CASE NO. 26-1248

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

CAREFIRST OF MARYLAND, INC., et al,
Plaintiffs-Appellants,
v.
JOHNSON & JOHNSON; JANSSEN BIOTECH, INC.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Virginia, No. 2:23-cv-629
(Hon. Jamar K. Walker)

BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF MANUFACTURERS AND THE AMERICAN TORT REFORM ASSOCIATION IN SUPPORT OF DEFENDANTS-APPELLEES JOHNSON & JOHNSON AND JANSSEN BIOTECH, INC.

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CORPORATE DISCLOSURE STATEMENT

The National Association of Manufacturers ("NAM") is a nonprofit trade association. The NAM has no parent corporation, and no publicly held company has 10% greater ownership in the NAM.

The American Tort Reform Association ("ATRA") is a nonprofit, tax-exempt organization incorporated in the District of Columbia. ATRA has no parent corporation, and no publicly held company has 10% or greater ownership in ATRA.

INTEREST OF AMICI CURIAE[1]

Amicus curiae the NAM is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs 13 million people, contributes nearly $2.9 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than half of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

Amicus curiae ATRA was founded in 1986, and consists of a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than three decades, ATRA has filed amicus curiae briefs in cases involving important liability issues.

[1] No party's counsel authored any part of this brief. No one, apart from the NAM, ATRA, and their counsel, contributed money intended to fund the brief's preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT[2]

This case presents an important question about the scope of antitrust liability under Section 2 of the Sherman Act, 15 U.S.C. § 2. Appellants urge a novel theory: that a defendant can violate antitrust law by incidentally acquiring patents that are owned by another company, even if, at the time of their acquisition, the defendant is unaware of existing patent claims and their potential, future impact on competitive markets. In so doing, Appellants ask this Court to vitiate the long-standing rule that antitrust violations must be willful and to instead adopt a rule of strict antitrust liability. Appellants argue that, so long as a defendant intentionally acquires a patent, and the patent has *future impact* on competitive markets, the defendant may be liable under the Sherman Act. This unprecedented theory not only contravenes black-letter antitrust law—which requires monopolistic intent (at a minimum, knowledge of potential competitive impact) at the time of the relevant acquisition—but carries broad, adverse policy implications for innovation and growth across economic sectors. This suit is yet another attempt by the plaintiffs' bar to expand liability and punish corporations under the purported guise of consumer protection. But far from protecting consumers, imposing antitrust liability on Appellees Johnson & Johnson and Janssen Biotech, Inc. ("J&J") would harm consumers by stifling competition, repressing innovation, and imposing even more costs and burdensome due diligence obligations on already heavily regulated industries.

For these reasons and those discussed below, Appellants' conception of Section 2 liability, premised upon J&J's acquisition of biosimilar manufacturing patents from Momenta Pharmaceuticals, Inc. ("Momenta"), should be rejected.

[2] Counsel for all parties were contacted and gave their consent to the filing of this amicus brief.

ARGUMENT

I. The Court should reject Appellants' novel theory imposing strict liability and reaffirm that Section 2 requires proof of willful acquisition or maintenance of monopoly power.

Section 2 of the Sherman Act states that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person . . . to monopolize any part of the trade" is subject to certain penalties. 15 U.S.C. § 2. The elements of the offense of monopolization under Section 2 have long been settled, requiring "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966). Accordingly, to prevail on their monopolization claim, Appellants must prove that J&J (1) willfully acquired or maintained monopoly power in the relevant market (2) through anticompetitive or exclusionary conduct. *Kolon Indus. Inc. v. E.I. du Pont de Nemours and Co.*, 748 F.3d 160, 173, 177 (4th Cir. 2014) ("*Kolon*"); *see also Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) ("the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*" (emphasis in original)).

