No. 25-1070

In the Supreme Court of the United States

ASTRAZENECA PHARMACEUTICALS LP; ELI LILLY AND COMPANY; LILLY USA, LLC; NOVO NORDISK INC.; SANOFI-AVENTIS U.S., LLC,

Petitioners,

v.

MOSAIC HEALTH, INC.; CENTRAL VIRGINIA HEALTH SERVICES, INC., individually and on behalf of all those similarly situated,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF ELECTRIC POWER SUPPLY ASSOCIATION, AMERICAN PETROLEUM INSTITUTE, NATIONAL ASSOCIATION OF WATER COMPANIES, NATURAL GAS SUPPLY ASSOCIATION, AND WIRES, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

"In a representative democracy such as this, the[] branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." *Eastern R.R. Presidents Conf.* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961). To help "make their wishes known" (*ibid.*), businesses routinely join trade associations that allow multiple companies who share some common feature—for instance, the same industry or geographic region—to advocate for policies and outcomes in their shared interest.

The decision below threatens to dramatically expand potential antitrust liability relating to this lawful and constitutionally protected conduct, holding that two businesses' mutual participation in a trade association is a plus factor supporting, at the pleading stage, an inference of collusion to state an antitrust claim and opens the door to costly discovery, not to mention potentially devastating liability.

That holding is contrary to six decades of Supreme Court precedent holding that "[t]hose who petition government for redress are generally immune from antitrust liability." *Professional Real Est. Invs., Inc.* v.

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici* and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. *Amici* further state that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to the due date pursuant to Supreme Court Rule 37.2.

Columbia Pictures Indus., Inc., 508 U.S. 49, 56 (1993). It is also dead wrong. It chills core First Amendment activity, harms providers of essential services, and makes government less efficient. Finally, it erodes the pleading standard the Court articulated in *Twombly*, advancing a lax "opportunity to conspire" standard that treats every interaction between industry peers in the context of a trade association with suspicion.

Amici have an especially pronounced interest in these issues. *Amici* are trade associations representing power and natural gas suppliers and investor-owned water utilities, businesses that are subject to—or have a vested interest in—careful economic regulation. Power and interstate natural gas pipelines are regulated by the Federal Energy Regulatory Commission, which has the authority to determine whether businesses' rates and terms and conditions for regulated services, and the rules used to determine interstate natural gas pipeline transportation rates and prices in organized electricity markets, are "just and reasonable." 15 U.S.C. § 717d, 16 U.S.C. §§ 824d, 824e. Investor-owned water utilities are subject to economic regulation by state public utility commissions, as well as environmental and quality regulation by the U.S. Environmental Protection Agency.

Amici's members not only depend on trade associations to advocate for their interests but, as members of (or those that are impacted by) rate-regulated industries, are doubly concerned that the potential expansion of antitrust liability threatened by the decision below will fall especially hard on them, given that much of *amici's* advocacy on behalf of members naturally tends to relate to prices—one of the key focuses of antitrust law.

Amicus the **Electric Power Supply Association (EPSA)** represents the nation's competitive electric power suppliers. EPSA advocates on behalf of its members for well-functioning competitive wholesale electricity markets that enable reliable and cost-effective energy expansion. Through EPSA, members exercise their First Amendment rights of association, petition, and speech, including by lobbying to urge state and federal legislative and regulatory policy makers to support policies that encourage the development and implementation of competitive wholesale markets for electricity.

Amicus the **American Petroleum Institute (API)** is a national trade association representing approximately 600 member companies involved in all aspects of the U.S. oil and natural gas industry. API strives to promote safety across industry globally and boost public policy that enables a strong, viable oil and natural gas industry. API's members include producers, refiners, suppliers, pipeline operators, and liquefied natural gas (LNG) exporters, as well as service and supply companies that support all segments of the industry. API advances its policy priorities by collaborating with industry, government and customer stakeholders to promote continued availability of our nation's abundant oil and natural gas resources for a more secure energy future. API frequently participates in proceedings before FERC and other federal agencies, as well as in litigation in state and federal courts.

Amicus the **National Association of Water Companies (NAWC)** represents investor-owned water and wastewater utilities that provide safe and reliable service to millions of Americans. NAWC was

founded in 1895 by a handful of small water companies and today has members throughout the nation. Members range in size from large companies owning hundreds of utilities in multiple states to individual utilities serving a few hundred customers. NAWC's priorities are to provide safe and reliable service to customers through a commitment to water equity, sound infrastructure investment, cybersecurity, and environmental stewardship.

