No. 15-942

IN THE

Supreme Court of the United States

BLACK & DECKER (U.S.), INC., *et al.*,

Petitioners,

v.

SD3, LLC AND SAWSTOP LLC,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Fourth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION, INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL, AND ALLIED EDUCATIONAL FOUNDATION, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

CORY L. ANDREWS
Counsel of Record
MARK S. CHENOWETH
WASHINGTON LEGAL FOUNDATION
2009 Mass. Ave. NW
Washington, DC 20036
(202) 588-0302
candrews@wlf.org

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QUESTION PRESENTED

Amici curiae address the following question only:

To survive summary judgment under *Matsushita Electric Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986), a plaintiff alleging an anticompetitive conspiracy in violation of § 1 of the Sherman Act, 15 U.S.C. § 1, must present "evidence 'that tends to exclude the possibility'" of independent action. At the pleading stage, must an antitrust plaintiff similarly plead facts that tend to exclude an innocent explanation of the conduct for the complaint's allegations to be plausible under *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007)?

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INTERESTS OF *AMICI CURIAE*[1]

Washington Legal Foundation ("WLF") is a public-interest law firm and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, a limited and accountable government, and the rule of law. To that end, WLF regularly appears as *amicus curiae* before this Court to address the proper scope of federal antitrust laws. *See, e.g., Apple Inc. v. United States*, No. 15-565 (S. Ct., petition pending); *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013). WLF has also been at the forefront of public-interest legal groups recognizing the need for plausible pleading standards to reduce the burdensome costs of frivolous litigation. *See Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

Allied Educational Foundation (AEF) is a nonprofit charitable foundation based in Tenafly, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

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[1] Pursuant to Supreme Court Rule 37(6), *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than ten days before the due date, counsel for *amici* provided counsel for all parties with notice of intent to file this brief. All parties to this dispute have consented to the filing of this brief.

The International Association of Defense Counsel (IADC) is an association of corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system.

Amici believe that the object of federal antitrust law should be to promote free-market competition and thereby provide consumers with better goods and services at lower prices. *Amici* are concerned that the decision below, by requiring antitrust defendants to litigate § 1 conspiracy claims in the absence of any factual allegations that plausibly demonstrate a "meeting of the minds," creates enormous uncertainty for the business community. For the reasons that follow, *amici* join with petitioners in urging this Court to grant certiorari.

STATEMENT OF THE CASE

Petitioners include major manufacturers and suppliers of table saws. Respondents SD3, LLC and its subsidiary SawStop, LLC (collectively "SawStop") are the owners of an "active injury mitigation technology" ("AIMT") that allegedly "detects contact between a person and the [table-saw] blade and then stops and retracts the blade to mitigate injury." Pet. App. 5a. Patent attorney Stephen Gass—Saw Stop's founder and president—developed AIMT in 1999 and has since acquired over 100 related patents for its implementation.

In 2002, having failed to license AIMT to any table-saw manufacturer, Gass proposed a safety standard revision to Underwriters Laboratories ("UL"), which provides safety-related certifications for table saws. Pet. App. 9a, 87a. The proposal, which UL's Standards Technical Panel ultimately rejected, would have mandated AIMT for all UL-certified table saws. *Ibid.*

Unable to mandate AIMT for all table saws through private channels, Gass next turned to the federal government. In 2003, he petitioned the Consumer Product Safety Commission ("CPSC") to impose mandatory table-saw performance standards that could only be satisfied by industry-wide adoption of AIMT. *Id.* at 10a, 87a. After inviting and receiving public comment on the issues raised by the petition, 68 Fed. Reg. 52,753 (Sept. 5, 2003), the CPSC directed its staff to draft an advance notice of proposed rulemaking ("ANPRM"). In 2011, the CPSC issued the ANPRM and has since extended and reopened the comment period. 77 Fed. Reg. 8,751 (Feb. 15, 2012); 76 Fed. Reg. 75,504 (Dec. 2, 2011). To date, the CPSC has not issued a final rule.

