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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

The *Noerr-Pennington* doctrine protects even objectively baseless litigation unless the antitrust plaintiff proves the defendant was subjectively motivated to use the litigation process itself as an anticompetitive weapon. *Professional Real Estate Inv'rs* v. *Columbia Pictures Indus.*, 508 U.S. 49, 60-61 (1993) ("*PRE*"). To ensure "breathing space" for First Amendment rights, *BE&K Constr.* v. *NLRB*, 536 U.S. 516, 531 (2002), the subjective element requires the antitrust plaintiff to establish the litigant's "'sincerely and honestly felt or experienced'" motivation, *PRE*, 508 U.S. at 61. If litigation is "'genuinely aimed at procuring'" a competitive advantage through the prospect of a successful outcome, it is not a sham—no matter its objective unreasonableness. *City of Columbia* v. *Omni Outdoor Advert.*, 499 U.S. 365, 380-381 (1991).

Contrary to these principles, the decision below holds that courts may find a sham upon proof of objective baselessness alone, simply by inferring that any litigant who brings a suit later found objectively unreasonable "must have been" subjectively motivated by bad faith—at least in patent-infringement suits brought under the Hatch-Waxman Act by experienced lawyers. Pet. App. 69a. The FTC does not deny that the court of appeals adopted this rule, which equates subjective bad faith with participation in Hatch-Waxman's deliberate statutory scheme and the commonplace intent to exclude others that underlies the patent system. Nor does the FTC dispute that holding's importance or the acute need for clarity at this frequently traversed intersection of antitrust law, patent law, and the First Amendment.

Instead, the FTC defends the court of appeals' approach on the merits. But in doing so, the FTC either glosses over or ignores the many consequential defects of that approach. The court's holding treats a patent owner that sues a competitor for infringement believing there is some chance of success despite long odds, and that the potential financial reward of a successful outcome justifies the effort, exactly the same as a patent owner that sues knowing its claim will be dead on arrival but calculating that the litigation burdens will harm its competitor. In both situations, under the decision below, if the suit is later judged objectively baseless, the patentee may be assumed to have sued in bad faith, and the antitrust plaintiff bears no burden to establish whether the suit was subjectively genuine.

That rule significantly expands the narrow sham exception in conflict with this Court's and other circuits' precedents, all but eliminating the First Amendment breathing space the subjective element is intended to preserve, impairing patent rights, and thwarting the purposes of the Hatch-Waxman Act. The Court should grant review.

ARGUMENT

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENT

As the petition explains, the decision below contravenes this Court's precedent in several respects. Pet. 17-24. *First*, the court of appeals improperly merged the objective and subjective elements, allowing antitrust plaintiffs that prove only objective baselessness to rely on a "syllogism" to infer bad faith in most cases. Pet. App. 68a-69a. *Second*, the court treated the commonplace "intent to thwart competition" that characterizes any infringement suit as an improper purpose

without regard to whether a litigant seeks a competitive advantage through the litigation process rather than its outcome. Pet. App. 67a, 49a. *Third*, the court held that evidence that a litigant subjectively saw no chance of success is "not required" even where, as here, there was no basis for finding bad faith except an inference from objective baselessness and ordinary circumstances that invariably exist in similar litigation. Pet. App. 67a-70a. *Finally*, the court treated AbbVie's lawyers' knowledge of the financial stakes as evidence of bad faith, even though a suit's economic rationality gives a litigant a good-faith reason to sue in pursuit of even a long-shot outcome. Pet. App. 69a-70a.

The FTC fails entirely to address the last of those conflicts and does not defend the court of appeals' intent-to-thwart-competition standard—even though the FTC urged the court below to adopt it. The arguments the FTC does make are meritless.

A. The FTC notes that the court of appeals' opinion addressed the objective and subjective prongs in separately headed sections. Opp. 13. That hardly demonstrates independent analysis. To the contrary, the court expressly held that the subjective element is not "distinct" from the objective element and that subjective bad faith may be inferred from a suit's objective lack of merit through a "syllogism." Pet. App. 68a-69a; *see* Pet. 18-19.

