No. 25-1641

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

AMGEN INC., IMMUNEX CORPORATION,
AMGEN MANUFACTURING, LIMITED,
Plaintiffs-Appellants,

v.

GAIL MIZNER, in her official capacity as Chair of the Colorado Prescription Drug Affordability Review Board, SAMI DIAB, in his official capacity as a member of the Colorado Prescription Drug Affordability Review Board, AMARYLIS GUTIERREZ, in her official capacity as a member of the Colorado Prescription Drug Affordability Review Board, CATHERINE HARSHBARGER, in her official capacity as a member of the Colorado Prescription Drug Affordability Review Board, JAMES JUSTIN VANDENBERG, in his official capacity as a member of the Colorado Prescription Drug Affordability Review Board, MICHAEL CONWAY, in his official capacity as Commissioner of the Colorado Division of Insurance, PHILIP WEISER, in his official capacity as Attorney General of the State of Colorado,
Defendants-Appellees.

On Appeal from the United States District Court for the District of Colorado, No. 1:24-cv-00810-NYW-SBP, Hon. Nina Y. Wang

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REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

Ashley C. Parrish
Paul Alessio Mezzina
Counsel of Record
Alexander Kazam
Nicholas Mecsas-Faxon
KING & SPALDING LLP
1700 Pennsylvania Avenue NW
Washington, DC 20006
pmezzina@kslaw.com

Counsel for Amgen Inc., Immunex Corporation, and Amgen Manufacturing, Limited

September 24, 2025

CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rule 47.4, counsel for Appellant certifies the following:

1. The full names of the parties represented by me:

   Amgen Inc., Immunex Corp., Amgen Manufacturing, Ltd. (n/k/a Amgen Manufacturing Limited LLC).

2. The names of the real parties in interest represented by me:

   N/A.

3. Parent corporations and publicly held companies that own 10% or more of stock in the party:

   The full name of Immunex Corp.'s parent corporation is Amgen Inc.

   The full names of Amgen Manufacturing, Ltd. (n/k/a Amgen Manufacturing Limited LLC)'s parent corporations and all publicly held companies that own 10% or more stock in the entities are Amgen International Holdings Inc., Onyx Pharmaceuticals, Inc., and Amgen Inc.

4. The names of all firms and the partners or associates that appeared for the party now represented by me in the trial court or are expected to appear in this Court (and who have not or will not enter an appearance in this case) are:

   - King & Spalding LLP
   - Brian A. Bohnenkamp
   - Kelly Nicole Reeves
   - Clifford Stricklin

4. Are there any cases known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this Court's decision in the pending appeal:

   No.

5. The organizational victims and bankruptcy cases applicable to this appeal:

   N/A.

Date: September 24, 2025

/s/ Paul Alessio Mezzina
Paul Alessio Mezzina

Counsel for Amgen Inc., Immunex Corporation, and Amgen Manufacturing, Limited

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INTRODUCTION

Colorado's brief confirms that Amgen has standing to challenge the state's decision to impose a price cap on Amgen's patented drug, Enbrel®. Colorado does not meaningfully defend the district court's speculation that the state might backtrack from its decision to impose a price cap or might set the cap at a level equal to or above current prices. Nor does it offer any remotely plausible scenario in which the price cap will not harm Amgen. Instead, Colorado rests nearly all of its arguments—about the proper standard to evaluate standing, the likelihood of harm, and the merits of Amgen's preemption claim—on what it treats as a single get-out-of-preemption-free card: its assertion that the upper payment limit (or "UPL") will apply only to "downstream" sales of Enbrel. But the Constitution, laws enacted by Congress, and this Court's precedent cannot be so easily evaded.

The Supreme Court's decision in *Diamond Alternative Energy, LLC v. EPA*, 145 S. Ct. 2121 (2025)—issued shortly after Amgen filed its opening brief—makes this straightforward case even simpler. There, taking a position similar to Colorado's, California and the EPA argued that fuel producers lacked standing to challenge fuel-efficiency

requirements imposed on "downstream" automakers. The Court rejected the argument. It first observed that the fuel producers could reasonably be considered "objects of the government action at issue" because the regulations were aimed at *their products*. *Id.* at 2135–36. It then held that regardless of whether the fuel producers were objects of the regulations, they had standing based on the "commonsense economic realit[y]," which "the record evidence confirm[ed]," that the regulations would reduce demand for fuel. *Id.* at 2136–38.

This case likewise presents "the 'familiar' circumstance where government regulation of a business 'may be likely' to cause injuries to other linked businesses." *Id.* at 2136 (quoting *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 384 (2024)). Common sense and basic economics, reinforced by unrebutted record evidence and confirmed by the text and history of the relevant statute, leave no doubt that Amgen will be harmed by a price cap on its drug, regardless of whether the price cap is nominally applied "downstream."

