No. 23-3089

In the United States Court of Appeals for the Third Circuit

IN RE: MERCK MUMPS VACCINE ANTITRUST LITIGATION

CHATOM PRIMARY CARE, P.C., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, ET AL., *Plaintiffs-Appellees*,

v.

MERK & CO., INC., *Defendant-Appellant*.

Interlocutory Appeal from the United States District Court
for the Eastern District of Pennsylvania
(No. 2:12-cv-03555, Judge Honorable Chad F. Kenney)

BRIEF FOR THE AMERICAN ANTITRUST INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS'-APPELLEES' PETITION FOR REHEARING EN BANC

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November 26, 2024

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), the American Antitrust Institute states that it is a nonprofit corporation and, as such, no entity has any ownership interest in it.

Dated: November 26, 2024

Respectfully submitted,

/s/ Joshua P. Davis

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The American Antitrust Institute ("AAI") is an independent nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. It serves the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. AAI enjoys the input of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. See http://www.antitrustinstitute.org.

No party, attorney for a party, or judicial member drafted this brief or participated in the decision to file it. Other than AAI, no person or entity, including any party or party's counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

When a monopolist lies to a judge then claims First Amendment protections, it should be laughed out of court if not sanctioned. But this Circuit has adopted a minority interpretation of the *Noerr-Pennington* doctrine that shields knowing misrepresentations to adjudicatory bodies from antitrust scrutiny. This expands a disfavored immunity and needlessly imperils markets. Every other circuit that has considered this Court's approach has rejected it. The Court should grant en banc

rehearing and adopt the majority rule, which better protects both constitutional rights and consumers.

Knowing misrepresentations to administrative bodies corrupt the adjudicatory process, undermine the validity of the resulting decisions, and distort markets when deployed by firms with market power. Private parties' fraudulent statements to regulators serve no lawful social purpose and do not qualify for constitutional protections. They can also harm competition and thwart innovation by preventing consumers from accessing superior products.

Antitrust immunities are heavily disfavored—for good reason. Each immunity deprives the public of protections that are "as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972). Cases like this one show why.

Merck allegedly made knowing misrepresentations to a regulatory body that distorted the market for a lifesaving vaccine. By providing an allegedly false label that misrepresented the drug's end-of-shelf-life potency, Merck allegedly maintained a costly monopoly and prevented a competing medicine from coming to market. If the plaintiffs prove those facts at trial, then Merck has unjustifiably handicapped a rival, distorted the regulatory process, and denied consumers the benefits of competition. As every other Court of Appeals to reach the issue has found, the First

Amendment does not immunize those activities from antitrust scrutiny. The en banc Court should grant the petition, resolve this question of exceptional importance, and adopt a misrepresentation exception to *Noerr-Pennington* immunity.

ARGUMENT

I. An Independent Misrepresentation Exception to *Noerr-Pennington* Immunity Is Consistent with the Weight of Precedent.

All six of the other circuit courts that have reached the issue raised in this petition held that intentional misrepresentations to regulatory bodies do not qualify for *Noerr-Pennington* immunity. Dissent 28 n.2 (collecting cases). Each court recognized that misrepresentations in regulatory or adjudicatory settings can cause harm to competition that can be remedied by the antitrust laws without infringing on First Amendment rights. This en banc Court should join them and create a uniform body of law.

Common sense reveals why the First Amendment does not confer, and the *Noerr-Pennington* doctrine does not protect, a right to fraudulently induce anticompetitive government action in adjudicatory proceedings through misrepresentations. The distinctions are clear:

- *Noerr* holds that in a representative democracy, the concept of representation depends largely upon the ability of the people to "freely inform the government of their wishes" without incurring the risk of

Sherman Act liability. *E. R.R. Conf. v. Noerr Motor Freight*, 365 U.S. 127, 137 (1961). Unlike in the political arena, there is no sense in which misrepresentations in adjudicatory settings "inform." They can only mislead.

- Pennington reaffirms that "[j]oint efforts to influence public officials do not violate the antitrust laws[.]" *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965). Misrepresentations are not a permissible means of "influence" in an adjudicatory setting. They are "unethical conduct [that] in the setting of the adjudicatory process often results in sanctions." *Cal. Motor Transp. Co. v. Trucking Unltd.*, 404 U.S. 508, 512 (1972) (citing perjury, Walker Process fraud, bribery, and other deceitful, sanctionable offenses not protected by *Noerr-Pennington*); *see* ABA Model Rule 8.4 ("It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation.").
- California Motor extends *Noerr-Pennington* immunity to the "channels and procedures of state and federal agencies and courts," but in the same breath it says, "[m]isrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process." *Id.* at 511, 513.

