No. 20-1293

IN THE
Supreme Court of the United States

ABBVIE INC., ABBOTT LABORATORIES, UNIMED PHARMACEUTICALS LLC, AND BESINS HEALTHCARE, INC.,
Petitioners,
v.
FEDERAL TRADE COMMISSION,
Respondent.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

Many of the Chamber's members are companies and professional organizations, which seek to enforce their rights in the courts. The Chamber files this brief to clarify the appropriate application of *Noerr-Pennington* immunity and to reinforce the strong public policies behind the First Amendment right to petition the courts for redress of grievances.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for the Chamber represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than the Chamber, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for the Chamber also represent that the parties have consented to the filing of this brief, and the parties were notified 10 days prior to the filing of the brief of the Chamber's intention to file.

SUMMARY OF ARGUMENT

This Court should grant the petition for a writ of certiorari to provide much needed clarity regarding the "sham" exception to *Noerr-Pennington* immunity, and thereby ensure this exception does not infringe the very First Amendment rights that *Noerr-Pennington* immunity was designed to protect. The *Noerr-Pennington* doctrine derives from the Petition Clause of the First Amendment and provides that those who petition any department of the government for redress are generally immune from statutory liability for their petitioning conduct. See *E.R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) (*Noerr*); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965) (*Pennington*).

While this Court has recognized an exception to that immunity for "sham" litigation, it has done so only in the narrow circumstances where the litigation was (1) "objectively baseless" and (2) subjectively intended to act as an "anticompetitive weapon[.]" *Pro. Real Estate Invs., Inc. v. Columbia Pictures Indus. Inc.*, 508 U.S. 49, 60-61 (1993) (*PRE*). The Third Circuit's ruling below improperly conflates these two distinct elements. In so doing, it effectively eliminates the requirement of subjective intent, which does important work under this inquiry to ensure those who petition the government have an avenue for redress of their grievances. See *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 556 (2014) (citing *PRE*, 508 U.S. at 56).

The Third Circuit's incorrect analysis of the *Noerr-Pennington* doctrine will have a chilling effect far

beyond the patent litigation context of this case. In addition to affecting other industry sectors, the Third Circuit's decision risks curtailing businesses' exercise of their First Amendment right to seek redress from all three branches of government, by chilling public statements aimed at inducing governmental action and changing prevailing legal standards. Moreover, the Third Circuit's decision deepens the wide-spread confusion among courts and the public over the scope of the doctrine.

ARGUMENT

A. This Court's Intervention Is Needed To Ensure That The "Sham" Exception Does Not Swallow *Noerr-Pennington* Immunity.

The Third Circuit's opinion waters down important limits on the "sham" litigation exception to the *Noerr-Pennington* doctrine. Litigants, including members of the Chamber, will be deterred from filing suit to vindicate their rights, for fear that courts may declare their lawsuits a "sham"—even where, as here, a trial produced no evidence of subjective unlawful intent.

1. *This Court Established a Two-Step Test for "Sham" Litigation that Requires Proof of Subjective Unlawful Intent*

Under the *Noerr-Pennington* framework, "[a] party who petitions the government for redress *generally is immune* from antitrust liability." *A.D. Bedell Wholesale Co. v. Philip Morris Inc.*, 263 F.3d 239, 250 (3d Cir. 2001) (cleaned up). An exception to the doctrine exists if a party files a "sham" lawsuit, which

is what the Federal Trade Commission (FTC) alleged here. *PRE*, 508 U.S. at 56.

If the plaintiff succeeds in establishing that the lawsuit is "objectively baseless," as required in the first step of *PRE*, then a court "may ... examine the litigant's subjective motivation." *Amarel v. Connell*, 102 F.3d 1494, 1518 (9th Cir. 1996) (citing *PRE*, 508 U.S. at 60-61); see also *U.S. Futures Exch., LLC v. Bd. of Trade of the City of Chicago, Inc.*, 953 F.3d 955, 963 (7th Cir. 2020) ("The exception requires a two-step inquiry: (1) only if challenged litigation is objectively meritless may a court (2) examine the litigant's subjective motivation ... In other words, an antitrust plaintiff must 'disprove the challenged lawsuit's *legal* viability' *before proceeding to the second, subjective step*.") (first emphasis in original, second emphasis added); *CSMN Inv., LLC v. Cordillera Metro. Dist.*, 956 F.3d 1276, 1283 (10th Cir. 2020) ("Under the first step, a court considers whether the petitioning has an objectively reasonable basis … If so, immunity applies ... But if not, a court proceeds to the second step, considering the subjective motivation behind the petitioning.") (citations omitted)