Colorado's efforts to avoid judicial review reflect the weakness of its merits arguments. As this Court has held, price-control laws like Colorado's undercut the objectives of the federal patent laws and are

therefore preempted. *See Biotech. Indus. Org. v. District of Columbia* (*BIO I*), 496 F.3d 1362, 1372–74 (Fed. Cir. 2007). Colorado tries to get around that precedent in the same way it tries to get around standing—by insisting that its price controls apply only "downstream." But whether the UPL is applied upstream or downstream, allowing states to set price caps on patented drugs would empower them to strip patent holders of the economic rewards that are the lifeblood of the federal patent system. Colorado does not dispute that its theory would supply a roadmap for every state to impose price controls on patented drugs—with no lower limit—and would render this Court's precedent in *BIO I* a practical dead letter. The flagrant invalidity of Colorado's scheme underscores the importance of rejecting the state's efforts to evade review.

ARGUMENT

I. This Court has jurisdiction, and the choice of circuit law is irrelevant to the standing question.

Colorado errs off the bat by suggesting that this Court lacks jurisdiction under 28 U.S.C. § 1295(a)(1) because the district court dismissed this case for lack of standing without reaching the merits of Amgen's patent-preemption claim. Resp. Br. 1. Colorado says it "nonetheless consent[s] to this Court's jurisdiction." *Id.* If Colorado were

right that the Court lacked subject matter jurisdiction, consent would be irrelevant. But Colorado is wrong. This Court has appellate jurisdiction.

Section 1295(a)(1) grants this Court "exclusive jurisdiction" of "an appeal from a final decision of a district court of the United States … in any civil action arising under … any Act of Congress relating to patents." The decision below is indisputably a "final decision" in a "civil action" that arises in part under the patent laws. *See BIO I*, 496 F.3d at 1369 (patent-preemption claims arise under the patent laws). Nothing in the statute suggests that the "final decision" must be on the merits, and this Court routinely exercises jurisdiction over patent cases where the court below dismissed for lack of subject matter jurisdiction. *See, e.g.*, *Intell. Tech LLC v. Zebra Techs. Corp.*, 101 F.4th 807, 813, 817 (Fed. Cir. 2024); *Stauffer v. Brooks Bros., Inc.*, 619 F.3d 1321, 1328 (Fed. Cir. 2010).

Colorado also quibbles about whether Amgen's standing is governed by Federal Circuit or Tenth Circuit law. Resp. Br. 26 & n.8. In *BIO I*, the Court held that Federal Circuit law governed plaintiffs' standing to bring a materially indistinguishable patent-preemption claim. 496 F.3d at 1369. Regardless, as Colorado acknowledges, nothing turns on this question: There are no material differences between the

circuits, and "the question of standing relies primarily on Supreme Court case law." Resp. Br. 26 n.8. The Supreme Court, the Tenth Circuit, and this Court have all embraced the "substantial risk" standard for standing based on a threat of future injury. *E.g.*, *Susan B. Anthony List v. Driehaus* (*SBA*), 573 U.S. 149, 158 (2014); *Kane County v. United States*, 928 F.3d 877, 888 (10th Cir. 2019); *Apple Inc. v. Vidal*, 63 F.4th 1, 16 (Fed. Cir. 2023). Because that standard is satisfied—the substantial risk of future injury posed to Amgen by government-imposed price controls on its product is obvious—Amgen has standing.

II. Like the district court, Colorado errs in failing to apply the "substantial risk" standard.

As Amgen's opening brief explains (at 33–40), the district court analyzed Amgen's standing using the wrong standard. To establish standing based on the UPL's impact on its revenue, Amgen must show that "the threatened injury is certainly impending, *or there is a substantial risk that the harm will occur*." *Apple*, 63 F.4th at 16 (emphasis added) (quoting *SBA*, 573 U.S. at 158). The district court ignored the "substantial risk" test and instead effectively required Amgen to demonstrate an absolute certainty of harm. Colorado takes the same tack, claiming the "substantial risk" test applies only "in a pre-

enforcement challenge" where the plaintiff is directly regulated—that is, where the plaintiff itself may "be subject to an enforcement action." Resp. Br. 32. That attempt to cabin the "substantial risk" standard fails for at least two reasons.

First, Amgen *is* directly regulated by Colorado's price-control scheme. *See* Opening Br. 38–39 & n.8. The Enbrel UPL will apply specifically to Amgen's product—and *only* to Amgen's product. In *Diamond*, the Supreme Court recognized the "force" of the argument that "when a regulation targets the provider of a product or service by limiting another entity's use of that product or service," the provider of the product should be "considered an object of the … regulation[]." 145 S. Ct. at 2136; *see also Energy Future Coal. v. EPA*, 793 F.3d 141, 144 (D.C. Cir. 2015) (Kavanaugh, J.) (concluding that biofuel producers were objects of regulation "technically directed" at vehicle manufacturers because the regulation concerned the producers' product). That is precisely the scenario here, even accepting Colorado's questionable assertion that the price cap applies only "downstream," *see* Opening Br. 38 n.8. Since Amgen is an object of the regulation, Colorado's argument against applying the "substantial risk" test falls flat even on its own terms.

