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Nos. 15-961 & 15-962

IN THE
Supreme Court of the United States

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

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

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

REPLY BRIEF FOR PETITIONERS

BENJAMIN A. FLEMING
HOGAN LOVELLS US LLP
875 Third Avenue
New York, NY 10022

NEAL KUMAR KATYAL
Counsel of Record
FREDERICK LIU
COLLEEN E. ROH SINZDAK
EUGENE A. SOKOLOFF
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Counsel for All Petitioners

[additional counsel listed on inside cover]

ANTHONY J. FRANZE
MARK R. MERLEY
MATTHEW A. EISENSTEIN
R. STANTON JONES
ARNOLD & PORTER LLP
601 Massachusetts Avenue, N.W.
Washington, D.C. 20001

Counsel for Petitioners Visa Inc., Visa U.S.A. Inc., Visa International Service Association, and Plus System, Inc.

MARK P. LADNER
MICHAEL B. MILLER
MORRISON & FOERSTER LLP
250 W. 55th Street
New York, NY 10019

W. STEPHEN SMITH
MORRISON & FOERSTER LLP
2000 Pennsylvania Avenue, N.W., Suite 6000
Washington, D.C. 20006

Counsel for Petitioners Bank of America Corporation, Bank of America, N.A., and NB Holdings Corporation

WILLIAM F. CAVANAUGH
PATTERSON BELKNAP WEBB & TYLER LLP
1133 Avenue of the Americas
New York, NY 10036

Counsel for Petitioners Wells Fargo & Company and Wells Fargo Bank, N.A.

PETER E. GREENE
BORIS BERSHTEYN
PETER S. JULIAN
SAM AULD
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
4 Times Square
New York, NY 10036

Counsel for Petitioners JPMorgan Chase & Co., JPMorgan Chase Bank, N.A., and Chase Bank USA, N.A.

KENNETH A. GALLO
JOSEPH J. SIMONS
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, D.C. 20006

GARY R. CARNEY
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019

Counsel for Petitioners MasterCard Incorporated and MasterCard International Incorporated

RULE 29.6 DISCLOSURE STATEMENT

The Rule 29.6 disclosure statement in the opening brief for petitioners remains accurate.

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INTRODUCTION

In a nutshell, the facts are these. First, the boards of Visa and MasterCard established the Access Fee Rules as one of many conditions for being part of their networks. Second, ATM operators—both bank-owned and independent—became part of each network and abided by those rules.

Where is the supposed horizontal agreement among banks, the subject of respondents' Section 1 claim? Not even respondents are quite sure.

At times, they locate the horizontal agreement at the *second* step above, contending that the banks agreed among themselves to *abide by* the rules. But their only basis for that contention is the banks' parallel conduct: that they allegedly all abided. Respondents' own complaints explain why that conduct is perfectly consistent with unilateral action: The Visa and MasterCard networks offer participating ATM operators substantial benefits, and each bank independently chose to abide by the rules in exchange for receiving those benefits—just as each independent, nonbank ATM operator did.

At other times, respondents locate the horizontal agreement elsewhere, at the *first* step above. They contend that the *rules themselves* are direct evidence of a horizontal agreement among each network's member banks. But the rules, on their face, are decisions by each network's board to impose conditions on network participation. Such decisions would join together independent centers of decisionmaking only if, in the absence of the rules, each bank would have exercised independent authority over conditions of network access. That is obviously not the case: The banks are not actual or potential competitors in the market for network services.

That leaves respondents with a final argument: that the rules were the product of concerted action among the members of each network's board. This argument focuses on the *passage* of the rules at the *first* step above. And it hinges on the claim that the rules were passed by the members of each board in

their capacity *as banks*. Respondents' own allegations, though, defeat that claim as well. Respondents acknowledge that the rules promoted the interests of Visa and MasterCard. And they themselves allege that the rules were contrary to the banks' separate commercial interests. There is thus only one plausible conclusion: The members of each board were not acting as banks at all, but were pursuing the interests of each network as a whole—just as other ATM networks were doing in imposing similar rules. Such unilateral action is beyond the scope of Section 1.

In the end, respondents would treat as a horizontal agreement *any* conduct by a joint venture that has *any* effect on the separate businesses of the venture's members. Such a rule would have no real limit, for a plaintiff will virtually always be able to plead *some* incidental effect on the members' separate businesses. If adopted, therefore, respondents' proposed rule would deter joint ventures and other business associations from engaging in even the most routine behavior, like passing the Access Fee Rules here.

