No. 15-961

IN THE

Supreme Court of the United States

VISA INC., *et al.*,

Petitioners,

v.

SAM OSBORN, *et al.*,

Respondents.

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

BRIEF FOR ANTITRUST LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

Amici curiae are Thomas C. Arthur, L.Q.C. Lamar Professor at Emory University School of Law; Jorge L. Contreras, Associate Professor at the University of Utah S.J. Quinney College of Law; D. Daniel Sokol, Professor at the University of Florida Levin College of Law; and Alexander Volokh, Associate Professor at Emory University School of Law. (All schools are listed for identification purposes only.) Amici specialize in antitrust law and have expertise in the application of the antitrust laws to business associations. They share the view that business associations often bring procompetitive benefits that strengthen the economy generally and enhance consumer welfare in particular through improved innovation, product interoperability, and enhanced safety standards. Amici are concerned that the decision below will chill business associations' procompetitive activities and thus reduce those benefits to consumers.[1]

INTRODUCTION

As explained in the petition, the courts of appeals are divided over whether a plaintiff can plausibly plead a horizontal conspiracy among competitors in violation of section 1 of the Sherman Act merely by alleging that members of a business association: (a) have governance rights in the association and (b) agreed to adhere to its rules. Amici submit that the D.C. Circuit erred in holding here that such allegations are sufficient. That hold-

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than amici and their counsel contributed money to fund its preparation or submission. Counsel for the parties received at least ten days' notice of amici's intent to file this brief. The parties' written consent to the filing of this brief is attached hereto.

ing is inconsistent with this Court's precedent requiring plaintiffs, in order to allege an illegal agreement, to plead facts plausibly suggesting collusion among the defendants to achieve a common unlawful objective. The approach approved by the decision below would mean that every business that participates in the affairs of a business association can be subjected to expensive discovery concerning an allegedly anticompetitive rule of the association. That would discourage beneficial business-association activities, to the detriment of businesses and consumers alike. This Court should grant review and reverse.

I. COURTS RECOGNIZE THAT BUSINESS ASSOCIATIONS YIELD IMPORTANT CONSUMER BENEFITS, AND THUS THEY DISTINGUISH BETWEEN ACTUAL CONCERTED CONDUCT AND MERE PARTICIPATION IN BUSINESS-ASSOCIATION ACTIVITIES

A. Both courts and antitrust-enforcement agencies have recognized that collaboration among industry participants in the form of business associations frequently has "decidedly procompetitive effects," *SD3, LLC* v. *Black & Decker (U.S.) Inc.*, 801 F.3d 412, 435 (4th Cir. 2015), *petition for cert. filed*, 84 U.S.L.W. 3423 (U.S. Jan. 27, 2016) (No. 15-942), including "greater product interoperability," "network effects," and "incentives to innovate," *Princo Corp.* v. *International Trade Comm'n*, 616 F.3d 1318, 1335 (Fed. Cir. 2010); *see also* Federal Trade Commission, *Spotlight on Trade Associations* ("[m]ost trade association activities are procompetitive").[2] As the leading antitrust treatise puts it, "joint innovation often produces significant so-

[2] *Available at* https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-competitors/spotlight-trade (visited Feb. 29, 2016).

cial benefits in relation to costs." 12 Areeda & Hovenkamp, *Antitrust Law* ¶ 2115a, at 112 (3d ed. 2012). Indeed, this Court itself observed long ago that business associations are "beneficial to [] industry and to consumers." *Maple Flooring Mfrs. Ass'n* v. *United States*, 268 U.S. 563, 566 (1925).

That observation makes sense: As Judge Wilkinson has explained, "many minds may be better than one. Joint ventures … and trade association meetings may allow individuals of different specialties to benefit from each other's expertise," enabling "efficient and effective product development. Those efficiencies in turn generate reduced costs of doing business that can then be passed along to the consumer in the form of reduced prices and better products." *SD3*, 801 F.3d at 455 (Wilkinson, J., concurring in part and dissenting in part).

