No. 17-1215

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

BRIEF OF ANTITRUST SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37.2, the antitrust scholars listed in the Appendix respectfully submit this brief as *amici curiae* in support of the petition for certiorari.[1] *Amici* are scholars who teach and write about antitrust law and economics at leading universities in the United States. While having a diverse range of antitrust views, they all share the position taken in this brief. *Amici* are interested in the sound development of antitrust law.

SUMMARY OF THE ARGUMENT

Splitting from four other circuits, the First Circuit's decision distorts antitrust petitioning immunity doctrine. In this case, the petitioner alleged that the respondent maintained its monopoly by delaying the petitioner's market entry for more than three years. Pet. for Cert. 2. The petitioner alleged that the respondent achieved this delay "by filing a series of petitions, state and federal court cases, appeals, and other legal challenges." Pet. for Cert. 2. The First Circuit held that the respondent enjoyed antitrust immunity from the petitioner's claims under Section 2 of the Sherman Act because there was no finding that any of the individual legal challenges was objectively baseless. Pet. App. 6a-10a. Expressly disagreeing with the Second, Third, Fourth, and Ninth Circuits, the court held that at least one objectively baseless petition was required to trigger any risk of antitrust liability for serial

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[1] Pursuant to Supreme Court Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part, and that no such counsel or party made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties received timely notice of the intent to file this brief, and all parties have consented to the filing of this brief.

litigation. Pet. App. 7a-9a. Review should be granted to resolve this circuit split on a purely legal question that goes to the heart of this Court's antitrust petitioning immunity doctrines.

This question is also important to the sound administration of the antitrust laws. Under the First Circuit's approach, a monopolist can sidestep antitrust scrutiny of a pattern of petitioning activity so long as each petition manages to avoid falling beneath a minimal threshold of objective merit. The First Circuit's rule thus gives a monopolist overly-wide latitude to thwart competition through a strategic campaign that, on the whole, abuses the administrative and adjudicative processes. At a minimum, the standards for antitrust petitioning immunity in this important and recurring context should not vary according to the circuit in which the antitrust plaintiff brings suit. As a result, *amici* urge this Court to grant the petition for certiorari.

ARGUMENT

I. THE CIRCUIT SPLIT IS CLEAN

The Second, Third, Fourth, and Ninth Circuits have held that, when the defendant has brought an allegedly anticompetitive series of legal proceedings, the "sham litigation" exception to antitrust petitioning immunity does not absolutely require an antitrust plaintiff to show that any individual proceeding is objectively baseless. For example, the Second Circuit has held that the objective baselessness requirement "applies to determining whether a single action constitutes sham petitioning," but not to a claim that "a pattern or practice of successive filings [is] undertaken essentially for purposes of harassment." *Primetime 24 Joint Venture v. Nat'l Broad. Co.*, 219 F.3d 92, 100-

01 (2d Cir. 2000) (citation and internal quotation marks omitted). The Third Circuit likewise has held that an antitrust claim based on a single act of petitioning "requires a showing of objective baselessness," whereas "a more flexible standard is appropriate when dealing with a pattern of petitioning . . . to assess whether a defendant has misused the governmental process to curtail competition." *Hanover 3201 Realty LLC v. Vill. Supermarkets, Inc.*, 806 F.3d 162, 179-81 (3d Cir. 2015). The Fourth Circuit also has adopted the view that "when purported sham litigation encompasses a series of legal proceedings rather than a singular legal action, . . . a district court should conduct a holistic evaluation of whether the administrative and judicial processes have been abused" without requiring a threshold showing that any individual action is objectively baseless. *Waugh Chapel S., LLC v. United Food & Commercial Workers Union Local 27*, 728 F.3d 354, 363-64 (4th Cir. 2013) (citation and internal quotation marks omitted). And the Ninth Circuit has held 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." *USS-POSCO Indus. v. Contra Costa Cty. Bldg. & Constr. Trades Council, AFL-CIO*, 31 F.3d 800, 811 (9th Cir. 1994). Each of these other court of appeals decisions reconciles this Court's precedents in *California Motor Transport* and *Professional Real Estate Investors* by recognizing that they apply to two different situations: "*Professional Real Estate Investors* provides a strict two-step analysis to assess whether a single action constitutes sham petitioning" and "*California Motor Transport* deals with the case where the

defendant is accused of bringing a whole series of legal proceedings." *USS-POSCO Indus.*, 31 F.3d at 810-11 (discussing *Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc. (PREI)*, 508 U.S. 49, 60 (1993), and *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 511-12 (1972)).

