NO. 15-111

IN THE

Supreme Court of the United States

ZWICKER & ASSOCIATES, P.C., *ET AL.*,
Petitioners,

v.

DAWSON W. WISE,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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INTRODUCTION

In *Heintz v. Jenkins*, 514 U.S. 291, 299 (1995), this Court held that the Fair Debt Collection Practices Act "applies to attorneys who 'regularly' engage in consumer-debt-collection activity, even when that activity consists of litigation." Although Zwicker & Associates indisputably fits that description, it contends that its demands to Ohio consumers for attorneys' fees—contrary to settled Ohio law—were immune from FDCPA liability precisely *because* Zwicker is comprised of attorneys engaged in consumer-debt-collection litigation.

Zwicker seeks refuge in the *Noerr-Pennington* doctrine, a statutory-construction tool developed by this Court to prevent broad antitrust liability for those who petition the government. But no precedent in the nearly forty years since the FDCPA's enactment holds that the doctrine applies in this context. Absent any FDCPA cases, Zwicker claims a conflict with *Sosa v. DirecTV*, 437 F.3d 923 (9th Cir. 2006). *Sosa*'s analysis, however, concerns the uniquely broad RICO statute. And every court in the Ninth Circuit to decide the issue after *Sosa* has held that *Noerr-Pennington* does not undermine the FDCPA's detailed regulation of debt-collection litigation.

Even if this Court wished to explore the *Noerr-Pennington* doctrine's application to the FDCPA, this case—a narrow, factbound dispute over whether Ohio or Utah law governs a credit-card agreement—is an unsuitable vehicle. The decision below touched on *Noerr-Pennington* in a single footnote, and the parties spent less than five pages combined on the issue in the court below. In any event, it is far from clear that the question presented will have any bearing on the outcome of this case. Further review is unwarranted.

STATEMENT

1. Respondent Dawson Wise, like many Americans, received a credit-card offer in the mail from American Express Centurion Bank (AmEx). Pet. App. 4a. By "keeping and using the credit card," Wise accepted the terms of the accompanying credit-card agreement. *Id.*

After Wise defaulted on his credit-card debt, AmEx enlisted petitioner Zwicker & Associates, P.C.—"a corporation specializing in debt collection"—to collect the debt. *Id.* 26a. "Two attorneys at the firm, Derek Scranton and Anne Smith, contacted Wise and demanded payment on the debt, as well as attorney's fees for their collection activities." *Id.* 5a. Zwicker also filed suit on behalf of AmEx in the Ohio Court of Common Pleas in Summit County, seeking a recovery of about $40,000 plus interest, "plus attorney fees." *Id.* 44a.

But "'Ohio law prohibit[s] creditors from recovering attorney's fees in connection with the collection of a consumer debt.'" *Id.* 31a (quoting *Barany-Snyder v. Weiner*, 539 F.3d 327, 332 (6th Cir. 2008)). Wise therefore filed this lawsuit in federal court against Zwicker and the two attorneys, on behalf of consumers who had, like Wise, received numerous, unlawful demands for attorney's fees. *Id.* 6a. Specifically, Wise alleged that, "[b]oth before and after filing state court complaints," respondents made "verbal and/or written demands . . . claiming that the creditors that they represented would be entitled to attorney fees" incurred while collecting consumer debts. Compl. 3. Zwicker demanded attorney fees both "outside the formal proceedings of state court," Compl. 4, and in the prayer for relief in its state court complaints. *Id.* 5a, 44a.

These demands, Wise contended, misled consumers in violation of the federal Fair Debt Collection Practices

Act and the Ohio Consumer Sales Practices Act, Ohio's state-law analogue. As relevant here, Wise alleged that, by unlawfully demanding attorney's fees, Zwicker (1) falsely represented the amount of Wise's and other Ohio consumers' debt, and the compensation Zwicker was entitled to receive in collecting that debt, in violation of 15 U.S.C. §§ 1692e(2)(A) and 1692e(2)(B); and (2) attempted to collect an amount in excess of what Wise and other Ohio consumers lawfully owed, in violation of 15 U.S.C. § 1692f(1). Compl. 4–5.

