No. 25-1070

# In the Supreme Court of the United States

ASTRAZENECA PHARMACEUTICALS LP, *et al.*,

*Petitioners,*

*v.*

MOSAIC HEALTH, INC., *et al.*,

*Respondents.*

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

## BRIEF IN OPPOSITION


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## QUESTIONS PRESENTED

The Second Circuit held that safety-net clinics sufficiently alleged that Petitioners, four drugmakers that control diabetes medication markets, conspired to restrict a longstanding discounted drug channel in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

Petitioners seek review of two questions, which Respondents reframe as follows:

1. Whether a court that has concluded a complaint plausibly alleges conspiracy under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), including by alleging parallel conduct against competitors' self-interest, is prohibited from noting that conspiracy is further supported by competitors' communications about the same conduct through joint lobbyists and a trade association immediately in advance of that conduct.

2. Whether *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), bars purchasers from challenging an antitrust restraint involving no overcharge passed down any chain of distribution, where the purchasers are the first ones harmed and their claims present no risk of multiple liability.

## CORPORATE DISCLOSURE STATEMENT

Respondents Mosaic Health, Inc. and Central Virginia Health Services, Inc. are not-for-profit organizations. They have no parent corporations and no stock.

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# In the Supreme Court of the United States

No. 25-1070

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

*v.*

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

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

## BRIEF FOR RESPONDENTS IN OPPOSITION

## INTRODUCTION

In this case, four drug companies that dominate the market for three key diabetes treatments adopted restraints that devastated a longstanding channel for safety-net hospitals and clinics to order drugs to retail pharmacies under Section 340B of the Public Health Service Act, 42 U.S.C. § 256b.

Safety-net providers are clinics and hospitals that care for uninsured and underinsured patients throughout the United States. For more than a decade, drug companies offered 340B discounts to safety-net providers not only for drugs purchased for on-site use but also for drugs purchased and dispensed

to patients through retail pharmacies. Through the latter arrangement, safety-net providers purchased drugs on their own accounts but had them shipped to retail pharmacies in their communities—typically called contract pharmacies—to dispense the drugs to safety-net providers' patients. Safety-net patients filling their prescription at a neighborhood pharmacy would receive drugs initially paid for by their safety-net clinic, rather than by the pharmacy itself, as is true in most retail-drug sales.

But in late 2020, Petitioners adopted a policy of principally refusing to sell drugs to safety-net clinics for shipment to contract pharmacies. As a result, safety-net providers like Respondents were pushed out of their prior role in the distribution chain and could no longer buy Petitioners' drugs for their patients to access at contract pharmacies in surrounding communities. Safety-net patients going to their neighborhood pharmacy would now, like regular pharmacy customers, only buy drugs initially purchased by the pharmacy itself; safety-net clinics and hospitals were cut out.

Petitioners seek certiorari based on two questions that were never addressed by the decision below, do not involve a circuit split of any kind, and do not merit this Court's review.

First, Petitioners and their *amici* urge this Court to grant certiorari to address whether allegations that a business had a mere opportunity to conspire through joint lobbying and participation in a trade association creates a plausible inference of conspiracy. But the parties have always agreed on the answer to that question: The law in the Second Circuit, as in every other circuit, is that joint lobbying or trade-association participation does *not* suffice to plausibly

suggest antitrust conspiracy, and the panel never held otherwise. Instead, the panel conducted the fact-bound analysis of the complaint required by this Court's decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and held that Petitioners' parallel conduct was plausibly explained by conspiratorial agreement rather than by "rational and competitive business strategy unilaterally prompted by common perceptions of the market," *id.* at 554. Pet. App. 8a–12a, 18a–26a.

The panel concluded that Petitioners' efforts to restrict the contract-pharmacy sales at issue "would have been against any individual [Petitioner's] own economic self-interest" but that a conspiracy was in their collective interest. Pet. App. 25a. Unilateral action would have risked exclusion from Medicare and Medicaid—a financially devastating threatened government sanction—as well as decreased market share. *Ibid.* But concerted action created "safety in numbers." *Ibid.* By acting together, Petitioners avoided losing market share on their diabetes drugs and made it impossible for the government to exclude them all—as doing so would deprive Medicare and Medicaid patients of lifesaving diabetes medications over which Petitioners held exclusive control. *Id.* at 25a–26a. In addition to these findings, the panel found "further support" for conspiracy in detailed allegations that Petitioners had "months of communications about Section 340B Drug Discount restrictions with the common aim of collusion" immediately in advance of the conspiracy via joint lobbyists and a trade association. *Id.* at 26a. This narrow, fact-bound conclusion is fully consistent with this Court's precedent and the decisions of other circuits.

Second, Petitioners (but not their *amici*) accuse the Second Circuit of misapplying the rule of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). That rule deems the first victim of antitrust overcharges "to have suffered the full injury from [any such] overcharge." *Id.* at 726. By granting the first victim "the full extent of the overcharge paid by them," *id.* at 746, the *Illinois Brick* rule encourages "vigorous private enforcement of the antitrust laws," *id.* at 745. And the rule avoids the apportionment complexities that "multiple liability for defendants" would raise, *id.* at 730, whenever an "overcharge was passed on by the first purchaser" to later purchasers, *id.* at 732. Petitioners do not identify any overcharge, any antitrust victim injured before Respondents, or any risk of multiple liability. They nevertheless contend that the panel reduced *Illinois Brick* into a "rule of pleading" (Pet. 19) by holding the rule "'does not apply' where an indirect purchaser labels its injury as 'lost profits' rather than 'overcharges'" (*id.* at 3 (quoting Pet. App. 17a & n.5)).

But the panel did not hold that antitrust plaintiffs may evade *Illinois Brick* by re-labeling overcharge claims. No overcharges were even possible under Petitioners' policies in this case. Petitioners conspired to block contract-pharmacy sales, ending charges and overcharges: Safety-net facilities lost earnings, not because of any "increased prices" at any level of distribution, but because Petitioners ended contract-pharmacy sales to them. There was no overcharge to be passed among "multiple levels of distribution." Pet. App. 17a. Petitioners simply cut Respondents out.

The panel's ruling below was entirely consistent with the precedents of this Court and other circuits. *Illinois Brick* does not bar damages "unrelated to

passing an overcharge down a chain of distribution." *Apple Inc. v. Pepper*, 587 U.S. 273, 287 (2019). Petitioners' joint restraints directly prevented safety-net providers from buying drugs for shipment to contract pharmacies by barring such shipments; they did not indirectly reduce those sales by charging higher prices. Intermediaries were not overcharged, did not absorb or pass on any overcharge, and do not claim any injury. This case is complex and *sui generis*. But, unlike in every other case Petitioners cite, no other class of victims here could seek federal antitrust damages. "This is not a case where multiple parties at different levels of a distribution chain are trying to all recover the same passed-through overcharge initially levied by the manufacturer at the top of the chain," *id.*, and *Illinois Brick* does not apply.

## OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1a–28a) is published at 156 F.4th 68. The opinion of the district court (Pet. App. 29a–51a) is published at 714 F. Supp. 3d 209. An earlier decision by the district court (Pet. App. 52a–70a) is not published in the Federal Supplement but is available at 2022 WL 4017895.

## JURISDICTION

The amended judgment of the court of appeals was entered on October 15, 2025. A petition for rehearing was denied on December 5, 2025. Pet. App. 71a–72a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATEMENT

1. Respondents Mosaic Health, Inc. and Central Virginia Health Services, Inc. are federally funded health centers that provide healthcare to uninsured and underinsured patients. Pet. App. 102a–103a. They filed this antitrust class action for injunctive and compensatory relief for safety-net clinics and hospitals harmed by a conspiracy among Petitioners to restrain a longstanding sales channel for safety-net providers, like Respondents, to order drugs for shipment to community pharmacies. *Id.* at 96a.

a. Petitioners Sanofi-Aventis U.S., LLC, Eli Lilly and Company and Lilly USA, LLC, Novo Nordisk Inc., and AstraZeneca Pharmaceuticals LP are drugmakers that compete with each other in and collectively dominate the most significant diabetes medication markets (*i.e.*, analog insulins and GLP-1s). Pet. App. 96a–97a, 123a–135a. As of 2020, when the restraints at issue were adopted, Petitioners collectively controlled those markets, facing no other competition. *Id.* at 97a, 179a–181a.

b. Starting in 2010, every drug manufacturer offered safety-net providers the opportunity to buy medications and have them delivered to community pharmacies for their patients. Pet. App. 97a, 117a, 151a. The pharmacies that receive these drugs are known as "contract pharmacies" because they contract with safety-net providers to dispense the medications purchased by providers to their patients. *Ibid.* Safety-net providers were able to purchase these drugs at a discount calculated in accordance with Section 340B of the Public Health Service Act, 42 U.S.C. § 256b. Pet. App. 97a, 117a.

Section 340B requires "that the manufacturer offer [safety-net providers] covered outpatient drugs" at a discounted price. Pet. App. 110a (quoting 42 U.S.C. § 256b(a)(1)); *see* 42 U.S.C. § 256b(a)(4). Safety-net providers benefitting from Section 340B include federally qualified health centers, tribal health centers, black lung clinics, hemophilia diagnostic treatment centers, and tuberculosis clinics. Pet. App. 106a–107a. As this Court has noted, these safety-net providers are "dominantly, local facilities that provide medical care for the poor." *Astra USA, Inc. v. Santa Clara County*, 563 U.S. 110, 115 (2011).

Section 340B directs the Secretary of the Department of Health and Human Services (HHS) to enter pharmaceutical pricing agreements (PPAs) with drug manufacturers participating in State Medicaid programs and Medicare Part B. 42 U.S.C. § 256b(a); 42 C.F.R. § 10.2. Drug companies must sign a PPA to participate in Medicaid and Medicare Part B. Pet. App. 108a–109a. More than 1,000 companies have signed PPAs, including each of the Petitioners. *Id.* at 109a, 152a.

Both Section 340B and the PPAs determine the methodology for calculating 340B discounts. Section 340B imposes a ceiling price for each drug, which is generally equal to the "Average Manufacturer Price" minus a "Unit Rebate Amount." 42 C.F.R. § 10.10(a); *see also* 42 U.S.C. § 256b(a)(1). The amount by which the ceiling price reduces the price for drugs often provides savings of 20% to 50% for safety-net providers. Pet. App. 109a.

Congress enacted Section 340B to enable safety-net providers to "stretch scarce Federal resources as far as possible, reaching more eligible patients and providing more comprehensive services." H.R. Rep.

No. 102-384(II), at 12 (1992). Section 340B sales often occur through distributor intermediaries, but only safety-net providers are entitled to these discounts. Pet. App. 111a–112a. As the text of the statute indicates, 340B discounts are offered by, funded by, and provided by drug companies to safety-net providers. *Id.* at 108a–111a (citing 42 U.S.C. § 256b(a)(1)).

Because 340B discounts lower the amount safety-net providers pay for drugs dispensed to their patients, the discounts reduce the provider's expenses for unreimbursed care. Pet. App. 107a. And for patients with insurance, a provider can earn revenue when an insurer's reimbursement payment exceeds the 340B-discounted price the provider paid for the drug. *Ibid.*

c. For over fifteen years, drug companies have allowed safety-net providers to purchase covered outpatient drugs on their own accounts with a 340B discount while shipping those drugs to contract pharmacies. Pet. App. 117a–118a. Within this distinct distribution channel, safety-net providers played a distinct role. In typical retail distribution of drugs, a healthcare provider's involvement in the distribution of drugs ends when they issue a prescription to a patient, which is then filled using drugs purchased by the retail pharmacy the patient uses.

In the contract-pharmacy channel, by contrast, safety-net patients have their prescriptions filled with drugs that safety-net facilities purchase for shipment to that pharmacy. Pet. App. 117a–118a. A safety-net provider's patient goes to a pharmacy contracted with that provider (*e.g.*, a Walgreens) to pick up their prescription. *Ibid.* The pharmacy fills the prescription with inventory purchased on the safety-net provider's

purchasing account. *Ibid.* The safety-net provider thus pays for the drugs on its own account, and the contract pharmacy fills the prescription using drugs purchased by that provider.

The pharmacy charges the patient for any co-pay or, if the patient is uninsured, any required fee, adjusted downward as required by any arrangement between the pharmacy and the safety-net provider to cover costs of uninsured patients. Pet. App. 117a–118a. The pharmacy will collect reimbursements if the patient is insured by any third party (such as a private insurer or Medicare Part D) and remit all amounts collected to the provider, which pays the pharmacy a dispensing fee. *Ibid.*

This contract-pharmacy channel has many benefits for safety-net providers and patients. The savings that hospitals and clinics generate from contract-pharmacy sales are used, among other things, to expand medical services for the communities they serve and to provide charity care and subsidized pharmacy benefits for needy patients. Pet. App. 102a, 107a–108a, 116a. Safety-net providers have thus been able to use the contract-pharmacy channel to "stretch scarce Federal resources as far as possible"—just as Congress intended. H.R. Rep. No. 102-384(II), at 12 (1992); Pet. App. 101a.

