Nos. 15-961, -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 OF THE AMERICAN SOCIETY OF ASSOCIATION EXECUTIVES AND THE AMERICAN VETERINARY MEDICAL ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The American Society of Association Executives (ASAE) is a membership organization of more than 21,000 association professionals and industry partners representing more than 9,300 organizations. Its members manage leading trade associations, individual membership societies, and voluntary organizations across the United States and in roughly 50 countries around the world. ASAE's mission is to provide resources, education, ideas, and advocacy to enhance the power and performance of the association community. ASAE is a leading voice on the value of associations and the resources they can bring to bear on society's most pressing problems. The American Veterinary Medical Association (AVMA) is a not-for-profit association representing more than 88,000 veterinarians working in private and corporate practice, government, industry, academia, and uniformed services across the country. Both ASAE and AVMA have participated as *amici* in this Court and other courts in cases implicating antitrust issues and the conduct of associations, see, *e.g.*, *Cal. Dental Ass'n* v. *FTC*, 526 U.S. 756 (1999); *N.C. Bd. of Dental Examiners* v. *FTC*, 135 S. Ct. 1101 (2015), and are highly interested in cases that affect the legal rules governing associations and their members.

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Rule 37.3(a), petitioners have granted consent to this *amici* brief through a blanket consent letter, and respondents have granted consent in letters accompanying this filing.

This is one of those cases. In a few paragraphs that are as striking for their breadth as they are for their brevity, the decision below dials back critical limits on the pleading requirements for a Sherman Act conspiracy and puts a target on the backs of associations of all kinds, as well as their members. It has long been true that associations are not by definition anticompetitive conspiracies, and it is widely recognized that they, in fact, offer many procompetitive benefits to their members. According to the court of appeals, however, an association and its members are plausibly alleged to have engaged in concerted action in violation of Section 1 of the Sherman Act merely because they act like an association—namely, because the association passes rules or codes and asks members to follow those rules or codes. That encourages plaintiffs to label *any* association—whether a bankcard association like Visa and MasterCard here, another type of business association, or an association with an entirely different purpose—a conspiracy and tells them how easily they can avoid a motion to dismiss in the process.

That is a profoundly troubling result given the ubiquity of associations and their value to society. "[T]he contributions made by trade, professional, philanthropic, and other nonprofit membership organizations to [the country's] economy, government, and society have been enormously important." Jerald A. Jacobs, *Association Law Handbook* xi (5th ed. 2012). They petition government, educate the public, engage in joint research efforts, hash out industry standards, and conduct many, many other invaluable and procompetitive activities. *Id.* The notion that these organizations and their members can be blamed for acting like associations, without any indication of complicit design, imperils the good that as-

sociations do and risks chilling the societal benefits that come with them. *Amici* have a strong interest in seeking to ensure that these ramifications do not come to pass.

The sweeping and careless reasoning of the decision below, however, tempts precisely those ramifications. Codes of conduct and other business or professional conduct-regulating rules are routine for associations, and enterprising antitrust plaintiffs will surely have no trouble pointing to such rules and claiming that they improperly affect prices or competition. If affirmed, the court of appeals' decision will invite such lawsuits. In the process, thousands of associations across the country, including *amici* and their members, will face the greatly increased risk of being called a conspiracy and the protracted litigation and significant settlement pressures that come along with such an allegation. But these are exactly the sort of effects the plausibility standard this Court first articulated in the antitrust context were supposed to prevent. See *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 558–59 (2007) (discussing settlement pressures and discovery costs). Given associations' many benefits to society, it would be perverse indeed to sanction the sort of end run around *Twombly* that the court of appeals created in the context of association liability. The Court should reverse the decision below.

ARGUMENT

I. THE SHERMAN ACT DOES NOT SUPPORT THE COURT OF APPEALS' APPROACH TO ANTITRUST LIABILITY IN THE CONTEXT OF ASSOCIATIONS AND THEIR MEMBERS.

The D.C. Circuit held that plaintiffs can state a Sherman Act claim against associations and their

members for doing no more than what such entities necessarily do, namely, vote for or appoint directors and adopt rules or codes governing the association and its members. The Court should categorically reject that approach to antitrust liability.

