Nos. 15-961, 15-962

IN THE

Supreme Court of the United States

VISA INC., *et al.*,

Petitioners,

v.

SAM OSBORN, *et al.*,

Respondents.

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

BRIEF FOR THE ATM INDUSTRY ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

RICHARD H. DOLAN
Counsel of Record
ELIZABETH WOLSTEIN
SCHLAM STONE & DOLAN LLP
26 Broadway
New York, NY 10004
(212) 344-5400
rdolan@schlamstone.com

Counsel for Amicus Curiae

268898

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

CASES

Page

STATUTES AND OTHER AUTHORITIES

INTERESTS OF *AMICUS CURIAE*[1]

Amicus curiae The ATM Industry Association (ATMIA) was founded in 1997. It is a non-profit, independent, global trade association. Its mission is to promote Automated Teller Machine (ATM) convenience, growth, and usage worldwide; to protect the ATM industry's assets, interests, good name, and public trust; and to provide education, best practices, political voice, and networking opportunities for member organizations. The ATMIA has over 7,500 members that operate in 65 countries. Its worldwide membership includes many independent (*i.e.*, non-bank) ATM deployers. The ATMIA's members have deployed over 2.2 million ATMs that provide consumers with cash when they need it. The ATMIA's members include virtually all of the independent deployers of ATMs that compete with Visa/MasterCard member banks to provide cash-access services to consumers.

As a trade association advocating on behalf of the ATM industry as a whole, the ATMIA avoids discussion of matters that involve the competitive decision-making of its members, many of which are competitors. Nor does the ATMIA set rules or policies intended to affect its members' competitive decision-making.

---

1. *Amicus* states that no counsel for a party authored this brief in whole or in part, and that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus* and its counsel made a monetary contribution intended to fund the preparation or submission of this brief. The parties' written consents are being filed with this brief.

As part of its advocacy for the interests of its members, the ATMIA regularly addresses legislative and regulatory issues impacting the ATM industry. It has conducted studies and issued numerous white papers, including a white paper addressing Visa's and MasterCard's rule restricting its members' ability to offer consumers discounted convenience fees for using non-Visa, non-MasterCard ATM networks.

Given its knowledge of the industry, the ATMIA is well qualified to address the implications of the questions presented here concerning competition in the ATM industry, in which ATMIA members compete with Visa and MasterCard member banks. The ATM Access Fee Rules at issue in this case, which the banks have all agreed to abide by and enforce, prohibit our members from discounting the fees paid by consumers for ATM access through lower-cost networks that compete with the Visa and MasterCard ATM networks. Consumers are harmed by being forced to pay artificially high fees that cannot be priced as the market would otherwise allow, *i.e.*, as they would be priced if the Access Fee Rules did not exist.

Because of the Visa/MasterCard networks' market dominance, our members' ATMs cannot decline to process ATM transactions on those networks -- if they did, they would lose too many customers to survive. Therefore, our members must contract with Visa/MasterCard and abide by their rules. Visa and MasterCard and their member banks have improperly used this market power to fix the prices our members may charge for ATM transactions, restraining their freedom to price in ways that would foster competition and benefit consumers as well as our members. This Court should reject Petitioners' attempt to

immunize these agreements from scrutiny under Section 1 of the Sherman Act.

SUMMARY OF ARGUMENT

Prior to their initial public offerings in 2006 (MasterCard) and 2008 (Visa), Petitioners operated as joint ventures owned and controlled by their member banks. Those member banks included virtually all of the banks in the United States that issued credit and debit cards to customers and signed up merchants to accept those cards. As the Second Circuit held in *United States v. Visa U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003), these banks are competitors:

> Visa U.S.A. and MasterCard, however, are not single entities; they are consortiums of competitors. They are owned and effectively operated by some 20,000 banks, which compete with one another in the issuance of payment cards and the acquiring of merchants' transactions. These 20,000 banks set the policies of Visa U.S.A. and MasterCard. These competitors have agreed to abide by a restrictive exclusivity provision to the effect that in order to share the benefits of their association by having the right to issue Visa or MasterCard cards, they must agree not to compete by issuing cards of Amex or Discover. The restrictive provision is a horizontal restraint adopted by 20,000 competitors.

Id. at 242.

Just as the banks compete to issue payment cards and obtain merchant transactions, those banks compete to issue debit cards that provide consumers access to ATMs, as Respondents' complaint amply alleged. Nor is there any doubt that the banks also compete with independent operators of ATM services such as ATMIA's members. Those allegations, together with additional allegations spelling out the banks' agreement to the ATM Access Fee Rules in their capacity as competitors, are sufficient to allege concerted action for purposes of Section 1 of the Sherman Act under this Court's precedents.