Specific instances of these benefits of collaboration are not hard to identify. "To take but one example, industry-wide coordination has been a driving force for technological progress in American semiconductor manufacturing." *SD3*, 801 F.3d at 454 (Wilkinson, J., concurring in part and dissenting in part). The ATM networks at issue here provide another example. Absent cooperation among banks, customers who wanted to withdraw cash from their accounts would be limited to using an ATM run by their own institutions. An ATM network gives customers the convenience of using an ATM operated by another bank (or other owner) on almost any city block, virtually anywhere in the world. *See* Hayashi et al., *A Guide to the ATM and Debit Card Industry* 7 (Federal Reserve Bank of Kansas City 2003) (noting the importance of "national networks," such as the Visa and MasterCard networks, in

linking smaller ATM networks to ensure accessibility).[3] To provide that convenience, ATM networks need rules that govern the interactions among members of the network and between the network and third parties, such as ATM owners. *See, e.g.*, *In re ATM Fee Antitrust Litig.*, 554 F. Supp. 2d 1003, 1015 (N.D. Cal. 2008) ("rules establishing hours of availability, ATM functionality standards, and ATM card standards" are "central to the functioning of an ATM network").

B. To avoid deterring the collaboration that yields these benefits for consumers, courts of appeals have been vigilant in ensuring that section 1's agreement requirement is met, and in particular have declined to subject business-association members to liability based solely on an entity's participation in the association's activities. As one court explained, while "[a] trade association by its nature involves collective action by competitors[,] ... [it] is not a 'walking conspiracy.'" *Viazis* v. *American Ass'n of Orthodontists*, 314 F.3d 758, 764 (5th Cir. 2002) (alterations in original) (quotation marks omitted); *see also AD/SAT, Div. of Skylight Inc.* v. *Associated Press*, 181 F.3d 216, 234 (2d Cir. 1999) (per curiam) ("[A]lthough the nature of trade associations is such that they are frequently the object of antitrust scrutiny, every action by a trade association is not concerted action by the trade association's members." (citation omitted)). More specifically, courts—including the court of appeals here—have recognized that "membership in an association does not render an association's members automatically liable for antitrust violations committed by the association." *Kendall* v. *Visa U.S.A., Inc.*, 518 F.3d 1042, 1048 (9th Cir. 2008); *accord*

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[3] *Available at* https://www.kansascityfed.org/Publicat/PSR/BksJournArticles/ATMpaper.pdf (visited Feb. 29, 2016).

Pet. App. 20a ("[M]ere membership in associations is not enough to establish participation in a conspiracy with other members of those associations."). Indeed, "[e]ven participation on the association's board of directors is not enough by itself." *Kendall*, 518 F.3d at 1048.

Instead, courts have held, plaintiffs must plausibly allege that "association members, in their individual capacities, consciously committed themselves to a common scheme designed to achieve an unlawful objective." *AD/SAT*, 181 F.3d at 234. Or as the Seventh Circuit stated, plaintiffs must prove "actual knowledge of, and participation in, an illegal scheme in order to establish a violation of the antitrust laws by a particular association member." *Moore* v. *Boating Indus. Ass'ns*, 819 F.2d 693, 712 (7th Cir. 1987) (quotation marks omitted)). Consistent with these decisions, the "few cases" finding that members of a business association colluded in violation of section 1 involved "a showing that the standard was deliberately distorted by competitors of the injured party, sometimes through lies, bribes, or other improper forms of influence, in addition to a further showing of market foreclosure." *SD3*, 801 F.3d at 436 (quoting *DM Research, Inc.* v. *College of Am. Pathologists*, 170 F.3d 53, 57-58 (1st Cir. 1999)). "In other words, a plaintiff must ordinarily show that the … activity had a market-closing effect that was committed 'through the use of unfair, or improper practices or procedures.'" *Id.* (quoting *Clamp-All Corp.* v. *Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 488 (1st Cir. 1988) (Breyer, J.))).

C. These court of appeals decisions are consistent with this Court's precedent. For example, in *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U.S. 492 (1988), the defendant was found to have conspired with others to "subvert" the voting process for an in-

dustry standard in order achieve their common goal of excluding a competitive product, *id.* at 498. Hence, the plaintiff pled (and proved) that the defendant did far more than participate in the governance of the association; the defendant had colluded with others in a scheme aimed at misusing the association processes for the purpose of achieving a common illegal objective. Similarly, in *American Society of Mechanical Engineers* v. *Hydrolevel Corp.*, 456 U.S. 556 (1982), an industry-standards association was found to have violated section 1 based on its agents' collusion with a supplier of heating boiler safety devices to misuse the association's processes to exclude a rival supplier, *id.* at 560-562.