Second, the "substantial risk" test would apply even if Amgen were not an object of the regulation. Nothing in *SBA* or its progeny limits that test's applicability to plaintiffs who would be subjects of an enforcement action. On the contrary, "[a]n *allegation of future injury* may suffice if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur," regardless of the casual mechanism of that injury. *SBA*, 573 U.S. at 158 (emphasis added) (quotation marks omitted). The other case on which Colorado relies, *California v. Texas*, similarly speaks only of "the need to assert an injury that is the result of a statute's actual or threatened enforcement"—it does not say the enforcement must be *against the plaintiff*. 593 U.S. 659, 670 (2021) (emphasis omitted). Although these cases happened to involve directly regulated plaintiffs, they are not limited to that context.

While Colorado fails to cite a single case limiting the "substantial risk" test in the manner it suggests, numerous cases apply that test where "a party alleges future injury from a regulation that does not directly regulate the party itself." *Nat'l Infusion Ctr. Ass'n v. Becerra*, 116 F.4th 488, 497 (5th Cir. 2024). In *Apple*, for example, this Court applied the "substantial risk" standard where the plaintiff, who faced no threat

of criminal or civil enforcement, challenged instructions from the Director of the PTO regarding when to institute inter partes review. 63 F.4th at 15–17 (quoting *SBA*, 573 U.S. at 158); *see also MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 130 (2007) (applying the framework to litigation between private parties); Opening Br. 39–40 (collecting cases). The "substantial risk" standard applies.

III. Amgen has established Article III standing.

Under anything resembling the proper standard, Amgen has standing. For one thing, it is an object of the challenged regulation, which makes standing a foregone conclusion. But even if Amgen were not an object of the UPL, it has demonstrated a strong likelihood (and at least a substantial risk) of financial harm. Colorado's arguments largely repeat the district court's errors—errors that are now all the more glaring considering the Supreme Court's recent decision in *Diamond*—by waving away common-sense economic realities and giving short shrift to Amgen's record evidence. In addition, regardless of the financial harm from a UPL, Amgen has standing based on the costs and uncertainty associated with its participation in a preempted price-setting process—a distinct injury that Colorado, like the district court, altogether ignores.

A. Amgen is an object of regulation under Colorado's price-control scheme.

As the Supreme Court reaffirmed in *Diamond*, "[w]hen a plaintiff is the 'object' of a government regulation, there should 'ordinarily' be 'little question' that the regulation causes injury to the plaintiff and that invalidating the regulation would redress the plaintiff's injuries." 145 S. Ct. at 2135 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)). Colorado does not contest that if Amgen is an object of regulation under Colorado's price-control scheme, then it has standing to challenge that scheme. But, like the district court, Colorado contends that Amgen is *not* an object of regulation because the UPL would purportedly not apply to Amgen's sales of Enbrel to wholesalers. *See* Resp. Br. 28–31; Appx12–14. That is wrong. Even assuming the Enbrel UPL will apply only "downstream," *see* Opening Br. 38 n.8, it will undisputedly apply directly to *Amgen's product* (and *only* Amgen's product). Amgen is not only *an* object of Colorado's regulatory scheme, but also its *principal* object.

In *Diamond*, the Supreme Court recognized the "force" of this sensible understanding. There, the Court considered whether fuel producers were an "object of … California regulations" that restricted the use of gasoline by imposing fuel-efficiency requirements on automakers.

145 S. Ct. at 2135. The Court explained that "[w]hen the government prohibits or impedes Company A from using Company B's product," both companies may "be deemed objects of the government action at issue." *Id.* The Court provided a list of illustrative examples:

> [I]f the government bans hot dog sales in stadiums, then hot dog manufacturers, not just stadiums, might be considered objects of the regulation. If the government prohibits aluminum bats in Little League, then aluminum bat manufacturers, not only Little League, might be objects of the regulation. If the government bans bookstores from selling certain publishers' books, then those publishers, not just bookstores, might be objects of the regulation.

Id. Likewise, when the government sets a price cap on a specific patented drug for sales to providers, pharmacies, or consumers, the drug's manufacturer, not only its downstream distributors, is an object of the regulation.

The Court observed that this argument "is not without force," especially as "the government might seek to indirectly target a product or service through a conduit in addition to" or instead of "regulating it directly." *Id.* at 2136 (quotation marks omitted). And it noted that the Court has found standing based on similar arguments. *See id.* at 2135–36 (citing *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535–36 (1925), and

Columbia Broad. Sys., Inc. v. United States, 316 U.S. 407, 422 (1942)). Despite signaling its agreement with this understanding of the "object" concept, the Court did not conclusively resolve the issue "because, regardless, the fuel producers ha[d] readily demonstrated their standing." *Id.*

Although this Court can take the same path because Amgen has demonstrated standing even under Colorado's framing, it is even more obvious that Amgen is an object of regulation than it was for the fuel producers in *Diamond*. Here, the UPL will target Amgen's *specific* product (Enbrel) rather than a category of products produced by many manufacturers (like gasoline or hot dogs). It strains credulity to claim that Amgen is not an object of a government action that identifies and regulates Amgen's specific product by name. Amgen is an object of a price cap on its drug, so there should be no question that Amgen has standing. *See Diamond*, 145 S. Ct. at 2135.

