NO. 26-1248

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

CAREFIRST OF MARYLAND, INC.,

Plaintiff-Appellant,

v.

JOHNSON & JOHNSON,

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Virginia
Case No. 2:23-cv-00629-JKW-LRL
(Hon. Jamar Kentrell Walker)

BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE SUPPORTING DEFENDANT-APPELLEE AND AFFIRMANCE

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IDENTITY AND INTEREST OF AMICUS CURIAE*

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. To that end, it regularly appears as amicus curiae to defend patent owners' rights in the face of antitrust challenges. *See, e.g., FTC v. Actavis, Inc.*, 570 U.S. 136 (2013); *Impax Labs., Inc. v. FTC*, 994 F.3d 484 (5th Cir. 2021); *UFCW Loc. 1500 Welfare Fund v. AbbVie Inc.*, 42 F.4th 709 (7th Cir. 2022).

This appeal asks whether Section 2 of the Sherman Act (15 U.S.C. § 2) still means what federal courts have said it means for decades, or whether it can be transformed into a results-based offense untethered from intent. The answer carries significant consequences for drug innovation, patent enforcement, and the administrability of federal antitrust law. Acceptance of CareFirst's standard for Section 2 monopolization claims would have disastrous consequences for drug

* No party's counsel authored any part of this brief. No one, apart from WLF and its counsel, contributed money intended to fund the brief's preparation or submission. All parties have consented to the filing of this brief.

innovation. WLF urges the Court to reaffirm the settled limits of Section 2 and reject CareFirst's attempt to convert it into a de facto strict-liability offense.

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 2 of the Sherman Act is not a strict-liability statute. For decades, the Supreme Court, this Court, and courts nationwide have required evidence of exclusionary intent to sustain a Section 2 monopolization claim. But CareFirst seeks to transform Section 2 into a results-based trap for any company that acquires a patent portfolio later found to contain patents conferring market power. The district court correctly rejected CareFirst's theory. This Court should do the same.

This case concerns the market for "Stelara," a prescription drug used to treat psoriasis, Crohn's disease, and ulcerative colitis. Johnson & Johnson has sold Stelara in the United States since 2009. In 2020, J&J acquired biotech company Momenta Pharmaceuticals for Momenta's investigational drug known as "nipocalimab"—a drug unrelated to Stelara that is used to treat an autoimmune disorder causing muscle weakness. As part of the acquisition, J&J obtained Momenta's 500-plus-

patent portfolio. Neither the Federal Trade Commission nor the Department of Justice objected to the acquisition.

Years later, during routine patent litigation, J&J discovered that four patents in the Momenta portfolio also covered a process that Amgen planned to use for manufacturing biosimilar versions of Stelara. With this discovery, J&J did what any reasonable patent-holder would do: it asserted its patents against Amgen. The case settled, and that should have been the end of the story.

But CareFirst had other plans. In 2023, it sued J&J, insisting that J&J's incidental acquisition of the four manufacturing patents—patents whose contents J&J did not even know about at the time of the Momenta acquisition—was "willful" monopolization.

CareFirst's theory is as unprecedented as it is wrong. If embraced, it would turn Section 2 into a trap for even the wary—punishing firms for what was quite literally unforeseeable. Not only would that novel standard debilitate drug innovation, but it would also undermine the federal government's review of mergers and acquisitions under the Hart-Scott-Rodino Act.

This Court should affirm the district court's judgment and reject CareFirst's theory.

ARGUMENT

I. SECTION 2 ISN'T A STRICT-LIABILITY STATUTE.

Market power acquired by accident is not unlawful. *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) ("The mere possession of monopoly power . . . is not . . . unlawful."). But CareFirst's sweeping theory would make it so. CareFirst argues that a firm violates Section 2 merely by acquiring a patent portfolio that, years later, turns out to contain patents conferring market power—even if the firm lacked knowledge of the relevant patents and couldn't have foreseen their competitive effect at the time of acquisition. The theory reduces Section 2 to strict liability and has no support in the statute or the governing case law.

A. Section 2 requires more than the accidental acquisition of market power.

The Supreme Court has long distinguished between monopoly power achieved through exclusionary conduct and monopoly power resulting from a "superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966). Only

market power from exclusionary conduct is actionable, and so the Supreme Court has consistently required a monopolization plaintiff to prove not only the possession of monopoly power, but also its "willful acquisition or maintenance." *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438, 448 (2009). CareFirst's theory disregards that distinction. It attempts to manufacture Section 2 liability from J&J's incidental acquisition of patents whose contents J&J didn't even know about when it acquired Momenta. In effect, CareFirst asks this Court, contrary to the "willfulness" requirement, to make market power by happenstance actionable.

