No. __-____

IN THE
Supreme Court of the United States

PUERTO RICO TELEPHONE COMPANY, INC.,
Petitioner,

v.

SAN JUAN CABLE LLC,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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February 28, 2018

QUESTION PRESENTED

Whether pursuing a series of petitions to courts and administrative bodies, filed for the purpose and with the effect of using the governmental process itself – rather than the results of that process – to harm competition, may be a basis for liability under the Sherman Act, even if no single petition in the series was objectively baseless.

PARTIES TO THE PROCEEDINGS

Petitioner Puerto Rico Telephone Company, Inc. was the plaintiff in the district court and the appellant in the court of appeals.

Respondent San Juan Cable LLC was the defendant in the district court and the appellee in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioner Puerto Rico Telephone Company, Inc. states the following:

Puerto Rico Telephone Company, Inc. is a Puerto Rico corporation. It is an indirect, wholly owned subsidiary of América Móvil, S.A.B. de C.V., which is a publicly traded Mexican corporation. América Móvil, S.A.B. de C.V., has no parent company, and no publicly traded company owns 10% or more of its stock.

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Puerto Rico Telephone Company, Inc. ("PRTC") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-21a)[1] is reported at 874 F.3d 767. The relevant opinions of the district court (App. 22a-92a, 93a-274a) are reported at 196 F. Supp. 3d 207 and 196 F. Supp. 3d 248, respectively.

JURISDICTION

The court of appeals entered its judgment on October 31, 2017. On January 19, 2018, Justice Breyer extended the time for filing a petition for certiorari to and including February 28, 2018. App. 277a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 2 and 3 of the Sherman Act, 15 U.S.C. §§ 2-3, and Section 4 of the Puerto Rico Anti-Monopoly Act, P.R. Laws Ann. tit. 10, § 260, are reproduced at App. 275a-276a.

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[1] References to "App. __a" are to the appendix bound together with this petition; references to "C.A. App. __" are to the appendix in the First Circuit; and references to "C.A. Supp. App. __" are to the sealed supplemental appendix in the First Circuit.

INTRODUCTION

Respondent San Juan Cable LLC ("OneLink") was the monopoly provider of cable TV service in San Juan; in 2008, petitioner PRTC, seeking to break that monopoly, filed an application with the responsible regulator to provide competing pay-TV service. The application process was intended to be quick (and largely ministerial), but it did not work out that way: OneLink, by filing a series of petitions, state and federal court cases, appeals, and other legal challenges, managed to delay action on PRTC's application by more than three years. During that period of delay, OneLink continued to reap millions if not tens of millions of dollars in monopoly profits, harming consumers and PRTC. Shortly before its application was granted, PRTC sued OneLink for monopolization in violation of Section 2 of the Sherman Act.

Preservation of monopoly power through conduct that "'attempt[s] to exclude rivals on some basis other than efficiency'" is condemned as exclusionary under Section 2. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985) (quoting Robert H. Bork, *The Antitrust Paradox* 138 (1978) ("Bork, *Antitrust Paradox*")). OneLink's conduct meets that description. But the First Circuit, affirming the judgment of the district court, held that OneLink's conduct, destructive of competition as it may have been, was immune from antitrust scrutiny under this Court's cases excluding from the scope of the antitrust laws activity that seeks government action. *See generally Professional Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49 (1993) ("*PREI*"); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965) ("*Pennington*"); *Eastern R.R. Presidents*

Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) ("*Noerr*").

PRTC asserted that OneLink's conduct could form the basis for antitrust liability, notwithstanding the doctrine of petitioning immunity, because a jury could reasonably determine that OneLink's campaign of petitioning activity was a "sham" – launched not to obtain government action or redress but rather to use the judicial and administrative processes as anti-competitive weapons. *See California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). The court of appeals disagreed. The court assumed (as PRTC had argued) that, during a four-year period, OneLink had filed "twenty-four separate petitions, and that none resulted in a meaningful victory." App. 4a. The court held, however, that even "a fusillade of ultimately unsuccessful petitions" cannot be the basis for imposition of liability under the antitrust laws so long as "no one petition was sufficiently baseless" to constitute a sham on its own. App. 6a.

As the First Circuit acknowledged, the standard it articulated conflicts with prior decisions of the Second, Third, Fourth, and Ninth Circuits, all of which have recognized that a pattern of litigation or petitioning, employed to delay entry or raise a competitor's costs rather than to obtain relief, may give rise to liability under the antitrust laws, whether or not the individual petitions are objectively baseless. Under the standard that governs in those circuits, OneLink's persistent filings, its failure to obtain relief, and the limited value of the relief sought compared to litigation cost – combined with additional evidence that OneLink's subjective purpose was to use the process to obstruct competition rather than to obtain the relief it purportedly sought – would create a triable

issue as to whether OneLink's conduct was indeed a sham and thus a potential basis for liability under the antitrust laws. The Court should grant review to address those inconsistent standards. *Cf. PREI*, 508 U.S. at 55 ("The Courts of Appeals have defined 'sham' in inconsistent and contradictory ways.").

Furthermore, the First Circuit's decision is incorrect because there should be no categorical immunity for the filing of a series of court actions or administrative petitions where the petitioner sought to use the process as an anticompetitive weapon rather than to obtain judicial relief or executive or legislative action. Immunity for petitioning conduct reflects two basic concerns. First, because the Sherman Act does not apply to "valid government action, as opposed to private action," the Sherman Act likewise does not apply to "attempt[s] to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." *Noerr*, 365 U.S. at 136. When a monopolist files petitions without regard to their merits and simply to impose procedural obstacles to the issuance of a license to a competitor – rather than in the hopes of gaining any actual relief – this interest does not apply.

Second, penalizing genuine efforts to influence government action "would raise important constitutional questions." *Id.* at 137-38. The First Amendment protects the right to petition the government; penalizing legitimate petitioning activity would potentially "invade" that freedom. *Id.* at 138. But the use of governmental processes for an improper purpose (here, suppressing competition) is not constitutionally protected: in the litigation context, for example, a filing is sanctionable if "presented for [an] improper purpose, such as to harass[or] cause unnecessary

delay," Fed. R. Civ. P. 11(b)(1), even though there might have been an otherwise reasonable legal basis for the filing. *See Whitehead v. Food Max of Mississippi, Inc.*, 332 F.3d 796, 805 (5th Cir. 2003) (en banc) (explaining that sanctions lie where a litigant's "improper purpose" is "objectively ascertainable," even though its position is "nonfrivolous").

