No. 25-1070

In the Supreme Court of the United States

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

v.

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

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

REPLY BRIEF FOR PETITIONERS

NOEL J. FRANCISCO
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939

RAJEEV MUTTREJA
JONES DAY
250 Vesey Street
New York, New York 10281
(212) 326-3939

Counsel for Petitioner Sanofi-Aventis U.S. LLC

ALLON KEDEM
Counsel of Record
C. SCOTT LENT
MATTHEW TABAS
ANTHONY J. FRANZE
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
allon.kedem@arnoldporter.com

Counsel for Petitioner AstraZeneca Pharmaceuticals LP

(additional counsel listed on inside cover)

DANIEL E. LAYTIN, P.C.
ALYSSA C. KALISKY
KATIE R. LENCIONI
KIRKLAND & ELLIS LLP
333 West Wolf Point Plaza
Chicago, Illinois 60654
(312) 862-2000

JOHN C. O'QUINN, P.C.
MEGAN MCGLYNN BUTLER
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 389-5000

Counsel for Petitioners Eli Lilly and Company and Lilly USA, LLC

ASHLEY C. PARRISH
ROBERT M. COOPER
KING & SPALDING LLP
1700 Pennsylvania Ave., NW,
Suite 200
Washington, DC 20006
(202) 737-0500

ROSS E. ELFAND
KING & SPALDING LLP
1290 Avenue of the Americas
Fourteenth Floor
New York, NY 10140
(212) 556-2100

LOHR A. BECK
KING & SPALDING LLP
1180 Peachtree Street, NE
Suite 1600
Atlanta, GA 30309
(404) 572-4600

Counsel for Petitioner Novo Nordisk Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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

REPLY BRIEF FOR PETITIONERS

Respondents do not dispute that they are indirect purchasers: Upstream "distributors" stand between Petitioners and Respondents in every transaction at issue here. Pet. App. 112a. Instead, Respondents say *Illinois Brick*'s indirect-purchaser bar is inapplicable because it "limits only who may recover 'overcharge' damages," and "[n]o overcharges were even possible under Petitioners' policies in this case." Opp. 4, 31.

That assertion contradicts their own brief, which admits they "sometimes purchased" Petitioners' medicines through distributors—at purportedly higher commercial prices. Opp. 11 n.2. It also contradicts their complaint, which alleges the "conspiracy caused [Respondents] to pay inflated prices" and seeks "overcharge damages" for antitrust claims under the laws of States that do not follow *Illinois Brick*. Pet. App. 215a.

Respondents say the decision below created no conflict. But the Sixth Circuit read the Second Circuit's decision as Petitioners do, with members of the court acknowledging the "disharmony" and declaring the dispute "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 denial of rehearing en banc).

On the other question presented, Respondents admit that multiple Circuits agree "[t]he mere opportunity to conspire through joint lobbying and participation in trade associations cannot support a plausible inference of conspiracy." Opp. 20-21. They say the Second Circuit's decision was consistent with this rule because it merely noted Petitioners' joint lobbying and trade-association activities "as an afterthought" and did not treat those allegations as "sufficient" to establish a conspiracy. Opp. 18-19. But the court below—in conflict with most Circuits—treated those activities as a plus factor "support[ing]" a conspiracy inference, and it faulted the district court for "fail[ing] to credit" those allegations. Pet. App. 26a.

This case is an ideal vehicle for addressing two far-reaching antitrust issues that divide the courts of appeals. The petition should be granted.

I. This Court Should Resolve the Conflict over *Illinois Brick*

Respondents cannot dispute that they are indirect purchasers. Respondents admit they obtain medications not from Petitioners themselves but through distributors who "serve as intermediaries." Pet. App. 112a. Under *Illinois Brick*, only "the immediate buyers from the alleged antitrust violators may maintain a suit," while purchasers farther down the distribution chain may not. *Apple Inc.* v. *Pepper*, 587 U.S. 273, 279 (2019) (cleaned up). That "bright-line" rule bars Respondents' federal antitrust claims. *Ibid.*

A. The Decision Below Created a Circuit Conflict

The courts of appeals are divided—directly and self-consciously—on this issue.

