

No. 25-45

In the Supreme Court of the United States

CHATOM PRIMARY CARE, P.C., et al., individually and on
behalf of all others similarly situated,
Petitioners,

v.

MERCK & CO., INC.,
Respondent.

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

KELLIE LERNER
SHINDER CANTOR
LERNER LLP
14 Penn Plaza, Suite 1900
New York, NY 10122
(646) 960-8601

DEEPAK GUPTA
Counsel of Record
JONATHAN E. TAYLOR
GUPTA WESSLER LLP
2001 K Street, NW
Suite 850 North
Washington, DC 20006
(202) 888-1741
deepak@guptawessler.com

(Additional counsel on inside cover)

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Counsel for Petitioners

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

VARSHINI PARTHASARATHY
GUPTA WESSLER LLP
505 Montgomery Street
Suite 625
San Francisco, CA 94111
(415) 573-0336

Counsel for Petitioners

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REPLY BRIEF IN SUPPORT OF CERTIORARI

Does successfully deceiving the government confer immunity from antitrust liability? That is a question that this Court has expressly reserved and that has generated an acknowledged conflict among the circuits. Even Merck concedes as much. It does not dispute that the circuits are split on the question presented or that the Third Circuit is alone in its answer. In that circuit, there is only one exception to *Noerr-Pennington* immunity, and that exception does not apply to successful deception.

No other circuit has adopted such a senseless rule. All other circuits to have addressed the question (plus the FTC) agree that the Third Circuit's approach is wrong. And Merck, for its part, barely attempts to defend that approach as consistent with first principles or precedent.

Instead, Merck mainly tries to derail this case as a vehicle—but none of its arguments bar review. *First*, Merck argues that the split isn't implicated because this case involves no "material" deception or "adjudicative" proceeding. But these are arguments for remand. Because of its categorical rule, the Third Circuit didn't reach either question, so this Court need not either. *Second*, Merck argues that the question presented is waived. But the plaintiffs argued below that the answer to the question is yes, while the Third Circuit held that it is no. Nothing more is needed to preserve the issue for this Court's review, and Merck's only contrary argument insists on empty formalism. *Third*, Merck posits an alternative ground for affirmance. This, too, is an argument for remand. It doesn't prevent this Court from answering the question presented and resolving the split.

I. Merck cannot, and does not, deny the circuit split.

A. As the petition details (at 16–23), the circuits are split over whether to confer *Noerr-Pennington* immunity on all misrepresentations made to the government. The Third Circuit itself acknowledged this split. Whereas “[s]everal of [its] sister circuits” uniformly “recognize a standalone exception to *Noerr-Pennington* immunity for petitions . . . containing fraudulent misrepresentations,” the Third Circuit has “reject[ed]” such an exception in “controlling precedent.” Pet. App. 16a–18a n.12, 25a n.17 (citing *Armstrong Surgical Ctr., Inc. v. Armstrong Cnty. Mem’l Hosp.*, 185 F.3d 154 (3d Cir. 1999), and *Cheminor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119 (3d Cir. 1999)). The Third Circuit instead rigidly applies the “sham” exception, Pet. App. 15a, under which petitioning activity must be both “objectively baseless” and subjectively intended to “use the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon.” *Pro. Real Est. Invs., Inc. v. Columbia Pictures Indus., Inc. (PRE)*, 508 U.S. 49, 60–61 (1993).¹

But this approach has a problem: What happens when a defendant’s fraudulent scheme *succeeds*? Because this Court stated in *PRE* that a “winning [petition] is by definition . . . not a sham,” *id.* at 60 n.5, a company that deceives the government into taking an action that creates anticompetitive effects will always enjoy immunity in the Third Circuit. Moreover, unlike ordinary sham petitioners that seek to abuse an adjudicatory “process” by tying up rivals in red tape, companies that defraud the government often care about the “outcome.” *Id.* at 61. After all, as the

¹ Unless otherwise specified, all internal quotation marks, alterations, and citations are omitted from quotations throughout.

FTC has explained, the “very purpose of making [a] misrepresentation likely *is* to obtain the desired outcome.” *Union Oil Co. of Cal. (UNOCAL)*, 138 F.T.C. 1, 47 (2004). That, too, makes the existing sham exception an ill fit for such anticompetitive conduct. The Third Circuit’s approach thus guarantees immunity to defendants that violate the antitrust laws by successfully misleading the government. If allowed to stand, this approach offers wrongdoers a clear roadmap: Deceive the government into sanctioning illegal acts, and immunity will follow.