The question presented for review on which this Court granted certiorari was: "Whether allegations that members of a business association agreed to the association's rules and possessed governance rights in the association, *without more*, are sufficient to plead the element of conspiracy in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1." Brief for Petitioners ("Pet. Br.") at i (emphasis added). Those allegations, "without more," say nothing about whether the members of the business association are "separate economic actors" or, assuming they are, whether they have acted in concert to "deprive[] the marketplace of independent centers of decisionmaking." *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 195 (2010).

Petitioners' Brief, however, goes beyond the question presented to argue the standards for assessing whether a joint venture of horizontal competitors has engaged in concerted action subject to analysis under Section 1. In *American Needle*, *supra*, the Court addressed those standards and held that competitors' agreement to abide by rules that restrict "independent centers

of decisionmaking" was sufficient to plead concerted action under Section 1. There is no dispute that the owner/member banks of Visa/MasterCard are "separate economic actors," and there is no dispute that they have agreed to abide by certain rules that restrict a form of price competition to the benefit of the Visa/MasterCard ATM networks and the banks which owned them. Under *American Needle*, then, Petitioners are subject to Section 1. The Court did not grant certiorari to revisit these standards.

Nonetheless, Petitioners argue that a new standard should apply in assessing whether a complaint sufficiently pleads concerted action—one directly at odds with *American Needle* and which, if adopted, would effectively overturn that case. According to Petitioners, for a joint venture of independent competitors to fall within Section 1, the complaint must allege that the venture acted purely in its members' individual interests and not to further the joint venture's objectives "as a 'whole.'" Pet Br. 10. But *American Needle* rejected this same argument by the NFL:

> It may be, as respondents argue, that NFLP "has served as the 'single driver' " of the teams' "promotional vehicle, 'pursu[ing] the common interests of the whole.'" Brief for NFL Respondents 28 (quoting *Copperweld*, 467 U.S., at 770-771, 104 S. Ct. 2731, 81 L. Ed. 2d 628; brackets in original). But illegal restraints often are in the common interests of the parties to the restraint . . . .

560 U.S. at 198.

Petitioners' proposed standard is wrong. Under *American Needle*, Section 1 reaches all joint conduct among competitors that "deprives the marketplace" of those "independent centers of decisionmaking." 560 U.S. at 195.

Notably, the antitrust immunity Petitioners seek would attach whether the conduct is characterized as horizontal (among competitors) or vertical (between the Visa or MasterCard ATM network on the one hand, and the banks on the other), thereby exempting from antitrust scrutiny broad categories of concerted action by competing banks. Moreover, because it is hard to imagine that rational competitors would enter into a joint venture that did not advance the joint venture's interests but only their own individual interests, *see American Needle*, 560 U.S. at 199 ("Any joint venture involves multiple sources of economic power cooperating to produce a product."), only an out-and-out sham venture would be subject to Section 1 under Petitioners' proposed standard. It effectively collapses the two distinct prongs of Section 1 analysis into the single question of whether the conduct is lawful.

Accordingly, the Court should reject Petitioners' arguments and affirm the judgment of the Court of Appeals.

ARGUMENT

I. The complaint adequately alleges that Petitioners engaged in concerted conduct for purposes of Section 1 of the Sherman Act.

A. Under *American Needle*, conduct is concerted under Section 1 when "separate economic actors" "deprive[] the marketplace of independent centers of decisionmaking."

In its unanimous decision in *American Needle v. Nat'l Football League*, 560 U.S. 183 (2010), this Court set forth the standards for applying Section 1 to joint ventures.

American Needle involved a Section 1 challenge to an NFL trademark-licensing practice. In its defense, the NFL argued, among other things, that Section 1 did not reach its conduct because the NFL and its licensing subsidiary, NFL Properties, were a "single economic enterprise." 560 U.S. at 188. The district court agreed, concluding that the NFL and its 32 teams could "be deemed a single entity rather than joint ventures cooperating for a common purpose." *Id.* The Seventh Circuit affirmed. *See id.*

This Court reversed, holding that the NFL teams were acting in concert under Section 1 because the teams are "separate economic actors" and their agreement to license their intellectual property jointly "deprives the marketplace of independent centers of decisionmaking." 560 U.S. at 195. The Court did not reach the legality of the practice; it held only that the conduct was subject to analysis under Section 1 because the conduct was concerted within the meaning of the statute. *See generally id.* at 196-203.

