No. 11-1275

IN THE

Supreme Court of the United States

SIGMAPHARM, INC.,

Petitioner,

—against—

MUTUAL PHARMACEUTICAL COMPANY, INC., UNITED RESEARCH LABORATORIES, INC., and KING PHARMACEUTICALS, INC.,

Respondents.

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

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES
Cont'd

CASES **PAGE(S)**

STATUTES

OTHER AUTHORITIES

For years, courts and commentators have recognized the existence of a circuit split on the exact issue raised by this case, which is whether courts may properly impose a rule that the class of plaintiffs capable of satisfying the antitrust injury requirement (a necessary prerequisite to any private antitrust action) should generally be limited to consumers and competitors in the restrained market. The degree of attention focused on this issue, both in the circuit courts (Pet. at 2-5) and in the commentary (Pet. at 5 & nn. 2-5), demonstrates its importance. And the amicus brief of prominent academic economists persuasively explains how "the 'consumer-or-competitor rule' that was applied below" results in "a class of technological innovators left vulnerable by being deprived of a private antitrust cause of action." Brief Amici Curiae of David B. Audretsch, et al., at 7 (hereinafter Amicus Brief of Academic Economists).

It is only by misstating the holdings of circuit precedent and ignoring completely all academic commentary that respondents can assert that there supposedly is "no split among the circuits" and that all is "harmonious." Opp. at 1, 17. Respondents evidently would have this Court believe that just about everyone—including respected judges and prominent commentators—is wrong in noting the existence of the circuit split identified by the petition. Indeed, in one extraordinary passage in their opposition brief, the respondents quote the First Circuit's explicit recognition of a circuit split and then assert that the court's "saying it does not make it so." *Id.* at 10 n.1.

It is true of course that saying something does not make it so, but that point is more aptly applied to the respondents' brief in opposition than to the judg-

es of the First Circuit. The claims made in the respondents' brief—specifically the denial of any split in authority and the denial that any circuit applies a rule-based approach to deciding antitrust injury—are contradicted not only by the vast weight of case law and commentary but also by *the respondents' own arguments made below*. In the Court of Appeals, the respondents repeatedly characterized the Third Circuit's law in precisely the way set forth in the petition for certiorari. In this respect, and in numerous other ways, the respondents' brief in opposition proves itself unreliable.

1. *A prior denial of certiorari in an interlocutory appeal provides no reason for denying certiorari in this case.* Respondents begin their reasons for denying certiorari in this case by arguing that "[i]t is worth noting at the outset" that this Court denied certiorari in *Novell, Inc. v. Microsoft Corp.*, 505 F.3d 302 (4th Cir. 2007), *cert. denied*, 552 U.S. 1276 (2008). Opp. at 7. This is an inauspicious start to respondents' arguments in opposition to certiorari.

The problem with the respondents' opening argument is not merely that the cases of this Court, as well as numerous opinions by individual Justices, reject the notion of "according denials of certiorari any precedential value." *Teague v. Lane*, 489 U.S. 288, 296 (1989). *See also Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 94 n. 11 (1983) ("denials of certiorari have no precedential force"); *Stebbing v. Maryland*, 469 U.S. 900, 907 (1984) (Marshall, J., dissenting from the denial of certiorari) (noting that "it is axiomatic that denials of writs of certiorari have no precedential value"); *Walker v. Georgia*, 555 U.S. 979 (2008) (Stevens, J., respecting the denial of the peti-

tion for writ of certiorari) (noting that "Court's denial [of certiorari] has no precedential effect").

The even larger problem with the respondents' argument is that the *Novell* case was *interlocutory. See Novell*, 505 F.3d at 304 & 307 (noting that the case involved appeals from "two interlocutory orders" so that the court of appeals had to grant "leave to appeal" the interlocutory orders under 28 U.S.C. § 1292(b)). Once again, the law of this Court and opinions by individual Justices confirm that the interlocutory status of a case "of itself alone furnishe[s] sufficient ground for the denial" of any petition for certiorari. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). *See also Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in the denial of certiorari) (citing several precedents to confirm that the Court "generally await[s] final judgment in the lower courts before exercising our certiorari jurisdiction").