To be sure, in *PREI*, this Court held that the filing of a copyright infringement suit could not be the basis for a claim under the Sherman Act absent evidence that the suit was "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." 508 U.S. at 60. Screening out claims based on a single lawsuit – if the suit was colorable – makes sense: the likelihood of significant harm to competition from the filing of a single meritless claim is low; at the same time, there is a meaningful risk that protracted antitrust litigation based on one well-grounded filing might improperly chill recourse to the courts. But those considerations are reversed where a litigant files a whole series of unsuccessful "proceedings and actions . . . with or without probable cause, and regardless of the merits of the cases." *California Motor Transp.*, 404 U.S. at 512 (alteration in original). Particularly where such action is undertaken by a monopolist (or a cartel) to block competitive entry, the consequences for competition can be dire (as they were here); furthermore, a large number of unsuccessful actions can provide the objective indication of anticompetitive intent that justifies further inquiry into subjective purpose.

The question presented has now been addressed by five courts of appeals and – given the necessity for administrative approvals and licensing in many sectors of the economy, as well as the relatively low cost of pursuing this predatory strategy – is likely to

recur. The First Circuit's decision expands antitrust immunity for petitioning, eliminates serial petitioning as a distinct basis for liability, and thus ignores the practical reality that, when it comes to obstructive litigation, quantity has a quality all its own. Review by this Court on this important question is warranted.

STATEMENT OF THE CASE

1. In 2008, PRTC was the incumbent telephone company providing citizens of Puerto Rico with voice and Internet access service. *See San Juan Cable LLC v. Puerto Rico Tel. Co.*, 612 F.3d 25, 28 (1st Cir. 2010). OneLink was the sole cable company in the capital San Juan, providing pay-TV, as well as broadband Internet access and voice service. *See id.*; App. 1a.[2]

In February 2008, PRTC filed a video franchise application with the Telecommunications Regulatory Board of Puerto Rico (the "TRB"), the first step to providing pay-TV service in competition with OneLink. App. 99a.

By regulation, the TRB had 180 days to grant or deny the application. *See Puerto Rico Tel. Co. v. San Juan Cable LLC*, 179 P.R. Dec. 177, 201 & n.64 (2010) ("[T]he decision to grant or deny the franchise must be taken within a period of 180 days following the franchise application date."). Despite acknowledging that the TRB's rules permitting intervention did not apply to the application proceeding at that time, OneLink sought to intervene. App. 99a. The TRB denied the motion to intervene nine days later. App. 101a.

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[2] Although satellite pay-TV service was available in Puerto Rico, OneLink had a greater than 64% share of the market for pay-TV service and a monopoly on bundled services – that is, pay-TV service combined with voice or Internet access service – and on interactive video-on-demand service.

PRTC filed an amended video franchise application in December 2008. App. 104a. The TRB ordered a 90-day expedited review of PRTC's application. C.A. App. 239-43. OneLink again moved to intervene, and it subsequently petitioned the Commonwealth Court of First Instance for mandamus relief when the TRB did not immediately act. App. 106a-108a. The TRB denied the motion to intervene, and the mandamus petition was denied as moot. App. 110a-111a. OneLink appealed the denial of intervention to the Commonwealth Court of Appeals (which issued a short stay) and lost. App. 112a-114a. OneLink moved for reconsideration in the Court of Appeals and lost. C.A. App. 3961-69. OneLink petitioned the Commonwealth's Supreme Court for certiorari; that court accepted the case (and stayed the application pending its decision) but then affirmed the denial of intervention. App. 115a-120a; *see also PRTC v. San Juan Cable*, 179 P.R. Dec. at 178. OneLink then sought reconsideration in the same court twice, losing both times. App. 120a. Even after that, OneLink again moved to intervene before the TRB and lost. App. 133a-134a; C.A. App. 1199.

OneLink also requested other forms of relief, with equal lack of success. It filed a motion to make PRTC's franchise application public and lost. App. 114a. It filed an "[u]rgent" motion to extend the time to file comments with the TRB on the application and lost. *Id.* OneLink filed an "[u]rgent" motion to dismiss the application, which the TRB ignored. *Id*. OneLink moved to require PRTC to report testing results and was ignored. App. 114a-115a. OneLink moved to set aside PRTC's public hearing date and lost. App. 115a. OneLink petitioned the TRB to initiate a rulemaking on cross-subsidization of services, which the TRB did

not do. App. 142a, 144a. When the TRB did not take action, OneLink petitioned for mandamus from the Commonwealth Court of First Instance and lost. App. 144a. OneLink appealed and lost. App. 144a. It moved for reconsideration and lost again. App. 144a-145a. It tried to recuse one of the TRB commissioners and lost. App. 121a-123a. It later filed a separate motion "for Vote of No Confidence and Disqualification of" the same commissioner and lost again. App. 126a; C.A. App. 1196-97. And OneLink filed an "[u]rgent" motion for access to documents, which it did not get. App. 126a-127a.

OneLink also instituted rearguard actions against PRTC's franchise application in the courts and other enforcement bodies. OneLink filed two complaints against PRTC in federal court alleging PRTC had violated the federal Cable Communications Policy Act of 1984 ("Cable Act") by performing TRB-authorized testing and construction of its planned network. App. 147a-154a. The district court dismissed the first complaint as moot – PRTC and the TRB agreed not to perform the TRB-authorized test. App. 152a-153a. When OneLink subsequently refiled its complaint, it was dismissed for lack of standing. App. 153a-154a. OneLink appealed, and the First Circuit affirmed. *San Juan Cable*, 612 F.3d 25; *see* App. 155a. OneLink lodged complaints with the United States Attorney's Office for the District of Puerto Rico, the Federal Communications Commission ("FCC"), and the Commonwealth Office of Monopolistic Affairs. App. 160a-161a. None of those agencies granted OneLink any relief. App. 162a-164a.

OneLink filed a lawsuit in Puerto Rico court alleging that PRTC violated the Commonwealth's Telecommunications Act and lost. App. 159a. OneLink appealed

and lost. App. 159a-160a. OneLink petitioned the Commonwealth Supreme Court for certiorari and lost. App. 160a. And OneLink and another cable company that provided service elsewhere in Puerto Rico – Choice Cable – filed a § 1983 action against PRTC; OneLink withdrew a request for a temporary restraining order in return for the TRB's agreement to delay approving the franchise application and to give OneLink prior notice of the approval, but ultimately lost the case on the merits. App. 155a-159a. OneLink also agreed to split litigation costs for a petition to the TRB, objecting to PRTC's application, filed by Choice alone; Choice ultimately dismissed its petition voluntarily. App. 173a & n.100.

On February 1, 2012 – four years after PRTC first filed its franchise application, more than three years after it amended its application, and almost three years after the 180-day time period to grant or deny the petition expired – the TRB granted PRTC's franchise application and approved its franchise agreement. App. 134a. OneLink filed a "Notice of Automatic Stay of the Franchise Order and Agreement," which the TRB rejected. App. 134a-135a. OneLink appealed and lost. App. 139a-140a. OneLink petitioned the Commonwealth Supreme Court for certiorari and lost. App. 140a. OneLink also sought reconsideration of the approval of the application and agreement and lost. App. 135a-137a; C.A. App. 1199. OneLink appealed and lost. App. 140a-141a.