The First Circuit parted company with its sister circuits in categorically rejecting the proposition that "a jury could find OneLink liable for launching a fusillade of ultimately unsuccessful petitions even if no one petition was sufficiently baseless to fit within the 'sham' exception under *PREI*." Pet. App. 6a. Acknowledging the contrary view of the other circuits, the court found 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." Pet. App. 8a. Focusing on each individual petition rather than on the litigation campaign as a whole, the First Circuit "[saw] 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." Pet. App. 9a.

This clear split among the courts of appeals is enough for this Court's review. The question presented is purely legal and squarely at issue: what is the proper test for antitrust petitioning immunity in a lawsuit challenging the filing of a series of administrative and judicial proceedings without an allegation that any individual action was objectively baseless? The First Circuit's answer is *PREI*; four other circuits say *California Motor Transport*. In the First Circuit, a competitor is *per se* immune from such a lawsuit; in at least four other circuits, immunity depends on a more nuanced analysis of the facts and circumstances. The

First Circuit's observation that "none of those circuits have ever sustained a finding of liability while simultaneously determining that no frivolous petitions were filed" does not erase the split. Pet. App. 9a. The number or percentage of frivolous petitions may factor into the other circuits' analysis, but the First Circuit stands alone in categorically barring the door when no objectively baseless individual proceeding is found. Pet. App. 9a. Nor does the concurring opinion dull the court's sharp break with its sister circuits; the panel opinion is the law in the First Circuit. This circuit split on an important federal question justifies this Court's review—even apart from any particular view on which side of the split gets it right.

II. THE FIRST CIRCUIT'S APPROACH IS MISGUIDED UNDER THIS COURT'S PRECEDENT AND THE PRINCIPLES THAT ANIMATE THIS COURT'S ANTITRUST PETITIONING IMMUNITY DOCTRINES

Under the "sham" exception, the hallmark of non-immune petitioning conduct is that it seeks to use the governmental process itself, as opposed to the outcome of that process, to injure competition. *See Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 380 (1991). There is no reason why a series of actions—unreasonable as a whole, though not necessarily in any one part—cannot fit this bill as much as a single objectively baseless lawsuit. A monopolist, for example, may file serial proceedings to inflict cost, delay, and sheer exhaustion on a potential market entrant and thus keep competition at bay. Whether any particular petition has sufficient merit to surpass the low threshold of "not objectively baseless" may be entirely irrelevant to the purpose and effect of this potentially anticompetitive strategy. By the same token, whether or not there is at least one "objectively baseless" petition should not dictate an antitrust court's immunity analysis. An entire course of conduct can have an objectively unreasonable character that exceeds the sum of its objectively non-baseless parts.

In finding no immunity, the Court in *California Motor Transport* did not require a finding that one or more of the monopolists' petitions was objectively baseless. 404 U.S. at 512-15. Rather, the Court looked to the purpose, character, and effects of the broader litigation campaign. *Id.* Viewing the conduct through this wider lens, the Court stated that otherwise-legitimate petitioning activity may trigger antitrust liability if the conduct evinces a "purpose to eliminate an applicant as a competitor by denying him free and meaningful access to the agencies and courts." *Id.* at 515.

The Court in *PREI* later established a two-part objective/subjective test for invoking the sham litigation exception. 508 U.S. at 60-61. *PREI* arose, however, in response to an assertion of petitioning immunity from antitrust liability for filing a single lawsuit. 508 U.S. at 52-54. *PREI* did not displace the more holistic approach of *California Motor Transport* in cases involving a broader litigation campaign with serial petitions. *See PREI*, 508 U.S. at 56-58 (discussing *California Motor Transport* with approval). Nor did it suggest that the threshold requirement of objective baselessness of a *single* lawsuit applies when a *series* of proceedings is the basis for an antitrust claim. *See id.* at 60-61 (formulating two-part test in the context of a single challenged lawsuit).

