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 WRITS 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 and enhance consumer welfare through improved innovation, product interoperability, and higher safety standards. Amici believe that the decision below will chill business associations' procompetitive activities and thus reduce those benefits to consumers.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

The D.C. Circuit held in this case that a plaintiff can plausibly plead a horizontal conspiracy among competitors in violation of section 1 of the Sherman Act merely by claiming (in addition to conclusory and unsupported allegations of agreement) that members of a business association have governance rights in the association and agreed to adhere to its rules. Amici submit that this holding is inconsistent with this Court's precedent requiring plaintiffs, in order to allege an illegal agreement, to plead facts plausibly suggesting col-

[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. The parties' written consent to the filing of this brief is attached hereto.

lusion among the defendants to achieve a common unlawful objective. The approach approved by the court of appeals 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 so long as the plaintiff makes a bare assertion of horizontal agreement. That would discourage beneficial business-association activities, to the detriment of businesses and consumers alike.

ARGUMENT

I. BUSINESS ASSOCIATIONS YIELD IMPORTANT CONSUMER BENEFITS, AND HENCE ANTITRUST LAW SHOULD DISTINGUISH BETWEEN CONCERTED CONDUCT AND MERE PARTICIPATION IN BUSINESS-ASSOCIATION ACTIVITIES

A. As both courts and antitrust-enforcement agencies have recognized, 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), *cert. denied*, 136 S. Ct. 2485 (2016). These effects include "greater product interoperability" and "incentives to innovate." *Princo Corp.* v. *ITC*, 616 F.3d 1318, 1335 (Fed. Cir. 2010); *see also* Federal Trade Commission, *Spotlight on Trade Associations* ("Most trade association activities are procompetitive[.]").[2] As the leading antitrust treatise puts it, "joint innovation often produces significant social benefits in relation to costs." 13 Areeda & Hovenkamp, *Antitrust Law* ¶ 2115a, at 112 (3d ed. 2012). And this Court itself ob-

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[2] *Available at* https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-competitors/spotlight-trade (last visited Sept. 8, 2016).

served 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." *SD3*, 801 F.3d at 455 (concurring in part and dissenting in part). "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." *Id.*

Specific instances of these benefits of collaboration are easy 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 wishing 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), virtually anywhere in the world. *See* Hayashi et al., *A Guide to the ATM and Debit Card Industry* 7 (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 both among members of the network and between the net-

[3] *Available at* www.kansascityfed.org/PUBLICAT/PSR/BksJournArticles/ATMpaper.pdf (last visited Sept. 8, 2016).

work 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"). And given the proliferation of competing ATM networks, individual networks—whether organized as associations or single entities—need latitude to adopt rules and policies designed to enhance their competitiveness with rival networks. *See* Hayashi, *supra* p. 3, at 50-51 (describing "competitive battlegrounds" in the ATM-network industry).

B. To avoid deterring the collaboration that yields these benefits for consumers, the courts of appeals have closely scrutinized complaints to determine whether they adequately allege an illegal agreement, which is necessary for section 1 of the Sherman Act to apply. In particular, courts have refused to subject business-association members to liability based solely on their participation in the association's activities, including participating in its governance structure and deciding to adhere to the rules of the association. As one court explained in upholding the dismissal of a section 1 complaint, 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) (internal quotation marks omitted). Or as another put it in affirming summary judgment, "although 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." *AD/SAT, Div. of Skylight, Inc.* v. *Associated Press*, 181 F.3d 216, 234 (2d Cir. 1999) (per curiam) (citation omitted).

More specifically, courts have held 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). Indeed, the court of appeals here recognized this, stating that "mere membership in associations is not enough to establish participation in a conspiracy with other members of those associations." Pet. App. 20a. Courts have further recognized that "[e]ven participation on the association's board of directors is not enough by itself" to create liability. *Kendall*, 518 F.3d at 1048.

Instead, courts have held that to avoid dismissal a complaint must "forecast [the required] factual showing," *SD3*, 801 F.3d at 422, namely 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. Put differently, a complaint must allege how each of the "defendants was involved in the alleged conspiracy" without relying on "indeterminate assertions" against all "defendants." *In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, 905 (6th Cir. 2009).

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 challenged rule or standard promulgated by the association "'was deliberately distorted by competitors of the injured party, sometimes through lies, bribes, or other improper forms of influence, in addition to a … 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.))).

At the petition stage, respondents claimed (Opp. 13 n.5) that the Fourth Circuit's description in *SD3* (which respondents called "*Sawstop*") of what is required to state and prove an illegal agreement under section 1 applies only in the narrow context of industry standard-setting organizations. They cited no language from the decision, however, to support that reading. Nor do they point to any distinction between the business association context here and standard-setting organizations that justifies applying a differing legal standard to allegations of illegal collusion. As this Court has instructed, evaluating whether competitors have engaged in concerted action for section 1 purposes requires a flexible, functional analysis of the economic consequences of their particular business arrangements, and must not be based on distinctions without a difference. *See American Needle, Inc.* v. *National Football League*, 560 U.S. 183, 192-196 (2010). Respondents' proposed distinction also makes little sense given that a wide variety of business and trade associations are called upon to set "standards" for group members. For example, in *Consolidated Metal Products, Inc.* v. *American Petroleum Institute*, 846 F.2d 284 (5th Cir. 1988), the court rejected conspiracy allegations based on a trade association's product approval programs, observing that "it has long been recognized that the establishment and monitoring of trade standards is a legitimate and beneficial function of trade associations." *Id.* at 293-294; *see also Hassan* v. *Spicer*, 2006 WL 228958, at *4 (E.D.N.Y. Jan. 31, 2006) (similarly for laboratory-accreditation organization), *aff'd*, 216 F. App'x 123 (2d Cir. 2007). Finally, the formulation in *SD3* simply characterizes what this Court

has long held is required to prove an illegal agreement: a conscious commitment to achieve an unlawful objective. *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984).

