No. _____

In the Supreme Court of the United States

IN RE: MERCK MUMPS VACCINE ANTITRUST LITIGATION

CHATOM PRIMARY CARE, P.C., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, ET AL.,
Applicants,

v.

MERCK & CO., INC.,
Respondent.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI

To the Honorable Samuel Alito, Associate Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Third Circuit:

Applicant Chatom Primary Care, P.C., individually and on behalf of all similarly situated entities, respectfully seeks a 60-day extension of the time within which to file a petition for a writ of certiorari to review the Third Circuit's judgment in this case, to and including July 11, 2025. Absent an extension, the deadline for filing the petition will be May 12, 2025. In support of this request, the applicant states as follows:

1. On February 10, 2025, the Third Circuit denied the petition for en banc and panel rehearing of its opinion in this case, a copy of which is attached. Judges Shwartz, Krause, and Restrepo all voted to grant the petition. This Court has jurisdiction under 28 U.S.C. § 1254(1).

2. This long-running antitrust dispute raises an issue on which the circuits are divided: whether fraudulent misrepresentations to the government are immune from antitrust scrutiny under the *Noerr-Pennington* doctrine. That judge-made doctrine is rooted in the need to avoid reading antitrust law to "invade the First Amendment right to petition." *Pro. Real Est. Invs., Inc. v. Columbia Pictures Indus., Inc.* (*P.R.E.*), 508 U.S. 49, 56 (1993). To reconcile statutory liability with the First Amendment, this Court has interpreted the antitrust laws not "to punish political activity though which the people … freely inform the government of their wishes." *Id.*

3. For over five decades, Merck was the sole supplier of MMRII, the only licensed mumps vaccine in the United States. That vaccine was Merck's most profitable pediatric vaccine, and as a monopolist, it raised its price every year. In the late 1990s, Merck's vaccine faced an imminent threat: GlaxoSmithKline (GSK) obtained approval to license a comparable mumps vaccine in Europe and had begun the process of bringing it the U.S. market. Around the same time, the FDA concluded that Merck was overstating the potency of its vaccine and demanded that Merck take corrective action. Revising the label on its vaccine to reflect its true potency would have been the most straightforward response. But Merck knew that a label change would "open the door to competition." *In re Merck Mumps Vaccine Antitrust Litig.*, 2024 WL 4432076, at *2 (3d Cir. Oct. 7, 2024). That's because GSK needed to prove that its vaccine performed as well as Merck's did to enter the market. By lowering the potency claim on its label, Merck would have lowered the bar to entry for GSK.

4. Rather than comply in a way that would reflect the vaccine's actual performance—and thereby facilitate GSK's entry into the market—Merck chose to preserve its market dominance by deceiving the FDA into believing that Merck's label was accurate. Internally, Merck formed a secret "competitive defense task force" to prevent GSK from entering the market. Externally, it conducted a flawed clinical trial known as Protocol 007, designed to conceal known potency issues and produce data supporting the original label claims. Merck submitted the results of this unreliable study to the FDA, successfully convincing the agency to maintain the original labeling.

4. GSK was unable to "replicate Merck's drug-label claims." *Id.* at *3. That was unsurprising, given that Merck's own vaccine (secretly) couldn't either. *See id.* Because GSK was unable to prove that its vaccine performed as well as Merck's (or at least as well as Merck's label claimed), GSK didn't apply for FDA approval to enter the American market. *Id.* Only in 2022, after gaining access to the flawed methodology used by Merck, was GSK able to match Merck's results and obtain FDA approval. *Id.* By that time, though, Merck had already succeeded in delaying GSK's U.S. entry by over a decade, depriving the public of an alternative source for an essential vaccine. For Merck, that meant more than a decade of monopoly pricing and power.

5. The applicants are physicians and physician' groups who filed this class action alleging that Merck unlawfully maintained its monopoly over the U.S. mumps vaccine market by defrauding the FDA to suppress competition from a rival manufacturer. After years of discovery, the district court rejected Merck's claim to *Noerr-Pennington* immunity at summary judgment, *In re Merck Mumps*, 2024 WL 4432076, at *3–4, but certified its

order under 28 U.S.C. § 1292(b) for interlocutory appeal. The Third Circuit granted the interlocutory appeal, and Merck renewed its argument for *Noerr-Pennington* immunity.

