No. 23-120

IN THE
Supreme Court of the United States

UNITED STATES SOCCER FEDERATION, INC.,
Petitioner,
v.
RELEVENT SPORTS, LLC, ET AL.,
Respondents.

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

BRIEF OF THE AMERICAN SOCIETY OF ASSOCIATION EXECUTIVES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

DONALD B. VERRILLI, JR.
Counsel of Record
LAUREN E. ROSS
MUNGER, TOLLES & OLSON LLP
601 Massachusetts Ave. NW
Suite 500E
Washington, DC 20001
(202) 220-1100
donald.verrilli@mto.com

JERALD A. JACOBS
ALVIN DUNN
PILLSBURY WINTHROP SHAW PITTMAN LLP
1200 Seventeenth Street NW
Washington, DC 20036
(202) 663-8000

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. The Decision Below Splits Starkly with the Decisions of Other Courts of Appeals and of This Court. 3

II. The Sweeping Rationale of the Second Circuit's Decision Threatens Associations and Their Members. 11

CONCLUSION 16

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Allied Tube & Conduit Corp. v. *Indian Head, Inc.*,
486 U.S. 492 (1988) 11

Am. Needle, Inc. v. *NFL*,
560 U.S. 183 (2010) 3

Am. Tobacco Co. v. *United States*,
328 U.S. 781 (1946) 4

Am. Dental Ass'n v. *Cigna Corp.*,
605 F.3d 1283 (11th Cir. 2010) 5

Anderson v. *Shipowners' Association of the Pacific Coast*,
272 U.S. 359 (1926) 9

Ass'n of Am. Physicians & Surgeons, Inc. v. *Am. Bd. of Med. Specialties*,
15 F.4th 831 (7th Cir. 2021)................................. 14

Maple Flooring Mfrs.' Ass'n v. *United States*,
268 U.S. 563 (1925) 2, 11, 13

Associated Press v. *United States*,
326 U.S. 1 (1945) 9

Bell Atl. Corp. v. *Twombly*,
550 U.S. 544 (2007) 5, 7, 8, 9, 10, 13, 14, 15

TABLE OF AUTHORITIES

Page(s)

Cal. Dental Ass'n v. *FTC*,
526 U.S. 756 (1999) 1

Consol. Metal Prods., Inc. v. *Am. Petroleum Inst.*,
846 F.2d 284 (5th Cir. 1988) 2, 5, 10

Copperweld Corp. v. *Indep. Tube Corp.*,
467 U.S. 752 (1984) 4, 9

Edward J. Sweeney & Sons, Inc. v. *Texaco, Inc.*,
637 F.2d 105 (3d Cir. 1980).................................... 4

Golden Bridge Tech., Inc. v. *Motorola, Inc.*,
547 F.3d 266 (5th Cir. 2008) 12

In re Ins. Brokerage Antitrust Litig.,
618 F.3d 300 (3d Cir. 2010).................................... 8

Kendall v. *Visa U.S.A., Inc.*,
518 F.3d 1042 (9th Cir. 2008) 8, 10, 13

Matsushita Elec. Indus. Co. v. *Zenith Radio Corp.*,
475 U.S. 574 (1986) 4, 15

Mayor & City Council of Baltimore, Md. v. *Citigroup, Inc.*,
709 F.3d 129 (2d Cir. 2013).................................. 14

TABLE OF AUTHORITIES

Page(s)

Monsanto Co. v. *Spray-Rite Serv. Corp.*,
465 U.S. 752 (1984) 4, 5, 9, 10

Nw. Wholesale Stationers, Inc. v. *Pac. Stationery & Printing Co.*,
472 U.S. 284 (1985) 7

Princo Corp. v. *ITC*,
616 F.3d 1318 (Fed. Cir. 2010)............................. 12

Relevent Sports, LLC v. *Fédération Internationale de Football Association*,
551 F. Supp. 3d 120 (S.D.N.Y. 2021) 6

Relevent Sports, LLC v. *United States Soccer Federation*,
61 F.4th 299 (2d Cir. 2023) 2, 5, 6, 9

SD3, LLC v. *Black & Decker (U.S.) Inc.*,
801 F.3d 412 (4th Cir. 2015) 8, 9, 10, 13

