Nos. 15-961 & 15-962

IN THE
Supreme Court of the United States

VISA INC., *et al.*,
Petitioners,
v.
SAM OSBORN, *et al.*,
Respondents.

VISA INC., *et al.*,
Petitioners,
v.
MARY STOUMBOS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF FINANCIAL INDUSTRY ASSOCIATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*[1]

The Clearing House, established in 1853, is the oldest banking association and payments company in the United States. The Clearing House Association LLC is a nonpartisan advocacy organization that represents the interests of its owner banks by developing and promoting policies to support a safe, sound, and competitive banking system that serves customers, communities, and economic growth. The Clearing House Association frequently participates as an *amicus* in cases that are important to the banking industry and financial sector. Its affiliate, The Clearing House Payments Company L.L.C., which is regulated as a systemically important financial market utility, owns and operates payments technology infrastructure that provides safe, sound, and efficient payment, clearing, and settlement services to financial institutions and promotes innovation and thought leadership for the development of future generations of payments systems, products, and services.

The American Bankers Association is the principal national trade association of the financial services industry in the United States. Founded in

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[1] The parties in this case have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that this brief was not authored in whole or in part by counsel for a party and that none of the parties or their counsel, nor any other person or entity other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

1875, the ABA is the voice for the nation's $13 trillion banking industry and its million employees. ABA members are located in each of the fifty States and the District of Columbia, and include financial institutions of all sizes and types, both large and small. ABA members hold a substantial majority of domestic assets of the banking industry of the United States and are leaders in all forms of consumer financial services

Since 1974, NACHA – The Electronic Payments Association has served as trustee of the ACH Network, managing the development, administration and rules for the payment network that universally connects all 12,000 financial institutions in the U.S. The ACH Network, which moves money and information directly from one bank account to another, supports more than 90 percent of the total value of all electronic payments in the U.S. Through its collaborative, self-governing model, education, and inclusive engagement of ACH Network participants, NACHA facilitates the expansion and diversification of electronic payments, supporting Direct Deposit and Direct Payment via ACH transactions, including ACH credit and debit payments, recurring and one-time payments; government, consumer and business transactions; international payments, and payments plus payment-related information. Through NACHA's expertise and leadership, the ACH Network is now one of the largest, safest, and most reliable systems in the world, creating value and enabling innovation for all participants.

The Independent Community Bankers of America ("ICBA"), a national trade association, is the nation's voice for more than 6,000 community banks of all sizes and charter types and is dedicated exclusively to representing the interests of the community banking industry. With 52,000 locations nationwide, community banks employ 700,000 Americans and hold $3.6 trillion in assets, $2.9 trillion in deposits, and $2.4 trillion in loans to consumers, small businesses, and the agricultural community. ICBA member community banks provide a broad array of payments to support the needs of small businesses and consumers.

The Consumer Bankers Association is the only national financial trade group focused exclusively on retail banking and personal financial services—banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, CBA provides leadership, education, research, and federal representation for its members. CBA members include the nation's largest bank holding companies as well as regional and super-community banks that collectively hold two-thirds of the total assets of depository institutions.

As advocates for a strong financial future, Financial Services Roundtable represents 100 integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. FSR's members provide fuel for America's economic engine, accounting directly for $98.4 trillion in managed assets, $1.1 trillion in revenue, and 2.4 million jobs.

Each *Amicus* and its members are engaged in technology-based collaborative efforts to advance innovation in the financial sector. *Amici* are concerned that the D.C. Circuit's decision regarding the pleading standard for an antitrust conspiracy will chill these essential collaborative activities.

SUMMARY OF ARGUMENT

The U.S. financial sector is at a critical juncture. New technologies have created opportunities for the development of new products and services and new and more efficient methods of delivery, while simultaneously creating new risks to the safety and soundness of existing banking and payments systems. Regulators have called on industry associations to work together to meet these challenges by pursuing initiatives to develop new and innovation-enhancing solutions that will increase competitiveness and improve consumer experiences. *See* Federal Reserve System, *Strategies for Improving the U.S. Payment System* 1 (Jan. 26, 2015).

