Nos. 15-961 and 15-962

In the Supreme Court of the United States

VISA INC., ET AL., PETITIONERS

v.

SAM OSBORN, ET AL.

VISA INC., ET AL., PETITIONERS

v.

MARY STOUMBOS, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether allegations that two associations of competing banks adopted written rules governing fees that the banks charge in their separate businesses suffice to plead concerted action subject to antitrust scrutiny under Section 1 of the Sherman Act, 15 U.S.C. 1.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes and rule:

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INTEREST OF THE UNITED STATES

The Department of Justice and the Federal Trade Commission have primary responsibility for enforcing the federal antitrust laws and a strong interest in their correct application.

STATEMENT

Section 1 of the Sherman Act, 15 U.S.C. 1, prohibits concerted action that unreasonably restrains trade. These consolidated cases arise from complaints alleging that two associations of competing retail banks unreasonably restrained trade by adopting rules gov-

erning fees that member banks charge consumers who use their automated teller machines (ATMs). The only issue before this Court is the threshold question whether the complaints adequately pleaded facts establishing that the associations' rules are concerted action subject to review for reasonableness under Section 1.

A. Factual Background

1. ATMs allow consumers to withdraw cash from their bank accounts without entering a bank branch. A consumer can use any ATM operated by his bank. He can also use ATMs operated by other banks and by non-bank independent operators, so long as those ATMs are connected to the consumer's home bank by at least one ATM network. Pet. App. 5a, 163a-165a.[1]

Petitioners Visa and MasterCard operate the two largest ATM networks, which together process the majority of ATM transactions. Pet. App. 5a, 15a. Visa and MasterCard compete against many smaller networks, including STAR, NYCE, and Credit Union 24. *Id.* at 5a. Banks may issue cards that work on multiple networks. *Id.* at 75a. "Most bank cards indicate the networks to which they are linked with logos printed on the back of the card, referred to colloquially as 'bugs.'" *Id.* at 5a. For example, a card with Visa and STAR bugs can be used at any ATM connected to either network. *Id.* at 31a.

A transaction in which a consumer uses an ATM run by an independent operator or a bank other than

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[1] Because these cases arise from motions to dismiss, we describe the facts as alleged in the relevant complaints. Citations to "Pet. App." refer to the petition appendix in No. 15-961 (*Osborn*). The petition appendix in No. 15-962 is cited as "*Stoumbos* Pet. App."

her home bank is called a "foreign" transaction. Foreign transactions generate several fees, three of which are relevant here. First, the ATM operator charges an "access fee," averaging around $2.10, which is deducted from the consumer's bank account. Second, the operator receives an "interchange fee" of up to $0.60 from the consumer's bank. Third, the network that completes the transaction may deduct a "network services fee" before remitting the interchange fee to the operator. The operator's revenue is thus equal to the access fee plus the "net interchange fee"—that is, what is left of the interchange fee after the network deducts its services fee. Pet. App. 6a, 31a.

Visa and MasterCard charge significantly higher network services fees than their rivals. Pet. App. 6a. As a result, ATM operators receive lower net interchange fees for transactions on the Visa and MasterCard networks—just $0.06 to $0.29, as opposed to up to $0.50 for transactions on other networks. *Ibid.* Given the dominant position of Visa and MasterCard, "ATM operators essentially have no choice but to maintain access to [those] networks, or they will have to turn away an increasing percentage of customers." *Id.* at 74a-75a. But operators prefer to route transactions over lower-cost networks and generally choose the cheapest available network when a consumer presents a multi-bug card. *Id.* at 40a, 69a. For example, if a consumer uses a card with Visa and STAR bugs at an ATM with access to both networks, the operator will use the STAR network to take advantage of its lower fee.

2. During the 1990s, after States repealed prohibitions on ATM access fees and independent operators entered the market to compete with bank-owned

ATMs, Visa and MasterCard adopted rules barring ATM operators from charging higher fees for transactions on the Visa and MasterCard networks than for transactions on rival networks. Pet. App. 5a-7a, 77a. MasterCard's rule provides:

> An [ATM operator] must not charge an ATM Access Fee in connection with a Transaction that is greater than the amount of any ATM Access Fee charged by that [operator] in connection with the transactions of any other network accepted at that terminal.

Id. at 7a n.1 (citation omitted). Visa's rule is materially identical. *Ibid.* These Access Fee Rules prevent ATM operators from using differential pricing to encourage consumers to use cards that can access lower-cost networks. Operators cannot, for example, "say to cardholders: 'We will charge you $2.00 for a MasterCard or Visa transaction, but if your card has a Star or Credit Union 24 bug on it, we will charge you only $1.75.'" *Id.* at 7a.

When the Access Fee Rules were adopted, Visa and MasterCard "were owned and operated as joint ventures" by the thousands of retail banks on the Visa and MasterCard networks. Pet. App. 7a; *Stoumbos* Pet. App. 122a-123a. Those banks elected Visa's and MasterCard's boards of directors, which were "composed exclusively or almost exclusively of competing member banks." Pet. App. 86a-87a. The boards of directors, in turn, "established" and "approved" the networks' rules and regulations, including the Access Fee Rules. *Id.* at 87a.

The Access Fee Rules bind Visa's and MasterCard's member banks in their retail ATM operations. Pet. App. 87a; *Stoumbos* Pet. App. 64a-65a, 137a.

They also bind independent ATM operators, which must be sponsored by or affiliated with a member bank to gain access to the Visa and MasterCard networks. *Stoumbos* Pet. App. 77a, 123a, 137a. All bank and non-bank ATM operators on the networks must "expressly agree" to comply with the Access Fee Rules, which Visa and MasterCard "actively monitor and vigorously enforce." *Id.* at 138a; see *id.* at 93a-94a.

In 2008 and 2006, respectively, Visa and MasterCard reorganized themselves from associations of member banks into public companies. Pet. App. 166a. The reorganizations "did not alter the substance of the Access Fee Rules, which remain intact to this day." *Id.* at 7a.

B. The Proceedings Below

1. Respondents are consumers and independent ATM operators who filed three putative class actions challenging the Access Fee Rules. As relevant here, their complaints allege that the rules violate Section 1 of the Sherman Act because they are horizontal agreements among Visa's and MasterCard's member banks that unreasonably restrain competition in the markets for ATM services and ATM network services. Two of the complaints name only Visa and MasterCard as defendants; the third also names three member banks. Pet. App. 8a, 160a.