In 2014, after waiting to no avail for more than a decade for the CPSC to effectively provide it with a monopoly by imposing AIMT on the table-saw industry, SawStop sued 22 major table-saw manufacturers for allegedly conspiring to restrain trade in violation of § 1 of the Sherman Antitrust Act, 15 U.S.C. § 1. The operative complaint claims that the defendants, seeking to avoid increased product liability exposure if AIMT became commercially available, secretly agreed at an

October 2001 meeting of the Power Tool Institute ("PTI") to refuse to license or implement AIMT.

Relying on this Court's holding in *Bell Atlantic Corp. v. Twombly*, 550 U.S. at 544, the district court dismissed the suit for failure to allege "either direct or circumstantial evidence 'that tends to exclude the possibility that the alleged conspirators acted independently.'" Pet. App. 89a (quoting *Matsushita v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986)). In the district court's view, SawStop's conspiracy allegations were "belied by [its] negotiating history with varying Defendants," some of whom negotiated with SawStop "well after the alleged group boycott began in October 2001." Pet. App. 89a-90a. For example, the complaint alleged that SawStop's negotiations with Bosch "ceased in September 2001—the month before the alleged conspiracy began"—but then "resumed several years later." *Id.* at 91a. Similarly, the complaint alleged that in 2002 both Black & Decker and Ryobi proposed licensing terms to SawStop for AIMT—at the same time the complaint alleges both of those firms were already "part of a conspiracy to refuse to deal with [SawStop] regarding the very same technology." *Id.* at 90a.

Moreover, SawStop's complaint also conceded that certain feasibility problems remained before AIMT became commercially available, and that some manufacturers sought "to explore alternatives before adopting untested technology with an unknown demand." *Id.* at 92a-93a. Accordingly, the district court ultimately concluded that SawStop's complaint failed to allege "why the failure of some Defendants to reach a licensing agreement with [SawStop] is not

simply the natural, unilateral reaction to a technology with uncertain commercial viability and safety," *id.* at 93a, rather than a refusal to deal.

On appeal, a divided panel of the Fourth Circuit reversed. While acknowledging that *Twombly* requires antitrust plaintiffs to plead more than mere parallel conduct, the majority nonetheless held that the district court erred by purportedly "confus[ing] the motion-to-dismiss standard with the standard for summary judgment" when it "dismissed certain claims because the facts alleged did not 'tend[] to exclude independent action.'" *Id.* at 21a. Relying on authorities from the Second and Sixth Circuits, the panel majority accused the district court of improperly "import[ing] the summary judgment standard [from *Matsushita*] into the motion-to-dismiss stage." *Id.* at 19a.

In the majority's view, the operative complaint satisfied *Twombly*'s heightened pleading standard because it alleged "the particular time, place, and manner in which the boycott initially formed," *i.e.*, a separate meeting at PTI's October 2001 annual conference. *Id.* at 28a. The court also viewed the complaint's bald allegations of defendants' "fear of product liability exposure" and "means and opportunity to conspire" as plausibly demonstrating a "meeting of the minds" under *Twombly*. *Id.* at 31a-33a. "[D]emanding more," in the panel majority's view, "would compel an antitrust plaintiff to plead evidence." *Id.* at 31a.

Judge Wilkinson dissented at length. Emphasizing the majority's refusal to follow the Supreme Court's decision in *Bell Atlantic Corp. v.*

Twombly, he criticized the panel's holding for making "mere communication the touchstone of liability" under the Sherman Act. *Id.* at 56a. "The fact that Sherman Act conspiracies in restraint of trade do assuredly continue to exist," he cautioned, "does not mean that we should rush too quickly to drape innocent commercial activity in sinister garb." *Id.* at 57a.

Observing that only four of the 22 named defendants are even mentioned in the operative complaint's allegations of "parallel" behavior, Judge Wilkinson took issue with the majority's "attempt to impose a presumption of guilt on antitrust defendants who now must bear the burden of proving a negative when the burden properly lies with the party bringing the claim." *Id.* at 59a. Although *Twombly* "could not be more clear" in holding that plausibility requires "more than a sheer possibility that a defendant acted unlawfully," the majority effectively held "that the full course of discovery is the proper mechanism for winnowing out meritless claims." *Id.* at 60a, 62a. In his view, the complaint's "conclusory assertions that defendants agreed to an industry-wide 'boycott' of [SawStop's] product are fully consistent with, and most plausibly reflect, independent and legitimate business decisions." *Id.* at 61a.

