

No.

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.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents two important antitrust questions that have divided the courts of appeals:

1. Whether *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), which bars antitrust claims by indirect purchasers and sellers, applies to a claim of “lost profit” damages based on indirect purchases or sales that were not made due to the alleged conspiracy.

2. Whether the allegation that businesses had an “opportunity to conspire,” such as through joint lobbying and participation in a trade association, plausibly suggests an antitrust conspiracy.

PARTIES TO THE PROCEEDING

Petitioners AstraZeneca Pharmaceuticals LP (NYSE: AZN), Eli Lilly and Company (NYSE: LLY) and Lilly USA, LLC, Novo Nordisk Inc. (NYSE: NVO), and Sanofi-Aventis U.S., LLC (NASDAQ: SNY) were Defendants-Appellees below.

Respondents Mosaic Health, Inc. and Central Virginia Health Services, Inc. were Plaintiffs-Appellants below.

RULE 29.6 STATEMENT

AstraZeneca Pharmaceuticals LP (NYSE: AZN) is a Delaware limited partnership. AstraZeneca Pharmaceuticals LP's general partner is AstraZeneca AB, a Swedish corporation. AstraZeneca Pharmaceuticals LP's sole limited partner is Zeneca, Inc., a Delaware corporation. AstraZeneca PLC, a publicly held company, is the ultimate parent company of AstraZeneca Pharmaceuticals LP, AstraZeneca AB, and Zeneca, Inc. No other publicly held company owns 10% or more of the voting interest in AstraZeneca Pharmaceuticals LP or AstraZeneca AB.

Eli Lilly and Company (NYSE: LLY) and Lilly USA, LLC do not have a parent corporation and no publicly held corporation owns 10% or more of either entity's stock.

Novo Nordisk Inc. (NYSE: NVO) is a privately held corporation wholly owned by Novo Nordisk US Commercial Holdings, Inc. Novo Nordisk US Commercial Holdings, Inc. is a privately held corporation wholly owned by Novo Nordisk US Holdings, Inc. Novo Nordisk US Holdings, Inc. is a privately held corporation wholly owned by Novo Nordisk A/S. No publicly held company owns 10% or more of the stock of Novo Nordisk A/S.

Sanofi-Aventis U.S., LLC (NASDAQ: SNY) is a wholly owned subsidiary of Sanofi, a French *société anonyme* organized under the laws of France and traded on the Paris Stock Exchange and NASDAQ. Sanofi owns 100% of the stock in Sanofi-Aventis U.S., LLC and no publicly held company owns 10% or more of its stock.

RELATED PROCEEDINGS

U.S. District Court for the Western District of New York:

Mosaic Health, Inc., et al. v. Sanofi-Aventis U.S., LLC, et al., No. 21-cv-6507 (Sept. 2, 2022) (order granting motion to dismiss)

Mosaic Health, Inc., et al. v. Sanofi-Aventis U.S., LLC, et al., No. 21-cv-6507 (Feb. 1, 2024) (order denying motion for leave to amend complaint)

U.S. Court of Appeals for the Second Circuit:

Mosaic Health, Inc., et al. v. Sanofi-Aventis U.S., LLC, et al., No. 24-598 (Aug. 6, 2025) (original opinion vacating and remanding to the district court)

Mosaic Health, Inc., et al. v. Sanofi-Aventis U.S., LLC, et al., No. 24-598 (Oct. 15, 2025) (order denying petition for panel rehearing of original opinion)

Mosaic Health, Inc., et al. v. Sanofi-Aventis U.S., LLC, et al., No. 24-598 (Oct. 15, 2025) (amended opinion vacating and remanding to the district court)

Mosaic Health, Inc., et al. v. Sanofi-Aventis U.S., LLC, et al., No. 24-598 (Dec. 5, 2025) (order denying petition for rehearing en banc of amended opinion)

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OPINIONS BELOW

The amended opinion of the court of appeals (App. 1a-28a) is published at 156 F.4th 68. The order of the court of appeals denying rehearing (App. 71a-72a) is unreported. A decision of the district court is published at 714 F. Supp. 3d 209 (App. 29a-51a), and another decision is unpublished but available at 2022 WL 4017895 (App. 52a-70a).

JURISDICTION

The amended judgment of the court of appeals was entered on October 15, 2025. The court of appeals denied a timely petition for rehearing on December 5, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions are reproduced in the petition appendix (App. 73a-94a).

INTRODUCTION

This Court has adopted rules designed to facilitate the early dismissal of weak and improper antitrust claims. Under *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), only direct purchasers or sellers may sue alleged antitrust violators. And under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), a plaintiff who relies on circumstantial evidence of parallel conduct must also allege additional facts, commonly known as “plus” factors, that plausibly suggest collusion.

In the decision below, the Second Circuit undermined both of those rules. It held that an indirect purchaser can evade *Illinois Brick*’s bar simply by characterizing its harm as “lost profits” from sales that *did not* occur, rather than being overcharged for purchases that *did* occur. And it held that an inference of conspiracy is warranted when competitors have an “opportunity to conspire,” such as when they engage in joint lobbying or participation in a trade association. In so ruling, the Second Circuit eroded key safeguards against improper antitrust claims, exposing defendants to burdensome discovery and extractive settlements.

Petitioners are pharmaceutical manufacturers that sell medications at steeply discounted prices under the federal 340B program. To stem abuses of the program, Petitioners and other manufacturers lobbied the government through their trade association to adopt meaningful reform. When those efforts failed, Petitioners and other manufacturers—at different times over a period of many months—independently exercised their rights to implement different (lawful) policies intended to limit profiteering off the program.

Respondents are healthcare providers who purchase Petitioners’ 340B-priced medicines through wholesalers. They brought this putative class action seeking to use the antitrust laws (and the threat of treble damages) to

undermine policies that each manufacturer adopted to curb well-documented abuses within the 340B program. Respondents allege that Petitioners conspired to deny them 340B pricing on certain drugs by coordinating the adoption of their otherwise lawful policies. The district court granted a motion to dismiss and then denied leave to amend.