More recently—and more generally—this Court held in *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007), that to state a claim under section 1, a plaintiff must allege "enough factual matter (taken as true) to suggest that an agreement was made," *id.* at 556. A section 1 complaint, that is, must plausibly allege concerted action on the part of each defendant. And to show concerted action, the Court explained previously, a plaintiff must allege that there is a "conscious commitment to a common scheme designed to achieve an unlawful objective" among each member of the alleged conspiracy. *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (quotation marks omitted).

In order to state a claim that members of a business association engaged in an antitrust conspiracy, then, a plaintiff is required to allege facts plausibly suggesting that each member consciously committed to pursue a common illegal objective with competing members. Allegations that members of a business association agreed to adhere to an association's rules, or participate in the association's governance, do not meet these standards, because such allegations are entirely

consistent with "merely parallel conduct that could just as well be independent action," *Twombly*, 550 U.S. at 552; *see also Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009) ("Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" (quoting *Twombly*, 550 U.S. at 557) (quotation marks omitted)).

Proper application of *Twombly*'s gatekeeping standards in this context is critical because, as the Court noted, "proceeding to antitrust discovery can be expensive." 550 U.S. at 558. Indeed, "discovery in antitrust cases frequently … gives the plaintiff the opportunity to extort large settlements even when he does not have much of a case." *Kendall*, 518 F.3d at 1047. These concerns are particularly salient when the conspiracy allegations rest solely on the defendant's participation in a business association. Because such associations necessarily involve some collective action by competitors, plaintiffs may be quick to claim an antitrust conspiracy whenever they do not like an association rule. Strict enforcement of *Twombly* is thus necessary to avoid burying associations and their members in discovery over meritless claims. *See, e.g.*, *Consolidated Metal Prods. Inc.* v. *American Petroleum Institute*, 846 F.2d 284, 288 (5th Cir. 1988) (observing that a baseless allegation of collusion based on the actions of a standard-setting organization led to two years of discovery). That "would stifle the beneficial functions of such organizations," *Golden Bridge Tech., Inc.* v. *Motorola, Inc.*, 547 F.3d 266, 273 (5th Cir. 2008), and chill, among other benefits, "product development, innovative joint ventures, and useful trade association conclaves," *SD3*, 801 F.3d at 443.

II. THE COMPLAINT HERE IS INADEQUATE BECAUSE IT DOES NOT ALLEGE FACTS PLAUSIBLY SUGGESTING COLLUSION AMONG THE DEFENDANT BANKS

A. A proper application of *Twombly* and the other cases cited above makes clear that the court of appeals erred in reversing the dismissal of respondents' complaint.

Respondents allege a horizontal conspiracy among Visa and MasterCard member banks to adhere to contractual provisions—known as the "Access Fee Rules"—prohibiting ATM operators from charging higher access fees to cardholders for transactions routed over Visa and MasterCard than for transactions routed over another network. Pet. App. 54a-55a, 65a. To support its conclusion that the complaint plausibly stated a section 1 claim as to this horizontal conspiracy, the court of appeals pointed to respondents' allegations that the Access Fee Rules "originated in the rules of the former bankcard associations *agreed to by the banks themselves*," and that representatives of the member banks served on the bankcard associations' boards of directors at the time the Access Fee Rules were adopted. Pet. App. 20a. From this alone, the court concluded that the plaintiffs had sufficiently alleged that "the member banks *used* the bankcard associations to adopt and enforce a supracompetitive pricing regime for ATM fees." *Id.*

But these allegations do not plausibly suggest that the member banks entered into any agreement among themselves to establish and adhere to the Access Fee Rules. There is no suggestion, for example, that the banks discussed or agreed among themselves how to vote on the Access Fee Rules, or even that they all voted the same way. Indeed, the allegations here—that

"members of a business association agreed to adhere to the association's rules and possess governance rights in the association," Pet. i—indicate simply that the member banks unilaterally decided to join the associations, participate in the governance of the association as they saw fit in their individual business judgment, and unilaterally agreed to the Access Fee Rules.

In fact, those rules are contractual provisions included in vertical agreements between the ATM networks and ATM owners that prevent the owners from discriminating against Visa and MasterCard debit cardholders. This makes it especially implausible that the defendant banks used the networks as a means to conspire among themselves for a common unlawful objective. Where members of a business association have been found to have engaged in horizontal collusion for purpose of section 1 liability, the members used the business association as a pretext to agree amongst themselves to exclude rivals or to limit competition *with each other*, in order to raise prices or depress output. *See Allied Tube*, 486 U.S. at 498; *DM Research*, 170 F.3d at 57 (the "principal concern" in the business-association context is the imposition of a "predatory device by some competitors to injure others").

