No. 99-905

In the Supreme Court of the United States

ARMSTRONG SURGICAL CENTER, INC., PETITIONER

v.

ARMSTRONG COUNTY MEMORIAL HOSPITAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE

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QUESTION PRESENTED

Whether petitioner stated a claim on which relief could be granted under the Sherman Act, 15 U.S.C. 1 *et seq.*, by alleging that respondents barred petitioner's entry into a market by making factual misrepresentations and boycott threats to a state agency, causing the agency to deny petitioner a certificate required for entry into the market.

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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

This case arises out of an antitrust suit brought by petitioner against respondents Armstrong County Memorial Hospital (the Hospital) and nineteen physicians on the Hospital's staff (the Doctors). Because petitioner's complaint was dismissed for failure to state a claim, petitioner's factual allegations must be taken as true. See Pet. App. 2a, 62a, 84a; *California Motor Transp. Co.* v. *Trucking Unlimited*, 404 U.S. 508, 515-516 (1972).

1. In 1991, petitioner sought to open a new "ambulatory surgery center" (ASC) in Armstrong County, Pennsylvania. At the time, state law required petitioner to obtain a "certificate of need" (CON) from the state Department of Health before it could open a new health care facility. See Pet. App. 3a. That requirement was designed "to prevent needless duplication of [health care] services." *Ibid.* (quoting Pa. Stat.

Ann. tit. 35, § 448.102 (West 1993)). CON requirements may restrain competition in health care markets by preventing the entry of new competitors or the provision of new facilities or services.

Respondent Hospital, which maintained the only operating rooms in the relevant market, "vigorously opposed" petitioner's application for a CON. Pet. App. 2a-3a; Br. in Opp. App. 5 (Compl. ¶ 12). Not long after petitioner applied for the CON, the Hospital also sought and received permission to open a new mixed-use operating room. Br. in Opp. App. 6 (Compl. ¶ 13). It then began constructing a new building, and represented that it planned to move three of its now six operating rooms to the new building for use in outpatient surgery—creating, in effect, its own version of a new ASC, much like the one petitioner had proposed. *Id.* at 7 (Compl. ¶ 19).

The respondent Doctors, who performed more than 73% of outpatient surgery (and more than 90% of all surgery) in the market, agreed with the Hospital to oppose petitioner's request for a CON. Br. in Opp. App. 8-9 (Compl. ¶¶ 22, 25). Each Doctor signed a substantially identical letter, prepared by the Hospital on its letterhead, representing to the Department of Health that he or she would not use petitioner's proposed facility if it were constructed, but would instead use the ASC at the Hospital. *Id.* at 8 (Compl. ¶ 21). Each letter said that the request for a CON should be denied because petitioner's proposed facility would "duplicate[] services already being provided," and was therefore unnecessary and not cost-effective. *Ibid.*

At the time the Hospital and the Doctors made their respective representations to the Department of Health, they knew that construction of the Hospital ASC had been stopped, and that the Hospital had no intention of completing construction or opening its own ASC if respondents succeeded in defeating petitioner's application for a CON. Br. in Opp. App. 12-13 (Compl. ¶ 37).

2. After "an extensive review process which included gathering information by investigation, submissions and at a public hearing," the Department of Health denied petitioner's request for a CON. Br. in Opp. App. 5 (Compl. ¶ 10). Petitioner appealed to the State Health Facility Hearing Board (the Board), which received additional evidence, conducted its own hearing, and then affirmed the Department's decision. Pet. App. 102a-117a; see *id.* at 4a.

The Board noted that there were "many facets to the issue of need," and that it was "required to consider all relevant factors" before authorizing the issuance of a CON. Pet. App. 112a. After finding that petitioner's facility "would serve essentially the same population as the Hospital," the Board observed that the Hospital already had six general-purpose operating rooms and a room for short procedures; that state projections indicated "at most, need for one additional (seventh) operating room"; and that petitioner's facility would add two new rooms. *Ibid.* The Board also noted that the Hospital had partly constructed, and might complete, a new "dedicated outpatient surgery facility" that would take over three of its existing operating rooms, although the need for such a facility had been questioned by some at the Hospital, and the new building was "currently being used as a storage facility." *Id.* at 113a & n.9. The Board concluded (*id.* at 113a):

> With regard to the population to be served and the surgical services to be offered, there would be little difference between [petitioner's] ambulatory surgical center and the one that the Hospital has partially completed, except that [petitioner's] project would raise the number of operating rooms in Armstrong County above the limit set by [the State Health Plan]. We conclude that approval of the instant CON application would result in needless duplication of existing facilities and health care services.