Amicus the **Natural Gas Supply Association (NGSA)** is a not-for-profit trade association that represents the interests of natural gas producers and marketers in the United States. NGSA represents integrated and independent energy companies that produce, transport, and market domestic natural gas. NGSA is the only national trade association that solely focuses on producer-marketer issues related to the downstream natural gas industry. NGSA members transport and/or supply billions of cubic feet of natural gas per day on interstate pipelines, and trade, transact and invest in the U.S. natural gas market.

Amicus **WIRES** is a non-profit trade association that promotes investment in electric transmission, as well as consumer and environmental benefits, through the development of electric transmission infrastructure. Its membership includes investor-, publicly, and cooperatively owned transmission providers, owners and developers, transmission customers, regional grid operators, and equipment service companies nationwide, each possessing extensive expertise and experience with local, state and federal regulatory processes. WIRES, on behalf of its members, advocates for policies that encourage collaboration among government, industry, and financial

institutions to support transmission investment, reduce uneconomic barriers to transmission development, and promote consistent and efficient regional and interregional transmission solutions.

SUMMARY OF ARGUMENT

I. The decision below is of immense practical importance for businesses that rely on trade associations to advocate their interests, and especially for those in rate-regulated industries or those significantly impacted by rate regulation. Trade associations enable businesses to engage in core First Amendment activity, including association, speech, and petition of the government. But the decision below threatens to chill that lawful and constitutionally protected conduct by exposing businesses to increased risk of damaging antitrust liability—and at the very least costly antitrust litigation—based on their participation in a trade association. Decades of this Court's precedent holds that engaging in conduct protected by the First Amendment does not create antitrust liability; those concerns animate the issues in this case and warrant this Court's review.

II. The decision below is also wrong under fundamental principles of civil procedure. *Twombly* expressly requires more than just parallel conduct to state a claim under Section 1 of the Sherman Act. There must also be conduct that suggests collusion, and which is not just as well explained by rational, lawful business conduct. The Second Circuit's "opportunity to conspire" standard is irreconcilable with that rule, particularly where that opportunity to conspire is through a trade association. Businesses obviously have legitimate and rational reasons for joining trade associations. The fact of participation alone therefore

cannot be a valid "plus factor" that pushes a claim across the line from dismissal to discovery.

ARGUMENT

I. The decision below is of profound importance to businesses—especially those in, or impacted by, highly regulated industries—who depend on trade associations to advocate on their behalf.

This case is of immense practical importance to the millions of American businesses that participate in trade associations to advocate for their regions and industries. This lawful and constitutionally protected activity should not become the basis for crushing antitrust liability and vexatious antitrust litigation.

A. The Second Circuit's decision threatens to chill the core First Amendment activity that trade associations exist to foster.

1. Every day, U.S. businesses of all sizes and from every sector of the economy turn to their respective trade associations to track, research, and advocate on the critical issues that shape markets. Trade associations have become conduits of First Amendment freedoms for American business: they enable businesses to freely associate where interests intersect, they hand businesses a megaphone to speak on the issues of the day, and they allow businesses to effectively petition the government for policies that will support innovation and allow commerce to thrive.

"This Court has 'long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others.'" *Americans for Prosperity Found.* v. *Bonta*, 594 U.S. 595, 606 (2021) (quoting *Roberts* v. *United States Jaycees*, 468 U.S. 609, 622 (1984)). Indeed, the "freedom to engage in association for the advancement

of beliefs and ideas is an inseparable aspect of the 'liberty' assured by" the constitutional provisions "embrac[ing] freedom of speech." *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). That is "particularly" the case for speakers with "controversial" viewpoints, and it is no less true for businesses forming trade associations than any others who have reason to associate around a common interest. See *ibid.* ("[I]t is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters."); *First Nat'l Bank of Bos.* v. *Bellotti*, 435 U.S. 765, 777 (1978) ("The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.").