The Second Circuit reversed, allowing this case to proceed to discovery (1) even though Respondents admittedly did not purchase any products from Petitioners, and (2) even though Respondents cannot identify any communications that Petitioners made in furtherance of the supposed conspiracy. The court's ruling implicated circuit conflicts on two important issues of federal antitrust law, both of which this Court should resolve.

The first concerns a question of standing: whether *Illinois Brick* bars all claims by indirect purchasers and sellers, or whether an antitrust plaintiff may evade the rule by seeking to recover lost profits on purchases or sales that were never made. The Second Circuit adopted the latter view, holding that “*Illinois Brick* does not apply” where an indirect purchaser labels its injury as “lost profits” rather than “overcharges.” App. 17a & n.5. Other courts of appeals have rejected that approach, holding that “*Illinois Brick* adopts a *plaintiff*-specific rule, not a *damages*-specific rule.” *Acad. of Allergy & Asthma in Primary Care v. Amerigroup Tenn., Inc.*, 155 F.4th 795, 817 (6th Cir. 2025) (Murphy, J.).

Those other courts are right. For nearly fifty years, this Court has treated *Illinois Brick* as a categorical rule: Only direct purchasers and sellers may sue under the federal antitrust laws. If the plaintiff is an indirect purchaser or seller—*i.e.*, more than one step removed from the antitrust defendant—then the plaintiff lacks standing. This Court has repeatedly reaffirmed that “bright-line” rule, *Apple Inc. v. Pepper*, 587 U.S. 273, 279 (2019), which

promotes administrability, prevents duplicative recoveries, and avoids the kind of speculative damages inquiries that plagued antitrust litigation before *Illinois Brick*. The rule does not turn on how an alleged injury is measured or characterized; it turns on the plaintiff’s relationship to the defendant.

In departing from that settled framework, the decision below converts *Illinois Brick* from an easily administrable rule into one that can be circumvented through artful pleading. Indeed, an overcharge theory and a lost-profit theory are two ways of describing the same alleged harm—namely, that the defendant’s conduct prevented the plaintiff from buying or selling goods at non-collusive prices. If anything, a lost-profit theory is far *more* speculative, because it requires hypothesizing about transactions that never occurred. Regardless, if an indirect purchaser or seller could sidestep *Illinois Brick* by reframing its claims in terms of forgone purchases or lost sales, rather than completed ones, the rule would become a meaningless pleading exercise.

The decision below also implicates a circuit conflict regarding a core question of pleading under *Twombly*: whether a plaintiff’s allegations that competitors had the “opportunity to conspire,” such as through joint lobbying or participation in a trade association, plausibly suggest an antitrust conspiracy, even where the plaintiff cannot identify any communications between the defendants about their alleged conspiracy. The Second Circuit held that such generalized allegations, by themselves, constitute a “plus factor” supporting an inference of unlawful agreement. But most other courts of appeals—including the Third, Sixth, Ninth, Eleventh, and D.C. Circuits—have rejected that approach, holding that participation in a trade association is not only compatible with, but indeed more likely explained by, lawful and unchoreographed free-market behavior.

Once again, those other courts are right. *Twombly* made clear that allegations of parallel conduct, without more, do not suffice to state a plausible antitrust claim; the plaintiff must also include “allegations plausibly suggesting (not merely consistent with) [an unlawful] agreement.” 550 U.S. at 557. Joint lobbying efforts and participation in trade associations do not plausibly suggest collusion. They are common in nearly every industry in America and are a primary way that companies engage in constitutionally protected activity. Treating such activities as if they were inherently suspect will chill core First Amendment conduct, while simultaneously lowering *Twombly*’s threshold for pleading viable antitrust claims. Companies will face an increased likelihood of treble-damages antitrust liability and burdensome discovery, merely for jointly petitioning the government.

Each of these issues was essential to the decision below, and this case cleanly presents both. Moreover, the implications of the Second Circuit’s ruling for antitrust law are far-reaching. So too its effects on the 340B program, which has ballooned to encompass more than \$81 billion in drug sales annually, making it the nation’s second-largest federal drug benefit program. This Court’s review is warranted now.

STATEMENT

1. Section 340B of the Public Health Service Act, 42 U.S.C. § 256b, requires pharmaceutical manufacturers to offer their medicines at greatly reduced prices—often as low as a penny per unit—to certain large hospital systems and other healthcare providers known as “covered entities.” *Id.* § 256b(a)(1). The statute was intended to benefit low-income and underserved patients. But covered entities use the 340B program primarily to generate revenue for themselves and their for-profit business partners.

Instead of passing 340B discounts on to their uninsured and vulnerable patients, covered entities partner with for-profit pharmacy chains (known as “contract pharmacies”) to sell 340B-priced medicines to patients at *regular* commercial prices. App. 31a. The covered entity and its contract pharmacies then “divvy up the spread” between the non-market 340B price and their actual sales price, generating significant arbitrage revenue. *Novartis Pharms. Corp. v. Johnson*, 102 F.4th 452, 457 (D.C. Cir. 2024). “Each of these actors thus has a financial incentive to catalog as many prescriptions as possible as eligible for the discount”—a dynamic that has produced well-documented “abuses.” *Id.* at 457-58.

The problem of 340B abuse has grown exponentially since 2010. That year, the Health Resources and Services Administration (HRSA), the subagency of the Department of Health and Human Services that administers the 340B program, issued guidance purporting to allow covered entities to partner with an unlimited number of contract pharmacies. 75 Fed. Reg. 10,272, 10,272-73 (Mar. 5, 2010). The number of contract pharmacies participating in the program subsequently exploded: from 1,300 (in 2010) to 23,000 (in 2019), an increase of approximately 1,669% in less than a decade. *Novartis*, 102 F.4th at 457. When 340B sales are made through for-profit contract pharmacies, the risks of abuse also skyrocket. See Office of Inspector General, Department of Health & Human Services, *Memorandum Report: Contract Pharmacy Arrangements in the 340B Program*, OEI-05-13-00431 (Feb. 4, 2014).