1. Section 1 of the Sherman Act says that "[e]very contract, combination . . . , or conspiracy, in restraint of trade [is] illegal." 15 U.S.C. § 1. Notwithstanding the apparent breadth of that language, however, this Court "has not taken a literal approach" to it. *Texaco Inc.* v. *Dagher*, 547 U.S. 1, 5 (2006); see also *Am. Needle, Inc.* v. *NFL*, 560 U.S. 183, 189 (2010) ("even though, 'read literally,' § 1 would address 'the entire body of private contract,' that is not what the statute means"); Pet'rs' Br. 15–16 (collecting additional authority). Instead, the Court has explained, the Act draws a "basic distinction between concerted and independent action," the latter of which "is not proscribed." *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984).

By requiring concerted action, moreover, the Act does not label every instance in which entities come together as a conspiracy. Like the word "conspiracy" itself, the very phrase "*concerted* action" denotes purpose—presumably an untoward one—rather than mere collective action. See, *e.g.*, *Black's Law Dictionary* 349 (10th ed. 2014) (defining "concerted action" as "action that has been planned, arranged, and agreed on by parties acting together to further some scheme or cause"). And this Court has repeatedly articulated the Sherman Act's reach in this way: it requires that defendants share "a conscious commitment to a common scheme *designed to achieve an unlawful objective*." *Monsanto*, 465 U.S. at 764 (emphasis added) (quoting *Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 637 F.2d 105, 111 (3d Cir. 1980)); see also

Copperweld Corp. v. *Indep. Tube Corp.*, 467 U.S. 752, 771 (1984) (requiring "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement") (quoting *Am. Tobacco Co.* v. *United States*, 328 U.S. 781, 810 (1946)); *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 595–98 (1986).

These principles have important implications for associations, which by their very nature tend to "involve[] collective action by competitors." *Consol. Metal Prods., Inc.* v. *Am. Petroleum Inst.*, 846 F.2d 284, 293 (5th Cir. 1988). Such activity, however, does not constitute an anticompetitive scheme all by itself. No doubt that is why this Court has held, for example, that "the internal pricing decisions of a legitimate joint venture" are not *per se* unlawful. *Dagher*, 547 U.S. at 7. And it is also why the Court had no difficulty brushing aside the suggestion that an allegation of "conspir[ing] to restrain trade" could be gleaned from the "allegation that the [defendants] belong to various trade associations": there was no basis for allowing allegations to survive a motion to dismiss "just because [a defendant] belonged to the same trade guild as one of his competitors when their pins carried the same price tag." *Twombly*, 550 U.S. at 567 n.12.

Applying these precepts, the courts have regularly declined to read the Sherman Act in a manner that would effectively turn associations into "walking conspirac[ies]." See, *e.g.*, *Consol. Metal Prods.*, 846 F.2d at 293–94; *Am. Dental Ass'n* v. *Cigna Corp.*, 605 F.3d 1283, 1295–96 (11th Cir. 2010). Instead, they have insisted upon showings like "some evidence of actual knowledge of, *and participation in*, the illegal scheme." *AD/SAT, Div. of Skylight, Inc.* v. *Associated Press*, 181 F.3d 216, 234 (2d Cir. 1999) (per curiam)

(rejecting "membership-ratification theory" basis for antitrust liability). In short, it follows directly from the strictures of Section 1 that "every action by a trade association is not concerted action by the association's members." *Id.*

2. The decision below erases these settled ground rules despite paying lip service to them. The alleged antitrust violations in this case are predicated upon rules allegedly adopted by Visa and MasterCard when they formerly were bankcard associations comprised of member banks. See Pet. App. 7a, 19a, 47a–48a, 196a–198a; see also *id.* at 48a n.9 (explaining MasterCard and Visa completed IPOs in 2006 and 2008, respectively, and became independent corporations).[2] Through these rules, the court of appeals held, allegations amounting to nothing more than participation in an association "satisfy the plausibility standard." *Id.* at 18a–21a.

The rationale for that conclusion was breezy. To start, the court declared that allegations "that a group of retail banks fixed an element of access fee pricing through bankcard association rules . . . describe the sort of concerted action necessary to make out a Section 1 claim." Pet. App. 19a. After citing a handful of decisions allowing conspiracy claims against organizations, including Visa and MasterCard, *id.* at 19a–20a, the D.C. Circuit did acknowledge that "[m]ere membership in associations is not enough to establish participation in a conspiracy with other members of those associations," *id.* at 20a (alteration in original). The court, however, found it decisive that it read plaintiffs' complaints to allege "that the member banks *used* the bankcard associations to adopt and enforce" purportedly anticompetitive rules.

