24-598

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOSAIC HEALTH, INC.; CENTRAL VIRGINIA HEALTH SERVICES, INC., INDIVIDUALLY AND ON BEHALF OF ALL THOSE SIMILARLY SITUATED,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of New York
Case No. No. 21-cv-6507

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES' PETITION FOR REHEARING *EN BANC*

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* discloses that the Chamber of Commerce of the United States of America is a nonprofit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in it.

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INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation.[1] It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber files this brief as *amicus curiae* in support of Defendants-Appellees' petition for rehearing *en banc*. The amended opinion is wrong in concluding that participation in a trade association or employing the same lobbying firms and lobbyists supports a plausible conspiracy claim under Section 1 of the Sherman Act.[2] According to the panel, the parties' joint participation in an industry association and joint lobbying efforts evince a "high level of interfirm communications" sufficient to provide a "plus factor" supporting the existence of a Section 1 conspiracy. Dkt. No. 94.1 at 32. In the Chamber's view, such an interpretation is contrary to well-

[1] No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

[2] The Chamber focuses on this issue because of its importance to the Chamber's mission and organization, and thus does not address other issues in the case.

established precedent, undermines the widely recognized pro-competitive effects of trade and industry association participation, and risks stifling organizations' First Amendment rights. Such an interpretation would further permit Section 1 plaintiffs to overcome pleading deficiencies by simply classifying trade association participants and those who employ similar lobbying services as co-conspirators, subjecting those associations—and their members—to unlawful conspiracy allegations and the associated burdensome litigation costs.

INTRODUCTION AND SUMMARY OF ARGUMENT

Trade associations play a pivotal role in American business and industry, and the Supreme Court has long recognized that trade associations are "beneficial to the industry and to consumers." *Maple Flooring Mfrs.' Ass'n v. United States*, 268 U.S. 563, 566 (1925). Trade associations allow organizations with common interests to advance the sectors they represent by facilitating networking and training, promoting appropriate industry standards, and providing individual businesses with a voice in legislative and regulatory processes that they otherwise would not have—essential functions of a democracy, and within the core protections of the First Amendment. The Chamber, for example, represents the interests of businesses of all sizes, sectors, and regions, promoting a vibrant economy for the betterment of all Americans.

There is nothing inherently concerning about these efforts from an antitrust or competition law perspective. Quite the contrary, the United States Federal Trade Commission has observed that "[m]ost trade association activities are procompetitive or competitively neutral." FTC, *Spotlight on Trade Associations*, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/dealings-competitors/spotlight-trade-associations (last visited Nov. 4, 2025). Indeed, the Chamber itself was founded after President William Howard Taft in a message to Congress urged the creation of a "central organization in touch with associations and chambers of commerce throughout the country . . . to keep purely American interests in a closer touch with different phases of commercial affairs." *The*

U.S. Chamber's History, https://www.uschamber.com/about/history (last visited Nov. 4, 2025).

This case concerns alleged violations of federal and state antitrust laws, and state common law, through a horizonal conspiracy to restrict drug discounts offered to pharmacies by several federally funded health centers and clinics. The Chamber appears as *amicus curiae* to address two legal issues raised by the amended decision: (1) whether membership and joint participation in a trade association plausibly supports the existence of a horizontal price-fixing conspiracy under Section 1; and (2) whether the use of shared lobbying firms and lobbyists likewise supports the plausible existence of a horizontal price-fixing conspiracy under Section 1.

Regarding the former, federal courts nationwide—including within the Second Circuit—have concluded that participation in common trade associations does not constitute a "plus factor" supporting the existence of a conspiracy. Indeed, in *Bell Atlantic Corp. v. Twombly* itself, the Supreme Court expressly rejected the notion that a plaintiff may adequately allege that a defendant has "conspire[d] to restrain trade" under Section 1 of the Sherman Act by claiming that the defendant "belong[s] to the same trade guild as one of his competitors." 550 U.S. 544, 567 n.12 (2007). Regarding the latter, allowing shared or joint lobbying efforts to support the plausibility of a horizontal price-fixing conspiracy is inconsistent with the *Noerr-Pennington* doctrine and directly conflicts with organizations' First Amendment rights.

