IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 00-5212, 5213

MICROSOFT CORPORATION,

Defendant-Appellant,

v.

UNITED STATES OF AMERICA and STATE OF NEW YORK, *et al*.,

Plaintiffs-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPELLANT'S MOTION FOR STAY OF THE MANDATE PENDING PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 41(d)(2) of the Federal Rules of Appellate Procedure and Circuit Rule 41, appellant Microsoft Corporation ("Microsoft") hereby requests the Court to stay issuance of its mandate pending final disposition of Microsoft's petition for a writ of certiorari in the Supreme Court, which Microsoft filed earlier today. (A copy of the petition is annexed to this motion for the convenience of the Court.)

Microsoft respectfully submits that the district judge should have been disqualified as of September 1999, the date of his earliest known violation of 28 U.S.C. § 455(a) and the Code of Conduct of United States Judges. Such disqualification would require vacatur of the district court's findings of fact and conclusions of law. Although acknowledging that the

district judge engaged in "deliberate, repeated, egregious, and flagrant" ethical violations, Op. at 106, this Court limited the scope of disqualification to the remedy phase of the trial, primarily because Microsoft had not shown actual bias, Op. at 122.

The requirement that Microsoft show actual bias is inconsistent with the language of 28 U.S.C. § 455(a). Under that provision, "what matters is not the reality of bias or prejudice but its appearance." *Liteky* v. *United States*, 510 U.S. 540, 548 (1994). In holding that, absent a showing of actual bias, disqualification was not effective until eight months after the earliest known ethical violation committed by the district judge, this Court's decision also conflicts with the Supreme Court's decision in *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847 (1988), as well as the Tenth Circuit's decision in *United States* v. *Cooley*, 1 F.3d 985 (10th Cir. 1993), and the Ninth Circuit's decision in *Preston* v. *United States*, 923 F.2d 731 (9th Cir. 1991).

That conflict makes the issue appropriate for the Supreme Court's attention. *See* SUP. CT. R. 10(a); ROBERT L. STERN ET AL., SUPREME COURT PRACTICE §§ 4.4, 4.5 (7th ed. 1993). Moreover, were the Supreme Court to determine that a new trial is required, that decision would substantially alter further proceedings in this case, potentially nullifying any actions taken by the district court on remand in the interim. Accordingly, the requirements for a stay under Rule 41(d)(2) of the Federal Rules of Appellate Procedure and Circuit Rule 41 are met.

A.

Under the Federal Rules of Appellate Procedure, "[a] party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court." FED. R. APP. P. 41(d)(2)(A). By operation of law, such a stay remains in place until the Supreme

Court's final disposition of the petition. The party seeking a stay "must show that the certiorari petition would present a substantial question and that there is good cause for a stay." *Id.* Similarly, Circuit Rule 41 permits a stay of the issuance of mandate upon a showing of "good cause." Under both rules, a stay to permit the filing of a petition for a writ of certiorari may "ordinarily" be for up to 90 days. D.C. CIR. R. 41; *see also* FED. R. APP. P. 41(d)(2)(B). Because Microsoft has already filed its petition, it is seeking a stay only pending the Supreme Court's final disposition of the petition.

Whether there exists "a substantial question" and "good cause" for a stay turns on the applicant's "reasonable probability of succeeding on the merits and whether the applicant will suffer irreparable injury." *Books* v. *City of Elkhart*, 239 F.3d 826, 827 (7th Cir.), *cert. denied*, 121 S. Ct. 2209 (2001). If either one of these elements is established, the stay should be granted. *See id.* at 829 (granting stay "although the [applicant] presents a weak case for a grant of certiorari"); *see also Deering Milliken, Inc.* v. *FTC*, 647 F.2d 1124, 1128 (D.C. Cir.) (existence of "substantial" issues constitutes "good cause" that would make the court "obliged to grant" stay), *cert. denied*, 439 U.S. 958 (1978). Both elements are present here.

B.

The question of whether a showing of actual bias is required before disqualification is available to remedy flagrant and concealed violations of 28 U.S.C. § 455(a) is a substantial one for purposes of Rule 41(d)(2)(A). The Supreme Court found the issue of remedies for violations of 28 U.S.C. § 455(a) deserving of its attention in *Liljeberg*, and Microsoft respectfully submits that this Court's decision conflicts with *Liljeberg*. There also can be no doubt that requiring a showing of actual bias creates a conflict with both the Tenth Circuit's decision

in *Cooley* and the Ninth Circuit's decision in *Preston*. The question presented thus falls within the first class of cases suitable for review on certiorari. *See* SUP. CT. R. 10(a); *see also* *United States* v. *Holland*, 1 F.3d 454, 456 (7th Cir. 1993) ("A conflict among the circuits is an accepted basis for the granting of the writ of certiorari.").

The Court found that the district judge committed clear and repeated violations of the Code of Conduct for United States Judges. *See* Op. at 113-17. The Court also found that the district judge's "conduct destroyed the appearance of impartiality" in violation of 28 U.S.C. § 455(a), which required that he disqualify himself at the time the violations began to occur. *See* Op. at 122. Moreover, the Court found that the district judge's concealment of his discussions with reporters "made matters worse" and "prevented the parties from nipping his improprieties in the bud." Op. at 115. Nevertheless, the Court held that the district judge's "rampant disregard for the judiciary's ethical obligations" did not warrant disqualification as of the time the violations began (and consequently vacatur of the district court's findings of fact and conclusions of law) primarily because Microsoft had not shown actual bias. *See* Op. at 117, 120-22.

In *Liljeberg*, the Supreme Court held that a violation of 28 U.S.C. § 455(a) far less egregious than the pattern of misconduct engaged in by the district judge in this case required that a final judgment (which had been affirmed on appeal) be vacated and the case retried. No requirement of actual bias was imposed. *See Liljeberg*, 486 U.S. at 867-68. The decisions in *Cooley* and *Preston* also support Microsoft's position that disqualification as of September 1999 is necessary to remedy the appearance of partiality created by the district judge's secret discussions with reporters, which began at least two months before the findings of fact were entered and at least six months before the conclusions of law were issued. *See* Op. at 109.

The misconduct at issue in *Cooley* concerned a single television appearance in which the district judge stated that an injunction he had entered would be enforced. *Cooley*, 1 F.3d at 995. The Tenth Circuit found that the district judge deliberately chose "to appear in such a forum at a sensitive time to deliver strong views on matters which were likely to be ongoing before him." *Id.* Although the Tenth Circuit concluded that "the record of the proceedings below, including the sentences imposed, discloses no bias," *id*. at 996, it found that the district judge's decision to appear on television conveyed the impression that he "had become an active participant in bringing law and order to bear on the protesters, rather than remaining as a detached adjudicator." *Id*. As a consequence, the Tenth Circuit held that a reasonable person would question the district judge's impartiality. *Id*. To remedy this violation of 28 U.S.C. § 455(a), the Tenth Circuit vacated not only each defendant's sentence, but each defendant's conviction as well, and remanded the case for a new trial before a different district judge. *Id.* at 998.