2. Zwicker moved for judgment on the pleadings, arguing that Wise was bound by a provision in the credit-card agreement—an agreement Wise had neither signed nor acknowledged—that stated: "You agree to pay all reasonable costs, including reasonable attorneys' fees, incurred by us [] in connection with the collection of any amount due on your Account." Pet. App. 5a. Zwicker further contended that Ohio's clear prohibition on personal-debt-collection attorney's fees did not apply; instead, it argued that Utah law governed any disputes arising from the agreement.[1]

The district court granted Zwicker's motion for judgment on the pleadings. *Id.* 6a. Applying "contract choice of law principles" to the facts of this case, the

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[1] In support of that position, Zwicker pointed to the following provision in the credit-card agreement:

> This Agreement and your Account, and all questions about their legality, enforceability and interpretation, are governed by the laws of the State of Utah (without regard to internal principles of conflicts of law), and by applicable federal law. We are located in Utah, hold your Account in Utah, and entered into this Agreement with you in Utah.

Id. 4a–5a.

court determined that Utah law governed the credit-card agreement. *Id.* 33a, 37a. And, because Utah law—in contrast to Ohio law—"explicitly provides for attorney fees in connection with consumer debt," the court concluded that Wise failed to state a claim for relief under the FDCPA and Ohio law. *Id.* 31a, 38a.

"Having disposed of [Wise's] FDCPA claims on the basis of contract interpretation," the district court expressly declined "to address the *Noerr-Pennington* doctrine." *Id.* 38a n.11.

3. Wise appealed to the Sixth Circuit, arguing that the district court employed a flawed choice-of-law analysis, and that Ohio law applied. His opening brief did not mention the *Noerr-Pennington* doctrine.

In response, Zwicker spent most of its brief defending the district court's choice-of-law analysis. *See* Zwicker CA6 Br. 6–20. Zwicker peripherally raised the *Noerr-Pennington* defense as an alternative ground for affirmance, analyzing its applicability here in about one page. *Id.* 22–23. And Zwicker acknowledged that the district court had "not addressed" this defense below. *Id.* 20. Wise contended in his reply brief that the Sixth Circuit, like the district court, should refuse to address the issue; he offered no further substantive argument. Wise CA6 Reply Br. 27, 29.

4. The Sixth Circuit reversed the district court's judgment as to the FDCPA claims, holding that "the pleadings do not resolve the question of which law would govern the attorney's-fee question." Pet. App. 4a. Recognizing that "[t]he question presented is whether the Summit County Common Pleas Court would have applied Ohio or Utah law," the court canvassed "Ohio and Sixth Circuit precedents shed[ding] light on the appropriate application of the Restatement [on Conflict of

Laws]," and articulated "primary considerations" to determine which state had a greater interest in the dispute for choice-of-law purposes. *Id.* 11a, 15a. The Sixth Circuit concluded that "there is not enough evidence . . . to determine whether Ohio has a materially greater interest than Utah." *Id.* 15a. Given that consideration of the Restatement's conflict-of-law principles "requires a sensitive, fact-specific analysis," the court remanded for "a careful examination of the contacts of each state"—and to allow Wise to "provide answers to many of the unresolved [factual] questions," either by an affidavit or through "limited discovery." *Id.* 19a–21a.

At the conclusion of its lengthy choice-of-law discussion, the Sixth Circuit touched on Zwicker's *Noerr-Pennington* defense in a single footnote. *See id.* 21a n.5. Recognizing that this Court held in *Heintz v. Jenkins*, 514 U.S. 291 (1995) that "[t]he FDCPA specifically included lawyers and litigation activities within its purview," the court stressed that Zwicker "present[ed] no cases in which a court has applied the *Noerr-Pennington* doctrine to FDCPA claims." Pet. App. 21a n.5. The court also refused to entertain Zwicker's attempt to create "a special protection for representations and demands made only in a complaint's prayer for relief," observing that, in any event, "Wise [had] pled that [Zwicker] demanded attorney's fees in contexts outside the litigation." *Id.*

5. Zwicker sought rehearing *en banc* on the question whether statements in its prayer for relief are immunized from FDCPA liability under the *Noerr-Pennington* doctrine. For the first time, Zwicker also contended that "communications incidental to the state court suit"—such as its attorneys' fees demands before and after litigation—triggered protection under the *Noerr-*

Pennington doctrine. Zwicker CA6 Pet. for Rehearing 2, 14–15. The Sixth Circuit denied Zwicker's petition without comment; no judge requested a vote.