SUMMARY OF ARGUMENT

The petition raises a question of exceptional importance: Whether an antitrust plaintiff must plead facts that tend to exclude an innocent explanation of defendants' parallel conduct in order to state a plausible antitrust claim under § 1 of the Sherman Act. The Fourth Circuit held that an antitrust complaint can withstand a motion to dismiss so long as it contains allegations—no matter how conclusory—that are consistent with an anticompetitive conspiracy. That holding does violence to this Court's decision in *Bell Atlantic Corp. v. Twombly*, which makes clear that where an equally plausible "alternative explanation" other than a conspiracy exists for the facts alleged, it is error to allow the complaint to go forward merely based on an inference that an unlawful agreement existed. Review is thus warranted to resolve the conflict between *Twombly* and the decision below.

Review is further warranted to address the enormous uncertainty the panel's decision creates—not only for the power-tool industry, but for the larger business community as a whole. Existing and potential antitrust defendants simply cannot operate efficiently without authoritative guidance as to what federal law requires an antitrust plaintiff to plead before it may advance to costly discovery. In the absence of this Court's review, such lingering uncertainty will have a chilling effect on the larger economy, deterring perfectly law-abiding firms from engaging in procompetitive conduct that could expose them to unfounded but costly litigation.

The decision below also undermines the free market by incentivizing unscrupulous competitors to use federal antitrust law as a means for accomplishing anticompetitive ends. As the record below makes clear, this lawsuit is merely SawStop's latest attempt to effectively monopolize the table-saw market—to use antitrust law not as a shield of protection but rather as a sword for attacking highly competitive firms with highly successful products. Review is thus needed to address not only the unfairness visited upon the individual defendants in this case, but to cabin the larger disruption that will befall the nation's free-enterprise system if a firm's market failure is allowed to serve as the basis for litigation success.

Review is also warranted because of the burdensome, unjustified expense that petitioners will incur if they are forced to defend this lawsuit beyond the pleading stage. As this Court has long recognized, the important gatekeeping function of Rule 12(b)(6) is particularly salient in the antitrust context, where allowing legally speculative and untenable claims to proceed through the discovery phase imposes extraordinary, unjustified costs on defendants. To eliminate the perverse incentives that the panel opinion creates for parties to bring speculative antitrust claims in the hope of extracting a settlement, this Court should grant review.

The interests of fairness, predictability, and *stare decisis* were all injured in this case. *Amici* join with petitioners in urging this Court to grant the petition for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH *TWOMBLY* BY PERMITTING § 1 ANTITRUST CLAIMS TO PROCEED TO DISCOVERY BASED ON MERE CONCLUSORY ALLEGATIONS OF WRONGDOING

As the petition shows, review is warranted to resolve the conflict that has developed among the federal courts of appeal regarding the level of factual specificity antitrust plaintiffs must plead to "set forth a claim for relief" under Rule 8(a) and thereby defeat a motion to dismiss under Rule 12(b)(6). Petitioners have capably demonstrated that the decision below conflicts with the decisions of at least three other federal appeals courts—the Third, Ninth, and Eleventh Circuits—as to whether an antitrust plaintiff claiming violation of § 1 of the Sherman Act must plead facts that tend to exclude innocent explanations for the allegedly anticompetitive conduct. *See In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300 (3d Cir. 2010); *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042 (9th Cir. 2008); *Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327 (11th Cir. 2010). Rather than repeat that discussion here, *amici* write separately to point out how the decision below also directly conflicts with the decision of this Court in *Twombly*.

A. The Complaint in This Case Is Insufficient Under *Twombly*

In *Twombly*, this Court clarified that although a plaintiff need not include "detailed factual allegations" in a complaint, "more than labels and

conclusions" are necessary to survive a motion to dismiss; "a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. To "enter the realm of plausible liability," an allegation must cross two lines: the line between "the conclusory and the factual," and the line between "the factually neutral and the factually suggestive." *Id.* at 557 n.5. This point was reinforced in *Ashcroft v. Iqbal*, 556 U.S. at 678, which explained that plausibility requires "more than a sheer possibility that a defendant acted unlawfully."