No other circuit has adopted such an extreme rule. *See* Pet. 20–23. To the contrary, other circuits and the FTC have taken note of the Third Circuit’s outlier view—and the “sizeable loophole” it leaves open for monopolists like Merck to walk through—and rejected it. *Mercatus Grp., LLC v. Lake Forest Hosp.*, 641 F.3d 834, 843 (7th Cir. 2011); *see* Fed. Trade Comm’n, *Enforcement Perspectives on the Noerr-Pennington Doctrine* 25 n.104 (2006).

B. Merck does not seriously dispute the existence of this split. It effectively concedes that two circuits have taken a position that cannot be reconciled with the Third Circuit’s. *See* BIO 29–30. As Merck acknowledges, the Seventh Circuit has made clear that “[f]raudulent misrepresentations made in an adjudicative proceeding before an administrative agency are not protected from antitrust liability.” *U.S. Futures Exch., LLC v. Bd. of Trade of the City of Chi., Inc.*, 953 F.3d 955, 960 (7th Cir. 2020). The Ninth Circuit agrees. *See Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1261 (9th Cir. 1982) (“[T]he fraudulent furnishing of false information to an agency in connection with an adjudicatory proceeding can be the basis for antitrust

liability, if the requisite predatory intent is present and the other elements of an antitrust claim are proven.”).

Rather than deny the existence of a split, Merck tries to downplay it as “shallow.” BIO 29. But the Seventh and Ninth Circuits are not alone in rejecting the Third Circuit’s approach. The First Circuit has also recognized a “well-established exception” to *Noerr-Pennington* immunity “for knowing [m]isrepresentations, at least in the administrative and adjudicatory contexts.” *Amphastar Pharms. Inc. v. Momenta Pharms., Inc.*, 850 F.3d 52, 56 (1st Cir. 2017). Although Merck tries to dismiss this case as irrelevant because the First Circuit did not have occasion to apply its rule, *see* BIO 29, there can be little doubt that the First Circuit articulated the rule—and it cannot be reconciled with the Third Circuit’s.

Nor is that all. The Eleventh Circuit has likewise explained that “alleged misrepresentations before a governmental agency . . . do not enjoy *Noerr* immunity.” *St. Joseph’s Hosp., Inc. v. Hosp. Corp. of Am.*, 795 F.2d 948, 955 (11th Cir. 1986). And the Sixth Circuit has held that the doctrine does not immunize “knowing and willful submission of false facts to a government agency.” *Potters Med. Ctr. v. City Hosp. Ass’n*, 800 F.2d 568, 580 (6th Cir. 1986). That these decisions—and others cited in the petition (at 21)—predate *PRE* does not undermine their force. As Merck itself points out, *see* BIO 28, this Court in *PRE* did not abrogate those earlier holdings, but rather expressly reserved whether *Noerr-Pennington* “permits the imposition of antitrust liability for a litigant’s fraud or other misrepresentations.” 508 U.S. at 61 n.6.

Merck also tries to suggest that the Third Circuit’s rule is unclear because the decision below is unpublished. *See* BIO 23–24. The unpublished nature of that decision,

however, does not alter the Third Circuit’s “binding” “precedential authority.” Pet. App. 18a–19a n.12. It is that binding precedential authority to which the panel below adhered (and presumably, why it did not feel the need to publish its decision). By voting to deny rehearing en banc, all but three judges on the Third Circuit confirmed as much, signaling their agreement that the panel was required under “controlling precedent” to reject a freestanding fraud exception, apply only the sham exception, and thereby immunize a monopolist’s deceptive, but successful, scheme. Pet. App. 25a n.17.

II. Merck identifies no legitimate barrier to review.

Faced with such a square split on such an important question, Merck spends most of its energy trying to derail this case as a vehicle for resolving it. But none of Merck’s arguments pose any obstacle to review.

First, Merck argues that the split isn’t implicated here because the alleged misrepresentations were neither “material” nor made during an “adjudicative proceeding.” BIO 16–18. But the Third Circuit did not address these issues, and this Court does not need to either. Because the Third Circuit held that Merck’s successful petitioning entitled it to absolute immunity, the court explained that it “need not” decide “whether Merck’s communications with the FDA should be characterized as adjudicative or legislative.” Pet. App. 15a n.10. The court did not address the materiality of Merck’s deception for the same reason. *See* Pet. App. 15a. This case thus comes to the Court on the assumption that these predicates are met. Should the Court grant certiorari and vacate the judgment below, Merck will be free to make these same arguments on remand. But they are not arguments that this Court will have to address in the first instance.

Second, Merck claims that the plaintiffs have “waived the question presented.” BIO 19. This argument is doubly wrong. For one, this Court “considers questions” that are either “pressed or passed upon” below. *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940). The Third Circuit held that Merck was shielded from antitrust liability because it “persuade[d] the FDA that” its vaccine performed as the label promised even though it “knew that was not true.” Pet. App. 21a. That is, because Merck tricked the FDA into helping it extend its monopoly and that “gambit worked,” Merck was categorically immunized from the antitrust laws. *Id.* By so holding, the Third Circuit squarely answered the question presented, preserving it for this Court’s review.

