No. 26-1473

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CAREFIRST OF MARYLAND, INC.; GROUP HOSPITALIZATION AND MEDICAL SERVICES, INC.; CAREFIRST BLUECHOICE, INC., on behalf of themselves and all others similarly situated,
Plaintiffs-Appellees,

v.

AMGEN INC.; IMMUNEX CORPORATION; AMGEN MANUFACTURING LIMITED LLC,
Defendants-Appellants.

On Appeal from the United States District Court for the Eastern District of Virginia
No. 2:24-cv-00484 (Hon. Arenda L. Wright Allen)

BRIEF OF THE FEDERAL TRADE COMMISSION AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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INTRODUCTION AND SUMMARY

Most acquisitions and licensing arrangements for patent rights or patent applications simply transfer rights from one party to another without changing overall competitive conditions. But courts have long recognized that acquiring a patent can violate the antitrust laws if it increases the purchaser's market power. This concern is particularly acute when an acquisition or license transfers rights between actual or potential competitors with intellectual property ("IP") covering the same product. The Federal Trade Commission ("FTC") and Department of Justice ("DOJ") routinely review acquisitions of, or exclusive licenses to, patents and patent applications to screen for such anticompetitive effects.

This interlocutory appeal threatens to upend that long-settled framework. Defendants Amgen, Inc., Immunex Corporation, and Amgen Manufacturing Limited LLC (collectively, "Amgen") acquired exclusive rights to patents and patent applications from a potential competitor, extending Amgen's monopoly on the drug Enbrel (etanercept) by fifteen years. The district court correctly rejected Amgen's arguments that (1) acquisitions of patent *applications*—as opposed to issued patents—should be *per se* legal under the antitrust laws, and (2) this private commercial transaction should be shielded under the *Noerr-Pennington* doctrine because Amgen subsequently prosecuted the patent applications and sued in court to enjoin competitors from the market.

"It is well settled that exemptions from the antitrust laws are to be narrowly construed." *Grp. Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979). Amgen's novel and sweeping arguments find no support in case law and, if accepted, would pose a substantial threat to competition.

First, acquisitions of patent applications are not categorically immune from antitrust scrutiny. The acquisition of IP rights indisputably can constitute anticompetitive conduct. And there is no meaningful antitrust distinction between the acquisition of a patent and the acquisition of a patent application: both can allow monopolists to maintain their monopoly power through some basis other than competition on the merits. In fact, some aspects of patent applications create anticompetitive concerns that issued patents do not; they give a monopolist more flexibility to seek to tailor the exclusionary scope of the patent to increase its monopoly.

Second, the acquisition of a patent application is not protected under *Noerr-Pennington*. Amgen's acquisition was a private commercial transaction, and any subsequent petitioning of the U.S. Patent and Trademark Office ("USPTO") or the district court was a separate step that merely maximized the value of the assets it acquired. While *Noerr-Pennington* may protect Amgen's petitioning activity, that protection does not attach to prior conduct that maintains monopoly power through anticompetitive means.

INTEREST OF AMICUS CURIAE

The FTC promotes competition and protects consumer welfare through enforcement of the federal antitrust laws. *See* 15 U.S.C. §§ 41 *et seq*. In that capacity, it has issued staff reports addressing the appropriate scope and likely impact of antitrust exemptions such as *Noerr-Pennington*,[1] and has filed amicus curiae briefs in similar cases.[2]

The FTC also reviews patent acquisitions and exclusive patent licenses under the Hart-Scott-Rodino (HSR) Act, which requires companies to provide advance notice of large mergers and acquisitions. The FTC has issued guidance and brought cases related to the intersection of patents and the enforcement of antitrust laws.[3]

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[1] *See, e.g.*, FTC Office of Policy Planning, *Enforcement Perspectives on the* Noerr-Pennington *Doctrine: An FTC Staff Report* (2006), https://tinyurl.com/43erfw7p; FTC Office of Policy Planning, *Report of the State Action Task Force* (Sept. 2003), https://tinyurl.com/ysvjmxrt.

[2] *See, e.g.*, *Intell. Ventures I LLC v. Cap. One Fin. Corp.*, No. 18-1367 (Fed. Cir. May 11, 2018), Dkt. 41; *Amphastar Pharms., Inc. v. Momenta Pharms., Inc.*, No. 16-2113, Doc. 00117081683 (1st Cir. Nov. 7, 2016).

[3] *See, e.g.*, U.S. DOJ & FTC, *Antitrust Guidelines for the Licensing of Intellectual Property* (Jan. 12, 2017), https://www.justice.gov/atr/IPguidelines/dl; *FTC v. Actavis, Inc.*, 570 U.S. 136 (2013); *FTC v. AbbVie, Inc.*, 976 F.3d 327 (3d Cir. 2020).

BACKGROUND

This case concerns Amgen's patent rights for its biologic drug Enbrel. Immunex Corporation ("Immunex") obtained a series of patents covering Enbrel's active ingredient, etanercept. JA0241–0242. In 1998, Immunex launched Enbrel in the United States to treat inflammatory diseases like rheumatoid arthritis. JA0242.