d. In late 2020, Petitioners adopted a common policy of barring contract-pharmacy shipments, quickly decimating the contract-pharmacy channel for their drug portfolios. Pet. App. 147a. In advance of these joint restraints, Petitioners had together spent millions of dollars lobbying the federal government to limit 340B drug discounts. *Id.* at 99a, 135a, 138a–141a. When those efforts failed, Petitioners adopted policies in quick succession that prohibited safety-net

providers from continuing to order their drugs (at any price) for shipment to contract pharmacies. *Id.* at 99a–100a, 135a–136a, 147a–151a. Through these policies, Petitioners jointly shut down most of a multi-billion-dollar contract-pharmacy channel for their drug portfolios.[1] *Id.* at 201a.

e. Until the four Petitioners restricted the contract-pharmacy channel together, no drug company had ever attempted to impose such drastic restrictions—and for good reason. Pet. App. 100a–101a, 192a–193a. Any competitor acting alone risked losing its market share to competitors who continued to sell into the contract-pharmacy channel, as safety-net providers could transition patients to the remaining competitors. *Id.* at 119a–121a, 185a–187a. And any company acting alone faced the risk of exclusion from Medicare and Medicaid—a financially lethal outcome. *Id.* at 122a–123a, 188a–189a.

f. Petitioners overcame these obstacles by acting together. Pet. App. 123a, 190a–192a. Restricting the contract-pharmacy channel together ensured safety-net providers could not shift their patients' diabetes medications to any competitor that continued to sell in the contract-pharmacy channel—because none remained. *Id.* at 119a–121a, 183a, 190a. And the government could not exclude all four Petitioners without depriving patients in Medicare and Medicaid of life-saving medications not otherwise available. *Id.* at 123a, 191a–192a. Petitioners' joint action provided safety in numbers, making government exclusion untenable.

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[1] Petitioners offered different exceptions to their policies, but the Second Circuit concluded they all had the "effect of limiting or eliminating" contract-pharmacy sales. Pet. App. 22a. Petitioners do not challenge that conclusion here.

g. Petitioners designed their policies to exclude safety-net providers from contract-pharmacy sales. Petitioners simply "'refus[ed] to transfer drugs to contract pharmacies'" at all, leaving "'no charge.'" Pet. App. 150a. As Petitioners themselves explained in their own words, their policies did "'not result in any overcharge because there is no order and no sale.'" *Id.* at 149a. Safety-net providers could not purchase drugs for dispensing at contract pharmacies at any price. *Id.* at 147a–151a, 203a. The restraints cut safety-net providers out.[2]

After Petitioners imposed their contract-pharmacy restrictions, patients could still get their prescriptions from their same pharmacies. And those prescriptions required the same distribution of the same drugs by the same distributors, but safety-net providers were cut out of that chain. Pet. App. 147a–151a, 204a. Instead of buying drugs purchased by their safety-net provider, patients were buying drugs purchased directly by their pharmacies.

Petitioners profited immensely and harmed safety-net providers in equal measure. Pet. App. 101a–102a. By cutting off the contract-pharmacy channel, each Petitioner wiped out safety-net savings of between $43.4 million and $100 million per month. *Id.* at 160a, 165a, 171a–172a, 175a. Safety-net providers had used those savings to offer healthcare services to the uninsured and underinsured, including charity

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[2] As with many antitrust conspiracies, Petitioners' joint restraints did not always work. Pet. App. 151a. Some safety-net providers sometimes purchased Petitioners' drugs at contract pharmacies—although not at a discount. *Id.* at 151a, 202a–203a. As Petitioners acknowledge (*see* Pet. 11, 18, 20), Respondents do not assert federal antitrust claims for those purchases, which are not at issue here (Pet. App. 209a & 216a).

medical care and subsidized pharmacy benefits. *Id.* at 101a–102a, 107a–108a, 116a. Respondent Mosaic Health, for instance, ensured needy patients received subsidized medications. *Id.* at 108a. Petitioners' joint restraints extracted billions of dollars of savings from safety-net facilities, reducing the patient services those facilities can provide. *Id.* at 101a–102a, 201a–202a.

h. Petitioners' restrictions marked an abrupt change from a decade-plus status quo. Pet. App. 192a–193a. And they remained anomalous. *Id.* at 193a–194a. All of the nearly 1,000 other drug manufacturers in the 340B program declined to impose similar restraints on the contract-pharmacy channel until the government revealed it would not exclude Petitioners. *Id.* at 189a, 193a–194a. Nor was this follow-the-leader: AstraZeneca acted by notifying its regulator before any other Petitioners' restrictions became public; it did so in secret, not in public. *Id.* at 199a–200a. So, one business day later, when Sanofi became the first Petitioner to make its restraints public and chose the identical start date as AstraZeneca (months in the future), it could have only been following AstraZeneca's lead if it knew that secret—*e.g.*, if the two had prior discussions. *Ibid.*

2. Respondents asserted violations of section 1 of the Sherman Act, which prohibits any "contract, combination * * * or conspiracy in restraint of trade." 15 U.S.C. § 1. The Act prohibits "unreasonable restraint[s]," and deems "price-fixing agreements * * * unlawful *per se*." *Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 343, 345 (1982). An agreement between competitors "to eliminate discounts * * * falls squarely within the traditional *per se* rule against price fixing." *Catalano, Inc. v. Target Sales, Inc.*, 446

U.S. 643, 648 (1980). Conspiring to restrict discounts is thus "conclusively presumed illegal." *Id.* at 650.

a. Section 1 claims require "enough factual matter (taken as true) to suggest that an agreement was made." *Twombly*, 550 U.S. at 556. Courts therefore require plaintiffs to plausibly allege circumstances suggesting that parallel conduct was the result of conspiracy, rather than independent action. Whether a plaintiff has done so is a fact-specific inquiry, which "must be evaluated holistically." *In re DRAM Indirect Purchaser Antitrust Litig.*, 28 F.4th 42, 53 (9th Cir. 2022) (citing *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962)); *see also SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 424–425 (4th Cir. 2015); *Erie County v. Morton Salt, Inc.*, 702 F.3d 860, 870 (6th Cir. 2012) ("We must consider these factors together, not in isolation, to determine whether they give rise to a plausible inference of conspiracy.").