In doing so, the court did far more than treat objective baselessness as "one relevant circumstance" in evaluating circumstantial evidence of a litigant's subjective intent. Opp. 13. The court instead held that its syllogism suffices to establish sham litigation unless the antitrust defendant comes forward with evidence showing that it "subjectively (though unreasonably)

expected the lawsuit to succeed." Pet. App. 68a-69a. That improperly shifts the burden of proof. *See PRE*, 508 U.S. at 60-61 (sham exception "requires the plaintiff" to prove both elements). Although the FTC tries to confine that holding, the "circumstantial evidence" the FTC cites and the court below relied on—*i.e.*, that the litigation was approved by experienced attorneys who knew the facts and the law, Opp. 7, 13—exists in every Hatch-Waxman suit. *E.g.*, Pet. 29.

B. Distancing itself from the position it advocated below, the FTC next argues that the court of appeals used "intent to 'thwart competition'" (Pet. App. 67a) only as "shorthand" for an improper purpose to abuse the litigation process. Opp. 14. But the court below "agree[d] with the FTC" that "what matters" under the subjective prong "is the intent to 'thwart competition,'" not the litigant's subjective belief about the merits of its claim. Pet. App. 67a; *see* FTC C.A. Third-Step Br. 56-57. The court thus held unequivocally that "[u]nder the subjective motivation prong, a plaintiff must show the defendant 'brought baseless claims in an attempt to thwart competition (*i.e.*, in bad faith).'" Pet. App. 49a (quoting *Octane Fitness* v. *ICON Health & Fitness*, 572 U.S. 545, 556 (2014)). *Octane* did not purport to authorize that standard, *see* Pet. 23-24, which contravenes this Court's holding that a mere "purpose of delaying a competitor's entry into the market does not render" a suit a sham. *Omni*, 499 U.S. at 381; *see* Pet. 19-21. To the extent the FTC now agrees that this "shorthand" does not accurately state the law—or believes that the language in *Octane* might have led the court of appeals astray, *see* Opp. 14—that only underscores the need for this Court to dispel any misapprehension that intent to seek competitive

advantage, which exists in every patent-infringement suit, can render litigation a sham.

The FTC is wrong that the decision below "*did* focus on abuse of process." Opp. 14. While the court initially recited (Pet. App. 48a) that a litigant must seek to impede competition "through the 'use [of] the governmental *process*,'" not its outcome, *PRE*, 508 U.S. at 60-61, the court never applied that standard or found it satisfied based on probative evidence of AbbVie's subjective intent (circumstantial or otherwise). Pet. App. 64a-71a. Instead, the court relied on facts present in every patent-infringement suit and the "collateral injury" the court believed is "invariably inflict[ed]" by the Hatch-Waxman statutory scheme. Pet. App. 70a. By relying on those facts to confirm an inference from a finding of objective baselessness, the court adopted a rule that cannot distinguish between efforts to gain a competitive advantage through patent enforcement and efforts to do so through abuse of process—a distinction even the FTC now concedes must be drawn. Opp. 15.

C. Defending the court of appeals' holding that evidence of a litigant's subjective belief about the merits of its lawsuit is "not required," Pet. App. 68a, the FTC contends that this Court has not formulated the subjective element that way. Opp. 15. That disregards this Court's explanation that suing with knowledge that a claim is baseless—*i.e.*, "with no expectation of achieving" success on the merits—is a defining hallmark of sham litigation. *Omni*, 499 U.S. at 380. And it disregards that if, as here, there is no other probative evidence of subjective bad faith—such as evidence that the potential relief does not justify investment in the suit, *PRE*, 508 U.S. at 65, or that the litigant has brought "a pattern of baseless, repetitive claims," *California Motor Transp.* v. *Trucking Unlimited*, 404 U.S.

508, 513 (1972)—evidence that the defendant subjectively believed the suit meritless is the only way to establish that the litigant was indifferent to the outcome and brought an objectively baseless suit solely to abuse the litigation process for anticompetitive ends. *See PRE*, 508 U.S. at 65.

The FTC underscores the court of appeals' statement that evidence about a litigant's subjective belief about the merits of its suit "'may be relevant.'" Opp. 15 (quoting Pet. App. 68a). But all the court said was that a plaintiff may, but need not, show that a litigant knew its claim was meritless. Other than that, the court explained, evidence of belief would matter only if the antitrust defendant adduced its own evidence that it subjectively (if mistakenly) believed its suit could succeed. Pet. App. 69a. That rule both forces litigants to sacrifice the attorney-client privilege to refute an improper inference and incorrectly shifts the burden of proof, in direct conflict with this Court's precedent. Pet. 22.