The Second Circuit held that *Illinois Brick* "does not apply" because Respondents disclaimed overcharge damages on their federal claims, instead seeking only lost profits from transactions that allegedly did not occur. Pet. App. 17a & n.5. Other Circuits reject that distinction. The Third Circuit held that antitrust "Plaintiffs may not recover lost profits damages [if] they are indirect purchasers," nor may they circumvent the indirect-purchaser bar by "fram[ing] their claim as one for lost profits rather than for overcharge damages." *Howard Hess Dental Labs. Inc.* v. *Dentsply Int'l, Inc.*, 424 F.3d 363, 375-76 (3d Cir. 2005). The Sixth Circuit similarly held 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), pet. for cert. pending, No. 25-1388 (filed June 12, 2026). On rehearing, Judge Bush invoked the decision below when lamenting the "disharmony in the application of *Illinois Brick* in the lower courts." 164 F.4th at 541 (respecting denial of rehearing en banc).

Respondents deny a conflict, asserting that those decisions, "unlike this one, involved overcharges or undercharges passed through a distribution chain by an initial injured party." Opp. 27. But that was not the basis for the Second Circuit's ruling, which turned *only* on the "form" of the "damages" sought (*i.e.*, lost profits instead of overcharges). Pet. App. 17a.

Regardless, as Respondents' complaint explains, this case *does* involve alleged overcharges passed through the distribution chain. For every drug sale Petitioners make to Respondents, "drug distributors serve as intermediaries" who "include [any 340B] discount" in the pricing they offer to Respondents. Pet. App. 112a. To be made whole, the distributor then turns to the manufacturer, which "pay[s] [the] distributor's invoice for the 340B Drug Discount amount provided (a procedure sometimes called a chargeback)." *Ibid.* If a manufacturer limits access to 340B prices, as Petitioners allegedly did, the manufacturer "remove[s] those discounts from the distribution stream" by refusing to offer the distributor a "chargeback." *Ibid.* Under those circumstances, the distributor will no longer convey discounts "from drug companies [*i.e.*, Petitioners] to covered entities [i*.e.*, Respondents]." *Ibid.*

Thus, as Respondents' allegations about the drug supply chain make clear, under Petitioners' policies, distributors lost access to 340B discounts "before Respondents," Opp. 4, to whom the distributors would otherwise have "convey[ed]" the discounts as part of their sale to the covered entity, Pet. App. 112a. The distributors were thus upstream of Respondents on every transaction. That makes this case directly analogous to *Howard Hess* and *Amerigroup*; the only difference is the outcome.

Nor can Respondents distinguish the alleged conspiracy here on the ground that the Second Circuit did not describe Petitioners' policies as a "group boycott." Opp. 33. Respondents alleged that Petitioners refused to make "chargeback[s]" available to distributors, who accordingly stopped "convey[ing]" them to Respondents. Pet. App. 112a. Those allegations do not differ meaningfully from *Amerigroup*, where insurers allegedly agreed to "not reimburse" physicians for the plaintiffs' services. 155 F.4th at 805. In both cases, the alleged conspirators withdrew money from a payment chain that started with a direct purchaser or seller; ran through an intermediary; and ended with the plaintiff—the only difference being the form of the payment withheld (chargeback versus reimbursement).

B. *Illinois Brick*'s Bright-Line Rule Applies Here

Respondents attempt to sidestep the acknowledged split by denying their own complaint's allegations. But their shifting litigation positions merely highlight why the ruling below transforms *Illinois Brick* from an easily administrable rule into one easily circumvented through artful pleading.

1. Respondents argue that *Illinois Brick* does not apply because "[n]o overcharges were even possible" under Petitioners' policies. Opp. 4. Respondents' complaint says otherwise. As Respondents alleged, each Petitioner adopted a 340B program-integrity policy that, in one fashion or another, adjusted the terms under which the Petitioner would offer reduced prices for contract pharmacy sales. Pet. App. 142a-147a. Respondents say they were left with two choices: purchasing the drugs at "inflated" prices (*i.e.*, regular commercial prices) or not at all. Pet. App. 208a.

In their complaint, therefore, Respondents advanced "two" corresponding theories of loss. Pet. App. 202a. First, they "purchased [Petitioners'] drugs for dispensing at Contract Pharmacies without access to the Contract Pharmacy 340B Drug Discounts," with the result that they were "overcharged for those purchases." Pet. App. 202a-203a. Second, they were *also* harmed when they did "*not* purchase[] drugs for dispensing at Contract Pharmacies" that they otherwise would have resold to patients for a profit. Pet. App. 203a (emphasis added).