This view—again, adopted by four circuits and now rejected by the First Circuit—harmonizes *PREI* and *California Motor Transport* while retaining the "indispensable objective component" of *California Motor Transport*. *PREI*, 508 U.S. at 58. The objective element is important because it makes the test more workable and more susceptible of consistent application than a purely subjective approach. *See* Einer Elhauge, *Making Sense of Antitrust Petitioning Immunity*, 80 Calif. L. Rev. 1177, 1208-09, 1231-34 (1992). The objective component also better balances competing values to avoid overdeterrence of novel and legitimate litigation. *Id.* at 1234. But there is no reason, either in principle or in precedent, to restrict the objective inquiry to the granular level of individual petitions when the serial, repetitive, and undiscerning character of the entire litigation campaign is the source of the alleged competitive harm. Such a campaign can be objectively unreasonable regardless of the lowest common quantum of merit present in the individual petitions. For example, even if each individual petition is not objectively baseless when assessed in isolation, it may be objectively unreasonable for a monopolist to file *two dozen* such petitions without meaningfully increasing its overall chances of success on the merits.

The First Circuit's rule improperly truncates the antitrust inquiry in these scenarios. The First Circuit's approach does not ask whether the series of petitions as a whole constitutes "an objectively reasonable effort to litigate," *PREI*, 508 U.S. at 57. Rather, its test prohibits an antitrust court from opening its eyes to the broader picture unless and until it finds at least one petition that is objectively baseless when viewed in isolation. But an objectively abusive purpose may exist when the direct costs or delays that the incumbent inflicts on the rival are objectively necessary to motivate the suit. *See* Elhauge, *Making Sense of Antitrust Petitioning Immunity*, 80 Calif. L.

Rev. at 1231-34. If the expected benefit of success in the litigation itself is less than the litigation costs, but the expected benefit of success *plus* the anticompetitive benefits of imposing costs or delay on the rival *exceeds* the litigation costs, then an objectively abusive purpose may exist irrespective of whether any single petition lacked objective merit. *See id.*; *see also PREI*, 508 U.S. at 68-69 (Stevens, 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."). The First Circuit's narrow focus on whether each individual petition is not objectively baseless reveals nothing about whether the odds of winning the litigation, relative to the litigation costs, would have motivated the incumbent's litigation campaign absent the imposition of costs or delay on the rival from the process itself.

Twenty-four overlapping petitions on the same topic can impose exponentially greater costs and delay on a rival than a single petition. Yet the marginal contribution of the 23 additional petitions to the litigation's chances of success may be negligible, and the maximum benefit of success—legally excluding the rival—remains the same whether the incumbent succeeds on one petition or all of them. Accordingly, the First Circuit was wrong to "see little logic," Pet App. 9a, in saying a pattern of 24 petitions can be objectively baseless even though no single petition was objectively baseless. Rather, the First Circuit's test fails to see the forest for the trees. This Court should grant review to close the significant loophole that the First Circuit has opened for efforts to maintain a monopoly through an unreasonable pattern of costly and protracted litigation.

III. THE ISSUE IS IMPORTANT AND RIPE FOR RESOLUTION

Amici recognize the importance of antitrust petitioning immunity doctrines in balancing various constitutional and statutory rights. This brief does not stake out any generally "pro-immunity" or "anti-immunity" position. Rather, precisely because these doctrines are important, this Court should review this case to ensure a sound reading of its precedent that is both theoretically and geographically consistent. Petitioning acts that have at least a threshold quantum of objective merit when viewed in isolation may nonetheless, when packaged together, constitute anticompetitive conduct warranting antitrust scrutiny.

For example, without regard to the legal merits of the proceedings, an incumbent may repeatedly oppose a competitor's efforts to get the regulatory approval necessary to enter a market. *See* Einer Elhauge, *Making Sense of Antitrust Petitioning Immunity*, 80 Calif. L. Rev. 1177, 1229 (1992). This persistent and undiscerning opposition may improperly delay the competitor's entry for a long time even though each individual act of opposition may escape the "sham" label under *PREI*. This scenario is precisely what the petitioner has alleged in this case, and the First Circuit's decision renders such conduct categorically immune from judicial antitrust inquiry.

Courts' ability to redress this type of conduct should not depend on the formalistic distinction between, for example, a voluminous litigation campaign containing one objectively baseless petition and an otherwise-identical campaign containing none. At a minimum, the rule should not vary according to the jurisdiction in which the antitrust litigation is filed. Now that a split has emerged, the Court should settle this important issue and instruct the lower courts on which test—*California Motor Transport*, *PREI*, or some other formulation—applies to antitrust claims based on serial petitioning.

CONCLUSION

Amici respectfully ask this Court to grant the petition for certiorari to address this important question about the scope of antitrust petitioning immunity.

Respectfully submitted,

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APPENDIX

APPENDIX

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