Courts have recognized, for example, that circumstances that may give rise to a plausible inference of conspiracy—depending on the factual context—include: (1) "parallel acts * * * against the apparent individual economic self-interest of the alleged conspirators," *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 781 (2d Cir. 2016) (citation modified); (2) "a common motive to conspire," *id.*; (3) concentrated market control, *see Todd v. Exxon Corp.*, 275 F.3d 191, 208 (2d Cir. 2001); (4) "[a]n abrupt shift from defendants' past behavior and near-unanimity of action by several defendants," *United States v. Apple, Inc.*, 952 F. Supp. 2d 638, 690 (S.D.N.Y. 2013), *aff'd*, 791 F.3d 290 (2d Cir. 2015); *accord Twombly*, 550 U.S. at 556 n.4; (5) that "defendants' price-fixing is the subject of a pending

investigation," *Starr v. Sony BMG Music Ent.*, 592 F.3d 314, 323–324 (2d Cir. 2010); or (6) a "high level of interfirm communications," depending on the other particular circumstances, *see Gelboim*, 823 F.3d at 781 (citation modified); *compare id.*, *with Mayor of Baltimore v. Citigroup, Inc.*, 709 F.3d 129, 139–140 (2d Cir. 2013) (finding allegations "not enough plausibly to allege a 'high level' of interfirm communications").

These various circumstances "are neither exhaustive nor exclusive," nor is any one necessarily sufficient. *Citigroup*, 709 F.3d at 136 n.6. They are merely "illustrative of the type of circumstances which, when combined with parallel behavior, might permit a jury to infer the existence of an agreement." *Ibid.* Whether a particular complaint has, in fact, alleged sufficient factual context to make plausible an inference of agreement depends on the circumstances of that case and the totality of that complaint.

b. Respondents sought, among other relief, damages under Section 4 of the Clayton Act (Pet. App. 208a), which allows "any person" injured by an antitrust violation to sue for treble damages. 15 U.S.C. § 15(a). *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), held that only direct purchasers may sue for "an overcharge" passed "down a chain of distribution," *Pepper*, 587 U.S. at 287. This rule "eliminate[s] the complications of apportioning overcharges" and "multiple recoveries." *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199, 208, 212 (1990). But *Illinois Brick* applies only to a "pass-on by [a] direct purchaser" of "overcharge[s]." 431 U.S. at 726. It does not "bar multiple liability that is unrelated to passing an overcharge down a chain of distribution." *Pepper*, 587 U.S. at 287. A plaintiff whose injury does

not consist of passed-on overcharges thus may still recover damages. *See, e.g.*, *Blue Shield of Va. v. McCready*, 457 U.S. 465, 474–475 (1982) (*Illinois Brick* inapplicable where there was "not the slightest possibility of a duplicative exaction"). Respondents sought damages arising from their exclusion from the contract-pharmacy channel. Pet. App. 203a, 208a.

3. The district court dismissed this action on the ground that Respondents inadequately alleged conspiracy. Pet. App. 29a–51a.

4. The court of appeals reversed in a unanimous panel decision. Pet. App. 1a–28a.[3]

a. The panel held Respondents sufficiently alleged conspiracy. Pet. App. 18a–26a.

The panel applied this Court's rule from *Twombly* for assessing whether a complaint supports "a plausible inference of an antitrust conspiracy at the motion to dismiss stage." Pet. App. 8a–11a (citing *Twombly*, 550 U.S. at 556). The panel ruled that the complaint alleged parallel conduct and that such conduct could not be explained by each Petitioner's economic self-interest. *Id.* at 18a–24a. Petitioners do not challenge those findings.

The panel explained why conspiracy was plausible. Pet. App. 18a, 23a–26a. As the panel observed, one firm's public announcement came just one business day after another revealed its novel restraints in private to its regulators—so that neither could have followed the other's lead, unless they were secretly conspiring. *Id.* at 18a n.6. The panel found a "common means and motive" for Petitioners "to conspire" (*id.* at

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[3] Petitioners do not challenge the panel's holdings that: (i) no claims were barred by *Astra USA, Inc. v. Santa Clara County*, 563 U.S. 110 (2011) (*see* Pet. App. 12a–15a); and (ii) *Illinois Brick* does not preclude injunctive relief (*see* Pet. App. 16a).

23a) to "neutralize or mitigate market-share and regulatory threats" (*id.* at 24a). It found sufficient detail that, "by acting collectively," Petitioners had "limited their exposure" to market-share losses and exclusion risks. *Id.* at 25a–26a. And lastly, it found conspiracy "further supported" by specific allegations that, immediately in advance of their restrictions, Petitioners were communicating about the contract-pharmacy channel through shared lobbying firms and through their board representation on PhRMA, "making coordination even more probable." *Id.* at 26a.

b. The panel also held that *Illinois Brick* did not apply because Respondents' federal claims did not seek overcharge damages. Pet. App. 15a–17a.

Respondents sought "damages not for losses incurred due to increasing prices, but instead, for losses incurred as a result of 'lost access'" to the contract-pharmacy channel. Pet. App. 17a. There were no overcharges to allocate across "multiple levels of distribution." *Id.* at 16a; *see id.* at 17a (citing *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 606 (7th Cir. 1997) ("*Illinois Brick* would 'fall away' where no overcharge damages were sought.")).

5. The Second Circuit denied two successive petitions for rehearing without dissent. Pet. App. 71a–72a.

## REASONS FOR DENYING THE PETITION

Neither question presented by Petitioners merits this Court's review. Petitioners and their *amici* claim the Second Circuit held that joint lobbying and membership in a trade association is a sufficient basis for an inference of conspiracy. But the panel opinion

simply concluded that Petitioners' joint lobbying and trade-association communications regarding 340B restrictions in the months leading up to their adoption of those restrictions provided "further support" for an already-plausible inference of conspiracy. Pet. App. 26a. This fact-bound conclusion does not conflict with any other circuit's decisions and does not warrant this Court's review.

Nor did the panel hold that antitrust plaintiffs can evade *Illinois Brick* by re-labeling overcharge claims as "lost profits" claims, as Petitioners (without support from their *amici*) claim. The panel held that *Illinois Brick* did not apply because Respondents sought savings from lost contract-pharmacy sales, not damages for overcharges. Indeed, the underlying restraint—cutting off contract-pharmacy sales—generated no overcharges. That restraint worked by blocking contract-pharmacy sales to safety-net providers; it did not operate by raising prices for those sales at any level of distribution. Respondents' claims are thus plainly "unrelated to passing an overcharge down a chain of distribution," *Pepper*, 587 U.S. at 287—so *Illinois Brick* does not apply.

## I. The *Twombly* holding does not merit review simply for noting conduct via joint lobbyists and a trade association.

Petitioners ask this Court to decide whether the mere "'opportunity to conspire,' such as through joint lobbying and participation in a trade association, plausibly suggests an antitrust conspiracy." Pet. i. But every circuit to have considered that question, including the Second Circuit, has given the same answer: Of course not. And Respondents have never

argued otherwise. Unsurprisingly, then, the Second Circuit did not hold that simply having the "opportunity to conspire"—through joint lobbying, a trade association, or anything else—is sufficient to plausibly allege an antitrust conspiracy. It instead held that, taken as a whole, the safety-net clinics' complaint in this case contains "'enough factual matter * * * to suggest that an agreement was made.'" Pet. App. 10a (quoting *Twombly*, 550 U.S. at 556). The Petition does not even challenge that holding.