In *Preston*, the Ninth Circuit disqualified a trial judge pursuant to 28 U.S.C. § 455(a) because he previously had been "of counsel" to a law firm that represented a non-party with an interest in the litigation. *Preston*, 923 F.2d at 732. Despite the absence of any claim of actual bias, *see id.* at 734, the Ninth Circuit held that there was "no way . . . to purge the perception of partiality in this case other than to vacate the judgment and remand the case to the district court for retrial by a different judge," *id*. at 935. The Ninth Circuit reached that conclusion despite acknowledging "that a retrial will involve considerable additional expense, perhaps with the same result as the first trial." *Id.*

The imposition of a requirement of actual bias on a record disclosing far more serious violations of 28 U.S.C. § 455(a) than those at issue in *Cooley* and *Preston* presents a clear conflict on an important issue with direct bearing on maintaining the integrity of the judicial process. This Court's decision not to vacate the findings of fact and conclusions of law in this case after explicitly stating that "[m]embers of the public may reasonably question whether the District Judge's desire for press coverage influenced his judgments," Op. at 120—not merely his judgments on the issue of remedy, but his judgments generally—poses a "risk of undermining the public's confidence in the judicial process." *Liljeberg*, 486 U.S. at 864. At a minimum, this Court's requirement of a showing of actual bias to obtain disqualification under 28 U.S.C. § 455(a) presents a substantial question that merits review by the Supreme Court.

C.

The Court has noted that "[r]ulings in this case have potentially huge financial consequences for one of the nation's largest publicly-traded companies and its investors." Op. at 117. Allowing the mandate to issue when questions going to the fundamental integrity of proceedings in the district court have not been finally resolved subjects Microsoft to the threat of severe and unnecessary injury. It also subjects both the federal judiciary and the parties to costly and distracting proceedings that may prove in the end to be of no avail. As proceedings on remand in this action will "require significant time and attention," the interests of the parties, the judiciary and the public would best be served by affording Microsoft "a full

opportunity to seek review in the Supreme Court of the United States" before going forward.

Books, 239 F.3d at 829.

Respectfully submitted,

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Annex

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

MICROSOFT CORPORATION,

Petitioner,

—v.—

UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

The district judge engaged in secret discussions with select reporters about the merits of this case beginning no later than September 1999 and continuing over the succeeding eight months. (A119-20) During that period, the district judge entered his findings of fact, followed by his conclusions of law, and then a remedial decree. (A120) The court of appeals held that (i) the district judge's course of conduct flagrantly violated 28 U.S.C. § 455(a) and the Code of Conduct for United States Judges (A118-19) and (ii) the district judge would have been immediately disqualified had he not concealed his misconduct by requiring the reporters to "embargo" their stories until after entry of judgment (A128). The court nevertheless disqualified the district judge "retroactive only to the imposition of the remedy" (A136), some eight months after the earliest known violation.

The question presented for review is:

> Whether the court of appeals erred in not disqualifying the district judge as of the date of his earliest known violation of 28 U.S.C. § 455(a) and the Code for Conduct of United States Judges, thus requiring that his findings of fact and conclusions of law be vacated.

List of Parties and Rule 29.6 Statement

The parties to the proceedings before the United States Court of Appeals for the District of Columbia Circuit were petitioner Microsoft Corporation and respondents the United States of America, the District of Columbia and the States of California, Connecticut, Florida, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, New Mexico, New York, North Carolina, Ohio, Utah, West Virginia and Wisconsin. New Mexico withdrew from the case after the court of appeals' decision.

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

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IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

MICROSOFT CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA, *et al*.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Microsoft Corporation respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Opinions Below

The court of appeals' opinion is reported at 253 F.3d 34 and is reprinted in the appendix hereto at pages A1 through A139. The district court's opinions and orders are reported at 97 F. Supp. 2d 59 (final judgment), 87 F. Supp. 2d 30 (conclusions of law) and 84 F. Supp. 2d 9 (findings of fact).

Jurisdiction

The court of appeals entered its judgment on June 28, 2001. Microsoft filed a timely petition for rehearing on July 18, 2001, which was denied on August 2, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutory Provision and Canons of the Code of Conduct of United States Judges Involved

Section 455(a) of Title 28 of the United States Code provides: "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

Canon 2A of the Code of Conduct for United States Judges provides: "A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." 175 F.R.D. 363, 365 (1996). Canon 3A(4) provides that a judge should "neither initiate nor consider *ex parte* communications on the merits . . . of a pending or impending proceeding." *Id*. at 367. Canon 3A(6) provides: "A judge should avoid public comment on the merits of a pending or impending action, requiring similar restraint by court personnel subject to the judge's discretion and control." *Id*.

Statement of the Case

The court of appeals held that the district judge's secret discussions with reporters violated 28 U.S.C. § 455(a) and Canons 2, 3A(4) and 3A(6) of the Code of Conduct of United States Judges. (A118-19) These "violations were deliberate, repeated, egregious, and flagrant." (A119) The court further stated: "Given the extent of the Judge's transgressions in this case, we have little doubt that if the parties had discovered his secret liaisons with the press, he would have been disqualified, voluntarily or by court order." (A128-29) As one judge stated at oral argument, "had he not placed that embargo, he would have been off that case in a minute." 2/27/01 Ct. App. Tr. at 326-27.

While acknowledging that the district judge began his secret discussions with reporters months before he issued his findings of fact and conclusions of law, the court of appeals did not vacate those rulings, primarily because it "discerned no evidence of actual bias." (A138-39) By requiring a show-

ing of actual bias, the decision below conflicts with this Court's decision in *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847 (1988), the Tenth Circuit's decision in *United States* v. *Cooley*, 1 F.3d 985 (10th Cir. 1993), and the Ninth Circuit's decision in *Preston* v. *United States*, 923 F.2d 731 (9th Cir. 1991).

The court of appeals' deference to the district judge's findings of fact in this important, highly visible case—despite the appearance of partiality created by his secret discussions with reporters—can only erode public confidence in the judicial system. As the court of appeals itself observed, "[t]he rampant disregard for the judiciary's ethical obligations that the public witnessed in this case undoubtedly jeopardizes 'public confidence in the integrity' of the District Court proceedings." (A130)

It is difficult to imagine a civil case that will leave a more indelible mark on the public's perception of the administration of justice than this case. That impact alone makes further review by this Court appropriate. That the decision below conflicts with a body of existing law on the proper remedy for violations of 28 U.S.C. § 455(a) establishes that further review is also critical to ensure uniformity of federal law on an issue of fundamental importance to the judiciary.