Appellants claim that, as a matter of law, J&J's acquisition of the Momenta biosimilar patents constitutes anticompetitive and exclusionary conduct. They are wrong. To sustain their burden of proof on the willfulness element, Appellants must show that, in acquiring the Momenta biosimilar patents in 2020, J&J used its alleged monopoly power "'*to* foreclose competition, *to* gain a competitive advantage, or *to* destroy a competitor.'" *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 482–83 (1992) (internal quotation marks omitted) (emphasis added); *see also id.* ("If Kodak adopted its parts and service policies *as part of a scheme of willful* *acquisition or maintenance of monopoly power*, it will have violated § 2." (emphasis added)); *accord Kolon*, 748 F.3d at 175 ("Even if Kolon had presented a triable issue on the monopoly-power element, Kolon also needed to show that DuPont willfully maintained that power. To violate this prong, a defendant must *engage in conduct 'to foreclose competition, to gain a competitive advantage, or to destroy a competitor*.'" (quoting *Kodak*, 504 U.S. at 482–83) (emphasis added)). In other words, *something more* than mere acquisition of patents must be established to impose antitrust liability on a single firm. *See Automatic Radio Mfg. Co. v. Hazeltine Res. Inc.*, 339 U.S. 827, 834 (1950) ("[M]ere accumulation of patents, no matter how many, is not in and of itself illegal."), *overruled in part on other grounds by Lear, Inc. v. Adkins*, 395 U.S. 653 (1969); *Dollac Corp. v. Margon Corp.*, 164 F. Supp. 41, 62 (D.N.J. 1958) ("The mere accumulation of these patents by the defendant, no matter how many, may not be condemned as illegal under the antitrust laws in the absence of some evidence that they were misused to unlawfully extend the patent monopoly." (citations omitted)), *aff'd*, 275 F.2d 202 (3d Cir. 1960).[3] It is this *something more* that is missing from Appellants' monopolization claim, which is premised upon a theory of no-fault or strict liability that is wholly unprecedented and discordant with black-letter antitrust law.

A. Under black-letter antitrust law, a monopolization claim requires the "willful" acquisition or maintenance of monopoly power at the time of the relevant patent acquisition.

Under longstanding Supreme Court precedent, for J&J to be found liable under Section 2 for its acquisition and assertion of the Momenta biosimilar patents, Appellants must prove that the company engaged in "the *willful* acquisition or maintenance of [monopoly] power." *Kodak*, 504

[3] *See also FMC Corp. v. Manitowoc Co.*, 835 F.2d 1411, 1418 n.16 (Fed. Cir. 1987) ("Mere procurement of a patent, whatever the conduct of the applicant in the procurement, cannot *without more* affect the welfare of the consumer and cannot in itself violate the antitrust laws.") (emphasis added) (citing R. Bork, *The Antitrust Paradox* 50–51 (1978), and W. Bowman, *Patent and Antitrust Law* 1, 2–3, 14 (1973)).

U.S. at 481 (quoting *Grinnell*, 384 U.S. at 570–71) (emphasis added). Proving willfulness, in turn, requires a showing of "monopolistic intent," namely "'that a jury could find no valid business reason or concern for efficiency'" for the allegedly unlawful conduct. *Oksanen v. Page Mem'l Hosp.*, 945 F.2d 696, 710 (4th Cir. 1991) (quoting *White v. Rockingham Radiologists, Ltd.*, 820 F.2d 98 at 105 (4th Cir. 1987)).