Respondents allege that the Access Fee Rules restrain competition in the market for ATM services by preventing operators from offering "discounted access fees for cards linked to lower-cost ATM networks"—a form of competition that would allegedly create "downward pressure on access fees generally." Pet. App. 14a. Respondents further allege that the rules

"protect[] banks from competition with each other over the types of bugs offered on bank cards" because the absence of differential access fees means that consumers have no reason to demand cards linked to lower-cost networks. *Id.* at 19a. And respondents allege that the lack of incentives for consumers to request or use those cards insulates Visa and MasterCard from "competition with other networks," allowing them to "charge supra-competitive network services fees with impunity." *Id.* at 13a; see *id.* at 18a.

2. The district court dismissed the suits without prejudice. Pet. App. 158a-207a. The court then denied respondents' motions for leave to file amended complaints, concluding that the proposed amended complaints would not withstand motions to dismiss. *Id.* at 27a-51a. The court held that respondents' allegations about the harms they suffer as a result of the Access Fee Rules were too speculative to establish an Article III injury. *Id.* at 37a-47a. It also held that respondents had failed to plead facts establishing that the Access Fee Rules are "a current horizontal conspiracy" among Visa's and MasterCard's member banks. *Id.* at 48a; see *id.* at 47a-50a. The court emphasized that Visa and MasterCard are no longer associations of member banks, and it reasoned that "[a]llegations that the member banks made a prior agreement when they were members of the bankcard associations do not suffice to allege a current agreement." *Id.* at 47a.

3. The court of appeals vacated and remanded. Pet. App. 3a-25a.

a. The court of appeals held that respondents had adequately pleaded an Article III injury because they had plausibly alleged that the Access Fee Rules lead

to inflated ATM access fees and network services fees. Pet. App. 12a-17a.

b. The court of appeals also held that respondents had adequately alleged that the Access Fee Rules are agreements among Visa's and MasterCard's member banks. Pet. App. 17a-23a. The court explained that member banks had "developed and adopted the Access Fee Rules when the banks controlled Visa and MasterCard," and that the rules govern fees the banks charge in their independent businesses. *Id.* at 18a-19a. The court concluded 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." *Id.* at 19a.

The court of appeals agreed with petitioners that "mere membership in associations is not enough to establish participation in a conspiracy with other members of those associations." Pet. App. 20a (brackets and citation omitted). The court observed, however, that respondents "have done much more than allege 'mere membership'" because they "alleged that the member banks *used* the bankcard associations to adopt and enforce a supracompetitive pricing regime for ATM access fees." *Ibid.* The court also held that the adoption of the Access Fee Rules "by Visa and MasterCard as single entities does not preclude a finding of concerted action." *Id.* at 19a. The court explained that "'a legally single entity violate[s] Section 1 when the entity is controlled by a group of competitors and serves, in essence, as a vehicle for ongoing concerted activity.'" *Ibid.* (brackets omitted) (quoting *American Needle, Inc.* v. *National Football League*, 560 U.S. 183, 191 (2010)).

Finally, the court of appeals rejected petitioners' contention that the reorganization of Visa and MasterCard into public companies "constituted a withdrawal" from the member banks' earlier agreements. Pet. App. 21a. The court explained that "[w]hether there was an effective withdrawal is typically a question of fact," and it held that the facts alleged in respondents' complaints would allow a jury to find a lack of withdrawal here. *Id.* at 22a-23a.

4. The court of appeals denied rehearing en banc with no judge requesting a vote. Pet. App. 1a-2a.

SUMMARY OF ARGUMENT

Section 1 of the Sherman Act prohibits every "contract, combination * * * or conspiracy" that unreasonably restrains trade. 15 U.S.C. 1. "The question whether an arrangement is a contract, combination, or conspiracy is different from and antecedent to the question whether it unreasonably restrains trade." *American Needle, Inc.* v. *National Football League*, 560 U.S. 183, 186 (2010). To constitute a Section 1 contract, combination, or conspiracy, an arrangement must be (a) an agreement (b) between two or more entities capable of engaging in concerted action. *Id.* at 189-190. Respondents' complaints adequately allege that the Access Fee Rules satisfy both of those requirements because they are written rules adopted by associations of competitors to govern the prices charged in the competitors' separate businesses.

A. In their petitions for writs of certiorari, petitioners asserted that respondents had failed adequately to allege agreements among Visa's and MasterCard's member banks because the complaints do not include sufficient details about the circumstances under which the Access Fee Rules were adopted or the

roles played by particular banks. Petitioners relied on this Court's holding that, when a Section 1 plaintiff seeks to establish an inference of an undisclosed agreement based on the defendants' parallel business conduct, the complaint must plead facts "that raise[] a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 577 (2007).

Here, however, respondents do not rely on inferences from parallel conduct or other circumstantial facts. Instead, respondents challenge express written rules adopted by associations of competing banks to govern the member banks' conduct. Those rules are reproduced verbatim in the complaints, and the rules themselves are *direct* evidence of the challenged agreements. This Court has long treated such rules as agreements among an association's members.

B. Unlike their certiorari petitions, petitioners' merits brief does not dispute that the Access Fee Rules are agreements among Visa's and MasterCard's member banks. Instead, petitioners now assert that the alleged agreements do not implicate Section 1 because each network and its respective member banks should be regarded for these purposes as a single entity. That separate issue is not properly before the Court because it is not "fairly included" in the question presented. Sup. Ct. R. 14.1(a).

In any event, petitioners' single-entity argument lacks merit. Joint ventures and business associations may properly be regarded as single entities when they engage in certain activities that do not relate to their members' separate businesses—for example, when they hire staff or lease office space. But an associa-

tion engages in concerted action when, as here, it adopts rules governing the conduct of its members' separate businesses. Such rules are subject to antitrust scrutiny because they "deprive[] the marketplace of independent centers of decisionmaking," and "thus of actual or potential competition." *American Needle*, 560 U.S. at 195 (citation omitted).