The law doesn't allow that, and for good reason. Section 2's "willfulness" requirement serves an essential purpose. It means that monopoly power becomes unlawful only when it's acquired through exclusionary or "anticompetitive" conduct. *Trinko*, 540 U.S. at 407. That limitation preserves the necessary distinction between legal business activity and unlawful exclusion. It protects the "incentive to innovate" and avoids chilling legitimate conduct. *Id.* (explaining that the "element of anticompetitive conduct . . . safeguard[s] the incentive to innovate").

Consistent with these principles, the Supreme Court has repeatedly explained that intent is relevant to whether challenged conduct is properly characterized as "anticompetitive," or merely the product of accident. *Trinko*, 540 U.S. at 409, 414 (rejecting Section 2 monopolization claim where defendant lacked "anticompetitive malice" in refusing to deal with competitors); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602 (1985) (explaining that intent bears on whether conduct is "fairly characterized" as "exclusionary," "anticompetitive," or "predatory") (internal quotes omitted). The Supreme Court applied this very framework in *Verizon Communications v. Law Offices of Curtis V. Trinko*. There, the Court rejected a monopolization claim premised on Verizon's refusal to share its network with rivals where there wasn't a basis to infer "anticompetitive malice" from the company's conduct. 540 U.S. at 409.

Following the Supreme Court's lead, this Court has repeatedly defined anticompetitive conduct for monopolization claims as that "intended to exclude rivals." *2311 Racing LLC v. NASCAR*, 139 F.4th 404, 410 (4th Cir. 2025) (internal quotes omitted); *Oksanen v. Page Mem'l Hosp.*, 945 F.2d 696, 710 (4th Cir. 1991) (en banc) (rejecting Section 2

monopolization claim where plaintiff-appellant "failed to demonstrate the monopolistic intent necessary"). And other circuits have done similarly, treating intent as vital. *See, e.g., Endsley v. City of Chicago*, 230 F.3d 276, 283 (7th Cir. 2000) ("The mere existence of the power to control prices or exclude competition is not unlawful unless it is coupled with intent"); *U.S. Football League v. NFL*, 842 F.2d 1335, 1359 (2d Cir. 1988) ("The willfulness element certainly requires proof of intent."); *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 487 (5th Cir. 1984) (same).

B. CareFirst's "general intent" theory improperly collapses Section 2 into a strict-liability offense.

The willfulness requirement dooms CareFirst's case. And so CareFirst attempts to circumvent it by redefining intent out of existence. It argues that only attempted monopolization claims require "specific intent," and from that premise, contends that monopolization claims require "general intent"—which, it says, is nothing more than "the mere intent to do the act." CareFirst Br. 28-29. But the cases that CareFirst relies on for this maneuver—*United States v. Aluminum Co. of Am.*, 148 F.2d 416, 432 (2d Cir. 1945) and *UFCW Local 1776 v. Takeda Pharm. Co.*, 11 F.4th 118, 137 (2d Cir. 2021)—merely distinguish attempted

monopolization from completed monopolization claims on the issue of *specific* intent. Nowhere do they hold that Section 2 can reach conduct undertaken without even knowledge of the facts that allegedly make the conduct exclusionary. The fatal flaw in CareFirst's argument is that it treats the absence of a *specific*-intent requirement as the absence of *any* intent requirement at all.

Such a strict-liability theory isn't correct. Indeed, it disregards case upon case explaining that intent affects whether conduct is anticompetitive, and it dissolves the Supreme Court's sharp distinction between willful acquisition of market power and accidental acquisition into no difference at all. *Trinko*, 540 U.S. at 407. Strict liability especially isn't correct in the context of patent acquisitions, where the "mere accumulation of patents, no matter how many, is not in and of itself illegal." *Automatic Radio Mfg. Co. v. Hazeltine Res., Inc.*, 339 U.S. 827, 834 (1950) *overruled on other grounds by Lear, Inc. v. Adkins*, 395 U.S. 653 (1969); *see also Procter & Gamble Co. v. Paragon Trade Brands, Inc.*, 61 F. Supp. 2d 102, 109 n.8 (D. Del. 1996) (quoting the same).

The Second Circuit's decision in *SCM Corp. v. Xerox Corp.*, 645 F.2d 1195 (2d Cir. 1981) confirms the point. In discussing when a patent

acquisition could conceivably violate Section 2, the court explained that liability may arise where a competitor acquires a patent that he "*knows when added to his existing share* will afford him monopoly power." *Id.* at 1205 (emphasis added). But the court rejected liability for Xerox's acquisitions because the patents there were acquired long before their competitive significance materialized. *Id.* at 1209. To impose liability under that circumstance would "undermine the entire patent system." *Id. SCM* shows that Section 2 liability premised on patent acquisitions turns, not on the fact of acquisition itself, but on the acquirer's knowledge and appreciation of the patents' competitive significance "at the time of acquisition." *Id.* at 1207-08.