Thus, the prior denial of certiorari in *Novell* provides no basis for denying certiorari in this case. Indeed, if anything, the existence of a prior petition for certiorari on the issue helps, not hurts, the case for certiorari. This Court frequently denies certiorari to allow further "percolation" of a legal issue in the lower courts. *See* Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. Rev. 681, 698-99 (1984). One important benefit to this "percolation" approach is that, if an issue is truly important and deserving of the Court's attention, the issue will return. The Court can then see that the issue is not going away, and this makes the case for certiorari stronger—as here. Also, the issue may re-

turn to the Court in a better procedural posture, again as is the case here (the Third Circuit's judgment in this case is not interlocutory). And the issue may return with helpful amicus support—again, as is the case here (no amicus briefs were filed to support the petition for certiorari in the *Novell* case, see HTTP://WWW.SUPREMECOURT.GOV/SEARCH.ASPX?FILENAME=/DOCKETFILES/07-924.HTM.

2. *Respondents erroneously conflate antitrust injury with antitrust standing.* Respondents' key argument for resisting certiorari is their claim that no circuit applies a consumer-or-competitor rule, as purportedly shown by the Third Circuit and other circuits applying a multi-factored balancing test to determine if a person has *standing* to invoke the private antitrust remedy, 15 U.S.C. § 15(a). Yet in making this argument, respondents repeatedly and erroneously conflate the distinct issues of antitrust *injury* and antitrust *standing.* This error is especially apparent in the respondents' discussion of Fifth Circuit law, see Opp. at 11.

The respondents assert that "the Fifth Circuit does not apply a mechanical 'customer or competitor' test, but rather carefully analyzes the relationship between the alleged violation and the plaintiff's claimed injury to determine whether plaintiff has suffered *antitrust injury*." *Id.* at 11 (emphasis added). To support that assertion, respondents cite *Norris v. Hearst Trust*, 500 F.3d 454 (5th Cir. 2007), and argue that "the court did not apply bright-line rule to resolve *antitrust standing*, but rather considered three factors . . . ." *Id.* (emphasis added).

The respondents' switch from "antitrust injury" to "antitrust standing" in describing *Norris* is signifi-

cant. As respondents elsewhere state in their brief (and we agree), this Court's precedents have recognized antitrust injury to be a "necessary, though not sufficient, condition of antitrust standing." Opp. at 8; *see also* Pet. App. at 13a n.8 (having concluded that petitioner did not allege "antitrust injury," Third Circuit held that it need not consider any other antitrust standing factor). *Norris* stated that three additional standing "factors" need be considered only if the plaintiff alleged injury that qualified as "antitrust injury":

> Even a plaintiff injured in his business or property must, in order to sue for damages, show 'antitrust injury,' that is, 'injury of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful.' Finally, *even if the plaintiff meets these requirements,* the court must consider whether he is a 'proper plaintiff' to sue for damages, examining such facts as (1) whether the plaintiff's injuries or their causal link to the defendant are speculative, (2) whether other parties have been more directly harmed, and (3) whether allowing this plaintiff to sue would risk multiple lawsuits, duplicative recoveries, or complex damage apportionment.

Norris, 500 F.3d at 465 (emphasis added) (quoting *McCormack v. National Collegiate Athletic Ass'n*, 845 F.2d 1338, 1341 (5th Cir. 1988)).

After stating this general framework for deciding issues of antitrust injury and antitrust standing, the *Norris* court focused on the issue of antitrust injury and it plainly applied a consumer-or-competitor rule. The court reasoned that the "Plaintiffs are neither consumers (buyers of advertising, or users of adver-

tising such as subscribers) nor competitors (sellers of advertising) in the relevant market," and then immediately concluded in the next sentence that "Plaintiffs have not suffered antitrust injury." *Id.* at 466. The *Norris* decision thus confirms (as accurately stated in the petition) that the Fifth Circuit uses a consumer-or-competitor rule when deciding if a person has suffered "antitrust injury."