F. Hoffman-La Roche ("Roche"), however, had already described etanercept in its own patent applications, which predated Immunex's applications; as a result, Roche had a priority right to the technology Immunex used to create the drug. JA0237–0240, JA0243. Immunex obtained a non-exclusive license to the relevant patents from Roche. JA0238–0239, JA0243. Roche retained the ability to commercialize its own version of the drug or license the patents to another company seeking to develop a competing version. JA0223–0224.

Enbrel proved to be a blockbuster drug. JA0244-0245. In large part due to Enbrel's commercial success, Amgen acquired Immunex. JA0246–0247. Amgen promptly took over marketing Enbrel, with the key patents for the drug set to expire in 2012. JA0250–0251.

Seeking to extend its exclusivity beyond 2012, Amgen restructured Immunex's 1998 license agreement with Roche.[4] JA0251. Under the 2004

[4] The restructuring deal was submitted to the FTC, which granted early termination of the HSR waiting period. Early termination merely reflects that "neither [the FTC (Continued…)

restructured agreement, Amgen obtained *exclusive* rights to the etanercept patent family—including control over the prosecution of two pending Roche patent applications—as well as the ability to sue companies seeking to market etanercept biosimilars.[5] JA0252–0253.

Those two pending patent applications proved critical to Amgen extending its monopoly over Enbrel. The USPTO issued the patents in 2011 and 2012, giving Amgen exclusive rights to patents covering Enbrel through 2029. JA0257–0258. Amgen then used those issued patents to block its competitors from marketing Enbrel biosimilars, obtaining permanent injunctions against two firms (Sandoz and Bioepsis). JA0259, JA0261, JA0211–0214, JA0216–0217. The injunctions terminate upon the expiration of both patents, on April 24, 2029—seventeen years after Amgen's initial Enbrel patents expired in 2012. JA0250, JA0261.

CareFirst filed a class action alleging that the acquisition of these patent applications constituted anticompetitive conduct that maintained Amgen's monopoly in violation of Section 2 of the Sherman Act. JA0279–0282. In moving

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nor DOJ] intends to take any action" during the waiting period. 15 U.S.C. § 18a(b)(2). It is not a determination of legality, does not constitute an endorsement of the transaction, and does not preclude later antitrust scrutiny. *See FTC v. Facebook, Inc.*, 581 F. Supp. 3d 34, 57 (D.D.C. 2022).

[5] A patent family is a group of related patents and applications that claim priority to the same application and generally share the same specification. *See Fuel Automation Station, LLC v. Energera Inc.*, 119 F.4th 1214, 1228 (10th Cir. 2024).

to dismiss, Amgen argued that its private transaction obtaining exclusive rights to Roche's patent applications was immune from antitrust scrutiny under *Noerr-Pennington* because it later obtained injunctions enforcing the issued patents. JA0451–0455. The district court disagreed, concluding that although the later litigation was protected by *Noerr-Pennington*, the overall scheme—beginning with the acquisition of Roche's patent rights—remained actionable. JA0039. The district court further rejected Amgen's separate contention that the acquisition of pending patent applications cannot constitute anticompetitive conduct as a matter of law. JA0030–0035. It then certified both questions for interlocutory appeal under 28 U.S.C. § 1292(b). JA0522.

ARGUMENT

Amgen seeks a sweeping rule that would prevent antitrust scrutiny of private commercial agreements acquiring the rights to patent applications.[6] First, Amgen argues categorically that the acquisition of patent applications cannot violate the antitrust laws. Second, Amgen argues that the acquisition of a patent application is

[6] For simplicity, this brief refers to the 2004 exclusive license as an acquisition, reflecting Amgen's exclusive control over prosecution of the applications and its ability to enforce the resulting patents. Amgen does not argue for purposes of this case that its exclusive licensing agreement should be treated any differently than an acquisition of a patent application. *See also* 16 C.F.R. § 801.2(g) (explaining that an exclusive patent license is substantively the same as a purchase).

immune from liability under *Noerr-Pennington*. Neither argument accords with legal precedent or economic reality.

I. ACQUISITIONS OF PATENT APPLICATIONS ARE NOT IMMUNE FROM ANTITRUST SCRUTINY.

A monopolization claim requires allegations that the defendant willfully acquired or maintained monopoly power "through anticompetitive conduct, as opposed to gaining its monopoly status 'as a consequence of a superior product, business acumen, or historic accident.'" *Duke Energy Carolinas, LLC v. NTE Carolinas II, LLC*, 111 F.4th 337, 353 (4th Cir. 2024) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966)).[7] It is well settled that acquiring patent rights can constitute anticompetitive conduct. As Amgen itself acknowledges, "Patent acquisitions are not immune from the antitrust laws." *SCM Corp. v. Xerox Corp.*, 645 F.2d 1195, 1205 (2d Cir. 1981); *see* Amgen Br. 42. Where a monopolist acquires "exclusive rights in related patents," that acquisition "should presumptively be a § 2 'exclusionary practice' … if the effect of the acquisition is to give the acquirer an exclusive right in them and this serves to increase or prolong the monopolist's market power." Phillip E. Areeda & Herbert Hovenkamp,

[7] The term "anticompetitive conduct" in monopolization cases is often used synonymously with another term of art—"exclusionary conduct"—which the Supreme Court has defined as behavior that "(1) tends to impair the opportunities of rivals" and "(2) either does not further competition on the merits or does so in an unnecessarily restrictive way." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 n.32 (1985) (cleaned up).