Because respondents fail to adequately allege a horizontal agreement, the D.C. Circuit should be reversed.

ARGUMENT

RESPONDENTS HAVE NOT ADEQUATELY ALLEGED ANY HORIZONTAL AGREEMENT AMONG BANKS

Respondents claim the existence of horizontal agreements among the member banks of Visa and among the member banks of MasterCard to restrain themselves from offering lower access fees to customers of other networks. *See* Osborn Pet. App. 77a

(Mackmin Compl. ¶ 81). Respondents contend that these horizontal agreements can be inferred from (1) the banks' parallel conduct, *see* Consumer Br. 19-22; and (2) the networks' Access Fee Rules, *see id.* at 14-17, 24-26.

Neither supports such an inference. Respondents' own allegations undermine the plausibility of any horizontal agreement here.

A. A Horizontal Agreement To Abide By The Rules Cannot Be Inferred From The Banks' Parallel Conduct

Respondents contend that the member banks of each network all abided by the Access Fee Rules. From that "parallel conduct," respondents urge this Court to infer a horizontal agreement among the member banks. Consumer Br. 19-20. According to respondents, it would be "contrary to any one bank's self-interest" to abide by the rules, because any one bank would want to offer customers of other networks *lower* access fees than they offer customers of Visa or MasterCard, thereby attracting those other networks' customers away from banks offering the *same* access fees to customers of all networks. Osborn Pet. App. 83a-84a (Mackmin Compl. ¶ 98). Thus, respondents contend, the only rational explanation for the banks' parallel conduct is an agreement among the banks to abide by the rules: Each bank complied with the rules only because it "knew that its competitors were also" complying. *Id.*; *see* Consumer Br. 11.

But in fact, respondents' allegations provide "an obvious alternative explanation" for the banks' parallel conduct: Each bank complied with the rules because it did not want to give up being part of the

Visa or MasterCard network. *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 567 (2007). As respondents acknowledge, the rules are "a condition of accessing Visa or MasterCard's ATM networks." Consumer Br. 3. And respondents allege that "Visa and MasterCard provide the only networks with nationwide reach," Osborn Pet. App. 72a (Mackmin Compl. ¶ 68), and that the "overwhelming majority of cards used for ATM transactions are Visa- or MasterCard-branded" cards. *Id.* at 74a (Mackmin Compl. ¶ 74); Stoumbos Pet. App. 120a (NAC Compl. ¶ 39). Being part of the Visa and MasterCard networks thus allows ATM operators to serve "an increasing percentage of customers," Osborn Pet. App. 75a (Mackmin Compl. ¶ 74), and to "spread the costs of the machines over more * * * transactions." *Id.* at 73a (Mackmin Compl. ¶ 70). Therefore, "a natural explanation" for the banks' parallel conduct is that each bank independently chose to abide by the rules to receive the substantial benefits of being part of the Visa and MasterCard networks. *Twombly*, 550 U.S. at 568.

Respondents maintain that the fact that the rules were a condition of participating in the networks does not matter. Consumer Br. 22. But of course it matters. Each ATM operator faces a choice: either abide by the rules or lose the substantial benefits of participation in the networks. The fact that each bank made the same choice does not mean that all of the banks agreed among themselves to do so. Such "parallel conduct * * * could just as well be independent action"—the decision of each bank, on its own, to choose the benefits of participating in the Visa and MasterCard networks over the ability to offer lower access fees to customers of other net-

works. *Twombly*, 550 U.S. at 557; *see also id.* at 556 ("[A]n allegation of parallel conduct and a bare assertion of conspiracy will not suffice."); Osborn Pet. App. 50a.

The experience of the non-consumer respondents—which are independent, nonbank ATM operators—proves the point. If parallel conduct were enough to suggest a horizontal conspiracy, then that conspiracy would include the independent operators. They, too, engaged in the same parallel conduct, abiding by the rules as a condition of participating in the Visa and MasterCard networks. *See* Stoumbos Pet. App. 123a (NAC Compl. ¶ 48); *id.* at 138a (NAC Compl. ¶ 71). Of course, the independent operators deny belonging to any horizontal conspiracy, explaining that they decided to participate in the networks because they "cannot afford to refuse to serve such a large market." Non-Consumer Br. 30*; see* Stoumbos Pet. App. 150a-151a (NAC Compl. ¶ 105). But that simply means that each independent operator determined that the substantial benefits of participation made abiding by the rules worth it—the very same determination behind the independent action of each bank.