SmileDirectClub, LLC v. *Tippins*,
31 F.4th 1110 (9th Cir. 2022)................................. 8

Starr v. *Baca*,
652 F.3d 1202 (9th Cir. 2011) 14

Texaco Inc. v. *Dagher*,
547 U.S. 1 (2006) 3

United States v. *U.S. Gypsum Co.*,
438 U.S. 422 (1978) 15

TABLE OF AUTHORITIES

Page(s)

Visa, Inc. et al. v. *Osborn*,
137 S. Ct. 289 (2016) 1, 7

Wilk v. *American Medical Ass'n*,
895 F.2d 352 (7th Cir. 1990) 5

FEDERAL STATUTES

15 U.S.C. § 1..................2, 3, 4, 6, 7, 8, 9, 10, 11, 13, 14

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TABLE OF AUTHORITIES

Page(s)

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Eric Watt Wiechmann & Patrick J. Day, *Guilt by Association: Trade Associations, Liability, and Protections*, 2001 A.B.A. Sec. Antitrust L. 35 (Winter)................................ 14, 15

INTEREST OF *AMICUS CURIAE*[1]

The American Society of Association Executives ("ASAE") is a membership organization of more than 49,000 members representing more than 1,750 organizations. Its members manage leading trade associations, individual membership societies, and voluntary organizations across the United States and in roughly 50 countries around the world. Individuals and entities that maintain memberships in the organizations represented by ASAE number in the millions.

ASAE's mission is to provide resources, education, ideas, and advocacy to enhance the power and performance of the association community. ASAE is a leading voice on the value of associations and the resources they can bring to bear on society's most pressing problems. To that end, ASAE has participated as an *amicus* in this Court and other courts in cases implicating the conduct of associations, *see, e.g.*, *Visa, Inc. et al.* v. *Osborn*, 137 S. Ct. 289 (2016); *Cal. Dental Ass'n* v. *FTC*, 526 U.S. 756 (1999), and is highly interested in cases that affect the legal rules governing associations and their members.

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[1] Pursuant to Rule 37, counsel for *amicus curiae* affirm that all parties were timely notified of the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Second Circuit concluded that more than 200 organizations, which comprise the Fédération Internationale de Football Association ("FIFA"), engaged in "concerted action" for purposes of Section 1 of the Sherman Act merely because they agreed, upon joining FIFA, to adhere to its rules and policies. *Relevent Sports, LLC* v. *United States Soccer Federation*, 61 F.4th 299, 303 (2d Cir. 2023). In so doing, it dialed back critical limits on the pleading requirements for a Sherman Act conspiracy, put a target on the backs of the many individuals and organizations who elect to participate in associations every year, and deepened a circuit conflict. This Court and others have long recognized that associations can be "beneficial [both] to … industry and to consumers," *Maple Flooring Mfrs.' Ass'n* v. *United States*, 268 U.S. 563, 566 (1925), and rejected the notion that associations are, by definition, anti-competitive conspiracies, *Consol. Metal Prods., Inc.* v. *Am. Petroleum Inst.*, 846 F.2d 284, 293-294 (5th Cir. 1988). According to the court of appeals, however, a plaintiff can plausibly allege that an association's members have engaged in concerted action merely because they act like members of an association; that is, merely because they join an association and agree to be bound by the association's rules. That decision encourages plaintiffs to label *any* association a conspiracy and tells them how easily they can avoid a motion to dismiss in the process.

That is a profoundly troubling result. Associations are everywhere, and "the contributions made by trade, professional, philanthropic, and other nonprofit membership organizations to [the country's] economy, government, and society have been enormously important." Jerald A. Jacobs, *Association Law*

Handbook ix (6th ed. 2018). They provide continuing adult education, petition governments, inform the public, engage in joint research, develop industry standards, certify professionals, accredit institutions, and conduct many other invaluable and procompetitive activities. *Id.* The notion that an individual or entity can be exposed to potential liability for doing nothing more than agreeing to participate with peers in an association risks chilling members' interest in taking part in these groups and imperils the social benefits that flow from the work of these organizations. ASAE has a strong interest in seeking to ensure that such dire consequences do not come to pass.