What is more, noting "the close nexus between freedoms of speech and assembly," this Court has long recognized how "group association" has "undeniably enhance[d]" "[e]ffective advocacy of both public and private points of view." *NAACP*, 357 U.S. at 460. That is, respecting the act of association not only preserves and promotes First Amendment freedoms in and of itself, but it also, by consequence, "furthers 'a wide variety of political, social, economic, educational, religious, and cultural ends'" that depend on stalwart protection of free expression to flourish. *Americans for Prosperity*, 594 U.S. at 606 (quoting *Roberts*, 468 U.S. at 622). After all, the root of the First Amendment is its "acknowledg[ment]" that protected "expression may contribute to society's edification." *Bellotti*, 435 U.S. at 783. That certainly carries through to trade associations, considering that "the Court's decisions involving corporations[' speech] * * * are based not

only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas." *Ibid.*

In other words, not only do trade associations enable First Amendment expression, but that expression also does a world of practical good for our economy and the Nation writ large.

Trade associations lend their deep knowledge and expertise to local, state, and federal governments by providing necessary expert insights and opening up a vast store of information and first-hand experience to legislators, administrative agencies, courts, and the public. Cf. Murray S. Monroe, *Trade and Professional Associations: An Overview of Horizontal Restraints*, 9 U. of Dayton L. Rev. 479, 489 (1984) ("[T]rade associations, which often allow competitors a chance to discuss common problems, obtain expert advice, or exchange industry information, may increase economic efficiency."); see also *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978) (recognizing that trade associations can "increase economic efficiency and render markets more, rather than less, competitive").

That free flow of information results in better-informed decisionmakers and citizens—the building blocks of a healthy political system that can produce sensible and democratically legitimate public policies that harness innovation and strengthen markets to the benefit of all.

2. The decision below threatens to stifle that free flow of information by turning businesses' participation in a trade association into an act inherently worthy of suspicion. "Government infringement of

[associational] freedom 'can take a number of forms'" (*Americans for Prosperity*, 594 U.S. at 606 (quoting *Roberts*, 468 U.S. at 622)), such as forced disclosure of major donors (*id.* at 611); forced association with undesired members (*Roberts*, 468 U.S. at 623); punishment based on political affiliation (*Elrod* v. *Burns*, 427 U.S. 347, 355 (1976) (plurality opinion)); denial of benefits to members based on an organization's message (*Healy* v. *James*, 408 U.S. 169, 181-182 (1972)); or compelled disclosure of membership rolls (*NAACP*, 357 U.S. at 466).

The Second Circuit's decision has now added to that list an increased risk of crushing antitrust liability based on participation in a trade association. That is what happened here: The court of appeals held that petitioners' mere presence at a trade association meeting, where they theoretically had the *opportunity* to discuss collusive conduct, counts as a "plus factor" supporting an inference of actual collusion. Pet. App. 26a. That is not just wrong (see *infra* at 17-22), it is dangerous.

Antitrust liability can be "sever[e]." *Staples* v. *United States*, 511 U.S. 600, 618 n.15 (1994) (quoting *United States Gypsum*, 438 U.S. at 443 n.18). The Sherman Act provides for devastating criminal and civil penalties. On the criminal side, that includes even the prospect of felony convictions, ten-year prison sentences, and million-dollar fines for individuals and *hundred*-million-dollar fines for corporations. 15 U.S.C. §§ 1, 2. Most directly relevant to this case, it also includes exposure to private civil suits that, besides being costly, invasive, and time-consuming in their own right, also provide for the recovery of treble damages. *Id.* § 15a. The Clayton Act,

meanwhile, implicitly makes available to private plaintiffs "'divestiture[,]' the 'most drastic * * * of antitrust remedies," among other equitable forms of relief. *California* v. *American Stores Co.*, 495 U.S. 271, 292 n.24 (1990) (quoting *United States* v. *E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961)); see also 15 U.S.C. § 26.

If the price of participating in a trade association is additional exposure to these sorts of hefty sanctions—to be viewed with suspicion and suspected of wrongdoing simply for identifying as part of an industry and speaking accordingly—then the predictable consequence is that fewer businesses will be willing to participate at all, and understandably so. The Court has warned against precisely this sort of "chilling effect" on the exercise of First Amendment freedoms through associational activity. *Americans for Prosperity,* 594 U.S. at 606. Such "threat" of "economic reprisals" is an "'effective [] restraint on freedom of association'" that warrants close scrutiny. *Ibid.* (quoting *NAACP*, 357 U.S. at 462).

