No. 25-1070

In the Supreme Court of the United States

ASTRAZENECA PHARMACEUTICALS LP, ET AL.,

Petitioners,

v.

MOSAIC HEALTH, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three 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 National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in all fifty states and in every industrial sector. Manufacturing employs nearly 13 million people, contributes $2.9 trillion to the economy annually, has the largest economic impact of any major sector, and accounts for over half of all private-sector research and development in the nation, fostering the innovation that is vital for this economic ecosystem to thrive. NAM is the voice of the manufacturing community and leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

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* Pursuant to this Court's Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici*, their members, or their counsel made a monetary contribution to this brief's preparation or submission. Counsel of record received timely notice of *amici*'s intent to file this brief under this Court's Rule 37.2.

Amici have a strong interest in this case. The panel decision is wrong in concluding that the mere fact that two businesses participate in a trade association, or that two businesses employ the same lobbying firms and lobbyists, supports a plausible inference of an unlawful antitrust conspiracy under Section 1 of the Sherman Act. According to the panel, the parties' joint participation in an industry association and shared lobbying efforts evince a "high level of interfirm communications" sufficient to provide a "plus factor[]" supporting the existence of a Section 1 conspiracy. Pet. App. 26a (citation omitted). That view is not only implausible on its face; it contradicts well-established precedent, undermines the widely recognized pro-competitive effects of trade- and industry-association participation, and stifles 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 the same lobbying services as co-conspirators, subjecting those associations—and their members—to allegations of unlawful conspiracy and the burdensome cost of rebutting such allegations in litigation.

INTRODUCTION AND SUMMARY OF ARGUMENT

Trade associations play a pivotal role in American business and industry, and this 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 enable members with common interests to collectively 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. And NAM represents small and large manufacturers in all fifty states and in every industrial sector, advocating a policy agenda that creates jobs across the country and enables the U.S. to compete in the global economy.

There is nothing inherently concerning about these efforts from an antitrust or competition-law perspective. Quite the contrary, the Federal Trade Commission has observed that "[m]ost trade association activities are procompetitive or competitively neutral." FTC, *Spotlight on Trade Associations*, https://perma.cc/F786-W8Y8 (last visited Apr. 7, 2026). 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 Apr. 7, 2026).

This case concerns alleged violations of federal and state antitrust laws, and state common law, through an alleged horizontal conspiracy to restrict drug discounts offered to pharmacies by several federally funded health centers and clinics. *Amici* address

two legal issues raised by the panel decision: (1) whether membership and joint participation in a trade association plausibly support 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.[1]

Regarding the former, federal courts nationwide 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, this Court expressly rejected the notion that a plaintiff could adequately allege that a defendant has "conspired 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). And as to both issues, allowing trade-association participation or shared lobbying efforts to support the plausibility of a horizontal price-fixing conspiracy conflicts with the *Noerr-Pennington* doctrine and directly impinges upon organizations' First Amendment rights. The panel decision in this case departs from this Court's precedent and the decisions of several other circuits on these important issues and warrants a grant of certiorari.

But the panel decision 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

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[1] *Amici* focus on this issue because of its importance to their respective missions and organizations, and thus do not address other issues presented in the case.

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 expressive 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 Second Circuit's decision could place trade associations and their members between a rock and a hard place: forgo pro-competitive collaboration for the sake of advancement and advocacy, or risk being branded as antitrust co-conspirators under Section 1 based on an association fallacy. The Court should step in to correct this problem and preserve trade associations' First Amendment rights of expressive association and advocacy.

ARGUMENT

A. NEITHER JOINT PARTICIPATION IN TRADE ASSOCIATIONS NOR SHARED LOBBYING EFFORTS SUPPORT THE EXISTENCE OF AN ANTITRUST CONSPIRACY.

1. Section 1 of the Sherman Act prohibits agreements that unreasonably restrain trade. 15 U.S.C. § 1. Although direct evidence of an agreement, such as a document or a phone call, is the best method of pleading sufficient facts establishing an antitrust agreement, courts allow plaintiffs to plead facts from which an inference of an agreement may be drawn, under certain safeguards enumerated in, among other decisions, *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007). There, this Court held that stating a Section 1 claim "requires a complaint with enough factual matter (taken as true) to suggest that an agreement was

made." *Id.* at 556. In particular, courts require plaintiffs to allege "certain parallel conduct" by the potential conspirators along with "some factual context suggesting agreement, as distinct from identical, independent action." *Id.* at 548-49. "[P]arallel conduct," by itself, is not enough without this "factual context" because parallel conduct, "[e]ven conscious parallelism," is "not in itself unlawful" and just as consistent with pro-competitive activity as anticompetitive activity. *Id.* at 553-56 (citation and internal quotation marks omitted).