Indeed, ensuring the competitiveness of the U.S. financial system requires technology-based collaboration among competitors. Development and operation of new banking and payment products and services depend on financial institutions participating in networks that are governed by rules that ensure interoperability, network efficiencies, and ubiquity. Such rules are particularly necessary for financial-sector networks because of the regulatory need to protect the safety, soundness, and

security of the strategically important U.S. financial system and need to ensure that the interests of consumers are protected. Collaboration is important to confront the increasing threats of fraud and the growing dangers of cyber and other security threats. And properly focused rules are crucial to ensure that fundamental banking and payments systems clearly delineate responsibilities among participants and operate to protect consumer interests.

As the financial sector confronts the challenges of new technologies, it is critically important that the antitrust laws not unduly deter the introduction of new competitive alternatives for which collaboration is necessary. The decision below risks doing so.

The D.C. Circuit's decision can be interpreted as lowering the bar for pleading an antitrust conspiracy under Section 1 of the Sherman Act by holding that mere membership in a collaborative activity and adherence to applicable rules is sufficient. This standard, which departs from the precedent of this Court and the other circuits, threatens technology-driven, innovation-enhancing collaborative activities in the financial sector.

Following properly developed and implemented rules of an association or a collaborative activity is necessary to achieve the activity's purpose. Allegations of membership in an association, participation in its leadership, and development of and adherence to its rules should not be enough to plead an antitrust conspiracy. Nor should a conclusory allegation that collaborators used an

organization's rules to achieve an anticompetitive end. Such general and conclusory assertions, involving activities inherent to membership in an association, do not provide sufficient "factual matter (taken as true)" to suggest that an antitrust conspiracy was formed. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). Plaintiffs could plead similar allegations against participants in any collaborative activity.

The judgment below—which can be interpreted as lowering established pleading standards for stating an antitrust conspiracy—threatens to chill important innovation-enhancing collaborations. Participants in the financial sector already face a high frequency of antitrust challenges. If plaintiffs can plead conspiracy claims under the standard adopted by the D.C. Circuit, then those challenges, even if ultimately unsuccessful, would still impose significant costs and create disincentives for banks and others to participate in collaborative efforts necessary for innovation and for maintaining fast, dependable, safe, sound, and secure financial transactions. The judgment below should be reversed.

ARGUMENT

I. THE FINANCIAL SECTOR REQUIRES TECHNOLOGY-DRIVEN COLLABORATIVE SOLUTIONS TO ADDRESS CURRENT AND FUTURE DEMANDS.

As the Federal Reserve has recognized, the U.S. financial sector is at a "critical juncture" in its development. Federal Reserve System, *Strategies*

for Improving the U.S. Payment System 1 (Jan. 26, 2015). In today's world, consumers demand faster, safer, and more dependable products, payment systems, and services from their financial institutions. *See* Office of the Comptroller of the Currency, *Support Responsible Innovation in the Federal Banking System: An OCC Perspective* 3 (June 3, 2016) (addressing "rapid technological change in the financial services industry" and commenting that "[m]any of these innovations are taking place outside the banking industry, often in unregulated or lightly regulated fintech companies.").

Meeting these demands requires collaboration among participants in the financial sector. Common rules promote consumer welfare. Payment systems require interoperability between competitors, which is most often achieved through networks such as the Automated Clearing House (ACH) network, Clearing House Interbank Payments System (CHIPs), or wire transfer networks.[2]

Networks, including those relied upon by the financial sector, depend on participants following the network's rules, including eligibility requirements. Like other networks, financial-sector networks become more efficient as participation spreads. *See, e.g.*, *Alabama Power Co. v. F.C.C.*, 311 F.3d 1357,

[2] International inter-bank wire transfers occur over the Society for Worldwide Interbank Financial Telecommunication (SWIFT) network.

1361 (11th Cir. 2002) (discussing "network effects and economies of scale"). And like other networks, the value of network-based financial services increases with the number of participants in the network. *See, e.g.*, Michael Katz & Carl Shapiro, *Network Externalities, Competition, and Compatibility*, 75 Am. Econ. Rev. 424, 424 (1985) (discussing "positive consumption externalities" for products for which "the utility that a user derives from consumption of the good increases with the number of other agents consuming the good"). "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." *Golden Bridge Tech., Inc. v. Motorola, Inc.*, 547 F.3d 266, 273 (5th Cir. 2008). The increased efficiency of networks promotes consumer welfare, the ultimate goal of antitrust law. *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1363 (2013).

