No. 25-45

IN THE

Supreme Court of the United States

CHATOM PRIMARY CARE, P.C., *et al.*, individually and on behalf of all others similarly situated,

Petitioners,

v.

MERCK & CO., INC.,

Respondents.

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

BRIEF OF THE AMERICAN ANTITRUST INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The American Antitrust Institute ("AAI") is an independent nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. It serves the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. AAI enjoys the input of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. See http://www.antitrustinstitute.org.[2]

SUMMARY OF ARGUMENT

When a monopolist lies to a judge and then claims First Amendment protections, it should be laughed out of court if not sanctioned. Instead, the Third Circuit's interpretation of the *Noerr-Pennington* doctrine shields knowing misrepresentations to adjudicators from antitrust scrutiny. This interpretation expands a disfavored immunity and needlessly imperils markets. Other circuits reject such an extreme approach. The Court should resolve the circuit split in favor of the other circuits and answer a question of exceptional importance: "whether and, if so, to what extent *Noerr* permits the imposition of antitrust liability for a

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[1] Pursuant to Rule 37.2, all parties received notice of the filing of this brief. No counsel for a party has authored this brief in whole or in part, and no party, party's counsel, or any other person—other than amicus curiae or its counsel—has contributed money that was intended to fund preparing or submitting this brief.

[2] Individual views of members of AAI's Board of Directors or Advisory Board may differ from AAI's positions.

litigant's fraud or other misrepresentations." *Pro. Real Est. Invs., Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 61 n.6 (1993).

Private parties' knowing misrepresentations to adjudicative bodies corrupt the adjudicatory process, undermine the validity of the resulting decisions, and can distort markets when deployed by firms with market power. They can harm competition and thwart innovation by preventing consumers from accessing superior products. And they do not qualify for constitutional protections.

Merck allegedly made knowing misrepresentations to an adjudicatory body of the Food and Drug Administration ("FDA") that distorted the market for a lifesaving vaccine. By providing allegedly false information that misrepresented the drug's end-of-shelf-life potency, Merck allegedly unreasonably maintained a monopoly and prevented a competing medicine from coming to market. If the plaintiffs prove those facts at trial, then Merck has unjustifiably handicapped a rival, distorted the adjudication process, and denied consumers the benefits of competition. Other courts of appeals to reach the issue have found that the *Noerr-Pennington* doctrine does not immunize those activities from antitrust scrutiny. The Court should grant the petition for certiorari, resolve the split in favor of the other circuits, and formally adopt a misrepresentation exception to *Noerr-Pennington*.

ARGUMENT

I. Knowing Misrepresentations to Adjudicatory Bodies Serve No Useful Social Purpose.

When a monopolist uses misrepresentations to deceive a government adjudicator and maintain or extend a monopoly, it cannot possibly clear the high bar for invoking an implied antitrust immunity. Because the "national policy in favor of competition" has an "indispensable role . . . in the maintenance of a free economy," *S. Motor Carriers Rate Conf. v. United States*, 471 U.S. 48, 57, 67–68 (1985) (Stevens, J., dissenting), "[i]mplied antitrust immunities . . . are disfavored, and any exemptions from the antitrust laws are to be strictly construed." *Id.*; *Carnation Co. v. Pac. Westbound Conf.*, 383 U.S. 213, 217–18 (1966) ("'[r]epeals of the antitrust laws by implication . . . are strongly disfavored'" because "antitrust . . . [is] a fundamental national economic policy[.]" (quoting *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 350–51 (1963)); *Fed. Trade Comm'n v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 225 (2013) ("[G]iven the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws . . . repeals by implication" are "disfavored.").

This Court recognizes an implied immunity to the antitrust laws based on the right to petition the government. *E. R.R. Conf. v. Noerr Motor Freight*, 365 U.S. 127, 138 (1961). *Noerr* holds that in a representative democracy, the concept of representation depends largely upon the ability of the people to "freely inform the government of their wishes" without incurring the risk of Sherman Act liability. *Id.* at 137. *Pennington*

reaffirms that "[j]oint efforts to influence public officials do not violate the antitrust laws[.]" *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965).

As with other implied immunities, there is a presumption against *Noerr-Pennington* immunity, and the burden is on the party claiming the immunity to overcome the presumption. *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 399–400 (1978) (discussing burdens of both state-action and *Noerr-Pennington* repeals by implication); *see also Goldfarb v. Va. State Bar*, 421 U.S. 773, 787 (1975). To carry its burden, the proponent of immunity must show that the policies underlying *Noerr* are not just "implicat[ed]" but rather "severely . . . impinge[d] upon." *City of Lafayette*, 435 U.S. at 400.