Respondents now attempt to deny that "overcharges were even possible under Petitioners' policies," on the ground that the policies "blocked sales altogether, [such that] there were no charges at any level of distribution." Opp. 4, 29. Their complaint says otherwise. Pet. App. 217a ("Defendants unlawfully overcharged Plaintiffs and the Class"). And even in this Court, Respondents admit that they "sometimes purchased" Petitioners' medicines through distributors—just "not at a discount." Opp. 11 n.2.[1]

2. Respondents' shifting position underscores why *Illinois Brick*'s application cannot turn on how damages are labeled. "[W]hen antitrust plaintiffs claim that anti-competitive behavior caused prices to increase," either of "two measures of damages could theoretically be used: (1) the overcharge … or (2) lost profits." *Howard Hess*, 424 F.3d at 374. For most alleged conspiracies whose goal is to affect prices, *both* theories will be implicated, because the would-be purchaser or seller will continue to make *some* purchases or sales at conspiracy-distorted prices—just at a lower "volume." *Ibid.* Again, that is what Respondents allege here. Pet. App. 202a-203a.

Given the close relationship between overcharges and lost-profit damages, moreover, drawing a rigid distinction between them makes little sense. What matters is whether the plaintiff transacted directly with the anti-trust defendant—not how the plaintiff characterizes its injury. As Respondents do not dispute, "[a] plaintiff who *declines* to make an indirect purchase is even further removed from the alleged antitrust violator than a plaintiff who *does* make indirect purchases." Pet. 19. Allowing only the former type of plaintiff to maintain suit (as the

---

[1] Respondents misleadingly quote their own Complaint for the proposition that "Petitioners admitted there was no 'overcharge because there was no order and no sale.'" Opp. 31 (quoting Pet. App. 149a, quoting Reply Mem. at 29, *Eli Lilly* v. *Health Res. & Servs. Admin.*, 1:21-cv-81, Dkt. 129 (S.D. Ind. July 14, 2021)) (cleaned up). The quotation-within-the-quotation comes from a brief Lilly filed arguing that its policy caused no "overcharge" under the 340B administrative dispute resolution process. The brief says only that no "overcharge" occurs *under Section 340B*, not that no *purchase* occurs at all. Nor can that brief negate Respondents' allegations that they were "overcharged" by Petitioners because they bought drugs whose "purchase price did not include the 340B Drug Discount." Pet. App. 202a-203a.

decision below did) invites gamesmanship, since antitrust plaintiffs "could always recharacterize their damages as lost profits [for incomplete sales] rather than overcharges or undercharges for completed sales." *Amerigroup*, 155 F.4th at 817. The Second Circuit's rule thus converts *Illinois Brick* from a bright-line rule of antitrust standing into a drafting rule governing how indirect purchasers and sellers describe their losses.

3. Respondents argue *Illinois Brick* should not apply here because no upstream party was "first harmed" by the alleged conspiracy. Opp. 27-30. As explained, that is incorrect: Distributors "convey 340B Drug Discounts from drug companies to covered entities." Pet. App. 112a.

Regardless, Respondents' "first-harmed" argument confuses the rationales for *Illinois Brick*'s rule with the rule itself, which does not require a case-specific showing that an intermediary was independently injured, is likely to sue, or could recover the same damages as the plaintiff. To the contrary, the "bright-line" rule means "there is no reason to ask whether the rationales of *Illinois Brick* apply with equal force in every individual case." *Apple*, 587 U.S. at 285 (cleaned up); see *Kansas* v. *UtiliCorp United, Inc.*, 497 U.S. 199, 217 (1990) ("[E]ven assuming that any economic assumptions underlying the *Illinois Brick* rule might be disproved in a specific case," litigating "a series of exceptions" would be "unwarranted and counterproductive"); *Amerigroup*, 155 F.4th at 817 (*Illinois Brick* "applies across the board—not [as] a fact-specific standard that courts may disregard when its rationales are absent").

In any event, even if *Illinois Brick*'s rationales were reconsidered on a case-by-case-basis, they apply with even *greater* force here. When a plaintiff's damages stem from purportedly *not* making certain purchases or sales, Opp. 11, the resulting harm is *more* speculative: "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." Pet. 19. Calculating damages where plaintiffs allege they *failed* to make purchases or sales through intermediaries requires layers of speculation.