Building and participating in interoperable networks thus requires collaboration among financial industry participants, often through participation in industry associations and collaboration in the development of common technical and operating rules. This is necessary to ensure that the collaboration is able to achieve its procompetitive purpose, including protecting consumers and enabling participants to make their own investments in innovative financial products and services that operate over the network, thus providing consumers with greater competition and

greater protection throughout the financial system value chain.

The D.C. Circuit's decision unnecessarily threatens the legitimacy of this required collaboration, which is indispensable to the financial industry. This is particularly true in light of recent calls by financial sector regulators for greater collaboration among financial institutions and in light of the requirement that regulatory safety and security standards be maintained. Under the pleading standard for antitrust conspiracy standard applied by the D.C. Circuit, these collaborative efforts could attract costly antitrust challenges that are fundamentally invalid but not easily disposed of at an early stage

A. The Federal Reserve Has Called for Technology-Driven Collaborative Improvement of the Payment System.

A recent paper by the Federal Reserve confirms the need for collaborative improvement of the U.S. payment system. In *Strategies for Improving the U.S. Payment System*, the Federal Reserve recognized that a "safe, efficient and broadly accessible" payment system is "vital to the U.S. economy" and called on stakeholders to "join together to improve the payment system." *Strategies for Improving the U.S. Payment System* at 1.

According to the Federal Reserve, the U.S. payment system is "at a critical juncture in its evolution" because technology is "rapidly changing

many elements that support the payment process." *Id.* Capabilities provided by new technology—such as ubiquitous high-speed data networks, sophisticated mobile computing devices, and real-time information processing—"are changing the nature of commerce and end-user expectations for payment services." *Id.* New technology also brings "dynamic, persistent and rapidly escalating threats" to payment security and the protection of sensitive data. *Id.*

The Federal Reserve has identified its "final desired outcomes" as a payment system that is fast, secure, efficient, and international. *Id.* at 2. Achieving these outcomes will be possible "only through collective effort by all stakeholders." *Id.*

To achieve its regulatory objectives for the financial sector, the Federal Reserve repeatedly calls for collaboration among banks and other stake holders. One of its strategies is "[s]upport[ing] . . . collective stakeholder efforts to implement faster payments capabilities." *Id.* at 3. "The Federal Reserve sees collectively designed solutions as foundational to achieving the desired outcomes and recognizes that this will require significant stakeholder collaboration and commitment." *Id.* at 5. Improving the payment system will require "all organizations involved in payments" to "alig[n] with best practices, implemen[t] standards, contribut[e] to research and data collection, upgrad[e] systems and more." *Id.* at 5.

The Federal Reserve report approvingly notes that "[m]any payment stakeholders are now independently initiating actions to discuss payment system improvements with one another—especially the prospect of increasing end-to-end payment speed and security" and that diverse stakeholder groups are "work[ing] together." *Id.* at 6. Such coordination avoid undesirable "fragmentation" that would otherwise result, "inhibiting ubiquity and creating confusion." *Id.* at 10. Improvements to the payment system must therefore, be "*collectively* identified and embraced by a broad array of payment participants." *Id.* at 15 (emphasis in original). This "will significantly increase the probability of successful outcomes." *Id.*

The Federal Reserve report recognizes and applauds recent collaborative efforts to achieve these goals:

> Recent stakeholder dialogue has advanced significantly, and momentum toward common goals has increased. Many payment stakeholders are now independently initiating actions to discuss payment system improvements with one another—especially the prospect of increasing end-to-end payment speed and security.

Id. at 1. There is "clear stakeholder momentum . . . to pursue faster retail payments on a comprehensive, industry-wide basis." *Id.* at 10.

Such momentum should not be deterred by uncertain antitrust rules.

B. Financial Sector Safety and Security Depends on Technology-Driven Collaboration.

Similarly, the need for increasing digital interoperability means that security and protection of the financial system infrastructure require collaborative efforts.

The Committee on Payments and Market Infrastructures, part of the Board of the International Organization of Securities Commissions, recently recognized the need for collective action in providing guidance on cyber-security. Committee on Payments and Market Infrastructures, Board of the International Organization of Securities Commissions, *Guide on Cyber Resilience for Financial Market Infrastructures* (June 2016) (the "Committee Guide").