A. Proceedings in the District Court

Respondents, the United States ("DOJ") and a group of State plaintiffs, filed these consolidated actions on May 18, 1998.[1] They alleged four violations of the Sherman Act: (i) unlawful exclusive dealing in violation of Section 1, (ii) unlawful tying of Internet Explorer to Windows 95 and Windows 98 in violation of Section 1, (iii) unlawful maintenance of a monopoly in PC operating systems in violation of Section 2, and (iv) unlawful attempted monopolization of

[1] The district court had subject matter jurisdiction under 15 U.S.C. § 4 and 28 U.S.C. §§ 1331, 1337 and 1367(a).

Internet browsers in violation of Section 2. The States also alleged corresponding violations of their own antitrust statutes. These actions were filed on the heels of a related action challenging Microsoft's integration of Internet Explorer and Windows 95 under a 1995 consent decree. *United States* v. *Microsoft Corp.*, 980 F. Supp. 537 (D.D.C. 1997), *rev'd*, 147 F.3d 935 (D.C. Cir. 1998).

After a 76-day bench trial, the district court issued findings of fact on November 5, 1999. *United States* v. *Microsoft Corp.*, 84 F. Supp. 2d 9 (D.D.C. 1999). Those findings, which are devoid of any citations to the record, resolved hotly contested factual issues by adopting virtually every position advocated by respondents. The court then referred the case to mediation before Chief Judge Richard A. Posner of the United States Court of Appeals for the Seventh Circuit. When that mediation failed four months later, the district court issued its conclusions of law on April 3, 2000. *United States* v. *Microsoft Corp.*, 87 F. Supp. 2d 30 (D.D.C. 2000). The court found Microsoft liable for tying under Section 1 and monopoly maintenance and attempted monopolization under Section 2, but rejected as a matter of law respondents' exclusive dealing claim under Section 1.

Following issuance of its conclusions of law, the district court asked respondents to submit a remedy proposal. Respondents requested structural relief splitting Microsoft into two companies, as well as far-reaching conduct remedies extending far beyond the violations found. At the instance of respondents, the district court rejected Microsoft's request for an evidentiary hearing to resolve disputed factual issues concerning relief, and issued its final judgment on June 7, 2000. *United States* v. *Microsoft Corp.*, 97 F. Supp. 2d 59 (D.D.C. 2000). The district court adopted respondents' proposed remedy without a single substantive change.

Microsoft promptly filed a notice of appeal, and the court of appeals ordered that Microsoft's appeal be heard *en banc*. At the DOJ's request, the district court certified Microsoft's

appeal of the DOJ's case to this Court pursuant to 15 U.S.C. § 29(b). The States also petitioned this Court for a writ of certiorari in their case. This Court declined to hear the appeal of the DOJ's case and denied the States' petition for a writ of certiorari. *Microsoft Corp.* v. *United States*, 530 U.S. 1301 (2000). Respondents did not appeal the dismissal of their exclusive dealing claim.

B. The District Judge's Secret Discussions with Reporters

Within a day of entry of judgment, accounts of interviews with the district judge began appearing in the press. The exact date on which these interviews began remains unknown because the judge "embargoed" the interviews: "he insisted that the fact and content of the interviews remain secret until he issued the Final Judgment." (A120) Published accounts reveal, however, that the judge began secretly discussing the case with reporters before issuing his findings of fact. As the court of appeals observed, "[t]he earliest interviews we know of began in September 1999, . . . two months before the court issued its Findings of Fact." (A119-20) Interviews with reporters for the *New York Times* and Ken Auletta, a reporter for *The New Yorker* (who later wrote a book about the case), "continued throughout late 1999 and the first half of 2000, during which time the Judge issued his Findings of Fact, Conclusions of Law, and Final Judgment." (A120)[2]

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[2] The district judge continued giving interviews to reporters after judgment and during appeal. *E.g.*, Paul Davidson, *Judge Defends Stay on Microsoft Curbs*, USA TODAY, June 28, 2000, at 3B; *'People Shouldn't See Me as the Wizard of Oz,'* NEWSWEEK, June 19, 2000, at 30; Jube Shiver, Jr., *Public Remarks by Judge in Microsoft Ruling Stir Furor*, L.A. TIMES, June 9, 2000, at C1; *Judge Thomas Penfield Jackson Discusses the Microsoft Case and His Rulings Against the Company*, NAT'L PUB. RADIO, June 9, 2000; James V. Grimaldi, *Reluctant Ruling for Judge*, WASH. POST, June 8, 2000, at A1. He also aired his views about the case in speeches at colleges and antitrust seminars. *E.g.*, *Microsoft*

The district judge's discussions with reporters covered a wide range of topics relating to the case. "Among them was his distaste for the defense of technical integration—one of the central issues in the lawsuit." (A122) Microsoft's integration of Internet Explorer and Windows was the focus of respondents' claims under both Sections 1 and 2. The district judge's most telling comment on that "central issue[]" *predated* the issuance of his findings of fact by two months. The court of appeals found:

> In September 1999, two months before his Findings of Fact and six months before his Conclusions of Law, and in remarks that were kept secret until after the Final Judgment, the Judge told reporters from the *New York Times* that he questioned Microsoft's integration of a web browser into Windows. Stating that he was "not a fan of integration," he drew an analogy to a 35-millimeter camera with an integrated light meter that in his view should also be offered separately: "You like the convenience of having a light meter built in, integrated, so all you have to do is press a button to get a reading. But do you think camera makers should also serve photographers who want to use a separate light meter, so they can hold it up, move it around?"

(A122 (quoting JOEL BRINKLEY & STEVE LOHR, UNITED STATES V. MICROSOFT 263 (2001))) Unaware of this comment until after entry of judgment, Microsoft was unable to seek disqualification of the district judge before he issued his findings of fact. As the court of appeals noted, "[b]y placing an embargo on the interviews, the District Judge ensured that

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Judge Says He May Step Down from Case on Appeal, WALL ST. J., Oct. 30, 2000, at B4; Peter Spiegel, *Microsoft Judge Defends Post-Trial Comments*, FIN. TIMES (London), Oct. 7, 2000, at 4; Alison Schmauch, *Microsoft Judge Shares Experience*, THE DARTMOUTH ONLINE, Oct. 3, 2000; James V. Grimaldi, *Microsoft Judge Says Ruling at Risk*, WASH. POST, Sept. 29, 2000, at E1.

the full extent of his actions would not be revealed until this case was on appeal." (A120)

In a March 2000 interview with the *New York Times*, while the mediation before Chief Judge Posner was ongoing, the district judge attributed the one-sided nature of his findings of fact to a desire to induce Microsoft to settle the case. *See* BRINKLEY & LOHR, UNITED STATES V. MICROSOFT 277-79. When asked to reconcile the harsh tone of his findings with his reluctance at that time to order structural relief, the district judge offered the following analogy:

> "I like to tell the story of the North Carolina mule trainer . . . . He had a trained mule who could do all kinds of wonderful tricks. One day somebody asked him: 'How do you do it? How do you train the mule to do all these amazing things?' 'Well,' he answered, 'I'll show you.' He took a 2-by-4 and whopped him upside the head. The mule was reeling and fell to his knees, and the trainer said: 'You just have to get his attention.' I hope I've got Microsoft's attention . . . . But we'll see."