In reaching its decision, the Court reasoned that the NFL teams were not fully economically integrated: "The NFL teams do not possess either the unitary decisionmaking quality or the single aggregation of economic power characteristic of independent action. Each of the teams is a substantial, independently owned, and independently managed business." *Id.* at 196. It did not matter that the NFL teams also "have common interests such as promoting the NFL brand"; "they are still separate, profit-maximizing entities, and their interests in licensing team trademarks are not necessarily aligned." *Id.* at 198.

Contrary to Petitioners' argument, the fact that a particular practice furthers a joint venture's legitimate objectives does not preclude the conclusion that the participants are engaging in concerted action. Acts furthering joint-venture objectives are concerted if they also affect or restrict competition among economically independent joint-venture members: in *American Needle*, "[t]he mere fact that the teams operate[d] jointly in some sense d[id] not mean that they are immune." *Id.* at 199. Furthering a joint venture's legitimate objectives is certainly relevant under Section 1 under *American Needle*. But it is *not* relevant to the concerted-action inquiry, and instead relates only to the rule-of-reason inquiry which balances the procompetitive effects of the challenged conduct against its anticompetitive effects. *See id.* at 202-03.

Excluding from Section 1's coverage agreements among horizontal competitors that may deprive the market of competition, simply because they further the objectives of the competitors' joint-venture, is contrary to the Act. "Obviously, the most significant competitive threats arise when joint venture participants are actual or

potential competitors." VII Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 1478a, at 340 (3d ed. 2010) (hereinafter "Areeda & Hovenkamp").

B. Visa and MasterCard are "consortiums of competitors" through which competing banks "deprive[] the marketplace of independent centers of decisionmaking"; they do not act as single-entity trade associations of ATM providers.

Visa/MasterCard member banks are plainly competitors. As the Second Circuit held after a full trial, the banks are horizontal competitors acting in concert when they issued credit and debit cards: "Visa U.S.A. and MasterCard, however, are not single entities; they are consortiums of competitors. They are owned and effectively operated by some 20,000 banks, which compete with one another in the issuance of payment cards and the acquiring of merchants' transactions." *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 242 (2d Cir. 2003), *cert. denied*, 543 U.S. 811 (2004).[2] In the ATM context, banks also compete with one another by joining multiple ATM networks, allowing their cardholder-customers to access

2. *See also United States v. Topco Assocs.*, 405 U.S. 596, 598 (1972) ("Each of the member chains operates independently; there is no pooling of earnings, profits, capital, management, or advertising resources."); *United States v. Sealy, Inc.*, 388 U.S. 350, 352 (1967) (internal citations omitted) ("If we look at substance rather than form, there is little room for debate. These must be classified as horizontal restraints. There are about 30 Sealy 'licensees.' They own substantially all of its stock. Sealy's bylaws provide that each director must be a stockholder or a stockholder-licensee's nominee. Sealy's business is managed and controlled by its board of directors.").

their accounts through more ATMs around the world. The more ATM access a bank can offer its cardholders, the better it can compete against rival banks for customers. There is no serious dispute that, as Respondents' complaint alleges, Visa/MasterCard member banks are "separate economic actors pursuing separate economic interests," *Am. Needle*, 560 U.S. at 195, when marketing and issuing ATM/debit cards to their customers.

Respondents properly allege that these independent competitors have "deprive[d] the marketplace of independent centers of decisionmaking" by adhering to the ATM Access Fee Rules. An economically rational response by an independent, competitive bank to competition from other banks and from non-bank ATM providers is to offer its customers and the customers of other banks a lower price when the consumer's card permits the use of lower-cost ATM networks. In that circumstance, an independent, competitive bank would be able to pass on to consumers, in the form of lower ATM fees, part of the savings that result from the use of lower-cost ATM networks – provided that the consumer maintained her account with a bank (such as the independent, competitive bank in this example) issuing cards that permitted use of lower-cost ATM networks. But the ATM Access Fee Rules have deprived the marketplace of just such a competitive response by prohibiting independent ATM operators from charging cardholders a lower fee if the cardholders use ATM networks costing less than Visa's and MasterCard's.

The Court of Appeals was correct in holding that the banks' development and adoption of the ATM Access Fee Rules pled a restraint of trade subject to Section 1:

> The rules served several purposes. First and foremost, the rules protected Visa and MasterCard from competition with lower-cost ATM networks, thereby permitting Visa and MasterCard to charge supra-competitive fees. Osborn Prop. Compl. ¶ 80. The rules also benefited the banks, who were equity shareholders of the associations (and therefore financial beneficiaries of the deal). *Id.* ¶¶ 116-117. And the rules protected banks from competition with each other over the types of [ATM network] bugs offered on bank cards. *See id.* ¶ 80 (alleging that "banks were assured that their MasterCard customers would not have to pay more in fees than their Visa cardholders, and they would not face competition at the network level").