This Court's review of the Second Circuit's decision is manifestly warranted: the decision conflicts with holdings of several other courts of appeals; it is wrong; and it resolves an important issue in a manner that threatens to chill the socially beneficial activities of associations. Absent this Court's intervention, the risk of being improperly labeled a conspirator, and the protracted litigation that comes along with such an allegation, is now much greater for the members of countless associations across the country.

ARGUMENT

I. The Decision Below Splits Starkly with the Decisions of Other Courts of Appeals and of This Court.

1. Section 1 of the Sherman Act provides that "[e]very contract, combination …, or conspiracy, in restraint of trade [is] illegal." 15 U.S.C. § 1. This Court has "not taken a literal approach to this language, however." *Texaco Inc.* v. *Dagher*, 547 U.S. 1, 5 (2006); *see also Am. Needle, Inc.* v. *NFL*, 560 U.S. 183, 189 (2010) ("[E]ven though, 'read literally,'

§ 1 would address 'the entire body of private contract,' that is not what the statute means" (citation omitted)). Rather, it has understood the Act to draw a "basic distinction between concerted and independent action," the latter of which "is not proscribed." *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984).

With respect to concerted action, the Act has long been understood not to deem every instance in which entities come together to promote a common purpose a suspect conspiracy. Like the word "conspiracy" itself, the phrase "*concerted* action" denotes purpose—presumably an untoward one—rather than mere collective action. *See, e.g.*, *Black's Law Dictionary* 349 (11th ed. 2019) (defining "concerted action" as "action that has been planned, arranged, and agreed on by parties acting together to further some scheme or cause"). And this Court has repeatedly articulated the Sherman Act's reach in this way, requiring that defendants share "a conscious commitment to a common scheme *designed to achieve an unlawful objective*." *Monsanto*, 465 U.S. at 764 (emphasis added) (quoting *Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 637 F.2d 105, 111 (3d Cir. 1980)); *see also Copperweld Corp.* v. *Indep. Tube Corp.*, 467 U.S. 752, 771 (1984) (requiring "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement" (quoting *Am. Tobacco Co.* v. *United States*, 328 U.S. 781, 810 (1946))); *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 595-598 (1986).[2]

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[2] These parameters, of course, apply at *every* stage of litigation. A "conclusory allegation of agreement at some unidentified point" is not good enough from the outset; plaintiffs need factual

In keeping with these precedents, this Court has rejected the notion that a plaintiff can adequately allege that a defendant has "conspire[d] to restrain trade" merely by noting that a defendant "belong[s] to the same trade guild as one of his competitors." *Twombly*, 550 U.S. at 567 n.12. Lower courts as well have routinely held that an association "is not, just because it involves collective action by competitors, a 'walking conspiracy.'" *Wilk* v. *American Medical Ass'n*, 895 F.2d 352, 374 (7th Cir. 1990) (citation omitted); *see also American Dental Ass'n* v. *Cigna Corp.*, 605 F.3d 1283, 1296 (11th Cir. 2010); *Consol. Metal Prods.*, 846 F.2d at 293-294.

2. The decision below threatens to destabilize that established rule.[3] The Second Circuit found that more than two hundred national soccer associations, as well as the numerous professional soccer leagues and teams which make up those associations, entered into a common scheme designed to achieve an unlawful objective. *Relevent Sports, LLC* v. *U.S. Soccer Fed'n, Inc.*, 61 F.4th 299, 303, 309 (2d Cir. 2023). The court of appeals divined the requisite "meeting of minds in an unlawful arrangement," *Monsanto*, 465 U.S. at 764 & n.9, across this disparate group from only two allegations from the plaintiff's Complaint. *First*, these 200 national associations had, when joining FIFA, agreed to abide by its rules and policies and required

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allegations and, ultimately, evidence demonstrating an "*illegal* agreement." *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 556-557 (2007) (emphasis added).

[3] Nothing in the Second Circuit's reasoning cabins this decision to the particular structure or purpose of FIFA. Rather, the rule articulated in the decision below would appear to apply equally to any other association, including trade associations, professional societies, scientific and educational organizations, or others whose rules assertedly have anticompetitive effects.

their members "to agree to comply with th[o]se same rules and policies" in turn. *Relevent Sports*, 61 F.4th at 303; *see also id*. at 309-310. *Second*, in 2018 a "smaller entity" within FIFA, the 37-member "FIFA Council," issued an allegedly anticompetitive rule that impacted the "conduct of [the] members' separate businesses." *Id.* at 303, 309-310; *see also Relevent Sports, LLC* v. *Fédération Internationale de Football Association*, 551 F. Supp. 3d 120, 125 (S.D.N.Y. 2021).