Where a court makes a threshold determination of objective baselessness, the second, subjective prong serves a critical purpose. It requires the court to determine "whether the baseless lawsuit conceals 'an attempt to interfere directly with the business relationships of a competitor...' through the 'use [of] the governmental process ... as an anticompetitive weapon.'" *PRE*, 508 U.S. at 60-61. Courts have described this second, subjective prong as demanding.

See, e.g., *Omni Res. Dev. Corp. v. Conoco*, 739 F.2d 1412, 1414 (9th Cir. 1984).

2. *The Third Circuit Improperly Conflated the Objective and Subjective Prongs*

Despite enunciating both prongs of the exception and characterizing the analysis as a "delicate task," the Third Circuit incorrectly allowed mere *satisfaction* of the first prong to satisfy *proof* of the second: subjective intent. Pet. App. 67a. The Court held, based on a "syllogism,"[2] that if a reasonable person pursues a lawsuit later found, in hindsight, to be objectively baseless, subjective bad faith can be presumed from that alone. This defective reasoning effectively collapsed the objective and subjective prongs into a single element. *Id.* at 69a.

The Third Circuit's erroneous legal standard was necessary to its decision because—even after a 16-day trial—there was "no direct evidence of [these individuals'] subjective intent." *Id.* at 66a. This posture, wherein the case has gone through full discovery and a lengthy trial (but produced no

[2] The Third Circuit stated: "consider the following syllogism: (1) A lawsuit is objectively baseless if "no reasonable litigant could realistically expect success on the merits," *PRE*, 508 U.S. at 60; (2) and a litigant who files an objectively baseless lawsuit **must have had** some subjective motivation for suing; (3) but because the lawsuit was objectively baseless, the litigant's subjective motivation could not have been success on the merits, unless the litigant was unreasonable; (4) thus, a reasonable litigant's subjective motivation for filing an objectively baseless lawsuit must be something besides success on the merits. The District Court merely applied this syllogism . . . The District Court's logic is valid." Pet. App. 69a.

evidence of subjective bad faith apart from an attenuated syllogism), illustrates the extent to which the court effectively eliminated the subjective prong.

Unquestionably, the Third Circuit's decision is at odds with this Court's decision in *PRE* that the "sham" litigation exception requires a discrete two-step inquiry. *PRE*, 508 U.S. at 60-61. The Third Circuit's opinion risks infringement of the protection afforded companies and businesses to vindicate their rights in an increasingly competitive marketplace.

Were this error to stand, it would remain unclear in many circumstances how a court can determine the line between the right to freely petition the government, which *Noerr-Pennington* protects, and the use of litigation as an "anticompetitive weapon," which *Noerr-Pennington* does not. See, e.g., *Westmac, Inc. v. Smith*, 797 F.2d 313, 318 (6th Cir. 1986) ("Determining whether a party who filed suit was indifferent to obtaining a favorable judgment may often be a difficult question of fact."); see also *Winterland Concessions Co. v. Trela*, 735 F.2d 257, 263 (7th Cir. 1984). In light of the considerable confusion displayed by courts about the "sham" litigation exception, including the mistaken view of the Third Circuit (see Part C, *infra*), this Court should intervene and provide much needed clarity.

B. The *Noerr-Pennington* Doctrine Protects Not Only Civil Litigation, But Also The Right To Petition Executive And Legislative Bodies.