The Committee explained that "the safe and efficient operation of financial market infrastructures (FMIs) is essential to maintaining and promoting financial stability and economic growth." *Id.* at 1. "FMIs" refers to "systemically important payment systems, central securities depositories (CSDs), securities settlement systems (SSSs), central counterparties (CCPs) and trade repositories (TRs)." *Id.* at 1 n.1.

Because of the "extensive interconnections in the financial system," effective cyber resilience requires "collaboration between FMIs and their stakeholders as they seek to strengthen their own cyber resilience." *Id.* at 1. "[I]t is important for FMIs to

take on an active role in outreach to their participants and other relevant stakeholders to promote understanding and support of resilience objectives and their implementation." *Id.* The security of an FMI "is in part dependent on that of interconnected FMIs, of service providers and of the participants." *Id.*

The security risks arising from the growing need for FMI-interconnections, and thus the need for collaboration, are not theoretical. As such interconnectivity increases, additional points of vulnerability for FMIs arise. "As a result of their interconnectedness, cyber attacks could come through an FMI's participants, linked FMIs, service providers, vendors and vendor products." *Id.* at 4. The threat posed by an interconnected entity does not depend on the importance of the other entity to the FMI's business. "From a cyber perspective, the small-value/volume participant or a vendor providing non-critical services may be as risky as a major participant or a critical service provider." *Id.*

The Committee Guide details the collaborative efforts appropriate to meet these new safety and security challenges. "[A]n FMI should identify the cyber risks that it bears from and poses to entities in its ecosystem and coordinate with relevant entities, as appropriate, as they design and implement resilience efforts with the objective of improving the overall resilience of the ecosystem." *Id.* at 11.

Safeguarding the FMI's network against these risks requires collaborative testing, which could

involve rules for the appropriate exchange of potentially competitively sensitive information. Penetration tests could involve a wide variety of participants, including "internal and external stakeholders, such as those involved in business continuity, incident and crisis response teams, as well as third parties, such as service providers and participants." *Id.* at 18-19.

The Committee Guide also emphasizes the need for FMIs to develop "situational awareness" of the entire threat landscape. *Id.* at 20. This requires "information-sharing arrangements and collaboration with trusted stakeholders within and outside the industry." *Id.*; *see also id.* at 21 ("FMIs should participate actively in information-sharing groups and collectives, including cross-industry, cross-government and cross-border groups to gather, distribute and assess information about cyber practices, cyber threats and early warning indicators relating to cyber threats.").

In response to a successful cyber-attack, an FMI may further need the assistance of other participants in the network for data recovery. *Id.* at 17. Prudence suggests that industry participants should develop these plans in advance. *Id.* And when an FMI considers reassuming operations in the wake of a cyber-attack, it must consider the risks its potentially-contaminated systems may pose to the broader environment. *See id.* ("An FMI should work together with its interconnected entities to enable the resumption of operations (the first priority being its critical services) as soon as it is

safe and practicable to do so without causing unnecessary risk to the wider sector or further detriment to financial stability."). Exercises to test an FMI's response, resumption and recovery plans and processes "should include FMI participants, critical service providers and linked FMIs." *Id.* at 19.

Industry participants have taken heed and are collaborating to commonly defend against digital threats. For example, the Financial Services Information Sharing and Analysis Center (FS-ISAC) "is the global financial industry's go to resource for cyber and physical threat intelligence analysis and sharing." Financial Services Information Sharing and Analysis Center, *About FS-ISAC*, https://www.fsisac.com/about (last visited Aug. 24, 2016). The FS-ISAC "was created by and for members and operates as a member-owned non profit entity." *Id.*

Similarly, in 2014, merchant and financial services trade associations and companies—including some *Amici*—came together to form the Merchant-Financial Services Cybersecurity Partnership. Press Release, Financial Services Roundtable, *Merchant and Financial Trade Associations Announce Cybersecurity Partnership* (Feb. 13, 2014), http://fsroundtable.org/merchant-and-financial-trade-associations-announce-cybersecurity-partnership/. The partnership "focus[es] on exploring paths to increased information sharing, better card security technology, and maintaining the trust of customers." *Id.*

Again, uncertain antitrust standards could deter such critical efforts.

