No. 20-2402

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

UFCW LOCAL 1500 WELFARE FUND, et al.,

Plaintiffs-Appellants,

v.

ABBVIE INC., et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Illinois, No. 19-CV-1873 (Shah, J.)

Brief of *Amicus Curiae* Open Markets Institute in Support of Plaintiffs-Appellants

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Appellate Court No: 20-2402

Short Caption: UFCW Local 1500 Welfare Fund, et al. v. AbbVie Inc., et al.

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INTEREST OF *AMICUS CURIAE*[1]

The Open Markets Institute (OMI) is a non-profit organization dedicated to promoting fair and competitive markets. It does not accept any funding or donations from for-profit corporations. Its mission is to safeguard our political economy from concentrations of private power that undermine fair competition and threaten liberty, democracy, and prosperity. OMI regularly provides expertise on antitrust law and competition policy to Congress, federal agencies, courts, journalists, and members of the public.

Pharmaceutical corporations can abuse the patent system to maintain monopolies on branded drugs. Instead of seeking patents for new molecular and biologic discoveries and other genuine inventions, they can indiscriminately apply for monopolistic patent protections for trivial modifications to existing drugs—modifications that may not meet the criteria for patentability. Through a policy of patent filings made without consideration for the merits, they can accumulate a large portfolio of patents and pending patents covering drugs that have been on the market for years or even decades. This misuse of the patent system excludes generic competition, perpetuates monopoly,

[1] The plaintiffs-appellants consented to the filing of the brief. Two of the defendants-appellees granted consent, while one of the defendants-appellees did not object and one did not respond to *amicus curiae*'s request for consent. *Amicus curiae* has moved for leave to file this brief. No counsel for any party authored this brief in whole or part. Apart from *amicus curiae*, no person contributed money intended to fund the brief's preparation and submission.

and costs patients and health care payors billions of dollars every year. Ensuring that antitrust law can police abuses of the Patent and Trademark Office, other administrative bodies, and the judiciary is essential for protecting the public from unfairly obtained monopolies in pharmaceuticals and the rest of the economy.

SUMMARY OF ARGUMENT

Corporations can abuse administrative and judicial proceedings to exclude rivals and maintain market dominance. Through a series of indiscriminate regulatory or judicial filings *not* made to assert legitimate legal rights, monopolists and other powerful corporations can impose exorbitant costs and overwhelming burdens on rivals and thereby preserve their market control. This abuse of government process is an unfair form of competition that can "build[] up one empire and destroy[] another." *Cal. Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 515 (1972). A series of petitions or litigation targeting a rival—without consideration for the underlying merits—is "costly, distracting and time-consuming" and can "inflict a crushing burden on a business." *USS-POSCO Indus. v. Contra Costa Cnty. Bldg. & Constr. and Trades Council, AFL-CIO*, 31 F.3d 800, 811 (9th Cir. 1994).

As a concrete example of regulatory abuse, corporations that indiscriminately apply for patents can deter prospective rivals and protect their monopolistic positions. A series of meritless patent filings can create the threat of potentially ruinous patent infringement liabilities. Out of many patent applications filed without consideration for

the patentability of the claim, one or even a small number of applications may yield enforceable patents. *See id.* at 811 ("[E]ven a broken clock is right twice a day."). In the face of this possibility, would-be competitors may be unwilling to take the risk of a devastating judgment for patent infringement. *See Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1928 (2016) ("Section 284 of the Patent Act provides that, in a case of infringement, courts 'may increase the damages up to three times the amount found or assessed.'"). Accordingly, a thicket of patents and pending patents, even if they are all ultimately found to be invalid and unenforceable, can serve as a powerful barrier to new entry. *See, e.g.*, I-MAK, Overpatented, Overpriced: How Excessive Pharmaceutical Patenting Is Extending Monopolies and Driving Up Drug Prices 5 (2018) (hereinafter "I-MAK Report") ("Today, drugmakers are filing dozens or even hundreds of patents, resulting in nearly double the length of protection, blocking competition and keeping cheaper versions of medicines off the market.").