Petitioners assert that a restraint adopted by a business association is concerted action only if the subjective motivation for the restraint was to benefit the members individually rather than to advance the interests of the association as a whole. That test is contrary to this Court's decisions and would improperly shield potentially anticompetitive conduct from antitrust scrutiny. The proper approach to identifying concerted action focuses on a restraint's objective effects, not its subjective motivation, and Section 1 has long been applied to restraints adopted to benefit an association or joint venture.

C. This Court's long-settled rules governing restraints imposed by associations of competitors pose no threat to the legitimate activities of trade associations, professional organizations, and joint ventures. The conduct of such entities is often procompetitive or neutral. But rules governing members' separate businesses can pose obvious dangers to competition. The rule of reason is the appropriate mechanism for distinguishing between lawful and unlawful conduct.

ARGUMENT

RESPONDENTS' COMPLAINTS ADEQUATELY ALLEGE THAT THE ACCESS FEE RULES ARE CONCERTED ACTION SUBJECT TO SECTION 1 OF THE SHERMAN ACT

Section 1 of the Sherman Act prohibits every "contract, combination * * * or conspiracy" that unrea-

sonably restrains trade. 15 U.S.C. 1. "The question whether an arrangement is a contract, combination, or conspiracy"—that is, whether it constitutes concerted action—"is different from and antecedent to the question whether it unreasonably restrains trade." *American Needle, Inc.* v. *National Football League*, 560 U.S. 183, 186 (2010). These cases present that antecedent question with respect to the Access Fee Rules that Visa and MasterCard adopted when they were associations of competing retail banks.[2]

To constitute a Section 1 contract, combination, or conspiracy, an arrangement must be (a) an agreement (b) between two or more entities capable of engaging in concerted action. *American Needle*, 560 U.S. at 189-190. Respondents' complaints adequately allege that the Access Fee Rules satisfy both of those requirements because they are written rules adopted by associations of competitors to govern prices charged in the competitors' separate businesses. Such rules "constitute concerted action that is not categorically beyond the coverage of [Section] 1." *Id.* at 186.

A. Respondents' Complaints Adequately Allege The Existence Of Agreements Because They Challenge Written Rules Adopted By Associations Of Competitors

Section 1 of the Sherman Act "does not prohibit all unreasonable restraints of trade . . . but only restraints effected by a contract, combination, or conspiracy." *Bell Atlantic Corp.* v. *Twombly*, 550 U.S.

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[2] In this Court, petitioners have disclaimed reliance on their prior contention that Visa's and MasterCard's reorganization into public companies terminated any concerted action. *Osborn* Cert. Reply Br. 8. Accordingly, the only question before the Court is whether the Access Fee Rules were concerted action when Visa and MasterCard were associations of their member banks.

544, 553 (2007) (brackets and citation omitted). A plaintiff asserting a Section 1 claim therefore must plead "enough factual matter (taken as true) to suggest that an agreement was made." *Id.* at 556. Respondents satisfied that burden by alleging that associations of competing banks adopted written rules embodying the challenged restraint.

1. In many Section 1 cases, the plaintiff claims that the observed behavior of two or more firms is the product of an undisclosed agreement. A plaintiff might allege, for example, that competing firms have refrained from selling in each other's territories, see *Twombly*, 550 U.S. at 551, or from dealing with certain customers, see *Theatre Enters., Inc.* v. *Paramount Film Distrib. Corp.*, 346 U.S. 537, 539-540 (1954). The plaintiff might further allege that the most likely explanation for that behavior is an agreement between the competitors. In such cases, "'the crucial question' is whether the challenged anticompetitive conduct 'stems from independent decision[s] or from an agreement, tacit or express.'" *Twombly*, 550 U.S. at 553 (quoting *Theatre Enters.*, 346 U.S. at 540) (brackets omitted). Two gas stations on opposite corners that consistently charge the same prices may have agreed not to compete, but each station may simply have made a unilateral decision to match the other's prices. The first scenario implicates Section 1, but the second does not, since "conscious parallelism" standing alone is not concerted action. *Id.* at 553-554 (citation omitted).

In *Twombly*, this Court described the factual allegations necessary to survive a motion to dismiss when a plaintiff's Section 1 complaint rests on "descriptions of parallel conduct" rather than on "any independent

allegation of actual agreement." 550 U.S. at 564. The Court emphasized that, "[w]ithout more, parallel conduct does not suggest conspiracy." *Id.* at 556-557. The Court therefore held that "an allegation of parallel conduct and a bare assertion of conspiracy will not suffice." *Id.* at 556. Instead, the "allegations of parallel conduct * * * must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." *Id.* at 557.

2. *Twombly* would be on point if respondents had simply alleged that Visa and MasterCard member banks consistently refused to offer lower fees for transactions on lower-cost ATM networks, and had argued that this observed conduct standing alone raised an inference of an undisclosed agreement among those banks. But respondents do not argue that an agreement should be inferred from the banks' parallel conduct. Instead, their complaints allege the relevant agreements *directly*: They challenge written rules adopted by Visa and MasterCard when those entities were associations of banks, and each complaint quotes the relevant rules verbatim. Pet. App. 76a; *Stoumbos* Pet. App. 82a-83a, 135a-137a. Each complaint further alleges that the rules were adopted by Visa's and MasterCard's boards of directors when those boards were controlled by member banks, and that all member banks are required to adhere to the rules in setting access fees at their ATMs. Pet. App. 87a; *Stoumbos* Pet. App. 64a-65a, 137a-138a.

When, as here, a Section 1 complaint "do[es] not rest on evidence of parallel business conduct" but rather on allegations that association members "conspired in the form of the [association's] rules," circum-

stantial facts of the sort required in *Twombly* are "superfluous." *Robertson* v. *Sea Pines Real Estate Cos.*, 679 F.3d 278, 289 (4th Cir. 2012) (Wilkinson, J.). The rules themselves are "direct evidence" of the challenged agreement, and "the concerted conduct is not a matter of inference or dispute." *Id.* at 289-290. The complaint in *Twombly*, for example, would have sufficiently pleaded an agreement if the plaintiffs (1) had alleged that the defendants formed an association that adopted a written rule barring members from competing outside their local markets and (2) had reproduced that rule in the complaint.