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[2] All record cites herein are to the appendix filed in *Osborn*.

Id. Specifically, the D.C. Circuit drew this inference from the plaintiffs' allegations that the "rules of the former bankcard associations were agreed to by the banks themselves" and that the banks appointed representatives to MasterCard's and Visa's "Boards of Directors, which in turn established the [allegedly] anticompetitive . . . rules." *Id.* (quoting complaints) (emphasis omitted). Those few sentences were all it took to reverse the district court's careful analysis dismissing plaintiffs' allegations as implausible. See *id.* at 47a–50a, 196a–207a.

This is all wrong. A Sherman Act conspiracy involves "a conscious commitment to a common scheme *designed to achieve an unlawful objective*." *Monsanto*, 465 U.S. at 764 (emphasis added); see also *Copperweld*, 467 U.S. at 771. Yet the court of appeals' reasoning ignores that facet of concerted action entirely. Plaintiffs' complaints do not allege who agreed to what or why, and they do not tie any allegations about associational conduct, like service on the board, Pet. App. 197a, to any supposedly anticompetitive outcome. On the contrary, as the district court appreciated, "plaintiffs did not allege facts to allow the Court to infer an unlawful agreement, such as facts showing that the actions of the participants represented a radical shift from the industry's prior business practices or that they were against the participants' own interests." *Id.* at 47a. If anything, "other alleged facts indicate that banks have reasons to join or stay in the Visa and MasterCard networks based on their individual interests." *Id.* at 50a (recognizing that the asserted "facts support a conclusion that [the challenged agreements with the associations were] in the banks' individual interests"); see also Pet'rs Br. 22–25. Such allegations did not show "a conscious commitment to a common scheme designed to achieve

an unlawful objective," *Monsanto*, 465 U.S. at 764, and the court of appeals erroneously failed to demand such a showing.

The remainder of the court of appeals' analysis was no better. The fact that association members *can* engage in unlawful concerted action—or even that Visa and MasterCard were found to have done so in a past life, Pet. App. 19a–20a—is a non-starter because no one thinks associations are inherently immune from Sherman Act liability. At the same time, however, association members do not sign onto a Sherman Act conspiracy the minute they join an association, agree to adhere to its rules or code, or vote for its board members. Yet the consequence of the court of appeals' reasoning here is that liability can be imposed on account of conduct that is part and parcel of being an association. Doing what associations do, in other words, meant the associations were engaged in unlawful agreements under the Sherman Act.

The purported distinction drawn between "mere membership" and the allegations pleaded here, however, is one without a difference. Participating in an association frequently will entail adopting and voting on things like rules, codes, bylaws, and directors (who, in turn, may vote on rules, codes, and bylaws). For business associations, moreover, members regularly assume leadership positions to help facilitate operations, including adopting rules and codes. Indeed, as this Court has recognized, an association often "must establish and enforce reasonable rules in order to function effectively." *Nw. Wholesale Stationers, Inc.* v. *Pac. Stationery & Printing Co.*, 472 U.S. 284, 296 (1985) (discussing a wholesale purchasing cooperative). It is therefore "a rare trade, professional, or similar membership organization or association that has not at some time in its history adopted a

business or professional code, code of ethics, or other guide for conduct or practices in the industry, profession, or field represented by the group." Jacobs, *supra*, at 326; see also 1 George D. Webster, *The Law of Associations* §§ 2.03[1], 2.03[1][e] (Nov. 2013) (describing by-laws and Board rules and policies); John E. Lopatka, *Antitrust and Professional Rules: A Framework for Analysis*, 28 San Diego L. Rev. 301, 307 (1991) ("Professionals tend to form associations. These private associations establish rules that prescribe requirements for initial membership, or eligibility requirements."). Concluding that such conduct demonstrates a violation of Section 1 of the Sherman Act, therefore, effectively punishes membership alone.[3]

The D.C. Circuit's view of Section 1's requirements—and what it takes to plead such a claim—breaks sharply with the statute and with this Court's precedent. Conclusory allegations about member banks' "knowing[], intentional[] and active[] participat[ion]" in Visa and MasterCard are "insufficient as a matter of law to constitute a violation of Section 1 of the Sherman Act." *Kendall* v. *Visa U.S.A., Inc.*, 518 F.3d 1042, 1048 (9th Cir. 2008); see also Pet. App. 200a ("Plaintiffs here argue that they have alleged much more than what was asserted in *Kendall*, but

