No. 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 OF *AMICI CURIAE* ANTITRUST-LAW PROFESSORS AND ECONOMISTS IN SUPPORT OF RESPONDENTS

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1. No counsel for any party authored this brief in whole or in part, and no person or entity other than amici and their counsel contributed money to fund its preparation or submission. The parties' written consent to the filing of this brief is attached hereto.

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Amici focus their research and teaching in antitrust law, policy, and economics, including in the application of antitrust law to business associations. They share the view that competition and balanced enforcement of antitrust law are critical for the economy and the public welfare, both by preventing the unlawful exercise of market power to deprive businesses and consumers of wealth and by promoting innovation which creates wealth and benefits the public.

In *American Needle, Inc. v. NFL*, 560 U.S. 183 (2010), this Court struck a proper balance as to when joint ventures and other business associations of competitors are subject to analysis as concerted action under § 1 of the Sherman Act. The Court directed that the "inquiry is one of competitive reality," not the form of the venture or association, *id.* at 196, and that the effects of competitors' action are subject to analysis under § 1 where they have formed a cooperative association and agreed to rules that "deprive[] the marketplace of independent centers of decisionmaking," *id.* at 195. The Court did not hold that businesses would be liable for such joint action, but only that it would be appropriate to analyze the balance of that action's anticompetitive and procompetitive effects and that the action would not be immune from § 1.

Under well-established Court precedent, dating back to the earliest days of the Sherman Act, such conduct has

always been subject to antitrust review to determine its effects on the economy, other businesses, and the public. Were it otherwise, any organization of competitors that integrated some functions, but still operated to suppress competition, would have been free from antitrust scrutiny. That is the danger posed by adoption of Petitioners' argument. Amici respectfully submit this brief to avoid that danger and to support the Court's reasoning in *American Needle* that the appropriate solution is to examine the effects of competitors' joint action, not grant them immunity.

SUMMARY OF ARGUMENT

Competing banks, as owners and members of Visa and MasterCard and their associated ATM networks, promulgated and agreed to rules which prevent both bank and non-bank ATM operators from charging ATM cardholders less for ATM access through cheaper networks than Visa and MasterCard (the "ATM Access Fee Rules"). The ATM Access Fee Rules thereby assure Visa, MasterCard, and their owner/member banks that their networks will not lose ATM transaction volume to price competition. The competitor banks adopted those rules in response to competition from non-bank ATMs.

Petitioners' Brief ("Pet. Br.") argues that because the ATM Access Fee Rules further Visa/MasterCard's ATM networks' interests "as a 'whole'" and not just the banks' individual interests as owners and members of Visa/MasterCard, the conduct is that of a "single entity" and not subject to analysis under § 1. Pet Br. 10. But the Court expressly rejected such an argument in *American Needle*, reasoning that "illegal restraints often are in the common

interests of the parties to the restraint," 560 U.S. at 198, and therefore such conduct requires analysis. That is especially true in this case, where competitors have agreed to abide by rules which prevent price competition. There is no justification for immunizing Petitioners' conduct, or any other joint conduct among competitors, from § 1. Just the opposite: § 1 most appropriately applies to joint conduct by competitors. That is "as plain as a pikestaff." *Skilling v. United States*, 561 U.S. 358, 412 (2010).

In *American Needle*, the Court unanimously restated and clarified the standards for assessing whether a joint venture of horizontal competitors is subject to analysis under § 1. The Court held, in assessing a joint venture of NFL teams, that competitors' agreement to abide by rules that restrict "independent centers of decisionmaking" was sufficient to plead concerted action under §1. In doing so, the Court drew upon a century of precedent applying § 1 to joint ventures and other associations of competitors.

As the court of appeals below correctly held, the Visa/MasterCard member banks' agreements to the ATM Access Fee Rules are agreements among separate economic actors—in fact, competitors—that restrain "independent centers of decisionmaking," and so the Rules' competitive effects are subject to analysis under § 1. Petitioners, self-styled joint ventures among competitors, now seek effectively to overturn those standards and thereby to immunize their joint conduct from § 1. Petitioners' business practices at issue here may or may not be unlawful, but the lack of immunity does not amount to a finding of liability. "The question whether an arrangement is a contract, combination, or conspiracy is different from and antecedent to the question whether it unreasonably restrains trade." *Am. Needle*, 560 U.S. at 186.