Concerned about abuses by contract pharmacies, a number of drug manufacturers, including Petitioners here, engaged lobbyists and their trade association, Pharmaceutical Research and Manufacturers of America (PhRMA), to advocate for 340B reform. App. 6a. They allegedly “spent millions” lobbying the federal government

to rein in the program’s most problematic aspects. App. 99a. But those “lobbying efforts failed,” which “became evident” when the President issued an executive order on July 24, 2020, that “did little to limit Contract Pharmacy 340B Drug Discounts.” App. 135a; see Exec. Order No. 13937, 85 Fed. Reg. 45,755 (July 29, 2020).

2. Even before the Executive Order, one manufacturer adopted a policy restricting covered entities from accessing 340B pricing through contract pharmacies. In the Order’s aftermath, numerous other manufacturers reacted to the failure of their lobbying efforts by unilaterally adopting distinct reforms to their own program-integrity policies. Each of these reforms altered, in some fashion, the circumstances under which the manufacturer would agree to facilitate delivering its products at 340B prices to contract pharmacies. Each policy differed in its timing, particulars, and impact. While dozens of manufacturers implemented different types of policy reforms after the Executive Order to address the well-documented contract-pharmacy abuses, this litigation involves a complaint against only four of them.

Eli Lilly & Company and Lilly USA, LLC (collectively, Lilly) adopted a policy—months *before* the Executive Order—restricting contract pharmacy sales for its prostate-treatment drug Cialis. App. 145a. A month after the Executive Order, Lilly revised its policy to include all its drugs, with an exception for insulin products when contract pharmacies actually passed 340B pricing on to patients. App. 144a.

AstraZeneca Pharmaceuticals LP adopted a policy—the same day as the Executive Order—under which a covered entity that lacked an in-house pharmacy could designate one contract pharmacy to use for accessing AstraZeneca’s drugs at 340B-discounted prices. App. 142a-143a.

Sanofi-Aventis U.S., LLC announced a policy—the next business day after the Executive Order—that it would continue to honor unlimited contract pharmacy orders, but only if a covered entity agreed to provide claims data that would allow Sanofi to better detect unlawful duplicate discounts. App. 143a-144a. Six months later, Sanofi clarified that its policy was limited to five particular types of covered entities, and even those entities could designate one contract pharmacy not subject to the claims-data restriction if they lacked an in-house pharmacy. App. 146a.

Novo Nordisk Inc. adopted a policy—four months after the Executive Order—that it would no longer honor contract-pharmacy orders made on behalf of one particular type of hospital covered entity. App. 145a-146a. The policy did not apply to any of Respondents here. Moreover, Novo Nordisk later modified its policy to permit even the hospitals covered by its policy to designate up to two contract-pharmacy locations if they lacked an in-house pharmacy. App. 146a-147a.

	Lilly	Astra-Zeneca	Sanofi	Novo Nordisk
<i>Adopted</i>	May 18, 2020	July 24, 2020	July 27, 2020	Dec. 1, 2020
<i>Announced Publicly</i>	May 18, 2020	July 27, 2020	July 27, 2020	Dec. 1, 2020
<i>Effective</i>	May 18, 2020	Oct. 1, 2020	Oct. 1, 2020	Jan. 2021
<i>Revised/ Clarified</i>	Aug. 19, 2020		Feb. 2021	Jan. 2022

App. 142a-147a.

Taking the position that covered entities are entitled to force manufacturers to deliver their drugs at 340B prices to contract pharmacies, HRSA threatened the manufacturers adopting such policies with “potentially massive civil monetary penalties.” App. 157a. Under Section 340B, a noncompliant manufacturer faces “up to \$5,883 per instance of overcharge,” App. 157a—a sum that can quickly become astronomical for major manufacturers that make hundreds of thousands of 340B sales per year. HRSA also threatened that it might expel a manufacturer from participation in Medicaid and Medicare Part B. App. 156a. In response, several different manufacturers (including Petitioners) sued HRSA to vindicate the legality of their program-integrity policies.

Multiple manufacturers prevailed in their litigation. The Third Circuit approved the policies adopted by Sanofi, Novo Nordisk, and AstraZeneca, explaining that nothing in Section 340B “requires delivery to an unlimited number of contract pharmacies.” *Sanofi Aventis U.S. LLC v. HHS*, 58 F.4th 696, 704 (3d Cir. 2023). The D.C. Circuit separately approved policies adopted by Novartis and United Therapeutics Corp. (neither of which was sued by Respondents here), agreeing that “section 340B does not categorically prohibit manufacturers from imposing conditions on the distribution of covered drugs to covered entities.” *Novartis*, 102 F.4th at 464. An appeal involving Lilly’s policy remains pending. See *Eli Lilly & Co. v. Kennedy*, No. 21-3128 (7th Cir.).

3. The decisions rejecting the government’s challenges to the manufacturers’ 340B policies should have been the final word on the policies’ legality. Covered entities “have no [private] right of action” to enforce Section 340B’s requirements. *Astra USA, Inc. v. Santa Clara Cnty.*, 563 U.S. 110, 117 (2011). And except as specifically authorized by the 340B statute, covered entities have no right to purchase drugs at 340B-discounted prices. For

these and other reasons, the government’s “enforcement authority” is “the proper remedy for covered entities complaining of overcharges and other violations of the discounted pricing requirements.” *Id.* at 122 (quotation marks omitted).