While the Board considered that conclusion "sufficient to support a finding that [petitioner] ha[d] failed to establish [a] need for the proposed facility," it also considered whether the proposed facility might be able to "generate a sufficient volume of surgical procedures to assure its financial stability." Pet. App. 113a. The Board concluded that petitioner's volume projections were unjustifiably optimistic by comparison to historical experience, and relied on provision of treatments that would require substantial investments not included in petitioner's cost projections. *Id.* at 114a-115a. Finally, and "most damaging," the respondent Doctors, some of whom had initially supported petitioner's application, had indicated that "they would utilize the Hospital's outpatient surgical services and would not operate at the proposed facility." *Id.* at 115a. Thus, "for whatever reason," *id.* at 116a, "the number of physicians who might have been expected to support the facility decreased significantly after [petitioner] had submitted its projections" (*id.* at 115a). Accordingly, the likely volume of procedures was "insufficient to support a finding of need for two additional operating rooms in Armstrong County." *Id.* at 116a.

3. The Commonwealth Court of Pennsylvania affirmed the Board's decision. Pet. App. 87a-101a. It held that there was "substantial evidence" to support the Board's determinations that petitioner had not established "need" for its facility and that petitioner's volume projections were unrealistic. *Id.* at 98a, 100a; see *id.* at 93a n.4. Addressing petitioner's argument that the Board's decision violated the state CON law because it "protect[ed] the hospital and those connected with it from competition" rather than "foster[ing] competition to promote cost efficiency, quality and access to care," the court observed that petitioner was "really challenging the board's weighing of the evidence presented." *Id.* at 99a.

4. Petitioner brought this suit alleging violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1, 2. The com-

plaint charged that respondents had combined to restrain competition, and to preserve their respective monopolies, in the local markets for outpatient surgery and associated medical services. See Br. in Opp. App. 7, 9-11 (Compl. ¶¶ 18, 24-26, 30-32). The gist of the alleged conspiracy was that respondents would join in opposing petitioner's CON application; that the respondent Doctors would represent to the Department of Health and the state review Board that they would not use petitioner's ASC, so that the proposal would not be "economically viable"; and that respondents would jointly misrepresent to the Department "that there was in fact a Hospital ASC readily available for use" and comparable, in facilities and price, to the one petitioner proposed. See *id.* at 8-9, 11-13 (Compl. ¶¶ 21, 24, 34-37); see also Pet. App. 60a-61a. The complaint alleged that respondents' representations became "controlling factors" in the decision to deny petitioner a CON. Br. in Opp. App. 11 (Compl. ¶ 31); see *id.* at 6-7 (Compl. ¶¶ 17-18). Petitioner sought damages for injuries resulting from the delay or final denial of its application for a CON. *Id.* at 17 (Compl. ¶ 56).

After the Commonwealth Court upheld the Board's decision, the district court dismissed petitioner's antitrust complaint for failure to state a claim on which relief could be granted. Pet. App. 51a-84a. The court held (*id.* at 80a) that petitioner's claims "fail[ed] as a matter of law" because "[t]he denial of [petitioner's] application for a CON and the consequences of that denial on the market were the result of direct state administrative action which was reviewed by a state appellate court." That "classic example of a restraint upon competition as a result of valid governmental action" could not support a claim for damages under the antitrust laws. *Ibid.*

The court rejected (Pet. App. 82a-84a) petitioner's argument based on respondents' conduct in opposing the CON. Noting (*id.* at 82a) that respondents had "a reasonabl[e] objective basis for success" in their opposition, the court held

(*ibid.*) that their actions "constituted political activity," and that any "solicitation" of government action they made was immune from antitrust liability, "regardless of its accuracy," under the doctrine of *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). In any event, the court viewed petitioner's contention that respondents "told lies in the state adjudicatory process which substantially affected the validity of the state process" as "unsupportable," because the state Board was "well aware" of respondents' self interest, and of "the circumstances surrounding the Hospital's 'phantom' ASC," and yet made "multiple independent findings and conclusions" that were "reflected in public documents which speak for themselves." Pet. App. 82a. In those circumstances, the court concluded, "it would be error to permit a jury in this action to consider and determine that the specific 'conduct' isolated by [petitioner] legally caused the injuries asserted." *Ibid.*