C. Financial Sector Collaboration Supports Compliance with Regulatory Safety and Security Obligations.

Finally, financial sector collaborations, including those described above, rely upon common rules to support compliance with regulatory requirements directed to ensuring the safety and security of the U.S. banking and payments systems and the protection of consumers. Such regulatory obligations include those stated in the Interagency Guidelines Establishing Standards for Safety and Soundness,[3] data security protection regulations under Gramm-Leach-Bliley Act,[4] Regulation E consumer protection obligations,[5] and the FFIEC Bank Secrecy Act/Anti-Money Laundering Examination Manual.[6]

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[3] 12 C.F.R. 364, App. A.

[4] 16 C.F.R. 314.

[5] 12 C.F.R. 205.

[6] *See* Federal Financial Institutions Examination Council, *Bank Secrecy Act / Anti-Money Laundering InfoBase*, https://www.ffiec.gov/bsa_aml_infobase/pages_manual/manual_online.htm (last visited Aug. 21, 2016).

II. THIS COURT SHOULD ENSURE THAT PROCOMPETITIVE COLLABORATION IS NOT DETERRED BY THE FEAR OF OVERLY EXPANSIVE ANTITRUST EXPOSURE.

Particularly at this critical time for the competitiveness, safety, and security of the U.S. financial system, clarity of antitrust liability standards is imperative. The D.C. Circuit's decision can be interpreted to lower the bar for pleading an antitrust conspiracy, thereby exposing efficiency-enhancing collaborations to increased risk of antitrust challenge. This change is inconsistent with established antitrust doctrine and represents an unwarranted expansion of the impact of antitrust law that could deter the exact conduct the antitrust laws are intended to promote.

A. The Antitrust Laws Fully Support Collaborative Solutions as Societally Beneficial.

This Court has recognized collaboration among competitors often benefits society. Combinations "such as mergers, joint ventures, and various vertical agreements, hold the promise of increasing a firm's efficiency and enabling it to compete more effectively." *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984); *see also Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501 (1988) (internal citation omitted) (noting the "significant procompetitive advantages" and "potential for procompetitive benefits" of collaborative technical standards setting).

Industry associations can have "'decidedly procompetitive effects' by encouraging 'greater product interoperability,' generating 'network effects,' and building 'incentives to innovate.'" *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 435 (4th Cir. 2015) (quoting *Princo Corp. v. Int'l Trade Comm'n*, 616 F.3d 1318, 1335 (Fed. Cir. 2010)). Enforcement of the antitrust laws must account for the societal benefits achieved through interoperability of technological networks: "A consequence of network externalities and lock-in effects is that antitrust enforcement in network markets becomes complicated." Howard A. Shelanski & J. Gregory Sidak, *Antitrust Divestiture in Network Industries*, 68 U. Chi. L. Rev. 1, 10 (2001).

Indeed, common rules for interoperability between competitors often enable products and services that would not otherwise be possible. *See Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 101-2 (1984) (recognizing that college football, which requires "rules on which the competitors agree," is "an industry in which horizontal restraints on competition are essential if the product is to be available at all"); *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 14 (1979) (noting the procompetitive widening of consumer choice permitted by the blanket license to musical compositions, which was "to some extent, a different product" than licenses to individual compositions).

The Department of Justice Antitrust Division and Federal Trade Commission acknowledge that "competitor collaborations have the potential to generate significant efficiencies that benefit consumers in a variety of ways." FTC & DOJ, *Antitrust Guidelines for Collaborations Among Competitors* 23 (April 2000). Competitor collaborations may "enable firms to offer goods or services that are cheaper, more valuable to consumers, or brought to market faster than would be possible absent the collaboration," "provide incentives for [participants] to make output-enhancing investments that would not occur absent the collaboration," or "enable the collaboration to produce a good . . . that no one participant alone could produce." *Id.* at 23, 6, 13. "Efficiencies generated through a competitor collaboration . . . may result in lower prices, improved quality, enhanced service, or new products." *Id.* at 23.

B. Over-enforcement of the Antitrust Laws Can Chill Procompetitive Conduct That Benefits Society.

This Court has also recognized that over-enforcement of the antitrust laws can "chill competition, rather than foster it." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993). If an antitrust claim survives the pleading stage, the defendant faces the "potentially enormous expense of discovery." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 559 (2007). These costs might lead businesses to avoid "a wide range of joint conduct that the securities law permits or encourages (but which they

fear could lead to an antitrust lawsuit and the risk of treble damages)." *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 282 (2007). The threat of antitrust liability "through error and disincentive," the Court cautioned, "could seriously alter . . . conduct in undesirable ways." *Id.* at 283.