Further, in the context of the acquisition of patents, the Second Circuit has concluded that "where a patent has been lawfully acquired, *subsequent conduct* permissible under the patent laws *cannot* trigger any liability under the antitrust laws." *SCM Corp. v. Xerox Corp.*, 645 F.2d 1195, 1206 (2d Cir. 1981) (emphasis added). Rather, "'a [§] 2 violation will have occurred where, for example, the dominant competitor in a market acquires a patent covering a substantial share of the same market that [they] *know[ ] when added to [their] existing share will afford [them] monopoly power*.'" *Id.* at 1207)) (emphasis added). And "[b]ecause the essence of a patent is the monopoly or exclusionary power it confers upon the holder, analyzing the lawfulness of the acquisition of a patent necessitates [a] primar[y] focus upon the circumstances of the acquiring party and the status of the relevant product and geographic markets ***at the time of the acquisition***.'" *Id.* (emphasis added). Amici submit that, under *SCM Corp.*, the *something more* (than mere acquisition of a patent) that could justify imposition of antitrust liability on the purchaser is monopolistic intent—in other words, *knowledge* of how the acquisition of the patents will aid the firm in acquiring or keeping monopoly power at the time of the purchase and *willful conduct* in furtherance of the monopoly.

Appellants do not even attempt to satisfy this standard. Instead, they claim that J&J's acquisition of the Momenta patents in October 2020 was inherently (or *per se*) anticompetitive—and thus violative of Section 2—*regardless of* whether, at the time of the acquisition, J&J harbored any intent to maintain its alleged monopoly power in the relevant antitrust market for ustekinumab. Indeed, the crux of Appellants' argument centers on their claim that J&J *willfully acquired* exclusive rights to the biosimilar patents, which cover processes for biosimilar development, and that Appellants' proof of J&J's *willful acquisition* is sufficient to satisfy the willfulness element under section 2. Appellants' Brief ("AB") at 38 ("A reasonable jury could find general intent because J&J knew it was acquiring the Momenta manufacturing patents as part of the Momenta deal[.]"); *see also id.* at 39 ("The general-intent standard is satisfied when a firm knowingly acquires patents, even if the firm is not aware of the substance of the patents[.]"). In other words, Appellants contend that they need not prove that J&J intended to do an *improper* act—just that J&J intended to do the act that acquired or maintained monopoly power. The Federal Trade Commission ("FTC") makes a nearly identical argument in their amicus brief. *See* FTC Brief at 20 ("It is sufficient that J&J bought those patents to prove a willful act.").[4] Appellants' and the FTC's expansive conception of Section 2 liability essentially imposes no-fault or strict liability and is directly contrary to black-letter antitrust law.

As noted, *supra*, a section 2 monopolization claim has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Grinnell Corp.*, 384 U.S. at 570–71. The second

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[4] Notably, the FTC's argument is contrary to its position in *In the Matter of Rambus, Inc.*, 2006 WL 2330117, Docket No. 9302 (August 2, 2006). There, the FTC noted that under Section 2 of the Sherman Act, "the defendant must act 'willfully' in acquiring or maintaining monopoly power." *Id.* at *16. Accordingly, the FTC reasoned, "for Rambus's allegedly deceptive course of conduct to be actionable under the Sherman Act, Rambus must have acted 'willfully,' as opposed to inadvertently or even negligently." *Id.* In other words, a degree of fault was required to impose Section 2 liability.

element is written in the disjunctive ("or"), meaning a plaintiff can establish the element by proving the *willful acquisition of monopoly power*, or the *willful maintenance of monopoly power*. Notably, the willfulness requirement is tethered to the possession or maintenance of ***monopoly power*** from the first element. The willfulness, therefore, that a plaintiff must show is not mere willfulness to do any act. But instead, willfulness in acquiring or maintaining monopoly power.