The court likewise rejected (Pet. App. 83a) petitioner's reliance on the threatened boycott of a new facility. In the court's view, respondent Doctors "merely posited into the state adjudicatory process for consideration a statement of future intent," just as the Hospital "merely posited evidence supporting the proposition that it was prepared to meet the future out-patient surgery demands of the region as they arose." *Ibid.* Respondents did not limit petitioner's access to state decision-makers, the court reasoned, and could not "control the [State's] subsequent decisions in coordinating and managing * * * the region's surgical market." *Ibid.* In sum, the denial of petitioner's application resulted from "state action," and petitioner accordingly could not "predicate [antitrust] claims on the basis of [respondents'] conduct." *Id.* at 84a.

5. The court of appeals affirmed. Pet. App. 1a-50a. Addressing first (*id.* at 5a-12a) petitioner's "boycott" claim, the court held (*id.* at 6a-8a) that respondents' conduct was protected, on its face, by the *Noerr* "petitioning" doctrine and

by the principle of *Parker* v. *Brown*, 317 U.S. 341 (1943), that the Sherman Act does not apply to "anticompetitive restraints imposed by the States 'as an act of government.'" Pet. App. 7a. The court ruled that the "sham" exception to *Noerr* immunity, on which petitioner relied, does not apply where respondents' conduct was in fact intended to secure favorable government action. *Id.* at 8a & n.2. "[W]here, as here, all the plaintiff's alleged injuries result from state action," the court held, "antitrust liability cannot be imposed on a private party who induced the state action by means of concerted anticompetitive activity." *Id.* at 12a.

The court of appeals applied the same reasoning in rejecting the claim that respondents should be held liable for making intentional misrepresentations to state regulators. Pet. App. 12a-20a. The court acknowledged this Court's suggestions that "petitioning activity involving knowingly false information submitted to an adjudicative tribunal might not enjoy antitrust immunity" (*id.* at 12a), and it recognized that the CON decision at issue "involved an individualized application of established criteria" (*id.* at 17a). Drawing heavily, however, on *City of Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), the court articulated a general principle that "injuries that are inflicted by states acting as regulators" do not give rise to liability under the Sherman Act, "even where it is alleged that a private party urging the action did so by bribery, deceit or other wrongful conduct that may have affected the decision making process." Pet. App. 17a.

On the record in this case, the court thought it unclear whether the actual existence or likely completion of the Hospital's own ASC was material to the state Board's decision on petitioner's CON. Pet. App. 18a & n.6. It thought it clear, however, that "to the extent [that] issue was material, * * * the [state] decision makers recognized that there was a dispute and made a credibility determination concerning it." *Id.* at 18a. The state officials "were disinterested, con-

ducted their own investigation, and afforded all interested parties an opportunity to set the record straight," and state law provided a mechanism for "mov[ing] to reopen the proceeding and attempt[ing] to persuade [the Department and the Board] that they were materially misled." *Id.* at 19a. Invoking *Omni*, the court therefore "decline[d] [petitioner's] invitation to look behind the decisions of the Department, the Board, and the Commonwealth Court," and it upheld respondents' claim to immunity under *Noerr*. *Id.* at 19a-20a.

Judge Schwartz dissented. Pet. App. 21a-50a. In his view, *Noerr* immunity should not have been accorded to threats of an illegal boycott (*id.* at 41a-42a), or "when intentional falsehoods pervade[d] the entire state administrative proceeding leading to the denial of [petitioner's] application for a [CON]." *Id.* at 21a; see *id.* at 27a-31a (distinguishing between political and administrative or adjudicative contexts). In this case, Judge Schwartz concluded, the misrepresentations alleged by petitioner "largely influenced and very probably dictated the outcome of the administrative process." *Id.* at 46a.

DISCUSSION

Petitioner's central contention is that respondents successfully conspired to bar its entry into the market for outpatient surgical services in Armstrong County, Pennsylvania, by causing state authorities to deny petitioner a CON, which the State would have granted in the absence of respondents' intentional misrepresentations and their threats to boycott petitioner's proposed facility. The question presented is whether that contention states a claim under the Sherman Act, in view of the immunity for "petitioning" activity established by *Noerr* and *United Mine Workers of America* v. *Pennington*, 381 U.S. 657 (1965), and the related principle of *Parker* v. *Brown* that the antitrust laws provide no remedy for competitive injuries inflicted by state regulation.