REASONS FOR DENYING THE WRIT

I. There is no split.

Zwicker does not identify a split of authority on any of its three questions presented. Because no precedent in the nearly forty years since Congress enacted the FDCPA holds that the *Noerr-Pennington* doctrine applies in this context, this Court's review is unwarranted.

A. There is no precedent applying the *Noerr-Pennington* doctrine to FDCPA claims.

On the narrow question whether "the First Amendment . . . and the *Noerr-Pennington* Doctrine apply to a prayer for relief in a state court complaint so as to provide a defense to a suit under the [FDCPA]," Pet. *i*, Zwicker does not even attempt to assert a conflict. *See id.* 11–16. And for good reason. Every court that has addressed this question has rejected applying the *Noerr-Pennington* doctrine to FDCPA claims. *See, e.g.*, *Hartman v. Great Seneca Fin. Corp.*, 569 F.3d 606, 615–16 (6th Cir. 2009); *Consumer Fin. Prot. Bureau v. Frederick J. Hanna & Assocs., P.C.*, No. 1:14-CV-2211, 2015 WL 4282252, at *11– *13 (N.D. Ga. July 14, 2015); *Fritz v. Resurgent Capital Servs., LP*, 955 F. Supp. 2d 163, 175–76 (E.D.N.Y. 2013); *Basile v. Blatt, Hasenmiller, Leibsker & Moore, LLC*, 632 F. Supp. 2d 842, 845–46 (N.D. Ill. 2009); *see also Pepper v. Routh Crabtree, APC*, 219 P.3d 1017, 1020–23 (Alaska 2009). The Sixth Circuit's decision below follows this unbroken line of precedent.

Zwicker's only support is an unpublished, nonprecedential opinion, *Satre v. Wells Fargo Bank, NA*, 507 Fed. App'x 655 (9th Cir. 2013). But, in *Satre*, the

Ninth Circuit concluded that appellee Weschler—an attorney representing the defendant in an action to enjoin a foreclosure sale—was "immune from FDCPA liability under the *Noerr–Pennington* doctrine because the [plaintiffs'] factual allegations . . . failed to establish that Wechsler . . . was a 'debt collector'" within the meaning of the statute. *Id.* (citing 15 U.S.C. § 1692a(6)). That is, although *Satre* purported to rely on the *Noerr-Pennington* doctrine, it held only that the attorney-defendant was not covered by the FDCPA's definition of "debt collector." It said nothing about the applicability of the *Noerr-Pennington* doctrine to misrepresentations made by attorneys that—as is the case here—indisputably qualify as "debt collectors" under the FDCPA. *See* Pet. App. 26a n.1 ("The parties do not dispute that the [FDCPA] applies to [Zwicker]."). *Satre*, which is not binding on any court, casts no doubt on the lower courts' unanimous consensus that the *Noerr-Pennington* doctrine does not apply in the FDCPA context.

B. The Ninth Circuit's decision in *Sosa* does not conflict with the decision below.

Zwicker next argues that the decision below conflicts with *Sosa v. DirecTV*, 437 F.3d 923 (9th Cir. 2006). Specifically, Zwicker contends (at 19) that, "[s]o far as any alleged pre-suit or post-suit requests for attorney's fees are concerned, the Ninth Circuit has found that these communications would be protected by the *Noerr-Pennington* doctrine as they were incidental to the litigation." But Zwicker misreads *Sosa*.

Sosa's analysis was closely tied to the statutory context in which it arose. It concerned the question "whether [a defendant] is immune from liability under RICO, [the Racketeer Influenced and Corrupt Organizations

Act, 17 U.S.C. § 1961 *et seq.*], as interpreted in light of the *Noerr-Pennington* doctrine." 437 F.3d at 926. "Under the *Noerr–Pennington* rule," the court explained, "we must construe federal statutes so as to avoid burdening conduct that implicates the protections afforded by the Petition Clause unless the statute clearly provides." *Id.* at 931. That is, "the principal application of the *Noerr-Pennington* doctrine is as a rule of statutory construction." *Id.* at 932 n.6.