But the panel decision in this case implicates more than just established legal precedent. If allowed to stand, the panel's ruling will significantly curtail organizations from participating in trade associations out of fear that they will be labeled as unlawful co-conspirators by association. It will also limit organizations—and the country's business community as a whole—from realizing the benefits inherent in trade association membership by stifling those organizations' ability to coordinate for the sake of industry advancement and impactful governmental change. Put simply, the Court's decision could place trade associations and their members between a rock and a hard place: forgo pro-competitive collaboration for the sake of economic advancement, or risk being branded as co-conspirators under Section 1 based on an association fallacy. Rehearing *en banc* is necessary.

ARGUMENT

I. THE AMENDED OPINION IS WRONG TO RELY ON DEFENDANTS-APPELLEES' JOINT PARTICIPATION IN TRADE ASSOCIATIONS TO SUPPORT THE EXISTENCE OF A SECTION 1 CONSPIRACY.

The amended opinion held that Plaintiffs-Appellants adequately "alleged parallel conduct and plus factors that support the plausibility of a Section 1 conspiracy" and remanded in part because "[t]he district court failed to credit the inference that the Defendants' sharing of lobbying services and joint participation on the PhRMA board suggests that the Defendants had ample opportunity to conspire based on months of communications about Section 340B Drug Discount restrictions

with the common aim of collusion." Dkt. No. 94.1 at 32-33. However, the panel erred in concluding that merely alleging joint membership in a trade association and the sharing of lobbying services is sufficient to plausibly allege a Section 1 conspiracy.

The panel's conclusion is barred by binding precedent. In *Twombly*, the Supreme Court expressly rejected the notion that a plaintiff may adequately allege that a defendant has "conspire[d] to restrain trade" under Section 1 of the Sherman Act by claiming that the defendant "belong[s] to the same trade guild as one of his competitors." 550 U.S. at 567 n.12. The Second Circuit has likewise concluded that alleging an opportunity to conspire is insufficient to plausibly allege a conspiracy to restrain trade under Section 1. *See Cap. Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 545 (2d Cir. 1993) ("The mere opportunity to conspire does not by itself support the inference that such an illegal combination actually occurred."); *Tera Grp., Inc. v. Citigroup, Inc.*, No. 24-135-CV, 2024 WL 4501967, at *4 (2d Cir. Oct. 16, 2024) ("[T]he law is clear that the mere opportunity to conspire does not by itself support the inference that such an illegal combination actually occurred.") (emphasis in original; internal quotation and citation omitted).

This approach is widely adopted throughout federal courts nationwide, even specifically in the pharmaceutical context. *See, e.g.*, *Hobart-Mayfield, Inc. v. Nat'l Operating Comm. on Standards for Athletic Equip.*, 48 F.4th 656, 667-68 (6th Cir. 2022) (rejecting the notion that "shared membership in trade associations demonstrates parallel conduct in trying to fix prices on generic drugs"); *Prosterman v. Am. Airlines, Inc.*, 747 F.

App'x 458, 462 (9th Cir. 2018) ("We have long been skeptical that participation in a trade organization is suggestive of collusion . . . and that skepticism has only hardened since *Twombly* and its progeny."); *Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1295 (11th Cir. 2010) ("[I]t was well-settled [even] before *Twombly* that participation in trade organizations provides no indication of conspiracy."); *Fed. Prescription Serv., Inc. v. Am. Pharm. Ass'n*, 663 F.2d 253, 265 (D.C. Cir. 1981) ("Mere membership in associations is not enough to establish participation in a conspiracy with other members of those associations."); *Moore v. Boating Indus. Ass'ns*, 819 F.2d 693, 722 (7th Cir. 1987) ("[M]ere membership in a trade association, attendance at trade association meetings and participation in trade association activities are not, in and of themselves, condemned or even discouraged by the antitrust laws.") (internal quotation and citation omitted).