The question presented has particular importance because *Noerr-Pennington* immunity extends not only to an array of civil cases, but also protects petitioning the government through administrative proceedings and other efforts to influence legislative and executive action. *Cal. Motor Transp. Co v. Trucking Unlimited*, 404 U.S. 508, 513 (1972). Although some variation exists based on the "context and nature of the activity," in each instance, the "sham" exception remains narrow so as to protect a party's constitutional right to petition the government. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499 (1988); see also *Westmac, Inc.*, 797 F.2d at 318; *Razorback Ready Mix Concrete Co. v. Weaver*, 761 F.2d 484, 487 (8th Cir. 1985).

In these varied contexts, the subjective prong has particular salience because the *Noerr-Pennington* doctrine protects the right to petition for *a change* to the legal status quo. See *Pennington,* 381 U.S. at 669-671 ("*Noerr* shields from the Sherman Act a concerted effort to influence public officials."); *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 380 (1991) (the doctrine protects those "who genuinely seek[] to achieve [their] governmental result" even if done "through improper means") (quoting *Allied Tube*, 486 U.S. at 500, n.10) (cleaned up). Whether a lawsuit, a legislative lobbying campaign, or an appeal to the executive is found objectively baseless under *current* law, that should not extinguish First Amendment

constitutional protections unless a party also possesses subjective unlawful intent.[3]

The myriad applications of *Noerr-Pennington* immunity provide further grounds for this Court's intervention because these principles affect parties' conduct far beyond the patent litigation context in which this case arose.

1. *Lobbying Legislatures and Public Officials*

Noerr itself arose in the legislative, not judicial arena. The Court in *Noerr* determined that immunity should apply to railroads that were engaged in a publicity campaign to induce governmental action adverse to the interests of trucking companies. *Noerr*, 365 U.S. at 129, 144. The Court found that the Sherman Act was "not violated by either the railroads or the truckers in their respective campaigns to influence legislation and law enforcement" and was not a "sham," because the "effort to influence legislation" was "not only genuine but also highly successful." *Id.* at 144-145.[4] Likewise, parties that

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[3] *See also* Marina Lao, REFORMING THE NOERR-PENNINGTON ANTITRUST IMMUNITY DOCTRINE, 55 RUTGERS L. REV. 965, 968 (Summer 2003) ("[T]he 'subjective' test is equally hard to meet because petitioners often do want a favorable outcome in litigation and not merely to inflict harm on a competitor through the litigation process.").

[4] "There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified. But this certainly is not the case here." *Noerr*, 365 U.S. at 144.

have lobbied local officials have successfully invoked *Noerr-Pennington* immunity. See *City of Columbia*, 499 U.S. at 381 (lobbying city council to consider zoning measures); see also *Manistee Town Ctr. v. City of Glendale*, 227 F.3d 1090, 1092 (9th Cir. 2000) (applying *Noerr-Pennington* "to claims under 42 U.S.C. § 1983 that are based on the petitioning of public authorities").

Importantly, "*Noerr* rejected the contention that an attempt 'to influence the passage and enforcement of laws' might lose immunity merely because the lobbyists' 'sole purpose ... was to destroy [their] competitors.'" *PRE*, 508 U.S. at 57 (quoting *Noerr*, 365 U.S. at 138).

2. *Lobbying the Executive Branch*

In *California Motor Transport*, the Court explained that *Noerr-Pennington* immunity also extends to petitioning the executive branches of local, state, and federal governments, including administrative agencies. See 404 U.S. at 510. Similarly, the Tenth Circuit has held that *Noerr-Pennington* immunity precluded a plaintiff's claims that insurance companies "conspired with each other and with [the] Superintendent of Insurance" in order "to set excessively high title insurance premium rates." *Coll v. First Am. Title Ins. Co.*, 642 F.3d 876, 893, 896 (10th Cir. 2011).

Other federal courts have applied the doctrine in the context of proceedings before the Federal Maritime Administration, *Assigned Container Ship Claims, Inc. v. American President Lines, Ltd.*, 784 F.2d 1420 (9th Cir. 1986); proceedings before the

Interstate Commerce Commission, *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240 (9th Cir. 1982); and petitioning the U.S. International Trade Commission and the Department of Commerce, *Cheminor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119 (3d Cir. 1999).

3. *Petitioning the Courts*

Other court decisions have expanded the circumstances in which *Noerr-Pennington* immunity applies to litigation. It may cover not only the party's filing of its own lawsuit, but also sponsorship of lawsuits advanced by others.