Antitrust Law ¶ 707 (2025). This principle is equally true where the acquisition of a patent *application* is concerned, for the reasons discussed below.

A. Pending Patent Applications, Like Issued Patents, Raise Competitive Concerns.

1. Acquiring a patent application can constitute anticompetitive conduct.

Whether a monopolist acquires either a patent application or an issued patent, that transaction can amount to anticompetitive conduct that violates the antitrust laws.

Nothing about the antitrust laws or the nature of patent applications warrants different treatment for applications. The Supreme Court indicated as much in *United States v. Singer Mfg. Co.*, 374 U.S. 174, 189 (1963). Singer engaged in a series of transactions—including acquiring both issued patents and pending patent applications—to exclude competition in the sewing machine market. In recounting Singer's course of conduct, the Court noted evidence that Singer believed it could "rewrite the claims" of the pending application "before the patent … issued" to "make it stronger than it now is." *Id.* at 182. The Court found an illegal Section 1 conspiracy, concluding that the Sherman Act "imposes strict limitations on the concerted activities in which patent owners may lawfully engage." *Id.* at 197. Nowhere in its analysis did the Court distinguish pending applications from issued patents. *See also Hartford-Empire Co. v. United States*, 323 U.S. 386, 395 (1945)

(defendants used "purchases of [patent] applications and patents" in violation of the Sherman Act).

Nor should it have. To hold otherwise would make a mockery of Section 2. Indeed, under Amgen's framing, a monopolist would enjoy total immunity if it bought its rivals' assets and squelched competition a single day before patent issuance. But the very next day, that same conduct—with materially indistinguishable competitive consequences—would be subject to treble damages and, potentially, criminal sanctions. 15 U.S.C. §§ 1, 2, 15.

To be sure, a patent application is different from an issued patent. It carries some uncertainty about the scope of any eventual patent, as well as the risk that no patent issues. But a patent application can also confer unique strategic advantages that can, in some circumstances, lead to *more* anticompetitive harm than acquiring an issued patent. Control of a patent application allows the holder to leverage: (1) prosecution control, (2) priority date, (3) continuation practice, and (4) competitive uncertainty for rivals. These advantages allow a monopolist who purchases a patent application broad opportunities to increase its monopoly.[8]

[8] Many competitive strengths of patent applications relate to their prosecution. As explained in Part II, though this subsequent prosecution is itself protected by *Noerr-Pennington*, that immunity does not extend to an anticompetitive *acquisition*. The petitioning only occurs after the commercial transaction has taken place, and serves as one means of maximizing the transaction's value.

a) Prosecution Control

A patent applicant has the unique ability to manipulate, expand, or pivot its patent claims over time, long after the application is first filed. In controlling an application's prosecution, the applicant can effectively paralyze the competitive landscape.

When a patent application is filed, it includes a "specification" that can stake out broad conceptual territory—often far broader than any single invention. The specification concludes with a set of "claims" that describes the particular scope of the exclusivity sought. *See* Tun-Jen Chiang, *Fixing Patent Boundaries*, 108 Mich. L. Rev. 523, 527 (2010). The applicant is free to later "amend or insert claims intended to cover a competitor's product the applicant's attorney has learned about during the prosecution of a patent application."[9] The party controlling prosecution can tweak the application's claims, cancel existing claims, or even add entirely new claims to the application. Mark A. Lemley & Kimberly A. Moore, *Ending Abuse of Patent Continuations*, 84 B.U. L. Rev. 63, 64 (2004). That ability to take affirmative steps to adjust the scope of the patent application's claims is a strategic advantage that can allow a monopolist to seek to tailor the patent to exclude competitors' later scientific developments and extend its monopoly.

[9] FTC, *The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition* (Mar. 2011) at 87 & n.92 (citation omitted), https://tinyurl.com/3z75u72y.

