No. 12-245

In the Supreme Court of the United States

MERCK & CO., INC., PETITIONER

v.

LOUISIANA WHOLESALE DRUG CO., INC., ET AL.

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

REPLY BRIEF FOR THE PETITIONER

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Since the filing of the petition for certiorari in this case, the Federal Trade Commission has filed a petition of its own presenting the same question. See *FTC* v. *Watson Pharmaceuticals, Inc.*, No. 12-416 (filed Oct. 4, 2012). Across the voluminous briefing in the two cases, there is broad consensus that the Court should grant review for two reasons: first, because the courts of appeals are unambiguously divided on the appropriate antitrust standard for evaluating patent settlements that contain a payment from a brand-name drug manufacturer to a generic manufacturer; and second, because the question presented is of exceptional legal and practical significance.

Leaving aside respondents' halfhearted suggestion that the Court should await an even better vehicle before granting further review, the principal disagreements before the Court at this stage involve which case or cases

the Court should hear—and how the briefing and oral argument should be structured. Petitioner respectfully submits that, both to ensure that the Court has before it the full range of legal arguments and factual scenarios in addressing the question presented and to avoid the possibility that an unforeseen problem with one of the cases could prevent the Court from answering it, the Court should grant review in both cases and set them for parallel briefing and oral argument, as discussed in greater detail below. In the alternative, the Court should grant this petition—which affords the Court the opportunity to hear from all of the interested constituents, including the federal government, in a case with a well-developed factual record—and hold the petition in *Watson* pending the disposition here.

1. As a preliminary matter, respondents' suggestion that this Court should delay resolving the circuit conflict (Br. in Opp. 9-12) warrants a brief rebuttal. Notwithstanding the fact that several of the respondents previously sought certiorari themselves in a case decided on summary judgment, see *Louisiana Wholesale Drug Co.* v. *Bayer AG*, cert. denied, 131 S. Ct. 1606 (2011) (No. 10-762), respondents contend that the Court should "await a final judgment *and* a complete record * * * before granting certiorari." Br. in Opp. 10 (emphasis added). Respondents thus seemingly suggest that both this case and *Watson* are "interlocutory" in the relevant sense: this case, because it was resolved on a motion for summary judgment (albeit after extensive discovery and a nine-week trial in prior administrative proceedings), and *Watson*, because it was resolved on a motion to dismiss (with no discovery at all).

That suggestion is deeply flawed. In civil cases, this Court frequently grants review before final judgment where a case presents "some important and clear-cut is-

sue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari." Eugene Gressman et al., *Supreme Court Practice* § 4.18, at 281 (9th ed. 2007). In fact, in recent years, it has been the norm rather than the exception for the Court to grant review before final judgment in antitrust cases. See, *e.g.*, *Pacific Bell Tel. Co.* v. *LinkLine Communications, Inc.*, 555 U.S. 438 (2009); *Credit Suisse Securities (USA) LLC* v. *Billing*, 551 U.S. 264 (2007); *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007); *Illinois Tool Works Inc.* v. *Independent Ink, Inc.*, 547 U.S. 28 (2006); *Texaco Inc.* v. *Dagher*, 547 U.S. 1 (2006); *F. Hoffmann-LaRoche Ltd.* v. *Empagran S.A.*, 542 U.S. 155 (2004); *United States Postal Service* v. *Flamingo Industries (USA) Ltd.*, 540 U.S. 736 (2004); *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004). That is unsurprising, because, as this Court is aware, defendants in antitrust class actions face enormous pressure to settle before trial if the cases are permitted to go forward under an incorrect legal standard—especially given the specter of treble damages. Cf. *Comcast Corp.* v. *Behrend*, No. 11-864 (argued Nov. 5, 2012).