797 F.3d 1057, 1066 (D.C. Cir. 2015).

In short, Visa and MasterCard are not acting unilaterally as trade associations. Trade associations, like the ATMIA, do not promulgate and enforce binding rules governing how their members can price their products and services. To the contrary, trade associations do not discuss matters that involve the competitive decision-making of their members. Professor Areeda's treatise agrees with the D.C. and Second Circuits that Visa and MasterCard do not act merely as trade associations: "The situation is quite different when 'thousands of separate financial institutions all of whom are competitors' form an association to create the MasterCard credit card network from which all rivals' cards are excluded. . . . The Supreme Court's *American Needle* decision clearly confirms the *MasterCard* result." Areeda & Hovenkamp ¶ 1477, at 339-40 (discussing *MasterCard Int'l v. Dean Witter, Discover*

& Co., 1993-2 Trade Cas. ¶ 70,352, 1993 U.S. Dist. LEXIS 11964 (S.D.N.Y.)).

C. The banks' agreements to Visa/MasterCard's rules are also vertical agreements subject to Section 1.

Even assuming *arguendo* that the D.C. Circuit, Second Circuit, and the Areeda treatise are wrong to characterize Visa/MasterCard member/owner banks as engaging in horizontal concerted action, Petitioners' conduct remains subject to analysis under Section 1 as a vertical restraint of trade. If Visa and MasterCard each are "single entities," then they separately contract with each member/owner bank to adhere to all Visa/MasterCard rules. By any measure, that is a vertical agreement subject to Section 1.

Moreover, the horizontal/vertical distinction is more formal than substantive in this case. As the First Circuit noted in applying Section 1 to the Major League Soccer joint venture, "MLS . . . has two roles: one as an entrepreneur with its own assets and revenues; the other (arguably) as a nominally vertical device for producing horizontal coordination, *i.e.*, limiting competition among operator/investors." *Fraser v. Major League Soccer*, 284 F.3d 47, 57 (1st Cir. 2002). Whether the banks are characterized as agreeing directly among themselves to refrain from independent competitive decision-making, or as agreeing with an upstream supplier to a scheme among all of them which creates the same effect, the result is the same: their concerted action is subject to analysis under Section 1 of the Sherman Act.

II. Petitioners' proposed standards for concerted action are contrary to well-settled antitrust law and would harm competition.

Petitioners argue that "where the parties to a joint venture cooperate within the context of that venture to pursue the interests of the *venture* as a 'whole,' their conduct counts as 'unilateral' rather than 'concerted' for purposes of Section 1." Pet. Br. at 10-11 (internal citation omitted). But *American Needle* holds exactly the opposite. As the Court explained:

> [D]ecisions by NFLP regarding the teams' separately owned intellectual property constitute concerted action. Thirty-two teams operating independently through the vehicle of NFLP are not like the components of a single firm that act to maximize the firm's profits. The teams remain separately controlled, potential competitors with economic interests that are distinct from NFLP's financial well-being. See generally Hovenkamp, 1995 Colum. Bus. L. Rev., at 52–61. Unlike typical decisions by corporate shareholders, NFLP licensing decisions effectively require the assent of more than a mere majority of shareholders. And each team's decision reflects not only an interest in NFLP's profits but also an interest in the team's individual profits. See generally Shushido, 39 Hastings L. J., at 69–71. The 32 teams capture individual economic benefits separate and apart from NFLP profits as a result of the decisions they make for the NFLP. NFLP's decisions thus affect each team's profits from licensing its own intellectual property. "Although the business interests of" the teams "will *often*

> coincide with those of the" NFLP "as an entity in itself, that commonality of interest exists in every cartel."

560 U.S. at 201.

Petitioners also argue that, to allege concerted action under § 1, a complaint must suggest that each joint venture's member was "'act[ing] on interests separate from those of'" the joint venture. Pet Br. 11 (quoting *Am. Needle*, 560 U.S. at 200). As noted above, that is akin to saying that Section 1 only reaches sham joint-venture activity that serves no purpose but to facilitate cartel activity amongst the members. Any such rule, if adopted by this Court, would invite all manner of dangerous, anti-competitive conduct. As the Visa and MasterCard ventures demonstrate, joint-venture conduct can involve both superficially legitimate conduct and rulemaking that nonetheless has anticompetitive effects at the member level. The rule of reason is designed to balance those effects, but under the Petitioners' standard, Section 1 would not reach such activity with the result that balancing of competitive effects would never occur.