For nearly a century, the Court has treated association rules imposing "duties and restrictions in the conduct of [the members'] separate businesses" as agreements subject to Section 1. *Associated Press* v. *United States*, 326 U.S. 1, 8 (1945).[3] The Court has

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[3] See, *e.g.*, *California Dental Ass'n* v. *FTC*, 526 U.S. 756, 759-760 (1999) (dental-association rule restricting members' advertising); *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 451 (1986) (dental-association rule forbidding members from submitting x-rays to insurers); *NCAA* v. *Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 99 (1984) (NCAA plan restricting members' licensing of television rights); *Arizona* v. *Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 357 (1982) (medical society's schedule of maximum prices); *National Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 681 (1978) (engineering society's ethical canon barring competitive bidding); *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 781-783 (1975) (bar associations' fee schedules); *United States* v. *Topco Assocs.*, 405 U.S. 596, 602-603 (1972) (joint-venture bylaws setting exclusive territories for members); *United States* v. *Sealy, Inc.*, 388 U.S. 350, 352-354 (1967) (same); *Silver* v. *New York Stock Exch.*, 373 U.S. 341, 347-348 (1963) (exchange rules prohibiting wire connections with nonmembers); *United States* v. *National Ass'n of Real Estate Bds.*, 339 U.S. 485, 488 (1950) (real-estate board's code of ethics requiring adherence to standard rates);

not demanded details about the manner in which such rules were adopted or which members supported them. Instead, it has treated the rules themselves as "concerted decisions by the members." 7 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1477, at 324 (3d ed. 2010) (Areeda & Hovenkamp).

3. In their certiorari petitions, petitioners argued that the court below had departed from *Twombly*, and from decisions of other circuits applying *Twombly,* by holding that "allegations that members of a business association agreed to adhere to the association's rules and possess governance rights in the association" are sufficient to plead a Section 1 agreement. *Osborn* Pet. i; *Stoumbos* Pet. i. That argument rested on two errors.

First, petitioners demanded the sort of circumstantial details that are unnecessary when, as here, the alleged agreements are embodied in written rules. For example, petitioners faulted respondents for not pleading "further circumstances pointing toward a meeting of the minds," *Osborn* Cert. Reply Br. 11 (quoting *Twombly*, 550 U.S. at 557), such as "who, did what, to whom (or with whom), where, and when," *ibid.* (quoting *Kendall* v. *Visa U.S.A., Inc.*, 518 F.3d 1042, 1048 (9th Cir. 2008)).

Associated Press, 326 U.S. at 4 (Associated Press bylaws prohibiting members from selling news to nonmembers); *Fashion Originators' Guild of Am.* v. *FTC*, 312 U.S. 457, 461-463 (1941) (guild rules prohibiting sales to certain retailers); *Sugar Inst., Inc.* v. *United States*, 297 U.S. 553, 579 (1936) (industry association's ethical rule governing price-setting); *FTC* v. *Pacific States Paper Trade Ass'n*, 273 U.S. 52, 58-59 (1927) (price lists set by associations of paper dealers); *Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918) (commodities-exchange rule governing members' off-exchange transactions).

Petitioners relied (*Osborn* Pet. 11-19) on decisions of other circuits requiring plaintiffs to plead such circumstantial facts in Section 1 cases involving associations. But those cases involved allegations of secret agreements among association members—not challenges to written association rules.[4] The fact that defendants are members of the same association does not suggest that they formed an undisclosed conspiracy, and additional facts are thus required to establish a plausible inference of agreement. Here, in contrast, the challenged restraints are written rules, and there is "no such uncertainty * * * about the terms of the agreement, let alone whether one was made." *Robertson*, 679 F.3d at 289.

Second, petitioners asserted that, in order to join a Section 1 agreement, a member of a business association must vote for or actively support, rather than simply agree to follow, an association rule. See *Osborn* Pet. 7-8, 19-20. But that is not the law. This Court has long held that the members of an association engage in concerted action when, as here, they "surrender[] [their] freedom of action" in an aspect of their separate businesses and "agree[] to abide by the will of the association[]." *Anderson* v. *Shipowners*

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[4] In the decision on which petitioners chiefly relied, the Ninth Circuit rejected a claim that Visa's and MasterCard's member banks had secretly conspired to fix "fees charged to merchants" in connection with credit-card sales. *Kendall*, 518 F.3d at 1045. The merchant discount fees at issue were set by banks, not by any rule adopted by Visa and MasterCard. *Ibid.* The Ninth Circuit held that the complaint was insufficient because it failed to "plead any evidentiary facts beyond parallel conduct." *Id.* at 1048-1050; see *SD3, LLC* v. *Black & Decker (U.S.) Inc.*, 801 F.3d 412, 435-438 (4th Cir. 2015), cert. denied, 136 S. Ct. 2485 (2016); *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 348-349 (3d Cir. 2010).

Ass'n of the Pac. Coast, 272 U.S. 359, 364-365 (1926); see, *e.g.*, *NCAA* v. *Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 99 (1984); *Silver* v. *New York Stock Exch.*, 373 U.S. 341, 348 (1963); *Associated Press*, 326 U.S. at 19. An association member that agrees to conduct its business according to the association's rules engages in concerted action even if it *opposed* those rules, because "acquiescence in an illegal scheme is as much a violation of the Sherman Act as the creation and promotion of one." *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 161 (1948); see *MCM Partners, Inc.* v. *Andrews-Bartlett & Assocs., Inc.*, 62 F.3d 967, 973-974 (7th Cir. 1995) (collecting cases).

Respondents alleged that all Visa and MasterCard member banks "expressly agree[d]" to be bound by the written Access Fee Rules in conducting their separate activities as ATM operators. *Stoumbos* Pet. App. 138a. Those allegations were more than sufficient to plead the existence of agreements.[5]

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[5] Petitioners' amici suggest that respondents were required to allege facts establishing that the member banks knew that the Access Fee Rules were "*unlawful*." ASAE Amicus Br. 8-9 (citation omitted); see Chamber Amicus Br. 16-17. That is incorrect. The question whether an arrangement constitutes concerted action is "different from and antecedent to the question whether it unreasonably restrains trade," *American Needle*, 560 U.S. at 186, and an agreement can be concerted action even if it is ultimately found to be procompetitive. Moreover, a Section 1 plaintiff is never required to prove—let alone plead—that the defendant knew its conduct was illegal. "[A] civil violation can be established by proof of *either* an unlawful purpose *or* an anticompetitive effect." *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 436 n.13 (1978) (emphasis added). This Court's decision in *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752 (1984), on which amici rely, is not to the contrary. In addressing the degree of proof required