SawStop's § 1 claim in this case is virtually indistinguishable from the § 1 claim that this Court roundly rejected in *Twombly*. There, the Court considered the sufficiency of a complaint alleging that several defendants violated § 1 of the Sherman Act by conspiring to oppose their rivals' entry into the market and to protect one another's geographic territories. In deciding that the plaintiffs' complaint did not satisfy the pleading threshold for such claims, the Court began its analysis by noting that liability under § 1 requires proof of "a contract, combination, or conspiracy." 550 U.S. at 553. The Court emphasized that because even "conscious parallelism"—"a common reaction of 'firms in a concentrated market [that] recogniz[e] their shared economic interests and their interdependence with respect to price and output decisions'"—is not in itself unlawful, a "bare assertion of conspiracy" will not survive a motion to dismiss. *Id.* at 553-56 (quoting *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993)).

Twombly ultimately concluded that the central fact asserted by the plaintiffs to support their

conspiracy allegation—that the defendants had engaged in parallel conduct by failing to initiate competition in their rivals' geographic service areas—did not create "plausible grounds to infer [such] an agreement." 550 U.S. at 556. Specifically, the Court held that where an equally plausible "alternative explanation" exists for the facts alleged other than a conspiracy, it is error to allow the complaint to go forward merely based on the notion that those facts permit an inference that an unlawful agreement existed. *Id.* at 567.

Here, the Fourth Circuit was able to find that SawStop satisfied *Twombly*'s "plausible grounds" standard only by stripping that standard of all its meaning. The panel majority viewed the complaint's bald allegation of a separate meeting at PTI's October 2001 annual conference as plausibly demonstrating the "means and opportunity to conspire." Pet. App. 33a. But merely alleging the "means and opportunity to conspire" does not cross the line between "the conclusory and the factual" or between "the factually neutral and the factually suggestive." *Twombly*, 550 U.S. at 557 n.5. As Judge Wilkinson pointed out in dissent, "[t]he majority rightly observes that agreement is the crux of an antitrust claim, but it has made mere communication the touchstone of liability." Pet. App. 56a.

Nonetheless, the Fourth Circuit effectively held that an antitrust complaint is sufficient to withstand a motion to dismiss so long as allegations in the complaint—no matter how conclusory—are consistent with an anticompetitive conspiracy. That holding does violence to this Court's decision in

Twombly, which makes clear that the mere "possibility" that conclusory allegations contained in an antitrust complaint are true is not enough. While it is theoretically possible that petitioners convened a secret meeting at an October 2001 PTI conference where they agreed to refuse to license or implement AIMT, SawStop has included *no facts* in its complaint to suggest that such a scenario is even remotely plausible.

Indeed, a number of facts alleged in the complaint undercut SawStop's conclusory assertion of an agreement. For example, SawStop alleges that Ryobi signed a binding offer to SawStop to license AIMT in January 2002—three months *after* the alleged conspiracy was hatched. *See* First Amend. Compl. ("FAC") ¶87. And even though Ryobi offered royalty payments starting at 3% (with an escalator potential up to 8%), SawStop refused to accept the offer due to an alleged "minor ambiguity" in wording. *Ibid.* Likewise, SawStop alleges that Black & Decker offered to license AIMT from SawStop for a 1% royalty payment in April 2002—six months *after* the alleged refusal-to-deal conspiracy. *Id.* at 89. The complaint also alleges that Bosch abandoned negotiations with SawStop in September 2001—the month *before* the allegedly conspiratorial meeting supposedly took place. *Ibid.* Neither any nor all of these claims supports an October 2001 conspiracy to boycott AIMT.

The panel majority also credited the complaint's bald allegations of petitioners' fear of increased product liability exposure as plausibly demonstrating a "meeting of the minds" under *Twombly*. *Id.* at 31a-33a. But that conclusion misses

the mark. The issue is not whether petitioners harbored anticompetitive motives when they chose not to license or implement AIMT; rather, the issue is whether they *agreed* to coordinated actions *at all* with respect to AIMT. As this Court cautioned in *Twombly*, "if alleging parallel decisions to resist competition were enough to imply an antitrust conspiracy, pleading a § 1 violation against almost any group of competing businesses would be a sure thing." *Twombly*, 550 U.S. at 566. In the absence of any factual allegations rendering it more than a theoretical possibility that petitioners conspired in their otherwise perfectly reasonable responses to AIMT, the complaint fails to state a claim, and *Twombly* requires its dismissal.