At minimum, under the rule the Second Circuit adopted below, businesses' wholly legitimate associational conduct will become fodder to sustain "anemic" complaints by plaintiffs hopeful that "the threat of discovery expense will push cost-conscious defendants to settle"—precisely what Section 1 of the Sherman Act and the plausibility standard should rule out. *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 559 (2007). More concerning still is the risk that future courts accept lawful and constitutionally protected associational activity as proof of collusion.

3. This Court has historically strived to protect associational rights from such incursions, recognizing

that "[t]hose who petition government for redress are generally immune from antitrust liability." *Professional Real Est. Invs., Inc.* v. *Columbia Pictures Indus., Inc.*, 508 U.S. 49, 56 (1993). Indeed, it held decades ago that "the Sherman Act does not prohibit * * * persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." *Eastern R.R. Presidents Conf.* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 136 (1961). This is true "regardless of intent or purpose"—"[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." *United Mine Workers of Am.* v. *Pennington*, 381 U.S. 657, 670 (1965).

The decision below—introducing the threat of antitrust liability merely for participating in a trade association for *any purpose*—is irreconcilable with *Noerr* and its progeny, under which even participating in associational and petitioning activity for the *express purpose* of restraining trade is permitted. The Court has declined to "'impute to Congress an intent to invade' the First Amendment right to petition." *Professional Real Est. Invs.*, 508 U.S. at 56 (quoting *Noerr*, 365 U.S. at 137). After all, "the Sherman Act does not punish 'political activity' through which 'the people * * * freely inform the government of their wishes.'" *Ibid.* (quoting *Noerr*, 365 U.S. at 138).

Here, however, that is exactly what the Second Circuit did. The court held that participation in a trade association is a "plus factor" for stating an antitrust claim—which it also explained is an *essential* allegation for a claim to survive a motion to dismiss. Pet. App. 24a, 26a. Under the court of appeals' new rule, a

business's involvement in a trade association, all on its own, can be the deciding factor between dismissing the complaint under *Twombly* and allowing it to move forward to discovery, where costly litigation, extractive settlements, and perhaps even treble damages await. Under *Noerr-Pennington*, that cannot be right. "[S]uch a construction of the Sherman Act" and the Federal Rules of Civil Procedure "would raise important constitutional questions." *Noerr*, 365 U.S. at 138.

B. These concerns are particularly pronounced for businesses in or impacted by economically regulated industries like electric power, natural gas, and investor-owned water utilities.

Though businesses of all stripes and in all industries benefit from participation in trade associations, and thus might be harmed by the decision below, the Second Circuit's decision is especially concerning for industries, like those *amici* represent, whose regulators oversee, influence, and sometimes even set prices and rates. For these businesses especially, participating in trade associations will likely result in lobbying legislators and regulators on issues ultimately relating to price—which may mean increased and wholly unwarranted scrutiny for potential antitrust violations that will chill the exercise of First Amendment associational rights.

1. Some industries—among them, the interstate wholesale power sector, natural gas transportation and storage, electric transmission, and investor-owned water utilities—operate under tight economic regulatory regimes that constrain the rates companies may charge for their services. Accordingly, trade

associations representing businesses in such rate-regulated sectors or impacted by those regulated sectors will, by necessity, engage in advocacy that relates, one way or another, to price—because price is a key object of regulation for which trade associations are especially likely to petition the government.

For example, the Federal Energy Regulatory Commission's primary regulatory lever is rate regulation. Congress has authorized FERC to determine "just and reasonable rate[s]" for wholesale electricity sales and transmission (16 U.S.C. §§ 824d, 824e) as well as natural gas transportation (15 U.S.C. § 717d). To be sure, in recent decades, FERC has pursued these goals for wholesale electricity sales through an "ambitious program of market-based reforms" that focuses on approving rules for market-based pricing solutions, rather than approving or disapproving prices directly. *Morgan Stanley Cap. Grp. Inc.* v. *Public Util. Dist. No. 1 of Snohomish Cnty.,* 554 U.S. 527, 535 (2008); see also, *e.g.*, *FERC* v. *Electric Power Supply Ass'n* (*EPSA*), 577 U.S. 260, 265-276 (2016) (describing the regulatory scheme). For example, "FERC extensively regulates the structure of the PJM capacity auction"—one such market-based structure—"to ensure that it efficiently balances supply and demand, producing a just and reasonable clearing price." *Hughes* v. *Talen Energy Mktg., LLC*, 578 U.S. 150, 157 (2016).