The independent operators' only response is to assert, without citation, that "petitioners *concede* they entered into an agreement." Non-Consumer Br. 32. To be sure, by participating in the networks, each bank entered into a *vertical* agreement with each network to abide by that network's Access Fee Rule. But that is not the issue here. The question is whether the banks entered into a *horizontal* agreement among themselves to do the same. And parallel conduct does not suggest such a horizontal agreement, any more than it suggests that the

independent operators themselves were part of one. To illustrate, consider what happens when people sign up for Internet service. Each subscriber enters into a *vertical* agreement with the network service provider to purchase Internet service at a fixed monthly rate. But no one would say that there was a *horizontal* agreement among the subscribers themselves to pay a fixed price.

Similarly misplaced is respondents' reliance on various banks' agreements with Visa or MasterCard to issue single-bug cards. Respondents do not dispute that those agreements are also *vertical*. *See* Consumer Br. 38; Non-Consumer Br. 19. And respondents never plausibly explain how vertical agreements about one thing (single-bug cards) could suggest a horizontal agreement about another (access fees). Moreover, respondents themselves allege that the networks offered banks "undisclosed sum[s]" and "favorable switch fees and interchange rates" in exchange for issuing single-bug cards. Osborn Pet. App. 78a-79a (Mackmin Compl. ¶¶ 83-88). As the District Court held, "[t]hese facts support a conclusion that entering into [vertical] agreements with these networks is in the banks' individual interests, which weighs against an inference of [a horizontal] agreement." *Id.* at 50a.

Respondents insist that even if the banks "abid[ed] by the Access Fee Rules [as] the price to gain the benefits of the Visa and MasterCard networks," that goes only to "*why* the banks engaged in the concerted action." Consumer Br. 22. But it is respondents who urge this Court to infer concerted action from the banks' parallel conduct. And it is they who contend that there is no "reasonable explanation" for that conduct other than a horizontal agreement. *Id.* at

11. The fact that abiding by the rules was the "price to gain the benefits" of the networks proves that contention false—and thus goes to *whether* the banks engaged in concerted action at all.

In the end, respondents' reliance on the banks' parallel conduct in abiding by the rules amounts to an argument that mere membership in the networks is enough to establish a horizontal conspiracy. But even the D.C. Circuit rejected that argument—and for good reason. Osborn Pet. App. 20a. Respondents' own allegations suggest that each bank, like each independent operator, unilaterally accepted the rules in exchange for the substantial benefits the networks provide.

B. A Horizontal Agreement Cannot Be Inferred From The Access Fee Rules

Unable to infer a horizontal agreement from the banks' parallel conduct, respondents attempt to locate one elsewhere: in the Access Fee Rules themselves. The rules, however, are no more suggestive of a horizontal agreement.

1. The rules are not direct evidence of a horizontal agreement among each network's member banks

Respondents contend that each rule embodies the "exact terms" of the horizontal agreement among the member banks of each network. Consumer Br. 14. The Government agrees, arguing that the "rules themselves are direct evidence of the challenged agreement." U.S. Br. 14.

Of course, petitioners do not dispute the existence of the rules. Nor do petitioners dispute that each bank entered into a *vertical* agreement with each

network to abide by that network's rule. *See* Stoumbos Pet. App. 138a (NAC Compl. ¶ 71). But what respondents allege is a *horizontal* agreement among each network's member banks. And the rules themselves are not direct evidence of any agreement of *that* kind.

Respondents' own contentions show why. As respondents acknowledge, the rules are "a condition of accessing Visa or MasterCard's ATM networks." Consumer Br. 3; *see also id.* at 5; Osborn Pet. App. 6a; Stoumbos Pet. App. 138a (NAC Compl. ¶ 71) ("All ATM operators must accept the ATM Restraints in order to accept defendants' cards."). On its face, each rule is a decision regarding the terms on which an ATM operator may "access[]" the network. That is not the type of decision that banks make in their independent capacities as competitors. Network services are distinct from any services the banks are alleged to independently provide. Accordingly, no bank exercises independent decisionmaking authority over the conditions of network access. Nor do the rules, on their face, deprive any bank of independent decisionmaking authority over access fees, because prior to becoming part of a network, a bank has no decisions to make regarding foreign ATM transactions at all. And so, at least on their face, the rules do not embody any joining together of banks as independent decisionmakers.