Nevertheless, Respondents—covered entities who indirectly purchase 340B-priced medicines from manufacturers through wholesalers—brought this putative anti-trust class action to try to invalidate the manufacturers’ policies. Respondents alleged that Petitioners, each of which manufactures one or more diabetes drugs (along with many other drugs), entered into an unlawful conspiracy to restrict the availability of 340B discounts for contract pharmacy sales. App. 177a-179a. Even though 340B sales are usually unprofitable for manufacturers, Respondents alleged that Petitioners acted in concert to avoid losing sales of their 340B-priced diabetes drugs. App. 182a-184a. Respondents also alleged that Petitioners had banded together to avoid expulsion from Medicaid and Medicare Part B. App. 188a-189a. There is no allegation that Petitioners conspired with respect to the market prices of their drugs (*i.e.*, what the drugs cost without the 340B discount). Nor do Respondents allege that Petitioners conspired with any manufacturer of non-diabetes drugs, even though Petitioners’ non-diabetes drugs were equally subject to the purportedly collusive 340B policies.

Respondents did not allege any communications between Petitioners in furtherance of this supposed conspiracy. Nor did they identify any particular meeting or conversation between Petitioners or their representatives—much less the timing, content, or the people involved. Instead, Respondents broadly alleged that Petitioners had an “opportunity to conspire” because they had “common lobbyists” and had “engaged in high levels of communications through industry associations” like PhRMA. App. 196a-197a.

Respondents acknowledged in their complaint that they were only indirect purchasers of Petitioners' medicines, because all of their drug purchases are made via wholesalers who "serve as intermediaries." App. 112a. Respondents nevertheless argued that their federal claims were not barred under *Illinois Brick* because they purportedly sought only "lost profit" damages—that is, damages based on the purchases that they chose *not to* make, rather than "overcharge" damages based on the purchases that they *did* make. App. 17a & n.5.

4. The district court dismissed Respondents' complaint and, after reviewing a proposed amended complaint, denied leave to amend. App. 30a. The court held that Respondents failed to allege parallel conduct—the basic threshold for stating this type of antitrust claim—because "the policies adopted by [Petitioners] had substantial variations in both their timing and their particulars." App. 41a.

The district court also found that Respondents had failed to identify "plus factors" or other circumstantial evidence "that, along with the parallel conduct, make it plausible to infer an agreement." App. 45a. While generalized allegations of joint lobbying may provide "an opportunity to conspire," the court explained, "they do not give rise to an inference of conspiracy without something more." App. 49a. The court further held that Respondents' allegations themselves had "set forth an obvious alternative explanation for the facts underlying the alleged conspiracy: the failure of [Petitioners'] joint lobbying efforts." App. 45a-46a.

5. The court of appeals reversed. App. 1a-28a.

Acknowledging that Respondents purchase 340B-priced medicines from Petitioners only indirectly, through wholesalers, the court of appeals nevertheless held that their claims are not barred by the rule in *Illinois Brick*. In the court's view, Respondents had successfully

pleaded around the indirect-purchaser bar by disclaiming any request to recover overcharges: “Here, [Respondents] have expressly disclaimed damages for overcharges in relation to their claims that are governed by *Illinois Brick*. Where *Illinois Brick* might apply, [Respondents] seek damages not for losses due to increasing prices, but instead, for losses incurred as a result of lost access”—that is, a loss of profits allegedly resulting from the lawful limits placed on their use of contract pharmacies. App. 16a-17a (footnote and citations omitted). The court reasoned that, when Respondents’ claims are recast as only seeking lost-profit damages, they “raise[] no threat of multiple lawsuits or duplicative recoveries.” App. 17a.

The court of appeals further held that Respondents had sufficiently alleged parallel conduct under the Second Circuit’s “broad understanding” of that concept. App. 19a. In the court’s view, Respondents had “plausibly allege[d] that [Petitioners] acted similarly enough in substance by restricting Section 340B Drug Discount pricing and raising prices in the market of certain popular diabetes medication over the course of months.” App. 20a-21a.

Regarding plus factors, the court of appeals held that Respondents’ allegations of an “opportunity to conspire,” in themselves, constituted a plus factor “support[ing]” an “inference of conspiracy.” App. 26a. It faulted the district court for “fail[ing] to credit the inference that [Petitioners’] sharing of lobbying services and joint participation on the PhRMA board suggests that [Petitioners] had ample opportunity to conspire.” *Ibid.* As the court of appeals saw it, this opportunity to conspire and other plus factors together suggested a plausible conspiracy to reduce Petitioners’ sales at below-market 340B prices. *Ibid.*

REASONS FOR GRANTING THE PETITION

The ruling below creates a circuit conflict on one important issue of antitrust law and deepens a conflict on another. Unlike other courts of appeals, the Second Circuit now permits an indirect purchaser or seller to easily circumvent *Illinois Brick* by characterizing its alleged injury as “lost profits.” And unlike most other courts of appeals, the Second Circuit now treats the mere “opportunity to conspire,” through joint lobbying or participation in a trade association, as a “plus factor” plausibly supporting an inference of conspiracy. In combination, these rulings offer plaintiffs a roadmap for circumventing critical safeguards against improper antitrust lawsuits. This Court’s review is warranted.

I. The Court Should Resolve a Circuit Conflict about Whether *Illinois Brick* Bars Indirect Purchasers and Sellers from Claiming “Lost Profit” Damages

In *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), this Court adopted a categorical rule that an “indirect purchaser” lacks antitrust standing. *Id.* at 726. As the Court recently explained, that longstanding rule serves several essential purposes: “(1) facilitating more effective enforcement of antitrust laws; (2) avoiding complicated damages calculations; and (3) eliminating duplicative damages against antitrust defendants.” *Apple Inc. v. Pepper*, 587 U.S. 273, 285 (2019). The Court has treated *Illinois Brick* as establishing a “bright-line rule,” *id.* at 279, and it has consistently rejected attempts to create “exceptions” to the rule based on “whether the rationales of *Illinois Brick*” apply to an “individual case,” *id.* at 285.