In *American Needle*, the Court established what a leading treatise has described as a two-part assessment of whether § 1 applies to a joint venture's conduct. To be held subject to § 1, both parts must be satisfied. Satisfying *American Needle*'s assessment does not mean that the conduct is unlawful; it means only that the conduct is among separate economic actors and therefore satisfies the concerted-action element of § 1. Whether that concerted action also amounts to an unreasonable restraint of trade in violation of Section 1 is a separate question depending on whether the conduct's anticompetitive effects outweigh any procompetitive justifications under the rule of reason or whether the conduct is per se unlawful.

The first part of the *American Needle* inquiry is "'structural'" and "pertains to the relationship between the venture and the individual business of its members." VII Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 1478d2, at 357 (3d ed. 2010) (hereinafter "Areeda & Hovenkamp"). This structural inquiry looks to whether the members of the joint venture are "separate economic actors pursuing separate economic interests." *American Needle*, 560 U.S. at 195.

"The second query is more 'functional' or 'behavioral,' [and] relates to the nature of the particular rule being challenged . . . and whether the challenged rule affects the individual market behavior of the members." Areeda & Hovenkamp, *supra*. As Petitioners rightly recognize, this "behavioral" inquiry means that "[s]ome of a joint venture's decisions may be subject to Section 1, while others may not." Pet. Br. 16 (citing *Am. Needle*, 560 U.S. at 200). That is as it should be. Antitrust law governs firms'

behavior. Not every joint venture among competitors requires scrutiny; neither does everything such a joint venture does. But certainly there are some joint ventures—especially those among competitors—whose conduct must be analyzed under § 1 for its competitive effects. The Court has done just that it in myriad cases throughout its 100+ years of Sherman Act jurisprudence.

In short, under *American Needle* (and perhaps self-evidently), independent competitors which agree to join a venture or other association and adhere to rules which affect competition among them have, at a minimum, acted in concert for purposes of § 1, and the courts should evaluate those rules' competitive effects. Petitioners would require more: allegations that a joint venture acted solely in its members' individual interests and not to further joint-venture objectives "as a 'whole.'" Pet Br. 10. But Petitioners have it backwards. Section 1 should reach all joint-venture conduct that restricts members' ability to compete with one another. Under Petitioners' proposed standard, §1 would reach only joint-venture conduct that is a sham because it serves no purpose beyond facilitating cartelization at the member level. Everything else would be immune from §1. Numerous practices that arguably further joint-venture objectives while also restricting competition at the member level would escape antitrust scrutiny. There is simply no authority for that extreme proposition, and Petitioners offer none.

In addition to having been rejected by the Court in *American Needle*, *see* 560 U.S. at 198, that requirement would swallow § 1 whole. As the Court stated in *American Needle*, "illegal restraints often are in the common interests of the parties to the restraint." *Id.* Removing

unlawful restraints from the scope of § 1, simply because they were institutionalized in a joint venture to advance those common unlawful objectives, would invite the corporatization of cartels and shield them from § 1. In sum, Petitioners' position is contrary to *American Needle* and to a century of the Court's § 1 precedent, and is unsustainable as a matter of antitrust law.

ARGUMENT

I. Under *American Needle*, parties acting in concert are subject to § 1 of the Sherman Act when they are "separate economic actors" and their concerted action "deprives the marketplace of independent centers of decisionmaking."

In *American Needle*, the Court unanimously restated and clarified long-governing rules concerning the application of § 1 to joint ventures.

American Needle involved a § 1 challenge to the NFL's trademark-licensing practices. The individual NFL teams had formed National Football League Properties (NFLP) to develop, license, and market each team's and the NFL's intellectual property. 560 U.S. at 187. The NFL argued that § 1 was inapplicable because, when it came to licensing trademarks, the teams, the NFL, and NFLP were "'a single economic enterprise.'" *Id.* at 187-88. The district court and the Seventh Circuit agreed with the NFL's position, reasoning that the teams had integrated their licensing operations into a single entity, NFLP. *Id.* at 188.