B. Respondents' Complaints Adequately Allege That The Access Fee Rules Are Concerted Rather Than Unilateral Action Because The Rules Govern Member Banks' Conduct Of Their Separate Businesses

In their merits brief, petitioners appear to acknowledge (*e.g.*, Br. 11, 13) that the Access Fee Rules are the product of "cooperation" among Visa's and MasterCard's member banks. Petitioners contend, however, that those agreements constitute unilateral rather than concerted action because each network and its respective member banks should be treated for these purposes as a single entity. That issue is not properly before this Court because it was not raised in the certiorari petitions and is not "fairly included" in the question presented. Sup. Ct. R. 14.1(a). The Court should therefore either answer "only the question petitioners raised in seeking certiorari," *Yee* v. *City of Escondido*, 503 U.S. 519, 538 (1992), or dismiss the writ as improvidently granted in light of petitioners' abandonment of that question in their brief on the merits, see *City & Cnty. of S.F.* v. *Sheehan*, 135 S. Ct. 1765, 1772-1774 (2015).

If this Court does reach the new issue petitioners raise in their merits brief, it should hold that the Access Fee Rules are concerted rather than unilateral

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to establish a Section 1 agreement based on circumstantial facts, the Court stated that the plaintiff must present evidence that the defendant had "a conscious commitment to a common scheme designed to achieve an unlawful objective." *Id.* at 764 (citation omitted). But the Court did not require that the "conscious commitment" include awareness of the scheme's unlawful nature. Instead, the Court held that the evidence of agreement in that case was sufficient because it supported an inference of "a meeting of minds." *Id.* at 765.

conduct. An agreement is concerted action if it "'deprives the marketplace of independent centers of decisionmaking' * * * and thus of actual or potential competition." *American Needle*, 560 U.S. at 195 (citations omitted). Visa's and MasterCard's member banks compete with each other in the market for ATM services. But for the Access Fee Rules, each bank would decide for itself, based on its own interests, whether to offer discounted fees to consumers whose cards are linked to lower-cost ATM networks. The Access Fee Rules supplant those decisions and prohibit all member banks from engaging in a particular form of price competition, thereby "depriv[ing] the marketplace of independent centers of decisionmaking." *Ibid.* (citation omitted).

Petitioners assert (Br. 17) that, even if a restraint adopted by a joint venture or other association limits the conduct of members' separate businesses, it is concerted action subject to Section 1 only if the *subjective motivation* for the restraint is to advance the members' "separate interests" rather than "the interests of the venture as a whole." The only purported defect that petitioners now identify in respondents' complaints is the failure to plead facts establishing that Visa's and MasterCard's member banks adopted the Access Fee Rules solely or primarily to serve their individual interests as providers of ATM services, rather than the interests of Visa and MasterCard.

Petitioners' fundamental premise is wrong. Under this Court's decisions, the existence of concerted action depends on an agreement's objective effects, not its subjective motivations. The Court has squarely rejected the contention that collaboration among competitors is shielded from Section 1 scrutiny simply

because it is "necessary or useful to a joint venture." *American Needle*, 560 U.S. at 199.

1. The conduct of a joint venture or other association is concerted action if it deprives the market of independent centers of decisionmaking

"The meaning of the term 'contract, combination . . . or conspiracy' is informed by the 'basic distinction' in the Sherman Act 'between concerted and independent action.'" *American Needle*, 560 U.S. at 190 (citation omitted). The independent conduct of a single firm is governed by Section 2 and is unlawful only if it "threatens actual monopolization." *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 767 (1984); see 15 U.S.C. 2. But two or more firms acting in concert are subject to Section 1, which prohibits all "unreasonable restraints of trade" and not just those that threaten monopolization. *Copperweld*, 467 U.S. at 768.

"The reason Congress treated concerted behavior more strictly than unilateral behavior is readily appreciated. Concerted activity is fraught with anticompetitive risk" because it "deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands." *Copperweld*, 467 U.S. at 768-769; see *American Needle*, 560 U.S. at 190-191. In determining whether an agreement constitutes concerted action, this Court therefore employs "a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate." *American Needle*, 560 U.S. at 191. "The relevant inquiry * * * is whether there is a 'contract, combination . . . , or conspiracy' amongst separate economic actors pursuing separate economic inter-

ests." *Id.* at 195 (citations and internal quotation marks omitted).

Under that standard, the "internally coordinated conduct of a corporation and one of its unincorporated divisions" is not concerted action because such a division exists to "pursue[] the common interests of the whole." *Copperweld*, 467 U.S. at 770. Similarly, "the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of [Section] 1" because such entities "have a complete unity of interest." *Id.* at 771.

The members of joint ventures and other business associations are in a very different position. They ordinarily remain "substantial, independently owned, and independently managed business[es]" with distinct and potentially competing interests. *American Needle*, 560 U.S. at 196. The conduct of such an association may properly be regarded as unilateral when, but only when, it has no effect on the members' separate businesses and does not deprive the market of independent centers of decisionmaking. "Thus, for example, if the [American Bar Association] decides to have its annual meeting in San Francisco, or to enlarge its committee on the accreditation of law schools, these decisions would be treated as unilateral to the extent that they have no impact whatsoever on the market behavior of individual members." Areeda & Hovenkamp ¶ 1477, at 333.[6]

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[6] The Court has also suggested that, although the initial formation of a joint venture is subject to Section 1, the pricing decisions of a legitimate joint venture may in some circumstances be regarded as "little more than price setting by a single entity." *Texaco Inc.* v. *Dagher*, 547 U.S. 1, 5-6 & n.1 (2006). But *Dagher* held only that the joint-venture pricing decisions at issue there did

In contrast, this Court has consistently applied Section 1 to the conduct of joint ventures and other associations when that conduct relates to actual or potential competition among the associations' members. See pp. 14-15 & note 3, *supra*. Most recently, the Court held that a separate corporation formed by the 32 teams in the National Football League (NFL) engaged in concerted action when it made decisions about the licensing and promotion of the teams' trademarks and other "separately owned intellectual property." *American Needle*, 560 U.S. at 201.