B. Amgen has established standing regardless of whether it is an object of regulation.

As with the fuel producers in *Diamond*, Amgen would have standing even if it were not an object of the regulation. As Amgen's opening brief explains (at 40–41), the district court identified three ways

in which Amgen might be able to avoid injury: (1) Colorado might backtrack and not set any price cap, (2) Colorado might ineffectually set the UPL above Enbrel's current price, or (3) downstream actors might absorb the entire cost of a UPL. Colorado makes no serious effort to show that any of these three eventualities is realistic. Such speculation, unmoored from practical reality, cannot defeat Amgen's standing. On the contrary, it is (and was at the time Amgen filed suit) virtually certain that Colorado will set a UPL for Enbrel that is below the current price and that the UPL will cause Amgen financial harm. Amgen thus easily clears the "substantial risk" bar. This Court should reject Colorado's misguided attempt to "misuse[]" standing doctrine "to prevent the target[] of government regulations from challenging regulations that threaten [its] business[]." *Diamond*, 145 S. Ct. at 2138.

Colorado Has Decided to Set a Price Cap for Enbrel. Colorado makes little effort to defend the district court's suggestion that it is speculative whether the Board will set a UPL for Enbrel. Colorado notes that "the Board does not have to set a UPL for a drug it has deemed unaffordable." Resp. Br. 12 & n.4. But even setting aside the unlikelihood that the Board would declare a drug unaffordable and then decline to

exercise its price-setting powers, Colorado ignores a critical aspect of the record in this case. Here, the Board did not just vote to declare Enbrel unaffordable; it also separately voted, on the same day, to "select[] Enbrel for establishment of an upper payment limit." Appx1276 (Tr. 36:19–22).

Colorado's brief omits mentioning this second Board vote, which shows that the Board had *already decided*, before Amgen filed its complaint, to subject Enbrel to a price cap, leaving only the amount of the cap to be determined. Appx1267, Appx1276 (vote occurring on February 23, 2024). And while Colorado mentions the Board's "statutory ability to terminate UPL rulemaking" without setting a UPL, Resp. Br. 42, it does not contend there is a real possibility that the Board will do so here. Regardless, the mere possibility that an agency could revise its decision cannot defeat review. *See Am. Petroleum Inst. v. EPA*, 906 F.2d 729, 739–40 (D.C. Cir. 1990) (per curiam). Given that the Board has formally voted to establish a UPL for Enbrel, the argument that the Board could theoretically backtrack is a particularly weak basis for contesting standing.

Even though the Board vote to select Enbrel for establishment of a UPL occurred a month before Amgen filed its complaint, Colorado takes

issue with Amgen's reference to the Board's subsequent deliberations. *See* Resp. Br. 41–44. In those deliberations, the Board has discussed only the amount of a UPL and not whether a UPL should be imposed at all. But those deliberations, which are matters of public record, simply confirm what was true at the time Amgen filed its complaint—that the Board had decided to establish a UPL for Enbrel. *See Baur v. Veneman*, 352 F.3d 625, 637 n.11 (2d Cir. 2003) ("Although a plaintiff's standing is assessed as of the time the lawsuit is brought, post-filing events may confirm that a plaintiff's fear of future harm is reasonable." (citation and quotation marks omitted)). And Colorado does not dispute that, consistent with its February 23, 2024, vote, the Board has never seriously entertained not establishing a UPL for Enbrel.

The Price Cap Will Be Below the Current Price. Next, while Colorado notes that the "amount" of the impending UPL is "unknown," Resp. Br. 18, 39–40 & n.9, it does not defend the district court's suggestion that the Board might set the UPL above Enbrel's current price, *see* Appx17. As Amgen's opening brief explains (at 45–46), for the Board to declare a drug unaffordable and go to the trouble of imposing a price cap, only to set the cap at a level above the current price, would be

illogical bordering on absurd. Indeed, setting the UPL at or above a price that the Board had deemed unaffordable would seemingly run counter to the Board's statutory mandate to "protect Colorado consumers from excessive prescription drug costs." Colo. Rev. Stat. § 10-16-1403(1). Statutory mandate aside, courts "can assume" that governments do not "enforce and defend regulations that have no … effect in the relevant market." *Diamond*, 145 S. Ct. at 2139; *see also id.* at 2137 ("[I]f invalidating the regulations would change nothing in the market, why are EPA and California enforcing and defending the regulations?").

Unsurprisingly, after Amgen filed its opening brief, the Board proposed a UPL of $583.59 per unit, which is far below Enbrel's current price.[1] Here again, this development "confirm[s]" what was true when Amgen filed its complaint, *Baur*, 352 F.3d at 637 n.11: The notion that the Board might set a UPL above or equal to the current, supposedly "unaffordable" price was always fanciful.