Respondents here admit they are indirect purchasers of Petitioners’ medicines: They do not buy 340B-priced products from Petitioners but rather from “distributors and suppliers,” who “serve as intermediaries.” App. 111a-112a. The Second Circuit nonetheless held that “*Illinois Brick* does not apply” because Respondents “seek

damages not for losses incurred due to increasing prices” on medications they *did* buy, but instead for “lost profits”—*i.e.*, “losses incurred as a result of ‘lost access’” to a discounted price on drugs they chose *not to* buy. App. 17a & n.5. That ruling creates an acknowledged circuit split and contravenes *Illinois Brick*’s bright-line rule. “Given the disharmony in the application of *Illinois Brick* in the lower courts,” this issue is “appropriate for Supreme Court review.” *Acad. of Allergy & Asthma in Primary Care v. Amerigroup Tenn., Inc.*, 164 F.4th 529, 541 (6th Cir. 2026) (Bush, J., respecting the denial of rehearing en banc).

A. Other Courts of Appeals Hold that Indirect Purchasers and Sellers Lack Antitrust Standing to Seek “Lost Profit” Damages

Two courts of appeals have expressly rejected the rule adopted by the Second Circuit below.

In *Howard Hess Dental Laboratories Inc. v. Dentsply International, Inc.*, 424 F.3d 363 (3d Cir. 2005), the Third Circuit rejected the indirect-purchaser plaintiffs’ attempt to establish “standing to recover lost profits damages caused by their lost opportunities to purchase and resell products of [the defendant’s] competitors.” *Id.* at 373. At issue there was an alleged conspiracy between a marketer of artificial teeth (Dentsply) and its dealer-middlemen. *Id.* at 366. The plaintiffs were dental laboratories who sought “to recover lost profits damages caused by their lost opportunities to purchase and resell products of Dentsply’s competitors.” *Id.* at 373. The plaintiffs alleged that, “as a result of Dentsply’s exclusive-dealing, its competitors [we]re denied adequate access to a necessary means of distribution—the dealers”—with the consequence that “Dentsply’s competitors’ products [we]re not available” to the plaintiffs. *Id.*

The Third Circuit rejected the plaintiffs’ lost-profit theory. “[W]hen antitrust plaintiffs claim that

anticompetitive behavior caused prices to increase,” the Third Circuit explained, “two measures of damages could theoretically be used”:

- (1) the overcharge (*i.e.*, the difference between the price paid for goods actually purchased and the price that would have been paid absent the illegal conduct),
- or (2) lost profits (*i.e.*, the overcharge paid minus the overcharge passed on for goods actually purchased and resold, plus lost profits from the lost opportunity to buy and resell a greater volume of goods).

Id. at 374. But the Third Circuit recognized that any potential distinction between those two measures is immaterial for purposes of *Illinois Brick*, because the rule “foreclose[s] the possibility of indirect-purchaser standing ... even if the indirect purchaser plaintiffs seek lost profits.” *Id.* at 375 (quotation marks omitted).

A contrary rule, the Third Circuit explained, would allow antitrust plaintiffs to circumvent *Illinois Brick* simply by “fram[ing] their claim as one for lost profits rather than for overcharge damages,” a result that would be “untenable.” *Id.* at 376. Indeed, “[e]ven commentators who advocate *for* indirect purchaser standing and a lost profits measure of damages admit that their position is currently precluded by Supreme Court case law.” *Id.* at 375. The Third Circuit accordingly held that the “Plaintiffs may not recover lost profits damages because they are indirect purchasers.” *Ibid.*

The Sixth Circuit recently agreed that “*Illinois Brick* adopts a *plaintiff*-specific rule, not a *damages*-specific rule.” *Acad. of Allergy & Asthma in Primary Care v. Amerigroup Tenn., Inc.*, 155 F.4th 795, 817 (6th Cir. 2025) (Murphy, J.). The plaintiff in *Academy of Allergy & Asthma* was a company that provides allergy-testing supplies and services to primary care physicians, and it alleged that several insurers had conspired to deny

coverage for its offerings and thus to drive it from the market. *Id.* at 801. As the Sixth Circuit explained, the plaintiff was an indirect seller: “The insurers directly bought from (and harmed) the primary-care physicians by allegedly conspiring to fix their reimbursement rates and deny their claims. And that conduct harmed [the plaintiff] only indirectly because it led the physicians not to pay for [the plaintiff’s] fees and to end their relationship.” *Id.* at 802.

Under those circumstances, the Sixth Circuit held, the plaintiff had alleged only “indirect harms that fall within the ‘bright-line rule’ from *Illinois Brick*.” *Id.* at 814 (quoting *Apple*, 587 U.S. at 279). Most relevant here, the court rejected the plaintiff’s argument that indirect purchasers or sellers can “avoid *Illinois Brick* by calculating their damages using ‘lost profits’ rather than an ‘overcharge’ (or ‘undercharge’) valuation.” *Id.* at 813. “[T]he Supreme Court’s bright-line rule bars indirect purchasers from suing *altogether*—even if they seek these ‘lost profits as opposed to overcharge damages.’” *Ibid.* (quoting *Howard Hess*, 424 F.3d at 375). Otherwise, the court explained, “indirect purchasers and sellers could always recharacterize their damages as lost profits rather than overcharges or undercharges for completed sales.” *Id.* at 817. In sum, the Sixth Circuit concluded, “*Illinois Brick categorically* bars suits by indirect purchasers or sellers; it does not bar them from only specific types of remedies.” *Ibid.*

Judge Kethledge concurred. *Id.* at 828-29. While he agreed that the panel’s opinion was “a careful synthesis of the relevant Supreme Court caselaw,” he expressed concern that strict application of the *Illinois Brick* rule “serves to harm consumer welfare rather than advance it.” *Id.* at 828.