Petitioners thus seek review on a question that is not presented here and is so trivial that every circuit and the parties themselves all agree. The actual question presented—whether the complaint in this case states a claim—is a fact-bound question that will have no impact on anyone besides the parties to this case. This Court should not grant review. *Cf. NVIDIA Corp. v. E. Ohman J:or Fonder AB*, 604 U.S. 20 (2024) (dismissing writ as improvidently granted under similar circumstances); *Rogers v. United States*, 522 U.S. 252, 259 (1998) (dismissing writ because "the record does not fairly present the question that we granted certiorari to address").

### A. This case only presents a fact-bound and unchallenged *Twombly* holding.

This case does not present Petitioners' purported question about lobbying and associations. Instead, it presents the fact-bound—and at this stage uncontested—question of *Twombly*: whether Respondents' complaint contains "enough factual matter (taken as true) to suggest that an agreement was made." 550 U.S. at 556. That is always "a context-specific task," *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009), and "in antitrust cases, '[t]he character and

effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole,'" *United States v. Apple, Inc.*, 791 F.3d 290, 319 (2d Cir. 2015) (quoting *Cont'l Ore Co.*, 370 U.S. at 699).

That is exactly the question the Second Circuit answered below. It first concluded that the complaint plausibly alleged that the drug manufacturers engaged in "parallel conduct" by acting almost simultaneously to restrict sales to safety-net providers for delivery at contract pharmacies. Pet. App. 18a–24a. The drug manufacturers do not contest that conclusion here.

The panel then considered the allegations holistically to determine whether they plausibly provided "factual context suggesting agreement, as distinct from identical, independent action." Pet. App. 10a, 24a–26a. The court explained how Petitioners had "a common motive to conspire to neutralize or mitigate market-share and regulatory threats just before the restrictions were imposed" and why "restricting Section 340B Drug Discounts would have been against any individual Defendant's own economic self-interest," thus preventing Petitioners from acting unilaterally. *Id.* at 24a–25a. The Second Circuit held that these were "plus factors that weigh in favor of plausibility." *Id.* at 26a. Petitioners do not contest those conclusions either.

Almost as an afterthought, fifteen paragraphs into its analysis, the panel briefly explained that this "inference of conspiracy" was "further supported by the alleged 'high level of interfirm communications' among Defendants on the issue of Section 340B Drug Discounts." Pet. App. 26a. The panel pointed to "months of communications about Section 340B Drug

Discount restrictions" among Petitioners immediately in advance of their joint restraints. *Ibid.* The panel did not hold—and Respondents never suggested[4]—that "joint lobbying efforts and participation in trade associations," standing alone, "plausibly suggest collusion." *Contra* Pet. 5. Instead, the Second Circuit found an already plausible inference of conspiracy could be "further supported" by "months of communications" about the subject of the conspiracy. Pet. App. 26a.

Accordingly, this case does not "cleanly present[]" the question of whether mere participation in joint lobbying efforts or trade associations "plausibly suggests an antitrust conspiracy." Pet. i, 5; *see also id.* at 4, 24. It does not present that question at all. The only question presented by the panel's decision is whether the complaint, viewed as a whole, states a plausible claim. Petitioners do not even dispute that it does. So, not only is Petitioners' plea one for fact-bound error correction: Petitioners do not even identify error. This Court should not grant certiorari to review a fact-bound question that the lower court got right, applying the same standard as every other circuit.

### B. There is no circuit split as to Petitioners' purported question.

Even if this case presented the question Petitioners claim it does, there would be no reason to grant review because there is no circuit split on that question. The parties and every circuit agree: The

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[4] Respondents specifically disclaimed the argument that mere participation in associations is sufficient for an inference of conspiracy. *See* Br. at 68, Dkt. 45.1 (2d Cir.); *accord* Reply Br. at 29, Dkt. 68.1 (2d Cir.).

mere opportunity to conspire through joint lobbying and participation in trade associations cannot support a plausible inference of conspiracy. *See In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, 911 (6th Cir. 2009) ("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 * * * does not suggest an illegal agreement."); *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 349 (3d Cir. 2010) (an "opportunity to conspire" is insufficient to "plausibly imply" conspiracy); *Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1296 (11th Cir. 2010) ("[A] trade association is not by its nature a 'walking 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 * * * ."). *See* p. 20 n.4, *supra*.

The rule in the Second Circuit is the same: "participation in trade associations" is not, in itself, a plus factor because "[t]he mere opportunity to conspire does not by itself support the inference that such an illegal combination actually occurred." *Gamm v. Sanderson Farms, Inc.*, 944 F.3d 455, 466 (2d Cir. 2019); *see also, e.g.*, *Tera Grp., Inc. v. Citigroup, Inc.*, No. 24-135-CV, 2024 WL 4501967, at *4 (2d Cir. Oct. 16, 2024) (rejecting reliance on allegation that defendants could have conspired "because their clearing operations communicate regularly" given that "the law is clear that the mere opportunity to conspire" does not "by itself support the inference" of conspiracy) (citation modified); *Maric v. St. Agnes Hosp. Corp.*, 65 F.3d 310, 313 (2d Cir. 1995) (similar); *Cap. Imaging Assocs., P.C. v. Mohawk Valley Med.*

*Assocs., Inc.*, 996 F.2d 537, 545 (2d Cir. 1993) (similar).

Unable to manufacture a circuit split with the rule in the Second Circuit, Petitioners turn to the First Circuit. But, like every other circuit, the First Circuit has explicitly held that "mere participation" in a trade association does not give rise to an inference of conspiracy. *Evergreen Partnering Grp., Inc. v. Pactiv Corp.*, 832 F.3d 1, 14 (1st Cir. 2016). Indeed, the First Circuit relies on the decisions from the Sixth and Ninth Circuits with which Petitioners claim it conflicts. *See id.* at 14 (citing *Musical Instruments*, 798 F.3d at 1196, and *Travel Agent Comm'n*, 583 F.3d at 911). Ignoring the specific facts cited by the First Circuit—such as "notifying alleged members of [a] conspiracy of the agreed-upon refusal to deal," which could "weigh[]" in favor of "the plausibility of a conspiracy," *Evergreen Partnering Grp., Inc. v. Pactiv Corp.*, 720 F.3d 33, 49–51 (1st Cir. 2013)—Petitioners seek to recast the First Circuit's rule. But the First Circuit agrees that "a defendant's mere participation in [a trade association] does not create a triable issue." *Evergreen*, 832 F.3d at 14.

Thus, even if this case presented Petitioners' question—and it does not—there is no circuit split on that question.