Condemning behavior like Merck's does not hinder the *Noerr-Pennington* doctrine's underlying policy of protecting petitions that "inform the government." Merck's alleged fraud and knowing misrepresentations do not "inform" but rather intentionally obscure the FDA's understanding of the Merck vaccine's end-of-shelf-life potency. *Noerr*, 365 U.S. at 137. Here, by making misrepresentations, Merck allegedly prevented the FDA from drawing accurate conclusions about the characteristics of Merck's product. These misrepresentations were an integral part of conduct alleged to have fraudulently induced the government to foreclose equally effective drugs from the market. As a result, consumers were denied the benefits of competitive entry and Merck allegedly extended its monopoly profits unreasonably.

Such misrepresentations are incapable of advancing any legitimate social interests, whether as a matter of free speech, petitioning, or competition policy. "[T]here is no constitutional value in false statements of

fact," *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974), and such statements "fundamentally" can only "subvert[] the competitive process." Joseph Farrell et al., *Standard Setting, Patents, and Hold-Up*, 74 Antitrust L.J. 603, 609 (2007). They are not a permissible means of influence. They are "unethical conduct" that "often results in sanctions." *Cal. Motor Transp. Co. v. Trucking Unltd.*, 404 U.S. 508, 512 (1972) (citing perjury, Walker Process fraud, bribery, and other deceitful, sanctionable offenses not protected by *Noerr-Pennington*); *see* ABA Model Rule 8.4 ("It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation."). Deception of this kind thus has "no redeeming virtue." IIIB Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 782b, at 326 (3d ed. 2008).

II. Clarity Is Needed on Whether *Noerr-Pennington* Immunizes Fraudulent Misrepresentations.

The Court has left open the possibility of a misrepresentation or fraud exception to the *Noerr-Pennington* doctrine, especially in the context of adjudicatory proceedings. *California Motor* extends *Noerr-Pennington* immunity to the "channels and procedures of state and federal agencies and courts," but in the same breath it says, "[m]isrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process." *Id*. at 511, 513; *see also Pro. Real Est. Invs.*, 508 U.S. at 61 n.6 ("[W]e have noted that unethical conduct in the setting of the adjudicatory process often results in sanctions and that [m]isrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process.") (internal citations omitted).

Without a misrepresentation exception, *Noerr* will vitiate a large swath of socially beneficial public and private antitrust claims challenging deceptive conduct. "It is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute." *Cal. Motor*, 404 U.S. at 514; *see also McDonald v. Smith*, 472 U.S. 479, 484 (1985). And courts frequently find that lies, misrepresentations, and deceit satisfy the conduct element of meritorious Sherman Act claims. *See, e.g.*, *Allied Tube & Conduit Corp. v. Indian Head, Inc*., 486 U.S. 492, 501 (1988) (spreading false information about rival product safety); *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp*., 382 U.S. 172 (1965) (fraud on the patent office); *United States v. Microsoft Corp.*, 253 F.3d 34, 76–77 (D.C. Cir. 2001) (deceiving developers about software compatibility with rival operating systems).

The Ninth Circuit has observed that these meritorious claims are salutary in preserving the integrity of regulatory proceedings. Practically speaking, adjudicatory bodies must rely on the information parties provide them and are often unable to "ferret out" misrepresentations on their own. *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1262 (9th Cir. 1982). "They seldom, if ever, have the time or resources to conduct independent investigations." *Id*. The promise of antitrust liability for anticompetitive misrepresentations helps solve this problem by "induc[ing] parties not to fraudulently misrepresent facts" in regulatory proceedings. *Id*.

Other circuit courts hold that fraud and intentional misrepresentations to adjudicative bodies do not qualify for *Noerr-Pennington* immunity. Pet. App. 28a n.2 (Scwartz, J., dissenting) (collecting cases). And the

FTC recognizes such an exception. *See In re Union Oil Co. of Cal.*, 138 F.T.C. 1 (2004) (finding that "knowing and willful misrepresentations" to the California Air Resources Board were ineligible for antitrust immunity and that a "proceeding fundamentally tainted by misrepresentation lacks the 'genuine' nature that is the hallmark of what the Supreme Court seeks to protect."). But the lower courts are split. *Compare Armstrong Surgical Ctr., Inc. v. Armstrong Cnty. Mem'l Hosp.*, 185 F.3d 154, 160 (3rd Cir. 1999) (the Third Circuit's reading of precedent "casts doubt on whether such an exception exists under any circumstances and dictates that, in the circumstances of this case, we honor the [] defendants' claim to immunity."); *with U.S. Futures Exch., L.L.C. v. Bd. of Trade of the City of Chi., Inc.*, 953 F.3d 955, 960 (7th Cir., 2020) (the Fifth, Seventh, First and Ninth Circuits among others hold varying articulations of the view that "fraudulent misrepresentations made in an adjudicative proceeding before an administrative agency are not protected from antitrust liability.").