The Court reversed, holding that, notwithstanding the teams' integration of their licensing operations into

the NFLP joint venture and the NFL and NFLP's status as legally distinct entities, the teams were acting in concert under § 1 because they (a) remained "separate economic actors" and (b) their conduct affected a matter of competition among them:

> As *Copperweld* exemplifies, "substance, not form, should determine whether a[n] . . . entity is capable of conspiring under § 1." This inquiry is sometimes described as asking whether the alleged conspirators are a single entity. That is perhaps a misdescription, however, because the question is not whether the defendant is a legally single entity or has a single name; nor is the question whether the parties involved "seem" like one firm or multiple firms in any metaphysical sense. The key is whether the alleged "contract, combination . . . , or conspiracy" is concerted action--that is, whether it joins together separate decisionmakers. The relevant inquiry, therefore, is whether there is a "contract, combination . . . , or conspiracy" amongst "separate economic actors pursuing separate economic interests," such that the agreement "deprives the marketplace of independent centers of decisionmaking," and therefore of "diversity of entrepreneurial interests," and thus of actual or potential competition.

560 U.S. at 195 (internal citations omitted). Also "because the question is not whether the defendant is a legally single entity" or seems like one firm, it is not "determinative that two legally distinct entities have organized themselves

under a single umbrella or into a structured joint venture." *Id.* at 195-96. "[T]he inquiry is one of competitive reality." *Id.* at 196.

In holding that the NFL teams acted in concert, 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.* 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.

Thus, the existence of lawful joint-venture business objectives common to all the joint venture's members does not change this competitive reality: separate, profit-maximizing entities' acts in furtherance of joint-venture objectives are concerted if they also affect a matter of competition among those independent economic actors. The Court recognized that "illegal restraints often are in the common interests of the parties to the restraint." *Id.* Removing agreements that deprive the market of independent, competitive "centers of decisionmaking" from scrutiny under § 1, simply because they further some colorable joint-venture objective, would invite the corporatization of cartels and shield them from § 1. That plainly would be contrary to the Sherman Act and this Court's century-long interpretation of it.

It makes sense to apply § 1 to economically separate, horizontal competitors that have entered into a joint

venture which affects competition among them, even if that joint venture is not a sham and may have legitimate purposes. "Obviously, the most significant competitive threats arise when joint venture participants are actual or potential competitors." Areeda & Hovenkamp ¶ 1478a, at 340. The risk of such significant competitive threats is what counsels for scrutiny of the venture under § 1. That is not to ignore the joint venture's procompetitive effects, for which the rule-of-reason analysis accounts. "But the conduct at issue . . . is still concerted activity under the Sherman Act that is subject to § 1 analysis." *American Needle*, 560 U.S. at 202-03. In *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), the Court stressed the importance of identifying concerted action as the proper subject of § 1. *See id.* at 760-61. And the Court also noted that the inquiry into competitive effects was a distinct one. *See id.* at 762.

The First Circuit's analysis in *Fraser v. Major League Soccer*, 284 F.3d 47 (1st Cir. 2002) (Boudin, C.J.), is illustrative. *Fraser* involved professional soccer players' antitrust challenge to Major League Soccer (MLS) teams' control over player employment and compensation. *Id.* at 53. In contrast to the NFL which does not own its teams, MLS owns all of its teams and their intellectual-property rights, tickets, and broadcast rights. *Id.* However, MLS had "relinquished some control over team operations to certain investors" who received a share of MLS revenues and the right to transfer their interests and obligations to other investors subject to MLS rules and approval. *Id.* at 53-54. The investors also controlled a majority of the MLS board of directors. *Id.* at 54.

The First Circuit held that the MLS and its investors were subject to § 1 notwithstanding MLS being a single entity:

> Here, it is MLS that 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.
>
> From the standpoint of antitrust policy, this prospect of horizontal coordination among the operator/investors through a common entity is a distinct concern. . . . This does not make MLS a mere front for price fixing, but it does distinguish *Copperweld* by introducing a further danger and a further argument for testing it under section 1's rule of reason.

284 F.3d at 57-58.

II. Under *American Needle*, because Visa/MasterCard member banks were (and are) separate economic actors which have agreed to abide by rules restricting their independent decision-making, they are subject to § 1.

A. The banks are separate economic actors.

Regarding the first, "structural" inquiry of *American Needle*, there is no serious dispute that Visa/MasterCard member banks are "separate economic actors pursuing separate economic interests" when it comes to providing their customers access to customers' bank accounts through ATM cards. Banks compete vigorously for customer accounts and funds which the banks then lend and use to build relationships with their customers for other financial products and services.