Id. at 278.[3]

The district judge also told Auletta that he separated his findings of fact from his conclusions of law (thus enabling him to import many conclusions into his findings) in order to insulate his ruling from reversal on appeal:

> There may have been another motive to split the facts from the law, whispered lawyers on opposite sides of the case: Judge Jackson was trying to box in the Court of Appeals. Guilty, Jackson later admitted to me, "The

[3] The court of appeals suggested that the district judge's "mule trainer analogy" related to his decision to impose structural relief. (A126; A133) In fact, the analogy related to the district judge's attempt to "get Microsoft's attention" with his findings of fact in order to produce a settlement.

> general rule of law is that the Court of Appeals is generally expected to defer to the trial judge as to matters of fact—unless the findings are clearly erroneous . . . . What I want to do is confront the Court of Appeals with an established factual record which is a fait accompli. And part of the inspiration for doing that is that I take mild offense at their reversal of my preliminary injunction in the consent-decree case, where they went ahead and made up about ninety percent of the facts on their own."

KEN AULETTA, WORLD WAR 3.0: MICROSOFT AND ITS ENEMIES 230 (2001).

The district judge's extrajudicial comments were highly critical of Microsoft and its senior executives, particularly Bill Gates. For example, the judge told a college audience that "'Bill Gates is an ingenious engineer, but I don't think he is that adept at business ethics.'" Spiegel, FIN. TIMES, *supra*. Ken Auletta similarly reported that the judge stated that "[t]hroughout the trial, . . . he couldn't get out of his mind the group picture he had seen of Bill Gates and Paul Allen and their shaggy-haired first employees at Microsoft." AULETTA, WORLD WAR 3.0 168-69. According to Auletta, the judge said, "[W]hat [I] saw was 'a smart-mouthed young kid who has extraordinary ability and needs a little discipline. I've often said to colleagues that Gates would be better off if he had finished Harvard.'" *Id*. at 169. (The photograph is not part of the record in this case.) In a different interview, the judge told Auletta that Gates "'has a Napoleonic concept of himself and his company.'" *Id*. at 397.

The *New York Times* reported that the district judge, "in one of several interviews granted to *The Times* during the trial on the condition that his comments not be used until the case left his courtroom, likened [Microsoft's e-mails] to the federal prosecution of drug traffickers, who are repeatedly caught as a result of telephone wiretaps." BRINKLEY & LOHR, UNITED STATES V. MICROSOFT 6. The judge again

invoked a drug trafficker analogy in his discussions with Auletta, this time with reference to the notorious Newton Street Crew that terrorized parts of Washington, D.C. According to Auletta, the district judge

> went as far as to compare the company's declaration of innocence to the protestations of gangland killers. He was referring to five gang members in a racketeering, drug-dealing, and murder trial he had presided over four years earlier. In that case, the three victims had had their heads bound with duct tape before they were riddled with bullets from semi-automatic weapons. "On the day of the sentencing, the gang members maintained that they had done nothing wrong, saying that the whole case was a conspiracy by the white power structure to destroy them." Jackson recalled. "I am now under no illusions that miscreants will realize that other parts of society view them that way."

Ken Auletta, *Final Offer*, THE NEW YORKER, Jan. 15, 2001, at 40-41; *see also* AULETTA, WORLD WAR 3.0 369-70 (same).[4]

The district judge also secretly divulged to reporters his extraordinary views concerning Microsoft's entitlement to due process at the remedy stage. He told the *New York Times*: "'I am not aware of any case authority that says I have to give them any due process at all. The case is over. They lost.'" Joel Brinkley & Steve Lohr, *Retracing the Missteps in the Microsoft Defense*, N.Y. TIMES, June 9,

[4] In contrast, the judge told Auletta that he holds government lawyers in high regard: "'I trust the lawyers from the Department of Justice. I trust civil servants and the U.S. attorneys. I'm not hostile to government . . . . In criminal cases, by and large, my experience is that when the government charges someone, they are probably guilty. I give the benefit of presumptive innocence, but I know of no case of a wrongful conviction.'" AULETTA, WORLD WAR 3.0 44.

2000, at A1. His remarks to the *Wall Street Journal* were, if anything, more shocking: "'[I]t's procedurally unusual to do what Microsoft is proposing—are you aware of very many cases in which the defendant can argue with the jury about what an appropriate sanction should be? Were the Japanese allowed to propose the terms of their surrender? The government won the case.'" John R. Wilke, *For Antitrust Judge, Trust, or Lack of It, Really Was the Issue*, WALL ST. J., June 8, 2000, at A8. The district judge offered the following explanation for his decision to adopt respondents' proposed remedy in its entirety without a hearing:

> "I know they have carefully studied all possible options. This isn't a bunch of amateurs. They have consulted with some of the best minds in America over a long period of time. I am not in a position to duplicate that and re-engineer their work. There's no way I can equip myself to do a better job than they have done."

Brinkley & Lohr, N.Y. TIMES, *supra*.

Lastly, there is no way to know what information reporters conveyed to the district judge during their secret sessions in his chambers. Auletta stated that the district judge granted him "a total of about ten hours of taped interviews." AULETTA, WORLD WAR 3.0 14 n.*. Auletta also disclosed that the judge showed him "a big green book where he kept notes on each witness" and "interpreted them for me with my tape recorder going." CNN MORNING NEWS, Jan. 16, 2001. As the court of appeals noted, "it [is] safe to assume that these interviews were not monologues. Interviews often become conversations. When reporters pose questions or make assertions, they may be furnishing information, information that may reflect their personal views of the case." (A129) The court of appeals remarked that "published accounts indicate this happened on at least one occasion." (A129) According to Auletta, the district judge became visibly "agitated" by Microsoft's "'obstinacy'" when Auletta informed him of

certain Microsoft employees' reactions to his rulings. AULETTA, WORLD WAR 3.0 369.

