No. 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 THE NON-CONSUMER RESPONDENTS

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QUESTION PRESENTED

Whether allegations that members of a business association agreed to adhere to the association's rules and possess governance rights in the association, without more, are sufficient to plead the element of conspiracy in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, as the court of appeals held below, or are insufficient, as the Third, Fourth, and Ninth Circuits have held.

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BRIEF FOR THE NON-CONSUMER RESPONDENTS

STATEMENT OF THE CASE

I. Statutory Background

Section 1 of the Sherman Act prohibits every (a) "contract, combination . . . , or conspiracy" that (b) is unreasonably "in restraint of trade." 15 U.S.C. § 1. The former requirement itself has two elements.

First, the defendants must have entered into an agreement. Many alleged anticompetitive schemes are hidden or implied. In such cases, plaintiffs' complaints generally seek to plead the existence of an agreement by drawing inferences from circumstantial evidence. In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), this Court held that the complaint must describe an agreement that is not merely "possible" but "plausible." *Id.* at 556.

Second, even when there is an "agreement" in form, it must in substance be between separate entities acting independently. Their acts must be "concerted," rather than "individual." Such agreements are subject to Section 1 because they involve collusive activity between the "independent centers of decisionmaking" that give rise to competition that benefits consumers. *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 190 (2010) (quoting *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768-69 (1984)).

For example, agreements between different units of one corporation – such as a parent company and its subsidiary – generally do not violate Section 1. Although in form they are agreements between

different parties, in substance they are the acts of the single corporation as a whole. *See generally Copperweld*, 467 U.S. 752 (articulating the "intracorporate conspiracy" doctrine).

The same issue can arise with respect to joint ventures. The partners to a joint venture must frequently agree on its management. Section 1 applies only to an agreement that involves the partners' separate economic interests, not merely the interests of their collective enterprise. To take a simple example, the partners' agreement to hire a new CEO would presumably not be an agreement under Section 1, because the partners act only on behalf of the common enterprise.

By contrast, in *American Needle, Inc. v. National Football League*, the plaintiff challenged an arrangement under which NFL teams authorized a joint venture to collectively license each team's intellectual property. This Court held that the complaint properly pleaded a combination under Section 1. Like the hiring of a CEO, this agreement certainly furthered the interests of the joint venture, which made profits. Section 1 nonetheless applied because, absent the agreement, the teams would have acted as "independent centers of decisionmaking" in competing against each other in licensing. *Am. Needle*, 560 U.S. at 190 (quoting *Copperweld*, 467 U.S. at 768-69).

If the plaintiffs do establish these threshold elements that the defendants (1) entered into an agreement that (2) reflects concerted activity, then a "contract, combination . . . , or conspiracy" exists. But the Section 1 inquiry is not concluded. The plaintiffs must then go on to prove that the concerted

agreement represents an unreasonable restraint of trade. Only then does the statute's prohibition attach. *Id.* at 196.

II. Factual Background

In this case, petitioners are Visa and MasterCard (Visa/MC), as well as certain large Banks (the Banks). The Banks originally formed Visa/MC as joint ventures. Visa/MC in turn operate the nation's largest credit and debit card networks.

Substantially simplified, debit card networks link automated teller machines (ATMs) to banks. ATMs allow consumers instant access to cash and other services by inserting a card and keying in a security code. The original ATM networks were built by individual banks, which over time were linked to create networks with greater reach. Visa/MC in turn acquired several existing networks.

Visa/MC have policies that restrict the operations of their customers – retail merchants that accept credit and debit cards, as well as banks and independent ATM operators (*i.e.*, operators that are not banks). For example, Visa/MC have "Honor All Cards" policies requiring merchants to accept all Visa- and MasterCard-branded cards from consumers – even those cards that impose higher costs on merchants. Such policies have given rise to billions of dollars in antitrust claims against Visa/MC and the Banks, some of which have been resolved adversely to them or settled for large amounts, and others of which remain pending. *See, e.g.*, *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 827 F.3d 223 (2d Cir. 2016) (reversing approval of $7.25 billion settlement of

Section 1 claims involving varied restraints); *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124 (2d Cir. 2001) (affirming class certification on claim that Honor All Cards policies violate Section 1; case settled); *United States v. Visa U.S.A. Inc.*, 163 F. Supp. 2d 322 (S.D.N.Y. 2001) (finding Section 1 violation relating to prohibition on member banks issuing Discover or American Express cards); *Pulse Network LLC v. Visa Inc.*, No. 14-cv-03391 (S.D. Tex.) (alleging effort to monopolize debit card network services; motion to dismiss denied Dec. 17, 2015); *In re Foreign Currency Conversion Fee Antitrust Litig.*, No. 01-md-1409 (S.D.N.Y.) (challenging pricing of foreign transactions; case settled); *Discover Fin. Servs. v. Visa U.S.A. Inc.*, No. 04-cv-7844 (S.D.N.Y.) (related case to *United States v. Visa*; case settled for $2.75 billion); *Am. Express Travel Related Servs. Co. v. Visa U.S.A. Inc.*, No. 04-cv-08967 (S.D.N.Y.) (related case to *United States v. Visa*; case settled for combined $4.05 billion); *United States v. Am. Express Co.*, No. 10-cv-04496 (E.D.N.Y.) (challenging restraints on merchants under Section 1; Visa and MasterCard entered into consent decree).