The Sixth Circuit denied a petition for rehearing. See *Acad. of Allergy & Asthma*, 164 F.4th at 529. In a

statement respecting the denial, Judge Bush acknowledged that the panel’s decision was “an eminently defensible application of governing precedent.” *Id.* at 531. He nevertheless questioned whether “the *Illinois Brick* rule” should apply to a case “that does not involve overcharge damages.” *Ibid.* He instead agreed with—and quoted—the Second Circuit’s ruling here that “*Illinois Brick* does not bar a suit when the ‘[p]laintiffs seek damages not for losses incurred due to increasing prices, but instead, for losses incurred as a result of lost access’ to the market.” *Id.* at 532 (quoting App. 17a). “Given the disharmony in the application of *Illinois Brick* in the lower courts,” he concluded, this issue “may be appropriate for Supreme Court review.” *Id.* at 541.

Judge Murphy, joined by Judges Sutton and Kethledge, concurred in the denial of rehearing en banc. *Id.* at 541-45. “Like the Third Circuit,” Judge Murphy “f[ou]nd it unlikely that the Supreme Court would retain *Illinois Brick*’s rule but transform it into a mere ‘pleading’ limit that plaintiffs can readily avoid by seeking lost profits rather than overcharge (or, as here, undercharge) damages.” *Id.* at 542 (citing *Howard Hess*, 424 F.3d at 376) (citation omitted). In any event, he noted, “the Supreme Court can depart from *Illinois Brick*’s rule if it sees fit to do so,” but “such a change must come from that Court.” *Id.* at 541.

B. The Ruling Below Is Incorrect

This Court has consistently treated *Illinois Brick* as “establish[ing] a bright-line rule that authorizes suits by *direct* purchasers but bars suits by *indirect* purchasers.” *Apple*, 587 U.S. at 279. Applying this straightforward approach, courts regularly dismiss antitrust claims against pharmaceutical manufacturers where healthcare providers, like the Respondents here, purchase medicines indirectly through a wholesaler or distributor. See, e.g., *Lakeland Reg’l Med. Ctr. v. Astellas US, LLC*, 763 F.3d 1280,

1285 (11th Cir. 2014) (“Under the direct purchaser rule, only the customer who purchased the goods or services at issue *directly* from the alleged antitrust violator can recover damages,” not the medical center that bought the medicine from the direct purchaser); *Warren Gen. Hosp. v. Amgen Inc.*, 643 F.3d 77, 87 (3d Cir. 2011) (similar).

In the decision below, however, the Second Circuit held that “*Illinois Brick* does not apply” to Respondents because they “have expressly disclaimed damages for overcharges in relation to their [federal antitrust] claims.” App. 16a-17a. For those claims, the court explained, Respondents “seek damages not for losses incurred due to increasing prices” on the drugs they *did* buy, but instead for “lost profits”—that is, for “losses incurred as a result of ‘lost access’” to discounts on drugs they chose *not* to buy. App. 17a & n.5. The court reasoned that *Illinois Brick* “barred indirect purchaser claims out of concern for duplicative recoveries and the complexities of tracing overcharges through multiple levels of distribution,” but that concern is inapplicable here, where “[Respondents] have expressly disclaimed damages for overcharges.” App. 16a.

That reasoning is contrary to a central justification for *Illinois Brick*’s bright-line rule: avoiding the need to “engage in an unwarranted and counterproductive exercise to litigate a series of exceptions.” *Apple*, 587 U.S. at 285 (quotation marks omitted). Thus, “there is no reason to ask whether the rationales of *Illinois Brick* ‘apply with equal force’ in every individual case.” *Ibid.* (quoting *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199, 216, 217 (1990)). To the contrary, this Court has adhered to its “stated decision not to ‘carve out exceptions to the direct purchaser rule for particular types of markets’” because “[t]he possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule.”

UtiliCorp, 497 U.S. at 216 (quoting *Illinois Brick*, 431 U.S. at 744) (cleaned up).

Even if it were appropriate to “litigate a series of exceptions” to the indirect-purchaser bar, *id.* at 217, the Second Circuit’s approach undermines other key justifications for *Illinois Brick*: “avoiding complicated damages calculations” and “duplicative damages” that stem from transactions lower down the distribution chain. *Apple*, 587 U.S. at 285. A plaintiff who *declines* to make an indirect purchase is even further removed from the alleged anti-trust violator than a plaintiff who *does* make indirect purchases. And lost-profit damages are also inherently more speculative than overcharges: An overcharge claim involves identifying transactions that actually *did* occur, whereas a lost-profit claim requires hypothesizing about how many transactions *would have* occurred but for the alleged conspiracy.

The decision below also renders *Illinois Brick* effectively meaningless, by transforming it from a rule of anti-trust standing into a rule of pleading. Under the Second Circuit’s approach, the viability of a claim turns on how a plaintiff describes its damages. Yet *Illinois Brick* looks only to the nature of the plaintiff and its relationship to the defendant—whether the plaintiff is an “indirect purchaser” or seller of the defendant’s goods and services—not the measure of damages sought. 431 U.S. at 725.

Allowing a plaintiff to sidestep the bar by relabeling an alleged “overcharge” as “lost profits” favors form over substance. These labels are opposite sides of the same coin, describing the same allegedly unlawful conduct and reflecting the same substantive harm. This case illustrates the problem. Respondents have alleged *both* that they were “overcharge[d]” for Petitioners’ medicines because the purchase prices did not include the 340B discount, *and* that they “lost” 340B savings from purchases that they declined to make at those higher prices. App.

209a; see App. 210a (asserting that Respondents “pa[id] inflated prices for 340B Drugs and/or [were] deprived of 340B Savings”). Yet in both instances, Petitioners’ allegedly improper conduct was exactly the same. To circumvent *Illinois Brick*, Respondents simply limited their requested damages to “lost profits” in jurisdictions where the indirect-purchaser bar applies, including for their federal claims. App. 207a (limiting federal claim to “lost 340B Savings”). Yet Respondents, based on the same alleged conduct, *continue* to assert “[d]amages for overcharges” in jurisdictions where no indirect-purchaser bar applies under state law. App. 209a.