C. The Court of Appeals' Decision

The court of appeals reversed the district court's determination that Microsoft violated Section 2 by attempting to monopolize Internet browsers. (A69-77) The court also vacated the district court's decision that Microsoft violated Section 1 by tying Internet Explorer to Windows and remanded for a new trial on that issue. (A77-101) And the court affirmed in part and reversed in part the district court's ruling that Microsoft violated Section 2 by maintaining a monopoly in PC operating systems. (A15-69) The court vacated the district court's remedy for three independent reasons: (i) the district court failed to hold an evidentiary hearing on relief despite the existence of disputed facts; (ii) the district court failed to provide adequate justifications for the remedy; and (iii) the district court's conclusions on liability had been "drastically altered" on appeal. (A101-18)

The court also concluded that the district judge violated the Code of Conduct for United States Judges "on multiple occasions in this case." (A130) The court noted that respondents "all but conceded that the Judge violated ethical restrictions by discussing the case in public," having begun their argument on this issue as follows:

> "On behalf of the governments, I have no brief to defend the District Judge's decision to discuss this case publicly while it was pending on appeal, and I have no brief to defend the judge's decision to discuss the case with reporters while the trial was proceeding, even given the embargo on any reporting concerning those conversations until after trial."

(A121 (quoting 2/27/01 Ct. App. Tr. at 326))

The court held that the judge "breached his ethical duty under Canon 3A(6) each time he spoke to a reporter about

the merits of the case." (A127) Canon 3A(6) is "straightforward and easily understood" and prohibits judges from commenting publicly 'on the merits of a pending or impending action.'" (A127) The court also rejected respondents' claim that the judge's "embargo" was somehow a mitigating factor. To the contrary, the court found that the judge's insistence on secrecy "made matters worse." (A128) The court explained:

> Concealment of the interviews suggests knowledge of their impropriety. Concealment also prevented the parties from nipping his improprieties in the bud. Without any knowledge of the interviews, neither the plaintiffs nor the defendant had a chance to object or to seek the Judge's removal before he issued his Final Judgment.

(A128)

The court of appeals further found that the judge's discussions with reporters violated Canon 3A(4), which provides that a judge should "'neither initiate nor consider *ex parte* communications on the merits . . . of a pending or impending proceeding.'" (A129) And the court held that the judge's "repeated violations of Canon 3A(6) and 3A(4) also violated Canon 2," which provides that "'a judge should avoid impropriety and the appearance of impropriety in all activities.'" (A129-30) The court stated: "The public cannot be expected to maintain confidence in the integrity and impartiality of the federal judiciary in the face of such conduct." (A130)

The court next turned to 28 U.S.C. § 455(a), which requires a judge to disqualify himself in any proceeding in which his impartiality might reasonably be questioned. Noting that other courts of appeals have found "violations of § 455(a) for judicial commentary on pending cases that seems mild in comparison to what we are confronting in this case" (A131), the court had no difficulty concluding that the district judge's secret discussions with reporters created an appearance of partiality:

> The public comments were not only improper, but also would lead a reasonable, informed observer to question the District Judge's impartiality. Public confidence in the integrity and impartiality of the judiciary is seriously jeopardized when judges share their thoughts about the merits of pending cases with the press. Judges who covet publicity, or convey the appearance that they do, lead any objective observer to wonder whether their judgments are being influenced by the prospect of favorable coverage in the media.

(A132)

In so ruling, the court of appeals emphasized that "[p]ublic confidence in judicial impartiality cannot survive if judges, in disregard of their ethical obligations, pander to the press." (A133) In the court's view, the district judge's statements "made outside the courtroom, in private meetings unknown to the parties," present a worst-case scenario:

> Rather than manifesting neutrality and impartiality, the reports of interviews with the District Judge convey the impression of a judge posturing for posterity, trying to please the reporters with colorful analogies and observations bound to wind up in the stories they write. Members of the public may reasonably question whether the District Judge's desire for press coverage influenced his judgments, indeed whether a publicity-seeking judge might consciously or subconsciously seek the publicity-maximizing outcome.

(A134)[5]

[5] The court of appeals also observed that the judge's selective disclosure to reporters "enabled them and anyone they shared" the information with to "anticipate rulings before the Judge announced them to the world" and thereby trade on "inside information about the case." (A130)

Notwithstanding the district judge's egregious ethical violations and their impact on public confidence in the integrity of the judiciary, the court of appeals disqualified the district judge "retroactive only to the date he entered the order breaking up Microsoft." (A135) The court therefore vacated the judge's remedy—which it had already done for three other reasons—but did not set aside his findings of fact or conclusions of law. Moreover, recognizing that under the Federal Rules findings of fact "receive either full deference . . . or they must be vacated" (A137), the court accorded full deference to the judge's findings under the clearly erroneous standard. The court of appeals thus not only provided no remedy for the judge's flagrant violations of Section 455(a) while he was making his findings of fact and conclusions of law, but also ratified an exercise of judicial power made possible only by the judge's concealment of those violations.

In so limiting the scope of disqualification, the court suggested that the "most serious judicial misconduct occurred near or during the remedial stage" and that vacatur of the judge's findings of fact "would unduly penalize plaintiffs, who were innocent and unaware of the misconduct, and would have only a slight marginal deterrent effect." (A135) "Most important," the court added, "full retroactive disqualification is unnecessary" because Microsoft had not demonstrated "actual bias." (A136)

Reasons for Granting the Petition

The importance of this case is not in dispute. As the DOJ told this Court last year, "all agree—and the evidence establishes—that the stakes in this case for the national economy are immense." U.S. Br. in Resp. to Jurisdictional Statement at 18 (No. 00-139). The DOJ thus predicted that "the case is virtually certain to return to this Court on a petition for a writ of certiorari." *Id*. at 29. Counsel for the States likewise told the district court early on in the case that they were "confident this case is going to wind up in the Supreme Court . . . ." 9/11/98 Dist. Ct. Tr. at 66.

The decision below raises many important questions of federal antitrust law that may ultimately warrant this Court's review. For example, Microsoft may ultimately seek review of the court of appeals' conclusion that Microsoft's "exclusive agreements" with Internet access providers violated Section 2 of the Sherman Act, notwithstanding the district court's ruling that those same agreements did not violate Section 1 because they did not foreclose a substantial share of the relevant market. (A46-53) Microsoft also may seek review of the court's ruling that provisions in Microsoft's license agreements with computer manufacturers that prohibit unauthorized alterations to Microsoft's copyrighted Windows operating system before it is distributed to users violate Section 2. (A32-40) And Microsoft may seek review of the court's treatment of causation under Section 2, which permits the DOJ in an equitable enforcement action to establish liability for monopoly maintenance without proof that a defendant's anticompetitive conduct contributed to its maintenance of monopoly power. (A66-69) Microsoft recognizes, however, that the interlocutory nature of the court of appeals' judgment militates against review of those issues by this Court now. *See* ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 4.18, at 197 (7th ed. 1993).