This is one of those cases. Respondents are independent operators of ATMs and also consumers who use ATMs to withdraw money. For purposes of obtaining cash, independent ATMs compete with banks, primarily by offering more convenient locations close to merchants.

In an ATM withdrawal transaction, the operator coordinates the withdrawal with the customer's bank through an ATM network. The bank determines which networks the bank's debit cards will access, by contracting with each network. The bank may select

one network or several, choosing from those operated by Visa/MC and numerous less expensive competitors.

The ATM network imposes a cost on the ATM operator. (The opinion below provides more detail on fees related to ATM transactions at *Osborn* Pet. App. 6a-7a.) Visa/MC have the highest costs in the industry. Starting at $0.05 per transaction in 2006, Visa's network fees have increased to $0.15 per transaction and MasterCard's to $0.18 per transaction. With only a single exception that charges $0.05, the other networks charge no network fees at all. Thus, although an ATM operator sends half of its volume over Visa and MasterCard's networks, it pays them ninety percent of its network fees.

Respondents brought these several suits – consolidated below and in this Court – challenging Visa/MC's "Access Fee Rules" (the Rules). An ATM operator may charge a consumer a fee – known as an "access fee" – to withdraw money. But the Visa/MC Rules prohibit ATM operators from charging a lower access fee when the debit card transaction is routed over a less expensive network. For example, a competitor might cost the ATM operator $0.15 less than Visa/MC. But the operator cannot pass that savings on to the customer unless it charges the same reduced fee to every user of the more expensive Visa/MC networks.

Respondents contend that the Rules are straightforward price fixing, the principal evil against which the Sherman Act is directed. The obvious, intended effect of the Rules is to set a price floor that eliminates any incentive for customers to

use a less expensive debit card and thus to switch away from Visa/MC. The rational response of ATM owners to Visa/MC's higher prices is to create a price differential to encourage consumers to use cards that access less expensive networks. Because ATM services are relatively fungible – the machine dispenses money or it doesn't – cost is a principal differentiator. A customer will choose a machine that charges her $2 over one that charges $2.50.

Petitioners have described the Rules as instead intended to prevent ATM operators from charging *more* to users of Visa/MC cards. *E.g.*, Br. 5. But they do that only by omitting that Visa/MC charge operators substantially more than do their competitors. An ATM operator has no practical ability – much less incentive – to impose a supra-competitive surcharge on Visa/MC debit cards. Consumers would simply use ATMs offered by operators that do not impose the surcharge. The Rules' effect is instead to block *discounting* that would encourage the use of more efficient, competing networks that are less expensive than Visa/MC.

Nor, as practical matter, can independent ATM operators refuse to accept Visa/MC debit cards. The market position of Visa/MC is too strong. Roughly half of an independent ATM operator's transaction volume is routed over Visa/MC. Petitioners therefore have essentially unbridled power over independent ATM operators, including the power to raise ATM network fees at will, knowing that the Rules prevent any effective competitive response.

III. Plaintiffs' Allegations of an Agreement

Respondents' complaints allege both of the dual requirements of an unlawful combination under Section 1. *First*, under *Twombly*, petitioners entered into one or more "agreements" to adopt and adhere to the Rules. The Banks controlled not only Visa/MC's adoption of the Rules, but also their ability to implement the Rules as a practical matter.

The Banks agreed in their roles as members of the joint ventures. They controlled the Rules' adoption through the networks' boards of directors. If the Banks had not agreed, the Rules could never have been imposed. *See Stoumbos* Pet. App. 145a (¶ 90).

The Banks also agreed in their further roles as participants in the Visa/MC networks. The Banks could have prevented the Rules from taking effect. At the relevant period in time, banks owned essentially all ATMs. Independent ATM operators would not emerge until substantially later. Because at that point in time they held the market power, the Banks could simply not have accepted the Rules – refusing to abide by them before they took hold. *See Stoumbos* Pet. App. 150a (¶ 105).

Further, in that same role, the Banks agreed with Visa/MC to create debit cards that recognized only the Visa/MC networks. The result was to limit further the ability of consumers to receive discounts for transactions that were routed over less expensive networks. *See Stoumbos* Pet. App. 151a (¶ 106).

After the Rules were adopted and firmly in place, the Banks did spin Visa/MC off as separate entities. But petitioners do not challenge the court of appeals'

holding that, if an agreement originally existed, they did not withdraw from it. *See Osborn* Pet. App. 21a-23a. The Banks continued to own equity positions in Visa/MC that gave them significant influence and control over the networks, which took no steps to eliminate the Rules. Further, none of the Banks refused to abide by the Rules or abandoned Visa/MC. *See Stoumbos* Pet. App. 157a (¶ 119).

Second, under *American Needle*, the Banks' agreement with Visa/MC to adopt and abide by the Rules constituted concerted activity because it eliminated "independent centers of decisionmaking." 560 U.S. at 190 (quoting *Copperweld*, 467 U.S. at 768-69). The Rules operate immediately on the Banks' own operations. But for the Rules' adoption, the banks would have decided for themselves whether to provide a discount for transactions routed over less expensive networks. *See Stoumbos* Pet. App. 137a (¶ 69), 148a-49a (¶ 101).