In their brief in opposition, respondents do not dispute that a ruling in petitioner's favor on the applicable legal standard would bring this litigation to an end. Nor do they explain how, in the event this case were to go to trial under the Third Circuit's rule of presumptive invalidity, the record would be meaningfully more "complete" than it already is now. And should the Court leave the Third Circuit's decision undisturbed even for a brief period of time, it would cause chaos in the lower courts—many of which have stayed proceedings in similar law-

suits pending the Court's disposition of this petition[1]—and further disrupt the ability of drug manufacturers to settle ongoing patent litigation. As the FTC correctly notes, the question presented in these cases is "of exceptional importance to one of the largest commercial markets in the United States," 12-416 Pet. 16, and it therefore cries out for immediate review.

2. In its petition in *Watson*, the FTC acknowledges (12-416 Pet. 29) that this case would be an "adequate" vehicle for resolving the question presented. It would be awkward for the FTC to contend otherwise, because the government viewed *this case* as so extraordinarily important as to justify sending the Deputy Solicitor General to argue the case in the court of appeals. See Oral Argument at 10:55, *In re K-Dur Antitrust Litig.* (Nos. 10-2077, 10-2078, 10-2079 & 10-4571) (3d Cir. Dec. 12, 2011) <tinyurl.com/kdurpart1; tinyurl.com/kdurpart2>. In so doing, the government presumably recognized that the legal standard adopted by the Third Circuit—the circuit with jurisdiction over many of the Nation's major pharmaceutical companies—would be particularly significant.

The FTC nevertheless primarily suggests that the Court should grant review only in *Watson*, and not in this case. Petitioner respectfully submits that the more prudent course would be to grant review in both cases, as the FTC suggests in the alternative. As explained below, the two cases are complementary in important respects. But in the event the Court decides it must choose

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[1] See, *e.g.*, *In re Wellbutrin XL Antitrust Litig.*, Civ. Nos. 08-2431 & 08-2433, ECF No. 445 (E.D. Pa. Nov. 7, 2012); *In re Effexor XR Antitrust Litig.*, Civ. Nos. 11-5479 & 11-5661, ECF No. 191 (D.N.J. Oct. 23, 2012); *King Drug Co. of Florence, Inc.* v. *Cephalon, Inc.*, Civ. No. 06-1797, ECF No. 479 (E.D. Pa. Aug. 29, 2012); *In re Cipro Cases I & II*, No. S198616 (Cal. Sept. 12, 2012).

between the cases, this case—which created both the broader circuit conflict on the appropriate legal standard and a specific circuit conflict *on the validity of the very same settlements*—is the superior vehicle. That is true for two primary reasons.

First, this case already involves all of the interested constituents in litigation concerning the validity of patent settlements between drug manufacturers, including private plaintiffs as well as the federal government. See Pet. 18-19. The government has been deeply involved in this case for years: the FTC itself pursued an unsuccessful administrative challenge to the settlements at issue here, and, as noted above, the government participated in proceedings before the Third Circuit. The government has already signaled that it would participate as an amicus curiae in the event that this petition is granted. See 12-416 Pet. 30.[2] And the Court could allot equal argument time to the private plaintiffs and the government if it so desired—as it has done with the parties' consent in other cases in which the government's interest is par-

[2] Granting this petition may be desirable for an additional reason. Prior to 2009, the two government entities with primary responsibility for enforcing the federal antitrust laws, the Department of Justice (DOJ) and the FTC, took radically divergent views on the appropriate antitrust standard for evaluating patent settlements containing payments from brand manufacturers to generic manufacturers—with DOJ even opposing a petition for certiorari filed by the FTC on that question. See *FTC* v. *Schering-Plough Corp.*, cert. denied, 548 U.S. 919 (2006) (No. 05-273). Although DOJ and the FTC filed separate briefs in the court of appeals *in this case*, the Solicitor General implies that DOJ and the FTC now agree—at least on the general principle that "reverse-payment settlements are presumptively anticompetitive." 12-416 Pet. 21 n.6. Granting review in this case would ensure that the Court receives the current views of the United States, not merely those of the FTC.

ticularly acute. See, *e.g.*, *Christopher* v. *SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012).[3]