The Court should grant certiorari to clarify the lower courts' confusion and create a uniform body of law holding that *Noerr-Pennington* immunity does not apply to knowing misrepresentations in adjudicatory proceedings.

III. An Independent Misrepresentation Exception Would Not Impinge Upon the Values that the *Noerr-Pennington* Doctrine Protects.

A misrepresentation exception to *Noerr* is in full accordance with the right to petition the government. *Noerr* sought to avoid chilling private parties' petitioning activity so as not to "deprive the government of a valuable source of information." *Noerr*, 365 U.S. at 139.

A misrepresentation exception would not chill the purveyance of valuable information. It would allow the government and courts to rely more readily on the information provided by parties in adjudicatory settings without deterring speech in the political arena (i.e., speech addressing "whether a law . . . should pass, or if passed be enforced."). *Id.* at 136. Under the rule adopted in most circuits, a firm need only consider the exception when determining whether to make a knowing misrepresentation in an adjudicative setting that would also subject it to potential antitrust liability. Such a rule thus would incentivize forthright communication with the government in adjudicatory proceedings while also facilitating unencumbered communication with the government in matters involving public affairs.

A misrepresentation exception also would not interfere with the separation of powers or federalism. There is no risk that an adjudicatory body would be acting as a gatekeeper to the political arena or infringing upon the activities of the executive and legislative branches. Non-adjudicatory decisions would remain the "responsibility of the appropriate legislative or executive branch of government." *Id.* If anything, the misrepresentation exception would provide a post hoc check to ensure that the appropriate branch of government is best able to carry out its functions.

IV. An Independent Misrepresentation Exception Can Be Easily Administrable.

The First Circuit has provided a simple and easily administrable articulation of a misrepresentation exception to *Noerr-Pennington* immunity. It holds that parties who make "knowing misrepresentations" in "administrative and adjudicatory contexts" are not entitled to the immunity. *Amphastar Pharms. Inc. v.*

Momenta Pharms., Inc., 850 F.3d 52, 56 (1st Cir. 2017) (citing *Cal. Motor*, 404 U.S. at 513). This articulation accords with the major positions of the other circuits and a well-reasoned 2006 Staff Report from the Federal Trade Commission ("FTC"), which drew on caselaw and the FTC's decision in *In the Matter of Union Oil Company of California*. Fed. Trade Comm'n, Staff Report, Enforcement Perspective on the *Noerr-Pennington Doctrine* 7 (2006).[3]

The FTC Staff Report recommends that where a communication undermines "a valid and independent government decision, it [] deserves no special treatment and should be subject to the antitrust laws." FTC at 22; *see also id.* at 22–28 (citing and discussing cases and authorities supporting misrepresentation exception). When, as a threshold matter, an anti-competitive misrepresentation qualifies as "petitioning," *Allied Tube*, 486 U.S. at 499 (1988), and occurs during an "adjudicatory process" (whether "administrative [or] judicial"), *Cal. Motor*, 404 U.S. at 513, it should fall within an exception to *Noerr-Pennington* if it is (1) knowing and (2) influential to government action.

This proposed framework is preferable to shoehorning a misrepresentation exception into the "sham" exception articulated in *Professional Real Estate Investors*, 508 U.S. at 51. While sham petitions seek to abuse the governmental process without regard to the outcome of the process, misrepresentations in adjudicatory contexts genuinely seek to influence government outcomes through nefarious means that harm the

[3] https://www.ftc.gov/sites/default/files/documents/reports/ftc-staff-report-concerning-enforcement-perspectives-noerr-pennington-doctrine/p013518enfperspectnoerr-penningtondoctrine.pdf [https://perma.cc/W3CC-85PJ].

legitimacy of the proceedings and the functioning of the market. A standalone misrepresentation exception for knowing and influential petitioning during adjudicative proceedings thus would allow courts to properly characterize and address the misconduct through a tailored framework.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari.

Respectfully submitted,

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