The Rules specifically furthered the Banks' interests in limiting competition between themselves – *i.e.*, in their roles as banks, as opposed to the owners of the joint venture – in two separate respects. In the Banks' role as operators of ATMs, the Rules make it unnecessary to compete by charging customers lower fees to use debit cards that access lower-cost networks. *See Stoumbos* Pet. App. 140a (¶ 78).

In their separate roles as providers of customer accounts, banks need not compete to offer accounts that provide ATM cards that can access less expensive networks. If the Rules permitted ATM operators to charge less, banks would offer those cards in response to consumer demand. In fact, the

Rules make it possible for banks to offer cards that do not access *any* of the competing networks – further limiting competition. *See Stoumbos* Pet. App. 149a (¶ 103).

Of note, the Rules do not merely limit competition between the Banks but also specifically inhibit emerging competition from independent ATM networks. As noted, for many years, banks owned all the ATMs; there were no independent ATM operators. That was true because in many jurisdictions it was unlawful for an operator to charge customers any "access fee" for using an ATM, depriving non-banks of the revenue sources necessary to operate ATMs. When that legal regime changed in the mid-1990s, independent ATM operators emerged that had every incentive to compete with the Banks to offer lower-priced ATM services by routing transactions over less expensive networks that compete with Visa/MC. The Rules were adopted then to stop just that, protecting the competitive position of both the Banks and also Visa/MC. *See Stoumbos* Pet. App. 121a (¶ 43), 140a (¶ 78).

IV. Procedural History

The district court granted petitioners' motion to dismiss, holding that respondents' complaints failed to plead the first of the two requirements of a Section 1 conspiracy under *Twombly* – *viz.*, that petitioners had entered into an "agreement" at all. *Osborn* Pet. App. 196a-207a; *see also id.* 47a-50a (reaffirming that decision in denying respondents' motions to file amended complaints).

The district court reasoned that the Banks' membership in the Visa/MC joint ventures was itself

insufficient to infer that petitioners had entered into an agreement to adopt the Rules. Further, after Visa/MC were spun off as independent corporations, the Banks had reasons to remain members of the networks apart from the Rules' effects on inter-bank competition. *Osborn* Pet. App. 50a. In reaching that conclusion, the district court distinguished the complaints' supposed failure to plead an agreement from the distinct question – which the court did not decide – whether such an agreement amounted to collective, rather than individual, action under *American Needle*. *See id.* 206a-07a.

The court of appeals (Tatel, Srinivasan, Wilkins, JJ.) reversed. The court agreed with the district court that under *Twombly* "mere membership" in an association such as the Visa/MC joint venture does not plead an "agreement" under Section 1. *Osborn* Pet. App. 20a. But it recognized that respondents' complaints "have done much more" by detailing how "the member banks *used* the bankcard associations to adopt and enforce a supracompetitive pricing regime," including at both the network and bank levels. *Id.* The Banks thus caused and permitted Visa/MC to adopt the Rules, which benefitted the Banks both as owners of the network and by reducing inter-bank competition. *Id.*

The court of appeals also briefly concluded that the complaints properly pleaded the second requirement of a Section 1 combination under *American Needle* – that petitioners engaged in concerted, rather than individual, activity. "The allegations here – 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." *Osborn* Pet. App. 19a (citing *Am. Needle*, 560 U.S. at 191). In a related context, the court recognized that "by removing any incentive for customers to demand [cards with access to lower price networks], the banks are able to avoid competition with each other on network offerings attached to their cards." *Id.* 23a.

The court of appeals denied rehearing en banc, with no member of the court calling for a vote.

Petitioners sought certiorari, seeking review of the court of appeals' threshold holding that respondents' complaints pleaded an "agreement" at all under *Twombly*. Osborn Pet i. (Question Presented). By contrast, petitioners did not challenge the court of appeals' passing conclusion that any such agreement – if it existed – was "concerted action" for purposes of Section 1. This Court granted certiorari.

SUMMARY OF THE ARGUMENT

In this Court, petitioners assume that respondents properly allege the following. The petitioner Banks are horizontal competitors. Petitioners entered into a naked price-fixing agreement with respect to the fees they charge their customers. That agreement reduced competition between the Banks with respect to both banking customers and ATM users. The fixed price reduced output and consumer choice, while increasing consumer costs. The agreement's effects on those consumers in turn made it possible for joint ventures owned by the Banks (also petitioners here) to block competition by rivals in yet another market – the upstream market for ATM network services – and to

charge consumers supra-competitive prices in that market as a result.

Even though they accept every one of those allegations, petitioners argue that the complaints do not allege that their agreement was a contract, combination, or conspiracy for purposes of Section 1 of the Sherman Act. On that view, petitioners have immunity from not just civil suits but also governmental enforcement.

Their argument proceeds in two steps. *First*, they say that Section 1 applies only if the Banks entered into the agreement for a specific *purpose*: to benefit themselves, not merely their joint venture. Absent that purpose, they say, the agreement is a lawful "individual" action of the joint venture, not a prohibited "concerted" action by petitioners together.