This "factual context" is often spelled out and categorized for efficiency into what are called "plus factors." *Id.* at 548-49, 553 (citation omitted). Plus factors can include evidence of common motive among alleged co-conspirators, evidence of acts against economic self-interest, and, as most relevant here, evidence of a high level of interfirm communications. *See, e.g.*, Pet. App. 39a. One set of questions in this case is whether membership and joint participation in a trade association or use of shared lobbying firms and lobbyists can plausibly support the existence of a Section 1 agreement as evidence of a high level of interfirm communications. *See* Pet. i.

The Second Circuit held that the answer to this set of questions is yes. *See* Pet. App. 26a ("The 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"). But this Court and numerous other circuits have clearly held that the answer is no, for both trade-association participation and shared lobbying efforts.

2. Trade-association participation cannot support the existence of a Section 1 conspiracy under this Court's precedent and the decisions of several circuits. In *Twombly* itself, this Court expressly rejected the notion that a plaintiff may adequately allege that a defendant has "conspired 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.

In *Twombly*, the complaint alleged that the defendants acted in a way suggestive of a conspiracy, including, among other things, by belonging to various common trade associations. *Ibid*. This Court nonetheless held that the complaint did not plausibly allege a conspiracy. The dissent objected, emphasizing that the complaint referred to trade-association membership and meetings and thus presented an opportunity to conspire, quoting Adam Smith for the proposition that "[p]eople of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices." *Id*. at 591 & n.10 (Stevens, J., joined by Ginsburg, J., dissenting). This Court summarily rejected that argument:

> If Adam Smith is peering down today, he may be surprised to learn that his tongue-in-cheek remark would be authority to force his famous pinmaker to devote financial and human capital to hire lawyers, prepare for depositions, and otherwise fend off allegations of conspiracy; all this just because he belonged to the same trade guild as one of his competitors when their pins carried the same price tag.

Id. at 567 n.12 (majority op.).

Both before and after *Twombly*, federal courts nationwide have taken the same approach to trade association membership and participation. *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 notion that "shared membership in trade associations demonstrates parallel conduct in trying to fix prices"); *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 . . . that skepticism has only hardened since *Twombly* and its progeny."); *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 349-50 (3d Cir. 2010) (rejecting allegation that joint membership plausibly implies that collusion occurred); *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."); *Moore v. Boating Indus. Ass'ns*, 819 F.2d 693, 712 (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."); *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"). *But see Evergreen Partnering Grp. v. Pactiv Corp.*, 832 F.3d 1, 14 (1st Cir. 2016) (considering membership a plus factor).

In reaching this conclusion, courts have cited the myriad pro-competitive and expressive benefits of trade associations, which make them "beneficial to the

industry and to consumers." *Maple Flooring Mfrs.' Ass'n v. United States*, 268 U.S. 563, 566 (1925). 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) (citation omitted). This 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 ex rel. Patterson*, 357 U.S. 449, 460 (1958).

The panel decision, if upheld, threatens these important benefits. It relied on Respondents' allegations that Petitioners' joint participation on the PhRMA board provided them with "ample opportunity to conspire." Pet. App. 26a. 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 expressive 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 against governmental intrusion 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").

3. Shared lobbying efforts also cannot support the existence of a Section 1 conspiracy, under this Court's precedent and the decisions of several circuits.

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 *Eastern Railroad 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), this 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, administrative, 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, Inc. v. Rite Aid Corp.*, 22 F. Supp. 2d 447, 470 (D. Md. 1998) ("The First Amendment shields this joint lobbying from antitrust liability, even when . . . competitors are seeking government action that would eliminate competition or

exclude competitors."), *aff'd*, 201 F.3d 436 (4th Cir. 1999) (per curiam).

To avoid any infringement of the right to petition the government, either individually or through an association, this constitutional protection is broad. First, the general immunity from antitrust liability extends both to petitioning conduct itself and to conduct "incidental" to petitioning conduct. *Noerr*, 365 U.S. at 143. *See also Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499-500 & n.4 (1988) (observing that *Noerr-Pennington* immunizes conduct "'incidental' to a valid effort to influence governmental action"); *Singh v. NYCTL 2009-A Tr.*, 683 F. App'x 76, 77 (2d Cir. 2017) ("[T]he *Noerr-Pennington* doctrine encompasses all petitioning activity").

In addition, as this 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*, "[t]he 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").

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 constitutionally protected political speech—precisely what the *Noerr-Pennington* doctrine aims to avoid. Yet in determining that Respondents sufficiently alleged the existence of a conspiracy, the panel relied on the allegation that "Defendants communicated with each other both indirectly and directly through use of the same lobbying firms." Pet. App. 26a. 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." *Ibid.* This reliance on Petitioners' alleged shared lobbying services to find a plausible Section 1 conspiracy is inconsistent with the *Noerr-Pennington* doctrine and warrants review by this Court. It disregards the longstanding principle that concerted governmental advocacy—including by business federations such as *amici*—is necessary under the First Amendment to safeguard the free expression of political viewpoints and the right to freely petition government officials.