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[3] Nothing in the D.C. Circuit's opinion is cabined to the manner in which Visa and MasterCard were formerly (or are) structured, their former composition of for-profit bankcard issuers, or their function. The D.C. Circuit's rule likewise would apply to any other association, including nonprofits and professional associations, whose rules assertedly had anticompetitive effects. Even without the rule here, a range of such associations have been subject to antitrust claims brought by private plaintiffs or the government. *See*, *e.g.*, *Am. Soc'y of Mech. Eng'rs, Inc.* v. *Hydrolevel Corp.*, 456 U.S. 556 (1982); *Viazis* v. *Am. Ass'n of Orthodontists*, 314 F.3d 758 (5th Cir. 2002).

they have not. Indeed, they allege less."). The court of appeals' decision should be reversed.

II. THE SWEEPING RATIONALE OF THE DECISION BELOW RISKS DANGEROUS CONSEQUENCES FOR ASSOCIATIONS AND THEIR MEMBERS.

Beyond being incorrect, the reasoning of the decision below is deeply unsettling for associations and their members. The D.C. Circuit's approach to pleading standards was not limited to the unique structure of the bankcard associations before it, *supra* n.3; rather, the principle adopted—namely that an association and its members may be liable under the Sherman Act for doing no more than becoming members, participating in selecting board members, serving in governance roles, and adopting or accepting association rules or codes—sweeps broadly across all sorts of associations. There are many reasons why such a holding portends an unstable and harmful state of affairs.

To begin with, courts are supposed to look skeptically upon antitrust conspiracy allegations because "infer[ring] conspiracies when such inferences are implausible . . . often . . . deter[s] procompetitive conduct." *Matsushita*, 475 U.S. at 593; see also *Twombly*, 550 U.S. at 556–58. These principles should have equal, if not special, force where, as here, plaintiffs make threadbare allegations about the supposed anticompetitive conduct of associations and their members. Compare Pet. App. 49a–50a (district court's contrary conclusion that conduct was in defendants' individual self-interest).

That is because it is widely recognized and understood that associations are "beneficial to the industry and consumers." *Maple Flooring Mfrs. Ass'n* v. *United*

States, 268 U.S. 563, 566 (1925); see, *e.g.*, *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U.S. 492, 501 (1988) ("When ... private associations promulgate safety standards based on the merits of objective expert judgments and through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition, those private standards can have significant procompetitive advantages.") (internal citation omitted). According to the FTC's own guidance, for example, "[m]ost trade association activities are procompetitive or competitively neutral." FTC, *Spotlight on Trade Associations*, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-competitors/spotlight-trade (last viewed Sep. 6, 2016). Even as to price, this Court has explained, "[j]oint ventures and other cooperative arrangements are . . . not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all." *Broad. Music, Inc.* v. *CBS*, 441 U.S. 1, 23 (1979). Courts of appeals have likewise recognized the procompetitive benefits of, for instance, research joint ventures, *e.g.*, *Princo Corp.* v. *ITC*, 616 F.3d 1318, 1335 (Fed. Cir. 2010) (en banc), and standard-setting associations, *e.g.*, *Golden Bridge Tech., Inc.* v. *Motorola, Inc.*, 547 F.3d 266, 273 (5th Cir. 2008) ("Potential procompetitive benefits of standards promoting technological compatibility include facilitating economies of scale in the market for complementary goods, reducing consumer search costs, and increasing economic efficiency.").

More broadly still, associations seek to influence government policy and action, to guide industry, to educate, and to collaborate on important research, among other objectives. Jacobs, *supra*, at xi. These and other intangible benefits that flow from member-

ship and participation in associations of all kinds are among the reasons why *amici* have tens of thousands of members. Much of the time in business and other professional settings, "many minds [are] better than one." *SD3, LLC* v. *Black & Decker (U.S.) Inc.*, 801 F.3d 412, 455 (4th Cir. 2015) (Wilkinson, J., dissenting); see also *Maple Flooring Ass'n*, 268 U.S. at 583 (rejecting conspiracy claims against trade association and explaining that "[i]t was not the purpose or the intent of the Sherman Anti-Trust Law to inhibit the intelligent conduct of business operations").