B. *Twombly* Considered and Rejected the Very Rationale Adopted by the Panel Below

In reversing the district court, the Fourth Circuit repeatedly accused the district court of "confus[ing] the motion-to-dismiss standard with the standard for summary judgment" when it dismissed SawStop's complaint for failing to allege facts that exclude the possibility that petitioners acted independently. Pet. App. 21a; *see also id.* at 19a (criticizing the district court for improperly "import[ing] the summary judgment standard [from *Matsushita*] into the motion-to-dismiss stage"). But *Twombly*, which concluded that "there is no reason to infer [from the complaint] that the [defendants] had agreed among themselves to do what was only natural anyway," 550 U.S. at 566, considered and rejected that very argument.

Indeed, the plaintiffs in *Twombly* urged the Court to reject what it viewed as petitioners' "radical proposal" to "apply *Matsushita* on a Rule 12(b)(6) motion" as "utterly inconsistent with the Court's precedents." *Twombly*, Br. for Resp'ts at 26. Claiming that this Court's precedents in *Swierkiewicz v. Sorema, N.A.,* 534 U.S. 506 (2002), and *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993), "foreclose the same *Matsushita* standard that Petitioners urge be adopted in antitrust conspiracy cases," the plaintiffs in *Twombly* argued that "to apply *Matsushita* standards on a motion to dismiss would diametrically reverse the established rule that the plaintiff gets the benefit of such inferences on a motion to dismiss." *Twombly*, Br. for Resp'ts at 28.

The Court specifically acknowledged but rejected the plaintiffs' suggestion that "transpos[ing] 'plus factor' summary judgment analysis woodenly into a rigid pleading standard … would be unwise." 550 U.S. at 569. Finding the complaint's allegations inadequate, the Court emphasized that "the inadequacy of showing parallel conduct or interdependence, without more, mirrors the ambiguity of the behavior: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market." *Id.* at 554. For that very reason, the Court explained, "we have previously hedged against false inferences from identical behavior *at a number of points in the trial sequence*." *Ibid* (emphasis added).

After citing *Matsushita* as an example of how the Court's antitrust jurisprudence hedges against

false inferences at each stage of the litigation, the *Twombly* Court went on to explain that "[a]sking for *plausible* grounds to infer an agreement" at the pleading stage is necessary to "raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id.* at 556. It was therefore "self-evident" to the Court that "the problem of discovery abuse cannot be solved by 'careful scrutiny of evidence at the summary judgment stage.'" *Twombly*, 475 U.S. at 559 (citations omitted).

In glossing over *Twombly*'s express reliance on *Matsushita*, the panel majority made too much of the Court's passing observation that "the motion-to-dismiss stage concerns an 'antecedent question.'" Pet. App. 19a. But an *antecedent* question is not an *unrelated* question—rather, just the opposite. Whether a plaintiff has stated a plausible claim under antitrust law hinges entirely on what antitrust law requires that plaintiff *to prove* in order to prevail on the merits. Antitrust law "limits the range of permissible inferences from ambiguous evidence in a § 1 case." *Matsushita*, 475 U.S. at 588. If an antitrust plaintiff cannot plead facts that, if accepted as true, would tend to exclude the possibility that the alleged conspirators acted independently, then it cannot plausibly allege a § 1 violation.

In other words, the very fact that parallel conduct can provide circumstantial evidence of an agreement—yet absent an agreement such conduct is innocuous and often efficient—calls for a careful parsing of a § 1 complaint. *See, e.g., Ins. Brokerage*, 618 F.3d at 322 ("We think *Twombly* aligns the pleading standard with the summary judgment

standard in at least one important way: Plaintiffs relying on circumstantial evidence of an agreement must make a showing at both stages (with well-pled allegations and evidence of record, respectively) of 'something more than merely parallel behavior,' something 'plausibly suggest[ive of] (not merely consistent with) agreement.'")