While the Supreme Court generally placed speech aimed at governmental actors outside the scope of the antitrust laws, *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965), the Court established limits on what constitutes petitioning protected by the *Noerr-Pennington* doctrine. The Court noted that protection may be lost—and the antitrust laws would apply—if the government petition is "a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business

relationships of a competitor." *Noerr*, 365 U.S. at 144. Without mentioning *Noerr-Pennington*, the Court, in a 1965 decision, established limits on petitioning the U.S. Patent and Trademark Office and held that the fraudulent procurement of a patent can give rise to liability under the Sherman Act. *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177 (1965).

Building on these decisions, the Supreme Court ruled that a series of petitions filed to administrative bodies, without consideration of the underlying merits, is not entitled to *Noerr-Pennington* protection. Specifically, "a pattern of baseless, repetitive claims . . . which leads the factfinder to conclude that the administrative and judicial processes have been abused" does not receive *Noerr-Pennington* protection. *California Motor Transport*, 404 U.S. at 513; *see also City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 380 (1991) ("A classic example [of sham petitioning] is the filing of frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay."). In a 1993 decision, the Court, in adopting a new test for what constitutes a *single* sham petition, did not change the standard for a *series* of sham petitions. *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60–61 (1993); *see also USS-POSCO*, 31 F.3d at 810 ("Far from criticizing or limiting *California Motor Transport*, the *Professional Real Estate Investors* majority cited it with approval.").

Given controlling Supreme Court case law, four courts of appeals formally adopted a "pattern of petitioning" exception to *Noerr-Pennington*. These courts synthesized *Professional Real Estate Investors* and *California Motor Transport* and held that the two decisions apply to different circumstances. Whereas the *Professional Real Estate Investors* test applies to a *single* petition, the *California Motor Transport* standard applies to a *series* of petitions made to an administrative agency or court. *Waugh Chapel South, LLC v. United Food and Commercial Workers Union Local 27*, 728 F.3d 354, 364 (4th Cir. 2013); *Primetime 24 Joint Venture v. Nat'l Broad. Co.*, 219 F.3d 92 (2d Cir. 2000); *USS-POSCO*, 31 F.3d at 810–11; *see also Hanover 3201 Realty, LLC v. Village Supermarkets, Inc.*, 806 F.3d 162, 180 (3d Cir. 2015) ("[W]hen a party alleges a series of legal proceedings, we conclude that the sham litigation standard from *California Motor* should govern.").

Whereas a single petition should be judged *retrospectively* to determine whether it constitutes a sham, a series of petitions are a sham if they were *prospectively* baseless. *Hanover 3201*, 806 F.3d at 180. Under this standard, a court must determine whether the petitions were filed "pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival." *USS-POSCO*, 31 F.3d at 811. Were the petitions filed to harm and exclude rivals without any consideration of the strength of the underlying claims? The policy of petitioning and the series of petitions should be evaluated in their totality. *Hanover 3201*, 806 F.3d at 180; *Waugh Chapel*, 728 F.3d at 364. The fact that one or a few petitions were successful in a series of

petitions does not automatically immunize the whole pattern of petitioning, because "even a broken clock is right twice a day." *USS-POSCO*, 31 F.3d at 811.

The district court should have applied *California Motor Transport* to the plaintiffs-appellants allegations of serial sham petitioning by AbbVie. Indeed, it was bound to apply this decision. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower court] should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions.").

The pattern of petitioning exception safeguards administrative and judicial processes against abuses and ensures that corporations cannot misuse government as a competitive weapon. Under the exception, corporations that serially abuse regulatory and judicial processes cannot cloak their misconduct in the *Noerr-Pennington* doctrine. "[L]egal filings made, not out of a genuine interest in redressing grievances, but as part of a pattern or practice of successive filings undertaken essentially for purposes of harassment" are not protected from antitrust liability. *USS-POSCO*, 31 F.3d at 811.