Merck’s waiver argument fails for a second reason. As this Court has explained, “[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.” *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). Below, the plaintiffs consistently pressed the claim that *Noerr-Pennington* does not immunize “successful” “misrepresentations.” Doc. 44 at 63. The plaintiffs did not somehow forfeit this central issue by acknowledging at the panel stage that binding Third Circuit precedent had “reject[ed]” a “separate exception for fraudulent misrepresentation.” Doc. 44 at 65. No authority supports Merck’s assertion that the plaintiffs had to make an argument that the panel was foreclosed from accepting. And Merck’s suggestion (at 21) that a “boilerplate statement” could have “preserv[ed] the argument for future review” only reinforces the hollow formalism of its rule. Because the plaintiffs have consistently argued that the answer to the question presented is no, while the Third Circuit held that it is yes,

this issue—along with any arguments that may be made in service of it—is fully preserved for this Court’s review.

Third, Merck asserts that the Court should deny certiorari because even if it were not entitled to *Noerr-Pennington* immunity, the Third Circuit could affirm on an alternative ground—“antitrust causation.” BIO 22. This alternative basis for affirmance, however, has nothing to do with the question presented, and Merck concedes that the panel did not reach it. *See* Pet. App. 26a n.18. That argument, too, is one that Merck can make on remand, but it does not affect this case as a vehicle.

III. Merck barely attempts to defend the decision below from first principles or precedent.

Merck spends little time defending the Third Circuit’s outlier position on the merits. Merck declares that “*Noerr-Pennington* extends to *all* efforts that genuinely seek government action,” regardless of whether those efforts are fraudulent. BIO 34. But it musters only one authority in support of that sweeping proposition—this Court’s decision in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991).

Omni, however, involved a regulatory body acting in a political capacity—the antitrust defendant there petitioned a “city council” passing “ordinance[s].” *Id.* at 368. And the Court has long held that the availability of *Noerr-Pennington* immunity turns on the “context and nature” of the petitioning activity at issue. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499 (1988). Because “forms of illegal and reprehensible practice” can “corrupt the administrative or judicial processes,” “[m]isrepresentations” that are “condoned in the political arena[] are not immunized when used in the

adjudicatory process.” *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972).

In other words, the Court has already explained why *Noerr-Pennington* applies “regardless of intent or purpose” in the “political arena.” *Omni*, 499 U.S. at 380. And it has just as clearly articulated why that isn’t true of adjudication. See *Allied Tube*, 486 U.S. at 500 (“[I]n less political arenas, unethical and deceptive practices can constitute abuses of administrative or judicial processes that may result in antitrust violations.”). In keeping with that distinction, the Court has held that “enforcement of a patent procured by fraud on the Patent office may” violate the antitrust laws, with no mention of *Noerr-Pennington* immunity. *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 174 (1965).

Merck’s contention that it would be “problematic” to “look behind government action to determine what effect, if any, the alleged misrepresentation had on that action” also elides the distinction that this Court has drawn between the political and adjudicative contexts. BIO 33. Unlike in the political arena, adjudication is “based on a record” created by the parties that “contains all the information and argument relevant to a decision that is based exclusively upon it.” Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 203e(1) (2025). And so, while deception in politics can be ferreted out “through a complex battle of contending political forces,” *id.*, adjudication has always required the truth.

At bottom, notwithstanding Merck’s attempts to muddle the Third Circuit’s dangerously expansive construction of *Noerr-Pennington* immunity, the decision below creates perverse incentives for regulated

companies to lie to their regulators. No other circuit has adopted that rule, and the FTC—without deviation for more than two decades and across five presidential administrations—likewise rejects it.

As the FTC has underscored, “[w]hatever the nomenclature, the various approaches” to fraudulent petitioning “should lead to the same place.” *UNOCAL*, 138 F.T.C. at 41. This Court has previously stepped in to resolve “inconsistent and contradictory” understandings of *Noerr-Pennington* among the lower courts. *PRE*, 508 U.S. at 55 & n.3. It should do the same here.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

DEEPAK GUPTA

Counsel of Record

JONATHAN E. TAYLOR

GUPTA WESSLER LLP

2001 K Street, NW

Suite 850 North

Washington, DC 20006

(202) 888-1741

deepak@guptawessler.com

VARSHINI PARTHASARATHY

GUPTA WESSLER LLP

505 Montgomery Street

Suite 625

San Francisco, CA 94111

(415) 573-0336

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KELLIE LERNER
SHINDER CANTOR
LERNER LLP
14 Penn Plaza, Suite 1900
New York, NY 10122
(646) 960-8601

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

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Counsel for Petitioners