This case exemplifies the artificiality of the Second Circuit’s approach in yet another respect. The agency charged with administering the 340B program *defines* an “overcharge” claim as “including claims that a manufacturer has limited the covered entity’s ability to purchase covered outpatient drugs at or below the 340B ceiling price.” 42 C.F.R. § 10.21(a)(1). That definition itself collapses any distinction between “overcharges” and “lost profits,” deeming both theories to be versions of the same claim, which can and should be resolved through the administrative process. Yet the Second Circuit’s approach nevertheless allows Respondents to evade *Illinois Brick* merely by recharacterizing the same alleged injury using different terminology.

II. The Court Should Resolve a Circuit Conflict about Whether the Mere “Opportunity to Conspire” Supports the Plausible Inference of a Conspiracy

The decision below implicates another circuit split too. As this Court has recognized, “parallel conduct” by competitors may be “consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554 (2007). A complaint must therefore include “allegations plausibly suggesting (not merely consistent

with) [an unlawful] agreement.” *Id.* at 557. When there is only circumstantial evidence of agreement, the plaintiff must allege *both* “parallel conduct” *and* additional facts—often referred to as “plus” factors—“tending to exclude the possibility of independent action.” *Id.* at 554.

Respondents here did not allege the details of any conspiratorial conversations that occurred between Petitioners or their representatives. Instead, they generally alleged only the “sharing of lobbying services and joint participation on the PhRMA board.” App. 26a. According to the Second Circuit, those constitutionally protected activities by themselves “supported” an “inference of conspiracy” because they “suggest[] that [Petitioners] had ample opportunity to conspire.” App. 26a.

A. In Most Circuits, the Mere Opportunity to Conspire Is Not a “Plus Factor” Supporting an Inference of Conspiracy

Five other Circuits have expressly declined to treat “the opportunity to conspire,” such as through joint lobbying and participation in a trade association, as “plausibly suggest[ing] conspiracy.” *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 349-50 (3d Cir. 2010). As these courts have emphasized, “it was well-settled before *Twombly* that participation in trade organizations provides no indication of conspiracy.” *Am. Dental Ass’n v. Cigna Corp.*, 605 F.3d 1283, 1295 (11th Cir. 2010). And that position “has only hardened since *Twombly* and its progeny.” *Prosterman v. Am. Airlines, Inc.*, 747 Fed. App’x 458, 462 (9th Cir. 2018).

In *Insurance Brokerage Antitrust Litigation*, for instance, the Third Circuit rejected the plaintiffs’ attempted reliance on the defendants’ “membership in ... a trade association” as suggestive of collusion. 618 F.3d at 313. That joint membership, the plaintiffs had alleged, “afforded [defendants] many opportunities to exchange information.” *Ibid.* Yet the Third Circuit refused to treat those common

communications as a plus factor. Instead, the court explained, the allegations of joint membership merely “indicate that the [defendants] had an opportunity to conspire,” which “do[es] not plausibly imply” that collusion actually occurred. *Id.* at 349; accord *In re Chocolate Confectionary Antitrust Litig.*, 801 F.3d 383, 409 (3d Cir. 2015).

Four other Circuits have similarly rejected antitrust plaintiffs’ attempts to invoke defendants’ common “participation in trade associations and other professional groups” as a plus factor supporting an inference of conspiracy. *Am. Dental*, 605 F.3d at 1295 (11th Cir.); see *In re Travel Agent Comm’n Antitrust Litig.*, 583 F.3d 896, 911 (6th Cir. 2009) (joint “presence” at trade meetings does not, “standing alone, plausibly suggest an illegal agreement”); *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1196 (9th Cir. 2015) (“[M]ere participation in trade-organization meetings where information is exchanged and strategies are advocated does not suggest an illegal agreement”); *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.”).

The First Circuit, by contrast, agrees with the Second Circuit that “the existence of a trade association [is] a plus factor.” *Evergreen Partnering Grp., Inc. v. Pactiv Corp.*, 832 F.3d 1, 14 (1st Cir. 2016). According to the First Circuit, “meetings between defendants have the potential to enhance the anticompetitive effects and likelihood of uniformity caused by information exchange.” *Ibid.* (quoting *Evergreen Partnering Grp., Inc. v. Pactiv Corp.*, 720 F.3d 33, 49 (1st Cir. 2013)). For that reason, while the First Circuit does not treat “a defendant’s mere participation in” a trade association as “creat[ing] a triable issue” by itself,

the court does still consider such participation to be “a plus factor.” *Ibid.*

B. The Ruling Below Is Incorrect

Respondents here alleged that Petitioners “likely ... communicated with each other both indirectly and directly through use of the same lobbying firms.” App. 26a. Respondents also alleged that “each defendant is a member and on the board of directors” of PhRMA. *Ibid.* According to the Second Circuit, those allegations were enough to establish “that [Petitioners] had ample opportunity to conspire,” thereby giving rise to an “inference of conspiracy.” *Ibid.* That conclusion is incorrect: Respondents’ allegations describe conduct that is not only lawful but commonplace in many industries, protected by the First Amendment, and not suggestive of unlawful collusion.

Joint participation in a trade association is “lawful parallel conduct” that “does not suggest conspiracy.” *Twombly*, 550 U.S. at 556-57. Competitors routinely join industry-wide associations to pursue “legitimate functions, such as providing information to industry members, conducting research to further the goals of the industry, and promoting demand for products and services.” *Musical Instruments & Equip.*, 798 F.3d at 1196. Participating in such a group is readily explained by independent self-interest, and it does not help distinguish lawful parallel behavior from anticompetitive collusion.