Under the governing regulations, after the TRB granted the application, OneLink could appear in the proceedings. App. 137a. When the TRB convened a hearing for OneLink to show the requisite "substantial and legitimate" interest, App. 136a, OneLink declined to come forward with any evidence, asserting

that the TRB lacked jurisdiction, App. 138a – a position that was rejected by the Commonwealth courts, App. 141a. Once it finally had an opportunity to intervene and press the issues that formed the purported basis for most of its 24 failed petitions, OneLink dropped the case.[3]

3. The TRB repeatedly stated that OneLink's actions were intended to delay PRTC's market entry rather than to obtain any relief on the merits. In responding to OneLink's mandamus petition for the TRB to halt PRTC's application and begin a rule-making regarding cross-subsidization, the TRB wrote that "[i]t is evident that Onelink's reason for bringing forth this action is not approval of a truly necessary regulation required by law, but rather the creation of an additional obstacle to evaluating the PRTC's franchise application," C.A. App. 2733, and that, "[h]aving unsuccessfully attempted to obstruct the administrative process by requests for interventions and injunctions, Onelink draws up 'Plan C' charging the [TRB] with failure to comply with an alleged ministerial duty," *id.* at 2790. The Commonwealth Court of Appeals agreed, holding that there were no "legal grounds whatsoever that obligated the [TRB] to start and conduct a process of formal regulation on the prohibition of cross-subsidies." *Id.* at 2700.

In rejecting OneLink's claim that the TRB lacked jurisdiction to hear challenges to PRTC's franchise, the TRB wrote that OneLink's position was "contrary to law and contrary to the factual reality of the proper procedures in these proceedings" and that OneLink was engaging in a "reckless attempt to continue delaying resolution of this case." *Id.* at 2018-19. And in

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[3] A complete chart of OneLink's petitions is attached as an addendum to this petition.

responding to OneLink's § 1983 complaint, the TRB wrote:

> Although their legal theories have been rejected by *every* federal and Commonwealth court to consider them, [OneLink is], again, seeking to prevent competition by resurrecting the same legal theories . . . in a transparent attempt to stop PRTC from entering the marketplace and [to] preserv[e] [its] monopoly for as long as possible.
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> . . .
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> . . . The incumbent monopolist [OneLink] ha[s] stopped competition for over four years by litigating in this Court, in Boston, in the Commonwealth Courts and at the FCC. The residents of Puerto Rico have suffered as a result.

Id. at 1804-05, 1808. The TRB even warned OneLink that its conduct bordered on unethical and that it would "not hesitate to impose penalties and to refer lawyers to the Supreme Court of Puerto Rico and to any other such courts as may govern the professional conduct of the lawyers who litigate before th[e] [TRB], especially for their false, inflammatory and disrespectful statements." *Id.* at 1198 (underlining omitted).

4. In November 2011, PRTC filed an action alleging that OneLink's pattern of meritless administrative and legal actions had unlawfully preserved OneLink's monopoly by delaying action on PRTC's application. OneLink moved to dismiss the complaint, claiming immunity under *Noerr* for its petitioning conduct. The district court (per Judge Gelpi) denied the motion, holding that (1) under governing Supreme Court precedent, when a defendant allegedly harms competition by filing a series of actions "without regard to the merits," there is no requirement to show that the proceedings were "objectively baseless";

and (2) PRTC had alleged "activity sufficient to meet the standard for a pattern of litigation" warranting further scrutiny. C.A. App. 77-79.

Documents produced in discovery supported PRTC's allegation that OneLink's actions were filed for the purpose of using the process as an anticompetitive weapon. The prospect of competition from PRTC in 2008 led OneLink to assess the impact of potential competition from PRTC on its market share, its prices, and its existing debt covenants – an assessment that acknowledged the risk that both market share and prices would fall sharply once PRTC entered the market. C.A. Supp. App. 797.

In a different 2008 email, OneLink stated that it "viewed its legal costs as '[a] good investment!!'" App. 172a (alteration in original). When the Puerto Rico Supreme Court stayed PRTC's application in 2009 while reviewing OneLink's motion to intervene, OneLink board members exchanged emails "proclaiming, 'We Win'; . . . [and] a OneLink Board member and partner at the firm representing OneLink in the litigation[] responded that securing the stay was 'fantastic.'" App. 116a. OneLink also admitted that it filed its federal Cable Act lawsuits even though "it probably would not have been harmed by" PRTC's TRB-approved test "'if you look[ed] at it independently.'" App. 148a (alteration in original).

Discovery also showed that when Choice decided to dismiss its petition to the TRB – which was prepared and filed by OneLink's law firm and for which OneLink had agreed to pay half the costs, C.A. Supp. App. 1334 – OneLink's CEO perceived no adverse effect on OneLink's position, *id.* at 1330; that is, despite agreeing to fund Choice's petition, OneLink had no real interest in the outcome. And, after OneLink

had negotiated a sale to a new owner and was put on a limited budget for legal fees, it dropped its efforts to delay PRTC further. OneLink's CEO then "wrote to OneLink board members: '[it is] up to you folks but I'd rather just save the $450k rather than spend it in a half-effort that cannot hope to succeed.'" App. 187a-188a (alteration in original).

5. After discovery, OneLink moved for summary judgment. While that motion was pending, the parties filed additional cross-motions for summary judgment. App. 24a, 95a-96a.

a. On July 25, 2016, the district court issued two opinions resolving those motions. In its first opinion, the court denied in part and granted in part OneLink's first motion for summary judgment. The court held that PRTC could "survive summary judgment by merely establishing a pattern of repetitive claims that were filed without regard to the merits." App. 86a. The court identified several filings with the TRB that "a reasonable jury could find . . . , in conjunction with the additional filings discussed below, were intended to stall and delay PRTC's entrance into the market, rather than to seek a favorable outcome from the TRB." App. 87a; *see* App. 88a (additional TRB filings). The court similarly concluded that a reasonable jury could draw an inference that various filings in federal court were intended "to stall and delay PRTC's entrance into the market, rather than seeking a favorable outcome from the federal court." App. 88a-89a. And the court further concluded that a jury could determine that the filings "were intended to impose the type of

enormous expense that PRTC claims it has accrued as a result (over $3.2 million)." App. 90a.[4]

b. A few hours later, the district court issued its second opinion resolving the parties' cross-motions for summary judgment, doing an apparent about-face. This time, the court reviewed OneLink's individual petitions and concluded that they were either objectively reasonable or not intended to interfere directly with PRTC's business. App. 247a-272a. The court stated that "[s]ham litigation may . . . be 'evidenced by repetitive lawsuits carrying the hallmark of insubstantial claims.'" App. 272a (quoting *Otter Tail Power Co. v. United States*, 410 U.S. 366, 380 (1973)). Rejecting PRTC's tally of "zero wins and twenty-four losses," the court found that OneLink had filed 13 lawsuits or proceedings, and "was successful in four" – the first intervention request (which the TRB had denied), the first Cable Act complaint (which was dismissed as moot, refiled, then dismissed for lack of standing), the mandamus action regarding intervention (which was dismissed), and the § 1983 suit (which also was dismissed). App. 273a-274a. Without explaining why it was now disregarding the evidence of sham litigation it had cited in its earlier opinion, the court stated that "the record is devoid of any bad-faith evidence that OneLink was using the governmental process, not the outcome of that process, as a means to delay PRTC's entry into the market or drive up litigation costs." App. 274a.