The facts of *United States v. Visa U.S.A., Inc.*, *supra*, highlight the potential pitfalls of Petitioners' approach. That case involved Visa/MasterCard member/owner banks agreeing to rules that barred all Visa/MasterCard banks from issuing American Express or Discover cards. 344 F.3d at 242. Under those exclusionary rules, banks faced expulsion from the dominant payment-card networks if they did business with American Express or Discover. Those rules were implemented by the banks, who approved them as owners and board members of Visa and MasterCard. And like the rules at issue here, those rules were embedded in all agreements between the

networks and their member banks, in which the banks all agreed to abide by all Visa/MasterCard rules.

Visa and MasterCard defended the restraints as necessary to prevent free riding by their network competitors and to ensure cohesion within their systems. The district court treated those as legitimate justifications and factored them into its analysis of the restraints' competitive effects. Nonetheless, the district court concluded that the rules constituted concerted action that harmed competition in violation of Section 1. *United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322 (S.D.N.Y. 2001). In doing so, the district court highlighted the fact that the exclusionary rules barred competing banks from differentiating their products by issuing cards over the American Express or Discover networks. *See id.* at 379, 395-96. The Second Circuit affirmed, and this Court denied certiorari. Visa and MasterCard ultimately paid American Express and Discover close to $7 billion in damages for these unlawful restraints, to settle follow-on lawsuits brought by those networks.

The fully litigated example of *United States v. Visa U.S.A.* provides a good example of a restraint that arguably had some network/joint venture justification but that was enacted by the members in their capacity as competitors, *i.e.*, independent centers of decision-making, to substantially restrain competition, limit consumer choice, discourage innovation, and reduce output. Under Petitioners' standard, Section 1 would not have reached that conduct; the court would not have balanced the restraints' competitive effects under the rule of reason; and Visa, MasterCard, and the banks would have had carte blanche to continue to suppress competition to the detriment of other businesses and consumers. There is no support in antitrust law or policy for such an outcome.

Visa, MasterCard, and their member banks have faced numerous antitrust cases over the past two decades because their joint venture structure provides many opportunities for concerted action that may (or may not) unreasonably restrain competition.[3] A rule of law that would have immunized those cases and would immunize the conduct at issue here and future joint venture conduct from antitrust scrutiny – based essentially on matters of form rather than substance -- is inconsistent with consumer welfare and undermines competition. For the same reason, Respondents' well pleaded and well-founded lawsuit challenging the ATM Access Fee rules should be permitted to proceed.

---

3. *See, e.g., In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 827 F.3d 223 (2d Cir. 2016) (reversing approval of $7 .25 billion settlement of 4Section 1 claims involving varied restraints); *In re Visa Check/MasterMoney Antitrust Litig.,* 280 F.3d 124 (2d Cir. 2001) (affirming class certification on claim that Honor All Cards policies violate Section 1; case settled); *United States v. Visa U.S.A. Inc.,* 163 F. Supp. 2d 322 (S.D.N.Y. 2001) (finding Section 1violation relating to prohibition on member banks issuing Discover or American Express cards); *Pulse Network LLC v. Visa Inc.,* No. 14-cv-03391 (S.D. Tex.) (alleging effort to monopolize debit card network services; motion to dismiss denied Dec. 17, 2015); *In re Foreign Currency Conversion Fee Antitrust Litig.,* No. 01-md-1409 (S.D.N.Y.) (challenging pricing of foreign transactions; case settled); *Discover Fin. Servs. v. Visa U.S.A. Inc.,* No. 04-cv-7844 (S.D.N.Y.) (related case to *United States v. Visa;* case settled for $2.75 billion); *Am. Express Travel Related Servs. Co. v. Visa U.S.A. Inc.,* No. 04-cv-08967 (S.D.N.Y.) (related case to *United States v. Visa;* case settled for combined $4.05 billion); *United States v. Am. Express Co.,* No. 10-cv-04496 (E.D.N.Y.) (challenging restraints on merchants under Section 1; Visa and MasterCard entered into consent decree).

CONCLUSION

For the reasons stated above, *Amicus* ATMIA respectfully urges the Court to affirm the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

RICHARD H. DOLAN
Counsel of Record
ELIZABETH WOLSTEIN
SCHLAM STONE & DOLAN LLP
26 Broadway
New York, NY 10004
(212) 344-5400
rdolan@schlamstone.com

Counsel for Amicus Curiae

Dated: October 24, 2016