No additional allegation was necessary, the court of appeals concluded, to find that the plaintiff had adequately pled that all of these national associations, and their members, had engaged in concerted action for purposes of Section 1 of the Sherman Act. *Relevent Sports*, 61 F.4th at 310. Indeed, the Second Circuit explicitly rejected the notion that whether these groups had "voted in favor of the [2018] policy or not" had any relevance. *Id*. at 307. And it did not consider whether these 200 national associations' decisions to join FIFA—and thus their agreement to abide by FIFA's rules—predated the allegedly anticompetitive policy.

In essence, therefore, the Second Circuit held that the mere fact that an association has the authority to issue rules or decisions that can bind its members suffices to subject *any* member of that association to, at a minimum, burdensome discovery and the opprobrium that accompanies an accusation that one has violated the antitrust laws, so long as a plaintiff can adequately allege that any policy of an association is anticompetitive and will impact the members' activities. The fact that an association's members may not have assented to that policy, or even been aware of it, does nothing to avert potential liability.

This decision, which would seemingly apply to any manner of association, is breathtaking in its scope. "It

is a rare trade, professional, or similar membership organization or association that has not at some time in its history adopted a business or professional code, code of ethics, or other guide for conduct or practices in the industry, profession, or field represented by the group." Jacobs, *supra*, at 367; John E. Lopatka, *Antitrust and Professional Rules: A Framework for Analysis*, 28 San Diego L. Rev. 301, 307 (1991) ("Professionals tend to form associations. These private associations establish rules that prescribe requirements for initial membership, or eligibility requirements."). Indeed, as this Court has recognized, an association often "must establish and enforce reasonable rules in order to function effectively." *Nw. Wholesale Stationers, Inc.* v. *Pac. Stationery & Printing Co.*, 472 U.S. 284, 296 (1985). Concluding that such self-regulating conduct, in and of itself, can establish that each and every one of an association's members has "conspired" for purposes of Section 1 of the Sherman Act effectively punishes membership in such organizations alone.

This extraordinarily broad interpretation of the Sherman Act's scope breaks sharply with the precedent of other courts of appeal and of this Court.[4]

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[4] In holding that a defendant's agreement to abide by an association's rules satisfies a plaintiff's obligation to allege that an association's members have engaged in "concerted action," the Second Circuit joins the D.C. Circuit in embracing an overly permissive understanding of the pleading requirements set forth in *Twombly*. In *Osborn* v. *Visa Inc.*, the D.C. Circuit concluded that plaintiffs had adequately alleged that Visa and Mastercard had engaged in concerted action because they asserted that Visa and Mastercard had "agreed" to adhere to associations' allegedly anticompetitive rules for ATM access fees and representatives for Visa and Mastercard served on the relevant associations' boards. 797 F.3d 1057, 1065-1067 (D.C. Cir. 2015). Certiorari was

The Ninth Circuit, for example, has rejected the notion that conclusory allegations about certain bank defendants' "knowing[], intentional[] and active[] participat[ion]" in a consortium of banks and credit card companies sufficed to allege a violation of Section 1 of the Sherman Act. *Kendall* v. *Visa U.S.A., Inc.*, 518 F.3d 1042, 1048 (9th Cir. 2008). That the plaintiffs in *Kendall* alleged that the bank defendants both "participat[ed] in the management of … [those] Consortiums" and "adopt[ed]" fee rules set by the consortiums did not alter that conclusion. *Id.* Instead, the Ninth Circuit recognized that a plaintiff cannot evade *Twombly*'s strictures simply by noting that a defendant has acted in a manner consistent with its obligations as a member of an association because such conduct "does not render an association's members automatically liable for antitrust violations committed by the association." *Id*. (reiterating that "participation on [an] association's board of directors is not enough by itself" for liability).[5]

Similarly, in the Third and Fourth Circuits, neither membership in an association that adopts industry standards, *SD3, LLC* v. *Black & Decker (U.S.) Inc.*, 801 F.3d 412, 436-438 (4th Cir. 2015), nor participation in a trade organization that adopts policies to which members allegedly adhere, *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 313, 328-329, 349 (3d Cir. 2010), is sufficient to allege a plausible antitrust

granted in this case but later dismissed because petitioners changed their position at the merits stage.