Second, this case is especially suitable for further review because the case carries with it an extensive factual record that could aid the Court in considering the question presented. To cite just two obvious ways in which the record in this case could be useful, the record contains extensive expert reports in which economists expressed their views on the competitive effects of the settlements being challenged—an issue that will inevitably be a focus at the merits stage. See C.A. App. 1439-1444, 1897-1903, 6020-6023, 6587-6690. And the record also contains extensive testimony concerning the circumstances that led to the settlements at issue—thus shedding light on the manufacturers' motives in agreeing to settlements containing payments from the brand manufacturer to the generic manufacturers. See *id.* at 1650-1652, 1712, 1740-1741. That factual record—well sum-

[3] The generic defendant in this case, Upsher-Smith, opted to file a petition of its own from the Third Circuit's judgment. See *Upsher-Smith Laboratories, Inc.* v. *Louisiana Wholesale Drug Co.*, No. 12-265 (filed Aug. 29, 2012). That petition presents a materially identical question to the other petitions, and the merits arguments Upsher-Smith makes are materially identical to those that Merck made jointly on behalf of both defendants before the Third Circuit. And as the FTC notes (12-416 Pet. 30-31), whereas Upsher-Smith is a party only to one of the settlements at issue in this case, which contains a payment that is arguably supported by independent consideration, Merck is also a party to a settlement with another generic manufacturer, ESI-Lederle, which contains a payment that lacks analogous consideration. See Pet. 7-8. At the same time, as a generic manufacturer, Upsher-Smith offers a distinctive perspective on the question presented. Should the Court decide to grant review in this case, it should grant both petitions if it wishes to hear divided argument from the manufacturers; otherwise, it should grant this petition and hold the petition in *Upsher-Smith*.

marized in comprehensive findings made by the administrative law judge, see 136 F.T.C. 1092 (2002)—would provide helpful insights about how the governing legal regime actually works in practice.

3. In contending that *Watson* is a superior vehicle to this case, the FTC makes four arguments. Each of those arguments is manifestly insubstantial.

First, the FTC contends that the Court "would benefit from the experienced participation that the FTC, represented by the Solicitor General, would offer as a party." 12-416 Pet. 29-30. But that contention is a wash, because the Court could benefit just as much from the participation of the United States as an amicus curiae. In fact, in all but one of the twelve antitrust cases this Court has decided in the last ten years, the government participated as an amicus rather than as a party. See *American Needle, Inc.* v. *National Football League*, 130 S. Ct. 2201 (2010); *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877 (2007); *Weyerhaeuser Co.* v. *Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007); *Volvo Trucks N. Am., Inc.* v. *Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006); p. 3, *supra* (citing additional cases). As the FTC acknowledges (12-416 Pet. 30 & n.8), moreover, the government has frequently participated as an amicus in cases raising the specific question presented here, both in the lower courts and at the certiorari stage in this Court. The FTC does not contend that the government would have an inadequate opportunity to be heard if the Court grants review only in this case and the government participates as an amicus. And in the event that the government wishes to have more than its customary 10 minutes of oral-argument time as an amicus, respondents and the Court would presumably honor that request. See pp. 5-6, *supra*; cf. Br. in Opp. 17.

Second, the FTC contends that *Watson* "arrives with a simpler record," whereas this case is "burdened by a complex [one]." 12-416 Pet. 30. As discussed above, however, that is a poor effort to turn one of this case's virtues into a vice. The FTC does not argue that the well-developed factual record in this case somehow constitutes an impediment, rather than an aid, to resolution of the question presented. To the contrary, the FTC ultimately concedes that the Court may "benefit from briefing on the factual record in [this case]"—and, for that reason, that the Court may wish to grant review in this case as well as *Watson*. *Id.* at 32.[4]

Third, the FTC contends that it is "seek[ing] only declaratory and prospective injunctive relief," whereas respondents in this case are "seek[ing] only retrospective damages relief." 12-416 Pet. 31-32. Again, however, it is hard to see why any open question about how to fix damages would justify a grant in *Watson*, rather than in this case. As respondents correctly point out (Br. in Opp. 17), the petition in this case raises only a question concerning the appropriate legal standard for *liability*. Because liability has not yet been established, there have obviously been no proceedings on damages, and this case