This understanding, not CareFirst's results-based theory, also aligns with traditional notions of what CareFirst references as "general intent." CareFirst Br. 28. As the Supreme Court has explained, "general intent" is commonly associated with a defendant's "knowledge," whereas "specific intent" is associated with the defendant's "purpose." *See United States v. Bailey*, 444 U.S. 394, 405 (1980) (explaining that "knowledge" corresponds with "general intent" and "purpose" corresponds with "specific intent"). A defendant acts "knowingly" when it knows "the facts"

that make his conduct unlawful, *Elonis v. United States*, 575 U.S. 723, 735 (2015*); see also id.* at 755 (Thomas, J., dissenting) ("General intent divides those who know the facts . . . from those who do not."); or when it knows that a prohibited result is "practically certain to follow from its conduct," *Borden v. United States*, 593 U.S. 420, 426 (2021) (internal quotes omitted). CareFirst's theory satisfies neither conception. It would permit liability based solely on J&J's acquisition of Momenta's 500-plus-patent portfolio, even without evidence that J&J knew of the four patents at issue or understood their later competitive significance. Courts have never extended Section 2 liability on that conception of general intent.

CareFirst's position is even more problematic given that Section 2 carries criminal penalties. The Supreme Court has instructed that statutes operating in both criminal and civil contexts should be construed "consistently," whether encountered "in a criminal or noncriminal context." *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004); *Sessions v. Dimaya*, 584 U.S. 148, 164 (2018) (same, noting the result "could hardly [be] otherwise"). Yet Section 2 can't be construed to impose criminal liability based solely on incidental acquisition of market power because of the long-standing presumption that Congress does not create criminal

offenses without some *mens rea* requirement. *See Staples v. United States*, 511 U.S. 600, 605-06 (1994) (explaining the "presumption favoring mens rea," even where a criminal statute is silent as to intent). In short, because CareFirst's results-based standard can't govern in the criminal context, it can't govern in the civil context either.

* * *

Section 2 requires, at minimum, that the defendant knew the facts giving its conduct exclusionary significance at the time it acted. In granting summary judgment to J&J, the district court asked whether "J&J had meaningful knowledge of the four Momenta patents in such a way that J&J could view Momenta as a potential competitor." ECF No. 795 at 45. The court ultimately answered that question, finding that CareFirst failed to produce admissible evidence from which a reasonable jury could find that J&J knew about the contents of the four patents at the time of acquisition. ECF No. 887 at 15. Contrary to CareFirst's characterizations, that's not a "specific intent" standard (CareFirst Br. 26); that's faithful application of Section 2's longstanding distinction between willful and accidental acquisition of market power. This Court should reject CareFirst's novel request for a strict-liability standard.

II. CAREFIRST'S STANDARD WOULD DESTABILIZE THE MERGER-REVIEW FRAMEWORK CONGRESS ESTABLISHED.

CareFirst can't win under Section 2. But its theory would also impose serious collateral damage on the Hart-Scott-Rodino premerger review framework that Congress established to promote certainty, predictability, and efficiency in corporate transactions. *See* 15 U.S.C. § 18a; s*ee also* Pub. L. No. 94-435, 90 Stat. 1383 (1976) (noting legislative purpose of HSR is to "improve and facilitate the expeditious and effective enforcement of the antitrust laws").

That tension is particularly evident here because the agencies charged with premerger review of the Momenta transaction—DOJ and FTC—raised no objection to it. But CareFirst's results-based theory would permit Section 2 liability years later based on patents whose alleged competitive impact was neither identified during the review nor apparent to J&J itself. The theory can't be reconciled with the operation of the HSR clearance process, either in this case or in the many cases that will follow.

HSR review focuses on the transacting parties' principal lines of business, overlapping products, supply relationships, and other high-level competitive overlaps. *See* Fed. Trade Comm'n, *Instructions to*

Notification and Report Form for Certain Mergers and Acquisitions (rev. Feb. 4, 2023), https://perma.cc/H3H2-RR7E (instructions for completing the pre-2025 acquisition report form); *see also* Fed. Trade Comm'n, HSR Notification Forms, Instructions and Guidance, (March 23, 2026), https://perma.cc/32FK-TRZS (explaining that the FTC is "accepting HSR filings using the Form and Instructions that were in place before [ ] February 10, 2025"). The process does not require exhaustive scrutiny of every asset in the target's portfolio—much less hundreds, if not thousands, of patents held by a biotech company. *Id*.