[5] The Ninth Circuit has since reaffirmed its view that a plaintiff must show that each defendant "actively participated in an individual capacity in [a] scheme" to plausibly allege that a defendant took part in a "contract, combination or conspiracy." *SmileDirectClub, LLC* v. *Tippins*, 31 F.4th 1110, 1118-1120 (9th Cir. 2022) (citations omitted).

conspiracy. To the contrary, the Fourth Circuit has declined to find evidence of an "alleged illegal agreement" even where members of a standard-setting organization voted in favor of an allegedly anticompetitive action. *SD3*, 801 F.3d at 437.

The Second Circuit has now broken sharply with the Third, Fourth, and Ninth Circuit holdings that association members do not sign on to a Sherman Act conspiracy the minute they join an association and agree to abide by its rules. And associations and their members sued in the Second Circuit now face potentially ruinous liability for doing little more than agreeing to participate in an association. *See supra* at 7 (describing the ubiquity of rules governing conduct of associations' members).

That should not be the law. A Sherman Act conspiracy involves "a conscious commitment to a common scheme *designed to achieve an unlawful objective*." *Monsanto*, 465 U.S. at 764 (emphasis added, citation omitted)); *see also Copperweld*, 467 U.S. at 771. Yet the Second Circuit's reasoning ignores that facet of concerted action entirely.[6] Agreeing to

[6] The court of appeals drew on two of this Court's precedents, *Anderson* v. *Shipowners' Association of the Pacific Coast*, 272 U.S. 359 (1926), and *Associated Press* v. *United States*, 326 U.S. 1 (1945), in support of its conclusion that the promulgation of an allegedly anticompetitive rule, in conjunction with the "members' 'surrender[] … to the control of the association,' sufficiently demonstrate[d] concerted action." *Relevent Sports*, 61 F.4th at 309 (citation omitted). As Petitioner explains, that reliance was misplaced. *Associated Press* involved a situation in which all of the defendants, in joining an association, had "assented to [an allegedly anticompetitive] rule … *as a condition of joining the association*." Pet. at 27 (emphasis in original). *Anderson*, for its part, predates *Monsanto* and *Twombly* by decades, and should not be read to pare back the stringent pleading requirements for

join an association—years before the advent of any allegedly anticompetitive rule or policy promulgated by that association—cannot possibly be evidence of a "meeting of the minds" or "common scheme" with respect to an unlawful objective. *Monsanto*, 465 U.S. at 764 n.9. Instead, at most it is evidence of the kind of "consciously parallel action" that courts routinely dismiss as inadequate to establish conspiracy. *Consol. Metal Prods.*, 846 F.2d at 294 n.30; *see Kendall*, 518 F.3d at 1048 (allegations that defendants adopted fees set by an association, even where defendants participated in the management of that association, failed "to plead any evidentiary facts beyond parallel conduct"); *SD3*, 801 F.3d at 437 (votes by members of standard setting organization were "parallel conduct," which is "equally consistent with legal behavior"). The decision below, in holding otherwise, fundamentally weakens the pleading standard laid out by this Court in *Twombly*, which rejected the notion that a complaint premised on "descriptions of parallel conduct and not on any independent allegation of actual agreement among [the defendants]" could sustain a Section 1 claim.[7] 550 U.S. at 564.

Section 1 claims that this Court carefully and deliberately crafted in its subsequent decisions.

[7] It is no response to claim that the national associations' agreements to abide by FIFA's rules is itself evidence of the requisite "agreement among" the defendants. This Court requires any such "agreement" to be tethered to the unlawful objective at issue—here, the 2018 policy. *See Monsanto*, 465 U.S. at 764 (requiring "a conscious commitment to a common scheme designed to achieve an unlawful objective" (citation omitted)). To find otherwise would invite perverse results, as plaintiffs could attempt to argue that *any* agreement between defendants, no matter how tenuously linked to their subsequent allegedly anticompetitive conduct, would suffice to show the existence of "concerted action."

This Court's review is plainly warranted because the decision below cannot be squared with this Court's precedent, and it conflicts with the decisions of many other courts of appeals.