In contrast, the disqualification issue is ripe for the Court's review. Before this case is remanded for a possible new trial on respondents' tying claim and for proceedings on relief, the Court should determine whether the district judge's flagrant violations of Section 455(a) require that his findings of fact be vacated. The Court has previously granted petitions that raised similar issues "fundamental to the further conduct of the case" even though the judgment below was not final. *See* STERN ET AL., SUPREME COURT PRACTICE § 4.18, at 196-97 (citing cases).

The Court's immediate review of the disqualification issue is also necessary to protect public confidence in the integrity of the judiciary. As the Court is no doubt aware, this

case has received enormous attention in the media, providing many members of the public with their greatest exposure to civil litigation in the federal courts. The threat that the judge's misconduct poses to the public's perception of judges and the process of judging is palpable. At oral argument below, which was broadcast nationally on C-SPAN, one judge asked, "if you are a member of the public and you are forming an impression as to whether the judge is biased or not, what possible legitimate reason could you assign to a judge going to media reporters and making derogatory comments about the parties to a lawsuit that had been tried in front of him unless the judge were biased against him?" 2/27/01 Ct. App. Tr. at 335. That the court of appeals deferred to the judge's findings of fact on hotly contested issues—despite his deliberate misconduct and the resulting appearance of bias—will further jeopardize public confidence in the judiciary.

I.

By Requiring a Showing of Actual Bias, the Court of Appeals' Decision Conflicts with Decisions of This Court and Other Courts of Appeals.

The court of appeals stated that the "[m]ost important" factor in its decision to limit the scope of disqualification to the remedy phase was the absence of actual bias. (A136)[6]

[6] The court stated that Microsoft did not allege or demonstrate actual bias. (A136) Microsoft contended below that the judge's comments to the press strongly suggest actual bias. *See* MS Opening Br. at 148; MS Reply Br. at 75; 2/27/01 Ct. App. Tr. at 323. Because the judge's secret interviews were unknown until after entry of judgment, there was no occasion to create a record on the issue of the judge's bias. This is not to say, based on published accounts of the judge's statements, that there is an insufficient basis for a finding of actual bias. The judge's derogatory comments about Microsoft, his comparison of company officers to drug dealers and his statement that Microsoft was not entitled to any "due process" all suggest a profound personal animus.

Leaving aside whether it is possible to determine on the current record if the district judge was biased, the court's requirement that Microsoft show actual bias is inconsistent with the language of Section 455(a). Under that provision, "what matters is not the reality of bias or prejudice but its appearance." *Liteky* v. *United States*, 510 U.S. 540, 548 (1994). What is more, in holding that vacatur of the findings of fact and conclusions of law is inappropriate absent a showing of actual bias, the decision below conflicts with this Court's decision in *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847 (1988), the Tenth Circuit's decision in *United States* v. *Cooley*, 1 F.3d 985 (10th Cir. 1993), and the Ninth Circuit's decision in *Preston* v. *United States*, 923 F.2d 731 (9th Cir. 1991).

In *Liljeberg*, the parties were unaware of the circumstances that created an appearance of partiality until ten months after the court of appeals had affirmed the trial court's judgment. 468 U.S. at 850. Defendant then learned that the trial judge was a member of the board of trustees of Loyola University, which stood to benefit financially if plaintiff were to prevail in the litigation. *Id*. Based on this information, defendant moved to vacate the judgment pursuant to Rule 60(b)(6). *Id*. Following the trial judge's denial of defendant's motion, the court of appeals remanded the case to a different judge to hold an evidentiary hearing and make findings of fact concerning the extent and timing of the trial judge's knowledge of Loyola's interest in the litigation. *Id*. at 851. The new judge found that, although the trial judge had previously been aware of Loyola's interest, he had forgotten it by the time the case went to trial and was not reminded of it until after he had filed his opinion. *Id*. The district court nevertheless held that the evidence gave rise to an appearance of partiality. *Id*.

Although there could be no claim of actual bias because the trial judge was unaware of Loyola's interest at the time of trial, *id*. at 864, this Court held that public confidence in

the impartiality of the judiciary required that the case be retried. The Court noted that the facts of the case "create precisely the kind of appearance of impropriety that § 455(a) was intended to prevent." *Id*. at 867. In holding that retrial was appropriate even absent a showing of actual bias, the Court noted that the "violation [was] neither insubstantial nor excusable." *Id*. The Court further found that "there is a greater risk of unfairness in upholding the judgment in favor of [plaintiff] than there is in allowing a new judge to take a fresh look at the issues." *Id*. at 868. The Court stressed that in determining the scope of disqualification, the "'guiding consideration is that the administration of justice should appear to be disinterested as well as be so in fact.'" *Id*. at 869-70 (quoting *Pub. Utils. Comm'n of D.C.* v. *Pollak*, 343 U.S. 451, 466-67 (1952) (Frankfurter, J., in chambers)).

The conflict with the Tenth Circuit's *Cooley* decision is equally pronounced. The district judge there had issued a preliminary injunction barring abortion protesters from blocking access to a Wichita, Kansas clinic. 1 F.3d at 987-88. Throughout this period, the judge was subjected to "death threats and other threats and intimidations." *Id*. at 988. He also "learned at the outset that protesters intended willfully to violate his orders." *Id*. The judge later appeared on the television program "Nightline" and warned the protestors that his preliminary injunction "would be honored." *Id*. at 995. Following their conviction before the same judge for preventing U.S. Marshals from enforcing the preliminary injunction, several of the protestors contended on appeal that the judge should have recused himself because of his appearance on "Nightline before trial." *Id*. at 990-92.

The Tenth Circuit agreed, holding that the judge's single television appearance would cause a reasonable person to "harbor a justified doubt as to his impartiality." *Id*. at 995. Although the judge's comments themselves were unobjectionable, the court found that his decision to appear on television created the appearance that he "had become an active

participant in bringing law and order to bear on the protesters, rather than remaining as a detached adjudicator." *Id.* In fashioning a remedy for the violation of Section 455(a), the Tenth Circuit referred to this Court's statement in *Liljeberg* that "'[w]e must continuously bear in mind that to perform its high function in the best way justice must satisfy the appearance of justice.'" *Id.* at 998 (quoting *Liljeberg*, 486 U.S. at 864 (internal quotation omitted)). The Tenth Circuit thus concluded:

> To best serve that goal, we are satisfied that the remedy in this case is to vacate the conviction and sentence of each of the defendants in these cases, and remand the cases to the district court for a new trial before a different judge.

Id.

The Tenth Circuit held that a new trial was necessary even though "the record of the proceedings below, including the sentences imposed, discloses no bias." *Id.* at 996. In fact, the court observed that "the district judge was courteous to the defendants and sedulously protected their rights." *Id.* Nor could defendants demonstrate any prejudice. To the contrary, the Tenth Circuit concluded that the evidence in the case "overwhelmingly establishes the guilt of each of these defendants with respect to the crime charged." *Id.* Finally, in stark contrast to the holding here, the fact that the United States was wholly innocent and no doubt had expended substantial resources in convicting the defendants did not lead the Tenth Circuit to ignore the public's interest in the appearance of justice. In sum, there is no way to reconcile the *Cooley* decision with the court of appeals' decision in this case.