In reaching this conclusion, courts have cited the myriad benefits of trade associations, which make them "beneficial to the industry and to consumers." *Maple Flooring*, 268 U.S. at 566. In addition to facilitating training, promoting appropriate industry standards, and empowering businesses with otherwise limited means to impact governmental policy, trade associations "provid[e] information to industry members, conduct[] research to further the goals of the industry, and promot[e] demand for products and services." *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1196 (9th Cir. 2015). The Supreme Court has also emphasized that "[e]ffective advocacy of both public and private points of view, particularly

controversial ones, is undeniably enhanced by group association[.]" *NAACP v. Alabama*, 357 U.S. 449, 460 (1958).

The amended decision, if upheld, threatens the realization of these benefits. It relied primarily on Plaintiffs-Appellants' allegations that Defendants-Appellees' joint participation on the PhRMA board provided them with "ample opportunity to conspire." Dkt. No. 94.1 at 33. But such allegations do not support an inference of a Section 1 conspiracy. Concluding otherwise would not only lower the pleading standard for prospective Section 1 plaintiffs, contrary to well-established law, but would also undermine the vital role that industry and trade associations—and their members—play in petitioning the government, educating the public, and establishing industry standards for the public's benefit. That role is protected by the First Amendment. *See Sanitation & Recycling Indus., Inc. v. City of New York*, 107 F.3d 985, 996 (2d Cir. 1997) (noting that "associational freedom" is "protected by the First Amendment").

II. THE AMENDED OPINION IS WRONG TO RELY ON DEFENDANTS-APPELLEES' SHARED LOBBYING EFFORTS TO SUPPORT THE EXISTENCE OF A SECTION 1 CONSPIRACY.

The amended opinion also erred in concluding that allegations of shared lobbying efforts can support a finding of a plausible Section 1 conspiracy.

In addition to enshrining a constitutional freedom of assembly, the First Amendment also guarantees the right to petition the government without fear of retribution or penalty. *See* U.S. Const. Amend. I. In *E.R.R. Presidents Conference v. Noerr*

Motor Freight, Inc., 365 U.S. 127 (1961), and *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965), the Supreme Court held that "[t]hose who petition government for redress are generally immune from antitrust liability." *Pro. Real Est. Invs., Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 56 (1993); *see also In re Elysium Health-Chromadex Litig.*, 354 F. Supp. 3d 330, 335-36 (S.D.N.Y. 2019), *as amended* (Feb. 7, 2019) ("[T]he *Noerr-Pennington* doctrine holds that attempts to influence legislative, executive, administration or judicial action are immune from liability by virtue of the First Amendment right to petition the government for a redress of grievances."). This general immunity applies even when the petitioning is done jointly between horizontal competitors, and even when it advocates for or results in reduced competition. *See A Fisherman's Best, Inc. v. Recreational Fishing All.*, 310 F.3d 183, 189 (4th Cir. 2002) ("[H]orizontal competitors may join together to lobby government because antitrust violations cannot be predicated on attempts to influence the passage or enforcement of laws."); *Merck-Medco Managed Care v. Rite Aid Corp.*, 22 F. Supp. 2d 447, 470 (D. Md. 1998), *aff'd*, 201 F.3d 436 (4th Cir. 1999) ("The First Amendment shields this joint lobbying from antitrust liability, even when [] competitors are seeking government action that would eliminate competition or exclude competitors.").