II. This Court Should Resolve the Conflict over Whether Joint Lobbying and Trade Association Participation Constitutes a "Plus Factor" Supporting the Inference of a Conspiracy

Respondents argue that all Circuits agree that an opportunity to conspire via joint lobbying and participation in a trade association "does not *suffice*," by itself, to establish a conspiracy. Opp. 2 (emphasis altered). No one claims otherwise. Instead, the question is whether such allegations can be a "plus factor" plausibly "supportive" of a conspiracy in cases based on parallel conduct (*i.e.*, where there is no *direct* evidence of conspiracy). The Circuits are divided on that question.

A. The Second Circuit Deepened a Circuit Split

The First and Second Circuits treat joint lobbying and participation in a trade association as a plus factor, but five others decline. Pet. 21-23. Treating such conduct as suggestive of illegal conspiracy "chills core First Amendment activity, harms providers of essential services, and makes government less efficient." Elec. Power Supply Ass'n *Amici Curiae* 2.

Respondents argue the Second Circuit "agree[s]" that "[t]he mere opportunity to conspire through joint lobbying and participation in trade associations cannot support a plausible inference of conspiracy" on its own. Opp. 20-21. But that conflates treating a factor as *sufficient* to allege conspiracy (which no Circuit does) with treating it as *supportive* of conspiracy (which the First and Second do, but others reject). The Second Circuit treated Petitioners' "opportunity to conspire" as a "plus factor[] that supports the plausibility of a Section 1 conspiracy." Pet. App. 26a. That implicates a Circuit split regardless of whether that factor would have been *sufficient* absent other plus factors.[2]

Notably, Respondents do not argue that the allegations here are meaningfully different from those considered insufficient by other Circuits. Moreover, such general allegations of "communications," Pet. App. 26a, are *always* available when businesses jointly lobby or participate in the same trade association. Under the ruling below, such conduct is an automatic plus factor. That "undermines the widely recognized pro-competitive effects of trade- and industry-association participation, and stifles organizations' First Amendment rights." U.S. Chamber *Amici Curiae* 2.

B. This Plus Factor Mattered

Respondents argue that even if the decision below implicated a Circuit conflict, its holding does not merit review because it was "[a]lmost … an afterthought." Opp. 19. The opinion itself says otherwise. And given Respondents' weak case, elimination of *any* factor was likely to change the outcome.

1. The Second Circuit not only described Respondents' "opportunity to conspire" allegations as "support[ing]" an "inference of conspiracy," but devoted nearly a page to the issue. Pet. App. 26a. Respondents note that the court described two other plus factors as well. Opp. 19. But it did not rank the factors or suggest the

---

[2] *Gamm* v. *Sanderson Farms, Inc.*, 944 F.3d 455 (2d Cir. 2019), highlights the distinction. *Gamm* recognized that trade-association participation does not, without more, *establish* a conspiracy. *Id.* at 466. Below, the Second Circuit held lobbying and trade association activities "supported" a conspiracy. Pet. App. 26a.

outcome would have been the same absent any one of them.

To the contrary, the Second Circuit made clear that the joint lobbying/trade association plus factor *was* necessary. When seeking rehearing, Petitioners asked the Second Circuit to eliminate its reliance on this factor. C.A. Dkt. 92.1 at 5, 7-13. In response, the court modified *other* parts of its decision, C.A. Dkt. 94, but left discussion of *this* factor untouched—in a binding decision that is now the law of the Circuit.

2. This plus factor also mattered because Respondents' case was weak. Petitioners' policies are lawful under Section 340B, where the government's "enforcement authority" is "the proper remedy for covered entities complaining of overcharges." *Astra USA, Inc.* v. *Santa Clara Cnty.*, 563 U.S. 110, 122 (2011) (citation omitted). The district court held Respondents had not even alleged parallel conduct because Petitioners' policies "had substantial variations in both their timing and their particulars." Pet. App. 41a. The Second Circuit disagreed, relying on the policies' "timing." Pet. App. 21a. As Respondents emphasize, "one firm's public announcement came just one business day after another revealed its novel restraints in private to its regulators." Opp. 15 (citing Pet. App. 18a n.6).

Yet Respondents themselves supplied an obvious (lawful) explanation. According to the complaint, manufacturers jointly sought governmental action to limit contract-pharmacy abuses, but those "efforts failed" when the President issued the Executive Order. Pet. App. 135a. Two responded by altering their policies almost immediately: AstraZeneca acted *the same* day, while Sanofi acted *the next* business day. Pet. 7-8 (citing Pet. App. 142a-147a). Nothing about that timing suggests collusion, as opposed to "independent responses to common stimuli." *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 556 n.4 (2007) (citation omitted).