6. The panel sided with Merck. The panel acknowledged that Merck had "concealed … ongoing potency problems," run a "flawed clinical trial," and used the results to "persuade the FDA to license a less potent vaccine," thereby delaying rival GSK's entry for over a decade. *Id.* at *1. Yet the majority reversed the district court and held that Merck was entitled to *Noerr-Pennington* immunity. The panel acknowledged that other circuits apply a fraud exception to *Noerr-Pennington*, but explained that binding circuit precedents "reject[ed] a standalone exception to *Noerr-Pennington* immunity for petitions containing fraudulent misrepresentations." *Id.* at *6 n.12. Accordingly, the Third Circuit applied the only *Noerr-Pennington* exception that it recognizes—the "sham" petition exception—instead. *Id.* at *5–6. Under that rule, it found that Merck's fraudulent behavior was protected because (1) "[a] winning petition is by definition a reasonable effort at petitioning for redress and therefore not a sham," and (2) "Merck [could not] have intended to commit a sham if it sought to use the result of petitioning the government (i.e., FDA-approved drug label claims)—as opposed to the petitioning itself—to harm competition." *Id.* at *6. In other words, because Merck concocted a fraudulent scheme to get something from the FDA that suppressed competition, and because that "gambit worked," Merck was immune from antitrust liability. *Id.* at *7.

7. Both the panel majority and dissent expressly noted that the Third Circuit has split from its sister circuits in rejecting a fraud exception to *Noerr-Pennington* immunity. *See id.* at *6 n.12 (majority); *id.* at *10 n.2 (dissent). Unlike the Third Circuit, at

least six others have held that deliberate falsehoods in administrative or adjudicative proceedings are not protected by *Noerr-Pennington*. For example, in *Amphastar Pharmaceuticals Inc. v. Momenta Pharmaceuticals, Inc.*, 850 F.3d 52 (1st Cir. 2017), the First Circuit held that a drugmaker was not immune from antitrust liability after intentionally misleading the FDA to block a competitor. Similarly, in *Hydranautics v. FilmTec Corp.*, 70 F.3d 533 (9th Cir. 1995), the Ninth Circuit denied immunity where a company fraudulently obtained a patent to exclude rivals. The D.C. Circuit, in *Whelan v. Abell*, 48 F.3d 1247 (D.C. Cir. 1995), and the Fifth Circuit, in *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971), have applied similar principles. The Federal Trade Commission has likewise rejected the Third Circuit's approach, recognizing that fraudulent conduct in non-political, adjudicative settings is not immunized.

8. The applicants respectfully request a 60-day extension of time to file a petition for a writ of certiorari seeking review of the Third Circuit's ruling and submit that there is good cause for granting the request. Counsel of record, Deepak Gupta, and his colleagues will be heavily engaged with other appellate matters. These matters include an oral argument in this Court in *Labcorp v. Davis* on April 29; a response brief due in the U.S. Court of Appeals for the District of Columbia Circuit in *National Treasury Employees Union v. Vought* on May 9; an oral argument in the U.S. Court of Appeals for the District of Columbia Circuit in *National Treasury Employees Union v. Vought* on May 16; and an oral argument in the U.S. Court of Appeals for the District of Columbia Circuit in *Wilcox v. Trump* on May 16.

9. Extending the deadline to July 11, 2025, will allow the applicant's counsel sufficient time to carefully research and prepare a petition in cooperation with co-counsel.

10. Respondent's counsel take no position on this request.

CONCLUSION

For the foregoing reasons, the applicant respectfully requests that the Court extend the time within which to file a petition for a writ of certiorari in this matter to and including July 11, 2025.

Dated: May 1, 2025

Respectfully submitted,

/s/ Deepak Gupta
DEEPAK GUPTA
Counsel of Record
GABRIEL CHESS
GUPTA WESSLER LLP
2001 K Street, NW
Suite 850 North
Washington, DC 20006
(202) 888-1741
deepak@guptawessler.com

KELLIE LERNER
SHINDER CANTOR LERNER LLP
14 Penn Plaza, Suite 1900
New York, NY 10133
(646) 960-8601

JEFFREY L. KODROFF
DIANA J. ZINSER
SPECTOR ROSEMAN & KODROFF PC
Two Commerce Square
2001 Market Street, Suite 3420
Philadelphia, PA 19103
(215) 496-0300

Counsel for Applicants