If anything, the panel majority's rationale echoes the rejected reasoning of the *dissent* in *Twombly*. *See Twombly*, 550 U.S. at 586 (Stevens, J., dissenting) ("Everything today's majority says would therefore make perfect sense if it were ruling on a Rule 56 motion for summary judgment and the evidence included nothing more than the Court has described."); ("[I]t should go without saying … that a heightened production burden at the summary judgment stage does not translate into a heightened pleading burden at the complaint stage."). As Judge Wilkinson acutely observed in his dissent to the panel majority below, "[t]he majority's approach to *Twombly* tells an old intermediate appellate story. The majority alights on a minor motif of that Supreme Court decision, while leaving its main point wholly unobserved." Pet. App. 61.

In sum, nothing supports the panel majority's curious insistence that the same substantive antitrust standard that governs every stage of the litigation (including summary judgment and trial) has no bearing on whether a complaint plausibly alleges a conspiracy under § 1 of the Sherman Act. To correct the Fourth Circuit's misguided view and provide much needed clarity to the lower courts in light of *Twombly*, this Court should grant the petition.

II. REVIEW IS WARRANTED BECAUSE THE QUESTION PRESENTED IS OF CRITICAL IMPORTANCE FOR THE U.S. ECONOMY

A. American Businesses Cannot Operate Efficiently Absent Clear Threshold Pleading Requirements for § 1 Claims

Whether an antitrust plaintiff must plead facts that tend to exclude an innocent explanation for defendants' parallel conduct in order to state a plausible conspiracy claim is of critical immediate importance, not only to the power-tool industry, but also to the wider business community. Because it is contrary not only to this Court's holding in *Twombly* but also to the decisions of three other federal courts of appeal, the decision below creates enormous uncertainty for market competitors trying to assess their potential exposure when defending § 1 claims under the Sherman Act.

Existing and potential antitrust defendants simply cannot operate efficiently without authoritative guidance as to what federal law requires a plaintiff to plead before it will be permitted to advance to burdensome discovery. In the wake of the Fourth Circuit's decision, antitrust defendants are now obliged to litigate to summary judgment claims for innocent parallel conduct that the Sherman Act simply does not cover. In the absence of a nationally uniform pleading standard—the sort that *Twombly* was supposed to provide—the business community will be unable to structure its conduct in advance so as to avoid the increased risk and expense of frivolous litigation.

Such uncertainty imposes a high cost, forcing companies to make difficult business decisions without knowing what the law requires or how it might be used against them by potential rivals or the plaintiffs' bar. Under the Fourth Circuit's approach, if a firm's actions—no matter how innocent or independently rational—constitute parallel conduct, then any competitor engaged in divergent actions can easily allege a claim for conspiracy under § 1. As Judge Wilkinson noted in his dissent, "[t]his is but part and parcel of the majority's attempt to impose a presumption of guilt on antitrust defendants who now must bear the burden of proving a negative when the burden lies properly with the party bringing the claim." Pet. App. 59a.

A business that cannot predict with any reasonable degree of certainty whether its behavior will subject it to costly discovery in litigation is "particularly vulnerable to guerilla warfare and intimidation," which is the very "antithesis of true competition." William J. Baumol & Janusz Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. Econ. 248, 254 (1985). By granting review in this case, the Court can provide a satisfactory degree of certainty that both the business community and the antitrust bar so desperately need.

B. The Decision Below Creates a Perverse Incentive that Will Severely Undermine the Nation's Free-Enterprise System

The decision below also disrupts the free market by encouraging unscrupulous competitors to use federal antitrust law as a means for

accomplishing anticompetitive ends. Indeed, it is impossible to overstate the extent to which, in this case, it is SawStop who is acting anticompetitively, not petitioners. As Judge Wilkinson keenly recognized, "[t]hey seek to achieve through litigation a monopoly for their product that neither the table saw market nor contractual negotiations would yield." Pet. App. 59a.

But that is not all. SawStop also seeks to achieve here what it has tried and (so far) failed to achieve via private and public regulation. Not content to let the market decide the costs and benefits of adopting AIMT, SawStop first sought to impose AIMT on the table-saw industry by proposing that UL, which provides safety-related certifications for table saws, mandate AIMT for all UL-certified table saws. But the experts at UL refused to go along. *See* Pet. App. 9a, 87a.