Courts routinely consult dictionary definitions to interpret the term "willful." *See, e.g.*, *Kawaauhau v. Geiger*, 523 U.S. 57, 61 n.3 (1998) (defining "willful" as "voluntary" or "intentional") (quoting *Willful*, Black's Law Dictionary (5th ed. 1979)); *Mass. Bay Ins. Co. v. Vic Koenig Leasing, Inc.*, 136 F.3d 1116, 1124 (7th Cir. 1998) (defining a "willful" action as "one done *intentionally, knowingly, and purposely*, . . . as distinguished from an act done . . . inadvertently") (alterations and emphasis in original) (quoting *Willful*, Black's Law Dictionary (6th ed. 1990)). Black's Law Dictionary defines "willful" as "done wittingly or on purpose, as opposed to accidentally or casually; voluntary and intentional . . . [and] *connot[ing] blameworthiness*." *Willful*, Black's Law Dictionary (12th ed. 2024) (emphasis added). "A voluntary act becomes willful, in law, only when it involves *conscious wrong or evil purpose on the part of the actor*, or at least inexcusable carelessness." *Id.* (emphasis added) Indeed, "[t]he term *willful* is stronger than *voluntary* or *intentional*; it is traditionally the equivalent of malicious, evil, or *corrupt*." *Id.* In short, willfulness indicates, at minimum, knowledge and connotates blameworthiness. Thus, when the Supreme Court interpreted Section 2 to require the *willful* acquisition or maintenance *of monopoly power*, the resultant standard distinguishes innocent accumulation of market power (not triggering antitrust liability), from the blameworthy or conscious wrongful acquisition or maintenance of market power (potentially triggering antitrust liability). *Grinnell Corp.*, 384 U.S. at 570–71 (emphasis added).

In other words, section 2, as interpreted by the Supreme Court, *does not* impose no-fault or strict liability. Case law from other contexts further marks the distinction between liability based on willfulness, on the one hand, and strict liability on the other. *See, e.g.*, *United States v. Collins*, 957 F.2d 72, 74 (2d Cir. 1992) ("Prior to the enactment of the 1986 Act, many firearms crimes were essentially strict liability offenses. Because Congress recognized that the lack of a *mens rea* requirement accompanying these offenses could result 'in severe penalties for unintentional missteps,' *see* 132 Cong. Rec. S5350 (daily ed. May 6, 1986), it added the willfulness requirement to § 924(a)(1)(D)."); *Finley v. United States*, 123 F.3d 1342, 1343 (10th Cir. 1997) (holding that "'willful' conduct as defined in the context of 26 U.S.C. § 6672 (1994 & Supp.1977) can be negated by a showing the responsible person had reasonable cause for failing to pay withholding taxes held in trust for the government," and reasoning that "[s]uch conclusion appropriately avoids a 'strict liability' interpretation of § 6672"); *Thibodeaux v. Rupers*, 196 F. Supp. 2d 585, 591 (S.D. Ohio 2001) (holding that the Consumer Credit Reporting Reform Act of 1996 "did not turn § 1681b into a strict liability statute, and that, in order to recover for a violation, Plaintiff must demonstrate either willful or knowing conduct under § 1681n, or negligent conduct under § 1681o").

It follows that, when construed in the context of a monopolization claim under Section 2, Appellants must show that, in acquiring the Momenta biosimilar patents in 2020, J&J—at the very least—voluntarily, intentionally, and purposely *used its monopoly power* in the relevant market for ustekinumab *to stifle competition*. That is, for liability to attach, J&J's acquisition of the Momenta patents must constitute intentional, *wrongful* conduct, i.e., "the use of monopoly power "*to* foreclose competition, *to* gain a competitive advantage, or *to* destroy a competitor." *Kodak*, 504 U.S. at 482–83 (emphasis added) (citation omitted). The test is not, as Appellants suggest, whether J&J willfully acquired Momenta's *patents*. Rather, the test is whether J&J willfully acquired or maintained its alleged *monopoly power*. *See id.* at 483 (the defendant's conduct must be "part of a scheme of willful acquisition or maintenance of *monopoly power*") (emphasis added).