II. The Sweeping Rationale of the Second Circuit's Decision Threatens Associations and Their Members.

Review is also warranted because the Second Circuit's decision creates intolerable risks for associations and their members. The Second Circuit's decision is in no way limited to FIFA's particular structure or purpose. Rather, the principle it adopted—that an association's members may be liable under the Sherman Act for doing little more than agreeing to participate in an association and abide by its rules, long before any allegedly anticompetitive rule is promulgated—would sweep in the full panoply of associations. There are many reasons why that decision promises an unstable and harmful state of affairs.

It is well-established that associations are "beneficial to the industry and to consumers." *Maple Flooring Mfrs.' Ass'n*, 268 U.S. at 566; *see, e.g.*, *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U.S. 492, 501 (1988) ("When … private associations promulgate safety standards based on the merits of objective expert judgments and through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition, those private standards can have significant procompetitive advantages.") (internal citation omitted). According to the Federal Trade Commission's own guidance, for example, "[m]ost trade association activities are procompetitive or competitively neutral." FTC, *Spotlight on Trade*

Associations, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-competitors/spotlight-trade (last viewed August 25, 2023). Courts of appeals have likewise recognized the procompetitive benefits of, for instance, research joint ventures, *e.g.*, *Princo Corp.* v. *ITC*, 616 F.3d 1318, 1335 (Fed. Cir. 2010) (en banc), and standard-setting associations, *e.g.*, *Golden Bridge Tech., Inc.* v. *Motorola, Inc.*, 547 F.3d 266, 273 (5th Cir. 2008) ("Potential procompetitive benefits of standards promoting technological compatibility include facilitating economies of scale in the market for complementary goods, reducing consumer search costs, and increasing economic efficiency.").

Associations' benefits, moreover, are not confined to the realm of commerce. Associations seek to influence government policy and action, to guide industry, to educate, and to collaborate on important research, among other objectives. Jacobs, *supra*, at ix. Indeed, given the complexities of the problems facing society today, "companies are increasingly considering collaboration as a means of solving intractable global problems." Inara Scott, *Antitrust and Socially Responsible Collaboration: A Chilling Combination?*, 53 Am. Bus. L.J. 97, 97 (2016). Associations or association-like structures that would be subject to the standard adopted by the court of appeals frequently are the vehicle through which such aims are sought to be—and are—achieved. *See id.* at 104-106 (discussing examples of socially responsible collaborations, and noting that "[p]erhaps the most common type of collaborative partnership is one in which various organizations join together to create standards, certifications, or codes of conduct for services and production of goods"); *id.* at 106 (discussing industry codes of conduct, including those to promote safety and

human rights and those to prevent environmental harm).

These and other intangible benefits that flow from membership and participation in associations of all kinds are among the reasons why ASAE has tens of thousands of members. After all, much of the time in business, as in all walks of life, "many minds [are] better than one." *SD3*, 801 F.3d at 455 (Wilkinson, J., concurring in part and dissenting in part); *see also Maple Flooring Mfrs.' Ass'n*, 268 U.S. at 583 (rejecting conspiracy claims against trade association and explaining that "[i]t was not the purpose or the intent of the Sherman Anti-Trust Law to inhibit the intelligent conduct of business operations").

The approach to Sherman Act liability adopted by the court of appeals could place these social goods in jeopardy. Associations routinely develop codes of conduct and other business or professional conduct-regulating rules, and enterprising antitrust plaintiffs would surely have no trouble pointing to such rules and claiming that they improperly affect prices or competition. Indeed, the Second Circuit's decision, if permitted to stand, would invite such lawsuits. In the process, associations across the country would face the greatly increased risk of being called a conspiracy and the protracted litigation and significant settlement pressures that come along with such an allegation.