### C. The Second Circuit's decision was correct.

The Second Circuit's decision was also correct: Respondents' allegations support a plausible inference of conspiracy. Indeed, Petitioners do not seriously argue otherwise.

Antitrust plaintiffs must plead "enough factual matter (taken as true) to suggest that an agreement

was made." *Twombly*, 550 U.S. at 556. Parallel conduct supports an inference of conspiracy when it is not obviously explained by "rational and competitive business strategy unilaterally prompted by common perceptions of the market." *Id.* at 554. And as the panel held, the complaint plausibly alleged that unilaterally "restricting Section 340B Drug Discounts would have been against any individual Defendant's own economic self-interest." Pet. App. 25a.

As the court explained, "if a Defendant alone restricted discounts, its market share and sales volumes for rapid-acting analog insulins, long-acting analog insulins, and incretin mimetics would be threatened" by other manufacturers who continued to sell in the 340B channel. Pet. App. 25a. Any unilateral strategy to terminate 340B contract-pharmacy sales risked loss of market share to competitors who continued to offer 340B discounts because safety-net providers would have shifted their patients to those competitors' drugs. *Ibid.* Any Petitioner acting unilaterally also "would have been exposed to the greater risk of exclusion from Medicare and Medicaid." *Ibid.* Through collective action, Petitioners made it unlikely that the government would attempt to exclude Petitioners from those programs, because simultaneously excluding all four producers of diabetes medications from Medicare and Medicaid would have had devastating impacts for Americans nationwide. *Ibid.*

And this was not "follow the leader." *See* p. 12, *supra*. Sanofi was the first to make public its policy of ending the contract-pharmacy channel. *See* Pet. App. 199a–200a. Yet AstraZeneca had already privately notified its regulator just one business day earlier, so it was not simply following Sanofi. *Ibid.* And, absent

coordination, Sanofi had no way to know that AstraZeneca had adopted the restraint, since it had done so privately. Moreover, both selected the same start date, months in the future. *Ibid.*; *see generally* Pet. App. 18a n.6.

These unchallenged conclusions by the panel make the joint lobbying and association issue academic. But the panel was correct, in any event, to conclude that Petitioners' communications about restraining the contract-pharmacy channel gave "further support[]"to "[t]his inference of conspiracy." Pet. App. 26a. The panel did not rest, contrary to Petitioners' contention, merely on Petitioners' common membership in an association or use of the same lobbyists. *Contra* Pet. 23. Instead, it noted that, immediately in advance of imposing unprecedented joint restraints, Petitioners used the same lobbyists to develop strategy to combat 340B discounts through political channels, and "the same lobbying firms worked on the Section 340B issue at the same time for PhRMA, an industry association of which each Defendant is a member and on the board of directors." Pet. App. 26a. That Petitioners had, in the same period, jointly developed strategies to end the contract-pharmacy channel through their shared lobbyists and PhRMA, further suggested the parallel restraints they adopted on the same issue might have been planned through such forums. *Ibid.*

The Second Circuit properly applied *Twombly*. The panel did not hold that joint lobbying or association membership is a basis to find conspiracy. The panel correctly held that, in the aggregate, the factual circumstances described in the complaint plausibly alleged conspiracy. Pet. App. 27a. That was true even without the communications through lobbyists and associations, as the panel already concluded that the

complaint plausibly explained why unilateral action "would have been against any individual [Petitioner's] own economic self-interest" (*id.* at 25a) but how "acting collectively" allowed Petitioners to conspire (*id.* at 25a–26a). Petitioners nowhere argue otherwise and never claim the panel's findings about lobbying were outcome determinative.

This Court should not grant certiorari to review a fact-bound question that the lower court got right, applying the same standard as every other circuit.

## II. The *Illinois Brick* question does not warrant review.

*Illinois Brick* prohibits courts from "allowing both direct and indirect purchasers to claim damages resulting from a single overcharge by the antitrust defendant." *McCready*, 457 U.S. at 474. But it does not bar damages "unrelated to passing an overcharge down a chain of distribution." *Pepper*, 587 U.S. at 287. *Illinois Brick* will thus bar an indirect purchaser's claim only when a plaintiff's claim is predicated on (i) an overcharge; (ii) passed down a chain of distribution to the plaintiff; (iii) creating liability to different levels of distribution.

None of these requirements was satisfied here, so *Illinois Brick* could not possibly apply. The restraint produced no overcharge. As the Second Circuit recognized, Respondents sought damages for lost contract-pharmacy sales, rather than for overcharges (Pet. App. 16a–17a), because Petitioners refused to permit sales to safety-net facilities (*id.* at. 21a–23a)—ending sales and accordingly any possible overcharges on those sales. Nor did the restraint "concern multiple levels of distribution." *Id.* at 17a. Petitioners'

restraints did not operate by "increasing prices" at any level of distribution. *Ibid.* Instead, they directly barred contract pharmacy sales, so there was no charge passed through multiple levels of distribution and "no threat of multiple lawsuits or duplicative recoveries." *Ibid.* Thus, this was an easy case under *Illinois Brick*. Petitioners only feign otherwise by distorting the panel's opinion and the caselaw of other circuits.

### A. The panel did not reframe overcharges as lost profits.

Petitioners claim the Second Circuit held plaintiffs can evade *Illinois Brick* by simply "relabeling an alleged 'overcharge' as 'lost profits.'" Pet. 19. But the court did no such thing. Nor did the panel hold that plaintiffs can "easily circumvent" *Illinois Brick* (*id*. at 13) by suing for lost-profit damages based on "purchases that they declined to make at those higher prices" (*id.* at 19).

Instead, the panel held that *Illinois Brick* did not apply in this case because Respondents do not seek "damages for overcharges" but "for losses incurred as a result of 'lost access'" to 340B contract-pharmacy sales. Pet. App. 16a–17a. By design, Petitioners' conspiracy prevented safety-net providers from purchasing drugs for shipment to contract pharmacies. Respondents never *chose* to forgo purchasing those drugs. Rather, in Petitioners' own words, Petitioners "'refus[ed] to transfer drugs to contract pharmacies'" (*id*. at 150a), permitting "'no order and no sale'" for shipment to a contract pharmacy at all (*id*. at 149a). Safety-net providers like Respondents never made a choice "not to buy" (Pet. 14, 18) because they "'lost access'" to contract-pharmacy

drug ordering at any price (Pet. App. 17a). Petitioners' conspiracy made overcharges impossible.

Thus, this is not a case where "overcharge[s]" and "lost profits" are "opposite sides of the same coin." Pet. 19. Petitioners restricted the contract-pharmacy channel by closing it altogether, not by raising prices within it. Pet. App. 147a–151a. This case thus "does not fairly present the question" identified by Petitioners and does not merit review. *Rogers*, 522 U.S. at 259 (dismissing writ as improvidently granted).