For example, this Court has held that "the approach of citizens or groups of them ... to courts, the third branch of Government" can be entitled to immunity. *Cal. Motor Transp. Co.*, 404 U.S. at 510; see also *Otter Tail Power Co. v. United States*, 410 U.S. 366, 372 (1973) (explaining that the defendant "instituted or sponsored litigation involving four towns in its service area which had the effect of halting or delaying efforts to establish municipal systems.").

Even in the context of multi-suit litigation campaigns, *Noerr-Pennington* immunity is lost under the "sham" exception only where a finding of objective baselessness is coupled with competent proof of subjective intent. *See Clipper Exxpress*, 690 F.2d at 1261 (holding there is "no first amendment protection for furnishing with *predatory intent false information* to an ... adjudicative body.") (emphasis added).

C. This Court Should Clarify The "Sham" Exception To The *Noerr-Pennington* Doctrine.

The Third Circuit's decision is but one example of the difficulty courts have exhibited over the application of the "sham" litigation exception.

Some courts, like the Third Circuit, articulate the correct standard but nonetheless err in its application. Take the Ninth Circuit. In *Rickards v. Canine Eye Registration Foundation*, it was alleged that a veterinary group violated the Sherman Act by engaging in a conspiracy to monopolize the market and by bringing a lawsuit which was baseless and a sham. 783 F.2d 1329, 1334 (9th Cir. 1986). Affirming that the "sham" litigation exception applied, the Ninth Circuit acknowledged that "[t]he application of the sham exception to single lawsuits may have a chilling effect on those who in good faith seek redress in the courts. The threat of treble damages may discourage the filing of meritorious claims, or preclude plaintiffs from asserting novel or cutting-edge theories of liability." *Id.* However, despite its appreciation that courts "must apply the sham exception with caution," the court nonetheless determined that the litigation before it presented the exceptional case despite "no evidence" the challenged conduct "cause[d] any cognizable [] injury." *Id.*

The Ninth Circuit's reasoning evidences an appreciation that in certain contexts, such as "bet the business" litigation or attempts to advance or alter the jurisprudential landscape, "novel" or innovative does not necessarily mean "sham." Yet, like the Third

Circuit here, the court nonetheless failed to faithfully apply these principles and mishandled the subjective intent inquiry. As explained in the dissent, where "[t]he district court made no factual findings on the issue ... simply [holding] that the lawsuit was 'baseless and a sham,'" *Noerr Pennington* immunity applies. *Id.* at 1336. The dissent rightly recognized that the majority opinion relied solely on "the concerted refusal to deal which showed the group's 'anticompetitive motivation[,]' [b]ut the desire to harm a competitor does not make a lawsuit a sham." *Id.*

Other courts have expressed dismay at the lack of clarity in the *Noerr-Pennington* doctrine and the "chilling effect" on the exercise of First Amendment rights. See *Mercatus Group, LLC v. Lake Forest Hosp.*, 641 F.3d 834, 846 (7th Cir. 2011). As the Court in *Mercatus* observed, "the greater the uncertainty, the more likely that laypeople will hesitate to seek redress, out of fear that their petitioning activity will subject them to legal liability." *Id.;* see also *Puerto Rico Tel. Co., Inc. v. San Juan Cable LLC*, 874 F.3d 767, 771 (1st Cir. 2017) ("We find ourselves quite skeptical of the notion that a defendant's willingness to file frivolous cases may render it liable for filing a series of only objectively reasonable cases.").

Even the FTC itself acknowledged the lack of clarity around the sham exception in a 2006 report: "[w]hat is not clear, however, are the exact boundaries of *Noerr*[*-Pennington's*] protection ... and neither the Supreme Court case law nor federal appellate decisions provide a firm guide."[5] The FTC issued this

[5] Enforcement Perspectives on the *Noerr-Pennington Doctrine*, An FTC Staff Report, at 16 (2006), available at

2006 report to "attempt[] to interpret the doctrine," and provide "the viewpoint of FTC staff, who have grappled with these issues when faced with anticompetitive conduct in the form of communications with the government." *Id.*

In light of lower courts' and the FTC's difficulty in interpreting and uniformly applying the "sham" exception, this Court's intervention is necessary not only to correct the Third Circuit's error, but also to clarify the boundaries of the First Amendment rights protected by *Noerr-Pennington* immunity.