Other "plus factors" are similarly thin. The Second Circuit said Petitioners had a "common motive" to "eliminate[] the vast majority of their Section 340B Drug Discount sales through [contract] pharmacies." Pet. App. 24a-25a. But because 340B sales are steeply discounted, manufacturers *always* have a financial interest in favoring commercial sales instead. The court relied on Petitioners' supposed need to collude to avoid "decreased market share and regulatory sanctions." Pet. App. 25a. But 340B sales are relatively *unprofitable*, so manufacturers always have an independent incentive to reduce 340B market share. And Petitioners still faced "regulatory sanctions"—enormous civil monetary penalties, 42 U.S.C. § 256b(d)(1)(B)(vi)—notwithstanding any supposed collusion.

III. This Case Is An Ideal Vehicle

Both questions presented were decided in a published opinion. There are no disputed facts; no preservation problems; and no jurisdictional concerns.[3] Nor do Respondents identify any genuine obstacle to this Court's review.

Respondents raise supposed "vehicle" objections on *Illinois Brick*. Opp. 32. But those largely reprise the merits, arguing the Second Circuit meant something different from what it said. Respondents also argue this case is unsuitable because it involves the "complex" 340B program and thus raises "fact-bound question[s] that will have no impact on anyone besides the parties to this case." Opp. 18. But the legal questions here are hardly case-specific. Indeed, the premise of Petitioners' argument is that *Illinois Brick*'s "bright-line" rule should dispose of cases like this

[3] Respondents suggest Petitioners waived *Illinois Brick*. Opp. 33 n.6. That is wrong, C.A. Dkt. 64.1 at 74-76, but also irrelevant: All agree the issue was "pressed" and "passed upon" below. *United States* v. *Williams*, 504 U.S. 36, 41 (1992).

one *without* implicating the precise supply-chain details of "individual cases." *Apple*, 587 U.S. at 285. Nor do Respondents identify any meaningful respect in which the supply chain here differs from other industries where distributors "serve as intermediaries." Pet. App. 112a.

Finally, the pending *Amerigroup* petition further confirms that the *Illinois Brick* conflict is ripe for review. The central factor on which the petition turns is that the indirect-seller plaintiff there was the alleged "*target* of a scheme by market incumbents." *Amerigroup* Pet. at I (emphasis added). Respondents allege the same targeting here: Petitioners' goal was to "cut [them] out" of the "chain" of discounts. Opp. 11. And both the *Amerigroup* petitioner and Respondents argue the indirect purchaser/sellers suffered the scheme's primary "harm." Opp. 28; *Amerigroup* Pet. at 29.

Since this petition raises two distinct cert-worthy issues and *Amerigroup* raises one, granting this petition will allow the Court to address both. Or if the Court wants to consider the indirect-purchaser bar in different factual contexts—one involving indirect purchasers (this case) and another involving indirect sellers (*Amerigroup*)—it could grant both petitions.

CONCLUSION

The petition should be granted.

Respectfully submitted,

ALLON KEDEM
Counsel of Record
C. SCOTT LENT
MATTHEW TABAS
ANTHONY J. FRANZE
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
allon.kedem@arnoldporter.com

Counsel for Petitioner AstraZeneca Pharmaceuticals LP

NOEL J. FRANCISCO
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939

RAJEEV MUTTREJA
JONES DAY
250 Vesey Street
New York, NY 10281
(212) 326-3939

Counsel for Petitioner Sanofi-Aventis U.S. LLC

DANIEL E. LAYTIN, P.C.
ALYSSA C. KALISKY
KATIE R. LENCIONI
KIRKLAND & ELLIS LLP
333 West Wolf Point Plaza
Chicago, Illinois 60654
(312) 862-2000

JOHN C. O'QUINN, P.C.
MEGAN MCGLYNN BUTLER
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 389-5000

Counsel for Petitioners Eli Lilly and Company and Lilly USA, LLC

ASHLEY C. PARRISH
ROBERT M. COOPER
KING & SPALDING LLP
1700 Pennsylvania Ave., NW, Suite 200
Washington, DC 20006
(202) 737-0500

ROSS E. ELFAND
KING & SPALDING LLP
1290 Avenue of the Americas
Fourteenth Floor
New York, NY 10140
(212) 556-2100

LOHR A. BECK
KING & SPALDING LLP
1180 Peachtree Street, NE
Suite 1600
Atlanta, GA 30309
(404) 572-4600

Counsel for Petitioner Novo Nordisk Inc.