Mistaken inferences under the antitrust laws "are especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986). Judge Easterbrook's seminal article, *The Limits of Antitrust*, explained why the dangers posed by a "false positive"—erroneously imposing antitrust liability—are greater than the dangers posed by a "false negative"—erroneously failing to impose antitrust liability. Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 15-16 (1984); *see also id.* at 15 ("For a number of reasons, errors on the side of excusing questionable practices are preferable."); Geoffrey A. Manne & Joshua D. Wright, *Google and the Limits of Antitrust: The Case Against the Case Against Google*, 34 Harv. J.L. & Pub. Pol'y 171, 180 (2011) ("[False positives] are likely, on average, to be more costly to society and consumers than [false negatives].")

These principles, and concerns, apply equally to the technology-driven collaborative activities now being pursued in the financial sector, including in response to regulators' calls for action.

C. The Decision Below Represents an Unwarranted Lowering of Applicable Antitrust Standards.

The D.C. Circuit's decision threatens the necessary collaboration that is now critical for the financial sector. If allegations that firms participated in an association, a network, or another collaborative activity, jointly developed and adhered to rules designed to ensure that the collaborative activity achieved its procompetitive purpose suffice for plaintiffs to plead the conspiracy element of a Section 1 claim, then the incentives for participating in such efforts will be diminished. The potential costs of increased antitrust litigation that could not be resolved at the pleading stage could limit incentives to participate in necessary, procompetitive collaborations. The pleading standard adopted by the D.C. Circuit also runs counter to this Court's and the other circuits' precedent.

In analyzing the conspiracy element of a Section 1 claim, this Court has "hedged against false inferences [of conspiracy] from identical behavior at a number of points in the trial sequence." *Twombly*, 550 U.S. at 554.

Twombly created an additional hedge against false inferences of conspiracy at the pleading stage by requiring that a complaint contain "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id.* at 556.

"[A]n allegation of parallel conduct and a bare assertion of conspiracy will not suffice." *Id.*

Enforcement of these pleading standards is important. Even if defendants eventually defeat claims on their merits, "proceeding to antitrust discovery can be expensive." *Id.* at 558. Without the protections of *Twombly*, regardless of the merits of any possible claims, the potential expense of discovery could cause financial sector participants to reconsider participation in activities that might force them to undergo time-consuming and costly discovery. *See In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 625–26 (7th Cir. 2010) ("When a district court by misapplying the *Twombly* standard allows a complex case of extremely dubious merit to proceed, it bids fair to immerse the parties in the discovery swamp . . . and by doing so create irrevocable as well as unjustifiable harm to the defendant . . . .").

Following this Court's guidance, the Circuits have scrutinized conspiracy allegations carefully. *See, e.g.*, *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1048 (9th Cir. 2008) (citing *Kline v. Coldwell Banker & Co.*, 508 F.2d 226, 232 (9th Cir. 1974)) ("[M]embership in an association does not render an association's members automatically liable for antitrust violations committed by the association.").

The allegation that members have followed an association's rules or participated in the organization's leadership adds nothing to an allegation of membership. For membership in an

association to have any meaning, rules must be followed. An allegation of compliance with an association's rules constitutes an allegation of parallel conduct, which "is insufficient as a matter of law to constitute a violation of Section 1 of the Sherman Act." *Kendall*, 518 F.3d at 1048. That remains true even if a plaintiff were to add the conclusory allegation, without more, that the association's rules were "used" by its members to achieve a purportedly anticompetitive effect. Such general and conclusory allegations could be made against any business association, especially in the financial sector where common rules and standards are both necessary and ubiquitous.

In a similar context, the Fourth Circuit has noted that cases in which a standard-setting organization and its members violate the antitrust laws are "few and far between" and involve "unique, external pressure applied to achieve an anti-competitive end." *SD3*, 801 F.3d at 435-36. The key question, it noted, is whether there has been "improper coercion of a standard-setting body." *Id.* at 436; *see also Golden Bridge Tech., Inc.*, 547 F.3d at 272 (holding that pleading that defendants engaged in parallel conduct by voting on common industry standards "does not refute the likelihood of independent action" and does not plead a conspiracy claim under Section 1).