The decision below is also at odds with the Ninth Circuit's decision in *Preston*, a wrongful death action brought against the United States under the Federal Tort Claims Act. Plaintiffs in *Preston* had moved to recuse the

trial judge pursuant to Section 455 because, prior to his appointment to the bench, he was "of counsel" to a law firm that later represented a non-party with an interest in the litigation. 923 F.2d at 732. After concluding that the judge had improperly denied the recusal motion, the Ninth Circuit noted that plaintiffs "make no claim of actual bias." *Id*. at 734. Indeed, the court observed, "nothing in the record before the court suggests that [the judge] acted in anything other than a professional manner in his conduct of the proceedings, and [plaintiffs] do not seriously contend to the contrary." *Id*. at 734 n.4.

The Ninth Circuit nevertheless held that there is "no way . . . to purge the perception of partiality in this case other than to vacate the judgment and remand the case to the district court for retrial before a different judge." *Id*. at 735. The Ninth Circuit explained:

> We recognize that this case has been tried once to judgment and that a retrial will involve considerable additional expense, perhaps with the same result as the first trial. This is unfortunate. It prompts us to repeat the words of the Fifth Circuit that "[t]he unfairness and expense which results from disqualification . . . can be avoided in the future only if each judge fully accepts the obligation to disqualify himself in any case in which his impartiality might reasonably be questioned."

Id. (quoting *Potashnick* v. *Port City Constr. Co.*, 609 F.2d 1101, 1115 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980)).

In erroneously holding that a showing of actual bias is necessary for disqualification under Section 455(a), the court of appeals appears to have relied on a line of authority overruled by this Court in *Liljeberg*. Specifically, the court of appeals cited *Liberty Lobby, Inc.* v. *Dow Jones & Co.*, 838 F.2d 1287 (D.C. Cir.), *cert. denied*, 488 U.S. 825 (1988), in the paragraph of its opinion discussing the absence of actual

bias. (A136) Relying on a decision from the Seventh Circuit, *Liberty Lobby* held that orders entered prior to the filing of a recusal motion under Section 455(a) should not be vacated absent a showing of actual bias. 838 F.2d at 1301-02 (citing *United States* v. *Murphy*, 768 F.2d 1518, 1539 (7th Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986)). In *Liljeberg*, this Court overruled *Liberty Lobby* (and the Seventh Circuit decision on which it relied), as the court of appeals itself later recognized. *See Jenkins* v. *Sterlacci*, 856 F.2d 274, 274-75 (D.C. Cir. 1988) (*Liljeberg* "rejects our holding that a motion for disqualification on the basis of an appearance of partiality may have prospective effect only"); *see also In re Sch. Asbestos Litig.*, 977 F.2d 764, 785 n.28 (3d Cir. 1992).

II.

The Court of Appeals' Refusal to Vacate the Findings of Fact and Conclusions of Law as a Remedy for the Violations of Section 455(a) Is Erroneous.

To be sure, "[t]here need not be a draconian remedy for every violation of § 455(a)," *Liljeberg*, 486 U.S. at 862, but the remedy here should be commensurate with the violations, which were "deliberate, repeated, egregious, and flagrant" (A119). This is not a case in which the violation can be deemed "harmless error" because it was "committed by [a] busy judge[] who inadvertently overlook[ed] a disqualifying circumstance." *Liljeberg*, 486 U.S. at 862. The violations of Section 455(a) in this case were deliberate. (A119) As one judge observed at oral argument, the judge's misconduct was "so extraordinary" that it is "beyond the pale." 2/27/01 Ct. App. Tr. at 336. "[T]he system would be a sham if all judges went around doing" what the district judge did in this case. *Id.* at 333.

In *Liljeberg*, this Court stated that "in determining whether a judgment should be vacated for a violation of § 455(a), it is appropriate to consider [i] the risk of injustice to the parties in the particular case, [ii] the risk that the denial of relief

will produce injustice in other cases, and [iii] the risk of undermining the public's confidence in the judicial process." 486 U.S. at 864. All three factors counsel strongly in favor of vacatur of the findings of fact and conclusions of law.

First, failure to vacate these rulings will result in manifest injustice to Microsoft. The district judge's earliest reported press interviews occurred in September 1999—two months *before* he issued his findings of fact—when he revealed a predisposition on "the central issue[] in the lawsuit" (A122) by telling two *New York Times* reporters that he "was not a fan of integration" (A122). Had Microsoft learned in September 1999 about this statement—which may have committed the district judge to a particular result in advance of his ruling on the issue—Microsoft would have immediately moved for disqualification. As the court of appeals noted, there is "little doubt" that such a motion would have been granted (A128-29). The only reason the district judge was not disqualified *before* issuing his findings of fact is that he embargoed his secret interviews. (A120-21) In *Liljeberg*, this Court stated that the district judge's failure to disclose a potential basis for disqualification "further compels the conclusion that vacatur was an appropriate remedy" because it prevented the parties from raising the issue in a timely fashion. 486 U.S. at 867. Concealment of a disqualifying circumstance also aggravates the public's perception that crucial parts of the proceeding were tainted.

The First Circuit's decision in *In re Boston's Children First*, 244 F.3d 164 (1st Cir. 2001), confirms that the district judge would have been disqualified immediately if his discussions with the press had been reported in September 1999. Plaintiffs in *Boston's Children* claimed that Boston's elementary schools deprived children of preferred assignments based on their race. After the district court decided to rule on standing before class certification, plaintiffs' counsel made several provocative statements in the *Boston Herald*. Comparing his case to one involving prisoners, he stated: "If

you get strip-searched in jail, you get more rights than a child who is of the wrong color." 244 F.3d at 165. In response, the district judge told the *Boston Herald* that plaintiffs' case was "more complex" than the prisoners' case. *Id.* at 166. Based on this comment, plaintiffs moved to disqualify the judge pursuant to Section 455(a) and, when that motion was denied, petitioned for a writ of mandamus. *Id.* The First Circuit held that the judge should have recused herself because her statement was "sufficiently open to misinterpretation so as to create an appearance of partiality." *Id.* at 170. Simple justice dictates that Microsoft cannot be put in a worse position than the *Boston's Children* plaintiffs because the district judge concealed the disqualifying circumstances until after judgment was entered.