The Ninth Circuit ultimately construed RICO to exempt the defendant's pre-litigation settlement demands from liability. In so doing, the court stressed that "RICO's general definition of racketeering activity does not in terms clearly reach the conduct at issue here," and that the "particular RICO predicates alleged here . . . [s]imilarly . . . do not unambiguously reach demands to settle reasonably based legal claims." *Id.* 939–40. "RICO does not unambiguously include the presuit demand letters in this case within the scope of conduct it enjoins," the court concluded, "so we decline to give it such a broad construction." *Id.* at 942.

Sosa's analysis and holding were thus expressly premised on the breadth of the RICO statute and its susceptibility to a narrowing construction. Zwicker's claim that the Ninth Circuit, if faced with the question, would apply identical reasoning to the disparate, highly detailed FDCPA context finds no support in *Sosa*.[2] This

[2] Aside from the disparate statutory contexts, *Sosa* is different from this case in another critical respect. In *Sosa*, the plaintiffs sought entirely to preclude the defendant from sending pre-litigation settlement demands to consumers, contending that the demands themselves violated RICO. Here, by contrast, Wise objects only to Zwicker's specific demands for attorneys' fees, not its broad-

(continued …)

is confirmed by the fact that every district court within the Ninth Circuit that has addressed the issue after *Sosa* has held that the *Noerr-Pennington* doctrine does not apply to FDCPA claims.[3] Zwicker fails even to mention these cases, which disprove the claimed split. As one federal district court in California explained: "*Sosa* supports the conclusion that the *Noerr-Pennington* doctrine does not bar this [FDCPA] litigation." *Sial*, 2008 WL 4079281, at *4. "The doctrine," the court continued, "requires courts to 'construe federal statutes so as to avoid burdening conduct that implicates the protections afforded by the Petition Clause unless the statute clearly provides otherwise.'" *Id.* (quoting *Sosa*, 437 F.3d at 931). And—as this Court held in *Heintz*—"the FDCPA 'clearly provides' that the Act covers some petitioning conduct"; "[Zwicker's] argument based on *Sosa* therefore lacks merit." *Id.*

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er settlement demands. Zwicker remains free to initiate lawsuits to collect debt from consumers on behalf of AmEx. Thus, even under *Sosa*'s test, it is difficult to see how Wise's "[FDCPA] lawsuit burdens [Zwicker's] petitioning activities." 437 F.3d at 932.

[3] *See, e.g.*, *Weigand v. Cheung*, No. 2:14-CV-00278, 2015 WL 621742, at *3 (E.D. Wash. Feb. 4, 2015); *Truong v. Mountain Peaks Fin. Servs., Inc.*, No. 3:12-CV-01681, 2013 WL 485763, at *7 (S.D. Cal. Feb. 5, 2013) (noting that "many courts within the Ninth Circuit have refused to apply . . . the *Noerr–Pennington* doctrine to cases" involving FDCPA claims); *Gerber v. Citigroup, Inc.*, No. CIV S07-0785, 2009 WL 248094, at *4 (E.D. Cal. Jan. 29, 2009) ("[T]his court is unpersuaded that the *Noerr-Pennington* doctrine bars actions under the FDCPA."); *Cassady v. Union Adjustment Co.*, No. C07-5405, 2008 WL 4773976, at *6 (N.D. Cal. Oct. 27, 2008) ("[T]he holding of *Heintz* strongly suggests that the *Noerr-Pennington* doctrine does not apply to FDCPA actions."); *Sial v. Unifund CCR Partners*, No. 08CV0905, 2008 WL 4079281, at *2–*5 (S.D. Cal. Aug. 28, 2008). None of these decisions was reversed on appeal.

C. There is no conflict on the third question presented.

Lastly, Zwicker asserts (at 19–20) that the decision below creates a conflict with the Seventh and Eighth Circuits over whether FDCPA liability can arise from statements in communications to a state court.