In other words, FERC's market-based approach entails administratively approving, and in some cases directly setting, rules whose whole purpose is to foster market conditions that yield a "just and reasonable rate." 15 U.S.C. § 717d, 16 U.S.C. §§ 824d, 824e. The output of these market-based structures—and,

therefore, the ultimate object of FERC's regulation of the industry—is still the prices that power suppliers charge.

Similarly, FERC regulates natural gas interstate pipeline rates under the Natural Gas Act and approves an interstate pipeline's tariff rates under these provisions. *See* 15 U.S.C. § 717c. In this realm, too, FERC regulations allow for market-based rates, but "only if the seller shows that it lacks power in the relevant markets." *ANR Storage Co.* v. *FERC*, 904 F.3d 1020, 1022 (D.C. Cir. 2018). Here, too, the ultimate object of FERC's regulatory activity is price.

Unsurprisingly, therefore, when those *amici* who are trade associations representing businesses regulated or impacted by FERC rate regulation engage in advocacy with the Commission, or, for that matter, Congress or the courts, the outcome of that advocacy is almost certain to relate in some fashion to rates and prices. *Amicus* EPSA, for example, frequently participates in FERC proceedings in a variety of capacities. See *Federal Energy Regulatory Commission*, EPSA (accessed April 2, 2026), available at https://perma.cc/6JDW-GEJN. Recently, EPSA submitted a comment to the Commission "urg[ing] the Commission to eliminate the WECC soft price cap." *EPSA Supports Elimination of Outdated Soft Price Cap in Western Electricity Coordinating Council*, EPSA (Aug. 15, 2025), available at https://perma.cc/6GQF-EW9C. EPSA's judicial advocacy, too, often involves issues related to rate regulation. See, *e.g., EPSA*, 577 U.S. at 265 (case in which EPSA challenged a regulation in which "FERC required [] market operators * * * to pay the same price to demand response providers for conserving energy

as to generators for making more of it"). NGSA, likewise, recently petitioned FERC to promulgate rules related to natural gas pipelines' practices for determining the highest value bid for the purpose of allocating capacity. See *Petition for Rulemaking To Update Commission Regulations Regarding Allocation of Interstate Pipeline Capacity*, 89 Fed. Reg. 22097, 22099 (Mar. 29, 2024).

At the retail level, state public utility commissions regulate the rates of water, wastewater, natural gas and electric utilities. In their economic oversight of these industries, state public utility commissions "generally share the same mandate: ensure customers' utility rates are 'just and reasonable.'" *Mandate Versus Movement: State Public Service Commissions and Their Evolving Power Over Energy Sources*, 135 Harv. L. Rev. 1616, 1619 & n.17 (2022) (collecting state statutes).

Ratemaking is a complicated task requiring tremendous technical knowledge and expertise—which is why states delegate the task to public utility commissions in the first place. Trade associations play an important role in this process, engaging in invaluable education and advocacy regarding rate-related issues. This is particularly true in the water sector, which consists of many small water systems with limited resources.

2. For businesses and trade associations in *amici*'s industries—those subject to careful economic price regulation—the decision below represents a particularly concerning development with respect to potential exposure to antitrust liability. "Ever since Congress overwhelmingly passed and President Benjamin Harrison signed the Sherman Act in 1890, 'protecting

consumers from monopoly prices' has been 'the central concern of antitrust.'" *Apple Inc.* v. *Pepper*, 587 U.S. 273, 288 (2019) (quoting 2A Phillip Areeda et al., Antitrust Law ¶ 345, at 179 (4th ed. 2014)); see also, *e.g.*, *Eastman Kodak Co.* v. *Image Tech. Servs., Inc.*, 504 U.S. 451, 478 (1992) ("The alleged conduct—higher service prices and market foreclosure—is facially anticompetitive and exactly the harm that antitrust laws aim to prevent."); S. Rep. No. 94-803, at 39 (1976) ("The economic burden of most antitrust violations is borne by the consumer in the form of higher prices for goods and services.").

Since "consumer welfare and price competition" are "the antitrust laws' traditional concern" (*Brooke Grp. Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 221 (1993)), the decision below is especially perilous for members of trade associations, like *amici*, whose advocacy is likely to touch on issues of regulated rates and prices. That is, if a business's involvement in a trade association, alone, can already be a plus factor supporting an inference of collusion, antitrust plaintiffs might endeavor to push that dubious inference even further where the trade association's advocacy by its nature tends to focus on the prices businesses can charge—the stuff of antitrust law.