The Price Cap Will Harm Amgen. Colorado is also wrong that the impending UPL may not have any financial impact on Amgen

[1] *See* Proposed 3 Colo. Code Regs. 702-9 Part 4.3, *available at* https://doi.colorado.gov/sites/doi/files/documents/Draft%20Proposed%20UPL%20Rule_Updated_8.22.25.docx.pdf.

because the UPL purportedly only applies to downstream sales. Resp. Br. 34–41. As Amgen (at 46–58) and *amici* industry members (Ct. App. ECF 20 at 6–12) explain, Amgen will bear at least some of the cost imposed by a downstream UPL. On this point, *Diamond* again supports standing.

In *Diamond*, the Supreme Court concluded that fuel producers had standing to challenge a California regulation that would "force automakers to manufacture more electric vehicles and fewer gasoline-powered vehicles"—that is, a regulation that was directed most immediately at third-party automakers, not the fuel-producer plaintiffs. 145 S. Ct. at 2136. The Court held that "commonsense economic principles support[ed] the fuel producers' standing" because "California's regulation of automakers' vehicle fleets in turn will likely 'cause downstream or upstream economic injuries to others in the chain,' such as producers of gasoline." *Id.* at 2136–37 (quoting *All. for Hippocratic Med.*, 602 U.S. at 384). The Court further explained that "record evidence confirms what common sense tells us: Invalidating the regulations likely (not certainly, but likely) would make a difference for fuel producers

because automakers would likely manufacture more vehicles that run on gasoline and other liquid fuels." *Id.* at 2137.

Amgen's standing is even clearer than that of the fuel producers in *Diamond*. To start, "commonsense economic principles," *id.* at 2136, indicate that Amgen's wholesalers cannot reasonably be expected to absorb the costs of a UPL without any effect on Amgen. As the opening brief explains (at 48–50), common sense dictates that "if distributors are forced to *sell* for less, they will in turn *buy* for less."

Colorado has no rebuttal. It gestures vaguely at the complexity of the pharmaceutical market in general, and it tries to wring support from a statement by Amgen's CEO noting that parts of the market sometimes exhibit "counterintuitive pricing behavior." *See, e.g.*, Resp. Br. 21 (quoting Appx16). But it offers no reason to think that any such complexity would apply or even is relevant here, much less that it would cause wholesalers to absorb the *entire* impact of a price cap without *any* effect on Amgen. *Cf. Diamond*, 145 S. Ct. at 2137 (rejecting contention that "that this case is unusual and does not fit the typical pattern"). Indeed, Colorado admits that "chargebacks" are standard practice in the pharmaceutical industry and are necessary to "prevent wholesalers from

selling a drug at a loss." Resp. Br. 8. The fact that wholesalers will generally refuse to sell at a loss—as Colorado now appears to concede—is as economically *intuitive* as it gets.

Colorado also tries to distinguish *Diamond* based on the purportedly more detailed factual record in that case. But no record evidence is required here because "[w]hen third party behavior is predictable, commonsense inferences may be drawn." *Diamond*, 145 S. Ct. at 2136. "[C]ommonsense inferences" are just that—inferences drawn from everyday experience, not ones that need to be proven with evidence. *Contra* Appx15 (district court's opinion suggesting that Amgen needed to support "basic economics and common sense" with record evidence). That is why *Diamond* cited record evidence as "confirm[ation]" of commonsense inferences, rather than as a prerequisite for drawing them. 145 S. Ct. at 2137. This approach aligns with precedent recognizing that, even when a party is not directly regulated, an "injury [that] is inferable from generally applicable economic principles rather than from any special circumstances … is sufficiently 'self-evident'" to support standing without additional evidence. *Airlines for Am. v. TSA*, 780 F.3d 409, 410–11 (D.C. Cir. 2015) (holding airlines had standing to challenge

government-mandated "security fees … paid by customers, not the airlines themselves" because of "the basic proposition that increasing the price of an activity will decrease the quantity of that activity demanded in the market" (cleaned up)); *see also* Opening Br. 47 (collecting cases).

In any event, there *is* evidence in the record to support Amgen's standing. Mr. Costello, Amgen's Associate Vice President, United States Value and Access, provided an unrebutted declaration explaining why Amgen will bear the cost of a downstream price cap. *See* Appx1442–1447. Like the district court, Colorado gives short shrift to this evidence—dismissing it as "speculative" and "conclusory" without meaningfully engaging with, let alone disputing, the testimony it contains. Resp. Br. 40. Mr. Costello did far more than just speculate or baldly assert that Amgen will bear the cost of a downstream price cap; he detailed the specific features of the supply chain, Amgen's contractual obligations, and market realities that lead inevitably to that conclusion.[2]

[2] Colorado asserts that clear error review applies to the district court's conclusion that the declaration was "conclusory." Resp. Br. 37 (quoting Appx17). That is doubly wrong. "Whether testimony is conclusory presents a legal question," not a factual one. *Anania v. McDonough*, 1 F.4th 1019, 1028 (Fed. Cir. 2021). And even if it were a factual question, "the clearly erroneous standard" would not apply