II. OTHER COURTS TAKE A DIFFERENT APPROACH

Unlike the court below, other courts of appeals hold that a litigant is presumed to assert patent rights in good faith unless an antitrust plaintiff presents "affirmative evidence" to the contrary. And they treat evidence of the patent litigant's belief about the merits of its claim as dispositive of sham-litigation claims. Pet. 25-27.

The FTC does not dispute this. It contends, however, that the decision below is consistent with those decisions because any presumption of good faith was overcome in this case. But the presumption of good faith applied by other courts cannot be overcome by an inference—only by "affirmative evidence of bad faith."

C.R. Bard v. *M3 Sys.*, 157 F.3d 1340, 1369 (Fed. Cir. 1998). Here, the FTC did not present and the court of appeals did not find such affirmative evidence apart from facts present in any Hatch-Waxman lawsuit; the court simply inferred that AbbVie's suit "must have been" brought in bad faith because experienced lawyers initiated a suit the court later deemed objectively baseless. Pet. App. 68a-70a.

The FTC also claims the court of appeals avoided any conflict by acknowledging that a litigant's knowledge of a suit's baselessness "'may be relevant.'" Opp. 16-17 (quoting Pet. App. 68a). But by holding that a plaintiff is "not required" to put on such evidence, the court placed the burden on the antitrust defendant to overcome the inference of bad faith by proving that it subjectively believed its suit might succeed. Pet. App. 68a. No other court of appeals has shifted the burden like that or inferred bad faith from a suit's objective baselessness alone. Other courts' analysis has turned instead on whether the antitrust plaintiff adduced evidence that the defendant subjectively believed its claim had no merit. Pet. 25-26.

III. THE CONSEQUENCES OF THE DECISION BELOW CONFIRM THE IMPORTANCE OF THE QUESTION PRESENTED

As the petition and amici demonstrate, the holding below will chill the exercise of First Amendment rights, undermine patent rights and the Hatch-Waxman Act, and jeopardize the attorney-client privilege. Pet. 27-32. To the extent the FTC addresses these consequences at all, it largely assumes the correctness of the decision below. For example, the FTC sloughs off concerns that the decision below will have any chilling effect by asserting that the court of appeals "did not improperly merge" the objective and subjective elements of the

sham-litigation test. Opp. 17. That is wrong for the reasons explained above.

Contrary to the FTC's suggestion, conditioning liability on objective baselessness will not alleviate those chilling effects. Patent litigation is "fraught with uncertainty." PhRMA/BIO Br. 9-10; *see* Pet. 30-31. Jurists frequently disagree about objective baselessness and sometimes get it wrong, especially in cases that turn on fact-intensive and technical patent-law doctrines. In this very case, while the district court deemed AbbVie's suit against Teva to be objectively baseless, the court of appeals disagreed, concluding that AbbVie had reasonable arguments supported by case law and the record, Pet. App. 56a-60a—even while finding that the nearly identical suit against Perrigo (which Perrigo itself thought AbbVie might win) was objectively unreasonable, Pet. App. 60a-64a; Pet. 11-13. The rule adopted below provides no assurance to a patentee considering whether to bring an uncertain claim, because it effectively relieves antitrust plaintiffs of the obligation to prove the subjective element.

As for the Hatch-Waxman Act, the FTC embraces the court of appeals' view that the Act's automatic stay—which Congress enacted specifically to encourage prompt assertion of infringement claims—"reinforces" a finding of bad faith. Opp. 12. Under that approach, any Hatch-Waxman litigant may be presumed to have sued in bad faith to inflict "'collateral injury'" on a competitor. Opp. 14. The FTC does not grapple with the perversity of that outcome, which is irreconcilable with the Act's design and purposes, or its consequences for innovation. Pet. 28-29.

Finally, the FTC downplays the consequences of the decision below for the attorney-client privilege by

asserting that privilege issues are "unlikely to arise in the typical case, where business executives will have at least some involvement in litigation decisions." Opp. 18. That makes little sense. It is hard to imagine any executive deciding to sue a competitor without obtaining legal advice, and the privilege applies broadly to communications with legal counsel, even where business professionals are involved. *See Upjohn Co.* v. *United States*, 449 U.S. 383, 391-393 (1981).