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[4] The district court also concluded that PRTC had failed to raise a genuine issue as to whether OneLink could be liable for certain periods of delay in PRTC's application process, including delay owing to stays imposed by the Commonwealth courts. App. 83a. PRTC appealed this aspect of the district court's ruling, but the First Circuit did not reach the question.

6. PRTC appealed, and the First Circuit affirmed. The court of appeals "assume[d]" that "OneLink's various filings can be viewed as twenty-four separate petitions, and that none resulted in a meaningful victory." App. 4a. Because PRTC had not sought to show that any single petition was objectively baseless, the court also assumed each was objectively reasonable. *Id.* That second assumption, the court stated, "create[d] an immediate obstacle to PRTC's ability to maintain this lawsuit" under *PREI*. App. 5a.

The court of appeals rejected PRTC's argument (relying on *California Motor Transport*) that a defendant loses immunity for petitioning activity if it files a series of petitions, without regard to the merits, for the purpose of impeding competition. App. 6a-10a. The court acknowledged that "opinions of . . . four circuits to have addressed similar arguments . . . all in one way or another adopt some variant of this view." App. 7a. But the court rejected those courts' reasoning, pronouncing itself "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." App. 8a. Instead, the court reasoned, "where a party files a large number of petitions – here twenty-four according to PRTC – and every single one is objectively reasonable, we struggle to see how a jury could reasonably conclude that the party was filing petitions 'regardless of the merits of the cases.'" App. 8a-9a (quoting *California Motor Transp.*, 404 U.S. at 512). The court continued: "[W]e see little logic in concluding that an exercise of the right to file an objectively reasonable petition loses its protection merely because it is accompanied by other exercises of that right." App. 9a.

Two judges filed a concurring opinion. They wrote that, "as [they] read [the majority] opinion, [it] leaves open the possibility that, *PREI* notwithstanding, a monopolist might be liable under the antitrust laws for engaging in a pattern of petitioning, even though no single filing in that pattern is objectively baseless." App. 11a. The concurrence did not explain what showing could meet that standard if not a 0-24 record combined with other evidence of subjective intent to abuse the petitioning process. Instead, it simply stated that "PRTC does not have the kind of direct evidence of OneLink's attempt to destroy PRTC's right to petition for a license to compete that the *California Motor* plaintiffs had." App. 19a-20a. The concurring judges "join[ed] the Court's opinion" in its entirety. App. 20a-21a.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT REVIEW TO ADDRESS INCONSISTENT IMMUNITY STANDARDS GOVERNING CLAIMS BASED ON ANTICOMPETITIVE PETITIONING

The courts of appeals have adopted conflicting rules for deciding whether a series of petitions to courts and administrative bodies, filed to obstruct competition through the governmental process itself rather than the results of that process, can provide a potential basis for antitrust liability. The First Circuit below held that such liability is barred where none of the petitions in the series was objectively baseless. In other words, it held that *PREI*'s objective-baselessness requirement applied even in cases involving serial petitioning. That holding conflicts with decisions of the Second, Third, Fourth, and Ninth Circuits, which

impose no requirement to defeat the immunity defense in cases involving a pattern of multiple petitions.[5]

A. The Second, Third, Fourth, and Ninth Circuits Recognize Liability for Serial Petitioning Regardless of the Merits and Intended To Obstruct Competition

In *USS-POSCO Industries v. Contra Costa County Building & Construction Trades Council, AFL-CIO*, 31 F.3d 800 (9th Cir. 1994) ("*USS-POSCO*"), the Ninth Circuit drew a distinction between antitrust claims based on a single lawsuit or administrative petition alleged to be a sham and claims based on "a whole series of legal proceedings" alleged to have been filed for anticompetitive purposes. *Id.* at 811. In the case of a single filing, *PREI* requires the plaintiff to establish that the litigation in question is "objectively baseless." *Id.* at 810. But in the case of a pattern of successive filings, the question is, instead, whether the proceedings are brought "without regard to the merits and for the purpose of injuring a market rival." *Id.* at 811. This distinction has been adopted by the Second, Third, and Fourth Circuits as well.

1. *USS-POSCO* involved defendant unions that had filed a series of petitions designed "to cause such delay and expense [for a non-union project] that future project owners would only hire unionized contractors and subcontractors." 31 F.3d at 804. The unions filed automatic protests to the plaintiff non-union contractor's permits, lobbied for an ordinance that

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[5] The staff of the Federal Trade Commission ("FTC") agrees. *See* FTC, *Enforcement Perspectives on the* Noerr-Pennington *Doctrine* 28-38 (2006) ("*FTC Enforcement Perspectives*"), https://www.ftc.gov/sites/default/files/documents/reports/ftc-staff-report-concerning-enforcement-perspectives-noerr-pennington-doctrine/p013518enfperspectnoerr-penningtondoctrine.pdf.

would require additional permits, sued to enforce the ordinance, encouraged subcontractors to protest nonexistent safety violations, sued the contractor for violating environmental laws, and brought numerous grievances and proceedings against one of the contractor's partners. *Id.* The contractor filed an antitrust action; the unions argued, and the district court agreed, that their activity was immunized by *Noerr-Pennington*. *Id.*

The Ninth Circuit affirmed. The court first addressed the question "[w]hether litigation *that is not objectively baseless* can still constitute 'sham litigation' sufficient to eliminate . . . immunity." *Id.* at 810. The court answered that question in the affirmative. It noted that *PREI* requires single lawsuits to be objectively baseless to be a potential basis for antitrust liability but held that *PREI* and *California Motor Transport* "apply[] to different situations." *Id.* The court observed that

> [w]hen dealing with a series of lawsuits, the question is not whether any one of them has merit – some may turn out to, just as a matter of chance – but whether they are brought pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival.

Id. at 810-11. Put differently, "[w]ere the legal filings made, not out of a genuine interest in redressing grievances, but as part of a pattern or practice of successive filings undertaken essentially for purposes of harassment?" *Id.* at 811.