Unable to find any genuine fault with Mr. Costello's declaration, Colorado protests that Amgen did not also "provide statements from its wholesalers regarding how they might respond to a UPL" (while simultaneously asserting that any such declarations would have been "too speculative"). Resp. Br. 40. But as *Diamond* makes clear, Amgen was not required to "introduce evidence from … directly regulated third parties to show how third parties would likely respond to" a UPL. 145 S. Ct. at 2139. On the contrary, "[r]equiring the plaintiff to produce affidavits from regulated parties" would be "especially problematic" because it would make the "ability to obtain judicial review dependent on the happenstance of whether the plaintiff and the relevant regulated parties are aligned and share litigation interests—and whether the regulated party is willing to publicly oppose (and possibly antagonize) the government regulator by supporting the plaintiff's suit." *Id.*

No more is needed, but if it were, Amgen has also shown that Colorado itself anticipated and intended that drug manufacturers would bear the costs of a UPL, as reflected in the statute's text and its legislative

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because the district court is not permitted to find facts at summary judgment. *Lemelson v. TRW, Inc.*, 760 F.2d 1254, 1260 (Fed. Cir. 1985).

history. *See* Opening Br. 56–58. Colorado's only response is that the provisions Amgen highlights—such as the ones penalizing a manufacturer (and *only* a manufacturer) who "refuses to make the drug available [in Colorado] as a result of an upper payment limit," Colo. Rev. Stat. §§ 10-16-1408 & -1412—do not necessarily mean that Amgen is directly regulated or that Amgen's own sales are subject to the price cap. Resp. Br. 29–31. That misses the point. Regardless of *where* in the supply chain the UPL applies, these provisions show that the Colorado legislature knew that the imposition of a UPL would affect manufacturers, not just downstream sellers. And if there were any doubt, a leading sponsor of the legislation stated openly that wholesalers required to comply with a UPL would "be made whole on the back-end by the pharmaceutical manufacturer." *Hearing on S.B. 21-175 Before H. Comm. on Health & Ins.*, 73d Sess. at 7:22:00–7:23:30 (Colo. 2021), *available at* https://tinyurl.com/3tas6ddc (statement of Rep. Kennedy).

In the end, Colorado fails to identify any remotely plausible scenario where a "downstream" UPL on Enbrel would not injure Amgen. That is because no such scenario exists. "[C]ommonsense economic principles support [Amgen's] standing," and the "record evidence

confirms what common sense tells us," *Diamond*, 145 S. Ct. at 2136–37: If downstream sellers are forced to sell Amgen's product at capped prices, Amgen will bear the cost. Amgen therefore has standing.

C. Requiring Amgen to participate in a preempted process independently establishes standing.

Even if the looming financial harm from a UPL did not establish standing, Amgen has already suffered and continues to suffer a distinct injury: the costs and uncertainty created by Colorado's preempted UPL rulemaking proceedings. Amgen explained in its opening brief that standing is independently established by "the concrete harms Amgen is already suffering (and will continue to suffer) because it is forced to incur substantial costs to defend its interests in a preempted state price-setting process and to deal with the regulatory uncertainty that process creates." Opening Br. 33–34; *see also id.* at 4, 5, 24, 32. Colorado does not address this argument in its brief, even as it highlights the "lengthy process" that Amgen has had to "participat[e] in … at every step." Resp Br. 10, 16. This process, and the costs it imposes on Amgen, independently establish the injury-in-fact necessary for standing.

IV. Colorado's inability to defend its price-control scheme on the merits underscores the importance of prompt judicial review.

Colorado protests that whether its law is preempted is a "merits issue" that is "outside the scope of this appeal." Resp. Br. 45–46. But if the Court concludes that Amgen has standing, the Court has discretion to reach the merits rather than remand to the district court. "[I]t is generally appropriate for a court of appeals to reach the merits of an issue that a district court did not decide provided, as is true here, the factual record is developed and the issues provide purely legal questions upon which an appellate court exercises plenary review." *Comite de Apoyo a Los Trabajadores Agricolas v. Perez*, 774 F.3d 173, 187 (3d Cir. 2014) (quotation marks omitted) (reversing jurisdictional dismissal, exercising discretion to reach the merits, and rendering judgment for plaintiffs); *see also, e.g.*, *Planned Parenthood v. HHS*, 946 F.3d 1100, 1112 (9th Cir. 2020); *Mendoza v. Perez*, 754 F.3d 1002, 1020 (D.C. Cir. 2014).

Amgen's patent-preemption claim presents a pure legal question that is fully briefed by the parties and controlled by binding precedent. Accordingly, the Court can conserve party and judicial resources by holding on the merits that Colorado's attempt to impose a price cap on

Amgen's patented drug is preempted. Reaching the merits would be particularly appropriate because Colorado's merits defense closely parallels its standing argument: Both rest on the fallacy that a drug manufacturer has no cognizable interest in the "downstream" price of its patented drug. In any event, even if the Court chooses to remand, a review of Colorado's merits arguments shows that the State is attempting an end-run around this Court's *BIO I* decision and demonstrates the need for prompt judicial review.