[4] The FTC contends that, in the briefing before the Third Circuit, the parties in this case "addressed at length complex matters of chemistry and patent doctrine" relevant to the generic manufacturers' defense of noninfringement. 12-416 Pet. 31. The parties did so, however, not in addressing the appropriate legal standard, but rather in arguing that they would prevail under a standard that takes into account the objective baselessness of the claims in the underlying patent litigation. See Pet. C.A. Br. 54-66; Resp. C.A. Br. 55-80; Pet. C.A. Reply Br. 29-35. The Third Circuit did not adopt such a standard. But if this Court were to do so—either in this case or in *Watson*—it could leave any open questions concerning the application of the standard to the lower courts in the first instance.

would therefore present no additional issue on damages for the Court to resolve.

Fourth, the FTC contends that *Watson* involves claims of patent invalidity as well as noninfringement, whereas this case involves claims only of noninfringement. 12-416 Pet. 32. To begin with, in the underlying patent litigation in this case, the generic defendants did plead defenses of invalidity as well as noninfringement, even if noninfringement emerged as the favored defense as the litigation unfolded. See Pet. 7. Notably, however, the FTC concedes that the appropriate antitrust analysis should be the same regardless of which defenses were raised in the underlying patent litigation. See 12-416 Pet. 32. Respondents, by contrast, make the additional argument that, even assuming that settlements with payments are ordinarily permissible "when the validity of an admittedly infringed patent is at issue," heightened antitrust scrutiny should apply "when a reverse payment is made to resolve an allegation that a generic product is non-infringing." Br. in Opp. 14. That additional legal argument would be unavailable to the Court if it were to grant review only in *Watson*, rather than in this case.

4. Whatever the competing merits of the two cases as vehicles for the Court's review, the foregoing discussion amply illustrates that the cases complement each other in important respects. This case is a private action alleging unreasonable restraints of trade in violation of Section 1 of the Sherman Act, whereas *Watson* is an FTC enforcement action alleging unfair competition in violation of Section 5 of the FTC Act. It is far from clear that the private plaintiffs in this case and the FTC in *Watson* will advocate precisely the same legal standard; as noted above, the private plaintiffs advance at least one discrete legal argument that the FTC disavows. And although the cases come to the Court with factual records

in varying stages of development, the underlying facts of the two cases differ in respects that may be significant to the analysis.

Accordingly, petitioner agrees with respondents and almost all of the parties in *Watson* that it would be appropriate for the Court to grant review in both cases. Indeed, that would be the more prudent course, in order to avoid the possibility that an unforeseen problem with one of the cases would delay resolution of the circuit conflict. Should the Court grant review in both cases, it should set the cases for parallel briefing and oral argument. If the Court wishes to hear divided argument in either of the two cases, it should set the cases for back-to-back argument and allot a total of two hours of argument time.

To avoid undue repetition of the arguments across the two cases, however, petitioner also agrees with respondents that it would be appropriate to set the cases for parallel briefing and oral argument but to abbreviate the time for argument, as the Court did earlier this Term in *Ryan* v. *Gonzales*, No. 10-930, and *Tibbals* v. *Carter*, No. 11-218. Should the Court decide to take that approach, it should grant this petition and the FTC's petition in *Watson* and allot the time for oral argument as follows: 20 minutes to petitioner in *Merck*; 20 minutes to respondents in *Merck*; 20 minutes to the FTC in *Watson*; and 20 minutes to respondents in *Watson*. It would be unnecessary further to divide the argument time, or to realign the parties, unless the Court wishes to allot additional argument time to the United States; any amici could simply file a single brief in either case. In petitioner's view, that approach suitably balances the need to ensure that the interested parties have an adequate opportunity to be heard with the desire to have a streamlined presentation that aids the Court in its resolution of

the question presented—an exceptionally important one for the pharmaceutical industry and for the American economy.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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