Misrepresentations in the adjudicatory process also should not be protected by *Noerr-Pennington* immunity as a matter of black letter law.

"It is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute." *Id.* at 514. Courts frequently find that lies, misrepresentations, and deceit satisfy the conduct element of an antitrust offense. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501 (1988) (spreading false information about rival product safety); *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965) (fraud on the patent office); *United States v. Microsoft Corp.*, 253 F.3d 34, 76–77 (D.C. Cir. 2001) (deceiving developers about software compatibility with rival operating systems); *see also Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 314 (3d Cir. 2007) (An intentionally false promise, coupled with reliance, qualifies as "actionable anticompetitive conduct."). In other words, misrepresentations may be more than integral to the conduct element of a monopolization offense; they may *constitute* the conduct itself.

Given the "indispensable role of antitrust policy in the maintenance of a free economy," "[i]mplied antitrust immunities, . . . are disfavored, and any exemptions from the antitrust laws are to be strictly construed." *S. Motor Carriers Rate Conf. v. United States*, 471 U.S. 48, 67–68 (1985) (Stevens, J., dissenting); *Carnation Co. v. Pac. Westbound Conf.*, 383 U.S. 213, 217–18 (1966) ("'[r]epeals of the antitrust laws by implication . . . are strongly disfavored'" because "antitrust . . . [is] a fundamental national economic policy[.]" (quoting *United States v. Phila. Nat'l Bank*, 374 U.S.

321, 350–51 (1963)); *Fed. Trade Comm'n v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 225 (2013) ("[G]iven the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws . . . repeals by implication" are "disfavored.").

To be sure, the Supreme Court has emphasized that "[t]he right of petition is one of the freedoms protected by the Bill of Rights." *Noerr*, 365 U.S. at 138. But because the antitrust laws are also essential safeguards, *Topco,* 405 U.S. at 610, there is a presumption against *Noerr-Pennington* immunity, and the burden is on the party claiming *Noerr-Pennington* immunity to demonstrate that the presumption is overcome. *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 399–400 (1978) (discussing both state-action and *Noerr-Pennington* repeals by implication); *see also Goldfarb v. Va. State Bar*, 421 U.S. 773, 787 (1975). To carry its burden, the proponent of immunity must show that the policies underlying *Noerr* are not just "implicat[ed]" but rather "severely . . . impinge[d] upon." *City of Lafayette*, 435 U.S. at 400.

When a monopolist uses misrepresentations to deceive a government adjudicatory body and maintain or extend a monopoly, it cannot possibly clear this hurdle. The behavior serves no legitimate social purpose, whether as a matter of free speech or competition policy. *See* Joseph Farrell et al., *Standard Setting, Patents, and Hold-Up*, 74 Antitrust L.J. 603, 609 (2007) (Deception "fundamentally" can do nothing but "subvert[] the competitive process."); IIIB Phillip E. Areeda &

Herbert Hovenkamp, Antitrust Law ¶ 782b, at 326 (3d ed. 2008) ("There is no redeeming virtue in deception[.]"); Harry S. Gerla, *Federal Antitrust Law and the Flow of Consumer Information*, 42 Syracuse L. Rev. 1029, 1030 (1991) ("False or misleading information is deadweight economic loss, causing injury without any offsetting economic benefit.").

Here, by making misrepresentations, Merck allegedly prevented the FDA from drawing objective conclusions about the characteristics of Merck's product. This fraudulently induced the government to foreclose equally effective drugs from the market. Because Merck allegedly tricked the government into holding its competitors to artificially inflated standards, consumers were denied the benefits of competitive entry and Merck was able to unjustly extend its monopoly profits. Such deceptive behavior is categorically incapable of advancing any legitimate social interests.

II. An Independent Misrepresentation Exception Would Not Impinge Upon the Values that the *Noerr-Pennington* Doctrine Protects.