Contrary to Zwicker's assertion, the Eighth Circuit has adopted a "case-by-case" approach that mirrors that of the Sixth Circuit. In *Hemmingsen v. Messerli & Kramer, P.A.*, 674 F.3d 814, 818–19 (8th Cir. 2012), the Eighth Circuit rejected the district court's "broad ruling" that false statements made during litigation are never actionable under § 1692e—the same position advocated by Zwicker. Instead, recognizing that representations made in state court documents "routinely come to the consumer's attention and may affect his or her defense of a collection claim," the court explained that "a case-by-case approach" was appropriate. *Id.* This approach is necessarily tailored to the type of conduct, in light of "the diverse situations in which potential FDCPA claims may arise during the course of litigation." *Id.*[4]

Any alleged conflict with the Seventh Circuit is similarly illusory. In *O'Rourke v. Palisades Acquisition XVI, LLC*, 635 F.3d 938, 939 (2011), the debt collector had attached a false credit-card statement to its state-court complaint. "Unlike [in] most lawsuits under the Act, [the

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[4] The Eighth Circuit nevertheless dismissed the plaintiff's FDCPA claims in *Hemmingsen*—but not because they concerned statements in court communications. Rather, the court concluded that the defendant was not liable because the "[t]he state court judge obviously was not misled," and "[n]either [the plaintiff] nor her attorneys took any action in reliance upon the accuracy of [defendant's] fact representations." *Id.* at 819.

plaintiff in *O'Rourke*] claimed that the attachment was actionable because it was meant to mislead the state court judge." *Id.* The plaintiff did not argue on appeal that "the attached statement would have misled the unsophisticated consumer." *Id.* at 940–41. In other words, the question presented in *O'Rourke* was "whether the Act covers filings that are meant to deceive a state court judge." *Id.* at 941 n.1.

That the Seventh Circuit answered that question in the negative does not mean that it conflicts with the decision below, which presents an entirely different question. Here, there is no allegation that Zwicker sought to mislead the district judge by its demands for attorney's fees. Rather, Wise alleged that such demands "falsely represented the . . . amount . . . of [Wise's] debt," and constituted "attempt[s] to collect an amount in excess of what [Wise] . . . lawfully owed." 15 U.S.C. §§ 1692e, 1692f(1). The Seventh Circuit stated in *O'Rourke* that "the [Act's] prohibitions are clearly limited to communications *directed to the consumer* and do not apply to state judges." 635 F.3d at 41 (emphasis added). That is the case here.

Finally, Zwicker fails to mention that other federal courts of appeals have also held—like the Sixth Circuit here—that "litigation activities, *including* formal pleadings, are subject to the FDCPA." *Sayyed v. Wolpoff & Abramson*, 485 F.3d 226, 231 (4th Cir. 2007); *see also Goldman v. Cohen*, 445 F.3d 152, 155 (2d Cir. 2006) (holding that "a consumer debt collector's initiation of a lawsuit in state court seeking recovery of unpaid consumer debts is an 'initial communication' within the meaning of the FDCPA").

* * * *

In short, Zwicker has not shown that the decision below conflicts with those of any other courts on any of

the questions presented—let alone that it creates a conflict worthy of this Court's review. For this reason alone, the petition should be denied.

II. This case is a poor vehicle to address the questions presented.

Even if there were a circuit conflict warranting this Court's review (which there is not), this case would be an exceptionally bad vehicle to explore the questions presented.

1. The decision below is almost entirely focused on the factbound application of conflict-of-laws principles under state law. Zwicker's petition, however, challenges a single six-sentence footnote that rejected Zwicker's *Noerr-Pennington* defense out of hand, primarily because Zwicker had "present[e]d no cases"—as noted, there are none—"in which a court has applied the *Noerr-Pennington* doctrine to FDCPA claims." Pet. App. 21a n.5. That the Sixth Circuit barely passed on Zwicker's *Noerr-Pennington* argument is unsurprising. The district court specifically declined to address it. Pet. App. 38a n.1. And the parties hardly discussed the issue in their briefs. Zwicker itself devoted only three pages of its Sixth Circuit brief to the *Noerr-Pennington* doctrine—and only one page analyzing the applicability of the doctrine here.