1. a. This Court's cases do not squarely answer that question. The Court has held that the Sherman Act does not prohibit collective action aimed at persuading a legislature, an executive official, an administrative agency, or a court to exercise governmental authority, even if the purpose underlying the attempt at persuasion is anticompetitive. *California Motor Transp.*, 404 U.S. at 510; *Pennington*, 381 U.S. at 669-670; *Noerr*, 365 U.S. at 135-145. From the beginning, however, the Court has also been careful to note that the antitrust "immunity" so established does not extend to cases in which activity "ostensibly directed toward influencing governmental action" is in fact "a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." *Noerr*, 365 U.S. at 144.

The Court applied that qualifying principle in *California Motor Transport*, where it held that the plaintiffs had stated an antitrust claim by alleging that their competitors had conspired to involve themselves in state and federal legal proceedings "to resist and defeat applications by [the plaintiffs] to acquire operating rights or to transfer or register those rights." 404 U.S. at 509. The defendants allegedly acted "regardless of the merits" of particular proceedings, and intended not to "influence public officials" but "to bar [the plaintiffs] from meaningful access to adjudicatory tribunals and so to usurp [the public] decisionmaking process." *Id.* at 512. On their face, the Court held, such allegations came "within the 'sham' exception in the *Noerr* case, as adapted to the adjudicatory process." *Id.* at 516.

The Court also declined to apply *Noerr* in *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U.S. 492 (1988), which involved efforts by a conduit manufacturer to manipulate the process used by a private association in determining whether to modify its National Electrical Code to allow the use of a competing type of conduit. The Code was routinely incorporated into law by many state and local governments,

and the manufacturer sought to portray its efforts as "the most effective means of influencing legislation regulating electrical conduit." *Id.* at 495, 502. Noting, however, that "the restraint of trade on which liability was predicated was the Association's exclusion of [the antitrust plaintiff's] product from the Code, and no damages were imposed for the incorporation of that Code by any government," *id.* at 500, the Court concluded that the manufacturer's conduct was most aptly characterized as "commercial activity with a political impact," and that "the context and nature of th[at] activity d[id] not counsel against inquiry into its validity" under the Sherman Act. *Id.* at 506- 507.

In *City of Columbia* v. *Omni Outdoor Advertising*, on which the court of appeals relied in this case (Pet. App. 13a-20a), this Court held that neither a local government (acting pursuant to state policy) nor a private party that had urged the enactment of local zoning ordinances could be held liable, under the Sherman Act, for the anticompetitive effects of those ordinances. Observing that *Parker* immunity for governmental action and *Noerr* immunity for seeking such action are "complementary expressions of the principle that the antitrust laws regulate business, not politics," the Court rejected an argument that the Sherman Act should reach "conspiracies" between private parties and public officials "to employ government action as a means of stifling competition." 499 U.S. at 382-383. All lawmaking, the Court reasoned, involves some agreement between legislators and some constituents; and the attempt to distinguish consensus from "conspiracy" either would be hopelessly vague or would turn on considerations, such as bribery, that are remote from the central concerns of the antitrust laws. See *id.* at 374-379, 382-383.

Omni also rejected an argument that vigorous insider lobbying could come within the "sham" exception to *Noerr* immunity. 499 U.S. at 380-382. That exception, the Court explained, "encompasses situations in which persons use the

governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon." *Id.* at 380. So long as a private party's actions are "genuinely aimed at procuring favorable government action," they come within the rationale of *Noerr*, even if the party employs "improper means" to that end. *Ibid.* (emphasis omitted).