The rules are thus unlike the decisions in *American Needle, Inc.* v. *NFL*, 560 U.S. 183 (2010). In that case, the competing teams had formed a separate entity, NFLP. But at least as relevant in *American Needle*, NFLP was not providing any service distinct from that which the teams had each provided in their independent capacities as competitors. To the

contrary, each team had ceded to NFLP its independent decisionmaking authority over its "separately owned trademarks." *Id.* at 197. In the absence of the teams' agreement to cooperate through NFLP, each team would have made its own decisions with respect to the "granting of licenses to use its trademarks." *Id.* at 200. So when the teams decided "to license their separately owned trademarks collectively and to only one vendor," those decisions necessarily "depriv[ed] the marketplace of independent centers of decisionmaking." *Id.* at 197 (internal quotation marks omitted).

The same is not true here. In the absence of the Access Fee Rules, the banks would not be making independent decisions about the conditions of network access, because the banks are not actual or potential competitors in the market for network services. So when each network decided to impose an Access Fee Rule as a condition of accessing the network, that decision, on its face, did not "depriv[e] the marketplace of independent centers of decisionmaking." *Id.* (internal quotation marks omitted).

In short, the rules themselves are not direct evidence of a horizontal agreement among each network's member banks. On their face, the rules are conditions for network access, which do not embody any agreement joining together the banks as independent decisionmakers. Accordingly, respondents cannot simply point to the existence of the rules and stop there.

2. The rules were not the product of concerted action among the members of each network's board

The foregoing forecloses any argument that the rules on their face represent a horizontal agreement among *all the thousands of member banks* of each network. But it does not necessarily rule out a conspiracy in the *passage* of the rules among the *members of each network's board of directors*. The argument would be that those who possessed governance rights in the network "*used* the bankcard associations to adopt and enforce a supracompetitive pricing regime for ATM access fees." Osborn Pet. App. 20a.

Assessing this argument requires going beyond the face of the rules and conducting a "functional" analysis of the "identity of the persons" who passed them. *See Am. Needle*, 560 U.S. at 191-192 (internal quotation marks omitted). According to the complaints, each network's board consisted of individuals chosen by member banks. *See* Osborn Pet. App. 65a, 86a-87a (Mackmin Compl. ¶¶ 45-46, 109). The question is: In what capacity were those individuals "actually operat[ing]" when they passed the rules? *Am. Needle*, 560 U.S. at 191. As explained in petitioners' opening brief (at 16), if they were actually operating as board members—pursuing the interests of each network as a "whole"—then the rule represents the "unilateral" action of the network, and cannot be the basis of a Section 1 claim. *Am. Needle*, 560 U.S. at 195-196 (internal quotation marks omitted). But if they were actually operating as individual banks—pursuing their own "separate" interests—then their alleged conduct would represent the "join[ing] to-

gether [of] independent centers of decisionmaking," *id.* at 196 (internal quotation marks omitted)—the very definition of "concerted" action, *id.* at 195. To get past the pleading stage, respondents must make "allegations plausibly suggesting (not merely consistent with)" the latter. *Twombly*, 550 U.S. at 557.

Respondents have not done so. Quite the opposite, respondents expressly assert—in both their briefs and their pleadings—that the Access Fee Rules promoted the competitive interests of Visa and MasterCard by preventing participating ATM operators from offering lower access fees to customers of other networks. *See* Non-Consumer Br. 9 (the rules "protect[ed] the competitive position" of "Visa/MC"); Consumer Br. 12 ("the rules benefited * * * the business associations"); Osborn Pet. App. 83a, 86a (Mackmin Compl. ¶¶ 97, 106); Stoumbos Pet. App. 66a (Stoumbos Compl. ¶ 47); *id.* at 142a (NAC Compl. ¶ 81).

For any given network, maintaining such a rule, which helps the network protect its brand and compete against other networks, is simply "routine market conduct." *Twombly*, 550 U.S. at 566. That is why Visa and MasterCard "perpetuat[ed]" the rules, even after the banks ceded their "ownership and control rights" through the networks' initial public offerings (IPOs). Osborn Pet. App. 89a-90a (Mackmin Compl. ¶¶ 116-118). And it is why so many other networks—including those that have always been independent of bank control—impose similar rules, too. Visa Br. 27; Financial Industry Ass'ns *Amicus* Br. 26.