The result is an even steeper price these businesses must pay to exercise their First Amendment associational rights. Those, like *amici*'s members, that participate in or are impacted by highly regulated industries need to contend not just with the rule the Second Circuit embraced below (that participation in a trade association generally can be a plus factor suggesting collusion in violation of federal antitrust law), but also with the fact that *their* participation in a

trade association may be a uniquely attractive target for novel antitrust claims.

In short, the decision below raises profound concerns, most of all for trade associations like *amici* and their members who buy and sell products subject to rate regulation by FERC, state public utility commissions, or other state and federal regulators. As it has done repeatedly through the decades, the Court should once again reject a rule of antitrust liability that would "transform conduct otherwise lawful into a violation of the Sherman Act"—and in the process would "invade" the "right to petition," "one of the freedoms protected by the Bill of Rights." *Noerr*, 365 U.S. at 138-139.

II. The decision below is wrong.

The decision below is also wrong under rudimentary principles of civil procedure. The essence of Rule 8, as applied in antitrust cases in particular, is the need to allege "enough factual matter (taken as true) to suggest that an agreement [to restrain trade] was made." *Twombly*, 550 U.S. at 556. Alleging parallel conduct and the bare "opportunity" to collude by virtue of participation in a trade association is not enough.

A. *Twombly* requires allegations of conduct that affirmatively suggests unlawful collusion.

Recognizing that "§ 1 of the Sherman Act 'does not prohibit [all] unreasonable restraints of trade * * * but only restraints effected by a contract, combination, or conspiracy,'" the Court explained in *Twombly* that "showing parallel conduct or interdependence, without more" is "inadequa[te]" to establish an antitrust violation. 550 U.S. at 553-554 (quoting *Copperweld*

Corp. v. *Independence Tube Corp.*, 467 U.S. 752, 775 (1984)). Conduct that is "consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy," does not amount to an illegal combination in restraint of trade. *Id.* at 554.

Applying these principles to the pleading standard under Federal Rule of Civil Procedure 8, the Court held that properly stating an antitrust claim requires "allegations of parallel conduct" to be "placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." *Twombly*, 550 U.S. at 557. Accordingly, "an allegation of parallel conduct and a bare assertion of conspiracy will not suffice." *Id.* at 556; see also *ibid.* (Parallel conduct alone "fails to bespeak unlawful agreement."). "[W]ithout that further circumstance pointing toward a meeting of the minds," the allegation does not "possess enough heft to 'sho[w] that the pleader is entitled to relief.'" *Id.* at 557 (quoting Fed. R. Civ. P. 8(a)(2)).

Put differently, it is not enough for allegations to be "merely consistent" with unlawful action; alleged conduct that has "an obvious alternative explanation" will not survive a motion to dismiss. *Twombly*, 550 U.S. at 557, 567; see also *Ashcroft* v. *Iqbal*, 556 U.S. 662, 680 (2009) (allegations of collusion are insufficient when the alleged behavior is "not only compatible with, but indeed * * * more likely explained by, lawful, unchoreographed free-market behavior."). Plaintiffs need to allege "something more," showing there is a "'reasonably founded hope that the [discovery] process will reveal relevant evidence' to support a § 1 claim" before subjecting defendants "to antitrust

discovery[, which] can be expensive." *Twombly*, 550 U.S. at 558, 559-560 (quoting *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 347 (2005)).

B. Contrary to the decision below, the mere opportunity to collude, such as participation in a trade association, is not a valid "plus factor."

Applying this Court's analysis in *Twombly*, lower courts have required "plus factors" on top of parallel conduct to support an inference of collusion sufficient to survive a motion to dismiss. See, *e.g.*, *In re Insurance Brokerage Antitrust Litig.*, 618 F.3d 300, 323 n.22 (3d Cir. 2010) (describing the outgrowth of the "plus factors" inquiry from *Twombly*); see also *In re Dynamic Random Access Memory (DRAM) Indirect Purchaser Antitrust Litig.*, 28 F.4th 42, 47 (9th Cir. 2022) ("[C]ertain plus factors may elevate allegations of parallel conduct to plausibly suggest the existence of a conspiracy."); cf. *Twombly*, 550 U.S. at 553 (reversing where Second Circuit had held that "plus factors are not *required* to be pleaded to permit an antitrust claim based on parallel conduct to survive dismissal"). That is how courts have operationalized this Court's demand for "something more than merely parallel behavior." *Id.* at 560.