B. THE PANEL DECISION THREATENS TO CHILL THE COMPETITIVE AND EXPRESSIVE BENEFITS OF TRADE ASSOCIATIONS.

This Court has long recognized that trade associations are "beneficial to the industry and to consumers." *Maple Flooring*, 268 U.S. at 566. Their benefits are myriad. They can facilitate networking and training, promote industry standards, and provide input in governmental processes. They are prevalent across industries and span the ideological spectrum, and thus provide a voice for a broad array of views and ideas. These activities are essential parts of democratic government and are protected by the First Amendment.

These activities and their benefits do not undermine the purposes of the antitrust laws in any way. Indeed, the Federal Trade Commission has observed that "[m]ost trade association activities are procompetitive or competitively neutral." FTC, *Spotlight on Trade Associations*, https://perma.cc/F786-W8Y8 (last visited Apr. 7, 2026).

Because of their importance, trade associations enjoy significant protections under the Constitution and the law. Specifically, because effective exercise of First Amendment rights "is undeniably enhanced by group association," *Buckley v. Valeo*, 424 U.S. 1, 15 (1976) (per curiam) (citation omitted), 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," *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 606 (2021) (citation omitted), as well as the right to "privacy in one's associations," *NAACP*, 357 U.S. at 462. *See also Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) ("An

individual's freedom to speak . . . could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward th[at] end[ ] were not also guaranteed."). These rights apply "whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters," *NAACP*, 357 U.S. at 460, and thus plainly extend to "trade groups and their members," *In re Motor Fuel Temp. Sales Pracs. Litig.*, 641 F.3d 470, 481 (10th Cir. 2011). *See also Ams. for Prosperity*, 594 U.S. at 617 ("these organizations span the ideological spectrum, and indeed the full range of human endeavors"). Burdens on these rights must survive significant First Amendment scrutiny. *Ams. for Prosperity*, 594 U.S. at 608-11.

These protections are particularly important when the trade-association activities involve, as they do in this case, clear petitioning conduct. "[S]peech concerning public affairs" "is the essence of self-government." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (quoting *Garrison v. Louisiana*, 379 U.S. 64 (1964)). Our democratic institutions necessarily rest on "our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 755, (2011) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). When people are free to express a wide range of views—even views based on "selfish political motives," *Garrison*, 379 U.S. at 73-74 (citation omitted)—our institutions gain popular legitimacy. It also becomes more likely that government officials will be held accountable to the people who elected them, and that sound ideas will

be brought to the attention of the public and public officials. *See Sullivan*, 376 U.S. at 269-73.

Burdens placed on trade-association activities also threaten to harm the broader "search for truth" that underpins the First Amendment, *Janus v. Am. Fed'n of State, Cnty., and Mun. Emps.*, 585 U.S. 878, 893 (2018)—thus harming both the organization itself, which has its speech restricted, and potential consumers of that speech, who are prevented from accessing information. *See Murthy v. Missouri*, 603 U.S. 43, 75 (2024) ("we have recognized a First Amendment right to receive information and ideas") (citation and internal quotation marks omitted); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978) ("[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw."). That is because trade associations strengthen the voice of those who participate, which, in turn, allows messages to reach those who would otherwise lack access to such information. Such expression is critical to our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *FEC v. Ted Cruz for Senate*, 596 U.S. 289, 302 (2022) (citation omitted). *See also Citizens United v. FEC*, 558 U.S. 310, 343 (2010) ("Corporations and other associations, like individuals, contribute to the discussion, debate, and the dissemination of information and ideas that the First Amendment seeks to foster" (citation and internal quotation marks omitted)). Trade associations—including business federations such as *amici*—often have the resources

and know-how to generate valuable ideas and expression that their members and other individuals and entities have "the right to receive." *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972) (citation omitted).

The panel decision threatens to chill participation in trade associations in much the same way as the Ninth Circuit's decision in *Americans for Prosperity*, which this Court reversed, threatened to chill such participation. In *Americans for Prosperity*, this Court was concerned that the mandated disclosure of trade association membership would discourage members' participation and advocacy and thereby undermine the "wide variety of political, social, economic, educational, religious, and cultural ends" that associations can and do further. 594 U.S. at 595 (citation omitted). That is because the Ninth Circuit's rule in that case would significantly burden such membership, there with required public disclosure. Here, the Second Circuit's rule imposes a similarly significant burden and a similarly chilling effect, namely, that participation in a trade association exposes a participant to antitrust litigation and expensive antitrust discovery.