Banks also compete with one another by joining multiple ATM networks, which allows banks' customers to access their accounts through more ATMs around the world. Part of that competition could have been price competition—banks joining networks with lower fees for non-bank ATM operators (banks typically do not charge their customers fees for using bank-owned ATMs) so that those independent ATM operators could charge the banks' customers a lower access fee for using those networks. But as discussed below, the banks instead used their control of the Visa and MasterCard boards to establish binding rules preventing that price competition.

B. The banks agreed to refrain from independent decision-making by adhering to the ATM Access Fee Rules.

Regarding the second, "behavioral" inquiry of *American Needle*, Respondents alleged, according to the court of appeals below: (a) "Visa and MasterCard were owned and operated as joint ventures by a large group of retail banks at the time that the Access Fee Rules were adopted"; and (b) "[a]lthough these member banks later relinquished direct control over the bankcard associations through public offerings, the IPOs did not alter the substance of the Access Fee Rules, which remain intact to this day." 797 F.3d 1057, 1061 (D.C. Cir. 2015). The D.C. Circuit correctly reasoned from *American Needle* that the banks' development and adoption of the Access Fee Rules when the banks controlled Visa and MasterCard pled a horizontal agreement to restrain trade when those rules affected competition among the banks:

> 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").
>
> That the rules were adopted by Visa and MasterCard as single entities does not preclude a finding of concerted action. The Supreme Court has "long held that concerted action under [Section] 1 does not turn simply on whether the parties involved are legally distinct entities," but rather depends upon "a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate." *Am. Needle, Inc. v. Nat'l Football League,* 560 U.S. 183, 191, 130 S. Ct. 2201, 176 L. Ed. 2d 947 (2010). Thus, "a legally single entity violate[s] [Section] 1 when the entity [i]s controlled by a group of competitors and serve[s], in essence, as a vehicle for ongoing concerted activity." *Id.*

797 F.3d at 1066; *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.").

Although it predated *American Needle*, *United States v. Visa U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003), also held, upon a full trial record, that Visa/MasterCard banks acted in concert through Visa and MasterCard and that they violated § 1 when they did so to restrain competition among them with respect to 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. 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.

The Areeda treatise is in accord with the D.C. and Second Circuits, distinguishing Visa/MasterCard from unilateral trade-association activity: "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.)). In *MasterCard*, the district court held MasterCard's rules subject to § 1, consistently with *American Needle*, because they affected competition among MasterCard's member banks. 1993 U.S. Dist. LEXIS 11964, at **7-8. It did not matter that "MasterCard may be acting as a 'single entity.'" *Id.* at *8.

Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210 (D.C. Cir. 1986), provides an analogous horizontal arrangement to Visa/MasterCard. The defendant, Atlas Van Lines, operated a national network for the transportation of used household goods. *Id.* at 211. Atlas used independent moving companies throughout the country to provide nationwide coverage, and those companies agreed to Atlas's rates, operating procedures, maintenance specifications, and other bylaws, rules, and regulations. *Id.* The Atlas Board of Directors, which adopted the challenged policy, "consisted of actual or potential competitors of Atlas," and "all but two members of the board represented separate legal entities that competed in interstate commerce." *Id.* at 215. The D.C. Circuit rejected Atlas's argument that it acted as a single entity in adopting the challenged policy, and held that

independent competitors' control of Atlas brought the case "within the rule of *Sealy* and *Topco* and shows the existence of a horizontal restraint." *Id.*[2]

III. Petitioners' arguments are contrary to this Court's long-standing precedent.

A. Petitioners' position would effectively overrule *American Needle*.

Petitioners acknowledge that, "[w]here 'separate economic actors pursuing separate economic interests' agree to limit competition among themselves, their conduct is 'concerted' and subject to Section 1." Pet. Br. 10 (citing *Am. Needle*, 560 U.S. at 195). But Petitioners argue further—and contrary to *American Needle*—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." *Id.* at 10-11 (internal citation omitted). *American Needle* expressly rejected that argument: "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

2. Other law-professor amici cite *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042 (9th Cir. 2007), as a case "involv[ing] allegations similar to those here." Br. for Antitrust Law Professors as Amici Curiae in Supp. of Pet'rs, at 12-13. To the contrary, the *Kendall* plaintiffs alleged only that each bank "participates in the management of and as a proprietary interest in" Visa and MasterCard and that Visa and MasterCard set certain fees adopted by the banks. 518 F.3d at 1048. That plainly falls short of pleading concerted action. The only allegations of concerted action among the banks were conclusory, and thus properly disregarded. Here, there are allegations that the banks have promulgated and agreed to rules that prevent price competition.

the whole." But illegal restraints often are in the common interests of the parties to the restraint, at the expense of those who are not parties." 560 U.S. at 198.