Incredulous that the world had not beaten a path to his door for his supposedly superior mousetrap, Mr. Gass then lobbied the CPSC for federal regulations that would essentially force manufacturers to license AIMT from SawStop in order to comply with federal law. Pet. App. 10a, 87a. For thirteen years and counting, SawStop's efforts to obtain a mandatory safety rule have proven unsuccessful, as the CPSC has never implemented table-saw performance standards that require use of AIMT. *See* 77 Fed. Reg. 8,751 (Feb. 15, 2012).

Viewed in context, then, this lawsuit is merely SawStop's latest attempt to effectively monopolize the table-saw market. As the district court recognized, SawStop's "allegations are colored by the

reality that [it] sought to mandate [its] technology throughout the table-saw industry and reap the royalties of such widely-imposed technology." Pet. App. 96a-97a. At bottom, SawStop seeks to use antitrust law not as a shield of protection but rather as a sword with which to attack highly competitive firms. But meaningful innovation in safety improvements requires investment-backed risk by market participants, who must not only create but then market and sell their products to consumers. If those products are more costly to manufacture and thereby more costly for consumers to adopt, that is no reason to second-guess the market by turning to the heavy hand of antitrust law.[2]

Beyond the unfairness visited upon the individual defendants in this case, the decision below creates perverse incentives that will severely undermine the nation's free-enterprise system. "Whenever routine business decisions don't go your way, for whatever reason, simply claim an industry conspiracy under the Sherman Act and the courts will infer malfeasance." Pet. App. 57a (Wilkinson, J., dissenting). Far from furthering the aims of free enterprise, allowing a firm's failure in the marketplace to serve as the basis for litigation success would erode competition in the larger economy, as successful market actors who meet consumer demand are forced to subsidize unsuccessful ones via redistributive litigation.

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[2] Among other things, the retail-price impact of adopting AIMT would "amount to about $100 per table saw" and could "eliminate some of the least expensive table saws from the market." CPSC, Briefing Package, Petition for Performance Standards for Table Saws, at iii (June 2006).

Many commentators have noted the troubling tendency of rivals to use antitrust law as a means of reducing competition. *See, e.g.,* William H. Wagener, *Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation*, 78 N.Y.U. L. Rev. 1887, 1921 n.8 (2003) ("If plaintiffs can extract sizable settlements by filing frivolous lawsuits capable of surviving motions to dismiss, potential defendants will avoid engaging in any behavior that could be construed as anticompetitive, further dampening these firms' incentives to compete aggressively."); Edward A. Snyder & Thomas E. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 Mich. L. Rev. 551, 555-603 (1991) (detailing how the exorbitant cost of defending even frivolous antitrust litigation can have a chilling effect on otherwise pro-competitive conduct); Bamoul & Ordover, *supra*, at 252 ("Antitrust, whose objective is the preservation of competition, by its very nature lends itself to use as a means to undermine effective competition. This is not merely ironic. It is dangerous for the workings of our economy.").

The decision below, if allowed to stand, will only exacerbate this problem further by curbing pro-competitive conduct among firms in a wide variety of markets. The threat of unfounded yet expensive antitrust litigation often deters firms from engaging in the vigorous competition that the antitrust laws were meant to encourage. Here, the panel's decision may have a chilling effect on a firm's willingness even to talk to the next innovator of an alleged product improvement because it is far easier to resist charges of anticompetitive conduct by never learning about the improvement. It would ultimately harm

consumers if a lack of clarity in the law resulted in any seller compromising on the appropriate level of consumer safety when it sells a dangerous product—solely to avoid the burden and expense of protracted litigation. Yet the decision below incentivizes precisely such behavior.

III. REVIEW IS WARRANTED TO VINDICATE THE VITAL GATEKEEPING FUNCTION OF RULE 12(b)(6)

This Court's review is especially warranted given the crucial procedural posture of this case. As *Twombly* makes clear, the allegations in respondents' complaint—even if entirely true—do not give rise to a "plausible inference of conspiracy." *Twombly*, 550 U.S. at 556 n.4. Had this case been brought in any of the three circuits with case law consistent with *Twombly*—the Third, Ninth, or Eleventh Circuits—petitioners would have been entitled to an immediate dismissal before undertaking burdensome and expensive discovery. Although this Court has consistently recognized that Rule 12(b)(6) is an "important mechanism for weeding out meritless claims," *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2471 (2014), the Fourth Circuit effectively jettisoned the vital gatekeeping function that the district court had capably performed in this case.