Second, respondents argue that petitioners' complaints do not plausibly allege that the Banks had that intention. Petitioners note that these complaints do not allege any express statement by the Banks – such as by an officer – that the purpose of the agreement was to reduce inter-bank competition to benefit the Banks. If the complaints seek to allege such an intention, it must be by inference. But petitioners contend that inference is not even "plausible," because conceivably the Banks might have *only* wanted to benefit the joint venture by allowing it to block competition and charge supra-competitive prices.

Those are very bad arguments. The complaints properly allege that petitioners are competitors who agreed to fix the prices of the services they sell and to foreclose competition by rivals. Their purpose in

entering into the agreement does not matter. Even if competitors bizarrely intend to lose money, they may not enter price-fixing agreements. But if petitioners' intention does matter, it is obviously far more than plausible that their purpose was to reduce competition between themselves. The fact that they also wanted to help their joint venture avoid other competition in another market is an evil under the antitrust laws; it does not confer antitrust immunity. If this Court accepts petitioners' contrary argument, it is hard to see how competitors could ever be subject to suit under Section 1 for the activities of a joint venture.

ARGUMENT

Petitioners seek to use a pleading motion to obtain antitrust immunity for concertedly adopting, implementing, and policing a rule that forecloses competition, reduces output, eliminates consumer choice, and raises prices to supra-competitive levels by forcing independent ATM operators to use petitioners' networks to the exclusion of less expensive competitors and by prohibiting discounting. That request should be denied.

I. Respondents' Complaints Properly Plead An "Agreement."

1. This Court granted certiorari to review the court of appeals' holding that respondents' complaints sufficiently plead that petitioners entered into an agreement under *Twombly*. The Question Presented is whether a complaint pleads a conspiracy under Section 1 through "allegations that members of a business association agreed to adhere to the association's rules and possess governance rights in

the association." Osborn Pet. i. Principally, the petitions argued that the ruling below conflicts with the holding of *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042 (9th Cir. 2008), that banks' mere membership in the Visa/MC joint ventures did not establish an "agreement" to restrict retailers' operations. *See* Osborn Pet. 11-14.

The petitions did not challenge – indeed, did not mention – the court of appeals' brief ruling that the complaints also properly plead that the agreement was "concerted" action. The petitions did not even cite *American Needle, Inc. v. National Football League*, 560 U.S. 183 (2010), or any other decision addressing that question.

In their brief on the merits, petitioners abandon the Question Presented. They do not argue that the complaints fail to plead an agreement. The premise of the certiorari petition was that the court of appeals effectively held that "mere membership" in a joint venture *ipso facto* constituted an agreement by the partners. *E.g.*, Osborn Pet. 3-4, 11-13, 19-22. But on the merits, they expressly reject that inaccurate characterization, citing *Kendall* as entirely consistent with the ruling below. Br. 23 & n.3.

Petitioners' concession is sound. The court of appeals correctly found that the complaints properly plead an agreement because respondents allege "much more." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554 (2007) requires that plaintiffs plead an "agreement" that is plausible, not merely possible. *Twombly* requires "some factual context suggesting agreement, as distinct from identical, independent action," *Id.* at 549; something that takes the allegation "above the speculative level," *id.* at 555.

That requirement is easily satisfied here, as this case does not involve the kind of tacit or implied "agreement" that generally give rise to disputes under *Twombly*. Here, the complaints allege multiple express agreements on their face: Visa/MC and the Banks agreed to adopt and implement the Rules; the Banks agreed with Visa/MC to offer cards that only recognize that network, in addition to the inferred agreement of the banks with one another to cede control over ATM access fee pricing to Visa/MC. *See supra* at 6-9.

To the extent *Twombly* requires respondents to plead more to establish plausibility, they have. The complaints allege that Visa/MC could not have implemented the Rules without the Banks' agreement *inter se*. The Banks controlled Visa/MC through the networks' boards of directors. Straightforwardly, Visa/MC could not have adopted the Rules without an agreement by the Banks. Separately, the Banks could have refused to abide by the Rules' restrictions on fees charged to ATM customers – and prevented them from taking effect – because banks owned all the ATMs at the time. *See supra* at 7.

The Banks moreover had to engage in concerted action – *i.e.*, they had to agree among themselves as competitors to implement the Rules. Individual action would have failed. The Rules were contrary to the Banks' separate commercial interests, because the higher fees charged by Visa/MC were imposed directly upon banks for the use of those networks. Any one bank that defected from accepting the Rules would have received a competitive advantage in the marketplace, by charging customers less for using

cards on a competing network, threatening to unravel the agreement.

If it does not dismiss the writ of certiorari as improvidently granted, this Court should affirm the court of appeals' judgment that respondents' complaints plead an "agreement" under Section 1. That is the end of the case in this Court.

II. Respondents' Complaints Properly Plead That Petitioners Engaged In Concerted Action.

In their merits brief, petitioners press an argument that is quite different than their abandoned theory that respondents failed even to plead an agreement. Petitioners now exclusively argue that, under *American Needle*, the complaints fail to plead sufficiently that their agreement is the concerted action of the petitioners acting together, rather than the individual action of the Visa/MC joint ventures.

A. The Court Should Decline To Resolve Petitioners' Argument.

This Court should not decide whether respondents' complaints plead that petitioners engaged in concerted action. That argument was not presented by the petitions, neither of which raised the issue or even cited *American Needle* (or the cases on which it relied) in passing. It is not the subject of any conflict in the lower courts that this Court would have agreed to resolve if asked. If it were, petitioners no doubt would have made that point in the petitions.