Respondents also conflate antitrust injury with antitrust standing on page 9 of their opposition, where they assert that the author of the opinion below "previously 'emphasized that the *antitrust standing* inquiry is not a black-letter rule, but rather, is 'essentially a balancing test comprised of many constant and variable factors'." Opp. at 9 (emphasis added) (quoting *City of Pittsburgh v. West Penn Power Co.*, 147 F.3d 256, 264-65 (3d Cir. 1998)). Nothing in that quote suggests that the Third Circuit applies a similar "balancing" approach in determining *antitrust injury*, which is the relevant issue in this case. *City of Pittsburgh* did not need to address the consumer-or-competitor rule because the plaintiff city *was* a "consumer"—it was "uncontested that the City will be a purchaser of electricity" in the relevant market. 147 F.3d at 266 & n.17.

The respondents' quotation of the "balancing" language in *City of Pittsburgh* is part of a more general mischaracterization of Third Circuit law on antitrust injury. To that issue, we now turn.

3. *The Third Circuit applies a rule-based approach in deciding issues of antitrust injury.* As the petition for certiorari accurately presents (Pet. at i, 2, 9, 12 & 18), Third Circuit precedent restricts the class of plaintiffs capable of satisfying the antitrust

injury requirement to those who happen to be "consumers" or "competitors" in a restrained market when a claimed antitrust injury occurs, or who fall within a narrow, rule-based exception tailored to take account of the facts of one particular decision by this Court, *Blue Shield of Va. v. McCready*, 457 U.S. 465, 482 (1982).

This is hardly just petitioner's view. Based on its reading of Third Circuit precedent, the district court below applied "the competitor-consumer rule" and the rule's narrow "exception . . . where the injury suffered is 'inextricably intertwined' with the wrongdoing." Pet. App. 40a. The "inextricably intertwined" language comes directly from this Court's *McCready* opinion, *see* 457 U.S. at 484, although the Third Circuit sometimes describes this exception with other language ("means by which") drawn directly from *McCready*. *See* 457 U.S. at 479 & Pet. App. 8a.

Before the Court of Appeals, the respondents themselves also embraced this position, arguing that the Third Circuit has "repeatedly held that 'a plaintiff who is neither a competitor nor a consumer in the relevant market does not suffer antitrust injury and therefore lacks standing to bring suit' under the antitrust laws." C.A. Brief for Appellees at 12 (quoting multiple Third Circuit decisions). The respondents recognized an exception based on this Court's decision in *McCready*, *id.* at 13, but they characterized the exception as "narrow." *Id.* at 26. Most importantly, this is exactly how the Third Circuit characterizes its own law, with a general rule that limits "the class of plaintiffs capable of satisfying the antitrust-injury requirement . . . to consumers and competitors in the restrained market and to those whose injuries are

the means by which the defendants seek to achieve their anticompetitive ends." Pet. App. 8a.

Respondent places great weight on the Third Circuit's decision in *Carpet Group Int'l v. Oriental Rug Importers Ass'n, Inc.*, 227 F.3d 62, 76 (3d Cir. 2000), which held that the consumer-or-competitor rule could not be an "absolute" but instead must include an exception to account for *McCready*. But as explained in SigmaPharm's petition, the Third Circuit's more recent decision in *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 320-21 (3d Cir. 2008), declined to extend that exception "beyond cases in which both plaintiffs and defendants are in the business of selling goods or services in the same relevant market." That limitation on the exception means that, under Third Circuit law, the exception to the consumer-or-competitor rule is kept vanishingly small.

In their opposition, respondents have chosen to ignore entirely the Third Circuit's ruling in *Broadcom* even though (i) *Broadcom* expressly limits the Third Circuit's decision in *Carpet Group*; (ii) the petition pointed out the significance of *Broadcom* in accurately defining the rule-based nature of the Third Circuit's approach to antitrust injury (Pet. at 18); and (iii) in the Court of Appeals the respondents themselves relied on *Broadcom* in arguing that SigmaPharm could not establish antitrust injury because "it does not manufacture generic metaxalone." C.A. Brief at 39-40. In sum, the brief in opposition does not provide a candid or accurate statement of Third Circuit law.