Indeed, given the complexities of the problems facing society and business today, "companies are increasingly considering collaboration as a means of solving intractable global problems." Inara Scott, *Antitrust and Socially Responsible Collaboration: A Chilling Combination?*, 53 Am. Bus. L.J. 97, 97 (2016). Associations or association-like structures that would be subject to the standard adopted by the court of appeals frequently are the vehicle through which such aims are sought to be—and are—achieved. See *id.* at 104-06 (discussing examples of socially responsible collaborations, and noting that "[p]erhaps the most common type of collaborative partnership is one in which various organizations join together to create standards, certifications, or codes of conduct for services and production of goods"); *id.* at 106 (discussing industry codes of conduct, including those to promote safety and human rights and those to prevent environmental harm).

The approach to Sherman Act liability adopted by the court of appeals, if affirmed, could place these social goods in jeopardy. The court of appeals, however, did not so much as hint at the potential repercussions of its rule (the court's insistence that this was no "mere membership" case seemingly caused tunnel vi-

sion). Nor did the D.C. Circuit acknowledge the many perfectly good and legitimate reasons why associations and their members may elect leadership, adopt rules or codes, and work together, let alone why defendants may have engaged in the conduct at issue. Quite the opposite, in fact. Rather than acknowledging—as the district court did, see Pet. App. 47a–50a, 196a–207a—Petitioners' motivations and viewing plaintiffs' allegations "with 'great caution and a skeptical eye,'" *Nat'l Parcel Servs., Inc.* v. *J.B. Hunt Logistics, Inc.*, 150 F.3d 970, 971 (8th Cir. 1998), the court of appeals sailed through the allegations without caution. See Pet. App. 18a–21a; see also *Twombly*, 550 U.S. at 558 ("[I]t 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.") (internal citation omitted).

In doing so, the court of appeals' decision threatens to deter and chill socially beneficial conduct by associations given the risk that quasi-strict liability will extend throughout the entire membership chain (at least during the motion to dismiss stage). Notwithstanding *Twombly* and its progeny, antitrust complaints fail to wane. See U.S. Courts, *Judicial Business 2015* tbl.C-2, at 2 (Sept. 30, 2015) (showing 799 new antitrust cases brought in 2014 and 769 in 2015). And such complaints still sometimes survive motions to dismiss, even when they characterize basic business activities like "trade association affiliations and attendance at industry events" as conspiracies. *In re Flash Memory Antitrust Litig.*, 643 F. Supp. 2d 1133, 1148 (N.D. Cal. 2009).

Plaintiffs, moreover, remain invested in "targeting trade associations and the relationship between the association and its constituent members." Am. Bar

Ass'n Section of Antitrust Law, *Guilt by Association: Trade Associations, Liability, and Protections* 35, 35 (Winter 2001) (calling the degree of such attacks "unprecedented"). After all, for plaintiffs to do so (i) is minimally burdensome because associations and their members—unlike many potential antitrust defendants—certainly have agreed to *something*, and (ii) increases the potential number of pockets that may be forced into the intolerable expense of discovery. See, *e.g.*, Hebert G. Smith II & John B. Williams III, *Assessing a Trade Association's Tort Liability Risk*, N.Y. Soc. of Ass'n Executives, Apr. 2011 (noting that plaintiffs' attorneys "have taken aim at trade associations" "[b]ecause of the possibility of collecting from an additional defendant, and one with seemingly deep pockets"); see generally *Twombly*, 550 U.S. at 558–59 (explaining the discovery costs and settlement pressures that accompany lax enforcement of motion-to-dismiss standards).

Beyond the threat of litigation costs, which are significant for any antitrust defendant, associations face unique disadvantages in attempting to vindicate themselves in litigations that survive dismissal. Associations are generally governed by unpaid volunteers, who have other occupations that demand their primary attention. Also, the adverse publicity associated with antitrust claims can redound across an industry or profession in a manner that makes continued litigation far more untenable than it would be for a for-profit entity. Finally, associations rarely have the resources to mount robust defenses in protracted and complex antitrust proceedings. These threats against associations "will push [them] to settle even anemic cases" early. *Twombly*, 550 U.S. at 559. In turn, the "potential for expanded liability may . . . have a significantly chilling effect on the free flow of

information between members and their trade association, undermining many of the benefits of participation." *Guilt by Association*, *supra*, at 35. That is unacceptable, and the court of appeals' decision threatening such consequences should be reversed.

CONCLUSION

For the foregoing reasons, and those stated by Petitioners, the Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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