Most recently, the Court revisited the "sham" exception in a case in which the antitrust defendant had brought a suit for copyright infringement against the antitrust plaintiff, who claimed that the suit was a "sham" brought solely to interfere with lawful competition. *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Indus.*, 508 U.S. 49, 51-52 (1993) (*PREI*). This Court held that *Noerr* protects the filing of a lawsuit unless the suit is "objectively baseless," *and* is brought in a bad faith attempt to injure competition through the use of the litigation process, rather than in any hope of success before the courts. *Id.* at 60-61. *PREI* itself was resolved under the first prong of that test, because the copyright claim at issue was not "baseless." *Id.* at 62-66. After a short discussion of the second prong, however, the Court noted its previous statement that "[m]isrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process." *Id.* at 61-62 n.6 (quoting *California Motor Transp.*, 404 U.S. at 513). The Court reserved the question "whether and, if so, to what extent *Noerr* permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations." *Id.* at 62 n.6.

b. Petitioners ask the Court to address that question in this case. They contend that the Sherman Act should reach the conduct of defendants who restrain competition by conspiring to "corrupt administrative or adjudicative proceedings * * * by making deliberate misrepresentations * * * for the purpose of poisoning the outcome of the proceedings." Pet. 12.

That contention finds some support in this Court's opinions. As noted in *PREI*, 508 U.S. at 61 n.6, for example,

California Motor Transport observed that there are "forms of illegal and reprehensible practice," including "[m]isrepresentations," that may "corrupt the administrative or judicial processes" and "result in antitrust violations." 404 U.S. at 513; see also *id.* at 517 (Stewart, J., concurring in the judgment) (distinction between legislative and administrative or judicial body "might make a difference in the applicability of the antitrust laws if the petitioners had made misrepresentations of fact or law to these tribunals, or had engaged in perjury, or fraud, or bribery"). *Allied Tube* made the same point in explaining that the "validity" of "effort[s] to influence governmental action * * *, and thus the applicability of *Noerr* immunity, varies with the context and nature of the activity" undertaken. 486 U.S. at 499-500; see also *id.* at 504 ("A misrepresentation to a court would not necessarily be entitled to the same antitrust immunity allowed deceptive practices in the political arena[.]"). Both *PREI* and *California Motor Transport* cited the Court's decision in *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172, 177-178 (1965), which held that proof that a patent-holder "obtained the patent by knowingly and willfully misrepresenting facts to the Patent Office * * * would be sufficient to strip [the holder] of its exemption from the antitrust laws" for any "injurious consequences * * * of the patent's enforcement."

Such statements, and the holding in *Walker Process*, are necessarily limited by their respective contexts. *Noerr*, which precluded liability for attempts to influence legislation, or for any "incidental effect[s]" of such efforts on competitors, noted that liability might be appropriate where activities "ostensibly" directed toward procuring government action were in fact "nothing more than an attempt to interfere *directly* with the business relationships of a competitor." 365 U.S. at 143-144 (emphasis added). *California Motor Transport*, which allowed a suit to go forward on the "sham" theory, likewise stressed that the gravamen of

the complaint was that the defendants' anticompetitive strategy involved repeated and unrelenting opposition to the plaintiffs' endeavors to acquire operating rights, without regard to the merits of specific cases, and for the purpose of injuring the plaintiffs, not so much by prevailing over them in the courts, but more directly by "harass[ing] and deter[ring] [them] in their use of administrative and judicial proceedings" so as to "deprive [them] of meaningful access to the agencies and courts." 404 U.S. at 511-512; see *id.* at 513, 515; see also *id.* at 518 (Stewart, J., concurring in the judgment); *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 379-380 (1973); *Omni*, 499 U.S. at 381-382 (holding of *California Motor Transport* is "limited to th[e] situation" in which "participation in the governmental process [is] itself claimed to be a 'sham,' employed as a means of imposing cost and delay").

Similarly, in *Allied Tube* the Court was careful to point out that damages had been awarded only for the effect that the private electrical safety standard wrongfully procured by the defendant "had of its own force in the marketplace," not for "injuries stemming from the adoption of the 1981 Code by governmental entities." 486 U.S. at 498; see *id.* at 500, 509-510. And although *Walker Process*, like this case, involved misrepresentations to a government agency (the Patent Office) that allegedly resulted in competitive harm, it was the antitrust defendant's attempt to *enforce* a fraudulently procured patent directly against a would-be competitor that the Court held could support an antitrust counterclaim. See 382 U.S. at 175-176; see also *PREI*, 508 U.S. at 60-61 ("subjective" component of test for "sham" litigation focuses on whether plaintiff actually hoped to win, or merely sought to use process to injure competitor); *Omni*, 499 U.S. at 381-382. In this case, by contrast, petitioner seeks to recover damages for competitive injuries that were directly caused by government action—the State's denial of a CON—on the theory that the action was procured through factual

misrepresentations and threats of unlawful anticompetitive conduct made by respondents to the relevant state decision-makers. While this Court's cases do not foreclose the possibility of such a claim, the Court itself has never gone so far.[1]