At the same time, the pattern of petitioning exception preserves the public's right to engage in good faith communications with the government. First, the exception applies only to repetitious petitions. It does not govern a single petition, which qualifies as a sham only if it triggers the rigorous two-part test announced in *Professional Real Estate*

Investors. *Hanover 3201*, 806 F.3d at 810. Second, the exception only applies to serial filings that are made without consideration for the merits. A series of good faith petitions is protected by *Noerr-Pennington*. Considering these conditions, the exception preserves ample space for legitimate requests for government action.

ARGUMENT

I. Corporations Can Maintain and Extend Their Monopoly Power Through Serial Misuse of Regulatory and Judicial Processes.

Corporations can abuse administrative and judicial proceedings to exclude rivals and maintain their market dominance. Through a series of filings made without any consideration of the merits, corporations, including monopolists, can impose prohibitive costs on these rivals. This abuse of government process is an unfair form of competition that can "build[] up one empire and destroy[] another." *California Motor Transport*, 404 U.S. at 515. For example, a firm that pursues patent applications irrespective of the underlying merits and has many patents pending at a given time can deter entry by confronting new rivals with the prospect, however small, of ruinous patent infringement liabilities. *See* Fed. Trade Comm'n, *Enforcement Perspectives on the* Noerr-Pennington *Doctrine* 29 (2006) (hereinafter "FTC *Noerr-Pennington* Report") (noting that firms can seek regulatory action "without regard to the merits but simply to hamper a marketplace rival").

A monopolist can harass and intimidate prospective competitors through baseless administrative and litigation proceedings. The monopolist, by initiating administrative

or judicial proceedings without consideration for the merits, can impose onerous costs on rivals. *See id.* at 16 ("[T]he abuse of governmental processes can impose a substantial financial burden on competitors, much of which may be incurred regardless of the outcome of the process."). A series of petitions or litigation targeting a rival is "costly, distracting and time-consuming" and can "inflict a crushing burden on a business." *USS-POSCO*, 31 F.3d at 811.

In the face of a monopolist's baseless repetitive petitions, would-be rivals may delay or even terminate plans to enter a market. As the Federal Trade Commission wrote, "Initiating litigation (or a burdensome administrative proceeding) is one of the most attractive means by which a firm, or a group of firms, can successfully prey on competitors." FTC *Noerr-Pennington* Report, at 38; *see also, e.g.*, *Hanover 3201*, 806 F.3d at 182 ("The filings have imposed significant expense on Hanover Realty, have continued to delay the project, and threaten the viability of the project altogether."); *Primetime 24*, 219 F.3d 92, 101 (2d Cir. 2000) ("PrimeTime's complaint therefore adequately alleges that the [Satellite Home Viewer Act] challenges were brought pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival.) (internal quotes omitted). Through such repetitious filings, monopolists can restrict entry and insulate themselves from fair competition.

For example, corporations that indiscriminately apply for patents can discourage prospective rivals and protect their monopolistic positions. A series of meritless patent

filings may create the threat of potentially ruinous patent infringement liabilities. Out of many of patent applications filed without consideration for the patentability of the claim, one or even a small number may be valid. *See USS-POSCO*, 31 F.3d at 811 ("[E]ven a broken clock is right twice a day."). A would-be competitor may be unwilling to take the risk of a devastating judgment for patent infringement. *See Halo Elecs.*, 136 S. Ct. at 1928 ("Section 284 of the Patent Act provides that, in a case of infringement, courts 'may increase the damages up to three times the amount found or assessed.'"). Under these circumstances, a thicket of patents and pending patents, even if they ultimately are all lacking in merit and unenforceable, can serve as a powerful barrier to new entry. *See, e.g.*, I-MAK Report at 5 ("Today, drugmakers are filing dozens or even hundreds of patents, resulting in nearly double the length of protection, blocking competition and keeping cheaper versions of medicines off the market.").