Because the rules undisputedly promote the interests of each network, respondents face a steep uphill

climb. This Court "generally" treats action undertaken by "a single firm as independent action on the presumption that the components of the firm will act to maximize the firm's profits." *Am. Needle*, 560 U.S. at 200. So respondents must plausibly allege that this is that "rare" case in which "that presumption does not hold." *Id.* They must plausibly allege, in other words, that in passing the Access Fee Rule, the board of each network was pursuing the "separate" interests of the individual banks instead of the undisputed interests of the network as a "whole." *Id.* at 195-196. Once again, however, respondents' own allegations suggest that that is *not* what the boards were doing.

According to respondents themselves, "[t]he Rules were *contrary to* the Banks' separate commercial interests." Non-Consumer Br. 15 (emphasis added). As respondents allege: "It would *not* be in the best interests of any individual ATM operator to choose to saddle himself or herself with a restrictive ATM Access Fee pricing restraint that required him or her to set a single, uniform fee for all transactions at that ATM, irrespective of the ATM Network used to complete the transaction." Stoumbos Pet. App. 70a (Stoumbos Compl. ¶ 53) (emphasis added). So if the members of each network's board were actually operating in their capacity as individual banks, why would they ever pass rules so "contrary" to their own separate interests?[1]

[1] As explained in Section A above, it was in each bank's individual interest to *abide by* the rules: Taking the existence of the rules as given, each bank had an interest in participating in the networks anyway. The question here is different: If the rules do not yet exist, why would a bank be in favor of *passing* the

Respondents have three apparent answers. *First*, they argue that the fact that it would have been "completely irrational" for any bank to support "adoption of the Access Fee Rules" just shows that there must have been "concerted action" among the banks. Consumer Br. 40. If concerted action were the *only* possible remaining explanation for the passage of the rules, that *reductio ad absurdum* might have some force. But it has no power here, where there is an "obvious"—and indeed, more "natural"—explanation, *Twombly*, 550 U.S. at 567-568: The members of each board were not actually operating as individual banks. They were instead acting in the interests of each network as a whole, interests each rule undisputedly served.

Second, respondents suggest it would *not* in fact have been irrational for a bank to support passage of the rules because the banks had "agree[d] among themselves * * * *to implement* the Rules." Non-Consumer Br. 15 (emphasis added). On this theory, board members acting as banks *would* have seen it in their interest to pass the rules, knowing that their fellow banks had agreed among themselves to abide by them. Note what this theory requires, though: a horizontal agreement among banks, *separate from* the rules and their passage. As explained in Section A above, respondents' only evidence of such an agreement is the banks' parallel conduct, and that conduct is not suggestive of any such agreement.

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rules in the first place? The allegation that "it was and is in the member banks' best interest to agree or continue to agree to be *bound by* the [rules]" does not speak to why it would be in a bank's interest to *pass* the rules. Osborn Pet. App. 90a (Mackmin Compl. ¶ 119) (emphasis added).

Third, respondents say that any benefit the rules offered for the networks was also a benefit for the individual banks because the banks "owned the networks and made money on the basis of the Rules through their distribution of their share of the profits." Non-Consumer Br. 24. But to the extent the banks profited from the success of the networks, they did so as owners of the network, not as banks; after all, banks do not compete in the market for network services. And benefiting the network's owners—whether banks or individual shareholders—is precisely what the rules would be expected to do, if they were passed in the interests of each network as a whole.

In short, respondents' own allegations suggest that the boards were pursuing the interests of the networks when they passed the rules. Indeed, respondents fail to provide any plausible theory of why, if the board members were instead acting as individual banks, they would have ever passed the rules at all. It is therefore not the case, as respondents suggest, that the boards could have been acting partly on the networks' interests and partly on the banks'. Consumer Br. 37. According to respondents' own allegations, the networks' interests in one market (in which the banks do *not* compete) stand *contrary to* the banks' interests in another market (in which the banks supposedly *do* compete). Given respondents' allegations, passage of the rules is consistent with only one plausible explanation: When the board members came together to pass the rules, they did so as the board of each network, not as a group of individual banks. There was no joining together of independent centers of decisionmaking here.

C. Respondents' Counterarguments Have No Merit And Their Proposed Test Has No Limiting Principle

1. Respondents contend that a ruling for petitioners "would effectively create a joint-venture exception to Section 1." Consumer Br. 1; *see* Non-Consumer Br. 13. Not so.