**B. There is no circuit split.**

The Second Circuit's decision does not create a circuit split with either case Petitioners identify. Pet. 14–17. Each of those cases, unlike this one, involved overcharges or undercharges passed through a distribution chain by an initial injured party. And both decisions recognized a scope for *Illinois Brick* that encompasses those cases but excludes this one: *Illinois Brick* applies only "when antitrust violators harm multiple parties along a vertical 'chain' of distribution." *Acad. of Allergy & Asthma in Primary Care v. Amerigroup Tenn., Inc.*, 155 F.4th 795, 812 (6th 2025) (quoting *Pepper*, 587 U.S. at 279); *see Howard Hess Dental Lab'ys Inc. v. Dentsply Int'l, Inc.*, 424 F.3d 363, 366 (3d Cir. 2005) (*Illinois Brick* "held that indirect purchaser plaintiffs do not have statutory standing to recover damages for 'passed-on' overcharges."). Because Respondents' claims are not based on overcharges or passed-on harms of any sort, the Second Circuit's decision is fully consistent with these cases.

In *Amerigroup*, the Sixth Circuit held that *Illinois Brick* barred a suit against insurers by an allergy-

testing center that sold services to primary care physicians. 155 F.4th at 820. The insurers indirectly harmed the testing center by reducing reimbursements on the physicians' allergy-related claims. *See id.* at 802. The Sixth Circuit recognized that, while this policy caused "[m]any primary-care physicians [to] stop[] offering allergy-care services" sold to them by the testing center plaintiff, *id.* at 805, that harm was first "inflicted on a direct seller and passed down a distribution chain," *id.* at 818. Upstream physicians that were injured could—and at least one did—bring suit. *See id.* at 820. That was because the upstream physicians had "directly suffered" in the first instance. *Id.* at 814.

The same cannot be said here. Petitioners did not harm safety-net facilities like Respondents indirectly, as in *Amerigroup*, by increasing prices to an upstream actor. Here, no upstream actor suffered. Pet. App. 204a. Instead, Petitioners harmed Respondents directly by barring contract-pharmacy sales to safety-net providers. In *Amerigroup*, the reimbursement change had a cascading effect that reached the testing center plaintiff, so that harm was "indirect." 155 F.4th at 806. By contrast, Petitioners "'refus[ed] to transfer drugs to contract pharmacies'" (Pet. App. 150a), so Petitioners' restraint directly barred any contract-pharmacy "'order [or] sale'" to safety-net providers (*id.* at 149a). The direct harms here did not pass through "multiple levels of distribution." *Id.* at 17a; *see id.* at 111a–112a, 148a–150a, 204a. That is in sharp contrast with *Amerigroup*, where the testing center's only "harms flow out of the injuries inflicted on its 'customers' up the chain: the physicians." 155 F.4th at 816.

*Howard Hess* is similarly inapposite. There, the Third Circuit held that dental laboratories were barred by *Illinois Brick* from bringing claims against a manufacturer that allegedly inflated the price of artificial teeth via anticompetitive terms for the manufacturer's middlemen dealers. 424 F.3d at 367, 384. Under *Illinois Brick*, *Howard Hess* was a straightforward case: plaintiffs sought damages for overcharges initially imposed on dealer middlemen, not on the plaintiffs. *See id.* at 375. The plaintiffs could still purchase artificial teeth from the defendant (and others). *Id.* at 367. The plaintiffs could not pursue damages—whether overcharges or lost profits—because their harms were merely "indirect," flowing from the first harms on dealers. *Id.* at 375–376. As the Third Circuit recognized, nothing "would prevent the dealers from suing," "thus creating a risk of duplicative liability." *Id.* at 372.

But here, again, Petitioners' joint restraint did not harm safety-net providers indirectly by creating overcharges for upstream actors. Instead, Petitioners restrained sales directly to safety-net providers like Respondents, and safety-net providers were the first parties harmed. Pet. App. 147a–150a, 204a. There was no cascading harm, as in *Howard Hess*. Nor is there another party of middlemen dealers to sue Petitioners here for overcharges. *Id.* at 204a. Indeed, because the restraint blocked sales altogether, there were no charges at any level of distribution. *Id.* at 147a–150a. *Howard Hess* is consistent with the panel decision below.

Petitioners thus again manufacture a false circuit split. Here, unlike in *Amerigroup* or *Howard Hess*, Petitioners directly barred Respondents from making a purchase; there was no sale, no charge, and no

overcharge. And Petitioners did not indirectly injure Respondents by "increasing prices" for an upstream actor. Pet. App. 17a. In *Amerigroup*, physicians were the first harmed and could sue, *see* 155 F.4th at 820, and in *Howard Hess*, dealers were the first harmed and could sue, *see* 424 F.3d at 372. But here, safety-net providers like Respondents were the first harmed and the only ones who could sue. Pet. App. 204a. *Illinois Brick* applied to the indirect injuries in *Amerigroup* and *Howard Hess*, but not the lost access here, which is distinct from both those cases because it is "unrelated to passing an overcharge down a chain of distribution." *Pepper*, 587 U.S. at 287.

### C. The Second Circuit's decision was correct.

The Second Circuit's decision was correct: *Illinois Brick* does not apply to Respondents' federal antitrust claims for at least three reasons.

First, *Illinois Brick* does not bar claims "unrelated to passing an overcharge down a chain of distribution." *Pepper*, 587 U.S. at 287. The injury here did not result from harm at another level of distribution. Pet. App. 17a. Safety-net facilities were the first to be harmed. *Id.* at 204a. They were not "two or more steps removed from the violator[s]." *Pepper*, 587 U.S. at 279; *see also id.* at 289–290 (Gorsuch, J., dissenting).[5] And they were harmed not because of any "increasing prices" at any upstream level of

[5] Notably, Petitioners not only announced restraints directly to Respondents but also made direct offers to Respondents and other safety-net providers to reopen contract-pharmacy drug channels in part. They asked for dispensing on certain terms (Pet. App. 168a–169a), valuable data (*id.* at 161a–163a), or use of a single contract pharmacy (*id.* at 166a, 176a).

distribution but because Petitioners cut off safety-net providers' ability to purchase drugs for shipment to contract pharmacies. Pet. App. 17a. There was no harm to pass down a chain of distribution. *See Pepper*, 587 U.S. at 287.

Second, there was no overcharge. *Illinois Brick* limits only who may recover "overcharge" damages. 431 U.S. at 724; *see Pepper*, 587 U.S. at 287; *see also id.* at 292 (Gorsuch, J., dissenting). As the Second Circuit correctly held, Respondents' federal claims did not seek damages "for losses incurred due to increasing prices"—but instead for lost contract-pharmacy sales. Pet. App. 17a. As Petitioners admitted, there was no "'overcharge because there [wa]s no order and no sale.'" *Id.* at 149a.