In *United States v. Sealy, Inc.*, 388 U.S. 350 (1967), this Court rejected the same argument Petitioners' advance here:

> Appellee argues that "there is no evidence that Sealy is a mere creature or instrumentality of its stockholders." In support of this proposition, it stoutly asserts that "the stockholders and directors wore a 'Sealy hat' when they were acting on behalf of Sealy."
>
> . . .
>
> We seek the central substance of the situation, not its periphery; and in this pursuit, we are moved by the identity of the persons who act, rather than the label of their hats."

Id. at 353. As in *Sealy*, the networks were formed to promote their members' interests. Thus, restraints on competition among the members are chargeable to them under § 1. *See id.* at 353-54.

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). But *American Needle*'s language excerpted by Petitioners addresses concerted action within a single profit-maximizing firm—not a joint

venture of "separately controlled, potential competitors with economic interests that are distinct from [the joint venture's] financial well-being." *Am. Needle*, 560 U.S. at 200-01. In the former, "rare cases," a complaint must plead something more to hold the firm subject to § 1. For example, multiple firm employees may have conspired among themselves to deal with the firm's suppliers only in exchange for kickbacks, to another supplier's exclusion. In the latter case, *American Needle* holds that a complaint must plead only that separate economic actors have acted in concert to refrain from independent decision-making.

In short, Petitioners position seems to be that joint-venture members' conduct cannot be concerted where the members are somehow acting in the venture's interests "as a 'whole'"—regardless of whether they are also simultaneously furthering their own individual interests—and that there may be an exception for conduct "that affected *only* competition" among the members and therefore that "might permit an inference that the [members] were acting in their own interests." Pet. Br. 11-12; *see also id.* at 18 ("A plaintiff might show, for example, that the only market affected by the challenged conduct is one in which the venture's members compete").

Petitioners would thus remove, from the Sherman Act § 1's scope, any restraint among horizontal competitors whenever the restraint furthered a joint venture's interests in addition to individual competitors' interests. That is unjustified and would effectively overrule *American Needle* and a century of the Court's precedent on the application of the Sherman Act § 1.

Petitioners actually have it backwards. When the conduct only affects competition in the market in which the

joint venture operates—and does not impact competition among the joint venture members at all—the conduct is properly characterized as the venture's unilateral conduct. *See* Areeda & Hovenkamp ¶ 1477, at 333 (A trade association's "decisions would be treated as unilateral to the extent that they have no impact whatsoever on the market behavior of individual members."). But when separate economic entities act in concert to "deprive[] the marketplace of independent centers of decisionmaking," § 1 applies regardless of whether the conduct may also further serve some legitimate joint venture purpose. *See Am. Needle*, 560 U.S. at 190-91, 202-03; Areeda & Hovenkamp ¶ 1477, at 333 ("This brings association rules having a competitive impact within the reach of §1 of the Sherman Act."). Whether the conduct serves some legitimate joint-venture purpose is irrelevant to the predicate inquiry of whether there is concerted action. The conduct's purpose, if it is a legitimate, procompetitive one, becomes a factor in the ensuing rule-of-reason analysis. *See Texaco Inc. v. Dagher*, 547 U.S. 1 (2006) (applying § 1 but holding that the joint venture's conduct was not per se unlawful); *Broad. Music, Inc. v. CBS*, 441 U.S. 1 (1979) (same); *Fraser v. Major League Soccer*, 284 F.3d 47 (1st Cir. 2002) (same).

Petitioners seek to distinguish *American Needle*, *Sealy*, and *Topco*, claiming that, in those cases, "the alleged restraints affected only a *single* market—the market in which the venture's members competed," whereas the Visa/MasterCard Access Fee Rules "affect an *additional* market—the market for network services—which lies beyond any market in which the banks supposedly compete." Pet Br. 34-35. In addition to being a distinction without a difference, Petitioners' distinction

is incorrect. Those cases also involved additional markets in which the joint ventures competed, yet this Court held them subject to § 1 because of the effects where the joint venture members did compete.[3]

B. The Court's jurisprudence on the application of § 1 to joint ventures and other business associations has not chilled procompetitive cooperation among businesses.