On the merits, this is a simple case. Colorado does not and cannot dispute that a central objective of the federal patent laws is to "foster and reward innovation" by giving patent owners the ability to set their own prices during the patent term. Resp. Br. 47; *see King Instruments Corp. v. Perego*, 65 F.3d 941, 950 (Fed. Cir. 1995) ("[T]he fundamental purpose of the patent grant" is to "create[] an incentive for innovation" by providing "economic rewards during the period of exclusivity." (quotation marks omitted)). And the same evidence and common sense discussed above in connection with standing leaves no doubt that Colorado's price-control scheme undercuts the economic rewards flowing from Amgen's patent. As this Court has held, state price regulation like Colorado's—

which limits "the pecuniary rewards stemming from the patent right" in the name of making patented drugs more affordable—is "contrary to the goals established by Congress in the patent laws" and is therefore preempted. *BIO I*, 496 F.3d at 1372–74. That should end the case.

Colorado's response echoes its standing arguments. It insists that because its price controls apply only "downstream," they are entirely beyond the reach of federal patent preemption. That theory is self-refuting. It would mean that even if a state set an upper payment limit of $1 for "downstream" sales of a patented drug, thereby devastating the patent owner's ability to reap the rewards of its patent, the federal patent laws would have nothing to say on the matter.

Colorado's theory is impossible to square with this Court's reasoning in *BIO I*. *See* Opening Br. 28–32. What mattered there was that a local price-control law thwarted Congress's intent to "provide … pharmaceutical patent holders with the pecuniary reward that follows from the right to exclude." *BIO I*, 496 F.3d at 1372. A state price-control law that applies one step downstream, but which has the same practical "effect" of "diminishing the reward to patentees in order to provide greater benefit to … consumers," is no less an "obstacle to the federal

patent law's balance of objectives as established by Congress." *Id.* at 1373–74.

Nor does Colorado grapple with the "just and well-settled doctrine" that "a State cannot do that indirectly which she is forbidden by the Constitution to do directly." *Passenger Cases*, 48 U.S. 283, 458–59 (1849); *see Nat'l Rifle Ass'n v. Vullo*, 602 U.S. 175, 190 (2024) ("[A] government official cannot do indirectly what she is barred from doing directly."). This principle applies with full force in the preemption context. For example, in *Kansas ex rel. Todd v. United States*, the Tenth Circuit rejected Kansas's attempt to avoid preemption by regulating federal crop insurance "by the back door," explaining that "[w]hat Kansas cannot do directly, it is, in essence, trying to do indirectly." 995 F.2d 1505, 1510 (10th Cir. 1993). And in *BIO I*, although the price-control law "d[id] not *directly* regulate manufacturers' wholesale prices," it was still preempted by the federal patent laws. 496 F.3d at 1371 (emphasis added).

Tellingly, Colorado does not support its theory with a single preemption case. Instead, Colorado (at 46–52) attempts to rely on the doctrine of "patent exhaustion," which is not a preemption doctrine but a defense to a patent-infringement suit. *See Helferich Patent Licensing,*

LLC v. N.Y. Times, Co., 778 F.3d 1293, 1301 (Fed. Cir. 2015). Unlike preemption doctrine, which addresses the relationship between the federal government and the states, patent exhaustion addresses the relationship between the seller of a patented product and the product's subsequent purchasers. When courts say that a sale of the product "exhausts" the patent right, they mean only that "[t]he purchaser and all subsequent owners are free to use or resell the product just like any other item of personal property, without fear of an infringement lawsuit." *Impression Prods., Inc. v. Lexmark Int'l, Inc.*, 581 U.S. 360, 366 (2017). They do not mean that *states* are free to undermine the purposes of the federal patent laws without fear of a *preemption* lawsuit.

For example, take Colorado's principal case, *Impression Products*. The Court held that Lexmark could not use the threat of a "patent infringement suit" to prevent other companies from refurbishing and reselling used printer cartridges. *Id.* at 374. That decision had nothing to do with state price controls. The Court held only that when the patent exhaustion doctrine is implicated, it applies equally with respect to domestic and foreign sales. *Impression Products* did not suggest that

patent exhaustion is a defense to preemption of state laws that undercut the economic rewards flowing to the patent owner.

As Colorado acknowledges, the patent exhaustion doctrine is premised on the notion that "the purpose of the patent law is fulfilled *when the patentee has received his reward for the use of his invention*." Resp. Br. 48 (emphasis added) (quoting *Impression Prods.*, 581 U.S. at 371). The whole point of Amgen's preemption claim is that Colorado's price-control scheme will *prevent* Amgen from receiving that due "reward." By Colorado's logic, the State could nullify that reward by imposing a near-zero upper payment limit, effectively defeating the acknowledged "purpose of the patent law," *id.* (quoting *Impression Prods.*, 581 U.S. at 371), yet nevertheless escape preemption. That cannot be right. Colorado's position not only defies common sense, but would render this Court's precedent a dead letter, enabling states to siphon away "the pecuniary rewards stemming from the patent right," *BIO I*, 496 F.3d at 1372, simply by imposing price caps that fall nominally on "downstream" sales. *See* Ct. App. ECF 20 at 36–39 (*amici* explaining that other states have recently adopted schemes similar to Colorado's).