4. The circuits are split on the issue. We have already explained how respondents mischaracterize

the law of the Fifth and Third Circuits. The same is true for their treatment of Eighth Circuit law.

In attempting to deny that the Eighth Circuit follows a consumer-or-competitor rule, respondents argue that "[i]n other cases, the Eighth Circuit has relied upon *Associated General* to find that plaintiffs failed to allege antitrust injury where their harm 'was not caused by anticompetitive conduct or an anticompetitive effect of such conduct'." Opp. at 11 (quoting *Fischer v. NWA, Inc.*, 883 F.2d 594, 600 (8th Cir. 1989)). Yet in the very paragraph they quote, the Eighth Circuit's *reasoning* was that the plaintiff airline in that case "d[id] not contend that it was a customer of [the defendant]. . . . Nor was [it] a competitor . . . ." Based on that analysis, the Eighth Circuit then "*conclude*[d] that Fischer's termination was not caused by anticompetitive conduct or an anticompetitive effect of [the defendant's challenged conduct]." 883 F.2d at 600. *Fischer* thus confirms rather than refutes that the Eighth Circuit follows a consumer-or-competitor rule.

Respondents also make no effort whatsoever to refute the multiple commentators identified in the petition (Pet. at 5 nn. 2-5 & 16-17) that discuss (and criticize) the consumer-or-competitor rule and that confirm the circuit split on the issue. Respondents' silence on the legal commentary is easy to understand: No good response can be made.

In sum, nothing in the opposition does anything to undermine the accuracy of petitioner's description of the circuit split, which is summarized at page 23 of the petition.

5. *The split makes a difference to the outcome in this case.* Even respondents' statements confirm the importance of the split to the outcome in this case. For example, according to respondents, petitioner's arguments that it should be considered a market "participant" were rejected below because, under Third Circuit precedent, the facts relied on by SigmaPharm "did 'not appear relevant in the determination of *whether SigmaPharm itself is a competitor in the relevant market*.'" Opp. at 15 (emphasis added; quoting opinion below). Exactly right. That is one of the many places in the opinion below where the effects of the Third Circuit's rule-based approach can be clearly seen.

Respondents' description of *Novell* and *Crimpers Promotions Inc. v. Home Box Office, Inc.*, 724 F.2d 290 (2d Cir. 1983), also reveals the importance of the circuit split. As respondents themselves describe those cases, the courts there found antitrust injury because the plaintiff's product was "specifically targeted" by the defendant or because the plaintiff's injury was "precisely the intended consequence" of the defendant's illegal conduct. (Opp. at 12). Those descriptions fit the allegations in this case exactly. Respondents' illegal agreement was precisely designed to keep off the market "the formulation for a drug that is bioequivalent to SKELAXIN," which, as the Third Circuit noted, is the "crucial" component for new competition that SigmaPharm had produced. Pet. App. 10a.

6. *The split is important.* Respondents make no effort to argue that the issue raised by the petition lacks importance. Indeed, they completely ignore the persuasive amicus brief filed by eminent academic

economists which clearly explains the general importance of the issue.

As the amici economists note, "Petitioner is representative of an important class of technological innovators—in particular, enterprises that specialize in research and then rely on other firms to manufacture, market, and distribute the products resulting from their research." Amicus Brief of Academic Economists at 9. As the amici explain, the Third Circuit's approach to antitrust injury "effectively removes a broad class of innovation-creating firms from access to an antitrust remedy, and makes no economic sense." *Id.* at 10.

The amicus brief also explains why federal antitrust policy has an interest in protecting such nascent market participants (broadly construed) even though they are not (yet) competitors of the market incumbents in the relevant product market: These non-manufacturing, research-oriented firms are the very source of innovations that are frequently crucial to bringing new competition into existing markets. Amici Br. at 11-13. Protecting the integrity of this Schumpeterian "dynamic competition" (*id.* at 16) is fully consistent with modern antitrust policies, and the consumer-or-competitor approach followed by some circuits but not others thwarts those policies by presumptively or completely excluding from antitrust injury the harms that illegal agreements to restrict competition can visit upon this important class of innovative firms. *Id.* at 17-20.

CONCLUSION

The petition should be granted.

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