The same is true of joint lobbying. This Court has held that the First Amendment right to lobby is of such importance 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) (describing *Noerr-Pennington* doctrine). As a result, “the Sherman Act does not punish ‘political activity’ through which ‘the people freely inform the government of their wishes,’” even when competitors do

so jointly. *Ibid.* (quoting *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961)) (ellipsis omitted). For similar reasons, when members of the same industry join together to engage in such political activity, nothing about those efforts “raises a suggestion of a preceding agreement” to violate the antitrust laws. *Twombly*, 550 U.S. at 557.

The Second Circuit below reasoned that Petitioners’ “sharing of lobbying services and joint participation on the PhRMA board suggests that [they] had ample *opportunity to conspire* based on months of communications about Section 340B Drug Discount restrictions with the common aim of collusion.” App. 26a (emphasis added). That assertion is dubious on its own terms: In an age of modern communication—where anyone can be reached at any time by phone or email (among other tools)—it is unclear why holding regular meetings would meaningfully affect the “opportunity” to reach a collusive agreement.

Regardless, joint lobbying and participation in a trade association are “likely explained by lawful, free-market behavior” and “do[] not, standing alone, plausibly suggest an illegal agreement.” *Travel Agent Comm’n*, 583 F.3d at 911. Treating the mere opportunity to conspire as a plus factor thus collapses the basic distinction on which *Twombly* rests: between conduct that is merely *consistent with* the existence of conspiracy, and conduct that plausibly *suggests* one exists because it “tend[s] to exclude independent self-interested conduct.” 550 U.S. at 552 (cleaned up).

The Second Circuit’s approach also raises serious constitutional concerns. Petitioning the government and engaging in associational activities lie at the heart of what the First Amendment protects. If such activities are treated as suggestive of conspiracy, then firms who engage in them will face an increased likelihood of treble-damages liability and burdensome discovery. Such a

result “can only chill communications among companies, which in turn may hinder product development, innovative joint ventures, and useful trade association conclaves.” *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 443 (4th Cir. 2015) (Wilkinson, J., concurring in part and dissenting in part). If that approach were to prevail, as Judge Wilkinson has warned, trade associations would be well advised to adopt a disclaimer: “WARNING: HOLDING OR ATTENDING THIS TRADE ASSOCIATION MEETING WILL INCREASE YOUR EXPOSURE TO ANTITRUST SUITS.” *Ibid.* That is not and cannot be the law.

III. This Case Is an Ideal Vehicle to Decide Issues of Critical Importance

In the ruling below, the Second Circuit significantly weakened the requirements for pleading a valid antitrust claim in two separate ways. First, the court transformed an important standing hurdle into an easily satisfied pleading exercise. Second, it converted First Amendment-protected activity into a plus factor supporting an inference of antitrust conspiracy. Either error on its own would justify this Court’s review.

The standing issue merits review because an indirect purchaser or seller can always repackage an overcharge claim as a claim for profits that were lost because of forgone purchases or sales, thereby evading the bar on suits by indirect purchasers and sellers. As a result, there will be little left of *Illinois Brick*’s “bright-line rule.” *Apple*, 587 U.S. at 285. That result undermines the goals of administrability, uniformity, and predictability that the rule was created to serve.

The Second Circuit’s “opportunity to conspire” ruling also merits review. In addition to chilling First Amendment-protected activity, it significantly lowers the threshold for antitrust pleading. As this Court has explained, “parallel conduct” by competitors is routine and is often

“prompted by common perceptions of the market.” *Twombly*, 550 U.S. at 554. Joint lobbying or participation in trade associations is similarly commonplace. The approach below, in treating such activities as plus factors supporting an “inference of conspiracy,” App. 26a, will result in “sprawling, costly, and hugely time-consuming” discovery—and a corresponding increase in the “*in terrorem* increment of the settlement value.” *Twombly*, 550 U.S. at 558, 560 n.6.

This case is also independently important in light of its effects on the 340B program. In *Astra USA, Inc. v. Santa Clara County*, 563 U.S. 110 (2011), this Court held that covered entities have no private right of action to sue over a manufacturer’s alleged failure to offer its drugs at 340B-discounted prices. Yet under the Second Circuit’s approach, covered entities may obtain the very relief that *Astra* foreclosed—so long as they pursue antitrust claims styled as seeking “lost profits.” That is what happened here. The federal government challenged Petitioners’ 340B policies in court and lost. See *Novartis Pharms. Corp. v. Johnson*, 102 F.4th 452, 457 (D.C. Cir. 2024); *Sanofi-Aventis U.S. LLC v. HHS*, 58 F.4th 696, 704 (3d Cir. 2023). The Second Circuit’s decision allows Respondents to assert private antitrust claims challenging the very same policies, using class action litigation to attempt to reshape a multi-billion-dollar healthcare program. That “is hardly what Congress contemplated when it centralized enforcement [of the 340B program] in the government.” *Astra*, 563 U.S. at 119 (quotation marks omitted).

Finally, this case is an exceptionally clean vehicle for resolving the questions presented. There is no dispute that Respondents are indirect purchasers, given their express allegations that they buy 340B-discounted products from “distributors and suppliers” who “serve as intermediaries.” App. 112a. And the agency that administers the 340B program considers a lost-profit claim to be merely

one type of “overcharge” claim. Likewise, Respondents’ strategic abandonment of overcharge damages in jurisdictions that have adopted an indirect-purchaser bar—but *not* in other jurisdictions—demonstrates the malleability of the approach adopted below. See pp. 19-20, *supra*. And the Second Circuit also squarely decided, as a purely legal matter, that the “opportunity to conspire” through joint lobbying and trade-association participation gives rise to an “inference of conspiracy.” App. 26a.

Ultimately, the questions presented are legal in nature, and both were expressly decided below. Given the motion-to-dismiss posture, there are no disputed facts. Nor are there any jurisdictional obstacles or alternative grounds that could prevent this Court from resolving the questions presented. Review is warranted now.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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