Permitting meritless claims to proceed past the pleading stage, particularly in antitrust cases, forces a defendant—or multiple defendants—to "bear [a] substantial 'discovery and litigation' burden." *Hoover v. Ronwin*, 466 U.S. 558, 580 n.34 (1984). Indeed, the unique attributes of antitrust litigation

under the Sherman Act underscore the crucial role that Rule 12(b)(6) plays in weeding out legally suspect claims. *See, e.g., Manual for Complex Litigation (Fourth)* § 30, at 519 (2004) ("Antitrust litigation can … involve voluminous documentary and testimonial evidence, extensive discovery, complicated legal, factual, and technical (particularly economic) questions, numerous parties and attorneys, and substantial sums of money."); Wagener, *supra*, at 1893 ("Strategically minded plaintiffs recognize that defendants risk incurring onerous discovery costs if an antitrust case progresses beyond the pleading stage.").

Antitrust suits routinely require defendants to spend millions of dollars simply to obtain summary judgment, extracting precious time and resources from counsel, clients, and the courts. As this Court has recognized, "it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive." *Twombly*, 550 U.S. at 558. That is why the Court has emphasized the importance of district courts' applying their "judicial experience"—along with their "common sense"—in disposing of legally untenable antitrust suits at the proper time: *before* a plaintiff launches intrusive and burdensome discovery. *Id.* at 557-60; *Iqbal*, 556 U.S. at 679.

Allowing a legally dubious antitrust claim to advance to summary judgment not only wastes substantial resources but creates harmful incentives for parties to bring speculative claims in the hopes of extracting a settlement. Because discovery is so daunting and expensive, antitrust lawsuits can

amass substantial settlement value once they survive a Rule 12(b)(6) motion to dismiss. And the availability of treble damages under the Sherman Act further enhances the potential for unjustified settlements. *See* Edward D. Cavanaugh, *Detrebling Antitrust Damages: An Idea Whose Time Has Come?*, 61 Tul. L. Rev. 777, 809 (1987) ("The lure of treble damages may encourage the filing of baseless suits which otherwise might not have been filed.").

When properly granted, however, as the district court did here, Rule 12(b)(6) motions help "to prevent settlement extortion—using discovery to impose asymmetric costs on defendants in order to force a settlement advantageous to the plaintiff regardless of the merits of his suit." *Am. Bank v. City of Menasha*, 627 F.3d 261, 266 (7th Cir. 2010). Accordingly, before a plaintiff can impose on a defendant the burden and expense of discovery, a plaintiff must first articulate a plausible legal theory that, if supported by the facts, would entitle the plaintiff to relief from the defendant. *See, e.g., DM Research, Inc. v. Coll. of Am. Pathologists*, 170 F.3d 53, 55 (1st Cir. 1999) ("The price of entry, even to discovery, is for the plaintiff to allege a factual predicate concrete enough to warrant further proceedings, which may be costly and burdensome.").

Where, as here, legally speculative and untenable claims are allowed to survive a Rule 12(b)(6) motion to dismiss, granting certiorari serves both the interests of judicial efficiency and the interests of justice. If allowed to stand, however, the panel's decision will only increase the likelihood that a plaintiff "with a largely groundless claim [will] simply take up the time of a number of other people,

with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the [discovery] process will reveal relevant evidence." *Dura Pharm, Inc. v. Broudo*, 544 U.S. 336, 347 (2005) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975)). To forestall such a result, and to accomplish the important gatekeeping function of Rule 12(b)(6), the Court should grant the petition.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that the Court grant the petition for certiorari.

Respectfully submitted,

CORY L. ANDREWS
Counsel of Record
MARK S. CHENOWETH
WASHINGTON LEGAL FOUNDATION
2009 Mass. Ave. NW
Washington, DC 20036
(202) 588-0302
candrews@wlf.org

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