Thus, the *Noerr-Pennington* questions are, at best, peripheral to this routine and factbound dispute over the choice of law governing a consumer contract. If, for some reason, the Court wishes to explore questions concerning the scope of the *Noerr-Pennington* doctrine in new statutory contexts, it should review a case in which those questions have been fully briefed by the parties and thoroughly analyzed by the lower courts. This is not such a case.

2. Zwicker has also waived the third question presented. Zwicker never raised below—either in its Sixth Circuit brief or in its petition for rehearing *en banc*—the question whether "the FDCPA appl[ies] to attorneys' communications with courts." Pet. *i*.

Nor did the Sixth Circuit pass on this question. True, it observed, this Court's decision in *Heintz* held that "[t]he FDCPA specifically includes lawyers and litigation activities within its purview." Pet. App. 21a n.5. But the Sixth Circuit did not rest its rejection of the *Noerr-Pennington* doctrine on Zwicker's misrepresentations in its complaints, because "Wise pled that [Zwicker] demanded attorney's fees in context outside the litigation." *Id.*[5] The question whether the FDCPA applies to communications to the court, then, was not resolved. Thus, this Court should follow its "ordinary course" and "not decide questions neither raised nor resolved below." *Glover v. United States*, 531 U.S. 198, 205 (2001).

3. In any event, this Court should deny review here because no question presented is outcome determinative.

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[5] Zwicker asserts (at 13), without reference to the record, that "no such instance" took place. But Wise alleged in his complaint that Zwicker "sought . . . attorney fees outside of the formal proceedings," on numerous occasions "[b]oth before and after filing state court complaints." (Complaint ¶¶ 8, 11–12.) And the Sixth Circuit acknowledged that two attorneys at Zwicker "contacted Wise and demanded payment on the debt, as well as attorney's fees for their collection activities." Pet. App. 5a. In any event, in a case arising from a motion to grant judgment on the pleadings—just as in a case arising from a motion to dismiss—this Court "accept[s] as true the allegations of the complaint." *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1705 (2012); *see Postal Tel. Cable Co. v. City of Newport, Ky.*, 247 U.S. 464, 474 (1918).

Zwicker admits that the answers to these questions only matter if the district court "decides that Utah law does not apply," a factbound determination that the court has yet to make. Pet. 3. If the court—as it did before—concludes that Utah law applies, Zwicker's demands for attorney's fees may not violate the FDCPA. Short-circuiting the normal litigation process here by granting the petition would result in this Court being asked to give, in effect, an advisory opinion regarding a novel extension of the *Noerr-Pennington* doctrine to the FDCPA's statutory context.

The questions presented are not outcome determinative in another respect. The Sixth Circuit suggested that, even if the *Noerr-Pennington* rule did apply generally to the claims here, Zwicker's statements fell within the exception for "'sham petitions, baseless litigation, or petitions containing intentional and reckless falsehoods.'" Pet. App. 21a n.5 (quoting *Hartman*, 569 F.3d at 616); *see Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60–61 (1993) ("outlin[ing] a two-part definition of *Noerr-Pennington*'s 'sham' [exception]"). And, aside from its assertion that "[t]his case does not involve 'sham petitions'" and the like, Pet. 13, Zwicker does not raise in this Court any questions as to the applicability of the sham exception.

III. The Sixth Circuit's decision is correct.

1. The Sixth Circuit correctly concludes that the *Noerr-Pennington* doctrine does not immunize from FDCPA liability debt collectors who, like Zwicker, mislead consumers in the course of litigation. The position that Zwicker advocates would fundamentally unmoor the *Noerr-Pennington* doctrine from its foundations and undermine this Court's FDCPA precedent.

a. This Court first developed the *Noerr-Pennington* doctrine in the antitrust context, in two 1960's decisions extending Sherman Act immunity to parties engaged in lobbying the legislative and executive branches. *See United Mine Workers v. Pennington*, 381 U.S. 657, 669–70 (1965); *E. R.R. Presidents' Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136–38 (1961). Still in the antitrust context, the Court later extended the *Noerr-Pennington* rule to petitions directed "to administrative agencies . . . and to courts," explaining that "[t]he right of access to the courts is indeed but one aspect of the right of petition." *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972).