C. The court of appeals decisions cited in the previous subsections 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 industry standard in order achieve their common goal of excluding a competitive product. *Id.* at 498. The plaintiff had proved (and therefore was or should have been required to plead) that the defendant did far more than participate in the governance of the association and adhere to the association's rules; 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, Inc.* 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. Nothing similar has been pled here.

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*, 465 U.S. at 764 (internal quotation marks omitted).

To state a claim that members of a business association engaged in an antitrust conspiracy, then, a plaintiff must allege facts plausibly suggesting that each member consciously committed to pursue a common illegal objective with other 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 by themselves meet this standard, because such allegations are 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)).

Moreover, unless *Twombly* is rigorously applied, the happenstance of an organizational structure that makes members easy targets for unsupported claims of horizontal collusion will dissuade business associations from establishing rules that enable them to compete most effectively with their rivals and thereby benefit consumers. That would contravene this Court's insistence that Section 1 was not designed to "chill[] vigorous competition through ordinary business operations" or lead to "judicial scrutiny of routine, internal business decisions. *American Needle*, 560 U.S. at 190. But it would also undermine the fundamental principle that entities must be free to organize in the form that best "serve[s] efficiency of control, economy of operations, and other factors dictated by business judgment," and not be forced to contort their structure to address arbitrary antitrust dis-

tinctions that are not well-grounded in economic principles. *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 773 (1984).

Finally, proper application of *Twombly*'s gatekeeping standards in the business association context is critical because, as the Court observed in that case, "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*, 846 F.2d at 288 (baseless allegation of collusion based on the actions of a standard-setting organization led to two years of discovery). Failing to do so "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 "product development, innovative joint ventures, and useful trade association conclaves," *SD3*, 801 F.3d at 443.

II. THE COMPLAINT HERE 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 all 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 based on this alleged conduct, 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. *Id.* 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 access 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 participate in the associations, contribute to the governance of the association as they saw fit in their individual business judgment, and unilaterally agreed to the Access Fee Rules.

At the petition stage, respondents contended (Opp. 16-17) that they have alleged "more" than mere membership in a trade association. But they never identified what that "more" is. All that respondents have alleged is that individual association members participated in the association's governance structure and have decided to adhere to the association's rules. Put differently, although respondents argue that the banks "agreed to th[e] rule and apply it in setting their prices," *id.* 10, they never alleged facts plausibly suggesting that the banks agreed with *one another* to implement the rule. If allegations like those made by respondents suffice to allege a section 1 agreement, then any plaintiff could plausibly plead conspiracy merely by alleging that more than one member of a trade association adhered to an association rule.

Respondents also claimed at the petition stage (Opp. 17) that the approach amici urge "would effectively immunize all trade associations from the antitrust laws." That is wrong. The lower-court cases discussed above provide a clear roadmap for distinguishing claims that rest solely on membership in an association from those that plausibly allege collusion. It is respondents' theory that would have far-reaching deleterious consequences, effectively subjecting any trade association member to section 1 liability, expensive discovery, and exposure to treble damages merely for following a rule of the association.

Disputing this, respondents argued (Opp. 16-17) that the requisite agreement can properly be inferred from their complaint because member banks' continued assent to the Access Fee Rules does not make economic sense absent agreement among the banks. Respondents never explained why that is so, instead attempting (*id.* 16) to shift the burden to petitioners to offer a "le-

gitimate reason for the banks[']" adherence to the rules. *Twombly* is clear, however, that in asking a court to infer agreement, the plaintiff bears the burden of alleging facts "plausibly suggesting (not merely consistent with) agreement." 550 U.S. at 556. In any event, a plausible explanation for why member banks' would adhere to the Access Fee Rules absent a conspiracy is plain from respondents' own complaint.

Respondents acknowledge that ATM owners receive a benefit from participating in networks with nationwide coverage. *See* Pet. App. 72a-73a. An ATM owner may therefore find it in its independent interest to participate in such a network, even though that owner is obliged to adhere to a rule that it cannot impose a fee on Visa and MasterCard transactions that is higher than transactions over other networks. Indeed, non-bank ATM owners—who are *respondents* here—found it in their interest to participate in the networks and adhere to the Access Fee Rules, and there are no allegations that they participated in any conspiracy. That straightforward economic explanation alone rebuts respondents' claim that the banks' adherence to the rules would make no business sense but for a horizontal agreement.

The Ninth Circuit's decision in *Kendall* illustrates how claims like respondents' are properly evaluated under this Court's precedent. *Kendall* involved allegations similar to those here: 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 of appeals 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.*

The district court here 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.* 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). As the Third Circuit has explained, neither defendants' membership in a business association "nor their common adoption of the trade group's suggestions[] plausibly suggest[s] conspiracy." *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 349 (3d Cir. 2010).

Respondents argued at the petition stage (Opp. 13) that this Third Circuit decision is distinguishable because they "have identified an agreement and quoted its relevant language." But respondents fail to specify any such "agreement," much less any *horizontal* agreement among the member banks.

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 here relied on this Court's decision in *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978). *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. Here, by contrast, there are no plausible factual allegations that members of the Visa or MasterCard networks agreed among one another to use the network to effectuate any common unlawful objective, *see Monsanto*, 465 U.S. at 764, and the existence of an illegal agreement is certainly not conceded.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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