Appellants' conception of "willfulness" fundamentally erodes the requirement that a plaintiff prove "monopolistic intent" (i.e., knowledge of potential competitive impact) for liability to attach under the anticompetitive-conduct prong of Section 2, s*ee Oksanen*, 945 F.2d at 710, and would functionally impose no-fault or strict liability. But, as one court has explained, the proper inquiry "is *not* whether the patent acquisitions actually enhanced [the defendant's] market power, but rather whether they reflect [the defendant's] *intent* to *maintain* monopoly power through *anticompetitive means*." *ABS Glob., Inc. v. Inguran, LLC*, No. 14-CV-503-WMC, 2016 WL 3963246, at *19 (W.D. Wis. July 21, 2016) (second and fourth emphases added); *see also* 2 Julian O. von Kalinowksi, *Antitrust Laws and Trade Regulation* § 7A.03 (2d ed. 2015) ("it is quite well established that, absent bad faith, an accumulation of patents by a single party is not inherently illegal"). By essentially transmuting Section 2 into a strict liability offense, Appellants' interpretation of the "willfulness" requirement contravenes governing precedent requiring a showing of "monopolistic intent" (i.e., knowledge of potential competitive impact) for a viable monopolization claim under the Sherman Act. Under this novel theory of liability, an entity with a valid patent (and thus a limited, *legal* monopoly) covering the relevant antitrust market would be precluded from acquiring any company that possesses patents or patent applications that have some inherent relationship to that market—*even absent an intent to monopolize*. There is simply no support for this interpretation in Section 2 or governing precedent.

B. Appellants' exclusionary-conduct argument relies on evidence of alleged anticompetitive effects that arose long after the October 2020 Momenta acquisition.

An additional problem with Appellants' Section 2 claim is that it seeks to untether the Court's analysis of anticompetitive effects from *the time of the Momenta acquisition*—the operative time frame for assessing a defendant's knowledge and the willfulness of their conduct, *see supra*—to instead focus on evidence of alleged downstream, anticompetitive effects that post-date the Momenta acquisition by at least two years.

Evidence that an entity such as J&J acquires certain patents and subsequently elects to assert those patent rights *years after their acquisition* is insufficient to sustain a plaintiff's burden of proof, absent evidence of willfulness (at a minimum, knowledge of potential competitive impact) *at the time of the acquisition*.

To hold as a matter of law that J&J possessed the requisite *mens rea* in October 2020 to render its acquisition of the Momenta biosimilar patents anticompetitive would be to deem inherently anticompetitive the conduct of any patent-holding company which, as a result of a corporate acquisition, *incidentally* acquires additional patents in the relevant market, even though the patent claims and alleged anticompetitive effects thereof were entirely unknown and unforeseeable at the time of acquisition. Amici are aware of no case law supporting Appellants' novel theory, which should be rejected as contrary to any sound conception of antitrust liability under Section 2.

II. Appellants' (and the FTC's) specific-intent argument is a red herring.

Both Appellants and the FTC claim that the district court erred in imposing a specific-intent requirement. AB at 26 ("The district court's fundamental error at summary judgment was to impose a specific-intent requirement that has no basis in law."); FTC Brief at 6 ("The district court erred in its articulation of the monopolization standard under Section 2 of the Sherman Act by misreading *2311 Racing* and *Duke Energy* to require proof of specific anticompetitive intent to exclude rivals on some basis other than efficiency.") (quotation omitted). They are both wrong.

The district court did not require proof of specific intent to monopolize. Indeed, the court expressly stated that "where, as here, the conduct alleged is not commonly before courts, intent is helpful *but not determinative* as to whether J&J's acquisition of the Momenta patents was anticompetitive." (Doc. 794 at 41 n. 19, emphasis added.) Rather than specific intent to monopolize, the district court noted this Court's "most recent articulation of the Sherman Act § 2 monopolization standard, which is 'whether the defendant 'intended to exclude rivals on some basis other than efficiency.'" (Doc. 888 at 5 (quoting Doc 794 at 50 (quoting *2311 Racing LLC v. Nat'l Ass'n for Stock Car Auto Racing, LLC*, 139 F.4th 404, 410 (4th Cir. 2025))). This Court's articulation of Section 2's monopoly standard in *2311 Racing LLC* was in turn derived from the Supreme Court's analysis in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602–03 (1985). There, the Supreme Court noted that "'no monopolist monopolizes unconscious of what he is doing.'" *Id.* at 602 (quoting *United States v. Aluminum Co. of America*, 148 F.2d 416, 432 (2nd Cir. 1945)). Instead, "*[i]mproper exclusion* (exclusion not the result of superior efficiency) *is always deliberately intended.*'" *Id.* at 603 (quoting R. Bork, The Antitrust Paradox 160 (1978)). In other words, proof of intent in the form of knowledge—which the district court found lacking here—is baked into the Section 2 monopolization standard. Contrary to Appellants and the FTC's position, consciousness of wrongdoing (*a.k.a.*, deliberate intent) must be shown in some form or another.