Even in this case, the court of appeals acknowledged that "[m]ere membership in associations is not enough to establish participation in a conspiracy with other members of those associations." Osborn Pet. App. at 20a. (quoting *Fed.*

Prescription Serv., Inc. v. Am. Pharm. Ass'n, 663 F.2d 253, 265 (D.C. Cir. 1981)) (alteration in original).

But the D.C. Circuit concluded that the complaints in this case satisfied the plausibility requirements of *Twombly* because, according to the D.C. Circuit, the complaints alleged "that the member banks *used* the bankcard associations to adopt and enforce" anticompetitive rules. Osborn Pet. App. at 20a. As explained, even if respondents had made this allegation, it adds nothing to the allegation of membership, which necessarily involves compliance with association rules and standards. If alleged membership in an association and adherence to its rules does not satisfy the pleading standard for establishing antitrust conspiracy, then neither could the bare assertion that members "used" association rules to achieve an anticompetitive result. Yet, that is all the court of appeals required here. That holding can be interpreted as effectively lowering the bar for pleading an antitrust conspiracy. If this Court endorses the D.C. Circuit's analysis, it would represent a significant change and inject uncertainty concerning the legitimacy of important activities, including those specifically being pursued by the financial industry.

Nor is it necessary to expand the conduct that will support a claim of unlawful antitrust conspiracy. Precedent sets appropriate bounds. Reference to this Court's decision in *Allied Tube*, 486 U.S. 492 (1988), is instructive. In *Allied Tube*, a group of producers of steel conduit sought to exclude plastic

conduit from the National Electrical Code. *Id.* at 496. "They collectively agreed to exclude respondent's product from the 1981 Code by packing the upcoming annual meeting with new Association members whose only function would be to vote against the polyvinyl chloride proposal." *Id.* Combined, the conspirators "recruited 230 persons to join the Association and to attend the annual meeting," where they were "instructed where to sit and how and when to vote by group leaders." *Id.* at 497. The Court noted that the steel group "organized and orchestrated the actual exercise of the Association's decision making authority in setting a standard." *Id.* at 507.

No remotely comparable allegations of abuse of rules for an anticompetitive purpose are at issue in this case. The *Osborn* complaint simply alleges that the alleged restraints were "agreed to by the banks themselves." Osborn Pet. App. 77a; *see also Stoumbos* Pet. App. 62a (describing the fee restraints as "horizontal restraints agreed to by the banks and the Defendants, and their members"). And the *Stoumbos* complaint simply notes the membership of the associations' boards of directors. *Stoumbos* Pet. App. 145a; *see also* Osborn Pet. App. 65a (alleging that banks hold "seats on the Network Defendants' boards of directors"). At most, these allegations allege parallel independent conduct by the banks and by the networks, not a plausible claim of an illegal agreement.

The D.C. Circuit's analysis would permit similar antitrust claims to be pleaded against the

membership of virtually any industry organization. A plaintiff could always claim that the membership used the organization to achieve anticompetitive ends or that the membership elected the leadership that enacted the rules.

This case illustrates the danger. At the time the rules challenged in this case were first adopted, nearly all ATM networks—not just Plus and Cirrus—had similar rules. *See, e.g.*, *EFT Rules Bend Under Surcharge Weight*, Bank Network News, Aug. 28, 1997, at 4 (noting that the ATM networks Honor, Magic Line, Cash Station, TransAlliance, MAC, NYCE, and Star have adopted non-discrimination clauses similar to the alleged restraints at issue here). The D.C. Circuit's approach could leave each of those networks' members in jeopardy.

If firms face allegations of an antitrust conspiracy based on their participation in a collaborative activity and adhering to the rules of the collaborative venture, then society will lose beneficial cooperation among competitors. This risk of loss is particularly concerning for the financial sector, which now must use collaborative efforts to address core commercial activities and activities that relate to the increasing threats of cyber-security challenges to U.S. financial systems.

Accordingly, in deciding this case, the Court should protect this necessary collaboration and reaffirm that pleading a conspiracy under Section 1 of the Sherman Act requires specific pleading of

plausible facts, *Twombly*, 550 U.S. at 554, and that this standard is not satisfied merely by alleging a defendant's membership in an industry association or participation in a collaborative activity.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

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Respectfully submitted,

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