bundle at stake raises the risk of a particular anticompetitive harm." Lessig Br. 38. Professor Meese, by contrast, has suggested that merged applications be treated as "separate products" unless the *defendant* shows that "(1) the bundle does not, in fact, enhance a firm's market power and/or (2) the benefits of the bundle outweigh its costs." Meese, *supra*, at 111. Professors Lessig and Meese agree that, under either test, the

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[6] In issuing this dictum about the meaning of the 1995 consent decree after deciding the case before it on procedural grounds, the court of appeals noted that nothing would "bar a challenge under the Sherman Act" to Microsoft's bundling. 147 F.3d at 950 & n.14.

facts found by the district court in this case render Microsoft liable under the antitrust laws. See *id.* at 109-110; Lessig Br. 26-43.[7]

As Professor Lessig put it (Br. 39), in settling the question of the antitrust analysis of the bundling of software products, courts ultimately must determine whether antitrust law is "neutral" as to whether a vendor combines products "by contract or * * * by code." If instead courts offer effective antitrust immunity toward any exclusionary goal accomplished through mingling of code, antitrust law would channel software development away from modular interoperability and toward bloated products that include everything in one morass — exerting the kind of harmful judicial influence in software design that the D.C. Circuit deplored. See 147 F.3d at 952-953.

This is a legal question of enormous practical importance to an industry that is critical to the economy of the United States. It is essential that this Court finally and expeditiously resolve the uncertainty surrounding the application of the antitrust laws to the software industry. While they wait, software firms are exposed to risks of unconstrained predatory behavior, on the one hand, and of debilitating legal uncertainty, on the other.

III. THE ISSUES RAISED IN THIS APPEAL FALL WITHIN THIS COURT'S EXPERIENCE AND INSTITUTIONAL CAPACITY.

While conceding the immense "importance of th[is] case[] * * * [for] consumers and the Nation's economy" (J.S. 30), Microsoft nonetheless questions the capacity of this Court to decide it in its present posture. According to Microsoft, the size of the record and the intricacy of the issues involved make it inappropriate for the Court to pass on this appeal without the benefit of "sifting" by the court of appeals.

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[7] Microsoft's suggestion (J.S. 7) that Professor Lessig recommended a finding of non-liability is false. See Lessig Br. 9-10, 15.

This argument misconceives Section 29(b). The size of the record, the complexity of the questions presented, and the value of lower court review may be decisive considerations in the grant or denial of certiorari before judgment. But they should not defeat direct appeal of a government antitrust action where (as here) "immediate consideration" by the Court (15 U.S.C. § 29(b)) is essential to "the economic welfare of this nation" (H.R. Rep. 93-1463, at 14). Antitrust cases of exceptional "public importance" (15 U.S.C. § 29(b)) necessarily generate large records; high stakes often lead to factual as well as legal disputes. Treating the burden of deciding such cases as a proper ground for *declining* jurisdiction, then, would render Section 29(b) a dead letter.

In any event, Microsoft's complaints are wildly overstated. Nothing about this case renders immediate review impractical or inappropriate.

A. There Is Nothing Extraordinary About the Record.

The size of the trial record is surely no reason to decline jurisdiction in this important case. This Court has decided many cases with records of similar dimension.

Until the Antitrust Expediting Act was amended in 1974, this Court decided several direct antitrust appeals *every Term.* And it did so at a time when the Court was rendering 150 or more plenary decisions annually. These Expediting Act cases, and other antitrust cases, often had extensive records.[8] Indeed, the *Joint Appendices* in some of these cases exceeded 10,000 pages. See *American Tobacco Co.* v. *United States*, 328 U.S. 781 (1946); *Hartford-Empire Co.* v. *United States*, 323 U.S. 386

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[8] See, *e.g.*, *United States* v. *General Dynamics Corp.*, 415 U.S. 486, 508 (1974); *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 368 (70-day trial and "voluminous" record); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969) (appendix exceeding 4000 pages); *United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966) (appendix exceeding 5,000 pages); *Schine Chain Theatres* v. *United States*, 334 U.S. 110 (1948) (appendix exceeding 6,000 pages).

(1945). The capacity of the Court to dispose of multiple appeals of this size every Term refutes Microsoft's suggestion that this Court is now incapable of deciding a *single* large case of exceptional importance.

More recently, this Court has exercised discretionary review to closely scrutinize massive records for evidentiary sufficiency under complex antitrust theories. Thus, the Court examined the sprawling record of a 115-day trial in *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 243-244, 254 (1993). And the watershed decision in *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), rested on review of factual claims presented in a 40-volume appendix, *id*. at 577, exceeding 18,000 pages. This Court routinely decides cases with similar large records in other types of litigation. *E.g.*, *Arizona* v. *California*, 120 S. Ct. 2304 (2000) (record exceeding 20,000 pages).