By not even arguing in their merits brief that this Court should exercise its discretion to go outside

the Question Presented and decide the distinct legal issue they have now briefed, petitioners have deprived respondents of the fair opportunity to respond in their own briefing. The issue is accordingly waived.

Departing from this Court's settled practice of deciding only the Question Presented would be particularly improvident in this case. The issue petitioners belatedly raise is central to an array of Section 1 claims against petitioners in other suits that have not yet been decided in the lower courts. Those cases involve a wide variety of restraints that have not even been described to this Court, much less briefed in a manner that could permit a reasoned decision on such important matters. *See supra* at 3-4. On petitioners' legal theory, it is hard to see how they could ever be held liable for any horizontal *or* vertical restraint, all of which inevitably share the feature that petitioners argue is dispositive: that the challenged agreement benefitted Visa/MC to some extent. Indeed, petitioners' goal in pivoting their argument in this Court so radically is almost certainly to secure such sweeping antitrust immunity, short-circuiting the other suits they now face.

B. Petitioners Acted In Their Capacity As Competitors.

If this Court does reach petitioners' merits argument, it presents "only a narrow issue to decide" (*Am. Needle*, 560 U.S. at 189), on which the court of appeals was obviously correct: is petitioners' agreement "categorically beyond the coverage of § 1" (*id.* at 186) because respondents failed to plead that

the agreement constitutes concerted rather than individual action? In fact, this is an *a fortiori* case under *American Needle*, because the complaints properly plead that the Rules reduced the number of "independent centers of decisionmaking that competition assumes and demands." *Id.* at 190 (quoting *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752 (1984)).

This Court has been steadfast in holding that joint ventures may not be used as a device to facilitate price fixing. *E.g.*, *Am. Needle*, 560 U.S. at 196; *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006); *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972); *United States v. Sealy, Inc.*, 388 U.S. 350 (1967). This is a particularly easy case because the complaints do not allege merely that petitioners entered into an agreement in their governance roles in the Visa/MC joint ventures. The complaints allege that the Banks not only controlled Visa/MC but also entered into the agreements in their role *as banks*. *See supra* at 7-8. The Rules operate directly on banks – not third-party merchants. So the Banks themselves had to decide whether to accept the Rules in the first instance or instead prevent them from taking place.

The Banks are thus independent entities that compete with each other with respect to the precise subject of the Rules. This case does not involve anything like a "complete unity of interest" that would transform petitioners into "a single enterprise for purposes of § 1 of the Sherman Act," *Copperweld*, 467 U.S. at 771, and immunize their agreement from scrutiny under the Sherman Act. If it were not for the Rules, each would be an "independent center[] of decisionmaking," *Am. Needle*, 560 U.S. at 190

(quoting *Copperweld*, 467 U.S. at 768-69), that was "pursuing separate economic interests," *id.* at 195 (quoting *Copperweld*, 467 U.S. at 769), in two separate respects: deciding whether to offer a discount to consumers for using a debit card with access to less expensive ATM networks and whether to offer account customers such a debit card. In concrete terms, absent the Rules, petitioner Bank of America would decide whether to charge consumers less than petitioner Chase for using a card that accesses a less expensive ATM network, and vice versa. Through the Rules, the Banks agreed that they would not. Output was reduced, and competition and consumer choice were lessened. That is the precise concern of Section 1.

The Banks also obviously acted in their independent role as competitors in agreeing with Visa/MC to offer consumers a debit card that provided banking customers with access only to those networks. *See supra* at 8. In a footnote, petitioners say that these agreements represent a "vertical" rather than "horizontal" restraint on competition. Br. 30 n.5. But that has nothing to do with the legal issue: Section 1 governs both; if petitioners are correct that there was no concerted action, then the Banks are just as immune from liability for a vertical restraint on competition. The complaints further allege that these agreements are part of petitioners' broader conspiracy, whether characterized as horizontal or vertical.

Petitioners also argue that the joint venture has an interest in consumers using such cards, without regard to the interests of banks. Br. 31. That is true but misses the point. The joint venture *cannot* issue

the cards itself; the banks must do so. It takes two to tango. The dance partner of Visa/MC is the banks, which act in their own commercial interests.

To see that the existence of the joint venture does not change the Section 1 analysis, consider that competing banks could agree between themselves directly to adopt the same restraints. Section 1 would obviously apply to such an agreement. That would be true even if their goal was to secure greater profits through their ownership of Visa/MC. The fact that the Banks imposed the same agreement through their ownership of Visa/MC does not change the agreement's anticompetitive effect or the applicability of Section 1. "An ongoing § 1 violation cannot evade § 1 scrutiny simply by giving the ongoing violation a name and label." *Am. Needle*, 560 U.S. at 197. Both arrangements involve the "[c]oncerted activity [that] is fraught with anticompetitive risk." *Copperweld*, 467 U.S. at 751-52. The fact that the Rules are imposed by Visa/MC means only that they can be imposed broadly across the nation's bank and non-bank ATM networks.