This case illustrates the significance of prosecution control. Immunex initially took a non-exclusive license to Roche's IP—even though Roche did not yet have patents covering Enbrel—because Roche's original patent application specification described etanercept, leaving open the possibility that future claims might cover Enbrel. Amgen Br. 4–5; JA0006–0007. Then Amgen, despite already having a non-exclusive license that ensured it could sell Enbrel without infringing Roche's IP rights, paid Roche to restructure the deal so that it acquired *exclusive* control over two pending applications. Amgen used that exclusive control to change the claims in Roche's patent applications, ensuring the USPTO would issue patents tailored to Enbrel. JA0257–0258. Those patents ultimately secured Amgen years of further market exclusivity.

b) Priority Date

The date a patent application is filed becomes the "priority" date that gives it precedence over subsequent filings. Prior art (e.g., scientific publications, competing patents) can only defeat a claim's patentability if it predates that priority date. Critically, subsequent applications in the same patent family inherit the priority date of the initial application. *See* 35 U.S.C. § 120; *see also* Donald S. Chisum, *Chisum on Patents* § 13.01 (vol. 4A 2026). The priority date of the original application anchors every patent claim pursued in that application or in any related continuation application—regardless of how many years later a

continuation application is filed or how different the eventual claims look from what was originally sought. Thus, when Amgen acquired control over Roche's applications in 2004, it inherited the applications' earlier priority date. JA0251. That priority date meant Amgen could pursue patent claims based on Roche's specification, shielded from the intervening fifteen years of scientific development that might otherwise have constituted prior art.

c) Continuation Practice

Control of a pending application also provides the ability to file continuation applications—new patent applications that claim the benefit of an earlier "parent" application's priority date and disclosure, and must be filed while the parent application remains pending. Lemley & Moore at 66. Because a continuation application is treated as a new application, prosecution begins again—giving the applicant another opportunity to shape its claims in response to developments in the marketplace since the parent was filed.

The FTC has recognized that applicants may keep applications pending, monitor market developments, and modify their claims to capture additional subject matter, including competitors' products. FTC, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy*, Ch. 4(II)(C)(1) (Oct. 2003). That conduct, in turn, allows an applicant to expand a patent family over time, adopt new claiming strategies as markets evolve, and potentially build a

dense set of related patents that deters or delays rivals. *See* Lemley & Moore at 71–83 (describing the "pernicious consequences" of continuation applications). By comparison, an issued patent offers something far less dynamic: a fixed set of rights based on the claims already allowed.

d) Competitive Uncertainty

The foregoing aspects of patent applications can create anticompetitive effects through the uncertainty they generate. Because the scope of a pending application's claims remains unsettled—and may expand or shift through continuation filings—competitors cannot reliably design around claims that are still evolving. This strategic uncertainty can delay or deter investment, product development, and market entry even before any patent issues. *See The Evolving IP Marketplace* at 87–89; Chiang at 525–26, 533–34, 536–37.

Taken together, these competitive advantages reinforce one another. Prosecution control shapes the application's claims; priority date anchors those claims to an earlier moment in time; continuation practice allows new claims to be pursued indefinitely from that anchoring date; and the resulting uncertainty can effectively constrain rivals even before any patent issues.

2. Amgen's attempts to distinguish patent applications from patents fall short.

First, Amgen contends (Br. 41) that patent applications are not exclusionary because of their probabilistic nature, emphasizing that a patent application may not

ultimately issue. But even issued patents carry with them uncertainty. *See Actavis*, 570 U.S. at 147 ("[T]o refer … simply to what the holder of a valid patent could do does not by itself answer the antitrust question. The patent here may or may not be valid, and may or may not be infringed."). Indeed, patents themselves "are in a sense probabilistic, rather than ironclad: they grant their holders a potential but not certain right to exclude." *In re Cipro Cases I & II* (2015) 61 Cal. 4th 116, 143. Patents are therefore best understood as conferring not the right to exclude "but rather a right to *try* to exclude." Mark A. Lemley and Carl Shapiro, *Probabilistic Patents*, 19 J. of Econ. Persps. 75, 76 (2005) (explaining that the "risk that a patent will be declared invalid is substantial," as "[r]oughly half of all litigated patents are found to be invalid").

This type of uncertainty is also commonplace in antitrust enforcement, which routinely addresses—and condemns—conduct on the basis of potential or probabilistic future harms. In *United States v. Microsoft Corp.*, 253 F.3d 34, 79 (D.C. Cir. 2001), the D.C. Circuit explained that uncertain conduct could violate Section 2 where it appeared "reasonably capable of contributing significantly to a defendant's continued monopoly power." And earlier this year in *FTC v. Edwards Lifesciences Corp.*, No. 25-2569, 2026 WL 228723 (D.D.C. Jan. 28, 2026), a court enjoined the merger of two companies that owned pre-commercialization medical devices. Even though FDA approval of the pending applications for each medical

device—like USPTO approval of a pending patent application—was "not a certainty," *id.* at *32, the merger of ownership for two pre-approval devices was "likely to lessen competition substantially," *id.* at *29.

The FTC undertakes that same analysis in reviewing a firm's IP in the context of a merger. In *In re Illumina, Inc.*, FTC Dkt. No. 9401, the FTC found that Illumina's acquisition of GRAIL was anticompetitive in part because Illumina's hundreds of issued patents *and* pending applications discouraged developers from adopting competing sequencing platforms, and at least one emerging competitor identified IP risk as a barrier to commercialization.[10] Likewise, the FTC's consent orders routinely define "patent(s)" to include pending applications because those applications can support future patent claims capable of undermining divested assets or recreating the harms the order is designed to prevent.[11]

Second, Amgen argues that patent applications should be treated differently from the patents that eventually issue because applications are "nothing more than *requests* for exclusionary rights." Amgen Br. 39. But a patent application is not a

[10] *See* Initial Decision (Sept. 9, 2022), https://tinyurl.com/3wuakewe (Finding of Fact ¶¶ 9, 599); *see also* Commission Opinion (Apr. 3, 2023) at 7–9 (citing *IDF* ¶¶ 664, 666, 697–98), https://tinyurl.com/3z88vn9f.