2. Several courts of appeals have discussed *Noerr* in terms that suggest support for the sort of "misrepresentation" theory that petitioner advocates. See, *e.g.*, *St. Joseph's Hosp.* v. *Hospital Corp. of America*, 795 F.2d 948, 954-955 (11th Cir. 1986) ("When a governmental agency * * * is passing on specific certificate [of need] applications it is acting judicially. Misrepresentations under these circumstances do not enjoy *Noerr* immunity."); *Kottle* v. *Northwest Kidney Ctrs.*, 146 F.3d 1056, 1060-1064 (9th Cir. 1998) (acknowledging exception to immunity, but affirming dismissal where complaint made only "vague" allegations of misrepresentations that "influenced" CON decision), cert. denied, 525 U.S. 1140 (1999); *Woods Exploration & Producing Co.* v. *Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971), cert. denied, 404 U.S. 1047 (1972).[2] As petitioner and the

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[1] Petitioner suggests (Pet. i, 13-19) that the decision below conflicts with cases establishing that private anticompetitive conduct is shielded from antitrust liability, as "state action," only if it is (1) undertaken pursuant to a clearly articulated and affirmatively expressed state policy to displace competition and (2) actively supervised by the State. See, *e.g.*, *FTC* v. *Ticor Title Ins. Co.*, 504 U.S. 621, 633 (1992); *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). The court of appeals, however, never suggested that the private misrepresentations and boycott threat alleged here would qualify as "state action." The question in this case is not whether private anticompetitive conduct that directly harms a plaintiff is properly attributable to the State, but whether an administrative or judicial decision that directly harms the plaintiff's competitive interests can give rise to antitrust liability on the part of a private party who induced that government action by fraudulent means.

[2] See also *Potters Med. Ctr.* v. *City Hosp. Ass'n*, 800 F.2d 568, 580-581 (6th Cir. 1986) (stating that "knowing and willful submission of false facts to a government agency falls within the sham exception," but affirming judgment against plaintiff that failed to respond to affidavit from defen-

court of appeals have pointed out, the reasoning, and occasionally the result, of those cases is in some tension with the decision below. See Pet. 9-10, 19; Pet. App. 19a-20a & nn.7-8.

Most of the cases cited were decided before *PREI* and *Omni*, which may, as the court of appeals observed, account for a good deal of that tension. See Pet. App. 7a-20a & n.7; but cf. *Liberty Lake Invs.* v. *Magnuson*, 12 F.3d 155, 158-159 (9th Cir. 1993) (discussing, although not applying, fraud or misrepresentation exception after and in light of *PREI*), cert. denied, 513 U.S. 818 (1994); *Whelan* v. *Abell*, 48 F.3d 1247, 1255 (D.C. Cir. 1995) (discussing and applying analogous exception in tort case, after *PREI*). So far as we are aware, no court of appeals has considered or affirmed an actual judgment awarding damages against a private defendant for competitive injuries inflicted most directly by state action, where that action was allegedly procured by the defendant's fraud.

The cited cases are also distinguishable from this case on their facts. See, *e.g.*, *St. Joseph's Hosp.*, 795 F.2d at 953 (state courts reversed, rather than affirmed, administrative decision to deny certificate of need); *Woods Exploration*, 438 F.2d at 1292-1293, 1297-1298 (state commission exercised no

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dant denying any knowing misrepresentation); *Clipper Exxpress* v. *Rocky Mtn. Motor Tariff Bureau*, 690 F.2d 1240, 1259-1263 (9th Cir. 1982), cert. denied, 459 U.S. 1227 (1983); *Federal Prescription Serv.* v. *American Pharm. Ass'n*, 663 F.2d 253, 262-266 & n.7 (D.C. Cir. 1981), cert. denied, 455 U.S. 928 (1982); *Israel* v. *Baxter Labs.*, 466 F.2d 272 (D.C. Cir. 1972) (reversing dismissal of complaint alleging misrepresentations and other improper interference with FDA drug-approval process); *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 424 F.2d 25, 32 (1st Cir.), cert. denied, 400 U.S. 850 (1970); cf. *Nobelpharma AB* v. *Implant Innovations, Inc.*, 141 F.3d 1059, 1068-1072 (Fed. Cir.) (holding that antitrust claim based on invalidity of patent procured by fraud, relying on *Walker Process*, *supra*, is independent of claim that infringement litigation is a "sham" under *PREI*, *supra*), cert. denied, 525 U.S. 876 (1998); *Whelan* v. *Abell*, 48 F.3d 1247, 1253-1255 (D.C. Cir. 1995) (discussing *Noerr*, the First Amendment, and misrepresentations in the context of torts of tortious interference, malicious prosecution, and abuse of process).