C. PROHIBITING TRADE ASSOCIATION PARTICIPATION AND SHARED LOBBYING EFFORTS FROM BEING USED TO SUPPORT THE EXISTENCE OF AN ANTITRUST CONSPIRACY PROVIDES CLARITY AND ADMINISTRABILITY.

This Court and other courts' precedent on trade associations plays an important function in ensuring that antitrust law serves its intended pro-consumer purposes. The antitrust laws must be carefully calibrated to successfully deter anticompetitive conduct without unduly chilling positive business activity like

that which often occurs within trade associations. By not allowing such activities to ground a Section 1 claim, these precedents provide parties and courts with clear guidance as to the types of expressive conduct that do not run afoul of the antitrust laws. But, if allowed to stand, the Second Circuit's decision here will destroy that clarity—making it even more difficult for businesses to engage in First Amendment protected conduct while still ensuring they stay on the right side of the antitrust line.

1. This Court has "repeatedly emphasized the importance of clear rules in antitrust law." *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438, 452 (2009). As then-Chief Judge Breyer explained, antitrust rules "must be clear enough for lawyers to explain them to clients." *Town of Concord v. Bos. Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990). Businesses need to be able to plan their activities, their investments, their allocation of resources, and their strategies. And "simple" and "[s]trong presumptions . . . guide businesses in planning their affairs by making it possible for counsel to state that some things do not create risks of liability." Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 14 (1984).

Without a rule that petitioning conduct cannot be used against the participant in the trade association, businesses can no longer rely on standard best practices with respect to association membership, communications, activities, and assessments of the overall situation. Instead, participants would need to relentlessly monitor and scrutinize every aspect of the association: to decide whether one meeting or two on a particular policy creates more risk, whether discussing

a policy question presents different risk than advocating to the government about it, and whether all of this risk changes over time depending on the market structure or the outcome of the policy advocacy. These are not only difficult questions but ones that can be avoided if this Court rejects the Second Circuit's rule.

2. Beyond increasing uncertainty for businesses, the Second Circuit's approach would also make it substantially more difficult for courts to resolve antitrust cases in a timely and efficient manner. That difficulty itself imposes tremendous costs on business.

A fundamental problem with the Second Circuit's approach is that it adds yet another factor for courts to consider in deciding whether to allow discovery to proceed. Yet, for decades, courts have warned against "sending the parties into discovery" based on dubious claims, given "the costs of modern federal antitrust litigation." *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984); *see Twombly*, 550 U.S. at 558 (observing the "unusually high cost of discovery in antitrust cases"); David F. Herr, *Annotated Manual for Complex Litigation* § 30 (4th ed., updated Sept. 2024) (noting that antitrust litigation can "involve voluminous documentary and testimonial evidence, extensive discovery, complicated legal, factual, and technical (particularly economic) questions, numerous parties and attorneys, and substantial sums of money"). Moreover, because the Sherman Act's treble-damages remedy can be "economically devastating," defendants often cannot realistically risk taking a case to trial. Edward D. Cavanagh, *The Private Antitrust Remedy: Lessons from the American Experience*, 41 Loy. U. Chi. L.J. 629, 633 (2010). Together, the combined effect of

unavoidably large discovery costs and potentially exorbitant damages creates intense pressure to settle antitrust cases. Indeed, antitrust "[d]efendants frequently face a Hobson's choice: either pay some amount to settle, even though they believe in their innocence, or try the matter and risk uncapped liability." Edward D. Cavanagh, *Contribution, Claim Reduction, and Individual Treble Damage Responsibility: Which Path to Reform of Antitrust Remedies?*, 40 Vand. L. Rev. 1277, 1284 (1987); *see Twombly*, 550 U.S. at 559 (noting that "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching" summary judgment and trial).

3. Finally, allowing plaintiffs to base their claims on petitioning conduct would also make it difficult for courts to devise appropriate remedies when cases do proceed all the way through trial.

In a related context, this Court has warned against "requir[ing] antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing." *Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko*, 540 U.S. 398, 408 (2004). And the Court has therefore declined to impose remedies "that it cannot explain or adequately and reasonably supervise." *Id.* at 415 (citation omitted). Entertaining Section 1 claims based on petitioning conduct goes a step further, for it would potentially involve a court directing defendants to stop engaging in First Amendment–protected expressive speech or conduct because of its supposed interaction with other conduct. Moreover, courts would need to decide the scope of the expressive speech or conduct they would require the defendant to cease engaging in, drawing a line between meetings, advocacy, policy discussions, and

similar activities. That sort of discretionary judicial control of a company's First Amendment activity is not only worrisome from an administrability perspective but also, as this Court has recognized, inimical to our American free-enterprise system. *See id.* at 414-16.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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