[11] *See, e.g.*, Decision & Order, *In re Elanco Animal Health Inc.*, FTC Dkt. No. C-4725 (Sept. 11, 2020) at § NN, https://tinyurl.com/35a7a8ys; Decision & Order, *In re AbbVie Inc.*, FTC Dkt. No. C-4713 (Sept. 4, 2020) at § NN, https://tinyurl.com/ykbctzce.

hollow supplication—it is an inchoate property right, as the Patent Act evinces. Congress has made clear that an applicant is entitled to a patent *unless* the USPTO can prove unpatentability. *See* 35 U.S.C. §§ 102 ("entitled to a patent unless"), 131 (USPTO "shall issue" a patent if the applicant is entitled), 151 (same); *see also In re Oetiker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992) (the patent examiner—not the applicant—bears the initial burden of dislodging applicant's entitlement to a patent). A patent application and an issued patent are thus best understood as points on a single statutory continuum: one at an earlier stage on that continuum, conferring a legally protected expectation of issuance, and one fully matured.

B. Recognizing Liability Here Will Not Stifle Innovation.

Amgen warns (Br. 54–56) that innovation will suffer if the Court recognizes that pending applications can pose anticompetitive concerns. That alarmism is unfounded.

The FTC recognizes that IP licensing can often be procompetitive. *See* U.S. DOJ & FTC, *Antitrust Guidelines* §§ 2.0, 2.3, 3.1. Most licenses are non-exclusive and, barring unusual circumstances, are unlikely to present antitrust concerns. *Id.* at § 4.1.2. Exclusive licenses, however, warrant antitrust scrutiny where they threaten to reduce competition—usually because the parties are competitors or potential competitors. *Id.* Subjecting this narrow category of deals to antitrust scrutiny adds

no new compliance burden, since transactions that meet HSR reporting thresholds are already reviewed by the FTC and DOJ.

Amgen also mischaracterizes its cited authority by equating an innovator's licensing of an application to a non-competitor (which generally promotes commercialization and competition) with a competitor's exclusive licensing to a monopolist (which stifles both). *See* Amgen Br. 55–56. *Aronson v. Quick Point Pencil*, 440 U.S. 257, 261–62 (1979), for example, is inapposite because the Supreme Court there endorsed an inventor licensing her own application to a non-competitor to enable commercialization of her invention (a procompetitive outcome). *See* Amgen Br. 55. Amgen's reliance on the Hovenkamp *Buying Monopoly* article undermines its own argument. *Id.* That article explains that while most patent assignments are procompetitive because they facilitate commercialization, acquisitions by a dominant firm of "substitute patents from external patentees" can "impede product market rivals by limiting their access to important technological inputs." Erik Hovenkamp & Herbert Hovenkamp, *Buying Monopoly: Antitrust Limits on Damages for Externally Acquired Patents*, 25 Tex. Intell. Prop. L.J. 39, 39 (2017). The authors stress that the Patent Act never justifies "the acquisition of individual patent rights into portfolios that dominate a market, something that … the antitrust laws rightfully prohibit." *Id.* They therefore propose that where a dominant firm acquires patents in its own technology market,

"its acquisition be limited to a *nonexclusive license*," because limiting dominant firms to nonexclusive rights "will tend to increase innovation by discouraging systematic monopoly in technology markets." *Id.* at 40 (emphasis added). In short, that article warns against precisely what occurred here: exclusive acquisitions by monopolists.

II. AMGEN'S ACQUISITION IS NOT PROTECTED UNDER *NOERR-PENNINGTON*.

The district court properly concluded that Amgen's acquisition of patent applications is not protected from the antitrust laws merely because Amgen later prosecuted those applications and enforced the issued patents through litigation.

Under *Noerr-Pennington*, "defendants are immune from antitrust liability for engaging in conduct (including litigation) aimed at influencing decisionmaking by the government." *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 556 (2014) (citing *E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965)). *Noerr-Pennington* "safeguards the First Amendment right to 'petition the government for a redress of grievances,' by immunizing citizens from the liability that may attend the exercise of that right." *Waugh Chapel S., LLC v. United Food & Com. Workers Union Loc. 27*, 728 F.3d 354, 362 (4th Cir. 2013) (internal citation omitted). Thus, legitimate petitioning activity, even when "intended to

eliminate competition," "is not illegal, either standing alone or as part of a broader scheme itself violative of the [antitrust laws]." *Pennington*, 381 U.S. at 670.