Appellants fabricate legal error in the hopes of convincing this Court to reverse. But there's no legal error and no justification for reversal. And in any event, the nitpicking over the district court's choice of words is academic. All agree that ultimately the correct standard is one of *willfulness*. And as shown *supra* § I, willfulness requires something more than mere intent to do the act. Because Appellants offered no evidence of anything other than mere intent to purchase the

Momenta patents—not even proof of awareness of how those patents could be used to acquire or maintain a monopoly—summary judgment in J&J's favor was proper.

III. Appellants' novel theory of antitrust liability would place an unnecessary burden on parties to corporate transactions to conduct onerous additional due diligence.

Compelling policy considerations and real-world business operations counsel against validating Appellants' novel theory of antitrust liability. Permitting Appellants' flawed monopolization claim to proceed past summary judgment would, as rightly noted by J&J, place an undue and unprecedented burden on parties to corporate transactions to conduct extensive investigations into and due diligence on every patent and patent application being acquired in a transaction and engage in a speculative analysis regarding the potential for theoretically possible *future competitive impacts*. That is, Appellants' theory of liability for allegedly anticompetitive conduct would mandate, as a functional prerequisite to any corporate transaction, a burdensome and speculative inquiry into the *potential, unforeseen, and unforeseeable* market effects of every patent and patent application being acquired. And still, even the most thorough and diligent inquiries still may not escape antitrust liability years in the future for anticompetitive effects that were unforeseeable at the time of acquisition. Put another way, Appellants' theory of antitrust liability would require every party to a corporate transaction involving the acquisition of manufacturing patents or technologies to be clairvoyant.[5] This interpretation of Section 2 liability

[5] It is worth noting that liability is often based, at a minimum, on the *foreseeability* of harm. *See, e.g.*, *McCain v. Fla. Power Corp.*, 593 So. 2d 500, 502 (Fla. 1992) (stating that foreseeability as an element of duty creates a "zone of risk" and is a minimum threshold legal requirement for opening the courthouse doors); *In re: Asbestos Prods. Liab. Litig. (No. VI)*, 873 F.3d 232, 236 (3d Cir. 2017) (stating that "[i]n the duty element in a negligence action, foreseeability limits a defendant's liability to only the risks and plaintiffs that are reasonably foreseeable," and "in proximate cause, foreseeability limits a defendant's liability to only the injuries that are a reasonably foreseeable result of the defendant's actions"); *Roneker v. Kenworth Truck Co.*, 977 F. Supp. 237, 240 (W.D.N.Y. 1997) (under *Hadley's* rule, foreseeability is a requirement for recovering consequential damages for breach of contract); *Bommarito v. Belle Chasse Marine*

has no basis in antitrust law, has never been expected or mandated by antitrust enforcement authorities, and would impose new and onerous burdens on commercial enterprise.