The *Noerr-Pennington* rule "reflected th[is] Court's effort to reconcile the Sherman Act with the First Amendment Petition Clause." *Sosa*, 437 F.3d at 929. Holding that private action seeking to persuade public officials to adopt anticompetitive policies violated the Sherman Act, this Court concluded, "would impute to the [] Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act." *Noerr*, 365 U.S. at 137. At bottom, then, the *Noerr-Pennington* doctrine developed "as a judicial gloss on the Sherman Act," under which the Court construed the Act so as to not deprive people of their right to petition. *Borough of Duryea, Pa. v. Guarnieri*, 131 S. Ct. 2488, 2503 (2011) (Scalia, J., concurring in part and dissenting in part); *see Noerr*, 365 U.S. at 139.

Aside from the Sherman Act, this Court has applied *Noerr-Pennington* to only one other statutory context: the National Labor Relations Act. "[A]nalogizing to the antitrust context," the Court held in *BE & K Construction Company v. NLRB* that the NLRB could not "im-

pos[e] liability under the NLRA" for "reasonably based but unsuccessful suits filed" to retaliate against workers for exercising their protected labor rights. 536 U.S. 516, 536 (2002). Observing that "there is nothing in the [NLRA's] statutory text indicating that [it] must be read to reach all reasonably based but unsuccessful suits filed with a retaliatory purpose, [this Court] decline[d] to do so." *Id.*

The *Noerr-Pennington* doctrine thus represents a specific mode of statutory interpretation, developed in particular statutory contexts—not the generally applicable constitutional doctrine that Zwicker describes. As Justice Breyer explained in *BE & K*:

> Antitrust law focuses generally upon anticompetitive conduct that can arise in myriad circumstances. Anti-competitively motivated lawsuits occupy but one tiny corner of the anticompetitive-activity universe. To circumscribe the boundaries of that corner does not significantly limit the scope of antitrust law or undermine any basic related purpose.

536 U.S. at 542 (Breyer, J., concurring in part). Similarly, the NLRA is a broad statute governing a vast array of labor practices, much of which has nothing to do with NLRB's regulation of retaliatory lawsuits.

In contrast, the FDCPA is a narrow, highly detailed statute, specifically authorizing consumers to bring claims against misrepresentations and other unfair practices employed by debt collectors to collect debts. *See Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, LPA*, 559 U.S. 573, 577–78, 596–600 (2010). And debt collection often requires some form of court action—from filing a state court complaint to enforcing a default judgment. Unlike in the antitrust or labor contexts, Con-

gress specifically intended and clearly stated that the FDCPA covers collection litigation by lawyers. *See Heintz*, 514 U.S. at 294. Applying *Noerr-Pennington* as Zwicker suggests would gut the FDCPA, exempting from liability the very conduct that Congress sought to declare unlawful.

Zwicker offers no meaningful argument for why—in conflict with the unanimous position of lower courts—the *Noerr-Pennington* doctrine should be extended to the FDCPA. That is because there is none.

b. This Court's decision in *Heintz* all but resolves this case. There, this Court held that the FDCPA "applies to the litigating activities of lawyers," because a "lawyer who regularly tries to obtain payment of consumer debts through legal proceedings" is a "debt collector" within the meaning of the Act. *Heintz*, 514 U.S. at 294. Congress's decision to repeal an earlier FDCPA exemption for lawyers, the Court explained, confirmed that the statue covers "debt-collecting activities of lawyers that consist of litigating." *Id.* at 295.

Zwicker concedes—as it must—that it qualifies as a "debt collector" under the FDCPA. Pet. App. 26a n.1. Yet Zwicker then argues that its demands for unlawful attorneys' fees in its complaints, and before and after filing—that is, in its attempts "to obtain payment of consumer debts through legal proceedings"—are protected from FDCPA liability under the *Noerr-Pennington* doctrine. Accepting this argument would make *Heintz* a dead letter. If the *Noerr-Pennington* rule immunized misrepresentations by attorneys, like Zwicker, during debt-collection litigation, how could the FDCPA apply to "the litigating activities of lawyers," as this Court concluded in *Heintz*? 514 U.S at 294.