Third, Respondents' damages claims raise no threat of "multiple liability," so none of the rationales from *Illinois Brick* apply. *See Pepper*, 587 U.S. at 286–287. As the Second Circuit held, this suit "raises no threat of multiple lawsuits or duplicative recoveries." Pet. App. 17a. Upstream distributors—who do not have access to 340B discounts in the first place (*id.* at 112a)—were not harmed by this restraint (*id.* at 204a). The restraint did not operate by "increasing prices" but, instead, by cutting out safety-net providers like Respondents. *Id.* at 17a, 147a–150a. Distributors continued to buy and sell the same drugs for delivery to the same pharmacies. *Id.* at 147a–150a, 204a. Neither they nor any other plaintiff apart from safety-net providers could have brought these claims for lost contract-pharmacy sales. *Id.* at 204a. If there is any party that can be described as an "indirect purchaser" who is downstream from the initial violation for purposes of *Illinois Brick*, it is the patients of safety-net providers, who may have

suffered indirectly from the restraints imposed on Respondents and other safety-net providers. But Respondents, as the upstream party in that scenario, would not be barred by *Illinois Brick*.

Petitioners wrongly accuse the Second Circuit of attempting to "'carve out exceptions to the direct purchaser rule for particular types of markets.'" Pet. 18–19 (quoting *UtiliCorp*, 497 U.S. at 216). But the panel made no "exception" to *Illinois Brick*. It simply recognized that *Illinois Brick* does not apply to claims "unrelated to passing an overcharge down a chain of distribution." *Pepper*, 587 U.S. at 287.

### D. This complex and unique case is a poor vehicle.

This case is a poor vehicle to address *Illinois Brick*. Petitioners say their *Illinois Brick* question is important because "an indirect purchaser or seller can always repackage an overcharge claim as a claim for profits that were lost." Pet. 25. But Respondents did not reframe any overcharge damages as lost profits. Respondents had no possible overcharge claim under Petitioners' restraints because those policies operated by blocking sales to safety-net providers, not by increasing prices. *See* pp. 26–27, 30, *supra*.

Moreover, to the extent this case even raises a question about *Illinois Brick*, it is inextricably bound up with the details of the notoriously complex 340B drug program. Thus, briefing in this case threatens to devolve into complex questions regarding the nature and structure of transactions within that unique contract-pharmacy channel, rather than focusing on whether *Illinois Brick* applies to "lost profits" claims in general. *See United States v. Johnston*, 268 U.S. 220, 227 (1925) (the Court does not "grant * * *

certiorari to review evidence and discuss specific facts").

And there is little evidence that any *Illinois Brick* question presented is likely to recur. Petitioners cite no other *Illinois Brick* case in which defendants allegedly conspired to eliminate a previously existing distribution channel, let alone in the context of the Section 340B program or any similar program. Tellingly, no *amici* supporting Petitioners have joined Petitioners' request for the Court to grant certiorari on this niche, fact-bound question. *See* Chamber Amicus Br.; Elec. Power Supply Amicus Br.[6]

**E. This case should not be held for review.**

If this Court grants certiorari in *Amerigroup*, there is no reason to hold this case for review. *See* Petition for Writ of Certiorari, *United Biologics, L.L.C. v. Amerigroup Tenn., Inc.*, No. 25-1388 (docketed June 12, 2026). The petitioners there ask this Court to decide whether *Illinois Brick* "bars the intended and actual target of a group boycott from recovering lost-profit damages when market incumbents band together to coerce the target's customers to stop doing business with the target." *Id.* at i. But this case does not involve market incumbents banding together to coerce patients of safety-net providers to stop doing business with them.

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[6] It is also unclear whether Petitioners preserved the *Illinois Brick* arguments they raise. Below, Petitioners offered only a cursory argument that Respondents are "indirect purchasers." Pet. Br. 74–76, Dkt. 60.1 (2d Cir.). *See Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." (quotation marks and citation omitted)).

More importantly, this case does not involve an injury that was initially suffered by distributors or any other upstream party. In *Amerigroup*, there is "no doubt" that upstream physicians "directly suffered" harms that were passed downstream to the petitioner. 155 F.4th at 814. Not so here, where Respondents' lost savings did not derive from an overcharge or lost-profit injury initially suffered by any upstream distributor.

And the decision below did not rely on any group-boycott exception to *Illinois Brick*. The panel never mentioned a group-boycott exception or *Crimpers Promotions Inc. v. HBO, Inc.*, 724 F.2d 290 (2d Cir. 1983) (Friendly, J.), the principal Second Circuit case on which the *Amerigroup* petitioners rely. *See Amerigroup* Pet. at 16–20 & 27. Nor does this case involve any "business arrangement that essentially functions as a joint venture," the issue in *Amerigroup* that Judge Bush suggested this Court consider reviewing. *Acad. of Allergy & Asthma in Primary Care v. Amerigroup Tenn., Inc.*, 164 F.4th 529, 541 (6th Cir. 2026) (statement respecting the denial of rehearing en banc). As explained, the panel below concluded that *Illinois Brick* did not apply for a much more straightforward reason: Respondents sued for lost savings attributable to direct market exclusion, not indirect overcharge damages. Pet. App. 17a.

The *Amerigroup* petitioners may be correct that *Illinois Brick* does not apply every "time there happens to be multiple potential plaintiffs." *Amerigroup* Pet. at 25. But that issue is irrelevant here, where safety-net providers are the only potential plaintiffs to recover lost contract-pharmacy sales. The mechanics of the 340B discount ensured that only they were directly harmed. Pet. App. 204a. The

distribution chain in *Amerigroup* does not feature any remotely analogous system of downstream price determination. Unsurprisingly, Petitioners do not pretend that distributors or any other upstream party could bring the claims asserted here.

Thus, the decision below does not depend on whether there is a group-boycott exception to *Illinois Brick*, and regardless of how *Amerigroup* is decided, the result here would be the same. If the Court grants review in *Amerigroup* and recognizes that exception, it would need to affirm in this case as well because safety-net providers were clearly Petitioners' intended and actual targets. But even if the Court rejects that exception, it would still need to affirm here, because Respondents' claims are not based on overcharges passed down a chain of distribution.

Instead, the only potential *Illinois Brick* question presented here is whether *Illinois Brick* bars damages where no purchase was possible, where no overcharge (or undercharge) could have been generated, and where no such charges were ever passed up or down any chain of distribution. But this Court has already answered that question—*see, e.g.*, *Pepper*, 587 U.S. at 273—and it has nothing to do with the issues raised by *Amerigroup*.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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