First, there will be cases in which "allegations of parallel conduct" involving parties to a joint venture are "placed in a context that raises a suggestion of a preceding agreement," subjecting those parties to Section 1 scrutiny. *Twombly*, 550 U.S. at 557. A group of price-fixing competitors, for example, could not "evade the antitrust laws simply by creating a 'joint venture.'" *Am. Needle*, 560 U.S. at 201 (internal quotation marks omitted). Unlike Visa or MasterCard, such a venture could be alleged to serve no plausible purpose other than requiring its members to adhere to the same price. And so its members could not justify adhering to that price by pointing to some other, legitimate reason for being part of the venture. The natural explanation for their parallel conduct would be the existence of a horizontal agreement to adhere to the same price. *See* Visa Br. 37-38.

Second, there will be cases in which concerted action is clear on the face of the joint venture's decision itself. In *American Needle*, for example, NFLP could not have granted an exclusive license to Reebok without depriving each NFL team of its independent power over its own licensing decisions. 560 U.S. at 197. Similarly, in *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979), associations of copyright owners were able to grant blanket

licenses to use the owners' work only because the owners, in their capacities as independent owners, agreed to pool their work. *Id.* at 4, 5, 8.

Third, there will be cases in which a group of competitors jointly undertakes some task that each competitor previously undertook unilaterally—making clear that independent centers of decisionmaking have been joined together. For instance, competing office supply retailers might form a cooperative to purchase supplies at wholesale—which each retailer would otherwise do independently. *Nw. Wholesale Stationers, Inc.* v. *Pac. Stationery & Printing Co.*, 472 U.S. 284, 286-287 (1985). Or competing dentists might form an association to decide how they shall advertise—a decision each dentist would otherwise make on his own. *Cal. Dental Ass'n* v. *FTC*, 526 U.S. 756, 760 (1999). Similar examples abound. *See FTC* v. *Ind. Fed'n of Dentists*, 476 U.S. 447, 459 (1986) (dentists' policy); *NCAA* v. *Board of Regents*, 468 U.S. 85, 98 (1984) (restrictions on schools' contracting); *Arizona* v. *Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 339 (1982) (doctors' fee schedule); *Nat'l Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 682-683 (1978) (engineers' code of ethics); *Goldfarb* v. *Va. State Bar*, 421 U.S. 773, 776 (1975) (lawyers' fee schedule); *Silver* v. *NYSE*, 373 U.S. 341, 343 (1963) (boycott of a non-member competitor); *United States* v. *Nat'l Ass'n of Real Estate Bds.*, 339 U.S. 485, 488 (1950) (brokers' rates); *Associated Press* v. *United States*, 326 U.S. 1, 8 (1945) (publishers' by-laws); *Fashion Originators' Guild of Am., Inc.* v. *FTC*, 312 U.S. 457, 464 (1941) (manufacturers' "system of sale"); *Sugar Inst., Inc.* v. *United States*, 297 U.S. 553, 578-579 (1936) (sugar refiners' code of ethics); *FTC* v. *Pac. States Paper Trade Ass'n*, 273

U.S. 52, 62 (1927) (dealers' price lists); *Board of Trade* v. *United States*, 246 U.S. 231, 237 (1918) (traders' hours restrictions).[2]

Fourth, there will be cases in which competitors form an association to pursue an interest nominally distinct from their own, but the facts plausibly suggest that the competitors are instead pursuing their own interests as competitors—converting the association into a mere "instrumentality" of the competitors themselves. *United States* v. *Sealy, Inc.*, 388 U.S. 350, 354 (1967). For example, although the association in *United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972), theoretically had a distinct interest as a licensor of the Topco brand, in practice the association existed only to allow its member grocery chains "to compete more effectively with larger national and regional chains." *Id.* at 599. Topco itself asserted as much, *id.* at 604-605, and the association rules challenged in the case made it equally clear that Topco was an entity dedicated to the joint pursuit of the members' independent interests in competing in the grocery market. Perhaps most tellingly, Topco's rules required that the association would grant wholesale licenses only after consulting with individual members "whose interests may potentially be affected." *Id.* at 603.