Noerr sought to avoid chilling private parties' petitioning activity so as not to "deprive the government of a valuable source of information[.]" *Noerr*, 365 U.S. at 139. A misrepresentation exception would not chill the purveyance of "valuable [] information[.]" It would allow the government to rely more readily on the information provided by parties in adjudicatory settings without deterring speech in the political arena, including in proceedings to determine, for example,

"whether a law . . . should pass, or if passed be enforced." *Id.* at 136. A firm would only need to consider the exception in the rare context of making a knowing misrepresentation in an adjudicative setting that would also subject it to potential antitrust liability. The rule adopted by other circuits incentivizes forthright communication with the government in adjudicatory proceedings while also facilitating unencumbered communication with the government in matters involving public affairs.

A misrepresentation exception also would not interfere with the separation of powers or federalism. There is no risk that an adjudicatory body would be acting as a gatekeeper to the political arena or infringing upon the activities of the executive and legislative branches. Non-adjudicatory decisions would remain the "responsibility of the appropriate legislative or executive branch of government[.]" *Id.* If anything, the misrepresentation exception would provide a post hoc check to ensure that the appropriate branch of government is best able to carry out its function.

III. An Independent Misrepresentation Exception Can Be Easily Administrable

This Court should adopt the rule that "knowing misrepresentations" in "administrative and adjudicatory contexts" are not entitled to *Noerr-Pennington* immunity. *Amphastar Pharms. Inc. v.*

Momenta Pharms., Inc., 850 F.3d 52, 56 (1st Cir. 2017) (citing *Cal. Motor*, 404 U.S. at 513).

This articulation of the exception is in accordance with the major positions of the other circuits and a well-reasoned report from the Federal Trade Commission ("FTC"). In 2006, the FTC released a Staff Report on the appropriate scope of *Noerr-Pennington* immunity, which drew on caselaw and the FTC's decision in *In the Matter of Union Oil Company of California*, 138 F.T.C. 1 (2004). FTC Staff, Enforcement Perspective on the *Noerr-Pennington Doctrine* 7 (2006).[1] The report recommends that where a communication undermines "a valid and independent government decision, it [] deserves no special treatment and should be subject to the antitrust laws." FTC at 22; *see also id.* at 22–28 (citing and discussing cases and authorities supporting misrepresentation exception).

This Court could apply the following straightforward framework for assessing the applicability of the misrepresentation exception:

1. Does the anticompetitive speech or omission constitute "petitioning government officials"? *Allied Tube*, 486 U.S. at 499 (1988). If so, proceed to Step 2. If not, apply the antitrust laws.

[1] https://www.ftc.gov/sites/default/files/documents/reports/ftc-staff-report-concerning-enforcement-perspectives-noerr-pennington-doctrine/p013518enfperspectnoerr-penningtondoctrine.pdf [https://perma.cc/W3CC-85PJ].

2. Was the speech made in the "political arena" or instead during an "adjudicatory process" (whether "administrative [or] judicial")? *Cal. Motor*, 404 U.S. at 513. If the adjudicatory process, proceed to Step 3. If not, consider whether a sham exception applies to the political activity.

3. Was the speech or omission both (1) knowing and (2) successful in influencing government action? If so, the misrepresentation exception applies and the antitrust laws should be enforced.

This proposed framework is preferable to shoehorning a misrepresentation exception into the "sham" exception articulated in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 51 (1993). Misrepresentations in adjudicatory contexts genuinely seek to influence government outcomes, they just do so in nefarious ways that harm the legitimacy of the proceedings and the functioning of the market. A standalone misrepresentation exception allows courts to properly characterize the misconduct and reach the appropriate outcome with a better tailored framework.

CONCLUSION

For the foregoing reasons, the Court should grant en banc rehearing.

Dated: November 26, 2024

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COMBINED CERTIFICATIONS

1. This brief complies with Local Appellate Rule 46.1(e) because Joshua P. Davis, counsel for amicus curiae American Antitrust Institute, is a member of the Bar of this Court.

2. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(b)(4) because the brief contains 2,082 words. This brief also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a) because it was prepared in 14-point Century Schoolbook font, a proportionally spaced typeface, using Microsoft Word.

3. This document was scanned for viruses using SentinelOne, version 23.4.4.223, and no virus was detected.

4. Pursuant to instruction of the Clerk and the Local Appellate Rules, no paper copies of this brief will be provided unless directed by the Clerk. The text of the electronic version of this document is identical to the text of any hard copies that will be provided.

5. On November 26, 2024, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

Dated: November 26, 2024 *<u>/s/ Joshua P. Davis</u>*
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