Furthermore, the court of appeals accorded the district judge's findings of fact "substantial deference" notwithstanding "[t]he severity of [his] misconduct and the appearance of partiality it created." (A136-37) For example, relying on the clearly erroneous standard of Rule 52(a), the court affirmed two key findings of fact over Microsoft's vigorous challenge. (A34-35; A43-44) The deference provided by Rule 52(a) presupposes that the trial judge was not disqualified from adjudicating the case.[7]

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[7] Courts have allowed prior rulings to stand despite an appearance of partiality only if the rulings will be subject to *de novo* review on appeal. *See, e.g.*, *Harris* v. *Champion*, 15 F.3d 1538, 1572 (10th Cir. 1994) ("[T]he district court panel was not called upon to make credibility determinations or to make findings on disputed facts that would later be subject to review for clear error only."); *In re Sch. Asbestos Litig.*, 977 F.2d at 786 ("[F]ailure to disqualify (and hence failure to vacate a ruling) may be harmless error when a court of appeals will later review a ruling on a plenary basis."); *In re Cont'l Airlines Corp.*, 901 F.2d 1259, 1263 (5th Cir. 1990) ("The risk of injustice to the parties in allowing a summary judgment ruling to stand is usually slight. Such rulings are subject to *de novo* review, with the reviewing court utilizing

Second, failure to vacate the district judge's findings of fact "will produce injustice in other cases." *Liljeberg*, 486 U.S. at 864. For one thing, imposing a stringent remedy for the judge's deliberate violations of Section 455(a) will have a deterrent effect in other cases. The judge's rulings should not be permitted to stand simply because he concealed his egregious misconduct. *See In re Barry*, 946 F.2d 913 (D.C. Cir. 1991) (district judge had already been admonished once for airing his views on a pending case outside of a judicial forum). For another, since the district judge issued his findings of fact, more than 150 private class actions have been filed against Microsoft under state and federal antitrust laws. Many of the allegations in those cases track the judge's findings in this case. If those findings are allowed to stand, class action plaintiffs undoubtedly will argue that certain findings should be given preclusive effect.[8]

Third, allowing the district judge's rulings to stand will erode "the public's confidence in the judicial process." *Liljeberg*, 486 U.S. at 864. This threat to the public's confidence is summarized in the following question posed at oral argument below:

> You don't think that the public at large watching the system doesn't look at that and say good heavens, is that what judges do? They take preferred reporters in,

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criteria identical to that used by the court below."), *cert. denied*, 506 U.S. 828 (1992). Obviously, the district court's findings of fact were not subject to such review under Rule 52(a).

[8] This factor distinguishes this case from others in which prior rulings were allowed to stand despite the appearance of partiality. *See, e.g.*, *In re Sch. Asbestos Litig.*, 977 F.2d at 785 n.27 ("But, here it does not appear that there is any risk that the nonvacated decisions will have a preclusive effect in other cases."); *In re Allied-Signal Inc.*, 891 F.2d 967, 973 (1st Cir. 1989) ("[Petitioners] have not pointed to any specific findings or rulings made in the Phase Two litigation that are incurable or could have preclusive effect in some other action.").

> and they will discuss with them what's going on in a case and listen to their views and take their views and reactions from the public and then show them all their notes? You don't think parties should be distressed about that?

2/27/01 Ct. App. Tr. at 343. As the commentary to the Code of Conduct states, "[d]eference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges." 175 F.R.D. 363, 364 (1996); *see also id*. at 365 ("Public confidence in the judiciary is eroded by irresponsible and improper conduct by judges.").

With regard to the three factors set out in *Liljeberg*, the court of appeals stated only that vacatur of the findings "would unduly penalize plaintiffs, who were innocent and unaware of the misconduct, and would have only slight marginal deterrent effect." (A135) Of course, Microsoft also was "innocent and unaware of" the judge's statements to reporters, which were uniformly disparaging of Microsoft. As the defendant in a case with potentially severe consequences for the company, Microsoft is entitled to a factfinder who both appears and in fact is impartial. *See Liljeberg*, 486 U.S. at 865 n.12 ("this concern has constitutional dimensions"). As the Court observed in *Liljeberg*, "there is a greater risk of unfairness in upholding the judgment in favor of [plaintiff] than there is in allowing a new judge to take a fresh look at the issues." *Id*. at 868. But ultimately whether the parties bear some responsibility for the judicial misconduct should not be determinative when the integrity of the judiciary is at stake. As for the court's supposition that vacatur of the findings would have "only marginal deterrent effect," the more stringent the remedy in this case, the greater its deterrent effect will be. It is hard to imagine a case in which vacatur of the district court's rulings would be more fully justified.

Finally, there will be extensive additional proceedings below regardless of how the disqualification issue is resolved. The court of appeals has already held that respond-

ents' tying claim must be retried and that further proceedings on relief are necessary. Although vacatur of the findings of fact may result in some additional expense and trial proceedings, that is a small price to pay for preserving public confidence in the integrity of the judicial system. In any event, the fault for this unfortunate fact lies not with Microsoft, but with the district judge, who could have easily avoided his flagrant violations of Section 455(a).

III.

This Court's Review of the Disqualification Issue Is Important to Restoring Public Confidence in the Integrity of the Judicial System.

By commenting on the merits of a pending case, a judge always threatens public confidence in the judicial system, whether or not the case is pending before him or her. *See Broadman* v. *Comm'n on Judicial Performance*, 959 P.2d 715, 727 (Cal. 1998), *cert. denied*, 525 U.S. 1070 (1999). The enormous public attention received by this case makes the potential adverse consequences of the district judge's comments even greater here. As this Court observed in *Liljeberg*, "people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges." 486 U.S. at 864-65. "In high profile cases such as this one," which is being followed by millions of people worldwide and will affect one of the most important sectors of the national economy, "such suspicions are especially likely and untoward." *In re Sch. Asbestos Litig.*, 977 F.2d at 782; *see also In re Charge of Judicial Misconduct*, 47 F.3d 399, 400 (10th Cir. Judicial Council 1995) ("While it is always incumbent upon a judge to maintain an objective and dispassionate demeanor, it is particularly important in a case such as this one, which was a highly-publicized case dealing with charged emotional issues.").

A large number of the ordinary citizens who have been following this case will perceive the district judge's com-

ments as demonstrating that the judge either "prejudged the merits of the controversy or is biased against or in favor of one of the parties." *Broadman*, 959 P.2d at 727. Whether or not true—and Microsoft, like any other reasonable person with knowledge of all the facts, believes it is true—the perception that the judge was biased is intolerable. The profound cynicism that will result if the judiciary turns its back on the district judge's extreme misconduct here should not be permitted. Although the court of appeals attempted to assure the public (and Microsoft) that it had "reviewed the record" and "discerned no evidence of actual bias" (A138-39), that bland assurance cannot remedy the appearance of bias created by the district judge's pervasive misconduct. As the court of appeals conceded, "there is fair room for argument that the District Court's factfindings should be vacated *in toto*." (A138) Given the importance of this case and the intense public attention it has received, this Court should make that judgment.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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