Petitioners criticize the court of appeals for supposedly finding concerted action based on the Banks' control of the Visa/MC boards of directors. Br. 24. That mischaracterizes the ruling below. The court of appeals looked to the joint ventures' structure in determining that petitioners entered into an *agreement*. *See supra* at 10. Petitioners no longer contest that holding. The court of appeals' further holding that the now-conceded agreement was concerted action instead rested on its correct conclusion that "[t]he allegations here – 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," *Osborn* Pet. App. 19a (citing *Am. Needle*, 560 U.S. at 191), because "by removing any incentive for customers to demand" cards with access to lower price networks, the banks are – *inter alia* – "able to avoid competition with each other on network offerings attached to their cards," *id.* 23a.

The court of appeals thus correctly held that respondents' complaints allege that petitioners' agreement constitutes concerted, not individual, action under Section 1.

C. Petitioners' Contrary Focus On The Purpose Of Their Agreement Is Misguided.

Petitioners' argument in this Court proceeds in two steps. *First*, as a matter of substantive antitrust law under *American Needle*, petitioners argue that an agreement is "concerted" only if it is entered into with the *purpose* of advancing the interests of the multiple competitors, rather than the single joint venture. *Second*, as a matter of pleading law under *Twombly*, petitioners argue that one cannot infer that purpose from any agreement that also benefits the joint venture.

Neither point has the slightest merit. Both would upend settled antitrust law and broadly immunize horizontal conspiracies.

1. The Relevant Issue Is The Conspirators' Role, Not Their Purpose.

Whether an agreement among partners to a joint venture is immune under Section 1 because it is individualized, not concerted, action does not turn on the partners' *purpose* in entering into the agreement. It turns on the *capacity* in which the partners acted. "The justification for cooperation is *not relevant* to whether that cooperation is concerted or independent." *American Needle*, 560 U.S. at 199 (emphasis added). Section 1 is concerned with agreements that reduce competition. Whether the conspirators benefit from some mechanism other than profiting directly – indeed, even if the conspirators lose money – there still is an agreement that reduces competition and threatens to injure consumers. Congress did not care why petitioners fixed the prices they charged to consumers; it cared that they did so. This is simply another version of the truism that the antitrust laws protect competition, not competitors. *E.g.*, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977). It protects competition, certainly not conspirators.

The result of accepting petitioners' argument would be to rework the substance of antitrust law substantially. In an ordinary Section 1 case, the conspirators' "intent" is irrelevant. The question is – as the statute says – whether the agreement is an unreasonable "restraint of trade." 15 U.S.C. § 1.

Look no further than this Court's unanimous decision in *American Needle*. (Indeed, it is striking that Visa/MC made a similar argument in *American Needle* as *amici* supporting the defendants, in that

case, which lost unanimously. Br. of MasterCard Worldwide & Visa Inc. as Amici Curiae in Support of Respondents, *Am. Needle*, 560 U.S. 183 (No. 08-661).) No one doubted that the exclusive licensing agreement in that case plainly benefitted the collective NFL enterprise. That joint venture made its own profits, which were then distributed to the teams, just as the Banks shared in the profits of Visa/MC. There was no direct evidence that the teams were acting for their own benefit, and this Court did not place any weight on – indeed, did not mention – the teams' purpose in entering into the agreement. But this Court unanimously held that the agreement was concerted because it also reduced competition between the teams and thus reduced the number of independent centers of decisionmaking. *Am. Needle*, 560 U.S. at 201.

Consider as well the reverse example. This Court held in *Copperweld*, 467 U.S. at 752, that agreements between two corporate affiliates generally are individual, not concerted, action under Section 1. That surely remains true if the plaintiffs could prove that the exclusive purpose of the scheme was to benefit each affiliate, not the overall enterprise. Purpose simply has nothing to do with the legal issue.

In this Court, petitioners do not dispute the complaints' allegations that the Rules reduced inter-bank competition in the two respects described above. Their only response is that the Banks would have had a reason to adopt and adhere to the Rules even if they had not sought to restrain competition – *i.e.*, that it remains possible that their purpose was simply to benefit the joint venture. But as discussed,

the relevant legal question is not petitioners' purpose in adopting the Rules. It is whether the Banks acted in their capacity as competitors, which they obviously did.

Further, petitioners draw an imaginary line between the interests of a joint venture and those of the partners that formed it. The partners take the profits of the joint venture. Here, if the Banks collectively reduced competition to benefit Visa/MC, they were still seeking to benefit themselves: they owned the networks and made money on the basis of the Rules through their distribution of their share of the profits. Nothing in the text of the Sherman Act or common sense suggests that such an anticompetitive scheme is immune from Section 1.

A hypothetical illustrates how petitioners' contrary rule is implausible. Imagine that the producers of widgets all agree to stop selling their products. Instead, the widgets will be sold through a joint venture at a single cartel price. Each manufacturer loses direct sales, so the purpose of the scheme is not to benefit the manufacturers directly. But the manufacturer gains on net through its share of the cartel profits. Under that arrangement, the conspiring producers are acting to benefit the joint venture and would do so without regard to reducing competition between themselves. But Section 1 surely applies, as this Court squarely held in cases such as *Sealy*, 388 U.S. 350.