The Court in *American Needle* explained that, despite the formation of the corporation, the teams were "not like the components of a single firm that act to maximize the firm's profits." 560 U.S. at 201. Instead, the teams "remain[ed] separately controlled, potential competitors with economic interests that are distinct from [the jointly owned corporation's] financial well-being." *Ibid.* The Court emphasized that, but for the collective decisions made through the corporation, "there would be nothing to prevent each of the teams from making its own market decisions" about its intellectual property. *Id.* at 200. The Court therefore concluded that "decisions by the [corporation] regarding the teams' separately owned intellectual property constitute concerted action." *Id.* at 201.

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not constitute "*per se* unlawful" horizontal price fixing; the Court did not decide whether those decisions were concerted action. *Id.* at 7 & n.2. And the Court's suggestion that single-entity treatment was appropriate rested on the fact that the venturers in *Dagher* had "end[ed] competition between [themselves]" in the relevant market. *Id.* at 4.

2. The Access Fee Rules are concerted action because they govern member banks' separate businesses and thereby deprive the market of independent centers of decisionmaking

The Access Fee Rules constitute concerted action because they "join together 'independent centers of decisionmaking.'" *American Needle*, 560 U.S. at 196 (quoting *Copperweld*, 467 U.S. at 769). Like NFL teams, Visa's and MasterCard's member banks are "separately controlled, potential competitors with economic interests that are distinct from [Visa's and MasterCard's] financial well-being." *Id.* at 201. And just as "the Saints and the Colts are two potentially competing suppliers of valuable trademarks" to a firm making athletic apparel, *id.* at 197, Bank of America and Wells Fargo are two potentially competing providers of ATM services to a consumer seeking to withdraw cash.

But for the collectively adopted Access Fee Rules, "there would be nothing to prevent each [member bank] from making its own market decisions" about whether to offer discounted access fees to consumers with cards linked to lower-cost networks. *American Needle*, 560 U.S. at 200. The jointly adopted Access Fee Rules eliminate that option, requiring all member banks to refrain from differential pricing. Accordingly, like the NFL teams' collective decisions on the management of their separately owned intellectual property, the Access Fee Rules constitute concerted action because they "'deprive the marketplace of independent centers of decisionmaking,' * * * and therefore of actual or potential competition." *Id.* at 197 (brackets omitted) (quoting *Copperweld*, 467 U.S. at 769).

Indeed, the existence of concerted action is even clearer here than it was in *American Needle*. The NFL teams had "market[ed] their NFL brands through a single outlet" for decades. 560 U.S. at 197; see *id.* at 187. This Court nonetheless viewed the decisions of that entity as concerted action because the teams were "potential competitors" in the relevant market. *Id.* at 201. Here, in contrast, Visa's and MasterCard's member banks are *actual* competitors in the market for ATM services, and the Access Fee Rules restrict pricing decisions that the banks make in their separate, competing businesses. Association rules regulating members' separate businesses present an obvious danger of serious anticompetitive harms, and they are a quintessential example of the sort of concerted action that is subject to scrutiny under Section 1. See pp. 14-15 & note 3, *supra*.

3. Petitioners' subjective standard for identifying concerted action is contrary to precedent and would improperly shield potentially anticompetitive conduct from antitrust scrutiny

Petitioners do not dispute that the Access Fee Rules restrict member banks' freedom to set fees charged in their separate, competing ATM operations. Petitioners assert, however, that such an objective limitation on actual or potential competition is not sufficient to establish that a restraint adopted by an association or joint venture is concerted action. Instead, petitioners advocate a subjective standard, under which the acts of a joint venture or other association are concerted action only if members seek to "advance their [own] interests separate from the venture." Pet. Br. 16-17. Petitioners argue that, if the members instead act at least in part to advance "the

interests of *th[e] venture* as a 'whole,' then their conduct counts as 'unilateral,' and cannot be the basis of a Section 1 claim." *Id.* at 16 (citations omitted) (quoting *American Needle*, 560 U.S. at 196, and *Copperweld*, 467 U.S. at 769). That subjective standard is contrary to this Court's decisions and would improperly shield potentially anticompetitive conduct from antitrust scrutiny.

a. The Court in *American Needle* articulated an objective test for concerted action: "The question is whether the agreement joins together 'independent centers of decisionmaking.' If it does, the entities are capable of conspiring under [Section] 1." 560 U.S. at 196 (citation omitted) (quoting *Copperweld*, 467 U.S. at 769). The Court thus did not require a showing that the NFL teams' collective licensing decisions were motivated by the teams' separate interests rather than by the interests of the league as a whole. To the contrary, the Court accepted the NFL's assertion that the teams' jointly owned corporation was "pursuing the common interests of the whole." *Id.* at 198 (brackets and citations omitted). It deemed that fact irrelevant to the concerted-action inquiry, however, because "illegal restraints often are in the common interests of the parties to the restraint." *Ibid.* The Court explained that, "[a]lthough the business interests of the teams will *often* coincide with those of [the jointly owned corporation] as an entity in itself, that commonality of interest exists in every cartel." *Id.* at 201 (citation and internal quotation marks omitted). And the Court held that an agreement that deprives the marketplace of independent centers of decisionmaking constitutes concerted action even if it is "necessary or useful to a joint venture." *Id.* at 199.

b. Numerous other decisions of this Court confirm that restrictions on members' separate businesses adopted by joint ventures and other associations constitute concerted action even if they are adopted to advance the interests of the association as a whole.

In *United States* v. *Sealy, Inc.*, 388 U.S. 350 (1967), a group of mattress manufacturers created a joint venture to manage the Sealy trademark, and the venture allocated exclusive territories to its members. *Id.* at 351-352. The defendants argued that the exclusive territories served the interests of the venture as a whole, and that the manufacturers "wore a 'Sealy hat' when they were acting on behalf of Sealy." *Id.* at 353. The Court rejected that argument, holding that what matters is "the identity of the persons who act, rather than the label of their hats." *Ibid.*

Similarly in *United States* v. *Topco Associates*, 405 U.S. 596 (1972), the Court held that a group of small supermarket chains violated Section 1 when they created a joint venture to wholesale private-label products and the venture established exclusive territories for its members. *Id.* at 599-601. The defendants argued that the exclusive territories were essential to allow the venture to compete with the private-label products offered by large supermarket chains. *Id.* at 623-624 (Burger, C.J., dissenting). This Court did not question that characterization, but it nonetheless treated the restriction as concerted action subject to Section 1.