Noerr-Pennington immunity is not boundless, however. The doctrine extends only to petitioning activity and restraints that are "'incidental' to a valid effort to influence governmental action." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499 (1988) (quoting *Noerr*, 365 U.S. at 143). The Supreme Court has repeatedly cautioned against an "absolutist" approach, underscoring that *Noerr-Pennington* "does not extend to 'every concerted effort that is genuinely intended to influence governmental action.'" *FTC v. Superior Ct. Trial Laws. Ass'n*, 493 U.S. 411, 425 (1990) (quoting *Allied Tube*, 486 U.S. at 503). Amgen's arguments represent precisely the kind of *Noerr-Pennington* absolutism the Supreme Court has rejected.

A. *Noerr-Pennington* Protects the Enforcement of Patents Through Litigation, But Not the Underlying Acquisition of Patents or Patent Applications.

1. *Noerr-Pennington* does not protect commercial transactions distinct from petitioning.

This Court should make clear that *Noerr-Pennington* does not preclude antitrust liability for acquiring patent rights where a monopolist later sues to enforce those rights in court. A wealth of case law supports this proposition. To start, the Supreme Court suggested as much in *Pennington* itself. 381 U.S. at 670. The Court stated that petitioning activity was not illegal, "either standing alone or

as part of a *broader scheme itself violative of the Sherman Act*." *Id.* (emphasis added). Thus, *Noerr-Pennington* protects petitioning, but non-petitioning aspects of the same anticompetitive scheme may remain "violative of the Sherman Act." *See also Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1265 (9th Cir. 1982) (explaining *Pennington* provides immunity only for "the narrow petitioning activity").

The Second Circuit addressed this issue directly in *PrimeTime 24 Joint Venture v. National Broadcasting. Co.*, 219 F.3d 92 (2d Cir. 2000). There, a satellite operator alleged that network broadcasters engaged in a concerted refusal to negotiate copyright licenses in violation of the Sherman Act. *Id.* at 97. The broadcasters argued that this alleged agreement was protected from antitrust scrutiny because they subsequently filed copyright-infringement lawsuits. *Id.* at 102. The Second Circuit rejected that argument, explaining that "copyright holders may not agree to limit their individual freedom of action in licensing future rights to such an infringer before, during, or after the lawsuit." *Id.* at 103. "Such an agreement would, absent litigation, violate the Sherman Act, and cannot be immunized by the existence of a common lawsuit." *Id.* (internal citation omitted).

Likewise, in *Amphastar Pharmaceuticals, Inc. v. Momenta Pharmaceuticals, Inc.*, 850 F.3d 52, 57 (1st Cir. 2017), the First Circuit held that "[t]he mere existence of a lawsuit does not retroactively immunize prior anti-

competitive conduct." The plaintiff there alleged that defendants did not disclose to a standard-setting organization that a pending patent application covered their proposed method for testing a generic drug. *Id.* at 54. The defendants subsequently obtained a preliminary injunction against the plaintiff for patent infringement. *Id.* The First Circuit reversed the district court's dismissal of the plaintiff's Sherman Act claims, which had reasoned that the defendants' conduct was immunized under *Noerr-Pennington*. *Id.* at 56. That "the alleged damages are based, in part, on a lawsuit seeking an injunction does not 'defeat the antitrust claim based on conduct before the standard-setting organization.'" *Id.* at 57 (citation omitted). Amgen tries to carve out "an exception" for *Amphastar* by noting the alleged underlying antitrust violation was rooted in fraud. *See* Amgen Br. 26 n.11. But that fact had no bearing on the court's analysis and offers no basis to distinguish *Amphastar*.

Other circuits have held similarly. *See A.D. Bedell Wholesale Co. v. Philip Morris Inc.*, 263 F.3d 239, 251 (3d Cir. 2001) ("Private parties cannot immunize an anticompetitive agreement merely by subsequently requesting legislative approval."); *Columbia Steel Casting Co., Inc. v. Portland Gen. Elec. Co.*, 111 F.3d 1427, 1446 (9th Cir. 1996) (finding *Noerr-Pennington* inapplicable where utility companies obtained order from state agency adopting anticompetitive contract, as the defendant "is not being held liable for filing the application" but instead "is being held liable for agreeing … to replace competition with area monopolies");

Premier Elec. Const. Co. v. Nat'l Elec. Contractors Ass'n, Inc., 814 F.2d 358, 376 (7th Cir. 1987) (holding *Noerr-Pennington* did not immunize underlying price-fixing contract that defendants sought to enforce in court).

These cases confirm that, while the act of bringing an infringement lawsuit is itself protected by *Noerr-Pennington*, the lawsuit does not shield prior anticompetitive conduct from antitrust liability. Stretching the boundaries of *Noerr-Pennington* to immunize the entire course of conduct would run counter to the Court's directive that antitrust exemptions be narrowly construed. *See Grp. Life & Health Ins. Co.*, 440 U.S. at 231.