If respondents' allegations suffice to allege a section 1 agreement, then all members of an association could be deemed to have entered an antitrust conspiracy regarding any allegedly anticompetitive rule of the association simply because they joined the association, participated in its governance, and agreed to abide by its rules. That is inconsistent with this Court's requirement of a "common scheme designed to achieve an unlawful objective." *Monsanto*, 465 U.S. at 764.

The Ninth Circuit recognized as much in *Kendall*, which involved allegations very similar to those in this case: that by joining and owning a proprietary interest in a credit card association, participating in its governance, and agreeing to abide by credit card consortium rules, banks had conspired with each other to fix fees charged to merchants for accepting credit cards. *See* 518 F.3d at 1048. The court held that the plaintiffs "[did] not allege any facts to support their theory that the Banks conspired or agreed with each other or with the Consortiums to restrain trade," and that the allegations were "insufficient as a matter of law to constitute a violation of Section 1." *Id.* Relying on *Twombly*, the court concluded that the plaintiffs "failed to allege any evidentiary facts beyond parallel conduct to prove their allegations of conspiracy," and thus that the complaint was rightly dismissed. *Id.*

Here, the district court properly relied on *Kendall* in dismissing the complaint. Pet. App. 199a-200a. In fact, the court explained, although respondents claimed that "they have alleged much more than what was asserted in *Kendall*," they actually "allege less." *Id.* at 200a. Specifically, the court noted, in *Kendall* the "bankcard associations were still in existence" and the "banks still belonged to the associations." *Id.* Here, by contrast, respondents "can only allege that banks *previously* belonged to the associations, and membership in a … defunct association … is not enough to establish agreement or conspiracy." *Id.*; *see also SD3*, 801 F.3d at 423-426 (allegations of a membership and governance role in a business association do not sufficiently plead an antitrust conspiracy); *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 349 (3d Cir. 2010) (neither defendants' membership in business association "nor their common adoption of the trade group's suggestions[]

plausibly suggest[s] conspiracy"). Put simply, "[n]one of the complaints allege that the banks agreed among themselves to do anything." Pet. App. 198a. That simply cannot be sufficient to state a claim.

B. In concluding that respondents' allegations "describe the sort of concerted action necessary to make out a Section 1 claim," Pet. App. 19a, the court of appeals cited *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978); *United States* v. *Visa U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003); and *Robertson* v. *Sea Pines Real Estate Co.*, 679 F.3d 278 (4th Cir. 2012). None of those cases supports the court's conclusion.

National Society is inapposite because there was no dispute in that case that the association's members had agreed to restrain price competition among one another. *See* 435 U.S. at 684-685 (defendant association admitted the essential facts alleged by the United States). Thus, the only issue was whether the agreement was justified by safety concerns. *Id.* at 685.

In *Visa*, the parties did not dispute that the challenged bylaw constituted a horizontal agreement for purpose of a section 1 claim. *See* 344 F.2d at 231-234. Here, by contrast, the dispute *is* over whether respondents have adequately alleged a horizontal agreement. They have not done so because the Access Fee Rules affect the *vertical* relationship between the networks and ATM owners by prohibiting ATM owners from charging higher access fees to cardholders presenting cards that include only bugs for Visa or MasterCard networks. Respondents baldly assert that the network members entered a *horizontal* agreement to restrict competition among themselves and other ATM owners over access fees, Pet. App. 77a, 83a-84a, but

they allege no facts plausibly suggesting any such agreement. *See Kendall*, 518 F.3d at 1048 (applying *Twombly* to affirm dismissal of complaint that failed to "allege any fact to support [plaintiffs'] theory" that bank members of credit card association used association rulemaking to horizontally conspire to fix fees charged to merchants).

Finally, in *Robertson* the plaintiff alleged that each of the joint venture's members specifically conspired with one another to use the venture to further their common objective of excluding rivals to their own brokerage businesses. *See* 679 F.3d at 287 (recounting allegations that the defendants conspired to pass organization rules to promote their objective of excluding discount brokerage firms). Here, by contrast, there are no plausible factual allegations that members of the Visa or MasterCard networks agreed to use the network to effectuate any common unlawful objective. *See Monsanto*, 465 U.S. at 764.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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