In *Silver*, the Court held that the New York Stock Exchange had violated Section 1 by adopting rules requiring members to discontinue wire communications with a former member that had been expelled from the Exchange. 373 U.S. at 364. That restraint

served the interests of the Exchange as a whole, but not the individual interests of members, many of which had off-exchange business that they wanted to conduct with the expelled company. *Id.* at 348.

In *Associated Press*, the Court invalidated several Associated Press bylaws, including one that "prohibited all AP members from selling news to non-members." 326 U.S. at 4. As in *Silver*, that prohibition served the interests of the Associated Press as a whole by protecting its position in the wholesale news market, but not the individual interests of members (which could have profited by selling news to non-members).

Petitioners' proposed standard, which would exempt from Section 1 scrutiny any challenged restraint adopted in part to benefit the association as a whole, cannot be reconciled with those decisions. Respondents' complaints allege that the Access Fee Rules served member banks' interests by insulating them from competition among themselves and from independent ATM operators. See Pet. App. 18a-19a. Petitioners assert (Br. 31) that those allegations are insufficient because the Access Fee Rules *also* benefitted Visa and MasterCard at the expense of rival networks, making it plausible that "a hypothetical network services provider that is not a joint venture" would "rationally adopt the same rule." But the same thing could have been said in *Sealy*, *Topco*, *Silver*, and *Associated Press*.[7]

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[7] Petitioners assert (Br. 33) that the challenged conduct in *American Needle*, *Sealy*, and *Topco* "affected only a *single* market in which the venture's members competed." The Access Fee Rules, in contrast, affect both the market for ATM services (in which the banks compete) and the market for network services (in

More broadly, "illegal restraints often are in the common interests of the parties to the restraint." *American Needle*, 560 U.S. at 198. If the fact that a restraint served the interests of a joint venture as a whole and could plausibly have been adopted by a hypothetical independent entity were sufficient to exclude it from Section 1, "any cartel could evade the antitrust law simply by creating a joint venture to serve as the exclusive seller of their competing products" and sharing the resulting profits. *Id.* at 201 (citation and internal quotation marks omitted). The venture's pricing and output decisions would be "in service of the interests of the venture as a whole," and would therefore constitute "unilateral action" under petitioner's test. Pet. Br. 17. This Court has made clear, however, that "competitors cannot simply get around antitrust liability by acting through a third-party intermediary or joint venture." *American Needle*, 560 U.S. at 202 (citation and internal quotation marks omitted).

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which Visa and MasterCard compete). But the NFL made a similar "two markets" argument in *American Needle*, contending that "coordinated team trademark sales are necessary to produce 'NFL football,' a single NFL brand that competes against other forms of entertainment." 560 U.S. at 199 n.7. This Court rejected that argument, noting that the fact that "the NFL produces NFL football"—a separate product competing in a separate market—"does not mean that cooperation amongst NFL teams is immune from [Section] 1 scrutiny." *Ibid.* After all, the Court explained, "[m]embers of any cartel could insist that their cooperation is necessary to produce the 'cartel product' and compete with other products." *Ibid.* In *Topco*, too, the Court treated the venture's restraints on its members' retail sales as concerted action even though the defendants argued that those restraints allowed the venture's branded groceries to compete more effectively with other brands. 405 U.S. at 623-624 (Burger, C.J., dissenting).

c. In support of their proposed subjective standard for identifying concerted action, petitioners rely (Br. 10, 16, 22) on the Court's description of concerted action as an agreement among "separate economic actors pursing separate economic interests." *American Needle*, 560 U.S. at 195 (quoting *Copperweld*, 467 U.S. at 769); see *id.* at 200 (observing that intra-firm agreements can constitute concerted action "when the parties to the agreement act on interests separate from those of the firm itself"). But as the totality of the Court's opinions in *American Needle* and *Copperweld* make clear, that standard calls for an examination of the parties' objective economic interests at the time of the challenged agreement—not a subjective inquiry into the motivation for the agreement itself.

"In any conspiracy," the *Copperweld* Court explained, "two or more entities that *previously* pursued their own interests separately are combining to act as one for their common benefit." 467 U.S. at 769 (emphasis added). Thus, agreements among "[t]he officers of a single firm" generally do not implicate Section 1 because such officers are not "separate economic actors pursuing separate interests," and "agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals." *Ibid.* The same is true of the coordinated activity of "a corporation and one of its unincorporated divisions" or of "a parent and its wholly owned subsidiary." *American Needle*, 560 U.S. at 195-196 (quoting *Copperweld*, 467 U.S. at 770-771). Even without an agreement, such entities have "a complete unity of interest," and coordination among them "does not represent a sudden joining together of two independent sources of economic power previous-

ly pursuing separate interests." *Ibid.* (quoting *Copperweld*, 467 U.S. at 771).

The situation is different where, as here and in *American Needle*, the parties to an agreement are "substantial, independently owned, and independently managed business[es]" that are actual or potential competitors in the relevant market. 560 U.S. at 196-197. Absent an agreement, such entities are "separate economic actors pursuing separate economic interests" and thus "potential independent center[s] of decisionmaking." *Id.* at 197 (quoting *Copperweld*, 467 U.S. at 769-770) (internal quotation marks omitted). Whatever their subjective motivation, collective decisions by such entities are concerted action because they "'deprive the marketplace of independent centers of decisionmaking,' and therefore of actual or potential competition." *Ibid.* (brackets and citation omitted).

C. The Potential Procompetitive Benefits Of Business Associations Are Assessed Under The Rule Of Reason And Thus Do Not Warrant Any Departure From The Settled Understanding Of Concerted Action

Petitioners and their amici correctly observe that "joint ventures," "business associations," and "trade groups" can "achieve a host of 'decidedly procompetitive effects.'" Pet. Br. 18 (citations omitted); see, *e.g.*, *id.* at 21-22, 28, 40; see also U.S. DOJ-FTC, *Antitrust Guidelines for Collaborations Among Competitors* § 2.1 (2000). But collaboration between actual or potential competitors also "can be rife with opportunities for anticompetitive activity." *American Soc'y of Mech. Eng'rs, Inc.* v. *Hydrolevel Corp.*, 456 U.S. 556, 571 (1982). The "accepted standard" for distinguishing procompetitive from anticompetitive cooperation

is "[t]he rule of reason." *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 885 (2007). That standard, and other features of the antitrust laws, provide ample protection for procompetitive collaborations.