CareFirst's theory diminishes the HSR process. Although HSR clearance does not confer antitrust immunity on a transacting party, it often carries weight in courts, before regulators, and in markets. *See, e.g.*, *Eastman v. Quest Diagnostics, Inc.*, Case No. 15-cv-00415, 2016 WL 1640465, at *10 (N.D. Cal. Apr. 26, 2016) (noting that FTC clearance "weigh[ed] against the conclusion that" the acquisition could be "plausibly characterized as an unreasonable restriction on competition"); *Pearl Brewing Co. v. Miller Brewing Co.*, No. SA-82-CA-435, 1993 WL 424236, at *3 (W.D. Tex. Mar. 31, 1993) (explaining that FTC's and DOJ's

decision to raise "no objection to the acquisition is entitled to some consideration by the Court").

Yet under CareFirst's standard, HSR approval would become a hollow formality: firms could comply fully with HSR requirements yet still face Section 2 liability years later for patents whose relevance only became apparent long after closing. CareFirst's standard would force the FTC and DOJ into an untenable choice: either (1) demand exhaustive, burdensome review of every incidental patent in each transaction, grinding procompetitive deals to a halt, or (2) maintain the current process and accept that HSR clearance provides no meaningful guidance to courts or markets.

Either outcome would undermine confidence in the HSR process and destabilize antitrust enforcement. Courts should reject a standard that is not only at odds with established doctrine but that would also disrupt a federal regulatory regime. *See Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 353 (2001) (rejecting liability theories that would "exert an extraneous pull" on the FDA approval "scheme established by Congress").

III. CAREFIRST'S STANDARD WOULD HARM PHARMACEUTICAL INNOVATION AND CONSUMERS.

Finally, CareFirst's invalid standard would have disastrous consequences for drug innovation. Mergers and acquisitions are essential to drug innovation. In 2025, more than 1,225 biotech and pharmaceutical M&A transactions occurred. *See* Inst. for Mergers, Acquisitions & Alliances, *M&A Biotechnology & Pharmaceuticals* (2026), https://perma.cc/MK3X-JKAE.

In the pharmaceutical industry, smaller firms typically drive early-stage innovation but lack the capital, regulatory expertise, and infrastructure to bring new drugs to market. Larger firms thus "leverage [their] comparative advantage" in these areas, enabling promising therapies to advance through late-stage trials and reach patients. *See* Wayne Winegarden, *Penalizing Mergers and Acquisitions Won't Accelerate Economic Growth*, Forbes (Sept. 15, 2025), https://perma.cc/W9WL-VZEG.

Industry analysts confirm that M&A activity sustains a robust research ecosystem and incentivizes future breakthroughs by rewarding early-stage innovators. *See* Roerich Bansal et al., *What's behind the pharmaceutical sector's M&A push,* McKinsey on Finance, No. 68 at 3-4

(Oct. 2018); Curvavit, *Understanding the Value of Mergers and Acquisitions in Life Sciences* (Jan. 8, 2024), https://perma.cc/KH2D-BFPJ.

But CareFirst's proposed standard would make routine acquisitions legally hazardous. A firm could face Section 2 liability for acquiring a patent portfolio even if it lacked knowledge of the relevant patents, the patents played no role in the acquisition decision, and any insight into the patents' market effects emerged only years later. To avoid that risk, acquirers would have to scour hundreds or thousands of patents, speculate about which of them might someday intersect with a competitor's manufacturing process, and then carve those patents out of the deal. That demands not reasonable diligence, but perfect clairvoyance. The practical result would be enormous costs, significant delays, and a substantial chill on otherwise beneficial acquisitions.

The consequences for innovation would be severe, upending the Supreme Court's caution to "safeguard the incentive to innovate." *Trinko*, 540 U.S. at 407. Fewer acquisitions would mean fewer buyouts, reducing incentives for small firms to invest in early-stage research. Smaller firms would be forced to shoulder late-stage development burdens that larger

firms are better equipped to handle, slowing the arrival of new, potentially lifesaving therapies. Consumers would face higher prices, fewer treatment options, and slower medical progress.

Nobody wants that. These outcomes contradict antitrust law's core purpose of maximizing consumer welfare. *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 107 (1984) ("Congress designed the Sherman Act as a consumer welfare prescription.") (internal quotes and citations omitted). They also undermine the patent system's goal of fostering innovation and efficient technology transfer. *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 262 (1979) (describing the purposes of the patent system, including to "foster and reward invention" and to "promote disclosure of inventions" to benefit the public).

CONCLUSION

Section 2 has never imposed liability for accidental acquisitions of market power. CareFirst's strict-liability theory contradicts binding precedent, lacks support in the case law, and would destabilize both pharmaceutical innovation and antitrust enforcement. This Court should affirm.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limits of Federal Rule of Appellate Procedure 29(a)(5) because it contains 3,109 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f).

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CERTIFICATE OF SERVICE

I certify that on August 19, 2026, I filed this brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit using the CM/ECF system. All participants in this case are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

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