Under that standard, the Ninth Circuit held that the unions' petitioning was not a sham: "fifteen of the twenty-nine lawsuits alleged by [the contractor] as part of the pattern of filings 'without regard to

the merits' have proven successful." *Id.* The unions' high success rate could not "be reconciled with the charge that the unions were filing lawsuits and other actions willy-nilly without regard to success." *Id.* The court of appeals accordingly agreed that the *Noerr-Pennington* doctrine immunized the unions' conduct.

2. The Second Circuit adopted the same standard and applied it to reverse a district court's dismissal of a claim based on a pattern of obstructive petitions. In *PrimeTime 24 Joint Ventures v. National Broadcasting Co.*, 219 F.3d 92 (2d Cir. 2000), the defendant broadcasters filed numerous challenges to require the plaintiff satellite provider to test the broadcast signal strength at its subscribers' locations. *Id.* at 96. The Satellite Home Viewer Act of 1988 gave satellite providers a mandatory copyright license to retransmit broadcast signals to subscribers if the subscribers could not receive a sufficiently strong signal over the air. *Id.* at 95-96. But the Act also gave broadcasters the ability to challenge the satellite providers' assertion that a subscriber could not receive a sufficiently strong signal over the air. *Id.* at 96. The plaintiff satellite provider filed an antitrust action, alleging that the broadcasters conspired to file baseless signal-strength challenges to raise the satellite provider's costs and hamper its ability to compete. *Id.* The district court dismissed the plaintiff satellite provider's complaint, finding broadcasters' signal-strength challenges protected by *Noerr-Pennington* immunity because PrimeTime "fail[ed] to allege . . . that the [defendants' method of challenging] was unreasonable under the circumstances or that defendants knew that challenges . . . would be meritless." *Id.* at 97 (first and second alterations in original).

The Second Circuit reversed. Relying on *USS-POSCO*, the court stated that the objective-baselessness requirement of *PREI* "applies to determining whether a single action constitutes sham petitioning." *Id.* at 101. By contrast, in cases in which "the defendant is accused of bringing a whole series of legal proceedings," the test is, instead, whether "the legal filings [were] made, not out of a genuine interest in redressing grievances, but as part of a pattern or practice of successive filings undertaken essentially for purposes of harassment?" *Id.* In this inquiry, "it is immaterial that some of the claims might, as a matter of chance, have merit." *Id.*

Under that standard, the court of appeals determined that the plaintiff satellite provider's complaint stated a claim of sham litigation: "PrimeTime's complaint therefore adequately alleges that the [signal-strength] challenges were brought pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival." *Id.* The allegation that some of the proceedings were objectively baseless – *e.g.*, "PrimeTime plausibly alleged that ABC, CBS, and FOX affiliates challenged thousands of subscribers who did not even receive ABC, CBS, or Fox programing," *id.* – was only one factor supporting PrimeTime's allegation that the proceedings "w[ere] done in order to overwhelm PrimeTime 24 and make it difficult and expensive for PrimeTime 24 to comply with" the Act. *Id.*

3. The Fourth Circuit subsequently applied the standard to uphold a claim for unfair labor practice based on a series of petitions, none of which was alleged to be objectively baseless. In *Waugh Chapel South, LLC v. United Food & Commercial Workers Union Local 27*, 728 F.3d 354 (4th Cir. 2013), the

plaintiff real estate developers sued the defendant union for unfair labor practices under the National Labor Relations Act. *Id.* at 356.[6] The plaintiffs alleged the union "orchestrated fourteen separate legal challenges against their commercial real estate project in order to force [the developers] to terminate their relationship with a non-unionized supermarket," including through surrogate plaintiffs. *Id.* at 356-58. The district court dismissed the complaint, in part on the basis that the petitioning was immunized by the *Noerr-Pennington* doctrine because "none of the prior legal challenges to the development . . . were objectively baseless." *Id.* at 358.

The Fourth Circuit reversed. The court acknowledged that *PREI* permitted liability for a single sham lawsuit only if that lawsuit was objectively baseless. But the court noted that, under *California Motor Transport*, when a claim is based on a series of sham petitions, "the objective merits of the suits are relevant, but other signs of bad-faith litigation" and the "subjective motive of the litigant" are also relevant. *Id.* at 363-64. The court "agree[d]" with the Second and Ninth Circuits that *California Motor Transport* and *PREI* could be

> "reconcile[d]" . . . "by reading them as applying to different situations. [*PREI*] provides a strict two-step analysis to assess whether a single action constitutes sham petitioning. . . . *California Motor Transport* deals with the case where the defendant

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[6] This Court has noted that standards governing immunity for petitioning activity under the antitrust laws are likewise applicable to claims of unfair labor practice. *See PREI*, 508 U.S. at 59.

> is accused of bringing a whole series of legal proceedings."

Id. at 363 (quoting *USS-POSCO*, 31 F.3d at 810-11) (second ellipsis in original). The court further noted that "a district court should conduct a holistic evaluation of whether 'the administrative and judicial processes have been abused,'" rather than "focus . . . on any single case." *Id.* at 364 (quoting *California Motor Transp.*, 404 U.S. at 513).

Under that standard, the court of appeals determined that the plaintiffs stated a claim of sham litigation: "[T]he vast majority of the legal challenges failed demonstrably. In fact, it appears that only [one] suit . . . could be called successful." *Id.* Although "some of the legal challenges directed by the unions may have been justifiable in one sense or another . . . , the fact that there may be moments of merit within a series of lawsuits is not inconsistent with a campaign of sham litigation, for 'even a broken clock is right twice a day.'" *Id.* at 365 (quoting *USS-POSCO*, 31 F.3d at 811).

4. Most recently, in *Hanover 3201 Realty, LLC v. Village Supermarkets, Inc.*, 806 F.3d 162 (3d Cir. 2015), *cert. denied*, 136 S. Ct. 2451 (2016), the Third Circuit (with one judge dissenting) likewise followed the reasoning of *USS-POSCO*. The defendant supermarket filed four petitions to prevent the plaintiff real estate developer from securing the necessary permits to develop a competing supermarket. *Id.* at 167-70. The plaintiff filed an antitrust action, and the district court dismissed it. *Id.* at 170.

The Third Circuit reversed. After concluding that the plaintiff had antitrust standing, the court addressed the defendant supermarket's defense of *Noerr-Pennington* immunity. *Id.* at 178 & n.12. The

court observed that this Court in *PREI* had required a single petition to be objectively baseless to be sham litigation, but had articulated in *California Motor Transport* a different standard for a series of petitions. *Id.* at 178-79. The court "agree[d]" that *California Motor Transport* and *PREI* "apply to different situations: *California Motor* [*Transport*] to a series of sham petitions and [*PREI*] to a single sham petition." *Id.* at 179-80. Applying the standard for a series of petitions from *California Motor Transport*, the court "ask[ed] whether a series of petitions were filed with or without regard to merit and for the purpose of using the governmental process (as opposed to the outcome of that process) to harm a market rival and restrain trade." *Id.* at 180. It further explained "the defendant's filing success – i.e., win-loss percentage" – is relevant as "circumstantial evidence of the defendant's subjective motivations," to be considered alongside "other evidence of bad-faith as well as the magnitude and nature of the collateral harm imposed on plaintiffs by defendants' petitioning activity." *Id.* at 180-81.