Colorado cannot distinguish *BIO I* on the ground that the D.C. law at issue there "exclusively regulated patented products." Resp. Br. 53. For one thing, Colorado forfeited that argument by raising it below only in a cursory footnote. *See Stauffer v. Brooks Bros. Grp., Inc.,* 758 F.3d 1314, 1322 (Fed. Cir. 2014) ("Issues not properly raised before the district court are waived on appeal."). In any event, in practice, Colorado's law inevitably targets patented drugs, not generics or biosimilars, because of the price premium flowing from the patent. Indeed, the Board's proceedings with respect to Enbrel and other drugs confirm that the Board is focused on patented drugs, both in selecting drugs for affordability reviews and in deciding to impose upper payment limits. *See* Opening Br. 15–17; Ct. App. ECF 20 at 33–35. And even in the unlikely event the Board were to regulate the price of a non-patented drug, its price-control scheme would still be preempted as applied to *patented* drugs like Enbrel.

Nor can Colorado analogize its price-control statute to evenhanded tax laws or health-and-safety regulations that may "incidentally" affect a patent owner's profits. Resp. Br. 51. Unlike such general laws, a targeted price-control statute like Colorado's strikes directly at the very

economic premium that the patent laws are designed to secure. As *BIO I*'s author explained in a subsequent opinion, "that states have broad leeway to regulate patented products does not mean that they have unlimited ability to do so in situations in which the regulation significantly and directly impedes Congress's purpose in providing the federal patent right." *Biotech. Indus. Org. v. District of Columbia* (*BIO II*), 505 F.3d 1343, 1346 n.1 (Fed. Cir. 2007) (Gajarsa, J., concurring in denial of rehearing en banc). Colorado's claim that its statute "does not significantly or directly interfere with the ability to make a profit" (at 54) merely rehashes its dubious standing argument and is belied by the statute itself, which would not evince so much concern about the prospect of manufacturers withdrawing from the state if manufacturers had nothing to fear from an upper payment limit. *See* Opening Br. 57.

As for Colorado's claim that Amgen "waived its field preemption argument" by not raising it below (at 54–55), that argument is both incorrect and beside the point. It is beside the point because there is no dispute that Amgen raised conflict preemption, *see* Resp. Br. 54, which is sufficient on its own to render Colorado's law unconstitutional. And it is incorrect because Amgen's challenge sounds in *both* conflict and field

preemption. "As the Supreme Court has cautioned, these categories are not 'rigidly distinct.'" *BIO II*, 505 F.3d at 1345 (Gajarsa, J., concurring in denial of rehearing en banc) (quoting *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 n.5 (1990)). "Indeed, field pre-emption may be understood as a species of conflict pre-emption." *English*, 496 U.S. at 79 n.5.

Like the D.C. law in *BIO*, Colorado's law "could *also* be considered preempted by 'field preemption.'" *BIO II*, 505 F.3d at 1345 (Gajarsa, J. concurring in denial of rehearing en banc) (emphasis added). A central theme of Amgen's briefing below (and of this Court's decision in *BIO I*) is that price controls on patented drugs disrupt Congress's carefully calibrated balance between promoting affordability and providing incentives for innovation. *See, e.g.*, Appx1195, Appx1197–1198. As Amgen explained, the "determination about the proper balance between innovators' profit and consumer access to medication … is exclusively one for Congress.'" Appx1198 (quoting *BIO I*, 496 F.3d at 1374). A law that seeks to reweigh that "careful balance" not only stands as an obstacle to the goals of the patent laws, but also "enters a field of regulation which the patent laws have reserved to Congress." *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 167 (1989).

In sum, Colorado's law is preempted. The State's inability to muster compelling arguments to the contrary should, at a minimum, lead this Court to look with skepticism on Colorado's attempts to avoid judicial review.

CONCLUSION

This Court should reverse and either hold that Colorado is preempted from imposing price controls on patented drugs or remand for the district court to address the merits of Amgen's claims.

Respectfully submitted,

/s/ Paul Alessio Mezzina
Ashley C. Parrish
Paul Alessio Mezzina
Counsel of Record
Alexander Kazam
Nicholas Mecsas-Faxon
KING & SPALDING LLP
1700 Pennsylvania Avenue NW
Washington, DC 20006
pmezzina@kslaw.com

Counsel for Amgen Inc., Immunex Corporation, and Amgen Manufacturing, Limited

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief:

(i) complies with the type-volume limitation of Federal Circuit Rule 32(a) because it contains 6,486 words, including footnotes and excluding the parts of the brief exempted by Federal Circuit Rule 32(b) and Federal Rule of Appellate Procedure 32(f); and

(ii) complies with the typeface and style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because this document has been prepared using Microsoft Office Word and is set in 14-point Century Schoolbook font.

Date: September 24, 2025

/s/ Paul Alessio Mezzina
Paul Alessio Mezzina

Counsel for Amgen Inc.,
Immunex Corporation, and
Amgen Manufacturing, Limited