II. The District Court Should Have Applied the Pattern of Petitioning Exception to the *Noerr-Pennington* Doctrine.

In evaluating the defendant-appellee's numerous administrative and judicial filings seeking patent monopolies and enforcement of these patents, the district court should have applied the "pattern of petitioning" exception to the *Noerr-Pennington* doctrine. *Hanover 3201*, 806 F.3d at 180. The Supreme Court announced this limitation in a 1972 decision, and four federal courts of appeals have applied this exception to a series of administrative and judicial filings that were alleged to be prospectively baseless.

The Supreme Court placed speech aimed at governmental actors, in general, outside the scope of the antitrust laws. The Court held that petitioning of legislators, even if it calls for state action to limit competition, is generally protected from antitrust challenges. *Noerr*, 365 U.S. 127; *Pennington*, 381 U.S. 657 (1965). In articulating the *Noerr-Pennington* doctrine, the Court reasoned that Congress did not enact the Sherman Act to regulate political speech and that the Bill of Rights protects petitioning of the government. *Noerr*, 365 U.S. at 137–38. The Court, however, indicated at the outset that *Noerr-Pennington* protection would not be absolute. It stated that efforts to obtain government action that are "a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor" would be subject to the Sherman Act. *Noerr*, 365 U.S. at 144.

In the decade after it announced the *Noerr-Pennington* doctrine, the Court established a clear limit on the doctrine.[2] Even as the Court extended the immunity to the petitioning of administrative bodies, *California Motor Transport*, 404 U.S. at 510–11, the Court noted that communications to the government were not categorically protected from legal liability. Reviewing then-existing rules governing administrative and judicial processes, it observed that "unethical conduct in the setting of the adjudicatory process

[2] In a 1965 decision, the Court implicitly adopted a fraud exception to *Noerr-Pennington*. The Court held that the fraudulent procurement of a patent from the U.S. Patent and Trademark Office can be the basis for a monopolization suit under the Sherman Act. *Walker Process*, 382 U.S. at 177.

often results in sanctions." *Id.* at 512. Building on these existing limits on what constitutes protected communications to government, the Supreme Court ruled that a series of petitions filed to administrative bodies without consideration of the underlying merits is not entitled to *Noerr-Pennington* protection. It held that "a pattern of baseless, repetitive claims . . . which leads the factfinder to conclude that the administrative and judicial processes have been abused" is not immunized under *Noerr-Pennington*. *Id.* at 513; *see also Omni*, 499 U.S. at 380 ("A classic example [of sham petitioning] is the filing of frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay.").

In 1993, the Supreme Court adopted a new test for what constitutes a *single* sham petition—but did not change the test for a *series* of sham petitions. It examined a single allegedly sham lawsuit and ruled that such litigation must be objectively unreasonable and motivated by a subjective bad faith to trigger the sham exception. *Professional Real Estate Investors*, 508 U.S. at 60–61. The Court rejected the argument that a single suit motivated by subjective bad intent alone can trigger the sham exception. *Id.* at 60.

In announcing this two-factor test, the majority did not limit the scope of *California Motor Transport* and indeed cited the decision approvingly. *See id.* at 58 ("Since *California Motor Transport*, we have consistently assumed that the sham exception contains an indispensable objective component."). The Court in *Professional Real Estate Investors* did *not* purport to revise the standard for a series of allegedly sham petitions to

administrative or judicial bodies.[3] *See USS-POSCO*, 31 F.3d at 810 ("Far from criticizing or limiting *California Motor Transport*, the *Professional Real Estate Investors* majority cited it with approval.").