For their part, petitioners argue that the application of Section 1 "depends on whose *interests* the parties were pursuing when they made the decision." Br. 16. But it could not be more telling that this centerpiece of their brief has no

accompanying citation – at all. They simply assert it as a rule of law, one literally without precedent. At other points, petitioners attempt to suggest that their position is supported by one clause of one sentence in *American Needle*, to the effect that concerted action exists when the parties to the agreement "'act[] on interests separate from those of' the venture." *Id.* 22 (quoting *Am. Needle*, 560 U.S. at 200). But that language is not only not a reference to the parties' *purpose*, but it is simply a description of the intra-corporate conspiracy doctrine, which is not at issue in this case. *Am. Needle*, 560 U.S. at 200-01 ("Agreements made within a firm can constitute concerted action covered by § 1 when the parties to the agreement act on interests separate from those of the firm itself, and the intrafirm agreements may simply be a formalistic shell for ongoing concerted action." (footnote omitted)).

That is so obviously right that petitioners ultimately concede that purpose is not the *sine qua non* of concerted action. Rather, they argue that the crux of this case is instead that Visa/MC operate in a different market than the Banks. Petitioners' theory is that even though they conspired to restrain inter-bank competition, Section 1 does not apply because their agreement also had a further effect in an "upstream" market – indeed, an anti-competitive effect. They improved the market position of Visa/MC by inhibiting competition by lower-cost networks to which consumers would switch if offered discounts. Br. 25-29.

That is simple misdirection, not relevant to the Section 1 inquiry. Whatever the effect on Visa/MC, it remains true that petitioners reduced competition in

the inter-bank market. Whether their agreement also had a follow-on effect in another market is irrelevant. In the terms of the statute, the agreement is no less a contract, combination, or conspiracy.

If the effect of this agreement on the ATM network market does make a difference, it makes the antitrust violation more obvious rather than less. Here, petitioners argue that by reducing competition in one market (the inter-bank market) they also reduced competition in another (the ATM services market). The "upstream" effect does not in any way negate the direct harm to competition in the "downstream" market. Petitioners' agreement restrained inter-bank competition; the fact that it made Visa/MC more profitable in the separate ATM network market makes no difference to whether their activities were "concerted." Put otherwise, the fact that an anticompetitive agreement is highly successful across multiple markets does not somehow confer antitrust immunity.

The relevant precedent is again *American Needle*, which petitioners badly misdescribe as involving only a single market. Br. 34. In fact, the licensing agreement furthered the NFL's interest in promoting football – *i.e.*, the separate market for professional sports entertainment. Indeed, that was the court of appeals' rationale in that case in holding that Section 1 did not apply. *See Am. Needle*, 560 U.S. at 189. This Court unanimously reversed.

If anything, *American Needle* was a closer case than this one. The NFL teams were organized around the overall common enterprise of the market for producing and marketing professional football.

The competition in the market for football apparel is also somewhat indirect: the Redskins may have trouble selling team-logo jerseys to Cowboys fans. By contrast, the Banks are ordinary competitors and ATM services are relatively fungible: few consumers have a "favorite" ATM brand outside their own banks.

To be sure, the agreement's effect on the joint venture may be relevant to the Section 1 inquiry. The restraint may prove to further competition. But that goes to whether it is an "unreasonable restraint of trade," not the antecedent question whether the partners engaged in concerted action when they adopted it. *See Am. Needle*, 560 U.S. at 186.

2. Petitioners Cannot Rescue Their Argument By Reference To Pleading Standards.

a. Respondents Were Not Required To Plead That The Purpose Of The Agreement Was To Benefit The Banks.

At points, petitioners suggest that their agreement is immune from Section 1 scrutiny merely because Visa/MC benefitted from the Rules, even if the Banks benefitted as well. On that view, competitors acting through a joint venture may enter into any naked restraint on competition that benefits the collective enterprise in some form. Put another way, Section 1 would not apply to an open, profitable cartel. That obviously cannot be right. *See* Herbert Hovenkamp & Christopher R. Leslie, *The Firm as Cartel Manager*, 64 VAND. L. REV. 813, 871-72 (2011) (describing Visa and MasterCard as "centrally

managed cartels" and observing that "it is unnecessary that the individual issuing banks coordinate their behavior with one another; the central organization solves that problem").

But petitioners would reach the identical result, and confer the same sweeping antitrust immunity, through the back door of reframing the issue as a matter of legal pleading. Petitioners' theory is that the complaints do not even *plausibly* allege that they acted in the interest of the Banks. They argue that, under *Twombly*, a complaint does not plead the existence of a "concerted" agreement if the activities are also consistent with the defendants' intent to pursue the interests of the joint venture. Br. 25-29. They thus contend that the case must be dismissed because there is no "smoking gun," *id.* 11, and the Rules are not "contrary to each network's independent interest," *id.* 31-32.

The breadth of petitioners' proposed rule is extraordinary. It is difficult to hypothesize an agreement between the partners to a joint venture that is *not* intended to further the interests of the collective enterprise. Petitioners prove the point themselves, explaining that the partners have a fiduciary duty to act in the joint venture's interest. Br. 11-12.

Petitioners' argument that the complaints fail to plausibly plead that the sought to benefit themselves fails for the same reason. The relevant question is whether petitioners acted in their capacity as competitors, not which entity's interest they were pursuing. Here, the complaints contain a well-pleaded allegation that the Banks agreed to a restraint that limited competition between them in

multiple respects. That plainly is at least a "plausible" assertion that they were not merely acting in the capacity of managing the joint venture.