Petitioners argue that if the Court does not adopt their position as the law, "the threat of suit would chill legitimate and procompetitive cooperation to the detriment of consumers and the purposes of the [Sherman] Act." Pet. Br. 13. But joint ventures of independent competitors have been subject to the Sherman Act § 1 for over a century, *see Am. Needle*, 560 U.S. at 192 (collecting Supreme Court case law), and that has not chilled their procompetitive uses.

Other law-professor amici state that "the 'few cases' finding that members of a business association

3. In *American Needle*, NFLP competed in the market for licensing sports-league trademarks, with NFL intellectual property in addition to individual teams' intellectual property. 560 U.S. at 198 ("NFL teams have common interests such as promoting the NFL brand"). The NFLP's conduct promoting the NFL brand likely would be properly characterized as unilateral, because it likely would not limit competition among the teams in any way. In *Sealy*, the joint venture competed with other national mattress brands while the individual Sealy licensees competed in the intrabrand Sealy market. In *Topco*, the joint venture competed with other private-label grocery brands and with national grocery brands, while the individual Topco members competed with one another in the sale of groceries.

colluded in violation of section 1 involved a showing that the challenged rule or standard promulgated by the association ' 'was deliberately distorted by competitors of the injured party, sometimes through lies, bribes, or other improper forms of influence, in addition to a . . . showing of market foreclosure."" Br. for Antitrust Law Professors as Amici Curiae in Supp. of Pet'rs, at 5.

That is incorrect. Although some cases do involve "improper" behavior by association members, many others do not, as *American Needle* and the cases cited by the Court in *American Needle* demonstrate. *See* 560 U.S. at 187-88 (holding subject to § 1 both the NFL and its member teams with respect to trademark licensing); *United States v. Terminal R. Ass'n*, 224 U.S. 383 (1912) (holding liable, under § 1, both the association formed for the purpose of acquiring railroad terminals' property and the association's members); *Fraser v. Major League Soccer*, 284 F.3d 47 (1st Cir. 2002) (holding subject to § 1 both professional sports league and league members with respect to league rules).

Associations and ventures among horizontal competitors have rightly received additional antitrust scrutiny which other associations have not. "[I]n § 1 Congress 'treated concerted behavior more strictly than unilateral behavior.' This is so because unlike independent action, '[c]oncerted activity inherently is fraught with anticompetitive risk' insofar as it 'deprives the marketplace of independent centers of decisionmaking that competition assumes and demands.' And because concerted action is discrete and distinct, a limit on such activity leaves untouched a vast amount of business conduct. As a result, there is less risk of deterring a firm's necessary conduct;

courts need only examine discrete agreements . . . ." *Am. Needle*, 560 U.S. at 190.

Even industry standard setting, which can be and has been procompetitive, has "a serious potential for anticompetitive harm." *Allied Tube & Conduit Corp. v. Indian Head*, 486 U.S. 492, 500 (1988). To exempt competitors' joint standard-setting activities from § 1 and wholly ignore their potential to cause anticompetitive harm, simply because they have some procompetitive effect as Petitioners would have it, is untenable both as a matter of antitrust law and as a matter of innovation policy. "Agreement on a product standard is, after all, implicitly an agreement not to manufacture, distribute, or purchase certain types of products." *Id.* The potential for joint standard setting to exclude innovative, disruptive competition is what requires antitrust vigilance of such joint conduct to ensure that innovation can flourish in a free market.

Antitrust law has governed joint ventures under the standards detailed in *American Needle* for over 100 years, and joint ventures have increasingly thrived in the economy—benefiting competition and promoting innovation while antitrust law provides a check against joint ventures' unlawful exercise of market power to undermine competition and innovation. There is no reason for the Court to alter the balance it has maintained for so long in the application of antitrust law to joint ventures, or to fear that the continued application of fundamental antitrust law would impair joint ventures' ability to function.

CONCLUSION

Because the court of appeals below correctly held Petitioners' joint conduct subject to analysis under the Sherman Act § 1 as construed by this Court's precedent, its decision should be affirmed.

Respectfully submitted,

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