Under that standard, the court of appeals concluded that the plaintiff developer's complaint "establish[ed] that Defendants had a policy of filing anticompetitive sham petitions." *Id.* at 181. Although the court observed that two of the petitions were objectively baseless because the defendant had lacked standing, it remanded the case for further proceedings on the plaintiff's antitrust claim based on a finding that the relative merit of the petitions as a whole, combined with "indicia of bad faith," "sufficiently allege[d] that Defendants brought these actions under a policy of harassment with the effect of obstructing [the plaintiff's] access to governmental bodies." *Id.* at 181-82. The dissent disagreed, criticizing the majority for

"excusing a plaintiff from having to show the objective baselessness of even a single action brought by the defendant." *Id.* at 200 (Greenberg, J., dissenting).

B. The First Circuit's Decision Creates a Conflict with the Decisions of Other Circuits

The decision below conflicts with the decisions of the Second, Third, Fourth, and Ninth Circuits. Rather than focus exclusively on whether one or more of OneLink's individual actions was objectively baseless, as the First Circuit did here, *see* App. 5a-10a, these other circuits would have considered all of the evidence regarding OneLink's conduct, including OneLink's 0-24 win-loss record; the questionable value of the relief it sought in many of the petitions; its repeated attempts to intervene in a proceeding whose rules admittedly did not allow for intervention, especially after the Commonwealth Supreme Court found no right to intervene; its repeated attempts to access documents in a proceeding in which it had no party status; and its repeated attempts to disqualify a TRB commissioner, even after its allegations had been rejected by a Commonwealth ethics body.

The Second, Third, Fourth, and Ninth Circuits also would have considered evidence that OneLink agreed to fund part of a competitor's petition to the TRB when its outcome (dismissal) did not affect OneLink, C.A. Supp. App. 1330; admissions that OneLink filed its federal Cable Act lawsuits even though it knew it had not been harmed; that its board celebrated stays of PRTC's application as though they were victories on the merits; and that, once OneLink had the opportunity to present its case regarding PRTC's franchise application, it abandoned its litigation strategy, which its CEO called "half-effort[s] that cannot hope to succeed," App. 187a-188a.

Applying the correct standard, any of those circuits would have found PRTC's evidence sufficient to show a triable issue as to whether the "series of petitions w[as] filed . . . without regard to merit and for the purpose of using the governmental process (as opposed to the outcome of that process) to harm a market rival and restrain trade." *Hanover*, 806 F.3d at 180; *see also California Motor Transp.*, 404 U.S. at 513 (asking whether "the administrative and judicial processes have been abused"). Under the standard adopted by the First Circuit, by contrast, PRTC's evidence was insufficient as a matter of law because it did not contend that a particular petition was objectively baseless.

The concurring opinion below – which purports to acknowledge the possibility for greater flexibility when evaluating claims based on a series of petitions rather than a single petition or lawsuit – does not lessen the need for review. The concurring judges expressly joined the majority opinion, *see* App. 20a-21a, which rested squarely on the conclusion that, because none of OneLink's petitions was objectively baseless, no further scrutiny was permitted. Majority opinions of the First Circuit are binding on all future panels and, of course, district courts in the circuit. *See United States v. Reveron Martinez*, 836 F.2d 684, 687 (1st Cir. 1988) ("The judgment of the majority of the *Moreno Morales* panel on this precise point has become precedent, binding in future cases before us."). And the concurrence's assertion that "*PREI*'s 'objectively baseless' requirement does not necessarily control the outcome of this case," App. 15a-16a, hardly carries weight given the court's refusal to consider OneLink's miserable win-loss record or other evidence of its intent to obstruct competition irrespective of the merits of its positions. The First Circuit has thus

unambiguously rejected the standard adopted and applied in four circuits to cases involving a pattern of successive suits. App. 7a-8a.

Because the courts of appeals are now divided on the standard to govern immunity for repetitive filings, review is warranted.

II. THE FIRST CIRCUIT'S DECISION IS ERRONEOUS

The First Circuit's holding that a series of petitions cannot give rise to antitrust liability absent objective baselessness ignores the important differences between a single petition said to be filed for an improper purpose and a pattern of petitions and lawsuits thrown up as obstacles to competition. The decision thus unduly restricts the reach of the antitrust laws without justification in this Court's precedents.

1. *Noerr* holds that "no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws." 365 U.S. at 135. Because "[t]he right of petition is one of the freedoms protected by the Bill of Rights," the Court refused "lightly [to] impute to Congress an intent to invade these freedoms." *Id.* at 138. Accordingly, legitimate petitioning activity, designed to secure favorable government action, cannot give rise to antitrust liability, even if the requested relief could injure competition or establish a monopoly, or if the collateral consequences of the petitioning (say, bad publicity) harm rivals.

But this Court has not extended that protection to petitioning that is a "mere sham" designed "to interfere directly" with a competitor's efforts to compete. *Id.* at 144. Litigation becomes a sham where it involves "us[ing] the governmental *process* – as opposed to the *outcome* of that process – as an anticompetitive weapon." *City of Columbia v. Omni Outdoor Adver.,*

Inc., 499 U.S. 365, 380 (1991); *see also id.* at 381 (explaining that "lobbying activity" becomes "a 'sham'" where it is used to "delay[] a competitor's entry into the market" and where "the delay is sought to be achieved only by the lobbying process itself, and not by the governmental action that the lobbying seeks"). In other words, "a defendant whose activities are 'not genuinely aimed at procuring favorable government action' at all," *id.* (quoting *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 n.4 (1988)), cannot invoke *Noerr-Pennington*.

"[A] pattern of baseless, repetitive claims" that "effectively bar[s]" a competitor or new entrant "from access to the agencies and courts" fits this definition. *California Motor Transp.*, 404 U.S. at 513. The crux of a claim based on such serial petitioning is that the defendant is not seeking government action, but is instead seeking to block a potential rival from obtaining needed action by interposing repetitive filings with no real concern about whether those filings ultimately succeed on the merits. In *California Motor Transport* itself, the would-be market entrants were trying to obtain operating rights for highway trucking in California. *See id.* at 509. The incumbents deployed their "power, strategy, and resources" in a flood of filings that "harass[ed] and deter[red]" the entrants from securing operating rights. *Id.* at 511. And they allegedly did so by filing petitions "with or without probable cause, and regardless of the merits." *Id.* at 512. Such allegations, the Court concluded, would permit a "factfinder to conclude that the administrative and judicial processes have been abused," *id.* at 513, and would accordingly permit antitrust liability. As the Court explained in *Omni*, "[a] classic example" of sham petitioning would be "the filing of frivolous objections to the license application of a

competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay." 499 U.S. at 380.