D. The Threat of Government Enforcement And Civil Litigation Will Chill Protected Activity Without Clarification By This Court.

Companies face significant enforcement and litigation risks without *Noerr-Pennington* immunity—risks that will undoubtedly deter their exercise of First Amendment protected activity absent intervention by this Court to establish clear rules for the doctrine's scope and the narrow "sham" litigation exception.

In the antitrust context, companies face liability for treble damages in suits brought by government enforcers, their competitors, or customers. *Octane Fitness*, 572 U.S. at 556 (observing the "chilling" effect of the threat of treble damages pursuant to 15 U.S.C.

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https://www.ftc.gov/sites/default/files/documents/reports/ftc-staff-report-concerning-enforcement-perspectives-noerr-pennington-doctrine/p013518enfperspectnoerr-penningtondoctrine.pdf

§ 15). The $500 million dollar disgorgement award obtained by the FTC in this case, on top of a private settlement, demonstrates the substantial risks a company faces when deciding whether it may proceed with efforts to petition the courts or other governmental agencies.

Additionally, unfair competition laws similarly may impose punitive and substantial liability. See, *e.g., ADP, LLC v. Ultimate Software Grp., Inc.*, No. 16-8664-KM-MAH, Dkt. Entry No. 119 (D.N.J., Mar. 5, 2018) (assessing *Noerr Pennington* immunity in light of claimed punitive damages and attorneys' fees under various federal and state trade secret and unfair competition laws); *Boydstun Equip. Mfg., LLC v. Cottrell, Inc.*, No. 3:16-cv-790-SI, 2017 WL 4803938, at *9-*13 (D. Or. Oct. 24, 2017) (applying *Noerr-Pennington* immunity to alleged violations of state and federal anti-monopolization laws and "*Walker Process"* fraud, citing *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965), which permits treble damages).

The FTC, moreover, has vigorously asserted its claimed right not only to damages, but also to disgorgement. See Shari Ross Lahlou, Greg Luib, & Michael Weiner, HIGH STAKES AT THE HIGH COURT: THE FTC'S DISGORGEMENT AUTHORITY COMES BEFORE THE SUPREME COURT, 35 Antitrust 71, 72 (Fall 2020) ("Since 2012, however, the FTC has routinely sought disgorgement in antitrust cases"); see also *AMG Cap. Mgmt., LLC v. Fed. Trade Comm'n*, 141 S. Ct. 194, No. 19-508 (argued Jan. 13, 2021).[6] Regardless of how this

[6] See *Fed. Trade Comm'n v. AMG Cap. Mgmt., LLC*, 910 F.3d 417 (9th Cir. 2018), cert. granted *AMG Cap. Mgmt. LLC. v. Fed.*

Court decides that question in *AMG*, private parties may be able to seek disgorgement and other equitable remedies under state law, resulting in substantial exposure. Such a risk is particularly dangerous, when the "sham" exception has been traditionally limited to "those rare instances where other conduct or incriminating documents" show bad faith. Lars Noah, *Sham Petitioning as a Threat to the Integrity of the Regulatory Process*, 74 N.C. L. REV. 1, 41 (1995).

With stakes this high, the need for clear rules to delineate parties' constitutionally protected rights is paramount. This Court should grant review to clarify the standards for the "sham" exception to the *Noerr-Pennington* doctrine.

Trade Comm'n, 141 S. Ct. 194 (Mem.) (2020). Petition for certiorari granted on the question of: "[w]hether § 13(b) of the Act, by authorizing 'injunction[s],' also authorizes the Commission to demand monetary relief such as restitution—and if so, the scope of the limits or requirements for such relief." *AMG Cap. Mgmt.*, No. 19-508, Pet. at (i) (Oct. 18, 2019).

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari and reverse the Third Circuit's decision.

Respectfully submitted,

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