Thus, if Amgen maintained its monopoly through an unlawful acquisition of patent rights (including the rights to pending patent applications), it violated the antitrust laws—regardless of whether it later filed infringement claims to enforce its patent rights. *See* JA0130 (alleging the acquisition violated the antitrust laws).[12] Indeed, Amgen would have committed the same alleged violation even if it had acquired the rights and "left them in a drawer" (Amgen Br. 50); the unlawfulness of Amgen's acquisition does not hinge on the subsequent infringement litigation. *Cf. McGuire Oil Co. v. Mapco, Inc.*, 958 F.2d 1552, 1561 (11th Cir. 1992) (*Noerr-*

[12] Because CareFirst has challenged the alleged antitrust violation, not the validity of the patents litigated in the Federal Circuit, Amgen's concerns that CareFirst's claims amount to a "collateral attack" (Br. 27–28) are unfounded.

Pennington immunity applied where defendants did not "allege any facts independent of plaintiffs' pre-litigative [threat of litigation] and litigative activities to establish that a conspiracy in violation of the Sherman Act took place").

For that reason, Amgen's primary authority, *Mayor of Baltimore v. AbbVie Inc.*, 42 F.4th 709, 711 (7th Cir. 2022), is not "highly analogous to this case." Amgen Br. 48–49. The Seventh Circuit did not address acquisitions at all. The defendant there "obtained" patents through its "successful petition[ing]"—prosecuting its patent applications before the USPTO—and later "invok[ed]" the issued patents in litigation. *Mayor*, 42 F.4th at 711–13. The court observed that the claim in that case was based on a "concern about the successful outcome of [a defendant's] petitioning" the USPTO; the dicta about "costs on rivals" "imposed by the process of petitioning" is thus irrelevant to this case. *Id.* at 714. The Seventh Circuit recognized that *Noerr-Pennington* protected the act of filing and prosecuting patent applications; it said nothing about an underlying commercial transaction to acquire exclusive rights to patent applications.

2. Breaking with the above precedent would cause serious and far-reaching practical problems.

To extend *Noerr-Pennington* here would suppress competition without serving any of the doctrine's purposes. And the risks of that extension are both clear and far-reaching.

Under Amgen's view, any anticompetitive scheme could be insulated from antitrust enforcement so long as the monopolist later engaged in some form of petitioning. The acquisition of an *issued* patent—which Amgen concedes is generally subject to antitrust review (Br. 42)—would be shielded if it was later enforced via petitioning the courts. Such an outcome is contrary to established precedent. *See Handgards, Inc. v. Ethicon, Inc.*, 601 F.2d 986, 994 (9th Cir. 1979). Similarly, if a participant in a price-fixing conspiracy sues a defector for breach of contract, the underlying conspiracy remains illegal. *See Allied Tube*, 486 U.S. at 503 (not all conduct aimed to influence government action is protected, as otherwise "competitors would be free to enter into horizontal price agreements as long as they wished to propose that price as an appropriate level for governmental ratemaking or price supports").

Indeed, Amgen's approach would create an arbitrary regime in which the antitrust legality of an agreement depended on whether it later led to a lawsuit. A patent or patent application acquisition would be protected if the acquirer sued someone for infringement, but unprotected if competitors opted to avoid the market entirely. A price-fixing agreement would be protected if the participants petitioned the government to endorse the price, but not otherwise. Worse, *Noerr-Pennington* protection would change over time: an acquisition of patents or patent applications that violated the antitrust laws would be illegal until the acquirer

brought an enforcement suit, at which point it would retroactively be protected. The scope of antitrust liability should not be so easily manipulated.

3. Amgen confuses antitrust violations with injury.

Amgen's argument also muddles an important distinction between two disparate legal concepts: antitrust violations and private plaintiff antitrust injury. Amgen's brief nominally frames its *Noerr-Pennington* causation arguments in terms of private plaintiff antitrust injury, rather than substantive antitrust liability. But in substance, Amgen contends *Noerr-Pennington* immunizes them from liability. *See* Amgen Br. 29–30 (arguing "causation of injury from anticompetitive conduct is an element of antitrust liability"). That is wrong.

As the Supreme Court has explained, "[P]roof of a[n antitrust] violation and of antitrust injury are distinct matters that must be shown independently." *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344 (1990) (citation omitted). All antitrust plaintiffs, private and public, must establish that the antitrust laws have been violated because the challenged conduct can have an anticompetitive effect. *Actavis*, 570 U.S. at 159. But only a private plaintiff must make an additional showing that it suffered an antitrust injury (actual or threatened) caused

by the anticompetitive conduct. *See California v. Am. Stores Co.*, 495 U.S. 271, 295–96 (1990).[13]

Amgen's subsequent petitioning does not protect its broader course of allegedly anticompetitive conduct under *Noerr-Pennington*. That is so regardless of whether CareFirst can make a showing of private injury.

B. The *Noerr-Pennington* Doctrine Does Not Categorically Immunize the Acquisition of Rights to a Patent Application.

Amgen separately contends that the acquisition of exclusive rights to patent applications is categorically protected under *Noerr-Pennington* because it is conduct "incidental to petitioning." Amgen Br. 44. Amgen reasons that because its deal with Roche was "preliminary" to its subsequent petition to the USPTO, seeking issuance of the patents, there is "simply no way to disentangle" the two. *Id.* at 45–46. This proposed categorical protection is as brazen as it is wrong.