Given Supreme Court case law, four courts of appeals have formally adopted a "pattern of petitioning" exception to *Noerr-Pennington*. They have synthesized *Professional Real Estate Investors* and *California Motor Transport* and held that the two decisions apply to different circumstances. Whereas the *Professional Real Estate Investors* test applies to a *single* petition, the *California Motor Transport* standard applies to a *series* of petitions made to an administrative agency or court.[4] *Waugh Chapel South, LLC v. United Food and Commercial Workers Union Local 27*, 728 F.3d 354, 364 (4th Cir. 2013); *Primetime 24*, 219 F.3d at 100–01; *USS-POSCO*, 31 F.3d at 810–11; *see also Hanover 3201*, 806 F.3d at 180 ("[W]hen a party alleges a series of legal proceedings, we conclude that

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[3] The Supreme Court can overrule its own precedents, but it is the *only* court with this prerogative on interpretations of federal law. Until the Court expressly overrules a previous decision, lower courts are bound to apply controlling Supreme Court case law. The Court made clear the lower courts' duty to follow its precedents:

> If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower court] should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions.

Rodriguez de Quijas, 490 U.S. at 484.

[4] The Third Circuit found four filings were sufficient to be a series. *Hanover 3201*, 806 F.3d at 181 ("[W]e do not set a minimum number requirement for the applicability of *California Motor* . . . ").

the sham litigation standard from *California Motor* should govern."); FTC *Noerr-Pennington* Report, at 29 ("[A] 'pattern' exception to *Noerr* should apply when a party invokes administrative processes, judicial processes, or a combination thereof, to hinder marketplace rivals.").

The point of reference is also different for a single alleged sham petition versus a series of alleged sham petitions. Whereas a single petition should be judged *retrospectively* to determine whether it constitutes a sham, a series of petitions are a sham if they were *prospectively* baseless. *Hanover 3201*, 806 F.3d at 180. Under this standard, a court must determine whether the petitions were filed "pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival." *USS-POSCO*, 31 F.3d at 811. Were the petitions filed to harm and exclude rivals without consideration of the strength of the underlying claims? *See Hanover 2301*, 806 F.3d at 180 ("This inquiry asks whether a series of petitions were filed with or without regard to merit and for the purpose of using the governmental process (as opposed to the outcome of that process) to harm a market rival and restrain trade."). The policy of petitioning and the series of petitions should be evaluated in their totality. *Id.*; *Waugh Chapel*, 728 F.3d at 364. The fact that even a few petitions were successful in a series of petitions does not automatically immunize the whole pattern of petitioning, because "even a broken clock is right twice a day." *USS-POSCO*, 31 F.3d at 811.

While this Court cast doubt on the validity of *California Motor Transport* in a decision earlier this year, *California Motor Transport* remains controlling precedent that the district court should have applied. This Court questioned whether *California Motor Transport* is good law given the two-part test announced in *Professional Real Estate Investors* for a single allegedly sham petition. *U.S. Futures Exch., LLC v. Bd. of Trade of the City of Chi., Inc.*, 953 F.3d 955, 965 (7th Cir. 2020). First, the district court "should [have] follow[ed] the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas*, 490 U.S. at 484. Lower courts are bound to follow *California Motor Transport* unless and until the Supreme Court formally overrules the decision. *Id.* Second, the skepticism expressed in *U.S. Futures Exchange* about *California Motor Transport* is dicta because this Court confronted a single legislative proceeding, *not* "multiple lawsuits or petition across various legislative and administrative fronts." *U.S. Futures Exchange*, 953 F.3d at 965.[5]

[5] The First Circuit's rationale for not applying *California Motor Transport* to the alleged abuse of a regulatory proceeding also constitutes dicta. *See P.R. Tel. Co. v. San Juan Cable LLC*, 874 F.3d 767, 772 (1st Cir. 2017) ("Nor is this a case in which a monopolist deterred competition by threatening to file suits without regard to their merit, as in *California Motor Transport*.").