These are precisely the sorts of consequences that the plausibility standard this Court first articulated in the antitrust context were supposed to prevent. *See Twombly*, 550 U.S. at 558-559 (discussing settlement pressures and discovery costs); *Kendall*, 518 F.3d at 1047 ("[B]ecause discovery in antitrust cases frequently causes substantial expenditures [it] gives the plaintiff the opportunity to extort large settlements even where he does not have much of a

case."). In *Twombly,* this Court emphasized the importance of ensuring an appropriately stringent standard when reviewing allegations that a defendant has violated Section 1 of the Sherman Act. For while it "is one thing to be cautious before dismissing an antitrust complaint in advance of discovery," it is "quite another to forget that proceeding to antitrust discovery can be expensive." *Twombly*, 550 U.S. at 558; *see also Ass'n of Am. Physicians & Surgeons, Inc.* v. *Am. Bd. of Med. Specialties*, 15 F.4th 831, 835 (7th Cir. 2021) (emphasizing the fact that "modern antitrust litigation is expensive"); *Mayor & City Council of Baltimore, Md.* v. *Citigroup, Inc.*, 709 F.3d 129, 137 (2d Cir. 2013) (same).

By relaxing the pleading requirements for a Sherman Act claim, the Second Circuit's decision threatens to undermine the bulwark against unwarranted antitrust suits, and their attendant expenses, that *Twombly* erected. *See Starr* v. *Baca*, 652 F.3d 1202, 1213 (9th Cir. 2011) (noting that the "Court made clear in *Twombly* that it was concerned that lenient pleading standards facilitated abusive antitrust litigation"). The risks associated with this sea change are particularly acute for associations and their members because plaintiffs remain invested in "targeting trade associations and the relationship between the association and its constituent members." Eric Watt Wiechmann & Patrick J. Day, *Guilt by Association: Trade Associations, Liability, and Protections*, 2001 A.B.A. Sec. Antitrust L. 35, 35 (Winter) (calling the degree of such attacks "unprecedented"). That is because a plaintiff's targeted attack on an association (i) is minimally burdensome because associations and their members—unlike many potential antitrust defendants—certainly have agreed to *something*, and

(ii) increases the potential number of pockets that may be forced into the intolerable expense of discovery. *See, e.g.*, Hebert G. Smith II & John B. Williams III, *Assessing a Trade Association's Tort Liability Risk*, N.Y. Soc'y of Ass'n Executives (Apr. 2011), *available at* https://www.nysaenet.org/resources1/inviewnewsletter/archives/20111/april2011/inview42011_article1 (noting that plaintiffs' attorneys "have taken aim at trade associations" "[b]ecause of the possibility of collecting from an additional defendant, and one with seemingly deep pockets"); *see generally Twombly*, 550 U.S. at 558-559 (explaining the discovery costs and settlement pressures that accompany lax enforcement of motion-to-dismiss standards).

Beyond the threat of litigation costs, which are significant for any antitrust defendant, associations face unique disadvantages in attempting to vindicate themselves in antitrust suits that survive dismissal. For example, for professional associations the bad publicity associated with antitrust claims can redound across the profession in a manner that creates far greater pressure to settle than would be the case for a for-profit entity. These threats against associations "will push [them] to settle even anemic cases" early. *Twombly*, 550 U.S. at 559. In turn, the "potential for expanded liability may… have a significantly chilling effect on the free flow of information between members and their trade association, undermining many of the benefits of participation." *Guilt by Association*, 2001 A.B.A. Sec. Antitrust L. at 35; *cf. United States* v. *U.S. Gypsum Co.*, 438 U.S. 422, 441 (1978) ("[S]alutary and procompetitive conduct … might be shunned by businessmen who chose to be excessively cautious in the face of uncertainty."); *Matsushita*, 475 U.S. at 593 ("[I]nfer[ring] conspiracies when such inferences are implausible… often … deter[s] procompetitive

conduct."). Such an outcome would be detrimental not only to associations but to the public at large.

The Court should grant certiorari to bring the Second Circuit back into line with precedent from other courts of appeals and this Court.

CONCLUSION

For the foregoing reasons, and those stated by Petitioner, the Court should grant the petition for certiorari and reverse the judgment of the court of appeals.

Respectfully submitted,

JERALD A. JACOBS
ALVIN DUNN
PILLSBURY WINTHROP SHAW PITTMAN LLP
1200 Seventeenth Street NW
Washington, DC 20036
(202) 663-8000

DONALD B. VERRILLI, JR.
Counsel of Record
LAUREN E. ROSS
MUNGER, TOLLES & OLSON LLP
601 Massachusetts Ave. NW
Suite 500E
Washington, DC 20001
(202) 220-1100
donald.verrilli@mto.com

Counsel for Amicus Curiae

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