2. When a plaintiff challenges a single lawsuit as anticompetitive, this Court's decision in *PREI* makes clear that antitrust liability does not apply unless "the lawsuit [is] objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits" and the litigant also subjectively intended to abuse the litigation process. 508 U.S. at 60. In *PREI*, movie studios had sued hotel operators for copyright infringement over renting movies to hotel guests, and the hotel operators counterclaimed, alleging that the copyright action against them was an antitrust violation. *Id.* at 52. The Court found it "by no means clear whether . . . videodisc rental activities intruded on . . . copyrights," so the suit was not objectively baseless. *Id.* at 64. Accordingly, the Court held that the movie studios had a defense to antitrust liability to which "evidence of anticompetitive intent" was irrelevant. *Id.* at 63.

In *PREI*, the Court did not have before it any claim that the defendants had filed multiple obstructive legal actions. As Justice Stevens noted in his concurring opinion – cautioning against reading the majority opinion too broadly – the hurdle of objective baselessness does not apply when multiple petitions in multiple actions have been filed; a serial petitioner can be liable if it "is indifferent to the outcome of the litigation itself, but has nevertheless sought to impose a collateral harm on" its competitor. *Id.* at 68 (Stevens, J., concurring in the judgment). He further explained:

> Repetitive filings, some of which are successful and some unsuccessful, may support an inference that the process is being misused. . . . It is in more

> complex cases that courts have required a more sophisticated analysis – one going beyond a mere evaluation of the merits of a single claim.

Id. at 73 (citing *California Motor Transport*).

3. The difference between a single petition and a series of petitions, as highlighted by Justice Stevens' concurrence and recognized by the Second, Third, Fourth, and Ninth Circuits, warrants different treatment for purposes of antitrust immunity. A single objectively reasonable application or complaint filed solely to harass or delay a competitor is immune not because such conduct deserves protection, but because permitting liability would create too great a risk of sweeping in real attempts to seek relief. Legitimate petitioning activity – intended to secure the relief sought – could be chilled by the threat of a retaliatory antitrust counterclaim. *See Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1757 (2014) ("We crafted the *Noerr-Pennington* doctrine – and carved out only a narrow exception for 'sham' litigation – to avoid chilling the exercise of the First Amendment right to petition the government for the redress of grievances.").

Where, however, an incumbent files a whole series of lawsuits or administrative actions that delay competition, a factfinder has greater ability to "evaluat[e] . . . whether 'the administrative and judicial processes have been abused'" by looking at the "pattern of the legal proceedings" rather than "their individual merits." *Waugh Chapel*, 728 F.3d at 364 (quoting *California Motor Transp.*, 404 U.S. at 513). As the FTC's staff noted in discussing this problem:

> When a pattern of petitioning is involved, . . . a court has more information and thus is likely to be in a better position to determine accurately

> whether a defendant's conduct is best characterized as a misuse of governmental processes that conceals an attempt directly to harm marketplace rivals and suppress competition.

FTC Enforcement Perspectives 36. The presence of a whole series of lawsuits or administrative petitions makes it easier for a factfinder to determine whether the actions were pursued purely to obstruct a rival, and there is little risk of chilling legitimate petitioning activity. *See PREI*, 508 U.S. at 68-69 (Stephens, J., concurring in the judgment) ("The label 'sham' . . . might also apply to a plaintiff who had some reason to expect success on the merits but because of its tremendous cost would not bother to achieve that result without the benefit of collateral injuries imposed on its competitor by the legal process alone."). Repetitive, mostly unsuccessful petitions are an objective warning sign that the petitioning process has been abused and thus warrants further scrutiny.

More searching judicial scrutiny is also justified because the threatened harm to competition is greater. "[T]he filing of a whole series of lawsuits and other legal actions without regard to the merits has far more serious implications than filing a single action, and can serve as a very effective restraint on trade." *USS-POSCO*, 31 F.3d at 811. A flood of petitions – in this case, 24 – has the potential to divert substantial resources into litigation and away from efforts to compete. In addition, such a flood can deter potential competitors by warning them that the incumbent is prepared to spend resources to make market entry burdensome and slow.

Further, as both *California Motor Transport* and this case illustrate, serial-petitioning cases frequently implicate legitimate interests in petitioning the

government on the plaintiff's side. The Court observed in *California Motor Transport* that the purpose of the defendants' conduct was "to eliminate . . . applicant[s] as . . . competitor[s] by denying [them] free and meaningful access to the agencies and courts." 404 U.S. at 515. Similarly, the TRB in this case observed that OneLink's petitions were aimed at "obstruct[ing] the administrative process." C.A. App. 2790. The constitutional interest in protecting the right "to petition the Government for a redress of grievances," U.S. Const. amend. I, thus cuts both ways in a case like this one.

Furthermore, there is no First Amendment rule that any resort to the courts or administrative processes is protected from liability unless it is objectively baseless. At common law, the tort of abuse of process was designed to address "cases in which legal procedure has been set in motion in proper form, with probable cause, and even with ultimate success, but nevertheless has been perverted to accomplish an ulterior purpose for which it was not designed." W. Page Keeton et al., *Prosser & Keeton on Torts* § 121, at 897 (5th ed. 1984). And courts may impose sanctions on parties who file pleadings with the courts "for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation." Fed. R. Civ. P. 11(b)(1). Thus, in *Whitehead v. Food Max of Mississippi, Inc.*, 332 F.3d 796 (5th Cir. 2003) (en banc), the court of appeals affirmed Rule 11 sanctions against an attorney who prematurely secured a writ of execution "to embarrass" the defendant "and call attention to himself," even though securing the writ was "nonfrivolous." *Id.* at 801, 805-08; *see also id.* at 805 (noting that district courts may impose sanctions for "nonfrivolous representations" "where it is objectively ascertainable that an attorney submitted a

paper to the court for an improper purpose"). And in *Cohen v. Virginia Electric & Power Co.*, 788 F.2d 247 (4th Cir. 1986), the court of appeals affirmed an award of sanctions against both an attorney and a party for filing a motion they had no intention of pursuing if it was opposed, even though there was a legal basis for the motion. *Id.* at 249.

III. THE QUESTION PRESENTED IS A RECURRING ISSUE OF NATIONAL IMPORTANCE THAT THIS COURT SHOULD RESOLVE

The question presented is important. The First Circuit has expanded antitrust immunity by shielding cases of serial petitioning from antitrust scrutiny unless the plaintiff can meet the additional burden of showing objective baselessness. Any pattern of behavior in which the First Circuit would recognize potential liability for serial petitioning would also, necessarily, contain some number of objectively baseless petitions that would, on their own, permit inquiry into the defendant's subjective anticompetitive intent. The First Circuit's decision therefore invites the filing of multiple lawsuits and other petitions, not for the relief requested, but to punish, injure, or delay rivals or competitors with the process of litigation itself, as long as each petition has some basis, however marginal, and some claim for relief, no matter how little its value.