There are also weighty notice considerations implicated by Appellants' theory. To comply with Section 2, businesses across industries need clarity as to the scope of proscribed, anticompetitive conduct. By seeking to impose liability for anticompetitive effects that were not known (or knowable) at the time of the patent acquisition—and absent evidence of any blameworthy or wrongful conduct)—Appellants urge the application of an amorphous standard that provides inadequate notice to businesses and regulators alike. If Appellants' theory is validated, businesses may unknowingly and *unwilfully* be found to violate antitrust law. Such a construction of Section 2 liability implicates due process concerns. *Cf. Tingley v. Ferguson*, 47 F.4th 1055, 1089 (9th Cir. 2022) ("The operative question under the fair notice theory is whether a reasonable person would know what is prohibited by the law. The terms of a law cannot require 'wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings.'" (quoting *Holder v. Humanitarian L. Project*, 561 U.S. 1, 20 (2010)). Congress has enacted complex antitrust and patent regulatory schemes, but has not sanctioned Appellants' novel claims. If Congress wishes to expand the scope of antitrust laws to reach the conduct at issue, it knows how to do so: amend the Sherman Act. But expanding the scope of antitrust liability under 15 U.S.C. § 2 is the sole preserve of the Legislature, *not* the Judiciary. *See United States v. Ducore*,

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Transportation, L.L.C., 159 F.4th 297, 306 (5th Cir. 2025) (an unforeseeable intervening act—such as a personal injury claimant's overdose of illegal drugs—can constitute a superseding cause that breaks the chain of causation). *Cf. Pinkerton v. United States*, 328 U.S. 640, 647–48 (1946) (a defendant can be found liable for the substantive crime of a co-conspirator provided the crime was reasonably foreseeable and committed in furtherance of the conspiracy). In *SCM Corp. v. Xerox Corp.*, the Second Circuit rejected the plaintiff's argument that Section 2 liability should be imposed based on the reasonable foreseeability of the future monopolization effects of the defendant's actions. 645 F.2d at 1209. Appellants' theory here would be a step down from the liability theory rejected in *SCM Corp.*, not even requiring reasonable foreseeability.

312 F. Supp. 3d 535, 539 (E.D. Va. 2018) ("it is the role of Congress, not the courts, to amend statutes").

Moreover, as a policy matter, antitrust liability should not attach to lawful, exclusionary conduct based purely upon "the benefit of hindsight." As courts have recognized, to hold otherwise risks undermining the "integrity of the patent system." *See SCM Corp.*, 645 F.2d at 1206 ("Where a patent in the first instance has been lawfully acquired, a patent holder ordinarily should be allowed to exercise his patent's exclusionary power even after achieving commercial success; *to allow the imposition of treble damages based on what a reviewing court might later consider, with the benefit of hindsight, to be too much success would seriously threaten the integrity of the patent system*." (emphasis added)).

Appellants' theory would also undermine *procompetitive* conduct and have a chilling effect upon economic activity not only in the pharmaceutical industry, but across sectors—detrimentally affecting research and development, and stymieing innovation. As this Court has admonished, "both antitrust and patent law are consistent with the theory that a competitive economy promotes lower prices," and therefore "a court analyzing whether a particular patent-related practice unlawfully extends the limited monopoly should hesitate to apply antitrust sanctions to prohibit the practice if the effect of such would be to discourage innovation and investment by reducing potential rewards that otherwise would accrue to the patentee." *Int'l Wood Processors v. Power Dry, Inc.*, 792 F.2d 416, 427 (4th Cir. 1986) (emphasis added). By threatening to impose Section 2 liability upon corporate entities that acquire valid patents for innovative technologies, based upon alleged anticompetitive effects that were unforeseen (and unforeseeable) at the time of their acquisition, Appellants' conception of monopolization would undermine the shared aims of patent and antitrust law outlined above, by "discourag[ing] innovation and investment," ultimately disincentivizing manufacturers from "devot[ing] resources to innovative research and to mak[ing] investments to develop the[ir] inventions," *id.* For these reasons, Appellants' theory of anticompetitive conduct would abide the use of antitrust law to undermine, rather than promote, a competitive economy. Condoning that approach could undermine the profitability of American manufacturing based upon patented products, thereby potentially hindering the development of innovative technologies.