Respondents contend that in each of these cases, the competitors could have invoked some benefit to

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[2] In none of the decisions cited in this third category did the Court squarely address whether the challenged conduct represented concerted action. To the extent the Court assumed that there was concerted action, a ruling in petitioners' favor would not call that assumption into question.

the association as a whole—just as petitioners do here. Consumer Br. 12, 29-30; Non-Consumer Br. 17; *see* U.S. Br. 26-27. But that is true in only the most superficial sense. *See Am. Needle*, 560 U.S. at 199 n.7 ("Members of any cartel could insist that their cooperation is necessary to produce the 'cartel product' and compete with other products."). In cases within the third category above, the interest of the group was nothing more than the joint pursuit of interests the competitors would otherwise pursue separately. And in cases within the fourth category, it was plausible that, whatever nominal interest might be attributed to the joint venture itself, the competitors were using the venture as a vehicle for pursuing their separate interests.

This case is different. Visa and MasterCard were formed to provide network services, something none of the banks did individually. The networks thus have their own interests, separate and apart from those pursued by the banks in their capacities as competitors. And respondents have not plausibly alleged that those interests were a mere fig leaf covering the banks' joint pursuit of their independent interests as competitors. In fact, as explained above, respondents' own assertions suggest that the networks were engaged in unilateral conduct, pursuing the interest of each network as a whole.

2. It is respondents' and the Government's position that lacks any genuine limiting principle. In their view, the conduct of a joint venture or other association should be considered unilateral only when "it

has *no* effect on the members' separate businesses." U.S. Br. 21 (emphasis added); *see* Consumer Br. 12.[3]

But virtually every meaningful decision by a joint venture will have *some* effect on the members' separate businesses. Even when a venture and its members compete in separate markets, the markets are typically interrelated in some respect. In just about every case, then, a plaintiff will be able to plead *some* incidental effect on the members' separate businesses—turning ventures of all stripes into "walking conspirac[ies]." *Viazis* v. *Am. Ass'n of Orthodontists*, 314 F.3d 758, 764 (5th Cir. 2002). The only decisions that could possibly escape scrutiny as horizontal conspiracies are either wholly unrealistic—like Visa purchasing a toaster manufacturer, Consumer Br. 41—or entirely trivial—like Visa deciding where to have its annual meeting, U.S. Br. 21.

The other side's position would thus sweep too broadly. The fact that a decision has some effect on the members' separate businesses bears little relationship to the "identity of the persons who act[ed]"—the key to whether the decision represented unilateral or concerted action. *Am. Needle*, 560 U.S. at 192 (internal quotation marks omitted). This case proves the point. Even if the rules have some effect on the market for ATM cash withdrawals, that does not mean that each network's board members were acting in their capacity as individual banks when

[3] For the Government, this is a rule far more sweeping than what it had proposed in *American Needle*. There, the Government argued for a test that considered whether the challenged restraint "*significantly* affected actual or potential competition . . . outside [the teams'] merged operations." 560 U.S. at 202 n.9 (emphasis added) (quoting U.S. Br. 17).

they passed the rules. The networks' own post-IPO experience shows why: Even post-IPO, the rules affected the banks' separate businesses, and yet the rules undoubtedly represented unilateral network action at that point. *See* Visa Br. 31-32. The other side's no-effect rule is thus a poor guide for deciding the unilateral-versus-concerted-action question.

3. Respondents' remaining counterarguments lack merit.

Respondents contend that whether the parties were "acting in the interests of the whole" matters only under the facts of *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752 (1984), which involved "divisions of a single corporation." Consumer Br. 29. But *Copperweld* represented just one application of that test. And the fact that this case involves the directors of a board, as opposed to the divisions of a corporation, does not render the test inapplicable. If each board member had been pursuing the interests of the network as a whole, the situation would be no different from "the president and a vice president of a firm * * * act[ing] in combination," which everyone agrees is not subject to Section 1. *Am. Needle*, 560 U.S. at 195.

Respondents and the Government also contend that the inquiry should not turn on the defendant's subjective motivations. Non-Consumer Br. 22; Consumer Br. 34; U.S. Br. 19. But that is not the touchstone of the inquiry above; petitioners agree that the inquiry should turn "on the *capacity* in which the partners acted," Non-Consumer Br. 22, just as *American Needle* requires. *See* 560 U.S. at 191 (demanding "a functional consideration" of how the parties "actually operate"). And in a case like

this, where there is no direct evidence, *see* Visa Br. 17, that inquiry revolves around an *objective* assessment of factors such as the networks' interests, the banks' interests, and the interests the rules serve.