In so doing, the First Circuit has given its imprimatur to a pernicious anticompetitive strategy. As a leading antitrust commentator pointed out, "[s]ham litigation [is] . . . a useful tactic against any size firm, regardless of relative reserves, for it may be worth the price of litigation to purchase a delay of a year or several years in a rival's entry into a lucrative market." Bork, *Antitrust Paradox* 348. This case

provides a good illustration: OneLink extended its monopoly for years for the low price of 24 lawsuits, which it celebrated as a "good investment." App. 172a.

Five courts of appeals have now addressed the question presented, indicating that this issue has arisen and is likely to continue to recur with frequency. The scope of the sham-litigation exception is important to any company that needs any form of regulatory permission before entering or expanding in a market and that is thus subject to the sort of obstruction that OneLink achieved here.[7] And the First Circuit's opinion – which rejects four circuits' "view of the respective applicability of *PREI* and *California Motor Transport*," App. 7a – establishes that the courts of appeals are out of sync. Review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[7] Competition in the pharmaceutical industry can be warped by sham litigation. One commentator notes that drug manufacturers can attempt to delay the entry of generics by filing "citizen petitions" with the Food and Drug Administration. *See* Robin Feldman & Evan Frondorf, *Drug Wars: A New Generation of Generic Pharmaceutical Delay*, 53 Harv. J. on Legis. 499, 547-48 (2016). The FTC has recently sued a pharmaceutical manufacturer for violating the antitrust laws by abusing this "citizen petition" process. *See generally FTC v. Shire ViroPharma Inc.*, No. 17-cv-131-RGA (D. Del.).

Respectfully submitted,

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ADDENDUM

Chart of OneLink's Petitions

No.	Petition	Results
1	Motion Requesting Intervention in the Case, Opposition to Request for Ex Parte Meeting, and Stay of Proceedings [First motion to intervene]	Filed before the TRB May 12, 2008; denied May 21, 2008
2	Motion to Intervene and Request for Proceedings [Second motion to intervene]	Filed before the TRB January 13, 2009; denied March 2, 2009 Appealed March 3, 2009, to the Commonwealth Court of Appeals; affirmed March 31, 2009 Motion for reconsideration filed April 16, 2009; denied April 24, 2009 Petition for certiorari to the Commonwealth Supreme Court filed May 14, 2009; affirmed June 9, 2010 First motion for reconsideration filed June 30, 2010; denied September 3, 2010

No.	Petition	Results
		Second motion for reconsideration filed September 13, 2010; denied October 22, 2010
3	Motion to Vacate or Stay Confidentiality Determinations and Enforce Board Confidentiality Procedures	Filed before the TRB January 30, 2009; denied March 2, 2009
4	Verified Complaint regarding alleged violations of the Federal Cable Act	Filed before the U.S. District Court for the District of Puerto Rico February 10, 2009; dismissed as moot February 24, 2009
5	Urgent Motion for an Extension of Time to File Comments, for the Establishment of a Reply Comment Cycle, and for a Revised Hearing Schedule	Filed before the TRB February 11, 2009; denied March 2, 2009
6	Request for Mandamus regarding second motion to intervene	Filed before the Commonwealth Court of First Instance February 25, 2009; denied as moot March 3, 2009

No.	Petition	Results
7	Urgent Motion to Dismiss PRTC Application for a Video Service Franchise	Filed before the TRB February 25, 2009
8	Motion for an Order Requiring PRTC to Report the Results of the Beta-Testing It Conducted Pursuant to the Board's December 17, 2008 Resolution and Order	Filed before the TRB March 2, 2009
9	Complaint regarding alleged violations of the federal Cable Act	Filed before the U.S. District Court for the District of Puerto Rico April 2, 2009; dismissed May 27, 2009 Appeal to the First Circuit filed June 17, 2009; affirmed July 15, 2010
10	Motion to Set Aside Public Hearing	Filed before the TRB April 27, 2009; denied May 1, 2009
11	Letter to the U.S. Attorney's Office for the District of Puerto Rico	Submitted June 11, 2009

No.	Petition	Results
12	Complaint to the Federal Communications Commission	Submitted July 13, 2009
13	Complaint regarding alleged violations of the Commonwealth Telecommunications Act	Filed before the Commonwealth District Court July 15, 2009; dismissed August 26, 2009 Appealed to the Commonwealth Court of Appeals September 4, 2009; affirmed January 28, 2010 Petition for certiorari to the Commonwealth Supreme Court filed February 25, 2010; denied August 20, 2010
14	Petition for Rulemaking Regarding Prohibition of Cross-Subsidization	Filed before the TRB July 22, 2009
15	Complaint to the Commonwealth Office of Monopolistic Affairs	July 30, 2009
16	Mandamus Petition regarding Petition for Rulemaking Regarding Prohibition of Cross-Subsidization	Filed before the Commonwealth Court of First Instance November 4, 2009; denied January 13, 2010

No.	Petition	Results
		Appealed to the Commonwealth Court of Appeals February 16, 2010; affirmed June 30, 2010 Motion for reconsideration filed July 23, 2010; denied August 5, 2010
17	Motion for Recusal of President Torres	Filed before the TRB January 20, 2011; denied by the Governmental Ethics Office March 29, 2011
18	Urgent Motion Requesting Access to Documents and Opportunity to Prepare for Hearing	Filed before the TRB August 1, 2011
19	Verified Complaint and Request for Emergency Relief by Choice Cable	Filed before the TRB October 27, 2011; Choice moved to dismiss October 9, 2012
20	Motion to Intervene [Third motion to intervene]	Filed before the TRB November 15, 2011; denied April 4, 2012
21	Motion for Vote of No Confidence and Disqualification of Commissioner Sandra Torres	Filed before the TRB November 16, 2011; denied April 4, 2012

No.	Petition	Results
22	Complaint for Injunctive and Other Relief regarding alleged 42 U.S.C. § 1983 violations	Filed before the U.S. District Court for the District of Puerto Rico November 29, 2011; dismissed February 2, 2012
23	Notice of Automatic Stay of PRTC Franchise Order and Agreement	Filed before the TRB February 13, 2012; denied April 4, 2012 Appealed to the Commonwealth Court of Appeals May 3, 2012; appeal denied May 9, 2012 Motion for reconsideration filed May 25, 2012; denied May 30, 2012 Petition for certiorari to the Commonwealth Supreme Court filed July 2, 2012; denied October 11, 2012

24	Petition for Reconsideration and in Further Support of Intervention	Filed before the TRB February 28, 2012; denied April 4, 2012 except to allow OneLink to prove its right to intervene Petition for review to the Commonwealth Court of Appeals filed June 27, 2012; denied August 30, 2012