Twombly is a very different case. When considering the distinct question whether parties have entered into an "agreement," the ordinary assumption is that a single company acts independently and in its own interests, and thus is not engaged in a secret conspiratorial agreement. Much parallel conduct is "in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market." *Twombly*, 550 U.S. at 554. The concern of *Twombly* is that complaints not be deemed to allege an agreement based on "an allegation of parallel conduct and a bare assertion of conspiracy." *Id.* at 556.

Here, in stark contrast, petitioners concededly have entered into an agreement. The only question is whether to excuse that agreement on the basis that it was not concerted action. So there is no risk of generating litigation over ordinary, unilateral conduct.

The agreement here is an open price-fixing agreement in a market in which petitioners compete. Indeed, unilateral action by the joint venture would be *impossible*, given the Banks' capacity in their role as competitors to refuse to accept the Rules at the outset. Petitioners' core premise that this overt agreement is not even "plausibly" regarded as concerted action makes no sense.

Indeed, petitioners' entire argument is at war with the premise of the Sherman Act. Petitioners

contend that their open, express agreement regarding the fees to be charged their own ATM customers is not even *plausibly* subject to the statute. But in fact, Congress adopted the statute precisely to combat the realistic prospect of anticompetitive practices, with a special emphasis on price-fixing arrangements by competitors.

Petitioners note that other ATM operators now adhere to the Rules too. Br. 38. That is misdirection as well. Petitioners adopted the Rules and agreed to implement them at the outset, before independent ATM operators even existed. At that early time, the Banks also could incur individual losses because of the supra-competitive profits they derived as owners of Visa/MC. Now those networks have more customers than their smaller rivals, by far. They have substantial leverage over independent ATM operators, which cannot afford to refuse to serve such a large market. *See supra* at 6. At the very least, in this procedural posture, the Court cannot assume that petitioners' self-interested version of the facts is correct.

Petitioners suggest the contrary by invoking the holding of *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), that when the plaintiffs' circumstantial evidence is just "as consistent with" unilateral action as with concerted action, it "does not, standing alone, support an inference of antitrust conspiracy." *Id.* at 588. That seriously misapprehends the *Matsushita* standard, which – as can be seen from its reference to "evidence" – applies only "at the summary judgment stage," whereas the pleading standard is an "antecedent question." *Twombly*, 550 U.S. at 554-55.

Petitioners thus seriously err in asserting that the Banks "could rationally choose to comply with the Access Fee Rules in the absence of an agreement." Br. 36. Under *Twombly*, the plaintiff need not negate every lawful, "rational" explanation for the defendants' conduct. If that were the rule, essentially no case could proceed.

b. The Complaints Do Properly Plead That The Agreement Was Intended To Benefit The Banks.

In any event, respondents' complaints equally plead a plausible allegation that the Banks were pursuing their own commercial interests rather than only those of Visa/MC. An agreement among the partners to reduce competition between themselves plausibly indicates that the partners had their own competitive interests in mind. The fact that they also may have been pursuing the interests of the joint venture is not to the contrary.

Indeed, petitioners' own argument eats itself. As just noted, petitioners explain that a board of directors has a fiduciary duty to act in the interests of the corporation. Necessarily, the Banks' boards were therefore legally required to further the commercial interests of those institutions, not – as petitioners imagine – munificently sacrifice the Banks' interests to favor Visa/MC.

Petitioners also forcefully argue that, after Visa/MC were spun off as separate corporations, the Banks had varied interests in remaining parts of the network. For example, the Banks wanted access to the ATM network of Visa/MC. On that basis, they argue that petitioners need not have entered into any

conspiratorial agreement. Br. 36. But that misses the point: petitioners *concede* they entered into an agreement. They do not challenge that holding of the court of appeals. *See supra* at 14. The actual relevance of petitioners' argument is their express admission that the Banks are acting in their own commercial interests. That is obviously correct. Petitioners' simultaneous argument that the complaints do not even *plausibly* allege that the banks acted with the purpose to further those same interests requires the suspension of reality.

c. The Ruling Below Does Not Threaten Joint Ventures.

Contrary to petitioners' suggestion, *American Needle*'s unanimous holding poses no risk to the lawful activities of joint ventures. Their ordinary operations do not involve lessened competition between the venture's partners and thus do not reduce the number of independent centers of decision-making.

In this case, the restraints challenged by the complaints are not in any way intrinsic to the operation of the joint ventures. Visa/MC could compete in the marketplace without the Rules. Indeed, they did so before they were threatened by the emergence of independent ATM networks. *See supra* at 9. The ordinary operations of Visa/MC – such as its marketing decisions –would not be subject to Section 1 scrutiny, without more. So too if Visa/MC introduced a product in a market in which the Banks do not compete – for example, offering insurance to customers who use debit cards for rental cars.

That is not to say that the effect of the agreement on the joint venture is irrelevant. "The question whether an arrangement is a contract, combination, or conspiracy is different from and antecedent to the question whether it unreasonably restrains trade." *Am. Needle*, 560 U.S. at 186. The lower courts in this case have not yet considered the latter question, which remains open on remand.

CONCLUSION

The judgment of the court of appeals should be affirmed or, because petitioners have abandoned the argument on which certiorari was granted, the petitions should be dismissed as improvidently granted.

Respectfully submitted,

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