Finally, respondents quote a passage from *American Needle*, 560 U.S. at 199, stating: "The justification for cooperation is not relevant to whether that cooperation is concerted or independent action." Consumer Br. 34; Non-Consumer Br. 22. Petitioners agree. The problem here is that respondents have not plausibly alleged *any* instance of cooperation *among banks*—acting in their capacities *as banks*—to begin with. Respondents' allegations suggest instead that the board of each network established a condition for participation in the network, which each bank unilaterally accepted.

Nor are petitioners relying on the "necessity of cooperation." *Am. Needle*, 560 U.S. at 199 n.6. Necessity is relevant to a Rule-of-Reason analysis, *id.*, but the Rule of Reason is not at issue here. The point here is a different one: that regardless of whether the alleged conduct was necessary or procompetitive, it was undertaken in the interest of each network as a whole, not the individual banks. Respondents and the Government are wrong to suggest that these considerations can simply be taken into account under the Rule of Reason. Consumer Br. 34-35; U.S. Br. 30-34. And they are wrong to "forget that proceeding to antitrust discovery," which a Rule-of-Reason inquiry often entails, "can be expensive." *Twombly*, 550 U.S. at 558. A court should reach that inquiry only if there is a plausible suggestion of concerted action in the first place.

D. The Court Should Decide The Question Presented

Respondents and the Government acknowledge that the D.C. Circuit decided whether the Access Fee Rules were the product of concerted action among members of each network's board. Consumer Br. 8-9; Non-Consumer Br. 14; U.S. Br. 7. They nevertheless contend that the question presented does not fairly encompass the issue the D.C. Circuit decided.

That is incorrect. In ruling on the issue, the D.C. Circuit first held that "a legally single entity violates Section 1 when the entity is *controlled by* a group of competitors." Osborn Pet. App. 19a (emphasis added) (internal quotation marks and brackets omitted). It then concluded 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*." *Id.* (emphasis added).

The question presented simply tracks the D.C. Circuit's opinion. It asks "[w]hether 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." Pet. i (emphasis added). The reference to "possess[ion] [of] governance rights" links up to the D.C. Circuit's view that the networks were "controlled by" a group of retail banks. And the reference to the "element of conspiracy in violation of Section 1" links up to the D.C. Circuit's conclusion that the allegations "describe the sort of concerted action necessary to make out a Section 1 claim."

The non-consumer respondents (at 14) nonetheless construe the question presented as concerned only with whether there was a literal "agreement" among the banks, and contend that petitioners have since abandoned any argument that the complaints fail to plead such an "agreement." They are wrong on both counts. The "element of conspiracy" under Section 1 requires not just a literal agreement, but concerted action. *See* Visa Br. 15-16. And given that the members of each network's board actually operated as a board, not as individual *banks*, petitioners maintain that the complaints fail to plead any "agreement"—even a literal one—among *banks*.

In short, the issue of whether the rules were the product of concerted action falls squarely within the question presented—which is presumably why respondents addressed the issue in their brief in opposition. *See* Br. in Opp. 18-19 (discussing *American Needle*).

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

NEAL KUMAR KATYAL
Counsel of Record
FREDERICK LIU
COLLEEN E. ROH SINZDAK
EUGENE A. SOKOLOFF
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004

BENJAMIN A. FLEMING
HOGAN LOVELLS US LLP
875 Third Avenue
New York, NY 10022

PETER E. GREENE
BORIS BERSHTEYN
PETER S. JULIAN
SAM AULD
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
4 Times Square
New York, NY 10036

KENNETH A. GALLO
JOSEPH J. SIMONS
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, D.C. 20006

GARY R. CARNEY
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019

ANTHONY J. FRANZE
MARK R. MERLEY
MATTHEW A. EISENSTEIN
R. STANTON JONES
ARNOLD & PORTER LLP
601 Massachusetts
Avenue, N.W.
Washington, D.C. 20001

MARK P. LADNER
MICHAEL B. MILLER
MORRISON & FOERSTER LLP
250 W. 55th Street
New York, NY 10019

W. STEPHEN SMITH
MORRISON & FOERSTER LLP
2000 Pennsylvania Avenue,
N.W., Suite 6000
Washington, D.C. 20006

WILLIAM F. CAVANAUGH
PATTERSON BELKNAP
WEBB & TYLER LLP
1133 Avenue of the Americas
New York, NY 10036

Attorneys for Petitioners

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