Ignoring this Court's clear holding in *Heintz*, Zwicker offers a parade of horribles that will supposedly flow from permitting FDCPA liability for attorney representations in and around litigation. *See* Pet. 15 ("[a]llowing this suit to proceed" would "freeze" a lawyer's "petitioning speech"); *id.* (permitting FDCPA liability will prevent attorneys from "carry[ing[out their ethical duties"); *id.* 16 ("lawyers will face liability for an unsuccessful suit, even when the suits makes no factual representations that are false"). Not only do these concerns lack merit, but they also are the very same concerns this Court rejected in *Heintz* and *Jerman*.

In *Heintz*, for instance, the petitioner contended that, "were the Act to apply to litigating activities, [it] automatically would make liable any litigating lawyer who brought, and then lost, a claim against a debtor." 514 U.S. at 295. Disagreeing with this position, the Court explained that, in light of the FDCPA's exemption for "a bona fide error," § 1692k(c), there was nothing "absurd" about including lawyers' litigation activities within the scope of FDCPA liability. *Id.*

Similarly, in *Jerman*, this Court rejected the petitioner's argument that permitting FDCPA liability for mistaken legal interpretations of the Act's requirements would "have unworkable practical consequences for debt collecting lawyers." 559 U.S. at 596. Indeed, like Zwicker here, the petitioner in *Jerman* asserted that broadly reading FDCPA liability "creates an irreconcilable conflict between an attorney's personal financial interest and her ethical obligation of zealous advocacy on behalf of a client." *Id.* at 597. This Court dismissed such concerns, observing that the FDCPA "contains several provisions that expressly guard against abusive lawsuits," and that attorneys often could find "recourse" in

§1692k(c)'s bona fide error defense. *Id.* at 598–99. And, "[t]o the extent the FDCPA imposes some constraints on a lawyer's advocacy on behalf of a client," this Court explained, "it is hardly unique in our law." *Id.* at 600.

Although Zwicker paints its petition with the gloss of *Noerr-Pennington*, its underlying goal seems to be, in effect, an exemption for debt-collecting lawyers under the FDCPA. This Court has twice before rejected this position, and it should do the same here.

2. Nor does the FDCPA exempt attorneys' communications with courts from its scope. Indeed, Zwicker makes no attempt at defending this position, *see* Pet. 19–20; its entire analysis of the third question presented is limited to asserting a circuit split, which, as discussed above, does not exist.

In any event, the FDCPA's plain language makes clear that the statute encompasses communications to courts. Congress broadly phrased both statutory sections at issue here to cover misrepresentations or unfair practices used to collect any debt, without limitation. *See* 15 U.S.C. § 1692e (prohibiting "any false, deceptive, or misleading representation or means in connection with the collection of any debt); *id.* § 1692f (prohibiting "unfair or unconscionable means to collect or attempt to collect any debt"). And Congress defined "communication" in the FDCPA as "the conveying of information regarding a debt *directly or indirectly* to any person through any medium." *Id.* § 1692a(2) (emphasis added). The FDCPA's broad language indicates that Congress did not intend to carve out court communications.

This understanding is confirmed by the fact that Congress "exempt[ed] formal pleadings from" certain "particularized requirement[s] of the FDCPA." *Sayyed*, 485 F.3d at 231. For example, the Act's requirement that

all communications disclose they are from a debt collector exempts "formal pleading[s] made in connection with a legal action." 15 U.S.C. § 1692e(11). If Zwicker "were correct that conduct in the course of litigation, or even formal pleadings more specifically, were entirely exempt from the FDCPA, [such] express exemption[s] of formal pleadings would be unnecessary." *Sayyed*, 485 F.3d at 231.

And this Court's decision in *Heintz* buttresses these conclusions. As noted, this Court held there that the FDCPA applies to "lawyer[s] who regularly tr[y] to obtain payment of consumer debts through legal proceedings." 514 U.S. at 294. Surely, an important—if not the primary—method by which lawyers attempt to collect debts is by filing debt-collection lawsuits. For this Court to hold that debt-collecting lawyers may be liable under the FDCPA, but then hold that such lawyers are exempt from FDCPA liability for any actions taken in connection with litigation, would be illogical to say the least.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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