The acquisition of a patent application is a far cry from what courts traditionally understand as "incidental." Courts have extended *Noerr-Pennington* protection beyond the specific petitioning activity only when necessary to provide "adequate 'breathing space' to the right of petition." *Navient Sols., LLC v. Lohman*, 136 F.4th 518, 525 (4th Cir. 2025) (quoting *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 932 (9th Cir. 2006)). As Amgen acknowledges (Br. 46), that has traditionally been

[13] The FTC takes no position on the requirements for private plaintiff injury.

necessary only for a narrow category of pre-litigation conduct that has no independent commercial significance apart from the petition it supports—*e.g.*, the threat of litigation, offer of settlement, or third-party litigation funding. *See Sosa*, 437 F.3d at 937; *Coastal States Mktg., Inc. v. Hunt*, 694 F.2d 1358, 1367–68 (5th Cir. 1983); *Baltimore Scrap Corp. v. David J. Joseph Co.*, 237 F.3d 394, 401 (4th Cir. 2001).[14]

Those limited instances warranted protection under *Noerr-Pennington* because the conduct was in service of, and derived its significance from, the forthcoming petition. The unifying principle is that the conduct exists solely to initiate, settle, or facilitate a petition—in other words, the conduct is subordinate to the petitioning.

Amgen's argument flips that concept on its head. Here, Amgen engaged in a standalone commercial transaction to acquire an asset that extended its market power. Petitioning the USPTO was a distinct subsequent step that helped maximize the financial value of its acquisition. If anything, Amgen's *petitioning* is incidental—and subordinate—to the commercial transaction. It would blink reality

[14] This Court has not yet addressed the scope of "incidental." *See Navient Sols.*, 136 F.4th at 525 (leaving "analyzing the exact bounds of *Noerr-Pennington* immunity for another day").

to suggest that Amgen's true aspiration was to petition the USPTO, with its acquisition of the assets a mere expedient towards this ultimate goal.

And critically, even if Amgen never petitioned the USPTO, its acquisition would retain value separate from any petitioning opportunity. An application's owner could sell its rights, license them, or use its ownership strategically to influence market-entry decisions. *See supra* Part I.A. By contrast, third-party litigation funding derives its value strictly from the petitioning activity it supports. That is why this Court in *Baltimore Scrap* analogized it to the aid a non-party provides when filing an amicus brief: both are derivative of and inseparable from protected petitioning by another party. 237 F.3d at 401. Amgen's acquisition of patent applications, by contrast, is distinct from the prosecution of those applications; it is neither coextensive with nor derivative of petitioning.

Amgen is thus wrong to argue that categorical *Noerr-Pennington* immunity for acquisitions of patent applications is necessary to avoid chilling USPTO petitioning. Amgen Br. 45. Rather, applying the antitrust laws to such transactions will chill private commercial transactions that increase market power—precisely the types of agreements the antitrust laws were enacted to prevent.

By way of analogy, consider a hotelier who maintains his monopoly by purchasing a property to build another hotel. That property has squatters, and the seller has already initiated eviction proceedings. After purchasing the property, the

hotelier takes over the squatter eviction proceedings—an act of petitioning. It would be nonsensical to suggest that the hotelier's property purchase was merely "incidental" to removing the squatters. The petitioning is simply a separate step necessary to maximize the value of the acquired property right. Enforcing the antitrust laws would not deter the hotelier from evicting squatters; it would only deter the hotelier from seeking to maintain his monopoly through unlawful land purchases. The same is true here.

Finally, while Amgen argues that its proposed carveout would be limited to the acquisition of patent applications, its logic necessarily sweeps far beyond this case, effectively pulling any standalone commercial transaction under *Noerr-Pennington*'s penumbra where petitioning is a foreseeable subsequent step. For example, the acquisition of a medical device in the FDA approval process would be incidental to the "petitioning" of seeking approval. *Contra Edwards Lifesciences*, 2026 WL 228723 at *46 (acquisition of medical device undergoing FDA approval process enjoined). Treating these private commercial transactions as "incidental" would thus impermissibly expand *Noerr-Pennington* far beyond its "breathing space," *Navient Sols.*, 136 F.4th at 525 (cleaned up), rendering the antitrust laws ineffectual.

CONCLUSION

The Court should hold (1) that the acquisition of a patent application can constitute exclusionary conduct under the antitrust laws; and (2) that the presence of petitioning activity in an overall course of anticompetitive conduct does not shield the non-petitioning activity from the antitrust laws.

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CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2026, I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

Dated: August 14, 2026 /s/ Robert A. Silverstein

CERTIFICATE OF COMPLIANCE

This brief complies with the length limits of Federal Rule of Appellate Procedure 29(a)(5). The brief is 6,469 words, excluding the portions exempted by Rule 32(f). The brief's typeface and type style comply with Rule 32(a)(5) and (6).

Dated: August 14, 2026 /s/ Robert A. Silverstein