independent review in applying production formula to allegedly false sales forecasts submitted by defendant). And it is not clear to what extent the decision below rests on the court of appeals' observation (Pet. App. 19a) that this case in fact involved "disinterested decision makers, an independent investigation, an open process, and extensive opportunities for error correction"—characteristics that make it unlikely that the misrepresentations and threats petitioner alleges here could have "deprived the entire CON proceeding of its legitimacy" in a way that other courts would recognize as sufficient to defeat a claim of *Noerr* immunity. See *Kottle*, 146 F.3d at 1063. Thus, although future cases may reveal a conflict that will call for intervention by this Court, whatever difference in approach currently exists does not demand review in this case.

3. This Court's decisions counsel caution in fashioning any theory of antitrust liability that would allow a plaintiff to recover damages from a private defendant for competitive injuries caused most directly by state administrative or adjudicatory action, such as the denial of a CON. Manifestly, under *Omni*, *Parker*, and like cases the State itself could not be held liable for such damages under the Sherman Act, even if the government action was procured by fraud, and even if state officials had condoned or participated in the fraud. Normally, too, damages flowing directly from valid state action cannot be recovered in an antitrust suit against a private party who procured that action, even by improper means. See, *e.g.*, *Omni*, 499 U.S. at 379-384; *Allied Tube*, 486 U.S. at 499; *Pennington*, 381 U.S. at 671. Moreover, the legal "validity" of such an action is presumably not a proper subject for adjudication in federal antitrust litigation among private parties. See *Angle* v. *Chicago, St. Paul, Minneapolis & Omaha Ry.*, 151 U.S. 1, 17-19 (1894); *Fletcher* v. *Peck*, 6 Cranch (10 U.S.) 87, 130-131 (1810) (Marshall, C.J.); cf. *W.S. Kirkpatrick & Co.* v. *Environmental Tectonics Corp., Int'l*, 493 U.S. 400, 406-407 (1990) (discussing "act of state" doc-

trine and *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347 (1909)).[3]

We do not understand petitioner to challenge the "validity" of Pennsylvania's CON decision in that sense. It has not, for instance, sought a federal injunction setting aside the State's decision and allowing petitioner to construct its surgical facility. Nonetheless, the premise of petitioner's claim is that the State's denial of the CON should not insulate respondents from antitrust liability, because the state process in question is fundamentally adjudicatory rather than legislative, and because respondents defrauded the State's decision-making agents, through factual misrepresentations and threats of an unlawful boycott, into making a decision contrary to the one (in favor of petitioner) that they would otherwise have made. The inquiry involved in substantiating or repudiating such a claim may involve "look[ing] behind the actions of state sovereigns" in a way this Court has disfavored. See *Omni*, 499 U.S. at 379. Further, the adjudication of such claims could—depending upon how the courts allow matters to proceed—risk federal intrusion into the state decision-making process, both through compelled discovery, conducted by private parties, into the nature of that process, and through judicial second-guessing of its results. It could, moreover, give rise to situations in which a federal court would award damages on the theory that a state decision was procured by fraud, and would not have been made in the same way had state

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[3] Compare *PREI*, 508 U.S. at 61 n.6 (citing Fed. R. Civ. P. 60(b)(3), permitting relief from final federal judgment based on fraud or other misconduct, and *Walker Process*, *supra*); *Walker Process*, 382 U.S. at 175-177 (although federal antitrust claim does not seek "annulment" of federal patent, premise for liability is proof that patent is invalid, under patent law, if procured by fraud); *Israel*, 466 F.2d at 282-283 ("The authority of the [federal] District Court to examine the findings of the [Food and Drug Administration] on a matter confided by Congress to the FDA's expertise is derived from the court's authority in a case such as this to investigate plaintiffs' allegations of conspiracy and antitrust violations.").

officials been fully informed, while the state action itself would continue to be valid and binding as a matter of state law.