In his concurrence in *Puerto Rico Telephone*, Judge Barron wrote, "[A]s I read our opinion, [it] leaves open the possibility that . . . a monopolist might be liable under the antitrust laws for engaging in a pattern of petitioning, even though no single filing in that pattern is objectively baseless." *Id.* at 773 (Barron, J., concurring).

III. The Pattern of Petitioning Exception Prevents Abuses of Administrative and Judicial Processes While Protecting the Public's Right to Petition the Government.

The pattern of petitioning exception safeguards administrative and judicial processes from abuse while protecting the public's right to petition the government. This exception ensures that corporations cannot make repetitious filings, without any consideration of the merits, to impede and block competitors. At the same time, it provides ample room for members of the public and businesses to communicate with the government, seek redress for their grievances, and exercise their statutory and regulatory rights. FTC *Noerr-Pennington* Report, at 38.

Serial petitioning presents much greater risks of abuse than a single petition. The Supreme Court observed that repetitious filings are far more likely to function as a form of harassment. *See California Motor Transport*, 404 U.S. at 513 ("One claim, which a court or agency may think baseless, may go unnoticed; but a pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused."). Courts are also better positioned to decide whether a party abused governmental processes with a series of alleged sham filings than with a single alleged sham petition. *See Hanover 3201*, 806 F.3d at 180 ("Not only do pattern cases often involve more complex fact sets and a greater risk of antitrust harm, but the reviewing court sits in a much better position to assess whether a defendant has misused the governmental process to curtail competition.").

The pattern of petitioning exception shields administrative and judicial bodies against abuses and ensures that the misuse of government process cannot be deployed as a competitive weapon. Under the exception, corporations that serially abuse regulatory and judicial processes cannot cloak their misconduct in the *Noerr-Pennington* doctrine. They are not free to "indiscriminately file[] (or direct[]) a series of legal proceedings without regard for the merits" with the aim of obtaining or maintaining a monopoly. *Waugh Chapel*, 728 F.3d at 364. Specifically, "legal filings made, not out of a genuine interest in redressing grievances, but as part of a pattern or practice of successive filings undertaken essentially for purposes of harassment" are not protected. *USS-POSCO*, 31 F.3d at 811.

At the same time, this exception fully preserves the public's right to engage in good faith communication with administrative and judicial bodies and assert their legal rights. First, the exception applies only to repetitious petitions. It does not govern single petitions, which qualify as a sham only if they trigger the two-part test announced in *Professional Real Estate Investors*. *Hanover 3201*, 806 F.3d at 810. Second, the exception only applies to serial filings that are made without consideration for the merits. A series of good faith petitions is protected by *Noerr-Pennington*. Given that the exception governs only repetitious petitions made pursuant to a policy of using government process to harass and burden rivals, the exception does not threaten or discourage genuine requests for government action.

CONCLUSION

The district court failed to properly apply the pattern of petitioning exception to the *Noerr-Pennington* doctrine and prematurely concluded that AbbVie's series of patent-related filings to the Patent and Trademark Office and federal courts were not a sham. Accordingly, this Court should reverse the district court's granting of the defendants-appellees' motion to dismiss and allow the plaintiffs-appellants to proceed to discovery.

/s/ Adam J. Levitt
Adam J. Levitt

Counsel for Open Markets Institute

Dated: October 12, 2020

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Circuit Rule 29 because the brief contains 4,181 words, excluding the parts of the brief exempted by Fed. R. App. 32(f)

2. This brief complies with the typeface and type style requirements of Circuit Rule 32(a) because it has been prepared in a proportionately spaced typeface using Microsoft Word 365, in 12-point Palatino Linotype font.

/s/ Adam J. Levitt
Adam J. Levitt

Counsel for Open Markets Institute

Dated: October 12, 2020

CERTIFICATE OF SERVICE

I hereby certify that, on this date, I caused a true and correct copy of the foregoing to be served on counsel of record for all parties via ECF.

/s/ Adam J. Levitt
Adam J. Levitt

Counsel for Open Markets Institute

Dated: October 12, 2020