Moreover, the Court will not need to review a raw trial record. Rather, experienced counsel will compile a joint appendix limited to the evidence needed to decide the appeal. This Court's long experience in cases with substantial records makes it absurd to suggest that the record in this case should deter the Court from giving effect to Section 29(b).

B. The Issues Are Readily Apparent and Clearly Framed.

Microsoft seeks to persuade this Court to delay resolution of this concededly important case by referring to the "sheer number of issues raised by [its] appeal[]." J.S. 23. In an effort to inflate these numbers, Microsoft both restates the same issues several different ways and proffers frivolous theories, such as the assertion that this litigation threatens its civil rights. The Court should view this desperate gambit for what it is — an effort to string out the present litigation by any expedient.

In virtually every case certified under the Expediting Act, the antitrust defendant could recite a host of marginal issues as a device to deter direct appeal. In the meanwhile, of course, the

defendant, having secured a stay pending appeal, could continue to engage in anticompetitive practices worth billions of dollars annually. This kind of artful pleading and dodging would go far toward making the Expediting Act a nullity.

In any event, in either this Court or the court of appeals, this appeal will involve the same record, the same potential issues, and the same applicable standards of review. In either venue, Microsoft will have to winnow the universe of potential issues to focus attention on the strongest ones — or expect summary rejection of its claims. The page limits applicable to briefs in both courts will aid that salutary requirement. Perhaps Microsoft hopes to use a scattershot approach in the court of appeals and let that court's reaction determine the arguments to be recycled in this Court. Whatever private benefit Microsoft might derive from this strategy, however, pales before the *public's* interest in a rapid and authoritative disposition of this case — an interest codified in Section 29(b).

Microsoft's artful proliferation of issues amounts to far less than meets the eye. The Court will address a set of extensive findings based on essentially undisputed historical facts, often resting on internal Microsoft documents. Under the "almost insurmountable burden" imposed by clear-error review, *International Boxing Club* v. *United States*, 358 U.S. 242, 252 (1959), Microsoft is unlikely to displace the Findings of Fact.[9]

Ultimately, there is a small set of important issues in this case, none of which is likely to change significantly in character were this case remanded to the court of appeals, and none of

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[9] Microsoft claims (J.S. 16) that this Court's review will be impeded by the lack of record citations in the Findings of Fact. Those findings are entitled to deference nonetheless, see *Amadeo* v. *Zant*, 486 U.S. 214, 228 (1988), and experienced appellate counsel can be counted on to bring relevant parts of the record to the Court's attention. Indeed, this Court has summarily affirmed decisions based on findings of fact that lacked record citations. *E.g.*, *Jerrold Electronics Corp.* v. *United States*, 365 U.S. 567 (1961), aff'g 187 F. Supp. 545 (E.D. Pa. 1960).

which is likely to involve intricate factual disputes when viewed through the lens of clear-error review. Microsoft claims that it will dispute the district court's market definitions, but concedes (J.S. 19-20) that this dispute turns on a "mixed question of fact and law" that depends primarily on the appropriate legal analysis. Whether Microsoft's conduct violated antitrust norms is more a question of what rules apply than of application of the correct rule to the historical facts. And whether the injunction entered by the district court complies with remedial principles set down by this Court in a long line of relevant precedents is again a matter of antitrust law and judicial policy.[10]

In short, there is little to be gained from interposing delay of a year or more to seek preliminary opinions from the court of appeals. This Court will receive the benefit of several reasoned perspectives on the issues. The Court not only will be assisted by briefing from able counsel for Microsoft and the plaintiffs, but also will receive amicus submissions from all sectors of the information technology industry and from antitrust experts. If Bill Gates is correct in asserting that the court of appeals already has "spoken directly to this case," Pontin, *supra*, then there is nothing at all to be gained from remanding this appeal. But whatever the marginal value of ventilating this case in another lower court, it cannot outweigh the enormous public interest in rapid and authoritative disposition of the case by this Court.

CONCLUSION

This Court should retain jurisdiction of this appeal.

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[10] See, *e.g.*, *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 381 (1973); *Ford Motor Co.* v. *United States*, 405 U.S. 562, 573, 577-578 (1972); *United States* v. *United Shoe Machinery Corp.*, 391 U.S. 244, 250 (1968); *United States* v. *E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 323, 326 (1961); *Schine Chain Theatres, Inc.* v. *United States*, 334 U.S. 110, 128 (1948).

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