In emphasizing the district court's statement that it did not draw "'any negative inference'" based on AbbVie's invocation of the privilege, Opp. 18, the FTC misses the point. The court of appeals held that, in most cases, the only way an antitrust defendant can defeat an inference of subjective bad faith when a suit has been found objectively baseless is by coming forward with evidence that it subjectively believed the suit had a chance of success—a showing that will frequently require a privilege waiver. Pet. 31-32. While litigants sometimes have to make "'difficult judgments'" whether to waive privilege, Opp. 18, a defendant should not be forced into that position when it is the plaintiff's burden to prove subjective bad faith—not the defendant's burden to disprove it.

The FTC finally laments that "no evident workable alternative" to the court of appeals' approach would permit plaintiffs to prevail on a sham-litigation claim. Opp. 18. Experience in other circuits shows otherwise. Pet. 25-27. If adhering to this Court's precedent makes it difficult for plaintiffs to prove sham litigation, that is because it is supposed to be difficult. The threat of antitrust liability and treble damages exerts a powerful chilling effect on the right to petition. *Octane*, 572 U.S. at 556. This Court has therefore deliberately made the sham exception "narrow," *id.*, and imposed a heavy

"two-part" burden on antitrust plaintiffs, *PRE*, 508 U.S. at 60-61. The decision below dramatically eases that burden, inviting precisely the harms this Court has sought to prevent. The Court should grant review and confirm—as it has had to confirm before—that the FTC "must prove its case." *FTC* v. *Actavis, Inc.*, 570 U.S. 136, 159 (2013).

IV. THIS CASE IS AN APPROPRIATE VEHICLE

As the FTC's focus on the merits suggests, this case squarely frames the issue for review on the merits.

The interlocutory posture is no barrier to review. *E.g.*, *Abbott* v. *Veasey*, 137 S. Ct. 612, 613 (2017) (statement of Roberts, C.J., respecting denial of certiorari) (cited in Opp. 10). This is not a case where remand could affect the question presented or eliminate the need to decide it. The sole issue on remand is the FTC's separate claim that the settlement with Teva entailed an unlawful reverse payment, which has no relation to the validity of AbbVie's suit against Perrigo or the sham-litigation test. Postponing review while the remand proceeds would be pointless. It would also prolong the harmful consequences of the court of appeals' decision—including in follow-on antitrust suits where private plaintiffs assert the decision below establishes AbbVie's liability on preclusion grounds. Pet. 33.

The FTC also suggests this case is a "poor vehicle" because the district court found that AbbVie actually knew its infringement claim had no chance of prevailing. Opp. 15-16. That finding, although couched in terms of "actual knowledge," Pet. App. 135a-136a, reflected only the court's syllogistic inference from its finding of objective baselessness (bolstered by facts present in every Hatch-Waxman case), Pet. App. 129a-

136a—an inference the court resorted to only after concluding that the 16-day trial had yielded no other evidence probative of subjective motivation, Pet. App. 125a-129a.[1] The district court's holding, no less than the court of appeals', thus hinged on the erroneous view that subjective bad faith may be inferred from a finding of objective baselessness, at least in Hatch-Waxman suits approved by experienced attorneys. Pet. App. 135a-136a. The court could not have made those findings had it applied the subjective element consistent with this Court's precedent. Pet. 32.

The FTC's reliance on the district court's findings, like the rest of its defense of the decision below, Opp. 10-12, thus assumes the correctness of the court of appeals' rule that litigation may be deemed a sham solely because it was objectively baseless, since any experienced lawyer who brings a Hatch-Waxman suit later judged objectively meritless "must have had" a subjectively improper motivation, Opp. 11. But that is not the correct rule. Far from a "factbound application of the subjective prong," Opp. 12, this case directly presents the important legal question whether the subjective element of the sham test may be inferred from a finding of objective baselessness.

CONCLUSION

The petition should be granted.

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[1] The court erroneously gave no weight to business-planning documents and settlement-negotiation conduct that showed AbbVie was confident of its chances against both Teva and Perrigo. Pet. 12-13; Pet. App. 127a.

Respectfully submitted.

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