To avoid any infringement of the right to petition the government, either individually or through an association, this constitutional protection is broad in scope. First, the general immunity from antitrust liability extends both to petitioning conduct, as well as to conduct "incidental" to valid petitioning conduct. *Noerr*,

365 U.S. at 143; *see also Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 n.4 (1988) (observing that *Noerr–Pennington* immunizes conduct "'incidental' to a valid effort to influence government action"); *Singh v. NYCTL 2009-A Trust*, 683 F. App'x 76, 77 (2d Cir. 2017) ("[T]he *Noerr-Pennington* doctrine encompasses all petitioning activity . . . "). In addition, as the Supreme Court made clear in *Pennington*: "Joint efforts to influence public officials . . . [are] not illegal, either standing alone or *as part of a broader scheme* itself violative of the Sherman Act." 381 U.S. at 670 (emphasis added). Thus—as is critical here—courts have generally held that *Noerr-Pennington* prohibits the use of lobbying activities as evidence of the existence of a Section 1 conspiracy. *See, e.g.*, *Merck-Medco,* 22 F. Supp. 2d at 472 (as a result of *Noerr-Pennington*, "the mere fact of meeting and lobbying cannot support an inference of conspiracy"); *JSW Steel (USA), Inc. v. Nucor Corp.*, 586 F. Supp. 3d 585, 598-99 (S.D. Tex. 2022) (declining to impose liability based on *Noerr-Pennington* conduct, including joint industry meetings in furtherance of petitioning efforts); *Pro Music Rights, LLC v. Apple, Inc.*, No. 20-cv-309, 2020 WL 7406062, at *8 (D. Conn. Dec. 16, 2020) (finding that *Noerr-Pennington* prevents the filing of litigation or other petitioning acts "to be considered as evidence of an antitrust conspiracy").[3]

[3] *See also Bay Area Surgical Mgmt. LLC v. Aetna Life Ins. Co.*, No. 15-cv-1416, 2016 WL 3880989, at *9 (N.D. Cal. July 18, 2016) (rejecting the notion "that immunized conduct can be considered as part of an overall scheme," and finding that "after removing the allegations concerning *Noerr* protected activity, Plaintiffs have not sufficiently alleged facts to plausibly establish a conspiracy"); *Lynn v. Amoco Oil Co.*, 459 F. Supp. 2d 1175, 1189-91 (M.D. Ala. 2006) (defendants' joint lobbying activities

These courts recognize what the panel here did not: allowing lawful petitioning conduct to nevertheless qualify as a "plus factor" demonstrating an antitrust conspiracy both misapprehends the hierarchy of the Petition Clause and the Sherman Act, and unduly chills political speech—precisely what the *Noerr-Pennington* doctrine aims to avoid. Yet in determining that Plaintiffs-Appellants sufficiently alleged the existence of a conspiracy, the panel relied on the allegation that "Defendants communicated with each other both indirectly and directly through the use of the same lobbying firms." Dkt. No. 94.1 at 32. The panel faulted the district court for "fail[ing] to credit the inference that the Defendants' sharing of lobbying services . . . suggests that the Defendants had ample opportunity to conspire based on months of communications about Section 340B Drug Discount restrictions[.]" *Id.* This reliance on Defendants-Appellees' alleged shared lobbying services to find a plausible Section 1 conspiracy is inconsistent with the *Noerr-Pennington* doctrine and warrants rehearing. It disregards the longstanding principle that concerted governmental advocacy—including by business federations such as the Chamber—is necessary under the First Amendment to safeguard the free expression of political viewpoints and the right to freely petition government officials.

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cannot be a "plus factor" supporting a Section 1 conspiracy because "[s]uch activity is protected by the Constitution and may not be proof of the conspiracy that the plaintiffs allege").

CONCLUSION

For the foregoing reasons, the petition for rehearing *en banc* should be granted.

Dated: November 5, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 29(b)(4), Rule 29(a)(4)(G), and Rule 32(g) of the Federal Rules of Appellate Procedure and Rule 32.1 of the Local Rules of the Second Circuit, the Chamber certifies that the foregoing brief complies with the applicable type-volume and spacing requirements. According to the word count feature on the word processing system used to prepare the brief, the brief, including text, footnotes, headings, and quotations (but excluding the parts exempted by Fed. R. App. P. 32(F), contains 2,409 words.

Dated: November 5, 2025 *Respectfully submitted*,

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CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2025, the foregoing document was served on all parties or their counsel of record through the Court's CM/ECF system.

/s/ Michael F. Murray
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