Plus factors, by definition, are facts that will "'tend[] to ensure that courts punish concerted action—an actual agreement—instead of the unilateral, independent conduct of competitors.'" *Insurance Brokerage*, 618 F.3d at 323 (quoting *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 360 (3d Cir. 2004)). They can include "(1) evidence that the defendant had a motive to enter into a price fixing conspiracy; (2) evidence that the defendant acted contrary to its

interests; and (3) 'evidence implying a traditional conspiracy.'" *Id.* at 322 (quoting *Flat Glass*, 385 F.3d at 360); see also *DRAM*, 28 F.4th at 47 ("Plus factors are often 'economic actions and outcomes that are largely inconsistent with unilateral conduct but largely consistent with explicitly coordinated action.'") (quoting *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1194 (9th Cir. 2015)).

Plus factors are not present, however, when allegations raise only the "bare *possibility* that discovery might unearth direct evidence of an agreement." *Insurance Brokerage*, 618 F.3d at 324 (emphasis added). That is, the plus factors cannot be "consistent with [d]efendants, as competitors in a highly concentrated market, reacting to the same market pressures and taking parallel action to serve their interests." *DRAM*, 28 F.4th at 53.

The Second Circuit therefore erred by holding that the mere "*opportunity* to conspire" (Pet. App. 26a (emphasis added)) contributes to an inference of unlawful agreement. Such bare opportunity, including through common membership in a trade association, without more, is not a valid plus factor supporting antitrust liability, as nearly every court of appeals to consider the question has concluded. See *Insurance Brokerage*, 618 F.3d at 349; *American Dental Ass'n* v. *Cigna Corp.*, 605 F.3d 1283, 1295 (11th Cir. 2010); *In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, 911 (6th Cir. 2009); *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d at 1196; *Federal Prescription Serv., Inc.* v. *American Pharm. Ass'n*, 663 F.2d 253, 265 (D.C. Cir. 1981). As the petition explains (at 21-23), this weight of contrary circuit authority is

compelling reason to grant the petition, and ultimately to reverse.

Moreover, the alleged "opportunity" to collude here—which consists essentially of nothing more than mutual participation in the same trade association—falls well short of "suggest[ing] conspiracy," as the allegations must to survive a motion to dismiss. *Twombly*, 550 U.S. at 557. That is because two businesses in the same industry participating in the same trade association and possibly crossing paths at a trade association event is "just as much in line with"—if not much *more* in line with—"a wide swath of rational and competitive business strategy" versus an unlawful conspiracy. *Id.* at 554. That is, trade associations serve useful purposes for businesses, giving them access to expertise, resources, and a fierce advocate. That two businesses would both be in a trade association is "not only compatible with, but indeed [i]s more likely explained by, lawful, unchoreographed free-market behavior"—and therefore cannot help push an antitrust claim over the motion-to-dismiss barrier into discovery. *Iqbal*, 556 U.S. at 680.

At bottom, the notion that two companies are in cahoots, merely because they belong to the same trade association and might have some "opportunity" to collude, is far from plausible. An allegation of having an *opportunity* to do something is fundamentally different from an allegation of having *done* it. Businesses have perfectly legitimate and rational reasons for joining trade associations, which lend them support and experience and advocate on their behalf. And the very nature of trade associations means that a business's competitors from the same industry are likely to be in the same trade association. Moreover, trade

associations like *amici* take great care to ensure their activities comply with the antitrust laws; they adopt, publicize, and enforce detailed antitrust policies to avoid any improper communications. See, *e.g.*, EPSA, *Antitrust Policy and Guidelines for Members of the Electric Power Supply Association* (Sept. 2023 update), https://perma.cc/93PD-6ZGJ. Trade associations thus take affirmative steps directly opposite to the inference the court of appeals would draw from a business's membership in a trade association.

Without "something more," allegations of parallel conduct coupled with participation in the same trade association are insufficient to state a claim. *Twombly*, 550 U.S. at 560. The Court should take this opportunity to clarify that it will not permit the trampling of First Amendment freedoms on such thin allegations.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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