In short, Appellants' overly broad theory of Section 2 liability is anti-business, anti-innovation, and ultimately anti-economic growth. To impose antitrust liability on J&J based upon its (merely incidental) acquisition of the Momenta patents would permit antitrust law to be wielded as a sword to stifle competition, repress innovation, and impose new obligations upon parties to corporate acquisitions to conduct onerous and speculative due diligence on every patent or patent application acquired. This would open the floodgates of antitrust litigation by the plaintiffs' bar against companies that were parties to corporate transactions which had no deleterious effect on competition in the market at the time of the at-issue patent acquisitions. These policy implications militate against this Court validating Appellants' novel understanding of anticompetitive, exclusionary conduct.

IV. J&J's acquisition of Momenta in 2020 was approved by the FTC and DOJ, and Appellants have provided no reason to second-guess antitrust authorities' determinations years after the fact.

Notably, J&J's acquisition of Momenta in 2020 was unconditionally approved by both the FTC and United States Department of Justice ("DOJ"), the two agencies charged with antitrust enforcement. (*See* Defs.' Mem. in Supp. of Mot. to Dismiss, Doc. 46 at 4 (citation omitted).) This Court should not now sanction Appellants' attempt to second-guess antitrust authorities' reasoned determination of the legality of a corporate acquisition *five years after the fact*.

If the FTC or DOJ had any concerns as to the legality of the transaction under relevant antitrust law, either agency had the authority to pause the deal and seek additional information—as they frequently do. *See* 15 U.S.C. § 18(a)–(c); (Doc. 46 at 4, 12). However, "[n]either agency expressed any such concerns, but rather permitted the transaction to proceed without any conditions." (*See* Doc. 46 at 4 (citations omitted).)

To be sure, the Supreme Court has acknowledged the importance of private enforcement of antitrust laws. *Perma Life Muffles, Inc. v. Int'l Part Corp.*, 392 U.S. 134, 139 (1968), *overruled on other grounds by Copperweld Corp. v. Indep. Tube Corp.*, 461 U.S. 752 (1984). Amici do not contend that the failure of the FTC or DOJ to challenge J&J's acquisition of Momenta *per se* dooms Appellants' claim under Section 2 of the Sherman Act. However, when considering (a) the doctrinal errors inherent in Appellants' expansive theory of liability under Section 2, and (b) the substantial policy concerns that would attend the imposition of liability here, the fact that the Momenta acquisition went unchallenged by both the FTC and DOJ counsels strongly against permitting Appellants to retroactively impose liability for conduct that the antitrust enforcement agencies deemed lawful.

Appellants—and the plaintiffs' bar writ large—should not be permitted to use antitrust law as a vehicle for second-guessing the reasoned determination of federal regulators years after the fact, based upon the alleged effects of acquired patents upon market competition that were unknown—and unknowable—at the time. While this Court need not defer to these regulatory authorities, it should follow the law and reject Appellants' novel, post facto effort to impose antitrust liability in this case based upon a flawed legal standard.

CONCLUSION

For the foregoing reasons, amici respectfully request that this Court affirm the district court's orders granting summary judgment.

Respectfully submitted this 19th day of August 2026,

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From:	ecfnoticing@ca4.uscourts.gov
Sent:	Wednesday, August 19, 2026 11:38 AM
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United States Court of Appeals for the Fourth Circuit

Notice of Docket Activity

The following transaction was entered on 08/19/2026 at 11:37:30 AM Eastern Daylight Time and filed on 08/19/2026

Case Name:	Carefirst of Maryland, Inc. v. Johnson & Johnson
Case Number:	26-1248
Document(s):	Docket Entry #51

Docket Text:
AMICUS CURIAE BRIEF by Amici Curiae National Association of Manufacturers and The American Tort Reform Association in Support of Defendants-Appellees Johnson & Johnson and Janssen Biotech, Inc.. . Do any cases pending in this court or the Supreme Court of the United States raise similar issues? NO.. [1002037424] [26-1248] Charles Brown

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