Development of antitrust law in this way would also require assessments of whether targeted state actors or actions were more "political in the *Noerr* sense" or more purely administrative or adjudicatory. See *Woods*, 438 F.2d at 1296-1297. It would focus federal courts hearing antitrust cases on abuses of state administrative or judicial process, for which there are presumably other remedies. Compare *Omni*, 499 U.S. at 378-379, 383-384. And even if such concerns could be mitigated or overcome, it is open to question whether the vindication of plaintiffs' rights in whatever number of cases proved both adjudicable and meritorious would adequately reward the judicial effort that would be involved in crafting and administering antitrust doctrine in this delicate area, and the private expense involved in litigating many claims that would ultimately be rejected.[4]

Despite these reservations, we are not presently prepared to conclude that relief should never be available in a case alleging that competitive damages caused directly by some state action were procured by private parties, in violation of the antitrust laws, through abuse of the State's administrative or judicial processes. Cases allowing a plaintiff to seek damages from private parties for injuries caused by wrongfully procured sovereign actions are not unknown. See *W.S. Kirkpatrick & Co.*, *supra* (allowing suit against competitor who allegedly procured contract with foreign government by bribing officials); *id.* at 406-408 (disapproving any suggestion in *American Banana* that antitrust suit "to obtain damages from private parties who had procured" damaging sovereign action "would not lie if [the] foreign state's actions would be,

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[4] We are not aware of any case brought by the Department of Justice or the Federal Trade Commission that depended on the theory advanced in this case.

though not invalidated, impugned" by establishment of the plaintiff's allegations); cf. *Angle*, 151 U.S. at 16-25 (valid legislation transferring property to defendant did not bar imposition of constructive trust on property based on defendant's wrongful conduct leading to state action). Intentional fraud on state courts or administrative tribunals can lay only a modest claim to the mantle of immunity that *Noerr* and its progeny cast around more legitimate, or more clearly political, "petitioning" conduct. See 1 P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 203f (rev. ed. 1997). There may be procedural mechanisms, such as discovery limitations, stays, and referral of questions to state agencies or courts, that could mitigate the concerns over practicality and comity expressed above. Cf. *Israel*, 466 F.2d at 280-283 (invoking doctrine of primary jurisdiction). And there may well be some situations—such as where an antitrust plaintiff has already persuaded a state tribunal to reverse its initial determination by revealing the defendants' fraud—in which those concerns are muted, and would be outweighed by the substantial public interest in vigorous enforcement of the Sherman Act.

The need for circumspection is, however, plain, and this case does not appear to be one in which the argument for liability can be forcefully advanced. The CON process is administrative, and in some respects adjudicatory, but it also has aspects that are "political in the *Noerr* sense." *Woods*, 438 F.2d at 1297; see Pet. App. 112a ("There are many facets to the issue of need, and [the state Board is] required to consider all relevant factors prior to authorizing construction of additional health care facilities."); see also *Woods*, 438 F.2d at 1293-1295 (distinguishing *Okefenokee Rural Elec. Membership Corp.* v. *Florida Power & Light Co.*, 214 F.2d 413 (5th Cir. 1954), in which defendants allegedly blocked approval of a new power line by building an unused "spite line," and then misrepresenting to regulators that there was no need for an additional one). The process in this case also fea-

tured "an independent investigation, an open process, and extensive opportunities for error correction." Pet. App. 19a. Petitioner was the party requesting state action, and was able to challenge the representations and threats made by its opponents. As the court of appeals pointed out (*id.* at 18a & n.6), it is not clear whether the Board's decision depended on the alleged misrepresentations. And there is no indication that petitioner ever sought clarification of that point, or asked the Board to reconsider and reverse its decision on grounds of fraud. Petitioner accordingly is not well placed to argue that it was "bar[red] from meaningful access to adjudicatory tribunals," or that respondents effectively "usurp[ed]" the legitimate public "decisionmaking process." *California Motor Transp.*, 404 U.S. at 512.

As we have explained (see pp. 14-16 *supra*), there is no direct conflict among the circuits on the question presented here, and any apparent divergence in the reasoning of the lower courts does not require immediate review by this Court. Because the question is difficult, the number of potentially relevant factual variables large, and the present appellate authority sparse and somewhat dated, we believe that review by this Court should await the illumination of further experience with such claims in the courts of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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