1. When Section 1 defendants contend that cooperation between them will have procompetitive effects, the strength or weakness of their arguments "is not relevant to whether that cooperation is concerted or independent action." *American Needle*, 560 U.S. at 199. Instead, defendants' proffered justifications for cooperation are considered in deciding whether particular concerted action effects an *unreasonable* restraint of trade. For example, courts have long analyzed restraints on association members' separate businesses under the "ancillary restraints" doctrine, which entered American antitrust jurisprudence with then-Judge Taft's seminal opinion in *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), aff'd, 175 U.S. 211 (1899). "That doctrine governs the validity of restrictions imposed by a legitimate business collaboration, such as a business association or joint venture, on nonventure activities." *Dagher*, 547 U.S. at 7. A restraint is deemed "ancillary" if it is "subordinate and collateral" to the joint venture and reasonably necessary to "make the [venture] more effective [or efficient] in accomplishing its purpose." *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986) (*Rothery Storage*) (Bork, J.), cert. denied, 479 U.S. 1033 (1987); see *Major League Baseball Props., Inc.* v. *Salvino, Inc.*, 542 F.3d 290, 338 (2d Cir. 2008) (Sotomayor, J., concurring in the judgment); *Addyston Pipe*, 85 F. at 289-291.

By definition, ancillary restraints are reasonably necessary to advance the interests of the joint venture. On petitioners' view, such restraints therefore would be shielded from Section 1 scrutiny. But courts have consistently reviewed ancillary restraints as concerted action subject to Section 1. *E.g.*, *Salvino*, 542 F.3d at 338 (Sotomayor, J., concurring in the judgment); *Rothery Storage*, 792 F.2d at 229-230; *Polk Bros., Inc.* v. *Forest City Enters., Inc.*, 776 F.2d 185, 188-189 (7th Cir. 1985) (Easterbrook, J.). Even though ancillary restraints are "part of a larger endeavor whose success they promote," they are still "real horizontal restraints," *Polk Bros.*, 776 F.2d at 189, rather than single-entity conduct, *Rothery Storage*, 792 F.2d at 214-215. The "necessity of cooperation" is highly relevant to the rule-of-reason inquiry, but it does not "transform[] concerted action into independent action." *American Needle*, 560 U.S. at 199.

2. More generally, the rule of reason authorizes a variety of procompetitive joint conduct by or within joint ventures and other associations. See, *e.g.*, *NCAA*, 468 U.S. at 101; *Broadcast Music, Inc.* v. *CBS*, 441 U.S. 1, 13 (1979). The rule of reason is a "flexible" standard that takes into account any procompetitive justifications for the challenged activities, and that accordingly leaves ample room for procompetitive conduct by associations. *American Needle*, 560 U.S. at 202-203. In *American Needle*, for example, this Court observed that NFL teams' need to "cooperate in the production and scheduling of games * * * provides a perfectly sensible justification for making a host of collective decisions." *Id.* at 202; see, *e.g.*, *NCAA*, 468 U.S. at 120 (emphasizing that the rule of

reason affords the NCAA "ample latitude" to make collective decisions).

"[D]epending upon the concerted activity in question," moreover, "the Rule of Reason may not require a detailed analysis; it 'can sometimes be applied in the twinkling of an eye.'" *American Needle*, 560 U.S. at 203 (quoting *NCAA*, 468 U.S. at 109 n.39). Many such cases can be resolved in defendants' favor before trial. See, *e.g.*, *Warrior Sports, Inc.* v. *NCAA*, 623 F.3d 281, 284-287 (6th Cir. 2010) (judgment on the pleadings); *Race Tires Am., Inc.* v. *Hoosier Racing Tire Corp.*, 614 F.3d 57, 72, 80-83 (3d Cir. 2010) (summary judgment). But while associations and joint ventures among actual or potential competitors "may well lead to efficiencies that benefit consumers," and therefore will often be found lawful, the "anticompetitive potential" of such arrangements is "sufficient to warrant scrutiny." *Copperweld*, 467 U.S. at 769.

3. Other features of the antitrust laws provide further protection for particular forms of collaboration by associations, including education, philanthropy, and petitioning the government, see ASAE Amicus Br. 2-3; standard-setting, see Pet. Br. 4, 25; ASAE Amicus Br. 11; Chamber Amicus Br. 7-11; and efforts to develop new technologies, see Law Professor Amicus Br. 2-3.

Educational programs and philanthropic activities ordinarily do not involve restraints on the conduct of the members' separate businesses. And association efforts to petition the government are generally protected from antitrust liability by the *Noerr-Pennington* doctrine. See *United Mine Workers of Am.* v. *Pennington*, 381 U.S. 657 (1965); *Eastern R.R.*

Presidents Conference v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

Congress has specifically addressed the application of the antitrust laws to standard-setting organizations and research joint ventures. In the Standards Development Organization Advancement Act of 2004, Pub. L. No. 108-237, Tit. I, 118 Stat. 661, Congress established specific protections "[t]o encourage the development and promulgation of voluntary consensus standards" by standards-development organizations. *Ibid.* Congress understood that those organizations were "vulnerable to being named as codefendants in lawsuits even though the likelihood of their being held liable is remote in most cases," *id.* § 102(8), 118 Stat. 662, and it addressed that vulnerability by detrebling damages and awarding costs (including attorneys' fees) to prevailing defendants if certain criteria are met. 15 U.S.C. 4303-4304. Congress afforded similar protections to research joint ventures in the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.*

Congress did not exclude those activities, however, from the reach of Section 1. Rather, recognizing that the conduct of standard-setting organizations and research joint ventures "might give rise to legitimate antitrust concerns," H.R. Rep. No. 125, 108th Cong., 1st Sess. 3-7 (2003), Congress "codif[ied] the 'rule of reason' for antitrust scrutiny" of such organizations, *id.* at 2, provided that they satisfy specified requirements. 15 U.S.C. 4302. Congress's determination that even such favored activities should continue to be subject to antitrust scrutiny confirms that the continued application of the rule of reason will not impair the procompetitive activities of business associations.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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